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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2012-209046
Case No. 2009-CP-10-6185

Henry W. Frampton, III Respondent,

v.

South Carolina Department of Transportation.....Appellant.

RECORD ON APPEAL
Volume I

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SC Court of Appeals

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

Henry W. Frampton, III)
Plaintiff,)
vs.)
South Carolina Department of)
Transportation,)
Defendant.)

ORDER REGARDING DEFENDANT'S
RULE 59(a) AND (e) MOTION AND PLAINTIFF'S
MOTION FOR LITIGATION EXPENSES

FILED
2012 APR 18 AM 10:39
CLERK OF COURT
J. ARMSTRONG

On March 13, 2012 I heard Motions of the Defendant for a new trial and to alter and amend the judgment pursuant to Rule 59(a) and (e) and Plaintiff's Motion for Litigation Expenses. For the following reasons the Defendant's Motion is denied and the Plaintiff's Motion for certain litigation expenses is granted.

DEFENDANT'S RULE 59 MOTION

Defendant advances several grounds for a new trial. It alleges that my decision refusing to bifurcate the taking phase from the just compensation phase created prejudice and denied it a mode of trial to which it was entitled. The Defendant argues that the denial of the motion to bifurcate caused it prejudice by having the jury sit through the "takings" phase of the trial. "Trial judges have discretion as to whether to bifurcate a trial." Durham v. Vinson, 360 S.C. 639, 644 n. 2, 602 S.E.2d 760, 763 n. 2 (2004). "A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice." Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct.App.1998)

Defendant argues that it was prejudiced because of multiple claims of takings, some of which allegedly arose from the non-compensable, police power acts of the State. The jury never heard any valuation testimony concerning any such claims. The Defendant cites only the testimony of Mr. Hartnett, the Plaintiff's appraiser, to show the alleged prejudice. Mr. Hartnett, however, did not testify until after the Court ruled and found a taking. The jury did not hear anything from Mr. Hartnett that was ultimately excluded. Indeed, Mr. Hartnett's testimony on median damages was proffered outside the presence of the jury and excluded.

The Defendant also argues prejudice in having the jury hear testimony from the Plaintiff and its own witnesses or former employees concerning the circumstances of the Defendant's affirmative acts of construction and their impacts on the use of Plaintiff's income producing property. However, Defendant did not object to any questions asked by the Plaintiff of any of the witnesses. Plaintiff's witnesses Larry Phinney and Henry Frampton set out, without objection, the facts giving rise to the taking: the intent to block access to the subject property; the plans calling for the installation of a bridge guardrail which would permanently block access to the existing driveway and elevation changes because of the installation of a new sidewalk; the affirmative and aggressive construction activities which physically blocked the existing driveway; the duration of the blockage; and the decision to shorten the guardrail and relocate the existing driveway to restore access to the property. Each of these facts were relevant to both the liability and just compensation issues of the case. None of this testimony was so distinct from the just compensation issues that an injustice was inflicted by the denial of the Motion to Bifurcate. Moreover, the Defendant did not

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T.L.B.

request to hear the testimony of any witness it called outside the presence of the jury on the taking issue. Furthermore, the Defendant's defense to the taking (access could have been provided if Plaintiff had requested it) was also evidence of mitigation of damages. Given the totality of the circumstances, bifurcation would have required the Plaintiff to try its case twice. There is no prejudice and I did not abuse my discretion in denying the motion to bifurcate.

Defendant also complains that the Plaintiff, on cross examination, provided unfavorable and nonresponsive testimony in response to a question it asked. Defendant however failed to move to strike or contemporaneously object to any testimony it elicited from the Plaintiff. See McClurg v. Deaton, 380 S.C. 563, 579–80, 671 S.E.2d 87, 96 (Ct.App.2008) A party may not raise an issue for the first time in a motion to reconsider, alter or amend a judgment.

Most of Defendant's post trial motion is centered on its argument that a regulatory taking analysis applied to this action and that I misinterpreted case law. Plaintiff alleged a physical interference with its judicially recognized, statutory easement of access. There was no allegation or evidence of a regulatory action by the Defendant. Therefore, there was no Penn Central or regulatory taking analysis to apply. Hardin v. SCDOT, 371 SC 598, 641 S.E.2d 437 (2007); Carolina Chloride, Inc. v. SCDOT, 394 S.C. 154, 714 S.E.2d 869 (2011).

The Defendant argues that I erred, as a matter of law, in failing to rule that the Plaintiff did not present sufficient evidence to establish a taking because the complete denial of access was only a temporary inconvenience. The Defendant's position is, I believe, contrary to South Carolina and Federal Law. See Carolina Chloride, Inc. v.

#3
T.L.H.

SCDOT, 394 S.C. 154, 714 S.E.2d 869 (2011) *citing* Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005). In Byrd, the Supreme Court removed what was previously an element of inverse condemnation—that the taking must have some degree of permanence—under the rationale that “it conflicts with the principle that the government must compensate for even a temporary taking.”); See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). “A plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking” of a recognized property right regardless of the duration. Byrd, *supra*. Defendant presses its argument by asserting that the property today is worth just as much as it was before the taking. If this were the measure of damage in a temporary taking then there could be no just compensation for the loss of use and income to the property in the interim period when access was totally blocked. Finally, no evidence of a temporary inconvenience was introduced. Plaintiff alleged and proved a physical blockage to its access easement which resulted in the loss of use and income for a sixteen (16) month period of time.

Defendant further seeks a new trial because the Plaintiff failed to prove the bridge construction period creating the blockage of access was unreasonable given the nature and scope of the work involved. Plaintiff's burden in a physical, temporary inverse condemnation claim is to establish the loss of use and income from the real property by an affirmative and aggressive act for a sufficient duration of time that establishes damages and a taking. It my finding that the facts shown at trial proved a material and substantial impairment of an access easement which required the payment of just compensation as determined by the jury.

The remainder of the Defendant's arguments relate to factual findings made by the Court based upon the evidence presented. The evidence presented by the Plaintiff supports my findings. Specifically, the Defendant claims that the finding of this Court that a taking for a sixteen (16) month period had occurred was an error. Defendant admits that there was evidence of a physical blockage of the driveway for thirteen and a half (13½) months. There was also however, evidence in this record that the period of the loss of use and income derived from the real property included a reasonable time to market and secure a tenant for the property when access was finally restored.

In summary, the Defendant's Motion for a new trial or an amendment to the judgment the jury awarded in this matter is hereby denied.

PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND EXPENSES

Plaintiff has moved pursuant to Code of Laws of South Carolina 28-11-30(3) for Plaintiff's reasonable costs, disbursements and expenses including reasonable attorney, appraisal or engineering fees actually incurred. This statute specifically applies to inverse condemnation actions. The Department contends that the Plaintiff has failed to prevail within the meaning of S. C. Code Section 28-2-510(b). This statute applies to direct eminent domain actions.

Defendant's position fails for two (2) reasons. First, the controlling statute is the more specific statute, which allows for recovery of litigation expenses and fees in the event a taking is proven. The right and entitlement to these expenses is not dependent upon a prevailing standard where a direct eminent domain action has been filed. Furthermore, if the prevailing standard of 28-2-510(b) did apply, the standard requires a comparison of the two highest competing attestations of value during the just

compensation phase of the trial. There was no attestation testimony presented to the jury higher than the amount found by the jury. Plaintiff therefore prevailed even under the direct taking statute.

Defendant complains that the amount of the litigation expenses included time spent on claims that were withdrawn prior to trial. The records reflect that the parties consented to a stay concerning the compensability of median claims by Henry and Dale Frampton concerning other property they owned pending another case on appeal and once that case was adjudicated in the South Carolina Supreme Court the claims were dropped. Defendant has failed to articulate any particular time expended in pursuit of those claims which would not have been incurred in the pursuit of the main claim which was adjudicated. For this reason, the Defendant's arguments that the request for expenses is excessive is rejected.

This Court is acutely aware that the litigation expenses exceed the value of the temporary taking. However, Defendants have proffered no evidence that the hours expended or the rate was unreasonable. The litigation expense provision in an inverse condemnation proceeding (§ 28-11-30(3)) evidences an intention on behalf of the General Assembly that condemnors should not force landowners to bring claims for the taking of a well established property right and that property rights, even if their value in the market may be less than the expense of trial, are so important to our system of justice that a denial of those rights could never be vindicated by comparing the market value of the right with the reasonable expense of protecting the right itself.

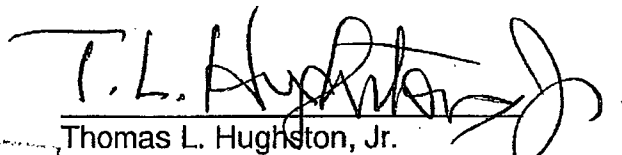
Finally, Defendant also argues that enhancement of the fee incurred in this case is not appropriate. Defendant's hearsay objections to the Affidavits submitted in support

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T.V.H.

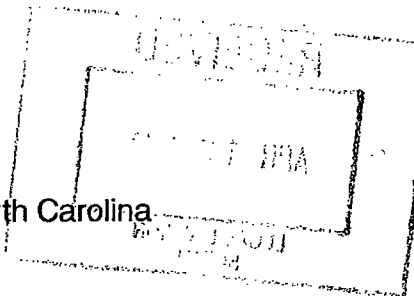
of the reasonableness of fees are hereby rejected. See S.C. Rules of Civil Procedure Rule 43. Plaintiff argues that this is a novel and exception case and an adjustment is appropriate. The Court declines to apply any enhancement of the fee in this case.

Plaintiff's Motion for the expenses and the statute authorizing the expenses provide that the judgment awarded by the jury for the taking of the property should be amended to include a total amount of reasonable litigation expenses. I hereby find that the amount of \$80,726.77 constitutes these reasonable expenses. The amount is, therefore, amended to be \$117,253.77.

IT IS HEREBY ORDERED.


Thomas L. Hughston, Jr.
Presiding Judge

#57
April 18, 2012
Charleston, South Carolina



JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258

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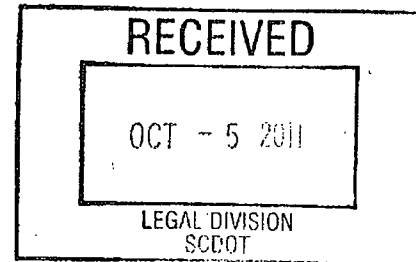


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BEACHAM O. BROOKER JR
SCDOT
PO BOX 191
COLUMBIA SC 29202-0191



NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/defnt's mot for partial sum judg is denied &

CASE NO: 2009CP1006185

Henry W Frampton Iii, plaintiff, et al VS South Carolina Department Of Transportation

This judgment was entered on the 29th day of September, 2011, and a copy mailed first class on Saturday, October 01, 2011, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.

FORM 4

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

Case No.: 2009-CP-10-6185

Henry W. Frampton

versus

South Carolina department of
Transportation

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

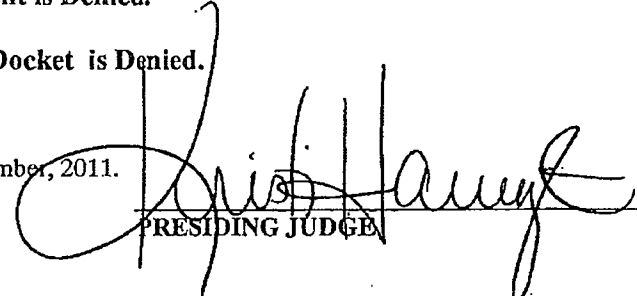
- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.
- ☐ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. nonsuit)
☐ Rule 43(k), SCRPC (Settled); ☐ Other -
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING THE LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

-Defendant's Motion for Partial Summary Judgment is Denied.

-Defendant's Motion to Transfer to the Non-Jury Docket is Denied.

Dated at Charleston, South Carolina, this 20th day of September, 2011.


PRESIDING JUDGE

SCCA SCRP Form 4 Revised 6/2008

Clerk of Court
Julie J. Armstrong

JF JF

Frampton v. SCDOT (09-6185)

Attorneys:

P: Richard D. Bybee —

D: Beacham O. Brooker —

Motions:

1. Defendant's Motion for Partial Summary Judgment (5/17/2011)
(Memo Submitted)
2. Defendants Motion to Transfer to the Non-Jury Docket (6/29/2011)

deny both
- deny both
** under advisement*
** Both under advisement*
** Rule within 10 days*

STATE OF SOUTH CAROLINA

County of Charleston

Henry W. Frampton, III, and Dale B.
Frampton,

Plaintiffs,

v.

South Carolina Department of Transportation,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

DEFENDANT'S RULE 59 MOTION

Defendant, the South Carolina Department of Transportation (the Department), respectfully moves the Court for a new trial and to alter and amend the judgment pursuant to Rule 59 (a) and (e).

This matter was tried before the Court and a jury on January 9-11, 2012. The Court ruled that there had been a taking for 16 months. The jury assessed compensation against the Department in the amount of \$36,527. Defendant asserts that the Court's procedural ruling permitting the jury to sit during the takings phase of the case prejudiced it and denied it a mode of trial to which it was entitled. Defendant further asserts that the Court's ruling that a taking occurred was based upon an erroneous interpretation of the law; that the Court's and the jury's determinations misapplied the evidence; and that each was outside the bounds of the facts presented and outside the scope of pleadings.

I. Procedure.

In its pre-trial motion, Defendant asked that the Court separate the proceedings into a takings phase to be tried by the Judge alone then, if a taking was found, a jury would sit to determine just compensation for the taking that the judge had declared. This suggested

procedure conforms to our appellate courts decisions in this area that only the compensation phase of an eminent domain case provides an entitlement to a jury trial under S.C. Code Ann. §28-2-310 (Rev. 2007). Cobb v. S.C. Department of Transportation, 365 S.C. 360, 618 S.E.2d 299 (2005), and Kiriakides v. School District of Greenville County, 382 S.C. 8, 14, 675 S.E.2d 439, 442 (2009); Hardin v. S.C. Department of Transportation, 359 S.C. 244, 248-49, 597 S.E.2d 814, 816 (2004), reversed on other grounds, 371 S.C. 598, 641 S.E.2d 437 (2007). Sitting a jury prior to the finding of a taking was premature.

Defendant argued in its pre-trial brief and orally in open court that allowing the jury to sit during the takings phase of the trial in which it has no role would be unduly prejudicial to the Defendant. Inverse condemnation actions, as the one at bar, often involve multiple claims of takings, many of which will ultimately be found not to be takings but losses to the landowner arising from police power acts of the State which do not warrant compensation. S.C. State Highway Dept. v. Carodale Associates, 268 S.C. 556, 235 S.E.2d 127, 129 (S.C. 1977). These non-compensable police power injuries may often be severe. The jury will invariably sympathize with the plaintiff over these losses and will be inclined to award the plaintiff as much money as possible on any claim ultimately found to be compensable in eminent domain. We believe our argument was vindicated by the course of these proceedings.

Plaintiff's claim as set forth in his amended complaint was for a permanent taking resulting from the construction of a concrete median on the highway in front of his property and a temporary taking resulting from the obstruction to "access" to his property. His expert, Mr. Hartnett, opined that the loss of value attributable to the median was \$37,500. This claim was dismissed by the Court. Mr. Hartnett also testified that the "loss of use" of the property during the bridge construction period was \$20,000. The jury awarded the plaintiff the full amount of his

claim for the temporary taking for 16 months¹, to wit: \$20,000 which was based on the opinion that the plaintiff could sell his property for \$250,000 to a buyer who could then rent it out at an 8% return or \$1,666.67 per month although plaintiff was only able to obtain \$950 per month rent in the market. Then, after adding certain expenses only tangentially connected to any loss of access rights, the jury accepted that the plaintiff would have realized a return of 8% on the money—a result clearly unreasonable given the state of the economy in 2008-2010. Further, the plaintiff was able to inject testimony concerning the reduced use of another of his properties before the defendant could object and the court rule on admissibility. None of the testimony regarding the median or the other property would have been heard by the jury had they sat only for the compensation phase. They were clearly influenced by the evidence and testimony submitted in the takings phase that had no bearing on the valuation of the taking eventually found. Defendant was prejudiced by the procedure followed and is entitled to a new trial under the proper mode of trial.

II. The Court's Finding of a Taking Was Based on a Misinterpretation of the Case Law and Outside the Scope of the Evidence.

The Court found that the Defendant had taken plaintiff's property for a period of 16 months. Under that view of the law, Defendant was prevented from introducing evidence that plaintiff's property was never devalued and, even if it was during the course of the project, it fully recovered and perhaps increased in value following project completion.

As set forth in our pre-trial brief, South Carolina courts follow federal jurisprudence in takings cases. In cases such as the one at bar, the Court must weigh and balance the "Penn

¹ As we argue below, 16 months was outside the range of the evidence and the complaint.

Central”² factors to determine whether the overriding public good outweighs the economic impact on the landowner. There are only two “categorical” rules where the government’s action will be deemed a taking *per se*. The first is where the government permanently occupies a portion of private property such as a requirement that an apartment building owner permit the installation of cable equipment. There, the government must pay no matter how insignificant the invasion. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). The second is the imposition of a regulation on property that prohibits all economically beneficial use. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). This Court’s ruling that a series of obstructions or interferences with the landowner’s use of his property or of his appurtenant right of access would create a third categorical rule that has never been held or recognized.

In cases involving alleged temporary takings, neither Lucas nor Lorretto apply where the property owner has suffered a temporary loss of all economically viable use. Because time is a component of an interest in property, the property owner in that situation has suffered a partial loss, not a total loss. Once the temporary restriction is lifted, value will return. This is why the Court’s refusal to let the defendant pursue its line of cross-examination of the plaintiff regarding the property tax valuations before, during, and after the project was so damaging to its case. We had intended to show that the assessed value for tax purposes remain constant through the period the construction was ongoing at \$256,000 and even increased thereafter. Plaintiff claimed his loss of value was a total of \$74,027. A reduction in value from \$256,000 to \$ 181,973 would certainly cause a reasonable landowner to appeal his tax assessments.

² Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Further, the Court declined to rule on the reasonableness of the restriction it declared on the plaintiff's use of his property. In the context of regulatory delay, the Penn Central inquiry is whether the delay ever became unreasonable. The length of the delay is not determinative. Rather, the Court is to consider all relevant circumstances including the reasons for the delay and the economic impacts on the plaintiff. All bridges must be replaced eventually. Here, there was testimony from Defendant's engineers that the bridge project did not take longer than usual. Even if so, it was because it had to be reconstructed in two phases in order to maintain traffic to Folly Beach. There were also important water or sewer mains hung on the bridge that had to be replaced. Thus, the character of the government's action was a bridge replacement that benefits all citizens including plaintiff. It is a necessary police power act that eventually affects all property owners who abut public roads and bridge approaches.

Moreover, the Court ruled that there was a taking for 16 months. This period is outside the bounds of the complaint and the evidence and likely based on the series of photographs by month that Plaintiff exhibited. Those photographs bore dates beginning in November of 2008 and ending in January 2010. Plaintiff's Amended Complaint only claims that access was blocked for one year. Amended Complaint, ¶ 8. The evidence was that Mr. Burkey who leased the house at the beginning of the project moved out of the house in November, 2008. Therefore, he paid rent for that month. Defendant's witnesses testified they always accommodated his egress to the property. Moreover, Plaintiff has always maintained the new driveway and parking area SCDOT built for him was completed January 13, 2010. Therefore, the longest possible period for Plaintiff's claim would be 13 ½ months. Review of the photographs, however, indicate that the driveway was open (no temporary silt fence was in place) during November and December of 2008 and January of 2009.

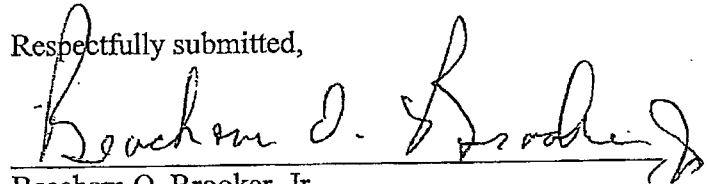
There was no evidence that the property could not have been rented or sold during the period in question. Testimony by Defendant's witnesses showed one tenant (Burkey) did live there well into the construction period. There was also no reason Defendant would not have accommodated a new tenant the same as it did the previous one and as it did for defendant's other two properties that were not vacant. At the very least, a tenant would be able to park on the highway right-of-way temporarily, should for some reason, the drive entrance need to be closed. Mr. Frampton testified that he did not attempt to sell the property during the construction period, that he has not attempted to sell it to date, and has no foreseeable intention of doing so. Thus, Plaintiff has no tenable claim to have lost a favorable sale as a result of Defendant's actions.

Finally, Plaintiff testified that he actually used the property during the Fall of 2009 to perform renovations to increase its income potential. This further reduces the impact on Plaintiff to be compared, along with the facts above with the character of the government's action to find that the Department's actions herein were not unreasonable.

Conclusion

The Court should reconsider and amend its order to conclude that no taking occurred. Alternately, Defendant asks that it be granted a new trial under the procedures and substantive law outlined above.

Respectfully submitted,



Beacham O. Brooker, Jr.

SCDOT

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Columbia, S.C.
February 15, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

Henry W. Frampton, III,)
Plaintiff,)

vs.)

South Carolina Department of)
Transportation,)
Defendant.)

PLAINTIFF/LANDOWNER'S
MEMORANDUM IN RESPONSE
TO SCDOT'S RULE 59 MOTION



Plaintiff/Landowner Henry W. Frampton, III, ("Landowner") hereby submits this memorandum in opposition to the Condemnor South Carolina Department of Transportation's ("Condemnor") Rule 59(a) and (e), SCRCPP, Motion. For each of the reasons stated herein, as well as all other applicable reasons, the motion should be denied.

Procedural History

This is an inverse condemnation action brought by the Plaintiff/Landowner pursuant to the Fifth Amendment of the United States Constitution and Article I, Section 13 of the South Carolina Constitution. The matter was tried before the Honorable Thomas L. Hughston and a jury February 6 through February 8, 2012 pursuant to a joint request for priority and a day certain trial in the Charleston County Court of Common Please. (See Attached Motion, e-mails and correspondence) Prior to trial, the Condemnor moved to bifurcate the proceedings into two separate trials. The Condemnor proposed that the first trial would be without a jury in order to have the Court decide whether or not a taking occurred as a matter of equity and law. A second

trial, if the Plaintiff/Landowner was successful in proving a taking, would be before a jury to determine any "just compensation" due to the Plaintiff/Landowner as a result of the taking. The Court denied the motion to bifurcate. The Court did recognize and the parties agreed that the Court would decide the issue of whether or not a taking occurred and, if so, the Court would submit the issue of just compensation to the jury.

The parties agreed that most efficient way to try the case was to have that portion of the case related to the taking issue presented by the Plaintiff/Landowner first. The Condemnor would then put up its case relating to the takings issue. The Court agreed to this procedure based upon the consent of the parties. The Plaintiff/Landowner then put up its case on the takings issue. At the conclusion of the Plaintiff/Landowner's case, the Condemnor did not make a motion for directed verdict or any other motion that the Plaintiff/Landowner failed to meet its burden of proof on the takings issue as a matter of law or that the evidence presented by the Plaintiff/Landowner did not constitute a taking as a matter of law. The Condemnor followed the Plaintiff/Landowner and put up its case on the takings issue. The Condemnor again did not make any motions at the conclusion of all the evidence on the takings issue. Accordingly, subsequent to the presentation of evidence by the Plaintiff/Landowner and the Condemnor on the taking issue, the Court ruled that the actions of the Condemnor caused a temporary physical taking of the Plaintiff/Landowner's Property for a period of 16 months. The Condemnor again did not make any motions at that time. In fact, though the trial was not yet complete, the Condemnor served the Plaintiff/Landowner with a Notice of Appeal to the South Carolina Court of Appeals. Notwithstanding the appeal, the Condemnor proceeded with

the remainder of the trial where evidence was presented by the Plaintiff/Landowner and the Condemnor on the issue of just compensation. The jury returned a verdict in favor of the Plaintiff/Landowner in the amount of \$36,527.00. The full amount of damages submitted to the jury by the Plaintiff/Landowner.

On February 15, 2012, subsequent to its service of a notice of appeal, the Condemnor filed this Rule 59, SCRPC, Motion seeking to have the Court "reconsider and amend its order to conclude that no taking occurred" or, in the alternative, to have the Court grant a new trial based upon its denial of the Condemnor's motion to bifurcate.

Argument

I. The Court did not err in denying the motion to bifurcate the proceedings.

"Trial judges have discretion as to whether to bifurcate a trial." Durham v. Vinson, 360 S.C. 639, 644 n. 2, 602 S.E.2d 760, 763 n. 2 (2004). "A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice." Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct.App.1998).

The Condemnor argues that the Trial Judge abused his discretion in denying the motion to bifurcate because it was prejudiced in having the jury sit through the "takings" phase of the trial.¹ The Condemnor cites to the testimony of Mr. Hartnett, the Plaintiff/Landowner's appraiser, to demonstrate the alleged prejudice. Mr. Hartnett, however, did not testify until after the Court ruled and found a taking. The jury did not

¹ The Condemnor did not object to any evidence presented during the takings phase as prejudicial or irrelevant. Therefore, it is unclear as to which evidence the Condemnor alleges to be prejudicial. The Landowner argued that it was going to present essentially the same facts for the purposes of just compensation and the taking claim.

hear anything from Mr. Harnett that was ultimately excluded. Indeed, the issue on median damages and Mr. Hartnett's testimony on such damages was only proffered outside the presence of the jury.

The Condemnor also argues prejudice in having the jury hear testimony from the Plaintiff/Landowner and its own witnesses or former employees. However, Condemnor did not object to any questions asked by the Plaintiff/Landowner of any of the witnesses. Plaintiff/Landowner's witnesses Larry Phinney and Henry Frampton set out, without objection, the facts giving rise to the taking: the intent to block access to the subject property, the plans calling for the installation of a bridge guardrail which permanently blocked access to the existing driveway and elevation changes because of the installation of a new sidewalk, the affirmative and aggressive construction activities which physically blocked the existing driveway, the duration of the blockage and the decision to shorten the guardrail and relocate the existing driveway to restore access to the property. Each of these facts were relevant to both the liability and just compensation issues of the case.

Nor did the Condemnor request the trial judge to hear the testimony of any witness it called outside the presence of the jury. Condemnor complains that the Plaintiff/Landowner, on cross examination, provided testimony in response to a question it asked. Condemnor however failed to move to strike any testimony it elicited from the Plaintiff/Landowner. See McClurg v. Deaton, 380 S.C. 563, 579–80, 671 S.E.2d 87, 96 (Ct.App.2008)(holding a party may not raise an issue for the first time in a motion to reconsider, alter or amend a judgment).

Condemnor argues that it was prejudiced because of multiple claims of takings some of which arise from the non-compensable police power acts of the State. The jury never heard any testimony concerning any such claims. This Court excluded valuation testimony concerning the installation of a concrete median from the ears of the jury and therefore prejudice is not possible. Furthermore, there is no evidence that the jury was influenced by any improperly admitted evidence. While the jury awarded a full verdict for all the damages claimed and entered (without objection), the more likely reason for the full verdict is the fact that the Condemnor failed to introduce any valuation testimony, except for a mitigation estimate for the asphalt transitioning of a driveway entrance, which was specifically authorized by statute to be performed by the SCDOT for all landowners in the State.

Most of Condemnor's post trial motion is centered on its argument that a regulatory taking analysis applied to this action. The Court did not misinterpret case law. Plaintiff/Landowner alleged a physical interference with its long recognized easement of access. There was no allegation or evidence of a regulatory action by the Condemnor. Therefore, there was no Penn Central or regulatory taking analysis to apply. See Hardin v. SCDOT, 371 SC 598, 641 S.E.2d 437 (2007); Carolina Chloride, Inc. v. SCDOT, 394 S.C. 154, 714 S.E.2d 869 (2011).

There is no prejudice and the Court did not abuse its discretion in denying the motion to bifurcate.

II. The Court properly found the actions of the Condemnor arose to a temporary physical taking of the Landowner's property.

The Condemnor argues that the Court erred as a matter of law in failing to rule that the Plaintiff/Landowner did not present sufficient evidence to establish a taking

because the complete denial of access was only temporary. The Condemnor's position, however, ignores South Carolina and Federal Law. See Carolina Chloride, Inc. v. SCDOT, 394 S.C. 154, 714 S.E.2d 869 (2011) *citing* Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005)(In Byrd, the Court removed what was previously the fourth element of inverse condemnation—that the taking must have some degree of permanence—under the rationale that “it conflicts with the principle that the government must compensate for even a temporary taking.”); see also See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). “A plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking” of a recognized property right regardless of the duration. Byrd, *supra*.

Moreover, the Condemnor failed to make any motions as to the insufficiency of the Plaintiff/Landowner's evidence. The Condemnor cannot now argue for the first time at the post trial motions stage that the evidence was insufficient. See McClurg v. Deaton, 380 S.C. 563, 579–80, 671 S.E.2d 87, 96 (Ct.App.2008)(holding a party may not raise an issue for the first time in a motion to reconsider, alter or amend a judgment).

III. The Court found facts in accordance with the evidence.

The remainder of the Condemnor's arguments relate to factual findings made by the Court based upon the evidence presented. The evidence presented by the Plaintiff/Landowner supports the Trial Court's findings. The Condemnor merely seeks to draw different conclusions from the same facts and photographs in support of its motion to reconsider. The motion should be denied.

Conclusion

For the reasons stated herein and all other applicable reasons, the motion should be denied.



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ATTORNEYS FOR PLAINTIFF/LANDOWNER
HENRY W. FRAMPTON, III

3.1, 2012

SMITH, BUNDY, BYBEE & BARNETT, P.C.

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W. H. BUNDY, JR.
RICHARD D. BYBEE
STAN BARNETT

RICHARD D. BYBEE
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M. BRENT MCDONALD

January 9, 2012

Honorable Deadra L. Jefferson
Charleston County Judicial Center
100 Broad Street, Suite 336
Charleston, SC 29401-2236

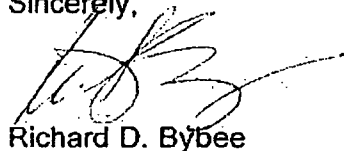
RE: Henry W. Frampton and Dale B. Frampton vs. South Carolina Department
of Transportation
C/A No.: 09-CP-10-6185
Request for Priority
Our File No.: 05-022

Dear Judge Jefferson:

Pursuant to South Carolina Code of Laws Section 28-2-310(c) the Landowner Frampton would request that this case be given precedent over civil cases for trial. Currently the matter is not to be tried before February 1st. Landowner requests priority for a day certain either the week of February 6th or February 27th. Enclosed please find a motion to that effect which is being filed with the Clerk. Mr. Brooker who represents the SCDOT joins in this priority request. He also has a matter to discuss with the court at a status conference. I would request that you schedule a status conference to set a trial date and address Mr. Brooker's issues in a timely fashion.

Thank you for your consideration in this regard

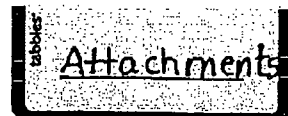
Sincerely,



Richard D. Bybee

RDB/dlb
Enclosures

cc: Mr. and Mrs. Hal W. Frampton (With Enclosure)
Beacham O. Brooker, Jr., Esquire (With Enclosure)
Mr. Don Michel (With Enclosure)



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Henry W. Frampton, III and Dale B. Frampton
☒ Plaintiff

v.

South Carolina Department Of Transportation
☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2009-CP-10-6185

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Beacham O. Brooker, Jr., Esquire, Bar No. Address: Post Office Box 191 Columbia, SC 29202-0191 phone: (803) 737-2314 fax: (803) 737-2071 e-mail: brookerbo@scdot.org other:	Defendant's Attorney: Richard D. Bybee, Bar No. 1063 Address: Post Office Box 1542 Mt. Pleasant, SC 29465-1542 phone: (843) 881-1623 fax: (843) 881-4406 e-mail: rdb@s3blaw.com other:
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO	
SECTION II: Motion/Order Type	
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
SECTION III: Motion Fee	
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE: _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Date Filed: _____	
Collected by: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____	

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

Henry W. Frampton, III and Dale
B. Frampton,)

Plaintiffs,)

vs.)

South Carolina Department of
Transportation,)

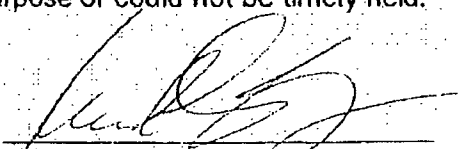
Defendant.)

PLAINTIFFS' MOTION FOR PRIORITY

2012 JAN 10 PM 12:23
CLERK OF COURT

Pursuant to South Carolina Code of Laws Section 28-2-310(c), the Plaintiffs would request that this case be given precedent over civil cases for trial. This case is presently scheduled not to be tried before February 1, 2012. Plaintiffs hereby requests priority for a day certain trial either the week of February 6, 2012 or February 27, 2012.

Counsel, prior to filing the motion herein, consulted with opposing counsel and attempted in good faith to resolve the matter contained in the motion or hereby certifies that such consultation would serve no useful purpose or could not be timely held.


Richard D. Bybee
Smith, Bundy, Bybee & Barnett
Post Office Box 1542
Mt. Pleasant, SC 29465-1542
(843) 881-1623
rdb@s3blaw.com

ATTORNEY FOR PLAINTIFFS
HENRY W. FRAMPTON, III AND
DALE B. FRAMPTON

1/1/12, 2012

CERTIFICATE OF MAILING

I, Deborah L. Bussey, of Smith, Bundy, Bybee & Barnett, do hereby certify that I have this day mailed, via U.S. Mail, postage paid, a true and accurate copy of:

PLAINTIFFS' MOTION FOR PRIORITY

in the foregoing action to the following as follows:

Beacham O. Brooker, Jr, Esquire
S. C. Department of Transportation
Post Office Box 191
Columbia, SC 29202-0191

2012 JAN 10 11:23
CLERK OF COURT

This 9th day of January, 2012

Deborah L. Bussey
Deborah L. Bussey

Clerk : Julie Armstrong
Charleston County Judicial Center
Charleston, SC 29401
(843) 958-5000

Received From:	Bybee, Richard D.		Date:	1/10/2012
	Smith Bundy Bybee & Barnett, Pc		Receipt #:	489709
	Mt. Pleasant, SC 29465-1542		Clerk:	COCANP
Paying for:	Frampton, Henry W			
Transaction Type:	Payment		Reference #:	23693
Payment Type:	Check	\$25.00	Comment:	motion for priority
Total Paid:		\$25.00	Non-Refundable	

ReceiptSingleCase.rpt V6.1

Rick Bybee

From: Don Michel [DMichel@charlestoncounty.org]
Sent: Friday, February 03, 2012 8:22 AM
To: Rick Bybee
Cc: brookerbo@scdot.org
Subject: RE: Frampton v SCDOT

See you both on Monday.

Don Michel
Court Management Supervisor
Charleston County Clerk of Court
100 Broad St. Suite 106
Charleston, SC 29401
Direct: 843-958-5013
Fax: 843-958-4440

From: Rick Bybee [mailto:rdb@s3blaw.com]
Sent: Thursday, February 02, 2012 5:46 PM
To: Don Michel
Cc: Beach (brookerbo@scdot.org)
Subject: RE: Frampton v SCDOT

Beach and I have talked to Judge Hughston. This is to confirm that since we have day certain Monday that we do not have to attend tomorrow's roster meeting. The case should take 2-3 days.

Richard D. Bybee
Smith, Bundy, Bybee and Barnett
PO Box 1542
Suite 100, Building F
1037 Chuck Dawley Blvd.
Mt. Pleasant SC 29465
843 881 1623

From: Don Michel [mailto:DMichel@charlestoncounty.org]
Sent: Thursday, February 02, 2012 10:52 AM
To: Rick Bybee; brookerbo@scdot.org
Cc: Hal Frampton
Subject: RE: Frampton v SCDOT

Rick,

Judge Hughston will be your trial Judge next week in courtroom 3a; however, he is not holding court this week so he has not made an appearance. I will let you both know if he does. Otherwise, he will meet with you on Monday prior to selecting a jury.

Don

Don Michel
Court Management Supervisor
Charleston County Clerk of Court
100 Broad St. Suite 106
Charleston, SC 29401
Direct: 843-958-5013
Fax: 843-958-4440

From: Rick Bybee [<mailto:rdb@s3blaw.com>]
Sent: Wednesday, January 18, 2012 9:17 AM
To: Beach (brookerbo@scdot.org)
Cc: Don Michel; 'Hal Frampton'
Subject: Frampton v SCDOT

Beach:

The case has been given priority, day certain for Feb. 6, 2012. The trial judge has not been selected yet but Don is aware of your desire to have a status conference and it will most likely be set the week before trial.

Richard D. Bybee
Smith, Bundy, Bybee and Barnett
PO Box 1542
Suite 100, Building F
1037 Chuck Dawley Blvd.
Mt. Pleasant SC 29465
843 881 1623

CERTIFICATE OF MAILING

I, Deborah L. Bussey, of Smith, Bundy, Bybee & Barnett, do hereby certify that I have this day mailed, via U.S. Mail, postage paid, a true and accurate copy of:

PLAINTIFF/LANDOWNER'S MEMORANDUM IN RESPONSE
TO SCDOT'S RULE 59 MOTION

in the foregoing action to the following as follows:

Beacham O. Brooker, Jr, Esquire
S. C. Department of Transportation
Post Office Box 191
Columbia, SC 29202-0191

BY _____
JUL 11 2012
2012 MAR 1
PM 3:32
11-1

This 1st day of March, 2012

Deborah L. Bussey
Deborah L. Bussey

STATE OF SOUTH CAROLINA

County of Charleston

Henry W. Frampton, III, and Dale B.
Frampton,

Plaintiffs,

v.

South Carolina Department of Transportation,

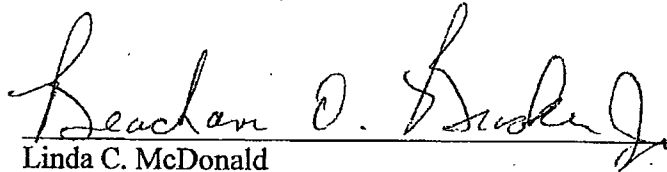
Defendant.

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

DEFENDANT'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

Defendant, the South Carolina Department of Transportation, moves the Court for partial summary judgment in its favor dismissing those allegations of the Complaint alleging a taking from plaintiffs' property at 699 Folly Road due to a temporary deprivation of access.



Linda C. McDonald

Beacham O. Brooker, Jr.

SCDOT

Post Office Box 191

Columbia, South Carolina 29202-0191

(803) 737-1347

brookerbo@scdot.org

Columbia, S.C.
May 13, 2011

FILED
2011 MAY 17 PM 1:42
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA

County of Charleston

Henry W. Frampton, III, and Dale B.
Frampton,

Plaintiffs,

v.

South Carolina Department of Transportation,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CR-10-685

DEFENDANT'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR PARTIAL
SUMMARY JUDGMENT

FILED
2011 MAY 17 PM 1:42
JULE J. ARMSTRONG
CLERK OF COURT

Defendant, the South Carolina Department of Transportation, submits this memorandum in support of its motion for partial summary judgment in its favor dismissing those allegations in the complaint relating to an alleged temporary loss of access to the plaintiffs' rental property at 699 Folly Road in Charleston. In support of its motion, defendant relies on this memorandum, the transcripts of both plaintiffs' depositions, plaintiffs' interrogatory answers and documents produced in response to defendant's request for production, and the attached affidavits of Bobby D.R. Burton, Richard L. Floyd, and Clifton L. Hough.

I. Statement of Facts.

Henry W. Frampton, III, is the current owner of two adjoining parcels of land on Folly Road in Charleston County bearing the street addresses of 685 Folly Road and 693 Folly Road. The first parcel is improved with a building leased to a law firm and the second is Mr. and Mrs. Frampton's residence. Dale B. Frampton is Henry's wife and is the current owner of a parcel of land, also adjoining 693 Folly Road, and improved with a rental house. Its address is 699 Folly Road. Until recently, the parcels at 693 and the rental parcel at 699 Folly Road were a single parcel owned by Mr. Frampton.

On or about August 31, 2004, Mr. Frampton was invited to, and did attend, a public information meeting hosted by the Department where he and his neighbors were briefed on the Department's pending plan to replace the James Island Creek Bridge on Folly Road. H. Frampton depos. tr., p. 15-16, App. 136-37.¹ Thereafter Mr. Frampton met on the property with Larry Phinney, SCDOT's regional rights-of-way administrator, where he and Phinney viewed the project plans. Id. It was at this meeting that Mr. Frampton first learned that a guardrail would extend from the bridge across the parking area of the rental house at 699 Folly Road. H. Frampton depos. tr., p. 16-17; App. 137-38. Thereafter, Mr. Frampton retained legal counsel and proceeded to subdivide his land into two separate parcels containing the personal residence and the rental house respectively. H. Frampton depos. tr., p. 19; App. 140. On December 22, 2005, Henry Frampton conveyed the parcel at 699 Folly Road to his wife, Dale. P. Resp. to D. Req. to Prod., App. 29-33. On January 23, 2006, the Framptons' attorney wrote Larry Phinney advising him that the Frampton property had been subdivided into two separate parcels with individual tax map numbers and the rental house property was now landlocked by the proposed guardrail. P. Resp. to D. Req. to Prod., App. 28. Thereafter, through a series of emails and telephone calls, Mr. Phinney was able to convince the Department's bridge design consultant, Ralph Whitehead Associates, and the Department's bridge design engineer, to alter the project plans and shorten the guardrail from the standard length of 50 feet to 37.5 feet with a "T-type" end treatment." Burton Affidavit, App. 7. This plan change had the effect of retaining the ability of the occupants of the rental house to enter into and use the parking area next to the house. The

¹ The references herein are to the transcripts of the Department's depositions of Mr. and Mrs. Frampton, their answers to the Department's interrogatories, the documents produced by plaintiffs in response to our first request to produce, and affidavits of SCDOT personnel and their contractor, Cape Romain Contractors, Inc. The documents, including the full transcripts and interrogatory answers are reproduced in an appendix to this memorandum, which is numbered serially and references made as "App. ___."

parking area was eventually repaved by SCDOT maintenance personnel at no expense to the plaintiffs. H. Frampton depos. tr., p. 24, App. 145; Hough Affidavit, App. 13.

On or about October 1, 2009, the Framptons began renovations on the rental house. According to the plaintiffs, "Renovations and deferred maintenance had to be done in order to rent this property and maximize the rental potential following the bridge construction." Answers to Def's First Interrogatories, 18; App. 20. The previous tenant, Greg Burkey, had moved out in early November, 2008, before his lease expired. Plaintiffs have asserted that Mr. Burkey vacated because of the construction work. H. Frampton depos. tr., p. 33, App. 154. However, that fact is disputed by Defendant's witnesses. Hough Affidavit, App. 13. Burkey had paid rent of \$950 per month. Id. On March 18, 2010, the house was rented to Todd Nixon for a monthly rent of \$1,150 per month. Answers to Def's First Interrogatories, 18, App. 20.

The tax assessed value of the property at 699 Folly Road was \$156,300 for each of the years 2007-2009. H. Frampton Depos., Exh. 6.

Plaintiffs filed their Complaint on September 29, 2009, alleging that the concrete median installed in Folly Road was a taking of access to all three of their properties. Additionally, they complain that the blocking of access to 699 Folly Road for one year was a temporary taking. All issues regarding the median have been stayed pending a decision by the South Carolina Supreme Court in another case. The Court is to consider only the question of whether the bridge work affected a taking of the property at 699 Folly Road by a denial of access.

II. Standard of Review.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of

law.” Rule 56(c), SCRPC. “[T]he evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the moving party.” Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001); Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). Although there is a dispute concerning whether plaintiffs or their tenants were ever actually prevented from accessing their property (see the affidavits of Bobby D.R. Burton and Clifton L. Hough, App. 7, 12), viewing that fact in plaintiffs’ favor, i.e., that they were deprived of the use of the rental house driveway for a one-year period, defendant is nevertheless entitled to summary judgment under the well-developed case law in this area. The Court is to determine whether there was a taking of property from the plaintiffs without just compensation, if so, define the property or property rights taken. Thereafter, the issue of just compensation for the rights taken may be tried before a jury as in any condemnation case. Cobb v. S.C. Dep’t. of Transportation, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2003); Hardin v. S.C. Dep’t. of Transportation, 359 S.C. 244, 249, 597 S.E.2d 814, 816 (Ct. App. 2004) reversed on other grounds, 371 S.C. 598, 641 S.E.2d 438 (2006).

III. Plaintiffs’ injuries are not compensable under this State’s inverse condemnation jurisprudence.

Plaintiffs complain that an obstruction of access to a rental house they own due to a bridge reconstruction project over James Island Creek that their property also abuts worked a taking of their property for which they have not been compensated by the State. Plaintiffs’ claim fails under the well-established law in this State for determining whether a temporary restriction on a landowner’s use of his property amounts to a taking of his property for which just compensation is due under article 1, section 13 of the South Carolina constitution.

As noted in Hardin v. SCDOT, 371 S.C. 598, 604, 641 S.E.2d 437, 440 (2007), although property interests are often determined by reference to state law, South Carolina courts have embraced federal jurisprudence as providing the rubric under which they analyze whether interference with someone's property interests amounts to a constitutional taking. Federal precedents stake out two categories of regulatory action that generally will be deemed per se takings. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. See, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to all regulations that completely deprive an owner of “all economically beneficial us[e] of her property.” Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (emphasis in original). Lucas held that the government must pay just compensation for such “total regulatory takings,” except to the extent that “background principles of nuisance and property law” independently restrict the owner's intended use of the property. Id., at 1026-1032, 112 S.Ct. 2886. In all other cases, courts apply the test set forth in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). See, Byrd v. City of Hartsville, 365 S.C. 650, 660, 620 S.E.2d 76, 81 (2005) (“If Lucas does not apply, then Penn Central does.”)

The analysis of whether a taking has occurred in a case like the one at bar is governed by Penn Central because the claim stems from an allegation of a temporary denial of less than all economically viable use of the property. Kiriakides v. School District of Greenville County, 382 S.C. 8, 15, 675 S.E.2d 439, 442 (2009). Moreover, Penn Central applies to this case even though our Supreme Court in Hardin, supra, characterized the rights of abutting landowners to access the

road as the abutter's "easements." Those rights are indeed rights that are appurtenant to land and a property interest. However, the law in this area focuses on the "parcel as a whole."

"'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment are entirely abrogated. In deciding whether a particular government action has affected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here the city tax block designated as the 'landmark site.'"

Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 331-32, 122 S.Ct. 1465, 1484, 152 L.Ed.2d 517, 546-47 (2002) quoting Penn Central, *supra*. See also, Sea Cabins on the Ocean IV v. City of North Myrtle Beach, 337 S.C. 380, 392-93, 523 S.E.2d 193, 200 (Ct. App. 1999). Thus, although plaintiffs' may have been temporarily deprived of their or their tenant's ability to fully utilize the parking area on the rental house parcel, they retained at all times all of the other sticks in the bundle of rights that make property valuable. See, Main v. Thomason, 342 S.C. 79, 88, 535 S.E.2d 918, 922 (2000).

