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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable Carmen T. Mullen, Circuit Court Judge

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Opinion No. 5807 (S.C. Ct. App. filed March 3, 2021)
Appellate Case No. 2021-000625

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Road, LLC and Pinckney Point, LLC of whom Road, LLC is the.....Petitioner,

v.

Beaufort County, a political subdivision of the State of South Carolina, .....Respondent.

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# REPLY BRIEF OF PETITIONER

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## REPLY ARGUMENT

In its brief the County makes four arguments for affirming the decision of the Court of Appeals. First, the County contends the Court of Appeals was correct in holding that that there was no evidentiary basis for Road LLC's damages because they were entirely speculative. **(Resp. Br. at pp. 12-17)**. Second, the County argues that, as a matter of law, it cannot be liable for breaching the implied covenant of good faith and fair dealing; according to the County, the express terms of the Settlement Agreement place no restrictions on the use or disposition of the Point Tract and contemplate only development by Pinckney Point, LLC. **(Id. at pp. 17-27)**. Third, the County asserts, for the first time after nine years of litigation, that the reserved powers doctrine precludes a finding that the County's purchase of the Point Tract somehow constitutes a breach of the Settlement Agreement. **(Id. at pp. 27-28)**. Finally, the County argues that the law of the case includes a ruling by the trial court that the Settlement Agreement became a nullity upon expiration of Pinckney Point, LLC's option. **(Id. at pp. 28-31)**.

As set forth in more detail below, none of the County's arguments suffices to uphold the decision of the Court of Appeals affirming the lower court's order granting the County's motion for JNOV and setting aside the jury verdict. As to the County's first argument, ample evidence was presented at trial to support the jury's verdict that Road, LLC suffered $5 million in damages; the fact that its damages were contingent on a future event does not make them speculative because there was extensive proof in the record supporting the jury's reasonable conclusion the event would probably have occurred but for the County's actions. As to the County's second argument, there was substantial evidence at trial that the County breached the implied covenant of good faith and fair dealing bypurchasing the Point Tract specifically to prevent its development, thereby frustrating the very purpose of the County's contract with Road, LLC. As to the County's third

argument, the reserved powers doctrine has no application because the County did not acquire the Point Tract through the power of eminent domain. Finally, as to the County's fourth argument, the law of the case does not to the trial court's ruling that the Settlement Agreement was a nullity because Petitioner appealed this ruling but it was not addressed by the Court of Appeals. **(Pet. Br. to Court of Appeals, App. pp. 2237-2238)**. Applying the stringent standard for granting a JNOV that respects the province of the jury and defers to the jury's findings this Court should reverse the Court of Appeals and lower court and reinstate the jury's verdict in favor of Road, LLC.

## I. The County incorrectly asserts that no evidence supported the verdict and that Road, LLC's damages were entirely speculative even though there was extensive evidence sufficient for the jury to reasonably find that Road, LLC sustained $5 million in damages.

Despite the considerable evidence supporting the jury's verdict, the County asserts that the Court of Appeals correctly held Road, LLC's damages were entirely speculative. As set forth in Petitioner's initial brief, the Court of Appeals ignored much of the evidence presented at trial and weighed the evidence that it did consider even though it is the jury's sole prerogative, not the court's, to evaluate the evidence. In doing so, the Court of Appeals ruled "Road LLC's expert [appraiser Thomas Hartnett] testified that the property was still worth $5 million after the County purchased the Point Tract. Thus, the evidence presented at trial indicated that the value of the property did not change." **(App. 2318)**. Although the appellate court "agree[d] . . . that the jury can accept or reject Hartnett's testimony regarding the value of the property," it reasoned, "without Hartnett's testimony, there was no evidence presented to the jury regarding the value of the Road Parcel." **(App. 2319)**. Based on this premise, it stated, "even if the jury ignored Harnett's testimony about the Road Parcel's current value, there was no other evidence presented regarding the value of the Road Parcel after the County had purchased the Point Tract." **(App. 2319)**.

