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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
Appellate Case No. 2021-000757

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 BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the filing of the Notice of Abandonment was a procedurally proper means of withdrawing the condemnation notice and condemnation action.**
- II. Whether the circuit court erred in finding that the condemnation action was moot based on the Town's abandonment of the subject condemnation notice.**
- III. Whether the circuit court properly applied the standard for granting judgment on the pleadings pursuant to Rule 12(c), SCRCF.**
- IV. Whether the Appellants are bound by the circuit court's grant of dismissal pursuant to Rule 12(b)(8), SCRCF.**
- V. Whether the circuit court erred in declining to rule that the Notice of Abandonment has a preclusive effect on any future condemnation attempt.**
- VI. Whether the circuit court erred in granting the Town's motion for protection from discovery.**

STATEMENT OF THE CASE

This appeal arises from the second of two related sets of condemnation challenge actions involving properties owned separately by the three Appellants. Counsel for the parties have sometimes referred to the two sets of cases as "Challenge I" and "Challenge II."

In or around June 2020, Respondent Town of Pawleys Island ("the Town") served on each Appellant a Condemnation Notice through which it sought to acquire a beach renourishment easement. (Amended Complaint, ¶ 81, et seq.). On July 21, 2020, each Appellant separately filed challenge actions objecting to the condemnations on various procedural and substantive grounds. (Franklin D. Beattie v. Town of Pawleys Island, Civil Action No. 2020-CP-22-0601; Sunset Lodge, LLC v. Town of Pawleys Island, Civil Action No. 2020-CP-22-0600; and M. Baron

Stanton v. Town of Pawleys Island, Civil Action No. 2020-CP-22-0602) (collectively, the “Challenge I” cases). (Amended Complaint, ¶ 180, et seq.).

Subsequently, in or around October 2020, the Town delivered to Appellants’ counsel a set of three new Condemnation Notices through which it sought to acquire similar beach renourishment easements on Appellant’s properties (referred to in the pleadings as the “New Notice[s]”). (Amended Complaint, ¶ 352, et seq.). On November 12, 2020, each appellant separately filed a second challenge action objecting to the second set of condemnation notices. (Franklin D. Beattie v. Town of Pawleys Island, Civil Action No. 2020-CP-22-0931; Sunset Lodge, LLC v. Town of Pawleys Island, Civil Action No. 2020-CP-22-0932; and M. Baron Stanton v. Town of Pawleys Island, Civil Action No. 2020-CP-22-0930) (collectively, the “Challenge II” cases) (Complaint). The Town filed Answers in the Challenge II cases on December 14, 2021, (Answer), and the Appellants then filed Amended Complaints on January 13, 2021 (Am. Complaint).

On January 20, 2021, Judge Michael Nettles issued summary judgment orders in favor of the Appellants in the Challenge I cases, dismissing the first set of condemnation notices without prejudice based on what were determined to be certain procedural deficiencies. (Order p.2; 4/1/21 Transcript p.7, ln. 15-21, p.30, ln.11 through p.31, ln.7). On February 3, 2021, current counsel for the Town entered an appearance in the Challenge II cases and, on February 10, 2021, the Town filed a Notice of Abandonment of Condemnation Action in all three Challenge II cases (N. Abandonment). The Town filed its Answers to the Amended Complaints on March 3, 2021, with copies of the previously filed Notice of Abandonment attached as an exhibit. (Ans. Amended Complaint). The Answers to the Amended Complaints included a defense that, on the basis of the Notice of Abandonment, the Challenge II actions were now moot. (Ans. Amended Complaint ¶

8). On March 5, 2021, the Town filed its Motion to Dismiss and Motion for Protective Order. (M. Dismiss).

The circuit court held a hearing on the Motion to Dismiss on April 1, 2021, and, on April 22, 2021, entered an Order of Dismissal without prejudice. (Order). The Appellants filed a Motion to Reconsider on April 28, 2021, (M. Reconsider), which was heard by the circuit court on June 3, 2021, and denied in a Form 4 Order the same day (Form 4 Order). With the consent of the parties, the June 3, 2021, order also consolidated the cases under a single civil action number. The Appellants filed and served a Notice of Appeal appealing the Order of Dismissal on July 2, 2021.

While not directly at issue in this appeal, on June 14, 2021, the Town filed a Motion to Correct or Amend Error in the July 3, 2021, Form 4 Order pursuant to Rules 59(e) and 60(a), SCRPC, requesting that the circuit court correct an inaccurate statement that the first set of condemnation notices involved in the Challenge I cases had also been “abandoned” (as opposed to being dismissed in the January 20, 2021, summary judgment orders in Challenge I). (M. Amend). That motion is still pending.

STANDARD OF REVIEW

“Any party may move for a judgment on the pleadings under Rule 12(c), SCRPC. When considering such motion, the court must regard all properly pleaded factual allegations as admitted.” Falk v. Sadler, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000) (citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991)). “On review of the motion, the court may not consider matters outside the pleadings.” Id. (citing Firemen's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct.App.1990)). “A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment.... When a fact is well pleaded, any inference of law

or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties. Furthermore, ‘a judgment on the pleadings is considered to be a drastic procedure by our courts.’” Id. at 286–87 (citing Russell at 89, 406 S.E.2d at 339).

