

IN THE SUPERIOR COURT OF BIBB COUNTY
STATE OF GEORGIA

LINDSAY D. HOLLIDAY,)
)
 PLAINTIFF,)
)
 V.) CIVIL ACTION FILE NO.
) 12-CV-58472
 GEORGIA DEPARTMENT OF)
 TRANSPORTATION and PROJECT)
 ENGINEER CLINTON FORD, P.E.)
)
 DEFENDANTS.)

**DEFENDANTS' BRIEF IN SUPPRT OF SPECIAL APPEARANCE MOTION TO
DISMISS PURSUANT TO O.C.G.A. § 9-11-12(b)(6) AND O.C.G.A. § 9-11-12(b)(1)**

COME NOW Defendants Georgia Department of Transportation (“GDOT”) and Clinton Ford, by and through the Attorney General, State of Georgia, and file their Brief in Support of Defendants’ Special Appearance Motion to Dismiss Pursuant to O.C.G.A. § 9-11-12(b)(6) and O.C.G.A. § 9-11-12(b)(1) for the following reasons:

A. The Complaint is barred by the defense of sovereign immunity because Plaintiff cannot show that there has been an express waiver of sovereign immunity for his claim for equitable relief because Defendants have not acted outside of the scope of their discretionary authority; therefore, the Court lacks subject matter jurisdiction.

B. The Complaint fails to state a claim upon which relief can be granted against Defendant Ford because Plaintiff has not alleged that he has done anything unlawful.

C. The Complaint fails to state a claim upon which relief can be granted with regard to Plaintiff’s claims of alleged future violations of state and federal environmental laws because such claims are not ripe for adjudication.

D. The Complaint should be dismissed due to failure of process, improper service of process, or insufficiency of service of process.

In addition, this Motion is filed contemporaneously with the filing of GDOT's Special Appearance Answer; thus, discovery is stayed pursuant to the provisions of O.C.G.A. § 9-11-12(j).

FACTUAL BACKGROUND

1. The Parties

Upon information and belief, Plaintiff Lindsay D. Holliday is a resident of the City of Macon, Georgia. Complaint, p. 2. Defendant GDOT is an agency of the State of Georgia created pursuant to O.C.G.A. § 32-2-1 *et seq.* Clinton Ford is an employee of GDOT and is the Acting Project Manager for the construction project at issue in this case, which is known as "Forest Hill Road from Forsyth Road to Northside Drive" STP00-3213-00 (003) Bibb County – P.I. No. 351130; BRMLB-3213-00 (005) Bibb County – P.I. No. 351135, and STP00-3213-00 (001) Bibb County – P.I. No. 350520. (the "Forest Hill Road Project" or "Project"). Affidavit of Thomas Howell, ¶ 4.

2. History of the Forest Hill Road Project

In 1983, George Israel, Mayor of Macon, asked the Georgia Department of Transportation ("GDOT") for help with improving Forest Hill Road, which has remained unchanged for the last 30 years. Affidavit of Van Etheridge ¶ 5. Approximately ten years later, in November of 1994, the citizens of Macon and Bibb County passed a referendum to increase the local sales tax by one cent on the dollar for five years in order to improve roads in the

County.¹ Etheridge Affid. ¶ 6. Projects selected for the referendum came from the Macon-Bibb County Transportation Improvement Program (TIP), which is a local-level comprehensive transportation plan incorporated into GDOT's State Transportation Improvement Plan ("STIP"). Etheridge Affid. ¶ 7. Many of the projects in the TIP had been proposed in the early 1980s. Id. The sales tax increase, which went into effect April 1, 1995, generated approximately \$126 million dollars; an additional \$200 million dollars has been or will be contributed from the state and federal government. Id. The Forest Hill Road Project was one of 64 projects included in the referendum. Id.

With the passage of this referendum, the Macon-Bibb County Road Improvement Program ("RIP") was born, the purpose and goal of which has been to improve safety on roadways, provide new sidewalks, improve traffic flow, and provide connectivity between routes. Etheridge Affid. ¶ 8. The Bibb County Board of Commissioners has the final authority for expenditures of the sales tax funds; therefore it has the responsibility of implementing the sales tax road improvement projects. Etheridge Affid. ¶ 9.

The RIP is governed by an Executive Committee, which makes policy and directs the RIP as a whole. Etheridge Affid. ¶ 10. The City of Macon's and Bibb County's interests are equally represented on the Executive Committee, which is composed of the following:

1. Chairman of Bibb County Board of Commissioners (Chairman)

¹ Prior to the referendum in November of 1994, ten community public information meetings were held during the months of September and October. The meetings were held at ten different public schools and covered the projects that were in the referendum. The community had the opportunity to look at various maps, hear about the changes that would affect their neighborhood, and ask questions about each project. Engineers and planners from both the City and County governments and Moreland Altobelli Associates ("Moreland"), an engineering consultant firm that was hired by Bibb County to manage all of the projects, were present to answer any questions. Also, comment sheets were provided to submit questions in writing, and a tape recorder was available for verbal comments. Id.

