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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

HONORABLE JENNIFER B. McCOY, Circuit Court Judge

Appellate Case No. 2026-001038

Court of Appeals Case No. 2023-001082

TOWN OF SULLIVAN'S ISLAND, ... Respondent,

v.

NATHAN BLUESTEIN and THEODORE ALBENESIUS, III,..... Petitioners.

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

ISSUE I.

A. Whether the Court of Appeals erred in affirming the circuit court's finding that the Settlement Agreement is invalid and unenforceable because it involves the use of legislative/governmental powers of the prior Town Council attempting to bind future town councils.

B. Whether the circuit court erred in finding that, even if the Settlement Agreement involves only the proprietary/governmental functions of the Town, it is invalid and unenforceable because its perpetual duration is unreasonable as a matter of law.

ISSUE II.

Whether the circuit court erred in finding the invalid and unenforceable Settlement Agreement is not severable.

COUNTER-STATEMENT OF THE CASE

This action concerns the validity and/or enforceability of a settlement agreement (as amended, the "Settlement Agreement"), between beachfront landowners Nathan Bluestein and Theodore Albenesius, III ("landowners") and a prior town council in a previous lawsuit concerning certain accreted beachfront property ("Accreted Land") owned by the Town of Sullivan's Island ("Town"). The Settlement Agreement was executed by landowners and the prior Town Council shortly before the election of a new successor town council and imposes ongoing obligations on the Town ***in perpetuity*** regarding use and maintenance of the Accreted Land.

The newly-elected Town Council filed this declaratory judgment action challenging the validity and/or enforceability of the Settlement Agreement as to successor town councils. The circuit court found the Settlement Agreement invalid and unenforceable as a matter of law and granted summary judgment in favor of the Town. The Court of Appeals affirmed.

I. FACTUAL BACKGROUND

The Accreted Land

The Town is the fee simple owner of the Accreted Land located between the Atlantic Ocean and the beachfront lot lines of landowners' real property on Sullivan's Island in Charleston County, South Carolina. It obtained fee simple ownership of the

Accreted Land in 1949 by deed from the War Assets Administration of the United States.[1] (R. 34; 80.)

In 1981, the Town passed a zoning ordinance restricting use of the Accreted Land. (R. 34-35; 80.) The ordinance states, in pertinent part:

> There shall be no construction of any type, no destruction of vegetation (except trimming, cutting and pruning of bushes and trees as provided in this section), and no man-made changes of topography in [the] area. The Town Council ***may*** establish a program pursuant to which citizens ***may*** apply to the Town for permission to prune, trim and cut bushes and trees in the … area as follows … (5) in those areas where the height of trees or bushes are deemed objectionable, the trees or bushes may be pruned to a height of no less than three (3) feet, provided that the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the ***safety, welfare, and health*** of the people of the Town.

(R. 3; 34-35; 80 (§ 21-39A, Town Code of Ordinances)) (emphasis added).

On February 12, 1991, the Town executed a deed conveying the Accreted Land to the Lowcountry Open Land Trust ("LOLT"). (R. 35; 80.) Subsequently, on that same day, LOLT executed a deed conveying the Accreted Land back to the Town, subject to certain terms, conditions, restrictions, and covenants (the "Deed"). (R. 35-37; 80; 122-41.) It provides, in pertinent part:

---

[1] Over the years the Accreted Land has significantly increased in width due to the gradual accumulation of sand and other sediment. Now the Accreted Land contains well over one hundred acres on which has grown a dense forest in a variety of trees, bushes, plants and undergrowth. (R. 74.)

1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property 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 Property.

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 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 Paragraphs 2 and 4, the Town Council of Sullivan's Island (the "Council") shall have ***the right to*** improve, change, modify or alter the Property only if such actions are to further or effect one or more of the following enumerated public objectives or policies ("Public Policies"):

    a) Drainage
    b) Mosquito control
    c) Public walkways and emergency access to the Atlantic Ocean
    d) Beach renourishment
    e) Erosion control
    f) Vegetation management
    g) Educational programs
    h) Public safety
    i) Public health; and
    j) Scenic enhancement.

    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;

    1) that the proposed Public Action is proposed solely for the purpose of furthering or effecting one or more of the enumerated Public Policies,

2) that the proposed Public Action is necessary for the health, safety or general welfare of the Town,

3) that the benefits of the proposed Public Action outweigh the damage done to the aesthetic, ecological, scientific, or educational value of the Property in its natural state, and

4) that in making its findings of fact, the Council has given due and reasonable consideration to

i) the cumulative effect of the proposed Public Action and past Public Actions on the natural state of the Property,

ii) the alternative methods, if any, of furthering or effecting the proposed Public Policy which do not impact adversely on the natural state of the Property, and

iii) the probable results of not taking the proposed Public Action.

