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

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

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

Georgetown County, ... Appellant/Petitioner,

v.

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

Of whom

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

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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

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

Georgetown County, ... Appellant,

v.

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

Of whom

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

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STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF GEORGETOWN	
Georgetown County, Plaintiff, v. Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., the South Carolina Department of Transportation and the City of Georgetown, Defendants.	C/A #: 13-CP-22-01062 **ORDER**

FILED
GEORGETOWN COUNTY, S.C.
2015 NOV 12 AM 11:29
ALMA Y. WHITE
CLERK OF COURT

This matter came before the Court upon the motion of the Plaintiff, Georgetown County, for summary judgment as to its inverse condemnation cause of action against Defendants South Carolina Department of Transportation (hereinafter "SCDOT") and the City of Georgetown (hereinafter "City"). The Court does not reach the merits of the County's summary judgment motion because the Court rules as a matter of law that Georgetown County cannot maintain an inverse condemnation cause of action because the Takings Clause of the South Carolina Constitution applies only to the taking of private property. The Court only rules that as a matter of law the County cannot maintain an inverse condemnation cause of action against the SCDOT and City. Therefore, the Court hereby strikes Plaintiff Georgetown County's Inverse Condemnation cause of action.

Georgetown County (the "County") brought this action seeking recovery for property damage allegedly caused by a public works project allegedly constructed by SCDOT and/or the City. The County asserted various claims against SCDOT and City including an inverse condemnation cause of action. The County moved for summary judgment on its inverse condemnation claim. The County's summary judgment motion was initially heard on August 7, 2014, at which time both SCDOT and City argued the County could not maintain its inverse condemnation claim because the subject property was public property, not private property. The SCDOT raised its Rule 12(b)(6) defense in response to the County's Summary Judgment

Motion. The Court requested additional briefs as to whether a public entity can assert a cause of action for inverse condemnation. After the submission of supplemental briefs by all parties, the matter was argued again on April 30, 2015. For the reasons set forth below, I conclude the County cannot maintain its inverse condemnation claim and therefore strike that cause of action from County's complaint.

The South Carolina Constitution, Art. I, § 13 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. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.
> ***Emphasis added.***

South Carolina has long recognized a cause of action for inverse condemnation grounded upon this Takings Clause. The elements of an action for an inverse condemnation are: (1) affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is for a public use. *Carolina Chloride v. South Carolina Dept. of Transportation*, 391 S.C. 429, 706 S.E.2d 501, (2011); *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005). "Inverse condemnation is based on the constitutional prohibition against taking of private property for public use without the payment of just compensation." *Mowrer v Charleston County Party and Recreation Com'n*, 361. S.C. 476, 480, 605 S.E.2d 563 (Ct. App. 2004). "The term 'inverse condemnation' describes an action grounded, not on the statutory condemnation power, but on the constitutional proscription against the taking or damaging of property for public use without just compensation." *Vick v. South Carolina Dept. of Transp.*, 347 S.C. 470, 480, 556 S.E.2d 693, 698 (Ct. App. 2001); *Horry County v. Insurance Reserve Fund*, 344 S.C. 493, 44 S.E.2d 637 (Ct. App. 2001). Inverse condemnation may result from the government's physical appropriation of private property, or it may result from the government-imposed limitations on the use of private property. *Carolina Convenience Stores, Inc. v. City of Spartanburg*, 398 S.C. 27, 30, 727 S.E.2d 28 (Ct. App. 2012).

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. The Takings 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 (1883).

The Takings Clause applies only to "private" property by its terms. When the language of a statutory or constitutional provision is clear and unambiguous, that clear meaning must be applied.

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain 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) (citations omitted). 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." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

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.

Our court considered a similar issue many years earlier. *Edgefield Cnty. v. Georgia-Carolina Power Co.*, 104 S.C. 311, 88 S.E. 801, 807 (1916). One of the issues presented was whether the constitution required just compensation for the taking by flooding of a public highway. The Court concluded that where public property is flooded by the legislatively authorized erection of a dam, the constitutional protection against the taking of private property does not apply. In dicta and referring to a road, the *Edgefield* Court stated, "[b]ut public property, we think, does not fall within the protection of the Constitution. *Leitzsey v. Power Co.*, 47 S. C. 479, 25 S. E. 744, 34 L. R. A. 215; Elliott on Roads and Streets, 484." 88 S.E. 801, 807 (1916).

Other courts have similarly considered this issue. The United States Fifth Circuit Court of Appeals held that a state agency may not sue the state under the Fifth and Fourteenth Amendments. *Board of Levee Com'rs of the Orleans Levee Bd. v. Huls*, 852 F.2d 140 (5th Cir.

1988). The United States District Court for the Western District of Texas held that a political subdivision may not bring a claim pursuant to a statute written to protect individual rights such as freedom of speech. *City of Alpine, et. al. v. Greg Abbot,* 730 F.Supp.2d 630 (W.D.Tx 2010). The Supreme Court of Mississippi held that the legislature may take or devote public land to an additional public use without paying any compensation. *Board of Supervisors of Covington County v. State Highway Commission,* 194 So. 743 (Miss. 1940).

The New Mexico Supreme Court found that a county hospital and county courthouse were public property and not private property within the constitutional provision against the taking of private property for public use without just compensation. *State ex. rel. State Highway Commission v. Board of County Com'rs of Dona Ana County,* 72 N.M. 86, 380 P.2d 830 (1963). That court determined:

> We think it is established that absent statutory authority, property of one public body being used for public purposes cannot be condemned by another public body. *City of Albuquerque v. Garcia,* 17 N.M. 445, 130 P. 118.
>
> ....
>
> We recognize the rule to be as stated in 2 Nichols, Eminent Domain 223, § 5.9, that:
>
> 'Over the property which a municipal corporation acquires as an agency of the state for the performance of the strictly public duties devolved upon it by law, the legislature may exercise a control to the extent of requiring the municipal corporation, *without receiving compensation therefor,* to transfer such property to some other agency of the government to be devoted to similar public uses or to other strictly public purposes.
>
> In *The School District of the Speers Borough School District v. Commonwealth,* 383 Pa. 205, 117 A.2d 702, 703, the rule is stated as follows:
>
> '**Constitutional prohibitions against the taking of property without compensation apply only to privately owned property.** Article I, Section 10 of the Constitution of Pennsylvania, P.S. 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, 57, 17 A.2d 212, the right to compensation in such cases being only a matter of grace or allowance by the Legislature.'
> (emphasis added).

Id. 72 N.M. at 88-89, 380 P.2d at 832.

The same reasoning applies when property is allegedly taken or damaged by one political subdivision of the state from another political subdivision of the state. In the *City of Evanston v.*

Regional Transportation Authority, 559 N.E.2d 899 (Ill. 1990), a city brought an action seeking injunctive relief against the RTA. The RTA counterclaimed alleging a taking and damaging of their property in violation of both the state and federal constitutions. The court phrased the issues as:

> (1) "[I]s a political subdivision of the state such as the RTA and PACE protected under the Illinois and United States constitutions from the taking of its property by another political subdivision; and
> (2) does such a political subdivision have the rights to due process and equal protection under the Illinois and United States constitutions?
> 559 N.E.2d at 905.

Answering those issues, the court said:

> [T]here is no authority that private property within the meaning of the Fifth Amendment includes public 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 just compensation clause ... [and] it was nevertheless public property that was not protected by the Illinois Constitution's just compensation clause.

Id.

The County correctly argues that some states have reached a different result. However, the Court finds that public property is not within the protection of the Takings Clause. Further, South Carolina jurisprudence on statutory interpretation requires that appropriate meaning be given to the clear and unambiguous term "private property".

Since Georgetown County's property is public property, the takings clause has no application. The Takings Clause is limited to private property by its clear and unambiguous terms. The purposes and intent of the enactment of the Takings Clause do not support an application to public property. South Carolina has previously addressed in dicta this issue, stating that public property does not fall within the protection of the Takings Clause. Other states have similarly addressed this issue and determined that public property is not protected by the Takings Clause of the constitution.

For the reasons stated above, the Court finds that Georgetown County cannot maintain an inverse condemnation action against SCDOT and City because the Takings Clause applies only to private property and not to public property. Therefore, because the Court finds as a matter of law that Georgetown County cannot maintain an inverse condemnation cause of action that claim

is stricken and the Court grants the SCDOT Rule 12(b)(6) motion[1]. In so ruling, the Court notes that this is a novel question of law in South Carolina, and it is this Court's intent by striking the County's inverse condemnation cause of action to affect the County's substantial right to proceed with this cause of action and that this Order be immediately appealable.

AND IT IS SO ORDERED.

Larry B. Hyman, Jr.
Presiding Circuit Judge

Conway, South Carolina
~~October~~ Nov 4, 2015

[1] The Court notes that this defense was raised not only in the Answer of the SCDOT, but was also referenced in "Defendant SCDOT's Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment," dated September 5, 2014.

ORIGINAL

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF GEORGETOWN	
Georgetown County,	C/A #: 13-CP-22-01062
Plaintiff,	
v.	**ORDER DENYING GEORGETOWN COUNTY'S SCRCP 59(e) MOTION TO RECONSIDER**
Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., the South Carolina Department of Transportation and the City of Georgetown,	
Defendants.	

FILED
GEORGETOWN COUNTY, S.C.
2017 JAN 17 PM 2:10
DAMA Y. WHITE
CLERK OF COURT

This matter is before the Court upon the Plaintiff's SCRCP 59(e) motion to reconsider the Court's Order of November 4, 2015. In that Order, the Court struck Plaintiff's inverse condemnation cause of action against the City of Georgetown and the South Carolina Department of Transportation. The Court has carefully reviewed the Plaintiff's motion and arguments in support and heard oral arguments on August 5, 2016. After due consideration, Georgetown County's motion to reconsider is **DENIED.**

The County sets out three separate grounds for reconsideration in its motion. First, the County simply requests the Court to reconsider its ruling on the merits and find that the Takings Clause of the South Carolina Constitution protects the County's public property from inverse condemnation. The Takings Clause specifically protects "private" property only. The Court declines to reconsider its ruling for the reasons set out in the original Order.

Second, the County claims that the Court failed to specifically address certain arguments it asserted. The Court considered all arguments presented by the County and determined that those arguments were unfounded even if they were not specifically addressed in the Court's written order. The County asserts that the Eminent Domain Procedure Act demonstrates a legislative intent to allow the County to be a condemnee for purposes of eminent domain.

However, the Court finds that the Act is a procedural act that does not change the substantive law. S.C. Code Ann. § 28-2-20 is entitled "Legislative Intent" and specifically 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....

S.C. Code Ann. § 28-2-20.

As that Act is procedural only and does not change the substantive law, it does not change the Court's analysis of the Takings Clause of the S.C. Constitution.

The County also claims that the State Authorities Eminent Domain Act also requires the conclusion that the County can bring an inverse condemnation action. "The term 'inverse condemnation' describes an action grounded, not on the statutory condemnation power, but on the constitutional proscription against the taking or damaging of property for public use without just compensation." *Vick v. South Carolina Dept. of Transp.*, 347 S.C. 470, 480, 556 S.E.2d 693, 698 (Ct. App. 2001); *Horry County v. Insurance Reserve Fund*, 344 S.C. 493, 44 S.E.2d 637 (Ct.App. 2001). The Act does not govern inverse condemnation claims.

Moreover, the State Authorities Eminent Domain Act codifies the grant of eminent domain authority to certain state authorities. The Act does not change the clear limitations of the Constitution. It does not re-define "private" property to include "public" property. The law presumes that the legislature did not intend to change the common law by a statutory enactment unless the language employed clearly indicates such an intention. The rules of the common law are not to be changed by doubtful implication or overturned except by clear and unambiguous language. *See, Nuckolls v. Great Atlantic & Pacific Tea Co.*, 192, S.C. 156, 5 S.E.2d 862 (1939); *Coakley v. Tidewater Const. Corp.*, 194 S.C. 284, 9 S.E.2d 724 (1940); *Branchville Motor Co. V. Adden*, 158 S.C. 90, 155 S.E. 277 (1930). There is no such clear indication in the language of State Authorities Eminent Domain Act.

Further, the Plaintiff is not arguing for a change to the common law. Instead, the Plaintiff is arguing for a change to the Constitution. The Constitution cannot be amended by statute. *See,* S.C. Constitution, Art. XVI. Clearly, the State Authorities Eminent Domain Act did not change the Constitution by implication and has no application here. The Act does not change the

constitutional limitation applying to "private" property only. The Act does not change the constitutional analysis.

The County circularly argues that public policy requires that the Court read the Constitution and the Eminent Domain Procedures Act together to require payment for the taking of public property. The Court finds no merit in the public policy argument and declines to read the word "private" out of the constitution on the basis of public policy.

Last, the County contends that the Court failed to consider that its ruling would work an absurdity. In support of that position, the County recites that the purpose of the Takings Clause is to prevent the government from forcing some people alone to bear public burdens which in all fairness should be borne by the public as a whole. Plaintiff relies upon *Sea Cabins on Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 345 S.C. 418, 429, 548 S.E.2d 595, 601 (2001) for authority. However, in *Sea Cabins*, the reference to "some people" is in fact referring to the ***private*** property owner Plaintiffs. *Sea Cabins* demonstrates only that one purpose of inverse condemnation is to prevent private property owners from bearing public burdens. *Id.* That does not support the County's position. *Sea Cabins* merely involved the taking of "private" property. There was no issue before the Court in Sea Cabins dealing with the taking of public property. There was no ruling by the Court that the taking of public property is proscribed by the Takings Clause. The Court does not believe that the clumsy use of the word "some" was intended to rule on an issue of this magnitude, especially when that issue was not before the Court.

The County claims that the Court's ruling results in the citizens of Georgetown County bearing a burden which should be borne by the State of South Carolina, and alleges that is an absurd result. The Court disagrees. However, the County also argues that the burden should be shifted from the citizens of Georgetown County to the citizens of a subset of Georgetown County, those County residents who happen to reside within the City limits of the City of Georgetown. That result is completely inconsistent with the County's absurdity argument. The County recognizes that the Framer's intention should control if an absurdity would result. The Court has previously found that the Framer's intent included the word "private" which necessarily excludes application of the Takings Clause to public property. The Court finds no merit in the County's argument regarding absurdity.

For the reasons stated above, the Court **DENIES** Georgetown County's motion to reconsider.

AND IT IS SO ORDERED.

Judge Larry B. Hyman, Jr.
Presiding Judge, Fifteenth Circuit

Georgetown, South Carolina

1-3, 2017

STATE OF SOUTH CAROLINA)) COUNTY OF GEORGETOWN)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Georgetown County,)) Plaintiff,)) vs.)) Davis & Floyd, Inc., Republic) Contracting Corporation, S&ME,) Inc., The South Carolina) Department of Transportation and) The City of Georgetown,)) Defendants.)	Civil Action No.: 2013-CP-22-01062 **COMPLAINT** (Jury Trial Demanded)

FILED
GEORGETOWN COUNTY, S.C.
2013 OCT 25 PM 1:50
ANNA Y. WHITE
CLERK OF COURT

The Plaintiff, complaining against the Defendants Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., the South Carolina Department of Transportation, and the City of Georgetown, would show the following:

PARTIES

1. The Plaintiff Georgetown is a body corporate and politic and a political subdivision of the State of South Carolina.

2. Defendant Davis & Floyd, Inc. is a corporation organized and existing under the laws of the State of South Carolina with a principal address of 1319 Highway 72/221 East, Greenwood, South Carolina 29649 and other offices at 3229 West Montague Avenue, North Charleston, South Carolina 29418.

3. Defendant Republic Contracting Corporation is a corporation organized and existing under the laws of the State of South Carolina with a principal address of 869 Pepper Street, Columbia, South Carolina 29202-2138.

4. Defendant S&ME, Inc. is a corporation organized and existing under the laws of the State of North Carolina with a principal office address of 3201 Spring Forest Road, Raleigh, NC 27616, and doing business in the State of South Carolina at 1330 Hwy 501 Business, Conway, South Carolina 29526 and 620 Wando Park Blvd., Mt. Pleasant, South Carolina 29464.

5. Defendant the South Carolina Department of Transportation is a governmental department and agency of the State of South Carolina.

6. Defendant the City of Georgetown is a municipal corporation and body politic of the State of South Carolina.

JURISDICTION AND VENUE

7. This Court is the proper venue in that the causes of action pertain to damage to real property situated in Georgetown County, South Carolina. All parties are subject to the personal jurisdiction of the Court.

8. This Court has subject matter jurisdiction of this action in that the events or omissions giving rise to this action occurred in Georgetown County, South Carolina, and the properties that are the subject of the action have at all material times been situated in Georgetown County, South Carolina.

FACTS

9. This action involves physical and structural damage to property owned by the Plaintiff and located in Georgetown, South Carolina at the following addresses: 333 Cleland Street; 401 Cleland Street; 405 Cleland Street; 325 Dozier Street; 330 Dozier Street; and 716 Prince Street (hereinafter collectively referred to as "the subject properties").

10. All of the subject properties are owned by the Plaintiff and have been so owned at all times pertinent to this action.

11. The subject buildings were damaged beginning on October 29, 2011 and continuing thereafter as a result of certain public works projects undertaken by the Defendant, which projects altered the water tables and caused sinkholes and land subsidence in Georgetown, South Carolina.

12. In or about 2009, the Defendants South Carolina Department of Transportation (hereinafter "the SCDOT") and City of Georgetown (hereinafter "City") began to undertake a water drainage project in the City of Georgetown, South Carolina (hereinafter "the drainage project").

13. The drainage project was intended to install and relocate certain storm water drainage and utility systems in and around US17 and Georgetown City Hall and was called the "US17/City Hall Georgetown Drainage Project."

14. During the period of 2009-2011, the City and SCDOT engaged Defendant Republic Contracting Corporation to serve as the general contractor for the building and completion of the drainage project.

15. During the period of 2009-2011, the City and SCDOT engaged Defendant Davis & Floyd, Inc. to serve as the engineer and consultant for the design, planning and the implementation of the drainage project.

16. During the period of 2009-2011, Davis & Floyd, Inc. and/or the City and SCDOT engaged Defendant S&ME, Inc. to perform geological testing and studies of the area of land that the drainage project was intended to serve.

17. As part of the drainage project, certain lands were to undergo a de-watering process so that new drainage structures could be fabricated below grade.

18. Before the de-watering process could begin, the Defendants attempted to establish a perimeter area intended to isolate the groundwater in the underground aquifer by installing underground sheeting and pilings. The purpose of establishing the perimeter area was to contain the area to be dewatered and prevent pumps from drawing water from outside the isolated area, thereby avoiding subsidence of land and structures outside the area to be dewatered.

19. In order to properly establish the perimeter of the area to be dewatered, the pilings needed to penetrate deep enough into the ground to reach an impervious layer of material, such as limestone.

20. Plaintiff is informed and believes that the Defendants failed to conduct any tests or analyses with respect to the area in and around where the de-watering work was to take place in order to establish the proper depth to which the pilings would need to be driven to reach an impervious layer of substrate.

21. As a result of Defendants' failure aforesaid, the pilings were not driven in deep enough to reach an impervious geological layer, thereby rendering the sheeting and pilings inadequate to isolate the groundwater. Once the de-watering process began, water was caused to be drawn from outside of the perimeter of the de-watering area.

22. Further, the Defendants failed to establish an adequate assessment system to monitor and analyze the rate, flow and quantity of water coming through the de-watering pumps in order to determine whether the water being removed was in excess of the water that should have been contained within the de-watering site.

23. Once the de-watering process began, the Defendants received actual notice that the de-watering process was drawing significant water from outside the de-watering site and that there were threats to the structural integrity of the piles and sheeting in the area being excavated.

24. Notwithstanding that the Defendants knew that the de-watering process was drawing significant water from outside the de-watering site, the Defendants continued to pump water such that sink holes formed under the land outside the de-watering site and the land slumped and depressed.

25. The Plaintiff's properties are outside the de-watering site. Sinkholes formed under Plaintiff's buildings and the buildings have subsided as the direct and proximate result of the Defendants' acts and omissions set forth herein.

26. As a result of the acts and omissions of the Defendants, the Plaintiff has sustained damages in excess of Six Million ($6,000,000.00) Dollars to its property.

27. Plaintiff has complied with S.C. Code Ann. §15-36-100 by filing with this Complaint, the Affidavit of George A. Sembos, P.E., attached hereto as Exhibit A.

FOR A FIRST CAUSE OF ACTION
(NEGLIGENCE AGAINST DAVIS & FLOYD, INC.)

28. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

29. Defendant, Davis & Floyd, Inc., having undertaken to serve as the engineer and consultant for the design, planning and implementation of the drainage project, had a duty to exercise reasonable care such that the property of others outside the intended isolation area would not be the subject of damage due to subsidence of the land in the course of de-watering activities.

30. This duty extended to persons or businesses with property and business interests in the area surrounding the intended isolation area, including the Plaintiff.

31. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, this would adversely affect the aquifer system below properties situated outside the intended isolation area.

32. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, the adverse effect this could have on the aquifer system below properties situated outside the intended isolation area would include subsidence of the land and resulting structural damage.

33. The engineering practices of the Defendant Davis & Floyd, Inc. fell below the standard of care of civil engineering, and geotechnical engineering practices in the State of South Carolina in one or more of the following particulars:

a. Before the de-watering process began, none of the engineers at Davis & Floyd, Inc. conducted or commissioned or recommended that anyone conduct or commission any hydro-geological testing or studies of the area in and around where they intended to conduct the de-watering work.

b. Before the de-watering process began, none of the engineers at Davis & Floyd, Inc. recommended that the sheeting and pilings be driven deep enough into the land to reach an impervious layer.

c. Before the de-watering process began, none of the engineers at Davis & Floyd, Inc. took any other steps to assure that the pilings in the intended isolation area would effectively isolate the underground aquifer in order to prevent water from being drawn from outside of the intended isolation area once the de-watering process began.

d. Before the de-watering process began, none of the engineers at Davis & Floyd, Inc. established an adequate assessment system to monitor and analyze the rate, flow and quantity of water coming through the pumps in order to determine whether the water being removed was excess of the water that should have been contained within the intended isolation system.

e. Once the de-watering process began, none of the engineers at Davis & Floyd, Inc. had on site a drainage engineer or other assessment system to adequately monitor and analyze the rate, flow and quantity of water coming through the pumps in order to address the potential that the water coming out was in excess of the water that should have been contained within the isolation system.

f. Once the de-watering process began, Davis & Floyd, Inc. received actual notice that the de-watering process was drawing significant water from outside the intended isolation area and that land outside that intended isolation area had become the subject of depressions (including in the parking lot of one of the subject properties), but none of the engineers at Davis & Floyd, Inc. discontinued or recommended discontinuing the de-watering process until nearly one month after such notice.

34. The failure of the Defendant, Davis & Floyd, Inc., to observe applicable standard of are as set forth herein constitutes careless, negligent and grossly negligent conduct by the Defendant.

35. As a direct and proximate result of the Defendant's carelessness, negligence and gross negligence, Plaintiff suffered damage to its buildings and property.

FOR A SECOND CAUSE OF ACTION
(NUISANCE AGAINST DAVIS & FLOYD, INC.)

36. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

37. The acts, omissions and other conduct of Davis & Floyd, Inc. proximately created a dangerous condition to exist in proximity to the property of others and unreasonably interfered with Plaintiff's use and enjoyment of its property.

38. The acts, omissions and other conduct of the Defendant created a nuisance which proximately caused the structural damage to the properties as set forth above.

FOR A THIRD CAUSE OF ACTION
(TRESPASS AGAINST DAVIS & FLOYD, INC.)

39. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

40. The conduct of the Defendant allowed the pumping out of water from under the properties of the Plaintiff.

41. The acts and/or omissions of the Defendant committed or omitted as set forth herein, constituted an unauthorized entry and/or invasion onto Plaintiff's real property which proximately resulted in interference with the Plaintiff's possessory interest, use and utility of such real property.

42. As a result of the acts, omissions and other conduct of this Defendant, Plaintiff incurred damage to its buildings and property.

FOR A FOURTH CAUSE OF ACTION
(NEGLIGENCE AGAINST S&ME, INC.)

43. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

44. Defendant, S&ME, Inc., having undertaken to provide geological engineering, geotechnical engineering and environmental engineering services related to the design, planning and implementation of the drainage project, had a duty to exercise reasonable care such that the property of others outside the intended isolation area would not be the subject of damage due to subsidence of the land in the course of the de-watering activities.

45. This duty extended to persons or businesses with property and business interests in the area surrounding the intended isolation area, including the Plaintiff.

46. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, this would adversely affect the aquifer system below properties situated outside the intended isolation area.

47. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, the adverse effect this could have on the aquifer system below properties situated outside the intended isolation area would include propagation of sinkholes, subsidence of the land and resulting structural damage.

48. The engineering practices of the Defendant S&ME, Inc. fell below the standard of care of environmental engineering and geotechnical engineering practices in the State of South Carolina in one or more of the following particulars:

a. Before the de-watering process began, none of the engineers at S&ME, Inc. conducted or commissioned or recommended that anyone conduct or commission any hydro-geological testing or studies of the area in and around where they intended to conduct the de-watering work.

b. Before the de-watering process began, none of the engineers at S&ME, Inc. recommended that the sheeting and pilings be driven deep enough into the land to reach an impervious layer.

c. Before the de-watering process began, none of the engineers at S&ME, Inc. took any other steps to assure that the pilings in the intended isolation area would effectively isolate the underground aquifer in order to prevent water from being drawn from outside of the intended isolation area once the de-watering process began.

d. Before the de-watering process began, none of the engineers at S&ME, Inc. established an adequate assessment system to monitor and analyze the rate, flow and quantity of water coming through the pumps in order to determine whether the water being removed was excess of the water that should have been contained within the intended isolation system.

e. Once the de-watering process began, none of the engineers at S&ME, Inc. had on site a drainage engineer or other assessment system to adequately monitor and analyze the rate, flow and quantity of water coming through the pumps in order to address the potential that the water coming out was in excess of the water that should have been contained within the isolation system.

f. Once the de-watering process began, S&ME, Inc. received actual notice that the de-watering process was drawing significant water from outside the intended isolation area and that land outside that intended isolation area had become the subject of depressions (including in the parking lot of one of the subject properties), but none of the engineers at S&ME, Inc. discontinued or recommended discontinuing the de-watering process until nearly one month after such notice.

49. The failure of the Defendant, S&ME, Inc., to observe applicable standard of care as set forth herein constitutes careless, negligent and grossly negligent conduct by the Defendant.

50. As a direct and proximate result of the Defendant's carelessness, negligence and gross negligence, Plaintiff suffered damage to its property and buildings.

FOR A FIFTH CAUSE OF ACTION
(NUISANCE AGAINST S&ME, INC.)

51. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

52. The acts, omissions and other conduct of S&ME, Inc. proximately created a dangerous condition to exist in proximity to the property of others and unreasonably interfered with Plaintiff's use and enjoyment of their property and business interests.

53. The acts, omissions and other conduct of the Defendant created a nuisance which proximately caused the structural damage to the Plaintiff's properties as set forth above.

FOR A SIXTH CAUSE OF ACTION
(TRESPASS AGAINST S&ME, INC.)

54. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

55. The conduct alleged of this Defendant allowed the pumping out of water from under the Plaintiff's properties and the creation of sinkholes.

56. The acts and/or omissions of the Defendant committed or omitted as set forth herein, constituted an unauthorized entry and/or invasion onto Plaintiff's real property which proximately resulted in interference with the Plaintiff's possessory interests, use and utility of such real property.

57. As a result of the acts, omissions and other conduct of this Defendant, Plaintiff incurred damage to its buildings and property.

FOR A SEVENTH CAUSE OF ACTION
(NEGLIGENCE AGAINST REPUBLIC CONTRACTING CORPORATION)

58. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

59. Defendant, Republic Contracting Corporation, having undertaken to implement and construct the drainage project, had a duty to exercise reasonable care such that the property of others outside the intended isolation area would not be the subject of damage due to subsidence of the land in the course of the de-watering activities.

60. This duty extended to persons or businesses with property and business interests in the area surrounding the intended isolation area, including the Plaintiff.

61. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, this would adversely affect the aquifer system below properties situated outside the intended isolation area.

62. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, the adverse effect this could have on the aquifer system below properties situated outside the intended isolation area would include subsidence of the land and resulting structural damage.

63. The practices and conduct of the Defendant Republic Contracting Corporation breached the above duty of care in one or more of the following particulars:

a. Before the de-watering process began, none of the sub-contractors or employees of Republic Contracting Corporation conducted or commissioned or recommended that anyone conduct or commission any hydro-geological testing or studies of the area in and around where they intended to conduct the de-watering work.

b. Before the de-watering process began, none of the sub-contractors or employees of Republic Contracting Corporation recommended that the sheeting and pilings be driven deep enough into the land to reach an impervious layer.

c. Before the de-watering process began, none of the sub-contractors or employees of Republic Contracting Corporation took any other steps to assure that the pilings in the intended isolation area would effectively isolate the underground aquifer in order to prevent water from being drawn from outside of the intended isolation area once the de-watering process began.

d. Before the de-watering process began, none of the sub-contractors or employees of Republic Contracting Corporation established an adequate assessment system to monitor and analyze the rate, flow and quantity of water coming through the pumps in order to determine whether the water being removed was excess of the water that should have been contained within the intended isolation system.

e. Once the de-watering process began, none of the sub-contractors or employees of Republic Contracting Corporation had on site a drainage engineer or other assessment system to adequately monitor and analyze the rate, flow and quantity of water coming through the pumps in order to address the potential that the water coming out was in excess of the water that should have been contained within the isolation system.

f. Once the de-watering process began, Republic Contracting Corporation received actual notice that the de-watering process was drawing significant water from outside the intended isolation area and that land outside that intended isolation area had become the subject of depressions (including in the parking lot of one of the subject properties), but none of the sub-contractors or employees of Republic Contracting Corporation discontinued or recommended discontinuing the de-watering process until nearly one month after such notice.

64. The failure of the Defendant, Republic Contracting Corporation, to observe applicable standard of care as set forth herein constitutes careless, negligent and grossly negligent conduct by the Defendant.

65. As a direct and proximate result of the Defendant's carelessness, negligence and gross negligence, Plaintiff suffered damage to its property and buildings.

FOR AN EIGHTH CAUSE OF ACTION
(NUISANCE AGAINST REPUBLIC CONTRACTING CORPORATION)

66. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

67. The acts, omissions and other conduct of Republic Contracting Corporation proximately created a dangerous condition to exist in proximity to the property of others and unreasonably interfered with Plaintiff's use and enjoyment of its property.

68. The acts, omissions and other conduct of this Defendant created a nuisance which proximately caused the structural damage to the properties set forth above.

FOR A NINTH CAUSE OF ACTION
(TRESPASS AGAINST REPUBLIC CONTRACTING CORPORPATION)

69. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

70. The conduct of the Defendant allowed the pumping out of water from under the Plaintiff's properties.

71. The acts and/or omissions of the Defendant committed or omitted as set forth herein, constituted an unauthorized entry and/or invasion onto Plaintiff's possessory interests, use and utility of such real property.

72. As a result of the acts, omissions and other conduct of this Defendant, Plaintiff incurred damage to its property and buildings.

FOR A TENTH CAUSE OF ACTION
(NEGLIGENCE AGAINST SCDOT AND CITY)

73. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

74. Defendants, City and SCDOT, having undertaken to implement and construct the drainage project, had a duty to exercise reasonable care such that the property of others outside the intended isolation area would not be the subject of damage due to subsidence of the land in the course of the de-watering activities.

75. This duty extended to persons or businesses with property and business interests in the area surrounding the intended isolation area, including the Plaintiff.

76. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, this would adversely affect the aquifer system below properties situated outside the intended isolation area.

77. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, the adverse effect this could have on the aquifer system below properties situated outside the intended isolation area would include the creation of sinkholes, subsidence of the land and resulting structural damage.

78. The practices and conduct of the Defendant's City and SCDOT breached the above duty of care in one or more of the following particulars:

a. Before the de-watering process began, the Defendants failed to conduct or commission or recommend that anyone conduct or commission any hydro-geological testing or studies of the area in and around where they intended to conduct the de-watering work.

b. Before the de-watering process began, the Defendants failed to recommend that the sheeting and pilings be driven deep enough into the land to reach an impervious layer.

c. Before the de-watering process began, the Defendants failed to take any other steps to assure that the pilings in the intended isolation area would effectively isolate the underground aquifer in order to prevent water from being drawn from outside of the intended isolation area once the de-watering process began.

d. Before the de-watering process began, the Defendants failed to establish an adequate assessment system to monitor and analyze the rate, flow and quantity of water coming through the pumps in order to determine whether the water being removed was excess of the water that should have been contained within the intended isolation system.

e. Once the de-watering process began, the Defendants failed to have on site a drainage engineer or other assessment system to adequately monitor and analyze the rate, flow and quantity of water coming through the pumps in order to

address the potential that the water coming out was in excess of the water that should have been contained within the isolation system.

f. Once the de-watering process began, the Defendants received actual notice that the de-watering process was drawing significant water from outside the intended isolation area and that land outside that intended isolation area had become the subject of depressions (including in the parking lot of once of the subject properties), but the Defendants failed to discontinue or recommend discontinuing the de-watering process until nearly one month after such notice.

79. Each time the Defendants undertook any one of the above actions, the action constituted a separate occurrence which caused damage to one of more of the Plaintiff's properties.

80. Once the Defendants had actual notice that the de-watering process was potentially related to the problems reported to the Defendants, each day that the Defendants allowed the de-watering process to continue rather than cease the de-watering process entirely constituted a separate, affirmative occurrence that caused damage to the Plaintiff's properties.

81. Each of the properties listed in this Complaint were subject to cracks and other damages that occurred over a period of weeks and months.

82. Each separate instance of damage constituted a separate occurrence.

83. The failure of the Defendants, City and SCDOT, to observe applicable standard of care as set forth herein, constitutes careless, negligent and grossly negligent conduct by the Defendants.

84. As a direct and proximate result of the Defendants' carelessness, negligence and gross negligence, Plaintiff suffered damage to its property and buildings.

FOR AN ELEVENTH CAUSE OF ACTION
(NUISANCE AGAINST SCDOT AND CITY)

85. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

86. The acts, omissions and other conduct of the Defendants City and SCDOT proximately created a dangerous condition to exist in proximity to the property of others and unreasonably interfered with Plaintiff's use and enjoyment of their property and business interests.

87. The acts, omissions and other conduct of the Defendants created a nuisance which proximately caused the structural damage to the properties and business interests set forth above.

88. Once the Defendants had actual notice that the de-watering process was potentially related to the problems reported to the Defendants, each day that the Defendants allowed the de-watering process to continue rather than cease the de-watering process entirely constituted a separate, affirmative act that caused damage to the properties that are the subject matter of this action.

FOR A TWELFTH CAUSE OF ACTION
(TRESPASS AGAINST SCDOT AND CITY)

89. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

90. The conduct of the Defendants City and SCDOT allowed the pumping out of water from under the three properties at issue.

91. The acts and/or omissions of the Defendants committed or omitted as set forth herein, constituted an unauthorized entry and/or invasion onto Plaintiff's real property which proximately resulted in interference with the Plaintiff's possessory interests, use and utility of such real property.

92. Once the Defendants had actual notice that the de-watering process was potentially related to the problems reported to the Defendants, each day that the Defendants allowed the de-watering process to continue rather than cease the de-watering process entirely

constituted a separate, affirmative act or occurrence that caused damage to the properties that are the subject matter of this action.

93. As a result of the acts, omissions and other conduct of the Defendants, Plaintiff incurred damage to its property and buildings.

FOR A THIRTEENTH CAUSE OF ACTION
(INVERSE CONDEMNATION AGAINST SCDOT AND CITY)

94. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

95. In undertaking the drainage project, the Defendants City and SCDOT undertook a municipal storm water utility project that involved excavating and de-watering upon public and private lands which constituted an affirmative, positive and aggressive act by the Defendants.

96. The actions of the Defendants City and SCDOT in undertaking the work of the project and damaging the Plaintiff's buildings and property constitutes a taking of Plaintiff's property.

97. Each day that the Defendants allowed the de-watering process to continue rather than cease the de-watering process entirely constituted separate and distinct positive, affirmative, aggressive acts by the Defendants.

98. The Defendant reasonably knew that these affirmative acts would damage and/or diminish the value of the Plaintiff's properties.

99. The Defendants' acts did in fact permanently damage and/or diminish the value of the subject properties.

100. The taking of the Plaintiff's properties was for a public purpose, to wit, storm water and drainage.

101. As a result of the taking of its property by Defendants, Plaintiff is entitled to an award of just compensation, attorney's fees and litigation expenses.

PRAYER FOR RELIEF:

WHEREFORE, Plaintiff requests a jury trial, and prays that this Court award the following relief:

1. That the Plaintiff recover its actual damages from the Defendants;

2. That the Plaintiff recover an award of just compensation, attorney's fees and litigation expenses from the Defendants SCDOT and City.

3. For such other and further relief as the Court may deem just and proper.

Respectfully Submitted.

CALLISON TIGHE & ROBINSON, LLC

James S. Meggs, Esquire
George A. Taylor, Esquire
Post Office Box 1390
Columbia, South Carolina 29202-1390
Telephone: 803-404-6900
Facsimile: 803-404-6902
Attorneys for the Plaintiff

October 25, 2013
Columbia, South Carolina

Wesley H. Bryant, Esquire
County Attorney
Georgetown County, South Carolina
Post Office Box 421270
Georgetown, South Carolina 29442
Telephone: 843-545-3194

October 25, 2013
Georgetown, South Carolina

EXHIBIT A 2013-CP-22-01062

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF GEORGE A. SEMBOS, P.E.
COUNTY OF LEXINGTON)

2013-CP-22-01062

PERSONALLY appeared before me, GEORGE A. SEMBOS, P.E., who having been duly sworn, deposes and states as follows:

FILED
GEORGETOWN COUNTY, S.C.
2013 OCT 25 PM 1:50
CLERK OF COURT

1. That I am a professional engineer licensed in the State of South Carolina.

2. That I have been actively engaged in the practice of geotechnical engineering for the past 23 years and have actual professional knowledge and experience in the field of geotechnical engineering.

3. That I have inspected and observed the site of the drainage improvement project located adjacent to West Fraser and Front Streets in the City of Georgetown, South Carolina.

4. That I have also inspected and observed the subject properties located at 401 and 405 Cleland Street, Georgetown, SC 29440, and various sites located in the vicinity of the Project which exhibit damage due to the movement of the supporting soils.

5. Based upon the information available to me at this time, I am informed and believed that Davis & Floyd, Inc. acted as the engineer and that S&ME, Inc. (the design team) performed geological testing and studies of the areas of land that the drainage improvement project was intended to serve.

6. Based upon the information available to me at this time, I am informed and believed that the engineers of the South Carolina Department of Transportation (the owner) were also responsible for the drainage improvement project.

7. Based upon the information available to me at this time, I am informed and

believed that the contractor responsible for the drainage improvement project was Republic Contracting Corporation (the contractor).

8. That in observing the conditions at the Project site and surrounding areas, I noted extensive damage to parking lots, streets and structures which, in my opinion, are the result of the excessive pumping or removal of groundwater/soil from the drainage improvement project site and surrounding areas.

9. That, upon information and belief, the damages that I have observed were caused by:

a. Failure to properly isolate the underground aquifers at the drainage project site;

b. Failure to properly analyze and assess the quantity of groundwater to be removed from the drainage project site;

c. Failure to analyze and assess the impact that the removal of excessive quantities of groundwater/soil would have on properties located in the vicinity of the drainage project site;

d. Continuous pumping/removal of groundwater/soil from the drainage project site after damages occurred to surrounding properties;

e. Failure to properly implement remedial procedures after damage occurred to surrounding properties.

10. That as a result of my observations and investigations relating to the drainage improvement project, it is my opinion that "the design team", "owner", and/or "contractor" was

negligent in one or more of the particulars stated in Paragraph 9 by failing to conform to the standard of care required by a design professional in the design, planning and administration, and construction of the drainage improvement project, and that said failure caused damage to properties located in the vicinity of the drainage improvement project.

11. That as a result of my observations and investigations relating to the drainage improvement project, it is my opinion that the engineers for the "owner" were negligent and breached the standard of care for engineers by failing to recognize the "design team", and/or "contractor" errors and omissions in reviewing and approving the de-watering plans and allowing the de-watering to continue after it knew, or should have known, that the plan was not in accordance with professional standards.

12. That additional impact to the site and surrounding areas may be realized, and as a result, additional opinions may and will be formed as additional information comes to light, as it is my opinion that the geological/hydrological conditions of downtown Georgetown have been altered as a result of the dewatering efforts undertaken to construct the drainage improvement project. These geological/hydrological alterations of Georgetown may affect the subject sites and adjacent properties in an unknown/unpredictable manner in the future.

FURTHER AFFIANT SAYETH NOT.

GEORGE A. SEMBOS, P.E.

SWORN TO AND SUBSCRIBED BEFORE

ME THIS 24 DAY OF October, 2013.

_____(LS.)
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: October 11, 2022

STATE OF SOUTH CAROLINA)) COUNTY OF GEORGETOWN)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Georgetown County,)) Plaintiff,)) vs.)) Davis & Floyd, Inc., Republic) Contracting Corporation, S&ME,) Inc., The South Carolina) Department of Transportation and) The City of Georgetown,)) Defendants.)	Civil Action No.: 2013-CP-22-01062 **AMENDED COMPLAINT** (Jury Trial Demanded)

FILED
GEORGETOWN COUNTY, S.C.
2014 JUL 10 PM 4:55
ALMA Y. WHITE
CLERK OF COURT

The Plaintiff, complaining against the Defendants Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., the South Carolina Department of Transportation, and the City of Georgetown, would show the following:

PARTIES

1. The Plaintiff Georgetown is a body corporate and politic and a political subdivision of the State of South Carolina.

2. Defendant Davis & Floyd, Inc. is a corporation organized and existing under the laws of the State of South Carolina with a principal address of 1319 Highway 72/221 East, Greenwood, South Carolina 29649 and other offices at 3229 West Montague Avenue, North Charleston, South Carolina 29418.

3. Defendant Republic Contracting Corporation is a corporation organized and existing under the laws of the State of South Carolina with a principal address of 869 Pepper Street, Columbia, South Carolina 29202-2138.

4. Defendant S&ME, Inc. is a corporation organized and existing under the laws of the State of North Carolina with a principal office address of 3201 Spring Forest Road, Raleigh, NC 27616, and doing business in the State of South Carolina at 1330 Hwy 501 Business, Conway, South Carolina 29526 and 620 Wando Park Blvd., Mt. Pleasant, South Carolina 29464.

5. Defendant the South Carolina Department of Transportation is a governmental department and agency of the State of South Carolina.

6. Defendant the City of Georgetown is a municipal corporation and body politic of the State of South Carolina.

JURISDICTION AND VENUE

7. This Court is the proper venue in that the causes of action pertain to damage to real property situated in Georgetown County, South Carolina. All parties are subject to the personal jurisdiction of the Court.

8. This Court has subject matter jurisdiction of this action in that the events or omissions giving rise to this action occurred in Georgetown County, South Carolina, and the properties that are the subject of the action have at all material times been situated in Georgetown County, South Carolina.

FACTS

9. This action involves physical and structural damage to property owned by the Plaintiff and located in Georgetown, South Carolina at the following addresses: 333 Cleland Street; 401 Cleland Street; 405 Cleland Street; 325 Dozier Street; 330 Dozier Street; and 1230 Highmarket Street (hereinafter collectively referred to as "the subject properties").

10. All of the subject properties are owned by the Plaintiff and have been so owned at all times pertinent to this action.

11. The subject buildings were damaged beginning on October 29, 2011 and continuing thereafter as a result of certain public works projects undertaken by the Defendant, which projects altered the water tables and caused sinkholes and land subsidence in Georgetown, South Carolina.

12. In or about 2009, the Defendants South Carolina Department of Transportation (hereinafter "the SCDOT") and City of Georgetown (hereinafter "City") began to undertake a water drainage project in the City of Georgetown, South Carolina (hereinafter "the drainage project").

13. The drainage project was intended to install and relocate certain storm water drainage and utility systems in and around US17 and Georgetown City Hall and was called the "US17/City Hall Georgetown Drainage Project."

14. During the period of 2009-2011, the City and SCDOT engaged Defendant Republic Contracting Corporation to serve as the general contractor for the building and completion of the drainage project.

15. During the period of 2009-2011, the City and SCDOT engaged Defendant Davis & Floyd, Inc. to serve as the engineer and consultant for the design, planning and the implementation of the drainage project.

16. During the period of 2009-2011, Davis & Floyd, Inc. and/or the City and SCDOT engaged Defendant S&ME, Inc. to perform geological testing and studies of the area of land that the drainage project was intended to serve.

17. As part of the drainage project, certain lands were to undergo a de-watering process so that new drainage structures could be fabricated below grade.

18. Before the de-watering process could begin, the Defendants attempted to establish a perimeter area intended to isolate the groundwater in the underground aquifer by installing underground sheeting and pilings. The purpose of establishing the perimeter area was to contain the area to be dewatered and prevent pumps from drawing water from outside the isolated area, thereby avoiding subsidence of land and structures outside the area to be dewatered.

19. In order to properly establish the perimeter of the area to be dewatered, the pilings needed to penetrate deep enough into the ground to reach an impervious layer of material, such as limestone.

20. Plaintiff is informed and believes that the Defendants failed to conduct any tests or analyses with respect to the area in and around where the de-watering work was to take place in order to establish the proper depth to which the pilings would need to be driven to reach an impervious layer of substrate.

21. As a result of Defendants' failure aforesaid, the pilings were not driven in deep enough to reach an impervious geological layer, thereby rendering the sheeting and pilings inadequate to isolate the groundwater. Once the de-watering process began, water was caused to be drawn from outside of the perimeter of the de-watering area.

22. Further, the Defendants failed to establish an adequate assessment system to monitor and analyze the rate, flow and quantity of water coming through the de-watering pumps in order to determine whether the water being removed was in excess of the water that should have been contained within the de-watering site.

23. Once the de-watering process began, the Defendants received actual notice that the de-watering process was drawing significant water from outside the de-watering site and that there were threats to the structural integrity of the piles and sheeting in the area being excavated.

24. Notwithstanding that the Defendants knew that the de-watering process was drawing significant water from outside the de-watering site, the Defendants continued to pump water such that sink holes formed under the land outside the de-watering site and the land slumped and depressed.

25. The Plaintiff's properties are outside the de-watering site. Sinkholes formed under Plaintiff's buildings and the buildings have subsided as the direct and proximate result of the Defendants' acts and omissions set forth herein.

26. As a result of the acts and omissions of the Defendants, the Plaintiff has sustained damages in excess of Six Million ($6,000,000.00) Dollars to its property.

27. Plaintiff has complied with S.C. Code Ann. §15-36-100 by filing with this Complaint, the Affidavit of George A. Sembos, P.E., attached hereto as Exhibit A.

FOR A FIRST CAUSE OF ACTION
(NEGLIGENCE AGAINST DAVIS & FLOYD, INC.)

28. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

29. Defendant, Davis & Floyd, Inc., having undertaken to serve as the engineer and consultant for the design, planning and implementation of the drainage project, had a duty to exercise reasonable care such that the property of others outside the intended isolation area would not be the subject of damage due to subsidence of the land in the course of de-watering activities.

30. This duty extended to persons or businesses with property and business interests in the area surrounding the intended isolation area, including the Plaintiff.

31. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, this would adversely affect the aquifer system below properties situated outside the intended isolation area.

32. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, the adverse effect this could have on the aquifer system below properties situated outside the intended isolation area would include subsidence of the land and resulting structural damage.

33. The engineering practices of the Defendant-Davis & Floyd, Inc. fell below the standard of care of civil engineering, and geotechnical engineering practices in the State of South Carolina in one or more of the following particulars:

a. Before the de-watering process began, none of the engineers at Davis & Floyd, Inc. conducted or commissioned or recommended that anyone conduct or commission any hydro-geological testing or studies of the area in and around where they intended to conduct the de-watering work.

b. Before the de-watering process began, none of the engineers at Davis & Floyd, Inc. recommended that the sheeting and pilings be driven deep enough into the land to reach an impervious layer.

c. Before the de-watering process began, none of the engineers at Davis & Floyd, Inc. took any other steps to assure that the pilings in the intended isolation area would effectively isolate the underground aquifer in order to prevent water from being drawn from outside of the intended isolation area once the de-watering process began.

d. Before the de-watering process began, none of the engineers at Davis & Floyd, Inc. established an adequate assessment system to monitor and analyze the rate, flow and quantity of water coming through the pumps in order to determine whether the water being removed was excess of the water that should have been contained within the intended isolation system.

e. Once the de-watering process began, none of the engineers at Davis & Floyd, Inc. had on site a drainage engineer or other assessment system to adequately monitor and analyze the rate, flow and quantity of water coming through the pumps in order to address the potential that the water coming out was in excess of the water that should have been contained within the isolation system.

f. Once the de-watering process began, Davis & Floyd, Inc. received actual notice that the de-watering process was drawing significant water from outside the intended isolation area and that land outside that intended isolation area had become the subject of depressions (including in the parking lot of one of the subject properties), but none of the engineers at Davis & Floyd, Inc. discontinued or recommended discontinuing the de-watering process until nearly one month after such notice.

34. The failure of the Defendant, Davis & Floyd, Inc., to observe applicable standard of are as set forth herein constitutes careless, negligent and grossly negligent conduct by the Defendant.

35. As a direct and proximate result of the Defendant's carelessness, negligence and gross negligence, Plaintiff suffered damage to its buildings and property.

FOR A SECOND CAUSE OF ACTION
(NUISANCE AGAINST DAVIS & FLOYD, INC.)

36. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

37. The acts, omissions and other conduct of Davis & Floyd, Inc. proximately created a dangerous condition to exist in proximity to the property of others and unreasonably interfered with Plaintiff's use and enjoyment of its property.

38. The acts, omissions and other conduct of the Defendant created a nuisance which proximately caused the structural damage to the properties as set forth above.

FOR A THIRD CAUSE OF ACTION
(TRESPASS AGAINST DAVIS & FLOYD, INC.)

39. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

40. The conduct of the Defendant allowed the pumping out of water from under the properties of the Plaintiff.

41. The acts and/or omissions of the Defendant committed or omitted as set forth herein, constituted an unauthorized entry and/or invasion onto Plaintiff's real property which proximately resulted in interference with the Plaintiff's possessory interest, use and utility of such real property.

42. As a result of the acts, omissions and other conduct of this Defendant, Plaintiff incurred damage to its buildings and property.

FOR A FOURTH CAUSE OF ACTION
(NEGLIGENCE AGAINST S&ME, INC.)

43. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

44. Defendant, S&ME, Inc., having undertaken to provide geological engineering, geotechnical engineering and environmental engineering services related to the design, planning and implementation of the drainage project, had a duty to exercise reasonable care such that the property of others outside the intended isolation area would not be the subject of damage due to subsidence of the land in the course of the de-watering activities.

45. This duty extended to persons or businesses with property and business interests in the area surrounding the intended isolation area, including the Plaintiff.

46. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, this would adversely affect the aquifer system below properties situated outside the intended isolation area.

47. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, the adverse effect this could have on the aquifer system below properties situated outside the intended isolation area would include propagation of sinkholes, subsidence of the land and resulting structural damage.

48. The engineering practices of the Defendant S&ME, Inc. fell below the standard of care of environmental engineering and geotechnical engineering practices in the State of South Carolina in one or more of the following particulars:

a. Before the de-watering process began, none of the engineers at S&ME, Inc. conducted or commissioned or recommended that anyone conduct or commission any hydro-geological testing or studies of the area in and around where they intended to conduct the de-watering work.

b. Before the de-watering process began, none of the engineers at S&ME, Inc. recommended that the sheeting and pilings be driven deep enough into the land to reach an impervious layer.

c. Before the de-watering process began, none of the engineers at S&ME, Inc. took any other steps to assure that the pilings in the intended isolation area would effectively isolate the underground aquifer in order to prevent water from being drawn from outside of the intended isolation area once the de-watering process began.

d. Before the de-watering process began, none of the engineers at S&ME, Inc. established an adequate assessment system to monitor and analyze the rate, flow and quantity of water coming through the pumps in order to determine whether the water being removed was excess of the water that should have been contained within the intended isolation system.

e. Once the de-watering process began, none of the engineers at S&ME, Inc. had on site a drainage engineer or other assessment system to adequately monitor and analyze the rate, flow and quantity of water coming through the pumps in order to address the potential that the water coming out was in excess of the water that should have been contained within the isolation system.

f. Once the de-watering process began, S&ME, Inc. received actual notice that the de-watering process was drawing significant water from outside the intended isolation area and that land outside that intended isolation area had become the subject of depressions (including in the parking lot of one of the subject properties), but none of the engineers at S&ME, Inc. discontinued or recommended discontinuing the de-watering process until nearly one month after such notice.

49. The failure of the Defendant, S&ME, Inc., to observe applicable standard of care as set forth herein constitutes careless, negligent and grossly negligent conduct by the Defendant.

50. As a direct and proximate result of the Defendant's carelessness, negligence and gross negligence, Plaintiff suffered damage to its property and buildings.

FOR A FIFTH CAUSE OF ACTION
(NUISANCE AGAINST S&ME, INC.)

51. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

52. The acts, omissions and other conduct of S&ME, Inc. proximately created a dangerous condition to exist in proximity to the property of others and unreasonably interfered with Plaintiff's use and enjoyment of their property and business interests.

53. The acts, omissions and other conduct of the Defendant created a nuisance which proximately caused the structural damage to the Plaintiff's properties as set forth above.

FOR A SIXTH CAUSE OF ACTION
(TRESPASS AGAINST S&ME, INC.)

54. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

55. The conduct alleged of this Defendant allowed the pumping out of water from under the Plaintiff's properties and the creation of sinkholes.

56. The acts and/or omissions of the Defendant committed or omitted as set forth herein, constituted an unauthorized entry and/or invasion onto Plaintiff's real property which proximately resulted in interference with the Plaintiff's possessory interests, use and utility of such real property.

57. As a result of the acts, omissions and other conduct of this Defendant, Plaintiff incurred damage to its buildings and property.

FOR A SEVENTH CAUSE OF ACTION
(NEGLIGENCE AGAINST REPUBLIC CONTRACTING CORPORATION)

58. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

59. Defendant, Republic Contracting Corporation, having undertaken to implement and construct the drainage project, had a duty to exercise reasonable care such that the property of others outside the intended isolation area would not be the subject of damage due to subsidence of the land in the course of the de-watering activities.

60. This duty extended to persons or businesses with property and business interests in the area surrounding the intended isolation area, including the Plaintiff.

61. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, this would adversely affect the aquifer system below properties situated outside the intended isolation area.

62. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, the adverse effect this could have on the aquifer system below properties situated outside the intended isolation area would include subsidence of the land and resulting structural damage.

63. The practices and conduct of the Defendant Republic Contracting Corporation breached the above duty of care in one or more of the following particulars:

a. Before the de-watering process began, none of the sub-contractors or employees of Republic Contracting Corporation conducted or commissioned or recommended that anyone conduct or commission any hydro-geological testing or studies of the area in and around where they intended to conduct the de-watering work.

b. Before the de-watering process began, none of the sub-contractors or employees of Republic Contracting Corporation recommended that the sheeting and pilings be driven deep enough into the land to reach an impervious layer.

c. Before the de-watering process began, none of the sub-contractors or employees of Republic Contracting Corporation took any other steps to assure that the pilings in the intended isolation area would effectively isolate the underground aquifer in order to prevent water from being drawn from outside of the intended isolation area once the de-watering process began.

d. Before the de-watering process began, none of the sub-contractors or employees of Republic Contracting Corporation established an adequate assessment system to monitor and analyze the rate, flow and quantity of water coming through the pumps in order to determine whether the water being removed was excess of the water that should have been contained within the intended isolation system.

e. Once the de-watering process began, none of the sub-contractors or employees of Republic Contracting Corporation had on site a drainage engineer or other assessment system to adequately monitor and analyze the rate, flow and quantity of water coming through the pumps in order to address the potential that the water coming out was in excess of the water that should have been contained within the isolation system.

f. Once the de-watering process began, Republic Contracting Corporation received actual notice that the de-watering process was drawing significant water from outside the intended isolation area and that land outside that intended isolation area had become the subject of depressions (including in the parking lot of one of the subject properties), but none of the sub-contractors or employees of Republic Contracting Corporation discontinued or recommended discontinuing the de-watering process until nearly one month after such notice.

64. The failure of the Defendant, Republic Contracting Corporation, to observe applicable standard of care as set forth herein constitutes careless, negligent and grossly negligent conduct by the Defendant.

65. As a direct and proximate result of the Defendant's carelessness, negligence and gross negligence, Plaintiff suffered damage to its property and buildings.

FOR AN EIGHTH CAUSE OF ACTION
(NUISANCE AGAINST REPUBLIC CONTRACTING CORPORATION)

66. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

67. The acts, omissions and other conduct of Republic Contracting Corporation proximately created a dangerous condition to exist in proximity to the property of others and unreasonably interfered with Plaintiff's use and enjoyment of its property.

68. The acts, omissions and other conduct of this Defendant created a nuisance which proximately caused the structural damage to the properties set forth above.

FOR A NINTH CAUSE OF ACTION
(TRESPASS AGAINST REPUBLIC CONTRACTING CORPORPATION)

69. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

70. The conduct of the Defendant allowed the pumping out of water from under the Plaintiff's properties.

71. The acts and/or omissions of the Defendant committed or omitted as set forth herein, constituted an unauthorized entry and/or invasion onto Plaintiff's possessory interests, use and utility of such real property.

72. As a result of the acts, omissions and other conduct of this Defendant, Plaintiff incurred damage to its property and buildings.

FOR A TENTH CAUSE OF ACTION
(NEGLIGENCE AGAINST SCDOT AND CITY)

73. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

74. Defendants, City and SCDOT, having undertaken to implement and construct the drainage project, had a duty to exercise reasonable care such that the property of others outside the intended isolation area would not be the subject of damage due to subsidence of the land in the course of the de-watering activities.

75. This duty extended to persons or businesses with property and business interests in the area surrounding the intended isolation area, including the Plaintiff.

76. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, this would adversely affect the aquifer system below properties situated outside the intended isolation area.

77. It was foreseeable that if the de-watering activities drew significant water from outside the isolation area for an extended period of time, the adverse effect this could have on the aquifer system below properties situated outside the intended isolation area would include the creation of sinkholes, subsidence of the land and resulting structural damage.

78. The practices and conduct of the Defendant's City and SCDOT breached the above duty of care in one or more of the following particulars:

a. Before the de-watering process began, the Defendants failed to conduct or commission or recommend that anyone conduct or commission any hydro-geological testing or studies of the area in and around where they intended to conduct the de-watering work.

b. Before the de-watering process began, the Defendants failed to recommend that the sheeting and pilings be driven deep enough into the land to reach an impervious layer.

c. Before the de-watering process began, the Defendants failed to take any other steps to assure that the pilings in the intended isolation area would effectively isolate the underground aquifer in order to prevent water from being drawn from outside of the intended isolation area once the de-watering process began.

d. Before the de-watering process began, the Defendants failed to establish an adequate assessment system to monitor and analyze the rate, flow and quantity of water coming through the pumps in order to determine whether the water being removed was excess of the water that should have been contained within the intended isolation system.

e. Once the de-watering process began, the Defendants failed to have on site a drainage engineer or other assessment system to adequately monitor and analyze the rate, flow and quantity of water coming through the pumps in order to

address the potential that the water coming out was in excess of the water that should have been contained within the isolation system.

f. Once the de-watering process began, the Defendants received actual notice that the de-watering process was drawing significant water from outside the intended isolation area and that land outside that intended isolation area had become the subject of depressions (including in the parking lot of once of the subject properties), but the Defendants failed to discontinue or recommend discontinuing the de-watering process until nearly one month after such notice.

79. Each time the Defendants undertook any one of the above actions, the action constituted a separate occurrence which caused damage to one of more of the Plaintiff's properties.

80. Once the Defendants had actual notice that the de-watering process was potentially related to the problems reported to the Defendants, each day that the Defendants allowed the de-watering process to continue rather than cease the de-watering process entirely constituted a separate, affirmative occurrence that caused damage to the Plaintiff's properties.

81. Each of the properties listed in this Complaint were subject to cracks and other damages that occurred over a period of weeks and months.

82. Each separate instance of damage constituted a separate occurrence.

83. The failure of the Defendants, City and SCDOT, to observe applicable standard of care as set forth herein, constitutes careless, negligent and grossly negligent conduct by the Defendants.

84. As a direct and proximate result of the Defendants' carelessness, negligence and gross negligence, Plaintiff suffered damage to its property and buildings.

FOR AN ELEVENTH CAUSE OF ACTION
(NUISANCE AGAINST SCDOT AND CITY)

85. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

86. The acts, omissions and other conduct of the Defendants City and SCDOT proximately created a dangerous condition to exist in proximity to the property of others and unreasonably interfered with Plaintiff's use and enjoyment of their property and business interests.

87. The acts, omissions and other conduct of the Defendants created a nuisance which proximately caused the structural damage to the properties and business interests set forth above.

88. Once the Defendants had actual notice that the de-watering process was potentially related to the problems reported to the Defendants, each day that the Defendants allowed the de-watering process to continue rather than cease the de-watering process entirely constituted a separate, affirmative act that caused damage to the properties that are the subject matter of this action.

FOR A TWELFTH CAUSE OF ACTION
(TRESPASS AGAINST SCDOT AND CITY)

89. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

90. The conduct of the Defendants City and SCDOT allowed the pumping out of water from under the three properties at issue.

91. The acts and/or omissions of the Defendants committed or omitted as set forth herein, constituted an unauthorized entry and/or invasion onto Plaintiff's real property which proximately resulted in interference with the Plaintiff's possessory interests, use and utility of such real property.

92. Once the Defendants had actual notice that the de-watering process was potentially related to the problems reported to the Defendants, each day that the Defendants allowed the de-watering process to continue rather than cease the de-watering process entirely

constituted a separate, affirmative act or occurrence that caused damage to the properties that are the subject matter of this action.

93. As a result of the acts, omissions and other conduct of the Defendants, Plaintiff incurred damage to its property and buildings.

FOR A THIRTEENTH CAUSE OF ACTION
(INVERSE CONDEMNATION AGAINST SCDOT AND CITY)

94. Each of the foregoing allegations is incorporated herein by reference as if fully repeated verbatim.

95. In undertaking the drainage project, the Defendants City and SCDOT undertook a municipal storm water utility project that involved excavating and de-watering upon public and private lands which constituted an affirmative, positive and aggressive act by the Defendants.

96. The actions of the Defendants City and SCDOT in undertaking the work of the project and damaging the Plaintiff's buildings and property constitutes a taking of Plaintiff's property.

97. Each day that the Defendants allowed the de-watering process to continue rather than cease the de-watering process entirely constituted separate and distinct positive, affirmative, aggressive acts by the Defendants.

98. The Defendant reasonably knew that these affirmative acts would damage and/or diminish the value of the Plaintiff's properties.

99. The Defendants' acts did in fact permanently damage and/or diminish the value of the subject properties.

100. The taking of the Plaintiff's properties was for a public purpose, to wit, storm water and drainage.

101. As a result of the taking of its property by Defendants, Plaintiff is entitled to an award of just compensation, attorney's fees and litigation expenses.

PRAYER FOR RELIEF:

WHEREFORE, Plaintiff requests a jury trial, and prays that this Court award the following relief:

1. That the Plaintiff recover its actual damages from the Defendants;

2. That the Plaintiff recover an award of just compensation, attorney's fees and litigation expenses from the Defendants SCDOT and City.

3. For such other and further relief as the Court may deem just and proper.

Respectfully Submitted.

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June 18, 2014
Columbia, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
GEORGETOWN COUNTY Plaintiff, vs. Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown Defendants	Civil Action No.: 2013-CP-22-1062 **DEFENDANT SCDOT'S ANSWER, AFFIRMATIVE DEFENSES, MOTIONS TO STRIKE AND CROSS CLAIMS** ***(Jury Trial Demanded)***

TO: GEORGETOWN COUNTY, PLAINTIFF AND THEIR ATTORNEYS JAMES S. MEGGS, GEORGE A. TAYLOR, ESQUIRE AND WESLEY P. BRYANT, ESQUIRE:

COMES NOW, the Defendant, South Carolina Department of Transportation (hereinafter "SCDOT"), to answer the Complaint of the Plaintiff and respectfully allege and show as follows:

FOR A FIRST DEFENSE
(General Denial)

1. Each and every allegation of Plaintiff's Complaint which is not hereinafter specifically admitted, qualified or explained is denied and strict proof is demanded thereof.

2. Defendant is without sufficient information with which to admit or deny the allegations contained in paragraph 1 of the Plaintiff's Complaint and therefore the same are denied and strict proof is demanded thereof.

3. Upon information and belief, Defendant admits the allegations contained in paragraph 2 of the Plaintiff's Complaint.

4. Upon information and belief, Defendant admits the allegations contained in paragraph 3 of the Plaintiff's Complaint.

5. Upon information and belief, Defendant admits the allegations contained in paragraph number 4 of the Plaintiff's Complaint.

6. In response to paragraph 5 of the Plaintiff's Complaint Defendant affirmatively asserts that South Carolina Department of Transportation is a governmental entity as defined in S.C. Code Ann. § 15-78-30, and any and all actions alleged against Defendant are controlled by the South Carolina Tort Claims Act, including but not limited to any and all limitations to liability contained therein. The rest and remainder of the allegations contained in paragraph 5 are denied and strict proof is demanded thereof.

7. Upon information and belief, Defendant admits the allegations contained in paragraph number 6 of the Plaintiff's Complaint.

8. Paragraph 7 of the Plaintiff's Complaint calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required, the same are denied and strict proof is demanded thereof.

9. Paragraph 8 of the Plaintiff's Complaint calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required, upon information and belief, the same are admitted and strict proof is demanded thereof.

10. Defendant is without sufficient information with which to admit or deny the allegations contained in paragraph 9 of the Plaintiff's Complaint and therefore the same are denied and strict proof is demanded thereof.

11. Defendant is without sufficient information with which to admit or deny the allegations contained in paragraph 10 of the Plaintiff's Complaint and therefore the same are denied and strict proof is demanded thereof.