2. Vice-Chairman of Bibb County Board of Commissioners
3. Mayor of City of Macon
4. President of Macon City Council
5. GDOT Board Member for Bibb County

Etheridge Affid. ¶ 11.

Two committees were formed to report to the Executive Committee and the County Commission. Etheridge Affid. ¶ 11. The first was the Technical Advisory Committee (“TAC”), which provided technical, financial, legal, and minority involvement advice for the RIP and brought to the attention of the Executive Committee and the Board of Commissioners any and all matters related to the Sales Tax Program. *Id.* The second committee was the Citizens Oversight Committee (“COC”), which was composed of 13 citizens. Etheridge Affid. ¶ 12. The function of the COC was to monitor and review the overall progress of the RIP to determine whether or not the program was proceeding in a manner consistent with the public commitments made to the citizens of the City and County. *Id.* Moreland Altobelli Associates (“Moreland”), an engineering and program management firm, was hired by Bibb County to serve as the Road Program Manager. Mr. Van Etheridge is the Moreland Project Manager; he reported to and was directed by the TAC and the Executive Committee. *Id.*

In the RIP package put together before the referendum, the Forest Hill Road improvements were listed as Project Numbers 8 and 9 and consisted of the following:

Project No. 8 — Forest Hill Road from Wimbish Road to Northside Drive

- Widen from 2 lanes to 3 lanes, urban section, curb and gutter, sidewalk on school side, storm water improvements, combine with Project No. 9

Project No. 9 — Forest Hill Road from Forsyth Road to Wimbish Road

- Widen from 2 lanes to 5 lanes, urban section, curb and gutter, sidewalks, storm water improvements, combine with Project No. 8

Etheridge Affid. ¶ 13. These two sections of Forest Hill Road are a joint venture between RIP, GDOT and the Federal Highway Administration (“FHWA”). Etheridge Affid. ¶ 14. RIP is paying for the design of the projects and utility relocation costs; and GDOT and FHWA are paying for right-of-way property costs and construction costs. Id.

GDOT has oversight, review, and approval authority for all aspects of a project that has state or federal funding. Etheridge Affid. ¶ 15. GDOT works with FHWA to obtain all needed approvals. Id. The project activities have to conform to GDOT’s established guidelines, policies, and procedures. Id. Specifically, the design process must conform to the Plan Development Process (“PDP”), which has been developed by GDOT for all GDOT and FHWA projects. Etheridge Affid. ¶ 16. One purpose of the PDP is to ensure that the proper level of public participation is maintained and that there is public disclosure of environmental impacts before project decisions are made. Etheridge Affid. ¶ 17. GDOT’s review and approval include, but are not limited to, the following activities:

- Project Identification and Funding
- Project Framework Agreement
- Project Schedule
- Project Concept Report
- Traffic Volume Study
- Lighting Agreement and Photometrics
- Maintenance Agreement
- Environmental Studies and Reevaluations (including archaeological, historical, ecological, air, noise, underground storage tanks, and hazardous waste)
- Public Meetings
- Project Survey and Mapping
- Soil Investigation Report
- Pavement Evaluation and Proposed Pavement Design
- Preliminary Design
- Design Variance/Exception
- Culvert Design, Foundation Investigation, and Hydraulic Study
- Utility Relocation

- Landscape Design
- Traffic Signal Design
- Erosion Control
- Right-of-Way Design
- Right-of-Way Acquisition
- Location and Design Report
- Final Design
- Special Provisions
- Cost Estimate
- Construction Authorization

Etheridge Affid. ¶ 18.

During the PDP, environmental resources are identified early and given consideration throughout project development. Etheridge Affid. ¶ 19. Because this Project involves federal funds, the process outlined in the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, (NEPA) also had to be followed. *Id.* There are three levels of environmental documentation: Categorical Exclusion (CE), Environmental Assessment (EA), Finding of No Significant Impact (FONSI) and Environmental Impact Statement (EIS)/Record of Decision (ROD). *Id.* The level of study depends upon the impacts to the environment and must have the concurrence of the FHWA. *Id.* Here, an Environmental Assessment was performed and a Finding of No Significant Impact or FONSI issued. *Id.*

NEPA also requires compliance with a variety of environmental laws, regulations and executive orders. Etheridge Affid. ¶ 20. Environmental laws require that every effort be made to avoid and/or minimize harm to certain environmental resource such as historic resources, publicly owned parks, recreation areas, wildlife and waterfowl refuges, waters of the United States (wetlands, streams and open waters), vegetative buffers on streams and their waters, cemeteries, and threatened/endangered species and their habitat. *Id.* The FHWA has full oversight for all projects and has approval authority of the environmental documents for all

federally funded projects. Id. The PDP has been fully and completely followed for the Project. Id.

