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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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

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

Georgetown County, ... Appellant,

v.

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

Of whom

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN RULING AS A MATTER OF LAW THAT GEORGETOWN COUNTY CANNOT MAINTAIN AN INVERSE CONDEMNATION CAUSE OF ACTION UNDER ART. I., § 13 OF THE SOUTH CAROLINA CONSTITUTION?

II. DID THE CIRCUIT COURT ERR IN RULING THAT GEORGETOWN COUNTY IS NOT ENTITLED TO JUST COMPENSATION UNDER THE SOUTH CAROLINA EMINENT DOMAIN PROCEDURE ACT, S.C. CODE ANN. § 28-2-10 *ET. SEQ.* OR THE STATE AUTHORITIES EMINENT DOMAIN ACT, S.C. CODE ANN. § 28-3-20, *ET. SEQ.?*

III. DID THE CIRCUIT COURT ERR IN RULING THAT PUBLIC POLICY DOES NOT REQUIRE THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION AND THE CITY OF GEORGETOWN TO PAY JUST COMPENSATION TO GEORGETOWN COUNTY?

STATEMENT OF THE CASE

Appellant, Georgetown County (the "County"), filed its Complaint on October 25, 2013. (ROA p. 11) and its Amended Complaint[1] on July 10, 2014 (ROA p. 34). Among the causes of action asserted by the County was an inverse condemnation claim against the South Carolina Department of Transportation ("SCDOT") and the City of Georgetown (the "City"). The inverse condemnation claim arose from damage to County buildings and property caused by a public utility project jointly undertaken by the City and SCDOT that was intended to resolve storm drainage and flooding problems in the City of Georgetown.

The County filed its Motion for Summary Judgment on May 2, 2014. (Motion for Summary Judgment, ROA, p. 76). A hearing was held on the County's motion on August 7, 2014. In its Memorandum in Opposition to the County's Motion for Summary Judgment, SCDOT asserted the County was not entitled to relief and moved to dismiss the inverse condemnation cause of action under Rule 12(b)(6), SCRCP. (SCDOT Memorandum in Opposition, ROA p. 118). The City joined in these arguments during the hearing. (ROA, p. 307).

After further briefing and a second hearing, the circuit court entered the appealed-from Order on November 12, 2015 (the "Order"). In the Order, the circuit court held:

> Since Georgetown County's property is public property, the takings clause (Art. I, § 13 of the South Carolina Constitution) has no application. The Takings Clause is limited to private property by its clear and unambiguous terms. The purposes and intent of the enactment of the Takings Clause do not support an application to public property.
>
> ***

[1] The only difference between the Complaint and the Amended Complaint is in paragraph 9 of each. The Amended Complaint substituted as one of the County's Buildings at issue, 1230 Highmarket Street, for the property pleaded in the Complaint, 716 Prince Street. Hereafter, except as may be pertinent regarding the affected property, reference will be to the Complaint.

> For the reasons stated above, the Court finds that Georgetown County cannot maintain an inverse condemnation action against SCDOT and City because the Takings Clause applies only to private and not to public property. Therefore, because the Court finds as a matter of law that Georgetown County cannot maintain an inverse condemnation cause of action that claim is stricken and the Court grants the SCDOT Rule 12(b)(6) motion. In so ruling, the Court notes that this is a novel question of law in South Carolina, and it is this Court's intent by striking the County's inverse condemnation cause of action to affect the County's substantial right to proceed with this cause of action and that this Order be immediately appealable.

Order, pp. 5-6, ROA, pp. 5-6.

The County filed a Motion to Reconsider, Alter or Amend, Pursuant to Rule 59(e), SCRCP on November 13, 2015. (County's Rule 59(e) Motion, ROA, p. 221). The circuit court heard arguments on this motion on August 5, 2016, and issued its written order denying the County's Rule 59(e) motion on January 17, 2017. (Order denying Rule 59(e) motion, ROA p. 7). This appeal followed.

STATEMENT OF FACTS

This case involves damage to the County's real property and buildings located at 333 Cleland Street (Magistrates Complex); 401 Cleland Street (the Georgetown County Judicial Center); 405 Cleland Street (Public Library); 325 Dozier Street (Winyah High Gym); 330 Dozier Street (Department of Social Services); and 1230 Highmarket Street (Waccamaw Regional Building) (collectively, the "County's Buildings"). (Amended Complaint ¶ 9, ROA, p. 35). These damages are a result of a public works project undertaken jointly by SCDOT and the City in 2009 to resolve storm drainage and flooding problems in the City of Georgetown (the "Drainage Project). (Compl. ¶ 12, ROA, p. 36; SCDOT's Answer ¶ 13, ROA, p. 53; and the City's Answer ¶ 10, ROA, p. 69). The purpose of the Drainage Project was to relieve or reduce the impact of historical surface water flooding in the area surrounding City Hall, including U.S.

