

NORTH CAROLINA **FILED** IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY 2011 SEP 15 PM 3:28 SUPERIOR COURT DIVISION
11 CVS _____

JAMES D. DEANS and wife WAKE COUNTY, N.C.)
CAROL A. DEANS)
And MOSE B. WISEMAN, Jr. and wife)
MARTHA D. WISEMAN)
VERONICA WILLIAMS WOODRUFF,)

Plaintiffs,)

v.)

NORTH CAROLINA DEPARTMENT)
OF TRANSPORTATION and)
NORTH CAROLINA TURNPIKE)
AUTHORITY)

Defendant.)

**COMPLAINT,
DECLARATORY JUDGMENT
and CLASS ACTION
(RULE 23)
(Jury Trial Demanded on Damages)**

COME NOW Plaintiffs James D. Deans, Carol A. Deans, Mose B. Wiseman, Jr. and Martha D. Wiseman, and Veronica Williams Woodruff (individually each a "Plaintiff" and collectively, "Plaintiffs"), through counsel, and file this Complaint and Declaratory Judgment Action pursuant to N.C.G.S. § 1-253 et. seq. against Defendants North Carolina Department of Transportation ("NCDOT") and North Carolina Turnpike Authority ("NCTA") alleging as follows:

NATURE OF THE ACTION

1. Since 1989, NCDOT has utilized N.C.G.S. §136-44.50 et seq. (the "Act"), a statutorily authorized roadway mapping procedure, to reserve roadways upon property over which NCDOT ultimately intends to construct highways. NCDOT records a legal document known as the "Roadway Corridor Official Map" with the register of deeds listing the properties and owners in that county that are in the proposed roadway; thus informing the owners and

putting prospective purchasers and any other party examining title to the property on notice that the property is reserved for future acquisition (the "Protected Corridor"). The Act places restrictions on the development and subdivision of the properties listed in the Protected Corridor. The Protected Corridor and the Act provide no timetable by which NCDOT must acquire the property, if at all, nor set forth NCDOT's liability to pay just compensation to owners for the NCDOT's reservation of the property.

2. The Act has the intended effect of a) freezing development of the properties in the Protected Corridor, b) curtailing the owners' incentive to develop the property in the future, c) negatively impacting or completely depriving the affected property owners' of the ability to dispose of the property at fair market value, and d) tortiously interfering with any ability to determine the fair market value of the properties in the Protected Corridor. The NCDOT's stated purpose of the "Protected Corridor" is to save the taxpayers money and prevent development that would increase NCDOT's ultimate acquisition costs. While the Protected Corridor is in place, the affected owners are deprived of the opportunity to financially benefit from development and other economically advantageous uses for their properties.

3. The Protected Corridor and the Act do not require the NCDOT to acquire the properties in the Protected Corridor. When NCDOT does acquire property in the Protected Corridor, NCDOT does not compensate the owner for the "taking" that occurs upon the filing of the Roadway Corridor Official Map. NCDOT simply pays owners present value absent any interest or reimbursement of taxes for the years the property was reserved by NCDOT. NCDOT receives the benefit of reserving property and preventing development in the Protected Corridor without the corresponding liability to pay the affected property owners for the "reservation" of their property.

4. NCDOT has used the Act and Protected Corridor to indefinitely force a small, unfortunate group of North Carolina property owners, whose most valuable asset in many instances is the real property that they own, to shoulder the cost of public roadway projects which instead is a cost that should ultimately be borne by the greater public.

PARTIES

5. North Carolina Department of Transportation (“NCDOT”) is an agency of the State of North Carolina and is vested with the powers of eminent domain.

6. North Carolina Turnpike Authority is an entity created by the North Carolina General Assembly under Article 6H of Chapter 136 of the North Carolina General Statutes. NCTA is granted the authority to condemn property pursuant to N.C.G.S. § 136-89.184.

7. NCDOT is allowed to participate in pre-construction activities of a Turnpike Project pursuant to N.C.G.S. § 136-89.191.

FACTUAL ALLEGATIONS **OWNERSHIP**

8. Plaintiffs James A. Deans and Carol A. Deans, husband and wife, are the owners of real property located in Wake County at 7901 Bells Lake Road, Apex, tax PIN 770602401 and 770612013, NCDOT Ref. Parcel Nos. 87 and 95.

9. Plaintiffs Mose B. Wiseman and Martha D. Wiseman, husband and wife, are the owner of real property located in Wake County at 5413 Buckwood Drive, Apex, and tax PIN 679996575, NCDOT Ref. Parcel No. 131.

10. Plaintiff Veronica Williams Woodruff, formerly Veronica Williams Council, is the owner of real property located in Wake County at 3816 Johnson Pond Road, Apex, North Carolina, Apex, and tax PIN 0689186651, NCDOT Ref Parcel No. 156.

11. The Plaintiffs' property referred to above shall be collectively referred to herein as the "Properties."

THE SOUTHERN WAKE EXPRESSWAY CORRIDOR

12. Pursuant to N.C.G.S. § 136-44.50, NCDOT recorded a Roadway Corridor Official Map for State Project 6.401078 (R-2721) in the Wake County Register of Deeds on August 6, 1996 at Book 7103, page 942, and in Highway Map Book 002, Page 00150 (this section of the subject roadway herein referred to as "Section One").

13. Pursuant to N.C.G.S. § 136-44.50, NCDOT recorded a Roadway Corridor Official Map for State Project 6.401079 (R-2828) in the Wake County Register of Deeds on March 10, 1997 at Book 7365, Page 0364, and in Highway Map Book 003, Page 00155 (this section of the subject roadway herein referred to as "Section Two").

14. Pursuant to N.C.G.S. § 136-44.50, NCDOT recorded a Roadway Corridor Official Map for State Project 6.401079 (R-2828) in the Johnston County Register of Deeds on March 10, 1997 at Book R-2, Page 1-89, and Book 1583, Page 071 (also "Section Two").

15. The NCDOT's recorded documents for Section One and Section Two set forth the list of properties and property owners whose real property is located within the mapped roadway corridor. The property owners listed in the Section One and Section Two documents who are not the Plaintiffs are referred to collectively as "Other Property Owners."

16. The parcels listed in Section One and Section Two (these parcels collectively referred to as the "Expressway Properties") comprise the NCDOT and NCTA's Southern Wake Expressway Project R-2721 and R-2828 ("Southern Wake Expressway"). The Southern Wake Expressway is a protected corridor governed by N.C.G.S. § 136-44.50 et seq.

17. NCDOT lists and identifies the parcels in Section One and Section Two by “NCDOT Ref #” Numbers 1 through 361.
18. The Southern Wake Expressway project has not been completed.
19. The Southern Wake Expressway is also called the Triangle Expressway Southeast Extension.
20. The Properties, as well as the Other Property Owners’ properties, are located within the proposed Southern Wake Expressway.
21. The Properties and all other property listed in the Southern Wake Expressway are subject to the provisions of N.C.G.S. § 136-44.51.
22. Plaintiffs and Other Property Owners are prohibited from obtaining building permits or sub-dividing their property for three (3) years pursuant to N.C.G.S. § 136-44.51. After three (3) years of making the application for a building permit or subdivision, and after incurring the cost and expense of such application, a permit or subdivision may be issued.
23. Upon information and belief, NCDOT actively discourages building permit and sub-division applications by Other Property Owners.
24. Real estate agents are required to disclose to prospective buyers that the Expressway Properties are listed in the Southern Wake Expressway and Protected Corridor.
25. Upon information and belief, in the years since filing the map NCDOT has not commenced any condemnation or other eminent domain actions against the Other Property Owners.

**NCDOT PURCHASES PROPERTY IN SOUTHERN WAKE EXPRESSWAY
and NCDOT HARDSHIP PROGRAM**

26. NCDOT has purchased property throughout the Southern Wake Expressway.

27. NCDOT has purchased no less than twenty - six parcels in the Southern Wake Expressway. NCDOT owns large sections of the Southern Wake Expressway. Exhibit A is a list of parcels purchased by NCDOT in the Southern Wake Expressway with the deed book and page for the transfers.

28. NCDOT has purchased property in the Southern Wake Expressway under its “Advanced Acquisition Due to Hardship” policy and 23 CFR § 710.503(c) (the “Hardship Program”).

29. NCDOT continues to approve acquisitions under the Hardship Program of certain properties in the Southern Wake Expressway.

30. Hardship acquisition is authorized by N.C.G.S. § 136-44.53. NCDOT must comply with 23 CFR § 710.503(c) when evaluating purchases under the Hardship Program.

