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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.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

MAYNARD NEXSEN, PC

William W. Wilkins (6112)
Clarence R. Turner, IV (104766)
104 South Main Street, Suite 900
P.O. Box 10648
Greenville, SC 29601
Telephone: 864.370.2211
BWilkins@maynardnexsen.com
CTurner@maynardnexsen.com

Alexandra H. Austin (102646)
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
Telephone: 843.577.9440
AAustin@maynardnexsen.com

Attorneys for the Respondent

HOOD LAW FIRM, LLC

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

172 Meeting Street
Post Office Box 1508
Charleston, SC 29401/02
Phone: (843) 577-4435
Fax: (843) 722-1630
Email: Info@hoodlaw.com

Attorneys for the Petitioners

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Town of Sullivan's Island, Respondent,

v.

Nathan Bluestein and Theodore Albenesius, III,
Appellants.

Appellate Case No. 2023-001082

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

Opinion No. 6139
Heard October 8, 2025 – Filed February 25, 2026

AFFIRMED

James Bernard Hood and Virginia Rogers Floyd, both of Hood Law Firm, LLC, of Charleston; Lisa Brennan Bisso, of Charleston; and Deborah Harrison Sheffield, of Columbia, all for Appellants.

Alexandra Harrington Austin, of Nexsen Pruet, LLC, of Charleston; Clarence Ross Turner, IV, of The Turner Agency Inc., of Greenville; and William W. Wilkins, of Billy Wilkins Law, LLC, of Greenville, all for Respondent.

GEATHERS, J.: This case arises out of a declaratory judgment action brought by Respondent Town of Sullivan's Island (the Town) against Appellants Nathan Bluestein and Theodore Albenesius, III (collectively, Property Owners). Property Owners appeal the circuit court's order granting summary judgment in favor of the Town, arguing the circuit court erred by (1) finding the settlement agreement between the parties was invalid and unenforceable because it involved the Town's legislative functions or governmental powers; (2) finding the settlement agreement was otherwise unreasonable as a matter of law because of its perpetual duration; (3) refusing to enforce the settlement agreement's severability clause; and (4) refusing to reinstate Property Owners' initial action against the Town after invalidating the settlement agreement. We affirm.

FACTS AND PROCEDURAL HISTORY

The Town is the fee simple owner of accreted land[1] located along the Atlantic Ocean on Sullivan's Island. Property Owners purchased property in the Town that abuts the accreted land. The settlement agreement that is the focus of our analysis arose from Property Owners' initial action concerning the Town's maintenance obligations under the deed for the accreted land.

The deed for the accreted land includes the following restrictive covenants:

> 1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the [accreted land] shall remain in its natural state, no changes shall be made to its topography or vegetation[,] and no structures or improvements shall be erected on the [accreted land].
>
> 2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and

[1] Accreted land is land that has gradually increased in size due to the deposit of sand, soil, or other materials caused by movement of water sources, such as rivers, lakes, or the sea. *See Accretion*, *Black's Law Dictionary* (11th ed. 2021).

> emergency access to the Atlantic Ocean[,] and providing views of the ocean and beaches to its citizens.
>
> 3. Notwithstanding the provisions of Paragraph 1 hereof, and subject to the limitations of this Paragraph 3 and of Paragraph[] 2 . . . *the Town . . . shall have the right to improve, change, modify[,] or alter the [accreted land] only if such actions are to further or effect one or more . . . enumerated public objectives or policies ("Public Policies") . . . .*

(emphasis added). Under the restrictions of paragraph 3, should the Town choose to trim or remove vegetation on the accreted land, it must do so in furtherance of at least one of the following Public Policies: (1) drainage; (2) mosquito control; (3) maintenance of public walkways and emergency access to the Atlantic Ocean; (4) beach renourishment; (5) erosion control; (6) vegetation management; (7) educational programs; (8) public safety; (9) public health; and (10) scenic enhancement.

