STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge
Case No. 2019-CP-10-04387
Appellate Case No. 2021-000051

Applied Building Sciences, Inc.,

Appellant,

v.

South Carolina Department of Commerce,
Division of Public Railways,

Respondents.

JOINT AMICI CURIAE BRIEF OF MUNICIPAL ASSOCIATION OF SOUTH CAROLINA and SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

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IDENTITY OF AMICI

The South Carolina Department of Transportation ("SCDOT") and the Municipal Association of South Carolina (hereinafter, "MASC" or "Municipal Association") are the amici curiae in this matter.

In *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542 (7th Cir. 2003), Judge Posner noted the appropriateness of amicus curiae briefs in cases "in which the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case; or in which the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide." *Id.* at 545; *see also, Sossamon v. Greater Gaffney Metropolitan Utilities Area*, 236 S.C. 173, 113 S.E.2d 534 (1960) (granting permission to file a brief of amicus curiae to the cities of Greenville, Spartanburg, Rock Hill, Charleston and Easley in an action instituted by certain citizens and taxpayers of Cherokee County). SCDOT and MASC both have unique perspectives and will be materially affected by the decision in this case as is further explained below.

SCDOT has "as its functions and purposes the systematic planning, construction, maintenance, and operation of the state highway system and the development of a statewide intermodal and freight system that is consistent with the needs and desires of the public." S.C. Code Ann. § 57-1-30(A). SCDOT has the duty and power to "acquire such lands, road building materials, and rights-of-way as may be needed for roads and bridges by purchase, gift, or condemnation …." S.C. Code Ann. § 57-3-110(2). SCDOT has a further, significant duty to pay just, or fair, compensation to landowners when their private property is acquired for public use. S.C. Const. art I. § 13(A); U.S. Const. Amendment V. Our Court of Appeals has noted that "[t]here is a keen public interest in the stewardship of public funds and a strong need to provide guidance

for future procurement decision." *Sloan v. Greenville County*, 356 S.C. 531, 554, 590 S.E.2d 338, 350 (Ct. App. 2003) (addressing whether or not certain design-build contracts for public projects complied with county procurement code.). This principle applies no less to real property acquisitions as it does to goods and services.

SCDOT has an interest in the particular issues on appeal and a valuable perspective on just compensation because it engages in a large number of property acquisitions to accomplish its responsibilities. SCDOT is possibly the single most active buyer of realty throughout the State and probably the most active condemnor in the State. According to reports generated by the agency, SCDOT engaged in an average of 649 property acquisitions for the years 2017-2022, with an average of over 104 condemnation filings over the same years -- fewer than 20% of the acquisitions.[1]

Year	Acquisitions	Condemnations
2017	560	70
2018	634	81
2019	552	126
2020	715	101
2021	676	108
2022	762	142

Furthermore, the "Roads Bill" (Act No. 40) passed by the South Carolina General Assembly in 2017 provided additional funding to SCDOT and the number of road improvement projects and the number of acquisitions will increase as additional funding comes online to reconstruct existing infrastructure systems.[2] One such current project is the Carolina Crossroads

[1] SCDOT Right of Way Data Management System Reports generated by the SCDOT Assistant Director of Right of Way for Headquarters Support. Reportedly, only about 5% of the condemnations proceed to trial and many of those will be because of clouded titles.

[2] SCDOT Strategic Plan 2018-2020, Executive Summary

project, which will reconfigure 14 miles of the I-20/26/126 corridor, will be conducted in five phases, and will require substantial property acquisition.

To fulfill its duties and functions, SCDOT must make a good faith determination of just compensation ("cause the property to be appraised") and offer the appraised amount to the landowner from whom property must be acquired for a public use. S.C. Code Ann. §28-2-70(A). As a steward of public funds, SCDOT must operate efficiently (S.C. Code Ann.§ 57-1-30(B)) and with consideration of the financial viability of a public project (S.C. Code Ann. § 57-1-370(B)(8)(a)) while also meeting its Constitutional responsibilities to pay just and fair compensation (S.C. Code Ann. § 57-1-370(E); S.C. Const. art. I § 13(A); U.S. Const. amend V).

