THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5627 (S.C. Ct. App. Filed February 9, 2017)

Georgetown County, ... Appellant/Petitioner,

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.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for the Petitioner certifies that there was a published opinion of the Court of Appeals in this matter filed February 13, 2019 and the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 29, 2019.

QUESTIONS PRESENTED

I. **Does Article I., Section 13 of the South Carolina Constitution require just compensation be paid to a political subdivision for its property unintentionally taken by the State or another political subdivision?**

II. **Does the South Carolina Eminent Domain Procedure Act provide governmental entities protection from unintentional takings where the same governmental entity would be entitled to just compensation had the Act been followed?**

III. **Does sound public policy necessitate the payment of just compensation where the state or other public entity unintentionally takes property owned exclusively by another governmental entity?**

INTRODUCTION

The just compensation clause is "designed to bar 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." Armstrong v. United States, 364 U.S. 40, 49 (1960).

This case involves substantial constitutional and novel legal issues, and matters of significant public interest, regarding damage done to the Georgetown County Judicial Center and other Georgetown County-owned buildings, as a result of a public works project undertaken by the South Carolina Department of Transportation and the City of Georgetown.

STATEMENT OF THE CASE

Georgetown County (the "County"), filed its Amended Complaint on July 10, 2014 (ROA p. 34), asserting an inverse condemnation claim against the South Carolina Department of Transportation ("SCDOT") and the City of Georgetown (the "City") arising from damage to

County buildings and property caused by a public utility project undertaken by the City and SCDOT.

The County filed its Motion for Summary Judgment on May 2, 2014. (Motion for Summary Judgment, ROA, p. 76), and a hearing was held on the motion on August 7, 2014. In its Memorandum in Opposition to the County's Motion for Summary Judgment, SCDOT asserted the County was not entitled to relief and moved to dismiss the inverse condemnation claim under Rule 12(b)(6), SCRCP. (SCDOT Memorandum in Opposition, ROA p. 118). The City joined in SCDOT's arguments. (ROA, p. 307).

On November 12, 2015 the circuit court held:

> Georgetown County cannot maintain an inverse condemnation action against SCDOT and City because the Takings Clause applies only to private and not to public property. Therefore, because the Court finds as a matter of law that Georgetown County cannot maintain an inverse condemnation cause of action that claim is stricken and the Court grants the SCDOT Rule 12(b)(6) motion. In so ruling, the Court notes that this is a novel question of law in South Carolina, and it is this Court's intent by striking the County's inverse condemnation cause of action to affect the County's substantial right to proceed with this cause of action and that this Order be immediately appealable.

Order, pp. 5-6, ROA, pp. 5-6.

The County filed its Rule 59(e), SCRCP, Motion to Reconsider, Alter or Amend, on November 13, 2015. (County's Rule 59(e) Motion, ROA, p. 221). The circuit court denied the motion on January 17, 2017. (Order denying Rule 59(e) motion, ROA p. 7).

The County filed its Notice of Appeal to the South Carolina Court of Appeals on February 9, 2017. After submission of final briefs to the Court of Appeals, oral arguments were presented on December 5, 2018. By published opinion dated February 13, 2019, the South Carolina Court of Appeals affirmed the circuit court's dismissal of the County's inverse condemnation claim against the SCDOT and the City.

The Court of Appeals held:

> We therefore hold the term private property as used in the Takings Clause of the South Carolina Constitution applies only to property owned by a private citizen, private corporation, or non-public entity.
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> ***
>
> [T]he [Eminent Domain Procedures] Act does not affect our conclusion that the term private property as used in the Takings Clause of the South Carolina Constitution does not include public property.
>
> ***
>
> We conclude the controlling public policy here was ratified by the people and enshrined in South Carolina's Takings Clause, whose reference to private property we have held does not include public property. We cannot stretch the meaning 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.

Opinion No. 5627, February 13, 2019.

On February 28, 2019, the County filed its Petition for Rehearing. By Order dated March 29, 2019, the Petition for Rehearing was denied.

