STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Eleventh Circuit

Markley R. Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-10495

Project: Intermodal Container Facility

Tract: 11

South Carolina Department of Commerce,
Division of Public Railways,

Respondent,

v.

Clemson University,

Respondent,

and

Charleston County School District,

Appellant.

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF PUBLIC RAILWAYS

Keith M. Babcock, SC Bar # 456
Ariail E. King, SC Bar # 8952
LEWIS BABCOCK L.L.P.
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Karen Blair Manning, SC Bar # 66216
South Carolina Department of Commerce
Division of Public Railways
1201 Main Street, Suite 1600
Columbia, South Carolina 29201
(803)737-1603

Derek F. Dean, SC Bar #65279
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, South Carolina 29412
(843) 762-9132

Stephen A. Spitz, SC Bar #5287
Stevens & Lee
151 Meeting Street, Suite 350
Charleston, South Carolina 29401
(843)414-5085

ATTORNEYS FOR RESPONDENT SOUTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF PUBLIC RAILWAYS

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COUNTER-STATEMENT OF THE CASE

This matter is a condemnation action in which South Carolina Department of Commerce, Division of Public Railways ("Railways") condemned an approximately 70 acre tract of property owned by Clemson University ("Clemson" or "Landowner"). The condemnation notice was filed by Railways on December 22, 2010. (R.p. 63). The Charleston County School District ("District" or "Appellant"), was one of several Other Condemnees. Id. The District's interest pertains to a 3.74 acre portion of Clemson's property where the District previously operated its Academic Magnet High School ("School").

Because certain issues needed to be decided for both the condemnation case and a related case *(Charleston County School District v. Clemson University*, C/A 12-CP-10-5093), the parties agreed to transfer these issues to a Limited Special Referee, John A. Massalon, Esquire, to determine those issues. (R.p. 3). The Limited Special Referee has now ruled on the issues before him and the instant case is proceeding forward. (R.pp. 23; 31).

Railways has resolved the condemnation case with regard to the Landowner Clemson. (R.p. 210). This resolution did not include a monetary payment to Clemson. Id. Because the condemnation issues with Clemson (the Landowner) were resolved, leaving only equitable issues in the case, Railways moved to transfer the matter to the non-jury roster. (R.p. 92). After a hearing on the motion, the Honorable R. Markley Dennis, Jr. issued an order granting the motion and transferring the matter to the non-jury roster. (R.p. 54). The District moved to alter or amend. (R.p. 129). After a hearing on that motion, the lower court denied the motion and this appeal by the District followed. (R.p. 61).

COUNTER-STATEMENT OF THE FACTS[1]

On September 10, 1996, the United States Government leased certain property ("Primary Lease") on the Charleston Naval Complex to the Charleston Naval Complex Redevelopment Authority ("RDA"). (R.p. 262). On September 10, 1996, the RDA entered into a Sublease Agreement with the District. (R.p. 251). The Sublease attached the Primary Lease and incorporated the Primary Lease by reference. Id. The Sublease attached a map with a cross-hatched marking, which showed the Property to be subleased as the building identified as Building 199 (known as Cochrane Hall) and the adjacent parking area ("Property"). (R.p. 262). This area on the map was subsequently determined to be 3.74 acres, and this Property is at issue in this case.

Paragraph 6 of the Sublease provided for the term of the Sublease. (R.p. 252). This paragraph of the Sublease was replaced in its entirety by the First Amendment to the Sublease entered into by the RDA and the District on February 26, 1998 (the "Amendment") and provided for an initial five (5) year term with the right to extend in five year-increments upon written notice, up to a maximum of fifty (50) years. (R.p. 327). The District failed to provide proper written notice for an extension, and the Sublease expired on September 3, 2001. (R.p. 25-26) The issue of the expiration of the lease and whether the District had renewed (and whether that renewal was for a term of 50 years, as the District claimed) were some of the issues referred to and resolved by the Limited Special Referee (R.pp. 22-37). The Limited Special Referee determined that after September 3, 2001, the District continued as a tenant at will in the Property. (R.p. 25)

In 2002, the District Board decided to move the School to a new building at the

[1] These facts derive from the orders of the Special Limited Referee and the undisputed facts in the record before him.

former Bonds Wilson High School site ("Bonds Wilson site") along with the School of the Arts and began the master plan for that move. Id. The Board specifically chose to construct the new joint school campus at the Bonds Wilson site over the Charleston Naval Complex, at least in part due to environmental concerns at the Naval Complex. The Board initially intended to construct both schools between 2005 and 2009.

