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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

TOWN OF SULLIVAN'S ISLAND,

Respondent,

vs.

NATHAN BLUESTEIN and
THEODORE ALBENESIUS, III,

Appellants.

FINAL BRIEF OF APPELLANTS

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

James B. Hood (70212)
james.hood@hoodlaw.com
Virginia R. Floyd (101849)
virginia.floyd@hoodlaw.com
Lisa B. Bisso (105258)
lisa.bisso@hoodlaw.com
Deborah Harrison Sheffield, *Of Counsel* (2757)
deborah.sheffield@hoodlaw.com

Attorneys for the Appellants
Nathan Bluestein and Theodore Albenesius, III

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Or as otherwise stated:

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?

A. 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?

Or as otherwise stated:

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?

B. Did Judge McCoy err in finding that the Settlement Agreement is unreasonable as a matter of law?

Or, as otherwise stated:

Is the Settlement Agreement, as approved by Judge McCoy, a fair and reasonable and necessary or advantageous business agreement to meet the Town's obligations to maintain the vegetation on the Accreted Land?

II. Did the Circuit Court err in refusing to enforce the Severability Clause of the Settlement Agreement to excise only such provisions that purportedly bind a future Town Council in regard to a legislative function or governmental power?

III. Did the Circuit Court err in refusing to nullify the corresponding Release and reinstate the Original Deed Enforcement Action after invalidating the Settlement Agreement?

STATEMENT OF THE CASE

This declaratory judgment action arises out of a Settlement Agreement reached in separate litigation that, itself, has already been before this Court - Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius, v. Town of Sullivan's Island and Sullivan's Island Town Council, Case No. 2010-CP-10-5449 (the "Original Deed Enforcement Action"). In that suit, Nathan Bluestein and Theodore Albenesius, III[1] ("Property Owners") brought an action against the Town to enforce the provisions of a 1991 Deed conveying beachfront accreted land (the "Accreted Land") issued to the Town of Sullivan's Island (the "Town"). This 1991 Deed contains a specific covenant regarding the trimming and pruning of vegetation on the Accreted Land and provides property owners with a right to enforce the same. After the Master-in-Equity granted summary judgment to the Town on all claims, the action proceeded through a lengthy appeal before the Court of Appeals and then the Supreme Court, until ultimately, the grant of summary judgment was reversed and the Original Deed Enforcement Action was remanded to the trial court for further proceedings.[2] 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 the Honorable Jennifer B. McCoy, Circuit Court Judge, in October 2020. Judge McCoy also approved one amendment to the Settlement Agreement in April 2021.

After the next election, only sixteen (16) months after the Settlement Agreement was approved and only ten (10) months after its amendment was approved, the Town commenced this action and sued the original plaintiffs to the Original Deed Enforcement Action (Messers Bluestein

[1] The alignment of the Defendants changed due to death and divorce during the course of the litigation.

[2] 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).

and Albenesius, the "Property Owners"), 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. This new effort has been pursued, ostensibly, on the ground that provisions of the Settlement Agreement improperly restrict the legislative/governmental powers and propriety functions of the successor Town Council. [Amd. ROA 31; Complaint, filed February 21, 2022.] The Defendant Property Owners filed an answer with counterclaims for breach of contract, specific performance, and promissory estoppel. [Amd. ROA 79; Answer and Counterclaims, filed April 13, 2022.] The Town filed a reply to the counterclaims, and then promptly filed a motion for summary judgment. [Amd. ROA 93; Reply, filed May 13, 2022. Amd. ROA 101; Motion, filed May 23, 2022.]

On September 22, 2022, the Town's motion for summary judgment came before the same Circuit Judge who had previously approved and adopted the Settlement Agreement, the Honorable Jennifer B. McCoy. [Amd. ROA 330; Transcript.] Both parties submitted memoranda with supporting exhibits. [Amd. ROA 101; Plaintiff's memorandum with exhibits, filed May 23, 2022. Amd. ROA 154; Defendants' memorandum with exhibits, filed September 16, 2022.] The Court requested that both parties submit proposed orders following the hearing. Ultimately, on January 30, 2023, Judge McCoy adopted and signed the Town's proposed order without revision, granting summary judgment to the Town and holding, as a matter of law, that:

> [T]he Settlement Agreement is invalid and unenforceable as a matter of law because it involves the legislative/governmental powers of the Town and purports to bind the current and future town councils. However, even if the Settlement Agreement could somehow be said to involve only proprietary/business functions, it is still invalid and unenforceable because it is unreasonable as a matter of law.

[Amd. ROA 12; Order, p. 12.] The order also granted summary judgment to the Town on the Property Owners' counterclaims for specific performance, breach of contract, and promissory estoppel associated with the Settlement Agreement.

The Property Owners filed a motion to alter or amend, asking Judge McCoy to reconsider her rulings and enter judgment upholding and enforcing the Settlement Agreement. In addition, the Property Owners asked Judge McCoy to address the issue raised as to enforcement of the severability provision of the Settlement Agreement, and to address the impact of her ruling on the Original Lawsuit. [Amd. ROA 311; Motion, filed February 8, 2023.] In a Form 4 Order filed on June 5, 2023, Judge McCoy summarily denied the motion without addressing the issues raised. [Amd. ROA 28; Order.] The Property Owners filed and served a Notice of Appeal on July 5, 2023. [Amd. ROA 377; NOA.]

