THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2016-000594
Case No. 2010-CP-26-7961

South Carolina Department of Transportation ..... Respondent,

vs.

David Franklin Powell ..... Petitioner,

Respondent's Petition for Rehearing

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August 22, 2018

INTRODUCTION

The Supreme Court issued Opinion Number 27827 in this condemnation matter on August 8, 2018. In its decision, the Court reversed the Court of Appeals based upon a determination that South Carolina's direct condemnation just compensation statute, South Carolina Code section 28-2-370, "by its plain language entitles a landowner to compensation for *any* diminution in value to the remaining property as a result of the taking." S.C. Dep't of Transportation v. Powell, Op. No. 27827 (S.C. filed Aug. 8, 2018) (Adv. Sh. No. 32 at 18, fn.4). The Respondent, South Carolina Department of Transportation ("the Department"), respectfully petitions the Court for a rehearing and reconsideration of its opinion on the grounds set forth below.

GROUNDS FOR PETITION

I. The Court has overlooked or misapprehended the legislative intent of the South Carolina Eminent Domain Procedure Act

Respectfully, the Court has overlooked or misapprehended the General Assembly's express legislative intent in enacting the South Carolina Eminent Domain Procedure Act (Act No. 173 of 1987) ("the Act").

> This act amends the law of this State relating to procedures for acquisitions of property and to the exercise of the power of eminent domain. It is the intention of the General Assembly that this act is designed to create a uniform procedure for all exercise of eminent domain power in this State. *It is not intended by the creation of this act to alter the substantive law of condemnation, and any uncertainty as to construction which might arise must be resolved in a manner consistent with this declaration.* In the event of conflict between this act and any other law with respect to any subject governed by this act, this act shall prevail.

S.C. Code Ann. § 28-2-20 (emphasis added).

Accordingly, the Act expressly states that its various provisions addressing the substantive law of condemnation are intended merely to touch upon the general principles of

substantive law that had been established and elaborated in greater detail by the Court's jurisprudence over the course of decades. In other words, while the Act substantially modified procedural law,[1] the prior substantive law of eminent domain continued in full force on and after March 30, 1988, the effective date of the Act.

The Court's opinion applies section 28-2-370 without reference to this express legislative intent. That section provides that,

> In determining just compensation, only the value of the property to be taken, *any diminution in the value of the landowner's remaining property*, and any benefits as provided in § 28-2-360 may be considered.

S.C. Code Ann. § 28-2-370 (emphasis added.)

As the Court explains its reasoning, "[e]mploying the clear language of our just compensation statute, we hold that a jury should be permitted to hear evidence on the diminution in value to the remaining property." Powell at 19. The Court determined that "section 28-2-370 controls, and the lone question is the amount of compensation which may be awarded to Powell. That statute explicitly authorizes compensation for 'any diminution in value to the remaining property'." Id. at 16. The Court further explained that "section 28-2-370 . . . by its plain language entitles a landowner to compensation for *any* diminution in value to the remaining property as a result of the taking . . . once it is established that a taking has occurred, the unambiguous words of the statute allow a jury to consider whether and to what extent the property's value has been diminished." Id. at 18, fn.4.

In other words, the Court appears to construe section 28-2-370 to require compensation for any diminution in value proximately caused by the overall project, regardless of whether the

[1] "Until the enactment of a uniform Eminent Domain Procedure Act, a variety of special rules and procedures existed, each applicable to a specific type of governmental entity." 18 S.C. Jur. Eminent Domain § 1.

actual physical acquisition was undertaken for the purpose of implementing the project component causing the diminution. This approach constitutes a significant departure from the Court's pre-Act case law, including S.C. State Highway Dep't v. Bolt, 242 S.C. 411, 131 S.E.2d 264 (1963), and S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970).

In Bolt, the Court explained that "[t]he special damages referred to in the above statutes relate to injury or damage to the remainder of the property from which a portion is taken. They would include any damage or any decrease in actual value of the remainder of the landowner's property *which are the direct and proximate consequence of the acquisition of the right of way.*" 242 S.C. at 417, 131 S.E.2d at 266–67 (applying § 33-135 of the 1962 Code of Laws) (emphasis added). Likewise, in Wilson, this Court cited with approval the above quoted language from Bolt and, in further reliance on that case, reaffirmed the rule that "the inquiry is, how much has the particular public improvement decreased the fair market value of the property, taking into consideration *the use for which the land was taken* and all the reasonably probable effects of its devotion to *that use*." 254 S.C. at 369, 175 S.E.2d at 396 (quoting Bolt, supra) (emphasis added). While it is true that, as noted in the Court's opinion in this case, Bolt involved application of a prior code section, section 33-135 of the 1962 Code of Laws, it is important to consider that Wilson also involved that same statute. See Wilson at 367, 175 S.E.2d at 395. Accordingly, Bolt and Wilson are properly read together as applying consistent substantive legal principles.

The common thread running through Bolt and Wilson is the requirement that compensable damage must be the direct and proximate consequence of the acquisition of the right of way, taking into consideration the use for which the land was taken and the effects of its devotion to that use. This standard emphasizes that it is the acquisition and the use to which it is put, and not separate elements of the overall project, that are the causal agents giving rise to

compensable damages. As the Court explains, Wilson was decided "under the rationale that but for the direct taking, no loss of access to the abutting roadway would have occurred." Powell at 14. In other words, the relevant question is whether the acquisition was necessary for, or for the purpose of, the component of the project claimed to cause damage.[2]

In this manner, South Carolina law is essentially consistent with the jurisprudence of the federal courts and the substantial majority of other states. See, e.g., Campbell v. United States, 266 U.S. 368, 372 (1924) ("The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking"); West Virginia Pulp & Paper v. United States, 200 F.2d 100 (4th Cir., 1952); United States v. Pope & Talbot, 293 F.2d 822 (9th Cir., 1961); Dimond D Properties v. Alaska DOT, 806 P.2d 843 (Alaska 1991); Simon v. Dep't of Transp., 265 S.E.2d 777 (Ga. 1980); Griffith v. Montgomery County, 470 A.2d 840 (Md. App. 1984).