3. The Project's Plans

Planning for the Forest Hill Road projects began in 1995. The TAC, along with Moreland, developed a Concept Report. Etheridge Affid. ¶ 21. This consists of a footprint of the improvements in the neighborhood; it addresses the lane widths, curb and gutter, drainage, sidewalks, re-alignments, turn-lanes, signalization, right-of-way, utility relocations, traffic counts, accidents, project description, estimated cost, and Need and Purpose Statement. Id.

During this concept development period, for Project No. 9 in the Referendum, Forest Hill Road from Forsyth Road to Wimbish Road, the RIP proposed a four-lane section with a 20-foot, raised, landscaped median instead of the five-lane section referenced in the Referendum. Etheridge Affid. ¶ 22. It was thought that the landscaped median would give the roadway a boulevard look instead of a wide, asphalt concrete look. Id. Project No. 8, Forest Hill Road from Wimbish Road to Northside Drive, consisted of two alternatives: (1) a three-lane urban section; or (2) a four-lane section with a 20-foot, raised, landscaped median. Etheridge Affid. ¶ 23. Both RIP and the citizen input favored the three-lane section. Id. Once the Concept Report was completed, it was presented to and approved by the following:

1. Technical Advisory Committee — July 24, 1997;
2. Executive Committee — November 21, 1997;
3. Georgia Department of Transportation
December 15, 1998 (Project No. 8)
April 20, 1998 (Project No. 9)

Etheridge Affid. ¶ 24. The basic concept approved by all parties consisted of four lanes with a raised, landscaped median from Forsyth Road to Wimbish Road and three lanes from Wimbish Road to Northside Drive. Etheridge Affid. ¶ 25. Preliminary plans were developed around this

concept; and the Environmental Assessment was approved by GDOT and FHWA on March 1, 2001. Id.

The official public hearing for Forest Hill Road was held on June 11, 2001 at Springdale Elementary School with 315 citizens attending. Etheridge Affid. ¶ 26. A total of 212 comments were received at the meeting with 153 stating they did not support the project. Id. Comments were summarized as follows:

1. The proposed project will increase traffic, noise, and pollution in the area, along with cut-through traffic in the neighborhood.
2. The project should be limited to turn-lanes at various intersections and sidewalks.
3. The project does not need sidewalks.
4. The project should be limited to three lanes.
5. The widening of the road will encourage speeders.
6. Property values will decrease.

Id. The footprint of the design shown at the public hearing in June 2001 is the same as it is today except for certain modifications requested by the community. Id.

In response to comments to the Project, GDOT arranged a stakeholders meeting at the Holiday Inn on Riverside Drive on May 30, 2002. Etheridge Affid. ¶ 27. As a result of the meeting, RIP agreed to make the following modifications as requested by the community:

1. Relocate overhead utilities to underground on the four-lane section (Cost: \$2.0 million in local funds).
2. Landscape the median and shoulders of the roadway (Estimated cost: \$550,000).
3. Provide lighting along the projects (Estimated cost: \$2.4 million).
4. Include sidewalks on both sides of the roadway on both projects (Estimated cost: \$516,000).
5. Provide a flat area at the driveways' entrances to roadway.
6. Cut lane widths to 11 feet on the four-lane section and to 12 feet on the three-lane section.
7. Redesign the entrance to The Prado and Overlook Drive to a right-in, right-out entrance.
8. Review the intersection of Northminster Drive at Wimbish Road to determine if it can be moved closer to Forest Hill Road.

9. Maintain the dual left-turn lanes from Wimbish Road to Forest Hill Road southbound.

Id. All of these recommendations have been incorporated into the plans except for No. 1, the overhead utilities on the four-lane section. These utilities could not be placed underground due to the cost involved. Etheridge Affid. ¶ 28. To obtain further stakeholder input on the development of the landscaping and lighting plans, stakeholder meetings were held on:

- April 14, 2005, at North Macon Park to initiate landscaping and lighting plans
- December 12, 2005, at St. Francis Church on Forest Hill Road to review proposed landscaping and lighting plans.

Id.

4. Opposition to the Project

Among the groups of citizens opposing the Project have been certain property owners along Forest Hill Road as well as CAUTION Macon. Etheridge Affid. ¶ 29. RIP has provided numerous opportunities for input from its citizens throughout the life of the program, which has been approximately 17 years. Etheridge Affid. ¶ 30. The Project has had neighborhood meetings along with an almost continuous opportunity for public input through TAC, which met every other week for years; the Executive Committee, which met monthly and then quarterly for years; and the Bibb County Commission, which meets twice per month. Id. The opposition to these projects has taken advantage of these opportunities to express their concerns; and RIP has implemented numerous suggestions that were appropriate for the design criteria of the Project.

Id.

