THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 20-CP-22-00600
Case No. 20-CP-22-00601
Appellate Case No. 2022-000291

Sunset Lodge, LLC, and Franklin D. Beattie, as trustee of The Franklin D. Beattie Preservation Trust, and M. Baron Stanton, Plaintiffs,

v.

Town of Pawleys Island, Defendant,

Of which Sunset Lodge, LLC and Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust are the ……Appellants,

and

Town of Pawleys Island is the…… Respondent.

MOTION TO STRIKE PORTION OF APPELLANTS' REPLY BRIEF

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Attorneys for Respondent

Respondent Town of Pawleys Island ("Town") moves the Court pursuant to Rules 208(b)(2) and 240, SCACR, for an order striking a portion of the Appellants' Initial Reply Brief, and in particular "Argument" Section II of the brief regarding judicial estoppel contained on pages 13 through 17 thereof (hereinafter, "Section II").

Section II impermissibly raises a new argument for the first time in the Reply Brief. By way of background, this litigation arises from Appellants' challenge actions filed in response to Town's attempts to condemn beach renourishment easements. The circuit court quashed the specific condemnation notices at issue but declined to prohibit future condemnation attempts. In this appeal of what Appellants argue was an inadequate subsequent award of their attorney fees, they argue for the first time in their Reply Brief that Town should be judicially estopped from drawing a distinction (also discussed in the circuit court order) between the temporary procedural relief Appellants obtained and the much broader permanent substantive relief that they sought but did not obtain.

"It is axiomatic that an issue cannot be raised for the first time in a reply brief." McClurg v. Deaton, 395 S.C. 85, 87, 716 S.E.2d 887, 888 fn.2 (2011) (citing Chet Adams Co. v. James F. Pedersen Co., 307 S.C. 33, 413 S.E.2d 827 (1992). "The reply brief is not the appropriate vehicle to raise new issues on appeal." Divine v. Robbins, 385 S.C. 23, 44, 683 S.E.2d 286, 297 fn.4 (Ct. App. 2009) (citing Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct.App.1989)). "[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief." Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (citing Jackson v. Bi–Lo Stores, Inc., 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct.App.1993)). Such an argument "[is] not properly presented to this Court and is deemed abandoned." Id.

Section II of the Reply Brief argues that the Town should be judicially estopped from making the objectively true assertion that, as acknowledged in the fee award order on appeal, the Appellants sought but "did not obtain any permanent prohibitive relief" barring any future condemnation efforts by the Town. (Order p.7 – 8). While the exact scope of what Appellants seek to have "estopped" is not clear, it appears that, among other things, they seek to prevent the Town from arguing that "the main thrust of the [Appellants'] complaint was 'the permanent and prohibitive relief that the Appellants so extensively pleaded and sought.'" (Initial Reply Brief p.15 (quoting Initial Brief of Respondent p.18)). Appellants' estoppel argument is based on their allegation that, in separate but related litigation referred to by the parties as the "Challenge 2" cases (as distinguished from these "Challenge 1" cases), the Town took the purportedly contradictory position that (1) those separate Challenge 2 pleadings did not request permanent prohibitive relief and (2) in any event, as a matter of law such permanent prohibitive relief would not be available (Initial Reply Brief p.14).

As to the substance of the judicial estoppel argument, the Town has not taken contradictory positions[1] and certainly does not concede the legal merits of the Appellants' position. For purposes of this motion, however, the relevant issue is that Appellants waived and abandoned any Section II judicial estoppel argument when they failed to raise it in their initial brief. In chronological order:

a.) April 22, 2021 (Challenge 2): The circuit court issued an order dismissing the separate

[1] In short, in the Challenge 2 cases the Town argued that *those* separate pleadings did not request permanent relief and that, even if they had, no such permanent relief would be available as a matter of law. In these Challenge 1 cases, the Town argues that *these* pleadings *did* seek permanent relief but that Appellants did not obtain it. Town has never taken the position, as inaccurately claimed on p. 15 of the Reply Brief, that the permanent relief sought in Challenge 1 was <u>available</u> as a matter of law. Acknowledging that a party sought relief is not the same as conceding that the relief was ever legally available.

