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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 REPLY BRIEF

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INTRODUCTION

Beaufort County seeks license to take private property from its citizens with impunity, ignoring the "***exclusive procedure***" enacted by the South Carolina General Assembly—the SCEDPA (App. Br. at 1, defined). Emboldened by the trial court's ruling, the County insists it can follow any process to condemn property—or no process at all—at its whim, so long as it does not act in bad faith, fraudulently, or with clear abuse of discretion. Resp. Brief at 9. Allowing the Order to stand would reinforce the County's misguided view of governing statutory law as discretionary rather than mandatory, and would render SCEDPA landowner protections meaningless. Affirmance would also squash the expressly stated legislative intent of uniform proceedings in eminent domain actions. Reversal is therefore both warranted and necessary.

ARGUMENT

I. THE EXCLUSIVE PROCEDURE OF THE SCEDPA IS MANDATORY, NOT DISCRETIONARY, AND STRICT COMPLIANCE IS REQUIRED

The County wastes no breath with a futile argument that it possesses an inherent sovereign power of eminent domain. Thus, the County appears to acknowledge, as it must, that its power of condemnation derives solely by statute, namely 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." Likewise, the County does not quibble with the inexorable conclusion that the SCEDPA is part of the "general law of this State" and thus limits its power of condemnation. The County further admits, as the Order determined, that it did not follow the "*exclusive procedure*" of the SCEDPA. Resp. Br. at 20; R. at ___. What is left? Several misguided arguments that seek to deflect and distract from the County's undisputed non-compliance with mandatory statutory provisions.

First, the County suggests that its statutory violations such as failing to make an offer based upon an appraisal, filing a false affidavit, and having no project plans, are merely technical and

excused by equitable principles. Second, by borrowing language from cases absent of statutory claims, the County grafts an additional requirement that Landowner must prove bad faith, fraud, or abuse of discretion to hold the County to account for shunning the exclusive procedure. Third, the County asserts that the landowner must show harm or damages to invalidate an aberrant condemnation process. Each argument fails.

A. South Carolina Principles of Statutory Construction and Application.

This Court has a deep and thorough understanding of the well-established rules governing statutory interpretation in South Carolina, but the County's arguments and confusion over the applicable standard of review warrants a brief overview.

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.

Hodges v. Rainey, 341 S.C. 79, 85, 533 SE 2d 578, 581 (2000) (other citations omitted).

The tenets of statutory construction require 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). Here, legislative intent for the SCEDPA could not be clearer: "**It is the intention of the General Assembly that this act is designed to create a uniform procedure for all exercise of eminent domain power in this State.**" S.C. Code Ann. § 28-2-20 (emphasis added). Ignoring the stated legislative intent would create inconsistency in dealings with landowners, and sow doubt as to what procedure governmental entities must follow in exercising the power of eminent domain in this state.

1. *Applying the Rules of Equity to Statutory Compliance Is Unfounded*

The County defends the trial court's infusion of equitable principles in its analysis of statutory violations. Resp. Br. at 13-14. However, by applying equitable law to statutory claims, the trial court clearly erred, according to one of the County's own supporting authorities, *Oien Family Invs., LLC v. Piedmont Mun. Power Agency*, 424 S.C. 168, 817 S.E.2d 647 (Ct. App. 2018). In *Oien*, the Court of Appeals noted that the circuit court's underlying decision "did not turn on statutory interpretation." *Id*. at 175, 651. On the other hand, the Court observed, where the lower court decision is based upon statutory interpretation, "this presents a question of law." *Id*. (quoting *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 8, 760 S.E.2d 785, 788 (2014)).

The County puzzles that Appellant seems to argue that "equitable principles only apply to the landowner and not the County." Resp. Br. at 13. However, it misses that statutory violations are questions of law, and not equity. *See Lambries*, 409 SC at 8. The County impermissibly lumps the statutory claims into the same category as the constitutional claims, which sound in equity pursuant to our jurisprudence. The trial court also failed to make this distinction, by "apply[ing] equitable principles when addressing statutory violations." Order at 6. This plain and reversible error, which ignores established law, is one of the many reasons the Order must be overturned. Because this case invites the Court to clarify the standard of review for violations of the SCEDPA, Appellant requests a clear pronouncement, consistent with centuries of caselaw, that SCEDPA statutory interpretation, and violations, are matters of law, and not equity.

2. *Even if Equitable Principles Control, the Trial Court Misapplied Them.*

Assuming, *arguendo*, that a decision on a statutory violation should balance the equities, and to show the trial court's error on applying equitable principles to other claims, the following is a table containing the conduct of both parties. The proper conclusion is self-evident.

Balancing the Equities

Landowner's Conduct	The County's Conduct
➢ Declined to sell privately owned real property at a price below the County's own appraised values. ➢ Refused to negotiate a voluntary sale, having not been informed of the County's intent to take the Property by eminent domain. ➢ Exercised its statutory right to challenge under § 28-2-470, which triggered the automatic stay the General Assembly created, allegedly causing project delay. *That is the entirety of the County's case on the equities.*	➢ Concealed both appraisals from Landowner prior to filing the NOC. § 28-2-70. ➢ Withheld the higher Owen appraisal ($3.9M) for months after condemnation. ➢ Offered only $3.2M — less than either of its own appraisals. ➢ Filed the NOC before serving it on Landowner, reversing the statutory sequence. §§ 28-2-220, -230. ➢ Filed a false affidavit stating Landowner had "rejected" an offer never tendered at the NOC amount. § 28-2-240. ➢ Admitted "no project plans" at time of condemnation. § 28-2-280(C)(5)–(6). ➢ Failed to specify a location for plan inspection because no plans existed. § 28-2-280(C)(6). ➢ Sent surveyors onto the Property in violation of the automatic stay. § 28-2-470. ➢ Gave no notice to Landowner before entering the Property. § 28-2-70(C). ➢ Changed the project purpose during the pendency of the Challenge Action — from ferry embarkation to parking lot. ➢ Discovered post-filing that the Property was unsuitable for its stated purpose ("I fear this is impossible").

