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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5965 (S.C. Ct. App. filed February 1, 2023)
Appellant Case No. 19-000728

National Trust for Historic Preservation in the United States and the City of Charleston ..... Petitioners,

v.

City of North Charleston ..... Respondent.

PETITION FOR A WRIT OF CERTIORARI OF NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES

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CERTIFICATE OF COUNSEL

Counsel for Petitioner the National Trust For Historic Preservation in the United States (hereinafter the "Petitioner" or "National Trust") certifies that the National Trust filed its Petition for Rehearing on March 20, 2023, and that the Court of Appeals denied the Petition by order dated May 11, 2023.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err and fail to follow precedent governing the standard for standing in the timely challenge of Petitioners to an annexation by the Respondent City of North Charleston where the Court of Appeals held that North Charleston could annex only property it owned under S. C. Code § 5-3-100, even though it is undisputed that the description of the territory annexed in the ordinance for annexation included a small portion of the adjoining property owned by the National Trust that was within the City of Charleston?

2. Did the Court of Appeals err and fail to follow precedent governing the standard for determining the territory annexed by considering extrinsic evidence of North Charleston's subjective intent as to what land it intended to annex rather than the legal description of the land annexed as set forth in North Charleston's annexation ordinance?

3. Did the Court of Appeals err and fail to follow precedent governing proprietary standing in upholding the lower court's determination the National Trust did not have standing even though it is undisputed that a portion of the property annexed was owned by the National Trust?

4. Did the Court of Appeals err in upholding the lower court's determination that the National Trust and Charleston did not demonstrate a basis for public importance standing, given North Charleston's gross violation of the laws governing annexation and the need for future guidance on whether a municipality may annex property by crossing over properties in another municipality to annex property that is neither contiguous with nor adjacent to the annexing municipality, as occurred here?

OVERVIEW

This case involves a challenge by Petitioners, the National Trust and City of Charleston ("Charleston"), to an unprecedented annexation by Respondent, City of North Charleston ("North Charleston"), of an acre of land that was separated from the existing limits of North Charleston by two properties within Charleston and that included a small portion of property owned by the National Trust. The lower court granted the motion for summary judgment of Respondent, North Charleston, on the basis that neither the National Trust nor Charleston had standing. **(R. pp. 1-28)** The lower court further ruled that if the Petitioners had standing, the annexation was legally invalid because the land annexed was not "adjacent" to the limits of North Charleston but, instead, separated from its municipal limits by two parcels within Charleston. **(R. pp. 1-2, 13-14)**.

In its Opinion No. 5965 (the "Opinion") issued February 1, 2023, National Trust for Historic Preservation in United States et al v. City of North Charleston, 439 S.C. 222, 886 S.E.2d 487 (Ct. App. 2023), the Court of Appeals upheld the lower court's ruling on standing and did not reach the issue of the legitimacy of the annexation if there were standing. 886 S.E.2d 491.

As stated in more detail below, the Opinion transgresses settled precedent of this Court governing standing in annexation cases and on the inviolate requirement of contiguity for annexation. The National Trust respectfully requests that this Court grant certiorari and review the decision of the Court of Appeals.

STATEMENT OF THE CASE

This controversy started on December 21, 2017, when Respondent, North Charleston, adopted Ordinance No. 2017-080 (the "Contested Ordinance") **(R.pp. 293-295)** to annex an acre of real property purportedly owned by North Charleston. North Charleston proceeded with the annexation under the statutory method for annexation afforded a municipality where the annexed

"territory" is ***entirely*** owned by the annexing municipality. See S.C. Code Ann. § 5-3-100.[1] **(Contested Ordinance, R.pp. 293-295).** The real property purportedly annexed by North Charleston consists of one (1) acre designated as TMS #301-00-00-797 (the "Acre").[2] The National Trust did not consent to the annexation even though a small portion of the Acre annexed is owned by it, not North Charleston, and within the boundaries of Charleston.

On March 20, 2018, after timely noticing their intent to contest this annexation, the National Trust and Charleston (sometimes jointly referred to as the "Petitioners") filed an action in circuit court challenging the annexation and asserting, inter alia, that the annexed land was not adjacent to, nor contiguous with, North Charleston and that the annexation was void and unauthorized as a matter of law. **(Petitioners' Notice of Challenge of Annexation, R.pp. 30-31; Petitioners' Summons & Compl., R.pp. 32-43).** Lying and intervening between the corporate limits of North Charleston and the Acre are the right-of-way for S.C. Highway 61 and real property owned by the National Trust that both lie within the municipal boundary of Charleston. **(Hrg. Tr. R.pp. 221:24-222:1)**. On April 16, 2018, North Charleston filed an answer denying these allegations, asserting affirmative defenses, and filing counterclaims against the Petitioners. **(North Charleston Answer, Affirmative Defenses and Counterclaims, R.pp. 47-58)**. North Charleston's counterclaim requested a declaration that the Acre did not encroach on the adjacent

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[1] S. C. Code Ann. Section 5-3-100 provides, in pertinent part, as follows: "If the territory proposed to be annexed *belongs entirely* to the municipality seeking its annexation and is adjacent thereto, the territory may be annexed by resolution of the governing body of the municipality. ... Upon the adoption of the resolutions required by this section and the passage of an ordinance to that effect by the municipality, the annexation is complete." S. C. Code Ann.§ 5-3-100 (emphasis added).

