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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

M. Baron Stanton, ...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

Sunset Lodge, LLC, ...Appellant,

v.

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

INITIAL APPELLANTS' BRIEF

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4. Did the Circuit Court err in overlooking that the facts of the sole pleading to be considered by the Circuit 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?

5. Did the Circuit Court err in overlooking that the Amended Complaint demonstrates the antithesis of "abandonment" by the Town of the matters complained of, and the antithesis of mootness -- namely that the Town is already on its second suit 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 these matters in a third suit or subsequent suits?

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13. Did the Circuit Court err in overlooking that the Amended Complaint challenges condemnation not only presently, but also prospectively, and challenges not only the proposed condemnation in its entirety but also various proposed unnecessary features of the condemnation?

14. Did the Circuit Court err in overlooking the prudential concern that dismissal of the landowner-plaintiff's challenge action as moot at the Town's behest could prejudice the landowner-plaintiff with respect to not only loss of sunk litigation expense, repeated additional litigation expense, delay and loss of evidence, but also statutes of limitation, including the short statute of limitations under the Tort Claims Act, in addition to subjecting the landowner-plaintiff to a continuing cloud on the landowner-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?

15. Did the Circuit Court err in overlooking the prudential concern that dismissing the suit "without prejudice" does not protect the landowner-plaintiff or afford the landowner-plaintiff relief even if to do so allows the landowner-plaintiff to immediately re-file a similar suit for permanent injunctive relief and other remedies, in that there might be a question whether the re-filed suit would stays a third condemnation suit by the Town, such that if the Town did thereafter file a third condemnation suit, the landowner-plaintiff would then have to file a similar challenge suit a <u>fourth</u> time in order to stay the condemnation until the challenge were resolved?

16. Does the Circuit Court's ruling err in presupposing that Plaintiff can simply 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?

17. If the Town's stated "abandonment" was to be given effect as a true abandonment, was it error for the Circuit Court not make a ruling that the effect of the abandonment was to preclude the ability of the Town to sue for a third time for condemnation of the same or a substantially similar interest in property?

18. Was the Town's stated "abandonment" a true abandonment, thus precluding the

ability of the Town to sue for a third time for condemnation of the same or a substantially similar interest in property?

19. Was it error for the Circuit Court to allow the Town to temporarily abandon the condemnation on terms designated by the Town before the challenge case was resolved, without the consent of the landowner-plaintiff?

20. Was it error for the Circuit Court to allow the Town to temporarily abandon the condemnation on terms designated by the Town in violation of the stay imposed by S.C. Code Ann. §28-2-470, without the consent of the landowner-plaintiff?

21. Was the Circuit Court's grant of the defendant Town's request to have the challenge case dismissed and curtail discovery upon the Town's merely making a statement that the Town intends to temporarily cease the acts the landowner-plaintiff sought to redress in the lawsuit an error, and an abuse of discretion?

22. If the Circuit Court's ruling that the challenge case was moot was based on the Town's unilaterally declared "abandonment" of the challenged condemnation, was it error for the Circuit Court not to rule that the abandonment was permanent with respect to future condemnations on the same subject matter for purposes of res judicata effect, law-of-the-case effect, or judicial estoppel effect in any future actions?

23. If the Circuit Court's ruling that the challenge case was moot was based on the Town's unilaterally declared "abandonment" of the challenged condemnation being only temporary abandonment, was it error for the Circuit Court to rule that temporary relief from a matter subject to repetition renders the matter complained of moot?

24. Did the Circuit Court, in granting "judgment on the pleadings," err 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?

25. If the Circuit Court based judgment on the pleadings on a perception that the Amended Complaint did not contain a separate allegation and prayer that permanent injunction be granted against all or stated attributes of the Town's present or future condemnation attempts, did the Circuit Court err in not allowing the landowner-plaintiff to supply that allegation and prayer?

26. Since the Circuit Court's ruling on the Town's motion for protection from discovery was based on determining to dismiss the case, was it error for the Circuit Court to grant the motion?

STATEMENT OF THE CASE

Consolidated on appeal are three suits which include challenges to three condemnation suits by the Town of Pawleys Island.

Pursuant to a motion of the Town for judgment on the pleadings, these three challenge suits by the landowners were dismissed by the Circuit Court as moot. Accordingly, the Circuit Court also granted the Town's motion for protection from pending discovery by the landowners.

In June 2020, the Town commenced the first three of six condemnation suits. Therein, the Town sought to impose upon the lots of three oceanfront beach house owners, easements for perpetual public use, and for the Town's right to perform "beach renourishment," among other things.

Each suit by the Town was against a different homeowner-landowner. The landowners were Sunset Lodge, LLC, Franklin D. Beattie, and M. Baron Stanton.

In July 2020, each of the landowners sued in a separate suit pursuant to S.C. Code Ann. §28-2-470 (part of the S.C. Eminent Domain Procedure Act ("the Act")) to stop the attempted condemnation. These were the first three of six challenge suits. The landowner-plaintiffs filed a

motion for summary judgment on August 21, 2020, requesting that the condemnation be quashed.

