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.*

PETITION FOR REHEARING OF
OPINION No. 5368
Heard December 10, 2014– Filed December 9, 2015

Pursuant to Rule 221, SCACR, Appellant, David Franklin Powell (hereinafter "Appellant" or "Mr. Powell"), hereby petitions this Court for rehearing of its decision in South Carolina Department of Transportation v. David Franklin Powell, Opinion No. 5368 (December 9, 2015). This Petition for Rehearing should be granted as this Court has "overlooked or misapprehended" material points of law and/or fact. As is more fully set forth in the accompanying Memorandum of Law in Support of Petition for Rehearing, incorporated herein, this standard is readily satisfied here.

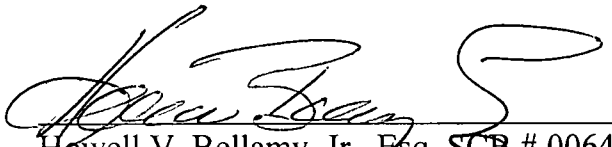
Appellant respectfully requests that this Court rehear and reconsider its Order filed herein December 9, 2015. In so requesting, Appellant appreciates and acknowledges this Court's attention to this important matter. The important issues concerning Appellant's right to just compensation for the diminution in the ***value*** of his property resulting from the public acquisition of a portion thereof in this matter clearly extend to similarly situated property owners throughout the State of South Carolina.

Submitted herewith and incorporated herein is Appellant's Memorandum in Support of this Petition for Rehearing. Appellant seeks rehearing and reconsideration as to the Court's conclusions that the Mr. Powell is not entitled to be compensated for "any diminution in value to the remaining property" pursuant to SC Code § 28-2-370 and, instead, determining Mr. Powell is not entitled to just compensation for property value diminution resulting from increased circuity, remoteness, or loss, of access. Moreover, Mr. Powell is entitled to reconsideration of the Court of Appeals determination as to purpose of the condemnation and construction project at issue in the present matter and further determination that this construction project could have been completed without the necessity of condemning any of his property, as no evidence exists in the record to support these determinations of the Court or that of the underlying trial court. Appellant is also entitled to reconsideration of the Court's reference to appraiser Corbin Haskell as an expert for Respondent, as no determination has been made by the court below of the appraiser's qualifications as

an expert and Mr. Powell has not yet been provided an opportunity to *voir dire* the proposed witness on the record as to his qualifications for such a designation. Mr. Powell is also entitled to reconsideration of the Court's decision in its entirety, as the holding below is reliant upon the extension of holding in *Hardin v. South Carolina Department of Transportation*, 371 S.C. 59, 641 S.E.2d 437 (2007), being an inverse condemnation case, to cases involving direct, forced acquisition of property by the government.

For the above reasons and those set forth more fully in the attached and incorporated Memorandum of Law in Support of Petition for Rehearing, this Court should grant this Petition for Rehearing, vacate its prior Opinion, and conduct rehearing proceedings.

Respectfully submitted,



Howell V. Bellamy, Jr., Esq. SCB # 00642
Robert S. Shelton, Esq. SCB # 68543
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
1000 29th Avenue North
Myrtle Beach, SC 29577
(843) 448-2400
Attorneys for Appellant David Franklin Powell

Myrtle Beach, South Carolina

Dated: December 28, 2015

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.*

APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REHEARING

I. CASE SUMMARY

Appellant David Franklin Powell ("Appellant" or "Mr. Powell") seeks rehearing of this Appellate Case No. 2013-001759 filed December 9, 2015. This case stems from the August 27, 2010 acquisition of real property from Appellant as part of the highway project Respondent South Carolina Department of Transportation ("Respondent," "SCDOT," or "Condemnor") deemed the "Interchange at US 17 Bypass and SC 707/Farrow Parkway." (R.pp. 16, 117)

Prior to the condemnation, Mr. Powell's property had a "clear view" from Hwy. 17 Bypass separated only by a power line easement and was accessible from Hwy. 17 via Emory Road. (R.p. 258, line 6; R.p. 271, line 17) As a result of the SCDOT's highway project and subsequent condemnation action, the intersection at Hwy. 17 and Emory Road was closed and Mr. Powell's property was left accessible via a frontage road one could enter from Hwy. 17 one (1) mile to the north. (R.p. 265, line 23)

Central to his argument below and in the present appeal, Appellant seeks to be provided just compensation for the diminution in value resulting from the acquisition and reconfiguration of his property by the South Carolina Department of Transportation as an integral part of the construction of the Interchange at U.S. Highway 17 Bypass SC 707/Farrow Parkway.

