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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Judge Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2025-000615
Circuit Court Case No. 2022-CP-07-01978

Broad Creek Development, LLC .....Appellant,

v.

Beaufort County.....Respondent.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Whether Beaufort County has the power to condemn private property without following the "exclusive procedures" mandated by The South Carolina Eminent Domain Procedure Act, S.C. Code Ann. §§ 28-2-10 — 28-2-510 ("SCEDPA").
2. Did the trial court err in considering evidence of Beaufort County's post hoc planning, conducted after the filing of its Notice of Condemnation and Landowner's Challenge Action, in determining the constitutionality of Beaufort County's taking?
3. Did the trial court err in finding that Landowner did not meet its burden on challenge claims of (a) lack of need and necessity, (b) absence of public use, and (c) failure to consider relevant project factors, when Beaufort County failed to plan its project prior to filing its Notice of Condemnation?
4. Are stipulations of fact binding, and did the trial court err in ignoring them?
5. Must the trial court be reversed due to material factual findings in the final amended order that lack evidentiary support?

STATEMENT OF THE CASE

This case arises out of the attempted condemnation by Beaufort County (the "County" or "Condemnor") of two (2) unimproved parcels of land owned by Broad Creek Development, LLC ("Landowner") located on Hilton Head Island. The two lots, identified with TMS numbers R552 010 000 0649 0000 and R552 010 000 0648 0000 (together, the "Property"), contain a combined total of approximately 4.98 acres. **Tr. Ex. 1**. The County filed a Notice of Condemnation (the "NOC") on September 15, 2022 (the "Date of Condemnation"), and served the Notice of Condemnation on Landowner by certified mail on September 26, 2022 (the "Date of Service"), seeking to take the entirety of the Property. **Notice of Condemnation ("NOC").** The NOC stated the County's purpose for taking the Property was "to establish a permanent embarkation location

and public parking on the mainland in order to provide public ferry services to and from Daufuskie Island" (the "Project"). **Tr. Ex. 1**. The NOC also stated: "There are no project plans at this time and but [*sic*] they will be made available in the [*sic*] as soon as available." **Tr. Ex. 1**. The filed NOC was accompanied by an Affidavit of Christopher L. Murphy, which, as the County admits, contains a false statement of fact, namely, "That the amount tendered by the Condemnor to the Landowner in the Condemnation Notice has been rejected." **Murphy Aff. at 1**. In fact, in violation of the clear requirements of Sections 28-2-220 and 28-2-230 of the SCEDPA, prior to filing the NOC, the County had not tendered—and thus Landowner had not rejected—the amount of just compensation set forth in the NOC. **Stipulation of Fact ("S.O.F.") No. 24**. The County made no effort, at any point, to correct the materially false Affidavit.

The County did not serve the NOC on the Landowner until September 26, 2022. On October 12, 2022, Landowner timely filed a challenge action pursuant to S.C. Code Ann. § 28-2-470, contesting the right of the County to condemn the Property on several statutory and constitutional grounds (the "Challenge Action"). **Complaint**. The Challenge Action alleged the County not only ignored the statutory condemnation process set forth in the SCEDPA, but also violated fundamental Constitutional principles controlling the rights of a government entity to take private property for a public use in South Carolina. Discovery in the case revealed that the County, under pressure due to related litigation, rushed to obtain possession of the land, without complying with the process mandated by law.[1] Therefore, the taking occurred prior to the development of Project plans.

[1] The SCEDPA provides for a "quick take" process, *i.e.*, the condemnor may enter, take possession, and commence project work, after serving a notice of condemnation and allowing for a period of 30 days for a landowner to challenge the right to condemn under S.C. Code Ann. § 28-2-470. However, the SCEDPA also contains mandatory "exclusive procedures" that the County, in its haste, manifestly ignored.

After the completion of discovery, the Beaufort County Circuit Court, Judge Carmen T. Mullen presiding, held a non-jury trial on October 14, 2024. **February 18, 2025 Order ("Order").** On February 18, 2025, the trial court issued an Order in favor of the County, denying all of Landowner's claims. **Order**. Landowner timely filed a Motion to Reconsider the Order on February 28, 2025 (**Motion to Reconsider**), and the trial court issued an Amended Order on March 7, 2025 (the "Amended Order"), making "minor changes" to the February 18 Order. **March 7, 2025 Amended Order ("Amended Order") at 1.**

Notably, the Amended Order found that "the County's procedure did not strictly adhere" to the exclusive procedures of the SCEDPA (**Amended Order at 17**), but concluded that Landowner "has proven no harm resulting from the County's deviation" from the statutory process. **Amended Order at 17**. The Amended Order further stated that "it would be an extreme remedy for this court to find in favor of the Landowner in this Challenge action and dismiss the Condemnation action for anything less than strict adherence to the procedures unless the statutory law or case law requires it." **Amended Order at 17**. The trial court also justified the County's failure to create and make project plans available for inspection, as required by statute, by explaining that the County's plans changed ***after*** the filing of the NOC. **Amended Order at 14**.

Landowner timely served its Notice of Appeal on March 28, 2025. **Proof of Service**.

STANDARD OF REVIEW

Our courts apply a preponderance of the evidence standard to challenge actions. *Ga. Dep't of Transp. v. Jasper Cnty.*, 355 S.C. 631, 636 n.3, 586 S.E.2d 853, 855 n.3 (2003) ("An action challenging a condemnation under § 28-2-470 is considered one in equity because it essentially seeks to enjoin the condemnation. Accordingly, on review we take our own view of the preponderance of the evidence.") (citing *S. Dev. Land and Golf Co. Ltd. v. S.C. Public Serv. Auth*.,

305 S.C. 507, 409 S.E.2d. 428 (Ct. App 1991) ("*S. Dev. Land*"), *aff'd in part*, *rev'd in part on other grounds*, 311 S.C. 29, 426 S.E.2d 748 (1993)). *S. Dev. Land* in fact was an injunction action, as opposed to this case, which is purely an action filed pursuant to S.C. Code Ann. § 28-2-470 to challenge the County's right to condemn.

Moreover, the SCEDPA does not call for a higher burden of proof in challenge actions. Absent such a mandate from the legislature, our courts cannot apply a heightened standard in challenge actions. *Rorrer v. P.J. Club, Inc.*, 347 S.C. 560, 569, 556 S.E.2d 726, 731 (Ct. App. 2001) ("'it would be equally improvident to judicially engraft extra requirements to legislation which is clear on its face[]'") (internal citation omitted).

STATEMENT OF THE FACTS

The history of this case begins with a natural disaster and ends with a bureaucratic one. On October 8, 2016, Hurricane Matthew destroyed Palmetto Bay Marina, on Hilton Head Island, where Daufuskie Island Ferry Service ("DIFS"), pursuant to a contract with the County, operated a ferry service. **S.O.F. No. 1**. The ferry transported passengers between Hilton Head and Melrose Landing, on Daufuskie Island, for a fee. **S.O.F. No. 1**.

In early 2017, the embarkation site was relocated to Buckingham Landing in Bluffton, where it remained as of the Date of Condemnation in this case. **S.O.F. No. 3**. On June 11, 2021, James Ware, together with a number of other residents of the historic Buckingham Landing neighborhood, filed a Complaint against the County in a case captioned *Ware, et al. v. Beaufort County, et al.*, Case Number 2021-CP-07-01078, in the Beaufort County Circuit Court (the "Ware Case"). **S.O.F. No. 4**; **Tr. Ex. 8**. The Complaint in the Ware Case also named HPCCA Ferry Company ("HPCCAFC") and DIFS as defendants, and sought, *inter alia*, to prohibit the continued use of the Buckingham Landing dock for ferry services operated by DIFS and HPCCAFC, under

contract with the County. **S.O.F. No. 5**; **Tr. Ex. 8**. Although a separate action, the County's response to the Ware Case had a deleterious impact on Landowner and must be considered as part of the instant matter.

