THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-38-938

Ajoy Chakrabarti and Sukla Chakrabarti, ...Respondents

v.

City of Orangeburg, ...Appellant.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This negligence and inverse condemnation lawsuit was commenced by the service of Respondents, Ajoy and Sukla Chakrabarti's Summons and Complaint, which were filed on July 26, 2007, seeking actual damages for the City's alleged negligence in condemning as a nuisance, and then demolishing, the house located at 2243 Middleton Drive in Orangeburg, which they had purchased in 2003 following a housefire. Alternatively, Respondents sought just compensation on the theory that the City's demolition of the house as a nuisance was an inverse condemnation. Appellant, City of Orangeburg, answered, on September 25, 2007, asserting fourteen defenses, including, *inter alia*, collateral estoppel/*res judicata*; waiver; sole and comparative negligence of Plaintiffs; and Tort Claims Act immunity (15-78-60) for administrative acts of judicial or quasi-judicial nature (2), adoption or enforcement or compliance with any law(4), and institution or prosecution of any judicial or administrative proceeding (23). Following denial of City's Motion for Summary Judgment, Respondents amended their Complaint so as to assert additional causes of action for inverse condemnation; wrongful condemnation and trespass. City answered the Amended Complaint on October 10, 2011, asserting similar defenses.

The matter was tried October 5 – 7, 2011, with the question of inverse condemnation being tried by the bench, and all other causes of action, as well as the amount of just compensation being decided by the jury. The jury rendered its verdict of gross negligence and awarded the amount of $ 165,000.00 in negligence

and $ 85,000.00 for just compensation. City moved under Rules 50(b), 52(b) and 59(a) SCRCP, for Judgment Notwithstanding the Verdict, and in the alternative, for a New Trial, or New Trial Nisi remittitur, and for an Order requiring Plaintiffs to elect a remedy. Respondents moved post-trial, to elect the negligence verdict of $ 165,000.00 and to preserve their right under the inverse condemnation award, in the event the negligence award is reduced or set aside. All of City's motions were denied and City timely filed its Notice of Appeal on February 1, 2012, which was served on Respondents' counsel on January 31, 2012.

ARGUMENT

I. The trial court erred in concluding that Appellant's actions leading to demolition of Respondents' house amounted to inverse condemnation, requiring payment of just compensation.

Through this appeal, Appellant, City of Orangeburg, ("City") seeks, *inter alia*, reversal of the trial court's decision that City's acts and actions in condemning and demolishing a house at 2243 Middleton Drive in Orangeburg, purchased by respondents in 2003 following a fire, amounted to inverse condemnation entitling Respondents to "just compensation". Following presentation of both parties' cases on all issues but damages, the Trial Court determined that there had been a compensable taking, and following damages evidence, submitted the negligence and damages cases to the jury.

At the heart of this appeal is the confusion of condemnation by eminent domain and condemnation of property under a municipality's police power. This confusion is heightened by considerations of what is meant by "taking" as well as whether or not the "taking" was for a public use.

In the case at bar, Respondents challenged City's actions in determining the house to be a nuisance, condemning it under the International Property Maintenance Code (IPMC) duly adopted as City's building maintenance code and demolishing it in August 2005. Respondents have claimed that the City was grossly negligent in its handling of the condemnation and demolition of the structure, and that the City's actions amounted to a "taking" of their property for

public use, entitling Respondents to just compensation. Throughout this litigation, from City's motion for summary judgment through trial and City's post-trial motions, City has consistently asserted that all of its actions were appropriate and were a permissible exercise of police power pursuant to the IPMC, and that there has been no taking of the property for public use; City, therefore, is not obligated to pay just compensation.

The South Carolina Constitution provides, "[e]xcept 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." S.C. Const. art. I, § 13(A). "To establish an inverse condemnation, a plaintiff must show: '(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence' ". Hawkins v. City of Greenville, 358 S.C. 280, 290, 594 S.E. 2d 557, 562 (2004); citing, Marietta Garage, Inc. v. South Carolina Dep't. of Public Safety, 352 S.C. 95, 572 S.E. 2d 306 (Ct. App. 2002). See also, Carolina Chloride, Inc. v. S.C. Dep't. of Transp., 391 S.C. 429, 706 S.E.2d 501 (2011).