Highways 17 and 521. (County's Memorandum in Support of Its Motion for Summary Judgment, Exhibit A[2] p. 8, ROA, p. 99). The Drainage Project consisted of the planning and construction of a water storage facility and wet well, redirection of stored water through a gravity piping system, and forced drainage of water from the wet well into the Sampit River. (Id.). As part of the Drainage Project, the water storage area underwent a significant pumping of water so that new drainage structures could be fabricated below grade. (Compl. ¶ 17, ROA, p. 13). During construction, king piles (hollow steel piles) were installed by pre-drilling holes and driving the king piles deep into the sub-surface of the ground to provide lateral support for the walls of the water storage facility. (Affidavit of George A. Sembos, P.E. ¶ 8, ROA p. 79, and F&ME Report, p. 22, ROA p. 113). During the installation of the king piles, a ring-shaped space was created around the outside of the pile. (Id.). These piles breached a subsurface layer which confined underground water, causing this underground water to rise from beneath the confining layer and fill the water storage area. (Id.). During the construction of the Drainage Project, multiple land-surface collapses occurred, and sinkholes and depressions formed in and around the area of the Drainage Project. (F&ME Report, p. 20, ROA p. 111).

After the sinkhole depressions occurred, SCDOT hired F&ME Consultants to investigate and identify the cause and origin of the sinkholes and depressions. According to F&ME, at least seven sinkhole/depressions were caused by the construction activities related to the Drainage Project which impacted a lower, confined aquifer system underlying the area in question. (F&ME Report, p. 22, ROA, p. 113).

The County's Buildings were damaged as a result of sinkhole collapses. (Compl. ¶ ¶ 9 and 11, ROA, pp. 12-13, (Affidavit of George A. Sembos, P.E. ¶ 9, ROA p. 79, and

[2] Hereinafter, the "F&ME Report."

Supplemental Affidavit of George A. Sembos, P.E. ¶ 5-9, ROA pp. 156-157). These sinkhole collapses were caused by the Drainage Project. (Affidavit of George A. Sembos, P.E. ¶ ¶ 7-11. ROA pp. 79-80).

STANDARD OF REVIEW

In reviewing a motion to dismiss, an appellate court applies the same standard of review as the circuit court. Carolina Park Associates, LLC v. Marino, 400 S.C. 1, 6, 732 S.E. 2d 876, 878 (2012). "Questions of law may be decided with no particular deference to the circuit court." Id. "The trial court's ruling on a Rule 12(b)(6) motion must be bottomed and premised solely upon the allegations set forth by the plaintiff." Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). The motion must be denied if the facts alleged and inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. Id. "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Doe v. Marion, 373 S.C. 390, 295, 645 S.E.2d 245, 247-48 (2007).

ARGUMENT

I. The circuit court erred in ruling the County is not entitled to just compensation under the Takings Clause, Art. I, § 13 of the South Carolina Constitution.

At the heart of this matter is whether, as a matter of law, one governmental entity, such as the County, may maintain an inverse condemnation claim against another governmental entity, such as SCDOT and the City. As stated in the circuit court's order, this is a novel question of law in South Carolina. (Order p. 6, ROA, p. 6). No South Carolina appellate decision has held that a governmental entity is barred from asserting an inverse condemnation claim against another governmental entity.

Article I, § 13 of the South Carolina Constitution of 1895 provides:

> (A) Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property...

Inverse condemnation is based on the constitutional prohibition of taking property without compensation. Horry Cty. v. Ins. Reserve Fund, 344 S.C. 493, 498, 544 S.E.2d 637, 640 (Ct. App. 2001). Inverse condemnation is a cause of action to recover the value of property that has been effectively taken by a governmental entity, although not through the process of eminent domain. Carolina Chloride, Inc. v. Richland Cty., 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011).

The elements of an inverse condemnation action based on physical appropriation of property, such as this case, are: (1) affirmative conduct of a governmental entity, (2) which effects a taking, and (3) the taking is for a public use. Carolina Chloride, Inc. v. S. C. Dept. of Transp., 391 S.C. 429, 435, 706 S.E.2d 501 (2011).[3]

a. The County is protected against unconstitutional takings by Article I, Section 13 of the South Carolina Constitution of 1895.

No South Carolina case has held that a governmental entity is barred from asserting an inverse condemnation claim against another governmental entity. No statutory authority supports this conclusion. In fact, South Carolina statutory authority supports the conclusion that the County is entitled to just compensation.

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

[3] Formerly, "some degree of permanence" was a required element; however, this element has been removed. E.g. Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76,79 (2005); Frampton v. South Carolina Dept. of Transp., 406 S.C. 377, 387, 752 S.E.2d 269, 275 (Ct. App. 2013).

