RECEIVED
Nov 08 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

HONORABLE JENNIFER B. McCOY, Circuit Court Judge

Appellate Case No. 2023-001082

TOWN OF SULLIVAN'S ISLAND, ... Respondent,

v.

NATHAN BLUESTEIN and THEODORE ALBENESIUS, III, ... Appellants.

INITIAL BRIEF OF RESPONDENT

William W. Wilkins, SC Bar No. 6112
Clarence R. Turner, IV, SC Bar No. 104766
MAYNARD NEXSEN, PC
104 South Main Street, Suite 900
Post Office Box 10648
Greenville, South Carolina 29601
Phone: (864)370-2211
BWilkins@maynardnexsen.com
CTurner@maynardnexsen.com

Alexandra H. Austin, SC Bar No. 102646
MAYNARD NEXSEN, PC
205 King Street, Suite 400 (29401)
Post Office Box 486
Charleston, South Carolina 29402
Phone: (843)577-9440
AAustin@maynardnexsen.com

Attorneys for Respondent Town of Sullivan's Island

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. Whether the circuit court erred in finding the Settlement Agreement, which purports to bind future town councils, is invalid and unenforceable because it involves the legislative/governmental powers of the Town.

II. Whether the circuit court erred in finding that, even if the Settlement Agreement involves only the proprietary/governmental functions of the Town, it is invalid and unenforceable because its perpetual duration is unreasonable as a matter of law.

III. Whether the circuit court erred in finding the invalid and unenforceable Settlement Agreement is not severable.

IV. Whether the circuit court erred in not addressing the impact of its ruling on matters outside the scope of the lawsuit.

STATEMENT OF THE CASE

This action concerns the validity and/or enforceability of a settlement agreement (as amended, the "Settlement Agreement"), between Appellants Nathan Bluestein and Theodore Albenesius, III ("Defendants") and a prior town council of Respondent Town of Sullivan's Island ("Town") 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 circuit court found the Settlement Agreement is invalid and unenforceable as a matter of law and granted summary judgment in favor of the Town on its claim for declaratory judgment.

I. FACTUAL BACKGROUND

The Accreted Land

The Town is the fee simple owner of the Accreted Land located between the Atlantic Ocean and the beachfront lot lines of Defendants' real property 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. (R. __ (Compl. ¶ 8; Answer ¶ 7).)

In 1981, the Town passed a zoning ordinance restricting use of the Accreted Land. (R. __ (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.

(R. __ (§ 21-39A, Town Code of Ordinances)) (emphasis added).

On February 12, 1991, the Town executed a deed conveying the Accreted Land to the Lowcountry Open Land Trust ("LOLT"). (R. __ (Compl. ¶ 10; Answer ¶ 9).) Subsequently, on that same day, LOLT executed a deed conveying the Accreted Land[1] back to the Town, subject to certain terms, conditions, restrictions, and covenants (the "1991 Deed"). (R. __ (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.

[1] 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 hundred acres on which has grown a dense forest in a variety of trees, bushes, plants and undergrowth. (R. __ (Compl., Ex. B at 6).)

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;

    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.[2] The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions.

(R. __ (*Id*.; Mot., Ex. A)) (emphasis added).

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

[2] 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 seven feet (7′) above the ground." (R. __ (§ 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." (R. __ (§ 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 construction, . . . 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. (R. __ (Compl. ¶ 4; Answer ¶5).) In June 2010, Defendants separately applied to the Town for a permit to trim and prune vegetation on ocean adjacent property to a height of no less than three (3) feet. (R. __ (Compl. ¶ 14; Answer ¶ 13; Mot., Ex. C).) The Town denied Defendants' permit

applications, as failing to meet the requirements of § 21-71(C) of the Town Code of Ordinances. (R. __ (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").[3] (R. __ (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. (R. __ (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). (R. __ (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). (R. __ (Compl. ¶ 19; Answer ¶ 17).) Following remand, on or about May 7, 2019, the prior Town Council was elected.

[3] 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.[4] (R. __ (Compl. ¶ 20; Answer ¶ 18).) The circuit court entered a consent order approving the Settlement Agreement in the Underlying Action on October 15, 2020. (R. __ (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>:**

[4] 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.

- 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 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.

(R. __ (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.[5] (R. __ (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. (R. __ (Compl. ¶ 25, Ex. B; Answer ¶ 21).)

