

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2013-001759

Case No. 2010-CP-26-7961

Opinion No. 5368

RECEIVED  
JAN 13 2016  
SC Court of Appeals

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

vs.

David Franklin Powell.....Appellant,

RESPONDENT’S RETURN TO APPELLANT’S PETITION FOR REHEARING

Respondent respectfully submits this Return to Appellant’s Petition for Rehearing filed December 29, 2015. Initially, we would note that the Court’s holding that a taking of land and acts done elsewhere on the same project can be separated--the latter giving rise to no recovery--is supported by a vast amount of authority that the Court did not and need not have cited. This precedent is so pervasive that it can be said that the principle that the Court confirmed is universally accepted in federal and state courts in the United States. 4A Sackman, Nichols on Eminent Domain, §14A.01[6][a], p. 14A-25.

**I. Respondent did not argue nor did this Court or the trial court hold that Appellant's property was not diminished in value by the highway project, only that the loss was not attributable to the taking of a portion of his land.**

In his section I., Case Summary, Appellant argues that the diminution in value of his land is recoverable because the taking of a portion of his land was "an integral part of the construction of the Interchange at U.S. Highway 17 Bypass SC 707/Farrow Parkway." However, this Court correctly concluded, based upon well settled precedent, that damages arising from the project as a whole are not necessarily recoverable in a condemnation case where those damages can be separated from the use of the land actually acquired from a landowner. The taking of Appellant's property was only an incidental result of the closure of the Emory Road/U.S. 17 intersection and was not indispensable to and inseparable from the overall project. Further, the taking of the property was not a substantial part of the overall road project. Slip opinion, Dec. 9, 2015.

On page two, Appellant states that his property was separated from the U.S. 17 Bypass only by "a power line easement." However, Appellant does not contend and has never argued that that he was the owner of the fee estate underlying the easement. If so, he would certainly be entitled to compensation for the taking of that important appurtenant property right of access. See, Hardin (& Tallent) v. SCDOT, 371 S.C. 598, 641 S.E.2d 437, 442 (2007).

**II. The Eminent Domain Procedure Act does not mandate that landowners be paid for any and all losses in value in a condemnation case.**

In section II, Appellant argues, as he has throughout, that it was error for the courts herein to decline to utilize the “before and after” method of determining just compensation and that all loss of value attributable to the project should be recoverable. However, as we pointed out in our brief to the Court herein, our Supreme Court long ago held that the “before and after” appraisal method is sound but not exclusive. SCDHPT v. Cheston, 278 S.C. 464, 465, 298 S.E.2d 447, 448 (1982). That method is particularly unsuited for evaluation of just compensation in a case such as this one where part of the loss of value is attributable to an exercise of the police power in diverting traffic on a highway and not to an act of eminent domain.

On this point, Appellant may be correct in his statement on page 7, that a willing purchaser may not discount his offer due to the possibility that a nearby valuable traffic artery may be converted to a side street by public authorities. However, that is because such a possibility in most cases is an exceedingly remote one. It does not change the nature of the vested rights the owner has in his land. All purchasers of property buy that property subject to the sovereign’s police power to regulate its use.

Beginning at page 8, Appellant asserts his statutory construction argument that the definition of just compensation in S.C. Code §28-2-370 does not place an express limitation on the damages to remaining land element. However, the seminal case in this area, S.C. State Highway Dep’t v. Bolt, 242 S.C. 411, 131 S.E.2d 264 (1963), clearly

limits the damages to remaining land to those damages resulting from the taking and not from the project as a whole. Moreover, a number of cases addressing the non-compensability of police power-related damages preceded the enactment of the Eminent Domain Procedure Act including Wilson v. Greenville County, 110 S.C. 110 S.C. 321, 96 S.E.2d 301 (1918); and South Carolina State Highway Dep't v. Carodale Assocs., 268 S.C. 556, 235 S.E.2d 127 (1977). Those cases include the one upon which Appellant places his greatest reliance, S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970). However, the Court in that case could have dispensed with its in-depth analysis of the facts if the law was as Appellant proposes: that any losses are recoverable once a condemnation notice is served. In ascertaining the meaning of a statute the General Assembly is presumed to know the pronouncements of the appellate courts. Grier v. Amisub of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012).

On page 17, Appellant appears to argue that a mere diminution in value of land constitutes a taking by eminent domain. This argument ignores the basic tenets of takings law. See, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). As this Court has stated, "The property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of the public use." Gray v. S.C. Dep't of Highways and Pub. Transp., 427 S.C. 144, 151, 427 S.E.2d 899, 903 (Ct. App. 1993), overruled on other grounds, Hardin (& Tallent), supra, (quoting 26 Am.Jur.2d *Eminent Domain*, Section 160 (1966)).

