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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
Eugene C. Griffith, Jr., Circuit Court Judge

Circuit Court Cases No. 2019-CP-10-00846, -02131, and -02539

Court of Appeals Case No. 2019-000903
Opinion No. 5966 (S.C. Ct. App. filed February 1, 2023)

Supreme Court Case No. 2023-000778

City of Charleston,

Petitioner,

v.

City of North Charleston and Millbrook Plantation, LLC,

Respondents.

and

Millbrook Plantation, LLC

Plaintiff,

v.

City of Charleston,

Defendant.

and

City of Charleston,

Plaintiff,

v.

City of North Charleston and Millbrook Plantation, LLC

Defendants.

CITY OF CHARLESTON'S REVISED PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Petitioner, the City of Charleston ("Charleston"), certifies that the Court of Appeals filed its opinion in this matter on February 1, 2023 (the "Subject Opinion"), and that the Court of Appeals denied Petitioner's timely petition for rehearing by order filed April 14, 2023.

INTRODUCTION

This appeal concerns contests to two annexation ordinances enacted by Respondent the City of North Charleston ("North Charleston") pursuant to S.C. Code Ann. § 5-3-150(3), known as the "100% Annexation Method." The first ordinance was introduced on December 21, 2017 ("2017 Ordinance"), the second on March 15, 2018 ("2018 Ordinance").

The 2017 Ordinance included in the annexed property a parcel of land (the "Millbrook Parcel") owned by Respondent Millbrook Plantation, LLC ("Millbrook"). The description of the Millbrook Parcel in the 2017 Ordinance, as well as the sketches of the tract utilized for the annexation, showed its boundaries as extending to, and running along, the northernmost boundary of SC Highway 61. Since 2005, however, a portion of the Millbrook Parcel, specifically, a 100-foot-wide strip running along the northernmost boundary of Highway 61, has been within Charleston's corporate limits. Upon discovering this, North Charleston introduced and enacted the 2018 Ordinance in an attempt to cure the defective 2017 Ordinance.

Prior to the 2017 and 2018 Ordinances being introduced or acted upon, however, Charleston, on December 19, 2017, had already commenced annexation proceedings pursuant to S.C. Code Ann. § 5-3-15(1), known as the "75% Annexation Method" (the "Charleston Annexation"). Part of the property subject to the Charleston Annexation included the remainder of the Millbrook Parcel, i.e., the property North Charleston now claims was the only portion of the tract it sought to annex.

The circuit court rejected Charleston's challenge to the 2017 and 2018 Ordinances for lack of

standing. Most respectfully, the Court of Appeals erred in affirming the circuit court via the Subject Opinion, overlooking and/or misapprehending a number of material points, and this Court should issue a writ of certiorari and correct such error, because this matter implicates important issues of public policy that require proper adjudication to provide clarity and guidance to annexation jurisprudence.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the circuit court's dismissal of Charleston's challenges to the 2017 and 2018 Ordinances for lack of standing?

A. Did the Court of Appeals err in affirming the circuit court where the circuit court erred in concluding that this Court has declined to adopt the prior jurisdiction doctrine?

B. Did the Court of Appeals err in affirming the circuit court where the circuit court erred in dismissing Charleston's claims because Charleston had standing to assert that the prior jurisdiction doctrine applies?

C. Did the Court of Appeals err in affirming the circuit court where the circuit court erred in denying standing to Charleston where Charleston asserted infringement of its proprietary interests and statutory rights?

1. Did the Court of Appeals err in affirming the circuit court where the circuit court misinterpreted the general standing framework in the context of annexation challenges?

2. Did the Court of Appeals err in affirming the circuit court where the circuit court misread *St. Andrews* as limiting standing to challenge a 100% annexation to the state of South Carolina?

3. Did the Court of Appeals err in affirming the circuit court where the circuit court misinterpreted *Vicary* as implicitly abrogating the right of a party to challenge a 100% annexation that violates the party's proprietary interests or statutory rights?

4. Did the Court of Appeals err in affirming the circuit court where the circuit court erred in finding Charleston lacked standing to challenge the 2017 and 2018 Ordinances, both of which infringe upon Charleston's proprietary interests or statutory rights?

D. Did the Court of Appeals err in affirming the circuit court where the circuit court erred in interpreting the 2017 Ordinance to annex only property outside Charleston's municipal limits?

E. Did the Court of Appeals err in affirming the circuit court where the circuit court erred in construing Charleston's allegations in a light most favorable to Millbrook?

STATEMENT OF THE CASE

This appeal arises from three consolidated actions challenging cross-annexations by Charleston and North Charleston of the Millbrook Parcel.[1]

The Millbrook Parcel consists of approximately 31 acres located on Highway 61, also known as Ashley River Road, in Charleston County. (R. pp. 44–45 ¶ 4, pp. 109–110 ¶ 4.) On May 10, 2005, Charleston adopted Ordinance No. 2005-093 (the "2005 Ordinance"), which annexed the portion of the Millbrook Parcel lying within 100 feet of Highway 61. (R. p. 45 ¶ 9, p. 111 ¶ 14.)

On December 19, 2017, Charleston commenced the annexation of the remainder of the Millbrook Parcel (i.e., the Charleston Annexation) by accepting an annexation petition under the 75% Annexation Method authorized by § 5-3-150(1) and ordering the statutorily-required public hearing. (R. p. 45 ¶¶ 10–11, p. 111 ¶¶ 15-16.)

Two days later, on December 21, 2017, North Charleston gave first reading to the 2017 Ordinance to annex the Millbrook Parcel under the 100% Annexation Method in § 5-3-150(3), which ordinance it thereafter adopted on December 28, 2017. (R. p. 46 ¶¶ 14–15, p. 112 ¶¶ 19–20.) The 2017 Ordinance clearly describes the annexed property as including the portion of the Millbrook Parcel lying within 100 feet of Highway 61 that Charleston had already annexed in 2005. (R. pp. 12–15, pp. 303–306.)

