

**This Land is Your Land, This Land is My Land:
An Overview of Eminent Domain**

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“Government has no other end but the preservation of Property.”

John Locke¹

“In no other country in the world is the love of property keener or more alert than in the United States”

Alexis de Tocqueville²

I. Introduction

The paramount importance of private property is so fundamental in this country that its protection is expressly guaranteed in the United States Constitution and the South Carolina Constitution.

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 offense 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.

United States Constitution, Amendment V.

¹ Two Treatises on Government, § 94 (1690).

² Democracy in America, vol. 2 (1840).

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 therefore.

South Carolina Constitution, Article I, Section 13.

II. Direct Condemnation and Inverse Condemnation

The basic difference between condemnation and inverse condemnation is that in condemnation proceedings, the governmental entity is the moving party, whereas, in inverse condemnation, the property owner is the moving party. An action for inverse condemnation is proper where a governmental body has decided to take private property for public use.

Hill v. Hanahan, 281 S.C. 527, 316 S.E. 2d 76 (S.C. Ct. App. 1984).³

a. Condemnation

Condemnation is defined as “the determination and declaration that certain property, especially land, is assigned to public use subject to reasonable compensation,” or as the “exercise of eminent domain by a governmental entity.”⁴ Condemnation is generally an “orderly process when property owners are properly compensated for the property.”⁵ By initiating condemnation proceedings, “[the government] concedes a landowner’s right to receive just compensation and seeks a mere determination of the amount of compensation due.”⁶

The Fifth Amendment, as incorporated by the Fourteenth Amendment, guarantees to landowners the right to compensation for their land, meaning that the taking is not unlawful if the landowner is given just compensation for property. Direct condemnation has two distinct features:

³ Citing *S.C. State Highway Department v. Moody*, 267 S.C. 130, 226 S.E.2d 423 (1976).

⁴ BLACK’S LAW DICTIONARY (8th ed. 2004).

⁵ 8 NICHOLS ON EMINENT DOMAIN § 14E.01 [1] (rev. 3d. ed. 2003).

⁶ *Id.* (citing *City of Monterrey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 711-712, 119 S.Ct. 1624, 1639-1640 (1999)).

the governmental entity must file the condemnation proceedings and the landowner must receive just compensation for the property.

Historically, South Carolina courts applied a narrow interpretation of the public use doctrine. A use is considered “public” only if the public has a definite and fixed use of the property independent of the will of the controlling entity.⁷ In *Georgia Department of Transportation v. Jasper County*,⁸ the County attempted to condemn property that was being used for dredging by the Georgia Department of Transportation. The property was to be condemned by the government and subsequently leased to a private developer who wanted to construct a maritime terminal along the river. Jasper County argued that the economic benefit to the area would serve a public use. The Court held that a projected economic benefit to the county could not justify condemnation of the property.

In 2005, the United States Supreme Court expanded the federal public use doctrine in *Kelo v. City of New London, Connecticut*.⁹ In a 5-4 decision, the Court allowed the condemnation and subsequent transfer of land to a private corporation for the construction of the development of the area, including a hotel, office park, and house. The landowners argued that “economic development” was not public use; that “economic development” lacked sufficient public benefit to be a public use; and that the condemning authority lacked sufficient control over the land to ensure that it would

⁷ In *Riley v. Charleston Union Station*, 71 S.C. 457, 51 S.E. 485 (S.C. 1905), plaintiffs sought an injunction against a condemnation proceeding brought by a company organized by the legislature and given the power to construct, build, and maintain a train station. Plaintiffs argued that the taking was not for a public use but rather for the benefit of a private company. The Court allowed the taking, finding that the public had a definite and fixed right to use the property for the purposes of building a train station. In this decision, the Court narrowed South Carolina’s interpretation of the public use doctrine by finding that public use was not synonymous with public benefit. The public benefit must also be “definite and fixed.”

⁸ 355 S.C. 631, 586 S.E.2d 853 (S.C. 2003). *See also* Matthew Howsare, *Kelo in South Carolina?: Economic Development Is Not a Public Use for Purposes of Eminent Domain in South Carolina*, 57 S.C. L. REV. 505, 505-529 (2006).