B. Strict Compliance Is the Standard Across Jurisdictions

Nichols on Eminent Domain has remained the most authoritative resource in the field of eminent domain since it was first published in 1909. The Nichols section entitled "Statutory Procedural Provisions" states as follows:

> In determining the validity of all condemnation procedure statutes, regardless of whether those procedures are found in general, special, or "incorporated by reference" statutes, **it has been generally held that they must be strictly construed against the condemnor, since such procedures are in derogation of both the common law and of property rights in general**. 13 Nevertheless, these statutes may not be so strictly construed as to defeat the purpose of the grant of power. 14 However, when the question relates solely to a procedural matter, it has been held that a liberal interpretation is authorized.15 Given a valid statute under which a condemnor has the unquestioned right to proceed, the statute's

> requirements must be fully compiled with.16 It has been held, however, that in limited circumstances, literal compliance will not be required when substantial compliance is sufficient.17

Nichols, Section 24.06. Strict compliance is the rule across jurisdictions. As the Michigan Supreme Court held in 1930:

> The rule is well settled, that in all cases where the property of individuals is sought to be condemned for the public use by adverse proceedings, the laws which regulate such proceedings must be strictly followed, and especially that every jurisdictional step, and every requirement shaped to guard the rights and interests of parties whose property is meant to be taken, must be observed with much exactness.

In re Petition of State Highway Comm'r, 252 Mich. 116, 233 N.W.172 (1930) (quoting *Detroit Sharpshooters' Association v. Highway Commissioner*, 34 Mich. 36 (1876)).

However, the Nichols treatise acknowledges specific allowances, and therefore the cases cited relating to these exceptions deserve closer scrutiny.

1. *Exceptions in Scope of Legislative Grant of Eminent Domain*

One set of cases, under footnote 14 of Section 24.06, relates to statutory interpretation in the context of the delegation of condemnation powers. *See, e.g., United States ex rel. Tennessee Valley Auth. v. Welch*, 327 U.S. 546, 551, 66 S. Ct. 715, 90 L. Ed. 843 (1946) (acknowledging the common law rule requiring a strict construction of powers to condemn but pointing out the Tennessee Valley Authority Act's language that it be "liberally construed"); *Smith v. City Bd. of Educ. of Birmingham*, 272 Ala. 227, 229, 130 So. 2d 29 (1961) ("mindful of the fact that statutory delegation of the power of eminent domain must be strictly construed against the one exercising the power," but determined that a City Board of Education possessed statutory authority to condemn land for school employee housing); *Kenneth Mebane Ranches v. Superior Court*, 10 Cal. App. 4th 276, 283, 12 Cal. Rptr. 2d 562 (1992) (recognizing that "[s]tatutory language defining

eminent domain powers is strictly construed…" but citing particular codified exception permitting "extraterritorial condemnation" to broaden the local flood district's power).

The remaining cases under footnote 14 follow along the same or similar lines of reasoning but all interpret the scope of authority granted. Here, there is no dispute as to the scope of the General Assembly's grant of condemnation power to counties. The question is whether the County has the power to condemn outside the exclusive procedure of the SCEDPA.

2. *Cases Authorizing "Liberal Interpretation" for Procedural Matters*

A second set of cases is cited at footnote 15 to support Nichols' comment regarding "liberal interpretation" for solely procedural matters. This would seem the most fertile soil for the County's arguments, and yet only five cases are cited. The first is a 1922 case from Missouri, *City of St. Louis v. Walbrath*, 293 Mo. 385, 239 S.W. 110 (1922). Right off the bat, we see that "[t]his was not an action to condemn private property for a street." *Id*. at 390. In fact, "[i]n this case there is no taking of private property." *Id*. at 391. The claim addressed the timing of assessment and payment of damages under a Missouri statute compensating landowners for damages caused by grading streets or alleys. *Id*. Clearly, this case is not relevant to this appeal.

Second are two New York appellate cases from 1892 and 1949. In *Rochester Ry. Co. v. Robinson*, 133 N.Y. 242, 30 N.E. 1008 (1892), the court upheld a railroad condemnor's petition in "literal compliance" with the statute. The court emphasized its "conclusions do not involve any relaxation of the rule of construction, which requires that statutes which seek to deprive the citizen of his property against his will shall be strictly construed." *Id*. at 247. *S. S. Kresge Co. v. City of New York*, 194 Misc. 645, 87 N.Y.S.2d 313 (1949) involved a complicated mapping dispute fact pattern which did not involve an actual taking of property from a landowner. It does nothing to aid the County's position.

The fourth case, *Nieman v. Bd. of Educ.*, 22 Ohio App. 457, 153 N.E. 918 (1925), involved a technical challenge to an appeal process involving a board of education taking. The court gave a statutory provision "liberal" construction to allow the same appeal procedure against the board of education as against a municipal corporation. *Id*. at 458. Finally, an intermediate appellate court in Pennsylvania rendered a decision in *In re Condemnation by Commonwealth, Dep't of Transp.*, 98 Pa. Commw. 527, 512 A.2d 79 (1986), which recognized that "condemnation proceedings affect the rights of individual citizens to use and enjoy their land, and must, therefore, be strictly construed." *Id*. at 531. The court nevertheless excused two nonconformities as nonprejudicial irregularities in the procedural aspects of condemnation. *Id*. at 533.