On appeal of a Rule 12(b)(8), SCRPC, dismissal based upon a finding that there is another action is pending between the same parties for the same claim, “each of the components of the rule are determined as a matter of law and thus [the Court will] apply a de novo standard of review to the grant or denial of this motion.” Cap. City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

ARGUMENTS

In appealing the Order of Dismissal after the Town voluntarily abandoned the condemnation notices at issue in the Challenge II cases, the Appellants seek to keep the parties engaged in wasteful, speculative litigation without any live condemnation notices or pending claims. Admittedly, the Town has been candid about its ongoing need to obtain beach renourishment easements on the Appellants’ properties, as well as its intention to initiate new condemnation proceedings based on amended procedures if absolutely necessary. As explained in the Town’s Answer to the Amended Complaint,

The easement sought to be acquired by the Defendant was a requirement by the United States Army Corps of Engineers (the “Corps”) in connection with a 45-year beach renourishment project for the Town of Pawleys Island. . . . If the Defendant complies with the easement requirements by the Corps, the Town’s beach renourishment project will be federally protected. Thus: a. The Corps will be responsible for an estimated cost of \$300,000.00 for erecting sand fence and planting beach grass, at no cost to the Town; b. The Corps will periodically renourish the Town’s beach every nine (9) years in

the next forty-five (45) years, and be responsible for 50% of the forecasted total renourishment costs of \$129,522,533.00; and, c. The Corps will repair all beach damage resulting from a significant storm for the next forty five (45) years, irrespective of federal declaration, at no cost to the Town.

(Ans. Amended Complaint ¶ 13-14).

However, despite the importance of these easements, after the circuit court granted summary judgment in the Challenge I cases based on certain procedural issues, the Town responsibly elected to abandon the Challenge II condemnation notices in order to avoid needless litigation over similar if not identical arguments the Appellants had raised regarding the second notices.¹ The appropriate time for the Appellants to assert their objections to any future condemnation will be if and when the Town is forced to initiate a new condemnation action by service of a new condemnation notice. Any piecemeal adjudication in this action of discrete facts or sub-issues that might come up later in any future condemnation attempt, which would likely involve new procedures for authorization, appraisal and initiation, new engineering analysis, and other new facts, would be entirely speculative. Accordingly, the circuit court correctly ruled that the case at hand has been rendered moot by the abandonment and properly dismissed the action.

1.) The filing of the Notice of Abandonment was a procedurally proper means of withdrawing the condemnation notice and condemnation action.

South Carolina courts have long recognized at common law the right of a condemnor to abandon a condemnation proceeding prior to physical appropriation of the property or the vesting of title. S.C. State Highway Dep't v. Bobotes, 180 S.C. 183, 185 S.E. 165 (1936) (reporting and affirming trial court order) (Condemnation statutes “[do] not confer the right of abandonment; that right is presupposed as existing at common law. [The statute] merely prescribes the conditions

¹ As Appellants acknowledge in their pleadings, the second set of condemnation notices had been delivered by the Town’s original counsel in an attempt to address alleged defects in the original notices that had been raised in the Challenge I cases. (Am. Compl. p.57 ¶ 370; See also 4/1/21 Transcript p.6, ln.18 - p.7, ln.2).

upon which it may be exercised, that is, upon paying the costs and expenses incurred by the property owner in the proceedings.”); Ex parte Savannah River Elec. Co., 169 S.C. 198, 168 S.E. 554, 556 (1933) (“The electric company had the right under the common law to abandon its condemnation proceedings. The act of 1924 . . . does not alter or take away that right.”); Haig v. Wateree Power Co., 119 S.C. 319, 112 S.E. 55, 59 (1922) (“The general rule is, the condemnation proceedings may be dismissed, or abandoned, at any time before, but not after, the landowner's right to compensation has become vested.”).

[I]n the absence of statutory authority, the condemnor may abandon the property condemned at any time before taking actual possession and entering thereupon. It is only when property is actually taken by the condemnor that the right of compensation to the landowner accrues, and then the condemnor cannot abandon the condemned property . . . until the property is taken, the landowner is not entitled to compensation, and abandonment by the condemnor is not violative of the constitutional rights of the landowner.”

Jennings v. Sawyer, 182 S.C. 427, 189 S.E. 746, 751 (1937) (reporting and affirming circuit court order), overruled on other grounds by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985).

A condemnor most certainly retains this right where, as here, the condemnation notice has been served but not filed and the landowner initiates a challenge action. This exact procedure is discussed in appellate opinions involving disputes over entitlement to litigation expenses following abandonment. See Kiriakides v. Sch. Dist. of Greenville Cty., 382 S.C. 8, 13, 675 S.E.2d 439, 441 (2009) (“[B]ecause of the urgency of the school construction project and the existence of this litigation challenging the right to proceed with condemnation, the School District notified Kiriakides that it had abandoned its efforts to condemn the property.”); Savannah River Elec. Co. at 198, 168 S.E. at 555 (1933) (After initiation of a challenge action, “the electric company gave notice to [the landowner] that they had abandoned the condemnation proceedings.”).

Neither the case law nor the S.C. Eminent Domain Procedure Act require a particular form or process for declaration of abandonment. However, the Act does specifically contemplate the common law power of a condemnor to abandon a condemnation. *See, e.g.*, S.C. Code Ann. § 28-2-230(B) (requiring landowner consent to abandonment after taking possession and making material alterations to property); § 28-2-510(C) (providing for litigation expenses after abandonment). Like prior condemnation statutes, the Act does not alter or diminish the power of a condemnor to unilaterally withdraw a condemnation action prior to physical appropriation and alteration of the property. *See* S.C. Code Ann. § 28-2-20 (“[T]his act is designed to create a uniform procedure for all exercise of eminent domain power in this State. It is not intended by the creation of this act to alter the substantive law of condemnation[.]”).

It is true that, in providing for an award of the landowner’s litigation expenses, the Act refers to abandonment or withdrawal of the condemnation action “in the manner authorized by this chapter.” § 28-2-510(c). However, this does not mean, as Appellants seem to argue, that the General Assembly intended the Act to implicitly revoke the common law power of abandonment except where specifically statutorily authorized. Nowhere does Section 28-2-230(B), the only other reference in the Act to abandonment, *specifically authorize* abandonment prior to taking possession and making material alterations. However, the provision unmistakably demonstrates that the General Assembly understood a condemnor to have that power at common law and chose not to impose a statutory requirement of landowner consent.² Following the Appellants’ argument to its logical conclusion would instead lead to the inexplicable result that abandonment is only ever allowed in the specific scenario where (1) the condemnor has taken possession of the property, (2)

² “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.” S.C. Code Ann. § 28-2-230(B).

material alterations have been made, and (3) the landowner consents. “In construing a statute, [courts] will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.” Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008).

