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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Unpublished Opinion No. 2018-UP-063 (Filed February 7, 2018)
Appellate Case No. 2016-001440

Carolina Chloride, Inc.,..... Petitioner,

v.

South Carolina Department of Transportation, ... Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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The South Carolina Court of Appeals

Carolina Chloride, Inc., Appellant,

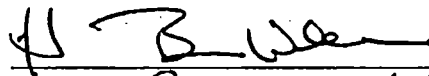
v.

South Carolina Department of Transportation,
Respondent.

Appellate Case No. 2016-001440

ORDER

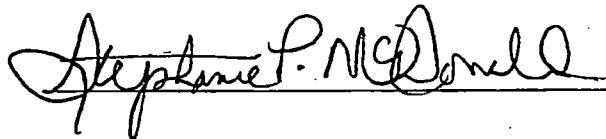
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Christian Stegmaier, Esquire
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Kelsey Jan Brudvig, Esquire
The Honorable Joseph M. Strickland

FILED

May 2, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

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Case No. 2016-001440

SC Court of Appeals
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Carolina Chloride, Inc., ...Appellant,

v.

South Carolina Department of Transportation, ...Respondent.

APPELLANT'S PETITION FOR REHEARING

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF
APPEALS:

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court
Rules, Appellant Carolina Chloride, Inc. respectfully petitions this Court for
rehearing in the instant matter. The opinion of this Court, which affirmed the

Master-in-Equity's Order of Dismissal, and is the catalyst of this petition, was filed on February 7, 2018.¹

FACTUAL/PROCEDURAL BACKGROUND

Appellant Carolina Chloride, Inc. ("Carolina Chloride") commenced the instant action against Respondent South Carolina Department of Transportation ("SCDOT") to recover just compensation for the taking of its vested property right. (R. p. 41). Carolina Chloride's inverse condemnation claim arises from SCDOT's closure of the grade crossing at Killian Road and Farrow Road in Richland County, which substantially reduced access to Carolina Chloride's property.

From November 1996 until November 2006, Carolina Chloride owned a 7.67 acre tract of land located at 600 Killian Road in Richland County (the "Property"). (R. p. 75). Carolina Chloride's use of the property was initially for storing and distributing calcium chloride, a chemical used to control dust and ice on road, as well as to treat drinking water. Carolina Chloride later expanded its operations to include commercial storage units, which it rented out to the public. Robert Morgan, former owner and president of Carolina

¹ Appellant timely filed a motion for extension of time to file this Petition for Hearing. The motion was granted pursuant to Order filed February 23, 2018.

Chloride, invested substantial sums in acquiring the subject property and developing the various operations on it.

The Property is located at the southeastern corner of the intersection of Killian Road and Farrow Road, abutting both roads. (R. p. 77). A railroad track runs parallel to Farrow Road adjacent to the property. (Id.). Carolina Chloride enjoyed an easement allowing it access to and from the Property via Killian Road and Farrow Road.

SCDOT entered into an agreement dated July 20, 2004 with Norfolk Southern Railway Company, a Virginia corporation (the "Railroad"), whereby SCDOT would eliminate the grade crossing at Killian Road and Farrow Road (identified as Mile Post R-95.89). The elimination of the grade crossing was made in exchange for the Railroad paying approximately \$116,000 toward construction (5% of the estimated total of \$2,313,152.80) of an overpass structure further up the railway line (Mile Post R-95.65) near the Town of Killian in Richland County. (R. p. 19).

In January 2006, SCDOT began blocking and did close the access to the Property from Farrow Road. Furthermore, it eliminated access to the Property from the portion of Killian Road west of Farrow Road. As a result of the elimination of the grade crossing, Carolina Chloride lost access to the

Property in three of four directions. (R. p. 75). The only remaining way to access the property was via Killian Road west of the intersection with Farrow Road. Specifically, Carolina Chloride no longer had access to Farrow Road by turning left onto Killian Road from the subject property and crossing the Railroad's tracks. Instead, Carolina Chloride was compelled to take a circuitous and lengthier route, by turning right onto Killian Road, then right onto Longtown Road, and travel around the back of the property to the point where Longtown Road intersects Farrow Road.

The purpose of SCDOT's actions was to close the railroad crossing in accordance with the aforementioned agreement with the Railroad. Carolina Chloride contends this closing resulted in the taking of its easement.

Following closure of the railroad grade, Carolina Chloride sold the property for much less than what it was worth due to, inter alia, the lack of direct access to Farrow Road, a main thoroughfare in that part of the county. (R. p. 76).

Carolina Chloride subsequently brought this inverse condemnation action against SCDOT, seeking damages for the taking of the easement. (R. pp. 39, 48). After engaging in discovery, Carolina Chloride moved for

summary judgment, arguing the closing of the grade crossing constituted a taking of its property as a matter of law. (R. pp. 60, 63).

The Circuit Court granted summary judgment in favor of Carolina Chloride. The Circuit Court initially held Hardin v. South Carolina Department of Transportation, 371 S.C. 598, 641 S.E.2d 437 (2007), which was decided after the closing, did not apply to the case at hand, but should have only prospective application because the decision created a new right. According to the Circuit Court, Carolina Chloride suffered a taking under the pre-Hardin special injury test.

In the alternative, the Circuit Court held Carolina Chloride prevailed even if Hardin did apply to the instant case. The Circuit Court reasoned the Property abutted both Killian Road and Farrow Road, and Carolina Chloride, therefore, possessed an easement for access to both roads. Because the grade closing resulted in Carolina Chloride's inability to access Farrow Road, the Circuit Court held Carolina Chloride suffered a taking of its property as a matter of law. (R. p. 18).

The Supreme Court reversed the Circuit Court. Carolina Chloride v. South Carolina Dept. of Transp., 391 S.C. 429, 706 S.E.2d 501 (2011) (R. p. 12). As an initial matter, the Circuit Court held that Hardin applies

retrospectively because Hardin did not create a “new right or cause of action, but, rather restated the focus in determining whether a road re-configuration amounts to a taking.” Id. at 433, 706 S.E.2d at 503 (R. p. 14).

The Court further held that the Circuit Court erred in granting summary judgment in favor of Carolina Chloride. The Court noted that there was no question that SCDOT’s closing of Killian Road was an affirmative conduct of a government entity. However, the Court held that “there remains a genuine issue of material fact whether SCDOT’s action constituted a taking. Specifically, there is a question whether respondent had an easement of access as an abutting landowner to Farrow Road.” Id. at 435, 706 S.E.2d at 504 (R. p. 15). The Court concluded: “Because further inquiry into the facts of this case is desirable to clarify the application of the law, we find summary judgment was not appropriate.” Id. at 436, 706 S.E.2d at 504 (R. p. 15).

On remand, the Court held a three-day hearing on the merits. (R. pp. 93-308). Robert Morgan, former president and owner of Carolina Chloride testified at the hearing. (R. p. 117, line 11). Morgan testified he bought the 7.68 acres near Killian Road. The Property was situated at the corner of Killian Road and Farrow Road. (R. p. 124, lines 5-7). A railroad ran parallel with Farrow Road. (R. p. 124, lines 8-10). Morgan testified of the

importance of the railroad to his business, stating that the product used in the processing of calcium chloride was brought to the Property by rail from Louisiana. (R. p. 124, lines 19-25). Morgan testified he had permission to use the rail siding of his property to “transport” the product from the rail cars to the Property. (R. p. 159, lines 9-20).

Morgan testified regarding his substantial improvements to the Property, including clearing big trees and old parts of equipment that was used by another manufacturing company, grading the property, and hauling in dirt, costing nearly \$20,000. He also poured concrete for the tank cars Carolina Chloride stored calcium chloride. Morgan testified estimated his investments in excess of \$200,000. (R. p. 126, line 24 – p. 129, line 6).

Once the product was produced, tractor-trailer tankers, owed by Carolina Chloride, would transport the product to customers. (R. p. 129, line 7 – p. 132, line 8). Most of the product was transported via I-77, and would exit the Property onto Killian Road, turn left, cross the rail crossing and Farrow Road, and continued up on Killian Road to I-77. (R. p. 132, lines 5-20). Morgan admitted there were other avenues to get to I-77 from the Property; however, the alternative route would take 18-wheelers hauling

tanks of chemicals through a residential neighborhood. (R. p. 133, line 10 – p. 134, line 13).

Morgan further testified that he used part of the Property as “mini warehouses” or storage units that he rented. (R. p. 131, lines 9-15). Customers of the warehouse business would access the warehouses by coming “down Farrow Road and cross – turn left on Killian Road and then turn right into Carolina Chloride and go to the warehouses just inside.” (R. p. 135, lines 8-11). Therefore, the access from Farrow Road was essential to Carolina Chloride’s warehouse business. (R. p. 135, lines 12-16).

Morgan testified that upon learning of a prospect for the rail grade at Killian Road to be close, he met with Brian Keys, an official at the Department of Transportation, where Morgan expressed his concerns about the Killian Road closing. (R. p. 137, line 15 – p. 138, line 22). At the time, there was no mention by Keys regarding an agreement of a private encroachment in order to continue accessing Farrow Road to Killian Road. (R. p. 138, line 23 – p. 139, line 4).

In early 2006, SCDOT closed the railroad grade, putting up barricades and tearing the timbers out against the rails. (R. p. 146, lines 7-19). Morgan was never provided any written notice of SCDOT’s closure of the road, nor

was any compensation provided in relation to SCDOT's activities in conjunction with Carolina Chloride. (R. p. 146, line 20 – p. 147, line 1; p. 150, lines 3-14).

Almost immediately upon the railroad closing, fifty percent (50%) of the renters of the warehouse units moved out. (R. p. 150, lines 15-24). Eventually, Carolina Chloride, due to lost profits, sold the business for an estimated \$400,000. (R. p. 151, lines 4-21). Morgan had a previous offer, prior to the railroad closing/Farrow Road closing, for \$1,100,000. (R. p. 155, lines 7-24).

On cross-examination, counsel for SCDOT presented a plat reflecting the Property when Carolina Chloride purchased the property. Counsel for SCDOT differentiated Morgan's testimony regarding the right to use the rail siding, but not that Carolina Chloride owned the land. (R. p. 173, lines 11-13). Counsel for SCDOT alleged that the statute from 1846, allowing the Railroad to take land in fee simple controlled. (R. p. 178, lines 22 – p. 179, line 3). Counsel for Carolina Chloride concurred that the technical property line for the Property at Killian and Farrow Road did not include the railway. However, whether the Railroad actually owns the property in fee simply is

not dispositive of the case, because Carolina Chloride abutted Farrow Road. (R. p. 177, line 17 – p. 178, line 8; p. 182, lines 1-5).

Morgan clarified that the right to the railroad siding that lies on the Railroad property, was by agreement. (R. p. 188, lines 4-13).

Also testifying at trial was Billy Way, Jr., a commercial real estate agent in Columbia. (R. p. 190, lines 4-23). Way was qualified as an expert in commercial real estate brokerage in Richland County. (R. p. 191, lines 4-11). Way testified that it was his opinion that the closing of the Killian Road access affected the value of the property. He testified that access and convenience are factors that are used in valuing a property, and that sellers and buyers use this factor in their valuation, as well. (R. p. 194, line 6 – p. 195, line 22). Way clarified that the loss of value was a result of the diversion of traffic to another access point of the property due to the closure of the Killian Road access. (R. p. 197, lines 21-23).

Brian Keys, director of Rights of Way for the South Carolina Department of Transportation testified that he participated in the projected involving the widening and location of Clemson Road from US Route 1 to I-77. (R. p. 205, line 16 – p. 208, line 7). The project was split into two parts. (R. p. 209, line 8-9). The second phase of the project occurred in January

2006. (R. p. 210, lines 4-13). During this phase, Keys was program manager and was responsible for the project from its inception through its construction, including the budget and timeframes. (R. p. 210, lines 14-20). Keys confirmed that SCDOT and the Railway had a written contract for purposes of constructing an overpass on Clemson Road where the railway runs underneath the overpass. (R. p. 213, line 13 – p. 214, line 7). Keys testified that the project was estimated at \$2.3 million, \$115,000 of which was contributed by the Railway. (R. p. 215, lines 11-15).

Keys recalled that the intersection of Killian Road and Farrow Road, specifically the rail grade, was closed to facilitate the construction of the overpass at Clemson Road at the request of the Railway, though Keys did not know why the Railroad petitioned for the rail grade to be closed. (R. p. 215, line 16 – p. 216, line 10).

Keys testified there were plans for a high speed railway between Columbia and Charlotte, North Carolina since the early 2000s and that these plans may have precipitated the rail grade closing. (R. p. 219, line 19 – p. 220, line 16). Keys further testified that there were safety concerns of the rail crossing at Killian Road and Farrow Road and noted that an individual was killed at the location in 1989. (R. p. 221, lines 3-20).

Keys did not recall meeting with Morgan regarding his property and the subject closing rail grade, though he admitted the same during his deposition. Keys admitted a second rail crossing at Longstown Road remained opened and operating during the time period that the subject rail grade was closed (at the intersection of Killian Road and Farrow Road). (R. p. 226, line 17 – p. 228, line 10). When asked why the railroad crossed at Longstown Road remained open, while the crossing at Killian Road was closed, Keys testified the Railroad was essentially calling the shots. (R. p. 228, lines 3-14).

Keys disputed that Carolina Chloride's property abutted Farrow Road. (R. p. 228, line 15-17). However, Keys agreed that a property owner would have an easement to any public highway that the property abuts. (R. p. 229, lines 20-25).

Keys testified SCDOT had a number of public hearings regarding the subject project, though Keys could not confirm that Morgan received notices of the public hearings personally. (R. p. 230, line 16 – p. 231, line 3).

There were right-of-ways affected by virtue of the alterations done to Farrow Road and the landowners received notice of the alterations from the Right-of-Way Office. (R. p. 231, lines 16-22). Keys was not aware of any

notice Morgan received from SCDOT regarding the closure of the railroad crossing at Killian Road. (R. p. 231, line 23 – p. 232, line 14).

The Railroad was responsible for removing the crossing; SCDOT removed anything up to the right-of-way. (R. p. 232, line 18 – p. 234, line 3). Keys believed that a railroad can unilaterally tear up tracks and create a break in the road regardless of any permission granted by the highway department who owns the adjoining roads. (R. p. 234, line 4-22). However, Keys confirmed that in this instance, there was a bilateral agreement between the Railroad and SCDOT. (R. p. 234, lines 1-16). Keys agreed that the concurrence of the Railroads petition to remove the rail crossing was affirmative conduct of the government. (R. p. 235, lines 18-23).

Keys testified that according to statute, he did not take it upon himself or SCDOT, unilaterally, to close the rail grade crossings, nor did SCDOT have any role in building a high-speed rail line. (R. p. 238, line 8 - p. 240, line 16). Keys acknowledged SCDOT's right-of-way provided by agreement with the Railroad. (R. p. 242, line 20 - p. 244, line 2). Keys testified that to his knowledge, the agreement represented SCDOT's only interest in the crossing at Killian Road and Farrow Road. (R. p. 244, lines 3-6).

Keys testified that the state typically acquires land for highways by purchasing the land in fee simple interest. (R. p. 260, lines 1-4). With regard to the subject land, the state had taken fee simple interest and not just right-of-way since the 1990s. (R. p. 260, lines 5-9). Keys testified it was his understanding that the agreement between the Railway and state was not an easement or fee simple acquisition, but rather was permission, and that the Railway did not purchase title because it was an active railroad. (R. p. 260, line 10 - p. 261, line 13).

Keys did not recall whether he told Morgan that his property interest ran to Farrow Road in the way of an easement or a right-of-way. (R. p. 264, lines 2-5).

On questioning by the Court, Keys agreed that the definition of “abut” means the sharing a common boundary. Keys opined that Carolina Chloride’s property did not abut Farrow Road because the Railroad has title property in between Farrow Road and Carolina Chloride. (R. p. 281, lines 8-13).

The Circuit Court held that Carolina Chloride’s property did not abut or share a common boundary with the right-of-way of Farrow Road and, therefore, it had no right to a drive entrance onto that road which can be taken

by SCDOT. (R. pp. 6-7). The Circuit Court further found Carolina Chloride failed to exhaust its administrative remedies. (R. p. 7). The Court also noted that testimony was presented that SCDOT would have no object to permitting a drive entrance onto Farrow Road to Carolina Chloride. (R. pp. 7-8).

In its Motion to Reconsider, Carolina Chloride contended the Circuit Court overlooked or misapprehended the true aegis of the term “abut,” as it has been defined and implemented by our appellate entities. Stated succinctly, Plaintiff maintains its property abutted Farrow Road and possessed the right of ingress or egress, which was terminated by the closure of the railroad crossing at the intersection of Killian and Farrow Roads. (R. p. 89). Carolina Chloride further alleged it utilized the administrative process to not avoid. It was not until shortly before trial that the Department advised Carolina Chloride that it had no objection to opening a private drive at the subject location for Carolina Chloride to utilize. (R. p. 90).

The Circuit Court denied Carolina Chloride’s Motion to Reconsider, stating that it found no reasons to reverse its decision based on “undisputed evidence that it does not abut.” (R. p. 1-2). The Circuit Court further stated that SCDOT has no object to permit a drive entrance to the subject property. (Id.). The Circuit Court found SCDOT was never given an opportunity to

find an engineering solution among the parties and the Railroad prior to the sale of the property. Accordingly, the Circuit Court denied Carolina Chloride's petition. (Id.)

In a Rule 220(b) opinion, this Court affirmed the Circuit Court's order of dismissal, ostensibly holding that evidence supported the Master-in-Equity's findings that Carolina Chloride's property did not abut Farrow Road. This Court did not reach the issue of exhaustion of administrative remedies.

LAW/ANALYSIS

I. Carolina Chloride's Property Abutted Farrow Road

In affirming the Circuit Court's ruling on the issue of whether Carolina Chloride's property abutted Farrow Road, this Court cited Mosteller v. Cnty. Of Lexington, 336 S.C. 360, 365, 520 S.E.2d 620, 623 (1999) for the proposition that "[a]but' means to be contiguous, or border on; to bound upon; to end at, or terminate, to join at a border or boundary; to meet; to touch at the end of side." While Appellant acknowledges the definition cited in Mosteller, South Carolina courts have also held "abut" does not always mean there must be actual contact. See id. For example, property may still be deemed to abut a road when there is some intervening, natural barrier like

a stream or river. Id. (citing Anderson v. Town of Albemarle, 182 N.C. 434, 109 S.E. 262 (1921)).

Not only does Appellant contend that the Court overlooked the additional analysis in Mosteller regarding barriers, but there have been holdings by our appellate courts—ostensibly ignored by this Court in its analysis of the case *sub judice*—in analogous disputes involving annexation, which have held that man-made conditions, such as roadways, do not destroy contiguousness and thus should aid in this Court’s disposition in the case at bar. See, e.g., St. Andrews Pub. Serv. Dist. V. City Council of City of Charleston, 339 S.C. 320, 529 S.E.2d 64 (Ct. App. 2002), rev’d on other grounds by 342 S.C. 602, 564 S.E.2d 647 (2002); see also Eldridge v. South Carolina Dept. of Transp., 384 S.C. 548, 552-53, 683 S.E.2d 483, 485 (2009);² Sonoco v. South Carolina Dept. of Rev., 378 S.C. 385, 662 S.E.2d 599 (2008).

² At issue in Eldridge v. South Carolina Dep’t of Transp., 384 S.C. 548, 683 S.E.2d 483 (2009), was whether “on premises” signs for private businesses on a median on a public highway running through the town of Greenwood were actually “on premises.” The median was situated upon an abandoned railroad right-of-way. A county ordinance defining “on premises” signs was interpreted by a special referee to be to be located on the actual property where the business is located. The Department of Transportation also concluded that such signs were not in fact “on premises” because they were

not contiguous with, adjacent to, or adjoining the businesses on either side of the road the signs were advertising and thus there would be no taking if the signs were taken down. The Supreme Court, applying, inter alia, its holding in Sonoco v. South Carolina Department of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008), held these signs were in fact “on premises” notwithstanding the physical separation between the subject businesses and their signs due to the intervening state-owned highway. The Eldridge Court held contiguousness is to be broadly interpreted and that an intervening land owner does not necessarily destroy contiguousness in South Carolina.

[T]his Court [has] acknowledged that the term “contiguous” has been broadly interpreted. Sonoco v. SC Dep’t of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008), citing Kizer v. Clark, 360 S.C. 86, 90–91, 600 S.E.2d 529, 532 (2004) (recognizing that marshlands and creeks do not defeat town’s contiguity for annexation purposes); Mosteller v. County of Lexington, 336 S.C. 360, 364–65, 520 S.E.2d 620, 623 (1999) (explaining the term “contiguous” and stating “ ‘[a]but’ means to be contiguous ... [h]owever, abut does not always mean there must be actual contact”).

In Sonoco, we went further and distinguished between “contiguous” in a lay or secondary sense, versus in legal contemplation, stating, “In the legal field, it has been defined as: ‘[i]n close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded by or traversed by.’ Black’s Law Dictionary 290 (5th ed.1979).” 378 S.C. at 391, 662 S.E.2d at 602. Significantly, S.C. Code Ann. § 5–3–305 is also cited in Sonoco; it states, in part:

For purposes of this chapter, “contiguous” means property which is adjacent to a municipality and shares a continuous border. Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line

In St. Andrews Public Service District, a public service district brought a declaratory judgment action, challenging city of Charleston ordinances that

which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous border, the intervening connector does not destroy contiguity.

In *Sonoco*, we ultimately held a taxpayer's office buildings were subject to property tax because the public road and railroad tracks did not defeat contiguity of the plant and office buildings. We find the issue presented here is squarely controlled by our opinion in Sonoco; we find the contiguity requirement is met here such that for purposes of the applicable ordinance, the signs may be considered "on premises."

Further support for this result is found in the definition of "adjacent." Black's Law Dictionary, 38 (5th Ed.1979) defines it adjacent as "lying near or close to; sometimes, contiguous, neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch."

We find the Court of Appeals and Referee unduly restricted the definition of "on premises." Given the liberal construction afforded the definition of "contiguity" in Sonoco, we find the Property between the Road's separation by the roadway does not defeat contiguity, such that the signs may be considered "on premises" for purposes of the ordinance. Accordingly, the Court of Appeals opinion is reversed, and the case is remanded to the Referee for calculation of damages.

Id. at 552-53, 683 S.E.2d at 485 (emphasis added).

annexed property into the city. An issue extant in the dispute was whether the annexation ordinances were unauthorized by law because the properties annexed were not contiguous to the city's existing boundaries. Specifically, the public service district alleged the city illegally annexed roads to achieve contiguity to properties that were not otherwise contiguous to the city. In its analysis, the Court stated:

Courts have generally held that contiguous is synonymous with the terms "adjacent to" or "adjoining." Erwin S. Barbre, Annotation, What Land is Contiguous or Adjacent to Municipality so as to be Subject to Annexation, 49 A.L.R.3d 589, 599 (1973). Our Supreme Court explained, "The statutory word 'contiguous' must be afforded its ordinary meaning of 'touching.'" Bryant v. City of Charleston, 295 S.C. 408, 410, 368 S.E.2d 899, 901 (1988). To achieve contiguity, **actual physical touching of the properties is not required**. The Supreme Court has rejected an argument that the annexed parcels must have the additional qualifications of unity, substantial physical touching, or a common boundary.

Id. at 324-25, 529 S.E.2d at 66 (Ct. App. 2000).

The St. Andrews Public Service District Court held there was no contiguousness:

In the present case, the Charleston City Council attempts to establish contiguity, not by merely crossing a roadway to annex an adjacent property, but by annexing the length of a road to establish a common boundary. In essence, it argues that because the City's current property abuts a roadway, any parcel that

abuts the same roadway is necessarily contiguous if the roadway is also annexed.

...

That kind of annexation is not authorized by the law of this state.

Id. at 326, 529 S.E.2d at 67.

However, in its review, the Supreme Court did find contiguousness via extension of the annexation of the bordering roadways. St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston, 349 S.C. 602, 606, 564 S.E.2d 647, 649 (2002).

After the opinion in St. Andrews was filed, the General Assembly enacted South Carolina Code § 5-3-305, which defines “contiguous” as the term applies to annexation and further states:

Contiguity is not establish by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another; whoever, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous border, the intervening connector does not destroy continuity.

S.C. Code Ann. § 5-3-305 (2015) (emphasis added).

The Master in Equity, as well as this Court in its Rule 220(b) opinion, erroneously applied a rigid definition of “abut.” Rather, under Mosteller,

Sonoco, and Eldridge, it is abundantly clear that Carolina Chloride's property and Farrow Road need not touch in order to be continuous (i.e., abut). Moreover, but for the intervening railroad grade, Carolina Chloride's property and Farrow Road would be directly adjacent and share a continuous border. By analogy of Mosteller, Sonoco, and Eldridge, the Railroad's railway bed does not destroy contiguity.

Accordingly, this Court, in misapprehending the law and definitions of "abut," erred in affirming the Master in Equity's order of dismissal.

II. Appellant Did Not Fail to Exhaust Administrative Remedies

This Court did not reach the issue of exhaustion of administrative remedies pursuant to Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal). Appellant maintains that this Court erred in holding the Master in Equity did not commit reversible error in finding that Carolina Chloride's property did not abut Farrow Road. Accordingly, the Court should address the alternative ground for dismissal. Appellant avers the Master in Equity erred in holding Carolina Chloride failed to exhaust its administrative remedies.

In its Order, the Master determined that Carolina Chloride did not make a meaningful request to allow SCDOT to exercise its discretion concerning the road closure. This finding apparently was an additional basis for dismissal. Respectfully, the Master in Equity overlooked or misapprehended the testimony of Robert Morgan, who detailed several meetings and other efforts he undertook prior to the road closure with the express purpose of being able to continue using the access to Farrow Road. (R. p. 137, line 15 – p. 142, line 9). As detailed by Morgan, he made it clear to SCDOT's engineering representative that he was aggrieved by the Department's apparent consideration of closing the crossing. (R. p. 137, line 15 – p. 142, line 9).

Moreover, at no point prior to the road closure did SCDOT advise Morgan that SCDOT would have no objection to permitting a drive entrance onto Farrow Road. It was only shortly before the trial of this case and long after Carolina Chloride sold its operations and land at the subject parcel did SCDOT advise Morgan of the right to apply for a drive entrance. In the April 8, 2014, letter from counsel to SCDOT, it was represented: "[T]his Department never argues that an abutting owner to a State Highway does not have the right to enter that highway as long as the land affords a safe and

suitable point for entry. The question, therefore, is who is the abutting owner vis-à-vis the plaintiff and the railroad. Our engineers have investigated this location and would have no objection to the opening of a private drive at this location.” (R. p. 309). This offer, of course, was too little, too late.

Carolina Chloride pursued administrative remedies concerning the road closure; however, SCDOT disregarded Carolina Chloride’s position. Carolina Chloride’s suit for inverse condemnation was therefore appropriate. Accordingly, the Master in Equity erred in finding Carolina Chloride failed to utilize the administrative process to resolve its claim.

CONCLUSION

Based on the foregoing, Carolina Chloride avers this Court misapprehended the definition of “abut” and its application of “abut” to the instant case. Furthermore, because this Court erred in affirming the Master’s ruling on the term “abut,” this Court must address the alternative ground for dismissal. Carolina Chloride maintains it exhausted its administrative remedies in resolving its claim against SCDOT. Accordingly, Carolina Chloride respectfully requests the Court reverse the Master-in-Equity’s order of dismissal.

Respectfully submitted,

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CAROLINA CHLORIDE

APPELLANT'S PETITION FOR
REHEARING

Columbia, South Carolina
March 9, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

RECEIVED

Case No. 2016-001440

MAR 09 2018

SC Court of Appeals

Carolina Chloride, Inc., ...Appellant,

v.

South Carolina Department of Transportation, ...Respondent.

PROOF OF SERVICE

I hereby certify that I served Appellant's Petition for Rehearing upon all parties, by placing a copy in the United States mail, postage prepaid, to the below listed parties on March 9, 2018, addressed to the following:

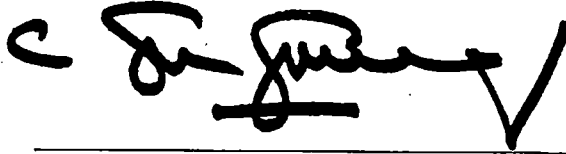
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ATTORNEYS FOR APPELLANT

PROOF OF SERVICE – APPELLANT'S
PETITION FOR REHEARING

Columbia, South Carolina
March 9, 2018

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Carolina Chloride, Inc., Appellant,

v.

South Carolina Department of Transportation,
Respondent.

Appellate Case No. 2016-001440

Appeal From Richland County
Joseph M. Strickland, Master-in-Equity

Unpublished Opinion No. 2018-UP-063
Submitted January 1, 2018 – Filed February 7, 2018

AFFIRMED

Christian Stegmaier and Kelsey Jan Brudvig, both of
Collins & Lacy, PC, of Columbia, and Edward D.
Sullivan, of Sullivan Law Firm, PC, of Columbia, all for
Appellant.

Beacham O. Brooker, Jr., of Brooker Law Offices LLC,
of Columbia, for Respondent.

PER CURIAM: Carolina Chloride appeals the Master-in-Equity's order granting the South Carolina Department of Transportation's motion to dismiss. On appeal,

Carolina Chloride argues the Master erred in finding (1) Carolina Chloride's property did not abut Farrow Road and (2) Carolina Chloride failed to exhaust available administrative remedies prior to filing suit. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether Carolina Chloride's property did not abut Farrow Road: *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009) ("In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law. The [c]ourt will not disturb the [Master]'s findings unless they are found to be without evidence that reasonably supports those findings."); *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 435, 706 S.E.2d 501, 504 (2011) ("The elements of an action for an inverse condemnation are: (1) affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is for a public use."); *id.* ("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."); *id.* ("A property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless whether he had additional access to and from another public road."); *Mosteller v. Cnty. of Lexington*, 336 S.C. 360, 365, 520 S.E.2d 620, 623 (1999) ("Abut' means to be contiguous, or border on; to bound upon; to end, end at, or terminate, to join at a border or boundary; to meet; to touch at the end or side." (quoting 1 C.J.S. at 397 (1985))).

2. As to whether Carolina Chloride failed to exhaust available administrative remedies prior to filing suit: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

AFFIRMED.

WILLIAMS, THOMAS, and MCDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

JAN 17 2017
SC Court of Appeals

Joseph M. Strickland, Master-in-Equity

Case No. 2016-001440

Carolina Chloride, Inc., ...Appellant,

v.

South Carolina Department of Transportation, ...Respondent.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court improperly held that Carolina Chloride's property did not abut Farrow Road.
- II. Whether the Circuit Court erred in finding Carolina Chloride failed to exhaust its administrative remedies.

STATEMENT OF THE CASE

Appellant Carolina Chloride, Inc. ("Carolina Chloride") commenced the instant action against Respondent South Carolina Department of Transportation ("SCDOT") to recover just compensation for the taking of its vested property right. (R. p. 41). Carolina Chloride's inverse condemnation claim arises from SCDOT's closure of the grade crossing at Killian Road and Farrow Road in Richland County, which substantially reduced access to Carolina Chloride's property.

After filing its Answer, SCDOT moved to dismiss pursuant to Rule 12(b)(6), SCRCPP. Thereafter, Carolina Chloride amended its Complaint and SCDOT filed an Answer to the Amended Complaint. (R. pp. 48, 53). Ultimately, SCDOT's motion to dismiss was denied. (R. p. 29).

After engaging in discovery, Carolina Chloride filed a motion for summary judgment, contending it suffered a compensable taking as a matter of law and was entitled to just compensation. (R. p. 60, 63-73). After a hearing, the Circuit Court issued an order granting Carolina Chloride's motion for summary judgment. (R. p. 18).

SCDOT appealed the Circuit Court's Order. On July 21, 2010, pursuant to Rule 204(b), SCACR, the appeal was certified for review by the South Carolina Supreme Court.

The Supreme Court reversed the Circuit Court's Order granting summary judgment in favor of Carolina Chloride. See Carolina Chloride, Inc. v. South Carolina Dep't. of Trans., 391 S.C. 429, 706 S.E.2d 501 (2011) (R. p. 12). The Court held, inter alia, that a question of fact remained regarding whether "SCDOT's actions constituted a taking. Specifically, there is a question whether respondent had an easement of access as an abutting landowner to Farrow Road." See id. at 435, 706 S.E.2d at 504 (R. p. 15).

The case was remanded to the Circuit Court. A trial was held on October 20, 21, and 22, 2014, where Appellant and Respondent presented witness testimony and documentary evidence. The Court also viewed the subject property in Richland County on October 22, 2014 to put the premises into evidence.

By order dated January 15, 2016, the Circuit Court held Appellant did not demonstrate the right to construct a drive entrance onto Farrow Road for the reason that its property does not abut Farrow Road. Accordingly, the Circuit Court dismissed Appellant's Complaint. (R. p. 3)

This appeal follows.

STATEMENT OF FACTS

From November 1996 until November 2006, Carolina Chloride owned a 7.67 acre tract of land located at 600 Killian Road in Richland County (the "Property"). (R. p. 75). Carolina Chloride's use of the property was initially for the storing and distributing of calcium chloride, a chemical used to control dust and ice on road, as well as to treat drinking water. Carolina Chloride later expanded its operations to include commercial storage units, which it rented out to the public. Robert Morgan, former owner and president of Carolina Chloride, invested substantial sums in acquiring the subject property and developing the various operations on it.

The Property is located at the southeastern corner of the intersection of Killian Road and Farrow Road, abutting both roads. (R. p. 77). A railroad track runs parallel to Farrow Road adjacent to the property. (*Id.*). Carolina Chloride enjoyed an easement allowing it access to and from the Property via Killian Road and Farrow Road.

SCDOT entered into an agreement dated July 20, 2004 with Norfolk Southern Railway Company, a Virginia corporation (the "Railroad"), whereby SCDOT would eliminate the grade crossing at Killian Road and Farrow Road (identified as Mile Post R-95.89). The elimination of the grade

crossing was made in exchange for the Railroad paying approximately \$116,000 toward construction (5% of the estimated total of \$2,313,152.80) of an overpass structure further up the railway line (Mile Post R-95.65) near the Town of Killian in Richland County. (R. p. 19).

In January 2006, SCDOT began blocking and did close the access to the Property from Farrow Road. Furthermore, it eliminated access to the Property from the portion of Killian Road west of Farrow Road. As a result of the elimination of the grade crossing, Carolina Chloride lost access to the Property in three of four directions. (R. p. 75). The only remaining way to access the property was via Killian Road west of the intersection with Farrow Road. Specifically, Carolina Chloride no longer had access to Farrow Road by turning left onto Killian Road from the subject property and crossing the Railroad's tracks. Instead, Carolina Chloride was compelled to take a circuitous and lengthier route, by turning right onto Killian Road, then right onto Longtown Road, and travel around the back of the property to the point where Longtown Road intersects Farrow Road.

The purpose of SCDOT's actions was to close the railroad crossing in accordance with the aforementioned agreement with the Railroad. Carolina Chloride contends this closing resulted in the taking of its easement.

Following closure of the railroad grade, Carolina Chloride sold the property for much less than what it was worth due to, inter alia, the lack of direct access to Farrow Road, a main thoroughfare in that part of the county. (R. p. 76).

Carolina Chloride subsequently brought this inverse condemnation action against SCDOT, seeking damages for the taking of the easement. (R. pp. 39, 48). After engaging in discovery, Carolina Chloride moved for summary judgment, arguing the closing of the grade crossing constituted a taking of its property as a matter of law. (R. pp. 60, 63).

The Circuit Court granted summary judgment in favor of Carolina Chloride. The Circuit Court initially held Hardin v. South Carolina Department of Transportation, 371 S.C. 598, 641 S.E.2d 437 (2007), which was decided after the closing, did not apply to the case at hand, but should have only prospective application because the decision created a new right. According to the Circuit Court, Carolina Chloride suffered a taking under the pre-Hardin special injury test.

In the alternative, the Circuit Court held Carolina Chloride prevailed even if Hardin did apply to the instant case. The Circuit Court reasoned the Property abutted both Killian Road and Farrow Road, and Carolina Chloride,

therefore, possessed an easement for access to both roads. Because the grade closing resulted in Carolina Chloride's inability to access Farrow Road, the Circuit Court held Carolina Chloride suffered a taking of its property as a matter of law. (R. p. 18).

The Supreme Court reversed the Circuit Court. Carolina Chloride v. South Carolina Dept. of Transp., 391 S.C. 429, 706 S.E.2d 501 (2011) (R. p. 12). As an initial matter, the Circuit Court held that Hardin applies retrospectively because Hardin did not create a "new right or cause of action, but, rather restated the focus in determining whether a road re-configuration amounts to a taking." Id. at 433, 706 S.E.2d at 503 (R. p. 14).

The Court further held that the Circuit Court erred in granting summary judgment in favor of Carolina Chloride. The Court noted that there was no question that SCDOT's closing of Killian Road was an affirmative conduct of a government entity. However, the Court held that "there remains a genuine issue of material fact whether SCDOT's action constituted a taking. Specifically, there is a question whether respondent had an easement of access as an abutting landowner to Farrow Road." Id. at 435, 706 S.E.2d at 504 (R. p. 15). The Court concluded: "Because further inquiry into the facts

of this case is desirable to clarify the application of the law, we find summary judgment was not appropriate.” Id. at 436, 706 S.E.2d at 504 (R. p. 15).

On remand, the Court held a three-day hearing on the merits. (R. pp. 93-308). Robert Morgan, former president and owner of Carolina Chloride testified at the hearing. (R. p. 117, line 11). Morgan testified he bought the 7.68 acres near Killian Road. The Property was situated at the corner of Killian Road and Farrow Road. (R. p. 124, lines 5-7). A railroad ran parallel with Farrow Road. (R. p. 124, lines 8-10). Morgan testified of the importance of the railroad to his business, stating that the product used in the processing of calcium chloride was brought to the Property by rail from Louisiana. (R. p. 124, lines 19-25). Morgan testified he had permission to use the rail siding of his property to “transport” the product from the rail cars to the Property. (R. p. 159, lines 9-20).

Morgan testified regarding his substantial improvements to the Property, including clearing big trees and old parts of equipment that was used by another manufacturing company, grading the property, and hauling in dirt, costing nearly \$20,000. He also poured concrete for the tank cars Carolina Chloride stored calcium chloride. Morgan testified estimated his investments in excess of \$200,000. (R. p. 126, line 24 – p. 129, line 6).

Once the product was produced, tractor-trailer tankers, owed by Carolina Chloride, would transport the product to customers. (R. p. 129, line 7 – p. 132, line 8). Most of the product was transported via I-77, and would exit the Property onto Killian Road, turn left, cross the rail crossing and Farrow Road, and continued up on Killian Road to I-77. (R. p. 132, lines 5-20). Morgan admitted there were other avenues to get to I-77 from the Property; however, the alternative route would take 18-wheelers hauling tanks of chemicals through a residential neighborhood. (R. p. 133, line 10 – p. 134, line 13).

Morgan further testified that he used part of the Property as “mini warehouses” or storage units that he rented. (R. p. 131, lines 9-15). Customers of the warehouse business would access the warehouses by coming “down Farrow Road and cross – turn left on Killian Road and then turn right into Carolina Chloride and go to the warehouses just inside.” (R. p. 135, lines 8-11). Therefore, the access from Farrow Road was essential to Carolina Chloride’s warehouse business. (R. p. 135, lines 12-16).

Morgan testified that upon learning of a prospect for the rail grade at Killian Road to be close, he met with Brian Keys, an official at the Department of Transportation, where Morgan expressed his concerns about

the Killian Road closing. (R. p. 137, line 15 – p. 138, line 22). At the time, there was no mention by Keys regarding an agreement of a private encroachment in order to continue accessing Farrow Road to Killian Road. (R. p. 138, line 23 – p. 139, line 4).

In early 2006, SCDOT closed the railroad grade, putting up barricades and tearing the timbers out against the rails. (R. p. 146, lines 7-19). Morgan was never provided any written notice of SCDOT's closure of the road, nor was any compensation provided in related to SCDOT's activities in conjunction with Carolina Chloride. (R. p. 146, line 20 – p. 147, line 1; p. 150, lines 3-14).

Almost immediately upon the railroad closing, fifty percent (50%) of the renters of the warehouse units moved out. (R. p. 150, lines 15-24). Eventually, Carolina Chloride, due to lost profits, sold the business for an estimated \$400,000. (R. p. 151, lines 4-21). Morgan had a previous offer, prior to the railroad closing/Farrow Road closing, for \$1,100,000. (R. p. 155, lines 7-24).

On cross-examination, counsel for SCDOT presented a plat reflecting the Property when Carolina Chloride purchased the property. Counsel for SCDOT differentiated Morgan's testimony regarding the right to use the rail

siding, but not that Carolina Chloride owned the land. (R. p. 173, lines 11-13). Counsel for SCDOT alleged that the statute from 1846, allowing the Railroad to take land in fee simple controlled. (R. p. 178, lines 22 – p. 179, line 3). Counsel for Carolina Chloride concurred that the technical property line for the Property at Killian and Farrow Road did not include the railway. However, whether the Railroad actually owns the property in fee simply is not dispositive of the case, because Carolina Chloride abutted Farrow Road. (R. p. 177, line 17 – p. 178, line 8; p. 182, lines 1-5).

Morgan clarified that the right to the railroad siding that lies on the Railroad property, was by agreement. (R. p. 188, lines 4-13).

Also testifying at trial was Billy Way, Jr., a commercial real estate agent in Columbia. (R. p. 190, lines 4-23). Way was qualified as an expert in commercial real estate brokerage in Richland County. (R. p. 191, lines 4-11). Way testified that it was his opinion that the closing of the Killian Road access affected the value of the property. He testified that access and convenience are factors that are used in valuating a property, and that sellers and buyers use this factor in their valuation, as well. (R. p. 194, line 6 – p. 195, line 22). Way clarified that the loss of value was a result of the

diversion of traffic to another access point of the property due to the closure of the Killian Road access. (R. p. 197, lines 21-23).

Brian Keys, director of Rights of Way for the South Carolina Department of Transportation testified that he participated in the projected involving the widening and location of Clemson Road from US Route 1 to I-77. (R. p. 205, line 16 – p. 208, line 7). The project was split into two parts. (R. p. 209, line 8-9). The second phase of the project occurred in January 2006. (R. p. 210, lines 4-13). During this phase, Keys was program manager and was responsible for the project from its inception through its construction, including the budget and timeframes. (R. p. 210, lines 14-20). Keys confirmed that SCDOT and the Railway had a written contract for purposes of constructing an overpass on Clemson Road where the railway runs underneath the overpass. (R. p. 213, line 13 – p. 214, line 7). Keys testified that the project was estimated at \$2.3 million, \$115,000 of which was contributed by the Railway. (R. p. 215, lines 11-15).

Keys recalled that the intersection of Killian Road and Farrow Road, specifically the rail grade, was closed to facilitate the construction of the overpass at Clemson Road at the request of the Railway, though Keys did not

know why the Railroad petitioned for the rail grade to be closed. (R. p. 215, line 16 – p. 216, line 10).

Keys testified there were plans for a high speed railway between Columbia and Charlotte, North Carolina since the early 2000s and that these plans may have precipitated the rail grade closing. (R. p. 219, line 19 – p. 220, line 16). Keys further testified that there were safety concerns of the rail crossing at Killian Road and Farrow Road and noted that an individual was killed at the location in 1989. (R. p. 221, lines 3-20).

Keys did not recall meeting with Morgan regarding his property and the subject closing rail grade, though he admitted the same during his deposition. Keys admitted a second rail crossing at Longstown Road remained opened and operating during the time period that the subject rail grade was closed (at the intersection of Killian Road and Farrow Road). (R. p. 226, line 17 – p. 228, line 10). When asked why the railroad crossed at Longstown Road remained open, while the crossing at Killian Road was closed, Keys testified the Railroad was essentially calling the shots. (R. p. 228, lines 3-14).

Keys disputed that Carolina Chloride's property abutted Farrow Road. (R. p. 228, line 15-17). However, Keys agreed that a property owner would

have an easement to any public highway that the property abuts. (R. p. 229, lines 20-25).

Keys testified SCDOT had a number of public hearings regarding the subject project, though Keys could not confirm that Morgan received notices of the public hearings personally. (R. p. 230, line 16 – p. 231, line 3).

There were right-of-ways affected by virtue of the alterations done to Farrow Road and the landowners received notice of the alterations from the Right-of-Way Office. (R. p. 231, lines 16-22). Keys was not aware of any notice Morgan received from SCDOT regarding the closure of the railroad crossing at Killian Road. (R. p. 231, line 23 – p. 232, line 14).

The Railroad was responsible for removing the crossing; SCDOT removed anything up to the right-of-way. (R. p. 232, line 18 – p. 234, line 3). Keys believed that a railroad can unilaterally tear up tracks and create a break in the road regardless of any permission granted by the highway department who owns the adjoining roads. (R. p. 234, line 4-22). However, Keys confirmed that in this instance, there was a bilateral agreement between the Railroad and SCDOT. (R. p. 234, lines 1-16). Keys agreed that the concurrence of the Railroads petition to remove the rail crossing was affirmative conduct of the government. (R. p. 235, lines 18-23).

Keys testified that according to statute, he did not take it upon himself or SCDOT, unilaterally, to close the rail grade crossings, nor did SCDOT have any role in building a high-speed rail line. (R. p. 238, line 8 - p. 240, line 16). Keys acknowledged SCDOT's right-of-way provided by agreement with the Railroad. (R. p. 242, line 20 - p. 244, line 2). Keys testified that to his knowledge, the agreement represented SCDOT's only interest in the crossing at Killian Road and Farrow Road. (R. p. 244, lines 3-6).

Keys testified that the state typically acquires land for highways by purchasing the land in fee simple interest. (R. p. 260, lines 1-4). With regard to the subject land, the state had taken fee simple interest and not just right-of-way since the 1990s. (R. p. 260, lines 5-9). Keys testified it was his understanding that the agreement between the Railway and state was not an easement or fee simple acquisition, but rather was permission, and that the Railway did not purchase title because it was an active railroad. (R. p. 260, line 10 - p. 261, line 13).

Keys did not recall whether he told Morgan that his property interest ran to Farrow Road in the way of an easement or a right-of-way. (R. p. 264, lines 2-5).

On questioning by the Court, Keys agreed that the definition of “abut” means the sharing a common boundary. Keys opined that Carolina Chloride’s property did not abut Farrow Road because the Railroad has title property in between Farrow Road and Carolina Chloride. (R. p. 281, lines 8-13).

The Circuit Court held that Carolina Chloride’s property did not abut or share a common boundary with the right-of-way of Farrow Road and, therefore, it had no right to a drive entrance onto that road which can be taken by SCDOT. (R. pp. 6-7). The Circuit Court further found Carolina Chloride failed to exhaust its administrative remedies. (R. p. 7). The Court also noted that testimony was presented that SCDOT would have no object to permitting a drive entrance onto Farrow Road to Carolina Chloride. (R. pp. 7-8).

In its Motion to Reconsider, Carolina Chloride contended the Circuit Court overlooked or misapprehended the true aegis of the term “abut,” as it has been defined and implemented by our appellate entities. Stated succinctly, Plaintiff maintains its property abutted Farrow Road and possessed the right of ingress or egress, which was terminated by the closure of the railroad crossing at the intersection of Killian and Farrow Roads. (R. p. 89). Carolina Chloride further alleged it utilized the administrative process

to not avoid. It was not until shortly before trial that the Department advised Carolina Chloride that it had no objection to opening a private drive at the subject location for Carolina Chloride to utilize. (R. p. 90).

The Circuit Court denied Carolina Chloride's Motion to Reconsider, stating that it found no reasons to reverse its decision based on "undisputed evidence that it does not abut." (R. p. 1-2). The Circuit Court further stated that SCDOT has no object to permit a drive entrance to the subject property. (Id.). The Circuit Court found SCDOT was never given an opportunity to find an engineering solution among the parties and the Railroad prior to the sale of the property. Accordingly, the Circuit Court denied Carolina Chloride's petition. (Id.)

On July 8, 2016, Carolina Chloride filed its Notice of Appeal. (R. p. 311).

STANDARD OF REVIEW

An appellate court's scope of review of a trial court's findings in a case tried without a jury extends merely to the correction of errors of law. Moseley v. All Things Possible, Inc., 395 S.C. 492, 719 S.E.2d 656 (2011). In an action tried by the Circuit Court, without a jury, the judge's findings of fact have the same force and effect as a verdict of a jury and will not be reversed upon appeal unless the circuit court committed some error of law leading to an erroneous conclusion or unless the evidence is reasonably susceptible of the opposite conclusion only. Columbia Venture, LLC v. Richland County, 413 S.C.423, 776 SE.2d 900 (2015). Stated succinctly, findings of fact by a trial judge will not be disturbed on appeal unless found to be without evidence which reasonable supports them. Horry Telephone Co-op., Inc. v. City of Georgetown, 408 S.C. 348, 759 S.E.2d 132 (2014).

LAW/ANALYSIS

I. Carolina Chloride's Property Abutted Farrow Road

The Circuit Court erred in finding that Carolina Chloride's property did not abut Farrow Road and, therefore, there was not taking by SCDOT. Carolina Chloride avers the Circuit Court overlooked or misapprehending the term "abut" as it has been defined and implemented by our appellate entities.

In Hardin v. South Carolina Dept. of Transp., 371 S.C. 598, 641 S.E.2d 437 (2007), the Supreme Court enunciated, inter alia, that a property owner in South Carolina has an easement for reasonable access to and from any public road that abuts his property, regardless whether he has additional access to and from another public road. Id., at 606, 641 S.E.2d at 442. At issue in the instant case, therefore, is whether Carolina Chloride's property abuts Farrow Road.

Our appellate courts have defined "abut" to mean "to be contiguous, or border on; to bound upon; to end, end at, or terminate, to join at a border or boundary; to meet; to touch at the end or side." Mosteller v. Cnty. of Lexington, 336 S.C. 360, 365, 520 S.E.2d 620, 623 (1999) (quoting 1 C.J.S. at 397 (1985)). **However, our courts have also held "abut" does not always mean there must be actual contact.** See id. For example, property may still be deemed to abut a road when there is some intervening, natural barrier like a stream or river. Id. (citing Anderson v. Town of Albemarle, 182 N.C. 434, 109 S.E. 262 (1921)).

Admittedly, our courts appear not to have reached a determination of whether an intervening man-made barrier like a railroad bed in a similar

takings dispute; however, Carolina Chloride asserts a railroad bed is analogous to the steam or a river example referred to in Mosteller.

Further, there have been holdings by our appellate entities in analogous disputes involving annexation, which have held that man-made conditions, such as roadways, do not destroy contiguousness and thus aid in the Court's disposition in the case at bar. See, e.g., St. Andrews Pub. Serv. Dist. V. City Council of City of Charleston, 339 S.C. 320, 529 S.E.2d 64 (Ct. App. 2002), rev'd on other grounds by 342 S.C. 602, 564 S.E.2d 647 (2002); see also Eldridge v. South Carolina Dept. of Transp., 384 S.C. 548, 552-53, 683 S.E.2d 483, 485 (2009);¹ Sonoco v. South Carolina Dept. of Rev., 378 S.C. 385, 662 S.E.2d 599 (2008).

¹ At issue in Eldridge v. South Carolina Dep't of Transp., 384 S.C. 548, 683 S.E.2d 483 (2009), was whether "on premises" signs for private businesses on a median on a public highway running through the town of Greenwood were actually "on premises." The median was situated upon an abandoned railroad right-of-way. A county ordinance defining "on premises" signs was interpreted by a special referee to be to be located on the actual property where the business is located. The Department of Transportation also concluded that such signs were not in fact "on premises" because they were not contiguous with, adjacent to, or adjoining the businesses on either side of the road the signs were advertising and thus there would be no taking if the signs were taken down. The Supreme Court, applying, inter alia, its holding in Sonoco v. South Carolina Department of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008), held these signs were in fact "on premises" notwithstanding the physical separation between the subject businesses and

their signs due to the intervening state-owned highway. The Eldridge Court held contiguousness is to be broadly interpreted and that an intervening land owner does not necessarily destroy contiguousness in South Carolina.

[T]his Court [has] acknowledged that the term “contiguous” has been broadly interpreted. Sonoco v. SC Dep’t of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008), citing Kizer v. Clark, 360 S.C. 86, 90–91, 600 S.E.2d 529, 532 (2004) (recognizing that marshlands and creeks do not defeat town’s contiguity for annexation purposes); Mosteller v. County of Lexington, 336 S.C. 360, 364–65, 520 S.E.2d 620, 623 (1999) (explaining the term “contiguous” and stating “ ‘[a]but’ means to be contiguous ... [h]owever, abut does not always mean there must be actual contact”).

In Sonoco, we went further and distinguished between “contiguous” in a lay or secondary sense, versus in legal contemplation, stating, “In the legal field, it has been defined as: ‘[i]n close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded by or traversed by.’ Black’s Law Dictionary 290 (5th ed.1979).” 378 S.C. at 391, 662 S.E.2d at 602. Significantly, S.C. Code Ann. § 5–3–305 is also cited in Sonoco; it states, in part:

For purposes of this chapter, “contiguous” means property which is adjacent to a municipality and shares a continuous border. Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous

In St. Andrews Public Service District, a public service district brought a declaratory judgment action, challenging city of Charleston ordinances that annexed property into the city. An issue extant in the dispute was whether the annexation ordinances were unauthorized by law because the properties annexed were not contiguous to the city's existing boundaries. Specifically,

border, the intervening connector does not destroy contiguity.

