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

Appellate Case No. 2019-000705

Georgetown County, ... 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.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

CERTIFICATION OF COUNSEL

Counsel for the Petitioner certifies there was a published opinion of the Court of Appeals 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., § 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 (S.C. Code Ann. §28-3-20 *et seq.*) 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 require 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 of the Fifth Amendment to the United States Constitution 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 Georgetown County's (the "County") claims for just compensation for damage done to the Georgetown County Judicial Center and other Georgetown County-owned buildings, as a result of a public utility project undertaken by the South Carolina Department of Transportation ("SCDOT") and the City of Georgetown (the "City").

STATEMENT OF THE CASE

The County filed an Amended Complaint[1] on July 10, 2014 (App. 37), asserting an inverse condemnation claim against SCDOT and the City arising from damage to County buildings and property caused by a public utility project undertaken by the City and SCDOT.

The County moved for Summary Judgment on May 2, 2014. (Motion for Summary Judgment, App. 79). In its Memorandum in Opposition to the County's Motion, SCDOT moved to dismiss the inverse condemnation claim under Rule 12(b)(6), SCRCP. (SCDOT Memorandum in Opposition, App. 121). The City joined in SCDOT's arguments. (App. 310).

On November 12, 2015 the circuit court granted the Rule 12(b)(6) motion holding "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." (Order, pp. 5-6, App. 8 - 9.)

The County filed a Rule 59(e), SCRCP, motion on November 13, 2015. (County's Rule 59(e) Motion, App. 224). The circuit court denied the motion on January 17, 2017. (Order denying Rule 59(e) motion, App. 10).

The County filed a Notice of Appeal to the South Carolina Court of Appeals on February 9, 2017. 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.

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[1] The only difference between the Complaint (App. 14) and the Amended Complaint is the correction in the Amended Complaint regarding one of the County's properties damaged by the public utility project.

The Court of Appeals held:

> ... [T]he 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.
>
> ***
>
> ...[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.
>
> ***
>
> ...[T]he 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

Opinion No. 5627, February 13, 2019.

On February 28, 2019, the County filed a Petition for Rehearing. (App. 224). By Order dated March 29, 2019, the Petition for Rehearing was denied. By Order entered August 5, 2019, this Court granted the County's Petition for Writ of Certiorari to the South Carolina Court of Appeals.

STATEMENT OF THE FACTS

This case stems from damage to six County buildings (collectively, the "County's Buildings"). (Amended Complaint ¶ 9, App. 38). These damages resulted from a public utility project undertaken jointly by SCDOT and the City to resolve flooding problems in the City (the "Drainage Project"). (Amended Compl. ¶ 12, App. 39; SCDOT's Answer ¶ 13, App. 56; and the City's Answer ¶ 10, App. 72). During construction of the Drainage Project, hollow steel piles were installed deep into the sub-surface of the ground to provide lateral support for the walls of a water storage facility. (Affidavit of George A. Sembos, P.E. ¶ 8, App. 82, and F&ME Report, p. 22, App. 116). During installation, some piles breached a subsurface layer which confined

underground water, causing the underground water to rise from beneath the confining layer and fill the water storage area, (id.), resulting in multiple land-surface collapses, sinkholes and depressions in and around the area of the Drainage Project. (F&ME Report, p. 20, App. 114).

After several sinkholes appeared, SCDOT hired F&ME Consultants to investigate and identify the cause the sinkholes. According to F&ME, the construction activities related to the Drainage Project affected a lower, confined aquifer system underlying the area in question causing numerous sinkholes and depressions to form in the area of the Drainage Project. (F&ME Report, p. 22, App. 116).

The County's Buildings were damaged as a result of these sinkhole collapses. (Compl. ¶ ¶ 9 and 11, App. 15-16, Affidavit of George A. Sembos, P.E. ¶ 9, App. 82, and Supplemental Affidavit of George A. Sembos, P.E. ¶ 5-9, App. 159-160).

ARGUMENT

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

The 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 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, § 13 of the South Carolina Constitution of 1895.

While this issue is novel 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 Marin Mun. Water Dist. v. City of Mill Valley, 202 Cal. App. 3d 1161, 249 Cal. Rptr. 469 (1988) (a public water district suffered no less of a taking than if the property were owned by an individual, and 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) (the property was owned by the city, not the State of Montana, and 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 saying 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, saying 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) (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) (two government entities are nevertheless entities distinct from the state and saying "[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) (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) (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.[2] 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 said:

> 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***

[2] 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.

> ***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 Marin court said 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.

Between 1868 and 1895 South Carolina functioned under one of the most liberal and democratic constitutions in its history. Harold Albert, Home Rule and a New Constitution: Article by Article in South Carolina, National Civic Review, Nov. 1977 at 491. Under the 1868 Constitution, county governments were granted the "power to govern" and exercised considerable fiscal control over funding of county improvements. Id.

The 1895 Constitution changed this state/county relationship dramatically, relegating the counties to the status of "virtual wards of the state." Id.

For the proposition that the County's property does not fall within the protection of the S.C. Const. art. I § 13, the Court of Appeals relied heavily on Edgefield Cty v. Georgia-Carolina

Power Co., 104 S.C. 311, 88 S.E.801 (1916), a case decided during the "counties-as-wards-of-the-state, 1895 Constitution era.

In Edgefield Cty., the county sued a utility company having the power to condemn for damage done to a county road. 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 defendant in Edgefield Cty. argued, "the county had no such ownership of the highway and ferry as to render their serious impairment by the defendant a wrong to [Edgefield County], 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 Edgefield Cty. Court agreed saying:

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

As the Edgefield Cty. Court noted, when the case was decided, "[t]he Constitution of 1895... left the government of the counties in the hands of the Legislature." Id. at 327, 88 S.E. at 806. The Court 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).