The above described written findings of fact must be made prior to each individual Public Action relating to the Property and shall be specific to the circumstances of the proposed Public Action and not merely conclusive in nature.

. . . .

6. During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof.[2] The Town may enact ordinances and regulations affecting the Property which are more restrictive than

[2] Paragraph 8 provides that the Restrictions may be amended by "an affirmative vote of both (a) seventy-five (75%) percent of the registered voters of the Town who vote in the referendum held pursuant to the terms hereof, and (b) one hundred (100%) percent of the members of Town Council."

> these Restrictions or which are not inconsistent with these Restrictions.

(R. 35-37; 80; 123-25) (emphasis added).

In 1995 the Town amended the 1981 zoning ordinance to provide, in pertinent part, that "vegetation may be trimmed and pruned so as to have a maximum height of no less than seven feet (7') above the ground." (R. 6; 37; 81 (§ 21-39.1G, Town Code of Ordinances).) In 2005, the Town amended the zoning ordinance again to provide, as it does to this day, that "vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground." (R. 6; 37; 81; 143 (§ 21-71(C)(3), Town Code of Ordinances).) The ordinance further provides:

> **A. No construction or removal of vegetation.**
>
> There shall be no construction, . . . no destruction or removal of vegetation by any means except trimming and pruning of shrubs and trees as provided in this Ordinance. . . .
>
> . . . .
>
> **C. Permit for trimming and pruning of vegetation.**
>
> . . . .
>
> (3) The only vegetation that may be trimmed and pruned . . . is limited to the following: Southern Waxmyrtle (Myrica Cerifera), Eastern Baccharis (Baccharis Halimifolia), and Popcorn trees (Tallowtree, Sapium Sebiferum).

(*Id*.)

The Deed Action

Although the applicable ordinance set the standard "of no less than five (5) feet above the ground," in 2010 the landowners applied to the Town for permits to trim vegetation on ocean adjacent property to a height of no less than three (3) feet. (R. 37; 81; 145-46.) The Town denied the applications as failing to meet the requirements of § 21-71(C) of the Town Code of Ordinances. (R. 38; 81; 148-49.)

The landowners subsequently filed a lawsuit against the Town in the Court of Common Pleas, Charleston County, captioned *Bluestein, et al. v. Town of Sullivan's Island, et al.* and bearing case number 2010-CP-10-05449. (R. 38; 81.) On November 10, 2015, the Master-in-Equity granted summary judgment in favor of the Town and the South Carolina Court of Appeals affirmed on August 1, 2018. *See Bluestein v. Town of Sullivan's Island*, 424 S.C. 362, 818 S.E.2d 239 (Ct. App. 2018). (R. 38; 81-82.) The South Carolina Supreme Court reversed, finding that genuine issues of material fact existed as to the maintenance responsibilities of the Town toward the Accreted Land, and remanded to the trial court for further proceedings. *See Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 839 S.E.2d 879 (2020). (R. 38; 82.)

The Settlement Agreement

Shortly before the case was remanded, newly-elected members to the Town Council took office ("prior Town Council").

Following remand, the newly-elected prior Town Council and the landowners entered into the Settlement Agreement and jointly sought its approval from the Court of Common Pleas. (R. 38; 82.) The circuit court entered a consent order approving the Settlement Agreement on October 15, 2020. (R. 39; 44-68; 82.) The Settlement Agreement provides, in part:

> **II. <u>Findings of Fact:</u>**
>
> a. The settlement, and implementing steps associated therewith, are solely undertaken to further specifical [sic] enumerated, permissible public purposes under the Deed. In this instance, the Town Council believes that thinning of vegetation will serve the interests of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement.
>
> . . . .
>
> b. The settlement, and implementing steps associated therewith, are necessary for the ***health, safety and general welfare*** of the Town.
>
> . . . .
>
> **III. Settlement of this litigation is agreed to on terms stated below:**
>
> **<u>General Approach</u>:**
>
> - The Town would implement selective thinning of the Accreted Land (AL), based on initial cut parameters set forth below for each of the four Zones (Transition Zone, Zone 1, Zone 2, and Zone 3.) In order to maintain similar conditions going forward, with the help of a naturalist the Town 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. Primary funding for transition zone work will be from the Town. Funding for work in Zones 1-3 is subject to receipt of adequate donations or grants.

. . . .

Compliance with Law required:

Implementation is subject to compliance with law.

. . . .