On October 16, 2020, while the first three condemnation suits and the first three challenge suits were pending, the Town sued each of the three landowners again. The Town again sought to take easements for perpetual public use, and for the right of the Town to perform "beach renourishment," among other things. These were the second three of six condemnation suits by the Town.

On November 12, 2020, each of the three landowners then commenced an additional separate suit against the Town. These were the second three of six challenge suits, the three cases on appeal herein, the plaintiffs in which are the Appellants herein.[1] These second three challenge suits included a prayer to stop the attempted condemnation.

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[1] None of the six condemnation suits have case numbers, because under the Act, a condemnation action is commenced by service, rather than by filing, and if a challenge suit is commenced, all proceedings in the condemnation action are stayed, and filing of the condemnation suit with the court does not occur unless the challenge is unsuccessful. The party bringing the condemnation action is the "condemnor," which is the functional equivalent of the plaintiff. The party sued in the condemnation action is the "landowner," which is the functional equivalent of the defendant.

In a challenge action, which must be brought as a separate suit by the landowner, the landowner is the plaintiff. The landowner-plaintiffs in the first 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. These suits are sometimes referred to in the record, and herein, as the "Challenge I cases."

The landowner-plaintiffs in the second three challenge 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. The second three challenge suits, which are the cases on appeal herein, are sometimes referred to as the "Challenge II cases."

Unless a difference is noted, the pleadings, motions, discovery, orders and other papers in the first three challenge cases were handled the same way. Reference to an item in the Record on Appeal herein is generally a reference to a paper in in the Sunset case and is intended to include a reference to the corresponding item in each of the first three challenge suits.

Unless a difference is noted, the pleadings, motions, discovery, orders and other papers in the second three challenge cases were also handled the same way. The order appealed from

On January 8, 2021, the Circuit Court preliminarily granted summary judgment against the Town in a "Form 4" order in the first three challenge suits, and on January 20, 2021, entered a full-length order. The order quashed the first condemnation attempt.

On February 10, 2021, the Town filed a paper in the second three challenge suits stating that the Town was giving notice of abandonment of its second three condemnation suits. The Town later declared in papers and arguments that it did so without prejudice to suing the landowner-plaintiffs for condemnation again.

On March 3, 2021, in the instant second three challenge suits, the Town filed motions for protection from then pending discovery sought by the landowner-plaintiffs. On March 5, 2021, in each of the second three challenge suits, the Town then filed a motion for judgment on the pleadings under Rule 12(c), SCRCP. Therein, the Town asserted that the pleadings established that the second three challenge suits were moot.

On April 1, 2021, the Circuit Court heard the motions. The court granted the March 3 and March 5 motions on April 22, 2021. The court dismissed, as moot, the second three challenge cases without prejudice. The order granting protection from discovery was based upon the fact that the case was being dismissed.

On April 28, 2021, the landowner-plaintiffs each filed a motion to reconsider. These motions were heard June 3, 2021. On June 3, the Circuit Court denied these motions and each landowner-plaintiff timely served notice of appeal on July 2, 2021.

SCOPE AND STANDARD OF REVIEW

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reads the same in each case. Reference to an item in the Record on Appeal herein is generally a reference to a paper in in the Sunset case and is intended to include a reference to the corresponding item in each of the second three challenge suits.

The Appellants herein have attempted to write one brief that reads the same for each Appellant, drawing distinctions where necessary. Therefore, many singular references in the brief will be to the "landowner-plaintiff," rather than to the Appellant or Appellants by name.

"[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Falk v. Sadler, 341 S.C. 281 at 287, 533 S.E.2d 350 at 353 (Ct. App. 2000).

When considering a motion under Rule 12(c) for judgment on the pleadings, the Court must regard all properly pled 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.

The standard is thus the same as that for a Rule 12(b)(6) motion. 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), and see Rule 12(c), SCRCP ("After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings").

Thus, no disputed allegation that the defendant affirmatively pleads to benefit itself is accepted in considering a Rule 12(c) motion, all inferences which are favorable to the plaintiff are indulged, and the plaintiff is under no requirement to negate any allegation of the defendant in the course of the motion.

A complaint attacked under a 12(c) motion is sufficient if the complaint 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.

As in the practice under Rule 12(b)(6), if the challenged pleading, when viewed under the required standard, still does not support any relief on any theory pled or not pled, 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 automatically 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.

Determinations of questions of law are reviewed de novo. Samuel v. Mouzon, 282 S.C. 182, 314 S.E. 2d 612 (Ct. App. 1984). An appellate court applies a de novo standard of review to determine whether, for example, an action was moot when it was considered at the trial court level. "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." McKoy v. McKoy, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

ARGUMENT

I. The following additional uncontested facts are relevant to the issues presented for review and make it self-evident that the case was far from moot. (Issues 1, 2, 4, 5, 7, 9-13, 21 and 24-26)

As set forth in "Scope and Standard of Review," above, the standard of decision calls for the allegations of the 375-paragraph Amended Complaint of the landowner-plaintiff to be accepted as true, and to not be confined to the specific relief requested or to the labels used to describe relief. The defendant's allegations are not accepted as true and the landowner-plaintiff has no duty to rebut them.

