

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-07-01078

RECEIVED
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SC Court of Appeals

JAMES WARE, ALISA WARE,)
HENRY SPAHR, ELAINE)
SPAHR, JULIE SANDERS,)
WILLIAM CRAIG DENNY,)
JEFF TOOMER, ALLYSON)
TOOMER, LOUIS E. DAVIS,)
DONNA NUTTY, THOMAS J.)
MacDONALD, MICHAEL G.)
MacDONALD, SUSANNE B.)
MacDONALD, ARLENE)
COLEMAN, WILLIAM H.)
McGEE, PATTI M.)
MacDONALD, SCOTT M.)
MacDONALD, ROSE F.)
McGEE, JASON DuBOSE,)
AMANDA DuBOSE, RONALD)
L. BROOME, LAWRENCE E.)
JONES, D. DIANE BURR,)
MARK H. THOMAS, KELLY)
C. THOMAS, WILLIAM)
MATTHEW YOLLO, NANCY)
H. YOLLO, JOSEPH)
DeANGELIS, BETH)
DeANGELIS, SHELLY HORN,)
THEODORE BRAMMER,)
ALLISON BRAMMER,)
WAYMON W. DURDEN,)
CONSTANCE C. DURDEN,)
DAVID C. POWELL,)

Plaintiffs,

vs.

BEAUFORT COUNTY, HPCCA)
FERRY COMPANY, INC., and)
THE DAUFUSKIE ISLAND)
FERRY SERVICE, LLC,)

Defendants.

**ORDER GRANTING
PRELIMINARY INJUNCTION**

This case came before the Court on January 5, 2023 for a hearing on the Plaintiffs' Renewed Motion for a Preliminary Injunction. Having carefully considered the pleadings, affidavits, exhibits and submissions of the parties, the Court grants the Motion and issues a Preliminary Injunction to take effect on January 1, 2024 based upon the findings of fact and conclusions of law below.

LEGAL STANDARD

Under South Carolina law, a party seeking to obtain injunctive relief generally must demonstrate that: (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. *See, e.g., FOC Lawshe Ltd. Partnership v. International Paper Co.*, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002). "In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief." *Compton v. South Carolina Dept. of Corrections*, 709 S.E.2d 639, 642, 392 S.C. 361, 367 (2011).

BACKGROUND

The 36 Plaintiffs herein filed their Complaint on June 11, 2021, alleging that Beaufort County and its vendors, HPCCA Ferry Company, Inc. and The Daufuskie Island Ferry Service, LLC, are damaging the Plaintiffs by conducting a commercial ferry operation in the historic neighborhood of Buckingham Landing, located on the shores of Mackay's Creek in southern Beaufort County. The Plaintiffs' Complaint alleges the commercial ferry is shuttling thousands of tourists and Daufuskie Island residents

annually to Daufuskie Island.¹ The Plaintiffs allege the County has operated the commercial ferry service in disregard of the Buckingham Landing Community Preservation District created in 2006, which bars such commercial businesses in the historic, quiet neighborhood. The Plaintiffs allege causes of action for creating a nuisance, negligence, inverse condemnation and promissory estoppel, and seek temporary and permanent injunctive relief, along with a declaratory judgment from this Court.

On March 14, 2022, the Plaintiffs filed their Motion for Partial Summary Judgment and a Temporary Restraining Order. After a hearing on May 18, 2022, Circuit Court Judge Bentley Price entered his Order of May 24, 2022, allowing the ferry operations at Buckingham Landing to continue only until Labor Day (September 5, 2022) and stated “If a new site has not been designated and approved by September 5, 2022, the Court will allow Plaintiff to seek a renewed injunction.” The County moved to Alter or Amend that Order, and on August 24, 2022, Judge Price entered a second Order stating that the County had shown “sufficient compliance” to satisfy the May 24 Order at that time, but specifically provided that the Plaintiffs could file a “new Motion for Temporary Injunction, should they be so inclined, after the scheduled mediation of the case on September 9, 2022.”

Presently pending before the Court is the Plaintiffs’ Renewed Motion for a Preliminary Injunction filed on October 3, 2022, after no progress was made at mediation.