Furthermore, for the Town to take any action permitted under paragraph 3, the deed requires the Town council to make the following findings of fact in writing: (1) the proposed public action is solely for the purpose of furthering one or more of the Public Polices; (2) the proposed public action is necessary for the Town's health, safety, or general welfare; (3) the benefits of the action outweigh any damage done to the accreted land's value in its natural state; and (4) in making the prior findings of fact, the Town considered the cumulative effect of the action, alternative methods, and probable results of not taking the action. Additionally, the deed gives property owners in the Town authority to "seek any appropriate remedy for any violation [of the deed's restrictions], including, but not limited to, injunctive relief to force a termination of the violation or to permit restoration of the area damaged by a[] prohibited activity."

In July 2010, Property Owners brought several causes of action against the Town, including a declaratory judgment action to determine how the Town must maintain the accreted land's vegetation to comply with the deed. The master-in-equity granted summary judgment in favor of the Town as to all claims, and this court affirmed the master's order. *See Bluestein v. Town of Sullivan's Island*, 424 S.C. 362, 818 S.E.2d 239 (Ct. App. 2018). Our supreme court

reversed—finding that genuine issues of material fact existed as to the Town's maintenance responsibilities of the accreted land and that such responsibilities under the deed were ambiguous—and remanded the case for further proceedings. *See Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 839 S.E.2d 879 (2020).

Following remand, Property Owners and the Town negotiated a settlement agreement, and the Town's council members passed a resolution authorizing the agreement. The resolution's findings of fact, which were incorporated into the settlement agreement, provided that "[t]he settlement, and implementing steps associated therewith, [were] solely undertaken to further specific enumerated, permissible public purposes under the [d]eed" and were "necessary for the health, safety, and general welfare of the Town." On October 7, 2020, the parties executed the settlement agreement.

As part of the settlement agreement, the Town agreed to implement a "selective thinning" plan consisting of the removal and trimming of vegetation on the accreted land. The selective thinning plan involves two components: (1) initial trimming of the accreted land (the Initial Trimming Component); and (2) subsequent and recurring review or maintenance of the accreted land and its vegetation (the Recurring Review Component).

For the Initial Trimming Component, the settlement agreement requires the Town to provide part of the funding, and the remainder of the funding is "subject to receipt of adequate donations or grants," which may include funding from Property Owners and neighboring homeowners. The agreement directs the Town to begin trimming or removing vegetation on designated portions of the accreted land once it receives sufficient funds and gives the homeowners twelve months from the date of the settlement agreement to provide sufficient funds to the Town.[2]

For the Recurring Review Component, the settlement agreement provides the following:

> *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*

[2] The parties later amended the settlement agreement for the twelve-month period to commence once "the Town receive[d] necessary regulatory approvals."

> *recurring basis* (for instance, once every five years) with an eye toward[] making whatever changes might be necessary to maintain appropriate levels of density and diversity.

(emphasis added). The parties stipulated that the settlement agreement could not be "modified or amended, nor [could] any of its provisions be waived, *except upon mutual agreement of all [p]arties* or their authorized agents in writing." (emphasis added). Furthermore, the settlement agreement provides that it would be "binding upon and inure to the benefit of all the parties, and their heirs, successors[,] and assigns."

After the parties executed the settlement agreement, the circuit court approved it, finding that it was proper and "in the best interests of all [p]arties." The parties later sought approval to amend the agreement,[3] and the circuit court issued an order approving the amendment on April 12, 2021.

On or about May 4, 2021, the Town elected a new town council. On February 21, 2022, the Town brought a declaratory judgment action against Property Owners, seeking an order that the settlement agreement was invalid and unenforceable. The Town moved for summary judgment, which the circuit court granted.

In granting summary judgment, the circuit court found the following:

> [T]he [s]ettlement [a]greement 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

[3] The parties intended the amendment to address "anticipated third-party regulatory concerns," "further the spirit of the original settlement agreement," and describe the work plan "with enough clarity and in enough detail to allow [f]ederal and [s]tate agencies with permitting authority to determine if the proposed activities [would] require a permit." The amendment added a more detailed scope of work for the accreted land and provided that "[t]he [p]arties' statements of general intent, goals, and desire to balance various interests as described in the original [s]ettlement [a]greement [were to] remain valid."

