THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2018-CP-10-0851
Appellate Case No. 2019-000728

National Trust for Historic Preservation
in the United States and the City of Charleston, Respondents/Appellants,

v.

City of North Charleston, Appellant/Respondent.

RESPONDENT/APPELLANT CITY OF CHARLESTON'S FINAL RESPONDENT'S BRIEF

Susan J. Herdina (S.C. Bar No. 13165)
Email: herdinas@charleston-sc.gov
Frances I. Cantwell (S.C. Bar No. 01121)
Email: cantwellf@charleston-sc.gov
Daniel S. ("Chip") McQueeney, Jr. (S.C. Bar No. 06802)
Email: mcqueeneyd@charleston-sc.gov
City of Charleston
50 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-3730

Attorneys for Respondent/Appellant City of Charleston

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STATEMENT OF THE CASE

This matter arises from multiple notices of appeal challenging the circuit court's decision in an annexation dispute. The present brief addresses the cross-appeal of Appellant/Respondent City of North Charleston ("North Charleston") to the circuit court's "conditional" ruling that North Charleston invalidly attempted to annex property that was neither contiguous nor adjacent to North Charleston's municipal limits. The ruling was conditioned on a finding of standing to challenge the annexation.

On December 21, 2017, North Charleston adopted Ordinance No. 2017-080 (the "Contested Ordinance"), which purports to annex an acre of land (the "Acre"), designated as Charleston County TMS No. 301-00-00-797, located southwest of Highway 61, also known as Ashley River Road. (R. pp. 293-95). North Charleston adopted the Contested Ordinance under the auspices of section 5-3-100 of the South Carolina Code, available when "the territory proposed to be annexed belongs entirely to the municipality seeking its annexation and is adjacent thereto . . . ." (R. pp. 293-95). In the Contested Ordinance, North Charleston represents that the Acre "belongs entirely" to North Charleston. (R. p. 293).

Pursuant to section 5-3-270 of the South Carolina Code, on February 16, 2018, Respondents/Appellants The National Trust for Historic Preservation in the United States (the "National Trust") and the City of Charleston ("Charleston") filed and served a notice of intent to challenge the Contested Ordinance, and, on March 20, commenced an action challenging the Contested Ordinance. (R. pp. 30-46). The complaint sought a determination that the Contested Ordinance was invalid because (1) the Acre did not "belong entirely" to North Charleston; (2) the Contested Ordinance included property owned by the National Trust since 1980 and previously annexed by Charleston in 2005; (3) the Acre was not contiguous or adjacent to North Charleston's

municipal limits; and (4) the Contested Ordinance violated the long-standing public policy against "leap frog" annexations. (R. pp. 40-41, ¶ 38).

North Charleston answered the complaint on April 17, 2018, interposing a general denial and asserting affirmative defenses that the National Trust and Charleston did not have standing and that the complaint failed to state a claim. (R. pp. 47-58). North Charleston also asserted a counterclaim, seeking a declaration that it was the sole owner of the Acre. (R. pp. 55-56, ¶¶ 57-63; p. 57, ¶¶ b, c). Charleston and the National Trust replied to the counterclaims on May 17, 2018, and May 21, 2018, respectively. (R. pp. 59-62; pp. 63-66).

North Charleston moved for partial summary judgment, arguing that the Acre was "adjacent to" its municipal limits, as a matter of law. (R. p. 67). Simultaneously, North Charleston moved to dismiss the complaint pursuant to Rule 12, SCRCP, and Rule 56, SCRCP, arguing that the National Trust and Charleston lacked standing to challenge the Contested Ordinance. (R. p. 68). The National Trust and Charleston later moved for summary judgment based on, among other things, the lack of contiguity or adjacency between the Acre and North Charleston's municipal limits. (R. pp. 69-72). The circuit court heard these motions on December 10, 2018, and requested that the parties prepare proposed orders. (R. p. 236, line 17-p. 237, line 8). On January 9, 2019, the parties submitted proposed orders to the circuit court. (R. pp. 130-54).

