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SC Court of Appeals

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
O. Stanley Smith, III, Acre Plus, LLC and Constan Gervais Street Car Wash, Inc., Plaintiffs, v. City of Columbia, Defendant.	C/A No.: 2023-CP-40-05555 **ORDER**

THIS MATTER came before the Court for a bench trial on June 23, 2025. The Court heard evidence and argument from the parties from June 23 through June 26, 2025. Having heard the evidence at trial, and for the reasons stated herein, the Court renders judgment for the Plaintiffs on their claim for inverse condemnation.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action concerns the City of Columbia's (the "City") demolition on March 9, 2021 of a portion of a retaining wall that Plaintiffs O. Stanley "Chip" Smith, III, Acre Plus, LLC ("Acre Plus"), and Constan Gervais Street Car Wash, Inc. ("Constan") (collectively, "Plaintiffs") had erected fronting on Gervais Street at the site of the now-former Constan Car Wash in Columbia. Plaintiffs contend that they were within their rights to construct the wall, for which the City had granted them a zoning permit, and that the City's destruction of the wall caused, and in fact was intended to cause, flooding on their property that rendered the property unusable for its intended purpose. Plaintiffs thus contend that the City's destruction of the wall constituted a taking of their property and property rights without just compensation.

By way of background, the Constan Car Wash began operating at 1950 Gervais Street in 1949. Chip Smith's grandfather, O. Stanley Smith, purchased the parcel of land whereupon sat the

original car wash building in 1949. The car wash itself was operated by Chip Smith's father, O. Stanley Smith, Jr., and his mother, Constance Smith, for many years (hence the name Con-Stan).

In 1964, the Smiths sought to expand the car wash facilities into an adjacent tract of land between the parcel that Stanley Smith, Sr. had purchased in 1949 and property that was, at the time, owned by Southern Railway. Evidently, the City of Columbia claimed to own that parcel of land as "unopened Laurens Street," and so Stanley Smith, Sr. petitioned the City for an encroachment permit to enter upon that land, construct buildings for the car wash, install underground storm drainage for Rocky Branch which flows through this land, and provide for other utilities in this area. On November 18, 1964, the City of Columbia passed an ordinance granting Stanley Smith, Sr. and his heirs an assigns "permission to build, maintain as presently located, or to relocate buildings, and install storm drainage for Rocky Branch, relocate the present sewer, and encroach generally on that part of Laurens Street south of Gervais Street lying between the Eastern boundary of his property and the right-of-way of Southern Railway Company." The ordinance further provided that:

> In exercising the privilege granted under this ordinance O. Stanley Smith, his heirs or assigns, will defend, indemnify, and save harmless the City from any and all claims or causes of action which may arise by reason of construction or maintenance of any encroachment upon said Laurens Street under the terms of this Ordinance and, in the event the area described becomes in conflict with future municipal plans, said property shall upon 30 days notice be returned to the City by O. Stanley Smith, his heirs or assigns, and all encroachments removed and the street restored to its original condition, or to such condition as may be agreeable to the City, by the said O. Stanley Smith, his heirs or assigns, at his own expense.

Thereafter, the Smiths in fact constructed a portion of the car wash facilities on this parcel, paid for the construction of an underground conveyance for Rocky Branch as well as additional sewer facilities, and operated their car wash on this property for many years.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

Sometime in the late 1970s, the property began to flood during periods of heavy rainfall. Chip Smith testified that the flooding did not begin until the City installed a sewer line within the underground conveyance for Rocky Branch beneath Gervais Street and through the underground conveyance that his family had constructed south of Gervais Street. Plaintiffs' engineering expert Dan Creed testified that the cause of the flooding is insufficient capacity at the entrance of the culvert running beneath Gervais Street, which causes Rocky Branch to overtop Gervais Street during periods of heavy rainfall. The water then flows south across Gervais Street and onto Plaintiffs' property. Chip Smith testified that each time Rocky Branch floods in this manner, the floodwater causes extensive damage to the property, including water damage to the car wash equipment, drywall and flooring, and inventory. He further testified that when it flooded, the car wash would close for the duration of the flood and sometimes for days thereafter while he and the car wash staff cleaned up and completed repairs.

Mr. Smith testified that for years he requested the City take action to correct the flooding, to no avail. In 2008, Mr. Smith sued the City seeking damages for the flooding and for an injunction, but ultimately dismissed that suit without prejudice in 2011. Mr. Smith thereafter continued to petition the City to alleviate the flooding condition, but the flooding continued.

In 2017, Mr. Smith sought his own solution to the flooding issue. He hired engineer and hydrologist Dan Creed to design a low-profile wall along Gervais Street to divert the floodwater away from his property. In December 2017, Mr. Creed submitted structural plans for the wall to the City's Planning and Development Services Department, which showed the height and length of the wall as well as elevations in the area of the wall. The plans also depicted the high-water

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

mark on the car wash building, which was 245.7 feet above mean sea level.[1] Because a portion of the wall would need to be constructed on property owned by the railroad (now Norfolk Southern Railway Company), Mr. Smith, through his wholly-owned company Acre Plus, LLC, entered into a lease with Norfolk Southern to allow construction of the wall. This took the form of an amendment to an existing lease with Norfolk Southern which leased to Acre Plus the land between the railroad embankment and the boundary of Norfolk Southern's property line, which is 65 feet from the centerline of the railroad.[2] A copy of the amended lease was included in the materials that Mr. Creed submitted to the City along with the plans for the wall.

In January 2018, having submitted all of the requisite materials and plans for the wall, Mr. Smith submitted an application for a permit to construct the wall, and the City approved the permit that same month. Mr. Smith hired Mashburn Construction to build the wall, and construction was completed in February 2018. Mr. Smith and other witnesses testified that for the duration of the time the wall stood, the wall effectively prevented floodwater from reaching the property and that the property did not flood.

At some point after the wall was constructed, an SCDOT engineer named Tony Magwood contacted the City Engineer Dana Higgins and informed her that he was concerned that the wall Mr. Smith had built could impound water on Gervais Street. Ms. Higgins then contacted Mr. Smith to inform him that the City objected to the wall and would seek its removal. Mr. Smith and the

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[1] The high water mark on the plans indicates that the flooding reached approximately 1.5 to 2 feet above ground level.

[2] Mr. Smith testified that his family had been using the railroad property for its car wash operations for many years under a handshake agreement with the railroad, but that the lease was formalized in 2017. After the lease was formalized, Acre Plus paid rent to Norfolk Southern under the terms of the lease.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

City discussed potential alternatives to the wall to mitigate the flooding, but the parties could not reach an agreement on this point.

In December 2019, the City Attorney, Patrick Wright, sent a letter to Mr. Smith demanding that the wall be removed. The letter asserted that the wall was a safety hazard to motorists on Gervais Street and that the permit application for the wall had been incomplete because it "mentioned nothing regarding drainage." The letter further asserted that the City of Columbia owns a portion of the land whereupon the wall was constructed, to include the railroad right-of-way, and that "[t]he wall prohibits reasonable access to City property." The letter demanded that Mr. Smith contact Dana Higgins within 30 days about a plan to remove the wall from City property, and noted that if the wall were not removed within 90 days, "the City may be forced to remove the wall or have the wall removed, at the property owner's expense."[3]

After receiving the letter, Mr. Smith asked Dan Creed to contact Dana Higgins to see if there might be a solution to the dispute. In their discussions, Ms. Higgins told Mr. Creed that she was concerned the wall was excluding floodwater from a grated drop inlet located just behind the wall, and was not allowing floodwater to enter the underground conveyance for Rocky Branch through that inlet.[4] In response, Mr. Creed developed hydraulic plans for an opening in the wall that would allow the drop inlet to accept its maximum capacity for floodwater. Mr. Creed submitted the plans to Dana Higgins; however, Ms. Higgins rejected the plans without offering any explanation and demanded simply that the wall be removed.

