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DATE: July 28, 2021

TO: DCHC MPO Board

FROM : Aaron Cain, MPO Staff

SUBJECT: D-O LRT Corridor in CTP

Summary. The Durham City-County Planning Department has brought to the attention of DCHC MPO staff an issue regarding reservation of land along the former Durham-Orange Light Rail Transit (D-O LRT) corridor. Durham's Unified Development Ordinance requires that land needed for future transportation corridors identified in the Comprehensive Transportation Plan (CTP) must be reserved through its development review process. The Durham City-County Planning Department, on behalf of the City of Durham, has requested that the D-O LRT corridor be removed from the CTP as part of Amendment #3. GoTriangle staff has resisted this request as it could eliminate an important future transportation corridor between Durham and Chapel Hill that could be repurposed for another technology such as bus rapid transit (BRT).

The TC is asked to discuss and provide guidance to MPO staff as it finalizes CTP Amendment #3, which is expected to come before the TC for a recommendation in August and to the Board for adoption in September.

Background. In 2017 the DCHC MPO Board adopted its first CTP in conjunction with the North Carolina Department of Transportation (NCDOT). One element that was included in the CTP was the Locally Preferred Alternative (LPA) alignment for the D-O LRT. In 2019, the D-O LRT project was discontinued and no further work has been done to advance the project. However, the D-O LRT corridor remains identified in the DCHC MPO Comprehensive Transportation Plan (CTP) as a possible future transit corridor.

The Durham City-County Unified Development Ordinance (UDO) states that land for transportation corridors identified in the CTP must be reserved when a site plan or rezoning with a development plan is requested on the property. The Durham City-County Planning Department has stated concerns about this requirement and its application to the 2016 North Carolina Supreme Court case *Kirby v. NCDOT* (56PA14-2), in which the court determined that NCDOT's use of the Map Act was an unconstitutional taking and required NCDOT to compensate landowners for property held in reserve for future transportation projects. The City of Durham is concerned about the continued enforcement of this exaction for a project which is widely known to no longer be viable, and for which no specific future use of the corridor has been identified in an adopted plan. Therefore, the City, and potentially the County, are vulnerable to civil action that could have substantial financial implications.

Conversely, GoTriangle has identified the D-O LRT corridor as a possible future BRT corridor serving Durham and Chapel Hill, particularly the off-road segments that could greatly aid future transit timeliness and efficiency. Loss of access to this corridor could have detrimental effects on future transit development between Durham and Chapel Hill. While no specific project has been identified, the Durham Transit Plan is expected to be concluded within the next six months, and may identify high capacity transit between Durham and Chapel Hill as a primary need for which further study can locate an appropriate route, which could include this corridor. If the D-O LRT corridor is removed from the CTP, due to the amount of development occurring between Durham and Chapel Hill along US Highway 15/501, access to the land for the corridor that is not currently within public right-of-way is unlikely to be available again without the costly condemnation of structures and utilities.

This issue is not applicable to the Town of Chapel Hill because its development ordinance does not require reservation of land based on the CTP.

Issues and Analysis. Conversations on this issue between MPO, Durham City-County Planning, the City Attorney's Office, and GoTriangle began in spring 2021. The parties requested that the MPO staff reach out to the UNC School of Government for guidance. Adam Lovelady of the School of Government concluded that the scenario presented is directly analogous to the situation in *Kirby*, and therefore all parties are susceptible to legal action if reservations are still required for the D-O LRT corridor. There are two primary reasons for legal risk: 1) *Kirby* stated that government regulation exacting land for future transportation corridors is an eminent domain power, and not a police power, and therefore cannot be enforced without compensation within a reasonable timeframe (the court did not state in *Kirby* what that timeframe is, so there is risk for any long-term project), and 2) transit corridors also must pass the "Nollan/Dolan" tests of proportionality and rational nexus. Projects must be able to demonstrate that there will be a benefit to those who must reserve land, which is difficult to do with an undefined project. D-O LRT had an adopted Locally Preferred Alternative (LPA), had completed an Environmental Impact Study (EIS), was in the engineering phase, in the pipeline for federal funding, and had a dedicated local funding source, all of which created a definitive timeline for the project. No project is currently defined, underway, or currently being studied for the corridor, so continued reservation of land is less justifiable.

Recommendation. MPO staff recommends that the D-O LRT corridor be removed from the CTP as part of the adoption of Amendment #3. Staff furthermore recommends that language be inserted in Amendment #3 that describes future high-capacity transit corridors between Durham and Chapel Hill, and the necessity of these corridors for the future transportation needs of our region, without specifying the exact location of future facilities.

While MPO staff agree with GoTriangle that it may be difficult in the future to gain access to land not within the public right-of-way for a future transportation project, the legal risk is too great, based on the decision and potential remedy in *Kirby*, for it to remain. Should a future study identify a corridor and an LPA with a timeline for development, MPO staff will work to include the LPA in the CTP so that the corridor can be reserved. In addition, the MPO is open to further discussions on potential funding sources for right-of-way acquisition for the corridor.