NO. 56PA14-2 JUDICIAL DISTRICT TWENTY-ONE

SUPREME COURT OF NORTH CAROLINA

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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, PHYLLIS NELSON; and REPUBLIC PROPERTIES, LLC, a North Carolina Company (Group 1 Plaintiffs), Plaintiffs, v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Defendant.	From Forsyth County No. COA14-184

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BRIEF OF AMICUS CURIAE
NORTH CAROLINA ADVOCATES FOR JUSTICE

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Plaintiffs,	)	From Forsyth County
v.	)	No. COA14-184
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,	)	
Defendant.	)	

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BRIEF OF AMICUS CURIAE
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ISSUES PRESENTED

I. Does the Map Act give NCDOT the right to exercise the State's power of eminent domain, requiring the payment of just compensation?

II. Did NCDOT exercise its power of eminent domain when it filed the transportation corridor maps for the Western and Eastern Loops of the Northern Beltway Project?

STATEMENT OF THE FACTS

Amicus Curiae North Carolina Advocates for Justice ("NCAJ") adopts the Statement of the Facts set forth in Plaintiff-Appellees' New Brief.

SUMMARY OF ARGUMENT

Pursuant to the Transportation Corridor Official Map Act ("Map Act"), the North Carolina Department of Transportation ("NCDOT") filed corridor maps with the Forsyth County Register of Deeds in 1997 and 2008, identifying protected corridors for the construction of the Northern Beltway Project. Landowners whose properties fall within those corridors are subject to certain statutory restrictions – they cannot obtain building permits or subdivide their property. These restrictions never expire. As a result, landowners within the corridors find it nearly impossible to develop or sell their property, and the avenues of supposed relief provided by the Map Act are insufficient.

The evidence refutes NCDOT's argument that the Map Act authorizes the State to exercise its police power rather than its power of eminent domain. The language used by the legislature when enacting the law, to NCDOT's arbitrary and capricious administration of the hardship acquisition program, and the statements of NCDOT employees all make it clear that the Map Act is a cost-control mechanism that aids NCDOT in property acquisition. There is no evidence that its

restrictions prevent harm to the public welfare. The Map Act empowers the State to take private property for public use, and by filing the corridor maps for the Northern Beltway Project, NCDOT has taken some interest in the private property of each landowner within the identified corridor. As a result, just compensation must be paid. Otherwise, NCDOT could effectively freeze development anywhere it chooses, for any length of time, whether or not funds actually exist to build a roadway – all without any compensation to landowners. The Court of Appeals correctly reversed the decision of the trial court, and remanded for further proceedings to determine the damages suffered by each individual Plaintiff.

ARGUMENT

I. IN FILING CORRIDOR MAPS FOR THE NORTHERN BELTWAY PROJECT PURSUANT TO THE MAP ACT, NCDOT EXERCISED ITS POWER OF EMINENT DOMAIN, REQUIRING PAYMENT OF JUST COMPENSATION.

A. The Map Act empowers NCDOT to exercise its power of eminent domain, rather than police power.

It is well established that governments are within their rights to regulate their citizenry via the police power. "The police power is inherent in the sovereignty of the State. It is as extensive as may be required for the protection of the public health, safety, morals and general welfare." *A-S-P Assoc. v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E. 2d 444, 448 (1979) (citation omitted). Pursuant to the police power, governments pass laws protecting social order, the life and health of

the citizenry, the enjoyment of private and social life, and the beneficial use of property. *See Skinner v. Thomas*, 171 N.C. 98, 101, 87 S.E. 976, 977 (1916). Examples of such regulation in the context of property use include zoning ordinances, land-use regulations, historic preservation restrictions, and density limitations. Exercising the police power, municipalities may limit development within flood plains, prohibit noxious land uses within residential neighborhoods, or designate certain landmarks as historic.

Governments likewise possess the power of eminent domain. "The power of eminent domain, that is, the right to take private property for public use, is inherent in sovereignty." *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533, 112 S.E. 2d 111, 113 (1960). Like police powers, the power of the State to exercise eminent domain is great: "the only limitation imposed on sovereignty with respect to taking" is the payment of just compensation as required by Article I, section 19 of the North Carolina Constitution, and that the taking be for a public use. *Id.* Takings may occur by a physical invasion, or by imposition of government regulations.

"What distinguishes eminent domain from the police power is that the former involves the *taking* of property because of the need for the public use while the latter involves the *regulation* of such property to prevent its use thereof in a manner that is detrimental to the public interest." *Nichols on Eminent Domain* §

1.42, at 1-132 to 1-133 (rev. 3d ed. 2013) (footnote omitted). "Laws and regulations of a police nature … do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner." *Id.* at 1-145 to 1-146, 1-148.

