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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY COURT OF COMMON PLEAS

R. LAWTON MCINTOSH, TENTH JUDICIAL CIRCUIT COURT JUDGE

C. A. NO. 2015-CP-36-120

RECEIVED

MAY 23 2016

APPELLATE CASE NO.: 2016-001037

SC Court of Appeals

Oien Family Investments, LLC, Appellant

v.

Piedmont Municipal Power Agency, Respondent

**NOTICE OF MOTION AND
MOTION TO LIFT STAY OR
REQUIRE BOND**

YOU WILL PLEASE TAKE NOTICE that Respondent's attorney, O. W. Bannister, does hereby move the Court for an Order lifting the stay granted on May 18, 2016 or to require bond. The grounds for this motion are as follows:

The Appellants, Oien Family Investments, LLC (hereafter "Oien") appealed the Order of the Honorable R. Lawton McIntosh rejecting the Oien complaint challenging the Respondent Piedmont Municipal Power Agency's (hereafter "PMPA") condemnation of a right of way across the Oien's property in order to construct a power line to serve the households and businesses in the City of Newberry.

GENERAL STATEMENT

The condemnation of private property for public use is a legislative function provided for in the South Carolina Eminent Domain Procedure Act, §25-2-10 through 28-2-510. Under this Act, one method of condemnation is to present the landowner with a

Notice of Condemnation of the specific property to be condemned and an offer of compensation. §28-2-220. In the event the landowner does not accept the offered compensation within thirty days, the condemnor may file the Notice of Condemnation with the clerk of court and deposit the offered compensation with the clerk. Notice of the filing with the Court must be served on the landowner. After the filing of the notice of condemnation the condemnor may then take possession of the property or interest in the property. §28-2-230. A trial is held later on the appropriate compensation. §28-2-240.

Section 28-2-470 grants the landowner the right to challenge the condemnor's right to condemn the property by filing a separate action in the Court of Common Pleas in the county where the condemned property is located. A challenge by the landowner under §28-2-420 stays the condemnation until the disposition of the action.

LOWER COURT STANDARD OF REVIEW

A challenge to a condemnation action by a landowner is in equity, Georgia Dept. of Transp. v. Jasper County, 355 S.C. 631, 586 S.E.2d 853 (2003), Footnote 3 citing with approval 305 S.C. 507, 409 S.E.2d 428 (Ct. App. 1991) aff'd as modified 311 S.C. 29, 426 S.E.2d 748 (1993).

The burden is on the landowner who challenges the right to condemnation. Sease v. City of Spartanburg, 242 S.C. 520, 131 S.E.2d 683 (1963).

The inquiry of the court in a challenge to a condemnation is limited to fraud, bad faith or a clear abuse of discretion. Bookhart v. Central Electric Power Company Cooperative, 222 S.C. 289, 72 S.E.2d 576 (1952).

PROCEDURAL HISTORY

PMPA served its Notice of Condemnation on Oien on February 9, 2015. On

March 6, 2015, Oien filed in the Court of Common Pleas for Newberry County its action challenging the condemnation. Oien Family Investments, LLC v. Piedmont Municipal Power Agency, 2015-CP-36-00120.

Oien's challenge to the condemnation was heard by the Honorable R. Lawton McIntosh on March 28, 29, 2016. On May 2, 2016 Judge McIntosh filed his Order denying Oien's challenge. Oien filed Motions to Reconsider on May 6, 2016. On May 16, 2016 Judge McIntosh filed an Amended Order denying Oien's relief from the condemnation. The Court also rejected all Oien's Motions to Reconsider.

On May 17, 2016 PMPA filed with the Clerk of Court for Newberry County its Notice of Condemnation. Piedmont Municipal Power Agency v. Oien Family Investments, LLC, 2016-CP-36-00239.

On May 18, 2016 Oien filed its Notice of Appeal from Judge McIntosh's Amended Order and moved for a stay which was granted by the Court of Appeals on May 18, 2016.

