Spotlight

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The Map Act

The end of the road?

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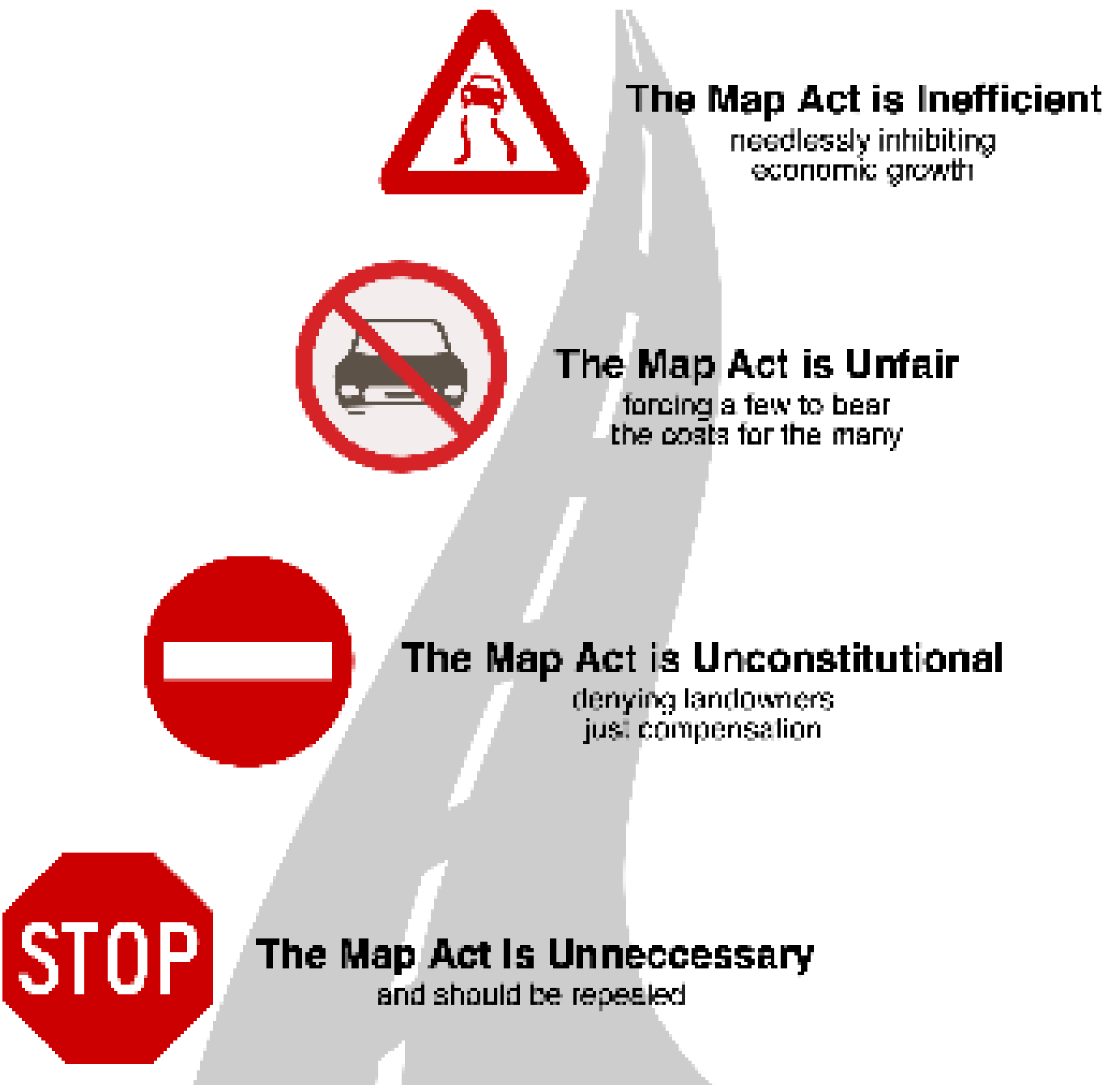
The NCDOT has used the Map Act to prohibit development of land, sometimes for decades, without compensating landowners.



In 1987 the General Assembly approved a contentious piece of legislation known as the Map Act.[1] The Act empowers the North Carolina Department of Transportation (DOT) to create "transportation corridors" within which "no building permits shall be issued for any building or structure or part thereof...nor shall approval of a subdivision...be granted."[2] There are no time limits on these development moratoria, and the DOT has been using them to control large tracts of land for years, without initiating condemnation proceedings and without compensating the land's owners.