VI. Binding

This Settlement Agreement shall be binding upon and inure to the benefit of all the Parties, and their heirs, successors and assigns.

. . . .

VIII. Miscellaneous Provisions.

. . . .

b) Acknowledgements. Each Party acknowledges and agrees that . . . this Settlement Agreement is a legally binding contract with which the Partis [sic] will faithfully comply. Each individual signing this Settlement Agreement on behalf of one of the Parties to this Agreement has the authority to execute this Settlement Agreement and bind the entity or person on whose behalf this Settlement Agreement is executed.

. . . .

f) Modification. This Agreement may not be modified or amended, nor may any of its provisions be waived, except upon mutual agreement of all Parties or their authorized agents in writing.

(R. 39-40; 44-68; 82.)

On April 6, 2021, the landowners and the prior Town Council sought approval from the circuit court of an amendment to the Settlement Agreement to address anticipated third-party regulatory concerns.[3] (R. 40; 82.) On April 12, 2021, the circuit court entered an order amending its prior consent order and amending the Settlement Agreement. (R. 41; 70-78; 82.)

On May 4, 2021, a subsequent election resulted in the prior Town Council being replaced by a ***new successor Town Council*** which filed the declaratory judgment action.[4]

II. PROCEDURAL HISTORY

The Town initiated this lawsuit on February 21, 2022, seeking a declaratory judgment that the Settlement Agreement is invalid and unenforceable. (R. 31-78.) The landowners alleged counterclaims against the Town for breach of contract, specific performance of the Settlement Agreement, and promissory estoppel. (R. 79-92.) The

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[3] The amendment did not materially modify the provisions of the Settlement Agreement, except to add that "[t]he Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning that is more aggressive than that detailed on the subject in the Settlement Agreement and Order originally executed in this case." (R. 40-41; 70-78.)

[4] During the public comment period of a Town Council meeting on September 21, 2021, members of the public gave presentations arguing against the Settlement Agreement and its enforceability. (R. 158.) The Town Council thereafter undertook an evaluation of its rights and obligations under the Settlement Agreement and, ultimately, voted to pursue the declaratory judgment action. *Id*.

Town filed its Motion for Summary Judgment with Supporting Memorandum of Law, (R. 101-153), to which the landowners filed their Memorandum in Opposition.[5] A hearing was conducted on September 22, 2022, and, on January 30, 2023, the circuit court entered an Order granting summary judgment in favor of the Town on the Town's claim for declaratory judgment and on the landowners' counterclaims ("Order"). (R. 1-27; 330-76.) The landowners filed a Motion to Alter or Amend Order Granting Summary Judgment, (R. 311-20), and the circuit court denied the motion by Form 4 order on June 5, 2023 (the "Form 4 Order"), (R. 28-30).

The landowners appealed the Order and Form 4 Order to the Court of Appeals. (R. 377-79.) The appeal was argued on October 8, 2025, and, by published Opinion filed February 25, 2026, the Court of Appeals unanimously affirmed the circuit court's grant of summary judgment (the "Opinion"). (App. 001-014.) A Petition for Rehearing was denied by order filed March 26, 2026. (App. 025.)

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). Under South Carolina law, "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.

[5] The landowners agreed with the Town that the Settlement Agreement is unambiguous. (R. 169.)

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)). Questions of law are reviewed de novo. *See Palmetto Mortuary*, 424 S.C. at 452, 818 S.E.2d at 729.

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). 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. *See also Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). "When determining whether triable issues of material fact exist, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Williams v. Tamsberg*, 425 S.C. 249, 258, 821 S.E.2d 494, 499 (Ct. App. 2018) (citing *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002)).

ARGUMENT

Long-established precedent of this Court provides that a municipal contract is invalid and/or unenforceable against successor councils if it involves the municipality's legislative/governmental powers. The principle underlying this rule is that a council has no discretion to circumscribe, limit, or diminish the efficiency of its legislative/governmental powers through contracts that would bind future elected bodies. A contract involving the municipality's proprietary/business functions, on the other hand, may extend beyond the term of the council entering into it if the contract is fair and of a reasonable duration. This Court has adopted a well-established functional test for determining whether a contract's subject matter involves a municipality's legislative/governmental powers or proprietary/business functions. The relevant inquiry is whether the contract deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.

The landowners (hereafter now referred to as "Petitioners") do not dispute the application of these legal principles or that the Settlement Agreement is invalid and unenforceable on a successor Town Council if its subject matter involves legislative/governmental powers of the Town. (Pet. Br. 16.) Petitioners concede that the Settlement Agreement purports to bind the current and future elected Town Councils, (Pet. Br. 16), but argue that the Court of Appeals "simply did not correctly identify the core subject matter of the [Agreement]," (Pet. Br. 19). According to Petitioners, the subject

matter of the Settlement Agreement is determined by the 1991 Deed, which, Petitioners argue, was a real estate transaction "accomplished purposefully through the Town's proprietary powers." (Pet. Br. 19.)

