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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY COURT OF COMMON PLEAS
The Honorable H. Steven DeBerry, IV, Circuit Court Judge

Appellate Case No. 2022-001266
Trial Court Case No. 2021-CP-27-00028

FINAL REPLY BRIEF OF APPELLANT CITY OF HARDEEVILLE

City of Hardeeville.……Appellant,

v.

Jasper County, South Carolina, Jasper County Treasurer,
and Jasper County Auditor……..…Respondents,

AND

Jasper County, South Carolina…..……...…….Cross Co-Plaintiff,

Verna Garvin, in her official capacity
as Jasper County Treasurer ……..…….Cross Co-Plaintiff,

and

Monica Wilson, in her official capacity
as Jasper County Auditor……..Cross Co-Plaintiff,

v.

City of Hardeeville, Nickel Plate Road, LLC, and Beaufort County,
South Carolina…….…..Cross Defendants.

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ARGUMENTS

I. THE COURT ERRED IN FINDING THAT THE PARK AGREEMENT IS VALID AND SATISFIES SECTION 4-1-170 (A)(3) AND SECTION 13(D).

The Circuit Court erroneously held that the Park Agreement satisfied the requirements of S.C. Const. art. VIII, § 13(D) ("Section 13(D)") and the three requirements of South Carolina Code Annotated § 4-1-170 (A). (*Jasper Order*, pp. 11-12) (R. 00015-16).

In relevant part, Section 13(D) provides that "Counties may jointly develop an industrial or business park . . . [and the] written instrument . . . is binding on all participating counties." Section 13(D) neither explicitly provides nor even suggests that any governmental entity (other than "participating counties" and, by application of *Horry County School District v. Horry County*, 346 S.C. 621, 552 S.E.2d 737 (2001), a school district) is bound by the participating counties' park agreement. *See also* S.C. Code Ann. § 4-1-170 (A) ("By written agreement, counties may develop jointly an industrial or business park [and t]he written agreement entered into by the participating counties . . . ."). This is not only basic statutory interpretation but also simple contract law. As a general rule, a contract is binding only on the parties to that contract. *See, e.g.*, *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997); *Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994) (holding a party not in privity with contracting parties has no right to enforce a contract). Appellant is not a party to the Park Agreement. (*Jasper Order*, pp. 15-16) (R. 00019-20).

Additionally, Section 13(D) must be read in its factual context. Each parcel in this State is, necessarily, located in a county *and* a school district. By contrast, absent annexation, or the creation of a new municipality (both of which require consent of all or a substantial portion of impacted landowners), a parcel of real property is not automatically located in an incorporated municipality.

Thus, a constitutional provision specifically addressing counties, but not municipalities, is consistent with the factual reality in which all real property in this State exists.

Consequently, absent some other basis in statute or judicial precedent, Appellant cannot be bound by the Park Agreement to which it is not a party. Recognizing that municipalities have distinctly different characteristics from school districts, the General Assembly expressly addressed the unique interest of municipalities by creating section 4-1-170(C).

A court cannot construe a statute without regard to its plain and ordinary meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993). A statute must receive such construction as will make all of its parts harmonize with each other and render them consistent with its general scope and object. *Davis v. County of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996).

The mere existence of section 4-1-170(C) illustrates the legal error of the Circuit Court's unilateral-county-control construction of Section 13(D). That is, the Circuit Court's Order holds that only counties can control the creation a multi-county park. (*Jasper Order*, pp. 16, 24) (R. 00020, 28). This holding is legal error because under such interpretation, section 4-1-170(C), by expressly requiring a municipality's consent (in any circumstance), would necessarily be an unconstitutional enactment. As our Supreme Court has instructed, a court must presume that when the General Assembly enacts a statutory provision, that provision is constitutional. *See generally Davis*, 322 S.C.at 73, 470 S.E.2d at 94.

The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. *S.C. Pub. Int. Found. v. Calhoun County Council*, 432 S.C. 492, 854 S.E.2d 836 (2021); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The first question to be asked when interpreting a statute is whether the statute's meaning is clear on its face. *Kennedy*

v. S.C. Retirement System, 345 S.C. 339, 549 S.E.2d 243 (2001). If a statute's language is plain, unambiguous, and conveys a clear and definite meaning, there is no need to employ the rules of statutory interpretation, and this Court must apply the statute according to its literal meaning. *Miller v. Aiken*, 364 S.C. 303, 613 S.E.2d 364 (2005). Under the plain meaning rule, a court has no right to search for or impose another meaning or resort to subtle or forced construction to change the scope of a clear and unambiguous statute. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011); *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010); *Cain v. Nationwide Prop. & Cas. Ins. Co.*, 378 S.C. 25, 29-30, 661 S.E.2d 349, 351-52 (2008).

Section 13(D) and section 4-1-170 must be read together to reach a harmonious construction. *See, e.g.*, *Centex International, Inc. v. S.C. Department of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) ("'[T]he statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.'" (quoting *S.C. State Ports Authority v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006))). Section 13(D) provides that the creation of a multi-county park is solely by agreement of the member counties. That agreement must be in writing. *Id.* The agreement is binding on the parties. *Id.* Similarly, section 4-1-170 permits a multi-county park to be "develop[ed]" "[b]y written agreement." There is ***no*** other mechanism for creation of a multi-county park under either Section 13(D) or section 4-1-170. Thus, the written agreement is the sole controlling mechanism for the multi-county park and all matters that flow from creating a multi-county park, and a court is not permitted to "blue pencil" or otherwise judicially amend a park agreement. *See generally Poynter Investments.*, 387 S.C. at 583, 694 S.E.2d at 15.