At the October 16, 2007 meeting of the Bibb County Commission, it was decided to send the controversial plan to widen Forest Hill Road to mediation. Etheridge Affid. ¶ 31. This action came after several weeks of pressure from residents and activists who, besides lobbying

local officials in private, demonstrated against the Project at the Courthouse. Id. Below is the motion that was approved October 16, 2007, regarding Forest Hill Road:

The Committee of the Whole voted to pursue resolution of the Forest Hill Road Project by engaging in mediation with representatives of Bibb County, persons who physically reside on Forest Hill Road, representatives from the Department of Transportation, representatives from Moreland Altobelli, and a representative from the City of Macon. The mediation will take place as soon as a mediator can be selected and a date established. It is the intent that the proposed mediation will not otherwise delay or stop the process of acquiring right-of-way along Forest Hill Road as is currently taking place nor delay the Project in any way.

NONE

Id. The mediation began on February 28, 2008, and continued until August 6, 2008, with former Court of Appeals' Judge Dorothy Beasley presiding. Etheridge Affid. ¶ 32. Over the course of the mediation, continuous efforts were made to reach a compromise on the Project to no avail.

Id. Options were thoroughly discussed with each side, and efforts were made to compromise on various features of the Project. Etheridge Affid. ¶ 33. Ultimately, it became evident that a settlement could not be reached on any of the proposals; therefore, the matter was returned to the Bibb County Board of Commissioners. Id. As you can see from the motion, it was never the intention of the County to stop the Project altogether.

5. The Purpose of the Project

The purpose of this Project is to provide additional capacity to the roadway from Forsyth Road to Northside Drive, to improve the traffic mobility for the entire section, and to provide safer access to street intersections and private driveways. Etheridge Affid. ¶ 34. Due to the present congestion that is on Forest Hill Road, the design approved is the most appropriate. Forest Hill Road has 141 private driveways along the Project and 22 street intersections. There were 404 accidents along the road from 2004 through 2010 — 64% were from rear-end collisions

NOT w 3 lanes

and left turns. Traffic counts from 2011 show 14,400 vehicles per day just north of Overlook and 10,300 vehicles per day just north of Lokchapee Drive. Etheridge Affid. ¶ 35.

RIP has finished right-of-way acquisition on the three-lane section of Forest Hill Road. Etheridge Affid. ¶ 36. To date, 120 parcels of required right-of-way have been purchased at a cost of \$1.2 million. Id. Right-of-way acquisition has not started on the four-lane section, which has 69 parcels to acquire. Etheridge Affid. ¶ 37. However, GDOT let to contract the three-lane section of Forest Hill Road, Project No. 8 on December 14, 2012 for a cost of \$8.4 million. Etheridge Affid. ¶ 38.

6. The Lawsuit

Plaintiff filed his Complaint for Injunction and Restraining Order on December 14, 2012. Defendant Clinton Ford was served with the Complaint on December 19, 2012. GDOT has not been served pursuant to O.C.G.A. § 32-2-5(b), which provides: “Service upon the department shall be sufficient by serving a second original process issued from the county where the action is filed upon the commissioner personally or by leaving a copy of the same in the office of the commissioner in the Department of Transportation Building, Atlanta, Georgia.”

Defendant Clinton Ford serves as an Assistant Project Manager in GDOT District Three. He is the acting Project Manager for the Project. Howell Affid. ¶ 5. Mr. Ford has no authority over a decision to begin or to continue a construction project. Howell Affid. ¶ 6. His job duties include, but are not limited to, learning to manage, and to a certain degree, managing the scope, budget, and schedule of assigned projects; creating the project work plan; identifying risks to the project’s schedule, scope and budget; participating in project development and delivery with GDOT management, offices and work teams, external project development partners, local and federal government entities, and other project stakeholders; monitoring payments to consultants

and contractors; and supporting the construction phase by monitoring the overall schedule, scope and budget and ensuring that commitments made in the developmental phases of a project are implemented at the proper time. Howell Affid. ¶ 7.

Along with this Opposition to the Complaint for Injunction and Temporary Restraining Order, Defendants have filed their Special Appearance Answer and Motion to Dismiss.

ARGUMENT AND CITATION OF AUTHORITY

A.

SOVEREIGN IMMUNITY PRECLUDES THE GRANT OF A TEMPORARY RESTRAINING ORDER OR INJUNCTION AGAINST GDOT AND CLINTON FORD.

I.

THIS ACTION MUST BE DISMISSED UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY BECAUSE PLAINTIFF CANNOT MEET HIS BURDEN TO SHOW THAT THERE HAS BEEN AN EXPRESS WAIVER OF SOVEREIGN IMMUNITY FOR ITS CLAIM FOR AN INJUNCTION; THEREFORE, THIS COURT HAS NO SUBJECT MATTER JURISDICTION TO HEAR THE CLAIMS.

- a. Sovereign Immunity Rises to a Constitutional Right and Cannot Be Abrogated by Any Court.

“Under the doctrine of sovereign immunity, the State cannot be sued without its consent.”

