

**RECEIVED**  
**Mar 11 2026**  
SC Court of Appeals

**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  
Opinion No. 6139, filed February 25, 2026

---

TOWN OF SULLIVAN’S ISLAND,

Respondent,

vs.

NATHAN BLUESTEIN and  
THEODORE ALBENESIUS, III,

Appellants.

---

**PETITION FOR REHEARING**

---

This declaratory judgment action arises out of a Settlement Agreement reached in separate litigation that, itself, has already been before this Court (the “Original Deed Enforcement Action”). After this Court affirmed the grant of summary judgment to the Town, the matter proceeded to review by the Supreme Court which resulted in a reversal and a corresponding remand to the trial court for further proceedings. Bluestein v. Town of Sullivan's Island, 424 S.C. 362, 818 S.E.2d 239 (Ct. App. 2018), *rev'd* 429 S.C. 458, 839 S.E.2d 879 (2020). On remand, the parties negotiated a settlement which was memorialized in a written Settlement Agreement, authorized by a resolution from the Town Council, and approved by a Circuit Court Judge. However, little more than a year later, after an election changed the composition of the Town Council, the Town

commenced this action seeking to invalidate the very Settlement Agreement that the Town had negotiated, approved, and executed, and that the Circuit Court had adopted and approved to resolve the Original Deed Enforcement Action. The Circuit Court granted summary judgment to the Town, holding, as a matter of law, that the Settlement Agreement is invalid and unenforceable. By opinion, issued February 25, 2026, this Court affirmed, holding that the Settlement Agreement was invalid and unenforceable because “the subject matter of the settlement agreement concerns the Town's governmental function to maintain land it owns in furtherance of public health and safety.” Pursuant to Rule 221, SCACR, the Appellants respectfully petition for rehearing and point to the following issues which have been overlooked or misapprehended by the Court.

**1. The Settlement Agreement involves the Town’s proprietary function as owners of the Accreted Land under the 1991 Deed.**

As to the issue raised of whether the Circuit Court erred in finding that the Settlement Agreement is invalid and unenforceable because it involves the Town’s legislative functions or governmental powers, the Court has overlooked or misapprehended that the subject matter of the Settlement Agreement at its core, primarily 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. In rejecting the Property Owners’ arguments on this issue the Court has overlooked or misapprehended the established case law in Piedmont Pub. Serv. Dist. v. Cowart (Cowart I), 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995), , *aff’d*, (Cowart II) 324 S.C. 239, 478 S.E.2d 836 (1996); City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth., 325 S.C. 174, 480 S.E.2d 728 (1997); and G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980).

Under general prevailing law as stated in Cowart I, the Town has the power to enter into binding contracts, with durations that extend beyond the term of the elected Council members,

when the contract “involves the exercise of the municipal corporation's business or proprietary powers.” 459 S.E.2d at 880. “However, if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils.” Id. Property Owners maintain that the holdings in Cowart I and the related precedent do not support a legal conclusion that settlement of pending litigation regarding enforcement of maintenance covenants in a deed involves a governmental function.

The Court’s opinion in Cowart I rests on the general rule that the appointment and removal of public officers is a governmental function. There is no such comparable general rule that the Town’s contractual maintenance obligations, as a landowner, under a land deed is a governmental function.

In City of Beaufort, the Court invalidated a clause in a water contract between the City and the water authority on the reasoning that public policy demands that a water sewer authority’s right to provide water to county residents be left relatively unimpaired. This decision rests on a settled holding that provision of water service is a governmental function. There is no comparable settled holding that a town’s maintenance obligations under a deed by which it acquired and holds ownership of the land is a governmental function.

In Clay, the Court held that a sewer district could not contractually give power to a private party to arbitrarily approve or disapprove potential users of the sewer system belonging to the corporate political entity. That holding rests on the premise that a governmental entity cannot contractually delegate away its powers and responsibilities to a private party. The Settlement Agreement is not, in any manner, analogous to the circumstances in any of these cases.

The Town, as the owner of the Accreted Land, negotiated a settlement of the then pending Original Deed Enforcement Action. After that action proceeded through the Court of Appeals and

the Supreme Court, and returned to the Circuit Court on remand, the Town negotiated a settlement agreement to end the litigation that had by that time been dragging on for a decade. The Settlement duly proceeded through the process of authorization/approval by the Town Council and was presented to a Circuit Court Judge for judicial approval. Judge McCoy expressly found that “such settlement is proper and in the best interest of all Parties.”

