

RECEIVED

Aug 07 2023

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
The Honorable Courtney Clyburn Pope, Circuit Court Judge
Beaufort County
Trial Court Case No. 2021-CP-07-1078

APPELLATE CASE 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,

v.

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

Defendants,

of which Beaufort County is the Appellant.

INITIAL BRIEF OF RESPONDENTS

Thomas C. Taylor, Esq.
Law Office Of Thomas C. Taylor, LLC
Post Office Box 1808, Bluffton, SC 29910
South Carolina Bar Number: 5499
Phone: 843-785-5050; Fax: 843-738-4502
Email: tom@thomastaylorlaw.com
ATTORNEY FOR RESPONDENTS

TABLE OF CONTENTS

	Page
Table of Authorities.....	3
Statement of Issues on Appeal.....	5
Statement of the Case.....	6
Standard of Review.....	11
Arguments.....	13
I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY ORDERING A PROHIBITORY PRELIMINARY INJUNCTION THAT REQUIRES THE COUNTY TO RELOCATE ITS COMMERCIAL FERRY OPERATIONS FROM THE HISTORIC BUCKINGHAM LANDING COMMUNITY BY JANUARY 1, 2024.....	13
II. THE CIRCUIT COURT DID NOT ERR NOR ABUSE ITS DISCRETION IN ORDERING A PRELIMINARY INJUNCTION EVEN THOUGH THE COUNTY’S DIRECTOR OF ZONING, FOLLOWING GUIDANCE OF THE COUNTY’S LEGAL COUNSEL, ISSUED AN OPINION THAT THE COUNTY’S CONTINUING OPERATION OF THE COMMERCIAL FERRY WAS A “LEGAL USE” UNDER ITS ZONING ORDINANCE.....	14
III. THE CIRCUIT COURT DID NOT ERR NOR ABUSE ITS DISCRETION IN IMPOSING A PRELIMINARY INJUNCTION GIVEN THE EVIDENCE OF IRREPARABLE HARM TO PLAINTIFFS.....	16
IV. THE CIRCUIT COURT DID NOT ERR NOR ABUSE ITS DISCRETION IN IMPOSING THE PRELIMINARY INJUNCTION GIVEN THE EVIDENCE OF A LACK OF ADEQUATE REMEDIES AT LAW	19
V. THE CIRCUIT COURT DID NOT ERR NOR ABUSE ITS DISCRETION IN SETTING AN INJUNCTION BOND OF \$10,000	20
Conclusion.....	22

TABLE OF AUTHORITIES

CASES

<u>Bethel M.E. Church v. City of Greenville</u> , 211 S.C. 442, 45 S.E.2d 841 (1947).....	19
<u>Blanks v. Rawson</u> , 296 S.C. 110, 370 S.E.2d 890 (Ct.App. 1988).....	12
<u>Brown v. Weathers</u> , 251 S.C. 67, 160 S.E.2d 133 (1968).....	12
<u>Compton v. South Carolina Dept. of Corrections</u> , 392 S.C. 361, 709 S.E.2d 636 (2011).....	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>FOC Lawshe Ltd. Partnership v. International Paper Co.</u> , 352 S.C. 408, 574 S.E.2d 228 (Ct.App. 2002).....	13
<u>Holliday v. Holliday</u> , 235 S.C. 246, 111 S.E.2d 205 (1959).....	12
<u>Kirk v. Clark</u> , 191 S.C. 205, 4 S.E.2d 13 (1939).....	19, 21
<u>Ledford v. Pa. Life Ins. Co.</u> , 267 S.C. 671, 230 S.E.2d 900 (1976).....	12
<u>LeFurgy v. Long Cove Club Owners Association, Inc.</u> , 313 S.C. 555, 443 S.E.2d 577 (Ct. App. 1994).....	12, 18
<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).....	16
<u>Rochester v. Holiday Magic, Inc.</u> , 253 S.C. 147, 169 S.E.2d 387 (1969).....	12
<u>Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n</u> , 298 S.C. 179, 379 S.E.2d 119 (1989).....	21
<u>Simon v. Flowers</u> , 231 S.C. 545, 99 S.E.2d 391 (1957).....	12
<u>Tiger, Inc. v. Fisher Agro, Inc.</u> , 301 S.C. 229, 391 S.E.2d 538 (1989).....	12
<u>Winget v. Winn-Dixie Stores, Inc.</u> , 242 S.C. 152, 130 S.E.2d 363 (1963).....	19