As an initial matter, the issue before the lower courts was the validity and/or enforceability of the Settlement Agreement, not the Deed restrictions, and Petitioners never sought a ruling on the Deed as a proprietary/business function. Petitioners' argument assumes that the Settlement Agreement is merely an administrative function of the Deed restrictions, but neither the documents nor applicable law support that conclusion. More importantly, in characterizing the subject matter of the Settlement Agreement as the settlement of litigation or as the subject matter of that litigation, Petitioners fail to apply the controlling test adopted by this Court, which requires an examination of the operative terms and obligations of the Settlement Agreement itself.

The Court of Appeals correctly determined that the Settlement Agreement is "not concerned with maintaining the Accreted 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***." (App. 011) (emphasis in original). The unanimous Opinion comports with the long-established precedent of this Court that a contract involves the legislative/governmental powers of a municipality if it impairs or restricts the authority of the municipality to act for the health, safety, or general welfare

of the public. The finding by the Court of Appeals as to the subject matter of the Settlement Agreement applies to the entire agreement and is dispositive.

While this Court can and should affirm the Court of Appeals, the decision by the circuit court provides additional, independent sustaining grounds. The circuit court correctly held that, even if the Settlement Agreement could somehow be found to only involve proprietary/business functions (which it does not), it is still invalid and unenforceable because its perpetual duration is unreasonable as a matter of law and, further, that the invalid and unenforceable Settlement Agreement is not severable.

I. THE COURT OF APPEALS AND CIRCUIT COURT CORRECTLY HELD THAT THE SETTLEMENT AGREEMENT IS INVALID AND UNENFORCEABLE UNDER CONTROLLING LAW

The Settlement Agreement clearly and unequivocally declares the purpose for which it was created. Paragraph II(a) states:

> The settlement, and implementing steps associated therewith, are ***solely*** undertaken to further specifical enumerated, permissible ***public purposes*** under the Deed. In this instance, the Town Council believes that thinning of vegetation will serve the interests of improved mosquito control, improved vegetation management, ***enhanced public safety, improved public health,*** and scenic enhancement. (R. 47) (emphasis added).

To emphasize the sole purpose of the Settlement Agreement, the first sentence in paragraph II(b) states:

> The settlement, and implementing steps associated therewith, ***are necessary for the health, safety and general welfare of the Town***. *Id*. (emphasis added).

The prior Town Council attempted to explain the use of its governmental/legislative power in the specific way that it did by then declaring:

> There are no suitable alternative methods of furthering the stated ***public benefits*** that would not adversely impact the natural state of the AL [Accreted Land]. (R. 216) (emphasis added).

In paragraph III under "General Approach," the Settlement Agreement requires future Town Councils to retain "the help of a naturalist … on a ***recurring basis (for instance, once every five years***)…." (R. 48) (emphasis added). It then requires future Town Councils ***to provide "[p]rimary funding*** for transition zone work…." *Id*. (emphasis added.)

The Agreement divides the Accreted Land into four zones. Then, it dictates, with great specificity, the trees to be left untouched, those to be trimmed, or removed. For example, in the "Transition Zone: Trees to be preserved are only Live Oaks, Magnolias, Palm Trees 16" DBH or greater. All other vegetation to be removed." (R. 50.) In "Zone 1: Keep all Live Oaks, Magnolias, Palmettos. Remove all Cedar, Pine, Hackberry trees under 12" DBH. Remove all other tree species under 6" DBH." (R. 49-50.) Similar, but not identical, requirements and specifications apply to Zones 2 and 3. (R. 50.)

The Settlement Agreement spells out in great detail specifically how "the ***health, safety and general welfare*** of the Town" is to be achieved, not only by the Town Council but by all successive Town Councils thereafter elected in the future. It thus purports to be binding ***in perpetuity*** on "all the Parties, and their heirs, successors and assigns." (R.

53.) And, it confers upon "***all Parties or their authorized agents***" the power ***to veto*** any attempt by future Town Councils to modify, amend, or waive any provisions of the Agreement. (R. 54) (emphasis added).

A. The Settlement Agreement Purports to Bind the Current and Future Town Councils and Involves the Legislative/Governmental Powers of the Town to Act for the Health, Safety, and Welfare of the Public.

