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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Courtney Clyburn Pope, Circuit Court Judge

Civil Action No. 2023-000581

James Ware, Alisa Ware, Henry Spahr, Elaine Spahr, Julie Sanders,
William Craig Denny, Jeff Toomer, Allyson Toomer, Louise 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, Respondents-Appellants,

v.

Beaufort County, HPCCA Ferry Company, Inc.,
and The Daufuskie Island Ferry Service, LLC, Defendants,

Of which Beaufort County is the Appellant-Respondent.

INITIAL BRIEF OF APPELLANT-RESPONDENT

Danny C. Crowe, SC Bar #1480
CROWE LAFAVE GARFIELD & BAGLEY, LLC
2019 Park Street
Columbia, SC 29201
803-724-5728
danny@crowelafave.com

Attorneys for Appellant-Respondent
Beaufort County

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Statement of Facts.....	6
Standard of Review.....	12
Arguments.....	13
I. THE CIRCUIT COURT ABUSED ITS DISCRETION BY ORDERING AN OVERLY BROAD PROHIBITORY PRELIMINARY INJUNCTION THAT REQUIRES THE COUNTY TO ABANDON THE CURRENT PUBLICLY OWNED FERRY SITE AND CEASE ALL OPERATION OF THE ONLY PUBLIC FERRY TO DAUFUSKIE ISLAND AS OF THE ARBITRARY DATE OF JANUARY 1, 2024.....	13
II. THE CIRCUIT COURT ERRED AND ABUSED ITS DISCRETION IN IMPOSING A PRELIMINARY INJUNCTION BY FAILING TO GIVE ANY CONSIDERATION TO THE PARALLEL ADMINISTRATIVE PROCEEDING THAT HAD DETERMINED THE COUNTY’S USE OF THE COMMERCIAL DOCK FOR A PUBLIC FERRY WAS “A LEGAL USE” UNDER THE ZONING ORDINANCE	15
III. THE CIRCUIT COURT ERRED AND ABUSED ITS DISCRETION IN IMPOSING A PRELIMINARY INJUNCTION IN THE ABSENCE OF EVIDENCE OF IRREPARABLE HARM TO PLAINTIFFS	19
IV. THE CIRCUIT COURT ERRED AND ABUSED ITS DISCRETION IN IMPOSING THE PRLIMINARY INJUNCTION WITHOUT APPROPRIATE CONSIDERATION OF THE ADEQUATE REMEDIES AT LAW SOUGHT BY PLAINTIFFS	20
V. IN LIGHT OF THE INDICATED SUBSTANTIAL COSTS TO THE COUNTY, THE CIRCUIT COURT ERRED AND ABUSED ITS DISCRETION IN SETTING A LOW INJUNCTION BOND OF \$10,000 FOR PLAINTIFFS WITH NO EVIDENTIARY BASIS AND WITHOUT A HEARING	21
Conclusion	22

TABLE OF AUTHORITIES

CASES

	Page
<u>County Council of Charleston v. Felkel</u> , 244 S.C. 480, 137 S.E.2d 577 (1964)	13
<u>County of Richland v. Simpkins</u> , 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002)	12
<u>Eldridge v. City of Greenwood</u> , 308 S.C. 125, 417 S.E.2d 532 (1992).....	14
<u>Hylar v. Wheeler</u> , 240 S.C. 386, 126 S.E.2d 173 (1962)	21
<u>LeFurgy v. Long Cove Club Owners Association, Inc.</u> , 313 S.C. 555, 443 S.E.2d 577 (Ct. App. 1994)	12, 19
<u>Mailsorce, LLC v. M.A. Bailey & Associates, Inc.</u> , 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003)	13
<u>Peek v. Spartanburg Regional Healthcare System</u> , 367 S.C. 450, 626 S.E.2d 34 (Ct. App. 2005), <u>cert. denied</u> (2007)	12
<u>Roberts v. Union County Board of School Trustees</u> , 284 S.C. 299, 326 S.E.2d 163 (Ct. App. 1985)	18
<u>Scratch Golf Company v. Dunes West Residential Golf Properties, Inc.</u> , 361 S.C. 117, 603 S.E.2d 905 (2004)	12
<u>Zabinski v. Bright Acres Associates</u> , 346 S.C. 580, 553 S.E.2d 110 (2001).....	13

STATUTES

S.C. Code § 6-29-820.....	17
S.C. Code § 6-29-840.....	17
S.C. Code § 14-3-330.....	12

COURT RULES

Rule 12(b)(6), SCRCP	2
Rule 65(c), SCRCP	21

OTHER

27 S.C. Jur. <u>Injunctions</u> § 12 (2023)	14
27 S.C. Jur. <u>Injunctions</u> § 56 (2023)	21

STATEMENT OF ISSUES ON APPEAL

- I. **DID THE CIRCUIT COURT ABUSE ITS DISCRETION BY ORDERING AN OVERLY BROAD PROHIBITORY PRELIMINARY INJUNCTION THAT REQUIRES THE COUNTY TO ABANDON THE CURRENT PUBLICLY OWNED FERRY SITE AND CEASE ALL OPERATION OF THE ONLY PUBLIC FERRY TO DAUFUSKIE ISLAND AS OF THE ARBITRARY DATE OF JANUARY 1, 2024?**