Marin Mun. Water Dist. v. City of Mill Valley, 202 Cal. App. 3d 1161, 249 Cal. Rptr. 469 (1988) (holding a public water district suffered no less of a taking than if the property were owned by an individual and that the district stated a cause of action in inverse condemnation for unintentional physical damage to its property); City of Three Forks v. State Highway Comm'n, 156 Mont. 392, 480 P.2d 826 (Mont. 1971) (holding the property was owned by the city, not the State of Montana, and that compensation must be paid for property of the City taken by the State); State ex. rel. State Highway Comm'r v. Cooper, 24 N.J. 261, 131 A.2d 756 (1957) (impliedly overruling New Jersey precedent on the governmental-proprietary distinction and stating if the breadth of previous case doctrine were followed it would lead to the startling result that "the State [could] appropriate, for wholly unrelated public purposes and without just compensation, various municipal properties such as town halls and schoolhouses..."); Highline Sch. Dist. No. 401, King Cty. v. Port of Seattle, 87 Wash. 2d 6, 548 P.2d 1085 (Wash. 1976) (en banc) (reversing grant of summary judgment on inverse condemnation against condemnee school district and stating that where a condemnee governmental unit must furnish services which require use of the property taken, just compensation must be paid); City of Chester v. Com., Dept. of Transp., 495 Pa. 382, 434 A.2d 695 (1981)(holding the Pennsylvania Constitution does not allow the Commonwealth to escape its financial obligation owed to a public condemnee for property taken); Brusco Towboat Co. v. State By & Through Straub,31 Or.App. 491, 493, 570 P.2d 996, 998 (1977)(en banc) (stating that two government entities are nevertheless entities distinct from the state and stating "[t]hey are supported by a distinct tax base and they serve a distinct constituency. Accordingly, they are protected against taking by the state without compensation."); State ex. rel. Ala. State Docks Dept. v. Atkins, 439 So.2d 128 (Ala. 1983) (holding Mobile County was entitled to compensation for the taking of its roadway by the State

of Alabama); Donnaher v. State, 16 Miss. 649, (Miss. Er. & App. 1847) (holding railroad company must pay just compensation to the City of Jackson to have a right to construct a railroad through the public streets). The South Carolina Supreme Court has held that property acquired and devoted to a public use may be condemned by the SCDOT. Riley v. S. C. State Hwy. Dept., 238 S.C. 19, 26, 118 S.E.2d 809, 812 (1961) (implying that compensation must be paid to an orphanage where the SCDOT was allowed to condemn).

Appended to this brief, marked as **Appendix A**, are the taking clauses of the constitutions of the eight states whose court opinions are discussed above – California, New Jersey, Montana, Washington, Pennsylvania, Oregon, Alabama, and Mississippi. All speak in terms of ***private property not being taken for a public use without just compensation.*** These states all held that their respective takings clauses require payment of just compensation where one public entity has taken the property of another public entity. South Carolina's taking clause should be interpreted no differently.

In Marin, the question presented, *i.e.*, can one public entity assert an inverse condemnation claim against another, was answered in the affirmative, the California Court of Appeals holding that a public water district's property was protected by the California state constitution. [4] Marin, 202 Cal.App.3d 1161, 249 Cal. Rptr. 469. In Marin, as in this case, the City of Mill Valley caused unintentional physical damage to the public water district's property.

The court stated:

> When the [City of Mill Valley] fails to construct or maintain its improvement properly, it takes a calculated risk that damage to private property may occur. If damage to private property results, it is proper to require the entity that took this risk to bear the loss when damage occurs. ***We see no reason why these principles***

[4] At the time Marin was decided, the California Constitution provided, "Private property may be taken or damaged for public use only when just compensation... has first been paid to... the owner." Marin, 202 Cal. App.3d at 1164 n.2, 249 Cal.Rptr. at 470, n. 2. The California Constitution is currently similarly drafted. Ca. Const. Art. 1, § 19.

> ***should not apply to compensate for damage to property owned by another public entity.*** To paraphrase the California Supreme Court, a public entity whose property has been damaged by another public entity suffers no less a taking merely because of its public entity status.

Id. at 1165, 249 Cal. Rptr at 471. (Emphasis added).

The court went on to discuss that to hold otherwise would overlook a basic fairness argument that one public entity should not be allowed to take property belonging to another public entity without compensation. Id. at 1166, 249 Cal. Rptr. 472. "Funds collected by one public entity for one purpose should not be thus appropriated, disrupting that entity's finances." Id.

Art. VIII, § 17 of the South Carolina Constitution provides, "[t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor." Under this Constitutional provision, the County, a local government, is entitled to have the provisions of Art. I, § 13 construed in its favor. Doing so requires a finding that the County is entitled to just compensation under Art. I, § 13.

Just as in Marin, the County's properties have been taken without an award of just compensation. SCDOT and City undertook the Drainage Project, taking the calculated risk that damage to the County's properties could occur. South Carolina's Constitution requires SCDOT and City compensate the County for the property damage to the County's buildings they caused.

i. The County's properties are not excluded from the Constitutional protection against taking of private property without just compensation.