In sum, the cases cited under this exception, liberal interpretation of eminent domain statutes for procedural matters, bear no resemblance to the facts and circumstances of this matter. As such, this is not a category of exception that would save the County from its myriad, substantive failures to comply with the SCEDPA.

3. *Cases Permitting Substantial Compliance in "Limited Circumstances"*

Nichols acknowledges that, in "limited circumstances, literal compliance will not be required when substantial compliance is sufficient." Nichols, § 24.06. Fourteen cases from ten jurisdictions are cited under this exception. A close examination of these authorities reveals that they overwhelmingly support the Landowner's position - not the County's - and that none excuses the kind of wholesale departure from mandatory statutory procedures at issue in this case.

Four Florida cases are cited, and **three of them (75%) held in favor of the landowner.** In *Tosohatchee Game Pres., Inc. v. Cent. and S. Fla. Flood Control Dist.*, 265 So. 2d 681 (Fla. 1972), the Florida Supreme Court noted that "this statute must be strictly construed in favor of the landowner and that substantial compliance with its provisions is required to sustain a petition for

condemnation." *Id*. at 683. While the decision paid lip service to the notion of substantial compliance, it found that the failure of the condemnor to attach a copy of the operative resolution to its petition rendered the attempted condemnation invalid. The opinion stated, "Although an agency of the State has general power to condemn, ***it may do so only in compliance with the statute giving it such power***." *Id*. (emphasis added). In *City of Miami Beach v. Manilow*, 232 So. 2d 759 (Fla. 3d Dist. Ct. App. 1970), *cert. denied*, 238 So. 2d 427 (Fla. 1970), the landowner prevailed where the condemnor never "surveyed and located its line or area of construction over the described property" as alleged in the petition. *Id*. at 760. In *Florida Cent. P. R. Co. v. Bear*, 43 Fla. 319, 31 So. 287 (1901), the Florida Supreme Court held that condemnor's failure to pay into court the compensation awarded by the jury renders the proceedings void. In *Inland Waterway Co. v. City of Jacksonville*, 160 Fla. 913, 37 So. 2d 333 (1948), the only cited Florida decision favorable to the condemnor, the Florida Supreme Court found that a landowner had waived its rights "to insist that the non-payment of clerk's commissions rendered the proceedings in the court below null and void." *Id*. at 917.

In *Austell v. City of Atlanta*, 100 Ga. 182, 27 S.E. 983 (1897), the Georgia Supreme Court, **in ruling for the landowner**, held:

> Condemnation statutes must be strictly construed. If the method to be pursued is prescribed by statute, it must be closely followed, and an attempt to exercise the right to condemn in a different manner will be *ultra vires* and void. This is well settled law, and really does not require the citation of authority to support it. Nevertheless, we quote the following from 2 Dill. Mun. Corp. (4th ed.) §§604, 605: "Not only must the authority to municipal corporations or other delegated legislative agents, to take private property, be expressly conferred, and the use for which it is taken specified, but the power, with all constitutional and statutory limitations and directions for its exercise must be strictly pursued. Since the power to condemn private property against the will of the owner is a stringent and extraordinary one, based upon public necessity or an urgent public policy, the rule requiring the power to be strictly construed and the prescribed mode for its exercise strictly followed, is a just one, and should, within all reasonable limits, be inflexibly adhered to and applied. Especially will the-courts require *a*

> *strict compliance with- all conditions precedent* to the exercise of the power, and all provisions as to the manner of its exercise intended for the benefit and protection of the citizen. If the authority be not thus pursued, the proceedings will not have the effect to divest the owner of his property.

Id. at 185-86 (emphasis in original).

In *Big Lost River Irrigation Co. v. Davidson*, 21 Idaho 160, 121 P. 88 (1912), another ruling in favor of the landowner, the Idaho Supreme Court held that eminent domain proceedings are:

> out of the course of the common law and in derogation of common rights, and being such, **it is essential that all statutory requirements should be strictly pursued**…the procedure must be substantially in accordance with the statute…

Id. at 178-179 (emphasis added).

In *Schenectady Ry. Co. v. Lyon*, 41 Misc. 506, 85 N.Y.S. 40 (1903), the court held **in favor of multiple landowners**, where the condemnor attempted "to establish compliance with the statute **by putting them upon the witness stand and having them state that prior to these proceedings they were unwilling to sell.**" (emphasis added). The court found non-compliance with the statute and dismissed the condemnation proceeding as to seven landowners. Landowners also prevailed in a second cited New York case, *In re Matter of Marsh*, 10 Hun. 49, 71 N.Y. 315 (1877) (court lacked jurisdiction for failure of condemnor to strictly comply with statute relating to negotiations to purchase easement interests).

In *Charleston & South Side Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S.E. 69 (1892), the West Virginia Supreme Court recited the "general rule that he who seeks to exercise the extraordinary power of taking private property for public use must follow strictly the mode of procedure prescribed by law." *Id*. at 275-276 (internal citation omitted)). But the court, in examining whether the jury selection process was adequate, held that if the condemnation proceedings are "substantially responsive to the requirements of the statute, then that is sufficient," citing *Railroad Co. v. Foreman*, 24 W. Va. 662 (1884).