The residence located at 2243 Middleton Drive was purchased for $35,000 on February 12, 2003 after it had been damaged by a fire in 2002. R. 525; 44-45. On March 6, 2003, City Building Official Alan Ott sent a letter to Respondents, notifying them that the Middleton house has been declared unsafe, unfit for use and a public nuisance, (Exhibit D-3) and advising of alternatives for future

responsive action.

Respondents applied for a Building Permit on April 7, 2003, identifying "owner acting as contractor". R. 528. A handwritten permit application of the same date, identified Thomas Darby as contractor, R. 529, reflecting the scheduled date of completion for the exterior was June 2, 2003 and for interior, August 1, 2003.

Restoration work had not been completed by the end date, however, and on May 19, 2004, City Building Official Ott again wrote to Respondents, advising of deadlines for the as-yet unfinished fire restoration, R. 531, giving a deadline 60 days later for completion of exterior repairs.

City Building Inspector David Epting wrote to Respondents on August 5, 2004, advising that exterior work was, per previous correspondence, to be completed by 30 days from August 4 (September 3, 2004) with 120 days from August 4 to complete the interior. R. 533.

On September 9, 2004, City Building Inspector, Gene Nelson, wrote to Respondents to recap a meeting of that date. R. 537. Among other things, the meeting was to address City's concerns that Respondents' initial permit was based upon the owner acting as builder, (which required that the structure not be placed for rent or sale for a period of 2 years), and it was then learned that Respondent no longer intended to occupy the structure upon completion. R. 376. Nelson's letter advised that the April 7, 2003 building permit would be voided, Respondents would hire a licensed architect to evaluate the condition of the property and

submit a plan for safety and code compliance, and a new building permit would be issued.

On December 7, 2004, a new building permit was issued with contractor identified as Michael Stroman and with a specified completion and expiration date of June 1, 2005. R. 538.

Building Official Nelson wrote to Plaintiffs on June 13, 2005, twelve days after the second Permit's completion target, advising that after an inspection of the Middleton building, he found it to be unsafe, unfit for human habitation and a public nuisance, and stating that Plaintiffs were in violation of code section 110.1 and the residence must be demolished. R. 543. That letter also advised, on page 2, that "any person affected by this decision shall have the right to appeal to the Construction Board of Appeals within 20 days of service of the notice". Plaintiffs did not appeal. R. 113 – 114.

The Notice of Condemnation was personally served on the Plaintiffs on June 15, 2005, according to Affidavit of Service of Reginald Conyers of the City Department of Public Safety. R. 544A (Exhibit D-19). The building was demolished in August, 2005. R. 232.

The City's procedure for identification, condemnation, and demolition of unsafe buildings is set forth, along with quality standards for structures within the city, in the International Property Maintenance Code (2000), enacted by the City of Orangeburg June 19, 2001, relevant portions of which were charged to the jury. R. 447 – 452.

In their Amended Complaint, Respondents asserted two causes of action amounting to claims of inverse condemnation, alleging that "the acts of Defendant violated Plaintiffs' rights to due process and constitute an unlawful taking of property without just compensation", R. 34; and that "the actions of Defendant described hereinabove constitute an unlawful and improper taking in violation of the rights of Plaintiffs, . . . that Defendant followed flawed and improper procedures, . . . that Defendant has failed to properly compensate Plaintiffs for the value of their property". R. 35[1].

City has denied that its actions of determining the residence to be a nuisance, condemning the property, and ultimately demolishing it, constituted a taking through inverse condemnation for which Respondents are entitled to just compensation, and has contended that the actions aforesaid are legitimate exercises of its police power in the public interest.

While a government must pay just compensation to a landowner when the government takes private property for *public use*, pursuant to the South Carolina Constitution and the takings clause of the U.S. Constitution, Fifth amendment, it is well recognized that there is no taking and no requirement of just compensation when the government acts in the public interest to abate or eliminate a nuisance. This type of action is recognized to be within the municipality's police power, for health, safety or wellbeing of the public; and it is readily distinguishable from

1 Respondents offered no evidence in trial that the procedures contained within the International Property Maintenance Code were in any manner flawed or improper.

taking the property for public use.

