THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H. Dukes, III

Appellate Case No.: 2017-000620

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SC Court of Appeals

BURTON FIRE DISTRICT.....Respondent,

vs.

CITY OF BEAUFORT.....Appellant.

And

BURTON FIRE DISTRICT.....Respondent,

vs.

TOWN OF PORT ROYAL.....Appellant.

FINAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. **Did the lower court fail to properly consider the language in the contract defining "assessed value" that incorporated by reference the "assessed values" set forth in the October 16, 2010 tax bills?**

II. **Did the lower court fail to consider and address the affirmative defenses of estoppel, waiver, laches, ultra vires, and reformation as asserted by the Town of Port Royal and the City of Beaufort?**

III. **Did the lower court err in finding the position taken by the parties during previous summary judgment motions bears any relevance in this matter?**

STATEMENT OF THE CASE

These consolidated breach of contract cases were commenced by the filing of Summonses and Complaints in the Beaufort County Court of Common Pleas on June 4, 2013. In its Complaints, the Burton Fire District ("Burton") alleges that the Defendant City of Beaufort ("Beaufort") and the Defendant Town of Port Royal ("Port Royal") breached a Settlement Agreement entered into between the parties on September 2, 2010 by failing to pay to Burton the full amount of the annual payments Burton asserts are mandated by the Agreement. On October 2, 2015 these consolidated cases were referred to the Beaufort County Master-In-Equity in accordance with Section 14-11-85 of the South Carolina Code of Laws. These consolidated cases were tried before the Beaufort County Master-In-Equity on December 1 and 2, 2015. The Court took the matter under advisement and issued an order on October 24, 2016 finding on behalf of Burton. Beaufort and Port Royal timely filed a Motion for Reconsideration with the Court. The Court denied that Motion by Order filed March 8, 2017. This appeal follows.

Burton is a public service district that provides fire protection, firefighting, and first response emergency medical services to the properties located within its district. It was established in 1973 with a grant of authority to act from the legislature that was codified at Act No. 566, 1973 S.C. Acts. 1004-1006. Beaufort and Port Royal are municipalities that are adjacent to and border Burton's district.

Over the years, both Port Royal and Beaufort have annexed into their respective municipalities properties that were located in Burton's district. The

Settlement Agreement that is the subject of this lawsuit recites that Burton is indebted to the federal government by virtue of loan awarded to it in 1993 by the Farmers Home Administration, now the Rural Development Authority. A federal statute, 7 U.S.C. § 1926(b), provides certain protections to the service area of a federal debtor from certain aspects of municipal annexation while this federal loan remains outstanding. The Settlement Agreement further recites that Sections 5-3-310 through 5-3-313 of the South Carolina Code of Laws, which went into effect on May 1, 2000, provides that upon annexation of a portion of a special purpose district, the annexing municipality and the effected special purpose district must devise a plan to provide for the continuation and/or transfer of services, which plan must balance the equities between the municipality and the special purpose district so that each can efficiently and effectively serve their respective constituents. In 1996, Burton instituted an action in the Court of Common Pleas in Beaufort County, Burton Fire District v. City of Beaufort and Town of Port Royal, Case Number 2006-CP-07-0551, seeking a declaration of its rights under the aforementioned federal statute. This litigation resulted in a settlement by way of consent orders that governed the relationship between the parties through July 16, 2010.

In anticipation of the pending expiration of the foregoing consent orders, Burton instituted an action in 2009 in the Beaufort County Court of Common Pleas, Burton Fire District v. City of Beaufort and Town of Port Royal, Case Number 2009-CP-07-3020 (hereinafter "Burton Litigation"). In this action, Burton sought a declaration of its rights under both the aforementioned federal statute

and state statutes. Shortly thereafter, Port Royal and Beaufort filed their own action in the Beaufort County Court of Common Pleas, City of Beaufort and Town of Port Royal v. Burton Fire District, Case Number 2009-CP-07-4008. In this suit, Beaufort and Port Royal sought to maintain the status quo with respect to the provision of fire service and emergency medical service by and among Port Royal, Beaufort, and Burton, pending the disposition of the recently filed Burton Litigation.

Once again, the parties were able to resolve their differences and on September 2, 2010 memorialized the terms of their agreement in the Settlement Agreement that is the subject of these lawsuits. In connection with the negotiation, drafting and execution of the Settlement Agreement, each of the parties was independently represented by experienced and competent counsel: Bill Harvey for the City of Beaufort; Francis Cantwell for the Town of Port Royal; and Fred Kuhn for the Burton Fire District.