The cannon of statutory construction, "expressio unius est exlusio alterius," or "inclusio unis est exclusio alterius" applies here. Those expressions mean that "to express or include one

thing implies the exclusion of another, or of the alternative." Black's Law Dictionary 602 (7th ed. 1999) (quoted in *Hodges v. Rainey,* 341 S.C. 79, 86, 533 S.E.2d 579, 582 (2000). Again, a court's reading is, and must be, consistent with the factual scenario in which ***any*** multi-county park could be created, not just the Multi-County Park at issue in this dispute.

Section 4-1-170(A) requires the written agreement to "(1) ***address*** sharing expenses of the park; (2) ***specify by percentage*** the revenue to be allocated to each county; and (3) ***specify the manner*** in which revenue must be distributed to each of the taxing entities within each of the participating counties" (emphasis added). Notably, the General Assembly elected to use different language for each required element of the agreement. Park expenses need only be "addressed," while revenue must be "specif[ied] by percentage" and the "manner in which revenue must be distributed" must likewise be "specified."

Where a term is not defined in a statute, the Court must employ a common understanding of the undefined term. "The court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation." *Sonoco Products Company v. S.C. Department of Revenue*, 378 S.C. 385, 391, 662 S.E.2d 599, 602 (2008). Reading these three requirements in concert and comparing the language, the Court must conclude that "specify" means something other than, and requires more particularity than, merely "addressing." Further, reviewing the 1999 Agreement For Development of a Joint County Industrial and Business Park between Jasper County ("Jasper") and Beaufort County ("Park Agreement")[1] in its entirety, specifically sections 5, 6, and 7, the parties elected to (a) address expense sharing by specific percentage, and (b) specify percentages for revenue distribution between Jasper and Beaufort, as required by section 4-1-170(A)(2), but (c) told the Park Agreement's reader to look

[1] *See* Compl. Ex. B. (R. 00069)

elsewhere for the specific manner in which revenue must be distributed[2]. (Park Agreement, p. 3) (R. 00072). It was legal error for the Circuit Court to conclude this is what the General Assembly intended without torturing the language of the statutory requirement to "specify."

Thus, at a minimum, the Park Agreement does not comply with section 4-1-170(A)(3) because the Park Agreement fails to "specify the manner in which revenue must be distributed to each of the taxing entities within each of the participating counties." Section 7 of the Park Agreement provides that any revenue Jasper receives pursuant to the Park Agreement will be distributed "in accordance with an ordinance adopted by Jasper County." On the face of the Park Agreement there is no provision for the actual distribution of revenue. Jasper Respondents appear to concede that the Park Agreement is incapable of being understood by a reading the document itself and instead argue that they are entitled to rectify this deficiency and amend the Park Agreement *ad infinitum*, without any non-parties' consent, devoting five pages of their Brief to explain how all of these various parts, pieces, and amendments should be understood by an outside reader. *See* Jasper Br. pp. 20-25. In short, Jasper Respondents appear to concede that a reader would have to find one or more subsequent documents that provide for revenue distribution, instead of simply reading the Park Agreement. This is not what section 4-1-170 requires. Thus, the Park Agreement fails as a matter of law and could not bind Appellant.[3]

It cannot have been the General Assembly's intent, in enacting legislation requiring that the "written agreement must include provisions which . . . ***specify*** the manner in which revenue

[2] The Park Agreement does not specifically incorporate the Park Ordinance by reference. Rather, Section 7 of the Park Agreement provides that: "Revenues received by Jasper County shall be distributed by Jasper County to the political subdivisions of Jasper County (hereinafter referred to as the 'Jasper Participating Taxing Entities') in accordance with an ordinance adopted by Jasper County." No specific reference to the Park Ordinance is contained in Section 7 or elsewhere in the Park Agreement.

[3] Jasper Respondents admitted "[w]ritten agreements creating a multi-county industrial park must address . . . the manner in which revenue must be distribute to the taxing entities within of each the counties." Jasper Answer, ¶ 21 (R. 00181).

must be distributed to each of the taxing entities," section 4-1-170 (A) (emphasis added), to allow parties to the Park Agreement to ***fail entirely*** to specify the manner in which revenue is to be distributed. Nor could a court assume it would have been the General Assembly's intention that this element could be satisfied by interminable, various future legislative actions by a local government, and still comply with the plain language of section 4-1-170.

Jasper Respondents argue that the Park Agreement is adequate because it specifies that "Park Revenues *must* be distributed." Jasper Br. p. 15 (emphasis in original). However, Jasper Respondents' textual emphasis is misplaced, and its reading of *Horry County* is misguided. As with the park agreement in *Horry County*, Jasper Respondents' Park Agreement is inadequate because it fails to comply with the requirements of section 4-1-170(A)(3) by failing to "**specify the manner** in which revenue must be distributed to **each of the tax entities**." The *Horry County* Court found that the park agreement in *Horry County* was defective because it provided "no basis for determining what proportion [of revenue] goes to debt service and what proportion to school operations. Nor does the [park] agreement provide a basis for determining whether the auditor, who sets debt millage, or the school board, which sets operational millage, would make the allocation." *Horry County School District v. Horry County*, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001). Jasper Respondents' Park Agreement is similarly defective in its lack of specificity.