In *Sonoco*, we ultimately held a taxpayer's office buildings were subject to property tax because the public road and railroad tracks did not defeat contiguity of the plant and office buildings. We find the issue presented here is squarely controlled by our opinion in Sonoco; we find the contiguity requirement is met here such that for purposes of the applicable ordinance, the signs may be considered "on premises."

Further support for this result is found in the definition of "adjacent." Black's Law Dictionary, 38 (5th Ed.1979) defines it adjacent as "lying near or close to; sometimes, contiguous, neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch."

We find the Court of Appeals and Referee unduly restricted the definition of "on premises." Given the liberal construction afforded the definition of "contiguity" in Sonoco, we find the Property between the Road's separation by the roadway does not defeat contiguity, such that the signs may be considered "on premises" for purposes of the ordinance. Accordingly, the Court of Appeals opinion is reversed, and the case is remanded to the Referee for calculation of damages.

Id. at 552-53, 683 S.E.2d at 485 (emphasis added).

the public service district alleged the city illegally annexed roads to achieve contiguity to properties that were not otherwise contiguous to the city. In its analysis, the Court stated:

Courts have generally held that contiguous is synonymous with the terms “adjacent to” or “adjoining.” Erwin S. Barbre, Annotation, What Land is Contiguous or Adjacent to Municipality so as to be Subject to Annexation, 49 A.L.R.3d 589, 599 (1973). Our Supreme Court explained, “The statutory word ‘contiguous’ must be afforded its ordinary meaning of ‘touching.’ Bryant v. City of Charleston, 295 S.C. 408, 410, 368 S.E.2d 899, 901 (1988). To achieve contiguity, **actual physical touching of the properties is not required**. The Supreme Court has rejected an argument that the annexed parcels must have the additional qualifications of unity, substantial physical touching, or a common boundary.

Id. at 324-25, 529 S.E.2d at 66 (Ct. App. 2000).

The St. Andrews Public Service District Court held there was no contiguousness:

In the present case, the Charleston City Council attempts to establish contiguity, not by merely crossing a roadway to annex an adjacent property, but by annexing the length of a road to establish a common boundary. In essence, it argues that because the City’s current property abuts a roadway, any parcel that abuts the same roadway is necessarily contiguous if the roadway is also annexed.

...

That kind of annexation is not authorized by the law of this state.

Id. at 326, 529 S.E.2d at 67.

However, in its review, the Supreme Court did find contiguousness via extension of the annexation of the bordering roadways. St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston, 349 S.C. 602, 606, 564 S.E.2d 647, 649 (2002).

After the opinion in St. Andrews was filed, the General Assembly enacted South Carolina Code § 5-3-305, which defines “contiguous” as the term applies to annexation and further states:

Contiguity is not establish by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another; **whoever, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous border, the intervening connector does not destroy continuity.**

S.C. Code Ann. § 5-3-305 (2015) (emphasis added).

The Circuit Court committed an error of law by apply a rigid definition of “abut.” Rather, under Mosteller, Sonoco, and Eldridge, it is abundantly clear that Carolina Chloride’s property and Farrow Road need not touch in order to be continuous (i.e., abut). Moreover, but for the intervening railroad grade, Carolina Chloride’s property and Farrow Road would be directly

adjacent and share a continuous border. By analogy of Mosteller, Sonoco, and Eldridge, the Railroad's railway bed does not destroy contiguity. Carolina Chloride avers the Circuit Court overlooked or misapprehended the true aegis of the term "abut," as it has been defined and implemented in these cases. Accordingly, Carolina Chloride respectfully requests the Court reverse the Circuit Court's findings.

II. Additional Basis for Dismissal: Purported Failure to Exhaust Administrative Remedies

In its Order, the Court determined that Plaintiff did not make a meaningful request to allow Defendant to exercise its discretion concerning the road closure. This finding apparently was an additional basis for dismissal. Respectfully, the Court overlooked or misapprehended the testimony of Robert Morgan, who detailed several meetings and other efforts he undertook prior to the road closure with the express purpose of being able to continue using the access to Farrow Road. (R. p. 137, line 15 – p. 142, line 9). As detailed by Morgan, he made it clear to SCDOT's engineering representative that he was aggrieved by the Department's apparent consideration of closing the crossing. (R. p. 137, line 15 – p. 142, line 9).

Moreover, at no point prior to the road closure did SCDOT advise Morgan that SCDOT would have no objection to permitting a drive entrance onto Farrow Road. It was only shortly before the trial of this case and long after Carolina Chloride sold its operations and land at the subject parcel did SCDOT advise Morgan of the right to apply for a drive entrance. In the April 8, 2014, letter from counsel to SCDOT, it was represented: “[T]his Department never argues that an abutting owner to a State Highway does not have the right to enter that highway as long as the land affords a safe and suitable point for entry. The question, therefore, is who is the abutting owner vis-à-vis the plaintiff and the railroad. Our engineers have investigated this location and would have no objection to the opening of a private drive at this location.” (R. p. 309). This offer, of course, was too little, too late.

Carolina Chloride pursued administrative remedies concerning the road closure; however, SCDOT disregarded Carolina Chloride’s position. Carolina Chloride’s suit for inverse condemnation was therefore appropriate. Accordingly, the Circuit Court erred in finding Carolina Chloride failed to utilize the administrative process to resolve its claim.

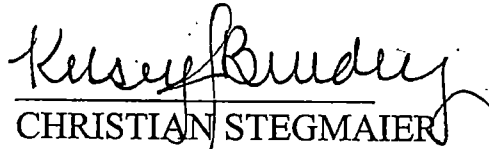
CONCLUSION

Based on the foregoing, Carolina Chloride avers the Circuit Court erred in defining “abut” and its application of “abut” to the instant case. Furthermore, the Circuit Court erred in finding Carolina Chloride failed to exhaust its administrative remedies in resolving its claim against SCDOT. Accordingly, Carolina Chloride respectfully requests the Court reverse the Circuit Court.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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APPELLANT'S FINAL BRIEF

Columbia, South Carolina
January 16, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

RECEIVED

JAN 24 2017

SC Court of Appeals

Case No. 2016-001440

Carolina Chloride, Inc., ...Appellant,

v.

South Carolina Department of Transportation, ...Respondent.

CERTIFICATE OF COUNSEL

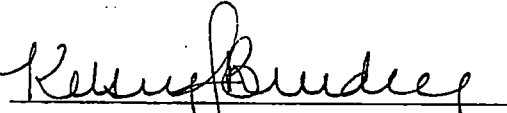
The undersigned certifies that Appellant's Final Brief and Appellant's
Final Reply Brief complies with Rule 211(b), SCACR.

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Columbia, South Carolina
January 24, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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JAN 11 2017

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

Joseph M. Strickland, Circuit Judge

Appellate Case Number 2016-001440

Carolina Chloride, Inc. Appellant,

v.

South Carolina Department of Transportation Respondent.

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court correctly held as a finding of fact that Carolina Chloride owned no property adjoining Farrow Road on which to base a direct abutter's easement onto that road?
2. Whether the trial court's finding of non-abutting is reasonably supported by the evidence?
3. Whether the trial court correctly held that Carolina Chloride failed to follow statutory procedures to apply for an encroachment permit to allow Respondent to mitigate its damages prior to filing suit in inverse condemnation?

STATEMENT OF THE CASE

This is Carolina Chloride's appeal of a decision of the Circuit Court for Richland County in an inverse condemnation case involving access rights to a highway. The trial court (Hon. Joseph M. Strickland, Special Circuit Judge) had originally granted summary judgment to the plaintiff finding a taking. Respondent appealed and the Supreme Court reversed pursuant to its decision in Hardin v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007), finding that, of the two easements held by a landowner with respect to public roads, Carolina Chloride did not lose its rights to access the general system of roads as a result of the closing of the rail/highway grade crossing at Killian and Farrow Roads because it could still travel east on Killian Road with little difficulty. However, because the case was decided on summary judgment, there had been no determination of whether the landowner actually owned any of the land adjoining Farrow Road that would support its entitlement to the second easement constituting access rights—an abutter's direct, on-off, easement to enter an adjoining highway. The Court remanded the case for that sole determination.

After a trial October 20, 21, and 22, 2014, the trial court found that Carolina Chloride could not prove its ownership of the land, rather the greater weight of evidence, including its own title and the admission of its principal, supported ownership by the Norfolk Southern Corporation and not Carolina Chloride. As a secondary holding, the court found that the landowner had never availed itself of the procedures set forth in S.C. Code Ann. §57-5-1080 (Rev. 2006) to apply for a permit for a drive entrance onto Farrow Road. Thus, the Department had been deprived of its right to administratively resolve

this matter before being haled into court. Moore v. Sumter County Council, 300 S.C. 270, 272, 387 S.E.2d 455, 457 (1990).

STATEMENT OF FACTS

We believe that all facts necessary to affirm Judge Strickland's Order and dismiss this appeal are contained in that Order. R.p. 3. Specifically, the Judge found upon undisputed evidence, that the Norfolk Southern Railroad and not Carolina Chloride owned the land abutting Farrow Road at this location and was thus the only entity with access rights to that highway. Further, the court found that Appellant never availed itself of the statutory right all landowners abutting State highways possess to apply for an encroachment permit to enter that highway across the public right-of-way. We respond to Appellant's specific fact statements as follows:

At page 5, Appellant states that its property is located "at the southeastern corner of Killian Road and Farrow Road, abutting both roads." This is incorrect. Both Appellant's title and plat and the testimony of its principal and the concession of its counsel prove that its land abutted the land of the railroad and not Farrow Road. R.pp. 173, 177-78, 181-82, 188.

Beginning at the bottom of page 5 and continuing onto page 6, Appellant appears to imply that the arrangement negotiated between the Department and Norfolk Southern to replace the grade crossing at Farrow and Killian with an overpass at nearby Clemson Road was somehow improper. In fact this project was pursuant to the legislative policy contained in S.C. Code Ann. §58-15-1635 (Supp. 2008) where the General Assembly directs the highway department to close highway/rail grade crossings where feasible.

The Department had no property rights in the section of Killian Road crossing the land and tracks of Norfolk Southern; rather, that crossing existed by the permission of and sufferance of the railroad company. Numerous Code sections provide for participation by railroads of the cost of replacing grade crossings with overpasses, underpasses, or in improving them. See, e.g., S.C. Code Ann. §§1660, 1930. Here, the Department negotiated a 5% cost participation by the railroad.

In the first full paragraph on page 6, Appellant complains of the inconvenience the new traffic pattern caused it. However, this discussion is irrelevant. The Supreme Court reversed the Circuit Court's holding regarding this factor and remanded the case to determine whether Appellant owned the land adjoining Farrow Road and thus possessed a direct abutter's access rights to that highway. The reversal was pursuant to its decision in Hardin v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007) where, in defining a landowner's access rights, the Court stated,

Further, as long as a landowner still has access to the public road system, this easement is unaffected [footnote omitted]. This reasoning is in line with the notion that a landowner has no right to access abutting roads in more than one direction. See 73 A.L.R.2d 689, 691-98.

Id. 641 S.E.2d at 442.

In any event, the general road system serving Appellant and others was improved by the project. Named the "Clemson Road/Northern Arterial" project, the improvements were for the purpose of connecting I-20 on the east with I-77 on the west. Commercial and industrial shipping in the area in general is greatly enhanced.

Beginning at the first full paragraph on page 9, Appellant discusses the business's use of the railroad siding in shipping its product. Appellant does not connect this

discussion to any argument as to how the highway grade crossing affected this function. The rail siding lies on its side of the tracks and not the Farrow Road side. Appellant could and can continue to use the siding. In any event, the fact that Appellant leased land from the railroad for the siding supports ownership in the railroad and not itself.

From the foregoing paragraph through page 3, Appellant discusses its use of the property and the effect of the grade closure on its business. However, a takings analysis in this regard is not use-based. Rather, the inquiry is whether access rights were taken. See, S.C. State Highway Dept. v. Carodale Associates, 268 S.C. 556, 235 S.E.2d 127, 129 (1977) (“Succinctly, the restriction of ingress and egress to and from one’s property is the right that must be compensated if infringed when a highway is closed by condemnation.”) Should a taking be found the factors Appellant cites may be relevant in determining the diminution of the value of its property. However, this goes to damages and not the issue *vel non* of a taking. In any event, loss of business is not a factor in the damage phase of a condemnation case. S.C. State Hwy. Dep’t v. Bolt, 242 S.C. 411, 413, 131 S.E.2d 264, 268 (1963).

At page 15, Appellant complains of the unfairness of Norfolk Southern’s choice to close the Killian Road crossing instead of other grade crossings along Farrow Road. It mentioned the testimony of Brian Keys that the railroad was calling the shots. As mentioned above, the Department had no property interest in the crossing. It existed by permission and at the sufferance of the railroad which was free to revoke it at any time. The Clemson Road project with its planned overpass gave it the opportunity to do so. The closure greatly enhanced traffic safety in the vicinity.

Finally, at the top of page 19, Appellant implies that the Department was somehow obligated to inform him of his access rights. The Department does not undertake to advise all landowners abutting its highways of their property rights. Rather, it reviews driveway permit applications for safety purposes after receipt of applications as required by the Code of Laws.

STANDARD OF REVIEW

We agree with Appellant's exposition of the standard of review and would note that Judge Strickland's finding of fact that Carolina Chloride's land did not abut Farrow Road is not a finding where the evidence is reasonably susceptible to the opposite conclusion only. Columbia Venture, LLC v. Richland County, 413 S.C. 423, 776 S.E.2d 900 (2015). The court's finding was based upon plaintiff's title and plat showing a boundary only with the railroad land and the admission of plaintiff's principal and its attorney that the land belonged to the railroad.

ARGUMENT

I. The trial court correctly held that Appellant's land did not physically abut Farrow Road thus had no pre-existing right to access that road from its property.

In its first argument, Appellant discusses a number of cases in the municipal annexation, real property tax, and regulatory law areas as precedents for its contention that its property actually abuts Farrow Road as a matter of law. As the trial court stated, these cases are not relevant to the instant case that involves actual physical access between a parcel of land and a highway. R.p. 2, 6-7.

Initially, we should respond to Appellant's argument that our Supreme Court's opinion in Mosteller v. County of Lexington, 336 S.C. 360, 365, 520 S.E.2d 620, 623 (1999), supports its contention that it is an abutting landowner. This is incorrect for a number of reasons. First, we believe that the Court's statement in Mosteller that a landowner may be considered an abutting owner where its land is separated only by a stream or river is a mere reference to the common law of South Carolina regarding the ownership of lands beneath non-tidal rivers and streams. South Carolina has never rejected the English rule that a riparian owner's title extends to the centerline of freshwater rivers or streams. State v. Sloan Construction Co., 284 S.C. 491, 328 S.E.2d 84 Ct.App. 1985), cert. denied (S.C. Aug. 12, 1985); Wyche and Finklea, Environmental Law in South Carolina (S.C. Bar 1999), page 235. Secondly, the Court in Mosteller cited a North Carolina case, Anderson v. Town of Albemarle, 182 N.C. 434, 109 S.E. 262 (1921), as authority for the above statement. In Anderson, the North Carolina Supreme Court stated the following:

By the term "abutting property" is meant that between which and the improvement there is no intervening land. Millan v. Chariton, 145 Iowa, 648, 124 N.W. 766.

* * *

Indeed, premises separated from a street by a small stream, but having access to the street by means of bridges, are premises abutting on the street, though the owner of the premises is not the owner of the bed of the stream, and he is liable to assessment provided he has the right of ingress and egress over the intervening land to the improvement.

Id., 109 S.E. 264.

Thus, Mosteller does not support Appellant's contention that its land abuts Farrow Road, that the Court may disregard fee simple ownership of intervening land owned by a third party, nor sanction trespass.

Next, Appellant cites cases involving municipal annexation in support of its argument that findings of contiguousness under those laws equals abutting for present purposes. Those cases are simply inapt to the law governing this case. The General Assembly, which created municipalities in the first place, may prescribe any rules it wishes for expansion of municipal boundaries including the authority to ignore intervening roads, railroads, or even private land. The statutes and cases do not alter fundamental common law regarding titles to land in this State.

Sonoco v. S.C. Department of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008), was a property tax case where the Court held that railroad tracks bisecting property of the same landowner on either side of the tracks did not divide the land into two tracts so that it may be considered a single parcel for tax assessment. This is common real property law. Where a landowner owns the fee estate on each side of railroad tracks and underneath the tracks, the tracks are a mere easement for a particular use and an encumbrance on the underlying land. It does not apply here where the railroad tracks are situated on land owned in fee simple by another person, the railroad.

The unique case history of Eldridge v. South Carolina Dep't of Transportation, 384 S.C. 548, 683 S.E.2d 483 (2009), distinguishes that case from the facts at bar. That case is not contra to the legal principles discussed in the foregoing paragraph. There, as noted in the dissent, a trial judge at one point during the lengthy proceedings had declared that, because the highway lying between plaintiff's larger parcel of land and the area across the road where plaintiff maintained a sign had become vested in the highway department through more than 20 year use as a public road,¹ the State and not plaintiff

¹ We believe this holding to be incorrect. Twenty year use as a public road would only establish a prescriptive easement for use as a public highway. It would not divest the underlying fee owner of its title

owned that strip of property. The majority in that decision did not appear to accept that ruling nor consider it the law of the case. Instead, it decided the case under the principles we discussed above that an easement in another for a use encumbering underlying land does not divide that land. Further, we would note as did the trial court that Eldridge and other cases cited by Appellant define contiguity for administrative purposes such as defining on-premises for outdoor advertising, tax parcels, and the like. Here, Appellant argues that it is entitled to physically cross the land of the Norfolk Southern, asking the Court to divest that landowner of part of its domain.

Finally, we should note that all of the foregoing discussion concerns abutting Farrow Road in the area defined by extending the north and south boundaries of Appellant's property to the edge of that highway's right-of-way. There has been no proof by Appellant that its land shared a boundary with the rectangle that contained the Killian Road crossing of the Norfolk Southern land. At most, Appellant's land touched it at a corner, but it had no right to enter it directly as an abutting owner. Thus, Appellant had no rights to the closed section differing from any other member of the travelling public. The Supreme Court in a similar case, Cherry v. Rock Hill, 48 S.C. 553, 26 S.E. 798 (1897), said

But we do not think that the alteration made in this street at a point where it did not adjoin plaintiff's property can be regarded as the taking of private property for public use. So far as appears from the allegations of the complaint, the only right which the plaintiff had in the street in question was the right to which, in common with all other citizens, he was entitled, of using this street as a public highway. That right is not, in our judgment, private property, protected by the constitution.

nor vest the State with fee ownership. State v. Hughes, 145 S.E.297 (1928). As was held in City of Greenville v. Bozeman, 254 S.C. 306, 317-28, 175 S.E.2d 211, 216 (1970), vacation and abandonment of a public street vests absolute possession and title in the abutting property owners to the centerline and not to the original owner.

Id., 26 S.E.801.

II. Appellant's claim is barred by its failure to give Respondent the opportunity to cure the alleged taking.

Pursuant to S.C. Code Ann. §57-5-1080 (Rev. 2006), a landowner must obtain a permit from the Department of Transportation prior to opening a drive entrance onto a State primary highway. Those permits are granted where the owner proposes an entrance at a "safe and suitable point as determined by engineering principles." Act 621, 1956 S.C. Acts 1594. Appellant has never applied for a permit.

The general rule "that administrative remedies must be exhausted absent circumstances supporting an exception to the rule" is well established in South Carolina. Hyde v. S.C. Dept. of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). At its core, the doctrine of exhaustion serves two main purposes: (1) the protection of administrative agency authority; and (2) the promotion of efficiency. Woodford v. Ngo, 548 U.S. 81, 89, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006). An administrative agency's authority is protected by exhaustion because it gives the agency "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into ... court, and discourages disregard of the agency's procedures." Id. (internal quotation omitted). Efficiency is promoted by the exhaustion doctrine because claims generally can be resolved more rapidly and economically by agency hearings and procedures than by litigation in court. Id. Moreover, "even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." Id.

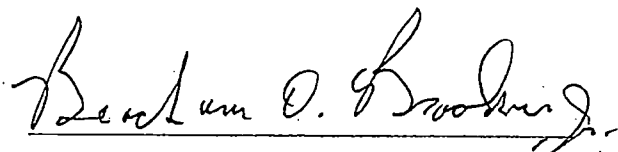
A permit application in this case would give Respondent the opportunity to prove that it owns the strip of land abutting Farrow Road. If so, a permit will be granted and further proceedings before this Court would be rendered unnecessary.

Related to exhaustion, and specific to the law of inverse condemnation, is the principle that a claimant must notify the government of his complaint and afford it the opportunity to correct an alleged taking. Here, Appellant complains that it has sold the land and would not benefit from the cure of a new driveway. It is universally held in the law of inverse condemnation that a claimant must first make a meaningful request to allow governmental agencies to exercise their discretion. Palazzola v. Rhode Island, 533 U.S. 606, 620, 121 S.Ct. 2448, 2459, 150 L.Ed.2d 592 (2001); Moore v. Sumter County Council, 300 S.C. 270, 272, 387 S.E.2d 455, 457 (1990). Appellant's failure to afford the Department the opportunity to mitigate its alleged taking bars the claim herein.

CONCLUSION

This Court should affirm the Order of the Circuit Court on the grounds that undisputed evidence proved that Appellant's land did not abut the highway to which it seeks access. The Court should also affirm the lower court's dismissal of the case on the grounds that Appellant's failure to afford Respondent the opportunity to correct the alleged taking bars its lawsuit.

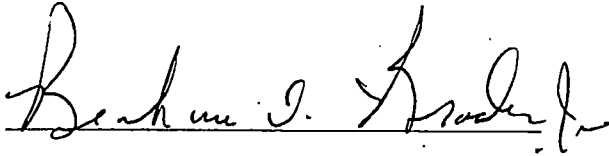
Respectfully submitted,

A handwritten signature in black ink, reading "Benjamin O. Brooking". The signature is written in a cursive style with a horizontal line underneath the name.

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January 9, 2017

I certify that this brief has not been changed from Respondent's Initial Brief except to add references to the Record on Appeal and to correct obvious misspellings.

A handwritten signature in cursive script, reading "Beacham O. Brooker, Jr.", written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Case No. 2016-001440

RECEIVED

JAN 17 2017

SC Court of Appeals

Carolina Chloride, Inc., ...Appellant,

v.

South Carolina Department of Transportation, ...Respondent.

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LAW/ANALYSIS

I. Carolina Chloride's Property Abuts Farrow Road

Respondent alleges that the definition of “abut” as articulated in Mosteller v. County of Lexington, 366 S.C. 360, 365, 520 S.E.2d 620, 623 (1999) is inapplicable to the facts of this case. Specifically, Respondent maintains the Court’s statement in Mosteller that a landowner may be considered an abutting owner where its land is merely separate by a stream or river references South Carolina common law regarding ownership of lands beneath non-tidal rivers and streams. (Brief of Resp., p. 7). However, it is important to note that the Court makes no formal reference to South Carolina common law in providing its definition of abut and cited exceptions to whether land abuts albeit with some type of barrier. See Mosteller, 366 S.C. 365, 520 S.E.2d 623.

Indeed, there appears to be no South Carolina case law where our courts have reached whether property may still be deemed to “abut” a road when there is an intervening, man-made barrier, i.e. a railroad bed.

Furthermore, Eldridge v. South Carolina Dept. of Transp., 384 S.C. 548, 683 S.E.2d 483 (2009) and Sonoco v. South Carolina Dept. of Transp., 378 S.C. 385, 662 S.E.2d 599 (2008) favorably cites Mosteller for the

principal that “[a]but means to be contiguous ... [h]owever, abut does not always mean there must be actual contact.” Eldridge, at 552-53, 683 S.E.2d at 485; Sonoco, 378 S.C. at 393, 662 S.E.2d at 603. It is clear the factual distinctions among the case law cited by Carolina Chloride are without a difference as the Court has repeatedly relied upon the definition of “abut” and “contiguous” throughout factually distinguishable cases.

Therefore, according to the definitions of “abut” and “contiguous” as articulated by our courts, Carolina Chloride’s property abuts Farrow Road.

II. Carolina Chloride Pursued Administrative Remedies Concerning the Road Closure

Respondent alleges Carolina Chloride failed to exhaust its administrative remedies to allow Respondent the opportunity to cure the taking. However, Respondent has seemingly ignored the testimony of Robert Morgan, who detailed several meetings and other efforts he undertook prior to the road closure with the express purpose of being able to continue using the access to Farrow Road. (R. p. 137, line 15 – p. 142, line 9). Because Morgan repeatedly efforts pursued administrative remedies regarding the road closure, Carolina Chloride’s suit for inverse condemnation is appropriate.

CONCLUSION

For the reasons stated within the argument of Appellant's Brief and Reply Brief, Appellant respectfully requests this Court reverse the Circuit Court.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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APPELLANT'S FINAL REPLY BRIEF

Columbia, South Carolina
January 17, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

RECEIVED

JAN 24 2017

SC Court of Appeals

Case No. 2016-001440

Carolina Chloride, Inc., ...Appellant,

v.

South Carolina Department of Transportation, ...Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Brief and Appellant's
Final Reply Brief complies with Rule 211(b), SCACR.

[SIGNATURE PAGE FOLLOWS]

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Columbia, South Carolina
January 24, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JAN 17 2017
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Case No. 2016-001440

Carolina Chloride, Inc., ...Appellant,

v.

South Carolina Department of Transportation, ...Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

In the Court of Common Pleas
Fifth Judicial Circuit

Civil Action Number 2007-CP-40-2833

RICHLAND COUNTY
FILED
2016 JUN -6 AM 9:59
JEANNETTE M. MCBRIDE
C.C.P. & G.S.

Carolina Chloride, Inc.,

Plaintiff,

vs.

South Carolina Department of Transportation,

Defendant.

Order on Plaintiff's Rule 59 Motion

This matter came before me in open court on May 24, 2016, on Plaintiff's Motion to Reconsider this Court's Order of January 26, 2016, dismissing the Complaint. Counsel for Plaintiff and Defendant appeared and Plaintiff submitted a memorandum in support of its motion.

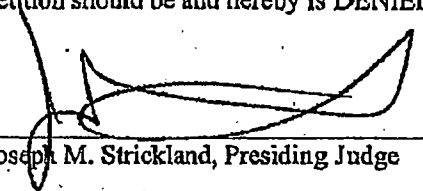
This case was before the Court on remand from the South Carolina Supreme Court. Carolina Chloride, Inc. v. S.C. Dep't. of Transportation, 391 S.C. 429, 706 S.E.2d 501 (2011). Under the terms of that remand, I was to determine the ownership of the strip of land surrounding the Norfolk Southern railroad tracks lying between Plaintiff's property and Farrow Road. A trial was held in Columbia October 20, 21, and 22, 2014, where plaintiff and defendant presented witness testimony and documentary evidence. As part of that evidence, both parties entered copies of Plaintiff's title to its land and the associated recorded plat. Those instruments clearly show that Plaintiff's land shares a boundary with the lands of the railroad company and not with Farrow Road. Additionally, Plaintiff's counsel stipulated that his client did not own the property beneath the railroad. Trial transcript, page 90.

Plaintiff's present motion argues that the Court overlooked some South Carolina case law regarding the contiguity of purportedly separate tracts for property tax and other regulatory law purposes. These cases are distinguishable from the subject matter of the case at bar. Here, Plaintiff must physically cross the lands of another by laying an asphalt drive for vehicular travel across the land and tracks of the railroad. Absent consent of the railroad, this would be trespass. "Abut," as defined by our Supreme Court in another inverse condemnation access case, Mosteller v. County of Lexington, 336 S.C. 360, 365, 520 S.E.2d 620, 622-23 (1999), means "...to join at a border or boundary; to meet; to touch at the end or side." If Plaintiff abuts Farrow Road, it would have the right to enter the road. However, I find no reason to reverse my decision made on the basis of undisputed evidence that it does not abut.

Finally, Plaintiff objects to the secondary holding in the Order that it did not satisfy the condition precedent to maintain an inverse condemnation case that it make a clear request to the governmental entity sued so that it may correct the alleged taking. Palazzolo v. Rhode Island, 533 U.S. 606, 620, 121 S.Ct. 2448, 2459, 150 L.Ed.2d 592 (2001); Moore v. Sumter County Council, 300 S.C. 270, 272, 387 S.E.2d 455, 457 (1990). The permit system for drive entrances onto State highways is laid out in Article 7 of Chapter 5, Title 57, S.C. Code. Defendant has stated that it has no objection to a drive entrance for the abutting owner at this location. The Defendant was never given the opportunity to find an engineering solution among the parties hereto and the railroad prior to Plaintiff's sale of the property and filing suit for money damages.

For the foregoing reasons, Plaintiff's petition should be and hereby is DENIED.

AND IT IS SO ORDERED.



Joseph M. Strickland, Presiding Judge

Columbia, S.C.
May 25, 2016

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

In the Court of Common Pleas
Fifth Judicial Circuit

Civil Action Number 2007-CP-40-7633

Carolina Chloride, Inc.,

Plaintiff,

vs.

South Carolina Department of Transportation,

Defendant.

Order

2016 JAN 25 PM 1:57
CLERK OF COURT
FIFTH JUDICIAL CIRCUIT
RICHLAND COUNTY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

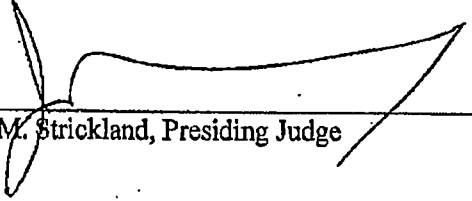
adjoining owner. Sight distance and other factors do not cause it to be an unsafe location. Thus, there is no case or controversy between the Department and that landowner even if Carolina Chloride could be proven to be the adjoining owner. In general, courts may only consider cases when a justiciable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

Conclusion

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

Complaint should be and hereby is DISMISSED.

AND IT IS SO ORDERED,



Joseph M. Strickland, Presiding Judge

Columbia, S.C.

~~October 27, 2015~~

January 15, 2016

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2007- CP-40-7633

Carolina Chloride, Inc.

South Carolina Department of Transportation

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

Master

Judge Code

Date

For Clerk of Court Office Use Only

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

Christian Stegmaier, Esq.

P O Box 12487

Columbia SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

Beacham O. Brooker, Esq.

P O Box 191

Columbia SC 29201

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

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

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or other markings on the paper.

391 S.C. 429
Supreme Court of South Carolina.

CAROLINA CHLORIDE, INC., Respondent,
v.
SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION, Appellant.

No. 26930.

Heard Nov. 3, 2010.

Decided Feb. 22, 2011.

Synopsis

Background: Property owner brought inverse condemnation action against South Carolina Department of Transportation (SCDOT), seeking damages for lost value of land after SCDOT closed portion of road that property owner used to access another road. The Circuit Court, Richland County, Joseph M. Strickland, Master in Equity, granted summary judgment in favor of SCDOT. Property owner appealed.

Holdings: The Supreme Court, Pleicoñes, J., held that:

^[1] Supreme Court's *Hardin* decision, which abandoned the "special injury" analysis regarding inverse-condemnation claims involving re-configuration of road access, applies retroactively, and

^[2] genuine issue of material fact as to whether SCDOT's actions constituted a taking precluded summary judgment.

Reversed and remanded.

Kittredge, J., filed concurring opinion.

West Headnotes (12)

^[1] **Courts**

⇒ In general; retroactive or prospective operation

Supreme Court's *Hardin* decision, which

abandoned the "special injury" analysis regarding inverse-condemnation claims involving re-configuration of road access and specified that focus in those cases should be how any road re-configuration affects a property owner's easements, applies retroactively. Const. Art. 1, § 13.

2 Cases that cite this headnote

^[2]

Courts

⇒ In general; retroactive or prospective operation

The general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively.

2 Cases that cite this headnote

^[3]

Courts

⇒ In general; retroactive or prospective operation

A judicial decision requires only prospective application when liability is created where formerly none existed.

2 Cases that cite this headnote

^[4]

Judgment

⇒ Particular Cases

Genuine issue of material fact as to whether actions of South Carolina Department of Transportation (SCDOT) in closing portion of first road containing railroad grade crossing near intersection with second road constituted a taking precluded summary judgment in favor of

SCDOT in inverse-condemnation action, which was brought by property owner, which could no longer use first road to directly access second road, which abutted its property. Const. Art. 1, § 13.

Cases that cite this headnote

- [5] **Appeal and Error**
↔Extent of Review Dependent on Nature of Decision Appealed from

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. Rules Civ.Proc., Rule 56(c).

Cases that cite this headnote

- [6] **Judgment**
↔Matters Affecting Right to Judgment

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Rules Civ.Proc., Rule 56(c).

2 Cases that cite this headnote

- [7] **Judgment**
↔Presumptions and burden of proof

In determining whether any triable issues of fact exist, as would preclude granting of summary judgment motion, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Rules Civ.Proc., Rule 56(c).

1 Cases that cite this headnote

- [8] **Eminent Domain**
↔Nature and grounds in general

The elements of an action for an inverse condemnation are: (1) affirmative conduct of a government entity, (2) the conduct effects a taking, and (3) the taking is for a public use. Const. Art. 1, § 13.

4 Cases that cite this headnote

- [9] **Eminent Domain**
↔Nature and grounds in general

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. Const. Art. 1, § 13.

2 Cases that cite this headnote

- [10] **Highways**
↔Right of access

A property owner has an easement for access to and from any public road that abuts his property, regardless whether he has additional access to and from another public road.

Cases that cite this headnote

- [11] **Highways**
↔Right of access

A property owner has an easement for access to and from the public road system.

Cases that cite this headnote

- [12] **Eminent Domain**
⇒ Highways and Streets
Eminent Domain
⇒ Obstruction of access

In inverse-condemnation cases addressing road re-configuration, the focus must be on a landowner's actual property interests; that is, his easements of access to and from the public road.

1 Cases that cite this headnote

the intersection of Farrow Road.¹ After the road closing, respondent could no longer access Farrow Road by turning left onto Killian road and crossing the Norfolk Southern tracks. Instead, respondent had to turn right onto Killian Road, then right onto Longtown Road, and travel around the back of the property to the point where Longtown Road intersects Farrow Road.

*433 Respondent subsequently brought this inverse condemnation action seeking damages for the lost value of its land that purportedly resulted from the taking of its access rights to Farrow Road. The master in equity granted summary judgment in favor of respondent.

Attorneys and Law Firms

**502 Beacham O. Brooker, Jr. and Natalie J. Moore, both of Columbia, for Appellant.

Edward D. Sullivan, Christian Stegmaier, and Amy L. Neuschafer, all of Collins & Lacy, of Columbia, for Respondent.

Opinion

Justice PLEICONES.

*432 Respondent brought this inverse condemnation action against South Carolina Department of Transportation (SCDOT). The master in equity granted summary judgment in favor of respondent. SCDOT appeals. We reverse and remand.

FACTS

Respondent owned a tract of land located at the southeast corner of the intersection of Killian Road (running east to west) and Farrow Road (running north to south). A railroad track owned by Norfolk Southern Corporation (Norfolk Southern) runs parallel to Farrow Road, adjacent to respondent's property. Respondent never had direct access to Farrow Road from its property. Respondent directly accessed Killian Road using a driveway to the right of the railroad track.

**503 In 2006, Norfolk Southern entered an agreement with SCDOT whereby SCDOT closed the portion of Killian Road that contained a railroad grade crossing near

ISSUES

I. Did the master err in finding *Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007) does not apply to this case?

II. Did the master err in granting summary judgment in favor of respondent?

DISCUSSION

I. Applicable Law

[1] SCDOT argues the master erred in finding *Hardin* should only apply prospectively. We agree.

Prior to the Court's decision in *Hardin*, a landowner's ability to recover damages as a result of a re-configuration of road access depended on the location of his land with reference to the road vacated and the effect of the vacation on his rights as an abutting landowner. See *City of Rock Hill v. Coltran*, 209 S.C. 357, 40 S.E.2d 239 (1946). The *Coltran* Court held a landowner is not entitled to recover damages unless he has sustained a "special injury," which is an injury different in kind and not merely in degree from that suffered by the public at large. *Id.* at 368-69, 40 S.E.2d at 243-44.

In *Hardin*, the Court abandoned the "special injury" analysis which previously existed in this state's jurisprudence, and specified that the focus in these cases should be how any road re-configuration affects a property owner's easements. *Hardin*, 371 S.C. at 609, 641 S.E.2d at 443.

[2] [3] "The general rule regarding retroactive application of

judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." *Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989). "Prospective application is required when *434 liability is created where formerly none existed." *Id.*; See also *Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d 85 (2007) (the holding that an adult social host who knowingly and intentionally serves an alcoholic beverage to a person between the ages of 18 and 20 created tort liability where formerly there was none, and thus, the Court's decision should be applied prospectively); *Ludwick v. This Minute of Carolina*, 287 S.C. 219, 337 S.E.2d 213 (1985) (employment law case first recognizing the tort of retaliatory discharge, thereby creating a new cause of action and a new substantive right); *McCaskey v. Shaw*, 295 S.C. 372, 368 S.E.2d 672 (Ct.App.1988) (the Court's recognition of a tort for the negligent infliction of emotional distress created a new cause of action and should be applied prospectively).

We find the master erred in concluding *Hardin* should only be applied prospectively. At the outset, we note counsel for respondent candidly agreed at oral argument that *Hardin* should apply here. We find *Hardin* created no new right or cause of action, but, rather restated the focus in determining whether a road re-configuration amounts to a taking. Thus, *Hardin* applies retrospectively.

**504 II. Summary Judgment

[4] SCDOT argues the master in equity erred in granting summary judgment in favor of respondent. We agree.

[5] [6] [7] When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860.

*435 [8] [9] Private property shall not be taken for public use without the payment of "just compensation." S.C.

Const. art. I, § 13. The elements of an action for an inverse condemnation are: (1) affirmative conduct of a government 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). 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. *Hardin*, 371 S.C. at 604, 641 S.E.2d at 441.

[10] [11] [12] A property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless whether he has additional access to and from another public road. *Hardin*, 371 S.C. at 606, 641 S.E.2d at 442. A property owner also has an easement for access to and from the public road system. *Id.* In cases addressing road re-configuration, the focus must be on a landowner's actual property interests; that is, his easements. *Hardin*, 371 S.C. at 609, 641 S.E.2d at 443.

As explained above, the master in equity erred in finding *Hardin* does not apply to this case. The master, however, went on to state respondent would prevail even under *Hardin*. Specifically, the master found the railroad track did not destroy the contiguity of respondent's property for purposes of determining whether the property abuts Farrow Rd. Thus, the master concluded SCDOT's closing of the grade crossing effected a taking of respondent's easement of access to Farrow Road.

We find the master erred in granting summary judgment in favor of respondent. There is no question respondent satisfied the first element of inverse condemnation, as SCDOT's closing of Killian Road was affirmative conduct of a government entity. Viewing the evidence in the light most favorable to SCDOT, however, we find that while the closure was effected for a public purpose, there remains a genuine issue of material fact whether SCDOT's actions constituted a taking. Specifically, there is a question whether respondent had an easement of access as an abutting landowner to Farrow Road. Respondent's property is separated from Farrow Road by the strip of land surrounding the railroad track, and there has *436 been no evidence presented of the quantum of the estate of that portion of land. Because further inquiry into the facts of this case is desirable to clarify the application of the law, we find summary judgment was not appropriate.

CONCLUSION

Based on our finding the factual record is insufficient for summary judgment, the decision of the master is

REVERSED AND REMANDED.

I concur in result and agree that the presence of a genuine issue of material fact renders summary judgment inappropriate. I write separately because my view of the law is reflected in Justice Waller's dissent in **505 *Hardin v. S.C. Dep't. of Transportation*, 371 S.C. 598, 641 S.E.2d 437 (2007).

TOAL, C.J., BEATTY and HEARN, JJ., concur.

KITTREDGE, J., concurring in a separate opinion.

All Citations

391 S.C. 429, 706 S.E.2d 501

Justice KITTREDGE.

Footnotes

- ¹ This agreement was made pursuant to S.C.Code Ann. § 58-15-1625 (Supp.2009). The agreement also provided for the construction of a highway overpass over the tracks at the next intersection to the north.

End of Document

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The Supreme Court of South Carolina

Carolina Chloride, Inc.,

Respondent,

v.

South Carolina Department of
Transportation,

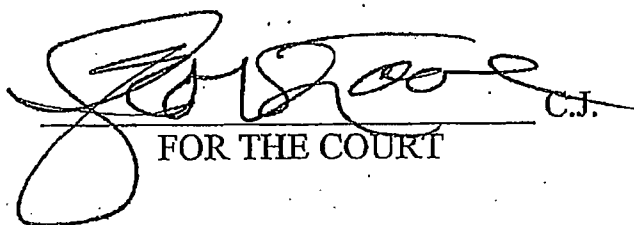
Appellant.

The Honorable Joseph M. Strickland
Richland County
Trial Court Case No. 2007-CP-40-07633

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules,
this appeal is hereby certified for review by the South Carolina Supreme
Court.

IT IS SO ORDERED.


C.J.
FOR THE COURT

Columbia, South Carolina

June 21, 2010

cc: Beacham O. Brooker, Jr, Esquire
Edward D. Sullivan, Esquire
Christian D. Stegmaier, Esquire
The Honorable Tanya Gee

0017

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
CAROLINA CHLORIDE, INC.,)
Plaintiff,)
vs.)
SOUTH CAROLINA)
DEPARTMENT OF)
TRANSPORTATION,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH CIRCUIT
CASE NO: 07-CP-40-7633

ORDER
GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

RICHLAND COUNTY
FILED
09 SEP 18 AM 8:49
JEANETTE W. McBRIDE
C.C.P. & G.S.

Plaintiff Carolina Chloride, Inc. ("Carolina Chloride") brought this action seeking damages for Inverse condemnation against Defendant South Carolina Department of Transportation ("SCDOT"). Carolina Chloride has moved for summary judgment pursuant to Rule 56, SCRCP, on the grounds that there is no genuine issue of material fact. A hearing on Carolina Chloride's motion was held on April 1, 2009. Present at the hearing were Edward D. Sullivan and Claude T. Prevost, counsel for Plaintiff, and Beachum O. Brooker and Natalie J. Moore, counsel for Defendant. Based on the arguments presented, as well as the applicable case law, and for the reasons more fully set forth below, Carolina Chloride's motion is granted.

Carolina Chloride owned a 7.67 acre tract of land located at 600 Killian Road in Richland County (the "Property") from November 1996 until November 2006. The Property is located at the southeastern corner of the intersection of Killian Road and Farrow Road, abutting both roads. Carolina Chloride enjoyed

an easement allowing it access to and from Farrow Road and Killian Road. Carolina Chloride's easement to and from Farrow Road and Killian Road was a vested property right and interest.

A railroad track runs parallel to Farrow road adjacent to the Property. SCDOT entered into an agreement dated July 20, 2004 with Norfolk Southern Railway Company, a Virginia corporation (the "Railroad"), whereby SCDOT would eliminate the grade crossing at Killian and Farrow Road (identified as Mile Post R - 95.89). The elimination of the grade crossing was made in exchange for the Railroad paying approximately \$116,000 toward construction costs (5% of an estimated total of \$2,313,152.80) of an overpass structure further up the railway line (Milepost R-95.65) near the Town of Killian in Richland County, South Carolina.

In January 2006, SCDOT began blocking the access and did close the access to the Property from Farrow Road. Furthermore, it eliminated access to the Property from the portion of Killian Road west of Farrow Road. The purpose of SCDOT's actions was to close the railroad crossing in accordance with the aforementioned agreement with the Railroad, thereby resulting in the taking of Carolina Chloride's easement.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; South Carolina Prop. and Cas. Guar. Assoc. v. Yensen, 345 S.C. 512, 548 S.E.2d 880 (Ct. App. 2001). "Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable

minds cannot differ." McNaughton-Mckay Elec. v. Andrich, 324 S.C. 275, 278, 482 S.E.2d 464, 466 (Ct. App. 1997). To determine whether any material fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001); Yensen, 345 S.C. 512, 548 S.E.2d 880.

"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." Hardin v. South Carolina Dep't of Trans., 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007) (citing Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 80 (2005)). "South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with a person's property interest amounts to an unconstitutional taking." Id. (citing Byrd, 365 S.C. at 656 n.6, 620 S.E.2d at 79). Both Article I, Section 13 of the South Carolina Constitution and the Fifth Amendment to the United States Constitution provide that private property shall not be taken for public use without the payment of "just compensation." Id. at 605, 641 S.E.2d at 441. "Determining whether governmental 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." Id. (emphasis added) (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 130, 131, 98 S.Ct. 2646 (1978)). "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." Id. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)).

The elements of a taking are: (1) affirmative conduct of a government 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 79-80.

In this case, as a matter of fact and law, elements (1) and (3) of a taking, mentioned above, are satisfied. With regard to element (1), it is patently evident Defendant, a government entity, affirmatively acted when it blocked Carolina Chloride's access to Farrow Road. Concerning element (3), it is clear that the construction in this case was for the public's use and benefit.

The analysis of element (2), whether the conduct of the government entity affects a taking, warrants further discussion. For years, South Carolina jurisprudence provided a "special injury" analysis in cases such as these. In City of Rock Hill V. Cothran, 290 S.C. 357, 40 S.E.2d 239 (1946), the South Carolina Supreme Court stated:

The right of a landowner to recover damages because of the vacation of a street depends on the location of his land with reference to the street vacated, or the part of the street vacated, and the effect of such vacation on his rights as an abutting owner. It is well settled that an owner is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large. If it appears that there is a special injury, the owner may recover damages notwithstanding his property does not abut, as in this case, on the part of the street vacated, because this amounts to a 'taking'.

In the absence of a special injury, no recovery will be allowed. The test is, not whether the property abuts, but whether there is a special injury, and the first practical question which

presents itself is whether one whose property does not abut immediately on the part of the street vacated - the part vacated being in the same block between his property and the next connecting cross street- is so specially injured as to be entitled to recover compensation on the ground that his access is cut off in one direction, but not in the opposite direction.

Id. at 368-69, 40 S.E.2d at 243-44.

Under the "special injury" test, it is clear that Plaintiff has suffered a taking. Carolina Chloride's access was not only cut off in one direction, it was cut off in three directions. Prior to closing the crossing, Carolina Chloride could access its property from the north and south off of Farrow Road and west from Killian Road. Today its only access is from the east.

SCDOT relies on the South Carolina Supreme Court's recent ruling in Hardin v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007). In Hardin, the Court expressly overruled decades of well-settled law in which takings of this type were decided by a "special injury" analysis - that is, whether a landowner could prove a closing of a road caused a special injury thereby constituting a taking. SCDOT's reliance on this recent decision is misplaced.

First, Hardin v. South Carolina Dept. of Trans., 371 S.C. 598, 641 S.E.2d 437 (2007), is not controlling precedent since its application should be prospective only and not retroactive. In Davenport v. Cotton Hope Plantation, 333 S.C. 71, 508 S.E.2d 565 (1998), the South Carolina Supreme Court held "[t]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied

retrospectively. . . ." (quoting Toth v. Square D Co., 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989)).

In overruling prior case law in Hardin, the Court overruled the "special injury" analysis and those decisions holding that a closing of a road which resulted under this "special injury" analysis constituted a taking. In doing so, the Court created a new right whereby the government could close roads in these situations without incurring liability. Because the ruling created a new substantive right for the government, the judicial decision should be only applied prospectively – that is after the date of the decision. The Hardin decision was decided February 12, 2007, more than a year after the closing of Carolina Chloride's road. Therefore, Hardin is of no precedential effect.

Assuming, *arguendo*, that Hardin does apply to this case, Plaintiff still must prevail because Hardin cannot be construed to defeat Carolina Chloride's motion for summary judgment. Hardin recognizes that "a property owner has a protected property right in the form of an easement for access to and from any public road that abuts his property, regardless of whether he has access to and from an additional public road." Hardin, 371 S.C. at 606, 641 S.E.2d at 442 (emphasis added); see South Carolina State Hwy. Dep't. v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965). "'Abut' means to be 'contiguous, or border on; to bound upon; to end, end at, or terminate, to join at a border or boundary; to meet; to touch at the end or side.'" Mosteller v. County of Lexington, 336 S.C. 360, 365, 520 S.E.2d 620, 623 (1999) (citing 1 C.J.S. at 397 (1985)). However, "abut" does not always mean there must be actual contact. See Id.;

Sonoco Products Co. v. South Carolina Dept. of Revenue, 378 S.C. 385, 393, 662 S.E.2d 599, 603 (2008). For example, "premises separated from a street by a small stream, but having access to the street by means of bridges, are premises abutting on the street, though the owner of the premises is not the owner of the bed of the stream." Anderson v. Town of Albermarle, 182 N.C. 434, ___, 109 S.E. 262, 264 (1921); see also Mosteller, 336 S.C. 360, 364-65, 520 S.E.2d 620, 623 (1999); Sonoco, 378 S.C. at 392, 662 S.E.2d at 603 (broadly interpreting the term "contiguous" so that railroads, roads, public right of ways, marshland, or water do not destroy contiguity).

The facts in the case at bar are very similar to those of a property owner who uses a bridge to access a road separated from his premises by a small stream. Carolina Chloride's property is separated from Farrow Road by railroad tracks that run directly beside and parallel to Carolina Chloride's property. Carolina Chloride's property is situated similar to a premises separated from a street by a small stream where the owner of the premises is not the owner of the bed of the stream. In addition, Carolina Chloride uses this portion of Killian Road running parallel to and directly in front of his premises like a bridge over the railroad tracks to access Farrow Road. Carolina Chloride's use of this portion of Killian Road is similar to a landowner's use of a bridge to access a road separated from the premises by a small stream. The location of Carolina Chloride's property and Farrow Road fit into the definition of "abut" utilized in Anderson and Mosteller.

While the plaintiff's premises in Mosteller did not fit into the definition of "abut", the facts are distinguishable from the case at bar. In Mosteller, the highway department closed the railroad crossing on White Owl Road, which ran perpendicular to the plaintiff's property. Harvestview Road ran parallel to and in front of the plaintiff's property. The Court found the plaintiff could not suffer a constitutional taking because no part of plaintiff's property actually abutted any section of White Owl Road. Plaintiff's property did not abut any section of White Owl Road because in order to reach White Owl Road, Plaintiff had to cross Harvestview Road. Thus, the facts in Mosteller are very different from those in the instant case.

In this case, Carolina Chloride has a protected property right in the form of an easement for access to and from Farrow Road because this road abuts its property. It does not matter that Carolina Chloride has access to and from Killian Road. See Hardin, 371 S.C. at 606, 641 S.E.2d at 442. A governmental taking has occurred because Defendant has taken Carolina Chloride's ability to access Farrow Road. Therefore, Carolina Chloride is able to establish and prove element (2) of a taking—government conduct that is a taking. Summary Judgment must be granted because Carolina Chloride is able to establish every element essential to a cause of action for a governmental taking. See Hansson v. Scalise Builders of S.C., 374 S.C. 352, 357, 650 S.E.2d 68, 71 (2007) (citing Baughman v. Amer. Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991)). Carolina Chloride has a right to recovery because the evidence is capable of only one inference—that Carolina Chloride has suffered a taking.

Furthermore, in Hardin, the South Carolina Supreme Court stated, "[i]n some jurisdictions, a property owner merely has an easement for the purpose of accessing the public road system." In South Carolina, however, a property owner has more rights. As we have held, a property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless of whether he has access to and from an additional public road. South Carolina State Hwy. Dep't v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965). Thus, for example, in South Carolina, an owner of a corner lot has an easement for access to and from both roads that abut his property." Hardin, 371 S.C. at 606, 641 S.E.2d at 442. "The court further noted, "as long as the owner has access to and from the remainder of the road that continues to abut his property, his easement with respect to that road remains intact. Id. at 607, 641 S.E.2d at 442. In this case, however, Carolina Chloride no longer has access to Farrow Road. Farrow Road has not been closed. Its easement therefore has not been extinguished as in the example set forth in Hardin; rather, it has been taken.

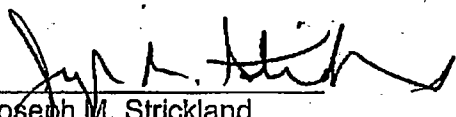
In the instant case, the Property is on the corner of Farrow Road and Killian Road. Here, only a railroad owned by Southern Railroad lies between the Property and Farrow Road. Under the law of South Carolina, the Property abuts Farrow Road because the railroad does not defeat the Property's contiguity to Farrow Road. Carolina Chloride has an easement to access Farrow Road because Farrow Road abuts the Property. Carolina Chloride, however, no longer has access to Farrow Road. Farrow Road has not been closed. Its easement

therefore has not been extinguished - it has been taken by SCDOT. "Succinctly, the restriction of ingress or egress to and from one's property is the right which must be compensated if infringed when a highway is closed by condemnation." Id. at 608, 641 S.E.2d at 443. In taking Carolina Chloride's easement, SCDOT substantially restricted ingress and egress to the Property.