¹ The Affidavit of Henry Criss filed by the Defendants HPCCA Ferry Company, Inc., and The Daufuskie Island Ferry Service, LLC, on October 25, 2022, confirms these allegations. Therein, Mr. Criss states that “19,100 trips for Beaufort County residents” were conducted between August 2021 and August 2022. Mr. Criss further affirmed that during the twelve months ending October 31, 2022, “an average of approximately 1,596 trips a month” were used by Beaufort County residents.

FINDING OF FACTS

1. The Plaintiffs are the owners and/or residents of real property lying and being in Beaufort County, South Carolina, located in the historic neighborhood of Buckingham Landing.

2. In 1991, Wilbert Roller, the previous owner of the parcel of land currently owned by Beaufort County (hereinafter “Restaurant Property”) was granted a permit for the construction of a restaurant known as the Sea Trawler. In 1993, Beaufort County issued a stop work order informing Mr. Roller that his permits were revoked.

3. In 2000, Mr. Roller requested a vested rights determination and on March 28, 2002, the Honorable Ernest A. Finney issued an order which determined Mr. Roller had a vested right to continue construction of the restaurant.

4. The restaurant was permitted to be constructed following the development plan submitted to the County in 1988.

5. In May of 2006, a committee was formed to create and enact the Buckingham Landing Community Preservation District (hereinafter “Preservation District”). A final draft of the Buckingham Landing Community Preservation Plan (hereinafter “Preservation Plan”) was submitted to the County and a public hearing was held on February 6, 2007. The Preservation Plan was adopted and appended as Appendix 4-F to the Beaufort County Comprehensive Plan on June 25, 2007.²

6. Under the Community Development Code Division A.10- Buckingham Landing Community Preservation District (BLCP)³, the properties within the Preservation District are zoned Residential and contain specific Land Use conditions and permissions.

² See Appendix 4-F, Beaufort Comprehensive Plan (Buckingham Landing Community Preservation Plan)

³ See Appendix A, Division A-10, Beaufort County Community Development Code (Buckingham Landing Community Preservation District)

7. Operation of a commercial ferry service is not a permitted use under the BLCF or the Preservation Plan.

8. The Preservation Plan specifically states that there are “five lots in the CP on which are existing commercial activities...All five parcels contain nonconforming uses”.⁴ The Restaurant Property is one of those five parcels defined as a nonconforming use.⁵

9. The Preservation Plan states:

“None of the above parcels contains uses that conform to the existing Community Preservation land use ordinance. In this respect the uses are considered to be nonconforming and subject to specific certain limitations (ZDSO Table 106-9)...⁵**Any nonconforming use shall be considered abandoned if vacant or unused for 120 days. Abandoned uses shall only be replaced with conforming uses and structures.**”(emphasis added)⁶

10. The Sea Trawler restaurant ceased operating at an unknown date, and another restaurant then called the Sunset Bay Restaurant, opened in its place. The Sunset Bay Restaurant closed permanently in September 2013, as verified by Affidavit of the General Manager of the restaurant, Zach Drescher.⁷

11. No other restaurant or other business operated out of the Restaurant Parcel and the property remained vacant until the Daufuskie Ferry began operations from the attached dock in January 2017 after Hurricane Matthew destroyed Palmetto Bay Marina, where the ferry service previously operated.⁸

12. The Daufuskie Island Ferry was allowed to use the dock attached to the Restaurant Property pursuant to a lease agreement with the property owner.

⁴ See Preservation Plan P. 10

⁵ See Preservation Plan P. 11

⁶ See Preservation Plan P. 12

⁷ See Affidavit of Zach Drescher filed March 14, 2022

⁸ See Affidavit of Amanda DuBose filed March 14, 2022

13. In July 2018, Beaufort County purchased the Restaurant Property specifically to continue operations of the Daufuskie Island Ferry service.

14. At no time did Wilbert Roller, Queensborough National Bank, Beaufort County or Haig Point (operator of the Daufuskie Island Ferry service), ever apply for or receive a variance from the Community Preservation District uses to be allowed to operate a commercial ferry service from the Restaurant Property.