In the Settlement Agreement **[R. p. 392]**, Burton acknowledges the right of Port Royal and Beaufort to annex property out of Burton's service area. In turn, Port Royal and Beaufort acknowledge the claim of Burton to be compensated both for the loss of tax revenue as a result of annexation and for providing services to Beaufort and Port Royal as set forth in the Agreement.

Attached to the Settlement Agreement, as an exhibit thereto, is a list of all the properties subject to the Settlement Agreement that had been annexed by Port Royal out of Burton's district ("Port Royal Annexed Properties"). **[R. p. 398]** A similar exhibit lists all of the properties subject to the Settlement Agreement

that had been annexed by Beaufort out of Burton's district ("Beaufort Annexed Properties"). **[R. p. 407]** On these exhibits each annexed property is separately listed and identified by its PIN or Property Identification Number. For each annexed property three columns, labeled "Appraised" "Assessed" and "Taxable VA," show the appraised, assessed, and taxable values for each annexed property.

Ordinarily, once a municipality annexes property into its jurisdiction, that municipality assumes responsibility for providing municipal services, such as fire protection, to the annexed property. Pursuant to the terms of the parties' Settlement Agreement, however, Burton is required to provide first response fire and emergency medical services to all of the "Port Royal Annexed Properties" and to all of the "Beaufort Annexed Properties" throughout the term of the Agreement.

The Settlement Agreement mandates that Port Royal will pay Burton for providing first response fire and emergency medical services to the Port Royal Annexed Properties. The payment is an annual, lump sum payment that is due on March 1st of each year during the term of the Settlement Agreement. The Settlement Agreement mandates that the following formula will be used to calculate the amount of each annual payment by Port Royal:

> Burton Total Millage X Assessed Value of Port Royal Annexed Properties X 25%

[R. p. 394]

There is a footnote (hereinafter Footnote 3) following the phrase "Assessed Value" above which provides as follows:

> "Defined as the assessed value of each subject property for the applicable service year. For example, the March 1, 2011 payment for services in, and cumulative annexations through, calendar year 2009 will use the assessed value established for the October 16, 2010 Beaufort County property tax bills.

[R. p. 394]

The Settlement Agreement contains similar provisions regarding Beaufort's payment to Burton for the first response fire and emergency medical services provided by Burton to the Beaufort Annexed Properties, i.e., an annual lump sum payment due March 1st of each year. The Settlement Agreement mandates that the following formula will be used to calculate the amount of each annual payment by Beaufort:

> Burton Total Millage X Assessed Value of Beaufort Annexed Properties X 19%.

[R. p. 395]

Additionally paragraph 7 of the Settlement Agreement references the property tax assessed values with specific relation to the values set forth on the 2010 tax bills. That section provides:

> This Agreement shall be deemed to have commenced on July 1, 2010. The first payment will be due on or before March 1, 2011 and will be calculated using those properties listed on Exhibits B and C, as well as the property tax assessed values for those properties and millage from the tax bills that are scheduled to be sent out on October 16, 2010.

[R. p. 396]

As can be seen, the formulas for calculating the annual payment to Burton by Beaufort and Port Royal, except for the final percentage multiplier, are identical.

Pursuant to the terms of the Settlement Agreement, Burton provided first response fire and emergency medical services to all of the Beaufort and Port Royal Annexed Properties, and has continued to satisfactorily fulfill its obligations under the Settlement Agreement through the date of the trial.

The initial payment by Beaufort and Port Royal to Burton was due no later than March 1, 2011. At that time, Beaufort paid $195,456.39 to Burton, while Port Royal paid $154,493.34. The checks were cashed and no issue was raised regarding the underpayment for that year at that time.

Beaufort was late making its payment in 2012 because of a change of finance department staff. In trying to reconcile the amount owed because of the late payment, Burton's counsel Kuhn eventually raised the issue to Beaufort and Port Royal in June 2012 that the respective payments were short based on Burton's understanding of the Settlement Agreement. Beaufort and Port Royal were calculating their annual payment by utilizing the taxable assessed values (or post-exemption values) of the Annexed Properties. The taxable assessed values corresponded to the "assessed values" as they existed on the 2010 tax bill. **[R. p. 254]**. A review of the 2010 tax bill indicates that the assessed values on those tax bills were post-exemption values. At some point subsequent to the 2010 tax bills being issued, the assessed value changed on the Beaufort County tax bill to reflect pre-exemption value.

