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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No.: 2024-000582
Circuit Court Case No. 2021-CP-40-04582

South Carolina Department of Transportation,Appellant,

vs.

Briargate Condominium Association, Inc. (HOA) and Mohammed Arabi,
as class representative for himself and all unit owners, to pursue just
compensation for all unit owners, Respondents,

and

Magna Capital, Mortgagee, The National Bank of South Carolina,
Mortgagee, South Carolina Department of Revenue, Tax Liens,
Arrow Financial Services, LLC, Judgment, Portfolio Recovery
Associates, LLC, Judgment, The National Bank of South Carolina,
Mortgagee, State Employees Credit Union, Mortgagee, NBSC a
division of Synovus Bank, Mortgagee, Carolina First Bank,
Mortgagee, Richland County, Judgment, Bank of America, N.A. c/o
Cooling & Winter, LLC, Judgment, Department of Treasury-
Internal Revenue Service, Judgment, HSBC Mortgage Corporation,
Mortgagee, First Community Bank-Gilbert, Mortgagee, America's
Wholesale Lender, Mortgagee, William R. Hollingsworth, Jr. and
Myong Hollingsworth, Mortgagee, First Palmetto Savings Bank,
Mortgagee, MERS as nominee for ERA Mortgage, Mortgagee, The
Resolution Trust Corporation as Receiver for Metropolitan Federal
Savings and Loan Association, Mortgagee, Wachovia Bank
National Association, Mortgagee, The Resolution Trust
Corporation as Receiver for Metropolitan Federal Savings and Loan
Association, Mortgagee, Brittany Frances Minogue, Mortgagee,
Mutual Savings Bank, F.A., Mortgagee, Richland County Tax
Assessor, Delinquent Taxes, Bank of America, N.A., Mortgagee,
UCC Financing, Miriam Properties Group, LLC, Turnberry
Associates, Inc., Mathes Auto Sales, Inc., BB&T of South Carolina,
Navy Federal Credit Union, Briargate Condominium Association,
Inc., Foreclosure Action,

Other Condemnee(s).

CONDEMNOR’S MEMORANDUM IN SUPPORT OF APPEALABILITY

Condemnor South Carolina Department of Transportation (“SCDOT” or “Condemnor”) respectfully submits this Memorandum in Support of Appealability in response to the Court of Appeal’s request dated April 16, 2024, with an extension granted on April 18, 2024.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

On September 9, 2021, Condemnor filed a Condemnation Notice and Tender of Payment (“Condemnation Notice”) with the Richland County Common Pleas Court to initiate the condemnation of property owned by members of the Briargate Condominium Association, Inc, a South Carolina horizontal property regime (“Briargate” or “horizontal property regime”). Tract 195 is identified as the subject property of the September 9, 2021 filing (“Tract 195 Case”). The acquisition is necessary to construct improvements for the Carolina Crossroads project (the “Project”) in Richland and Lexington Counties. The Project is one of the largest in South Carolina history and involves the reconfiguration of 14 miles of the I-20, I-26 and I-126 corridors. The Project will be constructed in several phases with each preceded by necessary land acquisition.

In this case, SCDOT has permanently acquired a total of 0.715 acres (31,412 square feet) of common elements which is necessary to construct improvements for the Project. In addition, SCDOT has temporarily acquired 1.03 acres, also of common elements, which is needed for project construction and utility relocation.

The area of acquisition is a portion of the Briargate *common elements only*, as evidenced by Exhibit A to the Condemnation Notice (attached hereto as “**Exhibit 1**”). Briargate is a condominium complex governed by a master deed and formed in accordance with the South Carolina Horizontal Property Act. Briargate, before the SCDOT acquisition, consisted of 336

individual residential units/apartments (contained within 15 residential buildings), 30 garage units and other common elements.

The Tract 195 acquisition impacts common elements only, including a garage building and garage units; residential units within the acquisition area (24 in total) are owned by individuals and separate condemnation proceedings were commenced to acquire those units. The remaining 312 residential units and garage units are situated outside of the acquisition area and will not be disturbed. The majority of the 24 individual unit cases that are the subject of separate condemnation proceedings have been resolved; those that are not resolved remain as pending filed condemnation actions. Attached hereto as **Exhibit 2** is a plat/sketch showing the permanent and temporary acquisition areas; importantly, separate condemnation actions were commenced to acquire the residential units shown within the acquisition area.

In the Tract 195 Case and pursuant to the terms and provisions of the South Carolina Eminent Domain Procedure Act (the “Act”), SCDOT named all Briargate unit owners as Landowners, a term defined in the Act, due to each unit owner’s undivided fee simple interest in the *common elements* of the horizontal property regime. SCDOT attempted service on all named Landowners and Other Condemnees and served notice by publication. In the separate actions for acquisition of individual unit owners, SCDOT served the owners as well as Other Condemnees, such as lienholders, who have an interest in those units.

At the time of filing, SCDOT deposited two-hundred thirty-six thousand and 00/100 dollars (\$236,000.00), its estimate of just compensation, with the Clerk of Court. That amount, plus accrued interest, remains on deposit with the Clerk of Court.

On October 10, 2023, named Landowner Mohammed Arabi (“Arabi”) filed a Motion to Certify Class (“Motion to Certify”) with the Richland County Common Pleas Court. Arabi is named as a Landowner in the instant case due to his undivided fee simple interest in the common

elements. Further, Arabi (or one of his entities) owns five individual units situated within the area of acquisition. Each of those five units is the subject of separate condemnation actions currently pending in Richland County; each of the five individual unit cases were filed in November 2022. Arabi also owns several units outside of the acquisition area.

Via WebEx on January 9, 2024, the Honorable Eugene C. Griffith, Jr. held a hearing on Arabi's Motion to Certify. Appearing on behalf of Landowners/Arabi and arguing in support of the Motion to Certify were attorneys Thomas H. Pope III, Walter H. Bundy, Jr., and M. Brent McDonald. David Pagliarini, Esq. appeared on behalf of SCDOT, arguing in opposition to the Motion to Certify.

On February 5, 2024, Judge Griffith executed an Order Granting Motion to Certify Class and Scheduling Order ("February 5 Order"). SCDOT filed a Motion to Reconsider on February 15, 2024; Landowners filed a Memorandum in Opposition to Motion to Reconsider on February 27, 2024. Judge Griffith denied SCDOT's Motion to Reconsider on March 15, 2024, and signed an Order Approving Class Notice and Exclusion Request Form March 25, 2024 ("March 25 Order").