In 2003, the District stopped paying rent due to the amount of improvements that the District had made to the Property pursuant to its agreement with the RDA. Paragraph 5 of the Sublease provided that the District's expenses for building improvements, alterations, and additions would be credited against rental payments in the event ownership had not been conveyed to the District by the end of the initial five (5) year term. (R.p. 252). In 2003, the RDA provided the District with a refund of approximately Thirty-thousand Dollars ($30,000.00) and notified the District that it would no longer be required to pay rent.

By quitclaim deed recorded August 19, 2004, the United States Government conveyed certain property to the RDA, including the Property used by the District. On December 21, 2004, the RDA conveyed the Property to the City of North Charleston. (R.p. 33). By deeds in 2007 and 2010, the City conveyed the entire parcel to Clemson. (R.pp. 28; 35). The 3.74 acre area used by the School was included in the second deed. (R.p. 37).

During this time frame, the District continued its plans to move the School away from the Naval Base property. In 2008, the District began construction on the new facility for the new School at the Bonds Wilson site, with the intention to open by 2010. The District moved the School to the new facility at the Bonds Wilson site in the spring of 2010. On December 22, 2010, the South Carolina Department of Commerce, Division of Public Railways filed its condemnation notice. (R.p. 63).

In the hearing before the Limited Special Referee, the District initially claimed that it had exercised the right to extend the lease and that the lease was extended for a 50 year term--an argument that was rejected by the Limited Special Referee. (R.pp. 25-26). Alternatively, the District claimed that after the RDA conveyed the Property to the City, the District had either equitable title to the 3.74 acre School campus and/or an equitable interest in the 3.74 acre School parcel because of improvements to the Property. (R.p. 27). The Limited Special Referee found that the District did not have equitable title to the Property at the time it was conveyed to the City by RDA. Id. The Limited Special Referee did find that the District "had an equitable interest in the 3.74 acre [School] parcel because of improvements made to that Property during the term of the Sublease and [the District's] use of the property thereafter."[2] (R.pp. 27-28). However, the Limited Special Referee did not determine whether that equitable interest had any monetary value, and if it did, how much it was worth. (R.p. 30). Ultimately, the lower court will need to make determinations as to the issues concerning the District's "equitable interest."

After the orders of the Limited Special Referee were issued, this case was assigned to Judge Dennis. In the Summer of 2016, Railways and the Clemson (the Landowner) settled the condemnation case. (R.p. 210). The settlement provides for an exchange of property, rather than monetary compensation. (Id.; p. 204: 11-15). Railways sought to have the issues with the District transferred to the non-jury roster because the only issues for the lower court to determine are: 1) whether the District's equitable interest is compensable; 2) what the interest is; 3) whether

[2] Railways does not concede that the District has an equitable interest in the property. In fact, Railways filed an appeal of the Special Referee's Orders, which was dismissed as interlocutory. However, Railways has preserved the right to appeal, if desired, the findings of those orders at the conclusion of this case.

the interest has value; and 4) if it has value, what that value is. All other issues involving the entire parcel of 70 acres have been resolved and do not require a trial, either jury or non-jury.

ARGUMENT

I. The lower court properly held that South Carolina law only gives the Landowner a right to a jury trial in a condemnation case, not an Other Condemnee.

Appellant has no constitutional right to a jury trial. Our Supreme Court has clearly held that such a right does not apply in a condemnation cases. *See*, Cobb v. S.C. Dep't of Transp., 365 S.C. 360, 364, 618 S.E.2d 299, 301 (2005)("We have specifically held there is no constitutional right to a jury trial in an eminent domain case because there was no such right when our constitution was adopted."). Thus, any right to a jury trial must derive from statute. Id.

In analyzing the South Carolina Eminent Domain Act, the lower court correctly held that the Act does not provide the District with the right to a jury trial. South Carolina Code Ann. § 28-2-310 governs the mode of trial for condemnation actions. It provides:

> If the condemnor and the landowner have demanded trial by the court without a jury, the clerk shall place the action on the nonjury trial roster. Otherwise, the action must be placed on the jury trial roster.

