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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 20-CP-22-00930
CASE NO. 20-CP-22-00931
CASE NO. 20-CP-22-00932

Sunset Lodge, LLC,Appellant,

v.

Town of Pawleys Island,.....Respondent.

and

Franklin D. Beattie, as trustee of the Franklin D. Beattie
Preservation Trust,Appellant,

v.

Town of Pawleys Island,.....Respondent.

and

M. Baron Stanton,Appellant,

v.

Town of Pawleys Island,.....Respondent.

RECORD ON APPEAL
(Including Stipulation and Certificate of Counsel)
Vol. II of III

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April 15, 2021 Landowner transmittal e-mail re Town motions to stop discovery and dismiss, with three 33-page proposed orders, and alternative three one-page proposed orders

Barry Stanton

From: Barry Stanton
Sent: Thursday, April 15, 2021 11:47 PM
To: Culbertson, Benjamin H. Law Clerk (Christopher Manning)
Cc: Culbertson, Benjamin Secretary (Ramona Moree); Will Dillard
Subject: Defendant's motions to dismiss and for protection from discovery: Sunset v. Town of Pawleys, 2020CP2200932; Beattie v. Town of Pawleys, 2020CP2200931; and Stanton v. Town of Pawleys, 2020CP2200930
Attachments: Order Denying TOP Mot to Dism Chall II as Moot and Mot Prot Frm Disc - Sunset 932.docx; Order SHORT Denying TOP Mot to Dism Chall II as Moot and Mot Prot Frm Disc - Sunset 932.docx; Order Denying TOP Mot to Dism Chall II as Moot and Mot Prot Frm Disc - Beattie 931.docx; Order SHORT Denying TOP Mot to Dism Chall II as Moot and Mot Prot Frm Disc - Beattie 931.docx; Order Denying TOP Mot to Dism Chall II as Moot and Mot Prot Frm Disc - Stanton 930.docx; Order SHORT Denying TOP Mot to Dism Chall II as Moot and Mot Prot Frm Disc - Stanton 930.docx; Proposed Form 4 Denying TOP MOT DISM AND MOT PROT ORD-Beattie 931.docx; Proposed Form 4 Denying TOP MOT DISM AND MOT PROT ORD-Sunset 932.docx; Proposed Form 4 Denying TOP MOT DISM AND MOT PROT ORD-Stanton 930.docx

Dear Mr. Manning:

We were instructed at the April 1, 2021 hearing to submit proposed orders in each the three cases by today.

Attached are a long order and a short order for each case. Please tell Judge Culbertson that we would be happy with either.

Also attached are Form 4s that can be used with either.

Please also tell Judge Culbertson that the orders all read the same in each case – to read one is to read the others. We would be happy to change any orders in any way desired or to provide more research on any aspect.

Best regards,

Barry Stanton

M. Baron ("Barry") Stanton
STANTON LAW OFFICES, P.A.

Cell 803-530-2642

Offc. 803-929-1484 (currently undergoing work)

POB 245

Cola., SC 29202

From: Barry Stanton <bstanton@stantonlaw.com>

Sent: Wednesday, March 31, 2021 8:23 AM

To: Culbertson, Benjamin H. Law Clerk (Christopher Manning) <BCulbertsonlc@sccourts.org>

Cc: Culbertson, Benjamin Secretary (Ramona Moree) <BCulbertsonSC@sccourts.org>; Will Dillard <will@belserpa.com>

Subject: Hearing April 1: Defendant's motions to dismiss and for protection from discovery: Sunset v. Town of Pawleys, 2020CP2200932; Beattie v. Town of Pawleys, 2020CP2200931; and Stanton v. Town of Pawleys, 2020CP2200930

Dear Mr. Manning:

You are probably aware that the e-filing system had problems yesterday. It appears there are still some glitches this morning.

Attached for Judge Culbertson for the hearing on Thursday, April 1 are, for each case, a combined brief opposing the Defendant Town's March 5 motion to dismiss for mootness and the Town's motion for protection from discovery.

For yours and the Judge's information, the briefs are written so as to be identical, requiring the reading of only one.

There are also motions pending by the Town for protection from discovery in related cases ending in 600, 601, and 602, for which we may not have time to file a brief, but which we will address at hearing. Those motions relate most immediately only to the same deposition which is the subject of the motions in the cases we have briefed.

Best,

Barry Stanton

Barry Stanton

Cell [803-530-2642](tel:803-530-2642)

Office [803-929-1484](tel:803-929-1484) (undergoing work)

Stanton Law Offices, P.A.

P.O. Box 245

Columbia, SC 29202

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00931
	)	
Franklin D. Beattie, as trustee of	)	
The Franklin D. Beattie	)	
Preservation Trust,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	

ORDER
(DENYING TOWN’S MARCH 5, 2021 MOTION FOR JUDGMENT ON
THE PLEADINGS TO DISMISS AS MOOT AND RELATED MOTION FOR
PROTECTION FROM DISCOVERY)

After carefully considering the pleadings, the motions, the submittals of the parties, and oral argument at the hearing April 1, 2021, this Court denies the Town’s March 5, 2021 motion for judgment on the pleadings and the Town’s March 3, 2021 motion for protection from discovery. Construing the pleadings in the light most favorable to Plaintiff, as this Court is required to do, and likewise accepting all of the allegations of the Amended Complaint and the favorable inferences therefrom as true, this action is not moot.

The pending discovery shall be complied with within 15 days of the entry of this order or within such other time as the parties may agree.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Circuit Judge

Date:_____

[or see electronic signature page for date and electronic signature]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00930
	)	
M. Baron Stanton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	

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(DENYING TOWN’S MARCH 5, 2021 MOTION FOR JUDGMENT ON
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Circuit Judge

Date:_____

[or see electronic signature page for date and electronic signature]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00932
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	

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AND IT IS SO ORDERED.

Benjamin H. Culbertson
Circuit Judge

Date:_____

[or see electronic signature page for date and electronic signature]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00931
	)	
Franklin D. Beattie, as trustee of	)	
The Franklin D. Beattie	)	
Preservation Trust,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

ORDER
(DENYING TOWN’S MARCH 5, 2021 MOTION FOR JUDGMENT ON
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PROTECTION FROM DISCOVERY)

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Background

On March 5, 2021, in each of three cases which have similar pleadings, motions and discovery, but which have different Plaintiffs, the Town filed a motion pursuant to Rule 12(c), SCRPC for judgment on the pleadings.¹

¹ The Plaintiffs in the three cases and respective case numbers are as follows: Sunset Lodge, LLC, 2020-CP-22-00932, Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, 2020-CP-22-00931, and M. Baron Stanton, 2020-CP-22-00930. These cases are referred to herein as the “Challenge II cases.” Unless a difference is noted, the motions in the three cases are handled the same way. This order reads the same in each case.

The Town requests that the Court dismiss the instant action as moot on the grounds that the Town has pled in paragraph 8 of its March 3, 2021 Answer to the Amended Complaint that the Town has withdrawn its condemnation notice which commenced the related condemnation action.

The Town asserts that Plaintiff's action is a "single cause of action" challenging the condemnation action, and that the Town's withdrawal of only the condemnation "notice" renders the case moot.

The Town also filed a March 3, 2021 motion for protection from discovery, which was based on the motion to dismiss, and was grounded on the assertion that if the case is dismissed, there no longer remains any subject warranting discovery.

Standard of Review and Standard of Decision

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Rule 12(c), SCRCF. When considering such motion, the Court must regard all properly pleaded factual allegations of the nonmoving party as admitted, and any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000).

The standard is thus the same as a Rule 12(b)(6) motion made after answering. See Rule 12(b), SCRCF (requiring that a Rule 12(b)(6) motion be made before pleading), and cf. Rule 12(h)(2), SCRCF (providing that the defense ordinarily addressed in Rule 12(b)(6) is not waived by failure to assert it in a pre-answer motion and may be asserted by motion for judgment on the pleadings).

A Rule 12(c) motion by a defendant is in essence, a Rule 12(b)(6) motion made after answering, with the added assertion by a moving defendant that nothing the defendant has pled lends any help to the complaint in stating any claim on any basis, and that the court may also consider facts, if any, formally admitted by Plaintiff's pleading in reply to a counterclaim or affirmative defense of the defendant.

Thus, no allegation the defendant affirmatively pleads to benefit itself is accepted unless the plaintiff admits it, and then only the inferences from it which are favorable to the plaintiff are indulged. Plaintiff is under no requirement to negate any allegation of the defendant in the course of the motion.

A complaint under a 12(c) motion is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Falk. See also Rule 54(c), SCRPC (“Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings”); and see Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P. et al., 385 S.C. 452 at 457, 684 S.E.2d 756 at ____ (2009)(“The character of a complaint is determined by its factual allegations, not the label assigned to it”).

"A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." Lydia v. Horton, 343 S.C. 376, 540 S.E.2d 102 (Ct. App. 2000), rev'd on other grounds; Douglass ex. rel. Louthian v. Boyce, 336 S.C. 318, 323, 519 S.E.2d 802, 805 (Ct. App. 1999)(citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991)).

"Our courts have held the pleadings should be construed liberally so that substantial justice is done between the parties." Falk, 341 S.C. at 287, 533 S.E.2d at 353. "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Id.

As in the practice under Rule 12(b)(6), if the challenged pleading does not meet the standard, the proper course is to grant the motion without prejudice, and grant the nonmoving party leave to amend the pleading to satisfy any missing requirement if the party can do so. See Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019)(discussing rationale for practice of granting leave to amend under Rule 12(b)(6)). This leave should be provided as part of the ruling on

the moving party's motion to dismiss without the nonmoving party making a motion to amend.

Skydive.

The Nature of the Case, the Issues, and the Amended Complaint Viewed
in the Light Most Favorable to the Nonmoving Party and Viewed
Without Limitation to Theories Named or Relief Requested

Because the standard of decision discussed above calls for the allegations of the 375-paragraph Amended Complaint of the nonmoving party to be accepted as true, and not be confined to the specific relief labeled or requested, the following background is necessary.

This background is recounted under the foregoing standard for the purposes of the motion and does not constitute this Court's findings on any disputed matters, other than that they are alleged. This background is concerned not only with the facts pled, but also with the issues they present and the types of relief to which they could entitle the pleader, keeping in mind how those claims and remedies would or would not be mooted by the filing of a notice of abandonment.

The instant case arises from the second suit by the Town against Plaintiff.

Previously, in June 2020, the Town commenced the first statutory condemnation action against Plaintiff.

Plaintiff had offered the Town a "beach renourishment easement" at no charge, but the Town sought an easement with terms and scope Plaintiff believed to be unreasonable.

The Town thereafter stated no easement would be necessary for its renourishment project, and completed the placement of all sand for the project.

The Town thereafter again sought an easement with terms and scope Plaintiff believed to be unreasonable. Plaintiff again declined to grant an easement with terms and scope Plaintiff believed to be unreasonable.

The Town sued to condemn.

In the first suit, the Town sought to condemn, among other things, a right of public use and access over a designated oceanfront portion of Plaintiff's oceanfront land.

The Town also sought to condemn the right to do "beach renourishment" work on the designated portion, and other rights to do things on or prohibit Plaintiff from doing things on the designated portion of Plaintiff's property. (See, e.g., Amended Complaint ¶¶45-52 (recounting provisions for limiting Plaintiff's access to Plaintiff's land and for tearing down improvements such as decks, stairs, showers, foundation elements, etc. if in easement area.))

One boundary of the designated portion of Plaintiff's land was just a few feet away from the door of Plaintiff's oceanfront house. (See id.)

The offer of payment stated by the Town in the condemnation papers was for zero (\$0.00) dollars, based on a report procured by the Town from an appraiser to whom the Town did not give the written terms of the easement and whom the Town did not inform of the terms verbally.

Within 30 days of being sued, Plaintiff separately filed an approximately 169-paragraph suit against the Town pursuant to statute, to challenge on numerous stated bases, the power and ability of the Town to condemn ("the Challenge I case").² The Challenge I case, by statute, stayed all proceedings in the condemnation action until resolution of the Challenge I case. S.C. Code Ann. §28-2-470.

The Challenge I case presented a request for declaratory and injunctive relief.³ Under present statutory practice, it may not be necessary for the purposes of the instant motion, to determine in which

² The Challenge I case was filed pursuant to S.C. Code Ann. §28-2-470, which is part of the Eminent Domain Procedure Act (sometimes herein, "the Act"). Town similarly sued the two other landowners, each of whom filed a similar challenge case. Plaintiffs in the three challenge cases and respective case numbers are as follows: Sunset Lodge, LLC, 2020-CP-22-00600, Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, 2020-CP-22-00601, and M. Baron Stanton, 2020-CP-22-00602. Unless a difference is noted, the cases were handled the same way.

³ The South Carolina Declaratory Judgment Act provides:
Courts of record may declare rights, status and other legal relations.

respects the Challenge I case requested declaratory relief, permanent injunctive relief, statutory relief, or other relief.⁴ A liberal reading of the extensive Challenge I Amended Complaint indicates that, among other things, Plaintiff challenged the power and ability of the Town to ever condemn any easement at all over Plaintiff's property for the generally stated purpose and subject matter involved.

The Challenge I Amended Complaint also indicates that, in the alternative, Plaintiff challenged the power and ability of the Town to ever include, in any easement condemned, various attributes the Town sought to include in the easement.

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

S. C. Code Ann. §15-53-20.

⁴ See, e.g., Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961). In Atkinson, under the prior equity practice, a motion to dismiss the plaintiff's challenge action had been filed by the defendant on the ground that the action was not maintainable under the Declaratory Judgment Act, in that the plaintiff's remedy, if any, was for a permanent injunction. Upon the hearing of this motion, however, counsel for the parties agreed that the action simply be treated as one for permanent injunctive relief "in accordance with the usual procedure in such cases."

But see Timmons v. South Carolina Tricentennial Commission, 175 S.E.2d 805, 254 S.C. 378 (1970)(discussing, but not granting, primary remedy of permanent injunction). In Timmons, Annie Mary Timmons brought an action against the South Carolina Tricentennial Commission and against Daniel R. McLeod, as attorney general, under the Uniform Declaratory Judgment Act, but sought "a permanent injunction enjoining any proceedings to condemn her property."

And see Columbia Water Co. v. Nunamaker, 73 S.C. 550, 53 S.E. 996 (1906). Nunamaker was decided under the prior equity practice. There, the court observed:

When the right to institute condemnation proceedings is contested, the proper remedy is to bring an action in the Court of Common Pleas in order that the Court may, in the exercise of its chancery powers, determine such right. *** The [cited] cases show that such action must be regarded as independent, and not ancillary to the condemnation proceedings. If upon the final hearing of the case the Court should decide that the defendants did not have a right to institute condemnation proceedings, it would then grant a permanent injunction.

Id., 53 S.E. at 998 (citations omitted).

The Challenge I Amended Complaint also indicates that, in the alternative, Plaintiff challenged the power and ability of the Town to ever pursue any easement in any action without complying with certain requirements. These particularly described requirements included common law requirements for fair dealing and good faith deliberation in the selection of the attributes of the property interest to be condemned and for authorization of the condemnation of same, as well as requirements for compliance with specifically described statutory prerequisites.

The Challenge I Amended Complaint also indicates that, in the further alternative, Plaintiff challenged the power and ability of the Town to proceed under the particular case which was commenced, to proceed under the particular appraisal which was obtained, and to proceed under the particular condemnation notice served.

Among other things, after setting forth numerous other allegations, the Challenge I case made the following allegation and prayer: “The contemplated condemnation is completely unnecessary as a matter of law, and therefore constitutionally and equitably prohibited, and the Town of Pawley’s Island’s attempt to condemn an overbroad easement after the fact for an already completed and no longer proposed or prospective project should be disallowed and permanently restrained.” (Challenge I Amended Complaint ¶ 158.)

The Challenge I Amended Complaint further asserted: “In the alternative that the Town asserts the condemnation is for some other, future, hypothetical project, the condemnation is still unnecessary and in bad faith in that any such putative future project is admitted by the Town to be speculative, unlikely, and by the Town’s own calculations, most probably unnecessary for as much as twenty-two years.” (Challenge I Amended Complaint ¶ 160.)

The Challenge I Amended Complaint also asserted:

In the alternative that an actual, bona fide, proposed additional project were to materialize, the easement sought has been sought through knowing, intentional misrepresentation, lack of honesty in fact, spite, caprice, arbitrariness, and illegality, and has also been sought under influence by legal error as to not only the nature of the easement that is sought, but also as to

the lack of basis, or legal or practical need, for the easement or its numerous overbroad attributes. The easement sought has also been sought under influence of legal error as to the consequences of Plaintiff granting it or the Town taking it. The easement is also being sought through bad faith noncompliance with procedural rules. In that these facts constitute “fraud, bad faith or abuse of discretion,” the Town’s contemplated condemnation action, currently stayed by this action, should be disallowed with prejudice.

(Challenge I Amended Complaint ¶ 162.)

In the Sunset and Beattie Amended Complaints, there were also allegations as to the Town making false certifications in its pleading, the condemnation notice. The Amended Complaint in those Challenge I cases asserts: “For the reasons that (1) noncompliance with exclusive mandatory procedure renders the Town’s condemnation notice ultra vires and void, and (2) knowing or recklessly negligent false statements in a pleading render the pleader subject to sanctions including dismissal, the beginnings of the condemnation action represented by the Town’s Condemnation Notice should be dismissed with prejudice.” (Challenge I Amended Complaint ¶ 172 Sunset-600 and Beattie-601.)⁵

The Challenge I Amended Complaint also asserts the following: “Among other things, there is no need for an easement over the owner’s entire lot. There is no need for public access of any kind, no need to limit owner access, no need for broad Town activities unassociated with doing and maintaining the work, no need to include owner improvements, no need to be so close to owner homes, and no reason not to clarify there is no change in owner access to ocean and beach.” (Challenge I Amended Complaint ¶ 175.)

⁵ In the Stanton Challenge I Amended Complaint, there were additional allegations as to the Town attempting to change the description of the easement sought after commencing the action, and the Amended Complaint asserts: “For the reasons that (1) noncompliance with exclusive mandatory procedure renders the Town’s condemnation notice ultra vires and void, and (2) knowing or recklessly negligent false statements in a pleading render the pleader subject to sanctions including dismissal, and (3) the Town stated in writing that the condemnation notice was withdrawn, the beginnings of the condemnation action represented by the Town’s Condemnation Notice should be dismissed with prejudice. (Challenge I Amended Complaint ¶ 172 in Stanton-602.)

In all three Challenge I Amended Complaints, there are allegations that the Town Administrator filed an easement grant for the Beattie property which was unauthorized by the Beattie. (See, e.g., Sunset Ch.I Cmplt. ¶66.)

The Challenge I suit also asserts: “In the alternative that Plaintiff’s rights herein or in any contemplated condemnation action are adversely affected by the already completed project, Plaintiff may need the already completed actions of the Town to be redressed by damages for trespass or other monetary remedy, for which cause of action Plaintiff would and does demand a trial by jury, despite the nonjury portions of this action challenging the Town’s right to condemn.” (Challenge I Amended Complaint ¶ 179.)

The Challenge I Amended Complaint further states: “Plaintiff prays that the Condemnation Notice be quashed and that the Town be forever barred and enjoined from filing it or proceeding with it, for such other and further relief as is just and proper, and for all litigation costs.” (Challenge I Amended Complaint, prayer for relief following ¶ 179 (emphasis added).)

The Town filed a motion pursuant to Rule 12(b)(6) to dismiss the Challenge I case for failure to allege facts sufficient to state a cause of action and this Court denied the motion on September 11, 2020.

While the first condemnation action by the Town was stayed and Plaintiff’s August 2020 motion for summary judgment in the Challenge I case was pending, the Town, in October 2020, commenced a second statutory condemnation action against Plaintiff.

In this second suit, the Town again sought to condemn a right of public use and access over a designated oceanfront portion of Plaintiff’s oceanfront land, as well as the right to do renourishment work on the designated portion, and other rights to do things on or prohibit Plaintiff from doing things

on the designated portion.⁶ In this second suit, again, one boundary of the designated portion of Plaintiff's land was just a few feet away from the door of Plaintiff's oceanfront house.⁷

⁶ For example, the Amended Complaint in case 2020-CP-22-00932 alleges:

354. The New Notice is similar to the Existing Notice, but among other possible differences, the New Notice attempts, without leave of court, to alter the Existing Notice by adding the aforescribed 9-line footnote in the description of the property sought to be acquired.

355. The New Notice is falsely dated June 9, 2020, as if it, including the map and proposed Beach Renourishment Easement forming a part of it, existed on that date. This leaves the Town actors poised to next represent to the public, the Town Council or a court, if need be, that the New Notice (including its constituent parts) is what was served in June 2020 instead of the Existing Notice.

356. The New Notice is dated the same as the Existing Notice, but upon information and belief, did not exist on that date and was not prepared until after the October 12, 2020 Town Council meeting.

357. The New Notice is fraudulent in the above respect, and is an attempt, like other aforescribed activities, to create a false public record and a morass of official-looking paperwork to obscure the delicts and derelictions of the various Town actors involved; the New Notice is part of the continuing series of bumbles at the landowner's expense, frauds, and coverups alleged in the Existing Action and now this one.

⁷ There appears to be no dispute that the Town intended to commence the second suit and did so. Under the peculiar statutory procedure, the first and second suits by the Town began with service of papers without yet filing the papers with the court, and therefore the captions simply reflect the same parties in an identical case caption, without any Common Pleas case number on either caption.

The Town's March 31, 2021 brief only states that the second suit by the Town against Plaintiff contained "revisions reflecting certain objections asserted in the first set of challenge actions."

The Town does not state what revisions were made or in what way the suit and any revisions in it were responsive to objections stated in the Challenge I case. The Challenge II Amended Complaint does address the similarities and differences in detail and at length.

No other explanation is offered for why the Town commenced a second suit against Plaintiff when one was already pending and stayed.

In the Amended Complaint of the instant Challenge II case, the allegations of which, as discussed above, must be taken as true for the purposes of the Town's motion, Plaintiff asserts that the second suit was not an amendment made within the first suit because the "New Notice" was created without any leave to amend, in a suit which was stayed. Plaintiff states and alleges at length and in detail that the second suit by the Town was without any lift of the statutory stay, was without proper authorization from Town Council, and was without any prior resolution of the already pending action. (See Ch.II Am. Cmpl. ¶¶ 224-374.)

In the Challenge II Amended Complaint, which must be taken as true, Plaintiff asserts that the additional action was without consultation with Plaintiff, without notice to Plaintiff, without consent of Plaintiff, and without prior or subsequent explanation of purpose to Plaintiff. (See *id.*)

Plaintiff further alleges in the Challenge II Amended Complaint that virtually no objections of the plaintiffs in the first set of challenge actions were cured or corrected in the Town's second suit, and that, rather, the Town attempted to pursue condemnation of substantially similar subject matter, with

In response to the second suit by the Town, Plaintiff, again, within 30 days of being served by the Town, separately filed suit against the Town pursuant to statute, to challenge the power and ability of the Town to condemn. Viz., Plaintiff filed the instant Challenge II case, which the Town contends is now moot.

In the 375-paragraph Amended Complaint in this Challenge II case, Plaintiff incorporated by reference, the entire Amended Complaint in the Challenge I case. (Challenge II Amended Complaint ¶ 182.)⁸

the same defective appraisal, and the same lack of good faith deliberation on applicable factors. (See id.) Plaintiff alleges that the condemnation was also generally made more onerous and damaging to the landowner by addition of a disparaging and legally incorrect “argument” inserted by footnote into the granting/demising language and that additional false statements and events occurred which were additionally fatal to the second condemnation attempt. (See id.)

⁸ Plaintiff offered in Plaintiff’s brief, a partial synopsis of the 375-paragraph Challenge II Amended Complaint’s allegations, referring to the Amended Complaint as an account “of numerous chapters of the Town’s acts, misrepresentations, evasions and persistent omissions over an extended period of time.” The synopsis is stated here for summary purposes in lieu of the longer allegations themselves, which must stand on their own for purposes of the motion. Plaintiff contends that the allegations “have included the following, among other things”:

- Misrepresentation of the nature and scope of the “renourishment” easement sought in 2019 when first soliciting it and seeking to pay nothing for it.
- Doing so by saying the “renourishment” easement was only for sand placement, sand fence and planting, when the legal document placed the easement two feet from the door of the house, granted perpetual public access within the easement area, granted a perpetual right to restrict the owner’s access to that oceanfront part of the owner’s property, granted a perpetual right to tear down and prevent replacement of the owner’s improvements within the area, and perpetually subjected the owner’s right to build structures for access to the ocean to approval of an unidentified person with no governing standards.
- Misrepresentation publicly of the landowners’ good faith offer of an easement of reasonable scope in response to those solicitations from the Town.
- Doing so by omitting all reference to the landowner’s offer, omitting all disclosure of the issues, and falsely perpetuating the impression and public representation that the landowner had refused any easement whatsoever.
- Misrepresentation of the nature and scope of the actually contemplated easement to the appraiser hired by the Town when seeking approval of federal participation in part of the project.
- Doing so by asking the appraiser to determine potential land acquisition costs for 109 properties as a condition of obtaining federal approval of federal assistance on that part of the overall proposed renourishment project, but omitting the unreasonable terms to which Plaintiff has objected.

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- Filing an unauthorized easement grant from one property owner, Mr. Beattie.
 - Active involvement in creating a poorly drafted and unreasonable proposed granting document proposed to become a permanent part of Plaintiff's chain of title.
 - Abandonment, altogether, of the request for the easement in 2019.
 - Concurrently with such abandonment, publicly announcing intention to perform the work without an easement.
 - Concurrently with such abandonment, publicly announcing the scientific likelihood of the lack of necessity of similar work for another 22 years or more.
 - Subsequent to such abandonment of the request for the easement, completion of the work for which the easement had been sought.
 - Subsequent to abandonment of the request for the easement and completion of such work, disclosing in 2020 a determination to pursue a "program" for only potential work.
 - Doing so knowing that the potential work was to be years in the future, with no certainty of future need or occurrence, no assurance of Congressional funding, and no guarantee of future assistance whatsoever, and that the need for the potential work was contrary to the Town's own prior data and estimates the Town obtained and publicized in order to justify the doing of the work, the scope of the work, and the spending on the work, which was now already done.
 - Subsequent to abandonment of the request for the easement and completion of the work without such easement, then requesting the easement again, but now only for the mere purpose of joining the uncertain "program" for which the need was unlikely, for which the possible need was remote in time, and under which the receipt of financial help and the actual doing of anything was speculative.
 - Repeating prior misrepresentations in making a new request for the easement. I.e., that the "renourishment" easement was for the limited purpose of sand placement, sand fence, and planting.
 - Continued publicly broadcast misrepresentation in the May 2020 Council meeting of both (i) the nature and scope of the easement now sought as only for putting sand on the beach and (ii) the landowners' responses to the prior solicitations as being a categorical refusal rather than a good faith offer of a reasonable easement.
 - Consequently issuing a resolution insufficient for and invalid for authorizing the condemnation which the Town would later pursue.
 - Misrepresentation of the nature and scope of the easement to the appraiser hired to determine the just compensation which should be paid to the landowner if the easements were to be purchased from the landowner or condemned and taken by eminent domain.
 - Doing so by asking the appraiser to determine the just compensation which should be paid to the landowner, but omitting from the easement he was asked to appraise, the unreasonable terms to which Plaintiff has objected.
 - Commencing a condemnation action seeking an easement containing the unreasonable terms to which Plaintiff has objected, but doing so in a proceeding integrally based on the falsely procured appraisal of an easement of materially more reasonable scope, while withholding the appraisal in violation of the statutory procedure, and while making a false certification in the condemnation papers that the appraisal had been previously provided.
 - In seeking condemnation of an easement the entire request for which had been previously abandoned, seeking also to include features and scope previously agreed with one or more landowners not to be necessary features or scope.
 - Misrepresenting publicly the nature of, progress of, and positions taken in the litigation.

In the Challenge II case, Plaintiff stated: “Plaintiff prays that both the “Existing” and the “New” Condemnation Notices be quashed and that the Town be forever barred and enjoined from filing either of them or proceeding with either of them, for such other and further relief as is just and proper, and for all litigation costs.” (Ch.II Am.Cmplt., prayer (emphasis added).)

In the instant Challenge II case, Plaintiff did not plead or request that the overall relief sought by Plaintiff be “without prejudice.”

Nor did Plaintiff plead or request that issues adjudicated within the action in order to provide the declaratory or injunctive relief requested not be given permanent preclusive effect. Nor did Plaintiff characterize Plaintiff’s Amended Complaint as a “single cause of action.”

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- Misrepresenting to the Court in moving to dismiss, for a bond, and for special expedited treatment, the likelihood that a storm could wash away all 1.1. million cubic yards of sand in a single event and misrepresenting to the Court that under the “program,” if such an event occurred, the Town would be eligible to have the Corps of Engineers put all 1.1. million cubic yards back, including portions on which there would never be federal involvement.
 - Presenting to the Court a resolution created by the Town which was known at the time of creation to be factually false, in which the Town Council falsely states that the materials contained in the resolution were presented to Plaintiff before the October 12, 2021 time of the resolution, impliedly in June 2020.
 - Doing so in order to dissuade the Court from granting summary judgment by attaching the false resolution as Exhibit B to the Town’s November 24, 2020 brief opposing Plaintiff’s motion for summary judgment in the initial action.
 - Doing so again on March 17, 2021 by attaching the false resolution to the Town’s memorandum in support of the Town’s motion to reconsider the granting of summary judgment.
 - Approximately two months after Plaintiff’s summary judgment motion was filed in the initial challenge actions, commencing a separate condemnation action based on knowingly falsely stated facts in the resolutions purportedly authorizing same.
 - Doing so using condemnation notices created in October but falsely dated June 9, 2020.
 - Doing so using condemnation notices in which the occurrence of other activities and events is recited falsely if the statements are taken to speak as of June 9, 2020.
 - Not adequately answering the factual allegations of the original complaint in the instant challenge action.
 - Abandoning the underlying condemnation notice on February 10, 2021.
 - Not adequately answering the January 13, 2021 amended complaint in the instant challenge action.
 - Seeking dismissal before discovery by Plaintiff on potential additional relief for Plaintiff has progressed, including the deposition of the Town Administrator noticed on January 15, 2021 for February 19 and the answering of January 10, 2021 interrogatories served by Plaintiff.

Subsequently to commencing the instant Challenge II case, Plaintiff began to pursue discovery from the Town in the Challenge II case, including the deposition of the Town Administrator.

On January 20, 2021, the Court granted Plaintiff's motion for summary judgment against the Town in the Challenge I case. The Town subsequently moved for reconsideration. After summary judgment was granted, the Town, without prior consultation, moved in the Challenge I cases of Beattie (ending in 601) and Sunset (ending in 600) to disqualify Plaintiff's counsel from representing them in the Challenge I cases. After those plaintiffs responded extensively in writing to the Town's motion to disqualify, and asserted the motion was completely without merit, the Town withdrew the motion without hearing.

In January 2021, Plaintiff petitioned for award of litigation expenses in the Challenge I case.⁹ The Town opposed the fee petition and requested at least a four-month period in which to conduct discovery and mount opposition to the award of attorney's fees in a proposed full-blown evidentiary hearing. As of April 14, 2021, proceedings relating to fees are still pending.

On February 10, despite the statutory stay in the second condemnation action, without leave of court or consent of Plaintiff, the Town sought to withdraw its condemnation notice which was used to commence the second condemnation action against Plaintiff.

The Town did so by filing, in the instant Challenge II case challenging the second condemnation suit, a "Notice of Abandonment." The Notice states that the condemnation action is "hereby abandoned and withdrawn."

⁹ Only the plaintiffs in the Sunset and Beattie Challenge I cases sought attorney's fees, and each asserted that the fee petition was based approximately if not exactly on one-third of the fees and expenses incurred in all three Challenge I cases and the early stages of the three Challenge II cases. The plaintiff in the Stanton Challenge I case did not seek the other one-third of the fees.

The Notice states that the action is “abandoned,” but does not state that the dismissal is with prejudice, or that the Town relinquishes any right to bring another condemnation action with regard to Plaintiff’s property.

On March 3, 2021, the Town filed an answer to the Amended Complaint in the instant Challenge II case, and, after denying the majority of the 375 paragraphs of the Amended Complaint, alleged at paragraph 8 that the “single cause of action” alleged by Plaintiff was rendered moot by the Town’s filing of the February 10 Notice of Abandonment.

In its Answer, the Town again did not allege or stipulate that the Notice of Abandonment was intended to end the condemnation action with prejudice to commencing another condemnation action on the same subject matter.

On March 5, 2021, the Town filed its instant motion for judgment on the pleadings pursuant to Rule 12(c), SCRCF, asserting that this case is now moot. The Town requests that the instant case be dismissed “without prejudice.” Just beforehand, on March 3, 2021, the Town filed a motion for protection from pending discovery, including the still un-taken deposition of the Town Administrator, pending interrogatories, and any future discovery.

Interpretation, Validity and Effect of the
Filed Notice of Abandonment Alleged by
the Town in its Answer to the Amended Complaint

Plaintiff argues that the Town's unilaterally "abandoning" its suit while the suit is stayed for a challenge to be resolved¹⁰ is as ineffectual as trying to "take a nonsuit" in a conventional civil action when a nonsuit is prohibited.¹¹

Plaintiff also argues that additionally trying to "abandon" the suit without leave of court or consent of the opposing party, and asserting separately that the "abandonment" is without prejudice to promptly pursuing a third suit on the same subject matter, is as ineffectual as to trying to declare one's own nonsuit to be "without prejudice" when neither the court nor the opposing party agrees that the nonsuit is without prejudice.

¹⁰ S.C. Code Ann. §28-2-470 provides: "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. No issues involving the condemnor's right to condemn may be heard in the trial upon the issue of just compensation." *Id.* (emphasis added).

Plaintiff points out that if a subsequent suit were brought by a condemnor after the condemnor abandoned the prior suit during a challenge action without consent, the landowner would be required to file a challenge action within 30 days of service of the new condemnation suit in order to resolve the question whether the prior "abandonment" during a stay was valid, and whether the abandonment was a permanent relinquishment of the right to pursue the landowner's property, thus barring further suit by the would-be condemnor.

¹¹ Rule 41(a), SCRPC provides for a plaintiff's unilateral dismissal, or nonsuit, by notice if filed before the defendant answers or files a motion for summary judgment. If the defendant has answered or filed such a dispositive motion, voluntary dismissal is still available, but not by unilateral dismissal. Nonsuit is then available by stipulation signed by all parties.

A crucial feature of Rule 41(a) is the "two dismissal rule": the first voluntary dismissal is without prejudice, that is, it is not an adjudication on the merits unless otherwise stated in the dismissal order. The second dismissal is with prejudice, that is, when a voluntary dismissal is filed "by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim," the dismissal is with prejudice.

For the further protection of a successively sued defendant, Rule 41(c), SCRPC additionally provides: "If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order." This Court has not researched whether Rule 41(c) reflects prior equity practice.

Putting aside for the moment, the question of whether a unilateral dismissal of any type was allowed while the matter was statutorily stayed and being challenged, the finality and preclusive effect of the stated “abandonment” is a question highly relevant to legal or practical mootness.

“Abandon” has been defined as “to give up with the intent of never again claiming a right or interest in.” Merriam-Webster’s Collegiate Dictionary (11th ed., Springfield, Mass. 2003).

“Abandonment” with regard to a use of real property is held legally to mean the owner’s intentional abandonment of the use in the sense of subjective intent to forever relinquish it. Conway v. City of Greenville, 254 S.C. 96 at 101, 173 S.E.2d 648 at 650 (1970)(stating, with respect to a prior use rendered nonconforming by a new zoning ordinance, that abandonment is discontinuance of a thing accompanied by intent to relinquish the right to do the thing that is discontinued); see also Maguire v. City of Charleston, 271 S.C. 451, 247 S.E.2d 817 (1978) (Rhodes, Justice, dissenting)(discussing cases in which “discontinuance” required intent to relinquish and meant the same as “abandonment”).

With respect to an easement, abandonment of it requires the intention to abandon and the external act by which the intention is carried into effect. Witt v. Poole, 182 S.C. 110, 188 S.E. 496 (1936). An intention to abandon property or a property right need not appear by express declaration, although it may be manifested thereby. Witt.¹²

The Town has now again expressly declared “abandonment.” If the “abandonment” is final, namely with prejudice to further attempts to condemn, it would clearly present, if not a legal, then at least a practical, question of mootness.

Historically, instances in which a condemnor does “abandon,” or is permitted to “abandon,” a condemnation action generally are instances of permanent relinquishment. In these instances, as a matter of fact, the condemnor has determined to abandon not only the action, but any claim to the

¹² The Challenge II Amended Complaint indicates that the Town had once before abandoned the right to pursue an easement. See the Amended Complaint ¶¶35-48 re 2019 cessation of requests for easement, declaration of no need for easement, and 2020 completion of work without easement.

property. I.e., the condemnor has determined that the condemnation will not be necessary at all, or for some other reason will not be pursued again.

These instances arise from time to time when, for instance, the underlying project for which the condemnation is pursued is changed or terminated so as to eliminate the need for the property, or when it becomes clear that the compensation which will be ordered is higher than it is feasible to pay for purposes of the project.

These instances historically receive attention when there is concern with, or dispute over, whether the condemnor should be able to thus permanently back out of, or “abandon” the condemnation. These issues of “abandonment” arise when the landowner wishes to enforce an award of compensation already made, or where the landowner or the landowner’s property has otherwise suffered or changed position in some respect because of the long pendency of the threat of condemnation before the condemnor finally decides to “abandon” the condemnation.

There are few instances involving “abandonment” as a temporary expedient exercised by the condemnor before promptly resuming substantially similar activities. See, e.g., Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951)(considering “injustice” to property owners in permitting a municipal body to tie up an owner's property for three years, after which the city can change its mind and abandon or refuse to take the property at the end of three years); In re Certain Land, 364 Pa. 71, 70 A.2d 847 (1950)(holding that in condemnation of land for playgrounds, the date of taking was the date the ordinance was passed which designated the property for acquisition, and holding the statute not unconstitutional, but holding that the city could not abandon the condemnation of the subject parcel without the consent of the owner); Town of Trumbull v. Ehram, 148 Conn.47 at ___, 166 A.2d 844 at 847 (1961)(addressing landowner objection to permanent withdrawal of condemnation, noting that if for some reason, it is desired “to give up the undertaking,” the proceedings may be discontinued before the payment of the judgment); and Hamer v. State Highway Comm'n, 304 S.W.2d 869 (Mo.

