STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
O. Stanley Smith, III, Acre Plus, LLC and Constan Gervais Street Car Wash, Inc., Plaintiffs, v. City of Columbia, Defendant.	C/A No.: 2023-CP-40-05555 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT CITY OF COLUMBIA'S LIABILITY FOR INVERSE CONDEMNATION**

TO: DEFENDANT CITY OF COLUMBIA AND ITS ATTORNEYS:

YOU WILL PLEASE TAKE NOTICE that, pursuant to Rule 56(a) of the South Carolina Rules of Civil Procedure, Plaintiffs O. Stanley Smith, III, Acre Plus, LLC, and Constan Gervais Street Car Wash, Inc. (collectively "Plaintiffs") will move on the tenth day after notice of the within motion, or at a date and time thereafter set by the Court, for an order granting summary judgment as to Defendant City of Columbia's (the "City") liability for inverse condemnation. The basis for this motion is as follows:

1. This is an action for, among other claims, inverse condemnation and trespass related to the City's illegal entry upon and destruction of Plaintiffs' property and damages resulting therefrom. More particularly, on March 9, 2021, the City demolished a wall that Plaintiffs had erected fronting on Gervais Street, a portion of which was constructed on land that Plaintiffs had leased from Norfolk Southern Railway Company. The City demolished the portion of the wall that rested on land owned by Norfolk Southern, believing incorrectly that the land belonged to the City and that it therefore had the right to demolish the wall. Its basis for this belief was a 1901 deed that, by its plain terms, applied to a different piece of property entirely. Meanwhile, the railroad has a deed to this land for which it paid $500 in 1874, and it had every right to lease it to Plaintiffs.

The evidence is thus clear that the City never owned this property and never had any right to do what it did on March 9, 2021.

2. Instead of acknowledging this fact and admitting liability in this case, the City has throughout this litigation concocted successive schemes why it actually does own this property. For example, the City's next argument was that this property is part of original Laurens Street and has belonged to the City since 1786. This is also wrong. The Legislature conveyed this land, along with large swaths of the southeastern portion of the City, to private landholders in 1816 and closed the streets, which is why so much of Columbia does not follow the original grid pattern laid out when the City was founded. The City, apparently, was totally unaware of this part of its own history. The City's other arguments why it was justified to do what it did on March 9, 2021 similarly lack merit. The truth is that the City just wanted to use Plaintiffs' property as a drain field to remedy its own inadequate stormwater infrastructure that it refused to fix, and wanted to do so without paying Plaintiffs the just compensation they are owed for the City's taking and destruction of private property. Its actions are prohibited by Article 1 of the South Carolina Constitution and numerous other basic principles of law, and Plaintiffs are due recompense for the City's illegal acts.

3. Indeed, the City's actions in this case can only be described as a calamity of errors. The evidence in this case has revealed that the City conducted no engineering analysis whatsoever of the hydrological impact of the wall or its removal before it destroyed it, despite claiming otherwise. It also falsely claimed that SCDOT had determined that the wall needed to be removed, but it had not. When the City showed up to tear the wall down on March 9, 2021, it was warned by a Norfolk Southern Railway police officer that it was trespassing on railroad property, but it ignored him and did it anyway. While demolishing the wall, the City caught the railroad

embankment on fire and threatened the safety not only of railroad operations but of all the employees and customers who were at the car wash that day. From start to finish, the City's actions in this case have been a trainwreck. And the ultimate result of these actions was that the Constan Car Wash—an iconic feature of downtown Columbia for over 70 years—was ruined due to repetitive flooding, along with the livelihoods of those who worked there.

4. The damage to Plaintiffs as a result of the City's acts have been determined by Plaintiffs' experts to be $4.27 million dollars,[1] and South Carolina law requires the City to pay prejudgment interest on that amount at 8% from the date of the taking to present, plus attorneys' fees and costs. The City, regrettably, could have avoided much of this financial loss by simply following the law and filing a condemnation action if it wanted to take Plaintiffs' property for a public use. Its failure to do so and to conduct itself responsibly in this matter has been a disservice not only to Plaintiffs, who have given much back to this City by their long-running family business, but also to the taxpayers of this City who will now be forced to foot the bill for the City's irresponsible and illegal acts.

5. After the South Carolina Supreme Court's decision in *Cobb v. South Carolina Department of Transportation*, 365 S.C. 360, 618 S.E.2d 299 (2005), it falls to this Court to determine whether a taking has occurred in the first instance. Upon finding that a claim for inverse condemnation has been established, "the issue of compensation may then be submitted to a jury at either party's request." *Id.* at 365, 301. Plaintiffs have requested this mode of trial, and the Court granted this request by its scheduling orders dated February 2 and April 21, 2025.

[1] The City, meanwhile, has no expert opinions on damages that are admissible in this case, despite this case having been pending since March 2021.

6. Plaintiffs submit that there is no genuine issue of material fact whether a taking has occurred in this case, and that Plaintiffs are entitled to judgment as a matter of law on the City's liability for inverse condemnation. If the Court agrees and so finds, it will then fall to the jury to determine the amount of just compensation owed to Plaintiffs for the City's taking. *Cobb*, 365 S.C. at 365, 618 S.E.2d at 301. Following the jury's determination, it is the Court's responsibility to determine the amount of prejudgment interest and litigation expenses owed to Plaintiffs for the taking. *See Burke v. S.C. Dep't of Transp.*, 429 S.C. 319, 324 838 S.E.2d 534, 537 (2020) ("[A] request for prejudgment interest on a just compensation award in an inverse condemnation action is for the trial court and not the jury."); *Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 394 752 S.E.2d 269, 279 (2013) (providing for attorneys' fees and costs in an inverse condemnation action).