On March 1, 2019, the circuit court entered an order (the "Original Order") dismissing the complaint and finding that neither the National Trust nor Charleston had standing to challenge the Contested Ordinance. (R. pp. 1-14). However, the circuit court further explained: "In the event that this Court is found to be 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." (R. pp. 1-2). As to this issue, the circuit court recognized, in pertinent part:

> This Court finds that the annexation under the facts present herein is not valid under that [sic] law of South Carolina. As a matter of law, adjacency under § 5-3-100 of the South Carolina Code is destroyed when privately-owned property lying within another municipality's corporate limits intervenes between the area to be annexed and the existing limits of the annexing municipality. This is true under the common law requirement for contiguity, the statutory definition of "contiguous," or the commonly-applied definition of the term "adjacent" in the context of municipal annexations.

(R. p. 13). The circuit court refiled the Original Order on March 5, 2019 (the "Refiled Order"). (R. pp. 15-28). As used herein, references to the "Order" include the "Original Order" and the "Refiled Order," which are identical.

Charleston received written notice of entry of the Original Order on March 4, 2019, and written notice of the entry of the Refiled Order on March 6, 2019. (R. p. 363). On March 14, 2019, Charleston served a Motion to Reconsider, Alter, or Amend the Original Order and the Refiled Order as they pertained to the issue of standing. (R. pp. 155-166). The circuit court denied Charleston's motion by order entered on May 1, 2019 (the "Reconsideration Order"). (R. p. 29). Charleston received written notice of entry of the Reconsideration Order on May 2, 2019. (R. p. 363).

On April 29, 2019, North Charleston filed a "Notice of Cross Appeal" of the circuit court's decision, conditioned upon the National Trust or the City filing a "primary appeal." (R. pp. 358-62). On May 24, 2019, Charleston served a Notice of Appeal of the Original Order, the Refiled Order, and the Reconsideration Order. (R. pp. 363-67). On May 31, 2019, the National Trust served a Notice of Appeal of the Original Order, the Refiled Order, and the Reconsideration Order. (R. pp. 368-71).[1]

[1] Pursuant to the scheduling order adopted by the South Carolina Court of Appeals on October 15, 2019, Charleston has served and filed a separate "Appellant's Brief" challenging the circuit court's

FACTS

On September 12, 2017, North Charleston purportedly acquired title to the Acre, shown as "NEW PARCEL 1," on that certain plat recorded in Plat Book S17 at Page 0224 (the "Acre Plat") in the Register of Deeds Office for Charleston County, South Carolina (the "ROD"). (R. p. 244, ¶ 4.j; p. 269; pp. 274-77). Intervening between the Acre and the municipal limits of North Charleston are Highway 61 and land owned by the National Trust (the "National Trust Property").[2] (R. p. 269; pp. 293-95). The National Trust Property is 100 feet in width and hugs the southern right-of-way line of Highway 61. (R. p. 243, ¶¶ 4.c, 4.d; pp. 252-57; pp. 293-95).

North Charleston admitted the following allegation in the Complaint: "Lying and intervening between the corporate limits of North Charleston and the Acre are (a) the right-of-way for S.C. Highway 61; and (b) the National Trust Parcel." (R. p. 37, ¶ 22; p. 50, ¶ 22). Likewise, North Charleston conceded that the National Trust Property has been within Charleston's corporate limits since 2005. (R. p. 38, ¶ 23; p. 50, ¶ 23).

It is undisputed that the Acre does not share a common border with, or otherwise touch, North Charleston's municipal limits. (No. Chas App.'s Br., pp. 1-2). It is also undisputed that, to access the Acre from North Charleston municipal limits, it is necessary to cross the privately-

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ruling that the National Trust and Charleston lacked standing to challenge the Contested Ordinance. In the present "Respondent's Brief," Charleston responds to the "Appellant's Brief" previously served and filed by North Charleston, in which North Charleston challenges the circuit court's ruling on contiguity and adjacency. Charleston incorporates the arguments raised in its Appellant's Brief herein by reference.

[2] As set forth in Charleston's "Appellant's Brief," Charleston and the National Trust established that the National Trust holds title to approximately 62 square feet of the Acre. (R. p. 245, ¶¶ 8-9). Notwithstanding the foregoing, the Acre is also separated from the municipal limits of North Charleston by the portion of the National Trust Property lying outside the boundaries of the Acre and Highway 61, both of which lie within the municipal limits of Charleston. (R. p. 2, ¶ 5; p. 3, ¶ 8).

owned National Trust Property that is in the corporate limits of Charleston. (No. Chas App.'s Br., pp. 1-2).