The gravamen of the Complaint herein is a temporary loss of use of the property due to an alleged interference with access to a driveway. However, the Penn Central analysis is appropriate even if the Department's actions here are considered to be a temporary physical invasion, which they were not.² Physical encroachments that fall short of permanent physical occupations are known as "temporary physical invasions." Temporary physical invasions are tested under the Penn Central three-factor test. Boise Cascade Corp. v. United States, 296 F.3d 1339, 1353 (Fed. Cir. 2002); see also, Main v. Thomason, *supra*.

² All of the highway and bridge work under this project was done on right-of-way already owned by the Department. No physical entry onto plaintiffs' property was ever made except for inspections pursuant to the landowners' permission. Hough Affidavit, App. 12. An adjoining landowner's right to enter onto a public road is a usufruct. As the Supreme Court of Maryland has stated in a much-cited quote, "An opposite view would require the State to pay through the nose for the privilege of further improving and adding to the safety of highways which it has built and which have evidently brought customers to the doors of the owners of land fronting on such highways." Langley Shopping Center v. State Roads Commission, 131 A.2d 690 (Md. 1957).

The U.S. Supreme Court decision in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed2d 868 (1982), involved a state law requiring landlords to permit cable companies to install cable facilities on apartment buildings. The Court held that a permanent physical occupation authorized by government is a taking without regard to the public interest it may serve. However, the holding of Loretto is quite narrow. It applies only to permanent physical occupations either by the government or by a third party acting under government authority. The Court distinguished permanent physical occupations, in which it had always found a taking, from “cases involving a more temporary invasion, or government action outside the owner’s property that causes consequential damages within,” which were not always takings. Id. at 428, 102 S.Ct. 3164. The Court noted that “[more] recent cases confirm that the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property.” Id. at 430. The Court held that of the three, only a permanent physical occupation is a per se taking, and courts therefore need not engage in a balancing test when confronted with such a situation. Id. at 434-35, 102 S.Ct. 3164.

Physical invasions, (as distinct from physical occupations) thus fall outside the *Loretto* rule. A physical occupation, as defined by the Court, is a permanent and exclusive occupation by the government that destroys the owner’s right to possession, use, and disposal of the property. The Court defined the destruction of these interests as follows: (1) possession: the owner has no right to possess the occupied space himself, and so has no power to exclude the occupier from possession and use of the space. Id. at 435, 102 S.Ct. 3164; (2) use, “the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property,” Id. at 436, 102 S.Ct. 3164; and (3) disposal, “even though the owner may retain the

bare legal right to dispose of the occupied space ... will ordinarily empty the right of any value, since the purchaser will be unable to make any use of the property,” id. Boise Cascade Corporation v. United States, 296 F3d 1339, 1353 (Fed. Cir.2002). Here, of course, plaintiffs retained all three of the above interests at all times. They retained exclusive possession of the property; the Department never possessed any part of it. They could use the property and, indeed took advantage of the hiatus between tenants to engage in deferred maintenance of the rental house and make major renovations in order to increase its rent-producing potential. Answers to D. First Interrog. 18, App. 20. They could have sold the property to a third party at any time during the course of the project.

Finally, several cases have discussed the relevance of the length of the restriction placed on the landowner’s use of its property, generally referred to as “regulatory delay.” In Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, the government instituted building moratoria that amounted to three years. The Court held that Lucas does not apply when the property owner has suffered a temporary loss of all economically viable use. 535 U.S. 302, 331-32, 122 S.Ct. 1465, 1484, 152 L.Ed.2d 517, 546-47 (2002). Because time is a component of an interest in property, the property owner in that situation has suffered a partial loss, not a total one. Once the temporary restriction is lifted, value will return. Tahoe-Sierra, 535 U.S. at 331-32, 122 S.Ct. at 1484, 152 L.Ed.2d at 546. In such a case, the court must determine whether there has been a taking. In the instant case, the assessed value of the property for tax purposes was exactly the same for the tax year preceding the project as for the tax year following project completion. H. Frampton Depos. tr. p. 55, Exhibit 6; App. 176, 69-72. Further, Mr. Frampton testified at his deposition that the only diminution in long-term value of the property is

attributable solely to the center median denial of left turns.³ H. Frampton depos. tr. 61-62, App. 182-83. That issue is not before the court on this motion having been stayed pending the Supreme Court's ruling in another case.

In Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005), the City delayed eleven months on Byrd's request to rezone his property for commercial use while it investigated the issue of whether such commercial development would threaten the National Historic Landmark status of Coker Farms of which Byrd's parcel was a part. After determining it would not, the board took an additional two months to approve the zoning change. In that case, our Supreme Court said,

In the context of regulatory delay, the *Penn Central* inquiry is whether the delay ever became unreasonable. Byrd is not entitled to compensation merely because he had to obtain a zoning change to develop his property. Until regulatory delay becomes unreasonable, there is no taking. The length of the delay is not determinative. Rather, we consider all relevant circumstances, including the reasons for the delay and the economic impacts on Byrd. And under the "parcel as a whole" doctrine, we must consider those impacts in relation to Byrd's interest in the City tract.

Id., 365 S.C. at 660-61, 620 S.E.2d at 81.

In Kiriakides v. School District of Greenville County, 382 S.C. 8, 15, 675 S.E.2d 439, 442 (2009), the school district delivered to Kiriakides a condemnation notice to acquire his property in August of 2002. Kiriakides challenged the condemnation in court and ultimately in May 2003, the district abandoned the condemnation. The Court found that there was no unreasonable delay or bad faith on the part of the school district. Kiriakides offered no proof that the value of his property was diminished or that he lost any potential sales of his property due to the proceedings. In fact, Kiriakides admitted that he had not tried to sell the property during this

³ Not all damages that are suffered by a private property owner at the hands of the governmental agency are compensable. Woods v. State, 314 S.C. 501, 504, 431 S.E.2d 260, 262 (Ct. App. 1993). The property itself must suffer some diminution in substance, or it must be rendered intrinsically less valuable. Id.

time. Likewise, in the instant case, Mrs. Frampton testified in her deposition that she had not attempted to sell the property after subdividing it into a separate tract and that she and her husband had no plans to do so. D. Frampton Depos. tr., pp. 7-8; App. 215.⁴

IV. The Penn Central analysis.

The general rule is that regulatory-takings cases require “essentially ad hoc, factual inquiries,” balancing all relevant circumstances to determine whether the government has taken property. Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659, 57 L.Ed.2d at 648, Byrd, 365 S.C. at 658, 620 S.E.2d at 80. Three factors are typically balanced to determine whether the public benefit from the regulation outweighs the private harm to the landowner: (1) the character of the government action (A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good); (2) the economic impact of the regulation on the claimant; and (3) the degree to which the regulation has interfered with distinct investment backed expectations. Penn Central Transportation Co. v. New York City, *supra*; Main v. Thomason, 342 S.C. at 88, 535 S.E.2d at 922.

a. The character of the government action.

The character of the Department’s action in this case is, of course, the reconstruction of the S.C. Route 171 (Folly Road) bridge across James Island Creek. Road and bridge maintenance and construction are one of the fundamental police power functions of the State. It

⁴ The Framptons’ claim for damages appears to be loss of rental income from the house during the construction period. Lost income is not recoverable in eminent domain cases. S.C. State Hwy. Dep’t. v. Bolt, 242 S.C. 411, 131 S.E.2d 264 (1963). However, it might be taken into account under the Penn Central analysis discussed *infra*.

is an exercise of the police power and not of the power of eminent domain. S.C. State Highway Dept. v. Carodale Associates, 268 S.C. 556, 235 S.E.2d 127, 129 (S.C. 1977).

It has long been held in this State that a purchaser of property on a public street does so subject to the discretion of government authorities to improve those streets. South Bound R.R. v. Burton, 67 S.C. 515, 46 S.E. 340 (1903)⁵. The power of eminent domain and the police power are distinct sovereign powers. In State Highway Dept. v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (S.C. 1970), the Court stated,

This Court has recognized that there is a distinction between the exercise of the police power and the exercise of eminent domain; that just compensation is required in the case of the exercise of eminent domain but not for the loss by the property owner which results from the constitutional exercise of the police power. *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 [(1955)]; *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 [(1956)].

Id. at 394. The principle is no different in the federal sphere.

It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413, 43 S.Ct at 159.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2899, 120 L.Ed.2d 798 (1992).

While the plaintiffs' herein suffered an inconvenience for a period of time, their loss was not unique to them compared to other landowners abutting public roads. All roads and bridges must be improved or replaced from time to time. See, Floyd Affidavit, App. 1-2. This is especially true of bridges in salt water environments such as the James Island Creek bridge at

⁵ See also *Richards v. City of Columbia*, 88 S.E.2d 683, 689 (S.C. 1955) ([D]etriment to private property which results from legitimate exercise of the police power does not constitute a taking of it for public use. All property is held subject to reason regulation by the State. * * * 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.)

issue here. When steel rebar within the structure becomes exposed, the urgency of repairs is greatly increased.

The "average reciprocity of advantage" test is based upon the notion of an overriding common good. When the government, by regulation, makes reasonable adjustments in the benefits and burdens of economic life, the Takings Clause does not provide a basis for compensation so long as no individual property owner is uniquely affected and the benefits and burdens of the government action are shared with the community.

Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 491, 107 S.Ct. 1232, 1245, 94 L.Ed.2d 303 (1926). Thus, a law which interferes with the use and enjoyment of property does not constitute a taking of that property "when [the] interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 2A Sackman, Nichols on Eminent Domain, §6.01[10], p. 6-18.

The approximately one year construction period for the bridge replacement was not an extraordinary length of time for this type of project. Burton Affidavit, App. 8. The delay was not unreasonable. Folly Road, including the James Island Creek bridge, is the only route into and out of the City of Folly Beach from the mainland. Because of this and the need to maintain traffic to and from the City, the bridge project had to proceed in two phases where traffic was shifted from one side of the bridge while work proceeded on the other -- then vice versa. Burton Affidavit; App. 7.

The road construction was a legitimate exercise of the police power that necessarily burdens all landowners eventually. However, each landowner benefits from the burden placed on others. "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Lingle v. Chevron, 544 U.S. 528, 537, 125 S.Ct. 2074, 2081, 161 L.Ed2d 876 (2005) quoting Pennsylvania Coal v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 28 A.L.R. 1321, 67 L.Ed. 322 (1922).

The governmental action herein was not an exercise of eminent domain. One is not entitled to compensation for restriction of use, or for deprivation, of property as a result of proper exercise of the police power. James v. City of Greenville, 88 S.E.2d 661 (S.C. 1955).

b. The economic impact on the claimant.

The Penn Central test has never been invoked successfully in either the U.S. or South Carolina Supreme Courts. It is unsettled whether courts should focus on the loss of value or the loss of use. It appears, however, that the tendency of the South Carolina Supreme Court is to focus on the degree of loss of use. See, Byrd, *supra*, Kiriakides, *supra*. Neither court has indicated what percent value loss or the degree of loss of use attributable to the government's actions will constitute a taking. However, the U.S. Supreme Court has indicated that the economic impact generally must be substantial, arguably severe, when the other Penn Central factors are not determinative. As stated in Lingle, *supra*,

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.

544 U.S. at 537, 25 S.Ct. at 2082.

As pointed out infra, in an alleged temporary taking such as complained of here, the finding of a taking should be rare because value returns when the restriction is lifted. That was the case here inasmuch as the assessed value of the rental property was \$156,300 before the project and the same, \$156,300 after. H. Frampton depos. tr. 55, Exhibit 6, App. 176, 69-72. According to Mr. Frampton, the only cause of long-term devaluation of the property resulted from the new center median's elimination of left turns, not from the driveway issue. H. Frampton depos. tr. 61-62, App. 182-83.

Moreover, according to plaintiff's interrogatory answers, the loss of gross rents amounted to \$11,400. Offset from this would be \$7,727 in maintenance costs, insurance and taxes for a net rental income of \$6,073. An additional factor is that the house required extensive renovations over a five-month period in order to re-let the property. These renovations would have been necessary regardless of the alleged disruptions caused by the bridge project. Therefore it is appropriate to further reduce the loss of net rent by \$2,530 resulting in an income loss of \$3,543. This is certainly not severe nor extraordinary. Many commercial properties such as convenience stores and motels suffer much larger losses in business income when the streets surrounding them undergo improvements. A holding that the State must pay for every disruption to businesses from ordinary highway maintenance activities would have a far-reaching and debilitating impact on the State's ability to maintain its highways.

Even so, loss of income is not the most common metric in determining the severity of the impact on a landowner under Penn Central. A more common focus of the courts is the plaintiff's ability to recoup his cost basis in the property. See, e.g., Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986). As mentioned above, full value of the property returned after the project ended and the alleged restriction on access was lifted.

With regard to use, Mr. Frampton admitted he could use and did use the property to make necessary repairs to enhance its rental value. It is also possible that a prospective tenant could have parked on one of his adjoining properties for access to the house during the construction period. According to Department and Cape Romain personnel, they would have provided room for tenant parking on the right-of-way had there been a tenant. Hough Affidavit, App. 13-14; Burton Affidavit, App. 8. In any event, plaintiffs retained all of the significant sticks in the bundle of property rights—possession, the right to exclude others, and the right to sell their property.

Finally, it should be noted that the plaintiffs did nothing to try to help themselves during the alleged taking. They admitted that no attempt was made to rent the house, and no direct request to allow access to it for a new tenant was ever directed to the Department or its contactor. Hal Frampton depos. tr., p. 45, App. 166.

c. Plaintiff's investment-backed expectations.

Although there appears to be no South Carolina case directly on point, it is universally held among other U.S. jurisdictions that temporary obstructions to private property by a public works project do not constitute a compensable taking unless there is a complete destruction of access. 2A Sackman, Nichols on Eminent Domain, 6.02[5][d]; Rubano v. Department of Transp., 656 So.2d 1264 (Fla. 1995). According to Nichols, the rule appears to be based upon recognition of the fact that the privilege of receiving the benefits of life within a municipality or other governmental jurisdiction carries with it certain attendant burdens, including the obligation to suffer the inevitable inconvenience associated with public works construction without compensation:

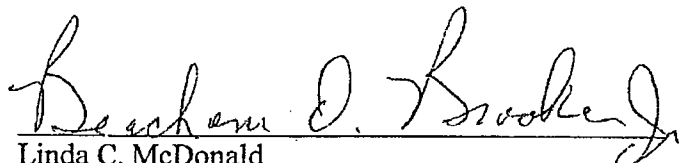
Consequential damages to adjoining property owners in the way of diminution of business while construction is in progress does not constitute a taking of property for which compensation must be made under the Fifth amendment of the Constitution. Such losses are *damnum absque injuria* and unfortunately must be borne by the individual as a price that he pays for being a member of organized society and living in an urban community.

Nichols, supra, quoting Meyers v. District of Columbia, 17 F.R.D. 216, 217 (D.D.C. 1955).

Here, the Frampton rental parcel is the last east-bound property before the James Island Creek bridge. It adjoins both the Creek and the highway approach to the bridge. At the time the bridge was last built, design standards called for a 50-year useful life. Tidal scour and the salt water environment erode the structure and necessitate replacement from time to time. Floyd Affidavit, App. 1-6. No landowner adjoining such a bridge is reasonably entitled to assume that it will not eventually have to be replaced with the attendant dislocations to their property occasioned by major construction.

V. Conclusion.

Mr. and Mrs. Frampton still own the same property at 699 Folly Road that they did prior to the commencement of the bridge replacement project. It has not been reduced in substance. It retains the same value and yields a greater net rental today than before the project. The Court should conclude that there has been no taking of property from the plaintiffs by the State and dismiss those allegations of the Complaint regarding this property.



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May 13, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

Henry W. Frampton, III and Dale)
B. Frampton,)

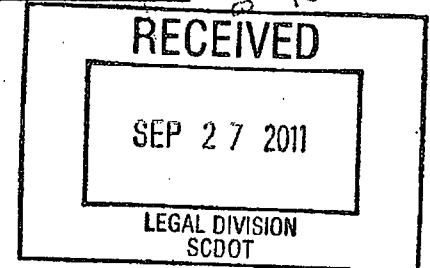
Plaintiffs,)

vs)

South Carolina Department of)
Transportation,)

Defendant.)

Memorandum in Opposition of SCDOT
Motion for Partial Summary Judgment



The Plaintiff Henry W. Frampton, III (hereinafter "Landowner")¹ hereby submits this memorandum of law in response to the motion for partial summary judgment filed by the Defendant South Carolina Department of Transportation (hereinafter "Condemnor"). For the reasons stated herein, the Condemnor's motion for summary judgment should be denied.

Standard of Review

"Summary Judgment is appropriate when it is clear that there is no issue of material fact and that the moving party is entitled to a judgment as a matter of law." Café Assocs., Ltd. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991); Rule 56(c), SCRCP. "Summary Judgment is not appropriate, however, where further inquiry into the facts of the case is desirable to clarify application of the law." Baugus v. Wessinger, 303 S.C. 412, 401 S.E.2d 169 (1991). It should not be granted even when there is no dispute as to evidentiary facts if there is a dispute as to the conclusion to be drawn from

¹ The claims of Dale Frampton arising out of damage to a separate parcel of property have been stayed. The only claims currently before the Court relate to the property owned by Henry W. Frampton, III.

such facts. Id. "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009). The evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997).

Facts

The Condemnor blocked all access to the Landowners' property for over a year. The Landowner used this property as an investment and leased it as a rental property. The Landowner lost the ability to rent the property for approximately a year. The Landowners' appraiser has conducted an evaluation on the damage to the Landowners' property using the income approach. The Landowners' appraiser has determined those damages to be \$20,000. Affidavit of Thomas F. Hartnett (attached hereto as **Exhibit 1**). Moreover, the Landowners' appraiser has determined that during the time of the taking the property suffered a significant loss of the economically viable use of the property. Affidavit of Thomas F. Hartnett.

Facts in Dispute

- The Condemnor contends in support of his motion that "[n]o physical entry onto plaintiffs' property was ever made except for inspections pursuant to the landowners' permission." For this representation the condemnor cites to the affidavit of Clifton L. Hough. However, importantly, in his deposition Mr. Hough testified that a silt fence was installed on SCDOT right of way which physically blocked access into the driveway of the Landowner.

- There is a dispute concerning whether the Landowner or their tenants were ever actually prevented from accessing their property or that the Landowner was deprived of the use of the rental house driveway for a one-year period,
- The Condemnor contends the Landowner "could have sold the property to a third party at any time during the course of the project." Thomas F. Hartnett, the Landowner's expert expressly contradicts this assertion.
- The Condemnor contends that the Landowners' only suffered an inconvenience that was not unique to them. However, the Condemnor has not come forward with any evidence of its assertion or a single additional property owner that experienced a loss of access for over a year. Moreover, the "inconvenience" and/or damage experienced by the Landowner is a question of fact.
- The Condemnor argues that the Landowner's access was "restricted" for over a year. However, the Landowner's access was in fact denied for over a year.
- The Condemnor argues what they "would" have done not what they did do. It is impossible to know what the Condemnor would have done if it had made the decision not to permanently block access by installing a bridge barricade.
- The Condemnor argues that the Landowner was merely inconvenienced. The Landowners' appraiser has submitted an affidavit stating that the property lost a significant portion of its economically viable use during the time of the taking.
- Whether or not property without legal access is marketable for sale or lease.
- The Condemnor originally planned to permanently cut off access to the Landowners' property. It was not until after construction commenced for nearly a year and access was denied for nearly a year did the Condemnor change its mind and seek to restore some access. Therefore, the Condemnor's argument that access could have been requested by the Landowner is in dispute.

Argument

The Condemnor's entire basis for its motion for partial summary judgment is predicated upon three (3) factual underpinnings upon which the Condemnor asks this Court to adopt. Though these facts are in dispute, they are as follows: (1) there has not been a "physical occupation" by the Condemnor of the Plaintiff's property, to wit: its abutter's easement of access; (2) the Landowner did not lose the use of his property during the project; and (3) there has not been a taking of the Landowner's property because the damage and/or the physical invasion was not permanent. Quite simply, these arguments ignore South Carolina law, including, most notably, the Supreme Court of South Carolina's holding in Byrd v. City of Hartville, 365 S.C. 650, 620 S.E.2d 79 (2005). Moreover, as there are numerous issues of disputed material facts in this case, including facts admitted to be disputed by the Condemnor, summary judgment in this matter is inappropriate.

I. The Condemnor physically occupied the Landowners' easement of access resulting in a taking per se.

There are three elements to a physical inverse condemnation case: (1) affirmative conduct of a governmental entity; (2) effecting a taking; and (3) the taking is for a public use. Byrd, 620 S.E.2d 79.

"The right of abutting property owner to access over the street adjacent to his property as an appurtenance to his property, and to have such access protected from material obstruction, has been recognized by many of the courts, including our own. And it has been held that an obstruction which materially injures or deprives the abutting property owner of ingress and egress to and from his property is a "taking" of his property for which recovery may be had. And the fact that other means of access to the

property are available affects merely the amount of damages, and not the right of recovery." Brown v. Hendricks, 211 S.C. 395, 45 S.E.2d 603 (1947); South Carolina State Highway Department v. Allison, 246 S.C. 389, 143 S.E.2d 800 (1965); Hardin v. SCDOT, infra, South Carolina State Highway Dept. v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970).

The easement of access is incorporeal and arises by operation of law. The factual evidence establishes that the easement was impaired because it was completely and physically blocked, and the Landowner's property was damaged for over a year. See Affidavit of Thomas F. Hartnett (Exhibit 1); Deposition of Henry W. Frampton, III, pp. 25-26 (a copy of the deposition is attached hereto as **Exhibit 2**). Therefore, in a constitutional sense there has been a physical taking arising out of the invasion, and occupation of the access easement by the SCDOT blockage of the Plaintiff's driveway which has resulted in damage in the form of a temporary loss of use and income. Webb v. Greenwood County, 97 S.E.2d at 692 ("South Carolina has taken the broadest possible view of 'what is a taking' and has construed the least actual 'damage' to be a taking as distinguished from the Federal rule, and that of many states, in making a distinction between 'taking' and 'damage.' Indeed, damage alone may constitute a taking."); see also City of Waco v. Texland Corporation, 446 S.W.2d 1 (1969)(holding that when the facts establish a material and substantial impairment of an abutter's access easement there is a constitutional taking even when no land is appropriated); DuPuy v. City of Waco, 396 S.W.2d 103 (1965). The Condemnor physically obstructed the Landowners' only easement of access for approximately one year during a public road/bridge project. See Deposition of Clifton Hough (attached hereto as **Exhibit 3**);

Exhibits 13, 14, and 15 to Deposition of Clifton Hough, (attached hereto as **Exhibits 4, 5, and 6**). The obstruction was material as it was in fact a complete deprivation of access to the Landowner's property due to the installation of a silt fence.² See e.g. City of Houston v. Precast Structures, Inc., 60 S.W.3d 331 (Ct.App. Tex. 2001)(finding that the installation of a curb in front of the landowner's driveway constituted a material impairment and a taking).

Notwithstanding South Carolina law, the Condemnor argues that "[p]hysical encroachments that fall short of permanent physical occupations are known as 'temporary physical invasions.'" Condemnors' Memorandum in Support of Partial Summary Judgment, p. 6. It argues that such "temporary physical invasions" are not per se physical takings under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) because they do not have a degree of permanence. The Condemnor cites Main v. Thomason, 342 S.C. 79, 535 S.E.2d 918 (2000) for this proposition. As will be discussed further below, Main v. Thomason, in addition to being factually inapposite to the present case, was overruled by the South Carolina Supreme Court in Byrd v. City of Hartville, *supra*, because the "permanence" element of a taking has been rejected by the United States Supreme Court. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). Therefore, there has either

² The Condemnor argues that because the Landowner's wife owned adjacent property the Landowner and/or his tenant should have used the adjacent property to access the Landowner's property. There is nothing, however, that requires the Landowner's wife to allow an easement over her property. Moreover, there is not a "unity of title" of the property and it cannot be, as a matter of law, considered in assessing condemnation damages because the properties do not share the same ownership. See Arnold v. South Carolina Public Service Authority, 292 S.C. 396, 356 S.E.2d 837 (1987)(where adjacent property owned by a sibling could not be considered in assessing condemnation damages). The Condemnor also appears to argue that the Landowner's use or transfer of the 699 property prior to the inverse condemnation is relevant. However, a landowner is free to make any lawful use of his property, whether or not a condemnation is imminent, up to the time the taking occurs. Kirby Forest Industries v. Lus, 467 U.S. 1 (1984).

been a physical entry and a taking per se or there has not. Here, there has been a physical taking of the right to access the abutting public road by blocking the easement of access appurtenant to the property. Summary judgment, on that basis alone, should be denied.

II. Permanency of the physical invasion is not required for an inverse condemnation claim under South Carolina law.

Central to the Condemnor's argument in support of its motion for partial summary judgment, is the incorrect premise that any "taking," whether by inverse condemnation or direct condemnation, must have a degree of permanence. In Byrd v. City of Hartsville, the South Carolina Supreme Court rejected this argument and expressly held that it removed the "permanence" element from its four factor test to determine either physical or regulatory inverse condemnation. 620 S.E.2d at 79 ("First, we remove the element 'some degree of permanence,' for it conflicts with the principle that the government must compensate for even a temporary taking."). Indeed, "[a] plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking" of a recognized property right. Carolina Chloride, Inc. v. SCDOT, 391 S.C. 429, 706 S.E.2d 501 (2011). A "taking" in South Carolina is synonymous with any amount of damage to a property right. Webb v. Greenwood County, 229 S.C. 267, 97 S.E.2d 688, 692 (1956). Therefore, subsequent to Byrd, it is irrelevant if the damage/taking is only for a duration that is not permanent. The real inquiry is whether a recognized property right—in this case something as fundamental as an abutting landowner's right of access—has been damaged. See Affidavit of Thomas F. Hartnett; see also South Carolina State Highway Department v. Allison, 143

S.E.2d 800 (A property owner in South Carolina has an easement for access to and from any public road that abuts his property.); Brown v. Hendricks, 45 S.E.2d 603; South Carolina State Highway Dept. v. Wilson, 175 S.E.2d 391.

III. The Landowner suffered a loss of economically viable use of its property.

Notwithstanding the foregoing, the Condemnor argues that this case should not be analyzed as a physical takings case but in fact it should be analyzed in the context of a regulatory taking under the standard set forth in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). To be clear, the Condemnor does not argue that this is a regulatory takings case, but it appears to argue that this is a physical takings (invasion) case that must be analyzed under Penn Central. Though the Condemnor cites no South Carolina law for the position that physical takings should be analyzed under a regulatory taking analysis and the Landowner disagrees with this legal position³, even in the context of a Penn Central analysis of a taking, summary judgment is inappropriate.

The general rule under a Penn Central analysis is that "essentially **ad hoc factual inquiries**" must be made that balance all relevant circumstances to determine whether the government has taken property. Byrd, 620 S.E.2d at 80 *citing* Penn Central, 438 U.S. at 124 (emphasis supplied). "Two circumstances are especially important: (1) 'the economic impact on the claimant, and, particularly, the extent to which the government has interfered with distinct investment backed expectations;' and (2) 'the character of the governmental action.'" Id.

³ The South Carolina Supreme Court in Hardin v. SCDOT, 371 S.C. 598, 641 S.E.2d 437 (2007) specifically analyzed—within the context of a median case—the impairment of access and the physical occupation of the easement of access under a physical taking analysis not a regulatory taking analysis as argued by the SCDOT.

Here, the landowner suffered a significant loss of use of its property and a substantial decrease in the economically viable use of the property. See Affidavit of Thomas F. Hartnett. Mr. Hartnett opines that without access this piece of property was incapable of being marketed for sale or of leasing at its fair market value. Therefore, the Landowner could not rent or use the property as he legitimately expected to and had in the past. This right of use is the essence of property ownership.⁴

The Condemnor argues that notwithstanding its physical denial of access, there is no loss of use or damage to the property of the Landowner because it is inherent in the ownership of property adjacent to a bridge that all access, from time to time, will be cut off from the property for over a year. The Condemnor cites no evidence or case law for this proposition probably because it is inconsistent with longstanding South Carolina law which does not draw a distinction between citizens who own property adjacent to a bridge and their neighbors.

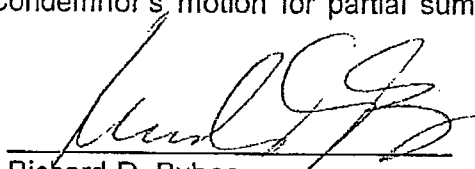
Finally, the Condemnor argues that any loss of use damages suffered by the Landowner should not be considered due to a failure to somehow mitigate damages. A failure to mitigate damages is an affirmative defense for which the Condemnor must both plead and bears the burden of proof. The Condemnor in this case did not plead the affirmative defense of failure to mitigate damages. "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." Whitehead v. State,

⁴ The Condemnor argues that it has a "usufruct" property right in the Landowners' property. A "usufruct" is an "archaic" term applicable, apparently, under Louisiana law. It is a right to use property without a vested interest in it. It is similar to a life estate. Though unrecognized under South Carolina law, a usufruct has as its chief characteristic the right to use or enjoy property without detriment to the fee owner. Here, the Condemnor's physical use of the Landowner's property denied the Landowner all legal access. This appears to be the exact opposite of a usufruct.

352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002). Therefore, in addition to being incorrect, this argument should not be considered by the Court.

Conclusion

For the aforementioned reasons, the Condemnor's motion for partial summary judgment should be denied.


Richard D. Bybee
Smith, Bundy, Bybee & Barnett
Post Office Box 1542
Mt. Pleasant, SC 29465-1542
(843) 881-1623

ATTORNEY FOR PLAINTIFF
HENRY W. FRAMPTON, III

9/26, 2011

STATE OF SOUTH CAROLINA

County of Charleston

Henry W. Frampton, III, and Dale B.
Frampton,

Plaintiffs,

v.

South Carolina Department of Transportation,
Defendant.

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

DEFENDANT'S MOTION TO TRANSFER
TO NON-JURY DOCKET

FILED
JULIE J. ARMSTRONG
CLERK OF COURT
JUN 29 11:22 AM
JUN 22 11:22 AM

Defendant, the South Carolina Department of Transportation (the Department), respectfully moves the Court for an order directing the Clerk to move this matter from the jury to the non-jury docket for purposes of a trial to determine whether there has been a taking of plaintiff's property by the State without first paying just compensation. Should the trial court find in the affirmative, the case may be placed on the jury docket at either party's request, for a trial on the just compensation due for the property or property rights the court adjudges to have been taken. In support of its motion, the Department relies on the Supreme Court's decisions in Cobb v. S.C. Department of Transportation, 365 S.C. 360, 618 S.E.2d 299 (2005), and Kiriakides v. School District of Greenville County, 382 S.C. 8, 14, 675 S.E.2d 439, 442 (2009), and the decision of the Court of Appeals in Hardin v. S.C. Department of Transportation, 359 S.C. 244, 248-49, 597 S.E.2d 814, 816 (2004), reversed on other grounds, 371 S.C. 598, 641 S.E.2d 437 (2007).

Memorandum

The Clerk has placed this matter on the jury roster for trial, likely due to the demand of the plaintiffs in the Complaint. However, the Department has denied it has taken property from the plaintiffs. Resolution of that dispute must be by the Court sitting in equity.

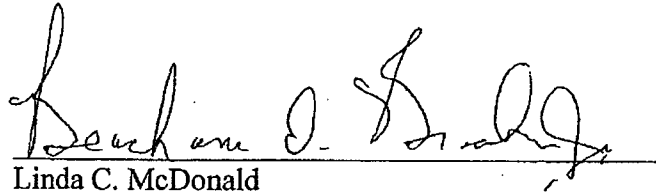
The only role of a jury in an eminent domain case is to assess the amount of just compensation due the landowner as a result of the taking of all or part of it. Johnson v. S.C. State Highway Dept., 236 S.C. 424, 114 S.E.2d 591, 592-93 (1960). This is provided by statute, S.C. Code Ann. §28-2-310 (Rev. 2007), as one of the forums for determining just compensation. All other matters relating to eminent domain are heard by a judge alone sitting in equity. See, e.g., S.C. Code Ann. §28-2-460 (determination of whom just compensation is to be made), and §28-2-470 (challenges to the condemnor's right to condemn.) Until a court has declared that the State has taken property or property rights from a landowner, and defined the extent of that taking, there is nothing for a jury to decide. Brock v. State Hwy. Comm'n. 195 Kan. 361, 404 P.2d. 934 (1965); see, also, United States v. Reynolds, 397 U.S. 14, 20, 90 S.Ct. 803, 807, 25 L.Ed.2d 12 (1970) (the court's determination and definition of the property right provides the parameters for a determination of an award); United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed.2d 1206 (1946) (the property interest found to have been taken must be stated with precision so that the government and the property owner will know what the government must buy.)

Forcing the Department to try both the taking issue and the just compensation issue before a jury in a single trial before a jury would deprive the Department of a mode of trial to which it is entitled and thus impair a substantial right. Cobb, 618 S.E.2d at 301. The proper procedure was outlined in Hardin, supra, where the Court of Appeals adopted the procedure outlined in the Florida case, Palm Beach County v. Tessler, 538 So.2d 846, 850 (Fla. 1989):

Actually, in an inverse condemnation proceeding of this nature, the trial judge makes both findings of fact and findings of law. As a fact finder, the judge resolves all conflicts in the evidence. Based upon the facts as so determined, the judge then decides as a matter of law whether the landowner has incurred a substantial loss of access by reason of the governmental activity. Should it be

determined that a taking has occurred, the question of compensation is then decided as in any other condemnation proceeding.

We respectfully request that the Court grant our motion and issue its Order to the Clerk accordingly.

A handwritten signature in black ink, appearing to read "Beacham O. Brooker, Jr.", is written over a horizontal line.

Linda C. McDonald

Beacham O. Brooker, Jr.

SCDOT

Post Office Box 191

Columbia, South Carolina 29202-0191

(803) 737-1347

brookerbo@scdot.org

Columbia, S.C.

June 17, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

Henry W. Frampton, III)

Plaintiff,)

vs.)

South Carolina Department of
Transportation,)

Defendant.)

MOTION FOR LITIGATION
EXPENSES

Plaintiff Henry W. Frampton, III pursuant to Code Section 28-11-30(3) hereby moves this Court for reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, incurred in prosecution of his inverse condemnation claim and would further request the Court to determine and award such an amount as an addition to the judgment awarded by the Charleston County jury in this matter. This motion is based upon the prior judgment rendered in this Court, the fees and expenses incurred by the Plaintiff in the prosecution of this claim and such affidavits as will be filed prior to the hearing of this matter concerning the reasonableness of the expenses incurred.


Richard D. Bybee
Smith, Bundy, Bybee & Barnett
Post Office Box 1542
Mt. Pleasant, SC 29465-1542
(843) 881-1623
rdb@s3blaw.com

ATTORNEY FOR PLAINTIFF
HENRY W. FRAMPTON, III

2.17, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
C/A NO.: 2009-CP-10-6185

Henry W. Frampton, III)
Plaintiffs,)
vs.)
South Carolina Department of)
Transportation,)
Defendant.)

AFFIDAVIT OF
JOHN P. LINTON

Affiant, being duly sworn hereby:

1. I am John P. Linton. I practice law in the State of South Carolina handling Plaintiff's and Defendant's cases in civil matters in both the state and federal courts. I have handled a number of condemnation cases on behalf of landowners and I am familiar with customary fee agreements in these cases.
2. I am familiar with the professional standing of Richard D. Bybee in the South Carolina legal community and particularly his reputation and ability to handle complex civil litigation in the fields of eminent domain and construction cases. Mr. Bybee has extensive experience in handling complex condemnation and inverse condemnation cases for both governmental entities and landowners. Additionally, he has been a frequent speaker at CLE seminars in South Carolina, North Carolina and Georgia on eminent domain topics. In summary, Mr. Bybee has successfully tried to verdict, mediated cases and handled appeals in the field of eminent domain and has a high professional standing and an excellent reputation among members of the S. C. Bar and business community for handling these types of cases.
3. My personal experience with Mr. Bybee's work in the condemnation arena began over twenty years ago when I was representing the Prestress Concrete Company, owners of considerable property on Charleston Harbor. Mr. Bybee was representing the South Carolina Highway Department, the condemner. Some years later, I was handling a large condemnation for the Godley Auction Company, which owned road frontage for a couple of miles on Dorchester Road in Charleston and Dorchester Counties. Mr. Bybee was again representing the condemner.

Based on those experiences, and knowing of Mr. Bybee's reputation and expertise in the matters of eminent domain, when I was engaged by the AIG group of insurance companies, as owner of a 50+ acre tract known as the Waccamaw Factory Outlet Center in Myrtle Beach, South Carolina concerning a condemnation, I associated Mr. Bybee because of unique and complex issues

regarding the compensability and a myriad of other issues. The Highway Department had offered the landowner approximately four hundred and fifty thousand dollars. Ultimately, the case was settled for nine million dollars, after a Circuit Judge appointed his own real estate expert appraiser. The case was handled on a contingency basis, at the request of the landowner. The result achieved was decidedly influenced by Mr. Bybee's comprehensive knowledge of eminent domain matters.

4. I am familiar with the customary legal fees charged for similar services rendered by Mr. Bybee in the above captioned matter. Customarily condemnation and inverse condemnation cases for landowners are handled on a contingent fee basis. These kinds of cases are generally handled on a contingency basis because the landowners are oftentimes landowners or small business owners who do not have the funds to pay a skilled lawyer on an hourly basis. In direct condemnation matters the fee is typically one third of any amounts collected above the government's first written offer or deposit of its estimate of just compensation. In inverse condemnation cases the customary contingency is one-third of any amounts collected or awarded by the Court or an hourly rate. I am informed that the Mr. Bybee originally charged his then standard hourly rate of \$250.00 for services when the SCDOT was threatening to permanently block access to Mr. Frampton's property. The agreement was then converted to a contingency agreement. Thereafter, the SCDOT decided to restore access to the parcel and the fee agreement was amended to provide for the original hourly rate of \$250.00. I have reviewed Mr. Bybee's fee agreements with the Landowner in the above captioned case and find them to be reasonable and in line with the customary legal fees for similar services rendered by other members of the Bar.
5. The Amended Fee Agreement reflects a reasonable hourly rate of \$250.00 per hour for services rendered in this action. It is my understanding that Mr. Bybee proved a temporary taking of access for a precise period of time and that the jury awarded 100% of the claim amount sought for the taking. Under these circumstances the best way to estimate a reasonable fee is to use a lodestar approach by determining appropriate hourly rates for Mr. Bybee and his staff and then apply an appropriate multiple, based on the factors recognized by the South Carolina courts. In my opinion, the factor of 1.25 adopted by the Supreme Court in Layman v. The State of South Carolina, 376 SC 434, 658 SE2d 320 (2008) is reasonable based on the complexity and exceptional circumstances of this case, the complexity and preparation concerning liability and the valuation issues including consideration of the six common law factors of reasonableness: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained and (6) the customary legal fees for similar services.

Further Affiant Sayeth Not.

February 15th, 2012

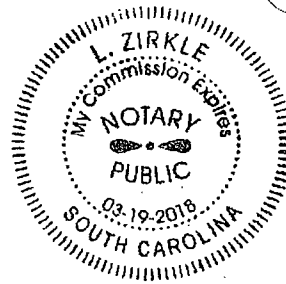
Sworn to before me this 15th day of
February, 2012.

L. Zirkle

Notary Public for South Carolina

My Commission Expires: 3/19/18

John P. Linton
John P. Linton



STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Henry W. Frampton, III)

Plaintiffs,)

vs)

South Carolina Department of
Transportation,)

Defendant.)

IN THE COURT OF COMMON PLEAS

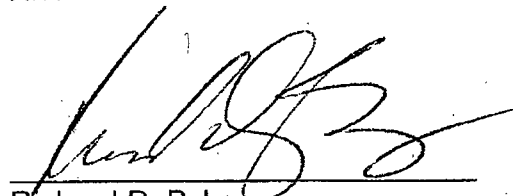
C/A NO.: 2009-CP-10-6185

AFFIDAVIT OF
RICHARD D. BYBEE

Affiant, being duly sworn hereby:

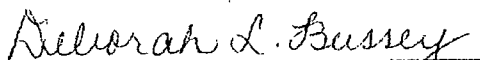
1. I am Richard D. Bybee shareholder in Smith, Bundy, Bybee & Barnett. Attached is a Summary of Attorney's Fees and Expenses incurred by the Landowner which reflects the number of hours expended by myself, my associate, my paralegal and law clerk in the preparation and handling of this matter. The summary reflects the combination of hours since the case was opened in accord with the agreed hourly rate in the Fee Agreements.
2. Also attached to this affidavit are the Invoices and Fee Agreements this firm had with the Landowner and back up invoices from others.

Further Affiant Sayeth Not.


Richard D. Bybee

2.17, 2012

Sworn to before me this 17 day of
February, 2012.


Notary Public for South Carolina
My Commission Expires: 3.9.19

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

Henry W. Frampton, III)
Plaintiffs,)
vs)
South Carolina Department of)
Transportation,)
Defendant.)

AFFIDAVIT OF
RICHARD D. BYBEE

Affiant, being duly sworn hereby:

1. I am Richard D. Bybee shareholder in Smith, Bundy, Bybee & Barnett. Attached is a Summary of Attorney's Fees and Expenses incurred by the Landowner which reflects the number of hours expended by myself, my associate, my paralegal and law clerk in the preparation and handling of this matter since February 16, 2012

Further Affiant Sayeth Not.


Richard D. Bybee

3/12, 2012

Sworn to before me this 12th day of
March, 2012.

Delorah L. Bussey
Notary Public for South Carolina
My Commission Expires: 3.9.19

SUMMARY OF ATTORNEYS' FEES AND EXPENSES AS OF MARCH 9, 2012

Attorneys' Fees

Smith, Bundy, Bybee & Barnett (3/05 to 2/16/12)	\$85,487.50
Smith, Bundy, Bybee & Barnett (2/16/12 to 3/9/12)	\$1,562.50

Hours Expended as of February 16, 2012

Richard D. Bybee	157.45 x \$250.00	\$39,362.50
Associate	91.40 x \$175.00	\$15,995.00
Paralegal	156.50 x \$75.00	\$11,737.50
Law Clerk	37.00 x \$35.00	<u>\$1,295.00</u>

PREVIOUS TOTAL \$68,390.00

Hours Expended from February 16, 2012 to March 9, 2012

Richard D. Bybee	3.60 x \$250.00	\$900.00
Associate	2.00 x \$175.00	<u>\$350.00</u>

REVISED TOTAL \$1,250.00

\$68,390.00 x 1.25 = \$85,487.50

\$1,250.00 x 1.25 = \$1,562.50

Expenses

Smith, Bundy, Bybee & Barnett	\$1,076.02
March 31, 2005 through December 31, 2009 - \$320.56	
January 31, 2010 through January 31, 2012 - \$484.42	
February 1, 2012 through February 16, 2012 - \$271.04	
Smith, Bundy, Bybee & Barnett	
February 16, 2012 through March 9, 2012 - \$508.70	\$508.70

Court Reporters

Clark & Associates	\$1,260.35
Henry W. Frampton, III - \$181.25	
Dale B. Frampton - \$35.00	
Clifton L. Hough - \$957.55	
Hough Exhibit - \$86.55	

Appraisers

Hartnett Realty Company	\$5,005.00
Thomas F. Hartnett, MAI	
Before and After Appraisal \$2,800.00	
Estimate of loss of income value \$275.00	
Analysis of loss of value/limited access \$750.00	
Trial Prep and Trial Attendance \$1,180.00	

Process Server

Trial Subpoena for Jerry Poore	\$139.00

Parking Garage

Frampton Parking Expenses	\$47.00
2/6/12 - \$17.00	
2/7/12 - \$17.00	
2/8/12 - \$13.00	

EXPENSES SUBTOTAL \$7,527.37

REVISED EXPENSE \$508.70

TOTAL FEES AND EXPENSES \$93,014.87

REVISED FEES AND EXPENSES \$2,071.20

TOTAL OF FEES AND EXPENSES \$95,086.07

PO Box 1542
1037 Chuck Dawley Blvd.
Mt. Pleasant, SC 29464
Telephone: 843-881-1623
Fax: 843-881-4406

February 29, 2012

Invoice No. 3781

Hal Frampton
693 Folly Road
Charleston, SC 29412

Client Number: 10562 Hal Frampton
Matter Number: 05-022 Frampton, Hal vs. SCDOT
For Services Rendered Through 2/29/2012.

Fees				
<u>Date</u>	<u>Timekeeper</u>	<u>Description</u>	<u>Hours</u>	<u>Amount</u>
02/01/2012	RDB	PREPARE FOR TRIAL; REVIEW SCDOT TRIAL BRIEF; T/C WITH CLIETN REGARDING PHOTOS, ETC.	5.50	\$1,375.00
02/01/2012	MBM	Trial Prep	8.30	\$1,452.50
02/02/2012	RDB	PREPARE FOR TRIAL; MEETING WITH HAL AND DALE FRAMPTON; MEETING WITH LARRY PHINNEY; MEETING WITH TOMMY HARTNETT.	7.50	\$1,875.00
02/02/2012	MT	Matters attendant to trial preparation, following up with instructions from RDB re specific documents, exhibits, etc., review of files, plans, documents and setting up in War Room for converences and review;	8.00	\$600.00
02/02/2012	MBM	Trial Prep	9.50	\$1,662.50
02/03/2012	RDB	PREPARE FOR TRIAL.	7.50	\$1,875.00
02/03/2012	MT	Matters attendant to trial preparation, following up with instructions from RDB re specific documents, exhibits, etc., review of files, plans, documents and setting up in War Room for converences and review;	8.00	\$600.00
02/03/2012	MBM	Trial Prep	5.50	\$962.50

Continued On Next Page

02/04/2012	RDB	PREPARE FOR TRIAL; MEETING WITH HAL AND DALE FRAMPTON; CONFERENCE WITH ASSOCIATE BRENT MCDONALD REGARDING LAW AND ARGUMENTS; FINAL EXHIBIT CHECKLIST ; DIRECTS AND OPENING STATEMENT.	8.00	\$2,000.00
02/04/2012	MT	Matters attendant to trial preparation, following up with instructions from RDB re specific documents, exhibits, etc., review of files, plans, documents and setting up in War Room for converences and review; Meeting w/RDB and dicussions regarding order of Exhibits, getting Exhibit Tabs on the individual exhibits, preparation and revisions of Exhibits and Witnesses list; Meeting w/RDB re same; Matters attendant to preparation of final Exhibits List and mailing same to Mr. Brooker; Matters attendant to preparation of Email with attachments concerning photographs received since last production and attempts to email to Mr. Brooker; Discusison w/RDB regarding emails being returned after having been broken down into increments of condensed zip files of 7 or less photographs;	8.00	\$600.00
02/04/2012	MBM	Trial Prep	5.00	\$875.00
02/05/2012	RDB	PREPARE FOR TRIAL; MEETING WITH TOMMY HARTNETT.	5.20	\$1,300.00
02/05/2012	MT	Maters attendant to trial preparation	8.00	\$600.00
02/05/2012	MBM	Trial Prep	6.00	\$1,050.00
02/06/2012	RDB	ATTEND TRIAL AND PREP FOR NEXT DAY.	13.00	\$3,250.00
02/06/2012	MT	Trial	8.00	\$600.00
02/06/2012	MBM	Trial; Trial Prep	11.00	\$1,925.00
02/07/2012	RDB	ATTEND TRIAL AND PREP FOR NEXT DAY.	11.00	\$2,750.00
02/07/2012	MT	Trial	8.00	\$600.00
02/07/2012	MBM	Trial; Trial Prep	11.50	\$2,012.50
02/08/2012	RDB	PREPARE AND ATTEND TRIAL.	8.00	\$2,000.00
02/08/2012	MT	Trial	6.00	\$450.00
02/08/2012	MBM	Trial; Trial Prep	7.50	\$1,312.50
02/09/2012	MT	Matters attendant to getting trial files and docs redistributed to proper locations;	1.00	\$75.00
02/09/2012	RDB	Preparation for trial report summary	0.40	\$100.00

Continued On Next Page

02/09/2012	MT	Matters attendant to getting trial files and docs redistributed to proper locations;	1.00	\$75.00
02/13/2012	RDB	Preparation of motion for attorney fees and expenses	0.40	\$100.00
02/20/2012	RDB	Review/Revise Memo in opposition to 59 motion of SCDOT	0.50	\$125.00
02/20/2012	MBM	Drafted memo in response to 59(e) motion	2.00	\$350.00
02/29/2012	RDB	Preparation of memo in opposition	2.00	\$500.00

Billable Hours / Fees: 191.30 \$33,052.50

Timekeeper Summary

Timekeeper MBM worked 66.30 hours at \$175.00 per hour, totaling \$11,602.50.