Therefore, the court concluded, "the jury would have been left to speculate as to what damages Road, LLC suffered." **(App. 2319)**.

In its brief, the County contends the Court of Appeals correctly ignored the numerous evidentiary bases supporting the jury's verdict. The County's primary argument to this Court is that the $5 million in damages suffered by Road LLC "assume[s] the Road Parcel is used as an access point to a residential development similar to the one planned by Pinckney Point, LLC . . . ." **(Resp. Brief at 13).** Therefore, according to the County, "Road LLC would have needed to prove the Point Tract would have been bought by another party who was a developer . . . ***and*** that the developer desired to build a similar residential development to that planned by Pinckney Point, (meaning the fifty foot access would have been required), ***and*** that such other developer would have agreed to pay [$5,000,000]." **(Resp. Brief at 13)** (emphasis by Respondent).

The County is wrong to the extent it is arguing that Road, LLC had to prove each of these facts as stated by it with certainty. Instead, Road, LLC met its burden by proving facts that reasonably supported findings that it was more probable than not another developer would have purchased the Point Tract if Pinckney Point, LLC could not proceed, more probable than not this purchaser would have proceeded with the same or similar residential development plan, and more probable than not it would have paid as much as $5 million to acquire the Road Parcel to provide the needed right of way to this high end residential community IF the County had not interceded the moment it could for the express purpose of preventing these events from happening.

Road, LLC was not required to prove the exact identity of who would have purchased the Point Tract had the County not acted specifically to undermine one of the primary purposes of the Settlement Agreement. Nor did the law require Road, LLC to prove the exact development plans a future purchaser of the Point Tract would have pursued. All Road, LLC had to prove were facts

from which the jury could reasonably infer that it was more likely than not these events would have transpired but for the County's purchase of the Point Tract.

The County's argument is contrary to South Carolina law that the jury's determination of damages may depend to some degree on the consideration of future, contingent events, such as the likely development of the Point Tract had the County not acted with the stated intent of preventing the development of the Point Tract by another residential developer. See Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., 725 S.E.2d 112, 126, 397 S.C. 348, 374 (Ct. App. 2012); Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968) (". . . it does not matter that the determination of damages depends to some extent on the consideration of contingent events."). Road, LLC needed only present proof it suffered damages to a reasonable level of certainty. There was substantial proof of that at trial.

First, a jury could have based its finding on the actions of the County itself; if it was not likely another developer would have purchased and developed the Point Tract, then there would have been no need for the County to rush to purchase it a few days after the option of Pinckney Point, LLC expired for the stated purpose of preventing another developer from developing it per the approved development plan. **(App. at pp. 1248:4; Pl. Ex. 36 at App. p. 1662)**(Presentation to County in favor of acquisition of Point Tract because it "removes development threat – 70+ residences.").

All the pieces were in place for the Point Tract's residential development. Described as "attractive [a] sight as there is in all of Beaufort County," **(App. at p. 1779:9-10)**, the Point Tract was already zoned residential, and its zoning permitted the development of 76 residential lots. **(App. at p. 430:5-7)**. The County had granted conceptual approval for the development plan of these 76 lots. **(App.at pp. 509-510; 914:19-916:5; 1047, Pet. Ex. 111, App. at p. 1978)**. Further,

the Point Tract consisted of 229 "basically undeveloped" acres of pristine property surrounded by water on three sides, at the confluence of the Okatie and Colleton Rivers; most of the lots were highly desirable waterfront lots. **(App. at p. 1779:9-10)**. The approved development plan of 76 lots, **(App. at p. 430:5-7)**, was described at trial as "a relatively simple development. It's one lot to every, actually, four acres, which is [a] very low-impact, low-density project . . . ." **(App. at p. 867:17-19)**. Hartnett testified that, in his expert opinion, which was given to a reasonable degree of certainty, the lots alone "w[ere] going to produce 55 or 56 million dollars of gross sales." (**App. at p. 1183:21-24)**.