12. Defendant is without sufficient information with which to admit or deny the allegations contained in paragraph 11 of the Plaintiff's Complaint and therefore the same are denied and strict proof is demanded thereof.

13. In response to paragraph 12 of the Plaintiff's Complaint, Defendant asserts that in 2002 the City of Georgetown applied to the SCDOT, and SCDOT accepted their application, for matching funds to assist in addressing the flooding problems in Georgetown, including upgrading the drainage along US 17 and US 521. In 2007, the City of Georgetown took an assignment and agreed to be responsible for administering the Project

as well as the Davis and Floyd contract. The City entered into additional contracts with Davis and Floyd related to project plans and scope revisions. In 2009, the SCDOT Commission approved City of Georgetown's application for additional funding for the City's drainage project under the American Reinvestment and Recovery Act (ARRA). The rest and remainder of the allegations contained in this paragraph are denied and strict proof is demanded thereof.

14. Defendant is without sufficient information with which to admit or deny the allegations contained in paragraph 13 of the Plaintiff's Complaint. In further response to paragraph 13, Defendant would incorporate the plans and specifications as prepared by Davis & Floyd, Inc. pursuant to their contract with the City of Georgetown. Defendant denies any allegation inconsistent therewith and strict proof is demanded thereof.

15. In response to paragraph number 14 of the Plaintiff's Complaint, Defendant asserts that the City of Georgetown could not qualify as a local public agency under FHWA's rules so at their request, SCDOT agreed to let the Project for the City. SCDOT put the Project out for bids. In March 2010, the construction contract was awarded to Republic Contracting and a Notice to Proceed was given on June 14, 2010. Defendant denies any allegation inconsistent therewith and strict proof is demanded thereof.

16. In response to paragraph 15 of the Plaintiff's Complaint Defendant asserts that in 2002, the City of Georgetown applied to SCDOT for matching funds to assist in addressing the flooding problems, including upgrading drainage along US 17 and US 521. March 7, 2003 SCDOT entered into a contract with Davis and Floyd to design the US Highway 17 Drainage Basin Improvement Project. This design was put out for bids in 2005, but the bids came in too high to accomplish the Project with the available funds. In 2007, SCDOT assigned to the City its responsibilities for administering the Project as well as the Davis and Floyd contract. The City entered into additional contracts with Davis and Floyd related to project plans and scope revisions. The City attempted to let the Project, but again the bids came back too high for the available funds. In 2009 Defendant and Davis & Floyd, Inc. entered into a contract for on call CE&I services on a statewide basis. In 2010 a contract modification was executed regarding CE&I services for the City of Georgetown's

Drainage Project. Defendant would refer to and incorporate this contract and contract modification in their entirety and would deny all claims inconsistent therewith.

17. In response to paragraph 16 of the Plaintiff's Complaint Defendant asserts that they did not enter into a contract with S&ME as alleged in this paragraph. Upon information and belief, Davis & Floyd, Inc. entered into a contract with S&ME for services to be provided in furtherance of Davis & Floyd's contract with the City of Georgetown for the design and development of the Drainage Project as well as the contract with this Defendant for CE&I services for the Drainage Project. Defendant does not have sufficient information with which to admit or deny the allegations in this paragraph regarding the services to be performed by S&ME under their contract with David & Floyd and as such, the same are denied and strict proof is demanded thereof.

18. Defendant is without sufficient information with which to admit or deny the allegations contained in paragraph 17 of the Plaintiff's Complaint, therefore the same are denied and strict proof is demanded thereof.

19. To the extent the allegations contained in paragraph 18 are directed at this Defendant, the same are denied and strict proof is demanded thereof. To the extent they are directed at other parties to this litigation, no answer is required from this Defendant.

20. Defendant is without sufficient information with which to admit or deny the allegations contained in paragraph 19 of the Plaintiff's Complaint, therefore the same are denied and strict proof is demanded thereof.

21. To the extent the allegations contained in paragraph 20 are directed at this Defendant, the same are denied and strict proof is demanded thereof. To the extent they are directed at other parties to this litigation, no answer is required from this Defendant.

22. To the extent the allegations contained in paragraph 21 are directed at this Defendant, the same are denied and strict proof is demanded thereof. To the extent they are directed at other parties to this litigation, no answer is required from this Defendant.

23. To the extent the allegations contained in paragraph 22 are directed at this Defendant, the same are denied and strict proof is demanded thereof. To the extent they are directed at other parties to this litigation, no answer is required from this Defendant.

24. To the extent the allegations contained in paragraph 23 of the Plaintiff's Complaint are directed at this Defendant, the same are denied and strict proof is demanded thereof. To the extent they are directed at other parties to this action, Defendant is without sufficient information with which to admit or deny allegations and therefore the same are denied and strict proof is demanded thereof.

25. To the extent the allegations contained in paragraph 24 are directed at this Defendant, the same are denied and strict proof is demanded thereof. To the extent they are directed at other parties to this litigation, no answer is required from this Defendant.

26. Paragraph 25 of the Plaintiff's Complaint does not contain any allegations of wrongdoing by the Defendant and therefore no response is required thereto. To the extent a response is required, the same are denied and strict proof is demanded thereof.

27. Defendant is without sufficient information with which to admit or deny the allegations contained in paragraph 26 of the Plaintiff's Complaint and therefore the same are denied and strict proof is demanded thereof.

28. To the extent the allegations contained in paragraph 27 are directed at this Defendant, the same are denied and strict proof is demanded thereof. To the extent they are directed at other parties to this litigation, no answer is required from this Defendant.

29. In response to paragraph 28, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

30. Paragraphs 29, 30, 31, 32, 33, 34 and 35 are directed at other parties to this action and therefore no response is required to these paragraphs.

31. In response to paragraph 36 of the Plaintiff's Complaint, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

32. Paragraphs 37 and 38 are directed at other parties to this action and therefore no response is required from this Defendant.

33. In response to paragraph 39 of the Plaintiff's Complaint, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

34. Paragraphs 40, 41 and 42 are directed at other parties to this action and therefore no response is required from this Defendant.

35. In response to paragraph 43 of the Plaintiff's Complaint, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

36. Paragraphs 44, 45, 46, 47, 48, 49 and 50 are directed at other parties to this action and therefore no response is required from this Defendant.

37. In response to paragraph 51 of the Plaintiff's Complaint, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

38. Paragraphs 52 and 53 are directed at other parties to this action and therefore no response is required from this Defendant.

39. In response to paragraph 54 of the Plaintiff's Complaint, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

40. Paragraphs 55, 56, and 57 are directed at other parties to this action and therefore no response is required from this Defendant.

41. In response to paragraph 58 of the Plaintiff's Complaint, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

42. Paragraphs 59, 60, 61, 62, 63, 64 and 65 are directed at other parties to this action and therefore no response is required from this Defendant.

43. In response to paragraph 66 of the Plaintiff's Complaint, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

44. Paragraphs 67 and 68 are directed at other parties to this action and therefore no response is required from this Defendant.

45. In response to paragraph 69 of the Plaintiff's Complaint, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

46. Paragraphs 70, 71 and 72 are directed at other parties to this action and therefore no response is required from this Defendant.

47. In response to paragraph 73 of the Plaintiff's Complaint, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

48. Paragraph 74 calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required, the same are denied and strict proof is demanded thereof.

49. Paragraph 75 calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required, the same are denied and strict proof is demanded thereof.

50. Paragraph 76 calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required, the same are denied and strict proof is demanded thereof.

51. Paragraph 77 calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required, the same are denied and strict proof is demanded thereof.

52. Paragraph 78 and all subparts thereto, calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required, the same are denied and strict proof is demanded thereof.

53. Defendant denies the allegations contained in paragraph 79 of the Plaintiff's Complaint and strict proof is demanded thereof.

54. Defendant denies the allegations contained in paragraph 80 of the Plaintiff's Complaint and strict proof is demanded thereof.

55. Defendant is without sufficient information with which to admit or deny the allegations contained in paragraph 81 of the Plaintiff's Complaint and therefore the same is denied and strict proof is demanded thereof.

56. Defendant denies the allegations contained in paragraph 82 of the Plaintiff's Complaint and strict proof is demanded thereof.

57. Paragraph 83 calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required, the same are denied and strict proof is demanded thereof.

58. Paragraph 84 calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required, the same are denied and strict proof is demanded thereof.

59. In response to paragraph 85 of the Plaintiff's Complaint, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

60. Paragraph 86 calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required, the same are denied and strict proof is demanded thereof.

61. Paragraph 87 calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required, the same are denied and strict proof is demanded thereof.

62. Defendant denies the allegations contained in paragraph 88 and strict proof is demanded thereof.

63. In response to paragraph 89 of the Plaintiff's Complaint, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

64. Defendant denies the allegations contained in paragraph 90 of the Plaintiff's Complaint and strict proof is demanded thereof.

65. Defendant denies the allegations contained in paragraph 91 and strict proof is demanded thereof.

66. Defendant denies the allegations contained in paragraph 92 and strict proof is demanded thereof.

67. Defendant denies the allegations contained in paragraph 93 and strict proof is demanded thereof.

68. In response to paragraph 94 of the Plaintiff's Complaint, Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

69. Paragraph 95 calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required, the same are denied and strict proof is demanded thereof.

70. Paragraph 96 calls for a legal conclusion and therefore no response is required from this Defendant. To the extent a response is required the same are denied and strict proof is demanded thereof.

71. Defendant denies the allegations contained in paragraph 97 and strict proof is demanded thereof.

72. Defendant denies the allegations contained in paragraph 98 and strict proof is demanded thereof.

73. Defendant denies the allegations contained in paragraph 99 and strict proof is demanded thereof.

74. Defendant denies the allegations contained in paragraph 100 and strict proof is demanded thereof.

75. Defendant denies the allegations contained in paragraph 101 and strict proof is demanded thereof.

76. In response to the "WHEREFORE" paragraph, the same are denied and strict proof is demanded thereof.

FOR A SECOND DEFENSE
(12(b)(6) S.C.R.C.P.)

77. Plaintiffs fail to state facts sufficient to constitute a cause of action against the Defendant and any claim against Defendant should be dismissed pursuant to Rule 12(b)(6) South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE
(Sovereign Immunity-Tort Claims Act)

78. Defendant reasserts and realleges each and every preceding paragraph as if each were fully repeated verbatim herein.

79. The Defendant alleges that the Plaintiff's Complaint is barred or otherwise limited by the provisions of the South Carolina Tort Claims Act, and, specifically but not limited to, Section 15-78-60 (1), (2), (4), (5), (7), (9), (13), (15), (16), (17) and (20) of the Act.

FOR A FOURTH DEFENSE
(Sole, Intervening and Superseding Negligence of Co-Defendants)

80. Defendant repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

81. Defendant alleges that any injuries and damages alleged by the Plaintiffs, if any, which the Defendant expressly denies, were due to and caused by the sole, intervening and/or superseding negligence of

Co-Defendant, over whom Defendant had no control, so as to bar the claims of the Plaintiffs as to this Defendant.

82. Defendant alleges that the injuries and damages alleged by the Plaintiffs, if any, which the Defendant expressly denies, were due to and caused by the negligence of a third-party, including but not limited to the Co-Defendant, if any so existed, which alone or concurring, supervening and/or intervening with the negligence, if any, of third-parties, unknown third parties, and/or the Plaintiffs so as to be the sole proximate cause of Plaintiffs alleged injuries and damages, if any, so as to bar Plaintiff's claims as to this Defendant.

FOR A FIFTH DEFENSE
(Sole, Intervening and Superseding Negligence of a Third-Party)

83. Defendant reasserts and realleges each and every preceding paragraph as if each were fully repeated verbatim herein.

84. The Defendant alleges that the injuries and damages alleged by the Plaintiffs, if any, which the Defendant expressly denies, were due to and caused by the negligence of a third-party or third-parties, which alone or concurring, supervening and/or intervening with the negligence, if any, of the Co-Defendants, and/or unknown third parties so as to be the sole proximate cause of Plaintiff's alleged injuries and damages, if any, so as to bar the Plaintiff's claims as to Defendant.

FOR A SIXTH DEFENSE
(Limitation of Remedies)

85. Defendant reasserts and realleges each and every preceding paragraph as if each were fully repeated verbatim herein.

86. Any recovery by Plaintiffs must be limited to the remedies allowed under the South Carolina Tort Claims Act, including but not limited to S.C. Code Ann. § 15-78-120(a)(1) and (2) and S.C. Code Ann. § 15-78-120(b).

FOR A SEVENTH DEFENSE
(Public Duty Rule)

87. Defendant reasserts and realleges each and every preceding paragraph as if each were fully repeated verbatim herein.

88. The Plaintiff's Complaint fails to state a claim against Defendant in that as a matter of law the Defendant violated no duty which it owed to the Plaintiffs for which the Plaintiffs are entitled to relief in the form of damages.

FOR A EIGHT DEFENSE
(Determination of Proportional Liability)

89. Defendant reasserts and realleges each and every preceding paragraph of its Motions, Answer and Affirmative Defenses as if each were fully repeated verbatim herein.

90. Defendant alleges that the injuries and damages alleged by the Plaintiffs, if any, which Defendant expressly denies, were due to and were the direct and proximate result of, at least partially if not solely, of the Co-Defendants in this action, if any so existed, so as to entitle Defendant to a determination of proportional liability as to any concurring negligence, if so found, pursuant to S.C. Code Ann. § 15-78-100.

FOR A NINTH DEFENSE
(Notice)

91. Defendant SCDOT repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

92. If a dangerous condition existed, which is denied, Defendant had no actual or constructive notice of the dangerous condition so as to bar the claim of the Plaintiffs as to this Defendant.

FOR A TENTH DEFENSE
(Compliance with Industry Standards)

93. Defendant SCDOT repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

94. Any and all work or services which Defendant provided met all construction industry customs, practices and standards applicable to the claims of the Plaintiffs.

FOR AN ELEVEENTH DEFENSE

95. Defendant SCDOT repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

96. Plaintiff fails to state facts upon which they are entitled to and DOT specifically denies that Plaintiffs are entitle to attorney's fees, litigation expenses and/or pre-judgment interest.

FOR AN TWELFTH DEFENSE AND AS A MOTION TO STRIKE

97. Defendant SCDOT repeats and realleges each and every preceding paragraph as if fully set forth herein verbatim.

98. Defendant moves to strike Plaintiff's Eleventh Cause of Action in its entirety on the grounds that they cannot be maintained and are not recoverable in this action in accordance with the South Carolina Tort Claims Act.

FOR AN THIRTEENDEFENSE AND CROSS CLAIMS DAVIS & FLOYD, INC., REPUBLIC CONTRACTING CORPORATION AND S&ME, INC.

FOR A FIRST CAUSE OF ACTION AGAINST DAVIS & FLOYD, INC., REPUBLIC CONTRACTING CORPORATION AND S&ME, INC.

99. Defendant reasserts and realleges each and every preceding paragraph as if each were fully repeated verbatim herein.

100. Upon information and belief Davis & Floyd, Inc. and Republic Contracting Corporation are businesses organized under the laws of State of South Carolina, conduct business in Georgetown County, South Carolina and performed work of the Georgetown drainage project that is the subject matter of this litigation.

101. Upon information and belief S&ME, Inc. is a business organized under the laws of State of North Carolina, conduct business in Georgetown County, South Carolina and performed work of the Georgetown drainage project that is the subject matter of this litigation.

102. Plaintiffs have filed a lawsuit against SCDOT for alleged defects and deficiencies in the work being performed on Georgetown drainage project, including the failure to conduct or commission or recommend that anyone conduct or commission a hydro-geological testing or studies of the area where dewatering work was intended, failure to recommend that the sheeting and king piles be driven deep enough into the land to reach and impervious layer, failure to take any steps to ensure that the pilings in the intended area would effectively isolate the underground aquifer in order to prevent water from being drawn from outside of the intended isolation area during dewatering, failure to establish an adequate assessment system to monitor

and analyze the rate and quantity of water coming through the pumps in order to determine whether the water being removed was excess of the water that should have been coming through, failure to have an onsite drainage engineer or other assessment system to adequately monitor and analyze the rate, flow and quantity of water coming through the pumps in order to address the potential of excess water coming through, in allowing the dewatering process to continue despite knowledge of excess water encountered during dewatering and the presence of a depression. SCDOT has denied the allegations of the Plaintiff's Complaint, however, in the event that the facts as alleged by the Plaintiffs are true, then same were caused by the negligence, breach of contract and breach of warranties on the part of Davis & Floyd, Inc., Republic Contracting Corporation and S&ME, Inc.

103. SCDOT alleges that any damages that were in fact sustained by the Plaintiffs in this action, if any, were a direct and proximate result of the actions, omissions and activities of Davis & Floyd, Inc., Republic Contracting Corporation and S&ME, Inc. in the work performed on the Georgetown drainage project and not as a result of any actions on the part of SCDOT.

104. In the event the Plaintiffs establish liability for damages alleged in the Plaintiff's Complaint, such liability will establish negligence by Davis & Floyd, Inc., Republic Contracting Corporation and S&ME, Inc. in the following, including but not limited to:

a. In failing to adequately and properly perform, inspect, supervise and monitor the work;

b. Failing to utilize the proper equipment during the course of performing, inspecting, supervising, and monitoring the work;

c. Failing to hire, train and supervise competent contractors, agents, subcontractors employees and representatives to perform, inspect, supervise, and monitor the work;

d. Creating a dangerous condition, which Defendants knew, or should have known would create an unreasonable risk of harm to Plaintiffs;

e. Otherwise failing to exercise the necessary care and skill under the circumstances; and

f. In any other such deficiencies as may be shown by the evidence.

105. In addition to the damages for breach of duty by Davis & Floyd, Inc., Republic Contracting Corporation and S&ME, Inc,, the breach of duty by these Defendants entitles Defendant to equitable indemnification and/or contractual indemnification, in whole or in part, including attorney's fee, costs and interest thereon.

FOR A SECOND CAUSE OF ACTION AGAINST DAVIS & FLOYD, INC., REPUBLIC CONTRACTING CORPORATION AND S&ME, INC.

106. Defendant reasserts and realleges each and every preceding paragraph as if each were fully repeated verbatim herein.

107. A Complaint has been filed against SCDOT by the Plaintiffs in which Plaintiffs asserts that SCDOT's improper performance in the work performed on the Georgetown drainage project caused the Plaintiffs to be damaged. SCDOT has denied any liability for the allegations in the Plaintiff's Complaint.

108. In the event the Plaintiffs establish liability for damages alleged in the Complaint, such liability will establish negligence of Davis & Floyd, Inc., Republic Contracting Corporation and S&ME, Inc. and /or breach of contract and breach of warranty as set forth in the various claims stated above.

109. In the event SCDOT is found liable to the Plaintiffs for damages based upon the allegations in the Complaint, SCDOT alleges they are without fault in regard thereto and are entitled to judgment against Davis & Floyd, Inc., Republic Contracting Corporation and S&ME, Inc. for full and complete equitable indemnity and/or contractual indemnity against any such liability, plus costs, expenses, and attorneys fees in defending this action.

110. Plaintiffs have filed a lawsuit against SCDOT for alleged defects and deficiencies in the work performed on the Georgetown drainage project. SCDOT has denied the allegations of the Plaintiff's Complaint, however, in the event that the facts as alleged by the Plaintiffs is true, then same was caused by the negligence, breach of contract and breach of warranties on the part of Davis & Floyd, Inc., Republic Contracting Corporation and S&ME, Inc. and these Defendants are liable directly SCDOT for breach of contract, breach of warranties and negligence as set forth in Plaintiffs Complaint.

FOR A THIRD CAUSE OF ACTION AGAINST DAVIS & FLOYD, INC.
(Breach of Implied Warranties – Plans and Specifications)

111. Defendant reasserts and realleges each and every preceding paragraph as if each were fully repeated verbatim herein.

112. Davis & Floyd, Inc. expressly and impliedly warranted that the plans and specifications were adequate for construction and in conformance with the generally accepted principles in the industry.

113. Davis & Floyd, Inc. were negligent in planning and designing the project and/or in failing to adequately supervise or inspect the project and the design of the project.

FOR A FOURTEENTH DEFENSE AND CROSS CLAIMS AGAINST CITY OF GEORGETOWN

114. Defendant reasserts and realleges each and every preceding paragraph as if each were fully repeated verbatim herein.

115. City of Georgetown expressly and impliedly warranted that the plans and specifications were adequate for construction and in conformance with the generally accepted principles in the industry.

116. City of Georgetown were negligent in planning and designing the project and/or in failing to adequately supervise or inspect the design of the project.

FOR A FIFTEENTH DEFENSE

117. Defendant reasserts and realleges each and every preceding paragraph as if each were fully repeated verbatim herein.

118. Defendant reserves any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner that is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Plaintiff's Complaint, Defendant prays as follows:

a. That the Plaintiff's action be dismissed with prejudice;

b. For trial by jury on all issues so triable;

c. For costs and disbursements of this action;

d. That the Plaintiff's claim for any damages not allowed or in excess of that provided by the South Carolina Tort Claims Act be stricken;

e. That the cost of this action be taxed to parties other than Defendant;

f. That Defendant be awarded their costs, attorneys fees and expenses of this action; and

g. That Defendant be granted such other and further relief as this court deems just and proper.

ANDERSON REYNOLDS & STEPHENS, LLC

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November 21, 2013

Charleston, South Carolina

ORIGINAL

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF GEORGETOWN	
Georgetown County, Plaintiff, v. Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., the South Carolina Department of Transportation and the City of Georgetown, Defendants.	C/A #: 13-CP-22-01062 **ANSWER OF DEFENDANT CITY OF GEORGETOWN (Jury Trial Demanded)**

FILED
GEORGETOWN COUNTY, S.C.
2014 JAN 22 AM 11:56
ALMA Y. WHITE
CLERK OF COURT

The Defendant, City of Georgetown, answers the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. The Summons and Complaint fails to state facts sufficient to state a cause of action. This Defendant reserved the right to file a motion pursuant to Rule 12(b)(6), SCRCP.

FOR A SECOND DEFENSE

2. This Defendant denies each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted.

3. As to Paragraph 1, this Defendant lacks sufficient information to form a belief as to the truth and veracity of those allegations and therefore demands the allegations and demands strict proof thereof.

4. As to Paragraphs 2, 3 and 4 of the Complaint, this Defendant admits upon information and belief that those organizations exist and do business in South Carolina. As to the remaining allegations contained in those paragraphs, this Defendant lacks sufficient

information to form a belief as to the truth and veracity of those allegations and therefore demands the allegations and demands strict proof thereof.

5. As to Paragraph 5, this Defendant admits that the South Carolina Department of Transportation is a governmental entity of the State of South Carolina. This Defendant lacks information sufficient to form a belief as to the remaining allegations in Paragraph 5 of the Plaintiff's Complaint, and therefore, deny those allegations and demand strict proof thereof.

6. As to Paragraph 6, this Defendant admits it is a political subdivision of the State of South Carolina.

7. Paragraph 7 is admitted.

8. Paragraph 8 is jurisdictional in nature and requires no response from this Defendant. To the extent Paragraph 8 requires a response, it is denied.

9. As to Paragraphs 9, 10 and 11, this Defendant lacks sufficient information to form a belief as to the truth and veracity of those allegations and therefore demands the allegations and demands strict proof thereof.

10. As to Paragraphs 12 and 13, this Defendant admits only that a drainage project existed. The remaining allegations are denied as to the City of Georgetown.

11. Paragraphs 14, 15, 16 and 17 are denied as to the City.

12. As to Paragraphs 18, 19, 20, 21, 22, 23, 24 and 25 are denied insofar as they relate to the City of Georgetown. As to other Defendants, this Defendant lacks sufficient information to form a belief as to the truth and veracity of those allegations and therefore denies the allegations and demands strict proof thereof.

13. Paragraphs 26 and 27 are denied.

14. Paragraphs 28 through 72 allege claims against other Defendants and require no response from this Defendant. To the extent any claims are intended to be alleged against this Defendant in those paragraphs, they are denied.

15. As to Paragraphs 73, 85, 89 and 94, this Defendant re-iterates each and every corresponding response and affirmative defense contained in this Answer as if fully re-stated here.

16. Paragraphs 74, 75, 76, 77, 78 (including all subparts therein), 79 and 80 are denied.

17. This Defendant lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 81, and therefore, denies those allegations and demands strict proof thereof.

18. Paragraphs 82, 83 and 84 are denied.

19. Paragraphs 86, 87 and 88 are denied.

20. Paragraphs 90, 91, 92 and 93 are denied.

21. Paragraphs 95, 96, 97, 98, 99, 100 and 101 are denied.

22. The Plaintiff's prayer for relief is denied in its entirety.

FOR A THIRD DEFENSE

23. This Defendant is entitled to sovereign immunity.

FOR A FOURTH DEFENSE

24. This Defendant is entitled to immunity pursuant to statutory law, including but not limited to, the immunities and defenses provided by South Carolina Tort Claims Act.

FOR A FIFTH DEFENSE

25. This Defendant is immune from suit pursuant to South Carolina Code Ann. Section 15-78-60(1), (2), (3), (4), (5), (7), (9), (10), (12), (13), (15) & (20).

FOR A SIXTH DEFENSE

26. This Defendant is immune for suit for punitive damages pursuant to the common law of the State of South Carolina, public policy and the South Carolina Tort Claims Act, including but not limited to S.C. Code Section 15-78-120.

FOR A SEVENTH DEFENSE

27. Plaintiffs' claims are barred in whole or in part by the public duty rule.

FOR AN EIGHTH DEFENSE

28. Plaintiffs' claims, along with others, are limited to the statutory caps contained in the South Carolina Tort Claims Act.

FOR A NINTH DEFENSE

29. Plaintiffs' claims are barred in whole or in part by the economic loss doctrine.

FOR A TENTH DEFENSE

30. This Defendant substantially performed any and all applicable duties upon it in accordance with industry standards and in a good and workmanlike manner and Plaintiffs' claims are barred.

FOR AN ELEVENTH DEFENSE

31. This Defendant asserts that whatever damages, if any, that were sustained by the Plaintiffs were due to, caused solely or partly by, and were the direct and proximate results of the negligence of the Plaintiffs, including, but not limited to, their acts or omissions in failing to properly maintain the property, in failing to mitigate their damages, and in failing to act as a

reasonably prudent company or person would have acted under the same or similar circumstances, and in any other particulars that may come to light through investigation and discovery, and therefore, the recovery, if any, should be barred, or reduced, in proportion to their own negligence.

FOR A TWELFTH DEFENSE

32. This Defendant would show, upon information and believe, that any injuries or damages sustained by the Plaintiffs were due to their own negligent, careless, reckless and grossly negligent acts or omissions which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, to produce such injuries or damages, if any, and without which such injuries or damages would not have occurred. This Defendant pleads such negligence, carelessness, recklessness and gross negligence on the part of the Plaintiffs and would ask that this court compare the negligence of the Plaintiffs and this Defendant, and if it is determined that the Plaintiffs' negligence, carelessness, recklessness and gross negligence was greater than the negligence, carelessness, recklessness and gross negligence of this Defendant, which is specifically denied, then the Plaintiffs should be totally barred from recovery, and if it is determined that the Plaintiffs' negligence, carelessness, recklessness and gross negligence is equal to or less than the negligence of this Defendant, then the amount of recovery available to the Plaintiffs should be reduced by the percentage of the Plaintiffs' own negligence, carelessness, recklessness and gross negligence.

FOR A THIRTEENTH DEFENSE

33. This Defendant asserts the Doctrine of Laches as complete or partial bar to the Complaint.

FOR A FOURTEENTH DEFENSE

34. This Defendant asserts Plaintiffs' failure to mitigate damages and/or the Doctrine of Avoidable Consequences as a complete or partial bar to the Complaint.

FOR A FIFTEENTH DEFENSE

35. This Defendant asserts the negligence of others not in the employ or control of this Defendant as a complete or partial bar to the Complaint.

FOR A SIXTEENTH DEFENSE

36. To the extent this Defendant may be liable to the Plaintiffs, which liability is denied, this Defendant would show upon information and belief that the subject property has either been destroyed or modified, and as such, this Defendant pleads the Doctrine of Spoliation of Evidence as a complete bar to the Complaint.

FOR A SEVENTEENTH DEFENSE

37. To the extent this Defendant is liable to the Plaintiffs, which liability is denied, this Defendant would show upon information and belief that Plaintiffs failed to give this Defendant timely and reasonable notice of any alleged defects and/or timely and reasonable opportunity to cure or correct any alleged defects as required in the applicable contracts. This Defendant asserts such lack of notice as a complete bar to the Complaint.

FOR AN EIGHTEENTH DEFENSE

38. This Defendant asserts the Defenses of Waiver and Estoppel as a complete or partial bar to the Complaint.

FOR A NINETEENTH DEFENSE

39. This Defendant asserts the Doctrine of Unclean Hands as a complete or partial bar to the Complaint.

FOR A TWENTIETH DEFENSE

40. This Defendant asserts the Economic Loss Doctrine as complete or partial bar to the Complaint.

FOR A TWENTY-FIRST DEFENSE

41. This Defendant is entitled to apportionment of its liability, if any, with the liability of any other Defendants and is only required to pay its apportioned share pursuant to the South Carolina Tort Claims Act.

FOR A TWENTY-SECOND DEFENSE

42. This Defendant preserves and reserves the right to rely on and assert any and all other applicable defenses, either in contract or under the law, as may be asserted by any other Defendant in this action (and specifically incorporates such defenses herein), or that may become evident through its investigation and discovery.

WHEREFORE, having fully answered the Complaint of the Plaintiffs, the Defendant, City of Georgetown, prays that the Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

(Signature on Following Page)

MORRISON LAW FIRM, LLC

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ATTORNEYS FOR THE DEFENDANT
CITY OF GEORGETOWN

Columbia, South Carolina

January 17, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	Civil Action No.: 2013-CP-22-01062
Georgetown County,	)	
	)	
Plaintiff,	)	**PLAINTIFF GEORGETOWN COUNTY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**
	)	
v.	)	
	)	
Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown,	)	
	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2014 MAY -2 AM 11:53
ALMA Y. WHITE
CLERK OF COURT

TO: J.J. ANDERSON, ESQUIRE AND LISA A. REYNOLDS, ESQUIRE, ATTORNEYS FOR DEFENDANT THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION; DAVID L. MORRISON, ESQUIRE AND KANDI B. SANDIFER, ESQUIRE, ATTORNEYS FOR THE CITY OF GEORGETOWN; J. PATRICK NORRIS, ESQUIRE, ATTORNEY FOR DEFENDANT DAVIS & FLOYD, INC.; and R. DAVIS HOWSER, ESQUIRE, ATTORNEY FOR DEFENDANT S&ME, INC.:

YOU WILL PLEASE TAKE NOTICE that Plaintiff, Georgetown County (the "County), by and through its undersigned counsel, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure will move before the Presiding Judge of the Court of Common Pleas for the Fifteenth Judicial Circuit, Georgetown County, on the tenth (10^{th}) day after service hereof, or as soon as counsel may be heard, for an order granting Summary Judgment in favor of the County with respect to its Thirteenth cause of action for inverse condemnation. This motion is based on the South Carolina Rules of Civil Procedure, such case and statutory authority as is applicable, the pleadings and admissions in this case, supporting memoranda of law filed or to be filed, supporting affidavits filed or to be filed, the arguments of counsel and the following:

1. There is no genuine issue as to any material fact; and

2. The South Carolina Department of Transportation and City engaged in a public works project which effected an unlawful taking under the South Carolina Constitution.

CALLISON TIGHE & ROBINSON, LLC

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Attorneys for the Plaintiff

April 25, 2014

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	Civil Action No.: 2013-CP-22-1062
Georgetown County,	)	
	)	
Plaintiff,	)	
	)	**AFFIDAVIT OF**
vs.	)	**GEORGE A. SEMBOS, P.E.**
	)	
Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown,	)	
	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2014 MAY -2 AM 11:53
ALICIA V. WHITE
CLERK OF COURT

PERSONALLY APPEARED before me, GEORGE A. SEMBOS, P.E., who having been duly sworn, deposes and states as follows:

1. I am a professional engineer licensed in the State of South Carolina.
2. I have been actively engaged in the practice of geotechnical engineering and construction for the past 23 years and have actual professional knowledge and experience in the field of geotechnical engineering.
3. I have inspected and observed the site of the drainage improvement project located adjacent to West Fraser and Front Streets in the City of Georgetown, South Carolina.
4. In observing the conditions at the project site and surrounding areas, I noted extensive damage to parking lots, streets, and structures which, in my opinion, are the result of excessive pumping or removal of groundwater/ soil from the drainage improvement project site and surrounding areas.
5. I have inspected the six properties owned by Georgetown County that are the subject of this litigation located at 333 Cleland Street; 401 Cleland Street; 405 Cleland Street; 325

Dozier Street; 330 Dozier Street; and 716 Prince Street (hereafter referred to as the "Subject Properties").

6. The Georgetown County Judicial Center (401 Cleland Street) and Library (405 Cleland Street) were studied by me at length in relation to the drainage improvement project site and are the subjects of a report generated by GS2 Engineering & Environmental Consultants, Inc. on August 5, 2013.

7. In my professional opinion, the Subject Properties have been damaged as a result of sinkhole collapses, caused by the action of water on limestone or dolomite. The aforesaid action of water was caused by, among other things, the king pile installation associated with the drainage improvement project and subsequent pumping or removal of groundwater/ soil from the drainage improvement project site and surrounding areas.

8. But for the installation of the king piles associated with the drainage project, which breached an impervious layer confining underground water, the action of water on limestone or dolomite would not have occurred. During the installation of the king piles, an annular space was created, causing the deep underground water to fill the wet well.

9. The subsequent groundwater drawdown further caused the action of water on limestone or dolomite which caused sinkhole collapses and consequent subsidence and destabilization of the load bearing soils in portions of downtown Georgetown, including the sites of the Subject Properties. The subsidence and destabilization has resulted in significant damage to the Subject Properties.

10. The groundwater drawdown further caused subsurface water previously located on the Subject Properties to be dewatered.

11. In my opinion the geological/ hydrological conditions of Georgetown have been altered as a result of the drainage improvement project and these geological/ hydrological alterations may affect the subject sites and adjacent properties in an unknown and unpredictable manner in the future.

FURTHER AFFIANT SAYETH NOT.

GEORGE A. SEMBOS, P.E.

SWORN to before me this 25th day of April, 2014.

Notary Public For South Carolina

My Commission Expires: 10. 12. 20

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN Georgetown County, Plaintiff, v. Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown, Defendants.	)	IN THE COURT OF COMMON PLEAS Civil Action No.: 2013-CP-22-01062 **PLAINTIFF GEORGETOWN COUNTY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

FILED
GEORGETOWN COUNTY, S.C.
2014 AUG 25 PM 2:09
ALMA Y. WHITE
CLERK OF COURT

Plaintiff Georgetown County (the "County"), by and through its undersigned attorneys, submits this Memorandum of Law in Support of its Motion for Summary Judgment pursuant to Rule 56, SCRCP. No genuine issue of material fact exists as to Defendants South Carolina Department of Transportation's and the City of Georgetown's inverse condemnation of Plaintiff's properties, and Plaintiff is entitled to judgment as a matter of law.

PROCEDURAL HISTORY

This case was commenced by the filing of the Summons and Complaint on October 25, 2013. The South Carolina Department of Transportation (the "SCDOT") filed its Answer on November 22, 2013. The City of Georgetown (the "City") filed its Answer on January 22, 2014. An Amended Complaint was filed July 10, 2014.

FACTUAL BACKGROUND

This inverse condemnation action arises out of a public utility project undertaken by the joint efforts of the City and the SCDOT that was intended to resolve storm drainage and flooding problems in Georgetown, and the damages resulting from the project. The SCDOT and City

began work on the drainage project in Georgetown (the "Drainage Project") in 2009. (Compl. ¶ 12; *See* SCDOT's Answer ¶ 13; *See also* City's Answer ¶ 10). The purpose of the Drainage Project was to relieve or reduce the impacts of historical surface water flooding in the area surrounding City Hall, including but not limited to US 17 and US 521. **Exhibit A**, at 8. The Drainage Project consisted of the planning and construction of a water storage facility and wet well, redirection of stored water through a gravity piping system, and forced drainage of water from the wet well into the Sampit River. *Id.* As part of the Drainage Project, the water storage area underwent a significant pumping of water so that new drainage structures could be fabricated below grade. (Compl. ¶ 17). During construction, king piles (hollow steel piles) were installed by pre-drilling holes and driving the king piles deep into the surface of the ground to provide lateral support for the walls of the water storage facility. (Affidavit of George A. Sembos, P.E. ¶ 8); **Exhibit A**, at 22. During the installation of the king piles a ring-shaped space was created around the outside of the pile. (Affidavit of George A. Sembos, P.E. ¶ 8); **Exhibit A**, at 20. These piles breached a confining layer which confined certain underground water existing in Georgetown County, causing water to rise from beneath the confining layer and fill the water storage area. *Id.* During the construction of the Drainage Project, multiple land-surface collapses occurred and sinkholes and depressions formed. **Exhibit A**, at 20.

Subsequent to the occurrence of sinkhole depressions, the SCDOT contracted with F&ME Consultants to investigate and identify the cause and origin of the sinkholes and depressions. True and accurate portions of the report of F&ME are attached hereto as **Exhibit A**. According to SCDOT's own expert, at least seven sinkhole/depressions were caused by the construction activities related to the Drainage Project which impacted a lower, confined aquifer system which underlies the area in question. **Exhibit A** at 22.

Georgetown County's ("Plaintiff") buildings located at 333 Cleland Street; 401 Cleland Street; 405 Cleland Street; 325 Dozier Street; 330 Dozier Street; and 1230 Highmarket Street (hereinafter "Subject Buildings") were damaged as a result of sinkhole collapses. (Compl. ¶ ¶ 9, 11) (Affidavit of George A. Sembos, P.E. ¶ 9) (Supplemental Affidavit of George A. Sembos, P.E. ¶ 5-9). These sinkhole collapses were directly and proximately caused by the Drainage Project. (Affidavit of George A. Sembos, P.E. ¶ ¶ 7-11).

As a result of the construction of the Drainage Project and associated dewatering, Defendants have caused the subsidence of land underneath Plaintiff's buildings, thereby causing damage. (Affidavit of George A. Sembos, P.E. ¶ ¶ 7, 9). The installation of king piles for the wet well associated with the Drainage Project and the subsequent excavation of water directly and proximately caused damage to the Plaintiff's Buildings. (Affidavit of George A. Sembos, P.E. ¶ 7-11); *see also* **Exhibit A** at 22.

It is undisputed that the sinkholes and depressions occurring in October and November 2011 throughout Georgetown were caused by the Drainage Project. **Exhibit A** at 22; (Affidavit of George A. Sembos, P.E. ¶ 9). The SCDOT and City cannot present a scintilla of evidence upon which a reasonable interpretation can rely that the damages sustained to the Subject Buildings were caused by something other than the Drainage Project.

STANDARD OF REVIEW

Plaintiff respectfully submits that it is entitled to summary judgment because no genuine issue of material fact exists. Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Manji v. Blackwell*, 323 S.C. 91, 92, 473 S.E.2d 837, 837 (Ct. App. 1996). In ruling on a motion for summary judgment, the evidence and inferences which can be drawn therefrom

should be viewed in the light most favorable to the nonmoving party. *Id.* When plain, palpable and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *USAA Property and Cas. Ins. Co v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (Ct. App. 2008).

Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing there is a genuine issue for trial. *Singleton v. Sherer*, 377 S.C. 185, 699 S.E.2d 196 (Ct. App. 2008). When a motion for summary judgment is made and supported by an affidavit, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise, must set forth specific facts to show that there is a genuine issue for trial. Rule 56 (e), SCRCP. "A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." *Shupe v. Settle*, 315 S.C. 510, 516, 445 S.E.2d 651, 655 (Ct. App. 1994). "Supporting and opposing affidavit shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56 (e), SCRCP.

In cases applying the preponderance of the evidence burden of proof, the non-moving party is required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014). However, when the evidence is susceptible of only one *reasonable* interpretation, summary judgment may be granted. *Id.* (emphasis added).

ARGUMENT

The South Carolina Constitution provides that private property shall not be taken for public use without payment of "just compensation." S.C. Const. art. I, § 13. Inverse condemnation is a cause of action to recover the value of property that has been effectively taken by a governmental entity, although not through the process of eminent domain. *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011). Inverse condemnation is not based in tort, but in the constitutional prohibition of taking of property without compensation. *Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 498, 544 S.E.2d 637, 640 (Ct. App. 2001). There are two forms of inverse condemnation: (1) the physical appropriation of property; and (2) regulatory inverse condemnation whereby the government imposes limitations on the use of private property. *Carolina Chloride Inc. v. Richland County*, 394 S.C. at 170, 714 S.E.2d at 877. This case is one of physical appropriation.

The elements of an inverse condemnation action based on physical appropriation of property are[1]: (1) affirmative conduct of a governmental entity, (2) the conduct effects a taking, and (3) the taking is for a public use. *Carolina Chloride, Inc. v. South Carolina Dept. of Transp.*, 391 S.C 429, 435, 706 S.E.2d 501 (2011). "A plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking." *Id.* (citations omitted).

In an inverse condemnation case, it is the trial judge who determines whether a claim has been established; however, the issue of compensation may be submitted to a jury upon request of either party. *Carolina Chloride, Inc. v. Richland County*, 594 S.C. at 170, 714 S.E.2d at 877.

[1] Formerly, "some degree of permanence" was a required element; however this element has been removed. *E.g. Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005); *Frampton v. South Carolina Dept. of Transp.*, 406 S.C. 377, 387, 752 S.E.2d 269, 275 (Ct. App. 2013).

SCDOT's and the City's actions effected a taking without just compensation in violation of the South Carolina Constitution. Plaintiff's buildings were damaged as a direct and proximate result of SCDOT's and the City's undertaking a public works project. Plaintiff's damages were precisely the type of damages which Article I, § 13(A) of the South Carolina Constitution was meant to protect.

I. Defendants SCDOT and City have engaged in an aggressive, affirmative, positive act.

To prevail on an action for inverse condemnation, the plaintiff must prove "an affirmative, aggressive and positive act" by a governmental entity that caused property damage. *WRB Ltd. Partnership v. County of Lexington*, 369 S.C. 30, 32, 630 S.E.3d 479, 481 (2006). "Allegations of mere failure to act are insufficient." *Hawkins v. City of Greenville*, 358 S.C. 280, 291, 594 S.E.2d 557, 563 (Ct. App. 2004). In *WRB Ltd.*, the Court relied upon its decisions in *Kline v. City of Columbia*, 249 S.C. 532, 155, S.E.2d 597 (1967), and *Berry's On Main v. City of Columbia*, 277 S.C. 14, 281 S.E.2d 796 (1981), and found that the capping of a landfill was a sufficiently aggressive, affirmative, positive act to meet the requirement for inverse condemnation. *WRB Ltd.* at 33, 630 S.E.2d at 481.

In *Kline*, the defendant, City of Columbia, was involved in the "affirmative, aggressive and positive act of improving and widening a public street for public use." 249 S.C. at 536, 155 S.E.2d at 599. A gas line ruptured causing an explosion and fire on nearby property. *Id.* at 535, 155 S.E.2d at 598. The Court held the widening of the public street was an affirmative, aggressive and positive act and that the resulting damages constituted a taking under which the plaintiffs could recover in inverse condemnation. *Id.* at 599-600, 155 S.E.2d at 599-600.

In *Berry's On Main*, the defendant, City of Columbia, was involved in excavation of a public street. 277 S.C. at 15, 281 S.E.2d at 797. Heavy rain and storm water flooded the

excavations, which caused damages to the premises and the plaintiff's personal property. *Id.* The Court held this was a sufficient affirmative, positive, aggressive act to constitute an inverse condemnation. *Id.* at 16, 281 S.E.2d at 797.

In a case substantially similar to the facts of the present case, *South Carolina Dept. of Highways and Public Transp. v. Balcome,* the SCDOT was involved in construction of a freeway. 289 S.C. 243, 245, 345 S.E.2d 762, 763 (1986). During construction, the SCDOT dewatered the construction site after encountering water at a depth of 20 to 25 feet. *Id.* This dewatering, or pumping of water away from the construction site, caused the water level in a nearby pond to drop. *Id.* The Court affirmed the jury's verdict based on the inverse condemnation cause of action. *Id.* at 246, 345 S.E.2d at 764.

In *Hawkins,* the plaintiff asserted that the "City improperly allowed development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the Laurel Creek drainage pipes beyond their capacity and then failed to replace these pipes." *Hawkins,* 538 S.C. at 291, 594 S.E.2d at 562-563. The Court held that based on the evidence presented, a failure to act could not support the claim of inverse condemnation. *Id.*

Here, the construction of the Drainage Project, installation of the king piles, and subsequent dewatering were affirmative, aggressive, positive acts, which culminated in the sinkhole collapses and damage to the Plaintiff's buildings. The SCDOT and City affirmatively undertook the construction and operation of the Drainage Project. Unlike in *Hawkins,* where the plaintiff alleged that the defendant failed to perform an act, here, the SCDOT and City were actively, aggressively, and affirmatively involved in a public project to relieve flooding problems and thereby caused the subsidence of land and damages to Plaintiff's properties. **Exhibit A** at 19-20; Affidavit of George A. Sembos, P.E. ¶ 7. Further, just as in *Balcome,* the City and

SCDOT were engaged in a public use project which caused water situated upon the plaintiff's land to be dewatered. (Affidavit of George A. Sembos, P.E. ¶ 10). This act of dewatering is an affirmative, aggressive, positive act just as in *Balcome*, supra.

II. Defendants SCDOT and City have unconstitutionally taken Plaintiff's Property.

Our Supreme Court has adopted and adhered to the broadest possible view of what is a taking and has construed the least actual damage to be a taking. *Kline*, 249 S.C. at 537, 155 S.E.2d at 599. "Determining whether government action effects a taking requires a court to examine the character of the government's action and the extent to which this action interferes with the owner's rights in the property as a whole." *Hardin v. South Carolina Dept. of Transp*, 371 S.C. 598, 605, 641 S.E.2d 437, 441 (2007). "Following *Hardin*, a proper analysis of an inverse condemnation claim premised on an alleged physical taking must begin with a determination of the scope of the property rights at issue." *Hilton Head Automotive, LLC v. South Carolina Dept. of Transp.*, 394 S.C. 27, 30, 714 S.E.2d 308, 310 (2011).

Property in a thing includes not only its ownership or possession, but the unrestricted use, enjoyment and disposal. *Balcome*, 289 S.C. at 246, 345 S.E.2d at 764. The South Carolina Constitution requires compensation in all cases in which *any* of the essential elements of ownership are destroyed or impaired as the result of governmental action. *Id.* (emphasis added). "The constitutional prohibition against taking private property for public use without just compensation must have been intended to protect all essential elements of ownership which make property valuable, including, of course, the right of the user and the right of enjoyment." *Moss v. South Carolina State Highway Dept.*, 223 S.C. 282, 287, 75 S.E.2d 462, 464 (1953) (internal citations omitted). Anything which destroys one or more of the rights to use, enjoyment or disposal of the property destroys the property itself. *Id.* South Carolina case law provides that

a taking within the constitutional sense includes the word damaged. *Id.; Hawkins,* 358 S.C. at 290, 594 S.E.2d at 562 ("The term 'inverse condemnation' describes an action grounded, not on statutory condemnation power, but on the constitutional proscription against the taking *or damaging* of property for public use without just compensation") (emphasis added).

In *Balcome,* the Department of Highways and Public Transportation was undertaking the construction of a freeway and excavated to a depth of 20 to 25 feet and encountered groundwater. *Balcome,* at 245, 345 S.E.2d at 763. The water encountered was dewatered away into a nearby drainage ditch which caused the water level in a pond on Balcome's adjacent property to drop. *Id.* at 245, 345 S.E.2d at 764. In holding that the evidence supported a taking verdict, the court stated:

> There may be a taking of property in the constitutional sense ***although there has been no actual entry within its bounds and no artificial structure has been erected upon it.*** When a public agency uses land which it has lawfully acquired for public purposes in such a way that neighboring real estate is destroyed ***or impaired in its usefulness,*** there is a taking within the meaning of the constitution.

Id. at 246, 345 S.E.2d at 764 (emphasis added)(internal citations omitted). The Court further held that the evidence presented could justify a jury's conclusion that the taking was for a public purpose. *Id.*

Here, the SCDOT and City's public project has resulted in damage to Plaintiff's buildings. As in *Balcome,* the SCDOT and City have engaged in a public project, excavated land and dewatered at the construction site thereby causing sinkhole collapses which damaged Plaintiff's buildings. **Exhibit A,** at 2 and 22; *see also* (Affidavit of George A. Sembos, P.E. ¶ 10).

By impairing the Subject Buildings' usefulness, the SCDOT and City's actions amount to a taking under the South Carolina Constitution.

III. The Drainage Project is for public use and serves a public purpose.

Where the construction, operation and maintenance of a project is for public use, the damages resulting therefrom are for a public use. *See Lindsey v. City of Greenville*, 247 S.C. 232, 239, 146 S.E.2d 863, 867 (1966). In *Lindsey*, the City of Greenville constructed, as part of its water system, a dam which made the discharge of water from a lake through a 72 inch pipe laid through the bottom of the dam and over an off-set spillway. *Id.* at 235, 146 S.E.2d at 865. The plaintiff's crops on his land lying beneath the dam were damaged by the discharge of water through the dam. *Id.* at 237, 146 S.E.2d at 866. The court stated that the discharge of excess water was "an integral and necessary part of the defendant's operation and required for the protection of the project." *Id.* at 238, 146 S.E.2d at 866. The Court held that the discharge of water causing damage to the plaintiff's land resulted from the operation of the dam and was therefore a taking for public use. *Id.* at 239, 146 S.E.2d at 867.

The purpose of the Drainage Project was to fix certain flooding which occurred in downtown Georgetown. **Exhibit A** at 8. As such, the Drainage Project was for a public use. Because the Subject Buildings were damaged as a result of the construction of the Drainage Project, the taking of the Subject Buildings was for a public use. *Lindsey*, 247 S.C. at 239, 146 S.E.2d at 867.

CONCLUSION

Based on the undisputed facts of the case, the SCDOT and City undertook a public utility project that has resulted in an unconstitutional taking of Plaintiff's property. Plaintiff respectfully requests that this Court grant summary judgment in its favor regarding Plaintiff's thirteenth cause of action for inverse condemnation as it respects a determination of a taking. Plaintiff requests a jury trial on the amount of compensation to which it is due.

Respectfully submitted,

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August 5, 2014

Columbia, South Carolina

F&ME
CONSULTANTS

December 12, 2012

Ms. Lisa A. Reynolds, Esq.
Anderson, Reynolds & Stephens, LLC
37 ½ Broad Street
Charleston, South Carolina 29401

Re.: US 17/City Hall Drainage Improvements
Georgetown, South Carolina
Sinkhole Investigation Report of Findings
SCDOT File No: 22.2001.2
F&ME Project No: G5144.00

Dear Ms. Reynolds:

Enclosed is our report of findings for the sinkhole investigation in Georgetown, South Carolina. The investigation was commissioned following the formation of sinkholes in the general work area associated with the US 17/City Hall Drainage Improvements.

If you have any questions concerning our investigation and findings, please do not hesitate to contact us.

This report has been prepared by F&ME Consultants for use by the South Carolina Insurance Reserve Fund. The following F&ME professionals assisted in the performance of fieldwork and the preparation of this report.

Signatures:

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Senior Project Engineer/Author

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SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER No. 20955 MICHAEL S. MILLER

SOUTH CAROLINA FOUNDATION & MATERIALS ENGINEERING, INC. No. C00375 CERTIFICATE OF AUTHORIZATION

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER No. 21272 ADAM JOHNSON SHANNON

12-20-12

EXECUTIVE SUMMARY

The objective of this investigation was to identify the cause and origin of the sinkholes and/or depressions that formed in the City of Georgetown, South Carolina in the general area bounded by Front Street to the South, Dozier Street to the East, Highmarket Street to the North, and Hazard Street to the West. The time period that the sinkholes and/or depressions formed was between July and November of 2011. A specific focus of this investigation was to determine if activities associated with the City Hall Drainage Improvement Project (City Hall DIP) contributed to the sinkhole and/or depression formations.

The following is a summary of our findings relating to the cause and origin of the sinkholes and/or depressions:

1. A "karst" condition exists within the area covered by this investigation. A karst condition, as it is utilized in this report to describe the conditions in Georgetown, is defined as a landscape that exists over fossiliferous marine limestone that contains solution cavities and is subject to sinkholes or depressions.

2. The subsurface stratigraphy of the study area can be characterized as depicted in Sketch 1.

3. The groundwater hydrology within the study area can be characterized as depicted in Sketch 2.

4. The formation of sinkholes and/or depressions that occurred between July and November of 2011 were caused by construction activities associated with the City Hall DIP.

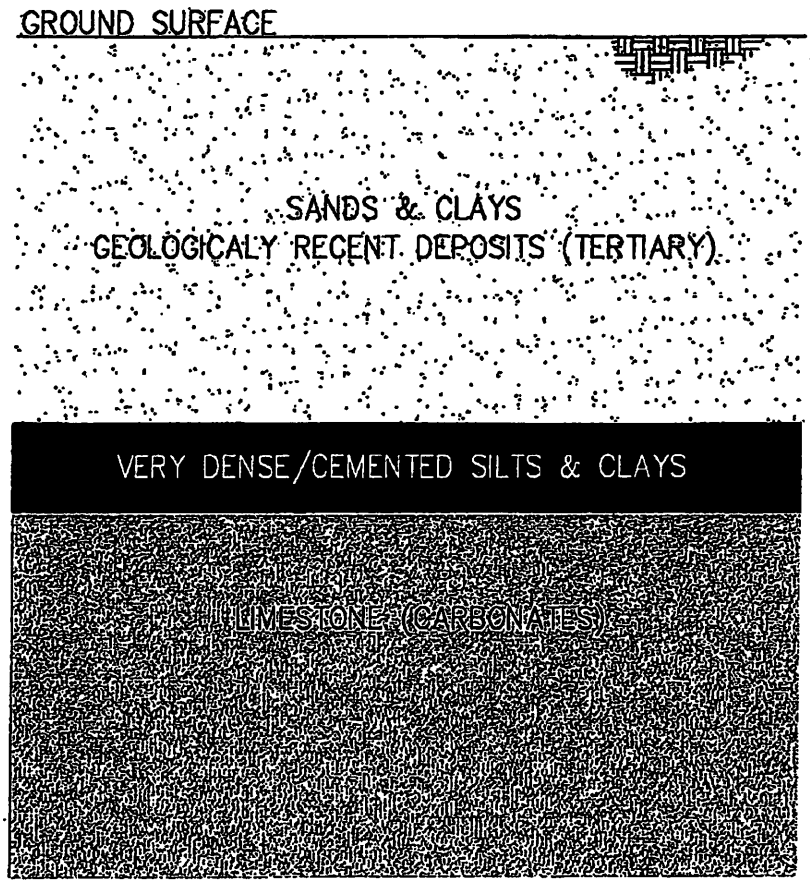
5. The specific construction activities that caused the sinkholes and/or depressions are as follows.

   A. Primary Cause
   Installation of king piles for the City Hall Storage Facility located on Front and Dozier Streets. The king pile installation penetrated the aquitard (depicted in Sketch 2), thereby providing a conduit for flow of groundwater upward from the lower confined aquifer.

   B. Accelerating Factor
   Pumping activities for the de-watering of work areas associated with the wet well construction. These activities resulted in a substantial volume of water flow from the lower confined aquifer. This flow rapidly reduced the upward hydraulic pressure within solution cavities in the lower confined aquifer. The reduced upward pressure resulted in an increase in stress in the aquitard and localized collapses of the aquitard into the solution cavities. The collapse or breach of the aquitard allowed the sandy soil deposits above the aquitard to flow down into the exposed cavities resulting in the observed sinkholes and/or depressions (see Sketches, 2, 3, and 4).

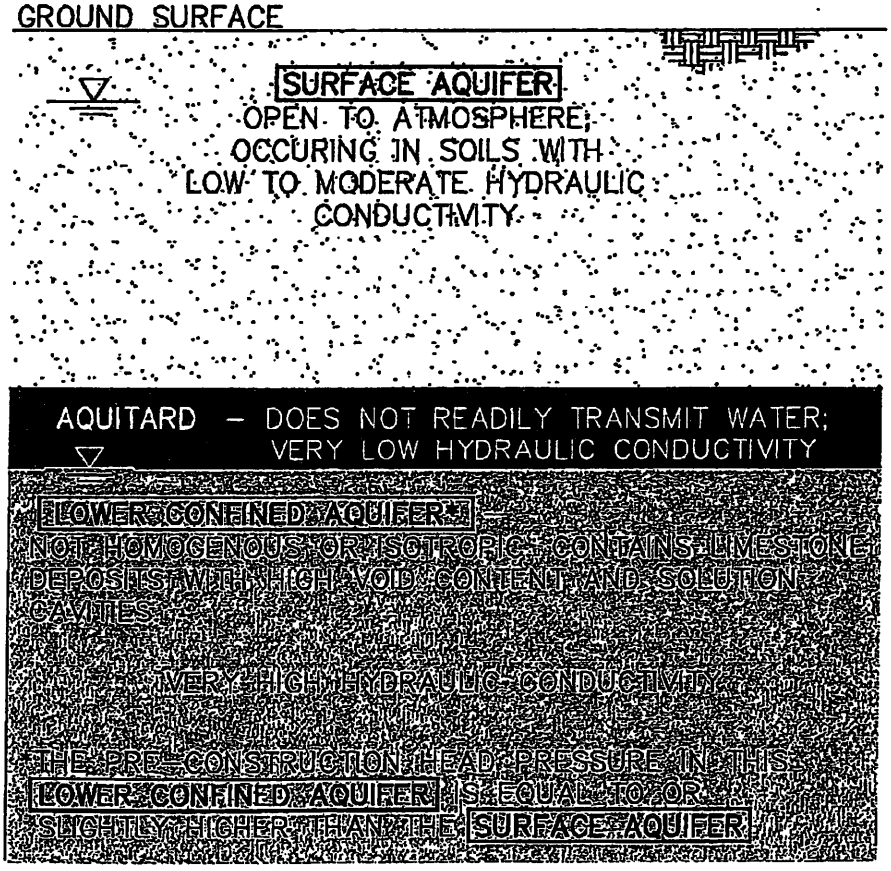
SKETCH 1

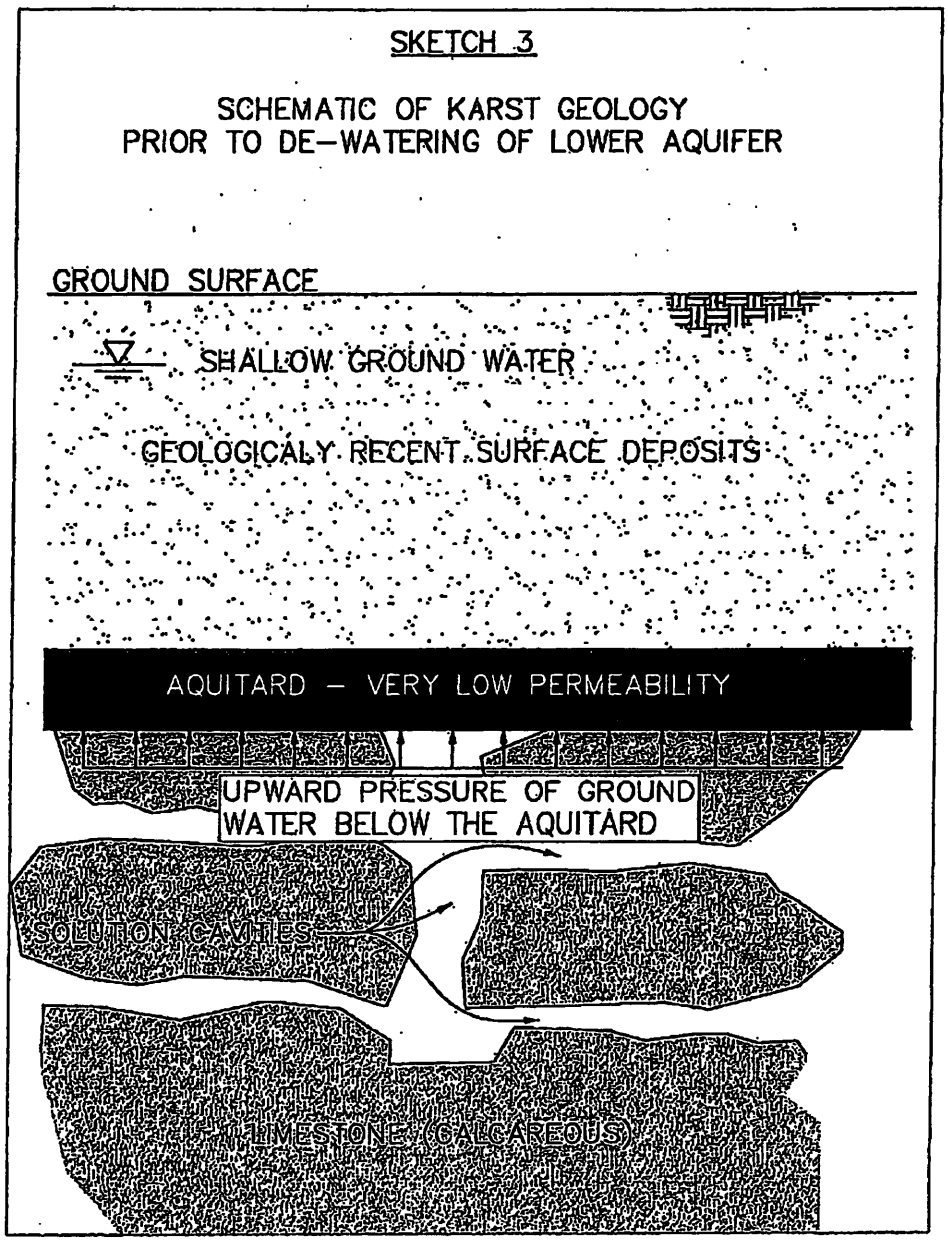
CHARACTERIZED SUBSURFACE STRATIGRAPHY



SKETCH 2

CHARACTERIZED GROUNDWATER HYDROLOGY




SKETCH 3
SCHEMATIC OF KARST GEOLOGY
PRIOR TO DE-WATERING OF LOWER AQUIFER
GROUND SURFACE
SHALLOW GROUND WATER
GEOLOGICALY RECENT SURFACE DEPOSITS
AQUITARD – VERY LOW PERMEABILITY
UPWARD PRESSURE OF GROUND WATER BELOW THE AQUITARD
SOLUTION CAVITIES
LIMESTONE (CALCAREOUS)

SKETCH 4

SCHEMATIC OF SINKHOLE FORMATION
FOLLOWING DE–WATERING OF LOWER AQUIFER

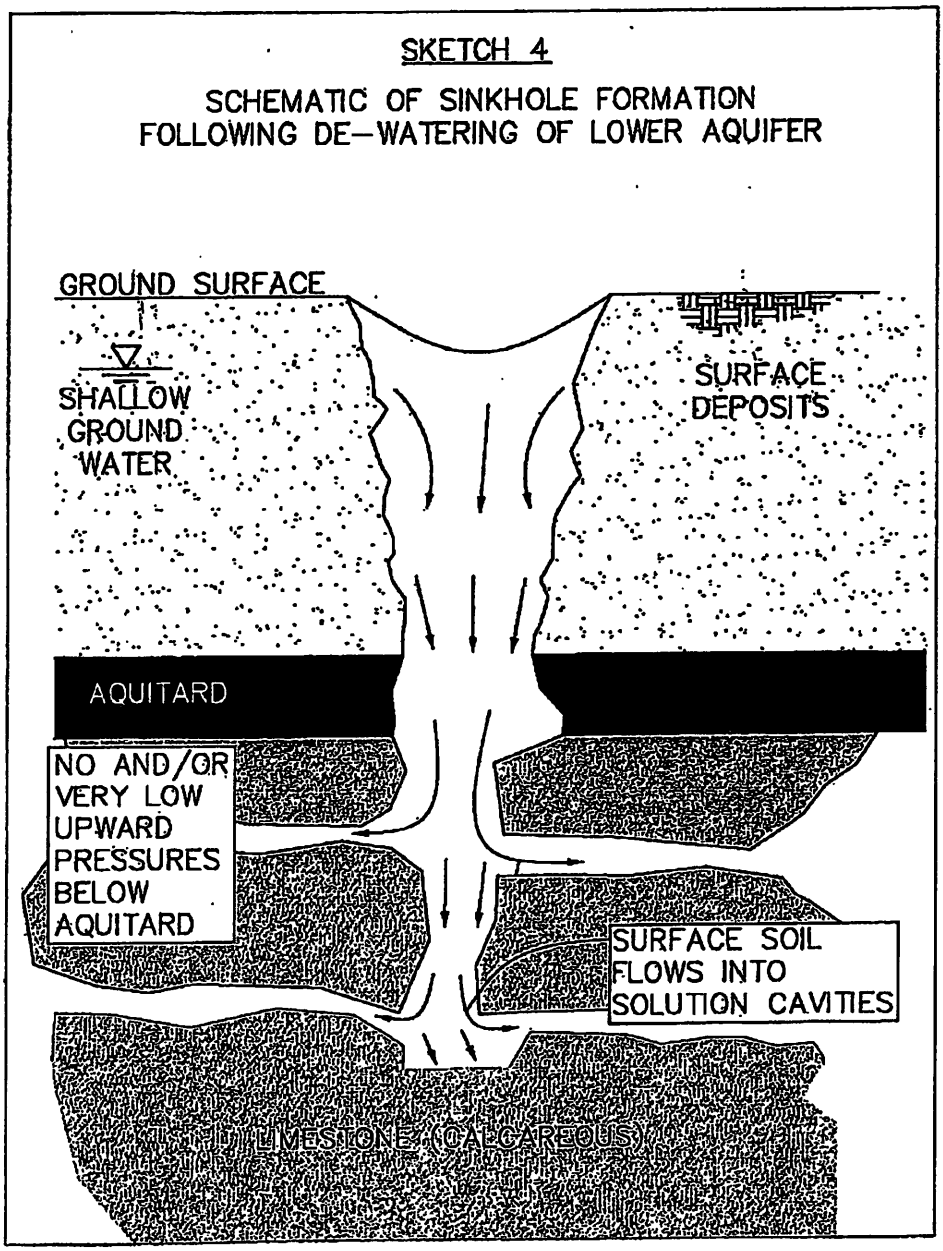


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1.0 INTRODUCTION

The purpose of the planning and construction of the City Hall Drainage Improvement Project (City Hall DIP) in the City of Georgetown, South Carolina was to relieve or reduce the impacts of historical surface water flooding in the area surrounding City Hall when subjected to relatively heavy or prolonged precipitation events.