1957)(involving claim that highway department's decision to abandon any plan to place highway on plaintiff's property after plaintiff made plans in cooperation with the intended condemnation constituted a taking without just compensation).

The Code is silent on whether a condemnor is authorized to define "abandonment" for itself. There is no express authorization for the condemnor to declare that a "temporary abandonment" is being made, in which the "abandonment" is an expedient or a tactical tool, such as for the purpose of ending discovery, moving out the valuation date for a subsequent condemnation attempt, changing counsel, etc., and to subsequently re-commence an action on substantially the same subject matter with a putatively "cleaner slate."

Plaintiff argues that if such a procedure were permitted, it would be comparable to allowing a government plaintiff in a conventional civil action to take a voluntary nonsuit without prejudice and without leave of court after the defendant answered and counterclaimed, over and over, ad infinitum.

As noted above, this is not permitted in a Civil Action governed by the Rules of Civil Procedure. "In the event of conflict between [the Eminent Domain Procedure Act] and the South Carolina Rules of Civil Procedure, th[e] act shall prevail." S.C. Code Ann. §28-2-120. However, it is unclear whether, here, the Legislature intended a conflict with the Rules of Civil Procedure, or a parallel scheme with the same guiding principles averse to successive multiple litigation.

Assuming the Rules of Civil Procedure do not apply by letter, it is difficult to conclude that the Legislature intended "abandon" to mean "not abandon" or "temporarily abandon," and to allow a limitless ability of the government condemnor to dismiss and re-commence a condemnation on the same subject matter.

There is also no delineation in the Act of "the manner of abandonment authorized by this chapter," as referenced in §28-2-510(c). I.e., there is no provision which states that the Town's "abandonment" is affirmatively authorized; there are only the requirement in Section 28-2-470 of

landowner consent to any proceedings during a pending challenge action, and the prohibition in §28-2-230(B) against abandonment without owner consent after taking possession and making material alterations. Section 28-2-470 authorizes actions taken during the automatic stay only if done with landowner consent: “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.” Id.

The Chapter 2 of Title 28 of the Code thus actually contains no express authorization for a condemnor to unilaterally “abandon” a condemnation once a challenge action has been commenced.

At that point, all proceedings have been stayed pending resolution of the challenge. The condemnor is clearly authorized to abandon and do other things after obtaining landowner consent, or to stipulate to the correctness of the challenge, or to have the court determine the merits of the challenge in the pending challenge action.

These questions may not need to be answered completely now, where the question is only whether these or other questions still present a live controversy and where the case involves an actual assertion of rights.

The Town’s present argument that it has abandoned condemnation and that the challenge action is “entirely moot” would at first imply that the Town’s voluntary dismissal of its condemnation action is with prejudice and puts an end to almost all controversy. However, the Town does not plead this in its Answer.

Plaintiff stated in Plaintiff’s March 30 pre-hearing brief at 5, that “as late as March 18, 2021, the mayor of the Town sent out a mass public e-mail announcing a determination to continue to ‘pursue’ the easements.” Plaintiff further stated, “In doing so, he continued in the same fashion in which the Town has previously operated, to not disclose to other owners, the actual issues in the two suits so far against each of three landowners.” The latter assertion by Plaintiff relates to the issues of misrepresentation and defamation which appear in the allegations of the Challenge II amended

Complaint, and are stated to need timely correction. (See, e.g., id., Preliminary Statement, and ¶¶78, 87 and 126.)

The Town’s oral argument at the April 1 hearing did not dispute or directly address the Plaintiff’s account of the mayor’s mass e-mail. The Town’s counsel’s statements that the Town “believes the issues are entirely moot at the present time,” and that “the Town is still very interested in acquiring the easements” indicate the Town clearly intends other than to stop pursuing condemnation of the same subject matter.

The Town’s statements at the hearing about starting over “with a clean slate” and giving the landowners a third “opportunity to present challenges” certainly do not communicate permanent relinquishment of the pursuit of the property. For this reason, and based on the well-defined and live dispute of the parties reflected on the face of the Challenge II Amended Complaint and its exhibits, the availability of relief, and the realistic threat of future litigation, this Court does not consider this case moot. It is also clear that a fee petition may be forthcoming from Plaintiff.

The Town acknowledged to the Court the probability of a third action against Plaintiff on substantially the same subject, qualifying the probability by stating that the matter might be averted if the Town “could negotiate an agreement” with the owners. This of course, would be the situation in many a case. When the Town introduced this subject at oral argument, Plaintiff responded to correct any implication that control of the matter might be in Plaintiff’s hands. Plaintiff, clarifying an intention of both parties to tread lightly on such matters, clarified to the Court that such negotiation is something on which the Town has put forth no proposal since before January 2021.

Plaintiff argues that the Town’s unilateral “temporary abandonment” for the purpose of arguing that that no present cause of action is stated in law or equity, and dismissing “without prejudice,” the case that Plaintiff brought – all in order to grant a “clean slate” to the Town and provide negotiating leverage – is ineffectual and unsupported in law.

Plaintiff contends that to date, the Town still has not adequately answered hundreds of allegations of the Amended Complaint.¹³ Plaintiff contends that to grant the Town’s motion would, among other things, continue to keep issues obscure, require dredging up “Challenge I,” “Challenge II,” and “Challenge III” pleadings in a Challenge III case, require Plaintiff, as a private citizen, to bear the expense, a third time, of commencing discovery that was not reached in the Challenge I and Challenge II cases and that might be similarly delayed in a Challenge III case, and allow memories and other evidence to be lost during the delay. Plaintiff submits that during the present litigation, the Town has already changed counsel, and the Town Clerk resigned, and that over time, people could not only forget, but die, resign, become disabled, move, be discharged, not run for reelection, fail to be reelected, etc.

In State v. Flamme, 217 Ind. 149, 26 N.E.2d 917 (1940), after the condemnation proceeding had progressed to the determination of an award and a judgment, the condemnor decided not to proceed with payment under the schedule in the statute for finalizing the condemnation and stated “that it has waived and abandoned, and does waive and abandon, any and all right, title, and interest it may have in said property.” This was yet another case of final, unequivocal, abandonment.

However, the landowner objected that the condemnor should not be allowed to “abandon” the condemnation. The court examined extensively, the authorities of various jurisdictions that a condemnor could “abandon” a condemnation at any time before judgment, but all instances examined were those in which the condemnor truly relinquished pursuit of the property and offered no intention to continue to pursue it.

The court reasoned that under the circumstances and the statutory scheme, the condemnor, in that case, could also abandon pursuit of the property even after judgment. The landowner

¹³ Denials shall fairly meet the substance of the averments denied. Rule 8(b), SCRCF. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Id.

“significantly pointed out that if the state, or any other agency possessing the power of eminent domain, may abandon a proceeding of this character after the damages have been fixed and determined by a court of competent jurisdiction and reduced to a final judgment, there is nothing in the statute to prevent the condemnor from claiming what would amount to a succession of new trials as of right until an acceptable award is obtained, or the property owner is exhausted by the uncertainty, annoyance, and expense of litigation and deprived of his property without just compensation.” Flamme, 26 N.E.2d 917 at 919.

The court, however, upheld the ability of the condemnor to permanently relinquish any pursuit the property. Notably, addressing the landowner’s “significant” point, the court observed:

It does not appear to be important that the state may attempt to abuse its privileges by resorting to a succession of condemnation proceedings with a view of acquiring the appellees' property at its own price, or harassing them into involuntary submission. There is ample authority for the intervention of courts of equity to prevent such abuses. Northern Pacific R. Co. v. Georgetown, 1908, 50 Wash. 580, 97 P. 659; Central of Georgia R. Co. v. Thomas, 1928, 167 Ga. 110, 144 S.E. 739; East Bay Municipal Utility Dist. v. Kieffer, 1929, 99 Cal.App. 240, 278 P. 476, 279 P. 178.

Flamme, 26 N.E.2d 917 at 919 (emphasis added).

The first question, then, remains, not whether the South Carolina Eminent Domain Procedure Act contemplates the ability of a condemnor to “abandon,” but what the South Carolina Eminent Domain Procedure Act contemplates “abandonment” to mean.

If “abandonment” of the notice is a permanent waiver of pursuit of the property and has a res judicata effect, the case cannot be considered moot until this is declared. Plaintiff fairly has a right to have that determined and declared in this second action before being faced with third in which the proposition is denied by the Town.

If, on the other hand, “abandonment” is not a final relinquishment of the right to pursue the plaintiff’s property, then before the case can be considered moot, the question still remains whether Plaintiff has stated a cause of action in equity or otherwise, for any relief preventing, affecting or redressing such a pursuit, or for any other relief.

Prospective or Present Relief Supported by
the Amended Complaint Which Would Not Be Concluded in the
Case of a “Nonfinal” Temporary “Abandonment” by the Town

In the instance of a “nonfinal” “abandonment” by the Town, one question affecting mootness is whether Plaintiff still seeks prospective or declaratory relief, notwithstanding the Town’s effectual dismissal of its claim without prejudice with reservation of right to start over a third time.

The case is not moot, for example, if Plaintiff still seeks to permanently enjoin the Town from pursuing the property, to declare certain attributes of the easement unnecessary under any future condemnation, to declare what steps would be required in any future condemnation for pursuit of a successful condemnation, or to permanently enjoin multiplicity of litigation by the Town, i.e., enjoin the Town from serving or filing yet a third suit on the same subject matter.¹⁴ Plaintiff seeks all these things, for which there are supporting allegations.

¹⁴ Courts of equity have long had the power to permanently enjoin condemnation, as well as the power to permanently enjoin multiple or successive litigation.

The Town appears to contend that its abandonment is not permanent with respect to condemnation of Plaintiff’s property, but only as to the particular notice which was used to commence the second lawsuit against Plaintiff.

Permanent injunction is the conventional remedy, rather than an unusual one, sought in challenge actions. See, e.g., Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961)(observing agreement of parties that the action simply be treated as one for permanent injunctive relief “in accordance with the usual procedure in such cases”); Timmons v. South Carolina Tricentennial Commission, 175 S.E.2d 805, 254 S.C. 378 (1970)(discussing, but not granting, primary remedy of permanent injunction enjoining any proceedings to condemn landowner’s property); and Columbia Water Co. v. Nunamaker, 73 S.C. 550, 53 S.E. 996 (1906)(observing that when the right to institute condemnation proceedings is contested, the proper remedy is to ask the Court to decide that the defendants did not have a right to institute condemnation proceedings, and to then grant a permanent injunction). See also S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 748 (1993)(barring re-institution of condemnation permanently, because the condemnor had previously represented that there would be no need for an easement on the landowner’s property).

Permanent injunction arises in many instances from the power of equity to prevent or minimize multiple or successive lawsuits.

It is obvious that the rule of res judicata, available in law cases, cannot apply and provide any protection to a party in a subsequent lawsuit unless the prior lawsuit is determined on the merits and the issues are actually or constructively decided. See Robert Von Moschzisker, Res Judicata, 38 Yale Law Journal 299 (1929).

Putting aside the question of permanent injunction and declaratory relief, which already render the case not moot, there also remains a question of whether Plaintiff, on the facts alleged, may pursue statutory or other at-law relief which is not prospective in nature, such as special costs including attorney's fees, or damages. If so, the case is not moot for that reason as well.

Both parties have already acknowledged the imminency of a request, before the action is completed, for litigation expenses including attorney's fees.

Additionally, Plaintiff has emphasized and explained in Plaintiff's various pleadings and papers, that Plaintiff did not seek the litigation -- that both challenge suits were defenses to suits

The rule of *res judicata* is said not to have been definitely formulated until 1776, but, in essence, it is of much earlier origin and application. Primarily, the rule is one of public policy, and, secondarily, of private benefit to individual litigants. The primary principle early found expression in the maxim, "Interest reipublicae ut sit finis litium," and the secondary or subordinate one in the form "Nemo debet bis vexari pro una et eadem causa." The whole doctrine bears a close resemblance to the exceptio rei judicatae of the Roman law. *Id.* at 299.

"Equity follows the law," that is, "Aequitas sequitur legem." Equity has determined that one ground supporting intervention providing the anticipatory relief of injunction is to forestall a multiplicity of suits. See Douglas Laycock, The Death of the Irreparable Injury Rule, 103 Harv. L. Rev. 687, 714 (1990) (citing decisions holding that "[a] legal remedy is inadequate if it would require a 'multiplicity of suits'"). And see Cent. of Ga. Ry. Co v. Thomas, 144 S.E. 739, 167 Ga. 110 (1928)(affirming injunction against railway company from proceeding with second condemnation after abandoning first: "We are of the opinion that this is a case where a court of equity should have interfered to protect the landowner in her rights"). Estoppel in pais has been employed by equity to serve the same purpose in a proper case. See S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth. (barring re-institution of condemnation permanently).

South Carolina courts have long recognized the power of equity to remedy prospective disputes over interests in land and prevent future or successive litigation, particularly when the aggrieved party does not have a present vehicle to resolve the issues finally by one action in law for ejectment or for trespass damages, thus settling title or definition of the interest in land. See, e.g., Uxbridge Co v. Poppenheim, 135 S.C. 26, 133 S.E. 461 (1926)(citing, among concerns, "the practical certainty of a multiplicity of suits growing out of the confusion or uncertainty," and reversing trial court's grant of demurrer, the precursor to the practice of granting a Rule 12(b)(6) motion, in which the trial court ruled that the allegations and prayer of plaintiff in possession for declaration of the location of a disputed land boundary were insufficient to constitute a cause of action either legal or equitable); and McRae v. Hamer, 148 S. C. 403, 146 S. E. 243 (1929)(affirming denial of demurrer to complaint of plaintiff in possession to settle land boundary line, citing a "feature of equitable cognizance, the prevention of a multiplicity of suits," as sufficient to sustain the complaint against demurrer).

brought by the Town which required that the defenses would be lost if not presented pursuant to statute within 30 days of being sued by the Town each time. While emphasizing a desire to conduct discovery and reflect first on both Plaintiff's grounds and appetite for a damages claim, Plaintiff has pointed out that numerous facts alleged in the Amended Complaint may support a claim for defamation of Plaintiff, or for slander of Plaintiff's title. . (See, e.g., Ch.II Am. Cmplt., Preliminary Statement, and ¶¶78, 87 and 126.)

The Amended Complaint of the Challenge I case, which is specifically incorporated into the Challenge II Amended Complaint, also specifically mentions the prospect of a trespass claim based on the facts alleged, arising from the work already done by the Town on Plaintiff's land, "[i]n the alternative that Plaintiff's rights herein or in any contemplated condemnation action are adversely affected by the already completed project." (Challenge I Amended Complaint ¶ 179.)

Paragraph 221 of the Challenge II Amended Complaint characterizes the action only summarily, as "an action challenging Town attempts which were alleged to be unconstitutional, illegal, unauthorized, noncompliant, fraudulent, etc." However, under Rule 12(c), this Court cannot summarily disregard all the other facts in the Amended Complaint which might state a claim for a constitutional tort or other wrongdoing.

For example, this Court has concurrent jurisdiction for a claim pursuant to 42 U.S.C. §1983, which prohibits deprivation of procedural or substantive due process under color of state law.¹⁵

¹⁵ An example of such a case arising in the municipal condemnation context is found in Haworth v. City of Forest Grove, Oregon, Case 3:09-cv-01241-HZ (U.S. Dist. Ct. D. Or. Apr. 12, 2011), adopted as modified, Case 3:09-cv-01241-AC (U.S. Dist. Ct. D. Or. Jul. 6, 2011), which incidentally described the need for proof of further facts in subsequent litigation, because the claim was not presented and heard in the prior litigation.

In Haworth, the Haworths got some previously refused discovery from the city late in the state court proceedings, after the condemnation trial had commenced, essentially just before those proceedings were concluded. During the condemnation trial, the judge persuaded the parties to dismiss without prejudice to see if the matter could be worked out in mediation, with leave of the city to re-institute the case with the parties resuming the positions they had at the time of dismissal. The issue of

attorney's fees was to be negotiated by the parties, included in mediation, or determined upon re-institution of the case.

The city agreed, not disclosing that it knew its position was untenable and that it had no intention to follow through with the condemnation.

The matter was not worked out. The city stated it did not intend to pay attorney's fees. The city did not mediate. The city did not re-institute. The Haworths re-instituted and were awarded over \$185,000 in legal fees sometime around 2009.

The Haworths sued in federal court for, among other things, violation of §1983. They were unable to establish issue preclusion based on the previous state court proceedings, in which the discovery was not available, the claim had not been made, and the state court determining the fee petition was only in a position to determine that the city had been "unreasonable," and not in a position to rule that the city had engaged in conduct which was not only unreasonable but also unconstitutional.

The federal court Magistrate Judge, however, recommended that the Haworths were entitled to try to prove the further facts in federal court. The Magistrate Judge recommended denying the condemnor Town's motion for summary judgment on violation of §1983 and the attendant claim for damages for violation of substantive due process.

After the fact, the Haworths had discovered that in executive session, the city council discussed the limited actual need for the Haworth's entire tract for a park and the city's ulterior desire for extra land to sell for private use, while nevertheless publicly making a case for the entire tract. The Haworths discovered discussions planning to whitewash the matter under an opinion "that we can demonstrate that we have a potential need in the not-too-distant future."

One city actor, Jordan, characterized the relevant issues as whether the entire parcel should be designated as parks and recreation land, whether the resolution should include the commercial development clause, and whether a resolution should be adopted in the first place. Another city actor, Holan, Forest Grove Community Development Director, authored a memorandum to the city manager, Sykes, wherein Holan stated that, in his estimate, "there is a 60 percent chance of success to develop a park as envisioned above."

The landowners had offered a portion of their land for free in order to buy peace from the city's efforts to acquire it and in order to be able to plan reliably with respect to remaining land. The Haworths argued that the audiotape of the executive session of the city council and the city's failure to produce it were unlawful because the tape revealed that no public need existed, that no condemnation analysis was ever conducted, and that the city only wished to keep its options open for the future.

This, the Haworths contended, allowed the condemnation action to proceed far further than it would have had the tapes been disclosed in a timely fashion and the City's true intentions been revealed. In failing to disclose the tapes and these matters, the city allowed the presumption to arise that there was a true public need to justify the condemnation action. Instead, the city attempted to condemn more than it needed for an ulterior purpose not disclosed in its resolution and had actively discussed manipulation of the resolution to avoid the disclosure.

The Haworths also described ways in which the city unnecessarily and unjustly delayed the process: the city rejected the Haworths' offer to donate seventy acres only to later abandon the condemnation entirely; having privately determined that the city had no chance of success in the condemnation, the city failed to inform the Haworths that the city had no intention of reinstating the condemnation action and allowed the charade of mediation to continue; and the city disputed the Haworths' entitlement to attorney fees.

On these and other facts, the Magistrate Judge recommended that summary judgment on a substantive-due-process §1983 claim should be denied.

Plaintiff has not sued, by named theory, under this or any other tort. However, the allegations of the complaint, liberally construed, could be understood by a factfinder to describe deliberate, concerted action making out causes of action other than permanent injunction of condemnation.

It is not this Court's job to construct every cause of action which the facts may support, but nor is it this Court's province to grant "drastic" relief and summarily dismiss a relatively young case on the face of pleadings when the absence of sufficient allegations or the absence of the ability to amend and add them has not been demonstrated by the moving party.

Mootness in the Law

As indicated above, the case is in commonsense understanding, no moot. Under South Carolina law, the case is not "moot," because the case is in a trial level court rather than on appeal and there is relief which can still be sought and ordered, particularly if the Town maintains that its "abandonment" of the condemnation is a not permanent abandonment, with prejudice.

Applying the Rule 12(c) standard straightforwardly, as this Court is required to do, the Town is taken to be admitting for the purposes of its motion, all 375 paragraphs of the Amended Complaint. Those paragraphs, taken as true, provide a basis for declaratory relief, and for a permanent, across-the-board bar on further action by the Town, as well as for permanent preclusive or injunctive relief on components of what the Town has now sued for twice and concretely threatens to sue for again, and for possible tort liability which has not been eliminated from consideration.

Mootness in federal court is a federal concept. It has been rooted since the 60s in Article III of the United States Constitution, which describes the limited jurisdiction of the federal courts. Article III, setting up the federal judiciary and courts, does not govern state courts, except when they are part of the federal judicial system in the course of deciding issues of federal law under concurrent jurisdiction.

Article III of the United States Constitution is not duplicated in Article V of the South Carolina Constitution or anywhere else in the South Carolina Constitution. The South Carolina Constitution does not have a “case or controversy” requirement for jurisdiction of state courts in general.

Nor does the State Constitution have such a requirement or restriction peculiar to appellate courts. Cf. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001)(describing mootness as if a doctrine generally confined to appellate forum).

The orientation of Curtis and other cases toward mootness as only an appellate concept is not surprising, as by the time a case is on appeal, not only can there be no amendment (unless amendment is the issue), but also the appeal is likely confined to the issues specifically raised. In contrast, the availability of relief is broader and more flexible at the trial level, both through the availability of amendment (e.g., Rule 15(a)) and through less rigidity in pleading rules (e.g., Rule 8(a)), relief rules (e.g., Rule 54(c)), and other procedural rules.

Unlike federal trial courts, state general trial level courts are not courts of limited jurisdiction. Like state appellate courts, state trial level courts, being courts operating on a local, rather than national scale and being informed by localized familiarity with local policy and issues, also, for that policy reason, are under no compulsion to emulate federal constitutional considerations unless doing so to avoid conflict with rights assured by the federal constitution to individuals or doing so as a part of the federal court system.

For most of this century, state courts have not been thought bound by the “case of controversy” requirement of Article III, even when deciding questions of federal law. William A. Fletcher, The “Case of Controversy” Requirement in State Court Adjudication of Federal Questions, Calif. Law Rev., Vol. 78, No.2 (Mar. 1990), at 263-264.

The difference between federal mootness and state mootness has received little judicial attention in some state courts, which have generally followed federal principles of justiciability without

discussing the root of the federal rule, likely doing so as a general policy matter, or basing the parallel on a longstanding more general concept of justiciability in a lay sense. See Jowers v. S.C.D.H.E.C., 423 S.C. 343, 815 S.E.2d 446 (2018)(citing Byrd v. Irmo H.S., 321, S.C. 426, 468 S.E.2d 861(1996) and collecting cases); and see Anderson v. North Carolina State Board of Elections, 788 S.E.2d 179 (N.C. Ct. App. 2016) (discussing federal constitutional underpinnings and state court policy basis).

By contrast with federal courts, in state courts, the exclusion of moot questions simply represents a form of judicial restraint. Anderson.¹⁶

¹⁶ South Carolina courts have described the concept of “justiciability” in connection with the Declaratory Judgment Act, in a history not explored at length here. There appear to be varying descriptions of whether the concept is one restraining courts and cases in general – and applying only derivatively to the Declaratory Judgment Act – or whether the concept is one specifically based on perceived legislative intent specifically with respect to the Declaratory Judgment Act.

The concept appears to have evolved without explanation into a concept referenced on the rare occasion as one of subject matter jurisdiction, specifically under the Declaratory Judgment Act, as if limiting judicial power only under that Act as a matter of the limits of the statute. The initial concept of “justiciability” under the Declaratory Judgment Act appears to have entered the case law in a context having nothing to do with concreteness of controversy, and to have been thereafter referenced as if the context had been otherwise. See South Carolina Electric & Gas Co v. South Carolina Pub. Serv. Auth., 215 S.C. 193, 54 S.E.2d 777 (1949)(holding the matter not “justiciable” because the acts of defendant sought to be enjoined were authorized by law and within its discretion and no cause of action was stated for coercive equitable relief).

The formulation for justiciability under the Declaratory Judgment Act is stated generally as simply that a justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002), reh. den., cert. den.

The test of sufficiency is not whether complaint shows plaintiff is entitled to declaration of rights according to his theory, but whether he is entitled to declaration of rights at all. Dismukes v. Carletta, 269 S.C. 110, 236 S.E.2d 421 (1977).

While it is true that a declaratory judgment should not deal with moot or abstract matters or constitute a merely advisory opinion, all that is required is that there be an existing controversy, or at least the “ripening seeds of a controversy”: the purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. Waller v. Waller, 220 S.C. 212, 66 S.E.2d 876 (1951).

The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purposes intended, namely, to afford a speedy and inexpensive method of adjudicating legal disputes without invoking any coercive remedies of the old procedure, to settle legal rights, and to remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships. Williams Furniture Corp. v. Southern Coatings & Chemical Co., 216 S.C. 1, 56 S.E.2d 576 (1949).

A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. Curtis v. State. In the instant case, a judgment, if rendered, will have definite, practical, and likely final legal effect. Once a case first meets the test of technically or superficially being moot, it is then subject to traditional exceptions. See Sloan v Greenville County, 380 S.C. 528 670 S.E.2d 663 (2008)(skipping the first prong of the inquiry only because the issue was already the law of the case).

The exceptions include exceptions for cases or issues “capable of repetition yet evading review.” See Roe v. Wade, 410 U.S. 113 (1973)(holding challenge to restrictions on abortion could not be mooted by birth of baby or otherwise no longer being pregnant). See also Sloan v Greenville County, 380 S.C. 528 670 S.E.2d 663 (2008) and Byrd v. Irmo High Sch., 321 S.C. 426, 468 S.E.2d 861 (1996). The instant case is such a case.

The exceptions also include “voluntary cessation” by the opponent and “collateral legal consequences or effect on future events” of not completing the litigation. The instant case fits both of these descriptions as well.

Subsumed in the “capable of repetition” exception is the “voluntary cessation” exception. See Curtis v. State (including broad notions of capability of repetition in the rule). If a defendant voluntarily terminates the allegedly unlawful conduct after the lawsuit has been filed but retains the power to resume the practice at any time, a court may deem the case nonmoot. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000).

The "heavy burden" of persuading the court that a case has been mooted by the defendant's voluntary actions lies with the party asserting mootness, and the standard for such a determination is a "stringent" one: "if subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior

The Declaratory Judgment Act itself contemplates that further litigation may ensue. Notios Corp. v. Hanvey, 256 S.C. 275, 182 S.E.2d 55 (1971). It is always possible that after the granting of declaratory relief, other contingencies and questions may arise. Notios Corp.

[can]not reasonably be expected to recur." Id. (citing United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 203 (1968)).

This exception is supported by the Supreme Court because, in addition to ensuring that the defendant is not "free to return to his old ways," there is "a public interest in having the legality of the practices settled." United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953) (citation omitted).

In Laidlaw, an environmental group had filed a citizen suit under the Clean Water Act against Laidlaw. Laidlaw was a company that operated a wastewater treatment plant. The citizens alleged that the plant had discharged far more toxic pollutants into a river than it was allowed under terms of a government-issued permit.

However, after the lawsuit began, Laidlaw began to comply with the discharge limit. The Supreme Court held that this case was not moot because it was a "disputed factual matter" whether the company's substantial compliance with its permit requirements, or its closure of the facility in question, which had occurred after the court of appeals had issued its decision, would make "it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur." Laidlaw, 528 U.S. at 193.

A related exception occurs if a decision or lack of decision by the trial court may affect future events, or have collateral consequences for the parties, even if the matter is on appeal and the appellate court cannot give effective relief in the present case. Curtis, 345 S.C. at 568, 549 S.E.2d at 596; accord Sloan, 365 S.C. at 303, 618 S.E.2d at 878. Obviously, when such a case is not on appeal but is in the trial court and the trial court can give relief, the case is not even superficially moot and the trial court should act.

In the instant case, the Town has already abandoned the easement request twice by some counts and yet has filed suit twice, and the Town has acknowledged an intent to persist in some manner. The parties are still in the trial level court. The circumstances described hereinabove demonstrate that not

only is the case not moot, but that even if it were perceived to be superficially so, at least three exceptions to dismissal for mootness apply.

Accordingly, the Town's motion to dismiss for mootness is denied. It is also therefore not unreasonable to require the Town, as the party bringing a second suit against Plaintiff and acknowledging the intent to bring a third, to respond to discovery while the case is pending. Accordingly, the Town's motion for protection from discovery is denied as well and the pending discovery shall be complied with within 15 days of the entry of this order or within such other time as the parties may agree.

AND IT IS SO ORDERED.

3/30/21

Benjamin H. Culbertson
Circuit Judge

[or see electronic signature page for electronic signature]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00930
	)	
M. Baron Stanton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

ORDER
(DENYING TOWN’S MARCH 5, 2021 MOTION FOR JUDGMENT ON
THE PLEADINGS TO DISMISS AS MOOT AND RELATED MOTION FOR
PROTECTION FROM DISCOVERY)

After carefully considering the pleadings, the motions, the submittals of the parties, and oral argument at the hearing April 1, 2021, this Court denies the Town’s March 5, 2021 motion for judgment on the pleadings and the Town’s March 3, 2021 motion for protection from discovery. Construing the pleadings in the light most favorable to Plaintiff, as this Court is required to do, and likewise accepting all of the allegations of the Amended Complaint and the favorable inferences therefrom as true, this action is not moot.

Background

On March 5, 2021, in each of three cases which have similar pleadings, motions and discovery, but which have different Plaintiffs, the Town filed a motion pursuant to Rule 12(c), SCRPC for judgment on the pleadings.¹

¹ The Plaintiffs in the three cases and respective case numbers are as follows: Sunset Lodge, LLC, 2020-CP-22-00932, Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, 2020-CP-22-00931, and M. Baron Stanton, 2020-CP-22-00930. These cases are referred to herein as the “Challenge II cases.” Unless a difference is noted, the motions in the three cases are handled the same way. This order reads the same in each case.

The Town requests that the Court dismiss the instant action as moot on the grounds that the Town has pled in paragraph 8 of its March 3, 2021 Answer to the Amended Complaint that the Town has withdrawn its condemnation notice which commenced the related condemnation action.

The Town asserts that Plaintiff's action is a "single cause of action" challenging the condemnation action, and that the Town's withdrawal of only the condemnation "notice" renders the case moot.

The Town also filed a March 3, 2021 motion for protection from discovery, which was based on the motion to dismiss, and was grounded on the assertion that if the case is dismissed, there no longer remains any subject warranting discovery.

Standard of Review and Standard of Decision

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Rule 12(c), SCRCF. When considering such motion, the Court must regard all properly pleaded factual allegations of the nonmoving party as admitted, and any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000).

The standard is thus the same as a Rule 12(b)(6) motion made after answering. See Rule 12(b), SCRCF (requiring that a Rule 12(b)(6) motion be made before pleading), and cf. Rule 12(h)(2), SCRCF (providing that the defense ordinarily addressed in Rule 12(b)(6) is not waived by failure to assert it in a pre-answer motion and may be asserted by motion for judgment on the pleadings).

A Rule 12(c) motion by a defendant is in essence, a Rule 12(b)(6) motion made after answering, with the added assertion by a moving defendant that nothing the defendant has pled lends any help to the complaint in stating any claim on any basis, and that the court may also consider facts, if any, formally admitted by Plaintiff's pleading in reply to a counterclaim or affirmative defense of the defendant.

Thus, no allegation the defendant affirmatively pleads to benefit itself is accepted unless the plaintiff admits it, and then only the inferences from it which are favorable to the plaintiff are indulged. Plaintiff is under no requirement to negate any allegation of the defendant in the course of the motion.

A complaint under a 12(c) motion is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Falk. See also Rule 54(c), SCRPC (“Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings”); and see Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P. et al., 385 S.C. 452 at 457, 684 S.E.2d 756 at ____ (2009)(“The character of a complaint is determined by its factual allegations, not the label assigned to it”).

"A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." Lydia v. Horton, 343 S.C. 376, 540 S.E.2d 102 (Ct. App. 2000), rev'd on other grounds; Douglass ex. rel. Louthian v. Boyce, 336 S.C. 318, 323, 519 S.E.2d 802, 805 (Ct. App. 1999)(citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991)).

"Our courts have held the pleadings should be construed liberally so that substantial justice is done between the parties." Falk, 341 S.C. at 287, 533 S.E.2d at 353. "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Id.

As in the practice under Rule 12(b)(6), if the challenged pleading does not meet the standard, the proper course is to grant the motion without prejudice, and grant the nonmoving party leave to amend the pleading to satisfy any missing requirement if the party can do so. See Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019)(discussing rationale for practice of granting leave to amend under Rule 12(b)(6)). This leave should be provided as part of the ruling on

the moving party's motion to dismiss without the nonmoving party making a motion to amend.

Skydive.

The Nature of the Case, the Issues, and the Amended Complaint Viewed
in the Light Most Favorable to the Nonmoving Party and Viewed
Without Limitation to Theories Named or Relief Requested

Because the standard of decision discussed above calls for the allegations of the 375-paragraph Amended Complaint of the nonmoving party to be accepted as true, and not be confined to the specific relief labeled or requested, the following background is necessary.

This background is recounted under the foregoing standard for the purposes of the motion and does not constitute this Court's findings on any disputed matters, other than that they are alleged. This background is concerned not only with the facts pled, but also with the issues they present and the types of relief to which they could entitle the pleader, keeping in mind how those claims and remedies would or would not be mooted by the filing of a notice of abandonment.

The instant case arises from the second suit by the Town against Plaintiff.

Previously, in June 2020, the Town commenced the first statutory condemnation action against Plaintiff.

Plaintiff had offered the Town a "beach renourishment easement" at no charge, but the Town sought an easement with terms and scope Plaintiff believed to be unreasonable.

The Town thereafter stated no easement would be necessary for its renourishment project, and completed the placement of all sand for the project.

The Town thereafter again sought an easement with terms and scope Plaintiff believed to be unreasonable. Plaintiff again declined to grant an easement with terms and scope Plaintiff believed to be unreasonable.

The Town sued to condemn.

In the first suit, the Town sought to condemn, among other things, a right of public use and access over a designated oceanfront portion of Plaintiff's oceanfront land.

The Town also sought to condemn the right to do "beach renourishment" work on the designated portion, and other rights to do things on or prohibit Plaintiff from doing things on the designated portion of Plaintiff's property. (See, e.g., Amended Complaint ¶¶45-52 (recounting provisions for limiting Plaintiff's access to Plaintiff's land and for tearing down improvements such as decks, stairs, showers, foundation elements, etc. if in easement area.))

One boundary of the designated portion of Plaintiff's land was just a few feet away from the door of Plaintiff's oceanfront house. (See id.)

The offer of payment stated by the Town in the condemnation papers was for zero (\$0.00) dollars, based on a report procured by the Town from an appraiser to whom the Town did not give the written terms of the easement and whom the Town did not inform of the terms verbally.

Within 30 days of being sued, Plaintiff separately filed an approximately 169-paragraph suit against the Town pursuant to statute, to challenge on numerous stated bases, the power and ability of the Town to condemn ("the Challenge I case").² The Challenge I case, by statute, stayed all proceedings in the condemnation action until resolution of the Challenge I case. S.C. Code Ann. §28-2-470.

The Challenge I case presented a request for declaratory and injunctive relief.³ Under present statutory practice, it may not be necessary for the purposes of the instant motion, to determine in which

² The Challenge I case was filed pursuant to S.C. Code Ann. §28-2-470, which is part of the Eminent Domain Procedure Act (sometimes herein, "the Act"). Town similarly sued the two other landowners, each of whom filed a similar challenge case. Plaintiffs in the three challenge cases and respective case numbers are as follows: Sunset Lodge, LLC, 2020-CP-22-00600, Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, 2020-CP-22-00601, and M. Baron Stanton, 2020-CP-22-00602. Unless a difference is noted, the cases were handled the same way.

³ The South Carolina Declaratory Judgment Act provides:
Courts of record may declare rights, status and other legal relations.

respects the Challenge I case requested declaratory relief, permanent injunctive relief, statutory relief, or other relief.⁴ A liberal reading of the extensive Challenge I Amended Complaint indicates that, among other things, Plaintiff challenged the power and ability of the Town to ever condemn any easement at all over Plaintiff's property for the generally stated purpose and subject matter involved.

The Challenge I Amended Complaint also indicates that, in the alternative, Plaintiff challenged the power and ability of the Town to ever include, in any easement condemned, various attributes the Town sought to include in the easement.

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

S. C. Code Ann. §15-53-20.

⁴ See, e.g., Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961). In Atkinson, under the prior equity practice, a motion to dismiss the plaintiff's challenge action had been filed by the defendant on the ground that the action was not maintainable under the Declaratory Judgment Act, in that the plaintiff's remedy, if any, was for a permanent injunction. Upon the hearing of this motion, however, counsel for the parties agreed that the action simply be treated as one for permanent injunctive relief "in accordance with the usual procedure in such cases."

But see Timmons v. South Carolina Tricentennial Commission, 175 S.E.2d 805, 254 S.C. 378 (1970)(discussing, but not granting, primary remedy of permanent injunction). In Timmons, Annie Mary Timmons brought an action against the South Carolina Tricentennial Commission and against Daniel R. McLeod, as attorney general, under the Uniform Declaratory Judgment Act, but sought "a permanent injunction enjoining any proceedings to condemn her property."

And see Columbia Water Co. v. Nunamaker, 73 S.C. 550, 53 S.E. 996 (1906). Nunamaker was decided under the prior equity practice. There, the court observed:

When the right to institute condemnation proceedings is contested, the proper remedy is to bring an action in the Court of Common Pleas in order that the Court may, in the exercise of its chancery powers, determine such right. *** The [cited] cases show that such action must be regarded as independent, and not ancillary to the condemnation proceedings. If upon the final hearing of the case the Court should decide that the defendants did not have a right to institute condemnation proceedings, it would then grant a permanent injunction.

Id., 53 S.E. at 998 (citations omitted).

The Challenge I Amended Complaint also indicates that, in the alternative, Plaintiff challenged the power and ability of the Town to ever pursue any easement in any action without complying with certain requirements. These particularly described requirements included common law requirements for fair dealing and good faith deliberation in the selection of the attributes of the property interest to be condemned and for authorization of the condemnation of same, as well as requirements for compliance with specifically described statutory prerequisites.

The Challenge I Amended Complaint also indicates that, in the further alternative, Plaintiff challenged the power and ability of the Town to proceed under the particular case which was commenced, to proceed under the particular appraisal which was obtained, and to proceed under the particular condemnation notice served.