The remaining cases[1] articulate a related but distinct proposition: that "strict compliance" does not always require "literal and exact" compliance with every provision of the statute. Importantly, *these cases assume the existence of a "strict compliance" baseline*. They do not hold compliance optional or deficiencies harmless. They say that a condemnor will not be defeated by trivial, hyper-technical deviations when it has otherwise followed the statute in substance. *None* of these fourteen cases holds that "substantial compliance" exception swallows the "strict compliance" rule. Under any formulation applied by any court in this group of authorities, the County's conduct fails the test. This is not a case of trivial, technical, or formal deviations. The substantial compliance exception, properly understood, provides no refuge for the County.[2]

C. The County Did Not Substantially Comply

At the outset, it must be noted that the trial court did not find substantial compliance. In fact, **the County did not even attempt to argue at trial that it had substantially complied**. It was a given that the County did not follow the exclusive procedure, and the stipulated facts demonstrated this. The Court found that "the County's procedure did not strictly adhere to the SCEDPA." R. at ___. Only now, on appeal, is the County audacious enough to suggest substantial compliance. But the phrase "substantial compliance" does not mean less than compliance. It means compliance with the substance of what the statute requires—as distinguished from fine-tuned adherence to every punctilio of form. The cases discussed above draw a line between

[1] *Phillips v. Town of Scales Mound*, 195 Ill. 353, 63 N.E. 180 (1902); *Darrow v. Chicago, L. S. & S. B. Ry. Co.*, 169 Ind. 99, 81 N.E. 1081 (1907); *Graves v. Town of Middletown*, 137 Ind. 400, 37 N.E. 157 (1894); *W. Union Tel. Co. v. Louisville & N. R. Co.*, 107 Miss. 626, 65 So. 650 (1914); and *Dodge Cnty. v. Acom*, 61 Neb. 376, 85 N.W. 292 (1901).

[2] The cases cited by the County to suggest that strict compliance is unnecessary, Resp. Br. at 22-23, are inapposite. The three cited Virginia cases dealt with a Virginia statutory precondition of a "bona fide but ineffectual effort" to acquire the property by purchase, akin to S.C. Code § 28-2-70(B). As discussed, in South Carolina, this is not a defense to condemnation and was not a statutory basis for the challenge in this case. The three West Virginia cases addressed whether condemnation petitions prepared in compliance with the statute were sufficient to grant court jurisdiction. In the cited Florida case, *JEA v. Williams*, 978 So. 2d 842 (Fla. Dist. Ct. App. 2008), the court followed the statute and determined no agency resolution was needed, *because the statute did not require it*, distinguishing the case from *Tosohatchee*, *supra*. *Id*. at 846. None of these cases erode the established rule of strict compliance.

immaterial irregularities in form (which may be excused) and failures to comply with substantive statutory mandates (which may not). The County's violations fall squarely on the wrong side of that line.

1. *"No Plans" Means No Plans*

In order to demonstrate this point clearly, consider the SCEDPA's requirements relating to project plans. S.C. Code Ann. § 28-2-280 requires the condemnor to have attached to a Notice of Condemnation a "map, diagram, sketch or reference to project plans," and to "specify a location within the county where the property to be taken is situated at which the landowner may inspect the project plans." The filed Notice of Condemnation stated, at paragraph 8, "**There are no project plans at this time and but (sic) they will be made available in the as (sic) soon as available. However this is a total take and *the project plans are not relevant* because the scope of the project does not impact any remaining property.**"[3] R. at ___ (emphasis added). No project plans were attached, as the statute requires. This is not substantial compliance. This is straightforward, clear-cut, and egregious non-compliance, with the County claiming that statutory requirements are ***irrelevant***.

The County engages in verbal gymnastics to explain away this failure. The County attempts to argue that it did not need "detailed construction" plans, Resp. Br. at 19-20, but it admitted in its NOC that it had no project plans at all. The County states that it had "procured a conceptual design demonstrating how the County can maximize parking on the Property," Resp. Br. at 19, to suggest the existence of project plans. But this contention is undercut not only by the statements in its filed NOC, but also by the County's admission that "the County originally planned

[3] Note that the SCEDPA does not excuse a lack of project plans for total takings, as suggested in the County's NOC. SC Code § 28-2-280(C)(6) requires project plans regardless of whether it is a full taking or a partial taking: "project plans showing, as far as practical, the property to be taken **and, if less than all of a whole parcel**, the location of the interest taken upon or within the whole parcel." (emphasis added).

to construct the necessary infrastructure—parking lot, restrooms and dock within the condemned property." Resp. Br. at 1. **The County can point to no project plans, conceptual or otherwise, to match its stated project purpose when it filed the NOC.** Without project plans, a heavy burden is placed upon the landowner to evaluate constitutional grounds such as public use, need and necessity, and project factors, as discussed in Appellant's Brief. See App. Br. at 22-31.

2. *False Affidavit: No Tender*

S.C. Code Ann. § 28-2-230 requires an affidavit stating "that the amount tendered in the Condemnation Notice has been rejected." The County filed such an affidavit, but it contained a false statement of fact, because the amount stated in the NOC had not been tendered to Landowner prior to filing. This type of hidden noncompliance is worse than omission, because a representation of compliance was made to the Court by the filing of the affidavit. Under no definition can this qualify as substantial compliance. It would be preposterous to suggest that substantial compliance is achieved by stating under oath that the condemnor has done things it has not done. The County does not dispute that it had not tendered the offer of $3,400,000 to the Landowner prior to filing, nor that the affidavit was false. The County excuses this violation by (1) claiming the false representation was unintentional, and (2) stating that the landowner would not have accepted the tender anyway. Resp. Br. at 19. The former argument would bake in a requirement for a landowner to show fraudulent intent for any statutory noncompliance. The latter would permit a condemnor to opt out of statutory requirements if it thinks the landowner will reject the offer. That same argument was rejected 123 years ago in the *Schenectady* case (*supra*, p. 9) and should be rejected today. Ignoring the fact that there would be no condemnation process if all sales were voluntary, the General Assembly made no provision for greater rights or better treatment of cooperative landowners than landowners who are, for whatever reason, unwilling to sell.