15. Beaufort County and the Daufuskie Island Ferry continue to operate a commercial ferry service from the Restaurant Property in violation of the Community Preservation District's land uses as defined in the Beaufort County Community Development Code.

16. Alternative sites exist in Southern Beaufort county for the embarkation/debarkation center, such as Pinckney Island or the Hilton Head Harbor.⁹

CONCLUSIONS OF LAW

Based on the record before the Court, the Plaintiffs have presented sufficient evidence to meet each of the required elements for this Court to enter a preliminary injunction:

A. The Plaintiffs Have Made a Sufficient Showing of Irreparable Harm

The Buckingham Landing neighborhood Plaintiffs have shown that irreparable harm will result if an injunction is not granted. “[W]hether a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law for a wrong, are questions that are not decided by narrow and artificial rules.” *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 16 (1939). If the threatened wrong involves actual damage, the

⁹ See the Affidavit of Neil Turner filed on January 2, 2023.

mere uncertainty of fixing the measure of such damage to the injured party may itself be sufficient to justify the exercise of equitable jurisdiction. *Id.* Irreparable injury as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages. *Bethel M. E. Church v. City of Greenville*, 211 S.C. 442, 451, 45 S.E.2d 841, 845 (1947).

In this case, the Plaintiffs have presented evidence sufficient to show several forms of irreparable harm that will occur in the absence of injunctive relief, including the following:

- a. An exponential increase in daily traffic flow on Fording Island Road Ext.
- b. Illegal parking in the boat landing and along roadways on Fording Island Road Ext. and Big Oak St.
- c. Numerous cars parked under the Bluffton Parkway flyover bridge and behind the gas station as overflow parking for the ferry service.
- d. Ferry passengers trespassing on private property.
- e. The County operated shuttle bus using the public boat landing as a designated pick up/drop off location for ferry passengers in violation of County Ordinance 102 Article II.
- f. Numerous cars excessively speeding on Fording Island Road Ext.
- g. On several occasions, walkers and bikers (including children) being forced off the road by speeding ferry passengers.
- h. Excessive noise emitting from the ferry dock and parking lot beginning as early as 6:00am until after 9:00pm.
- i. Ferry passengers allowing their dogs to roam unleashed within Buckingham Landing and defecate on private properties.
- j. Ferry passengers parking and blocking access to the BJWSA pump station, fire hydrant and AED station.

- k. Ferry passengers using Fording Island Road Ext. and the boat landing to unload and load their belongings in violation of County Ordinance 102 Article II.
- l. Ferry passengers parking and blocking access to private driveways and blocking access to other roads in the neighborhood.¹⁰

Taken as a whole, these circumstances demonstrate irreparable harm, notwithstanding the fact that the County asserts the level of damages is insufficient to warrant preliminary relief. Although this Court is not making any determinations on the merits, injunctive relief is necessary to preserve the Buckingham Landing neighbors' rights and interests pending the outcome of this litigation.

B. The Buckingham Landing Residents Have Shown A Likelihood of Success on the Merits

As is set forth above, the Buckingham Landing Community Preservation District, an ordinance established and passed by Beaufort County, prohibits the operation of a commercial ferry service in the Buckingham Landing neighborhood. The former restaurant, which the County purchased and owns, was once legally recognized as a “non-conforming” property, but under the express terms of the ordinance, that non-conforming status was lost to disuse.

To obtain a preliminary injunction, a party is “not required to prove an absolute legal right when seeking a preliminary injunction, but [she] must present a reasonable question as to the existence of such a right.” *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505, 509 (Ct. App. 2009); *see also Williams v. Jones & Amerman*, 92 S.C. 342, 75 S.E. 705 (1912) (“This does not mean an absolute legal right or certainty of success but rather that he has a fair question to raise as to the existence of such a right.”). Courts have

¹⁰ See Affidavits of Alisa Ware, Amanda DuBose, James Ware and Ronald Broome filed March 14, 2002.

broadly construed this element and a litigant is required to do little more than state a cause of action or make a *prima facie* showing. *County of Richland v. Simpkins*, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002); *Childs v. Columbia*, 87 S.C. 566, 70 S.E. 296 (1911).