Notably, Pickney Point, LLC was not the only one preparing for the development of the Point Tract. Once it received a deed in lieu, Equity Resource Partners, III, LLC ("ERP") made certain that, during the options period of Pinckney Point, LLC, all development permits received by Pinckney Point LLC were assigned to it, **(App. at p. 1800).** The reasonable inference is that ERP wanted to ensure the permits to develop the Point Tract could be used by a developer other than Pinckney Point, LLC. From all this evidence, the jury could find that a development on the Point Tract requiring access across the Road Parcel would probably have occurred had the County not rushed to prevent it.

As stated above, the law of South Carolina allows a jury to consider contingent events in determining damages if a *reasonable basis of computation* of those damages is provided, allowing *a reasonably close estimate of the loss*. While the existence or amount of damages cannot be left to pure conjecture, the general rule is that the evidence must enable the jury to determine the amount of damages with *reasonable* certainty or accuracy when also considering contingent events:

> 'Proof of the amount of loss with absolute or mathematical certainty is not required, and **it does not matter that the determination of damages depends to some extent on the consideration of contingent events.** So, it had been held sufficient if a reasonable basis of computation is afforded, even though the result may be only approximate, or to adduce evidence which is the best the case is susceptible of under the circumstances and **which will permit a reasonably close estimate of the loss**.'

Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968) (quoting 25A C.J.S. Damages s 162(2), p. 80) (double emphasis added); see also, Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., 725 S.E.2d 112, 126, 397 S.C. 348, 374–75 (Ct. App. 2012) ("The determination of damages may depend to some extent on the consideration of contingent events if a reasonable basis of computation is provided, allowing a reasonably close estimate of the loss." (citation omitted)); Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC, 803 S.E.2d 475, 487, 420 S.C. 424, 446 (Ct. App. 2017) (citations omitted).

For example, in Magnolia North, a construction defect case, the contingent event was the amount of hidden property damage that might be uncovered during repairs to the defective buildings. The damages expert testified that in his experience an allowance for approximately 20% of the repair contract price is a reasonable approximation of the amount of the unknown damages. Id. at 126–27, 397 S.C. at 375. The court in Magnolia North found this testimony was sufficient proof of damages with respect to the future event. In this case, the exact identity of the subsequent developer of the Point Tract was not required when there was ample proof of the reasonable likelihood that the Point Tract would have been sold to be developed by another developer and Road, LLC would have sold the Road Parcel to the that developer but for the County's actions to prevent the development from ever occurring.

The County's argument that Road, LLC was required to prove exactly who would have developed the Point Tract and the precise development plan that would have been executed should be rejected for the additional reason that the County prevented those events from ever happening. See generally, Minter v. GOCT, Inc., 473 S.E.2d 67, 70, 322 S.C. 525, 529 (Ct. App. 1996) (When the wrongful act of the defendant is of such nature as to prevent determination of the exact amount of damages, the defendant is not allowed to insist on absolute certainty, but only that the evidence show the damages by reasonable inference); see also, Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984)(If plaintiff presents evidence that defendant's prevention substantially contributed to the nonoccurrence of a condition, the condition is excused unless defendant proves the condition would not have occurred regardless of prevention). Here, the County argues that the Court of Appeals should be affirmed because there was no evidence that "any developer other than Pinckney Point, LLC was interested in purchasing and developing the Point Tract, much less interested in pursuing a development similar to that hoped for by Pinckney Point, LLC and much less also purchasing the Road Parcel from road, LLC for $5,000,000." **(Res. Br. at 14).** The County's position totally ignores that *it* prevented other developers from purchasing the Point Tract, developing it, and purchasing the Road Parcel as an absolute legal necessity for any residential development there. **(App. at p. 1248:3-4)** (Beaufort County Administrator Gary Kubic testifying that in acquiring the Point "the primary use we wanted was to prevent the development of the property"). It also ignores the substantial proof that the residential development of the Point Tract and necessity of the Road Parcel for such a development was contemplated by the Settlement Agreement and served as the basis of Road, LLC's investment. **(Pet. Br. at 11-12).**

Moreover, as covered in Petitioner's initial brief, there was also ample proof of the amount of the damages sustained by Road, LLC. As explained in detail in its opening brief, there were at least three independent bases for the jury to conclude Road, LLC suffered $5 million in damages.