- II. **DID THE CIRCUIT COURT ERR AND ABUSE ITS DISCRETION IN IMPOSING A PRELIMINARY INJUNCTION BY FAILING TO GIVE ANY CONSIDERATION TO THE PARALLEL ADMINISTRATIVE PROCEEDING THAT HAD DETERMINED THE COUNTY’S USE OF THE COMMERCIAL DOCK FOR A PUBLIC FERRY WAS “A LEGAL USE” UNDER THE ZONING ORDINANCE?**

- III. **DID THE CIRCUIT COURT ERR AND ABUSE ITS DISCRETION IN IMPOSING A PRELIMINARY INJUNCTION IN THE ABSENCE OF EVIDENCE OF IRREPARABLE HARM TO PLAINTIFFS?**

- IV. **DID THE CIRCUIT COURT ERR AND ABUSE ITS DISCRETION IN IMPOSING THE PRELIMINARY INJUNCTION WITHOUT APPROPRIATE CONSIDERATION OF THE ADEQUATE REMEDIES AT LAW SOUGHT BY PLAINTIFFS?**

- V. **IN LIGHT OF THE INDICATED SUBSTANTIAL COSTS TO THE COUNTY, DID THE CIRCUIT COURT ERR AND ABUSE ITS DISCRETION IN SETTING A LOW INJUNCTION BOND OF \$10,000 FOR PLAINTIFFS WITH NO EVIDENTIARY BASIS AND WITHOUT A HEARING?**

STATEMENT OF THE CASE

The Complaint in this action, filed on June 11, 2021, alleged that the Plaintiffs are owners or renters of residences in a neighborhood next to a County-owned public boat landing and a County-owned public ferry service access point known as Buckingham Landing. The Complaint further alleged that the County public ferry service access point has been operating as an illegal nonconforming zoning use and as a nuisance since 2018. (Complaint, paragraph 20). The principal allegations of the Complaint concerning nuisance were that the ferry access point results in a “greatly enhanced volume of traffic” and a “greatly enhanced volume of individuals who mill about the residential neighborhood on foot.” (Complaint, paragraph 23). The Complaint asserted six causes of action (inverse condemnation, promissory estoppel, declaratory relief, nuisance, negligence, and temporary and permanent injunction) and seeks actual and punitive damages, as well as equitable relief. (Complaint).

In response to the Complaint, the Defendant Beaufort County (the “County”) filed a motion to dismiss pursuant to Rule 12(b)(6), SCRPC. The motion asserted that the Complaint failed to allege facts showing that the Plaintiffs had sought any administrative determination, as provided by State statutory law and County ordinances, by the County zoning official or the County zoning board of appeals concerning the alleged illegal use of the dock under the County zoning ordinances. (County Motion to Dismiss). The County's motion to dismiss for this failure to exhaust administrative remedies was denied, after hearing, by Order of the Honorable Diane S. Goodstein, Circuit Court Judge, filed on October 27, 2021. (Order Denying Motion to Dismiss).

The subsequent Answer of the County to the Complaint, filed on November 10, 2021, (Answer) denied any liability of the County to the Plaintiffs and raised a number of affirmative defenses, including the County's asserted lawful use of the Buckingham Landing commercial dock

as a public ferry service access point by reason of, among other things, a 2005 State Commercial Dock Permit and a 2009 County Zoning Permit for a Commercial Dock. (Answer, paragraph 39). The Answer also asserted specific affirmative defenses to the inverse condemnation, promissory estoppel, and tort (negligence and nuisance) claims. (Answer pp. 6-9). With written consent of the parties, the County filed an Amended Answer on October 11, 2022 (Amended Answer), asserting additional affirmative defenses. The ferry operator Defendants, HPCCA Ferry Company, Inc., and The Daufuskie Island Ferry Service, LLC, filed their joint Answer on September 14, 2021, and also denied liability to the Plaintiffs and asserted affirmative defenses. (Answer of ferry operators).

On March 14, 2022, Plaintiffs filed a motion for partial summary judgment and for a temporary injunction (Plaintiffs' Motion filed March 14, 2022), along with supporting affidavits. (Affidavits of Thomas Taylor, James Ware, Alisa Ware, Amanda Dubose, Ronald Broome, and Zach Drescher). Plaintiffs later filed a supporting memorandum. (Plaintiffs' Supporting memorandum of May 16, 2022). In opposition to this motion, the County, on May 16, 2022, filed a memorandum in opposition (County Memorandum Opposing of May 16, 2022) and the affidavits of Robert Merchant (First Affidavit of Merchant) and David Wilhelm (Wilhelm Affidavit).

A hearing on Plaintiffs' motion for partial summary judgment and for a temporary injunction was held before the Honorable Bentley D. Price, Circuit Court Judge, on May 18, 2022. Judge Price issued, on May 24, 2022, a Form 4 Order (2022 Injunction Order) providing:

Ferry operations shall continue from now until Labor Day, which falls on September 5, 2022. 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 filed a motion to alter or amend the 2022 Injunction Order on June 3, 2022 (Motion to alter or amend filed June 3, 2022) which was heard by Judge Price on August 3, 2022. (Transcript of hearing of August 3, 2022). At the hearing, Judge Price described his Order as “[my]

nudge to get the county to get off of its rear and try to find an alternative site.” (Transcript of hearing of August 3, 2022, p. 3, lines 15-17).