BACKGROUND

History of the Car Wash and Flooding on Gervais Street

7. The Constan Car Wash opened on Gervais Street in downtown Columbia in 1949. **Exhibit A**, Deposition of O. Stanley Smith, III at 49. Founded by O. Stanley Smith, Jr. and his wife Constance (hence the name Constan), it was the first full-service car wash in Columbia, and the second such operation in South Carolina. For over 70 years, the car wash served the citizens of Columbia and the Midlands, provided gainful employment to those who worked there, and famously housed a live tiger that would eventually become the first resident of the Riverbanks Zoo. *See* Mike Fitts, *Longtime Columbia car wash, once home to a tiger, closes after more than 70 years*, THE POST AND COURIER, Nov. 3, 2022.

8. In the late 1970s, the car wash began to experience intermittent flooding during periods of heavy rainfall after the City installed a sewer pipe inside an underground conveyance for Rocky Branch that had been constructed by the Smith family in the 1960s. Smith Depo. at 113–

14. The installation of this sewer pipe diminished the capacity of the underground conveyance, which in turn caused—and in fact still causes—flood waters to overtop Gervais Street during periods of heavy rainfall. **Exhibit B**, Deposition of Daniel Creed, P.E. at 91–94 ("I'm saying that we have a culvert which does not have adequate capacity as evidenced by the flooding."). None of the Smith family can recall any instances of flooding on the property before the installation of the sewer pipe. Smith Depo. at 112.

9. Each time the car wash property flooded, it would predictably shut down the business and cause damage to the facilities, inventory, and equipment at the car wash. Smith Depo. at 172–73. It would also require extensive labor to clean and remediate the damage caused by the flood waters, which would result in further lost productivity and the closure of portions of the business for up to a week. *Id.* The negative effects of the flooding were both immediate and cumulative and, over time, eroded Constan's ability to operate a successful business. *Id.* at 191.

10. Over the years, Chip Smith (the eldest son of Stan and Constance Smith, who inherited the business) pleaded with the City to correct the flooding on Gervais Street. *See* Smith Depo. at 126–29. It was, after all, the City that had caused this malady to arise, and it was harming not only Constan, but also endangering motorists who travel down Gervais Street and encounter these floodwaters. Despite this, and despite a statutory responsibility to correct surface water flooding and protect its citizens from such harms, *see* S.C. Code Ann. § 5-31-450, the City failed and refused to take any action to correct this condition. Still today, this section of Gervais Street floods during periods of heavy rainfall. *See* CITY OF COLUMBIA PUBLIC WORKS, *List of Flood-Prone Streets and Intersections*, https://publicworks.columbiasc.gov/flood-prone-streets-intersections/ ("13. Gervais and Laurens").

Constan Constructs the Wall

11. In 2017, his repeated pleas to the City having been ignored, Mr. Smith sought his own solution to the flooding issues on the car wash property. He hired Dan Creed—a professional engineer with over 30 years of experience and one of the preeminent hydrologists in South Carolina—to help find a solution to abate the flooding. Creed Depo. at 5, 14. The solution they developed was a low-profile concrete wall that would be constructed parallel to Gervais Street to divert the floodwater and prevent it from reaching the property. Smith Depo. at 141–43. Mr. Creed designed the wall and, in December 2017, submitted the plans to the City's Planning and Development Services department for their review and approval. *See* **Exhibit C** (Dec. 20, 2017 "Submittal of Construction Drawings and Related Documents for a Proposed Screen Wall at 1950 Gervais Street in the City of Columbia Richland County, S.C.").

12. Further, because a portion of the wall would need to be constructed on property owned by Norfolk Southern in order to be effective, Mr. Smith requested an amendment to his existing lease with Norfolk Southern to permit construction of the wall. Smith Depo. at 132. Norfolk Southern agreed and, in January 2018, executed an amended lease with Acre Plus, LLC—a land-holding company wholly owned by Mr. Smith—to permit construction of the wall on its property. **Exhibit D** (Jan. 3, 2018 "First Amendment to Lease Agreement").

13. These prerequisite steps having been completed, Mr. Smith submitted a building permit application to the City for the wall on January 9, 2018. **Exhibit E**.[2] The City approved the permit on January 22, 2018. **Exhibit F**. Construction of the wall was completed in early 2019 and,

[2] Mr. Creed, who estimates that he has submitted "thousands" of municipal permit applications over his career, assisted Mr. Smith in creating the application. Creed Depo. at 98–99.

for the duration of the time that it stood, the wall effectively prevented floodwater from Gervais Street reaching the Constan property. Creed Depo. at 90.

The City Objects to the Wall

14. Later in 2019, City Engineer Dana Higgins contacted Mr. Smith to convey her view that the wall—not the City's inadequate stormwater facilities—was exacerbating flooding on Gervais Street and that it needed to be removed. Mr. Smith, who is not an engineer, asked Dan Creed to contact Ms. Higgins to discuss her concerns, which he did on October 21. **Exhibit G** (Email exchange between Dan Creed and Dana Higgins; Plaintiffs Bates 6–8). Ms. Higgins responded that she did not need to meet with Mr. Creed, and that "the City has requested the wall to be removed because it is impounding stormwater onto US Hwy 378 and keeping stormwater from freely entering our storm drainage inlet." *Id.* She further asserted that "SCDOT has also put us on notice of their concerns." *Id.*

15. Then, in December 2019, the City Attorney Patrick Wright sent a letter to Mr. Smith demanding that the wall be removed. *See* **Exhibit H** (Plaintiffs Bates 17–18). The letter began by asserting that "City of Columbia engineers and SCDOT engineers have both determined that during a significant rain event, the concrete wall could push water into the road, causing drivers to lose control of vehicles, resulting in serious accidents and potential loss of life." It further asserted that the permit application submitted by Mr. Smith had been a "misrepresentation of the project" because it "mentioned nothing regarding drainage," though it did not identify what ought to have been mentioned, and the submittal included complete plans of the project. Finally, the letter asserted that the City owns portions of the land whereupon the wall was constructed, including the land within the railroad right-of-way, and that "[t]he wall prohibits reasonable access to City

property." The letter demanded that the wall be removed within ninety days; otherwise, "the City may be forced to remove the wall or have the wall removed, at the property owner's expense."