In fulfilling its responsibilities and duties, SCDOT must use relevant, objective, and verifiable criterial to arrive at just compensation; that is, an appraisal used by SCDOT to determine just compensation must satisfy the Uniform Standards of Professional Appraisal Practice and the jurisprudence governing eminent domain issues. For SCDOT to use or accept any other criteria would be irresponsible and inconsistent with its fiduciary duties. Similarly, if SCDOT is asked to consider an appraisal obtained by a landowner of just compensation, it must consistently apply those same standards in evaluating that appraisal. In fulfilling its duties of responsibly administering State funds and paying just compensation, SCDOT has an interest in having the appropriate standards applied consistently and fairly in the State's trial courts.

The Municipal Association also has a fundamental interest in this matter. The MASC is a nonpartisan, non-profit association of the State of South Carolina's incorporated cities and towns. All 271 incorporated municipalities within the State are members of the Municipal Association. In addition to offering services and programs directly to its member municipalities, the MASC

promotes and represents the collective interests of municipalities throughout the State, both in the General Assembly and in the courts.

Municipalities have the power of eminent domain under several statutory grants. The general municipal right to condemn property for public use is found in S.C. Code Ann. § 5-7-50, which provides that "[a]ny municipality desiring to become the owner of any land or to acquire any easement or right-of-way therein for any authorized corporate or public purpose shall have the right to condemn such land or right-of-way or easement." With respect to property to be acquired for the construction and operation of public utilities, S.C. Code Ann. § 5-31-410 provides additional authority. Finally, the Eminent Domain Procedure Act, S.C. Code Ann. § 28-2-10, et seq., specifically recognizes that municipalities are among the types of public bodies that are "authorized by law to exercise the power of eminent domain." S.C. Code Ann. § 28-2-30(18).

Municipalities use this power of eminent domain to develop and provide transportation infrastructure, public utilities, law enforcement facilities, parks, gardens, and a wide variety of other projects to serve the public health, safety, and welfare. As such, municipalities have a substantial and vital interest in the correct determination of municipal rights and responsibilities concerning the exercise of eminent domain. In addition, the citizens of South Carolina's municipalities have a vital interest in ensuring that the courts apply the proper standards for reestablishment expenses. The costs of acquisitions by eminent domain are ultimately funded by the taxpayers of the state or municipality. Thus, this case presents issues of vital and constitutional importance to the MASC as the ruling will have a direct effect on the damages that municipalities must pay in condemnation cases.

STATEMENT OF FACTS

For the purposes of this Brief, Amici Curiae adopts the statement of facts as set forth in Respondent's Brief.

ARGUMENT

I. Appellant's renovation expenditures do not constitute personal property that was taken by Railways and are not subject to compensation.

Appellant's entire case is premised on the claim that it had to "incur and/or spend a significant amount of money for moving costs and reestablishment costs which is clearly 'personal property.'" App. Br., p. 14. Appellant then claims it is constitutionally entitled to just compensation because Railways took this personal property. This argument is flawed in several respects: 1) generally, personal property is not a part of just compensation in a condemnation action in which the real property is taken because the personal property can be moved; 2) Appellants improperly attempt to recharacterize a statutory condemnation case into an inverse condemnation case; and 3) Appellants' personal property was not physically taken or destroyed.

A) Personal property is not a part of just compensation unless physically appropriated.

While fixtures are a compensable element of damages in a condemnation case, "[a] landowner is not entitled to damages in condemnation actions for personal property not taken as a result of a highway condemnation." S.C. Dep't of Highways & Pub. Transp. v. Najma Recs., Inc., 288 S.C. 169, 170, 341 S.E.2d 649, 650 (Ct. App. 1986). *South Carolina State Highway Department v. Smith*, 253 S.C. 639, 172 S.E.2d 827 (1970)("When land is taken under the power of eminent domain, the ownership of personalty kept on the premises taken, but not permanently affixed thereto, is not affected; and the owner is entitled to remove same as was done here."). Personal property, unlike fixtures, can be removed from the condemned premises and, thus, is not taken. *Creative Displays, Inc. v. S.C. Highway Dep't*, 272 S.C. 68, 72-73, 248 S.E.2d 916, 918

(1978). In addition, our courts have specifically addressed the costs of removing personal property and held that those costs are not compensable as just compensation:

> A majority of the State Courts hold that, in the absence of a statute or agreement to the contrary, the removal costs of a stock of merchandise, or other personal property, and the breakages or other injury to such property caused by such removal, from a leasehold or fee in land, where there is an entire taking of the whole of the condemnee's estate under the sovereign power of eminent domain, cannot be considered as an element of damage, since such loss is not a taking of property.