The vital differences between eminent domain (inverse condemnation) taking which requires just compensation and exercise of police power was explained in Richards v. City of Columbia, 227 S.C. 538, 88 S.E. 2d 683 (1955), which, for over 55 years, has been the state's definitive reference for this issue:

> The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, morals, or safety of the public is not burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. Although such regulations may sometimes occasion inconvenience to an individual, he is deemed to have compensation in participating in the general advantage.
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> * * *
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> Burdens and expenses of various types may be imposed under the exercise of the police power without compensation and without in any way violating the constitutional guaranties as to due process of law.

Richards, at 690, citing, 12 Am. Jur. 371, 372, Constitutional Law, Sec. 696 and Sec. 684.

An early explanation of police power is found in City Council of the City of Charleston v. Werner, 38 S.C. 488, 17 S.E. 33 (1893). Noting that "[t]here seems to be some misapprehension as to the nature and object of this proceeding" and that the object of the proceeding is "to put in operation the police power granted to the city council for the purpose of preserving the health of the city" the Supreme Court explained:

> Although not clearly defined ... [it] is an extensive power, distinguished not only from the power of taxation, but also from that of eminent domain, and, in its widest sense, is said to be the general power of a government to preserve and promote the general welfare, even at the expense of private rights."

City Council of the City of Charleston, at 35.

In May, 2012, the Court of Appeals reiterated the important differences between inverse condemnation taking of private property for public use and police power actions in the public interest and underscored the reason for the differences, in Carolina Convenience Stores, Inc. v. City of Spartanburg, 398 S.C. 27, 727 S.E.2d 028, (Ct. App. 2012). In that case, CCS claimed, not unlike Respondents herein, that Spartanburg's use of a bulldozer to tear down CCS's building was an affirmative, aggressive act that constituted a physical taking of CCS's property, thereby entitling CCS to just compensation. The Court of Appeals found the City's actions did not constitute a taking within the meaning of either the state constitution or case law, noting that "eminent domain and police powers are not the same; just compensation must be made in government's exercise of eminent domain but not for loss of property from exercise of police power", citing, Edens v. City of Columbia, 228 S.C. 563, 571, 91 S.E.2d 280, 282 (1956). The Court further noted, "[a] detriment to private property that results from a legitimate exercise of police power does not constitute a taking of private property for public use". Carolina Convenience Stores Inc. v. City of Spartanburg, at 30.

"Building regulations for the purpose of promoting a decent and sanitary mode of living in cities and other thickly populated districts . . . is fully justified under the police power." Richards, at 688.

When a building used as a dwelling house is unfit for that use and a source of danger to the community, the Legislature in order to promote the general welfare may require its alteration or require that its use for a purpose which injures the public be discontinued; and, subject to reasonable limitation, the Legislature may

determine what alterations should be required and what conditions may constitute a menace to the public welfare and call for remedy.

Richards, at 689.

The government has authority, under its police powers, to restrict use of private property, without paying compensation. Nollan v. California Coastal Comm'n., 483 U.S. 825, 107 S.Ct. 3141, 97 L. Ed. 2d 677 (1987). "The exercise of police power under a municipal ordinance is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose." Peoples Program for Endangered Species v. Sexton, 323 S.C. 532, 476 S.E. 2d 477, 481 (1996).

A recent case of the Virginia Supreme Court, which is factually nearly identical, to this case, Lee v. City of Norfolk, 281Va. 423, 706 S.E. 2d 330 (Va. 2011), aptly recognized the City's responsibility to its citizens in such circumstances, and upheld the City's demolition of a privately owned structure against claims of inverse condemnation and negligence, as well as due process. The plaintiff in Lee had sought and obtained a municipal permit to restore a fire damaged residential structure. During the time of the permit, and while repairs were ongoing, a city inspector advised that the plaintiff's permits were revoked because of noncompliance with one of the conditions of the permit (the 50% rule), not unlike the 2004 inspection by Dan Cherry in this case, when it was learned that Respondents were not intending to live in the house, a condition of the "owner as contractor" permit. Shortly after revocation of the permits, the Lee plaintiff received a Notice to Demolish the residence. The Notice in Lee advised the

plaintiff, in similar fashion to that in this case, that he had the right to appeal the decision to the specified authority within 21 days.

