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Property Law

I. COURT ADDRESSES TWO EMINENT DOMAIN ISSUES

City of North Charleston v. Claxton[1] raises two interesting questions regarding the law of eminent domain. The first deals with the use of comparable sales as evidence of the value of condemned land; the second is whether the value of condemned land was influenced by being within the scope of a public project. The South Carolina Court of Appeals affirmed a jury award of $79,500 in compensation for the taking of a lot.[2] In so holding, the court followed South Carolina precedent by allowing evidence of comparable sales in valuing the condemned property and also by finding the Scope of the Project Rule to be inapplicable.[3]

In 1985 Centre Point Associates announced plans for the Centre Point development, to be built on approximately 394 acres at the intersection of Interstate 26 and the Mark Clark Expressway in North Charleston. The developer deeded 32 of the original 394 acres to the City of North Charleston. The City planned to construct a development including the North Charleston Coliseum on the site.[4] The developer planned to use the remaining land for the Centre Point Development.[5]

In February 1986 the Army Corps of Engineers issued a cease and desist order stopping work on the private development's site until it determined the amount of wetlands contained in the tract.[6] Ultimately, the Corps found 194 acres of wetlands upon which nothing could be built. The Corps did not classify the property conveyed to the City wetlands. The Corps finally agreed that the development could continue if the City's project was not built on the thirty-two acres donated by Centre Point.[7]

The developer negotiated an agreement with the City in which the City agreed to convey back the original thirty-two acres in exchange for another thirty-two acre tract within the development's site. However, the developer owned only twenty-nine of the thirty-two acres that it agreed to convey to the

1. ___ S.C.___, 431 S.E.2d 610 (Ct. App. 1993), *cert. denied*, (1994).
2. *Id.* at ___, 431 S.E.2d at 611.
3. *Id.* at ___, 431 S.E.2d at 612.
4. Brief of Appellant at 9.
5. *Claxton*, ___ S.C. at ___, 431 S.E.2d at 611.
6. *Id.* at ___, 431 S.E.2d at 612.
7. *Id.* at ___, 431 S.E.2d at 612.

City.[8] Therefore, the parties agreed that the developer would attempt to purchase nine lots adjacent to the twenty-nine acre tract to complete the thirty-two acre tract. These lots included the Claxton lot. If the developer could not purchase the land, the City would condemn the land at the developer's expense.[9] The developer purchased two of the nine lots; one from Robert Kinard for $65,000 and another from Edward Judy for $80,000.[10] The developer then offered $45,000 for the Claxton lot, but the Claxtons refused.[11] Subsequently, the City condemned the Claxton lot in December 1989.[12]

The Claxtons requested a jury trial to determine the property's value. At trial, the Claxtons' expert witness used the Kinard and Judy sales to value the property at $90,000. The City's expert set the value on the date of taking at $54,000. However, the City's expert said that the City's plans increased the lot's value to $72,500.[13] The jury valued the land at $79,500.[14]

Among other grounds, on appeal the City argued that the court should not have admitted the Kinard and Judy sales to support the expert witness' valuation of the Claxton lot.[15] It argued that the sales were not comparable because they were made under compulsion.[16] The City also argued that the jury should not have considered the increase in the lot's value due to the City's development because of the Scope of the Project Rule.[17] The court of appeals found sufficient evidence to support the jury's finding that the sales were voluntary.[18] The court stated that the general rule in South Carolina allows experts to base their opinions about property value on comparable sales in the vicinity within a reasonable time of the condemnation hearing.[19] Whether the Kinard and Judy lots were sold under compulsion was a question of fact for the jury's determination.[20] Therefore, the jury's finding stands unless "there is no evidence which reasonably supports" the finding.[21]

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8. *Id.* at ___, 431 S.E.2d at 612.
9. Brief of Appellant at 7.
10. *Claxton*, ___ S.C. at ___, 431 S.E.2d at 612.
11. Brief of Respondent at 1.
12. *Id.* at 2.
13. *Claxton*, ___ S.C. at ___, 431 S.E.2d at 612.
14. *Id.* at ___, 431 S.E.2d at 611.
15. *Id.* at ___, 431 S.E.2d at 612.
16. *Id.* at ___, 431 S.E.2d at 612.
17. *Id.* at ___, 431 S.E.2d at 612.
18. *Claxton*, ___ S.C. at ___, 431 S.E.2d at 612.
19. *Id.* at ___, 431 S.E.2d at 612 (citing S.C. CODE ANN. § 28-2-340(A) (5) (Law. Co-op 1991)).
20. *Id.* at ___, 431 S.E.2d at 612 (citing Duke Power Co. v. Opperman, 266 S.C. 99, 221 S.E.2d 782 (1976) (holding that the sufficiency of the foundation of an expert's opinion is a jury question)).
21. *Id.* at ___, 431 S.E.2d at 612 (citing Townes Assocs., Ltd. v. City of Greenville, 266

The court held that the record disclosed sufficient evidence as to the buyer's and sellers' voluntary participation in the sales.[22] Regarding the sales, the trial judge instructed the jury that "'[f]air market value is the price a willing buyer would pay and a willing seller would accept in the ordinary course of business *when neither person is being compelled to act.*'"[23] Under this instruction, the jury found that the lots were not purchased under compulsion and that the sales were comparable.

The court also refused to adopt formally the Scope of the Project Rule as the City had urged.[24] The City contended that its plans increased the value of the property. The City argued that the Scope of the Project Rule prevented consideration of this increase in the value of condemned land originally contemplated to be within the project.

In response, the court discussed *South Carolina State Highway Department v. Carodale Associates*.[25] In that case, the state supreme court made it clear that it was unsettled that the Scope of the Project rule applied in South Carolina.[26] The court also acknowledged a statute that prevents recovering an increase in value of condemned land due to the placement of a public works project on the land.[27] The court found that the trial judge correctly instructed the jury on this statute and that sufficient evidence existed to support the jury's finding.[28]

The majority of jurisdictions allows comparable sales to form the basis of an opinion as to the value of condemned property.[29] South Carolina followed the majority on this point in *South Carolina State Highway Department v. Estate of League*.[30] Although not mentioned in *League*, South Carolina also

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S.C. 81, 221 S.E.2d 773 (1976)).

22. *Id.* at ___, 431 S.E.2d at 612.

23. *Claxton*, ___ S.C. at ___, 431 S.E.2d at 612 (quoting trial judge).

24. *Id.* at ___, 431 S.E.2d at 613.

25. 268 S.C. 556, 235 S.E.2d 127 (1977).

26. *Id.* at 562, 235 S.E.2d at 129.

27. *Claxton*, ___ S.C. at ___, 431 S.E.2d at 613 (citing S.C. CODE ANN. § 28-2-350 (Law. Co-op. 1991)).

28. *Id.* at ___, 431 S.E.2d at 613.

29. 4 JULIUS L. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 12.311[3] (3d ed. 1985).

30. 251 S.C. 368, 162 S.E.2d 532 (1968). In that case the court said:

> While no arbitrary limits can be laid down, it must appear that the location, usability, and character of the other land was sufficiently similar to the land to be valued as to reasonably indicate that the two tracts were comparable in value; and the sale of the other land must have been sufficiently close in point of time and under such conditions as to represent a true test of market value at the time of the acquisition of the property to be valued.

Id. at 372, 162 S.E.2d at 533 (citations omitted).

holds that comparable sales must be voluntary; sales made under compulsion are not admissible as comparable sales for valuation purposes.[31]

Generally, other jurisdictions have held that the compulsion must be of some legal nature; economic compulsion alone does not suffice to disqualify a sale from being considered comparable.[32] These courts have found several types of sales to be forced or compelled.[33] For instance, a federal appellate court listed sales such as foreclosures, sales under a deed of trust, and sales at auction or attachment as examples of forced sales.[34]

Generally, courts have considered sales to parties having the power of eminent domain inadmissible forced sales.[35] For example, in *Gomez Leon v. State*,[36] the Texas Supreme Court held a sale to a university to be forced because the university had the power of eminent domain.[37] The court said that the element of compulsion in such a sale resulted from the underlying threat of condemnation.[38] The idea is that the seller knows that the buyer can take the land so the seller may as well sell.