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[3] Of note, the letter mentioned the 1964 City Ordinance as background for Constan's occupation of the premises, but it did not specifically invoke any of the provisions of the ordinance or demand that the property be "returned" to the City.

[4] Mr. Creed testified at trial that the drop inlet did not appear to be designed to accept floodwater from Gervais Street—it is rather a grated inlet similar to those commonly found in parking lots designed for accepting on-site drainage and rainwater.

Ultimately, the City developed its own plans to remove the wall and hired a contractor, G.H. Smith, Inc., to complete the demolition. Several days before the demolition was set to take place, the City's property manager Gale Nash provided Ms. Higgins with a 1901 deed that she believed conveyed to the City's a section of "Laurens Street" on this property. Ms. Higgins circulated the deed internally as evidence of the City's ownership of the portion of the property where the wall was to be removed.

On March 9, 2021, Dana Higgins and G.H. Smith contractors arrived at the Constan property to demolish the wall accompanied by a City of Columbia Police Officer. Mr. Smith, observing that the City was preparing to demolish the wall on the property that was leased from Norfolk Southern, called Norfolk Southern and informed them of the situation. In response, Norfolk Southern sent one of its railroad police officers, David Hill, to the scene. Upon arriving, Mr. Hill informed the City and its contractors that they were trespassing on Norfolk Southern property.[5] Ms. Higgins, following a phone call with the City Attorney, disagreed with Mr. Hill and told him that the wall was coming down that day. The City commenced its demolition, casting dust and debris while the car wash was operating and also set the railroad embankment on fire while sawing through the metal rebar that reinforced the wall.

Plaintiffs filed this suit on March 22, 2021 against the City and G.H. Smith asserting claims for trespass, conversion, inverse condemnation, negligence, a statutory claim under S.C. Code Ann. § 5-31-450 for drains for surface water, for declaratory judgment, and for a temporary injunction. The City filed a motion to dismiss; Plaintiffs' conversion claim was dismissed by the Honorable Alison Lee on March 6, 2022 by agreement of Plaintiffs and the remainder of the

[5] Plaintiffs offered Mr. Hill's deposition testimony at trial as he is a resident of Georgia and thus beyond the subpoena power of the Court. Rule 32(a)(2), SCRCP.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

motion was denied. The City answered the complaint on March 18, 2022 generally denying the allegations in the complaint and asserting a number of affirmative defenses, most of which are based on the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq*.

On December 20, 2022, this case was removed from the docket and placed on inactive status by consent of all parties in accordance with Rule 40(j). On October 18, 2023, following a motion from Plaintiffs, this case was restored to the active docket. On October 10, 2024, G.H. Smith was dismissed from this case by stipulation of all parties.

During discovery in this case, Plaintiffs observed that the 1901 deed upon which the City had relied to claim ownership over the subject property was actually for a different section of Laurens Street beginning at Senate Street and running south, making it irrelevant to the subject property, which is north of Senate Street. Plaintiffs also in July 2024 supplied the City with a deed from Norfolk Southern showing that its predecessor, the Charlotte, Columbia, and Augusta Rail Road Company, had acquired its property interests to its land—that being 65 feet from the centerline of the railroad—in 1874 from private individuals for $500. Just prior to trial, the City stipulated that (1) Norfolk Southern has good fee simple title to the land within 65 feet of the centerline of the railroad; (2) Norfolk Southern had the ability to, and did, lease to Acre Plus a portion of that land from the railroad embankment to the outer boundary of its property; (3) the lease with Norfolk Southern was in full force and effect on March 9, 2021; (4) the City does not own, and has no property rights with respect to, the Norfolk Southern property; and (5) the portion of the wall that was removed on March 9, 2021 sat entirely within the Norfolk Southern property that had been leased to Acre Plus.

In their pre-trial briefing, Plaintiffs informed the Court that they would not be proceeding on their claims for trespass, negligence, declaratory judgment, and for a temporary injunction.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

During trial, Plaintiffs withdrew their claim under S.C. Code Ann. § 5-31-450, thus leaving only the claim for inverse condemnation.

II. TESTIMONY AND EVIDENCE

At trial, Plaintiffs first called Gale Nash, who testified that she had erred in determining that the 1901 deed for Laurens Street applied to the subject property. She further identified an 1898 report from the City Attorney accounting for the City's ownership of the rights in its streets at that time, and testified that the report did not identify any property rights held by the City for Laurens Street between Gervais and Senate Streets, where the subject property is located.

Plaintiffs then called Dana Higgins, who testified that she mistakenly believed on March 9, 2021 that the City owned the property whereupon the wall was demolished, and that she would not have demolished the wall had she known that the City did not own that property. She further testified that she was aware of flooding issues on the property and had met with Mr. Smith about these issues before the wall was built. She further testified that she did not review Mr. Smith's permit application for the wall before it was granted as it was not submitted to her department, and described this as a "loophole" in the permitting process that has since been corrected. She further testified that she rejected Dan Creed's proposed modification to the wall because it included only hydraulic calculations and not hydrological calculations, the latter of which would have taken into account the flow of water from Rocky Branch upstream and from other sources. She further testified that she did not herself perform any hydrological calculations, or any other calculations, regarding this property or the wall before she determined to demolish the wall. She further testified that she knew when she demolished the wall that the property would flood again.

By agreement of the parties, the City was permitted to call Tony Magwood out of turn. Mr. Magwood testified that he contacted Dana Higgins after the wall was constructed to inform her of

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

his concern that the wall could be impounding water on Gervais Street, which is an SCDOT-administered road. However, because the wall was outside of the SCDOT right-of-way, SCDOT had no jurisdiction over the wall. Mr. Magwood testified on cross-examination that neither he nor SCDOT performed a study about the hydrological impact of the wall, nor did SCDOT make any formal determination about the wall.

Plaintiffs then called Dan Creed and qualified him as an expert in civil engineering without objection. Mr. Creed testified that he designed the wall to exclude floodwater from the Constan property based on the high water mark shown on his plans, and that for the duration of the time the wall stood, it could be expected to exclude floodwater from Gervais Street up to that height. Mr. Creed further testified that the materials he submitted to the City in support of the permit application were accurate and complete, and that at no time did the City raise any issues with the application. Mr. Creed further testified that after the portion of the wall on Norfolk Southern property was removed by the City, the wall could no longer be expected to exclude those floodwaters, and that in fact the removal of that portion of the wall would foreseeably cause flooding on the property to resume. Mr. Creed further testified that the cause of the flooding on the property was insufficient capacity at the entrance of the culvert for Rocky Branch on the north side of Gervais Street, which causes floodwaters to overtop Gervais Street. Mr. Creed further testified that the grated drop inlet on the Constan property, which was the subject of his and Dana Higgins' discussions and his hydraulic report, was not designed to accept floodwaters from Gervais Street and that it was inadequate for that purpose. Thus, hydrological calculations concerning that drop inlet would have been irrelevant and there was no need to perform them for his submittal to Ms. Higgins.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

Plaintiffs next called Chip Smith. Mr. Smith testified at some length about the flooding issues on the property and his efforts over the years to have the City correct those issues. He further testified about the damage to the property caused by the flooding, which included not only the temporary cessation of the car wash business, but also damage to the equipment and infrastructure at the car wash, the loss of employees who required consistent employment, and other deleterious effects of the flooding. Mr. Smith testified that after the wall was constructed, the property did not flood and he was able to successfully operate his business for the three years prior to the City's demolition. Mr. Smith testified that once the wall was demolished by the City, the flooding resumed[6] and there was no practical way for him to continue operating the business. He further testified that when the property flooded, the flooding damaged the entire car wash property. He further testified that the resumed flooding ultimately forced him to close the business in October 2022.

