STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

West/Hobby, LLC,)
)
Plaintiff,)
vs.)
)
County of Newberry,)
)
Defendant.)
)

Case No.: 2012-CP-36-00046

FINDINGS OF FACT AND CONCLUSIONS OF LAW

West/Hobby, LLC ("West/Hobby" or "Plaintiff") filed this inverse condemnation case against the County of Newberry ("the County" or "Defendant") related to a solid waste landfill the County operated on Cockrell Road in Newberry County ("Landfill"). This matter came before me for trial at the Newberry County Courthouse on December 14-15, 2015. Although Plaintiff asserted various causes of action in its pleading, it dismissed all claims prior to trial save its claim for inverse condemnation. At trial, West/Hobby was represented by James L. Bruner, Esquire and Benjamin C. Bruner, Esquire of Bruner, Powell, Wall & Mullins, LLC in Columbia, South Carolina. Defendant the County of Newberry ("the County" or "Defendant") was represented by Patrick J. Frawley, Esquire of Davis Frawley, LLC in Lexington, South Carolina.

West/Hobby, which owns land adjacent to the Landfill across Cockrell Road, claims landfill gas from the closed Landfill migrated across Cockrell Road and contaminated Plaintiff's property. According to the Plaintiff, the landfill gas migrated because the County installed a clay cap over the Landfill when it closed in 1994. The clay cap caused concentrations of landfill gas containing methane and volatile organic compounds ("VOC's") to migrate horizontally to Plaintiff's property, ultimately contaminating the property and thwarting a profitable sale of the property. The County denies and has defended vigorously against West/Hobby's claims.

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"In an inverse condemnation case, the trial court will first determine whether a claim has been established." *Frampton v. S. Carolina Dep't of Transp.*, 406 S.C. 377, 385, 752 S.E.2d 269, 274 (Ct. App. 2013) (citing *Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005)). "Then, the issue of compensation may be submitted to a jury at either party's request." *Id.* at 385. Thus, the bench trial held on December 14-15, 2015 was for this Court to receive evidence and make a determination about whether the Plaintiff has established a claim for inverse condemnation. For the reasons set forth below, I find West/Hobby proved its claim.

To prove a claim for inverse condemnation, a plaintiff must show three elements: (1) affirmative conduct of a governmental entity; (2) the conduct effects a taking; and (3) the taking is for a public use. *Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005). The parties do not dispute that the public use requirement is satisfied. Therefore, the issues before this Court relate to the first two elements. After a thorough review of the evidence presented by the parties and of the arguments of counsel at trial, I find there was affirmative conduct by Newberry County which effected a taking of the Plaintiff's property.

FINDINGS OF FACT

The Court has carefully reviewed and considered all of the evidence presented by the parties during the two-day trial, including the pleadings, the numerous exhibits the parties entered into the record and the testimony from all ten witnesses who testified, three of whom were expert witnesses. Based upon its review and evaluation of the record, the Court finds West/Hobby proved the following facts by a preponderance of the evidence:

1. The County operated the Landfill on land the County owned on Cockrell Road from 1970 until 1994. The County stopped accepting waste at the Landfill on April 1, 1994. (Plaintiff's Exhibit 1).

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2. When the landfill closed, the County installed a 24-inch thick clay cap on top of the Landfill. The County also installed seven (7) gas monitoring points and numerous groundwater monitoring wells around the perimeter of its property.

3. The County hired consulting engineers to monitor periodically the groundwater and the landfill gas emanating from the Landfill and to file reports of their findings with the South Carolina Department of Health and Environmental Control ("DHEC").

4. The gas generated by the decomposition of materials in a solid waste landfill is principally composed of methane and carbon dioxide, both of which are colorless and odorless. The lower explosive limit ("LEL") for methane is 5% in air.

5. On November 1, 2000, Billye West and Raymond D. Hobby bought a 40.7-acre tract of land across Cockrell Road from the closed Landfill for investment purposes ("the Property"). They paid $290,000 for the Property. (Plaintiff's Exhibit 2.)

6. On June 18, 2002, Messrs. West and Hobby conveyed the Property to West/Hobby, a South Carolina limited liability company they formed for the purpose of holding real property they bought for investment purposes. (Plaintiff's Exhibit 3.)