While Court states that it recognizes that the Town is the owner of the Accreted Land and therefore holds a proprietary interest, the Court has practically rejected that fact and seized upon terminology and phrasing in the settlement documents and S.C. Code § 5-7-30 to recast the Agreement as involving the public health and safety of the general public. This reasoning strains the decision in Cowart I and the related precedent, and overlooks or misapprehends that “[t]he 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.” 459 S.E.2d at 881. Public policy does not demand that the Town should hold unrestrained power to ignore its maintenance obligations under a deed by which it obtained ownership of the land. Nor does public policy demand that the Town be allowed to maneuver the court system to avoid its obligations by spending decades in litigation before finally negotiating a settlement only to immediately turn around and renege on the court-approved settlement.

The Town undertook certain maintenance obligations in the 1991 Deed by which it obtained ownership of the Accreted Land. As owner of that land, the Town entered into a legal, binding settlement agreement to meet/redefine those maintenance obligations. The invalidation of the duly-authorized and court-approved Settlement Agreement merely because of a political realignment of the Town Council members would be a travesty of justice and set a dangerous

precedent for instability in contractual and litigation negotiations with this Town, other municipalities, and all other governmental entities.

**2. The court-approved Settlement Agreement is valid as a fair and reasonable and necessary or advantageous business agreement to meet the Town’s obligations to maintain the vegetation on the Accreted Land, and resolve pending litigation.**

On a separate point, the Circuit Court held that “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.” [ROA 12.] The Property Owners have raised this issue and argued that the Settlement Agreement is a fair and reasonable and necessary or advantageous business agreement to meet the Town’s obligations to maintain the vegetation on the Accreted Land. This Court has declined to address this issue. In conjunction with the request for rehearing of the subject matter issue as discussed above, the Property Owners also request that the Court consider and address the reasonableness issue.

In the interest of avoiding repetition, the Property Owners incorporate the arguments as presented in their Final Brief and Final Reply Brief as if fully restated herein. However, to briefly restate, the reasonableness issue should be easily answered because the parties so stipulated and Judge McCoy so found in her October 7, 2020, order approving the Settlement Agreement:

UPON Motion of all Parties, and it appearing that the said Parties deem the offer of settlement acceptable, advantageous, and to the best interest of all Parties and

IT FURTHER APPEARING in the discretion of this Court that such settlement is proper and in the best interest of all Parties, ... [ROA 221; MIO Ex. 4.]

In addition, examination of the Settlement Agreement in the context of the status of the Original Deed Enforcement Action shows that the agreement was both fair and reasonable as well as advantageous from several perspectives. Settlement Agreement produced a thoroughly vetted,

comprehensive work plan for trimming and thinning to deal with the overgrowth of vegetation on the Accreted Land, and it balanced all competing interests and environmental concerns.

Viewing the posture of the dispute from a litigation costs perspective, the Town already had spent ten years and considerable funds litigating the Original Deed Enforcement Action. By October 2020, the Town faced the prospect of incurring additional legal expenses for more litigation and the possibility that it would be burdened with significant expenses of compensating the Property Owners for their damages and/or remediating the maritime forest to return the vegetation on the Accreted Land to the conditions existing in February 1991. [See ROA 225; MIO Ex. 4 - Agreement p. 3.] It certainly was advantageous at that time for the Town to settle the Original Deed Enforcement Action and avoid further lengthy and costly litigation and to reach a compromise with a work plan for finally remediating the overgrown vegetation without having to pay the Property Owners claims for millions of dollars in damages for the diminution in their property values.

**3. The Severability Clause of the Settlement Agreement should be enforced to excise only such provisions that purportedly bind a future Town Council in regard to a legislative function or governmental power.**

The Settlement Agreement contains a Severability Clause which states, in pertinent part, “[s]hould any portion, word, clause, phrase, sentence or paragraph of this Settlement Agreement be declared void or unenforceable, such portion shall be considered independent and severable from the remainder, the validity of which shall remain unaffected.” [ROA 231; MIO Ex. 4.] On appeal, the Property Owners raised the issue of the Circuit Court’s error in refusing to enforce this clause. This Court has declined to address this issue. In conjunction with the request for rehearing of the issues as discussed above, the Property Owners also request that the Court consider and address this issue.

In the interest of avoiding repetition, the Property Owners incorporate the arguments as presented in their Final Brief and Final Reply Brief as if fully restated herein. However, to briefly restate, the unambiguous terms of the Settlement Agreement clearly provide that it is severable and that the parties intended it to be severable. Thus, if the Court invalidates any portion of the Settlement Agreement, then the Court should enforce the plain and unambiguous terms of the same and reject only the aspects of the contract which it finds operate to improperly constrain the legislative function of future Town Councils.