In their briefs to the circuit court, SCDOT and the City relied upon Edgefield County v. Georgia-Carolina Power Co., 104 S.C. 311, 88 S.E.801 (1916), for the proposition that "public

property" does not fall within the protection of the Constitution.[5] See SCDOT's Supplemental Memorandum In Opposition to Plaintiff's Motion for Summary Judgment, p. 5, 9, (ROA p. 171, p. 175); and Brief of the City of Georgetown on Legal Issue of Whether Georgetown County Can Assert an Inverse Condemnation Claim Under the Law, p. 7 (ROA p. 184).

Edgefield County involved a suit for damages brought by Edgefield County against a utility company, the utility company having been legislatively granted the power to condemn. The circuit court overruled the utility company's demurrer, and the South Carolina Supreme Court affirmed, holding "... under the Constitution and statutes we are of the opinion that the county may maintain the action it has pleaded." Id. at 328, 88 S.E. at 806.

The Edgefield County Court also stated, "**[t]he defendant further asserts** that the county had no such ownership of the highway and ferry as to render their serious impairment by the defendant a wrong to the plaintiff, and that the constitutional prohibition to take private property without making compensation therefor has no application to the taking of public property." Id. at 326, 88 S.E. at 806 (emphasis added).

The Court went on to state:

> But public property, we think, does not fall within the protection of the Constitution. That which the state has set apart for one public purpose the state may dedicate to another and higher public purpose. The supreme good of the public—salus republicae suprema lex—is the ideal to be accomplished, and it is in the keeping of the state. So that in the instant case it would have been obviously within the power of the Legislature to have expressly subjected the highway in Edgefield to be overflowed by the waters of Stevens creek and Savannah river, and Edgefield could not complain about it.
>
> But such intent will not be lightly inferred; the intent to do so must be a necessary implication of the words of the grant and the purpose of the grant.

Id. at 329, 88 S.E. at 807.

[5] SCDOT and the City also relied on Edgefield County in their Return to the County's Motion to Certify to the Supreme Court.

As the Edgefield County Court noted, at the time that case was decided, "[t]he Constitution of 1895... by implication left the government of the counties in the hands of the Legislature." Id. at 327, 88 S.E. at 806. The Court also opined that at that time, "under the Constitution and laws of the state, the state [General Assembly] ha[d] absolute control over the government of counties." Id. That is not the case today, as the government of the counties is no longer in the hands of the General Assembly as a consequence of South Carolina's movement to local government "home rule" in 1975. See S.C. Const. art. VIII, § 1, *et. seq.*; S.C. Code Ann. § 4-9-10, *et. seq.*; and Hospitality Ass'n of South Carolina, Inc. v. Cty. of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113 (1995).

As explained in Hospitality Ass'n:

> For generations, legislative delegations of the General Assembly controlled virtually every aspect of local government. Relinquishment of this control effectively began in April of 1966, when the General Assembly created a Committee to study the South Carolina Constitution and appointed then Senator John C. West as chairman. The major task assigned to the West Committee was to develop and recommend amendments to the Constitution that would eliminate archaic provisions and "strengthen it in such other areas, so that it [would] provide a workable framework with proper safeguards for sound State, County and local governments."
>
> In June of 1969, after three years of numerous hearings and conferences, the West Committee submitted its Final Report to the Governor and General Assembly. In the Report, the Committee unanimously recommended amendments to the Constitution that would place the control and management of county and municipal affairs in the hands of duly elected local officials.
>
> Following three years of legislative debate on the Report, the General Assembly placed upon the November 1972 general election ballot for referendum vote an Amendment of Article VIII of the Constitution. See Act No. 1631, 1972 S.C.Acts 3184. Acting upon a favorable vote of the people, the General Assembly, on March 7, 1973, ratified the Amendment. See Act No. 63, 1973 S.C.Acts 67.
>
> As ratified, new Article VIII directed the General Assembly to implement what was popularly referred to as "home rule" by establishing the structure, organization, powers, duties, functions, and responsibilities of local governments

> by general law. S.C. Const. art. VIII, §§ 7 and 9. **In addition, new Article VIII mandated a liberal rule of construction regarding any constitutional provisions or laws concerning local government**. S.C. Const. art. VIII, § 17.
>
> Although the General Assembly was required to implement home rule, new Article VIII essentially left it up to the General Assembly to decide what powers local governments should have. Acting under this authority, the General Assembly enacted various statutes regarding the powers of counties and municipalities.

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

As noted in Hospitality Ass'n, prior to the implementation of the Home Rule, "courts in this State **strictly and narrowly** construed any grant of local government power." Id. at 225 n.5, 464 S.E.2d at 117 n.4. However, this is not the case today under S.C. Const. art. VIII, § 17.

