

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
COURT OF COMMON PLEAS

LARRY B. HYMAN, JR., CIRCUIT COURT JUDGE

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

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SC Court of Appeals

County of Georgetown, ... Appellant,

v.

Davis & Floyd, Inc., Republic Contracting Corp., 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

AMICUS CURIAE BRIEF OF THE
SOUTH CAROLINA ASSOCIATION OF COUNTIES

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INTERESTS OF AMICUS CURIAE

The South Carolina Association of Counties (Association) represents the interests of each of South Carolina's forty-six counties. The South Carolina General Assembly granted the counties the specific power to own and otherwise control real property. S.C. Code Ann. §4-9-30(2). The circuit court's finding that the South Carolina and United States Constitutions provide no protection from the State's unfettered ability to damage, destroy or seize county owned property works an absurdity that essentially nullifies the constitutional and statutory enactment of local government "home rule".

The Association supports Georgetown County's position that the county's real property is protected from inverse condemnation or taking by the Constitutions of the State and the United States.

Pursuant to Rule 213, SCACR, the Association respectfully submits this brief in support of Appellant Georgetown County, and asks that this Court to reverse the circuit court's dismissal of the County of Georgetown's claims.

STATEMENT OF ISSUES ON APPEAL

The Association respectfully adopts the Statement of Issues on Appeal as presented by the Appellant, Georgetown County in its Initial Brief of May 2017.

The fact that this Association did not comment on all issues before this Court should not be inferred to mean anything less than complete, across the board support for Georgetown County in this case. It reflects a conscious decision to concentrate on the most serious issues important to the membership of the Association, and those issues where the Association may provide this court with the unique insight of its members.

STATEMENT OF THE CASE

The Association respectfully adopts the Statement of the Case as presented by the Appellant, Georgetown County in its Initial Brief of May 2017.

ARGUMENT

The circuit court erred in ruling Georgetown County is not entitled to just compensation under the South Carolina Constitution, United States Constitution or the South Carolina Eminent Domain Procedures Act.

At first glance the issue in this case is whether in South Carolina, one governmental entity such as the County, may maintain an inverse condemnation claim against another governmental entity, such as SCDOT and the City. On this issue this is a case of first impression as no South Carolina appellate court has been forced to deal with it. Conversely, no appellate court has held that a governmental entity is barred from asserting an inverse condemnation claim against another governmental entity. Ultimately however, the deeper issue in this case is the determination of whether South Carolina will fully recognize county government's constitutionally granted right to "home rule," or whether the state and its various agencies may nullify entire constitutional provisions.

A. The South Carolina Constitution Protects County Owned Property Against Taking of Private Property Without Just Compensation.

Article I, § 13 of the South Carolina Constitution 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...

Additionally, Article VIII, § 7 provides the following related to the powers and authority of counties:

The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided. Alternate forms of government, not to exceed five, shall be established. No laws for a specific county shall be enacted and no county shall be exempted from the

general laws or laws applicable to the selected alternative form of government.

Prior to the successful 1972 amendment to the state constitution, the operation of local government was in the hands of the General Assembly. That is not the case today. County government is no longer in the hands of the General Assembly. *Hospitality Ass'n of S.C., Inc. v. County of Charleston*, 320 S.C. 219, 224, 464 S.E.2d 113 (1995). The court in *Hospitality Ass'n* took some lengths to outline the legislative history involved with the creation of local government "home rule":

For generations, legislative delegations of the General Assembly controlled virtually every aspect of local government in South Carolina. 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 the summer of 1969 the West Committee unanimously recommended amending the state constitution to place the management of county government in the hands of locally elected officials. The General Assembly, after three years of debate, placed a referendum question amending Article VIII of the Constitution on the ballot for the 1972 general election. See Act No. 1631, 1972 S.C. Acts 3184. Following the successful referendum vote, the General Assembly ratified the amendment. See Act No. 63, 1973 S.C. Acts 67.

The newly ratified 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. Importantly for the state's local governments, the 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, the 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. *Hospitality Ass'n* at 224-226, 464 S.E.2d at 117-18. As a consequence of South Carolina's movement to local government "home rule" the General Assembly enacted Chapter 9 of Title 4 of the S.C. Code. This chapter outlined the powers and authority granted to counties pursuant to the newly amended Art. VIII. 1975 Act No. 283, 1975 Acts 695. Among the express powers granted to counties in the "home rule" Act was the specific power "to acquire real property by purchase or gift; to lease, sell or otherwise dispose of real and personal property; and to acquire tangible personal property and supplies." See S.C. Code Ann. § 4-9-30(2). The property language in the "home rule" Act does not limit the bundle of rights counties possess as owners.

SCDOT and the City have failed to point to any constitutional or statutory provision that expressly denies counties the right to protection from the taking of county property. In their briefs to the circuit court, SCDOT and the City relied upon a more than 100 year old case, *Edgefield County v. Georgia-Carolina Power Co.*, 104 S.C. 311, 88 S.E. 801 (1916), to support their propositions that "public property" does not fall within the protection of the Constitution. Their respective reliance on that case was in error. *Edgefield County* involved a suit for damages brought by Edgefield County against a utility company that had been legislatively granted the power of condemnation. The court in that case stated,:

That which the state has set apart for one public purpose the state may dedicate to another and higher public purpose... 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. Emphasis added.