Road, LLC expert appraiser, Thomas Hartnett, testified that Road, LLC's damages were $5 million. **(App. at pp. 1184:3-5; 1177:11-1178:8)** (testifying that the highest and best use of the Road Parcel was as the exclusive access to a proposed residential development and that it was worth at least $5 million if used in that manner). Specifically, Hartnett's testimony included his opinion that "[Road Parcel] **was** worth **at least $5 million**" as the access point, or the key, to a residential development on the Point Tract. **(App. at p. 1178:8)** (double emphasis added). Hartnett used the past tense to express the value of the Road Parcel because the County intervened "to prevent the development of the property," as its own administrator admitted. **(App. at p. 1248:4)**. Contrary to the opinion of the Court of Appeals and position of the County, he did not testify that the County's purchase of the Point Tract had no impact on the value of the Road Parcel. Taken as a whole, his testimony is clear that the $5 million valuation for the Road Parcel is dependent upon it being used as a gateway to a residential development, its highest and best use. Moreover, it was the province of the jury to determine the meaning of Hartnett's singular answer that the Road Parcel was still worth $5,000,000 today, in light of his entire testimony.

Of course, Hartnett's testimony was not the only evidence presented at trial that the Road Parcel was worth at least $5 million to serve as access for the residential development on the Point Tract. There was other independent evidence supporting the jury's determination. Pinckney Point, LLC's purchase price of the Point Tract was reduced by approximately $5,000,000 to account for the risks associated with pending litigation over the available access to the Point Tract via the Road Parcel. See **(App. at pp. 505-506:21-2); (Pls. Ex. 84, App. at pp. 1883-1891)** (Q: "As a result of

this controversy over that access . . . was there an adjustment to the purchase price that you all were going to pay for Pinckney Point?" A: "Yes." Q: "And what was that adjustment?" A: "It was approximately five million dollars."); **(App. at pp. 206:21-207:2)**. Moreover, the $5 million that Pinckney Point LLC agreed to pay Road, LLC for the Road Parcel is additional independent proof presented to the jury which supports the verdict. **(App. at p. 1748)**; **(App. at pp. 1994-2001); (App. at p. 887:4-22**); **(App. at p. 886-887: 24-3).**

As a last resort, the County points to the liquidated damages clause in the Purchase and Sale Agreement between Road, LLC and Pinckney Point, LLC as proof that Road, LLC did not suffer damages because the liquidated damages were set at $10. The County's argument on this point is flawed for multiple reasons.

First and foremost, the County is simply making a factual argument, the same one it made to the jury, and the jury did not see it that way. The jury could easily have determined that even if Pinckney Point, LLC did not proceed with the development of the Point Tract and the purchase of the Road Parcel, Road, LLC probably would be able to sell it for at least the same amount to a subsequent developer, which is a finding entirely consistent with the verdict. Road, LLC still owned the Road Parcel, and it was worth $5 million to another residential developer, *until the County* acted to prevent the development of the Point Tract. The County fails to appreciate the inherent contradiction in its argument – that the Court should consider the liquidated damages provision of the contract but should totally ignore the purchase price provision of the contract even though that is the figure that is most pertinent. Regardless, the County is simply arguing the facts.