Challenge 2 actions as moot based on the Town's filing formal notices of abandonment. The order of dismissal found that the Challenge 2 pleadings requested only temporary procedural relief, and not permanent prohibitive relief.[2] The circuit court discussed, but did not rule upon, the issue of whether such permanent relief could ever be available under the facts alleged.[3] (relevant excerpts attached as Exhibit 1).

b.) June 2, 2021 (Challenge 2): Town argued (in its memorandum opposing the landowner's motion to reconsider the order of dismissal) that, as a matter of law, the Appellant/Plaintiff's factual allegations do not give rise to any permanent prohibitive relief.[4] (relevant excerpts attached as Exhibit 2). **Accordingly, the Town asserted in Challenge 2 what Appellants now claim to be the "contradictory" argument by no later than June 2, 2021**.

c.) June 3, 2021 (Challenge 2): The circuit court entered a Form 4 order denying Appellant/Plaintiff's motion to reconsider the order of dismissal. (attached as Exhibit 3). **Accordingly, the Town obtained a favorable ruling in Challenge 2, after asserting**

[2] Exhibit 1, Challenge 2 Order of Dismissal, p.6-7 ("The Amended Complaint, in the prayer for relief, requests that 'both the 'Existing' and the 'New' Condemnation Notices be quashed and that the Town be forever barred and enjoined from filing either of them or proceeding with either of them.' . . . The pleading does not contain a request for broad preclusive relief that would permanently bar the Town from any future similar condemnation action based on past "bad faith" or similar allegations.").

[3] Exhibit 1, Challenge 2 Order of Dismissal, p.7 ("Without prejudice to the right of the plaintiff to later assert such a claim, the Court notes that no authority has been submitted for the proposition that a court has the power to grant that type of relief (with the exception of the theory of estoppel, as discussed below). . . . [Furthermore,] the Court is unable to see how the plaintiff's factual allegations encompass the required elements of an estoppel claim, including the elements of reliance and prejudicial change in position.").

[4] Exhibit 2, Challenge 2 Memo. in Opp. M. Reconsider, p.3 – 4 ("South Carolina law does not entitle a landowner to seek permanent prohibition of a condemnor's exercise of eminent domain powers based on allegations of past "misrepresentation" and "bad faith" in the administrative and legal efforts used to pursue an otherwise legitimate effort to condemn property for a proper public use."). The argument is discussed in detail in Section I, pp.1 – 6 of that filing.

what Appellants now claim to be the "contradictory" argument, by no later than June 3, 2021.

d.) September 20, 2021 (Challenge 1): Town argued, in its memorandum in opposition to Appellants' fee petition, that in Challenge 1 the Appellants sought but did not obtain permanent prohibitive relief.[5] (relevant excerpts attached as Exhibit 4).

e.) October 6, 2021 (Challenge 1): The circuit court held a hearing on Appellants' fee petition. (App. Brief p.20). **As of the date of the hearing, Appellants certainly had notice of the purportedly "contradictory" arguments made by the Town in its June 3, 2021 Challenge 2 memorandum, as well as notice of the June 3, 2021 Challenge 2 order.**

f.) November 23, 2021 (Challenge 1): The circuit court entered a fee award (i.e., the order currently being appealed) finding that in Challenge 1 the Appellants sought but "did not obtain any permanent prohibitive relief". (Order p.7 – 8, filed with Notice of Appeal).

g.) December 2, 2021 (Challenge 1): Appellants filed a motion to reconsider the fee award.

h.) January 28, 2022 (Challenge 1): The circuit court entered a Form 4 order denying Appellants' motion to reconsider the fee award (filed with Notice of Appeal).

i.) August 1, 2022 (this appeal in Challenge 1): Appellants filed their Initial Brief. The brief did not raise the Section II judicial estoppel argument later asserted in their Reply Brief.

j.) October 28, 2022 (this appeal in Challenge 1): The Town filed its Initial Respondent's Brief, which included an argument (consistent with its circuit court memorandum and the fee award order now on appeal) that Appellants sought but did not obtain permanent prohibitive relief.

