STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge
Trial Court Case No. 2022CP1000846

Appellate Case No. 2023-001082

TOWN OF SULLIVAN'S ISLAND,

Respondent,

vs.

NATHAN BLUESTEIN and
THEODORE ALBENESIUS, III,

Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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ARGUMENT IN REPLY

I. ISSUE PRESERVATION: The Property Owners have preserved the issue of whether the Settlement Agreement is valid and enforceable because the subject matter of the Agreement involves the Town's business or proprietary functions as owner of the Accreted Land legally bound to comply with its maintenance responsibilities under the covenants in the 1991 Deed.

The Property Owners spent ten (10) years litigating the Deed Enforcement Action regarding the Town of Sullivan's Island's obligations to maintain the vegetation on the Accreted Land under terms of the covenants in the 1991 Deed by which the Town acquired and now holds ownership of that Land. When the Supreme Court determined that "the 1991 deed is ambiguous in terms of the Town's maintenance responsibilities towards the accreting land,"[1] and remanded that Action for further proceedings on the merits of the Town's responsibilities, the parties reached a settlement with a detailed plan for remediating and maintaining the vegetation on Accreted Land pursuant to the 1991 deed. The settlement of the Deed Enforcement Action was approved by the Town Council and the formal Settlement Agreement was approved by Judge McCoy[2]. Less than two years later, before any of the agreed upon remediation/maintenance work could even begin, the Town once again reneged on its obligations and brought this declaratory judgment action to invalidate the Settlement Agreement. The Property Owners counter-claimed to enforce the same. Despite the fact that she herself had approved the Settlement Agreement, Judge McCoy ruled in favor of the Town and held that the Settlement Agreement is invalid and unenforceable. These Property Owners now once again find themselves before this Appellate Court fighting to compel the Town to meet its obligations for maintenance of the vegetation on the Accreted Land as embodied in the 1991 deed and as further memorialized and detailed in the Settlement Agreement.

[1] 839 S.E.2d 879, 882.

[2] Judge McCoy also approved a subsequent amendment to the Settlement Agreement.

In their Statement of the Issues on Appeal, the Property Owners have articulated the ultimate issue as:

> Did the Circuit Court err in finding that the Settlement Agreement, as authorized by the Town Council and approved by the court, is invalid and unenforceable?"

The Property Owners have also restated/rephrased the issue from their perspective as:

> Is the Settlement Agreement between the Town and the Defendant Property Owners, that resolved pending litigation regarding enforcement of the 1991 Deed, valid and enforceable?

Under the applicable law, the answer to that ultimate issue depends on whether the Settlement Agreement involved the legislative/governmental powers of the Town or whether settling the Deed Enforcement Action involved the Town's business or proprietary functions. Piedmont Pub. Serv. Dist. v. Cowart (Cowart I) 319 S.C. 124, 459 S.E.2d 876, 880 (Ct. App. 1995), *aff'd,* (Cowart II) 324 S.C. 239, 478 S.E.2d 836 (1996). In accordance with the applicable precedent, the Property Owners also have articulated subsidiary arguments to frame the primary issue, namely:

> Did the Circuit Court err in finding that the Settlement Agreement is invalid and unenforceable because it involves the Town's legislative functions or governmental powers**?**

Restated as:

> Does the subject matter of the Settlement Agreement involve the Town's business or proprietary functions as owner of the Accreted Land legally bound to comply with its maintenance responsibilities under the covenants in the 1991 Deed?

Incredulously, the Town contends that the Property Owners did not preserve the issue raised on appeal because the Property Owners never argued in the Circuit Court that the purported proprietary/business functions at issue are the Town's obligations as a landowner under the 1991 Deed. [Respondent's Brief pp. 23-24.] The Property Owners maintain that review of the record from the Circuit Court, consisting of the pleadings, the motions and memoranda, and the transcript

of the motion hearing, evidence that the Property Owners adequately preserved the ultimate issue and the subsidiary points for this Court's review on appeal.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006), *quoted in* Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). While a party cannot raise an issue for the first time on appeal, the issue preservation rules do not require that appellants use the exact same words and terms in their appellate briefs, and appellants are not restricted from phrasing their arguments in different rhetoric.

In this appeal, the Property Owners are not raising any new issue or arguing any new legal theory. The Property Owners have consistently and repeatedly addressed the issue raised by the Town as to validity and enforceability of the Settlement Agreement with the position that the settlement of the underlying Deed Enforcement Action was a valid and enforceable exercise of the Town's business/proprietary functions in resolving the dispute over the Town's obligations under the covenants in the 1991 Deed for trimming and pruning the vegetation on the Accreted Land.

