THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Thomas L. Hughston, Circuit Court Judge

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SC Court of Appeals

Appellate Case no. 2012209046
Case No. 2009-CP-10-6185

Henry W. Frampton, III ....Respondent,

v.

South Carolina Department of Transportation...Appellant.

APPELLANT'S PETITION FOR REHEARING

Appellant, the South Carolina Department of Transportation, respectfully petitions the Court for rehearing and reconsideration of its Opinion filed October 30, 2013, on the grounds that the Court misconstrued the relevant law with regard to inverse condemnation and failed to fully consider appellant's arguments concerning proper trial procedure and the proper statute governing the award of attorney fees.

1. *The substantive law of inverse condemnation.*

In its Opinion, the Court held that highway construction on existing highway right-of-way outside the boundaries of a private owner's adjoining land is a physical taking of property from the owner that must be compensated under the constitution's takings clause. The Court cited the Supreme Court's decisions in *Hardin (& Tallent) v S.C. Dep't. of Transportation*, 371 S.C. 598, 641 S.E.2d 437 (2007), and *Hilton Head Automotive, LLC, v. SCDOT*, 394 S.C. 27,

714 S.E.2d 308 (2011), as mandating this conclusion. The Court is incorrect. Those decisions do not require that work done off of private property that has an effect within is a physical taking of that property. Rather, being a complaint of a temporary taking, this case is governed by *Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005), and must be analyzed under the factors set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The question is did the "delay," or the length of time the owner alleges he lost use of the property, ever become unreasonable. *Byrd, supra; Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 331-32, 122 S.Ct. 1465, 1484, 152 L.Ed.2d 517, 546-47 (2002). The character of the government's action herein, one of the factors to be analyzed under *Penn Central*, was not to force a landowner to alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Penn Central,* 438 U.S. at 123, 98 S.Ct. at 2646. Rather, because with few exceptions, the all landowners abut public roads that must be repaired from time to time, the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. *Dunes West Golf Club, LLC v. Town of Mount Pleasant,* 401 S.C. 280, 737 S.E.2d 601 (2013). This is not a taking. Mr. Frampton may be caused to suffer some loss of income every 75 years[1] when the James Island Creek Bridge is replaced. However, he greatly benefits as other landowners suffer the same inconvenience as the State's highway system is maintained in a serviceable condition. The *Dunes West* Court cited leading authorities as follows:

> " 'Not all damages suffered by a private property owner at the hands of [a] governmental agency are compensable.' " *Carolina Chloride,* 394 S.C. at 170, 714 S.E.2d at 877 (quoting *Woods v. State,* 314 S.C. 501, 504, 431 S.E.2d 260,

[1] When this bridge was last rebuilt in 1956 it was designed for a 50 year useful life. Today bridges are designed to last 75 years.

> 262 (Ct.App.1993)). Indeed, "[u]nder our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property." *Keystone Bituminous* [*Coal Ass'n v. Benedictis,* 480 U.S. 470, 491, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987)], 480 U.S. at 491, 107 S.Ct. 1232. "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." Id.

Dunes West, 737 S.E.2d 620.

The Court characterized our argument as claiming that Mr. Frampton's case was one of regulatory taking. It then declared the case to be one of a physical taking of private property. The Court is incorrect as a matter of law. In inverse condemnation jurisprudence, a physical occupation is a permanent and exclusive occupation by the government that destroys all of the owners' essential rights in the property. In *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002), the court, quoting *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), said,

> A physical occupation, as defined by the Court, is a permanent and exclusive occupation by the government that destroys the owners' right to possession, use, and disposal of the property.

Physical takings require physical occupation. *Tuthill Ranch, Inc. v. United States,* 381 F.3d 1132, 1135 (Fed. Cir. 2004). Permanent physical occupations are one of the two categories of cases that do not require the *Penn Central* analysis, being *per se* takings. The other category involves the enforcement of a government regulation that denies all economically beneficial use of land. *Hardin (& Tallent), supra*, 371 S.C. at 604, 641 S.E.2d at 441, citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). This is true even if the government's actions constitute a temporary physical invasion (as opposed to occupation). *Boise Cascade, supra,* at 1353. Thus, even entry onto property under legislative

authority to repair neighboring property is not a taking. *Main v. Thomason,* 342 S.C. 79, 88, 535 S.E.2d 918, 922 (2000).