Among other things, after setting forth numerous other allegations, the Challenge I case made the following allegation and prayer: “The contemplated condemnation is completely unnecessary as a matter of law, and therefore constitutionally and equitably prohibited, and the Town of Pawley’s Island’s attempt to condemn an overbroad easement after the fact for an already completed and no longer proposed or prospective project should be disallowed and permanently restrained.” (Challenge I Amended Complaint ¶ 158.)

The Challenge I Amended Complaint further asserted: “In the alternative that the Town asserts the condemnation is for some other, future, hypothetical project, the condemnation is still unnecessary and in bad faith in that any such putative future project is admitted by the Town to be speculative, unlikely, and by the Town’s own calculations, most probably unnecessary for as much as twenty-two years.” (Challenge I Amended Complaint ¶ 160.)

The Challenge I Amended Complaint also asserted:

In the alternative that an actual, bona fide, proposed additional project were to materialize, the easement sought has been sought through knowing, intentional misrepresentation, lack of honesty in fact, spite, caprice, arbitrariness, and illegality, and has also been sought under influence by legal error as to not only the nature of the easement that is sought, but also as to

the lack of basis, or legal or practical need, for the easement or its numerous overbroad attributes. The easement sought has also been sought under influence of legal error as to the consequences of Plaintiff granting it or the Town taking it. The easement is also being sought through bad faith noncompliance with procedural rules. In that these facts constitute “fraud, bad faith or abuse of discretion,” the Town’s contemplated condemnation action, currently stayed by this action, should be disallowed with prejudice.

(Challenge I Amended Complaint ¶ 162.)

In the Sunset and Beattie Amended Complaints, there were also allegations as to the Town making false certifications in its pleading, the condemnation notice. The Amended Complaint in those Challenge I cases asserts: “For the reasons that (1) noncompliance with exclusive mandatory procedure renders the Town’s condemnation notice ultra vires and void, and (2) knowing or recklessly negligent false statements in a pleading render the pleader subject to sanctions including dismissal, the beginnings of the condemnation action represented by the Town’s Condemnation Notice should be dismissed with prejudice.” (Challenge I Amended Complaint ¶ 172 Sunset-600 and Beattie-601.)⁵

The Challenge I Amended Complaint also asserts the following: “Among other things, there is no need for an easement over the owner’s entire lot. There is no need for public access of any kind, no need to limit owner access, no need for broad Town activities unassociated with doing and maintaining the work, no need to include owner improvements, no need to be so close to owner homes, and no reason not to clarify there is no change in owner access to ocean and beach.” (Challenge I Amended Complaint ¶ 175.)

⁵ In the Stanton Challenge I Amended Complaint, there were additional allegations as to the Town attempting to change the description of the easement sought after commencing the action, and the Amended Complaint asserts: “For the reasons that (1) noncompliance with exclusive mandatory procedure renders the Town’s condemnation notice ultra vires and void, and (2) knowing or recklessly negligent false statements in a pleading render the pleader subject to sanctions including dismissal, and (3) the Town stated in writing that the condemnation notice was withdrawn, the beginnings of the condemnation action represented by the Town’s Condemnation Notice should be dismissed with prejudice. (Challenge I Amended Complaint ¶ 172 in Stanton-602.)

In all three Challenge I Amended Complaints, there are allegations that the Town Administrator filed an easement grant for the Beattie property which was unauthorized by the Beattie. (See, e.g., Sunset Ch.I Cmplt. ¶66.)

The Challenge I suit also asserts: “In the alternative that Plaintiff’s rights herein or in any contemplated condemnation action are adversely affected by the already completed project, Plaintiff may need the already completed actions of the Town to be redressed by damages for trespass or other monetary remedy, for which cause of action Plaintiff would and does demand a trial by jury, despite the nonjury portions of this action challenging the Town’s right to condemn.” (Challenge I Amended Complaint ¶ 179.)

The Challenge I Amended Complaint further states: “Plaintiff prays that the Condemnation Notice be quashed and that the Town be forever barred and enjoined from filing it or proceeding with it, for such other and further relief as is just and proper, and for all litigation costs.” (Challenge I Amended Complaint, prayer for relief following ¶ 179 (emphasis added).)

The Town filed a motion pursuant to Rule 12(b)(6) to dismiss the Challenge I case for failure to allege facts sufficient to state a cause of action and this Court denied the motion on September 11, 2020.

While the first condemnation action by the Town was stayed and Plaintiff’s August 2020 motion for summary judgment in the Challenge I case was pending, the Town, in October 2020, commenced a second statutory condemnation action against Plaintiff.

In this second suit, the Town again sought to condemn a right of public use and access over a designated oceanfront portion of Plaintiff’s oceanfront land, as well as the right to do renourishment work on the designated portion, and other rights to do things on or prohibit Plaintiff from doing things

on the designated portion.⁶ In this second suit, again, one boundary of the designated portion of Plaintiff's land was just a few feet away from the door of Plaintiff's oceanfront house.⁷

⁶ For example, the Amended Complaint in case 2020-CP-22-00932 alleges:

354. The New Notice is similar to the Existing Notice, but among other possible differences, the New Notice attempts, without leave of court, to alter the Existing Notice by adding the aforescribed 9-line footnote in the description of the property sought to be acquired.

355. The New Notice is falsely dated June 9, 2020, as if it, including the map and proposed Beach Renourishment Easement forming a part of it, existed on that date. This leaves the Town actors poised to next represent to the public, the Town Council or a court, if need be, that the New Notice (including its constituent parts) is what was served in June 2020 instead of the Existing Notice.

356. The New Notice is dated the same as the Existing Notice, but upon information and belief, did not exist on that date and was not prepared until after the October 12, 2020 Town Council meeting.

357. The New Notice is fraudulent in the above respect, and is an attempt, like other aforescribed activities, to create a false public record and a morass of official-looking paperwork to obscure the delicts and derelictions of the various Town actors involved; the New Notice is part of the continuing series of bumbles at the landowner's expense, frauds, and coverups alleged in the Existing Action and now this one.

⁷ There appears to be no dispute that the Town intended to commence the second suit and did so. Under the peculiar statutory procedure, the first and second suits by the Town began with service of papers without yet filing the papers with the court, and therefore the captions simply reflect the same parties in an identical case caption, without any Common Pleas case number on either caption.

The Town's March 31, 2021 brief only states that the second suit by the Town against Plaintiff contained "revisions reflecting certain objections asserted in the first set of challenge actions."

The Town does not state what revisions were made or in what way the suit and any revisions in it were responsive to objections stated in the Challenge I case. The Challenge II Amended Complaint does address the similarities and differences in detail and at length.

No other explanation is offered for why the Town commenced a second suit against Plaintiff when one was already pending and stayed.

In the Amended Complaint of the instant Challenge II case, the allegations of which, as discussed above, must be taken as true for the purposes of the Town's motion, Plaintiff asserts that the second suit was not an amendment made within the first suit because the "New Notice" was created without any leave to amend, in a suit which was stayed. Plaintiff states and alleges at length and in detail that the second suit by the Town was without any lift of the statutory stay, was without proper authorization from Town Council, and was without any prior resolution of the already pending action. (See Ch.II Am. Cmpl. ¶¶ 224-374.)

In the Challenge II Amended Complaint, which must be taken as true, Plaintiff asserts that the additional action was without consultation with Plaintiff, without notice to Plaintiff, without consent of Plaintiff, and without prior or subsequent explanation of purpose to Plaintiff. (See *id.*)

Plaintiff further alleges in the Challenge II Amended Complaint that virtually no objections of the plaintiffs in the first set of challenge actions were cured or corrected in the Town's second suit, and that, rather, the Town attempted to pursue condemnation of substantially similar subject matter, with

In response to the second suit by the Town, Plaintiff, again, within 30 days of being served by the Town, separately filed suit against the Town pursuant to statute, to challenge the power and ability of the Town to condemn. Viz., Plaintiff filed the instant Challenge II case, which the Town contends is now moot.

In the 375-paragraph Amended Complaint in this Challenge II case, Plaintiff incorporated by reference, the entire Amended Complaint in the Challenge I case. (Challenge II Amended Complaint ¶ 182.)⁸

the same defective appraisal, and the same lack of good faith deliberation on applicable factors. (See id.) Plaintiff alleges that the condemnation was also generally made more onerous and damaging to the landowner by addition of a disparaging and legally incorrect “argument” inserted by footnote into the granting/demising language and that additional false statements and events occurred which were additionally fatal to the second condemnation attempt. (See id.)

⁸ Plaintiff offered in Plaintiff’s brief, a partial synopsis of the 375-paragraph Challenge II Amended Complaint’s allegations, referring to the Amended Complaint as an account “of numerous chapters of the Town’s acts, misrepresentations, evasions and persistent omissions over an extended period of time.” The synopsis is stated here for summary purposes in lieu of the longer allegations themselves, which must stand on their own for purposes of the motion. Plaintiff contends that the allegations “have included the following, among other things”:

- Misrepresentation of the nature and scope of the “renourishment” easement sought in 2019 when first soliciting it and seeking to pay nothing for it.
- Doing so by saying the “renourishment” easement was only for sand placement, sand fence and planting, when the legal document placed the easement two feet from the door of the house, granted perpetual public access within the easement area, granted a perpetual right to restrict the owner’s access to that oceanfront part of the owner’s property, granted a perpetual right to tear down and prevent replacement of the owner’s improvements within the area, and perpetually subjected the owner’s right to build structures for access to the ocean to approval of an unidentified person with no governing standards.
- Misrepresentation publicly of the landowners’ good faith offer of an easement of reasonable scope in response to those solicitations from the Town.
- Doing so by omitting all reference to the landowner’s offer, omitting all disclosure of the issues, and falsely perpetuating the impression and public representation that the landowner had refused any easement whatsoever.
- Misrepresentation of the nature and scope of the actually contemplated easement to the appraiser hired by the Town when seeking approval of federal participation in part of the project.
- Doing so by asking the appraiser to determine potential land acquisition costs for 109 properties as a condition of obtaining federal approval of federal assistance on that part of the overall proposed renourishment project, but omitting the unreasonable terms to which Plaintiff has objected.

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- Filing an unauthorized easement grant from one property owner, Mr. Beattie.
 - Active involvement in creating a poorly drafted and unreasonable proposed granting document proposed to become a permanent part of Plaintiff's chain of title.
 - Abandonment, altogether, of the request for the easement in 2019.
 - Concurrently with such abandonment, publicly announcing intention to perform the work without an easement.
 - Concurrently with such abandonment, publicly announcing the scientific likelihood of the lack of necessity of similar work for another 22 years or more.
 - Subsequent to such abandonment of the request for the easement, completion of the work for which the easement had been sought.
 - Subsequent to abandonment of the request for the easement and completion of such work, disclosing in 2020 a determination to pursue a "program" for only potential work.
 - Doing so knowing that the potential work was to be years in the future, with no certainty of future need or occurrence, no assurance of Congressional funding, and no guarantee of future assistance whatsoever, and that the need for the potential work was contrary to the Town's own prior data and estimates the Town obtained and publicized in order to justify the doing of the work, the scope of the work, and the spending on the work, which was now already done.
 - Subsequent to abandonment of the request for the easement and completion of the work without such easement, then requesting the easement again, but now only for the mere purpose of joining the uncertain "program" for which the need was unlikely, for which the possible need was remote in time, and under which the receipt of financial help and the actual doing of anything was speculative.
 - Repeating prior misrepresentations in making a new request for the easement. I.e., that the "renourishment" easement was for the limited purpose of sand placement, sand fence, and planting.
 - Continued publicly broadcast misrepresentation in the May 2020 Council meeting of both (i) the nature and scope of the easement now sought as only for putting sand on the beach and (ii) the landowners' responses to the prior solicitations as being a categorical refusal rather than a good faith offer of a reasonable easement.
 - Consequently issuing a resolution insufficient for and invalid for authorizing the condemnation which the Town would later pursue.
 - Misrepresentation of the nature and scope of the easement to the appraiser hired to determine the just compensation which should be paid to the landowner if the easements were to be purchased from the landowner or condemned and taken by eminent domain.
 - Doing so by asking the appraiser to determine the just compensation which should be paid to the landowner, but omitting from the easement he was asked to appraise, the unreasonable terms to which Plaintiff has objected.
 - Commencing a condemnation action seeking an easement containing the unreasonable terms to which Plaintiff has objected, but doing so in a proceeding integrally based on the falsely procured appraisal of an easement of materially more reasonable scope, while withholding the appraisal in violation of the statutory procedure, and while making a false certification in the condemnation papers that the appraisal had been previously provided.
 - In seeking condemnation of an easement the entire request for which had been previously abandoned, seeking also to include features and scope previously agreed with one or more landowners not to be necessary features or scope.
 - Misrepresenting publicly the nature of, progress of, and positions taken in the litigation.

In the Challenge II case, Plaintiff stated: “Plaintiff prays that both the “Existing” and the “New” Condemnation Notices be quashed and that the Town be forever barred and enjoined from filing either of them or proceeding with either of them, for such other and further relief as is just and proper, and for all litigation costs.” (Ch.II Am.Cmplt., prayer (emphasis added).)

In the instant Challenge II case, Plaintiff did not plead or request that the overall relief sought by Plaintiff be “without prejudice.”

Nor did Plaintiff plead or request that issues adjudicated within the action in order to provide the declaratory or injunctive relief requested not be given permanent preclusive effect. Nor did Plaintiff characterize Plaintiff’s Amended Complaint as a “single cause of action.”

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- Misrepresenting to the Court in moving to dismiss, for a bond, and for special expedited treatment, the likelihood that a storm could wash away all 1.1. million cubic yards of sand in a single event and misrepresenting to the Court that under the “program,” if such an event occurred, the Town would be eligible to have the Corps of Engineers put all 1.1. million cubic yards back, including portions on which there would never be federal involvement.
 - Presenting to the Court a resolution created by the Town which was known at the time of creation to be factually false, in which the Town Council falsely states that the materials contained in the resolution were presented to Plaintiff before the October 12, 2021 time of the resolution, impliedly in June 2020.
 - Doing so in order to dissuade the Court from granting summary judgment by attaching the false resolution as Exhibit B to the Town’s November 24, 2020 brief opposing Plaintiff’s motion for summary judgment in the initial action.
 - Doing so again on March 17, 2021 by attaching the false resolution to the Town’s memorandum in support of the Town’s motion to reconsider the granting of summary judgment.
 - Approximately two months after Plaintiff’s summary judgment motion was filed in the initial challenge actions, commencing a separate condemnation action based on knowingly falsely stated facts in the resolutions purportedly authorizing same.
 - Doing so using condemnation notices created in October but falsely dated June 9, 2020.
 - Doing so using condemnation notices in which the occurrence of other activities and events is recited falsely if the statements are taken to speak as of June 9, 2020.
 - Not adequately answering the factual allegations of the original complaint in the instant challenge action.
 - Abandoning the underlying condemnation notice on February 10, 2021.
 - Not adequately answering the January 13, 2021 amended complaint in the instant challenge action.
 - Seeking dismissal before discovery by Plaintiff on potential additional relief for Plaintiff has progressed, including the deposition of the Town Administrator noticed on January 15, 2021 for February 19 and the answering of January 10, 2021 interrogatories served by Plaintiff.

Subsequently to commencing the instant Challenge II case, Plaintiff began to pursue discovery from the Town in the Challenge II case, including the deposition of the Town Administrator.

On January 20, 2021, the Court granted Plaintiff's motion for summary judgment against the Town in the Challenge I case. The Town subsequently moved for reconsideration. After summary judgment was granted, the Town, without prior consultation, moved in the Challenge I cases of Beattie (ending in 601) and Sunset (ending in 600) to disqualify Plaintiff's counsel from representing them in the Challenge I cases. After those plaintiffs responded extensively in writing to the Town's motion to disqualify, and asserted the motion was completely without merit, the Town withdrew the motion without hearing.

In January 2021, Plaintiff petitioned for award of litigation expenses in the Challenge I case.⁹ The Town opposed the fee petition and requested at least a four-month period in which to conduct discovery and mount opposition to the award of attorney's fees in a proposed full-blown evidentiary hearing. As of April 14, 2021, proceedings relating to fees are still pending.

On February 10, despite the statutory stay in the second condemnation action, without leave of court or consent of Plaintiff, the Town sought to withdraw its condemnation notice which was used to commence the second condemnation action against Plaintiff.

The Town did so by filing, in the instant Challenge II case challenging the second condemnation suit, a "Notice of Abandonment." The Notice states that the condemnation action is "hereby abandoned and withdrawn."

⁹ Only the plaintiffs in the Sunset and Beattie Challenge I cases sought attorney's fees, and each asserted that the fee petition was based approximately if not exactly on one-third of the fees and expenses incurred in all three Challenge I cases and the early stages of the three Challenge II cases. The plaintiff in the Stanton Challenge I case did not seek the other one-third of the fees.

The Notice states that the action is “abandoned,” but does not state that the dismissal is with prejudice, or that the Town relinquishes any right to bring another condemnation action with regard to Plaintiff’s property.

On March 3, 2021, the Town filed an answer to the Amended Complaint in the instant Challenge II case, and, after denying the majority of the 375 paragraphs of the Amended Complaint, alleged at paragraph 8 that the “single cause of action” alleged by Plaintiff was rendered moot by the Town’s filing of the February 10 Notice of Abandonment.

In its Answer, the Town again did not allege or stipulate that the Notice of Abandonment was intended to end the condemnation action with prejudice to commencing another condemnation action on the same subject matter.

On March 5, 2021, the Town filed its instant motion for judgment on the pleadings pursuant to Rule 12(c), SCRCPP, asserting that this case is now moot. The Town requests that the instant case be dismissed “without prejudice.” Just beforehand, on March 3, 2021, the Town filed a motion for protection from pending discovery, including the still un-taken deposition of the Town Administrator, pending interrogatories, and any future discovery.

Interpretation, Validity and Effect of the
Filed Notice of Abandonment Alleged by
the Town in its Answer to the Amended Complaint

Plaintiff argues that the Town's unilaterally "abandoning" its suit while the suit is stayed for a challenge to be resolved¹⁰ is as ineffectual as trying to "take a nonsuit" in a conventional civil action when a nonsuit is prohibited.¹¹

Plaintiff also argues that additionally trying to "abandon" the suit without leave of court or consent of the opposing party, and asserting separately that the "abandonment" is without prejudice to promptly pursuing a third suit on the same subject matter, is as ineffectual as to trying to declare one's own nonsuit to be "without prejudice" when neither the court nor the opposing party agrees that the nonsuit is without prejudice.

¹⁰ S.C. Code Ann. §28-2-470 provides: "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. No issues involving the condemnor's right to condemn may be heard in the trial upon the issue of just compensation." *Id.* (emphasis added).

Plaintiff points out that if a subsequent suit were brought by a condemnor after the condemnor abandoned the prior suit during a challenge action without consent, the landowner would be required to file a challenge action within 30 days of service of the new condemnation suit in order to resolve the question whether the prior "abandonment" during a stay was valid, and whether the abandonment was a permanent relinquishment of the right to pursue the landowner's property, thus barring further suit by the would-be condemnor.

¹¹ Rule 41(a), SCRPC provides for a plaintiff's unilateral dismissal, or nonsuit, by notice if filed before the defendant answers or files a motion for summary judgment. If the defendant has answered or filed such a dispositive motion, voluntary dismissal is still available, but not by unilateral dismissal. Nonsuit is then available by stipulation signed by all parties.

A crucial feature of Rule 41(a) is the "two dismissal rule": the first voluntary dismissal is without prejudice, that is, it is not an adjudication on the merits unless otherwise stated in the dismissal order. The second dismissal is with prejudice, that is, when a voluntary dismissal is filed "by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim," the dismissal is with prejudice.

For the further protection of a successively sued defendant, Rule 41(c), SCRPC additionally provides: "If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order." This Court has not researched whether Rule 41(c) reflects prior equity practice.

Putting aside for the moment, the question of whether a unilateral dismissal of any type was allowed while the matter was statutorily stayed and being challenged, the finality and preclusive effect of the stated “abandonment” is a question highly relevant to legal or practical mootness.

“Abandon” has been defined as “to give up with the intent of never again claiming a right or interest in.” Merriam-Webster’s Collegiate Dictionary (11th ed., Springfield, Mass. 2003).

“Abandonment” with regard to a use of real property is held legally to mean the owner’s intentional abandonment of the use in the sense of subjective intent to forever relinquish it. Conway v. City of Greenville, 254 S.C. 96 at 101, 173 S.E.2d 648 at 650 (1970)(stating, with respect to a prior use rendered nonconforming by a new zoning ordinance, that abandonment is discontinuance of a thing accompanied by intent to relinquish the right to do the thing that is discontinued); see also Maguire v. City of Charleston, 271 S.C. 451, 247 S.E.2d 817 (1978) (Rhodes, Justice, dissenting)(discussing cases in which “discontinuance” required intent to relinquish and meant the same as “abandonment”).

With respect to an easement, abandonment of it requires the intention to abandon and the external act by which the intention is carried into effect. Witt v. Poole, 182 S.C. 110, 188 S.E. 496 (1936). An intention to abandon property or a property right need not appear by express declaration, although it may be manifested thereby. Witt.¹²

The Town has now again expressly declared “abandonment.” If the “abandonment” is final, namely with prejudice to further attempts to condemn, it would clearly present, if not a legal, then at least a practical, question of mootness.

Historically, instances in which a condemnor does “abandon,” or is permitted to “abandon,” a condemnation action generally are instances of permanent relinquishment. In these instances, as a matter of fact, the condemnor has determined to abandon not only the action, but any claim to the

¹² The Challenge II Amended Complaint indicates that the Town had once before abandoned the right to pursue an easement. See the Amended Complaint ¶¶35-48 re 2019 cessation of requests for easement, declaration of no need for easement, and 2020 completion of work without easement.

property. I.e., the condemnor has determined that the condemnation will not be necessary at all, or for some other reason will not be pursued again.

These instances arise from time to time when, for instance, the underlying project for which the condemnation is pursued is changed or terminated so as to eliminate the need for the property, or when it becomes clear that the compensation which will be ordered is higher than it is feasible to pay for purposes of the project.

These instances historically receive attention when there is concern with, or dispute over, whether the condemnor should be able to thus permanently back out of, or “abandon” the condemnation. These issues of “abandonment” arise when the landowner wishes to enforce an award of compensation already made, or where the landowner or the landowner’s property has otherwise suffered or changed position in some respect because of the long pendency of the threat of condemnation before the condemnor finally decides to “abandon” the condemnation.

There are few instances involving “abandonment” as a temporary expedient exercised by the condemnor before promptly resuming substantially similar activities. See, e.g., Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951)(considering “injustice” to property owners in permitting a municipal body to tie up an owner's property for three years, after which the city can change its mind and abandon or refuse to take the property at the end of three years); In re Certain Land, 364 Pa. 71, 70 A.2d 847 (1950)(holding that in condemnation of land for playgrounds, the date of taking was the date the ordinance was passed which designated the property for acquisition, and holding the statute not unconstitutional, but holding that the city could not abandon the condemnation of the subject parcel without the consent of the owner); Town of Trumbull v. Ehram, 148 Conn.47 at ___, 166 A.2d 844 at 847 (1961)(addressing landowner objection to permanent withdrawal of condemnation, noting that if for some reason, it is desired “to give up the undertaking,” the proceedings may be discontinued before the payment of the judgment); and Hamer v. State Highway Comm'n, 304 S.W.2d 869 (Mo.

1957)(involving claim that highway department's decision to abandon any plan to place highway on plaintiff's property after plaintiff made plans in cooperation with the intended condemnation constituted a taking without just compensation).

The Code is silent on whether a condemnor is authorized to define "abandonment" for itself. There is no express authorization for the condemnor to declare that a "temporary abandonment" is being made, in which the "abandonment" is an expedient or a tactical tool, such as for the purpose of ending discovery, moving out the valuation date for a subsequent condemnation attempt, changing counsel, etc., and to subsequently re-commence an action on substantially the same subject matter with a putatively "cleaner slate."

Plaintiff argues that if such a procedure were permitted, it would be comparable to allowing a government plaintiff in a conventional civil action to take a voluntary nonsuit without prejudice and without leave of court after the defendant answered and counterclaimed, over and over, ad infinitum.

As noted above, this is not permitted in a Civil Action governed by the Rules of Civil Procedure. "In the event of conflict between [the Eminent Domain Procedure Act] and the South Carolina Rules of Civil Procedure, th[e] act shall prevail." S.C. Code Ann. §28-2-120. However, it is unclear whether, here, the Legislature intended a conflict with the Rules of Civil Procedure, or a parallel scheme with the same guiding principles averse to successive multiple litigation.

Assuming the Rules of Civil Procedure do not apply by letter, it is difficult to conclude that the Legislature intended "abandon" to mean "not abandon" or "temporarily abandon," and to allow a limitless ability of the government condemnor to dismiss and re-commence a condemnation on the same subject matter.

There is also no delineation in the Act of "the manner of abandonment authorized by this chapter," as referenced in §28-2-510(c). I.e., there is no provision which states that the Town's "abandonment" is affirmatively authorized; there are only the requirement in Section 28-2-470 of

landowner consent to any proceedings during a pending challenge action, and the prohibition in §28-2-230(B) against abandonment without owner consent after taking possession and making material alterations. Section 28-2-470 authorizes actions taken during the automatic stay only if done with landowner consent: “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.” Id.

The Chapter 2 of Title 28 of the Code thus actually contains no express authorization for a condemnor to unilaterally “abandon” a condemnation once a challenge action has been commenced.

At that point, all proceedings have been stayed pending resolution of the challenge. The condemnor is clearly authorized to abandon and do other things after obtaining landowner consent, or to stipulate to the correctness of the challenge, or to have the court determine the merits of the challenge in the pending challenge action.

These questions may not need to be answered completely now, where the question is only whether these or other questions still present a live controversy and where the case involves an actual assertion of rights.

The Town’s present argument that it has abandoned condemnation and that the challenge action is “entirely moot” would at first imply that the Town’s voluntary dismissal of its condemnation action is with prejudice and puts an end to almost all controversy. However, the Town does not plead this in its Answer.

Plaintiff stated in Plaintiff’s March 30 pre-hearing brief at 5, that “as late as March 18, 2021, the mayor of the Town sent out a mass public e-mail announcing a determination to continue to ‘pursue’ the easements.” Plaintiff further stated, “In doing so, he continued in the same fashion in which the Town has previously operated, to not disclose to other owners, the actual issues in the two suits so far against each of three landowners.” The latter assertion by Plaintiff relates to the issues of misrepresentation and defamation which appear in the allegations of the Challenge II amended

Complaint, and are stated to need timely correction. (See, e.g., id., Preliminary Statement, and ¶¶78, 87 and 126.)

The Town’s oral argument at the April 1 hearing did not dispute or directly address the Plaintiff’s account of the mayor’s mass e-mail. The Town’s counsel’s statements that the Town “believes the issues are entirely moot at the present time,” and that “the Town is still very interested in acquiring the easements” indicate the Town clearly intends other than to stop pursuing condemnation of the same subject matter.

The Town’s statements at the hearing about starting over “with a clean slate” and giving the landowners a third “opportunity to present challenges” certainly do not communicate permanent relinquishment of the pursuit of the property. For this reason, and based on the well-defined and live dispute of the parties reflected on the face of the Challenge II Amended Complaint and its exhibits, the availability of relief, and the realistic threat of future litigation, this Court does not consider this case moot. It is also clear that a fee petition may be forthcoming from Plaintiff.

The Town acknowledged to the Court the probability of a third action against Plaintiff on substantially the same subject, qualifying the probability by stating that the matter might be averted if the Town “could negotiate an agreement” with the owners. This of course, would be the situation in many a case. When the Town introduced this subject at oral argument, Plaintiff responded to correct any implication that control of the matter might be in Plaintiff’s hands. Plaintiff, clarifying an intention of both parties to tread lightly on such matters, clarified to the Court that such negotiation is something on which the Town has put forth no proposal since before January 2021.

Plaintiff argues that the Town’s unilateral “temporary abandonment” for the purpose of arguing that that no present cause of action is stated in law or equity, and dismissing “without prejudice,” the case that Plaintiff brought – all in order to grant a “clean slate” to the Town and provide negotiating leverage – is ineffectual and unsupported in law.

Plaintiff contends that to date, the Town still has not adequately answered hundreds of allegations of the Amended Complaint.¹³ Plaintiff contends that to grant the Town’s motion would, among other things, continue to keep issues obscure, require dredging up “Challenge I,” “Challenge II,” and “Challenge III” pleadings in a Challenge III case, require Plaintiff, as a private citizen, to bear the expense, a third time, of commencing discovery that was not reached in the Challenge I and Challenge II cases and that might be similarly delayed in a Challenge III case, and allow memories and other evidence to be lost during the delay. Plaintiff submits that during the present litigation, the Town has already changed counsel, and the Town Clerk resigned, and that over time, people could not only forget, but die, resign, become disabled, move, be discharged, not run for reelection, fail to be reelected, etc.

In State v. Flamme, 217 Ind. 149, 26 N.E.2d 917 (1940), after the condemnation proceeding had progressed to the determination of an award and a judgment, the condemnor decided not to proceed with payment under the schedule in the statute for finalizing the condemnation and stated “that it has waived and abandoned, and does waive and abandon, any and all right, title, and interest it may have in said property.” This was yet another case of final, unequivocal, abandonment.

However, the landowner objected that the condemnor should not be allowed to “abandon” the condemnation. The court examined extensively, the authorities of various jurisdictions that a condemnor could “abandon” a condemnation at any time before judgment, but all instances examined were those in which the condemnor truly relinquished pursuit of the property and offered no intention to continue to pursue it.

The court reasoned that under the circumstances and the statutory scheme, the condemnor, in that case, could also abandon pursuit of the property even after judgment. The landowner

¹³ Denials shall fairly meet the substance of the averments denied. Rule 8(b), SCRCF. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Id.

“significantly pointed out that if the state, or any other agency possessing the power of eminent domain, may abandon a proceeding of this character after the damages have been fixed and determined by a court of competent jurisdiction and reduced to a final judgment, there is nothing in the statute to prevent the condemnor from claiming what would amount to a succession of new trials as of right until an acceptable award is obtained, or the property owner is exhausted by the uncertainty, annoyance, and expense of litigation and deprived of his property without just compensation.” Flamme, 26 N.E.2d 917 at 919.

The court, however, upheld the ability of the condemnor to permanently relinquish any pursuit the property. Notably, addressing the landowner’s “significant” point, the court observed:

It does not appear to be important that the state may attempt to abuse its privileges by resorting to a succession of condemnation proceedings with a view of acquiring the appellees' property at its own price, or harassing them into involuntary submission. There is ample authority for the intervention of courts of equity to prevent such abuses. Northern Pacific R. Co. v. Georgetown, 1908, 50 Wash. 580, 97 P. 659; Central of Georgia R. Co. v. Thomas, 1928, 167 Ga. 110, 144 S.E. 739; East Bay Municipal Utility Dist. v. Kieffer, 1929, 99 Cal.App. 240, 278 P. 476, 279 P. 178.

Flamme, 26 N.E.2d 917 at 919 (emphasis added).

The first question, then, remains, not whether the South Carolina Eminent Domain Procedure Act contemplates the ability of a condemnor to “abandon,” but what the South Carolina Eminent Domain Procedure Act contemplates “abandonment” to mean.

If “abandonment” of the notice is a permanent waiver of pursuit of the property and has a res judicata effect, the case cannot be considered moot until this is declared. Plaintiff fairly has a right to have that determined and declared in this second action before being faced with third in which the proposition is denied by the Town.

If, on the other hand, “abandonment” is not a final relinquishment of the right to pursue the plaintiff’s property, then before the case can be considered moot, the question still remains whether Plaintiff has stated a cause of action in equity or otherwise, for any relief preventing, affecting or redressing such a pursuit, or for any other relief.

Prospective or Present Relief Supported by
the Amended Complaint Which Would Not Be Concluded in the
Case of a “Nonfinal” Temporary “Abandonment” by the Town

In the instance of a “nonfinal” “abandonment” by the Town, one question affecting mootness is whether Plaintiff still seeks prospective or declaratory relief, notwithstanding the Town’s effectual dismissal of its claim without prejudice with reservation of right to start over a third time.

The case is not moot, for example, if Plaintiff still seeks to permanently enjoin the Town from pursuing the property, to declare certain attributes of the easement unnecessary under any future condemnation, to declare what steps would be required in any future condemnation for pursuit of a successful condemnation, or to permanently enjoin multiplicity of litigation by the Town, i.e., enjoin the Town from serving or filing yet a third suit on the same subject matter.¹⁴ Plaintiff seeks all these things, for which there are supporting allegations.

¹⁴ Courts of equity have long had the power to permanently enjoin condemnation, as well as the power to permanently enjoin multiple or successive litigation.

The Town appears to contend that its abandonment is not permanent with respect to condemnation of Plaintiff’s property, but only as to the particular notice which was used to commence the second lawsuit against Plaintiff.

Permanent injunction is the conventional remedy, rather than an unusual one, sought in challenge actions. See, e.g., Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961)(observing agreement of parties that the action simply be treated as one for permanent injunctive relief “in accordance with the usual procedure in such cases”); Timmons v. South Carolina Tricentennial Commission, 175 S.E.2d 805, 254 S.C. 378 (1970)(discussing, but not granting, primary remedy of permanent injunction enjoining any proceedings to condemn landowner’s property); and Columbia Water Co. v. Nunamaker, 73 S.C. 550, 53 S.E. 996 (1906)(observing that when the right to institute condemnation proceedings is contested, the proper remedy is to ask the Court to decide that the defendants did not have a right to institute condemnation proceedings, and to then grant a permanent injunction). See also S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 748 (1993)(barring re-institution of condemnation permanently, because the condemnor had previously represented that there would be no need for an easement on the landowner’s property).

Permanent injunction arises in many instances from the power of equity to prevent or minimize multiple or successive lawsuits.

It is obvious that the rule of res judicata, available in law cases, cannot apply and provide any protection to a party in a subsequent lawsuit unless the prior lawsuit is determined on the merits and the issues are actually or constructively decided. See Robert Von Moschzisker, Res Judicata, 38 Yale Law Journal 299 (1929).

Putting aside the question of permanent injunction and declaratory relief, which already render the case not moot, there also remains a question of whether Plaintiff, on the facts alleged, may pursue statutory or other at-law relief which is not prospective in nature, such as special costs including attorney's fees, or damages. If so, the case is not moot for that reason as well.

Both parties have already acknowledged the imminency of a request, before the action is completed, for litigation expenses including attorney's fees.

Additionally, Plaintiff has emphasized and explained in Plaintiff's various pleadings and papers, that Plaintiff did not seek the litigation -- that both challenge suits were defenses to suits

The rule of *res judicata* is said not to have been definitely formulated until 1776, but, in essence, it is of much earlier origin and application. Primarily, the rule is one of public policy, and, secondarily, of private benefit to individual litigants. The primary principle early found expression in the maxim, "Interest reipublicae ut sit finis litium," and the secondary or subordinate one in the form "Nemo debet bis vexari pro una et eadem causa." The whole doctrine bears a close resemblance to the exceptio rei judicatae of the Roman law. *Id.* at 299.

"Equity follows the law," that is, "Aequitas sequitur legem." Equity has determined that one ground supporting intervention providing the anticipatory relief of injunction is to forestall a multiplicity of suits. See Douglas Laycock, The Death of the Irreparable Injury Rule, 103 Harv. L. Rev. 687, 714 (1990) (citing decisions holding that "[a] legal remedy is inadequate if it would require a 'multiplicity of suits'"). And see Cent. of Ga. Ry. Co v. Thomas, 144 S.E. 739, 167 Ga. 110 (1928)(affirming injunction against railway company from proceeding with second condemnation after abandoning first: "We are of the opinion that this is a case where a court of equity should have interfered to protect the landowner in her rights"). Estoppel in pais has been employed by equity to serve the same purpose in a proper case. See S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth. (barring re-institution of condemnation permanently).

South Carolina courts have long recognized the power of equity to remedy prospective disputes over interests in land and prevent future or successive litigation, particularly when the aggrieved party does not have a present vehicle to resolve the issues finally by one action in law for ejectment or for trespass damages, thus settling title or definition of the interest in land. See, e.g., Uxbridge Co v. Poppenheim, 135 S.C. 26, 133 S.E. 461 (1926)(citing, among concerns, "the practical certainty of a multiplicity of suits growing out of the confusion or uncertainty," and reversing trial court's grant of demurrer, the precursor to the practice of granting a Rule 12(b)(6) motion, in which the trial court ruled that the allegations and prayer of plaintiff in possession for declaration of the location of a disputed land boundary were insufficient to constitute a cause of action either legal or equitable); and McRae v. Hamer, 148 S. C. 403, 146 S. E. 243 (1929)(affirming denial of demurrer to complaint of plaintiff in possession to settle land boundary line, citing a "feature of equitable cognizance, the prevention of a multiplicity of suits," as sufficient to sustain the complaint against demurrer).

brought by the Town which required that the defenses would be lost if not presented pursuant to statute within 30 days of being sued by the Town each time. While emphasizing a desire to conduct discovery and reflect first on both Plaintiff's grounds and appetite for a damages claim, Plaintiff has pointed out that numerous facts alleged in the Amended Complaint may support a claim for defamation of Plaintiff, or for slander of Plaintiff's title. . (See, e.g., Ch.II Am. Cmplt., Preliminary Statement, and ¶¶78, 87 and 126.)

The Amended Complaint of the Challenge I case, which is specifically incorporated into the Challenge II Amended Complaint, also specifically mentions the prospect of a trespass claim based on the facts alleged, arising from the work already done by the Town on Plaintiff's land, "[i]n the alternative that Plaintiff's rights herein or in any contemplated condemnation action are adversely affected by the already completed project." (Challenge I Amended Complaint ¶ 179.)

Paragraph 221 of the Challenge II Amended Complaint characterizes the action only summarily, as "an action challenging Town attempts which were alleged to be unconstitutional, illegal, unauthorized, noncompliant, fraudulent, etc." However, under Rule 12(c), this Court cannot summarily disregard all the other facts in the Amended Complaint which might state a claim for a constitutional tort or other wrongdoing.

