

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Courtney Clyburn Pope, Circuit Court Judge
Trial Court Case No. 2021-CP-07-01078
SEP 05 2023
SC Court of Appeals

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.

RECORD ON APPEAL
VOLUME 1

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INDEX
Volume 1

	Page
Order Granting Preliminary Injunction Filed February 21, 2023	1-12
Order Denying Defendant Beaufort County's Motion for Alteration and Amendment of the Court's Order of February 21, 2023, or, Alternatively, for a New Hearing Filed March 16, 2023	13-15
Order Granting Stay of Further Proceedings in this Case Pending Final Disposition of Appeal of Preliminary Injunction Filed February 22, 2023	16-19
Form 4 Order Denying Plaintiffs' Motion to Alter or Amend the Court's Order Granting a Stay of Further Proceedings Pending Final Disposition of Appeal Filed March 16, 2023	20-22
Form 4 Order Granting Plaintiffs' Motion for Partial Summary Judgment and Temporary Restraining Order Filed May 24, 2022	23-25
Order Amending and Supplementing the Court's Form 4 Order of May 24, 2022 Filed August 24, 2022	26-28
Order Denying Defendant Beaufort County's Motion to Dismiss Filed October 27, 2021	29-32
Complaint Filed June 11, 2021	33-46
Motion to Dismiss of the Defendant Beaufort County Filed July 9, 2021	47-48
Memorandum of Points and Authorities in Support of Defendant Beaufort County's Motion to Dismiss Filed September 13, 2021	49-53
Answer of Defendants HPCCA Ferry Company, Inc., and The Daufuskie Island Ferry Service, LLC Filed September 14, 2021	54-63
Answer of the Defendant Beaufort County Filed November 10, 2021	64-72

Amended Answer of the Defendant Beaufort County Filed October 11, 2022	73-82
Motion of Defendant Beaufort County for a Stay of Further Proceedings in this Case Pending Disposition of the Appeal in the Event of Issuance of a Preliminary Injunction Filed October 28, 2022	83-85
Plaintiffs' Motion for a Partial Summary Judgment, for a Temporary Injunction Against All Defendants, and for an Order Setting Trial of the Remaining Causes of Action Filed March 14, 2022	86-88
Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment and Temporary Restraining Order Filed May 16, 2022	89-108
Memorandum of Defendant Beaufort County Opposing Plaintiffs' Consolidated Motions for Partial Summary Judgment, for Temporary Injunction, and for Order Setting Trial Filed May 16, 2022	109-118
Defendant Beaufort County's Motion for Alteration and Amendment of the Court's Order of May 24, 2022, or, Alternatively, for a New Hearing Filed June 3, 2022	119-123
Plaintiffs' Renewed Motion for a Preliminary Injunction Against All Defendants Filed October 3, 2022	124-133
Defendant Beaufort County's Exhibit in Opposition to Plaintiffs' Renewed Motion for Preliminary Injunction with exhibit (transcript of record from the hearing held before the Honorable Bentley Price on August 3, 2022) Filed October 4, 2022	134-145
Plaintiffs' Memorandum in Support of Their Renewed Motion for a Preliminary Injunction Filed January 3, 2023	146-164
References at the Virtual Hearing to Record Filings by Defendant Beaufort County Filed January 4, 2023	165-167
Defendant Beaufort County's Motion for Alteration and Amendment of the Court's Order of February 21, 2023, or, Alternatively, for a New Hearing (without duplicative exhibits) Filed March 2, 2023	168-174

Plaintiffs’ Motion to Alter or Amend Order Granting Stay of Further Proceedings in this Case Pending Final Disposition of Appeal of Preliminary Injunction as Entered on February 22, 2023	
Filed March 2, 2023	175-176

Volume 2

Affidavit of Alisa Ware with exhibits	
Filed March 14, 2022	177-246
Affidavit of Amanda DuBose without duplicative exhibits	
Filed March 14, 2022	247-251
Affidavit of James Ware without duplicative exhibits	
Filed March 14, 2022	252-257
Affidavit of Ronald L. Broome without duplicative exhibits	
Filed March 14, 2022	258-263
Affidavit of Zach Drescher	
Filed March 14, 2022	264-265
Affidavit of Thomas C. Taylor with exhibits	
Filed March 14, 2022	266-272
Affidavit of David Wilhelm with attachment	
Filed May 16, 2022	273-277
Affidavit of Robert Merchant with exhibits	
Filed May 16, 2022	278-304
Second Affidavit of Robert Merchant with exhibits	
Filed October 11, 2022	305-319
Affidavit of Jared Fralix, P.E.	
Filed October 11, 2022	320-325
Affidavit of Henry Criss	
Filed October 25, 2022	326-328
Affidavit of Henry Amundson	
Filed November 14, 2022	329-332
Affidavit of Neil Turner	
Filed January 2, 2023	333-336

Transcript of Record from the hearing held before the Honorable Courtney Clyburn Pope on January 5, 2023	337-371
Certificate of Counsel.....	372

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-07-01078

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 BLCP 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

Electronically signed on 2023-02-21 14:27:12 page 12 of 12

ELECTRONICALLY FILED - 2023 Feb 21 4:23 PM - BEAUFORT - COMMON PLEAS - CASE#2021CP0701078

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP0701078

James Ware et al
PLAINTIFF(S)

Beaufort County et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

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

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

The Defendant's motion to alter or amend the court's February 21, 2023 order granting a preliminary injunction is DENIED. The Defendant's motion for a new hearing is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

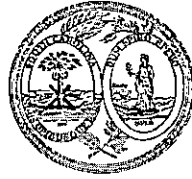
For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/15/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Beaufort Common Pleas

Case Caption: James Ware , plaintiff, et al VS Beaufort County , defendant, et al
Case Number: 2021CP0701078
Type: Order/Electronic Form 4

So Ordered

The Honorable Courtney Clyburn Pope

Electronically signed on 2023-03-15 11:50:05 page 3 of 3

ELECTRONICALLY FILED - 2023 Mar 16 11:59 AM - BEAUFORT - COMMON PLEAS - CASE#2021CP0701078

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT
)

James Ware, Alisa Ware, Henry Spahr, Elaine) Civil Action Number: 2021-CP-07-01078
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,)
)

Plaintiffs,)
)

v.)
)

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

Defendants.)
)

**ORDER GRANTING STAY OF
FURTHER PROCEEDINGS IN THIS
CASE PENDING FINAL DISPOSITION
OF APPEAL OF PRELIMINARY
INJUNCTION**

Following a hearing on January 5, 2023, this Court granted Plaintiffs' Motion for Preliminary Injunction and a written Order subsequently was filed. At the same hearing, this Court also heard argument on Defendant Beaufort County's Motion for a Stay of Further Proceedings in this case, in the event of issuance of a preliminary injunction, pending disposition of the appeal of the injunction. This Court subsequently ruled that the County's Motion for a Stay should be granted and this written Order follows.

In their motion for a preliminary injunction, the Plaintiffs advance the central argument that the County's operation of a public ferry at Buckingham Landing is contrary to the County's own zoning ordinances. The zoning situation also was central to this Court's findings of fact in granting the Order for Preliminary Injunction. See, for example, this Court's finding that "The neighborhood Plaintiffs have lived with the commercial ferry operations in violation of the County ordinances for more than five years."

However, the County contends that its use of the dock at Buckingham Landing was, and is, a lawful use pursuant to a County zoning permit for a commercial dock issued in 2009.¹ Lawful use of the property as a public ferry also was the position of the County's Planning Director in his administrative determination which was upheld by the County Zoning Board of Appeals in 2022.² The legality of the ZBOA decision upholding the Planning Director is the subject of a pending appeal to circuit court by some of the Plaintiffs.

In support of its Motion for a Stay, the County, based on these positions, asserts that a stay of further proceedings in this case is necessary if a preliminary injunction is granted. This is because, as the County also asserts, the judicial grant of a preliminary injunction is a judicial determination on the likelihood of success of the Plaintiffs' core claim of County zoning violation. This Court recognizes and agrees that the lawfulness of the County's use of the dock as a public ferry location is a substantial and determinative issue in this case. Accordingly, the Court considers a stay of further proceedings pending final disposition on appeal of the grant of preliminary injunction to be appropriate and in the interest of judicial economy and consistency of judicial results.

¹ See Second and Fifteenth Defenses. Def.'s Am. Answer (setting out its position on lawful use of the property).

² See Merchant Aff., Oct. 11, 2022.

IT IS THEREFORE ORDERED that, except as provided and limited by this Order, further proceedings in this case in this Court are stayed pending final disposition of the appeal of the grant of preliminary injunction. The exception to the stay of further proceedings is this Court's ruling on any timely motions filed pursuant to SCRCP Rules 52, 59, or 65, concerning the Order granting the preliminary injunction, or this Order granting a stay. The limitation on this stay pending disposition of appeal is that the stay shall expire if an appeal of the Order granting a preliminary injunction is not taken by the County in the manner and within the time provided by Rule 203, SCACR.

AND IT IS SO ORDERED.

Courtney C. Pope, Circuit Court Judge

February ____, 2023



Beaufort Common Pleas

Case Caption: James Ware , plaintiff, et al VS Beaufort County , defendant, et al
Case Number: 2021CP0701078
Type: Order/Stay

So Ordered

The Honorable Courtney Clyburn Pope

Electronically signed on 2023-02-21 14:27:24 page 4 of 4

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP0701078

James Ware et al
PLAINTIFF(S)

Beaufort County et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

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

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

The Plaintiff's motion to alter or amend the court's Order Granting a Stay of Further Proceedings Pending Final Disposition of Appeal is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/15/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Beaufort Common Pleas

Case Caption: James Ware , plaintiff, et al VS Beaufort County , defendant, et al
Case Number: 2021CP0701078
Type: Order/Electronic Form 4

So Ordered

The Honorable Courtney Clyburn Pope

Electronically signed on 2023-03-15 12:03:44 page 3 of 3

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP0701078

James Ware et al
PLAINTIFF(S)

Beaufort County et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

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

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

This matter came before the Court as Plaintiff James Ware's Motion for Partial Summary Judgment or Temporary Injunction heard on May 18, 2022.

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.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/24/2022 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Beaufort Common Pleas

Case Caption: James Ware , plaintiff, et al VS Beaufort County , defendant, et al
Case Number: 2021CP0701078
Type: Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2022-05-24 09:53:12 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
James Ware, Alisa Ware, Henry Spahr, Elaine	)	Civil Action Number: 2021-CP-07-01078
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,	)	ORDER AMENDING AND
Beth DeAngelis, Shelly Horn, Theodore	)	SUPPLEMENTING THE COURT'S
Brammer, Allison Brammer, Waymon W.	)	FORM 4 ORDER OF MAY 24, 2022
Durden, Constance C. Durden, David C.	)	
Powell,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Beaufort County, HPCCA Ferry Company,	)	
Inc., and The Daufuskie Island Ferry Service,	)	
LLC,	)	
	)	
Defendants.	)	
	)	

The matter is before the Court on the Defendant Beaufort County's Motion for Alteration and Amendment of the Court's Order of May 24, 2022, or, Alternatively, for a New Hearing. The Motion, filed on June 3, was made pursuant to Rules 52, 59(a)(2) and (e), and 65(c) and (d), SCRCF. A hearing on the Motion was held on August 3 in Allendale by agreement of the attorneys, with Danny C. Crowe appearing for the County and Thomas C. Taylor appearing for the Plaintiffs.

At the hearing, the attorney for the County, in response to questions from the Court, advised that the County had given the first and second of three required favorable readings to an ordinance authorizing the purchase or condemnation of a particular designated property on Hilton Head Island to replace Buckingham Landing as a location for the public ferry with Daufuskie Island. The attorney further advised that the third and final reading of that ordinance was scheduled for August 8, 2022. The Court is now informed that the ordinance received a favorable third reading at that meeting.

In light of this information concerning compliance and progress toward resolution of the issue of ferry location, and in response to points raised by the County's Motion, the Court hereby amends and supplements its Form 4 Order filed on May 24, 2022, as follows:

1. The May 24 Order will expire on the day after Labor Day on September 6, 2022.
2. The actions of the County Council with regard to the enactment of the ordinance authorizing the purchase or condemnation of a designated location for the public ferry landing on Hilton Head Island show sufficient compliance to satisfy the May 24 Order at this time.
3. The expiration of the May 24 Order is 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.

AND IT IS SO ORDERED.

Bentley D. Price
Circuit Court Judge

Dated: _____



Beaufort Common Pleas

Case Caption: James Ware , plaintiff, et al VS Beaufort County , defendant, et al
Case Number: 2021CP0701078
Type: Order/Amend

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2022-08-24 10:30:26 page 3 of 3

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-07-1078

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 DENYING
DEFENDANT BEAUFORT COUNTY'S
MOTION TO DISMISS

These thirty-six Plaintiffs filed their Complaint on June 11, 2021, alleging that Beaufort County and two private ferry companies have damaged the Plaintiffs by operating a commercial ferry terminal in their historic neighborhood in southern Beaufort County known as Buckingham Landing. The Plaintiffs contend that the County has operated the commercial ferry operation in disregard of the Buckingham Landing Community Preservation District created in 2006, which the Plaintiffs contend bars such commercial ferry operations in the neighborhood. The Plaintiffs allege causes of action for creating a nuisance, negligence, inverse condemnation and promissory estoppel, and seek temporary and permanent injunctive relief and a declaratory judgment from the Court.

In response to these allegations, the County filed a Motion to Dismiss under South Carolina Rule of Civil Procedure 12(b)(6), contending the Plaintiffs failed to allege facts sufficient to show that the Plaintiffs “exhausted their administrative remedies provided by State statutory law concerning zoning (including S.C. Code sections 6-29-300 and 6-29-730) and the ordinances of the County (including section 7.3.60 and Article 8 of the Community Development Code).” Motion, pp 1-2. The Motion contends the Plaintiffs were required to seek an administrative determination from the County’s zoning official that “the use of the property complained of is an illegal nonconformity” prior to seeking judicial relief.

The Motion came on for a hearing before the undersigned via WebEx virtual hearing technology on September 15, 2021. The Plaintiffs were represented by Thomas C. Taylor of the Beaufort County bar and the Defendant Beaufort County was represented by Danny Crowe of the Richland County Bar. The Court has heard the arguments of counsel, reviewed the Motion, and reviewed both the Defendant’s Memo in Support and the Plaintiffs’ Memo in Opposition.

Plaintiff argues the Motion to Dismiss should be denied because the Beaufort County Community Development Code (hereinafter sometimes the “CDC”) specifically provides the Plaintiffs with a private civil relief provision “in addition to all other remedies,” without any requirement of exploring administrative remedies prior to seeking judicial assistance.

The CDC states:

Section 9.5.30 – Private Civil Relief

In case a structure or land is or is proposed to be developed or used in violation of this Development Code, an adjacent or neighboring landowner or tenant who would be specially damaged by the violation may, in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful development or use, to correct or abate the violation, or to prevent the occupancy of the structure or use of the land.

This is a case where “a structure or land” is allegedly being used “in violation of this Development Code,” and these Plaintiffs are “adjacent or neighboring landowners or tenant(s) who would be specially damaged by the violation.” The CDC specifically gives these citizens the right to seek the assistance of this Court for an injunction or other appropriate relief to prevent the “unlawful” use or abate the violation.

Given the language of Section 9.5.30 and given the posture of this case (motion to dismiss), it would be inappropriate to dismiss the negligence and other causes of action at this time. “The ruling on a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the Complaint. A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.” Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601, 602-603 (1995). A Motion to Dismiss “should not be granted if ‘facts alleged and inferences reasonably deductible therefrom would entitle the plaintiff to any relief on any theory of the case’.” Slack v. James, 356 S.C. 479, 589 S.E.2d 772, 773-74 (Ct.App.2003). The Complaint alleges facts that may, if proven, entitle the Plaintiffs to relief on one or more theories set forth therein, and thus, Beaufort County’s Motion to Dismiss must be, and is, DENIED.

And it is so ordered this 26th day of October, 2021.

Diane Schafer Goodstein
Circuit Court Judge



Beaufort Common Pleas

Case Caption: James Ware , plaintiff, et al VS Beaufort County , defendant, et al
Case Number: 2021CP0701078
Type: Order/Other

It is so Ordered!

s/Diane S. Goodstein

Electronically signed on 2021-10-26 12:47:56 page 4 of 4

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-07-_____

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.

Complaint for Nuisance; Inverse Condemnation;
Promissory Estoppel; Declaratory Relief;
Negligence; and Temporary and Permanent
Injunctive Relief.

(Jury Trial Requested)

The Plaintiffs above-named hereby file this Complaint and allege as follows:

PARTIES AND JURISDICTION

1. That the Plaintiffs are residents of Beaufort County, SC, and specifically of that historic neighborhood located on the shore of McKay's Creek in southern Beaufort County, known as Buckingham Landing.

2. That the Defendant Beaufort County (hereinafter sometimes referred to as the "County"), is a political subdivision of the State of South Carolina.

3. That the Defendants HPCCA Ferry Company, Inc. (hereinafter "HPCCAFC") and the Daufuskie Island Ferry Service, LLC (hereinafter the "DIFC"), are corporations organized and existing under the laws of, and authorized to transact business in and doing business in, the State of South Carolina. On information and belief, the principal place of business of each corporate Defendant, is Beaufort County, SC.

4. That this Court has jurisdiction over all the parties under the South Carolina Rules of Civil Procedure, the South Carolina Code Annotated, and the common law.

5. That venue for all causes of action stated herein lies in Beaufort County, South Carolina.

CONDITIONS PRECEDENT

6. That the Plaintiffs have exhausted all administrative remedies and conditions precedent, including timeliness, deferral, and all other jurisdictional requirements necessary for the maintenance of the foregoing action, all of which are more fully described below.

FACTS

7. That the Plaintiffs are all owners or renters of residential lots in the historic Buckingham Landing neighborhood, and that all Plaintiffs purchased or rented their lots and/or homes in Buckingham Landing under the belief that the County would honor and adhere to its own ordinances and laws of the State of South Carolina.

8. That the Plaintiffs all purchased and/or rented their lots/or homes in Buckingham Landing under the belief that they could reside peacefully in the historic neighborhood, raise their families safely and enjoy the special location on McKay's Creek.

9. That the County has for decades seen fit to expend County taxpayer's money on the provision of a "ferry service" to offer County citizens who reside on Daufuskie Island, SC, a method of transportation back and forth from Daufuskie Island to the mainland of Beaufort County.

10. That because the County has historically recognized that a government-sponsored ferry service is a commercial enterprise, the County has, by Ordinance, declared that the Pinckney Island landing on Pinckney Island in Southern Beaufort County, is the designated embarkation/debarkation point for the Daufuskie Island ferry operations. *See* Beaufort County Community Development Code Section 102-97. "The county's Pinckney Island Landing and ramp is maintained by the county for the purposes of a ferry access to Daufuskie Island and public access for fishing and boating and for loading and unloading passengers, supplies, boats and boating gear." That designated embarkation/debarkation area is on a government-owned island, without any residential development and with hundreds of spaces for parking.

11. That the County has for years ignored and flaunted its Ordinance setting the Daufuskie Island ferry embarkation and debarkation point on Pinckney Island.

12. That in or around 1988, the owner of County tax parcel numbers R600-041-000-0009-0000 and R600-041-000-0008-0000 (together approximately one-acre at the end of the Fording Island Road Extension in Buckingham Landing), applied for and received a development permit from the County to build a restaurant on the land adjacent to the County's public landing.

13. That the property owner failed to construct the restaurant in a timely manner and when the developer sought to begin construction in or around 2000, the County denied him permission, asserting that he had no vested rights to develop the restaurant and that its construction at that time was not authorized under current County zoning. A legal determination against the County's position ultimately allowed the construction of what was then known as the "Sea Trawler" restaurant and galvanized the Buckingham Landing neighborhood to vocally seek protection of their homes and families.

14. That because of the County's inability to protect the Buckingham Landing neighborhood from the inappropriate commercial restaurant development, County and neighborhood leaders worked together to formulate the Buckingham Landing Community Preservation District in 2006, which had as its goal, among others, to "improve safety on Buckingham Landing roads for children, pedestrians, and drivers" and "maintain the existing character of Buckingham Landing." The Buckingham Landing Community Preservation District (hereinafter sometimes referred to as the "BLCPD") was passed by the Planning Commission and County Council in 2007, and at that time recognized the restaurant as a "non-conforming" use that

would be legally considered abandoned if allowed in the future to be vacant or unused for 120 days or more.

15. That the BLCPD specifically prohibits and forbids commercial development and commercial business operators in Buckingham Landing, which prohibition, on its face, applies to a commercial ferry operation. See Community Development Code Appendix A.10.10, stating “The purpose of the Buckingham Landing Community Preservation District is to conserve the existing residential neighborhood and to improve the quality of life and public safety for their residents.” The continued operation of the public boat landing for private recreational usage was specifically addressed and confirmed as permitting “facilities designed to launch and retrieve recreational watercraft from a trailer. Structures are not permitted.”

16. That in October 2016, Hurricane Matthew struck the coast of South Carolina, causing extensive damage in Beaufort County, including to the docks at Palmetto Bay Marina, then being used by the County as the debarkation/embarkation point for its Daufuskie Island ferry.

17. That the Sea Trawler restaurant was abandoned and/or closed on or before Hurricane Matthew’s damage, and remained closed more than 120 days thereafter.

18. That the Sea Trawler restaurant remained closed for more than 120 days after it could have been repaired and reopened from Hurricane Matthew damages, and thereby lost its “non-conforming” status and privilege (if any there actually really was) under Beaufort County’s then-existing zoning laws and the BLCPD requirements.

19. That on information and belief, the bank holding the mortgage on the Sea Trawler restaurant-initiated mortgage foreclosure proceedings in or around 2018, and on July 27, 2018,

Beaufort County spent \$2,200,000 of taxpayer money to purchase the Sea Trawler restaurant property from the bank.

20. That in or about late 2018, the County permitted and encouraged its designated vendors for the Daufuskie Island ferry, Defendants HPCCAFC and DIFC, to enter upon its Buckingham Landing property and begin operations of a commercial ferry from the old Sea Trawler restaurant property, in blatant and known violation of the BLCPD and the county's own zoning.