It is bedrock legal principle so well founded it needs no citation that in considering whether there was evidence to support the verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to Road, LLC, the nonmoving party. **(Pet. Brief at pp. 17-**

**18)**. Neither the trial court nor the Court of Appeals had authority to decide credibility issues, weigh the evidence and to resolve conflicts in the testimony or other evidence as they both did in reaching their separate determinations the verdict should be vacated and judgment entered for the County. For all of these reasons, as well as those detailed in Road, LLC's opening brief, this Court should reverse the Court of Appeals' decision and find that there was evidence at trial to support the verdict.

## II. The County's argument that because it did not breach an express provision of the Settlement Agreement it could not breach the implied covenant of good faith and fair dealing, is legally flawed. The covenant of good faith and fair dealing comes into play only in instances where there is no breach of an express provision of the contract.

The County's argument confuses breach of the implied covenant of good faith and fair dealing with breach of the express terms of a contract. The County asserts that, because there was no express provision of the Settlement Agreement that specifically precluded it from thwarting the purpose of the Settlement Agreement by purchasing the Point Tract to prevent its development, it was at liberty to do anything it wanted to subvert the primary purpose of the Settlement Agreement with impunity. Under the County's analysis, only the breach of an express provision of a contract could result in a breach of the implied covenant of good faith and fair dealing implied in the contract. The County's rationale is contrary to established South Carolina law and would render the implied covenant of good faith and fair dealing meaningless and obsolete.

As explained in Petitioner's opening brief, **(Pet. Brief at 24-25)**, the Court of Appeals failed to consider that, at trial, Road LLC argued the County breached the implied covenant of good faith and fair dealing by "preventing this two-tenths of a mile from being an access to a residential subdivision as contemplated in the settlement agreement." **(App. at p. 1462:17-19)**.

The jury was charged on this basis of liability and instructed as follows, without objection from the County:

> Ladies and gentlemen, there exists in every contract an unspoken, but legally enforceable promise of good faith and fair dealing. The concept behind the implied covenant of good faith and fair dealing is that the law will imply an agreement by the parties to do and perform those things that, according to reason and justice, they should do in order to carry out the purpose for which the contract was made.

**(App. at p. 1540:9-16)**. This covenant of good faith and fair dealing also requires that the parties to a contract not frustrate the purpose of the contract or impede its performance. See e.g., Boddie-Noell Properties, Inc. v. 42 Magnolia Partn., 344 S.C. 474, 485, 544 S.E.2d 279, 284 (Ct. App. 2000), aff'd as modified sub nom., 352 S.C. 437, 574 S.E.2d 726, (2002) (quoting 17A C.J.S. Contracts § 328, pages 282-284); Columbia East Associates v. Bi-Lo, Inc., 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989); Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 147 S.E.2d 481 (1966); see also, **(App. at pp. 1540:23-1541:25)** (circuit court's jury charge on breach of contract); **(App. at p. 1540:9-20)** (circuit court's jury charge on implied covenant of good faith and fair dealing).

Here, like every contract governed by South Carolina law, the Settlement Agreement included an *implied* covenant of good faith and fair dealing, meaning inter alia, that the County was not allowed to frustrate the purpose of the contract; in fact, by virtue of contracting, the County agreed to do and perform those things that, according to reason and justice, it should have done in order to carry out the purpose for which the contract was made. There was substantial evidence at trial that the purpose of the Settlement Agreement was to facilitate the development of the Point Tract, which necessarily includes the Road Parcel being used as the gateway to that development. See e.g., **(App. at p. 57)** (referencing "the development of the Point Tract as contemplated herein

. . ."); **(App. at 1747)** (Excerpt from Settlement Agreement: "Subject to the approval by Beaufort County of the plans to improve the roadway that is the subject of the Road Action and Variance Action, the parties hereto agree that the Road Parcel is and shall be a private road for the use and benefit of those parties described in the Right of Way and Easement Agreement, hereinafter defined."); **(Pet. Brief at 27-28)**.

The County contends that there can be no breach of an implied covenant of good faith where a party to a contract has done what the express provisions gave him the right to do. **(Resp. Brief at 19)**. Yet, in citing this rule, the County fails to identify any express provision in the Settlement Agreement permitting it to purchase the Point Tract to prevent the development contemplated by the contract. There is no such provision.