When advised at the hearing that the County Council had given two of three required readings to an ordinance for approval of purchase or condemnation of an alternative ferry site on Hilton Head Island to take the place of the Buckingham Landing site, Judge Price advised that he would not shut down the ferry on Labor Day. (Transcript of hearing of August 3, 2022, p. 3, line 19- p. 4, line 1; p. 5, line 3- p.7, line 5): “So on Labor Day, I’m not shutting it down. I would never do that because people got to get to and from the island, they’ve got to make money, the County’s got to run a marina. I mean, that’s just the way life goes, but my plan worked. So, I’m not going to stop on Labor Day.” (Transcript of hearing of August 3, 2022, p. 5, lines 12-18). Judge Price also noted “So there’s no reason for me to punish the County any further. I mean, they’re doing it.” (Transcript of hearing of August 3, 2022, p. 6, lines 19-20).

Judge Price’s conditional injunction was amended by his Order, filed on August 24, 2022, to provide that the injunction order would expire on September 6, and that the actions of the County Council in enacting the ordinance for purchase or condemnation of an alternate site showed “sufficient compliance to satisfy the May 24 Order at this time.” The Order also provided that the expiration of the Order was “without prejudice to the Plaintiffs’ ability to file a new motion for temporary injunction, should they be so inclined, after the scheduled mediation of the case on September 9, 2022.” (Order amending 2022 Injunction Order).

Plaintiffs filed a renewed motion for preliminary injunction on October 3, 2022 (Renewed Motion filed October 3, 2022), accompanied by a supporting memorandum. (Plaintiffs’ Supporting Memorandum filed October 3, 2022). The motion asserted that the County and the ferry operators “have made no good faith efforts toward actually moving forward to cease operations of the

commercial ferry service from Buckingham Landing” and requested a preliminary injunction requiring cessation of commercial operations “by the end of the year.” (Renewed Motion filed October 3, 2022, p. 2). On January 2, 2023, Plaintiffs filed an affidavit of Neil Turner in support of their renewed motion for preliminary injunction. (Turner Affidavit).

In response to Plaintiffs’ renewed motion, the ferry operator Defendants filed the affidavit of Henry Criss (Criss Affidavit), and the County filed an exhibit consisting of the transcript of the August 3 hearing (Transcript of Hearing of August 3, 2022), the second affidavit of Robert Merchant (second Merchant Affidavit), affidavits of Jared Fralix, P.E. (Fralix Affidavit) and Henry Amundson (Amundson Affidavit), and a document listing the record document references relied on by the County for the hearing (References document). The County also filed, on October 28, 2022, a motion for a stay of further proceedings in the case in the event the preliminary injunction was granted. (County Motion to Stay).

A hearing on both Plaintiffs’ renewed motion for preliminary injunction and on the County’s motion for stay was held on January 5, 2023, before the Honorable Courtney Clyburn Pope, Circuit Court Judge. (Transcript of Hearing of January 5, 2023). Following the hearing, Judge Pope filed an Order Granting Preliminary Injunction on February 21, 2023 (2023 Injunction Order) (sometimes referred to as “the 2023 Injunction Order”). That Order “prohibited [the Defendants] from operating commercial ferry boats from the Buckingham Landing property as of January 1, 2024.” (2023 Injunction Order p.10). The Order further provided that “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.” (2023 Injunction Order p. 10). The 2023 Injunction Order also ordered an injunction bond to be posted by the Plaintiffs by

December 31, 2023, as security in the event the County was wrongfully enjoined. The bond was set, without explanation, at the “appropriate amount” of \$10,000. (2023 Injunction Order p. 11).

The County's motion to alter or amend the 2023 Injunction Order or, alternatively, for a new hearing, was filed on March 2, 2023. (County’s Motion to alter or amend the 2023 Injunction Order). This motion was denied, without a hearing, by a Form 4 Order filed on March 16, 2023. (Order denying County's Motion to alter or amend). A timely appeal from the Order of preliminary injunction and from denial of the post-Order motions was filed by the County with this Court on April 6, 2023.

On February 22, 2023, Judge Pope filed an Order granting a stay of further proceedings in the case pending final disposition of the County’s appeal from the order granting a preliminary injunction (the “Stay Order”). (Stay Order). The Stay Order, by its terms, expressly excludes a stay of the Order granting a preliminary injunction. (Stay Order p. 2). Plaintiffs’ motion to alter or amend the Stay Order was filed on March 2, 2023. (Plaintiffs’ Motion to alter or amend). This motion was denied, without a hearing, by a Form 4 Order filed on March 16, 2023. (Order denying County’s Motion to alter or amend). A timely appeal from the Order denying the motion to alter or amend was filed by the Plaintiffs with this Court on April 10, 2023, and was withdrawn on June 7, 2023.

STATEMENT OF FACTS

Following damage from Hurricane Matthew in October 2016 to the original embarkation site for the County's public ferry to Daufuskie Island, and following an unsuccessful temporary relocation to another site, the County relocated the public ferry site to Buckingham Landing beginning February 13, 2017. (First Merchant Affidavit, Exhibit 4, last two pages). An aerial photo of the Buckingham Landing area, showing the County property, the commercial dock, the public

boat landing, the access road, and a portion of the neighborhood, is attached to and described in the affidavit of David Wilhelm filed by the County prior to the 2022 Injunction Order. (Wilhelm Affidavit pp. 2 and 5).