21. That numerous neighbors, including some of the Plaintiffs, complained to the County about the establishment in Buckingham Landing of a commercial ferry operation in derogation of the BLCPD and the County's zoning standards, but were ignored and/or placated by repeated promises from County officials and staff that the operation of the Daufuskie Island ferry from the old Sea Trawler (now County taxpayer's) property would be "temporary" until a new debarkation/embarkation dock on Pinckney Island for the Daufuskie Island ferry could be constructed.

22. That notwithstanding repeated verbal and written assurances from the agents, employees, and elected officials of the County that the commercial ferry operation would be moved from Buckingham Landing, the County has failed and refused, and continues to fail and refuse, to move the embarkation / debarkation point of the Daufuskie Island ferry to Pinckney Island or to another location where it is appropriate.

23. That over the course of the last three (3) years, while the Defendants have been operating the commercial ferry service in Buckingham Landing in derogation of the BLCPD and county zoning requirements, the Defendants HPCCAFC and DIFC have greatly expanded their

scope of operations, and as a direct and proximate result the Defendants' intentional actions, or their negligence, the greatly enhanced volume of traffic in the Buckingham Landing residential neighborhood, and the greatly enhanced volume of individuals who mill about the residential neighborhood on foot coming and going from the ferry runs, has created dangerous, ongoing situations in many ways, including but not limited to, the following:

- a. Traffic on the single residential roadway running from Fording Island Road to the County's property is dangerous and often blocks the driveways of residents;
- b. Individuals driving to the ferry are often distracted looking for entrances, and are a clear and present danger to the residential community; and,
- c. Individuals waiting on the ferry runs routinely trespass upon the private properties of the Plaintiffs, creating a dangerous situation for them and their families.

24. That the establishment and maintenance of the commercial ferry operation Buckingham Landing amounts to a nuisance *per accidens* because of its circumstances, location, and surroundings.

25. That the operation of the commercial ferry in Buckingham Landing causes an unreasonable interference with the Plaintiffs' use of their property, causes material annoyance, and causes hurt and/or discomfort to the Plaintiffs. In addition, the operation of the ferry is continuous, and the County has recently announced its intentions to enter into a new five (5) year agreement with Defendant HPCCAFC, with the avowed intention of continuing operations, and growing same, in the Buckingham Landing neighborhood in continuing blatant disregard of its own ordinances. It may thus only be assumed, based on past history, that the Defendants will, if not

enjoined, continue to be a nuisance to the Plaintiffs and cause immediate, irreparable harm to the Plaintiffs.

26. That each of the Plaintiffs has a special or particularized injury to their real and/or personal property as a direct and proximate result of the Defendants' ongoing commercial ferry operations.

FOR A FIRST CAUSE OF ACTION
INVERSE CONDEMNATION

27. That the allegations contained in Paragraphs 1 through 26 are re-alleged as fully as if repeated verbatim herein.

28. That the above alleged actions of the Defendant County and the ferry operator Defendants, have, as a practical matter, effectively "taken" a valuable property right from the Plaintiffs, to wit, the right to live peacefully in their residential neighborhood, resulting in inverse condemnation.

29. That the above alleged actions have caused and will continue to cause a serious economic impact on the Plaintiff's property values, and have interfered with the Plaintiffs' reasonable expectations of living peacefully in this historic residential community.

30. That the above alleged actions by the Defendants have been in bad faith and with the specific intent of depriving these Plaintiffs of a property right without any compensation.

31. That the County's placement of the ferry debarkation/embarkation operation in Buckingham Landing in the face of its declared policy of using Pinckney Island for such

commercial ferry operations, was an affirmative, aggressive, and positive act by a governmental entity that caused the alleged damages to the Plaintiffs' properties.

32. That the County's actions in maintaining a commercial ferry operation in derogation of its zoning laws, has caused a diminution in substance to the Plaintiffs' properties, and/or have rendered the properties intrinsically less valuable.

33. That the Plaintiffs have suffered damages as a result of the inverse condemnation of their properties.

FOR A SECOND CAUSE OF ACTION
PROMISSORY ESTOPPEL

34. That the allegations contained in Paragraphs 1 through 33 are re-alleged as fully as if repeated verbatim herein.

35. That as is alleged above, representatives, agents, and elected officials of the County, have repeatedly over the last three years promised the Plaintiffs that the County's commercial ferry operations were only located in Buckingham Landing temporarily (on an emergency basis after Hurricane Matthew), and that the nuisance would be removed from their neighborhood in the near future.

36. That the County officials, agents, and representatives were acting as duly authorized officers or agents of the County within the proper scope of their authority when the promises were made.

37. That during the years these false promises and assurances were given, the Plaintiffs lacked knowledge and lacked the means of gaining the knowledge, as to whether the County's true

intentions were to establish a permanent commercial ferry operation in Buckingham Landing in derogation of the BLCDP and the County's zoning ordinances.

38. That it was thus reasonable and prudent for the Plaintiffs to rely upon the representations, promises and assurances of the County agents, representatives and elected officials as the Plaintiffs continued to invest in improvements to their homes.

39. That the Plaintiffs justifiably relied upon the County's assurances, promises and representations as to the County's intentions to move the commercial ferry operations out of Buckingham Landing and restore the community to the peaceful lifestyle its residents enjoyed until the County's creation of the nuisance that is the commercial ferry operation.

40. That the Plaintiffs' actions in expending significant money in maintaining and improving their residences in Buckingham Landing in reliance upon the County's promises is a prejudicial change in position based upon such reliance.

41. That the Plaintiffs expending significant money on their homes in reliance upon the County's promises to move the commercial ferry operation, was expected and foreseeable by the County.

42. That the Plaintiffs have suffered damages as a result of their reliance upon the County's promises, assurances and representations identified above, and the County is estopped to deny such damages.

FOR A THIRD CAUSE OF ACTION
(DECLARATORY RELIEF)

43. That the allegations contained in Paragraphs 1 through 42 above are re-alleged as fully as if repeated verbatim herein.

44. That the Plaintiffs all are residents of Buckingham Landing and are being damaged on a daily basis by the ongoing nuisance created in their neighborhood by the Defendants.

45. That the Plaintiffs all are residents of Buckingham Landing and are being damaged on a daily basis by the Defendants' ongoing operation of a commercial ferry service in Buckingham Landing upon land that is not zoned for commercial ferry operations.

46. That the Plaintiffs all are residents of Buckingham Landing and are being damaged on a daily basis by the Defendants' ongoing operation of a commercial ferry service in Buckingham Landing upon land covered by the BLCPD zoning, which specifically prohibits operation of a commercial ferry service upon this land.

47. That the Plaintiffs bring this action pursuant to South Carolina Code Annot. Sections 15-53-10 through 15-53-140 and South Carolina Rule of Civil Procedure 57, for a judicial declaration that the Daufuskie Island commercial ferry operation being operated on parcels R600-041-000-0009-0000 and R600-041-000-0008-0000 identified above, violates Beaufort County's zoning ordinances, specifically the BLCPD.

FOR A FOURTH CAUSE OF ACTION
(NUISANCE)

48. That the allegations contained in Paragraphs 1 through 47 above are re-alleged as fully as if repeated verbatim herein.

49. That the Defendants' actions as set forth in detail above, in operating the commercial ferry service in Buckingham Landing, have since approximately July of 2019, amounted to an unlawful use of property causing material annoyance, discomfort and/or hurt to the Plaintiffs. Further, the Defendants' actions since approximately July 2019, have caused an unreasonable interference, which is continuous and has the continuing potential to re-occur, with the use and enjoyment of the Plaintiffs' properties in Buckingham Landing.

50. That the Defendants' actions as set forth in detail above, amount to both a nuisance *per se* and nuisance *per accidens*, and while the general public is harmed by the nuisance, the Plaintiffs each have a particularized injury in that the value of their homes and property is damaged by the continuing nuisance.

51. That the Defendants' actions in creating and maintaining the nuisance in Buckingham Landing as described above, amount to an unreasonable interference with the Plaintiffs' use and enjoyment of their land, and have proximately and directly caused each of the Plaintiffs damages in the form of loss of value of their homes and property, and physical and emotional distress.

FOR A FIFTH CAUSE OF ACTION
(NEGLIGENCE)

52. That the allegations contained in Paragraphs 1 through 51 above are re-alleged as fully as if repeated verbatim herein.

53. That the Defendants' actions as set forth in detail above, in operating the commercial ferry in Buckingham Landing in clear violation of the County's zoning ordinances, including the BLCPD, were negligent, grossly negligent and/or willful and wanton actions.

54. That the Defendants' actions as set forth in detail above, proximately and directly caused the Plaintiffs damages in myriad ways, to include damage to their property values, and emotional distress.

FOR AN SIXTH CAUSE OF ACTION
(FOR A TEMPORARY AND PERMANENT INJUNCTION)

55. That the allegations contained in Paragraphs 1 through 54 above are re-alleged as fully as if repeated verbatim herein.

56. That the Defendants' ongoing operation of the commercial ferry service from Buckingham Landing, which has created a nuisance and which operation is in blatant derogation of the County's zoning ordinances, including the BLCPD, is causing the Plaintiffs immediate, irreparable harm in that the Plaintiffs are affected daily by the nuisance of over-crowded, dangerous residential streets, unknown individuals repeatedly trespassing on their properties, and the continuing loss of value of their properties because of the nuisance.

57. That the actions of the County in repeatedly assuring the Plaintiffs and other Buckingham Landing residents that the County was going to move the ferry embarkation/debarkation facility out of Buckingham Landing and to a property properly zoned for commercial ferry activities, exemplifies bad faith, and warrants this Court's immediate action of prohibiting continuing operations of the commercial ferry service in Buckingham Landing.

58. That under the facts of this case and the law of equity, the Plaintiffs are entitled to an Order of the Court temporarily and permanently enjoining the Defendants from operating the Daufuskie Island Ferry from Buckingham Landing.

WHEREFORE, the Plaintiffs pray that this Honorable Court inquire into the matters set forth herein, and that the Plaintiffs have the declaration as sought--that the operation of the Daufuskie Island commercial ferry on parcels R600-041-000-0009-0000 and R600-041-0008-0000 identified above--violates Beaufort County's zoning ordinances, specifically the BLCPD. Further, the Plaintiffs request an entry of Judgment against the Defendants jointly and severally for damages for the nuisance they have created in Buckingham Landing. Further, the Plaintiffs request entry of a Judgment awarding them damages for the negligence of operating a commercial ferry, after notice, in an area whose zoning and the Preservation District overlay specifically prohibits such commercial ferry operations. Further, the Plaintiffs request 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. Finally, the Plaintiffs pray for the issuance of a Temporary and Permanent Injunction barring the Defendants from continuing operation of the commercial ferry service in Buckingham Landing until a final, non-appealable Order enters in this case.

Law Office of Thomas C. Taylor, LLC

s/ Thomas C. Taylor, Esq.

Thomas C. Taylor (S.C. Bar 5499)

P.O. Box 5550, Hilton Head Isl., SC 29938

Telephone:(843)785-5050-Fax:(843)785-5030

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ATTORNEY FOR PLAINTIFFS

Plaintiffs request trial by a jury

s/ Thomas C. Taylor, Esq.

Thomas C. Taylor

Hilton Head Island, South Carolina

June 11, 2021

James Ware, Alisa Ware, Henry Spahr, Elaine) Civil Action Number: 2021-CP-07-01078

**MOTION TO DISMISS OF THE
DEFENDANT BEAUFORT COUNTY**

The Defendant Beaufort County (“the County”) hereby notices its motion and moves to dismiss the Complaint as to the County. This motion is made pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, and on the general ground that the Complaint fails to state facts sufficient to constitute a cause of action against the County.

This motion is also made on the specific ground that the Complaint, on its face, shows that it is premature inasmuch as it fails to allege facts (beyond the single conclusory allegation of paragraph 6) sufficient to show that the Plaintiffs exhausted their administrative remedies

provided by State statutory law concerning zoning (including S.C. Code sections 6-29-300 and 6-29-730) and the ordinances of the County (including section 7.3.60 and Article 8 of the Community Development Code).

The gravamen of the Complaint, and the basis for all of its causes of action, is that the County's use of the property at issue is an illegal nonconforming use. The determination of the existence of an illegal nonconforming use is a matter requiring the application of specific provisions of the County zoning ordinance. However, the Complaint alleges no facts showing that any Plaintiff has sought any administrative determination by the County's zoning official or by the County's board of zoning appeals that the use of the property complained of is an illegal nonconformity. Exhaustion of administrative remedies is required before a plaintiff pursues judicial relief based on the application of a zoning ordinance to a property. See, for example, Moore v. Sumter County Council, 300 S.C. 270, 387 S.E.2d 455 (1990), and as applied specifically to a motion to dismiss, Stanton v. Town of Pawleys Island, 309 S.C. 126, 420 S.E.2d 502 (1992).

/s/Danny C. Crowe

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ATTORNEY FOR BEAUFORT COUNTY

July 9, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
James Ware, Alisa Ware, Henry Spahr, Elaine	)	Civil Action Number: 2021-CP-07-01078
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,	)	MEMORANDUM OF POINTS AND
Beth DeAngelis, Shelly Horn, Theodore	)	AUTHORITIES IN SUPPORT OF
Brammer, Allison Brammer, Waymon W.	)	DEFENDANT BEAUFORT COUNTY'S
Durden, Constance C. Durden, David C.	)	MOTION TO DISMISS
Powell,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Beaufort County, HPCCA Ferry Company,	)	
Inc., and The Daufuskie Island Ferry Service,	)	
LLC,	)	
	)	
Defendants.	)	
	)	

The Defendant Beaufort County (the "County") submits this brief memorandum of points and authorities in support of its Motion to Dismiss the Complaint pursuant to Rule 12(b)(6), SCRCF. The specific ground for the County's Motion is that the Complaint fails to allege facts to show that the Plaintiffs exhausted the administrative remedies provided by State statutory law and the County's zoning ordinance (known as the Community Development Code).

The Complaint, stated succinctly, alleges that the Plaintiffs are owners or renters of residences in a neighborhood near a County-owned public boat landing and ferry service access

point known as Buckingham Landing that, it is further alleged, has been operating as an illegal nonconforming zoning use and as a nuisance since 2018. The allegations concerning nuisance are 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 asserts 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.

Under the heading "CONDITIONS PRECEDENT," paragraph 6 of the Complaint alleges:

That the Plaintiffs have exhausted all administrative remedies and conditions precedent, including timeliness, deferral, and all other jurisdictional requirements necessary for the maintenance of the foregoing action, all of which are more fully described below.

Despite this conclusory allegation, and its representation that specific supporting facts will follow, no facts are alleged in the remainder of the Complaint's 58 paragraphs to show Plaintiffs' exhaustion of the administrative remedies that are provided by State law and by the County Community Development Code.

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994, codified in Chapter 20 of Title 6 of the South Carolina Code, sets out the general enforcement scheme for zoning ordinances enacted by local governments. The Act, as pertinent here, in S.C. Code §§ 6-29-780 through 6-29-860, provides for "the administrative mechanism designed to enforce the zoning ordinance" by an administrative official who makes orders, decisions and determinations in the enforcement of the zoning ordinance with an appeal "by any person aggrieved" to a local government board of zoning appeals and with further appeal, beyond the administrative level and to the judicial level of the circuit court, by a "person who may have a substantial interest in any decision of the board of appeals." The County Community Development

Code adopts this administrative mechanism by providing for appeals of Development Code interpretations by the Director of the Department of Community Development to the Zoning Board of Appeals. See generally, for example, Section 7.3.60 ("Interpretations") and Section 7.3.70 ("Appeals") of the County Development Code that provide for administrative interpretations of the Community Development Code by the Director with appeal to the Zoning Board of Appeals. Similar provisions for an administrative mechanism referring specifically to determinations of the existence of an illegal nonconformity are set out in Section 8.1.20 ("Applicability") of Article 8 ("Nonconformities") of the Community Development Code Subsection B ("Illegal Nonconformities") of that section provides:

Illegal nonconformities are those nonconformities that are neither properly permitted nor legally established and that do not comply with the applicable provisions of this Development Code. Illegal nonconformities are subject to cessation by the County upon a determination of such illegality by the Director.

Plaintiffs' Complaint contains no allegations of fact to show that the Plaintiffs, either as a group or individually, ever sought an administrative determination that the Buckingham Landing ferry access point, complained of in the Complaint, was an illegal nonconforming use under the County zoning ordinance. Mere conclusory allegations, such as those in the Complaint's paragraph 6 quoted above, are insufficient to constitute supporting facts. Causes of action based on conclusory allegations without the pleading of supporting facts are subject to dismissal. See Jones v. Gilstrap, 268 S.C. 525, 343 S.E. 2d 646, 648 (Ct. App. 1986)(in the context of a demurrer), and Clark v. Clark, 293 S.C. 415, 416, 361 S.E. 328 (1987)(in the context of a motion to dismiss for failure to state a cause of action).

As cited in the body of the County's Motion to Dismiss, State case law fully supports the County's ground that the general prerequisite of exhaustion of administrative remedies is also a

prerequisite for judicial relief in zoning-related cases. For example, in Moore v. Sumter County Council, 300 S.C. 270, 387 S.E. 2d 455 (1990), the State Supreme Court, in an opinion authored by then-Justice Toal, held that a claim for regulatory taking caused by operation of a zoning ordinance was premature because the landowners failed to exhaust administrative remedies. The Moore Court, citing Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E. 2d 848 (1976), reasoned that the impact of the zoning ordinance upon plaintiffs' real property "cannot be determined when the landowner has failed to pursue his administrative remedies." 300 S.C. at 273, 387 S.E. 2d at 457. Similarly, in Stanton v. Town of Pawleys Island, 309 S.C. 502, 309 S.C. 502 (1992), the Court, in another opinion authored by then-Justice Toal, determined that the landowner's claim of an unconstitutional zoning ordinance was properly dismissed for failure to exhaust available administrative remedies by appealing a permit denial. Although the case law recognizes some exceptions (such as futility) to the requirement of exhaustion of administrative remedies, no such exceptions are alleged in the Complaint (even in a conclusory fashion).

In our case, the Plaintiffs do not allege any attempt to initiate the administrative process by a written request to the Director for a determination on the issue of the existence of an illegal nonconforming use. Here, no facts are alleged concerning exhaustion of administrative remedies, even though Plaintiffs assert, in paragraph 6 of their Complaint, that exhaustion of administrative remedies is a "condition precedent" and one of the "jurisdictional requirements necessary for the maintenance of the foregoing action..."

[Please see conclusion and signature on next page.]

For the above reasons, and for the grounds asserted in its Motion and at the hearing on its Motion, Defendant Beaufort County requests that the Complaint be dismissed.

Respectfully submitted,

s/Danny C. Crowe

Danny C. Crowe, S.C. Bar No. 1480

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ATTORNEY FOR DEFENDANT
BEAUFORT COUNTY

September 13, 2021

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action Number: 2021-CP-07-01078

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,

Plaintiffs,

v.

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

Defendants.

ANSWER OF DEFENDANTS
HPCCA FERRY COMPANY, INC.
AND THE DAUFUSKIE ISLAND
FERRY SERVICE, LLC

TO: THE PLAINTIFFS ABOVE NAMED AND THEIR ATTORNEY,
THOMAS C. TAYLOR, ESQUIRE

DEFENDANTS' ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

Defendants HPCCA Ferry Company, Inc. and The Daufuskie Island Ferry Service, LLC, by and through their undersigned counsel, do respectfully answer the Plaintiff's Complaint and make their Answer (specifically reserving all rights to amend this Answer within thirty (30) days pursuant to Rule 15 (a) of the South Carolina Rules of Civil Procedure, and reserving all rights to include in the Answer any defenses and/or objections under Rule 12 of the South Carolina Rules of Civil Procedure, and reserving all rights to make any motions under Rule 12 of the South Carolina Rules of Civil Procedure) and would respectfully allege and show this Honorable Court its Answer, Affirmative Defenses, and Counterclaims as follows:

DEFENDANTS' ANSWER

1. The Defendants deny each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted or qualified.
2. Regarding Paragraph 1 of the Complaint, the Defendants have no knowledge of the whether the Plaintiffs are residents of Beaufort County or reside in or near Buckingham Landing, and to that extent deny the same and demand strict proof thereof.
3. The Defendants defer to Co-Defendant Beaufort County to admit or deny the allegations in Paragraph 2 of the Complaint.
4. Regarding Paragraph 3 of the Complaint, the Defendants admit the allegations, with the clarification that DIFC as defined in the Complaint is a South Carolina limited liability company.
5. Regarding Paragraph 4 of the Complaint, the Defendants admit that the Court has jurisdiction over the Defendants.
6. Regarding Paragraph 5 of the Complaint, the Defendants admit that venue lies in Beaufort County, South Carolina.
7. The Defendants deny the allegations in Paragraph 6 of the Complaint in that the Plaintiffs have not established that the Plaintiffs have initiated any administrative relief actions, much less exhausted any or all administrative remedies and conditions precedent to filing the Complaint.
8. Regarding Paragraph 7 of the Complaint, the Defendants have no knowledge as to whether the Plaintiffs own, rent or have any interest whatsoever in the Buckingham Landing area and therefore deny the same and demand proof thereof.

9. Regarding Paragraph 8 of the Complaint, the Defendants have no knowledge as to whether the Plaintiffs purchased and/or rent property in the Buckingham Landing area and therefore deny the same and demand proof thereof.
10. Regarding Paragraph 9 of the Complaint, the Defendants have no direct knowledge as to the intentions of Co-Defendant Beaufort County.
11. Regarding Paragraph 10 of the Complaint, the Defendants admit the language quoted with the qualification that Section 102-97 is from the Beaufort County Code of Ordinances rather than the Beaufort County Development Code.
12. The Defendants neither admit nor deny the allegations in Paragraph 11 of the Complaint, as the Defendants have no actual knowledge of such allegations.
13. The Defendants neither admit nor deny the allegations in Paragraph 12 of the Complaint, as the Defendants have no actual knowledge of such allegations.
14. The Defendants neither admit nor deny the allegations in Paragraph 13 of the Complaint, as the Defendants have no actual knowledge of such allegations.
15. The Defendants neither admit nor deny the allegations in Paragraph 14 of the Complaint, as the Defendants have no actual knowledge of such allegations.
16. The Defendants have no knowledge as to the allegations in Paragraph 15 of the Complaint which conclude that periodic public ferry operations are a “commercial business” and conclude that such operations are precluded by the BLCPD, as defined in the Complaint, and demand strict proof thereof.
17. The Defendants admit the allegations in Paragraph 16 of the Complaint.
18. The Defendants admit the allegations in Paragraph 17 of the Complaint.