Soon after the Ware Case was filed, on June 17, 2021, the then-County Administrator Eric Greenway ("Greenway") identified the Property as a potential replacement site for Buckingham Landing. **S.O.F. No. 6**; **Tr. Ex. 9**. The County engaged two appraisers, Tony Martin ("Martin") on July 1, 2021, and George Owen ("Owen") on August 5, 2021, to provide valuation opinions of the subject property. **S.O.F. No. 7**; **Tr. Exs. 38 and 39**. Mr. Owen issued an appraisal report on August 12, 2021, estimating the value of the Property to be $3,900,000 as of that date. **S.O.F. No. 8**; **Tr. Ex. 6**. Mr. Martin issued an appraisal report on August 20, 2021, estimating the value of the Property to be $3,400,000 as of that date. **S.O.F. No. 9**; **Tr. Ex. 7**. However, the County made no effort in 2021 to contact Landowner, acquire the Property or authorize funds for a purchase.

Subsequently, in the Ware Case, the circuit court issued a Form Order on May 24, 2022 on Plaintiffs' Motion for Partial Summary Judgment or Temporary Injunction, ruling as follows:

> 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.

S.O.F. No. 10; **Tr. Ex. 10**.

On June 3, 2022, the County filed a Rule 59 motion seeking reconsideration of this order. **S.O.F. No. 11**; **Tr. Ex. 11**. The County then initiated its haphazard, rushed effort to meet the September 5 deadline, when Beaufort County Council held first reading of proposed County ordinance 2022/35 (the "Appropriation Ordinance") on June 27, 2022, to appropriate funding for the acquisition of the Property as a replacement embarkation site for Buckingham Landing. **S.O.F. No. 12**; **Tr. Ex. 19**. Two weeks later, on July 11, 2022, Council held second reading of the

proposed Appropriation Ordinance. On August 3, 2022, just one month before the court-imposed deadline allowing the Ware Case plaintiffs to renew their motion to enjoin Buckingham Landing ferry operations, a hearing was held on the County's motion to reconsider in the Ware Case. **S.O.F. Nos. 13-14**.

On August 24, 2022, the circuit court entered an Order Amending and Supplementing its May 24, 2022 Form Order in the Ware Case (the "Ware Amended Order"). In the Ware Amended Order, the circuit court memorialized the statements of counsel for the County at the August 3 hearing.

> 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.

S.O.F. No. 15; **Tr. Ex. 12**. The pending ordinance the County's attorney referenced at the August 3 hearing, which received third reading by County Council on August 8, 2022, is the Appropriation Ordinance relating to the subject Property. **S.O.F. No. 16**; **Tr. Ex. 23**. Under pressure despite allowing a year to lapse after obtaining appraisals, Council considered and approved millions of dollars of taxpayer funds without formulating plans as to how the Property could be used for its intended purpose, or even feasibility, as a ferry embarkation site.

Just prior to initiating any legislative process to appropriate funds, on June 21, 2022, the County, via then County Deputy Attorney Brittany Ward ("Ward"), first contacted the Registered Agent for Landowner, Cantzon Foster, Esq. ("Foster"), regarding the Property. **S.O.F. No. 17.** Ward stated that the "County is interested in potentially purchasing these properties." **S.O.F. No.**

17. Foster instructed Anna Bouknight, his paralegal, to respond that the Landowner had no interest in selling. **S.O.F. No. 17**; **Tr. Ex. 3**; **Tr. Ex. 21**. On July 25, 2022, Ward again contacted Foster's office regarding the County's interest in purchasing the Property and asked to set an appointment for a telephone conference to discuss the issue. **S.O.F. No. 18**; **Tr. Ex. 3**; **Tr. Ex. 21**.

On August 2, 2022, Foster and Ward spoke by telephone regarding the County's interest in purchasing the Property. **S.O.F. No. 19**; **Tr. Ex. 3**; **Tr. Ex. 21**. Foster again informed her that the owner had no interest in selling. **S.O.F. No. 19**; **Tr. Ex. 3**; **Tr. Ex. 21**. On August 8, 2022, Ward emailed Foster stating the County "desires to obtain ownership of your two properties located on Helmsman Way on Hilton Head Island for the purpose of establishing a permanent embarkation location for public ferry services. The County would like to offer a purchase price of $3,200,000 for both properties, contingent on County Council approval." **S.O.F. No. 20**; **Tr. Ex. 3**; **Tr. Ex. 22**. This offer was less than either of the 2021 appraisals the County had in hand and less that the amount the County had approved at first and second reading. In response, Foster asked Ms. Ward for additional time to consider the offer. **S.O.F. No. 20**; **Tr. Ex. 3**; **Tr. Ex. 22**. That same day, August 8, 2022, Beaufort County Council gave its third reading of the ordinance to appropriate funds in the amount of $3,400,000, the same amount previously approved during first and second readings on June 27, 2022 and July 11, 2022, respectively, to "establish public ownership" of the Property. **S.O.F. No. 21**; **Tr. Ex. 23**. Prior to the trial of this case, the County and Landowner further stipulated to the following facts:

- At no time prior to the Date of Condemnation was Landowner contacted by either of the County's appraisers, Martin or Owen.[2] **S.O.F. No. 22**; **Tr. Ex. 3** at ¶10.
- At no time prior to the Date of Condemnation did Ward, or anyone else on behalf of

[2] The "Date of Condemnation" refers to the date on which the NOC was filed, September 15, 2022.

the County, disclose or offer to provide a copy of any appraisal of the Property. The County first produced a copy of the Martin Appraisal to counsel for Landowner on September 27, 2022 (twelve days after the Date of Condemnation). **S.O.F. No. 23**; **Tr. Ex. 3** at ¶11.

- At no time prior to the Date of Condemnation did Ward, or anyone else on behalf of the County offer more than $3,200,000 for the Property, an amount below the opinions of value of both the County's appraisers. **S.O.F. No. 24**; **Tr. Ex. 3** at ¶12.
- At no time prior to the Date of Condemnation did Ward, or anyone else on behalf of the County, state to the Landowner that the Property was under threat of condemnation, or that the County was considering taking the Property by the power of eminent domain. **S.O.F. No. 25**; **Tr. Ex. 3** at ¶13.

On September 15, 2022, Beaufort County filed its NOC and Lis Pendens. **S.O.F. No. 26**; **Tr. Ex. 1**. Additionally, on September 15, 2022, counsel for the County signed and filed the false affidavit stating that the amount tendered in the NOC, $3,400,000, had been rejected by Landowner. **S.O.F. No. 27**; **Tr. Ex. 31**. Landowner first received the NOC and Lis Pendens on September 26, 2022, upon delivery to Foster via certified mail. **S.O.F. No. 28**; **Tr. Ex. 1**.

After the Date of Condemnation, and after this Challenge Action was filed, the County belatedly recognized that the Property was unsuitable for a ferry embarkation point — the stated purpose for the taking. In a November 15, 2022 email analyzing Ocean and Coastal Resource Management's ("OCRM") dock requirements for the subject Property and adjacent parcels, Hank Amundson ("Amundson"), the County's Director of Special Projects, realized that establishing a ferry dock on the subject property might be unachievable, stating: "*I see property lines and problems everywhere I look.* ***I fear this is impossible.***" **S.O.F. No. 31**; **Tr. Ex. 56** (emphasis

added). OCRM had denied a prior commercial dock permit application by Landowner for the Property, which the County would have discovered if it had followed the proper condemnation process. **Trial Tr.** at 49:10-52:2; **Tr. Ex. 3** at ¶14; **Aug. 9, 2023 Dep. of Anthony Martin, MAI**, at 26:9-27:19; **Tr. Ex. 41**.

Even after confronting the reality of the Property's unsuitability for its intended purpose, the County commissioned updated appraisals, issued by both appraisers in late 2023 to reflect their estimated value of the Property as of the Date of Condemnation. Mr. Owen issued an updated appraisal report on December 1, 2023, estimating the value of the Property to be $4,370,000, as of the Date of Condemnation. **S.O.F. No. 35**; **Tr. Ex. 35**. Mr. Martin issued an updated appraisal report on December 3, 2023, estimating the value of the Property to be $3,700,000, as of the Date of Condemnation. **S.O.F. No. 36**; **Tr. Ex. 36**.