Timekeeper MT worked 56.00 hours at \$75.00 per hour, totaling \$4,200.00.

Timekeeper RDB worked 69.00 hours at \$250.00 per hour, totaling \$17,250.00.

Cost Detail

<u>Date</u>	<u>Description</u>	<u>Amount</u>
02/03/2012	Reimbursement for copy charges at RMC Office Payee: Mitzi Taylor	\$24.00
02/06/2012	Witness & Mileage Fee Payee: Jerry Poore	38.32
02/06/2012	Copy Costs Payee: Pro-Legal Copies	60.22
02/06/2012	MBM Mileage to Frampton's House 1.30.12 20 mi @ .555 Payee: M. Brent McDonald	11.10
02/06/2012	Postage	0.45
02/09/2012	Certified copies at RMC Payee: Mitzi Taylor	22.00
02/09/2012	Postage	0.45
02/10/2012	Postage	0.45
02/13/2012	MBM to Court Feb. 6, 7, 8 40 mi @ .555 plus parking Payee: M. Brent McDonald	70.20
02/14/2012	Adjustment for Voided Check #: 23764	(38.32)
02/15/2012	RDB to Courthouse 2.16; 2.17; 2.18.12 64 mi @ .555 and Parking Payee: Richard Bybee	83.52
02/16/2012	Photocopies	134.40
02/17/2012	Filing Fee-Motion Payee: Charleston County Clerk of Court	25.00
02/29/2012	Postage	5.55
02/29/2012	Photocopies	342.40

Continued On Next Page

Client Number: 10002
Matter Number: 05-022

02/29/2012
Page: 4

Total Costs \$779.74

Payment Detail

<u>Date</u>	<u>Description</u>	<u>Amount</u>
02/15/2012	2255554382	(\$146.89)
02/29/2012	2256567576	(\$271.04)
Total Payments Received:		<u>(\$417.93)</u>

Prior Balance:	\$9,586.89	Last Payment: 02/29/2012
Payments Received:	(\$417.93)	
Current Fees:	\$33,052.50	
Advanced Costs:	<u>\$779.74</u>	
TOTAL AMOUNT DUE:	\$43,001.20	

Thank You For Your Prompt Payment.
If You Have Any Questions About This Bill,
Please Call 881-1623.
PLEASE REFERENCE YOUR MATTER NUMBER ON YOUR CHECK.

Smith, Bundy, Bybee and Barnett

PO Box 1542
1037 Chuck Dawley Blvd.
Mt. Pleasant, SC 29464
Telephone: 843-881-1623
Fax: 843-881-4406

March 12, 2012
Invoice No. 3912

Hal Frampton
693 Folly Road
Charleston, SC 29412

Client Number: 10562 Hal Frampton
Matter Number: 05-022 Frampton, Hal vs. SCDOT
For Services Rendered Through 3/12/2012.

Fees				
<u>Date</u>	<u>Timekeeper</u>	<u>Description</u>	<u>Hours</u>	<u>Amount</u>
03/01/2012	RDB	Review/Revise memo; Preparation correspondence; respond to BB email re: hearing time	1.00	\$250.00
03/07/2012	RDB	Review and respond to BB email re: Hearing	0.10	\$25.00
Billable Hours / Fees:			1.10	\$275.00

Timekeeper Summary

Timekeeper RDB worked 1.10 hours at \$250.00 per hour, totaling \$275.00.

Prior Balance:	\$43,001.20
Payments Received:	\$0.00
Current Fees:	\$275.00
Advanced Costs:	\$0.00
TOTAL AMOUNT DUE:	\$43,276.20

Thank You For Your Prompt Payment.
If You Have Any Questions About This Bill,
Please Call 881-1623.
PLEASE REFERENCE YOUR MATTER NUMBER ON YOUR CHECK.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

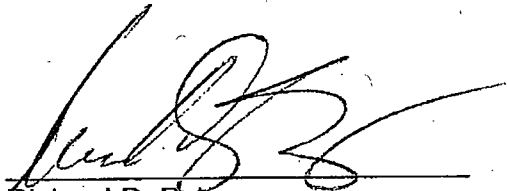
Henry W. Frampton, III)
Plaintiffs,)
vs)
South Carolina Department of)
Transportation,)
Defendant.)

AFFIDAVIT OF
RICHARD D. BYBEE

Affiant, being duly sworn hereby:

1. I am Richard D. Bybee shareholder in Smith, Bundy, Bybee & Barnett. Attached are two Summaries of Attorney's Fees and Expenses incurred by the Landowner, which reflects the number of hours expended by myself, my associate, my paralegal and law clerk in the preparation and handling of this matter through March 20, 2012.

Further Affiant Sayeth Not.


Richard D. Bybee

3.23, 2012

Sworn to before me this 23rd day of
March, 2012.

Deloris L. Bussey
Notary Public for South Carolina
My Commission Expires: 3.9.19

SUMMARY OF REVISIONS ATTORNEYS' FEES AND EXPENSES AS OF MARCH 20, 2012

Attorneys' Fees

Smith, Bundy, Bybee & Barnett (3/05 to 2/16/12)	\$68,390.00
Smith, Bundy, Bybee & Barnett (2/16/12 to 3/9/12)	\$1,250.00
Smith, Bundy, Bybee & Barnett (3/10/12 to 3/20/12)	\$3,032.50
	<u>\$72,672.50</u>

Hours Expended as of February 16, 2012

Richard D. Bybee	157.45 x \$250.00	\$39,362.50
Associate	91.40 x \$175.00	\$15,995.00
Paralegal	156.50 x \$75.00	\$11,737.50
Law Clerk	37.00 x \$35.00	<u>\$1,295.00</u>
	PREVIOUS TOTAL	\$68,390.00

Hours Expended from February 16, 2012 to March 9, 2012

Richard D. Bybee	3.60 x \$250.00	\$900.00
Associate	2.00 x \$175.00	<u>\$350.00</u>
	REVISED TOTAL	\$1,250.00

Hours Expended from March 10, 2012 to March 20, 2012

Richard D. Bybee	9.85 x \$250.00	\$2,462.50
Associate	1.00 x \$175.00	\$175.00
Paralegal	2.00 x \$75.00	\$150.00
Law Clerk	7.00 x \$35.00	<u>\$245.00</u>
	Second REVISED TOTAL	\$3,032.50

Expenses

Smith, Bundy, Bybee & Barnett	\$1,076.02
March 31, 2005 through December 31, 2009 - \$320.56	
January 31, 2010 through January 31, 2012 - \$484.42	
February 1, 2012 through February 16, 2012 - \$271.04	
Smith, Bundy, Bybee & Barnett	
February 16, 2012 through March 9, 2012 - \$508.70	\$508.70
March 10, 2012 through March 20, 2012 - \$18.20	\$18.20

Court Reporters

Clark & Associates	\$1,260.35
Henry W. Frampton, III - \$181.25	
Dale B. Frampton - \$35.00	
Clifton L. Hough - \$957.55	
Hough Exhibit - \$86.55	

Appraisers

Hartnett Realty Company	\$5,005.00
Thomas F. Hartnett, MAI	
Before and After Appraisal \$2,800.00	
Estimate of loss of income value \$275.00	
Analysis of loss of value/limited access \$750.00	
Trial Prep and Trial Attendance \$1,180.00	

Process Server

Trial Subpoena for Jerry Poore	\$139.00

Parking Garage

Frampton Parking Expenses	\$47.00
2/6/12 - \$17.00	
2/7/12 - \$17.00	
2/8/12 - \$13.00	

REVISED EXPENSES SUBTOTAL \$8,054.27

SECOND REVISED TOTAL OF FEES AND EXPENSES AS OF 3/20/12 \$80,726.77

SUMMARY OF REVIS ATTORNEYS' FEES AND EXPENSES () OF MARCH 20, 2012

Attorneys' Fees

Smith, Bundy, Bybee & Barnett (3/05 to 2/16/12)	\$85,487.50
Smith, Bundy, Bybee & Barnett (2/16/12 to 3/9/12)	\$1,562.50
Smith, Bundy, Bybee & Barnett (3/10/12 to 3/20/12)	<u>\$3,790.63</u>
	\$90,840.63

Hours Expended as of February 16, 2012

Richard D. Bybee	157.45 x \$250.00	\$39,362.50
Associate	91.40 x \$175.00	\$15,995.00
Paralegal	156.50 x \$75.00	\$11,737.50
Law Clerk	37.00 x \$35.00	<u>\$1,295.00</u>
	PREVIOUS TOTAL	\$68,390.00

Hours Expended from February 16, 2012 to March 9, 2012

Richard D. Bybee	3.60 x \$250.00	\$900.00
Associate	2.00 x \$175.00	<u>\$350.00</u>
	REVISED TOTAL	\$1,250.00

Hours Expended from March 10, 2012 to March 20, 2012

Richard D. Bybee	9.85 x \$250.00	\$2,462.50
Associate	1.00 x \$175.00	\$175.00
Paralegal	2.00 x \$75.00	\$150.00
Law Clerk	7.00 x \$35.00	<u>\$245.00</u>
	Second REVISED TOTAL	\$3,032.50

$\$68,390.00 \times 1.25 = \$85,487.50$
 $\$1,250.00 \times 1.25 = \$1,562.50$
 $\$3,032.50 \times 1.25 = \$3,790.63$

Expenses

Smith, Bundy, Bybee & Barnett	\$1,076.02
March 31, 2005 through December 31, 2009 - \$320.56	
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Process Server

Trial Subpoena for Jerry Poore	\$139.00

Parking Garage

Frampton Parking Expenses	\$47.00
2/6/12 - \$17.00	
2/7/12 - \$17.00	
2/8/12 - \$13.00	

REVISED EXPENSES SUBTOTAL \$8,054.27

SECOND REVISED TOTAL OF FEES AND EXPENSES AS OF 3/20/12 \$98,894.90

STATE OF SOUTH CAROLINA

County of Charleston

Henry W. Frampton, III, and Dale B.
Frampton,

Plaintiffs,

v.

South Carolina Department of Transportation,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

DEFENDANT'S RETURN TO
PLAINTIFF'S MOTION FOR LITIGATION
EXPENSES

Defendant, the South Carolina Department of Transportation (the Department), respectfully submits this return to the plaintiff's motion for litigation expenses.

I. Plaintiff is not entitled to recover his costs because he did not prevail under the statutory definition of that term.

The South Carolina General Assembly has expounded its policy on the recovery of litigation costs in condemnation cases in S.C. Code Ann. §28-2-510 (Rev. 2007). There, a condemnee may recover his litigation costs if he "prevails" in his case on just compensation. "Prevails" is defined in that section as an award that as at least as close to the highest value attested to at trial on behalf of the landowner as it is to the highest value attested to on behalf of the condemnor. This language sets forth the policy in this State that, while a landowner should not be penalized for vindicating his rights where it is determined that the condemnor has made a "lowball" offer, he, nevertheless should not be rewarded for "shooting the moon" and causing the taxpayer to pay his costs of pursuing obviously inflated claims. There is no reason this expressed public policy should not apply here.

Plaintiff pressed claims at trial involving two acts of taking: (1) that a concrete center median devalued his property in the amount of \$37,500; and (2) that the temporary obstruction to his access cost him \$36,527 in the 'loss of use' of his property. Of the total \$74,027, plaintiff received a verdict of \$36,527 which is 49 percent of his claim. Thus, the verdict was closer to defendant's evidence of zero dollars for no taking of any property than it was of plaintiff's claims in total. The Court should award no costs because of plaintiff's failure to prevail.

II. "Enhancement" of the attorney fee incurred is not appropriate under the case law governing fee shifting.

In his documentation supporting his request to tax costs, plaintiff presents a calculation of his attorney's fees along with those of an associate attorney, a paralegal and a law clerk totaling \$68,390. Plaintiff then multiplies that amount by 1.25 based upon an affidavit by John P. Linton that plaintiff's counsel deserves to have his fees "enhanced" by that amount due to the "complexity and exceptional circumstances of this case." According to Linton, the enhancement is justified under the six factors set forth in Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997).

Initially, there are problems with the Court's consideration of Linton's affidavit. First, it is hearsay. Secondly, Mr. Linton is an attorney who practices law in Charleston in similar legal areas as Mr. Bybee. He is not disinterested in the outcome of this Court's award of fees in this case and his credibility in this regard should be discounted. As stated by the 11th Circuit Court of Appeals:

Lawyers who handle these kinds of cases cannot be disinterested witnesses because they are financially interested. To state this is not to slam lawyers in general or plaintiffs' lawyers in particular. It simply recognizes that because self-interest is hard-wired into human circuitry, no group is disinterested when it comes to the question of what members of the group are to be paid. *Cf. H.L.*

Mencken, *A Little Book in C Major* 22 (John Lane Co. 1916) (“It is hard to believe that a man is telling the truth when you know you would lie if it were you in his place.”)

Kenny A. v. Perdue, 532 F.3d 1209, 1232 (11th Cir. 2008), rev. on other grounds, 130 S.Ct. 1907, 173 L.Ed.2d 1056 (2010).

Moreover, Mr. Linton’s statement of the case law governing fee shifting awards is incorrect. The six factors set forth Jackson v. Speed, supra, and reproduced in the Linton affidavit, are to be utilized by the court in determining the “lodestar” amount of attorney fees due, not in “enhancing” that amount. South Carolina utilizes the lodestar method of determining a reasonable attorney fee in fees awarded under fee shifting statutes. Layman v. State, 376 S.C. 434, 452-456, 658 S.E.2d 320, 329-331 (2008). The lodestar is calculated by multiplying a reasonable hourly rate by the reasonable time expended. Id., 376 S.C. at 332, 658 S.E.2d at 457. Once this amount is established it may be enhanced by a multiplier to reflect exceptional circumstances. This case does not present such exceptional circumstances.

Mr. Linton cites the 1.25 enhancement multiplier applied by the Supreme Court in Layman as appropriate in this case. In Layman, the Court found the fact that it had ordered an expedited timeline for the litigation of the case, the extraordinary amount recovered, and the termination of government acts found to be a breach of contract, to be extraordinary circumstances justifying the use of a multiplier in that case. Those factors are not present here. This case was a routine inverse condemnation case involving access. The recovery was in no way extraordinary and no expedited proceedings were present. Layman does not serve as precedent for enhancing the lodestar fee.

As the U.S. Supreme Court has stated, “Although upward adjustments in the lodestar are still permissible, ... such modifications are proper only in certain ‘rare’ and ‘exceptional’ cases,

supported by both 'specific evidence' on the record and detailed findings by the lower courts. [citations omitted]" Pennsylvania, et al. v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 546, 565-66, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986). A strong presumption that the lodestar figure represents a "reasonable" fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case. That is to enable private parties to obtain counsel to vindicate their rights against the State. As noted in Delaware Valley, supra,

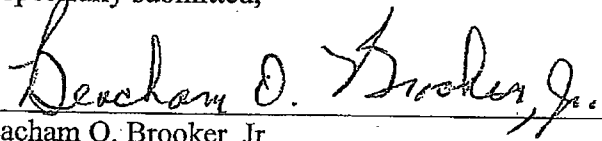
The statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. Hence, if plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on the statutory assurance that they will be paid a "reasonable fee" the purpose behind the fee-shifting statute has been satisfied.

Id. Here, plaintiff's counsel was willing to accept representation of plaintiff under a standard fee agreement at a stated hourly rate for all time of counsel and his support staff spent on the project. Any unanticipated extraordinary length of the litigation is reflected in the number of hours billed. The complexity of the case and the skills of counsel required to successfully prosecute it are reflected in the hourly rate. Any additions to these two factors constituting the lodestar would be double counting. Kenny A. v. Perdue, 130 S.Ct. 1662, 1673 (2010).

III. Plaintiff's request is excessive and includes hours worked on claims that were withdrawn and claims on which he did not prevail.

As noted above, plaintiff prevailed on only 49% of his claim. Additionally, plaintiff's original complaint included claims for takings from two other properties owned by him. The amended complaint deleting those claims was filed shortly before trial. In the event costs are awarded, plaintiff's claim should be reduced by 51%.

Respectfully submitted,

A handwritten signature in cursive script, reading "Beacham O. Brooker, Jr.", written over a horizontal line.

Beacham O. Brooker, Jr.

SCDOT

Post Office Box 191

Columbia, South Carolina 29202-0191

(803) 737-1347, brookerbo@scdot.org

Columbia, S.C.
February 28, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009 -CP-10- 6185

Henry W. Frampton, III and Dale
B. Frampton,)

Plaintiffs,)

and)

South Carolina Department of
Transportation,)

Defendant.)

COMPLAINT
(Inverse Condemnation and
Constitutional Torts)

2009 SEP 29 AM 11:45
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Plaintiffs, Henry W. Frampton, III and Dale B. Frampton, complaining of the Defendant named herein would respectfully allege:

1. Plaintiffs are the owners of real property located on Folly Road in Charleston County, more particularly described as 685, 693, and 699 Folly Road, Charleston, South Carolina.
2. South Carolina Department of Transportation ("SCDOT") is a state agency with the power of eminent domain and the responsibility to plan for and acquire the necessary property rights for the construction and widening of state highways within the State of South Carolina. The SCDOT is obligated to acquire real property in a fair and uniform manner, to provide equitable treatment of all affected persons and to ensure that such persons shall not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole.
3. SCDOT has the duty and responsibility to make acquisition decisions in accord with the legal principals of equal protection, due process and just compensation

pursuant to the South Carolina Constitution and laws and regulations governing the planning, purchase and construction of highways.

4. Plaintiffs owned a substantial property right, as abutting Landowners, to Folly Road, identified as an appurtenant easement of access to Folly Road which runs with the land. Plaintiffs had three separate driveway entrances to its individual parcels with an unrestricted method of ingress and egress providing full movements for vehicles entering and leaving the driveways.

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5. That at all times relevant hereto the Plaintiffs possessed vested property rights in the above described property including, but not limited to, the right of access to all lanes of travel of Folly Road.

6. That in 2005, SCDOT representatives approached the Plaintiffs and informed them of a widening and reconstruction project it was going to undertake on Folly Road abutting their property. Plaintiffs were told that a bridge barricade would permanently block access to the 699 Folly Road property after the construction was complete but that the SCDOT would not compensate them for the taking of Plaintiffs' access rights to Folly Road. The SCDOT representatives also informed the Plaintiffs that the plans for the widening and reconstruction did not include concrete medians or other access features which would affect their other properties.

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7. At that time the property at 699 Folly Road was rented as a single family residence. The property at 693 Folly Road was used by the Plaintiffs as their personal residence. The property at 685 Folly Road was rented to a law firm for commercial and business purposes. All of the property was zoned as commercial property during the relevant periods of time.

8. The SCDOT, without benefit of due process or the filing of a formal condemnation notice, began reconstructing Folly Road in such a manner as to completely block ingress and egress to 699 Folly Road for a period of approximately one (1) year commencing in the Fall of 2008. These affirmative acts caused the diminution of property values to this parcel, lost rent and deferred maintenance to the single family residence located thereon. In the late summer of 2009 the Plaintiffs were advised that the SCDOT had changed its plans and that the barricade which was going to block access permanently was altered and that access would be restored to 699 Folly Road. The SCDOT failed to appraise or offer just compensation for this temporary taking of access as required by the laws and constitution of the State of South Carolina.

9. In the late summer or early fall of 2009, the SCDOT installed raised concrete medians, preventing full movement ingress and egress to each tract of land owned by the Plaintiffs. These actions caused permanent damage to Plaintiffs' remaining property in the form of a material change in access. The SCDOT failed to appraise or offer just compensation for this permanent taking or damaging of Plaintiffs' rights of access as required by the laws and constitution of the State of South Carolina.

10. The SCDOT knew or should have known that it was taking Plaintiffs' rights of ingress and egress on either a temporary or permanent basis and decided not to appraise and compensate them for that property right and instead forced the Plaintiffs to bring this action to recover damages to its remaining property for these temporary and permanent material changes in access.

11. That all of these affirmative actions by the SCDOT constituted a physical taking of a property right, a taking of vested rights in real property, damage to the subject

temporary
denial
FALL 08
SUMMER 09

Hardin

properties and a denial of due process and equal protection within the meaning of the South Carolina Constitution.

FOR A FIRST CAUSE OF ACTION

12. Paragraphs 1 through 11 above are realleged herein as if set forth verbatim.
13. That these affirmative acts of the SCDOT amount to a taking and damaging of Plaintiffs' property as an abutting landowner and its appurtenant access easement at its driveway entrances to Folly Road.

FOR A SECOND CAUSE OF ACTION

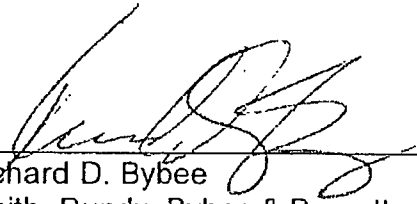
14. Paragraphs 1 through 13 above are realleged herein as if set forth verbatim.
15. That these affirmative acts constituted a denial of Plaintiffs' civil due process rights pursuant to the South Carolina Constitution.

FOR A THIRD CAUSE OF ACTION

16. Paragraphs 1 through 15 are realleged herein as if set forth verbatim.
17. That these affirmative acts constitute a denial of Plaintiffs' civil rights to the equal protection of the laws in the acquisition of rights of way for and the design and construction of a state highway in violation of the South Carolina Constitution because of unfair, non-uniform and inequitable treatment causing Plaintiff to suffer disproportionate injuries as a result of a project designed for the benefit of the public as a whole.

WHEREFORE, Plaintiffs pray for monetary judgment for the diminution in value to the subject properties caused by the temporary closing of the driveway access to 685, 693, and 699 Folly Road and the installation of a raised concrete median creating a permanent and material change in access cognizable under the South Carolina

statutes and Constitution and for a declaration that these actions violated Plaintiffs due process and equal protection rights; and Plaintiffs pray that they be allowed costs, attorneys fees, litigation expenses and prejudgment interest from the date of the closing of the driveway entrance to 699 Folly Road and from the installation of the raised concrete median for all of the other subject property until the time of verdict and thereafter for post judgment interest.



Richard D. Bybee
Smith, Bundy, Bybee & Barnett
Post Office Box 1542
Mt. Pleasant, SC 29465-1542
(843) 881-1623

ATTORNEY FOR PLAINTIFFS
HENRY W. FRAMPTON, III AND DALE
B. FRAMPTON

9/28, 2009

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Henry W. Frampton, III, and Dale B.
Frampton,

Plaintiffs,

v.

South Carolina Department of Transportation,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

ANSWER

2009 NOV -3 PM 3:55
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

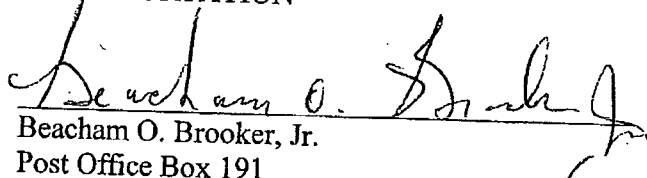
Comes now the South Carolina Department of Transportation (SCDOT) and for its Answer to the Complaint, admits, denies, and avers as follows:

1. Defendant is without knowledge or information with which to form a belief as to the truth of the allegations contained in paragraph 1. of the Complaint and, therefore, denies the same.
2. Admits the allegations contained in paragraph 2. of the Complaint.
3. Admits the allegations contained in paragraph 3. of the Complaint.
4. Admits that plaintiff had driveways entering Folly Road but denies that those entrances constituted a property right.
5. Denies the allegations contained in paragraph 5. of the Complaint.
6. Admits the allegations contained in paragraph 6. of the Complaint.
7. Defendant is without knowledge or information with which to form a belief as to the truth of the allegations contained in paragraph 7. of the Complaint and, therefore, denies the same.
8. Admits that it pursued a highway project in the vicinity of plaintiff's land but denies that its project denied plaintiff of any property right.

9. Admits that it installed raised concrete medians on Folly Road but denies that this construction took any property right from plaintiff resulting in any entitlement to just compensation.
10. Denies the allegations contained in paragraph 10. of the Complaint.
11. Denies the allegations contained in paragraph 11. of the Complaint.
12. Repeats its answers to paragraphs 1-11 of the Complaint.
13. Denies the allegations contained in paragraph 13. of the Complaint.
14. Repeats its answers to paragraphs 1-13 of the Complaint.
15. Denies the allegations contained in paragraph 15. of the Complaint.
16. Repeats its answers to paragraphs 1-15 of the Complaint.
17. Denies the allegations contained in paragraph 17. of the Complaint.
18. Denies that plaintiffs are entitled to the relief they demand in their WHEREFORE clause or any relief whatever arising from the allegations of the Complaint.

WHEREFORE, defendant prays that the Complaint be dismissed and it be awarded its costs of defending the action and any other relief the Court deems just and proper.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION



Beacham O. Brooker, Jr.
Post Office Box 191
Columbia, South Carolina 29202-0191
(803) 737-1347

Columbia, S.C.

November 2, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Henry W. Frampton, III)
Plaintiff,)
and)
South Carolina Department of)
Transportation,)
Defendant.)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

AMENDED COMPLAINT
(Inverse Condemnation and
Constitutional Torts)

FILED
2011 DEC 14 PM 3:23
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Plaintiff, Henry W. Frampton, III, complaining of the Defendant named herein would respectfully allege:

1. Plaintiff is the owner of real property located on Folly Road in Charleston County, more particularly described as 699 Folly Road, Charleston, South Carolina.
2. South Carolina Department of Transportation ("SCDOT") is a state agency with the power of eminent domain and the responsibility to plan for and acquire the necessary property rights for the construction and widening of state highways within the State of South Carolina. The SCDOT is obligated to acquire real property in a fair and uniform manner, to provide equitable treatment of all affected persons and to ensure that such persons shall not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole.
3. SCDOT has the duty and responsibility to make acquisition decisions in accord with the legal principals of equal protection, due process and just compensation pursuant to the South Carolina Constitution and laws and regulations governing the planning, purchase of rights for and construction of highways.

4. Plaintiff owns a substantial property right, as an abutting Landowner, to Folly Road, identified as an appurtenant easement of access to Folly Road which runs with the land. Plaintiff had separate driveway entrances with an unrestricted method of ingress and egress providing full movements for vehicles entering and leaving the driveways.

5. That at all times relevant hereto the Plaintiff possessed vested property rights in the above described property including, but not limited to, the right of access to all lanes of travel of Folly Road.

6. That in 2005, SCDOT representatives approached the Plaintiff and informed him of a widening and reconstruction project it was going to undertake on Folly Road abutting his property. Plaintiff was told that a bridge barricade would permanently block access to the 699 Folly Road property after the construction was complete but that the SCDOT would not compensate them for the taking of Plaintiff's access rights to Folly Road. The SCDOT representatives also informed the Plaintiff that the plans for the widening and reconstruction did not include concrete medians.

7. At that time the property at 699 Folly Road was rented as a single family residence.

8. The SCDOT, without benefit of due process or the filing of a formal condemnation notice, began reconstructing Folly Road in such a manner as to completely block ingress and egress to 699 Folly Road for a period of approximately one (1) year commencing in the Fall of 2008. These affirmative acts caused the diminution of property values to this parcel, lost rent and deferred maintenance to the single family residence located thereon. In the late summer of 2009, the Plaintiff was

advised that the SCDOT had changed its plans and that the barricade which was going to block access permanently was altered and that access would be restored to 699 Folly Road. The SCDOT failed to appraise or offer just compensation for this temporary taking of access as required by the laws and constitution of the State of South Carolina.

9. In the late summer or early fall of 2009, the SCDOT installed raised concrete medians, preventing full movement, ingress and egress. This action caused permanent damage to Plaintiffs remaining property in the form of a material change in access. The SCDOT failed to appraise or offer just compensation for this permanent taking or damaging of Plaintiffs rights of access as required by the laws and constitution of the State of South Carolina.

10. The SCDOT knew or should have known that it was taking Plaintiffs rights of ingress and egress on either a temporary or permanent basis and decided not to appraise and compensate them for that property right and instead forced the Plaintiff to bring this action to recover damages to its remaining property for these temporary and permanent material changes in access.

11. That all of these affirmative actions by the SCDOT constituted a physical taking of a property right, a taking of vested rights in real property, damage to the subject property and a denial of due process and equal protection within the meaning of the South Carolina Constitution.

FOR A FIRST CAUSE OF ACTION

12. Paragraphs 1 through 11 above are realleged herein as if set forth verbatim.

13. That these affirmative acts of the SCDOT amount to a taking and damaging of Plaintiff's property as an abutting landowner and its appurtenant access easement at its driveway entrances to Folly Road.

FOR A SECOND CAUSE OF ACTION

14. Paragraphs 1 through 13 above are realleged herein as if set forth verbatim

15. That these affirmative acts constituted a denial of Plaintiff's civil due process rights pursuant to the South Carolina Constitution.

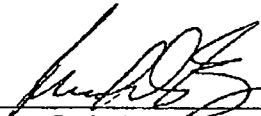
FOR A THIRD CAUSE OF ACTION

16. Paragraphs 1 through 15 are realleged herein as if set forth verbatim.

17. That these affirmative acts constitute a denial of Plaintiff's civil rights to the equal protection of the laws in the acquisition of rights of way for and the design and construction of a state highway in violation of the South Carolina Constitution because of unfair, non-uniform and inequitable treatment causing Plaintiff to suffer disproportionate injuries as a result of a project designed for the benefit of the public as a whole.

WHEREFORE, Plaintiff prays for monetary judgment for the diminution in value to the subject property caused by the temporary closing of the driveway access to 699 Folly Road and the installation of a raised concrete median creating a permanent and material change in access cognizable under the South Carolina statutes and Constitution and for a declaration that these actions violated Plaintiff's due process and equal protection rights; and Plaintiff prays that he be allowed costs, attorneys fees, litigation expenses and prejudgment interest from the date of the closing of the

driveway entrance to 699 Folly Road and from the installation of the raised concrete median until the time of verdict and thereafter for post judgment interest.


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ATTORNEY FOR PLAINTIFF
HENRY W. FRAMPTON, III

11/29, 2011

STATE OF SOUTH CAROLINA

County of Charleston

Henry W. Frampton, III, and Dale B.
Frampton,

Plaintiffs,

v.

South Carolina Department of Transportation,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A NO.: 2009-CP-10-6185

DEFENDANT'S ANSWER TO AMENDED
COMPLAINT

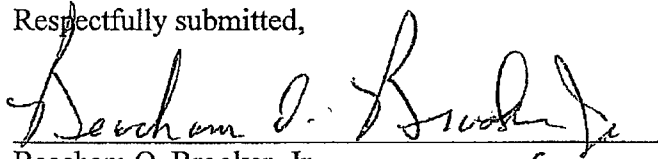
Defendant, the South Carolina Department of Transportation (the Department), for its answer to the complaint, admits, denies and avers as follows:

1. It is without information sufficient to form a belief concerning the truth of the allegations in paragraph 1. of the complaint.
2. Admits that it is an agency of the State empowered to condemn property for highway and transportation purposes. Denies the other allegations of paragraph 2. of the complaint and avers that it is obligation to pay just compensation to owners of property it condemns.
3. Admits the allegations contained in paragraph 3. of the complaint.
4. It is without information sufficient to form a belief concerning the truth of the allegations in paragraph 4. of the complaint.
5. Denies the allegations contained in paragraph 5. of the complaint.
6. Denies the allegations contained in paragraph 6. of the complaint.
7. It is without information sufficient to form a belief concerning the truth of the allegations in paragraph 7. of the complaint.

8. Denies the allegations contained in paragraph 8. of the complaint except admits that it offered no compensation to plaintiff.
9. Admits that installed a concrete median as alleged in paragraph 9. of the complaint but avers that any damages to plaintiff are *damnum absque injuria*.
10. Denies the allegations contained in paragraph 10. of the complaint.
11. Denies the allegations contained in paragraph 11. of the complaint.
12. Repeats its responses to paragraphs 1 through 11. of the complaint.
13. Denies the allegations contained in paragraph 13. of the complaint.
14. Repeats its responses to paragraphs 1 through 13. of the complaint.
15. Denies the allegations contained in paragraph 15. of the complaint.
16. Repeats its responses to paragraphs 1 through 15. of the complaint.
17. Denies the allegations contained in paragraph 17. of the complaint.
18. Denies that plaintiff is entitled to the relief prayed for in his WHEREFORE clause or any relief whatsoever arising from the allegations of the complaint.

WHEREFORE, defendant prays that the complaint be dismissed and that it be awarded its costs including a reasonable attorney fee.

Respectfully submitted,



Beacham O. Brooker, Jr.

SCDOT

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February 3, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON) CASE NO.: 2009-CP-10-6185

HENRY W. FRAMPTON, III, and)
DALE FRAMPTON,)

PLAINTIFFS,)

VS.)

SOUTH CAROLINA DEPARTMENT OF)
TRANSPORTATION,)

DEFENDANT.)

JURY TRIAL

VOLUME 1 OF 3

held before the Honorable Thomas L. Hughston
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Charleston County Courthouse
Charleston, South Carolina
on Monday, February 6, 2012, Commencing at 11:14 a.m.

SUSAN "MIA" PERRON, CVR-CM-M
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
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1-706-231-6028

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PROCEEDINGS

- - - - -

PRE-TRIAL MOTIONS

THE COURT: All right. This is in regard to the case for trial, Frampton against the South Carolina Department of Transportation.

I have a motion by the defendant as to how it thinks we should proceed, so I'll be glad to hear from you. Tell me your name again.

MR. BROOKER: Thank you. Your Honor, if it please the Court. I'm Beacham Brooker.

THE COURT: Brooker. Okay.

MR. BROOKER: I'm assistant chief counsel of DOT of Columbia.

THE COURT: All right, Mr. Brooker.

MR. BROOKER: And this is our motion, Your Honor, as to the mode of trial procedures for trying this case. This procedural issue in inverse condemnation is important to us. We've worked pretty hard to get this cleaned up across the State. And we've had some success in the Hardin decision and the Cobb decision.

The question in the inverse condemnation, at least those involving the Highway Department, is whether the Department's acts in relation to the

1 plaintiff were taken under police power or whether
2 that they went too far and would become an act of
3 imminent domain for which compensation is owed the
4 landowner.

5 A police power -- the consequences of police
6 power acts in the Supreme Court Caradel [phonetic]
7 case held that rerouting any diversion of traffic on
8 highway reconstruction are police power regulations
9 but the consequences of that, the damages, quote, to
10 the landowner can sometimes be fairly severe.

11 And what was going on before the Cobb and Hardin
12 decisions is the jury would be brought in, the
13 plaintiff-landowner would testify as to how badly he
14 was damaged. And sometimes they are, Your Honor. If
15 you can imagine a convenience store where we put a
16 center median in and where all its customers are only
17 right turn in, and then one down the road does not
18 have that restriction, is probably going to
19 definitively put a severe competitive disadvantage.
20 But that is not a taking. That is a consequence of
21 the Police Power Act.

22 So, Your Honor, even though the case law says
23 that the Court must decide whether the police power
24 went too far and there's an act of imminent domain and
25 then the jury will decide the diminishment in value of

1 -- under those guidelines that the Court sets out, in
2 other words, telling them what property rights were
3 taken and what they should focus on as devaluing or
4 diminishing in value the land. Nevertheless, they've
5 sit here -- or sat here for a day or two days hearing,
6 you know, how badly these landowners were treated and
7 how much they've lost, which may have nothing to do,
8 totally irrelevant, with an act of imminent domain.

9 We think there's also -- the correct procedure
10 under the law itself, Your Honor, the actions in
11 imminent domains are equitable and that they're all
12 heard by a judge, challenges to the take, the
13 distribution of the award, everything, until the 1989
14 Imminent Domain Procedures Act which listed, as one of
15 the three forums that you can demand what -- demand
16 for unjust compensations to be a jury trial in circuit
17 court. And the other two are trial by the judge or
18 appraisal power.

19 Until -- and in a normal condemnation, the State
20 will come to you and serve you with a -- first,
21 negotiate with you, then serve you with a condemnation
22 notice that spells out specifically what property or
23 property rights are being taken from you. After a
24 month, giving you time to challenge that, then that
25 notice, condemnation notice, is filed with the Court

1 and then you -- that was the point when you have the
2 chance to elect what -- how you want your damages
3 heard, your just compensation heard.

4 So even in an inverse case, that same procedure
5 would apply, according to the Cobb -- Supreme Court
6 Cobb decision, because the only right to a jury is
7 through the imminent domain procedures; therefore, to
8 have a jury trial now is premature because there's
9 been no finding of taking. If there's a finding of
10 taking, then obviously if Mr. Bybee and his clients
11 want a jury trial, they will make an election at that
12 time and they can proceed.

13 As far as the judicial economy and efficiency of
14 the proceedings, Your Honor, if a taking has not been,
15 of course we wouldn't have to have a jury here. And
16 there are two counts in the complaint as to takings,
17 one involving the center concrete median and one
18 involving the temporary taking, which is the time it
19 took us to complete the project and disrupting --
20 allegedly disrupting the plaintiff's use of the
21 property. If the judge should find one or the other,
22 it goes to the taking but not the other, then the jury
23 has already heard damages from that one and it's going
24 to be very difficult for them to sort it out.

25 So, Your Honor, what we would suggest is that

1 the jury be sent home, we have a non-jury trial before
2 Your Honor to determine whether there's been a taking
3 and what property rights have been taken and that
4 defines the jury's duties as to just compensation.
5 Thank you.

6 MR. BYBEE: Your Honor, Richard Bybee. May I
7 approach?

8 THE COURT: Yes.

9 MR. BYBEE: Your Honor, I want to repeat what we
10 put in our written memorandum in opposition to this
11 request and then I want to focus on what Mr. Brooker
12 just said.

13 First of all, the record is clear that he's made
14 a motion to have this transferred to the non-jury
15 roster and that was denied.

16 THE COURT: I saw that.

17 MR. BYBEE: Second of all, the landowner is at
18 an extreme prejudice to have to put up his case twice.
19 And I'm going to get into that. But first, let's go
20 to the premise from which he rises, which is that I'm
21 here complaining about a regulatory taking or I'm here
22 complaining about a police power exercise as opposed
23 to an imminent domain power of exercise.

24 The complaint focuses on a complete and total
25 depravation of access for a specified period of time.

1 That is not the passage of a regulation. That is what
2 we call a physical take. I am obligated under the law
3 to prove that the DOT acted in some affirmative,
4 aggressive way to establish that particular fact. But
5 it is not the passage of a regulation; and, therefore,
6 anytime that we start talking about, well, we have to
7 do a Penn Central analysis or we have to have this
8 non-jury setting in order to figure out what's going
9 on or that you want to talk about procedural issues
10 that he says are involved with Hardin and Cobb, at
11 least with respect to that first allegation, the
12 temporary taking.

13 The law is very clear. The statutes are very
14 clear. You cannot deprive a landowner or property of
15 access. You can't do it on a temporary basis; you
16 can't do it on a permanent basis. So let's analyze
17 that in the way -- in that fashion. Let's imagine
18 that we're here on a permanent take, that they just
19 never -- the facts will show they decided to reinstall
20 the guardrail halfway through this project or to
21 shorten the guardrail so that they did not block the
22 access. Well, let's just imagine that the -- it was a
23 total take, a complete deprivation of access. Because
24 that's the proper framework by which we have to look
25 at this. And is it Mr. Brooker's position that a

1 total deprivation of access to an independent,
2 separately constituted lot with a historical use as an
3 income-producing property, that that is somehow the
4 regulation of -- for an enhancement or a use of police
5 power? Well, of course not.

6 Any time you take a right, that is the taking.
7 And in this context, Hardin, Carolina Chloride, those
8 two cases specifically dealt with road construction
9 cases and they specifically analyzed them as physical-
10 taking cases. So if you analyze them as a physical
11 taking case, this police power argument just flies out
12 the window, because you've got this right of access.
13 The Court says it's an easement. In fact, it says
14 there's two easements. And the Imminent Domain Act
15 provides the definition of property to include any
16 right, title, and interest.

17 So if we can't deprive a particular parcel of a
18 complete denial of access, the only distinction here
19 is this has been temporary. Yes, the Court, under
20 Hardin, needs to make a determination, just like it
21 does in any other civil court, that I've met the
22 burden that in this particular circumstance, you would
23 be finding facts as to a taking. But we must, for
24 purposes of understanding prejudice, understand the
25 standard by which we're trying this case.

1 And let me -- I know that we talked a little bit
2 before we came in here, Judge, about how interesting
3 inverse condemnation cases can be. I would like to
4 harken back to law school days when the whole concept
5 was explained, at least to me, with the fruit that was
6 diseased and the farmers had to have those trees
7 removed in order to prevent harm to the public, and
8 there's case decisions out there that he's not
9 entitled to just compensation because he was
10 preventing harm to the public.

11 Now, my allegations in this case are that I have
12 an historic and safe use of a driveway. There is no
13 testimony, I do not believe, that can come into this
14 courtroom and say that this project was done because
15 my driveway -- Mr. Frampton's driveway was unsafe.
16 They were out there to do a public's work -- public
17 works project. They needed the bridge replaced.
18 We're not arguing that the bridge should not have been
19 replaced. We're not arguing they took too long to
20 construct the bridge. What we're arguing is knowing
21 they were going to take our access, they owed us the
22 duty of paying us just compensation. And they never
23 made the formal offer, they never filed a pleading,
24 they just took the access. And then halfway through
25 the project, or more like three-quarters of the way

1 through the project, as it impacted the Framptons they
2 decide, gee, this may not be such a good idea, we'll
3 restore the access. Unfortunately, it was a year
4 later and a year of rental income -- a loss of fair
5 market value of rental income has occurred.

6 So that is the focus, and that is why it's
7 extremely prejudicial to me to have to put up my
8 witnesses twice to prove the same facts. Because in
9 order to establish the right, I have to establish the
10 history -- I mean, use, and then I have to establish
11 what happened, the duration that it went through or
12 went on, how long was the access deprived -- because
13 I'm sure counsel will argue a shorter duration doesn't
14 amount to a taking. And the law says that I've got to
15 show material impairment of access, which I think we
16 can certainly do in this year period because the facts
17 may show it to actually be longer than a year. And
18 then once you have got that legal analysis set up and
19 a true issue at hand, then you can evaluate and ask
20 Mr. Brooker what is the prejudice to you if it goes
21 forward, I make the decision based on the facts as to
22 whether there's a taking, but instead of retrying this
23 case again, that we just move on and finish it.

24 So then we get to that point. Now, there's
25 one -- let me -- and there's been some case law, which

1 I'm sure he wants to talk about, with respect to the
2 compensability of damages arising from the needing.

3 And I just want to put forward to you: the
4 complaint was originally brought in respect to a
5 temporary taking of access. And that was the thrust
6 of the complaint. It was not until they decided to
7 provide a relocated driveway -- because they
8 ultimately blocked the driveway they want to block.
9 It was not until that decision was made that the
10 decision to add a median to the project came into
11 being. So, again, the project is not there to control
12 safe movement in and out of my clients' driveway. The
13 bridge project made it unsafe, and, therefore, they
14 added the median. And my position is very simple.
15 That type of circumstance under our case law in a
16 direct taking, where there has been a taking, if you
17 have found that there has been a temporary taking of
18 access, then I'm entitled to put in damages of a
19 permanent nature to the remainder of the property.
20 And that's where the median damages come into play.
21 They don't come into play until after I can get that
22 temporary taking standard in.

23 So to reiterate, I know this was an awful lot,
24 but the Hardin and the Cobb cases that counsel relies
25 on just don't answer the question. They provide a

1 general procedure. But the entire point I think is in
2 the rules. If you treat this as a bifurcation motion,
3 as opposed to a mode of trial -- I think he's waived
4 his mode of trial. But if you treat this as a
5 bifurcation motion, then the traditional standard is
6 that it is discretionary with you as the judge. So if
7 you're determining whether or not there's a taking,
8 how can Mr. Brooker be prejudiced by proceeding in
9 front of a jury and not having us call this case
10 twice? Because I have to use the same witnesses to
11 establish my damages and to establish the history and
12 the use in every bit of it. And instead of a two and
13 a half day trial, we're going to be looking at a five-
14 day trial under his scenario, and all of the expense
15 that goes with it.

16 So we would urge the Court to follow the broad
17 guideline they've given us that you have to make this
18 determination of the taking. But it's just like in
19 any other civil case. I haven't -- if I'm in a breach
20 of contract, if I can't show the contract and I can't
21 show the breach, then you're not going to let me go to
22 the jury on damages.

23 So in that respect, we would urge that when you
24 use that discretion that you think about that
25 prejudice and refocus back to the central essence of

1 this claim. Which I think is so basic, Judge. This
2 idea that they can just take away a man's access for a
3 year and not call it a taking, in light of the Supreme
4 Court decision in the Burke, is just not telling.

5 We're not talking about inconvenience that the
6 Mount Pleasant people are suffering right now while
7 they build and improve Johnny Dobbs Boulevard. We're
8 not talking about inconvenience of the adjacent
9 parcels of land in which they have an interest,
10 getting in and out while construction is going on.
11 That's not what we're talking about.

12 This case is because they refused to recognize a
13 statutory right to a driveway and a constitutional
14 right to just compensation if I take the driveway
15 away.

16 THE COURT: Anything you want to say in
17 response?

18 MR. BROOKER: I do have two or three points,
19 Your Honor. First of all, I have -- I e-mailed you
20 our pretrial brief that I have some cases --

21 THE COURT: I got that.

22 MR. BROOKER: May I hand up the cases?

23 [Whereupon, Mr. Brooker proffers documents to
24 the Court]

25 MR. BROOKER: Your Honor, I didn't realize we

1 were going to get into the substance of all of the
2 facts of this case on this motion, so I feel like I
3 should respond to that.