The February 5 Order grants Landowner's Motion to Certify, appoints Mohammed Arabi as class representative, and defines the class as "[a]ll unit owners at Briargate seeking just compensation and/or damage to remainder who have not settled with SCDOT as of January 22, 2024." (Order at 8). Those with units inside the area of acquisition are now permitted to make just compensation claims as part of the class despite the fact that (i) their units are individually owned and not shared with the other owners; (ii) separate awards of just compensation must be determined for each unit; and (iii) direct condemnation actions have been filed and are pending in each of these cases so that owners can litigate their individual just compensation claims. Finally, those with units outside of the acquisition area are now granted rights in a direct condemnation action and can make

damages claims, even though SCDOT has not acquired rights to those units. Prior to the February 5 Order, these unit owners would have had to pursue inverse condemnation claims which are subject to a different standard than a direct condemnation action.

On March 25, 2024 the court executed an Order approving the Class Notice and Exclusion Request Form.

SCDOT appeals the February 5 and March 25, 2024 Orders.

LEGAL STANDARD

I. Appellate jurisdiction in law cases, S.C. Code Ann. § 14-3-330 (1976)

The issue is whether the orders granting class certification in this case are immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2).

SCDOT acknowledges that orders certifying class actions are interlocutory and therefore generally not appealable at this stage. Salmonsens v. CGD, Inc., 377 S.C. 442, 661 S.E. 2d 81 (2008). However, the Salmonsens court recognizes that reviews of “interlocutory orders involving class certification [occur] when they contain other appealable issues.” Id. at 449.

S.C. Code Ann. § 14-3-330 provides, “[t]he Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and therefore shall review upon appeal: ... (2) [a]n order affecting a substantial right made in an action when such order ... (b) *grants or refuses a new trial.*” (emphasis added).

II. Horizontal Property Act, S.C. Code Ann. § 27-31-10, et. seq. (1976)

The issue is whether the Landowners named in the Tract 195 Case, a direct condemnation action limited to acquisition of common elements, have a right to just compensation as members of a class action for (i) the individually owned and titled apartment units that have been acquired in addition to a share of the just compensation owed to them as fee simple owners with an undivided interest in the Briargate common elements; and (ii) the units outside of the area of

acquisition, which are not affected by the acquisition and, therefore, have not been directly condemned.

S.C. Code Ann. § 27-31-20(a) defines apartment as “a part of the property intended for any type of independent use...including one or more rooms or enclosed spaces located on one or more floors (or parts thereof) in a building[.]”

S.C. Code Ann. § 27-31-20(c) defines condominium ownership as “the individual ownership of a particular apartment in a building and the *common right to a share*, with other co-owners, *in the general and limited common elements of the property*.” (emphasis added). General common elements are defined to include, among other things, “[t]he land whether leased or in fee simple...on which the apartment or building stands” and “[a]ll other elements of the property, in existence or to be constructed or installed, rationally of common use[.]” S.C. Code Ann. § 27-31-20(f)(1); S.C. Code Ann. § 27-31-20(f)(7).

Finally, S.C. Code Ann. § 27-31-60(a) provides the property rights of a condominium owner, as follows:

[a]n apartment owner shall have the exclusive ownership of his apartment and *shall have a common right to a share, with the other co-owners, in the common elements* of the property, equivalent to the percentage representing the value of the individual apartment with relation to the value of the whole property. (emphasis added).

III. The Eminent Domain Procedure Act, S.C. Code Ann. § 28-2-10, et seq. (1976)

The issue is whether the granting of a class in the instant case is averse to the mode of trial provided by The Eminent Domain Procedure Act, S.C. Code Ann. § 28-2-10, et seq. (the “Act”). Specifically, whether the lower court, by its February 5 Order, granted rights for individual unit owners – both those whose units are being acquired and those whose units remain untouched by the acquisition – and whether those newly created rights require the finder of fact to determine multiple just compensation awards.

The Act specifies the parties to be named in a condemnation action. Specifically, S.C. Code Ann. § 28-2-30(12) provides the definitions of “Landowner” and “Condemnee,” as follows:

Landowner means one or more condemnees having a record fee simple interest in the property condemned or any part thereof, as distinguished from condemnees who possess a lien or other nonownership interest in the property; where there are more than one, the term means the condemnees collectively, unless expressly provided otherwise. (internal quotations omitted).

The Act further provides a definition for “[p]roperty, real property, or land” as “*every estate, interest and right, legal or equitable, in lands ... and all rights, interests ...relating thereto.*” S.C. Code Ann. § 28-2-30(17) (emphasis added).

Finally, the sole issue at trial is the determination of just compensation for the rights acquired. S.C. Code Ann. § 28-2-370 provides, “[i]n 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.” (emphasis added). Importantly, the complexities of which the statutorily defined Landowners and other Condemnees are due what portion of just compensation are not determined at trial; rather, the Act provides a separate, equitable mechanism for such a determination. See S.C. Code Ann. § 28-2-460.

IV. Class Actions, Rule 23(a), SCRCF

Prerequisites to class certification pursuant to Rule 23(a)(2), SCRCF and Rule 23(a)(3), SCRCF are that “there are questions of law or fact common to the class,” and “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” In direct opposition to Rule 23(a)(2), (3), SCRCF, if the trial court Orders remain, a jury now must decide (i) the amount of just compensation due to each *individual* unit owner whose unit is acquired (despite there being separate actions commenced for these acquisitions), and (ii) damages claims by the remaining 312 owners whose units SCDOT has not directly condemned. The condemnation

action as originally filed in the Tract 195 Case appropriately provides a just compensation award merely for the acquired common elements.

LEGAL ARGUMENT

I. An apartment owner of a condominium holds a record fee simple interest in the common elements and, therefore, must be named as a “Landowner” of the subject property, pursuant to the Act.

Because the individual apartment owners have a record fee simple interest in the common elements of Briargate, SCDOT named the individual unit holders as Landowners of the common area elements in accordance with the Act. S.C. Code Ann. § 28-2-30(12).