Similarly, one commentator has written that a purchaser having the power to take property may so impact the terms of the sale that no voluntary sale can exist.[39] Additionally, such sales are inadmissible because they represent a

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31. South Carolina State Highway Dep't v. Hines, 234 S.C. 254, 258, 107 S.E.2d 643, 645 (1959) (stating that "the price realized from *voluntary* sales of similar land in the vicinity within a reasonable time" is admissible) (emphasis added).

More broadly, the South Carolina Supreme Court has held that fair market value depends partly upon a voluntary sale. In *Housing Authority of Charleston v. Olasov*, 282 S.C. 603, 320 S.E.2d 478 (Ct. App. 1984), the court defined fair market value as ". . . the price which a willing buyer will pay a willing seller, *neither being under compulsion to buy or sell* and both being fully informed of all uses to which the property is adopted and for which it is capable of being used." *Id.* at 608, 320 S.E.2d at 481 (citations omitted) (emphasis added).

32. *See* 5 JULIUS A. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 21.32 (3d ed. rev. 1993). North Charleston quoted the same section in its brief to support the proposition that economic compulsion suffices to disqualify a sale as comparable. Brief of Appellant at 18. However, the treatise makes clear that this is not the majority rule.

The federal courts also follow the rule that economic compulsion alone is insufficient. *See* United States v. Certain Land in City of Ft. Worth, 414 F.2d 1029 (5th Cir. 1969).

33. *See* District of Columbia Redevelopment Land Agency v. 61 Parcels of Land, 235 F.2d 864, 865 (D.C. Cir. 1956) (quoted in JACQUES B. GELIN & DAVID W. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN § 4.2 (1982)).

34. *Id.*

35. *See* Fred M. Lange, *Advantages and Pitfalls of Appraisal Techniques, in* NINTH INSTITUTE ON EMINENT DOMAIN 83, 93 (1969) ("[A] sale to some entity having the power of eminent domain does not meet the test of willing buyer and willing seller and is inadmissable in evidence for any purpose."); I.R.C. § 1033(g) (1988) (recognizing sales made under threat of condemnation as involuntary conversions).

36. 426 S.W.2d 562 (Tex. 1968).

37. *Id.* at 565.

38. *Id.* (citing State v. Curtis, 361 S.W.2d 448 (Tex. Civ. App. 1962)).

39. 1 LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 147 (2d ed.

compromise that "furnishes no true indication of the price at which the property could be sold in the open market to a 'willing buyer.'"[40] Interestingly, these compromises can benefit the seller as well as the buyer.[41]

While South Carolina apparently adheres to this general rule,[42] it also long has recognized an exception to the rule not mentioned in Claxton: Courts admit evidence of prior purchases by the condemnor to set the value of condemned land if the condemnor was the only purchaser in a general neighborhood in the recent past.[43]

In light of the foregoing discussion, the Kinard and Judy sales might have been forced sales. Although the developer did not have the power to condemn land, as did the university in the *Leon* case, it acted on behalf of the City — an entity that clearly possessed the power of condemnation. The landowners in the area knew of the development plans and the agreement between the City and the developer. Conceivably, the landowners could have believed that the City would condemn their land if they refused to sell to the developer. Under the general rule, such an underlying threat of condemnation would likely result in the sales being inadmissable because they arguably were made under compulsion. In application, this rule leaves little guidance for the finder of fact in valuing land sold under threat of condemnation.

Although the court did not address it in *Claxton*, South Carolina's exception may allow the sales to be comparable. Under the agreement with the City, the developer arguably acted as the condemnor. Also, the developer was the major purchaser of land in the vicinity for several years. This exception might have allowed admittance of the Kinard and Judy sales as comparable sales to guide the finder of fact in valuing the land.

A related question concerns the application of the Scope of the Project Rule to the Claxton condemnation. This issue concerns whether the Claxtons can recover any increase in the land's value attributable to the project for which the land was condemned.

Generally, the rule's applicability depends upon whether the land was within the original condemnation scheme.[44] If the land is within the original scope of the project, the recovery may not reflect any change in the land's

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1953).

40. *Id.*

41. *Id.* ("[T]he condemnor may pay more in order to avoid the expense and uncertainty of the condemnation proceeding, while the seller may accept less in order to avoid the same or similar burdens.").

42. *See supra* note 26 and accompanying text.

43. Charleston & W. Carolina Ry. v. Spartanburg Bonded Warehouse, Inc., 151 S.C. 542, 149 S.E. 236 (1929).

44. *See Sackman, supra* note 29, § 12B.17[8][b].

value caused by the condemnation project.[45] Otherwise, the owner's recovery should reflect any change in the land's value.[46]

The United States Supreme Court has discussed this rule in two cases. In *United States v. Miller*[47] the Court stated that the test is whether the "lands were probably within the scope of the project from the time the Government was committed to it."[48] In *Miller* the Court found that land condemned to relocate a railroad was within the original scope of the condemnation scheme.[49] Since the land was within the original scope, the owner could not recover any change in the property's value caused by the project.[50]

The Court also discussed the rule in *United States v. Reynolds*.[51] In addition to holding that the rule's applicability was a question for the court,[52] the opinion includes several instructive comments about the rule. First, the Court tied the rule to the constitutional requirement of just compensation; regarding land within the original scope, the Court stated "that to permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to the 'just compensation' that the Constitution requires."[53] The Court also said that the change in value of condemned land not within the original scope should be considered because "fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking."[54]

South Carolina courts have not yet had an opportunity to adopt the Scope of the Project Rule. However, the South Carolina Supreme Court discussed the rule very briefly in *Carodale*. In that case, the State Highway Department condemned 0.47 acres of land of an exit ramp on Interstate 77. Although the Board of Condemnation valued the land at $14,000, a jury awarded the landowner $117,000 in compensation. The department appealed and argued that the scope of the project rule prevented the landowner from realizing any increase in the land's value because it was within the original scope of the

45. *See id.*

46. *Id.* § 12.B17[4] ("[A] parcel involved in the supplemental taking is entitled to the benefit of any enhancement in value which resulted from the original taking.") (footnote omitted).

47. 317 U.S. 369 (1943).

48. *Id.* at 377.

49. *Id.*

50. *See id.*

51. 397 U.S. 14 (1970).

52. *Id.* at 20.

53. *Id.* at 16 (citing United States v. Virginia Elec. & Power Co., 365 U.S. 624, 635-36 (1901)).

54. *Id.* at 17 (citing United States V. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) and Boom Co. v. Patterson, 98 U.S. 403 (1878)).

project.[55] After remanding the case on other grounds, the court discussed the rule. It held that the rule did not apply to this situation because, unlike *Reynolds*, there was no bifurcated condemnation during which the project increased the land's value.[56]

Reading *Carodale* as consistent with the instructions given in *Reynolds*, the South Carolina Supreme Court seems to acknowledge a second type of situation to which the Scope of the Project Rule does not apply. The situation is one in which either there is no two-stage condemnation or the change in the land's value is attributable to something other than the project.[57] In such a situation, *Carodale* implies that the proper measure of compensation is the value at the time of the taking and not the value at the time the government commits to the project.[58] This reading of *Carodale* is consistent with *Reynolds* because *Reynolds* focused on changes in the value of condemned land attributable to the project and not attributable to other influences.[59]

For clarification of the effect of the Scope of the Project Rule, consider the following condemnation situations. First, a development is completed and, unexpectedly, adjacent land is condemned to expand the project. Because the later acquired land was not within the original scope of the project, the rule does not apply; the value of the later acquired land must reflect the change caused by the development. Second, assume a situation in which either the condemnation is completed in one stage or a change in value is caused by something other than the project. *Carodale* implies that the rule does not apply in such a situation and the court will value the land at the time of the taking.[60] Finally, assume a well-defined development that is to be completed in two stages. The rule applies in this situation, and the value of the land condemned in the second stage may not reflect any change caused by the project.

Several policy considerations support the Scope of the Project Rule. For example, by preventing the influence of the project from changing the value of land within the project's original scope, the rule assures just compensation for owners of condemned land. The compensation is just because land within the original scope could have be taken during the original condemnation phase at its value at that time. By preventing the compensation from reflecting the influence of the project, the rule encourages the condemnor to take only the land necessary at the initial stage of the project.

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55. *Carodale*, 268 S.C. at 562-63, 235 S.E.2d at 129.

56. *Id.* at 562, 235 S.E.2d at 129.

57. *See* SACKMAN, *supra* note 29, § 12B.17[8][d] (discussing the effect of changes in value attributed to influences other than the project for which the land is being condemned).