After completing mediation and discovery, this case was set for date-certain trial on March 11, 2013 before the Honorable Benjamin Culbertson. (R.p. 3) Prior to the start of the trial, counsel for SCDOT informed counsel for Mr. Powell there had been a change in the road plan. (R.p. 7) As a result of the change, the frontage road would no longer extend to the entrance one (1) mile north, but would dead-end as a cul-de-sac just north of Mr. Powell's land. (R.p. 266, line 2) According to SCDOT's Rule 30(b)(6), SCRCP witness, Mike Barbee, in order to access Mr. Powell's tract after the plan change, a motorist must travel 2.24 miles. (R.p. 304, line 7) Moreover, the pathway to Mr. Powell's property is no longer obvious at all; whereas his tract was historically accessible in a visible, *typical* manner, in the *after* condition the property

is only accessible *indirectly*, and the route of access is not visible to northbound travelers on Hwy. 17 By-pass. (R.p. 370, lines 18-25; R.p. 371, lines 1-7)

On Condemnor's Motion, rather than starting the trial as scheduled, Judge Culbertson permitted SCDOT five (5) days to revise its appraisal report to reflect the change to the plans and the court simultaneously continued the case for trial beginning on April 1, 2013. (R.p. 7) On Friday, March 14, 2013, SCDOT tendered the revised appraisal report of Corbin Haskell outlining his opinion of just compensation under the changed plans pursuant to which SCDOT took a portion of Mr. Powell's real property. (R.p. 117) Notably, in each of Mr. Haskell's appraisals he acknowledged SCDOT was condemning a portion of Mr. Powell's property. Whereas Mr. Haskell had assessed no damages at all to Mr. Powell's remaining property in any of his three (3) earlier reports, in his fourth (4th) report Mr. Haskell, as Condemnor's proposed real estate valuation expert, determined Mr. Powell's remaining property had been damaged Fifty percent (50%) as a result of the take, and determined the just compensation to which Mr. Powell was entitled totaled Five Hundred and Seventeen Thousand and no/100 ($517,000.00) Dollars. (R.p. 286, lines 1-14)

One week later, ten (10) days prior to the scheduled start of trial, counsel for SCDOT submitted yet *another* appraisal report of Corbin Haskell. (R.p. 505) This *fifth* (5th) report was tendered to the Appellant's counsel on March 21, 2013, which was beyond the time limit permitted by Judge Culbertson. On the cover of this report, Mr. Haskell printed the following disclaimer:

> I have been requested to revise my appraisal since legal counsel advises that the reconfiguration of the roadways does not constitute damages to the remainder in this case. Therefore, there are no damages to the subject. . . .

(R.p.505) Mr. Haskell goes on to set forth his appraisal of just compensation for the land SCDOT physically took from Mr. Powell and, as in his first three (3) reports, determined there were no damages to the remainder of Mr. Powell's land, per Condemnor's instruction, and only found $72,000.00 for the property actually acquired. (R.p. 530)

Thereafter, on March 25, 2013, Condemnor field a Motion in limine to exclude any reference at trial, by either the Condemnor or the Mr. Powell, to diminution in value to Mr. Powell's remaining property as a result of changes in access. (R.p. 32) Judge Cottingham heard argument and entered Exhibits into the record on April 1, 2013, which was to have been the first day of the trial of the action below. From the bench, Judge Cottingham held, *inter alia*:

> Now, in this case, it is clear to me that reasonable jury would find that there is a consider[able] loss in the after [sic].

(R.p. 110, lines 21-22)

Judge Cottingham further stated:

> It is clear to me that there would be some diminution in value. Now, whether that's payable under Hardin and Tallent is a different issue. I don't think it is, but I'll let the Supreme Court deal with it and they can overrule or modify it. But in fairness to the landowner, there is some diminution in value.

(R.p. 111, lines 17-24)

Judge Cottingham continued:

> I think my ruling will be on the issue of admissibility of evidence, which is a partial summary judgment which is in and of itself immediately appealable.

(R.p. 112, lines 24-25; R.p. 113, lines 1-2)

Finally, Judge Cottingham made clear:

> THE COURT: Well, that's why I want my – in fairness to the landowner and, you, sir, I want my order to provide that I would conclude that there is diminution in value, clearly.
> MR. BELLAMY: I understand.
> **THE COURT: You can agree with that I'm sure, Mr. McCutcheon?**
> **MR. MCCUTCHEON: Yes, sir.**

(R.p. 114, lines 3-10) (Emphasis Added.)

Immediately following the above exchange, counsel for Condemnor converted its Motion in Limine to a Motion for Partial Summary Judgment as to the admission of evidence at trial regarding the diminution in value of Mr. Powell's remaining property resulting from the reduction of access to Mr. Powell's property caused by the taking of his property for the underlying road project. (R.p. 113, lines 3-15) Judge Cottingham then instructed counsel for SCDOT, Jack McCutcheon, to prepare an Order and continued the case for trial. (R.p. 114, lines 14-16) This appeal followed. (R.p. 65)

Appellant's briefs filed with this Court, as well as the Record on Appeal in this matter and the transcript of oral argument before this Court are hereby incorporated herein by reference and made part of this Memorandum in Support of Appellant's Petition for Rehearing and Petition for Rehearing.