The County contends Road LLC's decision to contract with the County and to believe the County would live up to its word was a "mistake in judgment," and it describes the parties' contemplation that the Point Tract would be developed as "Road, LLC's beliefs, subjective intentions or private investment expectations." **(Resp. Brief at 20)**. This nonsensical position is once again a factual argument that was rejected by the jury. The parties' contemplation is referenced throughout the Settlement Agreement and even admitted by the County. See **(Pet. Brief at 27-28); (App. at pp. 1369:17-1371:20)** (Josh Gruber of the County discussing that the settlement language contemplated the development of the Point as a residential development). As such, the County's argument that "Road LLC's beliefs, subjective intentions, or private investment expectations cannot alter the express terms of the Settlement Agreement nor impose unwritten obligations under the guise of the implied covenant of good faith and fair dealing" falls flat. See **(Resp. Brief at 20)**.

The County's invocation of the parol evidence rule similarly misses the mark. As shown above, the Settlement Agreement specifically refers to the parties' contemplation of the development of the Point Tract. See e.g., **(App. at pp. 57, 1748)** (". . . for the development of the Point Tract as contemplated herein"). Further, the Settlement Agreement even expressly provides for, and contemplates, assignment of the development rights, stating: "PPLLC may assign its right and obligation hereunder in its sole discretion." **(App. at pp. 62, 1752)**. Thus, contrary to the County's assertion in its brief, **(Resp. Brief at p. 20-21)**, the jury did not need extrinsic evidence to determine that the contracting parties contemplated that the Point Tract might be developed by someone other than Pinckney Point, LLC. All the jury needed was the plain language of the contract. In any event, without objection from the County, the jury was instructed that "where the contract has more than one meaning, you may consider the circumstances surrounding the making of the contract to help you determine the real intention of the parties." **(App. at pp. 63-64)**. The County took no exception to this jury charge.

While it only needed the contract, the jury was presented with other evidence at trial from which it could have reasonably inferred the parties contemplated that one other than Pinckney Point, LLC would develop the Point Tract. As discussed in Petitioner's opening brief, such evidence included that, as part of the overall settlement with the County, Road, LLC deliberately structured its acquisition of the Road Parcel to place it in the position where any developer of the Point Tract would need to buy the Road Parcel, not just Pinckney Point, LLC, **(Pet. Brief at p. 25)**; that ERP required Pinckney Point, LLC to assign to it all the development permits and approvals obtained from the County, as well as provide regular updates on the same, **(Pet. Brief at p. 26)**; that the County admitted that it purchased the Point Tract to prevent its development; **(Pet. Brief at p. 27)**; and that the County's own representatives agreed one of the purposes of the

Settlement Agreement was for the County to facilitate the residential development of the Point Tract. **(Pet. Brief at pp. 27-28**).

The evidence that the parties contemplated residential development of the Point Tract or another developer was overwhelming, and it was not limited to development by Pinckney Point, LLC. All of this evidence is consistent with the contract and its purpose, and it was not offered to vary the terms of the contract, as prohibited by the parol evidence rule. McGill v. Moore, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009) ("The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary[,] or explain the written instrument.").

The "Complete Understanding" and "Admission of Liability" provisions in the Settlement Agreement do not change the conclusion that Road, LLC and the County entered the Settlement Agreement to facilitate the development of the Point Tract and that the County frustrated that purpose by purchasing the land from ERP immediately upon the expiration of the option of Pinckney Point, LLC, thereby breaching the covenant of good faith and fair dealing owed to Road, LLC. As discussed above, the express terms of the Settlement Agreement, which included an assignment provision, contemplated the development of the Point Tract by one other than Pinckney Point, LLC. Further, neither provision extricates from the Settlement Agreement the implied covenant of good faith and fair dealing, which is found in every contract under South Carolina law. Com. Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966) ("[T]here exists in every contract an implied covenant of good faith and fair dealing.").

