THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2013-CP-22-01062
Appellate Case No. 2017-000234

Georgetown County, ... Appellant,

v.

Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc.,
The South Carolina Department of Transportation and The City of Georgetown, ... Defendants,

Of whom

The South Carolina Department of Transportation and The City of Georgetown
are ..... Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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I.

As between Georgetown County and the South Carolina Department of Transportation and the City of Georgetown, the Georgetown County Judicial Center, and the other damaged Georgetown County structures, are "private property" within the meaning of S.C. Const. art. I, § 13.

Respondents, South Carolina Department of Transportation ("SCDOT") and the City of Georgetown (the "City"), argue at page 6 of their brief, that the "Bill of Rights ... prevents the government from depriving the citizens of their basic rights." This "charter of negative powers," as Respondents refer to the Bill of Rights, includes the prohibition against depriving the citizens of Georgetown County (the "County") of property the County owns, for which they have and continue to pay, i.e., the County Judicial Center and the other County structures, damaged by the acts of SCDOT and the City.

As between Respondents and the County, the property damaged by SCDOT and the City is "private" and SCDOT and the City must compensate the County for the damages they caused to that property.

As pointed out in the County's opening brief, the South Carolina Supreme Court case, also cited by SCDOT and the City, Edgefield County v. Georgia-Carolina Power Co., 104 S.C. 311, 88 S.E. 801 (1916), is illustrative.

This case, decided before home rule, said, "... the county had no ... ownership of the highway and ferry as to render their serious impairment by the defendant a wrong to the plaintiff, and the constitutional prohibition to take private property without making compensation therefor has no application to the taking of public property." Id. at 326, 88 S.E. at 806.

The Edgefield County Court noted that when the case was decided, "[t]he Constitution of 1895... by implication left the government of the counties in the hands of the Legislature," and "under the Constitution and laws of the state, the state [General Assembly] ha[d] absolute control over the government of counties." Id. at 327, 88 S.E. at 806,

This relationship between state and local governments has passed into history. County governments are no longer in the hands of the General Assembly. See S.C. Const. art. VIII, § 1, *et. seq.*; S.C. Code Ann. § 4-9-10, *et. seq.*; and Hospitality Ass'n of South Carolina, Inc. v. Cty. of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113 (1995).

As explained in Hospitality Ass'n:

> For generations, legislative delegations of the General Assembly controlled virtually every aspect of local government. Relinquishment of this control effectively began in April of 1966.
>
> ...
>
> Acting upon a favorable vote of the people, the General Assembly, on March 7, 1973, ratified the Amendment. See Act No. 63, 1973 S.C.Acts 67.
>
> ...
>
> As ratified, new Article VIII directed the General Assembly to implement what was popularly referred to as "home rule" by establishing the structure, organization, powers, duties, functions, and responsibilities of local governments by general law. S.C. Const. art. VIII, §§ 7 and 9. **In addition, new Article VIII mandated a liberal rule of construction regarding any constitutional provisions or laws concerning local government.** S.C. Const. art. VIII, § 17.

(Emphasis added).

The Edgefield County decision dealt with and explained the relationships between local and state government as they existed when the case was decided, one hundred and one years ago. That relationship has changed dramatically in the century that has passed between that decision and this case. The County owns the buildings damaged by the actions of SCDOT and the City,

that damage has resulted in a taking and the County is entitled to just compensation from SCDOT and the City.

Similarly, under the United States Constitution's Takings Clause, the federal government must compensate state or local governments for taking their property. Property not owned by the United States, is "private" as between the United States and state or political subdivisions.

> When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than to the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States. Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees.

U.S. v. 50 Acres of Land, 469 U.S. 24, 31 (1984).

The County is a body politic and corporate and has the power to purchase and hold, for its use, lands and personalty within its limits. S.C. Code Ann. § 4-1-10 (2). Real property conveyed to the County is property of the County. See S.C. Code Ann. § 4-17-10. The County holds title to the property subject to this lawsuit. That property was damaged by the acts of SCDOT and the City which amounts to a taking of that property.

S.C. Const. art. VIII., §17, mandates liberal construction of constitutional provisions concerning local governments. Just like the Federal Takings Clause, as interpreted by the United States Supreme Court, as between the County and SCDOT and the City, the County's damaged property is "private" within the meaning of S.C. Const. art. I, § 13. The taking of that property by SCDOT and the City requires just compensation.

II.

Other states have concluded where the state or political subdivision takes property belonging to another political subdivision, just compensation must be paid.

Numerous other states have concluded where a state or political subdivision takes property belonging to another political subdivision, just compensation must be paid.

Respondents disagree with this statement, saying "this particular issue has not been addressed by many states," suggesting that "what has been addressed is whether a governmental entity can intentionally take the property of another governmental entity...." Respondents' brief at 5.

In its opening brief, the County cites cases from California, Montana, New Jersey, Washington, Pennsylvania, Oregon, Alabama and Mississippi, to support its position the County's property cannot be taken by SCDOT and the City without just compensation.

The cases the County cited from California, (Marin Mun. Water Dist. v. City of Mill Valley, 202 Cal. App. 3d 1161, 249 Cal. Rptr. 469 (1988)), Montana (City of Three Forks v. State Highway Comm'n, 156 Mont. 392, 480 P.2d 826 (1971)), and Washington state, (Highline Sch. Dist. No. 401, King Cty. v. Port of Seattle, 87 Wash. 2d 6, 548 P.2d 1085 (1976)),[1] involve inverse condemnation claims by one state political subdivision against either the state or another political subdivision and all conclude such an action can be maintained.

