

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY

Thomas L. Hughston, Circuit Court Judge

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Case No. 2009-CP-10-6185

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Henry W. Frampton, III ..... Respondent,

v.

South Carolina Department of Transportation ..... Appellant.

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Initial Brief of Appellant

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November 15, 2012

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SC Court of Appeals

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## STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court's decision to seat the jury during the takings phase of the trial prejudiced defendant and deprived it of a mode of trial to which it was entitled?
2. Whether plaintiff proved any facts constituting a taking of property?
3. Whether the trial court applied the appropriate law in its finding of a taking?
4. Whether the compensation verdict exceeded any credible evidence of the plaintiff's loss?
5. Whether plaintiff was entitled to attorney fees and cost under the governing statute permitting fee shifting?

## STATEMENT OF THE CASE

This is the Department of Transportation's appeal of a judgment of the Circuit Court for Charleston County finding a temporary taking of Respondent's property and awarding him compensation in the amount of \$36,527 and assessing attorney fees and costs against the State in the amount of \$80,726.77. The case involved plaintiff's claim that access to a rental house he owned fronting Folly Road in Charleston County next to the James Island Creek Bridge was blocked during the Department's year-long project to replace that bridge. The trial court refused defendant's request to analyze the case under the relevant case law requiring him to consider the time period of the alleged taking under the parcel as a whole doctrine and ruled that any interference with plaintiff's rights for any length of time constituted a taking. The court found that period to be sixteen months.

The Department appeals four of the rulings below. First, the trial judge's decision to seat a jury during the proceedings to determine whether there had been a taking was unduly prejudicial to the defendant allowing the jury to hear evidence of losses by the landowner that were attributable to no act of taking as found by the trial judge. Such testimony necessarily predisposed them to return a high verdict on the taking that the judge did find. The sitting of a jury during proceedings in which it had no role deprived appellant of a mode of trial to which it was entitled. The verdict as influenced by that testimony should be reversed.

Secondly, there was no evidence presented that would support a finding that defendant was deprived of the use of his property for any duration.

Third, the trial judge misconstrued the governing case law, ignoring the parcel as a whole doctrine, and finding that any series of acts hindering plaintiff's use of his property constitutes a taking of that property for which he should be compensated.

Fourth, the jury's verdict awarding \$36,527 in just compensation greatly exceeded plaintiff's loss for the sixteen month time period the judge found to be a temporary taking.

Fifth, and finally, the Department appeals the award of attorney fees and costs against it as error because the landowner was not a prevailing party under the governing statute.

## STATEMENT OF FACTS

The highway project that is the subject of this lawsuit was the replacement of the James Island Creek<sup>1</sup> Bridge on Folly Road (S.C. 171). Because Folly Road provides the only route into and out of the City of Folly Beach, the project had to be pursued in two phases where traffic was shifted to one side of the existing bridge then back to the other side of the new span. R.p. \_\_\_\_.(Tr. 291-92) Utility lines, also serving Folly Beach, were hung on the bridge and had to be replaced as part of the project. Separation of the work area and the active traffic lanes was effected by a concrete barrier placed in the center of the bridge approaches and the bridge. R.p. \_\_\_\_.(Tr. 291, D. Exh. 3, 4) Gaps in the concrete barrier allowed contractor personnel and material and equipment to enter the work zone and also provided access for Mr. and Mrs. Frampton and their tenants to their properties. R.p. \_\_\_\_.(Tr. 291-93, P. Exh. 25; D. Exh. 3,4)

At the inception of the project, Mr. Frampton owned two parcels of land which were the last properties on Folly Road prior to the James Island Creek and the bridge. R.p. \_\_\_\_ (Tr. 134) The first parcel, designated as parcel 3P on the project plans, contained a building that Mr. Frampton rented to a law firm. R.p. \_\_\_\_ (P. Exh. 25). The second parcel, designated 4P, contained Mr. Frampton's residence and a small rental house situated next to the highway, James Island Creek and the bridge. R.p. \_\_\_\_ (P. Exh. 25). The postal addresses of the three buildings were 683, 693, and 699, respectively. No land was acquired from Mr. Frampton for the project. The "P" designations on the parcel numbers, however, indicate that permission was to be sought for the purpose of entering Mr. Frampton's land for the purposes outlined below.

The Department's preliminary plans showed that a service drive was proposed that paralleled the highway and connect all three of Mr. Frampton's driveways providing

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<sup>1</sup> James Island Creek becomes Ellis Creek at some point.

a single entrance onto the highway at the location of the residence driveway. R.p. \_\_\_\_.(Tr. 135; P. Exh. 25) In addition, a guardrail would be extended from the end of the bridge parapet across the front of the rental house at 699 Folly Road and partially across the existing parking area. R.p. \_\_\_\_.(Tr.104; P. Exh. 25) The service drive would run behind the guardrail and connect to the rental house's parking area.

Robert (Larry) Phinney, the Department's right-of-way agent responsible for obtaining the permissions R.p. \_\_\_\_ (Tr. 74-75, 101), testified that he met with Mr. Frampton in 2005 to show him the plans and obtain his permission for the Department's contractor to construct the service drive. Mr. Frampton's permission was needed because the work would have to been done at least partially on his property. R.p. \_\_\_\_ (Tr. 112, 136; P. Exh. 25) Mr. Frampton refused the permission. R.p. \_\_\_\_ (Tr. 105, 113, 114, 136) Following the meeting, Mr. Frampton obtained counsel and proceeded to subdivide his property into two lots by filing a plat with the County. R. p. \_\_\_\_ (P. Exh. 18) The new lot containing the rental house at 699 was 0.138 acres. The lot line to the west dividing the rental house lot from the residence lot placed the rental house lot entirely behind the proposed extended guardrail. R.p. \_\_\_\_ . Once the subdivision was approved, his counsel wrote the Department noting that the parcel was now landlocked. R.p. \_\_\_\_ (Tr. 237)

From 2005 until June 2009, the parties and their representatives worked to resolve the guardrail and driveway issue. R.p. \_\_\_\_ (Tr. 239-41). Ultimately, Mr. Phinney was able to persuade Department's design engineers to shorten the planned guardrail so that it did not entirely occlude the new lot. R.p. \_\_\_\_ (Tr. 139, 239) Thereafter, because the contractor had completed the project and left, Department maintenance forces paved a new parking area on the rental house lot of sufficient size that a tenant could turn around

without having to back out onto Folly Road. R.p. \_\_\_(Tr. 124-26, 140; P. Exh. 19-TT, 23, 24) Finally, at the end of the project, the Department's contractors installed a block-long, raised concrete median in the center of Folly Road to eliminate left turns onto and off of Folly Road from adjoining properties. R.p. \_\_\_(Tr. 128, Complaint, para. 9; P. Exh 9) After project completion, the installation by the Department of the new parking area, and the improvements to the structure made by Mr. Frampton, he was able to increase the rent from \$950 per month to \$1,150 per month. R.p. \_\_\_(Tr. 251, 472)