[5] Exh.4, Ch.1 Memo. Opp. p. 4 ("Plaintiff has obtained what is essentially temporary procedural relief . . . While the Plaintiff has prevailed on its allegations to that extent, it has most certainly not obtained the permanent prohibitive relief that it actually filed this action to obtain.").

k.) December 8, 2022 (this appeal in Challenge 1): Appellants filed their Initial Reply Brief asserting the Section II judicial estoppel argument for the first time.

Accordingly, Appellants waived and abandoned any Section II judicial estoppel argument they may have had by failing to include it in their Initial Appellants' Brief (assuming, hypothetically, that it had been preserved at the circuit level to begin with). Furthermore, although it would have been chronologically possible for Appellants to make the Section II judicial estoppel argument to the circuit court (e.g., the 6/2/21 Town memorandum and 6/3/21 order denying reconsideration in Challenge 2 were prior to the 10/6/21 fee petition hearing in Challenge 1), to the best recollection of undersigned counsel they did not do so, meaning that this issue was not preserved in the first place. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

Appellants did include an argument on page 32, fn.14 of their initial brief that "the Town is judicially estopped from arguing for less than full reimbursement" in this case because in the Challenge 2 cases it made the argument that statutory attorney fee provisions disincentivize government abuse of its eminent domain powers. However, that argument is completely distinct from the argument made in Section II of the Reply Brief.

In conclusion, Appellants are not entitled to raise a new argument for the first time in their Reply brief, and the Town would be prejudiced by them being allowed to do so here. Accordingly, the Town respectfully requests that the Court issue an order striking Section II of Appellants' Reply Brief and requiring Appellants to refile the Reply Brief with that section removed (with numbering and formatting adjusted but otherwise without any other revisions); or, in the alternative, granting Town leave to file a response brief addressing the Section II argument.

Respectfully submitted,

s/ William C. Dillard, Jr.
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ATTORNEYS FOR RESPONDENT
TOWN OF PAWLEYS ISLAND

December 28, 2022

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00932
	)	
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	**ORDER**
v.	)	**OF DISMISSAL**
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

PRESIDING JUDGE:	The Honorable Benjamin H. Culbertson
DATE OF HEARING:	April 1, 2021
TIME OF HEARING:	1:30 p.m.
PLACE OF HEARING:	Georgetown County Judicial Center
PLAINTIFF'S ATTORNEY:	M. Baron Stanton
DEFENDANTS' ATTORNEY:	William C. Dillard, Jr.
COURT REPORTER:	Cynthia Weaver

This matter came before the Court upon the Defendant Town of Pawleys Island ("Town")'s Motion to Dismiss and Motion for Protective Order Regarding Discovery. Upon due consideration of the pleadings, the arguments and submissions of the parties, and the applicable legal authorities, the Court grants Town's motions in the respects set forth hereinbelow.

This matter is related to two sets of condemnation challenge actions involving three properties, sometimes referred to informally by counsel for the parties as the "first set" of cases and "second set" of cases. The following general chronology appears in the pleadings in the respective actions:

a. In or around June 2020, Town undertook to serve on the plaintiff a Condemnation Notice through which it sought to acquire a beach renourishment easement (referred to in the pleadings herein as the "Existing Notice"). (Amended Complaint, ¶ 81, et seq.).

