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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

RECEIVED

FEB 28 2019

SC Court of Appeals

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

Georgetown County, Appellant,

v.

Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc.,
The South Carolina Department of Transportation and The City of Georgetown, Defendants,

Of whom

The South Carolina Department of Transportation and The City of Georgetown
are Respondents.

GEORGETOWN COUNTY'S PETITION FOR REHEARING

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In Opinion No. 5627, (S.C. Ct. App. filed February 13, 2019) (Shearouse Adv. Sh. No. 7 at 46) the Court affirmed the Circuit Court's dismissal of the inverse condemnation claim of Appellant, Georgetown County (County), brought against Respondents, South Carolina Department of Transportation (SCDOT) and the city of Georgetown (City).

Under Rule 221, Georgetown respectfully submits the following Petition for Rehearing.

I. INTRODUCTION

This case arises from damage to the County's real property caused by a public works project undertaken jointly by SCDOT and the City to resolve storm drainage and flooding problems in the City. During construction, king piles (hollow steel piles) were driven deep into the sub-surface of the ground to provide lateral support for the walls of a water storage facility. The piles breached a subsurface layer which had confined underground water, causing underground water to rise from beneath the confining layer and fill the water storage area. As a result, multiple land-surface collapses occurred, and sinkholes and depressions formed in and around the area of the drainage project, causing damage to County buildings.

The County sued SCDOT and the City alleging, among other claims, a cause of action for inverse condemnation. The Circuit Court dismissed the County's inverse condemnation claim under Rule 12(b)(6), SCRCPC and this Court affirmed.

II. ARGUMENT

1. **The Court misapprehended or overlooked the County's arguments that it was entitled to just compensation under the Takings Clause, Art. I, § 13, of the South Carolina Constitution for the damages to its buildings and real property caused by SCDOT and the City.**

The issue in this case is whether the County, a governmental entity, can maintain an inverse condemnation claim against other governmental entities.

a. The Court overlooked or misapprehended the County's argument it is protected against unconstitutional takings by Article I, Section 13 of the South Carolina Constitution of 1895.

Until this Court's ruling, no South Carolina case had held that a governmental entity is barred from asserting an inverse condemnation claim against another governmental entity.

The Court concluded that the "ordinary and popular meaning" of the undefined S.C. Const. Art. I, Section 13 phrase "private property" did not, as the County argued, include property owned by the County.

However, numerous other states, interpreting similar, and often identical, phrases, have concluded just compensation must be paid where the state or a political subdivision takes property belonging to another political subdivision. See e.g., Marin Mun. Water Dist. v. City of Mill Valley, 202 Cal. App. 3d 1161, 249 Cal. Rptr. 469 (1988) (holding a public water district suffered no less of a taking than if the property were owned by an individual and that the district stated a cause of action in inverse condemnation for unintentional physical damage to its property); City of Three Forks v. State Highway Comm'n, 156 Mont. 392, 480 P.2d 826 (Mont. 1971) (holding the property was owned by the city, not the State, and that compensation must be paid for property of the City taken by the State); State ex. rel. State Highway Comm'r v. Cooper, 24 N.J. 261, 131 A.2d 756 (1957) (impliedly overruling New Jersey precedent on the governmental-proprietary distinction and stating if the breadth of previous case doctrine were followed it would lead to the startling result that "the State [could] appropriate, for wholly unrelated public purposes and without just compensation, various municipal properties such as town halls and schoolhouses..."); Highline Sch. Dist. No. 401, King Cty. v. Port of Seattle, 87 Wash. 2d 6, 548 P.2d 1085 (Wash. 1976) (en banc) (reversing grant of summary judgment on inverse condemnation against condemnee school district and stating that where a condemnee

governmental unit must furnish services which require use of the property taken, just compensation must be paid); City of Chester v. Com., Dept. of Transp., 495 Pa. 382, 434 A.2d 695 (1981) (holding the Pennsylvania Constitution does not allow the Commonwealth to escape its financial obligation owed to a public condemnee for property taken); Brusco Towboat Co. v. State By & Through Straub, 31 Or.App. 491, 493, 570 P.2d 996, 998 (1977) (en banc) (stating that two government entities are entities distinct from the state and stating “[t]hey are supported by a distinct tax base and they serve a distinct constituency. Accordingly, they are protected against taking by the state without compensation.”); State ex. rel. Ala. State Docks Dept. v. Atkins, 439 So.2d 128 (Ala. 1983) (holding Mobile County was entitled to compensation for the taking of its roadway by the State of Alabama); Donnaher v. State, 16 Miss. 649, (Miss. Er. & App. 1847) (holding railroad company must pay just compensation to the City of Jackson to have a right to construct a railroad through the public streets).