58. *See Carodale*, 268 S.C. at 562, 235 S.E.2d at 129.

59. *See Reynolds*, 397 U.S. at 16.

60. *See Carodale*, 268 S.C. at 562, 235 S.E.2d at 129.

Moreover, the condemnor spends less tax money in the initial stages of land acquisition. This may be important in projects with problematic funding initially. Also, owners of land to be acquired later get to keep their property until it actually is needed. Due to the drastic nature of a taking, this policy consideration may be the most important.

Although South Carolina courts have not adopted the Scope of the Project Rule, section 28-2-350 codifies a provision similar to the rule.[61] This section states that the "award of compensation may not be increased by reason of any increases in the value of the property resulting from the placement of a public works project on it."[62]

Although *Claxton* is the only case to cite this provision, the statute's language suggests that it functions as a codified Scope of the Project Rule. At trial, the judge instructed the jury on the operation of this statute.[63] Although the City argued that the project influenced the amount awarded by the jury, the court of appeals ultimately found sufficient evidence to support the award.[64] After examining the relevant South Carolina law, the court of appeals' holding seems justified.

John W. Davidson

II. COURT DEFINES POWER OF RELEASE FOR FEE SIMPLE DETERMINABLE

South Carolina Department of Parks, Recreation, & Tourism v. Brookgreen Gardens[1] addresses the transferability of future interests in land. Consistent with earlier holdings, the South Carolina Court held that one can convert a fee simple determinable into a fee simple absolute by releasing the accompanying future interest (a possibility of reverter).[2] Furthermore, the court held that any individual entitled to the estate upon violation of the

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61. S.C. CODE ANN. § 28-2-350 (Law. Co-op. 1991).

62. *Id.*

63. *Claxton*, ___S.C. at __, 431 S.E.2d at 613. The judge charged the jury as follows:

> The value given to the subject property before the taking on December 11, 1989, can not [sic] contain any enhancement or increases in value attributable to the project if the subject property is probably within the scope of the project from the time the city was committed to it. Likewise, the value given the subject property can not [sic] be decreased by anything attributable to the project.
>
> Now, when I refer to the project, I refer to the coliseum, the civic center, placed and designated on the map where it is going to be placed.

Id. at ___, 431 S.E.2d at 613.

64. *Id.* at ___, 431 S.E.2d at 613.

1. ___ S.C. ___, 424 S.E.2d 465 (1992).

2. *Id.* at ___, 424 S.E.2d at 467 (citing Purvis v. McElveen, 234 S.C. 94, 106 S.E.2d 913 (1959)).

condition defining the fee simple determinable can execute the release.[3] Also, the court reaffirmed the rule that the legal description in a deed governs conflicting derivation information.[4]

In this case the parties did not dispute the relevant facts.[5] Archer and Anna Huntington formed Brookgreen Gardens, the respondent, as an eleemosynary corporation in 1931. The Huntingtons created Brookgreen as "a Society for Southeastern Flora and Fauna."[6] Between 1938 and 1941 Archer executed 4 land grants to Brookgreen, each including the following restricting language:

> TO HAVE AND TO HOLD all and singular the premises above mentioned unto the said BROOKGREEN GARDENS, A SOCIETY FOR SOUTHEASTERN FLORA AND FAUNA and to its successors but not to its assigns, upon the terms, covenants and conditions following, to wit: That the premises herein granted are to be used solely for the corporate purposes of said BROOKGREEN GARDENS . . . and maintained in a wild state for the preservation, protection and propagation of wild flora and fauna, and when the same shall cease to be used for such purposes or so maintained, said premises shall immediately revert to the grantors or their heirs. The grantors, or their heirs, upon breach of said condition shall be entitled to enter upon and take possession of said premises in the same manner as if this conveyance had not been made.[7]

In 1955 Archer Huntington died leaving his wife, Anna, as his sole heir.[8] Five years later Brookgreen leased a portion of its land to the state for the creation of Huntington Beach State Park.[9] Soon after the lease's execution, Anna Huntington released "'all rights she had [should the condition be broken] which might then exist or arise in favor of herself individually or as the sole heir of her husband.'"[10]

Following Hurricane Hugo, the Department of Parks, Recreation, and Tourism (PRT) sought Brookgreen's approval for reconstruction and

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3. *See id.* at ___, 424 S.E.2d at 467 (citing *Purvis*; Burnett v. Snoddy, 199 S.C. 399, 19 S.E.2d 904 (1942); 28 AM. JR. 2D *Estates* § 185 (1966)).

4. *See id.* at ___, 424 S.E.2d at 468.

5. *Id.* at ___, 424 S.E.2d at 465.

6. *Brookgreen*, ___ S.C. at ___, 424 S.E.2d at 466.

7. Brief of Petitioner at 2-3.

8. *Brookgreen*, ___ S.C. at ___, 424 S.E.2d at 466.

9. *Id.* at ___, 424 S.E.2d at 466.

10. *Id.* at ___, 424 S.E.2d at 466. Even though Anna Huntington was a citizen of Connecticut, the court applied South Carolina law because "'[t]he law of the situs would be applied to determine whether a conveyance transfers an interest in land and the nature of the interest transferred.'" *Id.* at ___, 424 S.E.2d at 468 (alteration in original) (quoting RESTATEMENT (SECOND) OF CONFLICTS § 223(1) (1971)).

improvement of its Huntington Beach State Park facilities.[11] Fearing that if Anna's release were ineffective, such expansion may violate the conditions of the original Brookgreen grant and result in defeasance, both parties asked the court to conclude "[w]hether the delivery of the Deed of Real Estate and Release, signed by Anna Hyatt Huntington, converted Brookgreen's estate in Huntington Beach into a fee simple absolute estate?"[12]

The court first determined the type of present estate the original grants created. The grant's language clearly indicates either a fee simple determinable or a fee simple subject to condition subsequent. "[F]unctional equivalents,"[13] both estates grant the fee provisionally, contingent upon the nonoccurrence of a specified event. The significant distinction between the two is their accompanying future interests:

> [T]he possibility of reverter [that follows the fee simple determinable] automatically becomes a present estate in the grantor in fee simple, without any election on the part of the grantor, on the occurrence of the event specified in the instrument of conveyance. But a right of entry for condition broken [following a fee simple subject to condition subsequent] is a power to terminate the granted estate for breach of the condition and until that power is properly exercised the grantee's estate continues despite the breach.[14]

This distinction's importance is that apparently none of the parties objected to the state's proposal to improve Huntington Beach State Park, even if such expansion violated the original grant.[15] Thus, if the court classified the grant as a fee simple subject to condition subsequent, Anna could opt not to exercise the power to regain the fee upon breach. However, if the grant were a fee simple determinable, the defeasance would occur by operation of law.[16]

Generally, the grant's semantics govern the determination of whether the grant is a fee simple determinable or a fee simple subject to condition subsequent. For example, words such as "while," "during," "until," and "so long as" indicate a fee simple determinable, and "upon condition that," "provided that," "but if," and "if it happen that" suggest the creation of a fee

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11. *Id.* at ___, 424 S.E.2d at 466.

12. *Id.* at ___, 424 S.E.2d at 466.

13. CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY § 5 (2d ed. 1988) (footnote omitted).

14. *Id.*

15. Nothing indicates consultation with Archer Huntington's heirs at law.

16. Defeasance would not occur, however, if this right were waived properly and released prior to the breach. E.S.O., Annotation, *Release of Possibility of Reverter*, 38 A.L.R. 1111, 1111-12 (1925)[hereinafter *Release*].

simple subject to condition subsequent.[17] . Based on the language of the Brookgreen grant, the court held that Archer granted a fee simple determinable, retaining a possibility of reverter in himself: "Archer M. Huntington's original intent was for a possibility of reverter to arise, this interpretation stems from the use of 'said premises shall immediately revert to the grantors or their heirs,' in the habendum clauses."[18]

Having concluded that Archer granted a fee simple determinable where the fee upon breach immediately would return to the original grantor, the court cursorily addressed the validity of Anna's release:

> A possibility of reverter has been held in South Carolina as non-transferable by will to a non heir, or by inter vivos alienation to a third party; however, it may be released to the party holding the fee simple determinable. Because Anna Hyatt Huntington was the sole heir of Archer M. Huntington, any possibility of reverter rights would belong to her upon the death of Archer M. Huntington. In June 1960, Anna Hyatt Huntington executed and delivered a Deed of Real Estate, and Release, which acted to release her possibility of reverter to Brookgreen Gardens [and to convert Brookgreen's fee simple determinable into a fee simple absolute].[19]

Although its conclusion is consistent with prior holdings, the court fails to address a crucial step in its analysis[20] - how did Anna receive the possibility of reverter retained by Archer if possibilities of reverter are not transferable in South Carolina?