Because the County admittedly had "no project plans" as of the Date of Condemnation, and because the Property was unsuitable for a ferry embarkation site, the County scrambled to come up with a workable solution while simultaneously litigating its right to take the Property for a ferry embarkation site. Finally, more than a year after the Date of Condemnation, the County developed project plans (entitled "Daufuskie Ferry at Cross Island") it deemed sufficient and submitted an application packet to the Town of Hilton Head on October 20, 2023 for Major Site Development Plan Review for the Daufuskie Ferry at Cross Island. **S.O.F. No. 37**; **Tr. Ex. 77**. Ultimately, the County decided that it would use the Property only for a parking lot and abandoned its stated purpose of developing a ferry embarkation point thereon.

ARGUMENT

I. THE COUNTY'S MULTIPLE FAILURES TO ADHERE TO THE EXCLUSIVE PROCEDURES SET FORTH IN THE SCEDPA INVALIDATED ITS ATTEMPTED CONDEMNATION

Landowner proved that the County failed to adhere to the "exclusive procedures" for

condemnation set forth in the SCEDPA in several respects. Some of these failures were so obvious that not even the County could deny them. Rather, the County deflected the consequences of its aberrant process by blaming the Landowner for wishing to keep its privately owned real property. The County also manufactured a "no harm to Landowner" standard found nowhere in the SCEDPA, which the trial court unfortunately accepted at face value without considering the judicial duty to apply the plain statutory language. In sum, Landowner met its burden of proof with respect to numerous violations, as specifically set forth, *infra*.

A. Sovereign Power of Eminent Domain.

From a historical perspective, the power of eminent domain is vested in the sovereign state. "The power of eminent domain is inherent in sovereignty. It is founded on the law of necessity." *Riley v. S.C. State Highway Dep't*, 118 S.E.2d 809, 810-811, 238 S.C. 19, 23-24 (1961) (citing *Paris Mountain Water Co. v. City of Greenville*, 110 S.C. 36, 96 S.E. 545 (1918)). Thus, the State of South Carolina's ***power*** to condemn private property is limited only by state and federal constitutional protections. The state also has the ability to delegate this power to its agencies and lower forms of local government, such as the County. *Smith v. City of Greenville*, 229 S.C. 252, 92 S.E.2d 639 (1956).

The South Carolina Supreme Court has recognized that any grant of the power of eminent domain from the state to provincial bodies is derived solely through enabling legislation, and, critically, that local political subdivisions such as the County have a lesser degree of condemnation power than the state. "Eminent domain is an attribute of sovereignty. Because condemnation by a state agency is on behalf of the State, a state agency's power of eminent domain is superior to that of a political subdivision." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citing *Riley*, 238 S.C. 19, 118 S.E.2d 809); *see also City of Abbeville v. Aiken*

Electric Coop., 338 S.E.2d 831, 835, 287 S.C. 361, 369 (1985) ("Eminent domain is an attribute of sovereignty and the general rule is that the legislature has the plenary power to grant or withhold the right.") (citing *Atkinson v. Carolina Power and Light Co*., 239 S.C. 150, 121 S.E.2d 743 (1961)). "Even though eminent domain powers may be delegated to municipal corporations, they are not inherent." *City of Abbeville,* 338 S.E.2d at 835, 287 S.C. at 369 (citing *Tuomey Hospital v. City of Sumter*, 243 S.C. 544, 134 S.E.2d 744 (1964)).

Fundamentally, the County's power to condemn property is ***granted***, ***defined***, and ***strictly limited*** by the statute which grants the County this extraordinary capability. If there is a statute conferring the power of eminent domain, then the Court must look to the express terms of the statute, or its necessary implication, to determine the scope of the grant. Here, the County's authority is conferred by S.C. Code Ann. § 4-9-30, which grants to Counties in South Carolina the power to condemn "subject to the general law of this State." The County's power of condemnation is therefore limited by the SCEDPA and it must follow the "exclusive procedures" set forth therein in order to exercise and carry out this power which is derived solely from statute.

B. Duty of Good Faith.

In reviewing statutory violations, it is important to understand the context and significance of statutory protections. As a general principle, government agencies have a duty to act in good faith with landowners whose property is subject to a taking. The condemnor has a duty to engage in the proper course of negotiations that would necessarily serve as the required predicate of condemnation proceedings. *See, e.g.*, *Louisville and Jefferson Cnty. Metro. Sewer Dist. v. Becker*, No. 2001-CA-001457, 2003 WL 1253699 (Ky. Ct. App. 2003). The condemnor, at all stages prior or subsequent to an acquisition by eminent domain of real property necessary for a proposed public project, shall make every reasonable and expeditious effort to justly compensate persons for such

real property by negotiation and agreement. *Matter of City of N.Y.*, 2008 NY Slip Op 28020, 18 Misc. 3d 945, 854 N.Y.S.2d 870 (Sup. Ct.); *see in accord City of Los Angeles v Decker,* 18 Cal. 3d 860 (1977), *Sacramento and San Joaquin Drainage Dist. ex rel. State Reclamation Bd. v. Reed* 215 Cal. App. 2d 60, 69, 29 Cal. Rptr. 847, 853 (1963). "The Condemnor acts in a quasi-judicial capacity and should be encouraged to exercise his tremendous power fairly, equitably, and with a deep understanding of the theory and practice of just compensation." Hogan, *Trial Techniques in Eminent Domain* (1970), at 133, 135.

It has also been held "the courts have a responsibility to see that an authority has not acted in bad faith…" *Redevelopment Auth. of City of Erie v. Owners or Parties in Interest,* 274 A.2d 244, 247 (Pa. Cmwlth. Ct. 1971). "Public bodies… stand in a fiduciary relationship to the public which they are created to govern… conduct must be guided by good faith and sound judgment." *Schwartz v. Urban Redevelopment Auth.,* 192 A.2d 371, 374 (Pa. 1963). A "check rein" shall be kept upon authorities. *Id*. at 374. The Minnesota Supreme Court has held: "When construing this language we have said that the right of compensation thus granted is absolute, precedent to the constitution itself, inherent without recognition therein; and no attempt to deprive the citizen of this incontestable right could be tolerated in any system of free government." *State ex. Rel. Ryan v. Dist. Court of Ramsey Cnty*., 87 Minn. 146, 151, 91 N.W. 300, 302 (Minn. 1902).

C. Exclusive Procedures.

Every Condemnor seeking to take property by the power of eminent domain in South Carolina is governed by the SCEDPA. S.C. Code Ann. § 28-2-60 unequivocally states: "The provisions of this chapter ***shall constitute the exclusive procedure*** whereby condemnation may be undertaken in this State." (emphasis added). There is no ambiguity in this statute, which contains the mandatory language "shall" in directing condemning authorities. The word "exclusive" means

that no other means are permitted, and narrows and limits the exercise of eminent domain power delegated to the County and other municipalities via the respective enabling statutes.

South Carolina jurisprudence reviewing earlier versions of statutory eminent domain procedures is clearly in accord. Prior to the SCEDPA's enactment, in *Godwin v. Carrigan*, 87 S.E.2d 471 (1955), the Supreme Court held that exclusive statutory procedures for condemnation "apply to those cases or situations which are embraced within the machinery of the condemnation statutes."[3] More recently, our Supreme Court has held that "the provisions of the SCDEPA, however, constitute the exclusive procedure for condemnation in this state." *Kiriakides v. Sch. Dist. of Greenville*, 675 SE 2d 439 (2009). This Court of Appeals has held: "The [SCEDPA] is the exclusive procedure for condemnation by a governmental entity." *Vick v. S.C. Dep't of Transp.*, 556 S.E.2d 693, 347 S.C. 470 (Ct. App. 2001). The County itself acknowledged in its NOC that the condemnation was being made pursuant to the SCEDPA. **NOC.**

D. County Violations.

The County ignored and violated the required procedures under the SCEDPA, rendering its attempted taking unauthorized and illegal under South Carolina law. The County's statutory violations—many of which are conceded—include the following.