[2] Prior to the purported annexation of the Acre, in October 2017, North Charleston annexed another parcel of real property known as Runneymede Plantation, which is a 113-acre parcel identified as TMS #361-00-00-002 (the "Runneymede Parcel") located directly across the Ashley River from the municipal boundaries of North Charleston. **(Hrg. Tr. R.p. 182:11-13)** No annexation challenge was filed by Petitioners or others because the Runneymede Parcel is contiguous to the municipal boundaries of North Charleston.

land owned by the National Trust and seeks a determination that North Charleston is the legal owner of the entire Acre. **(Id. at ¶ 61-63, R.p. 56).** On May 17 and 21, 2018, respectively, Petitioners filed separate replies denying the counterclaims. **(National Trust Reply to Counterclaims of City of North Charleston, R.pp. 63-66; City of Charleston Reply to Counterclaims of North Charleston, R.pp. 59-62)**.

On October 9, 2018, North Charleston served: (1) its motion for partial summary judgment pursuant to Rule 56, SCRCP, requesting an order that annexations under S.C. Code § 5-3-100 do not require contiguity and that the Acre was "adjacent" to North Charleston at the time of annexation; and (2) its motion to dismiss pursuant to Rules 12 and 56, SCRCP, arguing that Respondents/Appellants lacked standing to challenge the annexation. **(North Charleston Mot. for Partial Summ. J., R.p. 67; North Charleston Mot. To Dismiss, R.p. 68).** North Charleston accompanied its motions with the affidavit of Adam MacConnell who authenticated certain minutes of council, ordinances, and instruments of record attached to his affidavit. **(Aff. of MacConnell, R.pp. 240-241)**.

On November 9, 2018, Petitioners moved for summary judgment on the grounds that, inter alia, the purported annexation of the Acre was void since the Acre is neither adjacent to, nor contiguous with, the corporate limits of North Charleston and that the Acre annexed included land owned by the National Trust within the City of Charleston. **(Petitioners' Mot. for Summ. J, R.pp. 69-72)**. On December 6, 2018, Petitioners served the affidavit of Daniel C. Forsberg in opposition to North Charleston's motions attesting that the annexed Acre included land belonging to the National Trust. **(Aff. of Forsberg, R.pp. 242-245)**.

The Honorable Eugene C. Griffith, Jr., circuit judge, held a hearing on the motions on December 10, 2018. **(Hrg. Tr., R.pp. 177-239).** On March 1, 2019, Judge Griffith signed a

written order finding that Petitioners did not have standing to challenge the annexation. **(Order, R.pp. 1-28).** In the same order, Judge Griffith held that "[i]n the event that [the circuit court] is found to be in error regarding its ruling of lack of standing of the [Petitioners], this Court finds that North Charleston did not lawfully annex the one acre parcel under the annexation statute." **(Order, R.pp. 1-2, 13-14, 27-28).** Petitioners received written notice of the entry of the order on March 4, 2019. The order was re-filed on March 5, 2019. **(Re-filed Order, R.pp. 15-28).** On March 14, 2019, Petitioners separately filed motions to reconsider, alter, or amend the Order that were denied by Judge Griffith by Order filed on May 1, 2019. **(National Trust Mot. to Reconsid., R.pp. 167-176; City of Charleston Mot. to Reconsid., R.pp. 155-166; Order Denying Mots. To Reconsid., R.p. 29).**

On April 29, 2019, North Charleston filed a cross appeal of portions of the Order in the event that the Petitioners appealed the Order. **(North Charleston Notice of Cross Appeal, R.pp. 358-362).** After the circuit court's denial of their motions to reconsider on May 1, 2019, Charleston served its notice of appeal on May 24, 2019, and the National Trust served its notice of appeal on May 31, 2019. **(City of Charleston Notice of Appeal, R.pp. 363-365; National Trust Notice of Appeal, R.pp. 368-369).**

STATEMENT OF THE FACTS

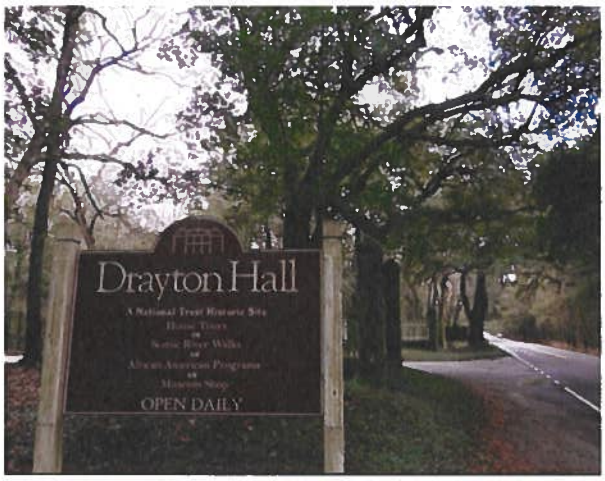
All the parcels involved or related to this annexation are within the Ashley River Historic District (the "Historic District") that is listed in the National Register of Historic Places (the "National Register").[3] **(National Trust Mem. In Opposition To Defendant's Mot. To Dismiss,**

[3] The National Register of Historic Places is the official list of the nation's historic places worthy of preservation. Authorized by the National Historic Preservation Act and managed by the National Park Service, the National Register is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect America's historic and archaeological resources. 54 U.S.C. § 302101 *et. seq.* The National Register is an authoritative guide to be used