Although the Lee plaintiff made a few attempts toward resolving some of the City's concerns with the building, and the City did not demolish when initially announced to the Lee plaintiff, but allowed time extensions of approximately 80 additional days, he never appealed the demolition decision and the City demolished the building 107 days after its Notice to the plaintiff. The plaintiff then filed a lawsuit against the city of Norfolk, based on due process, inverse condemnation and common law negligence, later amended to include a cause of action under 42 U.S.C. § 1983.

The Virginia Supreme Court agreed with the lower court and concluded that "the City's demolition of Lee's property was not a taking, but rather the abatement of a nuisance for which no compensation is due". Citing, Keystone Bituminous Coal Ass'n. v. DeBenedictus, 480 U.S. 470, 492, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987), the Virginia Court further explained:

> The abatement of a nuisance often requires prompt and summary proceedings, and where the abatement is authorized under the police power of the State and due process of law has been observed, the owner of the property destroyed for the public good has no constitutional rights beyond those provided in the statute under which the abatement is made.

Lee v. City of Norfolk, at 737.

It is clear under the persuasive authority of the Virginia Supreme Court, that the City's demolition of the house owned by the Chakrabartis at 2243 Middleton Street, was not an inverse condemnation taking for which just

compensation was required to be paid to the landowner, but instead, it was the City's abatement of a nuisance, in the interest of the public, and not for public use, for which no compensation is required. According to the foregoing sound principles of law, it is appropriate that the trial court's determination of inverse condemnation be reversed.

II. The Trial Court erred in denying Appellant's Motions for Directed Verdict and for JNOV on the Negligence cause of action because:

a. Respondents presented no evidence of a grossly negligent breach of any duty owed to Respondents;

Respondents alleged a single cause of action for negligence in their Complaint, which was retained in their Amended Complaint, contending that City was negligent in 19 specified particulars, dealing with the manner in which City determined the Respondents' structure to be a nuisance, condemned and then demolished it. R. 32 – 34. By their pleadings, Respondents have alleged a somewhat novel cause of action, combining the elements of traditional negligence in the context of municipality's handling of a nuisance, resulting in demolition of the residence, which Respondents contend to be harm that was proximately caused by City's gross negligence.

On its motions for directed verdict and JNOV, City asserted that Respondents were not entitled to recovery on their negligence count because Respondents did not present evidence of the standard of care required of the City, and Respondents presented no evidence of a breach by the City of any duty owed to Respondents in connection with the City's decision to condemn and demolish the house owned by Respondents.

According to traditional negligence analysis, "To recover on a claim for negligence, a plaintiff 'must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach.'" Carolina Chloride, Inc. v. Richland

County, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011). "A plaintiff must identify a duty that the defendant has to protect him or her from a particular harm to merit consideration of his or her claim by a jury." Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 393, 701 S.E. 2d 776, 781 (Ct. App. 2010). This is particularly true of a plaintiff seeking to recover from a governmental entity under the Tort Claims Act. "The Plaintiff must present evidence of the governmental entity's duty to act in order to recover under the Act". Hawkins v. Greenville County, at 564; citing, Arthurs v. Aiken County, 338 S.C. 253, 525 S.E. 2d 542 (Ct. App. 1999).

Respondent, Ajoy Chakrabarti, testified to the events experienced from his initial efforts to acquire the house, R. 43 – 45, through dealings with the City for the first permit in April, 2003 R. 49 – 50; 86 – 91, work performed by his first contractor, Darby, R. 48 – 53, meeting with City inspectors in September, 2004 and issuance of second permit in December 2004, R. 71 – 72, and communications from City in early to mid-2005, R. 72 – 76.