1. Concealing Appraisals, Violation of S.C. Code Ann. § 28-2-70.

S.C. Code Ann. § 28-2-70 requires, as a condition precedent to initiating a condemnation action, that the property must be appraised and the condemnor " shall make the appraisal available to the Landowner." The County violated this requirement by failing to make not just one, but two

[3] The *Gordon* case discussed Act No. 225, Act April 27, 1953, 48 St. at Large, p. 272, where the General Assembly provided, "Whenever any municipal corporation within this State desires to become the owner of any real estate or to acquire any easement or right-of-way through, over or across such real estate for any corporate or public purpose for which a municipality may now condemn real estate or an interest therein, the procedure prescribed herein shall be exclusive."

appraisals available to the Landowner before initiating its condemnation action. **Trial Tr.** at 185:4-11. The County did not dispute that it failed to provide the two appraisals in its possession to Landowner prior to filing the NOC. The Martin appraisal was provided to Landowner's counsel on September 27, 2022, after the Date of Condemnation, but the County did not produce the higher Owen appraisal at that same time. Months later, during discovery, the County produced the Owen appraisal report, which was dated eight (8) days *prior* to the Martin appraisal. Not only did the County withhold an appraisal, but it provided no explanation as to its failure to provide the Owen appraisal prior to the Date of Condemnation, or why it was withheld when the lower Martin appraisal was finally produced post-condemnation. The only reasonable inference is that the County intentionally withheld the Owen appraisal due to Owen's higher valuation of $3,900,000 versus Martin's valuation of $3,400,000, evidence of bad faith. **Dep. of County Rule 30(b)(6) Designee, Brittany Ward**, at 66:12-68:7; **Tr. Ex. 3** at ¶11.

2. *Failing to Offer Appraised Value, Violation of S.C. Code Ann. §§ 28-2-220 and 28-2-230.*

The County violated S.C. Code Ann. §§ 28-2-220 and 28-2-230, which only permit the filing of a notice of condemnation after the offer of just compensation tendered to the landowner is rejected. The SCEPDA contemplates service of an unfiled notice to allow the landowner to consider the condemnor's offer, and continue negotiations with the condemnor for thirty (30) days before accepting or rejecting the offer. In this case, the County violated the statute by failing to offer and appraisal value, and by filing its NOC with the Court on September 15, 2022, eleven (11) days before service on the Landowner. **Tr. Ex. 1**.

3. *Filing a False Affidavit, Violation of S.C. Code Ann. § 28-2-240(1).*

S.C. Code Ann. § 28-2-240(1) requires that along with a notice of condemnation, the condemnor must file an affidavit stating "that the amount tendered in the condemnation notice has

been rejected." Here, although the County did file an affidavit, signed and sworn by attorney Murphy, the affidavit contained an untrue statement, specifically that the amount tendered in the NOC, $3,400,000, had been rejected by Landowner, when in fact $3,200,000 was the highest amount ever offered to Landowner.[4] **Tr. Ex. 1**; **Tr. Ex. 3** at ¶13; **Tr. Ex. 24** at No. 4; **Tr. Ex. 31**; **Tr. Ex. 60**.

4. Failing to Make Plans Available for Inspection (Because No Plans Existed), Violation of S.C. Code Ann. § 28-2-280(C)(6).

The County violated S.C. Code Ann. § 28-2-280(C)(6) by expressly stating in ¶8 of the NOC that it had no plans as of the date of its filing and therefore failing to "specify a location within the county where the property to be taken is situated at which the landowner may inspect the project plans." **Tr. Ex. 1**; **Tr. Ex. 61**; **Dep. of County Rule 30(b)(6) Designee, Hank Amundson ("County-Amundson Dep."), Vol. I**, at 154:24-155:6; **Dep. of County Rule 30(b)(6) Designee, Jared Fralix ("County-Fralix Dep."), Vol. I**, at 88:2-91:8, 101:11-104:24.

5. Failing to Provide an Offer Based Upon the Statutory Date of Valuation, Violation of S.C. Code Ann. § 28-2-440.

The County violated S.C. Code Ann. § 28-2-440, which states that "the date of valuation is the date of the filing of the condemnation notice," by failing to not only to offer an estimate of just compensation as of the date of valuation, but by neglecting to update its appraisals to reflect opinions of value as of the date of filing of the NOC. **Tr. Exs. 6-7**. In fact, not only did the County conceal appraisals, failing to provide both the Martin Appraisal and the Owen Appraisal prior to filing the NOC, but even these appraisals were stale, with dates of valuation more than one year prior to the NOC's filing. Belatedly, both Martin and Owen issued updated appraisals in December

[4] Even the $3,200,000 offer, which was lower than either County appraisal, was made without the County disclosing that it was considering acquisition by condemnation.

2023 that reflected their opinions of the Property's value as of the Date of Condemnation, showing significantly higher valuations than the older appraisals. **Trial Tr. 31:9-25**.

6. *Failing to Provide Landowner with Reasonable Notice Prior to Entering Property, Violation of S.C. Code Ann. § 28-2-70(C).*

S.C. Code Ann. § 28-2-70(C) requires that the condemnor give "reasonable notice to the landowner" prior to entering on the "real property in which an interest is proposed to be acquired for the purpose of making a survey, determining the location of proposed improvements, or making an appraisal." The County ignored this requirement and gave Landowner no notice prior to directing its surveyor to enter the Property. **S.O.F. No. 33; Trial Tr. at 94-95; Tr. Ex. 64; County-Amundson Dep., Vol. I**, **at 54-57.** Even worse, by sending a surveyor to the Property after the Challenge Action was filed, the County also violated the automatic stay imposed by S.C. Code Ann. § 28-2-470, which states, in relevant part, that "[a]ll proceedings under the Condemnation Notice are automatically stayed until the disposition of the action, if any, unless the landowner and the condemnor consent otherwise." Because all proceedings under the NOC were stayed once Landowner's Complaint in this matter was filed, the County had no right to enter the Property or perform surveying work, without notice to and permission of, Landowner. **Tr. Exs. 64**; **Tr. Ex. 66**.

At trial, the County suggested that the SCEDPA sets forth no specific provision for a private right of action, and therefore, any violation of the statute is not actionable in a challenge action, but could perhaps be brought as a separate claim for denial of due process. **Trial Tr. at 26:10-28:21**. However, such an argument clearly misapprehends both the purpose of the SCEDPA and the nature of a challenge action. Because the SCEDPA sets forth the "exclusive procedure" for condemnation, and because the County's power of condemnation is derived solely by statute, the County's process was defective ***as a matter of law.*** *See* S.C. Code Ann. § 28-2-60 (The

provisions of this chapter shall constitute the exclusive procedure whereby condemnation may be undertaken in this State").

E. Guidance from Other States Validates Strict Construction.

Furthermore, the County's failures to comply with the specific statutory directives give rise to a challenge independent of any constitutional ground. Numerous courts in multiple jurisdictions over many decades have held that the failure of a condemnor to strictly comply with a statute governing the exercise eminent domain power renders the condemnation case subject to dismissal. The general principle of law that requires strict and exacting compliance with such statutes has been established and reiterated across numerous jurisdictions consistently for years. See, e.g., *Agricola v. Harbert Constr. Corp.*, 294 Ala. 7, 10, 310 So. 2d 472, 475 (1975) ("It goes without saying that statutes conferring the power of eminent domain must be strictly construed in favor of the owner of the property sought to be condemned") (citing *Ensign Yellow Pine Co. v. Hohenberg*, 200 Ala. 149, 75 So. 897 (1917)).