On May 4, 2021, a new Town Council—the Plaintiff in this action—was elected (the "current Town Council").

II. PROCEDURAL HISTORY

The Town initiated this lawsuit on February 21, 2022, seeking a declaratory judgment that the Settlement Agreement is invalid and unenforceable. (R. __.)

[5] 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." (R. __ (Compl. ¶¶ 24 n.4 and 25, Ex. B).)

Defendants answered the Complaint on April 13, 2022, and brought counterclaims against the Town for breach of contract, specific performance, and promissory estoppel. (R. __.) The Town replied to Defendants' counterclaims on May 13, 2022. (R. __.) On May 23, 2022, the Town filed its Motion for Summary Judgment with Supporting Memorandum of Law and Motion for Stay of Discovery ("Motion for Summary Judgment"). (R. __.) 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 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, when the subpoenas were re-issued. (R. __.) Defendants filed their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Motion for Stay of Discovery on September 16, 2022.

The circuit court conducted a hearing on all pending motions on September 22, 2022. (R. __.) On January 30, 2023, the circuit court entered an Order granting summary judgment in favor of the Town and against Defendants on the Town's claim for declaratory judgment and on Defendants' counterclaims ("Order"). (R. __.) The Order denied the portion of the Town's motion requesting a stay of discovery as moot. (*Id*.) On February 8, 2023, Defendants filed a Motion to Alter or Amend Order Granting Summary Judgment. (R. __.) The circuit court denied the motion by Form 4 order on June 5, 2023

(the "Form 4 Order"). (R. __.) Defendants appealed the Order and Form 4 Order on July 5, 2023. (R. __.)

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). Under South Carolina law, "settlement agreements are viewed as contracts." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). An action to construe a contract is one at law. *Hofer v. St. Clair*, 298 S.C. 503, 508 381 S.E.2d 736, 739 (1989) (citing *Small v. Springs Industries, Inc.*, 292 S.C. 481, 357 S.E.2d 452 (1987)). "An issue essentially one at law will not be transformed into one in equity simply because declaratory relief is sought." *Felts*, 303 S.C. at 356, 400 S.E.2d at 782. An action at law retains its character, "and the Court of Appeals must affirm where there is any evidence to support the judge's findings." *Loadholt v. S.C. State Budget and Control Bd., Div. of General Services, Ins. Reserve Fund*, 339 S.C. 165, 169, 528 S.E.2d 670, 672 (Ct. App. 2000) (citing *Felts*, 303 S.C. at 356, 400 S.E.2d at 782)).

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). A trial court may properly grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. *See also Tupper v. Dorchester County*,

326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). "When determining whether triable issues of material fact exist, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Williams v. Tamsberg*, 425 S.C. 249, 258, 821 S.E.2d 494, 499 (Ct. App. 2018) (citing *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002)).

ARGUMENT

I. THE SETTLEMENT AGREEMENT IS INVALID AND UNENFORCEABLE BECAUSE IT INVOLVES THE LEGISLATIVE / GOVERNMENTAL POWERS OF THE TOWN AND IMPERMISSIBLY PURPORTS TO BIND THE CURRENT AND FUTURE TOWN COUNCILS

"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." *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 a matter of discretion to be exercised by such councils are without force and effect upon succeeding councils."). Defendants concede that "the Settlement Agreement would not be binding on a successor Town Council if the subject matter of the Agreement involves legislative functions or governmental powers." Appellants' Br. 14-15.

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

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) (emphasis added). 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). Because such matters involve public policy considerations, each successive Town Council is vested with the discretionary power 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).[6] 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).

[6] Defendants argue the Settlement Agreement does not impact zoning matters because this action does not concern a zoning ordinance, but rather contractual obligations regarding the use of land. Appellants' Br. 17. However, "any promises restricting future decisions about [a property's] zoning classification are 'unauthorized' as a matter of law," "because zoning is a legislative function, and [municipal] officials are incapable of contracting to restrict their successors' exercise of legislative functions." *See Woodale Partnership*, 2010 WL 11661386, at *11.

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

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.[7] 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

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

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 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).[8]

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

[8] Defendants contend, for the first time, that the Settlement Agreement does not impact the Town's police powers because the Accreted Land is owned by the Town. Appellants' Br. 18-19. However, the Settlement Agreement expressly represents that the actions it proscribes are "necessary for the health, safety and general welfare of the Town." Thus, the Accreted Land is clearly subject to the Town's police powers and the requirements of the Settlement Agreement clearly impermissibly impact such powers.