Furthermore, the statutory stay triggered by the Appellants’ challenge actions did not affect the Town’s power to abandon the underlying condemnation action. Under the Act, when a challenge action is filed after service of a condemnation notice, “[a]ll proceedings under the Condemnation Notice are automatically stayed until the disposition of the action, if any, unless the landowner and the condemnor consent otherwise.” S.C. Code Ann. § 28-2-470. The condemnation “action” is defined with the explanation that it “includes all acts incident to the process of condemning property after the service of a Condemnation Notice.” § 28-2-30(1), (5).

Clearly, withdrawing or abandoning a condemnation notice and the associated condemnation action is not part of the “proceedings” under the notice or an act in the “process of condemning property”, and is in fact the opposite. The Appellants’ interpretation of the Act would lead to the bizarre result that, by imposing a stay to protect landowner rights during the pendency of a challenge action, the General Assembly had also implicitly taken away the government’s common law power to withdraw a condemnation in, and only in, the specific situation where the landowner files suit to challenge the legitimacy of that very condemnation. Again, such an absurd result is not supported under the rules of statutory construction. “[S]tatutes in derogation of the common law are to be strictly construed a statute restricting the common law will not be extended beyond the clear intent of the legislature.” Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012).

While a condemnor may choose to move forward and litigate procedural and other deficiencies alleged by a challenge action plaintiff, it is certainly not required to do so. The condemnor may instead abandon the relevant condemnation notice and, if it deems appropriate, amend the procedure or other relevant aspects in any future attempt. Particularly in a case such as this, where the Appellants had recently obtained summary judgment against the Town in a related case based on similar if not identical issues, the Town should not be forced to continue litigating over what the plaintiff alleges was a flawed condemnation process. Commonsense dictates that a landowner who challenges a condemnation waives the right to object to abandonment and withdrawal of the condemnation notice. See, e.g., Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) (waiver “may be implied from circumstances indicating an intent to waive. . . . [or] [a]cts inconsistent with the continued assertion of a right”).

2.) The circuit court did not err in finding that the condemnation action was moot based on the Town’s abandonment of the subject condemnation notice.

The single cause of action asserted by the Appellants, a challenge to a condemnation action pursuant to S.C. Code Ann. § 28-2-470, was rendered entirely moot by Town’s filing of the *Notice of Abandonment of Condemnation Action*, which was also attached as an exhibit to Town’s *Answer to the Amended Complaint*. Appellants alleged on page 58, Paragraph 372 of the Amended Complaint that “[t]he Court should quash, strike and dismiss the New Notice forthwith, thus allowing the dismissal of the instant challenge action after awarding litigation expenses to Plaintiff.” The S.C. Eminent Domain Procedure Act specifically contemplates the power of a condemnor to abandon a condemnation. See, e.g., S.C. Code Ann. §§ 28-2-230(B), -510(C). The “New Notices” were formally abandoned and withdrawn. Any condemnation actions initiated by those notices have therefore been

extinguished and warrant no further challenge. *See, e.g.*, §§ 28-2-30(5), 28-2-470.³

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

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

Id.

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

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

In Seabrook, the plaintiffs brought an action against the city alleging that the city imposed conditions on a residential development for which it had no authority. 337 S.C. at 304, 523 S.E.2d at 462. After the trial court found in favor of the plaintiffs, the city removed the conditions and approved the plat. In reviewing the appeal this Court

³ *See also* Kiriakides, 382 S.C. at 13, 675 S.E.2d at 441 (2009) (“[T]he master ruled in favor of the School District, finding . . . Kiriakides’s challenge to the School District’s right to condemn his property was moot because the School District had abandoned its condemnation efforts.”).

found that the issue was moot, and that although the scenario was capable of repetition, it did not evade review.

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

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

As indicated in this analysis, South Carolina has never applied a “stringent” analysis of “voluntary cessation” of conduct as the Appellants assert is applied in federal courts. (Appellant’s Brief p.28). The case of Jowers v. S.C. Dep't of Health & Env't Control, 423 S.C. 343, 815 S.E.2d 446 (2018), cited by Appellants for the proposition that South Carolina follows federal mootness principles, is in fact a case involving separate doctrines of standing and ripeness. Instead, South Carolina law is clear that “[t]he utilization of an exception under the mootness doctrine is flexible and discretionary pursuant to South Carolina jurisprudence, not a mechanical rule that is automatically invoked.” Sloan v. Greenville Cty., 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009).

In the present action, any future attempt to condemn a similar or identical easement would be inherently susceptible to judicial review. S.C. Code Ann. § 28-2-470 (“Proceedings to challenge condemnor's right to condemn”). The Town has no interest in and absolutely nothing to gain by repeatedly initiating condemnation actions and then “evading review.” *See, e.g.*, S.C. Code Ann. § 28-2-510(A) and (C) (providing for landowner recovery of attorney fees in challenge actions and withdrawn condemnation actions). This is clearly distinguishable from a wastewater treatment plant sporadically violating effluent limitations, Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167 (2000), or a challenge to “[s]hort-term student suspensions [which], by

their very nature, are completed long before an appellate court can review the issues they implicate.” Byrd at 432, 468 S.E.2d at 864.