[1] These actions are individually designated as Cases Nos. 2018-CP-10-00846 ("*Millbrook I*"), 2018-CP-10-02131 ("*Millbrook II*"), and 2018-CP-10-02539 ("*Millbrook III*"). On December 19, 2018, the circuit court consolidated them for all purposes. (R. pp. 38–39.)

Following a public hearing and first reading on January 23, 2018, Charleston adopted its annexation ordinance with respect to the portion of the Millbrook Parcel lying outside its then-existing corporate limits on April 10, 2018. (R. p. 46 ¶ 12, p. 111 ¶¶ 17–18.)

On March 15, 2018, North Charleston gave first reading to the 2018 Ordinance, purporting to amend or clarify the 2017 Ordinance by removing the portion of the Millbrook Parcel annexed by Charleston under the 2005 Ordinance. (R. pp. 307–309.) On March 22, 2018, North Charleston adopted the 2018 Ordinance. (R. p. 17, p. 113 ¶ 37.) By the time North Charleston took these actions, Charleston had not only accepted the annexation petition for the Millbrook Parcel and ordered a public hearing, but had also held the required public hearing and given first reading to the Charleston Ordinance. (R. p. 114 ¶ 40.)

On February 15, 2018, Charleston filed a notice of intent in *Millbrook I* to contest the 2017 Ordinance. (R. pp. 40–41.) The following day, Charleston served and filed the notice of intent with North Charleston's Clerk of Council. (R. pp. 40–41, p. 46 ¶ 17.)

On March 27, 2018, Charleston filed the summons and complaint in *Millbrook I*, asserting that the 2017 Ordinance was invalid because (1) the 2017 Ordinance illegally included property annexed by Charleston in 2005, and (2) Charleston took the first step to annex the remainder of the property before North Charleston, entitling Charleston to proceed with its annexation without interference from North Charleston. (R. p. 45 ¶ 5, 46 ¶ 16, pp. 46–47 ¶ 19.)

On April 24, 2018, Millbrook filed a notice of intent, summons, and complaint in *Millbrook II*, challenging the Charleston Ordinance annexing the balance of the Millbrook Parcel, a portion of which had already been annexed by Charleston in 2005. (R. pp. 85–99.)

On May 18, 2018, Charleston filed a notice of intent, summons and complaint in *Millbrook III*, challenging the 2018 Ordinance attempting to amend or clarify the property previously annexed

by North Charleston by omitting territory annexed by Charleston in 2005. (R. pp. 105–117.) Charleston alleged in *Millbrook III* that it had obtained prior jurisdiction over the Millbrook Parcel "by accepting the annexation petition, holding a public hearing, and giving first reading to the ordinance annexing the Millbrook Parcel into the City prior to North Charleston's beginning the process of passing [the 2018 Ordinance]." (R. p. 114 ¶ 40.) Charleston also alleged that the 2018 Ordinance could not "cure" the substantive defect regarding the legal description of the area purportedly annexed under the 2017 Ordinance. (R. p. 114 ¶¶ 38–39.)

On October 4, 2018, Millbrook moved to dismiss *Millbrook I* and *Millbrook III*, arguing that Charleston lacked standing to challenge the annexations. (R. pp. 144–147.) Following a hearing on October 24, 2018, the circuit court granted Millbrook's motions by order filed March 1, 2019 (the "Order"). (R. pp. 1–18, pp. 196–243.) Charleston received written notice of entry of the Order on March 4, 2019. (R. p. 182.) On March 5, 2019, the circuit court refiled the same order (the "Refiled Order"), and Charleston received written notice of its entry on March 6, 2019. (R. pp. 19–36, p. 182.) On March 14, 2019, Charleston timely moved to alter, amend, and reconsider the Order and the Refiled Order. (R. pp. 181–195.) On May 1, 2019, the circuit court entered an order denying Charleston's motion. (R. p. 37.)

This appeal (of the Order, the Refiled Order, and the order denying Charleston's motion to alter, amend or reconsider) timely followed by notice served and filed May 24, 2019,[2] and in due course, it was briefed and made ready for decision. Following oral argument on October 11, 2022, the Court of Appeals decided the appeal on February 1, 2023, via the Subject Opinion, affirming the circuit court. As certified above, the Court of Appeals denied Charleston's timely petition for rehearing on April 14, 2023.

[2] (R. pp. 314–317.)

This petition for a writ of certiorari timely follows.

STANDARD OF REVIEW

"In reviewing the dismissal of a claim for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 112, 659 S.E.2d 158, 161 (2008). "A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007).

ARGUMENT

I. The Court of Appeals erred in affirming the circuit court's dismissal of Charleston's challenges to the 2017 and 2018 Ordinances for lack of standing.

A. The Court of Appeals erred in affirming the circuit court where the circuit court erred in concluding that this Court has declined to adopt the prior jurisdiction doctrine.

Before North Charleston gave first reading to either the 2017 Ordinance or the 2018 Ordinance, Charleston had, in accordance with § 5-3-150(1), already accepted a petition to annex the portion of the Millbrook Parcel not annexed by the 2005 Ordinance and ordered a public hearing on the matter. (R. p. 17, p. 111 ¶¶ 15–16, p. 112 ¶ 19, p. 113 ¶ 37.) Charleston contended that these acts entitled it to complete the annexation without interference from North Charleston under the common law "prior jurisdiction doctrine," also called the "prior pending proceedings rule." (R. p. 45 ¶ 5, p. 46 ¶ 16, p. 47 ¶ 19.b, p. 114 ¶ 40, p. 115 ¶ 46.a.)

"The 'prior pending proceedings rule' provides that where two municipalities attempt to

annex the same area at approximately the same time, the legal proceedings first instituted, *if valid*, have priority." *City of Columbia v. Town of Irmo*, 316 S.C. 193, 196, 447 S.E.2d 855, 857 (1994) (emphasis added) (citing 1 Antieau *Municipal Corporation Law* § 1A.16 (1993); 2 McQuillan *Municipal Corporations* § 7.22A (1966)). In rejecting Charleston's argument for its application here, the circuit court erroneously held: "The Supreme Court of South Carolina has declined to adopt this rule as the law in this state, and this court likewise declines." (R. pp. 28–29.)