7. The County had readings for landfill gas taken periodically at the Landfill. The first readings which exceeded safe limits for landfill gas were taken in December 2003. (Plaintiff's Exhibit 16-L, Table 6.) In 2004 and 2005, the methane readings detected in five of the seven gas monitoring points exceeded 5% LEL. (Plaintiff's Exhibit 16-M, Table 7.) As a result, the County's consulting engineers prepared—and the County implemented—a Methane Remediation Plan in 2005. (Plaintiff's Exhibit 4.)

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8. In the County's Methane Remediation Plan, it was recommended that a Barhole Survey using the Geoprobe™ technique be conducted to determine the extent of lateral migration of off-site methane. (Plaintiff's Exhibit 4 p.8.)

9. On February 6, 2006, Tommy Whitehead, Director of Public Works for Newberry County, wrote to the Plaintiff stating that the County had received a letter from DHEC asking it to perform subsurface testing just outside the borders of the closed Landfill. Since the Plaintiff's Property was adjacent to the landfill, the County asked for permission to enter the Property to perform the tests. (Plaintiff's Exhibit 5.) The County did not tell West/Hobby that the test was part of a Methane Remediation Plan.

10. Mr. West signed the bottom of Mr. Whitehead's letter on behalf of West/Hobby giving the County permission to enter the Property to perform the tests.

11. On March 23 and 24, 2006, the County's consulting engineers conducted the off-site methane investigation by installing twenty (20) Geoprobe™ test holes outside the property boundaries of the Landfill. (Plaintiff's Exhibit 6.) Seven (7) of those test holes were located on Plaintiff's Property. (Plaintiff's Exhibit 6 p. 9.)

12. Five (5) of the seven (7) test holes on Plaintiff's Property reported methane levels in excess of 5% LEL. (Plaintiff's Exhibit 6 p. 8.) The record contains no evidence or indication that the County reported the results of the tests to the Plaintiff.

13. Based upon this evidence and the expert testimony presented at trial, it is evident that the Plaintiff's Property was contaminated with landfill gas from the Landfill on March 23 and 24, 2006. Furthermore, it is evident the Plaintiff had no reason to suspect its Property was contaminated.

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14. In the summer of 2006, the County installed a passive remediation trench, known as an Interceptor Trench, along a portion of the Landfill border with adjacent properties. The purpose of the Interceptor Trench was to give the landfill gas an avenue to exhaust itself vertically so it would not migrate horizontally onto adjacent properties. (Plaintiff's Exhibit 4 p. 10.)

15. The Interceptor Trench was not completely effective in remediating the horizontal migration of landfill gas from the closed Landfill. As a result, on January 24, 2008, the County's new consulting engineer recommended installing passive methane vent wells. (Plaintiff's Exhibit 9.)

16. On February 26, 2008, DHEC approved the County's request to install 32 passive gas vents to lower onsite methane levels at the Landfill. (Plaintiff's Exhibit 10.)

17. Over one year later, in June of 2009, the County submitted a Revised Methane Corrective Action Plan to DHEC in which the County sought permission to install only six (6) passive gas vents, rather than 32. (Plaintiff's Exhibit 11.) DHEC approved that plan on August 13, 2009.

18. In December 2010, sixteen months after receiving DHEC's approval for its revised plan, the County installed six (6) passive gas vents on the closed Landfill site.

19. The County did not give any notice to the Plaintiff of the steps it was taking to address the problem, and Plaintiff had no reason to suspect landfill gas from the Landfill was contaminating its Property.

20. On January 19, 2011, the Plaintiff signed an Agreement of Purchase and Sale ("Purchase Agreement") in which Plaintiff agreed to sell the Property to Kiswire, Inc. for $520,000. (Plaintiff's Exhibit 12.) Kiswire was building a new manufacturing facility, and the

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Property's proximity roughly a mile from Kiswire's existing location made it the most attractive parcel Kiswire had found.

21. Subsequently, as part of its due diligence, Kiswire commissioned S&ME, consulting engineers, to perform a Phase I Environmental Site Assessment ("ESA") on the Property. Upon completing the ESA, S&ME recommended additional investigation to establish with greater certainty the identified methane levels on the adjoining property. (Plaintiff's Exhibit 13 p. 21.)

22. In March, 2011, S&ME conducted a Limited Soil Gas Assessment on the Plaintiff's Property. (Plaintiff's Exhibit 15.) S&ME installed eight (8) Geoprobe™ test holes on the Plaintiff's Property along the eastern boundary of the Property and parallel to Cockrell Road (directly across the road from the Landfill). (Plaintiff's Exhibit 15, Figure No. 3, Soil Gas Sample Locations.)