STATUTES

S.C. Code Annot. § 14-3-330.....12

COURT RULES

Rule 12(b)(6), SCRCP.....6

Rule 65(c), SCRCP.....22

STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ABUSE ITS DISCRETION BY ORDERING A PRELIMINARY INJUNCTION THAT REQUIRES BEAUFORT COUNTY TO RELOCATE ITS COMMERCIAL FERRY OPERATION FROM THE HISTORIC BUCKINGHAM LANDING COMMUNITY BY JANUARY 1, 2024?
- II. DID THE CIRCUIT COURT ERR AND ABUSE ITS DISCRETION BY ORDERING A PRELIMINARY INJUNCTION, EVEN THOUGH THE COUNTY'S DIRECTOR OF ZONING, FOLLOWING THE GUIDANCE OF THE COUNTY'S LEGAL COUNSEL, ISSUED AN OPINION THAT THE COUNTY'S CONTINUING OPERATION OF THE COMMERCIAL FERRY WAS A "LEGAL USE" UNDER ITS ZONING ORDINANCE?
- III. DID THE CIRCUIT COURT ERR AND ABUSE ITS DISCRETION IN IMPOSING A PRELIMINARY INJUNCTION GIVEN THE EVIDENCE OF IRREPARABLE HARM TO THE PLAINTIFFS?
- IV. DID THE CIRCUIT COURT ERR AND ABUSE ITS DISCRETION IN IMPOSING THE PRELIMINARY INJUNCTION GIVEN THE EVIDENCE OF A LACK OF ADEQUATE REMEDIES AT LAW?
- V. DID THE CIRCUIT COURT ERR AND ABUSE ITS DISCRETION IN SETTING AN INJUNCTION BOND OF \$10,000?

STATEMENT OF THE CASE

The 36 Plaintiffs herein filed their Complaint on June 11, 2021, alleging that Beaufort County and two private ferry companies are damaging the Plaintiffs and have ruined the historic neighborhood of Buckingham Landing, located on the shores of Mackay's Creek in southern Beaufort County, by operating a commercial ferry terminal shuttling thousands of tourists and Daufuskie Island residents back and forth from the mainland to Daufuskie over the last six years in violation of the County's own zoning ordinances. The Complaint alleges that the County has operated the commercial ferry service in disregard of the Buckingham Landing Community Preservation District created by the County 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 the Circuit Court. Complaint, p. 14.

The County responded to the initial Complaint on July 9, 2021, with a SCRCP 12(b)(6) Motion to Dismiss premised upon an argument that the Plaintiffs had failed to exhaust their administrative remedies by not having sought an administrative determination by the County's Zoning Official that the use of the property in the neighborhood was an illegal nonconformity. On October 27, 2021, Judge Diane Goodstein entered her Order denying the County's Motion to Dismiss, and held that the Beaufort County Community Development Code (CDC) at Section 9.5.30 specifically vests in these Plaintiffs the right to "institute injunction" or other appropriate proceedings to prevent the unlawful use or correct violations of the CDC. Order, p.3.

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, the Honorable Bentley Price entered the first Preliminary Injunction in this case by his Order of May 24, 2022, which allowed

the ferry operations at Buckingham Landing to continue only until Labor Day (September 5, 2022) and Judge Price therein 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.” Order, p. 1. Beaufort County moved to Alter or Amend that Order, and on August 24, 2022, Judge Price entered another Order (after being advised that the County had made a policy decision to relocate the ferry operations out of Buckingham Landing), holding that the County had shown “sufficient compliance” to satisfy the May 24 Order at that time, but Judge Price specifically ruled 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.” Order, p. 2.

When mediation failed to resolve the case, the Plaintiffs filed a Renewed Motion for a Preliminary Injunction on October 3, 2022. Prior to the hearing on that Motion, the Plaintiffs also filed an Affidavit of Neil Turner, President of Turner’s Marina LLC on Hilton Head Island, in which Mr. Turner made clear that an immediately available, feasible alternative existed for the County’s commercial ferry operations outside of the Buckingham Landing historic community. Turner Affidavit, pp. 2-4.