Mr. Smith also testified about the property rights that he holds upon the subject property. He testified that the fee simple property that has been held by his family since the late 1940s was deeded to him in January 2000 by his father and by Constan, Inc. which each held a half interest in this land at the time. He testified that the land that was the subject of the 1964 City ordinance was also deeded to him by his father in 2000, and that his family has been exclusively occupying and using that property since at least 1964. He further testified that he paid property taxes on that land from 1983 until last year. He further testified that he is the sole owner of Acre Plus, LLC, which leased from Norfolk Southern the land from the railroad embankment to the outer boundary

[6] Mr. Smith identified in particular three flooding events on the property between March 2021 and October 2022, when the car wash closed, and explained the impact of those flooding events to the car wash property.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

of the railroad property, or 65 feet from the centerline of the railroad, and that this lease was in full force and effect on March 9, 2021.

Plaintiffs next called Deborah Haskell. Ms. Haskell offered her qualifications, which included over thirty years of experience as a real estate appraiser and a number of high-profile valuation projects including Fenway Park in Boston, utilities projects to include a nuclear power plant, and others. She was qualified as an expert in real estate evaluation without objection. Ms. Haskell explained generally how real estate valuation works and specifically how valuation in a condemnation case is performed. She explained that she performed a valuation of Plaintiffs' property interests—including the fee simple property owned by Mr. Smith, the so-called "ordinance property," and the leasehold from Norfolk Southern—as of the date of the taking in the condition with the wall intact, and in the condition after the wall was demolished.[7] For the before valuation, she obtained comparable sales of other car wash properties in North and South Carolina around the time of the taking and adjusted those sale prices to account for differences between her comparables and the Constan property, notably based on the age and condition of the improvements on the Constan property. She then deducted an additional $800,000 from the before valuation to account for additional upgrades and renovations that she believed a purchaser of the Constan property would undertake and would factor in to the sale price. After these adjustments, her before-the-taking valuation of the Constan property was $4.6 million.

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[7] Ms. Haskell's July 3, 2024 appraisal, which was taken into evidence without objection, listed the date of valuation as March 22, 2021. She explained that she identified this date based on the date that the complaint in this case was filed because in traditional condemnation actions, the date of valuation is the date the condemnation notice is filed. *See* S.C. Code Ann. § 28-2-440. However, because this is an inverse condemnation action, the correct date of valuation is the date of the taking itself. She clarified that her valuation was intended to, and did, reflect the value of this property as of the date of the taking, which was March 9, 2021.

In the after condition, Ms. Haskell found that the property was not marketable as a car wash due to the intermittent flooding that could be expected to occur after the City demolished the wall. In fact, Ms. Haskell found that no willing buyer would invest in infrastructure or renovations to the property if it could be expected to flood, even intermittently. She therefore found that the property in the after condition is marketable only as vacant land for surface parking. She found sales of comparable vacant properties—one of them directly across the street from Constan—and adjusted those sales to reflect the after condition of the Constan property. Ultimately, she found that after the taking the Constan property is worth $400,000.[8] Thus, she determined just compensation for the City's taking to be $4.2 million.

Ms. Haskell noted during her testimony that she determined to value all three of the parcels that constitute the Constan property as one parcel. She explained that it is appropriate to combine parcels for valuation purposes when they are contiguous and there is conformity in either ownership or use. Here, the properties are contiguous and are all used for the same purpose—indeed, a portion of the car wash building itself sat on the ordinance property, and Plaintiffs used the Norfolk Southern leasehold in the same manner as the other parcels for their car wash operations. Ms. Haskell therefore found that it was neither practical nor appropriate to value these properties separately. Ms. Haskell noted that her valuation reflected only the value of Plaintiffs' property interests in these parcels.

Finally, Plaintiffs published the deposition testimony of David Hill, the Norfolk Southern Police Officer, and Douglas "Brad" Hart, who is the head surveyor for Norfolk Southern and

[8] Ms. Haskell's appraisal originally valued the property in the after condition at $330,000. Ms. Haskell testified at trial that she miscalculated the total area of square footage when she performed the after valuation, and that after this error was corrected, it increased her valuation of the property in the after condition by $70,000.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

testified during a Rule 30(b)(6) deposition in this case. Both of these witnesses reside in Georgia and were not available to testify at trial.

Mr. Hill testified about his observations of the events that took place on March 9, 2021. He explained that he told Dana Higgins and the G.H. Smith contractors that they were trespassing on Norfolk Southern property when they removed the wall. He further testified that Dana Higgins told him that if she were proved to be wrong about the City's claim of ownership over the property, the City would pay to have the wall rebuilt.

Mr. Hart testified about Norfolk Southern's property rights in the vicinity of the Constan property. He explained that Norfolk Southern owns the property within 65 feet on either side of the centerline of the railroad in fee simple, and that it acquired these property rights by way of a quitclaim deed in 1874 from private individuals, for which Norfolk Southern's predecessor paid $500. He further testified that Norfolk Southern did not acquire any of its property rights in this land from the City of Columbia, that to his knowledge the City had never claimed to own any portion of this property, that he was unaware of any evidence that would show that the City owned this property, and that at no time did Norfolk Southern give the City permission to enter its property and remove the wall. Through his testimony, Plaintiffs entered into evidence the 1874 deed, the lease from Norfolk Southern to Acre Plus, and a Southern Railway station map dated December 31, 1927 that showed the boundaries of Norfolk Southern's property in this section of the track. At the conclusion of this testimony, Plaintiffs rested their case.

Before presenting its case, the City moved for a directed verdict on the basis that Plaintiffs had not established the elements of an inverse condemnation and on the additional basis that there had been no testimony concerning the damage to one of the Plaintiffs, Constan Gervais Street Car Wash, Inc. Plaintiffs responded that they had indeed met all of the elements of their claim and

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

further explained that Constan Gervais Street Car Wash, Inc. is a lessee of the car wash premises from Acre Plus, LLC and therefore has a compensable interest in the subject property, and that Ms. Haskell had included this entity in her valuation for this reason.[9] The Court denied the City's motion, having found that the Plaintiffs had met all of the elements of their claim.

For its first witness, the City called David Sharpe. Mr. Sharpe is a property surveyor for the City of Columbia and testified that he developed a plat in September 2023 showing the boundaries of "unopened Laurens Street" which roughly tracked the ordinance property. Mr. Sharpe testified that he based his survey on an inspection of the property as well as a number of plats dating back to the 1950s, some of which were developed for Stanley Smith, Sr. and depicted this portion of land as "Laurens Street." On cross-examination, Mr. Sharpe testified that he did not locate or identify any deed to the City for this land and that he believed it to be a portion of Laurens Street as originally laid out in the City of Columbia at its founding in 1786. Mr. Sharpe testified that his survey of this property was bounded on the east by the Norfolk Southern property, which is 65 feet from the centerline of the railroad, and that he believed Norfolk Southern must have acquired this property from the City of Columbia given its apparent placement within what would have been Laurens Street, although he did not know how exactly the railroad did acquire its rights to that land. Mr. Sharpe further acknowledged that the City had acquired easements within this property, including one from Mr. Smith in 2019, and that the City would not need to obtain an easement upon land that it owns.

