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. 5327 (S.C. Ct. App. Filed February 9, 2017)

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, ...Respondents.

JOINT BRIEF OF CITY OF GEORGETOWN AND SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

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QUESTION PRESENTED

Respondents would respectfully restate the question presented as follows:

DOES THE TERM "PRIVATE PROPERTY" AS CONTAINED IN THE INVERSE CONDEMNATION CLAUSE OF THE SOUTH CAROLINA CONSTITUTION, INCLUDE PUBLIC PROPERTY OWNED BY A GOVERNMENTAL ENTITY SUCH THAT ONE GOVERNMENTAL ENTITY MAY SUE ANOTHER GOVERNMENTAL ENTITY IN INVERSE CONDEMNATION PURSUANT TO THE SOUTH CAROLINA CONSTITUTION FOR ALLEGED UNINTENTIONAL DAMAGE TO NON-ABUTTING PROPERTY AS THE RESULT OF A PUBLIC WORKS PROJECT?

INTRODUCTION

The issue on appeal involves an alleged inverse condemnation. The South Carolina Constitution states in pertinent part: "Except as otherwise provided in this Constitution, **private property** shall not be taken . . . for public use without just compensation being first made for the property." (Emphasis added). The only issue decided by the lower court in striking the inverse condemnation claim is that Georgetown County cannot assert an inverse condemnation cause of action since the takings clause is limited to "private" not public property. The Georgetown County property at issue here is public property. The term "private property" is clear and unambiguous. The inclusion of the word "private" is a limiting term which specifically excludes "public" property. As such, the takings clause of the constitution can only be interpreted to prohibit the taking of private, not public, property. That interpretation is consistent with the original intention of the Bill of Rights - a negative charter to protect citizens from the government.

STATEMENT OF THE CASE

Petitioner filed its Complaint on October 25, 2013 (App. 14) and its Amended Complaint on July 10, 2014 (App. 37) against Respondents, the engineers and contractors who performed work on the public project. Respondents filed their Answers on November 21, 2013, (App. 55) and January 22, 2014. (App. 71). Petitioner asserted various claims against the Respondents

including an inverse condemnation cause of action. (App. 37). On May 2, 2014, Petitioner moved for Summary Judgment on their inverse cause of action against Respondents. (App. 79). Respondent SCDOT filed a Memorandum in Opposition to Petitioner's motion and moved to dismiss the inverse condemnation cause of action pursuant to Rule 12(b)(6), SCRCP. (App. 121). The City joined in that motion. The court heard the motions motion on August 7, 2014. (App. 290). Following arguments, the trial court requested further briefing on the legal issue about private property versus public property (App. 312-313). Petitioner filed their Brief in Support of Its Motion for Summary Judgment (App. 11). Respondent SCDOT filed a Supplemental Memorandum in Opposition to Petitioner's Motion (App. 170) and Respondent City filed a Brief on the Legal Issue of Whether Georgetown County Can Assert an Inverse Condemnation Claim Under the Law. (App. 181). Petitioner filed a Reply Brief in response to Respondents' filings. (App. 196). Thereafter Respondents filed responses thereto, Respondent SCDOT Response Brief (App. 209) and Respondent City's Reply Brief (App.216). The court held another hearing on April 30, 2015. (App. 317). The Court denied Petitioner's motion and granted Respondent's Motion orally on April 30, 2015. (App. 352). The court entered its written Order, from which this appeal stems, on November 12, 2015 ("Order"). (App. 4). The Court specifically limited its ruling to the legal issue of whether Petitioner could bring an inverse condemnation claim against Respondents for alleged unintentional damage to public, not private, property as the result of a public works project. (App. 4). Petitioner filed a Rule 59(e), SCRCP Motion to Reconsider, Alter or Amend on November 13, 2015. (App. 224). The court heard arguments on Petitioner's Motion to Reconsider on August 5, 2016 (App. 356) and entered an order denying the motion on January 17, 2017. (App. 10). Again, the Court specifically limited its ruling to the constitutional issue. (App. 10). Petitioner filed their Notice of Intent to Appeal. The Court of Appeals affirmed the circuit court's

order on February 13, 2019. (App. 471). Petitioner filed a Petition for Rehearing on February 28, 2019. (App. 224). On March 29, 2019, the Court of Appeals denied Petitioner's Petition. (App. 494). Petitioner then petitioned for Writ of Certiorari to the South Carolina Supreme Court and Certiorari was granted August 5, 2019. The sole issue on appeal is the constitutional issue of whether the term "private property" as contained in the inverse condemnation clause of the South Carolina Constitution, includes public property owned by a governmental entity such that one governmental entity may sue another governmental entity in inverse condemnation pursuant to the South Carolina Constitution for alleged unintentional damage to non-abutting property as the result of a public works project.

FACTS OF THE CASE

Georgetown County (Petitioner) brought this action seeking recovery for property damage allegedly caused by a public works project allegedly constructed by the South Carolina Department of Transportation (SCDOT) and/or the City of Georgetown (City) (collectively Respondents). (App. 37). Petitioner alleges there was a joint project between the Respondents to relieve flooding that occurs in Georgetown, South Carolina during heavy rains. (App.83-85).[1] The alleged joint project included work performed on public rights of way and property. (App. 85). Petitioner alleges that during this construction subsurface water was pumped from the ground that caused changes in the subsurface of Georgetown, South Carolina and caused damage to non-abutting public properties some distances away. (App. 86; p. 17, ¶ 23; p. 18, ¶ 24-25).

