THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2013-001759
Case No. 2010-CP-26-7961

South Carolina Department of Transportation.....Respondent,

vs.

David Franklin Powell.....Appellant,

[Initial] Brief of Respondent

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Questions Presented

1. Whether damages to a landowner's remaining land after a taking of part of it by condemnation includes damages attributable to a police power act of regulating traffic on lands that are remote from his property?
2. Whether the taking of a portion of appellant's land was indispensable to and inseparable from the closure of the intersection of which he complains?

Statement of the Case

This is landowner, David Franklin Powell's, appeal of an order of partial summary judgment in a condemnation case that has yet to be tried. R.p. ___ (May 14, 2013, Order) The condemnor, the South Carolina Department of Transportation had moved the Circuit Court *in limine* for an order suppressing any evidence of diminution in the value of appellant's remaining land caused by the loss of "access" to U.S. 17 caused by the closure of the intersection of that highway with Emory Road on the grounds that appellant's land did not abut U.S. 17 and had no private property right with respect to that road. R.p. ___ (Motion in Limine) Appellant's "easements" with respect to the public roads he did abut, as described in Hardin (& Tallent) v. S.C. Dep't of Transportation, 371 S.C. 598, 641 S.E.2d 437 (2007), had not been disturbed by the project. Additionally, SCDOT asked that damages to the remainder caused by loss of visibility from U.S. 17 be excluded. At the hearing on condemnor's motion, after the court indicated he would rule in favor of the motion, landowner's counsel requested that condemnor convert its motion

to one of partial summary judgment to accommodate an appeal. The condemnor agreed to do so and the judge sanctioned the conversion. R.p. __ (Tr. p. ___) The court, the Honorable Edward B. Cottingham, issued a written order filed May 14, 2013, in which he found that the landowner's loss of access is not compensable, excluded from the trial any evidence of loss of access, and refrained from ruling on the issue of loss of visibility leaving that issue to the trial judge. R.p. ___ (Order). Landowner's Motion to Alter or Amend under Rule 59(e), SCRCP was denied by written Order on July 26, 2013. Appellant timely noticed his appeal on August 15, 2013.

The highway improvement project that impacted appellants land is the "Interchange at US 17 Bypass and SC 707/Farrow Parkway," File 26.036774A, referred to as the airport "back gate' project in Horry County. R. p. ___ (Plans sheet 10, 11, and title page) The particular work involve here is the closure of an intersection of U.S. 17 and Emory Road including the milling up of a short section of Emory Road between Old Socastee Highway and U.S. 17. Also, Old Socastee Road will be terminated in a cul-de-sac prior to its intersection with Railroad Bed Road.

Prior to the acquisition of part of it, appellant owned an unimproved tract of land containing 2.51 acres. It was bounded by Emory Road and Old Socastee Highway. It had no frontage on U.S. 17 or on the segment of Old Emory Road between Old Socastee and U.S. 17 being separated from U.S. 17 by Old Socastee and by other lands. As a consequence of the closure of the U.S. 17/Emory Road intersection, there is no longer any crossing traffic at Old Socastee and Emory. Therefore, 0.183 acres of land was taken from the corner of appellant's land for the purpose of converting the corner to a curve. The stop sign on Old Socastee where it entered Emory was removed.

The grounds of appellant's appeal are that the holding in Hardin (& Tallent), supra, that there is no property right to travel in both directions on an adjoining road that may be asserted against the State does not apply in direct condemnation cases where land is actually taken and that the diminution in the value of his remaining land flowed from the taking of a part of it.

Standard of Review

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP. Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Companion Property and Casualty Insurance Co. v. Airborne Express, Inc., 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006). The facts herein are not in dispute. Thus, the questions for this Court are solely questions of law.

Argument

I. The closure of the intersection of U.S. 17 and Emory Road was not a taking of appellant's property compensable under the constitution's takings clause.

Appellant argues that any diminution in value to his land caused by a highway project is compensable as damages to his remaining land where those damages are caused by acts of the State occurring off of his land and even if those damages would not be recoverable in an inverse compensation case as not constituting a taking of a property right. Appellant is incorrect as a matter of law.