Instead, the Town has abandoned the “New Notices” underlying this challenge action based on the procedural issues ruled upon in Judge Nettles’s January 20, 2021 summary judgment order in the related “Challenge 1” cases and a desire to avoid unnecessary litigation of the same and additional procedural objections raised by the Appellants in this case. If the substantive objections the Appellants have raised relating to public necessity, “bad faith”, and other issues do eventually need to be adjudicated, then this should occur in the context of a condemnation action that has not been abandoned or ended by summary judgment. For the same reasons discussed above, any claim the Appellants may wish to assert for injunctive relief is also moot unless and until a new condemnation action is pursued.

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

3.) The circuit court properly applied the standard for granting judgment on the pleadings pursuant to Rule 12(c).

Based on its finding that the Notices of Abandonment rendered the challenge actions moot, the circuit court properly held that there was no remaining issue of fact raised by the Amended Complaint that would entitle Appellants to judgment if resolved in their favor and that the Town was

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

Appellants’ counsel repeatedly communicated to the circuit court that “[t]he relief I’m seeking today is to leave the case open, allow us to pursue some discovery, and decide whether we want to amend to seek further relief.” (4/1/21 Transcript p.34, ln. 15-24; See also p.41, ln. 5-10; 4/28/21 M. Reconsider p.2-3 ¶ 9, p.30). The circuit court properly declined to grant Appellants leave to amend the pleadings to assert new claims at some unspecified future date after conducting further discovery. A pleading “sets forth a cause of action, whether an original claim, counterclaim, [or] cross-claim[.]” Rule 8(a), SCRPC. While, generally speaking, additional claims may be permitted in an amendment after discovery of facts in the course of litigating an initial, properly stated cause of action, there is no basis under the South Carolina Rules of Civil Procedure for open-ended discovery in the absence of even a single pending claim. That manner of litigation would be unfairly prejudicial to the Town, which would be subjected to the time and expense of participating in discovery without even knowing which claims might be at issue.

a. Permanent prohibitive relief

The Amended Complaints did not request relief in the form of a permanent prohibition on any future condemnation of the subject easements (Am. Complaint p.58 ¶ 372, p.59). More fundamentally, the allegations of the Amended Complaint, even if taken as admitted, do not give rise to any issue of fact that would entitle the Appellants to judgment in the form of prospective relief prohibiting the Town from ever condemning a beach renourishment easement on their

properties. A party is not entitled to leave to amend where any amendment would be futile. Alterna Tax Asset Grp., LLC v. York Cty., 434 S.C. 328, 334, 863 S.E.2d 465, 468 (Ct. App. 2021) (citing Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019)). There is no South Carolina authority in support of the proposition that the type of conduct the Appellants allege the Town has engaged in, which they characterize as “bad faith,” would give rise to a judicial remedy permanently prohibiting the Town from exercising its power of eminent domain in order to acquire the same or a similar easement from the Appellants. When asked by the circuit court what authority would support a permanent prohibition, Appellants’ counsel stated that “[w]hat we’d like to do is have some discovery in the case . . . let us get some discovery and then let me find, Your Honor, that authority for when do you shut them down.” (4/1/21 Transcript p.32, ln.23 through p. 33, ln.22).

The S.C. Supreme Court has made it clear that the power of eminent domain is a fundamental attribute of sovereignty. “The primary right to acquire rests in eminent domain, and that power resides in the state of right and by necessity; the Constitution did not create it, but has only affirmed it (article 14), and limited its exercise (article 1, § 17; article 9, § 20). The exercise of the right resting in the Legislature, that body may prescribe how it shall be exercised.” Paris Mountain Water Co. v. City of Greenville, 110 S.C. 36, 96 S.E. 545, 551 (1918).

That right is based upon the theory that when the state originally granted lands to individuals the grant was made under the implied condition that the state might resume dominion over the property whenever the interest of the public or welfare of the state made it necessary. Its origin antedates constitutional provisions and legislative enactments. It is one of the unwritten laws of all civilized nations. It is justified by the fact that the right of individuals must yield to the public good, and the welfare of the state is paramount to that of the individual citizen. It is a previously existing universal law that lay dormant in the state until proper legal authorities directed the occasion and the mode through which it may become operative.

Haig v. Wateree Power Co., 119 S.C. 319, 112 S.E. 55, 57 (1922).

The General Assembly has authorized municipalities to exercise the power of eminent domain in order to “become the owner of any land or to acquire any easement or right-of-way therein for any authorized corporate or public purpose,” S.C. Code Ann. § 5-7-50, and enacted the Eminent Domain Procedure Act “to create a uniform procedure for all exercise of eminent domain power in this State.” S.C. Code Ann. § 28-2-20. Although the Act specifically contemplates challenge actions, § 28-2-470 (“Proceedings to challenge condemnor's right to condemn”), nowhere does it provide for permanent judicial prohibition of a certain type of condemnation based on “bad faith” or similar allegations.

Common law considerations of fraud, bad faith, and abuse of discretion in a challenge action relate to the basis for and intentions behind decisions about whether to condemn and what amount of property to condemn. For example, in Atkinson v. Carolina Power & Light Co., the plaintiff alleged that “the defendant's condemnation above the 220 foot elevation contour line, above mean sea level is **cloaked with a scheme to serve its own private purposes, uses and advantages** in that it intends to sell, lease or otherwise control the land surrounding the impounded waters for purposes not connected with the generating of electricity or proper adjuncts thereto[.]” 239 S.C. 150, 161, 121 S.E.2d 743, 748 (1961) (emphasis added).

