THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Edward B. Cottingham, Circuit Court Judge

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Case No. 2010-CP-26-07961

Appellate Case No. 2016-000594

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

v.

David Franklin Powell..........................................................................................*Petitioner.*

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# PETITIONER'S RETURN TO MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF BY THE SOUTH CAROLINA ASSOCIATION OF COUNTIES

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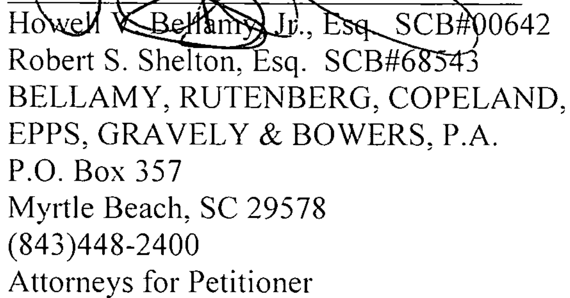
The Supreme Court issued Opinion Number 27827 in this condemnation matter, which was initiated with the filing of the Condemnation Notice by the South Carolina Department of Transportation ("Condemnor"). S.C. Dep't of Transportation v. Powell (S.C. filed August 8, 2018) (Adv. Sh. No. 32). In its decision, the Court reversed the holding of the Court of Appeals and concluded Petitioner David Franklin Powell ("Mr. Powell") was entitled to be paid the diminution in value to his remaining land following the taking of a portion of his property by Condemnor to facilitate the construction of the "Interchange at US 17 Bypass and SC 707/Farrow Parkway" ("Project"). Condemnor filed a Petition for Rehearing August 22, 2018. In keeping with the clear and unambiguous language of South Carolina Code section 28-2-370[1], Petitioner has filed a Return to Condemnor's Petition respectfully requesting the Petition be denied, and Mr. Powell be given the opportunity to present the facts of this matter to a jury such that the just compensation to which he has been constitutionally entitled since the August 27, 2010 filing of this matter may be determined. A copy of Petitioner's Return is attached hereto and incorporated herein by reference as Exhibit A. On August 23, 2018, the South Carolina Association of Counties (the "Association") filed a Motion for Leave to file an *Amicus Curiae* Brief. Petitioner respectfully requests the Counties' Motion be denied.

In opposition to the Motion of the Association, Petitioner points to the Record before the Court. Specifically, as confirmed by Condemnor's Rule 30(b)(6) SCRCP witness Michael Barbee, the acquisition from Mr. Powell is part of a project is being funded with an Horry County one-cent sales tax as part of the Ride on a Penny referendum approved by Horry County voters. (R.p. 304-305) Condemnor South Carolina Department of Transportation has from the onset of this matter

[1] S.C. Code § 28-2-370 provides: "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."

been representing the interests of Horry County, the entity which is funding the Project. Horry County's position, having been fully briefed and argued throughout the pendency of this matter, is well-known to the court. Condemnor, on behalf of Horry County (a member of the Association) has raised the very arguments the Association now seeks to advance. As such, the Association's position is fully before the Court in the Petition for Rehearing and addition of the Association is both unnecessary and cumulative. Petitioner relies on the arguments set forth herein and within Exhibit A in respectfully requesting the Association's Motion be denied.

Respectfully submitted,



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Dated: August 28, 2018

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## PROOF OF SERVICE

I certify that I have served the **Petitioner's Return to Motion for Leave to File an *Amicus Curiae* Brief by the South Carolina Association of Counties** in the above-captioned matter on the following individuals by depositing a copy in the United States Mail, with sufficient first-class postage affixed, addressed as follows:

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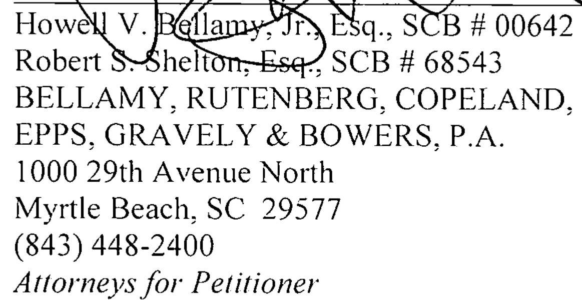

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August 28, 2018

# EXHIBIT A

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**PETITIONER'S RETURN TO RESPONDENT'S PETITION FOR REHEARING**

---

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## INTRODUCTION

The Supreme Court issued Opinion Number 27827 in this condemnation matter, which was initiated with the filing of the Condemnation Notice by the South Carolina Department of Transportation ("Condemnor"). S.C. Dep't of Transportation v. Powell (S.C. filed August 8, 2018) (Adv. Sh. No. 32). In its decision, the Court reversed the holding of the Court of Appeals and concluded Petitioner David Franklin Powell ("Mr. Powell") was entitled to be paid the diminution in value to his remaining land following the taking of a portion of his property by Condemnor to facilitate the construction of the "Interchange at US 17 Bypass and SC 707/Farrow Parkway" ("Project"). Condemnor filed a Petition for Rehearing August 22, 2018. In keeping with the clear and unambiguous language of South Carolina Code section 28-2-370[1], Petitioner respectfully requests Condemnor's Petition be denied, and Mr. Powell be given the opportunity to present the facts of this matter to a jury such that the just compensation to which he has been constitutionally entitled since the August 27, 2010 filing of this matter may be determined.

