STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
TOWN OF SULLIVAN'S ISLAND, Plaintiff, vs. NATHAN BLUESTEIN and THEODORE ALBENESIUS, III, Defendants.	Case No. 2022-CP-10-00846 **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court on Motion for Summary Judgment, filed May 23, 2022, on behalf of Plaintiff Town of Sullivan's Island ("Town" or "Town Council") against Defendants Nathan Bluestein and Theodore Albenesius, III (together, "Defendants") on the Town's claim for declaratory judgment and on Defendants' counterclaims for breach of contract, specific performance, and promissory estoppel (the "Motion"). The Court conducted a hearing on the matter on September 22, 2022. William W. Wilkins and Alexandra H. Austin appeared for the Town, and James B. Hood and Lisa B. Bisso appeared for Defendants. The Court has fully considered the Motion, memoranda of law submitted in support of and in opposition to the outstanding Motion, the evidence presented, the record herein, the applicable law, and arguments of counsel. The Court finds there is no genuine issue of material fact as to the Town's claim or Defendants' counterclaims, and the Town is entitled to summary judgment as a matter of law. Accordingly, as set forth below, the Court GRANTS the Town's Motion.

INTRODUCTION

This action concerns the validity and/or enforceability of a settlement agreement, as amended (the "Settlement Agreement"), between Defendants and a prior town council of Sullivan's Island with respect to certain accreted beachfront property (the "Accreted Land") owned by the Town. The Settlement Agreement imposes ongoing obligations on the Town in perpetuity regarding use and maintenance of the Accreted Land. The Town argues, and this Court agrees, the Settlement Agreement is invalid and unenforceable because it restricts, limits, and/or prohibits the exercise of the legislative functions or governmental powers ("legislative/governmental powers")[1] of the Town and purports to bind future town councils in the exercise of these powers. Moreover, even if the Settlement Agreement could somehow be said to involve only the proprietary/business functions of the Town, it would nonetheless be invalid and unenforceable because it is unreasonable as a matter of law.

Although this litigation is in its early stages, it is nonetheless ripe for summary judgment. The pleadings demonstrate that the Settlement Agreement standing alone governs the dispute, that it is unambiguous in its terms, that it presents no questions of material fact, and resolution presents solely matters of law. Moreover, a determination that the Settlement Agreement is invalid and unenforceable is dispositive of all claims in the case, including Defendants' counterclaims. Accordingly, a ruling on this threshold and dispositive issue is proper, without the need for unnecessary discovery or delay, and will best serve the interests of justice and judicial economy, as well as those of the parties and the public.

[1] Throughout the relevant case law the words "powers" and "functions" are used interchangeably.

FINDINGS OF UNDISPUTED FACT

The Accreted Land

The Town is the fee simple owner of the Accreted Land located along the Atlantic Ocean on Sullivan's Island in Charleston County, South Carolina. It obtained fee simple ownership of the Accreted Land in 1949 by deed from the War Assets Administration of the United States.[2] (Compl. ¶ 8; Answer ¶ 7.)

In 1981, the Town passed a zoning ordinance restricting use of the Accreted Land. (Compl. ¶ 9; Answer ¶ 8.) The ordinance states, in pertinent part:

> There shall be no construction of any type, no destruction of vegetation (except trimming, cutting and pruning of bushes and trees as provided in this section), and no man-made changes of topography in [the] area. The Town Council ***may*** establish a program pursuant to which citizens ***may*** apply to the Town for permission to prune, trim and cut bushes and trees in the … area as follows … (5) in those areas where the height of trees or bushes are deemed objectionable, the trees or bushes may be pruned to a height of no less than three (3) feet, provided that the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the safety, welfare, and health of the people of the Town.

§ 21-39A, Town Code of Ordinances.

On February 12, 1991, the Town executed a deed conveying the Accreted Land to the Lowcountry Open Land Trust ("LOLT").[3] (Compl. ¶ 10; Answer ¶ 9.) Subsequently, on that same day, LOLT executed a deed conveying the Accreted Land[4] back to the Town, subject to

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[2] This deed is recorded in the Register of Deeds Office for Charleston County in Book K51 at pages 271-286.

[3] This deed is recorded in the Register of Deeds Office for Charleston County in Book K200 at pages 484-495.