Respondents also presented testimony of Sam Fields, Andrew Beach, contractor Darby, Contractor Coulter, Bruce Holler, Kenneth Middleton, Orangeburg City Manager John Yow and Code Enforcement Official, Gene Nelson. Of these witnesses, none defined nor described the standard of care to be observed by the City when addressing the matter of structures which may have become nuisances. Likewise, Respondents have presented no documentary evidence which might serve as a guide for the duty or the standard of care for

municipalities faced with the kinds of decisions here involved.

"To establish a cause of action in negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty". Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 82 502 S.E.2d 78, 88 (1998).

In his instructions to the jury, the Court charged only gross negligence, as follows:

> Gross negligence is a relative term meaning the absence of care that is necessary under the circumstances. Gross negligence essentially involves an intentional conscious failure to do something which it is incumbent upon one to do, or the doing of a thing intentionally that one ought not to do. This degree of negligence denotes the failure to exercise even a slight degree of care. Conversely, there is no gross negligence where slight care is exercised. Gross negligence is the failure to exercise a slight degree of care. A person who is so indifferent to the consequences of his conduct as to not give a slight care as to what he is doing acts with gross negligence.

R. 453-454.

Through the evidence presented by Respondents, the jury was tasked with the responsibility for determining if City had been grossly negligent, and no means or basis of comparison for discerning in what manner, if any, City had breached its duty when it found the structure to be a nuisance that needed to be demolished.

When considering negligence in the context of specialized municipal responsibilities, it would be helpful to have guidance as to how the municipality is to conduct its activities; and to have a measurement device against which to

compare the municipality's actions.

"There can be no inference of negligence from the mere fact of injury, and that the burden is on the plaintiff to produce some reasonable evidence tending to show some breach of duty owed to him." Covington v. Atlantic Coast Line R.R. Co., 158 S.C. 194, 155 S.E. 438, 442 (1930).

Although Respondents offered no guidance for the City's duty in dealing with nuisances, City presented evidence that the International Property Maintenance Code (and the Ordinance by which it was adopted) is the controlling guidance document under which the City addresses and decides these matters. Respondent did not dispute that the IPMC, (relevant portions of which were charged to the jury, R. 447 – 452), provided the guidance to be followed by municipalities in dealing with buildings which may be condemned on nuisance grounds.

City presented the expert testimony of attorney Jim Meggs, former City Attorney of Columbia, in support of its handling of the Chakrabarti condemnation. Notably, attorney Meggs testified that City had complied in all respects with the guidance of the IPMC for purposes of condemnation and decisions to demolish. R. 327 – 343.

On cross examination, Respondents' counsel sought to have witness Meggs concede that City did not comply with that portion of the Notice provision which required notice of right to cure. R. 350 - 356. However, despite repeated questioning, witness Meggs steadfastly resisted counsel's assertions that the City's

Notice was defective and not in compliance with the requirements of the IPMC. Ultimately, Meggs never agreed that City failed to comply with the IPMC; Respondents had therefore offered no evidence that the City had deviated from the standard of care in any way. Put differently, against the City's evidence of full compliance with the IPMC, Respondents failed to present evidence that the City had not exercised even slight care.

City asserts that the Respondents having not met their burden with respect to evidence of negligence by the City; *a fortiori*, Respondents have certainly failed to present evidence of gross negligence. With no evidence of City's gross negligence, the decision of the trial court must be reversed.

b. Respondents are barred from recovery in negligence by the defenses of waiver and estoppel.

In response to Respondents' Amended Complaint, City asserted the affirmative defenses of waiver and estoppel (R. 38), which were charged to the jury, and raised by motion for JNOV, contending that Respondents were afforded the opportunity for administrative review of the decision to demolish, with access to the Circuit Court, but simply waived their right to challenge, and should now be estopped from pursuing a remedy in this court. City's June 13, 2005 letter, hand-delivered to Respondent Ajoy Chakrabarti, notified Respondents of the City's decision that the structure was to be demolished by Respondents, on or before July 13, 2005, and that if it were not, then the City would demolish it and bill Respondents for the cost. R. 543. That letter also contained the following information:

Any person directly affected by this decision shall have the right to appeal to the Construction Board of Appeals, provided that a written application for appeal is filed within 20 days after the day this was served on you. An application for appeal shall be based on a claim that the true intent of this code or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of this code do not fully apply, or the requirements of this code are adequately satisfied by other means, or that the strict application of any requirement of this code would cause an undue hardship.