It is well settled in South Carolina that there is a distinction between the exercise of the police power and the exercise of the power of eminent domain; that just compensation is required in the case of the exercise of eminent domain but not for the loss by the property owner which results from the constitutional exercise of the police power. Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955); Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956). Re-routing and diversion of traffic are police power regulations. South Carolina State Highway Dep't v. Carodale Assocs., 268 S.C. 556, 235 S.E.2d 127 (1977). Here, the right of the landowner to travel from his property to U.S. 17 via Emory road is not embraced with the property right of access that landowners possess with regard to roads adjoining their properties. Rather, it is a right of passage over public roads that Mr. Powell shares with all members of the travelling public which may be modified at any time by the State in redesigning highways and redirecting traffic without liability to any individual landowner. Thus, any diminution in the value of Mr. Powell's remaining land after the acquisition that is attributable to the closure of the intersection of Emory Road and U.S. 17 is an incidental result of a police power act of the State and not one of eminent domain and is not compensable.

The compensability of the taking of access from private property is governed by the S. C. Supreme Court's decision in Hardin (& Tallent) v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007). (See, also, Hilton Head Automotive, LLC v. S.C. Dep't of Transp., 394 S.C. 27, 714 S.Ed. 2d 308 (2011); Carolina Chloride, Inc. v. S.C. Dep't of Transp., 391 S.C. 429, 706 S.E.2d 501 (2011).) There the Court stated that, because road realignments and closures do not involve the enactment of any regulation that directly

regulates any use of owners' properties, the Department must have physically appropriated some aspect of them for a taking to be found. Id., 641 S.E.2d at 441. According to the Court, the focus of the inquiry in a case of this type must be on a landowner's actual property interests; that is, his easements. The easements a property owner holds with respect to public roads are of two types: The first is the right to enter and leave your property directly on to each of the roads it abuts. The second is the right to access the general system of roads. This latter right is akin to an easement by necessity between private owners and is based on the general principle that no property should be landlocked. Id., at 442. The inability to travel in both directions on a road adjoining one's property is irrelevant. Id., at 444.

The Hardin court summed up:

> As long as the owner has access to and from the remainder of the road that continues to abut his property, his easement with respect to that road remains intact. Further, as long as a landowner still has access to the public road system, this easement is unaffected. This reasoning is in line with the notion that a landowner has no right to access abutting roads in more than one direction. 73 A.L.R.2d 689, 691-698.

Hardin, 641 S.E.2d at 442. Here, the Powell property in the after situation still has full access to each of the roads it abuts—Emory Road and Old Socastee Highway. It still has access to the general system of roads by travelling south on Emory Road. The added distance is not unreasonable. Neither of the easements described in Hardin (& Tallent) have been taken. The "necessity" easement described in Hardin does not include the right to use any particular adjoining road to reach the general system of roads, only the general right to get out. This has long been the law in South Carolina.

In Cherry v. Rock Hill, 48 S.C. 553, 26 S.E. 798 (1897), Cherry, a citizen who resided on Park Avenue in Rock Hill, sued the City after it permitted Winthrop Normal

and Industrial School to re-route the street around its grounds where it previously passed straight through. Although Cherry did not abut the section of road so altered, he complained that he now had to take a more circuitous and difficult route in going to and from his residence and his law office. In affirming the grant of the City's demurrer, the Supreme Court said,

> But we do not think that the alteration made in this street at a point where it did not adjoin plaintiff's property can be regarded as the taking of private property for public use. So far as appears from the allegations of the complaint, the only right which the plaintiff had in the street in question was the right to which, in common with all other citizens, he was entitled, of using this street as a public highway. That right is not, in our judgment private property, protected by the constitutional provision which is invoked.

26 S.E.2d at 801; Accord, Mosteller v. Lexington, 336 S.C. 360, 520 S.E.2d 620 (1999); Woods v. State, 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993).

In affirming the foregoing principle, the Supreme Court more recently stated:

> This Court's prior decisions holding that the closing of a road constituted a taking actually imply that a property owner possesses more than an easement; they imply possession of a property interest in the existence of a particular public road. That cannot be correct. See Tuggle v. Tribble, 177 Ark. 296, 6 S.W.2d 312, 314 (1928) (not passing on the takings issue, but finding that a landowner can have no vested interest in the existence of an abutting road); cf. Carodale, 268 S.C. at 561, 235 S.E.2d at 128-29 (stating that a landowner has no vested rights in the continuance of a public highway and in the continuation of maintenance of traffic flow past his property). Thus, to the extent the rationale for these holdings was that the government had caused the owner to lose a property right, this reasoning collapses on itself.