[4] Over the years the Accreted Land has significantly increased in width due to the gradual accumulation of sand and other sediment. Now the Accreted Land contains well over one

certain terms, conditions, restrictions, and covenants (the "1991 Deed").[5] (Compl. ¶ 11; Answer ¶ 10.) It provides, in pertinent part:

> 1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.
>
> 2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given ***the unrestricted authority to*** trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens.
>
> 3. Notwithstanding the provisions of Paragraph 1 hereof, and subject to the limitations of this Paragraph 3 and of Paragraphs 2 and 4, the Town Council of Sullivan's Island (the "Council") shall have ***the right to*** improve, change, modify or alter the Property only if such actions are to further or effect one or more of the following enumerated public objectives or policies ("Public Policies"):
>
>   a) Drainage
>   b) Mosquito control
>   c) Public walkways and emergency access to the Atlantic Ocean
>   d) Beach renourishment
>   e) Erosion control
>   f) Vegetation management
>   g) Educational programs
>   h) Public safety
>   i) Public health; and
>   j) Scenic enhancement.
>
>   Prior to taking any action affecting the Property to further or effect a Public Policy ("Public Action"), the Council shall make specific written findings of fact;

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hundred acres on which has grown a dense forest in a variety of trees, bushes, plants and undergrowth. Compl., Ex. B at 6.

[5] This deed is recorded in the Register of Deeds Office for Charleston County in Book K200 at pages 496-510.

1) that the proposed Public Action is proposed solely for the purpose of furthering or effecting one or more of the enumerated Public Policies,

2) that the proposed Public Action is necessary for the health, safety or general welfare of the Town,

3) that the benefits of the proposed Public Action outweigh the damage done to the aesthetic, ecological, scientific, or educational value of the Property in its natural state, and

4) that in making its findings of fact, the Council has given due and reasonable consideration to

    i) the cumulative effect of the proposed Public Action and past Public Actions on the natural state of the Property,

    ii) the alternative methods, if any, of furthering or effecting the proposed Public Policy which do not impact adversely on the natural state of the Property, and

    iii) the probable results of not taking the proposed Public Action.

The above described written findings of fact must be made prior to each individual Public Action relating to the Property and shall be specific to the circumstances of the proposed Public Action and not merely conclusive in nature.

. . . .

During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof.[6] The Town may enact ordinances and regulations affecting the Property which are more restrictive

[6] Paragraph 8 provides that the Restrictions may be amended by "an affirmative vote of both (a) seventy-five (75%) percent of the registered voters of the Town who vote in the referendum held pursuant to the terms hereof, and (b) one hundred (100%) percent of the members of Town Council."

> than these Restrictions or which are not inconsistent with these Restrictions.

(*Id.*; Mot., Ex. A.)

In 1995 the Town amended the 1981 zoning ordinance to provide, in pertinent part, that "vegetation may be trimmed and pruned so as to have a maximum height of no less than seven feet (7') above the ground." § 21-39.1G, Town Code of Ordinances. (Compl. ¶ 12; Answer ¶ 11.) In 2005, the Town amended the zoning ordinance again to provide, as it does to this day, that "vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground." § 21-71(C)(3), Town Code of Ordinances. (Compl. ¶ 13; Answer ¶ 12; Mot., Ex. B.) The ordinance further provides:

> **A. No construction or removal of vegetation.**
>
> There shall be no . . . destruction or removal of vegetation by any means except trimming and pruning of shrubs and trees as provided in this Ordinance. . . .
>
> . . . .
>
> **C. Permit for trimming and pruning of vegetation.**
>
> . . . .
>
> (3) The only vegetation that may be trimmed and pruned . . . is limited to the following: Southern Waxmyrtle (Myrica Cerifera), Eastern Baccharis (Baccharis Halimifolia), and Popcorn trees (Tallowtree, Sapium Sebiferum).

(*Id.*)

The Underlying Action

Defendants own real property on Sullivan's Island. (Compl. ¶ 4; Answer ¶5.) In June 2010, Defendants separately applied to the Town for a permit to trim and prune ocean

adjacent property to a height of no less than three (3) feet. (Compl. ¶ 14; Answer ¶ 13; Mot., Ex. C.) The Town denied Defendants' permit applications, as failing to meet the requirements of Section 21-71(C) of the Town Code of Ordinances. (Compl. ¶ 15; Answer ¶ 13; Mot. Ex. D.)