S.C. Code § 28-2-310.[3] There is no mention of "other condemnees" in that section, nor does any other section address the mode of trial afforded to "other condemnees." South Carolina case law also indicates that the right to a jury trial is the landowner's right to exercise or waive. Richland Cty. v. Lowman, 307 S.C. 422, 424, 415 S.E.2d 433, 434 (Ct. App. 1992) ("In a condemnation proceeding, a **landowner** has right to demand a trial by jury, however this right can be waived.")

[3] Absent statutory authority, a party is only entitled to a jury trial for matters of law, not equity. S.C. Const. Art. 1 § 14; Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997) ("Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions.")

(emphasis added);[4] Cobb v. S.C. Dep't of Transp., 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005) (South Carolina law "provides in an eminent domain action a **property owner or the condemnor** may elect a jury trial on the issue of compensation")(emphasis added). In other words, only the landowner or condemnor, and not the "Other Condemnees," are entitled to a trial by jury.

In fact, one text notes: "The statutory scheme of the Act contemplates that the landowner, and not other condemnees, is the interested party in most phases of the action." 18 S.C. *Juris. Eminent Domain* § 44. That text also notes that:

> the **landowner** alone is served with the condemnation notice and accepts or rejects the tender or challenges the right to condemn, is served with the condemnor's election to proceed with trial, and consents to abandonment of the action. If an appraisal panel is used, the **landowner** appoints a member of the appraisal panel, receives notice of its decision, and has the right to appeal to court. Similarly, the **landowner** receives the notice of trial, if any issues. The **other condemnees** receive notice only of filing the action and of any proceedings to disburse the proceeds.

Id. (emphasis added). Of course, it is only logical that the landowner, as the fee simple owner of the property, has the right to control the condemnation litigation. It would be impractical and unwieldy to allow multiple "other condemnees," with minimal interest in the land, to control the litigation or veto decisions of the landowner.

Here, the Landowner is Clemson University. Railways and Clemson have resolved the condemnation of Clemson's land, and there will be no trial, either jury or non-jury, as to Clemson's compensation. Appellant is an "Other Condemnee" and thus has no right to demand a jury trial under the Eminent Domain Act.

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[4] In fact, the definitions in the Act make it clear that a "landowner" only includes the person or entity with a fee simple interest: " 'Landowner' means one or more condemnees having a record fee simple interest in the property condemned or any part thereof, as distinguished from condemnees who possess a lien or other nonownership interest in the property...." S.C. Code § 28-2-30.

Appellant argues that Railways initially sought a jury trial and that, pursuant to Rule 39(a), SCRCP, a jury trial must take place because the parties have not filed a written stipulation consenting to a non-jury trial. Rule 39(a), SCRCP states:

> When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the calendar and the clerk's filebook as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) **the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.**

(emphasis added).

Appellant's argument ignores the fact that Rule 39 specifically allows a court "upon motion or its own initiative" to find that an issue should not be tried by a jury. That situation is exactly what happened here. After the ruling of the Limited Special Referee and settlement with the Landowner, Railways moved to have the only remaining issues -- which are equitable in nature-- transferred to the non-jury docket.[5] As one practice guides notes, among the ways to "lose" the right to a jury trial is by:

> court order, by motion or on the court's initiative, on the ground that [a] right to a jury trial on some or all of the issues does not exist (note that this is not truly the loss of a right, because no right ever existed).

Trial Handbook for South Carolina Lawyers § 2:33. In other words, the District is not "losing" its right to a jury trial because one never existed.

By clinging to its argument that Railways initially sought a jury trial, Appellant also fails to recognize that posture of this case changed significantly since its inception in 2010. While Railways and Clemson may have initially needed a jury trial, their settlement obviated that need. Moreover, the fact that the District filed a Notice of Appearance of counsel and demanded a jury

[5] Clemson did not oppose the motion to transfer.

trial is of no consequence, since the District -- as an "Other Condemnee"-- is not entitled to a jury trial under the Act.

II. The lower court properly found that the issues were similar to those present in a proceeding under S.C. Code § 28-2-460 and that a similar equitable proceeding was appropriate.