[1] The City of Georgetown disputes that this was a joint project. The issues surrounding the City's participation in the project and the existence of any affirmative act for purposes of inverse condemnation were raised but not reached by the lower court. The only issue reached by the lower court and the only issue for this appeal is whether the County can bring an inverse condemnation claim when its property is clearly public, not private, property.

ARGUMENTS

The City of Georgetown and the South Carolina Department of Transportation (SCDOT) jointly respond to Petitioner, Georgetown County's Brief to the South Carolina Supreme Court.

I. THE COURT OF APPEALS DID NOT ERR IN ORDERING THAT ARTICLE I, SECTION 13 OF THE SOUTH CAROLINA CONSTITUION APPLIES TO PRIVATE PROPERTY.

A. THE COURT OF APPEALS DID NOT ERR IN NOT ADDING LANGUAGE TO THE SOUTH CAROLINA CONSTITUTION THAT IS NOT CONTAINED THEREIN.

This appeal concerns whether language/provisions can be added to Article I, § 13 of the South Carolina Constitution that are not contained therein. Article I, § 13 of the South Carolina Constitution states that "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 therefore".

This is not a case of one governmental entity intentionally and/or affirmatively condemning the property of another governmental entity. The cause of action in this matter is not the physical occupation or appropriation of property for another entity's use but the alleged unintentional damage of public property as the result of a public works project. As, such we turn to the law of inverse condemnation not eminent domain. "The term 'inverse condemnation' describes an action grounded, not on statutory condemnation power, but on the constitutional proscription." *Vick v. South Carolina Dep't of Transp.*, 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001). An inverse condemnation action is not based on tort, but on the constitutional prohibition. *Horry County v. Insurance Reserve Fund,* 344 S.C. 493, 544 S.E.2d 637 (Ct. App. 2001). Inverse condemnation is not simply the reverse of Eminent Domain. In South Carolina, a governmental entity that does not have the power of Eminent Domain can still be liable for inverse condemnation. "[A]s long as the state acts through one of its arms in such a way as to deprive an individual of his property for

public use, it is irrelevant whether the state arm doing the actual taking has eminent domain power." *Mowrer v. Charleston County Park & Rec. Comm'n*, 361 S.C. 476, 605 S.E.2d 563, (Ct. App. 2004) (emphasis added). "Liability for inverse condemnation is grounded in the Constitution, not in a statutory power of eminent domain or tort." *Id.* at 481 n. 8, 605 S.E.2d @ 565 n. 8.

Contrary to Petitioner's contention, few states have considered this precise issue. Other states have addressed whether a governmental entity can intentionally take the property of another governmental entity and convert it to their own use by eminent domain. Here, the property allegedly taken was not intentionally taken and has not been transferred to the use of the Respondents. Therefore, the case law in that vein cited by Petitioner is not applicable here.

The word "private" is not ambiguous and the court properly gave it its plain ordinary meaning. "When this Court is called upon to interpret our Constitution, we are guided by the 'ordinary and popular meaning of the words used...." *Richardson v. Town of Mt. Pleasant,* 350 S.C. 291, 566 S.E.2d 523 (2002). "A word used in the Constitution should be given its 'plain and ordinary' meaning." *Id.* "Under the plain and ordinary meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id,* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n,* 317 S.C. 434, 454 S.E.2d 890 (1995). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey,* 341 S.C. 79, 533 S.E.2d 578 (2000). Article I, § 13 of the South Carolina Constitution is contained in the Bill of Rights to

the SC Constitution. The Bill of Rights is a charter of negative powers, that is, it prevents the government from depriving the citizens of their basic rights. The Bill of Rights was not designed or intended to protect the government. The inalienable rights clause of state constitution protects the rights of citizens and does not provide a basis for one public entity to sue another public entity over the use of state-owned assets. *See Bd. of Water Works Trs. Of City of Des Moines v Sac, Cty, Bd. of Supervisors*, 890 N.W. 2d 50, (S.Ct. Iowa 2017). The term "private property" is clear and unambiguous. The Petitioner has not cited any caselaw wherein the term "private property" was found to be ambiguous. Petitioner cites no South Carolina case that has interpreted the word "private" to include "public" in its meaning, nor any instance in which a South Carolina court has ruled that article I, section 13 applies to public as well as private entities. This Court must interpret article I, section 13's use of the term "private property" according to its plain meaning. This constitutional language is unambiguous and therefore the Court is confined to reviewing the words of the provision itself. Black's Law Dictionary 2nd Edition defines property private as "the term that describes property belonging to a person or person's and not to a community." (The American Heritage Dictionary of the English Language (1978) "belonging to a particular person or persons, as opposed to the public or the government). "Public is an antonym of private." (App. 473).

The Supreme Court of Missouri recently considered this issue in a strikingly similar case. In *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors,* 476 S.W.3d 913, (S.Ct. Mo. 2016), the sewer district (MSD) sued the City of Bellefontaine Neighbors in inverse condemnation for the alleged unintentional damage to the sewers underground pipes as the result of a city public project. "Article I, section 26 of the Missouri Constitution provides '[t]hat private property shall not be taken or damaged for public use without just compensation." *Id.* MSD, has Petitioner did here, did not contest that it is a public entity, that the property taken was the property of a public

entity or that the constitutional article expressly provides that "private property" shall not be taken without compensation. MSD, like Petitioner, argued that the court should interpret the words "private property" as used in the constitutional article to include public property that is damaged by other public entities "either by ignoring the word 'private', by defining 'private' to include 'public', or by adding by implication the word 'public' because there is no good policy reason why just compensation should not be provided to public entities whose property has been taken by another public entity when private entities are so entitled." *Id.* Missouri rejected MSD's arguments finding that MSD, like Petitioner, cited no Missouri case that interpreted the word "private" to include "public" in its meaning, nor any instance in which a Missouri court had ruled that article I, section 26 applied to public as well as private entities. The Court held that, like Petitioner in this case, MSD asked 'the [c]ourt to act as a legislature or to add a provision to the constitution that is not there." *Id.* The Missouri Supreme Court held that "is not a role this Court can undertake." *Id.* "The Court must interpret article I, section 26's use of the term 'private property' according to its plain meaning." *Id.*