On July 8, 2010, Defendants filed a lawsuit against the Town in the Court of Common Pleas, Charleston County, captioned *Bluestein, et al. v. Town of Sullivan's Island, et al.* and bearing case number 2010-CP-10-05449 (the "Underlying Action").[7] (Compl. ¶ 16; Answer ¶ 14.) The Master in Equity granted summary judgment in the Underlying Action on November 10, 2015 in favor of the Town and against Defendants. (Compl. ¶ 17; Answer ¶ 15.) On August 1, 2018, the South Carolina Court of Appeals affirmed the grant of summary judgment in the Underlying Action. *Bluestein v. Town of Sullivan's Island*, 424 S.C. 362, 818 S.E.2d 239 (Ct. App. 2018). (Compl. ¶ 18; Answer ¶ 16.) On February 19, 2020, the South Carolina Supreme Court reversed the grant of summary judgment in the Underlying Action on grounds that genuine issues of material fact exist as to the maintenance responsibilities of the Town toward the Accreted Land and remanded to the Court of Common Pleas for further proceedings. *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 839 S.E.2d 879 (2020). (Compl. ¶ 19; Answer ¶ 17.) Following remand, on or about May 7, 2019, the prior Town Council was elected.

[7] The plaintiffs in the Underlying Action included the Defendants in this action, as well as Ettaleah Bluestein and Karen Albenesius. The defendants named in the Underlying Action included the Town, as well as Sullivan's Island Town Council.

The Settlement Agreement

Thereafter, on October 7, 2020, the prior Town Council and Defendants entered into the Settlement Agreement and sought its approval from the Court of Common Pleas.[8] (Compl. ¶ 20; Answer ¶ 18.) The circuit court entered a consent order approving the Settlement Agreement in the Underlying Action on October 15, 2020. (Compl. ¶ 21, Ex. A; Answer ¶ 18.) The Settlement Agreement provides, in part:

> **II. <u>Findings of Fact:</u>**
>
> a. The settlement, and implementing steps associated therewith, are solely undertaken to further specifical [sic] enumerated, permissible public purposes under the Deed. In this instance, the Town Council believes that thinning of vegetation will serve the interests of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement.
>
> . . . .
>
> b. The settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town.
>
> . . . .
>
> **III. Settlement of this litigation is agreed to on terms stated below:**
>
> **<u>General Approach</u>:**
>
> - The Town would implement selective thinning of the Accreted Land (AL), based on initial cut parameters set forth below for each of the four Zones (Transition Zone, Zone 1, Zone 2, and Zone 3.) In

[8] As stated in the Settlement Agreement, as of October 7, 2020, Ettaleah Bluestein and Karen Albenesius were no longer participating plaintiffs in the Underlying Action and, thus, were not parties to the Settlement Agreement. Additionally, after the Settlement Agreement was entered into, a new Town Council and Mayor were elected on May 4, 2021. Thus, the parties to the Settlement Agreement were the Defendants and a prior town council.

order to maintain similar conditions going forward, with the help of a naturalist the Town would review changes in the condition of the AL on a recurring basis (for instance, once every five years) with an eye towards making whatever changes might be necessary to maintain appropriate levels of density and diversity. This would provide a mechanism to deal with natural attrition, growth, or other changes to the natural environment. Primary funding for transition zone work will be from the Town. Funding for work in Zones 1-3 is subject to receipt of adequate donations or grants.

. . . .

Compliance with Law required:

Implementation is subject to compliance with law.

. . . .

VI. Binding:

This Settlement Agreement shall be binding upon and inure to the benefit of all the Parties, and their heirs, successors and assigns.

. . . .

VIII. Miscellaneous Provisions:

. . . .

b) Acknowledgements. Each Party acknowledges and agrees that . . . this Settlement Agreement is a legally binding contract with which the Partis [sic] will faithfully comply. Each individual signing this Settlement Agreement on behalf of one of the Parties to this Agreement has the authority to execute this Settlement Agreement and bind the entity or person on whose behalf this Settlement Agreement is executed.

. . . .

f) Modification. This Agreement may not be modified or amended, nor may any of its provisions be waived, except upon mutual agreement of all Parties or their authorized agents in writing.

(Compl. ¶ 22, Ex. A; Answer ¶ 19.)

On April 6, 2021, the parties in the Underlying Action sought approval from the circuit court of an amendment to the Settlement Agreement to address anticipated third-party regulatory concerns.[9] (Compl. ¶ 24; Answer ¶ 21.) On April 12, 2021, the circuit court entered an order in the Underlying Action amending its prior consent order and amending the Settlement Agreement. (Compl. ¶ 25, Ex. B; Answer ¶ 21.)

On or about May 4, 2021, a new Town Council—the Plaintiff in this action—was elected.

PROCEDURAL POSTURE

The Town filed this action against Defendants on February 21, 2022 seeking a declaratory judgment that the Settlement Agreement is invalid and unenforceable. Defendants answered the Complaint on April 13, 2022, and brought counterclaims against the Town for breach of contract, specific performance, and promissory estoppel. The Town replied to Defendants' counterclaims on May 13, 2022.