Neither *Hardin (and Tallent)* nor *Hilton Head Automotive* stand for the conclusion this Court states: that any interference with ingress and egress to private property during constructionon an adjoining highway constitutes a taking of that property. In *Hardin,* the Supreme Court explained that although the existence of property interests is often determined by independent sources (independent of the takings clauses themselves) such as state law, South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which they analyze whether interference with someone's property interests amount to a constitutional taking. *Hardin (& Tallent), supra*, 371 S.C. at 604, 641 S.E.2d at 441. Citing *Penn Central, supra*, the Court stated that that analysis involves *ad hoc,* factual inquires to weigh the character of the government's action against the economic impact on the owner including the degree to which the action interferes with the owner's investment-backed expectations. In analyzing the character of the government's action, the focus, according to the Court, should be on the landowner's easements which the Court described as the right to get on and off of an adjoining public road and the right to access the public road system. *Hardin (& Tallent)*, 371 S.C. at 606, 641 S.E.2d at 437. Because easements of the plaintiffs in *Hardin* and *Tallent*, and those of the landowners in the later cases, *Carolina Chloride, Inc. v. SCDOT*, 391 S.C. 429, 706 S.E.2d 501 (2011), and *Hilton Head Automotive* remained intact, the Court did not proceed to discuss the other half of the balancing test, the economic impact on the claimant.

In *Hilton Head Automotive*, the Court explained that it was resolving the matter as a claim for a physical taking only because that was the way the appellant landowner presented it. *Id,* 394 S.C. at 30, 714 S.E.2d at 310, f.n. 2. The Court found that, because the appellant did not

have the right to travel in both directions on the adjoining highway, nothing was taken from it. Thus, in both *Hardin (& Tallent)* and *Hilton Head Automotive* the plaintiffs did not pass the threshold test of showing that the use interest they claimed was part of their estate to begin with. *Lucas v. South Carolina Coastal Council, supra.* Therefore, a full *ad hoc* factual inquiry to weigh the character of the government's action against the economic impact of the action including the degree to which the action interferes with the owner's investment-backed expectations was unnecessary.

Here, all work complained of occurred entirely upon existing State highway right-of-way. The fact that Respondent has an implied right to use that right-of-way for access does not give him a possessory interest in it. See *Hardin (and Tallent), supra* ("The existence of the road was the condition that created the easement, not the other way around.") 371 S.C. at 607, 641 S.E.2d at 442, f.n. 2. Respondent retained the rights to possession, use, and disposal of his rental house tract. As we noted in our main brief, "government action outside the owner's property that causes consequential damages within," are not always takings. *Loretto*, 458 U.S. at 428, 102 S.Ct. at 3164. They are more akin to regulatory takings cases because the gravamen of the complaints, as here, are that the use of the property was restricted for a time, not that the owner has been dispossessed. The Court should have conducted a factual inquiry to determine whether the Department's acts unreasonably restricted Mr. Frampton's use of his property. The time period of the alleged obstruction is essential to this inquiry.

The analysis of whether a taking has occurred in a case like the one at bar is governed by *Penn Central* because the claim stems from an allegation of a temporary denial of less than all economically viable use of the property. *Kiriakides v. School District of Greenville County*, 382 S.C. 8, 14, 675 S.E.2d 439, 442 (2009). Moreover, *Penn Central* applies to this case even

though our Supreme Court in *Hardin (& Tallent), supra*, characterized the rights of abutting landowners to access the road as the abutter's "easements." As noted above those rights are indeed rights that are appurtenant to land and a property interest. However, the law in this area focuses on the "parcel as a whole."

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment are entirely abrogated. In deciding whether a particular government action has affected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here the city tax block designated as the 'landmark site.'"

Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 331-32, 122 S.Ct. 1465, 1484, 152 L.Ed.2d 517, 546-47 (2002) quoting *Penn Central, supra. See also, Sea Cabins on the Ocean IV v. City of North Myrtle Beach,* 337 S.C. 380, 392-93, 523 S.E.2d 193, 200 (Ct. App. 1999). Thus, although plaintiff' may have been temporarily deprived of his tenant's ability to fully utilize the parking area on the rental house parcel (which we deny), they retained at all times all of the other sticks in the bundle of rights that make property valuable. *See, Main v. Thomason,* 342 S.C. 79, 88, 535 S.E.2d 918, 922 (2000).

Moreover, because time is a component of an interest in property, the property owner in that situation has suffered a partial loss, not a total one. Once the temporary restriction is lifted, value will return. 535 U.S. at 331-32, 122 S.Ct. at 1484, 152 L.Ed.2d at 546. Here, Mr. Frampton complained of the loss of use of a driveway for twelve months.[2] The temporal aspect of property is part of the parcel as a whole. The question before the Court (although we deny the use was ever restricted) is whether that time period was unreasonable. *Byrd v. City of Hartsville, supra; Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, supra.*

[2] Although this Court found a sixteen month period, we believe this time period to be relevant to damages only. There was never any allegation nor proof that entrance onto the parking area was restricted for that amount of time.