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.[9] *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

[9] Defendants argue—again, for the first time—that the Settlement Agreement does not impact the Town's fiscal powers because otherwise the Town could never enter into agreements that affect the Town's future budgets. Appellants' Br. 18. However, the perpetual financial obligations imposed by the Settlement Agreement clearly concern the Town's fiscal spending on matters reflecting important public policy considerations, on which the Town must retain discretionary authority. Moreover, the Settlement Agreement binds the Town, ***in perpetuity***, to commit and expend such funds regardless of whether future public policy considerations and objectives compel these funds to be utilized differently or elsewhere. This situation is clearly distinguishable from the one suggested by Defendants, in which the Town, in the exercise of its proprietary/business functions, enters into a contract which merely involves a future expenditure of Town funds but only for a limited and reasonable period of time.

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.

(3) That The Town May Enter Into Contracts Does Not Authorize The Invalid And Unenforceable Settlement Agreement.

Defendants concede that the cases cited by the circuit court in support of its ruling that the Settlement Agreement involves the legislative/governmental powers of the Town offer "examples and guidance for determining whether a municipal contract involves a government or a proprietary function," but argue they are inapposite because they do not involve "a settlement of pending litigation regarding enforcement of a deed." Appellants' Br. 15. According to Defendants, the subject matter of the Settlement Agreement relevant to the analysis is either the settlement of the Underlying Action or the subject matter of the Underlying Action itself. *Id*. at 20. Thus, they argue, because the Town has authority to enter into settlements in litigation and to enter into contracts concerning the use of Town-owned land which extend beyond the terms of the council members who entered into them, the Settlement Agreement must involve only the Town's proprietary/business functions. Defendants' analysis is flawed.

As an initial matter, while Defendants now argue that the purported proprietary/business functions at issue are the Town's obligations as a landowner under the 1991 Deed. This argument was ***never*** raised in the circuit court. Rather, Defendants argued in the circuit court that the Settlement Agreement involved the Town's

proprietary/business functions to enter into contracts, including contracts settling litigation and involving land use. Accordingly, whether the Town's purported obligations under the 1991 Deed are proprietary/business functions and are the subject matter of the Settlement Agreement is ***not*** preserved for review.[10] *See South Carolina Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (holding that "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review") (citation omitted).

That the Town may enter into contracts is irrelevant to the analysis and does not authorize the invalid and unlawful Settlement Agreement. *See Berkebile v. Outen*, 311 S.C. 50, 53 n.2, 426 S.E.2d 760, 762 n.2 (1993) (holding that it is well-established in South Carolina that an unlawful contract is always unenforceable). As the circuit court recognized, "[i]t 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." Order 22. However, the authority of the Town to settle litigation does ***not*** permit it to enter into unlawful

[10] This is particularly true because neither the Underlying Action nor the Settlement Agreement determined the Town's obligations with respect to the Accreted Land under the 1991 Deed.

settlement agreements. Likewise, 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. The invalidation of the 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, it has no bearing on the enforceability of legally permissible deed restrictions or other contracts concerning the use of Town-owned property.[11]

Defendants are wrong to suggest that the validity and enforceability of the Settlement Agreement is determined by the authority of the Town to settle the Underlying Action or by reference to the 1991 Deed, which was the subject matter of the

[11] Defendants argue that the unenforceability of the Settlement Agreement may call into question the validity of the 1991 Deed. Appellants' Br. 21 n.7. As a dispositive matter, the legality of the 1991 Deed was not at issue in this lawsuit and, thus, is not properly raised on appeal. However, as the circuit court explained, "the 1991 Deed is fundamentally different from the Settlement Agreement …. [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…. It does not impose ongoing, affirmative duties on the Town, ***nor*** is it perpetual in duration, and may be modified or revoked by vote." Order 23-24.

Underlying Action. Rather, in determining the subject matter of the Settlement Agreement—and, thus, whether it involves the Town's legislative/governmental powers or proprietary/business functions—"the true test 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. Here, as set forth above, the Settlement Agreement bargains away the authority and discretion of future town councils to act in the public interest with respect to the Accreted Land. Accordingly, the Settlement Agreement involves the Town's legislative/governmental powers and it is invalid and unenforceable because it restricts, limits, and/or prohibits the exercise of those powers and purports to bind future town councils.