At the time Edgefield County was decided, the property at issue belonged to the State of South Carolina. Edgefield County, like all South Carolina counties, did not have the power to own property. This is not the case today regarding to the County's properties. See S.C. Ann Code Ann. §§ 4-1-10 (2); 4-17-10. Unlike when Edgefield County was decided, it is the County and not the State of South Carolina which has set apart the County's property for a public purpose. Id. It is not the property of the State, and the State does not exercise control over the County's properties. The General Assembly has not expressly subjected the County's properties, including the Georgetown County Judicial Center, to "another or higher purpose." Edgefield County was decided in a time when the State controlled the Counties, which was abrogated in 1975.

Furthermore, Edgefield County was not decided on Constitutional grounds. Any indication in the opinion that the County's properties are not protected by the Constitution was not necessary to the court's opinion, and is, therefore, non-binding dicta. Further, due to the

implementation of home rule, occurring decades after Edgefield County was decided, that opinion is of no significance here.

ii. Under Federal Takings Clause jurisprudence, followed by South Carolina, local governments are protected from taking of property without just compensation.

Like Art. I, § 13 of the South Carolina Constitution, the United States Constitution provides "... nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V. "South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with someone's property interests amounts to a constitutional taking." Hardin v. South Carolina Dept. of Transp., 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007) (Citing Byrd v. City of Hartsville, 365 S.C. 650, 656 n. 6, 620 S.E.2d 76, 79 n.6 (2005)). South Carolina courts have consistently relied upon Federal Takings Clause analysis. See Byrd, 365 S.C. at 656 n.6 and 659 n. 9, 620 S.E.2d at 79 n.6 and 81 n. 9; Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach, 337 S.C. 380, 390, 523 S.E.2d 193, 199 (Ct. App. 1999), aff'd in result by Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach 345 S.C. 418, 548 S.E.2d 595 (2001)(Sea Cabins II); Kiriakides v. School Dist. of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009); Early v. South Carolina Public Service Authority, 228 S.C. 392, 402, 90 S.E.2d 472, 476 (1955). Additionally, the Takings Clause of the United States Constitution applies to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV; § 1; Byrd, 365 S.C. at 656 n. 6, 620 S.E.2d at 79 n. 6.

In its brief to the circuit court, the City asserted "The Bill of Rights was not intended to protect one government against the actions of another sister government. Consequently, the restriction of the takings clause to 'private' property comports with the purposes of the Bill of

Rights." (Brief of the City of Georgetown on Legal Issue of Whether Georgetown County Can Assert an Inverse Condemnation Claim Under the Law, p. 5., ROA p. 182). The City is misguided in its analysis.

It is well established that under the Takings Clause of the United States Constitution, the Federal government must compensate state and local governments for the taking of their properties. See e.g. Ark. Game and Fish Com'n v. U.S., 568 U.S. 23 (2012) (finding a taking of the Commission's lands requiring compensation); Town of Bedford v. U.S., 23 F.2d 453 (1st Cir. 1927) (stating the Federal government is a stranger to the town and that the Federal government can no more take, without compensation a town's property rights, than it can those of an individual); U.S. v. State of Ark., 164 F.2d 943 (8th Cir. 1947) (reciting the "fundamental principle" that a public authority *must* be awarded the actual money loss which will be occasioned by the condemnation); U.S. v. Board of Ed. Of Mineral Cty., 253 F.2d 760, 764 (4th Cir. 1958) ("The [municipal] owner must be put in as good position peculiarly as he would have occupied if his property had not been taken"); Mayor and Council of City of Baltimore v. U.S., 147 F.2d 786, 790 (4th Cir. 1945) ("Frequently it occurs that the taking of a street causes substantial loss for which the city must be compensated").

The United States Supreme Court has stated:

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

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

Under the Federal Takings Clause, the Federal government must compensate a state or local government for the taking of that entity's property. The established rule is that property not owned by the sovereign, the United States, is "private" as between the United States and any other entity, including a state or its political subdivisions. With the establishment of Home Rule, the same rationale applies between the SCDOT, the City and the County—any property not actually owned by SCDOT or the City, is "private" as it pertains to them, and if damaged by one or the other or both, the owner, whether a public or private person or entity, is entitled to just compensation. As South Carolina has consistently applied Federal Takings Clause jurisprudence, interpreting the South Carolina Constitution in a similar way to the Federal Constitution requires SCDOT and City compensate the County for the taking of its properties.

b. Georgetown County has a vested property right, which cannot be taken without just compensation.