In 2012, when the discrepancy was first brought to light **[R. p. 549]**, the parties realized that while the municipalities were using the post-exemption value as reflected on the 2010 tax bill as "assessed value", Burton was calculating the

annual payment based upon pre-exemption values which were reflected as the assessed value on the Beaufort County tax bills at that time (and to the present). This amount was the pre-exemption value of the Annexed Properties. These properties were properties that were subject to statutory and other exemptions such as the homestead exemptions, religious exemptions and local government exemptions, and property belonging to the US Government including the Marine Corps Air Station and Parris Island, to name a few. For instance on the October 16, 2010 tax bill, the Marine Corps Air Station has an pre-exemption value shown on that bill as "taxable value" of $25,728,030. However, it has an "assessed value" of $0. **[R. p. 553]** This is because local government cannot tax the Federal Government; however tax bills are issued because of relevant stormwater fees.

Each of the parties re-involved their respective attorneys in an attempt to resolve the dispute. Neither party would concede to the interpretation being set forth by the other party(ies). Approximately a year later, Burton filed this lawsuit in June of 2013. **[R. p. 33]**

Through the March 1, 2015 payment, the City of Beaufort has paid the following amount towards each annual payment:

Amount Paid	Due Date
$195,456.39	March 1, 2011
$187,850.44	March 1, 2012
$197,831.98	March 1, 2013
$188,561.11	March 1, 2014

$189,904.15	March 1, 2015

Each of the forgoing payments by the City of Beaufort was calculated by Beaufort utilizing post-exemption values of the Beaufort Annexed Properties, as opposed to the pre-exemption values. **[R. p. 431]**

If the payments by Beaufort to Burton for each of the foregoing years had been calculated utilizing the pre-exemption values of the Beaufort Annexed Properties, then the payments for 2011, 2012 and 2013 would have been $13,477.90 higher each year, and the payments for 2014 and 2015 would have been $14,905.18 higher each year, resulting in a total shortfall of $70,244.06 through March 1, 2015 (Beaufort County underwent a reassessment between tax years 2013 and 2014).

Through the March 1, 2015 payment, the Town of Port Royal has paid the following amount towards each annual payment:

Amount Paid	Due Date
$154,493.34	March 1, 2011
$167,346.21	March 1, 2012
$170,752.14	March 1, 2013
$186,765.37	March 1, 2014
$199,007.20	March 1, 2015

[R. p. 431] Each of the foregoing payments by the Town of Port Royal, like those paid by the City of Beaufort, was calculated by Port Royal utilizing the post-exemption values of the Port Royal Annexed Properties, as opposed to pre-exemption values.

If the payments by Port Royal to Burton had been calculated utilizing the pre-exemption values of the Port Royal Annexed Properties, then the annual payments for 2011, 2012 and 2013 would have been $25,117.37 higher each year, and the payments for 2014 and 2015 would have been $31,361.43 higher each year, resulting in a total shortfall of $138,194.97 through March 1, 2015.

The dispute between these parties centers on the construction of the Settlement Agreement's formulas for calculating the annual payment. Burton contends the annual payment is calculated utilizing the pre-exemption values of the Annexed Properties, while Beaufort and Port Royal contend that the annual payment is calculated utilizing the post-exemption values the Annexed Properties. Although the formulas expressly recite that the "Assessed Value" is to be used, Footnote 3 goes on to define that term. Beaufort and Port Royal contend that, as used in the Settlement Agreement and defined at Footnote 3, this phrase is intended to mean post-exemption values as "assessed value" was reflected on the 2010 tax bill, as opposed to pre-exemption value as "assessed value" is currently reflected on the Beaufort County tax bill.

ARGUMENTS

I. The lower court failed to properly consider the language in the contract defining "assessed value" that incorporated by reference the "assessed values" set forth in the October 16, 2010 tax bills.

Port Royal and Beaufort contend that the court erred in finding that the term "assessed value" as set forth in the Settlement Agreement means the assessed value before any relevant tax exemptions are applied. This definition of assessed value is in direct contravention to the definition of assessed value

found in the Settlement Agreement. The Settlement Agreement specifically defines "assessed value" as "the assessed value established for the October 16, 2010 Beaufort County property tax bills." The "assessed value" on the 2010 tax bills are the assessed values for the properties after deductions are made for tax exemptions, or the post-exemption values.

Footnote Three of the Settlement Agreement specifically defines "assessed value" for the purpose of the Settlement Agreement. It is notated at the word "assessed value" used in the formula for calculating the payments owed and reads as follows:

> "Defined as the assessed value of each subject property for the applicable service year. For example, the March 1, 2011 payment for services in, and cumulative annexations through, calendar year 2009 will use the assessed value established for the October 16, 2010 Beaufort County property tax bills.
>
> **[R. p. 394]**

Importantly when read as a whole, the footnote makes specific reference to the assessed value established for the tax bills sent out in October 2010.