> "Webster's Third New International Dictionary defines 'private as 'belonging to or concerning an individual person, company or interest (~ property). *WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY AT 1804, (3RD ED. 1993).* 'Public' means authorized or administered by or on acting for the people as a political entity: government. *Id* at 1836. These definitions unequivocally do not support reading the word 'private' to include within its meaning the word 'public.' To the contrary, the words are understood as antonyms."

Id.

The court went on to hold that "article I, section 26 affirmatively limits its reach to private property. The meaning of this language is plain. It does not give a public entity a constitutional right to just compensation for the taking of its property."

As in the *Metro. St. Louis Sewer District* case above, the constitutional language in Article I, § 13 of the SC Constitution is unambiguous and therefore the Court is confined to reviewing the words of the provision itself. Article I, § 13 affirmatively limits its reach to private property and as such the court did not err in not ignoring the word "private", in not defining "private" to include "public", or in not adding by implication the word "public." This issue was also recently addressed by Iowa's Supreme Court. In overturning the lower court and the appellate court the Court stated: "We also reject DMWW's 'takings' claim. The takings clause provides, '[p]rivate property shall not be taken for public purpose without just compensation first being made ...." Iowa Const. art. 1, 18. No private property is involved in this case. To the contract, we have a dispute among various public subdivisions that only exist by the grace of the Iowa General Assembly." *Bd. Of Water Works Trs. Of City of Des Moines. Sac Cnty. Bd. of* Supervisors, 890 N.W.2d 50 (S.Ct. Iowa 2017).

The issue of whether a governmental entity can bring an inverse condemnation action against another governmental entity for unintentional damage to public property resulting from a public works project has been addressed in *Edgefield County v. Georgia –Carolina Power Co.*, 104 S.C. 311, 88 S.E. 801 (1916). In *Edgefield,* the Court analyzed the Complaint and held that it contained two classes of action: one in negligence and one in inverse condemnation. The Court held that the negligence cause of action could go forward on statutory grounds. In analyzing the inverse condemnation cause of action and whether public property falls under the protection of the Constitution the Court stated, "[a]nd it is true that, if the company should thereby flood the private property of the citizen, then under the constitutional protection it would need to make compensation to those persons who suffered a particular injury from the nuisance. But public

property, we think, does not fall within the protection of the Constitution." *Edgefield County v. Georgia –Carolina Power Co.*, 104 S.C. 311, 88 S.E. 801 (1916).

Petitioner's position would render the word "private" meaningless and of no effect. As used, "private" is an adjective modifying property to describe the type of property effected. The inclusion of the word surely was for a purpose. Petitioner's view would read "private" out of the Constitution altogether – an illogical interpretation.

B. HOME RULE DOES NOT CHANGE THE NATURE OF PUBLIC PROPERTY.

South Carolina's movement to "Home Rule" in 1975 does not change the public nature of the property at issue in this case. In *Chesterfield County v. State Highway Dep't,* 191 S.C. 19, 3 S.E.2d 686 (1939), the Court reviewed the relationship between counties and the State and, citing Corpus Jurisprudence stated:

> "[C]omprehensively considered, a county is an involuntary political or civil division of the state, created by statute to aid in the administration of government…[T]he authorities unite in holding that a county is a local, legal, political subdivision of the state, created out of the territory of the state, and that it is but an agency or arm of the state, created, organized, and existing for civil and political purposes, particularly for the purpose of administering locally the general powers and policies of the state."

Home Rule did not abrogate State control of counties. The General Assembly implemented home rule and they decide/decided what powers local governments should have. As such, the State has the authority to give, modify or remove grants of power to local governments. *Hospitality Ass'n of South Carolina, Inc. v. City of Charleston,* 320 S.C. 219, 464 S.E.2d 113 (1995). Home Rule did not change that counties are created by the state and it did not endow counties with separate sovereignty for purposes of the Takings Clause. Home Rule embodies the structure and power to the counties as granted by the legislature. The legislature/state still controls what powers it grants to the counties. Home Rule powers can only be exercised in a manner consistent with the acts of

the general assembly. A state statute trumps inconsistent local acts. The counties are akin to trustees of the state and not separate sovereigns. In a footnote to Attorney General Opinion No. 87-76, the Attorney General states, "[c]ounties or municipalities are arms or subdivisions of the State, subject to legislative control, created and existing with a view to the policy of the State and serving as its agencies...Accordingly, as a general rule, counties (or municipalities) may not sue the State or its agencies." "The county is but another manifestation of the state; it is an arm of the state." *Edgefield County v. Georgia –Carolina Power Co.*, 104 S.C. 311, 88 S.E. 801 (1916). "Counties are subdivisions of the State, subordinate and subject to legislative control, created and existing with a view to the policy of the State and serving as its agencies." *Parker v. Bates*, 216 S.C. 52, 56 S.E.2d 723 (1949). "The power to 'sue and be sued' given to almost all political subdivisions does not extend to a challenge of the acts of the creator of those subdivisions." *Richland County Recreation Dist. v. Columbia,* 290 S.C. 93, 348 S.E.2d 363 (1986).