STANDARD OF REVIEW

The issue of whether the annexation of the Acre complied with section 5-3-100 of the South Carolina Code was before the circuit court on cross-motions for summary judgment. "Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." Weigand v. U. S. Auto. Ass'n, 391 S.C.159, 163, 705 S.E.2d 432, 434 (2011). The interpretation of a statute is a matter of law, which an appellate court reviews without deference to the circuit court. See Vicary v. Town of Awendaw, 425 S.C. 350, 355, 822 S.E.2d 600, 602 (2018) ("[T]he interpretation of a statute is a question of law, which this Court reviews without any particular deference to the circuit court"); Charleston Cty. Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("The determination of legislative intent is a matter of law.").

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY HELD THAT SECTION 5-3-305 OF THE SOUTH CAROLINA CODE DID NOT ABROGATE THE COMMON LAW REQUIREMENT THAT PROPERTY ANNEXED TO A MUNICIPALITY MUST BE CONTIGUOUS TO THE MUNICIPALITY.

Section 5-3-100 of the South Carolina Code provides, in relevant 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.

(Emphasis added). In 1955, the General Assembly enacted the predecessor to section 5-3-100, which remains largely unchanged since that time. See 1955 (49); S.C. Code Ann. § 47-18.1 (1962).

North Charleston maintains that section 5-3-100 only requires the annexed area to be "adjacent," and thus the Acre can be annexed because it is "near" or "in close proximity" to North Charleston's borders. North Charleston relies on section 5-3-305 of the South Carolina Code, enacted in 2000, to support its urged construction of section 5-3-100. Section 5-3-305 provides:

> For purposes of this chapter, "contiguous" means property which is adjacent to a municipality and shares a continuous border. Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland or utility line which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous border, the intervening connector does not destroy contiguity.

The General Assembly has never attempted to define the term "adjacent" in this Chapter of the South Carolina Code.

To accept North Charleston's argument that "adjacent to" means something other than contiguous requires this Court to (1) completely disregard how the terms "adjacent," "adjoining," and "contiguous" have been interpreted by the courts of this State; (2) hold that section 5-3-305 evinces legislative intent to abrogate the common law as it applies to annexations; and (3) incorporate into annexation law an element of uncertainty by allowing a municipality to become the sole arbiter of what is "close to" or "near" its borders. The shortcomings of North Charleston's argument are evident.

The requirement that annexed land be "contiguous" to the annexing municipality has been a part of annexation jurisprudence since the 1950s. In the landmark decision of Tovey v. City of Charleston, 237 S.C. 475, 117 S.E.2d 872 (1961), the Supreme Court held contiguity to be such an inherent element of annexation that its requirement would be read into the law, even if the law was otherwise silent:

> The statutes of many States require that the land annexed be contiguous or adjacent to the municipal borders. Appellants say that the reference in Section 47-13 of our annexation statute to 'adjacent territory' necessarily implies such requirement. Whether this be true or not, it seems to be generally recognized, and is so conceded in this case, that there must be contiguity even in the absence of a statutory requirement to that effect. McGraw v. Merryman, 133 Md. 247, 104 A. 540; 37 Am. Jur., Municipal Corporations, Section 27; 62 C. J. S., Municipal Corporations, § 46c. Such is ordinarily essential to make the city a collective body having unity and compactness.

Id. at 484, 117 S.E.2d at 876 (emphasis added). While North Charleston characterizes this ruling in Tovey as mere dicta, South Carolina appellate court have repeatedly emphasized the common law requirement for contiguity in municipal annexations. See, e.g., St. Andrews Pub. Serv. Dist. v. City Council, 349 S.C. 602, 605-06, 564 S.E.2d 647, 649 (2002) ("We reiterate that the sole requirement for annexation is contiguity.").