In their Memorandum in Opposition to the Town's summary judgment motion, the Property Owners clearly raised the issue of whether "the Town Fairly, Reasonably, and Properly Exercised its Proprietary Powers When it Entered the Settlement Agreement" [ROA ___; Defendants' MIO, p. 8] On that issue, the Property Owners argued that "the Town properly utilized its proprietary powers by entering a valid settlement agreement which outlines a scope of work that fully resolves the litigated issues." [ROA ___; MIO, p. 8.] The Property Owners more specifically articulated their argument that "the Settlement Agreement is proprietary in nature by virtue of the business-like functions its subject matter encompasses: the maintenance of Town-owned land." [ROA ___;

MIO, p. 11.] At the motion hearing, the Property Owners presented argument in support of the position that the Settlement Agreement was an exercise of the Town's proprietary/business powers, and they articulated their arguments in terms of the Town's power over its own real estate and the fact that the Settlement Agreement coexists with the 1991 Deed:

> So they can do what they want with their property without limitation, which is what I believe they did in conjunction with these deeds in the beginning, in which I believe they did when they settled this case. And that's pursuant to their grant of authority.
>
> ****
>
> This is not about zoning. Zoning is a governmental function. Purchasing and selling real estate? That's a business proprietary function. I certainly hope it is. The placement of restrictive covenants? Proprietary business function.

[ROA ___; Tr. 21/1-23. See also ROA ___, ___, ___; Tr. 14, 15, 24.]

As Appellants, the Property Owners are not raising some new theory for the first time on appeal. Rather, they are making substantially the same arguments and presenting the same reasoning supporting their position on the central issue of whether the settlement of the underlying Deed Enforcement Action was accomplished as an exercise of the Town's proprietary/business function. While the wording and phrasing of the legal arguments in the appellate brief may not be identical to the arguments as articulated to the trial court, the factual and legal claim is, at its core, essentially the same. If the Property Owners may be refocusing and rephrasing points of argument, they still are raising the same ultimate issue which is fully supported by the indisputable facts of the underlying Deed Enforcement Action which form the foundation of the settlement that the Town is attempting to have set aside in this DJ action (which by virtue of the Property Owners' counter-claim, amounts to a Settlement Enforcement Action).

The Property Owners have been raising the same issue for over thirteen (13) years, namely the Town's obligations to maintain the vegetation on the Accreted Land under the 1991 Deed whereby the Town reacquired and currently holds ownership of the Accreted Land. The

underlying litigation was grounded in the covenants in the 1991 Deed and the Supreme Court remanded for a determination on the merits of the Town's maintenance responsibilities for the Accreted Land under that Deed. The parties reached a settlement to define the Town's maintenance responsibilities, but now the Town's refusal to abide by the Settlement Agreement has brought the issue of the Town's responsibilities once again before this Court. At this stage of the dispute, the question has become the validity and enforceability of the Settlement Agreement, but at the core, the issue remains the same as the issue presented in the underlying Deed Enforcement Action, namely, the Town's obligations to maintain the vegetation of the Accreted Land which it owns by virtue of the 1991 Deed.

II. APPLICABLE LEGAL AUTHORITIES: *Cowart I* and other relevant appellate opinions provide a general rule that guides the determination of whether the Settlement Agreement is valid and enforceable, but the analysis and holdings do not support the Circuit Court's conclusion.

The Town contends that the Property Owners have not provided any "controlling or persuasive authority" in support of their position that the settling the underlying Deed Enforcement Action was an exercise of the Town's proprietary/business powers. [Respondent's Brief, p. 26.] While the Property Owners have not cited a South Carolina appellate opinion "on point" as to an issue of whether settling litigation is a business or proprietary function of a governmental entity, by the same token, the Town cannot cite a particular case that holds that settlement of a land dispute or deed enforcement action falls within a governmental entity's legislative or governmental powers. The dearth of appellate decisions on this precise point is understandable if viewed from the prospect that apparently no other governmental entity has had the temerity to renege on a court-approved settlement agreement and proceed to appeal under any similar circumstances. Consequently, here, the Town's efforts to invalidate the Settlement Agreement presents a novel fact pattern for the application of the general rule.