23. The Limited Soil Gas Assessment did not report finding any methane levels in excess of the 5% LEL. However, S&ME the reported the following observations:

> 1. Several volatile constituents typically associated with municipal landfills were present at the Property boundary.
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> * * *
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> 3. Using the SCDHEC benchmarks for vapor intrusion that the Brownfield program developed, three (3) analytes posed potential concern for buildings that may be placed on the site-benzene, tetrachloroethene & trichloroethene.
> 4. The off-set of point GW-6 towards the interior of the site indicated that the landfill gas has impacted the site interior beyond the property boundary.
> 5. The extent of geographic penetration into the subject site by the landfill effects is unknown.
> 6. The future effects of the landfill on the site is unknown. These data represent current conditions on the day of sampling only . . . .

(Plaintiff's Exhibit 15 p. 6.)

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7. After learning of the results of the Limited Soil Gas Assessment from S&ME, David Minnick, President of Kiswire, wrote a letter to the Plaintiff terminating the Purchase Agreement. (Plaintiff's Exhibit 14.)

8. The Court found Mr. Minnick's testimony at trial about termination of the Purchase Agreement particularly credible. Mr. Minnick testified that he called Mr. West to have a face-to-face meeting and to explain why Kiswire was terminating the Purchase Agreement. Although Kiswire had not completed its due diligence at the time it terminated the Purchase Agreement, Mr. Minnick testified that Kiswire most probably would have closed on the purchase of the Property but for the presence of three volatile organic compounds: benzene, tetrachloroethene and trichloroethene.

9. Mr. West and his daughter, Misty West, testified that prior to Kiswire's termination of the Purchase Agreement, they had no reason to suspect the Property was contaminated with landfill gas. Not only did the Court find that testimony credible, the County presented no evidence to the contrary.

10. After the contract was terminated, the Plaintiff contacted the County Administrator, reported the problem and asked that the County either buy the Property or redress the contamination problem. According to Misty West's testimony, the County Administrator responded that the County "was not interested".

11. On January 26, 2012, less than one year after discovering landfill gas was migrating from the Landfill, West/Hobby filed this lawsuit against the County.

12. In February 2014, Terracon, an environmental testing firm, conducted testing on Plaintiff's Property and found various VOC's in the four soil gas samples of the Property with

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benzene and ethylbenzene concentrations in excess of the EPA Regional Screening Levels for residential air. (Plaintiff's Exhibit 16-V.)

13. In May 2015, the County completed installation of an active subsurface soil gas extraction system at the Landfill. (Plaintiff's Exhibit 16-X p. 1.)

14. The active subsurface soil gas extraction system has significantly reduced the landfill gas present at the property boundaries of the closed Landfill. (Plaintiff's Exhibits 16-X and 16-Y.)

15. The clay cap the County installed on the Landfill caused the landfill gas generated from the decomposing waste to migrate horizontally toward adjacent land rather than migrating vertically directly into the atmosphere. The new subsurface soil gas extraction system attempts to overcome that migration phenomenon by drawing the landfill gas out vertically, rather than allowing the gas to passively migrate to the Landfill boundary.

16. The evidence clearly demonstrates that while landfill gas was first shown to be present on the Plaintiff's Property in March 2006, the County did not install an active subsurface soil gas extraction system until May 2015.

17. The active subsurface soil gas extraction system was known by the County to be an available remedy for landfill gas migration in September 2005 when its consulting engineer issued the Methane Remediation Plan. (Plaintiff's Exhibit 4, p. 12.)

18. Based upon the testimony and other evidence presented at trial, it is apparent the County did not install an active subsurface soil gas extraction system earlier than 2015 in an effort to save money at the time. That delay, however, prolonged the contamination of the Property and cost West/Hobby the sale to Kiswire.