Finally, it is notable that, while Defendants attempt to distinguish the numerous cases cited by the circuit court in support of its ruling, they provide no controlling or persuasive authority of their own. Indeed, the only cases referenced by Defendants in relation to their position that the Settlement Agreement involves the proprietary/business functions of the Town, rather than its legislative/governmental powers, are referenced in

dicta and relegated to footnotes. *See* Appellants' Br. 16 n.4,[12] 17 n.5,[13] 20 n.6[14]. These cases do not provide authority for Defendants' position and, to the extent they are relevant at all, they do not support a finding that the Settlement Agreement involves the Town's proprietary/business functions.

---

[12] The first case is over a century old and held that taxation of certain property was unconstitutional where pre-existing state legislative acts exempted it from taxation. *See Columbia Water Power Co. v. Campbell*, 75 S.C. 34, 54 S.E. 833 (1906). Defendants cite *Campbell* in support of their "note" that they purportedly asserted a constitutional claim in the Underlying Action "for violation of the contract clauses of the state and federal constitutions." However, no constitutional claims are at issue in this lawsuit, and Defendants did not raise any constitutional arguments in the circuit court. Thus, *Campbell* is not only irrelevant, but the argument for which it is cited is not preserved for review.

[13] The second case involved a developer who sought a building permit in reliance on a defective, but duly authorized and approved, zoning map. *See Abbeville Arms v. City of Abbeville*, 273 S.C. 491, 257 S.E.2d 716 (1979). While the zoning map may have been incorrect, it was not unlawful, and the case did not involve a challenge to the zoning map itself, but rather the denial of a permit under the zoning ordinance. Accordingly, this case is inapposite.

[14] The third case involved the settlement of an action brought pursuant to the Voting Rights Act. *See Moore v. Beaufort County*, 936 F.2d 159 (4th Cir. 1991). 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 contention that limited voting was contrary to the "public policy" of North Carolina and held that it was ***not***. *Id*. at 164. 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. *Id*. at 162. Thus, the county had federal authority to enter into the settlement agreement, and was not confined to its authority under state law. As the circuit court correctly concluded, "[t]o the extent *Moore* is relevant at all, it is distinguishable." Order 22 n.14.

II. EVEN IF THE SETTLEMENT AGREEMENT COULD BE SAID TO INVOLVE ONLY PROPRIETARY / BUSINESS FUNCTIONS OF THE TOWN, IT IS STILL INVALID AND UNENFORCEABLE BECAUSE ITS PERPETUAL DURATION IS UNREASONABLE AS A MATTER OF LAW

The circuit court correctly concluded that the Settlement Agreement involves the legislative/governmental powers of the Town. It also held, as an additional sustaining ground, that even if the Settlement Agreement could somehow be found to involve only proprietary/business functions (which it does not), it was nonetheless invalid and unenforceable because its ***perpetual duration*** is unreasonable as a matter of law. Municipal contracts involving non-legislative/governmental powers must still "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 circuit court determined that the Settlement Agreement is of perpetual duration because it obligates the Town to "maintain similar conditions going forward" and to "review changes in the condition of the [Accreted Land] on a recurring basis (for instance, once every five years)." Order 18. It also considered that 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***,"[15] 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. *Id*. at 18-19.

The circuit court held the perpetual duration of the Settlement Agreement is *prima facie* unreasonable and contrary to public policy. *Id*. Defendants do not dispute that the duration of the Settlement Agreement is perpetual nor argue that such perpetual duration is reasonable. Rather, they simply allege that the plan for the Accreted Land contained in the Settlement Agreement is fair and reasonable, and that it was advantageous for the Town to settle the Underlying Action. Appellants' Br. 23-25. Defendants further argue that the Settlement Agreement must be fair, reasonable, and advantageous because the prior Town Council agreed that it was and because the circuit court approved it. *Id*. at 22. However, as the court recognized, the fact that the Settlement Agreement was approved by consent order is not determinative of its validity and enforceability. Order 24. *See, e.g.*, *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 268 (8th Cir. 2011) (a consent

[15] 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.

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 (9th Cir. 1997) (underlying consent decree is void to extent that it exceeded parties' authority). Indeed, these issues were not raised to the circuit court when the consent order was entered.