It is uncontested that the Amended Complaint states what is actually written in it. I.e., the pleading does not necessarily allege what the defendant or the Circuit Court may have inferred or stated in characterizations or attempted summaries. Accordingly, the following important additional background, derived from the pleading, must be considered as true and uncontested for purposes of this appeal.

Under the standard of decision, this Court should view these additional facts in light of the issues they present and the types of present or prospective relief to which they could entitle the pleader.

The instant case arises from the second suit by the Town against the landowner-plaintiff.

Previously, in June 2020, the Town commenced the first statutory condemnation action against the landowner-plaintiff. (Am.Cmplt. ¶¶81-179 (describing attributes of each of three suits).)

In 2019, before being sued for condemnation for the first time, the landowner-plaintiff had already offered the Town a "beach renourishment easement" at no charge, but the Town sought an easement with terms and scope the landowner-plaintiff believed to be unreasonable. (E.g., Am.Cmplt. ¶¶23-35, 38-41 and 75.)

Later in 2019, the Town eventually ceased any request for any easement. The Town stated publicly that no easement would be necessary for its renourishment project. The Town then began placement of 1.1 million cubic yards of sand on 2.7 miles of beach. (Am.Cmplt.

¶¶40-51.) The Town completed the placement of all sand for the project by the end of February 2020. (Am.Cmplt. ¶51.)

The Town thereafter again sought an easement with the terms and scope the landowner-plaintiff believed to be unreasonable. (Am.Cmplt. ¶¶52-56.) The landowner-plaintiff again declined to grant an easement with the terms and scope the landowner-plaintiff believed to be unreasonable. (See Am.Cmplt. ¶¶52-59.)

On May 18, 2020, the Town Council held a meeting, but did not identify any of the concerns of any of the three landowner-plaintiffs. (Am.Cmplt. ¶¶58-80.) The Town Council did not discuss the detailed terms of the proposed easement. (Id.) The Town Council was presented with a recitation simply that "for whatever reason, they would not grant the easement." (Id.)

In the meeting, the Town Council authorized condemnation of an easement simply to put sand on the beach. (Am.Cmplt. ¶¶58-80.)

Because the Act requires an appraisal report, the Town then obtained an appraisal report for use in the condemnation. (Am.Cmplt. ¶100.)

In late June 2020, the Town sued to condemn. (Am.Cmplt. ¶81.)

In this first suit, the Town sought to condemn, among other things, a right of public use and access over a designated oceanfront portion of the landowner-plaintiff's oceanfront land. (E.g., Sunset Am.Cmplt. ¶88.)

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 the landowner-plaintiff from doing things on the designated portion of the landowner-plaintiff's property. (See, e.g., Am.Cmplt. ¶89-93 (recounting provisions for limiting the landowner-plaintiff's access to the landowner-plaintiff's own 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 the landowner-plaintiff's land was just a few feet away from the seaside door of the landowner-plaintiff's oceanfront house. (See id. ¶87.)

For this interest in land on the oceanwardmost part of the landowner-plaintiff's oceanfront property, the offer of payment stated by the Town in the condemnation papers was zero ($0.00) dollars, based on the report procured by the Town from an appraiser. (Am.Cmplt. ¶94.) The Town had not given the "perpetual public access and use" terms or any other written terms of the easement to the appraiser and the Town had not informed the appraiser of the terms verbally. (Am.Cmplt. ¶¶101-112.)

Within 30 days of being sued this first time by the Town, the landowner-plaintiff separately filed an approximately 169-paragraph suit (the Challenge I case) against the Town pursuant to statute, to challenge on numerous stated bases, the power and ability of the Town to condemn.[2] (Am.Cmplt. ¶180.) 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]

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

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[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 EDPA" or "the Act"). As noted, the Town similarly sued the two other landowners, each of whom filed a similar Challenge I case.

[3] The South Carolina Declaratory Judgment Act provides:

> **Courts of record may declare rights, status and other legal relations.**
> 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.

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 (attached as Exhibit A to original Complaint in Challenge II, and incorporated by reference pursuant to Rule 10(c), SCRCP into Challenge II Amended Complaint at ¶182).)

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 Challenge I Amended Complaint, there were also allegations as to the Town making false certifications in its pleading, which, in a condemnation action, is the condemnation notice. The Amended Complaint in the Sunset and Beattie 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 in Sunset "600" case and Beattie "601" case.) [4]

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.)

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

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[4] 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. There, 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. (Stanton Challenge I Amended Complaint ¶172.)

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.)

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).)

On August 3, 2020, 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. (See Ch.II Am.Cmplt. ¶214.)[5]

While the first condemnation action by the Town was stayed, and about a month and a half after the filing of the landowner-plaintiff's August 21, 2020 motion for summary judgment and supporting affidavit in the Challenge I case, the Town Council, on October 12, 2020, held another meeting. (Ch.II Am.Cmplt. ¶224-226.) In the meeting, a resolution to be passed by Council was on the agenda. (Ch.II Am.Cmplt. ¶227.) The Council agreed that the Town Attorney, Town Administrator, and one member of Council could complete the incomplete resolution of the Council after the meeting. (See Ch.II Am.Cmplt ¶¶228-351 (recounting in detail, verbatim exchanges at the meeting and contents of the incomplete resolution and resolution completed after the meeting).)