The Court of Appeals had thousands of pages of records before it, including affidavits (e.g., affidavit of Calvin Leggett, manager of NCDOT's Program Development Branch (Slip Op. 32)); depositions (e.g., deposition of James Trogdon, NCDOT Chief of Operations); testimony from appraisers, realtors and landowners; public records regarding applications for building permits; language from the session law when the Map Act was passed (1987 N.C. Sess. Laws 1520, 1520, 1538-42, ch. 747, § 19); and letters from NCDOT employees (e.g., letter from James Trogdon (Slip Op. 42)). The Court of Appeals correctly determined that the great weight of the evidence shows that the Map Act does nothing to protect the public health, safety, morals and general welfare. There is, however, ample evidence that the Map Act suppresses sales and development of land within the protected corridor to facilitate acquisition and depress associated costs for NCDOT. The Map Act is "a cost-controlling mechanism" (Slip Op. 34) that "foreshadow[s] which properties will eventually be taken for roadway projects and in turn, decrease[s] the future price the State must pay to obtain those affected parcels." (Slip Op. at 34, quoting *Beroth Oil Co. v. N.C. Department of*

Transportation (Beroth II), 367 N.C. 333, 349, 757 S.E. 2d 466, 478 (2014) (Newby, J., dissenting in part and concurring in part)).

Finding that the power authorized by this legislation is that of acquiring property rather than protecting public health, safety and welfare, "the Map Act empowers NCDOT with the right to exercise the State's power of eminent domain to take private property of property owners affected by, and properly noticed of, a transportation corridor official map that was recorded in accordance with the procedures set forth in N.C. Gen. Stat. § 136-44.50, which power, when exercised, requires the payment of just compensation." (Slip Op. 34-35)

In its New Brief, NCDOT insists that the Court of Appeals should have applied the "ends-means" test to determine whether or not the Map Act is a valid exercise of police powers. *See Responsible Citizens v. City of Asheville*, 308 NC 255, 302 S.E. 2d 204 (1983). In this test the court must determine 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." *Id.* at 261, 302 S.E. 2d at 208. While we do not agree that this is the proper analysis, the Map Act would still fail the test, as the object sought by the legislation is not a valid police power, and, further, even if the ends were determined to be valid, the means by which the NCDOT seeks to regulate property amount to an unconstitutional taking without payment of just compensation. "[F]ailure in either "ends' or "means'

results in a taking." *Weeks v. N.C. Dep't of Natural Res.*, 97 N.C. App. 215, 225, 388 S.E. 2d 228, 234, cert. denied 326 N.C. 601, 393 S.E.2d 890 (1990) (citing *Finch v. City of Durham*, 325 N.C. 352, 363, 384 S.E.2d 8, 14, reh. denied, 325 N.C. 714, 388 S.E.2d 452 (1989)).

B. By filing the corridor maps in 1997 and 2008, NCDOT exercised its powers of eminent domain, requiring payment of just compensation.

Like the Court of Appeals, we recognize that "the recording of a map showing proposed highways, without any provision for compensation to the landowners until future proceedings of condemnation are taken to obtain the land, does not constitute a taking of the land, or interfere with the owner's use or enjoyment thereof." *Browning v. N.C. State Highway Comm'n*, 263 N.C. 130, 135-36, 139 S.E.2d 227, 230-31 (1964) (internal quotation marks omitted). However, plats filed pursuant to the Map Act are not merely maps – they also trigger onerous statutory restrictions; a landowner finding himself within the protected corridor is also subject to limitations on development that have no sunset provision or expiration date. (Slip Op. 41-42)

In its analysis of whether Plaintiffs' takings claims are ripe, the Court of Appeals relied on well-developed North Carolina case law regarding inverse takings:

> An action in inverse condemnation must show (1) a taking (2) of private property (3) for a public use or purpose. Although an actual occupation of the land, dispossession of the landowner, or physical touching of the land is not necessary, a taking of private property requires "a substantial interference with elemental rights growing out of the ownership of the property." A plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental.

Adams Outdoor Advertising v. North Carolina Dep't of Transp., 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993) (citations omitted).

In this case the Court of Appeals asked "whether the restrictions of the Map Act that were applicable to Plaintiffs at the time the maps were filed substantially interfered with the elemental rights growing out of Plaintiffs' ownership of their properties so as to have effected a taking and provided for the trial court to consider Plaintiffs' claims for inverse condemnation as ripe." (Slip Op. 40-41). The answer to that question, based on the record, is a clear "yes."