Plaintiff's original complaint claimed a taking from all three of his properties on account of the circuitry of travel to and from them caused by the installation of the median. His amended complaint sought compensation for losses only to the rental property at 699 Folly Road due to construction activities he claimed took his access for a period of approximately one year. R.p. \_\_\_(Complaint para. 8) Additionally, plaintiff claimed compensation for diminution in value of that parcel due to the median. R.p. \_\_\_(Complaint para. 9)

Trial was had February 6-8, 2012, with a jury sitting throughout. The trial judge ruled at the end of the takings phase of the proceedings that there was no claim for permanent diminution in value to the property, that any loss due to the median was not recoverable, but that plaintiff had suffered a temporary taking for sixteen months on account of blockage of the driveway. R.p. \_\_\_(Tr. 388) He opined that the damages should be \$15,200 being the rent Mr. Frampton received for the property prior to the taking (\$950 per month) times sixteen months.

The compensation phase of the trial then ensued before the jury. Plaintiff put up Thomas F. Hartnett as an expert appraisal witness who testified that the property was

worth \$250,000. Because a buyer would want an eight percent return on that price, annual rent would be \$20,000 or \$1,666 per month. R.p. \_\_\_(Tr. 450-51). Multiplied by sixteen months, that amount would be \$26,666.67. R.p. \_\_\_(Tr. 451) However, Mr. Hartnett testified on cross-examination that he had no indication that the rent Mr. Frampton received in the amount of \$950 per month was not a result of arm's-length transactions with tenants. R.p. \_\_\_(Tr. 475) Mr. Hartnett then added eight percent interest to the amount he found for a total loss of \$31,104 from rent. Next, he added \$3,835.25 from Mr. Frampton's claim of "cost to cure" through certain improvements, added eight percent interest to that figure to reach \$4,474.44, R.p. \_\_\_(Tr. 469), then added the rent and costs as so increased by the interest for a grand total of \$36,527. R.p. \_\_\_(Tr. 509) The jury returned a verdict in the amount of \$36,527. R.p. \_\_\_(Tr. 532)

Subsequently, plaintiff applied for attorney fees and costs in the amount of \$98,984.90 which included an "enhancement" multiplier of 1.25. Defendant responded that no costs were due because plaintiff did not prevail under the definition of that term in the governing fee-shifting statute. The trial court rejected the enhancement but awarded plaintiff his full request for fees and costs in the amount of \$80,726.77. R.p. \_\_\_(Order on Rule 59 and Fees).

On February 15, 2012, the defendant submitted its motion under Rule 59, SCRPC, for a new trial and to alter and amend the judgment. R.p. \_\_\_(Def. Rule 59 Motion) Defendant argued that the court's procedural ruling prejudiced it by letting the jury hear evidence of losses which were not occasioned by the taking as found by the court; that the court applied the wrong law in finding a taking; and that both the court's and the jury's findings were outside the pleadings and any evidence presented. All of

defendant's arguments were rejected by the court in a written order. R.p. \_\_\_ (Order on Rule 59 and Fees)

## ARGUMENT

### I. Standard of review.

As this Court has held, eminent domain cases sound in equity. Hardin v. S.C. Department of Transportation, 359 S.C. 244, 249, 597 S.E.2d 814, 816 (Ct. App. 2004), reversed on other grounds, 371 S.C. 598, 641 S.E.2d 437 (2007). They derive from the English writ of *ad quod damnum* ("to what damage") which was issued by courts of equity to the sheriff to conduct an inquest into the amount of damages incurred by a landowner as a result of a taking. 1 Sackman, Nichols on Eminent Domain, §1.22[1], pp. 1-78—1-79. See, e.g., John Walker v. City Council of Charleston, Bail Eq. 443, 8 S.C.Eq. 443, 1831 WL 1647 (S.C. App 1831); Lake Bowling Alley, Inc. v. City of Richmond, 82 S.E. 97, 99 (Va. 1914). They are special proceedings of equitable origin in which the court has a duty to see that the estimates made "are just, not merely to the individual whose property is taken, but also to the public, which is to pay for it." Searl v. School Dist. No. 2, 133 U.S. 553, 562 (1890); accord, Smith v. City of Greenville, 92 S.E.2d 639 (S.C. 1956).

In an appeal from an action in equity, the appellate court has authority to find facts in accordance with its own view of the preponderance of the evidence. Hardin, supra; Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

**II. The trial court's decision to seat a jury during the proceedings to determine whether there had been a taking deprived appellant of a mode of trial to which it was entitled and unduly prejudiced it.**

The Department had moved the Circuit Court prior to the trial herein to remove the matter from the jury trial roster to the non-jury roster for proceedings to determine whether or not there had been a taking. If a taking was found, the plaintiff could elect a jury trial to have the compensation due him determined in accordance with Cobb v. S.C. Department of Transportation, 365 S.C. 360, 618 S.E.2d 299 (2005) (Statutory right to a jury trial on the issue of compensation applies to inverse condemnation cases as well as direct condemnations.) We argued that a jury trial was premature and that there is nothing for a jury to do prior to a finding by the court in equity that a taking had occurred. Our motion was denied.

Upon being called to trial, the trial judge caused the parties to draw a jury. Once done, the Department argued its motion to separate the trial into a non-jury trial to determine whether a taking had occurred; then, assuming a positive ruling on that issue, a jury trial as requested by the plaintiff to assess the compensation due for the property or rights the trial judge deemed taken. R.p. \_\_\_\_ (Tr. 5-27) The judge refused. The trial proceeded with the jury present and involved the presentation by plaintiff of evidence of damages to him from acts of the defendant that were not takings of property under the governing law. This evidence included testimony concerning the installation of a raised concrete median to which plaintiff assigned a loss in value to his property of \$37,500. R.p. \_\_\_\_ (Tr. 65, 229-30) and losses in rent to a separate property owned by the plaintiff that were not covered by the amended complaint. R.p. \_\_\_\_ (Tr. 160-61).

