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S.C. SUPREME COURT

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Charleston County
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge

App. No. 2026-001038

TOWN OF SULLIVAN'S ISLAND,

Respondent,

vs.

NATHAN BLUESTEIN and
THEODORE ALBENESIUS, III,

Petitioners.

BRIEF OF PETITIONERS

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STATEMENT OF ISSUES FOR REVIEW

Pursuant to the order of August 12, 2026, the following questions are presented for review by this Court:

- I. Did the Court of Appeals err in affirming the Circuit Court's decision that the Settlement Agreement, as authorized by the Town Council and approved by the court, is invalid and unenforceable because the subject of the settlement does not involve the Town's legislative functions or governmental powers?

Or, as otherwise stated,

Did the Court of Appeals err in affirming the Circuit Court's ruling that the Settlement Agreement is invalid and unenforceable because:

A. 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; and

B. The court-approved 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.

Other Issues Presented on Appeal

- 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 regards to a legislative function or governmental power?

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, III¹ ("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 town council 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

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).

(Messers Bluestein 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 the Circuit Court Judge to reconsider her rulings and enter judgment upholding and enforcing the Settlement Agreement. In addition, the Property Owners asked the Judge 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, the Judge 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.]

The Court of Appeals affirmed by opinion issued February 25, 2026. [App. 001; Town of Sullivan's Island v. Bluestein, 447 S.C. 523, 928 S.E.2d 387 (Ct. App. 2026).] The Petitioners filed a Petition for Rehearing on March 11, 2026, which was denied by order filed March 26, 2026. [App. 015, 025.] The Petitioners filed a Petition for a Writ of Certiorari on April 27, 2026, which was granted by order of this Court, filed August 12, 2026.

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 shorelines 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. After years of study and deliberations, the Town decided that a two-step transfer of ownership was needed to ensure that the agreed upon deed restrictions would remain enforceable in the future and prevent any future Town Council from altering the restrictions. The Town’s explicit purpose in this regard is found in the official Town records: “A transfer of ownership was necessary to ensure enforceability of the restrictions and prevent a future Town Council with different motivations from changing or weakening the restrictions or doing away with them altogether.” [Bluestein v. Town of Sullivan's Island, Appellate Case No. 2018-001888 -- ROA 80; Summary of Deed Restriction, Recorded 2/14/1991.]

Ultimately, in 1991, after Hurricane Hugo, the Town negotiated a two-step real estate 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 Petitioners, 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 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 Town did not appeal from either order. Nor did the Town file a Rule 59 motion to alter or amend the orders or a Rule 60(b) motion for relief from the orders.

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 maritime 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 LowCountry Open Land 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. 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 as obstructions to ocean views. The Town together with the Property Owners 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.] 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 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 Town 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.

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.]

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 LowCountry Open Land 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 the Circuit Court Judge in April 2021. [Amd. ROA 246; MIO Ex. 5.]

The Town's Refusal to Honor the Settlement Agreement

Less than a month after obtaining court 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.

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. The Settlement Agreement, as previously approved by the Circuit Court Judge, is a fair and reasonable and necessary or advantageous business agreement to settle litigation and meet the Town's contractual obligations to maintain the vegetation on the Accreted Land. Accordingly, the 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). Here, there are no genuine issues of material fact as to the 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. Milliken, id. (citing Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

INTRODUCTION TO ARGUMENT

After pursuing appeals through the Court of Appeals and the Supreme Court in the Original Deed Enforcement Action, on remand, the Defendants negotiated a settlement with the Town, 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 reneged on its agreement and 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.

Although 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.

The Town then convinced the same Circuit Court Judge to invalidate the Settlement Agreement that she had approved less than two years prior. The Court of Appeals affirmed the Circuit Court holding that the Settlement Agreement was invalid and unenforceable on the ground that the Settlement Agreement concerns the Town’s governmental functions. The Petitioners maintain that the Court of Appeals erred in affirming the Circuit Court’s ruling that the Settlement Agreement is invalid and unenforceable because the subject matter of the Settlement Agreement at its core, primarily involves the Town’s business or proprietary functions as a litigant in the Original Deed Enforcement Action and as owner of the Accreted Land under the 1991 Deed.