Additionally, the court failed to consider the express language of the settlement agreement contained in paragraph 7 of the contract referencing tax assessed values. That section provides:

> This Agreement shall be deemed to have commenced on July 1, 2010. The first payment will be due on or before March 1, 2011 and ***will be calculated using*** those properties listed on Exhibits B and C, ***as well as the property tax assessed values for those properties and millage from the tax bills that are scheduled to be sent out on October 16, 2010***. (emphasis added.)

This section, like Footnote 3, clearly explains that the payments *will be calculated* using the tax assessed values...from the tax bills that are scheduled to be sent out on October 16, 2010.

The Beaufort County tax bills sent out in October 2010 were submitted into evidence at trial and a review of those bills clearly demonstrates that the term "assessed value", as testified to by Gary James as and as it currently exists on the Beaufort County tax bill, does not have the same meaning as it did on the October 16, 2010 Beaufort County tax bills referenced by the Settlement Agreement. **[R. pp. 552, 553]** Kathy Todd, CFO for the City of Beaufort, explained that she reviewed the October 16, 2010 tax bills and the values referenced as "assessed value" on those bills were the assessed value after any relevant tax exemptions were applied (or post-exemption values). Furthermore, she testified that the "assessed values" contained on the October 16, 2010 tax bills were not the same as the "assessed values" contained in the spreadsheets designated as Exhibits B and C to the Settlement Agreement. **[R. pp. 398 and 407]** In fact, the "assessed value" on the October 16, 2010 tax bills was the "Taxable VA" as contained on the spreadsheet. **[R. pp. 253-260]**

The court in this matter declined to consider the 2010 tax bills finding them to be inappropriate extrinsic evidence given its position that the contract language was clear in favor of Burton's position. However, this finding is erroneous. In South Carolina, a contract can incorporate another document by reference. Twiggs v. Williams, 98 S.C. 431, 456, 82 S.E. 676, 679 (1914). The parties' intent is determined by the language of an agreement. Cullen v. McNeal,

390 S.C. 470, 483, 702 S.E.2d 378, 385 (Ct. App. 2014). There is no specific language one must state to incorporate another writing into a written agreement; however, a contract "must explicitly or at least precisely, identify the written material being incorporated and must clearly communicate that purpose of the reference is to incorporate the referenced material into the contract[.]" Stevens Aviation. Inc. v. Dyncorp Int'l LLC, 394 S.C. 300, 308, 715 S.E.2d 655, 659 (Ct. App. 2011), *rev in part on other grounds by* Stevens Aviation, Inc. v. Dyncorp Int'l LLC, 407 S.C. 407, 756 S.E.2d 148 (2014) (*citing* Northop Grumman Info. Tech, Inc. v. United States, 525 F.3d 1339 (Fed. Cir. 2008) (internal quotations omitted)).

These October 16, 2010 tax bills and the "assessed value" contained thereon are explicitly referenced by both Footnote Three and Paragraph 7 of the Settlement Agreement and incorporated by that reference into the Settlement Agreement. The assessed value on these tax bills was the value after any relevant tax exemptions were applied. Thus, it is clear that in the formula in the Settlement Agreement, the parties intended "assessed value" to mean the assessed value after exemptions are taken for that tax year.

Alternatively, while Port Royal and Beaufort believe this definition to be clear on the face of the contract given the incorporation by reference of the 2010 tax bills, at the very least the use of the term "assessed value" on the 2010 tax bill and the purported common use of the term as defined by Gary James in his testimony and set forth in Exhibits B and C, gives rise to an ambiguity.

Where the terms of a contract are clear and unambiguous, the construction of the contract is a matter of law, but where the terms of a contract are ambiguous, the intention of the parties becomes a question of fact. Holcombe v. Orkin Exterminating Co., Inc., 282 S.C. 104, 317 S.E.2d 458 (Ct.App.1984). Extrinsic evidence relating to the conditions surrounding the parties, the circumstances under which the contract was executed and the negotiation between the parties leading to the execution thereof is admissible to aid the jury in determining the intent of the parties if the contract is ambiguous. Garrett v. Pilot Life Ins. Co., 241 S.C. 299, 128 S.E.2d 171 (1962); see Columbia East Assoc. v. Bi-Lo, Inc., 299 S.C. 515, 386 S.E.2d 259 (Ct.App.1989).

There was a plethora of evidence submitted in this case that it was the intent of all parties to utilize the taxable assessed value or post-exemption value when the parties were negotiating and confirming their agreement.