Efficiency

As an approach to transportation planning, the imposition of long-term development moratoria is crude and inefficient. Given rapid economic, demographic, and technological change, it is far from clear that the DOT, or any central planner, can accurately project, decades in advance, what North Carolina's transportation needs will be. Furthermore, even if such projections were possible, the fact that a certain parcel of land will eventually be needed for transportation purposes does not, in and of itself, mean the land should remain completely undeveloped in the interim. It is merely one of many factors that should be taken into consideration in determining how the land should be used.

Other factors include the market value of the land, the cost of development, the projected annual return, and the number of years available for earning that return. While the details will vary, there will almost always be productive interim uses to which the land could be put. Forbidding those deprives the public of the goods and services that would have been produced, places an unnecessary barrier in the way of economic growth, and makes everyone poorer.

Fairness

Because they are widely dispersed, the costs of the general economic losses caused by development moratoria to any specific individual are usually small. Other losses caused by development moratoria, however, fall exclusively on a few specific individuals, and for those individuals the costs can be very large indeed.

Because it cannot be improved in any way, land within a transportation corridor loses value and becomes difficult to sell, and that is precisely the point. The Map Act was enacted to reduce the amount the DOT has to pay for such land when it eventually takes it. As the General Assembly candidly declared at the time of passage, it is "An act to control the cost of acquiring rights-of-way for the State's highway system."[3]

Contrary to what the General Assembly's description implies, however, the Map Act does not actually reduce the cost of right-of-way acquisition; it merely shifts the cost from those who ought to bear it—the citizenry as a whole—to a small number of citizens whose property happens to lie in the path of a corridor. Development moratoria impose real and substantial costs on these citizens in the form of diminished property values and the loss of whatever income they might have earned by making more productive use of their property. Under the Map Act, thousands of North Carolina landowners have been unfairly forced to bear such costs for years.[4]

Constitutionality

Among the transportation corridors created by the DOT under the Map Act were two in Forsyth County that were created in 1997 and 2008 to tie up land for a future beltway around Winston-Salem. The creation of the corridors placed the owners of the affected property in a state of limbo—unable to develop their land, unable

1 N.C. Gen. Stat. § 136, Article 2-E

2 Ibid., 44.51(a). Several other agencies are also empowered to impose development moratoria, and, in addition, the Act includes provisions designed to ensure that it is applied in good faith and to mitigate the hardship it imposes on landowners. One of these requires that, "Within one year following the establishment of a transportation corridor official map… work shall begin on an environmental impact statement or preliminary engineering." (Ibid., 44.50(d).) Another states that, if an application for a building permit or subdivision is delayed for more than three years, "the entity that adopted the transportation corridor...shall issue approval for an otherwise eligible request or initiate acquisition proceedings." (Ibid., 44.51(b).) Still others provide for variances or advance acquisition when "no reasonable return may be earned from the land" and the Act's requirements "result in practical difficulties or unnecessary hardships." (Ibid., 44-52 & 53.) Sadly, over the years the DOT seldom granted requests for relief under these mitigation provisions, which was probably a strategic mistake.

3 1987 N.C. Sess. Laws 1520, 1520, 1538-42, ch. 747, § 19.

4 DOT Map Summary, available at the DOT website: connect.ncdot.gov/projects/planning/Planning%20Document%20Library/Current%20Transportation%20Corridor%20Official%20Map%20Summary.pdf.

to sell it for a reasonable price, and uncertain about when, if ever, the State would actually take it and offer them compensation—and they remained in that state of limbo for a long time.

Eventually some of those Forsyth County property owners decided they had had enough and took the bold step of suing the DOT. As the plaintiffs in *Kirby v. NCDOT*,[5] the landowners alleged, among other things, that the indefinite and absolute moratorium on their right to develop their property constituted a taking for which they had a constitutional right to be compensated.[6] When their case finally reached the Court of Appeals earlier this year, the Court agreed. In an admirably thorough and well-reasoned opinion, Chief Judge Linda M. McGee held that the imposition of a development moratorium under the Map Act is not, as the DOT had argued, an exercise of the State's police power, under which it may regulate land without compensation in order to prevent harm to the public welfare. It is, instead, an exercise of the State's power of eminent domain, for which compensation must be paid.[7] Judge McGee went on to rule that, "The NCDOT exercised its power of eminent domain when it filed the transportation corridor maps,"[8] and she remanded the case to the trial court to consider "the amount of compensation due to each Plaintiff for such takings."[9]

This was a major victory for the long-suffering property owners in Forsyth County who brought the lawsuit. Nevertheless, the legal battle is not over. The DOT has appealed,[10] and it is now up to the NC Supreme Court to determine the final disposition of the case. It is doubtful, however, that the Map Act will survive Supreme Court scrutiny in its present form.

