Greetings!

We are pleased to issue this newest edition of our newsletter.

I am truly honored to have served as the Section Chair this year and I am extremely thankful for the hard work of our Section Council members and liaisons.

As you begin to read the newsletter, there are a few items of which I would like to make you aware: (1) Consumer Protection Counsel; (2) Forms Manual Update Coordinator; (3) Legislative Items; and (4) 2018-19 Real Property Annual Meeting Brief Recap.

Consumer Protection Counsel

After several years of serving as our Section’s Consumer Protection Counsel, Ben Kuhn (Ragsdale Liggett PLLC) has determined it is time for someone else to pick up the mantle. Ben has done a tremendous job in this capacity and we appreciate his dedicated service. Going forward, we envision this role will continue to respond to consumer protection complaints as well as review and offer recommendations on legislative matters and ethics opinions touching on consumer protection issues. We will circulate a complete job description for this role within the next few weeks, so please watch for that announcement in case you are interested or have someone in mind.

Questions, challenges and nuances arise after Kirby v. NC DOT, 368 NC 847 (2016) construing the Map Act, Article 2E of Chapter 136. While the Map Act had the goal of reducing excessive cost of land acquisition for future highway projects, it ran afoul of fundamental constitutional rights.

The Kirby court held that tying up property indefinitely constituted a “taking” from the time of the recording of corridor maps. The Map Act was passed in 1987. Maps were rescinded by SL 2016-90, Section 18 effective July 11, 2016. The statute of limitations for inverse condemnation is 2 years – hence the July 11, 2018 deadline to decide.

Kirby held:

“Property” clearly includes the rights to improve, develop and subdivide, which were severely and indefinitely restricted here by the Map Act. The Map Act’s indefinite restraint on fundamental property rights is squarely outside the scope of the police power…

A taking effectuated by eminent domain does not require ‘an actual occupation of the land’ but need only be a substantial interference with elemental rights growing out of the ownership of the property… These elemental rights are generally considered ‘an important feature’ of the land and, as such, are accounted for within the valuation of the land, See Town of Midland v Wayne, 368 NC 55,66, 773 SL2d 301,309 (2015) (stating that ‘development rights’ are ‘an important feature of the condemned land and not a separate compensable property right.’

Questions?

1. Does NC DOT get credit for the reduction in property taxes that owners paid since recording of the Corridor maps in 1996 (date maps recorded for I-540)? It was local governments that were out the money. GS 105-277, 9 and 9A.

2. Does NC DOT get credit for continued occupation of the land by the landowner from 1996 (for 540) until the date of trial?

3. What property or rights in property is taken by the filing of the corridor map? Some have argued that only development rights were taken and not the fee. But Kirby is clear that the land itself was taken. (“Development rights” are “an im-

Continued on page 3
important feature of the condemned land and not a separate compensable right.”) *Kirby* is not clear whether it is referring to a partial take, say 10 acres in the corridor out of a total of 15 acres, or to the entire tract of a portion that was shown on the 1996 (for 540) map.

4. Effective July 11, 2016 with the passage of SL 2016 – 90, Section 18(b) the rate of interest to be used in NC DOT condemnation cases is the prime rate in effect when the case is filed or eight percent, whichever is less. Under cases such as *Lea v NC Board of Transportation* 317 NC 254,263-264 (1986) and *Concrete Machinery Co. v City of Hickory* 134 NC App 91 (1999) this limit is probably not constitutional. If evidence is accepted as to the true market rate of interest and/or that simple interest is insufficient for just compensation, the jury should consider it.

5. *Kirby* makes clear that “(s)uch determination (of damages) must be made on an individual property by property basis.”

Attorneys who wish to help their clients should always be aware of after-tax considerations. This article looks at different ways value can be approached. The extent of the taking of each person’s property and tax bracket and effects is different. **One size does not fit all.**

What amount of the property will be taken? When will value be determined? Will I be paid interest? At what rate? Will interest be compounded? What taxes will apply? How will the option to avoid or defer taxes by “like kind” exchanges under section 1033 be affected by my choice? Are attorneys’ fees treated differently under inverse condemnation rather than by a usual condemnation initiated by NC DOT? What are the deadlines?

Possible answers to these questions are suggested on the attached chart (page 4).

Paul Stam can be contacted at paulstam@stamlawfirm.com.