II. THIS COURT INCORRECTLY DETERMINED APPELLANT WAS NOT ENTITLED TO BE COMPENSATED FOR "ANY DIMINUTION IN VALUE TO THE REMAINING PROPERTY PURSUANT TO SC CODE § 28-2-370" AND, INSTEAD, DETERMINING APPELLANT IS NOT ENTITLED JUST COMPENSATION FOR PROPERTY DIMINUTION RESULTING FROM INCREASED CIRCUITY, REMOTENESS, OR LOSS, OF ACCESS TO HIS PROPERTY.

A. The trial court erroneously determined the South Carolina Supreme Court holding in Hardin/Tallent[1] prevents the consideration of access damages to remaining property in eminent domain actions.

This action was initiated by the South Carolina Department of Transportation in order to acquire from Mr. Powell 0.183 acres of his property referred to by SCDOT for the purpose of the "Interchange at US 17 Bypass and SC 707/Farrow Parkway" project as "Tract 13." (R.p. 17) Notably, SCDOT, on the face of the Condemnation Notice, demanded a trial by jury, not Mr. Powell, as indicated in the Order below. (R.p. 17 and R.p. 10) As a result of the condemnation of his property, Mr. Powell will lose northbound access along Socastee Highway. That road will now terminate north of Mr. Powell's property in a cul-de- sac. Also, the historic access to Hwy. 17, via

[1]Hardin v. S. Carolina Dep't of Transp., 371 S.C. 598, 641 S.E.2d 437 (2007).

Emory Road (along side Mr. Powell's property), will be closed to allow for the elevation of Hwy. 17 necessitated by the same overpass project. The issue of admissibility of evidence relating to the substantially increased remoteness and complexity of access to Mr. Powell's property resulting from the road project necessitating this action is essential to the determination of just compensation in this condemnation action and is the subject of the present appeal.

i. Evidence of Just Compensation

In order to value property affected by a highway project, the market value in the *before* and *after* conditions must be ascertained. Market value is defined in the SCDOT appraisal as:

> The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.[2]

Mr. Powell's property was zoned Highway Commercial as of the date of the take in this matter. (R.p. 120) It is axiomatic that any knowledgeable purchaser of highway commercial property will diligently investigate the ease of access to and from a parcel prior to making a purchase and the price such a purchaser would be willing to pay for the tract will necessarily depend, in part, upon the tract's ease of access. To suggest

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[2] March 14, 2013 appraisal of Corbin Haskell, Page 4. Citing The Dictionary of Real Estate Appraisal, 4th Edition.

the government may take real property from tax payers and residents of its state who are unwilling to sell their land voluntarily and then avoid payment for ***any*** diminution caused to remaining property as a result of the taking is not consistent with the Constitutional mandate of just compensation.

South Carolina's Eminent Domain Procedure Act, S.C. Code Ann. §28-2-30 instructs that the "provisions of this chapter shall constitute the exclusive procedure whereby condemnation may be undertaken in this State." The Act thereafter defines, at § 28-2-370, the proper evidentiary considerations when determining just compensation in *all* actions where private property is taken by the government for a public purpose:

> 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).

Had the South Carolina General Assembly intended to prevent consideration of ***any*** particular evidence of diminution in value to the remaining property, it could have plainly inserted such a limitation in the Eminent Domain Procedure Act, S.C. Code Ann. §§ 28-2-10 *et seq*. (1976). Our legislature inserted no such language; instead, it created a statute designed to place the property owner in the same position financially following the taking of his land as he enjoyed prior to the government taking. As our Supreme Court has repeatedly explained:

> **The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.** Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. at 233, 509 S.E.2d at 262 (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992) (Emphasis added).

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Simply stated, S.C. Code § 28-2-370 **does not invoke consideration of property *rights* once the government has taken by condemnation real property for a public purpose, but *requires* a determination of property *values* prior to the acquisition and following the acquisition. Any diminution thereof is owed to the Mr. Powell pursuant to a plain reading of the statute.**

The General Assembly's approach in this regard has been long-followed in South Carolina, and upholds the "just" compensation requirements of the Fifth Amendment of the U. S. Constitution and Article I, § 13 of South Carolina's

Constitution.[3] 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.