The only role of a jury in an eminent domain case is to assess the amount of just compensation due the landowner as a result of the taking of all or part of it. Johnson v S.C. State Highway Dept., 236 S.C. 424, 114 S.E.2d 591, 592-93 (1960). This is provided by statute, S.C. Code Ann. §28-2-310 (Rev. 2007), as one of the forums for determining just compensation. All other matters relating to eminent domain are heard by a judge alone sitting in equity. See, e.g., S.C. Code Ann. §28-2-460 (determination of whom just compensation is to be made), and §28-2-470 (challenges to the condemnor's right to condemn.) Until a court has declared that the State has taken property or property rights from a landowner, and defined the extent of that taking, there is nothing for a jury to decide. Brock v. State Hwy. Comm'n. 195 Kan. 361, 404 P.2d. 934 (1965); see, also, United States v. Reynolds, 397 U.S. 14, 20, 90 S.Ct. 803, 807, 25 L.Ed.2d 12 (1970) (the court's determination and definition of the property right provides the parameters for a determination of an award); United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed.2d 1206 (1946) (the property interest found to have been taken must be stated with precision so that the government and the property owner will know what the government must buy.)

Forcing the Department to try both the taking issue and the just compensation issue before a jury in a single proceeding deprived the Department of a mode of trial to which it is entitled and thus impaired a substantial right. Cobb, 618 S.E.2d at 301; see, also, Kiriakides v. School District of Greenville County, 382 S.C. 8, 14, 675 S.E.2d 439, 442 (2009). The proper procedure was outlined by this Court in Hardin, supra, where it adopted the procedure outlined in the Florida case, Palm Beach County v. Tessler, 538 So.2d 846, 850 (Fla. 1989):

Actually, in an inverse condemnation proceeding of this nature, the trial judge makes both findings of fact and findings of law. As a fact finder, the judge resolves all conflicts in the evidence. Based upon the facts as so determined, the judge then decides as a matter of law whether the landowner has incurred a substantial loss of access by reason of the governmental activity. Should it be determined that a taking has occurred, the question of compensation is then decided as in any other condemnation proceeding.

Procedure in inverse condemnation cases where the jury is privy to all arguments a landowner asserts regarding a taking would be bad public policy and harm judicial economy. The promise of such a procedure would encourage plaintiffs to include in their complaint various losses stemming from legitimate police power acts of the sovereign which are in no way recoverable in inverse condemnation. See, S.C. State Highway Dept. v. Wilson, 254 S.C. 360, 366, 175 S.E.2d 391, 394 (1970) (“This court has previously recognized that there is a distinction between the exercise of the police power and the exercise of the power of eminent domain; that just compensation is required in the case of the exercise of eminent domain but not for the loss by the property owner which results from the constitutional exercise of the police power.”) The jury would be sympathetic to the plight of the plaintiff and inclined to award him as large an amount of compensation possible for the takings he did prove.

As we argue below, the jury returned a verdict far in excess of any actual loss from the taking the court found. The trial court’s procedural error clearly prejudiced defendant and warrants a reversal of the verdict.

Moreover, judicial economy would be enhanced by the procedure we advocate. The court’s determination of the taking would narrow the issue for the jury providing for a simple proceeding, usually the testimony of appraisers, to value the rights or property

the court has adjudged to have been taken. Of course, if no taking is found by the judge the time of the court, counsel, and jurors would be saved.

**III. Plaintiff did not prove a taking under any theory of the law regarding temporary taking of private property.**

Even under the trial court's "any duration" theory, plaintiff did not prove facts supporting a taking of property, temporary or otherwise.

In his finding of a taking, the trial judge found that plaintiff's driveway had been blocked for sixteen months and that that constituted a taking of access to his property for which plaintiff was entitled to compensation for lost rent in the amount of \$15,200. R.p. \_\_\_\_ (Tr. 383-393). The period cited was November 2008 through February 2010. During argument on defendant's Rule 59 motion, the court could not recall how he arrived at the sixteen month period.<sup>2</sup>

The only evidence in the record possibly supporting a sixteen month period was a series of photographs presented as part of plaintiff's case in chief spanning the period between November 2008 and January 2010. R.p. \_\_\_\_ (P. Exh. 19). However, those photographs indicate that the driveway to 699 Folly Road was open and accessible during November 2008 and November and December, 2009, and January of 2010. R.p. \_\_\_\_ (P. Exh. 19-C, 19-OO, 19-QQ, 19-UU) Moreover, there was undisputed evidence that plaintiff's last tenant occupied the property until November, 2008, and paid rent.<sup>3</sup> R.p. \_\_\_\_ (Tr. 244) The landowner testified that the parking area built by the Department was

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<sup>2</sup> No court reporter was available for the hearing on the Rule 59 (e) motion.

<sup>3</sup> The tenant, Greg Burkey, signed a lease for the house for the period June 14, 2008, through July 31, 2009. R.p. \_\_\_\_ (Tr. 244) Mr. Frampton testified that he voluntarily let Mr. Burkey out of his lease after five months. R.p. \_\_\_\_ (Tr. 244-45)

completed as of January 24, 2010, and that there was no impediment to his renting the property after that time. R.p. \_\_\_\_ (Tr. 218-19)

Plaintiff's Amended Complaint alleges that "The SCDOT, without benefit of due process or the filing of a formal condemnation notice, began reconstructing Folly Road in such a manner as to completely block ingress and egress to 699 Folly Road for a period of approximately one (1) year commencing in the Fall of 2008." R.p. \_\_\_\_ (Amended Complaint) With regard to the particulars of the blocked ingress and egress, Mr. Frampton testified to numerous construction-related acts of defendant or its contractors, all occurring on SCDOT right-of-way. Those included: pick-up trucks parked in front of his property, R.p. \_\_\_\_ (Tr. 246); open trenches dug for utility lines; R.p. \_\_\_\_ (Tr. 270); the installation of a drain box, R.p. \_\_\_\_ (Tr. 198; P. Exh. 19-W); the parking of construction machinery, R.p. \_\_\_\_ (Tr. 175, P. Exh. 19-D); barrels and yellow caution tape, R.p. \_\_\_\_ (Tr. 176-77, P. Exh. 19-D, 19-E); mounds of dirt excavated for pipes and drainage, R.p. \_\_\_\_ (Tr. 180, P. Exh. 19-G); dump trucks blocking the driveway entrance while waiting to unload, (Tr. 182); torn up and slushy ground while installing a drain box, (Tr. 189, P. Exh. 19-N); a geyser due to a waterline break. R.p. \_\_\_\_ (Tr. 190-91, P. Exh. 19-O, 19-P); stacks of rebar and form boards, R.p. \_\_\_\_ (Tr. 192, 197, P. Exh. 19-P, 19-V); a port-a-potty, R.p. \_\_\_\_ (Tr. 194); concrete trucks, concrete pumping machinery, and a giant crane, R.p. \_\_\_\_ (Tr. 197, 200-201, P. Exh. 19-V, 19-Z); and a plastic silt fence, R.p. \_\_\_\_ (Tr. 184, 196, 197, P. Exh. 19-J, K, L). The Department's contractor testified that material laydown was kept as far forward toward the bridge as possible. R.p. \_\_\_\_ (Tr. 348)

It has long been held in this State that a purchaser of property on a public street does so subject to the discretion of government authorities to improve those streets. South Bound R.R. v. Burton, 67 S.C. 515, 46 S.E. 340 (1903)<sup>4</sup>. The power of eminent domain and the police power are distinct sovereign powers. In State Highway Dept. v. Wilson, *supra*, the Court stated,

This Court has recognized that there is a distinction between the exercise of the police power and the exercise of eminent domain; that just compensation is required in the case of the exercise of eminent domain but not for the loss by the property owner which results from the constitutional exercise of the police power. *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955); *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956).