Buckingham Landing is an area of high ground in Beaufort County located south of U.S. Highway 278 on the Bluffton side of Mackay Creek and immediately near the Highway 278 flyover bridge to Hilton Head Island. The Buckingham Landing neighborhood is not a private or restricted access development, and is accessed by and located on public streets. The ferry embarkation site and commercial dock at issue in this case is located on or adjoining more than 1.3 acres of County-owned property acquired in July 2018 (First Merchant Affidavit, Exhibit 4, pp. 17-20) along a portion of the water side of Fording Island Road Extension. This County property formerly was the site of a seafood restaurant (the Sea Trawler) and includes two structures. The County property adjoins, on its south or land side, a long-time County-owned public boat landing at the land's end of Fording Island Road Extension. A portion of the Buckingham Landing neighborhood adjoins the road and the public boat landing. (Wilhelm Affidavit).

The public ferry site and public boat landing are accessed from Highway 278 by Fording Island Road Extension, a State-owned and maintained two-lane paved public road. As a public road, it is open to use by all members of the public at all hours every day, and entrance into the road is not controlled or restricted. The Buckingham Landing area, and the streets within the area, are subject to the law enforcement jurisdiction of the Beaufort County Sheriff. (Wilhelm Affidavit pp. 2-3).

In his affidavit, David Wilhelm (the Deputy Director of Public Works for the County) stated that the shoulders of Fording Island Road Extension along and across from the County-

owned property are posted with “No Parking” signs (including such signs and cones at the gate to the BJWSA pump station, fire hydrant and AED station). The County provides a parking lot for the ferry service passengers on the north or water side of the road across from (but not adjoining) the neighborhood, as well as a remote parking area at the Daufuskie Island Visitor Center at 1536 Fording Island Road (Highway 278) and shuttle bus service to the embarkation site. The shuttle bus that services the passengers to and from the Visitor Center is permitted on the public roads and at the embarkation site. (Wilhelm Affidavit p. 3).

The volume of passenger usage of the County-provided ferry service at Buckingham Landing is evidenced by the affidavit of Henry Criss who is employed by the two named ferry operator Defendants as Director of Marine Operations and is responsible for overseeing operations of the ferry service between Buckingham Landing and Daufuskie Island. His affidavit provides that the ferry operator Defendants contract with the County for the ferry service to Daufuskie Island and that “The Defendants' ferry service is the only public transportation for Beaufort County residents and others to access Daufuskie Island.” (Criss Affidavit p. 2).

According to the Criss affidavit, the ferry service provided approximately 19,100 individual ferry trips in the year prior to September 2022, “for Beaufort County residents, mostly consisting of Daufuskie Island residents” and, for the twelve months ending October 31, 2022, provided an average of approximately 1596 ferry trips per month “by Beaufort County residents, mostly being Daufuskie Island residents or employees accessing jobs on Daufuskie Island.” (Criss Affidavit). The yearly figure for individual trips equates to just over 52 individual trips per day.

The evidentiary factual basis for the County’s position on “legal use” of the Buckingham Landing commercial dock as a public ferry site is provided by the two affidavits (and exhibits) of

Robert Merchant. (the two Merchant Affidavits). Both affidavits were on record and were argued to the circuit court before issuance of the two Orders now on appeal by the County.

Merchant is the Director of the Beaufort County Planning and Zoning Department and his duties include rendering of official interpretations of the County zoning ordinances (known as the Community Development Code) including determinations of the legality or illegality of nonconformities. These interpretations and determinations are then subject to appeal to the Zoning Board of Appeals pursuant to the Community Development Code. Interpretations and determinations from the Zoning Director are the first step in the County's formal administrative remedy under the County zoning ordinance. (First Merchant Affidavit pp. 1-2 and Exhibit 1, pp. 5-7)

In September 2021, Merchant received a letter from the Plaintiffs' attorney, on behalf of four of the Plaintiffs (James Ware, Alisa Ware, Jason DuBose, and Amanda DuBose), that referenced this lawsuit and requested a determination on whether the County's ferry operation at Buckingham Landing was an illegal nonconforming business. (First Merchant Affidavit p. 2, and Exhibit 2, pp. 9-10). Merchant subsequently received a position statement from the County's attorney in this lawsuit that also provided copies of (1) the Beaufort County Zoning Permit for a commercial dock for the Sea Trawler property issued on May 4, 2009, and referencing the OCRM permit by number, (2) the deed filed July 27, 2018 by which the County acquired the former restaurant property and dock for \$2,200,000, (3) the SCDHEC /OCRM Construction Authorization permit, dated May 4, 2009, for a commercial dock at the location, and referencing the original SCDHEC/OCRM commercial dock permit number and issue date of January 11, 2005. (4) the property owner/ ferry service lease for the property and dock dated January 27, 2017, with renewal on August 1, 2017, and (5) a Beaufort County News Release announcing relocation of the County

ferry service to Buckingham Landing beginning February 13, 2017. (First Merchant Affidavit, p. 2, and Exhibit 4).