4 THE COURT: Go right ahead.

5 MR. BROOKER: Mr. Bybee -- excuse me.

6 THE COURT: Go ahead.

7 MR. BROOKER: Mr. Bybee's argument, of course,
8 which his is the legal position that any time there's
9 any interference to a driveway, that's a taking of
10 access. We, of course, disagree and we think that's
11 the fundamental disagreement between us on the law.

12 We think the cases governing this case are the
13 Kiriakides and the Byrd cases on temporary takings.
14 In other words, saying that the amount of time -- and
15 we think it's much less than one year -- and we'll get
16 into that with our witnesses, Your Honor -- that is
17 factored into everything else. It's not like you have
18 a corporeal piece of land there that any time the
19 State interferes with, you get your taking. It's
20 actually a corporeal right of access that can be
21 extinguished permanently, can be extinguished
22 temporarily, when the State has to rebuild or
23 reconstruct the -- or repair the road that you
24 front on.

25 The second point I want to make, Your Honor, is

1 this argument that Mr. Bybee is going to have to do
2 his case twice: remember that he'll put up his case
3 for the taking, the history of all of this, before
4 you, sitting without a jury, under our preferred
5 procedure. And once that is done and you decide that
6 there has been a taking, then the only thing left for
7 a jury is the valuation issue. You bring up an
8 appraiser, you ask him how much was the property
9 devalued -- diminished in value permanently by what
10 the State did, which I have found -- or you have
11 found, Your Honor.

12 Number three, the idea of the median -- damages
13 flowing from the median can be recovered if you found
14 the temporary taking from the driveway obstruction,
15 that's just simply wrong. You find the diminution in
16 value from the -- arising from the taking. If some
17 diminution of value arises from the temporary driveway
18 obstruction, then you would not -- you're not entitled
19 to add in the diminution of value of your property
20 from the concrete median is just not a taking or a
21 police power act.

22 So, Your Honor, it's not true that the jury has
23 to hear all this. It should be decided before it gets
24 to a jury. And we think it's prejudicial for us to
25 have all this thrown before them when it's not

1 relevant to what they're supposed to decide. And they
2 will have heard all of this and it's going to be hard
3 for them to unscramble the egg. We think hear the
4 evidence, decide whether or not there's a taking, and
5 then bring the jury in for -- purely for evaluation
6 witnesses.

7 I thank the Court. Do you have any questions,
8 Your Honor?

9 THE COURT: Well, I'm not -- Mr. Bybee, as I
10 understand your position, your client's claim is that
11 -- of course, is that -- the bottom line, that there
12 has been a taking, what we refer to as a -- I mean,
13 refer to as an inverse condemnation. Through an act
14 of the government, it has taken some property or
15 property rights from your client.

16 One thing you claim is that there was a taking
17 of ingress/egress to the road by blocking the driveway
18 or blocking access to this property for a period of
19 time, whatever that was, and that that amounts to a
20 taking, for which your client is entitled to
21 compensation. Right?

22 MR. BYBEE: That is correct, Your Honor.

23 THE COURT: Okay. And as I understand the law,
24 I have to decide that issue. If I say, yes, there was
25 a taking, then we proceed to decide how much it's

1 worth, how much the lack of access is worth. Right?

2 MR. BYBEE: That is correct.

3 THE COURT: All right. And the jury would make
4 that determination.

5 And the other thing that you're claiming is that
6 by installing this median, that -- well, we refer to
7 that as permanent, but of course who knows what the
8 road may look like down the line.

9 MR. BYBEE: Well --

10 THE COURT: But at this point, anyway. So
11 that's going to be there for the foreseeable future,
12 anyway, and all.

13 MR. BYBEE: That's correct.

14 THE COURT: And that that's a permanent -- that
15 that's another taking.

16 MR. BYBEE: It's not another taking. It's a
17 consequence of the first taking. And let me talk
18 about that.

19 When you do an imminent domain case, which the
20 Cobb case tells us we have to follow the law on a
21 direct case and an inverse case, it's the same
22 standards. You are taking the project that they are
23 building and you are determining the value of the
24 property interests that's been acquired and any
25 damages to the remaining property. That's what the

1 statute says. I think you've been through a number of
2 imminent domain cases and you're well-familiar with
3 that.

4 THE COURT: In this case there's no physical
5 taking.

6 MR. BYBEE: Well, Judge, that's my contention.
7 There is a physical taking. That the entry into the
8 space of the easement -- because the easement, of
9 course, is incorporable. The easement arises out of
10 the law and they have a right -- according to the
11 Hardin decision, Carolina Carbide decision, a right to
12 enter into the highway system.

13 And the statutes, Judge -- these are very
14 particular statutes which provide rights for
15 driveways. Some driveways have more rights than
16 others. But these are particular statutory rights
17 which constitute a physical taking.

18 I think Mr. Brooker, in his brief, admits that
19 it's a physical taking but says because it's
20 temporary, that it has to be analyzed as a regulatory
21 taking, which we just think is turning the law upside
22 down.

23 THE COURT: I'm not following you.

24 MR. BYBEE: All right. Then let me -- the
25 driveway is a --

Frampton v. SCDOT
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February 6, 2012

1 THE COURT: You had a driveway and you --

2 MR. BYBEE: I had a driveway --

3 THE COURT: -- and you lost it for a period of
4 time but you've got a driveway now; right?

5 MR. BYBEE: I got a driveway back.

6 THE COURT: So we --

7 MR. BYBEE: So the duration of the -- but the
8 driveway is the right. It is an easement right. The
9 closing of the driveway materially impacted ingress
10 and egress to the lot for a period of --

11 Now, this is an income-producing piece of
12 property.

13 THE COURT: I understand that.

14 So we've got -- you had a driveway, you lost it,
15 you have a driveway now. So there was a temporary --

16 MR. BYBEE: Temporarily, it was a physical
17 obstruction to the driveway.

18 THE COURT: Okay. No questions about --

19 MR. BYBEE: Okay?

20 THE COURT: -- for which if I decide that under
21 the law that that's a taking, you're entitled to some
22 money?

23 MR. BYBEE: Correct. All right. Now, go back
24 to the imminent domain thing.

25 THE COURT: I mean, that is imminent domain.

1 MR. BYBEE: Well, that's part of it. But that's
2 the value of property interest taken. If you go back
3 to the statute, you are paying for, in a normal case
4 of an imminent domain, the value of the land taken.

5 Here the property right is ingress and egress --
6 the Court has articulated and says exists, even in its
7 most recent jurisprudence. They've never said you
8 don't have the easement. So then once you have that
9 taking established, the statute of the imminent domain
10 code says that in addition to being paid for the value
11 of the part taken, you're entitled to damages to the
12 remainder.

13 And here's where they run afoul of existing case
14 law. Because there's a case directly on point. It's
15 called Wilson. It's in the briefs. It's in the trial
16 briefs. Wilson allows the jury to hear damages to be
17 estimated because of the imposition of the median,
18 because it's an incidental part of the project. It's
19 not an exercise of a police power, according to that
20 case, because it was an incidental part of the
21 property.

22 And in this particular circumstances, it's even
23 more telling because they didn't decide to put the
24 median in until after they figured out what was wrong
25 with the driveway. In other words, the whole purpose

1 of this project was to replace an ailing bridge, an
2 old bridge. And once they got all of that done --
3 because the original plans don't have anything about
4 median. Once they got into this problem with the
5 driveway, it prompted the same engineers to go back
6 and revisit whether or not they could shorten the
7 guardrail, and those same engineers sent a crew out
8 there and they started picking sight distances and
9 they figured out it was too dangerous to allow this
10 left movement.

11 But it didn't -- the case -- excuse me. The
12 project didn't arise and the driveways were not
13 unsafe before the taking. Before the project, there
14 was nothing unsafe about those driveways. So the
15 statute --

16 THE COURT: But, I mean, the taking is only -- I
17 mean, the taking was only for a temporary --

18 MR. BYBEE: It doesn't matter. That's the
19 point. Byrd talks --

20 THE COURT: You may not think so.

21 MR. BYBEE: That is my -- that is my position,
22 Judge. And the reason is is because Byrd doesn't
23 distinguish and doesn't talk about physical takings.
24 It's in the context of a regulatory taking. But Cobb,
25 which is the most recent pronouncement of how we're

1 supposed to proceed with these cases, tells us you
2 look to the direct imminent domain statutes for
3 guidance and you have to look at that jurisprudence
4 while you evaluate it.

5 Well, the most telling piece of guidance is the
6 statute, which tells us what we look at for purposes
7 of compensation. We look at the value of the part
8 taken and the damages to the remainder. The median is
9 causing the damages to the remainder.

10 THE COURT: All right. Okay. And I understand
11 -- I'm beginning to understand it a little better than
12 I did before and all, I hope so, and I hope I continue
13 to get educated about it.

14 Anything else you want to say?

15 MR. BROOKER: Well, yes, Your Honor, just very
16 quickly.

17 One important point here is we never entered
18 Mr. Frampton's property. All this work was done on
19 existing highway right-of-way.

20 Secondly, going back to this taking, that the
21 law is the taking of some -- discrete property
22 interest, it is the interference of access, if there
23 was, which, of course, we deny again, is a restriction
24 of use. And it's no different from what you had in
25 the Byrd case and the Kiriakides case. One of them

1 was a failed condemnation, the other was a zoning
2 dispute that lasted for a year. It is still a
3 restriction of use. It is not a physical taking of
4 any property of -- any land of Mr. Frampton.

5 This case will be decided under the parcel-as-a-
6 whole rule, where you look at all these -- you know,
7 you don't -- you have a number of sticks in a bundle
8 that make up property rights and you don't say that
9 one of them was messed with for some small period of
10 time and therefore that is a taking of a property.
11 You look at the thing as a parcel as a whole and
12 see -- and use the Penn Central analysis to see if
13 the -- outweighs the harm to the landowner.

14 Finally, concerning the Wilson case, I disagree
15 with Mr. Bybee's interpretation of that, saying that
16 the -- any incidental damages of a highway project is
17 recoverable, is -- that was a direct condemnation
18 case, the incidental damages was connected to the
19 taking, actually that takes the land for a road and
20 winds up with a median. So the land taken --
21 available land taken, plus the consequence of the
22 failure of the denial of right turn because of the
23 median, were recoverable.

24 But this is not a direct condemnation case, Your
25 Honor. It's an inverse condemnation.

1 I think that's all I have, Your Honor.

2 THE COURT: All right. Well, okay. Well, I'm
3 continuing to learn and be educated on it.

4 But as far as the motion before me is concerned,
5 I deny your motion to bifurcate it, or try the issue
6 of taking or no taking to start with, without a jury.
7 We're going to go ahead and pick a jury and we'll
8 proceed with the representation of the testimony and
9 the evidence. It may be that -- well, anyway, we'll
10 see what happens after that, as far as how we'll
11 proceed, what part -- what will be submitted to the
12 jury, if anything, down the line.

13 So I'm going to ask the clerk to bring the jury
14 panel up, we'll pick a jury, and we'll get started
15 with the trial of the case.

16 So I deny your motion, as I said, to separate
17 it, to try the issue of taking, non-jury at this time.
18 And we'll see how we go after that. All right.

19 So the jury will be up in a few minutes and
20 we'll voir dire it and pick the jury and we'll go from
21 there.

22 MR. BYBEE: Thank you, Your Honor.

23 [Whereupon, a recess is taken from 11:52 a.m. to
24 11:58 a.m.]

25

- - -

JURY VOIR DIRE

[Whereupon, the jury panel enters the courtroom
at 11:58 a.m.]

THE COURT: Thank you. Please be seated.

All right. Members of the jury panel, first of
all, let me introduce myself. I am Tommy Hughston, as
the bailiff indicated, and I've been assigned by the
Chief Justice of the South Carolina Supreme Court to
preside over a week of common pleas of civil court
here in Charleston County.

The case we have for trial today is the case of
Henry W. Frampton, F-R-A-M-P-T-O-N, III, and Dale B.
Frampton --

Where are they? Are they here?

MR. BYBEE: Your Honor, may I approach?

THE COURT: Yes. Come on up, too, Mr. Brooker.

MR. BROOKER: Yes.

[Whereupon, an off-the-record bench conference
is held]

THE COURT: All right. I was just informed --
it started out both Mr. and Mss. Frampton were
parties. But it's only Mr. Frampton now. So it's
Henry W. Frampton, III.

Mr. Frampton, if you would -- and then Mrs.
Frampton, though, is over there with you. If you

1 would please stand, also.

2 [Whereupon, Mr. and Mrs. Frampton comply]

3 THE COURT: All right. Thank you. You can be
4 seated.

5 And then the defendant in this case is the South
6 Carolina Department of Transportation, or what we used
7 to call the Highway Department. South Carolina
8 Department of Transportation is the defendant.

9 This is a dispute between these parties growing
10 out of some work that the Department did out on Folly
11 Road. If you're going out -- if you go across the
12 James Island Connector or if you go across the old
13 Ashley River Bridges and go out on Folly Road, as you
14 get out there where the Harris Teeter grocery store is
15 on your right and Lowe's is on your left back in there
16 behind some businesses and so forth -- Ruby Tuesday's,
17 I know, and there's a bank there and all. But anyway,
18 you go through that intersection on down there a
19 little ways, there's a creek. I've forgotten what the
20 name of that creek is.

21 MR. BYBEE: Ellis Creek.

22 THE COURT: What? Ellis?

23 MR. BYBEE: Ellis.

24 THE COURT: Ellis Creek and all, the bridge, of
25 course, crossing the creek there.

1 A few years ago the Highway Department decided
2 that it needed to replace that bridge and so they
3 proceeded with the work in regard to replacing that
4 bridge. And the Framptons I think live on the right
5 there, and I know the piece of property that they own
6 is on the right there, right before you get to the
7 creek. I think it adjoins the creek.

8 And they say that the actions of the Department
9 damaged them, damaged their land, is what we refer to
10 as -- this is what we refer to as an inverse
11 condemnation claim. They say that the actions of the
12 Department took some property rights of theirs and the
13 Department should be required to pay them for what
14 they took, what the Department took from them, during
15 the course of this project that we are here about
16 during the trial. That's sort of a nutshell, a
17 description, of what this case is about.

18 Mr. Frampton owns a piece of property there that
19 adjoins the creek and adjoins the road and he says
20 that the Department, through its actions, deprived
21 him, took from him, some property rights, some money,
22 and that the Department should be required to pay him
23 for that. That's what this case is about, in a
24 nutshell, as I understand it anyway. And of course
25 the Department denies that, denies that it should be

1 required under the constitution and under the laws to
2 pay them anything in regard to what went on out there.
3 And that's why we're going to have this trial, for
4 you, the jury, to make the decision about how much
5 money, if anything, the Department should be required
6 to pay Mr. Frampton.

7 I give you that as background information so
8 that if any of you happen to know anything or think
9 you may know -- think you may know anything at all
10 about any facts or circumstance that may be involved
11 in this dispute between Mr. Frampton and the
12 department, I would like to know that now.

13 Is there any member of the jury panel who knows
14 anything or thinks of anything at all about any fact
15 or circumstance that may be involved in this case? If
16 so, please stand. Anyone on the jury panel have any
17 knowledge of anything at all to do with this dispute
18 between these parties? If so, please stand.

19 [Whereupon, there is no response]

20 THE COURT: No one standing.

21 Anyone on the jury panel related by blood or
22 marriage or do you know in any way either Mr. Frampton
23 or Mrs. Frampton, who stood over here just a moment
24 ago? Anyone on the panel related by blood or marriage
25 or do you know in any way Mr. and Mrs. Frampton -- Mr.

1 or Mrs. Frampton? If so, please stand.

2 [Whereupon, there is no response]

3 THE COURT: No one standing.

4 I would ask the lawyers to stand and identify
5 yourselves, if you would, to the jury, and call out
6 the names of any potential witnesses.

7 We'll start with the plaintiff's lawyers.

8 MR. BYBEE: Yes, sir.

9 Richard Bybee. Brent McDonald is my associate.
10 I've got law partners, Allison Smith, Bill Bundy and
11 Stan Barnett. Our witnesses will include Larry
12 Phinney, Hal Frampton, Henry Frampton, Dale Frampton,
13 Tommy Hartnett, and Jerry Poole.

14 THE COURT: All right. Thank you.

15 Anyone on the jury panel related by blood or
16 marriage, or do you know in any way any of those
17 potential witnesses whose names were just called out
18 to you by Mr. Bybee? If so, please stand. Anyone on
19 the panel related by blood or marriage or do you know
20 in any way any of those potential witnesses whose
21 names were just called out to you? If so, please
22 stand.

23 No one standing. Oh. We've got a hand.

24 MS. WALKER: My name is --

25 THE COURT: Tell me your name and number, if you

1 could.

2 MS. WALKER: Mary Walker, 320.

3 THE COURT: All right. What's your response?

4 MS. WALKER: My response is just that a name is
5 familiar to me.

6 THE COURT: All right. What is that name?

7 MS. WALKER: Tommy Hartnett.

8 THE COURT: I'm sorry?

9 MS. WALKER: Tommy Hartnett.

10 THE COURT: Oh. Okay.

11 MS. WALKER: Just as a representative or
12 something, but that's all.

13 THE COURT: Okay. Good. Thank you very much
14 for that information and everything. I would imagine
15 a few others might know that name.

16 Yes, sir? Your name?

17 MR. ERICKSON: William Erickson, 61.

18 I live on James Island. I'm familiar a little
19 bit. The Framptons I think might attend my church.

20 THE COURT: Your Framptons what?

21 MR. ERICKSON: Might attend. Or some Framptons
22 might attend the church I attend.

23 THE COURT: All right. If you don't mind my
24 asking, what church is that?

25 MR. ERICKSON: St. Johns Presbyterian.

1 THE COURT: All right. Very good. Thank you
2 very much for that information.

3 Anybody else with a positive response? If so,
4 please stand.

5 [Whereupon, there is no response]

6 THE COURT: All right. How about the attorneys,
7 Mr. Bybee and his associates that he called out?
8 Anybody familiar with Mr. Bybee, or know him in any
9 way, or any of the lawyers that he mentioned that he
10 works with? If so, please stand.

11 [Whereupon, there is no response]

12 THE COURT: No one standing.

13 All right. Now we go to Mr. Brooker. Go ahead.

14 MR. BROOKER: I'm Beacham Brooker. I'm
15 assistant chief counsel of the South Carolina
16 Department of Transportation. I work out of
17 Columbia --

18 THE COURT: And any witnesses? Call out the
19 name of any witnesses.

20 MR. BROOKER: Yes. I will have -- I will have
21 three witnesses. Two of them are local Charleston
22 employees of the DOT of Charleston bridge office, we
23 call it. I think Jeffrey Rajabi is the head of that.
24 And then Daniel Burton -- Daniel Person [phonetic]
25 also works with him. I'll also call the project

1 manager for the contractor who replaced the James
2 Island Creek bridge or Ellis Creek bridge. He's --
3 contractors, the project manager, as I call him, Cliff
4 Huff.

5 THE COURT: All right. Thank you.

6 All right. Anyone on the jury panel related by
7 blood or marriage or do you know, in any way, any of
8 those potential witnesses whose names were just called
9 out to you by Mr. Brooker? If so, please stand.
10 Anyone related by blood or marriage or do you know, in
11 any way, any of those potential witnesses? If so,
12 please stand.

13 [Whereupon, there is no response]

14 THE COURT: No one standing. All right.

15 Mr. Brooker: anybody know him in any way? If
16 so, please stand.

17 [Whereupon, there is no response]

18 THE COURT: No one standing.

19 Since this matter does involve the South
20 Carolina Department of Transportation, I would ask
21 this question. Anyone -- is there anyone on the jury
22 panel or a member of your immediate family -- and I
23 would define immediate family to be mother, father,
24 any brother or sister, any spouse, that is, husband or
25 wife, or child or children.

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1 Anyone on the jury panel or a member of your
2 immediate family ever been employed, past or present
3 employment, with the South Carolina Department of
4 Transportation? If so, please stand.

5 Yes, sir. Your name and number, please.

6 MR. ROGERS: James Rogers, 199.

7 Served as a summer intern, Department of
8 Transportation, Columbia office, the summer of 2000.

9 THE COURT: Good. All right. Just for the
10 summer of 2000.

11 And what kind of capacity were you an intern?
12 What department or what area did you work in?

13 MR. ROGERS: Worked in the traffic engineering
14 department.

15 THE COURT: Okay. Thank you very much for that
16 information.

17 Anyone else, or a member of your immediate
18 family, ever been employed by the department of
19 transportation? If so, please stand.

20 [Whereupon, there is no response]

21 THE COURT: How about anybody on the jury panel
22 or a member of your immediate family that has ever had
23 any working relationship, I would say, with the
24 Department? You know, sold materials to them, that
25 sort of thing? Anybody, or a member or your family,

1 have any type of relationship, ongoing relationship,
2 with the Department, not including employment -- I've
3 already asked about that -- but an ongoing business
4 relationship of any sort with the Department? If so,
5 please stand.

6 Yes, ma'am. Your name and number, please.

7 MS. BRAILSFORD: Teresa Brailsford, number 24.

8 I work for a company called Test America. We
9 test soil and water, and we've tested DOT samples
10 before through an engineering firm that sent it to us.

11 THE COURT: Good.

12 MS. BRAILSFORD: But they're uniquely
13 identified. We don't know where they come from or
14 exactly what the information does.

15 THE COURT: Thank you very much. You're very
16 thorough. Thank you for that information.

17 All right. Anyone else with a positive response
18 in regard to any type of employment or -- business
19 relationship, rather, with anybody that does business
20 with the department? Anybody else?

21 Yes, sir, please. Yes, sir.

22 MR. DIXON: Mark Dixon.

23 THE COURT: Tell me your name and number.

24 MR. DIXON: Mark Dixon, number 53.

25 I work with Roper St. Frances Health Care so

1 sometimes the hospitals get involved with things with
2 parks and roads in front of the hospitals.

3 THE COURT: Sure.

4 MR. DIXON: And back to Tommy Hartnett. I
5 recall he's -- I believe he's on the board of
6 directors of the new Mount Pleasant Hospital. We've
7 met briefly, I think. I don't really know him that
8 well.

9 THE COURT: All right. And what is it that you
10 do with the hospital?

11 MR. DIXON: I'm a vice president of mission for
12 the administration of the hospital system.

13 THE COURT: All right. Thank you very much for
14 that information.

15 Anyone else? All right. Yes, sir. Again --
16 tell me your name and --

17 MR. ROGERS: James Rogers.

18 THE COURT: -- number again.

19 MR. ROGERS: 199.

20 I did two summer internships with Florence and
21 Hutchinson in Columbia, South Carolina. We had a
22 strong business relationship with the Department of
23 Transportation.

24 THE COURT: All right. Thank you very much for
25 that information.

1 Anyone else?

2 [Whereupon, there is no response]

3 THE COURT: All right. Has any member of the
4 jury panel formed or expressed an opinion about any
5 issue or matter that may be involved in the trial of
6 this case? If so, please stand.

7 [Whereupon, there is no response]

8 THE COURT: No one standing.

9 Is there any member of the jury panel who has
10 any bias or prejudice either in favor of or against
11 either side of this case? If so, please stand --
12 please stand.

13 [Whereupon, there is no response]

14 THE COURT: No one standing.

15 Does any member of the jury panel know of any
16 reason why you cannot give both sides a fair and
17 impartial trial in this case? If so, please stand.

18 [Whereupon, there is no response]

19 THE COURT: No one standing.

20 One other specific question I thought maybe
21 about. Let me ask this question. Has any member of
22 the jury panel or member of your immediate family,
23 again, as I have defined that for you, ever been
24 involved in a condemnation action of any type? That
25 is where the government is taking or is alleged to be

1 taking some property belonging to you or a member of
2 your family. Anybody on the jury panel or a member of
3 your family ever been involved in any type of
4 condemnation dispute that you know of? If so, please
5 stand.

6 [Whereupon, there is no response]

7 THE COURT: Anybody on the jury panel know of
8 any reason whatsoever why you should not be picked to
9 serve as a juror in this case? If so, please stand.

10 [Whereupon, there is no response]

11 THE COURT: No one standing to that question or
12 the other question that I just asked.

13 Any additional questions from the plaintiff?

14 MR. BYBEE: No, sir.

15 THE COURT: From the defendant?

16 MR. BROOKER: No, sir.

17 THE COURT: All right. Mike, give us a list.

18 All right. The clerk over here has each one of
19 your names. I used to say it has each one of your
20 names on a little individual slip of paper -- that's
21 the way we used to do it -- and we put the names in a
22 box and we drew them out randomly from that box.
23 Actually, the law used to provide that a person who --
24 an unsighted person would do the drawing so that there
25 would be absolutely no question about that it was

1 being drawn without anybody knowing whose name was
2 being drawn. But now we do it by computer, you know.

3 So he's in the process, or just has, drawn your
4 names out by computer. And we're going to pass the
5 list around to the lawyers. We only need a certain
6 number for a case like this.

7 Come get your list.

8 And we're going to give them a few minute to
9 look over the list and then we have a procedure that
10 we'll follow for them to strike or excuse from the
11 list. And when we're through with that, we'll have
12 the twelve jurors and one alternate juror who will
13 actually be seated as the trial jury in this case.

14 I'm going to give them about fifteen minutes to
15 look over the list.

16 If you want to leave the courtroom, you can, but
17 be back in fifteen minutes. According to that clock,
18 from my angle it's about twenty minutes after 12:00.
19 Be back in here at twenty-five to 1:00 so we can
20 finish picking the jury. If you want to go out, you
21 can, but don't go too far. Be back in here at twenty-
22 five to 1:00. Fifteen-minute break.

23 [Whereupon, a recess is taken from 12:15 p.m. to
24 12:33 p.m.]

25 - - -

1 STRIKING OF THE JURY

2 THE COURT: All right. We're ready to pick the
3 jury. Use the number on the lefthand side, next to
4 the juror's name, to strike 1 through 20 for the
5 regular twelve jurors and then 21, 22, 23 for the
6 alternate juror.

7 Members of the jury panel, the number that you
8 hear called out in no way corresponds to your juror
9 number so don't try to figure out if we're talking
10 about you by the number that you hear, for it does not
11 correspond.

12 Plaintiff first.

13 MR. BYBEE: Number 4.

14 MR. BROOKER: Number 5.

15 THE COURT: Wait. Okay. Let us -- give us time
16 to record it.

17 All right. Plaintiff strikes number 4. And
18 defendant strikes what number?

19 MR. BROOKER: 5.

20 THE COURT: 5. Okay. All right. Plaintiff
21 next.

22 MR. BYBEE: Number 12.

23 THE COURT: 12. Defendant?

24 MR. BROOKER: 17.

25 THE COURT: 17. Plaintiff?

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1 MR. BYBEE: Number 8.
2 THE COURT: 8. Defendant?
3 MR. BROOKER: Number 18.
4 THE COURT: 18. Plaintiff?
5 MR. BYBEE: Number 11.
6 THE COURT: 11. Defendant?
7 MR. BROOKER: Number 19.
8 THE COURT: 19.
9 All right. Now, one each on the alternate. 21,
10 22, 23. Plaintiff?
11 MR. BYBEE: Number 21.
12 THE COURT: All right. Defendant?
13 MR. BROOKER: 23.
14 THE COURT: 23.
15 All right. Let me call out the number -- I'm
16 going to call out the number of the ones who will be
17 serving, the remaining people who will be serving as a
18 jury, make sure I have this correctly. If you would
19 follow along, then. Number, 1, number 2, number 3,
20 number 6, number 7, number 9, 10, 13, 14, 15, 16, 20,
21 for the regular twelve jurors, and then 22 for the
22 alternate juror.
23 Everybody agree with that?
24 MR. BYBEE: I believe that was correct.
25 MR. BROOKER: I believe so, Your Honor.

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1 THE COURT: Hearing no dissent, we'll assume.

2 All right. Members of the jury panel, if the
3 clerk calls your name, please come forward, bring any
4 personal belongings you may have with you, come over
5 here and have a seat in the jury box.

6 THE CLERK OF COURT: Yes, Your Honor.

7 Juror Number 149, Mamie Mack.

8 [Whereupon, Ms. Mack is seated in the jury box
9 as a juror]

10 THE CLERK OF COURT: Juror Number 216, Kimberly
11 Stone.

12 [Whereupon, Ms. Stone is seated in the jury box
13 as a juror]

14 THE CLERK OF COURT: Juror Number 193, David
15 Richie.

16 [Whereupon, Mr. Richie is seated in the jury box
17 as a juror]

18 THE CLERK OF COURT: Juror Number 207, Rhoda
19 Singleton.

20 [Whereupon, Ms. Singleton is seated in the jury
21 box as a juror]

22 THE CLERK OF COURT: Juror Number 230, Mary
23 Walker.

24 [Whereupon, Ms. Walker is seated in the jury box
25 as a juror]

1 THE CLERK OF COURT: Juror Number 192, Rhonda
2 Richards.

3 [Whereupon, Ms. Richards is seated in the jury
4 box as a juror]

5 THE CLERK OF COURT: Juror Number 90, Charles
6 Habersham.

7 [Whereupon, Mr. Habersham is seated in the jury
8 box as a juror]

9 THE CLERK OF COURT: Juror Number 108, Shawnee
10 Hooper.

11 [Whereupon, Ms. Hooper is seated in the jury box
12 as a juror]

13 THE CLERK OF COURT: Juror Number 197, Sylvester
14 Rodd.

15 [Whereupon, Mr. Rodd is seated in the jury box
16 as a juror]

17 THE CLERK OF COURT: Juror 221, Gilmer Thomas.

18 [Whereupon, Mr. Thomas is seated in the jury box
19 as a juror]

20 THE CLERK OF COURT: Juror Number 24, Teresa
21 Brailsford.

22 [Whereupon, Ms. Brailsford is seated in the jury
23 box as a juror]

24 THE CLERK OF COURT: Juror Number 129, Luther
25 Kinloch.

1 [Whereupon, Mr. Kinloch is seated in the jury
2 box as a juror]

3 THE CLERK OF COURT: And the alternate is Juror
4 Number 139, Catherine Linen.

5 [Whereupon, Ms. Linen is seated in the jury box
6 as an alternate juror]

7 THE COURT: All right. The first thing I'm
8 going to ask this jury to do is if you would follow
9 the bailiffs out that door to a jury room. I'll be
10 back with you in just a few minutes.

11 So if you would leave the courtroom through that
12 door, go to the jury room. I'll be back with you in
13 just a few minutes.

14 [Whereupon, the jury exits the courtroom at
15 12:38 p.m.]

16 THE COURT: All right. Any objection to the
17 jury as it's presently constituted? By the plaintiff?

18 MR. BYBEE: No, sir.

19 THE COURT: Defendant?

20 MR. BROOKER: No, sir.

21 THE COURT: All right. Good.

22 Members of the jury panel that are still seated
23 in the audience, I can release you now. Of course,
24 we're going to be -- we're going to -- we're going to
25 take a lunch break now and we'll be back about two

1 o'clock, start the trial of this case. If you want to
2 come back in, you can. You don't have to. So you're
3 free to go. Call in this evening after six o'clock.
4 You should have that number. Call in this evening
5 after six o'clock to get a recorded message as to when
6 we want you to come back and call back or whatever.
7 Thank you very much.

8 [Whereupon, the jury panel exits the courtroom
9 at 12:39 p.m.]

10 THE COURT: All right. So I suggest we take our
11 lunch break now and come back at two o'clock and get
12 started with opening statements then.

13 And, let's see. The procedure, I guess -- the
14 procedure we'll follow is this is where the landowner
15 puts up your --

16 MR. BYBEE: I think I put up my entire case.

17 THE COURT: Yes, the case. And then we'll see
18 where we go from there.

19 All right. Bring the jury in. And if you would
20 hold back juror number 221, Mr. Thomas, Gilmer Thomas.
21 I'm going to ask him to serve as foreman of the jury,
22 so hold back Mr. Thomas and to serve -- see if I can
23 get him to serve as foreman.

24 [Whereupon, the jury enters the courtroom at
25 12:42 p.m.]

1 THE COURT: All right. We have the jury with
2 us.

3 Mr. Thomas? Is that you?

4 MR. THOMAS: Yes, sir.

5 THE COURT: Okay. Would you mind serving as
6 foreman of the jury?

7 MR. THOMAS: No.

8 THE COURT: I'm asking you to serve as foreman
9 of the jury. Okay?

10 MR. THOMAS: Absolutely.

11 THE COURT: All right. If you would seat --
12 that's the seat that we reserve for the foreman.

13 And then the alternate juror, Ms. Linen, that's
14 the seat that we reserve for the alternate juror.

15 The rest of you are free to sit anywhere you
16 like in the jury box as such time as you come and go
17 from the courtroom, but if you would let the alternate
18 sit back there and the foreman sit up there on the
19 front in that first seat.

20 I would ask the clerk to swear the jury, please.

21 THE CLERK OF COURT: Ladies and gentlemen of the
22 jury, if you would please stand and raise your right
23 hand.

24 After this oath, if you accept it please respond
25 by saying I do.

1 [Whereupon, the jury is duly sworn by the clerk
2 of court as follows: do you swear or affirm that you
3 shall well and truly try the issues joined in the case
4 of Henry W. Frampton, III, plaintiff, versus South
5 Carolina Department of Transportation, defendant, and
6 a true verdict render according to the evidence and
7 the law, so help you God]

8 [Whereupon, jurors respond]

9 THE CLERK OF COURT: If you've accepted this
10 oath, please have a seat.

11 [Whereupon, all jurors comply]

12 THE COURT: Thank you. The first thing I'm
13 going to ask you to do is pass those notepads around
14 there, and pens. I want everybody to have a notepad
15 and a pen.

16 [Off the record momentarily]

17 THE COURT: And as the bailiff said, if you
18 would put some identifying mark on the outside of it,
19 the name, initials, number, whatever, so that you can
20 easily identify that as yours -- because when you
21 leave, I'll ask you to leave that here, and give it
22 back to you when you come back -- so it will be easy
23 for you to identify.

24 I do allow jurors to take notes during the
25 course of a trial. Some people don't think that's a

1 very good idea. They think it may distract you from
2 what is actually being said and done during the
3 presentation of the testimony and the evidence to you.

4 If you do take notes, do not allow your note-
5 taking to distract you. Notes are to be used only as
6 memory aids. Notes are not entitled to any greater
7 weight than the recollection or the impression of each
8 juror as to what the testimony or evidence actually
9 was. Those will be your notes and your notes only.
10 No one will be looking at them, checking to see what
11 you wrote down, whatever. Those are your notes and
12 your notes only. At the conclusion of the trial I
13 would ask you to carry the notes you may have made,
14 take them with you, tear them up, whatever you want to
15 do. As I said, those are your notes and your notes
16 only. And notes are not entitled to any greater
17 weight than the recollection or the impression of each
18 juror as to what the testimony or evidence actually
19 was.

20 The oath that you just took was an oath whereby
21 you swore you would decide this case based on the
22 testimony and the evidence that will be presented to
23 you, from that witness chair right over there, and my
24 instructions to you on the law. I really don't know
25 much more about this case, at this point in time, than

1 what you do. All I know is what I told you earlier.

2 This is a dispute between Mr. Frampton and the
3 South Carolina Department of Transportation that grows
4 out of, that came about, because of a project, work,
5 that the Department did over on Folly Road at the --
6 this side of Ellis -- I believe it's called Ellis
7 Creek. I think -- I described for you where that is.
8 I'm sure some of you at least are probably generally
9 familiar with that area. But Mr. Frampton owned a
10 piece of property that is on that road, and right up
11 next to the creek there, and he claims that the
12 Department did some things that require them to pay
13 him some money. There's a dispute about that. You
14 will have to decide what amount of money, if any, the
15 Department should be required to pay him as a result
16 of what happened. That's what your job is going to
17 be.

18 You are the sole judges of the facts of this
19 case. I don't have anything to do with the facts that
20 will be submitted to you, the questions of fact that
21 will be submitted to you, at the conclusion of the
22 case. I don't have anything to do with that. That's
23 your job.

24 My job during the trial is to make sure that the
25 parties follow the rules. We have certain rules of

1 evidence and rules of procedure that they're supposed
2 to follow in presenting the facts to you. My job is
3 to make sure that they follow those rules.

4 Probably during the course of the trial one or
5 both of the lawyers will get up and say something
6 like, Your Honor, I object, and hope they have some
7 reason as to why he objects to a question that's been
8 asked or an answer that's been given. When the
9 lawyers do that, they're talking to me, they're not
10 talking to you. They're calling a possible violation
11 of one of these rules to my attention. Don't you
12 concern yourselves with those objections or how I may
13 rule on those objections, whether I overrule it,
14 sustain it, whatever, because it has absolutely
15 nothing to do with your job in this case, which will
16 be the finders or the judges of the facts of this
17 case.

18 If an objection comes up or some other
19 procedural question comes up during the trial,
20 probably I'll ask you to leave the courtroom and go to
21 the jury room. I'm not trying to hide anything from
22 you by doing that. It's just that we've found over
23 the years that that's the easiest way for me and the
24 lawyers to discuss the rule that they're talking about
25 and its application. Not trying to hide anything from

1 you by doing that. It's just that we've found that's
2 the easiest way for me and the lawyer to deal with
3 those rules, let me make a decision, tell them what my
4 decision is, bring you back in, we go on with the
5 presentation of the testimony and the evidence.

6 Now, how will we go about learning about this
7 case? First of all, I'm going to allow each attorney
8 to make a brief opening statement to you. These are
9 not arguments. The arguments will come at the
10 conclusion of the case. But I do allow each side to
11 introduce themselves a little further, tell you a
12 little bit more about what this case is about, the
13 controversy, the dispute, between the parties. The
14 plaintiff will talk to you first, then the defendant's
15 lawyer will talk to you. After that, we'll have the
16 presentation of the testimony and the evidence. In
17 this case the landowner will present its side of the
18 case. Mr. Frampton will tell you everything he wants
19 you to know about it and call his witnesses. Then
20 we'll switch and the Department of Transportation will
21 have the opportunity to call witnesses and give you
22 its side of the case.

23 After both sides have had a full and fair
24 opportunity to present their evidence, present their
25 witnesses, present whatever physical evidence they

1 want to present, then we'll have summations and
2 arguments from the attorneys. And after that, I'll
3 discuss with you more fully what your duties and
4 responsibilities are as a jury in the case, and the
5 law that you can apply in the case, and then you'll go
6 in the jury room and you'll deliberate and you'll give
7 us your decision about this dispute between these
8 parties. Keep in mind what your job is going to be at
9 the conclusion of the case.

10 Now, it's almost one o'clock. Normally we work
11 in the morning from 9:30 until about one o'clock, take
12 a lunch break, come back about two o'clock, and we try
13 the case again until 4:30 or five o'clock in the
14 afternoon. So that's the time that you should plan on
15 being with us while you're on this jury. 9:30 in the
16 morning till about one o'clock, lunch break from 1:00
17 to 2:00, then we work until about 4:30 or 5:00 in the
18 afternoon.

19 So I'm going to let you go to lunch now and then
20 we'll come back and we'll get started with the trial
21 of the case with the opening statements from the
22 attorneys.

23 Let me mention one thing to you. This is an
24 instruction to you. It goes throughout the trial.
25 You cannot discuss the case even amongst yourselves

1 during the time that the trial is going on. The only
2 time you get to discuss it is at the conclusion of the
3 case when you've heard everything. That's when you'll
4 discuss it in the jury room amongst yourselves. So
5 don't discuss the case over lunch break, evening
6 recesses, whatever. The only time you're to discuss
7 it is, as I said, at the conclusion of the case when
8 you're deliberating to give us your verdict.

9 So keep that in mind throughout the trial. If
10 you go to lunch with somebody or whatever, or a family
11 member wants to know what you're doing, you can tell
12 them you're involved in the trial of a case but you
13 can't talk about the case. If they want to know why,
14 you can tell them -- blame it on me. Tell them that I
15 told you you cannot discuss the case. Once it's over
16 you can tell them all about it, but until it is over
17 it would be a violation of your oath for you to
18 discuss it with anyone. So keep that in mind.

19 Have a nice lunch. Be back in the jury room
20 back here at two o'clock. Jury room, two o'clock.

21 [Whereupon, the jury exits the courtroom at
22 12:52 p.m.]

23 [Whereupon, a recess is taken from 12:52 p.m. to
24 2:03 p.m.]

25 THE COURT: Thank you. Please be seated.

1 All right. As soon as they're all ready, bring
2 them on in.

3 MR. BROOKER: Your Honor --

4 THE COURT: Excuse me. Wait a minute.

5 MR. BROOKER: Before we bring the jury in, I do
6 have a matter to bring up.

7 I'm a little confused about your ruling this
8 morning. You denied our motion to have a separate
9 trial, one before the trial judge to determine the
10 taking and one before the jury, if taking is found, to
11 determine just compensation. But then when you were
12 instructing the jury before they left before lunch,
13 you told them that they would decide how much to award
14 Mr. Frampton because of what the Department did.

15 THE COURT: If any. I think I used the word if
16 any.

17 MR. BROOKER: But what I'm concerned about, Your
18 Honor, is you go forward and you're going to let them
19 decide whether or not there was a taking?

20 THE COURT: No.

21 MR. BROOKER: Okay.

22 MR. BYBEE: Your Honor, Mr. Brooker has agreed
23 to allow me to use an aerial photograph material in my
24 opening?

25 THE COURT: All right. Is that correct?

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1 MR. BROOKER: [No response]
2 THE COURT: Is that correct?
3 MR. BROOKER: That's correct.
4 THE COURT: All right. Bring the jury in.
5 [Whereupon, the jury enters the courtroom at
6 2:14 p.m.]
7 THE BAILIFF: All jurors are present, Your
8 Honor.
9 THE COURT: All right.. We do have the jury with
10 us.
11 All right. Appreciate you being on time. Hope
12 you had a nice lunch. We'll get started now with the
13 trial with the opening statements.
14 MR. BYBEE: May it please the Court?
15 THE COURT: Go right ahead.
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MIA PERRON, CVR-CM-M

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OPENING STATEMENT

MR. BYBEE: Ladies and gentlemen, my name is
Richard Bybee. As you know, I represent Hal Frampton.

I want to start off by just giving you a little
brief overview of what we expect that we can present
in this case. This case is really about two or three
issues.

One of the issues something very commonplace
called it's the driveway. Every one of us has a
driveway allows us to get in and out of the road
systems. And in this particular case we are alleging
that that is a property right, a property right, which
is protected by the United States constitution, the
South Carolina constitution, and several statutes and
that the Highway Department, the Department of
Transportation, which has the power to take property
rights and take land, does not have the power to take
it without paying compensation. And our evidence in
this case is that they closed the driveway to Hal
Frampton's property for over a year and did not pay
compensation. And that's why we're here. We are
seeking compensation for the closing, the physical act
of closing, a particular driveway at 699 Folly Road.

We are not here to tell you that the Highway
Department or the Department of Transportation doesn't

1 have the power to build roads or to improve roads.
2 And in this case, to build and replace the bridge over
3 Ellis Creek. We are not telling you that they can't
4 do that. Of course they can do that. They need to do
5 that. They have to improve the roads. We are not
6 arguing that.

7 We are here because when they do that, if they
8 interfere with a property right, they have to pay
9 compensation. And in this particular circumstance,
10 they have not.

11 Now, what's a property right? A property right
12 is the right to enjoy and use property. It can be
13 income-producing property, it can be family
14 residential property. And in this particular
15 circumstance, it was an income-producing property, a
16 property that was rented out to residential tenants on
17 a regular basis for decades. And we will show that it
18 was done for decades, continuously for decades, and
19 that when they started this project they took no
20 consideration of that fact and they closed that
21 particular driveway without paying compensation.

22 Indulge me for just a second and I'll orient you
23 to the property.

24 [Off the record momentarily]

25 MR. BYBEE: This is Folly Road. This is Ellis

1 Creek. This is 699 Folly Road. The Framptons called
2 it their rental house, the creek house. You'll notice
3 it has a separate dock. The Framptons' residence is
4 back farther back. The Frampton's residence has its
5 own independent driveway. 699 Folly has its own
6 driveway. Can't see it very well, but we'll show you
7 that it was in existence basically right up underneath
8 this tree canopy. And then there is another property
9 next door and it has its own driveway. So at this
10 time, this photograph, I think the evidence will show,
11 was about 1985. We'll go back farther than that.

12 These greenhouse structures here are no longer
13 there. There's a Speedy Lube here. And this is a
14 more modern facility.

15 The bridge -- well, you can tell in 1985 it had
16 four lanes of traffic. There's your double yellow
17 lines and there's your two lanes of traffic. The
18 bridge is here, very close to the house.

19 So if you pay particular attention to this
20 photograph, you'll see a curb, a raised curb -- no
21 sidewalk, but a raised curb -- and so there had to be
22 a valley to get that driveway in and out of there.

23 So what happened? What did the Department have
24 to do? The Department needed to improve that bridge.
25 They had to replace that bridge. And that was a major

1 project. They actually had to do it in two stages.
2 They had to put half of the construction on this side
3 and then they came back and did the construction on
4 the Frampton side of the house -- or the driveway,
5 excuse me, of the road.

6 Their contract gave to the bridge builder the
7 right to use this roadbed. Their contract required
8 the contractor to remove this curb. Their contract
9 required the contractor to install pipe all the way
10 across both of these driveways. Their contract
11 required the installation of what is known as a silt
12 fence, which is a barrier, in front of the driveway.

13 Now, interestingly, the contract did not require
14 a silt fence in front of Dale Frampton's residence,
15 which is 693 Folly Road. The contract did not require
16 a silt fence in front of this property, which is 685
17 Folly Road and at the time was being used by a law
18 office as a commercial structure. It was being
19 rented, also.

20 The reason the silt fence was required by the
21 contract to be installed by the contractor is because
22 the original plans of the DOT were to install what is
23 called a bridge guardrail all the way up across 699 to
24 the edge of the driveway at 693. That was intended by
25 the original contract to be bought. And they did not

1 offer compensation for it.

2 So the project starts. It takes a two, three-
3 year period. First half, the Framptons, suffered the
4 same inconvenience we all suffer when there is a
5 project going on, a road project. I'm not here --
6 we're not here asking for money because of a general
7 inconvenience. We all have to put up with it. It's
8 our burden as a society to do that. That's not why
9 I'm here. But when they decided to take that
10 guardrail and move it across to the edge of that
11 driveway and deny Hal Frampton the access, well, then
12 they denied him the use and enjoyment of his property.

13 And as I said before, we're going to show you
14 that this use, this particular use, was as a rental
15 property. So for a specified period of time, and our
16 evidence will show that went on for more than a year,
17 the rental income that he should have been deriving
18 was deprived from him. And that's how we're going to
19 articulate our damages.

20 Most of these facts that I've just relayed to
21 you are probably going to be undisputed. We might
22 argue about how long. The Department may argue, well,
23 it really doesn't matter, the -- the gaps weren't as
24 long. We will let the facts come out. The witnesses
25 will testify. You'll hear the cross-examination about

1 that.