State Bd. of Education v. Drury, 263 Ga. 429, 430 (1993). The Georgia Constitution extends sovereign immunity to the state and all of its departments and agencies except as specifically provided in paragraph IX of article I, section II. Paragraph IX provides:

Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

1983 Ga. Const. Art. I, § II, ¶ IX (e). As a department in the executive branch of government of the State of Georgia created pursuant to O.C.G.A. § 32-2-1 et seq., GDOT is immune from suit except as specifically waived in the Constitution or except as provided by an act of the General Assembly specifically providing that sovereign immunity has been waived and the extent thereof. Woodard v. Laurens County, 265 Ga. 404, 405 (1995).

Sovereign immunity requires that the conditions and limitations of the statute that waives immunity be strictly followed. Department of Human Resources v. Hutchinson, 217 Ga. App. 70 (1995)(citing Ingalls Iron Works Co. v. Blackmon, 133 Ga. App. 164 (1974)). “Where the sovereign has sovereign immunity from a cause of action, and has not waived that immunity, the immunity rises to a constitutional right and cannot be abrogated by any court.” Tyson v. Board of Regents, 212 Ga. App. 550, 551 (1994).

Sovereign immunity is an issue of subject matter jurisdiction. See e.g. Welch v. Ga. Dept. of Transportation, 276 Ga. App. 664, 664-665 (2005). Unless there has been a waiver of sovereign immunity, the Court does not have subject matter jurisdiction to hear the claim. See Department of Transportation v. Dupree, 256 Ga. App. 668, 671 (2002). Thus, the issue of sovereign immunity is properly addressed as a motion to dismiss pursuant to O.C.G.A § 9-11-12(b)(1); and when ruling on jurisdictional grounds, the trial court must make the determination acting as the trier of fact. Derbyshire v. United Builders Supplies, 194 Ga. App. 840, 842 (1990). The submission of evidence with a motion based on sovereign immunity does not convert it into a summary judgment motion and the trial court may therefore consider matters outside the pleadings. See International Indemnity Co. v. Blake, 161 Ga. App. 99, 100-102 (1982).

Sovereign immunity is not an affirmative defense and the burden of establishing a waiver of sovereign immunity is not on the party asserting immunity but on the party seeking to benefit

from that waiver. See Dupree, at 671 (citing Board of Regents v. Daniels, 264 Ga. 328, 329 (1994) and Sherwin v. Department of Human Resources, 229 Ga. App. 621, 625 (1997)). As shown below, because Plaintiff cannot show that there has been an express waiver of sovereign immunity for its claim for an injunction, this Court has no subject matter jurisdiction over Plaintiff's claim for injunctive relief and its request for a Temporary Restraining Order must be denied.

- b. Because Defendants have Acted Within the Scope of Their Discretionary Authority, Sovereign Immunity Bars plaintiff's request for Equitable Relief.

In the Complaint, Plaintiff seeks to enjoin GDOT from moving forward with the construction of the Project because the result would be "an unsafe road and a negative impact on the local environment." Complaint, ¶ 2. The Complaint must be dismissed because a court of equity may not interfere with the discretionary action of the GDOT in locating, grading, or improving a state-aid highway, within the area of its legally designated powers, unless such action is arbitrary. State Hwy. Dep't v. Strickland, 213 Ga. 785, 102 S.E.2d 3 (1958); Benton v. State Hwy. Dep't, 111 Ga. App. 86 (1965). In fact, a court may interfere with an exercise of the State's statutory and regulatory authority only where the state has acted wholly outside its authority; has acted arbitrarily and capriciously in its decision-making; has rendered a decision that is clearly erroneous; or has acted in violation of constitutional rights. IBM v. Georgia Dept. of Admin. Servs., 265 Ga. 215, 217 (1995)(judicial direction of legislative authority would unconstitutionally violate and interfere with the proper function of the legislative branch); Bentley v. Chastain, 249 S.E.2d 38, 242 Ga. 348, 352 (1978). Moreover, a court may not substitute its judgment for that of the state or its employees. Id. Such a suit is barred by sovereign immunity. Evans v. Just Open Government, 242 Ga. 834, 839 (1979); DeKalb County

v. Metro Ambulance Services, Inc., 253 Ga. 561 (1984); Strickland v. Douglas, 246 Ga. 640 (1980); Robbins v. Lumpkin, 187 Ga. App. 489 (1988).

In Evans, supra at 834-835, the plaintiff, Just and Open Government, an unincorporated association of citizens, taxpayers, voters, and property owners in Henry County, brought suit against the Georgia Department of Offender Rehabilitation, among others, to enjoin the construction of two state prisons in the county. Id. The Supreme Court reversed the trial court's entry of a TRO, holding that the Department of Offender Rehabilitation did not abuse its discretion or breach its authority in locating the prisons in Henry County because (i) the record affirmatively showed that there was no breach of authority and (ii) the courts will not by injunction interfere with state executive officials in the exercise of their discretionary powers. Id. at 838-839. The court also found that (i) "a prison is not, in a legal sense, a nuisance, and equity will not enjoin construction of a prison on that ground" and (ii) the plaintiffs had not been damaged in any legally cognizable sense. Id. at 837. In fact, the Supreme Court has stated that a court of equity cannot, at the instance of citizens and taxpayers, interfere to restrain or control the discretionary powers of government officials unless "it appears that the act is ultra vires or fraudulent and corrupt." Department of Transp. v. Brooks, 254 Ga. 303, 314 (1985). GDOT's actions regarding this Project are neither. Therefore, Plaintiff's Complaint should be dismissed based upon Plaintiff's failure to show a valid waiver of sovereign immunity.