The record below is clear that neither the Condemnor nor the Court sought to fully restore Mr. Powell to the pecuniary position he maintained prior to the acquisition of his property. **Judge Cottingham found and Counsel for SCDOT concurred that SCDOT's taking necessarily caused a diminution in value to Mr. Powell's remaining property. (R.p. 114, lines 3-10)**

In order to be certain the government fully and justly compensates private property owners from whom it takes real property, the full analysis of the property's value in the *before* condition and in the *after* condition must be presented at trial. This is the only manner in which "just compensation" can be properly identified. This is further clarified in S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970):

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[3]USCA CONST Amend. V-Just Compensation; S.C. Const. Art. I, § 13.

> 'In other words, he is entitled to full compensation for the taking of his land **and all its consequences**; * * * 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**.' (Emphasis added.)

Id. at 367–68, 175 S.E.2d at 395.[4] (Quoting from S.C. State Highway Dep't v. Bolt, 242 S.C. 411, 131 S.E.2d 264 (1963).

SCDOT relied heavily at the hearing below upon the holding in Hardin v. S. Carolina Dep't of Transp., 371 S.C. 598, 641 S.E.2d 437 (2007). Based upon its reliance on Tallent/Hardin, Condemnor admittedly instructed its appraiser to disregard the effects of the cul-de-sac and the closure of Emory Road. In SCDOT appraiser Corbin Haskell's March 25, 2013 deposition, the following exchange took place regarding his determination of the value of just compensation to be paid to Mr. Powell:

> Q: Then drop down. You notice under easements and encroachments: "It should be noted that I am not qualified to detect easements and encroachments, and legal counsel should be retained if there are any indications of title defects."
> A: Yes, sir.

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[4] 18 Am. Jur. *Eminent Domain* § 265, p. 905.

Q: And that's why you have yielded to Mr. McCutcheon on the question of the closing of Emory Road and the cul de sac on Socastee —
A: Yes, sir.
Q: --- Boulevard? Okay. But he has given you no written opinion as to why you should disregard the loss of access to Highway 17 on Emory Road or the cul de sac?
A: What do you mean written opinion?
Q: Written you a letter or ---
A: No, sir.
Q: --- memorandum or such?
A: No, sir.
Q: Has he told you orally what his position is?
A: Yes, sir.
Q: Tell me what that is.
A: Just quoted some law as, which I can't recall.
MR. McCUTCHEON: I told him about Talent [sic] and Hardin —

(R.p. 262, lines 9-25; R.p. 263, lines 1-14)

SCDOT's reliance on Tallent/Hardin is misguided. The **entire** analysis in Tallent/Hardin was to determine *whether* a taking had occurred. In each of the cases decided in the Tallent/Hardin opinion, no physical appropriation of property took place. Both of the plaintiffs in those inverse condemnation cases complained of reconfiguration of the road system near their respective property, but neither had sustained any actual government taking of their physical property. The legal analysis throughout Tallent/Hardin was to determine *whether* any of the plaintiffs' property rights had been taken, such that those plaintiffs would be permitted access to a court of law to seek redress for their pecuniary loss. As has been explained by one commentator:

> The tests adopted by the U.S. Supreme Court to determine a taking focus upon the severity of the burden that the government imposes upon private property rights. Physical takings require compensation because of the unique burden they impose: **a permanent physical invasion, however minimal, eviscerates the owner's right to exclude others from entering and using his or her property--perhaps the most fundamental of all property interests**. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

Richard Davis Bybee, Recent Inverse Condemnation Cases, S.C. Law., May 2007, at 24, 27 (emphasis added).

Likewise, the Court in Hilton Head Automotive, LLC v. S.C. Dep't of Transp., 394 S.C. 27, 714 S.E.2d 308 (2011), considered similar claims and explained the appropriate analysis in such cases thusly:

> Following Hardin, a proper analysis of an **inverse** condemnation claim premised on an *alleged physical taking* **must begin with a determination of the scope of the property rights** at issue. 371 S.C. at 605, 609, 641 S.E.2d at 441, 443 (explaining that a court evaluating an inverse condemnation claim premised on a physical taking should "focus ... on a landowner's actual property interests; that is, his easements"). As an abutting property owner, HHA had "an easement for access" to Highway 278, "regardless of whether [it had] access to and from an additional public road." Id. at 606, 641 S.E.2d at 442. In addition, HHA had "an easement for access to and from the public road system." Id. FN3 **If governmental action materially injured either of these easements, such that HHA no longer enjoyed the reasonable means of access to which it was entitled, a physical taking has occurred.**FN4 E.g., S.C. State Highway Dep't v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965) ("[A]n obstruction that materially injures or deprives the abutting property owner of ingress or

egress to and from his property is a 'taking' of the property, for which recovery may be had."); Sease v. City of Spartanburg, 242 S.C. 520, 524–25, 131 S.E.2d 683, 685 (1963) ("The protection of [the South Carolina "takings" clause] extends to all cases in which any of the essential elements of ownership has been destroyed or impaired as the result of the construction or maintenance of a public street."); Brown v. Hendricks, 211 S.C. 395, 403–04, 45 S.E.2d 603, 606–07 (1947) ("The accessibility of one's property may in some instances constitute a great part of its value, and to permit a material impairment of his access would result in the destruction of a great part of the value ... and his property is therefore as effectually taken as if a physical invasion was made thereon and a physical injury done thereto." (quoting with approval Foster Lumber Co. v. Arkansas Valley & Western Ry. Co., 20 Okla. 583, 95 P. 224, 228 (1908)).