Though the Town does not in this action appear to question the authority of its prior Town Council to enter into the 1991 transaction that resulted in the Deed by which it now holds ownership of the Accreted Land, the Town is asserting that the Town Council (presiding in 2020) somehow lacked the authority to settle litigation relating to its obligations under the 1991 Deed. Effectively, at the whim of the current Town Council, the settlement is somehow an improper "legislative" constraint on the authority of the Town Council while the original land transfer was a proper "proprietary" action.

STATEMENT OF THE FACTS

Undisputed Facts regarding the 1991 Deed of the Accreted Land

A central context of the 1991 Deed and the Original Deed Enforcement Action is the unique geology of the Sullivan's Island shoreline, as a barrier island where the beachfront lands have accreted over the years. The Accreted Land has grown and extended the dune, beach and shore

lines throughout parts of the Island, increasing the distance between the privately-held properties and the shore itself.

Today, the Town holds the Accreted Land pursuant to a 1991 Deed issued to it by the Lowcountry Open Land Trust (the "Trust"). 839 S.E.2d at 880. As noted by the Supreme Court in the Original Deed Enforcement Action, the Town began expressing concern about the future of the Accreted Land in the mid-1980s, and explored options for protecting the Accreted Land from development. 839 S.E.2d at 880. Eventually in 1991, after Hurricane Hugo, the Town negotiated a two-step transfer agreement with the Trust to protect the accreting land, pursuant to which the Town deeded the Accreted Land to the Trust and the Trust transferred the land back to the Town subject to a number of deed restrictions. *Id.* [Amd. ROA 108-188; MIO Ex. 1 – Deed as recorded in BOOK 200 PG 496 – 504.]

The 1991 Deed describes the Accreted Land as having "aesthetic, scientific, educational, and ecological value in its present state as a natural area which has not been subject to development or exploitation." [Amd. ROA 180; MIO Ex. 1 - Deed as recorded in BOOK 200 PG 496.] The 1991 Deed expressly states the parties' intention of protecting the Accreted Land as a "desire to place restrictions upon the Property for the purposes of, inter alia retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife." [Id.] The 1991 Deed further expresses the intention to preserve the Accreted Land in the conditions as existed in February 1991: "WHEREAS, "natural, scientific, educational, aesthetic, scenic and recreational resource," as used herein shall, without limiting the generality of the terms, mean the condition of the Property ***at the time of this grant ....***" [Emphasis added.] [Id.] In order to effectuate that intent to preserve the conditions on the Accreted Land as it existed in February 1991 at the time of the transfer, the 1991 Deed specifically provides for methods of

documenting that condition, including survey maps, aerial photographs, and on-site photographs. [Id.]

The 1991 Deed contains express restrictions which serve the purpose and intent of preserving the Accreted Land as it existed in February 1991, including the height and nature of the vegetation, and limits any efforts or action by the Town to alter the condition or character of the Accreted Land subject to limited conditions and requirements. By the express provisions of the 1991 Deed, the Defendant Property Owners are third party beneficiaries of the 1991 deed vested with enforcement rights. [Amd. ROA 182; Deed ¶ 5, BOOK 200 PG 498.]

Undisputed Facts regarding the Original Deed Enforcement Action to Enforce the 1991 Deed

Although the 1991 Deed obligates the Town to maintain the vegetation on the Accreted Land, as a matter of local practice, the adjacent property owners actually took the steps to keep up with trimming the vegetation on the Accreted Land adjacent to their property. At the time the 1991 Deed was executed, the Town had a trimming ordinance which provided that residents/owners of the front-row lots, such as those owned by the Plaintiffs, could obtain permits to prune, cut and trim all varieties of trees and to a height of no less than three (3) feet without any restriction as to the time of year. [Amd. ROA 34-5, 80; Compl. ¶ 9; Answer ¶ 8.] Just a few years later, the Town Council – with then-newly elected members -- radically rewrote the trimming ordinance. [Amd. ROA 37, 81; Compl. ¶ 12; Answer ¶ 11.] As rewritten, the ordinance added limitations on the time of year when trimming could be done and the species of trees that could be trimmed, but most significantly, the Town changed the height limitation from three (3) feet to seven (7) feet. Ten years later the Town again amended the trimming ordinance, changing the height limitation. [Amd. ROA 37, 81, 142; Compl. ¶ 13; Answer ¶ 12; Town MSJ - Ex. B.)

As noted by the Court of Appeals in the Original Deed Enforcement Action, at the time of the 1991 Deed, the ocean adjacent land was covered in sea oats and wildflowers and the Property Owners had unobstructed ocean views and breezes; however, the vegetation on the Accreted Land land has grown into a maritime forest as a result of the Town's changes to the trimming and pruning ordinances. 818 S.E.2d at 242. In the summer of 2010, Property Owners made applications to the Town for permits to trim and prune the Accreted Land to 1991 levels. When the Town denied the permits, Property Owners filed the Original Deed Enforcement Action against the Town asserting a number of claims, including breach of contract and nuisance. Property Owners alleged that the unchecked growth of vegetation on the ocean adjacent land has resulted in public and private harms and claimed that they have been deprived of their ocean views and breezes and that the overgrowth has caused other dangers and nuisances.