Petitioner contends that *Edgefield County* was decided against a different backdrop than today. They assert that Home Rule changed the relationship as to the ownership of property by the County so that a different result is reached. They quote from *Edgefield County* to the effect that the State had absolute control over the County at that time so that Edgefield County's roads were not owned by the County, but by the State. Petitioner quotes:

> "Under the Constitution and laws of the state, the state [General Assembly] ha[d] ***absolute control*** over the government of counties." (emphasis added by Petitioner)

Petitioner's brief @ p.8.

However, Petitioner omitted the very next sentence in the Court's opinion.

> But we are of the opinion that the state has by statute delegated to the counties jurisdiction over roads, bridges, and ferries. The General Assembly has empowered the counties to open new highways, and to close old highways; it has conferred

> upon the counties control and supervision of highways and ferries; it has also empowered the counties to establish free ferries; it has devolved upon counties the duty to maintain the public roads at its own expense under penalties, and to levy taxes upon the citizens of the county for the Constitution and maintenance of roads. Code of Laws, supra.

Edgefield Cty. v. Georgia-Carolina Power Co., 104 S.C. 311, 88 S.E. 801, 806 (1916).

Clearly, the *Edgefield County* court found that the highway was owned and maintained by the County. The situation in that case was no different than the situation in the present case. The well reasoned result remains the same: "But public property, we think, does not fall within the protection of the constitution." Petitioner's argument about home rule changing matters is wrong.

Further, petition insinuates that the court in *Chesterfield County v. State Highway Department of S.C.*, 191 S.C. 19, 3 S.E.2d 686 (1939), found that a County could bring an action in inverse condemnation against the State. However, again the quotes are misleading. In fact, that court simply found that the County could maintain a breach of contract suit over the cancellation of bonds, nothing more. That likewise has no bearing on the inverse condemnation issue here.

The Supreme Court of the United States has determined that there is a difference between transactions involving the State and private individuals and those between the State and a municipal corporation, such as a county. "[B]etween the State and municipal corporations, such as cities, counties, and towns, the relation is different from that between the State and the individual. Municipal corporations are mere instrumentalities of the State, for the convenient administration of government; and their powers may be qualified, enlarged, or withdrawn, at the pleasure of the legislature." *Tippecanoe County v. Lucas*, 93 U.S. 108, 114, 23 L.Ed. 822 (U.S. 1876). The Supreme Court further discussed the relationship between a State and a county in *Trenton v. New Jersey*, 262 U.S. 182, 43 S. Ct. 534, 536, 67 L. Ed. 937 (U.S. 1923):

> "The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the

> absolute discretion of the state." *Id.* "The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without consent of the citizens, or even against their protest."

"The City of Trenton and its progeny hold [a] municipality could not 'sue its parent state under a substantive provision of the Constitution." *Bd. Of Water Works Trs. Of City of Des Moines. Sac. Cnty. Bd. of* Supervisors, 890 N.W.2d 50, (S.Ct. Iowa 2017). In *Edgefield,* the Georgia-Carolina Power Co. built a dam which obstructed the Savannah River and a creek causing the water to back up and flood and destroy the public highway of Edgefield County. The Court found it was within the power of the Legislature to subject the highway in Edgefield to be overflowed, and the county did not have a right to complain about it. *Id.* "The constitutional prohibition to take private property without making compensation therefore has no application to the taking of public property." *Id.* Petitioner argues that *Edgefield County* has no application here since it was decided before South Carolina adopted Home Rule. In making that assertion Petitioner ignores the facts of *Edgefield County* in that the County was operating under a grant of power from the state over the highways in the county and were seeking compensation for damages thereto.

Petitioner argue that Home Rule allows counties to own property. Consequently, they contend that *Edgefield County* has no application today. However, counties can and did own property at the time Edgefield County was decided. That court found that *Edgefield County* controlled and maintained the road in issue. Further, counties could hold property separately pursuant to the State the South Carolina Constitution of 1865, as well as, under statutory law in 1800's, more specifically, S.C. Code Section 41-1-10. Home rule did not change the ability of a county to hold property and has no application here. The law at the time *Edgefield County* was

decided is no different than the law today. Petitioner's argument that home rule changes the validity of *Edgefield County* is just wrong.

Petitioner and Respondents are manifestation of the state - arms of the state and essentially this cause of action boils down to the state suing the state and its subdivisions for public property. Home rule makes absolutely no difference to the analysis. Petitioner's arguments are misplaced.

C. FEDERAL TAKINGS CLAUSE JURISPRUDENCE DOES NOT HOLD THAT A PRIVATE TAKING HAS OCCURRED AS BETWEEN TWO ARMS OF THE SAME SOVERIGN ENTITY

Federal Takings Clause jurisprudence does not support Petitioner's contention that local governmental property is included in the definition of "private property" pursuant to the South Carolina Constitution article 1, section 13. Rights under the South Carolina Constitutional Takings Clause follow the breath of those same rights under the Fifth Amendment to the United States Constitution. South Carolina recognizes that its legal analysis of any takings claim or inverse condemnation claim is the same as that utilized by the federal courts in interpreting the Fifth Amendment takings clause. In *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005), our Supreme Court stated:

> "The Takings Clause of the Fifth Amendment to the United States Constitution provides 'nor shall private property be taken for public use, without just compensation.' U.S. Const. amend. V. The Takings Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; *Chicago, B. & Q.R. Co. v. City of Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)."
>
> "In addition, the South Carolina Constitution states, "Except as otherwise provided in this Constitution, private property shall not be taken for public use without just compensation being first made therefor." S.C. Const. art. I, § 13. Takings analysis under South Carolina law is the same as the analysis under federal law. *Westside Quik Shop, Inc. v. Stewart,* 341 S.C. 297, 306, 534 S.E.2d 270, 275 (2000)."

Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005) @ footnote 6.

Therefore, reliance on federal takings law is appropriate. However, the cases cited by Petitioner do not stand for the proposition espoused by Petitioner. The Takings Clause of the United States Constitution is applicable to the state and local governments for the taking of their properties by the United States. *Ark. Game and Fish Com'n v. U.S.*, 568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012). Federal jurisprudence has **not** held that the takings clause of the US Constitution applies to an agency or arm of the federal government as against another agency or arm of the federal government. The states and local governments are not arms of the United States government. Here, Petitioner and Respondents are arms of the same sovereign. The relationship between arms of the same sovereign are different from the relationship between two separate sovereigns. The question raised in the instant matter involves the application of the Takings Clause of the Constitution as between departmental arms of the same state or sovereign. The Missouri Supreme Court addressed this in the *Metro. St. Louis Sewer Dist. v. Bellefontaine Neighbors* cited above. Missouri stated that *United States v. 50 Acres of Land*, 469 U.S. 24, 105 S. Ct. 451, 83 L. Ed. 2d 376 (1984) is not applicable as *50 Acres* dealt with whether local governments should receive greater compensation than private landowners. Additionally, *50 Acres* cited *United States v. Carmack*, 329 U.S. 230, 242, 67 S. Ct. 252, 91 L. Ed. 209 (1946)"[b]ut *Carmack* specifically said its rationale does not apply when the taking is of public property within one state or for when 'a sovereign state transfers its own public property from one governmental use to another."

> "Other states accordingly have recognized that the rationale of *50 Acres of Land* does not require a state or local public entity to compensate another state or local public entity for the taking of its property (absent a constitutional or statutory provision expressly so providing). For instance, *Evanston v. Regional Transp. Authority*, 202 Ill. App. 3d 265, 559 N.E.2d 998, 905-06, 147 Ill. Dec. 559 (Ill. App. 1990), held that 'there is no authority that private property within the meaning of the 5th Amendment includes the public property of one political subdivision taken by another political subdivision of the same state.' The Supreme Court of Georgia similarly rejected the relevance of *50 Acres of Land* to state proceedings, holding that a state constitutional requirement of just compensation for the taking of 'private

> property' did not require just compensation for the taking of 'public' lands in a state condemnation action because '[t]he relationship between the federal government and a state or a city is certainly different from the relationship between a state and a city." *Department of Transp. v. Atlanta*, 255 Ga. 124, 337 S.E.2d 327 (1985).

Metro. St. Louis Sewer Dist., Id. @ 920.

In *Evanston v. Reg'l Transp. Auth., Id.* the court stated:

> "[i]t has been held that the reference to private property in the fifth amendment encompassed the property of State and local governments when condemned by the United States but there is no authority that private property within the meaning of the fifth amendment includes the property of a political subdivision taken by another political subdivision of the same State. RTA's and PACE's property was public property that was not protected by the United States Constitution's just compensation clause."

The court went on to hold that though "RTA's and PACE's property was not subject to Evanston's control, but we hold that it was nevertheless public property that was not protected by the Illinois Constitution's just compensation clause." *Id.* Section 15 of article I of the Illinois Constitution of 1970 "[p]rivate property shall not be taken or damaged for public use without just compensation as provided by law." "[E]arly United States Supreme Court cases, is that a political subdivision of the State has no rights under the United States Constitution which it may invoke in opposition to its creator, the State." *Evanston citing City of Newark v. New Jersey,* 262 U.S. 192, 43 S. Ct. 539, 67 L. Ed. 943 (1923) (the regulation of municipalities is within the domain of the State so that the city could not invoke the protection of the fourteenth amendment against the State); *Trenton v. New Jersey*, 262 U.S. 182, 43 S. Ct. 534, 536, 67 L. Ed. 937 (U.S. 1923) (municipal corporation is merely a department of the Sate which may withhold, grant, or withdraw powers and privileges as it sees fit so that city could not attack State act as violative of due process and fifth amendment). *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500, (6th Cir. 1986) (fourteenth amendment does not impose restrictions upon one political subdivision *vis-à-vis* another political subdivision); *Town of Ball v. Rapides Parish Police Jury,*

746 F.2d 1049, (5th Cir. 1984) (a municipal corporation cannot invoke the fourteenth amendment against another subdivision of the State). "Counties are subdivisions of the State, subordinate and subject to legislative control, created and existing with a view to the policy of the State and serving as its agencies." *Parker v. Bates*, 216 S.C. 52, 56 S.E.2d 723 (1949); 1987 S.C. Op. Atty, Gen., 196 (S.C.A.G.), 1987 S.C. Op. Atty. Gen. No. 87-76, 1987 WL 245484. "A municipality or county has no vested rights which it may assert against the state and these entities have no vested rights in public property where the exercise of governmental powers is involved... Accordingly, as a general rule, counties (or municipalities) may not sue the State or its agencies." 1987 S.C. Op. Atty, Gen., 196 (S.C.A.G.), 1987 S.C. Op. Atty. Gen. No. 87-76, 1987 WL 245484 (citing *Richland County Recreation Dist. v. Columbia,* 290 S.C. 93, 348 S.E.2d 363 (1986); *Hibernian Soc. v. Thomas,* 282 S.C. 465, 319 S.E.2d 339 (Ct. App.1984).