The takings clauses of the states from which these rulings arise all speak in terms of *private property not being taken for a public use without just compensation*. The courts in these states all held that their respective takings clauses require payment of just compensation where one public entity has taken the property of another public entity. South Carolina’s taking clause should be interpreted no differently.

b. The Court overlooked or misapprehended the County’s argument regarding Edgefield County v. Georgia-Carolina Power Co., 104 S.C. 311, 88 S.E.801 (1916) and the effect of Home Rule on the County’s ability to maintain an inverse condemnation cause of action against SCDOT and the City.

The Court concluded Edgefield County v. Georgia-Carolina Power Co., 104 S.C. 311, 88 S.E. 801 (1916) “foreshadowed” it’s conclusion that “public property” does not fall within the protection of South Carolina’s Constitution.

However, as the Edgefield County Court noted, at the time that case was decided, “[t]he Constitution of 1895... by implication left the government of the counties in the hands of the Legislature.” Id. at 327, 88 S.E. at 806. The Edgefield County Court also observed that at the time of its decision, “under the Constitution and laws of the state, the state [General Assembly] ha[d] absolute control over the government of counties.” Id.

This is not the case today. County governments are no longer in the hands of the General Assembly due to South Carolina’s constitutional and statutory movement to local government “home rule.” See S.C. Const. art. VIII, § 1, *et. seq.*; S.C. Code Ann. § 4-9-10, *et. seq.*; and Hospitality Ass’n of South Carolina, Inc. v. Cty. of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113 (1995).

As explained in Hospitality Ass’n:

For generations, legislative delegations of the General Assembly controlled virtually every aspect of local government. Relinquishment of this control effectively began in April of 1966, when the General Assembly created a Committee to study the South Carolina Constitution and appointed then Senator John C. West as chairman. The major task assigned to the West Committee was to develop and recommend amendments to the Constitution that would eliminate archaic provisions and “strengthen it in such other areas, so that it [would] provide a workable framework with proper safeguards for sound State, County and local governments.”

In June of 1969, after three years of numerous hearings and conferences, the West Committee submitted its Final Report to the Governor and General Assembly. In the Report, the Committee unanimously recommended amendments to the Constitution that would place the control and management of county and municipal affairs in the hands of duly elected local officials.

Following three years of legislative debate on the Report, the General Assembly placed upon the November 1972 general election ballot for referendum vote an Amendment of Article VIII of the Constitution. See Act No. 1631, 1972 S.C.Acts 3184. Acting upon a favorable vote of the people, the General Assembly, on March 7, 1973, ratified the Amendment. See Act No. 63, 1973 S.C.Acts 67.

As ratified, new Article VIII directed the General Assembly to implement what was popularly referred to as “home rule” by establishing the structure, organization, powers, duties, functions, and responsibilities of local governments by general law. S.C. Const. art. VIII, §§ 7 and 9. **In addition, new Article VIII mandated a liberal rule of construction regarding any constitutional provisions or laws concerning local government.** S.C. Const. art. VIII, § 17.

Although the General Assembly was required to implement home rule, new Article VIII essentially left it up to the General Assembly to decide what powers local governments should have. Acting under this authority, the General Assembly enacted various statutes regarding the powers of counties and municipalities.

320 S.C. at 224-226, 464 S.E.2d at 117-18 (emphasis added, footnotes omitted).

As noted in Hospitality Ass’n, before the implementation of the Home Rule, “courts in this State **strictly and narrowly** construed any grant of local government power.” Id. at 225 n.5, 464 S.E.2d at 117 n.4. This no longer holds true under S.C. Const. art. VIII, § 17.

When Edgefield County was decided, property such as the County’s, belonged to the State of South Carolina. Edgefield County, like all South Carolina counties, did not have the power to own property. This is not the case today regarding the County’s properties. See S.C. Ann Code Ann. §§ 4-1-10 (2); 4-17-10. Unlike when Edgefield County was decided, it is the County and not the State of South Carolina which has set apart the County’s property for a public purpose. Id. The County’s property is not the property of the State, and the State does not exercise control over the County’s properties. The General Assembly has not subjected the County’s properties, including the Georgetown County Judicial Center, to “another or higher purpose.”

Edgefield County is not controlling authority and its *dicta* regarding any constitutional issue should not have been viewed as “foreshadowing” the Court’s conclusion in this case.

c. The Court overlooked or misapprehended the County's argument regarding the U.S. Const., amend. V, takings clause and its applicability to the analysis of South Carolina's Takings Clause.