As discussed above, sovereign immunity is not an affirmative defense. Defendants do not have to prove that they have immunity from suit. Rather, Plaintiff has the burden of establishing a waiver of sovereign immunity. See Dupree, at 671 (citing Board of Regents v. Daniels, 264 Ga. 328, 329 (1994) and Sherwin v. Department of Human Resources, 229 Ga. App. 621, 625 (1997)). In order to enjoin Defendants here, Defendant's actions at issue must be either ultra

vires or fraudulent and corrupt. Department of Transp. v. Brooks, 254 Ga. 303, 314 (1985)(a court of equity will not, at the instance of citizens and taxpayers, interfere to restrain or control the discretionary powers of municipal officials, but will only interfere if it appears that the act is ultra vires or fraudulent and corrupt.) Because the evidence before the Court is that GDOT's construction plans were approved by the FHWA pursuant to the requirements of a federally-funded road project, Plaintiff cannot show that GDOT has acted outside its statutory authority.

Moreover, even if Plaintiff were to produce an "expert" to opine that there is a safer or more environmentally protective road design, it is not the Court's role to weigh experts and enjoin GDOT unless GDOT's actions are clearly unlawful or arbitrary. Bentley v. Chastain, 242 Ga. 348, 350-52 (1978). Rather, the court must defer issues of safety and suitability to GDOT, the agency charged with managing Georgia's highways. Therefore, the fact that Plaintiff has a better "alternative plan" for the Project is irrelevant because, as discussed more fully below, the current plan is not arbitrary, unlawful or unreasonable as a matter of law.

First, GDOT has shown that the Project's activities have conformed to GDOT's established guidelines, policies, and procedures. Etheridge Affid. ¶¶ 15 & 20. Specifically, the design process has conformed to the PDP, which has been developed by GDOT for all GDOT and FHWA projects. Etheridge Affid. ¶¶ 16 & 20. One purpose of the PDP is to ensure the proper level of public participation is maintained and that there is public disclosure of environmental impacts before project decisions are made. Etheridge Affid. ¶¶ 17 & 20.

During the PDP, environmental resources were identified early and given consideration throughout project development. Etheridge Affid. ¶¶ 19 & 20. Because this Project involves federal funds, the process outlined in the National Environmental Policy Act (NEPA) also had to be followed. *Id.* There are three levels of environmental documentation: Categorical Exclusion

(CE), Environmental Assessment (EA), Finding of No Significant Impact (FONSI) and Environmental Impact Statement (EIS)/Record of Decision (ROD). *Id.* The level of study depends upon the impacts to the environment and must have the concurrence of the FHWA. *Id.* Here, and Environmental Assessment was performed and a “Finding of No Significant Impact” or FONSI issued by the FHWA. *Id.*

NEPA also required compliance with a variety of environmental laws, regulations and executive orders. *Etheridge Affid.* ¶ 20. Environmental laws require that every effort be made to avoid and/or minimize harm to certain environmental resource such as historic resources, publicly owned parks, recreation areas, wildlife and waterfowl refuges, waters of the United States (wetlands, streams and open waters), vegetative buffers on streams and their waters, cemeteries, and threatened/endangered species and their habitat. *Id.* The FHWA has full oversight for all projects and has approval authority of the environmental documents for all federally funded projects. *Id.*

Given the evidence that the PDP has been fully and completely followed for the Project, this Court must find, as a matter of law, that the Project’s plans are not arbitrary. *IBM v. Georgia Dept. of Admin. Servs.*, 265 Ga. 215, 217 (1995). In so finding, the Court must dismiss the Complaint because it is barred by GDOT’s and Defendant Ford’s sovereign immunity.

(i) Defendant Ford

Even if the Court determined that GDOT does not have sovereign immunity, Defendant Ford must be dismissed on that basis because Plaintiff has not alleged that Defendant Ford has acted outside the course and scope of his official duties or employment or has acted illegally. Additionally, Plaintiff has not alleged any specific facts that suggest enjoining Ford would afford Plaintiff the relief he seeks. *Id.*

Defendant Clinton Ford is an Assistant Project Manager for GDOT and is acting Project Manager for the Project at issue in this lawsuit. Howell Affid. ¶ 5. Mr. Ford has no authority over a decision to begin or to continue a construction project. Howell Affid. ¶ 6. His job duties include, but are not limited to learning to manage and managing the scope, budget, and schedule of assigned projects; creating the project work plan; identifying risks to the project's schedule, scope and budget; participating in project development and delivery with GDOT management, offices and work teams, external project development partners, local and federal government entities, and other project stakeholders; monitoring payments to consultants and contractors; and supporting the construction phase by monitoring the overall schedule, scope and budget and ensuring that commitments made in the developmental phases of a project are implemented at the proper time. Howell Affid. ¶ 7. Therefore, enjoining Clinton Ford in any manner whatsoever does not afford Plaintiff the relief he seeks, which is to stop the Project from moving forward.