Further, the Court in *Hibernian Society v. Thomas*, addressed the City maintaining a claim against the State to challenge a statute enacted by the State on equal protection grounds. The Court found that a "municipal corporation, created by a state for the better ordering of government, has no privileges or immunities ... which it may invoke in opposition to the will of its creator." *Hibernian Society v. Thomas,* 282 S.C. 465, 472 (1984). "Likewise, a governmental agency created and controlled by a state is not a "person" entitled, as against that state, to equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution."

As such, the court did not err in determining that Petitioner's property is public property and this court should affirm the grant of summary judgment to the Respondents as to the inverse condemnation claim.

D. THE TRIAL JUDGE'S ORDER DOES NOT WORK AN ABSURDITY.

Petitioner cites *City of Chester v. Com., Dept. of Transp.*, 495 Pa. 382, 434 A.2d 695 (1981) for the proposition that the Pennsylvania Court has decided that to hold a public entity is not entitled to just compensation would lead to a highly absurd result. However, *City of Chester* involved the affirmative act of a physical taking of property for another entities permanent use under eminent domain and for reasons discussed below is not applicable to the issue in this instant matter. When the Pennsylvania Court did address compensation pursuant to their constitutional prohibition the Court found that such constitutional prohibition only applied to private property and that the analysis of these two provisions are separate and distinct. *Sch. Dist. of Borough of Speers v. Com.*, 383 Pa. 206, 117 A.2d 702 (1955) also dealt with compensation under eminent domain act however the Court went further holding that:

> "[c]onstitutional prohibitions against the taking of property without compensation apply only to privately owned property: Article I, Section 10 of the Constitution of Pennsylvania. Different than interpreting meaning of 'owner or owners' contained in eminent domain act. Act 'does not contain any provision specifically declaring that compensation shall be paid only to private owners of property."

Sch. Dist. of Borough of Speers, Id. @ 703

Petitioner asserts that requiring the Petitioner to bear the burden of the damage to its buildings would be an absurdity. Petitioner's argument is misguided. In regard to at least some of the properties Petitioner refers to, such burden is expressly the burden of Petitioner per statute.

> "The governing body of each county shall furnish the probate judge, auditor, superintendent of education, clerk of court, sheriff, treasurer and master in equity of their respective counties office room, together with necessary furniture and stationery for the same, which shall be kept at the courthouse of their respective counties, and it shall supply the offices of such officials with fuel, lights, postage and other incidentals necessary to the proper transaction of the legitimate business of such offices."

S.C. Code Ann. § 4-1-80.

"The governing bodies of the several counties shall make any alternations and additions deemed advisable, or which may become necessary, to any courthouse or jail built in the several counties." S.C. Code Ann. § 4-17-60. "If at any time the courthouse of any county in this State shall be in course of reconstruction or repair or from any other cause shall not be in the condition to be occupied, the governing body of the county must furnish suitable rooms for the accommodation of the courts and public officers. S.C. Code Ann. § 4-1-90. "Each county council shall ... establish within the county a county public library system ...." S.C. Code Ann. § 4-9-35. "The governing authorities of each county shall provide office space and facility service, including janitorial, utility and telephone services, and related supplies, for its county Department of Social Services." S.C. Code Ann. § 43-3-65. Petitioner is provided funds from the State of SC for the funding of its offices, including the courthouse. "From funds distributed to the county pursuant to Section 6-27-40, a county council shall provide a reasonable amount of funds for all county offices of state agencies for which the council is require to provide funding by state law." S.C. Code Ann. § 6-27-55. "No later than thirty days after the end of the calendar quarter, the State Treasurer shall distribute the monies appropriated to the Local Government Funds as follows: Eighty-three and two hundred seventy-eight thousandths percent must be distributed to counties." S.C. Code Ann. § 6-27-40.

The construction of public projects would be severely impeded if one governmental entity incurred liability for inverse condemnation to another governmental entity when so much of the governmental entities properties in South Carolina lie within the physical boundaries of each other. Petitioner alleges that Respondent DOT "can spread this burden over the taxpayers of the entire State." *Petitioner's Initial Brief*, p. 17. Petitioner is incorrect, Respondent DOT does not set or collect taxes from the citizens of the State of South Carolina. Respondent DOT is allocated monies

yearly by the Legislature and cannot spend that money for purposes or activities for which it was not allocated. "It shall be unlawful for any monies to be expended for any purpose or activity except that for which it is specifically appropriated, and no transfer from one appropriation account to another shall be made unless such transfer be provided for in the annual appropriation act." S.C. Code Ann. § 11-9-10. Additionally, Petitioner's argument that the cost should be spread to a larger subset of the population as a matter of public policy, loses steam when the argument is applied to the City of Georgetown, a subset of the County.

The State would constantly be shifting monies from one pocket to the other. Allowing the County, as an alter ego of the state, to maintain an action against other state entities would be in effect allowing the state to sue itself.

> "Comprehensively considered, a county is an involuntary political or civil division of the state, created by statute to aid in the administration of government. Separating this definition into the elements that compose, it, and considering a county from the standpoint of its distinguishing characteristics, the authorities unite in holding that a county is a local, legal, political subdivision of the state, created out of the territory of the state, and that it is but an agency or arm of the state, created, organized, and existing for civil and political purposes, particularly for the purpose of administering locally the general powers and policies of the state."

Chesterfield County v. State Highway Dep't, 191 S.C. 19, 3 S.E.2d 686 (1939).