Even if the Settlement Agreement involves only non-legislative or non-governmental powers, South Carolina law requires it be of a "reasonable duration" to be valid and enforceable. *See Cowart I*, 319 S.C. at 135, 459 S.E.2d at 882. While Defendants point to other perpetual, municipal contracts, they have never addressed the reasonableness requirement in the context of the perpetual duration of this specific Settlement Agreement. Here, the affirmative and 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. Order 19. None of the contracts cited by Defendants impose affirmative obligations on a municipality in perpetuity.

Moreover, as the circuit court explained, "[w]hile 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 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.')." Order 19-20.

Thus, even if the Settlement Agreement involves only non-legislative or non-governmental powers—which the circuit court correctly determined it does not—it is invalid and unenforceable because it unfairly, unreasonably and improperly restricts the proprietary functions of the Town.

III. THE CIRCUIT COURT CORRECTLY DETERMINED THE INVALID AND UNENFORCEABLE SETTLEMENT AGREEMENT IS NOT SEVERABLE

Defendants argue the "prospective" provisions of the Settlement Agreement should be severed and the remaining provisions enforced. Appellants' Br. 26-27. This argument ignores the inescapable conclusion, correctly reached by the circuit court, that because the Settlement Agreement involves the legislative/governmental powers of the

Town, it cannot, as a matter of law, extend beyond the term of a ***prior*** town council which was a party to it. Order 21. Because the Settlement Agreement was entered into by a ***prior*** town council, the determination that the Settlement Agreement involves the legislative/governmental powers of the Town is conclusive that it is ***not*** binding on the current and future Town Councils, thus foreclosing any possibility of meaningful severability. *See Beaufort-Jasper County Water and Sewer Authority*, 325 S.C. 174 at 178, 480 S.E.2d 728 (1997) (holding a municipal contract is invalid where it "extends beyond the term of the governing members of the municipality entering into the contract" and its subject matter involves the legislative/governmental powers of the municipal corporation); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 876 (Ct. App. 2002) (holding severance of an illegal provision requires "an otherwise valid contract").

In addition to being otherwise invalid and unenforceable, the offending provisions of the Settlement Agreement are not subject to meaningful severability. As the Court correctly determined, "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.'" Order 21. These terms are central to the Settlement Agreement and are interdependent with the terms, nature and purpose of the agreement. *See Twillman*, 351 S.C. at 65, 566 S.E.2d at 864 (holding 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); *OrthAlliance, Inc. v. McConnell*, No. 8:08- 2591-RBH, 2010 WL 1344988, at *6 (D.S.C. Mar. 30, 2010) (holding even where a contract contains a provision for the severability of void or unenforceable terms, contractual provisions that are interdependent may not be severable). *See also* 17A Am. Jur. 2d *Contracts* § 273 (holding that, to assess whether offending provisions can be severed, "a court considers whether the illegality is central or collateral to the purpose of the contract").

Severance of the offending provisions would have required the circuit court to rewrite material terms of the Settlement Agreement, which is disfavored under South Carolina law. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34, 644 S.E.2d 663, 673 (2007) (holding "the general principle in this State is that it is not the function of the court to rewrite contracts for parties") (citing *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002)); *see also Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 604, 879 S.E.2d 746, 751 (2022) (holding blue-penciling a material term of a contract is "strongly disfavored"). Even where an agreement contains a severability provision, courts are reluctant to sever the unenforceable provisions "when illegality pervades the entire agreement 'such that only a disintegrated fragment would remain after hacking away the unenforceable parts.'" *Damico*, 437 S.C. at 618, 879 S.E.2d at 758 (citing *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673). "In those cases, judicial severing 'look[s] more like rewriting the contract than fulfilling the intent of the parties,'" *id*. at 618, 879 S.E.2d at 758-59, and courts

have declined to enforce the severability provisions, *see, e.g.*, *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 16-17, 742 S.E.2d 37, 41 (Ct. App. 2013) (declining to enforce severability provision due to the number of offending provisions).

Although it includes a severability provision, the Settlement Agreement itself recognizes that the implementation of its provisions "is subject to compliance with law." Order 20. Here, the circuit court would have been required to sever material terms in the Settlement Agreement concerning thinning measures on the Accreted Land, including as they relate to the substance, scope, and implementation thereof, reducing it to an agreement with no meaningful substance or effect. Under these circumstances, the circuit court correctly determined the offending provisions cannot be severed. Additionally, and more importantly, the circuit court correctly determined that because it was entered into by Defendants and a prior town council and involves the legislative/governmental powers of the Town, the Settlement Agreement, as a whole, is invalid and unenforceable against the current Town Council or future councils. That holding was dispositive of the severability question.