31. In order for NCDOT to purchase property under the Hardship Program, NCDOT must concur with the applicant’s documentation of the “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.”

32. A true and accurate copy of NCDOT’s hardship guidelines are attached as Exhibit B.

33. NCDOT has continued to purchase property and right of way in the Southern Wake Expressway after January 2008, including the purchase of: (a) Holly Spring Residential Properties, LLC for approximately \$1.42 million on or about March 25, 2011, as recorded in Book 14305 at Page 1789 the Wake County Register of Deeds; (b) Woodcreek Land, LLC for approximately \$1.41 million on or about December 8, 2010, as recorded in the Wake County Register of Deeds in Book 14191 at Page 1914; (c) Roger A. Blackburn, and wife Wanda, for

\$1.18 million on or about October 20, 2008, as recorded in the Wake County Register of Deeds in Book 13277 at Page 2112.

34. In determining whether to make an offer to purchase under the Hardship Program, NCDOT officials represent to Plaintiffs and Other Property Owners that hardship acquisitions are based on economic status, an owner's physical health and the owner's inability to sell the property at fair market value because of the Southern Wake Expressway.

35. Upon information and belief, NCDOT will not negotiate on purchase price with an Expressway Property owner making a Hardship Program application or being purchased under other early acquisitions programs in the Southern Wake Expressway.

36. Upon information and belief, NCDOT does not and has not compensated the Expressway Properties' owners for interest or reimbursement of taxes from the date of taking when NCDOT has purchased the property.

37. Upon information and belief, NCDOT has purchased property from some Southern Wake Expressway property owners but has made no effort to purchase the property of Plaintiffs and Other Property Owners.

CONDEMNATION BLIGHT

38. NCDOT rents homes that it has purchased in the Southern Wake Expressway.

39. NCDOT has not maintained its property in the Southern Wake Expressway to the standards of its Other Property Owners.

40. NCDOT's presence as an owner in and around Southern Wake Expressway neighborhoods has a negative impact on Plaintiffs' properties and other Expressway Properties.

41. NCDOT's ownership of homes in the Southern Wake Expressway indicates to owners and prospective owners that NCDOT intends to construct the roadway through the neighborhood, which contributes to a decline in the quality of the neighborhood.

42. NCDOT's activities as a property owner and landlord in the neighborhoods and communities in the Southern Wake Expressway have negatively changed and are negatively changing the character of the neighborhoods, have depressed and are depressing property values inside and adjacent to the Southern Wake Expressway, and have been and are detrimental to Plaintiffs and the Other Property Owners.

43. NCDOT's unreasonable delay in condemning property, ownership of property and homes in the Southern Wake Expressway and status as a landlord has caused condemnation blight and cloud on title in the Southern Wake Expressway.

NCDOT and NCTA STATEMENTS and PUBLICATIONS

44. NCDOT and NCTA web site for the Southern Wake Expressway is "<http://www.ncturnpike.org/projects/southeast>" which states that "The estimated construction time frame once funding is secured is 5 years for Phase I." The web site indicates that timeline events are "TBD".

45. NCTA document "Frequently Asked Questions About the Triangle Expressway Southeast Extension" states:

"What is the probability that the protected corridor will end up being the corridor selected for implementation after the environmental study? Because it has been shielded from residential and commercial development, the protected corridor is a strong candidate for final route selection." (emphasis added)

46. NCTA document "Frequently Asked Questions About the Triangle Expressway Southeast Extension" additionally states:

“Would damages be paid to a property owner in the protected corridor if the Turnpike Authority locates the highway in a different corridor? *The property owner has received tax relief on the reserved property, so damages would not be paid in this circumstance. (emphasis added).*

If a property owner in the protected corridor needs to sell before a route is selected, what process would be followed to purchase the property in the protected corridor? *In certain hardship cases, the Turnpike Authority and the NCDOT Right-of-Way Branch will consider acquiring properties in the protected corridor prior to final selection of a route.” (Emphasis added).*

47. As of the date of filing this action, NCDOT web site “[http:// www.ncdot.gov /projects/i540/schedule/](http://www.ncdot.gov/projects/i540/schedule/)” states “R-2721 and R-2828, planning is underway, Right of Way purchase and construction are unfunded at this time.”

48. NCDOT and NCTA have not provided Plaintiffs and Other Property Owners with any date when eminent domain proceedings will begin.

49. Plaintiff and Other Property Owners are discouraged and not permitted to make improvements to or build upon their property because those actions would increase the acquisition costs to NCDOT.

50. NCDOT maintains document entitled “Protected Corridor: What You Really Need To Know” at “[www.ncdot.gov / projects / greensborourbanloop / download / ProtectedCorridorFAQs.pdf](http://www.ncdot.gov/projects/greensborourbanloop/download/ProtectedCorridorFAQs.pdf)” and “[http:// www.ncdot.gov / projects / wsnb / download / ProtectedCorridor.pdf](http://www.ncdot.gov/projects/wsnb/download/ProtectedCorridor.pdf).” A true copy is attached as Exhibit C.

51. This document accurately sets forth the purpose of the Protected Corridor as it applies to all Protected Corridors, including the Southern Wake Expressway.

52. The document “Protected Corridor: What You Really Need To Know” states among other things that:

- “it is highly unlikely that property owners will be allowed to do things that will increase the cost of building the road (by dramatically increasing the cost of buying the property)”;
- “How long can a property be in the ‘protected corridor’: For as long as it takes for North Carolina to get enough money to build the road.”;
- “Why: This protection is designed to protect North Carolina taxpayers from excessive increases in expense when the State starts to buy property to build the road”;
- “Sometimes, a potential route becomes a ‘protected corridor’ because the area is growing so quickly it is important to limit new buildings to help save taxpayers money.”
- “The following is a list of things that are typically **NOT** approved:
 - Subdivide property to build more houses;
 - Add square footage to a building
 - Develop land”

53. NCDOT published on its website a document entitled “Corridor Preservation Methods” dated July 2004, which was prepared for the NCDOT by LandDesign, Inc. A true and accurate copy, less the appendix and model ordinance, is attached as Exhibit D.

54. The “Corridor Preservation Methods” document states that:

- “[j]urisdictions exercising police power must be very careful not to over-regulate, which can lead to liability under inverse condemnation, and may be challenged in court as a ‘taking’ requiring just compensation.”;

- “corridor preservation methods may be challenged in court as takings”;
- “official maps maybe challenged in court to determine whether the limits on development are a legitimate exercise of police power or qualify as takings”; and
- “government agencies should take care to deal fairly with property owners or litigation could ensue.”

TAKING ALLEGATIONS

55. The conduct of the NCDOT and NCTA alleged above, and the following actions by the NCDOT and the NCTA are unequivocal, fixed and irreversible indications that NCDOT and NCTA intend to ultimately condemn or purchase the Plaintiffs’ Properties and Other Property Owners’ properties at some future undisclosed time:

- a) The NCDOT’s inordinate and unreasonable delay of over 15 years in acquiring Plaintiffs’ and Other Property Owners’ property in the Southern Wake Expressway,
- b) the filing of the Roadway Corridor Official Map for Section One and Section Two with the Wake County Register of Deeds,
- c) the restrictions on the Expressway Properties imposed by N.C.G.S. § 136-44.51,
- d) the existence of the NCDOT Hardship Program offered to Plaintiffs and Other Property Owners,
- e) the statements of the NCDOT to Plaintiffs and Other Property Owners regarding the use of their properties,

- f) the statements of NCDOT and NCTA that acquisitions in the Southern Wake Expressway will not commence for an undetermined number of years,
- g) the expressed intent of NCDOT to depress future property values and development in the Southern Wake Expressway,
- h) the acquisition of dozens of parcels, large and small, in the Southern Wake Expressway by NCDOT,
- i) NCDOT's expenditure of \$2.8 million in public funds since December 2010 to acquire two parcels in the Southern Wake Expressway,
- j) NCDOT operation of rental properties in the Protected Corridor.

56. NCDOT, by its acquisition of property in the Southern Wake Expressway, has transitioned from any regulatory activity to pre-condemnation / acquisition activity in the Southern Wake Expressway.

57. The acts described above in the preceding paragraphs have placed a cloud upon the title of all real property in the Southern Wake Expressway.

58. The administrative remedies offered to Plaintiffs and Other Property Owners are inadequate and unconstitutional. Plaintiffs and Other Property Owners seek to be condemned and purchased by NCDOT; they do not want or require a building permit or subdivision.