16. As it turns out, nearly every assertion in the City Attorney's letter was false. First, SCDOT made no determination regarding the wall. **Exhibit I** (Email exchange between Linda McDonald and Chip Smith; Plaintiffs Bates 11 ("I spoke with Tony Magwood this morning. He says that there has been no 'determination' by SCDOT engineers as stated in the first paragraph of the City's letter.")). In fact, the City asked the SCDOT engineer to sign an affidavit stating that the wall needed to be removed, and he refused. *See* **Exhibit J** (Deposition of Dana Higgins at 78–79 ("He said he was advised by his legal counsel not to put one together.").

17. Worse still, while the letter claimed that City engineers had determined that the wall was creating a safety hazard on Gervais Street, the City Engineer would later admit that she failed to conduct any measurements, study, calculations, or any other evaluation to support her "determination." Higgins Depo. at 84–85 ("Q. And after [the wall] was built, is it your position that made the flooding worse, better? A. Actually, I didn't track it, so I don't have any data or metrics.").

18. Finally, the City's claim that it owned this property was, at the time, based on a 1901 deed to the City from one G.V. Allworden for land to be used as "Laurens Street." *See* **Exhibit K** (March 1, 2021 email from Dana Higgins and attachments; GH Smith_0024). More particularly, in March of 2021—just prior to the City's destruction of the wall—Dana Higgins circulated this deed internally with the message: "The portion of Laurens Street adjacent to the [Constan] property was acquired by deed from G.V. Allworden, dated 8/13/1901 and recorded on 5/15/1905 in Deed Bk. AG at Page 579 and is subject to right-of-way granted to Norfolk Southern

Railroad." Copied on the email chain was Gale Nash, the City's Property Manager, who had presumably pulled the deed.

19. Ms. Higgins, apparently, did not bother to read the deed. Had she done so, she would have discovered that the deed is for a section of Laurens Street beginning at Senate Street and running south to Greene Street, as it exists today in University Hill. The deed has nothing at all to do with the Constan property—a fact that the City has since admitted in this litigation:

> Q. Okay. Now, you were relying on this deed which is – well, let me ask you at the front end. Does this deed deal with the piece of property we're talking about?
>
> A. No.
>
> Q. Okay. So, when you gave this to Ms. Higgins justifying the destruction of the wall, you were wrong?
>
> Mr. Balthazor: Object to the form.
>
> Q. Go ahead.
>
> A. Correct.

Exhibit L (Deposition of Gale Nash at 25).

20. False as well was Ms. Higgins' assertion that this property "is subject to [a] right-of-way granted to Norfolk Southern Railroad." Actually, the railroad acquired its rights in this property by way of a quitclaim deed in 1874 to the Charlotte, Columbia, and Augusta Rail Road Company for $500. *See* **Exhibit M** (1874 CC&A Deed; NS-0023–30). The head surveyor and corporate representative of Norfolk Southern testified in this litigation that Norfolk Southern owns the section of track adjacent to the car wash in fee simple, and that it is not subject to any property rights of the City whatsoever. *See* **Exhibit N** (Deposition of Brad Hart at 78–79).

21. Thus standing upon a litany of falsehoods and errors, the City demanded that Constan remove the wall and allow its own property to be used as a drain field for the City's inadequate infrastructure that it refused to fix, or else the City would remove the wall itself.

Constan Attempts to Negotiate with the City

22. Upon receiving the City Attorney's letter, Mr. Smith contacted Dan Creed once more to see if there was an engineering solution to the dispute. Observing that Ms. Higgins' chief complaint was that the wall prevented access to a drop inlet that she (incorrectly) believed the City owned, Mr. Creed designed a hole in the wall that would have allowed the maximum capacity of water that could be accepted by that inlet to flow through the wall. Creed Depo. at 100. Any more than that, and the City would simply be flooding the car wash property. Mr. Creed undertook this work at significant expense to Mr. Smith, spending 20 hours of work on it and drafting a complete hydraulic report for Ms. Higgins to consider. *Id.*

23. Here again, Ms. Higgins did not trouble herself to consider Mr. Creed's detailed proposal. On February 6, 2020, she emailed Mr. Creed a terse message: "Hi Dan – thank you for the submittal, however it is unacceptable. Please move forward with removing/relocating the wall as requested by our legal group." Ex. G at Plaintiffs Bates 6. Mr. Creed responded and requested clarification: "Dana – is your rejection based on a belief that they contain technical inaccuracies? If so please identify those aspects you believe to be incorrect." *Id.* Ms. Higgins ignored and did not respond to this inquiry.

24. Asked later why she rejected Mr. Creed's proposal, Ms. Higgins claimed that it ought to have included hydrology calculations in addition to the detailed hydraulic calculations that Mr. Creed performed. Higgins Depo. at 85. This was strange because she never asked Mr. Creed to perform any such calculations, and as an experienced hydrologist himself, he did not see

why that would be relevant. Creed Depo. at 68 ("Q. But you don't recall her ever asking for hydrology calculations? A. I don't, and I don't see why they would be relevant. The hydrology calculations would have been calculations of the amount of water or the rate of water coming from upstream.").