Like Art. I, § 13 of the South Carolina Constitution, the United States Constitution provides "... nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V. "South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with someone's property interests amounts to a constitutional taking." Hardin v. South Carolina Dept. of Transp., 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007) (Citing Byrd v. City of Hartsville, 365 S.C. 650, 656 n. 6, 620 S.E.2d 76, 79 n.6 (2005)). South Carolina courts have consistently relied upon Federal Takings Clause analyses. See Byrd, 365 S.C. at 656 n.6 and 659 n. 9, 620 S.E.2d at 79 n.6 and 81 n. 9; Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach, 337 S.C. 380, 390, 523 S.E.2d 193, 199 (Ct. App. 1999), aff'd in result by Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach 345 S.C. 418, 548 S.E.2d 595 (2001)(Sea Cabins II); Kiriakides v. School Dist. of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009); Early v. South Carolina Public Service Authority, 228 S.C. 392, 402, 90 S.E.2d 472, 476 (1955).

The Court says that it has "never looked to federal law for the meaning of private property [as that phrase is used in Article I, § 13]," (Shearouse Adv. Sh. at 49). This case, however, presents a novel issue regarding which the County respectfully argued the Court should look to federal takings jurisprudence for guidance, just as it has in the past regarding other issues involving takings.

It is well established that under the Takings Clause of the United States Constitution, the Federal government must compensate state and local governments for taking their properties.

See e.g. Ark. Game and Fish Com'n v. U.S., 568 U.S. 23 (2012) (finding taking the Commission's lands requires compensation); Town of Bedford v. U.S., 23 F.2d 453 (1st Cir. 1927) (stating the Federal government is a stranger to the town and that the Federal government can no more take, without compensation a town's property rights, than it can those of an individual); U.S. v. State of Ark., 164 F.2d 943 (8th Cir. 1947) (reciting the "fundamental principle" that a public authority *must* be awarded the actual money loss occasioned by the condemnation); U.S. v. Board of Ed. Of Mineral Cty., 253 F.2d 760, 764 (4th Cir. 1958) ("The [municipal] owner must be put in as good position peculiarly as he would have occupied if his property had not been taken"); Mayor and Council of City of Baltimore v. U.S., 147 F.2d 786, 790 (4th Cir. 1945) ("Frequently it occurs that the taking of a street causes substantial loss for which the city must be compensated").

The United States Supreme Court has stated:

When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than to the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States. Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees.

U.S. v. 50 Acres of Land, 469 U.S. 24, 31 (1984).

Under the Federal Takings Clause, the Federal government must compensate a state or local government for taking that entity's property. The established rule is that property not owned by the United States, is "private" as between the United States and any other entity, including a state or its political subdivisions. With the establishment of Home Rule, the same rationale applies between the SCDOT, the City and the County—any property not owned by SCDOT or the City, is "private" as it pertains to them, and if damaged by one or the other or

both, the owner, whether a public or private person or entity, is entitled to just compensation. As South Carolina has consistently applied Federal Takings Clause jurisprudence, interpreting the South Carolina Constitution in a similar way to the Federal Constitution requires SCDOT and City compensate the County for taking its properties.

d. The Court overlooked the County's property rights in the real property it owns which was damaged by the actions – taking – of SCDOT and the City.

The County is a body politic and corporate and has the power to purchase and own real property. S.C. Code Ann. § 4-1-10 (2). Lands conveyed to the County are property of the County. See S.C. Code Ann. § 4-17-10.

In an early Wisconsin Supreme Court case, Town of Milwaukee v. City of Milwaukee, the court opined:

In [the municipality's] capacity of owner of property, designed for its own, or the exclusive use and benefit of its inhabitants, its vested rights of property are no more the subject of legislative interference or control without the consent of the corporators, than those of a merely private corporation or person. Its rights of property, once acquired, though designed and used to aid in the discharge of its duties as a local government, are entirely distinct and separate from its powers as a political or municipal body...In its character of a political power, or local subdivision of government, it is a public corporation, but in its character of owner of property it is a private corporation, *possessing the same rights*, duties and privileges as any other.

12 Wis. 93, 100-101 (1860) (emphasis added).

The properties at issue in this case are not owned by the State of South Carolina, SCDOT or the City, but are owned by the County and are protected under the South Carolina Constitution. As recognized in Town of Milwaukee, the County, in its character as owner of property, possesses the same rights, duties and privileges as any other owner, including the right to just compensation if its properties are taken for a public use.

e. The Court overlooked the County's argument that to hold the County's properties are not protected under the South Carolina Constitution would work an absurdity.