The just compensation award for the Tract 195 Case (specifically identified as Tract 195 in the SCDOT project plans) is only for the common area elements of Briargate. Exhibit A of the Condemnation Notice, attached hereto as **Exhibit 1**, identifies the area of acquisition in this case is for common elements only. Specifically, **Exhibit 1** delineates Tract 195, the subject tract of the instant case, from Tracts 195A through 195X, the subject tracts of separately commenced condemnation actions for the individually owned apartment units impacted by the project.

In Judge Griffith’s February 5 Order, the court suggests that “the Condemnation Notice, which lists as ‘Landowners’ the HOA and all unit owners, does not restrict its scope to common elements only since the claims of unit owners must be addressed to have full closure of this matter.” (Order at 5.) This is both factually and legally incorrect. As evidenced by **Exhibit 1**, SCDOT commenced separate condemnation actions to address those individual unit owners’ claims whose property was directly condemned.

Because the apartment owners hold separate fee simple interests in the common elements of the property condemned, SCDOT was obligated to individually name each Landowner in the instant action in accordance with both S.C. Code Ann. § 27-31-60(a) and S.C. Code Ann. § 28-2-30(12). Presumably, SCDOT could have solely named the HOA as Landowner: Pursuant to the

section (6), subsection (17) of the horizontal property regime bylaws, attached hereto as **Exhibit 3**, HOA powers include “maintain[ing] or defend[ing] any action in any court or other proceeding on behalf of the Unit Owners which arises in connection with the Common Elements.” However, a strict reading of S.C. Code Ann. § 28-2-30(12) indicates a requirement that each apartment owner be named because they have an undivided “record fee simple interest” in the common elements.

II. The Orders define the Class to include those apartment owners with just compensation claims specific to their individual unit and outside the common area; this is a fact-specific analysis that requires separate jury determinations and is inconsistent with class action certification requirements.

The trial court Orders directly violate the provisions of the Act by conflating an acquisition for common elements only with multiple individual actions. Class counsel contends that “[i]n granting the Motion to Certify, the lower court found and concluded that, without class certification, adjudication of the just compensation claims ‘would potentially involve over 160 trials and that closure would be protracted, with no end in sight.’” (Landowner’s Response to Court of Appeal’s Request for Memoranda and Motion to Dismiss Appeal as Interlocutory at 5) (citing Order at 8). SCDOT maintains that this is procedurally incorrect. The just compensation determination for Tract 195 requires only *one* jury trial and a singular determination of just compensation; any argument contending the action of which Tract 195 is the subject property involves multiple just compensation awards is legally inaccurate.

The February 5 Order defines the class to be “all unit owners at Briargate seeking just compensation and/or damage to the remainder who have not settled with SCDOT as of January 22, 2024.” (Order at 9). Specifically, the February 5 Order provides that “[t]hese owners have claims (or potential claims) for just compensation to 336 units and damages to remainder regardless of the fact that many claims may be for damage to the remainder and outside the common area acquired.” (Order at 7-9). If this class remains in effect, it will expand the scope of

the acquisition beyond common area elements by including just compensation findings for individual units, thereby negatively affecting the mode of trial set forth by the Act and in accordance with the definitions of S.C. Code Ann. § 27-31-20, et. seq.

Without class certification, the mode of trial for the Tract 195 Case is simple: The HOA, having the sole right to manage cases involving common elements pursuant to the horizontal property regime documents (attached hereto as **Exhibit 3**), can settle or manage the trial and the jury will make *one decision as to just compensation for the acquisition of common elements*.

Landowner repeatedly argues that “unit owners are entitled to seek just compensation for the non-common elements.” (Landowner’s Response to Court of Appeal’s Request for Memoranda and Motion to Dismiss Appeal as Interlocutory at 6). SCDOT agrees in principle that individual unit owners are entitled to seek just compensation, which is why Condemnor brought separate, distinct actions to acquire the individually owned units within the acquisition area affected by the project (Tracts labeled 195A through 195X on **Exhibit 1** were commenced as separate condemnation actions).

Ultimately, the trial court has permitted individual unit owners to make just compensation claims involving the fair market value of their individually owned units. If this case is permitted to proceed as a certified class, the following verdicts would be required at trial:

1. Just compensation for the common elements acquired;
2. Just compensation for each of the individual units situated within the area of acquisition that are being demolished (seven of these separately filed cases remain and all others have been settled); and
3. Any damages claims made by the remaining 312 individual residential unit owners situated *outside of the acquisition area*, who, prior to the trial court’s Order, had no such direct just compensation claims. Prior to the February 5 Order, these unit owners would have been

required to lodge inverse condemnation claims which carry a substantively different burden than direct condemnation cases. Further, Other Condemnees, such as mortgagees, will not have notice of the claims or their potential interest in the just compensation proceeds.

Significantly, a determination of just compensation is a fact-specific inquiry, with each individual unit holder having “unique property interests and expectations” that require “extensive examination of circumstances.” Beroth Oil Co. v. N.C. Dep’t of Transp., 367 N.C. 333 at 343, 757 S.E. 2d 466 at 474 (2014) (internal quotations omitted). The trial court Orders require that a jury determine just compensation for the units within the acquisition area and for those units outside the acquisition area where the owners prematurely claim damages. Pursuant to basic property law and eminent domain principles, just compensation awards for individually owned units require individual analysis and verdicts: “It is well settled that when the whole or part of a particular tract of land is taken for public use, the owner of such land is not entitled to compensation for damages to separate and independent parcels belonging to him which results from the taking.” S.C. State Hwy. Dep’t v. Terrain, Inc., 267 S.C. 186 at 192, 227 S.E.2d 184 at 186 (1976) (citing Nichols on Eminent Domain (3rd Ed.) Sec. 14.3; Sharpe v. United States, 191 U.S. 341, 24 S.Ct. 114, 48 L.Ed. 211 (1903)).

Condemnor rejects the concept raised by the February 5 Order “that claims of unit owners must be addressed to have full closure of this matter.” (Order at 5). Specifically, Condemnor reiterates that *the Tract 195 Case* – specifically, the condemnation of the common elements of Tract 195 – is inherently separate from those condemnation matters that were otherwise commenced for individual units. The Terrian court explains, “[o]rdinarily, the determination of whether two or more parcels constitute one tract for the purpose of offsetting damages with benefits to the remaining property received as a result of the public improvement is one of law for

the court. Only where there is factual doubt as to use, contiguity of common ownership depending on conflicting evidence may the court submit the issues to the jury.” 267 S.C. at 193.