[9] More particularly, Chip Smith, who was deeded his father's interest in the fee simple land and the ordinance property, leases that land to Acre Plus, which in turn leases the land to Constan Gervais Street Car Wash, Inc., which is the entity that operated the car wash. Mr. Smith is the sole owner of both of these entities.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

The City next called Grant Smith, who lives in North Carolina and is the younger brother of Chip Smith. Mr. Smith testified about his family's history in the car wash business and the history of the Constan property on Gervais Street, including flooding issues at that property. He further testified that he, along with his younger brother Houston, is a part owner in Constan, Inc. which owns property at 1922 Gervais Street, which sits directly west of 1950 Gervais Street. Mr. Smith attempted to testify about the impact of the flooding on the Constan property, but he acknowledged that he had not been involved in the operations of the car wash since the 1980s and could not testify about the financial impact to the car wash from these flooding events.

The City next called Houston Smith. Mr. Smith lives in Columbia and testified that he is intimately familiar with the property at 1922 Gervais Street owing to his part ownership in Constan, Inc., which leases that property to a tenant named Glen Roberts who manufactures grits at that location. Mr. Smith likewise testified about his family's history in the car wash business and about flooding issues at these properties. Mr. Smith further testified about his observations of the condition of the car wash building, which he characterized as poorly maintained, and mentioned that his tenant had undertaken to paint the car wash building himself because he was concerned about its appearance from Gervais Street. On cross-examination, Mr. Smith acknowledged that he could not recall when that repainting had occurred, which may have been after the car wash closed in October 2022. And similar to Grant Smith's testimony, he testified that he had not been involved in the operations of the car wash and could not testify about the financial impact to the car wash from the flooding. Upon examination by the Court, Mr. Smith testified that his property did not flood during the period of time the wall was erected.

Finally, the City called a real estate appraiser named Elizabeth Keys. Prior to trial on June 16, 2025, Plaintiffs filed a motion in limine to exclude at trial an appraisal by Ms. Keys that was

produced just one week before trial was to begin. Plaintiffs asked that the report and any testimony related to it be excluded for violating the scheduling order in this case, which required that discovery be completed no later than June 11, 2025. The Court heard argument on that motion on June 16 and the next day informed the parties that Ms. Keys' additional report would be excluded at trial for violating the scheduling order. The Court entered a written order to this effect on June 25, 2025 prior to Ms. Keys' testimony.

Ms. Keys had completed earlier appraisals of this property in November 2022 and January 2023, and the City sought to offer at trial Ms. Keys' testimony related to these appraisals. When the City called Ms. Keys to testify, Plaintiffs submitted another motion in limine to exclude her testimony related to these appraisals as well for lack of relevance under Rule 402, SCRE as well as lack of reliability under Rule 702, SCRE. The basis of the motion was that Ms. Keys' appraisals did not value the property as of the date of the taking, and also did not value the property before and after the taking, and her analysis therefore was not relevant to any issues before the Court. The Court denied Plaintiffs' motion and observed that it would give Ms. Keys' testimony the weight it deemed appropriate.

Ms. Keys testified that her appraisals valued the subject property in November 2022 and January 2023 at $950,000. Notably, Ms. Keys found that the car wash building was at the end of its useful life and that the highest and best use of the property was for retail development. On cross-examination, Ms. Keys acknowledged that her appraisals were not developed to determine just compensation in a condemnation action, but were rather developed in connection with a potential sale of the property to the City of Columbia. Thus, she acknowledged, the appraisals did not value the property as of the date of the taking, and did not include a before-and-after valuation that is traditional in a condemnation action. Ms. Keys further acknowledged that, at the time she

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

developed these valuations, and indeed at the time of her deposition in this case in March 2025, she was unaware of the nature of this litigation or that it was a condemnation action, was unaware what the alleged taking was, and was even unaware at the time of her deposition that she had been named as an expert in this case. Importantly, Ms. Keys also acknowledged that her appraisals did not include any adjustments or valuation with respect to flooding issues on the subject property, which she disregarded because the property is not in a flood zone.

At closing, Plaintiffs argued that they had met all the elements for inverse condemnation and further asserted that they are entitled to receive interest on the amount of just compensation found by the Court from the date of the taking to present, as well as an award of reasonable attorneys' fees and litigation expenses. The City made a number of arguments in closing, including that the City could have, under the 1964 ordinance, demolished the wall in the portion of property affected by the ordinance. The City acknowledged that it demolished the wall not on the ordinance property but on Norfolk Southern property, but argued that Plaintiffs should not be permitted to claim damages for the flooding caused by the wall's demolition because the wall could and should have been demolished on the ordinance property, and further argued that the terms of the ordinance require Plaintiffs to indemnify the City for any damage occurring on the ordinance property.

The City additionally argued that, although this is an inverse condemnation as opposed to a traditional condemnation action, the City is entitled to receive some property rights from Plaintiffs upon its payment of just compensation in this matter. The City presented the Court with several options of property rights it believed the Court could award to the City, including title to the affected property or an easement. The City cited no authority for this argument, and Plaintiffs in rebuttal argued that the City is not entitled to receive any property rights from Plaintiffs because

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

this is an inverse condemnation action as opposed to an affirmative condemnation action brought by the City.

At the conclusion of the trial, the Court requested additional briefing from the City regarding its argument that the Court should grant some property right to the City by way of this action. The City submitted a brief to this effect on July 3, 2025, and the Court will address those arguments below.

III. APPLICABLE LAW

"An inverse condemnation occurs when a government agency commits a taking of private property without exercising its formal powers of eminent domain." *Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (quoting *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004)). The elements of inverse condemnation are (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence. *Rolandi v. City of Spartanburg*, 294 S.C. 161, 363 S.E.2d 385 (Ct. App. 1987); *Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 352 S.C. 95, 101, 572 S.E.2d 306, 308 (Ct. App. 2002). "One basic difference between condemnation and inverse condemnation is that in condemnation proceedings, the governmental entity is the moving party, whereas, in inverse condemnation, the property owner is the moving party." *Hawkins*, 358 S.C. at 290, 594 S.E.2d at 562 (quoting *S.C. State Highway Dep't v. Moody*, 267 S.C. 130, 136, 226 S.E.2d 423, 425 (1976)). "The action is based not on tort, but on the constitutional prohibition of the taking of property without compensation." *Id.* (citing *Horry Cnty. v. Ins. Reserve Fund*, 344 S.C. 493, 498, 544 S.E.2d 637, 640 (Ct. App. 2001)).

With respect to the first element, our Supreme Court has observed that "a plaintiff must prove an affirmative, aggressive, and positive act by the government entity that caused the alleged

damage to plaintiff's property." *Ray v. City of Rock Hill*, 434 S.C. 39, 47, 862 S.E.2d 259, 263 (2021) (quoting *WRB Ltd. P'ship v. City of Lexington*, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006)). "Allegations of mere failure to act are insufficient." *Id.* (quoting *Hawkins*, 358 S.C. at 291, 594 S.E.2d at 563).