Carolina Chloride has established as a matter of law that SCDOT committed a taking when it closed the access to the Property from Farrow Road and eliminated access to the Property from the portion of Killian Road west of Farrow Road. Accordingly, Carolina Chloride's motion for summary judgment is granted because there exists no genuine issue of material fact. The undisputed evidence shows a governmental taking of Carolina Chloride's easement.

IT IS HEREBY ORDERED that Plaintiff Carolina Chloride's motion for summary judgment is granted.

AND IT IS SO ORDERED.


Joseph M. Strickland
Presiding Judge

Sept.
~~June~~ 17, 2009

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2007-CP-40-7633

Carolina Chloride, Inc.,

South Carolina Department of Transportation,

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

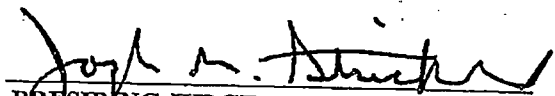
- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

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

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

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

Dated at Columbia, South Carolina, this 17th day of September, 2009.


PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Edward D. Sullivan, Esq.
Claude T. Prevost, Esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

Beachum O. Booker, Esq.
Natalie J. Moore, Esq.

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
CAROLINA CHLORIDE, INC.,	)	CIVIL ACTION NUMBER: 07-CP-40-7633
Plaintiff,	)	
vs.	)	ORDER
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION,	)	
Defendant.	)	

Plaintiff Carolina Chloride, Inc. ("Carolina Chloride") brings this action seeking damages for inverse condemnation by Defendant South Carolina Department of Transportation ("SCDOT"). SCDOT moves to dismiss under Rule 12(b)(6), SRCP, on the grounds that Carolina Chloride has failed to allege facts which would constitute a cause of action as a matter of law. A hearing on Defendant's motion was held on April 16, 2008. Present at the hearing were Edward D. Sullivan, counsel for Plaintiff, and Beachum O. Brooker, counsel for Defendant. Based on the arguments presented, as well as the applicable case law, and for the reasons more fully set forth below the motion to dismiss is denied.

Furthermore, Defense counsel presented to the court an exhibit purported to be an enlarged aerial view of Carolina Chloride's property. Because matters outside the pleadings were presented to, and not excluded by the court, Defendant's motion, as provided by Rule 12(b), shall be and is hereby treated as one for summary judgment pursuant to Rule 56. Gilbert v. Miller, 356 S.C. 25, 586 S.E.2d 861 (Ct. App. 2003). Because the exhibit does not show that there is no genuine issue of material fact

entitling Defendant to judgment as a matter of law, Defendant's motion for summary judgment is likewise denied.

Carolina Chloride alleges that it owned a 7.67 acre tract of land located at 600 Killian Road in Richland County (the "Property") from November 1996 until November 2006. The Property is located at the southeastern corner of the intersection of Killian Road and Farrow Road, abutting both roads. Carolina Chloride enjoyed an easement allowing it access to and from Farrow Road and Killian Road. Carolina Chloride's easement to and from Farrow Road and Killian Road was a vested property right and interest.

A railroad track runs parallel to Farrow road adjacent to the Property. SCDOT entered into an agreement dated July 20, 2004 with Norfolk Southern Railway Company, a Virginia corporation (the "Railroad"), whereby SCDOT would eliminate the grade crossing at Killian and Farrow Road (identified as Mile Post R - 95.89). The elimination of the grade crossing was made in exchange for the Railroad paying approximately \$116,000 toward construction costs (5% of estimated total of \$2,313,152.80) of an overpass structure further up the railway line (Milepost R-95.65) near the Town of Killian in Richland County, South Carolina.

In January 2006, SCDOT began blocking the access and did close the access to the Property from Farrow Road. Furthermore, it eliminated access to the Property from the portion of Killian Road west of Farrow Road. The purpose of SCDOT's actions was to close the railroad crossing in accordance with the aforementioned agreement with the Railroad thereby resulting in the taking of Carolina Chloride's easement.

A defendant may make a motion under Rule 12(b)(6), SCRCP, to dismiss based on a failure to state facts sufficient to constitute a cause of action. Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. The 12(b)(6) motion may not be sustained if the facts alleged and the inferences therefrom would entitle the plaintiff to any relief on any theory. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999).

The question to be considered is whether, in a light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Holy Loch Distributors, Inc. v. Hitchcock, 332 S.C. 247, 252, 503 S.E.2d 787, 790 (Ct. App. 1998). "[A] judgment on the pleadings is considered to be a drastic procedure by our courts. Therefore, pleadings in a case should be construed liberally and the trial court and this Court must presume all well pled facts to be true so that substantial justice is done between the parties." Overcash v. S.C. Elect. & Gas Co., 356 S.C. 165, 168, 588 S.E.2d 116, 118 (Ct. App. 2003).

A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. Fields v. The Melrose Limited Partnership, 312 S.C. 102, 104, 439 S.E.2d 283, 284 (Ct. App. 1993). All well pleaded factual allegations are deemed admitted for purpose of considering the motion for judgment on the pleadings. Id. "Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail." Carolina Care Plan, Inc. v. United HealthCare Services, Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (Ct. App. 2004).

The gravamen of SCDOT's motion to dismiss is the South Carolina Supreme Court's recent ruling in Hardin v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007). In Hardin, the Court expressly overruled decades of well-settled law in which takings of this type were decided by a "special injury" analysis – that is, whether a landowner could prove a closing of a road caused a special injury thereby constituting a taking. SCDOT's reliance on this recent decision is misplaced.

I. SCDOT's Reliance on Hardin is Misplaced.

First, Hardin is not controlling precedent since its application should be prospective only and not retroactive. In Davenport v. Cotton Hope Plantation, 333 S.C. 71, 508 SE2d 565 (1998) (quoting Toth v Square D Co., S.C. 298 S.C. 6, 8, 377 SE2d 584, 585 (1989)), the South Carolina Supreme Court held "[T]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively. . . ." In overruling prior case law in Hardin, the Court overruled the "special injury" analysis and those decisions holding that a closing of a road which resulted under this "special injury" analysis constituted a taking. In doing so, the Court created a new right whereby the government could close roads in these situations without incurring liability. Because the ruling created a new substantive right for the government, the judicial decision should be only applied prospectively – that is after the date of the decision. The Hardin decision was decided February 12, 2007, more than a year after the closing of Carolina Chloride's road. Therefore, Hardin is of no precedential effect.

Assuming arguendo that Hardin does apply to the instant case, it does not mandate dismissal of the complaint for failure to state a claim. Hardin recognizes that "a property owner has a protected property right in the form of an easement for access to and from any public road that abuts his property, regardless of whether he has access to and from an additional public road." See Hardin v. SCDOT, 371 S.C. 598, 606, 641 S.E.2d 437, 442 (2007); see also South Carolina State Hwy. Dep't. v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965). "'Abut' means to be contiguous, or border on; to bound upon; to end, end at, or terminate, to join at a border or boundary; to meet; to touch at the end or side." 1 C.J.S. at 397 (1985). However, "abut" does not always mean there must be actual contact. See Id. For example, "premises separated from a street by a small stream, but having access to the street by means of bridges, are premises abutting on the street, though the owner of the premises is not the owner of the bed of the stream." See Mosteller v. County of Lexington, 336 S.C. 360, 365, 520 S.E.2d 620, 623 (1999) (quoting Anderson v. Town of Albemarle, 182 N.C. 434, 109 S.E. 262, 265 (1921)).

The facts in the case at bar are very similar to those of a property owner who uses a bridge to access a road separated from his premises by a small stream. Carolina Chloride's property is separated from Farrow Road by railroad tracks that run directly beside and parallel to Carolina Chloride's property. Carolina Chloride's property is situated similar to a premises separated from a street by a small stream where the owner of the premises is not the owner of the bed of the stream. In addition, Carolina Chloride uses this portion of Killian Road running parallel to and directly in front of his premises like a bridge over the railroad tracks to access Farrow Road. Carolina Chloride's use of this portion of Killian Road is similar to a landowner's use of a bridge to access a road

separated from the premises by a small stream. The location of Carolina Chloride's property and Farrow Road fit into the definition of "abut" utilized in Anderson and Mosteller. While the plaintiff's premises in Mosteller did not fit into the definition of "abut", the facts are distinguishable from the case at bar.

In Mosteller, the highway department closed the railroad crossing on White Owl Road, which ran perpendicular to the plaintiff's property. Harvestview Road ran parallel to and in front of the plaintiff's property. The Court found the plaintiff could not suffer a constitutional taking because no part of plaintiff's property actually abutted any section of White Owl Road. Plaintiff's property did not abut any section of White Owl Road because in order to reach White Owl Road, Plaintiff had to cross Harvestview Road. Thus, the facts in Mosteller are very different from those in the instant case.

In Hardin, the Court stated, "[I]n South Carolina, an owner of a corner lot has an easement for access to and from both roads that abut his property." 371 S.C. at 606, 641 S.E.2d at 442. The court further noted, "As long as the owner has access to and from the remainder of the road that continues to abut his property, his easement with respect to that road remains intact." Id. at 607, 641 S.E.2d at 442. In this case, however, Carolina Chloride no longer has access to Farrow Road. Farrow Road has not been closed. Its easement therefore has not been extinguished as in the example set forth in Hardin; rather, it has been taken.

II. Carolina Chloride has properly alleged facts constituting a claim for which relief can be granted.

"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." Hardin (citing Byrd v. City of

Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 80 (2005)). "South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with a person's property interest amounts to an unconstitutional taking." Hardin (citing Byrd, 365 S.C. at 656 n. 6, 620 S.E.2d at 79 n. 6). Both Article I, Section 13 of the South Carolina Constitution and the Fifth Amendment to the United States Constitution provide that private property shall not be taken for public use without the payment of 'just compensation.' Hardin, 371 S.E.2d at 605, 641 S.E.2d at 441. Determining whether governmental 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. Id. (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31, 98 S.Ct. 2646, 2662 (1978)). "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." Id. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 102 S.Ct. 3164, 3171, 73 L.Ed.2d 868 (1982)).

The elements of a taking are: (1) affirmative conduct of a government 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 – 80 (2005). Carolina Chloride's amended complaint includes these allegations. More specifically, the Amended Complaint alleges that SCDOT took its easement and property right by closing an abutting road at an intersection on which it owns the corner lot. See Hardin at 371 S.C. 598, 606, 641 S.E.2d 437, 442. The ruling on a Rule 12(b)(6), SCRPC, motion to

dismiss must be based solely upon the allegations set forth in the complaint. A 12(b)(6) motion should not be granted if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. The question to be considered is whether, when viewed in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail. Carolina Care Plan, Inc. v. United HealthCare Servs, Inc., 361 S.C. 544, 606 S.E.2d 752 (Ct. App. 2004).

Furthermore, "ad hoc, factual inquiries" are required in a takings case in order to examine the character of the government's actions, the economic impact of the action, and the degree to which the action interferes with the owner's investment backed expectations". Hardin, 365 S.C. at 605, 620 S.E.2d at 441. In this case, for example, SCDOT sold Carolina Chloride's easement to the railroad company for \$116,000. Accordingly, when the pleadings in this case are liberally construed and the truth of the well pled facts are deemed admitted, it is evident that Carolina Chloride has stated a claim for which relief can be granted. Rather than resort to the drastic procedure of dismissal in this case, the court denies SCDOT's motion to dismiss the complaint.

Rule 12(b) provides that if motion asserting a 12(b)(6) defense to dismiss for failure to state facts sufficient to constitute a cause of action, matters outside the pleading are present to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed as of as provides in Rule 56. At the hearing, Defense counsel introduced an exhibit purportedly depicting an aerial view of Plaintiff's property, railroad track and highways. Because matters outside the pleadings were

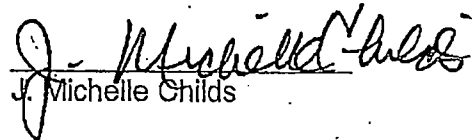
presented to, and not excluded by the court, Defendant's motion shall be and is hereby treated as one for summary judgment pursuant to Rule 56. Lee v. Kelley, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). "Summary judgment is appropriate only when there are no genuine issues of material fact the moving party is entitled to judgment as a matter of law. All evidence must be viewed in the light most favorable to the non moving party, and all reasonable inferences resolved in the same manner. Summary judgment should be withheld when further inquiry into the facts is desirable to clarify the application of the law." Ford v. SC Dept of Transportation, 328 S.C. 481, 485, 492 S.E.2d 811, 813 (Ct. App. 1997). The defense exhibit fails to show that there is no genuine issue of material fact entitling Defendant to judgment as a matter of law. Accordingly, Defendant's motion for summary judgment is likewise denied.

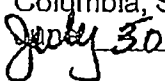
THEREFORE, IT IS HEREBY

ORDERED that Defendant South Carolina Department of Transportation's motion to dismiss is denied; and

FURTHER ORDERED that the motion will be treated as one for summary judgment, which motion is also hereby denied.

AND IT IS SO ORDERED.


J. Michelle Childs

Columbia, South Carolina
 July 30, 2008

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2007CP4007633

Carolina Chloride Inc

vs.

South Carolina Department Of Transportation

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED:

☒ See attached order;☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2008.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2008, and a copy mailed first class this 5th day of August, 2008, to attorneys of record or to parties (when appearing pro se) as follows:

Edward D. Sullivan

ATTORNEY(S) FOR THE PLAINTIFF(S)

SCRPC APP-24/FORM 4

Beacham O. Brooker Jr.

ATTORNEY(S) FOR THE DEFENDANT(S)

s/ BARBARA A. SCOTT

Clerk of Court

0038

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

CAROLINA CHLORIDE, INC.,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER:

SUMMON
(Jury Trial Demanded)

2007 NOV 14 PM 2:25
BARBARA A. SCOTT
C.C. & G.S.

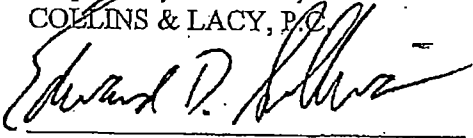
FILED

TO: SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT
ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint upon the subscriber at P.O. Box 12487, Columbia, South Carolina 29211, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,
COLLINS & LACY, P.C.

By:


EDWARD D. SULLIVAN
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660
(803) 771-4484 (f)

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
November 13, 2007

0039

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
CAROLINA CHLORIDE, INC.,	)	CIVIL ACTION NUMBER:
Plaintiff,	)	
vs.	)	
SOUTH CAROLINA DEPARTMENT OF	)	COMPLAINT
TRANSPORTATION,	)	(Jury Trial Demanded)
Defendant.	)	

FILED
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BARBARA A. SCOTT
C.C.C. & G.S.

The above-named Plaintiff, Carolina Chloride, Inc., complaining of and against the Defendant South Carolina Department of Transportation herein, alleges:

1. Plaintiff is, and at all times mentioned was, a South Carolina corporation doing business in Richland County.
2. Defendant is, and at all times was, an executive department of the State of South Carolina.
3. From November 1996 until November 2006, Plaintiff was the owner of certain real property consisting of 7.67 acres, as improved, located at 600 Killian Road, Richland County (the "Property"). The Property is located at the southeastern corner of the intersection of Killian Road and Farrow Road.
4. In January 2006, Defendant began blocking the access and did close the access to the Property from Farrow Road. Furthermore, it eliminated access to the Property from the portion of Killian Road west of Farrow Road. (See Exhibit A attached hereto and incorporated herein by reference.)

**FOR A FIRST CAUSE OF ACTION
(INVERSE CONDEMNATION)**

5. Each and every allegation herein above made is incorporated herein by reference as if fully set forth herein. Any and all descriptive captions herein are illustrative and not dispositive.

6. Defendant's actions in eliminating access to the Property is an affirmative act by the government.

7. Defendant's actions in eliminating access to the Property have resulted in a taking.

8. Defendant's taking of the Property was for a public use.

9. The Defendant's actions constitute a taking in violation of the Constitution of the United States and the Constitution of the State of South Carolina entitling Plaintiff to just compensation for his Property, plus interest thereon from the date of the taking.

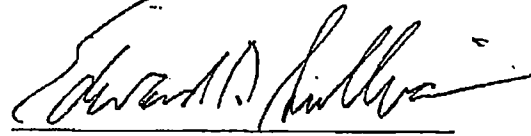
WHEREFORE, Plaintiff prays for judgment against the Defendant as follows:

- a. just compensation for the value of the Property at the time of the taking in the amount of One Million One Hundred Thousand (\$1,100,000) dollars;
- b. an award of damages for deprivation of Plaintiff's constitutional rights;
- c. an award of damages against Defendant for actual damages incurred;
- d. reasonable attorney's fees;
- e. costs of suit incurred;
- f. prejudgment interest; and,
- g. such other relief and further relief as the Court may deem just and proper.

Respectfully submitted,

COLLINS & LACY, P.C.

By:



EDWARD D. SULLIVAN

1330 Lady Street, Sixth Floor (29201)

Post Office Box 12487

Columbia, South Carolina 29211

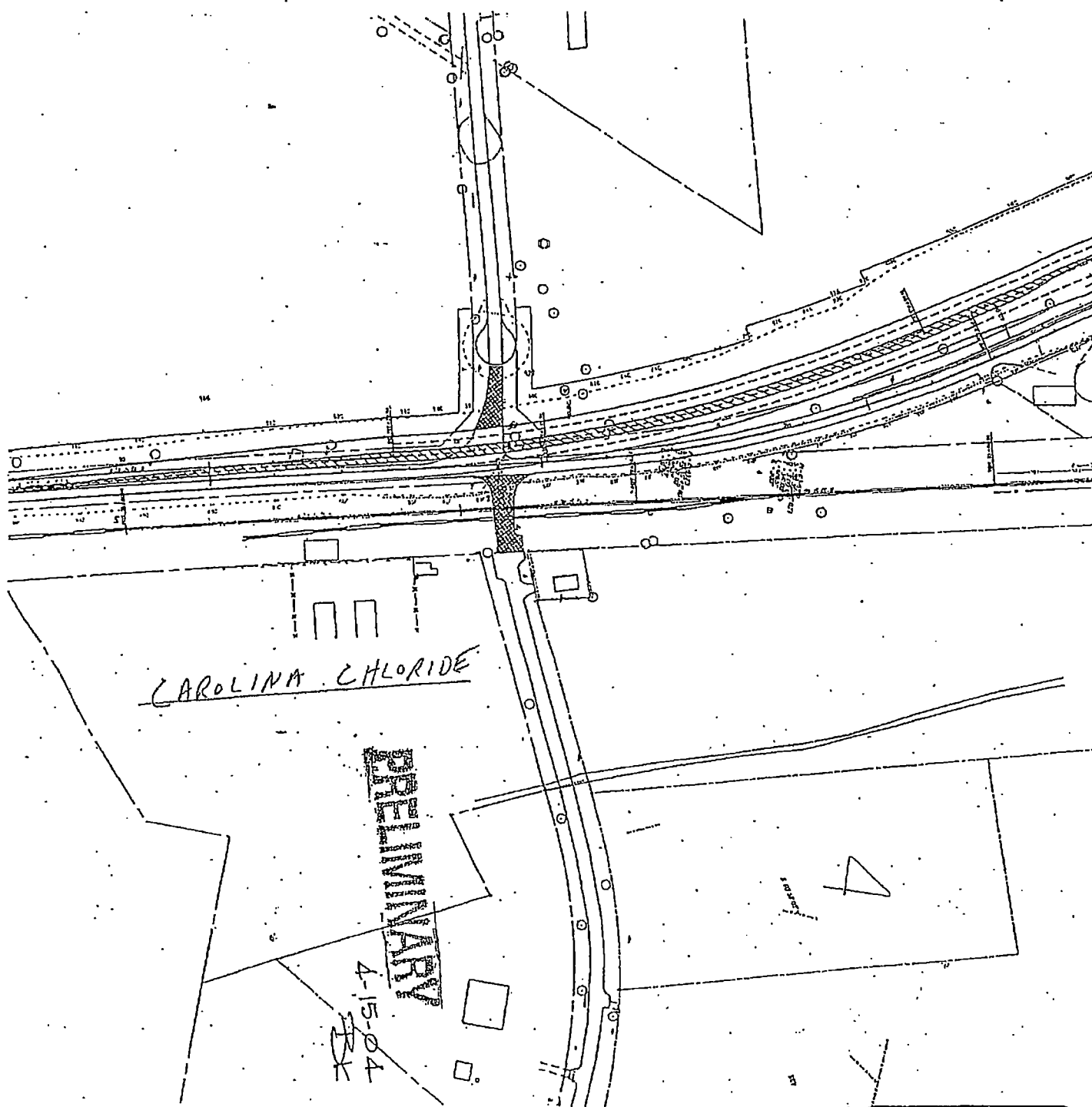
(803) 256-2660

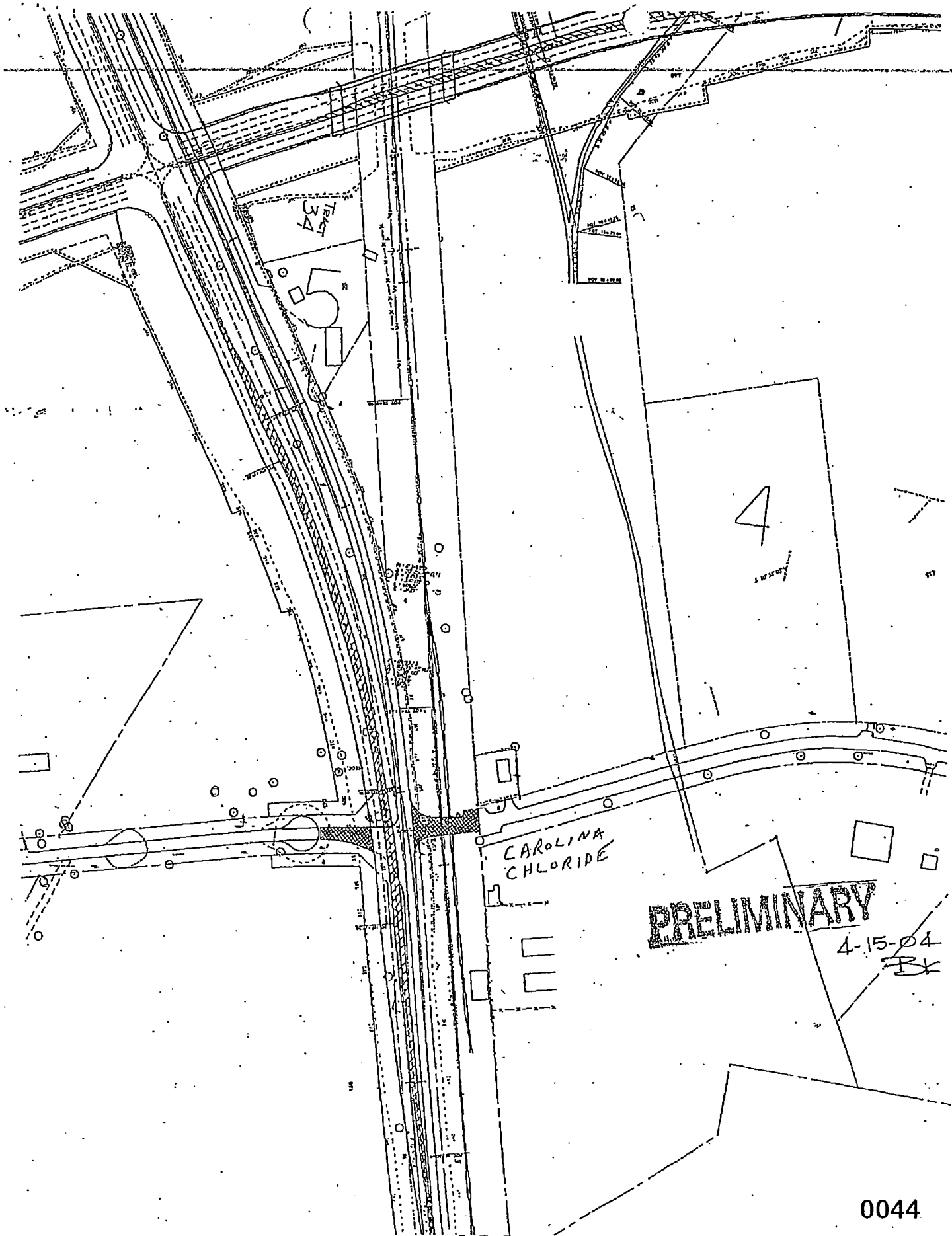
(803) 771-4484 (f)

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina

November 13, 2007



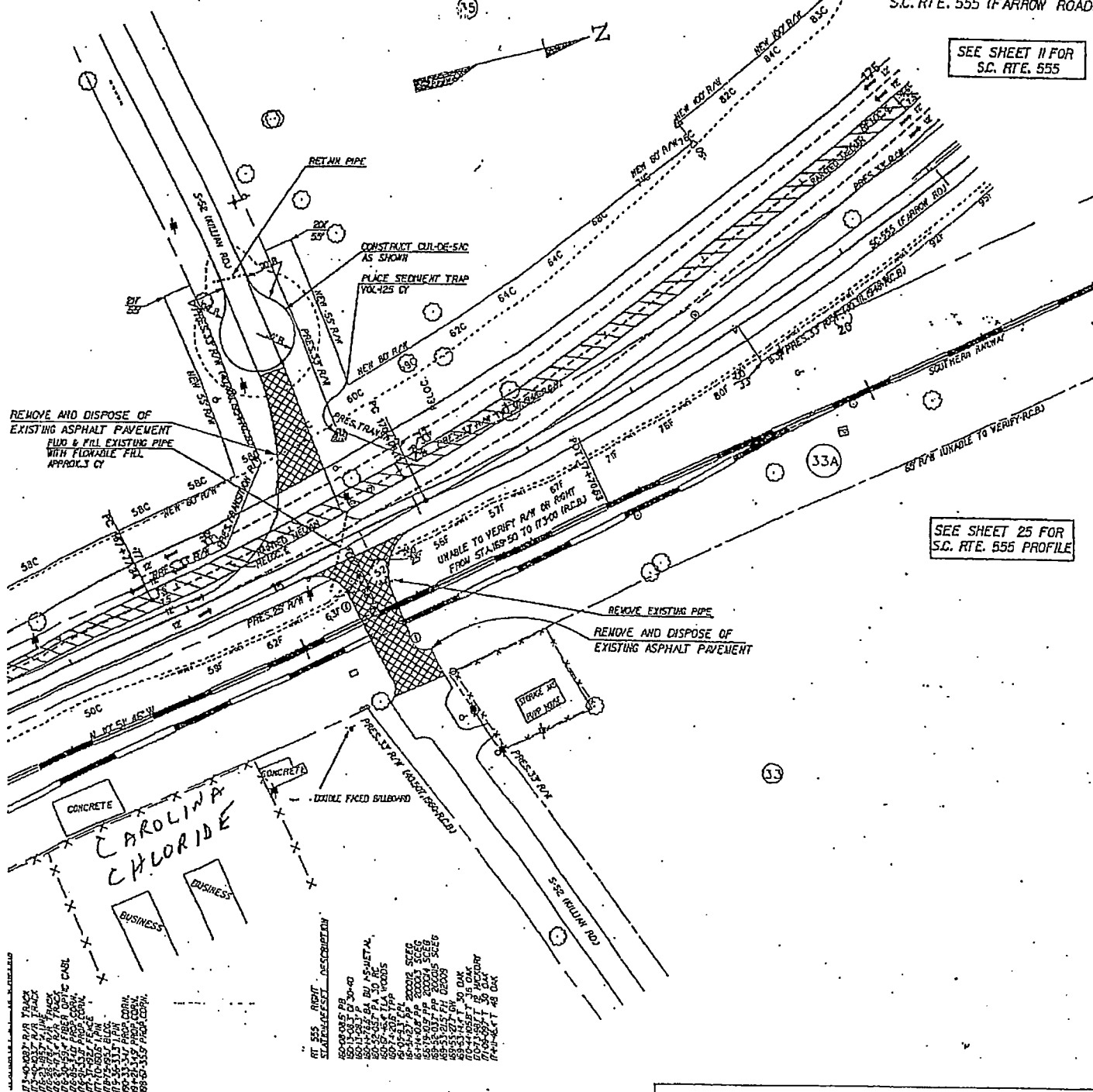


FILE NO.	DATE	QUANTITY	FILE NO.	DATE	QUANTITY
3	1.2.	RICHLAND	40-4984	5-52	16

S.C. RTE. 555 (FARROW ROAD)

SEE SHEET 11 FOR
S.C. RTE. 555

SEE SHEET 25 FOR
S.C. RTE. 555 PROFILE



ALIGNMENT CONTROL CAN BE FOUND ON REFERENCE SHEET

SOUTH CAROLINA
DEPARTMENT OF TRANSPORTATION
ROAD DESIGN COLUMBIA, S.C.

REV. NO.	BY	DATE	DESCRIPTION OF REVISION
4			
3			
2			
1	C.L.B.	1-5-01	ADDED 30" PPC 11.5 STA. 69+00 - 1-
TOPO.	DATE		
ENG.	DATE		
R/X	DATE		

SCALE 1" = 40' RTE. 0045

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

CAROLINA CHLORIDE, INC.,

Plaintiff

vs.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION COVERSHEET

07-CP-40-2633

(Please Print)

Submitted By: Edward D. Sullivan

Address: Collins & Lacy, P.C.

P.O. Box 12487

Columbia, SC 29211

SC Bar #: 11248

Telephone #: 803-256-2660

Fax #: 803-771-4484

Other:

E-mail: esullivan@collinsandlacy.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

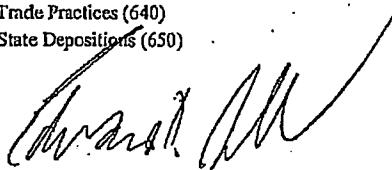
DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☒ Other (499) <u>Inverse Condemnation</u>
Inmate Petitions ☐ PCR (500) ☐ Sexual Predator (510) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture (840) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Administrative Law Judge (980) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650)		

Submitting Party Signature: 

Date: November 13, 2007

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Florence, H^o, Lexington, Richland, Greenville**, & Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

CAROLINA CHLORIDE, INC.,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2007-CP-40-7633

AMENDED
SUMMONS
(Jury Trial Demanded)

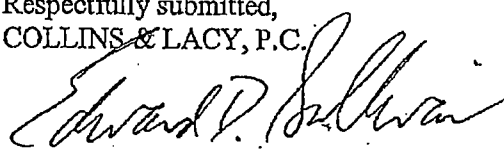
FILED
08 FEB 11 AM 9:10
CLERK OF COURT
J. C. C. & G. S. SCOTT

TO: SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT
ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint upon the subscriber at P.O. Box 12487, Columbia, South Carolina 29211, within fifteen (15) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,
COLLINS & LACY, P.C.

By:


EDWARD D. SULLIVAN
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660
(803) 771-4484 (f)

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
February 7, 2008

0048

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

CAROLINA CHLORIDE, INC.,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2007-CP-40-7633

AMENDED
COMPLAINT
(Jury Trial Demanded)

FILED
08 FEB 11 AM 9:10
CLERK OF COURT
BARBARA A. SCOTT
S.C. 29-3-3007

The above-named Plaintiff, Carolina Chloride, Inc., complaining of and against the Defendant South Carolina Department of Transportation herein, alleges:

1. Plaintiff is, and at all times mentioned was, a South Carolina corporation doing business in Richland County.
2. Defendant is, and at all times was, a department of the executive branch of the government of the State of South Carolina.
3. From November 1996 until November 2006, Plaintiff was the owner of certain real property consisting of 7.67 acres, as improved, located at 600 Killian Road, Richland County (the "Property"). The Property is located at the southeastern corner of the intersection of Killian Road and Farrow Road, abutting both roads.
4. Plaintiff enjoyed an easement allowing it access to and from Farrow Road and Killian Road.
5. Plaintiff's easement to and from Farrow Road and Killian Road was a vested property right and interest.
6. A railroad track runs parallel to Farrow road adjacent to the Property. The

0049

Defendant entered into an agreement dated July 20, 2004 with Norfolk Southern Railway Company, a Virginia corporation (the "Railroad") whereby the Defendant would eliminate the grade crossing at Killian and Farrow Road (identified as Mile Post R - 95.89) in exchange for the Railroad paying approximately \$116,000 toward construction costs (5% of estimated total of \$2,313,152.80) of an overpass structure further up the railway line (Milepost R-95.65) near the Town of Killian, Richland County South Carolina.

7. In January 2006, Defendant began blocking the access and did close the access to the Property from Farrow Road. Furthermore, it eliminated access to the Property from the portion of Killian Road west of Farrow Road.

8. Upon information and belief, the purpose of Defendant's actions was to close the railroad crossing in accordance with the aforementioned agreement with the Railroad thereby resulting in the taking of Plaintiff's easement.

**FOR A FIRST CAUSE OF ACTION
(INVERSE CONDEMNATION)**

9. Each and every allegation herein above made is incorporated herein by reference as if fully set forth herein. Any and all descriptive captions herein are illustrative and not dispositive.

10. Defendant's actions in closing the crossing, eliminating access to the Property, and taking Plaintiff's easement is affirmative, positive and/or aggressive conduct by a government entity.

11. Defendant's conduct deprived Plaintiff of its right of ingress and egress with respect to Killian Road and Farrow Road and, thus, effected a taking of Plaintiff's easement and property rights.

12. The taking was for a public use and purpose.

13. The Defendant's actions constitute a taking in violation of the Constitution of the United States and the Constitution of the State of South Carolina entitling Plaintiff to just compensation for its Property, plus interest thereon from the date of the taking.

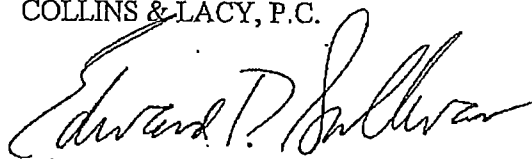
WHEREFORE, Plaintiff prays for judgment against the Defendant as follows:

- a. just compensation for the value of the Property at the time of the taking;
- b. an award of damages for deprivation of Plaintiff's constitutional rights;
- c. an award of damages against Defendant for actual damages incurred;
- d. reasonable attorney's fees;
- e. costs of suit incurred;
- f. prejudgment interest; and,
- g. such other relief and further relief as the Court may deem just and proper.

Respectfully submitted,

COLLINS & LACY, P.C.

By:



EDWARD D. SULLIVAN
1330 Lady Street, Sixth Floor (29201)
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Columbia, South Carolina 29211
(803) 256-2660
(803) 771-4484 (f)

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina

February 7, 2008

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

CAROLINA CHLORIDE, INC.,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2007-CP-40-7633

CERTIFICATE OF SERVICE

FILED
FEB 11 AM 10:30
BARBARA A. EATON
C.C.C.

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, 1330 Lady Street, Post Office Box 12487, Columbia, South Carolina, 29211, does hereby certify that the following named individual(s) were served with a copy of the pleading(s) indicated below by mailing a copy of same to said person(s) in the United States Postal Service, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED:

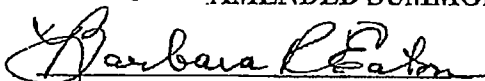
Natalie J. Moore, Esquire
Beacham O. Brooker, Jr., Esquire
Post Office Box 191
Columbia, SC 29202-0191

Linda McDonald, Esquire
955 Park Street, Suite 343
Columbia, SC 29201
Attorneys for Defendant

The Honorable Henry McMaster
P.O. Box 11549
Columbia, S.C. 29211
Secretary of State for South Carolina

PLEADINGS:

AMENDED SUMMONS AND COMPLAINT


Columbia, South Carolina
February 7, 2008

STATE OF SOUTH CAROLINA

County of Richland

CAROLINA CHLORIDE, INC.,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

C/A No. 07-CP-40-7633

ANSWER TO AMENDED COMPLAINT

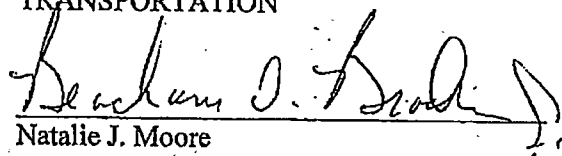
For its answer to the amended complaint, Defendant, the South Carolina Department of Transportation (hereinafter "the Department"), admits, denies and avers as follows:

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the amended complaint. Accordingly, it denies the same and demands strict proof thereof.
2. Admits the allegations contained in paragraph 2 of the amended complaint.
3. Denies that plaintiff's property abuts Farrow Road. Admits the remainder of the allegations contained in paragraph 3.
4. Denies that plaintiff has an easement onto Farrow Road, or, alternatively, that if such easement exists, defendant has done nothing to obstruct it. Admits that plaintiff has had and continues to have an easement onto Killian Road by virtue of its land abutting that road.
5. Denies the allegation contained in paragraph 5 as to Farrow Road, but denies the allegation with respect to Killian Road.
6. Admits the allegations contained in paragraph 6 of the complaint.

7. Admits that it closed that segment of Killian Road crossing the Northern Southern Railway tracks, but denies that this act deprived plaintiff of any vested right of access or any other property right.
8. Admits the allegations contained in paragraph 8 except denies that closure of the railroad crossing affected a taking of plaintiff's property.
9. Denies the allegations contained in paragraphs 9 through 13 of the complaint.
10. Denies that plaintiff is entitled to the relief prayed for in its WHEREFORE clause or any relief whatsoever arising from the allegations of the complaint.

WHEREFORE, defendant prays that the amended complaint be dismissed and that it be awarded its costs in defending this action and any other relief the Court deems appropriate.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION



Natalie J. Moore
Beacham O. Brooker, Jr.
Post Office Box 191
Columbia, South Carolina 29202-0191
(803) 737-1347

March 10, 2008

STATE OF SOUTH CAROLINA

County of Richland

CAROLINA CHLORIDE, INC.,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

C/A No. 07-CP-40-7633

DEFENDANT'S MOTION TO DISMISS
THE COMPLAINT

Defendant, the South Carolina Department of Transportation (hereinafter "the Department"), respectfully moves the Court pursuant to Rule 12(b)(6) for an Order dismissing the Complaint on the grounds that the plaintiff has failed to allege facts that would constitute a cause of action as a matter of law. Plaintiff's Complaint is governed by Hardin v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007), and Mosteller v. County of Lexington, 536 S.C. 360, 520 S.E.2d 620 (1999)—either of which requires its dismissal.

Facts.

The facts alleged in the Complaint, which are deemed true for purposes of this motion, are as follows: Plaintiff is the owner of a 7.67 acre tract of land in Richland County abutting Killian Road (State secondary route S-40-52) near that road's former intersection with Farrow Road (S.C. Route 555). The land is separated from Farrow Road by the lands of the Southern Railway. (Exhibit A) In 2006, as part of a highway project, the Department closed the portion of Killian Road that crossed the railroad right-of-way. See S.C. Code Ann. §58-15-1625 (Supp. 2006). Plaintiff filed its Complaint herein on November 14, 2007 in inverse condemnation alleging a taking of its access to Farrow Road and that part of Killian Road west of Farrow Road.

Law.

Plaintiff is not entitled to a judgment on the above facts because it has been deprived of no property or property right by the State's action. Plaintiff's property continues to have direct access to Killian Road and it may use Killian Road for access to the general system of streets and highways by traveling east. Plaintiff never had direct access to Farrow Road because it is separated from it by the railroad's right-of-way.

Our Supreme Court has recently clarified the law in this area in Hardin. There the Court stated that, because road realignments and closures do not involve the enactment of any regulation that directly regulates any use of owners' properties, the Department must have physically appropriated some aspect of them for a taking to be found. Id. 641 S.E.2d at 441. The Court stated that the focus of the inquiry in a case of this type must be on a landowner's actual property interests; that is, his easements. The easements a property owner holds with respect to public roads are of two types: The first is the right to enter and leave your property directly on to each of the roads it abuts. The second is the right to access the general system of roads. This latter right is akin to an easement by necessity between private owners and is based on the general principle that no property should be landlocked. Id. at 442. The inability to travel in both directions on a road adjoining one's property is irrelevant. Id. at 444. The Court's holding in Hardin is in accord with the basic principle of constitutional takings jurisprudence that a governmental entity may successfully defend an inverse condemnation suit by demonstrating that the use or the alleged property right was not a part of the owner's title to begin with. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2889, 120 L.Ed.2d 798 (1992); McQueen v. S.C. Coastal Council, 340 S.C. 65,

530 S.E.2d 628 (2000). Although plaintiff contends that its land has lost value, not all economic interests are property rights. United States v. Willow River Power Co., 324 U.S. 499, 65 S.Ct. 761, 764, 89 L.Ed. 1101 (1945). Losses resulting from a legitimate exercise by the State of its police power in re-routing and diverting traffic resulting in a landowner having to take a more circuitous route to and from his property are *damnum absque injuria*. S.C. State Highway Dept. v. Carodale Associates, 268 S.C. 556, 235 S.E.2d 127, 129 (1977).

In the case at bar, the at-grade highway-rail crossing at Killian Road was closed under the policy and authority of Code section §58-15-1625, supra, regarding closures of at-grade rail crossings where possible in the interest of highway safety. Although it prevents travel from plaintiff's property to the west, no taking is implicated because plaintiff's "necessity" easement is intact—travel in the eastward direction is still available.

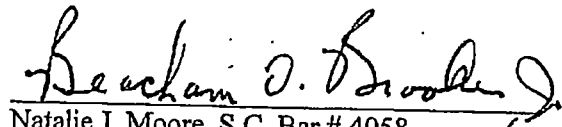
Plaintiff has never had "direct" access to Farrow Road. Its property is separated therefrom by the railroad. Direct (on-off) access rights are "abutters" rights. A property owner has certain rights with respect to a public road not shared by the general public by virtue of his land abutting it. Among these are light, air and access. However, these rights are dependent on the fact of abutting. In Mosteller v. County of Lexington and S.C. Dept. of Transp., 336 S.C. 360, 365, 520 S.E.2d 620, 623 (1999), the Court cited the definition of "abut" as "... to be contiguous, or border on; to bound upon; to end, end at, or terminate, to join at a border or boundary; to meet or touch at the end or side." "Property may still be deemed to abut a road where there is some intervening, natural barrier like a stream or river." Id. Here, as in Mosteller, there is no part of plaintiff's

property that actually touches, or is separated by a natural barrier from, any section of Farrow Road. Thus plaintiff had no access right to that road that could be taken.

Conclusion

Because plaintiff has not pleaded the existence of any property right inhering in its title to begin with, there is no taking of its property by the project herein. Accordingly, the Court should dismiss the Complaint.

Respectfully submitted,



Natalie J. Moore, S.C. Bar # 4058
Beacham O. Brooker, Jr., S.C. Bar # 909
Post Office Box 191
Columbia, South Carolina 29202-0191
(803) 737-1347

Attorneys for Defendant, South Carolina
Department of Transportation

January 2, 2008

STATE OF SOUTH CAROLINA

County of Richland

CAROLINA CHLORIDE, INC.,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

C/A No. 07-CP-40-7633

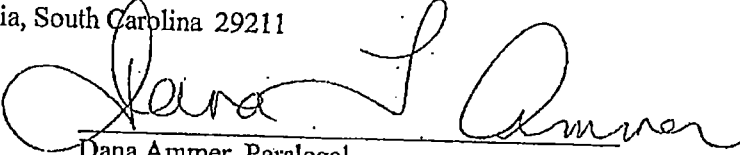
CERTIFICATE OF SERVICE BY MAIL

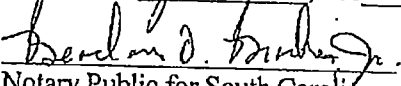
I certify that I have caused a copy of the below-mentioned documents to be served upon the following party by depositing same in the United States mail, with postage prepaid and affixed thereto, addressed as follows, this 3rd day of January, 2008.

Pleadings Served:

- 1) Defendant's Motion to Dismiss the Complaint

Party Served: Edward D. Sullivan, Esquire
Attorney at Law
PO Box 12487
Columbia, South Carolina 29211


Dana Ammer, Paralegal

SWORN TO BEFORE ME
in Columbia, South Carolina, this
3 day of Jan, 2008.

Notary Public for South Carolina
My Commission Expires: 3/10/12

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

CAROLINA CHLORIDE, INC.,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2007-CP-40-7633

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

JEANETTE W. MCBRIDE
CLERK OF COURT

2009 FEB -5 AM 11:36

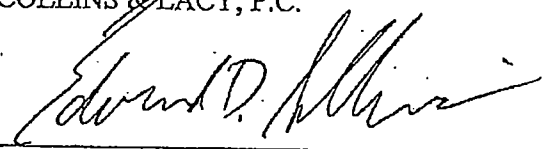
FILED

The Plaintiff, Carolina Chloride, Inc., by and through its undersigned counsel and in accordance with Rule 56 of the South Carolina Rules of Civil Procedure, hereby moves for an Order granting Carolina Chloride, Inc. summary judgment.

In support of this Motion, the Defendant relies on Rule 56 of the South Carolina Rules of Civil Procedure, such common law as may be applicable, affidavit(s) and such other and further documents or information which may be presented at the time of the hearing.

Respectfully submitted,
COLLINS & LACY, P.C.

By:


EDWARD D. SULLIVAN
CHRISTIAN B. STEGMAIER
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660
(803) 771-4484 (F)

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina

February 3, 2009

0060

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

CAROLINA CHLORIDE, INC.,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2007-CP-7633

CERTIFICATE OF SERVICE

JEANETTE W. McBRIDE
C.P. & S.

2009 FEB -5 PM 11:36

FILED

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, 1330 Lady Street, Post Office Box 12487, Columbia, South Carolina, 29211, does hereby certify that the following named individual(s) were served with a copy of the pleading(s) indicated below by mailing a copy of same to said person(s) in the United States Postal Service, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED:

Beacham O. Brooker, Jr., Esquire
Post Office Box 191
Columbia, SC 29202-0191

PLEADINGS:

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT



Columbia, South Carolina

February 3, 2009

0061

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Carolina Chloride, Inc.

☒ Plaintiff

v.

South Carolina Department Of Transportation

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2007-CP-40-7633

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

FILED
FEB -5 AM 11:36
JANETIE M. HIGBES
CLERK, C.P. & G.S.

Plaintiff's Attorney:
Edward D. Sullivan, Bar No. 11248
Address:
Post Office Box 12487, Columbia, SC 29202
phone: 803.256.2660 fax: 803.771.4484
e-mail: esullivan@collinsandlacy.com other:

Defendant's Attorney:
Beahum O. Brooker, Jr., Bar No.
Address:
Post Office Box 191, Columbia, SC 29202
phone: 803.737.1347 fax: 803.737.2071
e-mail: brookerbo@dot.state.sc.us other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment

Estimated Time Needed: 1 hour Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

February 3, 2009

Date submitted

SECTION III: Motion Fee

- ☐ PAID - AMOUNT:
☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by:

Date Filed:

- ☐ MOTION FEE COLLECTED:
☐ CONTESTED - AMOUNT DUE:

3-31-04

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

CAROLINA CHLORIDE, INC.,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION,

Defendant.

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

) CIVIL ACTION NUMBER: 07-CP-40-7633

) PLAINTIFF'S MEMORANDUM IN
) SUPPORT OF MOTION FOR
) SUMMARY JUDGMENT

RICHLAND COUNTY
FILED
MAR 31 PM 4:15
J. MICHELLE W. HARRIS
CLERK, S.C.P. & C.S.

STATEMENT OF THE CASE

Plaintiff Carolina Chloride Inc. ("Carolina Chloride") brings this action to recover just compensation for the taking of its vested property right by the South Carolina Department of Transportation ("SCDOT"). After filing its Answer, SCDOT moved to dismiss pursuant to Rule 12(b)(6), SCRCP. Thereafter, Carolina Chloride filed an Amended Summons and Amended Complaint to which SCDOT filed an Answer to Amended Complaint. A hearing on SCDOT's motion was heard on April 16, 2008 by the Honorable J. Michelle Childs. By Order dated July 30, 2008 and entered August 30, 2008, Judge Childs denied SCDOT's motion to dismiss and furthermore ruled that, because SCDOT presented matters outside the pleadings which were not excluded by the Court, the motion should be treated as one for summary judgment pursuant to Rule 56, SCRCP. Such motion was likewise denied by the Court.

Carolina Chloride now moves for summary judgment pursuant to Rule 56, SCRCP, on the grounds that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.

0063

STATEMENT OF FACTS

From November 1996 until November 2006, Plaintiff Carolina Chloride, Inc. ("Carolina Chloride") owned a 7.67 acre tract of land located at 600 Killian Road in Richland County (the "Property"). See Affidavit of Robert A. Morgan attached as Exhibit A. The Property is located at the southeastern corner of the intersection of Killian Road and Farrow Road, abutting both roads. See Exhibit B. Carolina Chloride enjoyed an easement allowing it access the Property to and from Farrow Road and Killian Road. Carolina Chloride's easement to and from Farrow Road and Killian Road was a vested property right and interest.

A railroad track runs parallel to Farrow Road adjacent to the Property. SCDOT entered into an agreement dated July 20, 2004 with Norfolk Southern Railway Company, a Virginia corporation (the "Railroad"), whereby SCDOT would eliminate the grade crossing at Killian and Farrow Road (identified as Mile Post R-95.89). The elimination of the grade crossing was made in exchange for the Railroad paying approximately \$116,000 toward construction costs (5% of estimated total of \$2,313,152.80) of an overpass structure further up the railway line (Mile Post R-95.65) near the Town of Killian in Richland County, South Carolina.

In January 2006, SCDOT began blocking the access and did close the access to the Property from Farrow Road. Furthermore, it eliminated access to the Property from the portion of Killian Road west of Farrow Road. The purpose of SCDOT's actions was to close the railroad crossing in accordance with the aforementioned agreement with the Railroad, thereby resulting in the taking of Carolina Chloride's easement, a vested property right.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC; South Carolina Prop. and Cas. Guar. Assoc. v. Yensen, 345 S.C. 512, 548 S.E.2d 880 (Ct. App. 2001). "Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ." McNaughton-Mckay Elec. v. Andrich, 324 S.C. 275, 278, 482 S.E.2d 464, 466 (Ct. App. 1997). To determine whether any material fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001); Yensen, 345 S.C. 512, 548 S.E.2d 880.

The purpose of a motion for summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. George, 345 S.C. 440, 548 S.E.2d 868. Accordingly, summary judgment should be granted when it is clear that "further inquiry into the facts is not desirable to clarify application of the law." Cullum Mech. Constr. Co. v. South Carolina Baptist Hosp., 336 S.C. 423, 520 S.E.2d 809 (Ct. App. 1999).

The South Carolina Supreme Court has established that the plain language of Rule 56(c) mandates the entry of summary judgment when a party succeeds in establishing every element essential to the party's case; Hansson v. Scalise Builders of S.C., 374 S.C. 352, 357, 650 S.E.2d 68, 71 (2007) (citing Baughman v. Amer. Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991)).

LAW/ANALYSIS

"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." Hardin v. South Carolina Dep't of Trans., 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007) (citing Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 80 (2005)). "South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with a person's property interest amounts to an unconstitutional taking." Id. (citing Byrd, 365 S.C. at 656 n.6, 620 S.E.2d at 79). Both Article I, Section 13 of the South Carolina Constitution and the Fifth Amendment to the United States Constitution provide that private property shall not be taken for public use without the payment of "just compensation." Id. at 605, 641 S.E.2d at 441. "Determining whether governmental 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." Id. (emphasis added) (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 130, 131, 98 S.Ct. 2646 (1978)). "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." Id. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)).

The elements of a taking are: (1) affirmative conduct of a government 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 79-80.

In this case, as a matter of fact and law, elements (1) and (3) of a taking, mentioned above, are satisfied. With regard to element (1), it is patently evident Defendant, a government entity, affirmatively acted when it blocked Carolina Chloride's access to Farrow Road. Concerning element (3), it is clear that the construction in this case was for the public's use and benefit.

The analysis of element (2), whether the conduct of the government entity effects a taking, warrants further discussion. For years, South Carolina jurisprudence provided a "special injury" analysis in cases such as these. In City of Rock Hill V. Cothran, 290 S.C. 357, 40 S.E.2d 239 (1946), the South Carolina Supreme Court stated:

The right of a landowner to recover damages because of the vacation of a street depends on the location of his land with reference to the street vacate, or the part of the street vacated, and the effect of such vacation on his rights as an abutting owner. It is well settled that an owner is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large. If it appears that there is a special injury, the owner may recover damages notwithstanding his property does not abut, as in this case, on the part of the street vacated, because this amounts to a 'taking'.

In the absence of a special injury, no recovery will be allowed. The test is, not whether the property abuts, but whether there is a special injury, and the first practical question which presents itself is whether one whose property does not abut immediately on the part of the street vacated - the part vacated being in the same block between his property and the next connecting cross street- is so specially injured as to be entitled to recover compensation on the ground that his access is cut off in one direction, but not in the opposite direction.

Id. at 368-69, 40 S.E.2d at 243-44.

Under the "special injury" test, it is clear that Plaintiff has suffered a taking. Carolina Chloride's access was not only cut off in one direction, it was cut off in three directions. Prior to closing the crossing, Carolina Chloride cut access to its property from

the north and south off of Farrow Road and west from Killian Road. Today its only access is from the east. See Exhibit B attached.