Id. 254 S.C. at 365, 175 S.E.2d at 394. The principle is no different in the federal sphere.

It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; “[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power.” *Pennsylvania Coal Co. v Mahon*, 260 U.S., at 413, 43 S.Ct. at 159.

Lucas v South Carolina Coastal Council, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2899, 120 L.Ed.2d 798 (1992). Rerouting and diversion of traffic are police power regulations. S.C. State Highway Dept. v. Carodale Associates, 268 S.C. 556, 561, 235 S.E.2d 127, 129 (1977).

It is the public’s investment in the road (in this case a bridge) that gives value to income-producing property. The public should not be forced to pay a landowner for the privilege of further improving roads and bridges that benefits his property as well as the

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<sup>4</sup> See also Richards v City of Columbia, 227 S.C. 538, 553, 88 S.E.2d 683, 689 (1955) ([D]etriment to private property which results from legitimate exercise of the police power does not constitute a taking of it for public use. All property is held subject to reason regulation by the State. \* \* \* Burdens and expenses of various types may be imposed under the exercise of the police power without compensation and without in any way violating the constitutional guaranties as to due process of law.)

general public. Langley Shopping Center v. State Roads Commission, 131 A.2d 690 (Md. 1957).

Plaintiff's principal evidence that he was denied access to the property was the existence for a number of months of a "silt fence" stretched across the driveway of 699 Folly Road. R.p. \_\_ (D. Exh. 6-8; P. Exh. 19-J—L) This "fence" consisted of a length of black plastic fabric apparently strung between plastic barrels placed in the highway right-of-way. Defendant's witnesses, including its project manager, its assistant project manager, and the project manager of its contractor, Cape Romain Contractors, did not recall who placed the "fence." R.p. \_\_. (Tr. 340) The likeliest source would be one of the several utility companies who also had to replace their underground pipes and lines as a result of the bridge replacement. All testified, however, that the "fence" was not constructed to standard specifications and was not on the project plans. R.p. \_\_. (Tr. 299) Silt fences are required by DHEC regulations on all construction projects involving land disturbing activities. R.p. \_\_. (Tr. 295) The specifications for the fences were introduced into evidence by defendant and are that the fabric be attached to posts six-feet off center and those posts be embedded 24 inches into the soil. R.p. \_\_ (D. Exh. 5) Their purpose is to protect adjoining property from dirt, dust, and debris from construction. S.C. Code Ann. §48-18-70 (Rev. 2008). The Department's project engineer testified that there are always "breaks" in the fence at driveways. R.p. \_\_ (Tr. 341) The "fence" in question was non-regulation--essentially a draped length of cloth. R.p. \_\_. (Tr. 299-301, 339) There are at least two reasons that the placement of this structure across the existing driveway to Mr. Frampton's rental house does not constitute a taking of private property.

First, the real issue is not that the fence was placed, but that it was not removed during the construction period. Defendant's witnesses testified that, following the abandonment of Mr. Burkey, who was not prevented in any way from entering his residence--the house was vacant. R.p. \_\_\_(Tr. 335-36, 341) Because there was no resident of the house and no one needing entry, defendant's construction personnel saw no reason to take it down. R.p. \_\_\_(Tr. 335) It provided protection for the property and also delineated the right-of-way line to prevent errant contractor personnel from entering the private property or placing material or equipment there. Appellant's bridge construction engineer, Jeff Rajabi, testified to frequent contacts with Mr. Frampton and with the tenant of his third property, Ms. Jensen, concerning problems with accessing their driveways due to vehicles. However, at no time did Mr. Frampton complain about or request that the silt fence or other items be moved to access the rental house at 699. R.p. \_\_\_. (Tr. 304-05) Appellant's project manager, Daniel Burton, testified that he and his staff were acutely aware of how tense an issue the matter of the Frampton driveways was and gave special attention to assuring that they were open and as unobstructed as possible. R.p. \_\_\_(Tr. 332) Mr. Burkey was always allowed access. R.p. \_\_\_(Tr. 332-34) Burton stated that, at no time during the project did Mr. Frampton approach him to request access to the 699 Folly Road property. He said it was reasonable to leave the silt fence fabric up to protect the property since it was vacant and neither he, nor to his knowledge, the contractors ever actively refuse to let anyone with rights to the property enter the property. R.p. \_\_\_(Tr. 335-36. The project manager for the Department's contractor, Cape Romain Contractors, Clifton L. Hough, testified that the contract let to Cape Romain required that access to private properties be kept open. R.p. \_\_\_(Tr. 345)

Mr. Hough testified that, at no time during the project, did Mr. Frampton approach him to ask for access to the property. R.p. \_\_\_\_ (Tr. 345, 350) Mr. Frampton stated that he never approached the Department to request entrance to the property. R.p. \_\_\_\_ (Tr. 261) Nor, did he make any attempt to re-let the property following the abandonment by Mr. Burkey. R.p. \_\_\_\_ (Tr. 171).

While the initial placement of this non-regulation silt fence by contactors or utility contractors may have been an affirmative act, plaintiff's real complaint is that it was not taken down during the contract period. This is a passive event that does not support a finding of a taking. Failures to act are not enough to constitute a taking. McGann v. Mungo, 287 S.C. 561, 573, 340 S.E.2d 154, 160 (Ct. App. 1986); Brown v. School District of Greenville County, 251 S.C. 220, 225, 161 S.E.2d 815, 817 (1968) (“[T]here would normally have to be some positive, aggressive, overt act on the part of the agency which brings about the taking. In other words, it is difficult, if not impossible to take anything from someone negatively or by failing to act.”) While refusal to remove the fence at the request of the property owner may be considered a positive act, not removing it in the absence of such a request is entirely passive.