3. *Making the Appraisal Available to Landowner*

S.C. Code Ann. § 28-2-230 requires, "Before initiating a condemnation action, the condemnor shall cause the property to be appraised to determine the amount that would constitute just compensation for its taking and shall make the appraisal available to the landowner." The County obtained two pre-filing appraisals, with estimates of just compensation of $3,700,000, and $3,400,000, respectively.[4] The County did not offer **either** amount to Landowner "before initiating a condemnation action." The County stipulated that "At no time prior to the Date of Condemnation did Ward, or anyone else on behalf of the County, offer to provide a copy of any appraisal of the Property." R. at ___. The County claims substantial compliance because Ward testified she told Landowner's lawyer Mr. Foster that the offer was based upon an appraisal. Resp. Br. at 17, R. at ___. However, as stipulated, "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." R. at ___. No appraisal valued the Property at $3,200,000. This leaves only one of two possibilities. Either Ward did not inform Foster about an appraisal (consistent with his testimony, see R. at ___), or she misled him as to the amount of the appraised value. Neither inference suggests substantial compliance.

D. "Bad Faith, Fraud and Abuse of Discretion"

Citing *Oien*, the County posits that the Court must examine each statutory violation to determine whether "those violations constitute harm, damages, prejudice or if the County acted in 'bad faith,' 'fraudulently,' or 'with clear abuse of discretion.'" Resp. Br. at 9. The County is wrong in this assumption, but the trial court errantly adopted it, leading to a deeply flawed Order.

The "bad faith, fraud, or clear abuse of discretion" standard is deeply rooted in South Carolina law. But its origin, purpose, and scope demonstrate that it has no application to the

[4] The higher appraisal of $3,700,000 was not produced until discovery months later in the Challenge Action.

question presented here — whether the County complied with the exclusive statutory procedures of the SCEDPA. The standard traces to the common law doctrine that the **necessity** of a particular taking is a legislative or political question, not a judicial one. In *Bookhart v. Cent. Elec. Power Coop., Inc.*, 222 S.C. 289, 72 S.E.2d 576 (1952), the foundational South Carolina case, landowners sought to enjoin condemnation of a power line right-of-way, arguing that no public **necessity** existed because the area was already served by another electric provider. The South Carolina Supreme Court, quoting 29 C.J.S. *Eminent Domain* § 89, adopted the rule:

> The legislature may delegate the power of determining the *necessity* of exercising the power of eminent domain to public officers or boards or to private corporations vested with the power of eminent domain, and in the absence of any statutory provision submitting the matter to a court or jury the decision of the **question of necessity** lies with the body of individuals to whom the state has delegated the authority to take. Generally, a determination by the grantee of the power is conclusive and is not subject to judicial review, in the absence of fraud, bad faith, or clear abuse of discretion.

Id. at 299 (quoting 29 C.J.S. *Eminent Domain* § 89, at 882) (emphasis added).

In *Sease v. City of Spartanburg*, 242 S.C. 520, 131 S.E.2d 683 (1963), the Supreme Court applied *Bookhart* and stated: "The rule in this State is that the decision of the *question of necessity* lies with the one to whom the State has delegated the authority to take property for a public use and is not subject to review by the Court in the absence of fraud, bad faith, or clear abuse of discretion." *Id.* at 525. In *Atkinson v. Carolina Power & Light Co.*, 239 S.C. 150, 121 S.E.2d 743 (1961), the Court extended the principle to the question of what interest the condemnor acquires: taking fee simple or a lesser estate is "optional and rests within the discretion of the condemnor, subject to review by the courts in case of fraud, bad faith, or abuse of discretion." *Id.* at 155. *See also Kunkle v. S.C. Elec. & Gas Co.*, 251 S.C. 127, 145–46, 160 S.E.2d 527, 536 (1968).

Every case in this lineage involves the same type of question: a **discretionary policy judgment** by the condemnor —is this taking **necessary**? Is **this particular property** needed? Is

this much property needed? Should the condemnor take **fee simple** or an **easement**? The deferential standard fits in that context.

1. *The Deferential Standard Governs Discretionary Necessity Determinations, Not Statutory Compliance*

However, questions presented by the statutory violation claims are categorically different from the questions addressed in *Bookhart*, *Sease*, and *Atkinson*. The trial court should have focused on a binary question: **did the County follow the statute**? Whether the County followed the SCEDPA's exclusive procedure is definitively **not** a policy decision. There is nothing discretionary about it. The statute says "shall"- the condemnor either did or did not comply.

Applying a bad faith, fraud, or abuse of discretion standard to statutory compliance questions would be like applying an abuse of discretion standard to whether a party filed within the statute of limitations. The answer is binary - complied or did not comply - and no deference is owed. A condemnor that fails to follow the statute's mandatory procedures is not exercising "discretion;" it is violating the law. The distinction is fundamental: **discretion** presupposes a range of permissible choices; **compliance** presupposes a single mandatory obligation. The "bad faith, fraud, or abuse of discretion" standard was designed for the former, not the latter.

2. *The SCEDPA Supersedes the Pre-1987 Common Law Framework*

The *Bookhart*/*Sease* line of cases was decided *before the SCEDPA was enacted in 1987*. *Bookhart* was decided in 1952. *Sease* was decided in 1963. *Atkinson* was decided in 1961. At that time, South Carolina had no comprehensive, unified condemnation procedure statute. The deferential standard filled a gap - in the absence of detailed statutory procedures, courts could only review the condemnor's discretionary judgments under a deferential standard.