A resolution dated October 13 was thereafter signed on behalf of the Council, in which the Council stated that an attached revised proposed easement had been previously provided to the landowner-plaintiff, when in truth, it had not been. (Id., particularly ¶¶275-284.)

On October 16, 2020, the Town commenced a second statutory condemnation action against the landowner-plaintiff. (Ch.II Am.Cmplt. ¶¶352-356.)

In this second suit, the Town again sought to condemn a right of public use and access over a designated oceanfront portion of the landowner-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 the landowner-plaintiff from doing things on, the designated portion.[6] (See Ch.II Am.Cmplt ¶354 (stating new notice was similar to previous, but with addition of onerous footnote); Brief dated March 30, 2021 at 7.)

In this second suit, again, one boundary of the designated portion of the landowner-plaintiff's land was just a few feet away from the seaside door of the landowner-plaintiff's oceanfront house. (Ch.II Am.Cmplt. ¶212 and see ¶354.)

In response to the second suit by the Town, the landowner-plaintiff, again, within 30 days of being served by the Town, separately filed suit against the Town and included a challenge to

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[5] The Circuit Court denied the motion on September 11, 2020. As discussed in the "Scope and Standard of Review" portion of this brief, the standard for the subject 12(c) motion is the same as that for a 12(b)(6) motion.

[6] For example, the Sunset Challenge II Amended Complaint (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 aforedescribed 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 aforedescribed 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 bungles at the landowner's expense, frauds, and coverups alleged in the Existing Action and now this one.

the power and ability of the Town to condemn. Viz., the landowner-plaintiff filed the instant Challenge II case, which the Town contends is now moot.[7]

In the 375-paragraph Amended Complaint in this Challenge II case, the landowner-plaintiff incorporated by reference pursuant to Rule 10(c), SCRCP, the entire Amended Complaint in the Challenge I case. (Ch.II Am.Cmplt. ¶182.)

The Challenge II Amended Complaint alleged facts pertaining to the property involved, the pertinent procedures, the actions of the Town before 2019, the landowner-plaintiff's offer of an easement to place sand, the rejection thereof by the Town, the declaration of the Town that no easement would be needed after all, the actions of the Town in completing the sand placement,

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[7] 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 of the Town's two sets of suits simply reflect the same parties in an identical case caption, without any Common Pleas case number on either caption to distinguish one condemnation suit from the other. The June and October notices cannot be distinguished by date, either, as the Town dated them both June 9, 2020.

The Town's March 31, 2021 brief in the Circuit Court states that the second suit by the Town against the landowner-plaintiff (the October suit) contained "revisions reflecting certain objections asserted in the first set of challenge actions." No other explanation has ever been offered for why the Town commenced a second suit against the landowner-plaintiff in October 2020 when the Town's first, June 2020, condemnation suit was already pending and stayed. Nor is there any record that the Town has ever been asked, other than by the landowner-plaintiff, whose discovery attempts have been curtailed. (See, e.g., interrogatories never answered, attached to Town's March 3, 2021 motion for protection from discovery.)

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

The landowner-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 the same defective appraisal, and the same lack of good faith deliberation on applicable factors. (See Ch.II Am.Cmplt. ¶¶224-374.)

The landowner-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 of the proposed easement and that additional false statements and events occurred which were additionally fatal to the second condemnation attempt. (See id.)

the actions of the Town Council in authorizing condemnation, the actions of the Town in obtaining an appraisal report, the actions of the Town in commencing the first condemnation action, the terms of the easement the Town sought to impose, the actions of the Town Council on October 12, 2020, and the actions of the Town in commencing a second condemnation suit on October 16, 2020.

In the Challenge II case, the landowner-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, the landowner-plaintiff did not plead or request that the overall relief sought by the landowner-plaintiff be "without prejudice."

Nor did the landowner-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 the landowner-plaintiff characterize the landowner-plaintiff's Amended Complaint as a "single cause of action."[8]

Subsequently to commencing the instant Challenge II case, the landowner-plaintiff began to pursue discovery from the Town in the Challenge II case, including interrogatories and the deposition of the Town Administrator.

On January 20, 2021, the Circuit Court entered a long-form order confirming the court's January 8, 2021 grant of the landowner-plaintiff's August 21, 2020 motion for summary

[8] In the Town's August 28, 2020 Memorandum in Support of Motion to Dismiss in Challenge I cases, page 4, the Town stated, "The Amended Complaint alleges 6 causes of action."

judgment against the Town in the Challenge I case. The Town subsequently moved for reconsideration.[9]

On January 25, 2021, the landowner-plaintiff petitioned for award of litigation expenses in the Challenge I case.[10] (Transcr. June 3, 2021, p.21 L4-p.22 L2; and see Brief dated March 31, 2021 at 3-4.) On January 29, 2021, the Town moved in the Challenge I cases of Sunset (ending in 600) and Beattie (ending in 601) to disqualify the landowner-plaintiff's counsel from representing them in the Challenge I cases.[11] (Motion to reconsider dated April 28, 2021 at 18.) The Town also 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 evidentiary hearing with witnesses.[12] (Transcr. June 3, 2021, p.21 L4-p.22 L2; and see Brief dated March 31, 2021 at 3-4.)