For example, this Court has concurrent jurisdiction for a claim pursuant to 42 U.S.C. §1983, which prohibits deprivation of procedural or substantive due process under color of state law.¹⁵

¹⁵ An example of such a case arising in the municipal condemnation context is found in Haworth v. City of Forest Grove, Oregon, Case 3:09-cv-01241-HZ (U.S. Dist. Ct. D. Or. Apr. 12, 2011), adopted as modified, Case 3:09-cv-01241-AC (U.S. Dist. Ct. D. Or. Jul. 6, 2011), which incidentally described the need for proof of further facts in subsequent litigation, because the claim was not presented and heard in the prior litigation.

In Haworth, the Haworths got some previously refused discovery from the city late in the state court proceedings, after the condemnation trial had commenced, essentially just before those proceedings were concluded. During the condemnation trial, the judge persuaded the parties to dismiss without prejudice to see if the matter could be worked out in mediation, with leave of the city to re-institute the case with the parties resuming the positions they had at the time of dismissal. The issue of

attorney's fees was to be negotiated by the parties, included in mediation, or determined upon re-institution of the case.

The city agreed, not disclosing that it knew its position was untenable and that it had no intention to follow through with the condemnation.

The matter was not worked out. The city stated it did not intend to pay attorney's fees. The city did not mediate. The city did not re-institute. The Haworths re-instituted and were awarded over \$185,000 in legal fees sometime around 2009.

The Haworths sued in federal court for, among other things, violation of §1983. They were unable to establish issue preclusion based on the previous state court proceedings, in which the discovery was not available, the claim had not been made, and the state court determining the fee petition was only in a position to determine that the city had been "unreasonable," and not in a position to rule that the city had engaged in conduct which was not only unreasonable but also unconstitutional.

The federal court Magistrate Judge, however, recommended that the Haworths were entitled to try to prove the further facts in federal court. The Magistrate Judge recommended denying the condemnor Town's motion for summary judgment on violation of §1983 and the attendant claim for damages for violation of substantive due process.

After the fact, the Haworths had discovered that in executive session, the city council discussed the limited actual need for the Haworth's entire tract for a park and the city's ulterior desire for extra land to sell for private use, while nevertheless publicly making a case for the entire tract. The Haworths discovered discussions planning to whitewash the matter under an opinion "that we can demonstrate that we have a potential need in the not-too-distant future."

One city actor, Jordan, characterized the relevant issues as whether the entire parcel should be designated as parks and recreation land, whether the resolution should include the commercial development clause, and whether a resolution should be adopted in the first place. Another city actor, Holan, Forest Grove Community Development Director, authored a memorandum to the city manager, Sykes, wherein Holan stated that, in his estimate, "there is a 60 percent chance of success to develop a park as envisioned above."

The landowners had offered a portion of their land for free in order to buy peace from the city's efforts to acquire it and in order to be able to plan reliably with respect to remaining land. The Haworths argued that the audiotape of the executive session of the city council and the city's failure to produce it were unlawful because the tape revealed that no public need existed, that no condemnation analysis was ever conducted, and that the city only wished to keep its options open for the future.

This, the Haworths contended, allowed the condemnation action to proceed far further than it would have had the tapes been disclosed in a timely fashion and the City's true intentions been revealed. In failing to disclose the tapes and these matters, the city allowed the presumption to arise that there was a true public need to justify the condemnation action. Instead, the city attempted to condemn more than it needed for an ulterior purpose not disclosed in its resolution and had actively discussed manipulation of the resolution to avoid the disclosure.

The Haworths also described ways in which the city unnecessarily and unjustly delayed the process: the city rejected the Haworths' offer to donate seventy acres only to later abandon the condemnation entirely; having privately determined that the city had no chance of success in the condemnation, the city failed to inform the Haworths that the city had no intention of reinstating the condemnation action and allowed the charade of mediation to continue; and the city disputed the Haworths' entitlement to attorney fees.

On these and other facts, the Magistrate Judge recommended that summary judgment on a substantive-due-process §1983 claim should be denied.

Plaintiff has not sued, by named theory, under this or any other tort. However, the allegations of the complaint, liberally construed, could be understood by a factfinder to describe deliberate, concerted action making out causes of action other than permanent injunction of condemnation.

It is not this Court's job to construct every cause of action which the facts may support, but nor is it this Court's province to grant "drastic" relief and summarily dismiss a relatively young case on the face of pleadings when the absence of sufficient allegations or the absence of the ability to amend and add them has not been demonstrated by the moving party.

Mootness in the Law

As indicated above, the case is in commonsense understanding, no moot. Under South Carolina law, the case is not "moot," because the case is in a trial level court rather than on appeal and there is relief which can still be sought and ordered, particularly if the Town maintains that its "abandonment" of the condemnation is a not permanent abandonment, with prejudice.

Applying the Rule 12(c) standard straightforwardly, as this Court is required to do, the Town is taken to be admitting for the purposes of its motion, all 375 paragraphs of the Amended Complaint. Those paragraphs, taken as true, provide a basis for declaratory relief, and for a permanent, across-the-board bar on further action by the Town, as well as for permanent preclusive or injunctive relief on components of what the Town has now sued for twice and concretely threatens to sue for again, and for possible tort liability which has not been eliminated from consideration.

Mootness in federal court is a federal concept. It has been rooted since the 60s in Article III of the United States Constitution, which describes the limited jurisdiction of the federal courts. Article III, setting up the federal judiciary and courts, does not govern state courts, except when they are part of the federal judicial system in the course of deciding issues of federal law under concurrent jurisdiction.

Article III of the United States Constitution is not duplicated in Article V of the South Carolina Constitution or anywhere else in the South Carolina Constitution. The South Carolina Constitution does not have a “case or controversy” requirement for jurisdiction of state courts in general.

Nor does the State Constitution have such a requirement or restriction peculiar to appellate courts. Cf. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001)(describing mootness as if a doctrine generally confined to appellate forum).

The orientation of Curtis and other cases toward mootness as only an appellate concept is not surprising, as by the time a case is on appeal, not only can there be no amendment (unless amendment is the issue), but also the appeal is likely confined to the issues specifically raised. In contrast, the availability of relief is broader and more flexible at the trial level, both through the availability of amendment (e.g., Rule 15(a)) and through less rigidity in pleading rules (e.g., Rule 8(a)), relief rules (e.g., Rule 54(c)), and other procedural rules.

Unlike federal trial courts, state general trial level courts are not courts of limited jurisdiction. Like state appellate courts, state trial level courts, being courts operating on a local, rather than national scale and being informed by localized familiarity with local policy and issues, also, for that policy reason, are under no compulsion to emulate federal constitutional considerations unless doing so to avoid conflict with rights assured by the federal constitution to individuals or doing so as a part of the federal court system.

For most of this century, state courts have not been thought bound by the “case of controversy” requirement of Article III, even when deciding questions of federal law. William A. Fletcher, The “Case of Controversy” Requirement in State Court Adjudication of Federal Questions, Calif. Law Rev., Vol. 78, No.2 (Mar. 1990), at 263-264.

The difference between federal mootness and state mootness has received little judicial attention in some state courts, which have generally followed federal principles of justiciability without

discussing the root of the federal rule, likely doing so as a general policy matter, or basing the parallel on a longstanding more general concept of justiciability in a lay sense. See Jowers v. S.C.D.H.E.C., 423 S.C. 343, 815 S.E.2d 446 (2018)(citing Byrd v. Irmo H.S., 321, S.C. 426, 468 S.E.2d 861(1996) and collecting cases); and see Anderson v. North Carolina State Board of Elections, 788 S.E.2d 179 (N.C. Ct. App. 2016) (discussing federal constitutional underpinnings and state court policy basis).

By contrast with federal courts, in state courts, the exclusion of moot questions simply represents a form of judicial restraint. Anderson.¹⁶

¹⁶ South Carolina courts have described the concept of “justiciability” in connection with the Declaratory Judgment Act, in a history not explored at length here. There appear to be varying descriptions of whether the concept is one restraining courts and cases in general – and applying only derivatively to the Declaratory Judgment Act – or whether the concept is one specifically based on perceived legislative intent specifically with respect to the Declaratory Judgment Act.

The concept appears to have evolved without explanation into a concept referenced on the rare occasion as one of subject matter jurisdiction, specifically under the Declaratory Judgment Act, as if limiting judicial power only under that Act as a matter of the limits of the statute. The initial concept of “justiciability” under the Declaratory Judgment Act appears to have entered the case law in a context having nothing to do with concreteness of controversy, and to have been thereafter referenced as if the context had been otherwise. See South Carolina Electric & Gas Co v. South Carolina Pub. Serv. Auth., 215 S.C. 193, 54 S.E.2d 777 (1949)(holding the matter not “justiciable” because the acts of defendant sought to be enjoined were authorized by law and within its discretion and no cause of action was stated for coercive equitable relief).

The formulation for justiciability under the Declaratory Judgment Act is stated generally as simply that a justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002), reh. den., cert. den.

The test of sufficiency is not whether complaint shows plaintiff is entitled to declaration of rights according to his theory, but whether he is entitled to declaration of rights at all. Dismukes v. Carletta, 269 S.C. 110, 236 S.E.2d 421 (1977).

While it is true that a declaratory judgment should not deal with moot or abstract matters or constitute a merely advisory opinion, all that is required is that there be an existing controversy, or at least the “ripening seeds of a controversy”: the purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. Waller v. Waller, 220 S.C. 212, 66 S.E.2d 876 (1951).

The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purposes intended, namely, to afford a speedy and inexpensive method of adjudicating legal disputes without invoking any coercive remedies of the old procedure, to settle legal rights, and to remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships. Williams Furniture Corp. v. Southern Coatings & Chemical Co., 216 S.C. 1, 56 S.E.2d 576 (1949).

A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. Curtis v. State. In the instant case, a judgment, if rendered, will have definite, practical, and likely final legal effect. Once a case first meets the test of technically or superficially being moot, it is then subject to traditional exceptions. See Sloan v Greenville County, 380 S.C. 528 670 S.E.2d 663 (2008)(skipping the first prong of the inquiry only because the issue was already the law of the case).

The exceptions include exceptions for cases or issues “capable of repetition yet evading review.” See Roe v. Wade, 410 U.S. 113 (1973)(holding challenge to restrictions on abortion could not be mooted by birth of baby or otherwise no longer being pregnant). See also Sloan v Greenville County, 380 S.C. 528 670 S.E.2d 663 (2008) and Byrd v. Irmo High Sch., 321 S.C. 426, 468 S.E.2d 861 (1996). The instant case is such a case.

The exceptions also include “voluntary cessation” by the opponent and “collateral legal consequences or effect on future events” of not completing the litigation. The instant case fits both of these descriptions as well.

Subsumed in the “capable of repetition” exception is the “voluntary cessation” exception. See Curtis v. State (including broad notions of capability of repetition in the rule). If a defendant voluntarily terminates the allegedly unlawful conduct after the lawsuit has been filed but retains the power to resume the practice at any time, a court may deem the case nonmoot. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000).

The "heavy burden" of persuading the court that a case has been mooted by the defendant's voluntary actions lies with the party asserting mootness, and the standard for such a determination is a "stringent" one: "if subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior

The Declaratory Judgment Act itself contemplates that further litigation may ensue. Notios Corp. v. Hanvey, 256 S.C. 275, 182 S.E.2d 55 (1971). It is always possible that after the granting of declaratory relief, other contingencies and questions may arise. Notios Corp.

[can]not reasonably be expected to recur." Id. (citing United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 203 (1968)).

This exception is supported by the Supreme Court because, in addition to ensuring that the defendant is not "free to return to his old ways," there is "a public interest in having the legality of the practices settled." United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953) (citation omitted).

In Laidlaw, an environmental group had filed a citizen suit under the Clean Water Act against Laidlaw. Laidlaw was a company that operated a wastewater treatment plant. The citizens alleged that the plant had discharged far more toxic pollutants into a river than it was allowed under terms of a government-issued permit.

However, after the lawsuit began, Laidlaw began to comply with the discharge limit. The Supreme Court held that this case was not moot because it was a "disputed factual matter" whether the company's substantial compliance with its permit requirements, or its closure of the facility in question, which had occurred after the court of appeals had issued its decision, would make "it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur." Laidlaw, 528 U.S. at 193.

A related exception occurs if a decision or lack of decision by the trial court may affect future events, or have collateral consequences for the parties, even if the matter is on appeal and the appellate court cannot give effective relief in the present case. Curtis, 345 S.C. at 568, 549 S.E.2d at 596; accord Sloan, 365 S.C. at 303, 618 S.E.2d at 878. Obviously, when such a case is not on appeal but is in the trial court and the trial court can give relief, the case is not even superficially moot and the trial court should act.

In the instant case, the Town has already abandoned the easement request twice by some counts and yet has filed suit twice, and the Town has acknowledged an intent to persist in some manner. The parties are still in the trial level court. The circumstances described hereinabove demonstrate that not

only is the case not moot, but that even if it were perceived to be superficially so, at least three exceptions to dismissal for mootness apply.

Accordingly, the Town's motion to dismiss for mootness is denied. It is also therefore not unreasonable to require the Town, as the party bringing a second suit against Plaintiff and acknowledging the intent to bring a third, to respond to discovery while the case is pending. Accordingly, the Town's motion for protection from discovery is denied as well and the pending discovery shall be complied with within 15 days of the entry of this order or within such other time as the parties may agree.

AND IT IS SO ORDERED.

Date:_____

Benjamin H. Culbertson
Circuit Judge

[or see electronic signature page for date and electronic signature]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00932
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

ORDER
(DENYING TOWN’S MARCH 5, 2021 MOTION FOR JUDGMENT ON
THE PLEADINGS TO DISMISS AS MOOT AND RELATED MOTION FOR
PROTECTION FROM DISCOVERY)

After carefully considering the pleadings, the motions, the submittals of the parties, and oral argument at the hearing April 1, 2021, this Court denies the Town’s March 5, 2021 motion for judgment on the pleadings and the Town’s March 3, 2021 motion for protection from discovery. Construing the pleadings in the light most favorable to Plaintiff, as this Court is required to do, and likewise accepting all of the allegations of the Amended Complaint and the favorable inferences therefrom as true, this action is not moot.

Background

On March 5, 2021, in each of three cases which have similar pleadings, motions and discovery, but which have different Plaintiffs, the Town filed a motion pursuant to Rule 12(c), SCRPC for judgment on the pleadings.¹

¹ The Plaintiffs in the three cases and respective case numbers are as follows: Sunset Lodge, LLC, 2020-CP-22-00932, Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, 2020-CP-22-00931, and M. Baron Stanton, 2020-CP-22-00930. These cases are referred to herein as the “Challenge II cases.” Unless a difference is noted, the motions in the three cases are handled the same way. This order reads the same in each case.

The Town requests that the Court dismiss the instant action as moot on the grounds that the Town has pled in paragraph 8 of its March 3, 2021 Answer to the Amended Complaint that the Town has withdrawn its condemnation notice which commenced the related condemnation action.

The Town asserts that Plaintiff's action is a "single cause of action" challenging the condemnation action, and that the Town's withdrawal of only the condemnation "notice" renders the case moot.

The Town also filed a March 3, 2021 motion for protection from discovery, which was based on the motion to dismiss, and was grounded on the assertion that if the case is dismissed, there no longer remains any subject warranting discovery.

Standard of Review and Standard of Decision

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Rule 12(c), SCRCP. When considering such motion, the Court must regard all properly pleaded factual allegations of the nonmoving party as admitted, and any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000).

The standard is thus the same as a Rule 12(b)(6) motion made after answering. See Rule 12(b), SCRCP (requiring that a Rule 12(b)(6) motion be made before pleading), and cf. Rule 12(h)(2), SCRCP (providing that the defense ordinarily addressed in Rule 12(b)(6) is not waived by failure to assert it in a pre-answer motion and may be asserted by motion for judgment on the pleadings).

A Rule 12(c) motion by a defendant is in essence, a Rule 12(b)(6) motion made after answering, with the added assertion by a moving defendant that nothing the defendant has pled lends any help to the complaint in stating any claim on any basis, and that the court may also consider facts, if any, formally admitted by Plaintiff's pleading in reply to a counterclaim or affirmative defense of the defendant.

Thus, no allegation the defendant affirmatively pleads to benefit itself is accepted unless the plaintiff admits it, and then only the inferences from it which are favorable to the plaintiff are indulged. Plaintiff is under no requirement to negate any allegation of the defendant in the course of the motion.

A complaint under a 12(c) motion is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Falk. See also Rule 54(c), SCRPC (“Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings”); and see Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P. et al., 385 S.C. 452 at 457, 684 S.E.2d 756 at ____ (2009)(“The character of a complaint is determined by its factual allegations, not the label assigned to it”).

"A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." Lydia v. Horton, 343 S.C. 376, 540 S.E.2d 102 (Ct. App. 2000), rev'd on other grounds; Douglass ex. rel. Louthian v. Boyce, 336 S.C. 318, 323, 519 S.E.2d 802, 805 (Ct. App. 1999)(citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991)).

"Our courts have held the pleadings should be construed liberally so that substantial justice is done between the parties." Falk, 341 S.C. at 287, 533 S.E.2d at 353. "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Id.

As in the practice under Rule 12(b)(6), if the challenged pleading does not meet the standard, the proper course is to grant the motion without prejudice, and grant the nonmoving party leave to amend the pleading to satisfy any missing requirement if the party can do so. See Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019)(discussing rationale for practice of granting leave to amend under Rule 12(b)(6)). This leave should be provided as part of the ruling on

the moving party's motion to dismiss without the nonmoving party making a motion to amend.

Skydive.

The Nature of the Case, the Issues, and the Amended Complaint Viewed
in the Light Most Favorable to the Nonmoving Party and Viewed
Without Limitation to Theories Named or Relief Requested

Because the standard of decision discussed above calls for the allegations of the 375-paragraph Amended Complaint of the nonmoving party to be accepted as true, and not be confined to the specific relief labeled or requested, the following background is necessary.

This background is recounted under the foregoing standard for the purposes of the motion and does not constitute this Court's findings on any disputed matters, other than that they are alleged. This background is concerned not only with the facts pled, but also with the issues they present and the types of relief to which they could entitle the pleader, keeping in mind how those claims and remedies would or would not be mooted by the filing of a notice of abandonment.

The instant case arises from the second suit by the Town against Plaintiff.

Previously, in June 2020, the Town commenced the first statutory condemnation action against Plaintiff.

Plaintiff had offered the Town a "beach renourishment easement" at no charge, but the Town sought an easement with terms and scope Plaintiff believed to be unreasonable.

The Town thereafter stated no easement would be necessary for its renourishment project, and completed the placement of all sand for the project.

The Town thereafter again sought an easement with terms and scope Plaintiff believed to be unreasonable. Plaintiff again declined to grant an easement with terms and scope Plaintiff believed to be unreasonable.

The Town sued to condemn.

In the first suit, the Town sought to condemn, among other things, a right of public use and access over a designated oceanfront portion of Plaintiff's oceanfront land.

The Town also sought to condemn the right to do "beach renourishment" work on the designated portion, and other rights to do things on or prohibit Plaintiff from doing things on the designated portion of Plaintiff's property. (See, e.g., Amended Complaint ¶¶45-52 (recounting provisions for limiting Plaintiff's access to Plaintiff's land and for tearing down improvements such as decks, stairs, showers, foundation elements, etc. if in easement area.))

One boundary of the designated portion of Plaintiff's land was just a few feet away from the door of Plaintiff's oceanfront house. (See id.)

The offer of payment stated by the Town in the condemnation papers was for zero (\$0.00) dollars, based on a report procured by the Town from an appraiser to whom the Town did not give the written terms of the easement and whom the Town did not inform of the terms verbally.

Within 30 days of being sued, Plaintiff separately filed an approximately 169-paragraph suit against the Town pursuant to statute, to challenge on numerous stated bases, the power and ability of the Town to condemn ("the Challenge I case").² The Challenge I case, by statute, stayed all proceedings in the condemnation action until resolution of the Challenge I case. S.C. Code Ann. §28-2-470.

The Challenge I case presented a request for declaratory and injunctive relief.³ Under present statutory practice, it may not be necessary for the purposes of the instant motion, to determine in which

² The Challenge I case was filed pursuant to S.C. Code Ann. §28-2-470, which is part of the Eminent Domain Procedure Act (sometimes herein, "the Act"). Town similarly sued the two other landowners, each of whom filed a similar challenge case. Plaintiffs in the three challenge cases and respective case numbers are as follows: Sunset Lodge, LLC, 2020-CP-22-00600, Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, 2020-CP-22-00601, and M. Baron Stanton, 2020-CP-22-00602. Unless a difference is noted, the cases were handled the same way.

³ The South Carolina Declaratory Judgment Act provides:
Courts of record may declare rights, status and other legal relations.

respects the Challenge I case requested declaratory relief, permanent injunctive relief, statutory relief, or other relief.⁴ A liberal reading of the extensive Challenge I Amended Complaint indicates that, among other things, Plaintiff challenged the power and ability of the Town to ever condemn any easement at all over Plaintiff's property for the generally stated purpose and subject matter involved.

The Challenge I Amended Complaint also indicates that, in the alternative, Plaintiff challenged the power and ability of the Town to ever include, in any easement condemned, various attributes the Town sought to include in the easement.

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

S. C. Code Ann. §15-53-20.

⁴ See, e.g., Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961). In Atkinson, under the prior equity practice, a motion to dismiss the plaintiff's challenge action had been filed by the defendant on the ground that the action was not maintainable under the Declaratory Judgment Act, in that the plaintiff's remedy, if any, was for a permanent injunction. Upon the hearing of this motion, however, counsel for the parties agreed that the action simply be treated as one for permanent injunctive relief "in accordance with the usual procedure in such cases."

But see Timmons v. South Carolina Tricentennial Commission, 175 S.E.2d 805, 254 S.C. 378 (1970)(discussing, but not granting, primary remedy of permanent injunction). In Timmons, Annie Mary Timmons brought an action against the South Carolina Tricentennial Commission and against Daniel R. McLeod, as attorney general, under the Uniform Declaratory Judgment Act, but sought "a permanent injunction enjoining any proceedings to condemn her property."

And see Columbia Water Co. v. Nunamaker, 73 S.C. 550, 53 S.E. 996 (1906). Nunamaker was decided under the prior equity practice. There, the court observed:

When the right to institute condemnation proceedings is contested, the proper remedy is to bring an action in the Court of Common Pleas in order that the Court may, in the exercise of its chancery powers, determine such right. *** The [cited] cases show that such action must be regarded as independent, and not ancillary to the condemnation proceedings. If upon the final hearing of the case the Court should decide that the defendants did not have a right to institute condemnation proceedings, it would then grant a permanent injunction.

Id., 53 S.E. at 998 (citations omitted).

The Challenge I Amended Complaint also indicates that, in the alternative, Plaintiff challenged the power and ability of the Town to ever pursue any easement in any action without complying with certain requirements. These particularly described requirements included common law requirements for fair dealing and good faith deliberation in the selection of the attributes of the property interest to be condemned and for authorization of the condemnation of same, as well as requirements for compliance with specifically described statutory prerequisites.

The Challenge I Amended Complaint also indicates that, in the further alternative, Plaintiff challenged the power and ability of the Town to proceed under the particular case which was commenced, to proceed under the particular appraisal which was obtained, and to proceed under the particular condemnation notice served.

Among other things, after setting forth numerous other allegations, the Challenge I case made the following allegation and prayer: “The contemplated condemnation is completely unnecessary as a matter of law, and therefore constitutionally and equitably prohibited, and the Town of Pawley’s Island’s attempt to condemn an overbroad easement after the fact for an already completed and no longer proposed or prospective project should be disallowed and permanently restrained.” (Challenge I Amended Complaint ¶ 158.)

The Challenge I Amended Complaint further asserted: “In the alternative that the Town asserts the condemnation is for some other, future, hypothetical project, the condemnation is still unnecessary and in bad faith in that any such putative future project is admitted by the Town to be speculative, unlikely, and by the Town’s own calculations, most probably unnecessary for as much as twenty-two years.” (Challenge I Amended Complaint ¶ 160.)

The Challenge I Amended Complaint also asserted:

In the alternative that an actual, bona fide, proposed additional project were to materialize, the easement sought has been sought through knowing, intentional misrepresentation, lack of honesty in fact, spite, caprice, arbitrariness, and illegality, and has also been sought under influence by legal error as to not only the nature of the easement that is sought, but also as to

the lack of basis, or legal or practical need, for the easement or its numerous overbroad attributes. The easement sought has also been sought under influence of legal error as to the consequences of Plaintiff granting it or the Town taking it. The easement is also being sought through bad faith noncompliance with procedural rules. In that these facts constitute “fraud, bad faith or abuse of discretion,” the Town’s contemplated condemnation action, currently stayed by this action, should be disallowed with prejudice.

(Challenge I Amended Complaint ¶ 162.)

In the Sunset and Beattie Amended Complaints, there were also allegations as to the Town making false certifications in its pleading, the condemnation notice. The Amended Complaint in those Challenge I cases asserts: “For the reasons that (1) noncompliance with exclusive mandatory procedure renders the Town’s condemnation notice ultra vires and void, and (2) knowing or recklessly negligent false statements in a pleading render the pleader subject to sanctions including dismissal, the beginnings of the condemnation action represented by the Town’s Condemnation Notice should be dismissed with prejudice.” (Challenge I Amended Complaint ¶ 172 Sunset-600 and Beattie-601.)⁵

The Challenge I Amended Complaint also asserts the following: “Among other things, there is no need for an easement over the owner’s entire lot. There is no need for public access of any kind, no need to limit owner access, no need for broad Town activities unassociated with doing and maintaining the work, no need to include owner improvements, no need to be so close to owner homes, and no reason not to clarify there is no change in owner access to ocean and beach.” (Challenge I Amended Complaint ¶ 175.)

⁵ In the Stanton Challenge I Amended Complaint, there were additional allegations as to the Town attempting to change the description of the easement sought after commencing the action, and the Amended Complaint asserts: “For the reasons that (1) noncompliance with exclusive mandatory procedure renders the Town’s condemnation notice ultra vires and void, and (2) knowing or recklessly negligent false statements in a pleading render the pleader subject to sanctions including dismissal, and (3) the Town stated in writing that the condemnation notice was withdrawn, the beginnings of the condemnation action represented by the Town’s Condemnation Notice should be dismissed with prejudice. (Challenge I Amended Complaint ¶ 172 in Stanton-602.)

In all three Challenge I Amended Complaints, there are allegations that the Town Administrator filed an easement grant for the Beattie property which was unauthorized by the Beattie. (See, e.g., Sunset Ch.I Cmplt. ¶66.)

The Challenge I suit also asserts: “In the alternative that Plaintiff’s rights herein or in any contemplated condemnation action are adversely affected by the already completed project, Plaintiff may need the already completed actions of the Town to be redressed by damages for trespass or other monetary remedy, for which cause of action Plaintiff would and does demand a trial by jury, despite the nonjury portions of this action challenging the Town’s right to condemn.” (Challenge I Amended Complaint ¶ 179.)

The Challenge I Amended Complaint further states: “Plaintiff prays that the Condemnation Notice be quashed and that the Town be forever barred and enjoined from filing it or proceeding with it, for such other and further relief as is just and proper, and for all litigation costs.” (Challenge I Amended Complaint, prayer for relief following ¶ 179 (emphasis added).)

The Town filed a motion pursuant to Rule 12(b)(6) to dismiss the Challenge I case for failure to allege facts sufficient to state a cause of action and this Court denied the motion on September 11, 2020.

While the first condemnation action by the Town was stayed and Plaintiff’s August 2020 motion for summary judgment in the Challenge I case was pending, the Town, in October 2020, commenced a second statutory condemnation action against Plaintiff.

In this second suit, the Town again sought to condemn a right of public use and access over a designated oceanfront portion of Plaintiff’s oceanfront land, as well as the right to do renourishment work on the designated portion, and other rights to do things on or prohibit Plaintiff from doing things

on the designated portion.⁶ In this second suit, again, one boundary of the designated portion of Plaintiff's land was just a few feet away from the door of Plaintiff's oceanfront house.⁷

⁶ For example, the Amended Complaint in case 2020-CP-22-00932 alleges:

354. The New Notice is similar to the Existing Notice, but among other possible differences, the New Notice attempts, without leave of court, to alter the Existing Notice by adding the aforescribed 9-line footnote in the description of the property sought to be acquired.

355. The New Notice is falsely dated June 9, 2020, as if it, including the map and proposed Beach Renourishment Easement forming a part of it, existed on that date. This leaves the Town actors poised to next represent to the public, the Town Council or a court, if need be, that the New Notice (including its constituent parts) is what was served in June 2020 instead of the Existing Notice.

356. The New Notice is dated the same as the Existing Notice, but upon information and belief, did not exist on that date and was not prepared until after the October 12, 2020 Town Council meeting.

357. The New Notice is fraudulent in the above respect, and is an attempt, like other aforescribed activities, to create a false public record and a morass of official-looking paperwork to obscure the delicts and derelictions of the various Town actors involved; the New Notice is part of the continuing series of bumbles at the landowner's expense, frauds, and coverups alleged in the Existing Action and now this one.

⁷ There appears to be no dispute that the Town intended to commence the second suit and did so. Under the peculiar statutory procedure, the first and second suits by the Town began with service of papers without yet filing the papers with the court, and therefore the captions simply reflect the same parties in an identical case caption, without any Common Pleas case number on either caption.

The Town's March 31, 2021 brief only states that the second suit by the Town against Plaintiff contained "revisions reflecting certain objections asserted in the first set of challenge actions."

The Town does not state what revisions were made or in what way the suit and any revisions in it were responsive to objections stated in the Challenge I case. The Challenge II Amended Complaint does address the similarities and differences in detail and at length.

No other explanation is offered for why the Town commenced a second suit against Plaintiff when one was already pending and stayed.

In the Amended Complaint of the instant Challenge II case, the allegations of which, as discussed above, must be taken as true for the purposes of the Town's motion, Plaintiff asserts that the second suit was not an amendment made within the first suit because the "New Notice" was created without any leave to amend, in a suit which was stayed. Plaintiff states and alleges at length and in detail that the second suit by the Town was without any lift of the statutory stay, was without proper authorization from Town Council, and was without any prior resolution of the already pending action. (See Ch.II Am. Cmpl. ¶¶ 224-374.)

In the Challenge II Amended Complaint, which must be taken as true, Plaintiff asserts that the additional action was without consultation with Plaintiff, without notice to Plaintiff, without consent of Plaintiff, and without prior or subsequent explanation of purpose to Plaintiff. (See *id.*)

Plaintiff further alleges in the Challenge II Amended Complaint that virtually no objections of the plaintiffs in the first set of challenge actions were cured or corrected in the Town's second suit, and that, rather, the Town attempted to pursue condemnation of substantially similar subject matter, with

In response to the second suit by the Town, Plaintiff, again, within 30 days of being served by the Town, separately filed suit against the Town pursuant to statute, to challenge the power and ability of the Town to condemn. Viz., Plaintiff filed the instant Challenge II case, which the Town contends is now moot.

In the 375-paragraph Amended Complaint in this Challenge II case, Plaintiff incorporated by reference, the entire Amended Complaint in the Challenge I case. (Challenge II Amended Complaint ¶ 182.)⁸

the same defective appraisal, and the same lack of good faith deliberation on applicable factors. (See id.) Plaintiff alleges that the condemnation was also generally made more onerous and damaging to the landowner by addition of a disparaging and legally incorrect “argument” inserted by footnote into the granting/demising language and that additional false statements and events occurred which were additionally fatal to the second condemnation attempt. (See id.)

⁸ Plaintiff offered in Plaintiff’s brief, a partial synopsis of the 375-paragraph Challenge II Amended Complaint’s allegations, referring to the Amended Complaint as an account “of numerous chapters of the Town’s acts, misrepresentations, evasions and persistent omissions over an extended period of time.” The synopsis is stated here for summary purposes in lieu of the longer allegations themselves, which must stand on their own for purposes of the motion. Plaintiff contends that the allegations “have included the following, among other things”:

- Misrepresentation of the nature and scope of the “renourishment” easement sought in 2019 when first soliciting it and seeking to pay nothing for it.
- Doing so by saying the “renourishment” easement was only for sand placement, sand fence and planting, when the legal document placed the easement two feet from the door of the house, granted perpetual public access within the easement area, granted a perpetual right to restrict the owner’s access to that oceanfront part of the owner’s property, granted a perpetual right to tear down and prevent replacement of the owner’s improvements within the area, and perpetually subjected the owner’s right to build structures for access to the ocean to approval of an unidentified person with no governing standards.
- Misrepresentation publicly of the landowners’ good faith offer of an easement of reasonable scope in response to those solicitations from the Town.
- Doing so by omitting all reference to the landowner’s offer, omitting all disclosure of the issues, and falsely perpetuating the impression and public representation that the landowner had refused any easement whatsoever.
- Misrepresentation of the nature and scope of the actually contemplated easement to the appraiser hired by the Town when seeking approval of federal participation in part of the project.
- Doing so by asking the appraiser to determine potential land acquisition costs for 109 properties as a condition of obtaining federal approval of federal assistance on that part of the overall proposed renourishment project, but omitting the unreasonable terms to which Plaintiff has objected.

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- Filing an unauthorized easement grant from one property owner, Mr. Beattie.
 - Active involvement in creating a poorly drafted and unreasonable proposed granting document proposed to become a permanent part of Plaintiff's chain of title.
 - Abandonment, altogether, of the request for the easement in 2019.
 - Concurrently with such abandonment, publicly announcing intention to perform the work without an easement.
 - Concurrently with such abandonment, publicly announcing the scientific likelihood of the lack of necessity of similar work for another 22 years or more.
 - Subsequent to such abandonment of the request for the easement, completion of the work for which the easement had been sought.
 - Subsequent to abandonment of the request for the easement and completion of such work, disclosing in 2020 a determination to pursue a "program" for only potential work.
 - Doing so knowing that the potential work was to be years in the future, with no certainty of future need or occurrence, no assurance of Congressional funding, and no guarantee of future assistance whatsoever, and that the need for the potential work was contrary to the Town's own prior data and estimates the Town obtained and publicized in order to justify the doing of the work, the scope of the work, and the spending on the work, which was now already done.
 - Subsequent to abandonment of the request for the easement and completion of the work without such easement, then requesting the easement again, but now only for the mere purpose of joining the uncertain "program" for which the need was unlikely, for which the possible need was remote in time, and under which the receipt of financial help and the actual doing of anything was speculative.
 - Repeating prior misrepresentations in making a new request for the easement. I.e., that the "renourishment" easement was for the limited purpose of sand placement, sand fence, and planting.
 - Continued publicly broadcast misrepresentation in the May 2020 Council meeting of both (i) the nature and scope of the easement now sought as only for putting sand on the beach and (ii) the landowners' responses to the prior solicitations as being a categorical refusal rather than a good faith offer of a reasonable easement.
 - Consequently issuing a resolution insufficient for and invalid for authorizing the condemnation which the Town would later pursue.
 - Misrepresentation of the nature and scope of the easement to the appraiser hired to determine the just compensation which should be paid to the landowner if the easements were to be purchased from the landowner or condemned and taken by eminent domain.
 - Doing so by asking the appraiser to determine the just compensation which should be paid to the landowner, but omitting from the easement he was asked to appraise, the unreasonable terms to which Plaintiff has objected.
 - Commencing a condemnation action seeking an easement containing the unreasonable terms to which Plaintiff has objected, but doing so in a proceeding integrally based on the falsely procured appraisal of an easement of materially more reasonable scope, while withholding the appraisal in violation of the statutory procedure, and while making a false certification in the condemnation papers that the appraisal had been previously provided.
 - In seeking condemnation of an easement the entire request for which had been previously abandoned, seeking also to include features and scope previously agreed with one or more landowners not to be necessary features or scope.
 - Misrepresenting publicly the nature of, progress of, and positions taken in the litigation.

In the Challenge II case, Plaintiff stated: “Plaintiff prays that both the “Existing” and the “New” Condemnation Notices be quashed and that the Town be forever barred and enjoined from filing either of them or proceeding with either of them, for such other and further relief as is just and proper, and for all litigation costs.” (Ch.II Am.Cmplt., prayer (emphasis added).)

In the instant Challenge II case, Plaintiff did not plead or request that the overall relief sought by Plaintiff be “without prejudice.”

Nor did Plaintiff plead or request that issues adjudicated within the action in order to provide the declaratory or injunctive relief requested not be given permanent preclusive effect. Nor did Plaintiff characterize Plaintiff’s Amended Complaint as a “single cause of action.”

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- Misrepresenting to the Court in moving to dismiss, for a bond, and for special expedited treatment, the likelihood that a storm could wash away all 1.1. million cubic yards of sand in a single event and misrepresenting to the Court that under the “program,” if such an event occurred, the Town would be eligible to have the Corps of Engineers put all 1.1. million cubic yards back, including portions on which there would never be federal involvement.
 - Presenting to the Court a resolution created by the Town which was known at the time of creation to be factually false, in which the Town Council falsely states that the materials contained in the resolution were presented to Plaintiff before the October 12, 2021 time of the resolution, impliedly in June 2020.
 - Doing so in order to dissuade the Court from granting summary judgment by attaching the false resolution as Exhibit B to the Town’s November 24, 2020 brief opposing Plaintiff’s motion for summary judgment in the initial action.
 - Doing so again on March 17, 2021 by attaching the false resolution to the Town’s memorandum in support of the Town’s motion to reconsider the granting of summary judgment.
 - Approximately two months after Plaintiff’s summary judgment motion was filed in the initial challenge actions, commencing a separate condemnation action based on knowingly falsely stated facts in the resolutions purportedly authorizing same.
 - Doing so using condemnation notices created in October but falsely dated June 9, 2020.
 - Doing so using condemnation notices in which the occurrence of other activities and events is recited falsely if the statements are taken to speak as of June 9, 2020.
 - Not adequately answering the factual allegations of the original complaint in the instant challenge action.
 - Abandoning the underlying condemnation notice on February 10, 2021.
 - Not adequately answering the January 13, 2021 amended complaint in the instant challenge action.
 - Seeking dismissal before discovery by Plaintiff on potential additional relief for Plaintiff has progressed, including the deposition of the Town Administrator noticed on January 15, 2021 for February 19 and the answering of January 10, 2021 interrogatories served by Plaintiff.

Subsequently to commencing the instant Challenge II case, Plaintiff began to pursue discovery from the Town in the Challenge II case, including the deposition of the Town Administrator.