The SCEDPA changed the landscape fundamentally. The General Assembly enacted an exclusive, mandatory, detailed procedural framework governing every condemnation in South

Carolina. S.C. Code Ann. § 28-2-60 ("exclusive procedure"); S.C. Code Ann. § 28-2-120 (prevails over Rules of Civil Procedure). The Act created S.C. Code Ann. § 28-2-470—a specific statutory mechanism for challenging the condemnor's "right to take"—that did not exist in the pre-1987 common law framework. The question under S.C. Code Ann. § 28-2-470 is not whether the condemnor abused its discretion in a policy judgment; it is whether the condemnor has the *right* to condemn – directly implicating the statutory prerequisites to exercising that right. The pre-SCEDPA deferential standard, developed for a world without detailed statutory procedures, should not be imported wholesale into the post-SCEDPA framework where the General Assembly has prescribed exactly what a condemnor must do. Enacting an exclusive statutory procedure and challenge mechanism evinces intent that compliance be subject to meaningful judicial review.

3. *The Bookhart Standard Contains Its Own Limiting Principle*

The very language *Bookhart* quoted from C.J.S. contains the limiting principle that renders it inapplicable here. The passage states: "*in the absence of any statutory provision submitting the matter to a court or jury*, the decision of the question of necessity lies with the body of individuals to whom the state has delegated the authority to take." *Bookhart*, 222 S.C. at 299 (quoting 29 C.J.S. *Eminent Domain* § 89) (emphasis added). That qualifying clause is critical. The deferential standard applies "*in the absence of*" a statutory provision submitting the matter to judicial review. But Section 28-2-470 *is* a statutory provision submitting the matter to a court. The General Assembly created a specific judicial mechanism—a right-to-take challenge—precisely to submit the condemnor's exercise of condemnation authority to judicial review.

4. *Applying Deferential Standard to Statutory Violations Produces Absurd Results*

The County's argument, and the trial court's ruling, leads directly to absurdity and chaos. In the County's view, the "bad faith, fraud, or abuse of discretion" standard as applied to SCEDPA

compliance means that a condemnor can skip every mandatory procedure in the Act and the condemnation still must stand unless the landowner proves the condemnor acted in *bad faith* when it violated the statute. The absurd became reality in this case. The County is left to say "we didn't know we had to do that" or "we made an honest mistake," and the violations are excused because they were not "fraudulent". The word "shall" converts to "shall, unless the condemnor acted in good faith when it didn't." **This result would nullify the SCEDPA**.

The absurdity is compounded when one considers that the SCEDPA's exclusive procedure exists precisely *to protect the landowner*. The appraisal requirement ensures the landowner receives a good-faith valuation before the taking. The Condemnation Notice requirements ensure the landowner has the information necessary to evaluate and, if warranted, challenge the condemnation within the 30-day window. Allowing a condemnor to disregard these protections whenever it can show it did not act in "bad faith" would render them wholly meaningless.

The County has supplied no authority to suggest that a condemnor's violation of mandatory statutory procedures is excusable so long as the violation was not committed in bad faith. The standard of review for statutory compliance is compliance — not good faith, not honest mistake, not absence of fraud. The condemnor either followed the statute or it did not.

E. Harm to Landowner

In its effort to excuse its noncompliance with the exclusive procedure, the County seeks not only to superimpose the extra-statutory requirement of bad faith, fraud and abuse of discretion, but also another condition outside the statute: harm to the landowner. The County misstates Landowner's position, suggesting the Landowner has conceded no damage, harm or prejudice. Resp. Br. at 15. This statement could not be further from the truth. Landowner has contended that the impact on its property rights is immaterial to whether the County complied with the SCEDPA. App. Br. at 22. However, harm, damage and prejudice to Landowner exists, and takes many forms.

First, the County's failure to follow the exclusive procedure of the SCEDPA creates harm to the Landowner *ipso facto*. By failing and refusing to follow the law, the County has attempted to take Property from Landowner **illegally**. Pursuing the defective process, rather than dismissing and re-filing, has caused extensive harm to Landowner, which has expended tremendous resources in energy, time and money to protect its Property from an invalid government taking.

Second, Landowner testified as to a more particularized harm at trial, R. at ___, resulting from the illegal condemnation and the filing of the Lis Pendens on the Property, which has caused, and continues to cause, harm, damage and prejudice to Landowner by depriving it of numerous property ownership rights in its bundle, including:

- alienability, as a condemnation and lis pendens renders the property unmarketable;
- impairment of the right to encumber and finance; and
- interference with the right to use and enjoy, as the cloud on title constrains decision-making about improvements, development, and long-term planning;

These harms are relentless and ongoing. As the Landowner testified at trial, the owner bears a disproportionate burden: it continues to owe property taxes, other obligations and liability on property whose economic utility has been substantially impaired. R. at ___. The litigation itself creates delay and expense. The combination creates undeniable financial harm.[5]

II. EVALUATION OF CHALLENGE GROUNDS MUST BE ANALYZED AT THE DATE OF TAKING.

The County blithely characterizes Landowner's argument for a fixed date for a challenge as an unwarranted limitation on the admissibility of evidence. Resp. Br. at 21. The County does not seem to have carefully considered the issue. In a valuation case, under the express language

[5] The County also overlooks the fact that damages to a landowner are presumed for a trespass. *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 145, 747 S.E.2d 468, 476 (2013). The County admitted that it sent surveyors upon the Property without permission, in violation of the automatic stay. R. at ___.

of the SCEDPA, the date of valuation is fixed as of the date of the filing of the condemnation notice. S.C. Code Ann. § 28-2-440. This is because the condemnor establishes rights as of the date of condemnation. The SCEDPA contemplates that the condemnor has followed the required exclusive procedure prior to filing and thus obtaining those rights. Similar to valuation issues, the right to condemn must be evaluated based on the project plans as they existed at the time the Condemnation Notice was served, for the following reasons:

First, the SCEDPA demands it. Section 28-2-280(C) requires the Condemnation Notice to state the purpose, attach project plans, and make them available for inspection — all at the time of service. These are not prospective requirements. Second, the challenge procedure requires it. The landowner's 30-day window under S.C. Code Ann. § 28-2-470 to bring a right-to-take challenge is triggered by—and necessarily references—the Condemnation Notice as served. The landowner cannot meaningfully exercise this right if the project is a moving target.