With respect to the "taking" element, our appellate courts have framed the inquiry thus:

> Although no set formula exists for determining whether property has been "taken" by the government, the relevant jurisprudence does provide significant guideposts. Determining whether government action effects a taking requires a court to examine the character of the government's action and the extent to which this action interferes with the owner's rights in the property as a whole.

Hardin v. S.C. Dep't of Transp., 371 S.C. 598, 605, 641 S.E.2d 437, 441 (2007). "Stated more specifically, these 'ad hoc, factual inquiries' involve examining the character of the government's action, the economic impact of the action, and the degree to which the action interferes with the owner's investment-backed expectations." *Id.* Our Supreme Court has stated, "[w]e have consistently held that the deprivation of the ordinary beneficial use and enjoyment of one's property is equivalent to the taking of it, and is as much a taking as though the property were actually appropriated to the public use. . . . there is no distinction between taking and damaging and [] the least damage to property constitutes a taking within the purview of the Constitution." *See S.C. State Highway Dep't v. Wilson*, 254 S.C. 360, 366–67, 175 S.E.2d 391, 395 (1970).

With respect to the public use element, our appellate courts have held that "the physical occupation of private property results in a taking regardless of the public interest the government's action serves." *Hardin*, 371 S.C. at 605, 641 S.E.2d at 441.

The last element—that the taking has some degree of permanence—continues to be cited by our appellate courts; however, other appellate court decisions have questioned whether it still applies. *See Byrd v. City of Hartsville*, 365 S.C. 650, 657 620 S.E.2d 76, 79 (2005) ("[W]e remove

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

the element 'some degree of permanence,' for it conflicts with the principle that government must compensate for even a temporary taking.") (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987)). However, the law is clear that "the government must compensate for even a temporary taking." *Frampton v. S.C Dep't of Transp.*, 406 S.C. 377, 387, 752 S.E.2d 269, 275 (Ct. App. 2013).

Importantly for this case, South Carolina law provides that a compensable taking may arise not only for land that is owned by the condemnee in fee, but also for other property interests that are affected by the taking. *See S.C. State Highway Dep't v. Hammond*, 238 S.C. 317, 320, 120 S.E.2d 21, 22 (1961) (construing earlier version of condemnation statute and holding that "[t]he word 'owner' as used in a condemnation statute has been construed to embrace not only the owner of the fee, but a lessee and any other person who has an interest in the property which will be affected by the condemnation"); *see also* S.C. Code Ann. § 28-2-30(6) (defining "condemnee" as "a person or other entity who has a record interest in or holds actual possession of property that is the subject of a condemnation action"). Indeed, there are inverse condemnation actions of record in this state that were brought only by a lessee. *See, e.g.*, *Gray v. S.C. Dep't of Highways & Pub. Transp.*, 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992), *overruled on other grounds by Hardin*, 371 S.C. 598, 641 S.E.2d 437.

With respect to damages, inverse condemnation actions "compensate property owners for the *diminution* in value to their property." *Horry County*, 344 S.C. at 501, 544 S.E.2d at 641–42. This analysis is similarly performed in affirmative condemnation actions, where the landowner's damages "include all injuries or damages which cause a diminution in the value of the remaining

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

property." *S.C. State Highway Dep't v. Bolt*, 242 S.C. 411, 417, 131 S.E.2d 264, 267 (1963). Said more fully:

> When part of a parcel of land is taken by eminent domain, the owner is not restricted to compensation for the land actually taken; he is also entitled to recover for the damage to his remaining land. In other words, he 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. 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.

Id. (quoting 18 Am. Jur. 905 § 265). This analysis is performed by valuing the property at the moment just before the taking and the moment just after the taking. *See Burke v. S.C. Dep't of Transp.*, 429 S.C. 319, 323–24, 838 S.E.2d 534, 537 (2020) ("The measure of damages from the taking is the difference in the value of the landowner's land before the taking and after the taking. As this instruction suggests, just compensation can be viewed as a snapshot in time: a picture of the property's market value at the moment of taking.").

In addition, South Carolina law provides that plaintiffs in an inverse condemnation action are entitled to pre-judgment interest from the date of the taking until the date of judgment at the rate of 8%. *See id.* (applying interest award in condemnation statute to an inverse condemnation action); S.C. Code Ann. § 28-2-420 (providing that "[a] condemnor shall pay interest at the rate of eight percent a year upon sums found to be just compensation by the appraisal panel or judgment of a court to the condemnee"); *see also SCDOT v. Faulkenberry*, 337 S.C. 140, 148, 522 S.E.2d 822, 826 (Ct. App. 1999) ("Where the market value of the property is not paid contemporaneously with the taking, the owner is entitled to interest for the delay in payment from the date of the taking

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

until the date of the payment.") (quoting *Clark County v. Alper*, 100 Nev. 382, 685 P.2d 943, 950 (Nev. 1984)).

Inverse condemnees are also entitled to an award of reasonable attorneys' fees and litigation expenses. *See Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 394 752 S.E.2d 269, 279 (2013). In affirmative condemnation actions, the landowner is entitled to fees only if he "prevails," which is defined by statute to mean that the compensation awarded for the property "is at least as close to the highest valuation of the property that is attested to at trial on behalf of the landowner as it is to the highest valuation of the property that is attested to at trial on behalf of the condemnor." S.C. Code Ann. § 28-2-510. However, "[u]nlike in a typical condemnation case, where the government and the landowner simply disagree on the value of the land taken, in most inverse condemnation cases, the government denies there was a taking at all, and thus, its valuation of the land is zero." *Frampton*, 406 S.C. at 394 752 S.E.2d at 279 (applying provisions of S.C. Code Ann. § 28-11-30 to an inverse condemnation action, which requires the plaintiff to be reimbursed "for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of the proceeding").

Finally, "[i]nverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken *in fact* by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Hardin*, 358 S.C. at 290, 594 S.E.2d at 562 (emphasis added). Thus, "[i]nverse condemnation actions do not constitute forced sales of property because such actions compensate property owners for the *diminution* in value to their property, not for the full value of the property." *Horry County*, 344 S.C. at 501, 544 S.E.2d at 641–42; *see also Columbia Gas Transmission Corp. v. An Exclusive Nat. Gas Storage Easement in the Clinton Subterranean Geological Formation*

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

beneath 80 Acres, Worthington TWP., Richland Cnty., Ohio, 747 F. Supp. 401, 405 (N.D. Ohio 1990) ("Inverse condemnation is not as the term might suggest, a means of property acquisition. Rather it is a landowner's remedy for uncompensated takings of property for public use."). In order for a governmental entity in South Carolina to take title to, or legal rights in, property, it must follow the procedures set forth in the South Carolina Eminent Domain Procedure Act, S.C. Code Ann. § 28-2-10, *et seq. See* § 28-2-20 ("It is the intention of the General Assembly that this act is designed to create a uniform procedure for all exercise of eminent domain power in this State.")

IV. FINDINGS OF FACT

Having observed the witnesses, reviewed the exhibits admitted at the trial, and taking into consideration the burden of persuasion and the credibility of the witnesses, the Court makes the following findings of fact by a preponderance of the evidence:

1. In January 2000, Chip Smith was deeded the property denoted on Richland County tax maps as parcel number R11405-11-38, which comprises a portion of the property whereupon sat the Constan Car Wash, by his father and by Constan, Inc. Mr. Smith and his predecessors in title have owned and controlled this land since the late 1940s and used it to operate the Constan Car Wash since that time.