25. Ms. Higgins, for her part, also did not conduct any hydrology calculations for this property, or any other calculations for that matter—she simply rejected Mr. Creed's proposal out of hand. Higgins Depo. at 88 ("Q. Okay. It was your hunch, your guess? A. No. No hunch. Calculations. Black and white. Q. But you didn't do calculations? A. No."). And she did so with a complete disregard for the consequences that would follow. *Id.* ("Q. Why not try it? Why not try the hole and see if it made a difference and allow – you would agree with me once the wall is taken out, Mr. Smith's property flooded again, correct? A. I did not keep tabs on it. I don't know.").

The City Demolishes the Wall

26. On March 9, 2021, Dana Higgins arrived at the Constan Car Wash with a contractor to demolish the wall. Observing that the work crew had set up on Norfolk Southern's property, Mr. Smith notified the railroad, which sent a Norfolk Southern police officer named David Hill to the scene. *See* **Exhibit O**, Deposition of David Hill at 26. Upon arriving, Mr. Hill informed Dana Higgins and her crew that they were trespassing on railroad property. *Id.* at 32. Unfazed, Ms. Higgins responded simply, "the wall is coming down." *Id.* at 33. When Mr. Hill asked her what she planned to do if she discovered she was in the wrong, she said "[w]e will pay to rebuild the wall." *Id.* at 28.

27. Having determined that this was a property dispute, Officer Hill gave verbal warnings to the work crew but decided not to intervene further. The City commenced its demolition, cutting into the wall with a metal saw. *Id.* at 29–30. When the saw struck the metal

rebar reinforcing the wall, it sparked a fire on the railroad embankment that burned for approximately ten minutes before it could be extinguished. *Id.* at 32 ("[T]hey went and got some water from the cooler or maybe the carwash, and was able to put it out."). Dust from the demolition was cast upon cars that had just been washed at Constan. *Id.* at 36. It was a chaotic scene.

28. When asked what he would have done if someone other than the City of Columbia had committed those acts on March 9, 2021, Officer Hill said that he would have taken them to jail:

> Q. Let me ask you this, Mr. Hill. If you had gone out to that property that day and someone other than the City of Columbia were cutting a wall that was on railroad property and, you know, caught a railroad embankment on fire and all that, what would you have done in that situation?
>
> A. . . . . I would have obtained everybody's permission who was with that – who was on that crew and escorted them off of Norfolk Southern Railway property. And possibly criminal charges could have been filed at a later date.
>
> Q. Do you think you might have –
>
> A. If every – I'm sorry. If it came down to where they were off the property. If they sat there and wanted to fight about being on that property, they would have been placed in cuffs and walked off that property to jail.

Id. at 37–38.

29. When the dust of the City's demolition settled, it had removed the easternmost portion of the wall in the area of lowest elevation along Gervais Street. *See* **Exhibit P**, Baxter Land Surveying Plan – 1950 Gervais Street (Sept. 2, 2022). More particularly, the City began cutting the wall at 65 feet from the centerline of the railroad and moved east all the way to the point where the wall tied into the railroad embankment. *Id.*; *see* **Exhibit Q**, Deposition of William O. Higgins at 30 (discussing the portion of the wall removed).[3] This was curious because 65 feet from the

[3] Bill Higgins is a real estate attorney who was retained by Plaintiffs to give expert testimony regarding the property rights at issue in this case.

centerline of the railroad is precisely the boundary of Norfolk Southern's property. *Id.*; Ex. M. If you drive past the Constan Car Wash today, you can see the wall just as the City left it.

30. Without the wall in place, the periodic flooding at the car wash resumed. Constan, left with no means to prevent the flooding and the attendant damages that befell the property each time it flooded, and with no ability to make capital improvements necessary to continue operating the car wash, was forced to close in October 2022. When it did, it left over a dozen people—including Mr. Smith—out of a job, and left the City of Columbia without the iconic family business that had occupied 1950 Gervais Street and served Columbians for over 70 years.

31. The effect of the City's actions was to render Plaintiffs' land and improvements unusable for their intended purpose. Plaintiffs retained real estate appraiser Deborah B. Haskell to appraise the damage to Constan's property interests as a result of the City's taking. She found that the City's actions resulted in $4,270,000 of damage to Plaintiffs, and that the land after the taking was usable only for surface parking in the areas not affected by the flooding. *See* **Exhibit R** (July 3, 2024 Valuation of Real Property).[4]

Constan Files Suit

32. Plaintiffs commenced this action on March 22, 2021 asserting claims against the City and its contractor, G.H. Smith Construction, Inc. for trespass, conversion, inverse condemnation, negligence, for violation of S.C. Code Ann. § 5-31-450, for declaratory judgment, and for a temporary injunction. Plaintiffs later dropped the claim for conversion, and on March 16, 2022, the Honorable Alison Lee denied motions to dismiss filed by the Defendants. On December

[4] The City also identified two real estate appraisers as experts in this case. Plaintiffs took those appraisers' depositions on March 24, 2025, and they admitted that the appraisals they performed in late 2022 and early 2023 were not condemnation appraisals and would not be relevant in a condemnation case. In fact, neither of these appraisers was even aware at the time of their depositions that they had been identified by the City as experts in this case.