Third, the South Carolina Constitution requires it. The "definite and fixed use" standard demands that the public use be established and identifiable at the time of the taking. A project that is still evolving is neither definite nor fixed. Fourth, due process requires it. The landowner is entitled to notice of what is being taken and why, and a meaningful opportunity to challenge. Both are negated if the project plans can change after the Condemnation Notice is served. Fifth, policy considerations demand it. Allowing post-filing plan changes would incentivize condemnors to file vague or incomplete Condemnation Notices and then refine and tailor a challenged project to “fix” alleged deficiencies—precisely the kind of "condemn first, decide later" approach that courts have rejected. Here, of course, the County has fully admitted, and even gloated about, making full-scale changes in project planning during the pendency of the challenge action. Resp, Br. at 6-8.

To borrow from administrative law, there is meaningful policy for requiring review of agency action based on the record before the agency **when it acted**—not on a record supplemented after judicial review is initiated. The Supreme Court has held that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Similarly, "a reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). *Post-hoc* rationalizations are inadmissible. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

These principles apply with equal force to eminent domain. The Condemnation Notice under S.C. Code Ann. § 28-2-280 is the condemnor's "decision"—the formal act by which it invokes its power and states its justification. The right-to-take challenge under S.C. Code Ann. § 28-2-470 is the functional equivalent of judicial review of that decision. Just as an agency may not supplement the administrative record with new reasons after judicial review is initiated, the condemnor may not supplement the Condemnation Notice with new or different project plans after the landowner has challenged. This is especially true in South Carolina, where the public use must be "definite and fixed"— not speculative, evolving, or contingent. *Riley v. Charleston Union Station Co.*, 71 S.C. 457 (1904); *Karesh v. City Council of City of Charleston*, 271 S.C. 339 (1978). A project still being defined during litigation is, by definition, neither definite nor fixed.

If the condemnor's project is insufficiently defined at the time it served the Condemnation Notice, the remedy is not to allow the condemnor to develop its plans mid-litigation. The remedy, as in administrative law, is to require the condemnor to start over — this time with a properly defined project, a new appraisal, a new Condemnation Notice, and a new 30-day challenge period

for the landowner. *See Camp v. Pitts*, 411 U.S. at 143 (when agency fails to adequately explain its action, the remedy is not to create a new record but to remand to the agency).

III. THE COUNTY'S PRIVATE RIGHT OF ACTION ARGUMENT FUNDAMENTALLY MISAPPREHENDS LANDOWNER'S CHALLENGE

The County argues that "the [SCEDPA] does not create a private cause of action for landowners" and that "no South Carolina case law asserts" that a violation of the Act "invalidates an underlying condemnation action." Resp. Br. at 11. For "guidance," the County invites this Court to look to the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 *et seq.* ("URA"), and specifically to *Barnhart v. Brinegar*, 362 F. Supp. 464 (W.D. Mo. 1973), in which a federal court held that the URA's land acquisition policies do not create enforceable rights. The County then reasons by analogy: "Because a statutory violation of the Federal Acquisition Act does not invalidate a condemnation, it makes sense that a violation of the [SCEDPA] does not invalidate a condemnation action." Resp. Br. at 12.

This argument fails at every level. It misstates and fails to respond to the Landowner's claim, mischaracterizes the SCEDPA, draws an analogy between two statutes that are fundamentally different in design, purpose, and enforcement mechanism, and if accepted, would nullify the protections the General Assembly deliberately created.

A. The SCEDPA Does Create an Enforcement Mechanism - Section 28-2-470

The County's threshold premise - that the SCEDPA does not create a "private cause of action" is refuted by the statute itself. A challenge action under S.C. Code Ann. § 28-2-470 ***is*** a private cause of action. The General Assembly created a specific judicial mechanism—a separate proceeding in the Court of Common Pleas - through which a landowner may challenge the condemnor's "right to condemn." A condemnor's "right to condemn" necessarily encompasses

whether the condemnor has satisfied the statutory prerequisites the Act imposes as conditions to the valid exercise of that right.

The County says "strictly speaking, the [SCEDPA] does not state, 'any violation of this section invalidates an underlying condemnation action.'" Resp. Br. at 11. Yet the County later concedes that "it is logical that the 'Challenge Action' under S.C. Code Ann. § 28-2-470 provides landowner a legal vehicle to assert statutory violations by a condemning authority." Resp. Br. at 15. To the extent that the County disagrees with invalidation and the remedy of dismissal, the SCEDPA need not spell out every conceivable consequence of noncompliance when the General Assembly declared the Act to be the "exclusive procedure" for condemnation (S.C. Code Ann. § 28-2-60), mandated that it "shall prevail" over any conflicting law (§§ 28-2-20, 28-2-120), and created a judicial challenge mechanism with an automatic stay (§ 28-2-470). The County asks this Court to read the SCEDPA as containing mandatory commands—"shall"—that carry no consequence for disobedience. That is not how statutes work.

B. The Analogy to the URA Fails

The County's argument-by-analogy - that because the URA does not create enforceable rights, neither does the SCEDPA - collapses upon examination of the two statutes.

1. <u>The URA Expressly Disclaims the Creation of Rights; the SCEDPA Does Not.</u>

The reason the URA does not create enforceable rights is not a matter of judicial inference, but because Congress explicitly so stated. 42 U.S.C. § 4602(a) provides: "The provisions of section 4651 of this title create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation." *Barnhart* and the four cases it cited relied principally on this express disclaimer. *Barnhart*, 362 F. Supp. at 469–71. Only one subsection of the SCEDPA contains a comparable disclaimer. S.C. Code Ann. § §28-2-70(B) regarding pre-condemnation negotiation, states, "A failure of any party to comply with this subsection is not a

defense to a condemnation action." The clear inference is that the failure to comply with any other provision of the SCEDPA **does** create a defense. See App. Br. at 20.