⁹ 545 U.S. 469, 125 S. Ct. 2655 (2005).

continue to be used by and for the public. In holding that the development plan served a public purpose even though the land was to be transferred to a private entity, the Court essentially included “economic development” within the scope of what constitutes a public use. The Court reiterated that “ ‘[i]t is only the taking’s purpose, and not its mechanics,’ . . . that matters in determining public use.”¹⁰

Although *Kelo* demonstrates that the Federal Takings Clause offers less protection for private property owners than many would like,¹¹ South Carolina property owners have a greater guarantee of protection through the South Carolina Constitution.¹² Even though the South Carolina Supreme Court has acknowledged that the definition of public use is “elastic . . . in order to keep abreast of changing social conditions,”¹³ the Court’s consistently narrow application of the public use doctrine helps to avoid a *Kelo* situation in public use cases. Furthermore, in 2007, the South Carolina Constitution was amended to specifically prohibit the condemnation of private property for economic development unless the acquisition is for a public use.¹⁴

b. Inverse Condemnation

Inverse condemnation is distinct from direct condemnation. It is “an action brought by a property owner for compensation from a governmental entity that has taken the owner’s property without bringing formal condemnation proceedings.”¹⁵ Inverse condemnation is “characterized by

¹⁰ Citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244, 104 S.Ct. 2321 (1984).

¹¹ For better or worse, *Kelo* is a logical extension of the two primary U.S. Supreme Court cases in the area, *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

¹² Howsare, *supra* note 8, at 529.

¹³ Howsare, *supra* note 8, at 523 (citing *Karesh v. City Council of Charleston*, 271 S.C. 339, 342, 247 S.E.2d 342, 344 (1978)).

¹⁴ Art. I, § 13, South Carolina Constitution.

¹⁵ BLACK’S LAW DICTIONARY (8th ed. 2004).

burdensome and uncertain litigation and great acrimony.”¹⁶ Landowners use inverse condemnation proceedings to challenge a de facto taking of their property.¹⁷ In contrast with direct condemnation, the landowner must file to receive compensation for the taking.

An individual’s right to bring an inverse condemnation action is rooted in the Constitution. Both the United States and South Carolina Constitutions guarantee that private property cannot be taken without giving the landowner just compensation for the taking.¹⁸ If a person’s property has been taken without any formal condemnation process, then the individual’s constitutional rights have been violated and the individual has a legal basis upon which to sue.

In *Berry’s On Main v. City of Columbia*,¹⁹ the City of Columbia removed public sidewalks to install and relocate water meters and pipes as a part of a downtown development project. Heavy rain flooded the basement of Berry’s building because the City failed to backfill the excavation site. The rain damaged Berry’s basement and the new merchandise stored there. Berry’s argued that the City’s actions were an unconstitutional taking for which they did not receive compensation. The Court agreed; the removal of the sidewalk was an “affirmative, positive, aggressive act” on the part of the City; and the destruction of personal property and damage to the building had “some degree of permanence.”²⁰

In *Hardin v. S.C. Department of Transportation*,²¹ the Court combined two inverse condemnation cases brought against the Department

¹⁶ 8 Nichols on Eminent Domain § 14E.01 [1] (rev. 3d. ed. 2003).

¹⁷ 6 Nichols on Eminent Domain § 28.01[4] (rev. 3d. ed. 2001).

¹⁸ U. S. CONST. amend. V.; S. C. CONST. art. I, § 13.

¹⁹ 277 S.C. 14, 281 S.E.2d 796 (S.C. 1981).

²⁰ *Id.*

²¹ 371 S.C. 598, 641 S.E.2d 437 (S.C. 2007).

of Transportation, *Hardin v. S.C. Dep't of Transp.* and *Tallent v. South Carolina Dep't of Transp.*²² In *Hardin*, the Department of Transportation closed a break in a median at the intersection of two public roads. This prevented traffic from making left turns at the Garrison Drive/Dave Lyle Boulevard intersection. *Hardin*'s property abutted Garrison Drive. In *Tallent*, the Department of Transportation realigned a road system, turning a connecting street into a cul-de-sac. *Tallent*'s property abutted the road, but not where the cul-de-sac was located. The South Carolina Supreme Court held that determining whether a road reconfiguration amounted to a taking depends on how the reconfiguration affects the property owner's access to public roads; reconfiguring a divided highway's intersection is not a taking, just as reconfiguring a road is not a taking.²³