IV. THE CIRCUIT COURT CORRECTLY DECLINED TO ADDRESS MATTERS OUTSIDE THE SCOPE OF THE LAWSUIT AND NOT PROPERLY BEFORE IT

Defendants argue the circuit court should have addressed the effect of invalidating the Settlement Agreement on the Underlying Action. Appellants' Br. 27-28. However, Defendants' request for guidance on this issue was not properly before the circuit court and is not appealable. *See First Carolina Corp. of S.C.*, 372 S.C. at 301-02, 641 S.E.2d at 907

(holding that there are four basic requirements to preserving issues for appellate review: "[t]he issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity") (citation omitted). Defendants raised this question for the first time in their Rule 59(e), SCRCP, Motion to Alter or Amend. (R. __.) "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (citation and internal quotation marks omitted). The effect of the circuit court's ruling on the Underlying Action was not an issue raised in the Town's Motion for Summary Judgment and was not encompassed in a ruling on the merits of this lawsuit. Moreover, while on appeal Defendants frame the issue as whether the circuit court "err[ed] in refusing to nullify the corresponding Release and reinstate the [Underlying Action]," Appellants' Br. 1, Defendants never asked the circuit court to do any such thing. Rather, ***after*** entry of the Order, Defendants merely asked the circuit court to "provide direction to the parties" as to the impact of the Order on the Underlying Action. (R. __ (Motion to Alter or Amend 8-10).) Had Defendants intended to seek affirmative relief regarding nullification of the release and reinstatement of the Underlying Action, they were required to do so in their pleadings or in an appropriate motion. Having failed to do so, these matters were not properly raised in the circuit court.

In addition, Defendants are seeking is an impermissible advisory opinion. *See Wellin v. Wellin*, No. 2:13-cv-1831-DCN, 2017 WL 3620061, at *3 (D.S.C. Aug. 23, 2017) (declining to issue a clarification which would amount to an advisory opinion where the parties asked the court to address facts or legal questions that were not presented in the motion on which the court ruled); *see also O'Shields v. McLeod*, 257 S.C. 477, 481-82, 186 S.E.2d 408, 409 (1972) (holding the law of this State is that courts "are without authority to issue advisory opinions") (citation omitted). Courts are not required "to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when the occasion might arise, or license litigants to fish in judicial ponds for legal advice." *Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 81-82, 742 S.E.2d 371, 374 (2013) (citing *City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957)) (internal quotation marks omitted). *See also CNF Constructors v. Donohoe Constr. Co.*, 57 F.3d 395, 402 (4th Cir. 1995) (affirming district court's denial of motion to amend its order to clarify an issue that could conceivably arise at a later date, because to alter the order under such circumstances would "amount to an advisory opinion"). The circuit court properly declined to do so here.

CONCLUSION

For the reasons set forth above, this Court should affirm summary judgment on the declaratory judgment pursuant to Rule 56, SCRCP, on the grounds that there is no genuine issue of material fact and the unambiguous Settlement Agreement is invalid and

unenforceable as a matter of law because it involves the legislative/governmental powers of the Town and impermissibly purports to bind the current and future town councils; that, even if the Settlement Agreement could be said to involve only proprietary/business functions of the Town (which it does not), it is still invalid and unenforceable because its perpetual duration is unreasonable as a matter of law; and the invalid and unenforceable Settlement Agreement is not severable.

s/William W. Wilkins
William W. Wilkins, SC Bar No. 6112
Clarence R. Turner, IV, SC Bar No. 104766
MAYNARD NEXSEN, PC
104 South Main Street, Suite 900
P.O. Box 10648
Greenville, SC 29601
Telephone: 864.370.2211
BWilkins@maynardnexsen.com
CTurner@maynardnexsen.com

Alexandra H. Austin, SC Bar No. 102646
MAYNARD NEXSEN, PC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
Telephone: 843.577.9440
AAustin@maynardnexsen.com

Attorneys for Respondent Town of Sullivan's Island

November 8, 2023
Charleston, South Carolina