59. The NCDOT's remedy of the Hardship Program is unequal in its treatment of similarly situated persons in the Southern Wake Expressway in that physically unhealthy or financially distressed owners are considered for acquisition yet healthy and financially stable owners are not.

60. The remedies offered to Plaintiffs are constitutionally inadequate, are futile and therefore Plaintiffs are not required to exhaust administrative remedies.

61. The acts described above in the preceding paragraphs have rendered the Plaintiffs' Properties and Other Property Owners' real properties in the Southern Wake Expressway unmarketable at fair market value and, economically undevelopable, and have depressed property values throughout the Southern Wake Expressway.

62. The acts described above in the preceding paragraphs have resulted in tortious interference by NCDOT and with any ability to determine the fair market value of the Plaintiffs' Properties and Other Property Owners' real properties in the Southern Wake Expressway.

63. NCDOT and NCTA's actions have confiscated Plaintiffs' Properties, treated similarly situated property owners differently, have deprived and are depriving Plaintiffs and Other Property Owners in the Southern Wake Expressway of the value of their properties, have substantially interfered with and are substantially interfering with the Plaintiffs' and Other Property Owners' elemental and constitutional rights growing out of the ownership of the properties, and have restricted and are restricting the Plaintiffs' and Other Property Owners' capacity to freely dispose, use and enjoy their properties.

64. NCDOT and NCTA's actions have deprived and are depriving Plaintiffs and Other Property Owners of the free and unhindered use of their properties, have destroyed and nullified and are destroying and nullifying their properties' value, have abridged and destroyed and are abridging and destroying the Plaintiffs' and Other Property Owners' right to dispose, use or enjoy the properties in a substantial degree resulting in injuries which are not merely consequential or incidental.

65. The Plaintiffs and Other Property Owners in Section One and Section Two of the Southern Wake Expressway are similarly affected by the acts of the NCDOT.

CLASS ACTION

66. There exists a class which includes the above-named Plaintiffs and all others similarly situated who own property in the Southern Wake Expressway, or who have owned property in the Southern Wake Expressway who have been purchased but not paid interest and reimbursement of taxes, and are or were subject to N.C.G.S. § 136-44.50 *et seq.* The named and unnamed members of the class have an interest in the same issues of fact and law, and these issues predominate over issues affecting only individual class members.

67. The named Plaintiffs and the unnamed class members have an actual controversy with NCDOT and NCTA.

68. The named Plaintiffs and the unnamed class members have a genuine personal interest in the outcome of this litigation because they are subject to N.C.G.S. § 136-44.50, own property in the Southern Wake Expressway and have been deprived of their property rights. The named Plaintiffs and the unnamed class members will continue to be damaged and injured if NCDOT is not compelled to purchase all property located in the Southern Wake Expressway.

69. By way of inverse condemnation, NCDOT and NCTA have taken the property of the named Plaintiffs and the unnamed class members as set forth in the paragraphs above. NCDOT and NCTA are obligated to purchase all of the properties in the Southern Wake Expressway from the named Plaintiffs and unnamed class members. The named Plaintiffs and the unnamed class members are entitled to a refund of any taxes paid and pre-judgment interest and other damages.

70. The named Plaintiffs will fairly and adequately represent the interest of all potential class members in that the named Plaintiffs have a genuine, personal, substantial and direct interest in successfully pursuing this case and are situated similarly to the unnamed class

members with respect to the Southern Wake Expressway and N.C.G.S. §§ 136-44.50, 136-44.51, 136-44.52 and 136-44.53. The named Plaintiffs will adequately represent members of the class located in Johnston County and outside of North Carolina.

71. There is no conflict of interest existing between the named Plaintiffs and any potential class members as to the issues raised in this action.

72. There are over 125 potential class members owning over 250 parcels in the Southern Wake Expressway; therefore, the class is so numerous that it is impractical to bring them all before the Court except pursuant to a Rule 23 class action designation or certification.

73. For the reasons stated above, proceeding as a class action will provide a fair and efficient adjudication of this controversy without the need for a multiplicity of lawsuits. This matter should proceed as a class action.

74. NCDOT and NCDOT are not immune from this suit or the relief sought hereunder by any claim of governmental immunity.

FIRST CLAIM FOR RELIEF
(Inverse Condemnation - N.C.G.S. § 136-111)

75. The allegations of the preceding paragraphs are incorporated and reasserted as if fully set forth herein.

76. The acts enumerated in the preceding paragraphs by the Defendants NCDOT and NCTA have resulted in the taking by inverse condemnation of the subject properties pursuant to N.C.G.S. § 136-111 for which Plaintiffs and all Other Property Owners in the Southern Wake Expressway are entitled to recover just compensation and attorneys' fees pursuant to N.C.G.S. §§ 136-111, 112 and 119, as well as interest, prejudgment interest and reimbursement of taxes from the date of the taking.

SECOND CLAIM FOR RELIEF
(Violation of Fifth Amendment of United States Constitution)

77. The allegations of the preceding paragraphs are incorporated and reasserted as if fully set forth herein.

78. The actions by Defendant NCDOT and NCTA constitute an unlawful taking in derogation of the Fifth Amendment of the U.S. Constitution as applied to the State of North Carolina pursuant to the Fourteenth Amendment. Plaintiffs are entitled to compensation arising out of such taking. The actions of the NCDOT violate 42 USC § 1983.

THIRD CLAIM FOR RELIEF
(Violation of Fourteenth Amendment of United States Constitution -Equal Protection Claim)

79. The allegations of the preceding paragraphs are incorporated and reasserted as if fully set forth herein.

80. The actions by Defendant NCDOT and NCTA in application of N.C.G.S. § 136-44.53 and the “Hardship Program” involve a fundamental right, treat persons differently than others similarly situated without any rational basis, are unevenly applied, and constitute a violation of the equal protection clause in derogation of the Fourteenth Amendment of the U.S. Constitution as applied to the State of North Carolina pursuant to the Fourteenth Amendment. Plaintiffs are entitled to compensation arising out of such violation. The actions of the NCDOT violate 42 USC § 1983.

FOURTH CLAIM FOR RELIEF
(Violation of North Carolina Constitution)

81. The allegations of the preceding paragraphs are incorporated and reasserted as if fully set forth herein.

82. The takings by Defendant NCDOT and NCTA constitute a wrongful taking of the property in violation of the Law of the Land clause of the North Carolina Constitution. Plaintiffs

are entitled to recover compensation pursuant to Article I, Section 19 of the North Carolina Constitution arising out of the taking.

FIFTH CLAIM FOR RELIEF
DECLARATORY RELIEF

83. Pursuant to N.C.G.S. § 1-260, this declaratory action is properly a class action as it shall determine the rights and obligation of all property owners in the Southern Wake Expressway.

84. Plaintiff seeks a declaration of taking and the date of the taking.

85. In the alternative, Plaintiff seeks a declaration that the Hardship Program, and statutes N.C.G.S. §§ 136-44.50, 136-44.51, 136-44.52 and 136-44.53 are unconstitutional, both facially and as applied, and invalid exercises of legislative power as they affect a taking by the NCDOT without just compensation and are unequal in their application to property owners.

WHEREFORE, Plaintiffs pray the Court:

1. Certify this matter as a class action pursuant to Rule 23 of the North Carolina Rules of Civil Procedure;

2. That Plaintiffs and all Other Property Owners in the Southern Wake Expressway have and recover of NCDOT and NCTA damages in excess of \$10,000 arising out of Defendant's taking by inverse condemnation of Plaintiff's property and violation of their constitutional rights under the North Carolina and United States Constitutions;

3. That NCDOT and NCTA be compelled to purchase Plaintiffs' and Other Property Owners' property;

4. That this matter be divided into separate trials on the issues of NCDOT and NCTA's liability to Plaintiffs and Other Property Owners and each Plaintiffs and Other Property Owners' individual damages;

5. That the Plaintiffs recover from the Defendant NCDOT and NCTA their attorneys' fees, appraisal, engineering, and other fees as provided in N.C.G.S. § 136-119, 42 U.S.C. § 1988, and Article I, section 19 of the North Carolina Constitution;

6. That Plaintiffs and all Other Property Owners, including owners purchased by NCDOT subsequent to this action, in the Southern Wake Expressway recover interest on all amounts awarded herein from the date of taking until paid pursuant to N.C.G.S. § 136-113;

7. That Plaintiffs and all Other Property Owners, including owners purchased by NCDOT, in the Southern Wake Expressway be reimbursed all taxes and expenses paid on the Property from the date of taking;


8. That Plaintiffs and all Other Property Owners in the Southern Wake Expressway have a jury trial on all damages issues so triable;

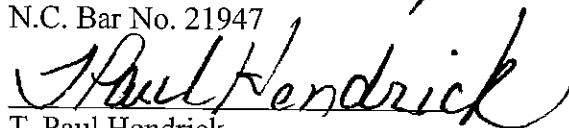
9. Award the named Plaintiffs and unnamed class members all further relief that the Court deems just and proper; and

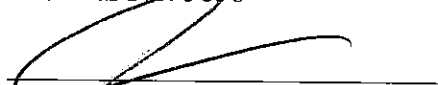
10. That the costs of this action be taxed against the Defendant.