Hardin (& Tallent) v. S.C. Dep't. of Transportation, 371 S.C. at 609, 641 S.E.2d at 443.

Mr. Powell argues that Hardin (&Tallent) is distinguishable from his case as that cases was an inverse condemnation case where the issue was the existence of a property right in the first place. Here, according to the landowner, there is no issue regarding the

ownership of property. Rather, the question is whether he is entitled to be compensated for diminution in value of his remaining land under the definition of just compensation contained in the Eminent Domain Procedure Act. S.C. Code Ann. §28-2-370[1].

Nichols provides the following on the question of whether compensable damages to a condemnee's remaining land must be made in every case where there is an actual appropriation of land by eminent domain even though those damages arise from a police power act that would not otherwise be a taking in an inverse condemnation case.

> The mere fact that a taking occurred does not resolve the issue of whether or not any consequence of the taking is measurable in damages therefrom.
>
> The court in Hales v. Kansas City [,248 Kan. 181, 804 P.2d 347 (1991)] addressed a landowner's claim that the mere acquisition of part of its land by the exercise of eminent domain rendered all damages resulting from a highway construction project compensable under the before-and-after rule applicable to a taking. While the court in Hales acknowledged its previous holding that the reasonableness of a police power regulation may be administratively asserted at any time by a city and tried in a condemnation action, the state may nevertheless, concurrent with a compensable taking in a condemnation proceeding validly exercise the police power for traffic control and public safety for which there may be no compensation even if it affects the method of ingress and egress to the affected property. In other words, the mere fact that a public project may also necessitate the physical appropriation of a portion of one's property does not necessarily entitle one to compensation for an otherwise valid exercise of police power associated with the same project.

4A Sackman, Nichols on Eminent Domain, §14A.01[6][a], p. 14A-25.

A nearly identical fact situation to the case at bar was presented in South Carolina State Highway Dep't v. Carodale Assocs., 268 S.C. 556, 235 S.E.2d 127 (1977). There the highway department acquired 0.47 acres of land from Carodale for the construction of and exit ramp for Interstate 77 in Richland County. Part of the project also involved the relocation of U.S. 1 upon which the landowner's property abutted. The property

[1] S.C. Code Ann. §28-2-370 (Rev. 2007) defines just compensation as "the value of the property to be taken, any diminution in the value of the landowner's remaining property, and any benefits ..."

continued to abut the old section of U.S. 1 and was provided access to the relocated highway by a newly constructed connecting street. The Supreme Court reversed the award of damages to the owner's remaining land attributable to the diversion of traffic previously passing its property. The Court declared that the State is under no duty to maintain a minimum level of traffic flow. Ingress and egress to and from one's property is the right that must be compensated in a condemnation, not the loss of frontage on a valuable traffic artery. Id., 236 S.E.2d at 128-29.

Appellant argues at pages __ though ___ of his brief that the language of the Eminent Domain Procedure Act defining just compensation in direct condemnations supports his view that all damages are recoverable where part of a landowner's property is taken for some aspect of a project. S.C. Code Ann. §28-2-370 (Rev. 2007). He argues that the Supreme Court's seminal decision in this area of law, S.C. State Highway Dep't v. Bolt, 242 S.C. 411, 131 S.E.2d 264 (1963), supports his view. Bolt interpreted prior statutes applicable to highway department condemnations only. Sections 33-135 and 136, 1962 S.C. Code of Laws. In Bolt, the Supreme Court defined the compensation due in a direct condemnation as follows,

> The special damages referred to in the above statutes relate to injury or damage to the remainder of the property from which a portion is taken. They would include any damage or any decrease in the value of the remainder of the landowner's property which are the direct and proximate consequence of the acquisition of the right of way.