On February 10, 2021, the Town filed a notice[13] in the instant Challenge II suit, stating that the Town had "abandoned" its condemnation notice which was used by the Town to commence the second condemnation action against the landowner-plaintiff.

The notice states that the action is "hereby abandoned and withdrawn," but does not state that the dismissal is with prejudice.[14] (See 2/10/21 notice.) Nor does the notice state that the

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[9] Reconsideration was denied and a substitute order was issued April 5, 2021, and was not appealed.

[10] Only the landowner-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 pro se landowner-plaintiff in the Stanton Challenge I case did not seek the other one-third of the fees.

[11] After those landowner-plaintiffs filed a response, the Town withdrew the motion without hearing. (Motion to reconsider dated April 28, 2021 at 18.)

[12] As of the June 3, 2021 hearing of the motion for reconsideration herein, a hearing of the fee petition in the Challenge I cases had not occurred. (Transcr. June 3, 2021, p.21 L4-p.22 L2.)

[13] A notice is not a pleading for purposes of a Rule 12(c) motion for judgment on the pleadings. See Rule 7(a), SCRCP (delineating pleadings allowed in a case). However, the

Town relinquishes any right to bring another condemnation action with regard to the landowner-plaintiff's property.

On March 3, 2021, the Town filed an answer to the Amended Complaint in the instant Challenge II case. (Ch.II Answ. to Am.Cmplt.) The Town denied the over 350 of the 375 paragraphs of the Amended Complaint. (See id. ¶7 (denying, subject to qualifications, paragraphs 12-375 of the Amended Complaint).) The Town alleged at paragraph 8 that the "single cause of action"[15] alleged by the landowner-plaintiff "has been rendered entirely[16] moot by Defendant's February 10, 2021 filing of a Notice of Abandonment of Condemnation Action." (Ch.II Answ. to Am.Cmplt. ¶8.)

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 a motion for judgment on the pleadings pursuant to Rule 12(c), SCRCP. Therein, the Town asserted that under the pleadings, 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 and pending interrogatories, and any future discovery.

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notice was later attached by the Town as an exhibit to the Town's answer to the amended complaint.

[14] Compare Rule 41(a), SCRCP, disallowing voluntary dismissal without the adverse party's consent after the adverse party files an answer or motion for summary judgment. And see EDPA §28-2-470, staying "all proceedings" after the landowner commences a challenge suit.

[15] In the Town's August 28, 2020 Memorandum in Support of Motion to Dismiss in Challenge I cases, page 4, the Town stated, "The Amended Complaint alleges 6 causes of action."

[16] As discussed below, the Town's counsel would later argue only that the notice made the action moot "at the present moment" and "at the present time."

The Circuit Court granted the Town's motions on April 22, 2021, and after timely motion by the landowner-plaintiff to reconsider was denied, notice of this appeal was timely served.

It should be clear from the foregoing facts that an attempt by the Town to unilaterally withdraw its condemnation notice without prejudice to suing the landowner-plaintiff for a third time on substantially the same subject matter did not render the landowner-plaintiff's action, in which the landowner-plaintiff sought permanent relief from the Town's attempts, moot.

II. The case was not moot. (Issues 1-11, 13, 14, 16, 21 and 23)

It is clear that the Challenge I case presented a request for declaratory[17] and injunctive relief. Under present statutory practice, it may not be necessary for the purposes of the instant appeal, to determine in which respects the Challenge I case requested declaratory relief, and in which respects it requested permanent injunctive relief, statutory relief, or other relief. [18] What is

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[17] See S. C. Code Ann. §15-53-20 of the Declaratory Judgment Act, set forth in a footnote above.

[18] 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).

clear is that there was relief the Circuit Court could still fashion and render based on the Amended Complaint, or an amendment of it, and as a matter of law, this means the case was not moot.

A liberal reading of the extensive Challenge I Amended Complaint -- which was incorporated into the Challenge II Amended Complaint by reference, and the allegations of which were elsewhere largely repeated in the Challenge II Amended Complaint -- indicates that, among other things, the landowner-plaintiff challenged the power and ability of the Town to ever condemn any easement at all over the landowner-plaintiff's property for the generally stated purpose and subject matter involved.

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

The Challenge I Amended Complaint also indicates that, in the alternative, the landowner-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, requirements for authorizing condemnation of the property interest with the attributes determined, and requirements for compliance with specifically described statutory prerequisites.

The Challenge I Amended Complaint also indicates that, in the further alternative, the landowner-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.

As will be discussed separately elsewhere in this brief, the Challenge II Amended Complaint also supported other relief, much of which would be prejudiced by a dismissal "without prejudice."

As indicated above, the case is in commonsense understanding, not moot. The case is also not "moot" under South Carolina[19] law, because the case was in a trial level court rather

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[19] Mootness in state court is a state-court concept. Mootness in federal court is a federal concept. Federal court mootness has been rooted since the 60s in Article III of the United States Constitution.

Article III 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 functioning as 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. Article III is not duplicated 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.