As with *Horry County*, Jasper Respondents likewise both overreads and misreads the May 5, 2022 opinion from the South Carolina Attorney General's Office ("School District AG Letter"). *See* Letter of Walter H. Cartin, Esq. to The Honorable Steven DeBerry, IV (R. 00634). In *Horry County*, because the county and municipality had a unity of interest, our Supreme Court stated from the outset that it would refer to the two entities, throughout its opinion, as one entity: "Horry County **and** the **City of Myrtle Beach** (collectively "**the county**")." *Horry County School District*

v. Horry County, 346 S.C. 621, 625, 552 S.E.2d 737, 739 (2001). Thus, whenever the *Horry County* Court asserts the rights of a "county," relative to other entities, the Court's opinion must be understood to mean what it said in its opening sentence: the *Horry County* Court is describing the rights of "county or city" relative to other entities. Similarly, the School District AG Letter, by adopting *Horry County*'s language, in a response to an inquiry from yet another school district, should not be understood to be the Attorney General's office issuing an opinion regarding a question that it was not asked. That is, the Attorney General's office was not asked to make a determination as to the relative rights of a municipality and a county, which were the same entity for the purposes of *Horry County*. If Jasper Respondents would like to ask such a question of the Attorney General's office, they are free to do so, but they are not free to selectively expand dicta and thereby clothe themselves with the authority of the Attorney General's office, purporting to expand our Supreme Court's holding in the *Horry County* decision, direct contravention of the first sentence of the opinion.

The Park Agreement is also not binding on Appellant because the revenue distribution under a park agreement covers those governmental entities that have jurisdiction over the property at the time of the agreement. A municipality that subsequently annexes property after a multi-county park's creation would possess interests that exist outside of a park agreement, as contemplated by the text of Section 13(D) and section 4-1-170, because such an annexing municipality is neither a county, nor otherwise a contracting party. If, and to the extent the counties that are parties to a park agreement want to include a municipality in the arrangement, then section 4-1-170(C) requires the counties to amend the agreement to obtain the municipality's consent such that section 4-1-170(A)(3), which requires the agreement specify the manner in which revenue must be distributed to each of the taxing entities in each of the participating counties, is satisfied.

See also Horry County. This is how the General Assembly must have understood the plain meaning of Section 13(D) when enacting section 4-1-170.

Jasper Respondents argue, without support, that if this Court holds that municipal consent remains an ongoing requirement in multi-county industrial park agreements would turn South Carolina's "public finance and economic development laws upside down." Jasper Br. p. 4. This hyperbolic rhetoric is belied by the fact that neither Appellant nor Jasper Respondents have located another case in this State in which a municipality has subsequently annexed real estate which was also located in a multi-county industrial park and a dispute arose between the governmental entities. It appears that this sequence of events has either occurred for the first time in this case, or if it has occurred in the past, the counties and the municipality involved must have simply engaged in negotiations to reach a consent agreement that was mutually acceptable, rather than requiring the intervention of the courts.

In addition to being the appropriate legal construction of Section 13(D) and section 4-1-170, the continuing obligation to obtain the consent of the involved municipality is also compelled by common sense. The Circuit Court's Order permitting Jasper Respondents to capture and distribute Appellant's millage would have the practical impact of "blue penciling" the Park Agreement to make Appellant a *de facto* party to the Park Agreement. However, Appellant does not actually receive the rights of a party to the Park Agreement, because Appellant is not permitted to participate in, or consent to, future amendments to the Park Agreement. The Circuit Court ought to have ordered that Jasper Respondents must either seek to amend the Park Agreement to include Appellant, which would require Appellant's consent under section 4-1-170(C) and basic premises of contract law, or in the absence of this, that the Appellant was not bound by an agreement to which it was not a party. Instead, the Circuit Court judicially mandated Appellant's addition to

the Park Agreement not only without Appellant's consent, but also over Appellant's very vehement objection and on unknown terms.

The Circuit Court's Order has the impact of materially changing several fundamental elements of the Park Agreement after the real property ("Real Property") now situate in the corporate limits of Appellant City of Hardeeville is already located inside Appellant's jurisdiction, and such "blue penciling" violates section 4-1-170(C) and general principles of contract interpretation, which requires a party's consent to be bound by contractual obligations. The Circuit Court's Order commits additional error by failing to specify the manner in which the Circuit Court has amended the Park Agreement, failing provide the amount of revenue that Appellant would receive or permitting Appellant to cease to provide municipal services to the Real Property. Thus, following the Order, the Circuit Court has made Appellant a party to the Park Agreement, but neither Appellant nor Jasper Respondents know how much revenue Appellant is actually to receive, and Appellants have no power to participate in future amendments or alterations to the Park Agreement.

Jasper Respondents argue that the "General Bond Ordinance tells Hardeeville exactly how the park Revenues will be distributed, which enables Hardeeville to determine the amount it will receive." Jasper Br. p. 26. However, this assertion is not supported by the record before this Court. If the Court were asked to calculate how much revenue Appellant will receive for fiscal year 2022, for example, this Court would be wholly unable to answer that question based on the information in the record. As a matter of basic math, "how revenues would be distributed" is an insufficient piece of information, without knowledge of how much total revenue has been received and what percentage of the 41% that is due to Jasper would be conveyed to Appellant. Put another way, absent information regarding total revenue obtained under the Park Agreement and information

regarding Jasper's claimed share of its fractional amount, neither of which is information contained in the record before this Court, any proposed fractional distribution is simply an unknown percentage of an unknown number.