Creative Displays, 272 S.C. at 72–73, 248 S.E.2d at 918, quoting *Williams v. State Highway Commission*, 113 S.E.2d 263, 266 (N.C. 1960).

Constitutionally, just compensation does not include relocation assistance. The United States Congress and the South Carolina General Assembly recognized that personal property, not condemned, would need to be relocated and that just compensation did not include this expense. Thus, in 1970, Congress established relocation assistance as a statutory remedy to address this financial impact on landowners. See, 42 U.S.C.A. § 4622 (providing for payment of actual moving expenses as well as reasonable expenses necessary to reestablish a displaced business of up to $25,000).[3] The General Assembly followed the lead of the federal government and enacted S.C. Code Ann. § 28-11-30, which provides for reestablishment expenses of up to $50,000.00, twice the amount allowed by federal law. The South Carolina Code makes it clear that this statutory remedy is separate and apart from constitutional just compensation stating: "Nothing in this chapter shall be construed as creating an element of damage in an eminent domain proceeding." S.C. Code Ann. § 28-11-70.

Moreover, in this case, the actual personal property located on the condemned parcel was moved to Appellant's new location, with the costs borne by Railways. Despite this fact, Appellant

[3] Section (a)(4) of the federal law limits the reestablishment expense payment to $25,000.00.

asserts that its money, which Appellant chose to spend on extensive renovations to its new location, somehow constitutes a taking by Railways.[4] Appellant determined how to reinvest the just compensation and how to relocate its personal property. Any upfitting of its new premises, above the statutory limit, is not a relocation expense but rather a capital investment of the award of just compensation.[5] Appellant's extensive expenditures on renovations to its new location "cannot be considered as an element of damage, since such loss is not a taking of property." *Creative Displays, supra.* As one treatise noted, just compensation ordinarily does not include compensation for loss to or destruction of good will or inability to relocate or here, compensation for complete renovation of a new location because "such items are generally held not to be directly attributable to the land but are peculiar to the owner. Thus their value is too speculative, remote and uncertain for accurate measurement." Martinez, John, 3 *Local Government Law* § 21:36 (Thompson Reuters, May 2022 Update).

B) Appellant's attempt to recategorize this matter as inverse condemnation is improper.

Appellant has improperly attempted to turn a statutory condemnation case, brought under the Eminent Domain Act, into an inverse condemnation case. There are two types of takings:

> On the one hand, there is government action that is "regulatory" that is, it defines or limits how far certain property may be used and enjoyed by its owner. On the other hand, there is government action that is "appropriative" that is, it mandates that some person other than the owner gets some or all of the use and enjoyment of the owner's property.

[4] The scope of relocation assistance is a legislative determination.

[5] It should be re-emphasized that Appellant was fully compensated by Railways for the expenses of moving its personal property to the location.

William P. Barr et. al., The Gild That Is Killing the Lily: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause, 73 Geo. Wash. L. Rev. 429, 436 (2005).

In support of its argument that it is entitled to compensation for the taking of personal property, Appellant tries to equate a statutory condemnation proceeding to an inverse condemnation and cites cases that do not apply. For example, Appellant relies on *Kiriakides v. Sch. Dist. of Greenville Cnty.*, 382 S.C. 8, 675 S.E.2d 439 (2009). *Kiriakides* explained that there were two types of inverse condemnation cases: one in which the government physically appropriates property but fails to initiate condemnation proceedings and the other, in which a government-imposed regulation effectively takes a property. Neither of those situations identified by *Kiriakides* apply to this situation. Railways has not physically appropriated the property without instituting condemnation proceedings nor is there a statute that effects a taking. Railways actually initiated condemnation proceedings in 2017 (which Appellant acknowledges on p. 1 of its Brief), pursuant to S.C. Code Ann. § 28-2-10, et seq. and named Appellant, a tenant, as a party. This matter involved the simple exercise of eminent domain for which Appellant was properly compensated.[6] Appellant's attempts to classify its voluntary funding of renovations to its new location as an inverse condemnation must be rejected.

[6] Appellant cites *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 281 S.E.2d 796 (1981), but that case involved the City's removal of a city sidewalk which resulted in a physical intrusion into a landowner's property and destruction of personal property onsite. Again, the case here was initiated by Railways as a condemnation case, which was settled and dismissed. Unlike *Berry*, Appellant's personal property was not destroyed (as discussed in Section C) and *Berry* has no application.