The Supreme Court's decision in *Hardin* departs from South Carolina's previous inverse condemnation precedent. *Hardin* directly overrules *City of Rock Hill v. Cothran*²⁴ and *Gray v. South Carolina Department of Highways and Public Transportation*.²⁵ In *Cothran*, the Court held that closing a portion of a public road amounted to a taking under the Constitution. The Court found however, that a landowner who alleged a "taking" was not entitled to recover damages unless they sustained "special injury," different in kind, and not merely degree, from the injury suffered by the public at large.²⁶ In *Gray*, a reconfiguration of the roads turned a once busy road into a cul-de-sac. A leaseholder owned a service station that was originally located at an intersection along the road. After the reconfiguration,

²² *Tallent*, 363 S.C. 160, 609 S.E.2d 544 (S.C. Ct. App. 2005); *Hardin*, 359 S.C. 244, 597 S.E.2d 814 (S.C. Ct. App. 2004).

²³ *Id.* at case summary.

²⁴ 311 S.C. 144, 427 S.E.2d 899 (S.C. Ct. App. 1992).

²⁵ 209 S.C. 357, 40 S.E.2d 239, 245 (S.C. 1946).

²⁶ *Cothran* at 368-69, 40 S.E.2d at 243-44.

the service station was at the end of the cul-de-sac. The Court of Appeals held that the deprivation of the most advantageous and profitable use of the property amounted to a taking.

The *Hardin* decision raises the bar for succeeding in an inverse condemnation action where the landowner's access to the road is altered or impaired. Specifically, the Court in *Hardin* abandoned the "special injury" analysis, instead focusing on how a road re-configuration affected the property owner's easement.²⁷ What *Cothran* and *Gray* gave to landowners as damages, *Hardin* takes away.

The South Carolina Supreme Court reaffirmed *Hardin* in *Carolina Chloride, Inc. v. South Carolina Dep't. of Transportation*, 391 S.C. 429, 706 S.E.2d 429 (2011). The Court reversed a Master in Equity's grant of summary judgment in favor of a landowner. In his complaint, the landowner argued that the SCDOT's closing of a railroad grade crossing amounted to a taking where it blocked his access rights to a road. In finding for the landowner, the Master in Equity concluded that *Hardin* did not apply retroactively, and that even if *Hardin* governed, the landowner would prevail because a railroad track did not destroy the contiguity of a landowner's property for purposes of determining easements.

The Court reversed the decision of the Master and remanded for further consideration, finding that *Hardin* applied retroactively because it did not create a new cause of action, but rather restated the focus in determining whether a road re-configuration amounts to a taking. The Court, noting that a landowner alleging a taking must prove (1) affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is

²⁷ *Hardin* at 609, 641 S.E.2d at 443.

for a public purpose,²⁸ concluded that a genuine issue of material fact existed as to whether the landowner's access constituted an "easement" for purposes of satisfying the elements of inverse condemnation.

In *South Carolina Dep't. of Transportation v. Powell*, a 2018 direct condemnation case, the Court distinguished the *Hardin* regulatory taking framework and broadened the scope for a landowner to receive compensation.²⁹ Here, the SCDOT condemned a portion of the landowner's property to reroute a road in connection with its upgrade to a nearby highway bypass. As the original condemnation jury trial was nearing, SCDOT changed its construction plans to eliminate the existing frontage road and instead turn it into a cul-de-sac. The lawsuit then expanded to address the additional loss of bypass access.³⁰ The trial court applied *Hardin* and held that the landowner's loss of indirect access to the bypass was not compensable as a regulatory taking.³¹

The state Supreme Court reversed, stating that while under *Hardin* the road changes alone would not be compensable, because the creation of the cul-de-sac was done in conjunction with the taking of land, the loss of road access was compensable.³² The Court also noted the differences in cases involving loss of traffic flow versus loss of road access.³³

In its 2009 opinion, *Kiriakides v. School District of Greenville*,³⁴ the Supreme Court of South Carolina further clarified the law of inverse

²⁸ *Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (S.C. 2005).

²⁹ *S.C. Dep't of Transportation v. Powell*, No. 2016-000594, 2018 WL 3748876 (S.C. Aug. 8, 2018).

³⁰ *Id.* at *1.

³¹ *Id.* at *2.

³² *Id.* at *2-4.

³³ *Id.* at *3-4 (finding this case more analogous to *S.C. State Hwy Dep't v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970) than to *S.C. State Hwy Dep't v. Carodale Associates*, 286 S.C. 556, 235 S.E.2d 127 (1977), which the state Court of Appeals was held to have improperly relied upon because *Carodale* denied damages from loss of traffic flow whereas here as in *Wilson* there was a loss of road access).