19. The Defendants neither admit nor deny the allegations in Paragraph 18 of the Complaint, as the Defendants have no actual knowledge thereof.
20. The Defendants neither admit nor deny the allegations in Paragraph 19 of the Complaint, as the Defendants have no actual knowledge thereof.
21. Regarding Paragraph 20 of the Complaint, the Defendants admit that Defendants are under contract with Co-Defendant Beaufort County to transport Beaufort County residents and others to and from Daufuskie Island to and from Buckingham Landing, but deny in its entirety the Plaintiff's label of such public transportation as a "commercial ferry" and conclusion that such transportation is "in blatant and known violation of the BLCPD and the County's own zoning."
22. The Defendants neither admit nor deny the allegations in Paragraph 21 of the Complaint, as the Defendants have no actual knowledge thereof.
23. Regarding Paragraph 22 of the Complaint, the Defendants admit that periodic public ferry stops are made at Buckingham Landing, but deny the rest of the allegations of Paragraph 22 and demand strict proof thereof.
24. The Defendants deny the allegations in Paragraph 23 of the Complaint and demand strict proof thereof.
25. The Defendants deny the allegations in Paragraph 24 of the Complaint and demand strict proof thereof.
26. The Defendants deny the allegations in Paragraph 26 of the Complaint and demand strict proof thereof.

DEFENSES AND AFFIRMATIVE DEFENSES

27. Regarding the First Cause of Action Inverse Condemnation set forth in Paragraphs 27 – 33 of the Complaint, the Plaintiffs offer no legal basis whatsoever for their claims of Inverse Condemnation or a “taking.” The Plaintiffs appear to be alleging that Defendants’ actions amount to a nuisance and, therefore, trigger the elements for inverse condemnation. Inverse condemnation caselaw establish that all material, investment backed expectations of a property owner have been thwarted by government action. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Even if Plaintiffs allegations are taken as fact, which Defendants deny, the alleged inconvenience of the public ferry pickups do not rise to the deprivation of property use or investment expectations outlined in inverse condemnation caselaw.
28. Regarding the First Cause of Action Inverse Condemnation set forth in Paragraphs 27 – 33 of the Complaint, Plaintiffs also allege a diminution in property values due to Defendants’ actions without any appraisals, sale comparisons or professional opinions to support their allegations. The Defendants maintain there have been no diminution in property values for the Plaintiffs whatsoever, and demand strict proof thereof.
29. Regarding the Second Cause of Action set forth in Paragraphs 34 – 42 of the Complaint, the Defendants have no knowledge of any promises, representations or assurances made by Beaufort County that the ferry service to Buckingham Landing was temporary.
30. Regarding the Second Cause of Action set forth in Paragraphs 34 – 42 of the Complaint, the Defendants deny that the Plaintiffs expended “significant money on their homes in reliance upon the County’s promises to move the commercial ferry operation . . .” No evidence whatsoever is given to support such a statement, and the Defendants deny any

funds were spent by the Plaintiffs due to alleged and unsubstantiated County representations.

31. Regarding the Third Cause of Action set forth in Paragraphs 43 – 47 of the Complaint, the Defendants maintain that the Plaintiffs have not approached the County for any administrative determination whatsoever as to whether the public ferry operations violate the County's zoning ordinance. It is premature for this Court to rule on the Plaintiff's Third Cause of Action prior to any administrative determination as to whether the County zoning ordinance precludes the pickup and drop-off of Beaufort County residents and others to and from Daufuskie Island on a public ferry service and not a commercial ferry operation.
32. Regarding the Fourth Cause of Action set forth in Paragraphs 48 –51 of the Complaint, the Defendants maintain the public ferry drop-off amount to a nuisance *per se*. The traditional test for determining the existence of a nuisance *per se* is whether the nuisance has become dangerous at all times and under all circumstances to life, health, or property. Suddeth v. Knight, 280 S.C. 540, 545, 314 S.E.2d 11, 14 (Ct.App.1984). A nuisance *per se* is an interference so severe that it would constitute a nuisance under any circumstances, and the Plaintiffs offer no supporting facts or evidence which would show the Defendant's ferry pickups or drop-off are dangerous under any circumstances to life, health or property.
33. Regarding the Fourth Cause of Action set forth in Paragraphs 48 –51 of the Complaint, the Defendants maintain the public ferry drop-off amount to a nuisance *per accidense*. The proven damages of the alleged nuisance in this Case, of which there are none, along may possible provide the Plaintiffs with elements needed to establish nuisance *per accidense*. Without any such substantiation, the Plaintiffs' cause of action fails. Nuisance requires a landowner to demonstrate that the defendant unreasonably interfered with his ownership or

possession of the land, Silvester v. Spring Valley Country Club, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001). [N]uisance is a substantial and unreasonable interference with the plaintiffs use and enjoyment of his property. *Id.*; see Blanks v. Rawson, 296 S.C. 110, 113, 370 S.E.2d 890, 892 (Ct. App. 1988) (A nuisance has been defined as anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property. (quoting Strong v. Winn-Dixie Stores, Inc., 240 S.C. 244, 253, 125 S.E.2d 628, 632 (1962)). Since the degree of annoyance or inconvenience necessary to constitute an actionable nuisance cannot be generally quantified, each case must depend largely on its own facts. *Id.* at 559, 443 S.E.2d at 579. The question is not whether the Plaintiffs have been annoyed or disturbed by the operation of the ferry service in question, but whether there has been an injury to their legal rights. No such injury has been identified other than unsubstantiated allegations of diminution in property values and general traffic complaints.

34. Regarding the Fifth Cause of Action set forth in Paragraphs 52 –54 of the Complaint, the Defendants maintain the public ferry drop-off and pickups amount to negligence. To support a negligence cause of action, the Plaintiffs must prove: 1) a duty of care owed to the Plaintiffs; 2) breach of that duty; 3) causation; and 4) damages. Andrade v. Johnson, 356 S.C. 238, 245 588 S.E.2d 588, 592 (2003). To succeed on a negligence claim, a plaintiff must first establish a duty of care owed by the defendant to the plaintiff. Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). In order for negligence liability to attach, the parties must have a relationship recognized by law as the foundation of a duty of care. Ravan v. Greenville County, 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993). The Defendants have no relationship with the Plaintiffs whatsoever,

and certainly no duty of care. In the absence of a duty to prevent an injury, foreseeability of that injury is insufficient to establish liability. South Carolina Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 375, 346 S.E.2d 324, 325 (1986). As such, it is well settled that, without a duty, there is no actionable claim for negligence. Platt v. CSX Transp., Inc., 388 S.C. 441, 445-46, 697 S.E.2d 575, 577 (2010).

35. Regarding the Sixth Cause of Action set forth in Paragraphs 55 –58 of the Complaint, the Plaintiffs maintain they are entitled to temporary and permanent injunctive relief. However, the Plaintiffs fail to plead the elements necessary for such relief. A plaintiff “must establish three elements” to obtain a preliminary injunction: (1) irreparable harm, (2) likelihood of success on the merits, and (3) no adequate remedy at law. Compton v. S.C. Dep’t of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). None of those three elements were set forth in the Complaint. Whether to grant preliminary injunction is in a trial court’s discretion. Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). A preliminary injunction “is a drastic remedy,” *id.*, that should “preserve the status quo,” Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). The status quo currently is the ongoing public ferry drop off and pick ups which have occurred for over a year now. There is no need for a “drastic remedy” and the Plaintiffs fail to establish any of the elements needed for the injunctive relief sought.

RIGHT TO ASSERT DEFENSES

36. Defendants hereby give notice that they intend to rely upon such defenses that may become available or apparent during the discovery in this case and reserve their right to amend its Answer to assert any such defense.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the Defendant prays that this Court find:

1. That Plaintiff take nothing by reason of the Complaint herein.
2. That the Complaint be dismissed with prejudice and the Defendants be dismissed from claims in the Complaint.
3. That Defendants be given judgment as follows:
 - a. Attorney's fees and costs of this action;
 - b. For such other just and equitable relief as this Court may deem appropriate.

NOVIT & SCARMINACH, P.A.

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843-758-5850
Attorneys for Defendants HPCCA
FERRY COMPANY, INC.
AND DAUFUSKIE ISLAND
FERRY SERVICE, LLC

September 14, 2021
Hilton Head Island, South Carolina

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

) FOURTEENTH JUDICIAL CIRCUIT

COUNTY OF BEAUFORT

)

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,

) Civil Action Number: 2021-CP-07-01078

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Plaintiffs,

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v.

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

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)

)

Defendants.

)

The Defendant Beaufort County (hereinafter sometimes referred to as "the County")

answers the Complaint of the Plaintiffs as follows:

1. Except as is hereinafter specifically admitted, the County denies each and every allegation of the Complaint.

2. Answering paragraph 1 as to residency of Plaintiffs in Beaufort County and the Buckingham Landing area, the County admits, upon current information, the residency of the

Plaintiffs except the Plaintiffs Burr and Horn as to whom the County, for purposes of this Answer, currently lacks information sufficient to admit or deny.

3. The allegation of paragraph 2 is admitted.

4. Answering paragraph 3, the County admits, on information, that the co-defendants are corporations authorized to transact business, and doing business in, the State and Beaufort County.

5. Answering paragraphs 4 and 5, the County admits jurisdiction and venue in this Court.

6. The allegations of paragraph 6 are denied.

7. Answering paragraphs 7 and 8, the County has not yet determined, for purposes of this Answer, whether all Plaintiffs are owners of property in the Buckingham Landing area. The County, for purposes of this Answer, has no information as to which Plaintiffs are renters of residential lots and the County has no information as to the beliefs of the Plaintiffs at the times they purchased or rented property.

8. Answering paragraph 9, the County admits only that it provides and has provided, as a County public service, certain ferry transportation service to and from the mainland for Daufuskie Island residents and others.

9. Answering paragraph 10, the County admits only that Pinckney Island Landing was formerly a ferry access point for the County's Daufuskie Island ferry service. Further answering, the County admits that the County Code of Ordinances refers to Pinckney Island Landing in Article II of Chapter 102 of the County Code, which includes a section 102-97 and to which the County craves reference for an accurate statement of its contents. Further answering, the County admits

that Pinckney Island is owned by an agency of the Federal Government, has no residential development, and has a number of spaces for parking.

10. The allegations of paragraph 11 are denied.

11. The County, based on current information obtained for the purpose of this Answer, admits the allegations of paragraph 12.

12. Answering paragraph 13, the County, based on current information, admits only or asserts that the County previously took a position in an arbitration that the property owner did not have certain vested rights, that the County did not prevail in the arbitration, and that it was determined by the arbitrator that the property owner did have certain vested rights to develop the property. The County further avers and asserts that the arbitration result is the law of the case applicable to the property owner's rights in that matter.

13. Answering paragraph 14, the County admits only that a Buckingham Landing Community Preservation District ("BLCPD") was created in or about 2007 as part of the County Zoning and Development Standards Ordinance. That Ordinance was superseded by the Beaufort County Community Development Code ("CDC") in 2014.

14. Answering paragraph 15, the County craves reference to the CDC for an accurate statement of its provisions. The County denies that all commercial use is prohibited in Buckingham Landing.

15. The allegations of paragraph 16 are admitted.

16. Answering paragraph 17, the County, based on current information, admits only that the Sea Trawler restaurant closed on or before the arrival of Hurricane Matthew. The County expressly denies that 120 days was the applicable period for loss of a nonconforming use after the

effective date of the CDC on December 8, 2014, and avers and asserts that the CDC (in its section 8.2.4) provides for a one-year period of abandonment for loss of legal nonconforming status.

17. The allegations of paragraph 18 are denied.

18. Answering paragraph 19, the County admits only that it obtained title to the property referred to as the Sea Trawler property, including the dock, by deed from Queensborough National Bank & Trust Company, dated July 27, 2018, for the recited amount of \$2,200,000.

19. The allegations of paragraph 20 are denied. The County avers and asserts that the effective date for relocation of the ferry service access point for Daufuskie Island to Buckingham Landing was February 13, 2017.

20. Answering paragraph 21, the County admits only that it has received complaints about the ferry service access point at Buckingham Landing.

21. Answering paragraph 22, the County admits only that it continues the ferry service from the access point on its property at Buckingham Landing.

22. The allegations of paragraph 23 are denied.

23. The allegations of paragraph 24 are denied.

24. The allegations of paragraph 25 are denied.

25. The allegations of paragraph 26 are denied.

26. Answering paragraph 27, the County reiterates and realleges paragraphs 1 through 25 of this Answer as fully and to the same extent as if here repeated word for word.

27. The allegations of paragraphs 28, 29, 30, 31, 32, and 33 are denied.

28. Answering paragraph 34, the County reiterates and realleges paragraphs 1 through 27 of this Answer as fully and to the same extent as if here repeated word for word.

29. The allegations of paragraphs 35, 36, 37, 38, 39, 40, 41, and 42 are denied.

30. Answering paragraph 43, the County reiterates and realleges paragraphs 1 through 29 of this Answer as fully and to the same extent as if here repeated word for word.

31. The allegations of paragraphs 44, 45, 46, and 47 are denied.

32. Answering paragraph 48, the County reiterates and realleges paragraphs 1 through 31 of this Answer as fully and to the same extent as if here repeated word for word.

33. The allegations of paragraphs 49, 50, and 51 are denied.

34. Answering paragraph 52, the County reiterates and realleges paragraphs 1 through 33 of this Answer as fully and to the same extent as if here repeated word for word.

35. The allegations of paragraphs 53 and 54 are denied.

36. Answering paragraph 55, the County reiterates and realleges paragraphs 1 through 35 of this Answer as fully and to the same extent as if here repeated word for word.

37. The allegations of paragraphs 56, 57, and 58 are denied.

38. The County denies any allegations and any entitlement to requested relief as asserted by the Plaintiffs in the Prayer of the Complaint.

FOR A SECOND DEFENSE

39. FURTHER ANSWERING, the County asserts that the use of the dock at Buckingham Landing as a commercial dock and/or as an access point for the County ferry service was, at all times pertinent, a lawful use, by reason of, among other things, its use ancillary to the restaurant, or by its use ancillary to the public landing, or by its use as a legal nonconformity, or by its use pursuant to lease in 2017 from the former owner to the co-defendant Daufuskie Island Ferry Service, or by its use as permitted by a 2005 State Commercial Dock Permit and/or by a 2009 County Zoning Permit, or by its use for reasons of public necessity by the County after Hurricane Matthew and continuing to the present.

FOR A THIRD DEFENSE

40. FURTHER ANSWERING, the County asserts that all or some of the Plaintiffs lack standing sufficient to prosecute a claim for violation of the County CDC or other causes of action, inasmuch as some or all of the Plaintiffs are not adjacent or neighboring property owners or have not suffered concrete particularized harm to a legally protected interest.

FOR A FOURTH DEFENSE

41. FURTHER ANSWERING, the County asserts that the Plaintiffs, prior to this lawsuit, failed to exhaust their administrative remedies by seeking an administrative interpretation of whether the use by the County complained of by the Plaintiffs was a legal or illegal nonconformity, pursuant to CDC section 8.1.20.

FOR A FIFTH DEFENSE

42. FURTHER ANSWERING, the County asserts that all or some of the Plaintiffs' causes of action are barred by the applicable statutes of limitation.

FOR A SIXTH DEFENSE

43. FURTHER ANSWERING, the County asserts that it is a South Carolina county and a political subdivision of the State, that it is a "governmental entity" within the meaning of S.C. Code section 15-78-30(d), and that, as such, any claims or actions arising in tort alleged against the County are subject to the provisions and limitations of the South Carolina Tort Claims Act (S.C. Code section 15-78-10 et seq.). The County further alleges and would show that, except as waived by the South Carolina Tort Claims Act, it is immune from suit and for liability for tort under the doctrine of sovereign immunity.

44. The County further alleges and would show that, under section 15-78-120(a), the amount of any recovery by some or all of the Plaintiffs arising from a single occurrence is limited and that, under Section 15-78-120(b), the recovery of punitive or exemplary damages or prejudgment interest are excluded from any award. The County pleads these provisions as limitations on any recovery in tort herein.

45. The County further alleges and would show that any of Plaintiffs' claims arising in tort against the County are barred by the provisions of the South Carolina Tort Claims Act and by the doctrine of sovereign immunity, including the provisions of the South Carolina Tort Claims Act contained in section 15-78-60 which except certain actions or inactions from the waiver of immunity and which provide that the governmental entity is not liable for losses resulting from certain actions or inactions. The County alleges that any matters arising in tort complained of by the Plaintiffs are within the meaning of those actions or inactions listed as items (1), (2), (4), and (12) of section 15-78-60, and that, accordingly, the County is immune from suit and from liability and is not liable for the loss or losses complained of by the Plaintiffs.

FOR A SEVENTH DEFENSE

46. FURTHER ANSWERING, the County asserts that the Plaintiffs fail to state a claim upon which relief can be granted for inverse condemnation, inasmuch as the facts alleged fail to show or establish, among other things, a direct taking or a regulatory taking functionally equivalent to a direct appropriation of private property or an ouster of Plaintiffs from their property, or an affirmative, positive, aggressive act, or any interference with investment-backed expectations.

FOR AN EIGHTH DEFENSE

47. FURTHER ANSWERING, as to any claims by the Plaintiffs sounding in tort, including nuisance and negligence, the County is immune from liability and any resultant damages,

inasmuch as the County owed the Plaintiffs no duty or, in the alternative if a duty is found, that any duty is to the public at large. The County pleads the public duty rule as a complete defense and bar to Plaintiffs' causes of action sounding in tort.

FOR A NINTH DEFENSE

48. FURTHER ANSWERING, the County asserts that all or some of the Plaintiffs, at the time of purchase of their property in the Buckingham Landing area, knew, or in the exercise of reasonable diligence, should have known, the uses of the property of which now they complain. With such knowledge or notice (actual or constructive), all or some of the Plaintiffs are now estopped or foreclosed from, and have waived, any claims as to such matters.

FOR A TENTH DEFENSE

49. FURTHER ANSWERING, the County asserts, in particular regard to the cause of action for nuisance, that any nuisance would constitute a public nuisance and not a private nuisance, and that Plaintiffs have sustained no special injury as required by law.

FOR AN ELEVENTH DEFENSE

50. FURTHER ANSWERING, the County asserts, in particular regard to the cause of action for promissory estoppel, that there was no promise, that any promise was without consideration, that reliance by the Plaintiffs on any promise was not justified or was unreasonable, and that any loss or damage was negligible.

FOR A TWELFTH DEFENSE

51. FURTHER ANSWERING, the County asserts that Plaintiffs' recovery of damages may be limited or barred because of Plaintiffs' own conduct or their failure to mitigate or minimize their damages by taking proper preventative or curative measures.

FOR A THIRTEENTH DEFENSE

52. FURTHER ANSWERING, the County asserts that punitive damages are not recoverable against it in negligence (including the tort of nuisance) pursuant to S.C. Code section 15-78-120(b), or otherwise in any other causes of action, inasmuch as it is a political subdivision of the State and a governmental entity.

FOR A FOURTEENTH DEFENSE

53. FURTHER ANSWERING, the County asserts that attorney's fees are not properly recoverable against the County, but that, if determined to be recoverable, attorney's fees should not be awarded, inasmuch as any such award of attorney's fees would be discretionary with the Court, the positions of the County are substantially justified, and the other circumstances of this case would make any award of attorney's fees unjust.

WHEREFORE, having answered the Complaint of the Plaintiffs, the Defendant Beaufort County prays that any relief requested by the Plaintiffs be denied, that judgment be entered in favor of the County, and that the Court grant such other and further relief in favor of the County as is appropriate.

s/Danny C. Crowe

Danny C. Crowe (S.C. Bar No. 1480)

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Columbia, South Carolina 29202

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danny@crowelafave.com

ATTORNEYS FOR DEFENDANT
BEAUFORT COUNTY

November 10, 2021

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT

COUNTY OF BEAUFORT

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,

Civil Action Number: 2021-CP-07-01078

**AMENDED ANSWER OF THE
DEFENDANT BEAUFORT COUNTY**

Plaintiffs,

v.

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

Defendants.

With the written consent of the parties, the Defendant Beaufort County (hereinafter sometimes referred to as “the County”) amends its previous Answer and answers the Complaint of the Plaintiffs as follows:

1. Except as is hereinafter specifically admitted, the County denies each and every allegation of the Complaint.
2. Answering paragraph 1 as to residency of Plaintiffs in Beaufort County and the Buckingham Landing area, the County admits, upon current information, the residency of the

Plaintiffs except the Plaintiffs Burr and Horn as to whom the County, for purposes of this Answer, currently lacks information sufficient to admit or deny.

3. The allegation of paragraph 2 is admitted.

4. Answering paragraph 3, the County admits, on information, that the co-defendants are corporations authorized to transact business, and doing business in, the State and Beaufort County.

5. Answering paragraphs 4 and 5, the County admits jurisdiction and venue in this Court.

6. The allegations of paragraph 6 are denied.

7. Answering paragraphs 7 and 8, the County has not yet determined, for purposes of this Answer, whether all Plaintiffs are owners of property in the Buckingham Landing area. The County, for purposes of this Answer, has no information as to which Plaintiffs are renters of residential lots and the County has no information as to the beliefs of the Plaintiffs at the times they purchased or rented property.

8. Answering paragraph 9, the County admits only that it provides and has provided, as a County public service, certain ferry transportation service to and from the mainland for Daufuskie Island residents and others.

9. Answering paragraph 10, the County admits only that Pinckney Island Landing was formerly a ferry access point for the County's Daufuskie Island ferry service. Further answering, the County admits that the County Code of Ordinances refers to Pinckney Island Landing in Article II of Chapter 102 of the County Code, which includes a section 102-97 and to which the County craves reference for an accurate statement of its contents. Further answering, the County admits

that Pinckney Island is owned by an agency of the Federal Government, has no residential development, and has a number of spaces for parking.

10. The allegations of paragraph 11 are denied.

11. The County, based on current information obtained for the purpose of this Answer, admits the allegations of paragraph 12.