The emails between the parties during the negotiation of the agreement with specific reference to the values contained on the Property List Exhibits to the Settlement Agreement clearly show that both parties understood they were dealing with the post-exemption tax assessed values. Bill Harvey, Beaufort's attorney explains these emails that were submitted as evidence in this matter, in the context of the negotiation at the time. **[R. pp. 310-322, 328-329] [R. pp. 539-541, 551]** In summary, these emails show that the parties set out to agree, prior to the mediation, which properties were part of the agreement and the total value of those properties that were the subject of the agreement. The term taxable value is found throughout these documents. Specifically, the parties agreed

through these email conversations and subsequent telephone conversations that the "universe" of properties had a total taxable value of $17,055,504 for Beaufort and $10,064,713 for Port Royal. This was the agreed upon value basis to be utilized by both parties for the properties before heading to mediation. Additionally, there are emails between the parties during the drafting of the Settlement Agreement by Francis Cantwell, attorney for Port Royal, that clearly show all parties understood that they were dealing with the taxable assessed (post-exemption) values and a specific effort was made with regard to Paragraph 7 to make sure the word "tax assessed value" was utilized. **[R. p. 329-332]** Lastly, there is evidence that Burton Fire District never anticipated the amounts they claim were owed to them by Port Royal and Beaufort because, the amounts budgeted by Burton in its yearly budgets submitted to Beaufort County show amounts anticipated as income from Port Royal and Beaufort much more closely reflected the amounts Port Royal and Beaufort contend were to be paid. **[R. p. 503]**

Based on the foregoing, it is respectfully submitted that the language in the contract clearly incorporates the assessed values as shown on the October 16, 2010 tax bill as the values upon which the formulas for payment in the settlement were based. The assessed values on the October 16, 2010 tax bills are actually taxable assessed or post-exemption values. Even if the court were to find this language created an ambiguity, all the extrinsic evidence in this matter supports the finding that the parties intended to utilize the post-exemption or taxable assessed values.

II. The lower court failed to consider and address the affirmative defenses of the Town of Port Royal and Beaufort.

Port Royal and Beaufort asserted several affirmative defenses in their respective answers to the complaint. Specifically, the municipalities asserted that the actions of the Burton Fire District in entering the contract were *ultra vires*, as Burton's agreement to provide fire services in the municipalities was outside the authority of the fire district's enabling legislation, and, therefore, the Settlement Agreement, which is the subject of this litigation, is void ab initio. Additionally, the municipalities asserted the defenses of Estoppel, Waiver and Laches. Lastly, the Port Royal and Beaufort moved for reformation of the contract at trial, which was granted by the court. The order of the court fails to address any of these defenses in the original order and only states in the Order on the motion for reconsideration that the court rejects these defenses with no application of law or fact.

In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. Rule 52, SCRCP. A motion was made pursuant to this section advising the court of the lack of ruling on the affirmative defenses. The court only "rejected" those affirmative defenses, still making no finding of fact or conclusion of law.

a. Ultra vires activity of Burton

Burton is a public service district that provides fire protection, firefighting, and first response emergency medical services to the properties located within its district. It was established in 1973 with a grant of authority to act from the

legislature that was codified at Act No. 566, 1973 S.C. Acts. 1004-1006. In Section One, Act 556 provides that "[t]here is hereby created the Burton Fire District in Beaufort County, which shall include all of Beaufort Township *except the area within the corporate municipalities of Beaufort and Port Royal." (emphasis added) Act No. 566, 1973 S.C. Acts. 1004.* The Act goes on to enumerate the powers and duties granted to the district from the legislature. These powers range from buying equipment, procuring property for and construction of a fire station, procuring and providing for training, maintenance and repair of equipment, set forth policies and rules, and borrowing money. It allows for a tax levy, not to exceed five mills (which is presently over ten times that amount), for the appointment of a fire chief and board. Nowhere in this Act does it allow for the ability to contract with other municipalities to perform fire services in those municipal limits, and it specifically provides that fire services will not be performed by Burton in the municipal limits of Beaufort and Port Royal. The Settlement Agreement in this matter is in direct contravention to that mandate and is outside the specific authority granted to the Burton Fire District by the Legislature.

During the trial, Counsel for the municipalities questioned the Burton Fire Commissioner as to where the authority existed for the District to enter into a contract to provide fire services with the municipalities of Port Royal and Beaufort.

Lohr: Where in [Act 566] does the legislature give you all authority to provide fire services for outside the

boundaries as well as to contract with other governmental agencies?

Bright: I'm not sure this document does that.

