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.

REPLY BRIEF OF PETITIONER

Louis H. Lang, Esquire
Richard C. Detwiler, Esquire
Harry A. Dixon, Esquire
CALLISON TIGHE & ROBINSON, LLC
Post Office Box 1390
Columbia, South Carolina 29202-1390
Telephone: 803-404-6900
Facsimile: 803-404-6902
Attorneys for Petitioner

OTHER COUNSEL OF RECORD:

Lisa A. Reynolds, Esquire
Anderson Reynolds & Stephens, LLC
Post Office Box 87
Charleston, SC 29402
Telephone: (843) 723-0185
Facsimile: (843) 405-0313

ATTORNEYS FOR THE RESPONDENT
SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

David L. Morrison, Esquire
Morrison Law Firm, LLC
7453 Irmo Drive, Suite B
Columbia, SC 29212
Telephone: (803) 661-6285
Facsimile: (803) 661-6289

ATTORNEYS FOR THE RESPONDENT
THE CITY OF GEORGETOWN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

ARGUMENT IN REPLY

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

Petitioner, Georgetown County (County) has argued the issue in this case is novel for South Carolina. However, other states have concluded that where a state or a political subdivision takes property belonging to another political subdivision, just compensation must be paid.

For example, in City of Three Forks v. State Highway Comm'n, 156 Mont. 392, 480 P.2d 826 (1971) (cited in the County's opening brief), the Montana State Highway Commission built an interstate highway on land owned by the City of Three Forks, without having first condemned the City of Three Forks' property as provided by Montana law. The City of Three Forks sued and was awarded judgment against the Highway Commission for damages.

On appeal, the Highway Commission first argued because the City of Three Forks' land was "public property" no compensation had to be paid because, under Mont. Const. art. III, § 14, only "'[p]rivate property shall not be taken or damaged for public use without just compensation having first made to or paid into court for the owner ." Id. at 395, 480 P.2d at 828.

The Montana Supreme Court rejected this argument. Referring to Montana's eminent domain act, which contemplated the taking of public property for a "more necessary" pubic use, and citing a Utah case, State By and Through Road Commission v. Salt Lake City Public Bd. of Ed. 13 Utah 2d 56, 368 P.2d 468 (1962), which analyzed Utah's somewhat similar eminent domain act regarding the taking of public property, the Montana Supreme Court said,

> ... [T]he legislature intended property held by a city ... be only taken by the State after compensation is paid. This property was owned by the City of Three Forks and its citizens, not the State of Montana or the federal government. It was taken for a more necessary pubic use and compensation must be paid."
>
> Id.

In Marin Mun. Water Dist. v. City of Mill Valley, 202 Cal. App. 3d 1161, 249 Cal. Rptr. 469 (1988) (also cited in the County's opening brief), the Municipal Water District asserted a cross-claim against its co-defendant, City of Mill Valley, for inverse condemnation. Mill Valley moved for judgment on the pleadings which was denied and a jury awarded the Water District over $36,000.00 in damages. Mill Valley appealed and the California Court of Appeals, First District, Division 4, affirmed.

Mill Valley first argued that the because the property "taken" from the Water District was public property, a claim for inverse condemnation would not lie.

Analogizing California's condemnation statute to an inverse condemnation claim, the California Court of Appeals concluded "... because [Mill Valley] could take the [Water District's] water lines in an exercise of its power of eminent domain, the district may state a cause of action for inverse condemnation against [Mill Valley] when it does not compensate the [Water District] for [the] taking." Id. at 1165, 202 Cal. Rptr. at 471. The California Court of Appeals went on to say,

> Liability in inverse condemnation for unintended physical damage is proper when the damage resulted from a public entity's maintenance and use of a public improvement. When the public entity fails to construct or maintain its improvement property, 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 principals should not apply to compensate for damage to property owned by another public entity. To paraphrase the California Supreme

> Court, 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. Citations omitted.

In another case cited by the County, City of Chester v. Conn. Dept. of Transp., 434 Pa. 382, 434 A.2d 695 (1981), the Pennsylvania Supreme Court considered whether, under Pennsylvania's eminent domain statute, Pennsylvania's Department of Transportation was required to compensate the City of Chester for a city bridge taken in an eminent domain proceeding.

Citing P. Const. Art. 1 § 10, "... nor shall private property be taken or applied to public use ... without just compensation being first made...," and reviewing what Pennsylvania case law existed touching on the question, the court said,

> Interestingly, the United State Constitution provides, '... nor shall private property be taken for public use, without just compensation." So while our federal Constitution also speaks only of "private" property, numerous decisions have held that United States must compensate the sates or lesser political subdivisions for public land taken generally....

Id. at 394, 434 A.2d at 702.