Despite the focus of South Carolina courts on mootness as a doctrine primarily applicable at the appellate level, the State Constitution also does not have a "case or controversy" requirement or restriction on jurisdiction 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. There are relatively few published South Carolina cases in which mootness was invoked at the trial court level. In those, there is no discussion of the different considerations applicable at the trial and appellate levels, and holdings are often paraphrases of cases determining mootness only in the appellate context. 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 continuing 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. The continuing availability of relief is the antithesis of mootness. Seldom could a case in the trial level court in South Carolina be properly dismissed as moot, unless either the relief to which the plaintiff is entitled is provided in full, or the court identifies a missing element in pleading and leave to amend is impossible.

Unlike federal trial courts, state general trial level courts are not courts of limited jurisdiction. Limehouse v. Hulsey, 397 S.C. 49 at 61, 723 S.E.2d 211 at __ (Ct. App.

2011)(citing Fairfax Countywide Citizens Ass'n v. Fairfax County, 571 F.2d 1299, 1304 (4th Cir.1978).

Additionally, 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 or 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 different 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 or prudential 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.

South Carolina courts have also 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 the same 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. The concept appears 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 were within the defendant's discretion and the plaintiff had therefore failed to state a cause of action 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

than on appeal and there was relief which could still be sought and ordered in the trial level court, particularly if the Town maintains that its "abandonment" of the condemnation is a not permanent abandonment, with prejudice. The actual test is whether an event has occurred that makes it impossible for the reviewing, i.e., appellate, court to render any relief.[20]

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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 main concern of the courts is that there is an identifiable controversy in which the opposing parties can present their respective positions in an adversarial forum, rather than an academic matter of curiosity on which the parties do not have or cannot formulate a position and in which the court is used as a ouija board to answer questions without advocacy from the parties.

The statute itself, S. C. Code Ann. §15-53-20, expressly clarifies "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 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.

[20] Significantly, even in courts of limited jurisdiction, a case does not necessarily become moot simply because intervening events make it impossible for a federal court to issue the exact form of relief that the plaintiff requests. See Chafin v. Chafin, 568 U.S. 165, 177 (2013)(Such relief would of course not be fully satisfactory, but with respect to the case as a whole, even the availability of a partial remedy is sufficient to prevent a case from being moot.) (quoting Calderon v. Moore, 518 U.S. 149, 150 (1996))(brackets and internal quotation marks omitted); Church of Scientology of Cal. v. United States, 506 U.S. 9, 12-13 (1992)(While a court may not be able to return the parties to the status quo ante . . . a court can fashion some form of meaningful relief in circumstances such as these . . . The availability of this possible remedy is sufficient to prevent this case from being moot.).

As long as the court retains the ability to fashion some form of meaningful relief, then that is sufficient to prevent the case from being moot. Church of Scientology, 506 U.S. at 12-13. See also, e.g., Chafin, 568 U.S. at 177 ([E]ven the availability of a partial remedy is sufficient to prevent a case from being moot.)(quoting Calderon v. Moore, 518 U.S. 149, 150 (1996))(brackets and internal quotation marks omitted).

To illustrate, if there is any chance of money changing hands as a result of the lawsuit,

"A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. If there is no actual controversy, this [appellate] Court will not decide moot or academic questions." Seabrook v. Knox, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006)(citations omitted); see Collins Music Co. v. IGT, 365 S.C. 544, 549, 619 S.E.2d 1, 3 (Ct. App. 2005), cert. denied (Dec. 7, 2006)(noting a matter becomes moot when some event occurs making it impossible to grant effectual relief).

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.

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 does first meet 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

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then the suit remains live. Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1660 (2019). Similarly, even if it is uncertain that the relief granted by the court will ultimately have any meaningful practical impact on the plaintiff, that does not itself render the case moot. See Chafin, 568 U.S. at 175 (Enforcement of the order may be uncertain if Ms. Chafin chooses to defy it, but such uncertainty does not typically render cases moot. Courts often adjudicate disputes where the practical impact of any decision is not assured.).

case). Because mootness is itself actually a policy- and prudence-based concept, the blurry question of whether the "exceptions" are truly exceptions or, rather, simply considerations that prevent the case from being "moot" in the first place is subject to debate. They will be discussed here as exceptions.

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). Of two approaches to defining this exception, South Carolina takes the less restrictive approach. State v. Passmore, 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005)(citing Byrd, 321 S.C. at 432, 568 S.E.2d at 864).

The instant case is such a case. The Town's actions are not only "capable of repetition." They already have actually been repeated. And the Town states it intends to repeat them again. The case is by definition, not moot. See Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 658, 661-63 (1993). In Northeastern Florida Chapter, the Court refused to find moot a constitutional challenge to a city ordinance requiring a mandatory quota on minorities hired as city contractors. Justice Thomas, writing for the majority, noted that "22 days after our grant of certiorari, the city repealed [the challenged] ordinance and replaced it with [a similar] ordinance," and then argued that the case was moot. The Court observed that the risk was not simply "that Jacksonville w[ould] repeat its allegedly wrongful conduct; it ha[d] already done so." Id. at 662.

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 [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.