Lohr: Okay. And is there a document that you believe does allow you to do that?

Bright: If there is, I haven't seen it.

[R. p. 121]

Burton Fire District is a creation of the legislature by state charter, akin to a municipal corporation. There is no authority in its enabling legislation to provide services outside of its district, and inside the municipal limits of Port Royal and Beaufort are specifically excluded. Furthermore, there is no authority to contract with other government agencies or municipalities to provide services.

In Barringer v. City Council of Florence, 41 S.C. 501, 19 S.E. 745, 747 (1894), the Supreme Court held that "[i]t is well settled that a municipal corporation has no powers except such as are conferred by its charter, it follows necessarily that any attempt on the part of the city council to act outside of the authority of its charter would be ultra vires and void. Additionally, "[t]hat which is illegal or ultra vires renders the proceedings void. State v. Norton, 69 S.C. 454, 48 S.E. 464, 465 (1904).

In a dissenting opinion in Newman v. Richland Cty. Historic Pres. Comm'n, 325 S.C. 79, 480 S.E.2d 72, 76 (1997), Justice Toal expounded on this principal of *ultra vires* conduct as it relates to a public service commission. She noted that

the relevant public service commission, the Richland Historical Public Service Commission

> was created by Act No. 69, 1963 S.C. Acts 63. This Act enumerates the powers of the Commission, declaring that the Commission has the power to "acquire, own, hold in trust, preserve, restore, maintain, suitably mark, develop, advertise, and operate buildings and structures of historic significance, and the land upon which the same may be situate, in Richland County, and to receive funds, grants, donations and appropriations for the accomplishment of these purposes." 1963 S.C. Acts at 64, § 4(5). Moreover, "The Commission shall have power and authority to borrow money and to mortgage or pledge its real and personal property...." 1963 S.C. Acts at 65, § 8.1 Conspicuously absent from the above list of powers is the power to convey property. When a statute expressly enumerates the requirements on which it is to operate, additional requirements are not to be implied. Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996). The statute specifically sets forth the powers of the Commission; the power to convey property may not be implied from the statute. This would be consistent with the role of the Commission as a "Historic Preservation Commission."

Toal determined Actions of the commission in conveying property should be void as there was no authority to do those acts in the enabling legislation.

Clearly, the same would apply here. The enabling legislation limits the geographical boundaries of the Burton Fire District, specifically excluding the municipal areas of Port Royal and Beaufort. It then goes on to explicitly enumerate the powers it is granting to the District. Byrd, as cited by Justice Toal above is clear, that if there powers are specifically set forth, other powers may not be implied. Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996). Thus, Burton was never authorized to enter into the subject contract with Port Royal and Beaufort or to provide services in Port Royal and Beaufort, and its actions in doing so were *ultra vires* and, therefore the contract is *void ab initio*.

b. Estoppel, Waiver and Laches

First, as to the defenses of Estoppel, Waiver and Laches, the claims of Burton should be barred, particularly as to the payments made in 2011 to 2013. Burton accepted the payments of Beaufort and Port Royal made in 2011 based on the post-exemption values and there is no evidence that they took issue with these payments until fifteen months later. By that time, budgets had been established for these entities for the fiscal years 2012 and 2013. By failing to address the allegedly insufficient payments in 2011, they caused the Appellants to believe the payment was acceptable and the payment to be made in 2012 and 2013 would have already been budgeted based upon the accepted payment in 2011.

The elements of equitable estoppel as related to the party being estopped are:

> (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
> (2) the intention that such conduct shall be acted upon by the other party; and
> (3) actual or constructive knowledge of the real facts.

The party asserting estoppel must show:

> (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question;
> (2) reliance upon the conduct of the party estopped; and
> (3) a prejudicial change of position in reliance on the conduct of the party being estopped.

"Equitable estoppel is based on affirmative conduct between the parties." Strickland v. Strickland, 375 S.C. 76, 84-85, 650 S.E.2d 465, 470 (2007).

In order to show a waiver the waiver must have been

1) voluntary; 2) intentional; 3) an abandonment or Relinquishment of a known right; and 4) with actual or constructive knowledge of his rights or all material facts upon which they depended. "Where an implied waiver is involved, the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins." Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992) *quoting* Am.Jur.2d, Estoppel And Waiver, § 154, 158 (1966).

The elements of laches are:

1) Complaining party unreasonably delayed its assertion of a right;
2) With knowledge of the facts upon which he bases his claim or refusal to embrace opportunity to ascertain facts; and
3) Resulting material prejudice to the defendant.