In Timmons v. S.C. Tricentennial Comm'n, in rejecting a landowner’s challenge to condemnation of property for historical preservation and recreational purposes, the court explained that, “[t]he burden would be upon the landowner to show that **the public use is a sham and a fraud**. . . . If there is no necessity for the use or the condemnation proceeding's purpose is **to cloak some sinister scheme**, then the courts may interfere with the taking, but there is no showing of that kind here.” 254 S.C. 378, 396, 175 S.E.2d 805, 814 (1970) (emphasis added). *See also* Sease v. City of Spartanburg, 242 S.C. 520, 527, 131 S.E.2d 683, 687 (1963) (“The allegations in the

complaint that the proposal of the respondent is fantastic, unreasonable, unnecessary, uncalled for and unwarranted are merely conclusions which are not admitted by the demurrer and, at most, merely characterize the facts set forth in the complaint which are insufficient to allege fraud, bad faith, or clear abuse of discretion on the part of the respondent.”).

By contrast, South Carolina law does not entitle a landowner to seek permanent prohibition of a condemnor’s exercise of eminent domain powers based on allegations of past “misrepresentation” and “bad faith” in the administrative and legal efforts used to pursue an otherwise legitimate effort to condemn property for a proper public use. That type of relief would be vastly different than simply invalidating a specific condemnation notice based on procedural deficiencies (or even fraud, bad faith, or abuse of discretion) in the administrative and legal efforts associated with the notice. While the Appellants clearly object to the wisdom and expediency of the previously sought beach renourishment easements and allege that the Town has acted poorly in its legislative, administrative, and legal efforts to acquire the easements, there has been no allegation that the fundamental decision to pursue the easement for a stated public use was in fact a “sham” meant to “cloak some sinister scheme” for the benefit of undisclosed private interests.⁴

Although older cases cited by the Appellants discussing what are now referred to as “challenge actions”, from a time when “the condemnation statutes provide[d] no machinery for determining the right to institute such proceedings,” Greenwood Cty. v. Watkins, 196 S.C. 51, 12 S.E.2d 545, 550 (1940), sometimes spoke in terms of “permanent injunction,” this was in relation

⁴ At the hearing on the motion for reconsideration, Appellants’ counsel raised for the first time a speculative theory that the Army Corps renourishment easements were being imposed only on south end beach owners in order to free up Town funds for renourishment of the northern area of the beach. (6/3/21 Transcript p.13, ln.19 through p.13, ln.25). This theory, in addition to being unsupported and false, was not included in the Amended Complaint, was not timely raised to the circuit court, and has not been briefed, and is therefore not preserved for appellate review.

to hypothetical allegations of “bad faith” or “fraud” in the sense of the initiation of a condemnation based on sham, pretextual purposes for a private or other improper benefit. *E.g.*, Atkinson, supra (denying requested relief), Timmons, supra (denying requested relief). These cases speak in general terms and do not purport to authorize judicial prohibition of future similar condemnations based on revised decision-making procedures.

Accordingly, to the extent that the Appellants have alleged that the withdrawn Condemnation Notices in this matter were, for example, based on an inadequately articulated public use or insufficient decision-making process relative to the scope or necessity of the easement, these and similar issues can be corrected (or attempted to be corrected) in any future condemnation effort. These types of alleged deficiencies simply do not give rise to permanent prohibitory relief, as reflected in more modern cases such as Hill v. York Cty. Nat. Gas Auth., 384 S.C. 483, 682 S.E.2d 809 (2009) (holding that condemnor could revise condemnation notice to correct statutory reference) and Southern Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 305 S.C. 507, 514 – 16, 409 S.E.2d 428, 432 – 434 (Ct. App. 1991) (“Southern Dev. I”), aff’d in part, rev’d in part on other grounds, 311 S.C. 29, 426 S.E.2d 748 (1993). As the Court of Appeals explained in Southern Dev. I, “[t]he parties have not cited any reported South Carolina case in which a planned condemnation was permanently enjoined by a court because the court found the condemning authority abused its discretion in the selection of a chosen route. . . . We vacate this portion of the master's decision and remand with instructions that the master direct Santee Cooper to re-evaluate its proposed route and the alternate routes proposed by Southern.” Id.

Finally, although the theory of estoppel was not included in the Amended Complaint, there is one South Carolina appellate opinion finding that a condemnor was permanently estopped from pursuing an overhead power line easement across a specific property, Southern Dev. Land & Golf

Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 748 (1993) (“Southern Dev. II”). In Southern Dev. II, the basis for estoppel was that the property owner had moved forward with plans to purchase and improve the property as a golf course, with expenses in excess of \$50 million, in reliance upon inaccurate representations from a Santee Cooper official that all powerline routes on the property would be buried. In this case, while the Amended Complaint includes allegations of “misrepresentation” and “fraud”, the Appellants’ factual allegations simply do not encompass the required elements of an estoppel claim, including the elements of reliance and prejudicial change in position, and no such arguments have been preserved for appeal.⁵

b. Declaratory relief regarding discrete factual issues

Likewise, the Appellants’ allegations do not give rise to any basis to allow further amendment of the pleadings seeking judicial determination of certain discrete issues that may be of interest to the parties in any future litigation. In the Amended Complaint, the Appellants allege that the Town engaged in various types of procedural missteps, as well as “misrepresentation”, “bad faith”, and “fraud” in the process associated with the first and second condemnation notices. The Appellants also raise questions about, for example, whether the Town adequately considered and established the necessity of an easement for participation in a long-term federal beach renourishment program. However, judicial determination in this action of the legal effect of any such alleged acts and omissions, even if proven to have occurred, would provide no more than an

⁵ “The essential elements of estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. . . . As related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position.” S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993) (internal citations omitted).

“advisory opinion”, with applicability to the legal relations between the parties only if and when identical acts or omissions occur in connection with any future condemnation effort. Neither the Eminent Domain Procedure Act nor the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, et seq., provide any basis for such hypothetical litigation.