R.p. 87). The Historic District is approximately 23,000 acres of undeveloped land that includes historic and archaeological resources that date to the earliest settlement of Charleston in the late 1600s. **(Id., R.p. 88).** Important historic resources in the Historic District include the 11.5 mile stretch of S.C. Highway 61 (also known as the Ashley River Road) (individually listed on the National Register and a resource that contributes to the significance of the Historic District), which has served as a major transportation route since 1691 and is known for its historic viewshed canopy of live oak trees, and Drayton Hall, a National Historic Landmark[4] owned by the National Trust that is considered the earliest and finest example of Palladian architecture in the United States. **(Id.).**

by Federal, state, and local governments, private groups, and citizens to identify the nation's cultural resources and to indicate what properties should be considered for protection from destruction or adverse impacts. 36 C.F.R. § 60.2. Listing in the National Register also makes property owners eligible to be considered for Federal grants for historic preservation and other Federal and state financial incentives, such as historic rehabilitation tax credits. Id. § 60.2(b), (c). A property can be removed from the National Register if the qualities which caused it to be originally listed have been lost or destroyed. 36 C.F.R. § 60.15.

[4] National Historic Landmarks ("NHLs") are historic places that hold exceptional national significance and receive heightened protection under Section 110(f) of the National Historic Preservation Act. 54 U.S.C. § 306107. Authorized by the Historic Sites Act of 1935, the Secretary of the Interior designates these places as exceptional because of their abilities to illustrate the United States' heritage. Today, there are only about 2,600 NHLs in the United States. See http://www.nps.gov/articles/roots-of-the-national-historic-landmarks-program.htm (accessed Sept. 16, 2019).



(Photographs at R. pp. 87-88).

Since 1974, the National Trust has owned and operated[5] Drayton Hall as a National Trust Historic Site open to the public, receiving over 50,000 visitors each year. **(Petitioners' Summons. & Compl., R.p. 35).** The National Register listings and the designation of Drayton Hall as a National Historic Landmark attest to the public significance of the preservation and protection of the properties and landscapes within the Historic District.[6]

The National Trust owns a two-mile long strip of property, 100' in width, butting up to the western side of S.C. Highway 61 that is designated as Charleston County TMS #301-00-00-017 (the "National Trust Parcel"). **(Aff. of Forsberg, R.p. 244).** The National Trust Parcel, along with the right-of-way for S.C. Highway 61, are within the City of Charleston and lie between the

[5] As of January 1, 2015, the Drayton Hall Preservation Trust operates the site on behalf of the National Trust pursuant to a set of legal agreements.

[6] The Court may take judicial notice of these listings. See National Register of Historic Places, Ashley River Historic District, Charleston County, South Carolina, available at: http://www.nationalregister.sc.gov/dorchester/S10817718009/S10817718009.pdf and http://www.nationalregister.sc.gov/dorchester/S10817718009/S10817710158BI.pdf (additional documentation and boundary increase); Ashley River Road, available at http://www.nationalregister.sc.gov/dorchester/S10817718010/S10817718010.pdf; and Drayton Hall, available at http://www.nationalregister.sc.gov/charleston/S10817710005/S10817710005.pdf.

municipal boundary of North Charleston and the Acre. **(National Trust Mem. In Opp. To North Charleston's Mot. To Dismiss, Annexation Area Overview Maps, R.pp. 100-101; Hrg. Tr. R.p. 221:24-222:1).** The Nature Conservancy conveyed the National Trust Parcel to the National Trust in 1980 (the "National Trust Deed"), for the purpose of protecting the historic character and context of the Historic District and the viewsheds along the historic Ashley River Road. **(Aff. of Forsberg, R.pp. 242-245; Deed into National Trust recorded at 0121/209, R.pp. 255-257; National Trust Mem. In Opp. To Defendant's Mot. To Dismiss, R.pp. 87-88).**

The National Trust Deed conveyed a parcel of 26.53 acres, more or less, more particularly described as "[t]hose certain strips or parcels of land, being 100 feet in width and immediately adjacent to the southern right-of-way line of Highway 61, and parallel with said Highway, and being a total of 11,556 feet in length...." **(Aff. of Forsberg, Deed into National Trust at 0121/209, R.pp. 255-257).** The National Trust Parcel is located across from the entrance to Drayton Hall and slightly to the north running along the northwestern side of the historic Ashley River Road. **(National Trust Mem. In Opp. To Defendant's Mot. to Dismiss, R.p. 88).** Both the National Trust Parcel and Drayton Hall are located within the City of Charleston's municipal boundaries. **(Order, R.p. 2).**

Tim Whitfield Construction and Development LLC (a related entity to the Whitfield Construction Company, together hereinafter referred to as "Whitfield") transferred the Acre to North Charleston for five dollars on September 12, 2017, by deed recorded in the RMC Office for Charleston County in Book 0673, Page 028 on October 16, 2018 (the "Acre Deed"). **(Aff. of Forsberg ¶ 4(j), R.p. 244; Deed into North Charleston recorded at 0673/028, R.pp. 274-277).** Whitfield subdivided the Acre from its much larger 2214.6-acre parcel, TMS 301-00-00-005 (the