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CONCLUSIONS OF LAW

As stated at the outset, the Plaintiff must prove three things to establish a claim for inverse condemnation: (1) affirmative conduct of a governmental entity; (2) the conduct effects a taking; and (3) the taking is for a public use. *Byrd*, 365 S.C. at 657, 620 S.E.2d at 79. While prior to *Byrd* there was a fourth element required - "some degree of permanence," the *Byrd* Court dispensed with that element. *Id.* "Whether the plaintiff has established a claim for inverse condemnation is a matter for the court to determine." *WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006) (citation omitted). "To prevail in such an action, a plaintiff must prove 'an affirmative, aggressive, and positive act' by the government entity that caused the alleged damage to the plaintiff's property." *Id.*

I. Was there was an affirmative, aggressive, and positive act for a public use?

The Court finds and concludes that the Plaintiff has proved an affirmative, aggressive and positive act by Newberry County that caused the damage to the Plaintiff's Property. It is undisputed that the County installed a clay cap on the Landfill in 1994. In *WRB Ltd.*, *supra*, a case with facts remarkably similar to these, the Supreme Court of South Carolina held Lexington County's installation of a clay cap on a solid waste landfill was an affirmative act that supported an inverse condemnation claim. 369 S.C. at 32-33, 630 S.E.2d at 481. In that case the plaintiff alleged methane gas from Lexington County's closed landfill contaminated its adjacent property.

The plaintiff alleged that the affirmative, aggressive and positive act was the county's installation of the clay cap on the landfill. The trial court disagreed and granted Lexington County summary judgment. On appeal, the Supreme Court addressed the following issue: "Is the capping of the landfill an affirmative, aggressive, and positive act to support an action for inverse condemnation?" *Id.* at 32, 630 S.E.2d at 481. The Court answered the question in the affirmative, holding,

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> Here, County undertook a permanent public project in capping the landfill. Whether this action resulted in a taking is not before us. We simply find on the single element of an affirmative, aggressive, positive act that County's action meets this requirement and summary judgment should not have been granted.

Id. at 32, 630 S.E.2d at 481. I find and conclude that the act of Newberry County in capping the Landfill was likewise a permanent public project that was an affirmative, aggressive, positive act for a public use that supports an action for inverse condemnation. Therefore, the Plaintiff proved the first element of its inverse condemnation claim.

II. Did the County's conduct effect a "taking"?

The Court further finds the County's actions effected a taking of the Plaintiff's Property. The South Carolina Constitution, Article I, §13, provides that "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property."

> In construing this provision of the Constitution, we have held, along with many other courts, *that an actual physical taking of property is not necessary to entitle its owner to compensation.* A man's property may be taken, within the meaning of this provision, although his title and possession remain undisturbed. To deprive him of the ordinary beneficial use and enjoyment of this property is, in law, equivalent to the taking of it, and is as much a "taking" as though the property itself were actually appropriated.
>
> Property in a thing consists not merely in its ownership and possession but *in the unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements of property to that extent destroys the property itself.* It must be conceded that substantial value of property lies in its use. *Henderson v. City of Greenwood,* 172 S.C. 16, 172 S.E. 689. If the right of use be denied, the value of the property is annihilated and *ownership is rendered a barren right.*
>
> What is a "taking" of property within the constitutional provision is not always clear; but, so far as the general rules are permissable of declaration on the subject, it may be said that there is a taking *where the act involves the actual interference with, or the disturbance of, property rights, resulting in injuries which are not merely consequential or incidental. . . .*

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Hill v. City of Hanahan, 281 S.C. 527, 530-31, 316 S.E.2d 681, 683-84 (Ct. App. 1984) (emphasis provided) (quoting *Gasque v. Town of Conway,* 194 S.C. 15, 21–22, 8 S.E.2d 871, 873–74 (1940)).

> A taking does not require the actual physical entry of the government upon the property.
>
> There may be a taking of property in the constitutional sense although there has been no actual entry within its bounds and no artificial structure has been erected upon it. When a public agency uses land which it has lawfully acquired for public purposes in such a way that neighboring real estate is destroyed or impaired in its usefulness, there is a taking within the meaning of the constitution.

S.C. Dep't of Highways & Pub. Transp. v. Balcome, 289 S.C. 243, 246, 345 S.E.2d 762, 764 (Ct. App. 1986) (citations omitted); *see also Milhous v. State Highway Dep't*, 194 S.C. 33, 8 S.E.2d 852, 854 (1940); *Chick Springs Water Co. v. State Highway Department*, 159 S.C. 481, 157 S.E. 842 (1931).

South Carolina "has previously adopted and adhered to the broadest possible view of 'what is a taking' and has construed the least actual 'damage' to be a 'taking'." *Kline v. City of Columbia*, 249 S.C. 532, 537, 155 S.E.2d 597, 599 (1967) (citing *Webb v. Greenwood County*, 229 S.C. 267, 92 S.E.2d 688).