2 But when you get to the phase on damages, you're
3 going to hear a different kind of a witness other than
4 a factual witness. You're going to hear an expert
5 witness, because we have to estimate and prove damages
6 and that is going to be done with an expert real-
7 estate appraiser. And he's going to go in there and
8 he's going to give you an opinion of the value of this
9 particular property and its impact for that duration
10 of time that that property right was interrupted.

11 Now, what do we call that property right? The
12 law calls it an easement of access, an abutters
13 easement of access. Abutter means adjacent. The
14 property owner owns, has in his possession as part of
15 his title, part of his property rights, a right to get
16 into the public highway system. That is what cannot
17 be taken without just compensation. That's the right.

18 All right. That's part of the story. Somewhere
19 along the line the Department decided, well, you know,
20 we are not going to extend that guardrail as far as we
21 originally planned; we're going to shorten it; and
22 we're going to widen and make two driveway entrances
23 next to the property at 693 to provide and reestablish
24 how Frampton's driveway to his -- house or his rental
25 house. Fine.

1 But that took time. One reason it took time is
2 because they had actually installed the curb and
3 gutter that was going to be there permanently. They
4 had already -- and then they installed the shortened
5 guardrail. So now they have the problem of creating a
6 new driveway over here. So they have to tear out that
7 property. They have to come up with another value,
8 another driveway, and that process. And then it still
9 didn't -- because our proof will show that they were
10 obligated to tie it in and make it all weatherproof,
11 that the statutes require that they do that, and that
12 there was still another duration of time where it was
13 inaccessible, could not be rented, could not produce
14 the income that it was supposed to produce.

15 I wish I could tell you that was the end of the
16 story, but it wasn't, because about the time --

17 See if I can get that in the same perspective.

18 [Off the record momentarily]

19 MR. BYBEE: At about the time they made the
20 decision we're not going to take this access
21 permanently, we're going to shorten the guardrail and
22 we're going to change our plans, they also decided
23 they had better go out there and check and see sight
24 distances this -- after the bridge is built and
25 they're out there engineering the work and they're

1 figuring out, according to what I think our evidence
2 is going to show, that the sight distance was going to
3 be putting the drivers going in and out of the
4 driveway in an unsafe position, that they couldn't see
5 the traffic that's coming out.

6 And so they decided to install a median, a
7 raised concrete median, so that where -- in the before
8 situation, Hal Frampton had a driveway exit, an
9 ingress and egress both ways. In the after situation,
10 he ended up having only right in and right out. And
11 that same appraiser who will be telling us about the
12 damages caused by the temporary denial of that
13 driveway will also estimate the permanent damages to
14 the property at 699 as caused by that particular
15 median.

16 Now, our evidence will finally show that there
17 was nothing unsafe about that driveway, certainly not
18 1985, not in 1990, and not at any time, up until the
19 time they decided to do new bridge work. And so as a
20 consequence of the new bridge work -- it was not that
21 there was anything unsafe about any of these driveways
22 before they started their project. Their project
23 caused that condition. And for that reason, under the
24 just compensation clause we're going to be presenting
25 evidence of that damage, also.

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1 Again, we're here only about 699. We're not
2 talking about the temporary inconvenience -- and there
3 is some, was some, to the actual residence -- and
4 we're not here about the temporary inconvenience to
5 685. We're here because of the denial of that access
6 and the damages that that median has wrought.

7 And we will going -- we're going to ask you for
8 a verdict -- and the judge will tell you that what the
9 landowner is entitled to is just compensation that's
10 fair to the DOT, what's fair to the landowner. We'll
11 have our side. We'll see what they put up. Thank you
12 very much.

13 THE COURT: Mr. Brooker.

14 MR. BROOKER: Thank you, Your Honor.

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OPENING STATEMENT

MR. BROOKER: Good afternoon. My name is Beach Brooker. I'm assistant chief counsel of the DOT in Columbia and I'm representing the Department as the defendant in this case.

We don't have a lot of -- as Mr. Bybee says, a whole lot of factual disputes here. The main one we would have is whether or not we actually denied anybody access to this rental property driveway. There were -- our main evidence -- chief evidence on that point is that no one was living there. It was vacant. They put up a -- the contractors put up a silt fence to protect the property, which is the purpose of silt fences, to keep dirt, dust and trash from washing into your property. And that was left there because nobody objected.

Our contracts always called for our contractors to maintain access to individual property owners and not disturb their access. In fact, this project was designed with some breaks into the temporary concrete barrier wall, with some orange-barrel space, for cars to get through and so Mr. Frampton could get to all three of his properties.

So the dispute is, you know, whether or not we actually denied anybody access. We'll put up our

1 witnesses, who are our engineers and our contractor's
2 engineer, to testify to that.

3 But keep in mind that we are second here with
4 the defendant. You will hear from the Framptons and
5 hear a lot of testimony about how we have harmed them.
6 We didn't. But the inconvenience that we caused them
7 is just what anyone who lives next to a road or a
8 bridge has to expect.

9 The State -- the taxpayer builds the road that
10 brings traffic to your commercial property. Without
11 it, the property would have no value. You have to
12 expect from time to time that road has to be
13 reconstructed and this -- and you're going to be
14 inconvenienced. You might even lose income, but the
15 law in this state is that that is not recoverable
16 because it comes with -- it comes with your title,
17 essentially, that you -- when you buy land next to a
18 road, you have to expect that the public will have to
19 redo that road for you from time to time.

20 It's especially important here because this is a
21 major salt-water bridge. Let me interject here.
22 We've been calling it, for preparation for this case,
23 James Island Creek. Mr. Bybee calls it Ellis Creek.
24 It's the same creek. It's just where the nomenclature
25 ends. So we're happy to go with Ellis Creek for this

1 location. It becomes James Island Creek at some point
2 around Mr. Frampton's property. But if I ever say
3 James Island Creek, we're talking about the same
4 creek.

5 Mr. Frampton's little rental house on like
6 thirteenth-hundredths of an acre -- it's right up
7 against the bridge. We put in a -- as I said, a
8 temporary concrete barricade there and worked it in
9 two phases. We originally had to do -- actually,
10 three phases, the third phase when we were taking out
11 the temporary bridge on the other side. And the
12 reason we had to do that is because it's the only way
13 to get to Folly Beach. We can't cut off a whole city.

14 So we worked -- put a cut-through barrier there
15 and worked on the far side and then came back over and
16 worked on Mr. Frampton's side. Because it's -- Mr.
17 Frampton's property is the last property by the
18 bridge, it was necessary to put in there lay down lay-
19 down material, and that sort of thing. But our
20 engineers will tell you that they always tried to
21 accommodate Mr. Frampton.

22 They accommodated the tenant to let him freely
23 come and go into his property while he was there. He
24 left. It was vacant, and therefore we put up a silt
25 screen -- or one of the subcontractors perhaps put up

1 a silt screen to protect the property. We were trying
2 to help.

3 Now, this thing about the extending the
4 guardrail, that was on the plans. The guardrail will
5 get longer when you pass in front of this rental house
6 and almost to the driveway to Mr. Frampton's main
7 house. And the purpose of guardrails of course is to
8 protect traffic from running off the bridge or hitting
9 the bridge. But it's also to protect the property
10 behind it. And to that end, we negotiated with Mr.
11 Frampton to put the little join we had designed where
12 we come in at one entrance and then T off behind on
13 the law-firm property on this side and the rental-
14 house property on this side, and the rental house
15 driveway would go behind the guardrail and get the
16 benefit of access there, plus the guardrail will
17 protect the rental house, which is right close to the
18 -- right close to the highway.

19 An important point to remember as you hear the
20 testimony from the plaintiffs on that is this was a
21 negotiation. It wasn't something that they came in
22 and did. The Department of Transportation or the
23 State of South Carolina cannot go onto someone's
24 property and damage it without paying. We tried to
25 negotiate the traffic entrances, the driveway

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1 entrances, into the highway and make it safe for the
2 traveling folk and safe for the Framptons.

3 And so I would ask you to please withhold your
4 judgment until we have a chance to give our -- do our
5 case on these facts.

6 This is an inverse condemnation as, you know --
7 you've been told by the judge -- and the damages, the
8 compensation, in an inverse condemnation case is the
9 diminution and fair-market value of property if it was
10 something the State did, something the State took from
11 you.

12 We will show through our witnesses that Mr.
13 Frampton rented his house for \$950 a month. He made
14 some improvements. We put in a nice new driveway for
15 him. And after the project was over, he could rent it
16 for 1150 a month. The property has not been
17 diminished in value. And that is the only measure of
18 damages in a condemnation case. And the judge will
19 instruct you on that law before you go out.

20 Let's see if I have anything else to say. I
21 think I'm pretty much finished.

22 [Whereupon, Mr. Brooker reviews documents]

23 MR. BROOKER: I think that's it. I would just
24 ask you to listen to the evidence and wait until we
25 have had our turn before you make up your minds.

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1 Thank you.

2 THE COURT: Thank you.

3 All right. Mr. Bybee, call your first witness.

4 MR. BYBEE: Robert Phinney.

5 Your Honor, we do have a stipulation as to the
6 evidence that's about to come in.

7 Mr. Brooker and I have agreed that those
8 documents, the plan sheets, the contract documents,
9 the e-mails from the DOT -- excuse me, Judge -- are
10 admissible.

11 [Whereupon, Court's Exhibit Number 1 is marked
12 by the court reporter]

13 [Whereupon, Mr. Phinney comes forward]

14 THE CLERK OF COURT: Raise your right hand.

15 [Whereupon, Mr. Phinney is duly sworn by the
16 clerk of court as follows: do you swear or affirm
17 that your testimony will be the truth, the whole
18 truth, and nothing but the truth, so help you God]

19 THE WITNESS: Yes, sir.

20 THE CLERK OF COURT: Be seated.

21 [Whereupon, Mr. Phinney takes the witness stand]

22 THE COURT: Mr. Brooker, he's given me this
23 written -- this stipulation signed by you, the plans,
24 contracts, correspondence, e-mails produced, so forth,
25 I hereby stipulate are authenticate and admissible.

1 MR. BROOKER: I think so, Your Honor. I agree.

2 THE COURT: All right.

3 - - - - -

4 ROBERT PHINNEY,

5 Having Been First Duly Sworn,

6 was Examined and Testified as Follows:

7 DIRECT EXAMINATION

8 BY MR. BYBEE:

9 Q. Mr. Phinney, tell us your full name, please,
10 sir.

11 A. Sir?

12 Q. Tell me your full name, please.

13 A. Robert Larry Phinney.

14 Q. Where do you live?

15 A. St. George. 105 Quaker Road, St. George, South
16 Carolina.

17 THE COURT: Your last name is what?

18 THE WITNESS: Phinney.

19 THE COURT: Phinney?

20 THE WITNESS: P-H-I-N-N-E-Y.

21 THE COURT: Okay.

22 Q. [Mr. Bybee] You are a retired employee of the
23 South Carolina Department of Transportation, are you not?

24 A. Yes.

25 Q. You were a right-of-way agent for that

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1 governmental agency for over --

2 A. Twenty-eight --

3 Q. Twenty --

4 A. Twenty-eight --

5 Q. -- eight years?

6 A. Yes, sir.

7 Q. Twenty-eight years.

8 And for the time period of 2005 through 2010,
9 you were acting as a district right-of-way agent; is that
10 correct?

11 A. That's correct.

12 Q. And the district that you were head of included
13 Charleston?

14 A. That's correct.

15 Q. And one of the jobs that you had right-of-way
16 responsibilities on was the bridge-widening project over
17 whether you call it James Island Creek or Ellis Creek --

18 A. That's correct.

19 Q. -- is that not correct?

20 A. Correct.

21 MR. BYBEE: Your Honor, we would seek permission
22 to ask leading questions of this witness, pursuant to
23 Rule --

24 THE COURT: Go ahead and ask your questions.

25 And if you have any objection, you let me know.

1 Q. [Mr. Bybee] Now, Mr. Phinney, a right-of-way
2 agent's job is to explain the plans for a road project?

3 A. Correct.

4 Q. And attempt to obtain either a right-of-way
5 document or a permission --

6 A. Correct.

7 Q. -- from a landowner; is that not correct?

8 A. That's correct.

9 Q. And there -- you are familiar with road plans,
10 are you not, sir?

11 A. Yes, sir.

12 Q. And you know how to read them?

13 A. Yes, sir.

14 Q. And you know how to try and figure out their
15 impact on a landowner?

16 A. Yes, sir.

17 Q. And one of your jobs is to try and explain that
18 impact to a landowner; is that not correct?

19 A. Yes, sir.

20 Q. Now, the practice of the DOT in obtaining right-
21 of-way is governed by state and federal law, is it not?

22 A. That's correct.

23 Q. You've got a certain manual or certain procedure
24 that you have to follow when you go about attempting to
25 obtain right-of-way?

1 A. That is correct.

2 Q. All right. They've got a whole manual that you
3 can find on the website; isn't that true

4 A. That's correct. Uh-huh.

5 Q. Now, in the course of a normal road or bridge-
6 widening project, if there was land to be taken, then an
7 appraisal would be done; is that not correct?

8 A. In most cases, an appraisal would be done. Or
9 it could be made off of a cost estimate.

10 Q. Okay. Anything of a serious matter, an
11 appraisal would be done --

12 A. If there was --

13 Q. -- certain amount of money?

14 A. If there was a physical taking of the property,
15 yes.

16 Q. If there was land taken?

17 A. Correct.

18 Q. Right.

19 And then after that appraisal had been
20 commissioned, you would make an offer to the landowner in
21 the normal course; is that not correct?

22 A. That is correct.

23 Once all the approvals had been obtained and the
24 appraisal had been reviewed and approved.

25 Q. Okay. Now, let's talk about some of the terms

1 that you have to use in your business as a right-of-way
2 agent. Tell me your -- what the practice is or how you
3 would explain the term fee simple to a landowner.

4 A. That is -- fee simple is the highest degree of a
5 landownership, that you can obtain as an individual, in
6 which you have an exclusive right to that property. You
7 actually own it, for want of a better term, lock, stock
8 and barrel, if it's not encumbered by an easement or a
9 mortgage.

10 Q. Okay. And that has brought up another term I
11 want you to define. What's an easement?

12 A. An easement is the right of an individual or a
13 governmental entity to utilize a portion of that property
14 for a purpose.

15 Q. Such as a road purpose?

16 A. Yes.

17 It could be electrical-line purpose, or a sewer
18 line, or anything of that nature.

19 Q. And historically it was the practice of the DOT
20 to obtain right-of-ways, at least in the 1950s, 1960s,
21 1970s, by way of easement; is that not correct?

22 A. That's correct.

23 Q. Now, a permission document: tell us what a
24 permission document is, Mr. Phinney.

25 A. Permission document is where you -- the

1 Department would ask the landowner for permission to do
2 something off of the right-of-way on their property. And
3 then --

4 Excuse me. Go ahead.

5 Q. No, sir. I don't want to interrupt. Go ahead.

6 A. -- such as a driveway permission. To get off of
7 the Department's right-of-way to tie in the grades and
8 make it a more even transition would require the
9 Department to get off of the right-of-way and transition
10 from the right-of-way or the edge of pavement onto the
11 land of the individual.

12 Q. Okay. So you have to seek permission from a
13 landowner in order to enter his property --

14 A. Correct.

15 Q. -- in order -- and you said -- you used the term
16 grade. That's also another term for elevation. Is that
17 not correct?

18 A. That would be correct. Uh-huh.

19 Q. And oftentimes when the Department is improving
20 any road project, it's raising the grade? The additional
21 asphalt oftentimes causes that? Some design feature may
22 cause that?

23 A. Well, in this portion of the state it's normally
24 raised. In other portions of the state, it could be
25 lower.

1 But in this particular case there might have
2 been a slight elevation change, yes, sir.

3 Q. All right. Well, let's deal with the term
4 guardrail. What is that?

5 A. Well, in layman's term -- and I'm not an
6 engineer and don't profess to be one. But in layman's
7 term, it is a structure that's normally put along the
8 roadway either at the abutment of a bridge, or it could be
9 in a high spot or low spot of the road, to contain or
10 control traffic.

11 Q. Okay. Now, let's talk about the term barricade.
12 A barricade is different than a guardrail, isn't it?

13 A. I don't know that I'm qualified to answer that
14 question exactly --

15 Q. All right. Let's talk --

16 A. -- as to what you're getting at.

17 Q. -- about this. You told me that a guardrail is
18 generally or can be attached to a bridge.

19 A. It can be, yes.

20 Q. And in this particular circumstance, that was
21 one of the discussion items that you had with Mr. Frampton
22 in 2005, the impact of a barricade on his property; is
23 that not correct?

24 A. That is correct.

25 Q. Now, there are -- the term barricade can include

1 a number of different types of things; correct?

2 A. I will agree with that, yes.

3 Q. You see these big barrels that are orange and
4 white. Sometimes they can be strung together with either
5 orange fencing or some kind of tape. That would be a
6 barricade; correct?

7 A. It could be, yes.

8 Q. All right. And there can be what's known as
9 concrete barricades to direct traffic, protect particular
10 lanes; is that correct?

11 A. Correct.

12 Q. So you heard the opening from Mr. Brooker. When
13 he spoke about being able to move barricades, he was
14 talking about a structure like that, but not the
15 guardrail; right?

16 A. Well, the guardrail would have been a permanent
17 structure upon the roadway. That is correct.

18 Q. Okay. Then let's talk about this other term,
19 silt fence. What is that? Describe that for us.

20 A. Here again, in laymen's terms I don't -- I'm not
21 that involved in the construction or the -- implementing
22 or putting in silt fences. But at times when we acquire
23 right-of-way, we get permission to install silt fences
24 from the property owner, for the purpose of containing any
25 roadway runoff that might result in silt leaving the side

1 or the shoulder of the road onto the property owner.

2 Q. Okay. And the permissions that you just
3 described, sometimes you don't obtain permissions but you
4 can install silt fences on your own right-of-way; right?

5 A. If it's installed on our road right-of-way, we
6 wouldn't necessarily have to get a permission.

7 Q. And a reason that you would obtain or have to
8 put up a silt fence is connected back to the environmental
9 regulations by which you must construct the roadway?

10 A. As far as I can understand, it is a federal
11 requirement and a DHEC requirement that requires that in
12 accordance with a specific law or act.

13 Q. All right. And, technically, when you show a
14 property owner -- or if you were asking permission for a
15 silt fence, there might be a line on the drawing and it
16 would be called an NPDE --

17 A. NPDES.

18 Q. -- S line. Tell us about what that stands for.

19 A. National Pollutant -- I can't remember the
20 terminology, the exact law, but we've always gone by
21 National NPDES line. And it's either shown on the plans
22 and labeled NPDES line or it could be in the data sheet
23 that says to obtain permission for NPDES.

24 Q. Okay. Curb and gutter --

25 A. Uh-huh.

1 Q. Tell us what curb and gutter is.

2 A. Curb and gutter would be -- here again, I'm not
3 an engineer and the engineer could probably describe it
4 better than I. But a curb and gutter would be where the
5 water would run off of the pavement, be caught in a lip.

6 This could be a curb and gutter here, this could
7 be your pavement here, this could be the top of your
8 gutter here, and it's --

9 Q. What's the curb made out of?

10 A. Concrete.

11 Q. And how high is it?

12 A. It would vary, depending on the design
13 standards, by, you know, three, four, six inches. Here
14 again, I'm not an engineer so I can't answer that
15 question.

16 Q. Mr. Phinney, I know you're not an engineer. I
17 appreciate that. But you have to explain plans and
18 features like this --

19 A. Right.

20 Q. -- every day --

21 A. Right.

22 Q. -- to a landowner; is that not correct?

23 A. Right.

24 Q. All right. Now, let's talk about that curb and
25 gutter just a little bit more. It is designed so that a

1 car doesn't drive over it; is that not correct?

2 A. Yes. Yes, sir.

3 Q. There's a curb there --

4 A. It can be --

5 Q. -- and you don't want a car --

6 A. -- a malleable gutter.

7 But it's -- normally, it's -- you just wouldn't
8 be able to arbitrarily drive across it without some degree
9 of effort.

10 Q. And for that reason, they make a valley in
11 between the two raised sections of the curb in order to
12 permit ingress and egress in a situation such as a
13 driveway?

14 A. They call it a drop curb. They would drop the
15 curb and gutter, yes, to allow for ingress and egress onto
16 the property.

17 Q. Tell me what a lay-down area is, Mr. Phinney.

18 A. My understanding, a lay-down area would be where
19 the contractor would have an area of land that he could
20 store materials and his equipment.

21 Q. And when the DOT enters into a contract with a
22 road contractor or a bridge contractor they are, in
23 essence, turning over control of whatever rights the DOT
24 has in its property to the contractor so that they can
25 complete the job; is that not correct?

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1 A. That is my understanding, yes. I'm not involved
2 in contracts, but that would be my understanding.

3 Q. But every -- you know enough about construction
4 to know that every contractor needs lay-down areas in
5 order to store materials --

6 A. Correct.

7 Q. -- equipment. He has to be able to have an
8 additional space in order to get his job done; is that not
9 correct?

10 A. That's my understanding, yes.

11 Q. And that's part of a contractual relationship
12 that's going on between the DOT and the contractor?

13 A. I would assume. I don't know that for a fact,
14 but --

15 Q. Now, can you identify Plaintiff's Exhibit 1 for
16 me, please, sir.

17 [Whereupon, the witness reviews documents]

18 A. It is an aerial photo of the Frampton property
19 at some point in time. What point in time it is, I don't
20 know.

21 Q. And can you discern enough to see the double
22 yellow lines?

23 A. I can see them through here, not through that --
24 well, you can see them through that section over the
25 trees.

1 Q. So how many lanes of travel would you think was
2 going through and across or next to the Frampton
3 properties?

4 A. According to this particular aerial photo, it
5 appears to be two lanes of traffic.

6 Q. All right, sir. And can you see the three
7 structures that are currently on the ground today, this
8 one being owned by Hal Frampton, the creek house or the
9 rental house? Can you see that, sir?

10 A. Yes, sir.

11 Q. Can you see the driveway entrance to and from
12 Folly Road from that house? that rental house?

13 A. This is an outdated -- this is an old --

14 Q. I recognize --

15 A. -- picture, because these greenhouses are no
16 longer there --

17 Q. I understand.

18 A. -- it's a different consideration. And there is
19 a -- at the start of this construction, there was --
20 there's a driveway that was here --

21 Q. But in this photo --

22 A. -- in this particular driveway. Because of the
23 trees I can't tell whether it accesses that property, this
24 property, and this property or not. But it appears to be
25 a driveway right there.

1 Q. Okay. That driveway would ingress and egress
2 from Dale Frampton's residence; is that not correct?

3 A. Which one?

4 Q. This one that you just pointed to. You can't
5 tell --

6 A. I can't --

7 Q. -- that? Can you tell that --

8 A. -- tell that from this aerial. I think you'll
9 agree with that.

10 Q. Do you know that in -- assume this photograph
11 was taken in 1985.

12 A. Okay..

13 Q. Do you know whether or not the rental house, 699
14 Folly Road, had a driveway?

15 A. I do not know.

16 Q. How about the residential house, 693? Do you
17 think it had a driveway?

18 A. Point out 693 to me.

19 Q. Dale Frampton's residence.

20 A. Whether it had a --

21 Q. Yes, sir.

22 A. -- driveway onto Folly? I have no idea.

23 Q. Okay. And Ms. Jensen's law office is how we
24 knew -- you and I refer to it today. But back then did it
25 have a driveway in 1985, Mr. Phinney?

1 A. I couldn't testify to that because I wasn't
2 familiar with the property in '85.

3 Q. Look at that photograph. Do you, in your
4 experience, believe that each of those have their own
5 independent driveways, Mr. Phinney?

6 A. They could have or could not have, Mr. Bybee.
7 I'm not really sure.

8 Q. Okay.

9 A. They would have access in some fashion, yes.

10 MR. BYBEE: Your Honor, we would move to
11 introduce Plaintiff's Exhibit Number 1.

12 THE COURT: Any objection?

13 MR. BROOKER: No objection.

14 THE COURT: All right. Admitted without
15 objection. It's a photograph.

16 [Plaintiff's Exhibit Number 1 is admitted into
17 evidence by the Court]

18 Q. [Mr. Bybee] I'm going to show you Plaintiff's
19 Exhibit 2, Mr. Phinney, which is -- well, you tell me. Is
20 that the plan sheet from the DOT?

21 A. That is the planning profile sheet from the DOT.
22 That's correct.

23 Q. For what year?

24 A. According to the signature of the state highway
25 engineer that approved these particular plans, 1955.

1 January the 3rd of 1955.

2 THE COURT: Did you say in '55 or --

3 THE WITNESS: '55.

4 THE COURT: Five five?

5 THE WITNESS: Five Five. Yes, sir.

6 Q. [Mr. Bybee]. Turn to the next page, please, sir.

7 Can you locate what we're calling either Ellis Creek or
8 Folly Creek on that plan sheet?

9 A. I can locate the creek that is labeled on this
10 plan sheet James Island Creek. But that's --

11 Q. Okay.

12 A. -- the creek that we have in question.

13 Q. All right. Do you also -- are you also able to
14 locate the rental house?

15 A. From the drawing on the plans, and my general
16 knowledge of the area, it would appear that the rental
17 house is right adjacent to the roadway and the creek.

18 Q. Okay. And do you also see, set back a little
19 ways, Dale Frampton's residence?

20 A. Well, I see a -- without actually scaling off
21 the distance, I see another residence indicated. Now,
22 whether that is the Jensen law property or Mr. Frampton's
23 residence, I can't tell from this drawing.

24 Q. From your experience and that drawing --

25 A. Uh-huh.

1 Q. -- would you expect that there were driveways to
2 the rental house, 699?

3 A. It possibly could be, yes. But it's not shown
4 on these plans.

5 Q. Understood.

6 But from your experience, as of 1955 isn't it logical
7 that there was a driveway from the rental house from Folly
8 Road?

9 A. Normally there would have been a driveway to
10 each residence, not just --

11 Q. To each residence --

12 A. -- not necessarily.

13 Q. But normally?

14 A. Yeah. It could be, yes.

15 Q. All right. So as of -- that's 1955 --

16 MR. BYBEE: Your Honor, we would move
17 Plaintiff's Exhibit 2 into evidence.

18 THE COURT: Any objection?

19 MR. BROOKER: No objection.

20 [Whereupon, State's Exhibit Number 2 is admitted
21 into evidence by the Court]

22 Q. [Mr. Bybee] I'm going to show you what's been
23 preliminarily marked as Plaintiff's Exhibit 3. Do you
24 recognize the form of that document, sir?

25 A. That is a right-of-way easement.

1 Q. And who's the easement in favor of?

2 A. Well, the top sheet is a right-of-way easement.

3 The second sheet is part of a right-of-way
4 easement.

5 The remaining sheets indicate to me that this
6 property at some point in time was condemned for the
7 acquisition of --

8 Q. Okay.

9 A. -- and these are the condemnation documents.

10 And then the last sheet is an aerial photograph
11 of recent time, it appears.

12 But the first two sheets are a right-of-way
13 easement executed by Nellie W. Frampton.

14 Q. Okay. A right-of-way easement from the Frampton
15 family?

16 A. From Nellie W. Frampton.

17 Q. And is it off -- for Folly Road?

18 A. I am not familiar with Folly Road's specific
19 route number at this time. But this is route number 615.

20 Q. Okay. It could have very well been?

21 A. Could have very well been.

22 Q. You see where it says this easement supercedes
23 the condemnation dated May 25th, 1955?

24 A. Correct.

25 Q. So the paperwork behind it got superceded by

1 this easement?

2 A. Correct.

3 In other words, there was a condemnation action
4 brought to condemn. And then, as a result, probably that
5 condemnation action, Ms. Frampton executed a right-of-way
6 easement.

7 Q. So in nineteen --

8 A. '57.

9 Q. -- fifty-seven, is it --

10 A. Uh-huh.

11 MR. BYBEE: All right. We would move the
12 document into evidence. And I believe this is subject
13 to the stipulation, Your Honor.

14 THE COURT: Any objection?

15 MR. BROOKER: No objection, Your Honor.

16 [Whereupon, Plaintiff's Exhibit Number 3 is
17 admitted into evidence by the Court]

18 A. Mr. Bybee, could I see that document one more
19 time?

20 Q. [Mr. Bybee] Sure.

21 A. You asked who it was in favor of. And if you
22 look at the signature block, it was Nellie W. Frampton
23 individually and as executor under the life, will and
24 testament of H.W. Frampton.

25 Q. But they were granting to the Department a

1 right-of-way easement?

2 A. Correct.

3 Q. And that's consistent with that time frame when
4 the DOT was constructing roads. Then it was known as the
5 Highway Department?

6 A. Right.

7 In other words, to obtain an easement. That's
8 correct.

9 MR. BROOKER: Your Honor, the last exhibit moved
10 in, I think it had a current later date map stapled to
11 it. But that 1955 --

12 THE WITNESS: On the last sheet.

13 MR. BROOKER: -- document that would have been
14 on it.

15 MR. BYBEE: Mr. Phinney's testimony is that
16 that's a recent photograph, yes.

17 MR. BROOKER: Yes. Okay.

18 Q. [Mr. Bybee] Now, we talked about fee simple.
19 Tell me what an underlying fee is.

20 A. Well, in this particular case the Department has
21 an easement over the underlying fee simple interest of the
22 Framptons to that property. The Framptons still own the
23 property but they had granted an easement for the
24 Department to construct and maintain a roadway, for public
25 purpose, over it.

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1 Q. Okay. So --

2 A. That is my interpretation of the law.

3 Q. That's how you --

4 A. And while I'm not an engineer, I'm not a lawyer,
5 either.

6 Q. But that's how you would explain it --

7 A. Yes, sir.

8 Q. -- in the course and practice of your job?

9 A. Correct.

10 Q. And the underlying fee so that the Frampton
11 family retains an interest in the roadway itself?

12 A. That would -- that's a legal question I'm not
13 qualified to answer.

14 Q. I don't mean in the concrete. But the
15 underlying fee --

16 A. That would be my interpretation, yes, sir.

17 Q. And it's your experience sometimes roads get
18 abandoned or relocated and changed and the underlying fee
19 either reverts or is abandoned back to the adjacent
20 property owner?

21 A. It can be. There are certain standards and
22 policies that govern that. They can also be abandoned to
23 the next lower governmental entity.

24 Q. Okay. But including government -- Charleston
25 County doesn't want it, y'all decide to move the road, the

1 landowner gets his property back?

2 A. If he would make that request it would be
3 entertained and addressed, yes.

4 Q. And that's the difference between the Highway
5 Department owning the road and fee simple and the Highway
6 Department owning the road as an easement?

7 A. Well, that would be one of the differences, yes.

8 Q. Now, with respect to the Frampton property -- we
9 know that this is an easement in this time -- have you
10 seen any evidence that there's anything other than an
11 easement interest to Folly Road in front of the Frampton
12 properties as they approach Ellis Creek?

13 A. Not that I was able to determine at that
14 particular time?

15 Q. And you searched?

16 A. Yes, sir.

17 Q. Because part of your job is to look this stuff
18 up?

19 A. That is correct.

20 Q. Part of it is to research it?

21 A. Correct.

22 Q. And you can't research this in the county
23 courthouse, can you?

24 MR. BROOKER: Your Honor, may I -- we've already
25 had put into evidence the right-of-way grant from

1 Nellie Frampton for this stretch of highway. Why do
2 we need to have a non-lawyer testify? The best
3 evidence is the instrument itself.

4 THE COURT: Ask another question.

5 Q. [Mr. Bybee] Mr. Phinney, I want to direct your
6 attention to Plaintiff's Exhibit Number 4. This is a set
7 of plans of 1962. And look in the inside sheet and tell
8 me if you can locate 699 Folly Road, Hal Frampton's rental
9 property.

10 A. Yes.

11 Q. And on that particular drawing, there's a drive
12 depicted, is there not?

13 [Whereupon, the witness reviews documents]

14 A. Correct.

15 Q. [Mr. Bybee] And then there's another driveway
16 depicted from the property next door, Dale Frampton's
17 residential property, and it's also labeled as a drive, is
18 it not?

19 A. Repeat the question, sir.

20 Q. The property to the rear -- let me get you
21 correlated back to the photograph. You can tie these
22 things together, I think. This property here, Dale
23 Frampton's residence at 693 --

24 A. To reiterate, I see on the plans depicted a
25 drive to what I'm going to call the rental property.

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1 Q. Yes, sir --

2 A. And --

3 Q. -- 699.

4 A. Right. There is a driveway depicted into the
5 back-house property.

6 Q. The back house being the house that --

7 A. The current residence.

8 Q. Ms. Frampton's current residence; right?

9 A. The Frampton's current residence, right.

10 Q. The Frampton's current residence.

11 A. Right.

12 Q. I mean, you and I have met there; correct?

13 A. Oh, yes.

14 Q. You know that place?

15 A. Yes.

16 Q. We've had iced tea there; right?

17 A. That's correct, yeah.

18 Q. Okay. Then the next property over, it has a
19 driveway, also? And that was formerly for Ms. Jensen's
20 law office?

21 A. And that is correct. And it is depicted on this
22 plan sheet.

23 Q. All right. So at least as of 1962, we clearly
24 understand we have three different driveways?

25 A. According to this plan sheet, you are correct.

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1 Q. And does that give you anymore comfort going
2 back to Plaintiff's Exhibit 2 where there was a drawing
3 but not an actual --

4 A. Can I review --

5 Q. -- drawing of the driveway?

6 A. Could I review that?

7 Q. Sure.

8 [Whereupon, the witness reviews documents]

9 A. Oh. I thought you were talking about the aerial
10 photo.

11 Q. [Mr. Bybee] Well, I'm asking dates here, sir.

12 A. Okay. Repeat your question again, Mr. Bybee.

13 Q. Plaintiff's Exhibit 2 is the 1955 plans; right?

14 A. Correct.

15 Q. And you could not find -- and I'm not trying to
16 assert that there's a driveway shown on that plan.

17 A. There's no driveway shown on the old set of
18 plans.

19 Q. My question is in your experience and practice,
20 looking at that drawing and comparing it to the 1962
21 drawing, would you not agree with me that in 1955, 699
22 Folly Road had a driveway?

23 A. There's a distinct possibility. It's just not
24 shown. And I wasn't around in those days --

25 Q. Mr. Phinney, is it a possibility or is it a

1 probability?

2 A. I'm going to say it's a possibility. I can't
3 say that it was probable. They could share in the
4 driveway, Mr. Bybee.

5 Q. All right. But at least as of 1962, we have a
6 separate driveway?

7 A. That is correct there. You're correct in that.

8 Q. And then let's look at --

9 MR. BYBEE: We would enter --

10 Q. [Mr. Bybee] Let me have that back, please, sir.

11 MR. BYBEE: Your Honor, we would move

12 Plaintiff's Exhibit 4 into evidence. Again --

13 THE COURT: Any objection?

14 MR. BROOKER: I'm sorry?

15 THE COURT: Any objection to Number 4, the 1962?

16 MR. BROOKER: No, Your Honor, no objection.

17 THE COURT: All right. Without objection.

18 [Whereupon, Plaintiff's Exhibit Number 4 is
19 admitted into evidence by the Court]

20 Q. [Mr. Bybee] Mr. Phinney, the next exhibit
21 there --

22 THE COURT: Have you got -- hold on just a --
23 Have you got everything you need, Mia?

24 THE COURT REPORTER: Yes, sir. Thank you.

25 THE COURT: Okay. Ask another question.

1 MR. BYBEE: Yes, sir.

2 Q. [Mr. Bybee] Plaintiff's Exhibit Number 5: this
3 is another 1962 plan sheet. Can you verify that there is
4 separate driveways, 699 Folly Road, 693, and 685 on that
5 plan sheet?

6 A. On this particular plan sheet it is depicted a
7 driveway into the three different structures, yes, sir.

8 Q. Three different driveways into each structure?

9 A. Correct.

10 MR. BYBEE: All right. And move Plaintiff's
11 Exhibit 5, subject to the stipulation, Your Honor.

12 MR. BROOKER: No objection.

13 THE COURT: All right. Wait. Wait.

14 Have you got it?

15 Let's make sure she gets the numbers down.

16 MR. BYBEE: Yes, sir.

17 THE COURT: Have you got it?

18 THE COURT REPORTER: I've got it. Thank you.

19 THE COURT: Okay.

20 [Whereupon, Plaintiff's Exhibit Number 5 is
21 admitted into evidence by the Court]

22 Q. [Mr. Bybee] Now, Plaintiff's Exhibit Number 6
23 is in 1990. Can you look at the second page of that
24 exhibit and tell me that there are driveways to two
25 [phonetic] different structures as of 1990?

1 A. According to this plan sheet, there are three
2 individual driveways as depicted --

3 Q. Each of the structures has its own independent
4 driveway?

5 A. That is correct.

6 MR. BYBEE: Okay. Move Plaintiff's Exhibit 6
7 into evidence, Your Honor.

8 MR. BROOKER: No objection.

9 THE COURT: All right. Thank you.

10 [Whereupon, Plaintiff's Exhibit Number 6 is
11 admitted into evidence by the Court]

12 THE COURT: I might tell the jury, by the way,
13 anything that's introduced into evidence, any physical
14 -- what I refer to as physical evidence, you'll have
15 it with you in the jury room at the end of the case
16 when you're considering your verdict.

17 Sometimes the lawyers like to pass those things
18 around during the course of the trial but if they
19 don't, don't think you're not going to get to see
20 those things. You will. Everything that's introduced
21 into evidence, you'll have it with you in the jury
22 room at the end of the case when you're considering
23 your verdict.

24 Go ahead.

25 Q. [Mr. Bybee] And I'm going to show you a thicker

1 set of plan sheets, and these are July of '05 and marked
2 as Plaintiff's Exhibit 7. Can you recognize those?

3 THE COURT: What did you say? Did you say a
4 date?

5 MR. BYBEE: The date, sir, is '05.

6 THE COURT: 2005.

7 MR. BYBEE: 2005.

8 A. They appear to be the right-of-way
9 acquisitioning -- and how detailed the construction plans,
10 I'm not real sure -- for the bridge replacement over James
11 Island Creek or Ellis Creek.

12 Q. [Mr. Bybee] And that's the assignment that you
13 had that brought you to interact with Henry Frampton, Hal
14 Frampton, sometime in 2005; is that not correct?

15 A. That would be correct.

16 Q. You had responsibility to either acquire right-
17 of-way or permission pursuant to those documents?

18 A. Either myself or one of the agents that work
19 within our office.

20 Q. All right. And the pages that refer to Mr. Hal
21 Frampton's property, can you find those for me? I put
22 tabs on them, if that helps you.

23 [Whereupon, the witness reviews documents]

24 A. Sheet 3-E is -- depicts their property and it is
25 entitled relocation of SC 171 over the James Island Creek

1 pre-protection detail.

2 To the best of my recollection, the original
3 plans that we used to acquire right-of-way did not have
4 these sheets in it until a later time when --

5 Q. [Mr. Bybee] So during the course, that page was
6 added?

7 A. Added, that's correct, at some point in time --

8 Q. And I know it has something to do with --

9 A. With tree protection.

10 Q. Right.

11 So let's move to the depiction -- the page that
12 depicts --

13 A. Sheet 4, which we call a right-of-way data
14 sheet --

15 Q. All right. The right-of-way data sheet has
16 information about who owns what. What I would like you to
17 direct your attention to is the sheet that displays how
18 Frampton's rental house, the creek house --

19 A. On the data sheet or --

20 Q. No, sir. On the displays, the pictorial sheets,
21 the one that shows the impacts of the project on his
22 property.

23 [Whereupon, the witness reviews documents]

24 A. Well, you have one sheet which is -- 4-A, which
25 is labeled a property map --

1 Q. [Mr. Bybee] Yes, sir.

2 A. -- which shows the different tracts and the
3 either existing or present right-of-way or right-of-way to
4 be acquired.

5 Q. But it doesn't show us the new impact or the
6 new construction. I want you to show me the sheet that
7 shows the new construction that you were there to talk to
8 Mr. Hal Frampton about in 2005.

9 A. Okay. Well, one sheet would have been
10 sheet 6, 7 --

11 Q. Let's stop there.

12 A. Okay.

13 Q. We'll talk about those other sheets in a minute.

14 A. Uh-huh.

15 Q. All right. Sheet 6 --

16 A. Uh-huh.

17 Q. -- it shows an individual driveway to Hal
18 Frampton's creek property, does it not?

19 A. Well, Mr. Frampton's properties were labeled, on
20 this plan sheet, three feet and four feet.

21 Q. I understand.

22 A. Okay. And the rental property was on four
23 feet --

24 Q. Okay. And does --

25 A. -- and it does depict an existing driveway onto

1 the rental property.

2 Q. And brought across that driveway is a symbol.
3 Do you see that?

4 A. If you're referring to a symbol that would
5 indicate a guardrail, yes, I do see that.

6 Q. And the guardrail was going to extend from the
7 edge of the bridge all the way to the other driveway at
8 693?

9 A. It did not extend completely to the other
10 driveway, but it did extend past the driveway to the
11 rental.

12 Q. It would -- it stopped short of the --
13 Ms. Frampton's driveway; right?

14 A. It stopped short of tract 4-P.

15 Q. Okay. The separate driveway to the residence?

16 A. Correct.

17 Q. But it would block the driveway to the rental
18 house completely?

19 A. It would drop -- excuse me -- block the driveway
20 to the rental property completely, yes.

21 Q. And then you came upon Mr. Frampton's property
22 to explain that to him, in addition to some other issues;
23 is that not correct?

24 A. That's correct.

25 Q. That was part of your duties and

1 responsibilities.

2 A. [Indicates affirmatively]

3 Q. And is it fair to say that he didn't like the
4 idea of a barricade blocking his rental house?

5 A. To the best of my recollection, that is correct.

6 Q. All right. And is also about the case, the
7 fact, that after you had discussions with him about this
8 impact, that you went back to the engineers and requested
9 that they shorten the driveway? This being in the time
10 frame of 2005.

11 A. I went back to the appropriate engineers at that
12 initial -- after that initial contact and asked them to
13 review the plans to see whether or not the guardrail in
14 that area could be shortened in order for that particular
15 driveway to remain unblocked.

16 Q. And the response that those responsible
17 engineers gave you was not, we cannot do that?

18 A. That's correct.

19 Q. And you communicated that response to
20 Mr. Frampton?

21 A. That is correct.

22 Q. And you communicated that response to me?

23 A. Correct.

24 Q. Because after you and Mr. Frampton had your
25 first discussion, then you and I had discussions; is that

1 not correct?

2 A. Yeah. Once he had retained you as a --

3 Q. Once he got me, you and I talked; right?

4 A. Correct.

5 Q. And all the way from the time period of 2005
6 until the time frame of the summer of 2009, that was the
7 status? That guardrail was going to be installed and the
8 engineers would not shorten it? Is that not correct?

9 A. I don't remember the exact time frame or the
10 sequence -- not sequence, but the exact time frame. But
11 up until shortly before completion of the project, that
12 was correct.

13 Q. Okay. So --

14 A. I cannot tell you the specific dates.

15 Q. I understand. And I'll get something to refresh
16 your recollection. If I got you an e-mail where the idea
17 was being discussed, would that help you refresh --

18 A. It would certainly -- it would certainly be --

19 MR. BYBEE: Beg your indulgence, Your Honor.

20 [Whereupon, Mr. Bybee reviews documents]

21 Q. [Mr. Bybee] While my associate is looking for
22 an e-mail, I have another e-mail. Maybe it'll jog your
23 memory.

24 Isn't it true that the time frame when the
25 Department decided to add the concrete median to its plans

1 is about the same time it decided that it could shorten
2 the guardrail?

3 A. That's correct.

4 Q. So let me show you this e-mail of June 17, 2009,
5 and marked as Plaintiff's Exhibit 9 --

6 Yes, it's Exhibit 9.

7 A. 9?

8 Q. -- and tell me whether that refreshes your
9 recollection as to the date, an approximate date, when the
10 Highway Department and DOT decided they could shorten that
11 guardrail.

12 [Whereupon, the witness reviews documents]

13 A. Based upon the information contained in this
14 e-mail -- and I do know for a fact that the guard -- that
15 the concrete median issue was addressed at the same time
16 the shortening of the guardrail was addressed -- then that
17 would be the approximate time frame in June of '09.

18 Q. [Mr. Bybee] Okay. Now I want to go back to my
19 original question. From 2005 until at least June of 2009,
20 the Department intended to install and permanently block
21 the driveway to Hal Frampton's rental property at 699
22 Folly Road. Is that not correct?

23 A. Repeat --

24 Q. Yes, sir.

25 A. Repeat that again with the dates again.

1 Q. From 2005 until June of 2009, it was the
2 Department's intentions to follow those plan sheets and
3 extend the guardrail so that it would completely block
4 driveway access to Hal Frampton's rental property at
5 699 Folly Road?

6 A. It was the Department's plans that -- as far as
7 I was aware of in construction plans, that between the
8 dates that you just stated, that a guardrail was to be
9 placed in that position that would have blocked Mr.
10 Frampton's access to the rental property at that
11 particular driveway.

12 Q. And that would -- that communication between
13 2005 and 2009 was in place in between -- as far as you and
14 I were concerned and you and Mr. Frampton?

15 A. To the best of my knowledge, yes, sir.

16 Q. And, thereafter, the idea changed?

17 A. Correct.

18 Q. All right. These plans that you have in front
19 of you do not show the median that they ultimately
20 installed, do they?

21 A. That is correct.

22 Q. When you first came to Mr. Frampton in 2005, you
23 didn't tell him about the median?

24 A. The plans that I explained to him did not
25 indicate that a median was to be installed --

1 Q. Right.

2 A. -- other than a painted median.

3 Q. And that's what this e-mail is all about?

4 They're making this decision? They're in the process of
5 making that decision?

6 A. Right.

7 MR. BYBEE: Move Exhibit 9 into evidence,
8 subject to that stipulation again, Your Honor.

9 MR. BROOKER: May I take a look at that one?

10 MR. BYBEE: Yes.

11 [Whereupon, Mr. Bybee proffers documents to
12 Mr. Brooker]

13 [Whereupon, Mr. Brooker reviews documents]

14 MR. BROOKER: No objection to Exhibit 9, Your
15 Honor.

16 MR. BYBEE: That's your copy.

17 [Whereupon, Plaintiff's Exhibit Number 9 is
18 admitted into evidence by the Court]

19 Q. [Mr. Bybee] And back to Exhibit 5 -- Exhibit 7.
20 One of the things -- one of the other things that you had
21 to talk to Mr. Frampton about in the fall, the driveway,
22 the other driveway on 4-P, part of that discussion needed
23 to be had because one of the improvements called for with
24 this new plan sheet was a sidewalk; is that not correct?

25 [Whereupon, the witness reviews documents]

1 A. These plans indicate that there was -- and
2 according to the typical section of the -- excuse me -- a
3 sidewalk would be placed in front of this property.

4 Q. [Mr. Bybee] And while 699 was going to be
5 blocked, that was going to impact 693 and it was also
6 going to impact 685 because there was going to be a grade
7 or an elevation change; is that not correct?

8 A. It would be impacted to the point that there
9 would be additional structure in front of that property
10 that was not there before.