³⁴ 382 S.C. 8, 675 S.E.2d 439 (S.C. 2009).

condemnation, distinguishing between the two different types of inverse condemnation claims. The Court found that “inverse condemnation claims can result from two instances[.]”³⁵ In the first, and more traditional, instance, the government physically appropriates private property, but fails to initiate condemnation proceedings. In these circumstances, a claimant must prove the *Byrd* elements, referenced above. In the second instance, the *Kiriakides* Court clarified that a claim for inverse condemnation may arise when the government imposes limitations on the use of private property.”³⁶ Such a taking is considered “regulatory inverse condemnation” and requires that a claimant demonstrate two elements: (1) affirmative conduct, and (2) a taking.³⁷

In *Columbia Venture v. Richland County*, a 2015 decision, the South Carolina Supreme Court upheld a Special Referee’s decision that a county’s development restriction against construction in a flood zone did not constitute a regulatory taking of property.³⁸ There, a land development company purchased 4,461 acres of land along a river while Federal Emergency Management Agency (FEMA) was in the process of revising area flood maps. Three years after the purchase, FEMA issued its revised floodway determination and placed 3,130 acres of that property within a regulatory floodway. Pre-existing Richland County ordinances effectively prevented construction in such a floodway, and so the development company filed suit against the county claiming a regulatory taking.³⁹

³⁵ *Id.* at 14, 675 S.E.2d at 442.

³⁶ *Id.* (citing to *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (S.C. 2005)).

³⁷ *Id.*

³⁸ 413 S.C. 423, 776 S.E.2d 900 (2015).

³⁹ *Id.*

Applying the *Penn Central* factors,⁴⁰ the Court acknowledged that the regulation significantly impaired the property's fair market value. That factor, however, was strongly outweighed by the company's unreasonable investment-backed expectations coupled with the legitimate and substantial health and safety-related rationales supporting the ordinance.⁴¹ The company knew or should have known that there was a considerable likelihood upcoming rezoning could limit their development plans and so assumed the speculative risk inherent to real estate development.

The Court also denied the company's claim that a flowage easement had been created by the regulation. In applying the test set forth in *United States v. Sponebarger*,⁴² the Court found that the county ordinances did not increase the chances of flood on the property. Even though it prevented expansion of existing levees, because the regulation allowed levee maintenance and repair it thereby maintained the status quo in terms of flood risk and thus a taking did not occur.⁴³

In 2019, in *Knick v. Township of Scott, PA*, the United States Supreme Court reversed precedent to allow property owners to sue state and local governments in federal court under § 1983 for deprivation of civil property rights. 139 S. Ct. 2162 (2019). Prior to this important decision, landowners were only allowed to bring such inverse condemnation actions in state court.

⁴⁰ In *Penn Central Transp. Co. v. City of New York*, the United States Supreme Court set forth three factors which may be used to determine whether a regulatory imposition is considered a taking under the Fifth Amendment. A court must balance (1) the extent to which the regulation has interfered with the property owner's reasonable investment-backed expectations, (2) the economic impact of the regulation on the claimant, and (3) the character of the governmental action at issue. 438 U.S. 104 (1978).

⁴¹ *Columbia Venture* at 447-454, 776 S.E.2d at 913-916. "The purpose of consideration of plaintiff's investment-backed expectations is to limit recoveries to property owners who can demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Id.* at 449, 776 S.E.2d at 914.

⁴² 308 U.S. 256 (1939) (where a taking does not occur if the government has neither caused one's property to flood or increased the chance of a flood).

⁴³ *Columbia Venture* at 446, 776 S.E.2d at 912.

In its opinion, The *Knick* court also provided a helpful summary of condemnation jurisprudence.

III. Condemnation: Statutory Procedure in South Carolina

“It is the intent of the General Assembly that this act is designed to create a uniform procedure for all exercise of eminent domain power in this State.” S.C. Code Ann. §28-2-20.

The South Carolina Eminent Domain Procedure Act, found in Title 28, Chapter 2 of the South Carolina Code, governs condemnations in our State. Eminent domain is the “inherent power of a governmental entity to take privately owned property, especially land, and convert it to public use, subject to reasonable compensation.”⁴⁴ Therefore, because the government has an inherent right to take privately owned property, attempts to reach a settlement for compensation before instituting a condemnation action are encouraged by the Act.

a. Generally

Under the Eminent Domain Procedure Act, settlements and compromises are encouraged to prevent or shorten the life of a condemnation action. Pursuant to § 28-2-40, compromises or settlements are permitted at any time before or after any action begins. Compromises and settlements may relate to any matter, including all or any part of the compensation or other relief.