The *Irmo* Court did not decline to *adopt* the doctrine but merely declined to *address* it because—in stark contrast to the instant case, where there is no contention, much less any showing, that the Charleston Annexation was invalid or illegal—Irmo failed to commence a *valid* annexation proceeding before Columbia. *Id.* at 196, 447 S.E.2d at 857 (emphasis in original). At the very least, the erroneous reading of *Irmo* (by the circuit court, which the Court of Appeals erroneously affirmed) warrants reversal to consider whether and under what circumstances the prior jurisdiction doctrine should apply.

B. The Court of Appeals erred in affirming the circuit court where the circuit court erred in dismissing Charleston's claims because Charleston had standing to assert that the prior jurisdiction doctrine applies.

The issue of whether, and to what extent, the prior jurisdiction doctrine should be recognized in South Carolina is novel. "In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court." *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 656 (2006). The Court of Appeals should have tackled the issue, for reasons of sound public policy, and most respectfully, this Court should do the same.

"The rule that among separate equivalent proceedings relating to the same subject matter, that one which is prior in time is prior in jurisdiction to the exclusion of those subsequently instituted, applies, generally speaking, to and among proceedings for the municipal incorporation, annexation,

or consolidation of a particular territory." 2 McQuillin, *Municipal Corporations* § 7.39 (3d ed. 2006). "In proceedings of this character, while the one first commenced is pending, jurisdiction to consider and determine others concerning the same territory is excluded." *Id.* "Thus, where two or more bodies or tribunals have concurrent jurisdiction over a subject matter, the one first acquiring jurisdiction may proceed, and subsequent purported assumptions of jurisdiction in the premises are a nullity." *Id.*

"This principle of the common law is based upon the general public policy of the promotion of orderly administration of government and justice." *Id.* "Thus, the first of two or more annexation proceedings prevails over those subsequently commenced relating to the same territory." *Id.* "The jurisdictional priority based on priority in time ordinarily is determined by the time of commencement or initiation of the proceedings, and not by the time of completion, nor by another time or date." *Id.* "The taking of the first mandatory public procedural step in the statutory process for incorporation or annexation of territory ordinarily fixes the date of the commencement of the proceedings, for the purpose of the rule as to jurisdictional priority." *Id.*; *see also City of Burlington v. Town of Elon College*, 314 S.E.2d 534, 537 (N.C. 1984) ("[T]he prior jurisdiction rule is the majority rule and is applied 'universally' in 'conflicts between two municipalities attempting to assert jurisdiction over the same territory.'") (quoting *Comment, Municipal Corporations: Prior Jurisdiction Rule*, 7 W.F.L. Rev. 77, 79 (1970); *id.* (applying the prior jurisdiction rule to allow Burlington to complete annexation after it had taken the "first mandatory public procedural step" to annex property by adopting a resolution of its intent under the North Carolina procedures for involuntary annexations);[3] *Lincolnshire v. Highbaugh Realty Co.*, 278 S.W.2d 636, 637 (Ky. 1955)

[3] Charleston would note here that the *Burlington* Court rejected Elon College's argument that the prior jurisdiction doctrine should not apply because, unlike its *voluntary* annexation proceedings, Burlington's were *involuntary*, and thus their respective annexation

("It seems to be the general rule that in the case of rivalry between two annexing municipalities the one that takes the first 'public' procedural step takes priority.").

Courts and commentators overwhelmingly endorse the prior jurisdiction doctrine in the context of annexation litigation. And with good reason. *See Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule*, 63 N.C.L. Rev. 1260, 1265 (Aug. 1985) ("Perhaps the most significant attribute of the prior jurisdiction rule is that it enhances the predictability and order of annexation proceedings."); *id.* at 1267 ("Although none of the alternatives . . . is without drawbacks, the policy statements and the universal acceptance of the prior jurisdiction rule suggest widespread agreement that proceedings first begun are more likely to be well conceived than those subsequently begun."); *id.* at 1265 ("A rule declaring as the winner the first municipality to *complete* its proceedings would only encourage North Carolina municipalities to rush annexation proceedings in order to thwart the success of other proceedings begun earlier.") (emphasis in original); *id.* at 1265 ("Such a rule should ensure that annexation proceedings are predictable and orderly and that the better conceived plan, which furthers the interests of the greatest number of persons in an urban area, prevails.").

Moreover, the prior jurisdiction doctrine is in keeping with the General Assembly's mandate for comprehensive planning in the field of local government planning and land development, as set out in the South Carolina Local Government Comprehensive Planning Enabling Act of 1994,

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proceeding were not "equivalent:"

> For purposes of the prior jurisdiction rule, annexation proceedings, regardless of their nature, are 'equivalent proceedings,' and it is of no consequence which town or city the landowners prefer. In fact, it appears to be the very essence of the *involuntary* annexation procedures that the affected landowners have no choice, as long as the annexing body complies with the applicable statutes.

Id. at 538 (emphasis in original).

codified in Chapter 29 of Title 6 of the South Carolina Code. *See, e.g.,* S.C. Code Ann. § 6-29-510 (instructing local planning commissions to "develop and maintain a planning process which will result in the systematic preparation and continual re-evaluation and updating of those elements considered critical, necessary, and desirable to guide the development and redevelopment of its area of jurisdiction," based on "surveys and studies," including "an inventory of exiting conditions," "a statement of needs and goals," and "implementation strategies").