For these reasons, the Court should reject the County's arguments, reverse the decision of the Court of Appeals, and reinstate the verdict of the jury.

### III. The County did not assert the reserved powers doctrine as a defense and, in any event, it has no application in the present case.

For the first time in nine years, the County argues in its brief that the reserved powers doctrine precluded the jury from issuing a verdict in favor of Road, LLC. This last minute Hail Mary likewise is not a valid basis for upholding the decision of the Court of Appeals.

As a threshold matter, the County failed to plead this doctrine in its Answer and, therefore, waived any right to rely on it as a matter of avoidance or affirmative defense. See Rule 8(c), SCRCP (requiring that "a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense"). As its note reveals, the purpose of Rule 8(c) is to avoid "surprise." Rule 8(c), note; see also, Garrison v. Target Corp., 429 S.C. 324, 360, 838 S.E.2d 18, 37 (Ct. App. 2020), reh'g denied (Feb. 20, 2020), cert. granted (Oct. 19, 2020), aff'd in part as modified, rev'd in part, 435 S.C. 566, 869 S.E.2d 797 (2022) ("Central to requiring the pleading of affirmative defenses is the prevention of unfair surprise. A defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense.") (internal quotation marks and citations omitted). This Court has defined the term "affirmative defense" as a defense that "'conditionally admits the allegations of the complaint, but asserts new matter to bar the action[,]'" Garrison v. Target Corp., 435 S.C. 566, 582, 869 S.E.2d 797, 806 (2022) (quoting O'Neal v. Carolina Farm Supply of Johnston, Inc., 279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983), and the term "avoidance" as "'the allegation or statement of new matter, in opposition to a former pleading, which, admitting the facts alleged in such former pleading, shows cause why they should not have their ordinary legal effect[.]'" Id. (quoting Avoidance, Black's Law Dictionary 136 (6th ed. 1990)).

Setting aside the fact that this novel argument has no application in the instant case, Rule 8(c) precludes the County from ambushing Road LLC with this unexpected defense before the South Carolina Supreme Court. Alternatively, the Court should exercise its discretion to ignore the County's argument that it should consider the reserved powers doctrine, despite not being pleaded or included in the record below. See I'On, L.L.C. v. Town of Mt. Pleasant, 526 S.E.2d 716, 724, 338 S.C. 406, 421 (2000) ("Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.").

It should also be noted that the County did not mention the reserved powers doctrine at trial nor in any previous brief at the trial or appellate level. Needless to say, the Court of Appeals made no reference to it either.

The County argues it cannot contract away its power of eminent domain. There is one insurmountable disconnect in this assertion. The County did not exercise the power of eminent domain nor try to exercise it with respect to either the Point Tract or the Road Parcel. The County bought the Point Tract pursuant to a contract of sale with ERP.

The County does not cite a single case wherein a court permitted a state or local government to avoid or impair its contractual obligations upon a theoretical finding that the contract bargains away a reserved power that had not been infringed. See **(Resp. Brief at pp. 27-28)** (citing Stone v. State of Mississippi, 101 U.S. 814, 818-21, 25 L. Ed. 1079 (1879) (holding that, because "[n]o legislature can bargain away the public health or the public morals," a lottery charter to a private corporation could be withdrawn at any time, as "a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal"); U.S. Tr. Co. of New York v. New Jersey, 431 U.S. 1, 21, 97 S. Ct. 1505, 1517, 52 L. Ed. 2d 92 (1977) (holding that the contract

