

EMINENT DOMAIN

Recent Case Law Update and Analysis of the *Kirby* Decision and Map Act

N.C. Municipal Attorneys'
Association Summer Conference

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Agenda

- Recent Case Law Update
 - Is the city's action a taking (i.e., an inverse condemnation)?
 - What forum is available for an inverse condemnation claim?
 - Is the taking for a public use or benefit?
 - Is the taking compensable?
 - What is considered the "entire tract" for a partial taking?
 - What kind of expert evidence is admissible at trial?
- Analysis Of The *Kirby* Decision And Map Act
 - Overview
 - What is the Map Act?
 - *Kirby*- holdings, misapplications, takeaway, and notes
 - Other Map Act cases
- Questions?

Is the city's action a taking (i.e., an inverse condemnation)?

-“If property has been taken by an act or omission of a (municipal) condemnor ... and no complaint containing a declaration of taking has been filed, the owner of the property may initiate an action to seek compensation for the taking.”
G.S. § 40A-51

Is the city's action a taking (i.e., an inverse condemnation)?

- *Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 780 S.E.2d 187 (2015)
- *Wagner, et al., v. City of Charlotte*, ____ N.C. App. ____, 840 S.E. 2d 799 (2020)
- *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018), reversing, 251 N.C. App. 514, 796 S.E.2d 57 (2016)

What forum is available for an inverse condemnation claim?

Knick v. Township of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019)

Is the taking for a public use or benefit?

“For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain[.]” G.S. § 40A-3(b)

Is the taking for a public use or benefit?

Town of Matthews v. Wright, 240 N.C. App. 584,
771 S.E.2d 328 (2015)

Is the taking compensable?

- “The determination of the amount of compensation shall reflect the value of the property ***immediately prior to the filing of the ... complaint*** under G.S. 40A-41 and except as provided in the following sections shall not reflect an increase or decrease due to the condemnation.” G.S. § 40A-63
- The measure of damages in a ***partial taking*** is the greater of: the fair market value of the ***entire tract*** immediately before the taking exceeds the fair market value of the ***remainder*** immediately after the taking, or the fair market value of the property taken. G.S. § 40A-64(b)

Is the taking compensable?

- *Town of Nags Head v. Richardson*, 260 N.C. App. 325, 817 S.E.2d 874 (2018), *aff'd*, 372 N.C. 349, 828 S.E.2d 154 (2019)
- *Dep't of Transp. v. BB & R, LLC*, 242 N.C. App. 11, 775 S.E.2d 8 (2015)
- *City of Charlotte v. Univ. Fin. Properties, LLC*, 246 N.C. App. 396, 784 S.E.2d 587 (2016)

What is considered the “entire tract” for a partial taking?

While there are no elements for determining the “entire tract,” a three-factor test used by courts involves determining:

- 1) unity of **ownership**;
- 2) **physical** unity; and
- 3) unity of **use** (usually given greatest emphasis)

Barnes v. N. Carolina State Highway Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959).

What is considered the “entire tract” for a partial taking?

- *Dep't of Transp. v. Riddle*, 253 N.C. App. 20, 813 S.E.2d 449 (2017)
- *Town of Midland v. Wayne*, 368 N.C. 55, 773 S.E.2d 301 (2015)

What kind of expert evidence is admissible at trial?

-“testimony [must be] the product of reliable principles and methods.” N.C. Rule of Evid. 702(a)(2); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

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- *Dep't of Transp. v. Jay Butmataji, LLC*, 260 N.C. App. 516, 818 S.E.2d 171 (2018), *review denied*, 373 N.C. 60, 832 S.E.2d 717 (2019)

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Kirby holding and Map Act

- What did *Kirby* involve?
 - *Kirby et al. v. NCDOT*, 368 N.C. 847, 786 S.E.2d 919 (2016), *aff'g Kirby et al. v. NCDOT*, 239 N.C. App. 345, 769 S.E.2d 218 (2015).
 - Inverse condemnation and other claims.
- Why does it matter to municipal attorneys?
 - Address creative land-use takings arguments

Kirby holding and Map Act

- What was the Map Act?
 - Statutory land-use restrictions. G.S. § 136-44.50 – 136-44.54.
 - Recording corridor official maps.
 - 3-year expiration upon permit application submittal.
 - Variances.
 - Hardships.
 - Appraisals.