The Master-in-Equity granted summary judgment to the Town on all claims, and the Court of Appeals affirmed. 818 S.E.2d 239. However, the Supreme Court reversed and remanded to the trial court, holding that "the 1991 deed is ambiguous in terms of the Town's maintenance responsibilities towards the accreting land." 839 S.E.2d 879, 882.

Undisputed Facts regarding the 2020 Settlement Agreement of the Original Lawsuit

On remand from the Supreme Court, the Town and the Property Owners negotiated an agreement to end the litigation that had by that time been dragging on for a decade. The Settlement Agreement was presented to the Town Council, and a resolution approving and adopting the same was passed on October 2, 2020:

> Making Specific Findings of Fact, Authorizing Settlement of Bluestein v. Sullivan's Island on the general parameters set forth below, and Authorizing Staff to Take All Actions Necessary and Proper to Implement the Described settlement including procurement actions in accordance with Town policy, the development of detailed plans and applications, and the submittal of applications necessary to effectuate this settlement. [Amd. ROA 214; MIO Ex. 3.]

The Settlement Agreement was executed by the individual Property Owners, and the Town's Attorney on behalf of the Town Council on October 7, 2020. [Amd. ROA 223; MIO Ex. 4.]

Thereafter, the Parties took the further step of memorializing the Settlement Agreement by submitting a consent motion to the Circuit Court seeking judicial approval of the Settlement Agreement. The Settlement Agreement was approved by the Honorable Jennifer B. McCoy, Circuit Court Judge, by Order dated October 15, 2020, which found that the Settlement Agreement "is proper and in the best interest of all Parties" and further authorized the Town to consummate the settlement per the Settlement Agreement. [Amd. ROA 221; MIO Ex. 4.]

After the Settlement Agreement was executed, approved, and consummated, the engineering firm retained by the Town to conduct a tree survey identified an issue regarding regulatory applications that needed to be submitted to certain State and/or Federal agencies in order to implement the work plan. With the guidance of the engineering firm, the Town and the Property Owners reached an agreement for a work plan to replace the scope of work described in the original Settlement Agreement. The Amendment was submitted to the Court for approval by a joint consent motion, and an Order Amending Settlement was entered by Judge McCoy on April 12, 2021. [Amd. ROA 246; MIO Ex. 5.]

The Terms of the Settlement Agreement

The compromise between the Property Owners and the Town reached in the Original Deed Enforcement Action thoughtfully and rationally addressed the Town's rights and obligations in regards to the unchecked vegetation growth throughout the Accreted Land—growth that has resulted in a marine forest and that has created a variety of problems ranging from depriving the Property Owners of their ocean views and breezes and diminishing their property values to creating dangerous nuisances including fire hazards, mosquitos, raccoons, snakes, and coyotes. As part of

the settlement negotiation process, the 1991 Deed's Grantor, the Trust, was consulted and an engineering firm retained to conduct a tree survey to identify (on a tree-by-tree basis) which select vegetation would be trimmed so as to reasonably achieve the stated requirements of the 1991 Deed. This survey is attached to and incorporated in the Settlement Agreement

During that process, the Town identified multiple problems created by the overgrowth, including difficulty applying anti-mosquito treatments, an increased prevalence of pests; unhealthy stagnant conditions from impeded airflow, wildfire risks as well obstructions to ocean views. The Parties concluded that: "The only way to address excessive vegetation growth and density is selective thinning," and a plan was proposed (as later amended) that presented "a selective thinning plan carefully tailored to address these stated concerns while maximizing retained ecological, educational and scientific goals." [Amd. ROA 225; MIO Ex. 4.] As expressly stated, the Town Council expressly found that the work plan adopted by the Settlement Agreement "balances the competing needs of beach front and inland island residents and the ecological and natural interests on the one hand and human needs and safety on the other." [Amd. ROA 223; *id*.]

The Settlement Agreement's work plan contemplates an initial trimming and thinning to be conducted in several stages. The work plan sets specific details for this initial trimming and thinning within a "Transition Zone" running 100 ft. seaward of private property lines adjacent to the Accreted Land as well as three unique "Zones" within the remaining portion of the Accreted Land between the "Transition Zone" and the shore line.[3] Beyond this initial trimming and thinning work, the Settlement Agreement does not prescribe or mandate a permanent or indefinite work

[3] The precise locations of the "Transition Zone", "Zone 1", "Zone 2", and "Zone 3" are clearly marked on the survey of the Accreted Land prepared by Thomas & Hutton that is attached to and incorporated in the Settlement Agreement itself. [Amd. ROA 234-245 - 10/2020 settlement agreement.]

plan for future management activities beyond providing that, "going forward" a naturalist would be consulted to review the condition of the Accreted Land on a recurring basis for consideration in making any changes that might be necessary to maintain appropriate levels of density and diversity. The Settlement Agreement suggests, but does not require, that this consultation occur every five (5) years.

While funding only for the initial work in the Transition Zone will be from the Town, work in three far larger Zones encompassing the vast majority of the Accreted Land is conditioned on receipt, on a block-by-block basis, of adequate donations or grants. More specifically, the work plan provides that thinning of the 2500 Block of Atlantic (where the Defendants own property) was to proceed with all deliberate speed after formal settlement approval by Council. Other homeowners are given a one-year period to provide funds to the Town to cover the expenses of trimming on the Accreted Lane adjacent to their block. Thus, while the physical work required to perform the Settlement Agreement's scope of work in the three designated Zones within the Accreted Land is to be performed by a landscaping or vegetation management contractor selected in the Town's discretion, in accordance with the Town's usual procurement process, it is not to be funded by taxpayer monies.