In South Carolina, Georgetown County is a body politic and corporate and is specifically given the power to purchase and hold, for the use of the county, lands and personalty within its limits. S.C. Code Ann. § 4-1-10 (2). Lands conveyed to the County are property of the County. See S.C. Code Ann. § 4-17-10. It is well settled that the circuit courts, probate courts, family courts and magistrates' courts are the courts of justice in the State of South Carolina. S.C. Code. Ann. § 14-1-70. Additionally, South Carolina Counties are legally required to provide facilities and support personnel necessary to accommodate the circuit courts. 1975 S.C. Op. Atty. Gen. No. 4194, 1975 WL 22491.

In an early Wisconsin Supreme Court case, Town of Milwaukee v. City of Milwaukee, the court opined:

> In [the municipality's] capacity of owner of property, designed for its own, or the exclusive use and benefit of its inhabitants, its vested rights of property are no

> more the subject of legislative interference or control without the consent of the corporators, than those of a merely private corporation or person. Its rights of property, once acquired, though designed and used to aid in the discharge of its duties as a local government, are entirely distinct and separate from its powers as a political or municipal body...In its character of a political power, or local subdivision of government, it is a public corporation, but in its character of owner of property it is a private corporation, *possessing the same rights,* duties and privileges as any other.

12 Wis. 93, 100-101 (1860) (emphasis added).

The properties at issue in this case are not owned by the State of South Carolina, SCDOT or the City, but are owned by the County and are protected under the South Carolina Constitution. As recognized in Town of Milwaukee, the County, in its character as owner of property, possesses the same rights, duties and privileges as any other owner, including the right to just compensation if its properties are taken for a public use.

c. To hold the County's properties are not protected under the South Carolina Constitution would work an absurdity.

The circuit court correctly noted that *ordinarily*, if a statute (or constitutional provision) is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation, and the court has no right to look for or impose another meaning. Ray Bell Const. Co., Inc. v. School Dist. of Greenville County, 331 S.C. 19, 25-26, 501 S.E.2d 725, 729 (1998). However, the circuit court erred in failing to recognize that finding the County is not entitled to just compensation works an absurdity, and therefore the Framer's intention should control.

> All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. However plain the ordinary meaning of the words used in the statute may be, the courts will reject that meaning when to accept it would lead to a result so *plainly absurd* that it could not possibly have been intended by the Legislature [or Framers of the Constitution] or would defeat the plain legislative intention. If

possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Id. at 26, 501 S.E.2d at 729 (citations and emphasis in original omitted)(emphasis added). As stated by our Supreme Court, "[t]he purpose of the Takings Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Sea Cabins II at 429, 548 S.E.2d at 601.

In the context of a state constitution Takings Clause, one court has noted, that to hold a public entity is not entitled to compensation, "would lead *to a highly absurd,* and to the [plaintiff- public-entity], costly result. We cannot believe, for example that school buildings costing many thousands of dollars can be destroyed for highway purposes and yet the Legislature not have intended that the loss be paid to the [plaintiff-public-entity]." City of Chester at 394, 434 A.2d at 702 (emphasis added).

In order to give meaning to our Takings Clause's purpose, SCDOT and the City should bear the burden of the damages to the County's buildings. S.C. Const. art. I, § 13 must be construed to avoid the absurdity and injustice which would result if the County is forced to bear the burden of the damage caused by SCDOT and the City to its buildings. Further, SCDOT, an arm of the State, can spread this burden over the taxpayers of the entire State, not just the taxpayers of the County, for damages which the SCDOT, not the County, caused.

II. The circuit court erred in ruling that the County is not entitled to just compensation under the South Carolina Eminent Domain Procedure Act and the State Authorities Act.

In addition to the requirement under the South Carolina Constitution that if the County's property is taken for a public use the County must receive just compensation, the County is also entitled to just compensation under the South Carolina Eminent Domain Procedure Act. The

General Assembly has expressed its intention that *all* exercise of eminent domain power in South Carolina shall be through the Eminent Domain Procedure Act (the "Act"), S.C. Code Ann. § 28-2-10 *et. seq.* S.C. Code Ann. § 28-2-20. Under the Act, a condemnor may not take possession of the property to be condemned until receipt of written consent of the landowner or *payment of just compensation. See* S.C. Code Ann. § 28-2-90. The Act defines condemnee as a "person or other entity who has a record interest in or holds actual possession of property that is the subject of a condemnation action." S.C. Code Ann. § 28-2-30 (6). "Person" includes not only a natural individual, but also a public entity. S.C. Code Ann. § 28-2-30 (16). The County is therefore an express condemnee under the Act.

"Inverse condemnation is a cause of action by a property owner against a governmental entity to recover the value of property that has been effectively 'taken' by the governmental entity, although not through the process of eminent domain." Carolina Chloride, Inc. v. Richland County, 394 S.C. at 170, 714 S.E.2d at 977. "While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings." Hawkins v. City of Greenville, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004).