12. Answering paragraph 13, the County, based on current information, admits only or asserts that the County previously took a position in an arbitration that the property owner did not have certain vested rights, that the County did not prevail in the arbitration, and that it was determined by the arbitrator that the property owner did have certain vested rights to develop the property. The County further avers and asserts that the arbitration result is the law of the case applicable to the property owner's rights in that matter.

13. Answering paragraph 14, the County admits only that a Buckingham Landing Community Preservation District ("BLCPD") was created in or about 2007 as part of the County Zoning and Development Standards Ordinance. That Ordinance was superseded by the Beaufort County Community Development Code ("CDC") in 2014.

14. Answering paragraph 15, the County craves reference to the CDC for an accurate statement of its provisions. The County denies that all commercial use is prohibited in Buckingham Landing.

15. The allegations of paragraph 16 are admitted.

16. Answering paragraph 17, the County, based on current information, admits only that the Sea Trawler restaurant closed on or before the arrival of Hurricane Matthew. The County expressly denies that 120 days was the applicable period for loss of a nonconforming use after the

effective date of the CDC on December 8, 2014, and avers and asserts that the CDC (in its section 8.2.4) provides for a one-year period of abandonment for loss of legal nonconforming status.

17. The allegations of paragraph 18 are denied.

18. Answering paragraph 19, the County admits only that it obtained title to the property referred to as the Sea Trawler property, including the dock, by deed from Queensborough National Bank & Trust Company, dated July 27, 2018, for the recited amount of \$2,200,000.

19. The allegations of paragraph 20 are denied. The County avers and asserts that the effective date for relocation of the ferry service access point for Daufuskie Island to Buckingham Landing was February 13, 2017.

20. Answering paragraph 21, the County admits only that it has received complaints about the ferry service access point at Buckingham Landing.

21. Answering paragraph 22, the County admits only that it continues the ferry service from the access point on its property at Buckingham Landing.

22. The allegations of paragraph 23 are denied.

23. The allegations of paragraph 24 are denied.

24. The allegations of paragraph 25 are denied.

25. The allegations of paragraph 26 are denied.

26. Answering paragraph 27, the County reiterates and realleges paragraphs 1 through 25 of this Answer as fully and to the same extent as if here repeated word for word.

27. The allegations of paragraphs 28, 29, 30, 31, 32, and 33 are denied.

28. Answering paragraph 34, the County reiterates and realleges paragraphs 1 through 27 of this Answer as fully and to the same extent as if here repeated word for word.

29. The allegations of paragraphs 35, 36, 37, 38, 39, 40, 41, and 42 are denied.

30. Answering paragraph 43, the County reiterates and realleges paragraphs 1 through 29 of this Answer as fully and to the same extent as if here repeated word for word.

31. The allegations of paragraphs 44, 45, 46, and 47 are denied.

32. Answering paragraph 48, the County reiterates and realleges paragraphs 1 through 31 of this Answer as fully and to the same extent as if here repeated word for word.

33. The allegations of paragraphs 49, 50, and 51 are denied.

34. Answering paragraph 52, the County reiterates and realleges paragraphs 1 through 33 of this Answer as fully and to the same extent as if here repeated word for word.

35. The allegations of paragraphs 53 and 54 are denied.

36. Answering paragraph 55, the County reiterates and realleges paragraphs 1 through 35 of this Answer as fully and to the same extent as if here repeated word for word.

37. The allegations of paragraphs 56, 57, and 58 are denied.

38. The County denies any allegations and any entitlement to requested relief as asserted by the Plaintiffs in the Prayer of the Complaint.

FOR A SECOND DEFENSE

39. FURTHER ANSWERING, the County asserts that the use of the dock at Buckingham Landing as a commercial dock and/or as an access point for the County ferry service was, at all times pertinent, a lawful use, by reason of, among other things, its use ancillary to the restaurant, or by its use ancillary to the public landing, or by its use as a legal nonconformity, or by its use pursuant to lease in 2017 from the former owner to the co-defendant Daufuskie Island Ferry Service, or by its use as permitted by a 2005 State Commercial Dock Permit and/or by a 2009 County Zoning Permit, or by its use for reasons of public necessity by the County after Hurricane Matthew and continuing to the present.

FOR A THIRD DEFENSE

40. FURTHER ANSWERING, the County asserts that all or some of the Plaintiffs lack standing sufficient to prosecute a claim for violation of the County CDC or other causes of action, inasmuch as some or all of the Plaintiffs are not adjacent or neighboring property owners or have not suffered concrete particularized harm to a legally protected interest.

FOR A FOURTH DEFENSE

41. FURTHER ANSWERING, the County asserts that the Plaintiffs, prior to this lawsuit, failed to exhaust their administrative remedies by seeking an administrative interpretation of whether the use by the County complained of by the Plaintiffs was a legal or illegal nonconformity, pursuant to CDC section 8.1.20.

FOR A FIFTH DEFENSE

42. FURTHER ANSWERING, the County asserts that all or some of the Plaintiffs' causes of action are barred by the applicable statutes of limitation.

FOR A SIXTH DEFENSE

43. FURTHER ANSWERING, the County asserts that it is a South Carolina county and a political subdivision of the State, that it is a "governmental entity" within the meaning of S.C. Code section 15-78-30(d), and that, as such, any claims or actions arising in tort alleged against the County are subject to the provisions and limitations of the South Carolina Tort Claims Act (S.C. Code section 15-78-10 et seq.). The County further alleges and would show that, except as waived by the South Carolina Tort Claims Act, it is immune from suit and for liability for tort under the doctrine of sovereign immunity.

44. The County further alleges and would show that, under section 15-78-120(a), the amount of any recovery by some or all of the Plaintiffs arising from a single occurrence is limited

and that, under Section 15-78-120(b), the recovery of punitive or exemplary damages or prejudgment interest are excluded from any award. The County pleads these provisions as limitations on any recovery in tort herein.

45. The County further alleges and would show that any of Plaintiffs' claims arising in tort against the County are barred by the provisions of the South Carolina Tort Claims Act and by the doctrine of sovereign immunity, including the provisions of the South Carolina Tort Claims Act contained in section 15-78-60 which except certain actions or inactions from the waiver of immunity and which provide that the governmental entity is not liable for losses resulting from certain actions or inactions. The County alleges that any matters arising in tort complained of by the Plaintiffs are within the meaning of those actions or inactions listed as items (1), (2), (4), (5), (7), (12), (13), (20), and (25) of section 15-78-60, and that, accordingly, the County is immune from suit and from liability and is not liable for the loss or losses complained of by the Plaintiffs.

FOR A SEVENTH DEFENSE

46. FURTHER ANSWERING, the County asserts that the Plaintiffs fail to state a claim upon which relief can be granted for inverse condemnation, inasmuch as the facts alleged fail to show or establish, among other things, a direct taking or a regulatory taking functionally equivalent to a direct appropriation of private property or an ouster of Plaintiffs from their property, or an affirmative, positive, aggressive act, or any interference with investment-backed expectations.

FOR AN EIGHTH DEFENSE

47. FURTHER ANSWERING, as to any claims by the Plaintiffs sounding in tort, including nuisance and negligence, the County is immune from liability and any resultant damages, inasmuch as the County owed the Plaintiffs no duty or, in the alternative if a duty is found, that

any duty is to the public at large. The County pleads the public duty rule as a complete defense and bar to Plaintiffs' causes of action sounding in tort.

FOR A NINTH DEFENSE

48. FURTHER ANSWERING, the County asserts that all or some of the Plaintiffs, at the time of purchase of their property in the Buckingham Landing area, knew, or in the exercise of reasonable diligence, should have known, the uses of the property of which now they complain. With such knowledge or notice (actual or constructive), all or some of the Plaintiffs are now estopped or foreclosed from, and have waived, any claims as to such matters.

FOR A TENTH DEFENSE

49. FURTHER ANSWERING, the County asserts, in particular regard to the cause of action for nuisance, that any nuisance would constitute a public nuisance and not a private nuisance, and that Plaintiffs have sustained no special injury as required by law.

FOR AN ELEVENTH DEFENSE

50. FURTHER ANSWERING, the County asserts, in particular regard to the cause of action for promissory estoppel, that there was no promise, that any promise was without consideration, that reliance by the Plaintiffs on any promise was not justified or was unreasonable, and that any loss or damage was negligible.

FOR A TWELFTH DEFENSE

51. FURTHER ANSWERING, the County asserts that Plaintiffs' recovery of damages may be limited or barred because of Plaintiffs' own conduct or their failure to mitigate or minimize their damages by taking proper preventative or curative measures.

FOR A THIRTEENTH DEFENSE

52. FURTHER ANSWERING, the County asserts that punitive damages are not recoverable against it in negligence (including the tort of nuisance) pursuant to S. C. Code section 15-78-120(b), or otherwise in any other causes of action, inasmuch as it is a political subdivision of the State and a governmental entity. The County further asserts that it is entitled to sovereign immunity for all other claims for punitive damages., including any claims under 42 U.S. C. section 1983 pursuant to City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S. Ct. 2748 (1981).

FOR A FOURTEENTH DEFENSE

53. FURTHER ANSWERING, the County asserts that attorney's fees are not properly recoverable against the County, but that, if determined to be recoverable, attorney's fees should not be awarded, inasmuch as any such award of attorney's fees would be discretionary with the Court, the positions of the County are substantially justified, and the other circumstances of this case would make any award of attorney's fees unjust.

FOR A FIFTEENTH DEFENSE

54. FURTHER ANSWERING, the County asserts that Plaintiffs' allegations and causes of action alleging a zoning violation are, in whole or in part, barred by collateral estoppel and/or issue preclusion, including the pursuit by certain named Plaintiffs (and binding on all Plaintiffs), after the filing of the Complaint, of the administrative remedy for zoning violations pursuant to the Beaufort County Community Development Code and by the Beaufort County Zoning Board of Appeals' subsequent dismissal of the administrative appeal, and by the further appeal to Circuit Court by separate action.

FOR A SIXTEENTH DEFENSE

55. FURTHER ANSWERING, the County asserts, in particular regard to the Plaintiffs' allegations and causes of action of public or private nuisance, that such allegations and causes of action are barred by S.C. Code sections 31-24-110, et seq., as to all or some of the Plaintiffs.

WHEREFORE, having answered the Complaint of the Plaintiffs, the Defendant Beaufort County prays that any relief requested by the Plaintiffs be denied, that judgment be entered in favor of the County, and that the Court grant such other and further relief in favor of the County as is appropriate.

s/Danny C. Crowe

Danny C. Crowe, SC BAR #1480
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danny@crowelafave.com

ATTORNEYS FOR DEFENDANT
BEAUFORT COUNTY

October 11, 2022

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT
)

James Ware, Alisa Ware, Henry Spahr, Elaine) Civil Action Number: 2021-CP-07-01078
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,)

**MOTION OF DEFENDANT
BEAUFORT COUNTY FOR A STAY OF
FURTHER PROCEEDINGS IN THIS
CASE PENDING DISPOSITION OF
THE APPEAL IN THE EVENT OF
ISSUANCE OF A PRELIMINARY
INJUNCTION**

Plaintiffs,

v.

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

Defendants.

The Defendant Beaufort County hereby notices its Motion and moves to stay further proceedings in this case pending disposition of the County's appeal should the Court issue a preliminary injunction as requested by Plaintiffs by their Renewed Motion for a Preliminary Injunction filed on October 3, 2022.

This Motion is made pursuant to statutory and case authority including S.C. Code sections 14-3-330(4) and 14-3-450 and Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 588-589, 694 S.E.2d 15, 18 ((2010)). This Motion is made on the grounds that, while

the appellate courts have jurisdiction to hear an appeal of an interlocutory order from a court of common pleas granting an injunction, the other proceedings in the case are not stayed during the pendency of the appeal of the grant of an injunction unless a stay is ordered by the court of common pleas.

If a preliminary injunction is granted, Beaufort County will appeal the propriety of the grant. If an appeal occurs, a stay of the other proceedings in this case is necessary because the propriety of the grant of injunctive relief involves the merits of the case and is a judicial determination on the Plaintiffs' likelihood of success on the issue of the County's right to use its property for a ferry landing. The ability of the County to use its property as a ferry landing is a substantial matter that forms the whole or part of one or more causes of action of the Complaint. In addition, a stay of all proceedings in the case pending appeal will promote judicial economy and consistency of judicial results.

This Motion is based on the pleadings, the State statutes and case authority cited above, and such other points and authorities as may be presented in argument at the hearing on Plaintiffs' Motion and this Motion or by any memorandum to be provided by the County.

s/Danny C. Crowe

Danny C. Crowe, SC BAR #1480
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Columbia, SC 29201
803-724-5728
danny@crowelafave.com

ATTORNEYS FOR BEAUFORT COUNTY

October 28, 2022

RULE 11(a), SCRCP, AFFIRMATION

Pursuant to Rule 11(a), SCRCP, the undersigned affirms that, prior to the filing of this Motion, he communicated in writing with opposing counsel and attempted in good faith to resolve the matter contained in the Motion.

s/Danny C. Crowe
Danny C. Crowe

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-07-01078

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.)

PLAINTIFFS' MOTION FOR A PARTIAL
SUMMARY JUDGMENT, FOR A TEMPORARY
INJUNCTION AGAINST ALL DEFENDANTS, AND
FOR AN ORDER SETTING TRIAL OF THE
REMAINING CAUSES OF ACTION

TO: THE DEFENDANTS BEAUFORT COUNTY BY AND THROUGH ITS COUNSEL OF RECORD, DANNY CROWE, ESQ. AND TO DEFENDANTS HPCCA FERRY COMPANY, INC., and THE DAUFUSKIE ISLAND FERRY SERVICE, LLC, BY AND THROUGH THEIR COUNSEL OF RECORD ROBERT M. DEEB, JR.:

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs will move before this Honorable Court, at a date and time to be scheduled by the Court more than ten days hereafter, for an Order pursuant to Rules 56 and 65, SCRCP, granting the Plaintiffs' a Partial Summary Judgment against all Defendants as to the Third Cause of Action (declaratory relief) and the Sixth Cause of Action (for a temporary and permanent injunction), and for an Order setting the case for trial on the remaining causes of action as soon as possible.

In support of this Motion, the Plaintiffs rely upon the Affidavits of Amanda DuBose, Ronald Bloome, Alisa Ware, James Ware, Zach Drescher and Thomas C. Taylor, all filed simultaneously with this Motion. In addition, the Plaintiffs rely upon the pleadings and record herein, including the Defendant Beaufort County's Responses to Plaintiffs' Request to Admit and Defendant Beaufort County's Responses to Plaintiffs' Interrogatories, as well as the applicable law and Rules of Civil Procedure, the arguments of counsel, and such other matters as may be presented to the Court consistent with the Rules at the Hearing.

The Plaintiffs may also submit a Memorandum in addition to the Affidavits in support of the Motion for Partial Summary Judgment and for the issuance of an immediate Temporary Injunction prohibiting further commercial ferry operations on the property. Because of the clear violation of the County ordinance, the Plaintiffs request the posting of minimal bond of \$500 to secure the Temporary Injunction.

I certify pursuant to SCRCP Rule 11 that consultation with opposing counsel on this Motion would be fruitless.

I SO MOVE.

Law Office of Thomas C. Taylor, LLC

S/Thomas C. Taylor

Thomas C. Taylor (S.C. Bar 5499)

P.O. Box 5550, Hilton Head Isl., SC 29938

Telephone:(843)785-5050-Fax:(843)785-5030

Email: tom@thomastaylorlaw.com

ATTORNEY FOR PLAINTIFFS

Hilton Head Island, South Carolina
March 14, 2022

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-07-01078

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.)

PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
TEMPORARY RESTRAINING ORDER

INTRODUCTION

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 four years. The County has operated the commercial ferry service in blatant 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.

Presently pending before the Court is the Plaintiffs' March 14, 2022 Motion for Partial Summary Judgment, for a temporary injunction, and for an Order setting trial of the remaining causes of action. In reply, Beaufort County has filed a Affidavit of the Beaufort County Director of Planning and Zoning Robert Merchant, seeking to re-argue a legal claim that Mr. Merchant can magically authorize the continuing improper commercial ferry operations by declaring them a "legal use" of the property, despite the fact that Judge Diane Schafer Goodstein has already rejected that argument (and the County's earlier filed Motion to Dismiss).¹

¹ On July 9, 2021, the County filed a 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 was an illegal nonconformity. On October 27, 2021, Judge Goodstein entered her Order denying the Motion, pointing out that the Beaufort County Community Development Code 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.

PARTIAL SUMMARY JUDGMENT STANDARD

Under Rule 56, SCRCP, a partial Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law as to certain issues.² Under Rule 56, SCRCP, Summary Judgment is appropriate:

[I]f the pleadings, depositions, and answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In determining whether any material issues of fact exist, the evidence and all inferences that can be drawn from the evidence must be viewed in the light most favorable to the non-moving party, or the party resisting the motion.³ The purpose of Summary Judgment is to expedite the disposition of cases that do not require the services of a fact-finder.⁴ For purposes of Summary Judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action.⁵ Once the moving party has met its burden of demonstrating that no genuine issue of material fact exists, a party only defeats summary judgment by affirmatively demonstrating the presence of a genuine issue of material fact. Rule 56(e), SCRCP, states a party may not rest upon the mere allegations or denials of his pleadings.⁶

UNDISPUTED FACTS

The following facts are not, or cannot be, disputed by the Defendants:

² Café Associates Limited v. Gengross, 305 S.C. 6, 406 S.E.2d 162(1991)

³ Redwend Limited Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003)

⁴ Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003)

⁵ P.P. G. Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988)

⁶ Hoard ex rel. Hoard v. Roper Hospital, Inc., 387 S.C. 539, 694 S.E. 2d 1 (2010)

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, 2007.⁷
6. Under the Community Development Code Division A.10- Buckingham Landing Community Preservation District (BLCP)⁸, the properties within the Preservation District are zoned Residential and contain specific Land Use conditions and permissions.

⁷ See Appendix 4-F, Beaufort Comprehensive Plan (Buckingham Landing Community Preservation Plan)

⁸ 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 BLCP 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”.⁹ The Restaurant Property is one of those five parcels defined as a nonconforming use.¹⁰

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)¹¹

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.¹²

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.¹³

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.

⁹ See Preservation Plan P. 10

¹⁰ See Preservation Plan P. 11

¹¹ See Preservation Plan P. 12

¹² See Affidavit of Zach Drescher filed March 14, 2022

¹³ 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.

ARGUMENT I
VIOLATION OF BEAUFORT COUNTY COMMUNITY DEVELOPMENT CODE
APPENDIX A, DIVISION A.10 et seq.

The claim of the Defendants that the operation of a commercial ferry service is an allowable use under the Community Development Code are patently false. Nowhere in the CDC under the Buckingham Landing Community Preservation District does it state any type of a ferry service is an allowable use under any circumstances.¹⁴

The purpose of the Buckingham Landing Community Preservation District "is to conserve the existing residential neighborhood and to improve the quality of life and public safety for their residents".¹⁵ The operation of a commercial ferry service is in direct contravention to the stated purpose of the Preservation District. The service brings in tremendous amounts of people, vehicles and noise on a daily basis, endangering residents

¹⁴ See Appendix A, Table A.10.40, Beaufort County Community Development Code (Buckingham Landing Community Preservation District)

¹⁵ See Appendix A, Division A.10.10 Purpose, Beaufort County Community Development Code (Buckingham Landing Community Preservation District)

and disturbing their quiet enjoyment of their properties and neighborhood. See the Affidavits of James Ware, Alisa Ware, and Amanda Dubose filed in support of this Motion.

There is absolutely no evidence that any of the current or previous owners of the Restaurant Property have ever applied for a use variance to be allowed to operate a commercial ferry service from the property. Nor have any of the current or previous owners applied for a change of zoning for the Restaurant Property. The Restaurant Property has always been and continues to be zoned residential with very limited “home-based” commercial uses.

The non-conforming status of the Restaurant Property was abandoned in March of 2014, 120 days after the closing of the operations of the restaurant in September of 2013. Defendant Beaufort County attempts to argue that the: “applicable period for loss of a non-conforming use after the effective date of the CDC on December 8, 2014 and avers and asserts that the CDC (in its section 8.2.4) provides for a one-year period of abandonment for loss of legal non-conforming status.”¹⁶ (Emphasis Added)

Even if this Court finds that the 120 day abandonment period provided for in the Preservation Plan does not apply to the within case, Beaufort County’s own one-year abandonment period determination still puts them well outside of the timeframe to retain the property’s non-conforming status. The last operation of the restaurant, or any business for that matter, was September 2013, as affirmed to by Zach Drescher, the General Manager of Sunset Bay Restaurant.¹⁷ The Daufuskie Island Ferry Service did not begin its leasing of the dock and operation of the ferry service until January 2017.¹⁸

¹⁶ See Answer of Beaufort County ¶ 16 filed November 10, 2021

¹⁷ See Affidavit of Zach Drescher filed March 14, 2022

¹⁸ See BC 00007, Lease Agreement between Wilbert Roller and Daufuskie Island Ferry Service

Beaufort County and the Daufuskie Island Ferry Service have always, and continue to, operate in violation of the Community Development Code that all other residents and businesses in Beaufort County must abide by. There can be no arbitrary application of the CDC requirements just because Beaufort County is the property owner. They must be held to abide by their own ordinances.

In an attempt to address the legal conundrum the County is in, it filed Affidavits of Robert Merchant and David Wilhiem on May 15, 2022, with Mr. Merchant's Affidavit stating that he has determined that the commercial operation moving hundreds of people a day through a commercial ferry is a "legal use" under section 7.2.140.E of the CDC, hanging his hat upon a "zoning permit" he alleges was issued Wilbert Roller on May 4, 2009 by the County for a "commercial dock." For the reasons set forth below, this argument must be rejected by this Court and the validity of the Preservation District upheld.

ARGUMENT II **JUDICIAL ESTOPPEL**

In 2008, the former owner of the Restaurant Property, Wilbert Roller, appealed a decision by the Beaufort County Zoning Administrator denying him a commercial County dock permit to construct the dock at the Restaurant Property. A hearing was held before the Board of Zoning Appeals in July 2008 wherein the County argued against the issuance of a commercial dock permit. The County argued that the requested variance was a "use variance." However the Board of Zoning Appeals disagreed. The Order specifically states:

“(1) We find a dock, whether residential or commercial, is not a ‘use’ of the property. In this case, the commercial restaurant is the ‘use’ of the property....