The Settlement Agreement also acknowledged that the work could not be conducted without permitting required through DHEC's Office of Ocean and Coastal Resource Management (OCRM). The Settlement Agreement contemplates the importance of consultation with OCRM and the Grantor, the Trust, for the Town to develop its implementation plan and permit application, and the necessity of engaging an engineer and/or technical consultant to develop an appropriate, detailed plan specifying methods and objectives, and to make appropriate regulatory applications. The Parties further agreed to cooperate in good faith to obtain any required permits.

Following the original approval of the Settlement Agreement by the Town and the Circuit Court, and after encountering certain field conditions during the preparation of regulatory applications, the retained engineering firm proposed a revised work plan that was adopted and approved as an amendment to the Settlement Agreement by Judge McCoy in April 2021. [Amd. ROA 246; MIO Ex. 5.]

The Town's Refusal to Honor the Settlement Agreement

Less than a month after obtaining Judge McCoy's approval of the amendment to the Settlement Agreement, the Town broke its promise to cooperate in good faith, when the Town Council (now comprised of several newly elected members) voted to initiate legal proceedings to invalidate the Settlement Agreement.

The Town now refuses to comply with the terms of the Settlement Agreement and filed the present action to effectively avoid performance of the Settlement Agreement or the 1991 Deed. In pursuing this action, the Town has somehow convinced Judge McCoy to invalidate the very Settlement Agreement that she had approved less than two years prior. The Property Owners maintain that there is no legal basis to invalidate the Settlement Agreement and allow the Town to avoid its obligations under the Settlement Agreement it had executed less than two years prior and, by extension, its obligation to maintain the Accreted Land in accordance with the 1991 Deed and the clarifying parameters embodied in the Settlement Agreement. The Settlement Agreement, as previously approved by Judge McCoy, is a fair and reasonable and necessary or advantageous business agreement to settle litigation and meet the Town's obligations to maintain the vegetation on the Accreted Land. Accordingly, Judge McCoy's order of January 30, 2023, should be reversed and the Settlement Agreement, as amended, should be fully enforced.

STANDARD OF REVIEW

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). "In South Carolina jurisprudence, 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). "Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court." Milliken & Co. v. Morin, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012) (quoting 17B C.J.S. Contracts § 1030). The appellate court has de novo review of questions of law. Milliken, id. (citing Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

Pursuant to Rule 56, SCRCP, summary judgment is appropriate "if 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." Here, there are no genuine issues of material facts as to validity of the Settlement Agreement because the relevant litigation history relating to the settlement of the Original Deed Enforcement Action is established by the pleadings as well as court records, and the Settlement Agreement itself is unambiguous. Therefore, the questions regarding the validity and enforceability of the Settlement Agreement are questions of law over which this Court has de novo review.

ARGUMENT

I. The Circuit Court erred by invalidating the Settlement Agreement between the Town and the Defendant Property Owners that resolved pending litigation regarding enforcement of the 1991 Deed.

Applicable Law regarding Authority of the Town to Enter a Binding Settlement Agreement

As a threshold matter, it is important to note what is not at issue in the Town's effort to invalidate the Settlement Agreement. It is indisputable that the Settlement Agreement fully complies with Rule 43(k), SCRCP—it is in writing and signed by the parties and/or their attorneys. There is no challenge to the legality or propriety of the process by which the Settlement Agreement was approved by the Town Council sitting in October 2020. Nor is there any challenge to the legality or propriety of the process by which Judge McCoy approved the Settlement Agreement or its amendment. The sole issue now raised by the Town is whether the duly elected members of the Town Council sitting in 2020 had the legal authority to enter the Settlement Agreement that will bind the current elected and future Town Councils.

Under general prevailing law, the Town has the power to contract, subject to certain limitations on the Town's authority, if the duration of the contract extends beyond the term of the elected Council members, in which case, the subject matter of the contract determines the validity:

> The general rule is that, if 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. 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.

Piedmont Pub. Serv. Dist. v. Cowart (Cowart I) 319 S.C. 124, 459 S.E.2d 876, 880 (Ct. App. 1995) (citing Newman v. McCullough, 212 S.C. 17, 46 S.E.2d 252 (1948)), *aff'd,* (Cowart II) 324 S.C.

239, 478 S.E.2d 836 (1996); see also City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth., 325 S.C. 174, 480 S.E.2d 728, 731 (1997).

In this action, Judge McCoy held, as a matter of law, that "the Settlement Agreement is invalid and unenforceable as a matter of law because it involves the legislative/governmental powers of the Town and purports to bind the current and future town councils." [Amd. ROA 12; Order, p. 12.] Judge McCoy held, in the alternative, 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." [Id.]

Property Owners maintain that the holdings in Cowart and related precedent do not support a legal conclusion that the Settlement Agreement, which resolves the Town's obligations to maintain vegetation on the Accreted Land in compliance with the standards required by the covenants in the 1991 Deed, involves the Town's governmental powers. Rather, the Settlement Agreement involves the Town's proprietary function as a landowner, and the sitting Town Council properly acted within its authority to enter into a fair and reasonable and advantageous agreement to settle the decade old litigation.