## STANDARD FOR REHEARING

Condemnor asserts the Court overlooked or misapprehended the legislative intent of the South Carolina Eminent Domain Procedure Act[2] as well as the "substantive law of compensable damages in direct condemnation actions."[3] This Court has explained the proper consideration to be given Petitions for Rehearing: "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Kennedy v.

[1] S.C. Code § 28-2-370 provides: "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."

[2] South Carolina Code Ann. Section 28-2-10, *et seq*

[3] Petition, Pp 1 and 5.

S.C. Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, Appellate Practice in South Carolina 309 (1999)). As did the Appellants in Kennedy, Condemnor "has had the opportunity to present [its] arguments and evidence" before the trial court below, to the Court of Appeals, and the Court. Id at 532.

Also as in Kennedy, this matter involves an assertion, for the first time, of inconsistency with legislative intent of a statute. That assertion in Kennedy was deemed unworthy of consideration by the Court which stated:

> Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule." Jean H. Toal, Shahin Vafai & Robert Muckenfriss, *Appellate Practice in South Carolina* 309 (1999) at 65. The appellants have the responsibility to identify errors on appeal, not the Court. South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal. See Butler v. Town of Edgefield, 328 S.C. 238, 493 S.E.2d 838 (1997). We, therefore, decline to depart from our standard issue preservation rules in order to address the longevity raises issue as the dissent suggests. As Chief Judge Alex Sanders so aptly stated, "Appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991).
>
> Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532-533, 564 S.E.2d 322, 322-323

## GROUNDS FOR DENIAL OF PETITION

1. **The Court's ruling is consistent with the legislative intent of the South Carolina Eminent Domain Procedure Act and properly applies the substantive law of compensable damages in direct condemnation actions**

The intent of the General Assembly stated in the South Carolina Eminent Domain Procedure Act is as follows:

> This act amends the law of this State relating to procedures for acquisitions of property and 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.

South Carolina Code Ann. Section 28-2-20.

Condemnor asserts the Court has misapprehended this language to impact the substantive, rather than procedural, law of eminent domain in South Carolina. Condemnor argues the substantive law at the time of the implementation of the Act is to determine "whether the acquisition was necessary for, or for the purpose of, the component of the project claimed to cause damage." Petition, Page 4.

Condemnor argues the Powell Court significantly departed from "Court's pre-Act case law" and cites S.C. Highway Dep't v. Bolt, 242 S.C. 411, 131 S.E.2d 264 (1963) and S.C. Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970) in support of its proposition. Petition, P 3. Bolt involved the acquisition of a swath of land through a tract owned by James W. Bolt ("Mr. Bolt"). Upon the acquired swath of Mr. Bolt's property, the Highway Department intended to construct a portion of U.S. Highway I-385. Mr. Bolt argued the highway would bring vehicular traffic through his remaining tract. Mr. Bolt further argued this traffic, in turn, would cause noise. Because Mr. Bolt maintained chicken houses on his tract, Mr. Bolt argued the traffic noise would "so adversely affect the productivity of the chickens as to completely destroy his commercial egg business." Bolt at 415. While the Court properly denied Mr. Bolt damages from loss of business income, the Court nonetheless concluded the reduction in egg production could be argued to result in a diminution in the value of Mr. Bolt's remaining property and permitted Mr. Bolt to present evidence of such diminution in value. It cannot be said the Highway Department constructed I-385 for the purpose of reducing the number of eggs Mr. Bolt's hens laid. Yet, the Court recognized

that reduction, and its attendant negative impact on the value of Mr. Bolt's remaining property, was a consequence of the public improvement, citing 18 Am.Jur 905, Section 265 as follows:

> Where part of a parcel is taken by eminent domain, the owner is not restricted to compensation for the land actually taken; he is also entitled to recover for the damage to his remaining land. In other words, he is entitled to full compensation for the taking of his land and all its consequences; and the right to recover for the damage to his remaining land is not based upon the theory that damage to such land constitutes a taking of it; nor is there any requirement that the damage be special and peculiar, or such as would be actionable at common law; it is enough that it is a consequence of the taking. The entire parcel is considered as a whole, and 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.