“To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy.” Thompson v. State, 415 S.C. 560, 565, 785 S.E.2d 189, 191 (2016) (quoting Sunset Cay, L.L.C. v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004)). “A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” Id. “The Declaratory Judgment Act is not properly invoked for an advisory opinion to be put on ice by the plaintiff for use if the [parties] reach the occasion which might demand it, nor is the Act a license to fish in this judicial pond for legal advice[.]” Orr v. Clyburn, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982) (citing Columbia v. Sanders, 231 S.C. 61, 97 S.E.2d 210 (1957)).

Now that the condemnation notices underlying this action have been abandoned, there is no basis for judicial review of the discrete underlying factual matters involved in the attempted condemnation process for the sake of the hypothetical, contingent possibility that identical combinations of facts might be at issue in future litigation. For example, any future condemnation effort may involve a decision-making process that includes new or additional scientific/engineering analysis, documentation related to necessity and public use, and legislative deliberation procedures, among other things. Any ruling regarding specific aspects of the prior condemnation efforts underlying the Challenge 1 and Challenge 2 actions would provide nothing more than an advisory opinion in relation to the specific facts of any future condemnation.

c. Hypothetical damages claims

Furthermore, the Amended Complaint presents no factual allegations providing a basis for claims for damages or similar relief. Although the pleadings include various allegations of acts and omissions presented as “misrepresentation”, “bad faith” and “fraud”, none of these factual allegations support a theory of damages relief. These allegations all relate to the condemnation process, and do not give rise, under any theory that has been identified by Appellants, to any claim for tort damages or other similar relief, and certainly not against the Town as an entity. Appellants’ counsel implicitly acknowledged that any potential damages claims require further factual support, stating at the April 1, 2021 hearing on the motion to dismiss that he wanted the court to “leave the case open, allow us to pursue some discovery, and decide whether we want to amend to seek further relief . . . [a]nd maybe sue them for damages.” (4/1/21 Transcript p.34, ln. 15-24).⁶

The Appellants’ general references to the speculative possibility of damages claims were insufficient to adequately raise and preserve the issue of any potential amendment. The Appellants’ Reply Memorandum in opposition to the motion to dismiss merely stated in general fashion that the allegations of bad faith conduct in the Amended Complaint “may allow permanent relief and damages.” (3/31/21 Reply Memo, p. 4-5). At the April 1, 2021, hearing on the Town’s motion to dismiss, Appellants’ counsel argued vaguely that, “there’s probably that 375 paragraphs of the complaint taken as true, would warrant some damages claim on various theories. And, again, going through and parsing all of that out on under the Tort Claims Act or Section 1983 of the Federal Statute, or other things.” (4/1/21 Transcript p.38, ln. 20-24).

⁶ The discovery the Appellants seek includes an interrogatory asking whether the Town would have cooperated with the Army Corps if that agency had hypothetically required an easement provision “allowing [the Town] or the Court to kill all family dogs found in the easement area,” (4/1/21 Transcript p.9, ln. 6-16), as well as “leave to propound 400 requests for admissions[.]” (6/3/21 Transcript p.38, ln. 20-25).

Appellants' Motion for Reconsideration did reference the possibility of claims "such as damages for defamation, violation of 42 U.S.C § 1983, malicious prosecution, trespass, and other torts", but noted that the theories "may be better considered" after discovery. (M. Reconsider p. 2-3). The motion also asserted that "numerous facts alleged in the Amended Complaint support a claim for defamation of Plaintiff, or for slander of Plaintiff's title. . . .[or] the prospect of a trespass claim . . . [and] which might state a claim for a constitutional tort or other wrongdoing", but again stated "a desire to conduct discovery and reflect first on both Plaintiff's grounds and appetite for a damages claim." (M. Reconsider p.30).

So, while on request for reconsideration after the order of dismissal the Appellants did belatedly identify a laundry list of hypothetical causes of action, even then they did not provide even a precursory explanation of how their factual allegations relate to the elements of any particular cause of action they might assert and did not express a readiness to do so without further discovery. In terms of entitlement to amend, this lack of articulable claims is particularly relevant given the broad scope of immunities applicable to governmental entities in South Carolina.⁷ Where any suggested amendment to the pleadings would be futile, even a dismissal with prejudice is not an abuse of discretion. Alterna, 434 S.C. at 334, 863 S.E.2d at 468. As the circuit court recognized, the dismissal without prejudice in this case does not prevent the Appellants from asserting any such claims they

⁷ See, e.g., § 15-78-60 (providing governmental entities with immunity from liability for losses resulting from, among other things, "(1) legislative, judicial, or quasi-judicial action or inaction; . . . (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies; . . . [and] (17) employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude[.]"); Richardson v. McGill, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) ("A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties. Accordingly, an absolute privilege is recognized as to defamatory statements made by legislators in the course of their functions, if such statements are connected with, or relevant or material to, the matter under inquiry.").

might determine have a basis after further factual investigation outside the context of this litigation. (4/1/21 Transcript p.34, ln. 25 through p.35, ln. 4).

At the hearing on the motion to dismiss, the Town pointed out that Appellants' counsel "cannot articulate today what theories he might pursue or what facts would underl[ie] those theories." (4/1/21 Transcript p.47, ln. 1-3). The Appellants still have not done so, and any new arguments raised in a Reply Brief would clearly be unpreserved. Likewise, the Appellants' vague reference to the dismissal causing "a statute of limitations problem", (6/3/21 Transcript p.28, ln. 17-19), was raised for the first time at the hearing on their motion to reconsider, was not explained any further at that time, and has not been briefed other than in another passing reference in Appellants' Issue on Appeal number 14. Accordingly, that argument has also not been adequately raised and preserved.

4.) The circuit court did not err in granting dismissal pursuant to Rule 12(b)(8), SCRCF, and the Appellants have not appealed that ruling.