The County argued that interpreting Article 1, §13, to mean it could not maintain an inverse condemnation action against SCDOT and the City works an absurdity, and therefore the Framers' intention should control.

All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. However plain the ordinary meaning of the words used in the statute may be, the courts will reject that meaning when to accept it would lead to a result so *plainly absurd* that it could not possibly have been intended by the Legislature [or Framers of the Constitution] or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Ray Bell Const. Co., Inc. v. School Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) (citations and emphasis in original omitted)(emphasis added).

As stated by our Supreme Court, “[t]he purpose of the Takings Clause is to prevent the government ‘from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” Sea Cabins II at 429, 548 S.E.2d at 601.

In the context of a state constitution Takings Clause, the City of Chester court noted that to hold a public entity is not entitled to compensation, “would lead to a *highly absurd*, and to the [plaintiff-public-entity], costly result. We cannot believe, for example that school buildings costing many thousands of dollars can be destroyed for highway purposes and yet the Legislature not have intended that the loss be paid to the [plaintiff-public-entity].” Id. at 394, 434 A.2d at 702 (emphasis added).

To give meaning to our Takings Clause's purpose, SCDOT and the City should bear the burden of the damages to the County's buildings. S.C. Const. art. I, § 13 must be construed to

avoid the absurdity and injustice resulting if the County is forced to bear the burden of the damage caused by SCDOT and the City to its buildings.

2. **The Court overlooked or misapprehended the County's argument it is entitled to just compensation under the South Carolina Eminent Domain Procedure Act and the State Authorities Act.**

Besides the requirement under the South Carolina Constitution that if the County's property is taken for a public use the County must receive just compensation, the County is also argued it was entitled to just compensation under the South Carolina Eminent Domain Procedure Act.

The Court rejected this argument.

The General Assembly expressed its intention that *all* exercise of eminent domain power in South Carolina shall be through the Eminent Domain Procedure Act (the "Act"), S.C. Code Ann. § 28-2-10 *et. seq.* S.C. Code Ann. § 28-2-20. Under the Act, a condemnor may not take possession of the property to be condemned until receipt of written consent of the landowner or *payment of just compensation*. See S.C. Code Ann. § 28-2-90. The Act defines condemnee as a "person or other entity who has a record interest in or holds actual possession of property that is the subject of a condemnation action." S.C. Code Ann. § 28-2-30 (6). "Person" includes not only a natural individual, but also a public entity. S.C. Code Ann. § 28-2-30 (16). The County is therefore an express condemnee under the Act.

"Inverse condemnation is a cause of action by a property owner against a governmental entity to recover the value of property that has been effectively 'taken' by the governmental entity, although not through the appropriate process of eminent domain." Carolina Chloride, Inc. v. Richland County, 394 S.C. at 170, 714 S.E.2d at 977. "While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the

entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.” Hawkins v. City of Greenville, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004).

The County owns the properties which are the subject of this lawsuit. Therefore, to condemn the County’s properties, SCDOT and City must have proceeded under the Act. Under the Act, the SCDOT and the City must pay just compensation. Otherwise, SCDOT and City are liable to the County in inverse condemnation in the same way they would be had they proceeded under the Act.

In Board of Comm’rs of Dona Ana Cty. the court determined that the New Mexico procedure for eminent domain required the payment of just compensation. Id. at 92-93, 380 P.2d at 835. It held the provisions in their statutes treated “the owners of public property no differently than the owners of private property in any respect, including specification of the proper measure of compensation for all property taken...” Id.; See also Sch. Dist. of Borough of Speers v. Com., 383 Pa. 206, 209, 117 A.2d 702, 703 (1955) (holding that where the act enabling a taking by eminent domain did not differentiate between “owners” and “private owners” the public school district was entitled to compensation).

In a similar case involving an action for inverse condemnation by a city against the State Highway Commission, the Supreme Court of Montana looked at the eminent domain statute, stating:

It is important to note that the act shows that the legislature had in mind that necessity may require that property devoted to one public use may be taken from its public owner if it was required for a different and more necessary public use. But in spite of this awareness, it made no distinction between the method of taking public or private property. It is true that the statute does not state specifically whether compensation is to be paid to the public agency from which it is taken.

From the language of the eminent domain statute, as well as upon the basis of its purpose and practical application, it is our conclusion that the legislature intended that public property should be taken and compensated for the same as if it had been taken from a private owner.