Laches has been defined as "[n]eglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). To prove laches the defendant "must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant. Strickland v. Strickland, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007) *citing* Kelley v. Kelley, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct.App.2006). "Importantly, delay in the assertion of a right does not, in and of

itself, constitute laches; rather, '[s]o long as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts, there can be no laches.'" Mid-State Trust, II v. Wright, 323 S.C. 303, 307, 474 S.E.2d 421, 423-24 (1996) *citing* Archambault v. Sprouse, 218 S.C. 500, 63 S.E.2d 459 (1951).

Burton Fire District had the information available to it to know exactly how much money they should have been receiving and had the obligation to the public to budget accordingly, as a public service district. It should have known exactly how much money it would have been receiving in March 2011 under the Settlement Agreement. Burton's employees contend they thought the payment was too little but the only evidence is they accepted 2011 with no complaint, only brought it to the municipalities attention with 2012 payment when new calculations were required, and demanded the difference and interest in 2013 when this lawsuit was filed. They did this knowing that Beaufort and Port Royal likewise had to prepare budgets to anticipate how much tax money from the public would be required when approving their 2012 and 2013 budgets.

Based on the foregoing, the claims of Burton should be barred, particularly as to the payments made in 2011 to 2013. Burton accepted the payments of Beaufort and Port Royal made in 2011 based on the post-exemption values and there is no evidence that they took issue with these payments until fifteen months later. By that time, budgets had been established for these entities for the fiscal years 2012 and 2013. By failing to address the allegedly insufficient payments in 2011, they caused the Appellants to believe the payment was acceptable and the

payment to be made in 2012 and 2013 would have already been budgeted based upon the accepted payment in 2011. Burton has waived the right to claim a deficit on the 2011 payment or should be estopped from doing so. The defense of laches should bar the collection of 2012 and 2013 payments as Port Royal and Beaufort relied on the acceptance of the 2011 payment and the ensuing silence prior to June 2012 to establish a budget for fiscal year 2011-12 and 2012-13. Also, they should be barred from claiming pre-judgment interest penalties on these tax years.

Additionally, Burton should be estopped from claiming that the post-exemption taxable assessed value is not the intended "assessed value" to be utilized in the formula for payment in the Settlement agreement. By agreeing to the "universe of properties" and the amount represented by those properties in the pre-settlement agreement emails and during the drafting process of the settlement agreement and then contending that those agreed upon values are, in fact, not the values to be used in the formula, Burton's conduct (1) amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intended such conduct be acted upon by the municipalities; and (3) had actual or constructive knowledge of the real facts. Thus, the first three requirements of equitable estoppel are met. Clearly the municipalities relied on the representation to their detriment.

c. Reformation

Lastly, Port Royal and Beaufort moved for reformation of the contract at trial, which was granted by the court. **[R. pp. 380, 381]** The court failed to address the affirmative defense of reformation in either its original order of its order on the motion for reconsideration which specifically raised the issue to the court.

A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it. Id. A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended. Sims v. Tyler, 276 S.C. 640, 281 S.E.2d 229 (1981). Before equity will reform a contract, the existence of a mutual mistake must be shown by clear and convincing evidence. Id. The essential question becomes the parties' intent, and "[p]arol evidence is admissible to show mistake." Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 747 S.E.2d 176 (2013) "'A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended.'...'Existence of mutual mistake must be shown by clear and convincing evidence'" Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 51, 747 S.E.2d 178, 186 (2013) citing Crosby v. Protective Life Ins. Co., 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct.App.1987).

Although the clear and unambiguous language of the contract is controlling in contract construction cases, our jurisprudence has recognized that different

considerations apply where a party seeks reformation of a contract. In such circumstances, the rules of construction, such as the ban on extrinsic evidence, do not apply. "A contract may be clear and unambiguous as far as it goes and yet may not express the agreement of the parties, by reason of mutual mistake." Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 747 S.E.2d 176 (2013). "[A]mbiguity or uncertainty has nothing to do with the reformation of a written instrument, but rather reformation is adjudged because the instrument, by reason of mistake or fraud, does not embody the true agreement of the parties." Id. "Both the parol evidence rule and the doctrine of merger are rules governing the construction of written documents." Id. at 308, 350 S.E.2d at 197

"[E]ach suit for reformation stands on its own peculiar facts." Belin v. Stikeleather, 232 S.C. 116, 123, 101 S.E.2d 185, 188 (1957) (citation omitted). "Reformation is the remedy by which writings are rectified to conform to the actual agreement of the parties." Crosby, 293 S.C. at 206, 359 S.E.2d at 300.