"Whitfield Parcel") that Whitfield acquired from Georgia-Pacific on July 14, 1989.[7] **(R.p. 317).** Whitfield donated the Acre to North Charleston by deed, shortly before its purported annexation. Whitfield desired to establish contiguity with North Charleston to annex two thousand acres adjoining the Acre that Whitfield plans to sell for development into a residential subdivision; North Charleston would allow 16 times the number of residential units as Charleston County. **(Aff. of MacConnell, deed dated September 12, 2018, recorded at 0673/028, R.pp. 274-277; Whitfield Ans. And First Amended Counterclaims in 2018-CP-10-0848, R.pp. 342-343; Hrg. Tr. R.p. 233:18-21).** The permitted density in Charleston County for single-family residential development is only one house per eight acres (i.e., up to 276 new houses) while the permitted density of North Charleston is two houses per acre (i.e., up to 4427 new houses) **(R. pp. 347-9, 353-6).**

The Acre Deed identifies the land conveyed as that property described in the plat for the Acre approved by Charleston County on September 9, 2018, and recorded in Plat Book S17, Page 0224 in the RMC Office for Charleston County on September 22, 2017 (the "Acre Plat"). **(Id., Plat recorded at S17/0224, R.p. 269).** The Acre Plat shows the northeastern boundary of the Acre that abuts the National Trust Parcel in two separate locations as 99.7' and 99.69' from the right-of-way line of S.C. Highway 61, thereby including a total of approximately 62 square feet of the National Trust Parcel for its entire length. **(Id., R.p. 269).** The County designated the Acre as TMS 301-00-00-797. **(Id.)**.

Below is the map accompanying the Contested Ordinance:

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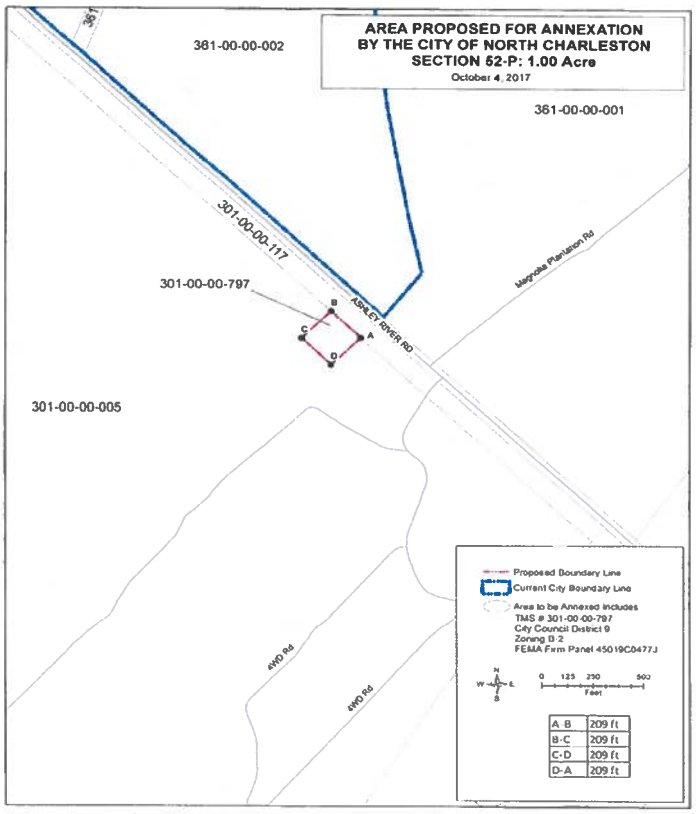
[7] Whitfield desired to have the Whitfield Parcel annexed into North Charleston because it was a condition of the sale of 500 acres of the Whitfield Parcel to a residential developer. See ¶ 50-51 of Whitfield's Answer and First Amended Counterclaim in Circuit Court Case No. 2018-CP-10-2073, a related case. **(R.p. 347).**



(R. p. 285).

North Charleston adopted the Contested Ordinance under the auspices of section 5-3-100 of the South Carolina Code, which provides, in pertinent part:

> If the territory proposed to be annexed *belongs entirely to the municipality* seeking its annexation and is adjacent thereto, the territory may be annexed by resolution of the governing body of the municipality.... Upon the adoption of the resolutions required by this section and the passage of an ordinance to that effect by the municipality, the annexation is complete.

S.C. Code Ann. § 5-3-100 (emphasis added).

The Contested Ordinance described the area to be annexed as "one acre identified as parcel designated TMS #301-00-00-797." This description includes a portion of the National Trust Parcel. **(R.p. 294).** The National Trust did not consent to the annexation of the Acre, nor does it desire for any portion of the National Trust Parcel to be annexed into North Charleston, particularly

since the National Trust Parcel lies within the City of Charleston. **(Order, R.p. 5)**.

SPECIAL CONSIDERATIONS FOR GRANTING A WRIT OF CERTIORARI

South Carolina jurisprudence is uniform that a person owning property in the annexed area has proprietary standing to challenge the annexation, yet the lower court and Court of Appeals denied standing to the National Trust on this basis. To justify its holding on standing, the Court of Appeals, like the lower court, determined that the property description in the Contested Ordinance did not control what property was annexed. Instead, they held that North Charleston was legally incapable of annexing property it did not own regardless of the description in the Contested Ordinance, and that North Charleston did not intend to annex any portion of the National Trust Parcel, even though it was included in the property description in the Contested Ordinance. These holdings all conflict with decisions of this Court governing standing in annexation challenges.