Following a hearing before Judge Courtney Clyburn Pope on January 5, 2023, Judge Pope entered her Order Granting Preliminary Injunction on February 21, 2023, from which the Defendant Beaufort County now appeals. The Order prohibits Beaufort County from continuing to operate its commercial ferry out of the Buckingham Landing neighborhood after December 31, 2023, and therein granted the County 313 days—10 months—to relocate the commercial ferry operation prior to the effective date of the injunction. Order, p. 10.

Because the Appellant Beaufort County herein asserts that Judge Pope abused her discretion by entering the prospective Preliminary Injunction, and to enable this Court to fully

understand the undisputed facts and well-pled allegations that Judge Pope relied upon, the Plaintiffs advise the Court of the following non-contested matters that provided the evidentiary basis for the Court's Preliminary Injunction:

1. The Plaintiffs are owners and/or residents of real property in Beaufort County, South Carolina, located in the historic neighborhood of Buckingham Landing. Affidavits of Alisa Ware, Amanda DuBose, James Ware and Ronald L. Broome.
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 Buckingham Landing. In 1993, Beaufort County issued a stop work order informing Mr. Roller that his permits were revoked. Alisa Ware Affidavit, Exhibit E, p. 4.
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. Alisa Ware Affidavit, Exhibit E, p. 5.
4. The restaurant was permitted to be constructed following the development plan submitted to the County in 1988. Alisa Ware Affidavit, Exhibit E, p. 5.
5. In May of 2006, a committee was formed to create and enact the Buckingham Landing Community Preservation District. A final draft of the Buckingham Landing Community 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. Alisa Ware Affidavit, Exhibits F and G.

6. Under the Community Development Code Division A.10- Buckingham Landing Community Preservation District, the properties within the Preservation District are zoned Residential and contain specific Land Use conditions and permissions. Alisa Ware Affidavit, Exhibit F.
7. Operation of a commercial ferry service is not a permitted use under the Buckingham Landing Community Preservation District or the Preservation Plan. Alisa Ware Affidavit, Exhibit F.
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.” The Restaurant Property is one of those five parcels defined as a nonconforming use. Alisa Ware Affidavit, Exhibit G, pp. 10-11.
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)

Alisa Ware Affidavit, Exhibit G, p. 12.
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 the March 14, 2022 Affidavit of the General Manager of the restaurant, Zach Drescher. Drescher Affidavit, p. 2.
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. Alisa Ware Affidavit, p. 5.

12. The Daufuskie Island Ferry was initially allowed to use the dock attached to the Restaurant Property pursuant to a lease agreement with the property owner. Alisa Ware Affidavit, Exhibit I.
13. In July 2018, Beaufort County purchased the Restaurant Property specifically to continue operations of the Daufuskie Island Ferry service. Alisa Ware Affidavit, Exhibit B, p. 8.
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. Alisa Ware Affidavit, p. 4.
15. Beaufort County and the Daufuskie Island Ferry continue as of the date of the filing of this Brief, to operate a commercial ferry service from the Buckingham Landing neighborhood in violation of the Community Preservation District's land uses as defined in the Beaufort County Community Development Code.
16. According to the County's filed Affidavit of Henry Criss, the Buckingham Landing neighborhood served as the staging area for moving more than 19,000 people by ferry during just the first eight months of 2022, meaning approximately 25,000 people are annually moving through the commercial ferry terminal in the neighborhood. Henry Criss Affidavit, pp. 2-3.
17. According to the sworn Affidavits of Plaintiffs Alisa Ware, Amanda DuBose, James Ware and Ronald Broome, filed on March 14, 2022, the residents of the Buckingham Landing neighborhood have suffered for over six years with the following damages as a direct result of the County's commercial ferry operations:
 - 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 trespass 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 begins as early as 6:00am until after 9:00pm.
- i. Ferry passengers allow 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.

Affidavits of Alisa Ware, Amanda DuBose, James Ware and Ronald Broome, pp. 5-6.