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

A. The subject matter of the Settlement Agreement involves the Town's business or proprietary functions: the Town, as owner of the Accreted Land, is legally bound to comply with its responsibilities under the covenants in the 1991 Deed to maintain vegetation on the same.

Under the legal principle as stated in Cowart, 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. If, however, the subject matter of the Agreement involves the Town's business or proprietary functions, it will be binding on a successor Town Council so long as it is "fair and reasonable and necessary or advantageous." Thus, the Court first must identify the subject matter of the Settlement Agreement to determine whether it is binding against a successor Town Council. While the legal principle seems straightforward, the application is not so simple because state law does not provide comprehensive definitions of what constitutes a municipality's legislative functions or governmental powers as contrasted with a municipality's business or proprietary powers which can intertwine and overlap. As the Court of Appeals noted in Cowart I, "the difference between proprietary and governmental functions is often difficult to determine." 459 S.E.2d at 881.

As cited by the Circuit Court, there is South Carolina appellate case law that provides a source of some examples and guidance for determining whether a municipal contract involves a government or a proprietary function. However, none of those opinions addressed any issue about whether a settlement of pending litigation regarding enforcement of a deed involves either a governmental or a proprietary power.

Two of the key cases, Piedmont Pub. Serv. Dist. v. Cowart and Newman v. McCullough, dealt with employment contracts and the Courts held that "appointment or removal of a public officer is a governmental function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body." Cowart II, 478 S.E.2d at 837 (citing Newman, 46 S.E.2d at 255).

The City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Authority case arose from a contract entered into between a legislatively-created water authority and the municipalities of Beaufort and Port Royal whereby municipalities had agreed to purchase water from the Authority.

The contracts contained "Contested Clauses" which prohibited the Authority from selling water to other entities without consent from the municipalities. The Court invalidated those clauses, holding that provision of water service to residents and non-residents, or at least the decision whom to serve, is a governmental function. 480 S.E.2d at 732 (citing G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980) (regarding sewer services)).

These existing precedents do not support Judge McCoy's legal conclusion that the Settlement Agreement involves the legislative functions or governmental powers of the Town. To the contrary, the agreement to settle the Original Deed Enforcement Action to resolve a decade-old dispute regarding the Town's responsibilities to maintain the vegetation on the Accreted Land involves the Town's business or proprietary powers as a landowner under the 1991 Deed. So too was the Town's decision to enter into the land contract which resulted in the 1991 Deed itself. Likewise, the South Carolina Supreme Court's decision in Knowles v. City of Aiken, 305 S.C. 219, 220, 407 S.E.2d 639, 640 (1991), and the federal district court's order in Woodale Partnership v. City of Charleston, No. 2:07-CV-2025-MBS, 2010 WL 11661386, at *3 (D.S.C. Sept. 17, 2010), as cited and relied upon by the Circuit Court are zoning cases that are inapposite and do not support the legal conclusion that the Settlement Agreement is invalid.

The Knowles case involved a landowner who was seeking to invalidate a zoning ordinance passed by the City of Aiken which she claimed constituted illegal spot zoning, and in rejecting the claim, the Court did state that "zoning is a legislative act."[4] However, in Knowles, there was no

[4] The complete quote from that opinion is: "Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights." Of note, in the Original Deed Enforcement Action, the Property Owners assert a constitutional claim for violation of the contract clauses of the state and federal constitutions. See Columbia Water Power Co. v. Campbell, 75 S.C. 34, 54 S.E. 833 (1906) (The Supreme Court refused to allow the State to ignore its contract in which the State had sold the Columbia Canal to the Columbia Water Power

claim of any contract with the city or discussion of the Cowart analysis. 407 S.E.2d at 642. In the federal case, certain property owners brought an action to stop the City of Charleston from enforcing a new zoning ordinance that changed the classification of their property. It is appropriate to note that the property owners' claim did not seek enforcement of an executed agreement with the city; rather the landowners asserted estoppel claims based on allegations that the city had made promises to maintain the zoning classification in perpetuity in order to induce the landowners to agree to annex property some years previously. When the city passed an ordinance to change the zoning, the landowner bought legal action to stop enforcement of the new zoning ordinance. Applying the rulings in City of Beaufort v. Beaufort-Jasper Cty. Water & Sewer Auth., and Cowart, the district court held that the city did not have the power to freeze the zoning classification of the property and forbid future city councils and zoning boards from exercising their legislative functions.[5] In contrast, to the zoning cases cited by the Circuit Court, this action is not a zoning matter challenging the Town's enforcement of any zoning ordinance on the Property Owners' land. This action, the Original Deed Enforcement Action, and even the 1991 Deed itself, involve contractual obligations for maintenance of the vegetation on the Town's own land.

Judge McCoy also ruled that the Agreement is invalid because it creates an on-going financial obligation, stating "the authority of the Town to adopt a budget cannot be delegated

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Company with a promise that the property would be free local taxes but after the transfer, the State had directed Richland County to assess and collect taxes from the new owner.)