11 Q. They're going to add a sidewalk?

12 A. Add a sidewalk.

13 Q. And it's --

14 A. It would be somewhat elevated.

15 Q. It would be elevated.

16 I think you can look at the cross-sections
17 there. Tell me if it's about a foot and a half.

18 A. Because of the installation of the sidewalk in
19 that particular section, it appears from my interpretation
20 of the cross-sections that it would be elevated
21 approximately a foot or a foot and a half, yes, sir.

22 Q. All right. And that was one of the things --
23 permission documents that you needed to discuss with
24 Mr. Frampton in terms of tying in his driveway because of
25 the elevation. But this was for the residential driveway

1 and then Ms. Jensen's law-firm driveway; is that not
2 correct?

3 A. Let me check the data sheet one second.

4 [Whereupon, the witness reviews documents]

5 A. Did you have the data sheet marked?

6 Q. [Mr. Bybee] It's just right there. I thought I
7 did.

8 A. I can't find it right now.

9 But what I had requested from Mr. Frampton was
10 what we call a driveway permission.

11 Q. Right.

12 A. It's indicated also, on the plans obtained,
13 driveway permission. And what that would indicate to me
14 that because of some change in alignment or elevation, we
15 wanted to make sure that the grade of the new elevation or
16 the new construction tied in with a smooth transition to
17 the existing grade of his property --

18 Q. Which is --

19 A. -- so it would be a smooth transition as opposed
20 to a drop off.

21 Q. Which is an obligation the Department has?

22 A. Yes, sir.

23 We normally require that so there'll be a smooth
24 transition. We just don't want it to drop straight off.

25 Q. Well, the law requires you --

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1 A. Right. I don't know --

2 Q. -- to tie it in?

3 A. I don't know the specific law, but --

4 Q. That's your practice?

5 A. Yes, sir.

6 Q. Your practice is to do that?

7 A. That is correct.

8 Q. And eventually that permission was worked out?

9 All that --

10 A. Correct.

11 Q. -- was done?

12 A. That's correct. Uh-huh.

13 Q. Okay.

14 A. And on this particular set of plans, it
15 indicated that we were to get driveway permission to allow
16 access to the rental property from the residential
17 driveway.

18 Q. All right. And you've been wanting to tell us
19 all about that, so let's go ahead and talk about it. That
20 plan sheet shows that -- that the Highway Department came
21 up with the idea that since they were blocking the access
22 through a guardrail, they wanted to connect the Folly Road
23 rental property to Mr. and Mrs. Hal Frampton's residential
24 property?

25 A. Well --

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1 Q. Right?

2 A. Driveway.

3 Q. Driveway.

4 A. Okay. According to these plans, the rental
5 property and the residential property were on the same
6 tract of land.

7 Q. And we're going to get to that in a minute, I
8 promise. We're going to talk about --

9 A. Well, I'm pretty sure you --

10 Q. -- it all.

11 A. Yeah.

12 Q. But when you ask for permission to do something
13 like that --

14 A. Uh-huh.

15 Q. -- the landowner has a perfect right to say, no,
16 I don't like that.

17 A. That is correct. He has his right to refuse us
18 to grant that permission [phonetic].

19 Q. And the DOT then has the ability to take
20 whatever powers it wants, build a frontage road or do
21 something like that, to provide -- to substitute access
22 it's required to provide; is that not correct, Mr.
23 Phinney?

24 A. Well, the frontage-road concept would be along
25 an interstate, so to speak, and not provide access to a

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1 specific piece of property but the properties, in general,
2 with the public.

3 Q. It's the DOT who decides what a frontage road is
4 or isn't, isn't it?

5 A. It's whose responsibility?

6 Q. The DOT.

7 A. Well, they -- somebody would make that
8 determination. It certainly wouldn't be within my realm
9 of authority to make that.

10 Q. No, sir. I'm not suggesting you could --

11 A. Okay.

12 Q. -- make that decision.

13 A. Right.

14 Q. You went back and you said, he doesn't want to
15 do this.

16 A. Correct.

17 Q. And he had a perfect right to say, I don't want
18 to do that?

19 A. Uh-huh.

20 Q. Because it could impact his property values;
21 isn't that right?

22 A. Sure, he has the right to refuse that.

23 Q. And he did?

24 A. Yeah.

25 Q. And thereafter, that's when you went to the

1 engineer and said, let's shorten this driveway, give this
2 man his access back?

3 A. Well, in an attempt to -- in an attempt to make
4 the road as viable to Mr. Frampton as possible, and the
5 property -- and his properties, I went and addressed the
6 issue with the engineers: can we do something to reduce
7 this guardrail to allow continued access onto this
8 particular rental property without going through his
9 residential driveway. That is correct.

10 Q. And you went back and they said no?

11 A. Well, we went back and forth several times and
12 we revisited it and said --

13 Q. To communicate --

14 A. -- and I was unsuccessful in being able to
15 obtain that --

16 Q. And from two thousand --

17 A. -- at that time.

18 Q. From 2005 through June of 2009, that's the
19 status of --

20 A. That's --

21 Q. -- that barricade would be in front of that
22 driveway?

23 A. That's correct.

24 You used the word barricade. I would prefer to
25 use --

1 Q. Excuse me.

2 A. -- the word guardrail.

3 Q. You're right, sir. I appreciate you bringing
4 that to my attention. It was a guardrail. All right. I
5 think we're finished with that.

6 Now, another term: encroachment permit, a
7 driveway encroachment permit. Tell me what that is.

8 A. That is a document and a term that the DOT
9 maintenance section uses and utilizes to allow a driveway
10 to encroach upon the Department's right-of-way.

11 Q. Okay. And you are familiar with the right of a
12 landowner to do what he will with his property up until
13 the Department were to institute a formal condemnation; is
14 that not correct?

15 A. Restate your question.

16 Q. After you've come to talk to the property
17 owner --

18 A. Correct.

19 Q. -- whether it was Mr. Frampton in this case or
20 some other property --

21 A. Uh-huh.

22 Q. -- and you told him about an upcoming planned
23 public improvement and if we can't work this out, we might
24 go to condemnation -- up until the point of condemnation,
25 the landowner has a full right to do whatever he wants to

1 with his property?

2 A. If he owns it in fee simple he would, yes.

3 By --

4 Q. He --

5 A. -- estimate determination he couldn't do what he
6 wanted to.

7 Q. Up until you file a formal document, he can do
8 anything he wants; correct?

9 A. I would think the law would support that, yes.

10 Q. Yes, sir.

11 That's what you would explain to the property
12 owner if he asked you?

13 A. I would -- if he asked me that, I would refer
14 him to an attorney for an interpretation of what he can or
15 cannot do with his property.

16 Q. But you're familiar enough to know with the
17 properties --

18 A. Right.

19 Q. -- that he has the right to sell it if he
20 choose --

21 A. Sure. Sure, he could sell it. That's right.

22 Q. Yeah. He could subdivide it?

23 A. Correct.

24 Q. He could change ownership; correct?

25 A. Correct.

1 Q. He can do any kind -- he can do anything he
2 wants because you've not condemned it, you've --

3 A. That's right.

4 Q. -- not taken it?

5 A. Correct.

6 Q. All right. Now, you're also familiar with the
7 practice of the Highway Department or the Department of
8 Transportation in connection with a subdivision of parcels
9 of land that they get involved in approving subdivisions
10 and making sure that the driveways that are involved are
11 safe and that they are okay with the subdivision plat and
12 the depiction of the driveways. You're familiar with that
13 process, are you not?

14 A. Yes, sir.

15 Q. Can you look at Plaintiff's Exhibit 17 for me.
16 That's from the DOT, is it not, sir?

17 A. It is on DOT stationary. It's addressed to
18 Mr. Frampton from Roger D. Lemon, who was a --

19 Q. And you know --

20 A. -- at that particular time Mr. Lemon was
21 involved with Charleston County DOT, Charleston County
22 maintenance section. Exactly what his position was, I
23 don't know. I don't think that he was a maintenance
24 engineer. I think he was just an employee, within the
25 maintenance section, that addressed encroachment permits.

1 Q. All right. But he's provided this letter to
2 Mr. Frampton. And attached to the letter is a subdivision
3 of the property, which I think you testified earlier
4 Mr. Frampton had the complete right to do, and he is
5 commenting that: no encroachment permit is necessary
6 because the driveways already exist and no changes are
7 planned for the property at this time.

8 A. Correct.

9 Q. So in November of '05, the DOT approved the
10 subdivision of the land as it pertains to their
11 jurisdiction as to the driveway?

12 A. That's what this document indicates, yes.

13 MR. BYBEE: Move it into evidence, Your Honor,
14 subject --

15 THE COURT: What number?

16 MR. BROOKER: No objection.

17 THE COURT: What number?

18 MR. BYBEE: This was Number 17, a two-page
19 document.

20 [Whereupon, Plaintiff's Exhibit Number 17 is
21 admitted into evidence by the Court]

22 Q. [Mr. Bybee] And this occurred in November of
23 2005 when he went to and received permission from the DOT;
24 is that not correct?

25 A. The letter to Mr. Frampton from Mr. Lemon is

1 dated November the 30th, 2005.

2 Q. And they don't issue those letters if there's
3 something unsafe about the driveway, do they?

4 A. To the best of my knowledge, they would not. If
5 they had a question, they would address it.

6 Q. You don't know of any reason that these
7 driveways, any of them, were unsafe before this project?

8 A. I do not. But I am not a traffic engineer.

9 Q. Isn't it true that the DOT refused to formally
10 condemn Mr. Frampton's access rights?

11 A. I don't know that we refused.

12 We never approached it or addressed the issue.
13 We kept trying to work out an agreement with him. We
14 would not have condemned for a driveway permission.

15 Q. You would not have condemned --

16 A. No, sir.,

17 Q. -- for a driveway permission --

18 A. No, sir.

19 Q. -- you would not have condemned to acquire an
20 access right, was not the promise?

21 A. At that particular time, in reference to this
22 property, we would not have pursued that option.

23 Q. Because I asked that you do that and that
24 was -- you refused; is that not correct?

25 A. That is my understanding.

1 I think Mr. Rucker was involved, who was the
2 director of rights-of-way at that time.

3 Q. And you reported to Mr. Rucker?

4 A. That is correct.

5 Q. Then in the summer of 2009, the engineers had a
6 change in heart. Can you tell us --

7 A. Well, in a -- in a --

8 Q. -- how that --

9 A. -- in an attempt to try to avoid any litigation
10 from Mr. Frampton in an attempt to try to provide him
11 access, and to avoid any exposure from any possible
12 litigation, I went back to the engineers in Columbia. I
13 asked them to address that issue to see whether or not
14 they could reduce the length of the guardrail and provide
15 access to that rental property. They went back and they
16 did do that and reported back that they could reduce it at
17 that time. Which it was done.

18 Q. Same request we made in 2005?

19 A. That is correct. Basically the same thing.

20 Q. And as a consequence of that request, then that
21 e-mail, Exhibit 9, reflects that the engineers went out
22 and did some site --

23 A. Well, they did some subsequent work, based upon
24 that request. That's correct.

25 Q. And then they determined that because of the

1 relocation, the rebuilding of the roads, the height -- the
2 new heights of the bridge, that the site distances which
3 were previously safe coming in and out of those driveways
4 were no longer safe?

5 A. I don't know that that determination was made
6 that they were previously safe. I don't know that it was
7 addressed --

8 Q. Well, I --

9 A. -- appropriately at the time.

10 Q. I agree with that. But you've testified that
11 Mr. Lemon in 2005 said they were safe.

12 A. I think he indicated in the letter -- he didn't
13 say safe. He said an encroachment permit would not be
14 needed unless you changed the use of the property.

15 Q. Okay. Well, he wouldn't write such a letter if
16 there was an unsafe condition. You've testified to that.
17 Is that not correct?

18 A. That would be my interpretation.

19 MR. BROOKER: Your Honor, I think that's
20 hearsay. It's --

21 THE COURT: Ask another question. Ask another
22 question.

23 Q. [Mr. Bybee] The solution to the problem was a
24 little bit more complicated than when it first appeared;
25 is that not correct?

1 A. What do you mean by complicated, Mr. Bybee?

2 Q. Well, something else had to be done besides just
3 making a decision to shorten the guardrail.

4 A. I don't quite follow what you --

5 Q. Do you not recall that at that approximate time,
6 the curb and -- the curb and sidewalk and shortened
7 guardrail had already been installed in front of Hal
8 Frampton's rental property?

9 A. I think at the time that I addressed that issue
10 in that time frame of that letter on the property the best
11 that I can recall the sidewalk had been poured.

12 Now, as far as how much of the guardrail had
13 been installed, I can't testify to that. I don't recall
14 that.

15 Q. And the -- I mean, excuse me. The curb that had
16 been poured extended over to 693's valley curb or --

17 A. And it provided access to the home property but
18 not access to the rental property.

19 Q. So what -- something that happened -- that
20 hadn't happened was that curb, which had already been
21 installed, that new curb, had to be torn back out?

22 A. It's my understanding it did, yes.

23 Q. All right. And then it -- then they had to pour
24 and widen what, in essence, is now today a joint driveway?

25 A. Correct.

1 Q. And thereafter, after that was done, then we
2 also had to do the transition to the property?

3 A. Correct.

4 What -- I met with Mr. Frampton on site. I
5 don't recall that you were there. But I -- met with
6 Mr. Frampton, and we staked out an area on his -- on this
7 rental property that the Department would be willing to
8 asphalt for cars to come in, park, be able to turn around,
9 and exit the property without having to back out onto
10 Folly Road.

11 Q. And that is standard practice to do that with
12 any landowner --

13 A. Not necessarily.

14 Q. -- or any private --

15 A. We do not necessarily -- unless circumstances
16 dictate, we would not have paved a parking area or a
17 turnaround area for him.

18 Q. For his property.

19 A. That's correct.

20 Q. But the transition on your right-of-way --

21 A. The right-of-way --

22 Q. -- up to the -- up to the sidewalk you would
23 have done?

24 A. Correct.

25 Q. That had to be done, because you needed to make

1 that area, that driveway, waterproof --

2 A. Right.

3 Q. -- correct?

4 A. Right.

5 Q. All right. So what you agreed to do was go a
6 little bit beyond there. He had to do the subsurface
7 prep, but you were going to lay the asphalt for that
8 point?

9 A. I think -- I don't know about the subsurface
10 prep. I think the maintenance division did all of that
11 for him.

12 Q. Okay. The maintenance division is different
13 than the contractor?

14 A. Right. That particular area of the construction
15 was not within the terms of the contract with the
16 contractor, so I was able to go work with the district
17 office and the district engineer that he would send
18 maintenance personnel out there and use maintenance funds
19 to do that.

20 Q. And as a matter of fact, the contractor was --

21 A. I think that's correct.

22 Q. You couldn't --

23 A. I mean, I wasn't there when that happened so you
24 would have to ask someone that was familiar with the
25 project.

1 Q. And so the -- it took some time to coordinate
2 that and get it done?

3 A. Correct.

4 Q. Isn't that true?

5 A. That's correct.

6 Q. But then finally the access was restored as of
7 that point; is that correct?

8 A. That's my understanding, yes, sir.

9 Q. And that was an oral agreement?

10 A. That was oral, yes, sir. And that was
11 negotiated entirely by me.

12 Q. But it had the blessing of the Department of
13 Transportation?

14 A. Oh, yes. Yeah. I coordinated it and marked it
15 out.

16 Q. And then Plaintiff's Exhibit 10 you recognize.
17 This is the Google photograph in 2012. Do you see the
18 legend on it?

19 A. Yes, I do.

20 Q. Does it accurately depict --

21 A. Right.

22 Q. -- what one would see from the air after the
23 project was developed?

24 A. Yes, sir.

25 MR. BYBEE: Move that document into evidence,

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1 Your Honor.

2 THE COURT: No objection?

3 MR..BROOKER: No objection, Your Honor.

4 [Whereupon, Plaintiff's Exhibit Number 10 is
5 admitted into evidence by the Court]

6 Q. [Mr. Bybee] And Exhibit 10 --

7 A. May I -- I do need a point of clarification with
8 you.

9 It does show 2012, Google. But was that when
10 the shot was taken?

11 Q. I don't know when the photograph was. Let me --

12 A. I can't --

13 Q. -- ask you this way --

14 A. I can't tell you that that's --

15 Q. -- let me ask it this way --

16 A. -- that that is a 2012 photo.

17 Q. Let me ask it this way.

18 A. All right, sir.

19 Q. Does that reasonably depict the after condition,
20 from an aerial photograph view, of what exists out there
21 today -- as far as Hal Frampton's house -- in relationship
22 to the new bridge and the median that was installed?

23 A. Well, it's difficult to tell whether or not this
24 median that's shown in this area is a painted median or a
25 raised median. I can't tell from that.

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1 Q. Because it's an aerial photo?

2 A. Right.

3 Q. But you know it's a raised median, do you not?

4 A. Well, there is a raised median. If we went out
5 there today, there would be a raised median there, yes,
6 sir --

7 Q. So if --

8 A. -- and it would have been there at the term --
9 at the termination of the contract.

10 Q. And that --

11 A. Is that fair?

12 Q. That was fair.

13 And part of that process was the change order
14 that had to happen with the contract --

15 A. That would be my interpretation of it, yes, sir.

16 MR. BYBEE: Your Honor, I believe we've entered
17 it without objection.

18 MR. BROOKER: No objection.

19 THE COURT: Do we know when the work was
20 completed? When was -- do you know when it was
21 completed?

22 THE WITNESS: No, sir, I don't know. You would
23 have to ask the project engineer, sir.

24 THE COURT: All right.

25 Q. [Mr. Bybee] In your experience as a right-of-

1 way negotiator and a right-of-way acquisition person, if
2 the project plans call for total loss of access -- total
3 loss of access -- to a tract of land, then the DOT would
4 have to pay just compensation, would it not?

5 A. If you've landlocked that piece of property,
6 they have no alternate access, legal access, yes, we would
7 normally address that issue.

8 Q. And in your experience in negotiating in
9 acquiring right-of-way for the SCDOT, isn't it true that
10 the SCDOT is paid for damages caused by the installation
11 of raised medians?

12 A. In some cases, yes, sir, we have addressed that
13 and paid for it, depending upon the appraisal.

14 Q. And that's because diverting full access road
15 into a right-in, right-out has an economic impact on some
16 properties?

17 A. It could have an economic impact on some
18 properties. But it would take an appraisal to make that
19 determination.

20 Q. Yes, sir. Thank you.

21 MR. BYBEE: Beg your indulgence, Your Honor. I
22 believe we are about finished.

23 [Whereupon, Mr. Bybee and Mr. McDonald confer]

24 THE BAILIFF: Your Honor, they need to take a
25 bathroom break.

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1. THE COURT: All right. We'll take a -- if
2 you'll go to the jury room. Everybody go to --
3 everybody on the jury go to the jury room. We'll be
4 back with you in just a few minutes.

5 [Whereupon, the jury exits the courtroom at
6 3:46 p.m.]

7 [Whereupon, a recess is taken from 3:47 p.m. to
8 3:52 p.m.]

9 [Whereupon, the jury enters the courtroom at
10 3:52 p.m.]

11 THE COURT: We have the jury back with us.
12 And you're through with your direct; right?

13 MR. BYBEE: I have neglected to introduce one of
14 the sets of plans, Judge.

15 THE COURT: What's that? Which one?

16 MR. BYBEE: Exhibit 7. We would move Exhibit 7
17 into evidence, Your Honor.

18 MR. BROOKER: No objection.

19 MR. BYBEE: We've talked about it. It's been
20 talked about. I'm just --

21 THE COURT: All right. Plaintiff's Exhibit 7 in
22 evidence without objection.

23 Is that right?

24 MR. BROOKER: That's correct.

25 [Whereupon, Plaintiff's Exhibit Number 7 is

1 admitted into evidence by the Court]

2 THE COURT: All right.

3 MR. BYBEE: No further questions.

4 MR. BROOKER: Mr. Phinney, we know each other.
5 We've worked together.

6 THE WITNESS: Yes, sir.

7 MR. BROOKER: Just have to -- we're going to
8 have to go over a few things that's already been over.
9 Not just to spend the time or bore you, but just get
10 the story straight.

11 CROSS-EXAMINATION

12 BY MR. BROOKER:

13 Q. You were -- what was your role in this project?

14 A. In this particular project, I was district --
15 excuse me -- district right-of-way agent and I had
16 supervisory control over the acquisition of right-of-way
17 for that particular project. There was one other agent
18 that worked with me on this, Richard Falen. He was the
19 primary agent, but I did handle and assist him in several
20 of the tracts, this being one of them.

21 Q. And what, generally, do you do as a right-of-way
22 agent? In other words, you get -- set up plans and --

23 A. Yes, sir.

24 Q. -- and that's when you begin --

25 A. The right-of-way process was once the plans had

1 been approved at the appropriate levels in Colombia, they
2 are sent to the right-of-way office for us to begin our
3 acquisition process. And based on those plans, an agent
4 would be assigned particular plans. They would do title
5 work, in which they would verify ownership of the
6 properties indicated on the plans. Depending on what was
7 being acquired from each property, they would -- they
8 would normally go out and make an initial contact with the
9 property owner, explain the plans to them. If there's any
10 permissions that need to be obtained, to try to obtain
11 those at that time.

12 If it is a project in which we are acquiring a
13 right-of-way fee simple, or a primary project such as
14 this, we would either make an offer to purchase the
15 property off of what we call a cost estimate, if it meets
16 certain criteria. If it was outside the limits of that
17 criteria, we would have an appraisal made and based on
18 that appraisal, an offer would be made to the property
19 owner to purchase the property.

20 If we could reach a settlement, then we would
21 ask them to execute a title to real estate. The money
22 would be transferred. We would obtain the necessary
23 releases of encumbrance on the property.

24 If we could not reach a settlement, then it
25 would be necessary to utilize imminent domain procedure

1 and acquire it through condemnation.

2 Q. So would it be fair to say that you were
3 essentially the Department of Transportation's point
4 man in dealing with landowners who will be impacted by
5 DOT --

6 A. Correct.

7 Q. -- construction projects?

8 A. That's correct.

9 Q. And that was your relationship with Mr. and
10 Mrs. Frampton during the course of this --

11 A. Correct.

12 Q. Okay. Now, you were given a set of plans and
13 it showed -- and we have already gone over that with
14 Mr. Bybee. It showed a guardrail extending across the
15 front of -- entirely across the front of the house, rental
16 house, and the driveway that Mr. Frampton owned; is that
17 correct?

18 A. The initial plans that I had, yes, sir.

19 Q. All right. And at that time, was the -- the
20 tract that now pertains to the rental house and the tract
21 next door that now pertains to Mr. and Ms. Frampton's
22 private residence, they were one tract, weren't they?

23 A. That was my recollection, that they were on one
24 tract, yes, sir.

25 Q. In other words, under the plans, that one single

1 tract would not be -- would not be landlocked; is that
2 correct?

3 A. Correct.

4 Q. And --

5 A. They would still have access to that.

6 Now, I don't know what time frame that the title
7 was transferred without actually looking at the title.
8 But the best that I can recall, at the time I made the
9 initial contact, I -- the property, to the best of my
10 knowledge, was still one tract.

11 Q. And because of that, the -- that was when this
12 idea came up. We recognize and --

13 THE COURT: When you say -- let me make sure.
14 When you say one tract, you mean the same person or
15 persons owned 699 and 693?

16 THE WITNESS: Yes.

17 THE COURT: Okay.

18 A. They were unity in title with both of them.

19 Q. [Mr. Brooker] It was one piece of land on a tax
20 map and it was a single owner, it just happened to have
21 two structures on it?

22 A. Correct.

23 Q. But later that changed? It was subdivided?

24 A. At some point in time it changed. The exact
25 date it changed I'm not -- I don't remember.

1 Q. But it was after your first discussions with
2 Mr. Frampton; is that correct?

3 A. That is my interpretation of it, yes, sir. If
4 it occurred prior to that time, I did not have knowledge
5 of it.

6 Q. All right. Now, there was a -- at some
7 point, the idea came up about this single entrance into
8 Mr. Frampton's residential driveway, and that T'd off to
9 his other two properties and the -- well, go ahead.

10 A. The initial plans called for -- and we tried to
11 obtain permission -- for the residential property to
12 remain in the same location and then T in a drive entrance
13 onto the rental property. And if you'll look at the
14 plans, you can see where that's drawn out. And that's
15 what we explored at that particular time.

16 Q. And under that scenario, the guardrail would
17 still extend across the front of the rental house, would
18 it not? It would --

19 A. Correct.

20 It would extend in front of the rental house and
21 the existing driveway at that time.

22 Q. Now, the T'd-off driveway coming off of
23 Mr. Frampton's main drive would run behind the guardrail;
24 is that correct?

25 A. Correct.

1 It would go behind the guardrail, yes, sir.

2 Q. That would -- it would have been -- wouldn't
3 that be a good idea --

4 A. It would provide him, in my opinion, with
5 adequate access, yes.

6 Q. But we don't go in and do this sort of thing on
7 somebody's property without getting their permission?

8 A. That is correct.

9 Q. The State doesn't do that --

10 A. No, sir.

11 Q. -- do they? Enter private property?

12 So you had to get Mr. Frampton's permission to
13 carry out this --

14 A. I would have had to obtain his permission.

15 Q. And he did not give that permission?

16 A. And we were not successful in obtaining that
17 permission. That's correct.

18 Q. So to this day, that just -- it -- remains some
19 lines on a piece of paper or a plan that was never
20 executed?

21 A. Correct.

22 Q. Never put into --

23 A. Yes, sir.

24 Q. -- into action?

25 Now -- well, let me ask you, concerning the silt

1 fence that you testified to with Mr. Bybee. As to -- you
2 don't have any indication that that silt fence, or any
3 silt fencing, was put on Mr. Frampton's private property,
4 do you?

5 A. I have no knowledge that it was or was not.

6 Q. To do things properly, in order to do that you
7 would have to -- it would be your job to get his
8 permission to --

9 A. Initially, if the plans had called for the
10 silt fence to be placed off of the right-of-way on his
11 property, we would have tried to have obtained that
12 permission at the onset.

13 Now, if for some reason they had made a determination
14 during construction that it was needed, then we could go
15 back and ask for it. Or the contractor could have gone
16 back and asked for it, but he would have had to get
17 permission.

18 Q. Now, let us just keep going with the story.
19 He -- he refused the idea of the T'd in -- the T'ing in
20 off on one plan?

21 A. Yes, sir.

22 Q. You go back to the planning -- what is that --
23 the road and bridge design people in Columbia and say,
24 well, if -- he subdivided this parcel here; it looks like
25 now that we actually physically extend this guardrail like

1 the plans say to do, that we're going to block in -- take
2 all of his access. Is that correct?

3 A. Initially, when we tried to obtained permission
4 with the T.M. section and could not.

5 At that time I did not have knowledge that it
6 had been subdivided. At what point it was -- I was still
7 going under the assumption that it was still one tract of
8 land.

9 Q. Right.

10 A. It could have been or could not have been. I
11 don't know the date title was transferred.

12 After we were unsuccessful to get that initial
13 permission, I did go back to the appropriate design
14 engineer in Columbia, asked them to reevaluate and look at
15 it to see whether or not we could shorten the guardrail
16 and continue access as in the beginning, or the before,
17 and I was unsuccessful in being able to obtain that change
18 or the engineer said that it did not meet the correct
19 design criteria at that time to do that.

20 Q. And how long -- how long did all these
21 negotiations take --

22 A. They went --

23 Q. -- you were talking about --

24 A. They went on from approximately '05 to sometime
25 right before construction was completed. I believe

1 construction was completed somewhere in '09.

2 Q. Before Cape Romain, the general contractor, left
3 the --

4 A. Correct.

5 To my knowledge -- the best of knowledge, it was
6 before they left.

7 In other words, they were -- when we reached an
8 agreement to shorten the guardrail and put in the part --
9 or the turnaround area, the bridge was still under
10 construction. It had not been completed. So that would
11 have been sometime in late '09, if I'm not mistaken.

12 Q. So close to the time that the bridge was
13 completed?

14 A. Correct.

15 Q. But then before that -- you made that agreement
16 at that point -- I'm guessing somewhere around November of
17 '09?

18 A. I would think -- that sounds -- somewhere in
19 that vicinity.

20 Q. So you finally got Mr. Frampton's permission to
21 do this. And then shortly thereafter, Cape Romain
22 finished up, their project's terminated, they're paid and
23 they're gone, you had to come back in and get the
24 maintenance forces to do that. And that took some time,
25 didn't it?

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1 A. Correct.

2 I don't know what the time frame -- I think
3 the --

4 Q. Two, three months maybe?

5 A. As far as who removed the existing sidewalk and
6 re-poured it, I don't know who did that.

7 But I do know the parking area, what I'm going
8 to refer to as the parking area or the turnaround area on
9 Mr. Frampton's property was done by maintenance forces in
10 Charleston County.

11 Q. And for a brief period of time, there was curb
12 and gutter -- new curb and gutter put there for a -- in
13 accordance with the original plans that had to be torn
14 out?

15 A. One of my -- excuse me. I'm sorry. Go ahead.

16 Q. It had to be ultimately torn out?

17 A. That is my understanding.

18 When I made approximately one of my last visits
19 there in '09, there was a curb and gutter there that was
20 preventing drive access into that property.

21 Q. Let me ask you. When you -- and you visited the
22 property numerous times, I guess, during the course of --

23 A. Uh-huh.

24 Q. -- all these negotiations?

25 A. [No response]

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1 Q. I'm sorry. Over the course of --

2 A. Right.

3 Q. -- these negotiations with Mr. Frampton, you
4 were actually out there on the -- on the site a couple of
5 times?

6 A. Correct.

7 Q. And was the rental house occupied?

8 A. I could not -- I did not notice. I do not know
9 whether it was or was not.

10 Q. Now, the guardrail -- you've already said that
11 the guardrail idea was never -- it was never put in. I
12 mean, it was -- it was shortened. It was no longer what
13 it was originally; is that correct?

14 A. I don't think that it was ever installed at the
15 length the original plans called for. And I stand to be
16 corrected, because I wasn't involved in the construction
17 part of it.

18 Q. And so, in other words, the guardrail never was
19 physically put there block -- completely blocking access
20 to the property?

21 A. To the best of my knowledge, it wasn't.

22 You'll have to ask the construction engineers to
23 what -- what that was.

24 Q. And in response to your question from Mr. Bybee
25 that you didn't condemn any property or any access rights,

1 would your response be that the reason was that --

2 MR. BYBEE: Objection to the leading.

3 MR. BROOKER: I was cross-examining, Your Honor.

4 THE COURT: I'll -- no, no. That's all right.

5 But, anyway, I sustain that objection.

6 Q. [Mr. Brooker] Okay. Why did you not condemn
7 any property rights of Mister --

8 A. There was no physical taking of the property.
9 We were only asking permission for driveway.

10 Normally, if a person would not grant driveway
11 permission, we would pave the drop -- we would pave the
12 driveway up to the right-of-way line and stop it there.
13 We would not condemn just to put in a driveway.

14 Q. Without permission, it's just direct to come
15 in -- your understanding is it's correct to come in and do
16 something without any kind of property interest in it?

17 A. That's right.

18 The permission does not convey any property
19 rights, in my opinion.

20 Q. Now, you did say that if there had been -- in
21 response to Mr. Bybee -- one of Mr. Bybee's questions --
22 and my notes are kind of light on this one. But you said
23 that if -- in a direct condemnation -- in other words,
24 where you take land, some land from somebody, then we
25 frequently compensate for medians and things that cause

1 right-in, right -- right-in, right-out turns?

2 A. Over the course --

3 Q. Not always. I mean --

4 A. Yeah. Over the course of my experience,
5 especially within the last ten or fifteen years, this
6 issue came up quite often that is it -- is the property
7 owner entitled to compensation because of a median that is
8 being placed as part of the construction.

9 We -- that was always a very confusing issue to
10 address with property owners. You would get differences
11 of opinions at different times, depending upon what
12 different courts had ruled at different times.

13 Q. It's a complicated legal issue?

14 A. That's correct.

15 And normally when the appraisal process
16 addresses it, some appraisers would deem damages because
17 of it and some would not. It would depend on the special
18 circumstances. But --

19 Q. So if you had that situation, you would consult
20 with the legal department?

21 A. We would consult the legal department.

22 But we have paid for damages because of that
23 and -- but it doesn't necessarily mean that we would be
24 obligated to because of the different legal opinions.

25 Q. That's all I had written down to ask you,

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1 Mr. Phinney. Is there anything else you wanted to say? I
2 don't want to cut you off in the middle of --

3 A. No, sir, not that I can think --

4 MR. BROOKER: All right. Thank you.

5 THE WITNESS: Uh-huh.

6 MR. BYBEE: No further questions, Your Honor.

7 THE COURT: Thank you very much. You can return
8 to your place in the courtroom, then.

9 MR. BYBEE: May I approach, Your Honor?

10 THE COURT: No.

11 [Whereupon, Mr. Phinney is excused and exits the
12 witness stand]

13 THE COURT: Call your next witness.

14 MR. BYBEE: That's what I wanted to approach
15 about.

16 THE COURT: Well, come on up, too, then, not
17 just one.

18 [Whereupon, an off-the-record bench conference
19 is held]

20 MR. BYBEE: Call Hal Frampton.

21 MR. PHINNEY: Mr. Bybee, am I needed anymore?
22 Judge, am I needed?

23 MR. BYBEE: Your Honor, Mr. Phinney was
24 subpoenaed. He's testified. I would release him
25 from his subpoena, if the Court will approve.

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1 THE COURT: Mr. Phinney you're talking about?
2 You're talking about the gentleman that just finished
3 testifying? Mr. Phinney?

4 MR. BYBEE: Yes, sir.

5 THE COURT: Okay. Thank you for coming. You're
6 free to go.

7 MR. PHINNEY: Okay. Thank you.

8 [Whereupon, Mr. Frampton comes forward]

9 [Whereupon, Mr. Frampton is duly sworn by the
10 clerk of court as follows: do you swear or affirm
11 that your testimony will be the truth, the whole
12 truth, and nothing but the truth, so help you God]

13 THE WITNESS: I do.

14 THE CLERK OF COURT: Be seated.

15 [Whereupon, Mr. Frampton takes the witness
16 stand]

17 THE CLERK OF COURT: Speak into the mike.

18 State your full name and spell your last name
19 for the record.

20 THE WITNESS: It's Henry Wilkins Frampton, III.
21 F-R-A-M-P-T-O-N. I go by Hal.

22 MR. BYBEE: Would you sit up closer to the
23 microphone, please, Hal.

24 [Whereupon, the witness complies]

25 MR. BYBEE: There we go.

HENRY W. FRAMPTON, III

Having Been First Duly Sworn,
was Examined and Testified as Follows:

DIRECT EXAMINATION

BY MR. BYBEE:

Q. Now, tell me what you do for a living.

A. I'm a real estate agent. I hold a broker's
license.

Q. And how long have you been in the real estate
business?

A. I've been in real estate for thirteen years.

Q. Also a little bit about your educational and
employment background.

A. I was born in '51 and went to Porta Military
Academy. Was at Porta Military Academy until it was
converted to Gaud school. After graduating from Porta-
Gaud I went to the College of Charleston in 1970. And I
met my wife Dale there in '70.

And shortly after that, I left college to start
a nursery business. Dale and I were married. Shortly
after that, I left and was in the nursery business on
James Island for nineteen years and subsequently have
worked for another company, after Hugo, for another ten
years, and now for real estate for thirteen.

THE COURT: Who for ten years after Hugo?

1 THE WITNESS: I was with a nursery company out
2 of Charlotte, that built a facility here in
3 Summerville, for --

4 THE COURT: I see.

5 THE WITNESS: -- for ten years.

6 THE COURT: I just didn't hear you.

7 THE WITNESS: All right, sir.

8 Q. [Mr. Bybee] And the first company that you
9 operated, what was that business' name?

10 A. It was Frampton's Greenhouses, on James Island.

11 Q. All right. Now, where do you go to church?

12 A. I go right across the street to St. Michael's
13 Episcopal Church.

14 Q. When you and Dale were married, where did you
15 live?

16 A. We lived at 685 Folly Road.

17 Q. Let me show you Plaintiff's Exhibit 1, Hal. Do
18 you recognize this?

19 A. I do.

20 Q. Where did this photograph come from?

21 A. It was an aerial that my wife gave me, in
22 sometime around 1995, of part of our greenhouse facility.
23 This was part of the nursery business. I had another
24 large nursery that was back behind this. You can't see it
25 in this photo. But that's where I was. I lived in this

1 house right here with my wife --

2 Q. Here. Point to the house. 685 is where you
3 lived?

4 A. 685. That -- my father was born in that house
5 and Dale and I lived there for thirty-five years. That
6 was my grandparents' home.

7 Q. All right. And then point out six ninety --
8 Well, before you do that, show me the driveway
9 entrance for 685.

10 A. 685 driveway is right here.

11 Q. And when you grew up, where did you grow up?

12 A. I was born and raised right here. Born in Roper
13 Hospital, but I was raised right here at 693 Folly Road.
14 I spent twenty years there. And after my parents passed,
15 my wife Dale and I remodeled. This is our home site. And
16 we've been back in there about -- we've been married forty
17 years. So that's -- I've been right there for sixty
18 years. I'm sixty years old. But I've lived here for
19 twenty-five, nearly thirty.

20 Q. All right. Now, 693: historically, since
21 you've been alive, how has that property been used?

22 A. It's always been a residence at 693.

23 Q. You've never rented that property out?

24 A. Property has never been rented.

25 Q. Now, 699, which you call -- what do you call

1 that property?

2 A. 699 is the bridge house or the creek house or
3 the honeymoon cottage. Over the course of my life, as a
4 young boy there were many people in James Island that
5 spent the first year or two years of their life right
6 there.

7 Q. And how was 699 used over the course of your
8 life?

9 A. As long as I can remember in my lifetime, it's
10 always been a rental.

11 Q. Your family has always rented it?

12 A. It's always been rented.

13 Q. And since you've owned it, you've rented it --

14 A. That's correct.

15 Q. --- is that correct?

16 How -- what is the rental history? I mean, how
17 often do you have to advertise or try -- change tenants?

18 A. It's had -- the rental history: usually people
19 will move into there and they'll stay there until -- one
20 lady who stayed there, that I remember that when my
21 parents had it, she was there fifteen, sixteen, seventeen
22 years. She actually stayed there until she passed away.

23 And then after my mother -- well, the first one
24 that I -- when mother was ill and I handled the property
25 for her, there was a young lady that lived there, Mandy

1 Keefley. She lived there for three or four years and
2 then --

3 Q. When did -- when did Mandy live there?

4 A. She lived there in the -- would have been the
5 early '80s [phonetic]. My father passed away in 2001 and
6 I think Mandy moved in probably in 2002.

7 Q. How long did Mandy stay in the creek house?

8 A. She was there three or four years.

9 Q. Who was the next tenant you recall being in the
10 creek-house property?

11 A. It was a young man by the name of Brad Davis.
12 He was actually -- worked for a builder. And when the --
13 in '06 and late '07, I guess, it was, when building started
14 to have a problem, he was laid off and went back to
15 Atlanta to live with his parents.

16 Q. All right. So that takes us to what period of
17 time when he left?

18 A. We're probably 2000 and-2008.

19 Q. All right. And who was your tenant in 2008?

20 A. It was a guy by the name of Berkey. I can't
21 remember his first name, but his name -- his last name was
22 Berkey.

23 Q. And how long was his tenancy for his lease?

24 A. His lease was -- he signed to be there a year.

25 Q. And what was the signature time frame? From

1 when to when?

2 A. He moved in in July of '08 and was to stay there
3 until July of '09.

4 Q. All right. And did he actually complete that
5 term, that lease term, with you?

6 A. No.

7 He moved out in October -- I guess it was late
8 October of '08.

9 Q. And what was going on as far as the construction
10 in late '08 when Mr. Berkey left?

11 A. The bridge construction had moved from the
12 opposite side of Folly Road over to our side of Folly
13 Road. And when Berkey -- when he moved in, the
14 construction was already going in and across the way. And
15 I told him at the time, I said, you know, we've got this
16 bridge construction. He said, don't worry about it, that
17 doesn't phase me at all.

18 So, anyway, he rented the property and he stayed
19 until late October.

20 Q. Okay. And when he told you he was leaving in
21 October, did you attempt to negotiate with him a reduced
22 rent to keep him there?

23 A. I did.

24 I told him that if he would stay, I would help
25 him with the rent.

1 Q. And that was unsuccessful; is that correct?

2 A. That's true. Correct.

3 Q. Tell me about your vacancy rate over -- I mean,
4 you told us the last -- since 2005, basically. Prior to
5 2005, did you have any trouble renting that property?

6 A. That property has never been vacant. When my
7 father was alive and he rented it, it was the same as it
8 is now. I guess basically the little creek house on the
9 bridge there, people can tell when people are moving and
10 coming and going. And usually, just like with this guy
11 Berkey, one tenant had moved out, we were cleaning up, as
12 you always have when a tenant leaves, and he stopped in
13 and basically wouldn't let me not rent it to him. And
14 that's usually the way it's been with that house as long
15 as I can remember.

16 Q. What are the attributes that you believe allow
17 you to have such a low vacancy rate?

18 A. Well, there's a lot of good things. You know,
19 we have to put up with a highway, but that's not always
20 bad because once you drive down in your driveway into that
21 little house right there, you're surrounded by hundred-
22 year-old oaks. And there's a creek that runs up behind
23 here so --

24 Q. There's a creek that runs where? You need to
25 show us.

1 A. It runs right -- a little gutter that runs right
2 here.

3 It used to be -- when my father was alive, he
4 was -- like I said, he was born here in 1923 --

5 Q. He was born in 685?

6 A. He was born in that house at 685.

7 And this gutter actually went all the way up in
8 here, and my grandmother would watch the kids off the
9 porch here, splashing in this gutter.

10 Q. By gutter, you're talking about a tidal creek?

11 A. Yeah, it's just a little tidal creek.

12 Q. All right. And is the tidal creek still there
13 today?

14 A. No.

15 It -- really, it only runs -- it runs actually
16 to my driveway to 693. This tidal creek actually butts up
17 to my driveway.

18 Q. Can you walk -- well, you've got two docks.

19 A. Right.

20 Q. Can you walk from 693 to 685 without going
21 across your driveway?

22 A. No.

23 This is -- at high tided it's flatted, and at
24 low tide it's soft mud.

25 Q. All right. And this dock here belongs to 693?

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1 A. 693.

2 Q. And this dock here belongs to 685?

3 A. That's correct.

4 Q. Do you think the dock is an attribute for the
5 rental vacancy rate that you've experienced?

6 A. Oh, yeah. The dock's a valuable part of that.

7 Q. We've got a small -- small, frame house; right?

8 A. Right. Right.

9 Q. Anything else that you believe makes that
10 property particularly tenantable?

11 A. Well, it's -- you know, it's close to town.
12 It's close to the beach. And like I said, it's -- people
13 have been living there for a long time and never had any
14 problems. And it's just like -- it's just like you've got
15 your own little world there, so people just love it.

16 Q. Now, let's describe your driveway to 693.

17 A. Okay.

18 Q. How wide is it?

19 A. My driveway going into 693, as you can see from
20 that aerial --

21 Q. From Plaintiff's Exhibit 1?

22 A. Yeah.

23 When you drive a full-size car down the
24 driveway, you have about a foot on each side of the car
25 when you go down that driveway. It's -- two cars can't

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1 pass. There's never been two cars that passed. And so
2 that's -- it's about twelve feet wide, I would say. Maybe
3 less.

4 Q. Okay. And where do you park your car when
5 you're at your residence at 693?

6 A. Really have three parking spaces. When you come
7 down in here there's one, two, three here. And this is
8 actually just kind of a backup to get in, maneuver in and
9 out.

10 Q. So how far is that from the structure?

11 A. From my house to the parking?

12 Q. Yeah.

13 A. It's probably not more than forty feet.

14 Q. Have you ever, or has your family ever, allowed
15 a tenant to park his car up at your house?

16 A. No. No, sir.

17 Q. The tenants have adequate parking, as is
18 depicted on this 1985 aerial photograph?

19 A. Yeah.

20 They can get -- actually, they can get three
21 cars in that -- in that driveway.

22 Q. As long as you can remember being living on
23 these properties, has 699 always had its individual
24 driveway?

25 A. It's always been a separate driveway.

1 Q. And 693 has always had its separate driveway?

2 A. That's correct.

3 Q. And 685 has always had its separate driveway?

4 A. That's correct.

5 Q. Does 693 have its own mailbox?

6 A. 693 has its own mailbox.

7 Q. Does 699 have its own mailbox?

8 A. It does have its own mailbox.

9 Q. And does 685 have its own mailbox?

10 A. It does.

11 Q. Tell me how you got title to 699 and 693 Folly
12 Road.

13 A. After my parents passed away -- my father passed
14 away in 2001, I actually purchased the property from my
15 mother in -- it was kind of an estate-planning purchase.
16 And I purchased it from my mother in two thousand -- late
17 2001.

18 My father died February 16th of '2001. After he
19 passed away, she sold me the property at 699 and 693. And
20 she maintained a life tenancy on the property, which meant
21 it was hers to use in any way she wanted.

22 Q. Until when?

23 A. Until she passed away.

24 Q. And when did she pass away?

25 A. 2004.

1 Q. Now, so you could not -- you could not have
2 subdivided the property up until that point?

3 A. No.

4 It wasn't my -- my mother had the life tenancy,
5 you know.

6 Q. But after your mom died, you did subdivide these
7 parcels?

8 A. That's correct.

9 My wife and I had always hoped to move back to
10 the house I was born in. And we remodeled that house
11 completely and it was -- had always been our feeling that
12 if we spent the money to do that, that we could sell the
13 little house at the bridge if we got in trouble.

14 Q. So staying -- the house you were born in, that's
15 693?

16 A. That's right.

17 Q. And 699 was being subdivided, the rental
18 house --

19 A. That's right.

20 Q. -- away from six ninety --

21 A. That's right.

22 Q. And in that subdivision process you had to
23 obtain the permission, which has already been introduced
24 from Mr. Lemon; is that not correct?

25 A. That's correct.

1 Q. And that is Exhibit 17; is that correct?

2 A. Yep. That's it right there. Roger Lemon.

3 Q. And when -- behind the exhibit is the
4 subdivision plat that you had to have done in order to
5 legally separate the two parcels?

6 A. That's correct.

7 Q. And as a result of that, the rental property's
8 assessment, tax assessment, went from four percent to six
9 percent, did it not?

10 A. That's correct.

11 Q. And as a result of that, there is now a legal or
12 a tax map difference between the two parcels. And that's
13 shown on Exhibit 11, is it not?