Bolt, 131 S.E.2d at 266-67. Thus, the damages to the remainder are confined to those damages resulting from the taking and not necessarily from the project as a whole. The General Assembly used identical language to the 1962 Code sections cited above in the Eminent Domain Procedure Act enacted in 1987 to govern all condemnations in the

State. In ascertaining the meaning of a statute the General Assembly is presumed to know the pronouncements of the appellate courts. Grier v. Amisub of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Had the legislature desired to greatly expand the range of compensable losses as appellant argues, it would have done so explicitly.

Regarding the "all consequences" argument appellant sets forth in his brief, he is correct that anything done by the State on land taken from an owner that diminishes the value of the owner's remaining land is compensable to the owner. As noted in Bolt, supra,

> [H]e is entitled to full compensation for the taking of his land and all its consequences; and the right to recover for the damage to his remaining land is not based upon the theory that damage to such land constitutes a taking of it, nor is there any requirement that the damage be special and peculiar, or such as would be actionable at common law; it is enough that it is a consequence of the taking.

Bolt, at 267. The all consequences formula does not extend, however, to acts taken by the State off-site or on land taken from another. An Alaska Supreme Court case is often cited to illustrate this distinction. Dimond D Properties v. Alaska DOT, 806 P.2d 843 (Alaska 1991). In that case, the State built a raised earthen berm on railroad right-of-way it owned that blocked the visibility of the plaintiff's property. In denying recovery, the court noted that a landowner cannot recover from a neighboring landowner simply because he dislikes the use to which the second landowner put his property. A property owner has no right to an unobstructed line of vision to his property from anywhere off his property, absent an easement of some sort. Id., at 845-46. A contrary result was held as to another aspect of the project--the lowering of the highway which partially blocked visibility. There, the work was done partially on land taken from Dimond D. The court

noted this important distinction. In the latter situation, ownership of the land gave the owner the right to limit any obstructions on the land. This right was taken from it and damages thus recoverable. This is the right to exclude others that the U.S. Supreme Court has noted was perhaps the most fundamental of all property interests. Lingle v. Chevron, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed2d 876 (2005).

Powell argues that the "before and after" rule used by appraisers to value property must be used herein in order to place the owner in the same position financially as before his land was taken. As our Supreme Court has said, the "before and after" appraisal method is sound but not exclusive. SCDHPT v. Cheston, 278 S.C. 464, 465, 298 S.E.2d 447, 448 (1982). The other method is the fair value of the land taken plus any special damages to the remainder. The before and after method is inappropriate where part of the diminution in value is attributable to the exercise of the police power because those losses are *damnum absque injuria.* Wilson v. Greenville County, 110 S.C. 110 S.C. 321, 96 S.E.2d 301 (1918). Thus, compensation for the taking plus any damages to the remaining land resulting from the taking including severance damage and proximity damages is exclusive of those consequences of police power acts. Because all purchasers of private property buy that property subject to the sovereign's police power to regulate its use, those interests are not part of the property. The State may resist compensation if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2899, 120 L.Ed.2d 798 (1992).

Appellant relies on the decision in Hilton Head Automotive, LLC v. S.C. Dep't of Transportation, 394 S.C. 27, 714 S.E.2d 308 (2011), for his argument that the loss of the

ability to travel on that section of Emory Road across the intersection of Emory and Old Socastee from his land and onto U.S. 17 is a physical taking of his property. This discussion ignores footnote 2 of that decision where the Court states that it was resolving the matter solely in the context of a physical taking because that was the way the landowner presented it to the Court. Id., 714 S.E.2d at 310. In fact, as explained in Hardin (& Tallent), supra, South Carolina utilizes federal jurisprudence in inverse condemnation cases in *ad hoc* factual inquiries taking into consideration the character of the government's action and the economic impact on the complainant. See, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). In reviewing the character of the government's action, the Court said only that the "focus" of the inquiry should be on the landowner's easements, not that interference therewith is always a *per se* taking. A "physical" taking in inverse condemnation jurisprudence refers to the government's act of physically entering land and appropriating some part of it. See, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). It is one of two "categorical" rules that do not require the Penn Central balancing test. (The other is regulation that so restricts the use of property that it is the same as a physical acquisition that ousts the owner from possession and use. See, Lucas, supra.)