The most likely outcome of the DOT's appeal is that the Supreme Court will simply decline to review the lower court's ruling (in which case that ruling will stand), but even if the Supreme Court does agree to hear the appeal, it is unlikely to rule in a way that will be favorable to the Map Act. In holding that development moratoria imposed under the Map Act are takings, the Court of Appeals was following the Supreme Court's own guidance from a previous Map Act case in which the high court "expressly disavowed" the idea that development moratoria are "regulatory in nature."[11] Furthermore, the North Carolina Supreme Court is not alone in having reached that conclusion. For example, in 1990, the Florida Supreme Court held that Florida's version of the Map Act, "Unconstitutionally permit[s] the state to take private property without just compensation."[12]

Even if the NC Supreme Court were to overturn the Court of Appeals' decision, that would not necessarily clear away the constitutional roadblock. In *Kirby v. NCDOT* the plaintiffs made a number of constitutional claims about the Map Act,[13] only one of which was addressed in the Court of Appeals' decision. If the Supreme Court rejects that decision, it will presumably remand the case for consideration of these additional claims, any one of which could still spell trouble for the Map Act.

The Legislative Response

The Court of Appeals' *Kirby* decision presented the NC legislature with three options: leave the Map Act in place and hope the Supreme Court completely overrules the Court of Appeals; modify the Act in ways that will enable it to withstand judicial scrutiny; or repeal it altogether. In the weeks that followed the Kirby decision, bills representing each of these options were filed in the General Assembly.

The first two options were represented by Senate Bill 654[14] and Senate Bill 364.[15] SB 654, sponsored by Sen. Michael V. Lee (R-9), assumes that the Map Act can survive intact, and, accordingly, the bill makes no substantive changes and merely clarifies the role that the Wilmington Urban Area Metropolitan Planning Organization plays under the Act. On the other hand, SB 364, which was filed by Sens. Bill Rabon (R-8), Wesley

5 *Kirby v. North Carolina Department of Transportation*, 769 S.E.2d 218.

6 Ibid., 223.

7 "We conclude that the Map Act empowers NCDOT with the right to exercise the State's power of eminent domain... which power, when exercised, requires the payment of just compensation." Ibid., 232.

8 Ibid., 235.

9 Ibid., 236.

10 Defendant's Notice of Appeal and Petition for Discretionary Review, March 24, 2015.

11 *Beroth Oil Co. v. N. C. Dep't. of Trans. (Beroth II)*, 757 S.E. 2d 466. Quoted in Kirby, 226.

12 *Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990), 623.

13 Kirby, 223-4.

14 S. 654, 2015 Gen. Assem. (N.C. 2015).

15 S. 364, 2015 Gen. Assem. (N.C. 2015).

Meredith (R-19), and Joel D. M. Ford (D-38), proposes several significant modifications to the Act, including one that would prevent a development moratorium taking effect until after a final environmental impact statement has been filed, and another that would impose a ten-year limit on the duration of such a moratorium. (See Appendix for a full discussion of the changes proposed in SB 364.)

Neither of these bills nor the options they represent is a satisfactory response to the Court of Appeals' decision. Leaving the Map Act unchanged, as SB 654 would do, is unlikely to be a viable option because, as has already been discussed, the Act is unlikely to survive Supreme Court scrutiny in its present form. Modifications like those proposed in SB 364, while certainly an improvement as far as they go, probably do not go far enough to make the Act constitutional (See Appendix), and they certainly do not go far enough to make it economically efficient and fair. Inefficiency and unfairness are not incidental problems that can be solved by modifying the Map Act; they are intrinsic attributes that are inherent to its purpose (preventing land that will be needed for future right-of-ways from rising in value) and to the method it employs to achieve that purpose (imposing uncompensated development moratoria). In order to avoid inefficiency and unfairness, what is needed is a completely different approach to transportation planning. Fortunately, many North Carolina legislators recognized this need.