> 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. *Penn Central,* 438 U.S at 130-31, 98 S.Ct. 2646. 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. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (quoting *Penn Central,* 438 U.S. at 124, 98 S.Ct. 2646); *Byrd,* 365 S.C. at 658-59, 620 S.E.2d at 80 (quoting the same). Generally, the physical occupation of private property by the government results in a taking regardless of the public interest the government's action serves. *See Loretto,* 458 U.S. at 426-28, 102 S.Ct. 3164; *see also Lucas,* 505 U.S. at 1015, 112 S.Ct. 2886.

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Hardin v. S. Carolina Dep't of Transp., 371 S.C. 598, 605, 641 S.E.2d 437, 441 (2007). *See also Frampton v. S.C. Dep't of Highways & Pub. Transp.*, 406 S.C. 377, 752 S.E.2d 269 (2013) (holding denial of access to property for 16 months during construction activities constituted a taking); *Newsome v. Town of Surfside Beach*, 300 S.C. 14, 386 S.E.2d 274, 275 (1989) (finding a taking where rebuilding of washed-out portions of a roadway seventeen inches higher than the damaged road's original level rendered plaintiff's property the lowest point on the roadway and caused the property to flood); *Balcome, supra.* (concluding the diversion of groundwater supply away from landowner's property and lowering his lake levels was taking); *Berry's On Main, Inc. v. City of Columbia*, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (holding the removal of a sidewalk and support during construction with resulting damage from flooding constituted "taking"); *Kline, supra.* (holding the rupturing of a gas line during construction which caused fire on landowner's property constituted "taking"); *Lindsey v. City of Greenville*, 247 S.C. 232, 146 S.E.2d 863 (1966) (holding the discharge of large amounts of water from a reservoir destroying a bean crop was a "taking"); *Chick Springs Water Co., supra* (holding the construction of an embankment which impounds water can constitute a "taking").

In the case at bar, West/Hobby bought the Property for investment purposes, rather than for its own use. According to testimony from Mr. West and Mr. Minnick, the Plaintiff's investment expectations were frustrated, and its ability to sell the Property frustrated, because the Property was contaminated by landfill gas that migrated from the Landfill due to the clay cap. Under the facts of this case, therefore, the Court finds and concludes there was a taking as a result of the County's installation of a clay cap on the Landfill. Though not an exhaustive list, the following facts in particular support this conclusion:

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(i) The clay cap diverted the vertical migration of the landfill gas being created by the decomposing waste and caused it instead to migrate laterally onto the Plaintiff's Property;

(ii) The presence of landfill gas on the Plaintiff's Property was first detected in the April 2006 Off-Site Methane Investigation Report for the Newberry County Landfill prepared by the County's consulting engineers;

(iii) The continued presence of landfill gas on the Plaintiff's Property was confirmed in the April 29, 2011 Limited Soil Gas Assessment prepared by S&ME for Kiswire, Inc.;

(iv) But for the continued presence of landfill gas on the Plaintiff's Property in 2011, Kiswire, Inc. would have purchased the Property; and

(v) The presence of landfill gas on the Plaintiff's Property diminished drastically after the County installed an active subsurface soil gas extraction system at the Landfill in 2015.

Although the taking was not immediate, the evidence establishes the Plaintiff's Property was contaminated by landfill gas as a result of the County's installation of a clay cap on the Landfill. The Court further notes, based upon the testimony of Mr. West, Ms. West and Mr. Minnick that the taking could have been avoided altogether had the County installed the active subsurface soil gas extraction system sooner. By electing not to spend the money to address the problem sooner, the County elected to prolong its taking of the Plaintiff's Property and thwart the sale to Kiswire.

III. The County's defenses to liability.

The County asserts a number of defenses to the Plaintiff's claims; however, the record does not support the conclusion that any of those defenses bars Plaintiff's claim.

The County contends the Plaintiff's claims are barred by the statute of limitations. Under the applicable statute of limitations, Plaintiff was required to bring suit within three years. *S.C. Code Ann.* §15-3-530(3). *See also Cutchin v. S. Carolina Dep't of Highways & Pub. Transp.*, 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (recognizing that the statute of limitations in S.C.