Documents: Kirby vs NCDOT

---

**SAVE THESE DATES:**

Real Property Section Fall 2018 Advanced/Specialization CLE
Sept. 21 at the N.C. Bar Center in Cary

Real Property Section Annual Meeting
May 2019
My property was included in a Corridor Plan under the Map Act. As a result of the Kirby case should I: file an inverse condemnation action; OR, wait for NCDOT to pursue its Usual Condemnation?

<table>
<thead>
<tr>
<th>Key factors owners should consider in determining their answer to the questions.</th>
<th>Effects of Inverse Condemnation</th>
<th>Effects of Usual Condemnation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Which acreage will be taken?</td>
<td>The current understanding from the resolution of the Kirby case by the NC Supreme court is that the Entire Parcel was taken. The protected corridor is 1000 feet wide, thus the entirety of any parcel that is wholly or partially within the corridor would be taken. There are those who contend that only &quot;development rights&quot; were taken and not the entire property.</td>
<td>Only the portion necessary to construct the highway, typically a 300 foot wide right-of-way, will be taken. Any balance will remain with the property owner.</td>
</tr>
<tr>
<td>How will the value be determined for the land that is taken?</td>
<td>Land Values will be determined based upon the highest and best use of the land immediately BEFORE and AFTER the date the corridor map was recorded (August 1996 for Southern Wake County)</td>
<td>Current land values will be used to determine the value of the property taken based upon its highest and best use immediately BEFORE and AFTER the date NCDOT files the condemnation action (date of the taking).</td>
</tr>
<tr>
<td>Will I be paid interest on what I am awarded?</td>
<td>Yes. Interest will be paid from the date of taking (August 1996 for 540 across southern Wake County).</td>
<td>Interest will be paid on the difference between the amount of the deposit and the amount of the court award from the date of the deposit to the date of judgment.</td>
</tr>
<tr>
<td>What rate of interest will I be paid? Will it be Simple or Compound interest?</td>
<td>The statutory rate in NC has been 8%. However, in 2016 the Legislature enacted measures to use the lower rate between the Prime Rate or 8% at the time of the taking. However, that is not constitutional. Simple interest is usually paid. You may request through expert testimony both a higher rate of interest and for compound interest. There are court precedents for each.</td>
<td>The statutory rate in NC has been 8%. However, in 2016 the Legislature enacted measures to use the lower rate between the Prime Rate or 8% at the time of the taking. However, that may not be constitutional. Simple interest is usually paid. You may request through expert testimony both a higher rate of interest and for compound interest. There are court precedents for each.</td>
</tr>
<tr>
<td>Will I have to pay any taxes on the money I receive?</td>
<td>Yes.</td>
<td>Yes</td>
</tr>
<tr>
<td>What taxes will apply on the money I receive?</td>
<td>Capital Gains Taxes (usually 20% federal and 5.499% state) will apply on the difference between your basis in the property and the value that is awarded for the land either through settlement or court action.</td>
<td>Capital Gains Taxes (usually 20% federal and 5.499% state) will apply on the difference between your basis in the property and the value that is awarded for the land either through settlement or court action.</td>
</tr>
<tr>
<td>Can I avoid paying taxes by doing a like kind exchange?</td>
<td>Personal Income tax at your applicable rate will be required for interest. The state rate is 5.499% and the federal rate could be as high as 40.8%.</td>
<td>Personal Income tax at your applicable rate will apply for interest. The state rate is 5.499% and the federal rate could be as high as 40.8%.</td>
</tr>
<tr>
<td>How much will an attorney cost me?</td>
<td>In an inverse condemnation action you can be reimbursed for your attorney fees. Attorneys generally charge a percentage of the entire amount awarded.</td>
<td>In a usual Condemnation you are responsible for your own legal fees. Attorney fees are usually charged only on the difference between the amount of the deposit made by NC-DOT and the amount of the final award.</td>
</tr>
<tr>
<td>Is there a deadline by which I must act?</td>
<td>Yes. There is a two year Statute of Limitations from the date of the repeal of the Map Act within which Inverse actions must be filed. The effective date of the repeal was July 11, 2016. Thus if you choose to file an inverse action you must do so before July 11, 2018.</td>
<td>When NCDOT files its action per G.S. 139-107 you will have 12 months in which to file an answer. Do not delay.</td>
</tr>
</tbody>
</table>