All property must be appraised in order to provide just compensation to the landowner for the taking. Section 28-2-70 requires the condemnor to have the property appraised prior to initiating a condemnation action. The appraisal must be made available to the landowner. The condemnor and

⁴⁴ BLACK’S LAW DICTIONARY (8th ed. 2004).

landowner are statutorily required to make a “reasonable and diligent” effort to negotiate a settlement agreement regarding the amount of compensation to be paid; however, failure to make an effort is not a defense to a condemnation proceeding.⁴⁵ The condemnor must certify to the court that the parties attempted to negotiate a settlement before instituting a condemnation action.

After giving the landowner reasonable notice, the condemnor has the authority to enter upon land for limited purposes of making a survey, determining the location of proposed improvements, and making an appraisal. If the landowner fails to give the condemnor permission to enter the property, the circuit court may issue an ex parte order to enforce the condemnor’s right.

Section 28-2-90 gives the condemnor a statutory right to take possession of the condemned property at four points in time. The first two points in time reflect the “reasonable and diligent efforts”⁴⁶ by the parties to negotiate an agreement. The condemnor can take possession of the property after receiving written consent from the landowner or upon payment to the landowner in the amount mutually agreed upon as just compensation. The last two points in time apply after the condemnor has filed a condemnation action. The condemnor can take possession after giving the clerk of court in the county in which the property to be condemned is located a deposit in the amount of just compensation for the property. The condemnor may also give the payment to the owner or the clerk of court in the amount set forth by the appraisal panel or awarded by the judgment in the condemnation action.

⁴⁵ S.C. CODE ANN. § 28-2-70(B).

⁴⁶ *Id.*

Section 28-2-110 requires the condemnor to pay or reimburse the landowner for any prepayment penalties for secured debt that arise as a result of the taking. However, the condemnor is given a credit against taxes due during the year in which fee simple title vests in the condemnor or the property is taken into possession by the condemnor.⁴⁷ The condemnor has the responsibility of paying the taxes on the property taken for that year.

As a matter of procedure, The Eminent Domain Procedure Act prevails over Rules of Civil Procedure in the event that two rules are in conflict.⁴⁸

b. Pre-Trial Procedures

The Eminent Domain Procedure Act gives a condemnor the right to bring an action for the acquisition of an interest in any real property necessary for a public purpose.⁴⁹ Before initiating a condemnation action, after the landowner rejects the amount of compensation, the condemnor must either choose to proceed by way of a trial or by way of an appraisal panel.⁵⁰ The condemnor must also state in the Condemnation Notice the amount determined as just compensation.⁵¹ The landowner has thirty days after service of the Notice to give the condemnor written notice that he either accepts or rejects the compensation amount. If the amount tendered is accepted, the landowner must also agree to execute all necessary instruments to convey the property to the condemnor. A landowner's failure to respond is construed as a rejection.

⁴⁷ S.C. CODE ANN. § 28-2-110(B).

⁴⁸ S.C. CODE ANN. § 28-2-120.

⁴⁹ S.C. CODE ANN. § 28-2-210. See S.C. CODE ANN. § 28-2-280 for the appropriate form and content of the condemnation notice.

⁵⁰ S.C. CODE ANN. § 28-2-220(A), referencing § 28-2-240 for trial and § 28-2-250 for appraisal panel. The condemnation form will vary depending upon which option the condemnor chooses. Note that two different Condemnation Notice forms must be used depending upon this choice.

⁵¹ See S.C. CODE ANN. § 28-2-70(A) for appraisal of property.

If the landowner rejects the amount tendered as just compensation within thirty days of receiving the Notice, then the condemnor may file and deposit the amount of just compensation with the clerk of court.⁵² The clerk shall charge a filing fee for the notice, which is the same as the filing fee for summons and complaint.⁵³ The condemnor must serve written notice of the action upon the condemnee and is permitted to take possession of the property pursuant to § 28-2-90.