Reps. Rayne Brown (R-81), Debra Conrad (R-74), Donny Lambeth (R-75), and Sam Watford (R-80) filed House Bill 183,[16] which calls for the Map Act to be repealed in its entirety and instructs the DOT to develop a new process for "acquiring land for future highway construction" that is "in accordance" with *Kirby v. NCDOT*, and soon thereafter the House voted unanimously to approve it. Concurrently, Sens. Joyce Krawiec (R-31), Warren Daniel (R-46), and Andy Wells (R-42), along with eight co-sponsors, filed an almost identical repeal bill, Senate Bill 373.[17] While SB 373 never came to a vote in the Senate,[18] the large number of co-sponsors shows that there is significant support for repeal in that chamber and suggests that a repeal bill of some description will indeed be passed this term.

16 H. 183, 2015 Gen. Assem. (N.C. 2015).

17 S. 373, 2015 Gen. Assem. (N.C. 2015).

18 Neither SB 364 nor SB 654 came to a vote either.

The Road Ahead

Thanks to the challenge brought by the plaintiffs in *Kirby v. NCDOT*, and the Court of Appeals' ruling in that case, and thanks to the NC House's decisive response to that ruling, the NC Senate has an opportunity to repeal the Map Act and set transportation planning in North Carolina on a new course. If the Senate seizes that opportunity, it will then be up to the DOT and the General Assembly as a whole to determine just what that course will be. As they consider their options, there are several lessons from the Map Act debacle that should guide their deliberations.

If and when it becomes necessary to regulate the use of land within projected transportation corridors:

1. For the sake of economic efficiency, that regulation should be applied as lightly and as briefly as possible. Blanket development moratoria will seldom, if ever, be justified, and, ideally, interim uses will be determined, not by the application of inflexible rules, but on the basis of market incentives and market discipline.[19]

2. To ensure fairness and constitutionality, the owners of the regulated property should be promptly and fully compensated for any significant losses they incur.[20]

3. The task of regulation should probably be assigned, not to the NCDOT, but to the appropriate local authorities.

Regarding the last of these lessons, it should be noted that, in addition to being inefficient, unfair, and unconstitutional, the Map Act is also unnecessary.

19 The best way to bring market information to bear on land use decisions is to shorten the length of the interim period as much as possible. However, if an extended period is necessary, a market outcome could still be achieved by, for example, condemning the property and then leasing it for the interim period—either back to the original owner, if he or she wants it, or to another private tenant if he or she does not. The tenant could then decide, at his or her own risk, what sort of interim development made sense, taking into consideration the full range of locally available market knowledge. Another approach would be to acquire from the owner an option to purchase the property at the end of the interim period. This would permit the owner to make market-based decisions about the property's use.

20 So-called "advance purchase" should be the preferred approach, but there are other options, including the purchase of development rights.

Prior to the enactment of statutes like the Map Act, state transportation departments were not generally in the business of regulating land use. Their job was to design and build roads, and if they needed land in order to do that job, they acquired it by buying it. They might negotiate a voluntary sale, or they might take the land by eminent domain, but either way they fully compensated its owners. And if, prior to acquisition, the use of that land needed to be regulated in some way, it was generally a municipal or county government that did the regulating.

Even now, 28 years after the passage of the Map Act, in the vast majority of states the division of labor described above continues to apply. In fact, a recent John Locke Foundation study found only 13 states (including North Carolina) had a statute like the Map Act that assigned their state transportation department the task of interim land use regulation.[21] In the other 37 states the transportation department designs and builds the roads, and local authorities provide whatever is required in the way of land use regulation. These 37 states seem able to provide for their transportation needs without difficulty. There is no reason why North Carolina could not do so as well.

Conclusion

The Map Act is economically inefficient, it is unfair, and it is unconstitutional. And making piecemeal statutory changes cannot solve these problems. It is time to repeal the Map Act and develop a new approach to transportation planning in North Carolina—one that delivers the roads and other transportation infrastructure we need, while simultaneously protecting our rights and promoting our economic well being.

21 Tyler Younts, "Wrong Way: How the Map Act Threatens NC Property Owners" (Raleigh: The John Locke Foundation, 2014). The report also notes that in 10 of thirteen states, the duration of interim regulation was significantly curtailed by iudicial decree. Ibid.. 5-6.

Appendix

Senate Bill 364 as a Response to *Kirby v. NCDOT*

Senate Bill 364,[22] which was filed by Sens. Bill Rabon (R-8), Wesley Meredith (R-19), and Joel D. M. Ford (D-38) on 3/24/15, proposes several modifications to the Map Act, each of which is an improvement as far as it goes. However, they do not go far enough to fully resolve the issues raised by the NC Court of Appeals in *Kirby v. NCDOT*.[23]

One the proposed changes deals with an odd provision in the Act that states, "No application for building permit issuance or subdivision plat approval…shall be delayed by the provisions of this section for more than three years," and requires that, if the application is still being reviewed after three years, the relevant agency "shall issue approval for an otherwise eligible request or initiate acquisition proceedings."[24] SB 364 would shorten the period during which applications may be delayed from three years to two years.

