STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

In the Court of Common Pleas
Fifth Judicial Circuit

Civil Action Number 2007-CP-40-7633

Carolina Chloride, Inc.,

Plaintiff,

vs.

South Carolina Department of Transportation,

Defendant.

Order

This inverse condemnation matter is before the Court on remand from the Supreme Court. Carolina Chloride, Inc. v. S.C. Dep't. of Transportation, 391 S.C. 429, 706 S.E.2d 501 (2011). A trial was held in Columbia October 20, 21, and 22, 2014, where plaintiff and defendant presented witness testimony and documentary evidence. In addition, the Court viewed the subject property on Killian Road in Richland County the morning of October 22 to put the premises into evidence.

In an inverse condemnation case, it is the landowner's burden to demonstrate that the government engaged in affirmative, positive, and aggressive conduct and that conduct resulted in a taking of private property for public use without just compensation being first made. Carolina Chloride, Inc. v. S.C. Dep't. of Transportation, 391 S.C. at 435, 706 F.2d at 504; Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005); McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986) ("[I]t is difficult, if not impossible, to take anything from someone negatively or by failing to act.")

Plaintiff claims that the Department's elimination of the highway-rail grade crossing on Killian Road deprived it of access to Farrow Road with which Killian Road formerly intersected.

In cases alleging a taking of access rights to private property from public roads, the Supreme Court has instructed that the focus of the inquiry must be on the landowner's actual property interest; that is, his easements. Hardin (& Tallent) v. S.C. Dept. of Transportation, 371 S.C. 598, 641 S.E.2d 437, 443 (2007) ("[I]n order to have taken any of these properties, SCDOT must have physically appropriated some aspect of them." 641 S.E.2d at 441.) As noted in Carolina Chloride, supra, a property owner has two easements with respect to the public roads adjoining his property. The first is the right to get on and off the property from each road it abuts. The second easement guarantees that a landowner may access the public road system. In reversing this Court's grant of summary judgment to the Plaintiff, the Supreme Court held that the second easement was not taken in that the Plaintiff could access the general system of roads without unreasonable difficulty by travelling east on Killian Road. A landowner has no right to demand that a public road remain open for his use nor has the right to travel in both directions on an adjoining road. There is no claim that Plaintiff has been denied the right to enter or exit his property onto Killian Road. Indeed, the Court's site visit showed the driveway to the property onto Killian Road open and in use. Thus, the only issue on remand is whether the Department engaged in any affirmative act to deny Plaintiff a right of direct access on and off of Farrow Road to and from its property. For the following reasons, I find that it did not.

As the Supreme Court explained in Mosteller v. County of Lexington, 336 S.C. 360, 365, 520 S.E.2d 620, 622-23 (1999), any claim for denial of access must be grounded in the fact of abutting. Because no part of Plaintiff's land abuts or shares a common boundary with the right-of-way of Farrow Road, it has no right to a drive entrance onto that road which can be taken by the Department.

In this regard, the Department presented the Court with a copy of the legislative charter to the Charlotte and South Carolina Railroad Company. AN ACT TO CHARTER THE CHARLOTTE AND SOUTH CAROLINA RAIL-ROAD COMPANY, Act 2988, 1846 S.C. Acts 415. Under that legislation, where the railroad exercises its authority to condemn lands, the lands shall vest in the company in fee simple upon payment of the valuation. Id. at 421. The Department presented the Court with a handwritten instrument purporting to be the report of the condemnation commissioners to the Circuit Court on the taking and valuation of the strip of land in question from Mary Boyle and children dated November 13, 1848. The land records of Richland County were destroyed in 1865. Thus, Defendant proffered this document obtained from the archives of the Norfolk Southern Corporation in Atlanta. Plaintiff's objection to the authenticity of this document was sustained. However, Defendant's difficulty in conclusively establishing title in the railroad is not determinative of the issue at bar.

In this regard, I find the case Hoogenboom v. City of Beaufort, 315 S.C. 306, 433 S.E.2d 875 (Ct. App. 1993), to be instructive. In that case, Ms. Hoogenboom claimed title against the City of the end of King Street in Beaufort that terminated at the marsh next to her property. The City was unable to produce the original instruments under which it had acquired fee simple title due to the fact that land records were destroyed in the Civil War in 1863. However, the Court of Appeals noted that the Act of 1811 required the City pay damages for the streets it was authorized to lay out and, upon payment received title in the "wardens of Beaufort and 'their successors in office forever.'" Id., 433 S.E.2d at 880. The Court of Appeals noted these words are the "classic words of limitation for granting a fee simple absolute in land to a municipal corporation." Id., 433 S.E.2d at 882. In any event, the Court noted that, "In an action to quiet title, the plaintiff must recover on the strength of his own title, not on the alleged weakness of the

defendant's title." Id., 433 S.E.2d at 880. None of the deeds in Ms. Hoogenboom's chain of title indicated ownership of the street end and neither she nor her predecessors in title ever paid taxes on the land. Because title could be declared in Hoogenboom only if the evidence supports no inference except title in her, the Court of Appeals reversed the trial court and declared title in the City.