The Pennsylvania Supreme Court concluded,

> As we believe the loss suffered by residents of any political subdivision from the taking of a road or bridge is no less real than the loss suffered by private individuals as condemnees, we hold that the Pennsylvania Constitution does not allow the Commonwealth to escape its financial obligation owed to a public condemnee for property taken.

Id. at 394 – 95, 434 A.2d at 702.

Unlike Pennsylvania's eminent domain act when City of Chester was decided, under South Carolina's Eminent Domain Procedures Act, S.C. Code Ann. § 28-2-10, et. seq. (the Act), our General Assembly has expressed its clear intention that public property cannot be taken without just compensation being paid by the taking public entity.

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). Most important, 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.

Just as in The City of Three Forks and Marin, the County's properties have been taken without payment of just compensation – the County's properties being damaged to an extent exceeding $6,000,000.00 because of the taking by the Respondents. (County's Amended Complaint, ¶ 26, App. 41).

Neither Respondent proceeded under the Act to take the County's property upon payment of just compensation and both took the calculated risk that damage to the County's properties could occur because of the Drainage Project. Both, therefore, should be required to answer for the County's damaged property.

Finally, the Pennsylvania Supreme Court's analogy to the United States Supreme Court's jurisprudence regarding the application of the Fifth Amendment takings clause to state, county or municipal property taken by the federal government, is an apt one. South Carolina's Constitution should be read to require Respondents compensate the County for the damage resulting from their drainage project.

Edgefield Cty. v. Georgia-Carolina Power Co., and Home Rule.

The Court of Appeals, and now Respondents, rely heavily on Edgefield Cty. v. Georgia-Carolina Power Co., 104 S.C. 311, 88 S.E. 801 (1916) for the proposition that the County's

damages to its property is not compensable under S.C. Const. art. I § 13, Respondents going so far as to argue "[t]he law at the time Edgefield Cty was decided is no different than the law today. [The County's] argument that home rule changes the validity of Edgefield Cty. is just wrong." (Respondents Brief at 12 – 13).

The County respectfully disagrees.

The 1916 Edgefield Cty. Court's view of the rights of Edgefield County regarding its property is clear, "[u]nder the Constitution and laws of the state, the state [General Assembly] has ***absolute control*** over the government of counties." Id. at 327, 88 S.E. at 806 (emphasis added).

Home rule dramatically changed the relationship between state and county government. In 1916, Edgefield County, like all South Carolina counties, was a "virtual wards of the state," and did not control its own property. Harold Albert, Home Rule and a New Constitution: Article by Article in South Carolina, National Civic Review, Nov. 1977 at 491. Now, unlike during the Edgefield Cty. 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 the Respondents' taking is not the property of the State but is owned, paid for and *controlled* by the County.

Given the current Constitutional and statutory relationship between the County and Respondents, 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.

CONCLUSION

In Chesterfield County v. State Highway Dept. of South Carolina, 181 S.C. 323, 187 S.E. 548 (1936), the Court, referring to S.C. Const. art. 1, § 13, and quoting Chick Springs Water Co. v. State Hwy. Dept., 159 S.C. 481, 157 S.E. 842, 843 (1931), *overruled by* McCall by Andrews v. Baston, 285 S.C. 243, 329 S.E. 741 (1985), said "[n]o act of General Assembly (sic) is needed for suit against state (sic) to recover just compensation for private property taken for public purpose." The Chesterfield County Court then said, "[i]f, then, the state has taken the private property of Chesterfield county, to wit, its bonds, without making just compensation therefor, the county main maintain its action thereabout..." *Id.*

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 for the County's over $6,000,000.00 in damage done to its property.

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

Louis H. Lang, SC Bar 3127
LouisLang@callisontighe.com
Richard C. Detwiler, SC Bar 6473
RickDetwiler@callisontighe.com
Harry A. Dixon, SC Bar 103509
HarryDixon@callisontighe.com
Post Office Box 1390
Columbia, South Carolina 29202-1390
Telephone: 803-404-6900
Facsimile: 803-404-6902

Attorneys for the Petitioner
Georgetown County

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PROOF OF SERVICE

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

DOCUMENTS SERVED: REPLY BRIEF OF PETITIONER

PARTIES SERVED:

Lisa A. Reynolds, Esquire
Anderson Reynolds & Stephens, LLC
Post Office Box 87
Charleston, SC 29402
ATTORNEYS FOR THE RESPONDENT
THE SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION

David L. Morrison, Esquire
Morrison Law Firm, LLC
7453 Irmo Drive, Suite B
Columbia, SC 29212
ATTORNEYS FOR THE RESPONDENT
THE CITY OF GEORGETOWN

CALLISON TIGHE & ROBINSON, LLC

Katie A. Minton

Katie A. Minton, Paralegal

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Columbia, South Carolina