In the Tract 195 Case, there is no common ownership of the common elements and the 336 individual units. The common elements are owned by each of the unit owners, each with an undivided fee simple interest. S.C. Code Ann. § 27-31-60(a) succinctly lays this out: “An apartment owner shall have the *exclusive* ownership of his apartment and shall have a common right to a share, with the other co-owners, in the common elements of the property, *equivalent to the percentage representing the value of the individual apartment*[.]” Moreover, the units are individually owned; therefore, a determination of just compensation for each must be made based on a multitude of factors including, but not limited to, size, condition, and location. See Beroth Oil Co., 367 N.C. 333.

Finally, there are no pending actions involving the units outside of the acquisition area because the project will not affect those apartment units. Apartment owners who wish to claim damages to such units have a legal right to pursue inverse condemnation claims against the SCDOT. See Hardin v. S.C. Dep’t of Transp., 371 S.C. 598, 641 S.E.2d 437 (2007); Hilton Head Automotive, LLC v. S.C. Dep’t of Transp., 394 S.C. 27, 714 S.E.2d 308 (2011).

Specifically,

[i]n an inverse condemnation action, a private property owner seeks to establish that a government entity has taken his or her property. The governmental conduct at issue generally takes one of two forms: (1) the entity has physically appropriated private property, or (2) the entity has imposed restrictions on the use of the property that deprive the owner of the property's economically viable use.

Hilton Head Automotive, LLC at 30 (citing Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005) (internal quotations omitted)). SCDOT has not physically acquired any of the units outside the acquisition area.

Per Hilton Head Automotive, LLC, the 312 owners with units outside of the acquisition area must first file an inverse condemnation action: only then can it be determined whether there has been a taking. Id. The trial court's February 5 Order allows these 312 owners the rights afforded in a direct condemnation action, with no determination of whether a taking has occurred, effectively changing well-established South Carolina law.

Moreover, “[f]ollowing Hardin, a proper analysis of an inverse condemnation claim premised on an alleged physical taking must begin with a determination of the scope of the property rights at issue.” Id. at 31. (citing Hardin, 371 S.C. at 605, 609, 641 S.E.2d at 441, 443). The trial court certified a class without “determin[ing] the scope of property rights at issue,” thereby expanding the scope of Landowners involved in the originally filed action. Id.

At the January 9, 2024 motion hearing, SCDOT counsel suggested that such a ruling would allow each of the 312 owners to make a claim for damages due to the proximity of the highway. Predictably, class counsel has since disclosed an appraisal wherein the appraiser opines that each of the 312 units should be paid damages due to proximity to the roadway (see **Exhibit 4**). No court has undertaken the necessary exercise of determining whether the SCDOT has taken any rights. Id.

Undoubtedly, class counsel will argue that, as the case is currently situated, a jury need only return one verdict: a compilation of figures to include the fair market value of the acquired common elements, the fair market value of each of the individual units acquired (each potentially differing in size, condition, and location), and the damages to each of the 312 units outside of the area of acquisition (each differing in size, location, condition, and proximity to the highway). They further take the position that the breakdown of that verdict and assignment of values should be accomplished at an allocation hearing. This is an incorrect and seriously flawed conflation of the

statutory just compensation requirements pursuant to S.C. Code Ann. § 28-2-370, and equitable allocation proceedings pursuant to S.C. Code Ann. § 28-2-460.

Just compensation, as previously mentioned in this Memorandum, is a fact specific analysis and must be determined by the trier of fact – in the Tract 195 Case, a jury. Allocation of just compensation proceeds is a separate and distinct equitable proceeding. S.C. Code Ann. § 28-2-460 provides:

Unless the persons served with the Condemnation Notice agree in writing as to whom just compensation must be made and paid, the appraisal panel determination, verdict, or judgment must be made jointly to all the parties and may be paid to the clerk of court. Upon making the payment, the condemnor's obligation to pay interest upon the funds shall terminate. The payment of the funds so awarded must be held by the clerk of court pending the final order of the court of common pleas in an equity proceeding to which all persons served with the Condemnation Notice must be necessary parties. From the order of the court of common pleas there may be an appeal as provided for appeals from the court in equity cases.

The just compensation determination and equitable allocation process are clearly and distinctly different. The verdict amount is unknown at this time; should a single just compensation verdict include values of acquired common elements, acquired individual units, and damages to other individual units, there is no way to determine the amount of just compensation awarded to each property owner. For example, it is possible that a jury believes that no damages should be due to the 312 unaffected unit owners, or that only some should be compensated, or that some are due more than others. The number of potential scenarios is impossible to predict.

Under this procedure, the equity court would then be charged with gleaning the intent of the jury and would have to perform its own just compensation analysis for each of the claimants. The very purpose of the equitable proceeding is to allocate proceeds between and among multiple parties with an interest in a single property, as well as attend to the interests of Other Condemnees; its purpose is decidedly not to declare separate just compensation findings and supersede the jury.

Conversely, should class counsel suggest that the jury make separate just compensation findings, there is no reason or legal basis for a class action as there are multiple questions of fact.

III. The trial court erred by unambiguously violating the class certification prerequisites provided by Rule 23(a)(2), (3).

Rule 23(a)(2), SCRCF and Rule 23(a)(3), SCRCF require that “there are questions of law or fact common to the class,” and “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Property rights, as highlighted above, are unique, facially eliminating any commonality and typicality between estate holders.

By expanding the class beyond fee simple interest holders of common elements to include both individual unit holders within the area of acquisition as well as individual unit holders outside the area of acquisition, the trial court class certification now includes Landowners who otherwise would have distinct equitable remedies. Specifically, an individual unit holder undoubtedly within the area of acquisition is appropriately identified as a Landowner in a separately commenced condemnation action; an individual unit holder who has not been identified as a Landowner impacted by the project, but who wishes to claim damages to his unit, must file an inverse condemnation action against the SCDOT. See Hardin v. S.C. Dep’t of Transp., 371 S.C. 598, 641 S.E.2d 437 (2007); Hilton Head Automotive, LLC v. S.C. Dep’t of Transp., 394 S.C. 27, 714 S.E.2d 308 (2011).