It is apparent based on the plain language of the SCEDPA that our legislature intended for violations of the SCEDPA to be used as a basis to challenge a condemning authority's exercise of eminent domain power. Many courts throughout the country have recognized that statutory violations similar to the ones in this case can be used to challenge an attempted condemnation. Some of these decisions are summarized below.

In *City of Marietta v. Summerour*, 302 Ga. 645, 807 S.E.2d 324 (Ga. 2017), the Georgia Supreme Court held that compliance with statutory pre-condemnation negotiation requirements was mandatory and that failure to do so warranted dismissal of the condemnation proceeding. A New Jersey appellate court, in *Monmouth County v. Whispering Woods*, 222 N.J. Super. 1, 535 A.2d 968 (N.J. App. Div. 1987), affirmed the lower court's dismissal of a condemnation action

when the condemning authority failed to make an appraisal available to the condemnee and failed to engage in good faith negotiations prior to commencing the action pursuant to a statutory requirement. *Id.* at 10, 535 A.2d 968 (noting that the purpose of the statutory requirement was to "to encourage [Condemnors] to make acquisitions without litigation" and that "'[i]f a Condemnor may ignore [the statutory requirement]… the purpose of [the statutory requirement] will be completely frustrated.'"). The *Whispering Woods* court further noted that "[t]o that extent, **dismissal of the complaint will have a prophylactic effect in that it will help to promote compliance with the statutory requirement**." *Id.* (emphasis added).

In *City of Charlotte v. McNeely*, 8 N.C. App. 649, 175 S.E.2d 348 (1970), the North Carolina Supreme Court affirmed dismissal of a condemnation proceeding where the condemning authority failed to adopt a pre-condemnation resolution in accordance with statutory requirements. The Virginia Supreme Court, in *City of Richmond v. Dervishian*, affirmed the lower court's decision to enjoin condemnation proceedings due to the condemning authority's failure to follow pre-condemnation resolution requirements. 190 Va. 398, 57 S.E.2d 120 (1950). Previously, in *City of Richmond v. Childrey*, the Virginia Supreme Court affirmed an award of damages to a landowner against the city where the city failed to comply with statutory requirements before performing roadwork which impacted the landowner's property, noting that **"[the legislature] may place its own limitations on the extent to which the power [to take property for public use] will be granted and the manner of its exercise, and when it does so its mandate must be obeyed. It is not for the courts to seek for reasons for restraint upon the exercise of the power**." 127 Va. 261, 103 S.E. 630 (1920) (emphasis added).

In California, a trial court's judgment in favor of condemning authority was vacated where the condemning authority failed to comply with pre-condemnation resolution requirements. *City*

of Stockton v. Marina Towers, LLC, 171 Cal. App. 4th 93, 114, 88 Cal. Rptr. 3d 909, 913 (2009). Similar to the instant case, the *City of Stockton* opinion described the government actions as "'condemn first, decide what to do with the property later.'" *Id*. at 99.

Where the condemning authority failed to comply with statutory pre-condemnation ordinance requirements, an Illinois appellate court vacated the lower court's judgment in favor of the condemnor. *Vill. of Cary v. Trout Valley Association*, 282 Ill. Ap. 3d 165, 667 N.E.2d 1082 (2d Dist. 1996). The Florida Supreme Court upheld a dismissal of a condemnation action where the condemning authority initiated the action without passing a required resolution, as required by statute. *Tosohatchee Game Preserve, Inc. v. Central & Southern Florida Flood Control District*, 265 So. 2d 681, 684 (Fla. 1972). The Utah Court of Appeals upheld the lower court's dismissal of a condemnation action when the condemning authority failed to comply with statutory pre-condemnation notice and hearing requirements. *Salt Lake City Corp. v. Kunz*, 2020 UT App. 139, 476 P.3d 989 (Utah 2020).

Mandatory, strict compliance with the SCEDPA is also consistent with the general tenets of statutory construction, specifically that no portion of a statute be rendered surplusage or be interpreted to lead to an absurd result. *See State v. Smith (In re Decker)*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995); *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012)("[t]his Court will not construe a statute in a way which leads to an absurd result or renders it meaningless"). Not enforcing the SCEDPA's requirements would frustrate the General Assembly's intent in enacting them and create disparity in an intentional, uniform set of procedures that government entities must follow in exercising the power of eminent domain in this state.

F. The Amended Order Errs by Applying Equitable Principles to the Strict Application of the Unambiguous Provisions of the SCEDPA.

To excuse the County's widespread failures to comply with the statutory mandates, the Amended Order improperly supplemented the plain and unambiguous language of the "exclusive procedures" of the SCEDPA with a requirement of harm or prejudice to the Landowner, and a balancing of the equities test. The lower court utilized these principles to rule on Landowner's claims despite the SCEDPA's complete silence on the issue. Where the language of the statute is clear and explicit, the court cannot rewrite the statute or inject matters into it that are not in the legislature's language. *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970). Under the plain meaning rule, it is not the court's place to alter the meaning of a clear and unambiguous statute. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000).

The trial court also overlooked a clear statutory inference in the SCEDPA. The Amended Order notes: "S.C. Code §28-2-70(B) states, 'A failure of any party to comply with this subsection is not a defense to a condemnation action.'" **Amended Order at 16**. The full text of the subsection reads as follows:

> (B) The condemnor and landowner shall make reasonable and diligent efforts to negotiate an agreement upon the amount of compensation to be paid. The condemnor shall certify to the court that a negotiated resolution of the conflict was attempted prior to the institution of the condemnation action. A failure of any party to comply with this subsection is not a defense to a condemnation action.

S.C. Code Ann. § 28-2-70(B). Landowner did not assert non-compliance with this subsection as a ground or claim in its Challenge Action. However, the logic that must be drawn from this subsection is that the legislature deemed it necessary to include the language — specific to this subsection — that the failure to comply does not create a defense to the right to condemn. Because this disclaimer relates only to this specific subsection, the inference that must be drawn is that the

failures of the condemnor to adhere to the *other* provisions of the SCEDPA do, in fact, create defenses to a condemnation action.

Furthermore, the trial court's selected jurisprudence on equitable principles involved cases having nothing whatsoever to do with government takings. The Amended Order relies upon a life insurance policy refund case from 1938, a 1958 building permit case, a 2011 mortgage foreclosure case, and an adverse possession case decided by the United States Supreme Court in 1842. The principle that "once a party establishes an equitable right, the court may set aside strict formalities that would otherwise undermine the equity" is inapposite. The County has a ***statutory right to condemn, not an equitable right***. It is the landowner who has the equitable right—to ***enjoin*** a flawed condemnation.

Moreover, there is no evidence in the record to support equitable conduct by the County. The Amended Order fails to list out and balance the equities of the respective positions of the parties, but it is clear from the record that the County's conduct was extraordinarily inequitable. The County created the problem by overstaying at Buckingham Landing, and compounded the problem through inertia and delay. **S.O.F. Nos. 4 and 5.** The County's Administrator who selected the site was terminated for cause. **Trial PowerPoint No. 1 at Slide 28**. The County concealed and withheld appraisals; before filing the NOC, offered Landowner less than either amount contained in its appraisals; filed a false affidavit; admitted it had no project plans; and sent surveyors on the Property in violation of the automatic stay, to name a few examples. **S.O.F. No. 27; Trial Ex. 1 at ¶8; Tr. Ex. 64.**

On the other end of the "balancing of the equities," the worst thing the evidence revealed about the Landowner was that it did not want to voluntarily sell the Property at the price offered, which was below any estimate of fair market value even according to the County's appraisers. A

fair and impartial reading of the record demonstrates that the equities favor the Landowner, who is the only party that may affirmatively assert equity in support of its case.

G. The Failure to Follow the Exclusive Procedures of the Statute Deprived the County of Its Right to Condemn, No Matter the Harm or Prejudice to Landowner.