Based on the evidence presented, the Court finds that the Buckingham Landing neighbors have made a *prima facie* sufficient to demonstrate a likelihood of success on the merits. In making this determination, the Court has relied upon the relevant provisions of Beaufort County's ordinances, that specifically prohibit commercial ferry services in the neighborhood. Additionally, the Plaintiffs have shown viable alternative locations for the commercial ferry service embarkation/debarkation at both the Hilton Head Harbor and Pinckney Island. Based on the circumstances presented and the record that is before the Court, a refusal on the part of the County to relocate the embarkation/debarkation point with more than ten months' notice as provided herein, would be unreasonable, such that the Plaintiff neighbors should be allowed to reclaim their privacy and safe roads.

C. The Buckingham Landing Plaintiffs Have Made a Sufficient Showing of an Inadequate Remedy at Law

Regarding the third and final required element,¹¹ the Buckingham Landing neighbor Plaintiffs have also shown that there is an inadequate remedy at law. The consequences of the continuing commercial ferry operations in this quiet, historic

¹¹ Based on the decision of the South Carolina Supreme Court in the case of *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010), it appears that an independent "balancing of the equities" is unnecessary because this analysis is subsumed by the underlying three-part test for injunctive relief. *See Poynter*, 387 S.C. at 587, 694 S.E.2d at 17 ("In our view, the 'balancing the equities' requirement is neither necessary nor appropriate in a preliminary injunction case, where the three requirements (irreparable harm, success on merits, and inadequate remedy at law) are well established and clearly delineate the burden of proof and of persuasion. Moreover, the balancing requirement is subsumed by the irreparable harm and inadequate remedy at law components of the three-part test.") To the extent that such an analysis is necessary under the circumstances, the Court finds that the balance of equities tips in favor of the Buckingham Landing Plaintiffs for the reasons set forth in this Order.

neighborhood are difficult, if not impossible, to quantify. Additionally, damages would be impractical and ineffective as the property rights and privacy and safety interests of the neighborhood residents will continue to be lost for as long as Beaufort County deems it appropriate to operate the commercial ferry service in a historic neighborhood where it specifically bars such activity by ordinance. Under South Carolina law, whether there is an adequate remedy at law for a wrong is a question that is not to be decided by narrow and artificial rules. *Kirk*, 191 S.C. at 205, 4 S.E.2d at 15. An “adequate” remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity. *See Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm’n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989).

The neighborhood Plaintiffs have lived with the commercial ferry operations in violation of the County ordinances for more than five years. Other than a preliminary injunction, there is no certain, practical, complete and efficient remedy that these Plaintiffs can pursue under the circumstances. Therefore, the issuance of a preliminary injunction is proper.

CONCLUSION AND RELIEF AWARDED

The Buckingham Landing Plaintiffs have made a sufficient showing to convince this Court that, under the unique circumstances presented, a preliminary injunction should be issued. Accordingly, it is hereby ordered that:

- A Preliminary Injunction is granted in favor of the Plaintiffs prohibiting Beaufort County, the Daufuskie Island Ferry Service, LLC, and the HPCCA Ferry Company, Inc. from operating commercial ferry boats from the Buckingham Landing property as of January 1, 2024. Until that date, the operations may continue consistent with current levels of use while the County and its vendor operators plan and prepare for a relocation by the end of this year; and,

- As security for such damages as may be incurred in the event that the County is wrongfully enjoined as of January 1, 2024, this Court directs the neighborhood Plaintiffs to post an injunction bond by December 31, 2023 of TEN THOUSAND DOLLARS (\$10,000.00). Under the circumstances, the court considers this to be an appropriate amount for an injunctive bond.

IT IS SO ORDERED.

The Honorable Courtney C. Pope
Circuit Court Judge, Second Circuit

February _____, 2023



Beaufort Common Pleas

Case Caption: James Ware , plaintiff, et al VS Beaufort County , defendant, et al

Case Number: 2021CP0701078

Type: Order/Temporary Injunction

So Ordered

The Honorable Courtney Clyburn Pope