There is no absurd result here. The trial court's order correctly reflects that the County's remedy is not an action in inverse condemnation since that constitutional prohibition in the bill of rights was made available only to private property owners as a protection against governmental property grabs. That result does not leave the County without a potential remedy, as they have pled thirteen causes of action against the parties below, four of which are pled against SCDOT and the City of Georgetown.

II. INVERSE CONDEMNATION IS NOT THE SAME AS EMINENT DOMAIN

"The term 'inverse condemnation' describes an action grounded, not on statutory condemnation power, but on the constitutional proscription." *Vick v. South Carolina Dep't of Transp.*, 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001). The power to take private property for public use without an owner's consent is one of the powers inherent in the concept of sovereignty. This clause, like the corresponding clause of the Fifth Amendment of the U.S. Constitution which provides for just compensation for private property taken, is merely a limitation on the use of the power. It is not part of the power itself, but a condition upon which the power may be exercised. *United States v. Jones*, 109 U.S. 513, 3 S. Ct. 346, 27 L. Ed 1015 (1883). "It is a generally recognized principle that the state, as sovereign, has the power, by virtue of its very nature and without the benefit of any express grant thereof, to condemn for public purposes property located within its boundaries." 35 ALR 1293. "The power of eminent domain does not originate in Article I, § 23. Instead, it is a power inherent in every sovereign state." *Gober v. Stubbs*, 682 So. 2d 430, (Ala. 1996). "'The right of eminent domain antedates constitutions, and is an incident of sovereignty, inherent in, and belonging to every sovereign State. *Steele v. County Commissioners*, 83 Ala. 304, 3 So. 761, 762 (Ala. 1887). Inverse condemnation is not simply the reverse of Eminent Domain. In South Carolina, a governmental entity that does not have the power of Eminent Domain can still be held liable in inverse condemnation. "[A]s long as state acts through one of its arms in such a way as to deprive an **individual** of his property for public use, it is irrelevant whether the state arm doing the actual taking has eminent domain power." *Mower v. Charleston County Parks and Recreation*, 361 S.C. 476, 605 S.E.2d 563 (emphasis added). "Liability for inverse condemnation is grounded in the Constitution, not in a statutory power of eminent domain or tort." *Id.* at 481 n. 8, 605 S.E.2d @ 565 n. 8. Petitioner's cause of action under

appeal is inverse condemnation based upon the constitutional prohibition and not a tort or statutory condemnation powers. The South Carolina Eminent Domain Procedures Act is just that, a procedural act, it is not and does not alter substantive law. S.C. Code Ann. § 28-2-20 Intent of General Assembly states:

> This act amends the law of this State relating to procedures for acquisitions of property and to the exercise of the power of eminent domain. It is the intention of the General Assembly that this act is designed to create a uniform procedure for all exercise of eminent domain power in this State. 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.

Clearly, the General Assembly did not intend to substantively amend the Takings Clause of the South Carolina Constitution by the adoption of the South Carolina Eminent Domain Procedures Act and they clearly stated their intent that this was a procedural act only. It did not and does not change substantive law.

The Act states "[t]he provisions of this chapter shall constitute the exclusive procedure whereby condemnation may be undertaken in this State." S.C. Code Ann. § 28-2-60. The Act defines condemnation as the "means to take property under the power of eminent domain." S.C. Code Ann. § 28-2-30. The Act speaks of the intentional acquisition of an interest in any real property necessary for any public purpose. S.C. Code Ann. § 28-2-60. As such, an action under the Eminent Domain Act can only occur when a government entity, endowed with the power to condemn, affirmatively takes legal action to acquire interest in any real property for any public purpose. "An inverse condemnation can result from two instances: 'An inverse condemnation can result from the governments physical appropriation of private property, or it may result from governmental-imposed limitations on the use of private property." *Kiriakides v. Sch. Dist.*, 382

S.C. 8, 675 S.E.2d 439 (2009) *citing Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005). If it is a regulatory taking then there must be a balancing of all relevant circumstances to determine whether the government has taken property. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 124, 98 S. Ct. at 2659, 57 L.Ed.2d at 631 (1978). Inverse condemnation actions are grounded in the self-executing takings clause of the Constitution. *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

This is a cause of action brought pursuant to inverse condemnation and not eminent domain and as such the law of eminent domain is not applicable to the instant matter. However, a review of the case law on this issue shows that the country is split on whether a public entity is entitled to compensation from another public entity pursuant to eminent domain. Other jurisdictions have addressed this issue of states taking county property without compensation, finding that no compensation was payable. *See State Highway Commission of New Mexico v. Board of County Commissioners of Dona Ana County,* 72 N.M. 86, 380 P.2d 830 (N.M. 1963) ("the property in question being public property and used for governmental purposes, the County cannot claim it is guaranteed compensation under this constitutional provision."); *City of Cambridge v. Commissioner of Public Welfare,* 357 Mass. 183, 257 N.E.2d 782 (1970) (holding that property owned by municipality for public use may be taken by the state without payment of compensation.); *City of Worcester v. Commonwealth,* 185 N.E.2d 633, 345 Mass. 99 (1962) (no compensation was payable for the taking of municipal property which was used as a school and park for highway purposes); *New Castle County School Dist. v. State,* 424 A.2d 15, (Del. 1980) ("Property which is held in governmental capacity may be taken by the State for public use without payment of compensation therefor; property which is held in a proprietary capacity cannot be taken by the State unless just compensation is paid. This is the majority rule."); *State ex rel. Department*

of Highways v. New Orleans, 360 So. 2d 624, (Ct. App. 1978) (holding that taking of city property to construct highway intersection did not deprive city of private property without due process of law and payment of compensation); *Board of Sup'rs v. State Highway Com.,* 188 Miss. 274, 194 So. 743 (Miss. 1940) (legislature may take or devote public land to an additional public use without paying any compensation).