Exhibit 1 (Motion to Strike)

In the present action, any future attempt to condemn a similar easement would be inherently susceptible to judicial review and would invoke statutory attorney fee protections for the plaintiff. S.C. Code Ann. § 28-2-470 ("Proceedings to challenge condemnor's right to condemn"); *see also* S.C. Code Ann. § 28-2-510(A) and (C) (providing for landowner recovery of attorney fees in successful challenge actions and withdrawn condemnation actions). This is distinguishable from a wastewater treatment plant sporadically violating effluent limitations, Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167 (2000), or a challenge to "[s]hort-term student suspensions [which], by their very nature, are completed long before an appellate court can review the issues they implicate." Byrd v. Irmo High Sch., 321 S.C. 426, 432, 468 S.E.2d 861, 864 (1996).

Under the second exception to the mootness doctrine, this case and the related actions are discrete disputes involving three properties and do not give rise to any "imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." Curtis at 568, 549 S.E.2d at 596. The third exception to mootness doctrine contemplates an appellate situation in which, because "a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." Id. As this matter is not on appeal, and does not involve review of any prior trial court decision, this exception is not relevant.

The Amended Complaint, in the prayer for relief, requests that "both the 'Existing' and the 'New' Condemnation Notices be quashed and that the Town be forever barred and enjoined from filing either of them or proceeding with either of them." For the reasons discussed above, this claim for relief is now moot as the New Notice has been withdrawn, and the plaintiff's substantive objections underlying the request to quash the condemnation notice, relating to public necessity, "bad faith", and similar issues, do not need to be addressed in this action. The pleading does not

contain a request for broad preclusive relief that would permanently bar the Town from any future similar condemnation action based on past "bad faith" or similar allegations. Without prejudice to the right of the plaintiff to later assert such a claim, the Court notes that no authority has been submitted for the proposition that a court has the power to grant that type of relief (with the exception of the theory of estoppel, as discussed below). As a general matter, municipalities are authorized to exercise the power of eminent domain in order to "become the owner of any land or to acquire any easement or right-of-way therein for any authorized corporate or public purpose," S.C. Code Ann. § 5-7-50.

Although the theory of estoppel was not included in the Amended Complaint, in connection with the subject motion counsel for the plaintiff did cite to an appellate opinion that found a golf course developer was entitled to an order estopping Santee Cooper from future attempts to condemn its property for an overhead high voltage transmission tower and line route. Southern Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 748 (1993) In Southern, the basis for estoppel was that the property owner had moved forward with plans to purchase and improve the property as a golf course, with expenses in excess of $50 million, in reliance upon inaccurate representations from a Santee Cooper official that all powerline routes on the property would be buried. In this case, while the Amended Complaint includes allegations that the Town engaged in various types of procedural missteps, as well as "misrepresentation", "bad faith", and "fraud" in the process associated with the first and second condemnation notices, the Court is unable to see how the plaintiff's factual allegations encompass the required elements of an estoppel claim, including the elements of reliance and prejudicial change in position.[1]

[1] "The essential elements of estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the

Georgetown Common Pleas

Case Caption: Sunset Lodge Llc VS Pawleys Island Town Of

Case Number: 2020CP2200932

Type: Order/Dismissal

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00932
	)	
	)	
Sunset Lodge, LLC,	)	
	)	**DEFENDANT'S MEMORANDUM**
Plaintiff,	)	**IN OPPOSITION TO PLAINTIFF'S**
v.	)	**MOTION TO RECONSIDER**
	)	**ORDER OF DISMISSAL**
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

The Defendant, TOWN OF PAWLEYS ISLAND ("Town"), hereby submits the following Memorandum in Opposition to Plaintiff's Motion to Reconsider Order of Dismissal, as follows. Identical memoranda are being filed in the "Stanton" (2020-CP-22-0930), "Beattie" (2020-CP-22-0931), and "Sunset Lodge" (2020-CP-22-0932) cases.