[5] *Compare* Abbeville Arms v. City of Abbeville, 273 S.C. 491, 494, 257 S.E.2d 716, 718 (1979) (Action involving issuance of a building permit under a duly approved zoning ordinance wherein the Court held that the city was estopped from denying the permit based on a "corrected" the zoning map it had adopted only after the permit application was submitted because the city council was acting within the scope of its authority in enacting a zoning ordinance and the associated zoning map.)

away." However, the opinions upon which she relies do not support a legal conclusion that the Town cannot make any binding agreement that effects the Town's future budgets.

In G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980), the issue before the Court was whether an agreement, by which a sewer district purchased a privately-owned sewer system under terms that granted the prior owner the right to approve or disapprove application for the use of the sewer system by certain types of customers, was legally enforceable and binding on the district. The Court held the delegation of power to the prior owner was unlawful and against public policy because the power to act on applications for sewer service could not be contracted away. There was no ruling by the Court or discussion in the opinion about the sewer district's budgetary powers. Comparably, on the point of the Court's actual holding in Clay, the Settlement Agreement does not delegate any power to the Property Owners to approve or disapprove applications for permit to trim on the Accreted Land. Notably, the Settlement Agreement acknowledges the fact it is the OCRM that will control the permitting for such work, and obligates the Town to cooperate in good faith in making the necessary permit applications.

The opinion in Sammons v. City of Beaufort, 225 S.C. 490, 83 S.E.2d 153 (1954), also does not support Judge McCoy's ruling. In that case, the Court was presented with a challenge to certain promises made as part of revenue bonds intended to finance a city project for off-street parking. The Court held that city's the promise to maintain and charge fees for on-street parking was invalid because the use of a city street was subject to the city's police power. That holding does not support a conclusion that the Town cannot make any agreement to own, operate, or maintain any Town-owned land. In fact, in Sammons the Court drew a distinction between off-street and on-street parking, and while the Court found that the on-street parking was particularly a governmental function, the Court further stated: "The validity of the entire covenant in so far as

it relates to off-street parking facilities is so apparent as to require no discussion here." 83 S.E.2d at 158 The Court also held that the city could contract to place a lien on the off-street parking facility, but it could not mortgage the city on-street parking. On the topic of a city's authority to make a binding agreement that affects further budgets, it can be noted that the Court discussed the possibility that the city could contract for payment of the off-street facility with revenues from the on-street parking.

It simply is incongruous to hold, as the Circuit Court did here, that the Town Council cannot make any financial agreements that will affect future budgets; it is inconceivable to contemplate that every contract would need to be renegotiated whenever the membership of the Town Council changes. If the law holds that a town's authority to adopt a budget cannot be limited by any contractual agreements, no contract would be valid if it extended the Town's contractual obligations past the next election cycle. Taken to its logical conclusion, the Town's position – the position adopted by the Circuit Court no more than two years after adopting and approving of the Settlement Agreement – would permit any newly-elected municipal government to abandon a project or avoid payment of its obligations on the basis that the agreement reached with the prior council. Such a result would only infuse greater uncertainty into municipal contracts and would, inevitably, interfere with the orderly administration of local government. The magnitude of uncertainty is incomprehensible.

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Under Cowart and the line of decisions discussed above, the first step in analyzing whether a municipality's contract is enforceable is determining the subject matter of the contract – proprietary or legislative. While that may not always be a simple determination, in this case, that determination encompasses several perspectives all of which support Property Owners' position

and require reversal. In perhaps the broadest perspective, the subject matter of the agreement is the settlement of a lawsuit and the delineation of the Town's contractual obligations under the 1991 Deed. None of the South Carolina opinions cited by the Circuit Court support a conclusion that a Town Council lacked the authority to settle the Original Deed Enforcement Action.[6] Indeed, it is entirely illogical to suggest that a municipality lacks the authority to negotiate or enter into settlements in litigation while state law permits them to be sued. The prospect of such a conclusion would be incomprehensible to the orderly process of litigation involving municipalities in our court system. Such a conclusion is also patently inconsistent with the Town's practice of regularly contracting and executing settlement agreements; especially in light of the fact that the Property Owners submitted four settlement agreements executed within the last ten years between the Town and various parties, which resolved litigation with the Town, and whose terms run in "perpetuity." [Amd. ROA 278; MIO Ex. 7.] The Circuit Court's holding also raises concern for other aspects of litigating with a municipality. For example, if a sitting town council has authorized and directed its representative to execute certain agreements and the representative has done so, can a newly-elected town council retroactively invalidate the same? The magnitude of uncertainty created by the Circuit Court's order (and its precedent) is difficult to fathom.

From another perspective, the subject matter of the Settlement Agreement is the Original Deed Enforcement Action which was a land contract case seeking the enforcement of a covenant in the 1991 Deed pursuant to which the Town had acquired and now holds ownership of the land. This specifically includes the Town's rights and obligations to maintain the vegetation on the Accreted Land it owns subject to the 1991 Deed. From these perspectives, none of the South

[6] Of interest is the Fourth Circuit' opinion in Moore v. Beaufort County, 936 F.2d 159 (4th Cir. 1991), a Voting Rights class action, where the court held that the county was bound to an agreement to create a new election method for years to come.