Appellant claims that the lower court improperly relied on S.C. Code § 28-2-460 in transferring this case to the non-jury docket and that the prerequisites of that statute have not met. Of course, the lower court did not find that S.C. Code § 28-2-460 should be utilized here,[6] only that the statute provided guidance as to how the value (if any) of equitable interest of an "Other Condemnee" should be determined. The Act provides for an equity proceeding to determine the rights of the Landowners or the Other Condemnees, stating:

> Unless the persons served with the Condemnation Notice agree in writing as to whom just compensation must be made and paid, the appraisal panel determination, verdict, or judgment must be made jointly to all the parties and may be paid to the clerk of court. Upon making the payment, the condemnor's obligation to pay interest upon the funds shall terminate. The payment of the funds so awarded must be held by the clerk of court pending the final order of the court of common pleas in an equity proceeding to which all persons served with the Condemnation Notice must be necessary parties. From the order of the court of common pleas there may be an appeal as provided for appeals from the court in equity cases.

S.C. Code § 28-2-460.

In this case, the just compensation to Clemson, as the Landowner, is not monetary. Thus, there is no "payment" to be made to the Court under Section 28-2-460. However, an "equity proceeding" similar to that provided by Section 28-2-460 must be conducted to determine issues concerning the District's equitable interest.

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[6] In fact, the lower court specifically noted "[i]n this case, there is no monetary payment to Landowner, so this precise procedure cannot be utilized." (R.p. 59.)

The District argues that the settlement agreement between Railways and Clemson is not a sufficient determination of value to support a proceeding similar to that of § 28-2-460. It appears that the District is seeking jury trial on the value of the entire 69.963 acres (see, App. Brief, p. 14). However, the District's equitable interest is limited to just 3.74 acres. This issue is not preserved for appeal, as the District specifically waived it at the December 14, 2016 hearing: "We are not demanding a trial of the entire 97 [sic] acres. We are perfectly happy with a jury trial as to the value of our equitable interests in the--" (R.p. 206:1-3). Having waived the request for a jury trial on the entire parcel in open court, the District cannot claim it is entitled to a jury trial on all 69.623 acres on appeal.

Even if the issue has been adequately preserved for appeal, the District ignores that fact that, while in a typical condemnation, the "undivided-fee rule" or "unit rule" (in which property is valued as a whole regardless of varying interests therein) would apply, there are exceptions when the case "before [the Court] is not the usual situation." Federal Oil Co. v. City of Culver City, 179 Cal.App.2d 93 (1960).[7] This case is certainly not the "usual situation" as the Landowner (Clemson) and the Condemnor (Railways) have settled the case between them and District's interest is only in a small portion of the property. Requiring a jury trial on the value of the entire 69.963 acres would be an exercise in futility (and a waste of judicial resources) as there is no dispute between the Landowner and Railways, **and** the Court would still have to hold a proceeding in equity, pursuant to S.C. Code §28-2-460, to determine the value, if any, of the

[7] In that case, the city owned land subject to an oil and gas lease held by Federal Oil. The lease accorded Federal Oil the right to use the surface of the land "to drill for, process and store thereon gas, oil and other hydrocarbons" produced from the land. When the city refused to vacate the surface, Federal Oil sued the city alleging inverse condemnation. The court found that, generally, the undivided-fee rule would apply, "[b]ut, the case which is before us is not the usual situation." The court noted that "the issue is solely as to the market value of Federal [Oil]'s rights in the surface of the subject land." Id. at 98.

District's equitable interest in the 3.74 acre parcel after such a jury trial.[8] Furthermore, this case presents a unique situation unlike those present in most condemnation cases -- the Condemnor and Landowner have settled; the settlement is a property exchange; and the Other Condemnee's interest (an equitable interest only) is in a small *portion* of the property.[9]

The District also argues that Railways (the Condemnor) and Clemson (the Landowner) cannot settle the condemnation action without the District's consent. The District has completely misconstrued the case law and the Act. It is entirely appropriate for Railways and the Landowner to resolve all issues between them related to the condemnation of the property. The South Carolina Eminent Domain Act specifically permits:

> At any time before or after commencement of an action, the parties may agree to and carry out, according to its terms, a compromise or settlement as to any matter, including all or any part of the compensation or other relief.

S.C. 28-2-40. In effect, the District is trying to challenge the right of two parties to settle their dispute.