The Town filed its Motion for Summary Judgment with Supporting Memorandum of Law and Motion for Stay of Discovery on May 23, 2022, which is the subject of this Order. The Town filed a Motion to Quash, or in the Alternative, for a Protective Order with Supporting Memorandum of Law, seeking to quash subpoenas issued to Town Council

[9] The amendment did not materially modify the provisions of the Settlement Agreement, except to add that "[t]he Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning that is more aggressive than that detailed on the subject in the Settlement Agreement and Order originally executed in this case."

members and to non-party Sullivan's Island For All or, in the alternative, seeking a protective order on June 17, 2022, and renewed the motion on July 14, 2022. Defendants filed their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Motion for Stay of Discovery on September 16, 2022. The same day, Defendants filed a Memorandum in Opposition to Plaintiff's Motion(s) to Quash. The Court conducted a hearing on all pending motions on September 22, 2022.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). The South Carolina Rules of Civil Procedure require that summary judgment be granted if "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. Under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by showing – that is, pointing out to the trial court – that there is an absence of evidence to support the nonmoving party's case." *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party meets this initial burden, "the nonmoving party must do more than simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." *Grimsley v. S.C. Law Enf't Div.*, 415 S.C. 33, 42,

780 S.E.2d 897, 901 (2015) (citation and internal quotations omitted). "Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment." *Langley v. Lynch*, No. 2017-UP-226, 2017 WL 4621154, at *3 (S.C. Ct. App. May 24, 2017) (citation omitted).

CONCLUSIONS OF LAW[10]

The Town has established the absence of a genuine issue of material fact with respect to its claim for declaratory judgment, and Defendants have not demonstrated the existence of a genuine issue for trial. There is no dispute as to the authenticity of the Settlement Agreement, which the Court finds is unambiguous, and a determination as to its validity and enforceability presents solely questions of law to be resolved by the Court. Further, there are no facts, relevant documents, or information not already before the Court which could impact the Court's determination of this purely legal issue. Accordingly, this case is ripe for disposal on summary judgment.

As set forth below, the Settlement Agreement is invalid and unenforceable as a matter of law because it involves the legislative/governmental powers of the Town and purports to bind the current and future town councils. However, even if the Settlement Agreement could somehow be said to involve only proprietary/business functions, it is still invalid and unenforceable because it is unreasonable as a matter of law. Accordingly, the Town is entitled to a declaratory judgment that the Settlement Agreement is invalid and unenforceable as a matter of law.

[10] Any findings of fact contained in the Conclusions of Law are incorporated into and deemed to be Findings of Undisputed Fact.

A. <u>The Settlement Agreement is Invalid and Unenforceable Because It Involves the Legislative/Governmental Powers of the Town and Purports to Bind the Current and Future Town Councils.</u>

South Carolina courts have found to be invalid many different kinds of contracts which attempted to bind successor governing bodies. "When a municipal contract extends beyond the term of the governing members of the municipality entering into the contract the subject matter of the contract will determine its validity." *City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority*, 325 S.C. 174, 178, 480 S.E.2d 728, 731 (1997). The general rule is that "if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils."[11] *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 132, 459 S.E.2d 876, 880 (Ct. App. 1995) (*Cowart I*). *See also Newman v. McCullough*, 212 S.C. 17, 25, 46 S.E.2d 252, 256 (1948) ("the acts of former councils relating to the governmental functions of said councils which involve

[11] While "there is an exception to the rule that contracts involving a governmental function may not bind successor boards when enabling legislation *clearly authorizes* the local governing body to make a contract extending beyond its members' own terms," no such enabling legislation has been found to exist here. *West Anderson Water District v. City of Anderson*, 417 S.C. 496, 507, 790 S.E.2d 204, 209 (Ct. App. 2016) (citation and internal quotations omitted) (emphasis in original). Some jurisdictions have held a further exception to exist where the municipal body is a board or commission with staggered terms. *See, e.g.*, *Daly v. Stokell*, 63 So.2d 644, 645 (Fla. 1953) (en banc). However, South Carolina courts have declined to recognize this exception. *See Cowart I*, 319 S.C. at 134, 459 S.E.2d at 882 (explaining that "[t]he rule that municipal corporations cannot bind successors to contracts involving governmental matters is very clearly and powerfully stated" by the South Carolina Supreme Court and that there is no suggestion of an exception to this rule for staggered boards). *See also Piedmont Public Serv. Dist. v. Cowart*, 324 S.C. 239, 241-42, 478 S.E.2d 836, 838 (1996) (*Cowart II*) (affirming *Cowart I* and holding "[w]e agree with the Court of Appeals that the policy considerations [underlying the general rule] are not changed by the bestowal of perpetual succession.").

a matter of discretion to be exercised by such councils are without force and effect upon succeeding councils.").