SCDOT relies on the South Carolina Supreme Court's recent ruling in Hardin v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007). In Hardin, the Court expressly overruled decades of well-settled law in which takings of this type were decided by a "special injury" analysis – that is, whether a landowner could prove a closing of a road caused a special injury thereby constituting a taking. SCDOT's reliance on this recent decision is misplaced. First, Hardin v. South Carolina Dept. of Trans., 371 S.C. 598, 641 S.E.2d 437 (2007), is not controlling precedent since its application should be prospective only and not retroactive. In Davenport v. Cotton Hope Plantation, 333 S.C. 71, 508 S.E.2d 565 (1998), the South Carolina Supreme Court held "[t]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively. . . ." (quoting Toth v. Square D Co., 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989)).

In overruling prior case law in Hardin, the Court overruled the "special injury" analysis and those decisions holding that a closing of a road which resulted under this "special injury" analysis constituted a taking. In doing so, the Court created a new right whereby the government could close roads in these situations without incurring liability. Because the ruling created a new substantive right for the government, the judicial decision should be only applied prospectively – that is after the date of the decision. The Hardin decision was decided February 12, 2007, more than a year after the closing of Carolina Chloride's road. Therefore, Hardin is of no precedential effect.

Assuming, *arguendo*, that Hardin does apply to this case, Plaintiff still must prevail because Hardin cannot be construed to defeat Carolina Chloride's motion for summary judgment. Hardin recognizes that "a property owner has a protected property right in the form of an easement for access to and from any public road that **abuts** his property, regardless of whether he has access to and from an additional public road." Hardin, 371 S.C. at 606, 641 S.E.2d at 442 (emphasis added); see South Carolina State Hwy. Dep't. v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965). "Abut" means to be "contiguous, or border on; to bound upon; to end, end at, or terminate, to join at a border or boundary; to meet; to touch at the end or side." Mosteller v. County of Lexington, 336 S.C. 360, 365, 520 S.E.2d 620, 623 (1999) (citing 1 C.J.S. at 397 (1985)). However, "abut" does not always mean there must be actual contact. See Id.; Sonoco Products Co. v. South Carolina Dept. of Revenue, 378 S.C. 385, 393, 662 S.E.2d 599, 603 (2008). For example, "premises separated from a street by a small stream, but having access to the street by means of bridges, are premises abutting on the street, though the owner of the premises is not the owner of the bed of the stream." Anderson v. Town of Albermarle, 182 N.C. 434, ___, 109 S.E. 262, 264 (1921); see also Mosteller, 336 S.C. 360, 364-65, 520 S.E.2d 620, 623 (1999); Sonoco, 378 S.C. at 392, 662 S.E.2d at 603 (broadly interpreting the term "contiguous" so that railroads, roads, public right of ways, marshland, or water do not destroy contiguity).

The facts in the case at bar are very similar to those of a property owner who uses a bridge to access a road separated from his premises by a small stream. Carolina Chloride's property is separated from Farrow Road by railroad tracks that run directly beside and parallel to Carolina Chloride's property. Carolina Chloride's property

is situated similar to a premises separated from a street by a small stream where the owner of the premises is not the owner of the bed of the stream. In addition, Carolina Chloride uses this portion of Killian Road running parallel to and directly in front of his premises like a bridge over the railroad tracks to access Farrow Road. Carolina Chloride's use of this portion of Killian Road is similar to a landowner's use of a bridge to access a road separated from the premises by a small stream. The location of Carolina Chloride's property and Farrow Road fit into the definition of "abut" utilized in Anderson and Mosteller.

While the plaintiff's premises in Mosteller did not fit into the definition of "abut", the facts are distinguishable from the case at bar. In Mosteller, the highway department closed the railroad crossing on White Owl Road, which ran perpendicular to the plaintiff's property. Harvestview Road ran parallel to and in front of the plaintiff's property. The Court found the plaintiff could not suffer a constitutional taking because no part of plaintiff's property actually abutted any section of White Owl Road. Plaintiff's property did not abut any section of White Owl Road because in order to reach White Owl Road, Plaintiff had to cross Harvestview Road. Thus, the facts in Mosteller are very different from those in the instant case.

In this case, Carolina Chloride has a protected property right in the form of an easement for access to and from Farrow Road because this road abuts its property. It does not matter that Carolina Chloride has access to and from Killian Road. See Hardin, 371 S.C. at 606, 641 S.E.2d at 442. A governmental taking has occurred because Defendant has taken Carolina Chloride's ability to access Farrow Road. Therefore, Carolina Chloride is able to establish and prove element (2) of a taking—government

conduct that is a taking. Summary Judgment must be granted because Carolina Chloride is able to establish every element essential to a cause of action for a governmental taking. See Hansson v. Scalise Builders of S.C., 374 S.C. 352, 357, 650 S.E.2d 68, 71 (2007) (citing Baughman v. Amer. Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991)). Carolina Chloride has a right to recovery because the evidence is capable of only one inference—that Carolina Chloride has suffered a taking.

Furthermore in Hardin, the South Carolina Supreme Court stated, "[I]n some jurisdictions, a property owner merely has an easement for the purpose of accessing the public road system. . . . In South Carolina, however, a property owner has more rights. As we have held, a property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless of whether he has access to and from an additional public road. South Carolina State Hwy. Dep't v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965). Thus, for example, in South Carolina, an owner of a corner lot has an easement for access to and from both roads that abut his property." 371 S.C. at 606, 641 S.E.2d at 442 (emphasis added). "The court further noted, "as long as the owner has access to and from the remainder of the road that continues to abut his property, his easement with respect to that road remains intact." Hardin, 371 S.C. at 607, 641 S.E.2d at 442. In this case, however, Carolina Chloride no longer has access to Farrow Road. Farrow Road has not been closed. Its easement therefore has not been extinguished as in the example set forth in Hardin; rather, it has been taken.

In the instant case, the Property is on the corner of Farrow Road and Killian Road. Here, only a railroad owned by Southern Railroad lies between the Property and

Farrow Road. Under the law of South Carolina, the Property abuts Farrow Road because the railroad does not defeat the Property's contiguity to Farrow Road. Carolina Chloride has an easement to access Farrow Road because Farrow Road abuts the Property. Carolina Chloride, however, no longer has access to Farrow Road. Farrow Road has not been closed. Its easement therefore has not been extinguished - it has been taken by SCDOT. "Succinctly, the restriction of ingress or egress to and from one's property is the right which must be compensated if infringed when a highway is closed by condemnation." *Id.* at 608, 443. In taking Carolina Chloride's easement, SCDOT substantially restricted ingress and egress to the Property. This restriction, therefore, must be compensated. Summary judgment is appropriate in this case because Carolina Chloride can establish every element of a taking. Summary judgment must be granted in this case because the evidence only shows Defendant's actions constitute a taking.

CONCLUSION

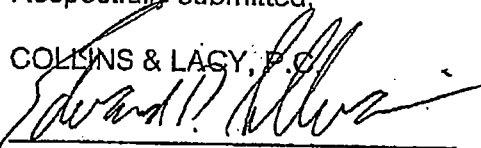
Carolina Chloride has established as a matter of law that SCDOT committed a taking when it closed the access to the Property from Farrow Road and eliminated access to the Property from the portion of Killian Road west of Farrow Road. Accordingly, Carolina Chloride's motion for summary judgment must be granted because the undisputed evidence shows a governmental taking.

(SIGNATURE PAGE FOLLOWS)

Respectfully submitted,

COLLINS & LACY, P.C.

By:


EDWARD D. SULLIVAN

CHRISTIAN B. STEGMAIER

1330 Lady Street, Sixth Floor (29201)

Post Office Box 12487

Columbia, South Carolina 29211

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(803) 771-4484 (f)

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina

MARCH 31, 2009

SOUTH CAROLINA

COUNTY OF RICHLAND

CAROLINA CHLORIDE, INC.,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 07-CP-7633

CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2009 MAR 31 PM 4:15
JEANETTE W. McBRIDE
C.C.

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, 1330 Lady Street, Post Office Box 12487, Columbia, South Carolina, 29211, does hereby certify that the following named individual(s) were served with a copy of the pleading(s) indicated below by mailing a copy of same to said person(s) in the United States Postal Service, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED:

Beacham O. Brooker, Jr., Esquire
Post Office Box 191
Columbia, SC 29202-0191

PLEADINGS:

- PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND EXHIBITS

Maria Varnadore

Columbia, South Carolina

March 31, 2009

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

CAROLINA CHLORIDE, INC.,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION,

Defendant.

32004
IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2007-CP-40-7633

AFFIDAVIT OF ROBERT H. MORGAN

FILED
2009 MAR 20 PM 3:28
JEANETTE W. McBRIDE
CLERK, C.P. & G.S.
SOUTH CAROLINA

PERSONALLY appeared before me, Robert H. Morgan, who being first duly sworn,
deposes and says:

1. I am the President and the sole stockholder of Plaintiff Carolina Chloride, Inc. -
2. In 1996, Carolina Chloride, Inc. purchased 7.67 acres located at the intersection of Killian Road and Farrow Road bearing TMS No. 17400-08-04 (the "Property").
3. In 2004, I learned that the SCDOT intended to close the railroad crossing at Killian Road and Farrow Road. In 2006, the railroad crossing was closed by placing a permanent barrier on Killian Road adjacent to the railroad tracks on the east side immediately adjacent to my driveway. The closing was carried out on Farrow Road by installing a drainage ditch across the intersection on the western side of the railroad tracks.
4. This closing occurred at the point at which my property abuts Killian Road and Farrow Road and eliminated access to my property from Farrow Road.
5. As a result of the road closing I lost access to the Property in 3 of 4 directions.
The property was sold in late 2006.



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0075

6. The road closing substantially reduced access to the Property and caused me to lose hundreds of thousands of dollars.

Further your affiant sayeth not.

Robert H. Morgan
Robert H. Morgan

SWORN to and SUBSCRIBED before me
this 20th day of March, 2009

Gately K Boatright (L.S.)
NOTARY PUBLIC for South Carolina
My Commission Expires: 12-31-13

2052
0076
SEP

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Carolina Chloride, Inc.,

Plaintiff,

vs.

South Carolina Department of
Transportation,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2007-CP-40-7633

PLAINTIFF

CAROLINA CHLORIDE, INC.'S

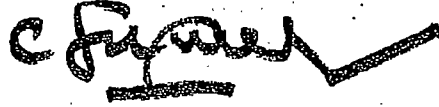
MOTION TO RECONSIDER

2016 FEB 22 PM 4:37
FILED
RICHLAND COUNTY
CLERK
JANETTE W. MCBRIDE
C.C.P. & G.S.

Plaintiff Carolina Chloride, Inc., by and through its undersigned counsel, hereby moves this Court, pursuant to Rule 59(e), of the South Carolina Rules of Civil Procedure, to alter or amend its judgment entered on January 25, 2016, which operated to dismiss the instant case in toto. Plaintiff respectfully requests the Court reconsider its dismissal and grant Plaintiff judgment in the instant case for the reasons enunciated in its proposed order granting relief in its favor. Respectfully, Plaintiff Carolina Chloride, Inc. avers the Court overlooked or misapprehended the true aegis of the term "abut," as it has been defined and implemented by our appellate entities. Stated succinctly, Plaintiff maintains its property abutted Farrow Road and possessed the right of ingress or egress, which was terminated by the closure of the railroad crossing at the intersection of Killian and Farrow Roads.

This Motion may be supplemented, supported by oral arguments, and/or a memorandum of law, if presented.

Respectfully submitted,
COLLINS & LACY, P.C.



By:

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cstegmaier@collinsandlacy.com
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And:

SULLIVAN LAW FIRM, PC

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esullivan@esullivanlaw.com
Post Office Box 11714
Columbia, South Carolina 29211
(803) 451-2775 (Voice)
(803) 451-2770 (Facsimile)

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
February 22, 2016

CERTIFICATE OF SERVICE
(2007-CP-40-7633)

The undersigned employee of Collins & Lacy, P.C., hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

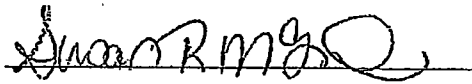
COUNSEL SERVED:

Beacham O. Brooker, Jr.
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Counsel for Defendant

Edward D. Sullivan
SULLIVAN LAW FIRM, PC
esullivan@esullivanlaw.com
Post Office Box 11714
Columbia, South Carolina 29202
Co-counsel for Plaintiff

RICHLAND COUNTY
FILED
2016 FEB 22 PM 4:37
JEANNETTE W. MCBRIDE
C.C. RICE & G.S.

PLEADING: MOTION FOR RECONSIDERATION



Columbia, South Carolina
February 22, 2016

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Carolina Chloride, Inc.

X Plaintiff,

vs.

South Carolina Department of Transportation

☐ Defendant.

check box above indicating submitting party

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2007-CP-40-7633

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Name, S.C. Bar No. and address of plaintiff's attorney: Christian Stegmaier, Esquire Post Office Box 12487 Columbia, SC 29211 telephone: 803.256.2660 fax: 803.771.4484 e-mail: cstegmaier@collinsandlacy.com other:		Name, S.C. Bar No. and address of defendant's attorney: Beacham O. Brooker, Jr., Esquire Post Office Box 191 Columbia, SC 29202 telephone: 803.737.2071 fax: 803.737.1347 e-mail: brookerbo@dot.state.sc.us other:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)		RICHLAND COUNTY FILED 2016 FEB 22 PM 4:37 JEANNETTE W. MOBRIDE C.C.P. & G.S.	
SECTION I: Hearing Information Nature of Motion: Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO			
SECTION II: Motion Type ☒ Written motion attached ☐ Form Motion - I hereby move for relief or action by the court as set forth in the attached proposed motion. Signature of Attorney for ☒ Plaintiff / ☐ Defendant February 22, 2016 Date submitted			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ Sexually Violent Predator Act ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other: ☐ State Agency v. Indigent Party ☐ Post-Conviction Relief ☐ Motion for Execution (Rule 69, SCRCP)			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION Collected by: _____ (print name) ☐ MOTION FEE COLLECTED: \$ ☐ CONTESTED - AMOUNT DUE: \$ DATE FILED _____			

SCCA/233 (11-03)

0081

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2007-CP-40-7633

MEMORANDUM IN SUPPORT OF

PLAINTIFF

CAROLINA CELORIDE, INC.'S

MOTION TO RECONSIDER

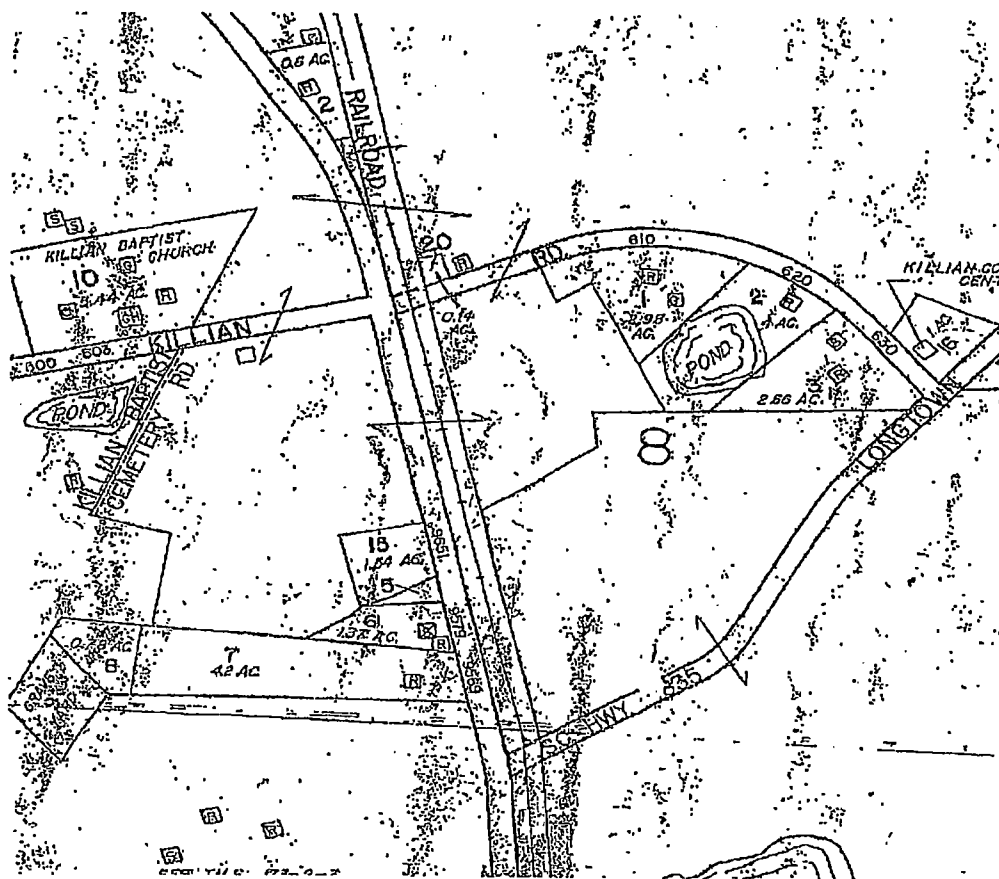
Respectfully, Plaintiff Carolina Chloride, Inc. avers the Court overlooked or misapprehended the true aegis of the term "abut," as it has been defined and implemented by our appellate entities. Stated succinctly, Plaintiff maintains its property abutted Farrow Road and possessed the right of ingress or egress, which was terminated by the closure of the railroad crossing at the intersection of Killian and Farrow Roads.

FACTS/PROCECURAL BACKGROUND

In November 1996, Plaintiff purchased 7.67 acres of land in northeast Richland County. Plaintiff's use of this property was commercial/industrial in nature; specifically, Plaintiff's initial use of the property was for the storing and distributing calcium chloride, a chemical used to control dust and ice on roads, as well as to treat drinking water. Plaintiff later expanded its operations to include commercial storage units, which it rented out to the public. At trial, Plaintiff's former owner and president, Robert Morgan, testified to investing substantial sums in acquiring the subject property and developing the various operations on it.

Plaintiff's tract of land was located at the southeast corner of the intersection of Killian Road (running east to west) and Farrow Road (running north to south). A railroad track owned by Norfolk Southern Corporation (Norfolk Southern) runs parallel to Farrow Road, adjacent to Plaintiff's property. Plaintiff accessed Killian Road using a driveway to the right of the railroad track.

In 2006, Norfolk Southern entered an agreement with Defendant whereby Defendant closed the portion of Killian Road that contained a railroad grade crossing near the intersection of Farrow Road. After the road closing, Plaintiff could no longer access Farrow Road by turning left onto Killian Road from the subject property and crossing the Norfolk Southern tracks. Instead, Plaintiff was compelled to take a circuitous and lengthier route, by turning right onto Killian Road, then right onto Longtown Road, and travel around the back of the property to the point where Longtown Road intersects Farrow Road.



Source: Richland County Tax Map, 17400-0524, December 1996.

Following closure of the railroad grade, Plaintiff sold the property for much less than what it was worth due to, inter alia, the lack of direct access to Farrow Road, a main thoroughfare in that part of the county. Plaintiff subsequently brought this inverse condemnation action, seeking damages for the lost value that purportedly resulted from the taking of Plaintiff's access rights to Farrow Road. This Court granted summary judgment in favor of Plaintiff. Defendant appealed this decision to the Supreme Court, which reversed the grant of summary judgment. See Carolina Chloride, Inc. v. South Carolina Dep't of Transportation, 391 S.C. 429, 706 S.E.2d 501 (2011). On remand, a hearing on the merits was held by this Court on October

20-22, 2014. At the close of trial, the Court requested both parties submit proposed orders, which they did. On January 25, 2016, this Court entered a written order in Defendant's favor, finding no taking occurred as a matter of law. Plaintiff thereafter moved for reconsideration.

I. Plaintiff's Contention That His Property "Abutted" Farrow Road

In the case at bar, Defendant's closure of the railroad grade eliminated Plaintiff's access to Farrow Road. This easement was taken from Plaintiff; hence, Plaintiff's pursuit of relief from this Court.

In Hardin v. South Carolina Department of Transportation, 371 S.C. 598, 641 S.E.2d 437 (2007), the Supreme Court enunciated, inter alia, that a property owner in South Carolina has an easement for reasonable access to and from any public road that abuts his property, regardless whether he has additional access to and from another public road. Id. at 606, 641 S.E.2d at 442. At issue in the instant case therefore is whether Plaintiff's property abutted Farrow Road.

Our appellate courts have defined "abut" to mean "to be contiguous, or border on; to bound upon; to end, end at, or terminate, to join at a border or boundary; to meet; to touch at the end or side." Mosteller v. Cnty. of Lexington, 336 S.C. 360, 365, 520 S.E.2d 620, 623 (1999) (quoting 1 C.J.S. at 397 (1985)). However, our courts have also held "abut" does not always mean there must be actual contact. See id. For example, property may still be deemed to abut a road when there is some intervening, natural barrier like a stream or river. Id. (citing Anderson v. Town of Albemarle, 182 N.C. 434, 109 S.E. 262 (1921)).

Admittedly, our courts appear not to have reached a determination of whether an intervening man-made barrier like a railroad bed in a similar takings dispute; however, Plaintiff asserts a railroad bed is analogous to the stream or a river example referred to in Mosteller.

Further, there have been holdings by our appellate entities in analogous disputes involving annexation, which have held that man-made conditions such as roadways do not destroy contiguousness and thus aid in the Court's disposition in the case at bar. See, e.g., St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston, 339 S.C. 320, 529 S.E.2d 64 (Ct. App. 2002) rev'd on other grounds by 342 S.C. 602, 564 S.E.2d 647 (2002); see also Eldridge v. South Carolina Dep't of Transp., 384 S.C. 548, 552-53, 683 S.E.2d 483, 485 (2009);¹ Sonoco v. South Carolina Dep't of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008).

¹ At issue in Eldridge v. South Carolina Dep't of Transp., 384 S.C. 548, 683 S.E.2d 483 (2009), was whether "on premises" signs for private businesses on a median on a public highway running through the town of Greenwood were actually "on premises." The median was situated upon an abandoned railroad right-of-way. A county ordinance defining "on premises" signs was interpreted by a special referee to be to be located on the actual property where the business is located. The Department of Transportation also concluded that such signs were not in fact "on premises" because they were not contiguous with, adjacent to, or adjoining the businesses on either side of the road the signs were advertising and thus there would be no taking if the signs were taken down. The Supreme Court, applying, inter alia, its holding in Sonoco v. South Carolina Department of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008), held these signs were in fact "on premises" notwithstanding the physical separation between the subject businesses and their signs due to the intervening state-owned highway. The Eldridge Court held contiguousness is to be broadly interpreted and that an intervening land owner does not necessarily destroy contiguousness in South Carolina.

[T]his Court [has] acknowledged that the term "contiguous" has been broadly interpreted. Sonoco v. SC Dep't of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008), citing Kizer v. Clark, 360 S.C. 86, 90-91, 600 S.E.2d 529, 532 (2004) (recognizing that marshlands and creeks do not defeat town's contiguity for annexation purposes); Mosteller v. County of Lexington, 336 S.C. 360, 364-65, 520 S.E.2d 620, 623 (1999) (explaining the term "contiguous" and stating "[a]but" means to be contiguous ... [h]owever, abut does not always mean there must be actual contact").

In Sonoco, we went further and distinguished between "contiguous" in a lay or secondary sense, versus in legal contemplation, stating, "In the legal field, it has been defined as: '[i]n close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded by or traversed by.'" Black's Law Dictionary 290 (5th ed.1979)." 378 S.C. at 391, 662 S.E.2d at 602. Significantly, S.C. Code Ann. § 5-3-305 is also cited in Sonoco; it states, in part:

In St. Andrews Public Service District, a public service district brought a declaratory judgment action, challenging city of Charleston ordinances that annexed property into the city. An issue extant in the dispute was whether the annexation ordinances were unauthorized by law because the properties annexed were not contiguous to the city's existing boundaries.

For purposes of this chapter, "contiguous" means property which is adjacent to a municipality and shares a continuous border. Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous border, the intervening connector does not destroy contiguity.

In Sonoco, we ultimately held a taxpayer's office buildings were subject to property tax because the public road and railroad tracks did not defeat contiguity of the plant and office buildings. We find the issue presented here is squarely controlled by our opinion in Sonoco; we find the contiguity requirement is met here such that for purposes of the applicable ordinance, the signs may be considered "on premises."

Further support for this result is found in the definition of "adjacent." Black's Law Dictionary, 38 (5th Ed.1979) defines it adjacent as "lying near or close to; sometimes, contiguous, neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch."

We find the Court of Appeals and Referee unduly restricted the definition of "on premises." Given the liberal construction afforded the definition of "contiguity" in Sonoco, we find the Property Between the Road's separation by the roadway does not defeat contiguity, such that the signs may be considered "on premises" for purposes of the ordinance. Accordingly, the Court of Appeals opinion is reversed, and the case is remanded to the Referee for calculation of damages.

Id. at 552-53, 683 S.E.2d at 485 (emphasis added).

It is important to note that Justice Pleicoones dissented, writing that in his opinion, an intervening land owner, which in Eldridge was in the form of the Department of Transportation, destroyed contiguity. Id. at 554-55, 683 S.E.2d at 486. The majority obviously disagreed with this assertion, which is edifying for resolving the instant case.

Specifically, the public service district alleged the city illegally annexed roads to achieve contiguity to properties that were not otherwise contiguous to the city. In its analysis,

Courts have generally held that contiguous is synonymous with the terms "adjacent to" or "adjoining." Erwin S. Barbre, Annotation, What Land is Contiguous or Adjacent to Municipality so as to be Subject to Annexation, 49 A.L.R.3d 589, 599 (1973). Our Supreme Court explained, "The statutory word 'contiguous' must be afforded its ordinary meaning of 'touching' " Bryant v. City of Charleston, 295 S.C. 408, 410, 368 S.E.2d 899, 901 (1988). To achieve contiguity, actual physical touching of the properties is not required. The Supreme Court has rejected an argument that the annexed parcels must have the additional qualifications of unity, substantial physical touching, or a common boundary.

Id. at 324-25, 529 S.E.2d at 66 (Ct. App. 2000).

The Court of Appeals held there was no contiguousness:

In the present case, the Charleston City Council attempts to establish contiguity, not by merely crossing a roadway to annex an adjacent property, but by annexing the length of a road to establish a common boundary. In essence, it argues that because the City's current property abuts a roadway, any parcel that abuts the same roadway is necessarily contiguous if the roadway is also annexed.

....

That kind of annexation is not authorized by the laws of this state.

Id. at 326, 529 S.E.2d at 67.

However, in its review, the Supreme Court did find contiguousness via extension of the annexation of the bordering roadways. St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston, 349 S.C. 602, 606, 564 S.E.2d 647, 649 (2002).

After the opinion in St. Andrews was filed, the General Assembly enacted South Carolina Code § 5-3-305, which defines "contiguous" as the term applies to annexation and further states:

Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for

the intervening connector would be adjacent and share a continuous border,
the intervening connector does not destroy contiguity.

(emphasis added).

Applying these holdings by analogy, this Court holds that: (1) under Mosteller, Sonoco, and Eldridge, Plaintiff's property and Farrow Road need not touch in order to be contiguous (*i.e.*, abut) for purposes of the Hardin analysis; (2) but for the intervening railroad bed, Plaintiff's property and Farrow Road would be directly adjacent and share a continuous border; and (3) the intervening railroad bed does not destroy contiguity. Fundamental fairness dictates a finding in Plaintiff's favor.

II. Additional Basis for Dismissal: Purported Failure to Exhaust Administrative Remedies

In its Order, the Court determined that Plaintiff did not make a meaningful request to allow Defendant to exercise its discretion concerning the road closure. This finding apparently was an additional basis for dismissal. Respectfully, the Court overlooked or misapprehended the testimony of Robert Morgan, who detailed several meetings and other efforts he undertook prior to the road closure with the express purpose of being able to continue using the access to Farrow Road. See Trial Testimony, pp. 45-50. As detailed by Morgan, he made it clear to Defendant's engineering representative that he was aggrieved by the Department's apparent consideration of closing the crossing. Id. Moreover, at no point prior to the road closure did Defendant advise Morgan that Defendant would have no objection to permitting a drive entrance onto Farrow Road.² It was only shortly before the trial of this case and long after Plaintiff sold its operations and land at the subject parcel did Defendant advise Morgan of the right to apply for a drive entrance. In the April 8, 2014, letter from counsel to the Defendant, it was represented: "[T]his

² Morgan has also testified that at no time prior to the road closing was he ever afforded official notice of the road closure.

Department never argues that an abutting owner to a State Highway does not have the right to enter that highway as long as the land affords a safe and suitable point for entry. The question, therefore, is who is the abutting owner vis-à-vis the plaintiff and the railroad. Our engineers have investigated this location and would have no objection to the opening of a private drive at this location." This offer, of course, was too little, too late.

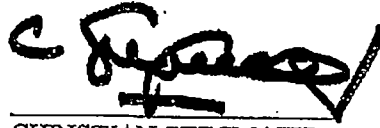
Plaintiff pursued administrative remedies concerning the road closure; however, Defendant disregarded Plaintiff's position. Plaintiff's suit for inverse condemnation in this Court was therefore appropriate.

CONCLUSION

For the reasons stated herein, Plaintiff Carolina Chloride, Inc. respectfully requests this Court grant its motion for reconsideration and enter judgment in its favor in the instant case.

[SIGNATURE PAGE ATTACHED]

Respectfully submitted,
COLLINS & LACY, P.C.



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Columbia, South Carolina
May 23, 2016

CERTIFICATE OF SERVICE

(2007-CP-40-7633)

The undersigned employee of Collins & Lacy, P.C., hereby certify that he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by delivering a copy of same to them via hand delivery and in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

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**PLEADING: MEMORANDUM IN SUPPORT OF PLAINTIFF CAROLINA
CHLORIDE, INC.'S MOTION TO RECONSIDER**



Columbia, South Carolina
May 23, 2016

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) CASE #: 2007-CP-40-7633

Carolina Chloride, Inc.,)
Plaintiff,)
v.)
South Carolina Department of)
Transportation,)
Defendant.)

HEARING ON THE MERITS

Monday, October 20, 2014
10:32 a.m. to 1:57 p.m.

Tuesday, October 21, 2014
10:00 a.m. to 11:54 a.m.

Wednesday, October 22, 2014
10:22 a.m. to 11:41 a.m.

The hearing before the Honorable Joseph M. Strickland, Master in Equity for Richland County, was taken in Courtroom 2D of the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina, commencing on the 20th day of October, 2014, and concluding on the 22nd day of October, 2014, before Robin K. Reibold, Court Reporter and Notary Public in and for the State of South Carolina.

Official Court Reporter
Master in Equity, Richland County
1701 Main Street - Post Office Box 192 (29202)
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EXHIBITS

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Plaintiff's Exhibit Number Eight.....	210	214
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Plaintiff's Exhibit Number Nine.....	210	214
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Defendant's Exhibit Number One.....	4	82
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Defendant's Exhibit Number Five.....	150	155
(Lincoln Street Deed)		
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1 (Plaintiff's Exhibit Numbers One through Five and
2 Defendant's Exhibit Numbers One and Two were marked
3 for identification prior to the hearing.)

4 THE COURT: This is Civil Action Number 2007-CP-40-7633,
5 Carolina Chloride, Incorporated against South
6 Carolina Department of Transportation. I believe
7 this -- my notes indicate this is an inverse
8 condemnation case. The Court -- or I ruled on a
9 motion for summary judgment in favor of the
10 plaintiff and that was appealed to the South
11 Carolina Supreme Court, and I was reversed and the
12 case was sent back here for a trial on the merits.
13 I understand that, Mr. Brooker, you have motions in
14 limine at this time?

15 MR. BROOKER: I do, Your Honor. We were -- we will find
16 and object to any testimony or evidence regarding
17 the use of -- let me put up my -- I think it would
18 be helpful to put up my aerial here. We'll object
19 to any testimony regarding the use of the closed
20 section of Killian Road to reach Farrow Road because
21 we believe that that has been determined by the
22 Supreme Court and is now the law of the case. Your
23 Honor ruled that they had a property -- they had a
24 property -- or Plaintiff had a property right to
25 continue from the property abutting Killian Road and

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1 use the closed section of Killian Road to reach
2 Farrow Road. The Supreme Court reversed on that
3 saying that under the *Hardin* case, the property
4 owner has a right of access to the roads his land
5 abuts. And those access, rights of access,
6 easements of access, are two -- are two. The first
7 is to get on and off each of your -- on your
8 property by each of the road it's -- it abuts. They
9 have not been restricted in getting onto Killian
10 Road. And the second access being, like an easement
11 of necessity, is the right to use that road to get
12 to the general system of roads. Your Honor said
13 that that access easement was taken because you
14 can't go in both directions on Killian Road. The
15 Supreme Court said no, that's wrong, they can still
16 reasonably use Killian Road going this way to reach
17 the general system of roads. This case has been
18 remanded for the very precise and simple purpose of
19 deciding whether or not they abut Farrow Road and
20 therefore have a right of driveway access onto
21 Farrow Road. And the exact precise language,
22 reading from the case, the Supreme Court's published
23 opinion, is: Specifically, there is a question of
24 whether the respondent had an easement of access as
25 an abutting owner to Farrow Road. Respondent's

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1 property is separated by Farrow Road by the strip of
2 land surrounding the railroad track, and there's
3 been no evidence presented of the quantum of the
4 estate of that portion of the land. And that --
5 that is the sole reason they -- they remanded the
6 case, Your Honor. So the law of the case as to the
7 necessity easement has been established by the
8 Supreme Court. So, as to whether they could cross
9 when we put the barricade here, or whether they can
10 cross there, has already been decided, and I don't
11 think Your Honor can revisit that. Otherwise, I
12 understand that the landowner here is going to try
13 to argue that even though the Railroad owns its
14 land, that somehow it is contiguous to the highway
15 and there's a right to get onto the highway. Of
16 course, our case would be, Your Honor, that, if so,
17 we have not done anything to restrict or prevent him
18 from getting on there. It's just a matter of who is
19 the abutting landowner. So we would object to that
20 easement-by-necessity testimony, Your Honor, and
21 assert that the only -- only thing before the Court
22 today is who owns the land, that strip of land
23 between Carolina Chloride and Farrow Road, whether
24 it's the Norfolk Southern Corporation or Carolina
25 Chloride.

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1 THE COURT: All right. Mr. Stegmaier.

2 MR. STEGMAIER: Good morning, sir.

3 THE COURT: Yes, sir.

4 MR. STEGMAIER: Again, for the record, my name is
5 Christian Stegmaier. I'm with the law firm of
6 Collins and Lacy. We have the privilege of
7 representing the plaintiff in this case. Joining me
8 is co-counsel, Mr. Sullivan. We've had the
9 opportunity to review the motion in limine that has
10 been forwarded to the Court concerning the argument
11 that was just propounded by Mr. Brooker.
12 Respectively, Your Honor, we'd ask the Court to deny
13 the motion, or at the very least, hold the matter in
14 abeyance or under advisement so that the Court may
15 hear testimony. Mr. Brooker is correct regarding
16 his understanding of the law as annunciated by the
17 Supreme Court specifically. A property owner in
18 South Carolina has an easement for access to and
19 from any public road that abuts his property,
20 regardless of whether he has additional access to
21 and from another public road. A property owner also
22 has an easement for access to and from the public
23 road system. In cases addressing the road
24 reconfiguration, the focus must be on the
25 landowner's actual property interests, that is his

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1 easements. Mr. Brooker has provided the Court, we
2 have a copy too as well as from the tax maps, but he
3 has clearly identified and correctly identified the
4 parcel of property that's at issue in this case that
5 was formerly owned by Mr. Morgan's entity, Carolina
6 Chloride, at Killian Road and then Farrow Road. Our
7 position is that pursuant to the law that was
8 enunciated by the Supreme Court in this case, as
9 well as in others, that Mr. Morgan's company had the
10 right of access not only to Killian Road but also to
11 Farrow Road. Because our position ultimately, and
12 it's supported by the cases that have been
13 previously decided by our appellate entities, that
14 he abuts or fronts Farrow Road. Respectfully, we
15 believe that Mr. Brooker's client misconstrues the
16 understanding or the analysis propounded by the
17 Supreme Court in its decision in this case
18 previously, *Carolina Chloride v Department of*
19 *Transportation*. As Mr. Brooker stated, Respondent's
20 property is separated from Farrow Road by the strip
21 of land surrounding the railroad track, and there
22 has been no evidence presented of the quantum of the
23 estate of that portion of land. Mr. Brooker is
24 correct that that is one of the reasons why we're
25 here today, is to discuss that part. But what Mr.

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1 Brooker didn't relate to the Court was the last
2 sentence, which is important in this case. "Because
3 further inquiry into the facts of this case is
4 desirable to clarify the application of law, we find
5 summary judgment was not appropriate." The Supreme
6 Court did not say that as a matter of law, if it is
7 found that the railroad was held in fee by some
8 owner entity other than Carolina Chloride, Carolina
9 Chloride immediately loses. We have case law that
10 we have previously argued to this Court, as well as
11 to another circuit judge, that supports the
12 proposition that irrespective of the ownership of
13 the railway or waterway or whatever that would be
14 between the public highway and the property at
15 issue, that that contiguousness is not broken, and
16 that it still continues, for purposes of definition
17 of law, continues to abut that highway. So, again,
18 it's not so simple as the State would have the Court
19 believe. I believe for the reasons that I've just
20 articulated, we wish the Court or ask the Court to
21 deny the motion in limine and let this matter go
22 forward.

23 THE COURT: Okay. Mr. Brooker.

24 MR. BROOKER: Yeah. I had this written out. I don't know
25 if I gave it to you in chambers. I don't think I

1 did because that looks like the original.

2 **THE COURT:** Have you seen this?

3 **MR. STEGMAIER:** I don't know what it is.

4 **THE COURT:** It's the motion ---

5 **MR. BROOKER:** It's the motion in limine.

6 **MR. STEGMAIER:** Oh, the motion in limine.

7 **THE COURT:** Right.

8 **MR. BROOKER:** Your Honor, contiguity is a matter of
9 property tax, the cases that he's referring to where
10 one -- one entity owns both sides of a railroad
11 track and the fee simple under the railroad's
12 easement. Those cases do hold that that does not
13 destroy contiguity for assessing them for taxes as
14 one tract. This is something entirely different.
15 Norfolk Southern Corporation, since 1848, when there
16 was the Charlotte and South Carolina Railroad, owns
17 this strip of land in fee simple. So in order to --
18 contiguousness is not the question, Your Honor.
19 It's whether they can physically can cross, by
20 vehicle, somebody else's land, not necessarily a
21 railroad, which would make it even more dangerous.
22 But the fact that a fee simple landowner lies
23 between them and the highway, that destroys abutting
24 and therefore they don't have the right to enter --
25 enter the highway as an abutting owner. And I have

10

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1 a second one, Your Honor. This one would be oral,
2 if I may.

3 THE COURT: You want me to rule on this one first?

4 MR. STEGMAIER: Just briefly, Your Honor.

5 THE COURT: Mr. Stegmaier.

6 MR. STEGMAIER: The difficulty that Mr. Brooker has, the
7 difficulty that the Court has too as well, as well
8 as the plaintiff, is there's no case on point that's
9 -- that rules against us or rules for the State as
10 far as what the parameters of what "abut" means for
11 purposes of this particular analysis. Our position
12 is that contiguousness, as has been previously
13 defined by our appellate courts in the zoning cases,
14 the annexation cases, and other similar disputes, is
15 a synonym for or equals the definition of abut.
16 This Court has previously agreed with our argument,
17 as well -- and that matter was not even taken up by
18 the Supreme Court in the prior -- in the prior
19 appeal. So it has not been disposed of. In
20 addition to this Court, Judge Childs agreed with the
21 plaintiff's position that the arguments that were
22 made by analogy concerning *Allison* and the *Sunoco*
23 case that talked about contiguity or contiguousness
24 of those, for all intents and purposes, equal the
25 definition of abut for purposes of this analysis.

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1 So our position is, again, respectfully, the motion
2 should be denied.

3 **THE COURT:** Let me -- let me, before I rule, let me state
4 that my rulings on motions in limine and any other -
5 - well, a motion in limine does not necessarily
6 reflect my views on the merits of the case, but I
7 think the motion in limine should be denied in this
8 case.

9 **MR. BROOKER:** Yes, sir.

10 **THE COURT:** All right, Mr. Brooker, you have one more?

11 **MR. BROOKER:** I do, Your Honor. In past proceedings in
12 this case it has been alluded to or stated that a --
13 that representatives of the Department told Mr.
14 Morgan certain things. I don't remember what that
15 is about, but it appears to be some sort of estoppel
16 argument, estoppel against the government or a
17 promissory estoppel. We would object to that
18 because that estoppel has not been pled. We had not
19 had -- no chance to investigate that, it's not part
20 of the complaint, and I would object to any estoppel
21 or evidence going towards estoppel.

22 **THE COURT:** All right. Mr. Stegmaier?

23 **MR. STEGMAIER:** We under- -- I think I understand Mr.
24 Brooker's argument. Unfortunately, there isn't a
25 lot of definition there for the Court to make a

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1 ruling one way or the other. If you don't -- we
2 don't even have testimony for you to even consider,
3 so we would -- we would respectively, at this point,
4 ask the Court to deny that motion in limine, at the
5 very least hold it in abeyance. Certainly under
6 Rule 801(d)(2), the statements of a party opponent
7 are admissible in this case. And so if there were
8 communications made by the Department, Mr. Brooker's
9 client, to Mr. Morgan, they're certainly admissible.
10 And whether they're ultimately -- I mean, they're
11 admissible on their face, but whether the Court
12 decides to permit them to actually ultimately end up
13 in the record, I think the Court really has to hear
14 the testimony.

15 THE COURT: Now, who are the individuals that made the
16 statements? You don't know, Mr. Brooker? Or you
17 haven't been told or ...

18 MR. BROOKER: I believe it's Brian Keys, a project manager
19 with the Department.

20 MR. STEGMAIER: And we've deposed Mr. Keys, and of course
21 we forwarded to Mr. Brooker our deposition
22 designations. As Mr. Brooker stated in his -- in
23 our discussions prior to this proceeding starting
24 back in chambers, he stated that Mr. Keys will be
25 here and he will provide live testimony and he'll be

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1 subject to cross-examination. And certainly, if I
2 ask a question that Mr., Brooker asks -- considers to
3 be objectionable, he can certainly render that
4 objection.

5 THE COURT: Okay. And that's your only witness, Mr. Keys?

6 MR. BROOKER: I think so, Your Honor, but I may have to
7 have a second one depending on Your Honor's ruling
8 on this. We have -- our position is that it's an
9 exhaustion of administrative remedies, plus a
10 principle of inverse condemnation law, that you have
11 to give the government -- if you believe property
12 has been taken from you, you have to give the
13 government an opportunity to cure that taking. It's
14 like exhaustion of administrative remedies in other
15 areas of the law.

16 THE COURT: How would y'all cure the taking?

17 MR. BROOKER: By granting them a driveway. Our point is
18 that he's never asked.

19 MR. STEGMAIER: Mr. Brooker ---

20 THE COURT: Hold on a second.

21 MR. STEGMAIER: Oh, I'm sorry.

22 MR. BROOKER: Excuse me?

23 MR. STEGMAIER: I apologize.

24 THE COURT: I want you to finish.

25 MR. STEGMAIER: I apologize.

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1 THE COURT: Yes, sir.

2 MR. BROOKER: No. Your Honor, our point is under -- under
3 Section 57-5-1090, the way the system works, if you
4 want a driveway onto a public road, you apply for
5 it, apply for and request a permit. And Mr. Morgan
6 or Carolina Chloride never did that. They just
7 dropped in an inverse condemnation suit saying pay
8 me damages for closing this railroad crossing. If,
9 even today, the landowner of the Carolina Chloride
10 property were to ask us for a driveway, we would
11 grant it to them. So, therefore, we could cure that
12 taking as of this moment. So money damages are not
13 appropriate.

14 THE COURT: Okay. Have you ever heard about that?

15 MR. STEGMAIER: Not up until I received a letter from Mr.
16 Brooker in April of this year advising us. Of
17 course, the Department well knows that this property
18 was sold back in 2006, so the offer at this point in
19 time is completely hollow. I would suggest to you
20 and I would make this representation to the Court,
21 that Mr. Morgan will testify to his meetings with
22 Brian Keys and at no point at any point in time did
23 Mr. Keys ever tell or advise Mr. Morgan of this
24 particular opportunity. The other thing, too,
25 that's important is this, and Mr. Keys testified to

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1 this in his deposition, and we are going to bring
2 this out today; that, from what we understand, one
3 of the big purposes of creating the revisions to the
4 highway up the street was some sort of idea about
5 creating some sort of high-speed rail system between
6 Columbia and Charlotte. And Mr. Keys testified to
7 it, that this was a plan that had been discussed
8 since the 1990s and that the actual construction in
9 the 2000s had some sort of component or relationship
10 to that. So, you know, what the -- what the
11 government argues now versus what the real facts
12 were when this was actually happening in real time,
13 respectfully, are disingenuous. Because the
14 Department had this plan along with the Railroad to
15 revise and restructure its railroad to facilitate
16 this project, among other things. And, as well, Mr.
17 Morgan is going to testify that Mr. Keys, who was in
18 a position of authority, never suggested, never
19 told, never advised our client that this private
20 encroachment would be something that would be
21 available to him.

22 MR. BROOKER: Just quickly, Your Honor.

23 THE COURT: Yes, sir.

24 MR. BROOKER: There's no obligation of the government or
25 any representative of the government to advise a

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1 private property owner of his right, property rights
2 under the law.

3 MR. STEGMAIER And we -- we appreciate that position.
4 Also, you know, our argument is that Mr. Morgan was
5 entitled to notice as to the Department's plans
6 under Chapter 5 of Section -- Chapter 5 of Title 57.
7 And in no way, shape, form or instance was he ever
8 provided that notice as well. And the statute
9 clearly, we believe, clearly required that of the
10 Highway Department as it relates to Mr. Morgan and
11 his business. So here we are, 2014, the property
12 has sold, it's been sold for the last eight years.
13 This right to cure business, it makes no sense.

14 THE COURT: Mr. Brooker.

15 MR. BROOKER: Your Honor, I'd cite the case of *Mosteller*
16 v. *Lexington County*, where the Supreme Court held
17 that there's no -- no obligation to give notice of a
18 closing of a rail-highway crossing.

19 THE COURT: Mr. Brooker, your next, your second motion in
20 limine has been denied as well. Any other motions
21 before we start with opening statements? Or we can
22 dispense with opening statements. I don't -- what's
23 your pleasure? I think there's enough in the record
24 that if this one goes up as well, I think the --
25 help the courts to understand what's going on.

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1 MR. STEGMAIER Would you mind terribly, sir? And I'll
2 keep it to three or four minutes. I won't go all
3 Atticus Finch on you. I'll -- I'll keep it to three
4 or four minutes.

5 THE COURT: That's fine. That's fine.

6 MR. STEGMAIER Just to kind of set the stage.

7 THE COURT: Yes, sir.

8 OPENING STATEMENT BY MR. STEGMAIER:

9 MR. STEGMAIER Thank you again, sir. Private property in
10 this country and in South Carolina should not be
11 taken for public use without payment or just
12 compensation. The elements for an action for
13 inverse condemnation, which is why we're here today,
14 involves a showing or demonstration of the
15 affirmative conduct of a government entity, and I
16 believe we are in concurrence that has in fact
17 occurred in this case. So the second is that the
18 conduct affects a taking, and that's what's in
19 dispute today. And the third element is the taking
20 is for -- is for a public use, and I believe that we
21 are in concurrence that this action by the
22 government was, at the very least, for a public use.
23 A plaintiff's right to recovering in an inverse
24 condemnation case is premised upon the ability to
25 show that he or she is affected -- suffered a

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1 taking. It is our position today that we'll be able
2 to put up sufficient evidence that will satisfy this
3 Court that a taking has in fact occurred. A
4 property owner in South Carolina has an easement for
5 access to and from any public road that abuts his
6 property, regardless of whether he has additional
7 access to and from another public road. As we
8 previously stated during the in limine portion of
9 the proceedings, Mr. Morgan's property abutted or
10 was situated to where it was at the corner of
11 Killian Road and Farrow Road. It is our position
12 that in addition to the Killian Road access, he had
13 the right of access under the *Hardin* law -- under
14 the *Hardin* case law to be able to access Farrow Road
15 too, as well. A property owner who also -- also has
16 an easement for access to and from the public road
17 system. In cases addressing the road
18 reconfiguration, the focus of this Court must be on
19 a landowner's actual property interests, that is his
20 easement. Just to sum up quickly, sir, just a
21 factual scenario of why we're here: Apparent --
22 Plaintiff, Carolina Chloride, actually brought this
23 action initially in this court seeking damages for
24 inverse condemnation against the Department of
25 Transportation. Carolina Chloride, in 1996,

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1 purchased a 7.67 acre tract of land to operate its
2 business, which included not only the chloride
3 business, which Mr. Morgan will talk very adroitly
4 about during his testimony -- during his testimony.
5 But, also, ultimately a warehouse business that he
6 used to rent out space to people seeking additional
7 storage for their homes and businesses and things
8 along those lines. A railroad track, as this Court
9 well knows, runs parallel to Farrow Road and
10 adjacent to the property. The Department of
11 Transportation entered into an agreement back in
12 2004 with Norfolk Southern Railway Company whereby
13 the Department of Transportation agreed to eliminate
14 the grade crossing at Killian and Farrow Road. The
15 elimination of the grade crossing was made in
16 exchange for the Railroad paying approximately
17 \$116,000 towards construction costs. So these two
18 parties were definitely partners in this operation.
19 In January 2006, and without any prior notice that
20 we believe was required by the Department, the
21 Highway Department began blocking the access; and
22 did close the access to the property from Farrow
23 Road and eliminated access to the property from a
24 portion of Killian Road west of Farrow Road. The
25 purpose of the Department's actions was to close the

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1 railroad crossing in accordance with the agreement
2 that I just mentioned, thereby resulting in what we
3 believe to be the taking of Carolina Chloride's
4 right to access Farrow Road. Finally, Your Honor,
5 our position is, in addition to the actual actions
6 of the government, Mr. Morgan's business was fatally
7 impaired by -- by virtue of the operations of the
8 government and the Railroad in this case. As I
9 mentioned, and as Mr. Morgan will testify more fully
10 in his testimony, he was running what he considered
11 to be a pretty robust business that was profitable.
12 It was two-pronged. He had the chloride business
13 that he was selling his chloride product to cement
14 vendors and cement customers, and then he also had
15 this warehouse business. Almost immediately, as Mr.
16 Morgan will testify, almost immediately when his
17 client -- his customers were unable to access his
18 property from Farrow Road onto Killian Road, he
19 noticed an immediate drop-off in business. And that
20 essentially caused -- and I've referenced with Mr.
21 Morgan in discussions with him -- the perfect storm
22 to start. By virtue of him having a reduction, a
23 substantial reduction, in revenue in his businesses,
24 he ultimately became very much in danger of having
25 his property foreclosed because of the monies that

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1 he had borrowed to facilitate his operations.
2 Ultimately, he was compelled to sell his property
3 for much less than it was worth in order to escape
4 that foreclosure. Mr. Morgan will testify that he
5 expended well over a million dollars in building up
6 this business, and at one point in time he had
7 actually received an offer of a \$1.1 million for
8 this business, which creates the valuation, the fix
9 on the numbers about, at least in his mind, what the
10 business was worth. But, and ultimately he sold his
11 business in the range of three to four hundred
12 thousand dollars. He suffered substantial losses as
13 a result of this action by the government. And
14 again, under the constitution, Mr. Morgan is
15 entitled to compensation by virtue of this taking,
16 and that's why we're here today. We appreciate the
17 Court's time and patience, and we look forward to
18 presenting our case.

19 THE COURT: When you say constitution, both state and
20 federal constitution?

21 MR. STEGMAIER: Yes, sir.

22 THE COURT: Okay. All right. Mr. Brooker.

23 OPENING STATEMENT BY MR. BROOKER:

24 MR. BROOKER: Your Honor, as we've said several times, the
25 constitution prohibits the taking of property,

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1 private property, without first making just
2 compensation. It is completely irrelevant of the
3 success of a business, the income someone derives
4 from property. For an inverse condemnation to be
5 held, the property must be diminished -- itself must
6 be diminished in substance, and not its income
7 producing potential; that goes to damages, that puts
8 the cart before the horse, as Justice Toal has said,
9 in an inverse condemnation case. So the loss of
10 business, the loss of income is completely
11 irrelevant. What we're here to determine is whether
12 any property was taken from Carolina Chloride. And
13 it is conceded, I believe, that no -- we never
14 entered -- the state never entered that property,
15 never acquired any portion of it. They are resting
16 entirely on access rights, and in the *Hardin* case
17 they don't have those rights. Under the *Carolina*
18 *Chloride* decision of the Supreme Court, they did not
19 have the right to cross -- use Killian Road to cross
20 those tracks onto Farrow Road. We're here only, as
21 I've said before, to determine who abuts Killian
22 Road. By law, the closing of this -- this highway
23 grade -- highway over rail crossing is done pursuant
24 to Title 58, Section 15 -- Article 15, Section 1625,
25 which encourages the Department of Transportation to

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1 close these things when possible. And when you can
2 come up with the resources to bridge over a
3 railroad, then the existing crossing at grade should
4 be closed. We had this opportunity with this
5 Clemson Road project to bridge over the Norfolk
6 Southern tracks on Clemson Road, and therefore
7 closed the crossing at Killian Road. It was done
8 for legitimate purposes specifically authorized by
9 law. It does not take any property because, as I
10 say again, it's the law of the case here. If the
11 plaintiff Carolina Chloride can prove that it abuts
12 Killian Road, and we don't see how, then that would
13 be the only taking the Court could find. But then
14 we should be allowed to cure that by giving them a
15 driveway across the Norfolk Southern tracks. And
16 Norfolk Southern is not here to object to it. But
17 there should be no money awarded here, Your Honor.