When the Supreme Court ruled that the 1991 Deed provisions regarding the Town’s duties and responsibilities to maintain the Accreted Land are ambiguous, the Original Deed Enforcement Action came back to the Circuit Court, on remand, for trial on the merits to resolve the ambiguity

and define the Town's duties and responsibilities. The Town chose to settle to avoid the potential financial implications an adverse ruling could impose as well as the cost of continuing the prolonged litigation, and in doing so the Town agreed to perform specific actions to meet the duties and responsibilities under the restrictive covenants of the 1991 Deed. To comply with the terms of the 1991 Deed regarding the mandatory process for any changes to the Property, the Settlement Agreement provided/documented specific findings of fact as required.⁴ Nothing in that process of modifying should be considered as changing the fundamental nature of the 1991 Deed as a proprietary real estate transaction nor should it convert the Settlement Agreement into a regulatory or governmental function.

Under the applicable law and the record, the Settlement Agreement was an extension/modification of the 1991 real estate transaction negotiated by the Town as a business/proprietary functions as the Owner of the Accreted Land to clarify its maintenance responsibilities under the covenants in the 1991 Deed; and the court-approved Settlement Agreement is a fair and reasonable and necessary or advantageous business agreement to settle the Original Deed Enforcement Action and to meet the Town's obligations to maintain the vegetation on the Accreted Land of which it obtained ownership under the 1991 Deed. Accordingly, the decision of the Court of Appeals should be vacated, the Circuit Court's order should be reversed, the Settlement Agreement should be declared valid and enforceable and the case should be remanded to allow the Property Owners to proceed with all available claims to enforce the terms of the Settlement Agreement and/or to recover for breach of the Agreement.

⁴ "Prior to taking any action affecting the Property to further or effect a Public Policy ("Public Action"), the Council shall make specific written findings of fact..." [1991 Deed, ¶ 3; Amd. ROA 123-124.]

ARGUMENT

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

Clarification of the Issue on Appeal for Review

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. The Supreme Court has explained that this rule works to “prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more perplexing than the case itself.” Ashfort Corp. v. Palmetto Const. Grp., Inc., 318 S.C. 492, 495, 458 S.E.2d 533, 535 (1995) (citation omitted.). “The purpose of Rule 43(k) and its predecessors is the avoidance of uncertainty.” South Carolina Human Affairs Commission v. Zeyi Chen, 430 S.C. 509, 846 S.E.2d 861, 867 (2020). Ironically, compliance with Rule 43 has not prevented the Town from creating this new dispute that has prolonged the Original Deed Enforcement litigation for over 16 years. It is beyond frustrating that the Town still is avoiding its obligations under the 1991 Deed despite the Petitioners' diligent efforts to formalize the settlement with not just a written agreement but also the additional steps of obtaining approval from the Town Council and the Circuit Court.

The Town has not challenged the legality or propriety of the process by which the Settlement Agreement was approved by the Town Council sitting in October 2020. There was no appeal from the orders of the Circuit Court Judge approving the Settlement Agreement or its amendment, and there is no challenge to the legality or propriety of the court-approval process.

Despite the considered and careful efforts to settle the issue remanded by the Supreme Court and resolve the ambiguities in the 1991 Deed regarding the Town’s maintenance duties and obligations, and even though the Circuit Court Judge had explicitly determined that the Town was authorized to consummate the settlement,⁵ the Town is challenging whether the duly elected members of the Town Council sitting in 2020 had the legal authority to enter the Settlement Agreement that might, in certain aspects, bind the current elected and future Town Councils.

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

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). Thus, there are two components for determining whether the Settlement Agreement is binding on the successor Town Council: (1) does the Agreement involve the exercise of the Town’s business or proprietary powers; and (2) was the Agreement fair and reasonable and necessary or advantageous to the Town?