The County[6] has a record interest in all of the County's properties which are the subject of this lawsuit. (Amended Complaint ¶ ¶ 9-10, ROA p. 35). Therefore, in order to condemn the County's properties, SCDOT and City must have proceeded under the Act. Under the Act, the

[6] The County and SCAGO Public Facilities Corporation for Georgetown County each have an undivided record interest in the Judicial Center pursuant to that certain Base Lease and Conveyance Agreement dated December 1, 2009, recorded December 1, 2009 in the Register of Deeds for Georgetown County, South Carolina in Book 1383 at Page 253 and that certain Installment Purchase and Use Agreement dated December 1, 2009, recorded December 1, 2009, in the Register of Deeds for Georgetown County in Book 1383 at Page 277.

SCDOT and the City must pay just compensation. Otherwise, SCDOT and City are liable to the County in inverse condemnation.

In a case cited by the SCDOT, State et rel. State Highway Comm'n v. Board of Comm'rs of Dona Ana Cty., 72 N.M.86, 380 P.2d 830 (1963), the court, in applying the governmental-proprietary distinction, which does not apply in South Carolina, found that the county's buildings were not protected. However, the Board of Comm'rs of Dona Ana Cty. court determined that the New Mexico procedure for eminent domain required the payment of just compensation. Id. at 92-93, 380 P.2d at 835. It held the provisions in their statutes treated "the owners of public property no differently than the owners of private property in any respect, including specification of the proper measure of compensation for all property taken..." Id.; See also Sch. Dist. of Borough of Speers v. Com., 383 Pa. 206, 209, 117 A.2d 702, 703 (1955) (holding that where the act enabling a taking by eminent domain did not differentiate between "owners" and "private owners" the public school district was entitled to compensation).

In a similar case involving an action for inverse condemnation by a city against the State Highway Commission, the Supreme Court of Montana looked at the eminent domain statute, stating:

> It is important to note that the act shows that the legislature had in mind that necessity may require that property devoted to one public use may be taken from its public owner if it was required for a different and more necessary public use. But in spite of this awareness, it made no distinction between the method of taking public or private property. It is true that the statute does not state specifically whether compensation is to be paid to the public agency from which it is taken.
>
> From the language of the eminent domain statute, as well as upon the basis of its purpose and practical application, it is our conclusion that the legislature intended that public property should be taken and compensated for the same as if it had been taken from a private owner.

City of Three Forks, 156 Mont. at 395-96, 480 P.2d at 828 (citing State By and Through Road Comm'n v. Salt Lake City Public Board of Education, 13 Utah 2d 56, 368 P.2d 468, 469). The Court continued, "[w]e agree with the above quoted position that the legislature intended property held by a city, such as here, be only taken by the State after compensation is paid. This property was owned by the City of Three Forks and its citizens, not the State of Montana or the federal government." Id.

Likewise, the Act not only defines the County as a condemnee, it also treats all condemnees the same in determining the amount of compensation to which the condemnee is entitled. See generally S.C. Code Ann. § 28-2-10 *et. seq.*

The General Assembly has expressed its intention that all eminent domain power be exercised through the Act, including the payment of just compensation. It has provided that just compensation must be provided for the taking of any property, including public entities such as the County. SCDOT and the City cannot circumvent the Act and thereby avoid payment of just compensation. To allow SCDOT and the City to circumvent the Act would not only be contrary to the General Assembly's stated purpose of the Act, but would also work an absurdity if this Court also found that the County's properties are not protected under the Constitution. Just as in Bd. of Cty. Comm'rs of Dona Ana Cty., our General Assembly has expressed its intention that the County be compensated under the Act.

Because SCDOT and the City exercised the powers of eminent domain outside of the procedures provided in the Act, they are liable to the County for just compensation.

III. The circuit court erred in ruling that public policy does not require SCDOT and the City to pay just compensation to Georgetown County.

Public policy is derived from the established law of the state, as found in its Constitution, statutes and judicial decisions. See Grant v. Butt. 198 S.C. 298, 17 S.E.2d 689, 694 (1941). It is something that is "uncertain, fluctuating, varying, with the changing economic needs, social customs, and moral aspirations of a people." Weeks v. New York Life Ins. Co., 128 S.C. 223, 122 S.E.2d 586 (1924).

In Bd. of Comm'rs of Dona Ana Cty., a case heavily relied upon by SCDOT, the Court stated:

> We would add a word to the effect that any other conclusion might lead to most incongruous results. Whereas, property owned and used by political subdivisions of the state for governmental purposes is technically state property, under our system of government, each subdivision is made responsible for providing the facilities required by the particular subdivision through taxes or bond issues payable by the property owners of the subdivision. If the state can take a strip from the courthouse lot or the hospital lot, it can also take the court house building and the hospital building. Many such buildings are financed by the county through issuance of general obligation bonds repayable with the taxes levied against property in the county. If the state took buildings and did not compensate the county, replacement would have to be made through new bond issues or by other means which might be available to the subdivision. The burden would be intolerable or, possibly, even prohibited by debt limitations pertinent to the subdivision. Since the highways are state projects paid for by the public of the state at large, including in many instances contribution by the federal government, *it is only just and proper for compensation when public property is taken for highway purposes*...
>
> Under this construction of the statutes, *absurdity, hardship and injustice* are avoided and *the public interest* and convenience are favored. ***These are the results to be sought.***