(1) The Settlement Agreement Involves the Legislative/Governmental Powers of the Town.

The test to determine whether a particular act involves legislative/governmental powers is "whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired." *Cowart I*, 319 S.C. at 133, 459 S.E.2d at 881 (citation and internal quotations omitted). Here, the Town is statutorily vested with certain powers, including but not limited to the power to enact ordinances, provide for the general health and welfare of the Town, and adopt the budget of the Town. S.C. Code Ann. § 5-7-30 (1986). As such matters involve public policy considerations, each successive Town Council is vested with the discretion to act in the public interest, and such discretion cannot be divested or delegated away by a prior Town Council. *See G. Curtis Martin Inv. Trust v. Clay*, 274 S.C. 608, 612, 266 S.E.2d 82, 85 (1980) (holding that the Sewer District Authority could not "delegate away those powers and responsibilities which give life to it as a body politic[;] [and] [a] municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise."). *See also Newman*, 212 S.C. at 25, 46 S.E.2d at 256 ("The power conferred upon municipal councils to exercise legislative or governmental functions is done so to be exercised as often as may be found needful or politic; and the council holding such powers is vested with no authority to circumscribe, limit or diminish their efficiency, but must transmit them unimpaired to their successors.").

The Settlement Agreement was entered into by a prior Town Council which attempted to restrict and limit the current and future Town Councils' use of their legislative/governmental powers on matters concerning the use and maintenance of the Accreted Land. *See* McQuillin, *Municipal Corporations*, § 29:103 (3d ed.) ("To the extent that a governmental contract impinges on a municipality's ability to legislate freely, the contract is ultra vires and void" because it violates the prohibition against municipal contracts binding successor councils with respect to a legislative/governmental function). Moreover, determinations concerning permissible uses of the Accreted Land are zoning issues, and "[z]oning is a legislative act." *Knowles v. City of Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991). *See also Woodale Partnership v. City of Charleston*, No. 2:07-CV-2025-MBS, 2010 WL 11661386, at *10 (D.S.C. Sept. 17, 2010) (holding that the city did not have the power to forbid future city councils and zoning boards from exercising their legislative functions by forever freezing the zoning classification of the property). These functions are uniquely sovereign in character and are not capable of being performed by a private corporation or entity. Accordingly, they are by definition legislative and/or governmental. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 645 (1980) (explaining that proprietary/business functions, as opposed to legislative/governmental functions, are those capable of being performed by a private corporation).

(2) <u>The Settlement Agreement Improperly Restricts, Delegates and/or Divests the Legislative/Governmental Powers of the Town.</u>

The Settlement Agreement infringes upon the legislative/governmental powers of the Town because it restricts, delegates and/or divests the statutory authority of the Town Council to enact ordinances concerning the use and maintenance of the Accreted Land.

Among other things, the Settlement Agreement requires the Town to "implement selective thinning of the Accreted Land" pursuant to specific, enumerated parameters, and to "maintain similar conditions going forward. . . ." Notably, many of the parameters directly violate the 2005 ordinance prohibiting the removal of vegetation on the Accreted Land, except for trimming and pruning to a height of no less than five (5) feet. The effective nullification by the Settlement Agreement of pre-existing ordinances and prohibition of the enactment of future ordinances concerning the Accreted Land constitutes an improper divestment of the legislative/governmental powers of the Town.

Relatedly, the Settlement Agreement restricts the ability of the Town to adopt regulations concerning the preservation, maintenance, or removal of vegetation on the Accreted Land pursuant to its legislative/governmental powers.[12] The Settlement Agreement states that "the Town Council believes that thinning of vegetation will serve the interests of . . . enhanced public safety, improved public health . . . [and] [t]he settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town." This provision effectively "freezes" the Town's position as to what will best serve the interests of the public as it relates to the Accreted Land. However, the Town may not be restricted from adopting in the future any regulations concerning the Accreted Land or taking any other action it deems appropriate for public safety and general welfare. "It is a fundamental principle of constitutional law that no legislative body may part with its right to exercise the police power, nor may a municipality to which such power has been

[12] Such issues involve important public policy considerations, particularly in the context of a coastal community, such as Sullivan's Island.

delegated divest itself of same ***by contract or otherwise***. It is a continuing power which may be exercised as often as required in the public interest and must always remain fluid." *Sammons v. City of Beaufort*, 225 S.C. 490, 499, 83 S.E.2d 153, 157 (1954) (invalidating covenant requiring town to maintain on-street parking facilities throughout life of municipal bonds, on ground that such a covenant deprives future boards of legislative/governmental powers to adopt parking regulations necessary for the public safety and welfare).