The City Hall DIP consists of construction of a water storage facility and associated wet well, redirection and tie-in of existing surface water to gravity drainage piping into the new water storage facility, and installation of forced (pressurized) drainage piping for pumped discharge from the wet well into the Sampit River. During construction of this project, land-surface collapses and the formation of subsidence sinkholes and depressions occurred.

On the night of November 17, 2011 the formation of a sinkhole resulted in the partial collapse of the building at Parrish Place and the closure of two northbound lanes on Fraser Street, which were closest to the partially collapsed structure. F&ME was contacted on November 18, 2011 by the South Carolina Department of Transportation (SCDOT) concerning the manifestation of sinkholes like ground surface features or ruptures in Georgetown, South Carolina. On November 19, 2011, Zane Abernethy and Adam Shannon of F&ME traveled to Georgetown for the purpose of performing visual inspections of the impacted areas and making preliminary assessments of potential causes.

At the time of this initial on-site inspection, SCDOT personnel directed attention to the Parrish Place building collapse and six (6) possible sinkholes and depressions. The overall surface and subsurface stability of the area and safety of the public were of major concern. F&ME began a fast-track assessment of observed conditions in the areas where sinkholes and/or depressions were noted, subsurface conditions in the locations of sinkholes and/or depressions, and in the general area of the City Hall DIP and construction records relative to the City Hall DIP. F&ME's charge from the SCDOT was to serve as an independent third party reviewer of the cause or causes of the sinkholes and depressions that had formed and determine if the City Hall DIP construction was contributing to the formation of the observed sinkholes and depressions.

Based on review of project documents, project images, and discussions with SCDOT personnel, there were at least six (6) confirmed depressions and/or land-surface collapses (sinkholes) since the City Hall DIP project started. The first depression was reported on July 14, 2011 on Hazard Street, south of the intersection of Hazard and Highmarket Streets. At the time of the formation of this surface depression, it was initially believed by the SCDOT to have been caused by leaking underground utility piping. This depression was repaired by filling with sand/aggregate and asphalt surfacing. The Hazard Street depression re-occurred with subsidence on July 29, 2011. During this occurrence, SCDOT construction inspectors reviewed plans and utility information and

determined that no utilities were present in the bottom of the hole. Once again, the hole was repaired by filling with sand/aggregate and asphalt surfacing.

The second documented depression was in the Parrish Place parking lot on October 30, 2011. The third sinkhole was documented along Highmarket Street the week of November 14, 2011.

The sinkhole connected with the Parrish Place building collapse, the sinkhole that occurred in the parking/drive area at the new fire station on Prince Street, and the depression behind the Bank of America facility all occurred within the same time period between the November 17, 2011 and November 18, 2011.

All the construction activities associated with the City Hall Storage Facility perimeter retaining system were installed prior to F&ME's involvement in the project. This included the king pile, sheet pile, and soil anchor tie back systems. Information pertaining to activities that occurred prior to November 18, 2011 was gathered through document review and multiple discussions with SCDOT, Republic Contracting Corporation, Davis & Floyd, and S&ME.

Shortly following the commencement of our initial assessment and field investigation, F&ME's contract was shifted to the South Carolina Insurance Reserve Fund (SCIRF). F&ME's charge was to determine cause and origin of the land-surface collapse and formation of subsidence depression and sinkhole features that had manifested during the time period of July 14, 2011 to November 18, 2011.

Other conditions or ground subsidence and/or depressions may have occurred. The compilation and verification of such conditions is beyond the scope of this investigation.

2.0 F&ME FIELD INVESTIGATION

Following contact from the SCDOT and F&ME's initial site visit and assessment of geotechnical conditions on November 19, 2011 a fast-track field investigation was undertaken. The following is a synopsis of our field investigation. More detailed discussions of our investigation methodologies and results are contained in the Appendix of this report.

2.1 Geophysical Investigation

For the geophysical field investigation, F&ME selected three techniques as our primary investigative methods. These were electrical resistivity (ER) imaging (two-dimensional and three-dimensional), ground penetrating radar (GPR), and seismic refraction. The main objective of our geophysical investigation was to provide a continuous indication of subsurface conditions beyond that which can be inferred from the relatively widely spaced roto-sonic corings.

GPR was used to search for potential voids below Fraser Street in the area where the partial structural collapse had occurred at Parrish Place. It was also utilized to search for possible underground utility piping that may have contributed to the formation of sinkholes and depressions.

ER surveys are a common tool utilized for locating limestone cavities. The process is most effective at locating large voids or cavities. In general, voids or cavities larger than the electrode node spacing are most easily detected.

Seismic refraction was chosen to supplement the ER data. Seismic refraction can detect changes in subsurface stratification and density. Issues with high background noise or vibration from the adjoining steel mill and railroad and highway traffic limited the usefulness of the seismic refraction surveys.

The geophysical investigation was performed in three phases.

1. Phase One was performed on November 18, 2011. The purpose of this operation was to supplement visual observation of the initial site visit with limited GPR scans at two (2) locations. Scans on Fraser Street were performed in the area adjacent to the sinkhole at the partially collapsed structure at Parrish Place. Two (2) scan lines were performed in the northbound lane, one (1) at the curb line and one thirteen (13) feet off the curb toward the centerline. These scans were used to identify possible ground collapses and/or voids under the pavement that could create safety issues for the motoring public. A grid of four (4) foot by four (4) foot squares was scanned in the area of the Parrish Place parking lot where the depression had formed. These scans were performed to locate possible utilities that may have contributed to the depression.

2. Phase Two was performed on November 22, 23, and 30, 2011. Three (3) geophysical techniques were used to include ER, seismic refraction, and GPR. Survey lines were placed in the study area to intersect as many sinkholes and/or depressions as possible while dealing with access and/or traffic.

3. Phase Three was performed on December 6 and 7, 2011 to supplement the previous seismic refraction data. This operation was performed during times when background noise was minimum (early a.m.). A larger energy source was utilized (mini excavator) to perform this survey in an effort to overcome background noise. The survey lines for this phase were at similar locations as used in Phase Two.

More detailed information on our geophysical investigation and data is included in the Appendix.

2.2 State Geologist Data

The South Carolina Department of Natural Resources (SCDNR) Office of Geology was on-site during our initial site visit on November 19, 2011. A number of test borings had been performed under the direction of Will Doar, PG. Mr. Doar shared his data with F&ME and F&ME provided Mr. Doar full access to our field drilling operations, samples collected, and laboratory test data. Logs from the test borings performed by the Office of Geology associated with current ground subsidence and sinkhole formations are included in the Appendix.

2.3 Geotechnical Investigation

F&ME selected roto-sonic drilling methods to sample and investigate subsurface conditions. The main objective of our geotechnical investigation was to provide a continuous indication of the subsurface conditions in proximity to the sinkholes and drainage improvement components.

This drilling process provided the best technique to gain continuous sampling with the large diameter (4 inches) core returns. This drilling procedure is fast and clean and provides the most complete data at the most rapid pace available. Also considering that ground subsidence and sinkholes were occurring, this method of drilling provided the safest means of drilling with casing extending the entire depth of sampling.

The drilling operation started on November 29, 2011 and all borings were completed on December 1, 2011. The following is a list of the drilling locations in the order they were performed and our rational of why each location was selected.

1. The Prince Street boring was drilled on November 29, 2011. This boring was located in the SCDOT right of way and we were allowed to temporarily close this section of road during the drilling operations. The boring was placed in the approximate center of the existing depression.

2. The Parrish Place boring was drilled on November 30, 2011. This boring was located on the property of Mr. Tony Jordan. There were two sinkholes and depressions at this location. Access to the center of these was not available. The boring at this location was placed at a location between the two (2) sinkholes and depressions.

3. The wet well boring (City Hall Storage Facility) was drilled on November 30, 2011. This boring was located on the south side of the City Hall Storage Facility between Front Street and the wet well. This was the nearest location where drilling could be performed adjacent to the king piles of interest.

4. The Hazard Street boring was drilled on December 1, 2011. This boring was located in the SCDOT right of way in the approximate center of the previously repaired sinkhole.

5. The Highmarket Street boring was drilled on December 1, 2011. This boring was located in the SCDOT right of way. Due to conflicts with traffic, this boring was placed beside the reported sinkhole on Highmarket Street in close proximity to the centerline of the roadway.

6. The Dozier Street boring was drilled on December 1, 2011. This boring was located in the SCDOT right of way on Dozier Street between south of the Dozier/Highmarket intersection. There was no sinkhole or depression at or in close proximity of this location.

7. The boring north of the City Hall Storage Facility and City Hall was located between the storage facility perimeter retaining wall system and the lower parking lot south of the City Hall building. This location was selected to provide subsurface data opposite of the boring described in three (3) above at the water storage facility. This boring was also utilized as a monitoring well installed in accordance with South Carolina Department of Health and Environmental Concern (SCDHEC) requirements.

All borings were backfilled with cement/bentonite grout to seal the boring completely. Where borings were performed through existing pavement, the paving surface was repaired after the boring was completed.

Samples of the subsurface stratigraphy were selected for additional testing and analyses as part of our laboratory testing program. In addition, the subsurface stratigraphy, as developed using the vibro-sonic coring, was subsequently used to calibrate the geophysical data allowing additional refinement and interpretation.

Based upon the findings from our field observations, field testing, and laboratory testing, the subsurface stratigraphy and conditions at the site have been characterized into a typical subsurface profile. This profile was presented earlier in this report in Sketch 1, Characterized Subsurface Stratigraphy.

2.4 F&ME Laboratory Testing

A series of laboratory tests were performed on samples of the subsurface strata. These tests were performed to assist in identification/classification of the materials, as well as to assist in establishing physical characteristics.

During ground water sampling, tests to determine pH and the presence of fecal coliform were performed. These tests provided indicators of potential connectivity between the upper surficial aquifer and the lower confined aquifer. The laboratory testing included the following.

1. Grain Size Distribution (ASTM D422)
2. Atterberg Limits (ASTM D4943)
3. In-Situ Natural Moisture Contents (ASTM D2216)
4. Calcium Carbonate Content (ASTM C25-33)
5. Water pH (ASTM D1293)
6. Water Fecal Coliform (SM-922D)

A more detailed discussion of our field and laboratory investigation process and results are included in the Appendix.

3.0 REVIEW OF CONSTRUCTION RECORDS

Due to the activities associated with construction of the City Hall Storage Facility, including the king pile installation and de-watering activities that were completed prior to F&ME's arrival, much of the information needed to determine cause and origin was acquired by review of the project records. The sources of project records were as follows.

3.1 SCDOT Records

SCDOT field staff provided F&ME the construction documentation developed by the onsite construction engineering and inspection (CEI) team of Davis & Floyd and S&ME. They also provided documentation that was developed by SCDOT field staff, including construction documents, design documents, daily work reports, and photos. A list of these items is included in the Appendix.

3.2 Contractor Records

The Contractor provided F&ME information on specific construction activities, design documents, and photos. A list of these items is included in the Appendix.

3.3 Project Timeline

Following the formation of sinkholes and/or depressions within the project area, the SCDOT created and provided a timeline of the project activities related to the City Hall Storage Facility. This timeline specifically detailed the installation of the king pile, wet well excavation, and major de-watering activities. This timeline

provided dates when the first king pile was installed and major construction activities related to the wet well construction, as well as documented dates of the formation of sinkholes and depressions. The timeline is included in the Appendix.

4.0 DETAILS OF SINKHOLES AND/OR DEPRESSIONS

Based upon information collected by the SCDOT, six (6) substantial occurrences of sinkholes or ground subsidence have been documented. As previously stated, other conditions or ground subsidence and/or depressions may have occurred. The compilation and verification of such conditions is beyond the scope of this investigation.

The following are the designations/names provided for the six (6) sinkholes and/or depressions.

1. Hazard Street Sinkhole
2. Parrish Place Parking Lot Depression
3. Highmarket Street Sinkhole
4. Parrish Place Sinkhole at Building Collapse
6. Prince Street Depression
7. Bank of America Depression

A map showing the location of the identified sinkholes and/or depressions and associated photographs are included in the Appendix.

5.0 REVIEW OF HISTORICAL DOCUMENTS

During the course of our investigation of the sinkhole and/or depression occurrence, a number of historical and published documents were reviewed. The following is a list of documents that provided specific information or insight relative to the local geology, subsurface stratigraphy, and ground water, as well as historical occurrence and mechanics of the formation of local sinkholes.

1. A 1798 historical map showing a tidal creek in the area of the City Hall Storage Facility. This map was provided by State Geologist, Will Doar. We understand this is a map that he found at the Georgetown Historical Society.

2. Information from the *Georgetown Times* newspaper on a 1956 sinkhole.

3. Sanborn Fire Insurance Maps

   A. *Georgetown, 1913 August Sheets 1 and 9*

4. SCDNR Reports on Sinkhole Formation in Jamestown

   A. *Land-Surface Collapse and Ground-Water Problems in the Jamestown Area,* Berkeley County, South Carolina, July 1978 by B.C. Spigner.

   B. *Review of Sinkhole – Collapse Problems in a Carbonate Terrane,* July, 1978, by B.C. Spigner.

5. Geologic Reports/Mapping from SCDNR

6. Water Well Data from SCDHEC

6.0 GEOLOGY

6.1 Regional Geology

The Georgetown area is located in the lower Coastal Plain subprovince of the Atlantic Coast Plain physiographic province. The lower Coastal Plain is topographically characterized by low relief, with generally sluggish drainage (very low gradients) of streams, and numerous swamps. Elevations in the study area range from four (4) feet to twelve (12) feet (project datum) and local relief is rarely more than about ten (10) feet.

The area of investigation is geographically located in the City of Georgetown, South Carolina, and geophysically located in South Carolina's Coastal Plain province.

Eustatic sea-level fluctuations caused transgressive-regressive cycles that contributed to the interaction of the marine and fluvial processes.

The Williamsburg Formation, which is within the Black Mingo aquifer system, extends to boring termination. Sediments within this formation are Paleocene Epoch deposits (55.8-65.5 million years ago, MYA). This formation is subdivided into two (2) members, known as the Chicora (upper member) and the Lower Bridge (lower member) Members. The top of the Williamsburg Formation strikes approximately N 88° E and dips approximately forty-seven (47) minutes per mile S 16° E (standard compass headings).

The sediments of the carbonate-rich Chicora Member consist of elastic silts, calcareous clayey sands, quartz sands, some shell hash and phosphate grains, silt sands, and calcareous silty sands with cemented zones (lenses).

Visual observation and laboratory testing of the sediments does not indicate the presence of the Lower Bridge Member of the Williamsburg Formation.

6.2 Local Geology

6.2.1 Shallow (Above Williamsburg Formation)

The near-surface natural sediments, which are a combination of Holocene Epoch to Pleistocene Epoch deposits (recent to 2.6 MYA), occur beneath pavements, fill materials, and disturbed ground and extend in depth to the top of the Williamsburg unconformity contact. The near surface Holocene and Pleistocene age sediments consist of sands, clays, peat, shell hash, silts, and a combination therein. These are typical of undifferentiated deposits in freshwater marshes and swamps, salt marsh deposits, and barrier-island deposits origins. With increasing depths the near-surface undifferentiated deposits transition into the Princess Anne Terrace Pleistocene Epoch deposits. These deposits consist of fine to coarse-grain quartz sand, phosphate nodules, shells, and silty and clayey sands which extend downward to an unconformity. This erosional unconformity, beneath the Princess Anne Terrace, represents a former erosional surface that separates younger strata from older strata and exhibits a well-defined lithologic separation between itself and the underlying Williamsburg Formation.

6.2.2 Limestone/Karst

The carbonates within the Chicora member were deposited in a shallow, warm marine environment, during the Paleocene Epoch. The Chicora member is composed of terrestrial sediments and marine carbonates from mollusks, and colonial animals such as bryozoans and corals. The Paleocene was approximately fifty-six (56) to sixty-six (66) million years ago (MYA). During the Paleocene, the climate here was warmer (tropical-like) and the sea level was higher.

Above the Paleocene Williamsburg Formation were deposited Eocene, Oligocene, Miocene, Pliocene and Pleistocene formations. The formations during these epochs were a combination of terrestrial and marine formations. The Eocene, Oligocene, Miocene, Pliocene and parts of the Pleistocene formations have been eroded away due to erosion associated with the development of the Cape Fear Arch and by numerous sea level rises and falls.

The Chicora member has had fifty-five (55) million years of weathering and exposure to allow solution cavities to develop.

6.2.3 Ground Water

Ground water is always an important component in the formation of sinkholes. Based upon the information observed and documented during construction, the date gathered in our investigation and observations and documentation during remedial grouting of the king piles indicates the ground water regime in the area of the drainage improvement project exists as two (2) separate physical conditions as follows.

1. Shallow Ground Water Aquifer or Water Table. The shallow ground water aquifer exists above the noted aquitard. The shallow ground water is in effect "perched" over the very low hydraulic conductivity aquitard. The upper surface of the shallow ground water is open to atmosphere (no pressure differential).

2. Deeper Confined Aquifer or Water Table. No water freely flows in the aquitard which separates the upper and lower ground water aquifers. This condition in effect places a "cap" over the lower aquifer. As water is being moved or pushed through the confined or capped aquifer. This movement results in an upward pressure on the bottom of the confining layer from the lower aquifer.

A more technical description of the ground water system is included in the Appendix.

7.0 CHARACTERISTICS OF SINKHOLES

Collapse of the land surface is a relatively common occurrence in areas underlain by soluble carbonate rocks. Collapses have sometimes been called "sinkholes" or "sinkhole collapses." The term "sinkhole" is inappropriate for these features because the term "sinkhole," synonymous with "doline" refers to a naturally-occurring depression formed by solution of underlying rocks. "Collapses," as developed in the Georgetown area, are either characterized as a steep-sided, relatively deep, closed, oval-shaped depression or shallow, circular to oval-shaped subsidence depressions of various dimensions, lacking the steep sides common to collapses.

It is possible for sinkhole collapses to occur in carbonate terrains as a result of naturally-occurring processes. Such collapses, however, are generally not numerous and usually occur in areas of naturally-steep groundwater gradients, often near surface streams. The occurrence of numerous, previously unrecorded collapses in a small area is usually due to artificial influences attributed to man and is generally related to dramatic fluctuations of the groundwater table.

Typically, the formation of karst terrains are produce by meteoric water (precipitation) becoming slightly acidic by picking up carbon dioxide as it falls through the atmosphere, creating a weak carbonic acid. Rainwater also picks up additional carbon dioxide once falling on ground surfaces and as it percolates downward through the soil profile. Organic materials, such as the "Williamsburg Clay," which overlies the carbonate stratum, can introduce additional carbon dioxide into the groundwater increasing the acidity and therefore increasing the ability of the groundwater to dissolve carbonate rocks, such as limestone. Limestone, which is composed predominately of calcium carbonate, dissolves in acid and over millions of years this leads to solution cavities developing within the limestone formation. Generally this begins along fractures, joints, bedding planes, and any other permeable zones. Over time, the solution cavities enlarge in such a manner that the weight of the overlying strata cannot be supported and this leads to subsidence expressed at the ground surface or a rapid collapse (sinkhole).

The Santee Formation (Eocene, approximately 34 to 56 MYA) in South Carolina is well known and documented for having solution cavities and sinkholes along the southern shore of Lake Marion and in the Jamestown area. Beginning in the summer of 1976, numerous collapses occurred in the Jamestown area attributed to groundwater withdrawal due to pumping from two (2) limestone quarries in the vicinity. In 1977, the pumping was halted due to continuing collapses that were attributed to the lowered water table. The water table had been lowered by about twenty (20) feet due to pumping ten (10) to fifteen (15) million gallons per day at the two (2) quarries (South Carolina Water Resources Commission, Reports 1 and 2). Additional articles have been published citing groundwater pumping in karst terrains causing subsidence and/or sinkholes.

Although the Georgetown area is not known as being underlain by karst terrain, there has been at least one (1) sinkhole collapse in the last sixty (60) years immediately to the north of the Icehouse (*Georgetown Times*, 1956). We do note that karst conditions and sinkhole formation is well documented in the Jamestown area west of the Santee River. Sinkhole activity east of the Santee River is known to occur but only sporadically. The only historical documentation of sinkhole activity in Georgetown found in our research is the 1956 newspaper reference.

The characteristics of limestones, solution cavities, and resulting sinkholes and depressions in South Carolina are different than that in other parts of the country where more massive limestone formations occur. The shallow limestones in the state tend to occur in relatively thin beds and are generally highly fossiliferous (high in fossilized marine animal skeletal components). The shallow deposits are vuggy (high in void content). The vuggy nature of local limestone can be seen in cut faces of local quarries. The closest commercial limestone mining operation is in Jamestown, approximately twenty (20) miles from the City of Georgetown project.

To provide the reader with a visualization of the characteristics of local (South Carolina) solution cavities in limestone, we have included a photo from the face of an open pit mine in Holly Hill in the Appendix. This is for illustration only to show that typical local solution cavities do not occur as single large caverns but as smaller inter-connected cavities generally within a defined nearly horizontal stratum.

8.0 DRAINAGE IMPROVEMENTS PROJECT CONSTRUCTION COMPONENTS RELATIVE TO SOIL AND GROUNDWATER MODEL

The drainage system to improve flooding conditions along Front Street and US 17 is nearing completion. The major components of this system and their relationship to the characterized subsurface stratigraphy and groundwater hydrology are as follows.

8.1 Improved Storm Water Collectors and Piping

This portion of the drainage improvement system consists of storm water collectors (improved ditches and drop inlets) and piping, to include reinforced concrete pipe and box culverts, which discharge into the wet well collector located on the block with City Hall. These components are being constructed primarily in the SCDOT right of way and along the rail spur serving the steel mill. New collectors and piping are being installed within the area bounded by Hazard Street to the West, Wood Street to the East, Duke Street to the North, and the outfall in the steel mill to the South.

The greatest depth below existing ground surface at which these components are being installed ranges between twelve (12) and fifteen (15) feet. At these depths, all of these components are founded in the geologically recent sand and clay deposits. These components do not contact the very dense/cemented silts and clays, which form the aquitard over the lower confined aquifer. These components only impact the shallow ground water aquifer.

8.2 City Hall Storage Facility and Wet Well System

This portion of the drainage improvement system consists of a collector "pond" located on the block with City Hall, which is a discharge point for the above collector and piping components. The collector "pond" has a perimeter sheet pile retaining wall and has a shallow portion of the pond with a bottom elevation of 96 feet (plan elevations) and a lower wet well (sump) portion with a bottom elevation of 84.66 feet.

The perimeter sheet pile system is constructed with steel sheet piles connected to steel king piles (30-inch outside diameter open end, concrete filled vertical pipe piles) and grouted tie back anchors installed at an angle varying between thirty (30) and forty-five (45) degrees from horizontal. The sheet piles extend approximately 2.66 feet below the bottom of the pond. The king piles extend approximately 14.66 to 22.66 feet below the bottom of pond depending upon exact location. The sump portion of the pond has a reinforced concrete bottom and serves as point of suction for the storm water pumping system.

The shallow portion of the collector pond is located within the geologically recent sand and clay deposits. The wet well or "sump" portion of the pond extends through the geologically recent deposits and its bottom is founded in the very dense/cemented silts and clays which form the aquitard for the lower confined aquifer. The perimeter sheet piles and the wet well bottom slab are founded in the very dense/cemented silts and clays (aquitard). Neither of these components extends into the limestone layer (lower confined aquifer).

The king pile components of the perimeter containment system extend through the geologically recent sands and clays and the very dense/cemented silts and clays and into the limestone strata (lower confined aquifer). A number of the tie back anchors extend through the surface silts and clays, and the very dense/cemented silts and clays into the limestone strata (lower confined aquifer).

The king piles and tie back anchors are the only components of the wet well system which intersect the limestone strata and associated confined aquifer.

Per the construction inspection documents, the inside of the 30 inch diameter steel king piles were cleaned out (to final tip elevation) after the pile was installed. Concrete was placed inside the pile from the tip of pile elevation to the top of pile. The annular space on the outside of the pile created by auguring and setting the piles was not filled.

We understand that the tie back anchors were filled with cement based grout from the tips to their terminus at the sheet piles. We also understand that due to the higher than anticipated volume of grout required to fill the tie backs, a geotextile "sock" was inserted into the drilled tie back anchor hole and then filled with grout. This controlled the outward flow of grout into void and/or very soft soils.

8.3 Water Pumping System Removing Collected Storm Water

This portion of the drainage improvement system consists of two hydraulic pumps connected to two 48-inch diameter pipes running from the wet well portion of the pond. The water pumping system is removing collected storm water from the City Hall Storage Facility, causing pressurized discharge into the Sampit River. These pumps are powered by two 500+ horsepower diesel powered hydraulic units located in a building across Dozier Street from the City Hall Storage Facility. Both 48-inch pipes terminate into an 84-inch diameter force main (pressurized) pipe, which runs under Front Street to the intersection of Front and Wood Street, then along Wood Street to a discharge point into the Sampit River.

The piping components are founded from approximately 5 to 15 feet below existing ground. These components do not contact the very dense/cemented silts and clays which form the aquitard over the lower aquifer. These components only impact the shallow ground water aquifer.

Design drawings depicting these three major components of the drainage improvements are included in the Appendix.

9.0 CONSTRUCTION DEWATERING

9.1 Shallow Construction Elements

The above noted shallow elements of the Drainage Improvement Project (those which did not extend below the aquitard) only impacted the shallow surfacial ground water aquifer. Based upon our discussions with the contractor and construction inspectors, minimal excavation de-watering was required during installation of all of the shallow system components. Most of the excavation de-watering activities associated with these construction elements were accomplished with standard 2 inch centrifugal pumps. No large volume discharges from these activities were documented.

9.2 City Hall Storage Facility Construction

As stated above, the installation of the king pile component of the perimeter retaining wall was the only construction element to penetrate the noted aquitard and extend into the underlying limestone comprising the lower confined aquifer. Two specific ground water conditions of interest were documented relative to the construction of the City Hall Storage Facility.

First, following installation of the king piles and prior to their filling with concrete, water flow from the open top of the piles was noted and documented. This provides specific evidence of a lower confined aquifer. It also indicates that the water pressure in the lower confined aquifer is at or slightly higher than that of the shallow surface groundwater aquifer.

Second, the large volume of ground water entering the excavations for the tie in of the two 48 inch diameter discharge pipes and during excavation for installation of the wet well concrete slab bottom. Each of these activities is noted on the SCDOT project time line. For each of these activities de-watering pumping greatly exceeded that associated with any other construction components. Multiple large pumps were required for the de-watering activities. Substantial quantities of discharged water were documented for each of these construction activities.

Photographic and written documentation of the wet well excavation indicates that the water entering the excavation was from the holes excavated for king pile installation.

10.0 CAUSE OF GEORGETOWN SINKHOLES AND/OR DEPRESSIONS

Based upon the information provided to and gathered by F&ME, the sinkhole/depression formation which has occurred in the vicinity of Front, Hazard, Highmarket, and Dozier Streets in Georgetown, SC beginning with the first documented sinkhole on Hazard Street and including at least six (6) other subsequent sinkholes/depressions was caused by construction activities related to the City of Georgetown Storm Drainage Improvement Project which impacted the lower, confined aquifer system which underlies the area in question.

The specific construction activities include: 1) Primary Cause: the installation of king piles for the wet well located on the block with City Hall; and 2) Accelerating Factor: construction de-watering activities which rapidly removed water from the lower, confined aquifer.

The 30 inch outside diameter (O.D.) king pile installation required the installation of 36 inch O.D. temporary casing and the drilling of 30 inch holes through the aquifer confining layer (aquitard) and into the limestone lower confined aquifer.

The identified de-watering activities which resulted in pumping of large quantities of water which flowed from the lower confined aquifer through the holes drilled in the confining layer (aquitard) for the king piles were: 1) during the excavation for the wall penetration in wet well for the installation of the 52 inch wall sleeve/48 inch steel force main outfall pipe; and 2) during the excavation of the wet well area for the construction of the concrete bottom slab.

The noted pumping activities for the de-watering of work areas associated with the wet well construction resulted in a substantial volume of water flowing from the lower confined aquifer. This flow reduced the upward hydraulic pressure within solution cavities in the lower confined aquifer. The reduced upward pressure resulted in an increase in stress in the aquitard and localized collapses of the aquitard into the solution cavities. The collapse or breach of the aquitard allowed the sandy soil deposits above the aquitard to flow down and into the exposed cavities resulting in the observed sinkholes and depressions. (See Sketches 2, 3, and 4)

We have found no evidence that existing utilities contributed to the formation of the identified surface sinkholes and/or depressions.

We have found no evidence that the shallow construction activities (above the noted aquitard) have contributed to the identified surface sinkholes and/or depressions.

11.0 WET WELL REMEDIATION ACTIVITIES

To prevent the flow of water from the lower confined aquifer into and around the City Hall Storage Facility, the Drainage Improvement Design Team (Davis & Floyd and S&ME) developed an injection grouting program and modification to the wet well slab. The grouting program has been completed as of this date (10/31/12). The modified slab installation is underway. Conditions noted during the remedial activities supported the F&ME findings that:

1. There is a lower confined aquifer.
2. Water levels in this aquifer are sensitive (reactive) to discharges of water from the confined system.
3. The limestone below the aquitard has high void content and interconnected cavities.

11.1 King Pile Grouting

The subcontractor for the king pile grouting program was Uretek. Uretek used and expansive urethane grout which was injected at each king pile Location.

The volume of urethane grout injected into the king pile excavation was substantially greater than the neat line volume of a slightly oversized augured hole. The injected volume of un-expanded grout was approximately 15 cubic yards. This is approximately 1.5 times the volume of a neat line augured hole of 32 inches (30 inch king pile OD). Allowing for expansion of the urethane grout, the volume could increase to approximately 15 to 20 times that of a 32-inch augured hole. It is our opinion that the excess volume of grout has entered the

void space and solution cavities in the limestone below the aquitard. Volume estimate calculations are included in the Appendix.

After completing the primary grout injections to seal the zone around the king piles below the wet well bottom, de-watering of the wet well excavation commenced. During this de-watering a substantial flow of water was noted around king pile No. 3 (see construction drawings in Appendix for location). During this de-watering the ground water level monitoring system installed by S&ME indicated a short term draw down response to the wet well de-watering in their monitoring wells at Parrish Place. De-watering was halted and additional grout was injected around king pile No. 3. After the additional grouting, we understand that de-watering for the installation of the wet well slab was achieved with no measured impact to the lower confined aquifer.

11.2 Wet Well Bottom Slab

Modifications to the wet well slab were made to include the addition a water stop to slab and the addition of a concrete collar and water stop outside the footprint of the original slab. See Concrete Collar Detail shown as in the Appendix.

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
GEORGETOWN COUNTY Plaintiff, vs. Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown Defendants	Civil Action No.: 2013-CP-22-1062 **DEFENDANT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION'S AFFIDAVIT AND DEPOSITION DESIGNATIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

TO: GEORGETOWN COUNTY, PLAINTIFF AND THEIR ATTORNEYS JAMES S. MEGGS, GEORGE A. TAYLOR, ESQUIRE AND WESLEY P. BRYANT, ESQUIRE:

COMES NOW THE DEFENDANT, South Carolina Department of Transportation ("SCDOT), by and through its undersigned attorney, in partial response to the Plaintiff's Motion for Summary Judgment in the above captioned action. SCDOT opposes the Plaintiff's request for summary judgment on the Plaintiff's thirteenth cause of action for inverse condemnation as there exists genuine issues of material fact and summary judgment is not appropriate in this matter. Defendant, SCDOT, hereby submits the following in support of their opposition to Plaintiff's Motion for Summary Judgment:

FILED
GEORGETOWN COUNTY, S.C.
2014 AUG -7 AM 11:33
ALMA Y. WHITE
CLERK OF COURT

1. Affidavit of Zane W. Abernathy, PE; and
2. Deposition designations from the deposition of Andrew Tolleson, PE:

   Pages 57-58; lines 18 -3,
   Pages 151 – 155, lines 6-21.

Additionally, this opposition will be supported by Memorandums, pleadings, depositions, argument of counsel, the common and statutory law of the State of South Carolina and any other material the Court may receive.

Respectfully submitted by:

Lisa A. Reynolds

JJ Anderson, Esquire
Lisa A. Reynolds, Esquire
Anderson Reynolds & Stephens, LLC
P.O. Box 87
Charleston, South Carolina 29402
Attorney for Defendant SCDOT

August 5, 2014

Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN GEORGETOWN COUNTY Plaintiff, vs. Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown Defendants	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT Civil Action No.: 2013-CP-22-1062 **DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

TO: GEORGETOWN COUNTY, PLAINTIFF AND THEIR ATTORNEYS JAMES S. MEGGS, GEORGE A. TAYLOR, ESQUIRE AND WESLEY P. BRYANT, ESQUIRE:

COMES NOW THE DEFENDANT, South Carolina Department of Transportation ("SCDOT), by and through its undersigned attorney, in opposition to the Plaintiff's Motion for Summary Judgment in the above captioned action. SCDOT opposes the Plaintiff's request for summary judgment on the Plaintiff's thirteenth cause of action for inverse condemnation as 1) Plaintiff is not entitled to the relief requested as it is a governmental/political subdivision of the State of South Carolina and has not alleged the taking of private property; 2) discovery is not complete; and 3) there exists genuine issues of material fact and therefore summary judgment is not appropriate in this matter.

FACTUAL BACKGROUND

This case arises out of the Plaintiff's claims that several of Georgetown County's buildings were damaged as a result of sinkholes and depressions that allegedly resulted from the construction of the Georgetown Drainage Project on or about November, 2011.

ARGUMENT

Plaintiff is not entitle to relief under an action for inverse condemnation or as may otherwise be stated for a failure to state a cause of action SCRCP 12(b)(6).

Georgetown County as a "body politic"of the State of South Carolina" has filed suit against the City of Georgetown and the SCDOT alleging, among other actions, an action for inverse condemnation. The motion before the Court is for an order granting summary judgment on the action for inverse condemnation. "The term 'inverse condemnation' describes an action grounded, not on statutory condemnation power, but on the constitutional proscription against the taking or damaging of property for public use without just compensation." *Vick v. South Carolina Dep't of Transp.*, 347 S.C. 470, 480, 556 S.E.2d 693, 698 (Ct.App.2001). An inverse condemnation occurs when a government agency commits a taking of private property without exercising its formal powers of eminent domain. 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). 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. In this matter the governmental agencies have not and are not alleged to have taken private property. The property alleged to have been damaged in this lawsuit is not private property but rather public property.

It has been decided that the power of eminent domain can be used to obtain property that is already been dedicated to a public use. However, this case does not involve the exercise of eminent domain. The Plaintiff has alleged an inverse condemnation and as stated above, and in Plaintiff's memorandum, inverse condemnation is based on the constitutional prohibition and not a tort or statutory condemnation powers. *Vick v. South Carolina Dep't of Transp.*, 347 S.C. 470, 480, 556 S.E.2d 693, 698 (Ct.App.2001); *Horry County v. Insurance Reserve Fund,* 344 S.C. 493, 544 S.E.2d 637 (Ct.App. 2001The purpose of the Constitutional prohibition in article I, § 13 is to protect the private property of citizens from governmental action. As such, there has been no taking of private property as is prohibited by S.C. Constitution, Plaintiff's Motion for Summary Judgment as to this cause of action should be dismissed and the claim for inverse condemnation should be dismissed from this lawsuit (SCRCP 12(b)(6)).

PREMATURE

Discovery is not complete in this case and therefore summary judgment is inappropriate at this time. This case is 1 of 11 lawsuits that were filed alleging damages as a result of the construction of the Georgetown Drainage Improvement Project. The parties in this case have all agreed that discovery is not complete and that this case will require more time to prepare than the thirteenth months (13) allotted by the South Carolina Rules of Civil Procedure and Plaintiff's counsel prepare a Consent Scheduling Order requesting a discovery deadline of January, 2015. *See Exhibit A.* As discovery is not complete in this matter, this motion is premature and summary judgment is not appropriate at this time.

GENUINE ISSUES OF MATERIAL FACT

Summary Judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. Etheredge v. Richland School Dist. One, 341 S.C. 307, 534 S.E.2d 275, 277 (2000). Summary Judgment is also appropriate when it is clear the moving party is entitled to judgment as a matter of law. Lawson v. South Carolina Dep't of Corrections, 340 S.C. 346, 543 S.E.2d 259, 260 (2000).

The elements of an **inverse condemnation** are: (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use. *Mowrer v. Charleston County Park and Recreation Com'n*, S.C.App. 2004) 361 S.C. 476, 605 S.E.2d 563. **Inverse condemnation** may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property. *Carolina Convenience Stores, Inc. v. City of Spartanburg*, S.C.App. 2012) 398 S.C. 27, 727 S.E.2d 28, rehearing denied, certiorari granted. A determination must first be made as to whether what is being alleged by the Plaintiff is a physical or regulatory taking. If it is regulatory takingthen there must be a "balancing all relevant circumstances to determine whether the government has taken property". Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659, 57 L.Ed.2d at 648. The information needed for this type of analysis has not been developed in this case and as such summary judgment is premature at this time. In this case there is no physical invasion or occupation of the property of the Plaintiff. In the recent case of *Carolina*

Convenience Stores, Inc. v. City of Spartenburg, 398 SC 29, 727 SE2d 28 (Ct.App. 2013), the Court of Appeals held that a taking as contemplated under the Constitution did not occur where the Plaintiff maintained title to and possession of the property.

> "In this case, CCS claims the City's use of a bulldozer to tear down CCS's building was an affirmative, aggressive act that constituted a physical taking of CCS's property, thereby entitling CCS to just compensation. We find the City's actions do not constitute a taking as contemplated under our Constitution or South Carolina case law." First, the City did not physically appropriate the property for public use. *See Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 435, 706 S.E.2d 501, 504 (2011) (holding the elements of an action for inverse condemnation are: (1) affirmative conduct of a government entity; (2) the conduct amounts to a taking; and (3) the taking is for a public use). CCS maintained title to and possession of the property at all relevant times, and while the City's actions caused damage to CCS's property, no physical appropriation occurred."

Id.

Even ignoring the fact that Plaintiff, as a governmental entity and owner of public/government property is outside the definition of a taking in this context, the plaintiffs have not been deprived of the use, possession, or title to the property by any physical appropriation, and the "balancing [of] all relevant circumstances to determine whether the government has taken property," *id.*, has not taken place. Therefore summary judgment is inappropriate at this time as there are issues of material fact to be determined.

Taking

The Plaintiff relies heavily on the *Balcome* case as essentially the same as the case at bar to prove that a taking has occurred. However, the Plaintiff misstates the facts of *Balcome*, such facts bearing directly on the outcome of that case. In *Balcome*, during the construction of a freeway natural flowing water was encountered. This water was diverted, not dewatered away. The diversion of the water is alleged to have caused the pond on the Plaintiff's property to not be able to refill in response to the natural decrease in water from evaporation, etc. and the Plaintiff argued that they used this property for agricultural and recreational purposes. The Court held that a jury *may* find that the Departments diversion of groundwater impaired the Plaintiff's use and enjoyment of their property. This is not the case here. In this case there is/was no pond on the Plaintiff's property fed by underground water, free flowing underground water was not permanently diverted away from these properties

and the Plaintiff has used and continues to use the properties involved in this litigation in the same manner and for the same purposes as before November, 2011. The right of use, enjoyment and disposal of these property by Georgetown County were never destroyed.

Plaintiff also alleges that it is undisputed that the Georgetown County Drainage Project caused the sinkholes and depressions in Georgetown County and that the damages alleged to the County's buildings are as a result of these sinkholes and depressions. This simply is not true. It has not been accepted by all parties to this action that this project was the cause of all of the sinkholes and depressions in Georgetown County. Sinkholes and depressions are naturally occurring phenomenon. *See* Exhibit B. There has been no investigation or inspection into every sinkhole and/or depression in Georgetown County and as such – there can be no determination that they were all as a result of this drainage project. *See* Exhibit C (F&ME report advising this report was not an exhaustive inspection and investigation of all sinkholes and depressions in Georgetown County). Additionally, the claims of the Plaintiff that the damages they allege in their buildings are as a result of the sinkhole is heavily disputed. It should be noted that there no sinkhole or depression occurred on any of the properties listed by the Plaintiff in this lawsuit. Also, the inspections and investigations of the County's properties by the Defendants is in its early stage. Deposition testimony of Andy Tolleson, PE (expert engineer for Republic Contracting) and the affidavit of Zane Abernathy both provide possible reasons for the cracks alleged by the County and state that further investigation is necessary to determine those issues.

> "The building system utilized for the Judicial Center consists of a pile supported building frame with a non-pile supported first floor slab. Such a system can and does result in differential settlements between the 'rigid' pile supported building frame and the 'floating' floor slab supported on natural ground or fill soil. This differential settlement can and does occur under 'normal' conditions. Further testing is needed to determine what damages if any at the properties owned by Georgetown County are related to the Drainage Project and what are from naturally occurring settlement."

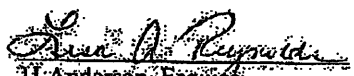
See Exhibit B and D. The deposition of Ross McGillvary, PE, was begun on Tuesday of this week and Mr. McGillvary raised issues regarding the continuing settlement properties of the soils in Georgetown, issues of whether the cracks and alleged damages being claimed to the residences and buildings in Georgetown existed prior to this drainage project and whether the damages alleged to the residences and buildings in Georgetown are from normal settlement unrelated to the drainage project. Mr. McGillvary's deposition took place Tuesday

and therefore a transcript has not been completed and references to deposition designations are not possible at this time.

CONCLUSION

For the reasons stated above the Plaintiff is not entitled to the relief requested, has failed to state facts sufficient to constitute a cause of action and Plaintiff's claim for inverse condemnation should be dismissed or in the alternative its request for summary judgment denied.

Respectfully submitted by:



J. Anderson, Esquire
Lisa A. Reynolds, Esquire
Anderson Reynolds & Stephens, LLC
P.O. Box 87
Charleston, South Carolina 29402
Attorney for Defendant SCDOT

August 12, 2014

Charleston, South Carolina

2013-CP-22-01062

EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Georgetown County, Plaintiff, vs. Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown, Defendants.	)	Civil Action No.: 2013-CP-22-01062 **CONSENT SCHEDULING ORDER**

Pursuant to Rule 16 of the South Carolina Rules of Civil Procedure, the following schedule is established for the above referenced case:

1. All interrogatories, requests for admission, requests for production, not previously served, including the identification of expert witnesses, shall be served in time for the responses to be served by **January 16, 2015**.

2. Depositions of all witnesses, including expert witnesses, shall be completed by **February 27, 2015**.

3. The parties shall mediate the case on or before **March 20, 2015.**

4. All dispositive motions shall be filed on or before **April 3, 2015**.

5. The parties shall exchange pre-trial briefs, including a list of known witnesses and exhibits to be presented at trial, one week before the trial of this matter.

6. This matter shall not be called to trial before **May 11, 2015**.

[SIGNATURES ON NEXT PAGE]

Consent Scheduling Order
2013-CP-22-01062

AND IT IS SO ORDERED.

_____
Presiding Judge
Fifteenth Judicial Circuit

Georgetown, South Carolina
_____, 2014.

I SO MOVE:
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Consent Scheduling Order
2013-CP-22-01062

I CONSENT:
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Attorneys for Defendant City of Georgetown

2013-CP-22-00062

EXHIBIT B

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN GEORGETOWN COUNTY Plaintiff, vs. Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown Defendants	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT Civil Action No.: 2013-CP-22-1062 **AFFIDAVIT OF ZANE ABERNETHY**

PERSONALLY APPEARED BEFORE ME, Zane W. Abernethy, P.E., who after being duly sworn, did depose and state:

1. That I am a licensed engineer in the State of South Carolina and the attached is a true and accurate copy of Curriculum Vitae.
2. That I have inspected the Georgetown Drainage Project and several properties located within and surrounding the footprint of the project to include the Georgetown County Judicial Center.
3. Subsidence/ground depressions can occur as a result of subsurface utilities, compressive soil layers or karst conditions.
4. In a karst condition, cavities can be formed in calcareous deposits (limestone) by the movement of groundwater.
5. The subsurface movement of groundwater is a naturally occurring condition.
6. Ground subsidence and/or sinkholes can occur as a result of naturally occurring conditions.
7. A sinkhole was documented to have occurred in the City of Georgetown in 1956. This was a naturally occurring sinkhole and was not a result of a known construction project.
8. The Judicial Center site is closer to the 1956 sinkhole than is the Drainage Project or its components.

9. The building system utilized for the Judicial Center consists of a pile supported building frame with non-pile supported first floor slab. Such a system can and does result in differential settlements betv the "rigid" pile supported building frame and the "floating" floor slab supported on natural ground o soil. This differential settlement can and does occur under "normal" conditions.

10. Further testing/inspection is needed to determine what damages if any at the properties owned by Georgetown County are related to the Drainage Project and what are from naturally occurring settlement.

Further Affiant sayeth not.

Zane W. Abernethy, P.E.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 5th DAY
OF August 2014.

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 4/22/24



Zane W. Abernethy, PE

Principal Engineer

Mr. Abernethy has over thirty years of experience in providing geotechnical engineering, environmental consulting, and materials testing services. This focus has resulted in his knowledge of subsurface conditions and geotechnical requirements throughout the southeast. As President and Principal Engineer, Mr. Abernethy has directed projects in every county in the State of South Carolina, from foundation and pavement investigations and designs, to quality assurance testing. His experience and the reputation of F&ME Consultants has resulted in major assignments from state and county agencies, municipalities, and industrial and private clients.

Mr. Abernethy has been instrumental in establishing "Industry Standards" in the State of South Carolina, as well as utilizing the latest available geotechnical and materials technology to provide cost effective solutions to difficult problems and construction projects. He has had direct hands-on and technical involvement and supervision on hundreds of geotechnical assignments. His experience, first-hand knowledge, and leadership abilities are the cornerstone of F&ME's commitment to providing first-class service to our clients.

EDUCATION

Bachelor of Science
Civil Engineering
University of South Carolina
(1971)

Master of Science
Geotechnical Engineering
University of South Carolina
(1972)

REGISTRATION

Professional Engineer
South Carolina (#6485)

Project Experience

AVX Ceramics
Battery Creek Bridge
Ben Sawyer Bridge
Berlin-Myers Parkway
Broad River Correctional Facility
Brodie Creek Mill Pond
Carolina Bays Parkway
Cellular One Microwave System
Central Parkway
Charleston Air Force Base
Columbia Mall
Columbia Metropolitan Airport
Columbia Museum of Art
Conway/Horry County Airport
Dawhoo River Bridge
Dorn VA Hospital
Edmonston Stormwater Pump Station
ETV Broadcast Towers
Fantasy Harbour Interchange
Fayetteville Airport
First Union Tower
Five Points Streetscape
Fort Mill Parkway
Francis Lieber Correctional Facility
George Bishop Boulevard
Gervais Streetscape
Governor's Mansion
Grand Strand Airport
Greenville Western Corridor
Greenville/Spartanburg Jetport
Hilton Head Airport
Hollow Creek Pond Dam
Horry County Airport
Huger Street Jail Demolition
Jackson Regional Mall
James Island Expressway
John F. Limehouse Bridge
John Hardee Expressway
Kalama Chemical Company
Lee County Correctional Facility
Linde Division of Union Carbide
M. J. Perry Federal Courthouse
McCormick Correctional Facility
McEntire Air National Guard Base
McLeod Medical Center
Myrtle Beach Connector
National Cryogenic
North Rhett Avenue
Orangeburg County Airport
Palmetto Commerce Parkway
Palmetto Parkway
Perimeter Road
Platt Springs Road
Richland County Detention Center
Richland County Library
Richland County Roadway Program
Richland Mall
Rite Aid Regional Distribution Facility
Rose Hill Plantation
Savannah Air National Guard Base
Sea Pines Plantation
Shaw Air Force Base
Southern Bell Building
Summeral Center
The Palace
Turbeville Correctional Institute
Union Camp
University of South Carolina
Wateree Station Ash Pond
Westinghouse Micarta Division
Williamsburg County Airport
WLXT Tower

F&ME CONSULTANTS

GEOTECHNICAL | ENVIRONMENTAL | MATERIALS

2013-CP-22-01062

EXHIBIT C

1.0 INTRODUCTION

The purpose of the planning and construction of the City Hall Drainage Improvement Project (City Hall DIP) in the City of Georgetown, South Carolina was to relieve or reduce the impacts of historical surface water flooding in the area surrounding City Hall when subjected to relatively heavy or prolonged precipitation events.

The City Hall DIP consists of construction of a water storage facility and associated wet well, redirection and tie-in of existing surface water to gravity drainage piping into the new water storage facility, and installation of forced (pressurized) drainage piping for pumped discharge from the wet well into the Sampit River. During construction of this project, land-surface collapses and the formation of subsidence sinkholes and depressions occurred.

On the night of November 17, 2011 the formation of a sinkhole resulted in the partial collapse of the building at Parrish Place and the closure of two northbound lanes on Fraser Street, which were closest to the partially collapsed structure. F&ME was contacted on November 18, 2011 by the South Carolina Department of Transportation (SCDOT) concerning the manifestation of sinkholes like ground surface features or ruptures in Georgetown, South Carolina. On November 19, 2011, Zane Abernethy and Adam Shannon of F&ME traveled to Georgetown for the purpose of performing visual inspections of the impacted areas and making preliminary assessments of potential causes.

At the time of this initial on-site inspection, SCDOT personnel directed attention to the Parrish Place building collapse and six (6) possible sinkholes and depressions. The overall surface and subsurface stability of the area and safety of the public were of major concern. F&ME began a fast-track assessment of observed conditions in the areas where sinkholes and/or depressions were noted, subsurface conditions in the locations of sinkholes and/or depressions, and in the general area of the City Hall DIP and construction records relative to the City Hall DIP. F&ME's charge from the SCDOT was to serve as an independent third party reviewer of the cause or causes of the sinkholes and depressions that had formed and determine if the City Hall DIP construction was contributing to the formation of the observed sinkholes and depressions.

Based on review of project documents, project images, and discussions with SCDOT personnel, there were at least six (6) confirmed depressions and/or land-surface collapses (sinkholes) since the City Hall DIP project started. The first depression was reported on July 14, 2011 on Hazard Street, south of the intersection of Hazard and Highmarket Streets. At the time of the formation of this surface depression, it was initially believed by the SCDOT to have been caused by leaking underground utility piping. This depression was repaired by filling with sand/aggregate and asphalt surfacing. The Hazard Street depression re-occurred with subsidence on July 29, 2011. During this occurrence, SCDOT construction inspectors reviewed plans and utility information and

determined that no utilities were present in the bottom of the hole. Once again, the hole was repaired by filling with sand/aggregate and asphalt surfacing.

The second documented depression was in the Parrish Place parking lot on October 30, 2011. The third sinkhole was documented along Highmarket Street the week of November 14, 2011.

The sinkhole connected with the Parrish Place building collapse, the sinkhole that occurred in the parking/drive area at the new fire station on Prince Street, and the depression behind the Bank of America facility all occurred within the same time period between the November 17, 2011 and November 18, 2011.

All the construction activities associated with the City Hall Storage Facility perimeter retaining system were installed prior to F&ME's involvement in the project. This included the king pile, sheet pile, and soil anchor tie back systems. Information pertaining to activities that occurred prior to November 18, 2011 was gathered through document review and multiple discussions with SCDOT, Republic Contracting Corporation, Davis & Floyd, and S&ME.

Shortly following the commencement of our initial assessment and field investigation, F&ME's contract was shifted to the South Carolina Insurance Reserve Fund (SCIRF). F&ME's charge was to determine cause and origin of the land-surface collapse and formation of subsidence depression and sinkhole features that had manifested during the time period of July 14, 2011 to November 18, 2011.

Other conditions or ground subsidence and/or depressions may have occurred. The compilation and verification of such conditions is beyond the scope of this investigation.

2.0 F&ME FIELD INVESTIGATION

Following contact from the SCDOT and F&ME's initial site visit and assessment of geotechnical conditions on November 19, 2011 a fast-track field investigation was undertaken. The following is a synopsis of our field investigation. More detailed discussions of our investigation methodologies and results are contained in the Appendix of this report.

2.1 Geophysical Investigation

For the geophysical field investigation, F&ME selected three techniques as our primary investigative methods. These were electrical resistivity (ER) imaging (two-dimensional and three-dimensional), ground penetrating radar (GPR), and seismic refraction. The main objective of our geophysical investigation was to provide a continuous indication of subsurface conditions beyond that which can be inferred from the relatively widely spaced roto-sonic corings.

2013-CP-22-01062

EXHIBIT D

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN

DEEP ENTERPRISE, LLC,

Plaintiff,

vs.

CASE NO. 2013-CP-22-0094

DAVIS & FLOYD, INC., REPUBLIC CONTRACTING CORPORATION, S&ME, INC., AND THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION and THE CITY OF GEORGETOWN, SOUTH CAROLINA,

Defendants.

(CONSOLIDATED CAPTION)

DEPOSITION OF: ANDREW R. TOLLESON, P.ENG., D.GE

DATE: JULY 10, 2014

TIME: 9:52 a.m.

LOCATION: Law Offices of Murphy & Grantland
4406-B Forest Drive
2nd Floor
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC (843) 722-8414	Hilton Head, SC (843) 785-3263	Myrtle Beach, SC (843) 839-3376
Columbia, SC (803) 731-5224	Greenville, SC (864) 234-7030	Charlotte, NC (704) 573-3919

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(INDEX AT REAR OF TRANSCRIPT)

STIPULATION

It is stipulated by and among Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial and that an objection by one stands for an objection by all.

* * * * * * * * * * * *

MS. REYNOLDS: We've also been agreeing that an objection for one is an objection for all.

MR. GRIMBALL: Yes, that is correct.

ANDREW R. TOLLESON, P.ENG., D.GE

being first duly sworn, testified as follows:

EXAMINATION

BY MR. GRIMBALL:

Q. Would you state your full name, please, sir.

A. Andrew R. Tolleson.

Q. And what's the R stand for?

A. Robert.

Q. Robert.

Mr. Tolleson, my name is Frank Grimball. I represent a number of the Plaintiffs

that area.

Q. What is the last document there?

A. Price Family Remembers 1956 Sinkhole in the City.

Q. Did you -- it looks like, in the version I got, that thing got done twice, it looks like? Do you know why?

A. No.

Q. Does it need to be in there twice?

A. No.

Q. It is reference material.

MR. HOWSER: It was a slow news day at Georgetown Times, so they're running the article twice.

(TOLLESON EXH. 273, newspaper clippings, was marked for identification.)

BY MR. GRIMBALL:

Q. That's the background material or whatever that came out of the local newspaper. Is that correct?

A. On sinkholes in Georgetown, yes.

Q. What did you do as a -- have you drawn any conclusions from the information contained in that document?

A. Some inferences, just to -- the

credible -- that sinkhole formation or subsidence features in Georgetown County occurred both before and after the period of record for this claim.

Q. So some of it is like this one -- Rain Causes Road Washout in Plantersville -- is that an obvious cause, it's unrelated to what occurred in the -- as a result of the work being done at the wetwell?

A. To be fair, what we were trying to document is are there occurrences where there are some subsidence, which may or may not be a sinkhole.

Subsidence features have characteristics that are similar to but not necessarily, as a term of art, equivalent to a sinkhole.

Q. We'll get into that.

A. The next document is Preliminary Document Review - Tide Report.

Q. Three pages?

A. Three pages.

Q. Around the time the November incident occurred?

A. Yes, November 2011.

Q. Does the tide affect the groundwater

compensated to do it, my professional belief was that it was in the best interest of the project for the originators that understood the construction schedule and all of the impacts far better than I would know.

Q. Is the draw-down area the area that, with the dewatering, the soil could be de-stabilized?

A. It would typically not be described in those types of terms. There's a subtle difference between -- you will notice on that legend, I believe I used the word like water table or unconfined.

Yes.

For number one on the legend on Exhibit 279, we used the term shallow piezometer and unconfined aquifer.

And then to represent the water level, I said water table in unconfined unit -- whereas, in the piezometer which I itemed as Number 2, deep piezometer and confine that with a deeper one -- in a confined aquifer, the water level is rising.

The pressure in the water or in that unit is sufficient to be -- well, it's pressurized -- so that if you were to stick some

type of piezometer or monitoring well into it, the water would rise up, potentially to the surface of the land, even. And you see that in places. They call them springs, or boils.

What that really means is that the soil itself, what holds -- you know, when we walk on earth -- there's a term -- there is a term, in karst, in sinkhole terminology, it uses the term mantle -- mantle -- like the mantle of the earth.

Typically, in a soil skeleton, you will have soil solids, and then you will have spaces between those solids, and those spaces can either be filled with air or with water.

If they're saturated, all of those interstitial spaces, just like cells in your body, the interstitial spaces, they're filed with water.

In a confined aquifer, the pressure in those interstitial spaces is actually higher than atmospheric.

I know this is a lot.

In an unconfined aquifer, the pressure in those interstitial spaces is atmospheric.

So one is higher than atmospheric. One is atmospheric.

All right? Now, the relevancy of that

is that there's this relationship between the skeleton holding up the weight of the earth and the soil above it and so on.

And they exist in an equilibrium. Like right now, outside, the dirt and everything is staying still.

If we had a water-bearing unit that was shallow and sandy, like in the coastal plains, if the water pressure changes or is either drawn off or pumped up, then you will see volume change. Those interstitial spaces will either collapse or possibly expand.

So by dewatering in a deep unit, you would have to have -- in order for the type of collapse that we saw here, we saw really two types, at least that I saw. You had these shallow units that were -- or shallow subsidences that were more like subsidence, much like what's called a dropout sinkhole. Some of those, the sidewalls were nearly vertical and their diameter to their depth were close to unity.

What that would mean is a relatively large volume of sediment would have to move.

The challenging thing on this particular case is -- well, first off, we don't

have quantimetric data to say how much water could be moved that far away to give rise to that much water in one location to cause a dropout kind of a sinkhole.

This is a whole lot of information, but it's all relevant.

We don't have the data to really know, with all certainty, could dewatering from this pump station give rise to sufficient groundwater level drop far enough away to cause a subsidence.

I don't know that we have sufficient information to know that. It's possible. But we don't have the kind of information to know that that's what really happened. It's possible, though.

Q. What's the other explanation?

A. Well...

Q. For not an individual property, but for everything that occurred in that period of time.

A. That's a very fair question, in my opinion.

We've got, like the Hazard Street, which maybe there was something going on over at Hazard Street that was close by, like maybe they're doing shallow dewatering, and maybe it was more

like a subsidence that looked like a sinkhole.

We've got news reports that we've gone through today, you know, what I have brought with us here, of what are called sinkholes in other places that might be subsidences, that don't have anything to do with this project but are in the region and are similar to some of the subsidences described here.

So you could have some natural conditions with just the ebb and flow and the groundwater table that would give rise to some of the non-catastrophic.

What I will say is the catastrophic -- you know, the North Fraser Street, you know, dropout, and the High Market Street, where it was clear and evident -- those ones are the most plausible, I think, evidence that we've had a sinkhole occurrence.

The shallow or subsidence ones -- I think there were about four others -- I don't know that we could really answer that.

Q. But ten properties have experienced damages all during this period of time, correct?

A. That's correct.

MR. SPERRY: Object to the form.

separately so that when I ask you to update your files before your next deposition, you can give me just the new material since the Subpoena response?

A. That's a good question.

Work products, like a report, of course, will be dated and that sort of thing, and they would have their own file name and that sort of thing.

Site visits, where we might collect data that's not provided to us that we record by, whatever, we -- our file system is we put a date, so there's a folder that literally says site visit with the date and then with photographs and things like that. So there is a way to segregate it.

Q. So when we come back, you'll be able -- before the next deposition -- be able to produce the new material without reproducing everything?

A. Yes, yes.

MR. MAJURE: Well, there would be one item of housekeeping, though.

And if we need to let Andy step out so it doesn't appear that I'm coaching the witness, that's fine.

The Subpoena that was sent to him, the scope of the Subpoena was limited to the properties

that you're representing your clients in; and the site inspection that was performed recently was to go view the Bank of America property and the judicial center, so those documents would not have been responsive to your subpoena.

MR. GRIMBALL: Understood.

No, that's fine.

I did not appreciate that.

Thank you.

BY MR. GRIMBALL:

Q. All right. Let me get straight with Exhibit 263. It's 11 pages, correct?

A. Correct.

Q. All right.

A. The next exhibit in red folder number 2 is a collection of photographs and maps of the subject property site. We typically use this document as perhaps an appendix to a report.

The first page of this document is a vicinity map of Georgetown, South Carolina.

MR. SPERRY: There's a sticker on mine. I think that's --

THE WITNESS: That first page would be the same.

MR. GRIMBALL: How many pages is it?

hall drainage project. So that's Number 4.

Number 5, we agree with 5A.

We can accept letter 5B.

Q. And what is the difference between agree and accept?

A. Agree. We can agree.

Q. Okay, very good.

A. I'm trying to be real nice.

MR. GRIMBALL: Why start at the end of the day? That's enough for the day.

(The deposition was adjourned at 4:11 p.m.)

(The witness, after having been advised of his right to read and sign this transcript, does not waive that right.)

SIGNATURE OF DEPONENT

DEPONENT: ANDREW R. TOLLESON, P.ENG., D.GE
DEPOSITION DATE: JULY 10, 2014
REPORTER: SUSAN M. VALSECCHI
CASE CAPTION: DEEP ENTERPRISE, LLC vs. DAVIS & FLOYD, INC.

(Please return both Signature of Deponent pages)

I, the undersigned, ANDREW R. TOLLESON, P.ENG., D.GE, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

SIGNATURE OF DEPONENT (CONTINUED)

DEPOSITION DATE: JULY 10, 2014
REPORTER: SUSAN M. VALSECCHI
CASE CAPTION: DEEP ENTERPRISE, LLC vs. DAVIS & FLOYD, INC.

PAGE	LINE	CHANGE	REASON

ANDREW R. TOLLESON, P.ENG., D.GE Date

I, SUSAN M. VALSECCHI, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent pages within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.

SUSAN M. VALSECCHI, RPR, CRR
My Commission expires
January 4, 2015

CERTIFICATE OF REPORTER

I, Susan M. Valsecchi, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 16th day of July, 2014 at Columbia, Richland County, South Carolina.

Susan M. Valsecchi, RPR, CRR
My Commission expires
January 4, 2015

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF GEORGETOWN	)	
Georgetown County,	)	
	)	C/A #: 13-CP-22-01062
Plaintiff,	)	
	)	
v.	)	
	)	**AFFIDAVIT OF LANE MIXON**
Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., the South Carolina Department of Transportation and the City of Georgetown,	)	
	)	
Defendants.	)	

PERSONALLY APPEARED BEFORE ME, Lane Mixon, who first being duly sworn deposes and states as follows:

1. I was employed by the City of Georgetown from 1995 until 2012, in various capacities including Civil Engineer, Engineering Manager and Water Utilities Director. Because of that I am familiar with the storm drain project in Georgetown. The City of Georgetown provided partial funding for the project.

2. Davis & Floyd was the design engineer for this project. The City of Georgetown did not award the initial contract for engineering design services, nor did the City request proposals for engineering design services for this project.

3. The City of Georgetown did not award any contract to Republic for construction of the project.

4. The City of Georgetown did not award any contract for construction engineering and inspection services. Davis & Floyd was awarded a contract for the construction, engineering, and inspection by SCDOT.

5. The City of Georgetown had no supervision or control over the construction of the project other than the relocation of City owned utilities such as water and electrical.

6. After the initial design of the project was complete, the SCDOT bid the project and the bids came back too high. The design contract for the project was then assigned to the City of Georgetown by SCDOT for the purpose of rebidding. The project was rebid and the bids came back too high once again. In practice, the SCDOT took back over the project, rebid the project, awarded a construction contract to Republic, and the City had no further role in the construction of the project other than partial funding.

7. The vast majority of the funding for this project came from sources other than the City of Georgetown.

FURTHER AFFIANT SAYETH NOT.

Lane Mixon

SWORN TO BEFORE ME THIS 5th

DAY OF AUGUST, 2014

NOTARY PUBLIC FOR S.C.

COMMISSION EXPIRES: 10/20/18

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS Civil Action No.: 2013-CP-22-1062
Georgetown County, Plaintiff, vs. Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown, Defendants.	)	**SUPPLEMENTAL AFFIDAVIT OF GEORGE A. SEMBOS, P.E.**

FILED
GEORGETOWN COUNTY, SC
2014 AUG 25 PM 2:10
ALMA Y. WHITE
CLERK OF COURT

PERSONALLY APPEARED before me, GEORGE A. SEMBOS, P.E., who having been duly sworn, deposes and states as follows:

1. I am a professional engineer licensed in the State of South Carolina.

2. I have been actively engaged in the practice of geotechnical engineering and construction for the past 23 years and have actual professional knowledge and experience in the field of geotechnical engineering.

3. I have inspected and observed the site of the drainage improvement project located adjacent to West Fraser and Front Streets in the City of Georgetown, South Carolina.

4. In observing the conditions at the project site and surrounding areas, I noted extensive damage to parking lots, streets, and structures which, in my opinion, are the result of excessive pumping or removal of groundwater/ soil from the drainage improvement project site and surrounding areas.

5. I have inspected the buildings owned by Georgetown County in detail and I have personally observed the damages to those buildings.

6. I have observed cracks in the buildings including within load bearing walls, concrete floors, and parking lots.

7. Seven crack monitors were installed on significant sized cracks in the Judicial Center located at 405 Cleland Street. Cracks within the Judicial Center were observed to grow in size and frequency through the building through these crack monitors.