While one could read the court's holding as expanding the transferability of possibilities of reverter, precedent permits a narrower reading. Because contingent future interests "were thought of as possibilities of an estate or mere expectancies rather than as estates,"[21] they traditionally are inalienable.[22] The *Brookgreen* court cited *Purvis v. McElveen*[23] as holding that possibilities of reverter are "non-transferable [sic] by will to a non heir [sic], or by inter vivos alienation to a third party."[24] According to *Purvis*, a possibility of reverter "is not an estate, but a mere possibility of acquiring

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17. MOYNIHAN, *supra* note 13, at § 6.

18. South Carolina Dep't of Parks, Recreation, & Tourism v. Brookgreen Gardens, ___ S.C. ___, ___, 424 S.E.2d 465, 467 (1992).

19. *Id.* at ___, 424 S.E.2d at 467 (citing County of Abbeville v. Knox, 267 S.C. 38, 225 S.E.2d 863 (1976); Purvis v. McElveen, 234 S.C. 94, 106 S.E.2d 913 (1959); Burnett v. Snoddy, 199 S.C. 399, 19 S.E.2d 904 (1942); 28 AM. JUR. 2D *Estates* § 185 (1966)).

20. The parties' briefs fail also to address this issue explicitly. *See* Brief of Petitioner at 8: Brief of Respondent at 9.

21. MOYNIHAN, *supra* note 13, at § 7.

22. *See id.*

23. 234 S.C. 94, 106 S.E.2d 913 (1959).

24. *Brookgreen*, ___ S.C. at ___, 424 S.E.2d at 467.

one. It cannot be the subject of devise or inheritance. Nor can it be conveyed."[25]

This inalienability leaves the question of what happens to the fee when the condition defining a fee simple determinable is breached after the grantor's death. *Purvis* addresses this issue directly:

> Because the grant of a fee simple determinable . . . has left nothing in the grantor that can be the subject of devise or inheritance, the whole estate will, upon the happening of the event of defeasance, pass, if the grantor be then dead, not to those who were his heirs at the time of his death, but to those who answer to the description of his heirs at the time of the termination of the estate granted.[26]

This rule of delayed qualification in the class of heirs suggests that the possibility of reverter does not actually belong to anyone until the breach occurs. Prior to the breach, a threat of defeasance limiting the fee's holder exists. Logically, Anna may not have owned enough of a property right to release.

Given this rule, had the condition contained in the Huntington-Brookgreen conveyance been broken after Archer's death, the fee simple would return to Anna, his only heir at breach. Equally, had the condition been broken after Anna's death, she would not have been an heir. Thus, Brookgreen could have deliberately breached the condition in 1960, causing a defeasance in favor of Archer's only heir Anna. Then, Anna would have had a fee simple absolute and could have deeded the property to Brookgreen in any way that she wished.

While a reconveyance would accomplish the parties' objectives, a release is preferable because of the inconvenience and uncertainty inherent in staging a breach sufficient to trigger defeasance. A release automatically transforms the estate into a fee simple absolute.[27] Who then can release a possibility of

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25. *Purvis*, 234 S.C. at 99, 106 S.E.2d at 916 (citing Vaughn v. Langford, 81 S.C. 282, 62 S.E. 316 (1908); Blount v. Walker, 31 S.C. 13, 9 S.E. 804 (1889); Pearse V. Killian, 16 S.C. Eq. (McMul. Eq.) 231 (1841) (per curiam); 2 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY § 314 (3d ed. 1939); P.M.D., Annotation, *Inheritable - Quality of Possibility of Reverter*, 77 A.L.R. 344 (1932)).

26. *Id.* at 100, 106 S.E.2d at 916 (citing Waller v. Waller, 220 S.C. 212, 66 S.E.2d 876 (1951); *Blount*, 31 S.C. at 13, 9 S.E. at 804).

27. *Release*, *supra* note 16 at 1111. This annotation and several cases discussed later address possibilities of reverter resulting from a grant of a fee simple conditional, rather than a fee simple determinable. A possibility of reverter follows both estates. "To A and the heirs of his body" creates a fee simple conditional. Because the condition governing a fee simple conditional is always that the grantee have children, defeasance could only occur upon the grantoree's death, the first instant in which no children can be born. Other than these differences, a fee simple conditional and a fee simple determinable operate alike, and therefore, case law on one applies equally to the other. *Cf. Purvis*, 234 S.C. at 100-01, 106 S.E.2d at 916.

reverter? If the possibility of reverter does not belong to anyone until defeasance (or perhaps belongs to a class, whose members are unknowable until defeasance), how are those individuals with the right to release identified?

Although these questions are critical to determinating the release's validity, the *Brookgreen* court failed to address them specifically. Instead the court cited *Purvis* for the proposition that "[b]ecause Anna Hyatt Huntington was the sole heir of Archer M. Huntington, any possibility of reverter rights would belong to her upon the death of Archer M. Huntington."[28] Addressing release, *Purvis* cites earlier cases for the rule "that he who would be entitled to the estate if the fee conditional should presently determine might, *in praesenti*, but not by will, release it to the tenant of the conditional fee so as to make his estate an absolute fee simple."[29] Alone, this statement may mean that only the original grantor can release a possibility of reverter. However, an examination of the cases proves that the statement indeed does apply to anyone entitled to the estate upon breach of the condition.

In *Pearse* John granted Sarah a fee simple conditional, and consequently "there was in the donor . . . a right or possibility of reverter, which he transmitted to his heirs."[30] Furthermore,

> Samuel Pearse now answers the description of heir of his father [John, the original grantor] and would have the right to the estate, if the fee simple conditional were now to determine. And having that right, though he could neither convey nor devise it, I think he may release it to the tenant of fee conditional [Sarah], so as to make her estate an absolute fee simple.[31]

In dictum *Vaughan* suggests that "a release could not be made effective by will, for the reason that a will could have no legal effect until the death of the testator; and at the moment of death the possibility of reverter passes from the testator and beyond his control to his heir."[32] Applying these rules, apparently Anna could release the possibility of reverter as Archer's sole heir and recipient of the fee had the condition been broken.

In conclusion, South Carolina law continues to permit heirs to release a possibility of reverter and free the estate from its limiting condition. The *Brookgreen* court reaffirmed the nontransferability rule; an heir still cannot receive inter vivos a possibility of reverter and likewise cannot transfer it inter

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28. *Brookgreen*, ___ S.C. at ___, 424 S.E.2d at 467.

29. *Purvis*, 234 S.C. at 99, 106 S.E.2d at 916 (citing *Vaughan*, 81 S.C. 282, 62 S.E. 316; *Pearse*, 16 S.C. Eq. (McMul, Eq.) 231).

30. *Pearse*, 16 S.C. Eq. (McMul. Eq.) at 232.

31. *Id.*

32. *Vaughan*, 81 S.C. at 285, 62 S.E. at 317.

vivos. The right to release remains only a narrow exception to that general rule.

Leigh Ammons Meese

III. ATTEMPTS TO LIMIT SOME DEDICATIONS FAIL

In *Timberlake Plantation Co. v. County of Lexington*[1] the South Carolina Supreme Court held that a developer who dedicated roads within a development to public maintenance and right-of-way could not retain the right to deny a cable television company access to the development's rights-of-way.[2] In its decision, the court considered the nature of the dedicated land and the dedicator's attempt to control future use of the dedicated areas.