The closure of the U.S. 17/Emory Road intersect was not a taking that deprived Mr. Powell of any pre-existing property right. That police power act does not confer compensation on Mr. Powell as a non-abutting owner. His losses are *damnum absque injuria.*

II. The diminution in value of appellant's remaining land did not flow from the taking of a portion of it but from the project overall which is not compensable.

In subsection B of his argument, Mr. Powell argues that, because the taking of a portion of his land was part of an overall highway project that involved the closure of an intersection, his damages are automatically recoverable as damage to the remainder from the taking. He relies solely upon language from the case S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970), to support this view. We disagree that Wilson stands for the proposition appellant urges.

First, it is unlikely that the Supreme Court would have, in a single sentence finding the relocation of a county road to line up with a break in the new median, intended to enact such a momentous change in the general law to allow all losses flowing from the police power act of redirecting the flow of traffic on public highway to be recoverable where there is a taking of a portion of a landowner's land. The Court's conclusion followed an exhaustive exposition of the relevant facts therein and should be confined to those facts. Both Wilson v. Greenville, supra, and Carodale Associates, supra, each direct condemnation cases decided before and after Wilson, respectively, hold the opposite. In Wilson v. Greenville, the Court held that the landowner could not recover for the discontinuance of a public highway through his lands even though land was taken from him for the relocated highway. The Court noted that the owner of land on a public highway has no property or other vested right in the continuance of it as a public highway. The Wilson Court in 1970 did not cite Wilson v. Greenville nor did it indicate that it intended to overrule that case. Likewise, Carodale, decided after Wilson

did not cite that case for the opposite conclusion that it reached--that loss of traffic is not recoverable--nor indicate that the Court considered Wilson to have overruled Wilson v. Greenville.

Secondly, a close reading of the factual background as related by the Wilson court indicates that that case is distinguishable from the one at bar. In Wilson, the highway department took land from Ms. Wilson in order to align a county road running alongside her property at right angles with U.S. 15 which her property abutted. Concurrently, the department installed a raised concrete median in the center of U.S. 15 eliminating her ability to make left turns from her property. The only break in the median was at the point the county road entered the highway. Thus, Ms. Wilson's only access to the far lanes of U.S. 15 was by use of the county road. The Court noted that it was impossible to separate the damages from the median from other damages suffered by Ms. Wilson.[2] The Court held that there was no need for, or the contemplated construction of, the median except for the overall construction and relocation. In other words the placement of the median break and the taking of land from Ms. Wilson to line the county road up with it were the same act and damages from the latter flowed from the taking. The taking was indispensable to the median break location and inseparable from it. Here, the Department could have eliminated the intersection without taking land from Mr. Powell. The land taken was for the purpose of rounding the intersection at Emory Road and Old Socastee Highway, not for the U.S. 17 intersection closure.

At best, Wilson represents a close factual case between acts of eminent domain and those taken under the police power for which no compensation is due. The federal

[2] Recovery for a median was later rejected by the Court in Hardin (&Tallent), supra.

courts have formalized a three part rule to distinguish damages resulting from a taking and damages resulting from concurrent police power acts elsewhere on the project. The rule, known as the "Campbell rule" after a U.S. Supreme Court decision, is contained in three cases: Campbell v. United States, 266 U.S. 368, 45 S.Ct.115, 69 L.Ed. 328 (1924); West Virginia Pulp & Paper v. United States, 200 F.2d 100 (4th Cir., 1952); and United States v. Pope & Talbot, 293 F.2d 822 (9th Cir., 1961).[3] In Campbell, the War Department condemned 1.81 acres of appellant's 69-acre tract along with 1,300 acres owned by other landowners to construct a nitrate plant. Campbell appealed the refusal of the district court to award him any damages for diminution in value to his remaining land. The government did not propose to use Mr. Campbell's land for industrial purposes. Rather, the plant would be physically located on land taken from the other landowners. The Court held that the proposed use of land by the government taken from others did not constitute a taking of Mr. Campbell's property. It noted that, if his neighboring private owners had put their land to the identical use that the government proposed, Campbell would have no right to prevent it. Thus, the exertion of the power of eminent domain did not deprive him of any right with respect to his land. In summary, the Court stated,

> The rule supported by better reason and the weight of authority is that just compensation assured by the Fifth Amendment to an owner, a part of whose land was taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking.