On January 20, 2021, the Court granted Plaintiff's motion for summary judgment against the Town in the Challenge I case. The Town subsequently moved for reconsideration. After summary judgment was granted, the Town, without prior consultation, moved in the Challenge I cases of Beattie (ending in 601) and Sunset (ending in 600) to disqualify Plaintiff's counsel from representing them in the Challenge I cases. After those plaintiffs responded extensively in writing to the Town's motion to disqualify, and asserted the motion was completely without merit, the Town withdrew the motion without hearing.

In January 2021, Plaintiff petitioned for award of litigation expenses in the Challenge I case.⁹ The Town opposed the fee petition and requested at least a four-month period in which to conduct discovery and mount opposition to the award of attorney's fees in a proposed full-blown evidentiary hearing. As of April 14, 2021, proceedings relating to fees are still pending.

On February 10, despite the statutory stay in the second condemnation action, without leave of court or consent of Plaintiff, the Town sought to withdraw its condemnation notice which was used to commence the second condemnation action against Plaintiff.

The Town did so by filing, in the instant Challenge II case challenging the second condemnation suit, a "Notice of Abandonment." The Notice states that the condemnation action is "hereby abandoned and withdrawn."

⁹ Only the plaintiffs in the Sunset and Beattie Challenge I cases sought attorney's fees, and each asserted that the fee petition was based approximately if not exactly on one-third of the fees and expenses incurred in all three Challenge I cases and the early stages of the three Challenge II cases. The plaintiff in the Stanton Challenge I case did not seek the other one-third of the fees.

The Notice states that the action is “abandoned,” but does not state that the dismissal is with prejudice, or that the Town relinquishes any right to bring another condemnation action with regard to Plaintiff’s property.

On March 3, 2021, the Town filed an answer to the Amended Complaint in the instant Challenge II case, and, after denying the majority of the 375 paragraphs of the Amended Complaint, alleged at paragraph 8 that the “single cause of action” alleged by Plaintiff was rendered moot by the Town’s filing of the February 10 Notice of Abandonment.

In its Answer, the Town again did not allege or stipulate that the Notice of Abandonment was intended to end the condemnation action with prejudice to commencing another condemnation action on the same subject matter.

On March 5, 2021, the Town filed its instant motion for judgment on the pleadings pursuant to Rule 12(c), SCRCPP, asserting that this case is now moot. The Town requests that the instant case be dismissed “without prejudice.” Just beforehand, on March 3, 2021, the Town filed a motion for protection from pending discovery, including the still un-taken deposition of the Town Administrator, pending interrogatories, and any future discovery.

Interpretation, Validity and Effect of the
Filed Notice of Abandonment Alleged by
the Town in its Answer to the Amended Complaint

Plaintiff argues that the Town's unilaterally "abandoning" its suit while the suit is stayed for a challenge to be resolved¹⁰ is as ineffectual as trying to "take a nonsuit" in a conventional civil action when a nonsuit is prohibited.¹¹

Plaintiff also argues that additionally trying to "abandon" the suit without leave of court or consent of the opposing party, and asserting separately that the "abandonment" is without prejudice to promptly pursuing a third suit on the same subject matter, is as ineffectual as to trying to declare one's own nonsuit to be "without prejudice" when neither the court nor the opposing party agrees that the nonsuit is without prejudice.

¹⁰ S.C. Code Ann. §28-2-470 provides: "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. No issues involving the condemnor's right to condemn may be heard in the trial upon the issue of just compensation." *Id.* (emphasis added).

Plaintiff points out that if a subsequent suit were brought by a condemnor after the condemnor abandoned the prior suit during a challenge action without consent, the landowner would be required to file a challenge action within 30 days of service of the new condemnation suit in order to resolve the question whether the prior "abandonment" during a stay was valid, and whether the abandonment was a permanent relinquishment of the right to pursue the landowner's property, thus barring further suit by the would-be condemnor.

¹¹ Rule 41(a), SCRPC provides for a plaintiff's unilateral dismissal, or nonsuit, by notice if filed before the defendant answers or files a motion for summary judgment. If the defendant has answered or filed such a dispositive motion, voluntary dismissal is still available, but not by unilateral dismissal. Nonsuit is then available by stipulation signed by all parties.

A crucial feature of Rule 41(a) is the "two dismissal rule": the first voluntary dismissal is without prejudice, that is, it is not an adjudication on the merits unless otherwise stated in the dismissal order. The second dismissal is with prejudice, that is, when a voluntary dismissal is filed "by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim," the dismissal is with prejudice.

For the further protection of a successively sued defendant, Rule 41(c), SCRPC additionally provides: "If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order." This Court has not researched whether Rule 41(c) reflects prior equity practice.

Putting aside for the moment, the question of whether a unilateral dismissal of any type was allowed while the matter was statutorily stayed and being challenged, the finality and preclusive effect of the stated “abandonment” is a question highly relevant to legal or practical mootness.

“Abandon” has been defined as “to give up with the intent of never again claiming a right or interest in.” Merriam-Webster’s Collegiate Dictionary (11th ed., Springfield, Mass. 2003).

“Abandonment” with regard to a use of real property is held legally to mean the owner’s intentional abandonment of the use in the sense of subjective intent to forever relinquish it. Conway v. City of Greenville, 254 S.C. 96 at 101, 173 S.E.2d 648 at 650 (1970)(stating, with respect to a prior use rendered nonconforming by a new zoning ordinance, that abandonment is discontinuance of a thing accompanied by intent to relinquish the right to do the thing that is discontinued); see also Maguire v. City of Charleston, 271 S.C. 451, 247 S.E.2d 817 (1978) (Rhodes, Justice, dissenting)(discussing cases in which “discontinuance” required intent to relinquish and meant the same as “abandonment”).

With respect to an easement, abandonment of it requires the intention to abandon and the external act by which the intention is carried into effect. Witt v. Poole, 182 S.C. 110, 188 S.E. 496 (1936). An intention to abandon property or a property right need not appear by express declaration, although it may be manifested thereby. Witt.¹²

The Town has now again expressly declared “abandonment.” If the “abandonment” is final, namely with prejudice to further attempts to condemn, it would clearly present, if not a legal, then at least a practical, question of mootness.

Historically, instances in which a condemnor does “abandon,” or is permitted to “abandon,” a condemnation action generally are instances of permanent relinquishment. In these instances, as a matter of fact, the condemnor has determined to abandon not only the action, but any claim to the

¹² The Challenge II Amended Complaint indicates that the Town had once before abandoned the right to pursue an easement. See the Amended Complaint ¶¶35-48 re 2019 cessation of requests for easement, declaration of no need for easement, and 2020 completion of work without easement.

property. I.e., the condemnor has determined that the condemnation will not be necessary at all, or for some other reason will not be pursued again.

These instances arise from time to time when, for instance, the underlying project for which the condemnation is pursued is changed or terminated so as to eliminate the need for the property, or when it becomes clear that the compensation which will be ordered is higher than it is feasible to pay for purposes of the project.

These instances historically receive attention when there is concern with, or dispute over, whether the condemnor should be able to thus permanently back out of, or “abandon” the condemnation. These issues of “abandonment” arise when the landowner wishes to enforce an award of compensation already made, or where the landowner or the landowner’s property has otherwise suffered or changed position in some respect because of the long pendency of the threat of condemnation before the condemnor finally decides to “abandon” the condemnation.

There are few instances involving “abandonment” as a temporary expedient exercised by the condemnor before promptly resuming substantially similar activities. See, e.g., Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951)(considering “injustice” to property owners in permitting a municipal body to tie up an owner's property for three years, after which the city can change its mind and abandon or refuse to take the property at the end of three years); In re Certain Land, 364 Pa. 71, 70 A.2d 847 (1950)(holding that in condemnation of land for playgrounds, the date of taking was the date the ordinance was passed which designated the property for acquisition, and holding the statute not unconstitutional, but holding that the city could not abandon the condemnation of the subject parcel without the consent of the owner); Town of Trumbull v. Ehram, 148 Conn.47 at ___, 166 A.2d 844 at 847 (1961)(addressing landowner objection to permanent withdrawal of condemnation, noting that if for some reason, it is desired “to give up the undertaking,” the proceedings may be discontinued before the payment of the judgment); and Hamer v. State Highway Comm'n, 304 S.W.2d 869 (Mo.

1957)(involving claim that highway department's decision to abandon any plan to place highway on plaintiff's property after plaintiff made plans in cooperation with the intended condemnation constituted a taking without just compensation).

The Code is silent on whether a condemnor is authorized to define "abandonment" for itself. There is no express authorization for the condemnor to declare that a "temporary abandonment" is being made, in which the "abandonment" is an expedient or a tactical tool, such as for the purpose of ending discovery, moving out the valuation date for a subsequent condemnation attempt, changing counsel, etc., and to subsequently re-commence an action on substantially the same subject matter with a putatively "cleaner slate."

Plaintiff argues that if such a procedure were permitted, it would be comparable to allowing a government plaintiff in a conventional civil action to take a voluntary nonsuit without prejudice and without leave of court after the defendant answered and counterclaimed, over and over, ad infinitum.

As noted above, this is not permitted in a Civil Action governed by the Rules of Civil Procedure. "In the event of conflict between [the Eminent Domain Procedure Act] and the South Carolina Rules of Civil Procedure, th[e] act shall prevail." S.C. Code Ann. §28-2-120. However, it is unclear whether, here, the Legislature intended a conflict with the Rules of Civil Procedure, or a parallel scheme with the same guiding principles averse to successive multiple litigation.

Assuming the Rules of Civil Procedure do not apply by letter, it is difficult to conclude that the Legislature intended "abandon" to mean "not abandon" or "temporarily abandon," and to allow a limitless ability of the government condemnor to dismiss and re-commence a condemnation on the same subject matter.

There is also no delineation in the Act of "the manner of abandonment authorized by this chapter," as referenced in §28-2-510(c). I.e., there is no provision which states that the Town's "abandonment" is affirmatively authorized; there are only the requirement in Section 28-2-470 of

landowner consent to any proceedings during a pending challenge action, and the prohibition in §28-2-230(B) against abandonment without owner consent after taking possession and making material alterations. Section 28-2-470 authorizes actions taken during the automatic stay only if done with landowner consent: “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.” Id.

The Chapter 2 of Title 28 of the Code thus actually contains no express authorization for a condemnor to unilaterally “abandon” a condemnation once a challenge action has been commenced.

At that point, all proceedings have been stayed pending resolution of the challenge. The condemnor is clearly authorized to abandon and do other things after obtaining landowner consent, or to stipulate to the correctness of the challenge, or to have the court determine the merits of the challenge in the pending challenge action.

These questions may not need to be answered completely now, where the question is only whether these or other questions still present a live controversy and where the case involves an actual assertion of rights.

The Town’s present argument that it has abandoned condemnation and that the challenge action is “entirely moot” would at first imply that the Town’s voluntary dismissal of its condemnation action is with prejudice and puts an end to almost all controversy. However, the Town does not plead this in its Answer.

Plaintiff stated in Plaintiff’s March 30 pre-hearing brief at 5, that “as late as March 18, 2021, the mayor of the Town sent out a mass public e-mail announcing a determination to continue to ‘pursue’ the easements.” Plaintiff further stated, “In doing so, he continued in the same fashion in which the Town has previously operated, to not disclose to other owners, the actual issues in the two suits so far against each of three landowners.” The latter assertion by Plaintiff relates to the issues of misrepresentation and defamation which appear in the allegations of the Challenge II amended

Complaint, and are stated to need timely correction. (See, e.g., id., Preliminary Statement, and ¶¶78, 87 and 126.)

The Town’s oral argument at the April 1 hearing did not dispute or directly address the Plaintiff’s account of the mayor’s mass e-mail. The Town’s counsel’s statements that the Town “believes the issues are entirely moot at the present time,” and that “the Town is still very interested in acquiring the easements” indicate the Town clearly intends other than to stop pursuing condemnation of the same subject matter.

The Town’s statements at the hearing about starting over “with a clean slate” and giving the landowners a third “opportunity to present challenges” certainly do not communicate permanent relinquishment of the pursuit of the property. For this reason, and based on the well-defined and live dispute of the parties reflected on the face of the Challenge II Amended Complaint and its exhibits, the availability of relief, and the realistic threat of future litigation, this Court does not consider this case moot. It is also clear that a fee petition may be forthcoming from Plaintiff.

The Town acknowledged to the Court the probability of a third action against Plaintiff on substantially the same subject, qualifying the probability by stating that the matter might be averted if the Town “could negotiate an agreement” with the owners. This of course, would be the situation in many a case. When the Town introduced this subject at oral argument, Plaintiff responded to correct any implication that control of the matter might be in Plaintiff’s hands. Plaintiff, clarifying an intention of both parties to tread lightly on such matters, clarified to the Court that such negotiation is something on which the Town has put forth no proposal since before January 2021.

Plaintiff argues that the Town’s unilateral “temporary abandonment” for the purpose of arguing that that no present cause of action is stated in law or equity, and dismissing “without prejudice,” the case that Plaintiff brought – all in order to grant a “clean slate” to the Town and provide negotiating leverage – is ineffectual and unsupported in law.

Plaintiff contends that to date, the Town still has not adequately answered hundreds of allegations of the Amended Complaint.¹³ Plaintiff contends that to grant the Town’s motion would, among other things, continue to keep issues obscure, require dredging up “Challenge I,” “Challenge II,” and “Challenge III” pleadings in a Challenge III case, require Plaintiff, as a private citizen, to bear the expense, a third time, of commencing discovery that was not reached in the Challenge I and Challenge II cases and that might be similarly delayed in a Challenge III case, and allow memories and other evidence to be lost during the delay. Plaintiff submits that during the present litigation, the Town has already changed counsel, and the Town Clerk resigned, and that over time, people could not only forget, but die, resign, become disabled, move, be discharged, not run for reelection, fail to be reelected, etc.

In State v. Flamme, 217 Ind. 149, 26 N.E.2d 917 (1940), after the condemnation proceeding had progressed to the determination of an award and a judgment, the condemnor decided not to proceed with payment under the schedule in the statute for finalizing the condemnation and stated “that it has waived and abandoned, and does waive and abandon, any and all right, title, and interest it may have in said property.” This was yet another case of final, unequivocal, abandonment.

However, the landowner objected that the condemnor should not be allowed to “abandon” the condemnation. The court examined extensively, the authorities of various jurisdictions that a condemnor could “abandon” a condemnation at any time before judgment, but all instances examined were those in which the condemnor truly relinquished pursuit of the property and offered no intention to continue to pursue it.

The court reasoned that under the circumstances and the statutory scheme, the condemnor, in that case, could also abandon pursuit of the property even after judgment. The landowner

¹³ Denials shall fairly meet the substance of the averments denied. Rule 8(b), SCRCF. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Id.

“significantly pointed out that if the state, or any other agency possessing the power of eminent domain, may abandon a proceeding of this character after the damages have been fixed and determined by a court of competent jurisdiction and reduced to a final judgment, there is nothing in the statute to prevent the condemnor from claiming what would amount to a succession of new trials as of right until an acceptable award is obtained, or the property owner is exhausted by the uncertainty, annoyance, and expense of litigation and deprived of his property without just compensation.” Flamme, 26 N.E.2d 917 at 919.

The court, however, upheld the ability of the condemnor to permanently relinquish any pursuit the property. Notably, addressing the landowner’s “significant” point, the court observed:

It does not appear to be important that the state may attempt to abuse its privileges by resorting to a succession of condemnation proceedings with a view of acquiring the appellees' property at its own price, or harassing them into involuntary submission. There is ample authority for the intervention of courts of equity to prevent such abuses. Northern Pacific R. Co. v. Georgetown, 1908, 50 Wash. 580, 97 P. 659; Central of Georgia R. Co. v. Thomas, 1928, 167 Ga. 110, 144 S.E. 739; East Bay Municipal Utility Dist. v. Kieffer, 1929, 99 Cal.App. 240, 278 P. 476, 279 P. 178.

Flamme, 26 N.E.2d 917 at 919 (emphasis added).

The first question, then, remains, not whether the South Carolina Eminent Domain Procedure Act contemplates the ability of a condemnor to “abandon,” but what the South Carolina Eminent Domain Procedure Act contemplates “abandonment” to mean.

If “abandonment” of the notice is a permanent waiver of pursuit of the property and has a res judicata effect, the case cannot be considered moot until this is declared. Plaintiff fairly has a right to have that determined and declared in this second action before being faced with third in which the proposition is denied by the Town.

If, on the other hand, “abandonment” is not a final relinquishment of the right to pursue the plaintiff’s property, then before the case can be considered moot, the question still remains whether Plaintiff has stated a cause of action in equity or otherwise, for any relief preventing, affecting or redressing such a pursuit, or for any other relief.

Prospective or Present Relief Supported by
the Amended Complaint Which Would Not Be Concluded in the
Case of a “Nonfinal” Temporary “Abandonment” by the Town

In the instance of a “nonfinal” “abandonment” by the Town, one question affecting mootness is whether Plaintiff still seeks prospective or declaratory relief, notwithstanding the Town’s effectual dismissal of its claim without prejudice with reservation of right to start over a third time.

The case is not moot, for example, if Plaintiff still seeks to permanently enjoin the Town from pursuing the property, to declare certain attributes of the easement unnecessary under any future condemnation, to declare what steps would be required in any future condemnation for pursuit of a successful condemnation, or to permanently enjoin multiplicity of litigation by the Town, i.e., enjoin the Town from serving or filing yet a third suit on the same subject matter.¹⁴ Plaintiff seeks all these things, for which there are supporting allegations.

¹⁴ Courts of equity have long had the power to permanently enjoin condemnation, as well as the power to permanently enjoin multiple or successive litigation.

The Town appears to contend that its abandonment is not permanent with respect to condemnation of Plaintiff’s property, but only as to the particular notice which was used to commence the second lawsuit against Plaintiff.

Permanent injunction is the conventional remedy, rather than an unusual one, sought in challenge actions. See, e.g., Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961)(observing agreement of parties that the action simply be treated as one for permanent injunctive relief “in accordance with the usual procedure in such cases”); Timmons v. South Carolina Tricentennial Commission, 175 S.E.2d 805, 254 S.C. 378 (1970)(discussing, but not granting, primary remedy of permanent injunction enjoining any proceedings to condemn landowner’s property); and Columbia Water Co. v. Nunamaker, 73 S.C. 550, 53 S.E. 996 (1906)(observing that when the right to institute condemnation proceedings is contested, the proper remedy is to ask the Court to decide that the defendants did not have a right to institute condemnation proceedings, and to then grant a permanent injunction). See also S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 748 (1993)(barring re-institution of condemnation permanently, because the condemnor had previously represented that there would be no need for an easement on the landowner’s property).

Permanent injunction arises in many instances from the power of equity to prevent or minimize multiple or successive lawsuits.

It is obvious that the rule of res judicata, available in law cases, cannot apply and provide any protection to a party in a subsequent lawsuit unless the prior lawsuit is determined on the merits and the issues are actually or constructively decided. See Robert Von Moschzisker, Res Judicata, 38 Yale Law Journal 299 (1929).

Putting aside the question of permanent injunction and declaratory relief, which already render the case not moot, there also remains a question of whether Plaintiff, on the facts alleged, may pursue statutory or other at-law relief which is not prospective in nature, such as special costs including attorney's fees, or damages. If so, the case is not moot for that reason as well.

Both parties have already acknowledged the imminency of a request, before the action is completed, for litigation expenses including attorney's fees.

Additionally, Plaintiff has emphasized and explained in Plaintiff's various pleadings and papers, that Plaintiff did not seek the litigation -- that both challenge suits were defenses to suits

The rule of *res judicata* is said not to have been definitely formulated until 1776, but, in essence, it is of much earlier origin and application. Primarily, the rule is one of public policy, and, secondarily, of private benefit to individual litigants. The primary principle early found expression in the maxim, "Interest reipublicae ut sit finis litium," and the secondary or subordinate one in the form "Nemo debet bis vexari pro una et eadem causa." The whole doctrine bears a close resemblance to the exceptio rei judicatae of the Roman law. *Id.* at 299.

"Equity follows the law," that is, "Aequitas sequitur legem." Equity has determined that one ground supporting intervention providing the anticipatory relief of injunction is to forestall a multiplicity of suits. See Douglas Laycock, The Death of the Irreparable Injury Rule, 103 Harv. L. Rev. 687, 714 (1990) (citing decisions holding that "[a] legal remedy is inadequate if it would require a 'multiplicity of suits'"). And see Cent. of Ga. Ry. Co v. Thomas, 144 S.E. 739, 167 Ga. 110 (1928)(affirming injunction against railway company from proceeding with second condemnation after abandoning first: "We are of the opinion that this is a case where a court of equity should have interfered to protect the landowner in her rights"). Estoppel in pais has been employed by equity to serve the same purpose in a proper case. See S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth. (barring re-institution of condemnation permanently).

South Carolina courts have long recognized the power of equity to remedy prospective disputes over interests in land and prevent future or successive litigation, particularly when the aggrieved party does not have a present vehicle to resolve the issues finally by one action in law for ejectment or for trespass damages, thus settling title or definition of the interest in land. See, e.g., Uxbridge Co v. Poppenheim, 135 S.C. 26, 133 S.E. 461 (1926)(citing, among concerns, "the practical certainty of a multiplicity of suits growing out of the confusion or uncertainty," and reversing trial court's grant of demurrer, the precursor to the practice of granting a Rule 12(b)(6) motion, in which the trial court ruled that the allegations and prayer of plaintiff in possession for declaration of the location of a disputed land boundary were insufficient to constitute a cause of action either legal or equitable); and McRae v. Hamer, 148 S. C. 403, 146 S. E. 243 (1929)(affirming denial of demurrer to complaint of plaintiff in possession to settle land boundary line, citing a "feature of equitable cognizance, the prevention of a multiplicity of suits," as sufficient to sustain the complaint against demurrer).

brought by the Town which required that the defenses would be lost if not presented pursuant to statute within 30 days of being sued by the Town each time. While emphasizing a desire to conduct discovery and reflect first on both Plaintiff's grounds and appetite for a damages claim, Plaintiff has pointed out that numerous facts alleged in the Amended Complaint may support a claim for defamation of Plaintiff, or for slander of Plaintiff's title. . (See, e.g., Ch.II Am. Cmplt., Preliminary Statement, and ¶¶78, 87 and 126.)

The Amended Complaint of the Challenge I case, which is specifically incorporated into the Challenge II Amended Complaint, also specifically mentions the prospect of a trespass claim based on the facts alleged, arising from the work already done by the Town on Plaintiff's land, "[i]n the alternative that Plaintiff's rights herein or in any contemplated condemnation action are adversely affected by the already completed project." (Challenge I Amended Complaint ¶ 179.)

Paragraph 221 of the Challenge II Amended Complaint characterizes the action only summarily, as "an action challenging Town attempts which were alleged to be unconstitutional, illegal, unauthorized, noncompliant, fraudulent, etc." However, under Rule 12(c), this Court cannot summarily disregard all the other facts in the Amended Complaint which might state a claim for a constitutional tort or other wrongdoing.

For example, this Court has concurrent jurisdiction for a claim pursuant to 42 U.S.C. §1983, which prohibits deprivation of procedural or substantive due process under color of state law.¹⁵

¹⁵ An example of such a case arising in the municipal condemnation context is found in Haworth v. City of Forest Grove, Oregon, Case 3:09-cv-01241-HZ (U.S. Dist. Ct. D. Or. Apr. 12, 2011), adopted as modified, Case 3:09-cv-01241-AC (U.S. Dist. Ct. D. Or. Jul. 6, 2011), which incidentally described the need for proof of further facts in subsequent litigation, because the claim was not presented and heard in the prior litigation.

In Haworth, the Haworths got some previously refused discovery from the city late in the state court proceedings, after the condemnation trial had commenced, essentially just before those proceedings were concluded. During the condemnation trial, the judge persuaded the parties to dismiss without prejudice to see if the matter could be worked out in mediation, with leave of the city to re-institute the case with the parties resuming the positions they had at the time of dismissal. The issue of

attorney's fees was to be negotiated by the parties, included in mediation, or determined upon re-institution of the case.

The city agreed, not disclosing that it knew its position was untenable and that it had no intention to follow through with the condemnation.

The matter was not worked out. The city stated it did not intend to pay attorney's fees. The city did not mediate. The city did not re-institute. The Haworths re-instituted and were awarded over \$185,000 in legal fees sometime around 2009.

The Haworths sued in federal court for, among other things, violation of §1983. They were unable to establish issue preclusion based on the previous state court proceedings, in which the discovery was not available, the claim had not been made, and the state court determining the fee petition was only in a position to determine that the city had been "unreasonable," and not in a position to rule that the city had engaged in conduct which was not only unreasonable but also unconstitutional.

The federal court Magistrate Judge, however, recommended that the Haworths were entitled to try to prove the further facts in federal court. The Magistrate Judge recommended denying the condemnor Town's motion for summary judgment on violation of §1983 and the attendant claim for damages for violation of substantive due process.

After the fact, the Haworths had discovered that in executive session, the city council discussed the limited actual need for the Haworth's entire tract for a park and the city's ulterior desire for extra land to sell for private use, while nevertheless publicly making a case for the entire tract. The Haworths discovered discussions planning to whitewash the matter under an opinion "that we can demonstrate that we have a potential need in the not-too-distant future."

One city actor, Jordan, characterized the relevant issues as whether the entire parcel should be designated as parks and recreation land, whether the resolution should include the commercial development clause, and whether a resolution should be adopted in the first place. Another city actor, Holan, Forest Grove Community Development Director, authored a memorandum to the city manager, Sykes, wherein Holan stated that, in his estimate, "there is a 60 percent chance of success to develop a park as envisioned above."

The landowners had offered a portion of their land for free in order to buy peace from the city's efforts to acquire it and in order to be able to plan reliably with respect to remaining land. The Haworths argued that the audiotape of the executive session of the city council and the city's failure to produce it were unlawful because the tape revealed that no public need existed, that no condemnation analysis was ever conducted, and that the city only wished to keep its options open for the future.

This, the Haworths contended, allowed the condemnation action to proceed far further than it would have had the tapes been disclosed in a timely fashion and the City's true intentions been revealed. In failing to disclose the tapes and these matters, the city allowed the presumption to arise that there was a true public need to justify the condemnation action. Instead, the city attempted to condemn more than it needed for an ulterior purpose not disclosed in its resolution and had actively discussed manipulation of the resolution to avoid the disclosure.

The Haworths also described ways in which the city unnecessarily and unjustly delayed the process: the city rejected the Haworths' offer to donate seventy acres only to later abandon the condemnation entirely; having privately determined that the city had no chance of success in the condemnation, the city failed to inform the Haworths that the city had no intention of reinstating the condemnation action and allowed the charade of mediation to continue; and the city disputed the Haworths' entitlement to attorney fees.

On these and other facts, the Magistrate Judge recommended that summary judgment on a substantive-due-process §1983 claim should be denied.

Plaintiff has not sued, by named theory, under this or any other tort. However, the allegations of the complaint, liberally construed, could be understood by a factfinder to describe deliberate, concerted action making out causes of action other than permanent injunction of condemnation.

It is not this Court's job to construct every cause of action which the facts may support, but nor is it this Court's province to grant "drastic" relief and summarily dismiss a relatively young case on the face of pleadings when the absence of sufficient allegations or the absence of the ability to amend and add them has not been demonstrated by the moving party.

Mootness in the Law

As indicated above, the case is in commonsense understanding, no moot. Under South Carolina law, the case is not "moot," because the case is in a trial level court rather than on appeal and there is relief which can still be sought and ordered, particularly if the Town maintains that its "abandonment" of the condemnation is a not permanent abandonment, with prejudice.

Applying the Rule 12(c) standard straightforwardly, as this Court is required to do, the Town is taken to be admitting for the purposes of its motion, all 375 paragraphs of the Amended Complaint. Those paragraphs, taken as true, provide a basis for declaratory relief, and for a permanent, across-the-board bar on further action by the Town, as well as for permanent preclusive or injunctive relief on components of what the Town has now sued for twice and concretely threatens to sue for again, and for possible tort liability which has not been eliminated from consideration.

Mootness in federal court is a federal concept. It has been rooted since the 60s in Article III of the United States Constitution, which describes the limited jurisdiction of the federal courts. Article III, setting up the federal judiciary and courts, does not govern state courts, except when they are part of the federal judicial system in the course of deciding issues of federal law under concurrent jurisdiction.

Article III of the United States Constitution is not duplicated in Article V of the South Carolina Constitution or anywhere else in the South Carolina Constitution. The South Carolina Constitution does not have a “case or controversy” requirement for jurisdiction of state courts in general.

Nor does the State Constitution have such a requirement or restriction peculiar to appellate courts. Cf. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001)(describing mootness as if a doctrine generally confined to appellate forum).

The orientation of Curtis and other cases toward mootness as only an appellate concept is not surprising, as by the time a case is on appeal, not only can there be no amendment (unless amendment is the issue), but also the appeal is likely confined to the issues specifically raised. In contrast, the availability of relief is broader and more flexible at the trial level, both through the availability of amendment (e.g., Rule 15(a)) and through less rigidity in pleading rules (e.g., Rule 8(a)), relief rules (e.g., Rule 54(c)), and other procedural rules.

Unlike federal trial courts, state general trial level courts are not courts of limited jurisdiction. Like state appellate courts, state trial level courts, being courts operating on a local, rather than national scale and being informed by localized familiarity with local policy and issues, also, for that policy reason, are under no compulsion to emulate federal constitutional considerations unless doing so to avoid conflict with rights assured by the federal constitution to individuals or doing so as a part of the federal court system.

For most of this century, state courts have not been thought bound by the “case of controversy” requirement of Article III, even when deciding questions of federal law. William A. Fletcher, The “Case of Controversy” Requirement in State Court Adjudication of Federal Questions, Calif. Law Rev., Vol. 78, No.2 (Mar. 1990), at 263-264.

The difference between federal mootness and state mootness has received little judicial attention in some state courts, which have generally followed federal principles of justiciability without

discussing the root of the federal rule, likely doing so as a general policy matter, or basing the parallel on a longstanding more general concept of justiciability in a lay sense. See Jowers v. S.C.D.H.E.C., 423 S.C. 343, 815 S.E.2d 446 (2018)(citing Byrd v. Irmo H.S., 321, S.C. 426, 468 S.E.2d 861(1996) and collecting cases); and see Anderson v. North Carolina State Board of Elections, 788 S.E.2d 179 (N.C. Ct. App. 2016) (discussing federal constitutional underpinnings and state court policy basis).

By contrast with federal courts, in state courts, the exclusion of moot questions simply represents a form of judicial restraint. Anderson.¹⁶

¹⁶ South Carolina courts have described the concept of “justiciability” in connection with the Declaratory Judgment Act, in a history not explored at length here. There appear to be varying descriptions of whether the concept is one restraining courts and cases in general – and applying only derivatively to the Declaratory Judgment Act – or whether the concept is one specifically based on perceived legislative intent specifically with respect to the Declaratory Judgment Act.

The concept appears to have evolved without explanation into a concept referenced on the rare occasion as one of subject matter jurisdiction, specifically under the Declaratory Judgment Act, as if limiting judicial power only under that Act as a matter of the limits of the statute. The initial concept of “justiciability” under the Declaratory Judgment Act appears to have entered the case law in a context having nothing to do with concreteness of controversy, and to have been thereafter referenced as if the context had been otherwise. See South Carolina Electric & Gas Co v. South Carolina Pub. Serv. Auth., 215 S.C. 193, 54 S.E.2d 777 (1949)(holding the matter not “justiciable” because the acts of defendant sought to be enjoined were authorized by law and within its discretion and no cause of action was stated for coercive equitable relief).

The formulation for justiciability under the Declaratory Judgment Act is stated generally as simply that a justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002), reh. den., cert. den.

The test of sufficiency is not whether complaint shows plaintiff is entitled to declaration of rights according to his theory, but whether he is entitled to declaration of rights at all. Dismukes v. Carletta, 269 S.C. 110, 236 S.E.2d 421 (1977).

While it is true that a declaratory judgment should not deal with moot or abstract matters or constitute a merely advisory opinion, all that is required is that there be an existing controversy, or at least the “ripening seeds of a controversy”: the purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. Waller v. Waller, 220 S.C. 212, 66 S.E.2d 876 (1951).

The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purposes intended, namely, to afford a speedy and inexpensive method of adjudicating legal disputes without invoking any coercive remedies of the old procedure, to settle legal rights, and to remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships. Williams Furniture Corp. v. Southern Coatings & Chemical Co., 216 S.C. 1, 56 S.E.2d 576 (1949).

A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. Curtis v. State. In the instant case, a judgment, if rendered, will have definite, practical, and likely final legal effect. Once a case first meets the test of technically or superficially being moot, it is then subject to traditional exceptions. See Sloan v Greenville County, 380 S.C. 528 670 S.E.2d 663 (2008)(skipping the first prong of the inquiry only because the issue was already the law of the case).

The exceptions include exceptions for cases or issues “capable of repetition yet evading review.” See Roe v. Wade, 410 U.S. 113 (1973)(holding challenge to restrictions on abortion could not be mooted by birth of baby or otherwise no longer being pregnant). See also Sloan v Greenville County, 380 S.C. 528 670 S.E.2d 663 (2008) and Byrd v. Irmo High Sch., 321 S.C. 426, 468 S.E.2d 861 (1996). The instant case is such a case.

The exceptions also include “voluntary cessation” by the opponent and “collateral legal consequences or effect on future events” of not completing the litigation. The instant case fits both of these descriptions as well.

Subsumed in the “capable of repetition” exception is the “voluntary cessation” exception. See Curtis v. State (including broad notions of capability of repetition in the rule). If a defendant voluntarily terminates the allegedly unlawful conduct after the lawsuit has been filed but retains the power to resume the practice at any time, a court may deem the case nonmoot. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000).

The "heavy burden" of persuading the court that a case has been mooted by the defendant's voluntary actions lies with the party asserting mootness, and the standard for such a determination is a "stringent" one: "if subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior

The Declaratory Judgment Act itself contemplates that further litigation may ensue. Notios Corp. v. Hanvey, 256 S.C. 275, 182 S.E.2d 55 (1971). It is always possible that after the granting of declaratory relief, other contingencies and questions may arise. Notios Corp.

[can]not reasonably be expected to recur." Id. (citing United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 203 (1968)).

This exception is supported by the Supreme Court because, in addition to ensuring that the defendant is not "free to return to his old ways," there is "a public interest in having the legality of the practices settled." United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953) (citation omitted).

In Laidlaw, an environmental group had filed a citizen suit under the Clean Water Act against Laidlaw. Laidlaw was a company that operated a wastewater treatment plant. The citizens alleged that the plant had discharged far more toxic pollutants into a river than it was allowed under terms of a government-issued permit.

However, after the lawsuit began, Laidlaw began to comply with the discharge limit. The Supreme Court held that this case was not moot because it was a "disputed factual matter" whether the company's substantial compliance with its permit requirements, or its closure of the facility in question, which had occurred after the court of appeals had issued its decision, would make "it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur." Laidlaw, 528 U.S. at 193.

A related exception occurs if a decision or lack of decision by the trial court may affect future events, or have collateral consequences for the parties, even if the matter is on appeal and the appellate court cannot give effective relief in the present case. Curtis, 345 S.C. at 568, 549 S.E.2d at 596; accord Sloan, 365 S.C. at 303, 618 S.E.2d at 878. Obviously, when such a case is not on appeal but is in the trial court and the trial court can give relief, the case is not even superficially moot and the trial court should act.

In the instant case, the Town has already abandoned the easement request twice by some counts and yet has filed suit twice, and the Town has acknowledged an intent to persist in some manner. The parties are still in the trial level court. The circumstances described hereinabove demonstrate that not

only is the case not moot, but that even if it were perceived to be superficially so, at least three exceptions to dismissal for mootness apply.

Accordingly, the Town's motion to dismiss for mootness is denied. It is also therefore not unreasonable to require the Town, as the party bringing a second suit against Plaintiff and acknowledging the intent to bring a third, to respond to discovery while the case is pending. Accordingly, the Town's motion for protection from discovery is denied as well and the pending discovery shall be complied with within 15 days of the entry of this order or within such other time as the parties may agree.

AND IT IS SO ORDERED.

Date:_____

Benjamin H. Culbertson
Circuit Judge

[or see electronic signature page for date and electronic signature]

FORM 4**STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN
IN THE COURT OF COMMON PLEAS****JUDGMENT IN A CIVIL CASE****CASE NO. 20-CP-22-00931**

Franklin D. Beattie, as trustee of The
Franklin D. Beattie Preservation Trust,

Town of Pawleys Island,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: M. Baron Stanton

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

Disposition Type (Check One)

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other

☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify
arbitration award; ☐ Other

☐ STAYED DUE TO BANKRUPTCY

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE
BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the
Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

FOR ELECTRONIC SIGNATURE

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

M. Baron Stanton, Esquire
P.O. Box 245

Columbia, SC 29202

William C. Dillard, Jr., Esquire
P.O. Box 96
Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy

of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 20-CP-22-00930

M. Baron Stanton,

Town of Pawleys Island,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: M. Baron Stanton

Attorney for : ☒ Plaintiff ☐ Defendant
or
☒ Self-Represented Litigant

Disposition Type (Check One)

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other

☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify
arbitration award; ☐ Other

☐ STAYED DUE TO BANKRUPTCY

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE
BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the
Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

FOR ELECTRONIC SIGNATURE

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

M. Baron Stanton
P.O. Box 245

Columbia, SC 29202

William C. Dillard, Jr., Esquire
P.O. Box 96
Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy

of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCp.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

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FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN
IN THE COURT OF COMMON PLEAS**

JUDGMENT IN A CIVIL CASE

CASE NO. 20-CP-22-00932

Sunset Lodge, LLC,

Town of Pawleys Island,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: M. Baron Stanton

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

Disposition Type (Check One)

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other

☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ STAYED DUE TO BANKRUPTCY

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the
Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

FOR ELECTRONIC SIGNATURE

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

M. Baron Stanton
P.O. Box 245

Columbia, SC 29202

William C. Dillard, Jr., Esquire
P.O. Box 96
Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This image shows a single sheet of white paper with horizontal blue ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

April 15, 2021 Town proposed order granting its motions to stop discovery and dismiss

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00931
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	ORDER
v.	)	OF DISMISSAL
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	

PRESIDING JUDGE:	The Honorable Benjamin H. Culbertson
DATE OF HEARING:	April 1, 2021
TIME OF HEARING:	1:30 p.m.
PLACE OF HEARING:	Georgetown County Judicial Center
PLAINTIFF’S ATTORNEY:	M. Baron Stanton
DEFENDANTS’ ATTORNEY:	William C. Dillard, Jr.
COURT REPORTER:	Cynthia Weaver

This matter came before the Court upon the Defendant Town of Pawleys Island (“Town”)’s Motion to Dismiss and Motion for Protective Order Regarding Discovery. Upon due consideration of the pleadings, the arguments and submissions of the parties, and the applicable legal authorities, the Court grants Town’s motions in the respects set forth hereinbelow.