There was no evidence that the length of the bridge construction project was unreasonable. There were no delays, contractor defaults, or other unusual circumstances causing the planned contract completion date to be extended. The work was delivered on time. It was not extraordinarily long compared to similar bridge replacements.

Mr. Frampton has an easement to use the adjoining public road for access to his property. But that easement is dependent on the existence of the road. As the Supreme Court noted in *Hardin (and Tallent), supra,* "The existence of the road was the condition that created the easement, not the other way around." 371 S.C. at 607, 641 S.E.2d at 442, f.n. 2. It has long been held in this State that a purchaser of property on a public street does so subject to the discretion of government authorities to improve those streets. *South Bound R.R. v. Burton,* 67 S.C. 515, 46 S.E. 340 (1903). Mr. Frampton and all other landowners near a bridge must yield their easements to use the road every fifty or seventy-five years during the time it takes to replace that bridge to the public's greater right to maintain the highway system. Without such maintenance there would be no road to support his private easement of access. The predictable time period it takes to do so, even if there is a loss of use or income of the adjoining properties, is not a taking of that property. The evidence shows that value, and even higher income, returned after project completion.

2. *Respondent did not prove a taking.*

In its discussion on the proof of a taking, the Court characterizes our argument as being that the government's action herein was undertaken under the sovereign's police power. Therefore, it could not be an act of eminent domain. The Court concluded that because the Department's bridge replacement project did not involve the rerouting or diversion of traffic, it

was not acting under the police power, thus, the issue is only one of eminent domain. With due respect, we believe that the Court misconstrues our argument and the relevant case law precedents. The maintenance and rebuilding of public roads and bridges have traditionally been considered government function taken under the State's police power. The police power is the power of the sovereign to legislate in behalf of the public health, morals or safety by general regulations reasonably adapted to the end in view and not creating any arbitrary discrimination between different classes of men or things. 1 Sackman, *Nichols on Eminent Domain,* §1.42, p. 1-145; *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); *see, also, Richards v City of Columbia,* 227 S.C. 538, 553, 88 S.E.2d 683, 689 (1955) ("Statutes and municipal ordinances calculated to better the health, safety and welfare of the people have long and universally been recognized to be with the police power.") The *Richards* court goes on to state:

> 'Regulations and restrictions upon the manner in which a property owner may use his property when necessary for the general welfare are properly a part of the police power of legislative bodies and, if reasonable, are valid in so far as they tend to prevent harm to the public and to promote the common good. Under the police power, the legislative authority may, within proper limitations, impose and enforce regulations governing buildings upon privately owned property without violating the constitutional property rights of the owner. Necessary and reasonable expenses or loss of value, which will be sustained by an owner of property as a result of regulations made in the lawful exercise of the police power, do not invalidate such regulations and are *damnum absque injuria.*

Id.

The police power is one of the inherent powers residing in the concept of sovereignty that require no constitutional or statutory authority.[3] They may only be restricted by the constitution or general law. Regardless of the classification of the power, the question is whether the exercise

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[3] The others according to *Nichols*, are (a) Power to construct public improvements, (b) Power to control the public domain, (c) Power to compel the rendition of personal services, (d) Power of Taxation, (e) Eminent domain, (f) Destruction by necessity, and (g) War power. 1 Sackman, *Nichols on Eminent Domain,* §1.4[1] (3rd ed. 2002).

of the power is legitimate. It cannot be seriously argued that the replacement of bridges on a public highway by the Department responsible for maintaining the State Highway System is not a legitimate act of the sovereign. It is only when the police power "goes too far" that it will be recognized as a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). For that determination, the Court must resort to an exercise balancing all relevant circumstances to determine whether government has taken property. *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659, 57 L.Ed.2d at 648; *Byrd*, 365 S.C. at 658, 620 S.E.2d at 80. Here, the reconstruction of the bridge and its approaches were a government function that affects all landowners eventually. It is a program that adjusts the benefits and burdens of economic life to promote the common good that are not generally found to be takings. *Dunes West, supra.* Regarding the economic impact on Mr. Frampton, the loss of rent of $950 per month for a year ($11,500) every seventy-five years is not extraordinary given the cost to the public to replace the bridge to guarantee his continued access to his property. Regarding Mr. Frampton's investment-backed expectations, no owner of a parcel of land on a public road may reasonably expect that that road will never need replacement. As any hard asset, it has a fixed useful life after which complete rebuilding is necessary.