⁵From the October 14, 2020, Order approving the settlement: “ORDERED, ADJUDGED AND DECREED that the Parties are hereby authorized to consummate the settlement...” [Amd. ROA 189.]

This legal principle protects the regulatory and governmental powers of a municipal governing body and prevents a sitting town council from surrendering discretion and locking in a successor town council. However, it does not constrain a town from conducting business or committing to contracts that bind a town beyond the term of a sitting town council. Realistically, a municipality could not operate if contracts and/or business agreements would not be valid and enforcement beyond the time of a sitting town council.

As noted above, when the Town was considering the issues and options for protecting the Accreted Land that it owned, the Town considered whether to take the political route of regulating the Land, which would have been subject to changes at the whim of future/successor town councils, or to take the property law route of utilizing a two-step real estate transaction to convey and reacquire the Land subject to permanent restrictive covenants that would be enforceable by the grantor LowCountry Open Land Trust, and the named third-party beneficiaries. The Town made a deliberate choice to exercise its business/proprietary power as a landowner and negotiated and finalized the two-step land transfer accomplished in the 1991 Deed. When the Property Owners filed the Original Deed Enforcement Action to force the Town to meet its maintenance obligations and the matter finally came back to the Circuit Court on remand from the Supreme Court, the Town made another deliberate decision to exercise its proprietary power to negotiate and formalize a settlement of underlying litigation and its obligations under the original 1991 Deed.

In this action, the Circuit Court Judge 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.] The Judge 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.” The Court of Appeals has affirmed the Circuit Court, holding that the Settlement Agreement is invalid and unenforceable because the subject matter of the settlement agreement concerns the Town's governmental functions. The Court of Appeals decision is not supported by the evidence or the applicable law because the answer to both the questions is YES – (1) the Agreement does involve the exercise of the Town’s proprietary function as a litigant and as owner of the Accreted Land under the 1991 Deed which contains legally binding maintenance responsibilities; and (2) the Agreement was fair and reasonable and necessary or advantageous to settle the decades-old litigation and resolve the dispute about the Town’s obligations to maintain the vegetation in the Accreted Land.

A. The subject matter of the Agreement involves the Town’s business/propriety power to settle the pending ligation that had been remanded by the Supreme Court to resolve ambiguities in the 1991 Deed regarding the Town’s duties and responsibilities to maintain the Accreted Land.

Under the legal principles as stated in Cowart, the key issue here as to whether or not the Settlement Agreement is invalid and unenforceable depends on whether 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. Here, the difference is not so difficult. The Circuit Court as well as the Court of Appeals simply did not correctly identify the core subject matter of the 2020 Settlement Agreement in relation to the original 1991 Deed where the documents and the undisputed history of the transactions shows that both were real estate transactions accomplished purposefully through the Town’s proprietary powers rather than its legislative functions or governmental powers.

In addressing the question of whether the Settlement Agreement involves the Town’s business or proprietary powers or its legislative functions or governmental powers, the Settlement Agreement cannot be considered apart from the 1991 Deed. The historical record shows that prior to the 1991 Deed, the Town owned the Accreted Land. After considerable, careful consideration of legal and governmental options to protect the Accreted land, the Town made a deliberate, reasoned decision to entered into a two-step real estate transaction whereby it transferred the Accreted Land that it already owned to the Land Trust and then received ownership of the Accreted Land back with specific restrictive covenants. The Town records expressly show that this two-step real estate transaction was intended to protect the land from future developments and from the whims of future town councils. The Town chose, as a proprietary landowner, to utilize property law to create a property ownership structure to achieve its goals, and it should not be allowed to recast its obligations as a governmental function in an effort to avoid its legal obligations under the Settlement Agreement that resolved the disputes about its duties under the 1991 Deed.