18 THE COURT: You said it abuts Killian Road or Farrow Road?

19 MR. BROOKER: Farrow Road.

20 THE COURT: Farrow. I'm sorry, you misspoke then.

21 MR. BROOKER: Did I? In other words, the Supreme Court
22 says that's okay, you can't go that way to get to
23 Farrow Road, you can go that way (indicating).

24 THE COURT: Right.

25 MR. BROOKER: What we're talking about is opening a

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1 driveway here, and our problem is that Norfolk
2 Southern line's there. That's what our case is,
3 Your Honor.

4 **THE COURT:** I understand. I understand. All right. Mr.
5 Stegmaier, call your first witness, please.

6 **MR. STEGMAIER:** Thank you, sir. The plaintiff calls Mr.
7 Morgan.

8 (Witness is sworn.)

9 Robert H. Morgan, being duly sworn, testifies as follows:

10 **MR. MORGAN - DIRECT EXAMINATION BY MR. STEGMAIER:**

11 Q: Mr. Morgan, good morning.

12 A: Good morning.

13 Q: For purposes of the record, would you state your
14 full name, please, sir?

15 A: Robert H. Morgan.

16 Q: And, sir, you are how old today?

17 A: I'm 76.

18 Q: And, sir, where do you live?

19 A: I live in Barnwell County, in the small town of
20 Williston.

21 Q: Now, are you originally from Williston?

22 A: I am.

23 Q: And that's where you went to high school?

24 A: That is correct.

25 Q: Now, after you finished high school, did you go to

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1 college?

2 A: I did.

3 Q: After you finished college, what did you do?

4 A: I worked for an industrial supply company, in sales.

5 Q: And how long did you do that job?

6 A: I did that five years.

7 Q: And after your industrial sales job, what did you

8 move on to?

9 A: I worked for a chemical division of Martin Marietta

10 Corporation, selling chemical add mixtures for

11 concrete.

12 Q: Now, Martin Marietta, sometimes when we hear that

13 name we think of like a defense contractor. Was

14 that -- was a big -- it was a big company that you

15 worked for?

16 A: It was a big company.

17 Q: Now, just for purposes of making sure that everybody

18 is on the same page about chemical add mixtures, can

19 you tell the Court what that -- what that means?

20 A: The basic chemical add mixtures in cold weather for

21 concrete, ready-mix concrete, you need something to

22 accelerate the set of the concrete or the cement in

23 the concrete in cold weather. And in the summertime

24 you need something to slow down or retard the set of

25 the concrete to eliminate a lot of cracking and have

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1 a chance to have the concrete finished. And then
2 there was air entraining agents that put microscopic
3 bubbles of air in the concrete which would prevent
4 scaling of the surface of concrete during freezing
5 weather.

6 Q: So you were essentially in the business of selling a
7 chemical to facilitate concrete getting poured the
8 right way?

9 A: That is correct.

10 Q: All right. You don't think about it when you're --
11 when you're in town and you're walking up and down
12 the sidewalks and see all that concrete on the
13 ground, you don't think about all the processes that
14 go into that?

15 A: That's correct.

16 Q: Now, you worked for Martin Marietta for how long?

17 A: For 20 years.

18 Q: And was there a point in time when you had the
19 opportunity to retire from Martin Marietta?

20 A: They selected some of us in upper management and
21 offered us early retirement if we were 50 years old
22 and had 20 years' service with the company. And I
23 met both of the requirements, and I considered it
24 and prayed about it and everything and decided to
25 take the retirement.

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1 Q: And what was in what year, sir?
2 A: In 1991.
3 Q: And you were how old at that point in time?
4 A: I was 52.
5 Q: And you had worked with Martin Marietta for how
6 long?
7 A: For 20 years.
8 Q: Is it fair to say at that point in time you knew a
9 lot about chemical add mixtures?
10 A: I have been exposed to a lot of problems with
11 concrete.
12 Q: Yes, sir. Now, when you retired, you quickly
13 realized that wasn't for you, was it?
14 A: Correct.
15 Q: Was there a point in time when you went back into
16 business?
17 A: I initially did some consulting with concrete
18 companies in regards to problems with concrete, and
19 I did some work for Hardaway Concrete Company in
20 Columbia, which I had sold chemical add mixtures to.
21 The owner was Guy Tate. And he and I talked a lot,
22 discussed concrete a lot. One day we were just
23 talking and I said we need to go in the liquid
24 calcium chloride business.. Because the add mixture
25 companies did not promote liquid calcium chloride

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1 because it was what they called just a commodity
2 product. So we discussed starting a company to
3 produce and distribute liquid calcium chloride to
4 the ready-mix concrete industry and a lot of other
5 applications for the calcium chloride. And so he
6 and I formed a corporation.

7 Q: Was that Carolina Chloride?

8 A: Carolina Chloride.

9 Q: And what, if you have a good recollection, do you
10 know approximately what year that would have been,
11 approximately?

12 A: 2002, I think it was.

13 Q: Well, let me ask you ---

14 A: No, I'm sorry, it was 1993.

15 Q: 1993. And so you and Mr. Tate operated for a period
16 of time together as partners?

17 A: Right.

18 Q: Did something happen to Mr. Tate at one point?

19 A: Mr. Tate developed cancer, terminal cancer, and a
20 little over two years after we formed the company he
21 passed away.

22 Q: So it was just you at that point in time?

23 A: Yes. But his company still owned half of the
24 company.

25 Q: Okay. Was there a point in time with regard to

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1 Hardaway where you -- you were operating where. at
2 this point in time?
3 A: I was operating out of the Hardaway Concrete
4 corporate office here in Columbia, on Taylor Street.
5 Q: And was that near a railroad track?
6 A: That was a railroad track -- a rail spur going into
7 there was the reason we operated it there.
8 Q: So you needed railroad track in order to do this
9 operation, correct?
10 A: That is correct. And there -- railroad sidings were
11 not readily available in many places.
12 Q: So at the point in time where it's just you, was --
13 were you -- were you -- did you get the idea or were
14 you told that you were going to have to leave the
15 operations at the Hardaway place on Taylor Street?
16 A: When purchasers of Hardaway Concrete came in, I
17 talked with them and they were interested in buying
18 the Hardaway part of the business. And my reaction
19 was that I felt like this would be the only
20 opportunity that I would have to own the whole
21 Carolina Chloride. So I denied their request to
22 sell -- or let them buy the other half of Carolina
23 Chloride. And so they told me immediately that I
24 would have to move my siding, not my siding, but the
25 use of the siding and move the tanks and my trucks

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1 from their property.

2 Q: So is that the point in time where you started

3 looking for other property?

4 A: I looked all over.

5 Q: And where did you ultimately find property that

6 would be suitable for your operations?

7 A: The only place I found was part of the property that

8 IBM owned, I think it was like 1600 acres out in

9 Northeast Columbia, Killian -- near Killian Road.

10 And negotiated with IBM about this 7.68 acres.

11 Q: Now, Mr. Brooker had previous put up during his

12 opening statement this board. I don't know if you

13 can see it. And we've got a blow-up of a tax map,

14 too, as well. Is the property that's depicted in

15 the aerial in Mr. Brooker's exhibit, is that a

16 property that you ultimately purchased out in

17 Northeast Columbia?

18 A: That appears to be the property that I purchased

19 from IBM.

20 Q: And what I'll do here ---

21 MR. STEGMAIER: Judge, I've got a copy for you, too, as

22 well.

23 THE COURT: Thank you.

24 Q: Let me show you what has been marked as Exhibit One.

25 And this is a tax map that's been certified by the

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1 assessor's office. And I'll hand this to you. I'll
2 hand this to you. Does that reflect where your
3 property was?
4 A: Yes.
5 Q: All right. So there -- this was at the intersection
6 of Killian Road and Farrow Road, correct?
7 A: That is correct.
8 Q: And then the railroad was running parallel with
9 Farrow Road, correct?
10 A: Correct.
11 THE COURT: Can I mark on this?
12 MR. STEGMAIER: Yes, sir, it's yours.
13 THE COURT: Thank you.
14 Q: Now, did this -- did this property when you
15 purchased it, did it have a rail spur on it?
16 A: It had a rail spur on it.
17 Q: Now, just for the Court's edification ---
18 A: Or adjoining it. I'm sorry.
19 Q: Yes, sir. Just for the Court's edification, why was
20 the railroad access so important to your operations?
21 A: The basic product that I used in the processing of
22 calcium chloride, I had to bring in my rail from
23 Louisiana. And I could not afford to truck it in
24 and it was more economical to bring it by rail, so
25 that was why I had to have a rail siding.

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1 Q: Now, the property that you purchased, let me show
2 you what's been marked as Exhibits Two-A and Two-B.
3 This appears to be a deed for the property that you
4 purchased out in Northeast Columbia. Are you in
5 agreement with that?
6 A: Yes.
7 Q: All right. And the purchase price for the property
8 was how much, sir?
9 A: \$85,000.
10 Q: Now, the property that you purchased, was it
11 actually being occupied by an existing business at
12 the time that you bought it?
13 A: No.
14 Q: But was it raw land?
15 A: It was grown up and had remains of a business that
16 had been on it and closed in 1905.
17 Q: All right. So it had been more or less, at that
18 point in time, 91 years since a business had
19 operated there?
20 A: That is correct.
21 Q: Now, is it fair to say that when you bought the
22 property, to get on there and start operating, that
23 you had to do some improvement on that property?
24 A: Yes, sir.
25 Q: Now, how much did -- what did you have to do in

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1, order to improve the property to operate on it?

2-A: Clearing a lot of big trees, old parts of equipment
3 that was used by the brick manufacturing company
4 that was on there, grading the property, getting rid
5 of the wisteria vine that was probably a foot deep,
6 and hauling in dirt to fill in the lower end of it.
7 But it was a task to clear it, grade it, get it
8 ready to start putting up equipment.

9 Q: Now, you, yourself, you weren't on a backhoe doing
10 all this, were you?

11 A: No.

12 Q: Did you have to pay somebody to come in and do that
13 work for you?

14 A: I had two contractors.

15 Q: And you -- and I know at this point in time we're
16 talking about over 20 years ago, but do you have a
17 recollection of how much money you would have spent
18 in order to grade and clear the property to get it
19 right for your operations?

20 A: It was in excess of \$20,000.

21 Q: All right. Now, once that was done and completed,
22 were you ready to operate?

23 A: No.

24 Q: What else did you have to do in order to operate
25 your sodium chloride business?

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1 A: Calcium chloride.

2 Q: Calcium. I apologize. I didn't do very well in
3 chemistry, I'll tell you that. What did you have to
4 do in order to operate the calcium chloride
5 business?

6 A: To be able to bring tank cars in. I had to have a
7 place to put the calcium chloride, so we had to pour
8 concrete, place concrete. And I had to build two-
9 foot thick reinforced concrete slabs to set these
10 tanks on. And I had to -- five tanks, big tanks,
11 ninety, hundred thousand gallon tanks that I stored
12 calcium chloride in, and then I had five more --
13 three more steel tanks that I put product in for
14 different applications.

15 Q: What were -- just since we're talking about it, what
16 were some of the applications for the calcium
17 chloride?

18 A: I sold to South Carolina Highway Department, North
19 Carolina Highway Department, Virginia Highway
20 Department, Georgia Highway Department. I sold to
21 the state of Florida, sold to counties for use as
22 dust control on dirt roads. I sold to wastewater
23 treatment plants. I sold to drinking water
24 treatment plants. I sold to other manufacturing
25 operations that used calcium chloride in the

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1 manufacturing process. There were multiple sales
2 outlets for me.
3 Q: In addition to the concrete applications?
4 A: The concrete application was the biggest part of it.
5 But most of that was in cool weather.
6 Q: It's fair to say, isn't it, that the calcium
7 chloride you were selling had a multitude of
8 applications and you had a multitude of different
9 types of customers?
10 A: That is correct.
11 Q: So, when the product came from Louisiana, it would
12 get into your tanks somehow, wouldn't it?
13 A: I had big pumps to pump from the railcars over to
14 the big tanks.
15 Q: Now, with regard, and I know that this has been some
16 time ago, but with regard to the cement pads, the
17 five steel tank -- I'm sorry, the five fiberglass
18 tanks you purchased, how many steel tanks?
19 A: There were three steel tanks.
20 Q: All right. So eight tanks in total, plus the pumps
21 -- you had to spend money on that too, didn't you?
22 A: Yes, sir.
23 Q: If you had to estimate the sum total of the amount
24 of money that you spent on improvements in order to
25 get sodium chloride off the -- calcium chloride off

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1 the trains and into the pump, into the tanks, do you
2 have a -- do you have an idea about that, an
3 estimate or a ballpark?
4 A: Including the tanks?
5 Q: Yes, sir.
6 A: It was in excess of \$200,000.
7 Q: Now, how do you go about delivering the product to
8 your customers, whether it's the Florida Highway
9 Department or the Darlington County Highway
10 Department or the ready-mix people, how do you --
11 how do you get your chloride to your customers?
12 A: I had tractor-trailer tankers, 18-wheel tankers,
13 5000 gallon capacity, most of them. They had to be
14 of a product -- the material the tanker was made out
15 of had to be of a special stainless steel that the
16 calcium chloride would not attach.
17 Q: And how many of these tractor-trailers did you own?
18 A: I had five tractor-trailers and then one straight
19 truck with a tank on it.
20 Q: And this is materials, this is transportation that
21 Carolina Chloride owned?
22 A: Correct.
23 Q: And these tank -- these trucks would be situated at
24 the property?
25 A: They would stay on the property when they're not on

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1 the road, yes, sir.

2 Q: And these tractor trailers were essential to your

3 operation?

4 A: Yes.

5 Q: Do you have an estimate as far as how much money

6 that you had spent on the transportation piece?

7 MR. BROOKER: Your Honor, not to be -- to disrupt things,

8 but I think this goes to my motion in limine and I

9 think I need to make an objection to loss of

10 business, business money because it doesn't go to

11 property.

12 THE COURT: Would you like to note a continuing objection

13 so you don't have to jump up every time?

14 MR. BROOKER: Could you do that, a continuing objection?

15 THE COURT: Yes, sir. Yes, sir.

16 MR. BROOKER: Unless it goes to the value -- not the value

17 of the property but the loss of a property right.

18 I'm going to object to any testimonies regarding the

19 loss of business or loss of income from the

20 property.

21 THE COURT: Your objection is overruled, and I'll note

22 that you have a continuing objection so you don't

23 have to jump up every time here when somebody says

24 something. Okay. Please proceed, Mr. Stegmaier.

25 MR. STEGMAIER: Thank you, sir. I appreciate it.

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1 Q: Was there -- now, we've clearly established that you
2 were in the calcium chloride business.. Was there a
3 point in time where you expanded operations at this
4 -- on this parcel of land out near Northeast
5 Columbia?
6 A: Yes.
7 Q: What did you get into in addition to the calcium
8 chloride business?
9 A: When I set the calcium chloride up, I set it back
10 from Killian Road, away from the road, and I had
11 this other acreage up near Killian Road, so I said
12 why not put some mini warehouses there because there
13 was a lot of growth in that area, building and --
14 for homes, residences. And so I built a hundred
15 mini warehouses or units on the property.
16 Q: And how -- you said you built a hundred units?
17 A: I built a hundred.
18 Q: And how much did you spend to build those units?
19 A: The cost of building those was 100 -- \$300,000.
20 Q: And did you borrow money?
21 A: I borrowed money to build those warehouses.
22 Q: So that's another substantial investment you made
23 into this property?
24 A: Yes.
25 Q: Now, let me ask you this. From the time period that

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1 you've opened for business in 1996, until you
2 ultimately had to sell the business, how did your
3 trucks get to where they needed to go, say the
4 interstate, to get to their customers?

5 A: Most -- most of the deliveries went to I-77, either
6 north or south, some deliveries did go back to I-20
7 and go out. But most of -- the majority of my loads
8 coming out of the plant went up and got on I-77.

9 Q: Well, how did -- how did your trucks get to I-77?

10 A: They came out of the gate of Carolina Chloride onto
11 Killian Road, turned left, crossed the rail crossing
12 and crossed Farrow Road, and went on up Killian Road
13 to I-77.

14 Q: So Killian goes across -- at that point in time
15 Killian went all the way across Farrow Road?

16 A: Correct.

17 Q: But it was essential, in order for you to get to the
18 interstate, to be able to access Farrow Road,
19 correct?

20 A: That is correct.

21 THE COURT: I'm sorry; he had to access Farrow Road or to
22 cross Farrow Road?

23 MR. STEGMAIER: I'm sorry. To cross Farrow -- well, I
24 guess you would have to do one and the same.

25 Q: In order to get to Killian Road, you would have to

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1 cross Farrow Road, wouldn't you?
2 A: Yes.
3 Q: All right. There was a point in time, and we'll
4 talk a little more about this later on, but there
5 was a point in time where you were precluded or
6 prevented from crossing Farrow Road, weren't you?
7 A: That is correct.
8 Q: That's the whole reason why we're here, right?
9 A: That is correct.
10 Q: Is there another way to access Farrow Road from
11 Carolina Chloride?
12 A: There was.
13 Q: How would you go about doing that?
14 A: You would come out of the gate of Carolina Chloride,
15 turn right on Killian Road, and go back through the
16 neighborhoods and get around to Longtown Road and
17 come back into Farrow Road, crossing the railroad
18 crossing near Farrow Road to get onto Farrow Road.
19 And then we'd have to go to the left and go down to
20 get on -- left on Farrow Road to go down and get on
21 77.
22 Q: Now, by virtue of Mr. Brooker's exhibit here, and
23 we're just using, this is Killian Road, correct?
24 A: Yes, sir.
25 Q: And of course, that's your property ---

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1 A: Yes.

2 Q: -- in red. This is Longtown Road that moves to the
3 south?

4 A: Yes.

5 Q: And is it fair to say that what's depicted here at
6 the bottom is a residential neighborhood?

7 A: That is correct.

8 Q: And you're hauling chemicals on 18-wheelers,
9 correct?

10 A: That is correct.

11 Q: So you didn't have a desire to haul chemicals
12 through a residential neighborhood?

13 A: No, sir.

14 MR. BROOKER: Your Honor, can I have the continuing
15 objection to the use of the Killian Road to cross
16 the tracks to Farrow Road that I mentioned in our
17 motion in limine?

18 THE COURT: I'm sorry. Re-state your objection, please.

19 MR. BROOKER: My objection is to testimony of the loss of
20 the use of the segment of closed Killian Road to
21 reach Farrow Road as opposed to having going the
22 other direction. The testimony we just heard is
23 objectionable because I think that it's the law of
24 the case, as decided by the Supreme Court, that it's
25 not a property right.

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1 THE COURT: Objection overruled. But I'll note a
2 continuing objection.
3 MR. BROOKER: Thank you, Your Honor.
4 Q: Now, with regard to your warehouse business or your
5 storage business, what was your experience when you
6 were operating out of there about how the majority
7 of your customers would access your property?
8 A: Probably 80 percent would come down Farrow Road and
9 cross -- turn left on Killian Road and then turn
10 right into Carolina Chloride and go to the
11 warehouses just inside.
12 Q: So is it your testimony that the access from Farrow
13 Road was essential to your business concerning your
14 storage units?
15 A: That is correct. But I did have some coming back
16 from Killian Road that lived behind the operation.
17 Q: Yeah. It wasn't a hundred percent, was it?
18 A: It was not.
19 Q: But it's your ---
20 A: But the majority.
21 Q: You said 80 percent?
22 A: Yes, sir.
23 Q: The majority, all right. Now, let me just ask you
24 some follow-up questions about revenue for both
25 sides of your business. And I know -- let me -- I

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1 know this and you know this, but let me ask you this
2 question for purposes of the Court. Where you have
3 lived down in Barnwell County, was there a point in
4 time where you had a fire?

5 A: Yes.

6 Q: And a lot of the corporate documents that you
7 possessed concerning Carolina Chloride, they were
8 destroyed in that fire?

9 A: That's correct.

10 Q: So at this point you're testifying by memory and
11 recollection, correct?

12 A: Yes.

13 Q: And you understand the significance of testifying
14 under oath?

15 A: Yes.

16 Q: With regard to the chloride business, is it fair to
17 say that your business was, in many respects,
18 seasonal?

19 A: Yes.

20 Q: When were you more busy versus less busy?

21 A: I was -- the busiest season was in cold weather.

22 Q: And that was the chemical that you were selling in
23 order to encourage, I guess ---

24 A: Accelerate the set of concrete and control ice on
25 roads and bridges.

- 1 Q: Now, during the years that you operated, which we
2 understand to be from 1996 to 2006, do you have an
3 estimate about your gross revenue, typically,
4 connected with the chloride business?
- 5 A: It was in excess of one million dollars.
- 6 Q: And that's your gross revenue?
- 7 A: Gross revenue.
- 8 Q: Now, with regard to your warehouse business, once
9 you got that started and running -- because that
10 came second, didn't it?
- 11 A: Yes.
- 12 Q: Do you have an estimate as far as your gross revenue
13 concerning your warehouse business?
- 14 A: It was roughly 85 to 90 thousand dollars.
- 15 Q: Now, let me -- let me turn our attention towards why
16 we're here today. Was there a point in time where
17 you came to some sort of understanding that there
18 was a prospect for the rail grade at Killian Road to
19 be closed?
- 20 A: Yes.
- 21 Q: Was there a point in time after learning that that
22 you had any sort of meetings with any official at
23 the Department of Transportation?
- 24 A: Yes.
- 25 Q: Do you remember who you would have met with at the

1 Department of Transportation?

2 A: I met with Brian Keys.

3 Q: And Brian Keys was who, as you understand it or

4 recall?

5 A: He was in management with Engineering with the

6 Highway Department involved in the Killian Road

7 bridge, Farrow Road -- Killian Road.

8 Q: Now, in the course of your conversations with Mr.

9 Keys, did you express to him your concern about

10 Killian Road being closed?

11 A: Yes, I did.

12 Q: Did you express to him that your business depended

13 upon, in large respect, your ability to access

14 Farrow Road at the Killian Road crossing?

15 A: I explained to him that I was concerned about my

16 tankers going back through neighborhoods and having

17 to cross another rail crossing. And at that time I

18 don't believe it had a red light to control the

19 traffic. And when you're talking about a tractor-

20 trailer tanker, it -- 80 feet long, there's a lot

21 of traffic on Farrow Road and I was concerned about

22 that, as well as the kids in the neighborhood.

23 Q: Did, at any point in time with your conversations

24 with Mr. Keys, did he ever tell you that he

25 appreciated your concerns and that if you wanted to,

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1 you could enter into some sort of a private
2 encroachment agreement in order to continue
3 accessing Farrow Road to Killian?

4 A: There was no mention ---

5 MR. BROOKER: Your Honor, may I note my continuing
6 objection on my second motion in limine concerning
7 statements made by any Department employee,
8 Department of Transportation employee, that this
9 appears to go to estoppel and estoppel is not pled
10 here. I would also cite the case of *Carolina*
11 *Chloride v Richland County*, holding that a state
12 employee cannot bind the government of misstatements
13 as to the law.

14 THE COURT: Objection overruled. I'll note your
15 continuing objection.

16 MR. BROOKER: Thank you, Your Honor.

17 Q: So at no point Mr. Keys said anything to you along
18 the lines of, Thank you, Mr. Morgan, if you'd like,
19 make an application for a private encroachment so
20 that you can continue accessing Farrow Road by way
21 of Killian Road?

22 A: He made no mention of making it available for me to
23 have another crossing there.

24 Q: Now, let me ask you this.

25 MR. STEGMAIER: And really, and I'll represent to the

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1 Court the purpose or the reason for our desire to
2 admit this into evidence is really nothing to do
3 with what's depicted on here, but by virtue of the
4 fact that there's some notes on here that create
5 some dates. And I'm going to ask Mr. Morgan some
6 questions about that.

7 THE COURT: Have you seen it?

8 MR. BROOKER: Yes, I have it. I don't know what it is,
9 Your Honor. It's confusing where that -- I don't
10 know what it came from -- where it came from.

11 MR. STEGMAIER: Well, we'll let Mr. Morgan testify to it.
12 Just as, I guess, a proffer by me -- well, I don't
13 want to do that. Can I -- can ---

14 THE COURT: Let me ask you, what exhibit number?

15 MR. STEGMAIER: This is Exhibit Number Three.

16 THE COURT: Of the plaintiff. All right. Now, what does
17 that document purport to show?

18 MR. STEGMAIER: This document would purport to show what
19 the Highway Department at this point in time, in
20 1997, proposed to do with regard to the work that it
21 was going to do concerning building the bridge up
22 the road on Farrow, as well as, from what I can
23 gather, the potential closure of the highway at
24 Killian.

25 THE COURT: And you say there are notes on it. I ---

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1 MR. STEGMAIER: There's no source on there.
2 THE COURT: Hold on a second. Is that a plat or -- if I
3 can look at it and see what it is, I'm not going to
4 ---
5 MR. BROOKER: There's nothing indicated on the document
6 that it comes from the Highway Department.
7 MR. STEGMAIER: Well, that's why I was going to ask Mr.
8 Morgan a question about that.
9 THE COURT: Okay. Ask him where it came from.
10 MR. STEGMAIER: Yes.
11 THE COURT: You object?
12 MR. BROOKER: I object because I've never seen it, I don't
13 know what it is. It's confusing, and I don't know
14 what the source of it is.
15 MR. STEGMAIER: Let me -- certainly Mr. Keys will be here
16 later. We can ask him about it as well.
17 THE COURT: Okay. Objection overruled.
18 Q: Mr. Morgan, I have what is marked as Plaintiff's
19 Exhibit Three. Can you tell me or describe to me
20 what that is and how you got it?
21 A: This was given to me by Brian Keys with the Highway
22 Department when I went up to visit with him.
23 Q: So this would be contemporaneous with these
24 discussions that you've been testifying about?
25 A: Right. We were showing -- it was explaining right-

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1 of-ways as far as the Highway Department and where
2 my business was.

3 Q: Now, on the -- on the -- on the map or the drawing
4 that was given to you, it says November 13, 1997,
5 To/By Morgan, Brian Keys. Is that your handwriting?

6 A: No, it is not. This was written on there by Brian
7 Keys.

8 Q: In your presence?

9 A: In my presence. And the map was given to me.

10 THE COURT: Now, has that document been admitted into
11 evidence.

12 MR. STEGMAIER: I haven't moved it in yet, sir.

13 THE COURT: Do you want to or are you planning to?

14 MR. STEGMAIER: I was going to at the end of his
15 testimony. But I can -- what I'll do is ---

16 THE COURT: Go ahead. I'm sorry.

17 MR. STEGMAIER: What I'll -- at this point in time, and I
18 understand Mr. Brooker's objections, at this time we
19 would ask the Court to move into evidence Exhibits
20 One, Two, and Three.

21 MR. BROOKER: We object to Three, Your Honor, on the
22 grounds that we -- it doesn't -- the document itself
23 does not indicate from whom it came, and I guess our
24 objection would be hearsay.

25 THE COURT: Okay. Mr. Stegmaier?

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1 MR. STEGMAIER: Well, it's a statement by a representative
2 of the Department, so it can't be hearsay.

3 THE COURT: Mr. Brooker thinks -- has already cited a case
4 that says it can't be bound by the statements of an
5 employee.

6 MR. STEGMAIER: And we're ---

7 THE COURT: The government can't be.

8 MR. STEGMAIER: I'm sorry for interrupting.

9 THE COURT: That's all right. How -- how is this document
10 relevant? I mean ---

11 MR. STEGMAIER: It's relevant, and the reason why we're
12 moving it in is that it is what we believe to be
13 evidence of the fact that Mr. Morgan did in fact go
14 to see Mr. Keys and discuss this matter. Really the
15 only reason why we're asking it to come into
16 evidence is it's tangible and material evidence
17 evincing or demonstrating the meeting that Mr.
18 Morgan is testifying to.

19 THE COURT: Okay. Mr. Brooker, does that make you feel
20 better? No?

21 MR. BROOKER: Not really, Your Honor. I guess we'll just
22 maintain our objection.

23 THE COURT: Yeah. The objection is overruled. However,
24 obviously I have to look at it and I'll have the
25 same question, how is this relevant, so -- but go

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1 ahead.

2 MR. STEGMAIER: Thank you, sir.

3 THE COURT: Yes, sir.

4 (Plaintiff's Exhibit Numbers One, Two and Three are
5 entered into the record.)

6 Q: Now, in addition to yourself, concerning the road
7 closure or the railroad closure at Killian and
8 Farrow, do you recall or do you remember any other
9 individual who was a citizen who was expressing the
10 same type of concerns relating to the closure?

11 A: Yes, I do. I remember, and I cannot remember his
12 name.

13 Q: Was the name Michael Letts?

14 A: Michael Letts. Michael Letts came by my office and
15 came and visited with me prior to me going to the
16 Highway Department and says, Are you aware that the
17 Highway Department is planning on closing this
18 railroad crossing right here where you come and go
19 from your property? I said, I am not. And he says,
20 with the organization that he worked with, he said,
21 We feel like -- I feel like that they should not
22 close this railroad crossing. And he said, Would
23 you like to go with me to the Highway Department and
24 talk with them about not closing this? And I -- I
25 expressed my desire to go and he went with me, and I

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1 think Eddie Sullivan went along as well and -- he
2 was representing me at that time. And we talked
3 again to Michael -- I mean ---
4 Q: Mr. Keys?
5 A: Brian Keys. And we really, really felt like we did
6 not do any good in talking to him. But we did meet
7 with him.
8 Q: So it's my understanding from a factual standpoint
9 that you had multiple face-to-face conversations
10 with Mr. Keys?
11 A: That is correct.
12 Q: And at no point in time did Mr. Keys ever, or
13 anybody from the Department, ever relate to you that
14 they were going to revisit or reconsider the idea or
15 notion of closing the rail line?
16 A: The first time I met with Brian Keys, he did -- he
17 would not commit to closing it. He says it was --
18 had been undecided; that they had decided not to
19 build a bridge over the Killian Road crossing, but
20 they decided to build it up beyond. And, but he
21 never really committed to me that they were going to
22 close the railroad crossing at Killian Road and
23 Farrow Road.
24 Q: But you never got any communication in the
25 affirmative from Mr. Keys or anybody else from the

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1 Department after these conversations that the
2 crossing was in fact going to stay open, did you?

3 A: I never got any information from the South Carolina
4 Highway Department that stated that -- verbally or
5 by letter that they were going to close the crossing
6 at Killian Road.

7 Q: Now, was there a point in time in early 2006 where
8 it became apparent to you that the railroad grade
9 was going -- was closed?

10 A: When they came in and put the barricades up and tore
11 the timbers out up against the rails and took back --
12 -- and dug the rock fill-out so that no one could
13 cross the bridge.

14 Q: Has that -- has that barricade ever been taken away?

15 A: Not to my knowledge.

16 Q: Has the timbers and the asphalt and everything else
17 that would be needed in order to use that crossing
18 ever been replaced?

19 A: No.

20 Q: You might have already answered this, but were you,
21 between the time that you last met with Mr. Keys in
22 July of 2006 -- I'm sorry, January 2006, when they
23 took up the crossing, were you ever provided any
24 written notice from the Highway Department of the
25 closure of this road?

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1 A: No.

2 Q: Now, let me ask you some questions because I've

3 heard before that a picture is worth a thousand

4 words, and I'd want to maybe help the Court get a

5 little bit more context. What I'm going to do, I've

6 got what would be marked as Exhibits Five-A through

7 Five-G. And let me have you look through these

8 photographs first, and let me ask you some questions

9 after you look at them.

10 A: I'm familiar with these, yes, sir.

11 Q: Before I ask you, let me show them first. Five-A

12 depicts what, sir?

13 A: That's the barricade on Killian Road at the railroad

14 crossing.

15 Q: Okay. Is that looking towards Farrow Road?

16 A: That is looking toward I-77 -- no, I'm sorry.

17 That's looking -- my plant was right here.

18 Q: On the left?

19 A: On the left, so that's looking toward Farrow Road.

20 Q: Okay. Now, we ---

21 THE COURT: I'm sorry. When was this picture taken,

22 Exhibit Five-A?

23 MR. STEGMAIER: Yesterday. We thought, as we were

24 preparing, that maybe some photographs would be

25 helpful.

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1 Q: Five-B depicts what, sir?

2 MR. BROOKER: I've seen ^{the} those.

3 THE COURT: Okay.

4 A: This is coming, I would say, eastbound on Killian
5 Road. And the railroad crossing sign, that is
6 before you get to where the railroad was closed,
7 coming down Killian Road.

8 Q: Now, I see here there are some pods on the left. Is
9 that where your old business was?

10 A: That is.

11 Q: Five-C depicts what, sir?

12 A: That is Killian Road at the railroad crossing,
13 again, with -- where Carolina Chloride was on the
14 left.

15 Q: Is that similar to A?

16 A: Yes.

17 Q: Five-D is from what vantage point, sir?

18 A: This is at the intersection of Farrow Road and
19 Killian Road, showing the businesses -- the
20 warehouse business that's on the property now that I
21 did own, looking across Farrow Road.

22 Q: Is it fair to say that vantage point is probably
23 from the corner here?

24 A: Right, going across that way. It doesn't really
25 depict the railroad, but it's in there in the weeds.

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1 Q: Five-E depicts what, sir?
2 A: That is going on Farrow Road toward Columbia.
3 Q: Okay.
4 A: Warehouses on the left.
5 Q: So is that south on Farrow?
6 A: South on Farrow Road.
7 Q: And that's your businesses, right there on Farrow
8 Road?
9 A: Yes, that was the warehouse.
10 Q: Five-F depicts what, sir?
11 A: That's the railroad track with the siding showing.
12 That was the rail siding that I used to bring tank
13 cars in and unload rail cars off the siding.
14 Q: So that would be the spur?
15 A: That's the spur.
16 Q: All right. Last picture, what does this depict?
17 That's G.
18 A: That shows the new bridge on Clemson, I think they
19 call it, Clemson Road.
20 Q: Is that north of your property?
21 A: Yes, it is.
22 Q: So if you were looking at that picture, you're
23 looking north?
24 A: That is correct.
25 Q: And that's the bridge that was ultimately built by

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1 the Highway Department?

2 A: Up above me, north of me.

3 Q: Mr. Morgan, just as a general question, when the
4 crossing was erected in January 2006, we've already
5 established you weren't given any notice for it, was
6 any offer by the Highway Department made to you in
7 the form of any sort of compensation for anything
8 related to their activities in conjunction with your
9 business?

10 A: At no time was I offered anything about a crossing
11 being put in by me, no, sir.

12 Q: But nobody offered any compensation?

13 A: No, sir, I was not contacted by anyone from the
14 Highway Department.

15 Q: And just for the Court's edification, by virtue of
16 the fact that at this point in time your tractor-
17 trailers and your other customers were precluded
18 from accessing your property off of Farrow onto
19 Killian, how did that affect your business in your
20 own words?

21 A: It affected the warehouse business tremendously. As
22 soon as the railroad crossing was eliminated, almost
23 immediately 50 percent of the renters in the
24 warehouse moved out.

25 Q: And how did that affect you? I think you testified

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1 earlier that you had borrowed money on those
2 warehouses to put them up.
3 A: That is correct.
4 Q: So financially how did that affect your ability to
5 make those obligations?
6 A: It really -- it really put a pinch on me making the
7 payments on those warehouses.
8 Q: I might have asked you this already, but do you have
9 an estimate as to the sum total of the amount of
10 money that you invested into the property to operate
11 both your chloride business as well as your
12 warehouse business?
13 A: It was well in excess of a million and a half
14 dollars, everything I had.
15 Q: What ultimately happened after January 2006? Did
16 you sell the business?
17 A: After repeated trying and sale signs and -- I
18 finally got an offer to sell the business.
19 Q: Do you have a recollection about how much you sold
20 the business for?
21 A: It was between 350 and \$400,000.
22 Q: That was for the property, the warehouses, and the
23 tractor-trailers?
24 A: No. It was -- no part of Carolina Chloride was
25 still on there. Some of it was still on there when

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1 it was sold. But when the person bought it, they
2 asked me to move the tankers and tanks off of the
3 property.
4 Q: Did you have anywhere to move all that stuff to?
5 A: I did not.
6 Q: And what did you do with it?
7 A: I sold everything to my nephew; tanks and tractors
8 and trailers.
9 Q: Was it essentially a fire sale?
10 A: It was, yes.
11 Q: What did you sell all that for?
12 A: I sold that for \$5000.
13 Q: Because you had nowhere to put anything?
14 A: I had nowhere, and I could not sell them otherwise.
15 MR. STEGMAIER: Now, Your Honor, we had thought about this
16 before Mr. Morgan started to testify today. It's
17 obviously on-record about how much the Carolina
18 Chloride property would have been sold for, it would
19 all be downstairs. When we were doing title
20 searches and all that, the one thing we didn't bring
21 upstairs with us was the sale, the actual sale price
22 of the property from Mr. Morgan's company to the new
23 company. I would respectfully ask if the Court --
24 if the record for this sole purpose would be held
25 open so that we could supplement for the Court what

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1 the sale price really was..

2 **MR. BROOKER:** Your Honor, we would repeat our objection
3 that the diminution in value of the property as a
4 result of at least our act of closing the rail
5 crossing is irrelevant to the issue of finding a
6 taking. Because a taking, to find a taking, you
7 must find that the actual property has been
8 diminished in substance, not in value. So we would
9 object to -- continue our objection to valuation
10 testimony in the takings part of the proceedings.

11 **THE COURT:** Your objection is overruled -- your continuing
12 objection is overruled. Let me ask though, you say
13 you have documents. They're in the register of
14 deeds office?

15 **MR. STEGMAIER:** It would be -- that would be the deed of
16 sale from Mr. Morgan's company to the new company,
17 which is an entity known as Stallings. Let me share
18 with you the sales sheet that the register of deeds
19 creates. It says \$450,000. But in talking with Mr.
20 Morgan about it, he goes, I don't think that's quite
21 right. So I need to find the deed.

22 **THE COURT:** Okay.

23 **MR. STEGMAIER:** We would -- what we would like to do is be
24 as accurate as possible about when Mr. Morgan sold
25 that property, how much did he actually sell the

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1 property for.

2 MR. BROOKER: And we would -- we would ---

3 THE COURT: Go ahead. I'm sorry, Mr. Brooker.

4 MR. BROOKER: We would object to that document, Your

5 Honor. It may be appropriate in the damages part or

6 the compensation phase of this trial, but it has

7 nothing to do and is not relevant to the taking,

8 which is only to go to property rights.

9 THE COURT: Now, Mr. Stegmaier, there was a closing?

10 MR. STEGMAIER: Yes, sir, there was.

11 THE COURT: Who was the closing attorney?

12 MR. STEGMAIER: Mr. Sullivan, I believe. No, Mr. Sullivan

13 was not.

14 MR. SULLIVAN: I was representing the sellers, and the

15 buyer's lawyer closed the transaction.

16 THE COURT: You don't remember who it was?

17 MR. SULLIVAN: No, sir.

18 THE COURT: Okay. All right. Maybe -- do you remember,

19 Mr. Morgan, who it was?

20 A: Your Honor ---

21 THE COURT: That's fine.

22 A: I don't remember. I'm sorry.

23 THE COURT: That's fine. So -- also, this may be

24 premature, but you'd asked -- you noted that he had

25 an offer of 1.3 million. Was there an actual

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1 contract in that case?

2 MR. STEGMAIER: I was rolling in to that, sir.

3 THE COURT: Okay. Well, I'll -- I'll hold my question in
4 abeyance then.

5 MR. STEGMAIER: Yes, sir.

6 THE COURT: All right.

7 Q: Now, Mr. Morgan, based on the judge's question to me
8 just now, was there a point in time where there had
9 been an offer made to you for your business, lock,
10 stock and barrel, prior to the closure of this
11 railroad?

12 A: Yes.

13 Q: And how much was that offer for?

14 A: \$1,100,000. That was for the entire business.

15 Q: And that was for the chloride business, it was for
16 the warehouse business?

17 A: And there was also a cell phone tower that brought
18 in revenue.

19 Q: And was there any other sideline business that you
20 had connecting with the property?

21 A: There was a billboard, a big rotating billboard sign
22 up on ---

23 Q: And the ---

24 A: --- outside. It was still on my property.

25 Q: And they paid rent to you for that?

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1 A: They did.

2 Q: Did the \$1.1 million constitute a fair offer to you
3 for the business?

4 A: It did.

5 Q: When you sold the business in 2006, you didn't make
6 a million one, did you?

7 A: No.

8 Q: As you've testified, it was somewhere between three
9 and four hundred thousand dollars?

10 A: Yes.

11 Q: And the majority of that money that you realized in
12 the way of the sale went towards what?

13 A: It went to the bank to pay for warehouses that I had
14 built and another small note that I had.

15 Q: I'm going to hand you what's been marked as Exhibit
16 Four. And I'll represent to you this: this is a
17 letter dated April 8, 2014, from the counsel's
18 office at the Department of Transportation, directed
19 to me. But you're my client, correct?

20 A: That is correct.

21 Q: And there was a point in time after I received this
22 letter that you got a copy of it, did you not?

23 A: I got a copy later, yes.

24 Q: The second paragraph contains a statement in there
25 that says "our engineers." Can you read that one

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1 sentence into the record?

2 A: "Our engineers have investigated this location and

3 would have no objection to the opening of a private

4 drive at this location."

5 Q: The date of the letter is April 8, 2014, correct?

6 A: That is correct.

7 Q: You sold the property in November 2006?

8 A: Yes.

9 Q: That was almost eight years ago at that point in

10 time, correct?

11 A: That is correct.

12 Q: And you had already instituted this litigation in

13 this case, correct?

14 A: Yes, sir.

15 Q: We had already been to the Supreme Court?

16 A: Yes.

17 Q: It was well-known by everybody in the equation,

18 wasn't it, that you had sold the property, correct?

19 A: Yes.

20 Q: And you had sold it in a fire sale, correct?

21 A: That's right.

22 Q: So you having a private drive at this location at

23 this point in time is good for nothing, isn't it?

24 A: That is true.

25 Q: Are you offended by this communication?

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1 A: It is at -- it was disturbing to me when I saw this
2 letter.
3 Q: Because, again, Mr. Keys didn't tell you anything
4 about this, did he?
5 A: No.
6 Q: Nobody at the Department of Transportation told you
7 about this, did they?
8 A: No.
9 Q: And you had expressed your concerns about the fact
10 that the Killian crossing was going to occur, didn't
11 you?
12 A: Yes, sir, at -- I -- repeat that, please, sir..
13 Q: But you had expressed your concerns to the
14 Department of Transportation on a multitude of
15 occasions about the effect of the closing at Killian
16 on your property?
17 A: Yes.
18 MR. STEGMAIER: Sir, if you'd -- two seconds, let me
19 confer with my counsel.
20 MR. BROOKER: While he's doing that, Your Honor, can I
21 respond to this idea with respect ---
22 THE COURT: Give him a moment.
23 MR. BROOKER: Okay.
24 Q: Just some follow-up questions just to make sure
25 we're in complete clarity. I had asked you a

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1 question but it had drawn an objection. How much
2 did you -- how much do you think you invested in the
3 transportation piece of your business, the tractor-
4 trailers? I thought I heard you say 200,000.
5 A: \$200,000.
6 Q: Now, with regard to the spur that you used, that was
7 at the Norfolk Southern railroad, correct?
8 A: That was owned by Norfolk Southern.
9 Q: And when you were using that, that was with
10 permission, was it not? The Railroad let you use
11 the spur, correct?
12 A: Sure. Oh, yes, I had to go to Norfolk Southern and
13 set up everything, an account and everything, and
14 they sent me documentation that I could use that
15 siding.
16 Q: So you had a permissive use to access that railroad,
17 correct?
18 A: That is true.
19 Q: As part of your business?
20 A: Yes.
21 Q: There was also a loading dock there, too, wasn't it?
22 A: There was.
23 Q: And you were allowed to use that, weren't you?
24 A: It was on my property.
25 Q: Okay. Last question, sir. We've talked about your

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1 investment in the property. We've talked about the
2 sale or the offer at one point for a million one.
3 We've talked about the ultimate -- the range of the
4 ultimate sale of your property to the Stallings
5 Group. Do you have an opinion as to the diminution
6 of value of your property in dollars by virtue of
7 the closure at Killian Road?

8 A: It cost me everything I owned, every bit of money I
9 had and investment, everything that I had, took my
10 life savings, I put into that company. And when
11 everything fell apart, when the crossing was closed,
12 I felt like that the damages would have been in
13 excess of, you know, having two million dollars, I
14 would have expected to have two million five hundred
15 -- three hundred -- two and a half million dollars
16 or three million dollars.

17 Q: I don't have any further questions.

18 THE COURT: Mr. Brooker.

19 MR. BROOKER: Just for the record, Your Honor, I have
20 objection to this, the fact that no one from the
21 Highway Department or DOT notified him of the
22 closing. And I would cite the case of *Mosteller v*
23 *Lexington County* as directly on point. And that's
24 found at 520 S.E.2d 620, and it says that the
25 railroad closing statute, referring to 58-15-1625,

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1 the same one that was utilized here, the railroad
2 closing statute does not require notice prior to a
3 grade crossing closing.

4 THE COURT: Do you have any questions for the witness?

5 MR. BROOKER: I do, Your Honor.

6 THE COURT: Now, hold on a minute. It's right now high
7 noon.

8 MR. BROOKER: It is. Some comfort would be nice.

9 THE COURT: Say again, sir.

10 MR. BROOKER: Some comfort would be nice too, Your Honor.

11 THE COURT: Okay. It's a little bit chilly in here? Is
12 it cold in here, is that what ---

13 MR. BROOKER: No, no, a bathroom break.

14 THE COURT: Oh, I'm sorry. Let's stand in recess until
15 one o'clock, we'll resume with cross at one o'clock.
16 And that will give you time hopefully to go
17 downstairs and get the documents you were looking
18 for.

19 MR. STEGMAIER: Okay.

20 THE COURT: If not, then we'll give -- you know, we'll
21 give you time.

22 MR. STEGMAIER: Thank you. Appreciate it.

23 MR. BROOKER: And, Your Honor, after -- let me understand.
24 I need to call Mr. Keys and give him some sort of
25 heads up as to when to be here. Do you have another

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1 witness after this?

2 MR. STEGMAIER: Let's -- I don't know how long your cross-
3 examination is going to take. We'll obviously be
4 ready to go at one o'clock. Assume for the sake of
5 discussion you're done by 1:30, we've got some
6 deposition designations we want to read in. That
7 should take no longer than 15 minutes. Mr. Way's
8 testimony is going to be very limited, and I would
9 assume that would be done by two o'clock or 2:15.

10 MR. BOOKER: Okay.

11 MR. STEGMAIER: Does that comport with your schedule?

12 MR. BROOKER: It's just a matter of the fact that he's in
13 Newberry.

14 THE COURT: Yeah. We also have all day tomorrow blocked
15 out and all day Wednesday. So ---

16 MR. BROOKER: That might be a good idea, but we'll talk
17 about it later, Your Honor. Thank you.

18 THE COURT: Now, let me clarify. I know you haven't
19 rested and you haven't finished your cross and you
20 haven't done redirect.

21 MR. STEGMAIER: Yeah.

22 THE COURT: But I want to make sure I understood what you
23 said, Mr. Morgan. Now, with regard to -- this is
24 with regard to your relationship with Norfolk
25 Southern. The driveway that was closed, or the

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1 access that was closed, did you pay for that or was
2 that -- they gave you permission? Did you pay them
3 to use that driveway?
4 A: No. They brought the railcars in and I paid them
5 freight. And that was really a rail siding that
6 could be used by other people as well. They told me
7 that when -- when I signed an agreement with them to
8 use that siding.
9 THE COURT: Now, when the tractor-trailers crossed the
10 tracks and made that left turn on Killian ---
11 A: Yes, sir.
12 THE COURT: All right. Now, did you -- they gave you
13 permission. I think that was your testimony; you
14 had permission?
15 MR. STEGMAIER: No, sir, that's not what he said.
16 THE COURT: Okay. I misunderstood then.
17 MR. STEGMAIER: No. He was talking about use of the rail
18 -- well, the spur, he was talking about the spur.
19 He had been given permission to use the spur. Not
20 to testify for Mr. Morgan, but that's a public --
21 that was a public highway.
22 THE COURT: Well, I know, but ---
23 MR. STEGMAIER: Yeah.
24 THE COURT: --- but I thought the whole case was about a
25 taking, and I'm trying -- I'm trying to figure out -

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1 - because this was the -- the property wasn't owned
2 by your client but I thought he said that -- I mean,
3 they -- if Norfolk Southern didn't want you to use
4 that driveway, they could have said something,
5 right? They could have stopped you or anything like
6 that? Maybe -- and I apologize if I'm confusing the
7 issue. I heard you say you paid Norfolk Southern
8 for the spur and you ---

9 A: I did clari- -- I'm sorry, sir, if I said that, I
10 did not mean to say that.

11 THE COURT: Oh, no, no. I don't know if -- I don't think
12 you did. I was just trying to get clear and make
13 sure I understand it. The road, the access that was
14 closed, the driveway, all right, my question was did
15 you pay Norfolk Southern to use that driveway? I
16 guess that's the question.

17 A: No, sir.

18 THE COURT: Okay. That's fine.

19 A: Because I crossed that road on Killian ---

20 THE COURT: Yes, sir.

21 A: --- crossed the railroad on Killian, which is a
22 public road.

23 THE COURT: All right. Thank you so much. I'm sorry, I
24 got confused.

25 (Off the record from 12:02 p.m. until 1:05 p.m.)

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1 THE COURT: All right. We'll start with cross-
2 examination. Please proceed, Mr. Brooker.

3 MR. BROOKER: Thank you, Your Honor.

4 MR. MORGAN - CROSS-EXAMINATION BY MR. BROOKER:

5 Q: Mr. Morgan, I'm Beach Brooker. I'm counsel for the
6 Department of Transportation. In your direct
7 testimony you were referring to deliveries in and
8 out of the property to I-77 and I-20. You're
9 familiar with this project that involved the closing
10 of the crossing on Killian Road; is that correct?

11 A: Yes. Yes, sir.

12 Q: And is it correct that Clemson Road was constructed
13 to -- in fact, it does connect 77 on the west with
14 I-20 on the east?

15 A: Yes, sir.

16 Q: So, in other words, you can leave your property
17 using Killian Road going to the right fairly easily,
18 take Longtown Road up to Clemson Road, and then go
19 right or left to reach I-20 or I-77; is that
20 correct?

21 A: I-20, it would go to I-20.

22 Q: Excuse me?

23 A: It would go to I-20 going to the right out of my
24 property, where my property was.

25 Q: Yes, but going right out of your property on Killian

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1 Road, you would hit Longtown Road, take a left and
2 that would put you right on Clemson Road?
3 A: Yes, sir.
4 Q: And Clemson Road goes left and right from I-77 to I-
5 20, west to east?
6 A: Yes, sir.
7 Q: So it is not necessary to use Farrow Road to reach
8 I-20 or I-77; is that correct?
9 A: You can go the way you just -- yes, sir.
10 THE COURT: I'm sorry. Hold on one second.
11 COURT REPORTER: I need for Mr. Brooker to speak up.
12 MR. BROOKER: Oh, I'm sorry.
13 COURT REPORTER: Thank you.
14 THE COURT: All right. Thank you, Robin.
15 Q: Now, you've testified also on direct that you lost a
16 business and a considerable amount of value after
17 the Highway Department closed this rail crossing; is
18 that correct?
19 A: That's correct, sir.
20 Q: But isn't it true that you also had some zoning
21 problems with the use of your property for which you
22 intended to use it for?
23 A: I had checked the zoning prior to buying the
24 property and was given a letter stating the property
25 was zoned M-2 at that time, heavy industrial,

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1 because it was part of IBM property that I bought.
2 And later on when I tried to sell it, I had -- well,
3 I had a contract to sell it, and the county refused,
4 saying that that property was zoned rural
5 residential.

6 Q: And you brought a lawsuit as a result of that denial
7 of the zoning; is that correct?

8 A: That is correct.

9 Q: And what was the result of that lawsuit ultimately?

10 MR. STEGMAIER: Object to the -- objection as to
11 relevance, sir. Two separate cases, two separate
12 cases involving two separate defendants in this
13 case.

14 THE COURT: Hold on one second. What was the question
15 again?

16 MR. BROOKER: He had testified that the closing of the
17 railroad crossing caused him to lose all value in
18 the property or lose a lot of money. And I'm trying
19 to point out that he also was not zoned for that
20 either, and that was a result of another Supreme
21 Court opinion.