We believe the Court's opinion adequately addresses the argument Appellant makes in Section II. B (page 21) that there is no evidence that Respondent could have closed the intersection without taking his property. Just compensation does not include

the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking. Campbell v. United States, 266 U.S. 368, 45 S.Ct.115, 69 L.Ed. 328 (1924).

**III. Appellant's evidentiary arguments are unconvincing in that the Court's decision is based on undisputed facts.**

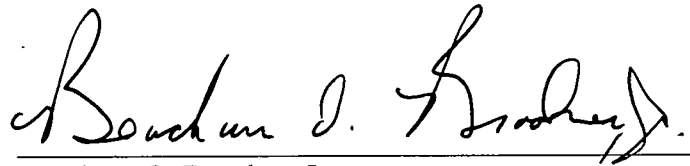
In section III. A., Appellant objects that there has been no testimony to support the conclusion that the taking of his property and the closure of the intersection were separate acts. However, as mentioned above, Appellant never claimed to own land at the intersection. Thus, he has no claim to its use as a matter of law.

In subsection B., Appellant complains that he was not able to cross-examine Respondent's appraisal witness. However, the issue on appeal is one of law and not of valuation. Valuation is yet to be tried.

Appellant complains in subsection C. that we did not object to statements made by the trial judge that the case was not a "police action." However, there was nothing to object to. The case was an affirmative condemnation brought under the Eminent Domain Procedure Act. The court merely ruled on an evidentiary matter in that valuation case that the landowner was not entitled to recover diminution in value flowing from an act of the State that did not affect any pre-existing property right held by him.

**IV. Conclusion.**

The Court correctly applied the prevailing law herein and should not rehear the appeal or alter its opinion in any way.



Beacham O. Brooker, Jr.  
S. C. Department of Transportation  
Post Office Box 191  
Columbia, South Carolina 29201-0191  
(803) 737-1347  
[brookerbo@scdot.org](mailto:brookerbo@scdot.org)

John B. McCutcheon, Jr.  
Thompson & Henry, P.A.  
Post Office Box 1740  
Conway, South Carolina 29528  
(843) 248-5741  
[JMcCutcheon@thompsonlaw.com](mailto:JMcCutcheon@thompsonlaw.com)

Attorneys for Respondent

Columbia, S.C.  
January 5, 2016

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Edward B. Cottingham, Circuit Court Judge

---

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

---

**RECEIVED**  
JAN 13 2016  
SC Court of Appeals

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

v.

David Franklin Powell.....Appellant.

---

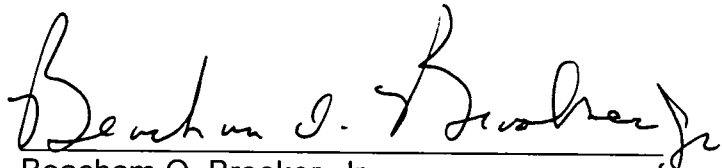
**PROOF OF SERVICE**

---

I certify that I have served the RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING on the Appellant by depositing a copy of it in the United States Mail, postage prepaid on January 12, 2016, addressed to his attorneys of record, Howell V. Bellamy, Jr. and Robert S. Shelton, and upon John B. McCutcheon, Jr., as follows:

Howell V. Bellamy, Jr., Esquire  
Robert S. Shelton, Esquire  
Bellamy, Rutenberg, Copeland,  
Epps, Gravely & Bowers, PA  
P O Box 357  
Myrtle Beach, SC 29578

John B. McCutcheon, Jr., Esquire  
Thompson & Henry, PA  
P O Box 1740  
Conway, SC 29528



Beacham O. Brooker, Jr.,  
South Carolina Department of Transportation  
Post Office Box 191  
Columbia, South Carolina 29202-0191  
(803) 737-1347  
[brookerbo@scdot.org](mailto:brookerbo@scdot.org)

Attorney for Respondent

January 12, 2016



South Carolina  
Department of Transportation  
Office of Legal Services

Linda C. McDonald,  
Chief Counsel

Assistant Chief Counsel(s)  
Natalie J. Moore  
Barbara M. Wessinger  
Beacham O. Brooker, Jr.  
Amanda T. Taylor, Claims  
Randolph E. Carothers, IV

Claims Office 737-1260

January 12, 2016

RECEIVED  
JAN 13 2016  
SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
P O Box 11629  
Columbia, SC 29211

RE: South Carolina Dept. of Transportation, Respondent, v.  
David Franklin Powell, Appellant  
Appellate Case No. 2013-001759

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING in the captioned matter, along with an original and one copy of PROOF OF SERVICE regarding same.

Please file the pleadings and return a filed copy of each to me using the envelope provided. I am this date by copy of this letter, serving all parties to this case with copies of these pleadings.

Very truly yours,

Beacham O. Brooker, Jr.  
Assistant Chief Counsel

Enclosures  
BOB, JR:jmt

cc: Howell V. Bellamy, Jr., Esquire  
Robert S. Shelton, Esquire  
John B. McCutcheon, Jr., Esquire