Zoning Director Merchant issued his administrative determination by his letter to Plaintiffs' attorney dated April 21, 2022. (First Merchant Affidavit, p. 2 and Exhibit 5). As he described in his first affidavit, "The gist of my determination was that the County's use of the dock for a ferry service is a legal use under the Development Code." (First Merchant Affidavit p.2). The opinion of the Zoning Director was that "the use of the commercial dock as a ferry landing conforms to the original zoning permit that was issued on May 4, 2009." (First Merchant Affidavit p. 2). This permit "did not establish any conditions or time restrictions. Additionally, the approval of the variance runs with the land, shall be binding on the landowners and their successors and assigns, and shall not be affected by a change in ownership." (First Merchant Affidavit, Exhibit 5).

Plaintiffs appealed the Merchant determination to the Beaufort County Zoning Board of Appeals ("ZBOA"). The ZBOA held a hearing on the appeal and, following the first hearing, also held a subsequent hearing on the appeal and Plaintiffs' petition for reconsideration. The Zoning Board issued a written Decision and Order dated September 16, 2022. (Second Merchant Affidavit, p. 2 and Exhibit 3). In its Decision and Order, the Zoning Board denied the petition for reconsideration and specifically found and concluded that Director Merchant's interpretation of the commercial dock as a legal use of the property for the embarkation point of the ferry service was "correct and proper, and should be upheld." (Second Merchant Affidavit, Exhibit 3).

Plaintiffs filed an appeal of the ZBOA action to circuit court on August 23, 2022, after the first ZBOA hearing , before the second BZOA hearing, and prior to service of the written ZBOA

Decision and Order. This appeal to circuit court (Case No. 2022-CP-07-01598) remains pending at the time of this writing.

The County's efforts to locate an alternative site to Buckingham Landing, independent of court action, are shown in the affidavit of Jared Fralix (filed on October 11, 2022) (Fralix Affidavit), and in the affidavit of Henry Amundson (filed on November 14, 2022) (Amundson Affidavit). These affidavits outline some of the details of the necessary alternative site property identification, site and dock design, procurement, contracting required for an alternative site, as well as the types of approvals needed from agencies of other governments such SCDHEC, OCRM and USCOE. These affidavits also describe problems with any selection of certain other possible alternative ferry sites, including the Jenkins Island/ Neil Turner site.

The County's further efforts to relocate from Buckingham Landing also included the adoption of County Ordinance 2022/35 authorizing the purchase or condemnation for up to \$3,400,000 of a designated site of approximately 4.98 acres on Helmsman Way on Hilton Head Island. (Plaintiffs' Renewed Motion of Preliminary Injunction, Exhibit D). The Ordinance, which was given the first of three required readings on June 27, 2022, was given third and final reading on August 8, 2022. This Ordinance served to initiate the County's efforts to obtain the alternative site property, resulting in the filing on September 15, 2022, of a condemnation action (Beaufort County v. Broad Creek Development, LLC with Case No. 2022-CP-07-01762) that remains pending. The landowner in the condemnation action then filed, on October 12, 2022, an action in circuit court challenging the condemnation (Broad Creek Development, LLC v Beaufort County, Case No. 2022-CP-07-01978) that also remains pending. (Amundson Affidavit p. 2 and References document p.2).

STANDARD OF REVIEW

An interlocutory order in the court of common pleas granting or denying an injunction is immediately appealable. S.C. Code § 14-3-330(4). The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion. Peek v. Spartanburg Regional Healthcare System, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005), cert. denied (2007). An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law. Id.

An action for an injunction is equitable in nature. LeFurgy v. Long Cove Club Owners Association, Inc., 313 S.C. 555, 557, 443 S.E.2d 577, 578 (Ct. App. 1994). In equitable actions, an appellate court may review the record and find facts in accordance with its view of the preponderance of the evidence. LeFurgy, 313 S.C. at 557, 443 S.E.2d at 578.

The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected. LeFurgy, 313 S.C. at 558, 443 S.E.2d at 578. An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. Scratch Golf Company v. Dunes West Residential Golf Properties, Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation. Peek, 367 S.C. at 454, 626 S.E.2d at 36; County of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). For a preliminary injunction to be granted, the plaintiff must establish 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. Scratch Golf Company, 361 S.C. at 121, 603 S.E.2d at 907-908.

The sole purpose of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation. Zabinski v. Bright Acres Associates, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). “[A] temporary injunction is [used] to preserve the subject of the controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation...” Mailsorce, LLC v. M.A. Bailey & Associates, Inc., 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003), citing County Council of Charleston v. Felkel, 244 S.C. 480, 483-484, 137 S.E.2d 577, 578 (1964) (emphasis supplied).

ARGUMENTS

I. THE CIRCUIT COURT ABUSED ITS DISCRETION BY ORDERING AN OVERLY BROAD PROHIBITORY PRELIMINARY INJUNCTION THAT REQUIRES THE COUNTY TO ABANDON THE CURRENT PUBLICLY OWNED FERRY SITE AND CEASE ALL OPERATION OF THE ONLY PUBLIC FERRY TO DAUFUSKIE ISLAND AS OF THE ARBITRARY DATE OF JANUARY 1, 2024.