Some thirty-five (35) years after Tovey, the Court reaffirmed this premise for areas proposed for municipal incorporation, in Glaze v. Grooms, 324 S.C. 249, 253 n.4, 478 S.E.2d 841, 843 (1996), explaining:

> Contrary to appellant's assertion, territory sought to be incorporated must be contiguous. McQuillen, Municipal Corporations, § 3.15(f). See also 1983 Op. Att'y Gen. 83-63 (contiguity requirement applies to incorporations as well as annexations). Further, we have previously recognized a contiguity requirement even in the absence of a statutory mandate to that effect. Tovey v. City of Charleston, 237 S.C. 475, 117 S.E.2d 872 (1961). We find the circuit court correctly held contiguity is required for incorporation.

(Emphasis added).

As annexation jurisprudence evolved, the appellate courts have interpreted the terms "adjacent," "adjoining," and "contiguous" as having the same meaning. "Courts have generally held that contiguous is synonymous with the terms 'adjacent to' or 'adjoining.'" St. Andrews Pub. Serv. Dist. v. City Council, 339 S.C. 320, 324-25, 529 S.E.2d 64, 66 (Ct. App. 2000), rev'd on

other grounds by St. Andrews Pub. Serv. Dist. v. City Council, 349 S.C. 602, 564 S.E.2d 647 (2002); quoting Erwin S. Barbre, Annotation, What Land is Contiguous or Adjacent to Municipality so as to be Subject to Annexation, 49 A.L.R.3d 589, 599 (1973). The Supreme Court has construed the term "contiguous," as follows: "The statutory term 'contiguous' must be afforded its ordinary meaning of 'touching.'" Bryant v. Charleston, 295 S.C. 408, 411, 368 S.E.2d 899, 901 (1988).

The evolution of annexation jurisprudence also recognized that annexed areas incidentally separated from the annexing municipality by natural barriers or features, as such roads, waterways or marshlands, do not destroy contiguity. See Tovey, 237 S.C. at 484-85, 117 S.E.2d at 876 ("The plat of the annexed territory introduced in evidence shows area 'A' as extending to the eastern bank of the Ashley River. There is, therefore, no intervening space between the annexed areas and the former city boundaries. We do not think the fact that they are separated by a navigable stream breaks the contiguity."); Bryant, 295 S.C. at 411, 368 S.E.2d at 901 ("We further hold that contiguity is not destroyed by water or marshland within either the annexing municipality's existing boundaries or those of the property to be annexed merely because it separates the parcels of highland involved."); St. Andrews Pub. Serv. Dist., 339 S.C. at 325, 529 S.E.2d at 66 ("The Supreme Court has rejected an argument that the annexed parcels must have the additional qualifications of unity, substantial physical touching, or a common boundary . . . . However, the Supreme Court has never held that non-adjacent properties not incidentally separated by a road, railway, or waterway are in fact contiguous.").

North Charleston does not dispute these premises. North Charleston's position is that the enactment of section 5-3-305 created a distinction between the concepts of "adjacent" and "contiguous" throughout Chapter 3 of Title 5 of the South Carolina Code, and, since the annexation

statute under which North Charleston annexed the Acre only requires the territory be "adjacent to" North Charleston's municipal limits, the Acre need not touch North Charleston's municipal borders. North Charleston's argument is that section 5-3-305 changed the common law of annexation. This argument cannot be countenanced.

Absent clear legislative intent to the contrary, there is a presumption against a change to the common law by way of statutory construction. "Statutes will not be held in derogation of the common law unless the statute itself shows that such was the object and intention of the lawmakers, and the common law will not be changed by doubtful implication." 16 Jade St., LLC v. R. Design Constr. Co., LLC, 398 S.C. 338, 347, 728 S.E.2d 448, 452-453 (2012), quoting 82 C.J.S. Statutes § 534. As explained in Nuckolls v. Great Atl. & Pac. Tea Co., 192 S.C. 156, 161, 5 S.E.2d 862, 864 (1939):

> Regarding the presumption against change of the common law by a statute, it is stated in 25 R. C. L. 1054, that it is not presumed that the Legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; that it is rather to be presumed that no change in the common law was intended unless the language employed clearly indicates such an intention; that the rules of the common law are not to be changed by doubtful implication, or overturned except by clear and unambiguous language.

