THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Edward B. Cottingham, Circuit Court Judge

Case No. 2010-CP-26-07961

Appellate Case No. 2013-001759

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

v.

David Franklin Powell ..... *Appellant.*

[INITIAL] REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. The present action is an exercise of the power of eminent domain, not the police power.

This action was initiated by the South Carolina Department of Transportation, "[p]ursuant to the South Carolina Eminent Domain Procedure Act, Section 28-2-10, et seq." upon the filing of the Condemnation Notice and Lis Pendens on August 27, 2010. (Condemnation Notice, Page 1.) Pursuant to those documents, SCDOT acquired a portion of Appellant's property for the construction of the "Interchange at US 17 Bypass and SC 707/Farrow Parkway." (The "Interchange Project") (Condemnation Notice, Page 2.) Yet, it was not until Condemnor sought to exclude an appraisal generated on its behalf that Condemnor sought the police power protection.

At the hearing below, Judge Cottingham repeatedly declared that SCDOT's actions in the present matter are exercises of the eminent domain, rather than the police power. For example, Judge Cottingham stated:

> THE COURT: I want to say one more time gentlemen, this is not a police action in my view. This is a taking by condemnation.

(Hearing Transcript, Page 41.) The court continued:

THE COURT: All right, sir. I've heard it and fine arguments on both sides. I want the record to reflect one more time that this is not a police action.

(Hearing Transcript, Page 42.) And, finally, Judge Cottingham concluded:

THE COURT: I will forward you my formal order as to my ruling, but I want it clear that this is not a police action.

(Hearing Transcript, Page 43.) Shortly thereafter, Judge Cottingham requested Condemnor submit a proposed order, and Condemnor complied. Notably, the order Condemnor submitted failed to include the finding Judge Cottingham repeated during the hearing.

Still, Condemnor seeks in its brief to invoke the protection of a governmental power Judge Cottingham clearly held Condemnor had not invoked here. Condemnor made no contemporaneous objection to Judge Cottingham's repeated ruling, failed to draft the order in a manner consistent with Judge Cottingham's clear instruction, and failed to seek reconsideration of or appeal from, Judge Cottingham's repeated finding. As such, this Court should not now extend to Condemnor protection from the very power Judge Cottingham held SCDOT had not exercised in the present matter.

B. Questions of fact are indeed present in this matter.

Condemnor asserts in its brief that "[t]he facts herein are not in dispute" in order to buttress its position as to the standard of review in seeking affirmation of the

order below. (RB, Page 3.) Yet, Respondent goes on to state that, with regard to the substantially increased remoteness of access the Landowner must endure as a result of the acquisition herein, "[t]he added distance is not unreasonable." Respondent cites no support for this assertion, which is likely due to the fact that none exists in the record. Whether access to Appellant's tract remains reasonable following SCDOT's acquisition has not been determined below. Neither is there any evidence in the record as to whether Appellant's property has suffered more than the "minor inconvenience" experienced by the property owner in Hilton Head Auto or whether Appellant's property has been "materially impaired" as a result of Respondent's actions.

In truth, these are precisely the type of holdings which Respondent seeks to prevent the jury the opportunity of reaching. The last thing the Department of Transportation wants a jury to determine is whether SCDOT is being reasonable by involuntarily relocating access to David Powell's property such that he would have to travel 2.4 miles further to reach the property after the acquisition than in the before and also such that a traveler would have to know in advance how to navigate to the property in the configuration SCDOT left it following the take. Were the jury to be made aware of these injustices suffered by Mr. Powell, the jury may be inclined to restore him to the financial position he enjoyed before SCDOT filed this action.

That would be precisely the outcome envisioned by the requirement for just compensation in the first place. As explained by the South Carolina Court of Appeals in S.C. Dep't of Transp. v. Faulkenberry, 337 S.C. 140, 522 S.E.2d 822 (Ct. App. 1999):

> In order for the landowner to be compensated fully, the government must "put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking." Phelps v. United States, 274 U.S. 341, 344, 47 S. Ct. 611, 71 L.Ed. 1083 (1927). See also Stewart & Grindle, Inc. v. State, 524 P.2d 1242 (Alaska 1974); State Roads Comm'n v. G.L. Cornell Co. Sav. & Profit Sharing Trust, 85 Md. App. 765, 584 A.2d 1331 (1991).

Faulkenberry, 387 S.C. at 148, 522 S.E.2d at 826.

C. "But for" the highway project necessitating the condemnation herein, Landowner David Powell would have suffered no diminution to his property value.