In addition to judgment on the pleadings, the circuit court also properly dismissed any claims "to the extent that the Amended Complaint may seek to challenge or otherwise obtain relief in relation to a separate prior condemnation notice and condemnation action," (Order p. 8), pursuant to Rule 12(b)(8), SCRCF, on the basis that another action was already pending between the same parties for the same claim(s). The Appellants have not appealed this ruling and, in any event, did not present or preserve any relevant arguments before the circuit court. Accordingly, the Appellants are bound by the dismissal, without prejudice, of any claims they might purport to have asserted in this action by way of reference to the Challenge I action. This includes any attempt to "incorporate" a claim for permanent prohibitive relief from the Challenge I pleading, which is clearly beyond the scope of the Challenge II prayer to simply quash the second set of condemnation notices.

5.) **The circuit court did not err in declining to rule that the Notice of Abandonment has a preclusive effect on any future condemnation attempt.**

While it appears that South Carolina’s appellate courts have not had much occasion to address the issue directly, it is black letter law across the country that, absent some bad faith attempt to take a “second bite at the apple” after an unfavorable jury verdict, a condemnor may abandon a condemnation attempt and then subsequently condemn the same property. As the leading eminent domain treatise explains,

[i]f a condemnor which has instituted proceedings for the condemnation of property causes the proceedings to be discontinued **before any award has been made**, the condemnor may subsequently institute new proceedings to condemn the same property.

Nichols on Eminent Domain, Ch.26D, § 26D.01[4] (Matthew Bender, 3rd ed.) (citing Cent. Ga. Power Co. v. Nolan, 69 S.E. 561, 561 (Ga. 1910) (condemnor not barred from bringing new condemnation action after abandonment of initial attempt prior to award); Bd. of Comm'rs of Cty. of Knox v. Wyant, 672 N.E.2d 77 (Ind. App. 1996); Corbin v. Cedar Rapids, I.F. & N.W.R. Co., 23 N.W. 270, 271 (Iowa 1885) (“In such case it cannot be doubted that another action may be commenced.”); Ctr. Sch. Dist. No. 58 of Jackson Cty. v. Kenton, 345 S.W.2d 120, 128 (Mo. 1961) (“[A] condemning party which abandons the proceedings before compensation has been paid or the right thereto has become vested does not thereby lose the right to institute new proceedings for the condemnation of the same property, if it acts in good faith.”)).

“Where, as here, the first proceeding has been abandoned and no interest has been taken, certainly the right of eminent domain is not extinguished.” Carolina Power & Light Co. v. Merritt, 41 N.C. App. 438, 441–42, 255 S.E.2d 225, 227 (N.C. App. 1979). See also Mayor & Council of City of Baltimore v. Ercolano, 170 Md. 341, 184 A. 164, 165-166 (1936) (city not barred from bringing new condemnation action after abandonment of initial procedurally invalid condemnation attempt); Lower Nueces River Water Supply Dist. v. Cartwright, 160 Tex. 239, 240, 328 S.W.2d

752, 753–54 (1959) (water district not barred from bringing district court condemnation and quiet title action after and withdrawing initial condemnation action before special commission prior to award).

The only exception to this rule applies to attempts secure a lower valuation of just compensation after an initial jury award:

When an award has been made, the condemnor may, if it sees fit, dismiss the proceedings and avoid liability upon the award; if, however, it takes this step it must give up the undertaking altogether or try to acquire a location somewhere else. It cannot repeatedly institute proceedings to condemn the same property until it finally succeeds in getting the verdict or award that it deems satisfactory.

Nichols on Eminent Domain, Ch.26D, § 26D.01[4] (citing numerous authorities). See also Cent. of Ga. Ry. Co. v. Thomas, 144 S.E. 739, 741 (Ga. 1928) (“Equity certainly will not tolerate that a condemnor, who has been vested with the power of eminent domain, vested with that high right that the needs of the public may be met in certain cases, shall, after having had the benefit of a trial before assessors, take the chances of getting a lower award, in a second proceeding, by dismissing the first proceeding.”).

The Appellants provide no support for their broad assertion that, “[h]istorically, instances in which a condemnor does ‘abandon’ . . . a condemnation action generally are instances of permanent relinquishment.” (App. Brief p.32). Likewise, the cases Appellants cite for the proposition that “[t]here are few instances involving ‘abandonment’ as a temporary expedient exercised by the condemnor before promptly resuming substantially similar activities” (App. Brief p. 32-33) do not support that proposition or the Appellants’ position.⁸ The cases Appellants cite in

⁸ In Miller v. City of Beaver Falls, 82 A.2d 34 (Pa. 1951), the court held a landowner was awarded compensation for temporary loss of use based on a city’s temporary “plotting” of a road across private property on the city map. In In re Certain Land, 70 A.2d 847 (Pa. 1950), the court held a condemnation could not be abandoned after an ordinance not only authorized but actually effected the condemnation, causing title to vest and entitlement to compensation. In Town of Trumbull v. Eshram, 166 A.2d 844 (Conn. 1961), the court acknowledged the condemnor’s right to abandon a

relation to abandonment of easements, nonconforming uses, and other interests are also inapposite, as the Town has not in any way “abandoned” a property interest as the term is used in those contexts. (App. Brief p.31).

Just as property ownership is perpetually subject to the government’s police powers, S.C. State Highway Dep’t v. Wilson, 254 S.C. 360, 365, 175 S.E.2d 391, 394 (1970); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022-23 (1992), property rights are also inherently subject to the government’s sovereign right to exercise its power of eminent domain, subject to constitutional constraints, at any time. Haig v. Wateree Power Co., 119 S.C. 319, 112 S.E. 55, 57 (1922). The General Assembly deemed it appropriate to protect landowners from the expense of condemnation disputes by, among other things, providing statutory rights to recover attorney fees and costs in the event of a condemnation abandonment or a successful challenge action. These statutory protections satisfy considerations of equity and due process, and clearly disincentive any condemnor from attempting to use “multiplicity of litigation” to gain leverage over a landowner.