In the context of changes to annexation statutes, the Supreme Court of South Carolina has held:

> "It is a rule of construction that changes made by a revision of the statutes will not be construed as altering the law, unless it is clear that such was the intention, and, if the revised statute is ambiguous or susceptible of two constructions, reference may be had to prior statutes for the purpose of ascertaining the intent of the Legislature." *Dennis v. Independent School Dist.*, 166 Iowa 744, 148 N.W. 1007, 1009. In the case of a general revision or codification of the laws, "it is well settled that neither an alteration in phraseology, nor an omission or addition of words, necessarily indicate an alteration of the construction of the earlier act. Indeed, the rule favoring the

> construction borne by the original statutes or sections is applied, even though in the course of revision or consolidation, the language may have been somewhat changed and the revised or consolidated statutes will be construed as bearing the same meaning as the original statutes or sections, unless the language of the revision or consolidation plainly requires a change of construction to conform to the manifest intent of the legislature. These rules are based upon the fact that the new language may be attributed to a desire to condense and simplify the law, or to improve the phraseology." 50 Am. Jur., Statutes, Section 447.
>
> When the change in phraseology involved in this case is considered in the light of the rule above stated, it certainly does not clearly appear that it was the intention of the legislature to substantially alter the manner in which the corporate limits of a municipality may be extended or restricted. On the contrary, we have a change in phraseology which is ambiguous and the real intent of the legislature can only be gathered by recurring to the original statute.

Forest Acres v. Seigler, 224 S.C. 166, 179-80, 77 S.E.2d 900, 906 (1953).

There is simply no suggestion in the statutory scheme, much less the expressed intent, that the General Assembly, in enacting section 5-3-305, intended to imbue municipalities with new authority to annex in a manner inconsistent with the judicial construction of the annexation statutes as requiring not only "touching" but also the sharing of a continuous border. Significant to this issue is that the General Assembly called out in section 5-3-305 specific types of lands as not affecting an area's being contiguous, which coincide with the very types of lands the judiciary had theretofore (and since) construed as also not affecting an area's eligibility for annexation. In enacting section 5-3-305, the General Assembly simply codified the judicial construction of what areas were subject to annexation.

The reasoning in Bd. of County Comm'rs v. City of Cheyenne, 85 P.3d 999 (Wy. 2004), is instructive. There, the City of Cheyenne attempted to annex a parcel of land roughly a quarter of a mile from its borders. Id. at 1001. The annexation statute required an annexed area to be

"contiguous with or adjacent to" the annexing municipality. Id at 1002. The Wyoming Supreme Court held:

> As we will explain further, we conclude that, by limiting annexation to lands that are either contiguous or adjacent, the legislature intended to limit annexation to lands sharing a common boundary with the municipality or touching at some point, with the exception of lands that are separated from the municipality only by those natural or artificial 'barriers' listed in Wyo. Stat. Ann. § 15-1-402(b) [providing that contiguity will not be adversely affected by the existence of a platted street or alley, a public or private right-of-way, a public or private transportation right-of-way, a lake, stream, reservoir or other natural or artificial waterway located between the annexing city or town and the land sought to be annexed]. This conclusion is consistent with what appears to be the majority rule, it is consistent with what this Court said in In re West Laramie, 457 P.2d 498, 501 (Wyo. 1969) ("under our statute the only requirement with respect to the scope and extent of the area to be annexed is that it must be contiguous to the annexing city or town"), it is consistent with the opinion of the Attorney General of the State of Wyoming, and it is consistent with reason and good sense.

Id. at 1006.

As to the argument proffered by the City of Cheyenne that the property need only be "near" its borders to be adjacent, the Court held:

> If the City's interpretation of the statute—that lands need only be "nearby"—is correct, there would be no reason for the exceptions that are spelled out in Wyo. Stat. Ann. § 15-1-402(b). If "nearby" lands that do not touch the municipal boundaries may be annexed, there is no reason specially to permit annexation of lands separated from the municipality by roads, rivers, and the like. In interpreting statutes, we are to read related laws together and we are to give effect to all the words used . . . .

Id. at 1007.

The Wyoming Court's reasoning resonates here. If "adjacent" means something other than touching, there would have been no need for the General Assembly, like the legislature in

Wyoming, to call out specific types of lands or features that do not destroy contiguity, as it did in section 5-3-305.