FN3. In *City of Rock Hill v. Cothran*, this Court also recognized an abutter's right to proceed upon the abutting road to the next intersection. 209 S.C. 357, 369, 40 S.E.2d 239, 244 (1946) ("[T]he right of an abutting landowner to passage at least to the next intersection is a substantial property right ...."); see also *Powell v. Spartanburg County*, 136 S.C. 371, 374–76, 134 S.E. 367, 368 (1926) (holding that, where a portion of a road was formally discontinued and a new road was built to route traffic around the discontinued portion such that the two roads formed a semicircle pattern, property owners abutting on the old road "could not rightfully be deprived of the privilege of still using it to reach the newly located portion [of the road] *in either direction*," and therefore, nonsuit was improper where access to the new road was cut off at the south end of the old road, even though the new road was accessible from the north end of the old road (emphasis added)). While *Hardin* overruled *Cothran* in certain respects, it did not expressly overrule the existence of this property right. We take no position regarding the status of this right, as HHA has not lost the

> ability to proceed upon Highway 278 to the next intersection. (Emphasis added.)
>
> FN4. Certain language in *Hardin* might suggest this "material injury" test is no longer good law. We take this opportunity to clarify. The "material injury" test is firmly rooted in our jurisprudence, and *Hardin* did not overrule this well-established aspect of our takings analysis. *See Hardin*, 371 S.C. at 609, 641 S.E.2d at 443 ("We therefore overrule the 'special injury' analysis ... and specify that our focus in these cases is on how any road re-configuration affects a property owner's easements."); id. at 609 n. 4, 641 S.E.2d at 443 n. 4 ("[N]either landowner ... has been *deprived* of ingress or egress ... *nor* have these landowners *been injured* in their ability to enter or exit their property." (emphasis added)).

Hilton Head Automotive, 394 S.C. at 30–32, 714 S.E.2d at 310–11 (emphasis added).

Both Hardin and Hilton Head Automotive explain in an inverse case, the *first step* is to look at the property right the plaintiff held prior to the government action for which the plaintiff complained. Then, to determine *whether* the government action materially injured the property right such that the plaintiff "no longer enjoyed reasonable means of access to which it was entitled." Hilton Head Auto., 394 S.C. 27, 31, 714 S.E.2d 308, 310 (2011). ***If these conclusions are affirmatively determined, then* a physical taking has occurred.**

This analysis is entirely unnecessary in cases brought by the government to condemn private property. In those instances, a physical taking occurred upon the filing of the Condemnation Notice and *all* elements of damage *must* be considered by the trial court if *any* private property owner is to be left in the *after* in the same

position pecuniarily as he was in the *before*. As noted by the aforementioned commentator:

> It is important to remember that the Hardin decision is an inverse condemnation action, not a direct condemnation action. In a direct condemnation action, a taking has already been established and the only issue us valuation. The distinction between direct and inverse condemnation cases is that in direct cases there is no need to show special injury, only that the damage is a consequence of the taking. South Carolina State Highway Dep't. v. Bolt, 242 S.C. 411, 131 S.E.2d 264, 267 (1963). **The reason for the distinction is that a taking has occurred and the General Assembly addressed how just compensation is to be determined in direct eminent domain actions. S.C. Eminent Domain Procedure Act, S.C. Code Ann. § 28-2-370 (2007). Section 370 of the Act provides compensation for "any" diminution in value of the remaining property. The condemnation cases interpreting this statute have adopted the "all consequences of the taking" standard. Bolt, 131 S.E.2d at 267.**

Richard Davis Bybee, Recent Inverse Condemnation Cases, S.C. Law., May 2007, at 29 (emphasis added).

Any analysis that does not take into account *each* element of value of the land taken both before and after the condemnation *cannot* render just compensation and fails to meet the requirements of the Eminent Domain Procedure Act, the South Carolina Constitution, and the United States Constitution.