Further, even if this amount were capable of calculation based on the information contained in the record, it would be inadequate because Jasper Respondents have argued that they are entitled to alter the Park Agreement by subsequent ordinance without either providing notice to, or obtaining the consent of, Appellant. *See* Jasper Br. pp. 18, 22-25. Thus, Jasper Respondents claim the unilateral right to vary the percentage Appellant will receive, indefinitely, and without notice or an opportunity to consent. Thus, Appellant neither knows, nor can it calculate, the amount that Jasper Respondents believe that Appellant ought to have received in the past or predict the range of the amount that Appellant might receive in the future. Jasper Respondents' claim to unfettered authority in this manner plainly violates the purpose of the municipal consent requirement in S.C. Code section 4-1-170(C), and it was reversible error of law for the Circuit Court to so hold.

II. THE COURT ERRED IN FINDING THAT DISCOVERY IS NOT NECESSARY FOR DETERMINING THAT THE PARK AGREEMENT IS VALID AS A MATTER OF LAW.

It is factually undisputed that, following Appellant's annexation of the Real Property in 2006, Appellant began levying, collecting, and retaining 100% of the taxes related to the Real Property, and, in 2008, Appellant contracted with the Auditor and the Treasurer to levy and collect Appellant's taxes and fees against all property located in Appellant's jurisdiction, including the Real Property, and distributed 100% of these collections to Appellant.

During the 14 years following annexation and the 12 years after the Auditor and the Treasurer were directly contracted to, and began levying and collecting for, and distributing taxes to, Appellant, until October 2020, not once did Jasper Respondents (which had actual knowledge of, and had not objected to, the annexation of the Real Property and had directly participated in

the tax levy and collection, via a contract between Appellant and the Auditor and the Treasurer) suggest that any entity other than Appellant was entitled to any portion of the revenue generated by the Real Property because of Appellant's imposition of millage.

Since Appellant's annexation of the Real Property in 2006, Appellant, Jasper, Nickel Plate, and Beaufort, and since 2008, Auditor and Treasurer directly, have interpreted the Park Agreement as the Park Agreement is written: it does not contemplate the collection of Appellant's millage as part of the Multi-County Park or the distribution of Appellant's revenue to anyone other than Appellant.

For at least 12 years, all parties have acted as if the governing constitutional, statutory, and contractual principles permitted Appellant to levy and collect its own millage not subject to any re-allocation or distribution according to the Park Agreement. Thus, under Jasper Respondents' own longstanding interpretation and direct participation, Appellant's millage should continue to be collected and distributed to Appellant without any interference by Jasper Respondents, Beaufort, or Nickel Plate. *See, e.g.*, Answer (Cross-Complaint), ¶¶ 35, 37, 38, & 40 (R. 00183-184). The sole exception to this would be Jasper Respondents obtaining Appellant's consent to participate in the Park Agreement, pursuant to section 4-1-170(C).

Something occurred in 2020 that altered the parties' longstanding course of dealing. Respondents contend that they simply noticed, after 14 years, that they were making an approximately 6-figure "mistake" annually, for nearly the better part of two decades. Despite Jasper Respondents' multi-year course of dealing, Respondents asserted that their prior decision should not be accorded any deference and that they were entitled to unilaterally alter future payments and offset prior payments from future revenues, Appellant had no say in the matter, and

Jasper Respondents was entitled alter Appellant's substantive rights by simply sending a demand letter in November of 2020. Jasper Br. p. 26.

Jasper Respondents further contend that they are entitled by statute to "correct future distributions". Jasper Br. p. 17. There are at least two problems with this contention. First, while section 4-1-170(B) provides that "[m]isallocations may be corrected by adjusting later distributions, it also provides these adjustments **must be made in** the **same fiscal year as** the **misallocations**." (emphasis added). Even assuming *arguendo* that Appellant is bound by the Park Agreement to which it is not a party and that this subsection empowers Jasper Respondents to alter Appellant's allocations of revenue, limiting such revisions to the then-current fiscal year is not the right Jasper Respondents have claimed. Instead, Jasper Respondents have claimed the unilateral right to "reconcile[e] the errors and confin[e] that allocation to the **three years immediate past**." Compl. Ex. G, p. 2 (R. 00168) (emphasis added). That is to say, Jasper Respondents claimed the right to demand that Appellant disgorge and repay multiple years of payments that Jasper Respondents previously collected and remitted to Appellant.

Second, section 4-1-170(B) provides that the issue of allocation, insofar as this subsection is concerned, is limited to "the purpose of bonded indebtedness limitation and for the purpose of computing the index of taxpaying ability pursuant to Section 59-20-20(3)", neither of which limitations are applicable to the distribution of Appellant's millage. Thus, contrary to the arguments in Jasper Brief, this subsection is either wholly inapplicable or stands in contravention of Jasper Respondents' claimed authority.