Timberlake Plantation Company (Timberlake) developed a residential community on Lake Murray in Lexington County.[3] On May 4, 1987, Timberlake contracted with Star Cable Associates (Star), giving Star an exclusive right to provide cable television service throughout the Timberlake residential development. Timberlake would not allow any other company or person to supply cable or satellite service in the development for the term of the agreement.[4] In August 1988 Timberlake filed a final plat with the Lexington County Register of Mesne Conveyance that dedicated certain roads in the Timberlake Plantation for public maintenance. The plat for the roads contained the following language:

> . . . Timberlake Plantation Company . . . dedicates all roads and associated storm drainage for public maintenance. . . . Furthermore, Timberlake Plantation Company, as owner of the property shown and described hereon, reserves unto itself certain rights as to any encroachment into the established easements and rights-of-way above. Any such encroachment of easements and rights-of-way will require prior written recorded approval of Timberlake Plantation Company or its assignee, Timberlake Plantation Property Owners' Association, Inc.[5]

In November 1988 Columbia Cable T.V. (CCTV) obtained encroachment permits from Lexington County to lay cable along public easements in Timberlake Plantation. Timberlake did not consent to CCTV's planned construction and sought to enjoin CCTV from laying cable.[6]

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1. ___ S.C. ___, 431 S.E.2d 573 (1993).
2. *Id.* at ___, 431 S.E.2d at 576.
3. *Id.* at ___, 431 S.E.2d at 574.
4. *Id.* at ___, 431 S.E.2d at 574.
5. *Id.* at ___, 431 S.E.2d at 574.
6. *Timberlake*, ___ S.C. at ___, 431 S.E.2d at 574.

The trial court ruled for Timberlake and enjoined CCTV from entering Timberlake Plantation to provide cable service. They found that the "limited dedication of roads and drainage systems 'for maintenance only' did not create public easements that Lexington County had authority to authorize a third party to use, enter upon, or occupy."[7] The court of appeals reversed, holding that the Star-Timberlake exclusive agreement violated the Federal Communications Policy Act's goal of encouraging competition.[8] On May 17, 1993, the South Carolina Supreme Court affirmed the court of appeals' holding, noting that . . . "Timberlake's attempt to retain discretionary control of property dedicated to the public was ineffective" and that the Timberlake dedications "created public easements for use consistent with their character."[9]

The *Timberlake* court concluded that all the dedicated roads within Timberlake Plantation were public easements.[10] Consequently, the issue of private easements became irrelevant, and the court did not further address it. More importantly, the court negated Star's argument that Timberlake made a limited dedication that gave Timberlake discretionary power over the use of the roads. The court held that the dedication was not limited because dedications "must be made to the use of the public exclusively, and not merely to the use of the public in connection with a user by the owners in such measure as they may desire."[11] The court reasoned that while a landowner could dedicate land for a specific purpose, the landowner could not retain control over its future after the public accepted the property.[12] The court held that Timberlake's reliance on *Knoerr v. Crews*[13] was misplaced.[14] Timberlake cited *Knoerr* for its recognition of limited dedications in South Carolina. The *Knoerr* court stated:

> [W]hen property is dedicated to the public the intent of the dedicator as to the use to which it may be put controls. Where such intent is clearly expressed and is specific and restricted, no deviation from such use may be permitted no matter how advantageous the changed use may be to the public . . . .[15]

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7. *Id.* at ___ , 431 S.E.2d at 574-75.

8. *Id.* at ___, 431 S.E.2d at 575.

9. *Id.* at ___, 431 S.E.2d at 575.

10. *Id.* at ___, 431 S.E.2d at 575.

11. *Timberlake*, ___ S.C. at ___, 431 S.E.2d at 575 (citing Safety Bldg. & Loan Co. v. Lyles, 131 S.C. 542, 545, 128 S.E. 724, 724 (1925)).

12. *Id.* at ___, 431 S.E.2d at 575.

13. 246 S.C. 174, 143 S.E.2d 120 (1965).

14. *Timberlake*, ___ S.C. at ___, 431 S.E.2d at 575.

15. *Knoerr*, 246 S.C. at 177, 143 S.E.2d at 121 (citing Sloan v. City of Greenville, 235 S.C. 277, 111 S.E.2d 573 (1959), Miller v. City of Columbia, 138 S.C. 343, 136 S.E. 484 (1926); Grady v. City of Greenville, 129 S.C. 89, 123 S.E. 494 (1923); and McCormac V. Evans, 107 S.C. 39, 92 S.E. 19 (1916)).

Therefore, Timberlake argued that South Carolina law treats the dedicator as the master of the dedication and, accordingly, the dedicator can limit the scope of the dedication.[16] The *Timberlake* court disagreed, stating that "[t]he essence of a dedication is that it shall be for the use of the public at large."[17] The court went further by equating a dedication to a grant: "In its effect upon the landowner's rights, there is no essential difference between a dedication and a grant."[18]

According to *Timberlake*, this dedication "created public easements for use consistent with their character."[19] The character of public roads includes the notion that encroachments may be made upon their rights-of-way.[20]

Consequently, the South Carolina Supreme Court strictly followed section 58-12-10,[21] which states that after obtaining approval from the appropriate governing body, any cable company may "construct, maintain, and operate its cable . . . over, beneath, or along any . . . public roads of the State."[22] Thus, the court held "that any cable television company may construct, maintain, and operate its cable along publicly dedicated roads in Timberlake Plantation in accordance with the provisions of the South Carolina Cable Act."[23] The court's holding allowed CCTV access to Timberlake Plantation to provide cable television service despite the exclusive agreement between Timberlake and Star.

Public dedications require not only a clear and unequivocal abandonment of interest but also the public's acceptance of such an interest.[24] In the past, South Carolina courts have recognized limited dedications.[25] Cases supporting limited dedication assert that the dedicator controls the dedication and thus has some level of control over the intended use of the dedicated lands.[26]

Timberlake Plantation dedicated certain roads and attempted to reserve the right to approve any encroachments on the rights-of-way of these dedicated

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16. Reply Brief of Petitioner at 2.

17. *Timberlake*, ___ S.C. at ___, 431 S.E.2d at 575 (citing *Lyles*, 131 S.C. at 542, 128 S.E. at 724).

18. *Id.* at ___, 431 S.E.2d at 575 (citing Grady v. City of Greenville, 129 S.C. 89, 95, 123 S.E. 494, 497 (1924)).

19. *Id.* at ___, 431 S.E.2d at 575.

20. *See* S.C. CODE ANN. § 58-12-10 (Law. Co-op. Supp. 1992).

21. *Id.*

22. Timberlake, ___ S.C. at ___, 431 S.E.2d at 576 (quoting S.C. CODE ANN. § 58-12-10 (Law. Co-op. Supp. 1992)).

23. *Id.* at ___, 431 S.E.2d at 576 (citing S.C. CODE ANN. §§ 58-12-10 to -130 (Law. Co-op. 1992)).

24. Anderson v. Town of Hemingway, 269 S.C. 351, 353, 237 S.E.2d 489, 490 (1977).

25. *See, e.g.*, Derby Heights, Inc. v. Gantt Water & Sewer Dist., 237 S.C. 144, 116 S.E.2d 13 (1960); Sloan v. City of Greenville, 235 S.C. 277, 111 S.E.2d 573 (1959).

26. *See, e.g.*, *Knoerr*, 246 S.C. at 177, 143 S.E.2d at 121; *Sloan*, 235 S.C. at 283, 111 S.E.2d at 576.

roads.[27] Timberlake's attempt to limit the dedication is the most important factor in *Timberlake*. Although a dedicator may impose reasonable restrictions upon dedication,[28] there are limits to such restrictions. Various commentators have recognized that "[t]he dedicator cannot attach to the dedication any conditions or limitations inconsistent with or repugnant to the grant, or which take the property from the control of public authorities, or which are against public policy. Such conditions are void, and leave the grant in full and unrestricted operation."[29] The *Timberlake* decision focuses on these types of repugnant restrictions and limitations. The result raises serious questions about the availability of a limited dedication in South Carolina.

The court invalidated Timberlake's dedication for two reasons. First, Timberlake's attempt to limit the scope of the dedication appears to have been repugnant to South Carolina's public policy of allowing general access to public roads.[30] Timberlake's attempted reservation of discretion was inconsistent with the use and nature of public roads. Allowing this kind of residual discretion would endanger the inherent nature of public roads and would undermine the authority of public officials who control the use of public roads.[31] Because stringing cable is within the parameters of a public road's right-of-way, CCTV could enter Timberlake Plantation and establish its cable system.[32]

Second, the attempted limitation apparently lacked the specificity required to limit effectively a dedication.[33] Had Timberlake used more specific and careful language with detailed restrictions on the use of the dedicated lands, this dispute might have been prevented. However, considering the nature of the dedicated land, this is doubtful.

In summary, *Timberlake* signifies the South Carolina Supreme Court's refusal to recognize any general attempts to limit dedications without specific language and to allow limited dedications in areas generally used for the public benefit. Otherwise, landowners could dedicate lands for public use and simultaneously use their discretion to dictate use of the land. This defeats the entire purpose of dedication.