Responding to grounds 1 through 18 and 20 of Plaintiff's Motion, the Town asserts that the Order of Dismissal correctly and adequately addressed all relevant and necessary issues, and further craves reference to the terms of the Order and its prior Motion to Dismiss and Memorandum in Support of its Motion to Dismiss. Responding to ground 19 of the Plaintiff's motion, the Town does not object to consolidation of the three related "Challenge 2" cases. Arguments regarding certain issues included in Plaintiff's Motion to Reconsider are further discussed below.

ARGUMENTS

1.) <u>The allegations of the Amended Complaint, accepted as true, do not entitle the plaintiff to prospective relief prohibiting future condemnation efforts</u>

The allegations of the Amended Complaint, even if taken as admitted, do not give rise to any issue of fact that would entitle the plaintiff to judgment in the form of prospective relief prohibiting the Town from ever condemning a beach renourishment easement on the plaintiff's property. Even treating all properly pleaded factual allegations as admitted, the plaintiff has presented no basis for

Exhibit 2 (Motion to Strike)

the Court to permit further amendment of the pleadings to assert a claim for permanent injunctive or other equitable relief. There is no South Carolina authority in support of the proposition that the type of conduct the plaintiff alleges the Town has engaged in, which the plaintiff characterizes as "bad faith," would give rise to a judicial remedy permanently prohibiting the Town from exercising its power of eminent domain in order to acquire the same or a similar easement from the plaintiff.

The S.C. Supreme Court has made it clear that the power of eminent domain is a fundamental attribute of sovereignty. "The primary right to acquire rests in eminent domain, and that power resides in the state of right and by necessity; the Constitution did not create it, but has only affirmed it (article 14), and limited its exercise (article 1, § 17; article 9, § 20). The exercise of the right resting in the Legislature, that body may prescribe how it shall be exercised." Paris Mountain Water Co. v. City of Greenville, 110 S.C. 36, 96 S.E. 545, 551 (1918).

> That right is based upon the theory that when the state originally granted lands to individuals the grant was made under the implied condition that the state might resume dominion over the property whenever the interest of the public or welfare of the state made it necessary. Its origin antedates constitutional provisions and legislative enactments. It is one of the unwritten laws of all civilized nations. It is justified by the fact that the right of individuals must yield to the public good, and the welfare of the state is paramount to that of the individual citizen. It is a previously existing universal law that lay dormant in the state until proper legal authorities directed the occasion and the mode through which it may become operative.

Haig v. Wateree Power Co., 119 S.C. 319, 112 S.E. 55, 57 (1922).

The General Assembly has authorized municipalities to exercise the power of eminent domain in order to "become the owner of any land or to acquire any easement or right-of-way therein for any authorized corporate or public purpose," S.C. Code Ann. § 5-7-50, and enacted the Eminent Domain Procedure Act "to create a uniform procedure for all exercise of eminent domain power in this State." S.C. Code Ann. § 28-2-20. Although the Act specifically contemplates challenge actions, § 28-2-470 ("Proceedings to challenge condemnor's right to condemn"),

nowhere does it provide for permanent judicial prohibition of a certain type of condemnation based on "bad faith" or similar allegations.

Common law considerations of fraud, bad faith, and abuse of discretion in a challenge action relate to the basis for and intentions behind decisions about whether to condemn and what amount of property to condemn. For example, in Atkinson v. Carolina Power & Light Co., the plaintiff alleged that "the defendant's condemnation above the 220 foot elevation contour line, above mean sea level is **cloaked with a scheme to serve its own private purposes, uses and advantages** in that it intends to sell, lease or otherwise control the land surrounding the impounded waters for purposes not connected with the generating of electricity or proper adjuncts thereto[.]" 239 S.C. 150, 161, 121 S.E.2d 743, 748 (1961) (emphasis added).