Kirby holding and Map Act

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FOR
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KIMBERLY J. HARRIS
REGISTER OF DEEDS
WAKE COUNTY

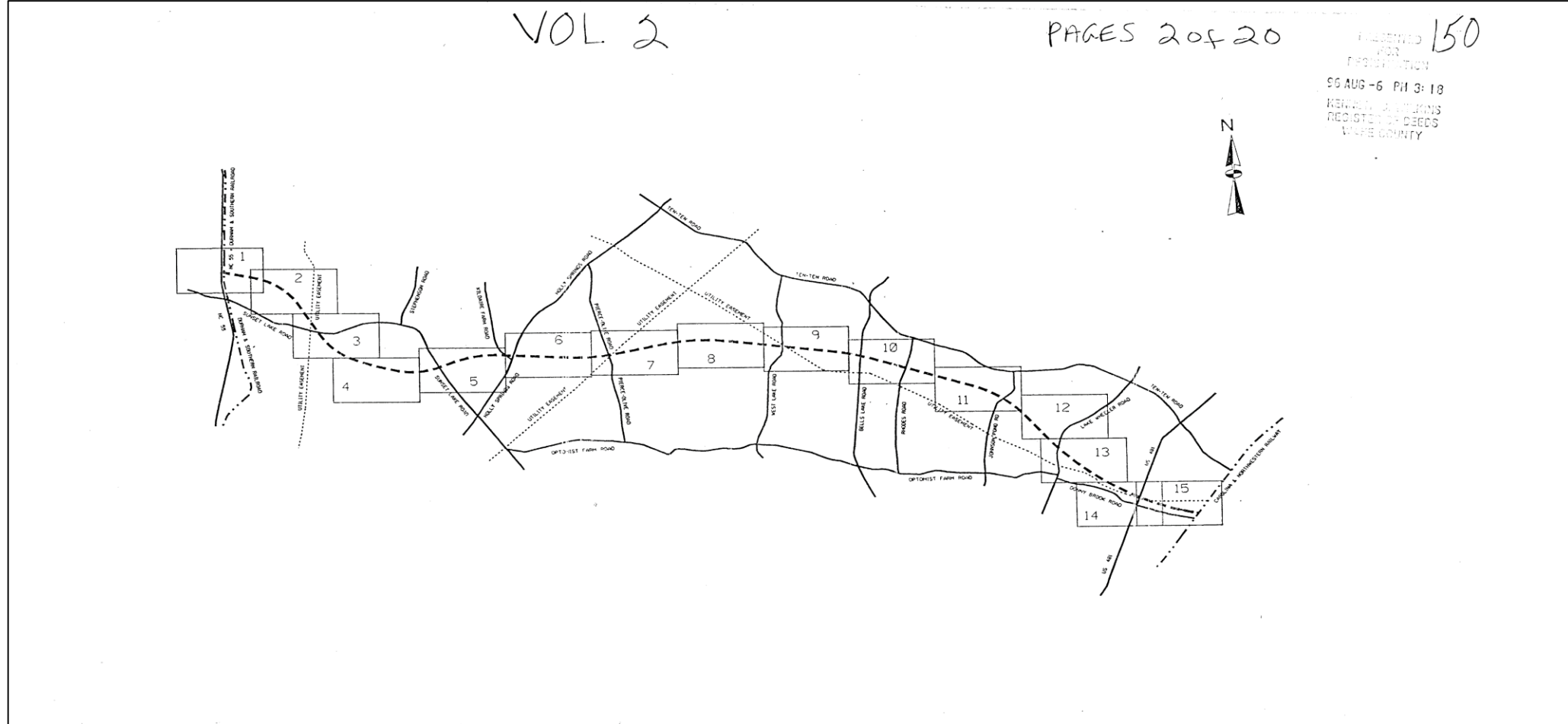
ROADWAY CORRIDOR OFFICIAL MAP

SOUTHERN WAKE EXPRESSWAY

STATE PROJECT: 6.401078 (R-2721)

NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION

Kirby holding and Map Act



Kirby holding and Map Act

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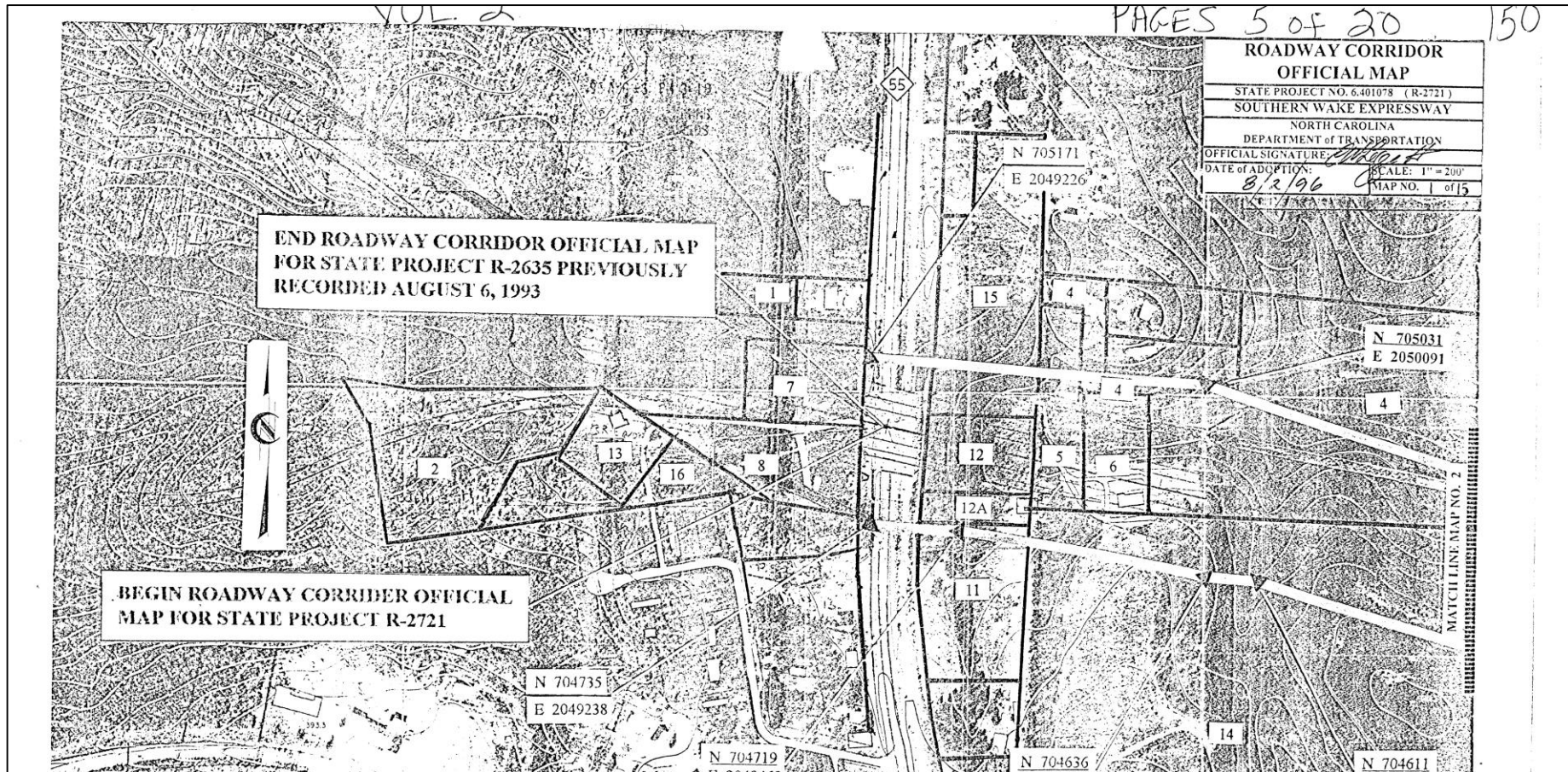
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NEW EDITION RECORDS
REGISTER OF DEEDS
WAKE COUNTY

| NCDOT REF # | NC PIN # | PROPERTY OWNER |
|----------------|----------------|------------------------------------|
| 111 | 0579995368 | COLEMAN, GRANT V & SUSAN G |
| 112 | 0579993871 | DEAN, ANTHONY L & VICKIE L |
| 114 | 0579999513 | HOLLEMAN, JERRY WAYNE |
| 115 | 0579993577 | HOOVER, PATRICK M & INDRA H |
| 117 | 0579990791 | MCKINNEY, DOUGLAS M & KIMBERLY P |
| 118 | 0579990508 | MCLAMB, DONALD W & DEBORAH S |
| 121 | 0579998202 | MILLS, WILLIE B & EVA L |
| 122 | 0579998287 | PRIOR CONSTRUCTION CO INC |
| 123 | 0579997680 | PRIOR CONSTRUCTION CO INC |
| 124 | 0579992620 | ROBINSON, TONY K & LESLIE S |
| 125 | 0579993470 | JONES, LEONARD & IRENE |
| 126 | 0579995534 | TOOLE, JAMES S & JENNIFER L |
| 127 | 0579990671 | WARREN, LEON S JR & BETTY O |
| 128 | 0580094764 | TSAI, JEFFREY |
| 129 | 0579993376 | WILSON, BRYAN J & JOYCE P |
| 131 | 0579998575 | WISEMAN, MOSE B JR & MARTHA D |
| 132 | 0580355618 | ARNOLD, WINIFRED W |
| 133 | 0589279019 | ARNOLD, WINIFRED W |
| 134 | 0580383721 | ARNOLD, WINIFRED W |
| 135 | 0580387661 | BANKS, EDWARD EVERETTE |
| 136 | 0580470882 | BANKS, MATTIE |
| 137 | 0580455964 | BANKS, THOMAS G & CHARLES E |
| 138 | 0589283355 | ENNIS & ATKINS NURSERY |
| 141 | 0589276738 | ENNIS, LEO |
| 142 | 0589189792 | ENNIS, MICHAEL A & LINDA C |
| 143 | 0589188394 | ENNIS, TERRY LANE |
| 144 | 0589451386 | FOWLER, CORA MAY |
| 145 | 0589541815 | SEARS, NANCY S & JAMES M |
| 146 | 0589287232 | WALTON, HELEN A & ARNOLD L |
| 147 | 0580364380 | WALTON, HELEN A & ROBERT |
| 148 | 0580400258 | WALTON, ROBERT L & HELEN A |
| 151 | 0589183481 | WILLIAMS, CATHERINE |
| 152 | 0589184509 | WILLIAMS, J W HEIR |
| 153 | 0589185471 | WILLIAMS, KINSTON D & EULA |
| 154 | 0589089513 | WOODDARD, PEE DEE |
| 155 | 0589186651 | COUNCIL, VERONICA WILLIAMS |
| 158 | 0589454897 | STEPHENS, HERBERT B |
| 161 | 0589092612 | STROPKY, JOSEPH JR & RICHEL S |
| 162 | 0589187150 | LAWRENCE, RONALD ALLEN & CYNTHIA E |
| 163 | 0589389107 | WALTON, HELEN A & ROBERT |
| 164 | 0589387284 | WALTON, RONALD S & JOY YV |
| 165 | 0589186768 | WILLIAMS, J W HEIR |
| 166 | 0589923817 | BARDEN, GENE & VIRGINIA |
| 167 | 0589545694 | BLACKBURN, ROGER A & WANDA B |
| 168 | 0589841383 | BLACKBURN, ROGER ADDISON & WANDA B |
| 171 | 0589745005 | BROADWELL, THOMAS M |
| 172 | 0589741352 | COLE, JEFFERY B |