The 1991 Deed was a proprietary real estate business transaction between the Town, as a property owner, and the LowCountry Open Land Trust, not a regulatory governmental action. Likewise, when the Town negotiated with the Property Owners, as third party beneficiaries of the 1991 Deed, to resolve the litigation regarding its maintenance obligations under that Deed, the

Town was acting in its capacity as a property owner, and accordingly, the Settlement Agreement was entered into as a proprietary real estate business transaction, was not a regulatory function or governmental action. On proper consideration of the documented history of the 1991 real estate transaction and the litigation proceedings, the caselaw does not support the conclusion of the Circuit Court or the Court of Appeals that the Settlement Agreement is invalid or unenforceable.

There is no dispute that certain legal principles on the general question of the legally permissible scope of municipal contract authority can be found in Cowart as well as other appellate decisions as cited by the Court of Appeals. However, the Court of Appeals overlooked or misapprehended and misapplied the rulings in those cases to the facts in this case because the subject matter of the Agreement at issue is, in the first instance, a settlement of the pending litigation as well as resolution of the Town's proprietary obligations under the original 1991 Deed., The subject matter is not a zoning dispute. The subject matter is not an employment contract. The subject matter is not delegation of a governmental function such as essential sewer or water services.

First, none of those opinions squarely address the question of whether the Town had authority to enter into an agreement to settle pending litigation regarding enforcement of covenants under a land deed. 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). Neither of those opinions are apposite to the settlement of litigation arising from the 1991 Deed by which the Town owns the Accredited Land which imposes certain maintenance responsibilities on the Town.

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. Comparably, here, the Settlement Agreement delegates nothing. It does not delegate any power to the Property Owners to approve or disapprove applications for permits to trim on the Accreted Land. Rather, the Settlement Agreement resolves the dispute over the resolution of the ambiguities, as found by the Supreme Court and provides a comprehensive plan to meet the Town's obligations to maintain the vegetation on the Accreted Land. Per that plan, the Town picks the contractor, the Town runs procurement, the Town applies for permits, and the OCRM controls what work is lawful. Notably, the Agreement also obligates the Town to cooperate in good faith in making any necessary permit applications.

The City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Authority, 325 S.C. 174, 480 S.E.2d 728 (1997), 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, *supra* (regarding sewer services)). 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 land is a governmental function. Rather, here, the subject matter is the settlement of the pending litigation regarding the Town's proprietary obligations to maintain the Accreted Land under the covenants in the 1991 Deed.

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. This action is not a zoning matter challenging the Town's enforcement of any zoning ordinance on the Property Owners' land about vegetation. This action is an effort by the Town to invalidate an agreement that it reached with the Property Owners to settle pending litigation in the Original Deed Enforcement Action. The Settlement Agreement, and the 1991 Deed itself, do address the subject matter of the Town's contractual obligations for maintenance of the vegetation on its Accreted Land. However, more precisely, the subject matter of the Agreement was a compromise and settlement of a disputed claim to resolve the merits and clarify the ambiguities in the 1991 Deed as remanded by the Supreme Court. The Town negotiated and formalized these real estate transactions, separately and collectively, in its capacity as a landowner, not as a zoning authority.⁶

The holdings in Cowart and these related precedents do not support a legal conclusion that the Settlement Agreement involves the Town's governmental powers. Rather, the facts establish

⁶ These decisions should not be read as preventing a town from settling litigation over zoning issues. Of note, the opinion in Road, LLC v. Beaufort Cnty., 443 S.C. 11, 26, 902 S.E.2d 366, 374 (2024), addressed the alleged breach of a written, court-filed settlement agreement wherein the county agreed to grant a developer certain zoning variances regarding relocating a road, but there was no mention questioning the county's authority to settle a zoning variance issue.

that the Settlement Agreement involves the Town's role as the defendant in the underlying pending Original Deed Enforcement Action which presented claims against the Town in its proprietary function as a landowner under the 1991 Deed, and the then-sitting Town Council properly acted within its authority to enter into a fair and reasonable and advantageous agreement to settle the decade-old litigation. Ultimately, 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 miscarriage of justice and sets a dangerous precedent for instability in contractual and litigation negotiations with this Town, other municipalities, and all other governmental entities.