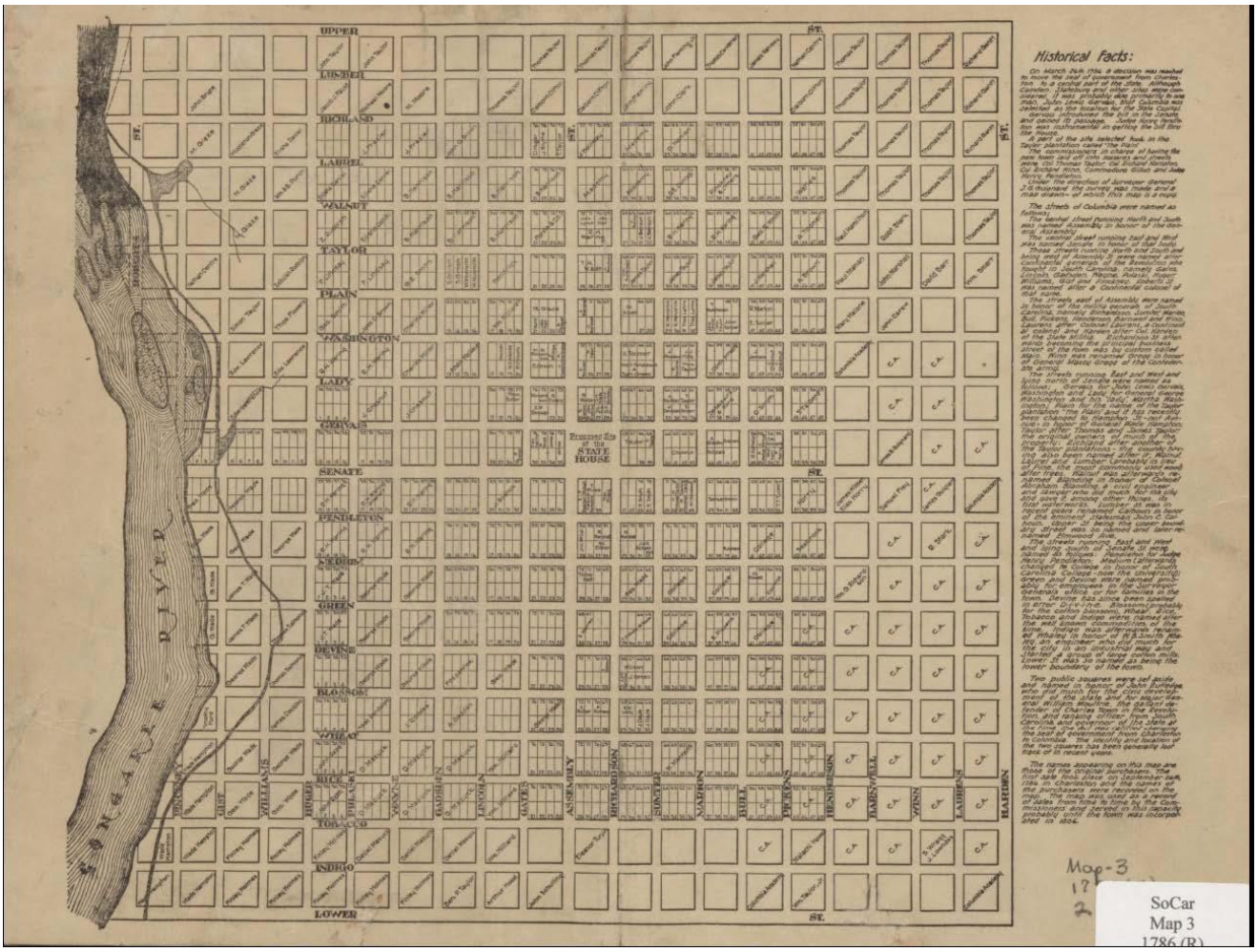
30, 2022, this case was removed from the docket and placed on inactive status by consent of all parties in accordance with Rule 40(j), SCRCP.

33. During the time this case was on inactive status, the parties attempted to negotiate a resolution to this case. Those efforts were unsuccessful, and on October 18, 2023, the Court issued an order restoring this case to the active docket. Defendant G.H. Smith was dismissed from this case by stipulation on October 10, 2024. By order of the Court dated April 21, 2025, this case is currently on the trial roster for June 23, 2025.

Discovery and Property Rights

34. After this case was restored, Plaintiffs conducted discovery on the property rights claimed by the City for the land that once occupied the car wash. At first, the City clung to the 1901 Allworden deed, still oblivious to the fact that it concerns a different piece of property entirely. When Plaintiffs pointed out this fact to the City, and shared the railroad's deed to its property, Plaintiffs thought that would be the end of the matter.

35. Instead, the City responded to Plaintiffs' discovery requests on this subject with a new assertion—the City admitted that the Allworden deed has no bearing on this property, but pivoted and now claimed that the City owns portions of this property as Laurens Street, and that it had always been Laurens Street since the founding of Columbia in 1786. *See* **Exhibit S** (City's August 19, 2024 Discovery Responses). Included in the responses was a map that the City claimed to be from circa 1786 that showed the original layout and plan for the streets of Columbia:



The City's claim was essentially that, if something is shown as a street on this map, it is still a street unless the City closed or transferred ownership of the street. Ex. S at 9–10.

36. The City's claim was odd because, obviously, entire swaths of the original City of Columbia do not follow this grid pattern. Notably, the Wales Garden and Wheeler Hill neighborhoods of Columbia contain many winding streets that are not original to the City—Saluda Avenue, Waccamaw Avenue, Edisto Avenue, Enoree, Wateree, Catawba, Seneca, Congaree—to name a few. When Plaintiffs investigated this matter further, they found that in 1816, the General Assembly had done precisely what the City claimed it had not—transferred the land and closed the streets in large parts of the City.