As was the case in Wilson, but for the construction of the elevated overpass, the intersection at Highway 17 and Emory Road would never have been closed, the cul-de-sac would have never been constructed, and SCDOT would have had no need to condemn Landowner's property. As stated in Wilson,

> But for such overall construction and relocation, and condemnation under the power of eminent domain for such purposes, there would have been no median and, of course, no damage to the abutting landowner. It logically follows, we think that any damage attributable to the planned median is an incidental result of the exercise of the

> power of eminent domain, and under these circumstances we know of no sound reason for departing from the established rule in this State, which is as follows:
>
> "The entire parcel is considered as a whole, and the inquiry is, how much has the particular public improvement decreased the fair market value of the property, taking into consideration the use for which the land was taken and all the reasonably probable effects of its devotion to that use."

Wilson at 396, quoting South Carolina State Highway Dept. v. Bolt, 242 S.C. 411, 417, 131 S.E.2d 264 (1963).

Likewise in the present action, Respondent had no plans or intention to close the intersection at Highway 17 and Emory Road at any point. In fact, that intersection was constructed when Appellant's father and predecessor in title conveyed property to the SCDOT for the construction of Highway 17. The intersection was the means by which Appellant's property retained value and access to the traveling public, rather than only the few locals who would otherwise know how to navigate to his tract.

"But for" the "overall" construction of the Interchange, that access point, and Appellant's property value, would remain today. See Wilson, Page 368-369. This was plainly evidenced in the appraisal Respondent commissioned, which it sought to exclude from the evidence to be presented at trial below. Respondent's appraiser, Corbin Haskell, determined the property, prior to the acquisition, was "located along two secondary thoroughfares with adequate access." (March 14, 2013 Appraisal of Corbin Haskell, Page 15.) This, Haskell confirmed, was "fairly common to the

neighborhood" and did "not limit the use of the subject property for secondary commercial, service, or light industrial uses common to the neighborhood." (March 14, 2013 Appraisal of Corbin Haskell, Page 15.) Based on its exposure, access, and other qualities, Haskell valued the property prior to the acquisition at Nine and no/100 ($9.00) Dollars per square foot, for a total of Nine Hundred and Sixty-Three Thousand and no/100 ($963,000.00) Dollars. (March 14, 2013 Appraisal of Corbin Haskell, Page 22.)

As a result of the Interchange Project, Haskell determined:

> ...there will be new controlled access along Highway 17 Bypass, thus closing the intersection with Emory Road and Highway 17 Bypass to the west of the subject. Additionally, just north of the subject Old Socastee Road will be closed with a cul-de-sac. Access to the subject will now be from Emory Road traveling east/northeast. Emory Road will provide eventual access to Farrow Parkway to the southwest. Emory Road will also eventually intersect with Old Railroad Bed Road, which will provide eventual access to Old Socastee Road/Highway 17 Bypass to the northeast. After the acquisition, vehicular access from Highway 17 Bypass is changed from "typical" of the neighborhood before the acquisition to "indirect" after the acquisition.

(March 14, 2013 Appraisal of Corbin Haskell, Page 23.)

Haskell contrasted this change in access to a paired sales analysis he conducted involving two properties accessible similarly with the subject *before* the acquisition and two other properties accessible similarly with the subject *after* the acquisition. According to his exhaustive research of the actual value of similar properties, as evidenced by the sales thereof in the marketplace, Haskell determined a reduction of

access such as the one SCDOT caused in the present action, leads to a reduction in value of Fifty Percent (50%) in the respective Horry County marketplace. (March 14, 2013 Appraisal of Corbin Haskell, Page 24 through 26.)

Thus, Haskell determined the subject property suffered a diminution in value from Nine Hundred and Sixty-Three Thousand and no/100 ($963,000.00) Dollars before the Interchange Project to Four Hundred and Forty-Six Thousand and no/100 ($446,000.00) Dollars as a result of the Interchange Project acquisition. Condemnor's intent in seeking to exclude this information from the jury's consideration, and the Circuit Court's ruling permitting Condemnor to do so, produce a result that cannot be characterized as "just" such as is required when an exercise of eminent domain results in the involuntary taking of private property. At best, Condemnor's position is that Landowner David Powell, and others so situated, have no expectation of being returned, following a taking, to the same financial position they enjoyed prior to the taking. This is wholly inconsistent with the constitutional mandates included in the provisions which empower governmental bodies to condemn private property.

D. The South Carolina Eminent Domain Procedure Act.

Section 28-2-10, et seq. of the South Carolina Code of Laws provides the "exclusive procedure whereby condemnation may be undertaken in this State." 28-2-30. The Act provides guidance in valuing the amount of just compensation to be paid to a landowner for the taking of real property. Specifically, the Act provides:

> In determining just compensation, only the value of the property to be taken, ***any*** **diminution in the value of the landowner's remaining property**, and ***any*** benefits as provided in Section 28-2-360 may be considered. (Emphasis added).

S.C. Code Ann. Section 28-2-370. The clear language of this statute, in all instances where property is taken pursuant to the Act, requires landowners be compensated fully for *all* the diminution in value to their property. This approach has been repeatedly explained by South Carolina appellate courts.