Even if Clinton Ford had any authority to direct GDOT in its decision to move forward with a construction project, which he does not,² there are no allegations in the Complaint that Clinton Ford has acted outside the scope of his lawful authority. As discussed above, in order for this Court to have subject matter jurisdiction over the claim for injunctive relief, Plaintiff's allegations must fall within the limited exception to sovereign immunity for equitable claims set forth in International Business Machines Corp. v. Evans, 265 Ga. 215, 217 (1995). Because there is no dispute that Defendant Ford has, at all times relevant to the Forest Road Project, acted within the scope of his employment and with lawful authority, Plaintiffs' claims do not fall within these limited exceptions. Compare Waters v. Glynn County, 237 Ga. App. 438, 440

² See Howell Affid. ¶¶ 6 & 7.

(1999)(plaintiff's termination by the County Commission was unlawful because the County's ordinances only gave the County Administrator the authority to terminate an employee; the County Commission was not equally authorized.) Therefore, Clinton Ford must be dismissed from this lawsuit.

B.

THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

I.

DEFENDANT CLINTON FORD MUST BE DISMISSED BECAUSE THE COMPLAINT FAILS TO MAKE ANY ALLEGATIONS AGAINST HIM.

Even if GDOT and Clinton were not dismissed under the doctrine of sovereign immunity, Clinton Ford should be dismissed from this case for the simple reason that there are no allegations against him in this case; therefore, the Complaint fails to state a claim upon which relief can be granted. O.C.G.A. § 9-11-12(b)(6).

“A motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof, and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.” Mooney v. Mooney, 235 Ga. App. 117 (1998) (quoting Anderson v. Flake, 267 Ga. 498, 501 (1997)). If, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant, the complaint is sufficient and a motion to dismiss should be denied. Id. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be

resolved in the filing party's favor. *Id.* In this case, the analysis is easy, the allegations of the Complaint say nothing about Defendant Ford and there is no framework in the Complaint for a claim against Defendant Ford.

The style of the Complaint references Defendant Ford; and Paragraph 1 alleges that "Defendants are residents and/or state employees of Georgia and are subject to the jurisdiction of this Court." Paragraph 4 of the Complaint alleges that Plaintiff made an attempt to resolve these issues, in part, with emails to "Clinton Ford, GDOT Project Engineer for Forest Hill Rd Project, in December 2012." Otherwise, the Complaint makes absolutely no reference to Defendant Ford at all. Construing the allegations most favorably to Plaintiff, there is simply no claim set out against Ford. Therefore, the Complaint fails to state a claim against Ford of any kind and he should be dismissed on this basis alone.

II.

PLAINTIFF'S CLAIMS THAT THE PROJECT WILL RESULT IN VIOLATIONS OF STATE AND FEDERAL ENVIRONMENTAL LAW MUST BE DISMISSED BECAUSE THEY ARE NOT RIPE FOR ADJUDICATION.

In the Complaint, Plaintiff contends that the Project, "if implemented" will negatively impact the community and environment." Complaint, ¶ 2. Plaintiff further contends that "[s]afety and environmental issues, *if proven and existing*, would violate state and federal law and best management practices of various governmental agencies." Complaint, ¶ 2. Because none of the alleged harm has occurred as of this date, Plaintiff's claims are not ripe for adjudication. Dep't of Transp. v. Bonnett is directly on point. There, the plaintiff sued to enjoin the construction of a road adjacent to her property in anticipation of the noise, vibrations, and dust that she believed would be caused by traffic on a new road. The Supreme Court held that an injunction was improper because there had not been an invasion of Bonnett's property rights at