And as applied here, Charleston is entitled to assert protection under the prior jurisdiction doctrine because it took the first mandatory public procedural step of accepting an annexation petition and calling for the statutorily required public hearing before North Charleston did anything. *Cf. Sherman v. Reavis*, 273 S.C. 542, 546, 257 S.E.2d 735, 737 (1979) ("An ordinance is legally pending when the governing body has resolved to consider a particular scheme of rezoning and has advertised to the public its intention to hold public hearings on the rezoning."). Additionally, as discussed, *infra*, Charleston is entitled to the protection of the rule because it gave first reading and held a public hearing on its annexation of the remainder of the Millbrook Parcel prior to North Charleston commencing any *valid* legal proceedings to annex the same territory. *See Irmo*, 316 S.C. at 196, 447 S.E.2d at 857; *see also Bostick v. Beaufort*, 307 S.C. 347, 350, 415 S.E.2d 389, 391 (1992) (characterizing irregularities in the description of the property to be annexed as a "substantive defect" that may not be corrected through a subsequent ordinance).

The circuit court did not address how and when the prior jurisdiction rule should apply, having erroneously concluded that this Court had refused to adopt the rule, and the Court of Appeals followed suit, erroneously affirming the circuit court. Charleston respectfully urges the adoption of the rule and its application to the facts of this case. At the very least, the circuit court's order should have been reversed and the matter remanded, either with instructions to consider the novel issues

associated with applying the prior jurisdiction rule or with instructions clarifying when and to what extent the rule applies, with the instructions also directing the circuit court to consider whether any facts need to be developed further before rendering a final judgment on the issue. *See McNeil v. S.C. Dep't of Corr.*, 404 S.C. 186, 196, 743 S.E.2d 843, 849 (Ct. App. 2013) ("The trial court failed to consider whether this case posed a novel issue and whether the facts should have been developed further.").

C. The Court of Appeals erred in affirming the circuit court where the circuit court erred in denying standing to Charleston where Charleston asserted infringement of its proprietary interests and statutory rights.

Charleston contends that the 2017 and 2018 Ordinances infringe on its "proprietary interests or statutory rights" because the 2017 Ordinance included lands already in Charleston and because the 2018 Ordinance could not cure the substantive defect contained in the 2017 Ordinance. (R. p. 45 ¶ 5, p. 46 ¶ 16, pp. 46–47 ¶ 19, p. 110 ¶¶ 5 & 10, p. 111 ¶ 11, p. 115 ¶¶ 44 & 46.)

The circuit court limited standing to the State of South Carolina to contest 100% annexations, ignoring well-recognized precedent that parties such as Charleston have standing to challenge annexations infringing upon their proprietary interests or statutory rights. It is also axiomatic that a municipality has standing to challenge the annexation of property already lying within such municipality's corporate limits, and Charleston asserted a number of statutory rights that are infringed by the 2017 and 2018 Ordinances. Most respectfully, the Court of Appeals should have found that the circuit court's ruling that Charleston lacked standing to assert a violation of these rights was erroneous and should be reversed.

1. The Court of Appeals erred in affirming the circuit court where the circuit court misinterpreted the general standing framework in the context of annexation challenges.

The circuit court held Charleston lacked standing to contest the 2017 and 2018 Ordinances

because the statute authorizing the 100% Annexation Method does not accord standing to specific parties. The circuit court relied on this Court's decision in *Quinn v. City of Columbia*, 303 S.C. 405, 401 S.E.2d 165 (1991), in reaching this conclusion. (R. pp. 6–8.) The circuit court misconstrued *Quinn*.

The *Quinn* Court held that none of the parties had standing to challenge the annexation as owners of property within the area annexed. *Quinn*, 303 S.C. at 407, 401 S.E.2d at 166. However, nothing in *Quinn* suggests that any other basis for standing was offered, and appellate courts do not address questions that have never been raised. *Langley v. Boyter*, 284 S.C. 162, 181–82, 325 S.E.2d 550, 561 (Ct. App. 1984) ("The question here before us has never been answered because it has never been asked.").

The standing issue in *Quinn* turned, not on statutorily-accorded standing under the 100% Annexation Method, but on whether the challenged annexation was of such public importance so as to imbue standing to other interested parties—often designated as "non-statutory" parties or "strangers" to the annexation. *Quinn* acknowledged that, unless an ordinance was "absolutely void," it was not subject to challenge by private individuals, i.e., non-statutory parties, who were "strangers" to the annexation. *Id.* at 407, 401 S.E.2d at 166. As the challengers in *Quinn* contested the method of annexation, but did not contend the ordinance was unauthorized by law, the *Quinn* Court held that they did not establish standing. *Id.* at 407, 401 S.E.2d at 166–67.

Post-*Quinn* case law repeatedly confirms that standing to challenge a 100% Annexation is accorded to those who can allege the annexation infringes on their own "proprietary interests or statutory rights." *See County of Lexington v. Columbia*, 303 S.C. 300, 300, 400 S.E.2d 146, 147 (1991); *State v. City of Columbia*, 308 S.C. 487, 489, 419 S.E.2d 229, 230 (1992); *State ex rel. Condon v. City of Columbia*, 339 S.C. 8, 14, 528 S.E.2d 408, 411 (2000).

It is clear under *Quinn* and subsequent case law that Charleston has standing to challenge any annexation infringing upon its proprietary interests or statutory rights. Most respectfully, the Court of Appeals should have reversed the circuit court's contrary conclusion.

2. The Court of Appeals erred in affirming the circuit court where the circuit court misread *St. Andrews* as limiting standing to challenge a 100% annexation to the state of South Carolina.

In *St. Andrews Pub. Serv. Dist. v. City Council*, 349 S.C. 602, 603, 564 S.E.2d 647, 647–48 (2002), this Court reviewed a decision by the Court of Appeals that held a public service district had standing to contest 100% annexations because the district had alleged that the annexations were unauthorized by law, and, thus, met the public importance exception articulated in *Quinn*. The Court reversed the decision of the Court of Appeals and overruled the public importance exception established by *Quinn*. *Id.* It did not, however, displace or alter the law according standing to those who can demonstrate an annexation infringes on their proprietary interests or statutory rights.