During cross-examination, Respondent Ajoy Chakrabarti acknowledged that he received City's June 13, 2005 letter and testified: "The answer is, yes, I have not filed. No, the answer is no, I have not filed." R. 114. Instead of filing an appeal as instructed by the letter, Mr. Chakrabarti testified that he went to speak with Code Enforcement official, Nelson:

Q. Okay. And as a result of that what were you led to believe?

A. I led to believe he's in charge, these are routine. He has to do as a file that he is working on for the city, that his boss man doesn't say anything, but he is protecting me.

R. 136.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right. Stated differently, waiver requires a party to have known of a right and known he was abandoning that right. Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." Eason v. Eason, 384 S.C. 473, 480, 682 S.E. 2d 804, 807 (2009)..

Mr. Chakrabarti candidly admitted that he did not attempt to pursue the appeal which was available to him. His response to questioning on redirect

examination comes across as nothing more than a *post hoc* attempt to explain his inaction as to his appeal rights.

III. The trial court erred in denying Appellant's Motions for directed verdict/JNOV invoking exceptions 2, 4 and 23 to the waiver of sovereign immunity of the South Carolina Tort Claims Act, 15-78-60.

City has asserted six Tort Claims Act immunities as defenses in this matter. Of these, only three have been actively pursued through trial and City's motions for directed verdict and JNOV. Exceptions numbered 2, 4, and 23 of section 15-78-60 of the Tort Claims Act are especially relevant in this case, and furnish a clear basis and mandate for City's immunity from Respondents' lawsuit. The statute expresses these immunities as follows:

> The governmental entity is not liable for a loss resulting from:
> (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;
> (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;
> (23) institution or prosecution of any judicial or administrative proceeding;

Section 15-78-60, S.C. Code Ann. (1986).

Exceptions 2 and 23 provide immunity to the City for its administrative activity, while exception 4 grants immunity to the entity in connection with enforcement of or compliance with any law, including ordinances. The bare statutory language clearly and succinctly describes the object of the exceptions such that little or no interpretation is necessary to conclude that the City's actions in furtherance of the nuisance/condemnation process is entitled to immunity under each of the three exceptions.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Charleston County School Board v. Budget and

Control Board, 313 S.C. 1, 5, 437 S.E. 2d 6, 8 (1993); citing, Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980).

"When interpreting a statute, the Court's primary function is to ascertain the intention of the legislature. The words used in the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation". Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E. 2d 18, 20 (1992); citing, Gilstrap v. S.C. Budget and Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992). Where a statute contains terms which are clear and unambiguous "there is no room for construction and courts are required to apply them according to their literal meaning". Citizens for Lee County, Inc. v. Lee County, 308 S.C. 23, 28, 416 S.E.2d 641, 644 (1992).

"A basic rule of statutory construction is that the words must be given their plain and ordinary meaning without resort to a subtle or forced construction which limits or expands the statute's operation". Adkins v. Varn, 312 S.C. 188, 191, 439 S.E. 2d 822, 824 (1993); citing, Berkebile v. Outen, 311 S.C. 50, 426 S.E. 2d 760 (1993); First Baptist Church v. City of Mauldin, 308 S.C. 226, 417 S.E. 2d 592 (1992).

The essence of Respondents' lawsuit is that City negligently performed the process of condemning Respondents' structure pursuant to the unsafe buildings portion of the City ordinance which adopted the International Property Maintenance Code. That process is both an administrative action of a judicial or

quasi-judicial nature and institution or prosecution of an administrative proceeding.

The limited caselaw applying or interpreting exceptions 2, 4 and 23 is instructive in the case at bar. The Supreme Court held in Wortman v. City of Spartanburg that the City of Spartanburg, which had claimed immunity under exception 4, was not immune because "the City cannot claim that [plaintiff's] arrest for possession of lottery tickets resulted from its attempt to enforce a law absent a showing that a law exists that prohibits the possession of lottery tickets". Wortman, at 20.