In the case at hand, the Notice of Abandonment was very clear about its purpose: “the Town of Pawleys Island hereby abandons and withdraws the Condemnation Notice underlying this challenge action . . . To the full extent that such Condemnation Notice and/or its delivery or service initiated a condemnation action, such action is hereby abandoned and withdrawn.” The filing abandoned and withdrew the specific Condemnation Notices and condemnation actions at issue in this case.⁹ There is absolutely no basis for the Appellants’ assertion that the abandonment of this specific Condemnation Notice, which they alleged was based on a fundamentally flawed

condemnation but never discussed the “permanency” issues. In Hamer v. State Highway Comm’n, 304 S.W.2d 869 (Mo. 1957), the Court held a landowner’s reliance on highway plans that were subsequently changed to not impact his property did not give rise to a claim for compensation.

⁹ “‘Condemnation action’ includes all acts incident to the process of condemning property after the service of a Condemnation Notice.” S.C. Code Ann. § 28-2-30(5)

process, could somehow preclude the Town from authorizing and pursuing any future condemnation action for a beach renourishment easement. That argument ignores what South Carolina law recognizes to be the broad nature of the eminent domain power, Haig, 119 S.C. 319, 112 S.E. at 57, Paris Mountain, 110 S.C. 36, 96 S.E. at 551, and there is no constitutional or legislative enactment that would circumscribe the exercise of the power in this way.

In other words, the Notice of Abandonment withdrew the Town's right to proceed based on filing the specific Condemnation Notices at issue in this matter but did not in any way withdraw the Town's authority to condemn an easement at a later time based on a separate condemnation process. To the extent that the Appellants may wish to argue that the abandonment was somehow undertaken in "bad faith" and should bar a future condemnation attempt, any such factual and legal conclusion, however unlikely, would only be ripe for determination at the time that any new attempt is initiated based on the full set of circumstances presented at that time. On the other hand, if the Court is inclined, future dealings between the parties could be aided by appellate guidance regarding the "bad faith" abandonment standard under South Carolina law and whether, as a matter of law, the procedural record and Appellants' allegations, taken as true, fall short of demonstrating that the Town's abandonment was in bad faith.

This situation is very clearly not an instance of a "bad faith" abandonment attempting to obtain a more favorable verdict after an adverse jury award. Furthermore, there is no legitimate indication that the Town is attempting to use successive condemnation actions in order to gain "negotiating leverage" over the Appellants. The Notices of Abandonment were filed shortly after the issuance of summary judgment orders in favor of the Appellants in the Challenge I cases, which the Amended Complaint herein asserts involved similar procedural deficiencies as were alleged here. Undersigned counsel also takes note of the statutory stay effected by the filing of the

Challenge I actions. It is clear, even accepting the allegations of the Amended Complaint at face value, that the Notice of Abandonment was filed in this action in order to avoid unnecessary, duplicative litigation over procedural issues. Accordingly, there is no factual basis for any assertion that the Town's withdrawal of the Condemnation Notice in this action was part of an effort to harass the Appellants into submission. To the contrary, the withdrawal was an attempt to minimize the time and expense burden on all parties. The Town simply undertook to withdraw this second set of unfiled condemnation notices and condemnation attempts in response to the Challenge I summary judgment order and other issues raised by the Appellants in this matter. As a matter of law, there was no bad faith abandonment.

Finally, touching on procedural issues raised by the Appellants, the "two dismissal" rule under Rule 41(a)(1), SCRCPP, has no bearing here, as the Town is not the plaintiff in this challenge action matter and has not asserted or dismissed any "claim" in this challenge action matter. More fundamentally, abandonment of a condemnation notice is a matter addressed by the Eminent Domain Procedure Act and common law, which allow for abandonment without such a limitation, and is therefore outside the scope of the "two issue" rule. S.C. Code Ann. § 28-2-120 ("In the event of conflict between this act and the South Carolina Rules of Civil Procedure, this act shall prevail."). "Our court has held in numerous cases that a condemnation proceeding is not such an action as should be commenced by service of summons and complaint, but is a special proceeding." Jennings v. Sawyer, 182 S.C. 427, 189 S.E. 746, 750 (1937) (reporting and affirming circuit court order), overruled by on other grounds by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985).

6.) The circuit court did not err in granting the Town's motion for protection from discovery.

Based upon the dismissal of the action, the Court also did not err in granting the Town's

motion for protection from discovery in these moot cases.

CONCLUSION

For the reasons set forth herein, this Court should (1) affirm the order of the circuit court; and, if the Court deems it proper to provide appellate guidance for the future dealings of the parties, (2) hold consistent with other authorities that abandonment of a condemnation action does not preclude a subsequent condemnation attempt unless the abandonment is a bad faith effort to secure a lower just compensation valuation after an unfavorable trial award; and (3) hold that, as a matter of law and construing all facts and allegations in favor of Appellants, the abandonment of the condemnation notices in this matter was not undertaken in bad faith and does not bar a future condemnation attempt, or, in the alternative, hold that any such determination would require further factual development to be conducted in the event of a future condemnation attempt and challenge action.

Respectfully submitted,

s/ William C. Dillard, Jr.
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ATTORNEYS FOR RESPONDENT
TOWN OF PAWLEYS ISLAND

December 17, 2021

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Dec 17 2021

SC 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
Appellate Case No. 2021-000757

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.

PROOF OF SERVICE

I certify that I have served the Initial Brief and Designation of Matter To Be Included in the Record on Appeal of Respondent Town of Pawleys Island by causing a copy to be e-mailed on **December 17, 2021** to counsel of record as listed below:

M. Baron Stanton (bstanton@stantonlaw.com)

s/ William C. Dillard, Jr.
William C. Dillard, Jr. (S.C. Bar No.78986)