Likewise, in Wilson, Gertrude B. Wilson ("Mrs. Wilson") complained of a reduction in her property value due to the construction of a highway median separating northbound and southbound traffic, such that traffic entering and exiting the Highway would be limited to right-turn ingress and egress, and Mrs. Wilson would only be able to access a substantial portion of her property via a roadway being constructed as part of the highway project for which her land was taken. The Court permitted Mrs. Wilson to present evidence of and the jury to award damages resulting from the diminution in value of her remaining property. As with Mr. Bolt, the purpose of the project was to improve the highway system, not to impede Mrs. Wilson or damage her property. Moreover, the Highway Department could have constructed the median, or placed a similar barrier, within its existing right-of-way limiting left turns without taking any of Mrs. Wilson's land. Had the Highway Department done so, Mrs. Wilson would have been required to meet the test now asserted by Condemnor in order to prove a taking had occurred.

However, in Wilson, the Highway Department had filed a condemnation action against Mrs. Wilson, so the matter had already crossed the threshold of the court. As such, the Court relied upon the same language from American Jurisprudence as the Court in Bolt, and explained Mrs.

Wilson was entitled to recover the diminution in value to her remaining property, finding she would not have incurred that loss in property value "[b]ut for such overall construction and relocation, and condemnation under the power of eminent domain for such purposes…" Wilson at 369. The Court identified the damage to the Wilson property as "an incidental result of the exercise of the power of eminent domain." Id. Likewise, the Powell Court correctly held Mr. Powell is entitled to present evidence of the diminution in value to his remaining property as a result of the exercise of the power of eminent domain by Condemnor as part of the overall construction of the "Interchange at US 17 Bypass and SC 707/Farrow Parkway" (the "Project"). (R. Pp. 16, 117)

In Powell, while the closure of the intersection at Highway 17 Bypass and Emory Road as well as the construction of the cul-de-sac terminating Old Socastee Road, with nothing more, may be an exercise of Condemnor's police power with no resulting compensable damage to Mr. Powell, the proposed closure of the intersection and the construction of the cul-de-sac are only incidental parts of the overall Department plans and contemplated construction. As the Wilson court explained:

> While the construction of a median, with nothing more, may very well be an exercise of the police power with no resulting compensable damage to an abutting property owner, in the instant case the proposed median is only an incidental part of the overall Department plans and contemplated construction. There is no suggestion of the need for, or the contemplated construction of, a median except as an incidental part of the major relocation and construction plans of the Department. But for such overall construction and relocation, and condemnation under the power of eminent domain for such purposes, there would have been no median and, of course, no damage to the abutting landowner. It logically follows, we think that any damage attributable to the planned median is an incidental result of the exercise of the power of eminent domain, and under these circumstances we know of no sound reason for departing from the established rule in this State, which is as follows:
>
> "The entire parcel is considered as a whole, and 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."[4]

This is the standard the Act envisions by its clear language, and this is the standard applied by the appraiser engaged by Condemnor, Corbin Haskell, who found Mr. Powell's remaining property had suffered a diminution in fair market value of Fifty percent as a result of the condemnation.[5]

As explained in Nichols on Eminent Domain, "[i]n considering the effect of the taking on the remainder, the after value must take into account the proposed use of the project and the effect of that use on the remainder. The landowner is entitled to assume, in the condemnation suit, that the taking authority will make the full use "physically possible of any easement or land described in the taking certificate." This is because the owner is to be put in as good position pecuniarily as he or she would have occupied had the owner's property not been taken. Damages to the remainder that are to be reasonably anticipated from use of the property for the purpose for which the condemnation is made are relevant in determining the compensation to be awarded for the taking." 4A Nichols § 14A.02 (2018), citing United States v. Dickinson, 331 U.S. 745, 749–750, 67 S. Ct. 1382, 91 L. Ed. 1789 (1947).

Here, the Eminent Domain Procedure Act, at § 28-2-280(C)(6), requires the Condemnation Notice "specify a location within the county where the property to be taken is situated at which the landowner may inspect the project plans," rather than merely a description of the land taken. As such, all of the impacts to Mr. Powell's fair market value arising from the project depicted

[4] S. Carolina State Highway Dep't v. Wilson, 254 S.C. 360, 368-69, 175 S.E.2d 391, 396 (1970). Quoting South Carolina State Highway Dept. v. Bolt, 242 S.C. 411, 417, 131 S.E.2d 264 (1963).