(3) The particular facts of this case demonstrate that a commercial dock on the property appurtenant to this seafood restaurant is merely an active 'practice' incidental to the 'use' of the property as a restaurant. The dock is not a land use in itself; it is solely associated with and related to the business on the land. It serves, in other words, as an amenity to the restaurant, but does not involve any independent commercial use."¹⁹

The Board stated in their Conclusion of Law:

"6. Applying the reasoning of *Heilker v. City of Beaufort*, we are persuaded that the proposed activity for which the land or buildings are designed, arranged or intended, or for which land or buildings are occupied or maintained is a restaurant; the dock is an incidental amenity or practice. This variance as granted is not a 'use variance'."²⁰

The appeal was granted because the Board of Zoning Appeals determined that an unnecessary hardship existed. The original dock permit was issued by OCRM in 1993, when Beaufort County did not have any form of a dock ordinance. Mr. Roller would have constructed the dock in 1993 under the original OCRM permit had the County not unlawfully interfered and revoked his development permits.²¹

In fact, Beaufort County was so opposed to the construction of the dock, they filed a Petition for Judicial Review on January 9, 2009 in Civil Action No. 2009-CP-07-00068, *Beaufort County v. Beaufort County Board of Zoning Appeals and Wilbert Roller*. Beaufort County actively argued that

"a commercial dock is not a 'use' authorized by the Buckingham Landing Community Preservation (BLCP) District. No where does the list include commercial boat docks as 'permitted uses' and Appellants would argue that they are not included because

¹⁹ See BC 00173: In Re: Wilbert Roller v. Beaufort County Zoning Administrator Order dated December 10, 2008 P. 8

²⁰ See BC 00175: In Re: Wilbert Roller v. Beaufort County Zoning Administrator Order dated December 10, 2008 p. 10

²¹ See BC 00172: Board of Zoning Appeals Order dated December 10, 2008 ¶16(1)

commercial establishments are not authorized as uses of right in BLCP zones.”²²

Their petition also stated:

“The Defendant has a legal non-conforming restaurant, pursuant to the zoning having been changed prohibiting restaurants and by virtue of Justice Finney’s 2002 Order, wherein Justice Finney determined that a vested right existed as to Mr. Roller’s ability to proceed with the development of a restaurant. The Order does not grant any vested rights or any other legal status to a dock. Thus, only the underlying building permit and development permit for the restaurant were issues before Judge Finney, and ruled on by his Order, not the authorization for a dock.”²³

Upon settlement of the Petition for Judicial Review, the County agreed to allow the dock to be constructed based upon the permits that had been previously issued by OCRM in 1993.²⁴

In 2009, Wilbert Roller applied to SCDHEC/OCRM for an amendment to his dock permit, to allow him to extend his floating dock. Again, the County argued against the amendment to the permit and proposed increase in the size of the dock. On May 29, 2009, Wm. Weston Newton, then Chairman of Beaufort County Council, wrote to OCRM on behalf of the County Council and the Beaufort County Administrator, opposing the Amended Permit application and laying out 11 arguments. Some of the arguments made are:

“1) there is a potential for using this boat lift to store a 25’ to 30’ vessel, which could be used to ferry patrons of the restaurant back and forth from Beaufort’s public boat landing on the other side

²² See BC 00160 ¶ j. Beaufort County Petition for Judicial Review filed January 9, 2009 Beaufort County et al v. Beaufort County Board of Zoning Appeals and Wilburt Roller, 2009-CP-07-00068

²³ See BC00158 ¶ 7b. Beaufort County Petition for Judicial Review filed January 9, 2009 Beaufort County et al v. Beaufort County Board of Zoning Appeals and Wilburt Roller, 2009-CP-07-00068

²⁴ See BC 00492, August 18, 2009 Written Request for Final Review to SC DHEC by Thomas A. Bendle, Jr., attorney for Beaufort County

of Mackay Creek. The County would strongly object to this type of dock use activity.

6)...The County has great concern that there will not be adequate parking area for this facility, and that "spill off" traffic would be on adjacent properties and roadways.

8)...The County also believes that this dock,...will take a toll, not only on the County's boat ramp, but also to the waterway itself. The long range, cumulative impacts of this excessive facility, as proposed, will create negative affects to the recreational use of this waterway, presently and in the future."²⁵

Additionally, Gary Kubic, the then Beaufort County Administrator, wrote to OCRM on July 7, 2009 on behalf of the County, making additional arguments. His letter states, in part:

"...the majority of our discussions with Mr. Roller focused upon the accessibility to the boat landing by our residents without any interference from restaurant patrons including the separation of parking. In other words, users of the boat landing would enjoy complete access to the water with available parking for their vehicles and trailers."...

"This site is located in a very confined area with many unique features that pose natural limitations on the ability to navigate the various channels within this waterway"...

"Why is a boat lift necessary for a restaurant? This one can lift a large boat.. it can lift a 25 to 30 foot vessel. Maybe, Mr. Roller plans to use these large boats to ferry patrons across Mackay Creek. Ironically, he will be using another county boat landing facility. This one may be attractive because it can accommodate large amounts of parking. Perhaps we see the beginnings of a park and ferry service to his restaurant."(emphasis added)²⁶

In 2009, the County was very concerned about a 25 to 30 foot boat potentially ferrying passengers to and from the public dock on the other side of Mackays Creek. Today, the County has no objection to a commercial ferry service shuttling hundreds of people a day back and forth to Daufuskie Island multiple times a day.

In 2009, the County was concerned with the impact of the dock and increased use by boats on the waterway and the narrow channel. Today, the County has no objection to

²⁵ See BC 00626-00627: Newton letter to OCRM May 29, 2009

²⁶ See BC 00621-00625; Kubic letter to OCRM July 7, 2009

ferry vessels ranging from 46 feet to 55 feet long using the narrow channel adjacent to federally protected oyster beds.

Apparently, these are only problems to the County when it does not suit their needs.

It is disingenuous that Beaufort County, which once adamantly opposed the issuance of the dock permit in 2009, now attempts to argue that the issuance of the “commercial dock permit” to Wilbert Roller for construction of a dock adjacent to the Restaurant Property in 2008, imparts a commercial use on the parent parcel and that a commercial dock is now an allowed use under the BLCP.

“Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements or contentions made under oath, is prohibited from adopting an inconsistent posture in subsequent proceedings.”²⁷

Beaufort County has argued for years that a commercial dock cannot exist in the Buckingham Landing Community Preservation District. The County cannot now argue that is an allowable use. “Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding from assuming a contrary position in another action simply because his or her interests have changed..” Quinn v. Sharon Corporation, 343 S.C. 411, 540 S.E. 2d 474 (Ct. App. 2000), citing City of New York v. Black Garter, 685 N.Y.S. 2d 606, 607-08 (N.Y. 1999)

In Cothran v. Brown, 350 S.C. 352, 566 S.E. 2d 548 (Ct. App 2002), the Court of Appeals upheld the trial court’s granting of summary judgment in favor of Cothran because Brown was judicially estopped from contesting liability. “The doctrine of judicial estoppel evolved to protect the truth-seeking function of the judicial process by punishing

²⁷ Black’s Law Dictionary 848 (6th Ed. 1990); 28 Am. Jur. 2d Estoppel and Waiver 74

those who seek to misrepresent facts to gain advantage.” Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E. 2d 472, 477 (1997).

In this case, the same party presented two patently inconsistent sets of facts in two different courts.... Permitting Brown to assert different facts in this action could result in the appearance that one court or the other was misled. Moreover, allowing Brown to change his story now might result in an unfair advantage to him. It would be unfair to allow him to reap the benefit of a lesser sentence by admitting culpability but avoid civil liability by denying it. We agree with the trial court that Brown was judicially estopped from presenting facts inconsistent with those presented at his guilty plea proceeding, including the McCray affidavit. ...Therefore, there was no issue of material fact remaining on the issue. Accordingly, we affirm the trial court's grant of summary judgment. *Id.*

Beaufort County has clearly taken an inconsistent position from its previous arguments regarding the same property and cannot be allowed to benefit from this inconsistency. Beaufort County's argument that because the construction permit for the dock imparts commercial zoning on the parent parcel is illogical. The fact is that the County, which once so vehemently opposed the construction of the restaurant and the construction of the dock, now seeks to change its interpretation of its own laws and ordinances so that it suits its own needs now that it is the owner of the parcel. That is legally incorrect and morally reprehensible.

ARGUMENT III TEMPORARY INJUNCTION

“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.” Levine v. Spartanburg Regional Services District, Inc. 367 S.C. 458, 464, 626 S.E. 2d 38, 41 (Ct. App 2005). Obtaining an injunction requires the plaintiff to show 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. Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E. 2d 833, 834 (2005). In considering whether to grant an injunction, this court should balance the equities of the opposing parties on the particular facts of the case to determine which side is more entitled to relief. Levine, supra.

Through the Affidavits of Alisa Ware, James Ware, Amanda Dubose, and Ronald Broome, the Plaintiffs have demonstrated that irreparable harm has already resulted and will continue to result if an injunction is not granted. Beaufort County and the Daufuskie Island Ferry Service have been promising the Plaintiffs and the other residents of Buckingham Landing for over **five** years that their quiet, historic neighborhood was not to be the permanent location for the large commercial ferry service and that they were actively seeking an alternate location. Unfortunately, it is quite evident that they have done no such thing and are content to allow the Daufuskie Island Ferry Service to continue to operate illegally, to the detriment of the residents of Buckingham Landing.

Despite numerous complaints from the residents and Plaintiffs and despite hearings and meetings with representatives of Beaufort County, Beaufort County Council, the Daufuskie Island Ferry Service and Daufuskie Island Council, nothing has been done to alleviate the continuing suffering of the residents of Buckingham Landing.

The Plaintiffs' only recourse to stop the illegal use of the Restaurant Property is to seek an Injunction against Beaufort County and the Daufuskie Island Ferry Service from operating out of the Restaurant Property. Plaintiffs have suffered for over five years with 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.²⁸

The Plaintiffs have shown nothing but good faith over the last five years, attempting to work with Beaufort County and the Daufuskie Island Ferry Service, only to be strung along with unfulfilled promises to alleviate the nuisance caused by the operation of the ferry service. Tourist season is once again beginning and the amount of traffic and the breadth of the nuisance has already begun to increase daily. Plaintiffs seek an

²⁸ See Affidavits of Alisa Ware, Amanda DuBose, James Ware and Ronald Broome filed March 14, 2002.

immediate Temporary Injunction to prevent the further suffering of the residents of Buckingham Landing.

Plaintiffs have shown a likelihood of success on the merits of this case. “Once a *prima facie* showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” Helsel v. City of North Myrtle Beach, 307 S.C. 29, 32, 413 S.E. 2d 824, 826 (1992). Throughout this case, Beaufort County and the Daufuskie Island Ferry Service have presented arguments that fail to reveal any fact that supports its argument on the question of the validity of its operations of a ferry service from the property known as the Restaurant Property located in Buckingham Landing. Plaintiffs have shown that there is no evidence that the Restaurant Property was ever zoned a commercial property or ever had a commercial ferry service as an allowable use.

Plaintiffs lack an adequate remedy at law and are therefore entitled to a temporary injunction to prevent the continuing damages they are suffering. They do not seek this remedy lightly. They and our Courts “recognize that an injunction is a drastic remedy and should be issued only to prevent irreparable harm suffered by the moving party.” AJG Holdings LLC, v Dunn, 382 S.C. 43, 674 S.E. 2d 505 (Ct. App 2009) “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 v. Long Cove Club Owner’s Ass’n, 313 S.C. 555, 558, 443 S.E. 2d 577, 578 (Ct. App. 1994).

But where, as here, parties are suffering from the actions of another that present a dangerous situation to their living peacefully upon their own land, equity allows an injunction because there is no adequate remedy at law. An excellent analysis of a similar situation is found in Shaw v. Coleman, 373 S.C. 485, 645 S.E. 252 (Ct. App. 2007),

involving a nuisance claim from neighboring property owners. In Shaw, the Court of Appeals noted that “[i]f a lawful business is operated in an unlawful or unreasonable manner so as to produce material injury or great annoyance to others or unreasonably interferes with the lawful use and enjoyment of the property of others, it will constitute a nuisance,” and entered a permanent injunction against the offending landowner despite the landowner’s pleas that the Shaws “have alternative legal remedies available.” Id.

Coleman suggests the Shaws and the Snowdens have legal actions available to them, and thus, a permanent injunction as an equitable remedy was not appropriate. Coleman is correct that equity is reserved for situations where there is no adequate remedy at law. See Santee Cooper Resort, Inc. v. S.C. Public Serv. Comm’n., 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) (‘Equitable relief is generally available only where there is no adequate remedy at law.’). The Shaws and the Snowdens, however, are seeking an injunction to prevent Coleman’s dangerous behavior, which cannot be adequately accomplished by an award of damages.

Because the desired action is to prevent Coleman’s dangerous activity, an injunction is appropriate in this case....A lawful business should not be enjoined on account of every trifling or imaginary annoyance, such as many offend the taste or disturb the nerves of a fastidious or overly sensitive person, but on the other hand, no one, whatever the circumstances or condition may be, should be compelled to leave his home or live in mental discomfort, although caused by a lawful and useful business carried on in the vicinity. Shaw, 645 S.E.2d at 259.

Thus, even if Beaufort County’s actions in operating the commercial ferry terminal in the Buckingham Landing Preservation District were lawful (which they are not), because of the nuisance it has created, the adjoining and neighboring landowners have no adequate remedy at law to protect themselves and their children from the dangers created by the on-going ferry terminal operations and equity demands the issuance of an injunction. Cf. Skinner v. Elrod, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992), where the Court of Appeals differentiated a case for breach of a covenant not to compete and noted that the Plaintiffs would be in a position to recover liquidated damages as a remedy at law, and thus denied the requested injunction.

Defendant Beaufort County has a duty to its residents to uphold its ordinances and the Community Development Code. Beaufort County has wantonly neglected its duties by failing to adhere to the CDC and zoning regulations applicable to all property owners in Buckingham Landing.

Plaintiffs are already seeing a daily increase in traffic in and out of the Buckingham Landing neighborhood, especially on weekends. As the tourist season comes into full swing, the amount of traffic will continue to grow and the disturbance to the neighborhood along with it. Once Memorial Day arrives, with schools on break and kids playing and biking in the neighborhood, and tourists unfamiliar with the area driving in and out of the neighborhood, the risk of a tragedy drastically increases.

The damages Plaintiffs have sustained are equitable in nature and monetary damages are not a sufficient remedy to cease the daily nuisances created by the illegal operation of the ferry service.

Defendants have been provided, on numerous occasions, with alternate ferry service options and locations from which to operate, yet they refuse to abide by their long standing promises to relocate the ferry service. Without an injunction, Defendants will continue their operations and daily infringements of the quiet property enjoyment of the residents of Buckingham Landing.

CONCLUSION

The Plaintiffs are entitled to a partial Summary Judgment on the above causes of action because there is no evidence showing the existence of a genuine issue of material fact related to the following:

1. The Defendants are in violation of Beaufort County Community Development Code Appendix A, Division A.10 *et seq*, Buckingham Landing Community Preservation District.
2. The property herein referred to as Restaurant Property was a legal non-conforming property authorized to operate a restaurant in 2002.
3. The Buckingham Landing Community Preservation Plan and Buckingham Landing Community Preservation District were adopted by Beaufort County in 2007 and applied to all parcels within the District, including the Restaurant Property and provide that any non-conforming property named as such under the Plan would lose its non-conforming status should it cease to operate for 120 days.
4. The Restaurant Property permanently closed in September of 2013 and remained closed and unoperational until January 2017. As such, the Restaurant Property lost any non-conforming rights and statuses as of March 2014, 120 days after closure and accordingly must conform to the existing Buckingham Landing Preservation District standards.
5. The operation of the Daufuskie Island Ferry Service is not an approved use under the Buckingham Landing Preservation District and is therefore in violation of the Beaufort County Community Development Code.

Because no genuine issue of material fact exists with respect to any of the claims asserted in this action, as described above, the Plaintiffs are entitled to and move this Court for a grant of Partial Summary Judgment in their favor.

The Plaintiffs are also entitled to a Temporary Injunction and have shown (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. Plaintiffs move this Court to require the Daufuskie Island Ferry Service to cease all operations that in any way utilize the Restaurant Property immediately.

[Signature block continued to next page.]

Respectfully submitted,

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May 16, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
James Ware, Alisa Ware, Henry Spahr, Elaine	)	Civil Action Number: 2021-CP-07-01078
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,	)	MEMORANDUM OF DEFENDANT
Beth DeAngelis, Shelly Horn, Theodore	)	BEAUFORT COUNTY OPPOSING
Brammer, Allison Brammer, Waymon W.	)	PLAINTIFFS' CONSOLIDATED
Durden, Constance C. Durden, David C.	)	MOTIONS FOR PARTIAL SUMMARY
Powell,	)	JUDGMENT, FOR TEMPORARY
	)	INJUNCTION, AND FOR ORDER
Plaintiffs,	)	SETTING TRIAL
	)	
v.	)	
	)	
Beaufort County, HPCCA Ferry Company,	)	
Inc., and The Daufuskie Island Ferry Service,	)	
LLC,	)	
	)	
Defendants.	)	

The Defendant Beaufort County (hereinafter sometimes referred to as the "County") submits this brief Memorandum in opposition to the Plaintiffs' consolidated Motion for partial summary judgment on the cause of action seeking declaratory relief, for temporary injunction, and for an order setting trial. Plaintiffs' Motion expressly states that it seeks summary judgment on Plaintiffs' Third Cause of Action in the Complaint (for declaratory relief) and summary judgment on Plaintiffs' Sixth Cause of Action (for a temporary and permanent injunction). The Motion also requests setting of trial for "the remaining causes of action." Succinctly stated (and as further

explained below), the County opposes Plaintiffs' Motion because (1) Plaintiffs have not yet exhausted their appeal remedies under State and local law from the County's April 21, 2022, administrative determination of the legality of the County's use of the commercial dock for a public ferry service, (2) Plaintiffs' Affidavits submitted with their Motion are insufficient to establish a right to prevail as a matter of law on any cause of action, (3) the Affidavits submitted by Plaintiffs and the County show the existence of genuine issues of material fact or the existence of issues of law that preclude summary judgment, and (4) the Affidavits submitted by Plaintiffs and the County fail to show immediate and irreparable harm to Plaintiffs and a likelihood of success on the merits for the Plaintiffs. As to the motion for setting of trial, consideration of the status of the case shows that discovery is not yet complete, and the case is not yet ready for trial. The parties' inability to complete discovery is underscored by Plaintiffs' own failure to respond (until Sunday, May 15) to written discovery served by the County on February 4, 2022. Plaintiffs' Motion should be denied.

NATURE OF THE CASE

The Complaint in this action alleges that the Plaintiffs are owners or renters of residences in a neighborhood near a County-owned public boat landing and a County-owned public ferry service access point known as Buckingham Landing. Buckingham Landing is an area of high ground located south of U.S. Highway 278 on the Bluffton side of Mackay Creek and near the flyover bridge to Hilton Head Island. The neighborhood is not a private or restricted area, is accessed and located on public streets, and the public ferry site and public boat landing are reached by way of a State-owned, two-lane paved public road known as Fording Island Road Extension. An aerial photo of the location, the commercial dock, and the public boat landing is attached to and described in the Affidavit of David Wilhelm filed by the County.

The Complaint further alleges that the County public ferry service access point has been operating as an illegal nonconforming zoning use and as a nuisance since 2018. The allegations of the Complaint concerning nuisance are 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 asserts 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. All Defendants have filed Answers, denied liability, and asserted various affirmative defenses.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT AND INJUNCTION

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Charleston Development Company, LLC v. Alami, 433 S.C. 533, 860 S.E.2d 687, (Ct. App. 2021).

An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. 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 v. Dunes West Residential Golf Properties, Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907-908 (2004). 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).

ARGUMENT

I. SUMMARY JUDGMENT, DECLARATORY RELIEF, AND INJUNCTIVE RELIEF ARE NOT APPROPRIATE AND ARE PREMATURE. PLAINTIFFS HAVE NOT YET APPEALED TO THE BOARD OF ZONING APPEALS FROM THE ZONING DIRECTOR DETERMINATION OF THE LEGALITY UNDER THE COUNTY ZONING CODE OF THE COUNTY'S USE OF THE COMMERCIAL DOCK AS A PUBLIC FERRY ACCESS POINT.

As shown by the Affidavit of Robert Merchant filed by the County, a written determination by the Zoning Director on the legality of the County's use of the commercial dock was issued, as part of the Zoning Ordinance administrative process, on April 21, 2022. (See the Merchant Affidavit and its Exhibit 5). The Director determined that the County's use of the dock on its property for a ferry service was "a legal use." That written determination was issued in response to the written request for a determination of legality of use submitted to Director Merchant by the Plaintiffs' attorney, and for some of the Plaintiffs, on September 15, 2021. (See the Merchant Affidavit and its Exhibits, including Exhibit 2).

In his request for an administrative determination of legality of the County's use of the dock under the zoning code, the attorney for Plaintiffs attempted to "reserve" his contention that the request was not a prerequisite or requirement for this legal action. Nevertheless, the circumstances that the request was made, and that the determination was given, mean that the Plaintiffs now are compelled to appeal the adverse administrative determination to the County Board of Zoning Appeals pursuant to the zoning ordinance. (See the Merchant Affidavit and its Exhibit 1). Otherwise, the County will urge in this lawsuit that the Zoning Director's administrative determination on the legality of the County's use of the property under the zoning ordinance is binding on Plaintiffs and is the law of the case.

At a minimum, the Affidavit of Robert Merchant and its Exhibits are sufficient to show the existence of genuine issues of material fact (and the existence of issues of law) that preclude summary judgment for Plaintiffs on the issue of alleged illegal use of the property. The determination by the Zoning Director was that the use of the dock for an embarkation point for the ferry service use of the commercial dock was "a legal use" under the Community Development Code. (Merchant Affidavit, Exhibit 5). This determination was based on the issuance by the Beaufort County Zoning and Development Administration, on May 4, 2009, of a County Zoning Permit for a "Commercial Dock" for the subject property at Buckingham Landing that was acquired by the County in July 2018 and is now used for the public ferry service. As noted by the determination, the Zoning Permit did not establish any conditions or time restrictions, and, under the zoning ordinance, the Permit ran with the land and was not affected by a change in ownership. (Merchant Affidavit, Exhibit 5).

