

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2023-000581

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SC Court of Appeals

James Ware, Alisa Ware, Henry Spahr, Elaine Spahr, Julie Sanders,
William Craig Denny, Jeff Toomer, Allyson Toomer, 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.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT¹

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

At the January 5, 2023, hearing before the circuit court on the motion for preliminary injunction, Plaintiffs' counsel concluded his argument by urging that the circuit court "give them [the County] a stick across the butt in order to encourage them." (R. p. 366, lines 18-24). The circuit court obliged. The 2023 Injunction Order alters the status quo and requires the County to cease the only public ferry service and only means of public transportation to Daufuskie Island from its current location by New Years Day 2024. The Order makes no exceptions based on the status of the County's acquisition of the property for the planned replacement landing site or for the status of the County's completion of the new ferry site. Can this judicial response to a requested "stick across the butt" of the County reasonably be said to be an appropriate exercise of judicial discretion?

¹ Respondents' Statement of the Case in their brief, contrary to Rule 208 (b)(C), SCACR, contains contested matter with which the County does not agree. For example, Plaintiffs' Complaint nowhere alleges that the County and the ferry companies have "ruined" the neighborhood (Brief of Respondents, p.6). The Statement of the Case also describes the Affidavit of Neil Turner as presenting "an immediately available, feasible alternative" to the ferry landing at Buckingham Landing (Brief of Respondents. pp. 7 and 11), allegations with which the County disagrees, as discussed in its briefs. By way of further example, the County disputes that the matters, described on page 8 of Respondents' Brief as "non-contested" and listed in Respondents Brief on pp. 8-11, are non-contested. The County, as it has argued in brief and throughout the case, urges that use of the County's dock as a public ferry landing is a permitted use and does not violate applicable zoning, and that the allegations of the Plaintiffs do not establish damages or causes of action for which the County is liable.

No evidence before the circuit court supports the January 1 date, and Plaintiffs referenced no such evidence in their brief to this Court. In setting the arbitrary date of January 1, 2024, the circuit court injunction order does not recognize or allow for legitimate delays in completion of the alternative site already selected by the County that are beyond the control of the County. The circuit court, without explanation (or even acknowledgement), disregarded the detailed evidence provided by the Affidavits of the County's Jared Fralix (R. pp. 320-325) and Henry Amundson (R. pp. 329-332) on the necessarily time-consuming work required to develop an operational relocated ferry landing site and obtain State and Federal governmental approvals. Similarly, the circuit court also ignored the evidence, as set out in the Affidavit of Henry Amundson (R. pp. 329-332), relating to the time delays in acquisition and possession of the condemned substitute site that have been and will be caused by the property owner 's pending legal action challenging the condemnation of the selected alternative site. (Broad Creek Development, LLC v. Beaufort County, Case No. 2022-CP-07-01978, filed October 12, 2022). The County cannot proceed legally on the condemnation action (including possession of the property) with the challenge action pending. (See S.C. Code § 28-2-470).

As discussed in the County's main brief, the injunction plainly is overly broad. It dramatically alters the status quo and requires a complete shutdown of the Buckingham Landing ferry operation by an arbitrary date, rather than tailoring its scope to mandatory or prohibitory measures to address the specific nuisance elements complained of by Plaintiffs, such as parking and traffic and pet management issues. An injunction should not be overbroad or provide relief more sweeping than is necessary. 27 S.C. Jur. Injunctions § 12 (2023), citing Eldridge v. City of Greenwood, 308 S.C. 125, 417 S.E.2d 532 (1992).

The circuit court's legal conclusion and near-advocacy concerning the Neil Turner property as an alternative ferry landing site (“Additionally, the Plaintiffs have shown viable alternative locations for the commercial ferry service embarkation/debarkation at both the Hilton Head Harbor and Pinckney Island.”) is bizarre. (R. p. 9). As shown by the Affidavits of Jared Fralix and Henry Amundson (R. pp. 320-325 and pp. 329-332), the County, as part of its search for an alternative ferry site, specifically considered and rejected use of the Turner property (also referred to as the Jenkins Island or Hilton Head Harbor property).

Another reason for rejection of that property, under any rational assessment, is shown by the Neil Turner Affidavit itself (“The ownership of Jenkins Island Road is the key to solving the issue of a new embarkation/debarkation site... If the County will convey Jenkins Island Road to Turner's Marina LLC, Turner's Marina LLC, will within 90 days, undertake the following improvements at its sole cost and will agree to maintain the roadway in the future at its sole cost.”) (R. p. 335). As revealed to the circuit court at the hearing on the injunction motion, Neil Turner is a client of the Plaintiffs' attorney in current litigation concerning the Hilton Head Harbor location. (R. p. 354, lines 6-23). The conclusion of the injunction order is that “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.” (R. p. 9). The circuit court’s apparent solution for an alternative ferry site is for the County to enter into a quick and questionable deal to convey a County-owned public road to a private party who happens to be another client of the Plaintiffs' attorney.