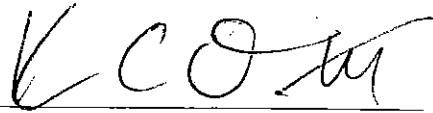
This is the 16th day of ~~August~~, 2011.

September


Matthew Bryant
mbryant@hendricklawfirm.com
N.C. Bar No. 21947


T. Paul Hendrick
phendrick@hendricklawfirm.com
N.C. Bar No. 5656


Timothy Nerhood
tnerhood@hendricklawfirm.com
N.C. Bar No. 25432



Kenneth C. Otis III
cotis@hendricklawfirm.com
N.C. Bar No. 28005
Attorneys for Plaintiffs.

Of Counsel:

Hendrick, Bryant Nerhood & Otis, LLP

723 Coliseum Drive, Suite 101

Winston Salem, NC 27106

Telephone: (336) 723-7200

Facsimile: (336) 723-7201

www.hendricklawfirm.com

Kenneth C. Otis III
cotis@hendricklawfirm.com
N.C. Bar No. 28005
Attorneys for Plaintiffs.

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

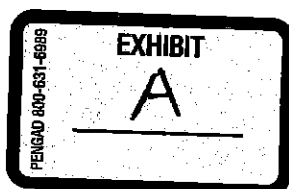


Kieran J. Shanahan, NCSB #13329
Brandon Neuman, NCSB #33590
Tonya B. Powell NCSB #23026
kieran@shanahanlawgroup.com
bneuman@shanahanlawgroup.com
tpowell@shanahanlawgroup.com
Attorney for Plaintiffs.

Of Counsel:
Shanahan Law Group, PLLC
128 E. Hargett Street, Suite 300
Raleigh, NC 27601
Telephone: (919) 856-9494
Facsimile: (919) 856-9499
www.shanahanlawgroup.com

NCDOT Parcels in Southern Wake Expressway

| NCDOT Parcel Number | Deed Book | Deed Page | Date Purchased |
|----------------------------|------------------|------------------|-----------------------|
| 22 | 14305 | 1789 | 3/25/11 |
| 22 | 14191 | 1914 | 12/8/10 |
| 41 | 11977 | 1151 | 5/26/06 |
| 32 | 9459 | 2436 | 6/19/02 |
| 108 | 11691 | 1628 | 11/18/05 |
| 115 | 11679 | 1282 | 11/10/05 |
| 126 | 11004 | 1488 | 9/3/04 |
| 111 | 11004 | 1488 | 9/3/04 |
| 103 | 08081 | 1131 | 6/12/98 |
| 168 | 13277 | 2115 | 10/20/08 |
| 204 | 11328 | 2797 | 4/27/05 |
| 205 | 10492 | 2759 | 10/13/03 |
| 237 | 11684 | 0389 | 11/15/05 |
| 249 | 08758 | 2689 | 12/15/00 |
| 250 | 07821 | 0532 | 12/29/97 |
| 265 | 7251 | 078 | 12/5/96 |
| 272 | 8678 | 221 | 9/6/00 |
| 288 | 8874 | 754 | 4/11/01 |
| 289 | | | |
| 290 | | | |
| 283 | 8851 | 1172 | 3/27/01 |
| 284 | 8851 | 1172 | 3/27/01 |
| 282 | 11883 | 060 | 3/30/06 |
| 291 | 11448 | 1853 | 7/1/05 |
| | 10976 | 2216 | 8/19/04 |
| | 10223 | 1884 | 6/23/03 |



Protected Corridor **What that really means to you**

Sometimes when NCDOT is planning a major new road, property that will be needed in the future to build the road is placed in what is called a "Protected Corridor". The following is designed to help explain -- in clear language -- what the term "Protected Corridor" means.

What is a "Protected Corridor"?

A "Protected Corridor" is the land NCDOT anticipates it will need to build the new road. This land (or corridor) is "protected" from certain activities.

Why?

This protection is designed to protect North Carolina taxpayers from excessive increases in expense when the State starts to buy property to build the road. More importantly, this reduces the number of people who will be impacted in the future when the new road is built.

How long can a property be in the "protected corridor"?

For as long as it takes for North Carolina to get enough money to build the road. Many roads in all parts of the state go through this process. Some areas simply take longer than others because of various reasons.

When does a suggested route become a "protected corridor"?

Typically, a route is designated a "protected corridor" after years of planning and work. Sometimes, a potential route becomes a "protected corridor" because the area is growing so quickly it is important to limit new buildings to help save taxpayer money. Other times, the route becomes a "protected corridor" after the environmental studies are complete and the route is approved. People are always notified before their property is placed in a protected corridor.

What if my home/business is in a "protected corridor"?

There are then additional rules and guidelines that apply to you.

The following is a list of things you **CAN** do to your property:

- Make repairs
- Make renovations that do NOT require building permits (put in a new sink, update light fixtures, landscape your yard, paint, put in new carpet, etc.)
- Sell your property

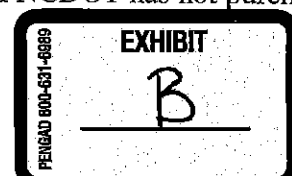
BUT if you want to do any work on your property that **DOES** require a building permit, you have to follow a different process.

You can apply for a "variance" which means you explain what you want to do and request permission. NCDOT reviews these, and often grants permission. But it is highly unlikely that property owners will be allowed to do things that will increase the cost of building the road (by drastically increasing the cost of buying the property).

The following is a list of things that are typically **NOT** approved:

- Subdivide property to build more houses
- Add square footage to a building
- Develop land

To do these things, you must apply for official permission from your local government. If permission is denied, NCDOT then has up to three years to offer to buy the property. If NCDOT has not purchased your



property within these three years and your local government gives you permission, you are free to upgrade your property.

What if I have a special situation and need NCDOT to buy my property now? You can apply for what is called “Advance Acquisition Due to Hardship”. Hardship cases are reviewed individually. If you have a medical or serious financial issue, NCDOT could buy your property early. To find out more about this, contact Rodney Hatton at rhatton@ncdot.gov or by calling (336) 760-8737.

Are there any benefits to the property owner once property is placed in a “protected corridor?”

Yes, you may be eligible for a reduction in your county taxes for the property that lies within the “protected corridor.” To find out if you qualify, contact your local Tax Office.

Corridor Preservation Methods

Prepared for
The North Carolina Department of Transportation

Prepared by
LandDesign, Inc.
223 North Graham Street
Charlotte, NC 28202

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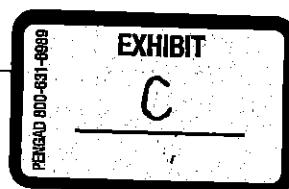


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I. Introduction

Why Preserve Corridors?

When a federally-funded new or expanded roadway is planned, an approval process conducted according to the National Environmental Policy Act of 1969 (NEPA) determines whether the transportation corridor is acceptable, given its environmental impacts. This process aims to minimize negative impacts on the environment made by the final alignment of a corridor. Under the current system, acquisition of the land needed for the right-of-way of the transportation facility is intended to begin once the alignment is approved according to NEPA. In fact, the Federal Highway Administration restricts right-of-way acquisitions before the NEPA process is completed, with the intent of avoiding prejudicing the environmental approval process. However, NEPA approval of a corridor can take up to five years; if land within the planned right-of-way is not set aside during this time period, the corridor may be developed, which may require a new location to be found for the corridor and could direct the corridor into environmentally sensitive areas, or areas in or near neighborhoods that will be negatively affected by the roadway. Relocation also requires that plans be redrawn and project development be postponed, increasing the cost of the project. Alternatively, if the corridor is not relocated, development that occurs within it will require transportation agencies to pay much higher prices for land that has been improved while the NEPA process has been underway. Thus, the very process that is meant to ensure that corridor alignments are appropriate may allow private development to occur within the preferred alignment, directing transportation improvements onto sensitive sites or costing transportation agencies far more than is necessary.