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994, codified in Chapter 20 of Title 6 of the South Carolina Code, sets out the general enforcement scheme for zoning ordinances enacted by local governments. The Act, as pertinent here, in S.C. Code §§ 6-29-780 through 6-29-860, provides for "the administrative mechanism designed to enforce the zoning ordinance" by an administrative official who makes orders, decisions and determinations in the enforcement of the zoning ordinance with an appeal "by any person aggrieved" to a local government board of zoning appeals and with further appeal, beyond the administrative level and to the judicial level of the circuit court, by a "person who may have a substantial interest in any decision of the board of appeals."

The Beaufort County Community Development Code adopts this State-mandated administrative mechanism by providing for appeals of Development Code interpretations by the

Director to the Zoning Board of Appeals. See generally, for example, Section 7.3.60 ("Interpretations") and Section 7.3.70 ("Appeals") of the County Development Code that provide for administrative interpretations of the Community Development Code by the Director with appeal to the Zoning Board of Appeals. Similar provisions for an administrative mechanism referring specifically to determinations of the existence of an illegal nonconformity are set out in Section 8.1.20 ("Applicability") of Article 8 ("Nonconformities") of the Community Development Code. Subsection B ("Illegal Nonconformities") of Section 8.1.20 provides:

Illegal nonconformities are those nonconformities that are neither properly permitted nor legally established and that do not comply with the applicable provisions of this Development Code. Illegal nonconformities are subject to cessation by the County upon a determination of such illegality by the Director. (Emphasis supplied).

Both State statutory law and Beaufort County's zoning ordinance provide administrative remedies for persons, such as the Plaintiffs, who complain of zoning violations occurring on the property of others.

State case law fully supports the exhaustion of administrative remedies as a prerequisite for judicial relief in zoning-related cases. For example, in Moore v. Sumter County Council, 300 S.C. 270, 387 S.E.2d 455 (1990), the State Supreme Court, in an opinion authored by then-Justice Toal, held that a claim for regulatory taking caused by operation of a zoning ordinance was premature because the landowners failed to exhaust administrative remedies. The Moore Court, citing Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E.2d 848 (1976), reasoned that the impact of the zoning ordinance upon plaintiffs' real property "cannot be determined when the landowner has failed to pursue his administrative remedies." 300 S.C. at 273, 387 S.E.2d at 457. Similarly, in Stanton v. Town of Pawleys Island, 309 S.C. 502, 309 S.C. 502 (1992), the Court, in another opinion authored by then-Justice Toal, determined that the landowner's claim of an

unconstitutional zoning ordinance was properly dismissed for failure to exhaust available administrative remedies by appealing a permit denial.

Section 9.5.30 ("Private Civil Relief") of the County's Community Development Code (which refers to injunctive actions in circuit court by adjacent or neighboring landowners for zoning violations) does not negate the impact and effect of the Zoning Director's administrative determination of legal use. Once Plaintiffs requested the administrative determination by the Director, they were bound to accept it or to appeal it, with appeal first to the BZA and then to the circuit court pursuant to S.C. Code section 6-29-820 ("Appeal from zoning board of appeals to circuit court: pre-litigation mediation; filing requirements"). Section 9.5.30, by its own language, is limited to court actions for injunctive or equitable relief and does not address or encompass court actions that seek the recovery of monetary damages such as are sought by Plaintiffs' Complaint with the causes of action for inverse condemnation, promissory estoppel, nuisance, and negligence.

Section 9.5.30 does not expressly supersede or provide for circumvention of an administrative determination of a zoning ordinance compliance or violation. Any attempted reliance by Plaintiffs on section 9.5.30 to avoid exhausting the administrative process, if followed to its logical conclusion, would render unnecessary and wholly bypass the State law requirement for an administrative process for enforcement of local zoning laws. If a neighbor could allege a zoning violation by a neighbor and sue for injunctive and monetary relief, without the administrative determination by a local government of the existence of a zoning violation, there would be no need for the State-mandated procedure of administrative determination and zoning board review for such claims. The circuit court, under this reasoning, would become the "decider" of all zoning issues between neighbors from nonconforming uses to setbacks to location of

accessory buildings to legality of variances. The circuit court would become a "super zoning administrator" or a "super zoning board." This could not have been the intent of Section 9.5.30.

II. PLAINTIFFS' ALLEGATIONS AND AFFIDAVITS ARE INSUFFICIENT TO ESTABLISH ENTITLEMENT TO SUMMARY JUDGMENT, DECLARATORY RELIEF, OR INJUNCTIVE RELIEF. PLAINTIFFS' ALLEGATIONS AND AFFIDAVITS FAIL TO SHOW IRREPARABLE INJURY, LIKELIHOOD OF SUCCESS ON THE MERITS, OR AN INADEQUATE REMEDY AT LAW.

The evidence and Affidavits offered by Plaintiffs are insufficient to establish entitlement to the declaratory and injunctive relief sought by the Complaint and by the Motion. The cause of action on which the Plaintiffs seek summary judgment is the cause of action for declaratory relief, and the declaration sought (according to Paragraph 47 of the Complaint) is that the County commercial ferry operation at Buckingham landing "violates Beaufort County's zoning ordinances." The Zoning Director's April 21 administrative determination blunts the relevancy and impact of the affiants' criticism of the County's "lawful use" position, and underscores the existence of genuine issues of fact and law. The judicial declaration of a zoning violation as sought by Plaintiffs would require this Court simply to ignore or disregard the Zoning Director's determination of lawful use.

The grant of the injunctive relief sought by Plaintiffs would require the Court to disregard the Plaintiffs' adequate remedy at law to address the Director's determination by way of appeal to the BZA and then to the circuit court, as well as the Plaintiffs' adequate remedy at law for any injury by way of the money damages sought by their 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. Additionally, the Director's determination of "legal use" deflates any claim of likelihood of success on the merits.

Moreover, the allegations in Plaintiffs' Affidavits that relate to damages are predominately general and vague in nature, and fail to establish "irreparable injury" or a legal nuisance. For example, the Plaintiffs' Affidavits provide no allegations as to frequency, duration, or repetition of occurrence of the instances of behavior of which affiants complain. The Affidavits also relate no objective measures of inappropriate parking or of increased traffic volume, 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 David Wilhelm submitted by the County illustrates other problems with Plaintiffs' Affidavits and their complaints about law enforcement on public streets and in places open to the public.

III. A SUBSTANTIAL SECURITY BOND SHOULD BE REQUIRED FOR ANY INJUNCTION OF THE COUNTY'S PUBLIC FERRY SERVICE FOR DAUFUSKIE ISLAND. THE APPROPRIATE AMOUNT OF SECURITY SHOULD BE DETERMINED FOLLOWING AN EVIDENTIARY HEARING BY THE COURT.

Subsection (c) ("Security") of Rule 65 ("Injunctions; Mandamus, Habeas Corpus, and other Remedial Writs"), SCRCP, provides that, as here applicable, "no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, 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." Plaintiffs, in their Motion, suggest a "minimal bond of \$500 to secure the Temporary Injunction."

The County submits that such a "minimal bond" is wholly inappropriate for security for the shutdown of the County's public ferry service for Daufuskie Island. In the event the Court determines to consider a temporary injunction, a special evidentiary hearing should be scheduled so that the Court can have a reasonable basis for the exercise of discretion in setting an appropriate amount of security.

IV. PLAINTIFFS' MOTION FOR THE SETTING OF TRIAL ALSO IS PREMATURE. DISCOVERY IS NOT COMPLETE AND HAS BEEN DELAYED BY PLAINTIFFS' FAILURE TO RESPOND TO WRITTEN DISCOVERY.

This case, filed on June 11, 2021, is not ready for trial. Discovery is not complete. The County has provided answers and responses to written discovery, and continues to produce responsive documents as they are located and assembled. However, the County received no responses to its written discovery (interrogatories and requests for production) from February 4 (for the Plaintiffs) and from February 7 (for the co-Defendants) until Sunday, May 15.

CONCLUSION

For the reasons summarized above, and for the additional reasons presented at the hearing by all parties opposing the Plaintiffs' Motion, the County urges that the Court should deny all relief sought by the Plaintiffs by their Motion.

Respectfully submitted,

s/Danny C. Crowe

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ATTORNEY FOR DEFENDANT
BEAUFORT COUNTY

May 16, 2022

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT

James Ware, Alisa Ware, Henry Spahr, Elaine) Civil Action Number: 2021-CP-07-01078
Spahr, Julie Sanders, William Craig Denny,)
Jeff Toomer, Allyson Toomer, Louise E.)
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Michael G. MacDonald, Susanne B.)
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McGee, Patti M. MacDonald, Scott M.)
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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,)

v.)

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

Defendants.)

**DEFENDANT BEAUFORT COUNTY'S
NOTICE OF MOTION AND MOTION
FOR ALTERATION AND
AMENDMENT OF THE COURT'S
ORDER OF MAY 24, 2022, OR,
ALTERNATIVELY, FOR A NEW
HEARING, PURSUANT TO RULES
52, 59(a)(2) AND (e), AND 65(c) AND
(d), SCRPC**

YOU WILL PLEASE TAKE NOTICE that the Defendant Beaufort County, by and through its undersigned counsel, will move before Circuit Court Judge Bentley D. Price, at such date and time and place as may be set by the Court, for an Order (1) altering or amending his Order filed on May 24, 2022, so as to enter judgment or a ruling in favor of Defendant Beaufort County on Plaintiffs' Motions, or, alternatively, (2) altering or amending his Order filed on May 24, 2022, to provide findings of fact, conclusions of law, a statement of reasons or legal

authority, and the giving of security for the injunction, or, alternatively, (3) granting a new hearing to obtain evidence on the appropriate amount and nature of security to be required of Plaintiffs for an injunction pursuant to Rule 65(c), SCRCP. This motion is made pursuant to Rules 52, 59(a)(2) and (e), and 65 (c) and (d), SCRCP, and on the grounds set out below.

Beaufort County interprets the Order filed on May 24, 2022 (“the May 24 Order”) as operating as (1) a conditional grant of an injunction (the County is enjoined from operating the ferry site after Labor Day unless it designates and approves by then a new ferry site), and (2) a mandatory injunction (the County is directed to undertake certain actions related to designation and selection of a new ferry site by Labor Day). The May 24 Order is a Form 4 Order that does not indicate that a formal order is to follow, that contains no statement of reasons for issuance as required by Rule 65(d), that contains no requirement of the giving of security by the moving party in a proper sum as required by Rule 65(c), and that contains no findings of fact and conclusions of law constituting the grounds for the Order as required by Rule 52(a). The Affidavits filed by Plaintiffs and Defendant Beaufort County in connection with Plaintiffs’ Motions before the Court provide no factual and legal basis for the granting of this injunction or this ruling of the Court. The May 24 Order is an abuse of discretion, was erroneously issued, plainly represents a determination, ruling or judgment on the merits and causes of action of the underlying case with no stated reasons or basis, and plainly affects substantial rights of the County by the imposition of further judicial action unless the County acts to abandon a public ferry site acquired at taxpayer expense and designate and approve a new ferry site at taxpayer expense before Labor Day 2022.

Beaufort County also makes this Motion on the following additional grounds:

1. No sufficient factual or legal basis for an injunction of the ferry site operation was provided by Plaintiffs. The Affidavits filed by Plaintiffs in connection with Plaintiffs' Motions before the Court on May 18, 2022, provided an insufficient factual and legal basis for the granting of this injunction or this ruling of the Court. Plaintiffs' Affidavits were insufficient to establish legal entitlement to injunctive relief, and specifically were insufficient to establish irreparable harm if the injunction were not granted, likelihood of success on the merits, and the absence of adequate remedy at law. The allegations in the Affidavits related to 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 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.

2. Plaintiffs' likelihood of success on the merits clearly was not established by the evidence before the Court at the hearing, and, in granting the injunction, the Court ignored the Affidavit of the County Zoning Director Robert Merchant. The Zoning Director, in his Affidavit, discussed and provided background documents and 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 Development Code. This administrative decision of the Zoning Director, made at the request of Plaintiffs by their attorney during the pendency of this case, is binding on Plaintiffs unless a timely appeal is taken to the County Board of Zoning Appeals and the Zoning Director's decision is overturned by that body. The clear weight of the evidence before the Court was that the County's use of a permitted commercial dock as a public ferry site is a lawful use under the

County zoning laws. The existence of this administrative process (in addition to Plaintiffs' causes of action in their Complaint for monetary relief) also underscores the availability of an adequate remedy for Plaintiffs other than injunction.

3. The May 24 Order, as discussed above, provides no reasons for its decision, and provides no findings of fact and conclusions of law. These are clear requirements of Rules 65(d) and 52(a).

4. The May 24 Order, as discussed above, requires no security from Plaintiffs, although the giving of security in a proper amount is a clear requirement of Rule 65(c). Considerable public expense will be incurred by the County in designation and approval of a new public ferry site before Labor Day, and considerable public expense will be suffered by the abandonment of the current public ferry site that was acquired by the County at considerable public expense. Security, as required by Rule 65(c), 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. As suggested by the County in its Memorandum filed prior to the hearing on May 18, an evidentiary hearing is needed to provide the Court with a reasonable basis for the exercise of discretion in setting an appropriate amount of security.

This Motion is based on the applicable law and rules of Court, the pleadings and documents and Affidavits filed in this case, and the evidence and argument at the hearing on May 18, 2022.

s/Danny C. Crowe

Danny C. Crowe, S.C. Bar No. 1480

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Attorney for Defendant Beaufort County

June 3, 2022

Rule 11(a) Compliance

Movant's counsel certifies that consultation with opposing counsel on Defendants' Motion would serve no useful purpose.

/s/Danny C. Crowe

Danny C. Crowe

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-07-01078

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.)

PLAINTIFFS' RENEWED MOTION FOR A
PRELIMINARY INJUNCTION AGAINST ALL
DEFENDANTS

TO: THE DEFENDANTS BEAUFORT COUNTY BY AND THROUGH ITS COUNSEL OF RECORD, DANNY CROWE, ESQ. AND TO DEFENDANTS HPCCA FERRY COMPANY, INC., and THE DAUFUSKIE ISLAND FERRY SERVICE, LLC, BY AND THROUGH THEIR COUNSEL OF RECORD ROBERT M. DEEB, JR.:

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs will move before this Honorable Court, at a date and time to be scheduled by the Court ten (10) days hereafter, for an Order pursuant to Rule 65, SCRCP, granting the Plaintiffs' a Preliminary Injunction against the commercial ferry operating from Buckingham Landing after December 31, 2022.

In support of this renewed Motion for a Preliminary Injunction, the Plaintiffs rely upon the previously filed Affidavits of Amanda DuBose, Ronald Bloome, Alisa Ware, James Ware, Zach Drescher and Thomas C. Taylor, all filed with the original version of this Motion on March 14, 2022. In addition, the Plaintiffs rely upon the attached Exhibit A (the Mediation Results of September 9, 2022), Exhibit B (Taylor letter to Crowe of September 13, 2022) and Exhibit C (E-mail exchange between Taylor and Crowe regarding County's plans for the new ferry terminal). Together with this Court's earlier Orders of May 24, 2022 and August 24, 2022, the Plaintiffs show unto this Court 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 thus a preliminary injunction requiring the County and the ferry operators to cease such commercial operations in the historic neighborhood by the end of the year is appropriate.

The Plaintiffs also rely upon Beaufort County Ordinance 2022/35, a true and correct copy of same being attached hereto as Exhibit D, along with the pleadings and record herein, including the Defendant Beaufort County's Responses to Plaintiffs' Request to Admit and Defendant Beaufort County's Responses to Plaintiffs' Interrogatories, as well as the applicable law and Rules

of Civil Procedure, the arguments of counsel, and such other matters as may be presented to the Court consistent with the Rules at the Hearing.

I certify pursuant to SCRCP Rule 11 that consultation with opposing counsel on this Motion would be fruitless.

I SO MOVE.

Law Office of Thomas C. Taylor, LLC

S/Thomas C. Taylor

Thomas C. Taylor (S.C. Bar 5499)

P.O. Box 1808

Bluffton, SC 29910-1808

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Fax: (843)738-4502

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ATTORNEY FOR PLAINTIFFS

Bluffton, South Carolina
October 3, 2022

James Ware, Alisa Ware, Henry Spahr, Elaine) Civil Action Number: 2021-CP-07-01078

MEDIATION RESULTS

V.

Defendants.

- 127

could lead to an agreement.

☒ In need of further mediation. (I x am/ am not willing to mediate this case further.) If Plaintiff and Defendant express a strong preference,

☐ Continued (Date) I'll do so. (see below #9)

3. Plaintiffs ☒ were/ ☐ were not present (video)

Defendants ☒ were/ ☐ were not present (video)

4. Other participants were:

☒ Attorney for Plaintiffs: (video)

☒ Attorney for Defendants, (video)

☐ Representative for Insurance Carrier: (video)

☐ Experts

☐ Others

5. This case was co-mediated with:

6. Choice of the mediator was by:

☒ Stipulation

☐ Court Order

7. The total number of hours spent in mediation was 6.0 hours, plus written and verbal communication.

8. The total mediator fees were \$2,947.50

9. Further comments of the mediator:

Defendant (Beaufort County) agreed to examine alternate sites and report to the mediator within 60 days. If further mediation is then desired by all parties, mediation may be completed.

By: /s/Bonum S. Wilson, III
Bonum S. Wilson, III
WILSON, HEYWARD & REESER, LLC
P.O. Box 13177
Charleston, SC 29422
Tel.: (843) 762-4567
Email: bwilson@wilsonheyward.com
MEDIATOR

Charleston, South Carolina

Dated: September 15, 2022

EXHIBIT B TO RENEWED MOTION FOR P.I.

ADMITTED TO THE UNITED STATES
SUPREME COURT BAR

ADMITTED IN SOUTH CAROLINA,
COLORADO AND GEORGIA

CERTIFIED SC CIRCUIT
COURT MEDIATOR

LAW OFFICE OF
THOMAS C. TAYLOR, LLC

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29910-1808

September 13, 2022

Via U.S. Mail and E-Mail Attachment to: danny@crowelafave.com

Danny C. Crowe, Esq.
Crowe LaFave, LLC
Post Office Box 1149
Columbia, SC 29202

Re: Wares et. al. v. Beaufort County et. al., 2021-CP-07-1078

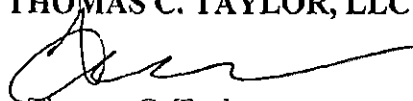
Dear Danny:

I am writing this morning to confirm that as of this date, September 13, 2022, Beaufort County has not provided the Plaintiffs in this matter with any specific information as to the County and the ferry operator's future plans for when the Buckingham Landing debarkation point will cease commercial ferry operations. Notwithstanding our repeated requests for detailed, specific information as to the County's plans, the only information the County has provided to date is that it intends to acquire a new parcel of land on Hilton Head for the future development of a new embarkation/debarkation point for the Daufuskie Island Ferry.

Because we are preparing to file a new Motion for Preliminary Injunction and because I do not want to refer to any items that were discussed in the failed mediation in that Motion as per the rules, I am asking that you please confirm these statements are accurate by Friday, September 16, 2022. Thank you.

Please let me know if you have any questions. Thank you again.

Cordially yours,
LAW OFFICE OF THOMAS C. TAYLOR, LLC



Thomas C. Taylor

TCT/dpt

cc: Alisa Ware via email attachment
Robert Deeb, Esq. via email attachment

ELECTRONICALLY FILED - 2022 Oct 03 1:51 PM - BEAUFORT - COMMON PLEAS - CASE#2021CP0701078

From: Danny Crowe
To: Tom Taylor; Robert Deeb
Subject: Re: From Tom Taylor regarding County's lack of information as to plans to move Ferry embarkation/debarkation point
Date: Friday, September 16, 2022 4:55:30 PM

Tom:

I did not and do not read your letter in that fashion, and did not intend to confirm anything by my e-mail. I also do not believe that Judge Price is expecting immediate final plans on a major multi-million dollar public project.

Danny

From: Tom Taylor <tom@thomastaylorlaw.com>
Date: Friday, September 16, 2022 at 4:48 PM
To: Danny Crowe <danny@crowelafave.com>, Robert Deeb <rdeeb@ns-lawfirm.com>
Subject: RE: From Tom Taylor regarding County's lack of information as to plans to move Ferry embarkation/debarkation point

Danny—I appreciate the email and understand that you are telling me that you don't have any information on the County's future plans other than the attached ordinance. That's all I was trying to confirm before filing the motion. We just have a difference of opinion as to whether this is the extent of what Judge Price was expecting.

T

Thomas C. Taylor

Law Office of Thomas C. Taylor, LLC
 10 Pinckney Colony Road
1808
 Building 400
 Bluffton, SC 29909
 843-785-5050 (office)
 843-301-6900 (cell)

PLEASE NOTE OUR NEW MAILING ADDRESS:
P.O. Box 1808, Bluffton, SC 29910-

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From: Danny Crowe <danny@crowelafave.com>

Sent: Friday, September 16, 2022 4:38 PM

To: Tom Taylor <tom@thomastaylorlaw.com>; Robert Deeb <rdeeb@ns-lawfirm.com>

Subject: FW: From Tom Taylor regarding County's lack of information as to plans to move Ferry embarkation/debarkation point

Tom:

This e-mail is in response to your cover e-mail of September 13 and its separate attached letter (copies are attached below and above).

I frankly am dismayed by your e-mail and your letter.

To my knowledge, there have been no "repeated requests for detailed, specific information as to the County's plans."

As I recall, I showed you a copy of the County's then-proposed (and now enacted) Ordinance on the replacement property acquisition when we spoke prior to the motion hearing in Allendale before Judge Price on August 3. Moreover, I have not withheld any available concrete or specific public information on future plans for cessation of ferry activities at Buckingham Landing. As you have been advised, the County is working on future plans for replacement of the Buckingham Landing ferry landing and will make those plans public after finalized and when feasible. Yet, your letter suggests that the County is now in possession of this final information and is intentionally withholding such information from you.

