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End of the road

State Court of Appeals ruling in Map Act case brings a halt to DOT takings and is expected to spur hundreds of new lawsuits

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For Winston-Salem lawyer Matthew Bryant, the recent North Carolina Court of Appeals decision that holds the state Department of Transportation liable for misusing the Map Act was an I-told-you-so moment six years in the making.

Bryant sent a letter in 2009 asking the DOT to rethink its position on the Map Act, and when the agency refused to back down he led a charge that has resulted in more than 70 lawsuits and counting against the state. That number is expected to rise sharply in the wake of the unanimous appellate decision Feb. 17 in *Kirby v. N.C. Department of Transportation*.

"It's a good day in North Carolina, where we defend people's property rights and follow what all the other states in the country have done, which is to say this constitutes a taking," said Bryant, a partner at Hendrick Bryant Nerhood Sanders & Otis.

A three-judge panel led by Chief Judge Linda McGee found that the DOT was exercising its power of eminent domain when it used the Map Act to halt development on land in the path of proposed road construction projects while the state secured funding. The DOT had contended, unsuccessfully, that it was merely regulating the land through its police powers, meaning that the state did not have to pay the landowners until it was ready to move forward with the road building.

The state touted the Map Act as a cost-saving measure, but the Court of Appeals found that the state's use of the Map Act constituted a taking, which is what Bryant has been arguing all along. The ruling, if it stands, will require the state to begin paying fair compensation for properties that have been damaged by the Map Act.

Some owners have been waiting for about two decades for the state to pay them. During that time, their neighborhoods have decayed, property values have dropped and some owners have died.

Now, owners who cannot reach settlements with the state will have to go through damages trials to determine the fair value of all the affected properties, which range from commercial and residential real estate to undeveloped land. Bryant estimates that between 1,300 and 2,000 property owners across the state have claims against the DOT. The state Supreme Court has determined that the owners cannot sue as a class based on the different land values involved in the litigation.

"I think it is the likely outcome, if this opinion sticks, that it will lead to multiple damages trials much in the same way that the asbestos litigation did. And that took years to resolve," said Anne Fisher of Henson & Fuerst in Raleigh. She represents several plaintiffs who own property along the future U.S. 74 Shelby Bypass.

Neil Yarborough of Yarborough, Winters & Neville in Fayetteville represents owners who have been harmed by map filings for the proposed Fayetteville Outer Loop project. He said the Court of Appeals has made it clear that the DOT is liable to his clients and others like them.

"It probably is going to have a chilling effect about what the state decides to place in a corridor under the Map Act, or I certainly hope it would," he added. "They've enjoyed a great deal for the last 20-something years and it's time to pay the piper."

The decision also affirms that the clock started ticking on attorneys' fees and interest on damages when the state first filed road maps with the register of deeds, according to Bryant.

"It's up to the state to determine the next course of action," he said. "However, many of these people have been waiting for 20 years and we think the state should act at its quickest. It's the right thing to do."

The DOT and state attorney general's office, which represents the agency in court, declined to comment on the decision.

'File a lawsuit'

The bulk of the Map Act suits have been filed in Forsyth County over the long-delayed Winston-Salem Northern Beltway. Dozens of property owners in the area have sued the DOT, including nine who are at the heart of the *Kirby* decision.

The ruling provides a "template for all of the inverse condemnation cases that are pending or will be pending related to the Map Act," Fisher said. She and Bryant believe that the opinion will encourage hundreds of owners who had been apprehensive about filing suit to step forward and seek compensation from the DOT.

"If you are really exhausted from the DOT you need to file a lawsuit," he said. "I've talked with hundreds and hundreds of owners about this very thing over the last few years. The time to be exhausted is over."

According to Fisher, property owners who were affected by DOT map filings that were later rescinded because the projects were cancelled also can seek damages for the period of time that the map was on the books.

An example of one such project is a scrapped connector that had been part of the DOT maps on the proposed Garden Parkway toll road, also known as the Gaston East-West Connector, and would have spanned Interstate 85 and U.S. 321 north of Gastonia.

"Abandonment is not without costs," Fisher said.

Our 'dunderheaded' leaders

Bryant also had argued that the Map Act was unconstitutional. The Court of Appeals did not address the issue head-on, but its decision keeps the law alive by interpreting its use as a taking.

"She [Judge McGee] construed the Map Act in a fashion that would render it constitutional by requiring compensation," Fisher said. "I think what she did was rescue the act by engrafting the requirement of compensation on it."

Bryant noted that the state has known for more than a decade that its use of the Map Act was improper. He cites a 2004 DOT-commissioned study, which advised that the law should only be used when "construction is imminent."

The study also warned that "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."

"This shows you how dunderheaded our leaders are," Bryant said of the study. "They were told it was unconstitutional, or that it could be, way back in 2004 in their own report. Then they get mad at everybody for suing them."