STATEMENT OF THE FACTS

This case originates from damage to five County buildings located on land owned by the County (collectively, the "County's Buildings"). (Amended Complaint ¶ 9, ROA, p. 35). These damages resulted from a public works project undertaken jointly by SCDOT and the City in 2009 to resolve flooding problems in the City of Georgetown (the "Drainage Project). (Compl. ¶ 12, ROA, p. 36; SCDOT's Answer ¶ 13, ROA, p. 53; and the City's Answer ¶ 10, ROA, p. 69). The Drainage Project included the planning and construction of a water storage facility and wet well, redirection of stored water through a gravity piping system, and forced drainage of water from the wet well into the Sampit River. (Id.). As part of the Drainage Project, the water storage area underwent a significant pumping of water so that new drainage structures could be

fabricated below grade. (Compl. ¶ 17, ROA, p. 13). During construction, king piles (hollow steel piles) were installed by pre-drilling holes and driving the king piles deep into the sub-surface of the ground to provide lateral support for the walls of the water storage facility. (Affidavit of George A. Sembos, P.E. ¶ 8, ROA 79, and F&ME Report, p. 22, ROA 113). During the installation of the king piles, some of the piles breached a subsurface layer which confined underground water, causing this underground water to rise from beneath the confining layer and fill the water storage area. (Id.). The breach resulted in multiple land-surface collapses, and sinkholes and depressions formed in and around the area of the Drainage Project. (F&ME Report, p. 20, ROA 111).

After several sinkholes manifested themselves, SCDOT hired F&ME Consultants to investigate and identify the cause and origin of the sinkholes. According to F&ME, the construction activities related to the Drainage Project impacted a lower, confined aquifer system underlying the area in question and caused numerous sinkholes and depressions to form in the area of the Drainage Project. (F&ME Report, p. 22, ROA, p. 113). At least twelve lawsuits, involving twenty properties were filed as a result of the Drainage Project.

The County's Buildings were damaged as a result of sinkhole collapses. (Compl. ¶ ¶ 9 and 11, ROA, p. 12-13, Affidavit of George A. Sembos, P.E. ¶ 9, ROA 79, and Supplemental Affidavit of George A. Sembos, P.E. ¶ 5-9, ROA 156-157).

ARGUMENT

Pursuant to Rule 242, SCACR, the County respectfully requests this Court issue a Writ of Certiorari to the Court of Appeals regarding its Opinion No. 5627, and reverse that Opinion.

This case involves substantial constitutional issues novel to South Carolina. Numerous other states, having takings clauses virtually identical to South Carolina's, have held that where

the state or a political subdivision takes property belonging to another political subdivision, just compensation must be paid.

This case also involves issues of significant public interest, including the property rights of governmental entities whose taxpayers should be entitled to the same legal remedies available to private citizens and corporations when property for which those taxpayers have paid is taken by another political subdivision.

In its Amicus Curiae Brief, the South Carolina Association of Counties, which is dedicated to the statewide representation of county governments, stresses the importance of this case to the forty-six county governments in South Carolina, and their desire that governmental entities be afforded the same legal remedies as private entities when their separate and discrete ownership interests are taken outside the purview of the Eminent Domain Procedures Act.

For these reasons, supported by the arguments set forth below, this Court should grant the County's Petition, reverse the decision of the Court of Appeals, and hold the County is entitled to just compensation for the taking of its Property.

I. The County is entitled to just compensation under the Takings Clause, Art. 1, § 13 of the South Carolina Constitution.

The central issue in this case is whether one governmental entity may maintain an inverse condemnation claim against another governmental entity. This is a novel question of law in South Carolina.

Article I, § 13 of the South Carolina Constitution of 1895 provides:

> (A) Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property...

Inverse condemnation is based on the constitutional prohibition of taking property without compensation. Horry Cty. v. Ins. Reserve Fund, 344 S.C. 493, 498, 544 S.E.2d 637, 640 (Ct.

App. 2001). Inverse condemnation is a cause of action to recover the value of property that has been effectively taken by a governmental entity, although not through the process of eminent domain. Carolina Chloride, Inc. v. Richland Cty., 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011).

a. The County is protected against takings without just compensation by Article I, Section 13 of the South Carolina Constitution of 1895.

While this issue is a novel one for South Carolina, other states have concluded that where the state or a political subdivision takes property belonging to another political subdivision, just compensation must be paid. 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 of Montana, 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 the 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 nevertheless 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 eight states whose court opinions are discussed above – California, New Jersey, Montana, Washington, Pennsylvania, Oregon, Alabama, and Mississippi, just like South Carolina's, speak in terms of ***private property not being taken for a public use without just compensation.*** These states hold that payment of just compensation must be made where one public entity takes the property of another public entity. South Carolina's taking clause should be interpreted no differently.