The Circuit Court committed further error in determining that discovery was unnecessary to determine whether the Park Agreement was valid as a matter of law. (*Jasper Order*, pp. 14-15, 24) (R. 00018-19, 28). For the Circuit Court to understand the revenue distribution, the Circuit

Court could not merely read the Park Agreement itself but would have to find each and every subsequent document that addressed revenue distribution. Jasper Respondents argue that Appellant should be held to have constructive notice of the same, but there is no evidence in the record that any or every document was indexed in such a way that it would be discoverable in a search of the real property records of the applicable county. S.C. Code Annotated section 30-9-4 provides that "the **recordation** of a deed, mortgage, or *other written instrument* **is not notice** as to the purport and effect of the deed, mortgage, or other written instrument **unless** the filing of the instrument for record is **entered** as required **in the indexes**." (emphasis added). There is no evidence in the record that any of Jasper Respondents' alleged recordings were properly indexed against the Real Property. This Court has held that "proper indexing supplied inquiry notice of an instrument, while recordation without proper indexing supplied no notice at all." *Thomas v. Thomas*, 286 S.C. 294, 295, 333 S.E.2d 76, 76 (S.C. Ct. App. 1985). *See also Bradley v. Guess*, 165 S.C. 161, 163 S.E. 466 (1932). Thus, Jasper Respondents' constructive notice argument against Appellant must fail because there is no evidence in the record before the Court regarding the indexing of the very documents which are alleged by Jasper Respondents to be necessary to interpret and understand the Park Agreement.

Regardless of the indexing of the Park Agreement or any subsequent ordinances, Jasper Respondents' contention is not what section 4-1-170(A) requires. Jasper Respondents asserted that at least three subsequent ordinances have modified this revenue distribution. (*Jasper Answer*, pp. 15-17) (R. 00191-193). However, nothing in the record proves that Jasper has not additionally modified, rescinded, or repealed the revenue distribution. Further, despite these, at least, three amendments, nothing appears to indicate Jasper is now compliant with our Supreme Court's admonition in *Horry County*: "we note an inadequacy in the [park] agreement itself . . . section 4-

1-170(3) requires the agreement creating the MCBP to 'specify the manner in which revenue must be distributed to each of the taxing entities within each of the participating counties.'" *Horry County School District v. Horry County*, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001).

Although the Circuit Court could have held in favor of Appellant's motion for summary judgment by determining that the Park Agreement failed, on its face, to comply with the requirements of section 4-1-170(A) and our Supreme Court's admonishment in *Horry County*, calling attention to particular defects in a park agreement, the Circuit Court committed a reversible error of law in reaching the conclusion that the Park Agreement was compliant with State statute, in the absence of discovery, given Jasper Respondents' position that interpreting and understanding the Park Agreement is only possible via reference to several additional actions and ordinances issued by Jasper, subsequent to execution of the Park Agreement.

Additionally, Jasper Respondents offered the Circuit Court no explanation for their 12 or 14 years' prior course of conduct, in contravention of their current position, and in Jasper Respondents' motion for summary judgment, this failure to provide responsive discovery must be construed against them. *See Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc.* (Ct. App. 2006). Similarly, the Circuit Court erred by failing to defer to Jasper Respondents' longstanding interpretation of the Park Agreement or by requiring that Jasper Respondents participate in discovery to rationalize their current position with their interpretation of the Park Agreement for the prior 14 years.

As the authorities responsible for budgeting, levying, and collecting taxes and fees, and then distributing those taxes and fees according to the Park Agreement, for more than 14 years, Jasper Respondents interpreted the Park Agreement as having no impact whatsoever on Appellant. "The construction of a statute by the agency charged with its administration will be accorded the

most respectful consideration and will not be overruled absent compelling reasons." *Brown v. S.C. Department of Health & Environmental Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002); (citing *Dunton v. South Carolina Board of Examiners in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). See also *Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014) (holding that courts are to give "deference to an administrative agency's interpretation of an applicable statute or its own regulation," when the agency's interpretation is consistent with, and not contrary to, the plain language of the statute).

III. THE COURT ERRED IN FINDING THAT APPELLANT'S CONSENT TO THE PARK AGREEMENT WAS NOT REQUIRED.

As a general rule, a contract is binding only on the parties to that contract. *See, e.g.*, *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997); *Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994) (holding a party not in privity with contracting parties has no right to enforce a contract).

The language of section 13(D) is plain, unambiguous, and conveys a clear and definite meaning: "Counties may jointly develop an industrial or business park . . . [and the] written instrument . . . is binding on all participating counties" (emphasis added). Counties are bound by their written instruments regarding a multi-county park. Nothing in paragraph D purports constitutionally to bind a municipality to a multi-county park instrument.

If the Constitution does not force a municipality to be bound, then in order for a municipality to be bound, the language creating such an obligation must be found elsewhere in statute or contract. But, like the Constitution, the relevant statutory authority contains no such binding language: "By written agreement, counties may develop jointly an industrial or business park . . . as provided in Section 13 of Article VIII of the Constitution of this State." S.C. Code

Ann. § 4-1-170(A) (emphasis added). Section 4-1-170(A) points the reader back to the constitutional provision discussed above, which contains no language binding a municipality.

Absent either constitutional and statutory authority forcing a municipality to be bound by a written agreement, Appellant must not be bound unless it is made a party to the Park Agreement and, thus, became bound by contract. However, as is previously noted, a primary source of the dispute in this case is that Appellants are not a voluntary party to the Park Agreement. (*Jasper Order*, pp. 15-16) (R. 00019-20). As a result, based on basic principles of statutory and contractual construction, it was legal error for the Circuit Court to conclude Appellant is bound by the Park Agreement.

Jasper Respondents attempt to obfuscate this point by contending that "[Appellant's] consent is only required *prior to* the creation of the park." Jasper Br. p. 20 (emphasis in original). While Jasper Respondents continue to erroneously insert the word "only," which does not appear in the text of the statute, the emphasized words actually support Appellant's argument: the section of statutory language on which Jasper Respondents relies is contains no prescription as to the process to be followed when an annexation occurs *subsequent to* the creation of a multi-county industrial park. The Court must, therefore, look to other law and precedent to determine a harmonious interpretation of applicable statutory law.