CONCLUSION

The February 5 and March 25 Orders go beyond certifying a class for the common areas of the horizontal property regime. Ultimately, the Orders expand the scope of the just compensation award and affect the mode of trial provided for by the Act, thereby having a prejudicial and lasting impact on SCDOT – and condemning authorities statewide. These Orders create direct and new condemnation trial rights for those 312 units outside of the acquisition area

with no determination of whether a taking has occurred, as well as additional trial rights for those units for which SCDOT commenced separate condemnation actions. SCDOT properly named each record fee simple interest holders of the common elements of Briargate because the Act defines, among other things, “property” to include “every estate, interest and right.” S.C. Code Ann. § 28-2-30(17) (emphasis added). If the trial court Orders remain, the scope of just compensation awards and the mode of trial, as already defined by the act, inherently change merely due to SCDOT’s diligence and adherence to South Carolina law by individually naming the Landowners for a condemnation action of common elements.

SCDOT maintains that the Orders referenced herein affect the mode of trial and create new direct condemnation trial rights; therefore, they are immediately appealable. For the reasons above, SCDOT respectfully requests that this Court immediately proceed with hearing the appeal and overturn the lower court Orders granting Class Certification.

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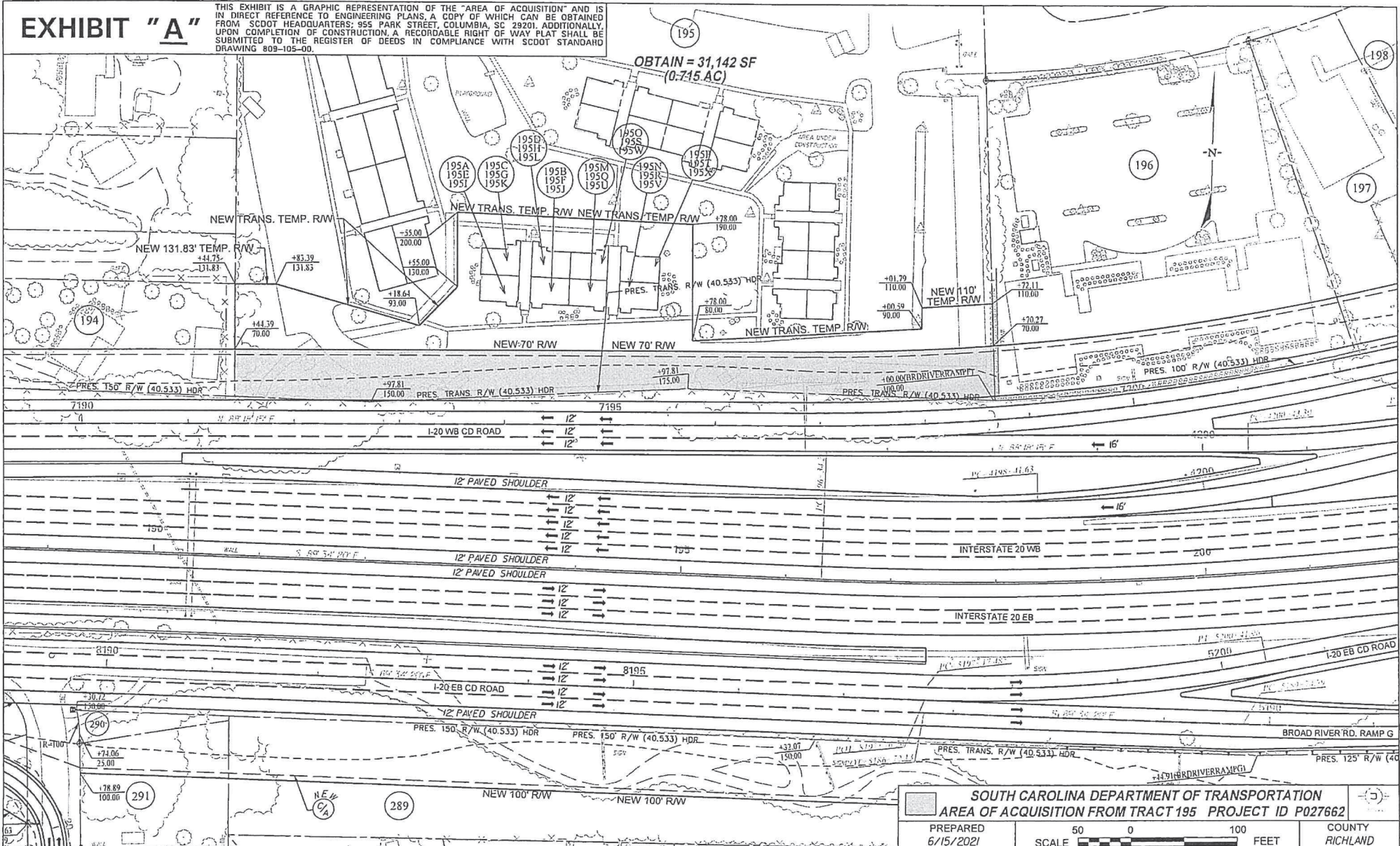
*Counsel for Appellant, South Carolina
Department of Transportation*

May 6, 2024

EXHIBIT 1

EXHIBIT "A"

THIS EXHIBIT IS A GRAPHIC REPRESENTATION OF THE "AREA OF ACQUISITION" AND IS IN DIRECT REFERENCE TO ENGINEERING PLANS, A COPY OF WHICH CAN BE OBTAINED FROM SCOTT HEADQUARTERS: 955 PARK STREET, COLUMBIA, SC 29201. ADDITIONALLY, UPON COMPLETION OF CONSTRUCTION, A RECORDABLE RIGHT OF WAY PLAT SHALL BE SUBMITTED TO THE REGISTER OF DEEDS IN COMPLIANCE WITH SCOTT STANOARD DRAWING 809-105-00.



SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
AREA OF ACQUISITION FROM TRACT 195 PROJECT ID P027662

PREPARED 6/15/2021

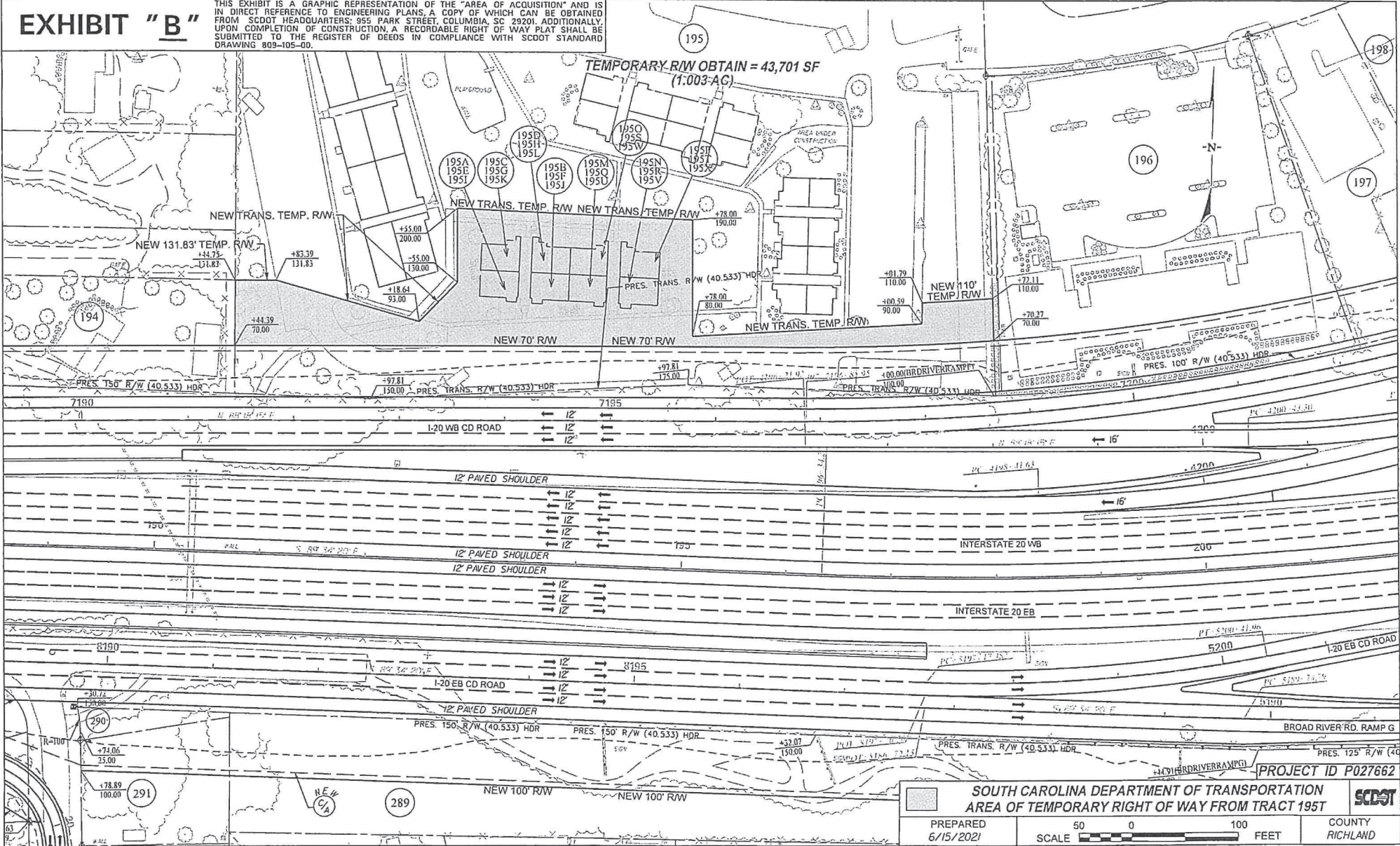
SCALE 50 0 100 FEET

COUNTY RICHLAND

ELECTRONICALLY FILED - 2021 Sep 09 5:47 PM BY RICHLAND COUNTY REGISTER OF DEEDS

EXHIBIT "B"

THIS EXHIBIT IS A GRAPHIC REPRESENTATION OF THE "AREA OF ACQUISITION" AND IS IN DIRECT REFERENCE TO ENGINEERING PLANS, A COPY OF WHICH CAN BE OBTAINED FROM SCDOT HEADQUARTERS: 555 PARK STREET, COLUMBIA, SC 29201. ADDITIONALLY, UPON COMPLETION OF CONSTRUCTION, A RECORDABLE RIGHT OF WAY PLAT SHALL BE SUBMITTED TO THE REGISTER OF DEEDS IN COMPLIANCE WITH SCDOT STANDARD DRAWING 809-105-00.