that point. It stated: “While Bonnett argues that an invasion of her property rights is probable, indeed inevitable, if the highway is constructed as planned, no such injury or taking exists at this time.” Id. It is important to note that the Court in Bonnett specifically refused to follow its ruling in Baranan v. Fulton County, 232 Ga. 852, 855 (1974), where the Court held that “[a]n injunction may be granted to prevent an impending nuisance, continuing in nature, the consequences of which are reasonably certain.” Basically, the Court distinguished Baranan, where the trial court had made a finding of fact that the impending flooding was certain, from Bonnett, where the adverse consequences were merely alleged by the plaintiff. See also Butler v. Mayor, etc., of Thomasville, 74 Ga. 570, 574 (1885)(where consequences are to a reasonable degree certain, a court of equity may interpose to arrest such nuisance before completed.); Mayor &c. of Waycross v. Houk, 113 Ga. 963 (1901)(allegations that the city’s location of the mouth of a sewer where sewage would be discharged directly upon plaintiff’s was sufficient for the equitable relief sought.); City of Atlanta v. Warnock, 91 Ga. 210 (1982)(no abuse of discretion in granting a temporary injunction enjoining the city from continuing to maintain a nuisance already created); Albany Theatre, Inc. v. Short, 171 Ga. 57, 74 (1930)(injunction allowed where defendants in their answer admitted that they were going to show movies on Sunday in violation of city’s penal code); see also Tillman v. Kight, 2006 U.S. Dist. LEXIS 95591 (S.D. Ga. Nov. 29, 2006) (citing IBM Corp. v. Evans, 265 Ga. 215, 216 (1995)(district court refused to extend the exception to sovereign immunity that allows an injunction against the State for current, ongoing injurious harm where the plaintiff merely seeks to avoid a potential repeat of the past conduct by the remedy of a preventative, positive injunction.)

Because the Plaintiff cannot support a claim for injunctive relief from the mere allegation

that an act of the GDOT is anticipated to violate federal or state law, the Complaint must be dismissed.

C.

THE COMPLAINT AGAINST GDOT SHOULD BE DISMISSED DUE TO FAILURE OF PROCESS, IMPROPER SERVICE OF PROCESS, OR INSUFFICIENCY OF SERVICE OF PROCESS.

In order to obtain jurisdiction over GDOT, Plaintiff must have complied with either O.C.G.A. § 9-11-4 or O.C.G.A. § 32-2-5(b). O.C.G.A. § 32-2-5(b) provides: “. . . . Service upon the department shall be sufficient by serving a second original process issued from the county where the action is filed upon the commissioner personally or by leaving a copy of the same in the office of the commissioner in the Department of Transportation Building, Atlanta, Georgia.” See Dep’t of Transp. v. Marks, 219 Ga. App. 738, 739 (1995)(“In the absence of service in conformity with [the statutory] rules, or the waiver thereof, no jurisdiction over the defendant is obtained by the court, and any judgment adverse to the defendant is absolutely void.”)

Here, the only service that has occurred is that Clinton Ford was served with a copy of the Complaint at his office in Macon. There has been no service on GDOT via service of a second original process upon the commissioner personally or by leaving a copy in the Commissioner’s office in Atlanta with the Commissioner or with a person other than the Commissioner who is authorized or otherwise qualified to receive service on behalf of GDOT. Any TRO or injunction against GDOT would be void as a matter of law. Id. at 739 (citing O.C.G.A. § 32-2-5(b)). Therefore, Plaintiff’s Complaint against GDOT should be dismissed for lack of personal jurisdiction over GDOT.

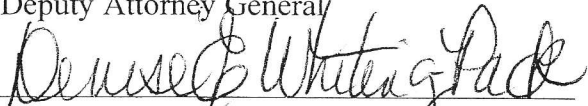
CONCLUSION


For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's request for an injunction and/or temporary restraining order, cast all costs against Plaintiff, award Defendants their reasonable attorney's fees and expenses, and for such other and further relief the Court may deem appropriate. If the Complaint is not dismissed against GDOT, Defendant Clinton Ford respectfully requests that it be dismissed against him.

Respectfully submitted this the 17th day of January, 2013.

SAMUEL S. OLENS 551540
Attorney General

W. WRIGHT BANKS, JR. 036156
Deputy Attorney General


DENISE E. WHITING-PACK 558559
Senior Assistant Attorney General


MARY JO VOLKERT 728755
Senior Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

MARY JO VOLKERT
Senior Assistant Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 656-3343
Fax : (404) 657-3239
mjvolkert@law.ga.gov

CERTIFICATE OF SERVICE

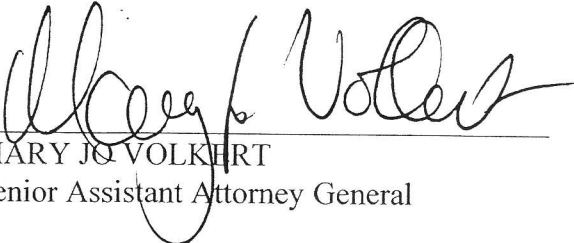
This is to certify that I have this day served a copy of the within and foregoing:

**DEFENDANTS' BRIEF IN SUPPORT OF SPECIAL APPEARANCE MOTION TO
DISMISS PURSUANT TO O.C.G.A. § 9-11-12(b)(1) AND O.C.G.A. § 9-11-12(b)(6)**

by U.S. Postal Service upon the following:

Lindsay D. Holliday
3091 Ridge Avenue
Macon, GA 31204

This the 17th day of January, 2013.



MARY JO VOLKERT
Senior Assistant Attorney General