As set forth above, there were multiple emails between counsel for the parties settling on the "Universe of Properties" and addressing the corresponding values to be used of $17,055.504 for the City and $10,064,713 for the Town from which the final agreement was drafted (numbers in Exhibits B and C) to contract. It is clear the parties had agreed to use the Taxable Value on Exhibits B and C. The Appellants clearly established that these values corresponded to the Assessed value on the October 16, 2010 tax bills.

Along with these emails was the testimony of Bill Harvey in the same regard. He testified that prior to the mediation he confirmed the agreement of the

parties to use those properties and values with Kuhn via telephone. He and Francis Cantwell further confirmed that all discussions of value during negotiations and in drafting the agreement between the parties dealt with what the taxable assessed value on exhibits B and C. **[R. pp. 310-322, 328-332 and R. pp. 190-195, 204-205, 215-224, 229-230]** Again this taxable assessed value was post exemption amount, but was indicated only as "Assessed Value" set forth on the tax bills referenced in the Settlement Agreement.

It is clear that both parties at the time of negotiation and the drafting of the agreement understood assessed value as referenced in the agreement to be the post-exemption value or the "taxable assessed value." There are no exhibits presented by Burton from that time period that dispute that contention.

III. The lower court erred in finding the position taken by the parties during previous summary judgment motions bears any relevance in this matter.

Initially the court held in its order that the parties stipulated that there was no ambiguity in the contract. The municipalities raised this as a ground for error in their motion for reconsideration. In response, in its order on reconsideration the lower court ruled that:

> Further, the Order is amended to modify that portion in which it is asserted that the parties "stipulated" to the unambiguity of the Settlement Agreement. While the motion correctly asserts that no technical "stipulation" occurred, in cross Summary Judgment motions (both denied) both parties argued that the Agreement, as a matter of law, should be interpreted in a manner consistent with unambiguity. While not a stipulation, and not the deciding factor in the Final Order, I find the parties' positions in that matter to be relevant.

A review of the transcript of the trial of this matter clearly demonstrates no such stipulation. The transcript reflects that Port Royal and Beaufort, while arguing the settlement agreement was unambiguous pursuant to the meaning of assessed value as defined Footnote 3 with reference to the 2010 tax bill, alternatively argued that if the court did not find that Footnote 3 was clear, it at least created an ambiguity in the Settlement Agreement requiring review of extrinsic material. **[R. pp. 378-381]** Additionally, the municipalities asserted reformation as an affirmative defense and argued that there was a clear understanding that all parties were using the taxable assesses post-exemption values. The court specifically acknowledges this in its ruling as to the amendment to add reformation of the contract as a defense and to allow in parole evidence. **[R. p. 381]**

Additionally Footnote 3 to the Court's Order references the cross motions for summary judgment and summary judgment and its relevance are referenced by the lower court in its order on the motion for reconsideration. There was no stipulation of unambiguity at trial and none in the Motions for Summary Judgment, or in the affidavits that were filed in support thereof. There is no record of the summary judgment hearing, so there is no recorded stipulation. Importantly, the cross summary judgment motions were denied. A denial of a summary judgment motion does not create any substantive ruling—or if anything is an indication that the court did NOT believe that the agreement was unambiguous as both parties moved. Port Royal and Beaufort asserted alternative grounds, one being the language is clear given the language in the

October 16, 2010 tax bills, and alternatively that if there was an ambiguity or mistake the parole and extrinsic evidence in this matter supports the municipalities positions. It is clear error for the court to rely on the assertion of no ambiguity at summary judgment, as it bears no relevance on the assertion of an alternative argument by the municipal parties.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the lower court failed to properly consider the language in the contract defining "assessed value" that incorporated by reference the "assessed values" set forth in the October 16, 2010 tax bills. Additionally, the lower court failed to consider and address the affirmative defenses of the Appellants. Lastly, the lower court erred in finding the position taken by the parties during previous summary judgment motions bears any relevance in this matter.

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November 20, 2017

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H. Dukes, III

Appellate Case No.: 2017-000620

RECEIVED
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SC Court of Appeals

BURTON FIRE DISTRICT.....Respondent,

vs.

CITY OF BEAUFORT.....Appellant.

And

BURTON FIRE DISTRICT.....Respondent,

vs.

TOWN OF PORT ROYAL.....Appellant.

APPELLANTS CITY OF BEAUFORT AND TOWN OF PORT ROYAL'S
CERTIFICATION OF COMPLIANCE WITH RULE 211(B)

I, the undersigned, as counsel for the Appellants, City of Beaufort and Town of Port Royal, certify that the within Final Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.

SIGNATURE PAGE FOLLOWS

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November 20, 2017