Carolina opinions cited in the Circuit Court's Order support a conclusion that the Town Council lacks the authority to make such agreements to meet its obligations as a property owner under a deed which contains covenants regarding maintenance of the property.[7] If this were the law, how could anyone reasonably or rationally conduct a land transaction with a municipality that encompasses any obligations that extend beyond the term of the elected town council members? The prospect of such a conclusion raises serious concerns in view of the prospect that one of the core concepts of our real estate and contractual jurisprudence is to support and further reliability, certainty, and confidence in our land transactions.

For these reasons, and as discussed in more detail below, the Settlement Agreement, as officially approved by a Resolution of the Town Council, executed by the Town, and approved by Judge McCoy, is fair and reasonable and necessary or advantageous business agreement that the Town cannot arbitrarily avoid or evade by the effort of newly elected and politically realigned Town Council .

B. The Settlement Agreement, as approved by Judge McCoy, 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.

Under the rule as set forth above, a business agreement made by the Town Council is binding on successor Councils, if it is fair and reasonable and necessary or advantageous to the

[7] Indeed, the covenants in the 1991 Deed itself could be seen as a restriction by an earlier Town Council upon subsequent Town Councils from performing a wide variety of activities within the Accreted Land. It is illogical to say that the Town is able to enter into a land contract that results in a deed restricting what future Town Councils may do on the Accreted Land, but then to conclude that the Town cannot enter into a contract to define what its obligations are. Taking the Town's argument against the Settlement Agreement raised in the present suit, the same argument could be made to render the transaction which brought about the 1991 Deed itself null and void and set a precedent that any transaction with any governmental entity to conserve or protect land or resources would be invalid as an improper restriction on future iterations of the governmental entity. Such an analysis – as has been embraced by the Town here - would achieve the opposite result than what was intended by the 1991 Deed.

Town at the time the contract was negotiated and executed. Accordingly, the relevant question is whether the Settlement Agreement was fair and reasonable and necessary or advantageous in October 2020. At first look, that question 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, ... [Amd. ROA 221; MIO Ex. 4.]

Yet, when presented with a challenge by the newly realigned Town Council before a work plan could even be implemented, Judge McCoy invalidated the very same Agreement, now finding it unreasonable. [Amd. ROA 19; Order, p. 19.]

Fundamentally, voiding the court-approved Settlement Agreement is unfair and unjust to the Property Owners that executed releases and stipulations of dismissal that discontinued the claims they were pursuing in the Original Deed Enforcement Action. [See discussion of Issue III, infra.] On a broader view, the invalidation of a court order from which no appeal was taken works a disservice to our judicial system. Such insecurity in court rulings is a detriment not just to the parties here, but also to the public's interest in certainty and consistency in the law.[8] Our jurisprudence encourages compromise settlement agreements because they can avoid costly legal expenses and delayed remedies associated with the litigation process. The Court has recognized that the public has an interest in the finality of settlement agreements. Condon v. State, 354 S.C.

[8] See generally Proctor v. Whitlark & Whitlark, Inc., 414 S.C. 318, 333, 778 S.E.2d 888, 896 (2015) (law of the case); Alexander v. Hunnicutt, 196 S.C. 364, 13 S.E.2d 630, 632 (1941) "Discussing principle of stare decisis and stating: "It is manifestly in the public interest that the law remain permanently settled.").

634, 642, 583 S.E.2d 430, 434 (2003). To allow such a collateral attack by a successor Town Council will inevitably wreak havoc, create instability and inefficiencies in the judicial process of litigation involving municipalities.[9]

Apart from the parties' stipulations and Judge McCoy's own findings in approving the Settlement Agreement, 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. First, contrary to Judge McCoy's perception, the Settlement Agreement should not be considered invalid as an unfair or unreasonable perpetual burden on Town. As described in the Statement of the Facts, the Settlement Agreement produced a thoroughly vetted, comprehensive work plan for trimming and thinning to deal with the overgrowth of vegetation on the Accreted Land. This Settlement Agreement balanced all competing interests and environmental concerns. It creates a specific plan for the initial work to thin the overgrown maritime forest that only now exists due to the Town's years-long refusal to maintain the Accreted Land in accordance with the 1991 Deed. However, the plan is not rigidly set in stone. The Settlement Agreement provides flexibility to meet changing conditions, with all parties obligated to cooperate and act in good faith.[10]

Viewing the posture of the dispute from a litigation perspective, the Town already had spent ten years and considerable funds litigating the Original Deed Enforcement Action.

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[9] See generally Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) (discussing salutary purposes of the law of the case doctrine – to promote finality and efficiency of the judicial process by "protecting against the agitation of settled issues").

[10] "In order to maintain similar conditions going forward, with the help of a naturalist 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." [Amd. ROA 225; MIO Ex. 4 - Agreement p. 3.]

Ultimately, the Town lost the appeal when the Supreme Court remanded the case to the trial court for further proceedings to determine the Town's responsibilities for maintaining the vegetation on the Accreted Land. Property Owners had prevailed on appeal and were finally being afforded the opportunity to pursue enforcement of the 1991 Deed as well as their breach of contract claims to remedy the unchecked vegetation growth that has resulted in a marine forest that has created a variety of problems ranging from depriving the Property Owners of their ocean views and breezes and diminishing their property values to creating dangerous nuisances including fire hazards, mosquitos, raccoons, snakes, and coyotes.