Sincerely,

Danny

From: Tom Taylor <tom@thomastaylorlaw.com>

Date: Tuesday, September 13, 2022 at 3:20 PM

To: Danny Crowe <danny@crowelafave.com>

Cc: Alisa Ware <alisamware@gmail.com>, James Ware <fibercontracting@gmail.com>, Amanda Dubose <aduboses@aol.com>, Donna Taylor <donna@thomastaylorlaw.com>, Robert Deeb <rdeeb@ns-lawfirm.com>

Subject: From Tom Taylor regarding County's lack of information as to plans to move Ferry embarkation/debarkation point

Danny—I am preparing a new Motion and do not want to refer to the mediation statements (or lack thereof). Please confirm the contents of my letter attached. Thank you.

Tom

Thomas C. Taylor

Law Office of Thomas C. Taylor, LLC
10 Pinckney Colony Road
1808
Building 400
Bluffton, SC 29909
843-785-5050 (office)
843-301-6900 (cell)

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ORDINANCE 2022/ 35

AN ORDINANCE TO APPROPRIATE FUNDS IN ORDER TO ESTABLISH PUBLIC OWNERSHIP OF THE REAL PROPERTY WITH TMS NO. R552 010 000 0648 0000 AND R552 010 000 0649 0000, LOCATED ON HELMSMAN WAY, HILTON HEAD ISLAND

WHEREAS, Beaufort County ("County") provides the residents of the County with a ferry transportation service from the mainland to Daufuskie Island ("Ferry Service") which requires an embarkation location on both the mainland as well as on Daufuskie Island; and

WHEREAS, in order for the County to continue providing the Ferry Service, the County must establish a permanent mainland embarkation location with public parking to serve the residents of Beaufort County now and in the future; and

WHEREAS, the best site for the Ferry Service mainland embarkation location has been identified as the real property consisting of approximately 4.98 acres on Helmsman Way on Hilton Head Island, and further identified with TMS NO. R552 010 000 0648 0000 and R552 010 000 0649 0000, collectively hereinafter referred to as the "Property"; and

WHEREAS, the purchase price for the Property must be at the current fair market value which will be determined by a licensed appraiser and by way of negotiating with the current Property owner; and

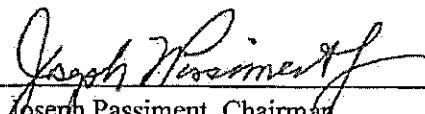
WHEREAS, funding for the purchase of the Property will be appropriated from use of General Fund – Fund balance in an amount not to exceed \$3,400,000 plus closing costs and legal fees; and

WHEREAS, County Council finds that it is in the best interest of the citizens and residents of Beaufort County to appropriate funds as described herein for the purchase of the Property.

NOW, THEREFORE, BE IT ORDAINED by Beaufort County Council, duly assembled, authorization to appropriate funds from General Fund – Fund balance in an amount not to exceed \$3,400,000 plus closing costs and legal fees in order to establish public ownership of the real property with TMS NO. R552 010 000 0648 0000 and R552 010 000 0649 0000, located on Helmsman Way on Hilton Head Island.

Adopted this 8th day of August 2022.

COUNTY COUNCIL OF BEAUFORT COUNTY

BY: 
Joseph Passiment, Chairman

ATTEST:


Sarah W. Brock, Clerk to Council

First Reading: June 27, 2022/ Vote 7:4
Second Reading: July 11, 2022/ Vote 8:2
Public Hearing: August 8, 2022
Third and Final Reading: August 8, 2022/ Vote 8:2

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT
)

James Ware, Alisa Ware, Henry Spahr, Elaine) Civil Action Number: 2021-CP-07-01078
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,) **DEFENDANT BEAUFORT COUNTY'S**
Amanda DuBose, Ronald L. Broome,) **EXHIBIT IN OPPOSITION TO**
Lawrence E. Jones, D. Diane Burr, Mark H.) **PLAINTIFFS' RENEWED MOTION**
Thomas, Kelly C. Thomas, William Matthew) **FOR PRELIMINARY INJUNCTION**
Yollo, Nancy H. Yollo, Joseph DeAngelis,)
Beth DeAngelis, Shelly Horn, Theodore)
Brammer, Allison Brammer, Waymon W.)
Durden, Constance C. Durden, David C.)
Powell,)

Plaintiffs,)

v.)

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

Defendants.)

The Defendant Beaufort County files, as an Exhibit in opposition to Plaintiffs' Renewed Motion for Preliminary Injunction, the attached court reporter transcript of the hearing before the Court on August 3, 2022.

[This space intentionally left blank for signature on next page.]

s/Danny C. Crowe

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

Attorneys for Defendant Beaufort County

October 4, 2022

1 STATE OF SOUTH CAROLINA)
2) IN THE COURT OF
3 COUNTY OF BEAUFORT) COMMON PLEAS
4
5 JAMES WARE, ET AL,)
6 Plaintiffs,)
7 Vs) CASE NO.
8 BEAUFORT COUNTY, HPCCA FERRY) 2021-CP-07-01078
9 CO., INC and THE DAUFUSKIE)
10 ISLAND FERRY SERVICE, LLC,)
11 Defendants)
12

13 AUGUST 3, 2022

14 ALLENDALE, SOUTH CAROLINA

15
16 HONORABLE BENTLEY PRICE, JUDGE
17

18 A P P E A R A N C E S:

19 BY: THOMAS C. TAYLOR, ESQUIRE

20 Attorney for the Plaintiffs

21 BY: DANNY C. CROWE, ESQUIRE

22 Attorney for the Defendants
23

24 KATHERINE A. SPIRES

25 REGISTERED PROFESSIONAL REPORTER

1 MR. CROWE: Your Honor, Danny Crowe on
2 behalf of Beaufort County. I have a case that I
3 have a copy of your Order and my Motion. I do not
4 have an extra copy of Mr. Taylor's memorandum.

5 MR. TAYLOR: Your Honor, may I hand up
6 -- thank you.

7 MR. CROWE: If you'd like me to
8 proceed, Your Honor, or did you want to look at
9 that Order?

10 THE COURT: All right. Well,
11 obviously, I know that y'all filed this. I've
12 already read everything and familiar with what the
13 County is asking for. But let's don't do the
14 judicial stuff. Let's talk.

15 This is a unique situation. All right.
16 Because it deals with a lot of moving parts. It
17 deals with the County, it deals with, obviously,
18 the residents. This isn't a legal per se question.
19 This isn't, you know, something that takes my legal
20 knowledge to be able to figure out. We've just got
21 to figure out what Beaufort can and can't do. Can
22 they move the marina or not?

23 MR. CROWE: Well, the concern from our
24 prospective would be that you issued a conditional
25 injunction and a mandatory injunction that gives us

1 until Labor Day to come up with alternative plans
2 approved by county counsel without the findings
3 that are required under Rule 52, 65, without the
4 security undertaking that's required under Rule 65.

5 So unlike the traditional injunction,
6 there is no security to be required by the Court to
7 be posted by the Plaintiffs. The County is at
8 considerable financial risk because this is the
9 only public ferry as I understand it to Daufuskie
10 Island from the mainland. So the effect of your
11 order would be to shut down that ferry come day
12 after Labor Day if the County does not have in
13 affect alternative plans that have been approved by
14 county counsel.

15 THE COURT: Right. So that was any
16 nudge to get the county to get off of its rear and
17 try to find an alternative site. If they can't,
18 then you come back and let me know we need to try
19 to work this out. So what has the County done to
20 this point?

21 MR. CROWE: Well, the County has given
22 two of three reads for approval of purchase or
23 condemnation of two other sites, one on Daufuskie
24 Island, and one on Hilton Head Island. That would,
25 as I understand it, take the place of Buckingham

1 Landing.

2 THE COURT: Okay.

3 MR. CROWE: The County still is at
4 considerable financial risk. They have to develop
5 the embarkation/debarkation point and also are
6 owners of Buckingham Landing, a considerable
7 expense, so they would be faced with considerable
8 financial risk should it subsequently be determined
9 that the injunction was improperly granted.

10 So that was the reason for our motion
11 which incorporated hopefully the traditional
12 reconsideration we're asking that you reconsider
13 the wisdom of granting that injunction. And,
14 second, that if that injunction is to stand that
15 the Court amend and alter to add findings of fact
16 statement of reasons as required by Rules 52 and
17 65. And also that the Court require security by
18 the Plaintiffs under Rule 65(c). And then third,
19 on the issue of security, that the Court we would
20 ask hold a hearing to determine what should be the
21 appropriate amount of security rather than just the
22 arbitrary \$500 suggested by the Plaintiffs in their
23 brief.

24 And, finally, we would ask -- request
25 that the Court stay this order pending appeal.

1 THE COURT: Pending what?

2 MR. CROWE: Appeal.

3 THE COURT: Well, I'm not going to shut
4 it down. I mean, that was kind of what I said in
5 my Order at the beginning where I said the Court
6 will allow Plaintiffs to seek a renewed injunction.
7 So really all it was was just a temporary
8 injunction saying, all right, I'm going to allow
9 the County to look for alternative sites. They've
10 done it. And that that is obviously something that
11 the Plaintiffs have been seeking this entire time,
12 so they're doing what I'm asking them to do. So on
13 Labor Day, I'm not shutting it down. I would never
14 do that because people got to get to and from the
15 island, they've got to make money, the County's got
16 to run a marina. I mean, that's just the way life
17 goes, but my plan worked. So, I'm not going to
18 stop on Labor Day.

19 Do you really need me to renew this at
20 that point -- I mean, to reconsider this at that
21 point other than the hearing on the securities?

22 MR. CROWE: You're asking do I -- would
23 I like to renew this motion?

24 THE COURT: No. Do you still want me
25 to reconsider it other than the 65(c)? Meaning, do

1 you still want me to make them or force them to
2 give some type of securities apart from the \$500,
3 you asked for a hearing on that?

4 MR. CROWE: Yes, sir. I think that
5 would be appropriate if the injunction remains in
6 affect.

7 THE COURT: It's not going to remain in
8 affect come Labor Day. It will cease.

9 MR. CROWE: It will cease on Labor Day?

10 THE COURT: Yes.

11 MR. CROWE: Even if the County has not
12 given three readings to alternative sites?

13 THE COURT: Yes.

14 MR. CROWE: Well, if that's the
15 situation, I don't know that we would need a
16 further -- that we would need appeal or security.

17 THE COURT: I did what he wanted me to
18 do. Which was to get the County to start moving
19 and y'all did that. So there's no reason for me to
20 punish the County any further. I mean, they're
21 doing it. I mean, they're already on the second
22 reading of it. But I've got no problem with that.
23 I will allow them to continue to run it, they'll
24 find an alternate site, they'll -- these people
25 will be happy that they're going to go ahead and

1 develop another spot. The owners will be happy
2 that they get, you know, do another spot. And then
3 if we need to fight it out later on down the road,
4 we can do it. For right now I think everything is
5 going in the right direction.

6 MR. CROWE: All right. So could the
7 Court clarify or could I submit some proposed order
8 that clarifies that the Order will expire on the
9 day after Labor Day?

10 THE COURT: Yeah. The Court will allow
11 the Plaintiff to seek a renewed injunction at that
12 time. If you want to say that it expires on that
13 point in time because there's been a second reading
14 or they've already sought alternative spots because
15 that was a part of my order, I've got no problem
16 with that.

17 MR. CROWE: Well, they've done two of
18 three readings. The third reading is scheduled for
19 later this month.

20 THE COURT: Tell them that I yelled at
21 you.

22 MR. CROWE: I'm sorry.

23 THE COURT: I said just tell them that
24 I yelled at you.

25 MR. CROWE: I appreciate that. Always

1 better to be yelled at than --

2 THE COURT: Yeah. Just tell -- just
3 tell them the grumpy judge just yelled at me and
4 we've got to get this third reading through. You
5 know, he said we were on the skin of our teeth.
6 We're on thin ice. You can make it whatever you
7 want.

8 MR. CROWE: All right.

9 MR. TAYLOR: May I ask that Mr. Crowe
10 and the Court allow us to include in a proposed new
11 order that's coming up that mediation is scheduled
12 on September 9th which we do have mediation
13 scheduled and that the Court will entertain if
14 necessary a renewed motion after mediation.

15 THE COURT: I can always do that. I
16 mean, I can always entertain renewed motions, so
17 it's not a problem. But, no, I'm not shutting it
18 down on Labor Day. You're good to go.

19 MR. CROWE: All right. Should I submit
20 a proposed order?

21 THE COURT: Yeah, I would. I don't
22 have a law clerk anymore. My new one doesn't come
23 for like two weeks, so there's no way I'm going to
24 do an order.

25 MR. CROWE: So with the Court's

1 permission then as I understand, I'll submit a
2 proposed order stating that this injunction will
3 expire the day after Labor Day, Plaintiff can renew
4 if necessary in the future?

5 THE COURT: If not successful at
6 mediation. Perfect.

7 MR. CROWE: All right.

8 MR. TAYLOR: Thank you, Judge.

9 MR. CROWE: Thank you, Your Honor.

10 MR. TAYLOR: That will give everybody a
11 little bit of something.

12 THE COURT: Yeah. That will give
13 everybody just a little bit of buffer and be good
14 to go.

15 MR. CROWE: Thank you, Your Honor.

16 THE COURT: Absolutely.

17 - - -END OF REQUESTED TRANSCRIPT OF RECORD- - -
18
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

I, KATHERINE A. SPIRES, Registered Professional Reporter for the Fourteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Beaufort County, South Carolina, on the 3rd of August, 2022.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

August 17, 2022

s/Katherine A. Spires

Katherine A. Spires

Registered Professional Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-07-01078

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.)

PLAINTIFFS' MEMORANDUM IN
SUPPORT OF THEIR RENEWED MOTION
FOR A PRELIMINARY INJUNCTION

INTRODUCTION

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. The County has operated the commercial ferry service in blatant 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, the Honorable 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 has shown "sufficient compliance" to satisfy the May 24 Order at that time, but specifically noted 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. In reply, Beaufort County continues to rely on an Affidavit of the Beaufort County Director of Planning and Zoning Robert Merchant, seeking to re-argue a legal claim that Mr. Merchant can magically authorize the continuing improper commercial ferry operations by declaring them a "legal use" of the property, despite the fact that Judge Diane Schafer Goodstein has already rejected that argument (and the County's earlier filed Motion to Dismiss).¹

UNDISPUTED FACTS

The following facts are not, or cannot be, disputed by the Defendants:

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.

¹ On July 9, 2021, the County filed a 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 was an illegal nonconformity. On October 27, 2021, Judge Goodstein entered her Order denying the Motion, pointing out that the Beaufort County Community Development Code 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.

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.

7. Operation of a commercial ferry service is NOT a permitted use under the BLCP 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

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)

⁴ See Preservation Plan P. 10

⁵ See Preservation Plan P. 11

⁶ See Preservation Plan 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 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.

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.

⁷ See Affidavit of Zach Drescher filed March 14, 2022

⁸ See Affidavit of Amanda DuBose filed March 14, 2022

ARGUMENT I
VIOLATION OF BEAUFORT COUNTY COMMUNITY DEVELOPMENT CODE
APPENDIX A, DIVISION A.10 et seq.

The claim of the Defendants that the operation of a commercial ferry service is an allowable use under the Community Development Code are patently false. Nowhere in the CDC under the Buckingham Landing Community Preservation District does it state any type of a ferry service is an allowable use under any circumstances.⁹

The purpose of the Buckingham Landing Community Preservation District “is to conserve the existing residential neighborhood and to improve the quality of life and public safety for their residents”.¹⁰ The operation of a commercial ferry service is in direct contravention to the stated purpose of the Preservation District. The service brings in tremendous amounts of people, vehicles and noise on a daily basis, endangering residents and disturbing their quiet enjoyment of their properties and neighborhood. See the Affidavits of James Ware, Alisa Ware, and Amanda Dubose filed in support of the original March 14, 2022 Motion.

There is absolutely no evidence that any of the current or previous owners of the Restaurant Property have ever applied for a use variance to be allowed to operate a commercial ferry service from the property. Nor have any of the current or previous owners applied for a change of zoning for the Restaurant Property. The Restaurant Property has always been and continues to be zoned residential with very limited “home-based” commercial uses.

⁹ See Appendix A, Table A.10.40, Beaufort County Community Development Code (Buckingham Landing Community Preservation District)

¹⁰ See Appendix A, Division A.10.10 Purpose, Beaufort County Community Development Code (Buckingham Landing Community Preservation District)

The non-conforming status of the Restaurant Property was abandoned in March of 2014, 120 days after the closing of the operations of the restaurant in September of 2013. Defendant Beaufort County attempts to argue that the: “applicable period for loss of a non-conforming use after the effective date of the CDC on December 8, 2014 and avers and asserts that the CDC (in its section 8.2.4) provides for a one-year period of abandonment for loss of legal non-conforming status.”¹¹ (Emphasis Added)

But even if this Court finds that the 120 day abandonment period provided for in the Preservation Plan does not apply to the within case, Beaufort County’s own one-year abandonment period determination still puts them well outside of the timeframe to retain the property’s non-conforming status. The last operation of the restaurant, or any business at the restaurant for that matter, was September 2013, as affirmed to by Zach Drescher, the General Manager of Sunset Bay Restaurant.¹² The Daufuskie Island Ferry Service did not begin its leasing of the dock and operation of the ferry service until January 2017.¹³

Beaufort County and the Daufuskie Island Ferry Service have always, and continue to, operate in violation of the Community Development Code that all other residents and businesses in Beaufort County must abide by. There can be no arbitrary application of the CDC requirements just because Beaufort County is the property owner. They must be held to abide by their own ordinances.

In an attempt to address the legal conundrum the County is in, it filed Affidavits of Robert Merchant and David Wilhiem on May 15, 2022, with Mr. Merchant’s Affidavit

¹¹ See Answer of Beaufort County ¶ 16 filed November 10, 2021

¹² See Affidavit of Zach Drescher filed March 14, 2022

¹³ See BC 00007, Lease Agreement between Wilbert Roller and Daufuskie Island Ferry Service

stating that he has determined that the commercial operation moving hundreds of people a day through a commercial ferry is a “legal use” under section 7.2.140.E of the CDC, hanging his hat upon a “zoning permit” he alleges was issued Wilbert Roller on May 4, 2009 by the County for a “commercial dock.” For the reasons set forth below, this argument must be rejected by this Court and the validity of the Preservation District upheld.

ARGUMENT II **JUDICIAL ESTOPPEL**

In 2008, the former owner of the Restaurant Property, Wilbert Roller, appealed a decision by the Beaufort County Zoning Administrator denying him a commercial County dock permit to construct the dock at the Restaurant Property. A hearing was held before the Board of Zoning Appeals in July 2008 wherein the County argued against the issuance of a commercial dock permit. The County argued that the requested variance was a “use variance.” However the Board of Zoning Appeals disagreed. The Order specifically states:

“(1) We find a dock, whether residential or commercial, is not a ‘use’ of the property. In this case, the commercial restaurant is the ‘use’ of the property....

(3) The particular facts of this case demonstrate that a commercial dock on the property appurtenant to this seafood restaurant is merely an active ‘practice’ incidental to the ‘use’ of the property as a restaurant. The dock is not a land use in itself; it is solely associated with and related to the business on the land. It serves, in other words, as an amenity to the restaurant, but does not involve any independent commercial use.”¹⁴

The Board stated in their Conclusion of Law:

“6. Applying the reasoning of *Heilker v. City of Beaufort*, we are persuaded that the proposed activity for which the land or buildings

¹⁴ See BC 00173: In Re: Wilbert Roller v. Beaufort County Zoning Administrator Order dated December 10, 2008 P. 8

are designed, arranged or intended, or for which land or buildings are occupied or maintained is a restaurant; the dock is an incidental amenity or practice. This variance as granted is not a 'use variance'."¹⁵

The appeal was granted because the Board of Zoning Appeals determined that an unnecessary hardship existed. The original dock permit was issued by OCRM in 1993, when Beaufort County did not have any form of a dock ordinance. Mr. Roller would have constructed the dock in 1993 under the original OCRM permit had the County not unlawfully interfered and revoked his development permits.¹⁶

In fact, Beaufort County was so opposed to the construction of the dock, they filed a Petition for Judicial Review on January 9, 2009 in Civil Action No. 2009-CP-07-00068, *Beaufort County v. Beaufort County Board of Zoning Appeals and Wilbert Roller*. Beaufort County actively argued that

"a commercial dock is not a 'use' authorized by the Buckingham Landing Community Preservation (BLCP) District. No where does the list include commercial boat docks as 'permitted uses' and Appellants would argue that they are not included because commercial establishments are not authorized as uses of right in BLCP zones."¹⁷

Their petition also stated:

"The Defendant has a legal non-conforming restaurant, pursuant to the zoning having been changed prohibiting restaurants and by virtue of Justice Finney's 2002 Order, wherein Justice Finney determined that a vested right existed as to Mr. Roller's ability to proceed with the development of a restaurant. The Order does not grant any vested rights or any other legal status to a dock. Thus, only the underlying building permit and development permit for the

¹⁵ See BC 00175: In Re: Wilbert Roller v. Beaufort County Zoning Administrator Order dated December 10, 2008 p. 10

¹⁶ See BC 00172: Board of Zoning Appeals Order dated December 10, 2008 ¶6(1)

¹⁷ See BC 00160 ¶ j. Beaufort County Petition for Judicial Review filed January 9, 2009 Beaufort County et al v. Beaufort County Board of Zoning Appeals and Wilbert Roller, 2009-CP-07-00068

restaurant were issues before Judge Finney, and ruled on by his Order, not the authorization for a dock.”¹⁸

Upon settlement of the Petition for Judicial Review, the County agreed to allow the dock to be constructed based upon the permits that had been previously issued by OCRM in 1993.¹⁹

In 2009, Wilbert Roller applied to SCDHEC/OCRM for an amendment to his dock permit, to allow him to extend his floating dock. Again, the County argued against the amendment to the permit and proposed increase in the size of the dock. On May 29, 2009, Wm. Weston Newton, then Chairman of Beaufort County Council, wrote to OCRM on behalf of the County Council and the Beaufort County Administrator, opposing the Amended Permit application and laying out 11 arguments. Some of the arguments made are:

“1) ...there is a potential for using this boat lift to store a 25’ to 30’ vessel, which could be used to ferry patrons of the restaurant back and forth from Beaufort’s public boat landing on the other side of Mackay Creek. The County would strongly object to this type of dock use activity.