37. More particularly, the 1816 Appropriations Act of the General Assembly included the following provision:

> XIV. *Be it further enacted*, That the commissioner of the town of Columbia be, and he is hereby, authorized and required to convey to the trustees of the Columbia Academy, all the unsold lots and squares of land lying in the outer town of Columbia, east of Bull-street, south of Senate-street, west of Harden-street, and north of Lower Boundary-street; and also all such lots and squares as include the marsh north of Senate-street, and eastward of the town: And that the streets within the said limits be, and they are hereby, vested in the said trustees, who shall have power to dispose of the same, reserving always the right of way to such persons as now are, or hereafter may become, the owners of lots, squares or portions of land within the said limits.

See **Exhibit T**, David J. McCord, THE STATUTES AT LARGE OF SOUTH CAROLINA, Vol. 6, p. 53 (1839).

38. Subsequent documents and cases confirmed that this legislative act closed the streets in Columbia within the boundaries described and transferred the land to private landholders. Notably, a contested case arose in 1894 when a landholder attempted to erect a structure within what would have been Lady Street if it had not been closed in 1816. *See* **Exhibit U**, *B.B. McCreery v. City of Columbia* (Richland County Common Pleas, decided October 23, 1894). Similar to here, the City claimed that the land was part of original Lady Street and ordered the landowner to remove the structure. *Id.* The landowner sued the City for a writ of prohibition; the Court granted the writ and found that this portion of Lady Street, which the City agreed was part of the "marsh north of Senate-street" identified in the 1816 Act, was closed by the 1816 Act and became private land. *Id.* The Court further found that "the reservation contained in the Act of 1816 is a private right with which the City of Columbia has no concern," referring to the last sentence of the Act which reserved a right-of-way to owners of those lots. *Id.* The Court enjoined the City from taking any further action with respect to the Plaintiff's land. *Id.*

39. This issue arose again many years later when G.V. Allworden—the same Allworden who transferred the land for the southern portion of Laurens Street to the City in 1901—sold another parcel nearby to a private landholder. *See Allworden v. Nelson*, 89 S.C. 368, 71 S.E. 982 (1911). In that case, Allworden sold a lot on what would have been the northern half of Senate Street and east of what is now Gregg Street, and the purchaser would not close on the sale until there was confirmation that this portion of Senate Street was closed by the 1816 Act. *Id.* at 368, 982. The Supreme Court conducted a review of the history of the streets of Columbia and the 1816 Act and found that this portion of Senate Street was indeed closed by the 1816 Act. *Id.* It further found that:

> It appears from the evidence that the lots lying north and south of Senate street were conveyed by the commissioners to the trustees of the Columbia Academy according to the directions of the act, and presumably also all that portion of Senate street lying between the lots so conveyed east of Winn (now Gregg) street, including the lot in controversy, which fronts on Gregg street.

Id. This is important for our purposes because the lots north of Senate Street and east of Gregg Street include the real property at issue in this case. Thus, the *Allworden* case confirms that the car wash property was included in the "marsh north of Senate-street," and that the streets therein—including Laurens Street—were closed by the 1816 Act.

40. If any more evidence were needed of the falsity of the City's property ownership claims in this case, the City produced in this litigation an 1898 report from the City Attorney to the City Council and Mayor of Columbia titled "The Rights of the City of Columbia," which described what land and streets the City owned and how it acquired those properties. *See* **Exhibit V** (March 15, 1898 City Attorney Report; City_Supp_103024_016–70). The report, which was updated in subsequent years, acknowledged that the 1816 Act had closed many of the streets in the City. *Id.* at 19. More telling for our purposes, the report also details how the City acquired

strips of land after 1816 to be used as City streets within the boundaries identified by the 1816 Act—thus acknowledging that those streets had been closed and needed to be acquired or re-acquired by the City. One of those strips of land was purchased from a Samuel Fair in 1855, and included "all that piece or parcel of land, 100 feet in width, being a continuation of Laurens Street, from Washington to Gervais." *Id.* at 21. Another was the 1901 Allworden deed, which conveyed a strip of land to be used as Laurens Street from Senate to Greene. *Id.* at 68–69. Thus, the report shows that the City has deeds for Laurens Street from Washington to Gervais and from Senate to Greene—noticeably absent is any deed for Laurens Street from Gervais to Senate.

41. That, of course, is because there is no Laurens Street between Gervais and Senate. The City's claim otherwise is and has always been a farce, based upon a fundamental misunderstanding and misapprehension of its own property rights and history. Rather than simply acknowledging this fact, the City obliged Plaintiffs to expend a great deal of time and resources in this case disproving something that was never true. The unfortunate result of this for the City is that all of that time and cost is recoverable from the City by law in this case. *See Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 394 752 S.E.2d 269, 279 (2013).

42. The final point of contention over the City's (non-existent) property rights in this case concerns a 1964 City ordinance that granted O. Stanley Smith and his heirs and assigns the right to encroach within a piece of land south of Gervais Street that the City then identified as "unopened Laurens Street." *See* **Exhibit W** (1964 City Ordinance; Plaintiffs Bates 1–2). The ordinance includes a property description of a quadrangle parcel of land that was between Mr. Smith's deeded property and the railroad property, fronting on Gervais Street for 22 feet. *Id.* Within that area of land, the City decreed that Mr. Smith and his heirs had the ability to "build, maintain as presently located, or to relocate buildings, and install storm drainage on Rocky Branch, relocate

the present sewer, and encroach generally on that part of Laurens Street." *Id.* And so they did—the Smith family installed storm drainage for Rocky Branch and constructed part of the car wash building on that property. Since 1964, the property has been deeded through three generations of Smiths, until it was finally deeded to Chip Smith in 2000. *See* **Exhibit X** (January 2000 deeds to O. Stanley Smith, III). During all that time, no one other than the Smiths and Constan used or occupied that property; in fact, Chip Smith paid property taxes on it from 1983 until last year. *See* Smith Depo. at 224.