In order to avoid development of properties within planned rights-of-way, local, regional, and state planning entities must find ways to protect key sections of planned corridors until construction is set to begin, without contravening the requirements of either NEPA or the FHWA. This can include finding ways to preserve the corridor without acquiring the properties, such as exercising police power, acquiring interests less than fee simple in the properties, or reaching agreements with property owners. Alternatively, the planning entities can find ways to acquire key properties within the parameters of NEPA.

Whether corridor preservation occurs through acquisition in accordance with NEPA requirements, or through methods that are not restricted by NEPA, it is key to avoiding the environmental and capital costs of delaying any control over the planned corridor until NEPA approvals are completed. While corridor preservation is not appropriate or necessary in all cases, it is crucial along corridors that are likely to experience significant development pressure in the near future. However, there may be instances in which a high level of controversy over a proposed improvement makes preservation efforts too contentious to be undertaken.

When Should Preservation Efforts Begin?

Corridor preservation should begin during the planning and project development process. Once the needed improvements to a roadway and its general corridor have been identified, the improvements should be prioritized. Next, state, regional, and local agencies should collaborate to determine whether the corridor will require protection. If

protection will be needed, the planning agencies should determine a more precise location for the corridor, the nature of the threats to the corridor, what preservation actions may be appropriate, how necessary funding may be obtained, and when the actions should be initiated. At this time, they may also consider preserving land to be used for environmental mitigation. For instance, if a right-of-way acquisition will occur in a wetland area, additional land may need to be preserved to act as replacement wetlands after construction begins. These steps should be taken early, so that the necessary actions can be included in the Transportation Improvements Program and coordinated with state, regional, and local transportation entities.

Communication, Coordination, and Cooperation

Preservation of the land needed for transportation improvements can only be achieved if local, regional, and state planning agencies work very closely together to identify threats to planned rights-of-way and find solutions to them. In reviewing each of the preservation techniques in this report, agencies should aggressively pursue communication, coordination, and cooperation within each agency, among the agencies, and with property owners.

This need for coordination can be formally promoted at the state level. For instance, local jurisdictions can be required or encouraged to notify the state transportation agency before approving any rezoning, building permit, subdivision change, or other permitting activity within a planned corridor. The state can then respond within a set time frame by purchasing the property in question, beginning negotiations with the owner for exercising other preservation techniques, or initiating eminent domain proceedings. State, regional, and local entities may also foster coordination by incorporating tools such as memoranda of understanding into their planning processes, ensuring that all parties with interest in a corridor are united in their efforts to preserve it. For instance, a memorandum of understanding may be issued by a state agency to a regional planning body to communicate full intention to develop a corridor if the regional body preserves land along it.

Even if no formal programs or tools to advance coordination are used, such collaboration should be considered absolutely vital to preservation efforts. This cooperation should help align the goals of planning bodies, as well as bring property owners into close communication with them, so that creative solutions are found, costs are minimized, and lawsuits are avoided.

II. Methods for Corridor Right-of-way Protection

A. State Corridor Management Program

State-level programs can make corridor preservation a priority by establishing a system for identifying and protecting important corridors, including methods for ensuring coordination between jurisdictions involved, and measures for obtaining funding. This type of program can be formal and included in state law, or may be informal.

Alternatively, the state may establish a corridor preservation team to address such issues at the state level, or may set up a procedure in which the state formally ensures regional or local entities that if they preserve certain corridors, the state fully intends to develop

them. These state programs support corridor management by providing established avenues for uniformly carrying out corridor preservation efforts across the state. North Carolina does not have such a system, but three examples of such state-level corridor preservation programs are described below.

California statutes allow the CalTrans, the state's transportation authority, to pursue corridor preservation, but the identification of corridors to be preserved is undertaken by regional transportation agencies and local municipalities. These regional and local entities must take several required steps in designating corridors for preservation, including establishing geographic boundaries for the corridor; completing a survey of traffic and air quality impacts of the corridor; and considering the widest possible range of transportation facilities that could be located in the corridor and the environmental impacts they may cause. The state department of transportation then pursues preservation through donations, dedications, transportation impact mitigations, advance right-of-way purchase, and other means. Each land acquisition proposal must be submitted to the regional transportation planning agency for review before it can be carried out.

In Kansas, a policy within the Department of Transportation allows for

- a Corridor Management Committee to coordinate corridor management issues
- District Plans that are collaboratively created to identify corridors that will require careful management
- Special requirements for commercial and industrial access, including design review for extensive development, traffic impact studies, and drainage reports
- methods for corridor preservation, and processes for carrying out each.

It also places heavy emphasis on coordination among the DOT, MPOs, local municipalities, public utility companies, and other groups in pursuing corridor preservation. The corridor preservation program based on this policy is allowed by state legislation, and funded by the state. It encourages memoranda of understanding between cities, counties, and KDOT for pursuing corridor preservation, but does not have mechanisms to enforce the policies it supports. Corridor identification is sometimes developer-driven, but the program also works with municipalities to identify corridors. The program does have the authority to pursue corridor preservation, including property acquisition, but the design process must be underway, with right-of-way limits established.

In 1988, Florida legislation authorized FDOT and local governments to designate transportation corridors for protection on an official map, based on which local governments were required to withhold development permits in mapped corridors for five years. This five-year period could be extended an additional five years with no commitment by the State to purchase the property in question. The statute's stated purpose was to freeze land values in anticipation of condemnation, and prevent the increased costs of land acquisition that would occur if development permits were granted. In 1990, the Florida Supreme Court ruled that these provisions were unconstitutional and a violation of due process. Since then, corridor preservation policy in Florida has changed focus, taking place mainly at the local level now. In 1995, new legislation encouraged

close coordination between FDOT and local governments on corridor preservation, emphasizing local comprehensive and thoroughfare plans as the proper place for designation of corridors for preservation. This legislation authorized local governments to adopt transportation corridor management ordinances, as discussed in section C.i.: Corridor Preservation/Management Ordinance. Local governments are directed to notify FDOT before approving any rezoning, building permit, subdivision change, or other permitting activity that would negatively impact the future viability of the corridor for transportation purposes. This allows FDOT to identify problems and negotiate alternatives while implementing corridor preservation at the local level.

While these programs make significant progress toward making corridor preservation a priority, none of them represents the perfect statewide program. For instance, the California program puts the task of identifying corridors for preservation with the regional and local entities, while the task of preservation remains with the state. This can reduce the likelihood that corridors preserved are significant and consistent on a broader level, and could lead to problems with the NEPA process if the state funds acquisition that contravenes NEPA rules. The Kansas program's use of a committee to promote corridor preservation throughout the state is not as strong as it could be, lacking the ability to enforce their recommendations. In a program like this, it should also be ensured that the committee has access to the staffing, information, and funding resources it needs to fulfill its duties. The Florida program, while innovative in offering a model ordinance for local adoption, lacks state-level coordination to ensure that local governments are aware of the ordinance's availability and purpose. It could also benefit greatly from state-level efforts to encourage communication among neighboring jurisdictions regarding corridor preservation. If the establishment of a state-level corridor management program is considered, the needs and opportunities specific to the state in question should be appraised in combination with successful aspects of existing programs in order to determine the best structure for the new system.

B. Mapping

Local governments can put transportation improvements and rights-of-way in master plans and comprehensive plans at varying levels of specificity, showing centerline alignments and rights-of-way required. The validity of later corridor preservation actions, if challenged, may depend on the inclusion of the project in a comprehensive, thoroughfare, or other plan, making these plans an important step in corridor preservation. In North Carolina, thoroughfare plans produced and adopted by MPOs are the most typical of these plans. Including corridors in these types of plans makes their preservation much more likely to succeed, as it forms a basis for corridor preservation efforts following plan adoption, especially those at the local level. This type of planning also allows land uses adjacent to the facility to be adjusted accordingly in order to reduce conflicts between the right-of-way needed and the development occurring within and near it. The planning process also helps establish buy-in and lays the groundwork for cooperation with property owners in the future. This planning step is effective for both expanding existing facilities and establishing new ones.

When incorporating future transportation corridors into local plans, municipalities and regional planning entities should coordinate closely with state agencies. Local efforts at corridor preservation may be strongly challenged if they do not have clear support from the state department of transportation.