Finally, by requiring primary funding for a portion of the work "[to] be from the Town," the Settlement Agreement also delegates the legislative/governmental powers of the Town to set and adopt a budget, *i.e.*, its fiscal power. As with its other legislative/governmental powers, the authority of the Town to adopt a budget cannot be delegated away. *See Clay*, 274 S.C. at 612, 266 S.E.2d at 85. Because the Settlement Agreement requires that similar conditions be maintained going forward, it creates an ongoing financial obligation for the Town, thus removing this budgetary item from its discretion and, instead, delegating it by contract. This constitutes an improper delegation of the legislative/governmental powers of the Town—powers that cannot be "bartered" away. *Sammons*, 225 S.C. at 498, 83 S.E.2d at 157.

The Settlement Agreement entered into by a prior Town Council may not limit a duly elected future Town Council in the exercise of its legislative/governmental powers, just as an ordinance passed by a prior Town Council may not prohibit a successor Town Council from repealing it and replacing it with a new ordinance the new Town Council determines promotes the public welfare of its citizens. *Id*. *See also Newman*, 212 S.C. at 25, 46 S.E.2d at

256. Because it improperly restricts, delegates and/or divests the legislative/governmental powers of the Town, the Settlement Agreement is invalid and unenforceable.

B. <u>Even if the Settlement Agreement Involves Only the Proprietary/Business Functions of the Town, It Is Invalid and Unenforceable Because It Unfairly, Unreasonably and Improperly Restricts Those Functions.</u>

As set forth above, the Court finds the Settlement Agreement involves the legislative/governmental powers of the Town. However, even if the Settlement Agreement could somehow be found to involve only proprietary/business functions (*i.e.*, non-legislative/governmental powers), municipal contracts must nonetheless, "at the time of their execution, be fair and of a reasonable duration." *Cowart I*, 319 S.C. at 135, 459 S.E.2d at 882 ("[I]f the contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was entered into, it was ***fair and reasonable and necessary*** or advantageous to the municipality."). Such municipal contracts "may be made for, but only for, such a term as is within the limitation imposed by statute or charter or, if no limitation is imposed, ***for a reasonable time***." *Id*. at 131, 459 S.E.2d at 880 (citation omitted) (emphasis added).

The Settlement Agreement is of perpetual duration because it obligates the Town to "maintain similar conditions going forward." The perpetual nature of the agreement is further evidenced by the requirement that the Town "review changes in the condition of the [Accreted Land] on a recurring basis (for instance, once every five years)." Moreover, the Settlement Agreement is binding upon and inures to the benefit of not only the named parties, but for their heirs, successors and assigns, and "may ***not*** be modified or amended,

nor may any of its provisions be waived, except upon mutual agreement ***of all Parties***,"[13] except that "[t]he Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning that is more aggressive than that" set forth in the original settlement agreement. The ongoing obligations of the Town under the Settlement Agreement extend not only to the individually named parties, their heirs, successors and assigns, but also to the Accreted Land itself, all of which evidences the perpetual, never-ending nature of the obligations imposed by it.

A perpetual duration of the Settlement Agreement is unreasonable as a matter of law. While it does not appear that South Carolina courts have had the opportunity to consider the specific issue of a perpetual municipal contract like the one set forth in the Settlement Agreement, the requirement under South Carolina law that municipal contracts be of a reasonable duration *ipso facto* strongly suggests that municipal contracts of a perpetual duration are, on their face, unreasonable. Moreover, decisions from other jurisdictions are instructive and demonstrate that perpetual municipal contracts are void as against public policy. *See Town of Secaucus v. City of New Jersey*, 20 N.J. Tax 562, 567-68 (2003) (explaining that "[m]unicipal agreements having a perpetual term are not favored" and are generally void as against public policy unless expressly authorized by statute). *See also State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 83 N.W. 32, 34-35 (Minn. 1900) (contract between city and railway company whereby city agreed to maintain a bridge in perpetuity

[13] Just like the contract with the Sewer District Authority in *Martin*, *supra* at 14, the Settlement Agreement improperly gives private citizens (the Defendants, their heirs, successors and assigns) a veto power over any act taken by future Town Councils to modify any provisions of the Settlement Agreement.

was void because such agreement is beyond municipal powers of the city and contrary to public policy); McQuillin, *Municipal Corporations*, § 29:104 (3d ed.) ("Municipal agreements having a perpetual term are not favored."). Here, the perpetual duration of the Settlement Agreement is *prima facie* unreasonable and contrary to public policy.