A review of other annexation statutes is also noteworthy to this issue. As to the geographic relationship of the annexed territory to the annexing municipality, some statutes require that the territory be "adjacent." See, e.g., § 5-3-100 (applicable to lands owned by annexing municipality); S.C. Code Ann. § 5-3-140 (applicable to lands belonging entirely to state or federal governments). Others require that the territory be "adjoining." See, e.g., S.C. Code Ann. § 5-3-250 (applicable to cemeteries). Still others require that the territory be "contiguous." See, e.g., S.C. Code Ann. § 5-3-150(1) (annexation by "75% method"); S.C. Code Ann. § 5-3-150(3) (annexation by "100% method); S.C. Code Ann. § 5-3-260 (applicable to church property); S.C. Code Ann. § 5-3-300 (annexation by petition and election). Finally, some annexation statutes have no express geographic requirements at all. See, e.g., S.C. Code Ann. § 5-3-120 (annexation if entire area belongs to a corporation only); S.C. Code Ann. § 5-3-130 (annexation if area proposed to be annexed belongs entirely to a school district).

If North Charleston is correct that section 5-3-305 changed the common law requirement of contiguity, then there would be no geographic limitation on annexing lands of school districts or corporations. Such an interpretation is absurd and would lead to a result that neither the General Assembly nor the appellate courts could ever have intended. See Florence County v. Moore, 344 S.C. 596, 601, 545 S.E.2d 507, 509 (2001) ("Our goal in construing statutes is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd."). It is much more likely that, in enacting section 5-3-305, the General Assembly meant what it said, i.e., that the General Assembly simply intended to define the term "contiguous" anywhere it was used within Chapter 3 of Title 5 of the South Carolina Code—not

abrogate the common law requirement for contiguity, redefine the common law contiguity requirement, change the meaning of adjacent, or eliminate *any* geographical limitations on many types of annexations. The term "contiguous" is not used in section 5-3-100, and there is no hint of legislative intent to redefine the term "adjacent," as used in section 5-3-100.

Though not binding on the Court, the Attorney General of South Carolina has rendered an opinion on the interplay between section 5-3-100 and 5-3-305. In 2005, in facts nearly identical to those here, the Attorney General construed the term "adjacent" in section 5-3-100, rejecting the construction of the term to mean "near," instead opining that it means "touching." See S.C. Atty. Gen. Op. (2005 S.C. AG LEXIS 9) p. 4 (filed January 18, 2005). When asked if a city may purchase a property which is one property removed from city limits and annex the property under section 5-3-100 because the property is "near," the Attorney General opined:

> [I]n my opinion, the term "adjacent" as used in Section 5-3-100 should be construed in keeping with the term "contiguous" as set forth by Section 5-3-305 which is defined as "property which is adjacent to a municipality and shares a continuous border." Therefore, as to your situation regarding purchase of property which is one property removed from the city limits, such property may not be annexed as being "near." Regardless of the size of any property in between the property, in my opinion, the property to be annexed must be touching the property of the municipality. Similarly, properties "adjacent" should not be construed as two properties separate and still near. Again, in my opinion, the property to be annexed must be touching the property of the municipality.

S.C. Atty. Gen. Op. (2005 S.C. AG LEXIS 9) p. 4 (filed January 18, 2005).

North Charleston's urged construction of section 5-3-100 introduces an element of uncertainty to areas eligible for annexation, where none now exists. What is "adjacent" or "near" would be left to the whim of the annexing municipality. The bright line created by contiguity, or touching, would be erased. As the presumption is against a statute abrogating the common law,

North Charleston's urged construction of the interplay between sections 5-3-100 and 5-3-305 should be rejected.

Nothing in section 5-3-305 evinces any legislative intent, much less clear and unambiguous intent, to set aside the common law requirement for contiguity in municipal annexations. The circuit court did not add an unwritten requirement of contiguity to section 5-3-100. The court simply, and correctly, interpreted the statute in accordance with longstanding principles pertaining to statutes and the common law.

II. THE CIRCUIT COURT PROPERLY CONSTRUED THE STATUTORY TERM "ADJACENT TO" IN SECTION 5-3-100 OF THE SOUTH CAROLINA CODE AS REQUIRING SOMETHING MORE THAN THAT THE TERRITORY TO BE ANNEXED BE "NEAR" THE ANNEXING MUNICIPALITY.