C. Police Power Regulation

Local governments can regulate development on private property by exercising police power in a variety of ways, as described in this section. These types of controls are best used for corridor preservation if they are considered early in the planning process, and are advantageous because they usually incur no capital costs. However, jurisdictions exercising police power must be very careful not to over-regulate, which can lead to liability under inverse condemnation, and may be challenged in court as a 'taking' requiring compensation.

i. Corridor Management/Preservation Ordinance

If state statutes allow it, as they do in Florida but do not in North Carolina, municipalities may adopt ordinances that establish procedures for preserving or acquiring needed right-of-way to protect transportation corridors for future improvement. A corridor preservation ordinance would generally address some or all of the following:

- Criteria to manage land uses within or adjacent to the corridor
- Restrictions on construction within the corridor
- Uses permitted in the corridor
- A public notification process
- A variance and appeal process
- A process for intergovernmental coordination

As with other exercises of police power, corridor preservation ordinances may be challenged in court as takings. In Florida, several counties and local municipalities have adopted such ordinances. A model ordinance for protecting corridors and rights-of-way developed by the State of Florida can be found in Appendix III.

ii. Zoning and Subdivision Regulations

Corridor preservation objectives should be considered in the formulation of local zoning and subdivision regulations. Existing zoning should be tested in combination with planned transportation facilities, with attention to the transportation impacts and the advantages of various land use options. Overlay district zoning may be applied along corridors to be preserved. These districts may include provisions that address right-of-way reservation or dedication, allowances for interim uses, setbacks on the corridor in question, cluster zoning, transferable development rights, specifications for joint and cross access, driveway limitations, and driveway spacing.

Setbacks required in the zoning code may also contribute to corridor preservation. A setback is an area within a certain distance from a curb, property line, or building line within which construction is prohibited; this area may provide space for a future right-of-way to supplement and widen an existing right-of-way. Local governments may also require setbacks to be measured from the future right-of-way line. A required setback must be related to the preservation and promotion of public health, safety, and welfare,

and may not be arbitrarily or capriciously applied. If a setback is used to reserve future rights-of-way and does not serve other, valid purposes for setbacks¹, courts may find the setback unconstitutional, viewing it as merely a way to avoid compensating the property owner. A setback may preserve land for the right-of-way, but that must be a secondary result of the setback, and compensation must be made to the property owner when the right-of-way is acquired.

Lot dimensions can also be coordinated with corridor management objectives. Deeper, wider lots along important corridors can allow space for an expanded right-of-way in the future. High minimum lot frontage requirements can help manage driveway spacing when lots access the corridor in question. Smaller frontages may be allowed when lots have alternative access options and do not require driveway cuts on the main highway.

To provide these alternative access options, joint or cross access can be encouraged, and may be required when a property later redevelops or expands. When using these access techniques, flexibility should be exercised as properties are addressed individually. Density bonuses, variances, or other benefits may be offered for properties that create joint and cross access.

During the development review process, local jurisdictions can make sure that their procedures further corridor preservation goals. The government and the developer may collaborate to find ways to avoid encroachment on planned corridors, such as making the planned right-of-way a single lot, which is left undeveloped until it is purchased prior to the roadway's construction. Traffic impact analyses may be required according to regulations established by the municipality. The process can also assess access features affecting corridors planned for improvement.

iii. Official Maps

North Carolina's Transportation Corridor Official Map Act allows official maps to place temporary restrictions on private property rights by prohibiting the issuance of a building permit or the approval of a subdivision within the adopted alignment of future corridors. However, an application for a building permit or for subdivision plat approval may not be delayed more than three years from the date the application is submitted. This tool is available to local jurisdictions or to the state transportation agency. It may be used only for major controlled access facilities that are included in the TIP, and only once an EIS has been drafted and construction is imminent. In addition, an official map may only be adopted where pressure from development is existing or anticipated, where inaction could lead to excessive costs for future right-of-way acquisition or to the elimination of highway alternatives, and where less restrictive measures would be ineffective or inappropriate. The Zoning Board of Adjustment in the local jurisdiction may grant special variances for corridor properties if

- the owner cannot earn a reasonable return on the land, even with the tax benefits, and
- the limitations on development create practical difficulties or unnecessary hardships.

¹ Valid purposes for setbacks include separation from noise of the street, promotion of safety for pedestrians, drivers, and occupants of structures along the street, improving the attractiveness of residential environments, and securing availability of light and air.

Within one year of the establishment of the official map, work must be begun on an environmental impact statement or preliminary engineering. Any undeveloped or unsubdivided land within an official map roadway corridor is taxed at 20% of the general tax rate levied on real property.

According to the North Carolina General State Statutes, the regional transportation authority or city that initiated the official map may make advance acquisition of parcels when the acquisition is determined to be in the best public interest to protect the transportation corridor, or when the official map places undue hardship on the affected property owner. The entity acquiring the property must obtain concurrence from the department of transportation, and the advance acquisition must subsequently be reimbursed by the DOT.

Like many other police power techniques, official maps may be challenged in court to determine whether the limits on development are a legitimate exercise of police power or qualify as takings. This was the case in Florida, where an aggressive official mapping program was declared unconstitutional. Under Florida's program, FDOT and local governments could file official maps designating transportation corridors for preservation, and local governments were required to withhold development permits for properties within each corridor for five years through a setback requirement. This five-year period could then be extended by another five years even without a commitment from the State to purchase the property. In the 1990 case *Joint Ventures v. Florida Department of Transportation*, reasons cited for the program's unconstitutionality included the lengthy time period of the moratorium on development, and the clear goal of suppressing land values for the purpose of reducing purchase prices several years in the future. The lack of flexibility for mitigating hardships to property owners was also noted as a problem. Several years later, Florida courts upheld Palm Beach County's right to pursue corridor management through their thoroughfare plan, which had its basis in the state-mandated comprehensive plan, met statutory objectives of planning for future growth, and provided for mitigation of hardships to property owners.

iv. Exactions

An exaction is a contribution by a developer to the government in return for subdivision approval, a special or conditional use permit, an amendment to the zoning map, or another land use approval or permit that is necessary to the developer. Contributions that act as property exactions can be

- in-kind contributions within the project, usually including dedication of land for streets, schools, parks, sewer lines, or fire facilities, and sometimes including construction of such facilities;
- in-kind contributions near the project, such as the construction or rehabilitation of streets that bound, cross, or pass near the site and will be strained by traffic generated by the development;
- payment in lieu of in-kind contributions; or
- impact fees.

Special assessments are often part of exactions, and are used to pay for improvements necessary to meet existing deficiencies on the site (not those generated by the development). The funds generated by special assessments are used for sewers, transportation facilities, and other infrastructure that benefits the property owner.

For corridor preservation, exactions may be used to obtain land within the planned right-of-way or to reach an agreement in which the developer constructs some part of the planned facility on or near the property. Exactions may also be used to obtain funds that may be used for corridor preservation, but care should be taken to ensure that the use of such funds, typically collected as impact fees, is legitimate and lawful. These fees may be used for transportation improvements that not only serve an immediate transportation need but also promote corridor preservation. However, such fees are likely to be more effective if collected in a larger fund that is dedicated to improving the roadway network community-wide, including corridor preservation. If this approach is taken, the unit of local government must make sure that the fund can be defended as mitigating the impacts created by those who contribute fees. Criteria must also be developed to determine who is required to contribute to this fund. For example, fees might be required of owners of all developments over a certain size (if the fund to be used throughout the jurisdiction), developers of properties over a certain size along a particular corridor (if the fund is to be used in that corridor), or owners of properties that generate a certain amount of traffic.

Property exactions should be used only when there is a clear and direct connection between the exaction and a substantial advancement of a legitimate government interest. Governments should be careful to ensure that the developer receives benefits equal to the value of the exaction, and that exactions do not constitute a regulatory taking of an easement.

v. Development Moratoria

Established through a local law or ordinance, a development moratorium suspends property owners' rights to obtain development approvals, including subdivision approvals, building permits, site plan approvals, or wetland permits. A moratorium is meant to allow a municipality time to address a pressing problem, develop and adopt a plan, or create new rules for the area in question. A moratorium may be applied to a specific geographic area, such as a planned transportation corridor, or a specific type of permit or approval. It may also allow exemptions under certain circumstances, such as hardship. Development moratoria should be considered very carefully before being used as a corridor preservation technique, and should be used only when absolutely necessary. The basis for the moratorium should be specific and legitimate, the timetable should be reasonable, and a solution to the problem and conclusion of the moratorium should be within reach. If the moratorium is challenged in court, it may be voided, and damages may even be awarded to the property owner.