Instead, *St. Andrews* laid out the requisites necessary to support standing to contest an annexation. *Id.* at 604–05, 564 S.E.2d at 648. *St. Andrews* specifically identifies parties with **statutory standing** to challenge annexations under section 5-3-150 and, with respect to 100% annexations, specifically states that "the challenger must assert an infringement of its own proprietary interests or statutory rights." *Id.* at 604, 564 S.E.2d at 648. *St. Andrews* stands for the proposition that, absent statutory standing, only the State may challenge a 100% annexation, when acting in the public interest. And the continued efficacy of this premise is established by post-*St. Andrews* case law. *See Ex parte State ex rel. Wilson*, 391 S.C. 565, 579, 707 S.E.2d 402, 410 (2011); *Vicary v. Town of Awendaw*, 425 S.C. 350, 356, 822 S.E.2d 600, 603 (2018).

The circuit court's conclusion that only the State may challenge a 100% Annexation contradicts *St. Andrews* and subsequent decisions, requiring reversal, as, most respectfully, the Court

of Appeals should have found.

3. The Court of Appeals erred in affirming the circuit court where the circuit court misinterpreted *Vicary* as implicitly abrogating the right of a party to challenge a 100% annexation that violates the party's proprietary interests or statutory rights.

Relying on *Vicary*, 425 S.C. 350, 822 S.E.2d 600, the circuit court held: "In *Vicary*, the court also noted the public importance exception to standing." (R. pp. 7–8.) "More importantly, the court failed to note an exception, which [Charleston] argues, that when a party alleges an infringement of a statutory and proprietary right [sic]." (R. p. 8.)

Vicary does not abrogate the general framework for standing to challenge 100% annexations set forth in *Quinn*, *St. Andrews*, and other cases, as the circuit court held. Instead, *Vicary* establishes that the public importance *exception* to the general standing requirements would apply, at the very least, when "nefarious conduct" is alleged. *See id.* at 358, 822 S.E.2d at 603-04 ("Although *St. Andrews* and *Town of Yemassee* set forth the general framework for resolving questions of standing pursuant to section 5-3-150, those cases are premised on a good faith attempt by the annexing body to comply with the statutory requirements."); *id.* at 360, 822 S.E.2d at 605 ("While this Court has previously declined to utilize the public importance exception in a zoning and annexation dispute, the unique facts present here compel a contrary decision.").

Charleston does not seek, as the circuit court suggests, to establish a "sliding scale" approach to standing in challenges to 100% annexations. (R. p. 7.) Instead, Charleston simply seeks to protect its proprietary interests and statutory rights in and to land legally within its borders, consistent with precedent of this State, as, most respectfully, the Court of Appeals should have recognized.

4. The Court of Appeals erred in affirming the circuit court where the circuit court erred in finding Charleston lacked standing to challenge the 2017 and 2018 Ordinances, both of which infringe upon Charleston's proprietary interests or statutory rights.

North Charleston twice attempted to annex the Millbrook Parcel utilizing the 100% Annexation Method. There is no question that, in *Millbrook I* and *Millbrook III*, Charleston alleges that the 2017 and 2018 Ordinances infringe upon Charleston's own statutory and proprietary rights over the Millbrook Parcel. (R. p. 46 ¶ 16, p. 110 ¶¶ 7–10, p. 111 ¶ 11, p. 115 ¶¶ 44 & 46.)

It is undisputed that the 2005 Ordinance annexed a portion of the Millbrook Parcel to Charleston. (R. p. 45 ¶ 5, p. 50 ¶ 5, p. 111 ¶ 14, pp. 119–120 ¶ 14, p. 141 ¶ 5.) Thus, since 2005, Charleston has had the statutory right to exclusive municipal jurisdiction over this property, as well as proprietary functions and interests of governmental dominion and control over this property, to include matters pertaining to taxation, land use, and the like. *See, e.g.,* S.C. Code Ann. § 5-7-30 (listing municipality's statutory rights with respect to property within its boundaries); S.C. Code Ann. § 5-21-110 (right to levy and collect taxes on personal and real property); S.C. Code Ann. § 5-7-80(1) (authority to abate nuisances); S.C. Code Ann. § 6-29-330(A) ("A municipality may exercise the powers granted under the provisions of this chapter in the total area within its corporate limits."); S.C. Code Ann. § 6-1-950 (establishing procedure for imposing development impact fee); S.C. Const. Ann. Art. VIII, § 15 (outlining constitutional right of municipal consent); S.C. Code Ann. § 5-3-150(1) (statutory right to annex property under 75% Annexation Method); S.C. Code Ann. § 5-7-280 (prescribing procedure under which corporate limits may be reduced).

Charleston has statutory standing because the 2017 Ordinance infringes on these statutory and proprietary rights by attempting to annex land within Charleston's municipal limits since 2005. It defies logic to suggest that one municipality may not challenge the annexation by another of property already within such municipality's corporate limits. *See Glaze v. Grooms*, 324 S.C. 249,

255-56, 478 S.E.2d 841, 845 (1996) (holding Charleston, "which owns the territory Town seeks to use to establish contiguity, claims a sufficient infringement of its interests to confer standing."); *St. Andrews*, 349 S.C. at 605, 564 S.E.2d 648 n.2 (recognizing Charleston had standing under *Glaze* to challenge an attempted incorporation of property already within its borders). The circuit court erred in its interpretation of the 2017 Ordinance, and erred in finding Charleston lacked standing to contest it.

Charleston also has statutory standing to contest the 2018 Ordinance, as its viability directly impacts Charleston's statutory and proprietary rights acquired in annexing the remainder of the Millbrook Parcel. As discussed, *supra*, the prior jurisdiction rule protects Charleston's annexation of the remainder of the Millbrook Parcel because, prior to North Charleston giving the 2018 Ordinance its first reading, Charleston had accepted a petition for the annexation of the remainder of the Millbrook Parcel, held the required public hearing, and given the ordinance first reading. (R. p. 17, p. 114 ¶ 40.) However, even if Charleston cannot avail itself of the protection of the prior jurisdiction rule, it nonetheless has standing to contest the 2018 Ordinance, as the validity of the 2018 Ordinance may have a direct bearing on the validity of the Charleston Annexation.