8. Additionally, I have observed the disturbance to the subsurface soils located below the Judicial Center and other County buildings.

9. In my professional opinion, the buildings have been damaged as a result of sinkhole collapses, caused by the action of water on limestone or dolomite. The aforesaid action of water was caused by, among other things, the king pile installation associated with the drainage improvement project and subsequent pumping or removal of groundwater/soil form the drainage improvement project site and surrounding areas.

FURTHER AFFIANT SAYETH NOT.

GEORGE A. SEMBOS, P.E.

SWORN to before me this 5th day of August, 2014.

Notary Public For South Carolina

My Commission Expires: July 28, 2018

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN Georgetown County, Plaintiff, v. Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown, Defendants.	)	IN THE COURT OF COMMON PLEAS Civil Action No.: 2013-CP-22-01062 **PLAINTIFF GEORGETOWN COUNTY'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

FILED
GEORGETOWN COUNTY, S.C.
2014 SEP 17 PM 4:13
ALMA Y. WHITE
CLERK OF COURT

Plaintiff Georgetown County (the "County"), by and through its undersigned attorneys, submits this Brief in Support of its Motion for Summary Judgment, pursuant to the Order of The Honorable Larry B. Hyman, Jr., orally given during the hearing on the County's Motion for Summary Judgment on August 7, 2014, and filed of record on August 7, 2014. As a body corporate and politic of the State of South Carolina, Georgetown County is entitled to the protections contained within the South Carolina Constitution, Article I, Section 13 and is therefore entitled to just compensation for the taking of its property.

ISSUE

Is a governmental entity, such as the County, protected by Art. I, § 13 of the South Carolina Constitution of 1895, against uncompensated and unconstitutional takings by other governmental entities, such as the City and SCDOT?

ARGUMENT

Article I, § 13 of the South Carolina Constitution of 1895, provides in pertinent part: "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." S.C. Const. Art. I, § 13.

Inverse condemnation is not based in tort, but in the constitutional prohibition of taking of property without compensation. *Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 498, 544 S.E.2d 637, 640 (Ct. App. 2001). Because the right to compensation for a taking is a constitutional right predating The South Carolina Tort Claims Act of 1986, S.C. Code 15-78-10 *et. seq.*, it cannot be altered by statute. *Mowrer v. Charleston County Park and Recreation Com'n*, 361 S.C. 476, 481 n. 8, 605 S.E.2d 563, 565 n. 8 (Ct. App. 2004). "As 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." *Id.* at 481, 605 S.E. 2d 566.

I. The County is protected against takings by Article I, Section 13 of the South Carolina Constitution of 1895.

No South Carolina case has found that a governmental entity is barred from asserting an inverse condemnation. No statutory authority supports such a conclusion. Across the country, numerous other jurisdictions have concluded that where the state or a political subdivision thereof takes property belonging to another political subdivision, just compensation must be paid. *See e.g., Marin Mun. Water Dist. v. City of Mill Valley*, 202 Cal. App. 3d 1161, 249 Cal. Rptr. 469 (Ct. App. 1988) (Holding the public water district suffered no less of a taking than if the property were owned by an individual and that the district stated a cause of action in inverse condemnation for unintentional physical damage to its property); *State ex. rel. State Highway Commissioner v. Cooper*, 24 N.J. 261, 131 A.2d 756 (1957) (Impliedly overruling New Jersey precedent on the governmental – proprietary distinction and stating if the breadth of previous case doctrine were followed it would lead to the startling result that "the State [could]

appropriate, for wholly unrelated public purposes and without just compensation, various municipal properties such as town halls and schoolhouses..."); *City of Three Forks v. State Highway Commission*, 156 Mont. 392, 480 P.2d 826 (Mont. 1971) (Holding that the property was owned by the city, not the State of Montana, and that compensation must be paid for property of the City taken by the State); *Highline School Dist. No. 401, King County v. Port of Seattle*, 87 Wash. 2d 6, 548 P.2d 1085 (Wash. 1976) (en banc) (Reversing a grant of summary judgment on inverse condemnation against the condemnee school district and stating that where a condemnee governmental unit is obligated to furnish services which require use of the property taken, just compensation must be paid); *City of Chester v. Com., Dept. of Transportation*, 495 Pa. 382, 434 A.2d 695 (1981) (Holding that the Pennsylvania Constitution does not allow the Commonwealth to escape its financial obligation owed to a public condemnee for property taken); *State ex. rel. Ala. State Docks Dept. v. Atkins*, 439 So.2d 128 (Ala. 1983) (Holding Mobile County was entitled to compensation for the taking of its roadway by the State of Alabama); *Donnaher v. State*, 1 Morr.St.Cas. 374 (Miss. 1847) (Holding that the railroad company must pay just compensation to the City of Jackson to have a right to construct a railroad through the public streets). The South Carolina Supreme Court has held that property acquired and devoted to a public use may be condemned by the SCDOT. *Riley v. South Carolina State Hwy. Dept.*, 238 S.C. 19, 26, 118 S.E.2d 809, 812 (1961) (Implying that compensation must be paid to an orphanage where the SCDOT was allowed to condemn). It follows that compensation must be awarded for property which may be condemned.

In *Marin*, the precise question presented to this Court was answered in the affirmative, that a public water district's property was protected by the state constitution[1]. *See generally*,

[1] The California Constitution provides, "Private property may be taken or damaged for public use only when just compensation... has first been paid to... the owner." Ca. Const. Art. I, § 19.

Marin, 202 Cal.App.3d 1161, 249 Cal. Rptr. 469. In *Marin*, just as in the case at bar, the City of Mill Valley caused unintentional physical damage to the water district's property. *Id.* at 1165, 249 Cal. Rptr at 471. The Court stated:

> "When the [City of Mill Valley] fails to construct or maintain its improvement properly, it takes a calculated risk that damage to private property may occur. If damage to private property results, it is proper to require the entity that took this risk to bear the loss when damage occurs. ***We see no reason why these principles should not apply to compensate for damage to property owned by another public entity.*** 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. (emphasis added). The Court went on to discuss 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 an award of just compensation. The SCDOT and City undertook the Drainage Project, taking the calculated risk that damage to the County's properties could occur. In the case at bar, it is proper to require the SCDOT and City to compensate for damage to property owned by the County.

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

In South Carolina, Georgetown County is a body politic and corporate and is specifically given the power to purchase and hold, for the use of the county, lands and personalty within its limits. S.C. Code § 4-1-10 (2) (1976). Lands conveyed to the County are property of the County. *See* S.C. Code § 4-17-10 (1976). It is well settled that the circuit courts, probate courts, family courts and magistrates' courts are the courts of justice in the State of South Carolina. S.C.

Code. § 14-1-70 (1999). Additionally, South Carolina Counties are legally required to provide facilities and support personnel necessary to accommodate the circuit courts. 1975 S.C. Op. Atty. Gen 243 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4194, 1975 WL 22491.

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

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

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

The properties at issue in this case were not owned by the State of South Carolina, the SCDOT or the City, but were owned by the County and thus were and are protected under the South Carolina Constitution. As recognized in *Town of Milwaukee*, the County, in its character as owner of property, possesses the same rights, duties and privileges as any other. Included within these rights is the right to not have its properties taken for public use without just compensation.

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

Similar to 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); *Kiriakides v. School Dist. of Greenville County*, 382 S.C. 8; *Early v. South Carolina Public Service Authority*, 228 S.C. 392, 402, 90 S.E.2d 472, 476 (1955). Additionally, the Takings Clause of the United States Constitution applies to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. Amd. XIV, § 1; *Byrd*, 365 S.C. at 656 n. 6, 620 S.E.2d at 79 n. 6.

It is well established that under the Takings Clause of the United States Constitution, the Federal government must compensate state and local governments for the taking of their properties. *See e.g. Arkansas Game and Fish Com'n v. U.S.*, 133 S.Ct. 511 (2012) (Finding a taking of the Commission's lands requiring compensation); *Town of Bedford v. U.S.*, 23 F.2d 453 (1st Cir. 1927) (Stating the Federal government is a stranger to the town and that the Federal government can no more take, without compensation a town's property rights, than it can those of an individual); *U.S. v. State of Ark.*, 164 F.2d 943 (8th Cir. 1947) (Reciting the "fundamental principle" that a public authority *must* be awarded the actual money loss which will be occasioned by the condemnation); *U.S. v. Board of Ed. Of Mineral County*, 253 F.2d 760, 764 (4th Cir. 1958) ("The [municipal] owner must be put in as good position pecuniarily 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").

Under the Federal Takings Clause, the Federal government must compensate a state or local government for the taking of that entity's property. As South Carolina has consistently applied Federal Takings Clause jurisprudence, interpreting the South Carolina Constitution in a similar way to the Federal Constitution requires the SCDOT and City to compensate the County for the taking of its properties.

c. South Carolina does not recognize a governmental - proprietary distinction.

A review of cases from other states reveals that in some jurisdictions, the question of compensation for takings of public property turns on the character of the use of such property. The analysis is fact driven and involves the "governmental – proprietary distinction." The South Carolina Supreme Court has unequivocally held that South Carolina law does not recognize a distinction between governmental and proprietary functions of municipal corporations and other governmental entities. *Boyce v. Lancaster County Natural Gas Authority*, 266 S.C. 398, 402, 223 S.E.2d 769, 770 (1976) (citing *McKenzie v. City of Florence*, 234 S.C. 428, 108 S.E.2d 825 (*overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985)).

While it is true that in other jurisdictions there is authority supporting the position that the State may take without compensation property held by a county or municipality in its governmental capacity[2], if such doctrines were followed, "it would enable the State to appropriate, for wholly unrelated public purposes and without just compensation, various municipal properties such as town halls and schoolhouses." *Cooper*, 24 N.J. at 269, 131 A.2d at 760. In *City of Chester* the Court recognized that to hold that the public entity is not entitled to

[2] *See City of Keizer v. Lake Labish Water Control Dist.*, 185 Or. App. 425, 60 P.3d 557 (2002) (Applying the governmental – proprietary distinction under Oregon Constitutional provision restricting takings of private property for public use, but finding the City of Keizer entitled to compensation under another Oregon Constitutional provision restricting a corporation's power of eminent domain)

compensation, "would lead to a highly absurd, and to the district (plaintiff, public entity), 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." *City of Chester*, 495 Pa. at 394, 434 A.2d at 702.

Our Court has plainly declined to recognize the governmental – proprietary distinction. Consequently, cases from other states which embrace the distinction have no application in this case.

II. Public policy weighs heavily in favor of the County being protected.

The State of South Carolina requires the County to provide certain services to the citizens of Georgetown County. The County must own and maintain buildings and properties within the county to house these services. The taxpayers of Georgetown County provide the revenue by which the buildings and properties are paid. Many courts have weighed in on the "absurd" result which would come from requiring the burden to be placed on the citizens and taxpayers of Georgetown County. It was the SCDOT and the City which have caused these damages. The County was simply in the unfortunate position of landowner in the affected area. The burden of repair to the County's properties should be borne by State of South Carolina, not solely by the citizens and taxpayers of Georgetown County.

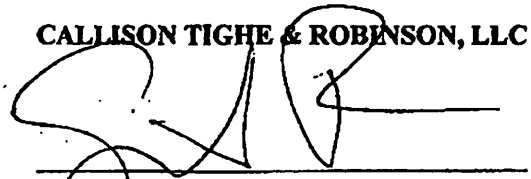
CONCLUSION

For the foregoing reasons, the County respectfully submits that it is protected by the South Carolina Constitution, from uncompensated takings by the SCDOT and the City. To hold otherwise would lead to a highly absurd, and to the citizens of Georgetown County, costly result.

[Signature on following page]

Respectfully submitted,

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September 5, 2014

Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN GEORGETOWN COUNTY Plaintiff, vs. Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown Defendants	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT Civil Action No.: 2013-CP-22-1062 **DEFENDANT SCDOT'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

TO: GEORGETOWN COUNTY, PLAINTIFF AND THEIR ATTORNEYS JAMES S. MEGGS, GEORGE A. TAYLOR, ESQUIRE AND WESLEY P. BRYANT, ESQUIRE:

The Defendant South Carolina Department of Transportation ("SCDOT), by and through its undersigned attorney, hereby submits this supplemental memorandum in opposition to Plaintiff's motion for summary judgment on their claim for inverse condemnation.

INTRODUCTION

This case arises out of Plaintiff's claims that several Georgetown County buildings were damaged as a result of sinkholes and depressions that allegedly resulted from the construction of the Georgetown Drainage Project on or about November 2011.

Included among the causes of action filed by the Plaintiff against SCDOT and the City of Georgetown is a claim for inverse condemnation. Plaintiff filed a motion for summary judgment on their claim for inverse condemnation, which SCDOT and the City of Georgetown oppose. A hearing was held on plaintiff's motion for summary judgment on August 7, 2014. The SCDOT and the City of Georgetown each submitted memorandum in opposition to plaintiff's motion and referred to their SCRCP 12(b)(6) defense raised in their answers. SCDOT and the City of Georgetown allege, among other things, that the plaintiff cannot maintain a cause of action for

inverse condemnation against these Defendants as these parties are all governmental entities and this suit regards governmental property not constitutionally protected private property. At the hearing, the Court requested that the parties submit a supplemental memorandum addressing the issue of whether a governmental entity may maintain a suit against another governmental entity for inverse condemnation. SCDOT's argument on this issue is set forth below.

LAW/ANALYSIS

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. *Etheredge v. Richland School Dist. One*, 341 S.C. 307, 534 S.E.2d 275, 277 (2000). Summary judgment is also appropriate when it is clear the moving party is entitled to judgment as a matter of law. *Lawson v. South Carolina Dep't. of Corrections*, 340 S.C. 346, 543 S.E.2d 259, 260

To prevail on an inverse condemnation claim, plaintiff must show (1) an affirmative, positive aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for public use. *Mowrer v. Charleston County Park and Recreation Com'n*, 361 S.C. 476, 605 S.E.2d 563 (Ct. App. 2004).

In an inverse condemnation case, it is the landowner's burden to establish a taking by a governmental entity that has caused damage to plaintiff's property. *Carolina Chloride v. Richland Co.*, 394 S.C. 154, 170, 714 S.E.2d 869 (2011); *Kiriakides v. Sc. Dist. of Greenville Co.*, 382 S.C. 8, 14, 675 S.E.2d 429 (2009). This includes proof of causation, including proximate cause. *See Lail v. S.C. State Highway Dept.*, 244 S.C. 237, 136 S.E.2d 306 (1964)(holding that plaintiff has not sustained burden of proving that defendant caused damages she sustained); *Moder v. U.S.*, 404 F.3d 1335 (Fed. Cir. 2005).

I. PUBLIC PROPERTY DOES NOT FALL WITHIN THE CONSTITUTIONAL PROTECTION AGAINST THE TAKING OF PRIVATE PROPERTY WITHOUT COMPENSATION.

The takings clause of the South Carolina Constitution provides in full:

> **§13 Taking private property.**
> 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 therefor. (1970 (56) 2684; 1971 (57) 315.)

S.C. Const., art. I, §13 (Rev. 1991). This clause, like the corresponding clause of the Fifth Amendment to the U.S. Constitution for just compensation for the property taken, is merely a limitation on the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. *United State v. Jones*, 109 U.S. 513, 3 S.Ct. 346, 27 L.Ed. 1015 (1883); *Parrish v. Town of Yorkville*, 96 S.C. 24, 79 S.E. 635 (1913).

Inverse condemnation claims are brought directly under the State and federal constitutions. "Inverse condemnation is based on the constitutional prohibition against taking **private property** for public use without the payment of just compensation. *S.C. Constitution* Art. 1, Section 13; *Mowrer v. Charleston County Party and Recreation Com'n*, 361 S.C. 476, 480, 605 S.E.d2d 563 (Ct. App. 2004). "The term 'inverse condemnation' describes an action grounded, **not on statutory condemnation power, but on the constitutional proscription** against the taking or damaging of property for public use without just compensation." *Vick v. South Carolina Dept. of Transp.*, 347 S.C. 470, 480, 556 S.E.2d 693, 698 (Ct. App. 2001) (emphasis added); *Horry County v. Insurance Reserve Fund*, 344 S.C. 493, 44 S.E.2d 637 (Ct. App. 2001). Inverse condemnation may result from the government's physical appropriation of **private property**, or it may result from the government-imposed limitations on the use of

private property. *Carolina Convenience Stores, Inc. v. City of* Spartanburg, 398 S.C. 27, 30, 727 S.E.2d 28 (Ct. App. 2012).

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 property at issue in this case does not fall under the Constitution's protection because it is not private property. The prohibition under the express constitutional limitation set forth above is against taking **private property** without first making just compensation therefor. There is no allegation of a taking of private property in this case. The Constitution makes no mention of public property held by a county or other governmental entity. Nichols on Eminent Domain states: "When a state seeks to condemn the property of one of its municipalities, compensability depends on whether the property is held by the municipality in its governmental capacity or in its proprietary capacity. Property held by a municipality in its governmental capacity may be taken by the state without the payment of compensation." Nichols on Eminent Domain 15.01(3). A courthouse has been determined to be a strictly governmental use which is not compensable. Nichols on Eminent Domain 15.01(3).

Public property does not fall within the protection of the constitution. The State must pay private property owners but not the County for loss of a County highway. *Edgefield County v.*

Georgia –Carolina Power Co., 104 S.C. 311, 88 S.E. 801, 806 (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 determined 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.* The Supreme Court, in rejecting claims by the County for compensation, noted that public property does not fall within the protection of the constitution. 88 S.E. 807.

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 (N.M. S.Ct. 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, 186 (Mass.S.Ct. 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 (Mass. S.Ct. 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 District v. State*, 424 A.2d 15 (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."); *Dept. of Highways v. City of New Orleans*, 360 So.2d 624 (La. 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).

Further, there is no statutory authority upon which Plaintiff may recover. Inverse condemnation is based on the Constitution and not simply the reverse of Eminent Domain based upon statute and is rightfully treated differently. A party does not have to have the power of eminent domain in order to be sued on an inverse condemnation cause of action. *Mowrer*, Id. The prohibition under the express constitutional limitation set forth above is against taking - private property without first making just compensation therefor. It says nothing about the State taking property of a county such as Georgetown by the State. Thus, any compensation due Georgetown County by the actions of the Department in this case must be based upon some statute. The County has cited none and there is none. Thus, this issue is a legislative and not a judicial matter. Counties are arms of the State. *Edgefield County v. Georgia-Carolina Power Co., Id.* The South Carolina General Assembly is vested with authority by our Constitution to direct by law in what manner claims against the State may be established and adjusted. S.C. Code Ann. Constitution Arts. X § 10, XVII, § 2 (Rev. 2009). The South Carolina legislature has not provided for the payment of claims by the County for damage to a county property alleged as a result of a public project. The General Assembly could, by law passed in due course, cause payment by the Department to a county in fact situations such as the present one—but it has not done so. Thus, the sovereign is immune.

In *State Highway Commission of New Mexico v. Board of County Commissioners of Dona Ana County*, the New Mexico Supreme Court was presented the question of whether or not the State Highway Commission was required to compensate the county for county property taken by the Commission for highway purposes. The property, which consisted of a county hospital

and a courthouse, was determined to be used in a governmental capacity. The Court found that "the property in question being public property and used for governmental purposes, the County cannot claim it is guaranteed compensation under this constitutional provision...absent statutory authority, property of one public body being used for public purposes cannot be condemned by another public body." *State Highway Commission of New Mexico v. Board of County Commissioners of Dona Ana County*, 72 N.M. 86, 88 (N.M. S.Ct. 1963). However, in this case, the New Mexico legislature included a provision in the statute that explicitly stated that compensation should be paid when public property was condemned for highway purposes. South Carolina does not have a statutory provision which authorizes compensation in this instance.

The caselaw, both federal and state, consistently use the terms "person", "private property", "private party" and the like in their analysis of the Constitutional prohibition against the taking of private property. Georgetown County is neither a "person" nor a "private party" and the property involved herein is not "private property" and therefore there no cause of action for inverse condemnation. Therefore, without any statutory or constitutional authority supporting compensation in this case, plaintiff may not recover against SCDOT.

II. GEORGETOWN COUNTY IS AN ARM OF THE STATE MAY NOT MAINTAIN AN ACTION AGAINST THE STATE.

The General Assembly has created the Department of Transportation and given it authority to construct, maintain, and protect State Highways. S.C. Code §§57-1-20 & 30 (Rev. 2006). It is, in essence, the sovereign itself. *Riley v. S.C. State Highway Dep't*, 238 S.C. 19, 25, 118 S.E.2d 809, 811 (1961). It is an alter ego of the State itself. *Id.* In *Chesterfield County v. State Highway Dept. of South Carolina*, the Court reviewed the relationship between counties and the State and, citing Corpus Jurisprudence stated "Comprehensively 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."

In a footnote to Attorney General Opinion No. 87-76, the Attorney General states, "Counties 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, 806 (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, 59 (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. City of Columbia*, 290 S.C. 93, 95 (1986). Additionally, Georgetown County repeatedly invokes the defenses and limitations of liability contained in the South Carolina Tort Claims Act, S.C. Code Ann. 15-78-10, et seq., in defense of suits filed against it. The South Carolina Tort Claims Act is the exclusive remedy for claims and actions brought against governmental entities. S.C. Code Ann. §§ 15-38-65, 15-78-10, 15-78-40. The act does not create a new substantive cause of action against a governmental entity. *Moore v. Florence Sch. Dist. No. 1*, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994). The Tort Claims Act is a limited waiver of governmental immunity. *Arthurs v. Aiken County*, 338 S.C. 253, 525 S.E.2d 542 (Ct.

App. 1999). By invoking the protections of the SC Tort Claims Act Georgetown County is asserting that they are akin to the state and are entitled to the same protections, immunity and limitations of liability as the state. As such, Georgetown County has repeatedly acknowledged and asserted that they are an arm of the state.

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 determined 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.*

The Supreme Court of the United States has also 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." *Tippecane County v. Lucas*, 93 U.S. 108, 114, 23 L.Ed. 822. 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: "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." *Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 536.

Additionally, in this instance the county is acting as the alter-ego of the State and may not maintain an action against itself. The county property alleged to have been damaged includes the Georgetown County courthouse. Article V of the South Carolina Constitution provides for the establishment of a uniform court system. S.C. Const. Art. V states, "The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Court of Appeals, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law." This includes municipal and magisterial courts. *State ex rel. McLeod v. Crowe 272 S.C. 41, 249 S.E.2d 772* (S.C. 1978); *City of Pickens v. Schmitz*, 297 S.C. 253, 376 S.E.2d 271 (S.C. 1989). "The judicial power vested in courts by this section includes the right to enforce and protect rights, prevent and redress wrongs, punish offenses against the public, and determine the rights, obligations, and liabilities of persons arising out of their relation to and dealings with each other." *Carolina Glass Co. v. State*, 87 S.C. 270 (1910). The courts uniformly apply the laws of this state. Housed within the courthouse is the office of the clerk of court. The office of the Clerk of Court is created by the Constitution and her duties are defined by statute. "The Clerk of Court has charge of the courthouse and has the authority to exercise control over the assignment of rooms and possess all office keys." *McCormick County Council v. Butler*, 603 S.E.2d 586 (S.C. 2004); S.C.Code Ann. § 14-17-210 (1976); Administrative Order of Chief Justice Toal of June 23, 2004. The County Administrator has no authority over the Clerk who is an elected State official. S.C. Code Ann. § 4-9-650 specifically states that the county administrator does not have authority over elected officials whose offices are created by the Constitution. In

functioning as a courthouse, which uniformly applies the laws of this state, the county is serving in a state capacity.

As such, Georgetown County and SCDOT are manifestation of the state - arms of the state and essentially this cause of action boils down to the state suing the state for public property.

SCDOT incorporates and joins in the arguments of the City of Georgetown in opposition to Plaintiff's Inverse Condemnation cause of action.

CONCLUSION

For the reasons set forth above, plaintiff may not maintain an action in inverse condemnation against SCDOT.

Respectfully submitted by:

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September 5, 2014

Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF GEORGETOWN	)	
Georgetown County,	)	
	)	C/A #: 13-CP-22-01062
Plaintiff,	)	
	)	
v.	)	
	)	**BRIEF OF THE CITY OF GEORGETOWN**
Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., the South Carolina Department of Transportation and the City of Georgetown,	)	**ON LEGAL ISSUE OF WHETHER GEORGETOWN COUNTY CAN ASSERT AN INVERSE CONDEMNATION CLAIM UNDER THE LAW**
	)	
Defendants.	)	
	)	

Statement of the case

Georgetown County has sued the City of Georgetown and the South Carolina Department of Transportation for several causes of action, including inverse condemnation, which prohibits the taking of **private** property for public use without just compensation.[1] The Plaintiff County has moved for summary judgment as to the inverse condemnation claim only. At oral argument, the Defendants raised the legal issue of whether Georgetown County can bring an inverse condemnation action for damage to **"public"** property. The Court requested the parties to brief this legal issue and the motion hearing is to be resumed sometime in November 2014 or later for this and other issues. The City of Georgetown submits this memorandum in opposition to the summary judgment motion on this one legal issue. Other issues remain to be argued and/or briefed. In this memorandum, the City contends that a political subdivision of the state cannot maintain an action in inverse condemnation for damage to "public" property since the County

[1] Georgetown County has indicated that it intends to amend its complaint to assert an inverse condemnation claim against the private defendants as well. For that reason, we anticipate that the remaining defendants may wish to file briefs on this issue too.

does not possess constitutional rights and since the takings clause of the Constitution applies to "private" property only.

I. The Takings Clause

The City of Georgetown contends that the language of the takings clause clearly and unambiguously applies only to private property, to the exclusion of public property. Therefore, there can be no taking of public property, and Georgetown County's motion for summary judgment must be denied.

Any analysis of an inverse condemnation or takings claim in South Carolina necessarily starts with the language of the South Carolina Constitution. The South Carolina Constitution prohibits the taking of "private" property without just compensation, but does not apply to "public" property. Georgetown County's property is public property. Article I, § 13 of the South Carolina Constitution states:

> (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. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.

S.C. Const. art. I, § 13 (emphasis added).

The language of this constitutional provision is clear and unambiguous. The drafters intentionally distinguished between "private property" and other property (presumably public) for valid reasons which are discussed below. This takings clause by its terms does not inure to the benefit of Georgetown County in claiming a taking of public property.

II. South Carolina Follows Federal Takings Clause Law

Rights under the South Carolina Constitutional Takings Clause follow the breath of those same rights under the Fifth Amendment to the United States Constitution. The Fifth Amendment

by its terms clearly and unambiguously applies only to private property to the exclusion of public property.

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, 657, 620 S.E.2d 76, 80 (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). (emphasis in bold added).

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.

III. The Federal Takings Clause

The Fifth Amendment to the United States Constitution contains the federal takings clause and states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall **private** property be taken for public use, without just compensation. (emphasis added)

USCA CONST Amend. V

IV. Construction and Interpretation of the Takings Clause Language

In order to ascertain the meaning of any constitutional provision, it is important to consider the language used and the purpose sought to be attained. One of the principal purposes of the just compensation clause, in prohibiting the taking of private property without just compensation, is to prevent the government from forcing *individuals* alone to bear the cost of public burdens, which in all fairness, should be borne by the public as a whole.

> "The 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. *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)."

Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach, 345 S.C. 418, 429, 548 S.E.2d 595, 601 (S.C. 2001).

Inverse condemnation actions are no different. Inverse condemnation actions are grounded in the self-executing takings clause of the Constitution. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 316, 107 S. Ct. 2378, 2386, 96 L. Ed. 2d 250 (1987). Inverse condemnation claims lie when the government takes private property and puts it to a public use without paying compensation. The landowner can institute the action to enforce their rights under the takings clause. Consequently, an inverse condemnation action is a constitutional claim. *Vick v. South Carolina Dept. of Transp.*, 347 S.C. 470, 480, 556 S.E.2d 693, 698 (Ct. App. 2001); *Horry County v. Insurance Reserve Fund*, 344 S.C. 493, 44 S.E.2d 637 (Ct. App. 2001). The claim inures to the benefit of individuals so that they are not forced to bear public burdens which in all fairness should be borne by the public as a whole. Consequently, the framers of the constitutions limited a right of recovery for inverse condemnation to "private" property owners.

The framers of both the United States Constitution and the South Carolina Constitution found it proper to limit the property that can be taken to "private" property. Clearly, the insertion of the word "private" had some purpose. Otherwise, the framers could have simply prohibited the taking of property without just compensation. Historically, the Fifth Amendment takings clause was adopted as a part of the Bill of Rights. Following the adoption of the United States Constitution, there was a fear that the government would be too powerful. The Fifth Amendment was adopted as a part of the negative liberties of the Bill of Rights that prevents the government from taking certain actions against its people. The Bill of Rights was not intended to protect one government against the actions of another sister government. Consequently, the restriction of the takings clause to "private" property comports with the purposes of the Bill of Rights.

A clear reading of the language of the takings clause renders the same result. Importantly, the Fifth Amendment begins with "No person". The clauses following that clearly are modified by the initial phrase "no person". The Fifth Amendment protects "persons" from actions by the government or from being compelled to take certain actions. For instance, the recitation that "nor shall be compelled in any criminal case to be a witness against himself, is clearly modified by "no person". The same is true for the clause "nor be deprived of life, liberty, or property, without due process of law". Certainly that phrase is referring to the person. Each clause contained within the Fifth Amendment is referring to the person, not the government as Georgetown County would now have the Court find. Historically, the Takings Clause clearly was intended to protect private people, not the government, from a taking of property. The use of the phrase "no person" reflects that rationale.

Likewise, the use of the phrase "private property" reflects that same intent and rationale. Both the federal constitution and the state constitution limit the prohibition against the taking of property for public use without just compensation to "private" property. When the language of a statutory or constitutional provision is clear and unambiguous, the courts must apply that clear meaning.

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.,* 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain 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) (citations omitted). 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." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

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.

Justice Toal in her dissent in *Byrd* recognized that the takings analysis applies to private individuals. "Both the Fifth and Fourteenth Amendments to the United States Constitution recognize that the government has the authority to interfere with a **private citizen's** property rights to promote the common good." *Byrd v. City of Hartsville*, 365 S.C. 650, 663, 620 S.E.2d 76, 83 (2005)(emphasis added).

Our court considered a similar issue many years earlier. *Edgefield Cnty. v. Georgia-Carolina Power Co.*, 104 S.C. 311, 88 S.E. 801, 807 (1916). One of the issues presented was whether the constitution required just compensation for the taking by flooding of a public highway. The Court concluded that where public property is flooded by the legislatively authorized erection of a dam, the constitutional protection against the taking of private property does not apply. "But public property, we think, does not fall within the protection of the Constitution. *Leitzsey v. Power Co.*, 47 S. C. 479, 25 S. E. 744, 34 L. R. A. 215; Elliott on Roads and Streets, 484." 88 S.E. 801, 807 (1916).

Other Courts have similarly considered this issue. The 5th Circuit Court of Appeals held that a state agency may not sue the state under the Fifth and Fourteenth Amendments. *Board of Levee Com'rs of the Orleans Levee Bd. v. Huls,* 852 F.2d 140 (5th Cir. 1988). The United States District Court for the Western District of Texas held that a political subdivision may not bring a claim pursuant to a statute written to protect individual rights such as freedom of speech. *City of Alpine, et. al. v. Greg Abbot,* 730 F.Supp.2d 630 (W.D.TX 2010). The Supreme Court of Mississippi held that the legislature may take or devote public land to an additional public use without paying any compensation. *Board of Supervisors of Covington County v. State Highway Commission,* 194 So. 743 (1040).

The New Mexico Supreme Court found that a County Hospital and County Courthouse were public property and not private property within the constitutional provision against the taking of private property for public use without just compensation. That Court found:

> We think it is established that absent statutory authority, property of one public body being used for public purposes cannot be condemned by another public body. *City of Albuquerque v. Garcia*, 17 N.M. 445, 130 P. 118.

....

We recognize the rule to be as stated in 2 Nichols, Eminent Domain 223, § 5.9, that:

> 'Over the property which a municipal corporation acquires as an agency of the state for the performance of the strictly public duties devolved upon it by law, the legislature may exercise a control to the extent of requiring the municipal corporation, *without receiving compensation therefor*, to transfer such property to some other agency of the government to be devoted to similar public uses or to other strictly public purposes.

In *The School District of the Speers Borough School District v. Commonwealth,* 383 Pa. 205, 117 A.2d 702, 703, the rule is stated as follows:
'Constitutional prohibitions against the taking of property without compensation apply only to privately owned property. Article I, Section 10 of the Constitution of Pennsylvania, P.S. 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, 57, 17 A.2d 212, the right to compensation in such cases being only a matter of grace or allowance by the Legislature.'
(emphasis added).

State ex rel. State Highway Comm'n v. Bd. of Cnty. Comm'rs of Dona Ana Cnty., 1963-NMSC-074, 72 N.M. 86, 88-89, 380 P.2d 830, 832.

The same reasoning applies when property is allegedly taken or damaged by one political subdivision of the state from another political subdivision of the state. In the *City of Evanston v. Regional Transportation Authority,* 559 N.E.2d 899 (Ill. 1990), a city brought an action seeking injunctive relief against the RTA. The RTA counterclaimed alleging a taking and damaging of their property in violation of both the state and federal constitutions. The Court phrased the issues as:

> (1) "[I]s a political subdivision of the state such as the RTA and PACE protected under the Illinois and United States constitutions from the taking of its property by another political subdivision; and
>
> (2) does such a political subdivision have the rights to due process and equal protection under the Illinois and United States constitutions?

The Illinois court was wrestling with the very issues presented here. In answering those issues, they found that:

> [T]here is no authority that private property within the meaning of the 5th Amendment includes public 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 just compensation clause ... [and] it was nevertheless public property that was not protected by the Illinois Constitution's just compensation clause.

559 N.E.2d 899, 905-906.

Since Georgetown County's property such as the courthouse is public property, the takings clause has no application. The takings clause is limited to private property by its clear and unambiguous terms. The purposes and intent of the enactment of the takings clause do not support an application to public property. South Carolina has previously addressed this issue finding that public property does not fall within the protection of the takings clause. Other states have similarly addressed this issue and determined that public property is not protected by the takings clause of the constitution. The County's motion for summary judgment must be denied.

V. Georgetown County Possesses No Constitutional Rights and Therefore Cannot State a Claim for Inverse Condemnation as That Clause Does Not Apply to the County.

Georgetown County attempts to enforce a constitutional right, the right to just compensation, which it does not possess. The Constitution is a limitation on the State's power to act. It is a charter of negative liberties. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). It forbids the State itself to deprive individuals of certain enumerated rights. It does not confer rights upon the government or Georgetown County. Consequently the takings clause does not inure to the benefit of the County.

> Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its]

> power, or employing it as an instrument of oppression," *Davidson v. Cannon, supra,* 474 U.S., at 348, 106 S.Ct., at 670; see also *Daniels v. Williams, supra,* 474 U.S., at 331, 106 S.Ct., at 665 (" ' "to secure the individual from the arbitrary exercise of the powers of government," ' " and "to prevent governmental power from being 'used for purposes of oppression' ") (internal citations omitted)" *Parratt v. Taylor,* 451 U.S. 527, 549, 101 S.Ct. 1908, 1919, 68 L.Ed.2d 420 (1981) (Powell, J., concurring in result) (to prevent the "affirmative abuse of power").

DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195-96, 109 S. Ct. 998, 1003, 103 L. Ed. 2d 249 (1989).

The Bill of Rights preserves certain rights to the people. It does not preserve those rights to the government. Georgetown County possesses no constitutional rights and therefore the constitutional takings clause does not afford Georgetown County any relief. A political subdivision of the state possesses no rights other than those expressly provided to it by the State.

The Illinois court in *City of Evanston v. Regional Transportation Authority,* cited above, not only determined that the takings clauses of the United States and Illinois constitutions do not apply to public property, but they also considered whether political subdivisions possess constitutional rights. They determined and held that political subdivisions are not persons protected by the United States Constitution:

> But even though RTA and PACE are not the political subdivisions of Evanston, political subdivisions of states are not persons protected by the United States Constitution. (See *Pennsylvania v. New Jersey* (1976), 426 U.S. 660, 665, 96 S.Ct. 2333, 2335, 49 L.Ed.2d 124, 129 (people and not states are protected by the privilege and immunities and the equal protection clauses); *South Carolina v. Katzenbach* (1966), 383 U.S. 301, 323-24, 86 S.Ct. 803, 816, 15 L.Ed.2d 769, 784 (states are not protected by 5th Amendment's due process clause); *Commonwealth Edison Co. v. Department of Local Government Affairs* (1984), 126 Ill.App.3d 277, 291, 81 Ill.Dec. 549, 466 N.E.2d 1351 (municipal governmental entities *277 are not protected by 14th Amendment's due process and equal protection clauses); *Franciscan Hospital v. Town of Canoe Creek* (1979), 79 Ill.App.3d 490, 496-97, 34 Ill.Dec. 738, 398 N.E.2d 413 (municipal corporations are not protected by 14th Amendment); **907 ***567 *People v. Valentine* (1977), 50 Ill.App.3d 447, 452, 8 Ill.Dec. 696, 365 N.E.2d 1082 (municipal governmental entities are not protected by 14th Amendment); *South Macomb Disposal Authority v. Township of Washington* (6th Cir.1986), 790 F.2d 500, 505 (14th Amendment

> does not impose restrictions upon one political subdivision *vis-a-vis* another political subdivision); *Town of Ball v. Rapides Parish Police Jury* (5th Cir.1984), 746 F.2d 1049, 1051, n. 1 (a municipal corporation cannot invoke the 14th Amendment against another subdivision of the state); *El Paso County Water Improvement District No. 1 v. International Boundary and Water Commission* (W.D.Texas 1988), 701 F.Supp. 121, 123-24 (political subdivision of state could not make challenge that federal agency deprived it of its property without due process); *City of Sault Ste. Marie, Michigan v. Andrus* (D.C.1980), 532 F.Supp. 157, 167-68 (city is not protected by 5th Amendment).
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> ....
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> The reasoning that political subdivisions have only those rights which are conferred on them by the state applies logically to challenges brought under the United States Constitution by political subdivisions not only to state statutes or other state action but to the action of other political subdivisions. (See *South Macomb Disposal Authority v. Township of Washington* (6th Cir.1986), 790 F.2d 500, 505 (14th Amendment does not impose restrictions upon one political subdivision *vis-a-vis* another political subdivision). **We therefore hold that the RTA and PACE did not have 14th Amendment rights.**
> (emphasis added)

City of Evanston v. Reg'l Transp. Auth., 202 Ill. App. 3d 265, 277, 559 N.E.2d 899, 907 (1990). Ultimately, the Court determined that that no reason exists to distinguish between suits brought by a political subdivision against the state and suits brought by political subdivisions against another political subdivision. They found that the takings clauses do not apply to public property and that political subdivisions possess no constitutional rights to enforce. Those same issues prevent Georgetown County from pursuing a claim against the City of Georgetown here.

Other courts have also determined that political subdivisions do not possess constitutional rights. The 10th Circuit, among many others, found that political subdivisions do not have constitutional rights.

> It is well established that a political subdivision may not lodge constitutional complaints against its creating state. *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933); *City of Newark v. New Jersey*, 262 U.S. 192, 196, 43 S.Ct. 539, 540, 67 L.Ed. 943 (1923); *City of Trenton v. New Jersey*, 262 U.S. 182, 188, 43 S.Ct. 534, 537, 67 L.Ed. 937 (1923); *City of Moore v. Atchison, Topeka & Santa Fe Ry. Co.*, 699 F.2d 507, 511 (10th Cir.1983).

Hous. Auth. of Kaw Tribe of Indians of Oklahoma v. City of Ponca City, 952 F.2d 1183, 1188 (10th Cir. 1991).

Likewise, the 6th Circuit has held:

> It is well established that political subdivisions cannot sue the state of which they are part under the United States Constitution. *City of Trenton v. New Jersey*, 262 U.S. 182, 186–87, 43 S.Ct. 534, 67 L.Ed. 937 (1923) (With respect to political subdivisions, "the state is supreme and its legislative body ... may do as it will, unrestrained by any provision of the Constitution of the United States."); *City of Newark v. New Jersey*, 262 U.S. 192, 196, 43 S.Ct. 539, 67 L.Ed. 943 (1923) ("The regulation of municipalities is a matter peculiarly within the domain of the state."); *South Macomb Disposal Auth. v. Washington Twp.*, 790 F.2d 500, 505 (6th Cir.1986) ("The relationship between [political subdivisions] is a matter of state concern; the Fourteenth Amendment protections and limitations do not apply.").

Greater Heights Acad. v. Zelman, 522 F.3d 678, 680 (6th Cir. 2008).

The 6th Circuit has also found that municipalities do not have constitutional rights. A municipal corporation whose purpose was to dispose of solid waste brought a civil rights suit against a township alleging constitutional claims. The 6th Circuit held:

> Since corporations, both public and private, are not "citizens" within the meaning of the Fourteenth Amendment, *see, e.g., Hague v. Committee for Industrial Organization*, 307 U.S. 496, 514, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939); *Grosjean v. American Press Co.*, 297 U.S. 233, 244, 56 S.Ct. 444, 446, 80 L.Ed. 660 (1936) (private corporation); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933) (municipal corporation), they can never assert the denial of privileges and immunities under section 1983. The issue before this court is actually quite narrow: whether a political subdivision of a state receives any protection from the Due Process or Equal Protection Clauses of the Fourteenth Amendment vis-a-vis another political subdivision of the same state. We believe this question is answered by analyzing the ramifications of the relationship between the plaintiff and the defendant, as well as the nature of the claim which is asserted.
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> ....
>
> {A} municipal corporation, in its own right, receives no protection from the Equal Protection or Due Process Clauses vis-a-vis its creating state. *City of Moore v. Atchison, Topeka & Santa Fe Railway Co.*, 699 F.2d 507, 511–12 (10th Cir.1983); *Delta Special School District No. 5 v. State Board of Education*, 745 F.2d 532, 533 (8th Cir.1984); *Appling County v. Municipal Electric Authority of*

> *Georgia,* 621 F.2d 1301, 1308 (5th Cir.) (per curiam), *cert. denied,* 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980); *City of New York v. Richardson,* 473 F.2d 923, 929 (2d Cir.), *cert. denied,* 412 U.S. 950, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973); *Aguayo v. Richardson,* 473 F.2d 1090, 1100–01 (2d Cir.1973), *cert. denied,* 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1974); *County Department of Public Welfare of Lake County v. Stanton,* 545 F.Supp. 239, 242–43 (N.D.Ind.1982).
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> ....
>
> For the same reasons, a political subdivision of a state cannot challenge the constitutionality of another political subdivision's ordinance on due process and equal protection grounds. *See, e.g., City of South Lake Tahoe v. California Tahoe Regional Planning Agency,* 625 F.2d 231, 233 (9th Cir.), *cert. denied,* 449 U.S. 1039, 66 L.Ed.2d 502 (1980); *Village of Arlington Heights v. Regional Transportation Authority,* 653 F.2d 1149, 1153 (7th Cir.1981); *Town of Ball v. Rapides Parish Police Jury,* 746 F.2d 1049, 1051 n. 1 (5th Cir.1984). Therefore, the Fourteenth Amendment simply does not prescribe guidelines and impose restrictions upon one political subdivision vis-a-vis another political subdivision.

S. Macomb Disposal Auth. v. Washington Twp., 790 F.2d 500, 505 (6th Cir. 1986).

The Supreme Court of Louisiana has made a similar determination. That Court held that constitutional provisions protect only the rights of "persons" and do not protect government entities from alleged unjust government action. *Louisiana Assessors' Retirement Fund v. City of New Orleans,* 849 So.2d 1227 (La. 2003). That court found that:

> {I}t is well established the City, as a political subdivision of the state rather than a "person," is without the protections of La. Const. Ann. art. I, the Declaration of Rights Article, or the Due Process and Equal Protection Clauses of the United States Constitution. The jurisprudence has long held that municipalities are not entitled to Fourteenth Amendment protections. *Williams v. Mayor & City Council of Baltimore,* 289 U.S. 36, 40, 53 S.Ct. 431, 77 L.Ed. 1015; *Risty v. Chicago, R.I. & P. Ry. Co.,* 270 U.S. 378, 390, 46 S.Ct. 236, 70 L.Ed. 641 (1926) ("The power of the state and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment."); *Warren County, Miss. v. Hester,* 219 La. 763, 54 So.2d 12, 18 (1951), *cert. denied,* 342 U.S. 877, 72 S.Ct. 167, 96 L.Ed. 659 (1951) ("[I]t is plain that the Fourteenth Amendment of the Federal Constitution, declaring that no state shall deprive any person of life, liberty or property without due process of law nor deny any person within its jurisdiction the equal protection of the laws, is utterly without application to the political subdivisions of a state, which cannot be viewed as a person within the purview of the constitutional provision."); *Morial v. Smith & Wesson Corp.,*

> 2000-1132 (La.4/3/01), 785 So.2d 1, 13; *State ex rel. Kemp v. City of Baton Rouge,* 215 La. 315, 40 So.2d 477 (1949); 2 DENNIS JENSEN & GAIL A. O'GRADNEY, MCQUILLIN MUNICIPAL CORPORATIONS § 4.20 at 60 (3rd ed. 1996) ("Municipal corporations are political subdivisions of the state, created for exercising any governmental powers of the state as may be entrusted to them and they may not assert the protection of the due process clause against action of the state government."). See also *City of Newark v. New Jersey,* 262 U.S. 192, 43 S.Ct. 539, 67 L.Ed. 943 (1923); *City of New York v. Richardson,* 473 F.2d 923 (2nd Cir.1973); *Yonkers Comm'n on* **4 *Human Rights v. City of Yonkers,* 654 F.Supp. 544 (S.D.N.Y.1987); *Bartels v. Roussel,* 303 So.2d 833 (La.App. 1 Cir.1974); *Penny v. Bowden,* 199 So.2d 345 (La.App. 3 Cir.1967). Correspondingly, Article I of the Louisiana Constitution protects only the rights of "persons" and does not protect government entities against unjust government action.

Louisiana Assessors' Ret. Fund v. City of New Orleans, 2002-1435 (La. 2003), 849 So. 2d 1227, 1229.

Georgetown County has no constitutional rights. The great weight of authority across the United States supports that conclusion. Since an inverse condemnation claim is grounded in the Constitution, Georgetown County cannot make a claim for inverse condemnation. This rationale also fits squarely with the language the federal takings clause, which refers to rights of a "person" in the Fifth Amendment. Georgetown County is not a person for constitutional rights purposes. It also fits with both the federal and the state takings clauses which limit the prohibition on the taking of property to "private" property only. The word private is clear and unambiguous. It differentiates between private property and public property. Sound policy reasons support that differentiation. The purposes for the enactment of the takings clause supports a reading that the provision was intended to benefit only private property. The Bill of Rights that contains the federal takings clause was intended to protect the individual from the government and not to confer rights upon the government. The history, the intent and the language of the takings clauses supports only one conclusion; the takings clauses are intended

only for the benefit of private, not public property. For those reasons, Georgetown County's motion for summary judgment must be denied.[2]

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ATTORNEYS FOR THE DEFENDANT CITY OF GEORGETOWN

Columbia, SC
September 5, 2014.

[2] The SCDOT is also filing a memorandum addressing these and similar issues. The City of Georgetown joins in those arguments made by the SCDOT to the extent not inconsistent with the arguments presented here.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN)
Civil Action No.: 2013-CP-22-01062

Georgetown County,

Plaintiff,

v.

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

Defendants.

PLAINTIFF GEORGETOWN COUNTY'S REPLY BRIEF

FILED
GEORGETOWN COUNTY, S.C.
2014 DEC 29 P 2:52
ALICIA Y. WHITE
CLERK OF COURT

Plaintiff Georgetown County (the "County"), by and through its undersigned attorneys, submits this Reply Brief in response to Defendant SCDOT's Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Defendant the City of Georgetown's Brief on the Legal Issue of Whether Georgetown County Can Assert an Inverse Condemnation Claim Under the Law.

ARGUMENT

I. The County's properties are protected by the South Carolina Constitution.

a. *Contrary to the assertions of the City, the County has Constitutional Rights under the South Carolina Constitution.*

Contrary to the Defendant's assertion, the County and other municipalities have constitutional rights under the South Carolina Constitution. For instance, Art. 8, Section 10 prohibits laws of special application. In *Kizer v. Clark*, the Plaintiff, City of Charleston brought an action challenging S.C. Code § 5-1-30 (B) as special legislation in violation of the South Carolina Constitution. *See generally Kizer v. Clark*, 360, S.C. 86, 600 S.E.2d 529 (2004). The Court there held in favor of the City, and held the provision unconstitutional special legislation.

The South Carolina Constitution also provides a right to counties and municipalities to consent to certain laws prior enactment by the General Assembly. S.C. Const. Art. VIII, § 15. This provision has provided the basis for counties and municipalities to maintain an action. *See e.g. City of Aiken v. Aiken Electric Co-op, Inc.*, 305 S.C. 466, 409 S.E.2d 403 (1991); *City of Cayce v. AT&T Communications of the Southern States, Inc.*, 326 S.C. 237, 486 S.E.2d 92 (1997).

Article VII, Section 5 gives a right to the counties in that, "[i]n the formation of new Counties no old County shall be cut within eight miles of its courthouse building." S.C. Const. Art. VII, § 5.

Article VII, Section 7 further provides a right to the County. *See* S.C. Const. Art. VII, § 7; *Clarendon County v. Sumter County*, 116 S.C. 258, 108 S.E.103 (1921).

As clearly illustrated, the County possesses rights under the South Carolina Constitution which have been protected by the courts of the State of South Carolina, including under Art. I, § 13 of the South Carolina Constitution.

i. *Rights under the United States Constitution.*

South Carolina Takings Clause analysis follows the analysis of the Federal Takings Clause. *See e.g. Byrd v. City of Hartsville*, 365 S.C. 65, 656 n.6, 620 S.E.2d 437, 441 (2005). The Defendants assert that the bill of rights, and specifically the Fifth Amendment to the United States Constitution, protects only "persons" and further that the County is not a "person" within the meaning of the Fifth Amendment. However, as discussed in Plaintiff's Brief in Support of Its Motion for Summary Judgment, under Federal Takings Clause analysis, states, counties, municipalities and other political subdivisions are protected against uncompensated takings by the Federal government under the Takings Clause of the Fifth Amendment. *See e.g. Arkansas*

Game and Fish Com'n v. U.S., 133 S.Ct. 511 (2012) (Holding a taking of the Commission's lands requires the payment of just compensation).

The full text of the Fifth Amendment to the United States Constitution states:

> No **person** shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any **person** be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

Each clause of the Fifth Amendment, by its very terms, applies only to persons *except* the Takings Clause. Art. I, § 13 of the South Carolina Constitution does not mention the word "person." Applying the Federal Takings Clause analysis requires payment of just compensation by the SCDOT and City.

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

This is a matter of first impression in South Carolina. Courts in other jurisdictions, considering the exact issue here, have held that where the state or a political subdivision thereof takes property belonging to another political subdivision, just compensation must be paid. *See e.g. Marin Mun. Water Dist. v. City of Mill Valley*, 202 Cal. App. 3d 1161, 249 Cal. Rptr. 469 (Ct. App. 1988); *State ex. rel. State Highway Commissioner v. Cooper*, 24 N.J. 131 A.2d 756 (1957); *City of Three Forks v. State Highway Commission*, 156 Mont. 392, 480 P.2d 826 (Mont. 1971); *Highline School Dist. No. 401, King County v. Port of Seattle*, 87 Wash. 2d 6, 548 P.2d 1085 (Wash 1976); *City of Chester v. Com., Department of Transportation*, 495 Pa. 382, 434 A.2d 695 (1981); *State ex. rel. Ala. State Docks Dept. v. Atkins*, 439 So.2d 128 (Ala. 1983);

Donnaher v. State, 1 Morr.St.Cas. 374 (Miss. 1847). As stated above, under the Federal Takings Clause analysis, the SCDOT and City likewise must pay the County for uncompensated takings.

Defendants SCDOT and the City rely upon *Edgefield County v. Georgia Carolina Power Co.* to state that "public property" does not fall within the protection of the Constitution. 104 S.C. 311, 88 S.E. 801. As fully quoted, *Edgefield County* stated, "**The defendant further asserts** that the county had no such ownership of the highway and ferry as to render their serious impairment by the defendant a wrong to the plaintiff, and that the constitutional prohibition to take private property without making compensation therefor has no application to the taking of public property." 88 S.E. at 806 (emphasis added). The Court went on to state in dicta:

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

88 S.E. at 807 (emphasis & bold added).

As noted in *Edgefield County*, at the time that case was decided, "[t]he Constitution of 1895... by implication left the government of the counties in the hands of the Legislature." 88 S.E. at 806. The Court also opined that at that time, "under the Constitution and laws of the state, the state [General Assembly] ha[d] absolute control over the government of counties." *Id.* That is not the case today, as the government of the counties is no longer in the hands of the General Assembly as a consequence of South Carolina's movement to local government "home rule" in 1975.

Interestingly, at the time *Edgefield County* was decided, the property at issue was ultimately the property of the State, not Edgefield County. This is not the case with regard to the County's properties. Unlike in *Edgefield County*, it is the County and not the State of South Carolina which has set apart the County's property for a public purpose. It is not the property of the State, and the State does not exercise control over the County's properties. The General Assembly has not expressly subjected the County's properties, including the Georgetown County Judicial Center, to "another or higher purpose." *Edgefield County* was decided in a time when the State controlled the Counties, which was abrogated in 1975.

Edgefield County was not decided upon Constitutional grounds. Any indication in the opinion that the County's properties are not protected by the Constitution was not decisive to the court's opinion, and is therefore non-binding dicta.

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

Ordinarily, if a statute (or constitutional provision) is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. *Ray Bell Const. Co., Inc. v. School Dist. of Greenville County*, 331 S.C. 19, 25-26, 501 S.E.2d 725, 729 (1998). However,

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

Id. at 26, 501 S.E.2d at 729 (citations and emphasis in original omitted)(emphasis added). As stated by our Supreme Court, "[t]he purpose of the Takings Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 429, 548 S.E.2d 595, 601 (2001).

In the context of the Takings Clause, one court has noted, that to hold a public entity is not entitled to compensation, "would lead *to a highly absurd*, and to the district [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 district.". *City of Chester v. Com., Dept. of Transportation*, 495 Pa. 382, 394, 434 A.2d 695, 702 (1981)(emphasis added).

In order to give meaning to the Takings Clause's purpose, the SCDOT, who can spread the burden to the public as a whole, should bear the burden of the damages to the County's buildings. This Court must construe Art. I, § 13 so as to escape the possible absurdity which would be worked if the County were forced to bear the burdens, which, in fairness and justice, should be borne by the public entity which caused the damages. Further, the 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, has caused.

d. Contrary to the assertions of the City, it is irrelevant to the County's inverse condemnation claims whether the City has eminent domain power.

"As 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 and Rec. Commission*, 361 S.C. 476, 481, 605 S.E.2d 563, 566 (Ct. App. 2004). In *Mowrer*, the trial court held the

plaintiff failed to prove the commission had the authority to commit the acts on which the complaint was based and granted the commission's motion for directed verdict. *Id.* at 481, 605 S.E.2d at 565. Our Court of Appeals held that whether the defendants had the authority to commit the acts about which the plaintiff complained was not relevant to the question of whether these acts amount to an unconstitutional taking for public use. *Id.; accord Baker v. Burbank-Glendale-Pasadena Airport Authority,* 39 Ca.3d 862, 867, 705 P.2d 866, 868-9 (1985).

As stated by one court, "[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. *Department of Forest, Parks and Recreation v. Town of Ludlow Zoning Board,* 177 Vt. 623, 628, 869 A.2d 603, 609 (Vt. 2004). Liability for inverse condemnation is grounded in the constitution, not in a statutory power of eminent domain or on tort. *Mowrer,* 361 S.C. at 481 n. 8, 605 S.E.2d at 565 n. 8; *Baker* 39 Ca.3d at 867, 705 P.2d at 868-9.

Regardless of whether the SCDOT and City had the authority to directly condemn the County's properties through the institution of an eminent domain proceeding, the SCDOT and City are liable to the County for taking its properties through inverse condemnation. As set forth in more detail in Plaintiff Georgetown County's Memorandum of Law in Support of its Motion for Summary Judgment, the Affidavit of George.A. Sembos, P.E, and the Supplemental Affidavit of George Sembos, P.E., the SCDOT and City undertook a Drainage Project in the downtown area of Georgetown. The SCDOT and City are, just as the Parks and Recreation Commission in *Mowrer,* arms of the State of South Carolina, and subject to liability for inverse condemnation regardless of whether they have been delegated the eminent domain power to condemn the County's properties.

II. South Carolina does not recognize the governmental-proprietary distinction.

Virtually all of the cases cited by both the SCDOT and City regarding the issue of taking of public property were decided upon the governmental-proprietary distinction. *See generally, 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) (applying the governmental-proprietary distinction in holding the *New Mexico* Constitution did not protect *governmentally owned* property, but finding the county was due compensation under certain condemnation statutes.); *City of Cambridge v. Commissioner of Public Welfare*, 357 Mass. 183, 257 N.E.2d 782 (Mass. 1970) (stating that property held in the private or proprietary capacity is not subject to legislative control, but that property held in the governmental capacity is subject to legislative control). This distinction is relied upon in a dwindling number of other jurisdictions to hold that properties which are held by a municipal government or county in their governmental capacity are not protected under the takings clause, while those held in their proprietary capacity are protected under the Takings Clause.

South Carolina does not recognize the governmental-proprietary distinction. *Boyce v. Lancaster County Natural Gas Authority*, 266 S.C. 398, 402, 223 S.E.2d 769, 770 (1976) ("This Court has consistently refused to recognize a distinction between governmental and proprietary functions of a municipal corporation. We refuse to draw the distinction here") (internal citations omitted).

To the extent the SCDOT and City rely upon the governmental-proprietary distinction, or cases based upon such a distinction, their reliance is misplaced. This Court should disregard such cases as irrelevant, as our Supreme Court has plainly declined to recognize the governmental – proprietary distinction in any context.

III. South Carolina Eminent Domain Procedure Act provides that the County is entitled to just compensation

If the Court finds the County is not protected from unconstitutional takings under the South Carolina Constitution, the County is nevertheless 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 § 28-2-10 *et. seq.* S.C. Code § 28-2-20 (1987). 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 § 28-2-90 (1987). 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 § 28-2-30 (6) (1987). "Person" includes not only a natural individual, but also a public entity. S.C. Code § 28-2-30 (16) (1987). The County is therefore an express condemnee under the Act.

"Inverse condemnation is a cause of action by a property owner against a governmental entity to recover the value of property that has been effectively 'taken' by the governmental entity, although not through the process of eminent domain." *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 170, 714 S.E.2d 869, 977 (2011). "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[1] has a record interest in all of the County's properties which are the subject of this lawsuit. *See* (Complaint ¶ ¶ 9-10). Therefore, in order to condemn the County's properties, the SCDOT and City must have proceeded under the Act. Under the Act, the SCDOT and the City must pay just compensation. Otherwise, the SCDOT and City are liable to the County in inverse condemnation.

In a case cited by the SCDOT, *Board of Commissioners of Dona Ana County, supra,* the court, in applying the governmental- proprietary distinction, which as previously stated does not apply in South Carolina, found that the county's buildings were not protected. However, the *Board of Commissioners of Dona Ana County* Court determined that the New Mexico Procedure for eminent domain required the payment of just compensation. *Board of Commissioners of Dona Ana County*, 72 N.M. 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.* Likewise, the Act not only defines the County as a condemnee, it also treats all condemnees the same in determining the amount of compensation to which the condemnee is entitled. *See generally*, S.C. Code § 28-2-10 *et. seq.*

The 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 provided for the taking of any property, including public entities such as the County. The SCDOT and City cannot circumvent the Act and thereby avoid payment of just compensation. To allow the SCDOT and City to circumvent the Act would not only be contrary

[1] The County and SCAGO Public Facilities Corporation for Georgetown County each have an undivided record interest in the Judicial Center pursuant to that certain Base Lease and Conveyance Agreement dated December 1, 2009, recorded December 1, 2009 in the Register of Deeds for Georgetown County, South Carolina in Book 1383 at Page 253 and that certain Installment Purchase and Use Agreement dated December 1, 2009, recorded December 1, 2009, in the Register of Deeds for Georgetown County in Book 1383 at Page 277.

to the General Assembly's stated purpose of the Act, that all eminent domain powers be exercised through the Act, but would also work an absurdity, if this Court also found that the County's properties are not protected under the Constitution. Just as in *Board of Commissioners of Dona Ana County*, the General Assembly has expressed its intention that the County be compensated under the Act.

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

IV. Public policy requires the payment of just compensation.

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

In *Board of Commissioners of Dona Ana County*, a case heavily relied upon by the SCDOT, the Court stated:

> We would add a word to the effect that any other conclusion might lead to most incongruous results. 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 court house 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 or, possibly, even prohibited by debt limitations pertinent to the subdivision. Since the highways are state projects paid for by the public of the state at large, including in many instances contribution by the federal government,

> *it is only just and proper for compensation when public property is taken for highway 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.***

Board of Commissioners of Dona Ana County, 72 N.M. at 93, 380 P.2d at 835 (emphasis & bold added).

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

CONCLUSION

For the foregoing reasons, the County respectfully submits that it is protected by the South Carolina Constitution, from uncompensated takings by the SCDOT and the City. The

requirement of just compensation under the South Carolina Constitution prevents the plainly absurd alternative result and accomplishes the intent of the Framers of the Constitution, to prevent forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Respectfully submitted,

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Attorneys for the Plaintiff

December 17, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
GEORGETOWN COUNTY Plaintiff, vs.	Civil Action No.: 2013-CP-22-1062
Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown Defendants	**DEFENDANT SCDOT'S RESPONSE BRIEF**

FILED
GEORGETOWN COUNTY, S.C.
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ANNA Y. WILLIS
CLERK OF COURT

TO: GEORGETOWN COUNTY, PLAINTIFF AND THEIR ATTORNEYS JAMES S. MEGGS, GEORGE A. TAYLOR, ESQUIRE AND WESLEY P. BRYANT, ESQUIRE:

he Defendant South Carolina Department of Transportation ("SCDOT"), by and through its undersigned attorneys, hereby submits this Brief in response to Plaintiff's Reply Brief in support of Plaintiff's motion for summary judgment on their claim for inverse condemnation.

ARGUMENT

I. The County does not have a right to maintain an action for inverse condemnation against SCDOT.

Although the South Carolina Constitution has provided counties and municipalities the right to maintain an action in certain instances, this does not include an action for inverse condemnation against another governmental entity. The cases Plaintiff cites in which they allege give counties and municipalities the right to maintain an action, *City of Aiken v. Aiken Electric Co-op, Inc.* and *City of Cayce v. AT&T Communications,* do not deal with inverse condemnation or eminent domain. These cases are irrelevant and do not address the issue of whether a county may maintain an action for inverse condemnation against another governmental entity.

"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, 59 (1949); Attorney General Opinion No. 87-76. "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. Atty. Gen. 196 Footnote 1 (citing Richland Co. Rec. Dist. v. Cola., 348 S.E.2d 363, 364 (1986); Hibernian Soc. v. Thomas, 319 S.E.2d 339 (S.C.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."

II. The County's properties are excluded from the Constitutional protection against taking of private property without compensation.

SCDOT's argument that Plaintiff may not maintain an inverse condemnation action is premised on the understanding that county-owned property does not fall under the constitutional protection against the uncompensated taking of private property. To determine whether or not the County's property falls within the protection of the Constitution, the language of the Takings clause itself should be reviewed. "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 Mount Pleasant*, 250 S.C. 291, 294 (2002). "A word used in the Constitution should be given its 'plain and ordinary' meaning." *Id.* The S.C. Constitution provides:

S.C. Constitution Art. I §13 Taking **private property.**

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 therefor. (1970 (56) 2684; 1971 (57) 315.)

S.C. Const., art. I, §13 (Rev. 1991)(emphasis added).

The Title of S.C. Constitution Art. I §13 is "Taking **Private Property.**" The Constitution specifically includes the word private. Likewise, The Takings Clause of the U.S. Constitution states, "nor shall **private property** be taken for public use, without just compensation." U.S.C.A. Const. Amend. V (emphasis added). Looking at the plain and ordinary meaning of the terms of the Takings Clause of both the South Carolina and U.S. Constitution, the County's property, which Plaintiff admits is public, does not fit within the framework.

The issue of whether County properties are excluded from the Constitutional protection against uncompensated takings of private property is not a matter of first impression in South Carolina as argued by Plaintiff in their brief. The issue is addressed by *Edgefield County v. Georgia-Carolina Power Co.*, 104 S.C. 311, which SCDOT cites in its supplemental memorandum for this proposition. Plaintiff 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 the Court addresses the issue of whether public property falls under the protection of the Constitution and states, "And 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.*, 88 S.E. 801, 807 (1916).

Plaintiff cites cases from other jurisdictions which have addressed the issue and found that compensation is due. However, the case law is split on the issue. There are jurisdictions that have addressed the issue and reached contrary results, finding that property owned by a political subdivision may be taken without compensation. *See City of Cambridge v. Commissioner of Public Welfare*, 357 Mass. 183, 186 (Mass.S.Ct. 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 (Mass. S.Ct. 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 District v. State*, 424 A.2d 15 (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."); *Dept. of Highways v. City of New Orleans*, 360 So.2d 624 (La. 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).

III. The Eminent Domain Procedures Act is inapplicable to an action in inverse condemnation.

Plaintiff agrees with SCDOT's position that whether SCDOT has eminent domain powers is irrelevant to any liability for inverse condemnation. Inverse condemnation is separate and distinct from eminent domain powers. While eminent domain is governed by statute, liability for inverse condemnation, which plaintiff agrees, is based solely on the constitution. *See Vick v. South Carolina Dept. of Transp.*, 347 S.C. 470, 480, 556 S.E.2d 637 (Ct. App. 2001); *Horry County v. Insurance Reserve Fund*, 344 S.C. 493, 44 S.E.2d 637 (Ct. App. 2001). Looking to the language of the Constitution, the Takings Clause only applies to private property.