In Timmons v. S.C. Tricentennial Comm'n, in rejecting a landowner's challenge to condemnation of property for historical preservation and recreational purposes, the court explained that, "[t]he burden would be upon the landowner to show that **the public use is a sham and a fraud**. . . . If there is no necessity for the use or the condemnation proceeding's purpose is **to cloak some sinister scheme**, then the courts may interfere with the taking, but there is no showing of that kind here." 254 S.C. 378, 396, 175 S.E.2d 805, 814 (1970) (emphasis added). *See also* Sease v. City of Spartanburg, 242 S.C. 520, 527, 131 S.E.2d 683, 687 (1963) ("The allegations in the complaint that the proposal of the respondent is fantastic, unreasonable, unnecessary, uncalled for and unwarranted are merely conclusions which are not admitted by the demurrer and, at most, merely characterize the facts set forth in the complaint which are insufficient to allege fraud, bad faith, or clear abuse of discretion on the part of the respondent.").

By contrast, South Carolina law does not entitle a landowner to seek permanent prohibition of a condemnor's exercise of eminent domain powers based on allegations of past

"misrepresentation" and "bad faith" in the administrative and legal efforts used to pursue an otherwise legitimate effort to condemn property for a proper public use. That type of relief would be vastly different than simply invalidating a specific condemnation notice based on procedural deficiencies (or even fraud, bad faith, or abuse of discretion) in the administrative and legal efforts associated with the notice. While the Plaintiff clearly objects to the wisdom and expediency of the previously sought beach renourishment easement and alleges that the Town has acted poorly in its legislative, administrative, and legal efforts to acquire the easement, there has been no allegation that the fundamental decision to pursue the easement for a stated public use was in fact a "sham" meant to "cloak some sinister scheme" for the benefit of undisclosed private interests.

Furthermore, there is no legitimate indication that the Town is attempting to use successive condemnation actions in order to gain "negotiating leverage" with the plaintiff. The Notice of Abandonment was filed shortly after the issuance of a summary judgment order in favor of the plaintiff in Challenge I, which the Amended Complaint herein alleges involved similar procedural deficiencies as were alleged here. Undersigned counsel also takes note of the statutory stay effected by the filing of the Challenge I action. It is clear, even accepting the allegations of the Amended Complaint at face value, that the Notice of Abandonment was filed in this action in order to avoid unnecessary, duplicative litigation over procedural issues. Accordingly, there is no factual basis for any assertion that the Town's withdrawal of the Condemnation Notice in this action was part of an effort to harass the plaintiff into submission. To the contrary, the withdrawal was an attempt to minimize the time and expense burden on all parties.

Just as property ownership is perpetually subject to the government's police powers, S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 365, 175 S.E.2d 391, 394 (1970); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022-23 (1992), property rights are also inherently subject

to the government's sovereign right to exercise its power of eminent domain, subject to constitutional constraints, at any time. Haig v. Wateree Power Co., 119 S.C. 319, 112 S.E. 55, 57 (1922). The General Assembly deemed it appropriate to protect landowners from the expense of condemnation disputes by, among other things, providing statutory rights to recover attorney fees and costs in the event of a condemnation abandonment or a successful challenge action. These statutory protections satisfy considerations of equity and due process, and clearly disincentive any condemnor from attempting to use "multiplicity of litigation" to gain leverage over a landowner.

Although older cases cited by the plaintiff discussing what are now referred to as "challenge actions", from a time when "the condemnation statutes provide[d] no machinery for determining the right to institute such proceedings," Greenwood Cty. v. Watkins, 196 S.C. 51, 12 S.E.2d 545, 550 (1940), sometimes spoke in terms of "permanent injunction," this was in relation to hypothetical allegations of "bad faith" or "fraud" in the sense of the initiation of a condemnation based on sham, pretextual purposes for a private or other improper benefit. *E.g.,* Atkinson, supra (denying requested relief), Timmons, supra (denying requested relief). These cases speak in general terms and do not purport to authorize judicial prohibition of future similar condemnations based on revised decision-making procedures.