[1] SCDOT and the City argue because the County does not have the right of exclusive control over its judicial center, it "lacks one of the essential sticks in the bundle of rights ... commonly characterized as property." Respondents' brief at 12. This, of course, does not deprive the County of title to the damaged property or the ability to maintain an inverse condemnation action. "...[O]wnership of property entails more than the right of exclusive possession...." Highline Sch. Dist. No. 401, 87 Wash. 2d at 11, 548 P. 2d at 1088.

The cases cited from New Jersey (State ex. rel. State Highway Comm'r v. Cooper, 24 N.J. 261, 131 A.2d 756 (1957)), Pennsylvania (City of Chester v. Com., Dept. of Transp., 495 Pa. 382, 434 A.2d 695 (1981)), Oregon (Brusco Towboat Co. v. State By & Through Straub, 31 Or. App. 491, 570 P.2d 996 (1977)), Alabama (State ex. rel. Ala. State Docks Dept. v. Atkins, 439 So. 2d 128 (Ala. 1983)), and Mississippi (Donnaher v. State, 16 Miss. 649 (Miss. Er. & App. 1847)) involve statutory condemnation or eminent domain actions by either the state or a political subdivision against another political subdivision.

Regarding the latter category of cases, the fact that they involve litigation brought under a state procedural, condemnation statute is irrelevant. All stand for the proposition that one political subdivision cannot take the property of another, whether intentionally or be accident or misadventure, without paying just compensation for that taking.

III.

The South Carolina General Assembly has interpreted the South Carolina Constitution to require just compensation to public entities.

The Eminent Domain Procedure Act, S.C. Code Ann. 28-2-10, *et seq.*, ("EDPA") reflects the South Carolina General Assembly's view that public entities are entitled to just compensation when their property is taken. "It is the intention of the General Assembly that this act is designed to create a uniform procedure for all exercises of eminent domain power in this State." S.C. Code Ann. §28-2-20. In establishing a procedure for how takings would be performed, the legislature defined both condemner and condemnee. A condemnee is "a person or other entity who has a record interest in or holds actual possession of property that is the subject of a condemnation action." S.C. Code Ann. §28-2-30 (6). "Person" is defined as "a natural individual, partnership, corporation, association, other legal or fiduciary entity, and ***a public entity***." S.C. Code Ann. §28-2-30 (16) (emphasis added). Under the plain language of the

EDPA, Georgetown County is a condemnee and would be entitled to just compensation where the SCDOT took the Judicial Complex under the procedure set out by the Legislature.

As is explicit in the EDPA, the legislature was strictly creating a procedure to standardize takings. "It is not intended by the creation of this act to alter the substantive law of condemnation." S.C. Code Ann. §28-2-20. Accordingly, by defining condemnee to include public entities, like the County, the General Assembly has codified their view that public entities are protected by S.C. Const. art. I § 13 and entitled to just compensation.

In the present case, the City and SCDOT did not disposses the County of its property under the procedure of the EDPA. Instead, they affected a taking by their affirmative acts in constructing a drainage pond and storm water collection system. The taking is nonetheless felt by the County. This Court should not permit the City and SCDOT to escape the requirement of paying just compensation under the South Carolina Constitution simply because the taking was unintentional and therefore not under the EDPA.

As the South Carolina Supreme Court said in Hosp.Ass'n.,

> Although the General Assembly was required to implement home rule, new Article VIII essentially left it up to the General Assembly to decide what powers local governments should have. Acting under this authority, the General Assembly enacted various statutes regarding the powers of counties and municipalities.

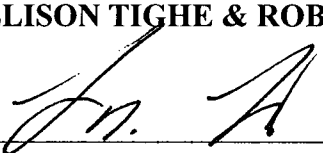
320 S.C. at 224-226, 464 S.E.2d at 117-18 (emphasis added, footnotes omitted).

The General Assembly has demonstrated through the EDPA that S.C. Const. art. I § 13 applies to takings from public entities, and this Court should likewise construe S.C. Const. art. I, §13 to require the payment of just compensation.

CONCLUSION

For the reasons set forth above, and in the County's opening brief, the circuit court erred in concluding the County could not maintain its inverse condemnation claims against SCDOT and the City. The circuit court's order dismissing those claims must be reversed and the case remanded to the circuit court for trial.

CALLISON TIGHE & ROBINSON, LLC



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September 25, 2017
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THE STATE OF SOUTH CAROLINA
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The Honorable Larry B. Hyman, Jr., Circuit Court Judge

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PROOF OF SERVICE

I certify that I have served a copy of the following as indicated hereinbelow by mailing a copy of same on the date below by First Class United States Mail, postage prepaid, addressed to the following:

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September 25, 2017

VIA HAND-DELIVERY
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Clerk of Court
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Re: Georgetown County v. Davis & Floyd, Inc., et al.
Appellate Case No. 2017-000234
Our File No. 5626.003

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of the Initial Reply Brief of Appellant and Proof of Service, in connection with the above-referenced matter. Please file the original with your office and return the clocked-in copy to me via my courier.

By copy of this letter, I am serving copies of same upon all counsel of record.

If you should have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC

Louis H. Lang

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