The Plaintiff's argument that it is entitled to compensation under the South Carolina Eminent Doman Procedures Act should be disregarded. Plaintiff previously argued to the contrary that eminent domain does not apply to this case. "The term **'inverse condemnation'** describes an action grounded, not on statutory condemnation power, but on the **constitutional** proscription against the taking or damaging of property for public use without just compensation." *Vick v. South Carolina Dep't of Transp.*, 347 S.C. 470, 480, 556 S.E.2d 693, 698 (Ct.App.2001). *Hawkins v. City of Greenville*, 358 S.C. 280 (Ct. App. 2004). **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. *Kiriakides v. Sch. Dist. of Greenville County*, 382 S.C. 8, 675 S.E.2d 439 (2009). "An **inverse condemnation** may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property." *Byrd v. City of Hartsville*, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005).*Carolina Chloride, Inc. v. Richland County* 394 S.C. 154 (2011). As plaintiff's action is for inverse condemnation, the Eminent Domain Procedures Act is inapplicable.

IV. South Carolina has determined that all functions of governmental entities are public.

Plaintiff argues that South Carolina does not recognize a distinction between a proprietary and governmental function of a governmental entity. South Carolina has determined that all functions of governmental entities are considered public and governmental. *See McKenzie v. City of Florence*, 234 S.C. 428 (1959) The court in *McKenzie* stated: "In many jurisdictions the courts have drawn a distinction between municipal activities that are governmental and those that are in the field of business rather than of government and are loosely referred to as proprietary. But no such distinction is made in this state; all functions

exercised by municipal corporations under powers constitutionally granted to them by the General Assembly are considered public and governmental." *McKenzie v. City of Florence*, 234 S.C. 428 (1959)(overruled on other grounds); *Wells v. City of Lynchburg*, 331 S.C. 296 (Ct. App. 1998) ("all functions exercised by municipal corporations under powers constitutionally granted to them by the General Assembly are considered public and governmental.") Further, in its brief County admits that it has set apart its property for a public purpose. (See Georgetown County's Reply Brief p. 5). As the property is not private and is subject to a public use, the County's property is not subject to protection under the Takings clause. Further, the cases cited by SCDOT in its supplemental memorandum should be relied upon by the Court in this regard.

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

Here, the terms of the Takings Clause are plain and unambiguous and should be applied by the Court. "The 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 on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 429, 548 S.E.2d 595, 601 (2001). Here, any burden would not be borne by certain individuals alone as would be the case with private property. Instead, the burden would fall to the public, the taxpayers of Georgetown County. Likewise, if the State was found to be required to compensate the County, the taxpayers which represent Georgetown County would still share in the burden. Shifting the burden to the state would not remove the burden from the County, since the County is but an arm of the State.

Further, 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 Hwy. Dept. of S.C.*, 191 S.C. 19 (1939).

The South Carolina legislature is vested with authority by our Constitution to direct by law in what manner claims against the State may be established and adjusted. S.C. Code Ann. Constitution Art. X § 10, XVII, § 2 (Rev. 2009). The South Carolina legislature has not provided for payment of claims by the County for damage to a county property alleged as a result of a public property. The General Assembly could, by law passed in due course, cause payment by the Department to a county in a fact situation such as the present one- but it has not done so. The terms of the Constitution are clear on their face, protecting only private property, and should be applied by the Court. To hold otherwise, would lead to a result contrary to the intent of the legislature.

Respectfully submitted by:

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February 13, 2015

Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF GEORGETOWN	)	
Georgetown County,	)	
Plaintiff,	)	C/A #: 13-CP-22-01062
v.	)	
Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., the South Carolina Department of Transportation and the City of Georgetown,	)	**CITY OF GEORGETOWN'S BRIEF IN OPPOSITION TO SUMMARY JUDGMENT**
Defendants.	)	

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CLERK OF COURT

Georgetown County has moved for summary judgment and filed three different briefs. The County filed a brief in support of its motion and the SCDOT filed a brief in opposition. The Court requested the parties brief the legal issue of whether a governmental agency can, as a Plaintiff, bring an action for inverse condemnation since the Takings Clause of the South Carolina Constitution applies only to "private" property. The City, SCDOT and the County all filed briefs on this issue. The County subsequently filed a response. SCDOT has filed a response. The City now files its brief in opposition to the motion for summary judgment and in response to the County's brief on the legal issue of whether the County can bring an inverse condemnation action when the Takings Clause applies only to private property.

The City did not commit any affirmative act which can be the basis of a claim for inverse condemnation and therefore, the Counties motion for summary judgment must be denied.

The City opposes Georgetown County's motion for summary judgment on several grounds. First, and most basically, the City contends that there is no evidence in this record to support any claim that the City inversely condemned County property as a factual matter. The

elements of an action for an inverse condemnation are: (1) affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is for a public use. *Carolina Chloride v. South Carolina Dept. of Transportation*, 706 S.E.2d 501, (2011); *Byrd v. City of Hartsville*, 620 S.E.2d 76, 70 (2005). Here, the Plaintiff cannot prove any affirmative conduct by the City of Georgetown.

Plaintiff relies on an affidavit of George Sembos, their expert engineer. Sembos' affidavit recites that he believes that the drainage project caused damage to County property. However, Sembos affidavit is silent as to any affirmative act by the City of Georgetown. The record created by the County is insufficient to demonstrate any affirmative act by the City that led to damage to County buildings. The record is silent on that point for good reason – there is no affirmative act by the City that contributed to this situation as this was not a City project. In its brief of August 5, 2014, the County contends that the affirmative acts are the construction of the drainage project, installation of king piles and subsequent dewatering. See County's August 5, 2014 Brief @ p. 7. However, the County has offered no evidence that the City undertook the construction of the drainage project, the installation of the king piles or the dewatering of the pond. To the contrary, the evidence is clear that the construction of the drainage project was by Republic Contracting Corporation under contract with SCDOT, not the City of Georgetown. The installation of the king piles and the dewatering of the pond were likewise performed by Republic under contract with SCDOT, not by the City of Georgetown. The County's motion for summary judgment must be denied on that basis.

Moreover, the City relies upon the Affidavit of Lane Mixon. Mr. Mixon was employed by the City of Georgetown from 1995 until 2012 in various capacities including Civil Engineer, Engineering Manager and Water Utilities Director. His affidavit leads to the conclusion that the

City was not in control of this project as it was a SCDOT project. The City did not issue the request for proposals for engineering design services. The city did not award the engineering design services contract to Davis and Floyd. The City did not request bids for construction of the project once the engineering design was complete. The City did not award a contract for construction to Republic Contracting. The City did not enter any contract for engineering construction and inspection services with Davis and Floyd. The City had no contract with Davis and Floyd's subcontractor, S&ME. In short, this was not a City project and the City did not place the king piles or pump water from the pond. The City had no supervision or control over the construction of this project. There is no affirmative act upon which a claim of inverse condemnation can be based. Therefore, the County's motion for summary judgment as to the inverse condemnation claim must be denied.

Inverse condemnation applies only to a taking of "private" property and Georgetown County's property is not private.

The City contends that a governmental entity cannot bring an inverse condemnation claim because the constitutional provision against the taking of property applies only to "private" property. Georgetown County argues that the word "private" does not mean what it says and that is should be read out of the constitutional provision. The County does not offer any alternative for what the word "private" was intended to mean, simply because there is no reasonable alternative to argue.

The County points out in brief that some federal cases allow local governments to pursue inverse condemnation cases against the United States. The United States is not a party to this proceeding and those cases interpreting the application of the Fifth Amendment to the rights of the United States versus the states or local governments is not in issue here. Instead, the issue is whether a political subdivision of the South Carolina can bring an action in inverse

condemnation against another political subdivision under the South Carolina Constitution. While the City acknowledges that some states have held that such an action can proceed, the City asserts that the more reasoned view is found in the cases declining to allow that type of claim. First, a plain reading of the South Carolina Constitution dictates the conclusion that the South Carolina Takings Clause applies to "private" property, not public property. Second, the Constitution is a charter of negative powers, that is, it prevents the government from depriving its citizens of basic rights. The Constitution was never designed or intended to protect the government. That is certainly consistent with the limitation of the Takings Clause to private property. Third, 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 Company*, 88 S.E.. 801, 807, where the Court stated "And it is true that, if the company should thereby flood the private property of the citizen, then under constitutional protection it would need to make compensation .... But public property, we think, does not fall within the protection of the Constitution." The County's remedy, if any, is in tort, not in inverse condemnation.

The awarding of compensation in inverse condemnation would work an absurdity against the City.

The County also argues that to find no inverse condemnation would work an absurdity. However, the County's argument plainly does not apply to the City and instead would work an absurdity if compensation were allowed. The County contends that the purpose of the Takings Clause is to prevent the government from forcing some people alone to bear public burdens which, in all fairness, should be borne by the public as a whole. County Brief of December 17, 2014 @ p.6. The County then argues that to give meaning to the Takings Clause's purpose, the burden should be spread to the public as a whole through the SCDOT. Interestingly, the County

omits any mention of the City in this portion of its argument. The County contends that SCDOT, as an arm of the State, can spread this burden over the taxpayers of the entire State, not just the taxpayers of a smaller entity, the County.

Clearly, that argument does not apply to the County's claim against the City, since the City taxpayers are a smaller subset of County taxpayers and to spread the burden to the City. taxpayers would certainly not be spreading the burden a public as a whole greater than the County. The County's stated purpose of the Takings Clause – to prevent the government from forcing some people alone to bear public burdens which should be borne by the public as a whole – fails when applied to the City. Applying the Takings Clause to the city would indeed result in an absurdity in narrowing the allocation of alleged burden to a smaller subset of County taxpayers – just those who live within the City limits.

The proprietary/governmental distinction is not recognized in South Carolina and is not a basis to distinguish any cases relied upon by the City.

The County correctly points out that South Carolina does not recognize a governmental-proprietary distinction. However, that has no impact in this case or in the cases cited by the City or by SCDOT. In those cases, the courts held that public property held for governmental purposes was not "private" property under the Takings Clause. In South Carolina, all property held is for a governmental purpose and therefore is not "private" property subject to the Takings Clause. That attempt to distinguish those cases has no merit because the properties at issue in those cases were found to be governmental properties like those in this case. The fact that some properties in those states might be held in a proprietary capacity makes no difference because it did not affect the result in those cases.

Conclusion

The City did not commit any affirmative act that resulted in an inverse condemnation. There is no evidence in this record of any such affirmative act by the City. Instead, the only evidence demonstrates that there was no such act committed by the City. Since the Plaintiff cannot prove the first element of an inverse condemnation, the County's motion for summary judgment must be denied.

Further, the County does not own private property. The Takings Clause is limited to private property rather than public property. Additionally, awarding compensation in inverse condemnation against the City would work an absurdity by the very argument put forth by the County. For those reasons, the motion must be denied.

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ATTORNEYS FOR THE DEFENDANT
CITY OF GEORGETOWN

Columbia, South Carolina

April 28, 2015

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS
Georgetown County, Plaintiff, v. Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., the South Carolina Department of Transportation and the City of Georgetown, Defendants.	)	C/A #: 13-CP-22-01062 AFFIDAVIT OF LANE MIXON

PERSONALLY APPEARED BEFORE ME, Lane Mixon, who first being duly sworn deposes and states as follows:

1. I was employed by the City of Georgetown from 1995 until 2012, in various capacities including Civil Engineer, Engineering Manager and Water Utilities Director. Because of that I am familiar with the storm drain project in Georgetown. The City of Georgetown provided partial funding for the project.

2. Davis & Floyd was the design engineer for this project. The City of Georgetown did not award the initial contract for engineering design services, nor did the City request proposals for engineering design services for this project.

3. The City of Georgetown did not award any contract to Republic for construction of the project.

4. The City of Georgetown did not award any contract for construction engineering and inspection services. Davis & Floyd was awarded a contract for the construction, engineering, and inspection by SCDOT.

5. The City of Georgetown had no supervision or control over the construction of the project other than the relocation of City owned utilities such as water and electrical.

6. After the initial design of the project was complete, the SCDOT bid the project and the bids came back too high. The design contract for the project was then assigned to the City of Georgetown by SCDOT for the purpose of rebidding. The project was rebid and the bids came back too high once again. In practice, the SCDOT took back over the project, rebid the project, awarded a construction contract to Republic, and the City had no further role in the construction of the project other than partial funding.

7. The vast majority of the funding for this project came from sources other than the City of Georgetown.

FURTHER AFFIANT SAYETH NOT.

Lane Mixon

SWORN TO BEFORE ME THIS 5th

DAY OF AUGUST, 2014

NOTARY PUBLIC FOR S.C.

COMMISSION EXPIRES: 10/20/18

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	Civil Action No.: 2013-CP-22-01062
Georgetown County,	)	
	)	
Plaintiff,	)	**NOTICE OF MOTION AND MOTION TO RECONSIDER, ALTER OR AMEND, PURSUANT TO RULE 59(e)**
	)	
v.	)	
	)	
Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc., The South Carolina Department of Transportation and The City of Georgetown,	)	
	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2015 NOV 13 P 4:31
ALMA Y. WHITE
CLERK OF COURT

TO: J.J. ANDERSON, ESQUIRE AND LISA A. REYNOLDS, ESQUIRE, ATTORNEYS FOR DEFENDANT THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION; DAVID L. MORRISON, ESQUIRE AND KASSI B. SANDIFER, ESQUIRE, ATTORNEYS FOR THE CITY OF GEORGETOWN; J. PATRICK NORRIS, ESQUIRE, ATTORNEY FOR DEFENDANT DAVIS & FLOYD, INC.; and R. DAVIS HOWSER, ESQUIRE, ATTORNEY FOR DEFENDANT S&ME, INC.:

YOU WILL PLEASE TAKE NOTICE that Plaintiff Georgetown County (the "County"), by and through its undersigned attorneys, will move pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for an order from this Honorable Court to reconsidering, altering, or amending this Court's Order Denying Plaintiff's Motion for Summary Judgment and Ruling as a Matter of Law that the Plaintiff Cannot Maintain an Action for Inverse Condemnation dated November 4, 2015 (the "Order"). 'Plaintiff moves this Honorable Court to (i) reconsider, alter or amend its ruling in the Order and find the County is protected under the South Carolina Constitution against uncompensated takings; (ii) rule upon certain arguments of the County that the Court failed to address in the Order including (a) the Eminent Domain Procedure Act, S.C. Code § 28-2-10, *et. seq.* and State Authorities Eminent Domain Act, S.C.

Code § 28-3-20, *et. seq.*, require payment of just compensation to the County; (b) public policy requires payment of just compensation to the County for the takings by the City and SCDOT; and (c) where applying the plain and unambiguous meaning of words to constitutional provisions would result in absurd results, the court should seek to escape the absurdity and (iii) in the event the Court rules the County is entitled to just compensation under (i) or (ii) above, rule that the County is entitled to summary judgment on its inverse condemnation cause of action.

ARGUMENT

Plaintiff incorporates herein by this reference all arguments made in its Memorandum in Support of Its Motion for Summary Judgment, filed August 25, 2014 (the "Memorandum"); its Brief in support of its Motion for Summary Judgment filed September 17, 2014 (the "Brief"); its Reply Brief filed December 29, 2014 (the "Reply"); and those arguments made during the hearings on this matter. To aid the court in making its decision, Plaintiff has reiterated certain arguments herein.

I. The Court should reconsider its ruling and find that the County is protected by Art. I., § 13 of the South Carolina Constitution.

In the Order, the Court found that the Takings Clause of the South Carolina Constitution does not protect the County's properties because they are "public property" and thus are not "private property" protected under the Takings Clause. The Court held that "[s]ince Georgetown County's property such as the courthouse is public property, the takings clause has no application.

The County moves this Court to reconsider, alter or amend its ruling set forth in the Order that the County is not protected by Art. I, § 13 of the South Carolina Constitution. As more fully discussed in the County's Brief and the County's Reply, the County is entitled to protection from uncompensated takings by Article I, Section 13 of the South Carolina

Constitution of 1895. *See e.g., Marin Mun. Water Dist. v. City of Mill Valley*, 202 Cal. App. 3d 1161, 249 Cal. Rptr. 469 (Ct. App. 1988) (Holding the public water district suffered no less of a taking than if the property were owned by an individual and that the district stated a cause of action in inverse condemnation for unintentional physical damage to its property); *State ex. rel. State Highway Commissioner v. Cooper*, 24 N.J. 261, 131 A.2d 756 (1957) (Impliedly overruling New Jersey precedent on the governmental – proprietary distinction and stating if the breadth of previous case doctrine were followed it would lead to the startling result that "the State [could] appropriate, for wholly unrelated public purposes and without just compensation, various municipal properties such as town halls and schoolhouses..."); *City of Three Forks v. State Highway Commission*, 156 Mont. 392, 480 P.2d 826 (Mont. 1971) (Holding that the property was owned by the city, not the State of Montana, and that compensation must be paid for property of the City taken by the State); *Highline School Dist. No. 401, King County v. Port of Seattle*, 87 Wash. 2d 6, 548 P.2d 1085 (Wash. 1976) (en banc) (Reversing a grant of summary judgment on inverse condemnation against the condemnee school district and stating that where a condemnee governmental unit is obligated to furnish services which require use of the property taken, just compensation must be paid); *City of Chester v. Com., Dept. of Transportation*, 495 Pa. 382, 434 A.2d 695 (1981) (Holding that the Pennsylvania Constitution does not allow the Commonwealth to escape its financial obligation owed to a public condemnee for property taken); *State ex. rel. Ala. State Docks Dept. v. Atkins*, 439 So.2d 128 (Ala. 1983) (Holding Mobile County was entitled to compensation for the taking of its roadway by the State of Alabama); *Donnaher v. State*, 1 Morr.St.Cas. 374 (Miss. 1847) (Holding that the railroad company must pay just compensation to the City of Jackson to have a right to construct a railroad through the public streets). The South Carolina Supreme Court has held that property

acquired and devoted to a public use may be condemned by the SCDOT. *Riley v. South Carolina State Hwy. Dept.*, 238 S.C. 19, 26, 118 S.E.2d 809, 812 (1961) (Implying that compensation must be paid to an orphanage where the SCDOT was allowed to condemn). It follows that compensation must be awarded for property which may be condemned.

Many of the cases cited by the South Carolina Department of Transportation (the "SCDOT") and the City of Georgetown (the "City") rely upon a governmental-proprietary distinction, *e.g. City of Cambridge v. Commissioner of Public* Welfare, 357 Mass. 183, 257 N.E.2d 782 (Mass. 1970), which is not followed in South Carolina. *E.g. Boyce v. Lancaster County Natural Gas Authority*, 266 S.C. 398, 402, 223 S.E.2d 769, 770 (1976) *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). These cases should be given no weight.

Further, the County has a vested property right which cannot be taken without just compensation. *See* S.C. Code § 4-1-10 (1976); S.C. Code § 4-17-10 (1976); 1975 S.C. Op. Atty. Gen. 243 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4194; 1975 WL 22491; *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 93, 100-101 (1860).

South Carolina courts have consistently relied upon the Federal Takings Clause analysis. *See Byrd v. City of Hartsville*, 365 S.C. 650, 656 n.6 and 659 n. 9, 620 S.E.2d 76, 79 n.6 and 81 n. 9 (2005); *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); *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). Under the Takings Clause of the United States Constitution, the Federal government must compensate state and local governments for the taking of their properties. *See e.g. Arkansas Game and Fish Com'n v. U.S.*, 133 S.Ct. 511 (2012)

(Finding a taking of the Commission's lands requiring compensation); *Town of Bedford v. U.S.*, 23 F.2d 453 (1st Cir. 1927) (Stating the Federal government is a stranger to the town and that the Federal government can no more take, without compensation a town's property rights, than it can those of an individual); *U.S. v. State of Ark.*, 164 F.2d 943 (8th Cir. 1947) (Reciting the "fundamental principle" that a public authority *must* be awarded the actual money loss which will be occasioned by the condemnation); *U.S. v. Board of Ed. Of Mineral County*, 253 F.2d 760, 764 (4th Cir. 1958) ("The [municipal] owner must be put in as good position pecuniarily 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").

As more fully set forth in the County's Brief and Reply, the County is protected under the South Carolina Constitution. Cases relying upon the governmental-proprietary distinction should be disregarded as South Carolina does not recognize such a distinction. The County has vested property rights which cannot be taken without just compensation. Applying the jurisprudence from the Federal Takings Clause, as South Carolina has consistently done, requires a finding that the County is protected by the South Carolina Constitution from uncompensated takings. For the foregoing reasons, and those set forth more fully in the Brief and Reply, the Court should reconsider its ruling in the Order and find that the County is protected by Art. I, § 13 of the South Carolina Constitution.

II. This Court should consider and rule upon the County's additional arguments.

In its Brief, Reply and at oral argument, the County raised additional arguments which this Court has not yet ruled upon. Among those are (a) the South Carolina Eminent Domain

Procedure Act and State Authorities Eminent Domain Act provide that the County is entitled to just compensation; (b) public policy requires the payment of just compensation to the County; and (c) where applying the plain and unambiguous meaning of words to constitutional provisions would result in absurd results, the court should seek to escape the absurdity.

"A party *must* file a motion (pursuant to rule 59(e)) when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original).

a. It is irrational to require just compensation under the Eminent Domain Procedure Act, but to allow the City and SCDOT to escape compensation if they circumvent the act.

If the Court upholds its ruling that the County is not protected from unconstitutional takings under the South Carolina Constitution, the County is nevertheless entitled to just compensation under the South Carolina Eminent Domain Procedure Act, S.C. Code § 28-2-10 *et. seq.* (the "Act"). The South Carolina General Assembly has expressed its intention that *all* exercise of eminent domain power in this State be through the Act. S.C. Code § 28-2-20 (1987) (emphasis added). 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 § 28-2-90 (1987) (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 § 28-2-30 (6) (1987). "Person" includes not only a natural individual, but also a public entity. S.C. Code § 28-2-30 (16) (1987). Therefore, the County is a condemnee under the Act.

"Inverse condemnation is a cause of action by a property owner against a governmental entity to recover the value of property that has been effectively 'taken' by the governmental entity, although not through the process of eminent domain." *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 170, 714 S.E.2d 869, 977 (2011). "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).

Furthermore, under the State Authorities Eminent Domain Act, S.C. Code § 28-3-20, *et. seq.*, public property is not exempt form condemnation and the question of compensation and special damages, including the costs of removing, rebuilding or relocating structures of any kind must be determined in accordance with the principles of law. S.C. Code § 28-3-140.

The County[1] has a record interest in all of the County's properties which are the subject of this lawsuit. *See* (Complaint ¶ ¶ 9-10). Its interests are not exempt from condemnation and the compensation must be determined in accordance with the principles of law. Therefore, in order to condemn the County's properties, the SCDOT and City must have proceeded in accordance with the Act. Under the Act, the SCDOT and the City must pay just compensation. Otherwise, the SCDOT and City are liable to the County in inverse condemnation.

In a case cited by the SCDOT, *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 court,

[1] The County and SCAGO Public Facilities Corporation for Georgetown County each have an undivided record interest in the Judicial Center pursuant to that certain Base Lease and Conveyance Agreement dated December 1, 2009, recorded December 1, 2009 in the Register of Deeds for Georgetown County, South Carolina in Book 1383 at Page 253 and that certain Installment Purchase and Use Agreement dated December 1, 2009, recorded December 1, 2009, in the Register of Deeds for Georgetown County in Book 1383 at Page 277.

in applying the governmental-proprietary distinction[2], found that Dona Ana County's buildings were not protected by the New Mexico Constitution[3]. However, the *Board of Commissioners of Dona Ana County* Court went on to determine that the New Mexico procedure for eminent domain required the payment of just compensation. 72 N.M. 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.* Likewise, our Act not only defines the County as a condemnee, it also treats all condemnees the same in determining the amount of compensation to which the condemnee is entitled. *See generally*, S.C. Code § 28-2-10 *et. seq.*

The General Assembly has expressed its intention that all eminent domain power be exercised through the Act, which requires the payment of just compensation. It has provided that just compensation must be provided for the taking of any property, including property of public entities such as the County. The SCDOT and City cannot circumvent the Act and thereby avoid payment of just compensation. To allow the them to do so would not only be contrary to the General Assembly's stated purpose of the Act, that all eminent domain powers be exercised through the Act, but would also work an absurdity. Just as in *Board of Commissioners of Dona Ana County*, the General Assembly has expressed its intention that the County be compensated.

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

b. The public policy of the State of South Carolina requires the payment of just compensation to the County.

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[2] As previously stated the governmental-proprietary distinction does not apply in South Carolina. *E.g. Boyce*, 266 S.C. at 402, 223 S.E.2d at 770.

[3] The applicable New Mexico Constitutional provision, Art. II, § 20 provided at that time: "Private property shall not be taken or damaged for public use without just compensation." *Board of Commissioners of Dona Ana County*, 72 N.M. at 88, 380 P.2d at 832.

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 680, 694 (1941). It is something that is "uncertain, fluctuating, varying, with the changing economic needs, social customs, and moral aspirations of a people." *Weeks v. New York Life Ins. Co.*, 128 S.C. 223, 122 S.E.2d 586 (1924).

In *Board of Commissioners of Dona Ana County*, a case heavily relied upon by the SCDOT, the Court stated:

> We would add a word to the effect that any other conclusion might lead to most incongruous results. 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 court house 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 or, possibly, even prohibited by debt limitations pertinent to the subdivision. Since the highways are state projects paid for by the public of the state at large, including in many instances contribution by the federal government, *it is only just and proper for compensation when public property is taken for highway 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.***

Board of Commissioners of Dona Ana County, 72 N.M. at 93, 380 P.2d at 835 (internal citations omitted) (emphasis & bold added).

Even in cases where the governmental-proprietary distinction was applied, the courts have recognized the disastrous results which would stem from not requiring the payment of compensation. Just as in New Mexico, under South Carolina law, the County is responsible for

providing certain facilities, including the courthouse. These buildings are financed by the County through various financing arrangements, including through SCAGO Public Facilities Corporation for Georgetown County. The County has a maximum debt limit under South Carolina law which it cannot constitutionally exceed. In the instant case, the Drainage Project was indeed paid through the SCDOT, City, and Federal financing and was for the purpose of relieving certain flooding on US 17. It is only just and proper for the SCDOT and the City to compensate the County for damages which were caused as a result of their Drainage Project. It is only under this construction of the Constitution and the Eminent Domain Procedures Act, that hardship, injustice and absurdity are avoided. To accomplish this desired result, this Court must construe the Constitution, the Eminent Domain Procedures Act, or the public policy of this State to require the payment of just compensation for the County's properties.

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

In the Order, the Court correctly noted that *ordinarily* "South Carolina jurisprudence on statutory interpretation requires that appropriate meaning be given to the clear and unambiguous term 'private property." *See Ray Bell Const. Co., Inc. v. School Dist. of Greenville County*, 331 S.C. 19, 23-26, 501 S.E.2d 725, 729 (1998). However, the Court failed to address the County's argument that to so hold in this case would work an absurdity and therefore the Framer's intention should control.

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

Id. at 26, 501 S.E.2d at 729 (citations and emphasis in original omitted)(emphasis added). As stated by our Supreme Court, "[t]he purpose of the Takings Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 429, 548 S.E.2d 595, 601 (2001).

Forcing the citizens and residents of Georgetown County to bear the burden of the damages to the County's properties is contrary to the purpose of the Takings Clause as stated by our Supreme Court in *Sea Cabins*. While it is true that *ordinarily* if a statute or constitutional provision is plain and unambiguous, there is no reason to employ rules of statutory construction, however plain the ordinary meaning of the words used in the Constitution may be, the courts must 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 Framers of the Constitution. Since the purpose of the Takings Clause is to prevent a select few from bearing the burdens of the many, to hold the Takings Clause does not protect the County leads to an absurd result, i.e. the citizens and residents of Georgetown County bear the burden of damages caused by the City and SCODT, which should be, in fairness and justice, borne by the City and SCDOT. Such a result is plainly absurd and could not possibly have been the intention of the Framers of the Constitution.

III. The Court should reconsider, alter or amend its denial of Summary Judgment in favor of the County on its inverse condemnation cause of action.

In the Order, the Court did "not reach the merits of the County's summary judgment motion because the Court rule[d] as a matter of law that Georgetown County cannot maintain an inverse condemnation cause of action...". However, as has been more fully set forth above, the Court should reconsider its ruling that the County cannot maintain an action against another

governmental entity, i.e. the City and SCODT, and find that such an action can be brought by the County. Therefore, since neither the City nor the SCDOT have presented a scintilla of evidence of a genuine issue of material fact, the Court should grant the County's Motion for Summary Judgment. The County incorporates by reference the arguments made in its Memorandum, Brief, and Reply, but has summarized those arguments to aid the Court in its decision.

Inverse condemnation is a cause of action to recover the value of property that has been effectively taken by a governmental entity, although not through the process of eminent domain. *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011). Inverse condemnation is not based in tort, but in the constitutional prohibition of taking of property without compensation. *Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 498, 544 S.E.2d 637, 640 (Ct. App. 2001).

The elements of an inverse condemnation action based on physical appropriation of property are[4]: (1) affirmative conduct of a governmental entity, (2) the conduct effects a taking, and (3) the taking is for a public use. *Carolina Chloride, Inc. v. South Carolina Dept. of Transp.*, 391 S.C 429, 435, 706 S.E.2d 501 (2011). "A plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking." *Id.* (citations omitted).

The construction of the Drainage Project, installation of the king piles, and subsequent dewatering were all affirmative, aggressive, positive acts, which culminated in the sinkhole collapse and damage to the Plaintiff's buildings.

The City and SCDOT rely upon their assertion that the County cannot maintain an action for inverse condemnation; however, they have presented no concrete evidence or testimony, by

[4] Formerly, "some degree of permanence" was a required element; however this element has been removed. *E.g. Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005); *Frampton v. South Carolina Dept. of Transp.*, 406 S.C. 377, 387, 752 S.E.2d 269, 275 (Ct. App. 2013).

affidavit or otherwise, that the damages to the County's buildings are caused by anything other than the Drainage Project. They have failed to present even a scintilla of evidence to support such a proposition. The County moves this Court to reconsider its ruling that the County cannot maintain an action for inverse condemnation. Such a finding by the Court, would require the Court to conclude that the conduct of the SCDOT and the City involving the Drainage Project constituted a taking.

Because the purpose of the Drainage Project was to fix certain flooding in downtown Georgetown, the Drainage Project was for a public use. Since the Drainage Project was for a public use, which resulted in damage to the County's buildings, the taking of the County's buildings was for a public use.

CONCLUSION

The Court should reconsider its ruling in the Order and find that the County can maintain an action for inverse condemnation against the City and the County, based not only upon the constitutional protection afford the County by Article I, Section 13 of the South Carolina Constitution, but also upon the raised, but un-ruled upon grounds that the Eminent Domain Procedures Act entitles the County to just compensation; that public policy requires the County be compensated for the taking of its properties by the City or the SCDOT; and that the plain meaning leads to a highly absurd result and therefore must be rejected in order to escape the absurdity. Such a finding by the Court that the County can maintain an inverse condemnation cause of action requires the Court to conclude that the County is entitled to summary judgment on its inverse condemnation cause of action.

[Signature Block on Following Page]

Respectfully submitted,

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November 10, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN Georgetown County and SCAGO Public Facilities Corporation for Georgetown County, Plaintiffs, vs. GS2 Engineering and Environmental Consultants, Inc.; Kyzer & Timmerman Structural Engineers, LLC; Tych & Walker Architects, LLP; George Sembos; Michael Walker; and Ashleigh Weatherly Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT Civil Action No.: 2016-CP-22-00123 **AMENDED COMPLAINT** (Jury Trial Demanded)

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GEORGETOWN COUNTY, S.C.
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The Plaintiffs, complaining of the Defendants GS2 Engineering and Environmental Consultants, Inc.; Kyzer & Timmerman Structural Engineers, LLC; and Tych & Walker Architects, LLP; George Sembos; Michael Walker; and Ashleigh Weatherly would show the following:

PARTIES

1. The Plaintiff Georgetown County is a body corporate and politic and a political subdivision of the State of South Carolina.

2. The Plaintiff SCAGO Public Facilities Corporation for Georgetown County is a non-profit corporation organized and existing under the laws of the State of South Carolina.

3. Upon information and belief, Defendant GS2 Engineering & Environment Consultants, Inc. ("GS2") is a corporation organized and existing under the laws of the State of South Carolina with a principal place of business in Richland County, South Carolina. GS2 is a

geotechnical engineering firm duly licensed in South Carolina and does business in Georgetown County, South Carolina.

4. Upon information and belief, Defendant Kyzer & Timmerman Structural Engineers, LLC ("Kyzer & Timmerman") is a limited liability corporation organized and existing under the laws of the State of South Carolina with a principal place of business in Richland County, South Carolina. Kyzer & Timmerman is an engineering firm duly licensed in South Carolina and does business in Georgetown County, South Carolina.

5. Upon information and belief, Defendant Tych & Walker Architects, LLP ("Tych & Walker") is a limited liability partnership organized and existing under the laws of the State of South Carolina with a principal place of business in Georgetown County, South Carolina. Tych & Walker is an architectural firm duly licensed in South Carolina.

6. Defendant George Sembos is a duly licensed professional engineer, and upon information and belief, is a citizen and resident of Richland County, South Carolina. George Sembos is employed by and a principal of GS2.

7. Defendant Michael Walker is a duly licensed professional architect, and upon information and belief, is a citizen and resident of Georgetown County, South Carolina. Michael Walker is employed by and a principal of Tych & Walker.

8. Defendant Ashleigh Weatherly is a duly licensed professional engineer, and upon information and belief, is a citizen and resident of Horry County, South Carolina. Ashleigh Weatherly is employed by and, upon information and belief, a principal of Kyzer & Timmerman.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction and venue is proper in Georgetown County in that a substantial portion of the events or omissions giving rise to this action occurred

in Georgetown County, South Carolina, and the property that is the subject of the action is located in Georgetown County, South Carolina.

FACTS

10. This action involves the negligence of the Defendants causing physical and structural damage to the Georgetown County Judicial Complex located at 401 Cleland Street (hereafter referred to as "the Judicial Complex").

11. The Judicial Complex is owned by the Plaintiffs and has been so owned at all times pertinent to this action.

12. Georgetown County engaged Tych & Walker to provide professional architectural and engineering services for the design and construction of the Judicial Complex by written Contract (hereinafter referred to as "the Contract").

13. Subsequent to the execution of the Contract, upon information and belief, Tych & Walker entered into a written contract with GS2 whereby GS2 agreed to provide certain professional engineering services, including geotechnical engineering services for the design and construction of the Judicial Complex, as a sub-consultant of Tych & Walker.

14. Subsequent to the execution of the Contract, upon information and belief, Tych & Walker entered into a written contract with Kyzer & Timmerman whereby Kyzer & Timmerman agreed to provide certain professional engineering services, including structural engineering design services for the design and construction of the Judicial Complex, as a sub-consultant of Tych & Walker.

15. Pursuant to the Contract, Tych & Walker and its sub-consultants prepared plans, specifications and related documents (the "Plans and Specifications") for the construction of the Judicial Complex. Georgetown County relied upon and utilized those Plans and Specifications

as the basis for documents provided to certain contractors who were invited to bid on the construction of the Judicial Complex (hereinafter referred to as "the Project").

16. Georgetown County then accepted bids for the Project, and on or about June 8th, 2007, Georgetown County entered into an agreement with the low bidder on the Project, MB Kahn Construction Company ("MB Kahn"), whereby MB Kahn agreed to construct the Judicial Complex for the sum of $17,470,800.00.

17. MB Kahn then began work on the Project utilizing subcontractors of its choosing.

18. During the course of the construction of the Judicial Complex and in accordance with the Contract, Tych & Walker along with its sub-contractors under its supervision continued to provide professional architectural, engineering and design services.

19. During the course of the construction of the Judicial Complex and in accordance with its written agreement with Tych & Walker, GS2 continued to provide professional engineering services, including geotechnical engineering services to the Project.

20. During the course of the construction of the Judicial Complex and in accordance with its written agreement with Tych & Walker, Kyzer & Timmerman continued to provide professional engineering services, including structural engineering services to the Project.

21. On June 28, 2006, GS2 provided Tych & Walker the Report of Geotechnical Exploration with Pavement Recommendations ("the GS2 Geotechnical Report"). The GS2 Geotechnical Report provides that the Judicial Complex "should be supported on a system of deep foundations, bearing into the Pee Dee Formation." The Pee Dee Formation is a subsurface geological layer composed of hard clay and sand.

22. The GS2 Geotechnical Report contains recommendations for the foundation of the Judicial Complex to be supported by either pre-cast, pre-stressed concrete piles and auger cast in-place piles.

23. On June 28, 2006, GS2 also provided Tych & Walker a Letter of Addendum to the GS2 Geotechnical Report. The Letter of Addendum provides driven timber pile foundation design recommendations, and the Letter of Addendum reflects that it was provided at the request of Tych & Walker.

24. The Judicial Complex was ultimately constructed with a driven timber pile foundation.

25. Construction of the Judicial Complex was substantially completed and cleared for occupancy on or about May 11th, 2009.

26. In or about 2009, the South Carolina Department of Transportation ("SCDOT") and the City of Georgetown ("City") undertook a water drainage project in the City of Georgetown.

27. The drainage project was intended to install and relocate certain storm water drainage and utility systems in and around US17 and Georgetown City Hall and was called the "US17/ City Hall Georgetown Drainage Project" (the "Drainage Project").

28. The SCDOT and/or City engaged its own subcontractors for the design and construction of the drainage project.

29. As part of the Drainage Project, a water storage facility and wet well was constructed to hold the redirected storm water until the water could be pumped into the Sampit River.

30. As part of the Drainage Project, the water storage area underwent a significant pumping of water so that new drainage structures could be fabricated below grade.

31. During construction of the Drainage Project, pilings were installed to provide lateral and vertical support for the water storage facility. Some of the pilings were installed by pre-drilling holes and driving piles ("king piles") deep into the surface of the ground to provide lateral support for the walls of the water storage facility.

32. The king piles breached a confining sub-surface layer which confined certain underground water existing in Georgetown, causing water to rise from beneath the confining layer to fill the water storage area.

33. During the construction of the Drainage Project, multiple land-surface collapses occurred and sinkholes and depressions formed throughout downtown Georgetown.

34. The Judicial Complex was one of the many buildings in Georgetown to experience damage during the construction of the Drainage Project.

35. From the date of completion of the Judicial Complex until the construction of the water storage facility and the associated pumping at the water storage facility, the Judicial Complex did not display any signs of foundation settlement.

36. From late October 2011 through the end of that year, there were numerous reports of damage to the interior and exterior of the Judicial Complex including, but not limited to, cracks in interior sheet rock and exposed CMU walls, racked doors and frames, separation of interior trim, first floor slab-on-grade cracks, and elevated slab cracks.

37. Georgetown County hired George Sembos and GS2 in early November 2011 to inspect the Judicial Complex and report on the geotechnical implications of the reported damage.

38. On or about October 25, 2013, Georgetown County filed a Civil Action against the South Carolina Department of Transportation, The City of Georgetown, Davis & Floyd, Inc. Republic Contracting and S&ME, Inc. for negligent acts and omissions, inter alia, in the construction of the Drainage Project and the damage resulting to the Judicial Complex and other Georgetown County buildings from their negligent acts and omissions (hereafter referred to as the "Sinkhole Litigation")

39. George Sembos and GS2 reported to Georgetown County on a regular basis from November 15, 2011 until September 2015 on the condition of the Judicial Complex and the geotechnical condition of the property surrounding and upon which the Judicial Complex rests, including issuing numerous written reports including but not limited to those dated 12/09/11, 09/14/12, 11/01/12, and 08/05/13.

40. At no point did George Sembos or GS2 alert Georgetown County of the design and construction deficiencies associated with Judicial Complex, hereafter referenced.

41. Kyzer & Timmerman reported to Georgetown County on the condition of the Judicial Complex following the 2011 reports of damage to the Judicial Complex, including but not limited to, issuing written reports on November 21, 2011 and August 5, 2013 providing, inter alia, that the damage to the Judicial Complex was due to the dewatering activities.

42. Attached hereto as **EXHIBIT A** is a true and accurate copy of the August 5, 2013[1] report signed by Defendants George Sembos, GS2, Kyzer & Timmerman, Tych & Walker, and Michael Walker.

43. At no point did Kyzer & Timmerman and Ashleigh Weatherly alert Georgetown County of the design and construction deficiencies associated with the Judicial Complex.

[1] Plaintiffs attach the report less the appendixes. Further, Plaintiffs note that the August 5, 2013 report also contains a date of September 18, 2013 in its heading.

44. Tych & Walker and Michael Walker reported to Georgetown County on the condition of the Judicial Complex following the 2011 reports of damage to the Judicial Complex by participating in Georgetown County meetings concerning the damage, and by issuing a written report on August 5, 2013, providing that the damage to the Judicial Complex was due to the dewatering activities.

45. At no point did Tych & Walker and Michael Walker alert Georgetown County of the design and construction deficiencies associated with the Judicial Complex.

46. Georgetown County relied on each of the Defendants and their applicable expertise to report the cause and origin of the damage occurring to the Judicial Complex in 2011 and thereafter.

47. At all times following the damage occurring at the Judicial Complex in 2011 and thereafter, Georgetown County exercised reasonable diligence to discover the cause and origin of the damages sustained by, including but not limited to, relying on the Defendants' written and oral reports to Georgetown County on the cause and origin of the damages.

48. In the course of the Sinkhole Litigation, Georgetown County retained ECS Carolinas, LLP ("ECS"), a geotechnical engineering firm for the purpose of serving as a corroborating expert and for designing a repair of the Judicial Complex.

49. ECS hired Rickborn & Associates, LLC ("R&A"), a structural engineering firm, to be its subcontractor for designing a repair of the Judicial Complex.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract Against Tych & Walker)

50. Plaintiffs repeat and reallege each and every paragraph above as if set forth verbatim herein.

51. Tych & Walker failed to perform architectural services in accordance with the terms of the Contract.

52. Tych & Walker failed to properly design the Judicial Complex and to manage and coordinate the services of its sub-consultants, GS2 and Kyzer & Timmerman, to ensure that the design and construction of the Judicial Complex was performed and completed in accordance with acceptable design practices.

53. This breach of contract by Tych & Walker has caused deficiencies in the construction of the Judicial Complex, which deficiencies manifested following the negligent design and construction of the Drainage Project and associated dewatering activities.

54. As a result of Tych & Walker's breach of contract, Georgetown County has incurred and continues to incur substantial damage.

FOR A SECOND CAUSE OF ACTION
(Negligence Against Tych & Walker and Michael Walker)

55. Plaintiffs repeat and reallege each and every paragraph above as if set forth verbatim herein.

56. Tych & Walker and Michael Walker owed a duty of care to Plaintiffs to design and oversee the design of the Judicial Complex in a skillful manner in accordance with the standards of a reasonably prudent architect.

57. Tych & Walker and/ or Michael Walker breached their duty of care to Plaintiffs in, including but not limited to, the following ways:

a. Failing to coordinate and perform all design elements such that the Judicial Center could be constructed properly;

b. Failing to exercise requisite care, skill and knowledge in accordance with the recognized standards of the architectural profession;

c. Failing to design the Judicial Center in accordance with the International Building Code in effect at the time of construction;

d. Failing to properly classify the construction site based on the presence of liquefiable soils;

e. Failing to design the recommended foundation system to properly account for liquefaction of soils;

f. Failing to ensure the support piles of the Judicial Center were properly installed and installed to an appropriate depth;

g. Failing to properly monitor the installation of the pilings and when deficiencies were discovered, failing to properly respond to the deficiencies;

h. Failing to ensure the structural design is adequate to withstand the seismic loads during a seismic design event;

i. Failing to properly oversee and monitor its consultants such that the Judicial Center could be properly designed and constructed;

j. Replacing the original design of the Judicial Center calling for pre-cast, pre-stressed concrete piles or auger cast in place piles with timber piles and in so doing allowed a building design that did not meet the International Building Code;

k. Failing to adequately advise the Owner of the implications and possible consequences of utilizing a timber pile foundation system and failing to properly inform the Owner once deficiencies were discovered with the timber pile system;

l. Failing to utilize the required safety factor dictated by the International Building Code applicable at the time;

m. Failing to provide a design that met the requirements of the appropriate International Building Code Occupancy Classification; and/or

n. Failing to assure that the design team members had the proper data required by the International Building Code which was necessary to design the structure in compliance with the Code.

58. The failure to observe the applicable standards of care constitutes careless, negligent, grossly negligent, willful, wanton, and reckless conduct by Defendants Tych & Walker and/or Michael Walker.

59. Tych & Walker and/ or Michael Walker's breaches of duty resulted in the defective design and ultimate construction of the Judicial Complex, and directly and proximately caused Georgetown County to incur and continue to incur significant damage.

FOR A THIRD CAUSE OF ACTION
(Negligence Against GS2 and George Sembos)

60. Plaintiffs repeat and reallege each and every paragraph above as if set forth verbatim herein.

61. GS2 and George Sembos owed a duty of care to perform the geotechnical exploration of the subsurface soils and report to and advise Tych & Walker in a skillful manner.

62. GS2 and George Sembos breached that duty, inter alia, in the following ways:

a. Failing to perform geotechnical exploration, testing and consulting services with the requisite care, skill and knowledge in accordance with the recognized standards of geotechnical engineering for projects of similar size, scope and in the particular geographic setting;

b. Providing recommendations that driven timber piles were a suitable deep foundation alternative to appropriate deep foundation systems;

c. Failing to properly advise Tych & Walker and Georgetown County of the risks associated with supporting the Judicial Center with driven timber piles instead of appropriate deep foundation systems;

d. Failing to properly advise Tych & Walker and Georgetown County of the risks associates with having timber pile foundations suspended within significant depths of liquefiable soil and soft marine clay;

e. Failing to properly advise Tych & Walker and Georgetown County of the risks associated with utilizing grade supported floor slabs over significant depths of liquefiable soil and soft marine clay;

f. Failing to properly advise Tych & Walker and Georgetown County of the risks associated with having timber piles suspended above void laden carbonate rock/limestone;

g. Failing to properly advise Tych & Walker and Georgetown County of the risks associated with driven timber piles not achieving the required design loads and installation criteria; and/or

h. That performance of the Georgetown County Judicial Center may be compromised in the future as a result of their recommendations to support the project on driven timber piles.

63. The failure to observe the applicable standards of care constitutes careless, negligent, grossly negligent, willful, wanton, and reckless conduct by Defendants GS2 and George Sembos.

64. GS2 and/ or George Sembos's breaches of duty resulted in the defective design and construction of the Judicial Complex, and directly and proximately caused Georgetown County to incur and continue to incur significant damage.

FOR A FOURTH CAUSE OF ACTION
(Negligence Against Kyzer & Timmerman and Ashleigh Weatherly)

65. Plaintiffs repeat and reallege each and every paragraph above as if set forth verbatim herein.

66. Kyzer & Timmerman and Ashleigh Weatherly owed a duty of care to perform the structural engineering design of the Judicial Complex in a skillful manner.

67. Kyzer & Timmerman and Ashleigh Weatherly breached that duty, inter alia, in the following ways:

a. Failing to exercise requisite care, skill and knowledge in accordance with the recognized standards of the profession;

b. The stated wind design criteria does not comply with building code requirements with respect to the building category, the wind importance factor, and the wind exposure category for a building of this type and

location. The use of this incorrect information in calculation of the wind loads for the building results in generation of wind loads lower than those required by the building code in effect at the original time of design and construction;

c. The stated seismic design criteria does not comply with building code requirements with respect to the mapped spectral response accelerations, the design spectral response accelerations, the seismic importance factor, and the seismic response coefficient for a building of this type and location. The use of this incorrect information in calculation of the seismic loads for the building results in generation of seismic loads lower than those required by the building code in effect at the original time of design and construction; and/or

d. The structural drawings identify the maximum axial and lateral load demand requirements for the timber piles. Based on minimal loading requirements contained in the building code, locations exist where both the axial downward load demand and the lateral load demand exceed the maximums listed in the structural drawings. This condition results in an inadequate design of the timber piles foundation system for the building.

68. The failure to observe the applicable standards of care constitutes careless, negligent, grossly negligent, willful, wanton, and reckless conduct by Defendants Kyzer & Timmerman and Ashleigh Weatherly.

69. Kyzer & Timmerman and Ashleigh Weatherly's breaches of duty contributed to and were integral in the ultimate defective design and construction of the Judicial Complex, and directly and proximately caused Georgetown County to incur and continue to incur significant damage.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract –Third Party Beneficiary- Against GS2)

70. Plaintiffs repeat and reallege each and every paragraph above as if set forth verbatim herein.

71. Georgetown County is a direct third party beneficiary under the contract between Tych & Walker and GS2.

72. Tych & Walker and GS2 intended for Georgetown County to be a direct beneficiary of their contract.

73. GS2 failed to perform geotechnical engineering services in accordance with the terms of the contract with Tych & Walker.

74. This breach of contract by GS2 directly and proximately caused Georgetown County to incur and continue to incur significant damage.

FOR A SIXTH CAUSE OF ACTION
(Breach of Contract –Third Party Beneficiary- Against Kyzer & Timmerman)

75. Plaintiffs repeat and reallege each and every paragraph above as if set forth verbatim herein.

76. Georgetown County is a direct third party beneficiary under the contract between Tych & Walker and Kyzer & Timmerman.

77. Tych & Walker and Kyzer & Timmerman intended for Georgetown County to be a direct beneficiary of their contract.

78. Kyzer & Timmerman failed to perform structural engineering services in accordance with the terms of the contract with Tych & Walker.

79. This breach of contract by Kyzer & Timmerman directly and proximately caused Georgetown County to incur and continue to incur significant damage.

FOR A SEVENTH CAUSE OF ACTION
(Negligent Misrepresentation Against GS2 and George Sembos)

80. Plaintiffs repeat and reallege each and every paragraph above as if set forth verbatim herein.

81. Subsequent to the November 2011 sinkhole events, Georgetown County retained GS2 and George Sembos to monitor the subsurface condition under and around the Judicial

Complex, and eventually engaged George Sembos to serve as an expert witness in the Sinkhole Litigation.

82. Subsequent to the November 2011 sinkhole events, GS2 and George Sembos have generated at least four reports related to the geotechnical condition of the subsurface condition under and around the Judicial Complex.

83. Subsequent to the November 2011 sinkhole events, George Sembos provided numerous affidavits for Georgetown County and SCAGO related to the various negligent acts and omissions of the SCDOT; Davis & Floyd, Inc., Republic Contracting Corporation, S&ME, Inc. and the City of Georgetown.

84. Subsequent to the November 2011 sinkhole events, George Sembos has been deposed multiple times in the various lawsuits concerning the Judicial Complex.

85. Neither GS2 nor George Sembos has ever alerted Plaintiffs to the numerous defects in the design and construction of the Judicial Complex.

86. GS2 and George Sembos falsely represented to Plaintiffs on numerous occasions that the Judicial Complex was constructed in a manner consistent with the applicable international building code and industry standards.

87. GS2 and George Sembos had a pecuniary interest in making the false representations as their work in the construction of the Judicial Complex could be subject to challenge.

88. GS2 and George Sembos have a pecuniary interest in making the false representations as they were being paid on an hourly basis to provide expert witness services to Georgetown County.

89. GS2 and George Sembos owed a duty of care to Plaintiffs to see that truthful information was communicated to Plaintiffs.

90. GS2 and George Sembos breached that duty by failing to exercise due care.

91. Plaintiffs were justified in its reliance on the representations of GS2 and George Sembos as they had a longstanding fiduciary relationship with GS2 and George Sembos.

92. Georgetown County suffered pecuniary loss as a direct and proximate result of reliance on the negligent misrepresentations, including, inter alia, loss of funds paid to GS2 and George Sembos following the November 2011 sinkhole events.

PRAYER FOR RELIEF:

WHEREFORE, Plaintiff prays for an award of its damages from the Defendants jointly and severally, to be determined by a jury, as follows:

1. For its actual, incidental and consequential damages for breach of contract;

2. For its actual, incidental and consequential damages resulting from the Defendants' negligence;

3. For its actual, incidental and consequential damages resulting from the third party beneficiary breaches of contract;

4. For its actual, incidental and consequential damages for Negligent Misrepresentation;

5. For punitive damages for the willful, wonton and reckless negligence of the Defendants;

6. For its attorneys' fees and costs, and

7. For such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

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Attorneys for the Plaintiffs

July 20, 2016
Columbia, South Carolina

2016-CP-22-00123

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August 5, 2013

Georgetown County
716 Prince Street
Georgetown, South Carolina 29440

Attention: **Sel Hemingway, County Administrator**

Reference: **Report of Geotechnical Exploration and Existing Facilities Investigation Services**
Georgetown County Buildings:
Judicial Center - 401 Cleland Street
Georgetown Library - 405 Cleland Street
Georgetown, South Carolina
GS2 Project Number 13-20216-G

Dear Mr. Hemingway;

This report presents our geotechnical exploration and existing facilities investigation services of the Judicial Center and Georgetown Library, located in Georgetown, South Carolina. Information obtained from our exploration and investigation has been used to evaluate the existing site conditions for the assessment of the existing structures at the site. This work was performed in general accordance with our proposals numbered P8659-13R, dated April 9, 2013, and P8675-13, dated July 15, 2013.

Recommendations detailed in this report are specific to the soil conditions in the immediate vicinity of the boring locations for this particular project. This report does not include any environmental assessment of soils, surface water or groundwater, the determination of wetlands, the determination of noise impact, the assessment of air quality, the identification of cultural resources, and the identification of endangered species. These services are beyond the scope of services of a geotechnical exploration.

SITE SETTING

Site Location

The existing Judicial Center and Library structures are located within the 400 block of Cleland Street, in Georgetown South Carolina. More specifically, the Judicial Center and Library are located within the northern portion of the 400 block at 401 and 405 Cleland Street, respectively. The northern portion the 400 block is bounded by Cleland Street to the east, Dozier Street to the west, Highway 17 to the North, and several other county structures to the South, including the Magistrates Center and Department of Social Services buildings. The location of the site relative to the nearby streets is shown in the *Site Location Map*, Figure 1 in Appendix A.

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EXHIBIT A

Existing Site Conditions

The subject site is generally rectangular in shape, and, at the time of our visit, was noted to be developed with the existing Judicial Center and Library structures.

From our involvement with the project we understand that the building components of each structure are as follows:

- Judicial Center (Segment No. 4590) 401 Cleland Street – 3-story structure constructed of reinforced CMU block framed walls and a steel framed roof system, supported with a deep driven foundation system, with substantial completion March 20, 2009.
- Georgetown Library (Segment No. 590) 405 Cleland Street – 1-story structure constructed of metal-stud with gypsum board sheathing framed exterior walls with interior steel column supports and a steel framed roof system, supported with a shallow foundation system and a cast-in-place concrete slab-on-grade, completed in the late 80's.

As stated above, construction of the subject Judicial Center structure was completed and the building was occupied in 2009, while the library has been occupied since the 1980s. In November of 2011, obvious signs of settlement and building component fatigue were observed in both structures that included cracking in the sheetrock, cast-in-place concrete/CMU block retaining walls along the east elevation of the Judicial Center, CMU block/brick veneer walls and ground floor and elevated slabs at multiple locations within the subject structures. Detailed accounting of the observed cracks and fatigue are cataloged in subsequent sections of this report.

It is important to note that our study focused on the above mentioned structures only, and that there are several other county buildings that are located within close proximity to these structures that exhibit similar signs of settlement related fatigue.

Site Topography

Topographically, the site of the existing structures is located along a large, fairly level coastal plain, in downtown Georgetown, South Carolina. Original ground surface elevations across the majority of the site appear to have ranged from about 12 to 15 feet above mean sea level (MSL). In general, the site appears to slope to the south and east, with stormwater draining into the surrounding infrastructure and eventually into the Pee Dee River.

Finished floor elevations for the Judicial Center and Library structures appear to be on the order of 15 and 12 feet above MSL, respectively.

General topographic information was obtained from the USGS Georgetown North and South topographic quadrangles, Figure 2 in Appendix A, while site specific grading plans were utilized to determine pre and post construction topographic data.

PROJECT INFORMATION

Purpose of Study

From our understanding and attendance at several meetings regarding the existing settlement issues at the existing structures, it is understood that additional information is being requested to help determine the cause, extent and corrective action for the failures at the site.

Historical Research and Records Review

In an attempt to better determine the history of the site that contains the subject structures; our personnel gathered and reviewed available historical records. We have provided a brief summary of our observations in this section, while the historical records are attached, in part, in Appendix A of this report.

Aerial Photographs: Our personnel gathered historical aerial photographs from the USC Thomas Cooper Library – Map Library, as well as on-line sources, which are shown on the attached Figures 3 through 8, and described below:

- *Historical Aerial Photographs – 1939, 1950, 1957, 1963, 1967 and 1973* (Figures 3 through 8) – In these aerial photographs, the northern portion of the 400 block of Cleland Street appears to be primarily undeveloped, with varying degrees of vegetative ground cover, with the exception of the northern perimeter, which appears to be developed for residential or light commercial purposes. In the earlier aerial photographs (1939 through 1957), an unpaved roadway appeared to bisect the 400 block, and it is observed to generally follow the alignment of the existing Duke Street. Additionally, the northern portion of the site appeared to be utilized as a track in the later aerial photos (1963 through 1973).

  Additionally, the southern portion of the 400 block of Cleland Street appeared to be developed with multiple structures (possibly a school) in the 1939 to 1973 aerial photos.

Topographic Maps: Additionally, our personnel gathered historical topographic maps from on-line sources, which are shown on the attached Figures 9 through 11, and described below:

- *Historical Topographic Maps – 1943, 1947, 1968* (Figures 9 through 11) – These topographic maps show the general elevation within the 400 block of Cleland Street to be nearly level and between 10 and 20 feet above MSL. As indicated above, all the topographic maps show that the northern portion of the 400 block is undeveloped, while the southern portion of the 400 block appears to be developed with school structures.

Historic Map: Additionally, our personnel gathered a historical map from Georgetown County personnel, which is shown on the attached Figure 12, and described below:

- *Historic Map – Undated, Provided by Georgetown County Personnel* (Figure 12) – This figure combines the location of a natural slough (recorded in the late 1700s) overlain with current tax map and building location maps. A review of this map indicates that early Georgetown's surface topography and storm water conditions in the near vicinity of the site were controlled by a natural slough that deposited storm water into the nearby Winyah Bay. It is understood that the slough was backfilled during, or prior to, the construction of the nearby steel mill.

Geotechnical and Facilities Documents: Available geotechnical documents that our personnel reviewed included;

- *Report of Geotechnical Exploration with Pavement Recommendations* and *Letter of Addendum*, dated June 28, 2006, prepared by GS2.
- *Summary Letter of Preliminary Observations*, dated November 16, 2011, prepared by GS2.
- *Preliminary Engineering Services Report*, dated December 9, 2011, prepared by GS2.
- *Meeting Summary and Monitoring Recommendations*, dated May 8, 2012, prepared by GS2.
- *Additional Engineering Report – Crack Addendum*, dated November 1, 2012, prepared by GS2.
- *Summary of Groundwater and Crack Observations*, dated September 14, 2012, prepared by GS2.

During our review of the available geotechnical and facilities documents, the following items were noted:

- *Report of Geotechnical Exploration with Pavement Recommendations* and *Letter of Addendum*, dated June 28, 2006 – Site Description – pg. 2. "At the time of our exploration, portions of the site were noted to be developed with an existing Library and Georgetown County Office Buildings, with associated asphalt paved parking and drives. The existing structures appeared to be in good working order, with little to no obvious signs of structural fatigue associated with settlement observed, while the existing pavements also appeared to be in good working order."

  Multiple Sections – Subsurface Conditions. The geotechnical document generally describes the subsurface soil conditions to include a surface layer of sands that were encountered in the borings to depths of approximately 27 to 30 feet below the existing ground surface. The near surface layer of sands was then recorded to be underlain by an over-consolidated layer of silts, mixed with cemented sandstones, that

extended to depths of approximately 35 feet below the existing ground surface. Groundwater elevations at the time of drilling were recorded to be at depths of approximately 8 to 12 feet below the existing ground surface. Stabilized groundwater readings were not recorded.

Multiple Sections – Foundation Recommendations. The geotechnical document provided for the support of the structure on deep foundations, with pile seating depths versus capacity provided for seating depths of 35 and 40 feet below the existing ground surface at the time.

- *Summary Letter of Preliminary Observations*, dated November 16, 2011 – Multiple Sections. This document establishes GS2's initial observations of the Judicial Center and catalogues observed settlement related events and conditions that had occurred in the downtown area in close proximity to the site beginning in early November 2011. Interviews with maintenance personnel that work for Georgetown County cataloged the propagation of over 60 recorded sheetrock cracks within the Judicial Center structure alone.

- *Preliminary Engineering Services Report*, dated December 9, 2011 – Multiple Sections. This document establishes GS2's additional observations of the Judicial Center between the time of the initial shut down and second start up of the dewatering system. This document further catalogues observations of the Judicial Center and observed settlement related events and conditions that had occurred in the downtown Georgetown area in close proximity to the site on the date of November 18, 2011 (the time of the second dewatering event). In summary, noticeable impact to the Judicial Center (primarily crack propagation and growth) and the structures in close proximity to the Juridical Center were observed and recorded.

  Preliminary testing and monitoring of the structure and site indicated noticeable drawdown and rebound of the groundwater table from the second dewatering event. Additionally, dozens of cracks were catalogued during the monitoring event and a total of seven (7) crack monitors were installed at the Judicial Center and three (3) were installed at the Library. As stated above, observable crack growth was noted during the dewatering event.

- *Meeting Summary and Monitoring Recommendations*, dated May 8, 2012 – Multiple Sections. This document summarizes a conversation held between the design team for the Judicial Center and representatives of the SCDOT. The document briefly details the remedial efforts that were to be undertaken to protect the groundwater aquifers adjacent to the City of Georgetown Drainage Improvement Project. The document also identifies stop work criteria in the event that the groundwater in the vicinity of the project was adversely affected. Finally, the document identifies

monitoring efforts that would be undertaken at the Judicial Center and Library at the time the dewatering efforts were recommenced.

- *Additional Engineering Report – Crack Addendum*, dated November 1, 2012 – Multiple Sections. This document records the presence of additional cracks in the Judicial Center, including; cracks in the ground floor slab of the Jury Assembly room, cracks in the second floor in Judge Thomas' office in the elevated slab and sheetrock, and cracks in the ground floor slab in the Clerk's Office. These cracks were not recorded in the December 9, 2011 report.

- *Summary of Groundwater and Crack Observations*, dated September 14, 2012 – Multiple Sections. This document records the monitoring activities of the groundwater elevations at the site, and the crack monitors installed at the Judicial Center and Library, at the commencement of the dewatering project after remedial measures had been taken. The observations recorded minimal to no impact to the site groundwater elevations and the crack monitors.

These documents are not attached to this report, however, they are available and on file at Georgetown County.

Project Plans: Tych & Walker Architects, LLP provided Construction Drawings for the Georgetown County Judicial Center project, drawings C1.1 through C1.8, dated March 8, 2007, prepared by ETS, Inc. Additionally, Tych & Walker Architects, LLP provided pile foundation as-built information for the Judicial Center Project.

From the provided plans detailed above, it appears that approximately 4 to 5 feet of structural fill was placed across the Judicial Center project site in order to raise the ground floor building elevation to 17 feet MSL. Additionally, it appears that the Judicial Center was supported on approximately 371, 12" butt diameter, tapered timber piles seated at depths of approximately 30 to 35 feet below foundation pile cap elevations.

Construction drawings were not available for the Georgetown Library.

Miscellaneous Documents: In addition to the geotechnical documents listed herein, our personnel reviewed an available geological document that was conducted in the vicinity of the subject site in November of 2011. Additionally, statements regarding the conditions of the Judicial Center and Library were presented for our review. Finally, Georgetown County observed and recorded readings associated with the installed crack monitors. A brief summary of our review of each document is provided below.

- *Geology of the City of Georgetown, SC based on drilling by the SC Geological Survey*, undated, prepared by William R. Doar III, Regional

Geologist, Coastal Plain. This document records a geologic rendering of the City of Georgetown based upon borings conducted in response to the sinkhole propagation that occurred in November 2011. The SCDNR - SCGS report includes a cross-section. Two borings were conducted in the vicinity of the site, GN-6 and GN-7.

Based upon review, it is surmised from the data that a conduit into the "limestone Lower Bridge member" was created by punching into the karst of the Lower Bridge (via pile or boring), which in-turn was dewatered, pulling sediment in at other locations causing subsidence.

- *Crack Time Line for Georgetown County Judicial Center*, undated. This document records the initial observation of the cracks present in the Judicial Center on November 2, 2011, and the events associated with the identification of the cracks during the initial and second dewatering events at the site.

- *Crack Time Line for Georgetown County Library*, undated. This document records the initial observation of the cracks and movement present in the Library on November 21, 2011, and the events associated with the identification of the cracks during the initial dewatering event at the site.

- *Crack Monitoring Logs – Georgetown County Judicial Center and Library.* These documents recorded the crack monitor readings made by Georgetown County personnel starting December 5, 2011 and December 25, 2011 for the Judicial Center and Library structures, respectively.

  The crack monitoring logs for the Judicial Center, in summary, indicate some elastic movement of the cracks, along with some minor crack growth primarily on the southwest corner of the structure and in the mezzanine. Dates of noted crack growth include: 7/6/12, 8/17/12, 11/2/12, 11/21/12. and 1/25/13.

  The crack monitoring logs for the Library, in summary, indicate some elastic movement of the cracks, along with some minor crack growth primarily on the west wall of the structure. Dates of noted crack growth include: 12/19/11, 9/13/12, and 9/20/12.