While Appellant recognizes this Court properly distinguished the Hardin decision from the present matter, Appellant asserts this Court's Opinion also improperly avoids proper application of S.C. Code § 28-2-370 and denies Mr. Powell

just compensation for the reduction in ***value*** caused to his remaining property as a result of the SCDOT acquisition. Accordingly, Appellant David Powell respectfully requests rehearing of this Court's Opinion.

ii. The March 14, 2013 SCDOT Appraisal

On March 14, 2013, the SCDOT produced to Mr. Powell a revised appraisal (hereinafter referred to as "the March 14, 2013 Report") report from the witness SCDOT listed, but not properly qualified by the trial court, as its proposed appraisal expert. This report was the first appraisal SCDOT produced following the revelation that the frontage road would no longer connect Mr. Powell's property to the North, but, instead, would terminate at a cul-de-sac shortly beyond Mr. Powell's property line. This report, along with Mr. Powell's appraisal report, assessed damages to Mr. Powell's property resulting from the reconfiguration of access to his property. Although Mr. Powell's and SCDOT's respective appraisers disagree as to the total amount due Appellant as just compensation for the condemnation of his property, each of these two reports, and only these two reports, contains a full and fair analysis of "any diminution in the value of the landowner's remaining property" caused by the present condemnation action. S.C. Code Ann. § 28-2-370.

Respondent's motion for partial summary judgment below, which is the subject of the present appeal, sought to exclude from the jury both SCDOT's and Appellant's conclusions as to the diminution in value caused to Mr. Powell's remaining property.

SCDOT, in this report, at Paragraph 9, indicated the highway-commercially-

zoned subject property was valued at Nine Hundred and Sixty-Three Thousand and No/100 ($963,000.00) Dollars as of the date of the filing of the Condemnation Notice *prior* to the construction of the interchange at the back gate for which the Condemnation Notice was filed. However, the report also concluded the property was only worth Four Hundred and Forty-Six Thousand and No/100 ($446,000.00) Dollars, as of the very same date, *following* the construction of the interchange.

According to SCDOT, the diminution in value, constituting just compensation, totaled Five Hundred and Seventeen Thousand and No/100 ($517,000.00) Dollars. According to the March 13, 2013 Report, at Paragraph 31, Seventy-Two Thousand and No/100 ($72,000.00) Dollars of just compensation was attributed to the land which SCDOT physically appropriated in the take. The remaining Four Hundred and Forty-Six Thousand and No/100 ($446,000.00) Dollar diminution in value to Mr. Powell's property was entirely due to damages to Mr. Powell's remaining property resulting from the reconfiguration of access. This, according to the SCDOT appraiser, represented a Fifty percent (50%) diminution in value of the property Mr. Powell retained after SCDOT condemned a portion of his property for the construction of the interchange.

The appraiser for SCDOT himself fully explained his analysis in his report and in his deposition. Notably, he even went to the trouble of locating paired sales in order to specifically quantify the diminution in value of the property in the *after* condition. In Mr. Haskell's deposition on March 25, 2013, Mr. Haskell testified:

Q: "After the acquisition, the subject will have similar access to Sale "C";
however, the subject will maintain its exposure along Highway 17, thus an adjustment slightly less than fifty-three percent is appropriate. Based on the paired sales data analysis, after the acquisition, a fifty percent downward adjustment is reasonable." So you're giving the benefit to Mr. Powell's tract of land?

A: That's correct.

Q: And this is your work product that you did and assembled on your own volition acting as an appraiser in evaluating the take and damages?

A: That's correct.

Mr. Haskell continued:

Q: So you indicated the difference of $517,000, which as I read your report, it's 72,000 for the take and 445,000 for damages to the remainder?

A: Yes, sir.

Q: And that was your opinion when you signed this report on March 14, 2013?

A: Yes, sir.

Q: All right, sir. And if you went to trial tomorrow morning, and this appraisal was determined by the court to be relevant, this would still be your opinion?

A: Yes, sir.

(R.p. 284, lines 14-25; R.p. 285; R.p. 286, lines 1-14)

Clearly, until Mr. Haskell was instructed by his client's attorney to disregard the reconfiguration of access to Mr. Powell's property directly resulting from the interchange project, he was prepared to testify under oath, as Condemnor's proposed expert, should he be so qualified, as to property value, that Mr. Powell's remaining property had been damaged by Fifty percent. Notably, not only did Mr. Haskell

determine in his report the remainder had been damaged by Fifty percent (50%), but he considered "Access/Frontage/Exposure" in determining the property value and the appropriate adjustments to be made to other properties in order to make them more comparable to the subject. (R.p. 137)

B. The reference in the Order below that the "Department could have eliminated the intersection without taking land from Mr. Powell" is not supported by *any* evidence before the court and should be remanded to the trial court for proper evidentiary consideration.