D. Early Property Acquisition

The most commonly used method of preserving corridors is simply to acquire key parcels along the corridor. However, care must be taken when using early acquisition as a method for preserving rights-of-way, because NEPA requirements generally disallow

state acquisition before the approval process is completed. There are some ways for states to acquire key properties within the parameters of NEPA: obtaining a categorical exclusion for right-of-way activities; using information developed during the planning process to demonstrate NEPA compliance for right-of-way authorizations, and possibly even construction authorizations; initiating full NEPA environmental document preparation during the planning process; and using a Tiered Environmental Document approach. Alternatively, local jurisdictions can acquire key properties in the right-of-way of the planned transportation improvement, which is not prohibited by NEPA rules.

Early acquisition of key parcels along the corridor usually takes place through fee simple acquisition, often by the exercise of eminent domain. After acquiring the parcels, a government banks them until construction begins. Property may be acquired for use in the actual corridor, to control the land use of property near the corridor, or for environmental mitigation, such as creating replacement wetlands. The purpose of the acquisition may determine the methods available for acquiring it; for instance, condemnation will likely require a strong justification on the grounds of safety or other legitimate goal.

Early acquisition has both strong advantages and great disadvantages. Acquisition avoids the need for government regulation of the property, fully compensates the property owner, allows for banking of land, and may allow for income on the property prior to construction, recapturing the acquisition costs.

However, acquiring property in advance requires substantial funding long before construction is to begin, and the property is eliminated from the local tax based. In addition, the liabilities associated with managing the property fall upon the transportation agency, which is responsible for maintaining the aesthetic and safety conditions of the property until construction begins. To decide whether acquisition is an appropriate choice for corridor preservation, the transportation agency must weigh these advantages and disadvantages to determine whether the savings achieved through early purchase are great enough to offset the liabilities of maintaining the property.

Several other challenges may be faced when early acquisition is attempted. When a transportation agency endeavors to acquire part of a larger property, the property owner may be hesitant to agree to early acquisition if their questions about basic project design and engineering cannot be answered. Constitutional or statutory problems may also arise during early acquisition. Some courts are hesitant to allow acquisition for public purpose or necessity unless a relatively short-term construction need is demonstrated. This attitude overlooks the important public purpose of avoiding the high cost of securing rights-of-way after land development or intensification of uses has occurred on the property in question.

The most often used approach to acquiring rights-of-way is taking advantage of federal regulations that allow federal aid or state funds to be used for protective and hardship acquisitions before the corridor's location is approved. Hardship and protective buying are usually parcel-by-parcel, and intended to be used only in extraordinary circumstances

or emergency situations. The state must also have documentation that the hardship or protective buying acquisition is in the public interest. State dollars can be used for either method, but if federal dollars are used, a public hearing must be held and a Categorical Exclusion document may be required. In the hardship or protective buying process, the state highway department may ask approval from the Federal Highway Administration to acquire a limited number of particular parcels in the proposed corridor before the environmental impact statement is processed or denied. In protective buying, land is acquired because the owner has impending plans to develop it in such a way that would preclude the future transportation use. Protective buying with state or federal funds can occur at any time during the NEPA process. However, protecting a corridor or certain parcels from being developed should not be used to influence the selection of the preferred alignment (or LEDPA). Hardship acquisition is initiated by the property owner because of particular financial or health-related hardship, such as when a transportation project renders the particular property unsaleable, placing a hardship on the owner. Hardship acquisition must not occur until after a least environmentally damaging practicable alternative (LEDPA) has been selected as part of the NEPA process, but it can occur before the record of decision.

E. Acquisition of Lesser Interest than Fee Simple

To avoid many of the disadvantages of acquisition, such as the significant costs and the need for maintenance of the property until construction begins, a government can acquire some interest in the property that is less than fee simple interest in order to preserve the land as is. This may be accomplished through development easements or options to purchase.

i. Development Easements

Through a development easement, a government acquires the right to use land owned by someone else for a special purpose. An easement² can be affirmative, allowing something to happen to the land (such as allowing wires to pass over it, or water to be discharged onto it), or negative, disallowing the owner from doing something to the land that he would otherwise be allowed to do. For corridor preservation, development easements often involve the purchase of development rights to offset the restricted use of the land. In this case, a government purchases the right to further develop a property, so that the property and its management remain the responsibility of the private owner, but the current condition of the property is preserved. If the owner sells the land, the purchaser is bound to the terms and conditions of the easement.

Unlike the case with fee simple acquisition, the property owner retains most rights to the property, including maintaining the current use of the property, as long as it is not further developed. In addition, the property remains on the local tax rolls.

A development easement can be permanent or temporary, and the price of the easement depends on its tenure. The valuation of an easement can cause litigation, and should be

² Common examples include conservation easements (to conserve environmental amenities), preservation easements (to protect a historic area from disruption by development), or scenic easements (to protect the aesthetic nature of open space).

carefully negotiated. Other challenges may be faced as well. If there is development pressure, development easement may cost nearly as much as the fee simple title. However, because the value of the easement is based on potential uses, not actual uses, the appraisal of the easement can be difficult and debatable. In addition, if the easement is acquired by condemnation, there may be litigation over the value of the lost development rights.

ii. Options to Purchase

An option to purchase is a conditional contract in which a party purchases the sole right to buy a property under specified conditions within a certain time period. An option to purchase is sometimes called a right of first refusal, but the two are actually distinct concepts; an option to purchase is more useful to the government, as it establishes the terms of the purchase in advance.

To use an option to purchase in the context of corridor preservation, a government agency, upon identifying a needed property whose value is likely to increase due to development pressure, determines the property's value and enters an option to purchase contract with the property owner, giving the government the right to purchase the property at the agreed-upon price within a specified time frame. As an incentive for the property owner to agree to such a contract, the government pays the owner a consideration. The cost of the option is often a percentage of the purchase price, negotiated between the agency and the seller. The option to purchase contract must specify the essential details of the sale if the option is used. Alternatively, a proposed contract of sale may be attached to the option so that the details of the potential sale are clear. The option should include a provision precluding the owner from substantially changing the condition of the property during the term of the option.

An option to purchase avoids many of the problems of fee simple acquisition, since the property owner still owns, uses, and is liable for the property. An option can allow the government to secure an advantageous price for a property in a rising market. It also avoids any increase in value that may accompany the development and announcement of the transportation project. On the other hand, if the sale is never completed, the agency has lost the consideration it paid for the option. In a seller's market or rapidly developing area (where it is most important to preserve rights-of-way ahead of time), it can be difficult to negotiate an option to purchase with a longer time frame. Also for this reason, the cost of the option can be prohibitive.

F. Inducements for Property Owner

In some cases, the government may be able to offer or arrange inducements for a property owner to preserve a site in its current state. These agreements do not remove the value of any rights from the property owner, but also help achieve the corridor preservation goals of the state. These inducements may include transferable development rights or public/private partnerships that encourage the property owner to preserve future rights-of-way. Like acquisition of less than fee simple interest in a property, these inducements achieve corridor preservation while avoiding many of the problems of property

acquisition: they do not generate high capital costs, and they allow the property owner to continue owning, using, and maintaining the property.

i. Transferable Development Rights

In a transfer of development rights (sometimes called density transfer), the right to develop a property is transferred to another appropriate property. Thus, the sending property—the property whose development right has been transferred—cannot be developed, while the receiving property—the property to which the development right has been transferred—can develop at a higher density than previously allowed. This can be used to remove development rights from a site to be preserved for a future right-of-way, either because the owner is allowed to transfer the rights to another of his own properties, or because he is encouraged to sell the rights to another property owner. Thus, the property owner is compensated in a monetary or non-monetary way without capital costs to the transportation agency. This approach could also be used if the property owner donated the right-of-way, if property dedication is exacted, or if the owner agrees to maintain the property as-is, in which case the owner would be compensated for the value of the development rights.

This technique can reduce the objections to police power regulation, since the property owner receives some benefits from transferring his development rights. It can also achieve a situation in which the land is preserved as open space, the owner is compensated, and the government incurs no capital costs. However, transfer of development rights can only be used when the ordinance allows transferable development rights in the area in question, either on the basis of floor area ratio, or units per acre. The ordinance should also establish a system for setting up recipient properties for transferable development rights. In North Carolina, transferable development rights are not allowed by the general statutes.

ii. Public/Private Partnerships

Under a public facilities ordinance or a similar system, such as a proffer system, sufficient roadway capacity to handle the traffic generated by a development must be provided before development approvals can be granted. This type of system may encourage developers to set aside the right-of-way and build the planned facility or contribute significantly to its construction. Even when this type of system is not in effect, communicating and cooperating with the property owner may be the best way to achieve corridor preservation. Some developers may be persuaded to set aside right-of-way or even build a part of the planned transportation improvement because it is in their best interest. For instance, the improvement may enhance access to the site. Accomplishing this level of cooperation requires that the property owner receives some benefit, such as the government allowing the location of the right-of-way to shift on the property to suit the developer's needs, or advancing the construction date of the improvement. However, many developers are willing to reach agreements in these situations in order to build a good relationship with the local planning bodies.