C) Appellant's property was not physically taken or destroyed.

Appellant cites a series of California cases in support of its argument that personal property is compensable in a takings case. *See*, pp. 12-13 of App. Brief. However, those cases do not apply as they are inverse condemnation cases that involve the destruction of the plaintiff's personal property. For example, in *Green v. Swift*, 47 Cal. 536 (1874), the government performed work on a river, which then flooded the plaintiff's property, killing his hogs and cattle. Similarly, in *Sutfin v. State*, 261 Cal. App. 2d 50 (Ct. App. 1968), the government's highway construction resulted in flooding waters that destroyed the plaintiff's cars. In *Affonso Bros. v. Brock*, 84 P.2d 515, 519 (3rd Dist. Cal. 1938), the government act involved the slaughtering of diseased cattle.

Here, there has been no destruction of the Appellant's personal property. Railways instituted a condemnation case and Appellant was compensated for its leasehold interest. None of its personal property was appropriated or destroyed and instead, the personal property was presumably moved to Appellant's new location. In fact, Railways compensated Appellant for the actual costs of moving personal property based on the bids received. R.p. 60.

Appellant chose to renovate a building for the business at a new location, for which it was entitled to (and did) receive the statutory limit of $50,000.00. Yet, Appellant claims it is entitled to $560,000 for this renovation, including over 400 hours of time for site visits by Appellant's owner (at $285 per hour). R. 158-206. These voluntary expenditures by Appellant do not create a compensable taking by Railways.[7] Moreover, Appellant has the possession and control over its new premises, including the benefit of the monies it spent. If this Court were to rule in Appellant's

[7] Appellant will undoubtedly argue that the expenditures were not voluntary in that it was forced to relocate pursuant to the condemnation. However, Appellant *was* in control how much it chose to spend on renovations at the new location, with the full knowledge that the limit for reestablishment expenses was $50,000.00. R.p. 61.

favor, it could open the floodgates as to claims for reestablishment expenses. There would be no limit to the amount a condemned business owner could claim and no guidance to condemning entities as to what could reasonably be included as reestablishment expenses. Thus, condemning authorities such as SCDOT and the member municipalities of MASC would, in effect, be forced to finance improvements of the business and subsidize paying business owners for their time in relocating, in addition to paying compensation for the value of the actual property interest that was condemned.

Appellant's continued reliance on *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015), as argued in reply, is misplaced. In *Horne*, the government had enacted a complex regulatory scheme in which it exercised physical control over private property. In that matter, the government physically collected a portion of Horne's raisin crop that Horne would otherwise have been able to sell. Thus, the court found that the government was obligated to compensate the property owner for taking possession of the private property.

Here, Railways did not "exercise physical control" over Appellant's private property (i.e., its money). Railways did not receive any monies from Appellant, nor did it force Appellant to engage in the extensive renovations to the new location. In fact, Appellant, pursuant to the requirements of the relocation program, submitted potential expenditures pursuant to a walkthrough with Railways that were approved.[8] R.p. 128-130; 135-136. Appellant then decided to make more extensive renovations than those approved and now claims that those expenditures constituted a taking by Railways. Neither the South Carolina Constitution nor the Code provide any basis to include these expenditures as compensable, nor does the case law support compensation.

[8] These included replacing windows, doors, drywall, flooring, roofing and more.

II. Constitutional just compensation is not unlimited and does not include reestablishment expenses.

The United States and South Carolina Constitutions both provide for "just compensation" when property is taken for public use. U.S. Const. Am. V; S.C. Const. Article 1, § 13(A). The South Carolina Code expressly defines just compensation for cases brought under the South Carolina Eminent Domain Procedure Act, S.C. Code Ann. § 28-2-10, et seq.:

> **S.C. Code § 28-2-370 Just compensation to include only value of property taken, damage to remaining land, and benefits to landowner.**
>
> In determining just compensation, only the value of the property to be taken, any diminution in the value of the landowner's remaining property, and any benefits as provided in Section 28-2-360 may be considered.