PROJECT ID P027662

**SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
AREA OF TEMPORARY RIGHT OF WAY FROM TRACT 195T**

PREPARED 6/15/2021	SCALE 0 50 100 FEET	COUNTY RICHLAND
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EXHIBIT 2

Project ID #: P027662 Road/Route: I-20/I-26/I-126 County: Richland Tract #: 195

SUBJECT PLAT\SKETCH

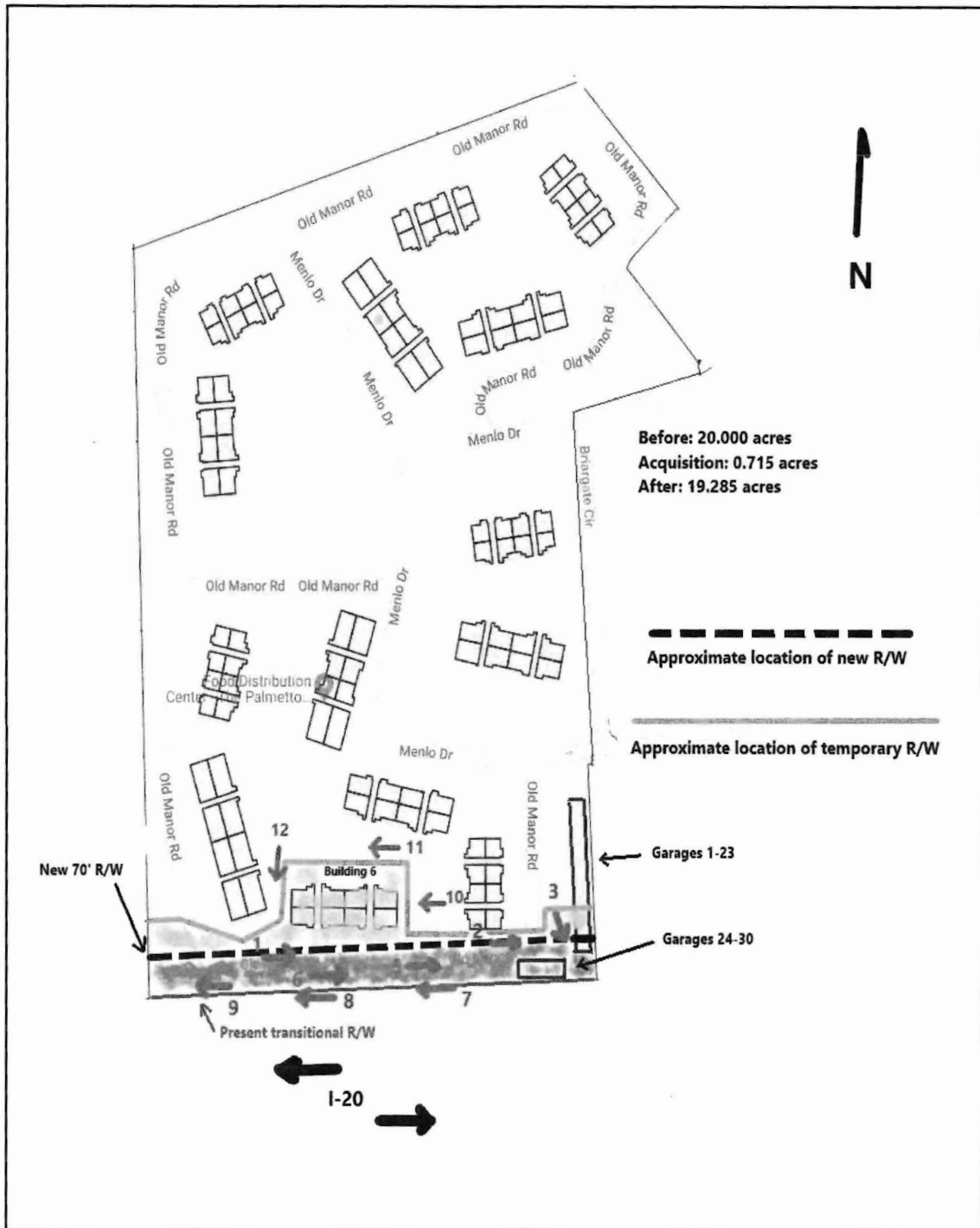


EXHIBIT 3

Directors, provided there then be at least three (3) in number, and any such resolution, when so executed, shall have the force and validity of a resolution adopted at any regular or special meeting.

(1) All minutes and records of actions of the Directors, and all records pertaining to operations of the Association, shall be kept at the Association office or at such place as may be designated by the Secretary of the Association, and shall be available to members for inspection at all times during normal business hours.

6. Powers and duties of the Board of Directors.

(a) All of the powers and duties of the Association existing under the Condominium Act, the Master Deed, and these By-Laws shall be exercised exclusively by the Board of Directors, its agents, contractors, or employees, subject only to approval by Unit Owners when such is specifically required. Compensation of employees of the Association shall be fixed by the Directors. A Director may be an employee of the Association, and a contract for management of the condominium may be entered into with a Director. The Board of Directors is specifically charged with the responsibility of providing for the care and upkeep of all Common Elements and Limited Common Elements of the Condominium pursuant to the provisions of the Master Deed. Specifically included in the foregoing general powers of the Board of Directors are the following powers and duties, which are listed by way of enumeration and not by limitation:

- (1) To elect and remove the officers of the Association;
- (2) To administer the affairs of the Association and the Condominium property;
- (3) To engage the services of an agent, hereinafter sometimes called the "Managing Agent", to maintain, repair, replace, administer and operate the Condominium or any part thereof for all the Unit Owners upon such terms and for such compensation and authority as the Board of Directors may approve;
- (4) To formulate policies for the administration, management and operation of the Condominium and the Common Elements;

(5) To adopt rules and regulations, with written notice thereof to all Unit Owners, governing the administration, management, operation and use of the Condominium property and the Common Elements, and to amend such rules and regulations from time to time;

(6) To provide for the maintenance, repair, and replacement of the Common Elements and Limited Common Elements as required by the Master Deed, to make payments therefor, and to approve payment vouchers or to delegate such approval to the officers or Managing Agent;

(7) To provide for the designation, hiring and removal of employees and other personnel, including accountants and attorneys, and to engage or contract for the services of others, and to make purchases for the maintenance, repair, replacement, administration, management and operation of the Condominium property and the Common Elements, and to delegate any such powers to the Managing Agent (or any employees of the Managing Agent);

(8) To appoint committees of the Board and to delegate to such committees the Board's authority to carry out certain duties of the Board of Directors;

(9) To determine the fiscal year of the Association and to change said fiscal year from time to time as the Board of Directors deems advisable;

(10) To fix the estimated annual budgets, and to provide the manner of assessing and collecting from Unit Owners their respective shares of such estimated expenses, as hereinafter provided;

(11) To enter into any lease agreement for lease of premises suitable for use as guest or custodian apartments, upon such terms as the Board of Directors may approve;

(12) To borrow money for the purpose of repair or restoration of Common Elements without the approval of the members of the Association;

(13) To secure insurance policies as required by the Master Deed and in this regard, annually to review the amounts of coverage afforded by such policy or policies;

(14) To obtain all licenses and permits necessary under applicable law to operate and maintain a private club serving alcoholic beverages on the Condominium property;

(15) To lease garages located on the Condominium property to individual Unit Owners, or third parties in accordance with the terms and conditions set by the Board of Directors, and subject to applicable zoning regulations;

(16) To lease storage areas located in certain Buildings on the Condominium property to Unit Owners or their tenants in accordance with the terms and conditions set by the Board of Directors;

(17) To maintain or defend any action in any court or other proceeding on behalf of the Unit Owners which arises in connection with the Common Elements;

(18) Unless otherwise provided herein or in the Master Deed, to comply with the instructions of a majority of Unit Owners as expressed in resolutions duly adopted at any annual or special meeting of Unit Owners;

(19) To exercise all other powers and duties of Unit Owners as a group referred to in the Condominium Act, in the Master Deed or these By-Laws.

(b) Specifically, whenever in these By-Laws or in the Master Deed the Association is given the power to take any action, it is the intention of such instruments that the Board of Directors shall act for the Association in all cases, except to the extent that it is expressly provided that action may be taken upon vote of the Unit Owners.

(c) Nothing in these By-Laws shall be considered to grant to the Board of Directors, the Association, or to the officers of the Association, any powers or duties which, by law, have been delegated to the Unit Owners.