18. According to the sworn Affidavit of Neil Turner filed January 2, 2023, Turner's Marina LLC, which owns a deep-water dock on the northern end of Hilton Head Island, is prepared to allow the County's ferry boats access to its dock immediately, and Turner's Marina will make any improvements that are reasonable and necessary to provide for the safe and efficient operation of the Daufuskie Island Ferry from its dock, consistent with the standards that the County has set in its Buckingham Landing commercial operation. Affidavit of Neil Turner, pp. 3-4.

STANDARD OF REVIEW

An interlocutory order in the court of common pleas granting or denying an injunction is immediately appealable. S.C. Code Annot. § 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). An abuse of discretion occurs when the decision of the trial court is unsupported the evidence or controlled by an error of law. Ledford v. Pa. Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976); County of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002). Specifically, the Supreme Court has held that an abuse of discretion arises in cases in which: (1) the judge issuing the order was controlled by some error of law; or (2) where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support. Rochester v. Holiday Magic, Inc., 253 S.C. 147, 169 S.E.2d 387 (1969); Brown v. Weathers, 251 S.C. 67, 160 S.E.2d 133 (1968); Holliday v. Holliday, 235 S.C. 246, 111 S.E.2d 205 (1959); Simon v. Flowers, 231 S.C. 545, 99 S.E. 2d 391 (1957).

An action for an injunction is equitable in nature. Blanks v. Rawson, 296 S.C. 110, 370 S.E.2d 890 (Ct. App. 1988). *See also* 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. Blanks, id. *See also* Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 391 S.E.2d 538 (1989).

Under South Carolina law, a party seeking to obtain injunctive relief generally must demonstrate that: (1) they would suffer irreparable harm if the injunction is not granted; (2) they 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, 392 S.C. 361, 367, 709 S.E.2d 636, 642 (2011).

ARGUMENTS

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY ORDERING A PROHIBITORY PRELIMINARY INJUNCTION THAT REQUIRES THE COUNTY TO RELOCATE ITS COMMERCIAL FERRY OPERATIONS FROM THE HISTORIC BUCKINGHAM LANDING COMMUNITY BY JANUARY 1, 2024.

As is noted above, 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, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011).

In its first argument, Appellant Beaufort County attacks the forthcoming Preliminary Injunction under a theory that its “very breadth” demonstrates “the circuit court’s lack of sound discretion in issuing the Order.” See Appellant’s Brief at p. 13. The County urges that Judge Pope should have instead addressed “parking and traffic issues” citing Eldridge v. City of Greenwood, 308 S.C. 125, 417 S.E.2d 532 (1992). However, Eldridge dealt with a unique specific fact situation involving a Circuit Court having prohibited certain landowners from contacting potential members

of a class action while allowing the City of Greenwood to contact them for purposes of obtaining quit claim deeds to a certain right-of-way. The Supreme Court noted the sweeping restraining order “frustrated one of the purposes of Rule 23(d)” and reversed. 308 S.C. at 127.

Here, the County’s blatant continuing violation of its own zoning ordinance (the Buckingham Landing Community Preservation District) was clear to two Circuit Court Judges—both Judge Pope and Judge Price—who both entered Preliminary Injunctions clearly aimed at moving the County’s commercial ferry operations out of the historic Buckingham Landing neighborhood, while providing sufficient time for the County—if it chose to in good faith—to make alternative arrangements.

The County also attacks the date of January 1, 2024 as being “purely arbitrary,” but notes it was more than eight (8) months after the April 15, 2023 date that had been requested by the Plaintiffs. See Appellant’s Brief at p. 14. Instead, the County asserts that Judge Pope should have rejected the Neil Turner Affidavit, embraced the Henry Amundson Affidavit, and refused the requested preliminary injunction. Judge Pope clearly gave the County more time than the Plaintiffs had requested, and January 1, 2024 is no more “arbitrary” than any other date would have been.

Although the County does not like the Preliminary Injunction (just as it did not like Judge Price’s before it), evidentiary support clearly exists in the Affidavits of Alisa Ware, James Ware, Amanda DuBose, Zach Dressher, Ronald Broome and Neil Turner supporting the allegations that the County has—after securing the neighborhood’s consent to temporarily use the old restaurant dock after Hurricane Matthew—continuously violated its own zoning ordinance and is continuing to damage the historic neighborhood and its residents. The County’s argument that the “breadth” of the injunction itself somehow meets its obligation to bring this Court a “clear showing” of an

abuse of discretion is simply wrong. Judge Pope had factual evidentiary support for her Order. She listed sixteen separate factual findings in her order supporting her decision. See Order pp. 4-6.