In claiming that its consent is required, the District relies on S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 651, 667 S.E.2d 7, 11 (Ct. App. 2008). However, that case only stated, in its recitation of facts, that "Tenant, Landlord, and SCDOT agreed to a condemnation award of $100,000." Id. The M&T case did not discuss whether such agreement was required and the court made no other reference to the agreement. Appellant also claims that Railways "can cite *no* South Carolina authority permitting and the Owner to deprive the School District to its right to a jury trial by settling only between themselves...." (App. Brief,

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[8] The District does not even have standing to assert the value of the entire 69.963 acres of the property because it only has an equitable interest in 3.74 acres. Moreover, it would be confusing and unwieldly for a jury to determine the value of the entire property as well as the value of an equitable interest in a small portion of the property.

[9] In contrast to, for example, a mortgagee, whose interest is in the entire property.

p. 17). Of course, the same can be said of Appellant; Appellant can cite *no* case requiring the Other Condemnees to consent to any settlement between the Landowner and Condemnor. Moreover, if Other Condemnees were required to consent to a settlement, the Other Condemnees, who generally have limited interests derived through the Landowner, could prevent settlements. It is axiomatic that settlements are favored by our judicial system. 6 S.C. Juris. Compromise and Settlement § 18 (It is well established that "that the law favors compromise."); Deal v. Deal, 91 S.C. 351, 74 S.E. 482 (1912)("The law favors the avoidance or settlement of litigation....").

III. The lower court correctly determined that the value, if any, of Appellant's equitable interest should be determined by the court sitting in equity without a jury.

The Limited Special Referee made certain conclusions of equity, including a determination that the School District held an "equitable interest," but he specifically declined to determine whether that interest had any monetary value, and if so, how much that value was. (R.pp. 27-28; 30). Electing not to exceed his limited authority, the Limited Special Referee explicitly noted he expressed no opinion as to the question of whether the "CCSD equitable interest has value or what the value may be." (R.p. 30).

As a result of the Limited Special Referee's opinion, the questions that will have to be determined by the lower court are the very equitable questions not answered by the Limited Special Referee, including what value, **if any,** the equitable interest found by the Limited Special Referee has. The equitable questions not addressed by the Limited Special Referee are matters for the lower court to decide, sitting in equity, without a jury.

Appellant argues, somewhat circularly, that an "equitable interest" does not need to be determined by a court in equity. Appellants rely on the definition of "property" in S.C. Code § 28-2-30(17) which includes "improvements and fixtures thereon, lands under water, easements

and hereditaments, corporeal or incorporeal, every estate, interest and right, **legal or equitable**, in lands or water and all rights, interests, privileges, easements, encumbrances, and franchises relating thereto, including terms for years and liens by way of judgment, mortgage, or otherwise." (emphasis added). All that definition does is recognize that condemned property may consist of legal and equitable interests, but it does not provide for a jury trial for a solely equitable interest (and neither does any other provision of the Act).

Even though the District's case before the Limited Special Referee argued the equities of the case, the District now wants to ignore the fact that its interest is limited to one in equity. Despite this shift in the District's argument, there are multiple bases supporting the lower court's transfer of this matter, rooted in equity, to the non-jury roster.

First, the fact that the Special Referee explicitly held that an "equitable interest" exists squarely supports the conclusion that there is nothing for a jury to decide. The District itself relied on multiple equitable maxims in the trial before the Limited Special Referee, which obviously indicates that the lower court should sit on the "equity side" of a Circuit Court's jurisdiction. Moreover, even though the Limited Special Referee found that an "equitable interest" existed, there are equitable defenses that may make the interest of little or no actual monetary value. For example, in Seabrook Island Property Owners Association v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (1987), the South Carolina Supreme Court held that the "equities clearly favor[ed]" the association and determined that the landowner's refund claim had no value or merit based on equitable defenses such as estoppel and acquiescence.