Secondly, Mr. Frampton did little to help himself regarding the situation of which he complains. He chose not to bring the issue of the silt fence to a head by approaching those Department personnel or contractors on site, who had authority to respond to his complaints, and asking that it be removed. This was despite the fact that he was at the site as frequently as daily, R.p. \_\_\_\_ (Tr. 160), and diligently built a record of his complaint with numerous photographs taken throughout the year-long construction period. R.p. \_\_\_\_ (P. Exh. 19)

Laches is an equitable doctrine involving the neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Emery v. Smith, 361 S.C. 207, 215, 603 S.E.2d 598, 692 (Ct. App. 2004). The doctrine arises upon the failure to assert a known right. Id. If a party, knowing his rights does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those right. Id. Here, had Mr. Frampton informed appellant's personnel of his desire to use the driveway of his rental house, or made any effort to secure a replacement tenant, those personnel, according to their testimony, would have accommodated him as they did in response to every complaint he communicated regarding his other two properties. It is now too late for appellant to correct the situation by removing the "fence." Respondent should not benefit for his own inexcusable delay.

**IV. The trial court applied incorrect law in finding a temporary taking. Plaintiff would not have recovered under a correct application of the relevant case law.**

In his rulings from the bench and in his Order denying appellant's Rule 59 motion, the trial judge relied on a theory that, because access to a highway by an abutting landowner is a property right, any interference by the State with that right, no matter how brief, constitutes a taking of the owner's property for which compensation in the form of lost income must be paid. R.p. \_\_\_\_ (Rule 59 Order). The court noted language in the S.C. Supreme Court's decision, Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005), that removed the element in existing case law that a landowner to prevail in an

inverse condemnation case show that the taking have “some degree of permanence.”<sup>5</sup> From this the court inferred that any interference with an abutting property owner’s right of access to public roads is a taking no matter how brief the interference. In its Rule 59 Order, the court stated the following:

“A plaintiff’s right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking” of a recognized property right regardless of the duration. Byrd, supra.

R.p. \_\_\_\_ (Order on Rule 59). The part of the foregoing sentence outside the quotation marks is not from Byrd and, in fact, Byrd stands for the opposite conclusion than the court drew, *i.e.* that given the legitimacy of the City’s conduct and slight impact on Byrd, he could not demonstrate that the delay ever became unreasonable meaning he could not demonstrate a taking. Byrd, 365 S.C. at 662, 620 S.E.2d at 82. Here a delay in removing the fence for approximately one year as stated in the complaint, R.p. \_\_\_\_ (Complaint), or even for the sixteen months found by the trial judge, was not unreasonable.

Plaintiff and the trial court are correct that the right of ingress and egress onto and off of private property to an adjoining public road is a right appurtenant to title to property. However, it is not an unqualified right. As mentioned in the preceding section, it must yield to the public’s right to maintain or reconstruct the road or bridge from time to time.<sup>6</sup> Secondly, in order to construct an entrance onto a State primary highway, the boundary of the private land must have a “safe and suitable point.” Act No. 49, 156 S.C.

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<sup>5</sup> The S.C. Supreme Court cited the U.S. Supreme Court’s decision First Evangelical Lutheran Church of Glendale v. City of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), holding that temporary takings which deny a landowner all use of his property do not differ in kind from permanent takings. It should be noted that, on remand, the California appellate court found there was no taking since the restriction on the landowner’s use of its property was not unreasonable in purpose, duration, or scope. First Evangelical Lutheran Church of Glendale v. City of Los Angeles, 210 Cal.App.3d 1353, 258 Cal.Rptr. 893 (1989).

<sup>6</sup> See, also, Hardin (and Tallent), infra, (It is the existence of the road that creates the easement, not the other way around. If the road is closed entirely, the landowner’s easement across it is not taken but extinguished.) 371 S.C. at 607, 641 S.E.2d at 442, f.n.2.

Acts 1594. That Act, governing control of access to State primary highways, authorizes the Department to close and move unsafe driveways and provide alternate means of access to private property. See, S.C. Code Ann. §§57-5-1090, 1100. In any event, characterization of the right as property does establish a taking by that fact alone under takings jurisprudence.

As our Supreme Court noted in Hardin (& Tallent) v S.C. Dep't. of Transportation, 371 S.C. 598, 641 S.E.2d 437 (2007)<sup>7</sup>, although property interests are often determined by reference to state law, South Carolina courts have embraced federal jurisprudence as providing the rubric under which they analyze whether interference with someone's property interests amounts to a constitutional taking. Federal precedents stake out two categories of regulatory action that generally will be deemed per se takings. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. See, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164; 73 L.Ed.2d 868 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to all regulations that completely deprive an owner of “all economically beneficial us[e] of her property.” Lucas v. South Carolina Coastal Council, supra (emphasis in original). Lucas held that the government must pay just compensation for such “total regulatory takings,” except to the extent that “background principles of nuisance and property law” independently restrict the owner's intended use of the property. Id., at 1026-1032, 112 S.Ct. 2886. In all other cases, courts apply the test set forth in Penn Central

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<sup>7</sup> There are two Hardin opinions: the first by this Court and the second by the Supreme Court. The Supreme Court's decision was combined with another case, Tallent v. SCDOT. We will refer to the Supreme Court decision as Hardin (& Tallent).

Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). See, Byrd v. City of Hartsville, 365 S.C. at 660, 620 S.E.2d at 81 (“If Lucas does not apply, then Penn Central does.”)

The analysis of whether a taking has occurred in a case like the one at bar is governed by Penn Central because the claim stems from an allegation of a temporary denial of less than all economically viable use of the property. Kiriakides v School District of Greenville County, *supra*. Moreover, Penn Central applies to this case even though our Supreme Court in Hardin (& Tallent), *supra*, characterized the rights of abutting landowners to access the road as the abutter’s “easements.” As noted above those rights are indeed rights that are appurtenant to land and a property interest. However, the law in this area focuses on the “parcel as a whole.”

“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment are entirely abrogated. In deciding whether a particular government action has affected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here the city tax block designated as the ‘landmark site.’”

Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 331-32; 122 S.Ct. 1465, 1484, 152 L.Ed.2d 517, 546-47 (2002) quoting Penn Central, *supra*. See also, Sea Cabins on the Ocean IV v. City of North Myrtle Beach, 337 S.C. 380, 392-93, 523 S.E.2d 193, 200 (Ct. App. 1999). Thus, although plaintiff may have been temporarily deprived of his tenant’s ability to fully utilize the parking area on the rental house parcel (which we deny), they retained at all times all of the other sticks in the bundle of rights that make property valuable. See, Main v. Thomason, 342 S.C. 79, 88, 535 S.E.2d 918, 922 (2000).

The gravamen of the complaint herein is a temporary loss of use of the property due to an alleged interference with access to a driveway. However, the Penn Central analysis is appropriate even if the Department's actions here are considered to be a temporary physical invasion, which they were not. Physical encroachments that fall short of permanent physical occupations are known as "temporary physical invasions." Temporary physical invasions are tested under the Penn Central three-factor test. Boise Cascade Corp. v. United States, 296 F.3d 1339, 1353 (Fed. Cir. 2002); see also, Main v. Thomason, *supra* (a statute allowing property owners to temporarily enter their neighbors' property to repair theirs is not a taking under either Penn Central or Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980)).