Thus, in 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. The Settlement Agreement itself actually reflects these concerns: "failure to undertake the proposed settlement would subject the Town and residents to the uncertainty inherent in a trial." [Amd. 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. The Settlement Agreement also is financially advantageous for the Town because it relieves the Town of the financial burden of implementing the initial trimming and

thinning work plan because all of the initial trimming and thinning work (except in the transition zone) must be funded by the property owners personally or other sources.[11]

Accordingly, for these reasons, Judge McCoy erred in granting summary judgment to the Town and declaring that the Settlement Agreement is invalid in its entirely and dismissing the Property Owners' counterclaims. As a fair and reasonable and necessary or advantageous business agreement, the Settlement Agreement should be declared valid and the Property Owners should be allowed to pursue their counterclaims for specific performance, breach of contract, and promissory estoppel thereunder.

II. The Severability Clause of the Settlement Agreement should be enforced rather than invalidated in its entirety.

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." [Amd. ROA 231; MIO Ex. 4.] In entering summary judgment and ruling that the Settlement Agreement is unenforceable in its entirety, the Circuit Court erred in failing to enforce the plain and unambiguous terms of the Severability Clause.

"The entirety of severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863, 867 (2002)[12] (citing Columbia Architectural Group Inc.v. Barker, 274 S.C. 639, 641,

[11] The financial provisions contradict the Judge McCoy's view that the Agreement in invalid because it limits the Town's power and authority over the budget.

[12] Abrogated on other grounds in Deutsche Bank Nat'l Tr. Co. as Tr. for NovaStar Mortg. Funding Tr., Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1 v. Est. of Houck, 440 S.C. 409, 892 S.E.2d 280 (2023).

266 S.E.2d 428, 429 (1980)). A severable contract is one that by its nature and purpose is susceptible of division, having two or more parts, that are not necessarily dependent on each other.

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.

The Settlement Agreement prescribes a detailed plan for an initial scope of work that is tailored for certain zones within the Accreted Land, even going so far as to identify the specific types of trees within each of the zones which would be pruned and what specific action would be taken for each species. This scope of work was to be performed by a company hired by the Town, upon the Town's receipt, within one year of the execution of the Settlement Agreement, of sufficient funding from property owners on a block-by-block basis and upon receipt of all necessary and appropriate permits.

After the completion of this work, the only prospective action contemplated by the Settlement Agreement is the parties' agreement as follows: "In order to maintain similar conditions going forward, with the help of a naturalist the Town would review changes in the condition of the [Accreted Land] 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." [Amd. ROA 225; MIO Ex. 4.] This undertaking leaves future Town Councils with the discretion to determine when such an evaluation will occur and what will be evaluated and this reference to possible future revisions of the work plan should not be found to improperly interfere with the Town's legislative or governmental functions since it is proprietary. 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.

III. The Court should address the ramifications of invaliding the Settlement Agreement on the status of the Original Deed Enforcement Action.

If the entire Settlement Agreement is invalidated, then the Property Owners are entitled to reinstatement of their Original Deed Enforcement Action. Yet, when Judge McCoy issued her order finding that the Settlement Agreement is wholly invalid and unenforceable, she failed to address the consequences of her invalidation on the Original Deed Enforcement Action.

By and through a Rule 59(e) motion, the Property Owners sought direction or clarification as to any of the following:

(1) whether, by entering and in light of the entry of the Order on January 30th, the Court rescinded its October 15, 2020 Order approving the Settlement Agreement or its April 12, 2021 Order approving the amendment of the same;

(2) whether, by entering and in light of the entry of the Order on January 30th, the Original Lawsuit must be reinstated to the active trial roster for Charleston County;

(3) whether, by entering and in light of the entry of the Order on January 30th, the Stipulation of Dismissal filed in the Original Lawsuit is set aside; or

(4) whether either of the parties is directed to file an appropriate motion to return the Original Lawsuit to the active roster for Charleston County, to set aside the Stipulation of Dismissal in the same, or to take any further appropriate action in relation to the Original Lawsuit in light of the January 30th Order invalidating the resolution of the same.

Judge McCoy denied the motion without addressing these issues in a Form 4 order. [Amd. ROA 228; Order.]

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 their all claims in the Original Deed Enforcement Action in accordance with the Supreme Court's prior decision. As to the appropriate steps necessary to restore litigation when a settlement agreement is vacated, guidance can be found in the Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 92, 419 S.E.2d 841, 841 (Ct. App. 1992), wherein, after vacating a settlement agreement, the trial court restored the case to the trial docket to allow the case to proceed on the merit.

CONCLUSION

Wherefore, based on the foregoing, 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 pending litigation regarding enforcement of the 1991 Deed because the Settlement Agreement, as approved by Judge McCoy in October 2020, 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. 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 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,

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
Lisa B. Bisso (105258)
lisa.bisso@hoodlaw.com
Deborah Harrison Sheffield, *Of Counsel* (2757)
deborah.sheffield@hoodlaw.com

Attorneys for the Appellants
Nathan Bluestein and Theodore Albenesius, III

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellants complies with Rule 211(b), SCACR.

HOOD LAW FIRM, LLC
172 Meeting Street / Post Office Box 1508
Charleston, SC 29402
Ph: (843) 577-4435 / Fax: (843) 722-1630

/s/ James B. Hood
James B. Hood (70212)

February 9, 2024
Charleston, South Carolina

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