Furthermore, the unwavering precedent in South Carolina is that a municipality cannot jump over property in another municipality to annex property or incorporate properties that are not contiguous to the municipality, just as the lower court held in the event an appellate court determined either of the Petitioners has standing. **(R.pp. 13-14, 27-28)** But, that is exactly what North Charleston did to accomplish the annexation of the One Acre in this case.

Instead of recognizing this prior precedent and the danger of upholding the annexation under these circumstances, the Court of Appeals spoke dismissively of the issues presented by the appeal. Near the conclusion of the Opinion, the Court of Appeals commented that Petitioners "failed to demonstrate that North Charleston's annexation of the Acre incites anything more than a boundary dispute between two municipalities." 886 S.E. 2d 487 at 491. It is far more than that. Upholding this annexation disregards settled law governing standing in annexation cases and

upends the entire body of South Carolina precedent on the sovereignty of existing boundaries of municipalities.

Finally, turning to the public importance of conferring standing on the National Trust and Charleston in this case, the Court of Appeals mistakenly defaulted to the Attorney General as the bellwether for whether a potentially invalid annexation involves a matter of public importance. 886 S.E. 2d 487 at 491("Further, the absence of a challenge to the annexation by the State is illustrative of the State's position on whether the matter rises to a level of public concern").[8] Whether a legal issue is of such public importance as to warrant standing is for the court to determine, not the Attorney General. There is no precedent from this Court that an annexation rises to the level of public importance only if the Attorney General challenges it. Using the inaction of the Attorney General as a proxy against the public importance of an illegal annexation eliminates standing based on public importance in annexation cases since the Attorney General always has standing. St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston, 349 S.C. 602, 564 S.E.2d 647 (2002).

Because the decision of the Court of Appeals conflicts with prior decisions of this Court and this case presents novel questions of law, the National Trust along with the City of Charleston petitions this Court for a Writ of Certiorari and a ruling reversing the Court of Appeals that acknowledges the standing of the National Trust and Charleston as well as the patent invalidity of the annexation of the Acre found by the lower court if standing were established.

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[8] The lower court made a similar pronouncement in its Order: "Both parties [Petitioners] also sought to advocate on behalf of citizens statewide in terms of the implications that a ruling in this case might have on other cases across the state down the road. Ultimately, none of these interests sound so urgent or repetitious that the South Carolina Attorney General could not adequately represent the public's best interest. The South Carolina Attorney General did not file a challenge here to advocate general public interest concerns or state concerns. The Plaintiffs must respect the State's decision in this regard." **(R. pp. 8-9)**

ARGUMENTS

I. The legal precedent that a property owner can convey title to only property owned by it is not controlling. The controlling consideration is what was the exact property described in the Contested Ordinance, not whether North Charleston had legal title to all the property described in the Contested Ordinance, which clearly it did not.

It is undisputed that the Acre annexed contains 62 square feet of the National Trust Parcel. The Court of Appeals dealt with this unpleasant truth by adopting and repeating the rationale of the lower court that the property description in the Contested Ordinance did not govern what property was annexed because, they reasoned, North Charleston could only annex land it owned:

> No matter what the property description or plat to the Acre might say, it is legally impossible for Whitfield to have conveyed to North Charleston title to any of the [National] Trust's land. Since North Charleston acquired its ownership to the Acre through a Quit Claim rather than a Warranty deed, assuming National Trust is correct that its boundary is exactly 100' from Ashley River Road rather than the 99.7' shown on the Acre plat, the result would not be that North Charleston owns any of National Trust's 100' strip property. As a matter of law, National Trust would retain its full undiminished acreage. The claimed 4" error could only reduce the amount of land obtained by North Charleston from a perfect acre to 99.999% of an acre.

886 S.E. 2d 487 at 490.

Like the lower court, the Court of Appeals then cited case law that a deed cannot convey title to land not owned by the grantor regardless of the property description. In so doing the lower court and the Court of Appeals incorrectly confused the question of legal ownership of the property annexed with the question of what property was annexed.

The question of whether the National Trust has proprietary standing turns on the description of the "territory" or "area" that was annexed in the Contested Ordinance, not whether the quitclaim deed for the Acre conveyed legal title to North Charleston to the 62 square feet of the National Trust Parcel included within the property description of the Acre. The territory or area annexed is solely determined by the legal description in the annexation petition or annexation

ordinance. Despite what the circuit court and this Court imply, there is no statute or judicial precedent that the description of the area or territory annexed is necessarily limited to the property owned by the property owner(s) submitting the annexation petition or the municipality seeking to annex territory under S.C. Code §5-3-100.

For example, in Ex parte State ex rel. Wilson, 391 S.C. 565, 707 S.E.2d 402 (2011) cited by both the Court of Appeals and the lower court, this Court specifically noted that the annexation petition included public trust tidelands of the State that were not owned by the annexing petitioner. This Court did not rule that public trust tidelands were not annexed because the petitioner did not own them. Rather, this Court held they were indeed annexed because they were described as the "area" to be annexed in the annexation petition but that the Attorney General's challenge to the annexation failed because he did not bring the challenge within the allowed statutory period:

> The State, which is the presumptive owner of the annexed marshlands, did not sign the petition. Notwithstanding the absence of the State's consent to the annexation, the annexation ordinance recites that the Town received a petition signed 'by all persons owning real estate' in the annexed area....
>
> ....Where the State holds title to real property in the area to be annexed, it is a 'person[ ] owning real estate' within the meaning of section 5-3-150(3) and its signature is required to accomplish an annexation by 100% petition....
>
> By its plain language, section 5-3-150(3) requires the signatures of 'all persons owning real estate in the area requesting annexation.'...
>
> This annexation did not comply with the requirements of the 100% petition method. The State was the presumptive owner of the annexed marshlands and the Town did not provide the State with prior notice of the annexation or obtain the State's signature on the petition. Nevertheless, the State's challenge of the annexation is time-barred.