The court did not accept Star's and Timberlake's reliance on *Knoerr*.[34] In *Knoerr* a landowner dedicated a certain plot of land to the City of Seneca for the erection of a rail depot and "'to leave as open squares for the convenience of the public and of the said Railway Company the lots laid out

27. *Timberlake*, ___ S.C. ___, 431 S.E.2d at 574.
28. 23 AM. JUR. 2D *Dedications* § 9 (1983).
29. *Id.* (footnotes omitted).
30. *See Timberlake*, ___ S.C. at ___, 431 S.E.2d at 575.
31. *See id.* at ___ n.1, 431 S.E.2d at 575 n.1.
32. *See* S.C. CODE ANN. § 58-12-10 (Supp. 1992).
33. *See Timberlake*, ___ S.C. at ___, 431 S.E.2d at 575.
34. *Id.* at ___, 431 S.E.2d at 575.

in Seneca City.'"[35] When the city wanted to construct a parking area on the open area, several taxpayers sought an injunction to prevent the parking construction.[36] The *Knoerr* court held that the use of property dedicated to the public is controlled by the dedicator's intent when the dedicator's intent is clearly expressed and is specific and restricted.[37] In such cases, "no deviation from such use may be permitted no matter how advantageous the changed use may be to the public."[38] Timberlake and Star relied on this language, arguing that Timberlake's dedication was not made to the public generally but only for maintenance.[39] The trial court agreed with this argument, holding that the roads in Timberlake did not become public roads when dedicated to Lexington County for maintenance purposes.[40]

The *Knoerr* court also held that where the dedicator's intent is unclear the public can use the dedicated property for any public purpose determined by the proper legal authority.[41] The city's use of the *Knoerr* property as a parking lot was consistent with the general terms of the dedication, and the court allowed the city to determine the proper use of the dedicated lands.[42] Thus, Timberlake and Star were overdependent on *Knoerr* because *Knoerr* expressly provides for general use of dedicated lands when the limits on the dedication lack clarity.

One of the most significant points the court made in *Timberlake* is that a dedicator cannot limit a dedication by attempting to retain discretion over future use.[43] The *Timberlake* court went further by equating a dedication and a grant.[44] This holding indicates that a dedication is a permanent and significant transfer of a property interest. Thus, if the dedicator wants to ensure that the public will use the land in a certain way, the dedicator must specifically state the parameters of the dedication.

Most interestingly, the South Carolina Supreme Court did not recognize restrictions that retain discretion over future public use. In *Timberlake* Star argued that the dedication was made for the limited purpose of receiving public maintenance so that the public acquired a mere right of passage in exchange for the obligation to maintain the roads.[45] The court disagreed, holding that the dedication of a street must be made for the purposes known

35. *Knoerr*, 246 S.C. at 176, 143 S.E.2d at 120 (quoting language of grant).
36. *See id.* at 176, 143 S.E.2d at 121.
37. *Id.* at 177, 143 S.E.2d at 121.
38. *Id.*, 143 S.E.2d at 121.
39. *See Timberlake*, ___ S.C. at ___, 431 S.E.2d at 575.
40. *Id.* at ___, 431 S.E.2d at 574.
41. *Knoerr*, 246 S.C. at 177, 143 S.E.2d at 121 (citing 26 C.J.S. *Dedication* § 65).
42. *Id.* at 177, 143 S.E.2d at 121.
43. *See Timberlake*, ___ S.C. at ___, 431 S.E.2d at 575.
44. *Id.* at ___, 431 S.E.2d at 575 (citing *Grady*, 129 S.C. at 95, 123 S.E. at 497).
45. *See id.* at ___, 431 S.E.2d at 575.

not only at the time of the grant "but for all purposes, present and prospective, consistent with its character as a public highway, and not actually detrimental to the abutting real estate."[46]

Timberlake clarifies and enhances the *Knoerr* decision by implying that if the dedicated property is not restricted specifically, any use of the dedicated area consistent with the property's nature that benefits the public may be a proper use of the dedicated area. Furthermore, this decision establishes that dedicators cannot limit certain types of property, such as roads, and cannot reserve future discretion in the dedication. Therefore, Star and Timberlake's attempt to restrict the use of the roads to right of passage and maintenance was ineffective. After *Timberlake* it is unclear what a dedicator must do to limit a dedication in South Carolina. Other jurisdictions have recognized that "an owner making a voluntary dedication may annex conditions and limitations to the grant at his pleasure, so long as they are consistent with, and will not defeat, the purpose of the dedication . . . ."[47] In *Timberlake* the attempted limitations clearly defeated the purpose of dedicating the roads to the public because the public was dependent upon Timberlake's discretion regarding the roads. While South Carolina law supports the theory of limited dedications,[48] *Timberlake* narrows the use of such limitations.

On the surface it appears that use of very specific language clearly indicating the dedicator's wishes is required to limit a dedication. However, the *Timberlake* grant contained specific language:

> I hereby certify that I am a Vice President of Timberlake Plantation Company . . . and that Timberlake Plantation Company adopts this plan of subdivision with its free consent, establishes *easements and rights-of-way as noted, and dedicates all roads and associated storm drainage for public maintenance.* . . . Furthermore, *Timberlake Plantation Company, as owner of the property shown and described hereon, reserves unto itself certain rights as to any encroachment into the established easements and rights-of-way above. Any such encroachment of easements and rights-of-way will require prior written recorded approval* of Timberlake Plantation Company or its assignee, Timberlake Plantation Property Owners' Association, Inc.[49]

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46. *Id.* at ___, 431 S.E.2d at 575.

47. 4 HERBERT T. TIFFANY, *The Law of Real Property* § 1111 (3d ed. 1975) (citing cases from nine jurisdictions including Baldwin Manor, Inc. v. City of Birmingham, 67 N.W.2d 812 (Mich. 1954) (holding that an alternative beneficial use, contrary to dedicated park's original purpose, did not justify deviating from original purpose) and Magnolia Petroleum Co. v. Drauver, 83 P.2d 840 (Okla. 1938) (holding that when dedication restrictions are clear and not repugnant, they are binding on all subsequent purchaser).

48. *See* cases cited *supra* note 25.

49. *Timberlake*, ___ S.C. at ___, 431 S.E.2d at 574 (emphasis added).

Despite this specific attempt at limitation, the court refused to recognize the limitation. This refusal evidences a preference for unrestricted dedications. The nature of the dedicated lands probably was the key factor in this case. Had some other kind of property been dedicated, the specificity of the language likely would have been more effective.

As a result, the importance of *Timberlake* is that a dedicator may not limit the dedication of areas generally used by the public because the inherent nature of these areas is to be fully dedicated to the public without residual discretion.

Other jurisdictions have recognized that roads may be dedicated for use only in certain seasons,[50] or subject to certain specific uses, or even for use at certain times.[51]

However, courts generally hold that:

> [t]he dedication of property for the purpose of a highway carries the right to public travel and also to the use for all present and future agencies commonly adopted by public authority for the benefit of the people, such as sewer, water, gas, lighting, and telephone systems, and a condition in a deed of dedication prohibiting such uses or circumscribing the future freedom of action of the authorities to devote the street to the wants and convenience of the public is void as against public policy or as inconsistent with the grant . . . .[52]

Courts hold also that the dedicator's reservations that create exclusive rights to construct, maintain, and control utility lines on or beside any public road are prohibited when statutes reflect a policy of allowing public access to such areas.[53] Thus, *Timberlake* is consistent with decisions in other jurisdictions in disallowing this kind of restriction.

Many issues arose in *Timberlake*, including the validity of an exclusive cable agreement, application of the Federal Cable Act, and questions of unconstitutional takings. However, the central issue of this case is the supreme court's interpretation of limited dedications. In *Timberlake* the court held that an attempt to dedicate a road within a subdivision only for public maintenance and right of passage was ineffective and actually created a general

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50. Hughes v. Bingham, 32 N.E. 78 (N.Y. 1892).

51. *See* TIFFANY, *supra* note 47, § 1111 (citing, among others, City of Noblesville v. Lake Erie & W. Ry. Co., 29 N.E. 484 (Ind. 1891); Hooker v. City of Grosse Pointe, 44 N.W.2d 134 (Mich. 1950); and Atlantic City v. Associated Realties Corp., 70 A. 345 (N.J. 1908)).