43. The 1964 ordinance also contained a provision purporting to give the City the right to ask for the land back:

> [I]n the event the area described becomes in conflict with future municipal plans, said property shall upon 30 days notice be returned to the City by O. Stanley Smith, his heirs or assigns, and all encroachments removed and the street restored to its original condition, or to such condition as may be agreeable to the City, by the said O. Stanley Smith, his heirs or assigns, at his own expense.

Id. The City, however, never asked for the land to be "returned," nor did it take any other steps to animate this provision of the 1964 ordinance.

44. For the reasons stated *supra*, the City never owned this land in the first place and therefore lacked the right or ability to place restrictions on it in the manner the 1964 ordinance purported to do. The Smiths, evidently, sought out this ordinance based on the City's claim at the time that this was part of Laurens Street; having obtained the City's agreement to allow them to use it, the Smiths lacked any reason to investigate or challenge the City's assertion. That, however, does not make the land the City's property; and in any event, the right that the City purported to reserve to itself—notably the "return" of the property upon 30 days notice—never came to pass. The ordinance therefore has no bearing on the property rights at issue in this case, except to evidence the fact that the Smiths have been using and occupying this land exclusively since 1964.

LEGAL STANDARD

45. A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Hawkins v. City of Greenville*, 358 S.C. 280, 288, 594 S.E.2d 557, 561 (Ct. App. 2004); *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001); *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998); *see also Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.").

46. Summary judgment is not solely a defensive mechanism. Rule 56 expressly contemplates the availability of summary judgment to a claimant. Rule 56(a), SCRCP. Regardless of which party ultimately is responsible for proof and persuasion, the party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party has met that burden, the nonmoving party must come forward and demonstrate that such an issue does exist. *Id.*

ARGUMENT

47. The South Carolina Constitution provides that "[e]xcept 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. 1 § 13(A). This right is also enshrined in the U.S. Constitution. *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

48. "An inverse condemnation occurs when a government agency commits a taking of private property without exercising its formal powers of eminent domain." *Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 262 (2021) (quoting *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004)). The elements of 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; and (4) the taking has some degree of permanence. *Id.* While the last element continues to be cited by our appellate courts, there is conflict in those decisions about whether it still applies. *See Byrd v. City of Hartsville*, 365 S.C. 650, 657 620 S.E.2d 76, 79 (2005) ("[W]e remove the element 'some degree of permanence,' for it conflicts with the principle that government must compensate for even a temporary taking.") (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987)). To be sure, however, it is the law of this State that "the government must compensate for even a temporary taking." *Frampton*, 406 S.C. at 387, 752 S.E.2d at 275.

49. Plaintiffs do not believe the first element is in question—the City's act of entering on the property on March 9, 2021 and demolishing the wall was most certainly an "affirmative, positive, aggressive act." The City had been warned in legal correspondence prior to taking these acts that it had no authority to remove the wall, and that to do so would be a taking. *See* **Exhibit Y** (March 1, 2021 Letter from Tobias Ward to Clint Shealy). On March 9, 2021, the City showed up in force along with CPD officers and demolished the wall over the active objections of both the landowner and a Norfolk Southern Railway police officer, both of whom informed the City that it was trespassing on Norfolk Southern property. Hill Depo. at 32. In the course of removing the wall, the City cast dust and debris all over cars that had just been washed, and even managed to light the railroad embankment on fire while sawing through the metal rebar in the wall. *Id.* at 36.

One struggles to imagine more affirmative, positive, and aggressive acts than the ones the City committed that day.

50. Nor do Plaintiffs believe that the "public use" element is in question. The City's stated purpose for removing the wall was to drain stormwater from Gervais Street, which it asserted was endangering the safety of motorists. *See* Ex. H. Further, "the physical occupation of private property results in a taking regardless of the public interest the government's action serves." *Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 605, 641 S.E.2d 437, 441 (2007).

51. Plaintiffs are not certain whether the City intends to assert that the taking lacks permanence, but it would be ill-advised to do so—the condition that the City effected on March 9, 2021 persists to this day; in all that time, the City never made good on Ms. Higgins' promise to rebuild the wall if she discovered she was in error. *See* Hill Depo. at 28. In the interim, the car wash business failed, its employees left, and the building was razed after the City informed Mr. Smith that it could no longer provide adequate security for the property and the insurance company cancelled the policy on the property. All of this was a direct result of the City's taking, and all of it evidences the permanency of the City's actions, which cannot now be undone. Even if they could, "the government must compensate for even a temporary taking," *Frampton*, 406 S.C. at 387, 752 S.E.2d at 275, and Plaintiffs' damages have been done during the pendency of this case.