In Marin, the California Court of Appeals held that a public water district's property was protected by the California state constitution. [1] Marin, 202 Cal.App.3d 1161, 249 Cal. Rptr. 469. In Marin, as in this case, the City of Mill Valley caused unintentional physical damage to the public water district's property.

The court stated:

[1] At the time Marin was decided, the California Constitution provided, "Private property may be taken or damaged for public use only when just compensation... has first been paid to... the owner." Marin, 202 Cal. App.3d at 1164 n.2, 249 Cal.Rptr. at 470, n. 2. The California Constitution is currently similarly drafted. Ca. Const. Art. 1, § 19.

> When the [City of Mill Valley] fails to construct or maintain its improvement properly, it takes a calculated risk that damage to private property may occur. If damage to private property results, it is proper to require the entity that took this risk to bear the loss when damage occurs. ***We see no reason why these principles should not apply to compensate for damage to property owned by another public entity...*** [A] public entity whose property has been damaged by another public entity suffers no less a taking merely because of its public entity status.

Id. at 1165, 249 Cal. Rptr at 471. (Emphasis added).

The court went on to say that to hold otherwise would overlook a basic fairness argument that one public entity should not be allowed to take property belonging to another public entity without compensation. Id. at 1166, 249 Cal. Rptr. 472. "Funds collected by one public entity for one purpose should not be thus appropriated, disrupting that entity's finances." Id.

Just as in Marin, the County's properties have been taken without payment of just compensation. SCDOT and the City undertook the Drainage Project, taking the calculated risk that damage to the County's properties could occur. South Carolina's Constitution should be read to require SCDOT and the City compensate the County for the resulting damage.

i. The County's properties are not excluded from the Constitutional protection against taking of private property without just compensation.

The Court of Appeals relies upon Edgefield County v. Georgia-Carolina Power Co., 104 S.C. 311, 88 S.E.801 (1916), for the proposition that the County's property does not fall within the protection of the Constitution. The Court of Appeals made no determination as to whether the applicable verbage of Edgefield County was law or dictum, stating instead, "[w]hether the statement in *Edgefield County* rises (or sinks) to the level of dictum is not important to our task today."

The circumstances existing under which Edgefield County was decided are critically important. Edgefield County involved a suit for damages brought by Edgefield County against a utility company, the utility company having been legislatively granted the power to condemn. The circuit court overruled the utility company's demurrer, and the South Carolina Supreme Court affirmed, holding "... under the Constitution and statutes we are of the opinion that the county may maintain the action it has pleaded." Id. at 328, 88 S.E. at 806.

The Edgefield County Court also stated, "**[t]he defendant further asserts** that the county had no such ownership of the highway and ferry as to render their serious impairment by the defendant a wrong to the plaintiff, and that the constitutional prohibition to take private property without making compensation therefor has no application to the taking of public property." Id. at 326, 88 S.E. at 806 (emphasis added).

The Court went on to state:

> But public property, we think, does not fall within the protection of the Constitution. That which the state has set apart for one public purpose the state may dedicate to another and higher public purpose. The supreme good of the public—salus republicae suprema lex—is the ideal to be accomplished, and it is in the keeping of the state. So that in the instant case it would have been obviously within the power of the Legislature to have expressly subjected the highway in Edgefield to be overflowed by the waters of Stevens creek and Savannah river, and Edgefield could not complain about it.

Id. at 329, 88 S.E. at 807.

As the Edgefield County Court noted, at the time the 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 Court also opined that at that time, "under the Constitution and laws of the state, the state [General Assembly] ha[d] ***absolute control*** over the government of counties." Id. (emphasis added). This is not the case today. County governments are no longer in the hands of the General Assembly as a consequence of South Carolina's

movement to local government "Home Rule" in 1975. 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).

Prior to the implementation of 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 (emphasis added). This, again, is not the case today under S.C. Const. art. VIII, § 17.

At the time Edgefield County was decided, the property at issue belonged to the State of South Carolina. In 1916, Edgefield County, like all South Carolina counties at that time, did not have the power to own property, counties then being controlled by the State. Now, unlike when Edgefield County was decided, the State does not exercise control over the County's properties. 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 property affected by SCDOT's and the City's taking is not the property of the State. The General Assembly has not expressly subjected the County's properties, including the Georgetown County Judicial Center, to "another or higher purpose." The current reality is, as between the County and Respondents, the property damaged is "private". This Court should recognize the import of Home Rule and the property rights of Counties that accompanied this shift away from State control.

ii. Under Federal Takings Clause jurisprudence, followed by South Carolina, local governments are protected from taking of property without just compensation.