2. Also in January 2000, Chip Smith was deeded any interest his father and grandfather had, or may have had, in the property that was the subject of a 1964 City encroachment ordinance, and which is currently denoted on Richland County tax maps as parcel number R11405-11-40. Mr. Smith paid property taxes on this property from 1983 until last year.[10]

[10] The parties stipulated that Mr. Smith did not file an appeal of the imposition of these taxes until 2023.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

3. Chip Smith and his predecessors in title have had exclusive use and possession of the above-described parcels since at least 1964, which they used to operate the Constan Car Wash until October 2022.

4. Chip Smith is the sole owner of both Acre Plus, LLC and Constan Gervais Street Car Wash, Inc.

5. In March 2017, the Norfolk Southern Railway Company leased to Acre Plus, LLC a portion of land between its railroad embankment and the outer boundary of its property line, or 65 feet from the centerline of the railroad, for use in the car wash operations.

6. In January 2018, Acre Plus and Norfolk Southern entered into an amended lease to permit the construction of a wall within the leasehold.

7. Also in January 2018, Chip Smith applied for and received from the City a zoning permit that permitted him to construct a low-profile wall fronting on Gervais Street and running within the three parcels of land described above.

8. In February 2018, the wall was constructed as designed and permitted.

9. This property has experienced intermittent flooding during periods of heavy rainfall since at least the late 1970s. When the property floods, the floodwater reaches and adversely affects each of the parcels described above. While the car wash was operating on these parcels, the adverse effects of the flooding included damage to car wash equipment and machinery, damage to infrastructure at the car wash including flooring, drywall, and other infrastructure, and damage to parts and inventory at the car wash. The flooding would also force the car wash to close for a period of time both during the flooding itself and during such time as was required to clean up and repair the property after the flooding. The flooding also contributed to the loss of personnel at the car wash.

10. The cause of the flooding was insufficient culvert capacity on the north side of Gervais Street for Rocky Branch. Plaintiffs did not cause or contribute to the flooding.

11. From the time the wall was built in February 2018 until the City demolished a portion of the wall in March 2021, the wall effectively excluded floodwaters from the property, and the property did not flood. During this time, Plaintiffs were able to effectively operate the car wash and make improvements to it.

12. On March 9, 2021, the City demolished a portion of the wall. The portion of the wall that the City demolished sat entirely within the property that was leased to Acre Plus by Norfolk Southern. At the time of the demolition, the City incorrectly believed that it owned the property whereupon the wall was demolished. The City's purpose in demolishing the wall was to alleviate flooding on Gervais Street by allowing the floodwater to flow into Plaintiffs' property.

13. After the City's demolition, the flooding on the property resumed and caused damage to all three of the parcels constituting the car wash property. Once the wall was demolished and the flooding resumed, Plaintiffs could no longer be expected to successfully operate the car wash. The closure of the car wash was a foreseeable result of the City's demolition of the wall.

14. The car wash ceased its regular operations in October 2022.

15. The City's demolition of the wall had a significant negative impact on the value and utility of Plaintiffs' property interests.

16. At no time between March 9, 2021 and now has the City repaired the wall or taken effective action to remedy the flooding caused by the demolition of the wall.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

V. CONCLUSIONS OF LAW

Based on the above findings of fact, the Court makes the following conclusions of law:

1. The Court has jurisdiction over this matter pursuant to Article V, § 11 of the South Carolina Constitution.

2. Venue is proper in Richland County pursuant to S.C. Code Ann. § 15-7-10 because this case concerns an injury to real property, and the property at issue in this case is situated in Richland County.

3. Plaintiffs have a compensable interest in each of the three parcels of land described above. With respect to Chip Smith's fee parcel, he and his family and entities owned by his family have owned and exclusively used and occupied that land since the late 1940s. The Smiths improved this land and put it to a productive use by using it to operate the Constan Car Wash. Mr. Smith has good deeded fee simple title to this land.

4. With respect to the "ordinance property," Mr. Smith and his family and entities owned by his family have exclusively used and occupied that land since 1964, and improved it and put it to a productive use by using it to operate the Constan Car Wash. Mr. Smith has a record interest in that land by way of the January 2000 deed from his father and by way of the 1964 ordinance itself.

5. The 1964 ordinance gave O. Stanley Smith and his heirs and assigns the right to construct buildings on the ordinance property and to "encroach generally" into it. In exchange for this right, the Smiths were expected to make improvements to the property, including by installing stormwater facilities for Rocky Branch and other infrastructure at their own expense, which they did. The Smiths also constructed a portion of the car wash building on the ordinance property.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

6. The 1964 ordinance required O. Stanley Smith and his heirs and assigns to indemnify the City for "any and all claims or causes of action which may arise by reason of *construction or maintenance* of any encroachment upon said Laurens Street" (emphasis added). Clearly, this provision was intended to indemnify the City in the event that some third party were injured while constructing or maintaining any of the buildings or other structures on the property. *See Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C.104, 109, 584 S.E.2d 375, 377 (2003) ("South Carolina courts have consistently defined indemnity as 'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.'" (quoting *Campbell v. Beacon Mfg. Co., Inc.*, 313 S.C. 452, 454, 438 S.E.2d 271, 272 (Ct. App. 1993)). By its plain language, it does not require the Smiths to indemnify the City for its own acts or omissions, and certainly does not require them to indemnify the City for its demolition, over the Plaintiffs' objections, of a portion of a wall that the City had approved to be built by permit and that it mistakenly believed was on its own property. *See id.* at 111, 379 ("Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms.") (quoting *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)); *Smoak v. Carpenter Enters., Inc.*, 319 S.C. 222, 224, 460 S.E.2d 381, 383 (1995) (finding that a standard indemnification clause limited recovery "to the reimbursement for damages, costs, expenses, etc. incurred in third party actions, not actions between the contracting parties themselves"). The Court finds that this provision is inapplicable to the facts of this case.

7. The ordinance also provided that:

> in the event the area described becomes in conflict with future municipal plans, said property shall upon 30 days notice be returned to the City by O. Stanley Smith, his

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

> heirs or assigns, and all encroachments removed and the street restored to its original condition, or to such condition as may be agreeable to the City, by the said O. Stanley Smith, his heirs or assigns, at his own expense.

The record is devoid of any demand from the City to Plaintiffs that the ordinance property be "returned" to the City. The December 2019 letter from the City Attorney demanded only that Plaintiffs' wall be removed—it did not invoke this provision of the ordinance, nor did it ask for the land to be returned to the City. In the absence of such a demand, the Smiths were given the right to use and "encroach generally" into this property, and were specifically tasked with making certain improvements to the property that the City desired, and they did so. Thus, the heirs and assigns of O. Stanley Smith—which includes Chip Smith—were entitled to use this property as they saw fit until such time as the City demanded its return, which it never did. The Court finds that this provision of the ordinance is likewise inapplicable to the facts of this case.

8. More importantly, the City stipulated that the portion of the wall that was removed on March 9, 2021 sat entirely within the Norfolk Southern property that had been leased to Acre Plus, and that the City does not own, and has no property rights with respect to, the Norfolk Southern property. The City did not remove the wall within the ordinance property, which renders its reliance on these provisions of the ordinance inapposite in this case.[11]

9. With respect to the Norfolk Southern property, the City stipulated that Norfolk Southern has good fee simple title to this land and that it had the right and ability to, and did, lease to Acre Plus the land between the railroad embankment and the outer boundary of the Norfolk Southern property, which is 65 feet from the centerline of the railroad. The City further stipulated

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[11] The Court notes as well that, based on the testimony and evidence at trial, there is a question whether the City owned this property to begin with and therefore had the right or ability to restrict its use in the way that the 1964 ordinance did. However, given the Court's findings and conclusions herein regarding the Plaintiffs' right and ability to use this property, the Court finds it unnecessary to resolve this question.

that the lease was in full force and effect on March 9, 2021. The law is clear that leaseholds and other property rights of record are compensable in a condemnation action.