For the reasons stated, the circuit court properly construed the term "adjacent to," as used in section 5-3-100 of the South Carolina Code, as synonymous with the common law definition of "contiguous," which requires touching except in limited circumstances not present here.

The circumstance of the Acre being separated from North Charleston by only one parcel having a width of "just about the smallest imaginable" is of no moment and begs the question of what about the next annexation undertaken under the device of section 5-3-100? If the annexed area is separated by a single parcel having a width of 200 feet or 2000 feet, does it still qualify as "near?" If the intervening parcel contains several thousand acres, is the territory sought to be annexed still "near?" The problems and chaos resulting from North Charleston's urged construction of section 5-3-100 are self-evident. As noted by the Supreme Court of Wyoming in Bd. of County Comm'rs v. City of Cheyenne, 85 P.3d 999 (Wy. 2004):

> The most reasonable interpretation of the words "contiguous with or adjacent to" in this context is that the legislature intended to limit annexation to lands touching a municipality's boundaries. There is no suggestion in the entire statutory scheme that the legislature intended to vest municipalities with the discretion to determine what

> land is "adjacent"—meaning "nearby"—on a case-by-case basis. The result of such an interpretation could be "crazy quilt" or "leap frog" annexation that would run counter to the concerns expressed in the statutory mandates.

Id. at 1007.

The circumstance of North Charleston having access rights over the National Trust Property to the Acre is of no moment because how one accesses one's property has no bearing on the issue of adjacency or contiguity. The imposition of an easement, especially when, as here, the easement area was previously annexed by Charleston in 2005, does not somehow convert Charleston's annexed territory into unincorporated territory.

The circuit court's order should be affirmed because South Carolina has never permitted the annexation of property "within close proximity" or "near," except in very limited circumstances enumerated by the appellate courts and reiterated by the General Assembly in the definition of "contiguous" in section 5-3-305, e.g., circumstances in which the intervening property is a road, easement, or marshland.

III. THE CIRCUIT COURT PROPERLY CONCLUDED, AS A MATTER OF LAW, THAT "ADJACENT TO" IN SECTION 5-3-100 DOES NOT INCLUDE TERRITORY SEPARATED FROM AN ANNEXING MUNICIPALITY BY PRIVATE PROPERTY LOCATED WITHIN ANOTHER MUNICIPALITY'S CORPORATE LIMITS.

Charleston does not agree with North Charleston that "adjacent" means "near" or "in close proximity." However, Charleston advocated to the circuit court that, whatever "adjacent to" means in section 5-3-100 of the South Carolina Code, it is destroyed when, as here, intervening property lies within the corporate limits of another municipality. (R. pp. 112-15).

The circuit court adopted this argument, concluding that "adjacency under § 5-3-100 of the South Carolina Code is destroyed when privately-owned property lying within another municipality's corporate limits intervenes between the area to be annexed and the existing limits

of the annexing municipality." (R. p. 13). North Charleston does not address this ruling, instead reiterating its opinion that adjacent should be interpreted to mean "near" or "in close proximity," such that no touching is required.

Not only is the Acre separated from North Charleston by privately-owned property, it is separated from North Charleston by privately-owned property in Charleston's corporate limits. Even if this Court were minded to find that adjacent means something other than contiguous, is it also minded to allow a "leap-frog" over the boundaries of another municipality? Such is precisely what the Court is being asked to condone. The Court should decline that invitation.

South Carolina appellate courts have consistently held that common law contiguity, which is synonymous with adjacency, is destroyed in the context of "leap-frog" annexations, in which one municipality attempts to annex or incorporate territory separated by property within a different municipality. For example, in Glaze v. Grooms, 324 S.C. 249, 253, 478 S.E.2d 841, 844 (1996), the Supreme Court of South Carolina, applying the common law concept of "contiguity" to an attempted municipal incorporation, explained:

> We agree with Appellants' basic proposition that contiguity is not destroyed by water or marshlands which separate parcels of highland. See, e.g., Tovey v. City of Charleston, 237 S.C. 475, 117 S.E.2d 872 (1961); Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). However, the flaw in Appellants' argument is that it essentially disregards the fact that the waters/wetlands it seeks to use to establish contiguity have already been annexed by another municipality.