SUMMARY OF GEOTECHNICAL FIELD EXPLORATION

The subsurface conditions along the ***exterior western elevation of the Judicial Center*** were explored with three (3) mechanically-augered soil borings (B-1 through B-3), with Standard Penetration Tests (SPT) taken at regular intervals, performed in general accordance with ASTM D1586 *Standard Test Method for Standard Penetration Test (SPT) and Split-Barrel Sampling of Soils*, while the recovered samples were visually and texturally classified by ASTM D2488 *Standard Practice for Description and*

Identification of Soils (Visual-Manual Procedure). These soil borings were extended to termination or refusal depths of 40 to 50 feet below the existing ground surface. ***It is important to note that during drilling activities at Boring B-3, the drilling mud being utilized was lost in the ground, and the drillers were unable to maintain circulation. Therefore, the boring was abandoned in-place initially with soils, at which point a subsurface void propagated. Approximately 3-1/4 cubic yards of 3,000 psi pump mix was utilized to fill the subsurface void. As a result of the flowing soils condition encountered, drilling methods were altered to incorporate a hollow stem auger in order to facilitate a grout abandonment of the boreholes. Boring B-1 required approximately 1 cubic yard of grout to abandon the borehole, while Boring B-2 required 1/4 cubic yard of grout.*** These approximate boring locations are shown on the attached *Boring Location Plan*, Figure 13 in Appendix B.

Additionally, the subsurface conditions within the ***exterior western elevation of the Library*** were explored with two (2) mechanically-augered soil borings (B-4 and B-5), with Standard Penetration Tests (SPT) taken at regular intervals, performed in general accordance with ASTM D1586 *Standard Test Method for Standard Penetration Test (SPT) and Split-Barrel Sampling of Soils*, while the recovered samples were visually and texturally classified by ASTM D2488 *Standard Practice for Description and Identification of Soils (Visual-Manual Procedure)*. These soil borings were extended to an auger refusal depth of 45 to 55 feet below the existing ground surface. These approximate boring locations are shown on the attached *Boring Location Plan*, Figure 13 in Appendix B.

As a result of the subsurface conditions encountered along the western elevation of the Judicial Center in June of 2013, our personnel returned to the site in September of 2013 in order to conduct additional borings along the ***exterior northern and southern elevations of the Judicial Center.*** A total of six (6) mechanically-augered soil borings (B-6 through B-11), with Standard Penetration Tests (SPT) taken at regular intervals, were performed in general accordance with ASTM D1586 *Standard Test Method for Standard Penetration Test (SPT) and Split-Barrel Sampling of Soils*, while the recovered samples were visually and texturally classified by ASTM D2488 *Standard Practice for Description and Identification of Soils (Visual-Manual Procedure)*. These soil borings were extended to termination or refusal depths of 40 to 50 feet below the existing ground surface. ***As a result of the flowing soils condition encountered in June, drilling methods were altered to incorporate a hollow stem auger in order to facilitate a grout abandonment of the boreholes. During drilling operations, the hollow stem augers were charged with groundwater in order to identify flowing conditions. In summary, similar heavy flowing groundwater/sand conditions were encountered in borings B-6, B-7, B-8 and B-10 at depths ranging from 12 to 27 feet, 22 to 30 feet, 23-1/2 to 30 feet, and 28-1/2 to 37 feet below ground surface, respectively, to those encountered***

in the borings performed in June. Soils samples within the flowing strata indicated the presence of washed/clean sands overlain by typical Georgetown deposits encountered previously. These approximate boring locations are shown on the attached *Boring Location Plan*, Figure 13 in Appendix B.

Finally, the subsurface conditions within the ***interior and covered drive area of the Judicial Center*** were explored with seven (7) hand-augered soil borings, with Dynamic Cone Penetrometer (DCP) testing taken at regular intervals, while the recovered samples were visually and texturally classified by ASTM D2488 *Standard Practice for Description and Identification of Soils (Visual-Manual Procedure)*. These soil borings were extended to refusal or termination depths of 2 to10 feet below the existing ground surface. These approximate boring locations are shown on the attached *Boring Location Plan*, Figure 14 in Appendix B.

The borings were located in the field by measuring from exiting building corners and site features.

SITE SOIL CONDITIONS

Regional Geology

The geology of the Lower Atlantic Coastal plain is dominated by a series of Quaternary marine terrace deposits of varying age and thickness, formed during interglacial ages, during which sea level was high due to extensive melting of the polar icecaps (Weems, 1993). As the sea level regressed, deposits of sand, clay, and silts were deposited along the seaward edge or the resulting estuarine back barrier environments. Quaternary deposits overlie the more consolidated Tertiary deposits which are generally calcareous sands and massive clays 18 to 30 million years old.

Local Geology

The subject site is located on the Princess Anne Terrace, a Pleistocene deposit consisting of Barrier-island and Estuarine environment deposits which overlie the Williamsburg Formation, an upper Paleocene deposit. More specifically, the subject site area typically will encounter alternating sediment layers that include, light-gray to dark-gray, phosphatic, poorly to moderately well sorted fine-grained quartz sand, bluish-gray, poorly sorted, fine to very coarse grained quartz sands and light-gray to bluish-gray muddy sand to sandy mud, clay, silt, silty sand, and clayey sand. Based on South Carolina Geological Survey, the Pleistocene deposit in the area of the site ranges in thickness from 30 ft to 50 ft below the ground surface.

As indicated above, the Pleistocene deposit is underlain by the Williamsburg Formation, a Paleocene (65-55 Ma) deposit. The Williamsburg Formation consists of a dominantly black to dark gray clay to very fine quartz sand component overlying two carbonate-rich members identified as the Chicora member and the Lower Bridge member. The upper section of the formation is the Chicora member that is typically identified as a carbonate mud matrix

supported, fine to coarse quartz sand to very coarse silt. The Lower Bridge member of the formation is encountered typically below the Chicora member (if present) and is typically identified as a carbonate cemented quartz and phosphatic sand.

Based on a review of a report prepared by William Doar III, of the South Carolina Geological Survey (SCGS), in 2011, titled *Geology of the City of Georgetown, SC based on drilling by the SC Geological Survey, SC Depart. Of Natural Resources*, it appears that the site is underlain by approximately 25 ft to 30 ft of Pleistocene Barrier-island and Estuarine deposits including a mapped layer of marsh mud (Pluff mud) followed by the Chicora member of the Williamsburg Formation. Drilling methods utilized refused on a rock type contact believed to be the Lower Bridge member of the Williamsburg formation at approximately 46 ft below ground surface (borehole GN-7). Furthermore, based on conversations with the SCGS the Lower Bridge member is believed to support Karst (cavity flow) topography. Evidence of voids within the Lower Bridge member have been confirmed by others.

Soil Conditions

The subsurface conditions encountered at the boring locations are detailed on the attached *Soil Test Boring Log* and *Record of Hand Auger Borings*. These logs represent our interpretation of the subsurface conditions at the boring locations based on our visual and textural examination of the recovered soil samples. The horizontal lines in the Soil Description column of the boring logs represent an approximate interface between various soil strata. It is important to understand that these horizontal lines represent an estimated depth of soil variance where as the actual soil change may be gradual. The boring logs are attached in Appendix B.

Judicial Center – West Elevation: Surface materials in the form of roughly 3 to 9 inches of asphalt pavement and 8 to 9 inches of graded aggregate base course were encountered across this portion of the site. Beneath the surface materials, the borings performed along the exterior wall (Borings B-1 through B-3) encountered 3 to 5 feet of fill materials, consisting of clean sands (SP) underlain by native Coastal Plain deposits comprised of clean and clayey sands (SP and SC) to depths of 30 feet below the existing ground surface. These near-surface sands were underlain by an approximate 5 foot thick layer of silts (ML), mixed with cemented particles. Beneath the silt layer, clean, silty and clayey sands (SP, SM and SC), mixed with varying degrees of cemented particles, were encountered to termination or refusal depths ranging between 40 and 50 feet below the existing ground surface.

The near-surface sand layer (SP and SC) exhibited SPT N-values noted to range from 4 to 36 blows per foot (bpf), indicating very loose to dense relative densities. The silt layer (ML) encountered at approximately 30 feet below the existing ground surface exhibited SPT N-values noted to range from 14 to 18 bpf, indicating a stiff relative consistency. Finally, the underlying layer of sands (SP, SM and SC) exhibited SPT N-values noted to range from Weight

of Hammer (W-O-H) to 100+ bpf, indicating very loose to very dense relative densities.

As stated above, it is important to note that during drilling activities at Boring B-3, the drilling mud being utilized was lost in the ground, and the drillers were unable to maintain circulation. Therefore, the boring was abandoned in-place initially with soils, at which point a subsurface void propagated. Approximately 3-1/4 cubic yards of 3,000 psi pump mix was utilized to fill the subsurface void. As a result of the flowing soils condition, drilling methods were altered to incorporate a hollow stem auger in order to facilitate a grout abandonment of the boreholes. Boring B-1 required approximately 1 cubic yard of grout to abandon the borehole, while Boring B-2 required 1/4 cubic yards of grout.

It is also important to note that the flowing soils condition was encountered at all of the boring locations conducted along the western elevation of the Judicial Center, and that according to the drillers, the condition was prevalent in a 3 to 5 foot thick layer beneath the silt layer identified herein.

Finally, it is important to note that a subsurface void was encountered in Boring B-1 at a depth of 3 feet below the existing ground surface.

Library – West Elevation: Surface materials in the form of roughly 4 inches of topsoil was encountered across this portion of the site. Beneath the surface materials, the borings performed along the exterior wall (Borings B-4 and B-5) encountered near-surface fill materials, consisting of clean sands (SP) with intermittent clays (CL), underlain by native Coastal Plain deposits comprised of clean and clayey sands (SP and SC) to depths of 30 to 35 feet below the existing ground surface. These near surface sand, were underlain by an approximate 5 to 10 foot thick layer of silts (ML) and clays (CH), mixed with cemented particles. Beneath the silt and clay layer, silty sands (SM), mixed with varying degrees of cemented particles, were encountered to refusal depths ranging between 45 and 55 feet below the existing ground surface.

The near-surface sands and clays (SP, SC and CL) exhibited SPT N-values noted to range from 1 to 14 bpf, indicating very loose to firm relative densities in the sandy soils and soft to firm consistencies in the clays. The underlying silt (ML) and clay (CH) layer encountered at approximately 30 to 35 feet below the existing ground surface exhibited SPT N-values noted to range from 4 to 15 bpf, indicating a soft to stiff relative consistency within the silty and clayey soils. Finally, the underlying layer of sands (SM) exhibited SPT N-values noted to range from 7 to 100+ bpf, indicating loose to very dense relative densities.

Judicial Center – North and West Elevations: As a result of the subsurface conditions encountered along the western elevation of the Judicial Center in June of 2013, our personnel returned to the site in September of 2013 in order to conduct additional borings along the ***exterior northern and southern elevations of the Judicial Center.*** It is important to note that the upper 8 feet of each boring conducted was hand angered in order to protect any buried utilities, therefore, sampling was commenced at 8-1/2 feet below ground surface.

In summary, the borings conducted along the northern portion of the Judicial Center (B-6, B-8 and B-9) encountered native Coastal Plain deposits comprised of clean and clayey sands (SP and SC) to boring termination depths ranging from depths of 40 to 50 feet below the existing ground surface, with the exception of Boring B-8 in which the near-surface sands were underlain by an approximate 10 foot thick layer of silts and clays (ML and CH), mixed with cemented particles. Borings B-6 and B-9 were terminated in a dense layer of cemented sands. Beneath the silt layer in B-8, clean, silty and clayey sands (SP, SM and SC), mixed with varying degrees of cemented particles, were encountered to termination or refusal depths ranging between 40 and 50 feet below the existing ground surface.

The sand layers (SP and SC) exhibited SPT N-values noted to range from Weight of Hammer (W-O-H) to 100+ blows per foot (bpf), indicating very loose to very dense relative densities, while the silt and clay layers (ML and CH) encountered in boring B-8 exhibited SPT N-values noted to range from 8 to 32 bpf, indicating a soft to stiff relative consistency.

Additionally, the borings conducted along the southern portion of the Judicial Center (B-10 and B-11) encountered native Coastal Plain deposits comprised of a surface layer of clean and clayey sands (SP and SC) to depths ranging from 10 to 15 feet below the existing ground surface. These near-surface sands were underlain by multiple approximate 10 foot thick layers of intermittent clays (CH). Beneath the clay layers, clean, silty and clayey sands (SP, SM and SC), mixed with varying degrees of cemented particles, were encountered to termination or refusal depths ranging between 40 and 50 feet below the existing ground surface.

The near-surface sand layer (SP and SC) exhibited SPT N-values noted to range from 6 to 11 blows per foot (bpf), indicating loose to firm relative densities. The clay layers (CH) exhibited SPT N-values noted to range from 2 to 17 bpf, indicating a very soft to stiff relative consistency. Finally, the underlying layer of sands (SP, SM and SC) exhibited SPT N-values noted to range from 2 to 100+ bpf, indicating very loose to very dense relative densities.

As stated above, it is important to note that as a result of the flowing soils condition encountered in June, drilling methods were altered to

incorporate a hollow stem auger in order to facilitate a grout abandonment of the boreholes. During drilling operations, the hollow stem augers were charged with groundwater in order to identify flowing conditions. In summary, similar heavy flowing groundwater/sand conditions were encountered in borings B-6, B-7, B-8 and B-10 at depths ranging from 12 to 27 feet, 22 to 30 feet, 23-1/2 to 30 feet, and 28-1/2 to 37 feet below ground surface, respectively. Soils samples within the flowing strata indicated the presence of washed/clean sands overlain by typical Georgetown deposits encountered previously.

Judicial Center – Covered Drive and Interior: Surface materials in the form of roughly 2-1/2 to 5 inches of concrete slab-on-grade were encountered in the hand borings (HA-4 through HA-7) conducted inside the Judicial Center, while 3 to 4 inches of asphalt or concrete, underlain by 5 to 7-3/4 inches of base course material were encountered at the surface in the hand borings (HA-1 through HA-3) conducted in the covered drive area.

Beneath the surface materials, the interior borings encountered approximately 5 feet of structural fill comprised of clean sands (SP), where they did not encounter refusal. These near surface fill sands were underlain by native Coastal Plain deposits comprised of intermittent layers of clayey sands (SC) and clays (CL) to boring termination depths. Borings HA-6 and HA-7 were extended to termination depths of 9 to 10 feet below grade-slab elevations, while HA-4 and HA-5 refused at shallow depths (e.g. 2 and 3 feet, respectively) on buried debris and utilities.

Additionally, beneath the surface materials, the covered drive borings encountered approximately 4 to 6 feet of structural fill comprised of clean sands (SP). These near surface fill sands were underlain by native Coastal Plain soils comprised of intermittent layers of clayey sands (SC) and clays (CL) to boring termination depths. Borings HA-1 through HA-3 were extended to termination depths of 9 feet below the existing pavement section grade-slab elevations, while HA-4 and HA-5 refused at shallow depths (e.g. 2 and 3 feet, respectively) on buried debris and utilities.

The near-surface sandy fill materials exhibited average DCP values noted to range from 3 to 25+ blows per increment (bpi), indicating very loose to very firm relative densities, while the underlying native soils exhibited average DCP values noted to range from 5 to 18 bpi, indicating loose to firm relative densities in the sands and soft to firm relative consistencies in the clays.

Groundwater

Free groundwater was encountered at the time of drilling in the borings conducted adjacent to the Judicial Center at depths ranging from 5 to 5-1/2 feet below the existing ground surface in June, and at depths ranging between 4 and 8 feet below the existing ground surface in September. Also, groundwater was encountered in the borings conducted adjacent to the

Library at depths ranging from 7 to 7-1/2 feet below the existing ground surface.

Additionally, stabilized groundwater was measured, on June 18, 2013, in the existing piezometers installed previously at the site at depths ranging from 5-1/4 to 7-1/2 feet below the existing ground surface. A summary of the measured groundwater elevations are presented in Appendices B and C.

Groundwater levels are dependent on many factors and can experience seasonal fluctuations and various other fluctuations due to precipitation, construction activities and many other factors.

EXISTING FACILITIES INVESTIGATION

Crack Survey

During our initial visit, on November 15, 2011, and subsequent follow up visit, on November 18, 2011, cracks were observed in the gypsum interior and masonry load bearing walls, concrete floor and ceiling slabs, brick veneer and masonry retaining walls. Our personnel returned multiple times to visually observe the cracks in both structures, with new cracks reported and recorded on October 31, 2012.

As stated in previous reports, cracking within the building components was observed to be primarily concentrated mostly toward the rear (western) areas of the buildings. Other observations include the heavy, 12-gauge detention grade steel framed holding cell metal doors catching on their frames which were observed to be out of alignment from the shifting of their door frames. Additionally, door frames were observed to have joints that have opened and cracks emanating in the walls from their corners. See the Appendix C photograph log for photographs of interior and exterior cracks.

In total, seven crack monitors were installed on significant sized cracks on the first floor, second floor and third floor mezzanine area of the Judicial Center building and three crack monitors were installed along the rear walls of the Library, on November 19, 2011. As noted in other GS2 reports, cracks within the various building components were observed to grow in size and frequency throughout the building between our initial visits in November of 2011, and since that time, the crack monitors have shown some elastic movement and some crack growth in the structures primarily along their western elevations.

The detailed crack monitoring logs for each structure are attached in Appendix A, and a list of the observed cracks, and tagged crack location drawings, is attached in Appendix C.

Foundation Investigation

Our personnel performed three (3) test pit excavations in order to access the foundations of the Judicial Center and Library structures. The locations of the excavations are as follows:

- Test Pit Excavation #1 (TP-1) – located within a landscaped area along the southern side of the southwestern corner of the existing Judicial Center building.
- Test Pit Excavation #2 (TP-2) – located within the asphalt pavements along the western side of the existing Judicial Center building, north of the southwestern corner, near the entrance into Sally Port 195.
- Test Pit Excavation #3 (TP-3) – located within a landscaped area along the western side of the existing Library building, south of the northwestern corner, adjacent to Library Director 113.

The location of the test pit excavations is shown on the attached *Foundation Excavation and Veneer Cut Location Plan*, Figure 15 in Appendix C.

Once the test pit excavations were performed, our personnel visually observed the existing, in-place foundations within these areas, with the following observations recorded:

- Test Pit Excavation #1 (TP-1)
  - roughly 2 feet of embedment,
  - a roughly 2-foot thick cast-in-place concrete pile cap, extending roughly 2 feet out from the face of wall,
  - timber piles with proper connection to the pile cap spaced at roughly 6-foot on-center.

- Test Pit Excavation #2 (TP-2)
  - roughly 2 feet of embedment,
  - a roughly 2-foot 8-inch thick cast-in-place concrete pile cap, extending roughly 2 feet 4 inches out from the face of wall,
  - timber piles with proper connection to the pile cap spaced at roughly 9-foot on-center.

- Test Pit Excavation #3 (TP-3)
  - roughly 1 foot 4 inches of embedment,
  - a roughly 1-foot thick cast-in-place concrete shallow continuous wall foundation, extending roughly 8 inches out from the face of wall,
  - shallow foundation extended 2+ feet beneath the face of foundation under the building.

Ground Penetrating Radar (GPR)

GS2 is familiar with the subject structures, and was hired to perform an initial GPR survey of both buildings on November 26, 2011. The initial survey revealed no sinkholes or large voids within 6 feet of the bottom of the floor slabs. Anomalies most likely associated with moisture intrusion under the

concrete slab were observed along the middle of the west elevation wall of the Library. The Library also had evidence of slab cracks and differential displacement. Numerous utility conduits were also observed in the Library floor slab.

The Judicial Center had anomalies observed below the asphalt pavement driveway adjacent to the southwest support column. Subsurface soils were observed to be disturbed with indications of changes in density. An indication of a subsurface anomaly was also observed at the end of the corridor near the holding cell.

A Vermeer Interragator INT-EZ GPR was used for our most recent GPR survey conducted of both buildings, on June 5, 2013. The GPR was obtained from the Georgetown County Public Works Department and was the same unit used during the initial survey.

The Library concrete floor slab appeared to have similar anomalies as our original GPR survey, (detailed above), with no new anomalies observed.

The Judicial Center had anomalies in the subsoil observed near the southwest support column under the asphalt driveway which appeared to be more prominent in size and clarity then previously observed. The soil changes in density were clearly visible and indicate a disturbance in the subsurface soils.

The raised slab at the clerk of court open office area had a depression observed near a door frame leading into a conference room. This area had localized anomalies under the slab. The clerk of court office area also had another depression along the west wall under the carpet near a doorframe and metal cabinets. Subsoil indications reveal a utility line approximately 3 inches wide under the slab at the depression.

The same indication was observed at the end of the corridor adjacent to the holding cell as previously observed.

Piezometer Observations

Piezometers (ground water wells) were installed around the exterior of the Judicial Center on November 20 and 21, 2011 with a mobile drill rig. Ten (10) piezometers were installed with five (5) at the rear (west) of the facility and five (5) along the front (east) of the facility. Ground water measurements were taken on three different occasions in November and December 2011, again three different occasions in September 2012, and most recently, on June 18, 2013. The data and site location map is provided in Appendix C.

The initial November and December readings showed as much as 5 feet of ground water height elevation difference from the east side to the west side of the site, with the average water level recorded on November 21, 2011 to be 10.47 feet. Subsequent readings made, on December 2, 2011, yielded an

average depth of 8.52, while measurements made, on September 14, 2012, indicate an average water level of 9.00 feet. The most recent groundwater measurements made, on June 18, 2013, yielded an average groundwater depth of 5.78 feet. It is important to note that our personnel were unable to locate piezometers 1 and 6 during our most recent site visit.

Veneer Section Cuts

Brick veneer section cuts at locations near areas of the veneer which had cracked were performed on both buildings, on June 26, July, 16 and 18 2013. Approximate locations of the veneer cuts are indicated on Figure 15, in Appendix C.

The section cut at the judicial center wall below the window near the holding cell was observed to have a 1-1/2" extruded polystyrene insulation board by Dow Chemical that was sealed with tape at all joints, and adhered to the CMU back-up wall. The exterior face of the CMU back-up wall was applied with a emulsion based semi-mastic damproofing/vapor-retarding coating (BASF Hydrocide 700B). Cool air was felt flowing from the section cut to the outdoors. Adjustable wall Seismic ties (Durawall DA-213S System) were observed attaching the veneer to the structural masonry block wall. Cracks in the brick veneer were observed to not translate through to the masonry block wall with black moisture barrier (bituminous damproofing) at the cut location. Movement of the veneer is allowed by the seismic ties, which bend under stress. The seismic tie has eyelets that are attached to the CMU back-up wall and allow for a pintle insertion of 1-1/4" maximum allowable eccentricity. Cracks may extend into the masonry block walls if the seismic ties are restricted from movement or bent to exceed their movement range. Seismic ties observed were not bent to their maximum range and the insulation board was not observed to be torn at this location.

The county library brick veneer section cuts were performed at two locations along the west elevation. One at the north half of the west elevation and the other at the south half. Both were located next to window frames and cracked brick veneer. A sheet rock wall with an integral black moisture barrier (exterior type gypsum board) attached to a metal stud frame was observed in each section cut as shown in the attached photograph log, Appendix C. Cracks were not observed in the interior sheet rock wall in the wall cavity.

See attached photograph log for photographs of veneer section cuts, Appendix C.

Infrared (IR) Survey

A Fluke TI25 infrared camera was utilized to perform the survey of both buildings, on June 28, 2013. The camera observations indicated that moisture was evident in both the Judicial Center and Library building brick veneer cracks in the early morning hours due to condensation on the roof and exterior walls.

Moisture was also observed in the IR photos of the cracks in the concrete curbing and asphalt drive way near the southwest support column of the Judicial Center as is shown in the attached IR photo log, Appendix C.

The Judicial Center walls were observed, as well as felt, to have cool air flowing inside them. This was evident in IR photos of the cracks in the electrical room block walls at the west elevation. Cool air was also felt leaving the brick veneer cut below the window near the holding cell along the west elevation. See the attached veneer cut photo log for the applicable photographs, Appendix C. Judicial Center employees have stated in the past that cool air was felt at a separated joint in a masonry accent block resting on the lintel over the asphalt driveway on the west elevation.

Heat was not observed with the IR camera to be entering the building through the cracks in the masonry block walls due to the Dow insulation board observed in the wall cavity, which was sealed with tape. See applicable photographs in the attached veneer cut photo log, Appendix C.

The Library walls have metal studs which were observed to be warmer than the interior sheet rock wall. Heat from the outside air was observed to be warming the metal studs in the wall cavity through conduction of the outside sheetrock wall, which has a black moisture barrier. No cracks of the interior sheetrock walls were observed with the IR Camera.

Window Spray Test

The exterior windows are a glazed aluminum curtain wall system by Kawneer: Series 1600 Wall System. The system is a 2-1/2" x 10" outside glazed pressure plate format, thermally broken with interior tubular sections insulated from the exterior glass retaining member. The glazing consists of hurricane resistant, sealed, insulated glass units providing a total unit thickness of 1-5/16" in which the outer pane is 1-1/4" heat strengthened with LoE coating, ½" air space with an in board lite consisting of ¼" clear plate glass with laminated 0.100 liquid resin to ¼" clear plate glass to form 9/16" laminated glass. Upon completion of the Judicial Center, a field water test in accordance with ASTM E 1005 was completed on 3 of the completed window units. No leaking was evident at the time these tests were performed. Exterior window spray testing using a B-25 nozzle and test rig from the ground and from a bucket truck per the guidelines of AAMA 501.2-03 *Quality Assurance and Diagnostic Water Leakage Field Check of Installed Storefronts, Curtain Walls, and Sloped Glazing Systems* was performed on July 30, 2013. Interior moisture intrusion observations in the rooms tested were made while the spray test was being performed.

Ground Floor Probate Judge's Chambers: On July 30, 2013, a fixed window system was tested in the probate judge's chambers. The right window of two windows facing outward from the interior was tested. The window consisted of 4 glass panels with aluminum structural components and rubber like gasket material. During the testing, leakage was observed at one

of the bottom glass panels. Water flowed along the inside of the aluminum panel and pooled on the window sill.

Second Floor Family Court Judge's Chambers: On July 30, 2013, a fixed window system was tested in the family court judge's chambers. The windows facing the south elevation near the southwest corner of the building was tested. The window consisted of 4 glass panels with aluminum structural components and rubber like gasket material. During the testing, leakage was observed at one of the bottom glass panels. Water flowed along the inside of the aluminum panel and pooled on the window sill.

Second Floor Unfinished Storage Room: On July 30, 2013, a fixed window system was tested in the unfinished storage room. The windows facing the west elevation at the far right facing outward from the interior of the building was tested. The window consisted of 4 glass panels with aluminum structural components and rubber like gasket material. During the testing, leakage was observed at one of the bottom glass panels. Water flowed along the inside of the aluminum panel and pooled on the window sill.

Cistern Investigation

Our personnel visually observed the existing water level in the underground cistern, on June 13, 2013. This visual observation was performed by removing the southwestern most manhole cover of the underground cistern, located within the handicapped parking to the north of the existing Judicial Center building. The existing water level appeared to be roughly 3 to 4 feet below the existing ground surface (elevation of manhole cover). From our conversations with Georgetown County Facilities representatives, it is understood that the underground cistern was originally installed to supply captured stormwater to the irrigation system at the site, however, the connection and pump system were not installed at the time of construction, or since, therefore, there is no collected stormwater utilized form this cistern. Therefore, as no water is being mechanically pulled from this cistern, and the existing water level appears to be consistent, it does not appear that there is any damage to the underground cistern causing leakage of the collected stormwater.

Interior CMU Field Survey

Anchor Consulting Engineers, LLC. conducted a survey, on September 14, 2013, of an established CMU block course around the perimeter of the interior of the Judicial Center in order to determine relative elevations along the exterior CMU block walls of the structure. The surveying was completed by establishing multiple relative elevation benchmarks. Survey elevations were measured to the nearest 100th of a foot, with survey locations and relative elevations recorded and attached in Appendix C.

In summary, the elevations recorded indicate a variance of as much as 0.12 feet (1.44 inches) in the elevation of the same block course between the north and south wall elevations along the perimeter of the Judicial Center structure. The highest relative elevations of the block course were recorded along the

northeast corner of the structure, while the lowest relative elevations were recorded along the south, southwest and southeast walls of the Judicial Center.

As indicated in the Interior CMU Field Survey, a significant elevation difference in a common block mortar joint has a variance of as much as 1.44 inches around the perimeter of the Judicial Center. This significant variance is likely a direct reflection of the differential (not total) elevation "drop" in the piles and related concrete pile caps.

Veneer Field Survey

Anchor Consulting Engineers, LLC. conducted a survey, on June 28, 2013, of an established brick course around the perimeter of both structures in order to determine relative elevations along the exterior veneers. The surveying was completed by establishing multiple relative elevation benchmarks. Survey elevations were measured to the nearest 100th of a foot, with survey locations and relative elevations recorded and attached in Appendix C.

In summary, the elevations recorded indicate a variance of as much as 0.19 feet (2.28 inches) in the elevation of the same brick course around the perimeter of the Judicial Center structure. The highest relative elevations of the brick course were recorded along the northeast corner of the structure, while the lowest relative elevations were recorded along the south, southwest and southeast walls of the Judicial Center veneer.

In summary, the elevations recorded indicate a variance of as much as 0.25 feet (3 inches) in the elevation of the same brick course around the perimeter of the Library structure. The highest relative elevations of the brick course were recorded along the northeast corner of the structure, while the lowest relative elevations were recorded along the south and west walls of the Library veneer.

As indicated in the Veneer Field Survey, a significant elevation difference in a common brick mortar joint has a variance of as much as 2.28 inches around the perimeter of the Judicial Center. This significant variance is likely a direct reflection of the differential (not total) elevation "drop" in the piles and related concrete pile caps.

STRUCTURAL ASSESSEMENT

The structural foundation for this Judicial Center building consists of cast-in-place reinforced concrete pile caps supported by piles founded at depths 30 to 40 feet. The exterior wall systems are load bearing masonry block, with an exterior brick veneer. Typical floor systems are steel beams composite with the concrete floor/steel deck systems by utilizing steel studs attached to the floor beams and embedded into the concrete floor slabs. The roof system is constructed with structural steel.

The exterior brick veneer is founded on the pile supported concrete caps and grade beams. The overall observed settlement is a direct reflection of the change in elevation of the concrete grade beams. Veneer cracks are likely to occur in locations where the concrete grade beams have deflected to the point of cracking thereby allowing an opportunity for the brick veneer to behave separately from the backup masonry block walls. In this type deflection, veneer cracks will rarely align with the cracks in the backup masonry wall. Wall height, wall configuration and settlement magnitudes may result in horizontal distances of as much as 15 feet between the veneer and backup masonry cracks. Given the actual conditions, the brick ties are subject to fail depending of the vertical displacements between the veneer and backup wall.

It is noted that the above described structural system provides a rather rigid masonry wall "box" type system which is resistant to deformations resulting from external loads and, in this case, foundation settlements. In the event of a failed pile, the system will likely bridge the pile through the structural capacity of the concrete pile cap and masonry walls above.

ARCHITECTURAL SERVICES

Georgetown County Judicial Center: The Architect was first notified of the presence of cracks along the interior surface of the gypsum wallboard walls and the structural exterior CMU wall in November of 2011. The Georgetown County Judicial Center consists of a three-story structure with a mechanical mezzanine within the roof. The structure consists of masonry load bearing walls supported on a concrete foundation on driven wood timber piles. The roof is a structural steel frame that supports the standing seam metal roof, and/or modified built up roof at the one-story sections. The exterior wall consists of a 4" brick masonry veneer with a cavity wall system consisting of a 2" air space and 1-1/2" board insulation and bituminous damproofing applied to the 12" reinforced CMU structural wall. The CMU structural wall has a typical vertical reinforcement at 32" on center with bond beams at every 48" on center vertically. Each floor line has a steel angle located along the building perimeter at the brick veneer. The cavity wall system is incorporated with an integrated thru-wall flashing as part of the building envelope assembly. The veneer fenestration consists of a curtain wall system with impact resistant glazing. The mechanical mezzanine accommodates all of the mechanical units with the exception of the cold water chilled unit that is located behind the vehicular sallyport. The design of the building incorporates the use of four stair towers at the building extremities with the core of the building consisting of the holding cells that are constructed of CMU walls that are filled solid and heavily reinforced and poured in place ceilings. The holding cell areas have detention grade doors/hardware and pick resistant sealant.

Georgetown County Library: Architect was first notified that the library director's door would not open (Room 113-Library Director). Upon further review of the facility, gypsum wall board cracks were evident along the main gallery of the library which incorporates Room 103 Circulation and Room 104 Reference. The cracks appeared to go vertically up the wall in correlation with the column line (Figure L9, L9, L10) and then extend along the sloped ceiling. Additionally a pronounced gypsum wallboard crack was identified above the door to Room 109 storage as denoted in Figure L-12. This crack extended through the entire gypsum wall board surface as well as the wallpaper. A walk around the exterior of the building denoted several cracks that extended from the window lintels along the brick veneer (figures L18-L25).

The structure was built in the late 1980s and is a slab on grade with metal stud exterior with interior column grid. The exterior wall condition consists of metal stud framing with an exterior grade gypsum wall board sheathing (of black appearance) that appears to be taped at the seams with an air space and 4" brick veneer. From the location in which they removed the brick veneer, it was unclear as to the use of proper thru-wall flashing and or seismic wall ties at the veneer. It is also unclear as to the type of gypsum wall board sheathing that was used. It appears that the interior cracks are recent and not due to lack of maintenance.

The main roof structure is a flat roof with a parapet at the perimeter consisting of a built-up roof installation. The vaulted gallery portion consists of a metal standing seam metal roof. The fenesteration and the veneer is aluminum storefront system.

Field Observations

Georgetown County Judicial Center: Our observations over numerous visits to the structure have found that the exterior reinforced CMU wall has numerous cracks as identified in previous sections of the report and the attached photographs/diagram. The cracks range from hairline cracks that penetrate the interior face of the CMU wall to cracks that penetrate the entire CMU wall exposing the cavity wall to the interior space. The cracks in the exterior CMU wall have not always transferred the cracks into the brick veneer. The brick veneer is attached to the exterior CMU wall via seismic wall ties that allow for movement. The electrical room, which does not have any interior gypsum wall board, demonstrates the severity of the tracking as the exterior CMU wall that could be present at other exterior walls that are not exposed due to interior gypsum wallboard. At this condition, the severity of their interior cracks is not translated through visual observation at the brick veneer (figure A26-A29, B-39, C-1).

The interior wall surface of the exterior CMU wall consists of 5/8" gypsum board attached to metal hat channel. These walls make up the perimeter of the structure. These walls have demonstrated numerous cracks in gypsum wallboard and numerous pops in the gypsum wallboard screws become dislodged from the substructure (figure C1).

This same reinforced CMU wall construction consists at +/- 40' on center pattern that divides the courtrooms from the holding cells, or the courtrooms from the corridors. Numerous cracks have been evident along these interior wall surfaces that extend from 3rd floor to 1st floor (figure A44, B21, B28, C22, C26). Several of these cracks have been noted to occur at expansion joints in the CMU wall.

Since the carpet has not been removed it is unclear as to the extent of cracks in the concrete slab. It is evident of concrete slab cracking in Jury Assembly Room, (figure A42) Electrical Room (figure A30, 31) and future Room (figure B38, B40)

The entry of the building consists of low planter walls and ramps for accessibility into the building and steps. It has been observed that the CMU walls at the planters have been separating and are experiencing movement issues. The low planter walls are supported on wood pile foundations (figure A 115-A130).

Throughout the building it has been observed that numerous door and door frame conditions have become unplumb and therefore not allowing the doors to close properly. In the holding cell area, where tolerance is much greater due to the 12 gauge detention grade door and the associated electronic locking system, several of these doors will not close at all. Additionally, there are cracks within the CMU wall and floor slabs at the holding cells in which contraband can be stored (A87, A92, B8, B12, B14, B16, B17)

Georgetown County Library: The interior and exterior cracks are denoted in the attached diagrams from figure L1-L32. The majority of the cracks occur at the rear portion of the building, which is the closest side to the Judicial Center, and along the vaulted ceiling gallery area. Both doors that were repaired due to misalignment occurred along the rear portion of the building.

Roof Assessment

See attached report from Shepard & Associates, LLC, regarding assessment of the roof for the Georgetown County Judicial Center and the Georgetown County Library.

Plumbing Elements

See attached report from McKnight Smith Ward Griffin Engineers, Inc, regarding assessment of the plumbing for the Georgetown County Judicial Center and the Georgetown County Library.

Mechanical Elements

See attached report from McKnight Smith Ward Griffin Engineers, Inc, regarding assessment of the mechanical for the Georgetown County Judicial Center and the Georgetown County Library.

Electrical Elements

See attached report from McKnight Smith Ward Griffin Engineers, Inc, regarding assessment of the electrical for the Georgetown County Judicial Center and the Georgetown County Library.

Fire Protection

See attached report from McKnight Smith Ward Griffin Engineers, Inc, regarding assessment of the Fire Protection for the Georgetown County Judicial Center and the Georgetown County Library.

CONCLUSIONS

From our additional geotechnical exploration and facilities investigation, we can make the following general conclusions:

1. From our Historical Research and Records Review, we have determined that early Georgetown's surface topography and storm water conditions in the near vicinity of the site were controlled by a natural slough that deposited storm water into the nearby Winyah Bay. It is understood that the slough was backfilled during, or prior to, the construction of the nearby steel mill.

2. Based on a review of a geological report prepared by the South Carolina Geological Survey (SCGS) in 2011, and based on recent conversations with the SCGS, the Lower Bridge member is believed to support Karst (cavity flow) topography.

3. Based on the observed frequency, timing and close proximity of the Judicial Center, Library and other surrounding structures that have experienced damage and or catastrophic failure due to recent settlement and/or the propagation of nearby sinkholes, we have determined that a common subsurface groundwater drawdown or redirection phenomenon caused the subsidence/destabilization of the load bearing soils in portions of downtown Georgetown, including the sites of the subject structures.

4. From our soil borings and coring activities, it is further obvious that the near-surface soils are generally competent beneath the grade-slab, however, the deeper soil borings exhibited "flowing" soil conditions between depths of 35 to 40 feet below the existing ground surface (bgs) along the western elevation, and at depths of 12 to 30 feet bgs and 22 to 37 along the northern and southern elevations, respectively. These flowing soil conditions lend a moderate to high probability for the propagation of sinkholes within the western 2/3rds of the Judicial Center building footprint.

5. From a review of the construction documents, it appears that the pile foundations for the Judicial Center bear within the flowing soil conditions. In addition to the relatively large settlement event that occurred in November and December of 2011, the fact that the piles bear within the

flowing soil conditions indicates that future degradation of the pile support capabilities is possible, either by the slow progressive erosion of the subsurface pile bearing soils or suddenly by the propagation of a sinkhole.

6. Mr. Ken Timmerman, P.E., with Kyzer and Timmerman Structural Engineers, performed site visits during the photographing phase of this report. Given the location and configuration of cracks, it was evident that the rear and side exterior walls and rear half of the building (interior) had undergone a significant settlement(s). In conversations with County Personnel, it appears that many of these cracks may have formed at differing times. The wall and floor crack configurations observed is characteristic of a undermining event with the epicenter located some distance behind the building.

   A rear epicenter event is much like a building located along the eroding bank of a river. As the erosion undermines the building the structural members will cantilever until the stresses are great enough to fail that portion of the building. As the erosion continues, the next section (or segment) of the building will cantilever until failure- and so on.

   At the Judicial Center, with the foundation support soils (piles) unsupported, the rear wall dropped opening cracks at and near the rear wall of the building. Over time, the foundation support failure progresses toward the front of the building which allows additional stresses in the walls resulting to additional cracks toward the center of the building.

   Depending on the location and progression of the foundation failure, the displacement stresses will travel to the upper floors and continue to produce and open additional cracks in the building upper walls and floors.

7. ***Georgetown County Judicial Center:*** Based on frequent observations and walk-throughs at the Georgetown County Judicial Center, after the commencement of subsurface groundwater draw down, the monolithic monumental structure that was designed for a long-life span has demonstrated deficiencies within the building envelope system: These deficiencies have manifested themselves in multiple ways including but not limited to cracks in the exterior building envelope, cracks in the interior load bearing walls, cracks at the interior gypsum wall board surfaces, cracks at the slab on grade, cracks at the elevated concrete slabs and cracks along the low plantar walls and accessible ramps. The door alignment/plumbness issues at numerous door openings is experienced throughout the facility with paramount concern at the holding cell areas that has a very tight tolerance in order for the electronic door locks to function properly in a high security environment. Therefore the stress placed on the exterior load bearing wall affects the integrated through wall flashing within the building assembly and breaches the bituminous dam-proofing vapor barrier, thus allowing for the potential for moisture

migration (from unconditioned outside air) into the building. The vapor pressure is higher at the exterior of the building than at the interior of the building, and will allow moisture to be driven into the building through the cracks in the exterior CMU, therefore establishing a condition that was not designed to accommodate.

The brick veneer that is attached to the exterior reinforced CMU load bearing wall is via hot dipped galvanized seismic ties has not demonstrated cracking in conjunction with the CMU wall at all locations. The brick veneer has the ability to move separately from the CMU wall due to the tolerance of the 1-1/4" leg of the seismic tie. It is unknown at this juncture as to how stressed the brick veneer is with regards to it's attachment to the eyelet (either the tie could be pushing into the eyelet beyond it's tolerance, or the tie could be close to being vertically removed from the eyelet), thus providing no anchorage of the brick veneer to the CMU wall and thus creating the potential for a veneer that is unsupported.

The curtain wall system has demonstrated through recent testing that the gasket along the pressure plate has been compromised. The initial testing at the conclusion of the construction demonstrated the curtain wall system was in compliance with industry standards and that no leakage occurred. Recent tests had each selected window fail within a short duration of time, thus concluding that some movement has occurred, placing the integrity of the sealed glazing condition under duress. There have been no cracks evident in the glazing, but the glazing system is a hurricane resistant glazing with laminated glass and a tempered glass at the exterior face. The curtain wall system allowing water intrusion provides another source of water migration that is detrimental to the integrity of the building envelope system.

The entire holding cell area to include detention hallways and all ancillary rooms provide a CMU walls that are filled solid with grout and all floor to wall joints as well as any cracks or crevices were sealed with high pick resistant sealant by Sika Corporation. In certain areas, this grout has been compromised and in other areas, cracks through the CMU wall have become evident, thus providing the potential for contraband to be hidden by detainees and creating an unsafe condition for a highly secure environment.

The exterior front entry of the structure is designed with a series of ramps, stairs and planters that form the entrance to the facility and link to the other surrounding buildings. The separation in the planter walls and subsequent cracks in the exterior concrete slabs and stairs present the potential for conditions that comply with accessibility standards to be compromised and therefore void their compliance. The current condition has not proven that the settlement has stopped; therefore the tolerances,

if further settling occurs, will not meet the current standards. For example, handrail height to ramp, ramp slope percentage.

Therefore, as it has been observed that obvious signs of stressing of the cosmetic and structural components of both buildings has occurred, we have concluded that the stressing is most likely attributed to excessive total and differential settlement. This total and differential settlement is attributable to multiple factors that appear to be compounded in many cases by the nearby dewatering events. In summary, the dewatering events created down-drag forces that were exerted unevenly on the deep (pile) and shallow foundations of the structures, resulting in the observed differential settlement.

Finally, we have concluded that the soil support characteristics observed during our exploration indicate that the bearing soils have the potential for ***additional*** large and unpredictable settlement, and, more importantly, large and unpredictable differential settlement under the current site and structural conditions. ***Of particular concern is the potential for the accelerated loss of support conditions that exists through the erosion of the soil matrix by the migration of groundwater through the western portion of the Judicial Center structure. If these conditions manifest, then large excessive/catastrophic settlements may occur in a relatively short period of time.***

These conclusions, and the associated recommendations, are provided in the assumption that the soil conditions at the site do not vary greatly from those encountered in our borings and that our recommendations presented in the following sections of this report are followed.

RECOMMENDATIONS

Based upon multiple conversations held with the design team, it is our recommendation that the foundations for both structures require stabilization in-place. In general, the following remedial activities are recommended to be undertaken;

- That the foundation loads of both structures be transferred to depths below the flowing soil conditions (e.g. below a depth of 50 feet below the existing ground surface).
- That the western half of the grade-slab in the Judicial Center be removed and replaced with a pile supported reinforced slab.
- That the grade-slab soils in the eastern half of the Judicial Center be filled with polyurethane, structural grout, or some other equivalent injected expansive structural fill/grout.
- That upon the stabilization of the foundations and grade-slabs, as described herein, the structures building components/systems/cosmetics be returned to original conditions.

- That additional pre and post remediation studies be conducted, including the monitoring of the structures.

Additional, building component/system specific recommendations are contained in subsequent sections of this report.

Proper sequencing of the remedial activities is paramount to the success of the project. Therefore, extensive design team planning and mandatory pre-bid and pre-construction planning sessions are strongly recommended.

Structural Recommendations

In order to stabilize the existing foundation for the Judicial Center, deep foundations in the form of micro-piles should be installed to augment the existing building piles and pile caps.

Furthermore, the ground floor slab-on-grade along the rear half of the building is recommended to be replaced with a micro-pile supported reinforced slab. The existing slab-on-grade near the front portion of the building is recommended to be supported by grout injection or soil solidification of the underlying support soils.

With the foundations and main level slabs stabilized, the existing cracks in the walls and floors may be repaired and/or replaced as required.

Architectural Recommendations

Georgetown County Judicial Center: It is recommended that the building envelope system be returned to its original condition due to the compromised condition, after the structural stabilization work is complete. This work would include removal of the brick veneer and building insulation to allow for the assessment and sealing of the cracks in the CMU load bearing wall and reapplication of the vapor barrier.

It is recommended that the curtain wall system at each individual unit be water tested and upon failure of system, remove and reinstall the glazing system after corrective work is complete. Upon completion, the window unit shall be retested to comply with standards.

It is recommended that all interior gypsum wallboard cracks be repaired and repainted.

It is recommended that cracks in the interior concrete slab shall be repaired. The extent of the cracking in the concrete slabs is unclear since the carpet has not been removed.

It is recommended that all doors and frames be reviewed to reestablish true plumbness and proper alignment so that doors will close in accordance with industry standard and tolerance required by the security system.

It is recommended that all landscape walls be demolished and reestablished in accordance with initial design standards and accessibility tolerances.

Georgetown County Library: It is recommended that the cracks in the interior gypsum wallboard be repaired and repainted (or install wall paper). Additionally, replumb the two existing doors that were misaligned.

It is recommended that the exterior cracks in the brick veneer be repointed and resealed.

Foundation Stabilization Recommendations

As stated above, it is our recommendation that due to the non-performing (unstable) bearing soils observed, that the ***foundation*** structural loads of the existing structures be transferred an adequate depth past the flowing soil conditions by a series of deep foundations. Additionally, it is our recommendation that the western half of the Judicial Center be demolished and replaced with a deep foundation supported reinforced slab.

Based upon our experience with similar site and remediation project conditions, the following pile types were considered;

- Push Pier Minipiles,
- Helical Pier Anchors, and
- Micropiles.

Push Pier Minipiles or Helical Pier Anchors appear to be acceptable pile types for the stabilization of the Library foundations. However, due to higher structural loads, we have determined that Micropiles are the most viable deep foundation type for the Judicial Center.

There are multiple types of Micropiles, including solid bar and hollow bar pile systems, and multiple installation methods, however, we do not recommend that jetting or wet method drilling techniques be utilized for installation, as excessive amounts of drilling water or mud should not be introduced into the subsurface karst formation beneath the structure. At a minimum, potential Micropile foundation types and installation methods should account for the following;

- The required structural load capacity (100 kips allowable in compression, FS=2.0),
- Proposed seating depths should extend to adequate depths below the recorded flowing soil conditions (e.g. to depths greater than 45 feet below the existing ground surface),
- Low-clearance and limited access beneath and around the structures,
- Subsurface obstructions that will be encountered (concrete, debris, etc.) that will create difficult drilling and installation conditions,

- Casing may be required depending upon the Micropile type and installation method selected. As stated above, the introduction of excessive drilling water or mud will not be allowed for this project,
- Finally, the installation method utilized to install the deep foundations should create minimal vibrations in order to minimize the potential for consolidation of the in-place subsurface loose soils and/or voids.

These design and installation services can be sought through a specialty or deep foundation contractor. This document should be presented to the selected specialty or deep foundation contractor for guidance. Additionally, the specialty or deep foundation contractor should submit their plan for completing the remedial work to our engineer, or the project structural engineer, for final review, with particular emphasis placed on the design of remedial structure or element, materials to be used, and the frequency of placement.

It is imperative that the Micropile contractor coordinate all work and schedule activities with the other specialty contractors that will be providing void remediation services, as additional services and/or impact to their work efforts may be realized by improper sequencing of the remedial activities.

Quality Control Recommendations: During deep foundation system installation, the installation process should be observed and monitored by a qualified geotechnical engineer or engineering technician, with their field report including the following, at a minimum:

- A daily recording of the operation of installation equipment and any non-compliance with the project specifications.
- A recommendation of suspension of installation if unexpected conditions or difficulties are encountered.
- A record of the dimensions and location, along with any defects, for each underpinning member.
- A record of the installation measurements achieved for each member.
- A record and report of movement of previously installed adjacent members.
- A record of installed lengths for pay purposes.

Subsurface Soil Remediation Recommendations

As stated above, it is our recommendation that the subsurface soils in the eastern half of the Judicial Center be filled by injecting pressure grout or through the installation of a hydro/insensitive high-density polyurethane system. It is important that the designer, and that the pressure grouting contractor, account for limiting additional loads applied to any retaining walls within these areas, as the injection of the pressure grout/polyurethane, can cause additional lateral loads to the adjacent walls, which could cause additional fatigue and failure.

At this time, the horizontal and vertical extents, and resulting volume, of any subsurface void(s) is unknown. However, the injection of the pressure grout/polyurethane will more than likely have to be completed by the installation of multiple pilot holes extended through the grade-slab to depths approaching 5 feet below finished floor elevation.

These services can be sought through a specialty Pressure Injection contractor. This document should be presented to the selected specialty contractor for guidance. Additionally, the specialty contractor should submit their plan for completing the remedial work to our engineer, or the project structural engineer, for final review, with particular emphasis placed on the design of remedial structure or element, materials to be used, and the frequency of placement.

It is imperative that the Pressure Injection contractor coordinate all work and schedule activities with the other specialty contractors that will be providing Micropile remediation services, as additional services and/or impact to their work efforts may be realized by improper sequencing of the remedial activities.

We strongly recommend that the installation process be observed and monitored by a qualified geotechnical engineer or engineering technician in order to confirm that the recommended application rates are achieved.

Monitoring Program

As recommended in previous letters and in multiple meetings, county personnel are undertaking a Crack and Settlement monitoring program at the site currently. The recommend programs underway at this time include:

Crack and Settlement Monitoring: A crack and settlement monitoring program has been approved by Georgetown County at this time, with the crack monitors initially set in November of 2011. Crack monitoring and surveying are recommended to continue, once new baseline data is established, weekly for the duration of the remedial work.

Pre and Post Construction Surveys

In addition to the monitoring, testing and inspection requirements called for in this document, we recommend that prior to performing any remedial activities at the site that a preconstruction survey be performed by a qualified facilities engineer. At the least, the survey should document the existing conditions of the adjacent structures and surrounding portions of the existing structure that are to remain prior to remedial activities, with any deficient building components and distressed sections noted during the initial preconstruction survey identified.

Upon identifying any obvious deficient and distressed building components, they should be marked in the field, and monitored with instrumentation, such as crack monitors or other devices, in order to observe movement or further

distress that may occur during the remediation process. Any instrumented sections should be monitored immediately after the completion of the remedial activities at the site, and for a period of 1 year at quarterly intervals in order to quantify any settlement or movement of the existing structure. If the findings from the monitoring conclude that settlement has occurred, or that the rate of settlement is increasing, then additional remedial recommendations should be made at that time.

Also, where necessary, (i.e. where remedial activities may impede, or undermine adjacent structures, or where vibrations from the adjacent activities may impact the existing structure), it will be necessary to develop a construction monitoring program to minimize impact to these structures. These activities may range from visual observations to the full time establishment of a vibration monitoring program, established to create a minimal threshold to stop work. The development of an acceptable monitoring program should be established by the project structural engineer, prior to the commencement of remedial activities.

BASIS FOR RECOMMENDATIONS

The conclusions and recommendations presented in this report are based on our understanding of the project information, our interpretation of the data obtained during our research and exploration and our experience with similar soil and project conditions. The Standard penetration Test (SPT) and Dynamic Cone Penetrometer (DCP) test values obtained at the boring locations have been used to estimate existing soil conditions at this specific site. Regardless of the thoroughness of this investigation, it is possible that the soil conditions intermediate of the borings vary from the soil conditions encountered at the boring locations. Therefore, it will be necessary for a geotechnical engineer or qualified engineering technician to be present during remedial operations in order to evaluate and document that the anticipated design conditions actually exist.

GS2 Engineering and Environmental Consultants, Inc. and its employees are not liable for any damages to the structure or the surrounding areas incurred during remedial activities. Nor is GS2 or its employees liable for any damages to the structures or the surrounding areas resulting from short or long term consolidation of the bearing soils due to the remedial activities conducted as a result of the recommendations outlined in this report.

CLOSING

Once again we appreciate the opportunity to provide our services for your geotechnical consulting needs. If there are any questions concerning our recommendations or if additional information becomes available, please contact us.

Sincerely,
GS2 ENGINEERING & ENVIRONMENTAL CONSULTANTS, INC.

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	FIFTEENTH JUDICIAL CIRCUIT
Georgetown County and SCAGO Public Facilities Corporation for Georgetown County, Plaintiffs, vs. GS2 Engineering and Environmental Consultants, Inc.; Kyzer & Timmerman Structural Engineers, LLC; Tych & Walker Architects, LLP; George Sembos; Michael Walker; and Ashleigh Weatherly, Defendants.	Civil Action No.: 2016-CP-22-00123 **CERTIFICATE OF SERVICE**

FILED
GEORGETOWN COUNTY, S.C.
2016 JUL 25 AM 9:07
ALMA Y. WHITE
CLERK OF COURT

I, Katie A. Minton, an employee of Callison Tighe & Robinson, LLC, Attorneys for Plaintiffs, do hereby certify that, on this date, I served the foregoing **AMENDED SUMMONS AND AMENDED COMPLAINT (with Exhibit A)** upon the following parties by depositing a copy of the same in the United States mail with proper First Class postage affixed thereon, addressed as follows:

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Katie A. Minton

July 20, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**

COUNTY OF GEORGETOWN) CASE NO: 2013-CP-22-1062

B E F O R E: The Honorable Larry Hyman
August 7, 2014

GEORGETOWN COUNTY,

Plaintiffs,

ORIGINAL

vs.

DAVIS & FLOYD, INC., et al.

Defendants.

APPEARANCES:

George Taylor, Esq.
Appearing on behalf of Georgetown County

David Morrison, Esq.
Appearing on behalf of the City of Georgetown

Lisa Reynolds, Esq.
Appearing on behalf of SCDOT

Court Reporter:
Natalie Dahl, RPR

P-R-O-C-E-E-D-I-N-G-S

THE COURT: Motion for summary judgment, Georgetown County versus Davis and Floyd, et al. I only have like two other really short things -- no, I don't. I have quite a few, sorry. Go ahead, let's hear it.

MR. TAYLOR: I'm George Taylor and I represent Georgetown County. If I may approach, I have a couple notebooks. We're here on the County's motion for summary judgment in respect to a claim of inverse condemnation, and the portion of the inverse claim that is the taking portion. The damages portion, we believe, we would be entitled to a jury trial.

THE COURT: The only issue before me, as I understand, is whether or not this injury -- or this damage -- actually, the disability, is it not, constitutes a taking under the condemnation law of this state, and you are not asking me to make a ruling as to damages; is that correct?

MR. TAYLOR: That is correct.

THE COURT: Now, are you asking me to make a ruling as to whether or not there is a -- I know that sounds like what I just said, but really there are two components. One, was there a taking; two, does this type of activity result in a taking under the

condemnation law; you understand? Did they do something that resulted in a taking?

MR. TAYLOR: That's right. That is the question.

THE COURT: Did they do something -- on the one hand I'm asked to say is damage that is caused by a loss of vertical support under a building due to dewatering some distance away, is that a taking? All right. And then the other component is did their dewatering cause the lack of vertical support? Now, that is two different things. Are you going forward on both? Number one, they did something that proximately resulted in this that actually caused this taking? We get in those problems where we have an inverse take.

MR. TAYLOR: We're not going into the extent of the damage. We're just trying to establish the three elements, and we believe that there is no genuine issue of material fact of the three elements of inverse condemnation, whether or not there was a taking, and part of that is showing that there was some damage.

THE COURT: Let me ask you this, is there some affirmative act?

MR. TAYLOR: That's correct.

THE COURT: That is it? That's what I want to

get to, whether it is conceded by counsel that dewatering down the street is what caused damage to this building. If they concede that that dewatering caused a loss of support in this building, then the only question is, is that a take.

MR. TAYLOR: That's true. If they concede that point --

THE COURT: And that's what I want to know. Is that a question, whether or not the loss -- the movement of the foundation of this building, if that movement was caused by an activity that was engaged in by the Defendants?

MR. TAYLOR: That's certainly our position. I don't know if they concede that point or not, Your Honor, but that is the first question. We think that the facts of the case is there. Really, there is no dispute as to the facts presented.

THE COURT: So you are prepared to argue that that is the case?

MR. TAYLOR: I'm prepared to argue that --

THE COURT: You see the two components? On one you could say, I want the Court to make a ruling that cracks, or whatever, in a building that occurred when there is no actual taking is a take under the condemnation law, in theory; that's one thing. The

other thing is for me to say that they dewatered down the street and that caused loss of support under this building, which caused a take. It's sort of a causation.

MR. TAYLOR: I think I follow you. Our expert opines that both things happened. There are actual cracks and damages in the building, which constitutes the taking, and that the effect that this project has had on the subsurface ground under the buildings has been destabilized, and that, too, is damage. So in both respects.

THE COURT: So we're looking at it both ways?

MR. TAYLOR: I believe so. I think the testimony of our experts support that.

THE COURT: You had a take, and it was caused by them?

MR. TAYLOR: That's right, Your Honor. I won't go into all of the details of the facts of this case, because I understand Your Honor is very well versed in the sinkhole cases because there is so many in front of you.

THE COURT: I did condemnation work for 15 years.

MR. TAYLOR: Well, that might help us this morning to move along. We have the City and the DOT on this for one main reason, that is that it was a

joint financial venture. This project and the planning for this goes back a decade. The DOT hired Davis & Floyd to draw up the plans for this project back in 2002. The project was initially bid in 2005. The bids came back too high. I think the City and DOT agreed to put in close to $2 million apiece at that point, but that wasn't enough, so the project didn't get to bid again until 2007.

At that time, the City, for whatever reason, bid the project. Bids were too high in 2007 as well. 2009, the DOT took over the bidding again, bid a third time. As I understand it, it was done that way in 2009, but there were federal funds available to the DOT that wouldn't be available to the City if the City bid it. In 2009, they bid it. The project was awarded to Republic Contracting to start the project.

It is really not our contention that the City had an accurate role in the project and the administration; that was all the DOT. DOT had an engineer on-site who oversaw the work, where the City didn't have an active part like that. They were financial partners, and in that sense it was a joint venture. Aside from having a representative at the meetings with the contractors on about a weekly basis, the City had no active role.

THE COURT: Let me throw something out to you. Were you aware that I represented the DOT for many years in many condemnations?

MR. TAYLOR: We are aware of that.

THE COURT: Does that cause you any problems?

MR. TAYLOR: It does not cause me any heartburn.

THE COURT: Counsel?

MR. MORRISON: No, Your Honor.

THE COURT: I just wanted to disclose that.

MR. TAYLOR: I appreciate that, but we have no problem with that.

When this project went underway, there were three main components. The first component was collection of water from the roads, and that involved DOT right away and some of the City's property. It also included a wet well area, which was, you know, that big concrete pond --

THE COURT: Right down the street.

MR. TAYLOR: Right down the street. That is where the water would be held. That is City property. The third component was a pumping mechanism to get the water from that well and into the Sampit River. The well portion is what really caused the portion in this project, and I gave you a notebook.

THE COURT: I understand how it occurred.

Fractured aquitard, the underlying -- the substrata aquifer bursts through, lost pressure, lost support, opened caverns in the limestone, caused it to fall through.

MR. TAYLOR: You got it, Your Honor. You understand that well. I'll point out that there is a report in here by F&ME. Zane Abernethy, who was hired in late November 2011 after Tony Jordan's building fell, to do a report. This report was generated on December 12, 2012, almost a year later. So there have been further investigations. Mr. Abernethy determined there were two main causes of this project. I will read to you briefly Page 22 of that report --

THE COURT: Is there a negligence cause?

MR. TAYLOR: There was a negligence cause in this thing, yeah.

THE COURT: As to the engineers and the contractor?

MR. TAYLOR: Absolutely, there is. We have an inverse claim against -- obviously just the City and DOT.

He says there was two causes. The specific construction activities include primary cause, installation of the king piles; secondary, the pumping after the king piles were installed. He said pretty

unequivocally based on the information provided to and gathered by F&ME, the sinkhole depression formation which has occurred in the vicinity of Front, Hazard, High Market and Dozier Street in Georgetown, South Carolina, beginning with the first documented is sinkhole on Hazard Street, and including at least six other subsequent sinkhole depressions, were caused by construction activities related to the City of Georgetown's storm drainage improvement project.

So he investigated seven sinkholes, and only seven, all of which he related to this project, all of which are -- and Your Honor knows -- in close proximity to this courthouse and the remaining of the County's buildings. We retained our own expert, George Simbose (phonetic), who was at the project site in November 2011 and has been involved in studying this project, plans and he's been to the site, been to all of the County's buildings. He's testified by affidavit that the County's buildings were damaged as a result of this project, and specifically the king pile installation and the dewatering after that. So Zane Abernethy really lays out all the framework why this went bad.

THE COURT: Don't they all agree? Isn't it pretty much the consensuses that the king piles went

down, and once they fractured that aquitard and allowed that water, which was under significant pressure, to come up through the fractures created by the aquitard, that without sealing those, to continue to pump just essentially pumped it down the sub-aquifer?

MR. TAYLOR: What you said is true, but, no -- it blows my mind, but not everyone agrees. That is our position that that is what happened and that is what caused the problem at these buildings. We submitted the affidavit of George Simbose that ties this project, our specific building, because Zane Abernethy did not do that when he wrote this report.

THE COURT: What does Mr. Abernethy say that is different?

MS. REYNOLDS: There were no sinkholes or depressions on any properties owned by Georgetown County, and we submitted an affidavit where Mr. Abernethy said that there is a question as to whether or not the damages that are alleged on the Georgetown County properties are as a result of any sinkholes or depressions for that project, that there are other reasons that can cause the damages that are alleged to have occurred.

THE COURT: Is he saying that -- my understanding

is that -- is Mr. Abernethy really reaching the same conclusions as Mr. Simbose in that what occurred, they put down king pilings, king pilings went through the aquitard, went into a lower strata of water and it is under pressure, it came back up and was dewatered into the Sampit River; I mean, they both agree that that happened, don't they?

MS. REYNOLDS: Yes, sir.

THE COURT: But Mr. Abernethy is saying that although that happened, and there may have been some loss of lateral or vertical support, that loss is not what caused this building we sit in to have the foundation problems that it has had, right?

MS. REYNOLDS: He did not say -- he doesn't agree there is a loss of vertical support. He says that the puncturing of the aquitard and dewatering is what caused the seven sinkholes that he saw in those specific areas. There is a question among numerous experts in this case whether or not the damages that are being alleged can expand out as far as there --

THE COURT: So he questions whether or not the cracks in this building are the result of loss of that vertical support?

MS. REYNOLDS: Yes, sir, Your Honor. There is numerous questions.

THE COURT: That brings me back to my first thing we discussed. First of all, would this be a taking as contemplated under the condemnation cases and statutes in this state? Absolutely right, no question about it, damaging a building because of a public works project would be a taking. Counsel, you don't even deny that, do you?

MR. MORRISON: Judge....

THE COURT: In theory.

MR. MORRISON: In theory and certain situations, that is true. The only question here is we don't have any taking of private county. Georgetown County property is public property.

THE COURT: That is an interesting thing.

MR. MORRISON: I'm not sure if that applies. One governmental entity is being accused of taking another governmental entity --

MR. TAYLOR: That is a red herring under our --

THE COURT: In theory, damage, without an actual taking, can occur by damage of this nature. If everything was like they say, that would be a taking.

MR. TAYLOR: I think everyone will agree, at least, that there was a public project taken on by a government entity; that is the first element of taking. I think everyone would agree that the public

project was for a public purpose, and that leaves us -- really, there is three elements of inverse.

THE COURT: Now we moved over to proximate cause, I guess, like a negligence action. They are saying you have to tie it.

MR. TAYLOR: I think, Your Honor, with what is in front of you, we tied it.

THE COURT: You tied it, but the question is whether or not there is any material issue of fact as to that, and they have a witness --

MR. TAYLOR: I'll address that.

THE COURT: Is he willing to say the damage was from some other cause?

MR. TAYLOR: No. Here is what he says. Zane Abernethy submitted an affidavit a couple days ago, ten paragraphs long. The first nine paragraphs, they are just general geological rules that for the sake of this motion, we'll stipulate to. They are things like the earth can subside and a building can get cracks from that, just things can happen. The fact that something can happen is not enough in a Rule 56 motion to have factual evidence that it didn't happen. So when we produced testimony of Simbose, it says these damages are as a result of this project. The onus shifts to the defense to show that that fact is not

true, and here is a general issue of material fact that those damages related to something else. So to say that something can happen isn't really -- isn't the kind of facts that are contemplated under the rules in South Carolina case law.

I mean, what is in front of you, there is not a genuine issue of material fact. There is an expert saying other things can happen, and then there is Zane Abernethy and Andrew Tolison (phonetic) saying they would like to do additional investigations. Here we are in 2014; this happened in November of 2011. What left is there to do? We opened all of the buildings for inspection. There is no doubt that anyone can inspect these properties. We've responded to discovery requests. We are at a stage we need to do additional investigations, and it doesn't hold water.

THE COURT: How old is this case?

MR. TAYLOR: It was filed the end of October of 2013.

THE COURT: Are you comfortable that I understand your position?

MR. TAYLOR: I am. And I know that this is going to be brought up, if I could. There is an issue that -- Mr. Morrison brought it up -- whether or not a county can maintain an inverse claim against another

governmental entity.