Upon filing the corridor maps for the Northern Beltway, Map Act restrictions apply to all property owners within the corridor. These restrictions prohibit issuance of building permits "for *any* building or structure or part thereof located within the transportation corridor," (emphasis added) N.C. Gen. Stat. § 136-44.51(a). They also prevent subdivision of property. These restrictions never expire. (Slip Op. 41, quoting *Beroth II* at 349, 478 (Newby, J. dissenting in part

and concurring in part)). While NCDOT argues that Plaintiffs did not apply for building or subdivision permits or variances, NCDOT's own employees indicate that even if Plaintiffs had applied, they would have been denied. *See, e.g.*, Affidavits of Clapp ¶8 p. 2420, Reynolds ¶11 p. 2523, Hriniak ¶16 p. 2555, Smith ¶8 p. 2494. NCDOT cannot produce proof of any variance or permit that had been allowed that would increase NCDOT's acquisition costs. M. Stanly Depo. Pp. 31-36. In fact, NCDOT's own response to an interrogatory was that it could produce no applications for building permits within the corridor that had been forwarded to them, as required by the Map Act (the Secretary of Transportation or appropriate agency "shall be notified within 10 days of all requests for building permits or subdivision approval within the transportation corridor."). N.C. Gen. Stat. § 136-44.51.

Moreover, while nothing in the Map Act expressly limits the sale and disposition of property within the protected corridors[1], the evidence in the record shows undeniably that property values were significantly depressed and owners were unable to sell their property for market value due to the inclusion within the corridor. According to the study commissioned by NCDOT and carried out by the appraisal firm McCracken and Associates, there were only five qualified sales

[1] Unless you wanted to subdivide your property in order to sell it – that is prohibited under the Map Act. N.C. Gen. Stat. § 136-44.51(b).

within the protected corridor of the Northern Beltway Project.[2] McCracken Depo. pp. 15-16. This compares to more than more than *16,000* qualified sales within a one-mile radius of the corridor since the project maps were filed. Joyce Aff. pp. 2591-92. The contrast is staggering, and devastating for landowners within the protected corridor.

"The word 'property' extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value." *Long v. City of Charlotte*, 306 N.C. 187, 201, 293 S.E.2d 101, 110 (1982) (internal quotation marks omitted). "The term comprehends not only the thing possessed but also, in strict legal parlance, means the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use." *Id*. (internal quotation marks omitted). There is no question that Plaintiffs' rights, including their ability to use and dispose of their property, have been substantially interfered with by NCDOT via the Map Act. The landowners within the corridor find themselves unable to use their property as their neighbors can – they can't build on it, they can't develop it, and in the final insult, no market exists for them to sell it. This interference is more than merely consequential or incidental. No one wants to buy land saddled with such onerous

[2] Qualified sales included sales conducted at arms-length, and did not include foreclosures, inter-family sales, or uninformed buyers. McCracken p. 16-18.

restrictions. NCDOT cannot credibly argue that there has been no substantial interference with these Plaintiffs' property rights.

Without a doubt, the State's land acquisition costs would be reduced if NCDOT could file Map Act corridor plats anywhere it chose, without limitation or expiration, and without any idea when or if a road would be built, with no requirement to pay just compensation. Fortunately, the Court of Appeals recognized the grave miscarriage of justice such a scheme allows.

Plaintiffs and other landowners within the protected corridor have suffered the loss of some or all of their property rights for the benefit of the public. There is no doubt that they have suffered a taking, and are entitled to just compensation. Our Nation's founding fathers recognized the profound importance of this fundamental right and specifically enumerated the right to receive just compensation in the Bill of Rights: "No person shall be… deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation*." U.S. CONST. amend V (Emphasis added).

And as each property is different, the Court of Appeals properly remanded the matter to the trial court for individual determinations of damages. (Slip Op. 44-45)

II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE NORTH CAROLINA SUPREME COURT'S DECISION IN *BEROTH*.

In *Beroth II* the North Carolina Supreme Court found that the Court of Appeals' ends-means analysis was improper because of the unique nature of land "when determining the issue of class certification in the case sub judice." *Beroth II*, 367 N.C. at 343, 757 S.E.2d at 474. But the *Beroth II* Court noted that it could not hold that this test, or any test, is improper in all Map Act cases to determine if inverse condemnation had occurred: "[a]lthough the need *may* arise to use a *different* test in order to determine whether a taking has occurred, it also *may* be most appropriate to utilize the *same* test to determine the takings issue, depending upon the facts and circumstances of the subject property." *Id*. at 344, 757 S.E.2d at 475. As the appeal in *Beroth* concerned class certification in which there were nearly 800 potential members, the Court of Appeals' analysis was an "improper substantive analysis of plaintiffs' arguments." *Id.* at 342, S.E.2d at 474. As class certification is not an issue in this case, the Court of Appeals decision does not conflict with *Beroth II*.

CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the Court of Appeals.

This the 6th day of November, 2015.

NORTH CAROLINA ADVOCATES FOR JUSTICE

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

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2015, I electronically filed the foregoing **BRIEF OF AMICUS CURIAE NORTH CAROLINA ADVOCATES FOR JUSTICE** with the Clerk of Court. The following counsel of record will be served via U.S. Mail with a copy via e-mail:

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