[5] Condemnor's appraiser Haskell testified that, left to his professional opinion of fair market value, rather than instruction from Condemnor's counsel limiting compensable impacts to Mr. Powell's property, the Interchange project changed the highest and best use of the property and, as a result of the closure of access to Highway 17 and the installation of the cul de sac, Mr. Powell's remaining property had suffered a diminution in fair market value of $446,000.00, which brought the total just compensation due Mr. Powell to $517,000.00, rather than the $72,000.00 Condemnor tendered for the area taken without regard to impacts to the remainder. R. Pp. 275-286.

within the plans are admissible evidence for the factfinder's consideration in awarding just compensation. The Powell Court properly applied these established principles as well as the plain text of the Act, § 28-2-370. Thus, Condemnor's Petition for Rehearing should be denied.

2. **The Court properly applied the substantive law of condemnation and the Eminent Domain Procedure Act**

Condemnor also asserts the Court should adopt a new test, leaving as a separate inquiry for the factfinder the determination of whether condemnees are entitled to compensation for any particular diminution in value to their remaining property. Such a bifurcation of eminent domain trials is neither necessary nor practical. Unlike nuisance cases prior to Babb v. Lee City Landfill SC, LLC, 405 S.C. 129, 747 S.E. 2d 468 (2013), the test to be applied in condemnation trials in South Carolina is already clear and easily applied, as was accomplished by the Court in Powell.

As in Wilson, it is undisputed the Department of Transportation in Powell exercised to the detriment of Mr. Powell its constitutional power of eminent domain.[6] The test suggested by Condemnor would place upon the factfinder the burden borne by the judiciary in determining whether plaintiffs have stated a claim for which relief can be granted in inverse condemnation actions. Mr. Powell did not bring a lawsuit against the Department of Transportation, and, as such,

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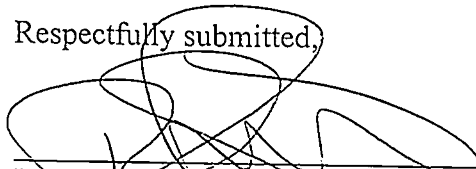
[6] The Condemnation Notice and commensurately-filed documents are in the form provided in South Carolina Code Section 28-2-280 and contain the following express references to the Eminent Domain Procedure Act:

- CONDEMNATION NOTICE, Preamble: "Pursuant to the South Carolina Eminent Domain Procedure Act, Section 28-2-10, et seq., Code of Laws of South Carolina, 1976, as amended, you are hereby notified as follows: ..."
- CONDEMNATION NOTICE, Paragraph 4: "The SCDOT is vested with the power of eminent domain pursuant to Section 57-5-320 and Section 28-2-60, Code of Laws of South Carolina..."
- CONDEMNATION NOTICE, Paragraph 6: "This action is brought pursuant to Section 28-2-240, Code of Laws of South Carolina..."
- CONDEMNATION NOTICE, Paragraph 7: "The SCDOT has complied with the requirements set forth in Section 28-2-70(a)..."
- SUMMONS: "YOU ARE HEREBY SUMMONED, advised and notified, that pursuant to the South Carolina Eminent Domain Procedures (*sic*) Act, Section 28-2-10..."
- LIS PENDENS: "NOTICE IS HEREBY GIVEN that the Condemnor above named pursuant to the South Carolina Eminent Domain Procedures (*sic*) Act..."
- NOTICE OF FILING: "Pursuant to the South Carolina Eminent Domain Procedure Act, Section 28-2-230(b) et. seq., ... pursuant to Section 28-2-90..."

does not bear the burden of proving his entitlement to his day in court. As the Court correctly held, the question of whether a particular element of diminution in value to Mr. Powell's property is recoverable is already in the hands of the factfinder. Powell at 16. Just as Condemnor bears the burden of proving benefits, where present, landowners in condemnation actions, bear the burden of proving "any diminution in the value" of their remaining property. S.C. Code Ann. 28-2-370 (1987); 5 Nichols on Eminent Domain § 18.02 (2018).

"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. Section 28-2-370. This statement of admissible evidence clearly sets forth an easily applicable test for the trial of these matters. Mr. Powell is entitled to present his evidence to the factfinder. As such, Condemnor's Petition should be denied.

Respectfully submitted,



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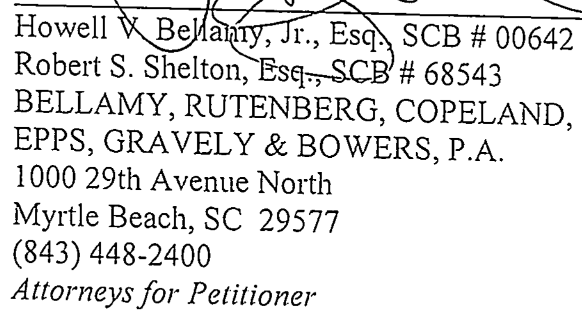

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