Petitioner appends to their Initial Brief what they allege are the takings clauses of the constitutions of eight (8) states and assert that all of "these states of held that their respective takings clauses require payment of just compensation where one public entity has taken the property of anther public entity." Petitioner is incorrect in this statement.[2] The cases which Petitioner references therewith involve cases of proper eminent domain or do not address the issue of constitutional taking prohibition. Additionally, Pennsylvania has held that Art. I, Section 10 of Pennsylvania's Constitution does not apply to public property. "Constitutional prohibitions against the taking of property without compensation apply only to privately owned property: Article I, Section 10 of the Constitution of Pennsylvania. Therefore it has always been held that the Commonwealth may take property of a political subdivision or agency without payment therefor." *Chester County Institution Dist. v. Commonwealth,* 341 Pa. 49, 17 A.2d 212 (1941), the right to compensation in such cases being only a matter of grace or allowance by the Legislature. *School Dist. v. Commonwealth,* 117 A.2d 702, 383 Pa. 206, (Pa. 1955). Pennsylvania distinguishes between cases pursuant to their eminent domain statute and the constitutional prohibition against taking private property. Petitioner asserts that South Carolina's taking clause should not be interpreted any differently yet they seek to enforce a cause of action for inverse condemnation

[2] Petitioner cites the wrong takings clause for Alabama. Petitioner cites to Art. I, section 23. However, the takings clause for inverse condemnation purposes is found in Art. XII, section 235. See *Sima Props., L.L.C. v. Cooper,* (Ala. Civ. App. 2017).

against the City. In Alabama, inverse condemnation can only stand against a governmental entity that has the power of eminent domain. See *Sima Props., L.L.C. v. Cooper*, (Ala. Civ. App. 2017). This is in contrast to South Carolina case law holding that "[a]s long as state acts through one of its arms in such a way as to deprive an individual of his property for public use, it is irrelevant whether the state arm doing the actual taking has eminent domain power." *Mower v. Charleston County Parks and Recreation*, 361 S.C. 476, 605 S.E.2d 563.

The issue in this case is not the exercise of the power of eminent domain but rather whether one public entity may bring a cause of action for inverse condemnation against another public entity for the unintentional damage to non-abutting property pursuant to the constitutional prohibition of taking private property. The Eminent Domain Procedures Act has no application.

III. THE COURT DID NOT ERR IN ORDERING THAT PUBLIC POLICY DOES NOT REQUIRE THE CIRCUIT COURT TO ADD LANGUAGE TO THE SOUTH CAROLINA CONSTITUION THAT IS NOT CONTAINED THEREIN.

"But for purposes of judicial application it may be regarded as well settled that a state has no public policy properly cognizable, by the Court, which is not derived from the established law of the state, as found in its Constitution, statutes and judicial decisions." *Grant v. Butt,* 198 S.C. 298, 17 S.E.2d 689 (1941). As discussed in the sections above, South Carolina's Constitution, statutes and judicial decisions do not support Petitioner's position in this matter. Petitioner states that the "circuit court erred in ruling that public policy does not require SCDOT and City to pay just compensation to Georgetown County" (Petitioner's Initial Brief p. 21). Petitioner states that "[P]ublic policy is derived from the established law of the state, as found in its Constitution, statutes and judicial decisions[.]" (Petitioner's Initial Brief, p. 21) yet they cite no South Carolina judicial decisions in support of their position that private property includes public property.

There is no authority under South Carolina law that private property includes public property of a political subdivision. Instead, the best reference to that under South Carolina law is the Court in *Edgefield County v. Georgia –Carolina Power Co.*, 104 S.C. 311, 88 S.E. 801 (1916). In *Edgefield,* the Georgia-Carolina Power Co. built a dam which obstructed the Savannah River and a creek causing the water to back up and flood and destroy the public highway of Edgefield County. The Court decided it was within the power of the Legislature to subject the highway in Edgefield to be overflowed, and the county did not have a right to complain about it. "The constitutional prohibition to take private property without making compensation therefore has no application to the taking of public property." *Id.* Petitioner is correct in that the case was ultimately not decided on constitutional grounds but statutory grounds, however in reaching the issue of whether the legislature provided a mechanism for the County to be compensated the Court addresses the issue of whether public property falls under the protection of the Constitution and states, "[a]nd it is true that, if the company should thereby flood the private property of the citizen, then under the constitutional protection it would need to make compensation to those persons who suffered a particular injury from the nuisance. But public property, we think, does not fall within the protection of the Constitution." *Id.*

Again, this result does not leave the County without a potential remedy. The County has twelve other causes of action pled with three additional causes of action against the City and SCDOT. Public policy does not require torturing the definition of "private" property to include admittedly public property as well.

For the foregoing reasons, the court did not err is ordering that public policy does not require the torturing the constitution to add language that is not contained therein. This Court should affirm the Court of Appeals.

CONCLUSION

For the reasons stated, this Court should affirm the trial court and the Court of Appeals and the grant of summary judgment to the Respondents on the inverse condemnation cause of action.

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October 24, 2019

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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OCT 24 2019

S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5327 (S.C. Ct. App. Filed February 9, 2017)

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, ...Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Joint Brief was served on October 24, 2019, and the Joint Brief complies with Rule 211(b).

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