II. THE CIRCUIT COURT DID NOT ERR NOR ABUSE ITS DISCRETION IN ORDERING A PRELIMINARY INJUNCTION EVEN THOUGH THE COUNTY'S DIRECTOR OF ZONING, FOLLOWING GUIDANCE FROM THE COUNTY'S LEGAL COUNSEL, ISSUED AN OPINION THAT THE COUNTY'S OPERATION OF THE COMMERCIAL FERRY WAS A "LEGAL USE" UNDER THE ZONING ORDINANCE.

In its second argument, Beaufort County asserts the Preliminary Injunction must be overturned because Judge Pope supposedly "disregarded and ignored all evidence" found in Beaufort County Zoning Director's Robert Merchant's Affidavits discussing Director Merchant's opinion rendered with the assistance of the County's Attorney (Merchant Affidavit of May 16, 2022, p. 2), that the County's commercial ferry operation from the former restaurant dock, was a "legal use." However, simply because Judge Pope did not adopt the Zoning Director's opinion does not mean she ignored it. The Beaufort County Board of Zoning Appeals also declined to embrace Director Merchant's opinion when the BZOA deadlocked in a tie vote, 3-3, on a motion to overturn Director Merchant's finding that the commercial ferry operation use of the dock was "a legal use." Merchant Second Affidavit of October 11, 2022, p.2.

The County has, since its original Motion To Dismiss filed on July 9, 2021 that was denied by Judge Goodstein, wrongfully taken the position that the Plaintiffs in this case were required to obtain an opinion from the Zoning Director as to the legality of the commercial ferry operation in Buckingham Landing prior to prosecuting this action. As Judge Goodstein noted in her Order of October 27, 2021, the Community Development Code specifically authorizes the Plaintiffs to seek injunctive relief without the necessity of pursuing an opinion from the Zoning Director. Order at p. 3. And the scenario that unfolded after four of the Plaintiffs elected in good faith to give the County

the opportunity to reverse course by asking Director Merchant to enforce the CDC and move the commercial ferry operations out of Buckingham Landing, proves how prescient those four individuals were. A brief review of the record documents reveals that while Director Merchant originally signaled a good faith interest in analyzing the situation under the CDC (Exhibit B to Affidavit of Thomas C. Taylor dated March 11, 2022), that 7 months later with the input of the County's attorney, he suddenly and without any supporting documentation, reached the opinion that the commercial ferry operation was a "legal" use of the property. Exhibit 2 to Second Merchant Affidavit dated October 11, 2022. Judge Pope did not ignore the Merchant Affidavits; she apparently simply gave them the consideration that she felt they merited.

The BZOA action from James Ware, Alisa Ware, Amanda DuBose and Jason DuBose, remains at the time of the filing of this Brief, at the Circuit Court level, and even if those Plaintiffs' good faith actions in asking Director Merchant to enforce the Buckingham Landing Community Preservation District are ultimately rebuffed, the remaining 32 Plaintiffs in this action are not a part of that action and are not bound by it. They each are seeking the Preliminary Injunction issued by Judge Pope.

Beaufort County further asserts in its second argument that Judge Pope's Preliminary Injunction somehow decided the case on the merits. Brief of Appellant, p. 18. However, unlike Roberts v. Union County Board of School Trustees, 284 S.C. 299, 301, 326 S.E.2d 163, 164 (Ct.App. 1985), cited by the County, where the Circuit Court actually issued a final order on the merits following a rule to show cause hearing as to whether a Preliminary Injunction should issue, here Judge Pope has simply ordered a prospective Preliminary Injunction giving the County more than 10 months to put its house in order and abide by its own zoning ordinances. All other issues in the case remain for trial.