"When a municipal contract extends beyond the term of the governing members of the municipality entering into the contract the subject matter of the contract will determine its validity."[6] *City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority*, 325 S.C. 174, 178, 480 S.E.2d 728, 731 (1997). The general rule is that "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*, 319 S.C. 124, 132, 459 S.E.2d 876, 880 (Ct. App. 1995) (*Cowart I*), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996) (*Cowart II*). *See also Newman v. McCullough*, 212 S.C. 17, 25, 46 S.E.2d 252, 256 (1948) ("the acts of former councils relating to the governmental functions of said councils which involve a matter of discretion to be exercised by such councils are without force and effect upon succeeding councils."). The Court of Appeals recognized that "[o]ur courts have consistently invalidated contracts that bind future

[6] Under South Carolina law, settlement agreements are viewed as contracts. *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.").

governing bodies because the contracts involved the bodies' legislative functions or governmental powers." (App. 010 (citing *G. Curtis Martin Inv. Trust v. Clay*, 274 S.C. 608, 612, 266 S.E.2d 82, 84-85 (1980); *City of Beaufort*, 325 S.C. at 179-82, 480 S.E.2d at 731-33; *Cowart I*, 319 S.C. at 133, 459 S.E.2d at 881).)

It is undisputed that the Settlement Agreement purports to bind the current and successor Town Councils. (Pet. Br. 16; R. 53.) Petitioners concede that the Settlement Agreement would not be binding on a successor Town Council if the subject matter of the Agreement involves legislative functions or governmental powers and that the cases cited by the Court of Appeals provide the controlling legal principles for determining whether a municipal contract involves a legislative/governmental power or a proprietary/business function. (Pet. Br. 15-23.) They argue, however, that those cases are not instructive because they do not involve a contract for the settlement of litigation regarding enforcement of a deed. (Pet. Br. 20.) According to Petitioners, the subject matter of the Settlement Agreement relevant to the analysis is "a settlement of the pending litigation as well as resolution of the Town's proprietary obligations under the original 1991 Deed." (Pet. Br. 20.) The Court of Appeals correctly disagreed, stating that:

> There is a public interest in the finality of settlement agreements, but we still must view this settlement agreement as a contract between the Town and Property Owners. 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. (App. 008) (citations and internal quotation marks omitted).

In determining whether a contract involves legislative/governmental powers or proprietary/business functions, "***the 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." *Cowart I*, 319 S.C. at 133, 459 S.E.2d at 881 (citation and internal quotations omitted) (emphasis added). Under this test, contracts extending beyond a council's own term which impinge upon its ability to legislate freely or which restrict, delegate, and/or divest it of its uniquely sovereign functions are ultra vires and void. "[T]he 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." *Id*.

Here, the Town is statutorily vested with certain powers, among them the powers to enact "regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State … respecting any subject which appears 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…." S.C. Code Ann. § 5-7-30 (1986). The Settlement Agreement restricts, delegates, and/or divests the Town of these powers with respect to the use, preservation, and maintenance of the Accreted Land.[7] Among other things, the Settlement Agreement requires the Town to "implement selective thinning of the Accreted Land" pursuant to specific, enumerated parameters,

[7] Such matters involve important public policy considerations, particularly in the context of a coastal community, such as Sullivan's Island.

and to "maintain similar conditions going forward. . . ." It states that "the Town Council believes that thinning of vegetation will serve the interests of . . . enhanced public safety, improved public health . . . [and] [t]he settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town."

The Settlement Agreement effectively "freezes" the Town's position as to what will best serve the interests of the public as it relates to the Accreted Land. However, the Town may not be restricted from adopting in the future any regulations concerning the Accreted Land or taking any other action it deems appropriate for public safety or general welfare. "It is a fundamental principle of constitutional law that no legislative body may part with its right to exercise the police power, nor may a municipality to which such power has been delegated divest itself of same ***by contract or otherwise***. It is a continuing power which may be exercised as often as required in the public interest and must always remain fluid." *Sammons v. City of Beaufort*, 225 S.C. 490, 499, 83 S.E.2d 153, 157 (1954) (holding that municipality could not covenant that it would maintain on-street parking facilities throughout the life of municipal bonds because it restricted future councils from adopting any parking regulations "necessary for the public safety and welfare" and constituted a delegation of the city's constitutional police power) (emphasis added). "[L]ike the contracts in *Clay*, *City of Beaufort*, and *Cowart I*, the [S]ettlement [A]greement

impairs, if not expressly delegates, authority the Town has a right to exercise under the constitution and law of this state."[8] (App. 013.)