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

As discussed in the County's main brief, the Plaintiffs' likelihood of success on the merits clearly was not established by the evidence of record at the hearing, and, in granting the injunction, the Court disregarded and ignored all evidence of the administrative proceedings under the County's zoning ordinance that have determined that the County's use of the dock for a public ferry was "a legal use." This history of administrative proceedings was of record, was argued to the Court, and clearly was presented to the circuit court by the two affidavits of Zoning Director Robert Merchant. However, the 2023 Injunction Order makes no effort to discuss or distinguish, or even acknowledge, this evidence of these administrative determinations of lawful use under the County zoning ordinance. The circuit court abused its discretion in ignoring this evidence.

Plaintiffs, in their brief, assert that the circuit court did not ignore the results of the administrative proceedings under the County's zoning ordinance. However, the basis for that assertion is not cited and is not clear, particularly since the zoning administrative proceedings are not even mentioned by the circuit court in its Order.

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

In its Conclusion of Law (C) on page 10, the circuit court stated: "The neighborhood Plaintiffs have lived with the commercial ferry operations in violation of the County ordinances

for more than five years.” (emphasis added). In reaching this Conclusion, the circuit court completely ignored the evidence of “legal use” as a public ferry provided by the County’s administrative process. “Although a court may consider a case’s merits to the extent necessary to determine whether a temporary injunction should issue, it is improper for a court to make a final determination or to decide the merits of the case upon an application for a temporary injunction.” Roberts v. Union County Board of School Trustees, 284 S.C. 299, 301, 326 S.E.2d 163, 164 (Ct. App. 1985) (internal citation omitted). As urged in the County's main brief, the language of the circuit court's preliminary injunction order, like the relief granted, goes too far and attempts to decide the ultimate issue of a zoning violation.

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

In their brief, Plaintiffs essentially re-state bullet points from the Affidavits of the four Plaintiffs and contend that irreparable harm is shown. However, that restatement of the evidence does not address the clear circumstance that the evidence itself is insufficient to provide a factual and legal basis for the granting of the injunction or for the findings and conclusions of the circuit court.

As stated in the County’s main brief, the allegations in the affidavits of the four Plaintiffs related to alleged irreparable injury provide only general, anecdotal and conclusory information with no specific facts alleged as to dates, frequency, duration, or repetition of the occurrences of the instances of public behavior of which the affiants complain. The affidavits also relate no objective measures or quantification of inappropriate parking or of increased traffic volume or of reports to law enforcement of criminal activity, and do not differentiate among vehicular and

pedestrian traffic related to the public ferry, users of the pre-existing public boat landing, residents and invited guests to the neighborhood itself, lost wayfarers, or general sightseers. The circuit court erred in accepting, without pause or question, these broad general allegations as substantial evidence showing irreparable harm.

In doing so, the circuit court also ignored the only evidence of record on the actual usage counts of the ferry service. The volume of passenger usage of the County-provided ferry service at Buckingham Landing is evidenced by the Affidavit of Henry Criss who is employed by the two named ferry operator/Defendants as Director of Marine Operations and is responsible for overseeing operations of the ferry service between Buckingham Landing and Daufuskie Island. (R. pp. 326-328). According to the Criss Affidavit, the ferry service, for the twelve months ending October 31, 2022, provided an average of approximately 1596 ferry trips per month. (R. p. 326-328). As a yearly figure, this represents just over 52 individual trips per day. The use of the ferry by 52 persons a day is hardly a number that suggests the circumstances described in the broad terms of the Plaintiffs' four affidavits.

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

As stated in the County's main brief, the existence of the State-mandated Zoning Director/ZBOA administrative process with appeal to circuit court utilized by four of the Plaintiffs clearly evidences the availability of an adequate remedy for Plaintiffs other than preliminary injunction. However, the circuit court's Injunction Order completely disregarded this adequate remedy at law and made no mention of it in the Order. Additionally, the 2023 Injunction Order

failed to mention or consider the Plaintiffs' adequate remedy at law for any injury by way of the money damages sought by four of the Complaint's causes of action and the Prayer of the Complaint. (R. pp. 40-46). In their brief, Plaintiffs essentially argue that the preliminary injunction granted by the circuit court is their "best" remedy.

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

Plaintiffs correctly observe, in their brief, that the County's \$2,200,000 purchase cost of the former restaurant property is a "sunk" cost given the County's intent and decision to relocate the public ferry landing. (Respondents' Brief, p. 22). However, clearly at risk for the County with the preliminary injunction, if the Daufuskie Island ferry service is to be continued, are the costs to the County to obtain a temporary ferry location until the previously selected site (on which the condemnation process has begun) is operational. Those costs are not revealed in the record because the necessity for such temporary replacement costs was not contemplated by the County prior to the 2023 preliminary injunction.

In the absence of evidence of record on such costs to the County, the circuit court should have required an evidentiary hearing to provide a sound and reasonable factual basis for the exercise of discretion in setting an appropriate amount of security. Such an evidentiary hearing was suggested by the County at the hearing on Plaintiffs' motion for temporary injunction in the description of exigencies of time and costs (R. p. 358, line 18-p. 359, line 3, and p. 359, line 20-p. 360, line 6) and directly in the County's post-Order motion. (R. pp. 168-169, 173).

CONCLUSION

The preliminary injunction ordered by the circuit court is a plain and clear abuse of discretion.

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

Respectfully submitted,

September 1 , 2023

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Certificate of Counsel

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b),
SCACR.

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