Finally, the Respondents urge this Court to reject any argument that Judge Pope's prospective Preliminary Injunction "goes too far and attempts to decide, for subsequent courts, the ultimate issues of County liability and appropriate final remedy" (Appellant's Brief at p. 18), when it was the County's action in moving for and securing a stay of all circuit court proceedings that has prevented discovery from being completed and preparing the case for trial prior to the January 1, 2024 Preliminary Injunction action date. Order Granting Stay, February 22, 2023.

III. THE CIRCUIT COURT DID NOT ERR NOR ABUSE ITS DISCRETION IN IMPOSING A PRELIMINARY INJUNCTION GIVEN THE EVIDENCE OF IRREPARABLE HARM TO PLAINTIFFS.

Beaufort County asserts that the Plaintiffs failed to show evidence of irreparable harm because supposedly no sufficient factual or legal basis for a preliminary injunction was provided, calling the Affidavits submitted "predominantly general and vague in nature." Appellant's Brief at p. 19. However, the Affidavits of Plaintiffs Alisa Ware, James Ware, Amanda DuBose, and Ronald Broome quoted earlier, actually show as follows:

- 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 trespass 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 begins as early as 6:00am until after 9:00pm.
- i. Ferry passengers allow 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.

Although it is true that the Court of Appeals in the single case cited by the Appellant, LeFurgy v. Long Cove Club Owners Association, Inc., 313 S.C. 555, 443 S.E.2d 577 (1994), did in dicta state that people living in organized communities must suffer some annoyance and inconvenience from each other incident to city life, the LeFurgy case must be analyzed in light of its facts, which included testimony from Mr. LeFurgy that the tee box alleged to be a nuisance, “was used approximately three times a day.” 313 S.C. at 561, footnote 1. While that dicta serves the Appellant’s Brief well, the case is not on point. Here, the filed Affidavits show continuing daily harm from 6:00 a.m. until 9:00 p.m. in myriad ways which differentiate the circumstances from a tee box being used three time a day.

More importantly to this Court’s analysis of this case and the issue of whether the Plaintiffs produced evidence or irreparable harm, is the Supreme Court’s decision in Winget v. Winn-Dixie Stores, Inc., 242 S.C. 152, 130 S.E.2d 363 (1963)(a case relied upon by the Court of Appeals in LeFurgy), in which the Supreme Court held “The question is not whether plaintiffs have been

annoyed or disturbed by the operation of the business in question, but whether there has been an injury to their legal rights.” Winget, 242 S.C. at 159.

Whether a particular use of property is reasonable and whether such use constitutes a nuisance depends largely upon the facts and no definite rule can be laid down for the determination of the question. As stated in 39 Am.Jur. 298, Section 16: “What is a reasonable use and whether a particular use is a nuisance cannot be determined by any fixed general rules, but depends upon the facts of each particular case, such as location, character of the neighborhood, nature of the case, extent and frequency of the injury, the effect upon the enjoyment of life, health, and property and the like. The use of property in one locality and under some circumstances may be lawful and reasonable, which under other circumstances would be unlawful, unreasonable and a nuisance.”

Winget, *id.* 242 S.C. at 160.

The Buckingham Landing 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 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).

Taking the facts alleged in the Affidavit quotes above as a whole, these circumstances demonstrate irreparable harm, notwithstanding the fact the County’s David Wilhelm seeks to question the severity of the harm through his Affidavit. Wilhelm Affidavit of May 16, 2022. The truth of the matter is that even though Fording Island Extension may be a public road, if the

commercial ferry were not moving over 25,000 people a year through the Buckingham Landing neighborhood, these damages would not exist.

IV. THE CIRCUIT COURT DID NOT ERR NOR ABUSE ITS DISCRETION IN IMPOSING THE PRELIMINARY INJUNCTION GIVEN THE EVIDENCE PRESENTED OF A LACK OF ADEQUATE REMEDIES AT LAW.

In this argument, the County urges this Court to strike down the Preliminary Injunction because four of the 36 Plaintiffs initiated a good faith, alternative effort to force the County to follow its own zoning ordinance by requesting that Zoning Director Merchant enforce the CDC as it is written. The argument rests upon a theory that the request by four of the Plaintiffs in a separate action, “clearly show[s] the availability of an adequate remedy for Plaintiffs other than an temporary injunction.” Appellant’s Brief a p. 20. Further, the County cites the Complaint’s request for monetary damages and asserts again that Judge Pope abused her discretion “by overlooking the Plaintiffs’ available and adequate remedies at law other than a preliminary injunction.” Appellant’s Brief a p. 20.