However, even in the Edgefield Cty. – counties-as-wards-of-the-state-era – this Court has not been averse to the concept that as between a county and the state, the county's property is "private."

In Chesterfield Cty. v. State Highway Dept. of S.C., 181 S.C. 323, 187 S.E. 548 (1936) (Chesterfield Cty. I), Chesterfield County brought a mandamus action against the Highway Department in the Court's original jurisdiction seeking an order directing the Highway Department to surrender to the county bonds purchased by it so the bonds could be cancelled by the county treasurer.

In denying the county's mandamus petition, the Court said, "[i]f, then, the state has taken the private property of Chesterfield county, to wit, its bonds, without making just compensation therefore, the county may maintain its action thereabout." Id. at 323, 548 S.E. at 551.[3]

Edgefield Cty. and Chesterfield Ctys. I and II were decided over 100 years ago. As this Court explained in Hospitality Ass'n of South Carolina, Inc. v. Cty. of Charleston, 320 S.C. 219, 224 - 226, 464 S.E.2d 113, 117 - 118 (1995), times have changed:

> 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 ...
>
> ***
>
> 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.

[3] The Court appears to have backed-up on this pronouncement in the follow-on case of Chesterfield Cty. v. State Highway Dept. of S.C., et al., 191 S.C. 19, 3 S.E.2d 686, 698 (1939) (Chesterfield Cty. II) ("The County is but an agency or arm of the State for governmental purposes, and privileges conferred upon counties and grants to them by the State ... are merely for the more convenient performance of the States governmental functions."

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> 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.
>
> (Emphasis added).

Before the ratification of S.C. Const. art. VIII, § 17, "courts in this State **strictly and narrowly** construed any grant of local government power under what was commonly referred to as Dillon's Rule." Id. at 225 n.5, 464 S.E.2d at 117 n.4 (emphasis added). Art. VIII, § 17 abolished Dillon's Rule, requiring South Carolina's "Constitution and all laws concerning local government [to be] liberally construed in [favor of local government]..."

When Edgefield County was decided, the property at issue belonged to the State. In 1916, Edgefield County, like all South Carolina counties, being "virtual wards of the state," did not control its own property. Now, unlike during the Edgefield County era, the State does not exercise control over the County's properties. It is the County and not the State which sets apart, pays for, and owns the County's property. The property affected by SCDOT's and the City's taking is not the property of the State.

Given the current Constitutional and statutory relationship of the County and Respondents, particularly SCDOT, the damaged County property is "private". This Court should recognize the impact of Home Rule, and the liberal construction required by S.C. Const. art. VIII § 17 of S.C. Const. art. I § 13, on the property rights of the County vis-à-vis the State and hold that the County may maintain its inverse condemnation action.

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).

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 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 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 said:

> 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).

Property owned by state and local governments is "private" as between the United States and non-federal governmental entities. With the establishment of Home Rule, the same rationale applies between SCDOT, the City and the County. The County's property is "private" as between the County and SCDOT and the City. Therefore, if the County's property is damaged, as is the case here, by SCDOT, the City or both, the County is entitled to just compensation. As South Carolina has consistently applied Federal Takings Clause jurisprudence, interpreting the South Carolina Constitution the same way as the Federal Constitution requires SCDOT and the City compensate the County for taking its properties.

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

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. Further, South Carolina Counties must provide facilities to accommodate the circuit courts, 1975 S.C. Op. Atty. Gen. No.

4194, 1975 WL 22491. Those facilities, however, are paid for by the citizens of the counties and belong to those counties.

In an early Wisconsin Supreme Court case, Town of Milwaukee v. City of Milwaukee, 12 Wis. 93, 100-101 (1890), the court opined:

> In [the municipality's] capacity of (sic) 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.

The County's Properties are not owned by the State, 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 a court cannot 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, concluding that the County is not entitled to just compensation under the facts of this case 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 this 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 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).

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, and significantly, **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. 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 the County's properties which are the subject of this lawsuit. (Amended Complaint ¶ ¶ 9-10, App. 38). Therefore, to condemn the County's properties, SCDOT and City must proceed 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 in its Court of Appeals brief, 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, saying:

> 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 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.

The Act is procedural and is "not intended... to alter the substantive law of condemnation." S.C. Code Ann. §28-2-20. However, to allow SCDOT and the City to circumvent the Act is contrary to the General Assembly's stated purpose. Jus 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 taking of its property.

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 "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 said:

> 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 (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 contended in the Circuit Court that public policy does not apply to the County's claim against it because the City is a smaller subset of the County taxpayers and holding them

liable would not spread the burden to a larger body. (City's Brief in Opposition of Summary Judgment, p. 5, App. 220). 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. ... 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.

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

Even 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 provides 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. Here, the Drainage Project was paid through SCDOT, the City, and Federal financing and was to relieve certain flooding on US 17. It is only just and proper for SCDOT and the City compensate the County for damages caused because of their Drainage Project. Under this construction of the Constitution, hardship, injustice and absurdity are avoided.

CONCLUSION

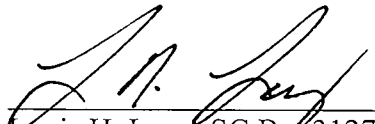
Art. VIII, § 17 of the South Carolina Constitution provides, "[t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor."

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 reverse the Court of Appeals and the Circuit Court 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)
Supreme Court Appellate Case No. 2019-000705

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:

DOCUMENTS SERVED: BRIEF OF PETITIONER
APPENDIX

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