Also, in this section of the Opinion, we believe the Court misconstrued our arguments concerning the positive and aggressive acts required for a taking and our point related to the doctrine of laches. In an inverse condemnation case, it is the landowner's burden to demonstrate a taking including the loss of "all economically viable use." *Sea Cabins on the Ocean Homeowners Association, Inc. v. City of North Myrtle Beach*, 337 S.C. 380, 397, 523 S.E.2d 193, 202 (Ct. App.1999) (affirmed 345 S.C. 418, 348 S.E.2d 595). In determining the taking the *ad hoc* factual inquiry weighs all relevant facts. The rental house was vacant. The fact that the

existence of the silt fence and the fact that Mr. Frampton never requested it be removed until the project was complete are relevant facts to be included in the Court's balancing determination whether are not they are affirmative defenses that must be pled in another type of case. *Sea Cabins, supra.*

Regarding the sixteen months versus twelve month's question, the Court is correct that the plaintiff submitted photographs spanning that period. However, the photographs for months at the beginning and end of the period show the parking area fully open and useable. Sixteen months may be relevant to damages, but our argument goes to the question set forth herein as to whether the period of the government's alleged interference was unreasonable. The length of the restriction is relevant to the consideration of the parcel as a whole including its temporal aspect.

Finally, the Court noted in its recitation of the facts that, during the project, Mr. Frampton partitioned his property to divide his residential tract from the rental house tract. At oral argument, Department's counsel mentioned the Supreme Court's then recent opinion in *Dunes West, supra.* In that opinion, the Court notes that,

> It has been suggested, "in order for the [United States Supreme] Court to find that 'something' has been completely taken, the severance ...must have existed *prior to the government's action* ... That is, the appropriate understanding of what constitutes a 'parcel as a whole'—is previous real-life treatment of the resource, not the conceptual possibilities property law holds available." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Taking, 88 Colum. L.Rev. 1667, 1677 (1988).*

Id., 401 S.C. 308, 737 S.E.2d 616. Professor Siegel refers to this as "strategic behavior" on behalf of a landowner and notes that courts generally ignore such late sales and treat the original parcel as the parcel as a whole for takings analysis. Daniel L. Siegle, *How the History and Purpose of the Regulatory Takings Doctrine Help to Define the Parcel as a Whole,* Vermont Law Review, 36 Vt. L.Rev. 603 (Spring 2012). The Supreme Court of Idaho has refused to

countenance such a severance in a much cited case. *City of Coeur D'Alene v. Simpson,* 136 P.3d 310 (Idaho 2006). In the instant case, the fact that, upon learning of the proposed guardrail, Mr. Frampton severed his property into two parcels and conveyed the residence lot to his wife should be ignored. Prior to the severance, income from the rental house defrayed maintenance expenses for both properties. That is still the case. The parcel as a whole should be considered the entire combined residence and rental house tracts.

3. *Standard of Review.*

The Court is correct that inverse condemnation cases are actions at law. However, the question *vel non* of a taking is a question of law and involves the essentially *ad hoc* factual inquiries dependent on the circumstances of each case. *Dunes West, supra,* 401 S.C. at 315, 737 S.E.2d at 619. Those facts are weighed to determine whether the State's actions rise to the level of a taking. The Court may review factual background of the case without particular deference to the findings of the trial court.

4. Procedural Issues.

In its ruling on our argument that allowing the jury to sit during the takings phase of the trial at which it had no role prejudiced us, the Court held that this argument was not preserved for its review. The Court held that the Department's failure to immediately appeal the form order denial by Judge Harrington of its motion to transfer the case to the non-jury docket waives any further argument by it on this point. The Court held that *Cobb v. S.C. Dep't of Transportation,* 365 S.C. 360, 618 S.E.2d 299 (2005), supports this conclusion. We disagree and argue that *Cobb* supports our argument that our appeal of the trial judge's rejection of our motion to try the takings question before the court without the jury present is our first opportunity to

appeal that erroneous procedural ruling. In *Cobb,* the Supreme Court held that the trial court's refusal of the Department's motion to move the case to the non-jury docket was not error inasmuch as landowners are entitled to a jury trial to determine just compensation in an inverse condemnation case. *Id.,* 365 S.C. at 364, 618 S.E.2d at 301. The *Cobb* Court reasoned that inverse condemnation cases had historically been treated similar to direct condemnations. Jury trials to determine just compensation all allowed in direct condemnations at either party's request by the Eminent Domain Procedure Act, S.C. Code §28-2-310 (Rev. 2007). The Court, however, did not rule on our argument that the taking and compensation (if necessary) phases be separated into two proceedings. The reason was that the yet to be named trial judge had not yet ruled on that request. Thus, that particular issue was not before the Court on appeal. The current case presents an identical situation. The trial court agreed to consider the takings issue without input of the jury. However, he denied our motion that the jury only sit for the purpose of just compensation after a taking had been found and defined. This is our first opportunity to appeal that ruling. Our argument has never been waived. The procedure followed below allowed the jury to hear testimony regarding losses that were ultimately found not to constitute takings. We believe this influenced them to find a higher value for those acts the judge did rule a taking to our prejudice.