22 THE COURT: But the question, though, was about the
23 lawsuit.

24 MR. BROOKER: That's correct, Your Honor.

25 THE COURT: All right. Mr. Stegmaier, are you objecting

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1 to that?

2 **MR. STEGMAIER:** The question that was posed to the witness
3 was, What was the result of the other litigation
4 involving Richland County, and we just objected on
5 the basis of how is that relevant to the this
6 action. Different defendant, different dispute
7 altogether, different time frames too, as well.

8 **THE COURT:** Objection overruled.

9 **MR. BOOKER:** Thank you, Your Honor.

10 **THE COURT:** Okay. Go ahead and restate the question.

11 **Q:** What was the -- how did that case end up, your case
12 against Richland County?

13 **A:** Ultimately I had to go before the county council and
14 have the zoning changed back to what it was, to M-2.

15 **Q:** What was the ruling of the circuit court in your
16 lawsuit against Richland County?

17 **A:** The case was dismissed.

18 **Q:** Did you appeal that?

19 **A:** Yes.

20 **Q:** Okay. What was the result of that appeal?

21 **A:** It was denied by the state Supreme Court, or
22 referred back I think.

23 **Q:** Now, you've testified fairly extensively to your
24 discussions with Brian Keys. Did Brian Keys make
25 any promises to you that the rail crossing, the

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1 highway rail crossing of Killian Road and the
2 Norfolk Southern tracks would always remain open?
3 A: He evaded that question.
4 Q: But he made no promise to you that it would remain
5 open?
6 A: He said there had been some discussion about closing
7 it, but that they also discussed leaving it open.
8 He said there was discussion about building a bridge
9 over the Killian Road crossing.
10 Q: Yes, sir.
11 A: And they ultimately decided to build it up the way.
12 Q: But your direct answer to my question, he made no
13 promise?
14 A: He never -- he never told me that they were going to
15 close Killian -- Killian Road rail crossing.
16 Q: And it was somewhat after that time you had that
17 discussion that you ultimately decided to sell those
18 properties; is that correct? Can you help me with
19 the time frame?
20 A: It was after that, yes.
21 Q: Did you ever ask either Mr. Keys or any other
22 representative of the South Carolina Department of
23 Transportation, did you ever approach them and say,
24 If you're going to close Killian Road, will you give
25 me a private driveway out to Farrow Road?

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1 A: No one ever came to me from the Highway Department.
2 Q: Excuse me?
3 A: No one ever came to me from the Highway Department.
4 Q: Okay.
5 A: No one ever notified me that the crossing would be
6 closed until I came there one day and they had
7 equipment there tearing the crossing up.
8 Q: After it was closed, did you ask anybody to -- Can
9 you allow me to continue crossing -- crossing over --
10 -- establishing a driveway onto -- onto Farrow Road?
11 A: No, I did not.
12 Q: Have you ever -- did you ever have occasion to ask
13 the Norfolk Southern Corporation, May I cross your
14 tracks to establish a drive, private drive into my
15 property from Farrow Road?
16 A: No, I did not.
17 Q: Bear with me, sir, I'm sorry. Well, I'll try to do
18 without it. Let me show you what I think is a
19 duplicate of a plaintiff's exhibit that we've marked
20 as Defendant's Exhibit One. And if I can hold back
21 these two. And if you could follow along with me
22 here.
23 MR. BROOKER: And, Your Honor, this is the -- I think is
24 the same deed that's Plaintiff's Exhibit Two-A and
25 Defendant's Exhibit One are the same except there's

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1 a corrective deed somewhere, which I don't
2 understand.
3 Q: But, now, sir, can you go to the third page there
4 where it has Exhibit A, please, and try to follow
5 along. In the first paragraph about one, two,
6 three, four, five, six, seven, eight lines down,
7 does the description, property description, refer to
8 a ---
9 A: Is this Exhibit A?
10 Q: Exhibit A to the deed.
11 A: Okay. I've got it.
12 Q: Go down about eight lines. It says, On a plat of
13 property surveyed by Carolina Chloride, Inc.,
14 grantee, by Inman Land Surveying Company, and
15 recorded, there's a date herewith, in plat book
16 blank, page blank, in the office of Register of
17 Mesne Conveyances for South Carolina, which plat is
18 incorporated by reference, and made a part hereof,
19 and have the following courses, distance and
20 measurements. Is that about -- am I reading right?
21 And then it has the courses and distances. And does
22 it therein refer to some pipes in the second
23 paragraph?
24 A: I see pipe, four-inch pipe.
25 Q: Okay. Can you go to the plat that's attached,

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1 that's clipped to the deed? Does that appear to be
2 the plat that was referred to in the deed? *

3 A: This was clipped to it.

4 Q: And who is the plat by?

5 A: Inman Land Surveying.

6 Q: And what's the date of the plat on there?

7 A: I cannot read it.

8 Q: Is that a plat of your property when you bought it
9 from IBM?

10 A: It appears to be, yes, sir.

11 Q: And do you see pipes at the corners of your property
12 on that plat?

13 A: I see dots indicating it could be a pipe.

14 Q: And the line that connects the pipes parallel to
15 Farrow Road and the Norfolk Southern ---

16 A: Yes.

17 Q: --- tracks, where does that line fall? Is it
18 against Farrow Road or is it against the outside of
19 the tracks?

20 A: It falls inside of the tracks.

21 Q: So you're not claiming that you have any ownership
22 at all of the Norfolk Southern property that lies
23 between your property and Farrow Road; is that
24 correct?

25 MR. STEGMAIER: Objection, sir. I believe that Mr. Morgan

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1 had previously testified that he had permission to
2 use the rail siding at his property. And at the
3 very least, that was some sort of permission,
4 whether it was an easement or something else, that
5 would create some sort of right. And if you would
6 want to consider that ownership in some respects,
7 that would be the basics -- the basis of our motion.
8 But I wanted to create that clarity for Court in
9 response to the question posed by Mr. Brooker.

10 **THE COURT:** Objection overruled.

11 **MR. BROOKER:** It's a rail siding agreement, Your Honor,
12 but I believe he did testify that he didn't own the
13 land, he just had the right to use it for siding.

14 **Q:** Now, let's go to the Killian Road side of the
15 property, Mr. Morgan. There's a label there that
16 says Clemson Road, but you're familiar with the
17 property and that's actually Killian Road?

18 **A:** Yes.

19 **Q:** And do the pipes incorporate Clemson Road or Killian
20 Road into your -- your fee simple ownership of the
21 property?

22 **A:** No.

23 **Q:** All right. May I offer my version of the title
24 (inaudible).

25 **COURT REPORTER:** I can't -- I didn't hear him, Judge.

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1 THE COURT: I'm sorry. You're just talking when you
2 walked. The court reporter didn't hear you.
3 MR. BROOKER: I'm letting him look at it.
4 THE COURT: That's fine.
5 MR. STEGMAIER: And I apologize. The answer to Mr.
6 Brooker's question, no objection. But the previous
7 question posed to Mr. Morgan was what concerning
8 Killian Road?
9 MR. BROOKER: Whether his property lines under this plat
10 and deed actually had given any claim to Killian
11 Road itself.
12 MR. STEGMAIER: Okay.
13 MR. BOOKER: In fee simple. I'd like to offer the plat
14 and deed as Defendant's Exhibit One.
15 MR. STEGMAIER: No objection.
16 (Defendant's Exhibit Number One is entered into the
17 record.)
18 Q: Mr. Morgan, I'd like you to bear with me for some
19 even more arcane stuff.
20 MR. BROOKER: And, Your Honor, this is a statute, it's a
21 very, old one, 1846, but it nevertheless is a
22 statute. I don't think I have to move it into
23 evidence. I just wanted to have him testify on it.
24 THE COURT: Have you seen this?
25 MR. STEGMAIER: At points in time. My suggestion would be

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1 is if the Court is so inclined, he can take judicial
2 notice of the existence of that statute. I would
3 concur with Mr. Brooker that it obviously need not
4 be formally moved into evidence.

5 THE COURT: Well, my first thought is, is it still on the
6 books and is it still good law because, you know,
7 we've had how many constitutions since 1846?

8 MR. STEGMAIER: That's correct.

9 THE COURT: And how many statutes being recodified? Can
10 you tell me? Do you represent that it's still good
11 law, that it's on the books and everything? And can
12 you cite me where it's incorporated into our present
13 code of laws?

14 MR. BROOKER: I would argue, Your Honor, that it was good
15 law in 1846, that the Railroad took the property in
16 1848 under this statute, so its title is based upon
17 this statute, which it was a good statute in 1848.
18 Whether it still is, I ---

19 THE COURT: You referred to this earlier. This was the --
20 this was originally called the Charlotte and South
21 Carolina Railroad Company?

22 MR. BROOKER: That's correct, Your Honor.

23 THE COURT: And now it's Norfolk Southern?

24 MR. BROOKER: That's correct.

25 THE COURT: When did it become Norfolk Southern?

1 THE COURT: I don't know.

2 MR. STEGMAIER: And this is the difficulty we have, sir,
3 is that if they -- if the State wants to either
4 propound testimony or create evidence relating to
5 original title, certainly Norfolk Southern could
6 have been available to testify to the same. Mr.
7 Morgan is not anybody who could testify to anything
8 as it relates to the actual legislature in 1845 --
9 1848, or be able to interpret some sort of archaic
10 or arcane title that may or may not exist to the
11 property..

12 THE COURT: I think, though, he wanted me to take judicial
13 notice of it. Is that correct?

14 MR. BROOKER: That would be -- that would suffice for our
15 purposes, Your Honor.

16 THE COURT: And my concern is that I can take judicial
17 notice of it, that it was -- it may have been law
18 back in 1846, but I'm not sure if it's still good
19 law. And I guess, I mean, if I take judicial notice
20 that it was on the books back then, I'm not sure how
21 that helps your case. Although, you say that's the
22 basis of Norfolk Southern's ownership of the
23 property, right?

24 MR. BROOKER: That's correct. And I have the deed.

25 THE COURT: Say that again, sir.

1 MR. BROOKER: And I have the deed.

2 THE COURT: And you have the deed? Let me look at the
3 deed. I might be more comfortable if I could see
4 the deed.

5 MR. BROOKER: Do you -- do you mind if I hand up this
6 translation?

7 MR. STEGMAIER: Well, yeah, I'm going to object -- I'm
8 just, for purposes of the record, I'd object to
9 anything as it relates to the deed or your
10 interpretation of the deed moving into evidence in
11 this case. Mr. Morgan is not the vehicle for that.
12 Somebody from Norfolk Southern could testify to
13 that. You certainly can't testify to it either.

14 THE COURT: Let me ask, though, is there any dispute about
15 this particular strip of land; is there any dispute
16 that it was owned by Norfolk Southern?

17 MR. STEGMAIER: Well, this is what -- and we had related
18 to you in chambers what we were prepared to
19 stipulate to is: Mr. Brooker has already questioned
20 Mr. Morgan about the fact of what were the
21 parameters of your ownership in this case. And
22 we've looked at the deed and we've looked at the
23 plat. And I believe we're in concurrence that the
24 technical property line for Mr. Morgan's property at
25 Killian and Farrow Road did not include the

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1 railroad, did not include the railway. When we talk
2 about who owns the railroad, we know this: Mr.
3 Morgan did not own the railroad. Whether it's a
4 technical right-of-way or an easement, or whether
5 the Railroad actually owns it in fee, we believe is
6 not dispositive of the case. But we are prepared to
7 stipulate that Mr. Morgan did not own the railroad
8 bed. I don't know if that resolves ---

9 MR. BROOKER: Well, Your Honor, I guess we could rely on
10 the principle -- that's the deed from 1846, and this
11 is my translation of it because it's handwritten. I
12 guess we could rely on that, Your Honor, that
13 someone other than Mr. Morgan and Carolina Chloride
14 owned that strip of land that the Norfolk Southern
15 now exists. But I had gotten that from the archives
16 of Norfolk Southern in Atlanta. Norfolk Southern's
17 counsel has shown me this statute under which they
18 obtained that deed. I can get Mr. -- Robert Green
19 is counsel of the Norfolk Southern, down here from
20 Greenville in the morning if you like. But ---

21 THE COURT: Okay. I don't ---

22 MR. BROOKER: --- I'd like to -- like to ask for judicial
23 notice that that is the statute allowing the
24 Charlotte and South Carolina Railroad to take land
25 in fee simple either by purchase or condemnation.

1 They condemned it, and that is the report of
2 condemnation, awarding the money and granting the
3 land to this Charlotte and South Carolina Railroad.

4 **THE COURT:** Mr. Stegmaier.

5 **MR. STEGMAIER:** Well, you know what's interesting, and Mr.
6 Sullivan brought this to my attention: we've got
7 this document. Of course, Mr. Brooker can't testify
8 to anything and can't just move it into evidence
9 unilaterally. You know, looking -- looking at the
10 deed from 1848, you get into questions of, as the
11 Court has already identified, is the statute that
12 apparently authorized the deed, does it remain good
13 or recognized law in this state. And there's been
14 no answer in the affirmative. The other thing too,
15 and Mr. Sullivan brought this to my mind, which is
16 kind of interesting, is he took a bunch of pictures
17 out there and there was actually a Civil War battle,
18 a Civil War battle fought there right after the fall
19 of Columbia, or contemporaneous with the fall of
20 Columbia, where they ripped up the rail lines. I
21 haven't read the deed because it's so difficult to
22 read, to get all the languages that was written into
23 it. But when the Yankees or when the Union Army
24 ripped up the rail line, did that constitute a
25 situation where the -- where the line reverted back

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1 to the original grantor? I don't know that. But,
2 again, what we are prepared to stipulate to for
3 purposes of moving this thing along is Mr. Morgan
4 did not own the rail bed. It's either a right-of-
5 way that was possessed by the Railroad or the
6 Railroad owned it in fee simple or somebody else
7 owned it in fee simple. But we -- we know that Mr.
8 Morgan didn't own it.

9 MR. BROOKER: And I -- to protect myself, Your Honor, I
10 would like to establish that Norfolk Southern, as
11 successor to the Charlotte and South Carolina
12 Railroad, owns that strip of land in fee simple. I
13 spoke with Mr. Green, who is counsel for the Norfolk
14 Southern in South Carolina, and he offered to drive
15 down here. I spoke to him this morning and I said
16 that I could probably get this in, I was hopeful of
17 getting this in under the ancient documents
18 exception. You know, all the land records in
19 Richland County were burned by Sherman. I had to
20 get this from Atlanta. It doesn't exist in South
21 Carolina. And it's much older than the 20 years it
22 takes for an ancient documents exception to hearsay.

23 THE COURT: Now, let me -- let me back up. You know,
24 we're not -- when I was -- this past year, and I'm
25 sorry, if you'll indulge me, you'll understand why

1 I'm saying what I'm going to say. I was president
2 of Inn of Court, and I was -- I had some critics
3 because our program, they said, didn't -- never
4 helped us in our practice. But we had as one of our
5 colleagues Warren Moise from Charleston wrote a book
6 on the South Carolina legal system during the Civil
7 War, and he talked about records that were destroyed
8 either by Sherman or by who knows whom. And they'd
9 find some of them on rail cars and things like that.
10 And that gave me pause. That's why, you know, your
11 documents gave me pause, because I'm not sure
12 there's any way to determine if that's still good
13 law or -- the deed I noticed you found -- you didn't
14 go downstairs and get a copy of the deed; you had to
15 go to Atlanta to get it. And, you know, so that
16 gives me pause. As far as whether or not -- you
17 stipulated basically what you think Mr. Brooker
18 needs to know, is that -- is that ...

19 MR. STEGMAIER: I believe so. That was one of the reasons
20 why the matter was remanded back from the Supreme
21 Court, because -- and Mr. Brooker can probably
22 remember just as well as I can, distinctly when the
23 Chief Justice said, Who owns the property? And in
24 the last paragraph of the opinion, they essentially
25 said we'd like to know what the status of that is in

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1 order to continue our analysis. We are prepared to,
2 again, stipulate the fact that Mr. Morgan did not
3 own it. We still believe that he abutted Farrow
4 Road, notwithstanding the existence of the railroad,
5 but we know that he did not own the railroad bed.

6 **THE COURT:** And is that good enough for you, Mr. Brooker?

7 **MR. BROOKER:** Well, I don't know, Your Honor. If they are
8 not stipulating that someone else owns it in fee
9 simple and are still trying to fall back and retain
10 some rights to use this property that Norfolk
11 Southern owns in fee simple simply to cross it to
12 get to Farrow Road, then I guess I'm going to have
13 to establish it myself even though, you know, the
14 ruling on land cases is that you have to establish
15 to rights to land on the strength of your own title,
16 not on the weakness. And this may be a weakness.
17 But ---

18 **THE COURT:** Well, I don't know. I thought he -- maybe I
19 misunderstood your stipulation. The stipulation was
20 that your client, the plaintiff in this inverse
21 condemnation, did not own the property that the
22 crossing is on, right?

23 **MR. STEGMAIER:** Did not own the rail bed, yes, sir.

24 **THE COURT:** Exactly.

25 **MR. STEGMAIER:** That right-of-way where the rail bed

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1 existed, Mr. Morgan did not own that. We don't
2 believe that's fatal to our case. But we're not the
3 ultimate arbiters of that.

4 **THE COURT:** Is that good enough, Mr. Brooker?

5 **MR. BROOKER:** Good enough for present purposes, Your
6 Honor. But if they are going to make a claim to
7 Killian Road, the segment of Killian Road that
8 crosses the Norfolk Southern, we're going to have to
9 establish that we had a public easement for the
10 road, Norfolk Southern was the landowner, and I'll
11 try to do that through Mr. Keys.

12 **THE COURT:** That might be the best way to approach that.
13 Even though your stipulation still stands, right? I
14 mean, you -- not ---

15 **MR. STEGMAIER:** Yes, sir. Yeah, there's no taking that
16 back.

17 **THE COURT:** Okay. Hold on to these and ...

18 **MR. BROOKER:** And, Your Honor, I think that's all the
19 questions I have for Mr. Morgan.

20 **THE COURT:** All right. Do you have any redirect, Mr.
21 Stegmaier?

22 **MR. STEGMAIER:** Briefly, sir. Thank you.

23 **THE COURT:** Please proceed.

24 **MR. MORGAN - REDIRECT EXAMINATION BY MR. STEGMAIER:**

25 **Q:** Mr. Brooker asked you questions about the contract

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1 that you had testified to concerning 1.1 million.
2 Do you remember that question?
3 A: Yes, sir.
4 Q: It is not your testimony, is it, that the million
5 one contract was lost because of the closure at
6 Killian Road?
7 A: That is not -- that's correct.
8 Q: It's true, isn't it, that the contract that we are
9 talking about happened sometime before 2006,
10 correct?
11 A: Correct.
12 Q: If I told you in the 2002, 2003 range, would you
13 concur with that?
14 A: Yes.
15 Q: Okay.
16 A: Yes.
17 Q: The zoning issues that Mr. Brooker took up with you
18 in his questions to you, they were ultimately cured,
19 were they not?
20 A: That is correct.
21 Q: And in 2006, when the road was closed by the Highway
22 Department, your zoning was straightened out, wasn't
23 it?
24 A: That is correct.
25 Q: So you didn't have to sell the property in 2006

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1 because of the zoning issue, did you?

2 A: No.

3 Q: You had to sell the property because of the access

4 by way of Farrow Road, didn't you?

5 A: Yes.

6 Q: With regard to your communications with Mr. Keys

7 during your various meetings with him, did he ever

8 make any sort of representation to you about where

9 your property ran to in relation to Farrow Road?

10 A: When I met Brian Keys, he told me -- we were looking

11 at the map, he told me my property joined the right-

12 of-way of Farrow Road.

13 Q: So at least as it relates to your communications

14 with Mr. Keys, you were told your property met the

15 right-of-way at Farrow Road?

16 A: That is correct.

17 Q: Now, just to be abundantly clear for the record, the

18 railroad siding or the railroad spur, you had

19 express permission to use that railroad siding or

20 railroad spur from the Railroad, correct?

21 A: That is correct.

22 Q: And that was by way of written agreement?

23 A: Yes.

24 Q: So when the tanks came, would fill with the

25 chloride, you were able to pump it off without any

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1 problem, without any difficulty from the Railroad?

2 A: That's correct.

3 Q: And it's your testimony that your use of the

4 railroad spur was integral to your operations there

5 in Northeast Columbia?

6 A: That is right.

7 Q: Now, last set of questions, so we have complete

8 clarity with everybody in the room about this. Your

9 difficulty, or the reason why you have brought this

10 lawsuit, is by virtue of you being cut off from

11 access to Farrow Road, correct?

12 A: That is correct.

13 Q: And when we talked about a driveway, you're talking

14 about a driveway that actually existed inside your

15 property, correct?

16 A: Yes.

17 Q: And that's how you got to Killian Road, correct?

18 A: Yes.

19 Q: And your understanding is Killian Road at that time

20 was a public road, was it not?

21 A: Yes.

22 Q: And the crossing that was closed was at Killian at

23 Farrow, was it not?

24 A: True.

25 Q: And it hasn't been reopened since, correct?

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1 A: That is true.

2 Q: And you're long since gone from there, correct?

3 A: Yes, sir.

4 Q: That's all my questions. Thank you.

5 THE COURT: Any re-cross?

6 MR. BROOKER: Oh, yeah.

7 MR. MORGAN - RECROSS-EXAMINATION BY MR. BROOKER:

8 Q: Now I'm confused, Mr. Morgan. Are you saying that
9 you had a second driveway that allowed the -- that
10 you used to get to Farrow Road from your property?

11 A: No. It -- one driveway that came off of Carolina
12 Chloride property onto Killian Road.

13 Q: Onto Killian Road, I see. And then you would use
14 Killian Road, which is a public road, to access
15 Farrow Road. I think I must have misheard.

16 A: But I might mention that, if I can, that an engineer
17 from the Highway Department came out and inspected
18 my road going in to my plant and assured me that it
19 was okay.

20 Q: And it still exists, doesn't it?

21 A: As far as I know.

22 Q: Nobody has -- nobody from the DOT or anyone else has
23 ever blocked you from entering or blocked the
24 property owner of this property from entering on
25 Killian Road; is that correct?

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1 A: No one ever -- after they told me that it was fine,
2 that it was okay to use that road that I put in
3 there.

4 Q: Okay. Just to clarify, and I thought we had already
5 established this, but the rights to the railroad
6 siding which lies within the Norfolk Southern
7 property, was by agreement? It was with Norfolk
8 Southern, correct?

9 A: I had a written agreement with Norfolk Southern.

10 Q: But they didn't convey you any land in fee simple
11 for that siding; they retained ownership of that
12 land ---

13 A: There was never any talk of that.

14 Q: That's all I have.

15 THE COURT: One moment, please, Mr. Morgan. Please bear
16 with me. Sometimes in non-jury cases the judge will
17 ask questions. And this usually drives the lawyers
18 crazy because I don't let them follow up on my
19 questions. But the better ones always mention it in
20 closing arguments, you know, because they figure out
21 a way to get their comments in. But I'm just going
22 to ask you point out: you sued these -- you sued the
23 government, the Department of Transportation; how
24 much do you think they owe you?

25 A: I testified earlier that I thought they owed me two

1 and a half million dollars because of the amount of
2 money that I put in buying the land, developing it,
3 and ultimately it cost me 60 to 70 percent of the
4 business that I had in the warehouses because of
5 people having trouble getting back in there to the
6 warehouses. And so that was -- and it took away my
7 income, and I live on Social Security.

8 THE COURT: All right. Thank you, sir.

9 A: Yes, sir.

10 THE COURT: You can come down. And watch your step.
11 Thank you, sir. Mr. Stegmaier, next witness?

12 MR. STEGMAIER: Yes, sir. We're going to take it a little
13 bit out of order, but since Mr. Way is here and we
14 don't want to burn up more of his precious time,
15 we'll call Mr. Way.

16 THE COURT: Let me state -- we said this in chambers. Mr.
17 Morgan, Mr. Way was hired by this Court some years
18 ago to sell some property that was involved in
19 litigation. I probably hadn't seen you since then
20 or talked to you since then.

21 MR. WAY: Just up and down Main Street.

22 THE COURT: That's right. That's right. Does that cause
23 you any problems, Mr. Stegmaier and Mr. Morgan?

24 MR. STEGMAIER: No, sir.

25 THE COURT: Okay. I wanted to disclose that anyway, for

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1 clarity of the record.

2 Billy Way, Jr., being duly sworn testifies as follows:

3 MR. WAY - DIRECT EXAMINATION BY MR. STEGMAIER:

4 Q: Mr. Way, good afternoon.

5 A: Good afternoon.

6 Q: For purpose of the record, would you mind stating
7 your full legal name, sir?

8 A: My full legal name is Billy Way, Jr.

9 Q: And you do what for a living, sir?

10 A: I'm a commercial real estate agent here in Columbia.

11 Q: And you've been doing that for how long?

12 A: Since '91, 1991.

13 Q: And are you licensed in this state?

14 A: Yes, I am.

15 Q: And what type of licensure do you possess?

16 A: I hold a salesman license, which is -- the state
17 doesn't differentiate between residential and
18 commercial, but I've been in the practice of selling
19 and leasing commercial rate -- commercial real
20 estate exclusively since 1991.

21 Q: All right. So your business is commercial real
22 estate?

23 A: Correct.

24 Q: And here in Columbia area. For whom do you work,
25 sir?

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1 A: I work for Newmark Grubb Wilson Kibler.

2 Q: Now, the questions I have for you today are very
3 limited.

4 MR. STEGMAIER: But beforehand, I'd ask that -- I'd ask
5 the Court's permission to qualify Mr. Way as an
6 expert in commercial real estate brokerage here in
7 Richland County.

8 THE COURT: Mr. Brooker, any voir dire?

9 MR. BROOKER: No objection, Your Honor.

10 THE COURT: Okay. Your motion is granted.

11 MR. STEGMAIER: Thank you.

12 Q: Mr. Way, you understand I guess at base that this is
13 a dispute involving commercial property that was
14 situated at the intersection of Farrow Road and
15 Killian Road, correct?

16 A: Correct.

17 Q: And your understanding is that the use of the
18 property by Mr. Morgan between the years of 1996 and
19 2006 were industrial/commercial in nature, correct?

20 A: Correct.

21 Q: He had the chloride business as well as the storage
22 units that he had. The two questions I have for you
23 today is this: Is that in the time period between
24 1996 and 2006, when we're just talking about
25 property values in Northeast Richland County, what

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1 generally was your experience at that point in time?

2 Did they rise or did they fall?

3 A: Prices in '06 were higher than they were in '96.

4 Q: And from a percentage standpoint, and I understand
5 very generally, but in this part of town, Northeast
6 Columbia, what was your recollection about on a --
7 maybe on a per year appreciation of commercial
8 property in that part of town?

9 A: An annual increase per year?

10 Q: Yes, sir.

11 A: I wouldn't venture a guess. That'd have a lot to do
12 with the type property, the use of the property, the
13 location of the property. In commercial real estate
14 every parcel is unique, every parcel has its own
15 attributes, its own positives and negatives. So to
16 make a general statement about increases year to
17 year over a ten-year period ---

18 Q: Yes, sir.

19 A: --- in a certain quadrant of town ---

20 Q: Yes, sir.

21 A: --- would be difficult for me to say. But I can
22 tell you -- I can tell you that in '06, '07, when
23 things really started to break, we really I'm not
24 sure knew what kind of trouble we were in with the
25 economy until sometime mid-'08. But certainly.

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1 prices were, again, depending on the circumstances
2 and the property, significantly higher in '06 than
3 they were in '96.
4 Q: And is it fair to say that in this part of town,
5 where you've got Clemson Road and Farrow Road and
6 the relationships between the interstates, 77 and
7 20, that if you would want to call it this, that
8 this was a main thoroughfare, or at least a busy
9 place where somebody would set up commercial shop?
10 A: You mean the area in general or just Farrow Road?
11 Q: Well, the area in general, and we can talk a little
12 bit about Farrow Road.
13 A: Yeah. I mean, it's a -- as I'm sure most people
14 know, that that property, most of this property was
15 owned by IBM. They had assembled a couple thousand
16 acres 20 years earlier and had been selling off
17 pieces. And it -- and everyone was anticipating the
18 new Clemson Road extension that would connect 77 to
19 the retail corridor. So, you know, I'd say that in
20 '06 this property was being sold by the acre --
21 excuse me, in '96 the property was being sold by the
22 acre and probably didn't have its full capacity by
23 then. But now they're selling it by the square
24 foot. So it's -- yeah, things were trending upward,
25 and that was a much anticipated retail development

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1 area.

2 MR. BROOKER: Christian, maybe -- I'm sorry, maybe this is
3 a time to restate a continuing objection that
4 valuation is not -- is premature at this point.

5 THE COURT: All right. Duly noted.

6 Q: Last question, sir. With regard to this dispute in
7 2006, when the Killian Road access was closed by the
8 Highway Department wherein the only means of access
9 to the parcel in question was by way of this portion
10 of Killian Road by way of Longtown Road rather than
11 by way of directly via Farrow Road, my question to
12 you is do you have an opinion whether a property
13 such as the one that was operated by Mr. Morgan
14 would be impaired from a valuation standpoint due to
15 the fact that he was now precluded from using the
16 turnoff on a main thoroughfare that was Farrow Road?

17 A: I believe it would affect the value.

18 Q: A follow-up question from Mr. Sullivan. What is the
19 basis of that opinion? Why would or how would that
20 affect valuation?

21 A: Well, as I mentioned a minute ago, all commercial
22 properties, each commercial property is unique. If
23 it's on a corner, many times, particularly in the
24 retail area, depending on which corner -- you could
25 have a four-way intersection and one corner is worth

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1 marginally or significantly more than the other
2 corner. So access and availability to road right-
3 of-way is very important. In this case, I see it
4 was a four-way intersection. It became a dead end
5 street. So that rather than -- rather than those
6 visitors leaving Interstate 77 and being able to
7 drive straight to the property, they had to go
8 another -- I haven't driven it, I don't know the
9 distance, but I would assume a couple of miles, if
10 that. It was just less convenient. I mean,
11 certainly if it was, you know, certain other types
12 of uses it would be -- it would significantly reduce
13 the value. But, yeah, I think the fact that it only
14 has the alternate access points versus a direct
15 access off of Killian by way of either 77 or Farrow
16 Road would affect the value negatively.

17 Q: So access and convenience are factors that you use
18 in valuations when you think about commercial
19 property?

20 A: As do sellers and buyers, yes.

21 Q: Sir, that's all the questions I have. I appreciate
22 it. Mr. Brooker might have questions for you.

23 MR. WAY - CROSS EXAMINATION BY MR. BROOKER:

24 Q: Mr. Way, I'm Beach Brooker from DOT. Sir, your
25 testimony is that the Carolina Chloride property

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1 lost value because of the closure of the crossing of
2 Killian Road onto Farrow Road because of the -- it
3 diminished the flow of traffic past the property and
4 therefore had less value as commercial land because
5 of that loss of flow of traffic?
6 A: That's correct.
7 Q: And so I'm probably being redundant here, but
8 customers or trade trying to come to this property
9 has to take a more circuitous route than in the
10 before situation.
11 A: Right.
12 Q: Is that correct?
13 A: Right.
14 Q: Did the -- this closure we're talking about as part
15 of this case, wouldn't it also impact the property
16 behind Carolina Chloride, the property on the other
17 side of Carolina Chloride, diminish the value of
18 them as well?
19 A: It would.
20 Q: And how far would you go back to before it would
21 stop diminishing the value of properties behind
22 Carolina Chloride?
23 A: That's hard to say, but I would think that any
24 property that would be more directly accessed by the
25 use of Killian Road across Farrow Road, that is now

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1 accessed only through this circuitous route that you
2 suggest, would be affected negatively. The fact
3 that this property had frontage and visibility on
4 what is and was a -- what was and is a heavily
5 traveled road would indicate -- would suggest to me
6 that it would be affected far greater perhaps than
7 the one that was on Killian and Longtown Road.
8 Q: You're not a lawyer, are you?
9 A: Beg your pardon.
10 Q: You're not a lawyer, are you?
11 A: No, I'm not.
12 Q: In using the term "access", you're just using it as
13 a generic? You don't mean to testify that that is a
14 property right? You're just testifying in a
15 general, being able to travel in one direction or
16 the other is what you're calling access; is that
17 correct?
18 A: That's correct, if I understand the question
19 correctly, yes. The availability to obtain physical
20 access to the property, yes.
21 Q: And loss of value was a result of the diversion of
22 traffic due to the closure of the ---
23 A: That's right. That's my opinion.
24 Q: Thank you, Mr. Way. I have nothing further.
25 THE COURT: Anything else?

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1 MR. STEGMAIER: No further questions, Your Honor.
2 THE COURT: All right. Thank you, Mr. Way. Watch your
3 step coming down, please.
4 MR. STEGMAIER: May we take two seconds so I can walk Mr.
5 Way out?
6 THE COURT: Sure.
7 MR. STEGMAIER: And then we've got some deposition
8 designations, but that's about it.
9 THE COURT: All right. We'll talk about that when you
10 come back.
11 (Off the record from 1:49 p.m. until 1:50 p.m.)
12 THE COURT: Let's go back on the record. That witness is
13 going to be here, isn't he?
14 MR. STEGMAIER: Well, that was unbeknownst to me. And,
15 you know, when I looked at, over lunchtime when I
16 looked at the rule, it's my understanding that use
17 of deposition -- you can use a deposition for really
18 any purpose. And I believe that under Rule 32(a)(5)
19 we're not precluded from publishing to the court
20 various designation of testimony from this
21 particular witness. So I understand where the Court
22 may feel it's duplicative, but I hope the Court can
23 appreciate the burden of proof that we have, because
24 Mr. Brooker is going to call him in his case in
25 chief after we have rested. So we would -- we would

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1 just like to publish what we've got, and we think
2 it's pursuant to the rule that we be permitted to do
3 that.

4 **THE COURT:** Okay. I'm also wondering about the timing of
5 it as well. You're not using it to impeach
6 anything.

7 **MR. STEGMAIER:** No, no.

8 **THE COURT:** Now, Mr. Brooker, you think his use of
9 deposition excerpts would change your mind in
10 calling this gentleman as a witness or ...

11 **MR. BROOKER:** You know, Your Honor, I'm not the biggest
12 expert in the rules of civil procedure evidence, but
13 I thought that deposition testimony was to be used
14 if the witness was not available in order to get
15 facts before the court. But I'm bringing Mr. Keys
16 in, and I hope we're in agreement that this is going
17 to be in the morning. And he could use that to
18 impeach him on cross-examination, but I -- I just
19 got this designation of a transcript this morning,
20 and I haven't been able to go through it and read
21 through it to see what he wants to bring out in
22 there. So I guess I'll make a weak objection, Your
23 Honor. If you think that that's appropriate, we can
24 always try to correct it tomorrow, I guess. But I'd
25 rather do it the right way.

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1 THE COURT: Now, when I said we'd come back tomorrow, I
2 didn't realize we'd finish the plaintiff's case so
3 soon. It's not even two o'clock yet. Do you think
4 Mr. Keys can get here by three o'clock or something
5 like that?

6 MR. BROOKER: No, he can't.

7 THE COURT: He can't -- he's tied up, he can't be here
8 today?

9 MR. BROOKER: He said he could be here in an hour and a
10 half.

11 THE COURT: Okay. So, he'll have to -- well, that's fine.
12 I mean, I don't mind. If the other party doesn't
13 mind, we can resume in the morning. And I agree
14 with you, Mr. Stegmaier, that you can use the
15 deposition for any purpose.

16 MR. STEGMAIER: Right.

17 THE COURT: Now, for what purpose would you want to show
18 it -- you want to publish the excerpts of the
19 deposition of a witness that's going to be here to
20 testify live. I don't mind you doing it. I'm just
21 wondering how that helps you.

22 MR. STEGMAIER: There are a couple -- there are a couple
23 reasons why. Number one, one of the issues that was
24 brought out maybe in the opening statement was the
25 matter of the closure of the road for safety

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1 purposes. Well, Mr. Keys testified in his
2 deposition -- I realize this sounds like it's an
3 impeachment as I was saying it. But he testified in
4 his deposition that he was not aware of any
5 accidents at this particular crossing. But what he
6 did elaborate about was this super speedy train --
7 I'm not saying it right, but the train between
8 Columbia and Charlotte, this was going to be that
9 thoroughfare. Apparently this design existed all
10 the way back into the '90s, that this was the plan
11 as far as that goes. He also testified as to the
12 arrangement between the Railroad and the Highway
13 Department, wherein the agreement, the Highway
14 Department secures the agreement of the Railroad to
15 close the crossing here in exchange for the
16 contribution of -- by the Railroad in the form of, I
17 think about \$122,000 out of about a two million-plus
18 expense for the bridge, the new overpass that was
19 going to be built. So it did bring out -- and then
20 also, as well, there was a bunch of testimony from
21 Mr. Keys as to his conversations with Mr. Morgan,
22 that we all -- we thought, number one, was assistive
23 with regard to our burden of proof, as well as just
24 giving the Court that much more in the way of
25 context concerning the factual scenario. Because

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1 really the only players -- although there were
2 obviously more people involved from the Highway
3 Department in conjunction with this project, the
4 only one Mr. Morgan ever dealt with was Mr. Keys. I
5 don't think the testimony will take more than
6 probably about ten minutes.

7 THE COURT: I'm not concerned about the time. I'm more
8 concerned about me following everything. And, of
9 course, in depositions he's pinned down, he can't
10 change his testimony.

11 MR. STEGMAIER: That's right.

12 THE COURT: I'm wondering if it might be better to wait
13 until tomorrow to publish the deposition while Mr.
14 Keys is here and, you know, again, he's pinned down
15 so he can't deny he said those things. And ---

16 MR. STEGMAIER: I guess this is what I would ask.

17 THE COURT: Okay.

18 MR. STEGMAIER: And I take what the Court has said to me,
19 and I will think about it. If -- if we adjourn
20 today I would prefer not to close. I mean, I would
21 not -- I prefer not to rest.

22 THE COURT: That's fine.

23 MR. STEGMAIER: Okay.

24 THE COURT: I understand. I understand.

25 MR. BROOKER: And, Your Honor, it would give me time to go

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1 through this. Like I said, I just got this this
2 morning.

3 **THE COURT:** Okay. Yes, I understand that we're still on
4 the plaintiff's case, and we can recess until 9:30
5 in the morning. And Mr. Keys will be here? He'll
6 be here.

7 **MR. BROOKER:** He'll be here.

8 **THE COURT:** And he's your only witness?

9 **MR. BROOKER:** He's my only witness and he, through me,
10 thanks the Court for allowing him to do this. There
11 was a charity golf tournament and he was willing to
12 come down, but as long as we have three days, you
13 know, that's ---

14 **THE COURT:** Okay. That's fine.

15 **MR. BROOKER:** We really appreciate it.

16 **MR. STEGMAIER:** I told Mr. Brooker that I think by virtue
17 of the fact that he's got one witness, we've got
18 these deposition designations that may or may not be
19 read into the record, that I would have every
20 anticipation of this being done by midday tomorrow.

21 **THE COURT:** That's fine. And my conflict I have on
22 Wednesday is gone, so that's not a problem. Well,
23 okay, we stand in recess but don't go anywhere yet.
24 We stand in recess until 9:30 tomorrow morning.

25 (There being nothing further at this time, the hearing was

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1 recessed at 1:57 p.m. and commenced at 9:57 a.m. on
2 Tuesday, October 21, 2015)

3 THE COURT: Okay. Mr. Stegmaier?

4 MR. STEGMAIER: Good morning, sir.

5 THE COURT: Yes, sir.

6 MR. STEGMAIER: I hope you're well.

7 THE COURT: Oh, thank you.

8 MR. STEGMAIER: Considering the Court's observations
9 yesterday about the deposition designations, and I
10 think what the Court was articulating was, Mr.
11 Stegmaier, you can read them if you like, but if Mr.
12 Keys is going to be here, doesn't that sound
13 duplicative. I think that's the vibe I got from the
14 ---

15 THE COURT: That's not exactly what I said. Well, not
16 just duplicative. I've never seen it done that way
17 before. That doesn't mean it's wrong, that doesn't
18 mean you shouldn't do it, but when the person's here
19 usually you don't use the deposition. If he says
20 something inconsistent with what he testified to ---

21 MR. STEGMAIER: Yeah.

22 THE COURT: --- then I think he's pinned down. He's not
23 going to say something that -- or if he does, you'll
24 explain it to him.

25 MR. STEGMAIER: Well, in consideration of the Court's

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1 observations, and by virtue of the fact Mr. Keys is
2 here, we would call Mr. Keys in our case in chief.
3 THE COURT: Okay. And you want him designated as a
4 hostile witness?
5 MR. STEGMAIER: Adverse witness, we'll make him ---
6 THE COURT: Adverse, be nice about it. And that way you
7 can ask leading questions that ---
8 MR. STEGMAIER: Yes, sir.
9 THE COURT: --- normally wouldn't be allowed under -- or
10 may not be allowed.
11 MR. STEGMAIER: Yes, sir.
12 THE COURT: All right. Sir?
13 (Witness is sworn.)
14 Brian W. Keys, being duly sworn, testifies as follows:
15 MR. KEYS - DIRECT EXAMINATION BY MR. STEGMAIER:
16 Q: Mr. Keys, good morning.
17 A: Hey, how are you?
18 Q: For the record, would you state your name and your
19 occupation?
20 A: My name is Brian Wayne Keys, and I'm the director of
21 Rights of Way for the South Carolina Department of
22 Transportation.
23 Q: And you and I were chatting just briefly before, and
24 today is the first time that you and I have had the
25 opportunity to meet one another. I've had the

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1 opportunity to review your affidavit, I'm sorry, your
2 deposition testimony. And it's my understanding you
3 grew up in Irmo?
4 A: That's correct.
5 Q: And you finished in '86, correct?
6 A: Yes, sir.
7 Q: And thereafter you went to Carolina?
8 A: That is correct.
9 Q: And then your first job out of school was at the
10 Highway Department?
11 A: That is correct.
12 Q: And have you been a career employee of the Department
13 of Transportation?
14 A: Yes, sir.
15 Q: So there's no breaks in your service?
16 A: I became full-time in '91, but I worked at the
17 Department prior to '91 on a part-time basis while I
18 was going to the university.
19 Q: Yes, sir. But to clarify, from '91 through today
20 there have been no breaks in your service?
21 A: No breaks since '91.
22 Q: Now, you stated -- when I asked for your occupation
23 you said that you were responsible for the rights-of-
24 way; is that correct?
25 A: That is correct.

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1 Q: How long have you been in that particular position?
2 A: About 16 months.
3 Q: And prior to that what were you doing?
4 A: I worked in the State Highway Engineer's Office.
5 Q: And what was your title there?
6 A: Assistant Deputy Engineer for Planning, Location and
7 Design.
8 Q: Now, you recall being deposed in this case, don't
9 you?
10 A: Yes, sir, I do.
11 Q: And to refresh your recollection, you were deposed on
12 Wednesday, March 11, 2009; does that sound familiar?
13 A: Yes, sir, it sounds correct.
14 Q: At that point in time, of course I know that's five
15 years ago, but at that point in time you were -- your
16 position at the Highway Department was what?
17 A: It was as Assistant Deputy State Highway Engineer,
18 the former one than I have now.
19 Q: Okay. I think I'd read through here it was Deputy --
20 exactly what you said. I thought I heard the word
21 Secretary in there, something like Deputy Assistant
22 Secretary or?
23 A: The title has changed over a number of years, and
24 there were -- I worked directly in the State Highway
25 Engineer's Office for a number of years.

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1 Q: Yes, sir. Well, getting to the meat of the story
2 here, you were a participant in the project involving
3 Farrow Road; were you not?
4 A: Yes, sir.
5 Q: And stated succinctly, what was that project?
6 A: The project was the widening and location of Clemson
7 Road from US Route 1 all the way to I-77.
8 Q: Now, if we look at this aerial map, this is an aerial
9 photograph that Mr. Brooker had brought, and the
10 first question, is this an aerial that would have
11 been produced by the Highway Department?
12 A: You're asking me is it?
13 Q: Yes.
14 A: I don't know that it is.
15 Q: Okay.
16 A: But it looks similar to one that we would, yes, sir.
17 Q: Now, when you talk about Clemson Road being widened,
18 hopefully you've got your bearings about you. This
19 is Farrow Road and this is Killian Road. And I would
20 represent to you by virtue of the fact that it's
21 labeled, it says Clemson Road; are you in agreement
22 with that?
23 A: Absolutely.
24 Q: All right. So the project that you were telling me
25 about that you were a participant in was the widening

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1 of Clemson Road, correct?

2 A: Yes, sir.

3 Q: And that was running from US 1 all the way to 77, on

4 the west?

5 A: That's correct.

6 Q: Now, your position at the Highway Department at that

7 particular time was what?

8 A: Actually I was involved in it in two different

9 phases.

10 Q: Okay.

11 A: Originally, as it was planned as a project, the

12 entire project was ---

13 Q: Was that back in the '90s?

14 A: That was back in the '90s. I was an assistant

15 project engineer, and I had just come into that

16 office and we did a public hearing and were doing the

17 original phases of the project. Subsequently, the

18 project was broken up into phases for construction.

19 And I moved away in different offices. And then I

20 came back to it as this last section was being

21 constructed.

22 Q: Now, we'll talk a little bit about the planning in a

23 second, but with regard to the second phase or the

24 second part where you were involved, do you remember

25 the particular time frames, like as in years, that

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1 the project would have been underway as far as
2 construction fees where you would have been involved?

3 A: No, sir, I do not recall.

4 Q: Well, would it cotton with your memory if I related
5 to you that it was in the mid-2000s?

6 A: Yes, sir, that would.

7 Q: I will represent to you that, based on our
8 understanding during the course of this litigation,
9 that the Killian Road, where the crossing was taken
10 up by the Highway Department, that happened or
11 occurred roughly or approximately January of 2006.
12 Does that cotton with your memory?

13 A: Yes, sir.

14 Q: All right. Now, in the construction phase, what was
15 your title? What was your responsibility?

16 A: It was a program manager. And working from
17 headquarters, a program manager is responsible for
18 the project from its inception through its
19 construction. And mainly you're involved with budget
20 and time frames.

21 Q: What, if any, dealings did you have with the public
22 at large, people that weren't affiliated with the
23 construction or the design or the planning, anything
24 along those lines, whether it would be the Highway
25 Department or its related vendors? What were your

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1 dealings with the public at large?

2 A: Well, generally when people outside have questions
3 and they inquire into the Department of
4 Transportation, it goes to the project manager at
5 first, or program manager. And then we would
6 disseminate where that one might be, whether it would
7 be related to the engineering side of it or the
8 construction side of it. So we're like a single
9 point of contact for all information regarding a
10 project.

11 Q: Was there points in time, and we'll talk a little bit
12 more about this as we go along, but were there points
13 in time, as applying to Mr. Morgan, were there points
14 in time where you dealt face-to-face with Mr. Morgan?

15 A: I do not recall directly dealing with him.

16 Q: All right. Now, do you recall being deposed about
17 this litigation before, have you not?

18 A: Yes, sir.

19 Q: And you recall being asked questions about your
20 dealings with Mr. Morgan at that point in time in
21 your deposition, do you not?

22 A: Yes, sir.

23 Q: In preparation for today, did you have the
24 opportunity to review your deposition testimony?

25 A: I did, yes, sir.

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1 Q: When you reviewed your deposition testimony, do you
2 recall the testimony that you gave that related to
3 the fact that you had met with Mr. Morgan prior to
4 January 2006?

5 A: Do not recall that.

6 Q: You don't recall reading that?

7 A: No. I really don't. I skimmed over it very, very
8 quickly and I really sort of focused on location and
9 things of that nature.

10 Q: All right. Well, we'll get back to that.

11 A: Yes, sir.

12 Q: We talked at length, at this point in time, about
13 Clemson Road. Tell me the relationship that this
14 project, the relationship that this project had with
15 Farrow Road and the railroad that were running in the
16 other direction. What were y'all doing on Farrow
17 Road?

18 A: We had to provide for design accommodations for the
19 intersection of the two roads.

20 Q: And how was -- what specifically was done to
21 accommodate the changes for the intersection? Was a
22 bridge constructed?

23 A: Not at the intersection.

24 Q: Okay. Was there ever a bridge constructed anywhere
25 near the intersection of Killian and Farrow Road?

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1 A: There was not a bridge constructed.
2 Q: Let me ask you this ---
3 MR. STEGMAIER: For purposes of identification, if we could
4 mark this as Defendant's next, I think this is ---
5 COURT REPORTER: Defendant's or Plaintiff's?
6 MR. STEGMAIER: I'm sorry, I'm so used to saying
7 Defendant's.
8 COURT REPORTER: This will be Six.
9 MR. STEGMAIER: Yeah. Plaintiff's Six.
10 (Plaintiff's Exhibit Number Six is marked for
11 identification.)
12 MR. STEGMAIER: Thank you.
13 Q: Mr. Keys, I have a document here that I would
14 represent to you to be a contract, written contract
15 between Norfolk Southern Railway Company and the
16 South Carolina Department of Transportation, dated
17 July 20th of 2004.
18 MR. STEGMAIER: May I approach, sir?
19 THE COURT: Yes, sir.
20 MR. STEGMAIER: Thank you.
21 Q: I'm going to hand you that document.
22 A: Certainly.
23 Q: Take a look through that, if you wouldn't mind, just
24 briefly, before I ask you some questions regarding
25 that.

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1 A: (Witness complies.)
2 Q: Would you agree with me that that is a contract that
3 was signed between the Norfolk Southern Railway and
4 the Department of Transportation for purposes of
5 constructing this overpass on Clemson Road, where the
6 railway runs underneath it?
7 A: I would agree, yes, sir.
8 Q: Okay. So y'all did build an overpass, at least on
9 the railroad, in conjunction with your Clemson Road
10 project?
11 A: Yes, we did.
12 Q: Okay. So we're on the same page, as far as that goes
13 at this point in time, correct?
14 A: That's correct.
15 Q: All right. With regard to the construction of this
16 railway overpass, did Norfolk Southern, by virtue of
17 your review of this contract, did Norfolk Southern
18 contribute in a material way, as in contributing
19 money, to the construction of this overpass?
20 A: Yes, sir.
21 Q: Okay. Do you recall how much ---
22 A: I need ---
23 Q: The first question is, do you recall how much the
24 bridge cost to construct?
25 A: No, sir.

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1 Q: All right. Do you recall how much Norfolk Southern
2 would have contributed to the construction of that
3 bridge?

4 A: No, sir.

5 Q: All right. Let me just have you refer to page one
6 there, where the dollar amounts are mentioned.

7 A: Yes, sir.

8 Q: How much -- does that refresh your recollection,
9 looking at that?

10 A: Yes, it does.

11 Q: How much was the total project for that bridge?

12 A: It was estimated to be 2.3 million.

13 Q: All right. And the Norfolk Southern contribution
14 would be how much, sir?

15 A: \$115,000-plus.

16 Q: Now, my question to you is this: Since we're on the
17 same page about the fact that part of the Clemson
18 Road project was going to include construction of
19 this overpass, why did the intersection of Killian
20 Road and Farrow Road come into play for purposes of
21 your project at Clemson Road? And specifically, why
22 did the rail grade have to be closed? The crossing
23 at Killian Road, why was this closed to facilitate
24 the construction of this overpass?

25 A: It was at the request of the Railroad.

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1 Q: Did the Railroad formally petition the Highway
2 Department to be able to close that?
3 A: Yes, sir.
4 Q: All right. As we sit here today, irrespective of
5 what the Railroad sought to do as far as closing it,
6 do you know the reasons why the crossing here was
7 closed?
8 A: Why they petitioned it to be closed?
9 Q: Right.
10 A: No, sir.
11 Q: All right. Do you recall being asked these questions
12 in your deposition testimony?
13 A: It's possible.
14 Q: All right. Well, let me ask you before we start
15 digging into your deposition testimony, let me ask
16 you this question: Was there a point in time -- you
17 had told us about your participation in the planning
18 of this project back in the '90s, correct?
19 A: Yes, sir.
20 Q: One of the things that we had read in your deposition
21 testimony was the idea or notion of a high-speed rail
22 line between Columbia and Charlotte, do you recall
23 giving that testimony?
24 A: I do.
25 Q: What do you remember about that in addition -- or,

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1 that design or that plan as far as constructing this
2 railroad?

3 A: It was my understanding that there were corridors
4 that were defined through South Carolina, in their
5 planning stage, and this was one of their corridors.

6 Q: So the Norfolk Southern railway that was running
7 along Farrow Road, right there where it intersects
8 with Killian Road, this was one of the corridors for
9 high-speed rail that somebody thought would be a good
10 idea to build between Columbia and Charlotte,
11 correct?

12 A: That's my understanding.

13 Q: What's the status of that?

14 A: I'm unaware of it.

15 Q: All right. Have you participated in any meetings
16 since the 1990s where the high-speed rail corridor
17 has been discussed at the Department of
18 Transportation?