THE COURT: That is a little interesting.

MR. TAYLOR: It is, but it is a red herring. There are cases in South Carolina, and by statute in South Carolina, a government entity can condemn property of another governmental entity. If a government can condemn property, then certainly someone who has been condemned can make a claim if the other entity didn't go to the courts.

Also, even if a government cannot technically condemn property -- if Georgetown County cannot use the courts to condemn Williamsburg County property, but they do it anyway, they ignore the courts and do it anyway, well, then, certainly an inverse claim would lie when your property has been condemned, even though technically, under the statute and constitution, the cause of action doesn't exist.

There is a case that goes back to, I think, the 1960s that says unequivocally that governments can condemn other property, and it is Title 28 of our state code.

THE COURT: Yes, sir.

MR. MORRISON: My name is David Morrison, here on behalf of the City of Georgetown. I'll address one of the last things he said, because if I don't, I'll

forget it. He said by statute the government can condemn other government property. That is not true for a city. The city only has eminent domain powers given to it by statute. Under 5-7-50, the City of Georgetown and municipalities in South Carolina receive their authority for eminent domain, and that statute specifically says that this authority shall not apply to property devoted to public use. So by statute, the City cannot take by eminent domain from other governmental entities.

THE COURT: So you are saying there is no way that the City could have made an inverse condemnation of this property?

MR. MORRISON: By statute, they can't take it through eminent domain, and inverse is usually opposite of eminent domain. It is where the taking was made and payment wasn't, so it is brought in reverse. If they can't take it through eminent domain, they can't go through the opposite way.

THE COURT: That's interesting.

MR. MORRISON: If my memory is correct, there is about 10, 11, 12 lawsuits filed over this. Georgetown County's lawsuit was either the last or next to last. Bank of America and Georgetown County, I believe, were the last two lawsuits filed. The first nine lawsuits

brought by two different law firms. Mr. Oxner's firm brought eight of those cases. All of the nine have been consolidated for discovery -- one was resolved -- and discovery has been ongoing for some time on those cases. There was approximately 27 depositions taken. The great majority were all-day depositions. Many of those depositions were not concluded. The experts were -- expert depositions begun last week. There was one Thursday or Friday, another two days ago, Tuesday of this week. I was preparing for trial, so I wasn't there, but someone else at my firm was. I don't know if the one on Thursday or Friday was concluded, but I know the one on Tuesday was not concluded. The point is that in this case the county is attempting to hold the two governmental entities liable in inverse condemnation for what other people did saying those affirmative acts are attributable to these governmental agencies, specifically the engineers and the contractors in trying to hold us liable --

THE COURT: You couldn't find a county right away out there encompassed in this project?

MR. MORRISON: Unfortunately, I think it is all within the city limits. Doesn't mean it is city property. When they are trying to hold us liable for what the other defendants did -- the other defendants'

experts have not been deposed yet, or have not been completely deposed. I know we didn't have an opportunity to ask the expert questions about their defense of what they did, and for that reason, we believe this motion is premature.

THE COURT: And I'm concerned about that. This case is about ten months old, right?

MR. MORRISON: Correct.

THE COURT: Is there a scheduling order?

MR. MORRISON: One is circulated that sets a trial date for, I believe, January -- is that right -- sorry, for May.

THE COURT: What does it say about mediation and what about a dispositive order for motion?

MR. MORRISON: I believe it was recently forwarded to the Court. It sets a discovery deadline of January 16th -- sorry, responding discovery by January 16. Depositions of all witnesses by February 27. Mediation by March 20, 2015, with trial in May of 2015. There have been, in the 27 depositions taken so far, basically took 27 days of time to take those. Georgetown County is not a party to that case. Discovery has not been consolidated in that case. They have attended the depositions as non-party and just listened. There have been no

depositions taken in Georgetown County's case.

THE COURT: Let me ask you this. Have you found anybody that will say that some of this movement was caused by anything other than the dewatering by the DOT and the City?

MR. MORRISON: The engineers, Davis & Floyd, S&ME and the contractor, Republic, all have identified and retained experts. Those are the depositions that started last Thursday or Friday. I don't know what they will say. Not all of them have been deposed, and certainly not all have been completed.

THE COURT: Have you made your expert available yet in this matter? Have you identified him?

MR. MORRISON: No, sir. We do not have an expert on this issue, at this point, because we're being sued, supposedly, for what other people did. The other people hired experts to defend them, and we're waiting to see what they will say.

THE COURT: That is a dangerous track.

MR. MORRISON: I understand. As far as the City is concerned -- and I'm changing tracks -- as far as the City is concerned, there is no affirmative act here by the City of Georgetown. You heard Counsel say that Georgetown was a financial partner in this only, that they weren't involved in the design,

construction, supervision, control. Georgetown wasn't involved in that, and we filed an affidavit to that effect from Lane Mixen. The first element that the Plaintiff has to prove in an inverse condemnation action against the City of Georgetown is some affirmative act by the City. The City did not hire Davis & Floyd to do the design of this project. The City did not hire Davis & Floyd to do the construction, engineering and inspection for this project. The City did not hire Republic to do the construction on this project. The City -- this is not the City's project.

Under those circumstances, there is no affirmative act by the City of Georgetown, and the fact that they were a financial partner who contributed money to the project -- the City contributed $2 million.

THE COURT: Doesn't that create a question of fact, Mr. Taylor, as to whether or not their financial participation creates or is an affirmative act?

MR. MORRISON: There were many funding sources besides the City and DOT. The simple fact that somebody contributes money to the project does not create an affirmative act when construction starts.

THE COURT: I contributed money to the project

last April 15th.

MR. MORRISON: I understand. At best, our position is that the City has no liability in inverse condemnation because there was no affirmative act. At best, it creates a factual issue which precludes the granting of summary judgment. So it is our position that, one --

THE COURT: Let me hear from the State.

MS. REYNOLDS: Lisa Reynolds on behalf of SCDOT.

THE COURT: Have we met?

MS. REYNOLDS: No, we have not.

THE COURT: Good to see you.

MS. REYNOLDS: Thank you, Your Honor. We take a position similar to the City, that we don't believe there can be a taking in this case as there has been no taking of private property. The case law cited both by the Plaintiff and by myself is clear, that inverse condemnation is not based on a statutory right. The statutory right is not the basis for it, it is the constitution. The constitution says "private property." The point of the constitution was to protect the citizens from the government. In this case, both parties on both sides of the "V" are governmental entities. So whether or not they are statutory -- or whether the State can condemn by

eminent domain another public-use property, I would submit that is the red herring, because the case law on inverse condemnation is clear that it is not based on statute at all; it is based on constitution.

Additionally, if you look, Your Honor, the Myler case versus Charleston County Parks and Recreation where Parks and Recreation were sued in an inverse condemnation, and Parks and Recreation don't have power of eminent domain, and the Court said that doesn't matter because it is not based on statute, it is based on the constitution. I have looked, and there is not one case in this state that finds a taking in inverse condemnation of one governmental entity's properties over another. In addition, Your Honor, one of the properties we're here on is this courthouse here today.

THE COURT: I thought that was the only property.

MS. REYNOLDS: No. It is one of several, I believe.

THE COURT: That the County has?

MS. REYNOLDS: Yes, sir.

THE COURT: They are right here, are they not, in the courthouse square, sort of?

MS. REYNOLDS: Yes, sir.

THE COURT: The old magistrate's building. I

mean, isn't that what we're talking about?

MS. REYNOLDS: Yes, sir. This property here is a County courthouse for circuit court, which is a state court. So we would submit that there can be no inverse condemnation, as there has been no taking of private property as constituted by the constitution.

Additionally, Your Honor, discovery is not complete. The experts that have been deposed have only been -- they've taken all day. Mr. Grimball, who is co-counsel with Mr. Oxner for the several of the individual property owners, is the only person who had a chance to talk to some of the experts who looked at the building regarding what they attribute the damage to. So we haven't had a chance to say what are your opinions on the county courthouse properties, because we haven't had a chance to talk to them or ask our questions to them.

THE COURT: Let me tell you what I want to do. What I want to do is I want to adjourn -- not continue, but adjourn -- this hearing for a period of 90 days, for a period of 90 days. During that time, I would like each party, or those participating in this hearing, and the County and the City may offer one, but I would like to have briefs on the issue of whether or not an inverse condemnation may be brought

by one governmental agency against another. I would like to see that brief in the interim. I think 90 days is more than adequate for you to have an opportunity -- you are in the mix. There have been experts from all around that have been identified. You say you are going to rely on those in these other cases. I'm sure Mr. Oxner and Mr. Grimball are taking those depositions. I want you to be able to come back in 90 days, and I want to be able to hear something from the State. I think it is a little premature. It's only a ten-month old case. It is an important, significant case. I want to adjourn it, and I'll retain jurisdiction. Can you handle that, Clerk? Make a note of that, that it comes before me in 90 days. That should be in mid-November.

THE CLERK: Yes, sir.

MS. REYNOLDS: Can I clarify one thing?

THE COURT: Yes.

MS. REYNOLDS: The expert testimony you are talking about, are you looking in regards to this property only?

THE COURT: I want to know what you are going to have. First, I want you to talk to me about this issue, whether or not Georgetown County can bring an inverse condemnation action against the DOT and the

City of Georgetown. I want to look at that in the interim. I would expect that in the next 21 days, next three weeks, I would expect that.

MR. TAYLOR: Might we incorporate that into the scheduling order along with the facts?

THE COURT: I would like to see a scheduling order, but I want you to have identified -- have something for me in 90 days. Because I can tell you, if you go to trial and their expert points the finger at this courthouse and says it is because of loss of vertical support and that is when it occurred and it happened suddenly, and there is no other explanation, and all you have is somebody that says we could have had an earthquake with nothing -- that is difficult for me to place a lot of credence in if I'm required to rule on summary judgment. I want to know what you have. That should be out there now. These cases have been going on awhile. I want to know what you got, okay.

Thank you, gentlemen. I would like to see a scheduling order. Mr. Oxner, you have one, don't you?

MR. OXNER: That is still floating back and forth, but I think we're very, very close. But like I said, we're having depositions two, three a week.

THE COURT: One, I would like to handle these

cases. At the end of the year I will no longer be chief admin. I think that reverts back to Judge John. In that case, I don't know who will try these cases, but I've been dealing with them for awhile, so I would like to have a scheduling order.

MR. OXNER: I'll get it right away.

THE COURT: Anyone consider a complex designation?

MR. OXNER: I think that is a good idea. We'll get that.

THE COURT: All right. Thank you.

(Whereupon, the proceedings concluded.)

CERTIFICATE OF REPORTER

State of South Carolina)
County of Georgetown)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the matter of the captioned case, relative to appeal, in the Court of Common Pleas for Georgetown County, South Carolina, on the 7th day of August, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 10, 2015

Natalie Dahl, RPR

Natalie Dahl, RPR
Court Reporter

State of South Carolina	)	Court of Common Pleas
	)	2013-CP-22-00090
County of Georgetown	)	2013-CP-22-00091
		2013-CP-22-00092
		2013-CP-22-00093
		2013-CP-22-00094
		2013-CP-22-00596
Georgetown County, et al,	)	2013-CP-22-00780
	)	2013-CP-22-00787
	)	2014-CP-22-00901
vs.	)	2013-CP-22-01062
	)	2014-CP-22-00863
Davis & Floyd, Inc., et al.	)	2013-CP-22-01141
	)	

Transcript of Record

ORIGINAL

April 30, 2015
Georgetown, South Carolina

BEFORE:

Honorable Larry W. Hyman, Judge.

APPEARANCES:

Harry A. Oxner, Esq.
Robert L. Wylie, IV, Esq.
William T. Stanley, Esq.
George A. Taylor, Esq.
Attorneys for the Plaintiffs

Brent M. Boyd, Esq.
Lisa A. Reynolds, Esq.
David L. Morrison, Esq.
Kent T. Stair, Esq.
R. Davis Howser, Esq.
Attorneys for the Defendants

Teresa J. F. Bautz, RPR
Official Court Reporter

(The hearing commenced at approximately 11:20 a.m.)

THE COURT: All right. Please be seated, thank you. All right. We'll see what we have here. Now, I want to, as a preliminary matter first, address the issue of the County's claim for inverse condemnation against the City and the State.

And let's first focus on the right, whether or not a taking of a public property is compensable, whether or not the Constitution or a statute or case law provides that it must be protected and compensated as private property would, okay.

Now, I understand that the City has filed a motion for -- the County has filed a motion for summary judgment on that issue and that the City or the State is a 12(b)6 --

MR. MORRISON: DOT.

THE COURT: The DOT, excuse me, the DOT has a 12(b)6 motion involving the same issue, or essentially the same issue. So who wants to go first?

MR. TAYLOR: Your Honor, I'm happy to go first.

THE COURT: Okay. And you are?

MR. TAYLOR: I am George Taylor, and I represent the County.

THE COURT: All right. Mr. Taylor, let me hear

from you.

MR. TAYLOR: Of course we've briefed this issue extensively, and I won't try to rehash it.

THE COURT: And I have your briefs, and I appreciate the work that you put into those, your briefs, your reply briefs. The materials you've provided to me have all been excellent but not particularly helpful.

MR. TAYLOR: Well, I'm going to try to hit the high points and be brief. But, Your Honor, as you can see from the cases that we've cited, the modern trend now across the country is to find that state governments can inversely condemn lesser state governments. And those cases all recognize that the way state governments are organized now, counties and lesser public entities hold property in a private capacity.

We're not dealing with a scenario like in South Carolina, pre the Home Rule, Home Rule, where the State controlled everything.

THE COURT: Right.

MR. TAYLOR: When it comes to this courthouse, the County alone came up with the financing mechanism and owns this building. The State is not involved in that. And so to pretend that now the County and the State are

one and the same and the County can't make -- cannot maintain this action, really it works in a --

THE COURT: Let me ask you this, and I apologize, I'm probably going to be interrupting you, but I'm going to give you a chance to be fully heard. Would you agree with me that in spite of what you referred to as a modern trend, neither the South Carolina appellate courts or the legislature have addressed this, or the Constitution addresses this matter directly?

MR. TAYLOR: I would agree with that. I would say, though, that the legislature has addressed this issue. We do have an Eminent Domain Procedures Act which I --

THE COURT: Okay. And tell me about that, tell me how it comes to play. And just let me share a thought with you. I think that it is, the right to take for public purposes at least, is inherent in the sovereign, in this case the State of South Carolina and its agencies.

Interestingly, in what, the last two or three years, the Article 1 of the State Constitution was addressed, and then it was amended in response to some of the things, I think it was maybe a Maryland or New Jersey case, where the State took property under a condemnation theory and took it to give or convey to a

private entity to develop under the auspices of this being for the better good.

And didn't we just have an amendment to our -- Article 1 of our constitution that just tacked on the language that prohibited that type of condemnation. I mean, it's not like we have an antiquated -- an antiquated prohibition against taking of private property without compensation. But we have actually had an amendment to that in recent years; would you agree?

MR. TAYLOR: I would agree with that.

THE COURT: Okay.

MR. TAYLOR: And I would like to also point out that under our Eminent Domain Procedures Act, a condemnee includes public entities. I mean, there is a hierarchy, and if a public entity, if the County's property is going to be taken directly, then they are entitled to just compensation.

THE COURT: What does its say about that? What does its say about that, who can condemn it, and does it address compensation at all?

MR. TAYLOR: It addresses compensation as just compensation, and --

THE COURT: And does it say that just compensation will be paid? I mean, doesn't it all hinge on the

constitutional limitation on the right of the sovereign to take? There's no question the right of the sovereign may take certainly in this state for public purposes. And that's pretty much unqualified except for the limitations of the Fifth Amendment, made equitable to the states under the Fourteenth Amendment of the US Constitution and Article 1, I believe it's Article 1, of the State Constitution. Limitations are placed on that inherent right to take for the public good.

How does that -- I mean, doesn't the Eminent Domain Act merely provide the procedure under which the State may exercise its right to take?

MR. TAYLOR: And that is the purpose of the statute is providing a uniform procedure for the take.

But, but, I think it's noteworthy that a public entity is named in that act as a condemnee and can be condemned from. I don't think the DOT would take the position that if they decided to fly a DOT flag above this building and occupy it and kick the County out, they can do that without paying the County for the building, if they wanted to take this building directly.

THE COURT: That's exactly what's happened in some jurisdictions; has it not?

MR. TAYLOR: Not without -- not without paying for it that I'm aware of, Your Honor. Not -- I mean, there is a hierarchy. And if you are going to take from the lesser, I think compensation is always good. And I'm not familiar with an incident where the property was taken --

THE COURT: I'm just trying to think, I've read and read and read cases from all over the country on this issue. And it would seem that there was a case where there was a school house or something that was taken by the State, and the issue was compensation, they didn't compensate at all. And maybe my memory is failing me in that regard, but it just seems that that rings a bell. Anyway, go ahead.

MR. TAYLOR: Oh, but, yeah, okay, Your Honor. And, you know, we talked about the federal takings cases, and I think the DOT and the City both recognize that in South Carolina we follow the federal taking's jurisprudence. And as far as back as 1927, federal courts have recognized that if a federal government takes from a state or from a lesser public entity --

THE COURT: Well, let's talk about that a minute.

MR. TAYLOR: -- the federal government owes just compensation.

THE COURT: You know, I think the last

pronouncement that you're talking about was in the Hardin case where the Supreme Court indicated that South Carolina had followed federal jurisprudence as it applies to a taking. But in every case that I have seen that language, and there are two or three around the state, in every case the issue was how do you define a take, how do you value a take?

And they were referencing federal cases in that regard. Like in Hardin and Talent, it was whether or not a person who did not suffer a physical take but had an adjustment in his use or her use of remote properties had an inverse take when there was no physical damage to the property. It was merely things like access and driveways and things of that nature. And that seemed to be the context in which the South Carolina Supreme Court has followed the federal rubric, and that's where I see it.

MR. TAYLOR: That's right.

THE COURT: I haven't seen it in a case where they determined who was protected under the Fifth Amendment and Article 1 of the State's Constitution.

MR. TAYLOR: Well, that's true, Your Honor. I mean, I think that that's absolutely true. The context is different, but if you look at it analogously, we have another area of the law under the takings

jurisprudence. And I think that we would still -- still follow the federal takings jurisprudence.

And in this case the federal courts have determined that the federal government must compensate state governments and lesser public entities and governments for takings. And if we were to follow that trend, and I would --

THE COURT: Go ahead.

MR. TAYLOR: I'm sorry. And I would point out if you look at that many of the state -- the other states throughout the country who began to recognize this taking of public property, they're citing these federal cases that go back to 1927 in Town of Bedford versus United States.

THE COURT: On what theory do they justify compensation? Certainly not by an extension of the Fifth Amendment, or is that how they've done it, or is it done in every argument or?

MR. TAYLOR: I think they just say it's analogous. I think that they are just recognizing that -- you mean the state courts in other states?

THE COURT: Yes.

MR. TAYLOR: I think that they are just recognizing that there is a relationship between a lower public entity that's lesser than the State but

holds property separate and apart from the State that's similar to how a state government would hold property as it relates to the federal government.

THE COURT: And how do they establish --

MR. TAYLOR: In that sense they hold that property privately. I mean, this county courthouse is, as it relates to the State, truly is a private building. The State didn't set aside funds for this building like they may have done 50 years ago before Home Rule. The County has done that.

THE COURT: And who establishes the hierarchy as to who can condemn whom? Could the City of Conway condemn against the State of South Carolina; isn't that prohibited by regulation or statute?

MR. TAYLOR: That's right.

THE COURT: Okay.

MR. TAYLOR: But -- yeah, that's correct.

THE COURT: Is there a hierarchy that says whether or not the City of Conway could condemn against Santee Cooper? How would that work?

MR. TAYLOR: I think that that's provided for by statute, and they have that right.

THE COURT: Okay. You know, we have a situation in Horry County where Conway and Myrtle Beach have almost grown together, essentially they have. Sooner

or later we'll probably end up with municipal boundaries in common. Would Conway be able to condemn parts of Myrtle Beach --

MR. TAYLOR: I don't think so.

THE COURT: -- and not pay for it?

MR. TAYLOR: I don't think that they can under the statute.

THE COURT: I don't know. I'm just asking. Go ahead.

MR. TAYLOR: But certainly, if they have the right to do it directly. If they did it indirectly, the entity that was condemned from should have a right in inverse condemnation.

THE COURT: And that interests me. What happens when there is no intent to condemn but an inverse condemnation occurs? I mean, there's no question that inverse condemnation has been recognized for many years in South Carolina. It all -- I think it began with the First Evangelical Church versus Los Angeles County out in California many years ago. That was a South Carolina -- I mean, a US Supreme Court case. Inverse is here to stay.

What happens like in this case where you have an entity that has no right to condemn against a sister entity that we've been talking about, but it occurs?

Why do -- you know, here, we have the City. The City would certainly be junior to the County in any hierarchy. The City that I would imagine, based on what we've been talking about here, we have no right to condemn County property, but it happens. What about that?

MR. TAYLOR: Well, I think that it would be absurd to say you can't do it, but if you do you don't have to compensate the other entity for it. So if there's no right to do it, but you do it anyway, you ought to have to pay for it. I mean, it would be illogical to hold otherwise. And I think that a lot of cases address that point square on and say it really works in absurdity to hold that you cannot maintain an inverse claim just because you couldn't have been condemned directly.

THE COURT: Okay. Go on.

MR. TAYLOR: And, you know, Your Honor, the last point I'd like really to make, I think that really public policy gets consumed in all of these arguments, but the DOT relied on a case in New Mexico, it was the Board of Commissioners of Dona Ana County. And in that case you had a Court that said this public entity is not protected under the Constitution, but that they have a procedure for eminent domain very similar to

ours. And they found under that act that the public entity was protected.

And there's a -- the end of that case, I think, is quite telling on the issues. And I'll try not to waste the Court's time, but I'll read to you briefly, the Court stated: 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.

And that's really, Your Honor, from a policy standpoint what we ought to be going for. If the County's property which they hold truly privately and apart from the State, are taken, the remedy for that taking is inverse condemnation. And that shouldn't be -- that shouldn't be taken away from us.

THE COURT: Tell me, counsel, how can I write an order supporting your position, tell me how I would write that order. Do I expand the Fifth Amendment in Article 1 of the South Carolina Constitution, do I say public -- private property is expanded to mean property held for the public by the County? Or do I write an order setting forth some equitable reason to give the County relief in spite of the absence of a statutory or constitutional right to compensation; how do I approach it?

MR. TAYLOR: I think you approach it by recognizing the true ownership that the County has here. The County owns this property private from the State.

THE COURT: And it owns it in trust, if you will, for the people of Georgetown County; would you agree?

MR. TAYLOR: I would agree.

THE COURT: And it would be unfair to have the people of Georgetown County absorb an injury caused by the State or the City when that injury should be absorbed by all people in the State; is that right?

MR. TAYLOR: It's a State project, the entire state should bear it.

THE COURT: But isn't it a state project that only benefits the citizens of the City of Georgetown or the County of Georgetown? And shouldn't they bear the cost, the brunt of the project?

MR. TAYLOR: And everyone else that utilizes the roads in Georgetown County, I think.

THE COURT: So you would tell me to proceed under an equitable theory of relief?

MR. TAYLOR: Your Honor, I think that there is an equitable theory that you could proceed under that I think under the --

THE COURT: But I applied the eminent domain

statute.

MR. TAYLOR: Well, you could, that's right. But also I think that the reading of the State Constitution can be read to recognize the private capacity in which the County owns this courthouse and these other buildings.

You know, and before Home Rule, you know, the State legislature really had control over everything. The State would have set aside properties and monies.

THE COURT: Wasn't it '75 when we got home -- wasn't that when we got Home Rule?

MR. TAYLOR: That's right.

THE COURT: I mean, didn't we just essentially codify what -- I mean, before the counties had commissions and the states -- the legislature said, okay, you're going to be in charge of the roads in your counties. And they kind of did the same thing, and then Home Rule came along, and it was more empowering.

MR. TAYLOR: It was more empowering. It in some way recognized what, I guess, perhaps was already being done, but it gave counties powers and rights that it didn't have before. And included in that is the ability to levy funds or to get general warranty bonds and pay for nice courthouses like this independent from anything that's happening at the State House.

THE COURT: Well, let me ask you one other question. Then tell me or give me an example of public property that would not be quasi private property as you suggest that the courthouse is.

MR. TAYLOR: I would --

THE COURT: Can you tell me what would be -- what else is there? Is there any property that's not held in the public trust by the County?

MR. TAYLOR: I think property -- property that's owned by State agencies, for example, that are funded by the legislature, and I think those -- all of those would be examples.

THE COURT: Okay. So --

MR. TAYLOR: Thinking on my feet here.

THE COURT: -- essentially we're talking about the smaller governmental entities would hold for trust in the name of people who live in their jurisdiction, and statewide agencies would hold for everybody, so that would be public.

MR. TAYLOR: I think so, Your Honor.

THE COURT: Okay, all right. Anything further?

MR. TAYLOR: That's all I have. Thank you.

THE COURT: Yes, sir.

MR. MORRISON: Your Honor, David Morrison on behalf of the City of Georgetown. You've obviously got

a very good grasp on all the issues here. We've briefed this issue extensively, all parties have filed briefs, I think you've got eight briefs in front of you, and you're obviously familiar with all of that too. So I don't want to rehash what we've argued in the briefs.

I want to talk about this from a more global historical context. And this starts with the Bill of Rights to the United States Constitution. The Bill of Rights was a charter of negative powers. It was preserving rights to the people.

THE COURT: Negative powers of the government.

MR. MORRISON: Of the government, correct. And preserving powers to the people. First Amendment, Second Amendment, all about preserving rights to the people. When you get to the Fifth Amendment to the United States Constitution, they are talking about liberty and property. They talk about from the liberty standpoint that persons can't be subject to double jeopardy. Persons can't be subject to self-incrimination, persons can't be subject to prosecution without indictment and presentment.

And then they move to the property aspect. And they can't say persons because it's not personal property, it's real property. So they say private,

private property can't be taken. It is a charter to protect the citizens, the people, from abuses of government. And that's what the Fifth Amendment was all about, that's what the Bill of Rights was all about.

THE COURT: Let me interrupt you right there. I understand the Bill of Rights, and I understand its counterpart in the state. I understand very well what they were there for, and they were there to protect individuals, okay. Do you know of any other limitation on the state or the federal government right to take?

MR. MORRISON: In this case, what we have is an accidental injury to property.

THE COURT: I understand.

MR. MORRISON: And that's the --

THE COURT: But is that what limits? Is the Fifth Amendment in Article 1 of State Constitution, are they the devices that limit the inherent authority of the State to take for public good?

MR. MORRISON: Certainly they do limit the State's right to take for public good, they limit it to just compensation.

THE COURT: Right.

MR. MORRISON: Both the Fifth Amendment and Article 1, Section 13 of the State Constitution.

THE COURT: But I asked you, are you aware of any other limiting authority?

MR. MORRISON: I am not.

THE COURT: Okay.

MR. MORRISON: Not that I can think of off the top of my head.

THE COURT: Okay.

MR. MORRISON: But what we have in this situation is not an intentional taking, it's not a condemnation, it's not an eminent domain. It was an accidental damage to property. And the remedy there is not in the takings provision of the Constitution, the remedy if there is one is in tort. And they've brought that action too. But going back to historical --

THE COURT: Well, let me just ask you this. Do you believe -- and I'm straying here, but I just want to touch on this. Well, you raised it so you're going to get it back.

MR. MORRISON: Okay.

THE COURT: Do you believe that the State Tort Claims Act would prevent the City, I think there is a limiting legislation in there, but do you think that the Tort Claims Act would prevent the City from bringing an action based in negligence in this situation?

MR. MORRISON: We would get into a different issue there.

THE COURT: No kidding.

MR. MORRISON: The issue of whether the government can be a plaintiff as a person under the Tort Claims Act. There's a different issue there that I don't think's been resolved by our Supreme Court yet.

THE COURT: Don't tell me that.

MR. MORRISON: I think there's attorney general's opinion on it, but I don't think there's been any case law from our Supreme Court on that issue yet.

THE COURT: Okay. But you believe there's an exception to the waiver of immunity, other than the obvious issue whether or not a governmental entity may be a plaintiff, a person. And I note that in the Tort Claims Act person is not defined. It is in everything else in the world, but not in the Tort Claims Act. And I guess that is exactly where you're going.

MR. MORRISON: That's exactly where I was going with that, yes, sir.

THE COURT: But do you believe that there is an exception to the waiver of immunity in this matter? You would be glad to hear that; wouldn't you?

MR. MORRISON: I'd have to go back to 15-17 and --

THE COURT: I won't hold you up. I'm cheating. I

told you that we would just argue this single issue, so I'm not going to hold your feet to the fire on that. I just thought you would fire back at me with something. But we'll --

MR. MORRISON: I think there are many that might apply. But I'd have to go back and look specifically.

THE COURT: Okay. Be an easier question, I think. Okay, go ahead. Go ahead.

MR. MORRISON: All right. Well, going back to the global view that the Bill of Rights and the Fifth Amendment was designed to protect the citizens from abuses of government, not to protect the government from abuses of government. Then we have the South Carolina Constitution that's modeled after the federal Constitution that says the same thing.

And the word private is used in both the takings clause in the federal Constitution and in the State Constitution. And the word private was put there just as the word person was put there when they were talking about liberty interests. The word private was put there when they were talking about property interest.

THE COURT: You know, when we revisited it two years ago, three years ago, it would have been easy to take that word out; wouldn't it?

MR. MORRISON: That's absolutely right. But that

word's still there, and that word was there for a reason, and it was to modify the type of property they were talking about. If the -- the County would have you write that word out of the Constitution and say it applies to property, not just private property. That word doesn't exist in the constitution anymore.

And it's interesting, I know there have been lots of cases cited in all of the briefs before you. But what you haven't seen in any of those cases cited is any agency or department in the federal courts, any agency or department of the federal government suing another agency or department or suing the United States in inverse condemnation. Those cases don't exist.

THE COURT: Well, yes, there is. I mean, there's Arkansas Department of Fishing and Game suing the United States Government on the construction of a dam that inversely flooded a hardwood swamp on the Black River. And you're getting into duck hunting there, and that's dear to my heart. I've read that case.

MR. MORRISON: But none of those cases, there's a difference between state agencies and federal agencies.

THE COURT: And I would say interestingly, I don't know how it got to the Court, but the issue that we're talking about here, the issue of whether or not public property, unarguably public property, can be damaged

and the damaging entity, the US government, doesn't have to pay strangely, never raised in the decision.

MR. MORRISON: And in the decisions dealing with state entities suing the federal government, you don't see that issue raised in those cases either. You don't see the argument or the analysis of private property in those cases.

THE COURT: Well, they must be able to do it.

MR. MORRISON: My point was the distinction is that while you sue -- while you see local government in cases against the United States, what you don't see is federal government in cases against the United States. You don't see the government suing the government, you don't see the agencies or departments of the federal government suing the United States. Those cases are absent, you don't see any of those cases.

There were lots of cases cited going both ways dealing with local and state governments suing the United States, but none cited, because none that I been -- none that I found with departments of the same branch of government in the United States suing an inverse condemnation.

THE COURT: Let me just throw something out, didn't ask you about this. That doesn't -- and I think it might be under Home Rule, there's a regulation

statute, something up there, that says that it would have prohibited the City of Georgetown from condemning property of the County. Now, am I wrong, or is that out there somewhere?

MR. MORRISON: You're correct, there is a statute that would prohibit the City --

THE COURT: I can't put my finger on it.

MR. MORRISON: -- of Georgetown from condemning government property.

THE COURT: Okay. They could not condemn this. What if, what if, let's assume everything they allege is true. If it is, it's a classic inverse take, if it's all true; would you not agree? And these have been individuals. If they were individuals, we didn't have the governmental thing, it's individual case. The department's either doing some work and I own a piece of property over here, and everything that they say about the causation is true, my property's damaged, classic inverse case; right?

MR. MORRISON: There's an abundance of case law out there dealing with public works projects working and taking.

THE COURT: Right.

MR. MORRISON: There is an abundance of case law on that.

THE COURT: Okay. Well, in this case we've got that strange twist. Can there be an inverse when there cannot be a direct?

MR. MORRISON: And that gets back to the hierarchy you were talking about earlier, if there's a hierarchy, the City is certainly at the bottom of that hierarchy, below the County, below the State, below everybody. The City's at the bottom of the hierarchy, as demonstrated by the fact the City doesn't even have the power to condemn any other government's property.

That takes you back to if there were an accidental damage to property, not taking of property but a damage to property, if there were an accidental damage to property, that's in the form of a negligence claim which goes back to the Tort Claims Act. It's not a taking of private property by the City. The City doesn't -- the City has the power to condemn private property, they don't have the power to condemn public property. That matches the Constitution, we can't take public property.

This courthouse, no matter how they want to phrase it, this courthouse is public property. This courthouse is not private property, certainly not in the traditional sense. And there's another issue in this case if we ever get to the merits that Georgetown

County doesn't own the courthouse anyway. But this courthouse is certainly public property. And we're standing the Constitution on its edge to write that provision out of the Constitution when there's another remedy out there that fits accidents.

THE COURT: And I bet you if they bring this action under tort claims, a negligence theory, that old independent contractor will be the one that's totally responsible for it; won't he? Could be.

MR. MORRISON: Certainly there's an exception there.

THE COURT: Could be, all right.

MR. MORRISON: And there's a remedy for that too, and the remedy would be an action against that contractor. And that contractor -- those contractors are parties to this action as well.

THE COURT: All right.

MR. MORRISON: So it's our position that the word private historically was in the Constitution, both the federal and State Constitutions, for a good reason. The word private is still in the State Constitution. It still means what it has always meant. And to say that you can sue for damage to public and private property just takes the word private out of the Constitution.

THE COURT: All right. The Constitution may limit the government in its taking. And that's all it does. It does not limit the right of the individual. Does the eminent domain statute in your view expand the rights of governmental entities as far as the possibility that they may become condemnees?

MR. MORRISON: I don't believe that it does. The Eminent Domain Procedures Act is just that, it is a procedural act. It is the act for the procedure to follow when the State wants to take property for some public purpose. That's an intentional taking where you're going to take property and dedicate it to the public use. It talks about the way you go about that and the procedures for going about that.

THE COURT: Well, it clearly says that a governmental agency may be a condemnee; would you agree with that?

MR. MORRISON: I would agree the definition of condemnee says that, yes.

THE COURT: All right. And does it not then at least by implication suggest that if you're a condemnee, you're subject to the act, that you'd also be subject to the benefits of the act?

MR. MORRISON: I don't think it takes that act and expands that definition of condemnee under the act and

expands the constitutional protections for inverse condemnation against private property. I don't think it expands that.

THE COURT: Well, I mean, basically the Fifth Amendment and Article 1 say if you take private property, you got to pay. That's what it says.

MR. MORRISON: Correct.

THE COURT: Okay. But if the State has established a procedure for condemnation, and the procedure says that a State agency or arm of the State, a body politic, can be a condemnee, why didn't it just stop right there and say, all you got to do is file notice of condemnation? You know what happens when you file that notice, you take immediately. You file your notice of condemnation, you take the property and you say, see you later.

Doesn't the rest of the act, which addresses many other issues concerning compensation and things of that nature, wouldn't that not also apply then, or couldn't they just have said, that's all you got to do if you got an arm of the government or body politic or governmental agency is just if you got the right to file it, they can either challenge your right to condemn right then and decide whether you got the right or not, otherwise the issue's over.

MR. MORRISON: I don't know what the edge would be under the Eminent Domain Procedures Act as to a condemnation action. But I do know that this is not a condemnation action. This is an inverse condemnation action. This not a situation where anybody went and intentionally took anything, anybody went and provided notice that they planned to take something. This is an accidental damage to other property.

If there's a condemnation at all, it's in an inverse condemnation form. And I don't believe the Eminent Domain Procedures Act has any application to inverse condemnation, and I don't believe the Eminent Domain Procedures Act rewrote the Constitution and rewrote Article 1, Section 13, the takings clause of the Constitution. So I don't think the Eminent Domain Procedures Act has any application at all to this case, because that's not what this case is.

THE COURT: All right. Let me just ask you one final question, just one. Suppose I adopt your position, your position generally speaking is that, and this is why I've been picking at you with questions, is that the state and federal government and their agencies have a right to take, an inherent right as a sovereign, to take unfettered except by the Fifth Amendment of the United States Constitution and Article

1 of the State Constitution, as a basic premises; right?

MR. MORRISON: Correct.

THE COURT: Okay. So if our courts were to pronounce that as the law in this state and said only private property is protected and you may take what you will, you may take what you will, and you don't have to pay for it, does that not unleash the dogs of war as far as condemnation is concerned?

Let me give you an example, let me tell you what worries me. I'm sure you've been over to Horry County courthouse, you know right where it is. They gave me a real nice office on the back wall. I get to look out over the -- through there, and I look out over the parking lot, I look over here on the left side and they got the tennis courts and the marina that are owned by the City.

Over to the right we've got the Grainger Steam Generating Plant that's now closed but Santee Cooper owns it. Right down by it we've got the housing authority that's got, I think, Section 8 housing. Right below me, we've got the County parking lot. Just beyond it we got a city street. Then we got a railroad between the city park and Santee Cooper.

Now, where does it stop? Santee Cooper's got this

beautiful piece of property that used to be their steam plant. What's to keep the City from saying, hey, let's take that, we ain't got to pay for it, or the County to say, hey, let's take the City tennis courts because we need, and they certainly do, need to expand the parking lot? Let's just move over there and take the tennis courts out.

What's to keep the City from saying, hey, let's expand this city street, let's take over that railroad right-of-way, we don't have to pay. Is that the law?

MR. MORRISON: I think from the City's standpoint, what stops that is the City statutorily doesn't have the power to condemn any other governmental property by statute.

THE COURT: How about the railroad and how about some of the those things?

MR. MORRISON: That would be -- the railroad, I presume, would be private property owned by CSX or Norfolk Southern and would be subject to the constitutional prohibitions on taking of private property. I think the illustration that you're coming up with, I think where it causes me trouble is if you get into state agencies and the state or state agencies taking from the City or county come down the hierarchy rather than up the hierarchy.

THE COURT: Can the City condemn Santee Cooper's property? Probably can. County sure could. What's the key, the just unfettered condemnation between agencies that goes on and on and on?

Money is what stops it. If you got to pay for it, you don't pick it up. Isn't that the logical answer here? I don't know if it's the right answer, I'm just saying it's the logical. I mean, what's legal and what's logical aren't always exactly the same thing.

MR. MORRISON: I understand. And I represent the City. And from the City's standpoint what stops it is not just money, but it's the statute that says we can't do it, we can't take other public property. So from our standpoint --

THE COURT: Well, how about from another agency?

MR. MORRISON: -- we are at the bottom of the hierarchy, they can't do it.

THE COURT: How about from Santee Cooper?

MR. MORRISON: If the distinction is for taking private property now, that it's constitutional --

THE COURT: Well, Santee Cooper's a state agency; isn't it?

MR. MORRISON: Well, then, it's public property, the City by statute can't take it.

THE COURT: How about the County, the County take

it? You know, I know I'm getting far afield. But that's the kind of thing that concerns me here, can just take it without paying for it. And I know it's inverse, but the theory is the same, it's a take. It's a take. You didn't initiate it, but it's a take. The only difference between the two is who files the lawsuit.

MR. MORRISON: And these are complex issues, and you could come up with all kinds of permutations of these complex issues that don't work under one rule or another. Ultimately, in this case we're not faced with those permutations, ultimately in this case we are faced with a political subdivision of the state, Georgetown County, suing a state agency, DOT, and another political subdivision of the state, the City of Georgetown over damage to public property owned by the County, over accidental damage to public property owned by the County. And that's the issues that we ultimately have to answer here.

And I realize we can't answer all the issues in this case. Our case law to date hasn't answered all the issues or we wouldn't be here having this argument. Our statutes and our Constitution haven't answered all these issues, or we wouldn't be here having this argument. But I think in this case, the issues we have

in this case, I think, are decided by the word private in the constitutional prohibition, because it's there for a purpose, it was put there for a purpose and it's always been there for a purpose.

THE COURT: You know, I look back at the Edgefield County versus Georgia Carolina Power Company, a hundred-year-old case, and albeit dicta, and I don't even think the issue was there, the pure dicta, the Supreme Court at that time said that public property is not protected by the Constitution, constitutional prohibition against the taking without compensation; what do you think about that?

MR. MORRISON: I realize that's not -- wasn't the holding in that case, but that's the only thing we have in South Carolina that comes close to addressing this issue. And I realize there are ways to distinguish that language in that case as well. But it's the only time we've had any court, any appellate decision make any comment at all on private versus public property under the takings clause.

THE COURT: All right. Let me hear from DOT.

MS. REYNOLDS: Your Honor, we join in with the arguments that Mr. Morrison has made, and we rely on briefs. I know you have nine briefs ahead of you -- in front of you, and you've read and reread them. And,

Your Honor, we just I think you probably -- we've beaten this horse.

THE COURT: Okay, all right. Thank you. You know, this is a very troublesome matter for me. And I think my comments and responses to your comments reflect that.

I don't know if I will make the right decision or the wrong decision, but I must make a decision. In doing so, I consider whether or not I should engage in judicial activism, try to create law, expand law, or apply the law as I think it is written out. Although in my opinion, there is a deficit here, it just hasn't been addressed. No reflection on our Supreme Court, our legislature or anyone else. It just for some reason, mysteriously we can all agree, has not been addressed.

My thoughts are this: The sovereign, either the state or the federal government, some of the State's agencies, acting through the State, have the inherent right to take. That right is limited by United States Constitution Article 5 -- or the Fifth Amendment, excuse me, and Article 1 of the State Constitution. Both of those articles and amendments clearly state that private property will not be taken without just compensation.

Now, what is private property? I think the meaning is clear and unequivocal. I know that the states have been everywhere with this ruling both ways. But I do not believe that it is my position to expand that. I look at, albeit a hundred years old, the Edgeville County case, the dicta in that case I referred to a moment ago, it is clear that the Court in that case was talking about public property and very clearly said County property, that it was not protected by the Fifth Amendment.

I don't believe that under current law in a condemnation situation that the taking of public property is prohibited without compensation. I'm going to rule -- I'm going to grant the 12(b)6 motion filed by the DOT. I'm going to deny the County's motion.

Now, I understand, and we're going to need to discuss this, gentlemen, this is an issue that regardless of how I ruled must go up. And my ruling, as I understand it, makes it directly appealable, and we're going to talk about that.

I would like to talk about it today when we finish the rest of our business here. But, counsel, I ask you to prepare an order addressing the issue in the fashion in which I have. I make absolutely no ruling as to the County's other causes of action. If any summary

judgment or 12(b)6 motion addresses those causes, they are denied.

The only issue before me, the only issue to be addressed in this order is the sole issue of whether or not public property in this state as it presently stands is protected by the Fifth Amendment and Article 1 of the South Carolina Constitution. Okay? All right.

Now, gentlemen, let's try to move on and see what else we have got going on here. All right. I got a motion to compel. The filing party is Republic Contracting, and the case is Graystone Holdings versus Davis and Floyd, et al.

MR. BOYD: Your Honor, Brent Boyd for Republic Contracting. We have reached an agreement.

THE COURT: Bless your heart.

MR. BOYD: There are several motions that you will find all filed by Republic against each of the plaintiffs that are represented by Mr. Oxner and the Mullen Wylie law firm. We've reached an agreement, just like to put it on the record for you.

THE COURT: Very well.

MR. BOYD: The motion to compel --

THE COURT: Well, first of all, as we go through them, how about telling me which ones -- have you got a

THE COURT: Yeah, I want you guys to talk about that among yourselves. And we'll get back together once the dust has settled on these motions and we'll see where we are. And I anticipate having a status for this case when we can get everybody together and see what we can work out and wrap up loose motions.

You know, I fully anticipate the County now filing notice of intent to appeal the ruling I just made. I would have expected the DOT and the City to do exactly the same if I had ruled the other way. Ruling against the County in, at least in my view, my understanding of the law, makes that directly appealable. It essentially ends one of their causes of action. I think they can appeal directly now.

So we may be down the road with some of these cases ever coming back to trial. And somebody's got to rule on this stuff. And I don't know whether it's better for the Supreme Court to rule on it before or after we spend two weeks in trial as it applies to the County's case. Who knows, I don't know. They may not even be involved when we try the rest of them.

Okay. Anyway, there's a motion for ADR sanctions, rule to show cause, Georgetown County case. Anybody know anything about that; was that something the clerk filed?

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

I, TERESA J.F. BAUTZ, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Georgetown County, South Carolina, on the 23rd day of June, 2015.

I FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

TERESA J.F. BAUTZ, RPR
Official Court Reporter

ORIGINAL

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF GEORGETOWN)	**2013-CP-22-01062**
GEORGETOWN COUNTY,)	
)	
Plaintiffs,)	**Transcript of Record**
)	(Motion Hearing)
vs.)	
)	August 5, 2016
DAVIS & FLOYD, INC.,)	
REPUBLIC CONTRACTING)	
CORPORATION, S&ME, INC.,)	
THE SOUTH CAROLINA)	
DEPARTMENT OF)	
TRANSPORTATION AND THE)	
CITY OF GEORGETOWN.)	
)	
Defendants.)	

B E F O R E:

Honorable Larry B. Hyman
Georgetown County Courthouse
Georgetown, South Carolina

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EXHIBITS

No. ID EV

(There were no exhibits marked or admitted.)

argument. I believe it's been argued since the briefing was completed.

MS. REYNOLD: What he did after ---

MR. ATKINS: I think the last briefing was in January.

THE COURT: Okay. All right.

MR. ATKINS: And I'm not sure that we've had any arguments since then.

THE COURT: Okay. Then I will submit an order on that.

What do we have today then? Can someone tell me?

MR. TAYLOR: The County also has a 59(e) motion to alter or amend your order that denies summary judgment for the County and granted the City and DOT's 12(b)(6) motion. I have an order denying that but ---

THE COURT: Okay. All right. Are we prepared to hear that?

MR. TAYLOR: The County certainly is prepared for it.

THE COURT: Okay. All right.

MR. MORRISON: I think I heard him say he has an order prepared denying that motion. I know they tried to hand one up at the last hearing or they talked about handing one up at the last hearing. We would argue that they certainly did that.

MR. TAYLOR: The arguments are essentially the same, you know, under Rule 59(e), we have to, I think, point out to the Court issues raised that were not addressed in the order. We

don't ---

THE COURT: Well, I would love for you to.

So, do we have a motion to reconsider here today on that issue?

MR. TAYLOR: It's on the roster.

THE COURT: Okay. Well, which one is it?

MR. TAYLOR: Number 9.

THE COURT: All right. Let me hear you then. Okay.

MR. HOWSER: Your Honor, we also have, I think on the roster -- this is Dave Howser, I represent S&ME -- the County's motions to consolidate a number of cases.

THE COURT: All right. Let's go ahead and hear the motion to reconsider. Let me just give you basically my thoughts on it. The sovereign obviously has inherent right to condemn. I think that the U.S. and the Article I of the state constitution are limiting articles that merely limit the inherent authority. Show me where there's any authority in this state to suggest that a sovereign would have to compensate for the taking of public property. Now, I understand all the arguments that can just create a nightmare across condemnations among condemning authorities. Show me something that would leave Georgetown County as a viable Plaintiff in this matter. Okay?

MR. TAYLOR: First and foremost, we think that the state constitution can be read to allow an inverse condemnation

claim by the County against the State. We don't think you have to read out the word private to appreciate the County's private property interest in this courthouse, in the funding mechanism that the County used to pay for this courthouse.

THE COURT: And I understand that.

MR. TAYLOR: Which is completely different than what the -- than what would've happened pre the home run rule and now the County truly is a separate and distinct entity that's private from the State. So, we think that just based on the language of the constitution, if you read out the absurdity of segregating the County, then we prevail.

THE COURT: I mean, do you appreciate the fact that if we look at the case law from across the country, it's split.

MR. TAYLOR: It goes both ways across the country.

THE COURT: It goes absolutely both ways.

MR. TAYLOR: And really, you know, and a lot of states that are in a similar position of South Carolina, with language almost identical in the constitution, they've looked at their procedures act for eminent domain and we have one in South Carolina. And under the South Carolina eminent domain procedures act, a -- the condemnee includes public entities. So, if the State were to come in and take this courthouse and make it a state building, they would have to follow the eminent domain procedures act. And it doesn't make any sense to say that ---

THE COURT: What do you say about that, counsel?

MR. MORRISON: Judge, the eminent domain procedures act -- we talked about this at the last two hearings, I believe. The eminent domain procedures act is just that. It is a procedural act. It talks about the procedure for bringing eminent domain claims. It does not change the substantive law and I think it's important to note that in Section 28-2-20, entitled Intent of the General Assembly, they state that this is a procedural act, it is not a change to substantive law. It is not a change to the constitution. It does not take out the word private out of the constitution. And that's what the act leads off with, It is not our intent to change the substantive law. This is a procedural mechanism.

MR. TAYLOR: Well, what it shows is that when the General Assembly was creating a procedure to enforce a constitutional right, they recognized that public entities would have the same benefit. So, they weren't -- the Eminent Domain Procedures Act was truly the Legislature's attempt to establish a way to compensate for takings. And when they -- in their attempt to come up with that procedure, they included public entities as condemnees. So, if the State ---

THE COURT: Would it be appropriate for this Court to limit, place further limits on the authority of the State of South Carolina, should that not be something that would be reserved for the legislature to specifically do it or for the

courts, the Appellate Courts?

MR. TAYLOR: I think the Legislature has shown their intent with the Eminent Domain Procedures Act. And I think that the fact that the County can be condemned from the State under that act, is evidence that the constitution protects the County from taking.

THE COURT: So, what you're saying is we can look at legislative intent on a procedural statute and alter the constitution?

MR. TAYLOR: I'm not suggesting you alter the constitution. I'm suggesting that the constitution can be read to include the County as a -- as a property owner.

THE COURT: All right, sir. Anything further?

Yes, ma'am?

MS. REYNOLDS: Lisa Reynolds for DOT. I would just like to point out that even in their complaint, the County has agreed that this not a case under the Eminent Domain Procedures Act. This is a case -- or what they're alleging is inverse condemnation based on the constitutional violation ---

THE COURT: Which has its roots in the constitution?

MS. REYNOLDS: Yes, sir, Your Honor.

MR. TAYLOR: They're the exact same thing.

MS. REYNOLDS: If I can finish. They're not the exact same thing. And, Your Honor, to address something you said, a determination or case law that the County is separate and

distinct from the State is not the same thing as a determination that the County is now a private entity. There's been no determination of that. And I doubt the County really wants to take that position that they're private because then there goes any and all defenses they want to claim when they get sued under the Tort Claims Act because now they're not a governmental entity, they're a private entity.

THE COURT: I understand. Well, you know, right or wrong, I'm going to deny the motion to reconsider. I think that my ruling was the appropriate ruling. It's a matter that must be determined by the Appellate Courts and then perhaps by the Legislature. But prepare an order, if you would, and submit it to me in that regard, okay.

MR. TAYLOR: I have one in hand if you are prepared to -- if I may approach.

THE COURT: Okay.

MR. TAYLOR: And I think we sent this to everybody.

MR. MORRISON: You have but it's been a while since I looked at it.

MR. TAYLOR: Here you go. It's very short.

MR. MORRISON: If I could have a minute before you make the decision on signing this.

THE COURT: Okay.

MR. MORRISON: If I could talk to my appellate lawyer about this.

MR. TAYLOR: Your Honor, if I may approach, I'll give you a copy.

THE COURT: Okay.

MR. TAYLOR: And, Your Honor, it may make sense that when this goes up that the SCAGO issue goes up with it.

THE COURT: I'm about to rule on SCAGO.

MR. TAYLOR: Timing may be of the essence.

THE COURT: I'm just about to rule on SCAGO.

MR. TAYLOR: Thank you.

MR. MORRISON: Your Honor, if I might, the Plaintiff's in their motion, in their motion, in their motion have -- we'd made the same arguments made before. And partly said, that some of these arguments were specifically addressed in your prior orders such as the Eminent Domain Procedures Act, wasn't referenced in your prior order. If we're gonna go up on appeal, and I'm sure this is going up on appeal, we would -- we would like to take the opportunity to present an amended order ruling on the 59(e) motion and addressing those things.

THE COURT: Share it with counsel, get it to me. Okay?

MR. MORRISON: Thank you, Judge.

THE COURT: All right. Let's make sure we have all the issues framed when it goes up. Okay? I don't want the Court sending it back because something wasn't preserved or something wasn't ruled on. Time is of the essence and we need to get this heard.

MR. TAYLOR: Could we just have, you know, fourteen days or some kind of ---

THE COURT: Certainly, certainly.

MR. MORRISON: Two weeks is sufficient.

THE COURT: But let's make sure we've -- that we step on every stone with that order. Okay?

All right. Gentlemen, what else do we have here that we need to hear today?

Mr. Lang, so good to see you.

MR. LANG: Good to see you, Your Honor.

THE COURT: All right.

MR. LANG: May it please the Court, Your Honor. Louis Lang for Georgetown County and SCAGO, in response to what I hope your question was in determining what is still pending, Motion Number 13 is a motion that SCAGO and Georgetown filed to the declare as complex two recently filed case -- well, one recently filed case and one recently restored case -- and then consolidated those two cases with the underlying two cases involving Georgetown County and the sinkhole litigation. And Your Honor, please, in terms of the declaration of complexity and assigning it to Your Honor, I kind of think Your Honor has had quite enough of these cases already but we think that that would be -- make logical sense because they all have the same issues, particularly the case involving coverage issues with the South Carolina Insurance Reserve Fund and then the, what

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Georgetown County, et al. versus Davis & Floyd, et al., held in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on August 5, 2016, taken by Dixie C. Eubank.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Kay H. Richardson
Official Court Reporter

January 18, 2017.

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Re: Georgetown County v. Davis & Floyd, Inc., et al.
Civil Action No. 2013-CP-22-1062

SCAGO Public Facilities Corporation for Georgetown County v. Davis & Floyd, Inc., et al.
Civil Action No. 2014-CP-22-0901

Georgetown County v. South Carolina Insurance Reserve Fund, a Division of the South Carolina Budget and Control Board
Civil Action No. 2013-CP-22-1061

Our File Numbers: 5626.003, 5626.004 and 5626.005

Dear All:

Please accept this correspondence in lieu of formal supplemental discovery responses.

Please be advised that the Plaintiffs withdraw George A. Sembos, P.E. of GS2 Engineering & Environmental Consultants, Inc. as an expert witness on behalf of Plaintiffs in regard to the above-referenced matters. The Plaintiffs will not rely on Mr. Sembos as an expert witness in these matters and therefore any reference to Mr. Sembos in his capacity as an expert

contained in Plaintiffs' discovery responses should be disregarded. Plaintiffs reserve the right to call Mr. Sembos on any factual issues he observed.

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

With warmest regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC

Louis H. Lang

WTS/kam
cc: Wesley P. Bryant, Esquire
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(6)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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

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

Georgetown County, ... Appellant,

v.

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

Of whom

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN RULING AS A MATTER OF LAW THAT GEORGETOWN COUNTY CANNOT MAINTAIN AN INVERSE CONDEMNATION CAUSE OF ACTION UNDER ART. I., § 13 OF THE SOUTH CAROLINA CONSTITUTION?

II. DID THE CIRCUIT COURT ERR IN RULING THAT GEORGETOWN COUNTY IS NOT ENTITLED TO JUST COMPENSATION UNDER THE SOUTH CAROLINA EMINENT DOMAIN PROCEDURE ACT, S.C. CODE ANN. § 28-2-10 *ET. SEQ.* OR THE STATE AUTHORITIES EMINENT DOMAIN ACT, S.C. CODE ANN. § 28-3-20, *ET. SEQ.?*

III. DID THE CIRCUIT COURT ERR IN RULING THAT PUBLIC POLICY DOES NOT REQUIRE THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION AND THE CITY OF GEORGETOWN TO PAY JUST COMPENSATION TO GEORGETOWN COUNTY?

STATEMENT OF THE CASE

Appellant, Georgetown County (the "County"), filed its Complaint on October 25, 2013. (ROA p. 11) and its Amended Complaint[1] on July 10, 2014 (ROA p. 34). Among the causes of action asserted by the County was an inverse condemnation claim against the South Carolina Department of Transportation ("SCDOT") and the City of Georgetown (the "City"). The inverse condemnation claim arose from damage to County buildings and property caused by a public utility project jointly undertaken by the City and SCDOT that was intended to resolve storm drainage and flooding problems in the City of Georgetown.

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

After further briefing and a second hearing, the circuit court entered the appealed-from Order on November 12, 2015 (the "Order"). In the Order, the circuit court held:

> Since Georgetown County's property is public property, the takings clause (Art. I, § 13 of the South Carolina Constitution) has no application. The Takings Clause is limited to private property by its clear and unambiguous terms. The purposes and intent of the enactment of the Takings Clause do not support an application to public property.
>
> ***

[1] The only difference between the Complaint and the Amended Complaint is in paragraph 9 of each. The Amended Complaint substituted as one of the County's Buildings at issue, 1230 Highmarket Street, for the property pleaded in the Complaint, 716 Prince Street. Hereafter, except as may be pertinent regarding the affected property, reference will be to the Complaint.

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

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

The County filed a Motion to Reconsider, Alter or Amend, Pursuant to Rule 59(e), SCRCP on November 13, 2015. (County's Rule 59(e) Motion, ROA, p. 221). The circuit court heard arguments on this motion on August 5, 2016, and issued its written order denying the County's Rule 59(e) motion on January 17, 2017. (Order denying Rule 59(e) motion, ROA p. 7). This appeal followed.

STATEMENT OF FACTS

This case involves damage to the County's real property and buildings located at 333 Cleland Street (Magistrates Complex); 401 Cleland Street (the Georgetown County Judicial Center); 405 Cleland Street (Public Library); 325 Dozier Street (Winyah High Gym); 330 Dozier Street (Department of Social Services); and 1230 Highmarket Street (Waccamaw Regional Building) (collectively, the "County's Buildings"). (Amended Complaint ¶ 9, ROA, p. 35). These damages are a result of a public works project undertaken jointly by SCDOT and the City in 2009 to resolve storm drainage and flooding problems in the City of Georgetown (the "Drainage Project). (Compl. ¶ 12, ROA, p. 36; SCDOT's Answer ¶ 13, ROA, p. 53; and the City's Answer ¶ 10, ROA, p. 69). The purpose of the Drainage Project was to relieve or reduce the impact of historical surface water flooding in the area surrounding City Hall, including U.S.

Highways 17 and 521. (County's Memorandum in Support of Its Motion for Summary Judgment, Exhibit A[2] p. 8, ROA, p. 99). The Drainage Project consisted of the planning and construction of a water storage facility and wet well, redirection of stored water through a gravity piping system, and forced drainage of water from the wet well into the Sampit River. (Id.). As part of the Drainage Project, the water storage area underwent a significant pumping of water so that new drainage structures could be fabricated below grade. (Compl. ¶ 17, ROA, p. 13). During construction, king piles (hollow steel piles) were installed by pre-drilling holes and driving the king piles deep into the sub-surface of the ground to provide lateral support for the walls of the water storage facility. (Affidavit of George A. Sembos, P.E. ¶ 8, ROA p. 79, and F&ME Report, p. 22, ROA p. 113). During the installation of the king piles, a ring-shaped space was created around the outside of the pile. (Id.). These piles breached a subsurface layer which confined underground water, causing this underground water to rise from beneath the confining layer and fill the water storage area. (Id.). During the construction of the Drainage Project, multiple land-surface collapses occurred, and sinkholes and depressions formed in and around the area of the Drainage Project. (F&ME Report, p. 20, ROA p. 111).

After the sinkhole depressions occurred, SCDOT hired F&ME Consultants to investigate and identify the cause and origin of the sinkholes and depressions. According to F&ME, at least seven sinkhole/depressions were caused by the construction activities related to the Drainage Project which impacted a lower, confined aquifer system underlying the area in question. (F&ME Report, p. 22, ROA, p. 113).

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

[2] Hereinafter, the "F&ME Report."

Supplemental Affidavit of George A. Sembos, P.E. ¶ 5-9, ROA pp. 156-157). These sinkhole collapses were caused by the Drainage Project. (Affidavit of George A. Sembos, P.E. ¶ ¶ 7-11. ROA pp. 79-80).

STANDARD OF REVIEW

In reviewing a motion to dismiss, an appellate court applies the same standard of review as the circuit court. Carolina Park Associates, LLC v. Marino, 400 S.C. 1, 6, 732 S.E. 2d 876, 878 (2012). "Questions of law may be decided with no particular deference to the circuit court." Id. "The trial court's ruling on a Rule 12(b)(6) motion must be bottomed and premised solely upon the allegations set forth by the plaintiff." Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). The motion must be denied if the facts alleged and inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. Id. "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Doe v. Marion, 373 S.C. 390, 295, 645 S.E.2d 245, 247-48 (2007).

ARGUMENT

I. The circuit court erred in ruling the County is not entitled to just compensation under the Takings Clause, Art. I, § 13 of the South Carolina Constitution.

At the heart of this matter is whether, as a matter of law, one governmental entity, such as the County, may maintain an inverse condemnation claim against another governmental entity, such as SCDOT and the City. As stated in the circuit court's order, this is a novel question of law in South Carolina. (Order p. 6, ROA, p. 6). No South Carolina appellate decision has held that a governmental entity is barred from asserting an inverse condemnation claim against another governmental entity.

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

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

Inverse condemnation is based on the constitutional prohibition of taking property without compensation. Horry Cty. v. Ins. Reserve Fund, 344 S.C. 493, 498, 544 S.E.2d 637, 640 (Ct. App. 2001). Inverse condemnation is a cause of action to recover the value of property that has been effectively taken by a governmental entity, although not through the process of eminent domain. Carolina Chloride, Inc. v. Richland Cty., 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011).

The elements of an inverse condemnation action based on physical appropriation of property, such as this case, are: (1) affirmative conduct of a governmental entity, (2) which effects a taking, and (3) the taking is for a public use. Carolina Chloride, Inc. v. S. C. Dept. of Transp., 391 S.C. 429, 435, 706 S.E.2d 501 (2011).[3]

a. The County is protected against unconstitutional takings by Article I, Section 13 of the South Carolina Constitution of 1895.

No South Carolina case has held that a governmental entity is barred from asserting an inverse condemnation claim against another governmental entity. No statutory authority supports this conclusion. In fact, South Carolina statutory authority supports the conclusion that the County is entitled to just compensation.

Numerous other states have concluded that where the state or a political subdivision takes property belonging to another political subdivision, just compensation must be paid. See e.g.,

[3] Formerly, "some degree of permanence" was a required element; however, this element has been removed. E.g. Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76,79 (2005); Frampton v. South Carolina Dept. of Transp., 406 S.C. 377, 387, 752 S.E.2d 269, 275 (Ct. App. 2013).

Marin Mun. Water Dist. v. City of Mill Valley, 202 Cal. App. 3d 1161, 249 Cal. Rptr. 469 (1988) (holding a public water district suffered no less of a taking than if the property were owned by an individual and that the district stated a cause of action in inverse condemnation for unintentional physical damage to its property); City of Three Forks v. State Highway Comm'n, 156 Mont. 392, 480 P.2d 826 (Mont. 1971) (holding the property was owned by the city, not the State of Montana, and that compensation must be paid for property of the City taken by the State); State ex. rel. State Highway Comm'r v. Cooper, 24 N.J. 261, 131 A.2d 756 (1957) (impliedly overruling New Jersey precedent on the governmental-proprietary distinction and stating if the breadth of previous case doctrine were followed it would lead to the startling result that "the State [could] appropriate, for wholly unrelated public purposes and without just compensation, various municipal properties such as town halls and schoolhouses..."); Highline Sch. Dist. No. 401, King Cty. v. Port of Seattle, 87 Wash. 2d 6, 548 P.2d 1085 (Wash. 1976) (en banc) (reversing grant of summary judgment on inverse condemnation against condemnee school district and stating that where a condemnee governmental unit must furnish services which require use of the property taken, just compensation must be paid); City of Chester v. Com., Dept. of Transp., 495 Pa. 382, 434 A.2d 695 (1981)(holding the Pennsylvania Constitution does not allow the Commonwealth to escape its financial obligation owed to a public condemnee for property taken); Brusco Towboat Co. v. State By & Through Straub,31 Or.App. 491, 493, 570 P.2d 996, 998 (1977)(en banc) (stating that two government entities are nevertheless entities distinct from the state and stating "[t]hey are supported by a distinct tax base and they serve a distinct constituency. Accordingly, they are protected against taking by the state without compensation."); State ex. rel. Ala. State Docks Dept. v. Atkins, 439 So.2d 128 (Ala. 1983) (holding Mobile County was entitled to compensation for the taking of its roadway by the State

of Alabama); Donnaher v. State, 16 Miss. 649, (Miss. Er. & App. 1847) (holding railroad company must pay just compensation to the City of Jackson to have a right to construct a railroad through the public streets). The South Carolina Supreme Court has held that property acquired and devoted to a public use may be condemned by the SCDOT. Riley v. S. C. State Hwy. Dept., 238 S.C. 19, 26, 118 S.E.2d 809, 812 (1961) (implying that compensation must be paid to an orphanage where the SCDOT was allowed to condemn).

Appended to this brief, marked as **Appendix A**, are the taking clauses of the constitutions of the eight states whose court opinions are discussed above – California, New Jersey, Montana, Washington, Pennsylvania, Oregon, Alabama, and Mississippi. All speak in terms of ***private property not being taken for a public use without just compensation.*** These states all held that their respective takings clauses require payment of just compensation where one public entity has taken the property of another public entity. South Carolina's taking clause should be interpreted no differently.

In Marin, the question presented, *i.e.*, can one public entity assert an inverse condemnation claim against another, was answered in the affirmative, the California Court of Appeals holding that a public water district's property was protected by the California state constitution.[4] Marin, 202 Cal.App.3d 1161, 249 Cal. Rptr. 469. In Marin, as in this case, the City of Mill Valley caused unintentional physical damage to the public water district's property.

The court stated:

> 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***

[4] 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.