52. Plaintiffs suspect that the only element the City truly intends to contest is whether the City's actions amount to a taking. Here, the cases provide some guidance:

> Although no set formula exists for determining whether property has been "taken" by the government, the relevant jurisprudence does provide significant guideposts. 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, 371 S.C. at 605, 641 S.E.2d at 441. "Stated more specifically, these 'ad hoc, factual inquiries' involve examining the character of the government's action, the economic impact of the action, and the degree to which the action interferes with the owner's investment-backed expectations." *Id.*

53. Importantly, South Carolina law is clear that a compensable taking may arise not only for land that is owned by the condemnee in fee, but also for any other property interest that is affected by the taking. *See S.C. State Highway Dep't v. Hammond*, 238 S.C. 317, 320, 120 S.E.2d 21, 22 (1961) ("The word 'owner' as used in a condemnation statute has been construed to embrace not only the owner of the fee, but a lessee and any other person who has an interest in the property which will be affected by the condemnation."); *see also* S.C. Code Ann. § 28-2-30(6) (defining "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"). Indeed, there are entire inverse condemnation actions of record in this state that were brought only by a lessee. *See, e.g.*, *Gray v. S.C. Dep't of Highways & Pub. Transp.*, 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992), *overruled on other grounds by Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007). The only firm requirement to be a condemnee is that the person "has an interest in the property which will be affected by the condemnation." *Hammond*, 238 S.C. at 320, 120 S.E.2d at 22.

54. Here, there are essentially three different, though closely related, property interests held by Plaintiffs that were affected by the City's taking. The first is the property that Acre Plus, LLC leased from Norfolk Southern—Plaintiffs paid for this lease, and used that land for the same purpose as the other parcels: operating a car wash. Plaintiffs also paid specifically for the ability to construct the wall and tie it into the railroad embankment. The City physically appropriated this

property when it demolished the wall and determined to use Plaintiffs' leasehold as a drain field. The City's actions deprived Plaintiffs of any valuable use of this property and made it impossible to use the property for its intended purpose. That is a taking.

55. The second is the property that Mr. Smith undisputedly owns in fee simple. That land was deeded to him in 2000 by his family and entities owned by his family and he has held and used it ever since for the same purpose as the leasehold—operating a car wash. Ex. X. That purpose was destroyed by the flooding that resulted from the City's demolition of the wall. *See* Creed Depo. at 50–51 (discussing high-water mark of the flooding); *id.* at 98 (after the wall was demolished, it could no longer be expected to mitigate floodwaters entering the property); Ex. R. Simply put, it was impossible for Mr. Smith to use his property as he intended and consistent with his investment-backed expectations once the flooding resumed. That is a taking.

56. The third is property that is the subject of the City's 1964 ordinance. First, for the reasons stated *supra*, the City never owned this property and its attempt in 1964 to assert control over it was *ultra vires*. The City did not pay for this land or condemn it, did not improve or maintain it, and did not follow any of the requirements for a local government to acquire real property. *See* S.C. Code Ann. § 5-7-50. It is telling that Plaintiffs have repeatedly asked the City to prove why it owns any portion of the land at issue in this case, and it has consistently failed to do so. Certainly, the ordinance itself is not a conveyance of land to the City and cannot be offered as such. Absent any such conveyance, the ordinance is a nullity and the City has no property rights applicable to this case.

57. The Smiths, on the other hand, occupied this land exclusively for many years, improved it, maintained it, and put it to a productive use—operating a car wash. Smith Depo. at 224. Mr. Smith paid taxes on it for decades. *Id.* This land was deeded to him along with the other

parcels in 2000, with the chain of title running back two generations. Ex. X. Thus, if anyone can claim ownership of this land, it is Mr. Smith and not the City of Columbia, which has precisely no evidence of title.[5]

58. But, importantly, Mr. Smith need not have fee title to the property to have his interest in it taken from him. He need only "ha[ve] an interest in the property which will be affected by the condemnation." *Hammond*, 238 S.C. at 320, 120 S.E.2d at 22. Of that, there can be no doubt—Mr. Smith used this property for the same purpose as the other parcels: operating a car wash. He and his predecessors in title constructed buildings on it, made other valuable improvements, and devoted their time and resources putting it to a productive, investment-backed use. His use was rendered impossible by the City's actions in removing the wall and flooding the property. That is a taking.

59. Thus, even if the 1964 ordinance were valid, the City's acts still constitute a taking. The ordinance itself provides a remedy for the City to seek the return of the property on 30 days' notice, which it never did. That is no surprise because to "reopen" Laurens Street would require the City to scale a sharp embankment at the back of the property that was almost certainly created when the railroad was constructed in the mid-Nineteenth Century. The City—both then and now—has no use for this property, evidenced by the fact that it never animated the terms of the ordinance to ask for its "return." Having failed to do so, the City has no rights under the ordinance, and it cannot be used as a defense to the taking of Plaintiffs' property interests.

[5] At the very least, and in the absence of evidence that the City of Columbia ever owned this property, Mr. Smith and his predecessors in title will have long ago owned it by adverse possession. *See Taylor v. Heirs of William Taylor*, 419 S.C. 639, 651, 799 S.E.2d 919, 925 (Ct. App. 2017) (providing the elements of adverse possession).

60. As observed *supra*, once the Court determines that there has been a taking in this case, it becomes the province of the jury to determine the value of Plaintiffs' property interests and the amount by which those interests were damaged by the City's taking. *Cobb*, 365 S.C. at 365, 618 S.E.2d at 301. Plaintiffs submit that there is ample evidence in the record to make that determination, and having done so, the Court may submit this matter to the jury for a determination of the just compensation owed to Plaintiffs' for the City's taking.

WHEREFORE having fully set forth their motion, Plaintiffs request that the Court grant summary judgment to Plaintiffs on the issue of the City's liability for inverse condemnation. This motion is based upon the pleadings, the South Carolina Rules of Civil Procedure, a memorandum or memoranda of law to be submitted at or before the hearing on this motion, and any other matters this Court may permit to be presented at the hearing on this matter.

[*Signature on following page*]

Respectfully submitted,

s/Andrew R. Hand

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