Id. at 569-78, 707 S.E.2d at 404-409.

The correct focus is entirely on the description of the territory or area to be annexed rather than ownership. Section 5-3-100 states: "If the *territory proposed to be annexed* belongs entirely

to the municipality seeking its annexation and is adjacent thereto, the territory may be annexed by resolution of the governing body of the municipality and the governing body of the county. S.C. Code § 5-3-100 (emphasis added). What section 5-3-100 does not state is that regardless of a municipality's description of the territory proposed to be annexed, only that portion it owns will be considered as being annexed under Section 5-3-100, which is the interpretation adopted by the Court of Appeals and the circuit court.

Likewise, S.C. Code Ann. § 5-3-150(3) governing annexation under the 100% rule that refers to "a petition signed by all persons owning real estate in the ***area requesting annexation***" and to "the agreement of the governing body to accept the petition and annex ***the area***...." S.C. Code Ann. § 5-3-100 (double emphasis added). The statute does not state that regardless of the area described to be annexed, the only area annexed is that area legally owned by the property owners petitioning for annexation.

The Court of Appeals mistakenly states in the Opinion that "...North Charleston did not claim to annex or own any portion of the National Trust Parcel...." 886 S.E. 2d 487 at 490. That is incorrect. In describing the territory annexed as TMS # 301-00-00-797, North Charleston in fact did claim to annex a portion of the National Trust Parcel, as explained more fully below.[9]

The clear precedent of this Court is that the description of the area or territory annexed controls as to what land was attempted to be annexed into a municipality. There is no precedent that the area or territory annexed can only be that owned by the annexing party, in this case North

[9] As indicated in its Counterclaim, the Court of Appeals' statement is further incorrect because North Charleston also contends it has ownership of the portion of the National Trust Parcel included in the One Acre. See, North Charleston Answer and Counterclaim, ¶113 ("North Charleston seeks a determination of its fee simple title in this action and further, that the Plaintiffs are forever barred from claiming any right title, or interest in North Charleston's property.") **(R. p. 338).** However, this dispute over ownership is entirely separate from the question of whether the description of the territory annexed included a portion of the National Trust Parcel.

Charleston, regardless of the property description. The Court of Appeals ruled contrary to decisions of this Court when it held the property description in the Contested Ordinance did not matter on the basis North Charleston could only annex property it owned. Because the description of territory annexed includes a portion of the National Trust Parcel, the National Trust has proprietary standing and the territory annexed was not *entirely* owned by North Charleston.[10]

II. Consideration of extrinsic evidence of North Charleston's subjective intent is without precedent in annexation law in South Carolina and should not have been relied upon to determine the boundaries of the land annexed were different from those in the legal description in North Charleston's annexation ordinance.

Section 5-3-100 does not state that the intention of the municipality determines the territory annexed when there is a conflict between that intent and the actual description of the territory annexed. Both the Court of Appeals and the circuit court looked to what it believed to be North Charleston's *intent* to circumvent the undisputed fact that the territory annexed by North Charleston included 62 square feet of the National Trust property that is within the City of Charleston:

> The circuit court therefore found Respondents lacked standing to challenge the annexation because North Charleston *only intended* to annex the property that it owned. Thus, Respondents did not 'have the requisite ownership to challenge the annexation.' We agree with the circuit court.

886 S.E. 2d 487 at 490 (emphasis added).

There is no precedent in the annexation opinions of this Court endorsing the proposition that the reviewing court can go outside the description of the area or territory annexed to derive

[10] The National Trust maintains that, separate from it, Charleston has proprietary and *statutory* standing because the purported annexation crossed its borders in violation of the host of statutes protecting the sovereignty of municipalities. The National Trust defers to Charleston's Petition for Writ of Certiorari for further elaboration of this distinct alternative ground for standing.

the intent of the annexing municipality, and none was cited by either the Court of Appeals or the circuit court.

Moreover, even if extrinsic evidence of intent were allowed to be considered, regardless of the absence of supporting precedent, the record establishes a genuine issue of material fact as to intent that prevents summary judgment. Nowhere does the Contested Ordinance state that the intent of North Charleston is to annex only the property it owns.[11] The closest is the recitation of the statutory prerequisite under section 5-30-100 that "THE PROPERTY TO BE ANNEXED BELONGS ENTIRELY TO THE CITY OF NORTH CHARLESTON." **(R. p. 293)**. However, the property to be annexed is described eleven times in Ordinance #2017-080 as TMS #301-00-00-797**(R.p. 293-4)**. As stated in the Affidavit of Daniel Forsberg, a licensed engineer and land surveyor in South Carolina, because the territory annexed is described as TMS #301-00-00-797, it included 62 square feet of the National Trust's property:

> 5. Charleston County maintains a tax mapping system whereby parcels of land are assigned a number for purposes of tracking ownership and assessment values. The tax map sequence (TMS) number is derived from the legal description of the parcel as set out in the most recently recorded deed or plat. The legal description for the Acre references Plat S 17 /0224.
>
> 6. ...As a result, Charleston County has assigned a tax map sequence (TMS) number to this property, that being TMS No The purported width of the National Trust's property is shown as 99.69 feet on the north side and 99. 7 feet on the south side. As a result, 62 square feet of the National Trust Property appears to have been included in the Acre.. 301-00-00-797....
>
> 8. Based on the records I have reviewed to date, it appears, to a reasonable degree of certainty based on my education and experience as a Professional Engineer and Land Surveyor, that the Acre overlaps the National Trust Property, encroaching on 62 square feet of the National Trust Property.
>
> 9. Based on the records I have reviewed to date, it appears, to a reasonable degree of certainty based on my education and experience as a

[11] The Court of Appeals found significant that the "legal description in the Annexation Ordinance stated North Charleston sought to annex property 'consisting of approximately 1.0 acres.' (emphasis added)." 886 S.E.2d 487 at 490.. The language referenced by the Court, however, is not the legal description. The legal description of the territory annexed is set forth in detail immediately after that statement and describes the boundaries of TMS #301-00-00-797. **(R.p.294).**

> Professional Engineer and Land Surveyor, that, if North Charleston annexed the Acre as described by Plat S 17 /0224 or as designated by TMS No. 301-00-00-797, then the land that was annexed included a small portion of the National Trust Property.

(R.pp. 244-5).

The intent of the annexing property owner or municipality is not admissible to vary the description of the area or territory proposed to be annexed. The rulings of the circuit court and Court of Appeals relying upon subjective intent rather than the description of the territory annexed are contrary to the settled law of this Court.

III. The plat of the Acre (R. p. 269) as well as the Affidavit of Forsberg (R.pp. 244-5) established that the National Trust owns a portion of the property within the legal description of the annexation petition sufficient to confer standing on the basis of its proprietary interest.

There is no dispute that the deed conveying the Acre to North Charleston relied on the plat of the Acre recorded at Book S17, p. 0244 for the legal description of the Acre:

> ALL that certain piece, parcel or tract of land, together with any improvements thereon, situate, lying and being in the County of Charleston, State of South Carolina, being shown and designated as "**New Parcel 1, 43,559.59 sq. ft., 1.000 acres**", on that certain plat entitled "SUBDIVISION PLAT SHOWING A NEW PARCEL 1 (1.000 ACRE) BEING A PORTION OF TMS 301-00-00-005, PROPERTY OF TIM WHITFIELD CONSTRUCTION AND DEVELOPMENT LLC., LOCATED NEAR WEST ASHLEY, CHARLESTON COUNTY SOUTH CAROLINA" prepared by Tim Elmer, RLS, LLC, dated October 17, 2016, and recorded on September 22, 2017, in the Charleston County RMC Office in Plat Book S17, Page 0224. Said parcel having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

(R.p.274) (emphasis in original).

This plat of the Acre provides the "size, shape, dimensions, buttings and boundings" of TMS #302-00-00-797, the territory that North Charleston annexed in Ordinance #2017-080. **(R.pp. 293-4)**. The circuit court acknowledged that "the 2009 [P]lat had width variations of a few inches here and there, ***so too did the 2017 plat of the Acre***." **(R.p. 4)** (emphasis added). North

Charleston has acknowledged the "four-inch discrepancy" along the northeastern boundary for a length of 208.71 feet. **(Hrg. Tr., R.p. 185) (R. p. 269).** The Court of Appeals also noted that the plat of the Acre includes this long sliver of the National Trust property. 886 S.E. 2d 487 at 490 ("Thus, although there is a four-inch deviation in the proposed plat, we find North Charleston only sought to annex the property within its proprietary rights as the proposed plat relied on the previously recorded Easement Plats in mapping the boundaries.") However, regardless of North Charleston's *intent*, the territory annexed is *described as* TMS #302-00-00-797 with boundaries shown on the Plat recorded at Book S17, Page 0244. Those boundaries include a portion of the National Trust Parcel.

This Court has never held that a property owner must own a specific minimum acreage in the area annexed to have proprietary standing to challenge an annexation. The only requirement is that *some* of the owner's property be described in the annexed area. Here the description of the territory annexed did just that. For that reason, the National Trust has standing. The lower court erred in determining that the National Trust did not create an issue of fact as to its standing and did not have standing as a matter of law.

IV. Even if the National Trust's proprietary interest did not bestow standing on it, which it does, the National Trust and Charleston demonstrated a basis for public importance standing, given North Charleston's gross violation of the laws governing annexation and the need for future guidance on whether a municipality may violate the boundaries of another municipality by crossing over them to annex non-contiguous property. The public importance exception is not limited to instances involving deceitful conduct as suggested in the Opinion.

In Vicary v. Town of Awendaw, 425 S.C. 350, 822 S.E.2d 600, 602 (2018) this Court established a new narrow exception for invoking the public importance exception for standing in annexation challenges but did not change the test for public importance standing. This case meets

the standards established in Vicary for "unique facts" and the need for future guidance to invoke the public importance exception, warranting standing for the National Trust and Charleston.