Id. It has been well-established in South Carolina, for over 70 years, that constitutional just compensation for property taken means the fair market value of the property. *See*, *Howell v. State Highway Dep't,* 167 S.C. 217, 166 S.E. 129, 130 (1932) (approving jury charge stating that "actual value of the land means the fair market value of the land, upon a fair market, upon fair advertisement, and a fair sale at normal times"). In South Carolina, the costs for reestablishment[9] are not compensable under the constitution and are permitted only under the state Relocation Assistance statute. S.C. Code Ann. § 28-11-70. That statute expressly notes that "[n]othing in this chapter shall be construed as creating an element of damage in an eminent domain proceeding."[10] *Id.*

[9] Moving expenses are established by actual bids and not capped. Appellant's actual moving expenses were paid by Railways, separate and apart from the reestablishment expenses at issue here.

[10] Appellant claims, in Footnote 1 of its Reply Brief, that South Carolina law defines property to include both real and personal property and thus it can recover for the "taking" of its money in a statutory eminent domain case. However, the code section Appellant cites, §14-1-10, is a general definition in the title of the code that governs the establishment of our courts, their powers,

Likewise, United States case law has held, for over a century, that businesses displaced as a result of eminent domain are not constitutionally entitled to reestablishment expenses. In *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), the court held that market value was the proper measure of damages and stated, "evidence of loss of profits, damage to good will, **the expense of relocation and other such consequential losses** are refused in federal condemnation proceedings." *Id.* at 377-78 (emphasis added); *see also*, *United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945) ("Even where state constitutions command that compensation be made for property 'taken or damaged' for public use, as many do, it has generally been held … that damage to those rights of ownership do not include losses to his business or other consequential damage.").[11] The

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jurisdiction, and operation. South Carolina has specifically defined property as it pertains to an eminent domain proceeding:

> "Property", "real property", or "land" means all lands, including improvements and fixtures thereon, lands under water, easements and hereditaments, corporeal or incorporeal, every estate, interest and right, legal or equitable, in lands or water and all rights, interests, privileges, easements, encumbrances, and franchises relating thereto, including terms for years and liens by way of judgment, mortgage, or otherwise.

South Carolina Code Ann. § 28-2-30(17). Clearly, if the General Assembly intended to include personal property, it could have.

[11] Appellant cites to *Olson v. United States*, 292 U.S. 246 (1934) for the proposition that just compensation includes personal property for an eminent domain case. However, that Court stressed that "[j]ust compensation includes all elements of value that **inhere in the property**, but it does not exceed market value fairly determined," and that "[c]onsiderations that may not reasonably be held to affect market value are excluded." *Olson*, 292 U.S. at 255-56 (emphasis added). *Black's Law Dictionary* (5th Ed.) defines "inhere" as "[t]o exist in and inseparable from something else." A party's personal property does not inhere in the property and does not affect market value. As noted in the other case upon which Appellant relies, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949), "[t]he value compensable under the Fifth Amendment … is only that value which is capable of transfer from owner to owner." Again, personal property (in contrast to a fixture) is not a part of or transferred with the property. Here, Appellant moved its

District Court of South Carolina has also expressly held that "the expense[s] of relocation … are not allowed in federal condemnation proceedings."[12] *United States v. 7,216.50 Acres of Land*, 507 F. Supp. 228, 235-36 (D.S.C. 1980).

Moreover, there are many limitations, besides reestablishment expenses, on constitutional just compensation. For example, courts across the country have held that just compensation does not include the lost profits of a business located on land taken for public use. *See*, *e.g., West Virginia Dep't of Transp., Div. of Highways v. W. Pocahontas Properties, L.P.*, 777 S.E.2d 619, 626 (W.Va. 2015) ("It is a well-established rule in the law of eminent domain that a jury may not award just compensation for the lost profits of a business on land taken by condemnation."); *Dep't of Transp. v. Gilling*, 796 N.W.2d 476, 484 (Mich. Ct. App. 2010) (noting the established proposition that lost profits are not compensable as just compensation). Other courts have noted that attorneys' fees are not a part of constitutional just compensation (though they may be recoverable pursuant to statutory law). *See*, *Ellis v. Arkansas State Highway Comm'n*, 363 S.W.3d 321, 327 (Ark. 2010) (acknowledging precedent that found that attorney's fees were not component of just compensation unless the condemnor acted in bad faith).

It is completely logical and reasonable that the limitations on just compensation extend to reestablishment costs:

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personal property to a new location and was compensated for moving expenses. Appellant's expenditures for improvements to the building at its new location (which Appellant claims are the taken "personal property") do not "inhere in the property" of the condemned location and should not be considered just compensation.