7. Officers.

(a) The executive officers of the Association shall be a President, who shall be a Director, a Vice President, who shall be

EXHIBIT 4

Market Value of the Remaining Units – After the Taking

As you can see, prior to the taking, there were 6 lanes in front of this property plus a single lane entrance ramp from Broad River Road and they were below the grade in front of Briargate Condominiums. The project increases the number of lanes in front of Briargate to 12 lanes plus a three-lane entrance ramp elevated 20' to 25' above grade and closest to Briargate.

Before the taking, Buildings 5, 6 and 7 front along the Interstate and are about 72', 75' and 105' from the Interstate 20 property line. After the taking, building 5 is about 42' from the new right of way and building 7 is about 75' from the new right of way.

With the demolition of building 6 coupled with 20' – 25' elevated entrance ramps along the new right of way, the remainder of the development is no longer "buffered" from road noise and visual effects. The interstate will be clearly visible from the park from building 4, the playground, and between buildings 5 and 7. This will adversely impact the remaining units.

There are many situations where proximity has negative effects on property value. There are residential neighborhoods along Interstate 526 and Chuck Dawley Boulevard in Charleston where homes (and former lot sales) demonstrate market resistance to purchasing because of the proximity to the Interstate. The differences in discounting for lots ranged from about 12% to about 50% and from improved properties about 10% to about 15%.

Currently, at Wharf Seven, which is a garden style residential apartment development on Daniel Island, rent is discounted as much as 15% for units proximate to Interstate 526.

Before the taking, Briargate Circle intersected with Broad River Road at two different intersections. The closest, which is a crossing street, is in the southwest quadrant of Interstate 20 and functions much like a frontage road. The other intersection is a crossing street and is controlled by a traffic signal. Every user on Briargate Circle had two options to enter and leave Briargate Circle. With the closing of the intersection closest to Interstate 20, there is a single intersection for everyone user to use.

After the taking, Briargate Circle functions like a dead-end frontage road of the interstate and not a frontage road with outlets at either end. There are examples of changes in highest and best use from retail to more service etc. as a property gets further from the interchange. While Briargate is not the furthest from the remaining intersection, the loss of a second outlet is an adverse factor.

After the taking, there are 312 condominium units remaining and 617 parking spaces. Zoning requires a minimum of 2 spaces per unit so with 617 spaces remaining, the maximum number of units is 308. Property use, after the taking, does not conform to zoning so it is a legal non-conforming use. While the number of spaces the property is deficient is 4, they would need to be replaced somewhere on the regime property to comply with zoning. That will require permitting, design and construction.

In addition to those costs and time involved, if there are any significant changes with the property, it may trigger a requirement to correct the non-compliance.

The combined effects of the proximity of the new ROW and related effects from increased noise, and visual impacts, the changes with traffic patterns with the closing of the Briargate intersection, and the non-conforming status, there are damages to the remainder. This measured at 15%.

The calculation of damages is summarized here:

Average Unit Value (312 Units)	\$44,516
Damages	15%
Damages per Unit	\$6,677
Total Damages	\$2,083,354
Round to	\$2,085,000

RECEIVED

May 06 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No.: 2024-000582
Circuit Court Case No. 2021-CP-40-04582

South Carolina Department of Transportation,Appellant,

vs.

Briargate Condominium Association, Inc. (HOA) and Mohammed Arabi,
as Class Representative for Himself and All Unit Owners, to pursue just
compensation for all unit owners, Respondents,

and

Magna Capital, Mortgagee, The National Bank of South Carolina,
Mortgagee, South Carolina Department of Revenue, Tax Liens,
Arrow Financial Services, LLC, Judgment, Portfolio Recovery
Associates, LLC, Judgment, The National Bank of South Carolina,
Mortgagee, State Employees Credit Union, Mortgagee, NBSC a
division of Synovus Bank, Mortgagee, Carolina First Bank,
Mortgagee, Richland County, Judgment, Bank of America, N.A. c/o
Cooling & Winter, LLC, Judgment, Department of Treasury-Internal
Revenue Service, Judgment, HSBC Mortgage Corporation,
Mortgagee, First Community Bank-Gilbert, Mortgagee, America's
Wholesale Lender, Mortgagee, William R. Hollingsworth, Jr. and
Myong Hollingsworth, Mortgagee, First Palmetto Savings Bank,
Mortgagee, MERS as nominee for ERA Mortgage, Mortgagee, The
Resolution Trust Corporation as Receiver for Metropolitan Federal
Savings and Loan Association, Mortgagee, Wachovia Bank
National Association, Mortgagee, The Resolution Trust Corporation
as Receiver for Metropolitan Federal Savings and Loan Association,
Mortgagee, Brittany Frances Minogue, Mortgagee, Mutual Savings
Bank, F.A., Mortgagee, Richland County Tax Assessor, Delinquent
Taxes, Bank of America, N.A., Mortgagee, UCC Financing, Miriam
Properties Group, LLC, Turnberry Associates, Inc., Mathes Auto
Sales, Inc., BB&T of South Carolina, Navy Federal Credit Union,
Briargate Condominium Association, Inc., Foreclosure Action, Other Condemnee(s).

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **Condemnor's Memorandum in Support of Appealability** via electronic mail on counsel of record in this action at the following AIS information address(es):

Counsel Served:

Thomas H. Pope III, Esq.
Pope Parker Jenkins, P.A.
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-and-

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David G. Pagliarini, Esq.

May 6, 2024

PAGLIARINI LAW FIRM, LLC

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May 6, 2024

Via Electronic Filing

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29211
ctappfilings@sccourts.org

RECEIVED
May 06 2024
SC Court of Appeals

Re: South Carolina Department of Transportation v. Briargate Condominium Association, Inc.
(HOA), et al.
Appellate Case No.: 2024-000582
Civil Action No. 2021-CP-40-04582
Project ID: P027662, Carolina Crossroads, Tract 195

Dear Ms. Kitchings:

Enclosed please find for filing, South Carolina Department of Transportation's Memorandum in Support of Appealability, along with a Proof of Service, in the above-referenced matter.

By copy of this letter to counsel of record, we are serving them with a copy of this memorandum.

Should you have any questions, please do not hesitate to contact me.

Thank you for your assistance.

With kind regards,



David G. Pagliarini

DGP/lis

Enclosures

cc: *(all via electronic mail only)*
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Michael P. Morris, Esq.
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