While the Court of Appeals stated that it recognized that the Town is the owner of the Accreted Land and therefore holds a proprietary interest, the Court effectively 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 holding and reasoning of the decision in Cowart I and the related precedent, and it 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. Public policy and settled precedent demands that the Town be bound to the terms of the 1991 Deed as addressed in the Settlement Agreement

B. The court-approved Settlement Agreement is valid as a fair and reasonable and necessary or advantageous business agreement to resolve the Original Deed Enforcement Action and meet the Town's obligations to maintain the vegetation on the Accreted Land.

On the second 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.” [Amd. 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. Although the Court of Appeals declined to address this issue, on *de novo* review, this Court will find that the record and the applicable law show the court-approved Settlement Agreement is valid as a fair and reasonable and necessary or advantageous business agreement to resolve pending litigation and 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 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 the Circuit Court Judge 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, the same Circuit Court Judge 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.⁷ In a broader view, ignoring official/formal representations made to the Circuit Court Judge court and the invalidation of the court order from which no appeal was taken works a disservice to our judicial system in several aspects. As the Court has recognized, the public has an interest in the finality of settlement agreements. Condon v. State, 354 S.C. 634, 642, 583 S.E.2d 430, 434 (2003). In addition, our jurisprudence encourages compromise settlement agreements because they can avoid costly legal expenses and delayed remedies associated with the litigation process. Invalidating this formalized and court-approved Settlement Agreement will create an insecurity in court rulings that will be detrimental not just to these parties, but also to the public's interest in certainty and consistency in the law. Likewise, to allow the Town to disavow the formal representations it made to the Circuit Court in presenting the Agreement to the Circuit Court for approval would pose a serious question about the ability of courts to rely upon the authority and power of a municipality to make binding stipulations in pending litigation.

As noted above, Rule 43(k), which requires that settlement agreements be reduced to writing and signed by the parties and/or their attorneys, is supposed to avoid uncertainty and prevent disputes about the existence or terms on a settlement agreement, and it is also supposed to

⁷ The Court has declined to review the question of whether the corresponding Release should be nullified and the Original Deed Enforcement Action should be reinstated if the Settlement Agreement is invalidated.

limit court involvement in such disputes which can be more complicated than the merits of the underlying matter. The parties complied with Rule 43(k) and went through the additional steps of obtaining official approval through the Town Council process and also seeking court approval, and in that settlement process, the Town made formal representations to the court. The court-approved Settlement Agreement should have fully and finally settled the matter. Instead, this action by the realigned Town Council to invalidate the Settlement Agreement has prolonged the dispute and created additional layers of legal proceedings through the Circuit Court, the Court of Appeals, and now this matter has returned to the Supreme Court for review of the settlement of the very dispute it had remanded for resolution of the merits of the ambiguities in the 1991 Deed as to the Town's maintenance obligations. Apart from the delay and expenses created by the Town's efforts to renege on its agreement in this matter, the precedent set in the Court of Appeals' decision will inevitably wreak havoc, create instability and inefficiencies in the judicial process of litigation involving municipalities.

Apart from the parties' stipulations and the Circuit Court Judge'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 the Circuit Court Judge'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. Moreover, 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.⁸

Viewing the posture of the dispute from a litigation perspective, the Town spent ten years and considerable funds litigating the Original Deed Enforcement Action. Ultimately, the Town lost the appeal when the Supreme Court remanded the case to the trial court for further proceedings to clarify the ambiguities in the 1991 Deed as to the Town's responsibilities for maintaining the vegetation on the Accreted Land. The 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, after the Supreme Court had remanded the Original Deed Enforcement Action for litigation on the merits, 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

⁸ "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.]

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.⁹

Accordingly, for these reasons, the Circuit Court erred in granting summary judgment to the Town and declaring that the Settlement Agreement is invalid in its entirety and dismissing the Property Owners’ counterclaims. As a fair and reasonable and necessary or advantageous business/proprietary 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 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.” [Amd. ROA 231.] On appeal, the Property Owners raised the issue, in the alternative, that the Circuit Court erred in failing to

⁹ The financial provisions contradict the Circuit Court Judge’s view that the Agreement is invalid because it limits the Town’s power and authority over the budget.

enforce the plain and unambiguous terms of the Severability Clause to excise only such provisions as might be deemed to implicate the Town's regulatory/governmental powers. The Court of Appeals declined to address this issue. The Court has granted permission to present this issue.