| NCDOT REF # | NC PIN # | PROPERTY OWNER |
|----------------|----------------|------------------------------------|
| 173 | 0580745255 | GOODMAN, MALCOLM E JR & PENNY B |
| 174 | 0580743285 | GUIN, WILLIAM A JR |
| 175 | 0580745135 | HAMRICK, GETTIS G & PHYLLIS J |
| 176 | 0580825884 | LEWIS, NOUVELLE M |
| 177 | 0580921781 | MERRILL, DEBORAH D & FRANK T ET AL |
| 178 | 0580925436 | RHODES, RAYMOND LEONARD |
| 181 | | NONE TAKEN |
| 182 | 0589927719 | RHODES, RAYMOND LEONARD |
| 183 | 0589929871 | RHODES, RONALD D |
| 184 | 0589939138 | SMITH, CLARK G |
| 185 | | NONE TAKEN |
| 186 | 0589931751 | TINGEN, VIRGINIA Y |
| 187 | 0589740193 | TINGEN, VIRGINIA Y |
| 188 | 0589718778 | WAKE TECHNICAL COLLEGE |

Kirby holding and Map Act



Kirby holding and Map Act

- Plaintiffs' Arguments.
 - Inverse condemnation, among other claims.
 - Map Act is eminent domain type statute.
 - Total fee taking of each parcel.
 - Cloud on title.
 - Can't sell property at FMV.

Kirby holding and Map Act

- NCDOT's Arguments.
 - No taking; especially no total fee taking.
 - Map Act is a land-use restriction, police power statute.
 - Mere restrictions on use.
 - Needed for orderly development; minimize future relocations, impacts due to planned project.
 - Mere mapping, threats to take are not takings.
 - People are living in houses, operating businesses.

Kirby holding and Map Act

- Holdings.
 - Trial court. Granted Summary Judgment for NCDOT.
 - NC Court of Appeals. Reversed.

Kirby holding and Map Act

- NC Supreme Court, affirmed COA.
 - Yes. Taking.
 - Indefinite property use restrictions triggered by map recording per eminent domain type statute created taking.
 - Go determine damages, per § 136-112.

Kirby holding and Map Act

- Takeaways for Municipal Attorneys:
 - Respond to creative Kirby arguments.
 - Map Act is different from zoning and land-use ordinances and statutes based on police power.
 - Zoning and land-use takings evaluated under regulatory takings analysis. *Responsible Citizens; Finch. Lucas. Penn Central.*

Kirby holding and Map Act

- Map Act maps recorded in chain of title.
- *Kirby* involved Map Act/eminent domain statute.
- Zoning and land-use ordinances are police power.
- Map Act is eminent domain; served a public benefit; did not prevent a harm, i.e., police power.
- 1987 enabling law referred to controlling cost of acquiring rights-of-way on State's highway system.

Kirby holding and Map Act

- Notes

- Map Act contemplated future condemnation for public transportation projects.
- Mere planning, threats to condemn still are not a taking.
- Map Act created an indefinite negative easement.
- There was no physical taking. People still living in houses, working in businesses.

Questions ?