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Code 15-3-530 applies to inverse condemnation claims); *Fuller-Ahrens P'ship v. S. Carolina Dep't of Highways & Pub. Transp.*, 311 S.C. 177, 179, 427 S.E.2d 920, 921 (Ct. App. 1993) (same). The Fourth Circuit Court of Appeals has recognized,

> The effect of the statute of limitations and the extent to which it is applicable depend upon the nature of the cause of action and the time when it accrues. The South Carolina rule is that there is a taking within the meaning of the constitution, and consequently an accrual of a right of action, when 'neighboring real estate, belonging to a private owner, is actually invaded by superinduced additions of water, earth, sand or other material.

Hilton v. Duke Power Co., 254 F.2d 118, 121 (4th Cir. 1958) (quoting *Milhous*, *supra.*). "Where, however, the cause of the injury is *abatable,* each injury gives rise to a new cause of action which may be commenced within the applicable limitations period." *Cutchin v. S. Carolina Dep't of Highways & Pub. Transp.*, 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (emphasis in original).

Furthermore, it is well-established that the discovery rule applies to actions for trespass upon or damage to real property trespass. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996); *Campus Sweater and Sportswear Co. v. M.B. Kahn Constr. Co.*, 515 F.Supp. 64 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981)). Under the discovery rule, "the statute of limitations begins to run from the date the claimant knew or should have known that, by the exercise of reasonable diligence, a cause of action exists." *Holmes v. Nat'l Serv. Indus., Inc.*, 395 S.C. 305, 309, 717 S.E.2d 751, 753 (2011). South Carolina courts "have interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist." *Dean*, 321 S.C. at 363-64, 468 S.E.2d at 647.

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The County contends that if the affirmative act which resulted in the taking was the installation of the clay cap in 1994, then the statute of limitations required Plaintiff to commence its lawsuit no later than 1997, or within three years of when the County installed the clay cap. I disagree. The record in this case presents no indication that Plaintiff or the prior owner of the Property had any notice that landfill gases were migrating from the Landfill and contaminating the Property until 2011, when Kiswire terminated its contract to buy the Property. In addition to Mr. West's testimony, Plaintiff's expert witness testified that closed landfills do not immediately begin venting landfill gas. Rather, a landfill is ordinarily closed for some time before the decomposing waste begin generating and emitting landfill gases primarily composed of methane and carbon dioxide. After that, the production of landfill gas tends to follow a bell-shaped curve out for a period of up to thirty years.

The documentary evidence admitted at trial clearly demonstrates that the County's gas monitoring points along the boundary of the Landfill reported no excessive levels of landfill gas until December 2003 and further that the first time landfill gas was detected on Plaintiff's Property was in March of 2006 after the County had testing performed on the Property. The test results appeared in the Off-Site Methane Investigation Report for the Newberry County Landfill dated April 2006. Although the County received the report following the testing, it never provided the report—or the information in it—to the Plaintiff. Mr. West testified that he believed at the time that if the County found something he needed to know (like landfill gas contaminating the Property), the County would have told him. But the County told him nothing about those test results.

The County contends West/Hobby had constructive notice of its claim by virtue of the records filed with DHEC. I am not persuaded. Had the Plaintiff reviewed those records, the

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County argues, the Plaintiff would have discovered the facts giving rise to its claim. That argument is based upon the holding in *Fuller-Ahrens Partnership v. S.C. Department of Highways and Public Transportation,* 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993).

In *Fuller-Ahrens,* a land purchaser sued the S.C. Department of Highways and Public Transportation, now known as the S.C. Department of Transportation, for inverse condemnation after the purchaser discovered a drainage pipe under the adjacent highway which discharged surface water onto its property. Relying on specific statutes governing highways, the Court of Appeals held a deed of right-of-way that had been filed pursuant to statute at the Department's office in Columbia "provided a record sufficient 'to impart notice,' albeit constructive notice, to Fuller–Ahrens of the deed and its contents, including the deed's reference to the Department's plans, 'just as though such transaction [was] recorded in the county where the land is situate.'" 311 S.C. at 181, 427 S.E.2d at 922. Accordingly, the Court held the land purchaser was on constructive notice of the Department's right-of-way, which encompassed the portion of the land alleged "taken," just as if the deed of right-of-way had been recorded in the property's chain of title.