52. TIFFANY, *supra* note 47, § 1111 (citing, among others, Callahan v. Ganneston Park Dev. Corp., 245 A.2d 274 (Me. 1968); Levi v. Schwartz, 95 A.2d 322 (Md. Ct. App. 1953); Richey v. Shephard, 53 N.W.2d 487 (Mich. 1952); City of Camdenton v. Sho-Me Power Corp., 237 S.W.2d 94 (Mo. 1951); Riley v. Davidson, 196 S.W.2d 557 (Tex. Civ. App. 1946)).

53. 23 AM. JUR. 2D *Dedication* § 10 (1983) (citing Gulf Properties of Ala., Inc. v. Southern Bell Tel. & Tel. Co., 346 So.2d 1085 (Fla. Dist. Ct. App. 1977).

dedication. In effect this gave the public use of the roads and allowed other uses generally associated with use of public roads.

The court refused to address the issue of government takings and private easements because of its interpretation that the dedication created a public easement, which made all other issues irrelevant. The *Timberlake* court strengthened the power of a dedication by making it more difficult to make a limited dedication unless the dedicator uses specific language. Furthermore, with certain kinds of property, a limited restriction may not be effective because of the inherent nature of the property for public use. As a result, the availability of a limited dedication is unclear, and its validity likely will depend on the particular facts of the case, the language of the attempted limitation, and the nature of the dedicated property.

Matthew B. Roberts

IV. VALUE OF BUSINESS MAY NOT BE ADDED TO TAKINGS DAMAGE CALCULATION

South Carolina Department of Highways & Public Transportation v. Galbreath[1] addresses the valuation of condemned properties on which businesses are situated. In *Galbreath* the South Carolina Court of Appeals held that in calculating the damages for a taking, a court may not add the value of a business to the realty's value. However, the court may consider the business value in determining the real property's value. *Galbreath* reaffirms the rule announced thirty years ago by the South Carolina Supreme Court in *South Carolina State Highway Department v. Bolt*.[2]

The South Carolina Department of Highways and Public Transportation condemned a portion of Galbreath's property on which he operated a Western Auto Store. Before the condemnation, Galbreath used the property to display riding lawn mowers and garden tractors. The court had to value only that condemned portion of Galbreath's property.

Before trial, the circuit court granted the Department's motion *in limine*[3] to exclude the testimony of Galbreath's economist who was to testify about the profits that Galbreath would lose from the loss of the display area. The court reasoned that Galbreath could present general evidence of previous sales and lost profits but that the evidence of exact profits was irrelevant. Galbreath

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1. ___ S.C. ___, 431 S.E.2d 625 (Ct. App. 1993). This case also addresses juror disqualification, an issue this article will not discuss.

2. 242 S.C. 411, 131 S.E.2d 264 (1963).

3. In its opinion, the court of appeals indicated that Galbreath might have made a procedural error by relying on the *in limine* ruling without subsequently presenting the economist's testimony during trial. Galbreath may have erred because the supreme court has held that a ruling on a motion *in limine* is not final as to the admissibility of evidence. *Galbreath*, ___ S.C. at ____, 431 S.E.2d at 627 n.2 (citing State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988)).

presented a real estate appraiser who testified about the loss in market value of the remaining property, taking into consideration loss of access and the loss of the display area. Galbreath himself testified to the loss of sales and profits that his business sustained. After the jury awarded Galbreath $13,001, he twice motioned for new trials.[4] The court denied both motions. Galbreath appealed to the South Carolina Court of Appeals, which affirmed the lower court's holding.

In *Galbreath,* the court of appeals upheld the trial court's exclusion of the economist's testimony because: (1) the testimony was precluded by the rule from *Bolt* and (2) even if the testimony were permissible under *Bolt,* the court could exclude the evidence as cumulative.[5]

Under the first rationale, the court applied *Bolt,* a case in which the South Carolina Supreme Court held that a court cannot add the value of a business carried out upon a property to the realty's value when the court assesses takings damages. *Bolt* stated further that a court should consider, however, the business' value in assessing the realty's market value.[6]

Secondly, the court reasoned that even if the economist's testimony had been admissible under *Bolt,* the trial court did not err in excluding it because the testimony would have been cumulative.[7] The real estate appraiser and Galbreath himself testified that the business was a "good" business; thus, there was no additional need for the economist's testimony.

Although *Galbreath* clearly states *Bolt's* holding, the opinion does not explicitly apply the rule to the facts in *Galbreath.*[8] Both parties agreed that *Bolt* does not permit a court to consider lost business profits as an independent element in determining just compensation.[9] The plaintiff argued chiefly that the dispute centered around whether *Bolt* permitted the economist's testimony to help estimate the market value of the condemned property by providing evidence of "the most advantageous and profitable use"[10] of the property. The opinion did not directly address this argument. The court articulated the plaintiff's argument: "Galbreath recognized lost profits are not recoverable as an independent element of damage, but he wanted to present the evidence

4. Galbreath based his second motion for a new trial upon the alleged disqualification of one of the jurors. *Galbreath,* ___ S.C. at ___, 431 S.E.2d at 626.

5. *Id.* at ___, 431 S.E.2d at 628.

6. *Bolt,* 242 S.C. at 418, 131 S.E.2d at 267.

7. *Galbreath,* ___ S.C. at ___, 431 S.E.2d at 628.

8. Only from the court's later statement "[E]ven if [the economist's] testimony would have been admissible under *Bolt* . . .," does the reader know that the court applies *Bolt* to exclude the economist's testimony. *Id.* at ___, 431 S.E.2d at 628.

9. *See* Brief of Respondent at 3; Brief of Appellant at 7.

10. *Bolt,* 242 S.C. at 419, 131 S.E.2d at 267. *Bolt* stated more specifically, "[I]t is proper to take into consideration the existence of a going business on the land in question as indicative of the highest economic use to which the land may be put." *Id.* at 418, 131 S.E.2d at 267.

to establish that his business was a 'good' business, that is, profitable, so that the jury could assess damages based upon the property's highest and best use."[11] Despite recognizing the plaintiff's argument, the court failed to address the distinction. Hence, the court did not provide guidance as to why the economist's testimony was irrelevant in establishing that Galbreath's business was a good business; this seems to be the most relevant evidence in determining whether a business is a good business. The issue blurs more when later in the opinion the court hints at the possible admissibility if the economist's testimony: "We hold, therefore, that even if [the economist's] testimony would have been admissible under *Bolt* with a limiting instruction that it could only be considered for evaluating whether he had a 'good' business prior to the taking, the testimony would have been cumulative."[12] The plaintiff sought this very limiting instruction, that the testimony only be considered for evaluating whether Galbreath had a 'good' business. Thus, the court initially rejected the plaintiff's argument but later declared the argument acceptable. To reconcile these views, although ostensibly seeking to include evidence of a good business, in fact, Galbreath must have sought to present the economist's testimony to recover lost business as an independent element of damage.

The court of appeals' second reason for affirming the trial court[13] provides a sounder basis for its holding. Galbreath and a real estate appraiser testified to the property's diminution in value and to the business' loss of sales. Thus, although perhaps more detailed, the economist's testimony would have been cumulative and excludable.

Although the court of appeals cannot overturn a supreme court rule, *Galbreath* presented the court of appeals with an opportunity to discuss whether the theoretical foundations[14] of the *Bolt* rule remain valid. Why should a court refuse to consider the loss of business of the landowner as an independent element of damage in a taking? Are the rationales originally offered to support the rule still viable? Some states have reanalyzed the business loss rule in light of these questions, resulting in the rule's significant modification in other states.[15]

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11. *Galbreath*, ___ S.C. at ___, 431 S.E.2d at 626.

12. *Id.* at ___, 431 S.E.2d at 628.

13. *Id.* at ___, 431 S.E.2d at 628. The court indicates that even "if the trial court erred in excluding evidence, there is no reversible error where the testimony would have been cumulative." *Id.* at ___, 431 S.E.2d at 628 (citing Goddard v. Fairways Dev. Gen. Partnership, __ S.C. __, 426 S.E.2d 828 (Ct. App. 1993)).

14. Neither *Galbreath* nor *Bolt* provide reasons for the business losses rule. Initially *Bolt* adopted the rule based on statements in *American Jurisprudence* and *Corpus Juris Secundum* as well as a Connecticut case, *Housing Authority v. Lustig*, 90 A.2d 169, 171 (Conn. 1952). *Bolt*, 242 S.C. at 418, 131 S.E.2d at 267.