> to involve only proprietary/business functions, it is still invalid and unenforceable because it is unreasonable as a matter of law.

To support the finding that the settlement agreement was unreasonable as a matter of law, the circuit court concluded that the agreement's provision requiring that the Town "maintain similar conditions going forward," as well as the provisions on the agreement's binding effect and modification requirements, imposed obligations on the Town for a perpetual duration, which was unreasonable and against public policy.

The circuit court also found that the material terms of the settlement agreement (specifically, the selective thinning plan and the provision requiring the Town to "maintain similar conditions going forward") were so interdependent that they could not be severed without depriving the agreement of any meaningful substance or effect.

Property Owners filed a motion to alter or amend, and the circuit court denied the motion. This appeal followed.

ISSUES ON APPEAL

I. Whether the circuit court erred by finding the settlement agreement was invalid and unenforceable because it involved the Town's legislative functions or governmental powers.

II. Whether the circuit court erred by finding the settlement agreement was unreasonable as a matter of law because of its perpetual duration.

III. Whether the circuit court erred by refusing to enforce the settlement agreement's severability clause.

IV. Whether the circuit court erred by not reinstating Property Owners' initial action after invalidating the settlement agreement.

STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable. The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Kinard v. Richardson*, 407 S.C. 247, 256, 754 S.E.2d 888, 893 (Ct. App. 2014) (citation omitted) (quoting *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003)).

"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). "An action to construe a contract is an action at law reviewable under an 'any evidence' standard." *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). "Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court." *Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 424 S.C. 444, 452, 818 S.E.2d 724, 729 (2018) (quoting *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012)); 17B C.J.S. *Contracts* § 1031 (2025). This court reviews questions of law de novo. *See Palmetto Mortuary*, 424 S.C. at 452, 818 S.E.2d at 729.

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *See Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). Rather, "[t]he purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *John Deere Constr. & Forestry Co. v. N. Edisto Logging, Inc.*, 443 S.C. 424, 434, 904 S.E.2d 889, 894 (Ct. App. 2024).

"[A]n adverse party may not rely on the mere allegations in [the] pleadings to withstand a summary judgment motion[] but must set forth specific facts showing there is a genuine issue [of material fact] for trial." *Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn

from the evidence must be viewed in the light most favorable to the nonmoving party." *Moore v. Weinberg*, 383 S.C. 583, 588, 681 S.E.2d 875, 878 (2009).

LAW AND ANALYSIS

Property Owners argue the circuit court erred by invalidating the settlement agreement because the subject matter of the agreement involves the Town's business or proprietary functions and, thus, could bind the current and future town councils. We disagree.

There is a "public interest in the finality of settlement agreements," *Condon v. State*, 354 S.C. 634, 642, 583 S.E.2d 430, 434 (2003), but we still must view this settlement agreement as a contract between the Town and Property Owners. *See Pee Dee Stores*, 381 S.C. at 241, 672 S.E.2d at 802 ("In South Carolina jurisprudence, settlement agreements are viewed as contracts."). As such, if the subject matter of the settlement agreement entered into by the prior town council involves the Town's legislative functions or governmental powers, the agreement cannot bind the current and future town councils.

> *If the term of the contract in question extends beyond the term of the governing members of the municipality entering into the contract, the validity of the contract is dependent on the subject matter of the contract.* 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, 132, 459 S.E.2d 876, 880 (Ct. App. 1995) (emphases added), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996); *see also* 10A McQuillin, *The Law of Municipal Corporations*, § 29:103 (3d ed. 2025) ("To the extent that a governmental contract impinges on a municipality's ability to

legislate freely, the contract is ultra vires and void."); 64 C.J.S. *Municipal Corporations* § 1140 (2025) ("Municipal corporations have no authority . . . to make contracts that will embarrass or control them in the performance of their legislative powers and duties."); 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 134 (2025) ("A city board exercising legislative authority lacks the power to bind its successors with regard to governmental functions . . . . On the other hand, the restriction regarding binding successors does not apply to the exercise of the business powers of a municipal corporation.").