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

The court went on to discuss 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.

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, a local government, 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.

Just as in Marin, the County's properties have been taken without an award of just compensation. SCDOT and City undertook the Drainage Project, taking the calculated risk that damage to the County's properties could occur. South Carolina's Constitution requires SCDOT and City compensate the County for the property damage to the County's buildings they caused.

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

In their briefs to the circuit court, SCDOT and the City relied upon Edgefield County v. Georgia-Carolina Power Co., 104 S.C. 311, 88 S.E.801 (1916), for the proposition that "public

property" does not fall within the protection of the Constitution.[5] See SCDOT's Supplemental Memorandum In Opposition to Plaintiff's Motion for Summary Judgment, p. 5, 9, (ROA p. 171, p. 175); and Brief of the City of Georgetown on Legal Issue of Whether Georgetown County Can Assert an Inverse Condemnation Claim Under the Law, p. 7 (ROA p. 184).

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

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

The Court went on to state:

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

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

[5] SCDOT and the City also relied on Edgefield County in their Return to the County's Motion to Certify to the Supreme Court.

As the Edgefield County Court noted, at the time that case was decided, "[t]he Constitution of 1895... by implication left the government of the counties in the hands of the Legislature." Id. at 327, 88 S.E. at 806. The Court also opined that at that time, "under the Constitution and laws of the state, the state [General Assembly] ha[d] absolute control over the government of counties." Id. That is not the case today, as the government of the counties is no longer in the hands of the General Assembly as a consequence of South Carolina's movement to local government "home rule" in 1975. See S.C. Const. art. VIII, § 1, *et. seq.*; S.C. Code Ann. § 4-9-10, *et. seq.*; and Hospitality Ass'n of South Carolina, Inc. v. Cty. of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113 (1995).

As explained in Hospitality Ass'n:

> For generations, legislative delegations of the General Assembly controlled virtually every aspect of local government. Relinquishment of this control effectively began in April of 1966, when the General Assembly created a Committee to study the South Carolina Constitution and appointed then Senator John C. West as chairman. The major task assigned to the West Committee was to develop and recommend amendments to the Constitution that would eliminate archaic provisions and "strengthen it in such other areas, so that it [would] provide a workable framework with proper safeguards for sound State, County and local governments."
>
> In June of 1969, after three years of numerous hearings and conferences, the West Committee submitted its Final Report to the Governor and General Assembly. In the Report, the Committee unanimously recommended amendments to the Constitution that would place the control and management of county and municipal affairs in the hands of duly elected local officials.
>
> Following three years of legislative debate on the Report, the General Assembly placed upon the November 1972 general election ballot for referendum vote an Amendment of Article VIII of the Constitution. See Act No. 1631, 1972 S.C.Acts 3184. Acting upon a favorable vote of the people, the General Assembly, on March 7, 1973, ratified the Amendment. See Act No. 63, 1973 S.C.Acts 67.
>
> As ratified, new Article VIII directed the General Assembly to implement what was popularly referred to as "home rule" by establishing the structure, organization, powers, duties, functions, and responsibilities of local governments

> by general law. S.C. Const. art. VIII, §§ 7 and 9. **In addition, new Article VIII mandated a liberal rule of construction regarding any constitutional provisions or laws concerning local government.** S.C. Const. art. VIII, § 17.
>
> Although the General Assembly was required to implement home rule, new Article VIII essentially left it up to the General Assembly to decide what powers local governments should have. Acting under this authority, the General Assembly enacted various statutes regarding the powers of counties and municipalities.

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

As noted in Hospitality Ass'n, prior to the implementation of the Home Rule, "courts in this State **strictly and narrowly** construed any grant of local government power." Id. at 225 n.5, 464 S.E.2d at 117 n.4. However, this is not the case today under S.C. Const. art. VIII, § 17.

At the time Edgefield County was decided, the property at issue belonged to the State of South Carolina. Edgefield County, like all South Carolina counties, did not have the power to own property. This is not the case today regarding to the County's properties. See S.C. Ann Code Ann. §§ 4-1-10 (2); 4-17-10. Unlike when Edgefield County was decided, it is the County and not the State of South Carolina which has set apart the County's property for a public purpose. Id. It is not the property of the State, and the State does not exercise control over the County's properties. The General Assembly has not expressly subjected the County's properties, including the Georgetown County Judicial Center, to "another or higher purpose." Edgefield County was decided in a time when the State controlled the Counties, which was abrogated in 1975.

Furthermore, Edgefield County was not decided on Constitutional grounds. Any indication in the opinion that the County's properties are not protected by the Constitution was not necessary to the court's opinion, and is, therefore, non-binding dicta. Further, due to the

implementation of home rule, occurring decades after Edgefield County was decided, that opinion is of no significance here.

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

Like Art. I, § 13 of the South Carolina Constitution, the United States Constitution provides "... nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V. "South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with someone's property interests amounts to a constitutional taking." Hardin v. South Carolina Dept. of Transp., 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007) (Citing Byrd v. City of Hartsville, 365 S.C. 650, 656 n. 6, 620 S.E.2d 76, 79 n.6 (2005)). South Carolina courts have consistently relied upon Federal Takings Clause analysis. See Byrd, 365 S.C. at 656 n.6 and 659 n. 9, 620 S.E.2d at 79 n.6 and 81 n. 9; Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach, 337 S.C. 380, 390, 523 S.E.2d 193, 199 (Ct. App. 1999), aff'd in result by Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach 345 S.C. 418, 548 S.E.2d 595 (2001)(Sea Cabins II); Kiriakides v. School Dist. of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009); Early v. South Carolina Public Service Authority, 228 S.C. 392, 402, 90 S.E.2d 472, 476 (1955). Additionally, the Takings Clause of the United States Constitution applies to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV; § 1; Byrd, 365 S.C. at 656 n. 6, 620 S.E.2d at 79 n. 6.

In its brief to the circuit court, the City asserted "The Bill of Rights was not intended to protect one government against the actions of another sister government. Consequently, the restriction of the takings clause to 'private' property comports with the purposes of the Bill of

Rights." (Brief of the City of Georgetown on Legal Issue of Whether Georgetown County Can Assert an Inverse Condemnation Claim Under the Law, p. 5., ROA p. 182). The City is misguided in its analysis.

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

The United States Supreme Court has stated:

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

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

Under the Federal Takings Clause, the Federal government must compensate a state or local government for the taking of that entity's property. The established rule is that property not owned by the sovereign, the United States, is "private" as between the United States and any other entity, including a state or its political subdivisions. With the establishment of Home Rule, the same rationale applies between the SCDOT, the City and the County—any property not actually owned by SCDOT or the City, is "private" as it pertains to them, and if damaged by one or the other or both, the owner, whether a public or private person or entity, is entitled to just compensation. As South Carolina has consistently applied Federal Takings Clause jurisprudence, interpreting the South Carolina Constitution in a similar way to the Federal Constitution requires SCDOT and City compensate the County for the taking of its properties.

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

In South Carolina, Georgetown County is a body politic and corporate and is specifically given the power to purchase and hold, for the use of the county, lands and personalty 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. It is well settled that the circuit courts, probate courts, family courts and magistrates' courts are the courts of justice in the State of South Carolina. S.C. Code. Ann. § 14-1-70. Additionally, South Carolina Counties are legally required to provide facilities and support personnel necessary to accommodate the circuit courts. 1975 S.C. Op. Atty. Gen. No. 4194, 1975 WL 22491.

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

> In [the municipality's] capacity of owner of property, designed for its own, or the exclusive use and benefit of its inhabitants, its vested rights of property are no

> more the subject of legislative interference or control without the consent of the corporators, than those of a merely private corporation or person. Its rights of property, once acquired, though designed and used to aid in the discharge of its duties as a local government, are entirely distinct and separate from its powers as a political or municipal body...In its character of a political power, or local subdivision of government, it is a public corporation, but in its character of owner of property it is a private corporation, *possessing the same rights,* duties and privileges as any other.

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

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

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

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

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

> possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Id. at 26, 501 S.E.2d at 729 (citations and emphasis in original omitted)(emphasis added). As stated by our Supreme Court, "[t]he purpose of the Takings Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Sea Cabins II at 429, 548 S.E.2d at 601.

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

In order to give meaning to our Takings Clause's purpose, SCDOT and the City should bear the burden of the damages to the County's buildings. S.C. Const. art. I, § 13 must be construed to avoid the absurdity and injustice which would result if the County is forced to bear the burden of the damage caused by SCDOT and the City to its buildings. 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 circuit court erred in ruling that the County is not entitled to just compensation under the South Carolina Eminent Domain Procedure Act and the State Authorities Act.

In addition to the requirement under the South Carolina Constitution that if the County's property is taken for a public use the County must receive just compensation, the County is also 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.* S.C. Code Ann. § 28-2-20. Under the Act, a condemnor may not take possession of the property to be condemned until receipt of written consent of the landowner or *payment of just compensation. See* S.C. Code Ann. § 28-2-90. The Act defines condemnee as a "person or other entity who has a record interest in or holds actual possession of property that is the subject of a condemnation action." S.C. Code Ann. § 28-2-30 (6). "Person" includes not only a natural individual, but also a public entity. S.C. Code Ann. § 28-2-30 (16). The County is therefore an express condemnee under the Act.

"Inverse condemnation is a cause of action by a property owner against a governmental entity to recover the value of property that has been effectively 'taken' by the governmental entity, although not through the process of eminent domain." Carolina Chloride, Inc. v. Richland County, 394 S.C. at 170, 714 S.E.2d at 977. "While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings." Hawkins v. City of Greenville, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004).

The County[6] has a record interest in all of the County's properties which are the subject of this lawsuit. (Amended Complaint ¶ ¶ 9-10, ROA p. 35). Therefore, in order to condemn the County's properties, SCDOT and City must have proceeded under the Act. Under the Act, the

[6] The County and SCAGO Public Facilities Corporation for Georgetown County each have an undivided record interest in the Judicial Center pursuant to that certain Base Lease and Conveyance Agreement dated December 1, 2009, recorded December 1, 2009 in the Register of Deeds for Georgetown County, South Carolina in Book 1383 at Page 253 and that certain Installment Purchase and Use Agreement dated December 1, 2009, recorded December 1, 2009, in the Register of Deeds for Georgetown County in Book 1383 at Page 277.

SCDOT and the City must pay just compensation. Otherwise, SCDOT and City are liable to the County in inverse condemnation.

In a case cited by the SCDOT, State et rel. State Highway Comm'n v. Board of Comm'rs of Dona Ana Cty., 72 N.M.86, 380 P.2d 830 (1963), the court, in applying the governmental-proprietary distinction, which does not apply in South Carolina, found that the county's buildings were not protected. However, the Board of Comm'rs of Dona Ana Cty. court determined that the New Mexico procedure for eminent domain required the payment of just compensation. Id. at 92-93, 380 P.2d at 835. It held the provisions in their statutes treated "the owners of public property no differently than the owners of private property in any respect, including specification of the proper measure of compensation for all property taken..." Id.; See also Sch. Dist. of Borough of Speers v. Com., 383 Pa. 206, 209, 117 A.2d 702, 703 (1955) (holding that where the act enabling a taking by eminent domain did not differentiate between "owners" and "private owners" the public school district was entitled to compensation).

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

> It is important to note that the act shows that the legislature had in mind that necessity may require that property devoted to one public use may be taken from its public owner if it was required for a different and more necessary public use. But in spite of this awareness, it made no distinction between the method of taking public or private property. It is true that the statute does not state specifically whether compensation is to be paid to the public agency from which it is taken.
>
> From the language of the eminent domain statute, as well as upon the basis of its purpose and practical application, it is our conclusion that the legislature intended that public property should be taken and compensated for the same as if it had been taken from a private owner.

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

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

The 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 provided for the taking of any property, including public entities such as the County. SCDOT and the City cannot circumvent the Act and thereby avoid payment of just compensation. To allow SCDOT and the City to circumvent the Act would not only be contrary to the General Assembly's stated purpose of the Act, but would also work an absurdity if this Court also found that the County's properties are not protected under the Constitution. Just as in Bd. of Cty. Comm'rs of Dona Ana Cty., our General Assembly has expressed its intention that the County be compensated under the Act.

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

III. The circuit court erred in ruling that public policy does not require SCDOT and the City to pay just compensation to Georgetown County.

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

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

> We would add a word to the effect that any other conclusion might lead to most incongruous results. 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 or, possibly, even prohibited by debt limitations pertinent to the subdivision. Since the highways are state projects paid for by the public of the state at large, including in many instances contribution by the federal government, *it is only just and proper for compensation when public property is taken for highway purposes...*
>
> Under this construction of the statutes, *absurdity, hardship and injustice* are avoided and *the public interest* and convenience are favored. ***These are the results to be sought.***

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

example, that school buildings costing many thousands of dollars can be destroyed for highway purposes and yet the Legislature not have intended that the loss be paid to the district.").

In the circuit court, the City contended that public policy does not apply to the County's claim against the City, "since the City taxpayers are a smaller subset of County taxpayers and to spread the burden to the City taxpayers would certainly not be spreading the burden a public as a whole greater than the County" (City's Brief in Opposition of Summary Judgment, p. 5, ROA p. 217). The Marin Court, addressing this same argument found two flaws:

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

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

Even in cases where the governmental-proprietary distinction was applied, the courts have recognized the disastrous results which would stem from not requiring the payment of just compensation. Just as in New Mexico, under South Carolina law, the County is responsible for providing facilities, including the courthouse. These buildings are financed by the County through various financing arrangements, including through SCAGO Public Facilities Corporation for Georgetown County. Among other financing arrangements is the issuance of general obligation bonds. In the instant case, the Drainage Project was indeed paid through SCDOT, the City, and Federal financing and was for the purpose of relieving certain flooding on

US 17. It is only just and proper for SCDOT and the City to compensate the County for damages which were caused as a result of their Drainage Project. It is only under this construction of the Constitution that hardship, injustice and absurdity are avoided. To accomplish this result, this Court must construe the Constitution and/or the Eminent Domain Procedures Act to require the payment of just compensation for the taking of the County's properties by SCDOT and the City.

CONCLUSION

The circuit court erred in concluding the County could not maintain its inverse condemnation claims against SCDOT and the City. Accordingly, the circuit court's order dismissing those claims must be reversed and remanded to the circuit court for trial.

Respectfully submitted,

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I hereby certify that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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APPENDIX "A" TO FINAL BRIEF OF APPELLANT, GEORGETOWN COUNTY, CONTAINING THE TAKINGS CLAUSES OF THE STATECONSTITITIONS OF:

CALIFORNIA

NEW JERSEY

MONTANA

WASHINGTON

PENNSYLVANIA

OREGON

ALABAMA

MISSISSSIPPI

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CALIFORNIA
Cal. Const. Art. 1, § 19
Eminent domain; just compensation; prohibition on acquisition for conveyance to private person; exceptions

(a) Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

NEW JERSEY
N.J. Const. Art. 1, ¶ 20
Private property for public use

Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

MONTANA
Mont. Const. Art. 2, § 29
Eminent domain

Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

WASHINGTON
Wash. Const. Art. 1, § 16
Eminent Domain

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

PENNSYLVANIA

Pa. Const. Art. 1, § 10

Initiation of criminal proceedings; twice in jeopardy; eminent domain

Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

OREGON

Or. Const. Art. I, § 18

Private property or services taken for public use; just compensation

Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.

ALABAMA

Ala. Const. Art. I, § 23

Eminent domain.

That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association.

MISSISSIPPI

Miss. Const. Art. 3, § 17

Taking property for public use; due compensation

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

MISSISSIPPI
Miss. 1832 Const. Art. 1, § 13[1]

No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall any person's property be taken or applied to public use without the consent of the legislature, and without just compensation being first made thereof.

[1] This is Mississippi's takings clause in effect at the time Donnaher v. State, 16 Miss. 649 (Miss. Er. & App. 1847), was decided, Donnaher being cited by the County in its Initial Brief at page 7. Miss. Const. Art. 3, § 17, is the Mississippi takings clause presently in effect.

CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Court of Appeals Case No.: 2017-000234

Georgetown County, ... Appellant,

v.

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

Of Whom

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

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STATEMENT OF ISSUE ON APPEAL

Respondents would respectfully restate the issue on appeal as follows:

1. **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?**

STATEMENT OF THE CASE

FACTS

Georgetown County (Appellant) 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). (R. p 34). Appellant alleges there was a joint project between the Respondents to relieve flooding that occurs in Georgetown, South Carolina during heavy rains. (R. pp. 81-82).[1] The alleged joint project included work performed on public rights of way and property. (R. p. 82). Appellant alleges that during the course of 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. (R. p. 83; p. 14, ¶ 23; p. 15, ¶ 24-25).

Appellant filed its Complaint on October 25, 2013 (R. p. 11) and its Amended Complaint on July 10, 2014 (R. p. 34) against Respondents, the engineers and contractors who performed work on the public project. Respondents filed their Answers on November 21, 2013, (R. p. 52) and January 22, 2014, (R. p. 68). Appellant asserted various claims against the Respondents including an inverse condemnation cause of action. (ROA p. 34). On May 2, 2014, Appellant moved for Summary Judgment on their inverse cause of action against Respondents. (R. p. 76). Respondent SCDOT filed a Memorandum in Opposition to Appellant's motion and moved to dismiss the inverse condemnation cause of action pursuant to Rule 12(b)(6), SCRCP. (R. p. 118).

[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.

A hearing on Appellant's motion was held on August 7, 2014. (R. p. 287). Respondents argued in defense to Appellant's motion at the hearing August 7, 2014 hearing. (R. p. 287). Following arguments the trial court requested further briefing on the legal issue regarding private property versus public property (R. pp. 309-310). Appellant filed their Brief in Support of Its Motion for Summary Judgment (R. p. 158). Respondent SCDOT filed a Supplemental Memorandum in Opposition to Appellant's Motion (R. p. 167) and Respondent City filed a Brief on the Legal Issue of Whether Georgetown County Can Assert an Inverse Condemnation Claim Under the Law. (R. p. 178). Appellant filed a Reply Brief in response to Respondents' filings. (R. p. 193). Thereafter Respondents filed responses thereto, Respondent SCDOT Response Brief (R. p. 206) and Respondent City's Reply Brief (R. p. 213). Thereafter another hearing was held on this matter on April 30, 2015. (R. p. 314). The Court denied Appellant's motion and granted Respondent's Motion orally on April 30, 2015. (R. p. 349). The written Order, from which this appeal stems, was entered on November 12, 2015 ("Order"). (R. p. 1). The Court specifically limited its ruling to the legal issue of whether Appellant 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. (R. p. 1). Appellant filed a Rule 59(e), SCRCP Motion to Reconsider, Alter or Amend on November 13, 2015. (R. p. 221). Arguments on Appellant's Motion to Reconsider were held on August 5, 2016 (R. p. 353) and the court entered an order denying same on January 17, 2017. (R. p. 7). Again, the Court specifically limited its ruling to the constitutional issue. (R. p. 7). Appellant filed their Notice of Intent to Appeal. 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, 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.

ARGUMENTS

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

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

The instant 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. That is covered by the law and principles of the Eminent Domain statute. This case involves the alleged unintentional damage of public property as the result of a public works project. The cause of action in this matter is not the physical occupation or appropriation of property for another entity's use. 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 held liable in 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 Appellant's contention, this specific issue has not been formally addressed by many states. What has been addressed is whether a governmental entity can intentionally take the property of another governmental entity and use such property for the use of the condemning entity pursuant to eminent domain. In this case the property alleged to have been 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 Appellant is not applicable here.

The word "private" is unambiguous and the court did not err in giving 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 never designed or intended to protect the government. The term "private property" is clear and unambiguous. The Appellant has provided no caselaw wherein the term "private property" has been held to be ambiguous. Appellant 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 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, 2016 Mo. LEXIS 1 (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 Appellant did here, did not contest that it is a public entity, that the property allegedly 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 Appellant, 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 not 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 Appellant, 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 Appellant 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."

The issue of whether a governmental entity can bring an inverse condemnation action against another governmental entity for unintentional damage to public property as the result of a public works project has not been directly decided in this state. However the issue has been addressed by the Supreme Court. The issue is addressed by *Edgefield County v. Georgia – Carolina Power Co.*, 104 S.C. 311, 88 S.E. 801 (1916). Appellant is correct in that the case was ultimately not decided on constitutional grounds but statutory grounds, however 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." *Edgefield County v. Georgia –Carolina Power Co.*, 104 S.C. 311, 88 S.E. 801 (1916).

Appellant'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. Appellant's view would read "private" out of the Constitution altogether – an illogical interpretation.

This court should affirm the Order of the Honorable Larry B. Hyman, Jr. dated November 12, 2015.

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. The General Assembly has created the Department of Transportation and given it authority to construct, maintain, and protect State Highways. S.C. Code §§ 57-1-20 & 30 (Rev. 2006). It is, in essence, the sovereign itself. *Riley v. S.C. State*

Highway Dep't, 238 S.C. 19, 118 S.E.2d 809, 811 (1961). It is an alter ego of the State itself. *Id.* 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). 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). Additionally, Georgetown County repeatedly invokes the defenses and limitations of liability contained in the South

Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq., in defense of suits filed against it. The South Carolina Tort Claims Act is the exclusive remedy for claims and actions brought against governmental entities. S.C. Code Ann. §§ 15-38-65, 15-78-10, 15-78-40. The act does not create a new substantive cause of action against a governmental entity. *Moore v. Florence Sch. Dist. No. 1*, 314 S.C. 335, 444 S.E.2d 498 (1994). The Tort Claims Act is a limited waiver of governmental immunity. *Arthurs v. Aiken County,* 338 S.C. 253, 525 S.E.2d 542 (Ct. App. 1999). By invoking the protections of the SC Tort Claims Act Georgetown County is asserting that they are akin to the state and are entitled to the same protections, immunity and limitations of liability as the state. As such, Georgetown County has repeatedly acknowledged and asserted that they are an arm of the state.

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."

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 determined 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.* Appellant argues that *Edgefield* has no implications here as it was decided before South Carolina adopted Home Rule. In making that assertion Appellant ignores the facts of Edgefield 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.

Additionally, as relates to the Georgetown County Courthouse, the county is acting as the alter-ego of the State and may not maintain an action against itself. Article V of the South Carolina Constitution provides for the establishment of a uniform court system. S.C. Const. Art. V states, "[t]he judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Court of Appeals, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law." This includes municipal and magisterial courts. *State ex rel. McLeod v. Crowe, 272 S.C. 41, 249 S.E.2d 772 (*1978*); City of Pickens v. Schmitz*, 297 S.C. 253, 376 S.E.2d 271 (1989). "The judicial power vested in courts by this section includes the right to enforce and protect rights, prevent and redress wrongs, punish offenses against the public, and determine the rights, obligations, and liabilities of persons arising out of their relation to and dealings with each other." *Carolina Glass Co. v. State,* 87 S.C. 270, 69 S.E. 391 (1910). The courts uniformly apply the laws of this state. Housed within the

courthouse is the office of the clerk of court. The office of the Clerk of Court is created by the Constitution and her duties are defined by statute. "The Clerk of Court has charge of the courthouse and has the authority to exercise control over the assignment of rooms and possess all office keys." *McCormick County Council v. Butler,* 61 S.C. 92, 603 S.E.2d 586 (S.C. 2004); S.C. Code Ann. § 14-17-210 (1976); Administrative Order of Chief Justice Toal of June 23, 2004. The County Administrator has no authority over the Clerk who is an elected State official. S.C. Code Ann. § 4-9-650 specifically states that the county administrator does not have authority over elected officials whose offices are created by the Constitution. In functioning as a courthouse, which uniformly applies the laws of this state, the county is serving in a state capacity. As the properties of the County are public property, the County does not enjoy all of the "essential sticks in the bundle of rights commonly characterized as property." The right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach,* 345 S.C. 418, 548 S.E.2d 595 (2001). The County does not have the right of exclusive use, exclusive control or the right to exclude others. The County does not have the right to freely charge rent from Respondent DOT without consent from Respondent DOT and/or a reduction in the amount that Appellant receives from the State Aid to Subdivisions in an amount in excess of the amount charged.

> "A local government entity which demands payment of rent or lease payments from a state agency or institution, unless approved by that state agency, must have deducted from that local government's State Aid to Subdivisions allocation an amount equal to one hundred ten percent of the amount charged. The state agency must be reimbursed the actual amount paid and the balance must be credited to the general fund of the State from the portion of the allocation deduction."

S.C. Code Ann. § 10-1-55.

Appellant 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 for public property.

Therefore, the court did not err in determining that Appellant's property is public property. This court should affirm the Order of the Honorable Larry B. Hyman, Jr. dated dated November 12, 2015.

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 Appellant's contention that local governments are 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 Appellant do not stand for the proposition espoused by Appellant. 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 is applicable 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, Appellant and Respondents are arms of the same sovereign. The relationship between arms of the same sovereign are not the same as 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. This issue was addressed by the Missouri Supreme Court 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, 1986 U.S. App. LEXIS 25113 (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, 1984 U.S. App. LEXIS 16609 (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 Appellant's property is public property and this court should affirm the Order of the Honorable Larry B. Hyman, Jr. dated November 12, 2015.

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

As discussed above, a word used in the Constitution should be given its "plain and ordinary' meaning. *Richardson v. Town of Mt. Pleasant,* 350 S.C. 291, 566 S.E.2d 523 (2002). "When this Court is called upon to interpret our Constitution, we are guided by the 'ordinary and popular meaning of the words used...." *Id.* Contrary to Appellant's contention, the court must first find that there is an ambiguous meaning to the language before you turn to the rules of statutory construction. "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) (bolded emphasis added). In *Ray Bell Const. Co., Inc., v. School Dist. of Greenville County,* 331 S.C. 19, 501 S.E.2d 725 (1998) the Court first decided that there was an ambiguity before they moved to a further analysis of the matters involved in that case. Here, the word "private" is clear and unambiguous, the court need not look further for the meaning of the word and did not err in giving it its plain ordinary meaning.

> "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 a 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 would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect."

Ray Bell Const. Co., Inc., v. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998).

"The concept of inverse condemnation was originally conceived as a remedy for the physical taking of **private property** without following eminent domain procedures." *Kiriakides v. Sch. Dist.*, 382 S.C. 8, 675 S.E.2d 439 (2009) (emphasis added.) As such, accepting the plain and ordinary meaning of the word "private" carries the intention of the Legislature into effect nor does it defeat the plain legislative intention. "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).

Appellant 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 issue in this instant matter. When the Pennsylvania Court did address compensation pursuant to their constitution prohibition the Court found that such constitution 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

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

To adopt Appellant's contention adds language to the constitution not contained therein, goes beyond the role of the courts and would lead to an absurd result. 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. Appellant alleges that Respondent DOT "can spread this burden over the taxpayers of the entire State." *Appellant's Initial Brief*, p. 17. Appellant 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, Appellant disputes the argument of spreading the

cost across a larger tax base when this argument was made on behalf of the City. See *Appellant's Brief* p. 22.

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 explicitly made available 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.

As such, the court did not err in determining that Appellant's property is public property and this court should affirm the Order of the Honorable Larry B. Hyman, Jr. dated November 12, 2015.

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, 1996 Ala. LEXIS 494 (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 SC 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. Appellant has agreed in their memorandums that a claim for inverse condemnation is based on the constitutional prohibition and not a tort or statutory condemnation powers. (R. pp. 85, 86, 158-159)(Brief of App., pp. 5-7). 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.

The SC Eminent Procedures 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, 1980 Del. LEXIS 466 (Del. 1980) ("Property which is held in governmental capacity may be taken by the State for public use without payment of compensation therefore; 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, 1978 La. App. LEXIS 2918 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).

Appellant 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." Appellant is incorrect in this statement.[2] The cases which Appellant 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 therefore." *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, 1955 Pa. LEXIS 342 (Pa. 1955). Pennsylvania distinguishes between cases pursuant to their eminent domain statute and the constitutional prohibition against taking private property. Appellant 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 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*, 2017 Ala. Civ. App. LEXIS 72, 2017 WL 1291130 (Ala. Civ. App. Apr. 7,

[2] Appellant cites the wrong takings clause for Alabama. Appellant 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*, 2017 Ala. Civ. App. LEXIS 72, 2017 WL 1291130 (Ala. Civ. App. Apr. 7, 2017).

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.

For the foregoing reasons, the court did not err in failing to find that the laws of the South Carolina Eminent Domain Act do not apply to the instant case and this court should affirm the Order of the Honorable Larry B. Hyman, Jr. dated November 12, 2015.

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 Appellant's position in this matter. Appellant states that the "circuit court erred in ruling that public policy does not require SCDOT and City to pay just compensation to Georgetown County" (Appellant's Initial Brief p. 21). Appellant states that "[P]ublic policy is derived from the established law of the state, as found in its Constitution, statutes and judicial decisions[.]" (Appellant'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 determined 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.* Appellant 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 addition of language to the South Carolina Constitution that is not contained therein and this court should affirm the Order of the Honorable Larry B. Hyman, Jr. dated November 12, 2015.

CONCLUSION

For the reasons stated, this Court should affirm the Order of the Honorable Honorable Larry B. Hyman, Jr. dated November 12, 2015.

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November 17, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
NOV 28 2017
SC Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Court of Appeals Case No.: 2017-000234

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 certifies that the Final Brief was served on November 17, 2017, and the Final Brief complies with Rule 211(b).

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November 27, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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

RECEIVED
NOV 13 2017
SC Court of Appeals

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

Georgetown County, ... Appellant,

v.

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

Of whom

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

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ARGUMENT IN REPLY

I.

As between Georgetown County and the South Carolina Department of Transportation and the City of Georgetown, the Georgetown County Judicial Center, and the other damaged Georgetown County structures, are "private property" within the meaning of S.C. Const. art. I, § 13.

Respondents, South Carolina Department of Transportation ("SCDOT") and the City of Georgetown (the "City"), argue at page 6 of their brief, that the "Bill of Rights ... prevents the government from depriving the citizens of their basic rights." This "charter of negative powers," as Respondents refer to the Bill of Rights, includes the prohibition against depriving the citizens of Georgetown County (the "County") of property the County owns, for which they have and continue to pay, i.e., the County Judicial Center and the other County structures, damaged by the acts of SCDOT and the City.

As between Respondents and the County, the property damaged by SCDOT and the City is "private" and SCDOT and the City must compensate the County for the damages they caused to that property.

As pointed out in the County's opening brief, the South Carolina Supreme Court case, also cited by SCDOT and the City, Edgefield County v. Georgia-Carolina Power Co., 104 S.C. 311, 88 S.E. 801 (1916), is illustrative.

This case, decided before home rule, said, "... the county had no ... ownership of the highway and ferry as to render their serious impairment by the defendant a wrong to the plaintiff, and 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.

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

This relationship between state and local governments has passed into history. County governments are no longer in the hands of the General Assembly. See S.C. Const. art. VIII, § 1, *et. seq.*; S.C. Code Ann. § 4-9-10, *et. seq.*; and Hospitality Ass'n of South Carolina, Inc. v. Cty. of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113 (1995).

As explained in Hospitality Ass'n:

> For generations, legislative delegations of the General Assembly controlled virtually every aspect of local government. Relinquishment of this control effectively began in April of 1966.
>
> ...
>
> Acting upon a favorable vote of the people, the General Assembly, on March 7, 1973, ratified the Amendment. See Act No. 63, 1973 S.C.Acts 67.
>
> ...
>
> As ratified, new Article VIII directed the General Assembly to implement what was popularly referred to as "home rule" by establishing the structure, organization, powers, duties, functions, and responsibilities of local governments by general law. S.C. Const. art. VIII, §§ 7 and 9. **In addition, new Article VIII mandated a liberal rule of construction regarding any constitutional provisions or laws concerning local government.** S.C. Const. art. VIII, § 17.
>
> (Emphasis added).

The Edgefield County decision dealt with and explained the relationships between local and state government as they existed when the case was decided, one hundred and one years ago. That relationship has changed dramatically in the century that has passed between that decision and this case. The County owns the buildings damaged by the actions of SCDOT and the City,

that damage has resulted in a taking and the County is entitled to just compensation from SCDOT and the City.

Similarly, under the United States Constitution's Takings Clause, the federal government must compensate state or local governments for taking their property. Property not owned by the United States, is "private" as between the United States and state or political subdivisions.

> When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than to the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States. Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees.
>
> U.S. v. 50 Acres of Land, 469 U.S. 24, 31 (1984).

The County is a body politic and corporate and has the power to purchase and hold, for its use, lands and personalty within its limits. S.C. Code Ann. § 4-1-10 (2). Real property conveyed to the County is property of the County. See S.C. Code Ann. § 4-17-10. The County holds title to the property subject to this lawsuit. That property was damaged by the acts of SCDOT and the City which amounts to a taking of that property.

S.C. Const. art. VIII., §17, mandates liberal construction of constitutional provisions concerning local governments. Just like the Federal Takings Clause, as interpreted by the United States Supreme Court, as between the County and SCDOT and the City, the County's damaged property is "private" within the meaning of S.C. Const. art. I, § 13. The taking of that property by SCDOT and the City requires just compensation.

II.

Other states have concluded where the state or political subdivision takes property belonging to another political subdivision, just compensation must be paid.

Numerous other states have concluded where a state or political subdivision takes property belonging to another political subdivision, just compensation must be paid.

Respondents disagree with this statement, saying "this particular issue has not been addressed by many states," suggesting that "what has been addressed is whether a governmental entity can intentionally take the property of another governmental entity...." Respondents' brief at 5.

In its opening brief, the County cites cases from California, Montana, New Jersey, Washington, Pennsylvania, Oregon, Alabama and Mississippi, to support its position the County's property cannot be taken by SCDOT and the City without just compensation.

The cases the County cited from California, (Marin Mun. Water Dist. v. City of Mill Valley, 202 Cal. App. 3d 1161, 249 Cal. Rptr. 469 (1988)), Montana (City of Three Forks v. State Highway Comm'n, 156 Mont. 392, 480 P.2d 826 (1971)), and Washington state, (Highline Sch. Dist. No. 401, King Cty. v. Port of Seattle, 87 Wash. 2d 6, 548 P.2d 1085 (1976)),[1] involve inverse condemnation claims by one state political subdivision against either the state or another political subdivision and all conclude such an action can be maintained.

[1] SCDOT and the City argue because the County does not have the right of exclusive control over its judicial center, it "lacks one of the essential sticks in the bundle of rights ... commonly characterized as property." Respondents' brief at 12. This, of course, does not deprive the County of title to the damaged property or the ability to maintain an inverse condemnation action. "...[O]wnership of property entails more than the right of exclusive possession...." Highline Sch. Dist. No. 401, 87 Wash. 2d at 11, 548 P. 2d at 1088.

The cases cited from New Jersey (State ex. rel. State Highway Comm'r v. Cooper, 24 N.J. 261, 131 A.2d 756 (1957)), Pennsylvania (City of Chester v. Com., Dept. of Transp., 495 Pa. 382, 434 A.2d 695 (1981)), Oregon (Brusco Towboat Co. v. State By & Through Straub, 31 Or. App. 491, 570 P.2d 996 (1977)), Alabama (State ex. rel. Ala. State Docks Dept. v. Atkins, 439 So. 2d 128 (Ala. 1983)), and Mississippi (Donnaher v. State, 16 Miss. 649 (Miss. Er. & App. 1847)) involve statutory condemnation or eminent domain actions by either the state or a political subdivision against another political subdivision.

Regarding the latter category of cases, the fact that they involve litigation brought under a state procedural, condemnation statute is irrelevant. All stand for the proposition that one political subdivision cannot take the property of another, whether intentionally or by accident or misadventure, without paying just compensation for that taking.

III.

The South Carolina General Assembly has interpreted the South Carolina Constitution to require just compensation to public entities.

The Eminent Domain Procedure Act, S.C. Code Ann. 28-2-10, *et seq.*, ("EDPA") reflects the South Carolina General Assembly's view that public entities are entitled to just compensation when their property is taken. "It is the intention of the General Assembly that this act is designed to create a uniform procedure for all exercises of eminent domain power in this State." S.C. Code Ann. §28-2-20. In establishing a procedure for how takings would be performed, the legislature defined both condemner and condemnee. A condemnee is "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" is defined as "a natural individual, partnership, corporation, association, other legal or fiduciary entity, and ***a public entity***." S.C. Code Ann. §28-2-30 (16) (emphasis added). Under the plain language of the

EDPA, Georgetown County is a condemnee and would be entitled to just compensation where the SCDOT took the Judicial Complex under the procedure set out by the Legislature.

As is explicit in the EDPA, the legislature was strictly creating a procedure to standardize takings. "It is not intended by the creation of this act to alter the substantive law of condemnation." S.C. Code Ann. §28-2-20. Accordingly, by defining condemnee to include public entities, like the County, the General Assembly has codified their view that public entities are protected by S.C. Const. art. I § 13 and entitled to just compensation.

In the present case, the City and SCDOT did not disposses the County of its property under the procedure of the EDPA. Instead, they affected a taking by their affirmative acts in constructing a drainage pond and storm water collection system. The taking is nonetheless felt by the County. This Court should not permit the City and SCDOT to escape the requirement of paying just compensation under the South Carolina Constitution simply because the taking was unintentional and therefore not under the EDPA.

As the South Carolina Supreme Court said in Hosp.Ass'n.,

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

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

The General Assembly has demonstrated through the EDPA that S.C. Const. art. I § 13 applies to takings from public entities, and this Court should likewise construe S.C. Const. art. I, §13 to require the payment of just compensation.

CONCLUSION

For the reasons set forth above, and in the County's opening brief, the circuit court erred in concluding the County could not maintain its inverse condemnation claims against SCDOT and the City. The circuit court's order dismissing those claims must be reversed and the case remanded to the circuit court for trial.

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Columbia, South Carolina

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I hereby certify that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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November 13, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
COURT OF COMMON PLEAS

LARRY B. HYMAN, JR., CIRCUIT COURT JUDGE

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SC Court of Appeals

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

County of Georgetown, ... Appellant,

v.

Davis & Floyd, Inc., Republic Contracting Corp., 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

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AMICUS CURIAE BRIEF OF THE SOUTH CAROLINA ASSOCIATION OF COUNTIES

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INTERESTS OF *AMICUS CURIAE*

The South Carolina Association of Counties (Association) represents the interests of each of South Carolina's forty-six counties. The South Carolina General Assembly granted the counties the specific power to own and otherwise control real property. S.C. Code Ann. §4-9-30(2). The circuit court's finding that the South Carolina and United States Constitutions provide no protection from the State's unfettered ability to damage, destroy or seize county owned property works an absurdity that essentially nullifies the constitutional and statutory enactment of local government "home rule".

The Association supports Georgetown County's position that the county's real property is protected from inverse condemnation or taking by the Constitutions of the State and the United States.

Pursuant to Rule 213, SCACR, the Association respectfully submits this brief in support of Appellant Georgetown County, and asks that this Court to reverse the circuit court's dismissal of the County of Georgetown's claims.

STATEMENT OF ISSUES ON APPEAL

The Association respectfully adopts the Statement of Issues on Appeal as presented by the Appellant, Georgetown County in its Initial Brief of May 2017.

The fact that this Association did not comment on all issues before this Court should not be inferred to mean anything less than complete, across the board support for Georgetown County in this case. It reflects a conscious decision to concentrate on the most serious issues important to the membership of the Association, and those issues where the Association may provide this court with the unique insight of its members.

STATEMENT OF THE CASE

The Association respectfully adopts the Statement of the Case as presented by the Appellant, Georgetown County in its Initial Brief of May 2017.

ARGUMENT

The circuit court erred in ruling Georgetown County is not entitled to just compensation under the South Carolina Constitution, United States Constitution or the South Carolina Eminent Domain Procedures Act.

At first glance the issue in this case is whether in South Carolina, one governmental entity such as the County, may maintain an inverse condemnation claim against another governmental entity, such as SCDOT and the City. On this issue this is a case of first impression as no South Carolina appellate court has been forced to deal with it. Conversely, no appellate court has held that a governmental entity is barred from asserting an inverse condemnation claim against another governmental entity. Ultimately however, the deeper issue in this case is the determination of whether South Carolina will fully recognize county government's constitutionally granted right to "home rule," or whether the state and its various agencies may nullify entire constitutional provisions.

A. The South Carolina Constitution Protects County Owned Property Against Taking of Private Property Without Just Compensation.

Article I, § 13 of the South Carolina Constitution 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...

Additionally, Article VIII, § 7 provides the following related to the powers and authority of counties:

> The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided. Alternate forms of government, not to exceed five, shall be established. No laws for a specific county shall be enacted and no county shall be exempted from the

> general laws or laws applicable to the selected alternative form of government.

Prior to the successful 1972 amendment to the state constitution, the operation of local government was in the hands of the General Assembly. That is not the case today. County government is no longer in the hands of the General Assembly. *Hospitality Ass'n of S.C., Inc. v. County of Charleston*, 320 S.C. 219, 224, 464 S.E.2d 113 (1995). The court in *Hospitality Ass'n* took some lengths to outline the legislative history involved with the creation of local government "home rule":

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

In the summer of 1969 the West Committee unanimously recommended amending the state constitution to place the management of county government in the hands of locally elected officials. The General Assembly, after three years of debate, placed a referendum question amending Article VIII of the Constitution on the ballot for the 1972 general election. See Act No. 1631, 1972 S.C. Acts 3184. Following the successful referendum vote, the General Assembly ratified the amendment. See Act No. 63, 1973 S.C. Acts 67.

The newly ratified 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. Importantly for the state's local governments, the new Article VIII mandated a liberal rule

of construction regarding any constitutional provisions or laws concerning local government. S.C. Const. art. VIII, § 17.

Although the General Assembly was required to implement home rule, the new Article VIII essentially left it up to the General Assembly to decide what powers local governments should have. Acting under this authority, the General Assembly enacted various statutes regarding the powers of counties. *Hospitality Ass'n* at 224-226, 464 S.E.2d at 117-18. As a consequence of South Carolina's movement to local government "home rule" the General Assembly enacted Chapter 9 of Title 4 of the S.C. Code. This chapter outlined the powers and authority granted to counties pursuant to the newly amended Art. VIII. 1975 Act No. 283, 1975 Acts 695. Among the express powers granted to counties in the "home rule" Act was the specific power "to acquire real property by purchase or gift; to lease, sell or otherwise dispose of real and personal property; and to acquire tangible personal property and supplies." See S.C. Code Ann. § 4-9-30(2). The property language in the "home rule" Act does not limit the bundle of rights counties possess as owners.

SCDOT and the City have failed to point to any constitutional or statutory provision that expressly denies counties the right to protection from the taking of county property. In their briefs to the circuit court, SCDOT and the City relied upon a more than 100 year old case, *Edgefield County v. Georgia-Carolina Power Co.*, 104 S.C. 311, 88 S.E. 801 (1916), to support their propositions that "public property" does not fall within the protection of the Constitution. Their respective reliance on that case was in error. *Edgefield County* involved a suit for damages brought by Edgefield County against a utility company that had been legislatively granted the power of condemnation. The court in that case stated,:

> That which the *state* has set apart for one public purpose *the state* may dedicate to another and higher public purpose... So that in the

> instant case it would have been obviously within the power of the Legislature to have expressly subjected the highway in Edgefield to be overflowed by the waters of Stevens creek and Savannah River, and Edgefield could not complain about it. But such intent will not be lightly inferred; the intent to do so must be a necessary implication of the words of the grant and the purpose of the grant.

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

As the court noted, "under the Constitution and laws of the state, the state had absolute control over the government of counties. Id. At the time *Edgefield County* was decided, public property belonged to the State. Counties at that time did not have the constitutional or statutory power to own their own property. This is no longer the case today. Unlike 1916 when *Edgefield County* was decided, the General Assembly, under the direction of Article VIII of the Constitution, has today granted the counties the express right to own property separate and apart from the State. The State does not exercise control over county properties. Further, the General Assembly has not expressly subjected the Georgetown County Judicial Center to "another or higher purpose." The taking of the property was through ordinary negligence in the performance of an infrastructure project carried out by SCDOT and the City.

Edgefield County was decided in a by-gone era when the State controlled the operation of counties. Further, it should also be noted that *Edgefield County* was not decided on Constitutional grounds. Any indication in the opinion that a county's property are not protected by the Constitution should be considered non-binding dicta. Finally, due to the amended Article VIII of the Constitution and the statutory implementation of "home rule" 60 years after *Edgefield County* was decided, that opinion is of no significance to the present case.

The Association's position on the issue of property rights for local government is not unique. A number of other states have concluded that where the state or a political subdivision

takes property belonging to another political subdivision, just compensation must be paid. A brief overview of the major decisions from other states is provided below:

- **Alabama**: *State ex. rel. Ala. State Docks Dept. v. Atkins*, 439 So.2d 128 (Ala. 1983) The court in this case held that Mobile County was entitled to compensation for the taking of its roadway by the State of Alabama.
- **California**: *Marin Mun. Water Dist. v. City of Mill Valley*, 202 Cal. App. 3d 1161, 249 Cal. Rptr. 469 (1988) In this case the California Court of Appeals held that a public water district's property was protected by the California state constitution.
- **Montana**: *City of Three Forks v. State Highway Comm'n*, 156 Mont. 392, 480 P.2d 826 (1971) The court here held the subject property was owned by the city, not the State of Montana, and that compensation must be paid for property of the City taken by the State.
- **New Jersey**: *State ex. rel. State Highway Comm'r v. Cooper*, 24 N.J. 261, 131 A.2d 756 (1957) The court impliedly overruled New Jersey precedent on the governmental-proprietary distinction and stating if the breadth of previous case doctrine were followed it would lead to the startling result that "the State [could] appropriate, for wholly unrelated public purposes and without just compensation, various municipal properties such as town halls and schoolhouses..."
- **Oregon**: *Brusco Towboat Co. v. State By & Through Straub*, 31 Or.App. 491, 493, 570 P.2d 996, 998 (1977) (en banc) In this case the court held that two government entities are nevertheless distinct from the state and accordingly, they are protected against taking by the state without payment of just compensation.
- **Pennsylvania**: *City of Chester v. Com., Dept. of Transp.*, 495 Pa. 382, 434 A.2d 695 (1981) The court in this case held that the Pennsylvania Constitution did not allow the

Commonwealth to escape its financial obligation owed to a local government condemnee for property taken.

- **Washington**: *Highline Sch. Dist. No. 401, King Cty. v. Port of Seattle*, 87 Wash. 2d 6, 548 P.2d 1085 (1976) (en banc) In this case the court reversed a grant of summary judgment on inverse condemnation against a condemnee school district and stated that where a condemnee governmental unit must furnish services which require use of the property taken, just compensation must be paid.

The California case is most similar to the facts of the instant case. In *Marin*, just as here with Georgetown County, the City of Mill Valley caused unintentional physical damage to the Marin Municipal Water District's property. The California court stated:

> If damage to private property results, it is proper to require the entity that took this risk to bear the loss when damage occurs. We see no reason why these principles should not apply to compensate for damage to property owned by another public entity. 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.

Marin at 1165, 249 Cal. Rptr at 471.

The court went on to discuss 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.

B. 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's courts have traditionally embraced federal takings jurisprudence as

providing the basis under which they analyze whether an interference with a property interest amounts to a constitutional taking. See *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)). Additionally, the Takings Clause of the United States Constitution applies to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; Byrd, 365 S.C. at 656 n. 6, 620 S.E.2d at 79 n. 6.

The United States Supreme Court has previously stated: When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than to the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States. Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees. *U.S. v. 50 Acres of Land*, 469 U.S. 24, 31 (1984).

Under the Federal Takings Clause, the Federal government must compensate a state or local government for the taking of that entity's property. The established rule is that property not owned by the sovereign, the United States, is "private" as between the United States and any other entity, including a state or its political subdivisions.

With the constitutional and statutory enactment of home rule, the same rationale applies between the SCDOT, the City and the County. Property that is not actually owned by SCDOT or the City, is "private" as it pertains to them, and if damaged by one or the other or both, the owner, whether a public entity or private person, is entitled to just compensation. As South Carolina has consistently applied Federal Takings Clause jurisprudence, interpreting the South

Carolina Constitution in a similar way to the Federal Constitution requires SCDOT and City compensate the County for the taking of its properties.

C. The Circuit Court Erred in Ruling that the County is not Entitled to Just Compensation under the South Carolina Eminent Domain Procedures Act.

In addition to the South Carolina Constitution's protection of a county's property from being taken for a public purpose without just compensation, the County is also entitled to just compensation under the South Carolina Eminent Domain Procedure Act. S.C. Code Ann. § 28-2-10 et. seq. 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. § 28-2-20.

Under the Act, a condemnor may not take possession of the property to be condemned until receipt of written consent of the landowner or payment of just compensation. See S.C. Code Ann. § 28-2-90. The Act defines condemnee as a "person or other entity who has a record interest in or holds actual possession of property that is the subject of a condemnation action." S.C. Code Ann. § 28-2-30 (6). "Person" includes not only a natural individual, but also a public entity. S.C. Code Ann. § 28-2-30 (16). It is undisputed that when a county purchases, or otherwise obtains real property, they have a record interest and hold possession of the property. The County is therefore an express condemnee under the Act.

Inverse condemnation is based on the constitutional prohibition of taking property without compensation. *Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 498, 544 S.E.2d 637, 640 (Ct. App. 2001). It is a cause of action to recover the value of property that has been effectively taken by a governmental entity, although not through the process of eminent domain. *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011).

"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 elements of an inverse condemnation action based on physical appropriation of property, such as this case, are: (1) affirmative conduct of a governmental entity, (2) which effects a taking, and (3) the taking is for a public use. *Carolina Chloride, Inc. v. S.C. Dept. of Transp.*, 391 S.C. 429, 435, 706 S.E.2d 501 (2011).

The South Carolina Supreme Court has held that property acquired and devoted to a public use may be condemned by the SCDOT. *Riley v. S.C. State Hwy. Dept.*, 238 S.C. 19, 26, 118 S.E.2d 809, 812 (1961) (implying that compensation must be paid to an orphanage where the SCDOT was allowed to condemn). the Act not only defines the County as a condemnee, it also treats all condemnees the same in determining the amount of compensation to which the condemnee is entitled. See generally S.C. Code Ann. § 28-2-10 *et. seq.*

In a New Mexico case cited by the SCDOT, *State et rel. State Highway Comm'n v. Board of Comm'rs of Dona Ana Cty.*, 72 N.M. 86, 380 P.2d 830 (1963), that court applied a governmental-proprietary distinction that does not apply in South Carolina. Applying that distinction led the court to find that a county's buildings were not protected. It should be noted however, that the court determined that the provisions in the New Mexico 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.* at 835.

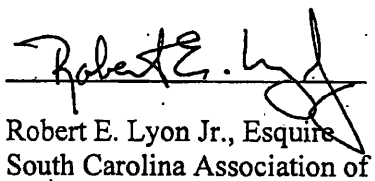
Based on the language and purpose of the eminent domain statute, the Association concludes that the General Assembly clearly intended that one governmental entity not be able to circumvent the Act and thereby avoid payment of just compensation when the property is owned by another governmental entity. 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.

CONCLUSION

As stated by our Supreme Court, "[t]he purpose of the Takings Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Sea Cabins at the Ocean IV v. City of Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595, 601 (2001). In order to give meaning to our Takings Clause's purpose, SCDOT and the City should bear the burden of the damages to the County's buildings.

S.C. Const. art. I, § 13 must be construed to avoid the absurdity and injustice which would result if Georgetown County is forced to bear the burden of the damage caused by SCDOT and the City to its buildings. The circuit court erred in concluding the County could not maintain its inverse condemnation claims against SCDOT and the City. Accordingly, the circuit court's order dismissing those claims must be reversed and remanded to the circuit court for trial.

Respectfully Submitted,



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November 20, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Georgetown County, Appellant,

v.

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

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

Appellate Case No. 2017-000234

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5627
Heard December 5, 2018 – Filed February 13, 2019

AFFIRMED

Louis H. Lang and George Albert Taylor, both of Callison Tighe & Robinson, LLC, of Columbia, for Appellant.

David Leon Morrison, of Morrison Law Firm, LLC, of Columbia, for Respondent City of Georgetown, and Lisa A. Reynolds, of Anderson Reynolds & Stephens, LLC, of Charleston, for Respondent South Carolina Department of Transportation.

Robert E. Lyon, Jr. and John K. DeLoache, both of the South Carolina Association of Counties, of Columbia, for the Amicus Curiae South Carolina Association of Counties.

HILL, J.: This appeal requires us to determine whether a county may sue another political subdivision and the South Carolina Department of Transportation (SCDOT) for inverse condemnation. Because we hold the property Georgetown County (the County) alleges was inversely condemned is not "private property" within the meaning of the Takings Clause of S.C. Const. art I, § 13, and further hold the County may not sue SCDOT, a state agency, on such a claim, we affirm dismissal of the County's claim.

I.

The County alleges the City of Georgetown (the City) and SCDOT, while engaged in a joint water drainage project, altered the water table, causing sinkholes to form and damaging public buildings and real property owned by the County. The County brought numerous causes of action against the City, SCDOT, and their private contractors, including one for inverse condemnation against the City and SCDOT. The City and SCDOT moved to dismiss the County's inverse condemnation claim pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure (SCRCP). The circuit court granted the motion to dismiss, which the County now appeals.

II.

In deciding a Rule 12(b)(6) motion, the trial court looks only at the complaint and, taking the facts alleged as true and construing all reasonable inferences and doubts in plaintiff's favor, asks whether the complaint would entitle the plaintiff to relief under any theory. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (2007). We use the same standard to review the dismissal order on appeal. *Id.*

A. Inverse Condemnation and the South Carolina Takings Clause

An inverse condemnation claim derives from the Takings Clause of our state constitution, which provides: "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."

S.C. Const. art. I, § 13(A). The County urges us to interpret "private property" as used in the Takings Clause to mean any property not owned by the condemnor, here the State. The County suggests this interpretation furthers the intent motivating the Takings Clause, i.e. to justly compensate a property owner for the taking. According to the County, it is damaged by the State's condemning of their property no less than a private citizen would be and is no less entitled to the just compensation our constitution guarantees.

We disagree with the County's interpretation that the private property referred to in the Takings Clause means any property not owned by the condemnor. The Takings Clause does not define what it means by private property, so we must turn to the "ordinary and popular meaning" of the term. *See Richardson v. Town of Mount Pleasant*, 350 S.C. 291, 294, 566 S.E.2d 523, 525 (2002); *Private*, The American Heritage Dictionary of the English Language (1978) ("4. Belonging to a particular person or persons, as opposed to the public or the government: *private property*."); *Private*, Webster's Ninth New Collegiate Dictionary (9th ed. 1988) ("[I]ntended for or restricted to the use of a particular person, group or class . . . belonging to or concerning an individual person, company, or interest."). Public is an antonym of private. We therefore hold the term private property as used in the Takings Clause of the South Carolina Constitution applies only to property owned by a private citizen, private corporation, or non-public entity. It does not encompass property owned by the State, its agencies, political subdivisions (including counties and municipal corporations), or other public entities. *See Roschen v. Ward*, 279 U.S. 337, 339 (1929) ("[T]here is no canon against using common sense in construing laws as saying what they obviously mean.") (Holmes, J.); *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824) ("[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.").

Our holding was foreshadowed over a century ago in *Edgefield County v. Georgia-Carolina Power Co.*, 104 S.C. 311, 88 S.E 801 (1916). At issue in that case was whether Edgefield County could sue a power company for flooding county roads. An Act of the General Assembly had authorized the power company to build a dam across the Savannah River, and the authority included a general power of condemnation. *Id.* at 322-27, 88 S.E. at 804–06. The circuit court denied the power company's demurrer to the county's complaint. Affirming the circuit court, the supreme court remarked the State could have flooded or even closed the county's road "and Edgefield could not complain about it." *Id.* at 328, 88 S.E. at 806–07. Likewise, the State, by the Act, could have "expressly" granted the power company the right to flood the roads. *Id.* The court observed: "[I]f the

company should thereby flood the private property of the citizen, then under 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.* at 328–29, 88 S.E. at 807 (emphasis added) (citations omitted). The court went on to hold that because the Act did not expressly delegate to the power company the right to flood the particular county road at issue, the county could sue the power company for damages. *Id.* at 330, 88 S.E. 807

SCDOT and the City claim *Edgefield County* shores up their position. The County—unsurprisingly—deems the "public property" remark dictum. Whether the statement in *Edgefield County* rises (or sinks) to the level of dictum is not important to our task today. What is important is our supreme court has once before explained the scope of the State's eminent domain power and its interplay with the Takings Clause in the context of an alleged condemnation of public property. *Yaeger v. Murphy*, 291 S.C. 485, 490 n.2, 354 S.E.2d 393, 396 n.2 (Ct. App. 1987) ("[T]hose who disregard dictum, either in law or in life, do so at their peril.").

Several other states have held "private property" as used in the state takings clauses of their state constitutions does not include property owned by political subdivisions of a state. *See Bd. of Water Works Trs. of City of Des Moines v. SAC Cty. Bd. of Supervisors*, 890 N.W.2d 50, 71 (Iowa 2017); *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 916–17, 923 (Mo. 2016) (en banc) (finding sewer district failed to state a claim for inverse condemnation and rejecting its argument that "this [c]ourt should interpret the words 'private property' as used in article I, section 26 [of the Missouri Constitution] to include 'public property' that is damaged by other unrelated public entities").

B. Federal Takings Law

The County is right that we have relied on federal common law in interpreting South Carolina's Takings Clause. *Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007). The United States Supreme Court has held the federal Takings Clause applies when the federal government takes public land owned by a state or its political subdivisions. *See United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) ("[I]t 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.").

But we have never looked to federal law for the meaning of private property as used in Article I, § 13. The decision in *50 Acres of Land* is no solace to the County because the Supreme Court has recognized the obligation of just compensation does not arise when a sovereign state transfers public property from one governmental use to another. *United States v. Carmack*, 329 U.S. 230, 242 n.12 (1946); *see also Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 645 n.2 (Tex. 2004) (citations omitted) ("The City cites several cases from other states that it contends support a municipality's constitutional right to compensation from the state. Those cases, however, are either distinguishable in that they involved statutorily created eminent-domain rights, or inapposite in their reliance on federal authority. The relationship between a city and state, which are not separate sovereigns, is not analogous to that between the federal government and a state.").

C. The Takings Clause and Home Rule

There is another basis for upholding dismissal of the County's inverse condemnation claim against SCDOT. As a state-created agency, SCDOT is an arm of the state. *Riley v. S.C. State Highway Dep't*, 238 S.C. 19, 24, 118 S.E.2d 809, 810 (1961). Like SCDOT, the County is a creature of the state. Political subdivisions of the state have no ancestor other than the state and its citizens, nor do they possess a separate sovereignty. *See Hibernian Soc'y v. Thomas*, 282 S.C. 465, 472–73, 319 S.E.2d 339, 343–44 (Ct. App. 1984); *see also City of Trenton v. State of New Jersey*, 262 U.S. 182, 185–87 (1923). Accordingly, we hold the County may not bring an inverse condemnation claim against its "creator," the state. *Richland Cty. Recreation Dist. v. City of Columbia*, 290 S.C. 93, 95, 348 S.E.2d 363, 364 (1986); *City of Reno v. Washoe County*, 580 P.2d 460, 463 (Nev. 1978) ("[T]he City, as a political subdivision of the State, may not raise the issues of taking of property without due process of law or just compensation and the impairment of its contracts, as against the State, its creator.").

The County contends that, as far as the Takings Clause is concerned, its symbiotic relationship with the State was severed by the enactment of Home Rule. The County notes Home Rule granted it the right to own property in its own name, S.C. Code Ann. § 4-1-10(2) (1986), and the Home Rule Amendments to our constitution require constitutional provisions such as the Takings Clause to be "liberally construed" in favor of local government, S.C. Const. art. VIII, § 17.

The County's argument disfigures the Home Rule concept. Nothing in the Home Rule Amendments changed the reality that counties were created by the State, nor did Home Rule endow counties with a separate sovereignty for purposes of the

Takings Clause. *Knight v. Salisbury*, 262 S.C. 565, 570, 206 S.E.2d 875, 876–77 (1974) ("State Constitutions are not grants of power to the General Assembly but are restrictions upon what would otherwise be plenary power."); *see* Underwood, *The Constitution of South Carolina, Volume II: The Journey Toward Local Self-Government* 177 (analyzing framers' debates concerning Home Rule Amendments and noting Article VIII, section 17 did not "reverse the traditional view that local governments in this country do not possess inherent power. Subdivisions still have only such power as the state grants either in the constitution or statutes . . .").

III.

The County next claims it is entitled to compensation under the Eminent Domain Procedure Act (the Act), S.C. Code Ann. §§ 28-2-10 to -510 (2007 & Supp. 2018). The County contends it is covered by the Act because the definitional sections of the Act include a public entity as a "person" and, consequently, a condemnee. *See* S.C. Code Ann. § 28-2-30(6), (16) (2007). The County further asserts that because the General Assembly intended that all exercises of eminent domain occur through the Act, the Act entitles the County to just compensation. S.C. Code Ann. §§ 28-2-20, -90 (2007).

We again disagree. First, the definitional sections of the Act cannot supplant the plain meaning of private property as used in Article I, § 13.

Second, the exclusivity the Act refers to "contemplates that the exclusiveness shall only apply to those cases or situations which are embraced within the machinery of the condemnation statutes." *Godwin v. Carrigan*, 227 S.C. 216, 225, 87 S.E.2d 471, 475 (1955). At least as to the fundamental issue of whether a taking of private property has occurred, the architecture and remedies of the Act cannot be superimposed on an inverse condemnation claim, which springs from the Constitution. *See Vick v. S.C. Dep't of Transp.*, 347 S.C. 470, 479–81, 556 S.E.2d 693, 698–99 (2001) (rejecting SCDOT's argument that statutory interest rate set forth in Act controlled in inverse condemnation action); *cf. Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005) ("In light of the historical treatment of an inverse condemnation action as equivalent to an eminent domain case, we conclude [the] statutory right to a jury trial on the issue of compensation applies as well in inverse condemnation actions."). The General Assembly was careful to note the Act was not designed to "alter the substantive law of condemnation," which includes the doctrine of inverse condemnation. S.C. Code Ann. § 28-2-20 (2007). It is called inverse condemnation because the normal taking procedure has been inverted: the government has taken private property

without initiating the formal condemnation process of the Act. *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004); *S.C. State Highway Dep't v. Moody*, 267 S.C. 130, 136, 226 S.E.2d 423, 425 (1976). Therefore, the 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.

IV.

As its final argument, the County insists public policy compels us to find the Takings Clause reaches the inverse condemnation of public property because of the fiscal burdens such takings inflict. The County notes courts have relied upon the policy of burden-sharing in explaining the reason for awarding just compensation for the exercise of eminent domain. *Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 345 S.C. 418, 429, 548 S.E.2d 595, 601 (2001) ("The 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.'" (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))). The United States Supreme Court found this policy strong enough to override the plain meaning of private property in the Fifth Amendment. *50 Acres of Land*, 469 U.S. at 31 ("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 the loss in a taking of private property."). Commentators have debated the practical sense of requiring just compensation for intergovernmental takings. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. Pa. L. Rev. 829 (1989); Payne, *Intergovernmental Condemnation As A Problem in Public Finance*, 61 Tex. L. Rev. 949 (1983); Note, *The Sovereign's Duty to Compensate for the Appropriation of Public Property*, 67 Colum. L. Rev. 1083, 1110 (1967).

We conclude the controlling public policy here was ratified by the people and enshrined in South Carolina's Takings Clause, whose reference to private property we have held does not include public property. We cannot stretch the meaning to match a party's public policy preference, even if we agreed with it, for our limited role is to say what the law is, not what it should be. *Gaud v. Walker*, 214 S.C. 451, 481, 53 S.E.2d 316, 329 (1949) ("Our duty is to declare the law, not to make it.").

The order of the circuit court dismissing the County's inverse condemnation claim is

AFFIRMED.

KONDUROS and MCDONALD, JJ., concur.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

RECEIVED
FEB 28 2019
SC Court of Appeals

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

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

Georgetown County, ... Appellant,

v.

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

Of whom

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

GEORGETOWN COUNTY'S PETITION FOR REHEARING

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

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

I. INTRODUCTION

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

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

II. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

As explained in Hospitality Ass'n:

> For generations, legislative delegations of the General Assembly controlled virtually every aspect of local government. Relinquishment of this control effectively began in April of 1966, when the General Assembly created a Committee to study the South Carolina Constitution and appointed then Senator John C. West as chairman. The major task assigned to the West Committee was to develop and recommend amendments to the Constitution that would eliminate archaic provisions and "strengthen it in such other areas, so that it [would] provide a workable framework with proper safeguards for sound State, County and local governments."
>
> In June of 1969, after three years of numerous hearings and conferences, the West Committee submitted its Final Report to the Governor and General Assembly. In the Report, the Committee unanimously recommended amendments to the Constitution that would place the control and management of county and municipal affairs in the hands of duly elected local officials.
>
> Following three years of legislative debate on the Report, the General Assembly placed upon the November 1972 general election ballot for referendum vote an Amendment of Article VIII of the Constitution. See Act No. 1631, 1972 S.C.Acts 3184. Acting upon a favorable vote of the people, the General Assembly, on March 7, 1973, ratified the Amendment. See Act No. 63, 1973 S.C.Acts 67.

> As ratified, new Article VIII directed the General Assembly to implement what was popularly referred to as "home rule" by establishing the structure, organization, powers, duties, functions, and responsibilities of local governments by general law. S.C. Const. art. VIII, §§ 7 and 9. **In addition, new Article VIII mandated a liberal rule of construction regarding any constitutional provisions or laws concerning local government.** S.C. Const. art. VIII, § 17.
>
> Although the General Assembly was required to implement home rule, new Article VIII essentially left it up to the General Assembly to decide what powers local governments should have. Acting under this authority, the General Assembly enacted various statutes regarding the powers of counties and municipalities.

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

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

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

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

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

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

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

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

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

The United States Supreme Court has stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court rejected this argument.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

Respectfully submitted,

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February 28, 2019
Columbia, South Carolina

The South Carolina Court of Appeals

Georgetown County, Appellant,

v.

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

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

Appellate Case No. 2017-000234

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

FILED
March 29, 2019

cc: Louis H. Lang, Esquire
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David Leon Morrison, Esquire
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The Honorable Larry B. Hyman, Jr.