Accordingly, to the extent that the plaintiff has alleged that the withdrawn Condemnation Notice in this action was, for example, based on an inadequately articulated public use or insufficient decision-making process relative to the scope or necessity of the easement, these and similar issues can be corrected (or attempted to be corrected) in any future condemnation effort. These types of alleged deficiencies simply do not give rise to permanent prohibitory relief, as reflected in more modern cases such as Hill v. York Cty. Nat. Gas Auth., 384 S.C. 483, 682 S.E.2d 809 (2009) (holding that condemnor could revise condemnation notice to correct statutory

reference) and Southern Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 305 S.C. 507, 514 – 16, 409 S.E.2d 428, 432 – 434 (Ct. App. 1991), aff'd in part, rev'd in part on other grounds, 311 S.C. 29, 426 S.E.2d 748 (1993). As the Court of Appeals explained in Southern Dev., "[t]he parties have not cited any reported South Carolina case in which a planned condemnation was permanently enjoined by a court because the court found the condemning authority abused its discretion in the selection of a chosen route. . . . We vacate this portion of the master's decision and remand with instructions that the master direct Santee Cooper to re-evaluate its proposed route and the alternate routes proposed by Southern." Id.

Likewise, the plaintiff's allegations do not give rise to any basis to allow further amendment of the pleadings seeking judicial determination of certain discrete issues that may be of interest to the parties in any future litigation. In the Amended Complaint, the plaintiff alleges that the Town engaged in various types of procedural missteps, as well as "misrepresentation", "bad faith", and "fraud" in the process associated with the first and second condemnation notices. The plaintiff also raises questions about, for example, whether the Town adequately considered and established the necessity of an easement for participation in a long-term federal beach renourishment program. However, judicial determination in this action of the legal effect of any such alleged acts and omissions, even if proven to have occurred, would provide no more than an "advisory opinion", with applicability to the legal relations between the parties only if and when identical acts or omissions occur in connection with any future condemnation effort. Neither the Eminent Domain Procedure Act nor the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, et seq., provide any basis for such hypothetical litigation.

"To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Thompson v. State, 415 S.C. 560, 565, 785 S.E.2d 189, 191 (2016)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Georgetown
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP2200932

Sunset Lodge Llc
PLAINTIFF(S)

Pawleys Island Town Of
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

Plaintiff's Motion to Consolidate is GRANTED with consent of all parties. This case is consolidated under case number 2020CP2200932.

Plaintiff's Motion to Reconsider is DENIED. The only relief sought by the plaintiff in the Amended Complaint is "that both the 'Existing' and the 'New' Condemnation Notices be quashed and that the Town be forever barred and enjoined from filing either of them or proceeding with either of them, for such other and further relief as is just and proper, and for all litigation costs." The "existing" and "new" condemnation notices have been abandoned by the defendant and the issue of litigation costs remains pending.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/03/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Exhibit 3 (Motion to Strike)

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Georgetown Common Pleas

Case Caption: Sunset Lodge Llc VS Pawleys Island Town Of

Case Number: 2020CP2200932

Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00600
	)	
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	**MEMORANDUM IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEY FEES**
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

The Defendant, TOWN OF PAWLEYS ISLAND ("Town"), hereby submits its Memorandum in Opposition to Plaintiff's Motion for Expenses Including Attorney's Fees, as follows. Identical memoranda and supporting affidavits are being filed in the "Sunset Lodge" (2020-CP-22-0600) and "Beattie" (2020-CP-22-0601) cases.