After conceding that section 4-1-170 clearly requires the consent of the municipality, rather than assuming that consent is a continuing right of the municipality, either as a matter of due process or as a matter of simple practicality, which our General Assembly sought to protect, Jasper Respondents then appear to insert themselves into the mind of the General Assembly by arguing that a municipality's right to consent is protected "*only if* a park would encompass municipal property *at the time the park is created*." Jasper Br. p. 19 (emphasis in original). The General

Assembly saw fit to insert neither of the two phrases Jasper Respondents have added, and emphasized, as modifiers to the statutory text.

Jasper Respondents' argument on this point relies heavily on *City of Abbeville*[4]. *See* Jasper Br. pp. 19-20. However, Jasper Respondents have chosen a poor case and their reliance on this holding is misplaced for several reasons. First, *City of Abbeville* involved original judicial review of an ongoing policy dispute between municipalities and General Assembly[5], rather than an interpretation of extant law. Second, as our Supreme Court has already distinguished in subsequent cases, *City of Abbeville* neither fully addresses allocation of fees due to a municipality, nor does it contemplate the impact of subsequent annexation by a municipality, if the General Assembly has passed laws which only specify the process to be applied when a municipality is necessarily involved at the creation of a contract. In short, *City of Abbeville* failed to consider the two primary issues in dispute in this appeal.

"*City of Abbeville* stands for the proposition that a[n entity's] right to serve its present customers continues upon annexation or incorporation, but **does not address the fee issue**." *S.C. Electric & Gas Company v. Town of Awendaw*, 359 S.C. 29, 37, 596 S.E.2d 482, 486 (2004) (emphasis added). Indeed, the *Awendaw* Court went on to hold that when our courts seek to harmonize provisions of the South Carolina Constitution and Title 5 of the South Carolina Code, when these impact the rights of municipalities, courts must recognize that timing of the municipal annexation is of paramount importance: "in areas which are subsequently annexed or newly incorporated, a **new relationship** is **created by operation of law** between the municipality and

[4] *City of Abbeville v. Aiken Electric Cooperative, Inc.*, 287 S.C. 361, 363, 338 S.E.2d 831, 832 (1985).

[5] "Plaintiffs, 88 muncipalities [sic] and Boards of Commissioners of Public Works (Cities), invoked the original jurisdiction of this court seeking a declaration of the constitutionality of Act 431 of the 1984 General Assembly (the Act)." *Id.* at 363.

the existing [entity]... Accordingly, a municipality may, consistent with § 5-7-30 and S.C. Const. article VIII, § 15, impose by ordinance a reasonable [] fee on an existing [entity] **in subsequently annexed** or **newly incorporated** areas." *Id.* at 37, 596 S.E.2d at 484 (emphasis added).

When weighing the respective rights of the parties and the municipality, the *Awendaw* Court focused on the municipal consent requirements enshrined in S.C. Const. article VIII, § 15 holding, "[w]e consistently have taken the view [an entity] generally **should not be allowed free use** of a municipality's [resources] in light of the constitutional and statutory authority reserving or granting power to municipalities to impose charges for such use." *Id*. at 38, 596 S.E.2d at 484. *See also City of Cayce*, 326 S.C. 237, 486 S.E.2d 92. Notwithstanding its finding in favor of the municipality, the *Awendaw* Court went on to emphasize that, rather than relying upon a court to protecting the rights of the municipality, the entity that commenced the dispute with the municipality remained free to simply behave in a rational manner and negotiate a solution by entering into a contract, in which the municipality would agree to provide services at a reasonable, agreed-upon fee: "municipality and [entity] remain free to negotiate terms and enter into a traditional [] agreement to be adopted in the usual fashion by a [] ordinance." *Id.* at 39, 596 S.E.2d at 484. *See also Quality Towing*, 345 S.C. at 165-167, 547 S.E.2d at 867. As Appellant has argued, Jasper Respondents are required to negotiate and obtain Appellant's consent to the Park Agreement, pursuant to the requirements of section 4-1-170(A), read in harmony with Section 13(D) and section 5-3-150, and ought to simply do so.

S.C. Code Ann. section 5-3-150 provides a method for annexing property into a municipality. When annexing property, section 5-3-150 requires, among other things, the annexing municipality (a) provide notice to the county administrator, (b) hold a public hearing during which (i) the municipality must alert the public to what public services will be assumed by the

municipality, and (ii) reveal what taxes and fees the municipality would be borne against the new city property for the public services, and (c) provide notice of the timeline for assumption of the public services. Unlike the constructive notice argument of Jasper Respondents, which must fail as described below, it is clear that Jasper Respondents and all other parties to this matter had actual notice of Appellant's annexation of the Real Property.

Section 5-3-150 provided the basis through which Appellant annexed the Real Property. There is no evidence in the record suggesting that Appellant failed to comply with section 5-3-150's requirements. Because the statutes at issue must be read harmoniously, the point of Appellant's annexation is the logical point in the timeline at which Jasper Respondents ought to have raised any concerns over Appellant's ability to levy and collect, based on the existence of the Park Agreement, or ought to have sought Appellant's consent to the Park Agreement. There is no evidence in the record that either such objection was raised, or such consent was sought. To the contrary, the record contains evidence that for 12-14 years, Jasper Respondents had actual knowledge of, and no objection to, Appellant's annexation of Real Property and collection of millage therefor.