The Property Owners have fully discussed, in detail, the various opinions which provide the controlling test/standards, including Piedmont Pub. Serv. Dist. v. Cowart (Cowart I) 319 S.C. 124, 459 S.E.2d 876, 880 (Ct. App. 1995), *aff'd* (Cowart II) 324 S.C. 239, 478 S.E.2d 836 (1996); Newman v. McCullough, 212 S.C. 17, 46 S.E.2d 252 (1948); City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth., 325 S.C. 174, 480 S.E.2d 728, 731 (1997). While the opinions issued in these cases contain holdings applying the controlling rule of law articulated in *Cowart I*, the analysis and reasoning in those decisions do not support the Town's position or the Circuit Court's conclusion that the settlement of the underlying Deed Enforcement Action involved the Town's legislative functions or governmental powers.

The Property Owners also maintain that the reasoning of the *Cowart* line of opinions does not address the serious policy implications of allowing governmental entities to walk away from contractual obligations and settlement agreements any time new members are elected to the town council. While the elected members of a town council conduct the business of the town, the legal obligations of the town cannot be invalidated at the whim of members when elections result in the realignment of the political leanings and opinions of the individual council members. Nothing in our legal jurisprudence does or should allow a town to repudiate a settlement agreement which was negotiated and finalized to resolve litigation to enforce covenants under a deed by and through which the town arranged to take ownership of the Accreted Land. Embodied in our common law of real property is the fundamental tenet that land transactions should provide notice and certainty as to ownership and covenants that run with the land. This particularly should be so with a transaction such as this where the Town intentionally and purposefully structured the Accreted Land's ownership and the covenants in the 1991 Deed. From the perspective of this settlement enforcement action, the judicial system demands, in the name of judicial economy and stability,

that settlements by a governmental entity such as the Town are final and litigation will not be resurrected whenever there is an election that tips the balance of opinions held by the council members.

III. PERPETUAL DURATION: The initial plan for thinning the overgrown maritime forest as defined in the Settlement Agreement is not perpetual, and any plans for future trimming of the vegetation to maintain appropriate level of density and diversity is open to periodic reassessment (such as every five years).

The general rule for determining validity of the Settlement Agreement, as articulated in *Cowart I,* includes a second factor if the contract involves the exercise of the Town's business/proprietary powers, namely, whether "if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality." 459 S.E.2d at 880. The Property Owners maintain that it was fair, reasonable, and advantageous for the Town to settle the underlying Deed Enforcement Action in view of the facts that after ten (10) years of litigation and appeal: (1) the Supreme Court had seemingly rejected the Town's attempts to posture the case as a zoning matter, and instead remanded the case to the trial court for the resolution of the Town's maintenance responsibilities for the Accreted Land under the 1991 deed, and (2) on remand, the Town faced the prospect of untold time and expense that would have been incurred with more litigation as well as the risk of a holding that the Town would be obligated to compensate the Property Owners for diminished property values and/or to pay for thinning to remediate the decade of overgrowth on the Accreted Land and for trimming maintenance costs going forward after the initial thinning. By entering into the very Settlement Agreement it now seeks to avoid, the Town avoided the cost and risk of more litigation and negotiated a plan (supported by experts) under which the Town controls the thinning and trimming and also shifts the vast majority of the cost to the owners of land that adjoins the Accreted Land, such as the Property Owners named in this

action. Under these circumstances, it should be hard to give any credence to an argument that the settlement was unfair, unreasonable or disadvantageous to the Town.

Yet, the Town argues that the settlement agreement in invalid because it has a perpetual duration. The fair and reasonable factor, as stated in *Cowart I*, can encompass a question of whether the agreement is "of a reasonable duration," *id*. at 882, and Judge McCoy ruled that even if the agreement involved the Town's proprietary function, the agreement was unreasonable because it is of "perpetual duration." [ROA ___; Order p. 8.] Again, inexplicably, the Town argues that the Property Owners do not dispute the perpetual duration or argue that the perpetual duration is reasonable. [Respondent's Brief p. 29.] However, the hearing transcript shows that that the Property Owners addressed the perpetual duration argument raised by the Town with reference to the different time frames of the initial thinning plan and the future maintenance trimming plans.[3] [ROA ___;Tr. 16.] The Property Owners press the argument on appeal that "the Settlement Agreement should not be considered invalid as an unfair or unreasonable perpetual burden on Town." [Appellants' Brief p. 23.]