[12] South Carolina state courts follow federal takings case law. *See, e.g.*, *Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007) ("South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with someone's property amounts to a constitutional taking.")

> The view sustained by the great majority of the cases is that an owner of real property taken or damaged in eminent domain is not entitled to compensation for the cost of removal of personal property from the premises.

69 A.L.R.2d 1453 (Originally published in 1960). The United States Supreme Court has expressly held that relocation expenses were only recoverable if provided for by statute:

> Ordinarily, the cost of removing personal property from land taken is not a proper element of damage unless made so by express statute, and it was not an unconstitutional exercise of power for the Legislature, in creating the right, to define its extent.

Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 676 (1923) (internal citation omitted) (emphasis added). *See also*, *Williams v. State Highway Comm'n*, 113 S.E.2d 263, 266 (N.C. 1960) ("[E]xpenses of removal or of relocation of personal property are not to be included in valuing property taken, where there is an entire taking of a condemnee's property, whether that property represents the interest in a leasehold or a fee."). There are valid reasons why relocation costs are excluded from just compensation:

> Just compensation ordinarily does not include compensation for loss to or destruction of good will, loss of profits, inability to relocate or frustration of future plans. The rationale is that such items are generally held not to be directly attributable to the land but are peculiar to the owner. Thus their value is too speculative, remote and uncertain for accurate measurement. Since they are not attributable to the land they furnish no reliable criteria for the fixing of market value at the time of the taking. Thus, the extent to which business related damages are compensable depends wholly on the meaning and intent of applicable statutory law.

Martinez, John. 3 *Local Government Law* § 21:36 (Thompson Reuters, May 2022 Update).

In the instant case, the Circuit Court's finding that reestablishment expenses were not a component of just compensation is consistent with the condemnation case law in this state and is the position taken by the majority of courts across the United States.

III. The limitation on reestablishment expenses in S.C. Code Ann. §28-11-30(4) is legal and constitutional.

A constitutional challenge to a statute involves a heavy burden of proof on behalf of the challenger because all statutes are presumed constitutional. *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). "A possible constitutional construction must prevail over an unconstitutional interpretation."Id. at 597-70, 549 S.E.2d at 597 (internal quotations omitted). South Carolina's Relocation Assistance statute provides certain payments for displaced persons and entities. S.C. Code Ann. § 28-11-10, et seq. Appellant claims that the financial cap on reestablishment expenses in the statute is unconstitutional. However:

> A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.

S.C. Hum. Affs. Comm'n v. Zeyi Chen, 430 S.C. 509, 528-29, 846 S.E.2d 861, 871 (2020) (internal quotation marks and citation omitted). Appellant has failed to meet this heavy burden.

The federal Uniform Relocation Assistance and Real Property Assistance Policies Act of 1970 ("federal Relocation Act"), from which South Carolina's relocation statute is drawn, provides for payment of (1) actual moving expenses, (2) direct losses of tangible personal property as a result of moving, (3) actual reasonable expenses in searching for a replacement site, and (4) actual reasonable expenses necessary to reestablish a displaced business, not to exceed a specified amount. 42 U.S.C. § 4622; S.C. Code Ann. § 28-11-30. While the federal law caps reestablishment expenses at $25,000, the South Carolina Code increased that amount to $50,000.00. *Id.* At issue in this case is S.C. Code Ann. § 28-11-30(4) which states:

> Reestablishment expenses related to the moving of a small business, farm, or nonprofit organization payable for transportation projects pursuant to federal guidelines and regulations may be paid in an amount up to fifty thousand dollars, notwithstanding a lower limitation imposed by federal regulations.

Id. (emphasis added). This statutory reestablishment payment is separate and distinct from just compensation for the condemnation of a real property interest, such as a fee simple or leasehold interest. In fact, S.C. Code Ann. § 28-11-70 specifically states: "Nothing in this chapter shall be construed as creating an element of damage in an eminent domain proceeding."

Appellant claims that the use of the phrase "may be paid" supports its argument that the statutory payment is intended to be an addition to expenses paid as part of the constitutional "just compensation." However, it is clear from the statute as a whole that the phrase indicates merely that reestablishment expenses may not be present in every case –or that those expenses may be far less than the statutory cap. The basic rule of statutory construction is that words must be given their plain and ordinary meaning. *Adkins v. Varn*, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993). The word "may" signifies "permission and generally means the action spoken of is optional or discretionary." *Robertson v. State*, 276 S.C. 356, 358, 278 S.E.2d 770, 771 (1980). When the question arises as to whether may is to be interpreted as mandatory or permissive in a particular statute, legislative intent is controlling. *Id*.