Jasper Respondents attempts to avoid directly address estoppel by instead contending that Appellant had "constructive notice" of the Park Agreement. Jasper Br. pp. 17-18. This contention must fail for two reasons. First, Jasper Respondents have failed to participate in discovery,[6] Jasper Respondents has failed to respond to Appellant's demand for information pursuant to the South Carolina Freedom of Information Act,[7] and there has not been a finding by the Circuit Court that

[6] Jasper Respondents' discovery obligations were stayed until thirty days after the Court entered a decision on Jasper Respondents' Motion for Partial Summary Judgment. (Jasper Order, p. 3) (R. 00007)

[7] Jasper Respondents have failed to respond to Appellant's request for related information pursuant to S.C. Code sections 30-4-10 et. seq. ("SC FOIA"), which were submitted to Jasper on December 23, 2020. See *City of Hardeeville's Reply to Jasper County's Response to City of Hardeeville's Motion to Reconsider*, p. 3. (R. 00540)

all ordinances passed by Jasper County or Beaufort County related to the Park Agreement have been produced to Appellant as of the current date, much less that they were properly recorded and indexed at the time of Appellant's annexation in 2006. To the contrary, (a) the order of the Circuit Court required Jasper Respondents to produce discovery to Appellant, at the latest, on or before October 2, 2022[8], but Jasper Respondents have yet to do so, and (b) in addition to the two documents which are alleged to have been recorded in Jasper Respondents' Brief, Jasper Respondents have also asserted that at least three subsequent ordinances have modified the revenue distribution under the Park Agreement[9]. (Jasper Answer, pp. 15-17) (R. 00191-193).

Second, even assuming *arguendo* that (a) the Park Agreement and General Bond Ordinance and the other potentially impactful ordinances were timely recorded in the Jasper County Clerk of Court's office in 2006 and (b) there are no other ordinances that have or ought to have been recorded, Jasper Respondents neither argues, nor is there any evidence in the record that (a) Appellant had actual knowledge of the Park Agreement or (b) any of these documents were *indexed* in such a way that a competent title abstractor seeking to determine the status of this real property in 2006 could have, or would have, located such documents. For Jasper Respondents prevail under a theory of "constructive notice", in addition to the statutory requirement of proper indexing, a variety of showings would be required to demonstrate that Appellant ought to have found these documents. Jasper Respondents would need to make a showing pertaining to the standard of care and practice in the locality, and such showing would require the testimony of an expert in the area to establish that a competent professional should have been expected to find these documents. "Since this is an area beyond the realm of ordinary lay knowledge, expert

[8] Thirty days after September 2, 2022, the entry date of the Order Denying Hardeeville's Motion to Reconsider.

[9] Jasper Respondents argue in a footnote that all other impactful additional ordinances were also recorded. Jasper Br. p. 25.

testimony usually will be necessary to establish both the standard of care and the defendant's departure therefrom." *Kemmerlin v. Wingate*, 274 S.C. 62, 65, 261 S.E.2d 50, 51 (1979). No such showings or findings are part of the record before the Court, nor is it part of the record that Appellant had actual notice of the Park Agreement. Therefore, Jasper Respondents' contentions pertaining to Appellant's alleged "constructive notice" should be disregarded.

IV. THE COURT ERRED IN FINDING THAT ALL PROPERTY IN THE PARK, INCLUDING THE ANNEXED PROPERTY, IS EXEMPT FROM ALL *AD VALOREM* TAXATION.

Further, the Court must read Section 13(D) and section 4-1-170 in concert with section 5-3-150. Nothing in Section 13(D), section 4-1-170, or section 5-3-150 suggests the General Assembly intended to limit a municipality's ability to annex property or to levy and collect taxes necessary to support the public services provided to that annexed property. Rather, section 5-3-150(1) specifically requires a municipality annexing property to provide notice to the public what services will be provided and when and how much those services will cost the landowners of the property being annexed through taxes and fees.

Jasper Respondents argue that Section 13(D) provides that "all park property is exempt from all *ad valorem* taxes" and that there "is no exception to this tax exemption," which thus, in their estimation, ends the inquiry as to the rights of a municipality. Jasper Br. p. 13. However, this assertion is incorrect and incomplete. Even by its own terms, the Park Agreement is time limited, and unless it has been subsequently amended, it expires "twenty-eight (28) years from the date of execution." Compl. Ex. A, p. 2 (R. 00067). Contrary to Jasper Respondents' arguments, the respective rights of the parties are, demonstrably, dependent upon modification by contract, as well as other statutory provisions, and the various parties' respective rights can only be understood with reference to all these applicable provisions. The fact that the rights of the parties to the Park

Agreement are time-limited and capable of modification is further support for Appellant's position that its rights cannot be modified unless it is a party to the Park Agreement.

Section 5-3-150(5) provides that for purposes of this section, any real property included within a multicounty park under section 4-1-170 is considered to have the same assessed valuation that it would have if the multicounty park did not exist. Notwithstanding any other provision of law, any real property which is or has been included within a multicounty park under section 4-1-170 and title to which is held by the State of South Carolina, ***only may be annexed*** with prior written consent of the State of South Carolina, and when title to real property in the park is held by a political subdivision of the State, the property ***may be annexed only*** with prior written consent of the governing body of the political subdivision holding title. (emphasis added).