The U.S. Supreme Court decision in Loretto v. Teleprompter Manhattan CATV Corp., *supra*, involved a state law requiring landlords to permit cable companies to install cable facilities on apartment buildings. The Court held that a permanent physical occupation authorized by government is a taking without regard to the public interest it may serve. However, the holding of Loretto is quite narrow. It applies only to permanent physical occupations either by the government or by a third party acting under government authority. The Court distinguished permanent physical occupations, in which it had always found a taking, from "cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within," which were not always takings. *Id.* at 428, 102 S.Ct. 3164. The Court noted that "[more] recent cases confirm that the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Id.* at 430. The Court held that of the three, only a

permanent physical occupation is a per se taking, and courts therefore need not engage in a balancing test when confronted with such a situation. Id. at 434-35, 102 S.Ct. 3164.

Physical invasions, (as distinct from physical occupations) thus fall outside the Loretto rule. A physical occupation, as defined by the Court, is a permanent and exclusive occupation by the government that destroys the owner's right to possession, use, and disposal of the property. The Court defined the destruction of these interests as follows: (1) possession: the owner has no right to possess the occupied space himself, and so has no power to exclude the occupier from possession and use of the space. Id. at 435, 102 S.Ct. 3164; (2) use, "the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no non-possessory use of the property," Id. at 436, 102 S.Ct. 3164; and (3) disposal, "even though the owner may retain the bare legal right to dispose of the occupied space ... will ordinarily empty the right of any value, since the purchaser will be unable to make any use of the property," id. Boise Cascade Corporation v. United States, 296 F.3d 1339, 1353 (Fed. Cir.2002). Here, of course, plaintiffs retained all three of the above interests at all times. They retained exclusive possession of the property-- the Department never possessed any part of it. They could use the property and, indeed took advantage of the hiatus between tenants to engage in deferred maintenance of the rental house and make major renovations in order to increase its rent-producing potential. R.p. \_\_\_(Tr. 250-51) They could have sold the property to a third party at any time during the course of the project.

Finally, several cases have discussed the relevance of the length of the restriction placed on the landowner's use of its property, generally referred to as "regulatory delay."

In Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, *supra*, the government instituted building moratoria that amounted to three years. The Court held that Lucas does not apply when the property owner has suffered a temporary loss of all economically viable use. 535 U.S. 302, 331-32, 122 S.Ct. 1465, 1484, 152 L.Ed.2d 517, 546-47 (2002). Because time is a component of an interest in property, the property owner in that situation has suffered a partial loss, not a total one. Once the temporary restriction is lifted, value will return. 535 U.S. at 331-32, 122 S.Ct. at 1484, 152 L.Ed.2d at 546. In such a case, the court must determine whether there has been a taking. In the instant case, the trial judge prohibited the Department from introducing plaintiff's property tax assessments for the years before, during, and after the project to show that he didn't contest them. His reason was that there was no claim of permanent deprivation of value of the property as a result of the driveway issue. R.p. \_\_\_(Tr. 258) Once the project was complete, the full use and value of the rental property returned.

In Byrd v. City of Hartsville, *supra*, the City delayed eleven months on Byrd's request to rezone his property for commercial use while it investigated the issue of whether such commercial development would threaten the National Historic Landmark status of Coker Farms of which Byrd's parcel was a part. After determining it would not, the board took an additional two months to approve the zoning change. In that case, our Supreme Court said,

In the context of regulatory delay, the *Penn Central* inquiry is whether the delay ever became unreasonable. Byrd is not entitled to compensation merely because he had to obtain a zoning change to develop his property. Until regulatory delay becomes unreasonable, there is no taking. The length of the delay is not determinative. Rather, we consider all relevant circumstances, including the reasons for the delay and the economic impacts on Byrd. And under the "parcel as a whole" doctrine, we must consider those impacts in relation to Byrd's interest in the City tract.

Id., 365 S.C. at 660-61, 620 S.E.2d at 81.

In Kiriakides v. School District of Greenville County, *supra*, the school district delivered to Kiriakides a condemnation notice to acquire his property in August of 2002. Kiriakides challenged the condemnation in court and ultimately in May 2003, the district abandoned the condemnation. The Court found that there was no unreasonable delay or bad faith on the part of the school district. Kiriakides offered no proof that the value of his property was diminished or that he lost any potential sales of his property due to the proceedings. In fact, Kiriakides admitted that he had not tried to sell the property during this time. Likewise, in the instant case, there was no lost sale.

**(1) The Penn Central analysis.**

The general rule is that regulatory-takings cases require “essentially *ad hoc*, factual inquiries,” balancing all relevant circumstances to determine whether the government has taken property. Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659, 57 L.Ed.2d at 648; Byrd, 365 S.C. at 658, 620 S.E.2d at 80. Three factors are typically balanced to determine whether the public benefit from the regulation outweighs the private harm to the landowner: (1) the character of the government action (A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good); (2) the economic impact of the regulation on the claimant; and (3) the degree to which the regulation has interfered with distinct investment backed expectations. Penn Central Transportation Co. v. New York City, *supra*; Main v. Thomason, 342 S.C. at 88, 535 S.E.2d at 922.

**a) The character of the government action.**

The character of the Department's action in this case is, of course, the reconstruction of the S.C. Route 171 (Folly Road) bridge across James Island Creek. Road and bridge maintenance and construction are one of the fundamental police power functions of the State. It is an exercise of the police power and not of the power of eminent domain. S.C. State Highway Dept. v Carodale Associates, supra. Moreover, the Department never took nor intended to take access from Mr. Frampton's rental house. It had planned to substitute his existing entrance with a service road. When permission to implement that plan was rejected by Mr. Frampton, it relocated the entrance a few feet to the west to accommodate the guardrail. Each of these proposals were for the enhancement of highway safety including the safety of plaintiff and his tenants and within the authority given the Department by the General Assembly in S.C. Code Ann., §§1090 and 1100.

As noted in the previous section, it has long been held in this State that a purchaser of property on a public street does so subject to the discretion of government authorities to improve those streets. South Bound R.R. v. Burton, supra. The power of eminent domain and the police power are distinct sovereign powers and no compensation is due for the State's exercise of its police power. State Highway Dept. v. Wilson, supra; accord, Lucas v. South Carolina Coastal Council, supra.