When using these techniques, agreements with developers must be carefully written so that decisions made during the NEPA process can be accommodated as they arise.

Another technique for using public/private cooperation to achieve corridor preservation is for the government to exchange excess government land for the desired property, when such property is available and the owner of the site in the planned corridor is amenable to such an arrangement.

Public/private partnerships can also be used to regain the cost of early fee simple acquisition. In this case, the government can purchase the property and then 1) exchange the 'air rights' above the ground level for other property needed, or 2) lease back the air rights. In this process, the government would need to identify excess land for joint development, and to enter into sale or leaseback arrangements with the developer. The government agency may also need to transfer development rights, fast track permitting, or issue tax exempt financing, revenue bonds, tax increment bonds, or mortgage backed bonds.

In all of these potential agreements with property owners, government agencies should take care to deal fairly with property owners or litigation could ensue.

G. Access Management Techniques

Some of the techniques used in access management may also be applied effectively to achieve corridor preservation along existing facilities where expansion is planned. Chief among the access management practices that may also support corridor preservation are increasing the minimum spacing between driveways, decreasing the number of driveways on a corridor, and using frontage and service roads. These practices not only contribute to the safety, capacity, and appearance of a corridor, but also help discourage development in and near the planned right-of-way. These techniques will be most effective for corridor preservation when used in combination with other access management techniques such as setbacks, joint and cross access, and lot dimensions, which are discussed in the Zoning and Subdivision Regulations section.

III. Conclusion

Corridor preservation is crucial to ensuring that important roadway projects are able to follow the preferred alignment with minimum capital, environmental, and social costs. Preservation will not be necessary or appropriate for every section of a corridor, and should be applied judiciously and creatively to achieve right-of-way protection goals in a strategic way. In order to work toward corridor preservation in North Carolina, it is recommended that the North Carolina Department of Transportation consider the following steps.

- A. Develop and distribute a model corridor preservation ordinance for adoption by municipalities and counties. The model ordinance provided to local governments in Florida may be used as a starting point, with elements removed or added to create a document that is appropriate for use in North Carolina.
- B. Assemble a detailed inventory of corridor preservation activities in North Carolina. Note which tools are in use, where they are in use, which entities are involved, and what level of success is being reached.

- C. Identify North Carolina state agencies, organizations, and departments that can play a role in successful corridor preservation. Study other states' agencies, organizations, and departments that are focused on land use issues in order to determine whether corridor preservation in North Carolina could benefit from the establishment of similar entities or the expansion of the duties of agencies and organizations already present in North Carolina to include corridor preservation activities.
- D. Coordinate with units of local government to promote corridor preservation.
 - Implement an educational program to inform municipalities and counties of the importance of corridor preservation, encourage them to pursue it, and identify the tools they can begin using right away to protect important corridors.
 - Identify NCDOT as a resource for corridor preservation information and materials such as the model corridor preservation ordinance.
 - Facilitate coordination of corridor preservation efforts between units of local government that neighbor one another or lie along the same corridor.
- E. Undertake advocacy of corridor preservation and the tools necessary to carry it out, including lobbying for legislation to allow corridor protection tools that are deemed necessary but are not currently allowed in North Carolina.
- F. Study the state-level corridor preservation programs of other states at greater depth and compare them to the needs, issues, and priorities present in North Carolina. Based on this research, develop a program to pursue corridor preservation statewide, either by expanding the Strategic Highway Corridors program or establishing a new system. This state-level program should act proactively and have the resources, staffing, and authority necessary to be effective. Upon creation, the program should assume responsibility for the activities outlined in the previous recommendations as well as pursue those corridor preservation efforts that can be made at the state level.

Appendix I. Funding

The biggest obstacle to corridor preservation is often a lack of funding at the state or local level. To avoid the significant costs of acquisition, governments may use some of the other techniques discussed in this report to reduce or eliminate capital costs of preservation. When the most appropriate technique does require funding, there are several approaches that may be taken to obtain it.

A. Federal-aid Reimbursement

States can, under federal regulations, acquire a right-of-way with their own funds and still be eligible for future Federal-aid reimbursement under limited circumstances. To take advantage of these reimbursements, acquisitions must be performed in accordance with civil rights provisions of Title VI and provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended.

Some local land use planning ordinances may encourage donations of rights-of-way for future transportation facilities. Under the Surface Transportation and Uniform Relocation Assistance Act of 1987, the market value may be used by state transportation agencies toward local matching share on Federal-aid projects.

When property is acquired from a local jurisdiction for corridor preservation, the cost of replacing any facilities on the acquired property may be recovered in Federal-aid funds: the Federal Highway Administration Functional Replacement Program allows Federal aid funding of the actual replacement cost (not the fair market value) of publicly-owned and -occupied facilities. This program can relieve the local jurisdiction from financial responsibilities for replacement costs of displaced public facilities, which benefits both the local government and the taxpayers.

B. State Trust Funds

Some states have transportation trust funds that collect revenues from fuel taxes, rental car surcharges, vehicle registration, and other sources, sometimes including bonds, to fund a variety of transportation endeavors. North Carolina has such a fund, the Highway Trust Fund, but corridor preservation is not an allowable use for it. Some efforts are being made to bring about changes that would make the fund more flexible or eliminate it altogether. Such funds in other states may be used for corridor preservation efforts if certain requirements are met, such as inclusion of the project in a work program within a specified timeframe.

C. State Infrastructure Banks

The ISTEA identified state infrastructure banks as a method for meeting transportation financing challenges, and selected ten states, including North Carolina, to participate in a pilot infrastructure bank program. These banks are investment funds that offer loans and other types of financial assistance to transportation projects that will meet State goals. States with an infrastructure bank are allowed to fund them with up to 10% of their federal gas tax funds annually. The funds are bolstered as the loans are repaid with interest, so that the fund acts as a revolving fund for a variety of transportation projects.

The North Carolina State Infrastructure Bank is a flexible funding tool that can be applied in different ways to a variety of project types.

D. Income from DOT-owned Land

California has used income from the rental, lease, or sale of land owned by the state Department of Transportation to fund corridor reservation efforts. As mentioned in the Value Recapture section, this method can be applied to land acquired as part of corridor preservation efforts as a way to recapture funds spent on preservation. However, it may also be extended to apply to other properties owned by the state transportation agency as a way to generate funds for future corridor preservation efforts.

E. Value Recapture

Once funding has been obtained, the government may be able to recapture the value of an acquisition through effective management in the interim. For example, excess land beyond the planned right-of-way that will be needed during construction may be acquired and leased back to the seller until the land is needed or remarketed. In this situation, the government can lease the seller 'air rights' above ground level, which can provide the government with revenue or nonmonetary returns such as parking or office space in joint use facilities. However, state statutes may limit leases of government-owned properties to short timeframes, which can make this arrangement less attractive to the private sector. The availability of long-term leases on these properties is important for the joint public/private use of excess property.

F. Local Option Sales and Use Taxes

Each municipality must petition the state legislature for the right to impose local taxes on gas, rental cars, or other relevant items. The revenues from the taxes are dedicated to a particular funding need, but the need can be defined broadly. Such a tax could be proposed to address long-term transportation needs such as corridor preservation.

G. State-shared Revenue Sources

Municipalities can use state-shared revenue sources to fund corridor preservation efforts, if there are enough available. Further study is needed to determine whether the use of state-shared revenue can be considered in violation of NEPA requirements.

H. Impact Fees

Impact fees, as discussed in the Property Exactions section, are payments made by a developer to a government to recover the costs of infrastructure improvements needed to support a development. Generally, impact fees must not generate more funds than are required to construct the necessary public facility, and must be directly related to a legitimate government purpose or to the cost necessitated by the development. As part of corridor preservation, these funds can be used to purchase additional rights-of-way that are necessitated by the development, but are not located in areas controlled by the developer and therefore cannot be secured by direct property exaction. However, a more powerful way to use these fees may be to combine them in a fund for improvement of the overall road network, so that corridor preservation may be pursued as one part of ensuring an efficient roadway network. This approach should be carefully structured,