The 2018 Ordinance attempted to amend the legal description of the property annexed by the 2017 Ordinance, to exclude land already in Charleston. (R. pp. 16–18.) It was the responsibility of North Charleston to ensure the sufficiency of the legal description of the property being annexed. If that description was fatally defective, it cannot be cured by way of a corrective ordinance. *See Bostick*, 307 S.C. at 350, 415 S.E.2d at 391 ("We find that Ordinance 0-07-89 was fatally flawed from its inception as to annexation of the Bosticks' property. Ordinance 0-07-89 bestowed authority to annex only the property listed and described in the petitions. Hence, no subsequent action by the City could validate a portion of the ordinance which was a nullity upon origination."); 2 McQuillin,

Municipal Corporations § 7.5 (3d ed. 2006) ("The description of municipal boundaries or of municipal territory is invalid and ineffective where it is indefinite and uncertain"). Under Millbrook's reasoning, one municipality may destroy another's statutory standing through the simple expedient of passing an amendatory or clarifying ordinance. It is self-evident that a party has standing to challenge any action intended to deprive it of its existing standing.

The description of the annexed area in the 2017 Ordinance was "flawed from its inception" because it included land within Charleston. Because the 2018 Ordinance attempted to cure that deficiency, and if upheld, will affect Charleston's statutory and proprietary rights, including its rights relating to the remainder of the Millbrook Parcel and its standing to challenge the 2017 Ordinance, Charleston has standing to have the 2018 Ordinance judicially vetted.

In affirming the circuit court, the Court of Appeals overlooked and/or misapprehended the holding of *Bostick*. The defect found to be incurable in *Bostick* was an omission from the property description and map of a part of the area annexed. Here, the defect was the inclusion, in what must be admitted as a meticulously drawn property description and map, *of property already in another municipality*. Respectfully, such is hardly a mere technical error. Annexation jurisprudence, by its very nature, is a property-centric exercise. Annexation establishes the boundaries of municipal jurisdiction, to the exclusion of any other municipality. Property descriptions and maps are thus crucial to the exercise. Thus, errors in depicting property annexed by an ordinance are substantive, whether the error be one of omission or inclusion, or inadvertent or intentional.

The circuit court erred in disregarding Charleston's allegations that the 2017 and 2018 Ordinances infringed upon Charleston's proprietary interests and statutory rights, as, most respectfully, the Court of Appeals should have found.

D. The Court of Appeals erred in affirming the circuit court where the circuit court erred in interpreting the 2017 Ordinance to annex only property outside Charleston's municipal limits.

The circuit court held that the 2017 Ordinance "did not attempt . . . to annex property (the 100' strip) which was part of [Charleston]." (R. p. 10.) As a result, the circuit court concluded: "Without this, City's claim fails to state any valid claim for relief." (R. p. 10.) This holding and conclusion do not comport with the pleadings, the annexation ordinances attached to the Order, or the arguments of counsel.

As a preliminary matter, such a ruling would not impact Charleston's standing to assert that, under the prior jurisdiction doctrine, the 2017 Ordinance was invalid because Charleston took the first public step toward annexing the remainder of the Millbrook Parcel before North Charleston, as discussed, *supra*.

The ruling is also an inaccurate legal conclusion. "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Mikell v. Cty. of Charleston*, 386 S.C. 153, 160, 687 S.E.2d 326, 330 (2009). "When interpreting an ordinance, the legislative intent must prevail if it can be reasonably discovered in the language used." *Id.* "The determination of legislative intent is a matter of law." *Charleston Cty. Parks & Rec. Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). "An appellate court may decide questions of law with no particular deference to the trial court." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772–73 (2010).

The 2005 Ordinance annexed to Charleston the portion of the Millbrook Parcel lying within 100 feet of the right-of-way line for Highway 61, i.e. Ashley River Road. The 2017 Ordinance is attached as Exhibit 1 to the Order. The description of the area to be annexed clearly runs 733 feet lying along the "northernmost right-of-way line of Ashley River Road," and the exhibit attached to the 2017 Ordinance shows that the area to be annexed lies immediately adjacent to Ashley River

Road. (R. pp. 12–15.) These facts are uncontroverted and belie the holding of the circuit court that the 2017 Ordinance did "not attempt to annex" land in Charleston. (R. p. 10.)

The 2018 Ordinance, which is attached as Exhibit 2 to the Order and which attempted to fix the delict in the 2017 Ordinance, provides, in pertinent part: "[B]ased upon the then-existing Charleston County TMS mapping data, the accompanying map and legal description described Parcel TMS #361-00-00-006 as extending all the way to Ashley River Road . . . ." (R. p. 17 (emphasis added).)

North Charleston's protests to the contrary notwithstanding, legislation must be construed in light of the conditions obtaining at the time the legislation was passed, not based on after-acquired knowledge. *See Durant v. Bennett*, 54 F.2d 634, 639 (D.S.C. 1931) ("As has been pointed out by the Supreme Court in many cases, a statute must be construed . . . in the light of the condition obtaining at the time the statute was passed."); *see also State ex rel. Attorney Gen. v. Kizer*, 164 S.C. 383, 397, 162 S.E. 444, 449 (1932) (adopting *Durant* as the opinion of the Supreme Court of South Carolina); *Soc'y of Divine Word v. Cty. of Cook*, 247 N.E.2d 21, 25 (Ill. App. Ct. 1969) ("[W]e believe the intention should properly be determined with regard to general conditions at the time of enactment.").