> [W]here the contract involved relates to governmental or legislative functions of the council, or involves a matter of discretion to be exercised by the council[,] unless the statute conferring power to contract clearly authorizes the council to make a contract extending beyond its own term, no power of the council to do so exists, since the power conferred upon municipal councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors.

Cowart I, 319 S.C. at 132, 459 S.E.2d at 880-81 (quoting *Newman v. McCullough*, 212 S.C. 17, 23, 46 S.E.2d 252, 255 (1948)).

> [T]he difference between proprietary and governmental functions is often difficult to determine, because, "[a]s the scope of 'governmentality' expands, the intertwining and overlapping of such functions make it increasingly more difficult to draw any definitive line of separation." However, it is clear the rule is intended to protect the public by insuring that each governing body has available to it the powers necessary to effectively carry out its duties. Thus, *when determining whether a contract is binding on successor boards, it appears that the "[t]rue test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired."*

Cowart I, 319 S.C. at 132-33, 459 S.E.2d at 881 (second and third alteration in original) (emphasis added) (first quoting *Valvano v. Bd. of Chosen Freeholders of Union Cnty.*, 183 A.2d 450, 452 (N.J. Super. Ct. App. Div. 1962); then quoting *Plant Food Co. v. City of Charlotte*, 199 S.E. 712, 714 (N.C. 1938)).

Our courts have consistently invalidated contracts that bind future governing bodies because the contracts involved the bodies' legislative functions or governmental powers. *See, e.g.*, *G. Curtis Martin Inv. Tr. v. Clay*, 274 S.C. 608, 612, 266 S.E.2d 82, 84-85 (1980) (holding that sewer service constituted a governmental function of a quasi-municipal sewer district); *City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth.*, 325 S.C. 174, 179-82, 480 S.E.2d 728, 731-33 (1997) (holding that the power to decide when a special purpose district can provide water to those in its service area was a governmental function of said district); *Cowart I*, 319 S.C. at 133, 459 S.E.2d at 881 (holding that a public service district's decision to employ an administrator and set the terms of the administrator's employment was a governmental function of said district).

In *Clay*, a sewer district entered an agreement in which a private company transferred a privately-owned sewer system to the sewer district; the private company, however, reserved the right to approve or disapprove of the sewer system's connection to large commercial establishments, apartments, townhouses, and condominiums. 274 S.C. at 610, 266 S.E.2d at 83-84. Our supreme court held that, though the sewer district had authority to engage in discretionary contracting, the reservation by the private company was unlawful because the sewer district abdicated its "statutory and constitutional responsibility to act for the public welfare to a private party who has no duty to give the public welfare any deliberation." *Id.* at 612, 266 S.E.2d at 84-85.

In *City of Beaufort*, a water and sewer authority contracted with municipalities to sell water to the municipalities. 325 S.C. at 177, 480 S.E.2d at 730. The contested clauses in the contract at issue prohibited the authority from selling its water for use in Beaufort County without the municipalities' consent. *See id.* Our supreme court determined that the contested clauses deprived the authority of its ability to provide utility services to "persons [the authority] would have the right to serve but for the [c]ontested [c]lauses." *Id.* at 181, 480 S.E.2d at 732. Thus, our supreme court held the contested clauses were an unlawful delegation of governmental power "both because the [c]ontested [c]lauses [bound] future governing boards and, more

importantly, because they g[a]ve away too much power in themselves." *Id.* at 182, 480 S.E.2d at 732-33.

In *Cowart I*, a public service district entered a twenty-year employment contract with the district's administrator. 319 S.C. at 127, 459 S.E.2d at 877. The contract contained a severance clause requiring the district to pay the administrator two years' salary following the district's termination of the administrator's employment, even "in the event of any violation by [the] employee." *Id.* The parties later signed a separate employment agreement encompassing the severance provisions in the original agreement, allowing severance pay for five years. *See id.* at 127, 459 S.E.2d at 877-78. This court held that the employment agreement was void as a matter of public policy because the agreement, in running for twenty years and requiring severance pay for five years even if the administrator breached the agreement, caused "an enormous impairment of the [d]istrict's power and authority" to employ and set terms of employment for the district's administrator, a public official. *Id.* at 133, 459 S.E.2d at 881.