15. *See infra* notes 33-43 and accompanying text.

In South Carolina, the Eminent Domain Procedure Act[16] sets forth the measure of compensation: "In determining just compensation, only the value of the property to be taken, any diminution in the value of the landowner's remaining property, and any benefits . . . may be considered."[17]
South Carolina follows the widely accepted rule[18] that business losses are not compensable: "[I]t is the general rule that injury to or loss of business resulting from the taking is not considered as an element of damage in eminent domain proceedings . . . ."[19]

Several arguments support the business losses rule. Among the traditional reasons given for excluding evidence of business income are that such losses are too speculative and too uncertain.[20] Some authorities have argued so because such losses depend upon diverse circumstances, making the losses difficult to determine.[21]

Cases outside of eminent domain reveal that the difficulty in ascertaining profits as an excuse for denying business losses is not a valid objection. For example, contract cases do not support that rationale.[22] Furthermore, tort cases allow for loss of future earning capacity.[23] If determining compensation for pain and suffering is not too speculative, then certainly a court cannot consider lost profits so. The courts resolve the question of uncertainty of damages through the presentation of evidence. There is no reason why the courts cannot use the same procedure in eminent domain cases. Thus, the uncertainty argument rightfully is criticized as inconsistent since "courts allow proof of loss of profits damages in most types of actions, on a case by case basis, and yet in eminent domain cases bar all such claims as inherently speculative."[24] Another argument supporting the notion that business losses are too speculative is that profits depend more upon the efforts of the business owner than the land itself.[25] Even if assumed to be valid, however, this argument does not address whether losses are ascertainable. Instead the

16. S.C. CODE ANN. §§ 28-2-10 to -510 (Law. Co-op. 1991)

17. *Id.* § 28-2-370.

18. *See* Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283, 319 (1991).

19. *Bolt*, 242 S.C. at 418, 131 S.E.2d at 267.

20. Ryan v. Davis, 109 S.E.2d 409, 413 (Va. 1959) (en banc).

21. *See* 5 JULIUS L. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 13.3[2] (rev. 3d ed. 1993).

22. *See* ROBERT L. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS (4th ed. 1987 & Supp. 1992).

23. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54 (5th ed. 1984).

24. State v. Hammer, 550 P.2d 820, 825 (Alaska 1976).

25. *See* SACKMAN, *supra* note 21, at § 19.06[1].

argument merely emphasizes that profitability depends more upon one factor than another.

That the condemnor has taken the land and not the business or its profits also supports denial of compensation for business losses.[26] This view assumes the transferability of the business, that the owner can move it without loss of value. However, this argument ignores goodwill,[27] which, depending upon the nature of the business, may not be transferable. Goodwill is linked to the name or product as well as to business location. Transferability of businesses is fact-specific.[28] The argument also focuses incorrectly upon the wrong party: "[I]nstead of looking at the benefit to the condemnor as a measure of compensation, [it] looks to the loss to the owner, as measured by an objective standard."[29]

Another reason offered in defense of noncompensation is that the rights in a business are more intangible than those protected by the United States Constitution. Thus, "[t]he diminution of [a business's] value is a vaguer injury than the taking or appropriation with which the Constitution ordinarily deals."[30] Hence, a "business is not 'property' in the constitutional sense."[31] It is not clear how other rights are any more tangible than business rights. Thus, some courts reject this restricted property definition, redefining property as "the rights of the owner in relation" to the property.[32]

Recognizing that these theoretical foundations may no longer be stable, some states have rejected the rule.[33] The response has not been uniform. The approaches vary significantly not only in the types and extent of losses allowed[34] but also in the manner by which the states have modified the rule.

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26. *See, e.g.*, Boynton v. State, 215 N.Y.S.2d 953, 956 (N.Y. Ct. Cl. 1961).

27. "Goodwill" is an amorphous concept that has been variously defined. BLACK'S LAW DICTIONARY defines it as "every positive advantage that has been acquired by a proprietor in carrying on his business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business." BLACK'S LAW DICTIONARY 694 (6th ed. 1990).

28. *See* Metropolitan Atlanta Rapid Transit Auth. v. Ply-Marts, Inc., 241 S.E.2d 599, 601 (Ga. Ct. App. 1978).

29. *Hammer*, 500 P.2d at 824.

30. 27 AM. JUR. 2D *Eminent Domain* § 285 (1962).

31. State *ex rel.* Secretary of Dep't of Highways & Transp. v. Davis Concrete of Delaware, Inc., 355 A.2d 883, 886 (Del. 1976).

32. Bowers v. Fulton County, 146 S.E.2d 884, 890 (Ga. 1966) (quoting Woodside v. City of Atlanta, 103 S.E.2d 108, 114-15 (Ga. 1958)).

33. Several states effected changes in the business losses rule through judicial reform, including Alaska, Georgia, Michigan, Minnesota, and Wisconsin. Others, such as California, Florida, Vermont, and Wyoming, approached the issue with legislative reform. Louisiana addressed the question through constitutional reform. *See* Oswald, *supra* note 16, at 322-62.

34. The types and extent of business losses allowed vary from loss of goodwill to going-concern value to profits to a host of other factors.

In *Bowers,* the Georgia court held that the destruction of a business is recoverable separately and includes lost profits and diminution of the business in addition to the realty's value.[35] The Georgia court since has narrowed the rule, allowing loss of business only when "the condemnee has proved that the condemned property has some unique or peculiar relationship to the condemnee and his business."[36]

Michigan also deviates from the norm:

> [R]ecovery of the going concern value[37] of a business lost to condemnation will depend on the transferability of that business to another location. If the business can be transferred, nothing is taken and compensation is therefore not required. Whether a business is transferable will be decided on a case by case basis inasmuch as a specific factual analysis is required.[38]

Therefore, the Michigan approach attempts to prevent the landowner from receiving a windfall in those cases in which successful relocation is possible.

Legislative tempering of the business losses rule has occurred in some states,[39] particularly with the adoption of the Uniform Eminent Domain Code.[40] Under state versions of the Uniform Eminent Domain Code, courts allow compensation for the loss of goodwill subject to certain exceptions. Paralleling the Uniform Code, the California statute provides:

> The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following: (1) The loss is caused by the taking of the property or the injury to the remainder. (2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill. (3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code. (4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.[41]

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35. *Bowers,* 146 S.E.2d at 891.

36. *Metropolitan Atlanta Rapid Transit Auth.*, 241 S.E.2d at 601.

37. Going concern value refers to the "value of a firm, assuming that the firm's organization and assets remain intact and are used to generate future income and cash flows. The value which inheres in a company where its business is established, as distinguished from one which has yet to establish its business." BLACK'S LAW DICTIONARY 691 (6th ed. 1990).

38. City of Detroit v. Michael's Prescriptions, 373 N.W.2d 219, 224 (Mich. Ct. App. 1985) (footnote omitted).

39. *See* Oswald, *supra* note 18, at 329.

40. UNIF. EMINENT DOMAIN CODE § 1016 (1974) (addressing loss of goodwill).

41. CAL. CIV. PROC. CODE § 1263.510(a) (West 1982). The statute defines goodwill as those

Louisiana took a constitutional approach to resolving the question of business losses when it redrafted its constitution in 1974. The state replaced the provision of "just and adequate compensation" with one requiring that the owner "be compensated to the full extent of his loss."[42] Louisiana courts interpret this provision to include business losses.[43]

This sampling of approaches taken by various states reveals that although the response has not been uniform, states have recognized that an inflexible application of the rule does not produce equitable results. Business losses are real losses borne by the landowner. The rationales traditionally offered in support of the business losses rule may no longer be valid. Inequities may result from the continued application of a rule that has lost its theoretical footing.

Thus, *Galbreath* reaffirms the long-standing rule in South Carolina that courts may not consider business losses resulting from the exercise of the state's eminent domain power as an independent element of damage but may only consider them as a factor in determining the property's market value. Because the theoretical arguments supporting noncompensation may no longer be valid, the courts should examine the need for a modification of the rule articulated in *Bolt* and reaffirmed recently in *Galbreath*.

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"benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and other circumstances resulting in probable retention of old or acquisition of new patronage." *Id.* § 1263.510(b).

42. LA. CONST. art. I, § 4.

43. Layne v. City of Mandeville, 633 So. 2d 608, 611 (La. Ct. App. 1993).