Like Art. I, § 13 of the South Carolina Constitution, the United States Constitution provides "... nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V. "South Carolina 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 analysis. 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). Additionally, the Takings Clause of the United States Constitution applies to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; Byrd, 365 S.C. at 656 n. 6, 620 S.E.2d at 79 n. 6.

It is well established that under the Takings Clause of the United States Constitution, the Federal government must compensate state and local governments for the taking of public property. See e.g. Ark. Game and Fish Com'n v. U.S., 568 U.S. 23 (2012) (finding a taking of the Commission's lands requiring 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 which will be 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).

The established rule is that property not owned by the United States, is "private" as between the United States and any other entity, including public ones. 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 the taking of its properties.

b. Georgetown County has a vested property right, which cannot be taken without just compensation.

Georgetown County is a body politic and corporate and has the power to purchase and hold, for the use of the county, real property within its limits. 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. While South Carolina Counties are required to provide facilities necessary to accommodate the circuit courts, 1975 S.C. Op. Atty. Gen. No. 4194, 1975 WL 22491, those facilities are paid for by the citizens of the various counties and belong to those counties.

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, they are owned by the County and 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.

c. To hold the County's properties are not protected under the South Carolina Constitution would work an absurdity.

Ordinarily, if a statute (or constitutional provision) is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation, and the court has no right to look for or impose another meaning. Ray Bell Const. Co., Inc. v. School Dist. of Greenville County, 331 S.C. 19, 25-26, 501 S.E.2d 725, 729 (1998). However, the lower courts have failed to recognize that finding the County is not entitled to just compensation works an absurdity, and therefore the Framer's 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.

Id. at 26, 501 S.E.2d at 729 (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, one court has 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]." City of Chester at 394, 434 A.2d at 702 (emphasis added).

In order to give meaning to our Takings Clause's purpose, SCDOT and the City should bear the burden of the damages to the County's buildings. S.C. Const. art. I, § 13 must be construed to avoid the absurdity and injustice which would result if the County is forced to bear the burden of the damage caused by SCDOT and the City. Further, SCDOT, an arm of the State, can spread this burden over the taxpayers of the entire State, not just the taxpayers of the County, for damages which the SCDOT, not the County, caused.

II. The County is entitled to just compensation under the South Carolina Eminent Domain Procedure Act. The County should be treated no differently when its property is taken inadvertently by another governmental entity.

The County is entitled to just compensation under the South Carolina Eminent Domain Procedure Act. The General Assembly has expressed its intention that *all* exercise of eminent domain power in South Carolina shall be through the Eminent Domain Procedure Act (the "Act"), S.C. Code Ann. § 28-2-10 *et. seq.* "It is not intended by the creation of this act to alter

the substantive law of condemnation, and any uncertainty as to construction which might arise must be resolved in a manner consistent with this declaration. In the event of conflict between this act and any other law with respect to any subject governed by this act, this act shall prevail." 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 (emphasis added). 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 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 has a record interest in all of the County's properties which are the subject of this lawsuit. (Amended Complaint ¶ ¶ 9-10, ROA 35). Therefore, in order 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 a case cited by the SCDOT, State et rel. State Highway Comm'n v. Board of Comm'rs of Dona Ana Cty., 72 N.M.86, 380 P.2d 830 (1963), the court, in applying the governmental-proprietary distinction, which does not apply in South Carolina, found that the county's buildings were not protected. However, the Board of Comm'rs of Dona Ana Cty. 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 or 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.*

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 to property owners for the taking of any property, including public entity owners such as the County.

While the Act is procedural, it is "not intended... to alter the substantive law of condemnation." S.C. Code Ann. §28-2-20. To allow SCDOT and the City to circumvent the Act is contrary to the General Assembly's stated purpose and the objective of codifying a procedure for takings without changing the substantive law. Just as in Bd. of Cty. Comm'rs of Dona Ana Cty., our General Assembly has expressed its intention that the County be compensated under the Act.

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

III. Sound public policy requires SCDOT and the City to pay just compensation to Georgetown County.

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 something that 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).