clause prohibited bistate legislation that altered bond contracts); Pima Gro Sys., Inc. v. Bd. of Supervisors of King George Cnty., 52 Va. Cir. 241 (2000) (declaring that a consent agreement with the county to allow off-site transportation of biosolids stored on a farm was invalid and could not be assigned because the County did not have the power or authority to allow an activity made "illegal pursuant to a valid ordinance properly adopted by the County exercising police powers . . ."); Matsuda v. City & Cnty. of Honolulu, 512 F.3d 1148, 1156 (9th Cir. 2008) (finding that "the district court erred in applying the reserved powers doctrine to find that no constitutional violations occurred"); 108 Holdings, Ltd. v. City of Rohnert Park, 136 Cal. App. 4th 186, 189, 38 Cal. Rptr. 3d 589, 591 (2006) (holding that "the City's acceptance of [a] Stipulated Judgment does not constitute an improper surrender of its police power" and "reject[ing] [the plaintiff's] argument that the City's agreement to interpret its General Plan in a particular fashion amounts to an impermissible 'amendment' of the General Plan"); and Contributors to Pennsylvania Hosp. v. City of Philadelphia, 245 U.S. 20, 23, 38 S. Ct. 35, 36, 62 L. Ed. 124 (1917) (finding that a city did not violate the Contracts Clause by "exerting the right of eminent domain to provide for [a] street" after it entered into a contract over fifty years earlier with a hospital, pursuant to which it agreed not to appropriate any land on the grounds of the hospital, without its consent, for streets or alleys).

Putting aside the procedural bar to this argument arising from the County's failure to assert this defense in any prior pleading, brief, or other filing, the County has not brought forth any legal precedent that the reserved powers doctrine voids the Settlement Agreement, or otherwise permitted the County's breach thereof, due to some theoretical infringement of the eminent domain power, particularly where it was never purported to be exercised.

## IV. The trial court's finding that the Settlement Agreement was a nullity is not the law of the case because Road, LLC appealed this ruling to the Court of Appeals and the Court of Appeals failed to address it

The County argues that the law of the case includes a ruling by the trial court that the Settlement Agreement was a nullity. The ". . . doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case." Ross v. Med. Univ. of S.C., 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). An unappealed ruling is also the law of the case. Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Inj. Fund, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010). ("An unappealed ruling is the law of the case and requires affirmance." (citations omitted)).

There is a very large hole in this argument of the County as well. Road, LLC did in fact appeal this conclusion of the trial judge to the Court of Appeals. **(Pet. Br. to Court of Appeals, App. pp. 2237-2238)**, but the Court of Appeals did not rule on it.

The single case the County cites in support of its argument is easily distinguishable. In Transportation Insurance Company and Flagstar Corporation v. South Carolina Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (2010). 699 S.E.2d 687, 389 S.C. 422 (2010), the South Carolina Injury Fund transferred several cases pending on appeal before the Circuit Court directly to the South Carolina Supreme Court, including one in which a single commissioner found that the Fund had waived a laches argument by failing to assert it as an affirmative defense. Id. at 691. When the Fund raised laches on appeal, this Court concluded that the finding of waiver had become the law of the case, because "[t]he Fund failed to appeal the single commissioner's finding to the full commission[.]" Id. at 691-92.

As already pointed out, Road LLC did appeal the trial court's nullity ruling to the Court of Appeals. However, the Court of Appeals limited its decision to damages and, in doing so, did not

address the nullity issue. **(App. at p. 2319)** (". . . whether the County breached is inconsequential for the disposition of this case."). The Court of Appeals' decision is now before this Court for review. See Rule 242(a), SCACR ("The Supreme Court . . . may in its discretion . . . issue a writ of certiorari to review a final decision of the Court of Appeals."). Because the appellate court did not rule on the nullity issue, Road, LLC was not required to, and did not, include it as grounds for certiorari.

## CONCLUSION

Because of these fundamental errors in the decision of the Court of Appeals, including its failure to consider all the evidence and bases of liability in the light most favorable to Road, LLC when considering the County's Motion for JNOV, Road, LLC respectfully requests this Court reverse the Court of Appeals and reinstate the jury's verdict.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief of Petitioner complies with Rule 211(b), SCACR.

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