5. *The Court should have applied the General Assembly's express definition of prevailing parties in eminent domain cases.*

In rejecting our argument that the General Assembly's expressed policy on entitlement to costs and attorneys' fees in eminent domain should apply to inverse condemnation cases, the Court held that S.C. Code §28-11-30 (Rev. 2007) and not S.C. Code §28-2-510 (Rev. 2007) is the more specific statute and requires the award of costs and fees no matter how minimal the landowner's recovery. The Court reasons that to hold otherwise would cause the landowner to

"bet against himself" and foresee that the judgment will be closer to his testimony than that of the government which typically asserts that no compensation is due. However, the Court does not explain why this is any different from award determinations in direct condemnation cases. In those cases, the State institutes a condemnation case by service of a Notice of Condemnation and Tender of Payment. Concurrently, it pays into court the amount of its estimate of just compensation. The landowner is entitled to challenge that estimate in court and if it recovers an amount closer to that to which it testified than to what the State testified, he may be awarded his costs and fees unless the court determines it delayed the case, or that the condemnor's litigating position was substantially justified. In such a case the landowner is also "betting against himself in seeking more than twice the government's offer.

The General Assembly has the authority to determine how claims may be made against the State. S.C. Code Const., art. XVII, §2. Even when legislative action is taken, statutes enacted in derogation of sovereign immunity must be strictly construed. *Washington v. Whitaker*, 317 S.C. 108, 127, 451 S.E.2d 894, 906 (1994); *accord, Unisys v. S.C. Budget & Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001). Both of the Code sections at issue negate the "American Rule" that each party to a lawsuit bear its own costs. Statutes in derogation of the common law are to be strictly construed as well. *Crosby v. Glasscock Trucking Co., Inc.*, 340 S.C. 626, 532 S.E.2d 856 (2000).

In enacting the condemnation fee statute and erecting a bar to recovery thereunder, the General Assembly obviously wanted to enable landowners who had been mistreated by the State by way of a low offer for their land be able to obtain an attorney to vindicate their rights by assuring that attorney that by obtaining a positive result in a meritorious case, he will be paid for his services. *See, Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S.

546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986). On the other hand, by setting a relatively high bar to the recovery of fees, the General Assembly also wanted to discourage landowners from "rolling the dice" and seeking a large verdict knowing that they would never be out of pocket for their litigation costs in doing so.

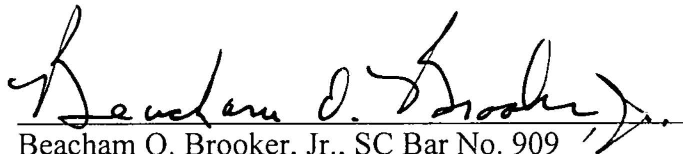
A hypothetical may be presented using the facts of this case. Had the Department offered to pay the amount Mr. Frampton was ultimately awarded herein, $36,527, as settlement of the taking of driveway access that it admitted to be compensable, he would have no incentive to accept the offer because there would be no risk in continuing the case to collect on less meritorious claims. All costs of the continued litigation would be borne by the State. The General Assembly obviously wanted landowners to be fully protected against abuse by the State but not to finance frivolous claims against itself.

Likewise, the fact that an inverse condemnee must prove a taking while a direct condemnee need only try damages, does not present a distinction that justifies more favorable treatment of the former with respect to fee awards. The additional time and attorney skills required should be fully compensated under the lodestar formula. *See, Jackson v. Speed,* 326 S.C. 289, 308, 486 S.E. 2d 750, 759-60 (1997) (The nature, extent, and difficulty of the case is one of the factors in determining a reasonable rate and hours expended under the loadstar formula.)

6. Conclusion.

The Court should reconsider its decision and determine that under *Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005), the length of the period (if any at all) which the Department may have caused Mr. Frampton to lose income from his property was not unreasonable and, thus, not a taking. Full value and, indeed greater value, returned to the

property after a taking partially due to improvements made thereon by the State. The procedure followed by the trial court prejudiced the defendant and the trial court awarded fees under the wrong law.



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