14 A. That's correct.

15 MR. BYBEE: Move it into evidence, Your Honor.

16 THE COURT: What number?

17 MR. BYBEE: 11.

18 MR. BROOKER: I don't object.

19 [Whereupon, Plaintiff's Exhibit Number 11 is
20 admitted into evidence by the Court]

21 Q. [Mr. Bybee] Now, Exhibit 11 shows the street
22 address, as well as the tax-map parcel; is that correct?

23 A. That's correct.

24 Q. For 699 --

25 A. Right.

1 Q. -- 693 and 685 --

2 A. That's correct.

3 Q. Each of which had their own driveways, even
4 before the subdivision; right?

5 A. Always had --

6 Q. Always had --

7 A. -- their own driveways.

8 Q. And 699 always had been used as an income-
9 producing property?

10 A. For as long as I was -- can remember. My life.

11 Q. All right. Let's go over one house over, the
12 685 property.

13 A. Okay.

14 Q. Has that always been used as a residence?

15 A. It was used as a residence until after -- after
16 my wife and I remodeled my original home at 693 and our
17 old residence, my grandparents' house, at 685, was turned
18 into a -- it was a law firm there for four or five years.

19 Q. All right. Up until that time, it was always
20 used as a residence?

21 A. That's correct.

22 Q. And then you rented it to a law firm?

23 A. That's correct.

24 Q. And the name of the law firm was what?

25 A. Jensen Law Firm.

1 Q. And when did Jensen Law Firm cease renting that
2 property?

3 A. They left in I believe it was '09 or '10. It
4 was either late '09 or I think it was -- I think it was
5 '010 [phonetic].

6 Q. Was it while construction was ongoing --

7 A. It was --

8 Q. -- or was it after construction was over?

9 A. It was right at -- the straw that broke the
10 camel's back with her is when they put the permanent
11 median in, because then you were only faced with --

12 MR. BROOKER: I'm going to object, Your Honor.

13 A. -- right-in, right-out turns.

14 THE COURT: Okay. Just tell me when they left,
15 when they left.

16 A. They left -- I'm pretty sure the date was 2010.
17 I would have to look it up, but I believe it was 2010.

18 Q. [Mr. Bybee] It was after the median was
19 constructed?

20 A. It was after the median was put in.

21 Q. And that was commercial use of that property; is
22 that not correct?

23 A. That's correct.

24 Q. The 685 property is actually commercially zoned,
25 is it not?

1 A. That's correct.

2 Q. How is 699 zoned?

3 A. It's zoned residential.

4 Q. Now, after Ms. Jensen left or the law firm left,
5 did you attempt to again let it, rent it -- rent that
6 property as a commercial parcel?

7 THE COURT: Hold on just a second.

8 Members of the jury panel, I need you to go to
9 the jury room for a few minutes, please.

10 [Whereupon, the jury exits the courtroom at
11 4:28 p.m.]

12 THE COURT: I want to make sure I understand
13 what we're talking about. We're talking about 685?

14 MR. BYBEE: That's correct.

15 THE COURT: Why is that relevant?

16 MR. BYBEE: Because it's illustrative of the
17 damage to 699.

18 THE COURT: You think it is?

19 MR. BROOKER: I don't. No, I don't.

20 MR. BYBEE: Your Honor --

21 THE WITNESS: I do, Your Honor. My rent's
22 dropped by half.

23 THE COURT: Well, you may.

24 But I think there's a -- legally, I don't think
25 it is.

1 MR. BYBEE: Well, here's the proffer. I'll
2 try --

3 THE COURT: Well, go ahead. Go ahead and offer
4 it. But I sustain the objection to that. But I'll
5 let you put in what you want to put in. I may change
6 my mind. Go ahead.

7 MR. BYBEE: Here's the question. Well, there
8 was no objection --

9 MR. BROOKER: Yes, there was, Your Honor --

10 THE COURT: Well, there was an objection. There
11 was an objection. He was -- he was coming.

12 - - - - -

13 PROFFER

14 BY MR. BYBEE:

15 Q. All right. Tell me: after the median was put
16 into place at -- and your attempts to rent 685 as a
17 commercial establishment, were they successful?

18 A. They were not.

19 Q. And why were they not successful?

20 A. They were not successful because we were left
21 with right-in, right-out turn only.

22 Q. And what did you have to do, with respect to the
23 rental of that property, after the installation of the
24 median?

25 A. It's back into residential rental status. It's

1 still commercial zoned, but it's back with residential
2 tenants.

3 MR. BYBEE: That would be the extent of that
4 line of questioning, Your Honor, and I think the
5 relevancy of laying the foundation for damages at 699.

6 MR. BROOKER: He said 699 was residential and
7 its use hasn't changed, so what is the --

8 MR. BYBEE: The inference --

9 MR. BROOKER: -- why would it -- it be
10 comparable?

11 MR. BYBEE: The entire --

12 THE COURT: Well, I appreciate your position,
13 but I think it's irrelevant to the issues in this case
14 and any possible relevance -- any possible relevancy
15 would be outweighed by the potential for unfair
16 prejudice to the defendant when you're -- when we're
17 talking about it like this.

18 If it's -- if it's damaged, I mean, I don't see
19 how the jury could take that and not assign unjust
20 weight to it. So I think the potential for unfair
21 prejudice outweighs any value, legitimate value, that
22 it would have regarding what happened in regard to
23 699. And that's what I see the issue to be. So I
24 sustain the objection to that.

25 Bring the jury back in.

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1 [Whereupon, the jury enters the courtroom at
2 4:32 p.m.]

3 THE COURT: Actually, this might be a good place
4 for us to stop. I hadn't thought about that. But I
5 think this is a good place to stop, then, for the
6 evening. I like to try to get you out of here before
7 the absolute worse of the rush-hour gets here, as far
8 as traffic is concerned, so I'm going to stop -- call
9 a halt to it right now and we'll resume tomorrow
10 morning at 9:30. So remember my instructions to you
11 before lunch. Don't discuss the case with family,
12 friends, or anyone else. They're not the twelve
13 people that will make a decision in this case. You
14 are. So with that, I'll let you go home. Leave your
15 notepads with the bailiffs. Don't be so quick --
16 wait, wait, wait. Leave your notepads with the
17 bailiff. Please be back in the jury room by 9:30
18 tomorrow morning. We'll get started just as soon as
19 we can after that. Have a nice evening. 9:30
20 tomorrow morning.

21 [Whereupon, the jury exits the courtroom at
22 4:33 p.m.]

23 THE COURT: All right. Let's let the jury have
24 a chance to get out before y'all start leaving.

25 [JURY TRIAL ADJOURNS AT 4:35 P.M.]

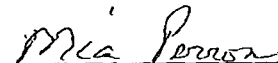
C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the jury trial held before the Honorable Thomas L. Hughston, on Monday, February 6, 2012.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 3rd day of September, 2012.


Mia Perron, CVR-CM-M
Circuit Court Reporter
9th Judicial Circuit

MIA PERRON, CVR-CM-M

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STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO.: 2009-CP-10-6185.

HENRY W. FRAMPTON, III, and)
DALE FRAMPTON,)

PLAINTIFFS,)

VS.)

SOUTH CAROLINA DEPARTMENT OF)
TRANSPORTATION,)

DEFENDANT.)

JURY TRIAL

VOLUME 2 OF 3

held before the Honorable Thomas L. Hughston
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Charleston County Courthouse
Charleston, South Carolina
on Tuesday, February 7, 2012, Commencing at 9:52 a.m.

SUSAN "MIA" PERRON, CVR-CM-M
Circuit Court Reporter - 9th Judicial Circuit
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PROCEEDINGS

THE COURT: They'll be in in just a minute.

Come on back up, wherever Mr. Frampton is.

[Whereupon, Mr. Frampton re-takes the witness stand]

[Whereupon, the jury enters the courtroom at 9:53 a.m.]

THE COURT: We have all of the jurors. The parties are present with all of their attorneys.

Okay. I believe Mr. Frampton was on the stand yesterday, and back on the stand. You are still under oath.

You can continue your examination.

MR. BYBEE: Thank you, Your Honor.

- - - - -

HENRY W. FRAMPTON, III,

Having Been Previously Sworn,

was Examined and Testified as Follows:

CONTINUED DIRECT EXAMINATION

BY MR. BYBEE:

Q. Yesterday we talked about Mr. Berkey. And my question is this: after Mr. Berkey left, did you attempt to rent 699 Folly Road from November '08 until January of 2010?

A. No, sir, I did not.

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1 Q. And why not?

2 A. Mr. Phinney had visited with me in 2005 and told
3 me that the driveway was to be permanently closed.

4 Q. Now, sir, show you what's been marked as
5 Plaintiff's Exhibit 19. It's a notebook of photographs,
6 is it not?

7 A. Yes, sir.

8 MR. BYBEE: Your Honor --

9 THE COURT: Any objection to these?

10 MR. BROOKER: Has something been offered?

11 THE COURT: Photographs, Number 19.

12 MR. BROOKER: I thought they were already in,
13 Your Honor, but, no, I do not object.

14 THE COURT: All right.

15 MR. BYBEE: Thank you, Your Honor.

16 [Whereupon, Plaintiff's Exhibit Number 19 is
17 admitted into evidence by the Court]

18 Q. [Mr. Bybee] Let's look at the photographs --

19 [Off the record momentarily]

20 MR. BYBEE: Can you zoom in? There we go. A
21 little wider. A little wider. Let's see if we can
22 get the time -- exhibit with the date on it. There we
23 go. All right.

24 Q. [Mr. Bybee] This one is Plaintiff's Exhibit A.
25 Mr. Frampton, you can either look at the screen or you can

1 look at your notebook, because I want to talk about each
2 one. Okay?

3 A. All right.

4 Q. Plaintiff's Exhibit A is -- what date is shown
5 on that date, sir?

6 A. It's November the 5th, 2008.

7 Q. And can you describe what it depicts, please?

8 A. It depicts the area in front of the driveway
9 areas that we're referring to.

10 It's completely dug up. They're getting ready
11 to put pipe, or do something in there. But it's dug up.

12 Q. Did you take this photograph?

13 A. Yes, sir, I did.

14 Q. And where are you standing? Approximately where
15 are you standing?

16 A. I'd just be standing back in the driveway area
17 to 699, 93 area, just in the mouth of what would be the
18 driveways.

19 Q. All right. And the structures -- the concrete
20 structure which is in the hole, what is that?

21 A. That's a drain box. They're going to put a
22 drain in.

23 Q. All right. Now, let's go to the next one. This
24 one is marked Plaintiff's 19-B. Look in your notebook and
25 tell me the date of that photograph, please, sir.

1 A. It was November the 10th, 2008.

2 Q. It shows a mailbox. You can't really see it on
3 the screen, but when you look in your notebook you can
4 read the address on the mailbox, can you not?

5 A. Yes, sir.

6 Q. Read or publish the mailbox address.

7 A. 699.

8 Q. All right. Now, immediately adjacent to the
9 mailbox is a reflector; is that not correct?

10 A. That's correct.

11 Q. And can you point out -- this time point to the
12 screen so the jury can understand what we're calling the
13 reflector.

14 A. Right here [indicates].

15 Q. All right. So you're standing in the driveway
16 at 699 for this photograph; is that correct?

17 A. That's correct.

18 Q. And the piece of equipment is immediately in
19 front of the rental house; is that not correct?

20 A. That's correct.

21 Q. And that's November 10th, 2008?

22 A. Yes, sir.

23 Q. Has the curb to the house -- or the curb
24 separating the house from the road been removed at this
25 point?

1 A. I believe in this photograph that they had
2 removed the curb. You can just see the asphalt line.

3 It doesn't show up on this photograph, but it
4 shows in mine.

5 Q. Okay. Anything else you need with -- any --
6 does this photograph depict anything else?

7 A. It's just a typical depiction of the type of
8 machinery that was parked in front of the driveway.

9 Q. Thank you, sir.

10 Now I want you to turn to Plaintiff's Exhibit
11 19-C. And this one is dated November 11th, 2008, is it
12 not?

13 A. Yes, sir, that's correct.

14 Q. And that -- what is going on in that photograph?

15 A. They're removing the rest of what would be the
16 curb and gutter from the entire driveway area from -- from
17 the bridge all the way down to where it tied in at 693.

18 Q. All right. And the mailbox, which number is
19 that?

20 A. Yes, sir. That's 699 Folly Road.

21 Q. All right. Now, just for orientation purposes,
22 does your mailbox have a number on the other side of the
23 mailbox at 699?

24 A. It does not.

25 Q. And, now, at 693 it has it on both sides,

1 doesn't it?

2 A. That's correct.

3 Q. All right. The road-closed sign, sir, where is
4 that located as it relates to your rental house?

5 A. It's directly across from the driveway. That
6 whole side was -- is closed.

7 Q. Okay. Now, there is a stockpile of materials,
8 looks like rock; is that correct?

9 A. Yes, sir. Right here.

10 Q. All right. Let's go to the next one. The next
11 one is Plaintiff's Exhibit 19-D.

12 A. Yes, sir.

13 Q. What does 19-D depict?

14 A. 19-D shows the driveway to my wife's residence
15 at 693 Folly Road. It shows some barrier barrels with
16 orange netting and it also shows yellow caution tape has
17 been pulled across the whole expanse in front of 699.

18 Q. Could you access 699 without tearing that tape
19 off?

20 A. No, sir.

21 Q. Anything else that Exhibit 19-D depicts?

22 A. It depicts that my driveway into my residence --
23 you can't see it in this photograph, but all of that had
24 been torn out. This was ROC rock compound, or some type
25 of rock. I don't know what kind it was. They had paved

1 that back in with rock so that I could enter in and out of
2 my driveway.

3 Q. Okay. So they've taken out the concrete curbs,
4 the concrete -- what did Mr. Phinney call it -- valley
5 curb or some kind of --

6 A. Drop --

7 Q. -- driveway entrance in the concrete. They've
8 taken that out. They've now replaced it with some kind of
9 material so that you would have ingress and egress to the
10 family residence at 693?

11 A. That's correct.

12 Q. Correct?

13 This photograph has a different date stamp. You
14 didn't take this photograph, did you, sir?

15 A. No, sir, I did not.

16 Q. Let's go to Plaintiff's Exhibit 19-E. This
17 photograph is also of November the 11th, 2008. What does
18 it depict, sir?

19 A. It depicts -- this doesn't show it very well,
20 but it depicts the barrels and the caution tape that
21 stretch from midway in front of my property at --
22 actually, at the 685 properly -- property. The barrels
23 run continuously all the way just about to the bridge.
24 You can see it in this photograph. Those barrels run the
25 whole way down. And all of that area had been excavated

1 the whole way down.

2 Q. All right. And behind the barrels is there some
3 construction of orange netting? Can you see that in your
4 notebook?

5 A. I see that in my notebook, yes, sir.

6 Q. Hard to see on this screen; is that correct?

7 A. That's right.

8 Q. And is that netting actually blocking the
9 driveway to 699?

10 A. That's correct.

11 Q. Anything else this photograph is depicting?

12 A. Really just shows that the whole thing has been
13 excavated.

14 And from that point on, the driveway that
15 remained open to my residence and to the 685 residence was
16 rock. And they continually would come back and dump more
17 rock in there, as over the time it would wash out and you
18 would have kind of a rut area going in and out of your
19 driveway, until it was paved.

20 Q. Did they do that for 699?

21 A. No, sir.

22 Q. They only did that for 693 and 685; is that
23 correct?

24 A. That's correct. That's correct.

25 Q. All right, sir. Now, this is another one of the

1 photographs that you did not take.

2 A. Correct.

3 Q. It's marked Plaintiff's Exhibit 19-F.

4 MR. BYBEE: Mike, can you give me a fade on that
5 so I can --

6 [Off the record momentarily].

7 Q. [Mr. Bybee] Now, what does this photograph
8 depict, Hal?

9 A. This is a driveway at 699, the house that we
10 were talking about, the rental house. This actually -- I
11 was here, right over there, when this photograph was
12 taken. I had been to my mailbox. I saw the guy from DOT.
13 That morning the barrels and the netting was stretched
14 across. This is what I call a staged photograph. The
15 barrels and netting was across the driveway. He took the
16 photo.

17 That afternoon when the construction crew went
18 home, they pulled the barrels and things back across. So
19 this actually was done to make it look like the driveway
20 was open, but indeed it wasn't.

21 Q. And then the photograph displays the mailbox at
22 699; is that not correct?

23 A. That'll be right up here.

24 Q. And it also displays the same reflector that we
25 identified before; is that correct?

1 A. Yes, sir. Right here.

2 Q. All right. As of this date could you have
3 rented this property, sir?

4 A. No, sir.

5 Q. Why not?

6 A. Well, there wasn't any way to get in and out of
7 the property. This driveway was blocked.

8 MR. BYBEE: Let's go to the next one, please.

9 Q. [Mr. Bybee] I'm going to show Exhibit 19-G.
10 What's the date of this photograph? It's hard to read on
11 the screen.

12 A. It's December the 10th of 2008.

13 Q. And it clearly depicts the mailbox at 699?

14 A. Yes, sir.

15 Q. And the reflector?

16 A. Yes, sir.

17 Q. And that piece of equipment is in front of your
18 rental house, is it not?

19 A. That's correct.

20 Q. All right. And the mound --

21 A. Right.

22 Q. -- in front of 699, what is that?

23 A. It's a giant mound of dirt that's been excavated
24 from this area, that they're trying to put some pipe and
25 drainage in, in front of the driveway at 699.

1 Q. And in your opinion, could you have rented this
2 property as of this day, sir?

3 A. No, sir.

4 Q. And why not?

5 A. It was inaccessible.

6 Q. The next one, 19-H. What's the date on that
7 photograph?

8 A. It's December the 17th of 2008.

9 Q. And the barrels and the orange fencing is
10 depicted; is that correct?

11 A. That's correct.

12 Q. And on 12/17/2008, it also shows 699's mailbox,
13 does it not? Would you point that out? It's a little
14 hard to see, again, on the screen but --

15 A. Yes, sir.

16 Q. -- the jury will get this notebook.

17 A. Right here.

18 Q. All right.

19 A. And the reflector is right here.

20 Q. Could you rent your property at 699 Folly Road
21 on this date?

22 A. No, sir.

23 Q. And why not?

24 A. It was no access.

25 Q. The next photograph is marked 19-I and it is

1 dated December 17th, 2008; is it not, sir?

2 A. That's correct.

3 Q. This is taken from the back of the rental house;
4 is that right?

5 A. Yes, sir.

6 Q. And you took the photograph?

7 A. Yes, sir.

8 Q. What's the piece of -- what's going on, as far
9 as construction is concerned?

10 A. As far as construction is concerned, they've got
11 dump trucks that are blocking the driveway. They've got
12 the barrels and the orange cloth that are blocking the
13 driveway.

14 And there's also a compact machine. This yellow
15 machine right here is one of those big rolling machines.

16 So that area is just constantly lined up with
17 equipment that they're building the bridge with.

18 Q. Right. And when that truck would leave, would
19 another one come back?

20 A. Yes, sir.

21 Q. Because they've got to work on the bridge?

22 A. Right. That's right.

23 That was their staging area to move machines
24 and --

25 Q. And this photograph -- you can hardly see it.

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1 But, again, you said orange mesh was tied to that orange
2 barrel?

3 A. Yes.

4 Q. Would you point that out for us?

5 A. It's just right in there. You can see it in
6 the -- in this photo.

7 Q. And it was blocking the driveway; is that
8 correct?

9 A. That's correct.

10 Q. Could you rent your house on this day, sir?

11 A. No, sir.

12 Q. All right. Now, this is 12/21/2008; is that
13 correct?

14 A. That's correct.

15 Q. Again, it's a little hard to read that date.
16 But that's what it says, isn't it?

17 A. Yes, sir.

18 Q. Tell me what that black silt fence is doing.

19 A. That black silt fence is strung across the
20 entire driveway at 699. The mailbox is right there. It's
21 pulled across that -- the driveway the whole way across.

22 Q. All right. Now, the orange mesh construction
23 fencing is pulled away from the driveway --

24 A. Yes, sir.

25 Q. -- in this photograph, no longer blocking it.

1 But one -- and one access? 699?

2 A. There's no access.

3 Q. How long did this silt fence remain up?

4 A. The silt fence remained up for the better part
5 of the whole year, that's coming up. It wasn't really
6 taken down until December of '10 when the maintenance crew
7 came in and poured the asphalt or laid the asphalt on the
8 other side of the mesh.

9 Q. Did they install such a silt fence in front of
10 693's driveway?

11 A. No, sir.

12 Q. Did they install such a -- a silt fence in front
13 of 685's driveway?

14 A. No, sir.

15 MR. BYBEE: Move to the next one, please, sir.

16 Q. [Mr. Bybee] This one is also dated December
17 11th, 2008. It depicts the same silt fence, but at a
18 different angle; is that correct?

19 A. Yes, sir. This is December 21.

20 Q. Excuse me. December 21.

21 A. Yes, sir.

22 It's just taken from a different angle. You
23 can -- this white material here is where they excavated
24 the whole area in there to put the drainage pipe in. And
25 then when they filled it back up, they put some of that

1 white, sticky, gummy rock in front of that driveway.

2 Q. All right. Had they already excavated and
3 installed the drainage pipe at this point in time?

4 A. I think the drainage pipe may have been
5 installed. They had problems with sinkholes in this area
6 and several times came back and ripped it back out to try
7 to figure out why it kept caving in. So I don't know
8 exactly if that -- I think the sinkholes occurred after
9 this.

10 Q. All right. But I was asking about when they
11 were installing the pipe itself, the drainage pipe.

12 A. To my knowledge, the drainage pipe was
13 installed.

14 Q. The drainage pipe that they installed was
15 installed in front of both 693 and 699's driveway?

16 A. That's correct.

17 Q. The photograph depicts a wooden stake. Do you
18 see that, sir?

19 A. Yes, sir.

20 Q. And that wooden stake has some markings on it I
21 believe with references of particular location and a
22 station number. Could you publish that for us, please?

23 A. It looks like 16.

24 Q. And then the number under it?

25 A. 60.

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1 Q. The number under that? 16 plus 60 again?

2 A. Yes, sir. 16 plus 60 again.

3 Q. All right, sir.

4 MR. BYBEE: Let's go to the next photograph.

5 Q. [Mr. Bybee] All right. You took these
6 photographs, these -- the last two; is that not correct,
7 sir?

8 A. Yes, sir.

9 Q. That's a fairly poor showing on the screen
10 again, Mr. Frampton, but can you show me the 699 mailbox?

11 A. Right here.

12 Q. And the -- there's -- the reflector is shown in
13 there, is it not?

14 A. Let's see. Yeah, it -- it is. It's right here.

15 Q. And 12/21/2008 is the date that you took this
16 photograph?

17 A. Yes, sir.

18 Q. You're standing in your driveway or your former
19 driveway at 699?

20 A. Yes, sir.

21 Q. And the black material, the silt fence, is still
22 installed?

23 A. Yes. All the way across here.

24 They've got the road-closed signs up. And this
25 whole area over here has become a lay-down area.

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1 Q. And when you tell me a lay-down area, what's the
2 lay-down in that area that you can see in that photograph?

3 A. The material that's in there right now, I don't
4 know the terminology for it but it's heavy-metal type
5 stuff, pipes and things, that they're going to use to tie
6 the concrete together with, I guess. But the metal --

7 Q. Have you ever heard the term rebar?

8 A. Rebar? Yes, sir.

9 Q. Is that what that is?

10 A. That looks like it to me.

11 Q. Now we're going into the next month. This is
12 the month of January '09. And I'm going to show you
13 Plaintiff's Exhibit 19-M. What's the date of this
14 photograph? The specific date.

15 A. January 13th, 2009.

16 Q. And it depicts 693, does it not?

17 A. Yes, sir. That's the driveway.

18 Q. Now, this is a little different than what 693
19 looked like back in November or December; is that not
20 correct?

21 A. That's correct.

22 Q. It reflects that installation of a sidewalk,
23 does it not?

24 A. Yes, sir.

25 Q. And that sidewalk extended in front of 699, did

1 it not?

2 A. Yes, sir.

3 Q. And attached or immediately in front of the
4 sidewalk was the curb -- was the curb -- is it not?

5 A. Yes, sir.

6 Q. So at this point in time, that sidewalk and that
7 curb, in addition to the silt fence, blocked access to
8 699; is that not correct?

9 A. That's exactly right.

10 Q. Now, there's a gap in that sidewalk in front of
11 693.

12 A. Yes, sir.

13 Q. Describe the circumstances that led to that gap
14 in the sidewalk.

15 A. Well, they said they had problems in this area
16 with the drain box and the drainage. And they had poured
17 the concrete across there but had to come back and take a
18 saw and cut this out, dig this whole thing back out again,
19 so that they could try to get this -- the drain box in and
20 figure out what was going on with all that.

21 Q. Now, the drain box was the very first photograph
22 you showed us --

23 A. Yes, sir.

24 Q. -- back in November.

25 How many times did they have to take in, take

1 out and reinstall curb, gutter, sidewalk, in the vicinity
2 of 699 and 693?

3 A. It was at least twice, maybe three times, in
4 front of 693. But it was -- it was at least twice.

5 Q. Now, January 13th of 2009, the silt fence was
6 still blocking access to 699 --

7 A. Yes, sir.

8 Q. -- in addition to the new four-inch curb --

9 A. Yes.

10 Q. -- is that correct?

11 A. That's correct.

12 MR. BYBEE: Move to the next one, please.

13 Q. [Mr. Bybee] I'm going to show you what's been
14 marked as Plaintiff's Exhibit 19-N. And what does this
15 depict, Mr. Frampton?

16 A. It's a shot back at the -- that's the 693
17 mailbox there that's been shot back at what's going on
18 with the box and all this mess over here. You can see the
19 road is all torn up and slushy. And it also shows the
20 concrete sidewalk with the raised curb that eventually had
21 to be replaced again, which I think would have been the
22 third time for that. But that would have been at least
23 twice that they replaced that section.

24 Q. And this photograph is taken on what date?

25 A. January 13th, 2009.

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1 Q. And it's essentially the same condition as the
2 prior photograph, it's just at a different angle; is that
3 correct?

4 A. That's correct.

5 Q. And you took those photographs --

6 A. Yes, sir --

7 Q. -- is that not correct?

8 A. -- I did.

9 Q. What does Plaintiff's Exhibit 19-0 depict,
10 Mr. Frampton?

11 A. This is one of the adventures we had to
12 experience. The gentleman you see, he leans down there.
13 But they broke the main waterline that runs all the way to
14 Folly Beach and there's a geyser going up that went up
15 above the top of the telephone pole that you can see
16 there. They had all kind of vehicles and things out here,
17 all kind of people and stuff, trying to figure out how to
18 get this geyser turned off. But you can see where the --
19 the raised curb that's going down here and that it's dug
20 out. Well, that's where that box was. And I don't know
21 exactly what caused the geyser, but I know we had a pretty
22 good mess there for a long time after that occurred.

23 Q. Now, this is a -- this is farther down, towards
24 the city of Charleston, from 693; is that correct?

25 A. Yes.

1 It's about twenty feet from my driveway at
2 693.

3 Q. But the photograph clearly depicts the four-inch
4 curb?

5 A. That's right.

6 Q. Is that not correct?

7 A. That's right.

8 Q. And that's the same type of curb which was in
9 existence at 699 at that particular time?

10 A. That's correct.

11 Q. And is this a continuation of what they had to
12 cut out when they were dealing with the problems with that
13 drain box, that area that's separating the sidewalk?

14 A. That would be the area from there to the
15 driveway.

16 They had all that poured and had to come
17 back and tear it out and -- I don't know. It was a
18 technical -- some kind of technical thing that went on
19 with the drain-box problem. I don't know what was going
20 on.

21 Q. All right, sir. Next is 19-P. And this is on
22 January 14th; is that correct?

23 A. That's correct. January 14th, 2009.

24 Q. It's another photograph of the geyser or the
25 main water break. But there's a space between those two

1 concrete sidewalk sections?

2 A. Yes, sir.

3 Q. How did that space get there?

4 A. Well, this is the drain locks right here.

5 Q. Okay.

6 A. They cut all this out to put this freeform drain
7 box back in.

8 Q. Now, for the month of January of 2009, could you
9 have rented your property at 699 Folly Road?

10 A. No, sir.

11 Q. And why not?

12 A. I didn't have any access to the property.

13 Q. Let's move to the next photograph, Mr. Frampton.
14 This is in February. What's the date, please, sir?

15 A. February the 12th, 2009.

16 Q. The road-closed signs are located where in
17 proximity to 699 and 693, please?

18 A. Right in front of the driveway.

19 This would be my trash can right here and that's
20 the corner of my driveway. And then 699 would be right
21 here. They closed both of these lanes all the way to the
22 bridge. And this is the rebar we were talking about and
23 some of the other materials that had been staged in there.

24 Q. Right. Somebody had -- the rebar that you see
25 in one photograph, they've taken it and poured it in the

1 bridge and then they bring back more rebar and stack it
2 up; right?

3 A. That's correct.

4 Q. Now, at this point, February 12th, 2009, they
5 reinstalled the sidewalk in front of 693; is that correct?

6 A. That's correct.

7 Q. The garbage can is sitting on 693?

8 A. That's correct.

9 Q. Now, can you see the silt fence, in your copy of
10 the photograph, in front of 699?

11 A. Yes, sir, I can.

12 Q. And so it's a little difficult to see on the
13 screen. Point it out to us, please.

14 A. It's right here [indicates].

15 Q. The next photograph is Plaintiff's Exhibit 19-R.
16 What does that depict?

17 A. It's the driveway -- what was the driveway at
18 699.

19 Q. You're standing where?

20 A. I'm down in the driveway looking back out at the
21 road.

22 Q. You're in your -- you're on your property; is
23 that --

24 A. Yes, sir.

25 Q. -- correct?

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1 A. I'm down the driveway.

2 Q. And this is February 12th of 2009?

3 A. Yes, sir.

4 Q. All right. And behind the silt fence, what's
5 going on behind there?

6 A. All this is taken up with vehicles and lay-down.
7 There's a port-a-potty right there, I believe. Vehicles.
8 This whole thing constantly, from seven o'clock in the
9 morning until 6:00 or 7:00 in the evening, was nothing but
10 vehicles and equipment and nothing to go on and nothing
11 but material laid down there.

12 Q. The next exhibit is taken a couple of days
13 later. Publish that for me, please. Can you read it?

14 A. Yes, sir. It's February 15th, 2009.

15 Q. And what does this photograph depict?

16 A. Well, it's a mailbox at 699. And all this area
17 now is all material -- bridge materials. You can see it
18 so much better in these other photographs. But it's all
19 bridge materials and equipment that they're going to use
20 to build this section of the bridge.

21 You can still see the drums in here and black
22 cloth that's being stretched across the driveway.

23 Q. The silt cloth is still --

24 A. Yes, sir.

25 Q. -- stretched; is that not correct?

1 A. Yes, sir.

2 Q. And, now, what is that box? That metal box.

3 A. I guess it's like a construction dumpster is
4 what that would be. I assume it's a dumpster. But it's a
5 big box, like a dumpster, that's sitting right in front of
6 the driveway on the ground.

7 Q. All right. February 15th, 2009, is Plaintiff's
8 Exhibit 19-T. What does that depict?

9 A. It's again the driveway in front of 699. It's
10 got -- as you can see, it's crammed up with materials.
11 These are the forms that they use to put down and build
12 the concrete on, and rebars, and I think this is some kind
13 of water container, and just all of their equipment that's
14 lined up right in that area.

15 Q. What's the water container standing on?

16 A. It's on the sidewalk. You can see the sidewalk
17 right here.

18 Q. And does that also depict a curb blocking access
19 to --

20 A. Yes. You can see --

21 Q. -- 699 --

22 A. -- it's -- runs -- runs right along there. It's
23 a regular raised curb.

24 Q. And the house in the background is 699 --

25 A. Yes, sir.

1 Q. -- is that correct?

2 A. That's correct.

3 MR. BYBEE: Move to the next one, please.

4 Q. [Mr. Bybee] 19-U. What does it depict,
5 Mr. Frampton?

6 A. Again, this is a driveway at 699.

7 You can see the silt cloth is still in place,
8 and the barrels. The sidewalk is in here. And all this
9 is all heavy rebar type material that they use for
10 building the bridge.

11 Q. All right. And the little decline permitting
12 ingress and egress would be to 693, that sidewalk
13 location; is that not correct?

14 A. That's correct.

15 MR. BYBEE: Let's move to the next one.

16 Q. [Mr. Bybee] Okay. Before we go there, this is
17 February of 2009. Could you have rented your property in
18 that date -- in that month, sir?

19 A. No, sir.

20 Q. And why not?

21 A. I didn't have any access.

22 Q. The next photograph is 19-V. What date did you
23 take this photograph, Mr. Frampton?

24 A. This was March the 4th of 2009.

25 Q. And it depicts the mailbox?

1 A. Yes, sir. Mailbox right here.

2 Q. 699's mailbox. And a reflector is shining right
3 there, isn't it?

4 A. Yes, sir. Right here.

5 Q. And it's also displaying to us the silt fence;
6 is that not correct?

7 A. That's correct.

8 Q. And in front of there is the same sidewalk area
9 and lay-down materials; is that right?

10 A. Yes, sir. It's even got more stuff stacked on
11 the sidewalk.

12 Q. More form boards?

13 A. More form boards on the sidewalk now.

14 Q. Anything else about that photograph?

15 A. You can see the giant crane that they used to
16 get the old piling out and put the new piling in. It's
17 operating just a few feet away from the property.

18 Q. In between the crane and the 699 mailbox, it
19 looks like rebar on the ground. Is that what you see?

20 A. Yes, sir.

21 Q. And that's before they poured the concrete for
22 the new bridge?

23 A. That's correct.

24 Q. In March of 2009, could you have rented your
25 property, sir?

7

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1 A. No, sir.

2 Q. For the same reason. No access; correct?

3 A. That's correct.

4 Q. The next photograph is 19-W. What does it
5 depict, Mr. Frampton?

6 A. That's April 4th, 2009, and it depicts a mess.
7 My driveway to my house going in here, all the barrels,
8 orange netting, road-closed signs, port-a-potty right in
9 front of the driveway to the rental house.

10 This is the box that they're having trouble with
11 and it has rained and this whole thing is just nothing but
12 a quagmire and you -- you couldn't get in or out of there
13 without slosh.

14 Q. There's a puddle in front of the drain.

15 A. Yes, sir.

16 Q. Was the drain functioning at that point?

17 A. No, sir. That drain did not function even after
18 the bridge project was finished.

19 As a matter of fact, just about four months ago
20 they finally sent somebody out there that figured out what
21 was wrong with that drain. Prior to that, all that water
22 off the highway was going onto my property.

23 Q. And they removed another section of concrete by
24 this time; is that correct?

25 A. Yes, sir. I believe so.

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1 Q. So they reinstalled the driveway and then they
2 took it back out?

3 A. Right. I don't -- I don't think this box is at
4 the final resting place yet. You can see it in these
5 photographs. It's still a little bit cattiwhampus, and
6 they were still trying to figure out how to get that set
7 and tied in, and it gave them quite a bit of problems.

8 Q. Now, in the distance you can see the mailbox at
9 699, can you not?

10 A. 699? Yes, sir.

11 It's directly across from -- here's the port-a-
12 potty and here's the mailbox.

13 Q. All right. And the silt fence is still right in
14 front of 699?

15 A. That's correct.

16 MR. BYBEE: Let's move to the next one, please.

17 MR. BROOKER: What is the number of that one?

18 MR. BYBEE: 19 -- I can't read my paralegal's
19 writing.

20 UNIDENTIFIED: X.

21 MR. BYBEE: X. Thank you.

22 THE COURT: X?

23 MR. BYBEE: X. 19-X.

24 Q. [Mr. Bybee] This is depicted -- or taken on
25 what date, Mr. Frampton?

1 A. April 2nd, 2009.

2 Q. And the silt fence is still up?

3 A. That's correct.

4 Q. The mailbox is still showing. The port-a-let is
5 still in place in front of the driveway?

6 A. That's correct.

7 Q. And now there's another kind of a box, for
8 whatever purpose; right?

9 A. Yes, sir, that's correct. All this around here.

10 Q. In the entire month of April of 2009, were you
11 able to rent the property?

12 A. No, sir.

13 Q. And that's because of the lack of access; is
14 that correct?

15 A. Lack of access.

16 Q. 19-Y: what does that depict, Mr. Frampton?

17 A. May 27th, 2009. That's the driveway to 699.

18 There's a SCDOT vehicle parked right in front of
19 the driveway and this is a Cape Romain pickup truck parked
20 right in front of the driveway in the lay-down area there.

21 Q. So you're standing in your -- on your property,
22 in your driveway, looking out?

23 A. That's correct.

24 MR. BYBEE: Let's go to the next one.

25 Q. [Mr. Bybee] 19-Z. May 27th, 2009 photograph;

1 is that correct?

2 A. That's correct.

3 Q. All right. Same day. But this time you're
4 depicting what?

5 A. It's a -- they're getting ready to pour the
6 bridge down here.

7 And this is the staging area, where these huge
8 concrete trucks would come and one Bonnie Yellow
9 [phonetic] would wait right -- wait right in this area.
10 The driveway.

11 You can still see the silt cloth. There's the
12 port-a-potty.

13 And that's what you had to contend with.

14 Q. How did that operation work? What do they do
15 with those big cement trucks?

16 A. I'm not exactly sure, but they had some kind of
17 method of pumping that concrete to the area that they
18 would use to do the rebar and make the forms.

19 They pump that stuff in there and then as soon
20 as this truck is gone another one pulls up. And they only
21 have so long to pump it, because the concrete has got to
22 cure, so they're -- they're moving pretty fast.

23 Q. So they had one concrete truck waiting on
24 another. So what you can't see is another concrete truck
25 waiting on this one?

1 A. That's correct.

2 MR. BYBEE: Let's move to the next one.

3 Q. [Mr. Bybee] 19-AA. This is taken on the same
4 day; is it not?

5 A. May 27th, 2009.

6 Q. And it's taken from what position?

7 A. Standing -- see the mailbox is 699. I'm
8 standing right here, at 693, shooting towards the bridge.

9 Q. Okay. And that's the same port-a-let facility?
10 That's the same sidewalk curb?

11 A. Yes, sir.

12 You can't see it. But from this photograph,
13 it's called Access Port-A-Potty. So I guess I had access.

14 Q. 19-BB, Mr. Frampton. What does that show?

15 A. That's their notice board that Cape Romain --
16 it's Cape Romain I would assume put that up. But it has,
17 as you can see, all the government notices, government
18 regulations, I guess to every hold-harmless document in
19 the world, right next to the 699 mailbox.

20 Q. And the silt fence is still depicted; is that
21 not --

22 A. You can see the silt --

23 Q. -- right?

24 A. -- fence. They've got written on there sixty
25 four feet from wherever they're measuring. And then the

1 silt fence comes out and goes on down.

2 MR. BYBEE: Let's move to the next one, please.

3 Q. [Mr. Bybee] This one is also dated May 27th,
4 2009. Just a farther angle on the same photograph? Or
5 farther away? You're standing back a little bit?

6 A. Yeah. And at this point they've -- I guess they
7 had cleaned the port-a-potty, or did -- for some reason
8 they moved it.

9 And it was my driveway that I come in and out
10 every day, and they moved it right in front of my face
11 coming in and out of the driveway every day.

12 Q. The mailbox at 699 is showing?

13 A. Yes, sir.

14 Q. And the curb is shown?

15 A. Right here is the curb.

16 Q. And the yellow structure to the far left in the
17 photograph, what is that?

18 A. That's a container like you see going down the
19 highway back and forth to the State Ports Authority. I
20 don't know how long this one was, but it's a container
21 that they have there. Shovels and all that. And they
22 just offload that onto the ground, the doors open up, and
23 they lock all their shovels and generators up in there for
24 the night.

25 Q. And that was photograph 19-CC; is that correct?

1 A. That's correct.

2 Q. Now, at this point in time, do they still have
3 to tear out that concrete and curb one more time?

4 A. Yes, sir.

5 Q. So in May of 2009, could you have rented this
6 property to a tenant, sir?

7 A. No, sir.

8 Q. The next photograph I want to show you is 19-DD.
9 What does that depict?

10 A. That's the closed driveway at 699. It's got the
11 silt fence that runs the whole way and then the orange
12 barrier fence is in front of that.

13 Q. And immediately in front of the silt fence, what
14 does that show?

15 A. That's all that gummy, white, ROC-type rock that
16 they have dug this thing out again and keep putting more
17 rock back in there.

18 Q. [Mr. Bybee] All right. Let's move to the next
19 one, please, sir. June 25th, 2009, Exhibit 19-E-E, what
20 does that show us?

21 A. Here again is the driveway in front of 699.
22 Some of their trash bags, those big steel, plastic trash
23 bags full of their stuff, parked up -- laid up in front of
24 the sign.

25 And at this point they've come through and put

1 that -- used that gun that they seed with on the highways.

2 Q. When you say seed with: seed -- planting grass?

3 A. Yes, sir.

4 They planted grass from this area right in here
5 where the 693 starts they -- 699 starts -- takes over,
6 they sprayed that all the way down -- I think all the way
7 down to the bridge. Or at least to the end of the silt
8 fence. When you get these photographs, you'll be able to
9 see. But it's sprayed up all up in -- on the thing up in
10 here.

11 Q. All right. Now, you were standing where on June
12 25th, 2009, when you took this photograph?

13 A. I was in my driveway at 693.

14 Q. You were in 693's driveway?

15 A. Yes, sir.

16 Q. So the asphalt we see to the right in the
17 driveway, that was to 693?

18 A. Yes, sir.

19 Q. Is that correct?

20 A. Yes, sir.

21 Q. In June of 2009, could you rent your property at
22 699 Folly Road?

23 A. No, sir.

24 Q. All right. We're now looking at Plaintiff's
25 Exhibit 19-F-F. What does that depict, Mr. Frampton?

1 A. This is where they installed a permanent
2 guardrail across the front of the property:

3 And the silt cloth is still out --

4 This little green patch here is part of that
5 grass I was telling you that they sprayed above this.

6 The mailbox and the reflector.

7 Here's your guardrail that blocked the whole
8 driveway.

9 Q. The mailbox at 699; is that correct?

10 A. That's right. Right there.

11 Q. And across the way from -- across the street it
12 looks like a large pole. Was that installed as part of
13 the project?

14 A. Yes, sir.

15 That's on the other side of the street. It's
16 one of those giant power poles.

17 Q. And it's hard to see in the display on the
18 screen. And, again, the jury is going to look at these
19 photographs later. What is -- is that fencing right
20 behind your mailbox?

21 A. Yes, sir.

22 That's where the -- that's where the old
23 driveway -- actually, it's hard to see. But that's where
24 the old driveway actually came in right here. The fence
25 stopped at the driveway. So they added this guardrail

1 here. This is about another -- I don't know. After they
2 shortened it, it was about another sixteen or eighteen
3 feet.

4 Q. The next one is 19-G-G. And that's another
5 photograph of the guardrail in front of your 699 property;
6 is that correct?

7 A. Yes, sir.

8 Q. And the silt fence is still there?

9 A. Yeah.

10 This is the edge of the asphalt in the driveway.

11 I --

12 Q. You mean the old asphalt?

13 A. The old asphalt, yeah. That was in the drive
14 area.

15 Q. It doesn't look like there's a lot of activity
16 in front of the -- going on, as far as construction is
17 concerned, at this point in time. Do you recall?

18 A. I still see the moveable barrels that are --
19 separate the lanes of traffic, so it's not -- the bridge
20 is not open. But they probably moved -- they poured in
21 two sections when they poured it. And so right now
22 they're -- the big cranes are sitting on the section that
23 -- the first section that they poured. They're getting
24 ready to pour the second section.

25 Q. What are those moveable barriers made of?

1 A. They're concrete.

2 Q. And what was their purpose? Did you see them in
3 use?

4 A. Oh, yeah.

5 Q. How did you -- how were they used?

6 A. Basically, they were used to divert traffic so
7 that you couldn't have any use of these -- this half of
8 the bridge that they were building here. It kept
9 everything on the other side of that -- of those barriers.

10 Q. And you also had those barricades leading into
11 the driveway areas for 685 and 693 during the prior
12 construction period; is that not correct?

13 A. That's correct.

14 Q. You could physically get to 685 and 693, could
15 you not?

16 A. You could, yes, sir.

17 Q. But of course 699, in July of 2009, is now
18 permanently blocked; is that correct?

19 A. That's correct.

20 Q. Plaintiff's Exhibit 19-H-H. What does that
21 depict, please?

22 A. 699 driveway.

23 Q. Again, the barricade?

24 A. Yeah. You can hardly see it, but here it is
25 right here.

1 Q. And the silt fence is still up?

2 A. The silt fence.

3 They've still got barrels.

4 There's traffic moving towards Charleston.

5 Q. All right, sir. And that's July 8th of --

6 A. July 8th --

7 Q. -- 2009; is that correct?

8 A. That's correct.

9 Q. The next one is July 23rd, 2009. Where were you
10 standing when you took Plaintiff's Exhibit 19-I-I?

11 A. I'm standing right up in front of my driveway at
12 693 -- that's where my mailbox is -- looking towards the
13 bridge.

14 Q. All right. And the grass that they've seeded is
15 now overgrown --

16 A. Yes, sir, it's grown.

17 Q. -- n front of the silt fence.

18 And the silt fence is in a bit of disrepair at
19 that point?

20 A. Yes, sir.

21 Q. All right. And the orange cones: what were the
22 purposes of those orange-and-white cones?

23 A. They were barrier -- just barriers sitting in
24 front of there, in front of the -- I believe this is at
25 the time period where they started having some trouble

1 with some sinkholes, and I think those -- they put those
2 there to keep anybody from falling in the sinkholes.

3 Q. All right. July 23rd, 2009, is the date of this
4 photograph; is that correct?

5 A. Yes, sir.

6 Q. Could you have rented your property at 699 Folly
7 Road in the month of July of 2009?

8 A. No, sir.

9 Q. What does that depict?

10 A. This actually is the photograph that my wife
11 doesn't like because she thinks I ought to have been
12 wearing something better than my yard clothes. But I'm
13 standing in the -- standing in one of the sinkholes that
14 occurred. This was either the second or third time. If
15 you come out of my driveway at 693 -- and this is right in
16 front of the driveway here at 699.

17 Q. Okay. This is part of the sinkholes that you
18 keep telling us about?

19 A. That's correct.

20 Q. Can you estimate the number of times they had to
21 deal with that sinkhole --

22 A. They had a lot of people looking in that
23 sinkhole a lot of times. They had -- they called
24 everybody at SCE&G Gas, everybody in there, and they had
25 these big I guess head-scratching parties. But they

1 filled that hole at least three, if not four, times.

2 And there was a curb along here. They excavated
3 it again to see if they could find out what was causing
4 it, but to my knowledge they never figured it out.

5 Q. So do you have knowledge as to whether this is
6 the first time the sinkhole came about, the second time,
7 the third time, or what?

8 A. I think this was -- I'm pretty sure this was the
9 second time, if not the third time. I can't be a hundred
10 percent sure. But they had filled it. And that's why I
11 got in it, because they had filled it a few days before
12 and then all of a sudden this thing reappeared again. So
13 that's why I got in it, to show that it was almost waist
14 deep and was a big hole.