In the event the landowner rejects the amount tendered and the condemnor elects to proceed by way of trial, the condemnor must serve an affidavit upon the landowner and file it with the court. Either the condemnor or the condemnor's attorney can sign the affidavit.⁵⁴ Under § 28-2-240, the affidavit must state that the amount tendered has been rejected and that the condemnor demands a trial by jury or by the court not earlier than sixty days after the date of service of the affidavit.⁵⁵ The condemnor is also given the right to demand that the trial be given priority over other cases.⁵⁶ The affidavit must list the name(s) and known address(es) of all known landowners whom the clerk should notify of the call of the case for trial.⁵⁷

Instead of proceeding with a trial, section 28-2-250 provides that a condemnor may elect to proceed with the condemnation by way of an appraisal panel. The appraisal panel is used to determine the amount of just compensation for the property taken. The condemnor bears the cost of the fee, but the fee cannot exceed one hundred dollars per member plus actual

⁵² S.C. CODE ANN. § 28-2-230(A).

⁵³ Under S.C. CODE ANN. § 8-21-310(11)(a), the fee for filing a first complaint or petition in a civil action or proceeding in a court of record is \$100.00.

⁵⁴ S.C. CODE ANN. § 28-2-240(A)(5).

⁵⁵ *Id.* at (A)(1) – (3).

⁵⁶ *Id.* at (A)(4).

⁵⁷ *Id.* at (A)(5).

expense incurred by the panel in performing the appraisal.⁵⁸ The appraisal panel is comprised of three people.

The condemnor appoints its member in the condemnation notice. The appointee cannot be an employee or former employee. The landowner has thirty days from the date of service to appoint a member to the panel. This appointment must be made in writing and served upon the condemnor. Within five days of the appointment of the landowner's member, the two appointees must appoint a disinterested party as the third member. If the landowner fails to appoint a member, then the clerk of court shall appoint the member after receiving a written request from the condemnor.⁵⁹ If both parties fail to appoint a third member, the clerk of court will also make the appointment after receiving a written request from both parties.⁶⁰ The third appointee must have his South Carolina real estate broker's license as a minimum qualification. This person will serve as the chairman of the appraisal panel and is responsible for convening the panel and presenting the report to the condemnor. The chairman will receive fifty dollars as additional compensation for his service.

The appraisal panel must determine the amount of just compensation and give a written report to the condemnor within twenty days of appointing the third member.⁶¹ However, this time period may be extended by written consent from both parties.⁶² If the appraisal panel fails to make a determination within the time allowed, then the chairman must certify this fact in writing to the condemnor.⁶³ The condemnor must file this with the

⁵⁸ S.C. CODE ANN. § 28-2-250(A).

⁵⁹ S.C. CODE ANN. § 28-2-250(D).

⁶⁰ *Id.*

⁶¹ S.C. CODE ANN. § 28-2-260(A).

⁶² S.C. CODE ANN. § 28-2-270(D).

⁶³ S.C. CODE ANN. § 28-2-270(E).

landowner and the clerk of court.⁶⁴ This will have the same effect as an appeal by both parties from a determination of the appraisal panel.⁶⁵

Within ten days of receipt of the panel's report, if the Condemnation Notice has not yet been filed and the deposit of the amount tendered has not been made with the clerk of court, the condemnor must do so and attach a copy of the panel's report.⁶⁶ If the condemnor previously filed the Condemnation Notice and deposited the amount tendered with the clerk of court, and the amount was less than the determination by the panel, then the condemnor has ten days to deposit the excess with the clerk.⁶⁷ The condemnor must also serve the landowner written notice of the appraisal report, Condemnation Notice, and the deposit amount within ten days of receiving the panel's report.⁶⁸ The written notice must also state whether the condemnor accepts the panel's report.

The landowner has thirty days to either accept or appeal the determination. The acceptance or appeal must be made in writing.⁶⁹

c. Trial Procedures

Unless otherwise demanded by the condemnor and landowner, all condemnation actions are placed on the jury trial roster.⁷⁰ Although no response to the condemnation notice is statutorily required, a prudent practitioner will either file a response with the clerk of court or file a notice of appearance. Each party has the right to demand priority status over other

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ S.C. CODE ANN. § 28-2-260(B)(1).

⁶⁷ *Id.* at (B)(2).

⁶⁸ *Id.* at (B)(3).

⁶⁹ *Id.* at (C). Refer to § 28-2-290 for the appropriate form to either accept or reject the appraisal panel's determination.