In this case, Respondents have challenged as gross negligence the City's handling of condemnation of their structure under the Property Maintenance Code – (the ordinance which the City sought to enforce). By the inference and authority of the Wortman case, City is entitled to the immunity of exception 4.

A more direct application of exception 4 is found in Adkins v. Varn. In Adkins, the plaintiff sued Greenville County over the wrongful death of a 13 year old bicyclist chased into traffic by vicious dogs. Greenville County contended that it was immune from liability for not enforcing its animal control ordinance, under exception 4. Affirming the trial court's grant of summary judgment, the Supreme Court acknowledged that Greenville County was a governmental entity within the meaning of the Tort Claims Act, and said: "The provisions of Section 15-78-60(4) are clear and unambiguous on their face and not subject to judicial interpretation. The statute clearly exempts from liability any loss resulting from

the failure to enforce an ordinance; therefore the County is immune from suit for any loss as a result of their non-enforcement of the animal control ordinance". Adkins, at 824.

In the case at bar, the clarity of the statutory language of exception 4, applied to the City's enforcing of its unsafe buildings ordinance requires that the City be recognized as immune from this lawsuit.

And the same rationale applies with respect to exceptions 2 and 23, both of which are clear and unambiguous on their face and not subject to judicial interpretation. A plain straightforward reading of exception 2 compels recognition that the City's action toward condemnation is an administrative municipal action of a quasi-judicial nature. Similarly, that process is indisputably the institution or prosecution of an administrative proceeding, within the express description of the exception, so that the immunities of numbers 2 and 23 apply, without the need for judicial interpretation

IV. The trial court erred in issuing two distinct damages awards.

The jury rendered two decisions involving amounts – one amount was the damages ($ 165,000.00) incurred by Respondents in the negligence cause of action. The other amount ($ 85,000.00) was the fair market value figure to be used as an award on the inverse condemnation cause of action. In arriving at these figures, the jury erred, and deviated from the instructions on the law charged to them. In reality, there could only be a single number which would derive from adherence to the Court's instruction.

The jury was instructed on damages as follows:

> Actual damages are to compensate the plaintiff for the plaintiff's injuries or loss, and to put the plaintiff as near as possible in the same position that the plaintiff was in before the incident occurred. In other words, actual damages would be the actual losses and expenses which the plaintiff has suffered because of the defendant's negligence.
>
> Also in this case you must determine the fair market value of the property at the time it was demolished, and you must make that a separate determination on the verdict form. You must only decide the amount, if any, the plaintiff land owner should be paid in order to be adequately paid for the property.

R. 454.

As to inverse condemnation, the amount must be fair market value as of the time of the "taking". Early v. South Carolina Public Service Authority, 228 S.C. 392, 90 S.E. 2d 472 (1955). For damage or injury to real property, the general rule is that the proper measure of damages is the diminution of the market value by reason of that injury, or in other words, the difference between the value of the land before the injury and its value after the injury. Yadkin Brick Co., Inc. v. Materials Recovery Co., 339 S.C. 640, 529 S.E. 2d 764 (Ct. App. 2000).

"Collateral damages, including lost business profits, are not recoverable on a takings claim." Mibbs v. South Carolina Dept. of Rev., 327 S.C.601, 606, 524 S.E. 2d 626, 628 (1999). Plaintiff's evidence of fair market value or actual damages came only from Respondent, Sukla Chakrabarti, who described the amounts expended for purchase of the burned structure, which included land, pool house and pool - $ 35,000.00; and amounts paid to Mr. Darby - $ 40,000.00 and amounts paid to Mr. Coulter, - over $ 100,000.00; arriving at her opinion of fair market value of between $ 160,000.00 and $ 170,000.00. (R. 424, 423). Mrs. Chakrabarti testified that she believed this amount reflected the value of the property, confusing the matter of value with amount expended.