Here, we recognize that the Town has a proprietary interest in the accreted land due to its ownership of and control over the land. *See Proprietary*, *Black's Law Dictionary* (12th ed. 2024) ("[o]f, relating to, or holding as property"). However, unlike an agreement entered into by a private business that is tied to the commercial interests of the business, the settlement agreement's selective thinning plan is not concerned with maintaining the land (nor settling the initial action against the Town) for some financial benefit; it is concerned with maintaining the land *in furtherance of the public health and safety of the general public*. *See Governmental Function*, *Black's Law Dictionary* (12th ed. 2024) (defining a governmental function as conduct by a government agency "that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general public"); 63 C.J.S. *Municipal Corporations* § 875 (2025) (defining a governmental function as "one that benefits the general public and is performed for the common good of all" and a proprietary function as "one intended primarily for the advantage and benefit of persons within the corporate limits of the municipality rather than for use by the general public"); 57 Am. Jur. 2d *Municipal, Etc., Tort Liability* § 44 (2025) ("Governmental functions are public acts that are integral in some way to government while proprietary functions are of a sort in which private persons or businesses might engage for profit."); 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 167 (2025) ("Generally, the principal test for determining whether a function is 'governmental' or 'proprietary' is whether the act performed is

for the common good of all, or whether it is for the special benefit or profit of the corporate entity.").

The Town is statutorily authorized to enact "regulations, resolutions, and ordinances, not inconsistent with the [c]onstitution and general law of this [s]tate . . . which appear[] to it *necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it*."[4] S.C. Code Ann. § 5-7-30 (Supp. 2025) (emphasis added).

Under the authority of section 5-7-30, the Town enacted a resolution that authorized the settlement of the initial action, detailed the selective thinning plan, and provided that both the settlement agreement and the selective thinning plan were "*necessary for the health, safety, and general welfare of the Town*" and were "solely undertaken to further specific enumerated, permissible public purposes under the deed." (emphasis added). The "enumerated, permissible public purposes" are the Public Policies listed in the deed, which include, but are not limited to, public safety and public health. The resolution also provided a statement that the benefits of the selective thinning plan outweighed any damage done to the accreted land's value in its natural state and a discussion of the cumulative effect of the plan, alternative methods to the plan, and probable results of not executing the plan.

The Town not only passed the resolution in furtherance of public health and safety under its authority under section 5-7-30, but it also included findings of fact in the resolution that were required under the deed to be made before the Town could

[4] Section 5-7-30 and Article VIII of the South Carolina Constitution give the Town authority to enter contracts in furtherance of such regulations, resolutions, and ordinances. *See* S.C. Const. art. VIII, § 17 ("The provisions of this [c]onstitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this [c]onstitution and by law shall include those fairly implied and not prohibited by this [c]onstitution."); *see also Williams v. Town of Hilton Head Island*, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993) (noting that municipalities have constitutional and statutory "authority to enact regulations for government services deemed necessary and proper for . . . preserving health, peace, order[,] and good government," removing the need for additional statutory authorization "so long as such regulations are not inconsistent with the [c]onstitution and general law of the state").

improve, change, modify, or alter the accreted land. These findings of fact, along with the details of the selective thinning plan, were effectively incorporated into the settlement agreement.

Thus, by passing the resolution with language subsequently incorporated into the settlement agreement, the Town acted both in its statutorily-authorized authority and in furtherance of public health and safety to formalize a plan to maintain the accreted land. For these reasons, we hold the subject matter of the settlement agreement concerns the Town's governmental function to maintain land it owns in furtherance of public health and safety.[5] Because our analysis on the subject matter of the settlement agreement above applies to the entire agreement and is dispositive of the second and third issues on appeal, including the severability of the agreement, we need not address those issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). Further, the fourth issue, concerning the reinstatement of Property Owners' initial action against the Town, is not preserved for appeal because Property Owners did not raise this issue to the circuit court. *See State v. Stahlnecker*, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court.").