⁷⁰ S.C. CODE ANN. § 28-2-310(B). Note that this is different from SCRCRCP Rule 38, which requires that parties must demand a jury trial.

cases for civil trial.⁷¹ However, the parties must have at least sixty days before trial after service of the condemnation notice or notice of appeal unless both parties agree to a shorter pre-trial period.⁷² The issue of whether priority status will be invoked is a subject for discussion at any status conference that might be held in the case. Furthermore, this is a matter that may be raised upon motion by either side. This could also require expedited disposition by the Court, rather than allowing the matter to be disposed of by the motions calendar.

For all proceedings on appeal from the determination of the appraisal panel, the appellant has the burden of proof and the right to open and close.⁷³ In the event that both the landowner and condemnor appeal, the landowner is considered the appellant.⁷⁴ Despite the foregoing, § 28-2-320 provides that the first witness at trial shall be the condemnor's witness concerning the property being taken and the purpose thereof. The procedure of the condemnor offering the first witness is one that should be confirmed by counsel and the Court at a pre-trial conference.

Section 28-2-340 specifies certain types of evidence that are deemed to be "relevant, material, and competent" for the purpose of determining the value of the land sought to be condemned:

- Evidence may be admitted to show that a building or improvement is unsafe, unsanitary, a public nuisance, or in a state of disrepair as well as the cost to correct the condition.⁷⁵
- Evidence may be admitted to show that a state public body issued an order to repair or demolish the aforementioned

⁷¹ *Id.* at (C).

⁷² *Id.* at (D).

⁷³ S.C. CODE ANN. § 28-2-320.

⁷⁴ *Id.*

⁷⁵ S.C. CODE ANN. § 28-2-340(A)(1).

building or improvement as well as the cost of complying with the order.⁷⁶

- The last assessed valuation of the property for tax purposes and any information in connection with the assessment showing the value of the property, including depreciation, may be admitted. This type of evidence may create a situation where the landowner is compelled to call the tax assessor as a witness to explain the assessment process.⁷⁷
- Evidence may be admitted to show that the property or improvement is being used for illegal purposes, or purposes that may be harmful to the occupants.⁷⁸
- Evidence of the price and other terms of any previous sale or rent reserved, or the terms of any lease or tenancy affecting the property when the lease or sale occurred. Evidence of this information applicable to property in the vicinity is also admissible.⁷⁹

Upon motion of either party, the jury will inspect the property. If there is no jury, then the court may make the inspection.⁸⁰ The site view is mandatory if requested by either side. The question of a site view should be discussed with the court at the start of the action, in order for the Court to determine the most appropriate time for the site visit to occur, and to allow the clerk and/or Sheriff's Office to make arrangements for transportation.

In determining just compensation, only the value of property taken, damage to remaining land, and benefits to the landowner may be

⁷⁶ *Id.* at (A)(2).

⁷⁷ *Id.* at (A)(3).

⁷⁸ *Id.* at (A)(4).

⁷⁹ *Id.* at (A)(5).

⁸⁰ *Id.* at (B).

considered.⁸¹ Benefits include any that are “derived from the proposed project including the value of any property or rights relinquished or reverting to the landowner as a part of or result thereof.”⁸² Under § 28-2-440, the date of valuation is the date of the filing of the condemnation notice. This date should be confirmed at the pre-trial conference and provided to the jury at the commencement of the action.

d. Interest

Section 28-2-420 requires the condemnor to pay interest at the rate of eight percent per annum on the amount of just compensation awarded by the appraisal panel or the judgment of the Court. The interest accrues from the date of the filing of the condemnation notice through the date of the verdict or judgment by the Court. The statute further provides that there is a twenty-day period for the payment of the judgment, after which time that interest accrues at the rate provided for interest on judgments. The subject of interest is one that is not likely to create controversy but might be the subject of a post-trial motion should there be any question as to the amount of the interest.

e. Actions Challenging the Right to Condemn

Section 28-2-470 provides that an action challenging a condemnor’s right to condemn is initiated by way of a separate proceeding. The action must be commenced within thirty days after service of the Condemnation Notice on the landowner. All proceedings under condemnation are automatically stayed until the disposition of the action. No issues involving the condemnor’s right to condemn may be heard in the trial upon the issue of compensation.

⁸¹ S.C. CODE ANN. § 28-2-370.

⁸² S.C. CODE ANN. § 28-2-360.