Two years is still far too long to delay permit applications. It is twice as long as the longest permit delay period in any other state that has a corridor preservation statute;[25] it is four times as long as the permit delay period in a Map Act reform bill that was previously proposed in the NC House;[26] and it is so long that it would effectively discourage any serious development proposal.

More importantly, because, as the Court of Appeals notes, the Map Act's prohibition on the issuance of permits is "absolute,"[27] any application for a building or subdivision permit would be futile. What the provision really does is provide a way, in theory, for a landowner to force the DOT to commence condemnation proceedings. However, requiring owners to incur the expense of preparing and filing imaginary building or subdivision plans simply in order to force the DOT to condemn their property within a finite period of time is clearly unfair and almost certainly a violation of due process.

22 S. 364, 2015 Gen. Assem. (N.C. 2015).
23 *Kirby v. North Carolina Department of Transportation*, 769 S.E.2d 218.
24 N.C.G.S. § 136-44.51(a).
25 "Wrong Way," 5.
26 H. 127, 2015 Gen. Assem. (N.C. 2015), § 4.
27 *Kirby*, 234.

In any case, the length of the permit delay period is irrelevant. In response to the DOT's claim that the Map Act merely "creates a temporary three-year restriction on new improvements…within the mapped corridor,"[28] the Court pointed out that the restrictions do not begin to apply when and if a landowner files an application for a building or subdivision permit; they begin "upon the filing…of a…transportation corridor map,"[29] and they "never expire."[30] The fact that a property owner may, in theory, force the DOT to condemn a parcel of land by applying for a permit and waiting for the prescribed period does not alter either of those facts. The other changes proposed by SB 364, on the other hand, would alter both of them.

The first of these changes would postpone the onset of a development moratorium until a final environmental impact statement (EIS) had been filed. Currently, in North Carolina, the process of completing and filing a final EIS for a large project can take 10 years or longer, which is much longer than in other states.[31] Assuming property owners would be allowed to go on developing their land as usual while environmental compliance was underway, adopting this change would significantly reduce their uncompensated losses under the Map Act (while simultaneously putting pressure on the DOT to cut environmental processing times). The second change would require that "failure to begin construction . . . within 10 years . . . shall constitute an abandonment of [a] corridor."[32] Imposing such a ten-year time limit on development moratoria would also significantly reduce landowners' uncompensated losses—some Map Act moratoria have been in place for more than twenty years.[33]

Because of the extent to which they would reduce landowners' uncompensated losses, these two changes would make the Map Act much more acceptable in practical terms; however, they would probably not reduce landowners' uncompensated losses enough to make it constitutional. When Florida landowners challenged that state's version of the Map Act, the Florida Supreme Court found the statute unconstitutional despite a ten-year limit on the duration of development moratoria.[34] In arriving at its decision in Kirby, the NC Court of Appeals relied heavily on the Florida Supreme Court's reasoning.[35] It seems unlikely, therefore, that a ten-year time limit would have changed the outcome in Kirby.

Moreover, both of these proposed changes suggest that the entire Map Act approach to transportation planning is questionable. If preventing development within transportation corridors is necessary, how can it be acceptable to postpone a development moratorium for a decade or longer, and how can it be acceptable to arbitrarily limit its duration?

28 Ibid.

29 Ibid., 235

30 Ibid., 234, quoting Beroth II.

31 Personal correspondence with Jim Trogdon, former NCDOT Chief Operating Office.

32 S. 364, § 1.

33 The most recent DOT Map Summary includes recorded corridor maps dating back as far as 1989. It is available at the DOT website: connect.ncdot.gov/projects/planning/Planning%20Document%20Library/Current%20Transportation%20Corridor%20Official%20Map%20Summary.pdf.

34 *Beroth Oil Co. v. North Carolina Department. of Transportation (Beroth II)*, 757 S.E. 2nd 466 (2014), in which the plaintiffs sought certification for "no less than 800 class members" in Forsyth County alone whose interests had been adversely affected by the Map Act.

35 "In order to determine whether the Map Act…is an exercise of the State's power of eminent domain or police powers, we find persuasive and instructive the Florida Supreme Court's approach…in Joint Ventures, Inc. v. Department of Transportation." *Kirby*, 231.