ARGUMENT

All condemnation proceedings are stayed until the disposition of a challenge under §28-2-470. Oien interprets the words of that section, "disposition of the action" to include appeals.

Oien's interpretation should be rejected. Had the legislature intended to stay condemnation actions until all appeals were exhausted, it would have said so.

As a practical matter Oien's interpretation would wreak havoc to condemnations. A single disgruntled landowner could tie up a vital public works project for years by simply challenging the condemnation and then appealing the denial. Landowners could

legally extort more than fair market value for their property by appealing challenges on vital projects.

This Court should not enlarge the term “disposition” to include appeals.

Oien cites Rule 241, S.C.R.A.P. for the application of an automatic stay to the relief granted in the appealed Order. Because Oien was denied an injunction against the proposed condemnation, Oien should not be granted that injunction by the simple expedient of appealing. The introduction to Rule 241 states that, “As a general rule...” an appeal stays the relief ordered. In condemnation cases the general rule should not apply.

An exception to the general rule is found in subparagraph (b)(4) of Rule 241. That exception states that judgments directing the sale or delivery of possession of real property are not stayed. The denial of an injunction prohibiting the condemnation of property is akin to ordering the possession of property be allowed. Stearns Bank v. Glenwood Falls, 375 S.C. 423, 653 S.E.2d 274 (2007).

In the event this Court accepts Oien’s argument regarding the meaning of “disposition” as used in §28-2-470 or that Rule 241 S.C.R.A.P. applies, PMPA asserts it is entitled to have Oien enter into a substantial bond to reimburse the City of Newberry for the costs it incurs by the delay in construction of its power line pursuant to Rule 62(c), S.C.R.C.P.

By challenging the condemnation Oien sought an injunction. The lower court denied the injunction. Oien now seeks a stay of the condemnation during its appeal. Thus, Rule 62(c) affords the Court the opportunity to require Oien to post a bond to secure the rights of PMPA and the City of Newberry which will benefit from the

completion of the transmission lines.

It is suggested that the bond be at least \$1,000,000.00.

Finally, the Court should recognize that this current stay is of a legislative action.

As was said in Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961) p. 157, 158.

By §24-12 of the 1952 Code of Laws (now §28-2-10-510) the Legislature of South Carolina has expressly delegated to the Respondent company, and all others similarly engaged, the power of eminent domain. In the exercise of that power those to whom it has been delegated represent the sovereignty of the state, and are empowered to decide, subject only to supervision of the courts to avoid fraudulent or capricious abuse, what and how much land of the citizens they will condemn for their purposes.

PMPA requests the stay of its condemnation be lifted. If not lifted, PMPA requests that Oien be required to post a sufficient bond to reimburse PMPA and the City of Newberry for all monetary losses occasioned by the appeal.

Respectfully submitted,



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Attorneys for Respondent

May 20, 2016

Other Counsel of Record:

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PROOF OF SERVICE

The undersigned hereby certifies that on May 20, 2016 the Respondent's Motion to Lift Stay or Require Bond in the above-captioned matter was served upon counsel of record by placing a copy of same in the U.S. Mail, sufficient postage affixed thereto, addressed as follows:

Thomas H. Pope, III, Esq.
P.O. Box 190
Newberry, SC 29108



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SC Court of Appeals

May 20, 2016

V. Claire Allen, Deputy Clerk
S.C. Court of Appeals
P. O. Box 11629
Columbia, SC 29211

**Re: Oien Family Investments, LLC vs. Piedmont Municipal Power Agency, LLC
Appellate Case No.: 2016-001037**

Dear Ms. Allen:

Enclosed please find the original and six copies of the Respondent's Motion to Lift Stay or Require Bond in connection with the above-referenced matter. Also enclosed is our Proof of Service and check in the amount of \$25.00.

By copy of this letter I am providing of copy of this Motion to opposing counsel.

Please let me know if you need anything further from our office.

Yours truly,

BANNISTER, WYATT & STALVEY, LLC



O. W. Bannister

OWB/tjc

Enclosures

cc: Thomas H. Pope, III

NEOPOST

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