Thus, even if the Settlement Agreement involves only non-legislative or non-governmental powers—which, as set forth above, the Court finds it does not—it is invalid and unenforceable because it unfairly, unreasonably and improperly restricts the proprietary functions of the Town.

C. <u>The Settlement Agreement is Invalid and Unenforceable Against the Town.</u>

An illegal contract is unenforceable. *Berkebile v. Outen*, 311 S.C. 50, 53 n.2, 426 S.E.2d 760, 762 n.2 (1993). The Settlement Agreement itself recognizes that the implementation of its provisions "is subject to compliance with law." "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Id.* Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Scruggs v. Quality Elec. Servs., Inc.*, 282 S.C. 542, 545, 320 S.E.2d 49, 51 (Ct. App. 1984). But a contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent. *See Beach Co. v. Twillman, Ltd*., 351 S.C. 56, 65, 566 S.E.2d 863, 864 (Ct. App. 2002).

Here, the material terms of the Settlement Agreement are interdependent, such that merely severing the offending provisions is not feasible. *See OrthAlliance, Inc. v. McConnell*,

No. 8:08-2591-RBH, 2010 WL 1344988, at *6 (D.S.C. Mar. 30, 2010) (explaining that, even where a contract contains a provision for the severability of void or unenforceable terms, contractual provisions that are interdependent may not be severable). The offending provisions are material to and go to the very heart of the agreement. Even if the unenforceable terms could be severed, the Settlement Agreement would then be reduced to an agreement with no meaningful substance or effect. Specifically, the provisions requiring vegetation to be removed, or trimmed, cut, or pruned beyond what is permissible under the 2005 ordinance in effect would have to be severed as unenforceable, as would the provision requiring the Town to "maintain similar conditions going forward."

Most importantly, because it involves the legislative/governmental powers of the Town, as set forth above, the Settlement Agreement cannot, as a matter of law, extend beyond the term of the town council which was a party to it. Because the Settlement Agreement was entered into by Defendants and a prior town council, it is not binding or enforceable against the current Town Council or future councils.

D. <u>That The Town May Enter Into Contracts Does Not Authorize The Invalid And Unenforceable Settlement Agreement.</u>

Defendants concede that contracts involving legislative/governmental powers of a municipality are not binding on future councils. Def.'s Mem. Opp'n at 8. Instead, they argue the Settlement Agreement must involve only the Town's proprietary/business functions because the Town regularly enters into contracts for maintenance of Town-owned land and concerning land use and zoning, which extend beyond the terms of the council members who entered into them. Def.'s Mem. Opp'n at 10-12. Further, Defendants argue a determination that the Settlement Agreement is invalid risks invalidating other contracts to which the

Town is a party. Def.'s Mem. Opp'n at 20. Both on the record before the Court and as a matter of law, neither argument is persuasive.[14]

It is axiomatic that a municipality has authority to enter into contracts. For example, a municipality may enter into service contracts in the exercise of its proprietary/business functions. Inherent in a municipality's power to contract, as well as in its power to sue and be sued, is the authority to settle litigation. Defendants, in fact, submitted four settlement agreements to which the Town was a party and which resolved litigation involving land use issues. Def.'s Mem. Opp'n at Ex. 7. Three of the four agreements involved appeals by private landowners of zoning denials or restrictions on private property. *Id*. at 1-8, 20-33. In each instance, the settlement resulted in the Town granting the applied-for special exception or conditional use, subject to termination under certain conditions. The fourth agreement

[14] Defendants rely upon *Moore v. Beaufort County*, 936 F.2d 159 (4th Cir. 1991) in support of their argument that the Settlement Agreement does not involve the legislative/governmental functions of the Town. Def.'s Mem. Opp. at 9-10. *Moore* involved the settlement of a case pursuant to section 2 of the Voting Rights Act in which the parties agreed that a limited voting plan for the Board of County Commissioners elections would be implemented. When the ***same*** Beaufort County board subsequently rejected the agreement, the plaintiffs moved to enforce the agreement and the district court granted their motion. The Fourth Circuit addressed the county's contention that limited voting was contrary to the "public policy" of North Carolina and held that it was ***not***. There, the issue of whether the agreement involved the legislative/governmental powers of the county was not an issue before the court. Furthermore, it was established that the county's previous election method violated section 2 of the Voting Rights Act, and that, therefore, the consent decree was necessary to remedy a violation of federal law. Thus, the county had federal authority to enter into the settlement agreement, and was not confined to its authority under state law. To the extent *Moore* is relevant at all, it is distinguishable.

settled a dispute over land ownership, and resulted in the Town granting a twenty-year temporary easement for access over the property. *Id*. at 8-19.