This matter is related to two sets of condemnation challenge actions involving three properties, sometimes referred to informally by counsel for the parties as the “first set” of cases and “second set” of cases. The following general chronology appears in the pleadings in the respective actions:

a. In or around June 2020, Town undertook to serve on the plaintiff a Condemnation Notice through which it sought to acquire a beach renourishment easement (referred to in the pleadings herein as the “Existing Notice”). (Amended Complaint, ¶ 81, et seq.).

b. On July 21, 2020, the plaintiff and two nearby property owners parties filed separate challenge actions (*Franklin D. Beattie v. Town of Pawleys Island*, Civil Action No. 2020-CP-22-0601; *Sunset Lodge, LLC v. Town of Pawleys Island*, Civil Action No. 2020-CP-22-0600; and *M. Baron Stanton v. Town of Pawleys Island*, Civil Action No. 2020-CP-22-0602) (referred to in the pleadings herein as the “Existing Actions”). (Amended Complaint, ¶ 180, et seq.).

c. In or around October 2020, Town undertook to deliver to plaintiff’s counsel for service a separate, new Condemnation Notice through which it sought to acquire a similar beach renourishment easement (referred to in the pleadings herein as the “New Notice”). (Amended Complaint, ¶ 352, et seq.).

d. On November 12, 2020, the plaintiff and the same two nearby property owners filed new challenge actions, including this action, challenging the “New Notices” (*Franklin D. Beattie v. Town of Pawleys Island*, Civil Action No. 2020-CP-22-0931; *Sunset Lodge, LLC v. Town of Pawleys Island*, Civil Action No. 2020-CP-22-0932; and *M. Baron Stanton v. Town of Pawleys Island*, Civil Action No. 2020-CP-22-0930) (referred to in the pleadings herein as the “New Actions”).

e. On January 20, 2021, Judge Michael Nettles issued orders granting plaintiffs’ motions for summary judgment in the first set of cases. Amended Orders granting summary judgment were issued on April 5, 2021.

f. On February 10, 2021, the Town filed a Notice of Abandonment of Condemnation Action in this and the other “New Actions” (i.e., the second set of cases). (Answer to Amended Complaint, Exh.A).

g. On March 5, 2021, Town filed its Motion to Dismiss and Motion for Protective Order in this action.

Conclusions of Law

1.) The plaintiff's sole cause of action is moot based on Town's abandonment of the subject condemnation notice and is dismissed without prejudice pursuant to Rule 12(c), SCRPC

“Any party may move for a judgment on the pleadings under Rule 12(c), SCRPC. A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff's favor.” Sapp v. Ford Motor Co., 386 S.C. 143, 146, 687 S.E.2d 47, 49 (2009). As the Court of Appeals has further explained,

When considering such motion, the court must regard all properly pleaded factual allegations as admitted. . . . On review of the motion, the court may not consider matters outside the pleadings.

[“]A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment.... When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties.[”]

Falk v. Sadler, 341 S.C. 281, 286–87, 533 S.E.2d 350, 353 (Ct. App. 2000) (citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Firemen's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct.App.1990)) (internal citation omitted).

In this action, treating all properly pleaded allegations as admitted and regarding any inference of law or conclusions of fact that may properly arise therefrom to be embraced therein, the single cause of action asserted by the Plaintiff, a challenge to a condemnation action pursuant to S.C. Code Ann. § 28-2-470, has been rendered moot by Town's filing of the *Notice of Abandonment of Condemnation Action*, which is also attached as an exhibit to Town's *Answer to the Amended Complaint*. Plaintiff alleges on page 58, Paragraph 372 of the Amended Complaint that “[t]he Court should quash, strike and dismiss the New Notice forthwith, thus allowing the dismissal of the instant

challenge action after awarding litigation expenses to Plaintiff.” The S.C. Eminent Domain Procedure Act specifically contemplates the power of a condemnor to abandon a condemnation. *See, e.g.*, S.C. Code Ann. §§ 28-2-230(B), -510(C). The New Notice has now been formally abandoned and withdrawn. Any condemnation action the New Notice initiated has therefore been extinguished and warrants no further challenge. *See, e.g.*, S.C. Code Ann. §§ 28-2-30(5), 28-2-470.

Accordingly, based on the pleadings and the single cause of action asserted, there is no remaining issue of fact raised by the Amended Complaint that would entitle plaintiff to judgment if resolved in Plaintiff's favor, and Town is entitled to judgment on the pleadings pursuant to Rule 12(c), SCRCP.

“Mootness has been defined as follows: ‘A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief’.” Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (citing Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). “In the civil context, there are three general exceptions to the mootness doctrine.” Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. . . . Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. . . . Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

Id. (emphasis added).

In evaluating whether a moot issue is capable of repetition, yet evading review, “the action must be one which will truly evade review.” Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 27, 630 S.E.2d 474, 478 (2006). “[A]n action that is capable of repetition does not necessarily evade review.”

Id. (citing Seabrook v. City of Folly Beach, 337 S.C. 304, 307, 523 S.E.2d 462, 463 (1999)). Sloan involved an appeal of a trial court ruling that a Freedom of Information Act challenge to the defendant's refusal to produce certain records became moot when the records were produced. As the Sloan Court explained,

In Seabrook, the plaintiffs brought an action against the city alleging that the city imposed conditions on a residential development for which it had no authority. 337 S.C. at 304, 523 S.E.2d at 462. After the trial court found in favor of the plaintiffs, the city removed the conditions and approved the plat. In reviewing the appeal this Court found that the issue was moot, and that although the scenario was capable of repetition, it did not evade review.

The instant case is analogous to Seabrook. Although Friends admits that the current situation is capable of repetition, it does not evade review. Should another person bring an action against Friends for a violation of FOIA and Friends fails to produce the requested documents, the Court will have the opportunity to review the issue.

Sloan at 27, 630 S.E.2d at 478. In other words, a matter susceptible to “evading review” is something which by its nature “usually becomes moot before it can be reviewed.” Byrd v. Irmo High Sch., 321 S.C. 426, 432, 468 S.E.2d 861, 864 (1996) (citing S.C. Dep't of Mental Health v. State, 301 S.C. 75, 390 S.E.2d 185 (1990)).

As indicated in this analysis, South Carolina does not apply a “stringent” analysis of “voluntary cessation” of conduct as the plaintiff asserts is applied in federal appellate courts. See Plaintiff's Memo. in Opposition (discussing Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167 (2000)). The case of Jowers v. S.C. Dep't of Health & Env't Control, 423 S.C. 343, 815 S.E.2d 446 (2018), cited by plaintiff for the proposition that South Carolina follows federal mootness principles, is in fact a case involving separate doctrines of standing and ripeness. Instead, under South Carolina law, “[t]he utilization of an exception under the mootness doctrine is flexible and discretionary pursuant to South Carolina jurisprudence, not a mechanical rule that is automatically invoked.” Sloan v. Greenville Cty., 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009).

In the present action, any future attempt to condemn a similar easement would be inherently susceptible to judicial review and would invoke statutory attorney fee protections for the plaintiff. S.C. Code Ann. § 28-2-470 (“Proceedings to challenge condemnor's right to condemn”); *see also* S.C. Code Ann. § 28-2-510(A) and (C) (providing for landowner recovery of attorney fees in successful challenge actions and withdrawn condemnation actions). This is distinguishable from a wastewater treatment plant sporadically violating effluent limitations, Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167 (2000), or a challenge to “[s]hort-term student suspensions [which], by their very nature, are completed long before an appellate court can review the issues they implicate.” Byrd v. Irmo High Sch., 321 S.C. 426, 432, 468 S.E.2d 861, 864 (1996).

Under the second exception to the mootness doctrine, this case and the related actions are discrete disputes involving three properties and do not give rise to any “imperative and manifest urgency to establish a rule for future conduct in matters of important public interest.” Curtis at 568, 549 S.E.2d at 596. The third exception to mootness doctrine contemplates an appellate situation in which, because “a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.” Id. As this matter is not on appeal, and does not involve review of any prior trial court decision, this exception is not relevant.

The Amended Complaint, in the prayer for relief, requests that “both the ‘Existing’ and the ‘New’ Condemnation Notices be quashed and that the Town be forever barred and enjoined from filing either of them or proceeding with either of them.” For the reasons discussed above, this claim for relief is now moot as the New Notice has been withdrawn, and the plaintiff’s substantive objections underlying the request to quash the condemnation notice, relating to public necessity, “bad faith”, and similar issues, do not need to be addressed in this action. The pleading does not

contain a request for broad preclusive relief that would permanently bar the Town from any future similar condemnation action based on past “bad faith” or similar allegations. Without prejudice to the right of the plaintiff to later assert such a claim, the Court notes that no authority has been submitted for the proposition that a court has the power to grant that type of relief (with the exception of the theory of estoppel, as discussed below). As a general matter, municipalities are authorized to exercise the power of eminent domain in order to “become the owner of any land or to acquire any easement or right-of-way therein for any authorized corporate or public purpose,” S.C. Code Ann. § 5-7-50.

Although the theory of estoppel was not included in the Amended Complaint, in connection with the subject motion counsel for the plaintiff did cite to an appellate opinion that found a golf course developer was entitled to an order estopping Santee Cooper from future attempts to condemn its property for an overhead high voltage transmission tower and line route. Southern Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 748 (1993) In Southern, the basis for estoppel was that the property owner had moved forward with plans to purchase and improve the property as a golf course, with expenses in excess of \$50 million, in reliance upon inaccurate representations from a Santee Cooper official that all powerline routes on the property would be buried. In this case, while the Amended Complaint includes allegations that the Town engaged in various types of procedural missteps, as well as “misrepresentation”, “bad faith”, and “fraud” in the process associated with the first and second condemnation notices, the Court is unable to see how the plaintiff’s factual allegations encompass the required elements of an estoppel claim, including the elements of reliance and prejudicial change in position.¹

¹ “The essential elements of estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the

Accordingly, the Amended Complaint and the single cause of action asserted in the pleading, a challenge to the “New Notice,” are held to be moot and are hereby dismissed. This dismissal is without prejudice to any claims that the plaintiff may wish to assert at a later time and, likewise, without prejudice to any future condemnation attempts by the Town.

2.) Any claims related to the “Existing Challenge Action” are dismissed pursuant to Rule 12(b)(8), SCRCP

The Amended Complaint also includes extensive discussion of the allegations underlying the plaintiff’s separate prior “Existing Challenge Action.” (*See generally, e.g.*, Paragraphs 81 through 212). Paragraph 182 specifically incorporates by reference the allegations from the Amended Complaint in the plaintiff’s Existing Challenge Action. That current action is still pending between the same parties (subject to the recent summary judgment order, with a pending fee and/or cost petition by the plaintiff). Therefore, to the extent that the Amended Complaint may seek to challenge or otherwise obtain relief in relation to the separate prior condemnation notice and condemnation action, any such claim in this action is hereby dismissed without prejudice pursuant to SCRCP 12(b)(8) on the ground that another action is already pending between the same parties for the same claim.

3.) The Court declines to grant plaintiff leave to conduct further discovery and then amend the pleadings to assert new claims for relief

At the hearing on this motion, counsel for the plaintiff expressed an interest in further amending the pleadings at an undetermined date to assert some new claims for relief. With the

party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. . . . As related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position.” S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993) (internal citations omitted).

exception of indicating a desire for an adjudication that the Town be forever barred from seeking a beach renourishment easement on the subject property, the plaintiff did not directly assert which specific causes of action or claims for relief would be raised in a Second Amended Pleading. Instead, counsel for the plaintiff generally referenced different types of claims, including claims for damages, that might be asserted after additional factual discovery.

The Court declines to grant plaintiff leave to amend the pleadings to assert new claims after conducting further discovery. A pleading “sets forth a cause of action, whether an original claim, counterclaim, [or] cross-claim[.]” Rule 8(a), SCRPC. While, generally speaking, additional claims may be permitted in an amendment after discovery of facts in the course of litigating an initial, properly stated cause of action, there is no basis under the South Carolina Rules of Civil Procedure for open-ended discovery in the absence of even a single pending claim. Allowing the action to move forward in that manner would be unfairly prejudicial to the Town, which would be subjected to the time and expense of participating in discovery without even knowing which claims might be at issue.

To the extent that such discovery may be intended to obtain evidence pertaining to potential claims for which the plaintiff presently lacks sufficient information or belief to even assert allegations, this only underscores the fact that such claims are beyond the scope of the facts pleaded in the Amended Complaint. The plaintiff must complete any additional desired factual investigation and assert any additional claims outside of this now moot action.

***ALTERNATIVE SECTION 3 LANGUAGE FOR THE COURT’S CONSIDERATION IN
THE EVENT LEAVE TO AMEND IS DEEMED WARRANTED***

**3.) The plaintiff may request an opportunity to file a Second Amended Complaint
within forty-five (45) days**

Within forty-five (45) days from entry of this Order or any order entered in response to a Rule 59(e) motion, and pursuant to Rule 15(a), SCRCP, the plaintiff may either (1) file a Second Amended Complaint with written consent of counsel for the Town or (2) file a motion requesting leave to file a Second Amended Complaint. The Court notes that “[e]ach cause of action . . . shall be stated in a separate cause of action”, Rule 10(b), SCRCP, that “[e]ach averment of a pleading shall be simple, concise, and direct”, Rule 8(e)(1), SCRCP, and that the procedural rules contemplate “a short and plain statement of the facts showing that the pleader is entitled to relief”, Rule 8(a)(2), SCRCP. The Town shall have thirty (30) days after service to answer or otherwise respond to any Second Amended Complaint.

Either party may initiate new discovery in accordance with the S.C. Rules of Civil Procedure only after the filing of any Second Amended Complaint and, as set forth below, the Town is protected from any currently outstanding discovery requests, deposition notices, or other efforts by the plaintiff to obtain discovery (except as may relate specifically to any petition for attorney fees or costs).

In the event that the Plaintiff does not take action to amend as set forth above within the specified time period, the Town is directed to submit to the Court a proposed order dismissing this action without prejudice.

END OF ALTERNATIVE SECTION 3 LANGUAGE

4.) The Town’s request for protection from discovery is granted

Based on the Court’s holding that the single cause of action asserted in the Amended Complaint is dismissed as moot, the Court also grants the Town’s request for protection from any obligation to respond to or comply with plaintiff’s outstanding written discovery requests and deposition notice in this action. This relief is granted on the grounds that (a) as set forth above, the

challenged Condemnation Notice has been abandoned and withdrawn, rendering this action moot and the discovery sought unnecessary; (b) such discovery would therefore be unreasonably burdensome and expensive taking into account the needs of the case, Rule 26(a), SCRCF; and (c) such protection is necessary to protect Town from unnecessary burden and expense, Rule 26(c), SCRCF. At this time, discovery is limited to any claim that may be submitted for attorney fees or costs.

Conclusion

For the foregoing reasons, Town's Motion to Dismiss and Motion for Protective Order Regarding Discovery are hereby granted in the respects set forth hereinabove, and the Amended Complaint and the single cause of action it asserts, a condemnation challenge action pertaining to the October 2020 "New Notice," are hereby dismissed without prejudice. This dismissal is without prejudice to any claims that the plaintiff may wish to assert at a later time and, likewise, without prejudice to any future condemnation attempts by the Town.

Any request for fees and/or costs should be presented by separate petition/motion in this action. For purposes of this Order and any ensuing petition for fees and/or costs, the Town has stipulated that:

- (a) Delivery of the Condemnation Notice referenced as the "New Notice" in the Amended Complaint constituted service of the same and commencement of a condemnation action within the meaning of the Eminent Domain Procedure Act, and Town's filing of the *Notice of Abandonment* constituted an abandonment and withdrawal of such Condemnation Notice and action; and
- (b) Plaintiff may assert any claim it may have herein to reasonable attorney fees, litigation expenses, and costs as part of this action or, in the alternative and upon written notice to Town, in the separately pending "Existing Condemnation Action" referenced in the Amended Complaint.

IT IS SO ORDERED.

The Honorable Benjamin H. Culbertson
Circuit Court Judge

_____, 2021

Georgetown, South Carolina

April 28, 2021 Landowner motion for reconsideration of stopping discovery and dismissing as moot

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00932
	)	
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
	)	

MOTION TO RECONSIDER
ORDER GRANTING TOWN'S MARCH 5, 2021 MOTION FOR JUDGMENT ON
THE PLEADINGS TO DISMISS AS MOOT AND RELATED MOTION FOR
PROTECTION FROM DISCOVERY

Plaintiff moves the Court to reconsider its Order entered April 22, 2021 granting the Town's March 5, 2021 motion for judgment on the pleadings and the Town's March 3, 2021 motion for protection from discovery.

Construing the pleadings in the light most favorable to Plaintiff, as this Court is required to do under the applicable standard of decision for a Rule 12(c) motion, and likewise accepting all of the allegations of the Amended Complaint and the favorable inferences therefrom as true, this action is not moot.

The grounds for this motion, respectfully submitted, are the following, as more fully explained below:

1. The Court overlooked or misapprehended the standard of decision, the facts of the case, the procedural posture of the case and the applicable substantive law in considering the pleadings, the motions, the submittals of the parties, and oral argument at the hearing April 1, 2021;
2. The Court overlooked the fact that this case is not in an appellate court, but is, rather, still in the trial court, where pleadings are liberally construed, amendment is freely granted, and the

rules require the court to grant all relief to which a party is entitled, regardless of whether prayed for in the complaint;

3. The Court overlooked that the facts of the sole pleading to be considered by the Court, the Amended Complaint, amply show that there is more than a possibility of repetition of the alleged acts, issues and controversies, and more than a prospect of multiple or repetitive litigation created by the actual and threatened acts that the suit addresses;

4. The Court overlooked that the Amended Complaint in fact demonstrates that the Town is already on its second suit repeating and persisting in the matters complained of and that, further, the declarations of the Town in public e-mails, in its briefs and at hearing demonstrate a specific intent to repeat and persist in these matters in a third suit – this is the antithesis of mootness and the antithesis of “abandonment”;

5. The Court erred in accepting the defendant’s pat assertion that the 375-paragraph Amended Complaint states a “single cause of action.”

6. The Court overlooked this error and the fact that the allegations of fact entitle Plaintiff to relief not confined to dismissing the Town’s second unsuccessful condemnation action “without prejudice.”

7. The Court overlooked the fact that the allegations of fact entitle Plaintiff to relief not confined to a mere determination that the one particular notice used to commence the Town’s second unsuccessful action is procedurally deficient.

8. To wit, the Court overlooked that the facts pled presently support declaratory relief and permanent injunctive relief beyond stopping only the present action and condemnation notice.

9. The Court overlooked that the facts pled presently support relief beyond stopping only the present action and condemnation notice, such as damages for defamation, violation of 42 U.S.C.

§1983, malicious prosecution, trespass, and other torts which may be better considered after the discovery thus far thwarted in two actions to date is obtained;

10. The Court thus overlooked that the Amended Complaint challenges condemnation on various and numerous levels of scope, regardless of which case or notice is used as a vehicle for pursuing condemnation, and that the Amended Complaint challenges condemnation both presently and prospectively;

11. The Court overlooked the fact that in the instant case, Plaintiff did not plead or request that the overall relief sought by Plaintiff be “without prejudice”;

12. The Court’s erroneous and extraordinary dismissal of Plaintiff’s action at the Town’s behest could prejudice Plaintiff with respect to statutes of limitation, including the short statute of limitations under the Tort Claims Act, in addition to subjecting Plaintiff to a repetitive, third, set of litigation expenses, a continuing cloud on Plaintiff’s title, continuation of uncorrected public misrepresentations and omissions of the Town, and suspension of personal and professional planning and scheduling with respect to the subject property.

13. The Court overlooked that dismissing a suit such as this “without prejudice” does not render the ruling innocuous, a proper exercise of discretion, or unprejudicial: even if Plaintiff does re-file the instant suit the day after a dismissal of the instant suit were final (thus demonstrating that the suit was not moot to begin with), there might be a question whether doing so stays a third condemnation suit by the Town, such that if the Town did file a third condemnation suit, Plaintiff would then have to file the same suit a fourth time in order to assure that the challenges to condemnation are resolved before any condemnation goes forward; Plaintiff cannot just keep spending money on filing fees and discovery again in a third or fourth action in an attempt, after great delay, loss of evidence and attorney time, only to get back to the same procedural stage as the instant suit.

14. The Court erred in its ruling that the case is moot;

15. The Court's ruling constitutes an extraordinary, impermissible, prejudicial and unconstitutional grant to a defendant of a request to have a case duly brought against it by a plaintiff dismissed merely upon making no more than a unilateral statement that the defendant intends to temporarily cease the acts sought to be redressed in the lawsuit.

16. Plaintiff requests that the Court rule on the issue of whether the Town's unilaterally declared "abandonment" was temporary or permanent with respect to future condemnations on the same subject matter for (i) the purposes and basis of the Court's ruling of mootness, and (ii) res judicata effect, law-of-the-case effect, or judicial estoppel effect in any future actions; the Court did not do so;

17. In granting "judgment on the pleadings," the Court erred in not ruling on what, if any, allegation or lack of allegation in the Amended Complaint caused the case to be moot and in not providing leave to amend to remove, change, or add such allegation;

18. For example, if all that was perceived to be lacking is a separate allegation and prayer that permanent injunction be granted against all or stated attributes of the Town's present or future condemnation attempts, Plaintiff should be allowed to supply that allegation and prayer, which are already in the Amended Complaint.

19. In the alternative that this Court does not change its ruling on mootness, this Court should in fairness reconsider the ruling and include a ruling consolidating the three related cases bearing the same rulings or lack of rulings on these issues so that Plaintiff will not be subjected to further inequitable repetitive expense; to do so would alleviate some protracted expense on appeal for filing fees, printing and binding of briefs, printing and binding of records on appeal, etc. for a party who has not yet even been paid fees and other expenses for the previous successful case brought by Plaintiff to challenge the previous unsuccessful condemnation case commenced by the Town; and

20. Since this Court's ruling on the Town's motion for protection from discovery was based on determining to dismiss the case, the Court should also change that ruling to deny the motion upon changing the ruling on mootness and dismissal.

Background

In November 2020, having already once before been sued by the Town on the same subject matter, Plaintiff filed the instant case. Plaintiff challenged a second attempt by the Town to condemn an easement on the oceanfront portion of Plaintiff's oceanfront property on Pawleys Island.

The ostensible and represented purpose of the easement was for permission to do "beach renourishment." Two similarly situated owners filed similar actions. (The instant case may herein be referred to as the "Challenge II case.")

On March 5, 2021, in each of three challenge cases which have similar pleadings, motions and discovery, but which have different Plaintiffs, the Town filed a motion pursuant to Rule 12(c), SCRCP for judgment on the pleadings.¹

The Town requested that the Court dismiss the instant action as moot on the grounds that the Town has pled in paragraph 8 of its March 3, 2021 Answer to the Amended Complaint that the Town had recently withdrawn its second condemnation notice which commenced the related second condemnation action.

The Town asserted that Plaintiff's action is a "single cause of action" challenging the second condemnation action, and that the Town's unilateral withdrawal, without prejudice, of only the second condemnation "notice" renders the instant case brought by Plaintiff moot.

¹ The Plaintiffs in the three cases and respective case numbers are as follows: Sunset Lodge, LLC, 2020-CP-22-00932, Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, 2020-CP-22-00931, and M. Baron Stanton, 2020-CP-22-00930. These cases are referred to herein as the "Challenge II cases." Unless a difference is noted, the motions in the three cases were handled the same way. The order reads the same in each case.

On April 22, 2021, this Court issued an order dismissing this Challenge II case as moot, in light of the Town's unilateral and ambiguously stated "abandonment" of only the present, second, condemnation "action" challenged in this suit by Plaintiff.

Plaintiff requests that the Court take judicial notice of the fact that the fee petition in the instant case has yet to be submitted, and the January 2021 fee petition in the case challenging the first unsuccessful condemnation case brought by the Town is on April 27 still being opposed, delayed and scrutinized by the Town.

The Town also filed a March 3, 2021 motion for protection from discovery, which was based on the motion to dismiss, and was granted based on the determination that since the case is dismissed, there no longer remains any subject warranting discovery.

Standard of Review and Standard of Decision

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Rule 12(c), SCRCP. When considering such motion, the Court must regard all properly pleaded factual allegations of the nonmoving party as admitted, and any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000).

The standard is thus the same as a Rule 12(b)(6) motion made after answering. See Rule 12(b), SCRCP (requiring that a Rule 12(b)(6) motion be made before pleading), and cf. Rule 12(h)(2), SCRCP (providing that the defense ordinarily addressed in Rule 12(b)(6) is not waived by failure to assert it in a pre-answer motion and may be asserted by motion for judgment on the pleadings).

A Rule 12(c) motion by a defendant is in essence, a Rule 12(b)(6) motion made after answering, with the added assertion by a moving defendant that nothing the defendant has pled lends any help to the complaint in stating any claim on any basis, and that the court may also consider facts,

if any, formally admitted by Plaintiff's pleading in reply to a counterclaim or affirmative defense of the defendant.

Thus, no allegation the defendant affirmatively pleads to benefit itself is accepted unless the plaintiff admits it, and then only the inferences from it which are favorable to the plaintiff are indulged. Plaintiff is under no requirement to negate any allegation of the defendant in the course of the motion.

A complaint under a 12(c) motion is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Falk. See also Rule 54(c), SCRCP ("Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings"); and see Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P. et al., 385 S.C. 452 at 457, 684 S.E.2d 756 at ____ (2009)("The character of a complaint is determined by its factual allegations, not the label assigned to it").

"A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." Lydia v. Horton, 343 S.C. 376, 540 S.E.2d 102 (Ct. App. 2000), rev'd on other grounds; Douglass ex. rel. Louthian v. Boyce, 336 S.C. 318, 323, 519 S.E.2d 802, 805 (Ct. App. 1999)(citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991)).

"Our courts have held the pleadings should be construed liberally so that substantial justice is done between the parties." Falk, 341 S.C. at 287, 533 S.E.2d at 353. "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Id.

As in the practice under Rule 12(b)(6), if the challenged pleading does not meet the standard, the proper course is to grant the motion without prejudice, and grant the nonmoving party leave to amend the pleading to satisfy any missing requirement if the party can do so. See Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019)(discussing rationale for practice of

granting leave to amend under Rule 12(b)(6)). This leave should be provided as part of the ruling on the moving party's motion to dismiss without the nonmoving party making a motion to amend.

Skydive.

The Nature of the Case, the Issues, and the Amended Complaint Viewed
in the Light Most Favorable to the Nonmoving Party and Viewed
Without Limitation to Theories Named or Relief Requested

Because the standard of decision discussed above calls for the allegations of the 375-paragraph Amended Complaint of the nonmoving party to be accepted as true, and not be confined to the specific relief labeled or requested, the following background is necessary.

This background is recounted under the foregoing standard for the purposes of the motion. This background is concerned not only with the facts pled, but also with the issues they present and the types of relief to which they could entitle the pleader, keeping in mind how those claims and remedies would or would not be mooted by the filing of a notice of abandonment.

The instant case arises from the second suit by the Town against Plaintiff.

Previously, in June 2020, the Town commenced the first statutory condemnation action against Plaintiff.

Plaintiff had offered the Town a "beach renourishment easement" at no charge, but the Town sought an easement with terms and scope Plaintiff believed to be unreasonable.

The Town thereafter stated no easement would be necessary for its renourishment project, and completed the placement of all sand for the project.

The Town thereafter again sought an easement with terms and scope Plaintiff believed to be unreasonable. Plaintiff again declined to grant an easement with terms and scope Plaintiff believed to be unreasonable.

The Town sued to condemn.

In the first suit, the Town sought to condemn, among other things, a right of public use and access over a designated oceanfront portion of Plaintiff's oceanfront land.

The Town also sought to condemn the right to do "beach renourishment" work on the designated portion, and other rights to do things on or prohibit Plaintiff from doing things on the designated portion of Plaintiff's property. (See, e.g., Amended Complaint ¶¶45-52 (recounting provisions for limiting Plaintiff's access to Plaintiff's land and for tearing down improvements such as decks, stairs, showers, foundation elements, etc. if in easement area.))

One boundary of the designated portion of Plaintiff's land was just a few feet away from the door of Plaintiff's oceanfront house. (See id.)

The offer of payment stated by the Town in the condemnation papers was for zero (\$0.00) dollars, based on a report procured by the Town from an appraiser to whom the Town did not give the written terms of the easement and whom the Town did not inform of the terms verbally.

Within 30 days of being sued, Plaintiff separately filed an approximately 169-paragraph suit against the Town pursuant to statute, to challenge on numerous stated bases, the power and ability of the Town to condemn ("the Challenge I case").² The Challenge I case, by statute, stayed all proceedings in the condemnation action until resolution of the Challenge I case. S.C. Code Ann. §28-2-470.

The Challenge I case presented a request for declaratory and injunctive relief.³ Under present statutory practice, it may not be necessary for the purposes of the instant motion, to determine in which

² The Challenge I case was filed pursuant to S.C. Code Ann. §28-2-470, which is part of the Eminent Domain Procedure Act (sometimes herein, "the Act"). Town similarly sued the two other landowners, each of whom filed a similar challenge case. Plaintiffs in the three challenge cases and respective case numbers are as follows: Sunset Lodge, LLC, 2020-CP-22-00600, Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust, 2020-CP-22-00601, and M. Baron Stanton, 2020-CP-22-00602. Unless a difference is noted, the cases were handled the same way.

³ The South Carolina Declaratory Judgment Act provides:
Courts of record may declare rights, status and other legal relations.

respects the Challenge I case requested declaratory relief, permanent injunctive relief, statutory relief, or other relief.⁴ A liberal reading of the extensive Challenge I Amended Complaint indicates that, among other things, Plaintiff challenged the power and ability of the Town to ever condemn any easement at all over Plaintiff's property for the generally stated purpose and subject matter involved.

The Challenge I Amended Complaint also indicates that, in the alternative, Plaintiff challenged the power and ability of the Town to ever include, in any easement condemned, various attributes the Town sought to include in the easement.

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

S. C. Code Ann. §15-53-20.

⁴ See, e.g., Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961). In Atkinson, under the prior equity practice, a motion to dismiss the plaintiff's challenge action had been filed by the defendant on the ground that the action was not maintainable under the Declaratory Judgment Act, in that the plaintiff's remedy, if any, was for a permanent injunction. Upon the hearing of this motion, however, counsel for the parties agreed that the action simply be treated as one for permanent injunctive relief "in accordance with the usual procedure in such cases."

But see Timmons v. South Carolina Tricentennial Commission, 175 S.E.2d 805, 254 S.C. 378 (1970)(discussing, but not granting, primary remedy of permanent injunction). In Timmons, Annie Mary Timmons brought an action against the South Carolina Tricentennial Commission and against Daniel R. McLeod, as attorney general, under the Uniform Declaratory Judgment Act, but sought "a permanent injunction enjoining any proceedings to condemn her property."

And see Columbia Water Co. v. Nunamaker, 73 S.C. 550, 53 S.E. 996 (1906). Nunamaker was decided under the prior equity practice. There, the court observed:

When the right to institute condemnation proceedings is contested, the proper remedy is to bring an action in the Court of Common Pleas in order that the Court may, in the exercise of its chancery powers, determine such right. *** The [cited] cases show that such action must be regarded as independent, and not ancillary to the condemnation proceedings. If upon the final hearing of the case the Court should decide that the defendants did not have a right to institute condemnation proceedings, it would then grant a permanent injunction.

Id., 53 S.E. at 998 (citations omitted).

The Challenge I Amended Complaint also indicates that, in the alternative, Plaintiff challenged the power and ability of the Town to ever pursue any easement in any action without complying with certain requirements. These particularly described requirements included common law requirements for fair dealing and good faith deliberation in the selection of the attributes of the property interest to be condemned and for authorization of the condemnation of same, as well as requirements for compliance with specifically described statutory prerequisites.

The Challenge I Amended Complaint also indicates that, in the further alternative, Plaintiff challenged the power and ability of the Town to proceed under the particular case which was commenced, to proceed under the particular appraisal which was obtained, and to proceed under the particular condemnation notice served.

Among other things, after setting forth numerous other allegations, the Challenge I case made the following allegation and prayer: “The contemplated condemnation is completely unnecessary as a matter of law, and therefore constitutionally and equitably prohibited, and the Town of Pawley’s Island’s attempt to condemn an overbroad easement after the fact for an already completed and no longer proposed or prospective project should be disallowed and permanently restrained.” (Challenge I Amended Complaint ¶ 158.)

The Challenge I Amended Complaint further asserted: “In the alternative that the Town asserts the condemnation is for some other, future, hypothetical project, the condemnation is still unnecessary and in bad faith in that any such putative future project is admitted by the Town to be speculative, unlikely, and by the Town’s own calculations, most probably unnecessary for as much as twenty-two years.” (Challenge I Amended Complaint ¶ 160.)

The Challenge I Amended Complaint also asserted:

In the alternative that an actual, bona fide, proposed additional project were to materialize, the easement sought has been sought through knowing, intentional misrepresentation, lack of honesty in fact, spite, caprice, arbitrariness, and illegality, and has also been sought under influence by legal error as to not only the nature of the easement that is sought, but also as to

the lack of basis, or legal or practical need, for the easement or its numerous overbroad attributes. The easement sought has also been sought under influence of legal error as to the consequences of Plaintiff granting it or the Town taking it. The easement is also being sought through bad faith noncompliance with procedural rules. In that these facts constitute “fraud, bad faith or abuse of discretion,” the Town’s contemplated condemnation action, currently stayed by this action, should be disallowed with prejudice.

(Challenge I Amended Complaint ¶ 162.)

In the Sunset and Beattie Amended Complaints, there were also allegations as to the Town making false certifications in its pleading, the condemnation notice. The Amended Complaint in those Challenge I cases asserts: “For the reasons that (1) noncompliance with exclusive mandatory procedure renders the Town’s condemnation notice ultra vires and void, and (2) knowing or recklessly negligent false statements in a pleading render the pleader subject to sanctions including dismissal, the beginnings of the condemnation action represented by the Town’s Condemnation Notice should be dismissed with prejudice.” (Challenge I Amended Complaint ¶ 172 Sunset-600 and Beattie-601.)⁵

The Challenge I Amended Complaint also asserts the following: “Among other things, there is no need for an easement over the owner’s entire lot. There is no need for public access of any kind, no need to limit owner access, no need for broad Town activities unassociated with doing and maintaining the work, no need to include owner improvements, no need to be so close to owner homes, and no reason not to clarify there is no change in owner access to ocean and beach.” (Challenge I Amended Complaint ¶ 175.)

⁵ In the Stanton Challenge I Amended Complaint, there were additional allegations as to the Town attempting to change the description of the easement sought after commencing the action, and the Amended Complaint asserts: “For the reasons that (1) noncompliance with exclusive mandatory procedure renders the Town’s condemnation notice ultra vires and void, and (2) knowing or recklessly negligent false statements in a pleading render the pleader subject to sanctions including dismissal, and (3) the Town stated in writing that the condemnation notice was withdrawn, the beginnings of the condemnation action represented by the Town’s Condemnation Notice should be dismissed with prejudice. (Challenge I Amended Complaint ¶ 172 in Stanton-602.)

In all three Challenge I Amended Complaints, there are allegations that the Town Administrator filed an easement grant for the Beattie property which was unauthorized by the Beattie. (See, e.g., Sunset Ch.I Cmplt. ¶66.)

The Challenge I suit also asserts: “In the alternative that Plaintiff’s rights herein or in any contemplated condemnation action are adversely affected by the already completed project, Plaintiff may need the already completed actions of the Town to be redressed by damages for trespass or other monetary remedy, for which cause of action Plaintiff would and does demand a trial by jury, despite the nonjury portions of this action challenging the Town’s right to condemn.” (Challenge I Amended Complaint ¶ 179.)

The Challenge I Amended Complaint further states: “Plaintiff prays that the Condemnation Notice be quashed and that the Town be forever barred and enjoined from filing it or proceeding with it, for such other and further relief as is just and proper, and for all litigation costs.” (Challenge I Amended Complaint, prayer for relief following ¶ 179 (emphasis added).)

The Town filed a motion pursuant to Rule 12(b)(6) to dismiss the Challenge I case for failure to allege facts sufficient to state a cause of action and this Court denied the motion on September 11, 2020.

While the first condemnation action by the Town was stayed and Plaintiff’s August 2020 motion for summary judgment in the Challenge I case was pending, the Town, in October 2020, commenced a second statutory condemnation action against Plaintiff.

In this second suit, the Town again sought to condemn a right of public use and access over a designated oceanfront portion of Plaintiff’s oceanfront land, as well as the right to do renourishment work on the designated portion, and other rights to do things on or prohibit Plaintiff from doing things

on the designated portion.⁶ In this second suit, again, one boundary of the designated portion of Plaintiff's land was just a few feet away from the door of Plaintiff's oceanfront house.⁷

⁶ For example, the Amended Complaint in case 2020-CP-22-00932 alleges:

354. The New Notice is similar to the Existing Notice, but among other possible differences, the New Notice attempts, without leave of court, to alter the Existing Notice by adding the aforescribed 9-line footnote in the description of the property sought to be acquired.

355. The New Notice is falsely dated June 9, 2020, as if it, including the map and proposed Beach Renourishment Easement forming a part of it, existed on that date. This leaves the Town actors poised to next represent to the public, the Town Council or a court, if need be, that the New Notice (including its constituent parts) is what was served in June 2020 instead of the Existing Notice.

356. The New Notice is dated the same as the Existing Notice, but upon information and belief, did not exist on that date and was not prepared until after the October 12, 2020 Town Council meeting.

357. The New Notice is fraudulent in the above respect, and is an attempt, like other aforescribed activities, to create a false public record and a morass of official-looking paperwork to obscure the delicts and derelictions of the various Town actors involved; the New Notice is part of the continuing series of bumbles at the landowner's expense, frauds, and coverups alleged in the Existing Action and now this one.