Whether the Landowner is was damaged or prejudiced (**Amended Order at 13-15**) is immaterial to the requirement of statutory compliance, and forms no basis, statutory or otherwise, to excuse statutory non-compliance of the condemnor. Thus, the trial court erred in the following conclusion: "Fourth, I find that while the County's procedure did not strictly adhere to the SCEDPA, the Landowner has proven no harm resulting from the County's deviation, and it would be an extreme remedy for this court to find in favor of the Landowner in this Challenge action and dismiss the Condemnation action for anything less than strict adherence to the procedures unless the statutory law or case law requires it." **Amended Order at 17**.

There is no evidentiary support in the record as to why dismissal of the Condemnation action would be an "extreme" remedy or prejudicial to the County. If the County fails to follow the exclusive procedures, it must start anew. This is Landowner's sole remedy provided by the General Assembly. Dismissal of the condemnation action would have meant only that the County would pay for the Property based on a valuation date after following the necessary statutory and constitutional steps to condemn, rather than rushing through its self-created, non-compliant process to the prejudice of the Landowner. Thus, strict adherence to the procedures is plainly required by statutory law.

II. NO PLANS MEANS NO CONSTITUTIONAL TAKING

A. Date of the NOC is Operative.

The trial court mistakenly rejected the plain and clear statutory language which enables challenge actions to be brought, by failing to evaluate the Project as of the Date of Condemnation

or Date of Service.

Section 28-2-470 states, in relevant part:

> An action challenging a condemnor's right to condemn must be commenced in separate proceedings filed in the court of common pleas in the county in which the property or a portion thereof is located. The action **must be commenced within thirty days after service of the Condemnation Notice upon the landowner**. **All proceedings under the Condemnation Notice are automatically stayed until the disposition of the action**, if any, unless the landowner and the condemnor consent otherwise.

S.C. Code Ann. § Section 28-2-470 (emphasis added); *see also*, *e.g.*, S.C. Code Ann. § 28-2-440.[5]

By considering facts and circumstances arising after the Date of Condemnation and Date of Service in order to evaluate the challenge claims, the trial court erred.[6] Based upon the statutory language, the landowner must evaluate its position within the 30-day deadline required to file a challenge. Upon this deadline, the landowner does not receive the benefit of foresight as to future activities the condemnor may (or may not) undertake to change its project to attempt to pass muster constitutionally and under the SCEDPA.

The scope of the project contained in the NOC is very clear and is recited at page 1 of the Amended Order, which found that the condemnation was "for the purpose of constructing a permanent ferry embarkation landing and public parking on the mainland to service Daufuskie Island." **NOC**. However, the Amended Order states: "At the time of filing, the County intended to use the Property as an embarkation and parking site; however, this plan later changed…"

[5] Although only applicable to the condemnation action, and not the challenge, the fact that the date of valuation is the date of filing, as set forth in Section 28-2-440, further supports that the attempted condemnation being challenged must be evaluated at the time of the condemnation notice.

[6] The SCEDPA defines "condemnation action" and sets the challenge deadline based on the date of service. However, the County proceeded in the opposite manner required by the SCEDPA, filing the NOC before service. Additionally, the County did not create any project plans until well after both dates, meaning either point of temporal reference results in the same outcome: judicial error by the lower court.

Amended Order at 14.

However, the trial court permitted introduction of, and in fact based its ruling on, a different public purpose other than the one cited in the NOC. The Amended Order adopts the County's position that its plan has morphed and the Property is now being taken simply for a "self-contained" parking lot. **Amended Order at 8**. Even though the trial court attempted to divide the parking from the rest of the ferry project, it cannot do so and thus contains further contradictions. For example, two pages after the "self-contained" characterization, the Amended Order states: "However, this case is distinct because the County is tasked with finding a suitable location for a ferry dock, including both embarkation and parking, which limits the available property options." **Amended Order at 10**. The Amended Order views the "project" alternatively as a "ferry and parking project" or as a "parking project," whichever description benefits the County on a particular issue. Prior to the Date of Condemnation, there was no distinction, as a private ferry company handled parking administration responsibilities according to its contract with the County. **Tr. Ex. 5**. Moreover, the Amended Order failed to recognize that if viewed as a "self-contained" parking lot, due to plan changes during the pendency of the Challenge Action, ***the record contains no evidence to show that the County studied any alternative sites for "self-contained parking lots."***

It seems obvious that a condemnor cannot fundamentally change the project during the pendency of the challenge action. Project purpose, scope and plans must be evaluated as of the date of filing of the NOC. Holding otherwise would permit a condemnor to take property for no purpose at all, so long as the government "figures it out" at some point during the pendency of the challenge action, which is filed to contest a taking as noticed and described in the condemnation notice. What the County has done, and the lower court sanctioned in this case, is to effectively

freeze real property without government planning or due diligence, tying it up with a condemnation notice, and depriving Landowner of its use and enjoyment of the Property, while the County makes post-hac changes to its project in an attempt to conform to the law. Establishing such precedent is extremely dangerous and violative of fundamental private property rights.

B. In Its Notice of Condemnation, Condemnor Admitted "No Plans" Existed.

The SCEDPA requires the Condemnor to attach a map, diagram, sketch or reference to a project plan showing the property to be taken and "specify a location within the county where the property to be taken is situated at which the landowner may inspect the project plans." S.C. Code Ann. § 28-2-280. The NOC filed by the County did not include any such map, diagram, sketch, or reference to a project plan. Nor did the NOC make project plans available for inspection. In fact, the NOC states there are "no project plans at this time." **Tr. Ex. 1 at ¶8**.

As demonstrated in the Complaint and NOC, Landowner alleged very clearly that the County admitted in its own NOC that it did not have project plans, and made none available. Whatever the requisite degree of project plans contemplated by the statute, the County failed to meet it. Thus, contrary to the Amended Order's conclusion, there can be no question, as an admission and stipulation, that the County violated S.C. Code Ann. § 28-2-280(C)(6) on its face. The Amended Order misstates Landowner's position on project plans, reciting that: "The Landowner contends that the County should have had fully developed construction plans before filing a Condemnation action." Order at 14. This conclusion is unsupported in the record.

C. Without Any Plans, the County Made No Showing of Public Use.

Article 1, Section 13 of the South Carolina Constitution states that public funds may not be used to condemn property "for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use." As set forth in

Karesh, "Mere benefit to the public or permission by the owner for use of the property by the public are not enough to constitute a public use, but it must appear that the public has an enforceable right to a definite and fixed use of the property." *Karesh v. City Council of Charleston*, 247 S.E.2d 342, 271 S.C. 339, 342 (1978). The government must have "exclusive ownership and control over the parking facility" to demonstrate public use. *Goldberg v. City Council of Charleston*, 254 S.E.2d 803, 273 S.C. 140, 141 (1979). These holdings were most recently affirmed by the South Carolina Supreme Court in *Ga. Dep't of Transp. v. Jasper Cnty.*, 355 S.C. 631, 636, 586 S.E.2d 853, 855 (2003).

Thus, in order to constitute a public use in this case, the County must either operate or control the ferry service, or the general public must have unfettered access to the property taken. Because the County did not create or supply any project plans, there was no evidentiary basis upon which the trial court could conclude that the Project meets the necessary criteria for public use. In fact, there was ample evidence that the ferry Project, a stated purpose in the NOC, failed the public use test. This includes that the County had no intention to operate a County ferry service with County personnel and vessels on the Date of Condemnation. **County-Amundson Dep. Vol. I**, at 63:3-64:6. Also, the purpose of the Defendant's ferry project is to foster economic development and continue contracting the service to a private ferry service operator. **County-Amundson Dep. Vol. I**, at 10:11-23, 13:1-17, 16:20-24, 21:6-16, 22:23-25, 23:25-¬24:17, 24:25-27:17, 30:24-35:20, and 110:11-25.