Id., at 93, 380 P.2d at 835 (emphasis & bold added); See also Sch. Dist. of Borough of Speers, at 210; 117 A.2d at 704 (stating to hold that the School District was not entitled to compensation "would lead to a highly absurd and, to the district, costly results. We cannot believe, for

example, that school buildings costing many thousands of dollars can be destroyed for highway purposes and yet the Legislature not have intended that the loss be paid to the district.").

In the circuit court, the City contended that public policy does not apply to the County's claim against the City, "since the City taxpayers are a smaller subset of County taxpayers and to spread the burden to the City taxpayers would certainly not be spreading the burden a public as a whole greater than the County" (City's Brief in Opposition of Summary Judgment, p. 5, ROA p. 217). The Marin Court, addressing this same argument found two flaws:

> First, if adopted, it would make the availability of an inverse condemnation cause of action dependent on the relative sizes of the parties—that is, a smaller entity could bring such an action against a larger one, but not vice versa. Reason suggest that the law have a more uniform approach to the issue of whether public entities may state a cause of action in inverse condemnation. Second, the city's analysis overlooks a basic fairness argument. One public entity should not be allowed to take property belonging to another public entity without compensation. Funds collected by one public entity for one purpose should not be thus appropriated, disrupting that entity's finances. (See *State v. Salt Lake City Public Board of Education* (1962) 13 Utah 2d 56, 58-59, 368 P.2d 468, 470 [road authority must compensate school district for school it condemned.] Therefore, we are satisfied that the district stated a cause of action in inverse condemnation for unintentional physical damage to its property.

Marin, 202 Cal. App. 3d at 1165-66, 249 Cal. Rptr. at 472.

Even in cases where the governmental-proprietary distinction was applied, the courts have recognized the disastrous results which would stem from not requiring the payment of just compensation. Just as in New Mexico, under South Carolina law, the County is responsible for providing facilities, including the courthouse. These buildings are financed by the County through various financing arrangements, including through SCAGO Public Facilities Corporation for Georgetown County. Among other financing arrangements is the issuance of general obligation bonds. In the instant case, the Drainage Project was indeed paid through SCDOT, the City, and Federal financing and was for the purpose of relieving certain flooding on

US 17. It is only just and proper for SCDOT and the City to compensate the County for damages which were caused as a result of their Drainage Project. It is only under this construction of the Constitution that hardship, injustice and absurdity are avoided. To accomplish this result, this Court must construe the Constitution and/or the Eminent Domain Procedures Act to require the payment of just compensation for the taking of the County's properties by SCDOT and the City.

CONCLUSION

The circuit court erred in concluding the County could not maintain its inverse condemnation claims against SCDOT and the City. Accordingly, the circuit court's order dismissing those claims must be reversed and remanded to the circuit court for trial.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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APPENDIX "A" TO FINAL BRIEF OF APPELLANT, GEORGETOWN COUNTY, CONTAINING THE TAKINGS CLAUSES OF THE STATECONSTITITIONS OF:

CALIFORNIA

NEW JERSEY

MONTANA

WASHINGTON

PENNSYLVANIA

OREGON

ALABAMA

MISSISSSIPPI

CALIFORNIA
Cal. Const. Art. 1, § 19
Eminent domain; just compensation; prohibition on acquisition for conveyance to private person; exceptions

(a) Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

NEW JERSEY
N.J. Const. Art. 1, ¶ 20
Private property for public use

Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

MONTANA
Mont. Const. Art. 2, § 29
Eminent domain

Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

WASHINGTON
Wash. Const. Art. 1, § 16
Eminent Domain

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

PENNSYLVANIA
Pa. Const. Art. 1, § 10
Initiation of criminal proceedings; twice in jeopardy; eminent domain

Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

OREGON
Or. Const. Art. I, § 18
Private property or services taken for public use; just compensation

Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.

ALABAMA
Ala. Const. Art. I, § 23
Eminent domain.

That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association.

MISSISSIPPI
Miss. Const. Art. 3, § 17
Taking property for public use; due compensation

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

MISSISSIPPI
Miss. 1832 Const. Art. 1, § 13[1]

No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall any person's property be taken or applied to public use without the consent of the legislature, and without just compensation being first made thereof.

[1] This is Mississippi's takings clause in effect at the time Donnaher v. State, 16 Miss. 649 (Miss. Er. & App. 1847), was decided, Donnaher being cited by the County in its Initial Brief at page 7. Miss. Const. Art. 3, § 17, is the Mississippi takings clause presently in effect.

CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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