19 A: No, sir.

20 Q: This -- again, I would represent to you that the
21 closure occurred at Killian Road in January 2006. In
22 the lead-up to the closure of the crossing at Killian
23 Road and Farrow Road, in 2006, 2005, 2004, were you,
24 as a project manager, a participant in any meetings
25 where the high-speed rail line was being discussed as

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1 something that would come to fruition?
2 A: Say the question again?
3 Q: All right. In 2004, 2005, 2006 ---
4 A: During that time frame?
5 Q: During that time frame.
6 A: Yes.
7 Q: Were you, as a project manager for the Highway
8 Department, a participant in any conversations,
9 meetings, discussions regarding making the high-speed
10 rail line something to come to fruition?
11 A: Yes, I believe I was.
12 Q: Okay. Tell me about that.
13 MR. BOOKER: Your Honor, just for the record, I must state
14 a general objection here. The planning of highways
15 or any kind of governmental planning does not
16 constitute a taking. The fact that there may have
17 been some plans or some discussions for a high-speed
18 rail line is not relevant to an inverse condemnation
19 case alleging a taking. So I would object to this
20 whole line of questioning concerning a high-speed
21 rail.
22 THE COURT: Mr. Stegmaier?
23 MR. STEGMAIER: Well, I -- our position would be that the
24 closing was pretextual. And specifically, and we'll
25 get more into it, but -- with regard to Mr. Keys'

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1 prior testimony in his deposition, but one of the
2 reasons given for the closing at Killian Road was
3 that it was going to facilitate this high-speed rail
4 line from Columbia to Charlotte. Our belief is that
5 this was just something that was sitting on paper,
6 from the 1990s, and by the point in time when the
7 closure was made in 2006, it wasn't any closer to
8 becoming a reality than it was in the early '90s.

9 THE COURT: Objection overruled. Do you note a continuing
10 objection, Mr. Brooker?

11 MR. BOOKER: Excuse me?

12 THE COURT: Do you want to note a continuing objection to
13 this line of questioning?

14 MR. BOOKER: I would. I would appreciate it.

15 THE COURT: All right. Yeah, duly noted. And that means
16 you don't have to jump up every time.

17 MR. BOOKER: Thank you.

18 THE COURT: You can stay seated. Go ahead, Mr. Stegmaier.

19 Q: Mr. Keys, let me hand this back, on the same page.
20 My understanding was that you were a participant in
21 the planning process back in the '90s, correct?

22 A: Yes, sir.

23 Q: And your testimony was that, as I understood it to
24 be, that you hadn't participated in any sort of
25 conversations or meetings involving the planning of

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1 the high-speed rail line from the time you were
2 involved in the planning process in the '90s through
3 today; is that fair to say?
4 A: If you're asking me did I have a role in planning the
5 high-speed rail corridor ---
6 Q: Okay.
7 A: --- I would agree.
8 Q: Okay. When was the last time you had been either a
9 participant in a conversation or on notice of a
10 conversation within the Highway Department about
11 making the high-speed rail line a reality?
12 A: It would be a guess, but it would be in the early
13 2000s. I mean ---
14 Q: Okay. The early 2000s. So, you know, we're talking
15 ten, 12 years ago, 14 years ago?
16 A: That is correct, yes, sir.
17 Q: In 2006 were those conversations still going on?
18 A: I would be unaware at that ---
19 Q: Okay.
20 A: I don't recall.
21 Q: Okay. One of the other, one of the other aspects
22 about your deposition testimony was that you had
23 related that there, from time to time, where you have
24 a rail grade crossing -- I'm sorry, rail crossing at
25 grade, concerns about safety. Do you remember giving

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1 that testimony?

2 A: Yes, sir.

3 Q: Tell me a little bit more about that. What was the

4 concern at Killian Road, the intersection of Killian

5 Road and Farrow Road about the safety of a rail

6 crossing there?

7 A: I'm not sure I know ---

8 Q: Okay. Were there concerns by the Department of

9 Transportation that the rail grade -- the rail

10 crossing at Farrow Road and Killian constituted some

11 sort of dangerous condition?

12 A: I'm sure there were.

13 Q: All right. Do you have any sort of knowledge about

14 any sort of history of accidents or other events at

15 the crossing that would have occurred between a

16 railroad -- between the railroad and an automobile?

17 A: Yes, I am.

18 Q: Okay. Tell me about that.

19 A: I believe in 1989 there was a gentleman who was

20 killed at that location.

21 Q: Let me ask you to turn to page 50 in your deposition.

22 And the page number's at the top. Actually, let me

23 ask you to look back on page 49. And it's at line

24 20. I'll ask you the question, and then you give me

25 the response you gave back in 2009. You said you're

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1 not aware, all right. "And in your letter you say,
2 'Given the safety benefits and the potential high-
3 speed railroad, we remain committed to removal of the
4 crossing.'" What safety benefits are you referring
5 to? And your answer was what? Line one, page 50.
6 A: "Reduction in train/car accidents at that location."
7 Q: And the follow-up question was, "Okay, but you told
8 me earlier you weren't aware of any accidents,
9 right?"
10 A: "No, sir."
11 Q: And the follow-up question to that was, "You told me,
12 correct, that you were not aware of any?" And your
13 response was what?
14 A: "I'm not aware of any."
15 Q: Okay. So you testified in 2009 under oath, and you
16 understand the significance of testifying under oath,
17 correct?
18 A: Yes, sir.
19 Q: You testified under oath in 2009 that you weren't
20 aware of any accidents at this particular crossing,
21 didn't you?
22 A: That's correct.
23 Q: And today you're telling me you know of at least one?
24 A: That's correct.
25 Q: All right. What's the difference in your, what's the

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1 different in the testimony; what's the explanation
2 for the difference in testimony?

3 A: At the time, I wasn't aware.

4 Q: Okay. But you've since come into that understanding?

5 A: Well, at the Department, Traffic Engineering provides
6 that type of information. And I was unaware of that
7 information at the time. It wasn't under my design
8 purview as a program manager. But since that time
9 I've become aware, yes, sir.

10 Q: All right. So, assuming that what you're telling us
11 is true, that this accident occurred in 1989, at the
12 intersection at Killian Road and Farrow Road, at that
13 point in time, when the road was ultimately closed in
14 2006, you would agree with me that about 17 years had
15 gone by, correct?

16 A: Yes, sir.

17 Q: And in that point in time, although you didn't know
18 it then apparently, you know it now, but only one
19 accident had occurred during that entire time frame,
20 correct?

21 A: That is correct.

22 Q: Would you -- and you can't see it very well on this
23 aerial, you might be able to see it on this other map
24 -- yeah, actually you can. This is the tax map, I
25 know it's not the Highway map. But you've got the

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0223

1 railroad that runs parallel to Farrow, and you've got
2 Killian, and you've got Longtown Road. And you see
3 there's another crossing there, at grade, at the
4 intersection of Longtown and Farrow Road.

5 A: That is correct.

6 Q: It's true, isn't it, that that rail crossing has
7 continued to exist at grade?

8 A: Yes, sir.

9 Q: Okay. That's there today, correct?

10 A: Yes, sir.

11 Q: Obviously it wasn't closed back in 2006?

12 A: Certainly.

13 Q: So my question is, at this point in time, where
14 you've got a commercial property, at the corner of
15 Farrow and Killian Road, that is accessing Farrow
16 Road by way of this intersection, why did the
17 Department permit the rail crossing at grade to
18 continue to exist on Longtown Road and Farrow, and
19 not at Farrow Road and Killian?

20 A: I don't have an answer for it.

21 Q: All right. Now, is it your testimony as we sit here
22 today, I just want to make sure I'm completely clear,
23 is it your testimony today that you don't recall ever
24 having any dealings with Mr. Morgan in the run-up to
25 the closure of the crossing at Killian Road in

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1 January 2006?

2 A: Ask that question -- this is the gentleman right
3 here?

4 Q: Mr. Morgan. Do you recall ever meeting him?

5 A: I really don't. And if I have, I apologize.

6 Q: Okay. Let me refer you back to your testimony on
7 page 40, sir. And I believe you were having
8 difficulty at that point too, but the question posed
9 to you on page 40, line six, was, "Okay, so do you
10 now remember meeting Mr. Morgan?" And your response
11 was?

12 A: "I recall a meeting, and the name sounds familiar."

13 Q: The following question, on line 12, was, "Do you
14 remember what the meeting was about?" And your
15 response was what?

16 A: "Probably about this piece of property right here and
17 the access."

18 Q: And we're talking about obviously this piece of
19 property sitting at the corner of Killian Road and
20 Farrow Road. As we're sitting here today, do you
21 remember what kind of business Mr. Morgan was
22 involved in?

23 A: I do not.

24 Q: All right. So if I told you that he was involved in
25 a business involving calcium chloride and supplying

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1 that calcium chloride to various vendors, including
2 the Department of Transportation, you don't remember
3 anything about that?
4 A: The name does sound familiar now that you said
5 calcium chloride, or something like that.
6 Q: All right. Do you know what -- being an engineer, do
7 you know how calcium chloride plays into the highway-
8 building business and the sidewalk-building business?
9 A: No, sir.
10 Q: All right. And as we sit here today, do you have a
11 recollection about the fact that Mr. Morgan also had
12 an additional business involving warehousing or,
13 specifically, renting out spaces to people that
14 needed storage for homes and businesses and things
15 along those lines?
16 A: I do not recall that.
17 Q: All right. So you don't recall having conversations
18 with Mr. Morgan where he expressed to you a concern
19 about the fact that by virtue of his inability to
20 access his businesses from Farrow Road, that this was
21 going to cause a serious condition for him, or impair
22 his business?
23 A: I do not recall.
24 Q: Michael Letts, is that a name that rings a bell?
25 A: Absolutely.

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0226

1 Q: Okay. Tell me about Michael Letts. Who is he? I'll
2 make it easier, who is Mr. Letts?
3 A: He, as best I know, he sits on Midlands Regional
4 Planning Council for transportation items and issues.
5 Q: All right. Was there a point in time where you met
6 with Mr. Letts about this very same issue, about the
7 closure of the road at Killian?
8 A: I don't recall meeting directly with him. I do
9 recall writing him a letter.
10 Q: Okay. Tell me about that letter.
11 A: He inquired about retaining an access from Killian
12 Road on to Farrow Road, and we wrote him back not
13 supporting that idea.
14 Q: Now, that letter was written -- and I'm referring to
15 page 47 of your deposition, line 17, where the letter
16 is referenced. And I later finally located -- I
17 don't have the letter to show you, but the letter was
18 dated April 23rd, 2004, and that's referenced later
19 in your deposition testimony.
20 A: Yes, sir.
21 Q: Does that cotton with your memory of approximately
22 the period of time where you would have advised Mr.
23 Letts that, notwithstanding his request to keep that
24 intersection open, the Highway Department had
25 considered -- had considered it and was not -- was

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0227

1 going to stick with the original plan?

2 A: Yes, sir.

3 Q: What was the basis for not going along with what

4 either Mr. Morgan or Mr. Letts asked you to do? If

5 the railroad crossing was going to stay open at

6 Longtown Road, why couldn't it stay open at Killian

7 Road?

8 A: Because we had agreed with the Railroad when we built

9 the crossing going over the railroad, to remove that

10 crossing.

11 Q: So the Railroad was essentially calling the shots to

12 the Highway Department about what was going to stay

13 open and what was wasn't?

14 A: Yes.

15 Q: Would you agree with me that Mr. Morgan's property

16 abuts Farrow Road?

17 A: No, sir.

18 Q: Tell me why you don't think so.

19 A: The Department of Transportation has no interest or

20 right-of-way in that section of any of those

21 roadways, title interest to any of those properties.

22 Q: What do you mean by that? Well, let me ask you this

23 question: Killian Road's a state highway, isn't it?

24 A: It is.

25 Q: Farrow Road's a state highway, isn't it?

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0228

1 A: It is.

2 Q: At the very least, you would agree with me that Mr.

3 Morgan's property fronts Farrow Road, doesn't it?

4 A: No, sir.

5 Q: You don't?

6 A: No, sir.

7 Q: All right. You were telling me that the Highway

8 Department doesn't have an interest in these roads?

9 Maybe I'm misconstruing that. Tell me what you

10 meant.

11 A: We don't have title interest in those roads. We have

12 deeds to right-of-way, and we're allowed to use them

13 -- as a deed to right-of-way, you're only allowed to

14 use them for transportation purposes.

15 Q: Right.

16 A: If you were to buy a piece of property -- when most

17 people get a piece of property, you would get a title

18 to that land. The Department of Transportation does

19 not have title to those lands.

20 Q: All right. But you would agree with me, wouldn't you

21 -- and you don't have to if you don't want, but you

22 would agree with me, wouldn't you, that as a property

23 owner in South Carolina you would have an easement to

24 any public highway that you abut?

25 A: That is correct.

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0229

1 Q: And as a property owner in South Carolina, you have
2 an easement or a right of access to the public
3 highway department, don't you?
4 A: That is correct.
5 Q: I'm sorry, the public highways?
6 A: Yes, sir.
7 Q: But irrespective of our two agreements, as far as
8 that goes, you still say or still contend that Mr.
9 Morgan's property does not abut Farrow Road?
10 A: That's correct.
11 Q: Was -- let me ask you this question first: With
12 regard to Farrow Road and any of the work that was
13 done, because Farrow Road was reconfigured to
14 facilitate the Clemson Road alterations, wasn't it?
15 A: Yes, it was.
16 Q: With regard to the alterations done to Farrow Road,
17 the reconfiguration, were there points in time where
18 the Highway Department gave notice to adjacent
19 property owners of what it was doing?
20 A: Yes, sir.
21 Q: What particular type of notice?
22 A: Generally it would be public hearing notices. We had
23 a number of public hearings on this project.
24 Q: Are you able to testify in the affirmative today that
25 Mr. Morgan ever received any sort of notices for any

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1 public hearings involving the alterations done to
2 Farrow Road?
3 A: Not that he received them personally.
4 Q: Were these notices mailed to adjacent landowners?
5 A: No, they're published.
6 Q: Okay. Would there be a point in time where any
7 notice would be directly mailed to an adjacent
8 landowner?
9 A: No, sir.
10 Q: Not even in situations or circumstances involving
11 imminent domain?
12 A: Only when the Department is actually moving through
13 the purchase with right-of-way are they specifically
14 identified. We have to do the title search and
15 correspond with that property owner.
16 Q: Were there any right-of-ways affected by virtue of
17 the alterations done to Farrow Road, to your
18 recollection or to your knowledge?
19 A: Yes, sir.
20 Q: Okay. And in those circumstances, those landowners
21 would have received notice?
22 A: From Right-of-Way Office, yes, sir.
23 Q: Did Mr. Morgan ever receive any notice from the
24 Highway Department about the closure of the railroad
25 crossing at Killian Road?

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0231

1 MR. BOOKER: Objection. Asked and answered, Your Honor.
2 THE COURT: Overruled.
3 MR. STEGMAIER: I'll ask it again.
4 Q: Did Mr. Morgan ever receive any written notice from
5 the Highway Department about the closure ---
6 A: Not that I'm aware of.
7 Q: I know you're anticipating my answer, but let me get
8 out the question.
9 A: Okay.
10 Q: Did Mr. Morgan ever receive any written notice from
11 the Highway Department of the closure of the rail
12 crossing at Killian Road?
13 A: Not that I'm aware of.
14 Q: All right.
15 MR. STEGMAIER: Hold on a second.
16 THE COURT: Oh, yes, sir.
17 MR. STEGMAIER: Thank you, sir.
18 Q: The rail grade was dismantled -- I keep saying rail
19 grade, and I apologize. The rail crossing was
20 dismantled by the Highway Department, was it not?
21 A: No, sir.
22 Q: It was not?
23 A: No, sir.
24 Q: The barricades that are at the rail crossing to this
25 day belong to whom?

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1 A: The barricades belong to the Department of
2 Transportation..
3 Q: Okay.
4 A: The railway company is responsible for the removal of
5 those items within their right-of-way. We only take
6 care of the items within our right-of-way.
7 Q: But that was with the permission of the Highway
8 Department, correct?
9 A: No, sir.
10 Q: The Highway Department can just tear up a crossing
11 wherever they want to do that?
12 A: The Railroad took down the crossing.
13 Q: Okay, I understand that. But the crossing was
14 dismantled with the permission of the Highway
15 Department, was it not?
16 A: No, sir.
17 Q: So, the Railroad ---
18 A: The Railroad owns their rail lines and their
19 property.
20 Q: I understand.
21 A: And they're responsible for that. The Department of
22 Transportation only goes up to their -- the right-of-
23 way line that they own. The railroad company is
24 responsible for everything within its own right-of-
25 way or property, so they actually removed the

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0233

1 crossing.

2 Q: Okay.

3 A: Or had it removed.

4 Q: Okay. I appreciate that clarity. But at this point

5 in time, when the rail crossing was pulled up, that

6 created a terminus at Killian Road. You could no

7 longer run to Farrow Road, as you had historically

8 been able to do, correct?

9 A: That is correct.

10 Q: And so when the rail crossing was taken up, that was

11 with, at the very least, the permission of the

12 Highway Department, was it not?

13 A: No, sir. The Department does not own that property

14 and does not maintain that property. It was with the

15 Railroad's permission that it was removed, and we're

16 responsible -- we put the signs up on the roadway

17 portion of it.

18 Q: But in every road in South Carolina where there's a

19 rail crossing running through it, how -- the Railroad

20 can't just unilaterally tear up tracks to create a

21 break in the road, can it?

22 A: I believe they can.

23 Q: You think so?

24 A: If they own the title to it and if it's in the public

25 interest, they would have the ability to do that.

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1 Q: Didn't you previously testify to this Court that the
2 Railroad had actually applied to be able to close
3 this crossing? Wasn't that one of the first things
4 you testified to today?
5 A: That they had applied to close the crossing?
6 Q: Yep, and petitioned the Department to close the
7 crossing and ---
8 A: The Department asked to put the railroad at a
9 different -- the crossing at a different location.
10 And the Railroad stipulated that this crossing was
11 going to be taken up as a result of that, and we
12 agreed to that, yes, sir.
13 Q: Okay. So it's a bilateral agreement, isn't it? It's
14 not a unilateral agreement? That's what you just
15 testified to.
16 A: Right.
17 Q: All right.
18 A: They sought our concurrence in that also, yes, sir.
19 Q: Okay. Thank you. So would you agree with me that
20 that concurrence would be conduct of the government?
21 It's affirmative conduct of the government, that the
22 Highway Department says yes, you can do that?
23 A: Yes.
24 Q: And would you agree with me that the construction of
25 the overpass, the alterations to Clemson Road,

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0235

1 alterations to Farrow Road, the closing of the grade
2 -- closing of the crossing at Killian Road, that was
3 all for a public purpose?
4 A: Yes, sir.
5 Q: I appreciate your time. That's all the questions I
6 have.
7 THE COURT: Mr. Brooker?
8 MR. BROOKER: Oh, I'm sorry.
9 THE COURT: Take your time.
10 Q: With regard ---
11 MR. STEGMAIER: I'm sorry, sir, just a couple more
12 questions.
13 THE COURT: That's fine.
14 Q: With regard to Exhibit Six, I'd asked you some
15 amounts with regard to the project with the overpass.
16 Who determined the amount that the Railroad was going
17 to contribute?
18 MR. BOOKER: I'm sorry, could I hear that again?
19 MR. STEGMAIER: I'm sorry.
20 Q: Who determined how much the Railroad was going to
21 contribute to the project?
22 A: I'm unaware of that.
23 Q: Now, is it fair to say that at one point during the
24 planning process at Killian and Farrow Road, that
25 there was a plan to cul-de-sac the west side, what

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1 was 'to the west of Farrow Road?

2 A: That is correct.

3 Q: Explain the reason why the Highway Department
4 ultimately decided not to cul-de-sac that portion and
5 instead close a part of it at Killian Road?

6 A: The Department petitioned to change the design in
7 that area.

8 Q: So somebody petitioned, somebody asked for a
9 reconsideration ---

10 A: That is correct.

11 Q: --- and the Highway Department went along with that?

12 A: That is correct.

13 Q: Thank you, sir.

14 MR. KEYS - CROSS-EXAMINATION BY MR. BROOKER:

15 Q: I have a few questions for you, Mr. Keys.

16 MR. BOOKER: First, I wanted to get an exhibit marked, if
17 I can.

18 (Defendant's Exhibit Number Three is marked for
19 identification.)

20 Q: Mr. Keys, we know each other. I'm Beach Brooker,
21 your assistant chief counsel. I've got some -- I
22 printed out this morning some sections from the South
23 Carolina Code of Laws, and I wanted to hand them to
24 you. And if you could -- the first one's going to be
25 Section 58-15-1625 of the South Carolina Code of Laws

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1 from Title 58. It's fairly short. I just wonder if
2 you could read for the Court the text of that
3 statute.
4 A: Beginning where? That whole thing right here?
5 Q: The text, yes.
6 A: This piece right here?
7 Q: Yes.
8 A: "Notwithstanding any other provisions of the law, the
9 Department of Transportation may order legally closed
10 and abolished as a public way within the limits of a
11 railroad right-of-way a grade crossing that exists at
12 the time the Department assumes jurisdiction of the
13 matter upon a finding that the enhancement of public
14 safety resulting from such closing outweighs any
15 convenience caused by increased circuitry of highway
16 routes. This order by the Department may be issued
17 either in conjunction with or independent an order
18 related to automatic train-activated warning signals.
19 The authority of the Department legally to close and
20 abolish an at-grade crossing is in addition to
21 authority granted by law to other state agencies or
22 to local units of government to close and abolish
23 grade crossings. Upon the issuance of the order by
24 the Department, the railroad or railroads involved
25 shall physically remove the crossing from the tracks

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1 and the governmental unit maintaining the highway
2 shall remove or barricade the approaches to the
3 crossing."

4 Q: Thank you. I'm going to show you two more, and these
5 will be 58-15-1910 and 58-15-1920. If you could read
6 the text of those, and maybe the titles with them so
7 it won't run-on and confuse the Court.

8 A: 1910, "The Department of Transportation shall
9 cooperate in relation to grade separation structures.
10 The Department of Transportation shall cooperate with
11 any railroad company operating lines in the state in
12 effecting necessary reconstruction, changes or
13 alterations in grade separation structures on
14 highways where the tracks of such company crosses
15 such highways." 1920, "Necessity of work shall be
16 determined by Department; notice to companies. The
17 necessity for any such reconstruction, changes or
18 alterations shall be determined by the Department of
19 Transportation and made in accordance with plans
20 adopted by the Department, but any railroad company
21 concerned shall be given at least ten days' notice
22 before any such work is initiated by the Department
23 and shall be permitted by the Department to offer
24 suggestions and counsel as to the proposed
25 reconstruction, changes or alterations."

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1 Q: Thank you. Upon reviewing those code sections, it
2 would not be your view that you, Brian Keys, actually
3 arbitrarily and capriciously decided to close this
4 rail structure in contravention of the Department's
5 authority, would it?

6 A: Are you asking if it was my decision?

7 Q: If it was your decision. If you took it upon
8 yourself to decide what the Department's authority
9 with regard to closing rail grade crossings?

10 A: No, sir.

11 Q: Okay. Now, you testified -- well, you were
12 questioned concerning the plans for a high-speed rail
13 line. Does the Department have any role in building
14 a high-speed rail line in the first place, that you
15 know of?

16 A: No, sir.

17 Q: You were also questioned about the accident history
18 at this location. I'll show you what's been marked
19 as Defendant's Exhibit Three and ask if you can
20 identify, recognize what that is.

21 A: That is, appears to be an excerpt from The State
22 newspaper regarding a accident and death at the
23 railway crossing we're discussing at this time.

24 MR. STEGMAIER: Your Honor, at this point in time I would
25 respectfully request -- or, we would object to any

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1 testimony as to this particular accident inasmuch as
2 I think what Mr. Keys is reading from is just some
3 typed out, printed out, it's obviously not the
4 newspaper, it hasn't been authenticated. At this
5 point, at the very best it's hearsay, and so we would
6 object to this testimony.

7 THE COURT: Okay. Mr. Brooker?

8 MR. BOOKER: Well, Your Honor, I think it's a published
9 article from The State newspaper. I'm not sure what
10 exception to the hearsay rule that would come in, but
11 I think it does.

12 MR. STEGMAIER: There's nothing to authenticate it.
13 There's nothing to evince or illustrate that that's
14 actually an article that came from The State
15 newspaper other than you saying it came from The
16 State newspaper.

17 THE COURT: All right. Now, is this the same accident
18 that you've asked Mr. Keys about?

19 MR. STEGMAIER: Apparently, yes, sir.

20 THE COURT: Is this the same accident you were telling ---

21 A: As I understand it, yes, sir.

22 THE COURT: Okay. Your objection's sustained.

23 MR. STEGMAIER: Thank you.

24 Q: And I think you answered Mr. Stegmaier's question,
25 that you are only aware of one accident at this

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1 location. My question is, did you mean to say that
2 that was the only accident or the only fatal
3 accident?

4 MR. STEGMAIER: Objection to leading.

5 THE COURT: Yeah, actually this is cross.

6 MR. STEGMAIER: Yeah. I know.

7 THE COURT: He's allowed. Yes. Please restate the
8 question, sir. Objection overruled.

9 MR. STEGMAIER: Thank you.

10 Q: By your testimony did you mean that this was the only
11 accident that had ever happened at this intersection?

12 A: It's the only accident I'm aware of.

13 Q: You're aware of, okay.

14 MR. BOOKER: I should have these marked too. I'm sorry,
15 Judge, I should have done this yesterday but I didn't
16 know it was going to be brought up.

17 THE COURT: That's okay.

18 (Defendant's Exhibit Numbers Four and Five are marked for
19 identification.)

20 Q: I'm showing you what's been marked as Defendant's
21 Exhibit Four, Mr. Keys. Can you identify that
22 document, that instrument?

23 A: It's an agreement between the Department of
24 Transportation and the Southern Railway Corporation
25 with regard to our permission to utilize the railroad

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1 rights-of-way for crossing of the railroad.
2 Q: And can you tell us the date of this agreement?
3 A: November 1977, it appears, the 18th day.
4 Q: Now, could you go down to paragraph four and read
5 paragraph four, the text of paragraph four in full,
6 please?
7 A: "Should the use of said crossing be abandoned, then
8 all rights hereby granted to the state shall
9 thereupon cease and terminate, and State will, at its
10 sole cost and in a manner satisfactory to the
11 Railroad, remove from the rights-of-way of the
12 Railroad the portions of said public road located
13 beyond the limits of the crossings proper and restore
14 the Railroad's property to condition existing prior
15 to the construction of the said crossings within the
16 limits of the said rights-of-way. It's being
17 understood Railroad will remove the railroad crossing
18 proper located within the track area and restore its
19 property."
20 Q: You have identified yourself as currently occupying
21 the position of Director of Rights-of-Way; is that
22 correct?
23 A: Yes, sir.
24 Q: And to your knowledge and -- well, in that position,
25 are you the custodian of the Department's rights-of-

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1 way records, its property interests?

2 A: Yes, sir.

3 Q: And to your knowledge, does this instrument represent

4 the Department's only interest in this crossing of

5 the Norfolk Southern road at Killian and Farrow Road?

6 A: Yes, sir.

7 Q: Can you identify this instrument for me, please?

8 THE COURT: Which exhibit? No, no, what's the number I

9 guess?

10 A: Five.

11 MR. BOOKER: Defendant's Exhibit Five. I'm sorry..

12 THE COURT: Okay, thank you, sir.

13 A: It is a -- it is the Department -- excuse me, the

14 Federal Railroad Administration's inventory of this

15 railway road crossing.

16 Q: By this railway crossing, you mean the one that's the

17 subject of this lawsuit?

18 A: That is correct.

19 MR. BOOKER: I would move these instruments be entered

20 into evidence, Your Honor, as evidence of the

21 Department's interest such that it is in the property

22 in question.

23 THE COURT: Okay, Mr. Stegmaier?

24 MR. STEGMAIER: I don't have any difficulty with this

25 document ---

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1 THE COURT: Which one?

2 MR. STEGMAIER: Mr. Brooker I think has asked the
3 questions necessary to satisfy the business records
4 rule. But with regard to the second document, I
5 don't understand this to be a Department of
6 Transportation document. I haven't heard that this
7 is anything that would be considered a business
8 record of the Department of Transportation, so for
9 those reasons we would object to the admission of
10 this document.

11 THE COURT: By this document, you mean Defendant's Exhibit
12 Five; is that the one?

13 MR. BOOKER: I'm sorry, yeah.

14 THE COURT: You said he hadn't ---

15 MR. STEGMAIER: This is Exhibit Five, the one he's
16 objecting to.

17 THE COURT: All right, may I look at it, please? One
18 moment, please.

19 MR. BOOKER: I think it's a business record and ---

20 MR. STEGMAIER: I mean, you can think that but, I mean, I
21 haven't heard that testimony.

22 THE COURT: One moment, please. All right, Mr. Brooker,
23 where'd you get this record? Where'd you find this?

24 MR. BOOKER: From Mr. Keys' files.

25 Q: Where did we get that record?

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1 A: We got that from our railroad coordinator in Rights-
2 of-Way.

3 THE COURT: All right, one moment, please, let me look at
4 it. Now, the map part of it has Norfolk Southern
5 Corporation on it, Signal and Electrical. The second
6 page appears to be a federal form, does that sound
7 right?

8 A: It is. It's their inventory form, yes, sir.

9 THE COURT: Okay. And you're required by federal law to
10 complete one of these or?

11 A: The Department of Transportation is responsible for
12 updating those records and forwarding them back to
13 the Railroad Administration.

14 THE COURT: Okay. And the third page is the same thing?

15 A: It's the second page of that form, yes, sir.

16 THE COURT: And it came out of your file?

17 A: That is correct.

18 THE COURT: Okay. Anything else to add on the objection?

19 MR. STEGMAIER: Based on Mr. Keys' testimony at this point
20 in time, I think the business record rule is
21 satisfied there, so.

22 THE COURT: All right. Objection overruled. Please
23 proceed, Mr. Booker.

24 MR. BOOKER: Thank you. So this will be entered as
25 Defendant's Exhibit Five, except that I've got the

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1 wrong copy.

2 MR. STEGMAIER: I think the judge has my copy.

3 THE COURT: Yeah, that was Mr. Stegmaier's copy.

4 (Defendant's Exhibit Numbers Four and Five are entered

5 into the record.)

6 Q: Mr. Keys, I'm going to show you another statute. I

7 know I'm wearing you down with reading these things,

8 but I'd like to show you a document and ask you to

9 read it by title and by the date, which will appear

10 in the top right-hand corner.

11 A: This date right here?

12 Q: Yes, A.D.

13 A: A.D. 1864. Title is, "An Act to Charter the

14 Charlotte and South Carolina Railroad Company."

15 MR. STEGMAIER: Judge, I thought we'd been through this

16 yesterday, and unless Mr. Keys was a member of the

17 General Assembly in the 1860s and 1870s, I don't know

18 what he can personally testify to as to acts of the

19 General Assembly.

20 THE COURT: Now, I think yesterday Mr. Brooker wanted me

21 to take judicial notice of several documents. And I

22 certainly -- I wouldn't let them in because I didn't

23 think they met the requirements for taking judicial

24 notice of something. If he has another way to get it

25 in, I'll hear from him. You may just hold your

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1 objection in abeyance to see if the question's all
2 right.

3 MR. STEGMAIER: Yes, sir.

4 MR. BOOKER: It is a statute, Your Honor, from 1846. And
5 I would ask that you take judicial notice even though
6 it's not codified that it is a statute and still
7 exists as the law of South Carolina.

8 THE COURT: All right. What's the current statute?

9 MR. BOOKER: This is it.

10 THE COURT: No, I mean, but you got that from the most
11 recent published Code of Laws in South Carolina?

12 MR. BOOKER: I did not.

13 THE COURT: And everything's on the Internet as well. Let
14 me -- I don't feel comfortable taking judicial notice
15 of it, but if you can show me where it's in our Code
16 today certainly I have to abide by it and also take
17 judicial notice -- I could take judicial notice of
18 that. During a break I can go look it up, if you
19 like. Or we can all on our computers.

20 MR. BOOKER: That'll be fine -- Your Honor, I don't think
21 all statutes passed by the General Assembly over the
22 300 years of South Carolina are codified in the
23 current Code of Laws, but it is a statute passed by
24 the General Assembly of South Carolina.

25 THE COURT: Okay. Mr. Stegmaier?

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1 MR. STEGMAIER: I would suggest they are. I would suggest
2 whatever is accurate and recognized as statutory law
3 in this state would be found in the most current
4 version, which is the 1976 Code of Laws.

5 THE COURT: Right. Could we hold this whole line of
6 questioning in abeyance, give me a chance to go look
7 it up? I apologize for not having a clerk. I had a
8 summer clerk who had it on his phone, could have
9 looked it up by now. But I'll go look this up during
10 a break, and you and -- you know, I won't -- I'll
11 give you a chance to ask questions about it if ...
12 but the issue's whether or not I should take judicial
13 notice of it, not necessarily whether you can get it
14 in or whether you can ask questions about it. Is
15 that, I mean, is that -- everyone agree with that?

16 MR. STEGMAIER: Correct, sir.

17 THE COURT: Yeah.

18 Q: Now, Mr. Keys, I'm going to show you an instrument,
19 and if you could do your best to identify what that
20 might be.

21 A: Appears to be a condemnation for real estate between
22 a property owner and the Railroad.

23 Q: And who is the property owner?

24 A: According to the cover sheet, Ms. Mary Boyle.

25 MR. STEGMAIER: And, Judge, we would object to this line

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1 of questioning, and certainly to the admission of
2 this document, by virtue of the fact that I think Mr.
3 Brooker was very candid with the Court yesterday when
4 he said this was not a Department document, this was
5 one that was obtained by both parties in the course
6 of discovery in this case, from the Railroad. And
7 this would not be in the custody of the Department of
8 Transportation.

9 MR. STEGMAIER: Your Honor, I would say a decision of the
10 South Carolina Supreme Court, *Hoogenboom versus the*
11 *City of Beaufort*, which is remarkably similar
12 factually to this situation we have here, Mrs.
13 Hoogenboom sued for possession of a street end in the
14 city of Beaufort, saying that the City of Beaufort
15 did not have any record of title to that street end
16 and therefore she was entitled to claim it as the
17 underlying fee owner. The Supreme Court ruled that
18 all the record, land records in the county of
19 Beaufort were destroyed in the Civil War in 1863.
20 However, the -- there was a statute on the books
21 specific to Beaufort County that allowed the City of
22 Beaufort to acquire streets by fee simple and that
23 this street had been in existence and there were
24 records that they had acquired it by the quality of
25 title, even though the actual deed and instrument

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1 transferring it to the City no longer existed. If it
2 was acquired, it was acquired in fee simple because
3 the only authority existing at the time was the
4 statute that says when they acquire it, it acquires
5 in fee simple. The statute that Your Honor, I've
6 handed up to Your Honor, the 1846 statute that I
7 handed up gives railroads in the state of South
8 Carolina the right to acquire and condemn land. If
9 they do, it would be acquired in fee simple title.

10 **THE COURT:** Let me ask you, is that -- Mr. Stegmaier, do
11 you object to that? You disagree with that? Well, I
12 guess I should -- let me ask the question I was going
13 to ask, Mr. Brooker, when you finish. What are you
14 trying to prove with this?

15 **MR. BOOKER:** What I'm trying to do, Your Honor, they have
16 resisted our attempts to show that Norfolk Southern
17 Railroad owns fee simple there instead of owning an
18 easement. I don't believe, and I'm relying on
19 *Hoogenboom* again, but it is our burden to show
20 Norfolk Southern's title. It is their burden to show
21 the strength to -- to cover on the strength of their
22 title. I'm just trying to show that Norfolk Southern
23 in fact does own fee simple and not an easement.
24 They have not entered any evidence to contradict
25 that.

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1 MR. STEGMAIER: Well, our position is there's a right way
2 and a wrong way to do these things. And the Rules of
3 Evidence contemplate how to do this. If we wanted to
4 eliminate any sort of doubt about what that title
5 said or who the title presided with, the State
6 certainly could have called somebody from the
7 railroad company to come testify. You know, trying
8 to get this evidence in through a manager of the
9 Department of Transportation, who does not have this
10 material in his file, it's not in the Department of
11 Transportation's files, doesn't seem to be in
12 concordance with the Rules of Evidence.

13 THE COURT: And also, if I remember from yesterday, it
14 wasn't from the Register of Deeds Office. This came
15 from an attorney's office in Atlanta.

16 MR. STEGMAIER: That's correct.

17 THE COURT: Which is fine, but -- and on the other hand,
18 we couldn't read it because -- Mr. Brooker translated
19 it, offered a translation as well.

20 MR. STEGMAIER: I don't think Mr. Keys is the appropriate
21 custodian for these records. And, and the other
22 thing too is, we have clearly stipulated that Mr.
23 Morgan owned up -- we looked at the plat yesterday
24 and we looked at his deed. And we have stipulated
25 that he did not own the railway bed.

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1 THE COURT: All right. Now, do you, do you stipulate that
2 the Railroad owned whatever they owned in fee simple
3 and not, not just an easement?

4 MR. STEGMAIER: It goes back to what I just said, there's
5 a right way and a wrong way to do it. And certainly
6 somebody from the Railroad could have come in here
7 and testified to this in a second.

8 THE COURT: But you think that's not true, that they don't
9 own it in fee simple?

10 MR. STEGMAIER: Either in fee or it's just a, it's just an
11 easement given to the them by the state. It's one or
12 the other. We know this, that it's not within the
13 bounds of Mr. Morgan's property. Which is I think
14 what was -- what the Supreme Court was interested in
15 knowing.

16 THE COURT: Now, now tell me, and again, I want to rule
17 correctly on this particular point, tell me why it
18 makes a difference to your client whether they owned
19 it in fee simple or they, you know, they had an
20 easement.

21 MR. STEGMAIER: Well, I think just for my purposes.
22 Because, again, you know, and I understand what the
23 Rules of Evidence say and how to get testimony -- how
24 to get evidence into the record, and I think trying
25 to back-door it in through Department witnesses is

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1 not the right way to do it. It would have to come
2 through a Railroad representative. You know, what
3 does it matter? Like I said, it's either -- it was
4 either owned in fee by the Railroad or it was an
5 easement granted to the Railroad by the state. We
6 know that Mr. Morgan didn't own it.

7 **THE COURT:** Right.

8 **MR. STEGMAIER:** And ultimately, whether it was owned by
9 the Department -- I'm sorry, owned by the Railroad or
10 it was a right-of-way given to the Railroad by the
11 Highway Department, we still don't think that's
12 dispositive as to the ultimate issue as to whether
13 Mr. Morgan's property abutted Farrow Road.

14 **MR. BROOKER:** Your Honor, let's ---

15 **THE COURT:** I'm sorry, go ahead, Mr. Brooker.

16 **MR. BOOKER:** I'm sorry. Just, to the extent that the
17 Court may find this to be probative or determinative,
18 the Norfolk Southern has offered to send one of their
19 property managers down here from Richmond. May we
20 have a continuance on that issue if it does become an
21 issue on which this case turns, to get him down here
22 in the future and get his testimony?

23 **THE COURT:** I'm going to make a decision on that later on.
24 Let's take about a ten, 15-minute break, and I'll
25 just look up -- and the issue is, again, whether I

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1 should take judicial notice of these documents.

2 MR. STEGMAIER: Yes, sir.

3 THE COURT: And you're saying he's trying to get it in
4 anyway. Can I have that, that copy? You've seen
5 this, right?

6 MR. STEGMAIER: Yes, sir.

7 THE COURT: Okay. Give me -- let's reconvene at 11:20.

8 MR. STEGMAIER: Yes, sir.

9 MR. BOOKER: Your Honor, this is my translation, the best
10 I could.

11 THE COURT: Okay.

12 (Off the record from 11:04 a.m. to 11:28 a.m.)

13 THE COURT: Okay. Again, I apologize for my lack of
14 research ability, but I could not find a reference to
15 -- there are several references to Norfolk Southern
16 Railroad in the Code of Laws, but none that would be
17 relevant to this case. The Charlotte and South
18 Carolina Railroad Company, which was chartered back
19 in 1846, there have been so many mergers in that time
20 I could not find any mention of both companies
21 together, Norfolk Southern and Charlotte and South
22 Carolina Railroad. There are several more relatively
23 recent mergers, and I couldn't find a connection.
24 Doesn't mean it's not out there someplace. But I
25 can't take judicial notice of a statute that

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1 apparently has either been superseded by some other
2 law or replaced by some other law, you know, I can't
3 take judicial notice of it. And the deed that we
4 got, couldn't find it in the courthouse, we had to
5 find it in Atlanta, in the lawyer's file, so. So my
6 ruling would be that neither of those documents can
7 come into evidence.

8 MR. BROOKER: I thank Your Honor, and ---

9 THE COURT: You want to make a proffer though?

10 MR. BOOKER: I would like to make a proffer that these ---

11 THE COURT: Okay.

12 MR. BOOKER: And just to explain, Your Honor, why I put
13 you through that is to -- I was trying to show that
14 there was a statute in 1846 under which the -- this
15 railroad right-of-way was taken in 1848. Now, the
16 laws on how railroads take property may have changed
17 since then, but I was trying to connect the two. So
18 I would repeat our motion that we don't believe that
19 it is our burden to show the Railroad's interest; it
20 is the plaintiff's burden to show his interest, the
21 strength of his own title. But if the burden is
22 shifted, I would move that we have an opportunity to
23 get Norfolk Southern experts down here to rebut that.

24 THE COURT: Okay. At whose expense?

25 MR. BOOKER: We'll bring him in.

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1 THE COURT: Okay. Mr. Stegmaier?

2 MR. STEGMAIER: I think ultimately -- I'm not in
3 opposition to what Mr. Brooker proposes, but I think
4 the caveat would be provided this Court is satisfied
5 that's necessary. If this Court determines that the
6 stipulation by the plaintiff as to the aegis of
7 records of his property is enough for purposes of
8 disposition of this case, and we suggest it is, then
9 we need not go through those additional proceedings.
10 Because, again, our position is Mr. Morgan didn't own
11 the railway, and the railway was either held in fee
12 simple by the railroad company or it was provided an
13 easement from the state. One of the two. And we
14 don't, we don't think whether it was held in fee by
15 the railroad company or given an easement by the
16 state is dispositive as to whether ultimately Mr.
17 Morgan's property abuts, for purposes of the legal
18 definition, Farrow Road.

19 THE COURT: Okay. All right. We've gotten a proffer and
20 your response. Please -- I don't really see the need
21 in bringing people down from Richmond, unless you
22 feel very, very strongly that you need to establish
23 this connection. But, I mean, it's -- I mean, if you
24 -- that's your motion -- I mean, that's -- you want
25 to insist on that, I don't mind, but I don't see -- I

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1 don't really think it adds much to the case, to your
2 case, but you made your point pretty clear. And I'll
3 consider that argument. But I don't think there's a
4 need to bring somebody from Richmond down. Unless
5 you insist on doing it. If you insist, I'll ---

6 MR. BOOKER: Well, Your Honor, understand what I'm saying
7 is, if the burden is to be put on us to show fee
8 simple then that's the only way we can show it being
9 that its records had been burned in 1865. The only
10 document is in the possession of the Railroad.

11 THE COURT: Okay. Mr. Stegmaier?

12 MR. STEGMAIER: Has it been clearly demonstrated that the
13 records were in fact burned and destroyed in 1865? I
14 think we've been talking about it, but I don't think
15 there's any clear evidence that these records were in
16 fact destroyed.

17 MR. BOOKER: In the Record of Deeds Office they have
18 nothing past 1865, nothing before 1865 because of the
19 ---

20 THE COURT: And that was one of the themes of Mr. Moise's
21 book that I read a few months ago. That a lot of
22 court records were destroyed, either by the
23 Confederacy or the Union soldiers for whatever
24 reason. Some have surfaced in recent years. But the
25 problem is, I guess, is that you have to take

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1 judicial notice of a statute, judicial notice of a
2 deed, and I don't think I can do that. Mr.
3 Stegmaier, you don't think he can get it in through a
4 witness either?

5 MR. STEGMAIER: No, sir, I don't.

6 THE COURT: Yeah. Unless -- you say you can, Mr. Brooker,
7 if you bring him down from Richmond to tell us what
8 happened, but -- so I'll -- you -- when we finish you
9 can renew your motion and we'll see from -- I don't
10 think it's necessary, but, but if you insist.

11 MR. BOOKER: Okay. That's a good way to do it, Your
12 Honor.

13 THE COURT: Yes, sir.

14 MR. BOOKER: Renew it at the end. I think I have one more
15 question of Mr. Keys then on that same subject.

16 Q: Mr. Keys, can you look again at Defendant's Exhibit
17 Four. It's the agreement, 1977 agreement between the
18 Railroad and the Department that you testified to
19 earlier. Is that the normal way that -- you're the
20 director of Rights-of-Ways. Is that the normal way
21 that the Department of Transportation takes property
22 for highways? Is this the typical way that the
23 Department of Transportation acquires land for
24 highways?

25 A: I'm not sure exactly what ---

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1 Q: How do you typically acquire land for highways?
2 A: We purchase it.
3 Q: And what interest do you purchase?
4 A: Take title interest, fee interest.
5 Q: Fee interest. And how long have you taken fee
6 interest and not just right-of-way?
7 A: It's my understanding since the '90s.
8 Q: The '09s?
9 A: Right.
10 Q: Okay. And this instrument is not an easement or a
11 fee simple acquisition, is it?
12 A: No, sir.
13 Q: What is it?
14 A: I believe it's a permission.
15 Q: Permission. Had you -- had the Department had any
16 real property interest in this right-of-way, would it
17 have needed permission?
18 MR. STEGMAIER: I don't know that Mr. Keys can testify to
19 that on behalf of the Department.
20 THE COURT: You don't think he knows, or you don't think
21 he is the proper ---
22 MR. STEGMAIER: I think he's asked to have -- I think he's
23 asked what the Department's opinion would be. I
24 don't know if he -- I don't know if he's able to
25 testify completely as to what the Department ---

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1 THE COURT: Objection overruled.

2 MR. STEGMAIER: Yes, sir.

3 THE COURT: All right. Please proceed. Mr. Keys, if you
4 know the answer you can answer the question, if you
5 know.

6 Q: Can you explain to us why we acquired this particular
7 right-of-way by permission instead of by fee simple
8 or easement, a right-of-way easement?

9 A: I'm not sure that I can; but it's the Railroad, we
10 have to have their permission. I don't think that we
11 purchased title from the Railroad.

12 Q: Why would you not purchase title from the Railroad?

13 A: Because it's an active railroad line.

14 Q: Okay. I think that's a sufficient answer. I thank
15 you, and Mr. Stegmaier may have some follow-up
16 questions.

17 THE COURT: Any re-direct?

18 MR. STEGMAIER: Briefly, sir.

19 MR. KEYS - RE-DIRECT EXAMINATION BY MR. STEGMAIER:

20 Q: During your meetings with Mr. Morgan, did you ever
21 tell him -- let me back up. With regard to your
22 meetings with Mr. Morgan -- let me ask this question.
23 This was -- Mr. Morgan had the opportunity to testify
24 yesterday. And this is Plaintiff's Exhibit Three,
25 which has been moved into evidence. And I'll make

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1 this representation to you: Mr. Morgan related to us
2 during the course of his testimony that when he met
3 with you on at least one occasion, this drawing or
4 schematic or whatever you would want to call it, of
5 the area, was produced to him by you. And these are
6 Post-it notes that I put to create some reference in
7 my mind. One was Farrow Road, one was Killian Road.
8 And right here at the, I guess the -- I don't know
9 how you want to look at it, but the bottom left
10 corner, that's where his property would be. My
11 question is, number one, do you remember giving this
12 map or this schematic or drawing to Mr. Morgan?

13 A: I do not recall that.

14 Q: Okay. But is it fair to say that that is a schematic
15 or drawing that looks similar to one that the
16 Department would produce in the course of its
17 planning out a project?

18 A: Absolutely.

19 Q: Okay. And there is a stamp there that says,
20 Preliminary, Subject to Change. Is that a stamp that
21 would be used by the Department, whether now or at
22 one point, to indicate these are just preliminary
23 plans?

24 A: Absolutely.

25 Q: And the last question I have is, what's handwritten

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1 on here says, 1/13/97, To Bob Morgan, Brian Keys.
2 Mr. Morgan stated, that's not my handwriting. My
3 question to you is, is that your handwriting?
4 A: Absolutely.
5 Q: All right. So, as you look at this, although you
6 don't have a recollection of even meeting Mr. Morgan
7 as we sit here today, and you don't have a
8 recollection of giving him this schematic, you don't
9 dispute that that's your signature and that's your
10 handwriting?
11 A: I do not dispute that.
12 Q: Okay. And the date 1/13/1997, would that indicate to
13 you the date where you would have given him this
14 schematic or drawing?
15 A: I believe so, yes, sir.
16 Q: Has that been a habit of yours or something that you
17 would have done in dealing with other citizens?
18 A: Absolutely.
19 Q: And why is that?
20 A: It's routine, especially when you're in preliminary
21 engineering, to mark it and stamp it as preliminary.
22 Q: Right.
23 A: And then I just made it a habit of documenting with
24 the date in which it was given.
25 Q: Now, when you met with Mr. Morgan, and he related

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1. that he had met with you on multiple occasions,
2. didn't you tell him that his property interest ran to
3. Farrow Road in the way of an easement or a right-of-
4. way?

5 A: I do not recall that.

6 Q: All right. One more question, and this was triggered
7 by something that Mr. Brooker had asked you. There
8 was a statute you had read, and I don't know if that
9 was -- do you have all of the statutes you have read
10 in front of you?

11 A: This was the document that -- I don't see those.

12 Q: I think Mr. Brooker has it. The first statute that
13 he had asked you was Title 58 -- I'm sorry, Section
14 58-15-1625. And you read this aloud. And this was -
15 - this is a statute or a section that pertains to the
16 Department of Transportation's authorization to
17 eliminate railroad grade crossings. And you recall
18 obviously reading that into the record, just happened
19 30 minutes ago?

20 A: Yes, sir.

21 Q: You had mentioned when you had read this that the
22 Department of Transportation may issue an order upon
23 a finding, and this is a direct quote, "upon a
24 finding that the enhancement of public safety
25 resulting from such closing outweighs any

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1 inconvenience caused by increased circuitry of highway
2 routes. This order by the Department may be used
3 either in connection with or independent of an order
4 relating to the automatic train-activated warning
5 signals." My question to you as it relates to
6 specifically the closing of the crossing at Killian
7 Road at Farrow Road is, we have never seen such an
8 order from the Department of Transportation. Do you
9 have that in your possession?

10 A: No, sir.

11 Q: Did you issue that order?

12 A: No, sir.

13 Q: To your knowledge, does an order in fact exist that
14 comports with Section 58-15-1625 as it pertains to
15 the crossing at Killian Road at Farrow?

16 A: I'm not aware whether there is one or not.

17 Q: So as we sit here today, you couldn't testify under
18 oath that absolutely somewhere up the stream in the
19 Department of Transportation there in fact is an
20 order that comports with that statute?

21 A: I could not.

22 Q: Thank you, sir.

23 THE COURT: Anything else, Mr. Brooker?

24 MR. BOOKER: One quick follow-up, Your Honor.

25 MR. KEYS - RECROSS-EXAMINATION BY MR. BROOKER:

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1 Q: Mr. Keys, this is going to be a tax map that Carolina
2 Chloride brought, and it has the Carolina Chloride
3 property colored in in yellow identifying, or I could
4 have you do this, the quadrilateral where the closing
5 was across the tracks. Can you say that Carolina
6 Chloride's property actually abuts that section of
7 this closing; do they share a common boundary?

8 A: No, sir.

9 Q: Do you have any indication or do you believe that
10 this rail/highway closing was done for any reason
11 other than for the public purposes of safety and in
12 convenience of the public?

13 A: No, sir.

14 MR. BOOKER: That's all I have, Your Honor.

15 THE COURT: All right. Mr. Keys, sometimes in non-jury
16 cases the judge will ask questions, and it drives
17 lawyers crazy because I don't let them follow up on
18 my questions. I'm going to ask him a couple of
19 questions, that's all. Now, you remember now,
20 lawyers use very precise language. I think Mr.
21 Brooker may have answered my question. My question
22 was going to be, what does the word "abut" mean in
23 the context of this case. And his question was, does
24 the properties, do they have a shared boundary, a
25 common boundary. Is that your definition of what

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1 abut means?

2 A: Yes, sir.

3 THE COURT: Okay. And so your testimony is that Carolina
4 Chloride did not abut or did abut Farrow Road?

5 A: Does not.

6 THE COURT: Does not abut. Okay. And is there an
7 administrative process for closing a road? And the
8 reason I ask, I've actually presided over cases
9 where, where I've been asked to issue a court order
10 closing a road. Typically, the roads that I've been
11 involved in though that they close have been -- never
12 been constructed; they're on a plat but they're not
13 there in real life. You can show me a plat showing a
14 road, and I -- usually they're abandoned I guess is
15 what happens. And I'm wondering what process you
16 have to go through to get up to a court. You know,
17 we're a part of circuit court. And I was wondering
18 if there is -- is there an administrative process
19 that had to be followed to close this road, within
20 the Department of Transportation and within the state
21 government? Or y'all can do it the way y'all did it,
22 and nobody complains?