Under the test set forth in *Cowart I* and employed by this Court in *City of Beaufort*, the subject matter of the Settlement Agreement concerns the Town's legislative/governmental power to maintain the Accreted Land in furtherance of public health and safety. Petitioners acknowledge the test, (Pet. Br. 23), but fail to properly apply it, focusing instead on the activities underlying the Settlement Agreement, rather than the specific terms and obligations of the Settlement Agreement itself and their effect on the current and future Town Councils.[9] That it recorded the settlement of litigation is irrelevant to the analysis and does not authorize the invalid and unlawful Settlement Agreement. *See Berkebile v. Outen*, 311 S.C. 50, 53 n.2, 426 S.E.2d 760, 762 n.2 (1993) (holding that it is well-established in South Carolina that an unlawful contract is always unenforceable). Similarly, it has no bearing on the validity of other legally permissible

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[8] Although not specifically addressed by the Court of Appeals, by requiring primary funding for work in the Transition Zone "[to] be from the Town," the Settlement Agreement also improperly delegates the legislative/governmental powers of the Town to set and adopt a budget, *i.e.*, its fiscal power. As with its other legislative/governmental powers, the authority of the Town to adopt a budget cannot be delegated away. *See Clay*, 274 S.C. at 612, 266 S.E.2d at 85. Moreover, the Settlement Agreement binds the Town, ***in perpetuity***, to commit and expend such funds regardless of whether future public policy considerations and objectives compel them to be utilized differently or elsewhere.

[9] Our Courts adopted a functional test precisely 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." *Cowart I*, 319 S.C. at 132-33, 459 S.E.2d at 881 (citation and internal quotation marks omitted).

settlement agreements or on the enforceability of legally permissible deed restrictions or other contracts concerning the use of Town-owned property.[10]

As the Court of Appeals correctly determined:

> Before the [S]ettlement [A]greement, the prior [T]own [C]ouncil could conduct maintenance on the [A]ccreted [L]and 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 [the] [S]ettlement [A]greement, the decisions of the current or future [T]own [C]ouncils to alter or stop the selective thinning plan—even if done under the [T]own [C]ouncil's

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[10] As a dispositive matter, the validity and/or enforceability of the Deed is not at issue in this lawsuit and is not before this Court for determination. *See* R. 349 ("[Petitioners] do not contend that the [D]eed[ ] [is] void nor do [they] want any determination about that.") However, as the circuit court explained, [w]hile not at issue in this action, the 1991 Deed is fundamentally different from the Settlement Agreement …. [A] deed restriction is a privately-enforceable ***limitation*** on the use of property—it does not authorize a use in excess of what is permitted under the applicable zoning laws …. Furthermore, and with respect to the 1991 Deed specifically, it expressly permits the Town to take actions inconsistent with the deed restrictions where the Town determines such action is in furtherance of the public interest, ***including but not limited to public health and safety*** …. [It is not] perpetual in duration, and may be modified or revoked by vote." (R. 23-24) (emphasis added). The Settlement Agreement is not a mere "extension," "modification," or "clarif[ication]" of the Deed, as Petitioners contend, (Pet. Br. 14), because the express purpose of the Deed restrictions to preserve the natural condition of the Accreted Land or "as suitable habitat for fish, plants, or wildlife," (R. 122), is materially different from the express purpose of the Settlement Agreement's thinning plan, which was deemed "necessary for the health, safety and general welfare of the Town," (R. 47). Nor can the Deed somehow legitimize the invalid and unlawful Settlement Agreement. According to Petitioners, the Settlement Agreement is enforceable to the same extent that the Deed is enforceable. (Pet. Br. 12-28). But the Settlement Agreement presents separate issues and, on its face, imposes material obligations on the Town concerning the Accreted Land not found in the Deed restrictions. Moreover, the Deed is not at issue in this lawsuit. The last court to consider the Deed—this Court in the prior Deed enforcement action—determined that, because "genuine issues of material fact exist," the grant of summary judgment was not appropriate.

> 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 [A]greement 'may not be modified or amended … except upon *mutual agreement of all [p]arties*….'" (App. 013.)

This delegation of a veto power to private citizens is precisely the situation this Court has previously found to be "intolerable." *See Clay*, 274 S.C. at 612, 266 S.E.2d at 84.

Because it improperly restricts, delegates and/or divests the legislative/governmental powers of the Town, the Settlement Agreement is invalid and unenforceable and the Court of Appeals correctly affirmed the circuit court's grant of summary judgment to the Town.

B. Even if the Settlement Agreement Could be Said to Involve Only Proprietary/Business Functions, Its Perpetual Duration is Unreasonable as a Matter of Law.