The very breadth of the preliminary injunction demonstrates the circuit court’s lack of sound discretion in issuing the Order. Even though couched as preliminary, the injunction will require the County to abandon a public ferry site acquired at significant taxpayer expense and obtain a new site on the mainland or on Hilton Head Island. Even though framed as prohibitory, the injunction will operate as a mandatory injunction against the County government if the ferry service is to be continued at a new site. The result is the forced restructure of the County’s public ferry service to Daufuskie Island, at considerable taxpayer expense, all before New Year’s Day 2024.

The circuit court Order has the effect of granting Plaintiffs all the injunctive relief that they could obtain upon a final hearing on the merits. In doing so, the Order also dramatically alters the status quo existing at the time of the Order.

Rather than tailor the scope of the preliminary injunction to address the nuisance elements complained of by Plaintiffs, such as parking and traffic issues, the circuit court instead required a complete shutdown of the Buckingham Landing ferry operation. An injunction should not be overbroad or provide relief more sweeping than is necessary. 27 S.C. Jur. Injunctions § 12 (2023), citing Eldridge v. City of Greenwood, 308 S.C. 125, 417 S.E.2d 532 (1992). The injunction ordered by the circuit court is overbroad and sweeping.

The Order granting the preliminary injunction provides no factual basis for the New Year's Day start date for the cessation of the ferry service from Buckingham Landing, and no basis for that date is suggested by any of the evidence. The date is purely arbitrary. Plaintiffs, in their supporting memorandum (dated January 3, 2023), specifically requested, without explanation, the date of April 15, 2023, for the effective date of the prohibitory injunction. (Plaintiffs' Memorandum in Support of their Renewed Motion, p. 18). At the January 5 hearing on the motion, the attorney for Plaintiffs noted that the April 15 date would give the County more than 90 days "to transition" (Transcript of January 5, 2023, hearing, p. 12, line 20 - p. 13, line 5) and, presumably, serve to "give them a stick across the butt in order to encourage them" as suggested by the Plaintiffs' attorney. (Transcript of January 5, 2023, hearing, p. 30, lines 18-24).

The selection of the date of January 1, 2024, also fails to consider, as set out in the affidavit of Henry Amundson (Amundson Affidavit), the evidence concerning the pending legal action (Broad Creek Development, LLC v Beaufort County, Case No. 2022-CP-07-01978, filed October 12, 2022) that challenges the condemnation action by the County for its selected alternative site to

Buckingham Landing (Beaufort County v. Broad Creek Development, LLC with Case No. 2022-CP-07-01762, filed September 15, 2022). The County cannot proceed on the condemnation action (and possession of the property for the beginning of construction) with the challenge action pending. This halt to the condemnation and possession was the situation at the time of the hearing before the circuit court, at the time of the County's post-Order motion, and is the situation at the time of the writing of this brief. The circuit court failed to consider this delay in the County's ability to acquire a site that the County Government considers appropriate.

As discussed in the Statement of Facts, the filed affidavits of the County's Jared Fralix (Fralix Affidavit) and Henry Amundson (Amundson Affidavit) set out some of the detail of the necessarily time-consuming work required to develop an operational relocated site. The circuit court Order indicates no consideration of this evidence.

Additionally, without any expressed consideration of the substantial negatives identified in the affidavits of Fralix and Amundson, the circuit court order simply assumed that the alternative site owned by the client of the Plaintiffs' attorney would be an appropriate location for the alternative public ferry site. (Transcript of hearing on January 5, 2023, p. 18, lines 6- 23). This assumption by the circuit court ignores the adverse circumstances described in the affidavits of Jared Fralix (Fralix Affidavit pp. 3-4) and Henry Amundson (Amundson Affidavit pp.2-3), and substitutes the circuit court's opinion on the providing of governmental services for that of the County.

II. THE CIRCUIT COURT ERRED AND ABUSED ITS DISCRETION IN IMPOSING A PRELIMINARY INJUNCTION BY FAILING TO GIVE ANY CONSIDERATION TO THE PARALLEL ADMINISTRATIVE PROCEEDING THAT HAD DETERMINED THE COUNTY'S USE OF THE COMMERCIAL DOCK FOR A PUBLIC FERRY WAS "A LEGAL USE" UNDER THE ZONING ORDINANCE.

Plaintiffs' likelihood of success on the merits clearly was not established by the evidence of record at the hearing, and, in granting the injunction, the Court disregarded and ignored all evidence of the administrative proceedings under the County's zoning ordinance that have determined that the County's use of the dock for a public ferry was "a legal use." This history of administrative proceedings was of record, was argued to the Court, and clearly was presented to the circuit court by the two affidavits of Zoning Director Robert Merchant.

Zoning Director Merchant, in his first affidavit, discussed and provided background documents for his written decision of April 21, 2022, that the County's use of the commercial dock at issue as a public ferry site was "a legal use" under the County's zoning ordinance (known as the Development Code). (First Merchant Affidavit, pp). The basis for that decision was that the dock at issue was the subject of a County zoning permit for a "Commercial Dock" issued on May 4, 2009. According to the Zoning Director, this zoning permit for a Commercial Dock sets out no conditions or time restrictions, and, in accord with the County zoning ordinance, runs with the land and is not affected by a change in ownership.