City of Three Forks, 156 Mont. at 395-96, 480 P.2d at 828 (citing State By and Through Road Comm'n v. Salt Lake City Public Board of Education, 13 Utah 2d 56, 368 P.2d 468, 469). The Court continued, “[w]e agree with the above quoted position that the legislature intended property held by a city, such as here, be only taken by the State after compensation is paid. This property was owned by the City of Three Forks and its citizens, not the State of Montana or the federal government.” Id.

Likewise, the Act not only defines the County as a condemnee, it also treats all condemnees the same in determining the amount of compensation to which the condemnee is entitled. See generally S.C. Code Ann. § 28-2-10 *et. seq.*

Just as in Bd. of Cty. Comm'rs of Dona Ana Cty., our General Assembly has expressed its intention that all eminent domain power be exercised through the Act, including the payment of just compensation. It has provided that just compensation must be paid for taking property owned by a public entity. SCDOT and the City cannot circumvent the Act and avoid payment of just compensation by taking the County's property informally, rather than under the Act.

Because SCDOT and the City exercised the powers of eminent domain outside of the procedure provided in the Act, they are liable to the County for just compensation.

3. **The Court overlooked or misapprehended the County's argument that public policy requires SCDOT and the City pay the County just compensation.**

The County argued public policy necessitates a construction of the Constitution or the Act to require payment of just compensation for taking property of separate public entities. This

Court rejected the argument, stating “[w]e cannot stretch the meaning [of private property] to match a party’s public policy preference, even if we agreed with it, for our limited role is to say what the law is, not what it should be.” *Shearouse Adv. Sh.* at 52.

Public policy is derived from the established law of the state, as found in its Constitution, statutes and judicial decisions. See *Grant v. Butt*, 198 S.C. 298, 17 S.E.2d 689, 694 (1941). It is “uncertain, fluctuating, varying, with the changing economic needs, social customs, and moral aspirations of a people.” *Weeks v. New York Life Ins. Co.*, 128 S.C. 223, 122 S.E.2d 586 (1924).

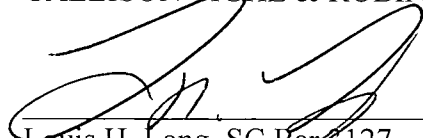
The County provides facilities, including the courthouse, by statutory mandate to its citizens. These buildings are purchased and financed by the County. The drainage project was undertaken by the SCDOT and the City for the public purpose of relieving flooding on US 17. It is only just and proper for SCDOT and the City to compensate the County for the damage caused because of their project. It is only under the construction of the Constitution advanced by the County that hardship, injustice and absurdity are avoided. Such a construction does not stretch the meaning of the Constitution, but instead contemplates the evolution of state government over the last century, considers the impact of the Act (and the actions of the legislature) mandating just compensation for public entities in formal takings, and avoids the absurdity of allowing a governmental body to execute takings with impunity.

III. CONCLUSION

The County respectfully requests its Petition for Rehearing be granted, the Court vacate its February 13, 2019 Opinion, reverse the Circuit Court’s dismissal of the County’s inverse condemnation cause of action, and remand the case to the Circuit Court for trial.

Respectfully submitted,

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February ²⁸, 2019
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PROOF OF SERVICE

I certify that I have served a copy of the following as indicated hereinbelow by mailing a copy of same on the date below by First Class United States Mail, postage prepaid, addressed to the following:

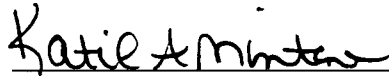
DOCUMENT SERVED: GEORGETOWN COUNTY'S PETITION FOR REHEARING

PARTIES SERVED:

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February 28, 2019
Columbia, South Carolina

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CALLISON  TIGHE

February 28, 2019

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
FEB 28 2019
SC Court of Appeals

Re: Georgetown County v. Davis & Floyd, Inc., et al.
Appellate Case No. 2017-000234
Our File No. 5626.003

Dear Ms. Kitchings:

Enclosed for filing please find the original and six (6) copies of Georgetown County's Petition for Rehearing and Proof of Service, in connection with the above-referenced matter. Also enclosed please find my firm's check in the amount of \$50.00 as the required filing fee. Please return one (1) clocked-in copy to me via my courier.

If you should have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC


George A. Taylor

GAT/kam
Enclosures
cc: (w/encl.) Lisa A. Reynolds, Esquire
David L. Morrison, Esquire
Wesley P. Bryant, Esquire
Clerk.Court of Appeals.011