As an initial matter, the Court of Appeals correctly concluded that the Settlement Agreement involves the legislative/governmental powers of the Town. That finding is dispositive of this issue and the Court of Appeals need not have addressed it. (App. 013 (citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)).)

Nevertheless, the circuit court correctly held, as an additional sustaining ground, that even if the Settlement Agreement could somehow be found to involve only proprietary/business functions (which it does not), it was nonetheless invalid and unenforceable because its ***perpetual duration*** is unreasonable as a matter of law.

Municipal contracts involving non-legislative/governmental powers must still "at the time of their execution, be fair and of a reasonable duration." *Cowart I*, 319 S.C. at 135, 459 S.E.2d at 882. ("[I]f 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."). Such municipal contracts "may be made for, but only for, such a term as is within the limitation imposed by statute or charter or, if no limitation is imposed, ***for a reasonable time***." *Id*. at 131, 459 S.E.2d at 880 (citation omitted) (emphasis added).

The circuit court determined that the Settlement Agreement is of perpetual duration because it obligates the Town to "maintain similar conditions going forward" and to "review changes in the condition of the [Accreted Land] on a recurring basis (for instance, once every five years)." (R. 18.) It also considered that the Settlement Agreement is binding upon and inures to the benefit of not only the named parties, but for their ***heirs***, ***successors*** and ***assigns***, and "may ***not*** be modified or amended, ***nor*** may any of its provisions be waived, except upon mutual agreement ***of all Parties***." *Id.* at 18-19 (emphasis added).

The circuit court held the perpetual duration of the Settlement Agreement is *prima facie* unreasonable and contrary to public policy. *Id*. Petitioners do not dispute that the duration of the Settlement Agreement is perpetual nor argue that such perpetual duration

is reasonable. Rather, they simply allege that the plan for the Accreted Land contained in the Settlement Agreement is fair and reasonable, and that it was advantageous for the Town to settle.[11] (Pet. Br. 24-28.) Petitioners further argue that the Settlement Agreement must be fair, reasonable, and advantageous because the prior Town Council agreed that it was and because the circuit court approved it. *Id*. at 24-26. However, although not raised when the proposed consent order was filed, the circuit court subsequently recognized that a court's execution of a consent order is not determinative of its validity and enforceability. (R. 24.) *See, e.g.*, *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 268 (8th Cir. 2011) (a consent order settling litigation cannot authorize an unlawful agreement); *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995) (parties can settle litigation with consent decrees but they "can only agree to that which they have the power to do outside of litigation"); *Keith v. Volpe*, 118 F.3d 1386 (9th Cir. 1997) (underlying consent decree is void to extent that it exceeded parties' authority).

Even if the Settlement Agreement involves only non-legislative or non-governmental powers, South Carolina law requires it be of a "reasonable duration" to be valid and enforceable. *See Cowart I*, 319 S.C. at 135, 459 S.E.2d at 882. As the circuit court

[11] Petitioners argue that "the plan is not rigidly set in stone" and "provides flexibility to meet changing conditions." (Pet. Br. 27.) However, that argument concedes that the duration is perpetual and ignores the plain language of the Agreement, which provides that necessary changes may be made only "to maintain similar conditions going forward." (R. 39.)

explained, "[w]hile it does not appear that South Carolina courts have had the opportunity to consider the specific issue of a perpetual municipal contract like the one set forth in the Settlement Agreement, the requirement under South Carolina law that municipal contracts be of a reasonable duration *ipso facto* strongly suggests that municipal contracts of a perpetual duration are, on their face, unreasonable." (R. 19-20.) Moreover, it pointed to decisions from other jurisdictions as instructive and demonstrating that perpetual municipal contracts are void as against public policy. (*Id*. (citing *Town of Secaucus v. City of New Jersey*, 20 N.J. Tax 562, 567-68 (2003) (explaining that "[m]unicipal agreements having a perpetual term are not favored" and are generally void as against public policy unless expressly authorized by statute); *State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 83 N.W. 32, 34-35 (Minn. 1900) (contract between city and railway company whereby city agreed to maintain a bridge in perpetuity was void because such agreement is beyond municipal powers of the city and contrary to public policy); McQuillin, *Municipal Corporations*, § 29:104 (3d ed.) ("Municipal agreements having a perpetual term are not favored.")