Finally, the general public will not have unfettered rights to use and enjoy the Property condemned under any scheme or project plan of the County's while the private ferry operator is embarking or disembarking. The private operator's rules specifically control and limit the passengers using the private ferry, parking is limited to those using the private ferry, and the public

rights to use the facilities will be limited, not unfettered, at the ferry dock. **Tr. Ex. 5** at Attachment 1; **Tr. Ex. 71** p. 5 at § 2.1.2.1, p. 7 at § 2.2.2; **Tr. Exs. 84-95**; **County-Amundson Dep. Vol. I**, at 33:10-35:20; **County-Amundson Dep. Vol. III**, at 303:16-304:18; **County-Fralix Dep., Vol. II**, at 30:05-41:17. Limiting access to the parking lot for ferry passengers and preventing unfettered access by the public to the ferry dock, while allowing a private third-party to control the docking facility, fails the public use test defined by our Supreme Court.

The Amended Order's conclusion as to public use is in error. The Constitution and case law require that either the County own and operate the ferry operation or that the public have unfettered access to the property taken. The evidence is clear that the County intended to lease the Property (and the right to wharf out) to a private company. The evidence is equally clear that the public will not have unfettered access to the dock. **Tr. Ex. 5** at p. 12; **Tr. Exs. 84-95**. Thus, even if the County's failure to develop project plans is set aside, the evidence shows that the trial court's finding of public use was in error.

D. Without Any Plans, the County Made No Showing of Need and Necessity.

Landowner also challenged the County's condemnation on the grounds that the attempted taking exceeds the County's demonstrated need and necessity for the Property. "It is well established law that necessity, as well as public use, must always exist in order to warrant the taking of lands, through condemnation, by a grantee of the power of eminent domain. The delegation of the right to exercise that power carries with it the implied condition that it shall be exercised only to the extent found necessary." *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. at 388–89, 175 S.E.2d at 810. Necessity is a legislative question. *Id.* at 396, 175 S.E.2d at 814. "Legislative enactments are to be construed as they are written," and legislative intent is ascertained from the language used. *Id.* at 402, 175 S.E.2d at 817. "The grantee of the power to

condemn must not abuse the discretion confided by the legislature, and spoliate private property by taking, for pretended public use, more than a reasonable necessity requires." *Atkinson v. Carolina Power & Light Co.,* 121 S.E.2d 743, 748, 239 S.C. 150, 158 (1961).

The County submitted no evidence to support a formal finding by the County or its Council of the need or necessity of acquiring the entire five acres of the Property prior to the Date of Condemnation Moreover, consistent with its failure to develop Project plans, Defendant offered no evidence that any study or investigation was undertaken to determine the acreage need for parking or ferry embarkation, prior to the filing of the NOC. Rather, the County sought to take as much land as possible for parking without any study or analysis for the present or future prior to the filing of its NOC. **Trial Tr.** at 139:18-140:14; **County-Amundson Dep. Vol. I**, at 124:12-126:19, 141:23-142:22. The County's methodology for creating parking was to identify land near a potential embarkation site and create a concept plan that maximized the parking spots available within the acreage identified, instead of first analyzing the parking needs for the Project. **Tr. Exs. 47, 48, 50; Dep. of Beaufort County Rule 30(b)(6) Designee, David Wilhelm**, at 143:16-19, 153:21-154:18, 154:23-155:07, 163:17-24, 239:07-240:10, 240:17-241:01, 242:18-244:07.

A pre-taking "needs and necessity" analysis is required to avoid an arbitrary and capricious abuse of discretion. In the exercise of eminent domain, the government must take only the minimum amount of land necessary for its project. An example of this common law restriction has been codified in the SCEDPA, which requires a valuation risk analysis to justify taking more land than the project plans call for. S.C. Code Ann. § 28-2-100. Without any plans, the County could make no viable argument in favor of need and necessity, and the trial court erred in finding to the contrary.

E. No Plans Demonstrates an Abuse of Discretion in Site Selection.

In *S. Dev. Land*, this Court found that a condemnor abused its discretion by condemning

property without "weighing and considering" criteria which would show the suitability of the property for the intended use. *S. Dev. Land and Golf Co. Ltd. v. S.C. Public Serv. Auth*., 305 S.C. 507, 516, 409 S.E.2d. 428, 434 (Ct. App 1991). The Court went on to clarify that failing to consider legitimate project factors or to have project plans which establish a public use constitute abuses of discretion in a condemnation case. The Court noted that such an abuse occurred because the condemning authority did not fully investigate one of the following criteria or legitimate project factors, as articulated in *Fla. Power & Light Co. v. Berman*, 429 So.2d 79 (Fla. Dist. Ct. App. 1983): "(1) availability of an alternate route; (2) cost; (3) environmental factors; (4) long-range planning; and (5) safety considerations[.]" *S. Dev. Land*, 305 S.C. at 514, 409 S.E.2d at 432. The Court focused on the condemnor's choice of a route, concluding that the condemnor failed to consider the cost of its selected power line route when considering alternate route alignments, which constituted an abuse of discretion, rendering the condemnation defective. *Id*. at 516, 409 S.E.2d at 434.

The abuse of discretion framework of *S. Dev. Land* was applied in this Court's 2018 decision, *Oien Family Investments, LLC v. Piedmont Municipal Power Agency*, which relied on testimony that the condemnor had "considered environmental impact, land use, impact to individual landowners, costs for the route, and visual impact in selecting" the property being condemned, and ultimately chose the most cost-effective option. 424 S.C. 168, 181, 817 S.E.2d 647, 654 (Ct. App. 2018).

Here, the evidence shows that due to its failure to plan prior to seeking to take the Property, the County did not consider any of the legitimate project factors recognized by our courts. Prior to the Date of Condemnation, the County failed to:

- prepare plans or specifications detailing elements of either the proposed ferry system

or its components, such as docks, facilities, or other structures (**Tr. Ex. 1**; **Tr. Ex. 61**; **County-Amundson Vol. I**, at 63:16-25, 154:24-155:6; **County-Fralix Dep. Vol. I**, at 88:2-91:8, 101:11-104:24, 145:20-22, 148:21-151:3);

- determine the reasonable likelihood of the issuance of any of the necessary permits to carry out or construct its proposed ferry system (**Tr. Exs. 46, 47**; **County-Wilhelm Dep.**, at 233:2-235:4; **County-Fralix Dep. Vol. II**, at 13:10-24; **County-Amundson Dep. Vol. I**, at 131:2-9, 133:18-136:17, 161:13-166:1);
- prepare any cost estimates, or budgets, for ferry embarkation land or marine structures to be constructed on Landowner's Property (**County-Wilhelm Dep.**, at 93:6-23); and
- consider the costs involved in attempting to obtain permits, designing, or constructing the embarkation facilities or comparing those costs with other embarkation site options (**County-Fralix Dep. Vol. I**, at 100:23-103:6).

Here, the County's NOC clearly states the intent to establish a ferry embarkation point on the Property to be taken and admits that the County did not have any conceptual, preliminary or final plans sufficient to establish a legitimate project factors analysis. The County's post-taking justifications for the lack of a plan or rationale for the taking are insufficient under the South Carolina statutory and constitutional scheme. **Trial Tr.** at 78:1-109:15. Similarly, deadlines to relocate existing facilities on other property imposed by judicial decrees in a related but different case are not justification for bypassing and violating the statutory process for condemnation. This is especially the case when the County's staff was unknowledgeable about the legal requirements for acquiring land through the governmental power of eminent domain, meaning the County

should have engaged outside assistance or taken the time necessary to study and comply with the law. **Trial Tr.** at 78:1-109:15; **Trial Tr.** at 208:20-220:4.

Not only does the lack of Project plans, as admitted in the County's NOC, constitute a statutory violation of the SCEDPA, as described above, but it also signifies the County's failure to comply with the requirement to consider legitimate project factors. The evidence, at best, shows the County took private property based on a few options arbitrarily chosen by its administrative staff, without any cost comparisons or permitting, design, or construction feasibility studies to attain the goals of its project. **Tr. Exs. 46, 47**; **County-Wilhelm Dep.**, at 233:2-235:4; **County-Fralix Dep. Vol. II**, at 13:10-24; **County-Amundson Dep. Vol. I**, at 131:2-9, 133:18-136:17, 161:13-166:1.