I find *Fuller-Ahrens* distinguishable from this case. In *Fuller-Ahrens,* the purchaser had an obligation to examine the chain of title of the property it was buying. Since the deed of right-of-way was deemed to be in the chain of title, the purchaser was on notice of the existence of the deed. In this case, the Court finds no corresponding obligation for Plaintiff to examine the records at DHEC, nor has the County pointed to any statute which imputes notice of records filed with DHEC to potential land purchasers or to land owners. Furthermore, while Mr. West testified that he knew in 2000 that the Property was adjacent to the closed Landfill, the record contains no indication that he or anyone else on behalf of the Plaintiff knew colorless, odorless

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landfill gas was migrating from the Landfill to the Property until over a decade later. Had he examined the records at DHEC before buying the Property, he would have learned no more than what he already knew: there was a closed landfill across the street. What the records would not have shown, as previously mentioned, was the presence of landfill gas on the Property in 2000, for the contamination did not begin until after Plaintiff took title to the Property. I therefore find Plaintiff had no obligation to examine the records at DHEC while purchasing the Property. I further find that even if the Plaintiff were deemed to be on notice of the records filed with DHEC, nothing in those records would have placed the Plaintiff on notice of a claim against the County when Plaintiff purchased the Property.

With respect to the County's statute of limitations defense, therefore, the Court finds no fact, circumstance or indication in the record which would have placed a person of common knowledge and experience on notice of a claim against the County prior to 2011. Plaintiff had no reason to know its Property was affected by landfill gas before Kiswire terminated the Purchase Agreement, and the landfill gases contaminating the Property were odorless and colorless. As an additional sustaining grounds, the Court finds the injury the Plaintiff suffered was abatable and continued after Plaintiff commenced this lawsuit.

To apply the statute of limitations as the County suggests would not only disregard the fact that the Plaintiff's injury was abatable and continued long after this suit was commenced but also would unjustifiably and indefensibly reward the County's actions. *See Strong v. University of South Carolina School of Medicine,* 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994) (holding statute of limitations is tolled where defendant deliberately withholds information from a potential plaintiff). Indeed, to the extent the statute of limitations did begin to run prior to January 26, 2009 (or three years before suit was commenced), the Court finds as a matter of law

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that the statute of limitations was tolled until 2011, when the Plaintiff discovered it may have a claim against the County, because the County withheld the conclusions and information contained in the April 2006 Off-Site Methane Investigation Report from the Plaintiff.

For these reasons, the Court finds the Plaintiff filed suit well within the statute of limitations.

The County also asserts assumption of risk as a defense. "The defense of assumption of risk is established when the plaintiff freely and voluntarily enters into a known danger and is subsequently injured." *Cutchin v. S. Carolina Dep't of Highways & Pub. Transp.*, 301 S.C. 35, 38, 389 S.E.2d 646, 648 (1990) (declining to apply assumption of risk where there was no evidence the homeowners knew when they purchased their home that the home was in a flood plain or that culvert had been improperly designed). The record simply does not support a finding that West/Hobby assumed the risk that the Property would be contaminated because there is no evidence that the contamination existed when the Property was purchased or that Mr. West and Mr. Hobby knew in 2000 that landfill gases were contaminating the Property and bought it anyway. The evidence demonstrates that the contamination of Plaintiff's Property began after Plaintiff took title and was abated years after Plaintiff filed this lawsuit. Consequently, the Court finds no support for the County's assumption of risk defense.

Finally, the County argues the Plaintiff's claim should be barred because Plaintiff failed to mitigate its damages. To the extent that defense applies to a claim for inverse condemnation, the Court finds the County failed to prove it. The sale to Kiswire collapsed due to the presence of landfill gas that migrated from the Landfill onto the Property. Once Plaintiff discovered the presence of landfill gases, it could not sell the Property under terms comparable to the Kiswire Purchase Agreement unless and until the County took measures to abate the problem. When

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asked to either purchase the Property or properly address the issue, the County responded that it "was not interested." While the County argued the Plaintiff should have utilized a "brownfield" program, the Court finds no evidence in the record that that program was a viable and reasonable option for the Plaintiff. The evidence in this case clearly demonstrates that abatement of the contamination on Plaintiff's Property required the County to take active measures on the Landfill property. A party is only required to take reasonable measures to mitigate its damages. Nothing required West/Hobby to install an active subsurface soil gas extraction system at the Landfill.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment be entered in this matter in favor of Plaintiff West/Hobby, LLC on its inverse condemnation claim. Having found in favor of the Plaintiff, the Court will proceed with a trial on the issue of damages at its earliest convenience.

AND IT IS SO ORDERED.

Donald B. Hocker, Presiding Judge
Eighth Judicial Circuit

February 11, 2016

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