While the plaintiffs' herein suffered an inconvenience for a period of time, their loss was not unique to them compared to other landowners abutting public roads. All roads and bridges must be improved or replaced from time to time. This is especially true of bridges in salt water environments such as the James Island Creek Bridge at issue

here. When steel rebar within the structure becomes exposed, the urgency of repairs is greatly increased. As defendant's engineers testified at trial, there are more than 9,000 publicly-owned bridges in South Carolina. Because four properties abut each bridge, 36,844 landowners face disruption at least every fifty years when those bridges must be replaced. R.p. \_\_\_(Tr. 308-09)

The "average reciprocity of advantage" test is based upon the notion of an overriding common good. When the government, by regulation, makes reasonable adjustments in the benefits and burdens of economic life, the Takings Clause does not provide a basis for compensation so long as no individual property owner is uniquely affected and the benefits and burdens of the government action are shared with the community.

Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 491, 107 S.Ct. 1232, 1245, 94 L.Ed.2d 303 (1926). Thus, a law which interferes with the use and enjoyment of property does not constitute a taking of that property "when [the] interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 2A Sackman, Nichols on Eminent Domain, §6.01[9], p. 6-17.

The approximately one year construction period for the bridge replacement was not an extraordinary length of time for this type of project. R.p. \_\_\_(Tr. 310) The delay was not unreasonable. Folly Road, including the James Island Creek Bridge, is the only

route into and out of the City of Folly Beach from the mainland. Because of this and the need to maintain traffic to and from the City, the bridge project had to proceed in two phases where traffic was shifted from one side of the bridge while work proceeded on the other -- then vice versa. R.p. \_\_\_(Tr. 303)

The road construction was a legitimate exercise of the police power that necessarily burdens all landowners eventually. However, each landowner benefits from the burden placed on others. "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Lingle v. Chevron, 544 U.S. 528, 537, 125 S.Ct. 2074, 2081, 161 L.Ed2d 876 (2005) quoting Pennsylvania Coal v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 28 A.L.R. 1321, 67 L.Ed. 322 (1922).

The governmental action herein was not an exercise of eminent domain. There was no taking. The Department did not "take" plaintiff's driveway. It simply relocated it as it is authorized to do by S.C. Code Ann. §57-5-1100 (Rev. 2006). One is not entitled to compensation for restriction of use, or for deprivation, of property as a result of proper exercise of the police power. James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955).

**b) The economic impact on the claimant.**

The Penn Central test has never been invoked successfully in either the U.S. or South Carolina Supreme Courts. It is unsettled whether courts should focus on the loss of value or the loss of use. It appears, however, that the tendency of the South Carolina Supreme Court is to focus on the degree of loss of use. See, Byrd, supra, Kiriakides, supra. Neither court has indicated what percent value loss or the degree of loss of use

attributable to the government's actions will constitute a taking. However, the U.S. Supreme Court has indicated that the economic impact generally must be substantial, arguably severe, when the other Penn Central factors are not determinative. As stated in Lingle, supra,

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.

544 U.S. at 537, 25 S.Ct. at 2082.

As note infra, in an alleged temporary taking such as complained of here, the finding of a taking should be rare because value returns when the restriction is lifted. That was the case here.

Moreover, according to plaintiff's testimony, the loss of gross rents amounted to \$15,200.<sup>8</sup> This is certainly not severe nor extraordinary. Many commercial properties such as convenience stores and motels suffer much larger losses in business income when the streets surrounding them undergo improvements. Importantly, however, plaintiff's degree of loss should not be view as isolated to this project. Rather, the question is whether plaintiff, or any landowner abutting a bridge, should expect income from his property to be curtailed once every fifty years while the bridge is replaced by necessity. A holding that the State must pay for every disruption to businesses from ordinary highway maintenance activities would have a far-reaching and debilitating impact on the State's ability to maintain its highways.

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<sup>8</sup> As noted above, the tenant Burkey was contractually obligated to pay some months of that amount.

Even so, loss of income is not the most common metric in determining the severity of the impact on a landowner under Penn Central. A more common focus of the courts is the plaintiff's ability to recoup his cost basis in the property. See, e.g., Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986). As mentioned above, full value of the property returned after the project ended and the alleged restriction on access was lifted.

With regard to use, Mr. Frampton admitted he could use and did use the time period at issue here to make necessary repairs to enhance its rental value. It is also possible that a prospective tenant could have parked on one of his adjoining properties for access to the house during the construction period if that was ever necessary due to construction activity. Department and Cape Romain personnel testified that they would have provided room for tenant parking on the right-of-way had there been a tenant. Mr. Frampton's last tenant had signed a lease for a period well into the construction period. His vacancy was not the fault of the Department. Mr. Frampton let him terminate the lease voluntarily. R.p. \_\_\_(Tr. 244-45)In any event, plaintiff retained all of the significant sticks in the bundle of property rights—possession, the right to exclude others, and the right to sell his property.

Finally, it should be reiterated that the plaintiff did nothing to try to help himself during the alleged taking. He admitted that no attempt was made to rent the house, and no direct request to allow access to it for a new tenant was ever directed to the Department or its contractor.

**c) Plaintiff's investment-backed expectations.**

It is clear from his trial testimony that Mr. Frampton's objection is to the project in general. R.p. \_\_\_(Tr. 263-64, 273) His complaints were directed at the construction process overall which was in no way extraordinary for this type and magnitude of public works. As noted above, bridges must be replaced every fifty years. No landowner may reasonably expect that their lives will never be inconvenienced or that some income from property will not be reduced from time to time for this reason. The general law in this area supports this conclusion.

According to Nichols, the rule appears to be based upon recognition of the fact that the privilege of receiving the benefits of life within a municipality or other governmental jurisdiction carries with it certain attendant burdens, including the obligation to suffer the inevitable inconvenience associated with public works construction without compensation:

Consequential damages to adjoining property owners in the way of diminution of business while construction is in progress does not constitute a taking of property for which compensation must be made under the Fifth amendment of the Constitution. Such losses are *damnum absque injuria* and unfortunately must be borne by the individual as a price that he pays for being a member of organized society and living in an urban community.

Nichols, supra, quoting Meyers v. District of Columbia, 17 F.R.D. 216, 217 (D.D.C. 1955).

Here, the Frampton rental parcel is the last east-bound property before the James Island Creek Bridge. It adjoins both the Creek and the highway approach to the bridge. Tidal scour and the salt water environment erode the structure and necessitate replacement from time to time. No landowner adjoining such a bridge is reasonably entitled to assume that it will not eventually have to be replaced with the attendant

dislocations to their property occasioned by major construction. As noted above, there are 36,884 such potential plaintiffs.

**(2) Conclusion.**

Mr. Frampton still owns the same property at 699 Folly Road that he did prior to the commencement of the bridge replacement project. It has not been reduced in substance. It retains the same value and yields a greater net rental today than before the project. The Court should conclude that there has been no taking of property from the plaintiffs by the State and reverse the trial court's finding that there was.