10. Thus, I find that Plaintiffs had both a record interest in, and actual possession of, all three of the parcels of land affected by the City's taking, and that their interests are compensable in this inverse condemnation action.

11. I further find that the Plaintiffs had the right, and took all of the requisite steps necessary to, construct the wall. Notably, Plaintiffs submitted a complete and accurate application to the City for a zoning permit to build the wall. Dan Creed testified that the permit application was complete and accurate, and that the City at no time raised any objections to or criticism of the plans for the wall. The Court found his testimony to be credible and well-supported. The City approved the permit, and the wall was constructed upon land that the Plaintiffs either owned outright or otherwise had the legal right to build upon. Plaintiffs thus had a valid and compensable interest in the wall itself and the productive use to which it was put, which was mitigating flooding on their property.

12. The City's demolition of the wall on March 9, 2021 was an affirmative, positive, aggressive act that caused Plaintiffs' damages. The City's actions on March 9, 2021 were not a "mere failure to act," but were rather calculated to destroy Plaintiffs' wall, and in fact were intended to cause flooding on the property. The City was well aware that flooding on this property would result from its demolition of the wall—the City's stated purpose in demolishing the wall was to alleviate flooding on Gervais Street. And, when the City demolished the wall, it did so over the active objections of Mr. Smith as well as a Norfolk Southern police officer who told the City it was trespassing on railroad property. This was undoubtedly a positive, aggressive act.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

13. The City's demolition of the wall also effected a taking of Plaintiffs' property. The demolition of the wall itself was most certainly a taking—the City entered upon property it did not own and demolished a structure that Plaintiffs had not only paid for, but for which they had also received a permit from the City. The City allowed the wall to stand for over three years before it undertook its demolition, during which time Plaintiffs made improvements to the property and were able to successfully operate their business.

14. Further, the City's demolition of the wall was the foreseeable and proximate cause of the flooding that resulted to Plaintiffs' property. Indeed, the City knew and intended that flooding would result to the property from the demolition of the wall. The law is clear that "the deprivation of the ordinary beneficial use and enjoyment of one's property is equivalent to the taking of it, and is as much a taking as though the property were actually appropriated to the public use. . . . there is no distinction between taking and damaging and [] the least damage to property constitutes a taking within the purview of the Constitution." *Wilson*, 254 S.C. at 366–67, 175 S.E.2d at 395. The flooding that was caused by the wall's removal is thus as much a taking of Plaintiffs' property as the destruction of the wall itself.

15. The City's taking was manifestly for a public use—again, the City's stated purpose in demolishing the wall was to alleviate flooding on Gervais Street. Further, "the physical occupation of private property results in a taking regardless of the public interest the government's action serves." *Hardin*, 371 S.C. at 605, 641 S.E.2d at 441. The Court finds that both the demolition of the wall and the resulting flooding that occurred on the property constitute a physical taking of the property for a public use.

16. The City's taking also has some degree of permanence. The condition that the City effected on March 9, 2021 persists to this day. During that time, the City has made no effort to

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

correct this condition, and in the interim, Plaintiffs' business failed and the car wash building was demolished. The value of Plaintiffs' property interests has been significantly eroded by the City's taking, and those damages cannot now be undone.

17. Thus, I find that the Plaintiffs have established all of the elements of an inverse condemnation by the City by a preponderance of the evidence.

18. For the reasons stated above, the City neither offered nor proved any valid defense to the taking. The Court observes that affirmative defenses must be pled in the party's answer, and they must be proved by a preponderance of the evidence. *See Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007) ("[W]e recognize that affirmative defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading."); *Wright v. Craft*, 372 S.C. 1, 21, 640 S.E.2d 486, 497 (Ct. App. 2006) ("The failure to plead an affirmative defense is deemed a waiver of the right to assert it."); *Mills v. S.C. State Ports Auth.*, 435 S.C. 213, 223, 865 S.E.2d 910, 915 (Ct. App. 2021) ("The burden of proving an affirmative defense rests upon the party asserting it."); *Ross v. Paddy*, 340 S.C. 428, 436–37, 532 S.E.2d 612, 616–17 (Ct. App. 2000) (affirmative defenses must be proved by a preponderance of the evidence). At trial, the City attempted to invoke the 1964 ordinance as a defense to the taking, but it did not plead this defense in its answer.[12] In its pre-trial briefing, the City attempted to couch this defense as one of estoppel; however, "[e]stoppel must be affirmatively pleaded as a defense and cannot be bootstrapped onto another claim." *Wright*, 372 S.C. at 21, 640 S.E.2d at 497 (quoting *Collins Entm't, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005)). By not pleading estoppel as a defense prior to trial, the City waived it; and even if it had pled it, the City failed to prove this defense, or

[12] The City's affirmative defenses were based largely upon the Tort Claims Act, which were rendered inapplicable to this case when Plaintiffs abandoned their tort claims prior to trial.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

any other defense, at trial. I therefore find that the City is liable to Plaintiffs for inverse condemnation.

19. Turning to damages, the law is clear that inverse condemnation actions "compensate property owners for the *diminution* in value to their property." *Horry County*, 344 S.C. at 501, 544 S.E.2d at 641–42. Determining this figure is accomplished by subtracting the value of the property just after the moment of taking from the value of the property just before the moment of taking. *See Burke*, 429 S.C. at 323–24, 838 S.E.2d at 537 ("The measure of damages from the taking is the difference in the value of the landowner's land before the taking and after the taking. As this instruction suggests, just compensation can be viewed as a snapshot in time: a picture of the property's market value at the moment of taking.").

20. Plaintiffs introduced the testimony of Deborah Haskell, who performed precisely this analysis. She determined that the value of the property just before the City's demolition of the wall was $4.6 million, and its value just after the demolition was $400,000. Thus, she determined that just compensation in this matter for the City's taking is $4,200,000. The Court found Ms. Haskell's testimony to be persuasive and well-supported, offered by an expert with many years of experience in valuing real property. Further, the Court found Ms. Haskell's analysis to be supported by the other witnesses who testified, notably Chip Smith, who gave extensive testimony about the damage that was inflicted on his property by the demolition of the wall and the resulting flooding. The Court found Mr. Smith's testimony to be persuasive and credible. Dan Creed also gave persuasive expert testimony about the utility of the wall and the effect of its removal to the property—notably that the flooding and damage to the property was a foreseeable result of the wall's removal. These witnesses' testimony established that the damage to the property caused by the removal of the wall and the resulting flooding made it impractical, if not impossible, to use the

property for its intended purpose in operating a car wash, and severely diminished the value of the property for any productive use.

21. I further find that it was appropriate for Ms. Haskell to value all three of these parcels together. As she observed, separate parcels may be valued as one parcel when they are contiguous and untied in ownership or use. *See Lewis v. S.C. State Highway Department*, 278 S.C. 170, 293 S.E.2d 434 (1982). These parcels are contiguous and unquestionably united in use, and Ms. Haskell valued only the Plaintiffs' interest in these parcels—her appraisal was clear that she understood the different interests the Plaintiffs held in these properties and valued them accordingly. Notably, while the Norfolk Southern property was leased to Plaintiffs, that lease ran for an indefinite term, and the Smiths had been effectively leasing this property from Norfolk Southern for many years, and there was no reason to doubt that the lease would continue. Thus, it was appropriate for her to value the leasehold as she did along with the other parcels.