The record demonstrates that, when the 2017 Ordinance was enacted, North Charleston believed, rightly or wrongly, inadvertently or otherwise, that the entire Millbrook Parcel lay within unincorporated Charleston County. As a result, North Charleston intended to, and in fact did, annex to the right-of-way line of Highway 61. (R. pp. 12–18.) The record demonstrates that, when the 2017 Ordinance was enacted, it included land annexed by Charleston in 2005. If such were not the case, the enactment of the 2018 Ordinance would be tantamount to an exercise in futility. Legislative bodies are not presumed to engage in futile acts. *Cf. Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406

S.C. 132, 145, 750 S.E.2d 65, 72 (2013) ("Because the legislature is presumed to be aware of prior legislation and does not perform futile acts, we find the 2008 amendment represents a conscious decision by the legislature to preclude partnerships from earning and passing through certain tax credits.").

The circumstance of the 2017 Ordinance reciting that "[t]he area proposed for annexation includes the parcel designated TMS # 361-00-00-006" is not dispositive of the issue of whether other property was also annexed. (R. p. 13.) That becomes especially clear when considering the annexed area does, in fact, include other property, that being the waters and river bottom of the Ashely River. (R. pp. 12–15.)

The circumstance of the 2017 Ordinance reciting all distances being more or less does not affect the placement of points described in the Ordinance, but would only affect, perhaps, the exact distances between those points. *See Kirven v. Bartell*, 266 S.C. 385, 389, 223 S.E.2d 597, 599 (1976) (explaining that the words "more or less," when used in connection with distance, intend to "cover some slight or unimportant inaccuracy" and enable an adjustment of distances "to the imperative demands of fixed monuments and boundaries"). But it is undeniable that the 2017 Ordinance establishes points at the northern right-of-way line of Ashley River Road and describes the southwestern line of the area annexed as "along the northernmost right-of-way of Ashley River Road." (R. pp. 12–13.)

In affirming the circuit court, the Court of Appeals overlooked and/or misapprehended the proven fact that the 2017 Ordinance included land already in Charleston, instead finding the 2017 Ordinance did not intend to annex what is now described Parcel 006-1. The Court deemed its inclusion in the 2017 Ordinance as being inadvertent, due to faulty County records. The consequence of these findings, however, is that Charleston is precluded from pursuing its statutory

right to annex the remainder of the Millbrook Parcel, an undertaking Charleston had indeed commenced before North Charleston had even introduced the 2017 Ordinance. The consequence of the Court's ruling is to withhold from Charleston statutory rights to annex because North Charleston and the property owner made a mistake, a mistake in which Charleston had no hand and of which it had no knowledge at the time it instituted its annexation proceedings of the remainder of the Millbrook Parcel. That North Charleston relied on faulty records should not serve as a barrier to Charleston pursuing its statutory rights to annex, especially when Charleston commenced its annexation effort of the remainder of the Millbrook parcel before North Charleston made its mistake. Moreover, the 2017 and 2018 Ordinances, being pursuant to the 100% method, beg the question of what property was described in the annexation petitions, a matter not in the record and one ripe for discovery. And in this regard it must be noted that, while the 2017 and 2018 Ordinances describe the area annexed as including Parcel 006, the area annexed includes other properties, those being the waters, marshes and river bottoms of the Ashley River.

Whether intentionally or not, the area annexed by the 2017 Ordinance includes the territory annexed by Charleston in 2005. This circumstance gives Charleston standing to contest its validity, as, most respectfully, the Court of Appeals should have found. *See Glaze v. Grooms*, 324 S.C. 249, 235, 478 S.E.2d 841, 845 (1996) (finding the City of Charleston had standing to contest incorporation of the Town of James Island because areas of the Town included lands already in Charleston); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008) (upholding North Charleston's challenge to Summerville's invalid attempt to annex territory which North Charleston also annexed). As discussed, *supra*, this circumstance also casts a cloud on whether, and when, North Charleston commenced a valid attempt to annex the Millbrook Parcel, for purposes of the prior jurisdiction rule.

E. The Court of Appeals erred in affirming the circuit court where the circuit court erred in construing Charleston's allegations in a light most favorable to Millbrook.

The circuit court, in interpreting the allegations in Charleston's complaints, concluded: "Examining the complaints, it is clear that the 100' strip of land was identified by the court records, prior to and on December 21, 2017, as TMS 361-00-00-006-1." (R. p. 8.) "This is the land City had annexed in 2005." (R. pp. 8–9.) "To succeed under any of City's causes of action, this court must interpret the 2017 Ordinance that it was annexing TMS 361-00-00-006-1." (R. p. 9.)

Neither this ruling nor the conclusion drawn therefrom comports with the allegations or the law requiring construction in a light most favorable to Charleston. *Plyler*, 373 S.C. at 645, 647 S.E.2d at 192.

Initially, Charleston can prevail under the prior jurisdiction doctrine regardless of what North Charleston intended to annex under the 2017 Ordinance because Charleston took the first public procedural step to annex the balance of the Millbrook Parcel before North Charleston did anything relating to the 2017 Ordinance.

The circuit court misconstrued Charleston's allegations, as emphasized in Charleston's motion to reconsider. (R. pp. 190–192.) Specifically, the circuit court construed the complaints as alleging that TMS No. 361-00-00-006-1 had been established before North Charleston's purported annexation of the Millbrook Parcel, such that the 2017 Ordinance's reference to TMS No. 361-00-00-006 could only be interpreted to include property outside Charleston's municipal limits. This construction is not correct.

The allegations in *Millbrook I*, read in a light most favorable to Charleston, establish that, at the time North Charleston passed the 2017 Ordinance, North Charleston's City Council purported to annex property, "**currently** designated as Charleston County TMS 361-00-00-006 and 361-00-00-

006-1." (R. pp. 44–45 ¶ 4 (emphasis added).) This allegation clearly indicates that TMS 361-00-00-006-1 had been created by the time the complaint in *Millbrook I* was filed. It does not suggest that TMS 361-00-00-006-1 had been created at the time the 2017 Ordinance was given first reading or adopted, as the circuit court concludes.