S.C. Code Ann. § 28-11-30 addresses reimbursement for certain expenses, including recording fees incidental to transfer or title, real property taxes, and attorneys' fees. That provision, in its current basic form, was originally enacted by Act No. 1577 of 1972, several years after the enactment of the federal Relocation Act for projects using federal money and reestablishment expenses. In 2010, South Carolina added subsection (4) to S.C. Code Ann. § 28-11-30,[13] providing

[13] South Carolina's relocation assistance statute expressly incorporates all payments that are required to be made to displaced persons under the federal Relocation Assistance Act, and makes such payments applicable on all projects in South Carolina regardless of whether state or federal funds are used. S.C. Code Ann. § 28-11-10. *See*, *Brown v. City of North Charleston*, 314 S.C. 298, 300, 442 S.E.2d 633, 635 (Ct. App. 1994) ("[T]he statute contains plain language expressing the legislative intention to supply relocation assistance 'whether the program or project is federally aided or not.'").

reestablishment expenses of up to $50,000 for small businesses, farms, and non-profit organizations. Legislative history shows little, if any, debate or amendments to this addition. In other words, the legislative intent here is clear that the General Assembly was not broadening constitutional "just compensation." Instead, the General Assembly, which had already adopted portions of the federal law on relocation, simply adopted the federal law on reestablishment expenses for small businesses, though at an increased amount of compensation.[14] As noted previously, under federal jurisprudence, relocation expenses are not considered part of the constitutional just compensation. *United States v. 7,216.50 Acres of Land*, *supra.* There is nothing in the language of the statute or the legislative intent that demonstrate the General Assembly was attempting to expand constitutional just compensation in eminent domain cases.

Appellant has offered no basis upon which it can be said that the South Carolina General Assembly's statutory cap of $50,000 for reestablishment expenses is repugnant to the constitution beyond a reasonable doubt. South Carolina's relocation assistance mirrors the federal Relocation Assistance Act and, in fact, has a more favorable limit on reestablishment expenses. The $50,000 statutory limit on reestablishment expenses is not unconstitutional.

IV. Other states' recognition of moving and/or reestablishment expenses as part of just compensation as a matter of state law is irrelevant.

Appellant argues that this Court should reject years of case law and adopt the position of other states[15] that have allowed reestablishment expenses to be included as just compensation in eminent domain cases. Appellant primarily relies on the law of two states, Florida and Michigan, for its claim that South Carolina should adopt such a holding. None of the cases are persuasive. In

[14] The federal Relocation Act limits the reestablishment expenses to $25,000.

[15] Those states appear to be in the minority in holding reestablishment costs are a part of just compensation.

a Florida case entitled *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289. 291 (Fla. 1958), the appellate court noted that:

> [T]he current weight of authority in the United States supports appellant's contention that no compensation to the owner for the cost of moving his personal property should be allowed.

In spite of that, the court ruled that, under existing Florida law, the moving expenses could be factored in. Of course, in the case before this Court, moving expenses are not at issue as Railways paid for these.

Du Pree was later limited by two other cases, one of which noted, that the *Du Pree* court "probably went the last mile, so to speak." *Florida E. Coast Ry. Co. v. Martin Cnty.*, 171 So. 2d 873, 877 (Fla. 1965). A subsequent Florida case held that *DuPree* could not be extended and to do so would "lead to a stampede into the field of damages" in condemnation cases. *State Rd. Dep't v. Bramlett*, 189 So. 2d 481, 483 (Fla. 1966). Ultimately, the court in *Bramlett* found that the lower court had erred in erred in awarding business compensation in addition to the value of the land, appurtenances, the lease, and the remaining value of the land.

The Michigan case, *Department of Transportation v. Gilling*, 796 N.W.2d 476 (Mich. Ct. App. 2010), which allowed relocation expenses, was also based exclusively on state law, not federal law. As noted earlier, South Carolina follows federal jurisprudence on this issue. In addition, even the *Gilling* case found that that just compensation as not without limits, ruling that lost profits were not compensable. Appellant argues that, because the South Carolina constitutional provision on takings is the same as Michigan's, this state should adopt the holding in *Gilling*. However, Michigan case law reflects a long history of including other costs in just compensation. For example, the court in *Grand Rapids & I.R. Co. v. Weiden*, 38 N.W. 294, 295 (Mich. 1888) permitted the condemned party to be compensated for the interruption to its business. South

Carolina, following federal case law, has never included any other category of damages in a takings case, other than the market value of the property itself.