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[2] In this posture, "necessary" and "for the purpose of" are equivalent, because by the very act of condemning property the government asserts that the acquisition is reasonably necessary for a specific public use. "The delegation of the right to exercise that power carries with it the implied condition that it shall be exercised only to the extent found necessary. . . . Necessity does not mean an absolute but only a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and the property owner consistent with each benefit." Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 388–89, 175 S.E.2d 805, 810 (1970). See also Greenwood Cty. v. Watkins, 196 S.C. 51, 12 S.E.2d 545, 549 (1940) ("It is not disputed that Greenwood County, in condemning this particular land, deemed it necessary to acquire the fee."); Haig v. Wateree Power Co., 119 S.C. 319, 112 S.E. 55, 57 (1922) ("That right is based upon the theory that when the state originally granted lands to individuals the grant was made under the implied condition that the state might resume dominion over the property whenever the interest of the public or welfare of the state made it necessary.").

To the extent that the Court holds that section 28-2-370 "explicitly authorizes compensation for 'any diminution in value to the remaining property,' and [there is] no reason why a jury should not decide the extent of Powell's damages" (Id. at 16,) it overlooks the express intention of the General Assembly that the statute would continue, and not abrogate, modify, restrict, or expand, the substantive legal principles set forth in Bolt, Wilson, and other applicable case law.

II. The Court has overlooked or misapprehended the effect of its significant alteration of the substantive law of compensable damages in direct condemnation actions

The Department maintains that the only factual conclusion to be drawn from the record is that the acquisition of Petitioner's property was not necessary for, and was not for the purpose of, installation of a cul-de-sac on Emory Road or the closing of the intersection of Emory Road and US 17, and that therefore the trial court's grant of summary judgment, affirmed by the Court of Appeals, was proper. Nevertheless, the Court could hold, consistent with Bolt, Wilson, and the long established "substantive law of condemnation", § 28-2-20, that the compensability of any diminution in value resulting from the cul-de-sac installation and intersection closure is dependent upon the factual question of whether the acquisition of Petitioner's property was necessary for, or for the purpose of, those components of the overall project, but still arrive at the same result of reversing the Court of Appeals by holding that the record presents a question of fact on those issues.

This approach, while allowing the parties an opportunity to present evidence regarding the facts of this specific case, would simultaneously continue a condemnation jurisprudence that "possesses the virtues of clarity, ease of implementation, and ability to serve as a guide for future conduct." Babb v. Lee Cty. Landfill SC, LLC, 405 S.C. 129, 151, 747 S.E.2d 468, 480 (2013)

(adopting the "dimensional test" in trespass actions). These considerations are particularly important in the context of public acquisitions, which only move forward to costly litigation after failure of the condemnor and landowner's "reasonable and diligent efforts to negotiate an agreement upon the amount of compensation to be paid". S.C. Code Ann. § 28-2-70(B).

On the other hand, the Court's focus on whether the acquisition and cul-de-sac installation were "integrally connected components of the project," Powell at 19, appears to put litigants in the position of having to argue to a *jury* whether the facts of a given case are less like Wilson than, for example, S.C. State Highway Dep't v. Carodale Assocs., 268 S.C. 556, 235 S.E.2d 127 (1977), or vice versa. Respectfully, this approach risks development of an unwieldy doctrinal complexity analogous to that which arose from the United States Supreme Court's original formulation that a regulatory taking occurs where "regulation goes too far," Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)[3], with the added difficulty that, unlike the judicial determination of "essential nexus" and "rough proportionality" in a regulatory takings case, "integral connection" would be a question for the jury.[4]

CONCLUSION

For the foregoing reasons, the Respondent South Carolina Department of Transportation respectfully petitions the Court to rehear and reconsider its Opinion and affirm the decisions of the Court of Appeals and the Circuit Court.

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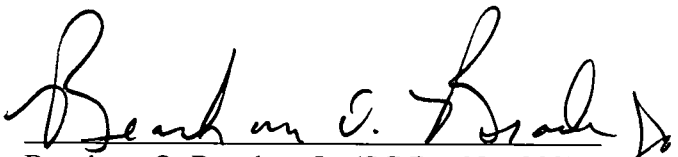
[3] "Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." Nollan v. California Coastal Comm'n, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

[4] *Cf., e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (discussing judicial analysis of whether a regulatory exaction taking has occurred based on a conditional land use approval's lack of an "essential nexus" or "rough proportionality").

Respectfully submitted,



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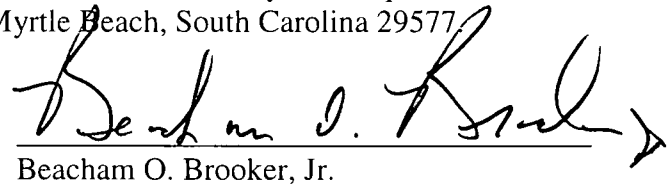
Proof of Service

I certify that I have served one copy of RESPONDENT'S PETITION FOR REHEARING on Petitioner's counsel by depositing it in the United States Mail, postage prepaid, on November 15, 2017, addressed to Howell V. Bellamy, Jr., Esq., and Robert S. Shelton, Esq., at 1000 29th Avenue North, Myrtle Beach, South Carolina 29577.



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