In stating the "Department could have eliminated the intersection without taking land from Mr. Powell," the trial court established an inference that could erroneously distinguish the closure of the Emory Rd. intersection with Hwy. 17 and the creation of the cul-de-sac on Socastee Hwy. from the highway project for which this action was filed. (R.p. 12) This inference was: (1) not sought by the Condemnor's Motion nor argued by Condemnor at the hearing below; (2)not stated by the court in the hearing below; and, (3) not specifically enumerated as a holding in the Order below. Neither is it supported by ***any*** evidence in the record below. In his deposition on March 25, 2013, Mike Barbee testified as the SCDOT engineer as follows:

Q: And who is constructing the cul de sac?
A: The cul de sac will be constructed by the DOT and the county's contractor, which is Balfour Beaty Infrastructure.
Q: Okay. And is that being constructed with the Ride on a Penny Fund?
A: Yes, sir.

Q: Okay. So that's part of the construction project that you've called the interchange at Highway 17 and Farrow Parkway?
A: Yes, sir.

(R.p. 304, lines 20-25; R.p. 305, lines 1-6)

This interchange project is part of the group of highway projects funded by a "One-Cent Capital Projects Sales Tax" that was approved by Horry County voters in the referendum of November 7, 2006.[5] Moreover, the plan sheet depicting the cul-de-sac and Emory Rd. closure (which appears in both SCDOT's appraisal report Condemnor seeks to suppress from evidence and the appraisal report which Condemnor seeks to present to the jury at trial in place of the one it seeks to suppress from evidence) is clearly labeled as a plan sheet for this same interchange project. (R.p. 127) This interchange project has closed an intersection that had been open for decades. **There is not one scintilla of evidence in this record to support any inference other than: were it not for the interchange project, the intersection would never have been eliminated.**

As the Wilson case correctly noted:

> 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

[5] http://www.ridingonapenny.com

> 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." South Carolina State Highway Dep't v. Bolt, . 242 S.C. 411, 131 S.E.2d 264 (1963).

The implication of this court's (and that of the court's below) unsupported statement is that the present condemnation is somehow unrelated to the project listed in the caption of the Condemnation Notice itself. The only evidence in the record on this issue is directly contrary to this inference; and, nothing in the record before this court supports the statement in the order or its inference. Accordingly, Mr. Powell respectfully requests this Court reverse its findings as to this issue and remand the case for trial by jury to determine, once evidence has been proposed and considered, whether the involuntary acquisition of Mr. Powell's property was "an incidental part of the major relocation and construction plans of the Department" as was the case in Wilson. The "trial judge simply did not have any

evidence to support" the inference of the statement his order. Brown v. Johnson, 276 S.C. 68, 72, 275 S.E.2d 876, 878 (1981).

III. ADDITIONAL GROUNDS FOR REHEARING OF APPELLATE CASE NO. 2013-001759

A. The determination that Respondent "could have eliminated the intersection without taking part of Powell's property" was in error and not supported in the record.

This Court determined "Respondent "could have eliminated the intersection without taking part of Powell's property". South Carolina Department of Transportation v. Powell, Op. No. 5368 (S.C. Ct. App. Filed December 9, 2015) (Davis Adv.Sh. No. 48 at 50) However, the trial judge entertained no testimony at the hearing below. The caption designated by Respondent in the filing of the Condemnation Notice and Lis Pendens, each make clear this matter was filed as part of SCDOT project identified as the "Interchange at US 17 Bypass and SC 707/Farrow Parkway." (R.p. 17) Moreover, the testimony of SCDOT engineer further clarifies this condemnation and the acquisition of real property from Appellant was part of the project identified by SCDOT as the construction of the said interchange. There exists no testimony supporting this Court's conclusion the acquisition of Appellant's property was unnecessary to the overall construction of the interchange.

Accordingly, Appellant respectfully requests reconsideration of this conclusion by the Court.

B. This court erred in referring to Respondent's appraiser was a "real estate valuation expert" without any qualification in the record.

This Court erred in referring to Respondent's real estate appraiser as a "real estate valuation expert"without any qualification in the record. South Carolina Department of Transportation v. Powell, Op. No. 5368 (S.C. Ct. App. Filed December 9, 2015) (Davis Adv.Sh. No. 48 at 50) In this matter, the trial judge entertained no testimony at the hearing below. Appellant was provided no opportunity to *voir dire* Mr. Haskell. Moreover, Respondent did not offer Mr. Haskell, on the record, as an expert, and the trial court made no determination Mr. Haskell was qualified as an expert in this matter.

Accordingly, Appellant respectfully requests reconsideration of this conclusion by the Court.

C. To the extent this Court relied upon any of the actions of SCDOT as being an exercise of the State's police power, it is in error and warrants rehearing.

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. (R.p. 16) 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") (R.p. 17) 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.

(R.p. 109, lines 7-9)

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.

(R.p. 110, lines 5-7)

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.