Because the authorization for a commercial dock on the property is a "permit," it necessarily is a permitted use under the County zoning ordinance. It is not a nonconforming use and, accordingly, is not subject to abandonment through disuse, as argued by Plaintiffs' attorney and sworn to in the affidavits of the lay Plaintiffs. The circuit court erred by failing to give appropriate weight to the administrative determination and to the existence of the 2009 County Zoning Permit.

The administrative decision of the Zoning Director, made at the request of four Plaintiffs by their attorney during the pendency of this case, was appealed by the Plaintiffs Ware and DuBose to the County Zoning Board of Appeals (ZBOA). The second affidavit of the Zoning Director

described that appeal, and attached the written decision of the ZBOA (dated September 16, 2023) (Second Merchant Affidavit, Exhibit 2) that denied Plaintiffs' appeal and affirmed the determination of the Zoning Director.

As also described in the second affidavit of Merchant, Plaintiffs subsequently appealed that ZBOA decision, pursuant to the State statutory framework for challenges to local government zoning decisions (including S.C. Code § 6-29-820), to the circuit court with docket number 2022-CP-07-01598. At the time of this writing, the appeal of the ZBOA decision to the circuit court is pending. A circuit court judge in that action will determine whether the ZBOA decision will stand. S.C. Code § 6-29-840(A).

The 2023 Injunction Order has the effect of ignoring and short-circuiting this State-mandated administrative/judicial process for zoning issues. The circuit court erred by failing to give appropriate weight to this written decision by the Zoning Board and by failing to give appropriate weight to the very process for determination of zoning issues established by State statutory procedure. The 2023 Injunction Order makes no effort to discuss or distinguish, or even acknowledge, this evidence of these administrative determinations of lawful use under the County zoning ordinance. The evidence before the circuit court was the administrative determinations by the Zoning Director and ZBOA that the County's use of a permitted commercial dock as a public ferry site is a lawful and legal use under the County zoning laws. The circuit court abused its discretion in ignoring this evidence.

The circuit court's findings and conclusions in the Order granting preliminary injunction include broad statements that go far beyond determination of the existence of a showing of likelihood of success, and are framed and presented as findings and conclusions directed to ultimate issues of the case. For example, Findings of Fact 7 and 15 state broad findings on disputed

facts rather than assess a showing of likelihood of success on the merits. Similarly, Finding of Fact 16 adjudicates a clearly disputed issue of fact (see the affidavits of Henry Amundson and Jared Fralix on the lack of viability of other alternative sites suggested by Plaintiffs). As argued at the hearing on January 5, the alternate site proposal by Neil Turner (a client of Plaintiffs' attorney) advocated by Plaintiffs and "adopted" by the Court's Finding 16 would require the County transfer a public road to Turner. (Turner Affidavit p.3). How could such an alternative have been determined by the circuit court to be reasonable or viable? These adjudications by the circuit court of disputed factual issues in the context of a motion for preliminary injunction are clearly erroneous.

In similar fashion, the 2023 Injunction Order sets out Conclusions of Law in its sections A, B, and C that purport to decide and declare conclusions of law on ultimate issues of law in the case. See, for example, the language on page 10 that: "The neighborhood Plaintiffs have lived with the commercial ferry operations in violation of the County ordinances for more than five years." (emphasis added).

"Although a court may consider a case's merits to the extent necessary to determine whether a temporary injunction should issue, it is improper for a court to make a final determination or to decide the merits of the case upon an application for a temporary injunction." Roberts v. Union County Board of School Trustees, 284 S.C. 299, 301, 326 S.E.2d 163, 164 (Ct. App. 1985) (internal citation omitted). The circumstance that the circuit court considered its findings and conclusions to be judicial determinations on County liability suggests an underlying basis for the broad sweep of the preliminary injunction. The language of the circuit court's preliminary injunction order, like the relief granted, goes too far and attempts to decide, for subsequent courts, the ultimate issues of County liability and appropriate final remedy.

III. THE CIRCUIT COURT ERRED AND ABUSED ITS DISCRETION IN IMPOSING A PRELIMINARY INJUNCTION IN THE ABSENCE OF EVIDENCE OF IRREPARABLE HARM TO PLAINTIFFS.

No sufficient factual or legal basis for a preliminary injunction of the ferry site operation was provided by Plaintiffs. Plaintiffs' affidavits were insufficient to establish legal entitlement to preliminary injunctive relief in light of the existence of the 2009 County Zoning Permit and were insufficient to establish irreparable harm if the injunction were not granted.

The allegations in the affidavits of Plaintiffs related to alleged irreparable injury are predominately general and vague in nature, and provide only anecdotal information with no allegations as to frequency, duration, or repetition of the occurrence of the instances of public behavior of which the affiants complain. The affidavits also relate no objective measures or quantification of inappropriate parking or of increased traffic volume or of reports to law enforcement of criminal activity, and do not differentiate among vehicular and pedestrian traffic related to the public ferry, the public boat landing, the neighborhood, lost wayfarers, or general sightseeing. The affidavit of the County's David Wilhelm also illustrates other problems with Plaintiffs' affidavits and their complaints about traffic and law enforcement on public streets and in places open to the public.(Wilhelm Affidavit pp. 2-3).