2. URA's Aspirational Policies vs. SCEDPA's Mandatory Procedures.

The land acquisition provisions of the URA - 42 U.S.C. § 4651 - are framed as "policies" to "encourage and expedite" fair treatment. The *Barnhart* court emphasized this point, noting that Congress structured 42 U.S.C. § 4651 as a "statement of policy" rather than as a mandate, and that the legislative history confirmed Congress intended these policies as guidance, not as enforceable commands. *Barnhart*, 362 F. Supp. at 469–71.

The SCEDPA is fundamentally different. It prescribes mandatory procedures using the word "shall" throughout: the condemnor (before initiating a condemnation action) "shall" make the appraisal available to the landowner" (S.C. Code Ann. § 28-2-70(A)); the condemnor "shall" serve upon the landowner and file with the clerk an affidavit; the Condemnation Notice "must contain" specified information (S.C. Code Ann. § 28-2-280(A)); the Notice "must" allege the basis of the condemnor's right to take, state the purpose of the condemnation, and have attached project plans (S.C. Code Ann. § 28-2-280(C)(3)-(6)). These are not aspirational policies encouraging fair treatment. They are mandatory procedural steps a condemnor must complete before it may lawfully exercise the power of eminent domain.

C. The County's Cited Authorities Reinforce, Rather Than Undermine, the Landowner's Position

The County cites *Barnhart* and four additional federal district court decisions: *Nall Motors, Inc. v. City of Iowa City*, Civil No. 72-47-D (S.D. Iowa Jan. 2, 1973) (unreported); *Martinez v. Dep't of Hous. & Urban Dev.*, 347 F. Supp. 903 (E.D. Pa. 1972); *Rubin v. Dep't of Hous. & Urban Dev.*, 347 F. Supp. 555 (E.D. Pa. 1972); *Will-Tex Plastics Mfg., Inc. v. Dep't of Hous. & Urban Dev.*, 346 F. Supp. 654 (E.D. Pa. 1972). A closer look at these authorities reinforces

the Landowner's position. Each of these cases turned on the same statutory feature: 42 U.S.C. § 4602(a)'s express disclaimer that the URA's acquisition policies "create no rights or liabilities." The courts did not hold that condemnation statutes in general are unenforceable, but simply followed the applicable statutory language. They held that *this particular federal statute*, which *expressly disclaimed* the creation of rights, did not create rights. That is an unremarkable conclusion—and one that proves nothing about a different statute that contains no such disclaimer.

The *Barnhart* court's reasoning, read carefully, underscores the distinction. The court canvassed the legislative history at length and found that Congress deliberately chose *not* to make the land acquisition policies judicially enforceable, opting instead for administrative enforcement. 362 F. Supp. at 467-71. The implicit premise of this analysis is that a legislature *could* make acquisition policies enforceable—the question was whether Congress *did* so with the URA. The South Carolina General Assembly plainly chose to: it created S.C. Code Ann. § 28-2-470.

Moreover, the Eastern District of Pennsylvania trilogy—*Martinez*, *Rubin*, and *Will-Tex Plastics*—concerned whether displaced persons could bring federal lawsuits to recover relocation benefits and advisory assistance under the URA. These cases addressed the compensatory provisions of the URA (Titles II and III), not land acquisition procedures or condemnation process. They are therefore doubly inapposite: they interpret a different statutory provision in a different context, and their holdings depend on a statutory disclaimer the SCEDPA does not contain.

D. The County's Argument, If Accepted, Would Nullify the SCEDPA

The most revealing test of the County's argument follows it to its logical conclusion. If violations of the SCEDPA's mandatory procedures do not “invalidate a condemnation”- if the Act's commands are merely aspirational, as the County's URA analogy implies - then the SCEDPA is a dead letter. A condemnor could skip every step the Act requires and the landowner would have no remedy, because according to the County, the Act “does not create a private cause of action.”

This result cannot be squared with the statute. The legislature declared the SCEDPA as the "exclusive procedure whereby condemnation may be undertaken in this State." S.C. Code Ann. § 28-2-60. The word "exclusive" means simply: there is no other procedure. If a condemnor does not follow the exclusive procedure, it has not validly undertaken a condemnation. That is not the Landowner's novel theory, just a logical consequence of the statute's own terms. The County must follow the law. When it does not, the Landowner is entitled to challenge under S.C. Code Ann. § 28-2-470. In sum, the Court should refuse to import the URA's limitations into the SCEDPA.

IV. THE ORDER IGNORED MATERIAL STIPULATIONS

The Order strayed from binding, pretrial Stipulations, as noted in Appellant's Brief and in the record in Plaintiff's Motion to Reconsider filed below. R. at ___. Among many errors, most egregious was the trial court's finding that "[n]othing in the facts indicate that the County withheld the appraisals or failed to provide them upon request." Order at 13. This finding conflicts with:

- Stipulation 23 ("At no time prior to the Date of Condemnation did Ward, or anyone else on behalf of the County, offer to provide a copy of any appraisal of the Property… The County produced a copy of the Martin Appraisal to counsel for Landowner on September 27, 2022.") The NOC was filed on September 15, 2022.
- Stipulation 24 ("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.")

As discussed, *supra*, Section I.C.3., Ward's testimony on this point was self-contradictory.

CONCLUSION

The County's arguments to uphold the Order apply the wrong standards, defeat legislative intent, and eradicate landowner protections. These arguments must be rejected, the Order reversed, and the faulty condemnation action dismissed.

Respectfully submitted,

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