6)...The County has great concern that there will not be adequate parking area for this facility, and that “spill off” traffic would be on adjacent properties and roadways.

8)...The County also believes that this dock,...will take a toll, not only on the County’s boat ramp, but also to the waterway itself. The long range, cumulative impacts of this excessive facility, as proposed, will create negative affects to the recreational use of this waterway, presently and in the future.”²⁰

¹⁸ See BC00158 ¶ 7b. Beaufort County Petition for Judicial Review filed January 9, 2009 Beaufort County et al v. Beaufort County Board of Zoning Appeals and Wilburt Roller, 2009-CP-07-00068

¹⁹ See BC 00492, August 18, 2009 Written Request for Final Review to SC DHEC by Thomas A. Bendle, Jr., attorney for Beaufort County

²⁰ See BC 00626-00627: Newton letter to OCRM May 29, 2009

Additionally, Gary Kubic, the then Beaufort County Administrator, wrote to OCRM on July 7, 2009 on behalf of the County, making additional arguments. His letter states, in part:

“...the majority of our discussions with Mr. Roller focused upon the accessibility to the boat landing by our residents without any interference from restaurant patrons including the separation of parking. In other words, users of the boat landing would enjoy complete access to the water with available parking for their vehicles and trailers.”...

“This site is located in a very confined area with many unique features that pose natural limitations on the ability to navigate the various channels within this waterway”...

“Why is a boat lift necessary for a restaurant? This one can lift a large boat.. it can lift a 25 to 30 foot vessel. Maybe, Mr. Roller plans to use these large boats to ferry patrons across Mackay Creek. Ironically, he will be using another county boat landing facility. This one may be attractive because it can accommodate large amounts of parking. Perhaps we see the beginnings of a park and ferry service to his restaurant.”(emphasis added)²¹

In 2009, the County was very concerned about a 25 to 30 foot boat potentially ferrying passengers to and from the public dock on the other side of Mackays Creek. Today, the County has no objection to a commercial ferry service shuttling hundreds of people a day back and forth to Daufuskie Island multiple times a day.

In 2009, the County was concerned with the impact of the dock and increased use by boats on the waterway and the narrow channel. Today, the County has no objection to ferry vessels ranging from 46 feet to 55 feet long using the narrow channel adjacent to federally protected oyster beds.

Apparently, these are only problems to the County when it does not suit their needs.

It is disingenuous that Beaufort County, which once adamantly opposed the issuance of the dock permit in 2009, now attempts to argue that the issuance of the

²¹ See BC 00621-00625; Kubic letter to OCRM July 7, 2009

“commercial dock permit” to Wilbert Roller for construction of a dock adjacent to the Restaurant Property in 2008, imparts a commercial use on the parent parcel and that a commercial dock is now an allowed use under the BLCP.

“Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements or contentions made under oath, is prohibited from adopting an inconsistent posture in subsequent proceedings.”²²

Beaufort County has argued for years that a commercial dock cannot exist in the Buckingham Landing Community Preservation District. The County cannot now argue that is an allowable use. “Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding from assuming a contrary position in another action simply because his or her interests have changed..” Quinn v. Sharon Corporation, 343 S.C. 411, 540 S.E. 2d 474 (Ct. App. 2000), citing City of New York v. Black Garter, 685 N.Y.S. 2d 606, 607-08 (N.Y. 1999)

In Cothran v. Brown, 350 S.C. 352, 566 S.E. 2d 548 (Ct. App 2002), the Court of Appeals upheld the trial court’s granting of summary judgment in favor of Cothran because Brown was judicially estopped from contesting liability. “The doctrine of judicial estoppel evolved to protect the truth-seeking function of the judicial process by punishing those who seek to misrepresent facts to gain advantage.” Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E. 2d 472, 477 (1997).

In this case, the same party presented two patently inconsistent sets of facts in two different courts.... Permitting Brown to assert different facts in this action could result in the appearance that one court or the other was misled. Moreover, allowing Brown to change his story now might result in an unfair advantage to him. It would be unfair to allow him to reap the benefit of a lesser sentence by admitting culpability but avoid civil liability by denying it. We agree with the trial court that Brown was judicially estopped from presenting facts inconsistent with those presented at his guilty plea

²² Black’s Law Dictionary 848 (6th Ed. 1990); 28 Am. Jur. 2d Estoppel and Waiver 74

proceeding, including the McCray affidavit. ...Therefore, there was no issue of material fact remaining on the issue. Accordingly, we affirm the trial court's grant of summary judgment. *Id.*

Beaufort County has clearly taken an inconsistent position from its previous arguments regarding the same property and cannot be allowed to benefit from this inconsistency. Beaufort County's argument that because the construction permit for the dock imparts commercial zoning on the parent parcel is illogical. The fact is that the County, which once so vehemently opposed the construction of the restaurant and the construction of the dock, now seeks to change its interpretation of its own laws and ordinances so that it suits its own needs because it is now the owner of the parcel. That is legally incorrect and morally reprehensible.

ARGUMENT III **TEMPORARY INJUNCTION**

"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." Levine v. Spartanburg Regional Services District, Inc. 367 S.C. 458, 464, 626 S.E. 2d 38, 41 (Ct. App 2005). Obtaining an injunction requires the plaintiff to show 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. Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E. 2d 833, 834 (2005). In considering whether to grant an injunction, this court should balance the equities of the opposing parties on the particular facts of the case to determine which side is more entitled to relief. Levine, *supra*.

Through the Affidavits of Alisa Ware, James Ware, Amanda Dubose, and Ronald Broome, the Plaintiffs have demonstrated that irreparable harm has already resulted and

will continue to result if an injunction is not granted. Beaufort County and the Daufuskie Island Ferry Service have been promising the Plaintiffs and the other residents of Buckingham Landing for over ~~six~~ years that their quiet, historic neighborhood was not to be the permanent location for the large commercial ferry service and that they were actively seeking an alternate location. Unfortunately, it is quite evident that they have done no such thing and are content to allow the Daufuskie Island Ferry Service to continue to operate illegally, to the detriment of the residents of Buckingham Landing.

Despite numerous complaints from the residents and Plaintiffs and despite hearings and meetings with representatives of Beaufort County, Beaufort County Council, the Daufuskie Island Ferry Service and Daufuskie Island Council, nothing has been done to alleviate the continuing suffering of the residents of Buckingham Landing. The County contends it is “working” on the problem and that it will, at some yet to be determined point in the future, move the ferry service from Buckingham Landing. But no definitive timetable has been given, and in consideration of the litany of broken promises the County has made over the years, these assurances ring hollow.

The Plaintiffs’ only recourse to stop the illegal use of the Restaurant Property is to seek an Injunction against Beaufort County and the Daufuskie Island Ferry Service from operating out of the Restaurant Property. Plaintiffs have suffered for over six years with 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.²³

The Plaintiffs have shown nothing but good faith over the last six years, attempting to work with Beaufort County and the Daufuskie Island Ferry Service, only to be strung along with unfulfilled promises to alleviate the nuisance caused by the operation of the ferry service. Tourist season will soon begin and the amount of traffic and the breadth of the nuisance will increase daily. Plaintiffs seek an immediate Temporary Injunction to prevent the further suffering of the residents of Buckingham Landing.

²³ See Affidavits of Alisa Ware, Amanda DuBose, James Ware and Ronald Broome filed March 14, 2002.

Plaintiffs have shown a likelihood of success on the merits of this case. “Once a *prima facie* showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” Helsel v. City of North Myrtle Beach, 307 S.C. 29, 32, 413 S.E. 2d 824, 826 (1992). Throughout this case, Beaufort County and the Daufuskie Island Ferry Service have presented arguments that fail to reveal any fact that supports its argument on the question of the validity of its operations of a ferry service from the property known as the Restaurant Property located in Buckingham Landing. Plaintiffs have shown that there is no evidence that the Restaurant Property was ever zoned a commercial property or ever had a commercial ferry service as an allowable use.

Plaintiffs lack an adequate remedy at law and are therefore entitled to a temporary injunction to prevent the continuing damages they are suffering. They do not seek this remedy lightly. They and our Courts “recognize that an injunction is a drastic remedy and should be issued only to prevent irreparable harm suffered by the moving party.” AJG Holdings LLC, v Dunn, 382 S.C. 43, 674 S.E. 2d 505 (Ct. App 2009) “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 v. Long Cove Club Owner’s Ass’n, 313 S.C. 555, 558, 443 S.E. 2d 577, 578 (Ct. App. 1994).

But where, as here, parties are suffering from the actions of another that present a dangerous situation to their living peacefully upon their own land, equity allows an injunction because there is no adequate remedy at law. An excellent analysis of a similar situation is found in Shaw v. Coleman, 373 S.C. 485, 645 S.E. 252 (Ct. App. 2007), involving a nuisance claim from neighboring property owners. In Shaw, the Court of Appeals noted that “[i]f a lawful business is operated in an unlawful or unreasonable

manner so as to produce material injury or great annoyance to others or unreasonably interferes with the lawful use and enjoyment of the property of others, it will constitute a nuisance,” and entered a permanent injunction against the offending landowner despite the landowner’s pleas that the Shaws “have alternative legal remedies available.” Id.

Coleman suggests the Shaws and the Snowdens have legal actions available to them, and thus, a permanent injunction as an equitable remedy was not appropriate. Coleman is correct that equity is reserved for situations where there is no adequate remedy at law. See Santee Cooper Resort, Inc. v. S.C. Public Serv. Comm’n., 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) (‘Equitable relief is generally available only where there is no adequate remedy at law.’). The Shaws and the Snowdens, however, are seeking an injunction to prevent Coleman’s dangerous behavior, which cannot be adequately accomplished by an award of damages.

Because the desired action is to prevent Coleman’s dangerous activity, an injunction is appropriate in this case....A lawful business should not be enjoined on account of every trifling or imaginary annoyance, such as many offend the taste or disturb the nerves of a fastidious or overly sensitive person, but on the other hand, no one, whatever the circumstances or condition may be, should be compelled to leave his home or live in mental discomfort, although caused by a lawful and useful business carried on in the vicinity. Shaw, 645 S.E.2d at 259.

Thus, even if Beaufort County’s actions in operating the commercial ferry terminal in the Buckingham Landing Preservation District were lawful (which they are not), because of the nuisance it has created, the adjoining and neighboring landowners have no adequate remedy at law to protect themselves and their children from the dangers created by the on-going ferry terminal operations and equity demands the issuance of an injunction. Cf. Skinner v. Elrod, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992), where the Court of Appeals differentiated a case for breach of a covenant not to compete and noted that the Plaintiffs would be in a position to recover liquidated damages as a remedy at law, and thus denied the requested injunction.

Defendant Beaufort County has a duty to its residents to uphold its ordinances and the Community Development Code. Beaufort County has wantonly neglected its duties

by failing to adhere to the CDC and zoning regulations applicable to all property owners in Buckingham Landing.

As the tourist season comes into full swing by April 1, 2023, the amount of traffic will continue to grow and the disturbance to the neighborhood along with it. Once Memorial Day arrives, with schools on break and kids playing and biking in the neighborhood, and tourists unfamiliar with the area driving in and out of the neighborhood, the risk of a tragedy drastically increases.

The damages Plaintiffs have sustained are equitable in nature and monetary damages are not a sufficient remedy to cease the daily nuisances created by the illegal operation of the ferry service.

Defendants have been provided, on numerous occasions, with alternate ferry service options and locations from which to operate, yet they refuse to abide by their long standing promises to relocate the ferry service. See the Affidavit of Neil Turner filed on January 2, 2023. Without an injunction, these Defendants will apparently continue their operations and daily infringements of the quiet property enjoyment of the residents of Buckingham Landing.

CONCLUSION

The Plaintiffs are entitled to a Preliminary Injunction and have shown (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 no adequate remedy at law. Plaintiffs move this Court to require the Daufuskie Island Ferry Service to cease all operations that in any way utilize the Restaurant Property by April 15, 2023. The County has an alternative to use Turner's Marina on the North end of Hilton Head, and should be required to do so.

Respectfully submitted,

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January 3, 2023

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
 COUNTY OF BEAUFORT)

James Ware, Alisa Ware, Henry Spahr, Elaine) Civil Action Number: 2021-CP-07-01078
 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,)

**REFERENCES AT THE VIRTUAL
 HEARING TO RECORD FILINGS BY
 DEFENDANT BEAUFORT COUNTY**

Plaintiffs,)

v.)

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

Defendants.)

In light of the Court's January 3, 2023, Notice of virtual hearing, Defendant Beaufort County, for the convenience of the Court, sets out a listing of its anticipated references at the virtual hearing to several documents in the case e-filings. These include:

- Affidavit of David Wilhelm (and its Exhibit 1) (filed May 16, 2022)
- Affidavit of Robert Merchant (and its Exhibits 1-5) (filed May 16, 2022)

- Defendant Beaufort County's Memorandum Opposing Plaintiffs' Consolidated Motions for Partial Summary Judgment and for Temporary Injunction (filed May 16, 2022)
- Form 4 Order by Judge Bentley Price (filed May 24, 2022)
- Defendant Beaufort County's Motion for Alteration and Amendment of the Court's Order of May 24, 2022 (filed June 3, 2022)
- Order of Judge Bentley Price Amending and Supplementing the Court's Form 4 Order of May 24, 2022 (filed August 24, 2022)
- Transcript of Hearing before the Court on August 3, 2022 (filed October 4, 2022, as County's Exhibit and Exhibit 1 in Opposition to Plaintiffs' Renewed Motion for Preliminary Injunction)
- Second Affidavit of Robert Merchant (and its Exhibits 1-3) (filed October 11, 2022)
- Affidavit of Jared Fralix, P.E. (filed October 11, 2022)
- Affidavit of Henry Amundson (filed November 14, 2022)
- Affidavit of Henry Criss (filed October 25, 2022)

Additionally, Plaintiffs' appeal to circuit court of the decision of the County Zoning Board of Appeals (James Ware, et al. v. Beaufort County Zoning Board of Appeals and Robert Merchant) bears Case No. 2022-CP-07-01598 and was filed on August 23, 2022. The County's condemnation action on the proposed replacement site for the Buckingham Landing ferry landing (Beaufort County v. Broad Creek Development, LLC) bears Case No. 2022-CP-07-01762 and was filed on September 15, 2022. Broad Creek Development's challenge action to the condemnation action by the County (Broad Creek Development, LLC v. Beaufort County) bears Case No. 2022-CP-07-01978 and was filed on October 12, 2022.

Respectfully submitted,

s/Danny C. Crowe

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ATTORNEY FOR DEFENDANT
BEAUFORT COUNTY

January 4, 2023

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT

James Ware, Alisa Ware, Henry Spahr, Elaine) Civil Action Number: 2021-CP-07-01078
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,)
Plaintiffs,)

**DEFENDANT BEAUFORT COUNTY'S
NOTICE OF MOTION AND MOTION
FOR ALTERATION AND
AMENDMENT OF THE COURT'S
ORDER OF FEBRUARY 21, 2023, OR,
ALTERNATIVELY, FOR A NEW
HEARING, PURSUANT TO RULES
52, 59(a)(2) AND (e), AND 65(c) AND
(d), SCRPC**

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

YOU WILL PLEASE TAKE NOTICE that the Defendant Beaufort County, by and through its undersigned counsel, will move before Circuit Court Judge Courtney C. Pope, at such date and time and place as may be set by the Court, for an Order (1) altering or amending the Order filed on February 21, 2023, so as to provide findings of fact and conclusions of law favorable to this Defendant and to enter judgment or a ruling in favor of Defendant Beaufort County on Plaintiffs' Motion, or (2) granting a new hearing on the merits of Plaintiffs' Motion or a new hearing to obtain evidence on the appropriate amount and nature of security to be required

of Plaintiffs for an injunction pursuant to Rule 65(c), SCRCP. This motion is made pursuant to Rules 52, 59(a)(2) and (e), and 65 (c) and (d), SCRCP, and on the grounds set out below.

The Affidavits filed by Plaintiffs and Defendant Beaufort County in connection with Plaintiffs' Motion provide no factual and legal basis for the granting of this injunction or the ruling of the Court. The February 21 Order is an abuse of discretion, was erroneous, and plainly represents a determination on the merits of ultimate issues of fact and law in this case. The injunction ordered, even though couched as preliminary, will require the County to abandon a public ferry site acquired at significant taxpayer expense and to establish operation at a new public ferry site at considerable taxpayer expense, all before New Year's Day 2024.

Beaufort County also makes this Motion on the following additional grounds:

1. No sufficient factual or legal basis for an injunction of the ferry site operation was provided by Plaintiffs. The Affidavits filed by Plaintiffs in connection with Plaintiffs' Motion and Renewed Motion for Preliminary Injunction provided an insufficient factual and legal basis for the granting of the injunction or for the findings and conclusions of the Court. Plaintiffs' Affidavits were insufficient to establish legal entitlement to injunctive relief, and specifically were insufficient to establish irreparable harm if the injunction were not granted, likelihood of success on the merits, and the absence of adequate remedy at law.

The allegations in the Affidavits 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, 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.

2. 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 Court by the two Affidavits of Beaufort County Zoning Director Robert Merchant. [For the ready reference of the Court, the Affidavit of Merchant filed originally on May 16, 2022, is filed with this Motion as Exhibit 1, and the Affidavit of Merchant filed originally on October 11, 2022, is filed with this Motion as Exhibit 2.]

The Zoning Director, 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). The basis for that decision was that the dock at 35 Fording Island Road Extension (the property and dock that are the subject of this action) 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. The Court erred by failing to give appropriate weight to this administrative determination.

This administrative decision of the Zoning Director, made at the request of three Plaintiffs by their attorney during the pendency of this case, was appealed by the Plaintiffs to the County Zoning Board of Appeals (ZBOA). The second Affidavit of the Zoning Director describes that appeal, and attaches the written decision of the ZBOA (dated September 16, 2023) that denied Plaintiffs’ appeal and affirmed the determination of the Zoning Director. (Exhibit 2 to this Motion). As also described in the second Affidavit of Merchant, Plaintiffs have 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. In the context of that appeal action (which is pending), a circuit court judge will determine, after consideration of the record, whether the Zoning Board decision “is correct as a matter of law.” S.C. Code § 6-29-840(A). This Court’s Order has the effect of short-circuiting this State-mandated administrative process for zoning issues. This 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 Court’s 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 clear weight of the evidence before the Court was that the County’s use of a permitted commercial dock as a public ferry site is a lawful use under the County zoning laws.

3. The Court's findings and conclusions include broad statements that go far beyond determination of the existence a showing of likelihood of success, and constitute findings and conclusions on 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. How can such an alternative be determined to be reasonable or liable? These adjudications by the Court of disputed factual issues in the context of a motion for preliminary injunction are clearly erroneous.

In similar fashion, the Court's February 21 Order sets out Conclusions of Law in its sections A, B, and C that 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). The Court's Order goes too far and decides an ultimate issue in the case on a motion for preliminary relief.

4. The existence of the State-mandated Zoning Director/ZBOA administrative process with appeal to circuit court also underscores the availability of an adequate remedy for Plaintiffs other than injunction. The Court's grant of the injunctive relief sought by Plaintiffs disregards this adequate remedy at law. Additionally, the Order fails to consider the Plaintiffs' adequate remedy at law for any injury by way of the money damages sought by their 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. Those causes of action for money damages have not been abandoned or withdrawn by Plaintiffs and remain at play in the case.

5. The February 21 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) that will be suffered by the abandonment of the current public ferry site. Security, as required by Rule 65(c), 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 Court erred in disregarding the evidence of record and in failing to require evidence to provide the Court with a reasonable basis for the exercise of discretion in setting an appropriate amount of security.

This Motion is based on the applicable law and rules of Court, the pleadings and documents and Affidavits filed in this case, and the evidence and argument at the hearing on January 5, 2023.

[Signature page and Rule 11(a) Compliance follow]

s/Danny C. Crowe

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March 2, 2023

Rule 11(a) Compliance

Movant's counsel certifies that consultation with opposing counsel on Defendants' Motion would serve no useful purpose.

/s/Danny C. Crowe

Danny C. Crowe

S
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-07-01078

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.

PLAINTIFFS' S.C.R.Civ.R. 59 (e)
NOTICE OF MOTION AND MOTION TO
ALTER OR AMEND ORDER GRANTING STAY
OF FURTHER PROCEEDINGS IN THIS CASE
PENDING FINAL DISPOSITION OF APPEAL
OF PRELIMINARY INJUNCTION AS
ENTERED ON FEBRUARY 22, 2023

TO: THE DEFENDANT BEAUFORT COUNTY BY AND THROUGH ITS COUNSEL OF RECORD, DANNY CROWE, ESQ., AND THE DEFENDANTS HPCCA FERRY COMPANY, INC., and THE DAUFUSKIE ISLAND FERRY SERVICE, LLC BY AND THROUGH ITS COUNSEL OF RECORD, ROBERT M. DEEB, JR., ESQ.:

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs, by and through their undersigned counsel of record, will, ten (10) days after the filing of this Notice of Motion and Motion or at such other time that may be set by the Court, move the Hon. Courtney C. Pope to alter or amend her Order To Stay entered in this matter on February 22, 2023, and reconsider certain matters encompassed in the Order.

As the basis for this Motion, the Plaintiff would show unto this Honorable Court that the February 22, 2023 Order referenced above, granting a stay of further proceedings, is not necessary or appropriate given the fact that the Court's other Order of February 22, 2023, of a Preliminary Injunction, does not take effect until January 1, 2024. Thus, there is no need whatsoever for a stay being issued. Without a stay, the Defendants may continue to operate the commercial ferry for the next ten months and discovery will proceed in this case and hopefully a trial can be conducted and a final Order entered before the Preliminary Injunction takes effect on January 1, 2024. As a matter of judicial economy, that is the wisest and most efficient course of action.

In sum, the Plaintiff moves this Honorable Court to reconsider her February 22, 2023 Order and withdraw same so that discovery, and hopefully trial, may proceed prior to the effect of the Preliminary Injunction taking place on January 1, 2024.

This Motion may be supported by a Memorandum in Support to be submitted at least five days prior to a hearing on the Motion.

I SO MOVE.

Law Office of Thomas C. Taylor, LLC

S/Thomas C. Taylor

Thomas C. Taylor

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Bluffton, South Carolina
March 2, 2023

ATTORNEY FOR PLAINTIFFS