As observed in LeFurgy v. Long Cove Club Owners Association, Inc., 313 S.C. at 558, 443 S.E.2d at 580, "people living in organized communities must suffer some annoyance and inconvenience from each other incident to city life." The Court in LeFurgy also noted, in footnote 3 at 313 S.C. at 561, 443 S.E.2d at 580: "mere annoyance or inconvenience will not support an action for a nuisance."

IV. THE CIRCUIT COURT ERRED AND ABUSED ITS DISCRETION IN IMPOSING THE PRELIMINARY INJUNCTION WITHOUT APPROPRIATE CONSIDERATION OF THE ADEQUATE REMEDIES AT LAW SOUGHT BY PLAINTIFFS.

The existence of the State-mandated Zoning Director/ZBOA administrative process with appeal to circuit court, as well as the Plaintiffs' utilization of that process, clearly show the availability of an adequate remedy for Plaintiffs other than temporary injunction. However, the circuit court's injunction Order completely disregarded this adequate remedy at law and made no mention of it in the Order.

Additionally, the 2023 Injunction Order failed to mention or consider the Plaintiffs' adequate remedy at law for any injury by way of the money damages sought by their Complaint's First Cause of Action for inverse condemnation, their Second Cause of Action for promissory estoppel, their Fourth Cause of Action for nuisance, and their Fifth Cause of Action for negligence. (Complaint pp. 8-13). As stated in part of the Prayer of the Complaint,

Further the Plaintiffs request that this Court award Plaintiffs damages jointly and severally against all Defendants in an amount to be proven at trial, plus punitive damages and their attorney's fees for the damages they have sustained from the County's inverse condemnation, and under a theory of promissory estoppel, and for any and all further declarations as this Court deems just and proper. (Complaint p.14).

The causes of action for money damages and the quoted portion of the Prayer have not been abandoned or withdrawn by Plaintiffs, and the issue of money damages as an adequate remedy remains fully at play in this case. The circuit court abused its discretion by overlooking the Plaintiffs' available and adequate remedies at law other than a preliminary injunction.

V. IN LIGHT OF INDICATED SUBSTANTIAL COSTS TO THE COUNTY, THE CIRCUIT COURT ERRED AND ABUSED ITS DISCRETION IN SETTING A LOW INJUNCTION BOND OF \$10,000 FOR PLAINTIFFS WITH NO EVIDENTIARY BASIS AND WITHOUT A HEARING.

The amount of an injunction bond is significant because South Carolina law appears to be that the damages that may be assessed against the party improperly obtaining a temporary injunction are limited to the amount of the bond. 27 S.C. Jur. Injunctions § 56 (2023); Hylar v. Wheeler, 240 S.C. 386, 126 S.E.2d 173 (1962). The 2023 Injunction Order requires Plaintiffs to post an injunction bond of \$10,000 and characterizes that amount as “an appropriate amount” under the circumstances. However, that amount, on its face, is woefully insufficient to address the considerable public expense that will be incurred by the County in establishing a new public ferry site before January 1, and the considerable public expense (\$2,200,000 in purchase price alone, as shown by the first Merchant Affidavit)(First Merchant Affidavit, Exhibit 4, pp. 17-20) that will be jeopardized by a wrongful abandonment of the current public ferry site.

Adequate security, as required by Rule 65(c), SCRCF, is needed to provide for payment by Plaintiffs of such costs and damages, in the language of Rule 65(c), as may be incurred or suffered by any party who is found to have been wrongfully enjoined. The circuit court erred in disregarding the evidence of record of the costs of land acquisition and the reasonable steps necessary to be taken by the County to replace the ferry site (as contained in the affidavits of Fralix and Amundson). This evidence, considered together, plainly indicates substantial costs well in excess of \$10,000.

With these indications of substantial costs, the circuit court should have required an evidentiary hearing to provide a sound and reasonable factual basis for the exercise of discretion in setting an appropriate amount of security. Such an evidentiary hearing was suggested by the County at the hearing on Plaintiffs’ motion for preliminary injunction in the description of

exigencies of time and costs (Transcript of January 5, 2023, Hearing, p. 22, line 18 - p.23, line 3, and p. 23, line 20- p. 24, line 6) and was urged directly in the County's post-Order motion. (County Motion to alter/amend Order, pp. 1-2, 6).

CONCLUSION

The preliminary injunction ordered by the circuit court lacks a sound factual and legal basis, and is arbitrary and punishing. It represents a rush to a remedy that places the punishment before any adjudication of liability. It is a plain and clear abuse of discretion.

For the reasons stated and apparent from the record, the Appellant-Respondent Beaufort County urges that this Court (1) dissolve the preliminary injunction ordered by the circuit court, or, in the alternative, (2) order modification of the effective date of the injunction and of the amount of security upon bond for the injunction, with directions that the circuit court hold an evidentiary hearing for the purposes of determining a sound, fair and reasonable effective date for a modified preliminary injunction, and determining a proper and sufficient modified amount for security by the applicant upon bond for the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined.

Respectfully submitted,

June 7, 2023

s/Danny C. Crowe

Danny C. Crowe, SC BAR #1480
CROWE LAFAVE GARFIELD & BAGLEY, LLC
2019 Park Street
Columbia, South Carolina 29201
Phone: 803-724-5728
danny@crowelafave.com

Attorney for Appellant-Respondent
Beaufort County