(R.p. 111, lines 14-16)

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

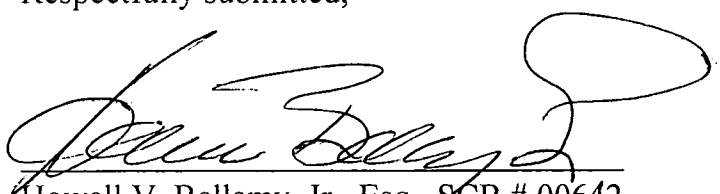
draft the order in a manner consistent with Judge Cottingham's clear instruction, and failed to seek reconsideration of or appeal from, Judge Cottingham's repeated finding. As such, this Court should not now extend to Condemnor protection from the very power Judge Cottingham held SCDOT had not exercised in the present matter.

Accordingly, Appellant requests rehearing of this matter as to this Court's reliance, in any manner, of SCDOT's actions herein being exercised of police power, as this issue was never properly before this Court.

III. CONCLUSION

For the reasons set forth above, Appellant respectfully requests rehearing of this matter.

Respectfully submitted,



Howell V. Bellamy, Jr., Esq., SCB # 00642
Robert S. Shelton, Esq., SCB # 68543
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
1000 29th Avenue North
Myrtle Beach, SC 29577
(843) 448-2400
Attorneys for Appellant David Franklin Powell

Myrtle Beach, South Carolina

December 28, 2015

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.

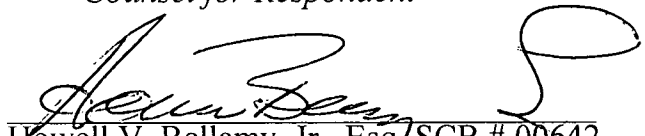
David Franklin Powell ..... *Appellant.*

PROOF OF SERVICE

I certify that I have served a copy of **Appellant's Petition for Rehearing of Opinion No. 5368** and **Appellant's Memorandum of Law in Support of Petition for Rehearing** in the above-captioned matter on the following individuals by depositing a copy in the United States Mail, with sufficient first-class postage affixed, addressed as follows:

John B. McCutcheon, Jr., Esq.
P.O. Box 1740
Conway, SC 29528
Counsel for Respondent

Beacham O. Brooker, Jr., Esq.
P.O. Box 91
Columbia, SC 29202-0191
Counsel for Respondent



Howell V. Bellamy, Jr., Esq. SCB # 00642
Robert S. Shelton, Esq. SCB # 68543
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
1000 29th Avenue North
Myrtle Beach, SC 29577
(843) 448-2400
Attorneys for Appellant David Franklin Powell

Myrtle Beach, South Carolina
Dated: December 28, 2015

HOWELL V. BELLAMY, JR.
EDWARD B. BOWERS, JR.*
BRADLEY D. KING
M. EDWIN HINDS, JR.
DAVID B. MILLER**
C. WINFIELD JOHNSON, III
DOUGLAS M. ZAYICEK
MARTIN C. DAWSEY*
ROBERT S. SHELTON**

* LLM TAXATION
** CERTIFIED MEDIATOR
*** LICENSED IN SC & NC

THE BELLAMY LAW FIRM

HOWELL V. BELLAMY, III
ASHLEY P. MORRISON
GEORGE W. REDMAN, III ***
BENJAMIN A. BAROODY ** ***
PHILLIP H. ALBERGOTTI* ***
HAYES K. STANTON ** ***
KARA J. KEITH
HOLLY M. LUSK

RETIRED:
CLAUDE M. EPPS, JR.
JOHN E. COPELAND
DAVID R. GRAVELY
JILL F. GRIFFITH
JOHN K. RUTENBERG (1939-2012)

1000 29TH AVENUE NORTH • MYRTLE BEACH, SC 29577
MAILING ADDRESS: P.O. BOX 357 • MYRTLE BEACH, SC 29578
TELEPHONE (843) 448-2400 • FACSIMILE (843) 448-3022
www.BellamyLaw.com

Writer's Direct Line: 843-916-7162
E-Mail: nrichardson@bellamylaw.com

December 28, 2015

VIA FEDERAL EXPRESS # 8007 9665 4758
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: South Carolina Department of Transportation v. David Franklin Powell
C/A No. 2010-CP-26-07961
Appellate Case No. 2013-001759

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of Appellant's Petition for Rehearing of Opinion No. 5368, Memorandum of Law in Support of Petition for Rehearing, filing fee in the amount of $25.00, and Proof of Service of same. By copy of this letter, I am serving a copy of the Petition and Memorandum on counsel of record for this matter. Please kindly return a clocked copy of the Proof of Service in the self-addressed, stamped envelope I have provided.

With kindest regards, I remain

Yours truly,

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.

Howell V. Bellamy, Jr.

HVBjr:nmr
Enclosures as stated
cc: John B. McCutcheon, Jr., Esq.
Beacham O. Brooker, Jr., Esq.

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