⁷ There appears to be no dispute that the Town intended to commence the second suit and did so. Under the peculiar statutory procedure, the first and second suits by the Town began with service of papers without yet filing the papers with the court, and therefore the captions simply reflect the same parties in an identical case caption, without any Common Pleas case number on either caption.

The Town's March 31, 2021 brief only states that the second suit by the Town against Plaintiff contained "revisions reflecting certain objections asserted in the first set of challenge actions."

The Town does not state what revisions were made or in what way the suit and any revisions in it were responsive to objections stated in the Challenge I case. The Challenge II Amended Complaint does address the similarities and differences in detail and at length.

No other explanation is offered for why the Town commenced a second suit against Plaintiff when one was already pending and stayed.

In the Amended Complaint of the instant Challenge II case, the allegations of which, as discussed above, must be taken as true for the purposes of the Town's motion, Plaintiff asserts that the second suit was not an amendment made within the first suit because the "New Notice" was created without any leave to amend, in a suit which was stayed. Plaintiff states and alleges at length and in detail that the second suit by the Town was without any lift of the statutory stay, was without proper authorization from Town Council, and was without any prior resolution of the already pending action. (See Ch.II Am. Cmpl. ¶¶ 224-374.)

In the Challenge II Amended Complaint, which must be taken as true, Plaintiff asserts that the additional action was without consultation with Plaintiff, without notice to Plaintiff, without consent of Plaintiff, and without prior or subsequent explanation of purpose to Plaintiff. (See *id.*)

Plaintiff further alleges in the Challenge II Amended Complaint that virtually no objections of the plaintiffs in the first set of challenge actions were cured or corrected in the Town's second suit, and that, rather, the Town attempted to pursue condemnation of substantially similar subject matter, with

In response to the second suit by the Town, Plaintiff, again, within 30 days of being served by the Town, separately filed suit against the Town pursuant to statute, to challenge the power and ability of the Town to condemn. Viz., Plaintiff filed the instant Challenge II case, which the Town contends is now moot.

In the 375-paragraph Amended Complaint in this Challenge II case, Plaintiff incorporated by reference, the entire Amended Complaint in the Challenge I case. (Challenge II Amended Complaint ¶ 182.)⁸

the same defective appraisal, and the same lack of good faith deliberation on applicable factors. (See id.) Plaintiff alleges that the condemnation was also generally made more onerous and damaging to the landowner by addition of a disparaging and legally incorrect “argument” inserted by footnote into the granting/demising language and that additional false statements and events occurred which were additionally fatal to the second condemnation attempt. (See id.)

⁸ Plaintiff offered in Plaintiff’s brief, a partial synopsis of the 375-paragraph Challenge II Amended Complaint’s allegations, referring to the Amended Complaint as an account “of numerous chapters of the Town’s acts, misrepresentations, evasions and persistent omissions over an extended period of time.” The synopsis is stated here for summary purposes in lieu of the longer allegations themselves, which must stand on their own for purposes of the motion. The allegations “have included the following, among other things”:

- Misrepresentation of the nature and scope of the “renourishment” easement sought in 2019 when first soliciting it and seeking to pay nothing for it.
- Doing so by saying the “renourishment” easement was only for sand placement, sand fence and planting, when the legal document placed the easement two feet from the door of the house, granted perpetual public access within the easement area, granted a perpetual right to restrict the owner’s access to that oceanfront part of the owner’s property, granted a perpetual right to tear down and prevent replacement of the owner’s improvements within the area, and perpetually subjected the owner’s right to build structures for access to the ocean to approval of an unidentified person with no governing standards.
- Misrepresentation publicly of the landowners’ good faith offer of an easement of reasonable scope in response to those solicitations from the Town.
- Doing so by omitting all reference to the landowner’s offer, omitting all disclosure of the issues, and falsely perpetuating the impression and public representation that the landowner had refused any easement whatsoever.
- Misrepresentation of the nature and scope of the actually contemplated easement to the appraiser hired by the Town when seeking approval of federal participation in part of the project.
- Doing so by asking the appraiser to determine potential land acquisition costs for 109 properties as a condition of obtaining federal approval of federal assistance on that part of the overall proposed renourishment project, but omitting the unreasonable terms to which Plaintiff has objected.

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- Filing an unauthorized easement grant from one property owner, Mr. Beattie.
 - Active involvement in creating a poorly drafted and unreasonable proposed granting document proposed to become a permanent part of Plaintiff's chain of title.
 - Abandonment, altogether, of the request for the easement in 2019.
 - Concurrently with such abandonment, publicly announcing intention to perform the work without an easement.
 - Concurrently with such abandonment, publicly announcing the scientific likelihood of the lack of necessity of similar work for another 22 years or more.
 - Subsequent to such abandonment of the request for the easement, completion of the work for which the easement had been sought.
 - Subsequent to abandonment of the request for the easement and completion of such work, disclosing in 2020 a determination to pursue a "program" for only potential work.
 - Doing so knowing that the potential work was to be years in the future, with no certainty of future need or occurrence, no assurance of Congressional funding, and no guarantee of future assistance whatsoever, and that the need for the potential work was contrary to the Town's own prior data and estimates the Town obtained and publicized in order to justify the doing of the work, the scope of the work, and the spending on the work, which was now already done.
 - Subsequent to abandonment of the request for the easement and completion of the work without such easement, then requesting the easement again, but now only for the mere purpose of joining the uncertain "program" for which the need was unlikely, for which the possible need was remote in time, and under which the receipt of financial help and the actual doing of anything was speculative.
 - Repeating prior misrepresentations in making a new request for the easement. I.e., that the "renourishment" easement was for the limited purpose of sand placement, sand fence, and planting.
 - Continued publicly broadcast misrepresentation in the May 2020 Council meeting of both (i) the nature and scope of the easement now sought as only for putting sand on the beach and (ii) the landowners' responses to the prior solicitations as being a categorical refusal rather than a good faith offer of a reasonable easement.
 - Consequently issuing a resolution insufficient for and invalid for authorizing the condemnation which the Town would later pursue.
 - Misrepresentation of the nature and scope of the easement to the appraiser hired to determine the just compensation which should be paid to the landowner if the easements were to be purchased from the landowner or condemned and taken by eminent domain.
 - Doing so by asking the appraiser to determine the just compensation which should be paid to the landowner, but omitting from the easement he was asked to appraise, the unreasonable terms to which Plaintiff has objected.
 - Commencing a condemnation action seeking an easement containing the unreasonable terms to which Plaintiff has objected, but doing so in a proceeding integrally based on the falsely procured appraisal of an easement of materially more reasonable scope, while withholding the appraisal in violation of the statutory procedure, and while making a false certification in the condemnation papers that the appraisal had been previously provided.
 - In seeking condemnation of an easement the entire request for which had been previously abandoned, seeking also to include features and scope previously agreed with one or more landowners not to be necessary features or scope.
 - Misrepresenting publicly the nature of, progress of, and positions taken in the litigation.

In the Challenge II case, Plaintiff stated: “Plaintiff prays that both the “Existing” and the “New” Condemnation Notices be quashed and that the Town be forever barred and enjoined from filing either of them or proceeding with either of them, for such other and further relief as is just and proper, and for all litigation costs.” (Ch.II Am.Cmplt., prayer (emphasis added).)

In the instant Challenge II case, Plaintiff did not plead or request that the overall relief sought by Plaintiff be “without prejudice.”

Nor did Plaintiff plead or request that issues adjudicated within the action in order to provide the declaratory or injunctive relief requested not be given permanent preclusive effect. Nor did Plaintiff characterize Plaintiff’s Amended Complaint as a “single cause of action.”

-
- Misrepresenting to the Court in moving to dismiss, for a bond, and for special expedited treatment, the likelihood that a storm could wash away all 1.1. million cubic yards of sand in a single event and misrepresenting to the Court that under the “program,” if such an event occurred, the Town would be eligible to have the Corps of Engineers put all 1.1. million cubic yards back, including portions on which there would never be federal involvement.
 - Presenting to the Court a resolution created by the Town which was known at the time of creation to be factually false, in which the Town Council falsely states that the materials contained in the resolution were presented to Plaintiff before the October 12, 2021 time of the resolution, impliedly in June 2020.
 - Doing so in order to dissuade the Court from granting summary judgment by attaching the false resolution as Exhibit B to the Town’s November 24, 2020 brief opposing Plaintiff’s motion for summary judgment in the initial action.
 - Doing so again on March 17, 2021 by attaching the false resolution to the Town’s memorandum in support of the Town’s motion to reconsider the granting of summary judgment.
 - Approximately two months after Plaintiff’s summary judgment motion was filed in the initial challenge actions, commencing a separate condemnation action based on knowingly falsely stated facts in the resolutions purportedly authorizing same.
 - Doing so using condemnation notices created in October but falsely dated June 9, 2020.
 - Doing so using condemnation notices in which the occurrence of other activities and events is recited falsely if the statements are taken to speak as of June 9, 2020.
 - Not adequately answering the factual allegations of the original complaint in the instant challenge action.
 - Abandoning the underlying condemnation notice on February 10, 2021.
 - Not adequately answering the January 13, 2021 amended complaint in the instant challenge action.
 - Seeking dismissal before discovery by Plaintiff on potential additional relief for Plaintiff has progressed, including the deposition of the Town Administrator noticed on January 15, 2021 for February 19 and the answering of January 10, 2021 interrogatories served by Plaintiff.

Subsequently to commencing the instant Challenge II case, Plaintiff began to pursue discovery from the Town in the Challenge II case, including the deposition of the Town Administrator.

On January 20, 2021, the Court granted Plaintiff's motion for summary judgment against the Town in the Challenge I case. The Town subsequently moved for reconsideration. After summary judgment was granted, the Town, without prior consultation, moved in the Challenge I cases of Beattie (ending in 601) and Sunset (ending in 600) to disqualify Plaintiff's counsel from representing them in the Challenge I cases. After those plaintiffs responded extensively in writing to the Town's motion to disqualify, and asserted the motion was completely without merit, the Town withdrew the motion without hearing.

In January 2021, Plaintiff petitioned for award of litigation expenses in the Challenge I case.⁹ The Town opposed the fee petition and requested at least a four-month period in which to conduct discovery and mount opposition to the award of attorney's fees in a proposed full-blown evidentiary hearing. As of April 27, 2021, proceedings relating to fees are still pending.

On February 10, despite the statutory stay in the second condemnation action, without leave of court or consent of Plaintiff, the Town sought to withdraw its condemnation notice which was used to commence the second condemnation action against Plaintiff.

The Town did so by filing, in the instant Challenge II case challenging the second condemnation suit, a "Notice of Abandonment." The Notice states that the condemnation action is "hereby abandoned and withdrawn."

⁹ Only the plaintiffs in the Sunset and Beattie Challenge I cases sought attorney's fees, and each asserted that the fee petition was based approximately if not exactly on one-third of the fees and expenses incurred in all three Challenge I cases and the early stages of the three Challenge II cases. The plaintiff in the Stanton Challenge I case did not seek the other one-third of the fees.

The Notice states that the action is “abandoned,” but does not state that the dismissal is with prejudice, or that the Town relinquishes any right to bring another condemnation action with regard to Plaintiff’s property.

On March 3, 2021, the Town filed an answer to the Amended Complaint in the instant Challenge II case, and, after denying the majority of the 375 paragraphs of the Amended Complaint, alleged at paragraph 8 that the “single cause of action” alleged by Plaintiff was rendered moot by the Town’s filing of the February 10 Notice of Abandonment.

In its Answer, the Town again did not allege or stipulate that the Notice of Abandonment was intended to end the condemnation action with prejudice to commencing another condemnation action on the same subject matter.

On March 5, 2021, the Town filed its motion for judgment on the pleadings pursuant to Rule 12(c), SCRCP, asserting that this case is now moot. The Town requested that the instant case be dismissed “without prejudice.” Just beforehand, on March 3, 2021, the Town filed a motion for protection from pending discovery, including the still un-taken deposition of the Town Administrator, pending interrogatories, and any future discovery.

This Court granted the Town’s motions on April 22, 2021.

Interpretation, Validity and Effect of the
Filed Notice of Abandonment Alleged by
the Town in its Answer to the Amended Complaint

The Town's unilaterally "abandoning" its suit while the suit is stayed for a challenge to be resolved¹⁰ is as ineffectual as trying to "take a nonsuit" in a conventional civil action when a nonsuit is prohibited.¹¹

Additionally trying to "abandon" the suit without leave of court or consent of the opposing party, and asserting separately that the "abandonment" is without prejudice to promptly pursuing a third suit on the same subject matter, is as ineffectual as to trying to declare one's own nonsuit to be "without prejudice" when neither the court nor the opposing party agrees that the nonsuit is without prejudice.

¹⁰ S.C. Code Ann. §28-2-470 provides: "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. No issues involving the condemnor's right to condemn may be heard in the trial upon the issue of just compensation." *Id.* (emphasis added).

If a subsequent suit were brought by a condemnor after the condemnor abandoned the prior suit during a challenge action without consent, the landowner would be required to file a challenge action within 30 days of service of the new condemnation suit in order to resolve the question whether the prior "abandonment" during a stay was valid, and whether the abandonment was a permanent relinquishment of the right to pursue the landowner's property, thus barring further suit by the would-be condemnor.

¹¹ Rule 41(a), SCRCP provides for a plaintiff's unilateral dismissal, or nonsuit, by notice if filed before the defendant answers or files a motion for summary judgment. If the defendant has answered or filed such a dispositive motion, voluntary dismissal is still available, but not by unilateral dismissal. Nonsuit is then available by stipulation signed by all parties.

A crucial feature of Rule 41(a) is the "two dismissal rule": the first voluntary dismissal is without prejudice, that is, it is not an adjudication on the merits unless otherwise stated in the dismissal order. The second dismissal is with prejudice, that is, when a voluntary dismissal is filed "by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim," the dismissal is with prejudice.

For the further protection of a successively sued defendant, Rule 41(c), SCRCP additionally provides: "If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order."

Putting aside for the moment, the question of whether a unilateral dismissal of any type was allowed while the matter was statutorily stayed and being challenged, the finality and preclusive effect of the stated “abandonment” is a question highly relevant to legal or practical mootness.

“Abandon” has been defined as “to give up with the intent of never again claiming a right or interest in.” Merriam-Webster’s Collegiate Dictionary (11th ed., Springfield, Mass. 2003).

“Abandonment” with regard to a use of real property is held legally to mean the owner’s intentional abandonment of the use in the sense of subjective intent to forever relinquish it. Conway v. City of Greenville, 254 S.C. 96 at 101, 173 S.E.2d 648 at 650 (1970)(stating, with respect to a prior use rendered nonconforming by a new zoning ordinance, that abandonment is discontinuance of a thing accompanied by intent to relinquish the right to do the thing that is discontinued); see also Maguire v. City of Charleston, 271 S.C. 451, 247 S.E.2d 817 (1978) (Rhodes, Justice, dissenting)(discussing cases in which “discontinuance” required intent to relinquish and meant the same as “abandonment”).

With respect to an easement, abandonment of it requires the intention to abandon and the external act by which the intention is carried into effect. Witt v. Poole, 182 S.C. 110, 188 S.E. 496 (1936). An intention to abandon property or a property right need not appear by express declaration, although it may be manifested thereby. Witt.¹²

The Town has now again expressly declared “abandonment.” If the “abandonment” is final, namely with prejudice to further attempts to condemn, it would clearly present, if not a legal, then at least a practical, question of mootness.

Historically, instances in which a condemnor does “abandon,” or is permitted to “abandon,” a condemnation action generally are instances of permanent relinquishment. In these instances, as a matter of fact, the condemnor has determined to abandon not only the action, but any claim to the

¹² The Challenge II Amended Complaint indicates that the Town had once before abandoned the right to pursue an easement. See the Amended Complaint ¶¶35-48 re 2019 cessation of requests for easement, declaration of no need for easement, and 2020 completion of work without easement.

property. I.e., the condemnor has determined that the condemnation will not be necessary at all, or for some other reason will not be pursued again.

These instances arise from time to time when, for instance, the underlying project for which the condemnation is pursued is changed or terminated so as to eliminate the need for the property, or when it becomes clear that the compensation which will be ordered is higher than it is feasible to pay for purposes of the project.

These instances historically receive attention when there is concern with, or dispute over, whether the condemnor should be able to thus permanently back out of, or “abandon” the condemnation. These issues of “abandonment” arise when the landowner wishes to enforce an award of compensation already made, or where the landowner or the landowner’s property has otherwise suffered or changed position in some respect because of the long pendency of the threat of condemnation before the condemnor finally decides to “abandon” the condemnation.

There are few instances involving “abandonment” as a temporary expedient exercised by the condemnor before promptly resuming substantially similar activities. See, e.g., Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951)(considering “injustice” to property owners in permitting a municipal body to tie up an owner's property for three years, after which the city can change its mind and abandon or refuse to take the property at the end of three years); In re Certain Land, 364 Pa. 71, 70 A.2d 847 (1950)(holding that in condemnation of land for playgrounds, the date of taking was the date the ordinance was passed which designated the property for acquisition, and holding the statute not unconstitutional, but holding that the city could not abandon the condemnation of the subject parcel without the consent of the owner); Town of Trumbull v. Ehram, 148 Conn.47 at ___, 166 A.2d 844 at 847 (1961)(addressing landowner objection to permanent withdrawal of condemnation, noting that if for some reason, it is desired “to give up the undertaking,” the proceedings may be discontinued before the payment of the judgment); and Hamer v. State Highway Comm'n, 304 S.W.2d 869 (Mo.

1957)(involving claim that highway department’s decision to abandon any plan to place highway on plaintiff’s property after plaintiff made plans in cooperation with the intended condemnation constituted a taking without just compensation).

The Code is silent on whether a condemnor is authorized to define “abandonment” for itself. There is no express authorization for the condemnor to declare that a “temporary abandonment” is being made, in which the “abandonment” is an expedient or a tactical tool, such as for the purpose of ending discovery, moving out the valuation date for a subsequent condemnation attempt, changing counsel, etc., and to subsequently re-commence an action on substantially the same subject matter with a putatively “cleaner slate.”

If such a procedure were permitted, it would be comparable to allowing a government plaintiff in a conventional civil action to take a voluntary nonsuit without prejudice and without leave of court after the defendant answered and counterclaimed, over and over, ad infinitum.

As noted above, this is not permitted in a Civil Action governed by the Rules of Civil Procedure. “In the event of conflict between [the Eminent Domain Procedure A]ct and the South Carolina Rules of Civil Procedure, th[e] act shall prevail.” S.C. Code Ann. §28-2-120. However, it is unclear whether, here, the Legislature intended a conflict with the Rules of Civil Procedure, or a parallel scheme with the same guiding principles averse to successive multiple litigation.

Assuming the Rules of Civil Procedure do not apply by letter, it is difficult to conclude that the Legislature intended “abandon” to mean “not abandon” or “temporarily abandon,” and to allow a limitless ability of the government condemnor to dismiss and re-commence a condemnation on the same subject matter.

There is also no delineation in the Act of “the manner of abandonment authorized by this chapter,” as referenced in §28-2-510(c). I.e., there is no provision which states that the Town’s “abandonment” is affirmatively authorized; there are only the requirement in Section 28-2-470 of

landowner consent to any proceedings during a pending challenge action, and the prohibition in §28-2-230(B) against abandonment without owner consent after taking possession and making material alterations. Section 28-2-470 authorizes actions taken during the automatic stay only if done with landowner consent: “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.” Id.

The Chapter 2 of Title 28 of the Code thus actually contains no express authorization for a condemnor to unilaterally “abandon” a condemnation once a challenge action has been commenced.

At that point, all proceedings have been stayed pending resolution of the challenge. The condemnor is clearly authorized to abandon and do other things after obtaining landowner consent, or to stipulate to the correctness of the challenge, or to have the court determine the merits of the challenge in the pending challenge action.

These questions may not need to be answered completely now, where the question is only whether these or other questions still present a live controversy and where the case involves an actual assertion of rights.

The Town’s argument that it has abandoned condemnation and that the challenge action is “entirely moot” would at first imply that the Town’s voluntary dismissal of its condemnation action is with prejudice and puts an end to almost all controversy. However, the Town does not plead this in its Answer.

Plaintiff stated in Plaintiff’s March 30 pre-hearing brief at 5, that “as late as March 18, 2021, the mayor of the Town sent out a mass public e-mail announcing a determination to continue to ‘pursue’ the easements.” Plaintiff further stated, “In doing so, he continued in the same fashion in which the Town has previously operated, to not disclose to other owners, the actual issues in the two suits so far against each of three landowners.” The latter assertion by Plaintiff relates to the issues of misrepresentation and defamation which appear in the allegations of the Challenge II amended

Complaint, and are stated to need timely correction. (See, e.g., id., Preliminary Statement, and ¶¶78, 87 and 126.)

The Town's oral argument at the April 1 hearing did not dispute or directly address the Plaintiff's account of the mayor's mass e-mail. The Town's counsel's statements that the Town "believes the issues are entirely moot at the present time," and that "the Town is still very interested in acquiring the easements" indicate the Town clearly intends other than to stop pursuing condemnation of the same subject matter.

The Town's statements at the hearing about starting over "with a clean slate" and giving the landowners a third "opportunity to present challenges" certainly do not communicate permanent relinquishment of the pursuit of the property.

For this reason, and based on the well-defined and live dispute of the parties reflected on the face of the Challenge II Amended Complaint and its exhibits, the availability of relief, and the realistic threat of future litigation, this Court should have determined this case not to be moot. It is also clear that a fee petition may be forthcoming from Plaintiff; there is more to do in the case, and the Town's sudden urgency to end the case and end discovery does nothing but trumpet a lack of mootness.

The Town acknowledged to the Court the probability of a third action against Plaintiff on substantially the same subject, qualifying the probability by stating that the matter might be averted if the Town "could negotiate an agreement" with the owners. This of course, would be the situation in many a case. When the Town introduced this subject at oral argument, Plaintiff responded to correct any implication that control of the matter might be in Plaintiff's hands. Plaintiff, clarifying an intention of both parties to tread lightly on such matters, clarified to the Court that such negotiation is something on which the Town has put forth no proposal since before January 2021.

The Town's unilateral "temporary abandonment" for the purpose of arguing that that no present cause of action is stated in law or equity, and dismissing "without prejudice," the case that Plaintiff

brought – all in order to grant a “clean slate” to the Town and provide negotiating leverage – is ineffectual and unsupported in law.

To date, the Town still has not adequately answered hundreds of allegations of the Amended Complaint.¹³ To grant the Town’s motion would, among other things, continue to keep issues obscure, require dredging up “Challenge I,” “Challenge II,” and “Challenge III” pleadings in a Challenge III or Challenge IV case, require Plaintiff, as a private citizen, to bear the expense, a third or fourth time, of commencing discovery that was not reached in the Challenge I and Challenge II cases and that might be similarly delayed in a Challenge III or Challenge IV case, and allow memories and other evidence to be lost during the delay. During the present litigation, the Town has already changed counsel, and the Town Clerk resigned, and that over time, people could not only forget, but die, resign, become disabled, move, be discharged, not run for reelection, fail to be reelected, etc.

In State v. Flamme, 217 Ind. 149, 26 N.E.2d 917 (1940), after the condemnation proceeding had progressed to the determination of an award and a judgment, the condemnor decided not to proceed with payment under the schedule in the statute for finalizing the condemnation and stated “that it has waived and abandoned, and does waive and abandon, any and all right, title, and interest it may have in said property.” This was yet another case of final, unequivocal, abandonment.

However, the landowner objected that the condemnor should not be allowed to “abandon” the condemnation. The court examined extensively, the authorities of various jurisdictions that a condemnor could “abandon” a condemnation at any time before judgment, but all instances examined were those in which the condemnor truly relinquished pursuit of the property and offered no intention to continue to pursue it.

¹³ Denials shall fairly meet the substance of the averments denied. Rule 8(b), SCRCPP. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Id.

The court reasoned that under the circumstances and the statutory scheme, the condemnor, in that case, could also abandon pursuit of the property even after judgment. The landowner “significantly pointed out that if the state, or any other agency possessing the power of eminent domain, may abandon a proceeding of this character after the damages have been fixed and determined by a court of competent jurisdiction and reduced to a final judgment, there is nothing in the statute to prevent the condemnor from claiming what would amount to a succession of new trials as of right until an acceptable award is obtained, or the property owner is exhausted by the uncertainty, annoyance, and expense of litigation and deprived of his property without just compensation.” Flamme, 26 N.E.2d 917 at 919.

The court, however, upheld the ability of the condemnor to permanently relinquish any pursuit the property. Notably, addressing the landowner’s “significant” point, the court observed:

It does not appear to be important that the state may attempt to abuse its privileges by resorting to a succession of condemnation proceedings with a view of acquiring the appellees' property at its own price, or harassing them into involuntary submission. There is ample authority for the intervention of courts of equity to prevent such abuses. Northern Pacific R. Co. v. Georgetown, 1908, 50 Wash. 580, 97 P. 659; Central of Georgia R. Co. v. Thomas, 1928, 167 Ga. 110, 144 S.E. 739; East Bay Municipal Utility Dist. v. Kieffer, 1929, 99 Cal.App. 240, 278 P. 476, 279 P. 178.

Flamme, 26 N.E.2d 917 at 919 (emphasis added).

The first question, then, remains, not whether the South Carolina Eminent Domain Procedure Act contemplates the ability of a condemnor to “abandon,” but what the South Carolina Eminent Domain Procedure Act contemplates “abandonment” to mean.

If “abandonment” of the notice is a permanent waiver of pursuit of the property and has a res judicata effect, the case cannot be considered moot until this is declared. Plaintiff fairly has a right to have that determined and declared in this second action before being faced with third in which the proposition is denied by the Town.

If, on the other hand, “abandonment” is not a final relinquishment of the right to pursue the plaintiff’s property, then before the case can be considered moot, the question still remains whether

Plaintiff has stated a cause of action in equity or otherwise, for any relief preventing, affecting or redressing such a pursuit, or for any other relief. Plaintiff has done so.

Prospective or Present Relief Supported by
the Amended Complaint Which Would Not Be Concluded in the
Case of a “Nonfinal” Temporary “Abandonment” by the Town

In the instance of a “nonfinal” “abandonment” by the Town, one question affecting mootness is whether Plaintiff still seeks prospective or declaratory relief, notwithstanding the Town’s effectual dismissal of its claim without prejudice with reservation of right to start over a third time.

The case is not moot, for example, if Plaintiff still seeks to permanently enjoin the Town from pursuing the property, to declare certain attributes of the easement unnecessary under any future condemnation, to declare what steps would be required in any future condemnation for pursuit of a successful condemnation, or to permanently enjoin multiplicity of litigation by the Town, i.e., enjoin the Town from serving or filing yet a third suit on the same subject matter.¹⁴ Plaintiff seeks all these things, for which there are supporting allegations.

¹⁴ Courts of equity have long had the power to permanently enjoin condemnation, as well as the power to permanently enjoin multiple or successive litigation.

The Town appears to contend that its abandonment is not permanent with respect to condemnation of Plaintiff’s property, but only as to the particular notice which was used to commence the second lawsuit against Plaintiff.

Permanent injunction is the conventional remedy, rather than an unusual one, sought in challenge actions. See, e.g., Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961)(observing agreement of parties that the action simply be treated as one for permanent injunctive relief “in accordance with the usual procedure in such cases”); Timmons v. South Carolina Tricentennial Commission, 175 S.E.2d 805, 254 S.C. 378 (1970)(discussing, but not granting, primary remedy of permanent injunction enjoining any proceedings to condemn landowner’s property); and Columbia Water Co. v. Nunamaker, 73 S.C. 550, 53 S.E. 996 (1906)(observing that when the right to institute condemnation proceedings is contested, the proper remedy is to ask the Court to decide that the defendants did not have a right to institute condemnation proceedings, and to then grant a permanent injunction). See also S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 748 (1993)(barring re-institution of condemnation permanently, because the condemnor had previously represented that there would be no need for an easement on the landowner’s property).

Permanent injunction arises in many instances from the power of equity to prevent or minimize multiple or successive lawsuits.

Putting aside the question of permanent injunction and declaratory relief, which already render the case not moot, there also remains a question of whether Plaintiff, on the facts alleged, may pursue statutory or other at-law relief which is not prospective in nature, such as special costs including attorney's fees, or damages. If so, the case is not moot for that reason as well.

Both parties have already acknowledged the imminency of a request, before the action is completed, for litigation expenses including attorney's fees.

It is obvious that the rule of *res judicata*, available in law cases, cannot apply and provide any protection to a party in a subsequent lawsuit unless the prior lawsuit is determined on the merits and the issues are actually or constructively decided. See Robert Von Moschzisker, *Res Judicata*, 38 Yale Law Journal 299 (1929).

The rule of *res judicata* is said not to have been definitely formulated until 1776, but, in essence, it is of much earlier origin and application. Primarily, the rule is one of public policy, and, secondarily, of private benefit to individual litigants. The primary principle early found expression in the maxim, "Interest reipublicae ut sit finis litium," and the secondary or subordinate one in the form "Nemo debet bis vexari pro una et eadem causa." The whole doctrine bears a close resemblance to the exceptio rei judicatae of the Roman law.

Id. at 299.

"Equity follows the law," that is, "Aequitas sequitur legem." Equity has determined that one ground supporting intervention providing the anticipatory relief of injunction is to forestall a multiplicity of suits. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687, 714 (1990) (citing decisions holding that "[a] legal remedy is inadequate if it would require a 'multiplicity of suits'"). And see *Cent. of Ga. Ry. Co v. Thomas*, 144 S.E. 739, 167 Ga. 110 (1928)(affirming injunction against railway company from proceeding with second condemnation after abandoning first: "We are of the opinion that this is a case where a court of equity should have interfered to protect the landowner in her rights"). Estoppel in pais has been employed by equity to serve the same purpose in a proper case. See *S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.* (barring re-institution of condemnation permanently).

South Carolina courts have long recognized the power of equity to remedy prospective disputes over interests in land and prevent future or successive litigation, particularly when the aggrieved party does not have a present vehicle to resolve the issues finally by one action in law for ejectment or for trespass damages, thus settling title or definition of the interest in land. See, e.g., *Uxbridge Co v. Poppenheim*, 135 S.C. 26, 133 S.E. 461 (1926)(citing, among concerns, "the practical certainty of a multiplicity of suits growing out of the confusion or uncertainty," and reversing trial court's grant of demurrer, the precursor to the practice of granting a Rule 12(b)(6) motion, in which the trial court ruled that the allegations and prayer of plaintiff in possession for declaration of the location of a disputed land boundary were insufficient to constitute a cause of action either legal or equitable); and *McRae v. Hamer*, 148 S. C. 403, 146 S. E. 243 (1929)(affirming denial of demurrer to complaint of plaintiff in possession to settle land boundary line, citing a "feature of equitable cognizance, the prevention of a multiplicity of suits," as sufficient to sustain the complaint against demurrer).

Additionally, Plaintiff has emphasized and explained in Plaintiff's various pleadings and papers, that Plaintiff did not seek the litigation -- that both challenge suits were defenses to suits brought by the Town which required that the defenses would be lost if not presented pursuant to statute within 30 days of being sued by the Town each time. While emphasizing a desire to conduct discovery and reflect first on both Plaintiff's grounds and appetite for a damages claim, Plaintiff has pointed out that numerous facts alleged in the Amended Complaint support a claim for defamation of Plaintiff, or for slander of Plaintiff's title. (See, e.g., Ch.II Am. Cmplt., Preliminary Statement, and ¶¶78, 87 and 126.)

The Amended Complaint of the Challenge I case, which is specifically incorporated into the Challenge II Amended Complaint, also specifically mentions the prospect of a trespass claim based on the facts alleged, arising from the work already done by the Town on Plaintiff's land, "[i]n the alternative that Plaintiff's rights herein or in any contemplated condemnation action are adversely affected by the already completed project." (Challenge I Amended Complaint ¶ 179.)

Paragraph 221 of the Challenge II Amended Complaint characterizes the action only summarily, as "an action challenging Town attempts which were alleged to be unconstitutional, illegal, unauthorized, noncompliant, fraudulent, etc." However, under Rule 12(c), this Court cannot summarily disregard all the other facts in the Amended Complaint which might state a claim for a constitutional tort or other wrongdoing.

For example, this Court has concurrent jurisdiction for a claim pursuant to 42 U.S.C. §1983, which prohibits deprivation of procedural or substantive due process under color of state law.¹⁵

¹⁵ An example of such a case arising in the municipal condemnation context is found in Haworth v. City of Forest Grove, Oregon, Case 3:09-cv-01241-HZ (U.S. Dist. Ct. D. Or. Apr. 12, 2011), adopted as modified, Case 3:09-cv-01241-AC (U.S. Dist. Ct. D. Or. Jul. 6, 2011), which incidentally described the need for proof of further facts in subsequent litigation, because the claim was not presented and heard in the prior litigation.

In Haworth, the Haworths got some previously refused discovery from the city late in the state court proceedings, after the condemnation trial had commenced, essentially just before those

proceedings were concluded. During the condemnation trial, the judge persuaded the parties to dismiss without prejudice to see if the matter could be worked out in mediation, with leave of the city to re-institute the case with the parties resuming the positions they had at the time of dismissal. The issue of attorney's fees was to be negotiated by the parties, included in mediation, or determined upon re-institution of the case.

The city agreed, not disclosing that it knew its position was untenable and that it had no intention to follow through with the condemnation.

The matter was not worked out. The city stated it did not intend to pay attorney's fees. The city did not mediate. The city did not re-institute. The Haworths re-instituted and were awarded over \$185,000 in legal fees sometime around 2009.

The Haworths sued in federal court for, among other things, violation of §1983. They were unable to establish issue preclusion based on the previous state court proceedings, in which the discovery was not available, the claim had not been made, and the state court determining the fee petition was only in a position to determine that the city had been "unreasonable," and not in a position to rule that the city had engaged in conduct which was not only unreasonable but also unconstitutional.

The federal court Magistrate Judge, however, recommended that the Haworths were entitled to try to prove the further facts in federal court. The Magistrate Judge recommended denying the condemnor Town's motion for summary judgment on violation of §1983 and the attendant claim for damages for violation of substantive due process.

After the fact, the Haworths had discovered that in executive session, the city council discussed the limited actual need for the Haworth's entire tract for a park and the city's ulterior desire for extra land to sell for private use, while nevertheless publicly making a case for the entire tract. The Haworths discovered discussions planning to whitewash the matter under an opinion "that we can demonstrate that we have a potential need in the not-too-distant future."

One city actor, Jordan, characterized the relevant issues as whether the entire parcel should be designated as parks and recreation land, whether the resolution should include the commercial development clause, and whether a resolution should be adopted in the first place. Another city actor, Holan, Forest Grove Community Development Director, authored a memorandum to the city manager, Sykes, wherein Holan stated that, in his estimate, "there is a 60 percent chance of success to develop a park as envisioned above."

The landowners had offered a portion of their land for free in order to buy peace from the city's efforts to acquire it and in order to be able to plan reliably with respect to remaining land. The Haworths argued that the audiotape of the executive session of the city council and the city's failure to produce it were unlawful because the tape revealed that no public need existed, that no condemnation analysis was ever conducted, and that the city only wished to keep its options open for the future.

This, the Haworths contended, allowed the condemnation action to proceed far further than it would have had the tapes been disclosed in a timely fashion and the City's true intentions been revealed. In failing to disclose the tapes and these matters, the city allowed the presumption to arise that there was a true public need to justify the condemnation action. Instead, the city attempted to condemn more than it needed for an ulterior purpose not disclosed in its resolution and had actively discussed manipulation of the resolution to avoid the disclosure.

The Haworths also described ways in which the city unnecessarily and unjustly delayed the process: the city rejected the Haworths' offer to donate seventy acres only to later abandon the condemnation entirely; having privately determined that the city had no chance of success in the condemnation, the city failed to inform the Haworths that the city had no intention of reinstating the condemnation action and allowed the charade of mediation to continue; and the city disputed the Haworths' entitlement to attorney fees.

Plaintiff has not sued, by named theory, under this or any other tort. However, the allegations of the complaint, liberally construed, could be understood by a factfinder to describe deliberate, concerted action making out causes of action other than permanent injunction of condemnation.

It is not this Court's job to construct every cause of action which the facts may support, but nor is it this Court's province to grant "drastic" relief and summarily dismiss a relatively young case on the face of pleadings when the absence of sufficient allegations or the absence of the ability to amend and add them has not been demonstrated by the moving party.

Mootness in the Law

As indicated above, the case is in commonsense understanding, no moot. Under South Carolina law, the case is not "moot," because the case is in a trial level court rather than on appeal and there is relief which can still be sought and ordered, particularly if the Town maintains that its "abandonment" of the condemnation is a not permanent abandonment, with prejudice.

Applying the Rule 12(c) standard straightforwardly, as this Court is required to do, the Town is taken to be admitting for the purposes of its motion, all 375 paragraphs of the Amended Complaint. Those paragraphs, taken as true, provide a basis for declaratory relief, and for a permanent, across-the-board bar on further action by the Town, as well as for permanent preclusive or injunctive relief on components of what the Town has now sued for twice and concretely threatens to sue for again, and for possible tort liability which has not been eliminated from consideration.

Mootness in federal court is a federal concept. It has been rooted since the 60s in Article III of the United States Constitution, which describes the limited jurisdiction of the federal courts. Article III, setting up the federal judiciary and courts, does not govern state courts, except when they are part

On these and other facts, the Magistrate Judge recommended that summary judgment on a substantive-due-process §1983 claim should be denied.

of the federal judicial system in the course of deciding issues of federal law under concurrent jurisdiction.

Article III of the United States Constitution is not duplicated in Article V of the South Carolina Constitution or anywhere else in the South Carolina Constitution. The South Carolina Constitution does not have a “case or controversy” requirement for jurisdiction of state courts in general.

Nor does the State Constitution have such a requirement or restriction peculiar to appellate courts. Cf. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001)(describing mootness as if a doctrine generally confined to appellate forum).

The orientation of Curtis and other cases toward mootness as only an appellate concept is not surprising. By the time a case is on appeal, not only can there be no amendment (unless amendment is the issue), but also the appeal is likely confined to the issues specifically raised. In contrast, the availability of relief is broader and more flexible at the trial level, both through the availability of amendment (e.g., Rule 15(a)) and through less rigidity in pleading rules (e.g., Rule 8(a)), relief rules (e.g., Rule 54(c)), and other procedural rules. Seldom could a case in the trial level court in South Carolina be properly dismissed as moot, with no defect in pleading being identified, no leave to amend being provided, and the relief to which Plaintiff is entitled not being granted or provided in full.