In Vicary, this Court found that the Town of Awendaw's continued use of a letter from the United States Forest Service to show consent to annexations, and its possible use in the future, satisfied the "future guidance" prong of the public importance exception. Vicary at 359-360. Here, in a similar manner, there is nothing stopping North Charleston, or other municipalities, from continuing to use Section 5-3-100, and a legally incorrect definition of adjacency, to continue to annex property across the boundaries of another municipality.

This annexation challenge is not a "purely private matter" between the National Trust, the City of Charleston, and North Charleston, but "[rises] to the level of public importance" with the need for future guidance on the requirements of adjacency and contiguity under Section 5-3-100. Id. at 359. **(City of Charleston App. Br., pp. 21-24)**. The requirements of adjacency and contiguity under Section 5-3-100 presented in this case have never been addressed by our Supreme Court.[12] **(Id.)**.

North Charleston tries to negate the need for future guidance by marginalizing Section 5-3-100, labeling it an "obscure statute" with there being "no risk of S.C. Code 5-3-100 perpetually escaping review." North Charleston further asserts that "[s]hould this issue ever crop up again the Attorney General can address it the moment he sees fit." **(North Charleston Resp. Br., pp. 11-13) (emphasis in original)**. North Charleston's minimization of its illegal conduct in this annexation does not eliminate the need for future guidance to resolve the issue before this Court. After all, North Charleston concedes that there is an absence of reported precedent interpreting

[12] The National Trust fully supports the legal position of the City of Charleston, particularly as it relates to the applicability of the public importance exception, as set forth in the City of Charleston's briefs before the Court of Appeals and in its Petition for Writ of Certiorari.

and applying Section 5-3-100. **(Appellant/Respondent's Brief, p. 13)** ("North Charleston has been unable to find a prior reported opinion during the entire life of the statute!").

Contrary to North Charleston's assertions, if this annexation stands, what occurred in this case under section 5-3-100 will become the judicially sanctioned loophole for annexation by one municipality across the boundary of another municipality. This Court of Appeals' decision provides the formula. Suppose a property owner wants to annex into one municipality but is confronted with parcels of land in another municipality intervening between that owner's property and the municipality, as in this case. All the property owner must do to circumvent the cardinal rule of contiguity is convey some small piece of acreage to the annexing municipality. The municipality can then invoke Section 5-3-100 to annex the small piece recently acquired by it despite the intervening land of the other municipality. Once this leapfrog annexation is complete, the property owner can annex the remainder of the property owners land because it is contiguous to the small portion that was earlier annexed. This capacity for repetition satisfies the "future guidance" prong of the public importance exception and warrants guidance on the interpretation of Section 5-3-100.

There is no precedent from this Court that the determination of whether an illegal annexation like this one [13] involves a matter of public importance is determined by whether the Attorney General decides to challenge it. The Attorney General is frankly not interested in these municipal matters. One of the very few reported instances where the Attorney General objected to an annexation is Ex parte State ex rel. Wilson, supra, which proves the point. Because there is no process for timely notification to the Attorney General of annexations, he showed up late, and

[13] "In the event that this Court is found in error regarding its ruling of lack of standing of the Plaintiffs, this Court finds that North Charleston did not lawfully annex the one acre parcel under the annexation statute." **(Order, R.pp. 1-2)**.

the annexation that was otherwise invalid because 100% of the property owners did not join in the petition for annexation was upheld.

The Court of Appeals' invented standard is also troubling because there is no statute requiring that an annexing municipality notify the Attorney General of annexations at any time, even when it commits an illegal annexation like this one. It is particularly perplexing that the Court of Appeals and the lower court embraced North Charleston's argument that the failure of the Attorney General to become involved means the illegal annexation per se has no public importance *when there is* ***nothing in the record in this case*** *to show that the Attorney General was notified of the annexation of the Acre in a timely manner,* much less considered it and consciously chose not to contest it.

In concluding that this case has no public importance implication, both the Court of Appeals and the lower court overlook the federal statutory mandate to the National Trust to protect and preserve historic places. The National Trust was chartered by the United States Congress in 1949 to advocate on behalf of historic preservation, including increasing scarce places like this National Historic District and Drayton Hall, a National Historic Landmark owned by the National Trust located across Highway 61 from the Acre **(54 U.S.C. §§ 312102-312106 (2015), Mem. National Trust in Opposition to Defendant's Mot. to Dismiss, R.pp. 95-96)**. Further, the National Trust is not a "stranger" or "outsider" to the annexation. It is a property owner whose rights have been infringed by the purported annexation of a portion of the National Trust Parcel by North Charleston and will suffer harm to its statutory historic preservation interests if 4000 houses are built if the annexation is upheld. See St. Andrews Pub. Serv. Dist. v. City Council, 349, S.C. 602, 564, S.E.2d 647 (2002). Nor is this a frivolous lawsuit—the circuit court held that

"North Charleston did not lawfully annex the one acre parcel under the annexation statute." **(Order, R. pp. 1-2, 9-10)**.

This case has "unique facts present" that, as suggested by Justice Hearn in Vicary, merit granting the National Trust and Charleston public importance standing as discussed by the circuit court in its order. **(Order, R.pp. 9-10)**.

CONCLUSION

Based on the foregoing, the National Trust respectfully requests that this Court grant its Petition for Writ of Certiorari and review the decision of the Court of Appeals herein.

Respectfully submitted,

Charleston, SC
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