Id., 45 S.Ct. at 116.

The Fourth Circuit in West Virginia Pulp & Paper, distinguished Campbell, and awarded damages for the diminution in value to two other contiguous tracts owned by the

[3] Numerous state court decisions follow the rule. *See, e.g.,* Simon v. Dept. of Transp., 265 S.E.2d 777 (Ga. 1980), and the Maryland case, Griffith, discussed below.

condemnee and put by him to the same use noting that just compensation includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted.

The Ninth Circuit, in Pope & Talbot, established a corollary rule to Campbell. There the United States had taken part of plaintiff's land and lands of other owners for a dam project. The part taken from Pope & Talbot was flooded along with other lands. In addition, the remaining Pope & Talbot land suffered a loss of accessibility due to having to drive around the lake instead of straight across its bed. The Court held that three elements are necessary to negate the application of Campbell: indispensability, substantiality, and inseparability. Here, (1) the land taken from the condemnee landowner was indispensable to the dam project; (2) the land taken constituted a substantial (not inconsequential) part of the tract devoted to the project; and (3) the damages resulting to the land not taken from the use of the land taken were inseparable from those to the same land flowing from the condemnor government's use of its adjoining land in the dam project.

As the Ninth Circuit noted in a later case, both the rules in Campbell and in Pope & Talbot are sensible. United States v. 15.65 Acres of Land in Marin County, Cal., 689 F.2d 1329 (9th Cir. 1982). With regard to Campbell, a private seller receiving a bid for a portion of his land and responding thereto in a rational manner, will fix his asking price at an amount that will compensate him for any diminution in value of his remaining land. On the other hand, a private landowner whose property has its value reduced by the

acquisition and use of an adjoining neighbor's land by a third party buyer ordinarily cannot recoup this loss from either the neighbor or the third party buyer. Id., at 1332.

The necessity of the elements in Pope & Talbot is also quite sensible according to the Marin court:

> The element of indispensability assures that the government is being required to pay no more than a private buyer confronted with the same compulsion. In either event, indispensability affords the landowner the ability to demand payment for the injury to his remaining property, just as he is able to do so under the first rule stated above. Substantiality tends to assure the existence, in fact of indispensability, and inseparability tends to assure that the injury to the land not taken does not arise from a use independent of the project with respect to which the property taken was indispensable.

Id.

The same question--whether a property owner who has had a parcel of his property taken as part of a public project is entitled to consequential damages to his remaining land flowing from the entire project?—was addressed in Griffith v. Montgomery County, 470 A.2d 840 (Md. App. 1984).

In Griffith, a portion of the plaintiff's land was taken for a road to provide access to a new County landfill. The court rejected plaintiff's claim that he was entitled to consequential damages to his remaining property attributable to the proximity of his property to the landfill. The court held that plaintiff's land was used to construct a road and its use for those purposes is readily separated from the use of other properties utilized as a landfill. The court stated,

> In United States v. Pope & Talbot, supra, and United States v. 15.65 Acres of Land, supra, the cases were determined on the question of whether damages were capable of being separated. In those cases, the portion of the property owner's land appropriated was put to the same use as the neighboring lands. This was not the case in the proceeding presently before us. The appropriation of appellants' land for use as a road is

> clearly differentiated from the land taken for the purposes of use as a landfill, and the damages resulting from each are clearly separable.

Id., at 845.

In the instant case, the State clearly could have closed the U.S. 17/Emory Interchange without taking a corner of appellant's land which is remote from and separated from the intersection by lands of others. Appellant answers his own question correctly: the intersection closure was part of the overall U.S. 17/U.S. 707/Farrow Road project. However, the relevant question is whether the taking of part of his land was necessary for the intersection closure. The taking of his corner was only an incidental result of the closure: to round off a stop sign-controlled intersection to improve traffic flow where there was no longer crossing traffic. The taking was not indispensable to and was separable from the police power act that caused the purported damage to him.

Conclusion

The Court should confirm the Order of the Circuit Court that no evidence of damages attributable to the loss of traffic from the closed U.S. 17/Emory Road intersection be introduced in the jury trial of the just compensation due the landowner herein for the taking of part of his land.

Respectfully submitted,

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