The Buckingham Landing Plaintiffs have demonstrated that there is an inadequate remedy at law. The consequences of the damages that are suffered daily—increased traffic through the residential neighborhood, illegal roadway parking, trespassing upon the Plaintiff’s residential property, a County shuttle bus running up and down the road, speeding vehicles, bicyclers and pedestrians being forced off their residential roads, excessive noise from 6 a.m. until after 9 p.m., dogs running free within the neighborhood, and ferry customers parking in violation of fire ordinances and blocking private property—are difficult, if not impossible, to quantify. Additionally, damages would be impractical and ineffective as the property rights of the Buckingham Landing neighborhood residents will be wrongfully affected not just in this instance, but also for the

foreseeable future as long as the County deems it appropriate to continue disregarding its own ordinances and operating the commercial ferry service in this historic neighborhood.

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, *id.* 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). For the Buckingham Landing neighborhood Plaintiffs, other than a preliminary injunction, there is no certain, practical, complete and efficient remedy that these Plaintiffs can pursue under the circumstances. The issuance of a preliminary injunction is proper under the circumstances.

V. THE CIRCUIT COURT DID NOT ERR NOR ABUSE ITS DISCRETION IN SETTING AN INJUNCTION BOND OF \$10,000 .

Finally, Beaufort County asserts that Judge Pope further abused her discretion by setting an injunction bond at \$10,000 “with no evidentiary basis and without a hearing.” Brief of Appellant, p. 21. The County deems such “woefully insufficient” to address the “considerable public expense” that may be incurred by the County “by a wrongful abandonment of the current public ferry site.”

This argument flies in the face of the County’s acknowledgment to Judge Price, when requesting he set aside the original Preliminary Injunction prohibiting commercial ferry operations in Buckingham Landing after Labor Day, 2022, that the County has absolutely determined that it must relocate the commercial ferry operation out of Buckingham Landing as soon as possible. Transcript of Hearing of August 3, 2022. See also Order of August 24, 2022. When it served the County’s purpose, they readily admitted that a policy determination has been made to move the

commercial ferry operation from Buckingham Landing. But now, they wish to have this Court believe that being forced to move the ferry operations out of Buckingham Landing endangers the “considerable public expense” of \$2,200,000 the County used in 2018 to buy the restaurant property. Unfortunately for all County taxpayers, including the Buckingham Landing Plaintiffs, that questionable acquisition is a “sunk” cost that the County has acknowledged for almost a year since it petitioned Judge Price to remove the initial Preliminary Injunction. The County’s commitment to spend another three million dollars plus to acquire a new location for the ferry operations shows the County’s acknowledgment that it will ultimately have to abide by its own zoning ordinances.

Rule 65(c) SCRCF requires a Circuit Court Judge to set a security amount for a temporary injunction “in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” The County has admitted that it must move the commercial ferry operation out of Buckingham Landing and has already spent, according to the County’s lawyer, over three million dollars of taxpayers’ money acquiring new property on Hilton Head Island, even though Turner’s Marina has offered the County a minimal cost, readily available alternative. Judge Pope found that the \$10,000 injunction bond was, “[u]nder these circumstances...an appropriate amount.” Again, as with every finding of fact articulated in the Preliminary Injunction Order of February 21, 2023, there exists in the record a sufficient evidentiary basis to support the discretionary holdings of the Court. The Plaintiffs should not be punished further by being forced to place a large bond when the County admits it must relocate the ferry operations out of Buckingham Landing.

CONCLUSION

As Judge Pope wrote on February 21, 2023, “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.” Order of February 21, 2023 at p. 10.

Respectfully submitted,

s/Thomas C. Taylor

Thomas C. Taylor, Esq.

Law Office Of Thomas C. Taylor, LLC.

Post Office Box 1808

Bluffton, South Carolina 29910

South Carolina Bar Number: 5499

Telephone: 843-785-5050

Facsimile: 843-738-4502

Email: tom@thomastaylorlaw.com

ATTORNEY FOR RESPONDENTS

Bluffton, South Carolina
August 7, 2023