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will. See id. If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning. Strickland v. Strickland, 375 S.C. 76, 88, 650 S.E.2d 465, 472 (2007). The Court will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation. Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009).

Transp. Ins. Co. & Flagstar Corp. v. S. Carolina Second Injury Fund, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010).

In the present action, both Landowner and Condemnor, as well as their respective expert witnesses, agree Landowner David Powell's personal net worth will diminish greatly as a result of the Interchange Project. Respondent's own expert estimates the diminution in Mr. Powell's property value to be Five Hundred and Seventeen Thousand and no/100 ($517,000.00) Dollars.

The position of the government in this matter is that, while Mr. Powell may in fact suffer a great personal financial loss as a result of the government construction project, it is non-compensable under South Carolina law. This, again, fails to uphold the constitutional mandate attendant with the provision granting the government the power to take private property. As the Wilson court explained:

> While the construction of a median, with nothing more, may very well be an exercise of the police power with no resulting compensable damage to an abutting property owner, in the instant case the proposed median is only an incidental part of the overall Department plans and contemplated construction. There is no suggestion of the need for, or the contemplated construction of, a median except as an incidental part of the major relocation and construction plans of the Department. But for such overall construction and relocation, and condemnation under the power of eminent domain for such purposes, there would have been no median and, of course, no damage to the abutting landowner. It logically follows, we think that any damage attributable to the planned median is an incidental result of the exercise of the power of eminent domain, and under these circumstances we know of no sound reason for departing from the established rule in this State, which is as follows:
>
> "The entire parcel is considered as a whole, and the inquiry is, how much has the particular public improvement decreased the fair market value of the property, taking into consideration the use for which the land was taken and all the reasonably probable effects of its devotion to that use."

S. Carolina State Highway Dep't v. Wilson, 254 S.C. 360, 368-69, 175 S.E.2d 391, 396 (1970). Quoting South Carolina State Highway Dept. v. Bolt, 242 S.C. 411, 417, 131 S.E.2d 264 (1963).

Likewise, while the closure of the intersection at Highway 17 Bypass and Emory Road as well as the construction of the cul-de-sac terminating Old Socastee

Road, with nothing more, may very well be an exercise of the police power with no resulting compensable damage to Appellant David Powell, in the instant case the proposed closure of the intersection at Highway 17 Bypass and Emory Road and the construction of the cul-de-sac are only incidental parts of the overall Department plans and contemplated construction. There is no suggestion of the need for, or the contemplated construction of, the closure of the intersection at Highway 17 Bypass and Emory Road or the cul-de-sac except as an incidental part of the major relocation and construction plans of the Department. But for such overall construction and relocation, and condemnation under the power of eminent domain for such purposes, there would have been no closure of the intersection nor any cul-de-sac and, of course, no damage to David Powell. It logically follows, that any damage attributable to the planned closure of the intersection or the cul-de-sac are incidental results of the exercise of the power of eminent domain, and under these circumstances there exists no sound reason for departing from the established rule in this State, which is as follows:

> "The entire parcel is considered as a whole, and the inquiry is, how much has the particular public improvement decreased the fair market value of the property, taking into consideration the use for which the land was taken and all the reasonably probable effects of its devotion to that use." South Carolina State Highway Dept. v. Bolt, supra.

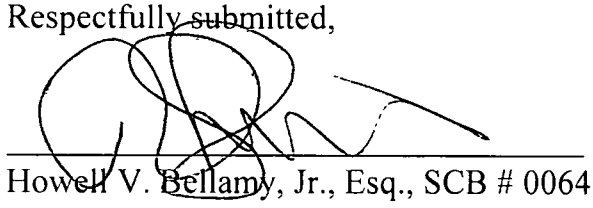
S. Carolina State Highway Dep't v. Wilson, 254 S.C. 360, 368-69, 175 S.E.2d 391, 396 (1970). Quoting South Carolina State Highway Dept. v. Bolt, 242 S.C. 411, 417, 131 S.E.2d 264 (1963).

Clearly, Respondent and the court below seek to prevent Landowner David Powell from being made whole following the condemnation of his property and the incredible reduction of his property value. Respondent's logic would suggest Mr. Powell should merely donate Five Hundred and Seventeen Thousand and no/100 ($517,000.00) Dollars to the Interchange project. That position cannot be justly supported by a government constrained by constitutional mandates of "just" compensation.

II. CONCLUSION

Once the government takes the *extreme* step of seizing private property, it should be held to a heightened standard and required to leave the private property owner in as good a position pecuniarily as he was before his land was taken. Anything less fails to secure just compensation. Accordingly, Landowner David Powell respectfully requests this Court reverse the holding below and remand this case for trial on the merits to include full and fair consideration of "any diminution in value to the landowner's remaining property," including *any* diminution caused by reconfiguration of access necessitated by the government's construction project for which his land was condemned pursuant to the Eminent Domain Procedure Act.

Respectfully submitted,



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