As the court noted, “under the Constitution and laws of the state, the state had absolute control over the government of counties. Id. At the time *Edgefield County* was decided, public property belonged to the State. Counties at that time did not have the constitutional or statutory power to own their own property. This is no longer the case today. Unlike 1916 when *Edgefield County* was decided, the General Assembly, under the direction of Article VIII of the Constitution, has today granted the counties the express right to own property separate and apart from the State. The State does not exercise control over county properties. Further, the General Assembly has not expressly subjected the Georgetown County Judicial Center to “another or higher purpose.” The taking of the property was through ordinary negligence in the performance of an infrastructure project carried out by SCDOT and the City.

Edgefield County was decided in a by-gone era when the State controlled the operation of counties. Further, it should also be noted that *Edgefield County* was not decided on Constitutional grounds. Any indication in the opinion that a county’s property are not protected by the Constitution should be considered non-binding dicta. Finally, due to the amended Article VIII of the Constitution and the statutory implementation of “home rule” 60 years after *Edgefield County* was decided, that opinion is of no significance to the present case.

The Association’s position on the issue of property rights for local government is not unique. A number of other states have concluded that where the state or a political subdivision

takes property belonging to another political subdivision, just compensation must be paid. A brief overview of the major decisions from other states is provided below:

- **Alabama:** *State ex. rel. Ala. State Docks Dept. v. Atkins*, 439 So.2d 128 (Ala. 1983) The court in this case held that Mobile County was entitled to compensation for the taking of its roadway by the State of Alabama.
- **California:** *Marin Mun. Water Dist. v. City of Mill Valley*, 202 Cal. App. 3d 1161, 249 Cal. Rptr. 469 (1988) In this case the California Court of Appeals held that a public water district's property was protected by the California state constitution.
- **Montana:** *City of Three Forks v. State Highway Comm'n*, 156 Mont. 392, 480 P.2d 826 (1971) The court here held the subject 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.
- **New Jersey:** *State ex. rel. State Highway Comm'r v. Cooper*, 24 N.J. 261, 131 A.2d 756 (1957) The court impliedly overruled 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..."
- **Oregon:** *Brusco Towboat Co. v. State By & Through Straub*, 31 Or.App. 491, 493, 570 P.2d 996, 998 (1977) (en banc) In this case the court held that two government entities are nevertheless distinct from the state and accordingly, they are protected against taking by the state without payment of just compensation.
- **Pennsylvania:** *City of Chester v. Com., Dept. of Transp.*, 495 Pa. 382, 434 A.2d 695 (1981) The court in this case held that the Pennsylvania Constitution did not allow the

Commonwealth to escape its financial obligation owed to a local government condemnee for property taken.

- **Washington:** *Highline Sch. Dist. No. 401, King Cty. v. Port of Seattle*, 87 Wash. 2d 6, 548 P.2d 1085 (1976) (en banc) In this case the court reversed a grant of summary judgment on inverse condemnation against a condemnee school district and stated that where a condemnee governmental unit must furnish services which require use of the property taken, just compensation must be paid.

The California case is most similar to the facts of the instant case. In *Marin*, just as here with Georgetown County, the City of Mill Valley caused unintentional physical damage to the Marin Municipal Water District's property. The California court stated:

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 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.

Marin at 1165, 249 Cal. Rptr at 471.

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.

B. 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's courts have traditionally embraced federal takings jurisprudence as

providing the basis under which they analyze whether an interference with a property interest amounts to a constitutional taking. See *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)). 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.

The United States Supreme Court has previously 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 constitutional and statutory enactment of home rule, the same rationale applies between the SCDOT, the City and the County. Property that is 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 entity or private person, 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.

C. The Circuit Court Erred in Ruling that the County is not Entitled to Just Compensation under the South Carolina Eminent Domain Procedures Act.

In addition to the South Carolina Constitution's protection of a county's property from being taken for a public purpose without just compensation, the County is also entitled to just compensation under the South Carolina Eminent Domain Procedure Act. S.C. Code Ann. § 28-2-10 et. seq. 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. § 28-2-20.

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). It is undisputed that when a county purchases, or otherwise obtains real property, they have a record interest and hold possession of the property. The County is therefore an express condemnee under the Act.

Inverse condemnation is based on the constitutional prohibition of taking property without compensation. *Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 498, 544 S.E.2d 637, 640 (Ct. App. 2001). It 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 County*, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011).

“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 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).

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). 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.*

In a New Mexico 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), that court applied a governmental-proprietary distinction that does not apply in South Carolina. Applying that distinction led the court to find that a county’s buildings were not protected. It should be noted however, that the court determined that the provisions in the New Mexico 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.* at 835.

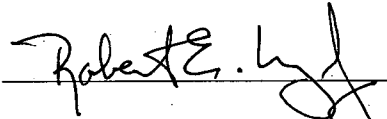
Based on the language and purpose of the eminent domain statute, the Association concludes that the General Assembly clearly intended that one governmental entity not be able to circumvent the Act and thereby avoid payment of just compensation when the property is owned by another governmental entity. 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.

CONCLUSION

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 at the Ocean IV v. City of Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595, 601 (2001). 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 Georgetown County is forced to bear the burden of the damage caused by SCDOT and the City to its buildings. 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,

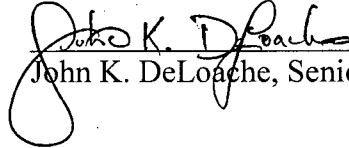
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The undersigned hereby certifies that a true and correct copy of the South Carolina Association of Counties' *Amicus Curiae* Brief was mailed this 20th day of November, 2018 via United States Postal Service, First Class Postage Prepaid, to the following counsel of record:


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