Also noteworthy is the Court's economic observation. Justice Ginsburg, writing for the Laidlaw majority, pointed out the significant "sunk costs" when "the case has been brought and litigated" and is subsequently "abandon[ed] . . . at an advanced stage." Id. at 191-92 (citing Honig v. Doe, 484 U.S. 305, 329-32 (1988)(Rehnquist, C.J., concurring)). Abandoning a case on mootness grounds may often lead to significant "sunk costs," making "abandon[ment] . . . more wasteful than frugal." Id. at 192.

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. Here, were the Circuit Court's dismissal to stand, the landowner-plaintiff would, among other things, continue to suffer a cloud on the title to valuable oceanfront property.

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 were still in the trial level court, where relief to the landowner can still be afforded. 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, it was error to dismiss the case.

III. The filed notice of abandonment alleged by the Town in paragraph 8 of its answer to the amended complaint is not permitted and is invalid, and if permitted and treated as mooting the case, must be treated as permanently barring further condemnation attempts. (Issues 5 and 15-23)

The Town's unilaterally "abandoning" its suit while the suit is stayed for a challenge to be resolved[21] is as ineffectual as trying to "take a nonsuit" in a conventional civil action when a nonsuit is prohibited.[22]

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.

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

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[21] 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.

[22] 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

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). The subject word denotes a high degree of finality and completeness. It is difficult to find a legal reference to "sort of abandoning" or "temporarily abandoning."

"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.[23]

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

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order."

[23] 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.

legal, then at least a practical, question of mootness, assuming there were no damages claimed by the landowner-plaintiff.

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 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. Ehrsam, 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 South Carolina EDPA does not define "abandonment." The Act certainly does not allow a condemnor to define "abandonment" for itself. There certainly is no express authorization for the condemnor to declare that only a "temporary abandonment" is being made. There is no authorization to use a quasi-"abandonment" as 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 sue a citizen and then take a voluntary nonsuit without prejudice and without leave of court after the defendant answered and counterclaimed, and then allowing the government plaintiff to do so over and over, ad infinitum, or at least until the citizen died or ran out of money for counsel.

As noted above, this is not permitted in a Civil Action governed by the South Carolina Rules of Civil Procedure. There should be relatively few places in the free world where the government or any other litigant is allowed such power.

"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. It does not appear that the Legislature intended a conflict with the Rules of Civil Procedure on this point. Rather, the EDPA appears to contemplate a parallel scheme with the same guiding principles averse to successive multiple litigation.

If the Rules of Civil Procedure do not apply by letter, it is still 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. The abandonment, unless with terms determined by landowner consent, needs to be permanent. Further, the Act does not allow abandonment without landowner consent unless a challenge action has not been brought, and the condemnor has not taken possession and made material alterations.

Not only is there no definition of "abandonment" in the Act, but also there is no affirmative authorization of "abandonment." The term is mentioned only twice. Once, it is mentioned in §28-2-230(B), which is prohibitory: "The condemnor may not abandon the condemnation action after taking possession if material alterations have been made in the property, except with consent of the landowner." The only other mention is in §28-2-510(c), which states the monetary consequence to the condemnor: "If the condemnor abandons or withdraws the condemnation action in the manner authorized by this chapter, the condemnee is entitled to reasonable attorney fees, litigation expenses, and costs as determined by the court."

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. However, the EDPA states when things are not authorized. Section 28-2-230(B) prohibits 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.

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, much less do so without prejudice. Once a challenge action has been commenced, all proceedings have been stayed pending resolution of the challenge. At this point, the condemnor may still abandon and do other things if the condemnor obtains landowner consent, and the condemnor also has the option to stipulate in the challenge action to the correctness of the challenge, or to have the court determine the merits of the challenge in the pending challenge action.

Since the Circuit Court based its mootness ruling on abandonment without ruling on whether abandonment was allowed and without determining that the abandonment was indeed permanent, these questions now need to be answered completely.

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, whether actually allowed or not, is with prejudice and puts an end to almost all controversy. However, the Town does not plead this in its Answer.

The landowner-plaintiff stated in the landowner-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." The landowner-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."[24]

The Town's oral argument at the April 1 hearing did not dispute the landowner-plaintiff's account of the mayor's mass e-mail. The Town's counsel's statements agreed.

His reference to the case as presenting issues which are "at the present moment entirely moot" (Transcript of April 1, 2021 hearing of motion to dismiss at 8, LL18-23 (emphasis added)), and his statements that the that the Town "believes the issues are entirely moot at the present time" (Transcr. April 1, 2021 at 9, LL18-21 (emphasis added)), and that "the Town is still very interested in acquiring these easements" (Transcr. April 1, 2021 at 12, LL 1-10 (emphasis added)) indicate the Town clearly intends other than to stop pursuing condemnation of the same subject matter. A matter cannot be temporarily moot, just as a condemnation is not "temporarily" abandoned.

The Town's statements at the April 1 hearing about starting over "with a clean slate" (Transcr. April 1, 2021 at 47, LL 47) and about how, "if we pursue a new [third] condemnation action," the landowner-plaintiff "could file a new challenge action" (Transcr. April 1, 2021 at 11, LL19-25) certainly do not communicate permanent relinquishment of the pursuit of the property. This position was in no way retracted at the June 3, 2021 hearing of the motion for reconsideration, where counsel for the Town stated, "Yes, they do still want to work to try to get this easement" (Transcr. June 3 p.37, LL6-7), and argued that abandonment is not permanent (Transcr. p.31, L17-p.33, L3).