Second, cases involving an "equitable interest" have overwhelmingly been interpreted as a clear signal for a judge to decide the nature and value of the equitable interest. There is simply nothing at all for a jury to even address or decide. *See*, e.g., Kinard v. Hiers, 3 Rich Eq. 423

(1851 Court of Appeals of Equity in S.C.) (holding that the "equitable interest" that existed was to be decided solely by the lower court with no jury); McNair v. Moore, 50 S.E.197 (S.C.1905) (finding that the claimed equitable interest was a question of law for the lower court);[10] Gilkerson v. Connor, 24 S.C. 321 (S.C.1866) (finding that an "equitable interest" was a question of equity for the Court and not for a jury); Witsell v. City of Charleston, 7 S.C. 88 (1876) (determining whether or not an "equitable interest" of land was or was not within the scope of a married women's right of separate use and holding this question was a question of law for the Court itself to decide); White v. Kavangh, 8 Rich. 377 (1855 S.C. Court of Errors) (holding that scope of the phrase equitable interests in land was a question for the Court); Oskin v. Johnson, 736 S.E.2d 459 (S.C. 2012) (transfer of an equitable interest of land from wife to LLC and whether or not this was fraud was a question of equity for the Court)[11].

Third, in the recent publication of the S.C. Bar, South Carolina Equity: A Practitioner's Guide, by Lowell, Reibold, and Reibold, the authors suggest that there are 10 different general questions that raise equitable jurisdiction. In that list, the very first basis for equitable jurisdiction cited by the authors is "[d]eclarative remedies, with the objective of declaring or establishing a right or title." Id.at Pg.13. The Limited Special Referee in this case, in specifically finding that the School District did not have "equitable title," but only an "equitable interest" in the property,

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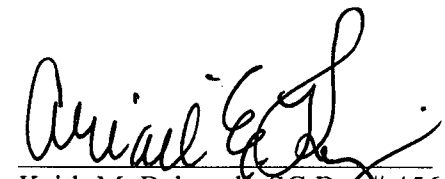
[10] Apparently, this question was twice appealed, see McNair v. Moore, 41 S.E.829 (S.C. 1902) (Lower Court issued a decree that both parties appealed).

[11] Remarkably, in over 200 years of litigation, only one South Carolina case involving an "equitable interest in land" was remanded the case for a jury. *See*, Bell v. Bell, 99 S.C. 501, 84 S.E. 369, 369 (1914), appeal after remand 103 S.C. 95, 87 S.E. 540 (1915). That case is distinguishable as the jury issue present in that case was a question of fact as to whether a purchaser of property had notice of a claim of title in the premises by another before the purchase paid the purchase price.

clearly left for the lower court to determine the scope and meaning of this phrase as applied to this case.

CONCLUSION

In conclusion, the lower court properly transferred the case to the non-jury roster because, *inter alia*, neither the South Carolina Constitution nor the South Carolina Eminent Domain Act provide the District with a right to a jury trial. Furthermore, a determination of the value of the entire 69.623 acre parcel is not needed to determine the nature and value, if any, of the District's equitable interest in a small 3.74 acre portion of the property. The questions before the lower court (including the nature, extent, and value, if any, of the equitable interest) are question of equity to be decided by the Court itself without the need or aid of any jury. Since the issues present are exclusively equitable, there is nothing left for a jury to decide in this case. The lower court's order should be affirmed and the determination of the issues concerning the equitable interest of the District should proceed on a non-jury basis.



Keith M. Babcock, SC Bar # 456
Ariail E. King, SC Bar #8952
LEWIS BABCOCK L.L.P.
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Karen Blair Manning, SC Bar #66216
South Carolina Department of Commerce
Division of Public Railways
1201 Main Street, Suite 1600
Columbia, South Carolina 29201
(803)737-1603

Derek F. Dean, SC Bar #65279
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, South Carolina 29412
(843) 762-9132

Stephen A. Spitz, SC Bar # 5287
Stevens & Lee
151 Meeting Street, Suite 350
Charleston, South Carolina 29401
(843)414-5085

Attorneys for Respondent South Carolina Department of Commerce, Division of Public Railways

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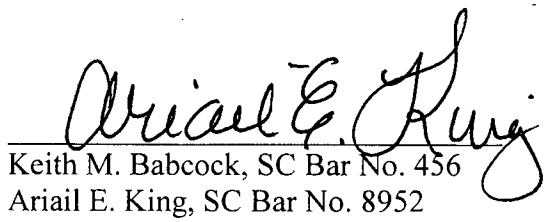
CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellant complies with Rule 211(b), SCACR and the South Carolina Supreme Court's Order of April 15, 2014 on personal identifiers.



Keith M. Babcock, SC Bar No. 456
Ariail E. King, SC Bar No. 8952
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