23 A: You say close this road?

24 THE COURT: Okay, well, maybe, maybe I'm mixing up the
25 terms.

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1 MR. BOOKER: With due respect, Your Honor, I think it's
2 probably a better question to ask of me.

3 THE COURT: Okay. Well, okay. We can get, we can get --
4 I'll get some briefs on that then, if there's an
5 administrative process that's followed to do what
6 y'all did in this particular case.

7 MR. BOOKER: There are a number of statutes that would
8 answer that.

9 THE COURT: And it depends on what type of road you're
10 closing or whether there are railroads involved or
11 whether -- you're saying it's different, it's
12 different depending on who owns the property that's
13 going to be affected by it?

14 MR. BOOKER: It does. It's primarily the county
15 responsibility except at certain very rare
16 exceptions, such as we have here. The Department is
17 given authority by the statutes that Mr. Keys read to
18 close crossings.

19 THE COURT: Okay. All right. All right, thank you, sir,
20 you may come down. Watch your step coming down.

21 MR. STEGMAIER: Your Honor, I believe we're prepared to
22 close. I'm sorry, we're prepared to rest. I did
23 want to ask this before we did though: Prior to the
24 commencement of the trial I had circulated to Mr.
25 Brooker, and I believe that I included the Court in

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1 the conversation too as well, about some proposed
2 stipulations of fact.
3 THE COURT: I got an email, but I hadn't read the ---
4 MR. STEGMAIER: Yes, sir.
5 THE COURT: --- the email.
6 MR. STEGMAIER: And I wanted to include you in the
7 conversation but, of course, they were probably more
8 directed to Mr. Brooker.
9 THE COURT: Well, let me interrupt you for a second
10 because I want to tell you what I'm thinking about
11 doing ---
12 MR. STEGMAIER: Okay.
13 THE COURT: --- as far as the rest of this case is
14 concerned. Mr. Brooker, are you going to call any
15 witnesses other than Mr. Keys? He was called by the
16 plaintiff, but ---
17 MR. BOOKER: My thought, Your Honor, is to move for a
18 judgment right now. If that is denied, then I'll
19 call Mr. Keys for the very narrow purpose of showing
20 what was done and that it was a legitimate exercise
21 in the state's police power.
22 THE COURT: Okay. Now, let me, let me explain what I'm up
23 to. I want to make sure I've got the facts straight.
24 And one of the things I'd like to do is, if both
25 sides agree, and if they don't agree then I'll decide

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1 whether I'm going to do it or not, I want to go look
2 at the property and look at what happened and just
3 see -- I know you have pictures that were recently
4 taken.

5 **MR. STEGMAIER:** Yes, sir.

6 **THE COURT:** But I need to make sure I get the facts
7 straight. I was thinking that we could convene -- I
8 mean, we could come back tomorrow morning if we need
9 to, but, but that I was going to leave the record
10 open and meet with y'all out there at noon tomorrow,
11 which would be Wednesday, October 22nd. Now, my
12 question is, who owns the property now? I know Mr.
13 Morgan sold it recently.

14 **MR. STEGMAIER:** Yes, sir. And one of the things we had
15 talked about yesterday in recess was the matter of
16 the deed that Mr. Morgan had given to the Stallings
17 organization. It's Stallings, Incorporated, S-T-A-L-
18 L-I-N-G-S, Inc.. And that, that entity to our
19 knowledge still owns the property.

20 **THE COURT:** Do we need to let them know we're coming?
21 That's why I asked that question.

22 **MR. STEGMAIER:** Well, if we come on their property,
23 probably.

24 **THE COURT:** Yeah.

25 **MR. STEGMAIER:** The other thing too is I do have the deed

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1 of sale that Mr. Sullivan went downstairs during the
2 -- one of the breaks yesterday. And as soon as we
3 take a break, I'll fish it out and -- I don't know
4 what Mr. Brooker -- I'll show it to Mr. Brooker. And
5 if he doesn't have any difficulty with it, I'd like
6 to at least give it to you and at the very least mark
7 it as a Court's exhibit. Because one of the other
8 things, it -- well, if Mr. Brooker calls Mr. Keys in
9 the case in chief, then I think we'd have the
10 opportunity to do some rebuttal testimony through Mr.
11 Morgan. Probably I'll just get it in through him, as
12 far as that goes. But the answer to your direct
13 question is, we understand the Stallings entity still
14 owns it.

15 THE COURT: Okay.

16 MR. STEGMAIER: And from what we gathered, they're still
17 running the storage business to some extent. And
18 they've got those pods, you know how you can move
19 around and you get the pod delivered to your house.
20 I think they've got some sort of business where
21 they're storing those, from what I understand.
22 That's what it appears to be.

23 THE COURT: All right. Yes, sir?

24 MR. SULLIVAN: Can I jump in? I was out the other day
25 taking pictures, and there's a big driveway there,

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1 you know, with gates. And I think if you want to
2 meet out there and park along the driveway, I don't
3 think it would interfere with their business.

4 THE COURT: Okay. Is that okay, Mr. Brooker, for us to --
5 -

6 MR. BOOKER: That'd be fine, Your Honor.

7 THE COURT: Okay. And you were going to move for a non-
8 suit after the plaintiff rested.

9 MR. BOOKER: I was -- I would move for a directed verdict
10 on the judgment or whatever the Court would call it.
11 And I would rely primarily on the case of *Poolson*
12 *versus Ingram*.

13 MR. STEGMAIER: Can I -- I'm sorry, I don't mean to
14 interrupt here. I didn't know we were going straight
15 into that at this point in time.

16 THE COURT: Well, no, no, no. I was going to -- I wasn't
17 actually -- Mr. Brooker, I was going to suggest that
18 if we do put the premises into evidence and then we
19 come back to court, if you want to make a motion for
20 a non-suit at that time because all the evidence
21 hasn't ---

22 MR. BOOKER: I'm sorry, Your Honor.

23 THE COURT: Unless -- well, on the other hand -- or, we
24 could do the motions first and, and I could see it at
25 the very, very end. I mean, that's -- we've done

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1 that in other cases as well, put the premises in
2 evidence. And I can just go see it after, after the
3 lawyers are finished. But, all the parties, how do
4 you wish to proceed? We could meet earlier. I hate
5 to say it, but I'm trying to avoid the traffic,
6 that's why I say meet out there at noon. But we
7 could meet out there at ten a.m. I guess. And then
8 come back to the courtroom and, and hear your motion
9 and then, like you said, based on how I rule you may
10 call Mr. Keys back. Is that acceptable to everyone?
11 MR. STEGMAIER: We'll do whatever the Court wishes. That
12 scenario sounds fine, too, as well.
13 THE COURT: All right. Mr. Brooker?
14 MR. BOOKER: That sounds fine to me, Your Honor.
15 THE COURT: Okay. And y'all will take care of getting --
16 letting the new owners know we're going to be out
17 there and why and -- and if we can meet at ten. It
18 shouldn't take very long once we get out there for me
19 to see, because I want to make sure I get the facts
20 straight.
21 MR. STEGMAIER: And if I could just let -- before we
22 convene for the -- or, before we adjourn for the day,
23 let me ask this, and this is probably more posed to
24 Mr. Brooker because I want to make sure before we
25 rest that we are in concurrence, and I'm reading the

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1 stipulation of, the proposed stipulation of facts
2 that I disseminated over the weekend, that paragraph
3 12 says, the Department of Transportation's closure
4 of the railroad crossing on Killian Road constituted
5 affirmative conduct of a government entity. Now, Mr.
6 Keys testified in the affirmative to that today, but
7 I want to make sure that, Mr. Brooker, you're in
8 concurrence with that. That's one of the elements of
9 the takings analysis. That's element number one.

10 MR. BOOKER: I don't think I would, Your Honor, because I
11 -- the affirmative act isn't really a taking. That's
12 our whole case.

13 MR. STEGMAIER: No ---

14 THE COURT: Didn't, didn't, didn't the Supreme Court say
15 that ---

16 MR. STEGMAIER: Yes.

17 THE COURT: --- there was an affirmative act?

18 MR. STEGMAIER: Yes. In the opinion of the Supreme Court,
19 the Supreme Court did in fact state that element
20 number one was satisfied. But before we rested, I
21 wanted to make sure that there wasn't going to be any
22 difficulty. And I reference this, it's at headnote
23 eight in the opinion, "The elements of an action for
24 inverse condemnation are, number one, affirmative
25 conduct of a government entity; number two, the

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1 conduct affects a taking." And I believe that's what
2 this whole dispute is about. And number three, that
3 "the taking is for a public use." As I understand
4 the testimony that's been propounded thus far by both
5 Mr. Morgan, as well as by Mr. Keys, elements number
6 one and three have been satisfied.

7 **THE COURT:** That -- well, that's what I thought from
8 reading the court's opinion.

9 **MR. STEGMAIER:** I just want to make sure before I rest
10 that that wasn't going to be the basis of a directed
11 verdict.

12 **MR. BOOKER:** Whatever the Supreme Court said, they said,
13 Your Honor. I don't know that my opinion matters.

14 **MR. STEGMAIER:** Yes, sir. I'll leave it at that.

15 **THE COURT:** In other words, just a bunch of -- five
16 lawyers up there. We don't always agree, but. Okay.
17 Well, let's do this: Let's stand in recess and
18 convene at the premises at 10 a.m. tomorrow morning.
19 And after that we can come back to the courtroom and
20 you can decide if you have any more witnesses. And,
21 Mr. Brooker, you'll make your motion if he does rest,
22 motion for a non-suit. And we'll see where that
23 goes.

24 **MR. STEGMAIER:** Yes, sir. Understood.

25 **THE COURT:** All right. Anything, Mr. Brooker?

1 MR. BOOKER: Nothing further.

2 THE COURT: All right.

3 (There being nothing further, the hearing was recessed at
4 11:54 a.m. and reconvened at 11:03 a.m. on Wednesday,
5 October 22, 2015.)

6 THE COURT: All right. Yesterday the Court asked that the
7 premises be put into evidence, and we were out there
8 this morning. And I think I understand a little
9 better now what's going on. So I appreciate your
10 helping me do that, all of you. While we were out
11 there though, I understand, Mr. Brooker, you're going
12 to -- you're arguing a motion for a non-suit, and
13 you're going to call Mr. Keys again; is that correct?

14 MR. BOOKER: That's correct, Your Honor.

15 THE COURT: All right. Now, Mr. Stegmaier, I'm not sure
16 you've rested yet, formally.

17 MR. STEGMAIER: We have not, sir.

18 THE COURT: Okay.

19 MR. STEGMAIER: And I think only the -- if it pleases the
20 Court at this point.

21 THE COURT: Yes, sir.

22 MR. STEGMAIER: I think the only matter of housekeeping
23 would be Exhibits Four and Six, I just want to make
24 doubly -- and Five, which were the photographs. That
25 would be Five-A through, it appears to be G, we would

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1 ask that they be moved into evidence.
2 THE COURT: Okay. Mr. Brooker?
3 MR. BOOKER: I would have no objection.
4 (Plaintiff's Exhibit Numbers Four, Five and Six are
5 entered into the record.)
6 MR. BOOKER: Also, Your Honor, we forgot to move into
7 evidence our Exhibit Four, which is the agreement
8 between the Southern Railway and the Department in
9 1977 for the crossing. I would move that at this
10 time.
11 THE COURT: Okay.
12 MR. STEGMAIER: We have no objection to that, sir.
13 THE COURT: All right.
14 (Defendant's Exhibit Number Four was previously entered
15 into the record at page 155.)
16 MR. STEGMAIER: If we might be able to -- I don't know if
17 going off the record is -- I just want to make sure I
18 know what the State has in the way of evidence that's
19 been admitted at this point in time.
20 THE COURT: We'll stand at ease and y'all can talk about
21 that.
22 (Off the record briefly.)
23 THE COURT: All right. Mr. Stegmaier?
24 MR. STEGMAIER: Thank you, sir, for your accommodation as
25 far as being able to look through the exhibits. At

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1 this point in time the plaintiff believes it's put up
2 all the testimony it needs to put up in order to
3 satisfy the elements of inverse condemnation and
4 submitted the requisite documents that we believe
5 support that testimony. And therefore the plaintiff
6 rests, sir.

7 THE COURT: Okay. The plaintiff rests. Mr. Brooker?

8 MR. BOOKER: Thank you, Your Honor. I call Brian Keys.

9 THE COURT: Mr. Keys?

10 (Witness is sworn)

11 (Defendant's Exhibit Number Six is marked for
12 identification.)

13 Brian Keys, being duly sworn, testifies as follows:

14 MR. KEYS. - DIRECT EXAMINATION BY MR. BROOKER:

15 Q: Mr. Keys, I won't go back through your position and
16 qualifications because we did that yesterday. But I
17 did want -- at the end of the proceedings yesterday
18 afternoon, yesterday morning, there seemed to be a
19 little confusion about what's going on with the
20 geometry and the geography of this area and having to
21 do with what affirmative act that the Department did
22 with respect to Carolina Chloride's property. I'm
23 going to show you what's been marked as Defendant's
24 Exhibit Six and ask -- before I ask you a question, I
25 want to give the judge and counsel a copy because

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1 they may not be able to see that small document up
2 here.

3 **THE COURT:** Thank you, sir.

4 **Q:** Can you identify that -- what this is, that document
5 known as Exhibit Six is?

6 **A:** It's the plan sheet from the engineer drawings.

7 **Q:** And what is a plan sheet and what is its purpose?

8 **A:** A plan sheet is a document the Department uses for
9 the development of roadway plans to move from
10 engineering into construction.

11 **Q:** And who creates it?

12 **A:** The Department, either directly or by its agent
13 through engineers.

14 **Q:** And it is a -- and who is the custodian of the
15 document?

16 **A:** South Carolina Department of Transportation.

17 **Q:** Can you refer -- on the plan sheet there is an area
18 with hash marks. Can you tell us what that
19 signifies, what those hash marks signify?

20 **A:** Hash marks signifies the removal and the disposal of
21 the existing pavement that's out there.

22 **Q:** And also on the plan sheet we have colored in in
23 yellow, there's a certain area. Can you identify
24 that?

25 **A:** I believe that, and it's not identified on here, but

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1 I believe that's the property that we're discussing,
2 the property in question.

3 Q: And is that property on that exhibit consistent with
4 the tax map parcel and the aerial that we've been
5 discussing?

6 A: Yes, sir.

7 Q: Okay. Does any part of Carolina Chloride's property,
8 the area shaded in yellow, about the section of
9 Killian Road, where the hash marks are that has been
10 closed and removed?

11 A: No.

12 MR. STEGMAIER: Objection, Your Honor. That goes to the
13 ultimate issue, sir.

14 THE COURT: Okay. I think I asked him a similar question
15 yesterday about Farrow Road, abutting Farrow Road.
16 Objection's overruled. Now, again, if he knows. I
17 mean, you know, again, that's -- you say it goes to
18 the ultimate issue. If he -- if he thinks he doesn't
19 know or doesn't know, you know, we're just looking
20 for an honest answer, not necessarily a right or
21 wrong answer.

22 MR. STEGMAIER: Yes, sir.

23 THE COURT: So, the objection's overruled. You can repeat
24 your question, please. I'm sorry, you wanted to say
25 something else?

1 MR. STEGMAIER: No, sir.

2 THE COURT: All right.

3 Q: All right. Mr. Keys, does any part of Carolina
4 Chloride's property, as identified on these plans,
5 abut the section, the hash-marked section signifying
6 the closure of that -- the end of Killian Road?

7 A: No, sir.

8 Q: And does Carolina Chloride's property, the area
9 identified in yellow, abut Farrow Road?

10 A: No, sir.

11 Q: And why does it not abut Farrow Road?

12 A: Because the Railroad has title property in between
13 Farrow Road and the subject property.

14 Q: Okay. Just to sum it up, is there contiguity, is
15 there any common property line between either the
16 closed section of Killian Road or Farrow Road and
17 Carolina Chloride's property?

18 A: No, sir.

19 Q: Thank you. That's all the questions I have. Thank
20 you.

21 THE COURT: Okay. Mr. Stegmaier?

22 MR. STEGMAIER: Yes, sir. One second, sir.

23 MR. KEYS - CROSS-EXAMINATION BY MR. STEGMAIER:

24 Q: Mr. Keys, briefly, with regard to -- and I believe
25 this is Defendant's Six, correct?

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1 A: Yes, sir.

2 Q: With regard to Defendant's Six, you've got it in
3 front of you, you can look -- if you look at the
4 railroad, on either side there appears to be what has
5 been characterized as right-of-way; is that correct?
6 It says, 65 foot right-of-way at the bottom. And at
7 the top there's a mention of a right-of-way, too. Do
8 you see that?

9 A: Point to those again?

10 Q: Certainly, sir. And maybe it's ---

11 A: Yeah, what ---

12 MR. STEGMAIER: I'm sorry, sir, may I approach?

13 THE COURT: That's fine. Yes, sir.

14 MR. STEGMAIER: Okay. I'm sorry.

15 Q: On Exhibit Six, we have the railroad that runs
16 parallel with Farrow Road, correct?

17 A: That's correct.

18 Q: And typically, whether it's a highway or a railroad,
19 there would generally be a right-of-way, correct?

20 A: Yes, sir.

21 Q: Is the right-of-way with regard to the railroad
22 indicated on this schematic?

23 A: Yes, it is.

24 Q: All right. With regard to the right-of-way that runs
25 south of the railroad, can you point that out for me?

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1 A: This being the north there ---
2 Q: Yes, sir.
3 A: South being this way.
4 Q: Well, I appreciate that. I appreciate your
5 precision. If we're looking at the schematic marked
6 as Defendant's Exhibit Six, you've got the top of the
7 paper and you've got the bottom of the paper.
8 A: Okay, I understand.
9 Q: You've got the railroad that runs along here, and
10 that's indicated, correct?
11 A: That is correct.
12 Q: Can you point to me the right-of-way that would
13 appear below the railroad?
14 A: (Witness complies.)
15 Q: Okay. So -- and I'm in concurrence with -- for what
16 that's worth, I'm in concurrence with that's my
17 understanding of the right-of-way too, as well. With
18 regard to this schematic, did you prepare it?
19 A: No, sir.
20 Q: Was it prepared under your supervision?
21 A: No, sir.
22 Q: Okay. How -- what -- how or what, if anything, was
23 your relationship to the preparation of this
24 schematic?
25 A: Managing the project as a whole, there is a design

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1 group that's responsible for that and has a series of
2 managers that oversees the actual design.

3 Q: Right.

4 A: As a program manager, I was responsible for making
5 sure it hit certain steps along the process, one of
6 those steps being the design process.

7 Q: All right. And so this schematic would be a
8 component of your job as a program manager overseeing
9 the Clemson Road widening, correct?

10 A: Yes, sir.

11 Q: All right. And do you -- can you identify for me the
12 date, approximately, when the schematic would have
13 been put together? Let me ask you this question, as
14 you're looking through it. Is it apparent to you as
15 you're looking at this?

16 A: There are a number of dates on here.

17 Q: There are.

18 A: And they range between 2004 and 2005.

19 Q: Yes, sir. If we are in agreement that the schematic
20 would have been prepared in or around the time of
21 2004 or 2005, is it fair to say that what's indicated
22 in the schematic was ultimately what was executed
23 upon by the Highway Department when it did its
24 alteration at this particular segment of Farrow Road?

25 A: Yes, sir.

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1 Q: All right. So this schematic would have been
2 integral to the work done by the Highway Department
3 on or around 2005, 2006, and going forward until the
4 project was completed?
5 A: Yes, sir.
6 Q: Let me ask you this. You've indicated the bottom
7 portion of the right-of-way for the Railroad. And I
8 want to ask you this. And, of course, you've
9 identified this as being a Highway Department
10 document. And I see here, it says, 65 foot R/W. I'm
11 assuming that says Right-of-Way, correct?
12 A: Yes.
13 Q: And it says, Unable to verify, RCB. Have I read that
14 correct?
15 A: Yes, sir.
16 Q: Is RCB somebody that works for the Department?
17 A: Yes.
18 Q: All right. Looking at that, doesn't it appear true
19 that at the time the schematic was drawn, even the
20 Highway Department hadn't figured out who owned title
21 to the railroad bed when this project was underway?
22 A: I would say when the drawing was done.
23 Q: Okay.
24 A: Not necessarily when the, when the project was
25 underway.

1 Q: All right. I appreciate that. But, as you sit here
2 today, testifying based on your personal knowledge
3 and to the extent possible testifying on behalf of
4 the Department, do you have a document in your
5 possession that you have brought to court today that
6 verifies or demonstrates that at the time the project
7 was in fact underway, that the right-of-way had in
8 fact been verified?

9 A: I need you to ask your question again.

10 Q: Okay. My question to you was, at the time that this
11 schematic was drawn, which would have been in the
12 2004/2005 range, is it true, based on what we see
13 here, that the right-of-way, ownership of the right-
14 of-way had not been verified by the Department of
15 Transportation? And your answer was yes, correct?
16 Because that's what's indicated on the schematic.

17 A: No. And I'm going to step back here.

18 Q: All right.

19 A: And -- because you asked, at the time that the
20 drawing -- and my answer was, at the time that the
21 drawing was done.

22 Q: Okay.

23 A: And we have a design group that does the drawing.

24 Q: Correct.

25 A: We have another group that does our railroad

1 coordination. And they're not responsible for the
2 design and putting together the document. But there
3 would have been a time, after the designs and
4 everything were put together, that the Department had
5 to execute an agreement with the Railroad. And at
6 that time we would have had the information. It
7 would have been at a time most likely after this was
8 done. But they're two separate groups.

9 Q: Now, you didn't work for that separate group, did
10 you? With regard to the Railroad coordination?

11 A: Not at that time.

12 Q: All right. But at -- so my ultimate follow-up
13 question to you is this: is, we've had years of
14 discovery, where we've asked for whatever documents
15 are in possession of the Department with regard to
16 this particular project. And my question to you is,
17 do you have something in your possession to accompany
18 your testimony today that in fact verifies that at
19 the time the project was underway the Highway
20 Department had in fact verified the ownership of the
21 right-of-way?

22 A: I don't have that in my possession.

23 Q: All right. So you can't testify with a hundred
24 percent accuracy as you sit here today that that in
25 fact -- that document does in fact exist?

1 A: I have seen a document representative of that right-
2 of-way.
3 Q: And where is that document?
4 A: I believe Beach has it, and it was -- I don't want to
5 misstep, but I don't know that it's been allowed. It
6 was copies of, of -- it was information we looked at
7 yesterday, but I don't know that it's been allowed to
8 be entered.
9 Q: Well, we -- let me ask you this question, follow-up
10 question here with regard -- we talked about the
11 bottom right-of-way.
12 A: Yes, sir.
13 Q: The top right-of-way, it says essentially the same
14 thing, doesn't it? It says, Unable to verify right-
15 of-way on right. And it's indicating the top right-
16 of-way; does it not?
17 A: Yes, it is correct.
18 Q: All right. Is my understanding correct that when Mr.
19 Brooker asked you a question about the relationship
20 of the property to Killian Road, that you said that
21 the property does not abut Killian Road?
22 A: That is not correct.
23 Q: Okay. Does it abut, does the property, subject
24 property abut Killian Road?
25 A: It does.

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1 Q: But your opinion is that it does not abut Farrow
2 Road?
3 A: That is correct.
4 Q: All right. Let me ask you a question about our visit
5 to the property today. And I represent to you that I
6 took this photograph shortly before the judge arrived
7 on the scene. And, of course, you were out there,
8 correct?
9 A: Yes, sir.
10 Q: And you were there when the judge was there, correct?
11 A: Yes, sir.
12 Q: You had heard some testimony earlier, but -- I don't
13 know what you heard or didn't hear, but you are
14 acquainted with the fact that there's a railroad
15 siding at the property, correct? Or, there's a
16 railroad siding on the railroad, correct?
17 A: I am not familiar with that.
18 Q: Okay. Did you have the opportunity to look around
19 today?
20 A: I did.
21 (Plaintiff's Exhibit Number Seven is marked for
22 identification.)
23 Q: All right. Let me show you what's been marked as
24 Plaintiff's Exhibit Seven. And this was taken from
25 inside the fence at the current property owner's

1 property, at this point in time. And, of course, you
2 see the railroad, correct?
3 A: Yes, sir.
4 Q: And I would represent to you that's a rail siding,
5 and I would further represent to you that Mr. Morgan
6 had testified in his direct that he used that
7 railroad siding for purposes of his chloride
8 business.
9 A: Yes, sir.
10 Q: Were you acquainted with that?
11 A: With?
12 Q: Mr. Morgan's use of the railroad.
13 A: No, I was not.
14 Q: When you were out there today, did you see for
15 yourself the railroad siding next to the main
16 railroad?
17 A: I did notice there were two tracks, and they're
18 represented by this drawing. So, yes, sir.
19 Q: Okay. And you see what would be -- I would
20 characterize as a loading bay or a loading dock for
21 the railroad. And that's indicated there, correct?
22 A: That is correct.
23 Q: Two questions. And I know you're not an expert in
24 property matters, but I'm going to have you look at
25 your own schematic here and have you answer for me

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1 your opinion concerning the loading bay and tell me
2 whether the loading bay, as indicated in your
3 schematic, is within the subject property, the
4 Carolina Chloride property, or on some other
5 property.

6 A: It appears that the concrete pad that we've
7 identified is on the Railroad's property.

8 Q: Okay. And I would further represent to you that Mr.
9 Morgan had testified that he had a written agreement
10 with the Railroad to permit him to use, not only the
11 siding, but the concrete pad too, as well.

12 A: Yes, sir.

13 Q: With regard to Plaintiff's Exhibit Seven, and again,
14 I would represent to you, and you can tell me if you
15 think I'm wrong, that that concrete pad is depicted
16 on the left side of this photograph. Two questions:
17 Number one, what type of business did it appear to
18 you was in operation at the subject property today
19 when we went out there to visit?

20 A: Storage.

21 Q: Okay. Did it also appear to be one of these pod
22 businesses too, as well?

23 A: Yes, sir.

24 Q: Okay. Would you agree with me that what's situated
25 on the pad is one of these pods that you've seen in

1 other places on the subject property?

2 A: Yes, sir.

3 Q: All right.

4 MR. STEGMAIER: Sir, I'd ask that Exhibit Seven be moved

5 into evidence.

6 THE COURT: Okay. Mr. Brooker?

7 MR. BOOKER: No objection.

8 THE COURT: All right, your motion's granted.

9 (Plaintiff's Exhibit Number Seven is entered into the

10 record.)

11 Q: Referring back to Exhibit Six, Defendant's Exhibit

12 Six, in pointing to you Killian Road, that ran and

13 intersected with Farrow Road, the shaded part, or the

14 hash marks that we call it, that was the portion that

15 was ultimately barricaded and torn up, correct?

16 A: Yes, sir.

17 Q: All right. Would you agree with me though that

18 before the crossing was closed and before it was torn

19 up and before it was barricaded, that was in fact a

20 portion of Killian Road, correct?

21 A: It was.

22 Q: And we're in agreement that the subject property did

23 in fact abut Killian Road, correct?

24 A: Yes, it does.

25 Q: All right. One last question. Did you have the

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1 opportunity to look at the intersection today? And
2 when I say the intersection, the intersection of
3 Farrow Road and the current existing Killian Road.
4 A: I looked at it simply from the entrance to the
5 facility.
6 Q: Yes, sir.
7 A: I did not drive in this area and drive through, so I
8 did see it in general.
9 Q: Okay. My representation to you would be, on this
10 portion of Killian Road that remains open, this
11 triangle, that would be what type of device on a
12 highway when you look at it on a schematic like this?
13 A: It's a concrete median used for direction and flow of
14 traffic.
15 Q: Okay. My representation to you would be, when we
16 were on that road today, because we were on that
17 other side, it -- that feature was not there, which
18 would indicate to me that what was whatever on the
19 schematic at this point in time didn't actually --
20 wasn't actually executed upon when the project was
21 actually completed. And my question to you would be,
22 do you have an explanation for that?
23 A: Yes, I do.
24 Q: Okay.
25 A: And my explanation was, is, I believe that it was

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1. constructed. And after some time, after it was
2. constructed, the Department was requested to remove
3. the structure. And over a period of time, if I'm
4. correct, we removed the structure that was put into
5. place. That's my best recollection.

6. Q: Thank you. So, as we talked about yesterday, at one
7. point there was a proposal by the Highway Department
8. to cul-de-sac the west side of Killian Road, correct?

9. A: Right.

10. Q: And ---

11. A: I hate to interrupt you.

12. Q: You're not.

13. A: But at the time that aerial photograph was taken, if
14. you'll notice the white part that's in there?

15. Q: Yes, sir.

16. A: I would have you -- it's an aerial photograph, so I
17. believe at one time it was out there and it's been
18. removed. And I didn't see that but ---

19. Q: Okay. Well, I appreciate that clarity.

20. MR. BOOKER: Your Honor, I think I should renew my
21. objection. I think all this testimony is going to
22. the continued use of Killian Road to enter Farrow
23. Road, which has been decided by the Supreme Court.
24. And I object to it. That was part of my motion in
25. limine. It was my motion in limine.

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1 MR. STEGMAIER: Well, can you give me a little bit of
2 latitude, sir, I've got about two questions left. I
3 would ---

4 THE COURT: Yeah. Objection overruled, and we'll note a
5 continuing objection.

6 Q: So, your testimony is -- and I would concur with you,
7 okay? If you look at this aerial photograph, it was
8 in fact constructed at one point in time. But if
9 it's not there today, if you would agree with me that
10 it's not there today, and I would certainly invite
11 you to go back out there and look at it at your
12 leisure, it would have been the product of a request
13 to the Department by somebody that it be removed,
14 correct?

15 A: That's correct.

16 Q: And the question I just asked you was: During one of
17 the proposals, one of the things that the Highway
18 Department had come up with was the potential for
19 cul-de-sac'ing of the west side of Killian Road; do
20 you remember that?

21 A: Absolutely.

22 Q: And that -- I think your testimony was that there was
23 a request that that not occur ---

24 A: Correct.

25 Q: --- that the road continue to Farrow Road, correct?

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1 A: That is correct.

2 Q: And we've already been over this, but you don't
3 remember anything about the details of your
4 conversations with Mr. Morgan, correct? When you met
5 with him.

6 A: No, no, sir.

7 Q: You don't remember him expressing to you his concern
8 about the effect of closing Killian Road on his side
9 of Farrow Road and the fact that it would impair his
10 business, do you?

11 A: No, sir, I do not remember that conversation.

12 Q: But we have been able to establish that there are
13 points in time where the Department will in fact
14 respond to citizens' requests for an alteration of
15 its plans, correct?

16 A: Yes, sir.

17 Q: Thank you. Thank you, sir.

18 THE COURT: Okay.

19 MR. KEYS - RE-DIRECT EXAMINATION BY MR. BROOKER:

20 Q: Mr. Keys, highway plans, project plans are something
21 that's routinely -- are routinely created and used by
22 the Department when they do projects, construction;
23 is that correct?

24 A: Most exclusively. Yes, sir.

25 Q: And in fact, it's required by law; isn't it?

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1 A: It is.
2 Q: And can you identify this sheet by file number under
3 which it's filed at the Department?
4 A: Yes, sir. You want me to read it?
5 Q: Yes. Read us the file number.
6 A: "40.498A."
7 Q: And that is a file number for the project; is that
8 correct?
9 A: Yes, that is the file number for the project, being
10 40 is Richland County, and the other numbers are
11 arbitrary numbers but they help us track the
12 construction.
13 MR. BOOKER: Your Honor, I'd like to move Defendant's
14 Exhibit Six into evidence, please.
15 MR. STEGMAIER: No objection, sir.
16 THE COURT: Okay. Your motion's granted.
17 (Defendant's Exhibit Number Six is entered into the
18 record.)
19 Q: And I have one final question, or series of questions
20 for you, Mr. Keys. Let's take a hypothetical here
21 that you extend the, I guess this would be the
22 northern property line of Carolina Chloride, up to
23 the right-of-way of Farrow Road, the Department's
24 right-of-way of Farrow Road. And the, I guess that
25 would be the southern boundary. In other words,

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1 assuming that Carolina Chloride actually abuts Farrow
2 Road, which we, of course, do not agree to.

3 **MR. STEGMAIER:** Your Honor, not to interrupt Mr. Brooker,
4 but to the extent this line of questioning exceeds
5 the scope of my cross-examination, we would object.

6 **THE COURT:** You're saying that he's off on a new matter on
7 re-direct?

8 **MR. STEGMAIER:** I suspect, but I don't know.

9 **MR. BOOKER:** Well, Your Honor, it's going to this
10 affirmative act, he was talking about the ---

11 **THE COURT:** Objection overruled.

12 **Q:** If that were the case, or even as to the Railroad's
13 ownership, has the Department done any affirmative
14 act to prevent this property owner, whoever the
15 abutting property owner is to Farrow Road, in this
16 area from entering the highway?

17 **A:** In the yellow area particularly is what you're
18 talking about?

19 **Q:** Well, assuming -- I'm just going to assume that
20 Carolina Chloride owns the railroad property
21 abutting.

22 **A:** Okay.

23 **Q:** Or the Railroad itself. If that were the case, could
24 they enter Farrow Road?

25 **A:** If their property line were extended over and

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1 adjacent to ours, I know of no reason why they could
2 not.
3 Q: There's no apparent problems that you see as sight
4 distance ---
5 A: No, sir.
6 Q: --- or anything like that? How would they do that?
7 A: Through an encroachment permit.
8 Q: And they would submit an encroachment permit to the
9 Department?
10 A: That is correct.
11 Q: Now, the affirmative act, I would represent to you,
12 that we've been talking about, that the Supreme Court
13 said we did, was the closure of the end of Killian
14 Road before it enters Farrow Road; is that correct?
15 A: Yes.
16 Q: But that affirmative act did not prevent the abutting
17 owner in this area from entering Farrow Road, did it?
18 MR. STEGMAIER: Objection, leading.
19 THE COURT: Overruled.
20 A: Say that again?
21 Q: In other words, the affirmative act of ending Killian
22 Road in the hash mark area ---
23 A: Right.
24 Q: --- that did not necessarily prevent the abutting
25 owner of this property within Carolina Chloride's

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1 existing northern and southern property lines from
2 entering Farrow Road?
3 A: No. Not without -- I mean, provided they go through
4 an encroachment permit and our processes.
5 Q: So they would be able to do that if they'd asked?
6 A: Yes.
7 Q: That's all I have, Mr. Keys. Thank you.
8 THE COURT: Any recross?
9 MR. KEYS - RECROSS-EXAMINATION BY MR. STEGMAYER:
10 Q: You didn't make that offer to Mr. Morgan when you
11 talked with him on any occasion, did you?
12 A: No, sir.
13 Q: Thank you.
14 THE COURT: All right. Thank you, sir, you may come down.
15 Watch your step coming down, please. All right. Mr.
16 Brooker?
17 MR. BOOKER: Yes, Your Honor.
18 THE COURT: Do you have another witness or ---
19 MR. BOOKER: I do have -- the defense rests, Your Honor.
20 THE COURT: All right. In lieu of closing arguments, let
21 me ask for proposed orders from each side. And
22 please don't give me a brief. If you think you have
23 to brief an issue, make it a separate brief. I'd
24 like -- when I say proposed order, I'd like something
25 that if you had your druthers, I'd just read and sign

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1 it.

2 MR. STEGMAIER: Yes, sir.

3 THE COURT: I don't want a' brief, where I have to sit
4 there and strike out three or four pages because it's
5 argumentative. But -- and y'all want to do that
6 within 30 days, or?

7 MR. STEGMAIER: We can, sir.

8 THE COURT: Okay. Mr. Brooker, is that satisfactory?

9 MR. BOOKER: Yes, sir. And do you want it electronically,
10 Your Honor, or in paper form?

11 THE COURT: Actually both. I'm old school; I don't read
12 emails as often as I should, so I'm afraid if you
13 send it just email I might not see it until the end
14 of the year or something. So, yeah, if you can both
15 send an email and a hard copy to me.

16 MR. STEGMAIER: Your Honor, Mr. Sullivan just brought to
17 my attention, if you've got another five minutes,
18 I've got -- I believe that we would be permitted the
19 opportunity to put up some slight rebuttal testimony.

20 THE COURT: I don't see any problem for that.

21 MR. STEGMAIER: I've got two questions to ask Mr. Morgan
22 based on -- in the interest of clearing some things
23 up.

24 THE COURT: Okay. Mr. Brooker, any objection?

25 MR. BOOKER: No objection.

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Official Court Reporter
Master in Equity, Richland County
1701 Main Street - Post Office Box 192 (29202)
Columbia, South Carolina 29201

0301

1 MR. STEGMAIER: It'll be very brief, sir.

2 THE COURT: All right.

3 MR. STEGMAIER: Mr. Morgan.

4 (Witness is sworn.)

5 (Plaintiff's Exhibit Numbers Eight and Nine are marked for
6 identification.)

7 Robert H. Morgan, being duly sworn, testifies as follows:

8 MR. MORGAN - REBUTTAL DIRECT EXAMINATION BY MR. STEGMAIER:

9 Q: Mr. Morgan, just briefly, because before we adjourned
10 I wanted to make sure that the Court had all the
11 facts straight as far as this goes. In 2006, you
12 sold your property, sir?

13 A: That's correct.

14 Q: And it's been your previous testimony that you did so
15 because you were compelled to because of your
16 inability to access Farrow Road, correct?

17 A: Yes, sir.

18 Q: And you had testified, I believe in your direct, that
19 your sale price for the property was in the three to
20 four hundred thousand dollar range, correct?

21 A: Right.

22 Q: I'm handing you what's been marked as Exhibit Nine,
23 and represent to you that this is a document that
24 we've obtained from the Register of Deeds downstairs.
25 But we wanted to make sure that the Court knew this

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0302

1 too, as well. You would agree with me, wouldn't you,
2 that that appears to be a deed that you gave to the
3 Stallings Group, which was the entity that purchased
4 the property from you, correct?
5 A: That's correct.
6 Q: And the Stallings Group still owns that property to
7 this day, correct?
8 A: As far as I know.
9 Q: Now, so that the Court has a complete understanding
10 and precision, the sale price of your property to the
11 Stallings Group was for how much, sir?
12 A: This shows \$450,000..
13 Q: Okay. So when you testified to the range of three to
14 four hundred thousand dollars, we were off by about
15 50, weren't we?
16 A: Yes, sir.
17 Q: Okay. Just wanted to make sure. And let me ask you
18 this, too: You recall that I had given -- I had asked
19 you some questions about the offer that had been made
20 to you back in 2002, 2003 for the property, correct?
21 A: Yes, sir.
22 Q: And it was your testimony that you had received a 1.1
23 million offer for that property, correct?
24 A: Yes, sir.
25 Q: And I believe the prospective buyers in that case

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0303

1 were the Watsons, correct?

2 A: Right.

3 Q: And at the time that Ms. -- there's been points in

4 time where Mr. Sullivan has represented you solely,

5 correct?

6 A: Yes, sir.

7 Q: And Mr. Brooker had made reference to some other

8 litigation involving this property, involving the

9 County, correct?

10 A: (Nods affirmatively.)

11 Q: And I believe the law firm of Davidson, Morrison

12 represented the County in that case, correct?

13 A: I cannot remember.

14 Q: Okay. Michael Wren, I would represent to you, was

15 one of the lawyers.

16 A: Okay.

17 Q: And in 2005 Mr. Sullivan was your lawyer, correct?

18 A: Yes.

19 Q: And Mr. Sullivan was your agent at that point in

20 time. That -- would you agree with me that that's a

21 letter that your agent, Mr. Sullivan, sent to Mr.

22 Wren, the lawyer for the County?

23 A: Yes, sir.

24 Q: Now, on the second page -- actually, let me ask you

25 this before we get going further. The letter starts

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0304

1 with "Dear Michael," which would be opposing counsel.
2 Could you read the first sentence into the record,
3 please.
4 A: "Enclosed, please find documents received from Jay
5 Watson regarding this lawsuit. Please consider this
6 a supplemental response to your discovery request."
7 Q: Okay.
8 A: "If you have any questions ..."
9 Q: Mr. Watson was a prospective buyer, correct?
10 A: Yes.
11 Q: And the prospective sale price in this case, as
12 documented by these exhibits sent to Mr. Wren, was
13 for how much, sir?
14 A: \$1,100,000.
15 Q: Okay.
16 MR. STEGMAIER: Judge, that's all the questions I have. I
17 would respectfully request that both Exhibits Eight
18 and Nine be moved into evidence, sir.
19 THE COURT: Okay. Mr. Brooker?
20 MR. BOOKER: Your Honor, I think I would object to that.
21 I do not object to the deed. I object to the letter
22 and the calculations of valuation on relevance
23 grounds and that we're here to find a taking. A
24 taking must be found on some reduction in substance
25 of the property itself. The value or loss of value

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Columbia, South Carolina 29201

0305

1 or a lost sale is irrelevant to the issue of a
2 taking, and it goes to compensation perhaps, but it
3 does not go to a taking because our -- under the law,
4 the -- a reduction in -- a diminish in property value
5 resulting from a police power is not a taking. So I
6 would object to Exhibit Eight. I do not object to
7 Exhibit Nine, I believe it was.

8 THE COURT: Objection overruled.

9 (Plaintiff's Exhibit Numbers Eight and Nine are entered
10 into the record.)

11 THE COURT: Okay. Anything else?

12 MR. STEGMAIER: That's all the questions I have, sir.

13 THE COURT: Mr. Brooker, do you have any questions for Mr.
14 Morgan?

15 MR. BOOKER: I do not, Your Honor.

16 THE COURT: All right. Thank you, sir, you may come down.
17 Watch your step coming down, please. Mr. Stegmaier,
18 you rest?

19 MR. STEGMAIER: Yes, we're completely done, sir.

20 THE COURT: All right. Mr. Brooker?

21 MR. BOOKER: We rest, Your Honor.

22 THE COURT: All right. Please take a minute -- you got my
23 instructions as far as proposed orders. Please take
24 a minute and make sure all the exhibits are up here,
25 and the court reporter's going to keep them. Thank

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Master in Equity, Richland County
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0306

1 you so much.

2. (There being nothing further, the hearing was concluded at

3 11:41 a.m.)

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1701 Main Street - Post Office Box 192 (29202)
Columbia, South Carolina 29201

0307

CERTIFICATE

I certify that the foregoing transcript, consisting of 215 pages, is a true, accurate and complete transcript of the hearing taken before me, Robin K. Reibold, the undersigned Court Reporter. This hearing was held without a jury before The Honorable Joseph M. Strickland, Master in Equity for Richland County, from October 20, 2015, through October 22, 2015, in the within-captioned case.

Said hearing was reported using the method of Stenomask with backup and was transcribed by me.

September 7, 2015

ROBIN K. REIBOLD
MY COMMISSION EXPIRES: 4-28-2021.

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Official Court Reporter
Master in Equity, Richland County
1701 Main Street - Post Office Box 192 (29202)
Columbia, South Carolina 29201

0308



South Carolina
Department of Transportation
Office of Chief Counsel

Linda C. McDonald
Chief Counsel

Assistant Chief Counsel
Natalie J. Moore
Barbara M. Wessinger
Beacham O. Brooker, Jr.
Amanda T. Taylor, Claims
Glennith C. Johnson

Claims Office
737-1260

April 8, 2014

Christian Stegmaier, Esquire
Collins & Lacy, P.C.
Post Office Box 12487
Columbia, South Carolina 29211

RE: Carolina Chloride, Inc. v. SCDOT
C/A No.: 2007-CP-40-7633

Dear Christian:

I have your letter of April 4, 2014, concerning ADR.

At this point, I believe mediation or settlement negotiations would be premature and have little chance of success. As you know, we have two motions pending before the master which were suspended on your suggestion for a need for further discovery. One of those motions, to bring the Norfolk Southern in as a party, would bring the real party in interest with regard to the remaining issues to the table. As we have explained, this Department never argues that an abutting owner to a State Highway does not have the right to enter that highway as long as the land affords a safe and suitable point for entry. The question, therefore, is who is the abutting owner vis-à-vis the plaintiff and the railroad. Our engineers have investigated this location and would have no objection to the opening of a private drive at this location. We would, however, object to opening a public road crossing the tracks. No landowner has the right to cause a public road to be maintained for his benefit at public expense. *State v. Hughes*, 147 S.C. 452, 145 S.E. 297 (1928).

My suggestion is that we have the court consider the motions and, if summary judgment is denied, proceed to meet with counsel for the railroad to negotiate your client's access.

Very truly yours,

Beacham O. Brooker, Jr.

FILE NO. 1114-102

Cc: Robert T. Green, Esquire

APR 10 2014

REC'D CS/ALN/ICC
COLLINS & LACY

955 Park Street - Suite 343, Post Office Box 191, Columbia, South Carolina 29202-0191, (803) 737-1347 Fax 737-2071

0309

Galivan, White & Boyd, P.A.
Post Office Box 10589
Greenville, South Carolina 29603

bobjr: •

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED

Joseph M. Strickland, Master-in-Equity

JUL 08 2016

SC Court of Appeals

Case No. 2007-CP-40-7633

Carolina Chloride, Inc., ...Appellant,

v.

South Carolina Department of Transportation, ...Respondent.

NOTICE OF APPEAL

TO: BEACHAM O. BROOKER, JR., ESQUIRE, AND NATALIE J.
MOORE, ESQUIRE, COUNSEL FOR RESPONDENT:

Carolina Chloride, Inc., through its undersigned counsel, appeals the
following orders:

- Order (filed January 25, 2016); and
- Order on Plaintiff's Rule 59 Motion (filed Jun 6, 2016).

The undersigned counsel for Appellant Carolina Chloride, Inc. received written notice of the entry of the Order on Plaintiff's Rule 59 Motion on June 22, 2016, which is the trigger date for the instant appeal.

Respectfully submitted,
COLLINS & LACY, P.C.



By:

CHRISTIAN STEGMAIER
cstegmaier@collinsandlacy.com
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

And:

SULLIVAN LAW FIRM, PC

EDWARD D. SULLIVAN
esullivan@esullivanlaw.com
Post Office Box 11714
Columbia, South Carolina 29211
(803) 451-2775 (Voice)
(803) 451-2770 (Facsimile)

ATTORNEYS FOR APPELLANT

NOTICE OF APPEAL

Columbia, South Carolina
July 8, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

RECEIVED

JUL 08 2016

Case No. 2007-CP-40-7633

SC Court of Appeals

Carolina Chloride, Inc., ...Appellant,

v.

South Carolina Department of Transportation, ...Respondent.

PROOF OF SERVICE

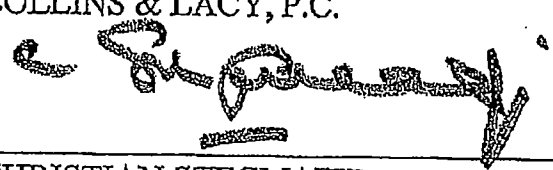
I hereby certify that I served the Notice of Appeal upon all parties and
the lower court, by placing a copy in the United States mail, postage prepaid,
to the below listed parties on July 8, 2016, addressed to the following:

Beacham O. Brooker, Jr.
South Carolina Department of
Transportation
Post Office Box 191
Columbia, SC 29202-0191
Counsel for Respondent

Edward D. Sullivan
SULLIVAN LAW FIRM, PC
esullivan@esullivanlaw.com
Post Office Box 11714
Columbia, South Carolina 29211
Co-counsel for Appellant

The Honorable Jeanette W. McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, SC 29202

Respectfully submitted,
COLLINS & LACY, P.C.

By: 

CHRISTIAN STEGMAIER
cstegmaier@collinsandlacy.com
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And:

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ATTORNEYS FOR APPELLANT

Columbia, South Carolina
July 8, 2016

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

In the Court of Common Pleas
Fifth Judicial Circuit

Civil Action Number 2007-CP-40-7633

Carolina Chloride, Inc.,

Plaintiff,

vs.

South Carolina Department of Transportation,

Defendant.

RECEIVED
JUL 08 2016
SC Court of Appeals

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

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

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

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

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

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

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

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

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

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

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

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

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

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

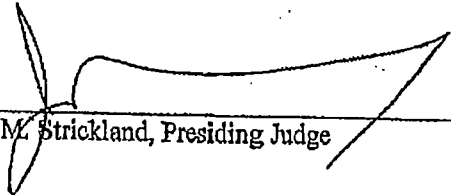
adjoining owner. Sight distance and other factors do not cause it to be an unsafe location. Thus, there is no case or controversy between the Department and that landowner even if Carolina Chloride could be proven to be the adjoining owner. In general, courts may only consider cases when a justiciable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

Conclusion

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

Complaint should be and hereby is DISMISSED.

AND IT IS SO ORDERED,



Joseph M. Strickland, Presiding Judge

Columbia, S.C.
~~October 27, 2015~~

January 15, 2016

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2007- CP-40-7633

Carolina Chloride, Inc.

South Carolina Department of Transportation

PLAINTIFF(S)

DEFENDANT(S)

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

Master

2097
Judge Code

Jan. 15, 2016
Date

For Clerk of Court Office Use Only

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

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

Beacham O. Brooker, Esq.
P O Box 191
Columbia SC 29201
ATTORNEY(S) FOR THE DEFENDANT(S)
CLERK OF COURT

Court Reporter:

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

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

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

In the Court of Common Pleas
Fifth Judicial Circuit

Civil Action Number 2007-CP-40-833

RICHLAND COUNTY
FILED
2016 JUN -6 AM 9:59
JEANETTE W. MCGRIDE
C.C.P. & S.S.

Carolina Chloride, Inc.,

Plaintiff,

vs.

South Carolina Department of Transportation,

Defendant.

RECEIVED

JUL 08 2016
Order on Plaintiff's Rule 59 Motion
SC Court of Appeals

This matter came before me in open court on May 24, 2016, on Plaintiff's Motion to Reconsider this Court's Order of January 26, 2016, dismissing the Complaint. Counsel for Plaintiff and Defendant appeared and Plaintiff submitted a memorandum in support of its motion.

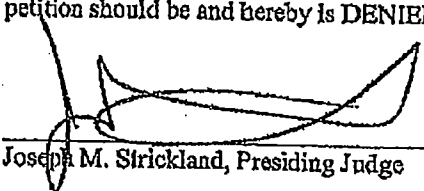
This case was before the Court on remand from the South Carolina Supreme Court. Carolina Chloride, Inc. v. S.C. Dep't. of Transportation, 391 S.C. 429, 706 S.B.2d 501 (2011). Under the terms of that remand, I was to determine the ownership of the strip of land surrounding the Norfolk Southern railroad tracks lying between Plaintiff's property and Farrow Road. A trial was held in Columbia October 20, 21, and 22, 2014, where plaintiff and defendant presented witness testimony and documentary evidence. As part of that evidence, both parties entered copies of Plaintiff's title to its land and the associated recorded plat. Those instruments clearly show that Plaintiff's land shares a boundary with the lands of the railroad company and not with Farrow Road. Additionally, Plaintiff's counsel stipulated that his client did not own the property beneath the railroad. Trial transcript, page 90.

Plaintiff's present motion argues that the Court overlooked some South Carolina case law regarding the contiguity of purportedly separate tracts for property tax and other regulatory law purposes. These cases are distinguishable from the subject matter of the case at bar. Here, Plaintiff must physically cross the lands of another by laying an asphalt drive for vehicular travel across the land and tracks of the railroad. Absent consent of the railroad, this would be trespass. "Abut," as defined by our Supreme Court in another inverse condemnation access case, Mosteller v. County of Lexington, 336 S.C. 360, 365, 520 S.E.2d 620, 622-23 (1999), means "...to join at a border or boundary; to meet; to touch at the end or side." If Plaintiff abuts Farrow Road, it would have the right to enter the road. However, I find no reason to reverse my decision made on the basis of undisputed evidence that it does not abut.

Finally, Plaintiff objects to the secondary holding in the Order that it did not satisfy the condition precedent to maintain an inverse condemnation case that it make a clear request to the governmental entity sued so that it may correct the alleged taking. Palazzolo v. Rhode Island, 533 U.S. 606, 620, 121 S.Ct. 2448, 2459, 150 L.Ed.2d 592 (2001); Moore v. Sumter County Council, 300 S.C. 270, 272, 387 S.E.2d 455, 457 (1990). The permit system for drive entrances onto State highways is laid out in Article 7 of Chapter 5, Title 57, S.C. Code. Defendant has stated that it has no objection to a drive entrance for the abutting owner at this location. The Defendant was never given the opportunity to find an engineering solution among the parties hereto and the railroad prior to Plaintiff's sale of the property and filing suit for money damages.

For the foregoing reasons, Plaintiff's petition should be and hereby is DENIED.

AND IT IS SO ORDERED.


Joseph M. Strickland, Presiding Judge

Columbia, S.C.
May 25, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Case No. 2016-001440

Carolina Chloride, Inc., ...Appellant,

v.

South Carolina Department of Transportation, ...Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

[SIGNATURE PAGE FOLLOWS]

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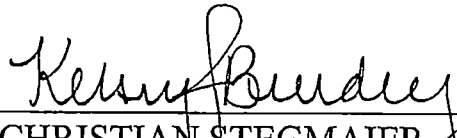
JAN 17 2017

SC Court of Appeals

Respectfully submitted,

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Columbia, South Carolina
January 17, 2017