[24] The latter assertion by the landowner-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., Ch.II Am.Cmplt. Preliminary Statement, and ¶¶78, 87 and 126.)

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, the Circuit Court erred in determining this case to be moot. The Town's sudden urgency to end the case when faced with discovery pointedly examining its motives, methods, and rationale (see, e.g., interrogatories never answered, attached to Town's March 3, 2021 motion for protection from discovery) did nothing but trumpet a lack of mootness.

The Town acknowledged to the Circuit Court the probability of a third action against the landowner-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. The mere possibility of settlement does not moot a case. When the Town introduced this subject at oral argument, the landowner-plaintiff responded to correct any implication that control of the matter might be in the landowner-plaintiff's hands. The landowner-plaintiff, clarifying an intention of both parties to tread lightly on such matters, clarified to the Court that such negotiation was something on which the Town had 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 the landowner-plaintiff brought – all in order to grant a "clean slate" to the Town and provide negotiating leverage – is unsupported in law and should be ruled ineffectual by this Court.

As of April 28, 2021, the Town still had not adequately answered hundreds of allegations of the Amended Complaint.[25] (4/28/21 Motion to reconsider at 26.) The Circuit Court's granting of the Town's motion, among other things, will 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 the landowner-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 Challenge II litigation, the Town had already changed counsel, and the Town Clerk resigned, and over time, people could not only forget, but die, resign, become disabled, move, be discharged, not run for reelection, fail to be reelected, etc. (4/28/21 Motion to reconsider at 26.)

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 a case of an actual, 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,

[25] Denials shall fairly meet the substance of the averments denied. Rule 8(b), SCRCP. 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.

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 of that state, 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. The landowner-

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 the landowner-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. The landowner-plaintiff has done so. According, at least, to the Indiana Supreme Court in Flamme, "[t]here is ample authority for the intervention of courts of equity" to deal with such matters. The case is therefore not moot.

IV. Prospective or present relief is supported by the amended complaint, which would not be concluded in the case of a "nonfinal temporary abandonment" by the Town. (Issues 1-4, 6-16, 21, and 23-25)

In the instance of a "nonfinal" "abandonment" by the Town, one question affecting mootness is whether the landowner-plaintiff still seeks prospective or declaratory relief, notwithstanding the Town's effectual dismissal of its claim without prejudice, with reservation of right to sue for substantially the same thing for a third time.

"There is ample authority for the intervention of courts of equity" to deal with such matters. Flamme. See also 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). And see 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).

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.[26] Plaintiff seeks all these things, for which there are supporting allegations.

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[26] 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; Timmons v. South Carolina Tricentennial Commission; and Columbia Water Co. v. Nunamaker. See also S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth..

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).

> 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

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.

The landowner-plaintiff has emphasized and explained in the landowner-plaintiff's various pleadings and papers, that the landowner-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 the landowner-plaintiff's grounds and appetite for a damages claim, the landowner-plaintiff has pointed out that numerous facts alleged in the Amended Complaint support a claim for defamation of the

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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).

landowner-plaintiff, or for slander of the landowner-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 the landowner-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.[27] 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.

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[27] 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 federal court Magistrate Judge 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

It was not the Circuit Court's job to construct every cause of action which the facts may support, but it was not the Circuit Court's province to grant "drastic" relief and summarily dismiss the 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 even been demonstrated by the moving party.

V. Because it was error to dismiss the case, it was an abuse of discretion to curtail discovery against the Town. (Issues 21 and 26)

Because it was error to dismiss the suit and the discovery order was based on dismissal, it was unreasonable not to require the Town, as the party bringing a second suit against the landowner-plaintiff and acknowledging the intent to bring a third, to respond to discovery while the case was pending. Accordingly, the Town's motion for protection from discovery should have been denied and the pending discovery should have been ordered to be complied with within 15 days of the entry of the order requiring same.

CONCLUSION

For the reasons stated above, 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 suit, 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.

In the alternative, the Circuit Court should have at least (i) ruled 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, and (ii) ruled on what, if any,

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attendant claim for damages for violation of substantive due process.

allegation or lack of allegation in the Amended Complaint caused the case to be moot and provided leave to amend to remove, change, or add such allegation.

For the reasons stated hereinabove, the issues stated herein should be ruled upon, the Circuit Court should be reversed, and the matter should be remanded so that the landowner-plaintiff may proceed with suit.

Respectfully submitted,

s/M. Baron Stanton

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Franklin D. Beattie as trustee, Sunset Lodge, LLC, and pro se (for self)

Date: October 29, 2021

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

M. Baron Stanton, ...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

Sunset Lodge, LLC, ...Appellant,

v.

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

CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on this date, served the foregoing **Initial Appellants' Brief** upon the Respondent by causing a copy to be e-mailed in accordance with current rules to will@belserpa.com . The postal mailing address of the above addressee is:

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Columbia, SC 29202

s/M. Baron Stanton
M. Baron Stanton

Date: October 29, 2021
Again with pagination error corrected: October 30, 2021