(Emphasis added). In fact, the Court in Glaze emphasized: "It defies the very concept of contiguity to suggest that one municipality may use an adjacent municipality's annexed territory to establish contiguity." Id. at 254, 478 S.E.2d at 844 (emphasis added); see also Kizer v. Clark, 360 S.C. 86, 91, 600 S.E.2d 529, 532 (2004) ("[In Glaze, we] agreed that marshlands and creeks do not destroy

contiguity; however, these marshlands and creeks had previously been annexed by other municipalities and therefore could not be used to establish Town's contiguity.").

More recently, in Sonoco Prods. Co. v. S.C. Dep't of Revenue, 378 S.C. 385, 393, 662 S.E.2d 599, 603 (2008), the Supreme Court of South Carolina parenthetically cited to this passage from Glaze for the proposition that a "town lacked [the] requisite contiguity to incorporate where waters/wetlands it sought to use to establish contiguity had already been annexed by another municipality."

In Sonoco, the Supreme Court recognized that an intervening public road, owned in fee by Sonoco, could not destroy the contiguity between two developed parcels, also owned by Sonoco, for purposes of a tax law which contained no statutory definition of "contiguity." Id. at 391, 662 S.E.2d at 602. In looking to the definition of "contiguity" in other cases and statutes, including in the annexation context, the Supreme Court concluded that *the road did not destroy contiguity because there were no intervening landowners*, explaining: "Thus, as in the annexation case, there is no intervening landowner in this case that would destroy contiguity." Id. at 396, 662 S.E.2d at 604 (emphasis and double-emphasis added).

Likewise, in St. Andrews Pub. Serv. Dist. v. City Council, 339 S.C. 320, 325, 529 S.E.2d 64, 66 (Ct. App. 2000), reversed on other grounds by St. Andrews Pub. Serv. Dist. v. City Council, 349 S.C. 602, 564 S.E.2d 647 (2002), the Court of Appeals emphasized that "the Supreme Court has never held that non-adjacent properties not incidentally separated by a road, railway, or waterway are in fact contiguous." In Sonoco, 378 S.C. at 394, 662 S.E.2d at 603-04, the Supreme Court of South Carolina parenthetically reaffirmed the "general contiguity analysis in municipal annexation cases[s]" articulated by the Court of Appeals in St. Andrews Pub. Serv. Dist.,

explaining that the opinion of the Court of Appeals had been previously reversed only on the issue of standing.

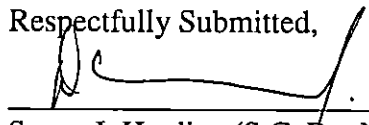
Consequently, in the present case, there is no need to precisely define the term "adjacent" in section 5-3-100 because, whatever the meaning, adjacency is destroyed, as a matter of law, by intervening, privately-owned property, especially when, as in the present case, such intervening property has been annexed to another municipality.

The circuit court's ruling was supported "under the common law requirement for contiguity, the statutory definition of 'contiguous,' or the commonly-applied definition of the term 'adjacent' in the context of municipal annexations." (R. p. 13). The circuit court should be affirmed.

CONCLUSION

For the reasons set forth herein, the circuit court's decision that the Contested Ordinance invalidly attempted to annex property which was not contiguous or "adjacent to" North Charleston should be affirmed.

Respectfully Submitted,



Susan J. Herdina (S.C. Bar No. 13165)
E-mail: herdinaj@charleston-sc.gov
Frances I. Cantwell (S.C. Bar No. 01121)
E-mail: cantwellf@charleston-sc.gov
Daniel S. ("Chip") McQueeney, Jr (S.C. Bar No. 06802)
E-mail: mcqueeneyd@charleston-sc.gov
50 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-3730

Attorneys for the Respondent/Appellant City of Charleston

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Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2018-CP-10-0851
Appellate Case No. 2019-000728

National Trust for Historic Preservation
in the United States and the City of Charleston, Respondents/Appellants,

v.

City of North Charleston, Appellant/Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Respondent's Brief complies with Rule 211(b), SCACR.

February 25, 2020

Daniel S. ("Chip") McQueeney, Jr.
(S.C. Bar No. 6802)
Email: mcqueeneyd@charleston-sc.gov

City of Charleston
50 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-3730
Attorney for Respondent/Appellant City of Charleston