"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)¹⁰ (citing Columbia Architectural Group Inc. v. Barker, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980)). A severable contract is one that by its nature and purpose is susceptible to division, having two or more parts, which 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

¹⁰ 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).

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.] 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.

SUMMARY OF ARGUMENT

Long ago, the Town carefully and wisely made the decision to employ property law, with its principles of permanency and stability, to effectuate its goals of conserving and preserving the Accreted Land. By contracting with the LowCountry Open Land Trust to regain ownership through the two-step land transfer, the Town legally bound itself to the restrictive covenants that made the Town the legal steward of the Accreted Land with certain legal obligations and duties

beyond general political governance and regulation. However, the Town has failed repeatedly and consistently over decades to fulfill its legal stewardship duties to maintain the vegetation as required by the 1991 Deed. The Town's failure to fulfill its maintenance obligations as set forth in the 1991 Deed and its refusal to allow the Property Owners to provide the necessary upkeep has allowed the unchecked growth of a maritime forest that has resulted in public and private harms.

After the years of litigation with the Property Owners seeking to enforce the maintenance obligations, ultimately, this Court held that the 1991 Deed is ambiguous as to the Town's maintenance responsibilities and remanded the Original Deed Enforcement Action to the circuit court to resolve the matter on the merits. On remand, the Town again faced the need to make a decision. The Town could continue with the litigation which would mean incurring additional legal expenses, and it would also mean facing the multiple financial risks of paying damages sustained by the Property Owners and accepting the costs of remediating the maritime forest as well as the ongoing costs of maintaining the vegetation in the future. Or, the Town could settle the dispute and reach an agreement on a plan to redress its prior neglect in maintaining the vegetation and to address future upkeep.

The Town chose to settle -- that decision was a business decision in its proprietary capacity as a Defendant in the underlying Original Deed Enforcement Action and as the owner of the Accreted Land. It was a decision that was supposed to save the Town the expense of further litigation, and it produced a plan that would allow the Town the ability to control/guide the remediation and maintenance while limiting the Town's financial responsibility for the work. Unfortunately, however, the decision by the realigned Town Council to walk back from the Agreement and commence new litigation seeking to have the Settlement Agreement declared

invalid and unenforceable has incurred huge litigation expenses and allows the continued unchecked growth of the maritime forest and its dangers and harms.

Nothing in the holding in Cowart or the jurisprudence regarding the powers of municipalities to enter binding contract supports a decision allowing the Town to invalidate an agreement that it entered into to settle the ongoing litigation arising from the 1991 Deed. And, nothing in contract law allows the Town to make legal, contractual promises to protect and maintain the Accreted Land and then obviate those promises on the political vacillations of a successor Town Council.

The Town, as a landowner, made a business decision in 1991 to enter into a real estate transaction governed by property contract law principles. Likewise, the Town, as a litigant and as a landowner, made a business decision to settle its legal dispute with the Property Owners. Accordingly, the Town should be legally bound, as a matter of contract law, to the Settlement Agreement.

CONCLUSION

WHEREFORE, inasmuch as the evidence in the Record and the applicable law shows that the Settlement Agreement is valid and fully enforceable, the Petitioners respectfully ask the Court to vacate the decision of the Court of Appeals and reverse the Circuit Court order invalidating the entire Settlement Agreement, and to remand the matter for further proceedings on the Property Owners counter claims. In the alternative, the Severability Clause of the Settlement Agreement should be enforced rather than invalidating the entire Agreement, and this matter should be remanded to the Circuit Court with directions to sever only the unenforceable provisions as might be held by this Court's decision, and to proceed with further proceedings on the remaining claims.

Respectfully submitted,

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