For a landowner to receive such injunctive relief, South Carolina case law outlines that a court in equity must find that the condemnor has acted in bad faith, fraudulently, or with a clear abuse of discretion in condemning the property.⁸³ To avoid an abuse of discretion finding, a condemnor must exercise its discretion through a “rational decision making process” considering criteria such as safety and reliability factors, aesthetics, costs, environmental impact, and long-range planning.⁸⁴

f. Attorneys Fees, Costs, and Litigation Expenses

Under § 28-2-510 (A), if the Court determines that the condemnor has no right to take all or a portion of the landowner’s property, the landowner’s reasonable costs and litigation expenses are awarded to the landowner. If, however, the Court determines that the “right to take” was not raised and litigated in good faith by the landowner, the Court must award the condemnor the reasonable costs and litigation expenses incurred therein. The award of costs and litigation expenses is mandatory in either instance, although the Court must also predicate an award against the landowner upon a finding that the landowner did not raise and litigate the issue “in good faith.”

Section 28-2-510 (B) (1) provides that a landowner who prevails in a condemnation action, in addition to just compensation, may recover his reasonable litigation expenses. “Prevailing” means that the just compensation awarded exclusive of interest is “at least as close to the highest valuation of the property that is attested to a trial on behalf of the landowner as it is to the highest valuation of property that is attested at the

⁸³ *Oien Family Investments, LLC v. Piedmont Municipal Power Agency*, No. 2016-001037, 2018 WL 3447607 at *4 (S.C. Ct. App. 2018) (citing *Southern Development v. South Carolina Public Service Authority*, 305 S.C. 507, 515, 409 S.E.2d 428, 433 (Ct. App. 1991)).

⁸⁴ *Id.* at *5.

beginning of trial on behalf of the condemnor.”⁸⁵ The procedure for recovering these expenses is that the landowner serves on the condemnor and files with the clerk of court an application for such expenses within fifteen days after the entry of judgment. The application must show (1) that the landowner has prevailed, (2) state the amount sought, and (3) include an itemized statement from an attorney or expert witness stating the fee charged, and basis therefore, the actual time expended, and all actual expenses for which recovery is sought.

Litigation expenses are defined as:

[t]he reasonable fees, charges, disbursements, and expenses necessarily incurred from and after service of the Condemnation Notice, including, but not limited to, reasonable attorney’s fees, appraisal fees, engineering fees, deposition costs, and other expert witness fees necessary for preparation or participation in condemnation actions and the actual cost of transporting the court and jury to view the premises.⁸⁶

In determining attorney’s fees, the Courts in South Carolina have considered the following factors:

- The nature, extent, and difficulty of the case;
- The time necessarily devoted to the case;
- The professional standing of counsel;
- The contingency of compensation;
- The beneficial results obtained; and
- The customary fee for similar services.⁸⁷

Attorney fees are not recoverable unless they are authorized by a statute or contract.⁸⁸ Contracts do not control the determination of a reasonable

⁸⁵ S.C. Code Ann. § 28-2-510(B)(2).

⁸⁶ S.C. Code Ann. § 28-2-30(14).

⁸⁷ *Jackson v. Speed*, 326 S.C 289, 308, 486 S.E.2d 750, 760 (S.C. 1997).

attorney fee rate when a statute mandating the award of attorney fees exists.⁸⁹

The Court has the discretion to reduce the amount to be awarded, or to deny an award, to the extent that the landowner engages in conduct which unduly and unreasonably protracts the final resolution of the action.⁹⁰ The Court may also reduce or deny the award if it finds the position of the condemnor was substantially justified or that special circumstances make an award unjust.⁹¹

⁸⁸ *Id.* at 307, 486 S.E.2d at 759.

⁸⁹ *Id.* at 308, 486 S.E.2d at 759.

⁹⁰ *Id.*

⁹¹ *Id.*

IV. Conclusion

As Chief Justice William Howard Taft once wrote:

Next to the right of liberty, the right of property is the most important individual right guaranteed by the Constitution and the one which, united with that of personal liberty, has contributed more to the growth of civilization than any other institution established by the human race.⁹²

Whether representing the condemnor or the landowner, it is incumbent upon an attorney to recognize that a condemnation action represents an extraordinary event – the taking of private property for public use. As such, it is not a normal civil action, and both sides should work to ensure that a landowner receives “just compensation” as mandated by the Constitution.

⁹² WILLIAM HOWARD TAFT, *POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE, AND ITS PERILS* 90 (Yale University Press 1913).