22. The City did not put forth sufficient evidence to call Ms. Haskell's valuation into doubt. The City's real estate appraiser, Elizabeth Keys, admitted that she did not value this property as of the date of the taking, nor did she perform a before-and-after valuation or attempt to determine just compensation for the City's taking. Her valuation was rather for a potential sale of the property as it existed in late 2022 and early 2023—long after the taking in this case. Importantly, Ms. Keys' valuation did not account or make any adjustment for flooding issues on the property, which was the critical factor in the diminution of the property's value caused by the taking.

23. The testimony of Grant and Houston Smith also did not credibly call Ms. Haskell's valuation into doubt. The Smith brothers testified generally about their knowledge of the property and its history and about flooding issues on the property, but they admittedly had no involvement in operating the car wash in March of 2021, or for many years before then. Thus, these witnesses

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

were not able to testify about the value impact to this property as a result of the taking, and the Court found their testimony to be largely irrelevant.

24. For these reasons, the Court finds that Plaintiffs put forth credible and well-supported evidence of their damages owing to the City's taking, and proved by a preponderance of the evidence that just compensation for the City's taking is $4,200,000. The Court therefore finds that just compensation for the City's taking in this case is $4,200,000.

25. I further find that Plaintiffs are entitled to interest on this amount from the date of the taking until the date the judgment is paid. The law is clear that interest is part of just compensation if the compensation is not paid contemporaneously with the taking. *See Faulkenberry*, 337 S.C. at 149, 522 S.E.2d at 827 ("Just compensation is for property presently taken and necessarily means the property's present value, presently paid—not its present value to be paid at some future time without interest.") (quoting *Grant v. Cronin*, 107 N.W.2d 153, 155 (Wis. 1961)). In South Carolina, interest on an award of just compensation runs from the date of the taking at the rate of eight percent. *See* S.C. Code Ann. § 28-2-420; *Burke*, 429 S.C. at 323–24, 838 S.E.2d at 537 (applying interest award in condemnation statute to an inverse condemnation action). Under § 28-2-420, the City will have 20 days from the date of this order to pay the full amount of just compensation and interest thereon; after that time, the full amount of the judgment will begin to earn interest at the rate provided by law for interest on judgments.

26. I further find that Plaintiffs are entitled to an award of reasonable attorneys' fees and litigation expenses in this matter. *See Frampton*, 406 S.C. at 394 752 S.E.2d at 279. By any measure, the Plaintiffs have prevailed in this action—the City never offered its own valuation of just compensation in this case, and indeed denied until its opening argument at trial that there had even been a taking. And, I read *Frampton* to require an award of litigation expenses in an inverse

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

condemnation case if the plaintiff proves there was a taking. Plaintiffs will be required to submit an application demonstrating their litigation expenses that comports with the requirements of S.C. Code Ann. § 28-2-510(B)(1), at which time the Court will evaluate the reasonableness of those expenses.

27. Finally, the Court will address the City's argument that it ought to receive either title to the subject property or some other property right from Plaintiffs upon its payment of just compensation in this case. The City's claim is without merit. In order for a governmental entity to obtain title to or rights in property from a landowner, it must either purchase the property by agreement with the landowner or follow the procedures set forth in the Eminent Domain Procedure Act. *See* S.C. Code Ann. § 28-2-20 ("It is the intention of the General Assembly that this act is designed to create a uniform procedure for all exercise of eminent domain power in this State."). That Act requires many predicate acts to be taken by the government before it may obtain property by eminent domain, including obtaining an appraisal of the just compensation for the property and filing a condemnation notice that sets forth a description of the property to be taken and the interest to be obtained thereby. *See* §§ 28-2-70, -280. The City did not do any of those things in this case—it never, even at trial, obtained a valuation of just compensation in this matter, nor did it file any claim or counterclaim against the Plaintiffs in this case that would entitle it to relief against Plaintiffs.

28. This argument has been made before and it was soundly rejected by the Court of Appeals. *See Horry County*, 344 S.C. at 501, 544 S.E.2d at 641–42 ("Inverse condemnation actions do not constitute forced sales of property because such actions compensate property owners for the *diminution* in value to their property, not for the full value of the property."). Indeed, Plaintiffs put forth evidence in this case substantiating the diminution in value to their property interests as

a result of the City's taking, and Plaintiffs' expert found that the property had a residual value of $400,000 after the taking. If the Court were to grant title to the property to the City as it requests, it would necessarily expand the scope of the taking and destroy what value remains in the property to Plaintiffs. Again, because the City asserted no claim for relief against the Plaintiffs in this case, there is simply no procedural mechanism by which the Court could grant the City the relief that it seeks.

29. More broadly, the City's position is based on a misunderstanding of inverse condemnation. "Inverse condemnation is a cause of action against a governmental defendant to recover the *value of property* which has been *taken in fact* by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Hawkins*, 358 S.C. at 290, 594 S.E.2d at 562 (emphases added) (citing *Horry County*, 344 S.C. at 498, 544 S.E.2d at 640). Here, the fact of the City's taking was to destroy a wall and to cause flooding to Plaintiffs' property, which resulted in a diminution of value to Plaintiffs' property interests. The City did not in fact take title to any portion of the property, which could only be accomplished by an affirmative condemnation action. If the City wished for the Court to declare what if any property right it obtained by the fact of its taking, the City was obligated to file a claim or counterclaim for that relief. It has not done so, and the Court therefore has no ability to grant the City any such relief in this case.

30. Ultimately, the Court of Appeals in *Horry County* found this same argument to be "without merit," and so it is here—the City has cited no persuasive authority that it is entitled to receive ownership of Plaintiffs' property interests because it flooded their property, and its argument is counterintuitive to inverse condemnation law. The Court is bound by the Court of Appeals' ruling and perceives no reason or justification to deviate from it.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

VI. ORDER

IT IS THERFORE ORDERED that Plaintiffs shall have judgment against the City of Columbia in this matter on their claim for inverse condemnation in the amount of $4,200,000.00, plus interest on that amount running from March 9, 2021 to the date of this order at the rate of eight percent per annum.[13] The City shall have twenty (20) days from the date of this order to pay the full amount of this judgment, at which time the full amount of this judgment shall begin to draw interest at the rate provided by law from the date of this order until it is paid.

IT IS FURTHER ORDERED that Plaintiffs, within fifteen (15) days of the date of this order, shall submit to the Court an application for their attorneys' fees and litigation expenses in this matter, which application shall conform to the requirements of S.C. Code Ann. § 28-2-510(B)(1). The City shall then have ten (10) days to respond to Plaintiffs' application, and the Court will then hear and determine the amount of reasonable litigation expenses due to Plaintiffs in this case.

[*Signature page to follow*]

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[13] Interest at 8% on $4,200,000 is $336,000.00 per annum, or $920.50 per diem. Thus, as of March 9, 2025, the total amount of interest due was $1,344,000, for a total judgment of $5,544,000, with $920.50 to be added each day thereafter until the date of this order.

ELECTRONICALLY FILED - 2025 Jul 28 3:55 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005555

Richland Common Pleas

Case Caption: O Stanley Smith III , plaintiff, et al vs City Of Columbia , defendant, et al

Case Number: 2023CP4005555

Type: Order/Other

So Ordered

s/ R.E. Hood #2164