As explained, the Settlement Agreement does not impose a "set-in-stone" plan intended to control the thinning and trimming of the vegetation for all times in perpetuity. Rather, the Settlement Agreement creates staged plans with different time frames. First, there is a specific plan for work to thin the maritime forest which has grown during the many years that the Town has refused to perform or allow trimming including the thirteen (13) years since the Property Owners brought their original suit. The initial stage for selective thinning of the Accreted Land on the 2500 Block of Atlantic (which is the block where the houses owned by these Property Owners are

[3] The covenants at issue in the 1991 Deed contain a finite period of 50 years (with options for extension). We are now 30 years into that period, but for much of that time the Town has been avoiding it responsibilities for trimming and pruning the vegetation.

located) was supposed to have proceeded "with all deliberate speed" after the Settlement Agreement was formally approved and the owners' funding was in place. The second stage for selective thinning was supposed to have allowed other property owners a one-year time period (from the settlement of the underlying action) to opt in to the thinning plan and provide funding. [ROA ___; MIO Ex. 2.] The provisions in the Agreement for these initial stages of thinning to achieve control over the decade of overgrowth allowed by the Town's refusal to honor its obligations under the 1991 Deed are not, by any viewpoint, perpetual. It also should be beyond argument that the time frames of "all deliberate speed" and a one-year opt-in are reasonable in duration, particularly, in comparison to the 10+ years that the Town limited trimming and allowed the overgrown maritime forest to develop.

After the initial stage of thinning, the Settlement Agreement does not contain a pre-defined, set plan for maintaining the vegetation "going forward." Rather, the Settlement Agreement provides flexibility to structure a plan for maintenance trimming to meet changing conditions on a periodic basis (such as every five years) with all parties obligated to cooperate and act in good faith. The Property Owners maintain that this provision for flexibility "going forward" does not amount to an unreasonable perpetual duration. However, the Property Owners also argued, in the alternative, that the court had the ability and the obligation under the severability clause in the Settlement Agreement to at least enforce the plan for the initial stage of thinning and sever provision for any future maintenance trimming "going forward":

> [T]his Court has the ability to say, "Well, if y'all don't like it and this -- I'm going to determine it's not a reasonable duration, I can go ahead and strike these provisions and enforce the balance of the agreement and the work gets done as they agreed."

[ROA ___; Tr. 16/12-17.] The overgrown maritime forest presents serious dangers which need to be remediated now in accordance with the agreed upon plan, and if necessary, the property owners

can haggle with the Town in the future about future maintenance trimming and pruning after the initial agreed-upon work was completed. In the alternative, if the Court allows the Town to repudiate the entire Settlement Agreement, the Property Owners should be allowed to reopen/reinstate the underlying Deed Enforcement Action and proceed to trial on all the claims arising from the Town's breach of the covenants in the 1991 Deed.

CONCLUSION

Based on the issues raised and argued in the Appellant's opening brief and in this reply, the Appellant Property Owners respectfully request that the Court reverse Judge McCoy's order invalidating the Settlement Agreement between the Town and the Defendant Property Owners that resolved the Deed Enforcement Act because the Settlement Agreement, as approved by Judge McCoy in October 2020, is a fair and reasonable and necessary or advantageous business agreement to resolve the dispute as to Town's obligations to maintain the vegetation on the Accreted Land. In the alternative, if any part of the Settlement Agreement is deemed to be invalid because the provisions to revisit the trimming plan for future maintenance of the vegetation "going forward" is considered an unreasonable perpetual duration, the Severability Clause of the Settlement Agreement should be enforced to excise only the future plans for trimming without invalidating the initial stage of thinning which was supposed have proceeded with all deliberate speed and/or within a year of the formal settlement. Ultimately, if the Court finds that the entire Settlement Agreement is invalid, then the Property Owners are entitled to reinstatement of the original Deed Enforcement Action so they can proceed with their claims under the 1991 Deed in accordance with the Supreme Court's prior decision.

Respectfully submitted,

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November 20, 2023

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STATE OF SOUTH CAROLINA

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Appeal from Charleston County
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TOWN OF SULLIVAN'S ISLAND,

Respondent,

vs.

NATHAN BLUESTEIN and
THEODORE ALBENESIUS, III,

Appellants.

CERTIFICATE OF SERVICE

The undersigned certifies that on this 20th day of November, 2023, a copy of the Initial Reply Brief on behalf of Appellants Nathan Bluestein and Theodore Albenesius, III was served by emailing a copy to the address listed below:

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November 20, 2023

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Appeal from Charleston County, Case No. 2022-CP-10-00846
Appellate Case No. 2023-001082
HLF File No. 805.001

Dear Ms. Kitchings:

Enclosed please find the Appellants' Initial Reply Brief in the above captioned matter. Also enclosed herewith is the Certificate of Service. I am serving all other counsel of record by emailed copy of this letter.

Kind regards,

Yours truly,

/s/ James B. Hood

James B. Hood

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