V. The fact that the constitutional provisions in South Carolina and Michigan are similar is not unique and does not form a basis requiring our state to adopt Michigan case law.

Appellant claims that Michigan's constitutional just compensation is identical to the South Carolina constitution. Art X, § 2 of the Michigan constitution states: "Private property shall not be taken for public use without just compensation." South Carolina's constitution states: "[p]rivate property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property." Art. I, §13. The similarity is unremarkable; most states use almost identical constitutional language, but their courts have nevertheless ruled that moving expenses are not a part of constitutional just compensation.

For example, the Connecticut Constitution, Art. I §11 states: "The property of no person shall be taken for public use, without just compensation therefor." Yet, in *Slavitt v. Ives*, 303 A.2d 13, 21–22 (Conn. 1972), the court held that the tenant's moving expenses were not a proper element of damages, stating:

> In general, the lessee's cost of removing his personal property from the land condemned is not an element meriting consideration whether such item is considered as a separate, substantive element of damages or whether it is considered insofar as its effect on market value of the leasehold is concerned. "The reasons for not allowing this damage (tenant's moving expense) are: (1) That the tenant would have to move anyhow, and this is one of the incumbrances attaching to the act of placing personal property on leased premises; (2) it is not within the language of the Constitution – that the expense of moving it is neither a taking nor a damaging of the property." In the absence of a statute the moving expenses of a lessee, where there is an entire taking of the whole of the condemnee's estate under the sovereign power of eminent domain, cannot be considered as an element of damage, since such a loss is not a taking of property.

Id. (internal citations omitted).

Similarly, Colorado's constitution states: "Private property shall not be taken or damaged for public or private use without just compensation." Colo. Const. Art. II, § 15. The Colorado Supreme Court held that it did not "perceive that there is any constitutional right to relocation benefits or assistance" other than those supplementary benefits as granted by statute. *Auraria Businessmen Against Confiscation, Inc. v. Denver Urb. Renewal Auth.*, 517 P.2d 845, 849 (Colo. 1974). Most states have reached the same conclusion. *See*, e.g. *Redevelopment Auth. of City of Nanticoke v. Spencer*, 350 A.2d 442, 444-445 (Pa. Commw. Ct. 1976) ("We would further observe that the inability to relocate one's business taken in condemnation cannot vitiate or negate the power of condemnation otherwise enjoyed by the Authority nor does the cost of such relocation, if relocation is possible, enlarge one's constitutional entitlement to just compensation…. That the legislature has seen fit to provide for such payments subject to the expressed conditions and limitations found [the code] does not enlarge one's constitutional right to just compensation for property taken."); *City of Janesville v. CC Midwest, Inc.*, 734 N.W.2d 428, 438 (Wis. 2007) ("[We] conclude that the relocation assistance benefits provided by [statute] do not have a direct relationship to the fair market value of a tenant's interest, and therefore, are incidental or consequential damages that are not considered in the constitutional requirement for just compensation."); *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289, 291 (Fla. 1958) ("Admittedly the current weight of authority in the United States supports appellant's contention that no compensation to the owner for the cost of moving his personal property should be allowed."). South Carolina courts should follow the weight of authority, which has concluded that constitutional just compensation does not include reestablishment expenses.

CONCLUSION

For years, South Carolina courts have rejected the notion that the costs or removing or relocating personal property constitutes damages where there is a total taking of an entire parcel of real property. Furthermore, the South Carolina Constitution does not include reestablishment expenses as just compensation in eminent domain. To so rule would eliminate all guidelines in condemnation cases and force condemning authorities to finance a condemnee's improvements rather than compensating the condemnee for the property actually taken. Reestablishment costs are only permitted as dictated by statute, which limits reimbursement to $50,000.00. Deviation from well-established case law and procedure is not warranted.

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge
Case No. 2019-CP-10-04387
Appellate Case No. 2021-000051

Applied Building Sciences, Inc.,

Appellant,

v.

South Carolina Department of Commerce,
Division of Public Railways,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief complies with Rule 211(b), SCACR and the Supreme Court's April 15, 2014 Order on Personal Identifying Information.

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