Thus, even if the Settlement Agreement involves only non-legislative or non-governmental powers—which both the circuit court and Court of Appeals correctly determined it does not—the circuit court nonetheless also correctly determined that it is invalid and unenforceable because it unfairly, unreasonably and improperly restricts the proprietary functions of the Town.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THE INVALID AND UNENFORCEABLE SETTLEMENT AGREEMENT IS NOT SEVERABLE

Once again, because the finding by the Court of Appeals as to the subject matter of the Settlement Agreement applies to the entire Agreement, that finding is dispositive of this issue and the Court of Appeals need not have addressed it. (App. 013 (citing *Futch*, 335 S.C. at 613, 518 S.E.2d at 598).) Nevertheless, the circuit court correctly determined that the invalid and unenforceable Settlement Agreement is not severable.

Petitioners argue the "prospective" provisions of the Settlement Agreement should be severed and the remaining provisions enforced. (Pet. Br. 30.) This argument ignores the inescapable conclusion, correctly reached by the circuit court, that because the Settlement Agreement involves the legislative/governmental powers of the Town, it cannot, as a matter of law, extend beyond the term of a ***prior*** town council which was a party to it. (R. 21.) Because the Settlement Agreement was entered into by a ***prior*** town council, the determination that the Settlement Agreement involves the legislative/governmental powers of the Town is conclusive that it is ***not*** binding on the current and future Town Councils, thus foreclosing any possibility of meaningful severability. *See City of Beaufort*, 325 S.C. at 178, 480 S.E.2d at 731 (holding a municipal contract is invalid where it "extends beyond the term of the governing members of the municipality entering into the contract" and its subject matter involves the legislative/governmental powers of the municipal corporation); *Beach Co. v. Twillman*,

Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 876 (Ct. App. 2002) (holding severance of an illegal provision requires "an otherwise valid contract").

In addition to being otherwise invalid and unenforceable, the circuit court correctly determined that the offending provisions of the Settlement Agreement are not subject to meaningful severability. (R. 21.) *See Twillman*, 351 S.C. at 65, 566 S.E.2d at 864 (holding a contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent); *OrthAlliance, Inc. v. McConnell*, No. 8:08-2591-RBH, 2010 WL 1344988, at *6 (D.S.C. Mar. 30, 2010) (holding even where a contract contains a provision for the severability of void or unenforceable terms, contractual provisions that are interdependent may not be severable). *See also* 17A Am. Jur. 2d *Contracts* § 273 (holding that, to assess whether offending provisions can be severed, "a court considers whether the illegality is central or collateral to the purpose of the contract").

Severance of the offending provisions would have required the circuit court to attempt to rewrite material terms of the Settlement Agreement, which is disfavored under South Carolina law. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34, 644 S.E.2d 663, 673 (2007) (holding "the general principle in this State is that it is not the function of the court to rewrite contracts for parties") (citing *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002)); *see also Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 604,

879 S.E.2d 746, 751 (2022) (holding blue-penciling a material term of a contract is "strongly disfavored"). Even where an agreement contains a severability provision, courts are reluctant to sever the unenforceable provisions "when illegality pervades the entire agreement 'such that only a disintegrated fragment would remain after hacking away the unenforceable parts.'" *Damico*, 437 S.C. at 618, 879 S.E.2d at 758 (citing *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673). "In those cases, judicial severing 'look[s] more like rewriting the contract than fulfilling the intent of the parties,'" *id*. at 618, 879 S.E.2d at 758-59, and courts have declined to enforce the severability provisions, *see, e.g.*, *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 16-17, 742 S.E.2d 37, 41 (Ct. App. 2013) (declining to enforce severability provision due to the number of offending provisions).

Although it includes a severability provision, the Settlement Agreement itself recognizes that the implementation of its provisions "is subject to compliance with law." (R. 20.) Here, the court would have been required to sever material terms in the Settlement Agreement concerning thinning measures on the Accreted Land, including as they relate to the substance, scope, and implementation thereof, reducing it to an agreement with no meaningful substance or effect. Under these circumstances, the circuit court correctly determined the offending provisions cannot be severed. Additionally, and more importantly, the circuit court correctly determined that because it was entered into by Petitioners and a prior town council and involves the legislative/governmental powers of the Town, the Settlement Agreement, as a whole, is invalid and unenforceable

against the current Town Council or future councils. That holding was dispositive of the severability question.

CONCLUSION

For the reasons set forth above, this Court should affirm summary judgment on the declaratory judgment pursuant to Rule 56, SCRCP, on the grounds that there is no genuine issue of material fact and the unambiguous Settlement Agreement is invalid and unenforceable as a matter of law because it involves the legislative/governmental powers of the Town and impermissibly purports to bind the current and future town councils; that, even if the Settlement Agreement could be said to involve only proprietary/business functions of the Town (which it does not), it is still invalid and unenforceable because its perpetual duration is unreasonable as a matter of law; and the invalid and unenforceable Settlement Agreement is not severable.

Respectfully submitted,

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