In *Millbrook III*, challenging the 2018 Ordinance, Charleston alleges:

> This action is brought pursuant to section 5-3-270 of the South Carolina Code, challenging Ordinance No. 2018-017 (the "Contested Ordinance" or "Ordinance"), adopted by the City Council of North Charleston on March 22, 2018, purporting to amend and supplement Ordinance No. 2017-083, adopted by the City of North Charleston on December 28, 2017, whereby the City of North Charleston purported to annex, upon petition of Millbrook that certain tract of land **previously designated as Charleston County TMS Nos. 361-00-00-006 and presently designated as Charleston County TMS Nos. 361-00-00-006 and 361-00-00-006-1 (the "Millbrook Parcel")**."

(R. pp. 109–110 ¶ 4 (emphasis added).)

While Charleston alleged in the *Millbrook III* complaint (¶ 21), relied upon by the circuit court, that "[p]rior to and on December 21, 2017, Charleston County's records showed a portion of the Millbrook Parcel lying within the municipal limits of the City of Charleston," Charleston never alleged that this portion of the Millbrook Parcel had been designated as TMS No. 361-00-00-006-1 on or before December 21, 2017. (R. p. 112 ¶ 21.) The same may be said for Paragraph 22 of the *Millbrook III* Complaint, also relied upon by the circuit court, which contains no allegations that a portion of the Millbrook Parcel had been designated as TMS No. 361-00-00-006-1 on or before December 28, 2017. (R. p. 112 ¶ 22.)

Although a portion of the Millbrook Parcel was annexed to Charleston in 2005, and although the County's records reflect this annexation, it is unclear when a separate TMS number was created for the portion annexed by Charleston in 2005. The allegations in Charleston's complaint, construed in a light most favorable to Charleston, establish that Charleston pled: (1) the County's records

reflected that a portion of the Millbrook parcel had been annexed into Charleston in 2005, and (2) TMS No. 361-00-00-006-1 was shown at the time Charleston filed its complaints. This construction is buttressed by the recitations in the 2018 Ordinance that the new TMS number was created after North Charleston adopted the 2017 Ordinance on December 28, 2017, and by North Charleston's explanation at the hearing on Millbrook's motions to dismiss. (R. pp. 219:24–220:13, p. 308.)

In affirming the circuit court, the Court of Appeals overlooked and/or misapprehended the posture of the cases, that being motions to dismiss pursuant Rule 12(b)(6), SCRCP, the sole ground of which was Charleston's supposed lack of standing. The inquiry on such motions is, of course, limited to the allegations of the pleadings, the question being "whether, in the light most favorable to the plaintiff, with every doubt being resolved in his behalf, the complaint states any valid claim for relief." *Plyer*, 373 S.C. at 645, 647 S.E.2d at 192.

The Court of Appeals overlooked and/or misapprehended the fact that, as to the 2017 Ordinance, Charleston pleaded and the 2017 Ordinance itself on its face proved, the property sought to be annexed extended to the northernmost right-of-way line of SC Highway 61 and that, in doing so, plainly included property that had been in Charleston since 2005. The pleadings thus plainly demonstrated Charleston's statutory rights and governmental interests in a portion of the area sought to be annexed, the cornerstone for standing to contest an annexation accomplished under the 100% petition method of annexation. The Court of Appeals overlooked and/or misapprehended this circumstance and instead rendered a decision on the merits of the question of whether the apparent defect of the 2017 Ordinance could be cured, an issue not argued to, or ruled on by, the circuit court. The only matter before the court was whether the pleadings, viewed in a light most favorable to Charleston, supported its standing.

The circuit court misconstrued Charleston's complaints and misapplied its standard of

review. This error colored its ruling both on whether Charleston had standing to challenge the 2017 and 2018 Ordinances as violating Charleston's statutory rights *and* the acts which Charleston had undertaken to annex the remainder of the Millbrook Parcel prior to North Charleston's commencing any valid annexation proceeding of its own, implicating the pending jurisdiction doctrine, as, most respectfully, the Court of Appeals should have found.

CONCLUSION

For the foregoing reasons, Charleston asks this Honorable Court to grant the instant petition, to reverse the Subject Opinion, and, in turn, to reverse the circuit court.

Respectfully submitted,

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Charleston, South Carolina

June 20, 2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
Eugene C. Griffith, Jr., Circuit Court Judge

Circuit Court Cases No. 2019-CP-10-00846, -02131, and -02539

Court of Appeals Case No. 2019-000903
Opinion No. 5966 (S.C. Ct. App. filed February 1, 2023)

Supreme Court Case No. 2023-000778

City of Charleston,

Petitioner,

v.

City of North Charleston and Millbrook Plantation, LLC,

Respondents.

and

Millbrook Plantation, LLC

Plaintiff,

v.

City of Charleston,

Defendant.

and

City of Charleston,

Plaintiff,

v.

City of North Charleston and Millbrook Plantation, LLC

Defendants.

PROOF OF SERVICE

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Attorneys for the City of Charleston

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for the City of Charleston, hereby certify that the **CITY OF CHARLESTON'S REVISED PETITION FOR A WRIT OF CERTIORARI** was served on June 20, 2023, on all parties to this matter via emailing (see attached) a copy of the same to the following:

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I also certify that, on June 5, 2023, the **CITY OF CHARLESTON'S REVISED PETITION FOR A WRIT OF CERTIORARI** was filed with the South Carolina Court of Appeals via emailing the same to ctappfilings@sccourts.org.

Respectfully submitted,

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June 20, 2023

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Subject: City of Charleston v. City of North Charleston (Sup. Ct. 23-000778 // Ct. App. 19-000903) - (CR 210598)
Attachments: Charleston v. N. Chas. -- Revised Cert Petition.pdf

Enclosed please find the City of Charleston's Revised Petition for a Writ of Certiorari which will be filed today in the above-referenced matter.

Thank you,

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