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[5] Additionally, like the contracts in *Clay*, *City of Beaufort*, and *Cowart I*, the settlement agreement impairs, if not expressly delegates, authority the Town has a right to exercise under the constitution and law of this state. *See Cowart I*, 319 S.C. at 132-33, 459 S.E.2d at 881 (noting the "true test" as to whether a contract is binding on successor boards is "whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired"). Before the settlement agreement, the prior town council could conduct maintenance on the accreted land to improve public health and safety by simply exercising its statutory authority and passing a resolution with findings of fact as required by the deed. But as a result of this settlement agreement, the decisions of the current or future town councils to alter or stop the selective thinning plan—even if done under the town council's statutorily-authorized authority and in furtherance of public health and safety—would require and be conditioned upon the consent of private individuals, specifically, Property Owners (who have no statutory duty to give public health and safety any deliberation) as the agreement "may not be modified or amended . . . except upon *mutual agreement of all [p]arties* or their authorized agents in writing." (emphasis added).

CONCLUSION

For the foregoing reasons, the circuit court's grant of summary judgment is **AFFIRMED.**

KONDUROS and VINSON, JJ., concur.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2023-001082
Opinion No. 6139, filed February 25, 2026

TOWN OF SULLIVAN'S ISLAND,

Respondent,

vs.

NATHAN BLUESTEIN and
THEODORE ALBENESIUS, III,

Appellants.

PETITION FOR REHEARING

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

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

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

As to the issue raised of whether the Circuit Court erred in finding that the Settlement Agreement is invalid and unenforceable because it involves the Town's legislative functions or governmental powers, the Court has overlooked or misapprehended that the subject matter of the Settlement Agreement at its core, primarily involves the Town's business or proprietary functions as owner of the Accreted Land legally bound to comply with its maintenance responsibilities under the covenants in the 1991 Deed. In rejecting the Property Owners' arguments on this issue the Court has overlooked or misapprehended the established case law in Piedmont Pub. Serv. Dist. v. Cowart (Cowart I), 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995), , *aff'd,* (Cowart II) 324 S.C. 239, 478 S.E.2d 836 (1996); City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth., 325 S.C. 174, 480 S.E.2d 728 (1997); and G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980).

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

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

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

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

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

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

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

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

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

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

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

On a separate point, the Circuit Court held that "even if the Settlement Agreement could somehow be said to involve only proprietary/business functions, it is still invalid and unenforceable because it is unreasonable as a matter of law." [ROA 12.] The Property Owners have raised this issue and argued that the Settlement Agreement is a fair and reasonable and necessary or advantageous business agreement to meet the Town's obligations to maintain the vegetation on the Accreted Land. This Court has declined to address this issue. In conjunction with the request for rehearing of the subject matter issue as discussed above, the Property Owners also request that the Court consider and address the reasonableness issue.

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

> UPON Motion of all Parties, and it appearing that the said Parties deem the offer of settlement acceptable, advantageous, and to the best interest of all Parties and
>
> IT FURTHER APPEARING in the discretion of this Court that such settlement is proper and in the best interest of all Parties, ... [ROA 221; MIO Ex. 4.]

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

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

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

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

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

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

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

4. Unaddressed Status of the Original Deed Enforcement Action

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

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

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

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

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

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

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

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

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

CONCLUSION

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

they can proceed with their claims under the 1991 Deed in accordance with the Supreme Court's prior decision.

Respectfully submitted,

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

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

Attorneys for the Appellants
Nathan Bluestein and Theodore Albenesius, III

March 11, 2026

The South Carolina Court of Appeals

Town of Sullivan's Island, Respondent,

v.

Nathan Bluestein and Theodore Albenesius, III,
Appellants.

Appellate Case No. 2023-001082

ORDER

After careful consideration of the petition for rehearing, this court has discovered no material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. *See* Rule 221(a), SCACR. Therefore, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

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cc:
Lisa Brennan Bisso, Esquire
Virginia Rogers Floyd, Esquire
James Bernard Hood, Esquire
Deborah Harrison Sheffield, Esquire
Clarence Ross Turner, IV, Esquire
Alexandra Harrington Austin, Esquire
William W Wilkins, Esquire
The Honorable Jennifer B. McCoy