Introduction

Plaintiff's fee petition seeks an award far in excess of "the landowner's reasonable costs and litigation expenses incurred [herein]." S.C. Code Ann. § 28-2-510(A) (emphasis added). The Plaintiffs in this and another closely related action (2020-CP-22-0600 and -0601), represented by the same counsel, seek a combined total expense award of **$120,396.67** based on proportionate amounts of a total of **950.5 hours** of attorney time averred to have been spent on those and a third closely related matter (2020-CP-22-0602). When factoring back in the proportionate amount of time for the third matter, the underlying premise of the Plaintiff's claim is that **$180,595** worth of legal time has been reasonably devoted to simultaneous work on the three essentially identical matters.[1]

Exhibit 4 (Motion to Strike)

[1] As conceded in the affidavit of plaintiff's counsel, the three cases were handled in tandem and involved essentially identical filings (e.g., 9/10/21 Stanton Aff. ¶ 72).

and is calculated by multiplying a reasonable hourly rate by the reasonable time expended." Id. The six Jackson factors are applied to determine "the reasonable time expended and a reasonable hourly rate for purposes of calculating attorneys' fees." Id. at 458, 658 S.E.2d at 333.

"[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise 'billing judgment' with respect to hours worked[.]" Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40 (1983).

> As part of his duty to claim only reasonable fees, an attorney must exercise "billing judgment[,]" . . . [which] is usually shown by the attorney writing off unproductive, excessive, or redundant hours. . . . An affidavit from a party or an attorney stating only the total amount of fees and that the amount is reasonable is not sufficient to satisfy the burden of proof.

Dishman v. First Interstate Bank, 362 P.3d 360, 365 (Wyo. 2015) (citing Hensley at 434; other internal citations omitted). "Block billing is problematic because it makes it more difficult for the party requesting fees to demonstrate the reasonableness of the billed hours; a party requesting attorneys' fees block bills at its own risk." Gurrobat v. HTH Corp., 346 P.3d 197, 204 (Haw. 2015).

Arguments

I. "Beneficial Results Obtained" in this Matter

The Plaintiff has obtained what is essentially temporary procedural relief based upon its stated position that "noncompliance with procedural rules must first be cured before any contemplated condemnation may proceed[.]" (Amended Complaint p.11). While the Plaintiff has prevailed on its allegations to that extent, it has most certainly not obtained the permanent prohibitive relief that it actually filed this action to obtain.

Specifically, the relief obtained in the summary judgment order can be comprehensively summarized as follows:

1.) Per the Court, the condemnation was unauthorized because Town Council's general

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 20-CP-22-00600
Case No. 20-CP-22-00601
Appellate Case No. 2022-000291

Sunset Lodge, LLC, and Franklin D. Beattie, as trustee of The Franklin D. Beattie Preservation Trust, and M. Baron Stanton, Plaintiffs,

v.

Town of Pawleys Island, Defendant,

Of which Sunset Lodge, LLC and Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust are the ……Appellants,

and

Town of Pawleys Island is the…… Respondent.

PROOF OF SERVICE

I certify that I have served the *Motion to Strike Portion of Appellants' Reply Brief by* causing a copy to be e-mailed on **December 28, 2022**, to counsel of record as listed below:

M. Baron Stanton (bstanton@stantonlaw.com)

s/ William C. Dillard, Jr.
William C. Dillard, Jr. (S.C. Bar No.78986)

C. HEYWARD BELSER, SR. (1918-1994)
CLINCH H. BELSER, JR.
H. FREEMAN BELSER
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December 28, 2022

Via personal delivery and email (ctappfilings@sccourts.org)
The Office of the Clerk of Court
South Carolina Court of Appeals
1220 Senate St.
Columbia, SC 29201

Re: Motion to Strike Portion of Appellants' Reply Brief
Sunset Lodge, LLC v. Town of Pawleys Island
(Appellate Case No. 2022-000291)

Dear Madam Clerk:

Please find enclosed the Respondents' *Motion to Strike Portion of Appellants' Reply Brief* (including Exhibits 1 – 4) and proof of service on counsel of record. Also enclosed with the hard copy of this letter is a check for the $50 filing fee.

Thank you, and please let me know if I can provide any additional information at this time.

Sincerely,

William C. Dillard

Enclosures

Cc: Barry Stanton, Esq. (via email)