Unlike those examples, the Settlement Agreement at issue imposes affirmative, ongoing, and perpetual obligations on the Town, circumvents the Town's zoning procedures, supplants the Town's duly enacted zoning ordinances, and bargains away the authority and discretion of future town councils to act in the public interest. Simply put, the authority of the Town to settle litigation does not permit it to contract around state and local substantive and procedural laws; and the invalidation of an unlawful Settlement Agreement has no bearing on the validity of other lawful settlement agreements, or on the authority of the Town to enter into them.

Similarly, the authority of the Town to accept property subject to deed restrictions, or to place restrictions on public land, is uncontroverted. However, like contracts and settlement agreements, deed restrictions must also be lawful and not contrary to public policy to be enforceable. Defendants argue that the unenforceability of the Settlement Agreement may call into question the validity of the 1991 Deed. Def.'s Mem. Opp'n at 20. While it is not at issue in this action, the 1991 Deed is fundamentally different from the Settlement Agreement. As a preliminary and dispositive matter, a deed restriction is a privately-enforceable *limitation* on the use of property—it does not authorize a use in excess of what is permitted under the applicable zoning laws. Thus, while the 1991 Deed is an agreement not to use the Accreted Land for purposes which might otherwise be legally permissible, the Settlement Agreement purports to legally authorize (and indeed require) a

specific use of the Accreted Land. Both involve uses of the Accreted Land, but only the latter is distinctly legislative in character.

Furthermore, and with respect to the 1991 Deed specifically, it expressly permits the Town to take actions inconsistent with the deed restrictions where the Town determines such action is in furtherance of the public interest, including but not limited to public health and safety. Mot., Ex. A at ¶ 3. It does not impose ongoing, affirmative duties on the Town, ***nor*** is it perpetual in duration, and may be modified or revoked by vote. Mot., Ex. A at ¶¶ 8-9.

Finally, this Court dismisses Defendants' suggestion that the issues presented in this action were resolved in or may be resolved by reference to rulings in the Underlying Action. The validity and enforceability of the Settlement Agreement were not in dispute in the Underlying Action and have not been previously litigated or decided. Nor is the fact that the Settlement Agreement was approved by consent order determinative of its validity or enforceability. *See, e.g.*, *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 268 (8th Cir. 2011) (a consent order settling litigation cannot authorize an unlawful agreement); *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995) (parties can settle litigation with consent decrees but they "can only agree to that which they have the power to do outside of litigation"); *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (underlying consent decree is void to extent that it exceeded parties' authority).

E. <u>Defendants' Counterclaims Fail as a Matter of Law.</u>

That the Settlement Agreement is invalid and unenforceable is dispositive of Defendants' counterclaims for breach of contract, specific performance, and promissory

estoppel. Specifically, all three causes of action require, at a minimum, that there be a valid and binding contract. *See Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 506 (Ct. App. 2012) (holding a plaintiff must prove the existence of a binding contract to recover for breach of contract); *Chitwood v. McMillan*, 189 S.C. 262, 264, 1 S.E.2d 162, 164 (1939) (holding liability for breach of contract requires the existence of a valid contract); *Ingram v. Kasey's Associates*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000) (holding specific performance requires "clear evidence of a valid agreement"); *Trident Const. Co., Inc. v. Austin Co.*, 272 F. Supp. 2d 566, 577 (D.S.C. 2003) (holding the doctrine of promissory estoppel "may not be used to create a legally enforceable promise when it would not otherwise be binding under ordinary contract principles"). Thus, because the Settlement Agreement is invalid and unenforceable, as set forth above, summary judgment in favor of the Town and against Defendants is proper, not only as to the Town's claim for declaratory judgment, but also as to Defendants' counterclaims.

FINAL ORDER AND JUDGMENT

The Court **GRANTS** summary judgment in favor of the Town and against Defendants on the Town's claim for declaratory judgment and on Defendants' counterclaims for breach of contract, specific performance, and promissory estoppel. The portion of the Town's Motion requesting a stay of discovery is denied as **MOOT**. Because there is no just reason for delay, it is hereby **ORDERED, ADJUDGED AND DECREED** that this is a **FINAL JUDGMENT** as a matter of law as to all claims and counterclaims herein, such that final judgment is hereby entered.

AND IT IS SO ORDERED.

_____
Honorable Jennifer B. McCoy
Circuit Court Judge, At Large

_____, 2023
Charleston, South Carolina

Charleston Common Pleas

Case Caption: Sullivans Island Town Of VS Nathan Bluestein , defendant, et al

Case Number: 2022CP1000846

Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764