The statutory scheme of the SCEDPA contemplates a pre-condemnation study and analysis consistent with South Carolina jurisprudence concerning legitimate project factors to be considered, weighed and studied prior to the taking of the property as recognized in *S. Dev. Land* and *Oien.* This process requires any such analysis to take place before service or filing of a condemnation action. Substantively, post-taking alternative studies or deviations from the pre-taking plan, eviscerates the challenge process contemplated by the General Assembly. This point is made abundantly clear by the statutory requirement of having a project plan sufficient to enable a landowner to ensure the protection of a reasonable alternative analysis of the proposed use of the property to be taken.

III. THE AMENDED ORDER MUST BE REVERSED DUE TO SEVERAL OTHER FUNDAMENTAL DEFECTS

A. The Amended Order Impermissibly Ignored the Parties' Stipulations.

Without explanation, the lower court elected to bypass and ignore the Stipulations of Fact entered into by and between the parties, and submitted to the Court as Court's Exhibit No. 1, on

the date of trial, October 14, 2024. **Trial Tr.** at 6:4-9. Other than a passing reference to "stipulations of fact" in paragraph 2 of the Amended Order, the stipulations are ignored, never cited, and generally eschewed in favor of an unsupported statement of facts lacking a single citation to the trial transcript or any exhibit. Consequently, unmoored from the record, the Amended Order contains "facts" that are misstated, mischaracterized, or completely without any evidentiary support. Because the Amended Order fails to cite any of the parties' stipulations, it contains numerous contradictions of the stipulations in its factual findings. The lower court erred by failing to adhere to the binding stipulations between the parties.

> "A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations, of course, are binding upon those who make them." A stipulation is an agreement, an understanding. The court must construe it like a contract, *i.e.,* interpret it in a manner consistent with the parties' intentions.

Porter v. S.C. Public Serv. Comm'n, 507 S.E.2d 328, 337, 333 S.C. 12, 30 (1998) (quoting *Kirkland v. Allcraft Steel Co.,* 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998); citing *Webster v. Holly Hill Lumber Co.,* 268 S.C. 416, 421, 234 S.E.2d 232, 234 (1977)).

"Because the court construes it like a contract, a stipulation that is unambiguous and explicit must be construed according to the terms the parties have used, as those terms are understood in their plain, ordinary, and popular sense." *Porter*, 507 S.E.2d at 337, 333 S.C. at 30 (1998) (a "court must construe unambiguous contracts according to plain meaning of terms used by parties … it plainly is 'the duty of the court to construe a written contract if there be no ambiguous language which is susceptible of more than one meaning'" (*id.*) (citing *C.A.N. Enterprises, Inc. v. S.C. Health and Human Servs. Fin. Comm'n,* 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988); quoting *Chapman v. Metro. Life Ins. Co.,* 172 S.C. 250, 256, 173 S.E. 801, 804 (1934); *accord* 83 C.J.S. *Stipulations* § 11 (1953); 73 Am.Jur.2d *Stipulations* § 7 (1974))).

"When a party has not asked the court to relieve it from the terms of a stipulation, that party remains bound by the stipulation." *Porter*, 507 S.E.2d at 338, 333 S.C. at 31 (internal citation omitted). Here, no party made any such request. Thus, disregarding the stipulations of fact agreed to by the parties was in error.

B. The Amended Order Contains Findings of Fact with No Supporting Evidence.

The Amended Order recites certain findings of "fact" that directly contradict all evidence in the record, have no basis in any testimony or documentary evidence presented at trial, and run contrary to the Stipulations of Fact executed by the parties and presented to the trial court. The following "facts" in the Amended Order are demonstrably inaccurate.

- "Furthermore, the record shows that when the Landowner's counsel requested the appraisal, the County provided it immediately on September 27, 2022, just 12 days after the NOC was filed, and within a day [*sic*], the NOC was served." **Amended Order at 13**. This finding is untrue and inaccurate. One County appraisal, the lower valuation of the two commissioned (the $3.4mm Martin appraisal), was sent to Landowner's counsel on September 27, 2022. **Motion to Reconsider, Exhibit A**. The Owen appraisal, with a higher $3.9mm opinion of value, was ***not*** delivered, ***nor even disclosed***, until it was produced much later, after the Challenge Action had been filed, as part of the County's document production in discovery. **Motion to Reconsider, Exhibits B and C**. *See also* **Pre-Trial Brief at p. 11 § A, ¶1.**
- "Nothing in the facts indicate that the County withheld the appraisals or failed to provide them upon request." **Amended Order at 13**. This statement is plainly incorrect. The Owen appraisal was withheld for months.

- The Amended Order states that the County filed the NOC "[a]s a result of Broad Creek's refusal to sell the property outright." Amended Order at 4. However, the testimony at trial directly contradicts this finding. *See* Ward testimony: "Q: On the date that the notice of condemnation was filed, the landowner had not rejected an offer of $3.4 million, isn't that right? A: The landowner had not provided any response to any offer at that point." **Trial Tr. 68:14-18.**

The Amended Order also contains findings of fact that were not supported or proven by evidence in the record. Specifically, the Amended Order's findings set forth in the subparagraphs below are not supported.

- "The testimony clearly established the ferry landing would be in operation but for the challenge action. The testimony also demonstrates that the Challenge action is the only issue holding up this project." **Amended Order at 8**. Hank Amundson testified during trial that parking was "the main issue at this point." **Trial Tr. 215:4-7**. However, there is no testimony that but for the Challenge Action, the ferry landing at Cross Island would be in operation. In fact, the County determined the Property was not suitable for a ferry landing. *See supra* Argument Sec. II.A.
- "The County will own and control the parking lot to be placed on the Broad Creek property, and the public will enjoy access to the parking lot." **Amended Order at 9**. First, the County's intentions on ownership and control of a "self-contained" parking lot were developed after the September 15, 2022 filing of the NOC and should not have been considered. Second, evidence regarding the operation of the ferry system prior to the filing of the NOC demonstrated that the private ferry operator, not the County, exercised control over the parking area. **Tr. Ex. 5**. Third, the County's

testimony was not at all clear as to unfettered access by the public to the parking lot (Q: Do you know if the County plans to charge for this parking lot? A: That is not determined.) **Trial Tr. 87:11-13**.

- "All parties agree that the affidavit was incorrect; however, ***the Court determines that it resulted from a scrivener's error or miscommunication on the County's part.***" **Amended Order at 14** (emphasis added). There is no evidence to support or provide a basis for this finding.
- "Therefore, it is clear that the County requires more than 200 spaces to adequately address its present parking needs, a fact that is not disputed." **Amended Order Order at 11**. There was no such finding prior to the filing of the NOC; the Town of Hilton Head permit applied for by the County does not support the need claimed by the County. **Trial PowerPoint No.2 at Slide 18**.
- There is no support in the record for the finding that Cantzon Foster "was aware that County Council on August 8, 2022, had approved a $3.4 million budget for the property." **Amended Order at 13; Trial Tr. 43:3-12**.

CONCLUSION

If allowed to stand, the Amended Order would have a vastly negative impact on landowner protections in this state. By permitting a taking that fails to comply with both SCEDPA mandatory conditions precedent, and ignores constitutional safeguards, the Amended Order would create a system where any taking could be justified *post hac*, even in the absence of any government planning, much less reasonable and rational planning. The Amended Order must therefore be reversed and an order entered ruling in favor of Landowner on its claims.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Judge Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2025-000615
Circuit Court Case No. 2022-CP-07-01978

Broad Creek Development, LLC .....Appellant,

v.

Beaufort County.....Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief in this matter on the above-named Respondent by e-mailing a .pdf copy of the same to its counsel of record, on this 20th day of October, 2025, addressed to the recipient attorney's primary e-mail address listed in the South Carolina Attorney Information System as shown below:

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