In Bd. of Comm'rs of Dona Ana Cty., a case heavily relied upon by SCDOT, the Court stated:

> Whereas, property owned and used by political subdivisions of the state for governmental purposes is technically state property, under our system of government, each subdivision is made responsible for providing the facilities required by the particular subdivision through taxes or bond issues payable by the property owners of the subdivision. If the state can take a strip from the courthouse lot or the hospital lot, it can also take the court house building and the hospital building. Many such buildings are financed by the county through issuance of general obligation bonds repayable with the taxes levied against property in the county. If the state took buildings and did not compensate the county, replacement would have to be made through new bond issues or by other means which might be available to the subdivision. The burden would be intolerable....*[I]t is only just and proper for compensation when public property is taken for highway [public] purposes...*
>
> Under this construction of the statutes, *absurdity, hardship and injustice* are avoided and *the public interest* and convenience are favored. ***These are the results to be sought.***

Id., at 93, 380 P.2d at 835 (emphasis & bold added); See also Sch. Dist. of Borough of Speers, at 210; 117 A.2d at 704 (stating to hold that the School District was not entitled to compensation "would lead to a highly absurd and, to the district, costly results. 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 district.").

The City has contended that public policy does not apply to the County's claim against the City because the City is a smaller subset of the County taxpayers and, as such, holding them liable would not spread the burden to a larger body. (City's Brief in Opposition of Summary Judgment, p. 5, ROA 217). The Marin Court, addressing this same argument found two flaws:

> First, if adopted, it would make the availability of an inverse condemnation cause of action dependent on the relative sizes of the parties—that is, a smaller entity could bring such an action against a larger one, but not vice versa. Reason suggest that the law have a more uniform approach to the issue of whether public entities may state a cause of action in inverse condemnation. Second, the city's analysis overlooks a basic fairness argument. One public entity should not be allowed to take property belonging to another public entity without compensation. Funds collected by one public entity for one purpose should not be thus appropriated, disrupting that entity's finances. (See *State v. Salt Lake City Public Board of Education* (1962) 13 Utah 2d 56, 58-59, 368 P.2d 468, 470 [road authority must compensate school district for school it condemned.] Therefore, we are satisfied that the district stated a cause of action in inverse condemnation for unintentional physical damage to its property.

Marin, 202 Cal. App. 3d at 1165-66, 249 Cal. Rptr. at 472.

Even in cases where the governmental-proprietary distinction was applied, the courts have recognized the disastrous results which would stem from not requiring the payment of just compensation. Just as in New Mexico, under South Carolina law, the County is responsible for providing facilities, including the courthouse. These buildings are financed by the County through various financing arrangements, including through SCAGO Public Facilities Corporation for Georgetown County. Among other financing arrangements is the issuance of general obligation bonds. In the instant case, the Drainage Project was indeed paid through SCDOT, the City, and Federal financing and was for the purpose of relieving certain flooding on US 17. It is only just and proper for SCDOT and the City to compensate the County for damages which were caused as a result of their Drainage Project. Under this construction of the Constitution, hardship, injustice and absurdity are avoided.

CONCLUSION

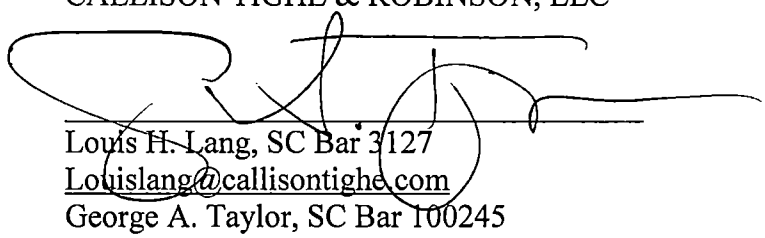
Art. VIII, § 17 of the South Carolina Constitution provides, "[t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor."

Under this Constitutional provision, the County is entitled to have the provisions of Art. I, § 13 construed in its favor. Doing so requires a finding that the County is entitled to just compensation under Art. I, § 13.

Georgetown County respectfully requests that the Court grant this Petition for a writ of certiorari to the Court of Appeals and hold that Georgetown County can maintain a claim of inverse condemnation against the South Carolina Department of Transportation and the City of Georgetown.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC



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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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

Opinion No. 5627 (S.C. Ct. App. Filed February 9, 2017)

Georgetown County, ... Appellant/Petitioner,

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.

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:

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