The land was not destroyed. The Chakrabartis retained ownership of the land, until it was forfeited for non payment of taxes. R. 228. So, the initial purchase price cannot fairly be included in the damages from demolition. Also, amounts expended do not necessarily equate with fair market value. While Mrs. Chakrabarti may offer her opinion of value, such opinion is clearly based upon a faulty premise.

The determination of damages for injury to real property must be the result, not of amounts expended on the property, but the reduction in value of the property occasioned by the City's actions or demolition. In this sense, then, the relevant inquiry for damages is, by what amount was the property devalued, from its condition immediately before the demolition, to its condition immediately after the demolition?

Significantly, because this is a case of injury or damage to real property, rather than personal injury, the amount of actual damages does not allow for consideration or inclusion of other "soft" or intangible factors to increase the amount of damages.

The only evidence of real, fair market value was that offered by City's expert witness, appraiser Henson. His opinion of fair market value of the property at the time of the demolition in the summer of 2005, was $ 45,000.00, based upon his appraisal based upon comparable area values. R. 566 - 659. Henson further testified that the demolition cost incurred by the City, in the amount of $ 12,025.00, would appropriately be deducted from the value, so that the real value of the property in 2005 would have been around $ 33,000.00. R. 433 – 434.

While a plaintiff may certainly testify to an opinion of value, Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 671 S.E. 2d 79 (Ct. App. 2008), when that opinion amounts to a computation of value that is completely devoid of any rational basis, such that there is nothing to take a plaintiff's opinion of value out of the realm of pure conjecture, such as Mrs. Chakrabarti's recitation of labor and materials expended, the court can properly conclude there was no competent, admissible evidence of the amount of damages.

The only credible evidence of the value of the property at 2243 Middleton Street, was the opinion of the appraiser, and City is entitled to JNOV setting the amount of actual damages as well as just compensation at $ 33,000.00.

CONCLUSION

The trial court erred in its determination that City's decision to condemn as a nuisance and then demolish Respondents' investment house at 2243 Middleton, amounted to inverse condemnation or a taking entitling Respondents to just compensation. City's actions were clearly an exercise of its police power, as reaffirmed by the Court of Appeals earlier this year in Carolina Convenience Stores, Inc. v. Spartanburg, for which no compensation is due the landowner.

On Respondents' negligence cause of action, City's motion for directed verdict should have been granted, because Respondents utterly failed to present any evidence of any deviation from the appropriate standard of care and, for purposes of gross negligence, Respondents failed to demonstrate that City did not exercise even slight care.

With respect to City's defenses of waiver and estoppel, it is clear that Respondents were informed of their rights to contest City's demolition decision, through appeal to the Construction Board of Appeals, but chose not to file any such appeal. Respondents' knowing failure to follow available procedures amounts to waiver, such that they should be estopped from pursuing this action.

City was also entitled to Tort Claims Act immunities under exceptions 2, 4 and 23. Although interpretive caselaw on these immunities is limited, the plain language of each of the mentioned exceptions leads to the conclusion that City should have been entitled to immunities 2 and 23 based upon the City's actions being administrative in nature. Exception 4 also applies, based upon the City's

actions being enforcement or compliance with the City's Ordinance for nuisance structures.

Finally, to the extent Respondents may be entitled to damages of some measure on one or the other of their causes of action, the measure of damages should be the same. While a landowner may testify to his or her opinion as to value of his or her property, the Respondents' evidence tends toward value added or replacement cost rather than fair market value immediately prior to the demolition, so that the only true measure of damage is that reflected in the appraisal.

City respectfully asks this Court to reverse the trial court's decision as to inverse condemnation, and to reverse the denial of City's directed verdict motions as to negligence as well as the defenses of waiver and estoppel and Tort Claims Act immunities. To the extent either of Respondents' verdicts remains in place, City asks this Court to reverse the trial court on the amount of damages.

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October 2, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-38-938

Ajoy Chakrabarti and Sukla Chakrabarti, ...Respondents

v.

City of Orangeburg, ...Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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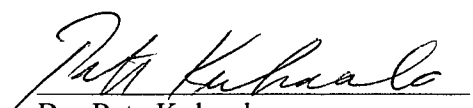

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October 2, 2012