**V. The verdict was based on testimony of the landowner's appraiser that contained hypotheticals and suppositions that were not credible.**

Should this Court affirm the trial court's finding of a taking, it should reduce the amount of the jury's verdict as excessive and outside the scope of any credible evidence. As set forth in our statement of facts, the landowner's evidence of his losses was chiefly based upon the testimony of his expert witness, Mr. Hartnett. Mr. Hartnett testified that, based upon his investigation of other commercial property sales in the area, Mr. Frampton should expect to receive \$250,000 for his 0.138 acres and house at 699 Folly Road. R.p. \_\_\_(Tr. 449) He then assumed that purchaser for \$250,000 would want an eight percent return on his or her investment--\$20,000 per year. When pressed on cross-examination as to why one would pay \$250,000 for a property that was only producing rent of \$11,400 per year, he explained that the purchaser would not buy the property as an investment in income producing property, but would buy it as a personal residence to live in. Then, the buyer would rent it out for \$16,667 because twenty percent is what he should expect as an annual return on what he paid. He said he had no information that

the rent Mr. Frampton was receiving was not gained by an arms-length transaction with his tenants. R.p. \_\_\_(Tr. 471-75) The circularity of the reasoning the witness utilized is apparent.

Next Mr. Hartnett computed interest from the loss of money by Mr. Frampton at eight percent. This was not based upon his expertise but on the statutory rate counsel supplied him. R.p. \_\_\_(Tr. 454). As noted in Vick v. S.C. Dep't. of Transp., 347 S.C. 470, 479-81, 556 S.E.2d 693, 698-99 (Ct. App. 2001), the loss of the use of money is compensable in inverse condemnation cases as in other property cases but must be proven. Judicial notice should have been taken that market interest rates in the 2008-09 time period were minimal and certainly less than eight percent.

In the event the Court affirms a taking herein, it should reduce the amount awarded to the plaintiff's actual losses of \$950 per month rental income.

**VI. Plaintiff was not entitled to attorneys' fees and costs because he was not a prevailing party under the governing fee-shifting statute.**

In his award of attorney fees and costs, the trial judge rejected defendant's argument that plaintiff was not entitled to recover his costs against the State because he was not a "prevailing party" as that term is defined in the governing statute for fee-shifting in eminent domain cases. That code section, S.C. Code Ann., §28-2-510 (Rev. 2007), provides that a landowner "prevails" when the compensation awarded is at least as close to the highest valuation testified to by the landowner as it is to the highest amount testified to by the condemnor. Here, Mr. Frampton's valuation witness testified to \$36,527 in compensation for the temporary blockage of the driveway, and \$37,500 as diminution in value due to the installation of the raised, concrete center median. R.p.

\_\_\_(Tr. 460-61). Thus, the amount defendant testified to (zero dollars) was closer to the verdict of \$36,527 than the landowner's testimony of \$ 74,027.

The trial court held that another section of the Code, S.C. Code Ann. §28-11-30, listing certain types of claims under which a landowner may be reimbursed, was the "more specific statute" and requires an award of fees regardless of the amount of recovery. The trial court is incorrect. Code section 28-2-510 is the more specific statute and expresses the policy of the General Assembly with regard to recovery against the State. The rules of statutory construction and public policy considerations support our view.

It is well settled that it is for the General Assembly to determine when and under what circumstances the State may be sued. S.C. Code Const., art. XVII, §2. Even when legislative action is taken, statutes enacted in derogation of sovereign immunity must be strictly construed. Washington v. Whitaker, 317 S.C. 108, 127, 451 S.E.2d 894, 906 (1994); accord, Unisys v. S.C. Budget & Control Bd., 346 S.C. 158, 551 S.E.2d 263 (2001). Both of the Code sections at issue negate the "American Rule" that each party to a lawsuit bear its own costs. Statutes in derogation of the common law are to be strictly construed as well. Crosby v. Glasscock Trucking Co., Inc., 340 S.C. 626, 532 S.E.2d 856 (2000).

In enacting the condemnation fee statute and erecting a bar to recovery thereunder, the General Assembly obviously wanted to enable landowners who had been mistreated by the State by way of a low offer for their land be able to obtain an attorney to vindicate their rights by assuring that attorney that by obtaining a positive result in a meritorious case, he will be paid for his services. See, Pennsylvania v. Delaware Valley

Citizens Council for Clean Air, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986). On the other hand, by setting a relatively high bar to the recovery of fees, the General Assembly also wanted to discourage landowners from “rolling the dice” and seeking a large verdict knowing that they would never be out of pocket for their litigation costs in doing so.

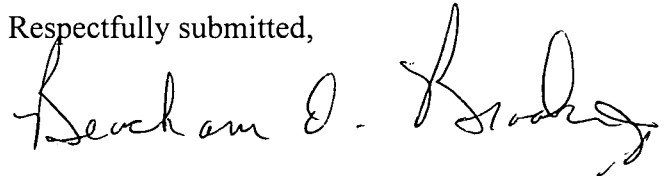
The same considerations should attain in inverse condemnation cases. See, Cobb, supra, (noting the historical treatment of an inverse condemnation action as equivalent to an eminent domain case), 365 S.C. at 365, 618 S.E.2d at 301, and Hardin, supra, this Court, quoting Palm Beach County v. Tessler, supra, stated, “Should it be determined that a taking has occurred, the question of compensation is then decided as in any other condemnation proceeding.” As we have stated supra, losses occasioned by a legitimate act of the State in furtherance of its police power do not require compensation to affected landowners. A landowner who does suffer from a compensable taking may be encouraged to seek compensation for non-compensable claims in order to prevent the State from settling and paying him compensation for a conceded taking in order to recover his fees and costs.

Thus, the generalized statute, S.C. Code Ann. §28-11-30, listing various circumstances where landowners may be entitled to reimbursements should not be held to override the clear expression of public policy contained in the condemnation fee-shifting statute. Plaintiff did not prevail under the latter statute. The Court should reverse the trial court’s award of fees and costs.

#### CONCLUSION

The Court should reverse the trial court's finding of a taking under the tests set forth in Byrd and Tahoe-Sierra, *supra*. In the event the Court concludes there was a taking, it should nevertheless remand the case for a new trial with instructions to follow a procedure where a jury is not impanelled until and unless the court, after resolving the facts and law, determines there has been a taking and defines with specificity the property and property rights taken and the duration of that taking. Should the Court affirm the finding of a taking, it should reduce the verdict to an amount reflecting the plaintiff's actual losses and reverse the award of attorneys' fees and costs.

Respectfully submitted,



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November 15, 2012