Unlike federal trial courts, state general trial level courts are not courts of limited jurisdiction. Like state appellate courts, state trial level courts, being courts operating on a local, rather than national scale and being informed by localized familiarity with local policy and issues, also, for that policy reason, are under no compulsion to emulate federal constitutional considerations unless doing so to avoid conflict with rights assured by the federal constitution to individuals or doing so as a part of the federal court system.

For most of this century, state courts have not been thought bound by the “case of controversy” requirement of Article III, even when deciding questions of federal law. William A. Fletcher, The

“Case of Controversy” Requirement in State Court Adjudication of Federal Questions, Calif. Law Rev., Vol. 78, No.2 (Mar. 1990), at 263-264.

The difference between federal mootness and state mootness has received little judicial attention in some state courts, which have generally followed federal principles of justiciability without discussing the root of the federal rule, likely doing so as a general policy matter, or basing the parallel on a longstanding more general concept of justiciability in a lay sense. See Jowers v. S.C.D.H.E.C., 423 S.C. 343, 815 S.E.2d 446 (2018)(citing Byrd v. Irmo H.S., 321, S.C. 426, 468 S.E.2d 861(1996) and collecting cases); and see Anderson v. North Carolina State Board of Elections, 788 S.E.2d 179 (N.C. Ct. App. 2016) (discussing federal constitutional underpinnings and state court policy basis).

By contrast with federal courts, in state courts, the exclusion of moot questions simply represents a form of judicial restraint. Anderson.¹⁶

¹⁶ South Carolina courts have described the concept of “justiciability” in connection with the Declaratory Judgment Act, in a history not explored at length here. There appear to be varying descriptions of whether the concept is one restraining courts and cases in general – and applying only derivatively to the Declaratory Judgment Act – or whether the concept is one specifically based on perceived legislative intent specifically with respect to the Declaratory Judgment Act.

The concept appears to have evolved without explanation into a concept referenced on the rare occasion as one of subject matter jurisdiction, specifically under the Declaratory Judgment Act, as if limiting judicial power only under that Act as a matter of the limits of the statute. The initial concept of “justiciability” under the Declaratory Judgment Act appears to have entered the case law in a context having nothing to do with concreteness of controversy, and to have been thereafter referenced as if the context had been otherwise. See South Carolina Electric & Gas Co v. South Carolina Pub. Serv. Auth., 215 S.C. 193, 54 S.E.2d 777 (1949)(holding the matter not “justiciable” because the acts of defendant sought to be enjoined were authorized by law and within its discretion and no cause of action was stated for coercive equitable relief).

The formulation for justiciability under the Declaratory Judgment Act is stated generally as simply that a justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002), reh. den., cert. den.

The test of sufficiency is not whether complaint shows plaintiff is entitled to declaration of rights according to his theory, but whether he is entitled to declaration of rights at all. Dismukes v. Carletta, 269 S.C. 110, 236 S.E.2d 421 (1977).

While it is true that a declaratory judgment should not deal with moot or abstract matters or constitute a merely advisory opinion, all that is required is that there be an existing controversy, or at least the “ripening seeds of a controversy”: the purpose of the Act is to provide for declaratory

A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. Curtis v. State. In the instant case, a judgment, if rendered, will have definite, practical, and likely final legal effect. Once a case first meets the test of technically or superficially being moot, it is then subject to traditional exceptions. See Sloan v Greenville County, 380 S.C. 528 670 S.E.2d 663 (2008)(skipping the first prong of the inquiry only because the issue was already the law of the case).

The exceptions include exceptions for cases or issues “capable of repetition yet evading review.” See Roe v. Wade, 410 U.S. 113 (1973)(holding challenge to restrictions on abortion could not be mooted by birth of baby or otherwise no longer being pregnant). See also Sloan v Greenville County, 380 S.C. 528 670 S.E.2d 663 (2008) and Byrd v. Irmo High Sch., 321 S.C. 426, 468 S.E.2d 861 (1996). The instant case is such a case.

The exceptions also include “voluntary cessation” by the opponent and “collateral legal consequences or effect on future events” of not completing the litigation. The instant case fits both of these descriptions as well.

Subsumed in the “capable of repetition” exception is the “voluntary cessation” exception. See Curtis v. State (including broad notions of capability of repetition in the rule). If a defendant voluntarily terminates the allegedly unlawful conduct after the lawsuit has been filed but retains the

judgments without awaiting a breach of existing rights. Waller v. Waller, 220 S.C. 212, 66 S.E.2d 876 (1951).

The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purposes intended, namely, to afford a speedy and inexpensive method of adjudicating legal disputes without invoking any coercive remedies of the old procedure, to settle legal rights, and to remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships. Williams Furniture Corp. v. Southern Coatings & Chemical Co., 216 S.C. 1, 56 S.E.2d 576 (1949).

The Declaratory Judgment Act itself contemplates that further litigation may ensue. Notios Corp. v. Hanvey, 256 S.C. 275, 182 S.E.2d 55 (1971). It is always possible that after the granting of declaratory relief, other contingencies and questions may arise. Notios Corp.

power to resume the practice at any time, a court may deem the case nonmoot. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000).

The "heavy burden" of persuading the court that a case has been mooted by the defendant's voluntary actions lies with the party asserting mootness, and the standard for such a determination is a "stringent" one: "if subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior [can]not reasonably be expected to recur." Id. (citing United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 203 (1968)).

This exception is supported by the Supreme Court because, in addition to ensuring that the defendant is not "free to return to his old ways," there is "a public interest in having the legality of the practices settled." United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953) (citation omitted).

In Laidlaw, an environmental group had filed a citizen suit under the Clean Water Act against Laidlaw. Laidlaw was a company that operated a wastewater treatment plant. The citizens alleged that the plant had discharged far more toxic pollutants into a river than it was allowed under terms of a government-issued permit.

However, after the lawsuit began, Laidlaw began to comply with the discharge limit. The Supreme Court held that this case was not moot because it was a "disputed factual matter" whether the company's substantial compliance with its permit requirements, or its closure of the facility in question, which had occurred after the court of appeals had issued its decision, would make "it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur." Laidlaw, 528 U.S. at 193.

A related exception occurs if a decision or lack of decision by the trial court may affect future events, or have collateral consequences for the parties, even if the matter is on appeal and the appellate court cannot give effective relief in the present case. Curtis, 345 S.C. at 568, 549 S.E.2d at 596; accord Sloan, 365 S.C. at 303, 618 S.E.2d at 878. Obviously, when such a case is not on appeal but is in the

trial court and the trial court can give relief, the case is not even superficially moot and the trial court should act.

In the instant case, the Town has already abandoned the easement request twice by some counts and yet has filed suit twice, and the Town has acknowledged an intent to persist in some manner. The parties are still in the trial level court. The circumstances described hereinabove demonstrate that not only is the case not moot, but that even if it were perceived to be superficially so, at least three exceptions to dismissal for mootness apply.

Conclusion

Accordingly, the Town's motion to dismiss for mootness should have been denied. It was also therefore not unreasonable to require the Town, as the party bringing a second suit against Plaintiff and acknowledging the intent to bring a third, to respond to discovery while the case is pending.

Accordingly, the Town's motion for protection from discovery should have been denied as well and the pending discovery should have been ordered to be complied with within 15 days of the entry of the order requiring same.

For these reasons, Plaintiff requests that these corrections to the order be made.

In the alternative, the Court should at least (i) rule as to whether the Town's declared "abandonment" is a permanent abandonment of the right to pursue any future condemnation of Plaintiff's property on the same subject matter, (ii) consolidate the three related cases for purposes of the ruling and further proceedings, including but not limited to fee petitions and appeal, and (iii) rule on what, if any, allegation or lack of allegation in the Amended Complaint caused the case to be moot and provide leave to amend to remove, change, or add such allegation.

Respectfully submitted,

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4/27/21

June 2, 2021 Town memorandum in opposition to Landowners' motions to reconsider

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00932
	)	
Sunset Lodge, LLC,	)	
	)	DEFENDANT’S MEMORANDUM
Plaintiff,	)	IN OPPOSITION TO PLAINTIFF’S
v.	)	MOTION TO RECONSIDER
	)	ORDER OF DISMISSAL
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	

The Defendant, TOWN OF PAWLEYS ISLAND (“Town”), hereby submits the following Memorandum in Opposition to Plaintiff’s Motion to Reconsider Order of Dismissal, as follows. Identical memoranda are being filed in the “Stanton” (2020-CP-22-0930), “Beattie” (2020-CP-22-0931), and “Sunset Lodge” (2020-CP-22-0932) cases.

Responding to grounds 1 through 18 and 20 of Plaintiff’s Motion, the Town asserts that the Order of Dismissal correctly and adequately addressed all relevant and necessary issues, and further craves reference to the terms of the Order and its prior Motion to Dismiss and Memorandum in Support of its Motion to Dismiss. Responding to ground 19 of the Plaintiff’s motion, the Town does not object to consolidation of the three related “Challenge 2” cases. Arguments regarding certain issues included in Plaintiff’s Motion to Reconsider are further discussed below.

ARGUMENTS

1.) The allegations of the Amended Complaint, accepted as true, do not entitle the plaintiff to prospective relief prohibiting future condemnation efforts

The allegations of the Amended Complaint, even if taken as admitted, do not give rise to any issue of fact that would entitle the plaintiff to judgment in the form of prospective relief prohibiting the Town from ever condemning a beach renourishment easement on the plaintiff’s property. Even treating all properly pleaded factual allegations as admitted, the plaintiff has presented no basis for

the Court to permit further amendment of the pleadings to assert a claim for permanent injunctive or other equitable relief. There is no South Carolina authority in support of the proposition that the type of conduct the plaintiff alleges the Town has engaged in, which the plaintiff characterizes as “bad faith,” would give rise to a judicial remedy permanently prohibiting the Town from exercising its power of eminent domain in order to acquire the same or a similar easement from the plaintiff.

The S.C. Supreme Court has made it clear that the power of eminent domain is a fundamental attribute of sovereignty. “The primary right to acquire rests in eminent domain, and that power resides in the state of right and by necessity; the Constitution did not create it, but has only affirmed it (article 14), and limited its exercise (article 1, § 17; article 9, § 20). The exercise of the right resting in the Legislature, that body may prescribe how it shall be exercised.” Paris Mountain Water Co. v. City of Greenville, 110 S.C. 36, 96 S.E. 545, 551 (1918).

That right is based upon the theory that when the state originally granted lands to individuals the grant was made under the implied condition that the state might resume dominion over the property whenever the interest of the public or welfare of the state made it necessary. Its origin antedates constitutional provisions and legislative enactments. It is one of the unwritten laws of all civilized nations. It is justified by the fact that the right of individuals must yield to the public good, and the welfare of the state is paramount to that of the individual citizen. It is a previously existing universal law that lay dormant in the state until proper legal authorities directed the occasion and the mode through which it may become operative.

Haig v. Wateree Power Co., 119 S.C. 319, 112 S.E. 55, 57 (1922).

The General Assembly has authorized municipalities to exercise the power of eminent domain in order to “become the owner of any land or to acquire any easement or right-of-way therein for any authorized corporate or public purpose,” S.C. Code Ann. § 5-7-50, and enacted the Eminent Domain Procedure Act “to create a uniform procedure for all exercise of eminent domain power in this State.” S.C. Code Ann. § 28-2-20. Although the Act specifically contemplates challenge actions, § 28-2-470 (“Proceedings to challenge condemnor's right to condemn”),

nowhere does it provide for permanent judicial prohibition of a certain type of condemnation based on “bad faith” or similar allegations.

Common law considerations of fraud, bad faith, and abuse of discretion in a challenge action relate to the basis for and intentions behind decisions about whether to condemn and what amount of property to condemn. For example, in Atkinson v. Carolina Power & Light Co., the plaintiff alleged that “the defendant's condemnation above the 220 foot elevation contour line, above mean sea level is **cloaked with a scheme to serve its own private purposes, uses and advantages** in that it intends to sell, lease or otherwise control the land surrounding the impounded waters for purposes not connected with the generating of electricity or proper adjuncts thereto[.]” 239 S.C. 150, 161, 121 S.E.2d 743, 748 (1961) (emphasis added).

In Timmons v. S.C. Tricentennial Comm'n, in rejecting a landowner’s challenge to condemnation of property for historical preservation and recreational purposes, the court explained that, “[t]he burden would be upon the landowner to show that **the public use is a sham and a fraud**. . . . If there is no necessity for the use or the condemnation proceeding's purpose is **to cloak some sinister scheme**, then the courts may interfere with the taking, but there is no showing of that kind here.” 254 S.C. 378, 396, 175 S.E.2d 805, 814 (1970) (emphasis added). *See also* Sease v. City of Spartanburg, 242 S.C. 520, 527, 131 S.E.2d 683, 687 (1963) (“The allegations in the complaint that the proposal of the respondent is fantastic, unreasonable, unnecessary, uncalled for and unwarranted are merely conclusions which are not admitted by the demurrer and, at most, merely characterize the facts set forth in the complaint which are insufficient to allege fraud, bad faith, or clear abuse of discretion on the part of the respondent.”).

By contrast, South Carolina law does not entitle a landowner to seek permanent prohibition of a condemnor’s exercise of eminent domain powers based on allegations of past

“misrepresentation” and “bad faith” in the administrative and legal efforts used to pursue an otherwise legitimate effort to condemn property for a proper public use. That type of relief would be vastly different than simply invalidating a specific condemnation notice based on procedural deficiencies (or even fraud, bad faith, or abuse of discretion) in the administrative and legal efforts associated with the notice. While the Plaintiff clearly objects to the wisdom and expediency of the previously sought beach renourishment easement and alleges that the Town has acted poorly in its legislative, administrative, and legal efforts to acquire the easement, there has been no allegation that the fundamental decision to pursue the easement for a stated public use was in fact a “sham” meant to “cloak some sinister scheme” for the benefit of undisclosed private interests.

Furthermore, there is no legitimate indication that the Town is attempting to use successive condemnation actions in order to gain “negotiating leverage” with the plaintiff. The Notice of Abandonment was filed shortly after the issuance of a summary judgment order in favor of the plaintiff in Challenge I, which the Amended Complaint herein alleges involved similar procedural deficiencies as were alleged here. Undersigned counsel also takes note of the statutory stay effected by the filing of the Challenge I action. It is clear, even accepting the allegations of the Amended Complaint at face value, that the Notice of Abandonment was filed in this action in order to avoid unnecessary, duplicative litigation over procedural issues. Accordingly, there is no factual basis for any assertion that the Town’s withdrawal of the Condemnation Notice in this action was part of an effort to harass the plaintiff into submission. To the contrary, the withdrawal was an attempt to minimize the time and expense burden on all parties.

Just as property ownership is perpetually subject to the government’s police powers, S.C. State Highway Dep’t v. Wilson, 254 S.C. 360, 365, 175 S.E.2d 391, 394 (1970); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022-23 (1992), property rights are also inherently subject

to the government's sovereign right to exercise its power of eminent domain, subject to constitutional constraints, at any time. Haig v. Wateree Power Co., 119 S.C. 319, 112 S.E. 55, 57 (1922). The General Assembly deemed it appropriate to protect landowners from the expense of condemnation disputes by, among other things, providing statutory rights to recover attorney fees and costs in the event of a condemnation abandonment or a successful challenge action. These statutory protections satisfy considerations of equity and due process, and clearly disincentive any condemnor from attempting to use "multiplicity of litigation" to gain leverage over a landowner.

Although older cases cited by the plaintiff discussing what are now referred to as "challenge actions", from a time when "the condemnation statutes provide[d] no machinery for determining the right to institute such proceedings," Greenwood Cty. v. Watkins, 196 S.C. 51, 12 S.E.2d 545, 550 (1940), sometimes spoke in terms of "permanent injunction," this was in relation to hypothetical allegations of "bad faith" or "fraud" in the sense of the initiation of a condemnation based on sham, pretextual purposes for a private or other improper benefit. *E.g.*, Atkinson, supra (denying requested relief), Timmons, supra (denying requested relief). These cases speak in general terms and do not purport to authorize judicial prohibition of future similar condemnations based on revised decision-making procedures.

Accordingly, to the extent that the plaintiff has alleged that the withdrawn Condemnation Notice in this action was, for example, based on an inadequately articulated public use or insufficient decision-making process relative to the scope or necessity of the easement, these and similar issues can be corrected (or attempted to be corrected) in any future condemnation effort. These types of alleged deficiencies simply do not give rise to permanent prohibitory relief, as reflected in more modern cases such as Hill v. York Cty. Nat. Gas Auth., 384 S.C. 483, 682 S.E.2d 809 (2009) (holding that condemnor could revise condemnation notice to correct statutory

reference) and Southern Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 305 S.C. 507, 514 – 16, 409 S.E.2d 428, 432 – 434 (Ct. App. 1991), aff'd in part, rev'd in part on other grounds, 311 S.C. 29, 426 S.E.2d 748 (1993). As the Court of Appeals explained in Southern Dev., “[t]he parties have not cited any reported South Carolina case in which a planned condemnation was permanently enjoined by a court because the court found the condemning authority abused its discretion in the selection of a chosen route. . . . We vacate this portion of the master's decision and remand with instructions that the master direct Santee Cooper to re-evaluate its proposed route and the alternate routes proposed by Southern.” Id.

Likewise, the plaintiff’s allegations do not give rise to any basis to allow further amendment of the pleadings seeking judicial determination of certain discrete issues that may be of interest to the parties in any future litigation. In the Amended Complaint, the plaintiff alleges that the Town engaged in various types of procedural missteps, as well as “misrepresentation”, “bad faith”, and “fraud” in the process associated with the first and second condemnation notices. The plaintiff also raises questions about, for example, whether the Town adequately considered and established the necessity of an easement for participation in a long-term federal beach renourishment program. However, judicial determination in this action of the legal effect of any such alleged acts and omissions, even if proven to have occurred, would provide no more than an “advisory opinion”, with applicability to the legal relations between the parties only if and when identical acts or omissions occur in connection with any future condemnation effort. Neither the Eminent Domain Procedure Act nor the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, et seq., provide any basis for such hypothetical litigation.

“To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy.” Thompson v. State, 415 S.C. 560, 565, 785 S.E.2d 189, 191 (2016)

(quoting Sunset Cay, L.L.C. v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004)). “A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” Id. “The Declaratory Judgment Act is not properly invoked for an advisory opinion to be put on ice by the plaintiff for use if the [parties] reach the occasion which might demand it, nor is the Act a license to fish in this judicial pond for legal advice[.]” Orr v. Clyburn, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982) (citing Columbia v. Sanders, 231 S.C. 61, 97 S.E.2d 210 (1957)).

Now that the condemnation notice underlying this action has been abandoned, there is no basis for judicial review of the discrete underlying factual matters involved in the attempted condemnation process for the sake of the hypothetical, contingent possibility that similar facts might be at issue in future litigation. For example, any future condemnation effort may involve a decision making process that includes new or additional scientific/engineering analysis, documentation related to necessity and public use, and legislative deliberation procedures, among other things. Any ruling regarding specific aspects of the prior condemnation efforts underlying the Challenge 1 and Challenge 2 actions would provide nothing more than an advisory opinion in relation to the specific facts of any future condemnation.

Finally, as noted in the Order of Dismissal, although there is one South Carolina appellate opinion finding that a condemnor was permanently estopped from pursuing a power line easement across a specific property, Southern Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 748 (1993), in the case at hand there are no allegations giving rise to a claim for estoppel.

2.) Plaintiff is not entitled to a ruling that the Notice of Abandonment has a preclusive effect on future condemnation efforts

It is unclear what specific relief the plaintiff seeks with respect to its claim that the Notice of Abandonment has some preclusive effect. As noted in the Order of Dismissal, the S.C. Eminent Domain Procedure Act specifically contemplates the power of a condemnor to abandon a condemnation. *See, e.g.*, S.C. Code Ann. §§ 28-2-230(B), -510(C). South Carolina courts have long recognized at common law the right of a condemnor to abandon a condemnation proceeding prior to physical appropriation of the property or the vesting of title. S.C. State Highway Dep't v. Bobotes, 180 S.C. 183, 185 S.E. 165 (1936) (quoting and affirming trial court order) (Condemnation statutes “[do] not confer the right of abandonment; that right is presupposed as existing at common law.”). *See also* S.C. Code Ann. § 28-2-20 (“[T]his act is designed to create a uniform procedure for all exercise of eminent domain power in this State. It is not intended by the creation of this act to alter the substantive law of condemnation[.]”).

While a condemnor may choose to move forward and litigate procedural and other deficiencies alleged by a challenge action plaintiff, it is certainly not required to do so. The condemnor may instead abandon the relevant condemnation notice and, if it deems appropriate, amend the procedure or other relevant aspects in any future attempt. Particularly in a case such as this, where the plaintiff has recently obtained summary judgment against the Town in a related case based on similar if not identical issues, the Town should not be forced to continue litigating over what the plaintiff alleges was a flawed condemnation process. Commonsense dictates that a landowner who challenges a condemnation waives the right to object to abandonment and withdrawal of the condemnation notice.

The Notice of Abandonment was very clear about its purpose: “the Town of Pawleys Island hereby abandons and withdraws the Condemnation Notice underlying this challenge action . . . To

the full extent that such Condemnation Notice and/or its delivery or service initiated a condemnation action, such action is hereby abandoned and withdrawn.” The filing abandoned and withdrew the specific Condemnation Notice and condemnation action at issue in this case.¹ There is absolutely no basis for the plaintiff’s assertion that the abandonment of this specific Condemnation Notice, which the plaintiff alleges was based on a fundamentally flawed process, could somehow preclude the Town from authorizing and pursuing any future condemnation action for a beach renourishment easement. This conclusion is contradicted by what South Carolina law recognizes to be the broad nature of the eminent domain power, Haig, 119 S.C. 319, 112 S.E. at 57, Paris Mountain, 110 S.C. 36, 96 S.E. at 551, and there is no constitutional or legislative enactment that would circumscribe the exercise of the power in this way.

In other words, the Notice of Abandonment withdrew the Town’s right to rely on the specific Condemnation Notice at issue in this matter but did not in any way purport to withdraw the Town’s authority to condemn an easement at a later time based on a separate condemnation notice. The cases cited by Plaintiff in relation to abandonment of easements and other property rights are inapposite, as the Town has not in any way abandoned any easement. Instead, the Town simply undertook to withdraw this second, unfiled condemnation notice and condemnation attempt in response to the Challenge I summary judgment order and other issues raised by the Plaintiff in this matter. To the extent that the plaintiff may wish to argue that the abandonment was somehow undertaken in “bad faith” and should bar a future condemnation attempt, that is a question that will only be ripe for determination at the time that any new attempt is initiated based on the full set of

¹ “‘Condemnation action’ includes all acts incident to the process of condemning property after the service of a Condemnation Notice.” S.C. Code Ann. § 28-2-30(5)

circumstances presented at that time. However, this situation is very clearly not an instances of a “bad faith” abandonment attempting to obtain a more favorable verdict after an adverse jury award.

The Plaintiff provides no support for the broad assertion on page 22 of its motion that, “[h]istorically, instances in which a condemnor does ‘abandon’ . . . a condemnation action generally are instances of permanent relinquishment.” Likewise, the cases cited on page 22 of the Plaintiff’s motion for the proposition that “[t]here are few instances involving ‘abandonment’ as a temporary expedient exercised by the condemnor before promptly resuming similar activities” do not seem to relate to that proposition and do not support Plaintiff’s position.²

Finally, touching on procedural issues raised by the Plaintiff, the “two dismissal” rule under Rule 41(a)(1) has no bearing here, as the Town is not the plaintiff in this challenge action matter and has not asserted or dismissed any “claim” in this challenge action matter. More fundamentally, abandonment of a condemnation notice is a matter addressed by the Eminent Domain Procedure Act and common law, which allow for abandonment without such a limitation, and is therefore outside the scope of the “two issue” rule. S.C. Code Ann. § 28-2-120 (“In the event of conflict between this act and the South Carolina Rules of Civil Procedure, this act shall prevail.”). Regarding the statutory stay of condemnation proceedings, abandonment of a condemnation notice is the opposite of pursuing the condemnation, and is clearly not part of the “proceedings *under* the

² In Miller v. City of Beaver Falls, 82 A.2d 34 (Pa. 1951), the court held a landowner was awarded compensation for temporary loss of use based on a city’s temporary “plotting” of a road across private property on the city map. In In re Certain Land, 70 A.2d 847 (Pa. 1950), the court held that a condemnation could not be abandoned after an ordinance that did not merely authorize but instead effected the condemnation, causing title to vest and entitlement to compensation. In Town of Trumbull v. Eshram, 166 A.2d 844, the court acknowledged the condemnor’s right to abandon a condemnation but never discussed the “permanency” issues. In Hamer v. State Highway Comm’n, 304 S.W.2d 869, the Court held that a landowner’s reliance on highway plans that were subsequently changed to not impact his property did not give rise to a claim for compensation.

Condemnation Notice” as contemplated in the statutory stay provision. § 28-2-470 (emphasis added).

3.) An attorney fee petition by the plaintiff would not prevent the underlying substantive action from being moot

On page 29 of the Motion to Reconsider, the plaintiff seems to take the position that plaintiff’s stated intention to submit a petition for attorney fees somehow renders the action not moot. This position is incorrect. Town’s understanding is that the plaintiff intends to seek an award of attorney fees on the basis of the filing of the Notice of Abandonment. This relates to a procedure for taxing expenses at the end of an action, and does not mean that the underlying substantive issues are still in controversy.

Conclusion

In conclusion, the Defendant Town of Pawleys Island respectfully requests that the Court deny the Plaintiff’s Motion to Reconsider the Order of Dismissal. Plaintiff does not object to an order consolidating this and the two related “Challenge 2” actions. In the event that the Court permits the Plaintiff to move forward with one or more claims in this action, the Town requests that (1) it be permitted 30 days to answer any second amended pleading and (2) it be protected from any pending discovery and that no new discovery shall be served or otherwise initiated by Plaintiff until after service of any second amended pleading.

Respectfully submitted,

s/ William C. Dillard, Jr.
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 Attorneys for Town of Pawleys Island

June 2, 2021

June 14, 2021 Town motion to reconsider Form 4 which stated that the Town had also abandoned its first set of suits (which were, rather, dismissed on summary judgment)

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	Civil Action No. 2020-CP-22-00932
	)	
Sunset Lodge, LLC,	)	<i>Consolidated from Civil Action No's</i>
	)	<i>2020-CP-22-00932</i>
Plaintiff,	)	<i>2020-CP-22-00931</i>
v.	)	<i>2020-CP-22-00930</i>
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
and	)	
	)	
Franklin D. Beattie, as trustee of	)	
The Franklin D. Beattie Preservation Trust,	)	
	)	DEFENDANT'S MOTION TO
Plaintiff,	)	CORRECT OR AMEND ERROR
v.	)	IN JUNE 3, 2021 ORDERS
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
and	)	
	)	
M. Baron Stanton,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	

TO: THE PLAINTIFFS ABOVE NAMED AND THEIR ATTORNEY, M. BARON STANTON, ESQ.

YOU WILL PLEASE TAKE notice that the Defendant, Town of Pawleys Island, by and through its undersigned attorney, will within ten (10) days after service hereof or as soon thereafter as counsel may be heard, move the Court for an order or orders amending the June 3, 2021 Form 4 Orders entered by the Honorable Benjamin H. Culbertson separately in each of the above

referenced matters (“the Orders”) for the purpose of correcting a clerical mistake pursuant to Rule 60(a), SCRCP, or in the alternative, as an amendment to the Orders pursuant to Rule 59(e), SCRCP. This motion is made on the following grounds:

a.) The Order consolidated the three above referenced actions and denied the Plaintiffs’ motions to reconsider prior orders of dismissal. The final line of text in the “Statement of Judgment by the Court” in each of the Orders states that “[t]he **“existing”** and “new” **condemnation notices have been abandoned** by the defendant and the issue of litigation costs remains pending.” (emphasis added).

b.) The “existing condemnation notices”, as discussed in the pleadings, refer to condemnation notices underlying prior challenge actions involving identical parties and bearing Civil Action No.’s 2020-CP-22-0600, -0601 and -0602. These “existing” notices were not abandoned but, instead, quashed pursuant to summary judgment orders in those actions entered by the Honorable Michael G. Nettles on January 20, 2021 and subsequently amended on April 5, 2021. Specifically, Judge Nettles’s orders in those prior actions stated in the “Conclusion” paragraphs, in reference to what are referred to here as the “existing” condemnation notices, that:

“The Town’s Condemnation Notice is quashed and the action commenced by it is hereby declared ended without prejudice in the respect described hereinabove.”

c.) On information and belief, the reference in the Orders to abandonment of the “existing” notices, which did not occur and has not been asserted by any party to have occurred, was the result of a clerical error. “A clerical error is a mistake or omission by a clerk, counsel, judge or printer, which is not the result of exercise of judicial function.” Ex parte Strom, 343 S.C. 257, 264, 539 S.E.2d 699, 702 (2000) (“Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time.”).

d.) In order to avoid any future confusion, whether on the part of an appellate court or otherwise, Defendant respectfully requests that the relevant portion of the Orders be corrected and/or amended to state as follows, or words to the same effect:

“The ‘existing’ condemnation notice has been quashed in a separate challenge action, the ‘new’ condemnation notice has been abandoned by the defendant and the issue of litigation costs remains pending.”

Based on the foregoing, the Defendant respectfully requests that the Court correct and/or amend the Orders as set forth above. This motion may be supported by a memorandum of law, as well as the South Carolina Rules of Civil Procedure, and oral arguments by counsel.

Rule 11 Certification

Undersigned counsel hereby certifies that further consultation with opposing counsel regarding the matter herein would have served no useful purpose.

Respectfully submitted,

s/ William C. Dillard, Jr.
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Attorneys for Town of Pawleys Island

June 14, 2021

July 22, 2022 Landowner motion to reconsider Form 4 marking case as “ended”

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2020-CP-22-00932
	)	
Sunset Lodge, LLC,	)	CIVIL ACTION NO. 2020-CP-22-00932
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	
	)	
Franklin D. Beattie, as trustee of	)	CIVIL ACTION NO. 2020-CP-22-00931
The Franklin D. Beattie	)	
Preservation Trust,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	
	)	
M. Baron Stanton,	)	CIVIL ACTION NO. 2020-CP-22-00930
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	

MOTION TO ALTER/AMEND/CORRECT/RECONSIDER
FORM 4 ORDER MARKING CASE ENDED

Plaintiffs move the Court to amend its Form 4 Order entered July 12, 2022 in these consolidated cases to check the box for “does not end the case.”

The grounds for this motion are that correction of this clerical mistake is needed. The subject order denied a motion of the Town to correct a previous Form 4 entered on June 3, 2021. The June 3, 2021 order denied the plaintiffs' motions to reconsider the Court's previous dismissal of the principal case. Although a final dismissal may be interpreted as "ending the case" in chief and not affecting the taxing of costs and attorney's fees, the June 3, 2021 order expressly noted that "the issue of litigation costs remains pending" and checked the box, "does not end the case."

When the Court entered the subject July 12, 2022 order, declining to change the June 3, 2021 order, the Court checked the wrong, different, box, for "ends the case." The issue of litigation costs remains pending. The Town's June 14, 2021 motion to alter or correct the June 3, 2021 order has been pending until recently and fee proceedings in the related cases have occurred and are now on appeal.

In an abundance of caution, the plaintiffs request that the Court enter a new Form 4 with the "does not end the case" box checked instead.

Respectfully submitted,

s/M. Baron Stanton

M. Baron Stanton (Bar#7970)

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Attorney for Sunset Lodge, LLC, Franklin D. Beattie, as Trustee, and for M. Baron Stanton, pro se

7/22/22

September 7, 2022 stipulation of parties to resolve subject of Town's appeal of July 12, 2022 Form 4 which stated that prior cases had also been abandoned

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	Civil Action No. 2020-CP-22-00932
	)	(Consolidation of below Civil Actions)
Sunset Lodge, LLC,	)	
	)	
Plaintiff,	)	2020-CP-22-00932
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	
and	)	
	)	
Franklin D. Beattie, as trustee of	)	
The Franklin D. Beattie Preservation Trust,	)	
	)	
Plaintiff,	)	2020-CP-22-00931
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	
and	)	
	)	
M. Baron Stanton,	)	
	)	
Plaintiff,	)	2020-CP-22-00930
v.	)	
	)	
Town of Pawleys Island,	)	
	)	
Defendant.	)	
_____	)	

STIPULATION REGARDING JUNE 3, 2021 FORM 4 ORDERS

WHEREAS, on April 22, 2021, the Circuit Court, by the Honorable Benjamin H. Culbertson, separately in each of these actions, entered an order granting the Town's March 5, 2021 motion for judgment on the pleadings and the Town's March 3, 2021 motion for protection from discovery;

WHEREAS, on April 28, 2021, the plaintiffs each filed a motion to reconsider the April 22, 2021 order;

WHEREAS, on June 3, 2021, the Honorable Benjamin H. Culbertson, separately in each of the actions, entered a Form 4 order (“the June 3 Form 4 Order(s)”) denying the motion to reconsider;

WHEREAS, the plaintiffs subsequently commenced an appeal of the April 22, 2021 orders and the June 3 Form 4 Orders;

WHEREAS, the June 3 Form 4 Orders incorrectly state or indicate that, prior to serving a February 10, 2021 formal notice of abandonment in the instant cases, of the underlying Condemnation Notices dated June 9, 2020 served in October 2020, the Town of Pawleys Island also separately “abandoned” (impliedly by separate formal notice of abandonment) previous condemnation notices dated June 9, 2020, which it had served in June or July 2020 and which were the subject of prior challenge actions, Civil Action Numbers 2020-CP-22-00600, 2020-CP-22-00601 and 2020-CP-22-00602¹;

WHEREAS, these previous condemnation notices were referred to in the instant actions as “the Existing Notices,” as opposed to the subsequent condemnation notices which prompted the commencement of the instant challenge actions, and which are referred to in the instant challenge actions as “the New Notices”;

WHEREAS, the language of the February 10, 2021, formal Notice of Abandonment in the instant cases referred expressly to abandonment of the “New Notice[s]”;

¹ Specifically, the June 3 Form 4 Orders include a statement that “[t]he ‘existing’ and ‘new’ condemnation notices **have been abandoned** by the defendant” (emphasis added).

WHEREAS, the “Existing Notices” were instead quashed on the Plaintiffs’ motions for summary judgment by orders entered by the Honorable Michael G. Nettles on January 20, 2021, such orders being subsequently amended on April 5, 2021;

WHEREAS, in an abundance of caution, the Town of Pawleys Island moved to reconsider the incorrect statement in the June 3 Form 4 Orders and, upon receiving an order indicating that the Circuit Court determined it had lost jurisdiction to make correction, also appealed those Orders;

WHEREAS, neither the landowners’ Complaint, nor the landowners’ Amended Complaint, nor any of the landowners’ motions or briefs in Circuit Court, nor the landowners’ Appellants’ Brief, nor the landowners’ Appellants’ Reply Brief in the instant cases asserts that the Existing Notices were formally “abandoned” by the Town prior to February 10, 2021 by the Town filing a notice of abandonment, as opposed to being quashed by summary judgment, and the plaintiffs herein have never taken the position that the Existing Notices were abandoned by the Town filing or serving a formal notice of abandonment prior to February 10, 2021 referring to those Existing Notices; and

WHEREAS, the parties wish to assure that the Town is not bound by the statement in the June 3 Form 4 Orders to the extent it denotes service, before February 10, 2021, of a separate formal notice of abandonment expressly referencing the “Existing Notices,” which were dated June 9, 2020 and served in June or July 2020; namely, the parties wish to acknowledge that no separate formal notice of abandonment of the “Existing Notices” was filed or served prior to the February 10, 2021 formal notice of abandonment referencing the condemnation notices dated June 9, 2020 served in October 2020, and the parties wish to dispense with the need for appeal or briefing, and the plaintiffs agree to accommodate that objective:

NOW THEREFORE, the Plaintiffs and Defendant, through undersigned counsel, hereby stipulate that, notwithstanding the above referenced statement in the June 3 Form 4 Orders, the “existing” condemnation notices referred to in such orders (i.e., the condemnation notices underlying the prior challenge actions involving identical parties and bearing Civil Action Numbers 2020-CP-22-00600, -00601 and -00602) were not abandoned by the Defendant filing or serving a formal notice of abandonment referencing such “Existing Notices” prior to the February 10, 2021, notice served in the instant cases, but were instead quashed on the Plaintiffs’ motions for summary judgment by orders entered by the Honorable Michael G. Nettles on January 20, 2021, such orders being subsequently amended on April 5, 2021.

WE SO STIPULATE:

s/ William C. Dillard, Jr.

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Franklin D. Beattie,

as trustee of The Franklin D.

Beattie Preservation Trust, and

pro se for M. Baron Stanton

[All signatures included with written consent]

September 7, 2022

October 7, 2022 order of Court of Appeals dismissing, by
agreement of the parties, the Town's appeal of July 22, 2022 Form
4

The South Carolina Court of Appeals

Sunset Lodge, LLC, Respondent,

v.

Town of Pawleys Island, Appellant.

and

Franklin D. Beattie, as trustee of The Franklin D. Beattie
Preservation Trust,

v.

Town of Pawleys Island, Appellant.

and

M. Baron Stanton, Plaintiffs,

v.

Town of Pawleys Island, Appellant.

Appellate Case No. 2022-001154

The Honorable Benjamin H. Culbertson

Georgetown County

Trial Court Case No. 2020CP2200932, 2020CP2200931,
2020CP2200930

FILED
GEORGETOWN COUNTY, S.C.
2022 OCT -7 AM 11:33
ALMA Y. WHITE
CLERK OF COURT

ORDER

The parties have filed a stipulation of dismissal pursuant to Rule 260(b) of the

South Carolina Appellate Court Rules (SCACR). Accordingly, this appeal is dismissed. The remittitur will be sent as provided by Rule 221(b) of the SCACR.

FOR THE COURT

BY V. Claire Allen
CLERK

Columbia, South Carolina

FILED
Sep 14 2022

cc:

M. Baron Stanton, Esquire

William Clayton Dillard, Jr., Esquire

Norwood David DuRant, Sr., Esquire