In the case at bar, both parties introduced Carolina Chloride's title to its land into evidence. That deed contains both a metes and bounds legal description of the property and reference to a recorded plat prepared by Inman Land Surveying, Inc. Both the description and the plat clearly indicate that its property boundary is with the lands of the railroad and not with the right-of-way of Farrow Road. Moreover, Plaintiff's lands do not abut the closed segment of Killian Road across the railroad property being offset from that parcel. ("'Abut' means to be contiguous, or border on; to bound upon; to end, end at, or terminate, to join at a border or boundary; to meet; to touch at the end or side." Mosteller, supra, 520 S.E.2d at 623.) The Department also introduced and instrument between it and the Southern Railway Company dated November 18, 1977, under which it acquired the company's permission to construct and maintain the Killian Road rail crossing at this point. From its site visit, the Court takes judicial notice that the rail line appeared to be in full service.

In his testimony, Plaintiff's principal, Robert Morgan, admitted that his land did not abut Farrow Road. Further, he admitted that he had never obtained an easement from the Norfolk Southern to cross its land and tracks nor had ever made such a request. Rather, Plaintiff's argument with respect to abutting rests on a number of property tax cases holding that a public road or rail tracks do not destroy contiguity between the taxpayer's land on either side of the road or tracks where it owns the fee simply estate under those rights-of-way. See, e.g., Sonoco

Products Company v. S.C. Dept. of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008). I find these cases inapt. The issue here is not contiguity for administrative law or tax purposes; rather whether Plaintiff has a right to physically cross the lands of the Norfolk Southern Corporation to reach Farrow Road. Plaintiff has not shown that it owns the fee under that strip of land nor that it has any superior right to the railroad with regard to access. As noted above, the stronger inference is that the railroad company and not Plaintiff holds fee title. Further, Plaintiff has not shown fee title under the highway right-of-way that adjoins the railroad property.

There are other reasons why Plaintiff cannot prevail. First, it is a maxim of inverse condemnation law that a claimant must first make a meaningful request to allow governmental agencies to exercise their discretion. Palazzolo v. Rhode Island, 533 U.S. 606, 620, 121 S.Ct. 2448, 2459, 150 L.Ed.2d 592 (2001); Moore v. Sumter County Council, 300 S.C. 270, 272, 387 S.E.2d 455, 457 (1990). The common law right to enter adjoining public roads as an appurtenant right to title in an adjoining parcel is not absolute. Rather, the General Assembly has established a permit system to assure such drive entrances are reviewed by the Department and approved to be safe to the travelling public with regard to their design and location. S.C. Code Ann. §57-5-1090 (Rev. 2006). Plaintiff's testimony is that it never made such a request. Plaintiff's failure to afford the Department the opportunity to mitigate its alleged taking bars the claim herein.

The foregoing rule is in effect an application of the exhaustion of administrative remedies rule in claims against the government. The general rule "that administrative remedies must be exhausted absent circumstances supporting an exception to the rule" is well established in South Carolina. Hyde v. S.C. Dept. of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994).

Finally, the Department's engineer, Mr. Keys, testified at the trial that the Department would have no objection to permitting a drive entrance onto Farrow Road at this location to the

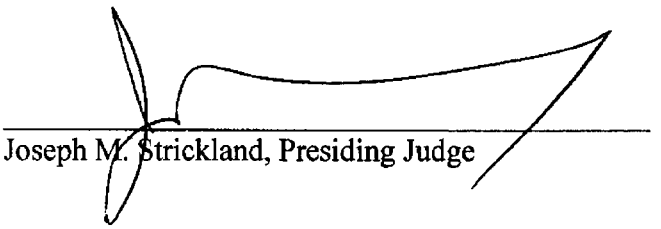
adjoining owner. Sight distance and other factors do not cause it to be an unsafe location. Thus, there is no case or controversy between the Department and that landowner even if Carolina Chloride could be proven to be the adjoining owner. In general, courts may only consider cases when a justiciable controversy exists. See Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct.App.1998) (holding "a threshold inquiry for any court is a determination of justiciability"). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Pee Dee Elec. Coop., Inc. v. Carolina Power Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983); see also Kiawah Property Owners Group v. The Public Service Comm'n of South Carolina, 357 S.C. 232, 593 S.E.2d 148 (2004); Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996). Accordingly, issues that are not ripe are not proper subjects of adjudication.

Conclusion

A governmental entity may successfully defend an inverse condemnation suit by demonstrating that the use or the alleged property right was not a part of the owner's title to begin with. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2889, 120 L.Ed.2d 798 (1992); McQueen v. S.C. Coastal Council, 340 S.C. 65, 530 S.E.2d 628 (2000). I find that the Plaintiff herein has not demonstrated the right to construct a drive entrance onto Farrow Road for the reason that its property does not abut that road. Plaintiff's ability to get to the general system of roads has been adjudged not to have been taken by the Supreme Court in this case and is now the law of the case. Thus, it is the Order of this Court that Plaintiff has not suffered a taking of its property without just compensation and that the

Complaint should be and hereby is DISMISSED.

AND IT IS SO ORDERED,



Joseph M. Strickland, Presiding Judge

Columbia, S.C.
~~October 27, 2015~~
January 15, 2016

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2007- **CP**-40-7633

Carolina Chloride, Inc.

PLAINTIFF(S)

South Carolina Department of Transportation

DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

~~Circuit Court Judge~~ Master

2097
Judge Code

Jan. 15, 2016
Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Christian Stegmaier, Esq.
P O Box 12487
Columbia SC 29211
ATTORNEY(S) FOR THE PLAINTIFF(S)

Beacham O. Brooker, Esq.
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Columbia SC 29201
ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.