More particularly, the Settlement Agreement prescribes a detailed plan for an initial scope of work that is tailored for certain zones within the Accreted Land. After the completion of this work, the only prospective action contemplated by the Settlement Agreement is the parties' agreement to maintain similar conditions going forward which ostensibly leaves future Town Councils with some discretion. However, if this provision regarding future maintenance of the vegetation were to be determined an impermissible constraint on some governmental function of successor Town Councils, then the rest of the Settlement Agreement should be preserved and enforced so that these Property Owners, who released their claims against the Town and dismissed the Original Deed Enforcement Action, can demand that the initial thinning and trimming work on their block can proceed to restore the vegetation to some semblance of the conditions as existed in 1991.

#### **4. Unaddressed Status of the Original Deed Enforcement Action**

As part of the Settlement Agreement, the Property Owner's executed a release and dismissed the Original Deed Enforcement Action. The Circuit Court's order failed to address the ramifications of invalidating the Settlement Agreement on the status of the Original Deed Enforcement Action. The Court has refused to address this issue as "not preserved for appeal because Property Owners did not raise this issue to the circuit court." In so holding, the Court has

overlooked or misapprehended the posture of the proceeding and the arguments asserted by the Property Owners in the circuit court.

To clarify the point – it was the Town who commenced this separate, independent action – apart from the Original Deed Enforcement Action – seeking to invalidate the court-approved Settlement Agreement, and then moved for summary judgment. In opposing the motion, the Property Owners raised the question of the implications on the Original Deed Enforcement Action: “If the Town’s position as to the validity of the Settlement Agreement is correct, then the releases contained in the Settlement Agreement were without consideration and would be equally invalid. Defendants are prepared to re-open the Original Lawsuit and proceed with trial on their original claims at the earliest opportunity.” [Memorandum in Opposition ROA 170 n. 8.]

When the Circuit Court granted summary judgment to the Town in the January 30, 2023, order, the Property Owners filed a motion for reconsideration in which they raised the point that the Court had not addressed the consequences of invalidating the Settlement Agreement or the steps the parties would need to take to resume the Original Deed Enforcement Action. [ROA 313.]

Even if the Court is not inclined to alter or amend its Order, it should provide direction to the parties as to the effect the Order has in the Original Lawsuit.

\*\*\*

Even if the Court is not inclined to grant Defendant’s Motion to Alter or Amend pursuant to Rule 59(e), it should nevertheless provide direction to the parties as to the impact of its January 30th Order on the Original Lawsuit and Defendants’ respectfully request that the Order be amended to reflect the same. [ROA 319-320.]

The Circuit Court, in denying the motion for reconsideration, sidestepped the issue as premature and outside the scope because the Original Deed Enforcement Action was “a prior, different lawsuit.” [ROA 326-328.] Accordingly, the Property Owners properly preserved the issue for

review on appeal to this Court and the Court should address the issue in the interest of justice and judicial economy.

The Original Deed Enforcement Action was commenced in 2010 and proceeded through years of litigation and appeals which resulted in a remand in 2020. The Property Owners negotiated with the Town in good faith to reach a settlement that was duly authorized by the Town Council and approved by the Circuit Court. Yet, here once again the parties are before the Court on yet another appeal when the Town has convinced the same Circuit Court to invalidate the Settlement Agreement.

The Property Owners respectfully submit that the Town cannot be allowed to avoid its obligations under the 1991 Deed and simultaneously evade all liability for the claims for breach of the Deed by repudiating the Settlement Agreement. The Releases and Stipulations of Dismissal were integral to the Settlement Agreement and the resolution of the Original Deed Enforcement Action. If the Settlement Agreement is deemed invalid in its entirety, the Property Owners are entitled to resume pursuing all their claims in the Original Deed Enforcement Action in accordance with the Supreme Court's prior decision.

## **CONCLUSION**

WHEREFORE, based on the foregoing together with the issues raised and argued in their final briefs, the Appellants Property Owners respectfully request that the Court grant this petition, reconsider the issues raised, and reverse Judge McCoy's order invalidating the Settlement Agreement. In the alternative, if any part of the Settlement Agreement is held invalid, the Severability Clause of the Settlement Agreement should be enforced rather than invalidating the entire Agreement. Ultimately, if the Court finds that the Settlement Agreement is invalid, then the Property Owners should be allowed 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,

**HOOD LAW FIRM, LLC**

172 Meeting Street  
Post Office Box 1508  
Charleston, SC 29401/02  
Ph: (843) 577-4435  
Fx: (843) 722-1630

*/s/ James B. Hood* \_\_\_\_\_

James B. Hood (70212)

james.hood@hoodlaw.com

Virginia R. Floyd (101849)

virginia.floyd@hoodlaw.com

Deborah Harrison Sheffield, *Of Counsel* (2757)

deborah.sheffield@hoodlaw.com

**Attorneys for the Appellants**

**Nathan Bluestein and Theodore Albenesius, III**

March 11, 2026