The Circuit Court ought to have, and this Court must read, all of section 5-3-150 in concert with itself and with Section 13(D) and section 4-1-170. Section 5-3-150(1) provides general authority for a municipality to annex property and levy taxes and fees in exchange for providing services. Section 5-3-150(4) provides that (a) property owned by a local government and leased to a company pursuant to a "title transfer" fee-in-lieu of tax structure maintains the same assessed value to the annexing municipality ***after annexation*** as the property's original cost and (b) provides the lessee (not the local government) can consent to the annexation. Section 5-3-150(5) provides that property subject to a multi-county park arrangement under section 4-1-170, as is present in the instant dispute, maintains the same assessed value to the annexing municipality ***after annexation*** as the property would have had absent the multi-county park designation and when title to the property is in the name of a county, for example, that county must consent to the annexation. That is, when the General Assembly intended to restrict a municipality's ability to

annex multi-county park property and, therefore, tax that property, it expressly did so.[10] *See* section 5-3-150(5) ("when title to real property in the park is held by a political subdivision of the State, the property may be annexed only with prior written consent of the governing body of the political subdivision holding title").[11]

The General Assembly's intention, particularly when read in concert with section 4-1-170, is plain: a municipality may annex, levy, and collect taxes and fees, as part of the property's becoming part of a municipality even after property is located in a multi-county park. Further, nothing in the plain language of section 5-3-150 suggests the General Assembly intended for a municipality to be bound to an existing multi-park agreement following annexation. Indeed, such a reading contradicts the plain reading of section 5-3-150(1) which requires, as a condition of the annexation, that the requisite "public hearing must include . . . a statement as to what public services are to be assumed or provided by the municipality, and the taxes and fees required for these services." Had the General Assembly intended to require that a municipality consent to a multi-county park agreement as part of the annexation process, the General Assembly could have done so.

Further, as a matter of public policy, the General Assembly would not have intended for a municipality to be able to annex property, which requires the municipality to provide services to the annexed property, but then leave the capture and distribution of revenue generated by the annexed property up to another entity, such as the county. Essentially, in that scenario, a municipality would be required to provide services, but would receive no revenue, which result contradicts the plain language of section 5-3-150(1). The Circuit Court erroneously interpreted

[10]Again, the cannon of statutory construction, "expressio unius est exlusio alterius," or "inclusio unis est exclusio alterius" applies here.

[11]Jasper does not own the Real Property. Thus, Hardeeville was not required to obtain Jasper's consent prior to annexation.

Horry County to have considered and dismissed, similar policy arguments made by the Horry County School District. The Circuit Court misconstrued *Horry County* by failing to acknowledge that none of the statutes applicable to annexation or multi-county parks treat municipalities and school districts interchangeably.

CONCLUSION

In applying these principles, construing State statues and the State Constitution in harmony, and finding that school districts and municipalities are treated differently under State statute, the Circuit Court should have found, and this Court should now find, in favor of Appellant.

This Court should find that Appellant's annexation of property located in the Multi-County Park, after that park was created, resulted in the annexed property being subject to *ad valorem* taxation. Instead of foisting an unworkable agreement with uncertain terms on a non-party, the Circuit Court should have deferred to the wisdom of the General Assembly's requirement that municipalities must consent to these county-based park agreements. This Court should hold that Appellant's *ad valorem* taxation does not constitute park revenues generated from park property and that Appellant's revenues from the Real Property, therefore, are not to be allocated and distributed in accordance with the judicially blue-penciled Park Agreement.

And, at the very least, instead of ignoring the parties 14-year course of dealing, the Circuit Court should have required that the parties meaningfully participate in discovery before entering the Jasper Order.

For these reasons, Appellant respectfully asks this Court to reverse the decision of the Circuit Court and find for Appellant in all respects, or in the alternative, find that the case should be remanded to the Jasper County Court of Common Pleas for further proceedings consistent with the opinion of this Court.

Respectfully submitted,

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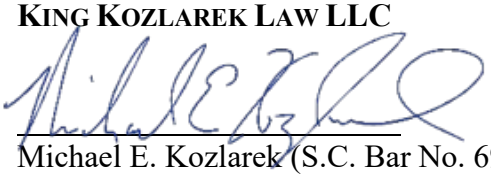

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May 1, 2023
Greenville, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY COURT OF COMMON PLEAS

The Honorable H. Steven DeBerry, IV, Circuit Court Judge

Appellate Case No. 2022-001266
Common Pleas Case No. 2021-CP-27-00028

City of Hardeeville.……Appellant,

v.

Jasper County, South Carolina, Jasper County Treasurer,
and Jasper County Auditor……..…Respondents,

AND

Jasper County, South Carolina…..……...…….Cross Co-Plaintiff,

Verna Garvin, in her official capacity
as Jasper County Treasurer ……..…….Cross Co-Plaintiff,

and

Monica Wilson, in her official capacity
as Jasper County Auditor……..Cross Co-Plaintiff,

v.

City of Hardeeville, Nickel Plate Road, LLC, and Beaufort County,
South Carolina…….…..Cross Defendants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellant City of Hardeeville complies with Rule 211(b).

[Signature Page Follows]

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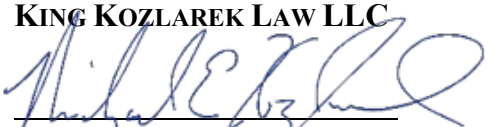

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May 1, 2023
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