15 Q. All right. And that's August 1st of 2009?

16 A. That's correct.

17 Q. Now, the next photograph is ten days later; is
18 that correct?

19 A. That's correct. It was --

20 Q. 19-K-K. Is that correct?

21 A. August the 11th. Yes, sir.

22 Q. And we see the end of the guardrail.

23 A. That's correct.

24 Q. And then clumps of dirt. What are those clumps
25 of dirt?

1 A. Well, that's where they excavated this whole
2 area again after you saw me. I was standing right in here
3 somewhere. But that's where they excavated it and filled
4 it back in.

5 And they just kind of -- I mean, they didn't go
6 in there and rake it off or anything. They just kind of
7 left big old hunks of stuff in the driveway.

8 Q. All right. So Plaintiff's Exhibit 19-K-K
9 depicts the same thing or the same area, although a
10 different day, as Plaintiff's Exhibit 19-J-J?

11 A. That's correct. Ten days later.

12 Q. Now, this photograph is dated August 19th of
13 2009 and it's Plaintiff's Exhibit 19-L-L. Describe to me
14 what is depicted here.

15 A. This is about a week or so later and they had
16 excavated this again. And that's the fill dirt that they
17 put back in that area.

18 Q. All right. Now, beyond -- show me the mailbox
19 up on the screen.

20 A. The mailbox.

21 Q. And beyond the mailbox is grass; is that
22 correct?

23 A. That's right. That's where I told you they used
24 that chopped stuff earlier.

25 That was screen from the earlier. The rest of

1 this had all been taken out again.

2 Q. All right. Now, did they come back and spray
3 this area with grass after August 19th --

4 A. They did eventually come back. I don't remember
5 what date it was, but they did eventually come back and
6 put grass in there.

7 Q. And immediately to the left of this photograph
8 is the curb, the four-inch curb; is that not correct?

9 A. That's correct.

10 Q. In the month of August of 2009, could you have
11 rented 699 Folly Road?

12 A. No, sir.

13 Q. Now, I'm going to jump ahead in time. This is
14 Plaintiff's Exhibit 19-M-M and it's dated November 11th of
15 2009. So before I get there: we're in the month of
16 September of 2009. Could you have rented 699 Folly Road?

17 A. No, sir.

18 Q. And why not?

19 A. I didn't have any access to it.

20 Q. Okay. Now, what does the photograph at the --
21 November 11th, 2009, display or depict? And that's
22 Exhibit 19-M-M.

23 A. That's the -- basically, what I was left with
24 was the part of the old -- this would have been part of
25 the old parking area. And all this that you see, you'll

1 see in these photographs, is just a quagmire where that
2 water was -- every time it rained -- we hadn't had any
3 rain this year, but that particular year was a wet year.
4 And it would come over there like Niagra Falls and it just
5 washed everything just out of there, all the topsoil,
6 everything.

7 Q. All right. Now, the road is open by this point;
8 is that correct?

9 A. That's correct.

10 Q. The road leading to the bridge is open; is that
11 correct?

12 A. I believe so.

13 Q. The new bridge is open?

14 A. Yes, sir.

15 Q. And do you recall the testimony of Mr. Phinney
16 with respect to his agreement to provide an asphalt
17 transition into the property --

18 A. That's correct.

19 Q. -- at this time in November 11th of 2009 was
20 that asphalt partition, designed to make it weatherproof,
21 was it installed yet?

22 A. No, sir.

23 Q. But at this point in time, you understood they
24 were going to do that?

25 A. Yes, sir.

1 Q. What was -- did you cause any delay in them
2 getting that accomplished?

3 A. No, sir.

4 Q. But how long did you wait once they told you
5 they were going to install that asphalt transition?

6 A. It was several months.

7 Q. In November of --

8 MR. BYBEE: Let's see. We've got a few more to
9 go --

10 Q. [Mr. Bybee] Plaintiff's Exhibit 19-N-N, dated
11 November 11th, 2009, what is that depicting?

12 A. This was another example of what I was dealing
13 with with the water runoff. When you see this brook,
14 you'll be able to see that it was coming so fast and hard
15 through there that it had foam bubbles that you'd see,
16 when water rushes, that just gutted everything out. You
17 can see in these pictures.

18 Q. Was access to 699 possible at this point?

19 A. No, sir.

20 Q. Let's move to the next photograph, sir.

21 This one is Plaintiff's Exhibit 19-O-O. What
22 does it depict?

23 A. Well, that's actually depicting what's going to
24 be the new driveway. This is a row of ligustrum hedges
25 that have been there for, I don't know, forty or more

1 years, that actually always separated these properties.
2 This is ligustrum hedges. That's 693.

3 And this is just some privet hedge and things
4 that eventually was going to have to be pruned out to tie
5 in the driveway.

6 This actually would be the new drive area.

7 Q. All right, sir. In November of 2009, could you
8 have rented this property to a tenant? 699 Folly Road.

9 A. No, sir.

10 Q. And now in December -- and this is 12/21/2009.
11 Is that correct, Mr. Frampton?

12 A. That's correct.

13 Q. What does this photograph depict?

14 A. It's the -- basically, the ROC rock compound
15 that's in front of the driveway there at 699.

16 Q. Are those ruts?

17 A. Yes, sir, those are all ruts that's been washed
18 out in there.

19 Q. All right. And that's the purpose of the
20 asphalt transition, is to allow one to get an all-weather
21 condition; is that correct?

22 A. That's right. When you get these pictures,
23 y'all will be able to see how the channel washed out, too,
24 in there. That's what I was taking.

25 Q. Where did the water go?

1 A. The water went down the driveway and in the
2 creek.

3 Q. That's Plaintiff's Exhibit 19-P-P; is that
4 correct?

5 A. That's correct.

6 Q. And then Plaintiff's Exhibit 19-Q-Q, 12/21/2009,
7 does that depict the same ruts or different ruts?

8 A. That's actually some of the -- some of the same
9 ruts, just kind of washed down. This stuff has actually
10 washed down into the driveway now.

11 Q. All right. In the month of December of 2009,
12 could you rent the property at 699 Folly Road?

13 A. No, sir.

14 Q. The next photograph is Plaintiff's Exhibit
15 19-R-R. This is in January of 2010. And that is another
16 photograph of the rutting; is that correct?

17 A. That's right.

18 Basically, this is showing -- this is where the
19 new driveway is going to be. But it's just showing that
20 all that stuff that they put in front of it is just washed
21 down through there.

22 Q. Okay. And that's photograph 19-R-R?

23 A. That's correct.

24 Q. Next is photograph 19-S-S. And that's also the
25 same date, January 4th, 2010; is that correct?

1 A. That's correct.

2 Q. What does that photograph depict?

3 A. It's showing the same. Front of the driveway
4 basically hadn't been finished yet.

5 Q. All right, sir. The next photograph is going to
6 be Plaintiff's Exhibit T-T. What does that photograph
7 depict?

8 A. Ta-dah! It's the new driveway all tied in and
9 ready to go on January the 24th. I actually was out of
10 town. My wife had to supervise this. She did a good job.

11 Q. All right. Now, you did some improvements on
12 the property prior to this driveway being asphalted as of
13 January 24th, 2010, did you not?

14 A. Yes, sir.

15 Q. And the fence area at 699, which has not got a
16 number -- that says 699. That's new fence; is that
17 correct?

18 A. Yes, sir. Put out the old fence for the new.

19 Q. If I were standing on the other side of the
20 fence, it would be blocking a view of what?

21 A. The guardrail.

22 Q. The guardrail is still there; right?

23 A. Yes, sir.

24 Q. All right. On the street side of the asphalt,
25 they've finally got the concrete sidewalk and the curbing

1 situation situated; is that not correct?

2 A. Yes, sir.

3 Q. In essence, what they did was relocate the old
4 driveway and combined it with 693's driveway?

5 A. That's right.

6 Q. Just like Mr. Phinney suggested back in 2005?

7 A. That's correct.

8 Q. So as of January 24th, 2010, was there any
9 physical impediment to your attempting to rent the
10 property?

11 A. No, sir.

12 Q. And now we're looking at Plaintiff's Exhibit
13 19-U-U dated 1/24/2010. It's basically showing us the
14 same thing except we've got a little bit of the sidewalk
15 in this photograph; is that correct?

16 A. Yes, sir.

17 Q. Now, how long did it take for you to get a
18 tenant into the property?

19 A. I think it was March.

20 We had some work to do, of course, but I think
21 it was the first of March we had a tenant in. Sometime
22 around the first of March.

23 Q. In your experience, was that an unusually long
24 time to advertise and rent 699? Or any parcel?

25 A. No. Because, I mean, they probably rented it in

1 February and you wouldn't move in until the next month.

2 Wherever you're coming from, you would finish
3 your rent out and you would move in the next month. So
4 that's typical of this property. Usually a one-month
5 turnover would be the maximum that we ever had.

6 Q. Did you hire somebody to prepare the property,
7 at least the side of your property, for the asphalt-
8 transition area?

9 A. I hired Jerry Poore Landscape Contractors.

10 [Whereupon, Mr. Bybee and Mr. McDonald confer]

11 [Whereupon, Mr. Bybee and Mr. Brooker confer]

12 MR. BYBEE: Your Honor, we're going to proffer a
13 series of deeds. They have been certified. Counsel
14 advises he does not object to them.

15 THE COURT: Without objection?

16 MR. BROOKER: No objection, Your Honor.

17 MR. BYBEE: It'll just take me a minute to
18 publish these into evidence, Judge.

19 THE COURT: All right. And is this the actual
20 Plaintiff's exhibit?

21 MR. BYBEE: That was your copy, Exhibit --

22 THE COURT: All right. That's fine. I just --
23 I just wanted to make sure I didn't have what the
24 clerk -- what the court reporter is supposed to have.

25 MR. BYBEE: All right. And just for the record,

1 I now -- I think we entered all the photographs but --

2 THE COURT: 19 is in evidence.

3 MR. BYBEE: Thank you, Your Honor.

4 THE COURT: Okay. And now what's coming next?

5 MR. BYBEE: A series of deeds.

6 THE COURT: All right.

7 Q. [Mr. Bybee] Mr. Frampton, I'm going to show you
8 a series of deeds. I think you've already given testimony
9 about all of these.

10 THE COURT: Are those all marked? Premarked?

11 MR. BYBEE: They are premarked, Your Honor.

12 THE COURT: What is -- the number is what?

13 MR. BYBEE: Yes, sir. The first one is
14 Plaintiff's Exhibit 12, and that is from Jean Jerdon
15 [phonetic] Frampton for a half interest to Henry W.
16 Frampton, III.

17 Q. [Mr. Bybee] That is you; is that correct?

18 A. That's correct.

19 Q. This is your mother's half-interest deed to you;
20 is that correct?

21 A. That's correct.

22 Q. And what year was that?

23 A. This was 2002.

24 Q. All right. And she was still alive, of course,
25 at that point?

1 A. She was.

2 Q. And then --

3 MR. BYBEE: So we would move Plaintiff's Exhibit
4 12 into evidence, Your Honor.

5 THE COURT: All right.

6 [Whereupon, Plaintiff's Exhibit Number 12 is
7 admitted into evidence by the Court]

8 Q. [Mr. Bybee] And about the same time -- I want
9 to ask you to identify Plaintiff's Exhibit 13 again. Your
10 mother is granting to you another half interest into the
11 property; is that correct?

12 A. That's correct.

13 Q. And that's about the same period of time; is
14 that not correct?

15 A. Yes, sir.

16 MR. BYBEE: We move Plaintiff's Exhibit 13 into
17 evidence, Your Honor.

18 THE COURT: All right.

19 [Whereupon, Plaintiff's Exhibit Number 13 is
20 admitted into evidence by the Court]

21 Q. [Mr. Bybee] Now, Plaintiff's Exhibit 14 is a
22 deed from you to Dale; is that correct?

23 A. That's correct.

24 Q. And what are you deeding to Dale?

25 A. Our residence.

1 Q. The residence at 693; is that correct?

2 A. That's correct.

3 Q. Your mother had deeded both 699 and 693 to you
4 by those prior deeds; is that correct?

5 A. That's correct.

6 Q. I know you're getting a little bit emotional
7 here.

8 When did your mom die?

9 A. She died in 2004.

10 Q. Okay. And up until that period of time I think
11 you previously testified you couldn't subdivide the
12 property --

13 A. That's correct.

14 Q. -- because she was going to be living her life
15 estate through that; is that correct?

16 A. [Indicates affirmatively]

17 Q. Now, why did you give this deed to Dale?

18 A. It was a Christmas present.

19 Q. What year did you give the residence, the
20 residential property, to Dale?

21 A. 2005.

22 Q. At that time you still owned 685 outright, did
23 you not?

24 A. That's correct.

25 MR. BYBEE: We would move Plaintiff's Exhibit 14

1 into evidence.

2 THE COURT: All right. It's in evidence.

3 [Whereupon, Plaintiff's Exhibit Number 14 is
4 admitted into evidence by the Court]

5 MR. BYBEE: Do you need some more water, or are
6 you all right?

7 THE WITNESS: No. I'm all right.

8 Q. [Mr. Bybee] Thereafter, you and Dale exchanged
9 interest in the residential property and the 685 property;
10 is that correct?

11 A. That's correct.

12 Q. She gave you half an interest in the residential
13 property and she gave you -- excuse me -- you gave -- she
14 gave you half an interest in the residential property --

15 A. Right.

16 Q. -- and you gave her half an interest in the 685
17 property?

18 A. Right.

19 Q. And why did y'all do that?

20 A. We did that as part of the estate planning.

21 Q. That was your estate plan?

22 A. Yes, sir.

23 Q. All right. And when did you do that?

24 A. We did that in --

25 Q. If you need to look at the deed --

1 A. '06, I believe.

2 Q. Now, let's take a look at the document..

3 [Whereupon, the witness reviews documents]

4 Q. [Mr. Bybee] This is after you gave Dale her
5 interest at Christmas in '08, wasn't it?

6 A. Well, it was '09.

7 Q. All right. So in '09 you swapped --

8 A. Right.

9 Q. -- half interest out?

10 MR. BYBEE: And so we would move into -- we
11 would move into evidence Plaintiff's Exhibit 15, I
12 assume with no objection, Your Honor.

13 [Whereupon, Plaintiff's Exhibit Number 15 is
14 admitted into evidence by the Court]

15 Q. [Mr. Bybee] And then the other part of the
16 transaction is Plaintiff's Exhibit 16; is that not
17 correct?

18 A. That's correct.

19 Q. All right. One other clean-up item here.
20 Plaintiff's Exhibit 18 -- this is not in chronological
21 order.

22 MR. BYBEE: Let me do this. Plaintiff's Exhibit
23 16 moved into evidence, Your Honor.

24 THE COURT: In evidence.

25 MR. BYBEE: Thank you, Your Honor.

1 [Whereupon, Plaintiff's Exhibit Number 18 is
2 admitted into evidence by the Court]

3 Q. [Mr. Bybee] Plaintiff's Exhibit 18 -- and this
4 is not in chronological order. But what is that?

5 A. It's the -- a plat of the property showing the
6 residence at 693 and the rental property at 699.

7 Q. And this is when you subdivided the properties?

8 A. That's correct.

9 Q. And what's the date of the absolute surveying
10 plat?

11 A. September 22nd, 2005.

12 Q. 2005.

13 MR. BYBEE: Move that into evidence, Your Honor.

14 THE COURT: Any objection?

15 MR. BROOKER: No objection.

16 THE COURT: All right.

17 [Whereupon, Plaintiff's Exhibit Number 18 is
18 admitted into evidence by the Court]

19 Q. [Mr. Bybee] The 685 property is currently
20 rented as a residential structure; is that correct?

21 A. That's correct.

22 Q. Yesterday Mr. Phinney testified about in 2005 he
23 wanted permission to tie the 693 and 699 driveways
24 together.

25 A. Yes, sir.

1 Q. And you refused that?

2 A. That's correct.

3 Q. Why?

4 A. Well, I refused it because the property has
5 always been there as a rental property, separate property,
6 and it has always been a part of my wife and I's plan to
7 subdivide that property, I testified yesterday, in case we
8 needed it for medical reasons or help a child or whatever.
9 And, in addition, he wanted to cut off my right arm. So
10 I'm tied to this property. That's why I'm emotional.
11 It's family property.

12 Q. Would 699 be harder to rent or sell with access
13 from 693?

14 A. Yeah.

15 It would be harder to rent and harder to sell.
16 You wouldn't have a dedicated driveway.

17 Q. And would 693, your residence, if you ever
18 elected to sell that, would access -- with access
19 connected between 699 and 693, would 693 be harder to
20 sell?

21 A. Yeah.

22 You wouldn't have a dedicated driveway. The
23 driveway is valuable.

24 Q. And did you want tenants at 699 to use your
25 driveway at 693 to park and come in and out?

1 A. No.

2 It wasn't -- number one, there isn't room.

3 It would be a tremendous liability having a
4 tenant park there. You would have to have all kind of
5 different documents.

6 You would have to have a designated space. We
7 only got three spaces ourselves, and from time to time we
8 do have somebody come visit us, so there wasn't any area
9 in there just to give away.

10 Plus, that's my wife's driveway.

11 Q. At that time it was?

12 A. That's right.

13 Q. And I believe you testified yesterday that you
14 never allowed tenants to drive into 693 or to park --

15 A. No, sir.

16 Q. -- at 693.

17 I'm going to show you, again, Plaintiff's
18 Exhibit 10.

19 MR. BYBEE: And I'm going to try to set this up,
20 both of us -- it won't take very long -- for my
21 questions.

22 Q. [Mr. Bybee] Can you see that, Hal?

23 A. Yes, sir.

24 MR. BYBEE: Can the jury see it? All right.

25 Q. [Mr. Bybee] That photograph depicts some aerial

1 photographs depicting the property after the bridge
2 replacement job was complete; is that correct?

3 A. Yes, sir.

4 Q. Now, you can't see the driveway. But the
5 driveway to 699, the restored and relocated driveway, is
6 in place; is that --

7 A. Yes, sir.

8 Q. -- correct?

9 A. Yes, sir.

10 Q. And, also, there's a concrete median that's been
11 installed; is that not correct?

12 A. Yes, sir.

13 Q. Tell me how a tenant leaving the property and
14 wanting to go to Charleston legally must -- what path does
15 he follow?

16 A. He's got to come out, go across the bridge and
17 then, depending on the time of day, he's got to find a
18 place to pull in a service station or Bojangle's or go
19 down to the next stoplight, or whatever, to turn around
20 and get headed the other way.

21 Q. You make that movement when you have to go to
22 Charleston from 693; is that not correct?

23 A. Every day.

24 Q. And that's because you can't legally turn left
25 to go directly to Charleston?

1 A. That's correct.

2 Q. And you've got the median barricading you from
3 doing so?

4 A. That's correct.

5 MR. BROOKER: Your Honor, can I move to strike
6 that question and answer? I mean, he's talking about
7 traffic law, about making U-turns -- but he's not
8 qualified to speak to it.

9 THE COURT: Well, I'll let you -- I'm going -- I
10 overrule your objection at this point.

11 I don't know. I'll let you bring it out, or
12 whatever you want to, on cross-examination.

13 MR. BROOKER: Thank you.

14 THE COURT: But at this point I don't think it's
15 objectionable.

16 Q. [Mr. Bybee] Now, in order to estimate damages,
17 you've engaged an appraiser in this case; is that not
18 correct?

19 A. That's correct.

20 Q. That's Mr. Tommy Hartnett; is that not correct?

21 A. That's correct.

22 MR. BYBEE: Your Honor, a moment of indulgence,
23 please.

24 Your Honor, may -- I have a matter I would like
25 to take up out of the presence of the jury.

1 THE COURT: Members of the jury panel, I need
2 you to go to the jury room, please.

3 [Whereupon, the jury exits the courtroom at
4 11:16 a.m.]

5 THE COURT: Yes, sir. What is it?

6 MR. BYBEE: That constitutes the factual
7 presentation on the facts that are predicated for
8 just compensation, but all of the facts that we intend
9 to offer on the taking.

10 The next evidence we would offer into the record
11 would be concerning damages, and Your Honor has ruled
12 that you're going to make a ruling as to damages, and
13 I want to make --

14 THE COURT: No. Not as to damages.

15 MR. BYBEE: I mean, excuse me. As to a taking.

16 THE COURT: Taking.

17 MR. BYBEE: I apologize, Judge.

18 And I wanted to let the Court understand and
19 know, before I move forward to damages -- because a
20 way for we -- that we can proceed is for me to rest on
21 the taking and then come back after you've ruled on
22 the taking and put in the damages. But I don't want
23 to get mouse-trapped and have them argue I didn't show
24 it was damaged.

25 Do you see what I'm saying, sir?

1 THE COURT: Well, I do in some ways and in some
2 ways I don't. I don't know. Are you asking me to
3 rule? I mean, are you asking me to rule anything now?

4 MR. BYBEE: Here's what I would propose as a
5 procedure, Judge. Those are my facts on the taking.
6 Mr. Brooker wants to contest the taking issue so --
7 but I would -- a procedure I would suggest is for me
8 to stop testimony, let him put up his case on his
9 defense to the taking and then if you rule there is a
10 taking, then I would move forward on my damages case
11 as to both the temporary taking -- and I know Your
12 Honor is questioning the median damages. But that's
13 what I would propose, to put all of that evidence into
14 the record.

15 THE COURT: What do you want to say?

16 MR. BROOKER: I don't have a choice one way or
17 the other.

18 It does sound like it would speed things along,
19 Your Honor.

20 THE COURT: All right.

21 MR. BROOKER: Of course, I do have cross-
22 examination.

23 THE COURT: Well, I know that. I know that.
24 I'm just trying to -- I don't want to advise anybody
25 or whatever.

1 All right. What I'm going to do is we'll come
2 back and talk about this, make sure I understand what
3 you're -- what your proposal is or how we're going to
4 proceed.

5 I'm going to let the jury have their morning
6 break and y'all have y'all's morning break, and me
7 have my morning break and all, for about ten minutes.

8 MR. BYBEE: Thank you.

9 THE COURT: So we'll take about a ten-minute
10 break. Okay?

11 [Whereupon, a recess is taken from 11:25 a.m. to
12 11:34 a.m.]

13 THE COURT: All right. We'll proceed like y'all
14 agreed on.

15 MR. BYBEE: Thank you, Your Honor.

16 THE COURT: All right. If I understand it.

17 MR. BYBEE: All right. Just let me make it as
18 clear as I can, Your Honor.

19 THE COURT: Well, they're coming in now. That's
20 all right.

21 [Whereupon, the jury enters the courtroom at
22 11:34 a.m.]

23 THE BAILIFF: All jurors are seated, Your Honor.

24 THE COURT: All right. Now we're through with
25 your examination, direct examination, at least at this

1 point, of Mr. Frampton --

2 MR. BYBEE: Yes, Your Honor.

3 THE COURT: -- so we'll switch now to the other
4 side, then.

5 Okay. Go ahead.

6 MR. BYBEE: As to all questions related to the
7 taking --

8 THE COURT: Okay. Go ahead.

9 MR. BYBEE: -- to recall --

10 THE COURT: All right.

11 MR. BROOKER: I'm Beach Brooker, as you know.
12 We've met before in depositions and some motions in
13 this case.

14 CROSS-EXAMINATION

15 BY MR. BROOKER:

16 Q. It's no fun living next to a major highway
17 construction project, is it, for a year or so?

18 THE COURT: Keep your voice up. I'm having a
19 hard time hearing you. I'm getting hard of hearing,
20 Mr. Brooker, so --

21 Q. [Mr. Brooker] Okay. I was just kind of -- it's
22 not -- it's not any fun living next to a major bridge
23 construction project, is it, Mr. Frampton?

24 A. I wouldn't consider it fun, no, sir.

25 Q. Well, let me just start off by just sort of

1 turning this whole story into a narrative of beginning
2 when you first became aware of this guardrail issue. You
3 went out on the street in front of your property. You saw
4 Mr. Phinney -- and I'm taking all of this from your
5 deposition --

6 A. No, sir, that's -- that's not correct.

7 I didn't go out on -- I didn't go out on the
8 street in front of my property. Mr. Phinney came down
9 into my property. I met him on my property.

10 Q. Okay. And what did y'all do?

11 A. What did we do?

12 Q. Yes.

13 A. Mr. Phinney -- we shook hands. I knew Mr.
14 Phinney from before. And I looked out the window and saw
15 Mr. Phinney out there. And I went out, greeted him, and
16 he proceeded to pull the plans out, put them on the back
17 of the car, and basically was there to tell me that they
18 were going to put this permanent guardrail in that I had
19 no idea that they were going to put this guardrail in.
20 And so he proceeded to tell me that.

21 And he was pretty much taken back as much as me,
22 because he thought somebody before him had come to tell me
23 that there was going to be a guardrail there.

24 But that's what happened when Mr. Phinney came.

25 Q. About the time that these highway plans were

1 created, and at the time that you spoke to Mr. Phinney on
2 this occasion, the properties at 693 and 699 were all one
3 tax-map parcel just having two structures on it, one being
4 the rental house and one being your house?

5 A. That's correct.

6 Q. So following your meeting with Mr. Phinney and
7 viewing the plans showing that the guardrail would come
8 across the -- from the bridge in front of the rental
9 house, and at least partially across the front of the
10 existing driveway to the rental house, you then consulted
11 with Mr. Bybee? You went to retain an attorney; is that
12 correct?

13 A. That's correct.

14 Q. And was it Mr. Bybee --

15 MR. BYBEE: Objection.

16 MR. BROOKER: I'm not trying to get in what they
17 discussed, Your Honor.

18 I'm just -- well, I'll just strike that
19 question, if you --

20 Q. [Mr. Brooker] But after that time, then you
21 decided to subdivide the property so that the rental house
22 parcel was a separate piece of property?

23 A. No, sir. I had decided to subdivide the
24 property way in advance of that.

25 That property had always been stand-alone. And

1 my mother still had life interest in that. But my wife
2 and I remodeled the house that I grew up in and when we
3 made a decision to spend our life savings doing that, our
4 fallback was the little house on the road. And that's
5 always been our desire, was to have that put in a separate
6 tax map.

7 Q. So the timing was just a coincidence?

8 A. The timing was like anything else: you mean to
9 do something and all of a sudden you wake up one day and
10 realize it's time to do it. And that was -- it was time
11 to do it then.

12 Q. And after this -- after you had gone to the -- I
13 guess it was the county zoning -- County Planning
14 Commission or whatever, and gotten permission to subdivide
15 it, and that is when Mr. Bybee wrote to mister -- to the
16 Department saying that this is now a separate parcel and
17 it's landlocked?

18 A. I'm not exactly sure what Mr. Bybee's
19 correspondence were but --

20 Q. But even after retaining Mr. Bybee, you and --
21 you, he, and Mr. Phinney were negotiating this driveway
22 issue as to the 699 creek house; is that correct?

23 A. Well, I wouldn't really call it negotiating. It
24 was a period from '05 to '10 before we got the driveway
25 back.

1 I asked Mr. Phinney many times what the status
2 was on getting the driveway back and he couldn't ever give
3 me an update. So after the initial visit, we really
4 didn't have a whole lot going on with Mr. Phinney. He did
5 it one time, tried to get them to reduce the guardrail,
6 and they told him no.

7 But to my knowledge, from the time he came in
8 '05 until they did reduce the guardrail, the driveway was
9 closed permanent. It was a permanent closing of the
10 driveway.

11 Q. Okay. But he did present to you this plan about
12 T-ing off right at the entrance of your residential
13 driveway so that a service drive would go behind this
14 proposed guardrail to get to the existing --

15 A. Well --

16 Q. -- parking area of the --

17 A. -- I -- I wouldn't really call it a proposal.
18 It was a thumb print on where they were supposed to put
19 some asphalt for me to park.

20 But I didn't get anything from him saying, you
21 know, this is -- this is what I'm proposing. It was just
22 a plan sheet with a dot on it. It didn't have any grades
23 or any of that -- there wasn't any designation. It was
24 just a thumb print on a piece of paper.

25 Q. But there wasn't any reason to produce detailed

1 construction plans, until he got your permission, because
2 it was your land behind that guardrail?

3 A. Well, I certainly couldn't even negotiate with
4 him until I got a detailed presentation of what he
5 proposed to do. I never received that.

6 Q. But you never -- you never agreed to such a --
7 and I think you testified in your direct examination that
8 you wouldn't consider that because it was two different
9 parcels?

10 A. Well, I didn't consider that at the time. But I
11 never was given any specific proposal here's -- this is
12 what we want to do.

13 Q. So then what proceeded from that point was that
14 the Department -- well, let me see. So what proceeded
15 from that point, then, is Mr. Phinney goes back and talks
16 to the highway design engineers and finds out that the
17 AASHTO regulations would permit a shorter guardrail so
18 that it would actually leave open some access into the 699
19 property?

20 A. No. It was four years later.

21 Q. And then somehow Mr. Phinney, or someone
22 representing the Department, must have agreed to pave a
23 brand new driveway into six -- on 699; is that correct?

24 A. They didn't give me a brand-new driveway. The
25 guys in the maintenance department did a nice job of

1 patching that driveway up. And the contractor had gone.
2 I don't -- still don't have a driveway in there that's
3 like a Wal Mart parking lot that's been all excavated and
4 packed and asphalt. These guys had filled potholes going
5 down the highway. They came in and did it. And they did
6 a nice job of it.

7 But it was -- it's not a professional driveway.
8 It's a patch job. It works fine, but, you know, it's not
9 a nice brand-new hundred-percent professional driveway.

10 Q. But it's an asphalt driveway, it's not --

11 A. That's correct.

12 Q. -- an insubstantial piece of work?

13 A. Well, you'll have to come see for yourself.

14 Q. Okay. And the reason that -- I've been told
15 that Cape Romain, who is the bridge contractors, were
16 expecting that they would do that work under their
17 contract but they didn't because you and Mr. Phinney were
18 still negotiating and they didn't have your permission to
19 enter.

20 A. Well, according to Mr. Phinney -- conversation I
21 had with Mr. Phinney, he didn't have any negotiations
22 going on with anybody, to get the guardrail, until late in
23 2009.

24 Any time I asked Mr. Phinney about the driveway,
25 it was out of his hands, there was somebody higher up that

1 had to give him permission to do anything to make it
2 right.

3 Q. Okay. But once that was cleared, then he still
4 had to get your permission to go onto your property; is
5 that correct? And that's when --

6 A. In two thousand -- in two thousand --

7 Q. -- and that's when he approached you --

8 A. In 2009, once they shortened the guardrail, I
9 was happy to give him permission.

10 Q. Okay. And then they proceeded to do the work
11 and it was completed in January of 2010?

12 A. That's correct.

13 Q. That's not -- that's not an unusual amount of
14 time to build a driveway, is it?

15 A. Well, you had five years to figure it out.

16 Q. But the figuring it out -- part of the process
17 of figuring it out, that's my point, is getting your
18 permission to do it.

19 A. Well, I didn't have any -- what was I going to
20 give him permission to do? I didn't have a proposal. He
21 didn't get the proposal until late 2009. Once that was on
22 the table, we were able to put our heads together and
23 figure out what was going to be done to give us a driveway
24 back.

25 Q. Okay. What I have in your -- in your

1 deposition, Mr. Frampton, you said -- I think I've written
2 down an exact quote of yours: they had to put a new
3 curb-cut in; they didn't have room to put two curb-cuts in
4 so they put a giant driveway so both the properties were
5 accessible and once they got completed --

6 THE COURT: I'm having a hard time hearing what
7 you're reading.

8 Q. [Mr. Brooker] It's a -- the sentence is: and
9 they didn't have room to put two curb-cuts in so they put
10 a giant driveway so both properties were accessible and
11 once they got completed -- that completed, you know, it
12 was fine.

13 So things are fine now? There's no -- there's
14 no problem --

15 A. That's correct.

16 Q. -- with access to --

17 A. That's correct.

18 Q. -- 699?

19 And there's no ongoing devaluation of your
20 property as a result of any of this driveway negotiation
21 in any of the construction work out in front of 699
22 that --

23 A. I -- I can't testify to the valuation.

24 I have an appraiser, that's professional and
25 unbiased, that would -- I'm not qualified to do that, so

1 that's --

2 Q. Well, let's -- let's -- don't phrase it, then,
3 in terms of devaluation. You don't -- there's no -- you
4 don't consider there any ongoing harm to -- at this point
5 in time to --

6 A. To 699?

7 Q. -- to 699?

8 A. We have a permanent raised median in front of
9 the property.

10 Q. And that would be the only feature that could --
11 you would argue would devalue the property; is that
12 correct?

13 A. I guess you would say that.

14 Q. Greg Berkey, he was the last tenant that you had
15 before he -- before the end of the project and before it
16 became vacant; is that correct?

17 A. That's correct.

18 Q. Let me at this time -- let me get the leases,
19 because I'm going to enter those.

20 MR. BROOKER: I need some exhibits marked as 1
21 and 2, if you could.

22 [Whereupon, Defendant's Exhibit Number 1 is
23 marked by the court reporter]

24 [Whereupon, Defendant's Exhibit Number 2 is
25 marked by the court reporter]

1 Q. [Mr. Brooker] I'm going to hand you these,
2 Mr. Frampton. Can you identify the first document I sent
3 up?

4 A. Yes. A lease at 699 Folly Road that began on
5 the 14th day of June.

6 Q. And who's that with?

7 A. Greg Berkey.

8 THE COURT: 16th -- 14th day of June. What
9 year?

10 THE WITNESS: 2008.

11 THE COURT: 8?

12 THE WITNESS: That's correct.

13 Q. [Mr. Brooker] And what is the term of that
14 lease? When does it begin and end, Mr. Frampton?

15 A. It begins on the 14th of June and ends on the
16 31st of July, 2009.

17 Q. All right. Then Mr. Frampton [sic] didn't honor
18 his entire lease period, did he?

19 THE COURT: Who did you mean? Frampton?

20 MR. BROOKER: I'm sorry.

21 Q. [Mr. Brooker] Mr. Berkey did not honor the
22 entire lease, did he?

23 A. He did not.

24 Q. And when did he move out? Do you recall?

25 A. He left in late October of 2008.

1 Q. And late October of 2008.

2 And so until July 31st, 2009, under the original
3 lease that would have taken you into -- pretty well into
4 this bridge construction period, wouldn't it?

5 A. That's correct.

6 Q. And when he breached the lease, you didn't
7 insist that he continue paying rent for the remainder of
8 the lease term, did you?

9 A. Mr. Berkey called me over to -- I was in my
10 driveway and he called me over and told me that he had had
11 it, he couldn't take it anymore, that every time he tried
12 to get in or out of his driveway that it was blocked, he
13 had to have somebody move it, and he was leaving.

14 I said, Mr. Berkey, if you need me to help you
15 on this rent and reduce the rent some, anything I can do
16 to help you to stay, I'll be glad to help you to stay.

17 And he told me at that time he just couldn't
18 take it anymore, and that was the end of that. He said it
19 was just -- he couldn't handle it.

20 Q. Well, let's get into that, Mr. Frampton. You've
21 -- to me, you've served us with some answers to our
22 interrogatories, responses to our request for production,
23 and we had a deposition back in Mr. Bybee's office a while
24 back with me and Mr. McDonald. Do you recall that?

25 A. That's correct.

1 Q. And one of them you said, yeah, Mr. Berkey had
2 had it, like you just testified, he couldn't get -- he
3 couldn't get to his property; the other one you said he
4 was having trouble paying the rent; and the other one you
5 said that he was just frustrated at all of the
6 construction going on in front of him.

7 Did he ever -- did he actually tell you that he
8 had been prevented from getting to his property?

9 A. Yeah, he actually told me that.

10 Q. And how was he prevented?

11 A. Well, you see the photos up there. You can see
12 how he would be prevented: that he couldn't get in and
13 out of the driveway. There would be a Cape Romain or a
14 DOT or -- there were multiple subcontractors that were
15 coming and going from the property.

16 I couldn't get out of my driveway from time to
17 time. They were not permanent blockages, but I had to
18 stop and go track somebody down and say, hey, can you move
19 a truck.

20 Q. Right.

21 A. And of course they would. But when it happens
22 to you every time you come and go, that's enough.

23 Q. So the -- this temporary blockage of
24 subcontractors, pick-up trucks, that sort of thing, parked
25 in front of your -- in front of your driveway. I think

1 there's -- there were pictures of the port-a-let being put
2 in front of the 699 driveway, or maybe it was your
3 driveway at 693 -- those were things that were ongoing and
4 you would have issues with the contractor or with DOT's
5 construction representatives all the time during this;
6 isn't that correct?

7 A. Pretty much all the time.

8 Q. But it was no different from -- what the 699
9 property then was the 693, it was just --

10 A. Oh. The 685 --

11 Q. -- day-to-day disruptions?

12 A. The 685 property, in addition, that was Jensen
13 Law Firm.

14 Q. Okay. But every time you called Mr. Rajabi at
15 the construction office or approached Mr. Huff or called
16 him on the site, they would accommodate you, wouldn't
17 they?

18 A. They would accommodate me if they could.

19 A lot of times they weren't on the site and it
20 would take some time to get it done. And then a lot of
21 times, the same day another sub would come park in the
22 same place. You know, it was -- it was ongoing.

23 Q. But my point is that would be the same -- that
24 would be the same thing that would be true as to the 699
25 property and Mr. Berkey; is that correct?

1 A. I'm not sure.

2 Q. But you have no indication that when these
3 trucks were parked, when the port-a-let was put there, all
4 this stuff was there, that Mr. Berkey ever asked them
5 could you move them so I could get in and they said no?

6 A. I don't have any direct knowledge --

7 Q. But when you asked them in regard to your
8 residence, they were -- they accommodated you, didn't
9 they?

10 A. They did accommodate me.

11 Q. Okay. Let me -- this is one of the pictures
12 that was up on the screen in your direct testimony,
13 Plaintiff's Exhibit 19-M. And that shows your -- the
14 entrance into your main house, your residence; is that
15 correct?

16 THE COURT: What is that? 19-M, did you say?

17 MR. BROOKER: M.

18 A. This is in the 693 Folly Road on January 13th.

19 Q. [Mr. Brooker] And that's the sort of thing they
20 did, too, to let you in and out? That's the way they set
21 it up so they could -- you could have access to your
22 house; is that correct?

23 A. I'm not sure that that had anything to do with
24 having access to the house. My driveway had to be open.
25 Mr. Rajabi told me that it would always be open during

1 this project. And that's what I expected, was for it to
2 be opened. I didn't expect to be denied access.

3 Q. Well, let's look at the photograph again. I
4 mean, they've got the barrels there with the silt screen
5 and taped on each side. But it's open in the middle
6 and --

7 A. Well, you can also --

8 Q. -- and that's the way you got in and out.

9 A. -- see in some of these other photographs where
10 it was all dug out and they put a metal plate across that
11 for me to drive back and forth across. So different
12 occasions required different amount of getting in and out
13 of the driveway. But it was not possible for them to do
14 the project without closing my driveway from time to time.

15 Q. Okay. But they accommodated you whenever you
16 complained and couldn't get in and out? They --

17 A. They did accommodate me.

18 Q. Is there any reason that would not be true as to
19 699?

20 A. I have no idea what Mr. Berkey went through. I
21 just know that he told me that he couldn't take it
22 anymore, and that was it.

23 Q. Okay. Is it possible Mr. Berkey lost his job
24 and couldn't pay you rent and moved in with his
25 girlfriend?

1 A. I have no idea.

2 Q. You -- I believe it was in your interrogatory
3 responses and in your responses to the request for
4 production that you stated that you had to do some
5 deferred maintenance, or actually put in major renovations
6 to the property, is that -- to the 699 property. Is that
7 correct?

8 A. I did some renovations to it.

9 There's always deferred maintenance any time a
10 property is shut down like that for a year and a half.
11 And I took the opportunity to upgrade the bathroom and
12 kitchen.

13 Q. But isn't it -- is that all you did?

14 A. Painted the inside and outside, upgraded the
15 driveway right in there, tied it into the asphalt that
16 those guys poured.

17 Q. Well, I think in your interrogatory answers you
18 said that this maintenance had to be done to maximize the
19 rent potential of the property; is that correct?

20 A. I don't -- I don't -- I wouldn't be sure that I
21 said it in that way, no. It didn't have to be done to
22 maximize the rent on the property. It had to be done to
23 get the house back on the rental market once we got the
24 driveway.

25 Q. Well, let's refer to Exhibits 1 and 2 again.

1 What is the monthly rental that you charged Greg Berkey?

2 A. Berkey was paying nine fifty a month.

3 Q. All right. And then the Exhibit 2 is the lease
4 that you entered into after the project was over and after
5 the renovations were over; is that correct?

6 A. That's correct.

7 Q. Now, when you -- you were doing this renovation,
8 I think you had -- probably had a number of different
9 contractors working on your house for you, didn't you?

10 A. No, sir. I think there might have been one
11 contractor in there.

12 I did most of the work myself, being the
13 maintenance man that I am.

14 THE COURT: You may have already said this, but
15 I don't know. Nine fifty was what you were renting it
16 for. Nine fifty a month, that was the rent that --
17 from Berkey; right?

18 THE WITNESS: That's correct.

19 THE COURT: And when you rented it after the
20 next time, what was the rent?

21 THE WITNESS: I went to eleven fifty.

22 THE COURT: And that was when?

23 THE WITNESS: That would have been March -- it
24 looks like the first of March.

25 THE COURT: Of?

1 THE WITNESS: Of '10.

2 THE COURT: '10.

3 MR. BROOKER: 2010, Your Honor.

4 THE COURT: Okay.

5 Q. [Mr. Brooker] I think you also -- in your
6 depositions that we took, I think you also said that --
7 however, that some of the workmen coming to work on the
8 renovations in your -- on your house would park their
9 pickup trucks out on the right-of-way; is that correct?

10 A. On the --

11 Q. Do you recall saying that?

12 A. -- the sidewalk.

13 Q. Okay. So it wasn't just one person. There was
14 -- you had a number of tradesman coming in there and
15 parking?

16 A. Well, no. I had one guy. He had two pickup
17 trucks.

18 Q. Okay. And he parked on the right-of-way. This
19 was during the bridge construction. They --

20 A. Well, Cape Romain was gone by then.

21 Q. Okay. But they walked into the property from
22 their trucks -- their tools and --

23 A. That's right.

24 Q. Is there any reason that Mr. Berkey or any other
25 tenant couldn't do that, as well?

1 A. Well, yeah, there's a reason. In 2005, Mr.
2 Phinney came and told me the driveway was going to be
3 permanently closed. I mean, it was still closed.

4 Q. But we didn't -- the apartment -- the contractor
5 didn't physically prevent your contractors doing your
6 renovations from parking there and walking into the
7 property?

8 A. You're talking about in January of 2010?

9 Q. No, I'm talking about --

10 THE COURT: Well, when did you do the
11 renovations? When did you do the renovations?

12 THE WITNESS: The biggest part of the
13 renovations were done in 2010. I did some of the
14 painting, interior and exterior painting, and getting
15 the prep ready but we did the biggest part of that
16 right after we got the driveway.

17 Q. [Mr. Brooker] Did you do any drywall? Drywall.

18 A. Drywall work?

19 Q. Take out drywall? Take out and replace the
20 drywall? Interior drywall.

21 A. No, sir. We did some patching, but we didn't
22 take out any drywall.

23 That house was plaster. That house was built --
24 that house is a hundred years old.

25 Q. Right.

1 A. Those walls are plastered in there, so we didn't
2 really do any drywall work.

3 Q. The house is -- the house is pretty close and
4 always has been pretty close to Folly Road, hasn't it? I
5 mean, it's only a few steps?

6 A. That's correct.

7 Q. And for that reason -- I guess I'm testifying
8 here, rather than asking a question.

9 You have a board fence that -- between the road
10 and the house?

11 A. That's correct.

12 Q. And how long has that been there?

13 A. We added two sections when we -- to cover up the
14 guardrail. And previous to that, that wooden fence -- I
15 don't know the number of years. Quite a few years.

16 Q. Why did you put it up?

17 A. Why did I put the fence up?

18 Q. Well, why is there a fence?

19 A. Well, actually, I think -- I think -- my father
20 put the fence up. It's a privacy fence.

21 Q. And why did you extend it?

22 A. Well, I had a big, huge, metal guardrail in
23 front of my driveway now so I really put it up to cover up
24 the guardrail.

25 Q. Not to protect the house and the residence from

1 noise, dust, and make it nicer?

2 A. That wouldn't do that on that highway. That
3 wouldn't have any --

4 It's a privacy fence. It's not a noise or
5 ablation fence or any of that. It's just a privacy fence.

6 Q. Well, what I'm trying to get at, my question is
7 extending two sections of that privacy fence was a benefit
8 to the -- it made it -- it made it nicer. Would you
9 agree?

10 A. Okay.

11 Q. And you couldn't have done that if the driveway
12 had stayed in the same place, because you had to end the
13 privacy fence before the driveway?

14 A. That's right.

15 MR. BROOKER: Let me grab some more exhibits.
16 Mr. Frampton, I want to go through the tax notices.
17 It won't take long.

18 [Whereupon, Mr. Brooker reviews documents]

19 MR. BROOKER: This is a series of annual tax
20 notices from the Charleston -- property tax notices
21 from Charleston County. I think it's okay to mark
22 them as a single exhibit.

23 Do you agree with that or --

24 MR. BYBEE: No, sir, I do not.

25 MR. BROOKER: You want each page?

1 MR. BYBEE: It depends on what testimony you're
2 eliciting.

3 Your Honor, I object to these documents until
4 he's laid the proper foundation as to where he's
5 going.

6 THE COURT: Members of the jury panel, I would
7 ask you to go to the jury room for a moment, please.

8 [Whereupon, the jury exits the courtroom at
9 12:03 p.m.]

10 THE COURT: All right. So what are we dealing
11 with?

12 MR. BROOKER: I have the property tax notices
13 for this house, this parcel at 699 Folly Road, running
14 from 2005 to 2011 and my purpose for entering them,
15 Your Honor, is showing that the assessed value of the
16 properties remain the same before, during, and after
17 the construction. Going to the issue, of course, of
18 the --

19 THE COURT: Property tax notices from 2005 to
20 what? Two thousand --

21 MR. BROOKER: Let's see. The last one I have is
22 2011. That's correct. Tax year 2011.

23 MR. BYBEE: Excuse me, Judge.

24 Your Honor, we object to the tax assessment.
25 There's been no testimony to indicate that the tax

1 assessment is reflecting the fair market value. In
2 order to introduce evidence of fair market value, he
3 needs to have a witness, an expert. He could call I
4 guess somebody from the tax assessor's office, if he
5 chose, or he can have an appraiser. That's the first
6 objection.

7 The second objection is the premise is not what
8 we're about. We're here with respect to the temporary
9 taking. The temporary taking is for a specific
10 duration and preparing tax bills from 2005 to 2010
11 doesn't indicate anything about that temporary-taking
12 period.

13 MR. BROOKER: First of all, Your Honor, I've got
14 the tax notices of 2005, '06, '07, '08, '09, '10 and
15 '11. And the -- you know, the issue here is is there
16 is -- the law is that once these temporary
17 restrictions on your use of the property are lifted
18 or gone -- and they're claiming the construction
19 period interfered with their access for some period of
20 time -- that the property, the value of the property,
21 springs back. And that's ultimately what we're trying
22 to show.

23 MR. BYBEE: Your Honor --

24 THE COURT: Well, I would -- at this point, I'll
25 -- I sustain the objection to the introduction of