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 REPLY BRIEF

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Respondent/Appellant City of Charleston ("Charleston") reaffirms the Statement of the Case, Facts, and Statement of Issues on Appeal set forth in its Appellant's Brief.

STANDARD OF REVIEW

North Charleston asserts that the circuit court properly awarded summary judgment on the issue of standing to North Charleston because, according to North Charleston, there are no *material* facts in dispute. Cf. Lanier Constr. Co. v. Bailey & Yobs, Inc., 384 S.C. 275, 281, 681 S.E.2d 909, 913 (Ct. App. 2009) ("The disputed fact of whether Mike Cupp informed Yobs he would mark the septic tank location is not a *material* fact when determining the Cupps' liability.").

In this case, there are genuine issues of *material* fact on the issue of standing. Most importantly, the undisputed evidence that Charleston annexed a portion of the Acre prior to North Charleston directly impacts the issue of standing based on well-recognized case law that a party has standing to challenge an annexation which infringes upon the former's proprietary interests or statutory rights. See St. Andrews Pub. Serv. Dist. v. City Council, 349 S.C. 602, 604, 564 S.E.2d 647, 648 (2002) ("In order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights.").

It is also clear that the factual issue of whether Respondent/Appellant National Trust for Historic Preservation in the United States (the "National Trust") owned a portion of the territory annexed is material to whether the National Trust alleged an infringement of its proprietary interests and statutory rights as a result of North Charleston's annexation. See Ex parte State ex rel. Wilson, 391 S.C. 565, 577 n.5, 707 S.E.2d 402, 408 (2011) ("The truly absurd result would be to construe the statute to allow a landowner's property to be annexed without his consent where

the annexation purports to have been achieved by a petition of 100% of the landowners."). Lanier is inapposite.

ARGUMENT IN REPLY

I. NORTH CHARLESTON, LIKE THE CIRCUIT COURT, INCORRECTLY ARTICULATES THE "TRADITIONAL FRAMEWORK" FOR STANDING TO CHALLENGE A 100% ANNEXATION, IGNORING CHARLESTON'S STANDING TO ASSERT AN INFRINGEMENT OF ITS STATUTORY RIGHTS.

Like the circuit court, North Charleston's articulation of the traditional standing framework to challenge a 100% annexation mistakenly limits such standing to (1) property owners of the annexed land; and (2) the Attorney General. (No. Chas. Resp.'s Br., p. 4; R. p. 5). This articulation is incorrect because it ignores case law conferring standing upon a party asserting that a 100% annexation infringes upon its statutory rights.

"In order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights." St. Andrews Pub. Serv. Dist. v. City Council, 349 S.C. 602, 604, 564 S.E.2d 647, 648 (2002) (emphasis added). In Vicary v. Town of Awendaw, 425 S.C. 350, 358, 822 S.E.2d 600, 603-04 (2018), the Supreme Court of South Carolina confirmed the framework articulated in St. Andrews and its progeny, while noting that the traditional framework presumes a good faith attempt to annex: "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." (Emphasis added). Nothing in Vicary abrogates the prevailing standing framework in St. Andrews.

North Charleston also "brushes off" Charleston's argument that a municipality has standing to challenge another municipality's annexation of property within its corporate limits as one that "might be a question one day in need of an answer. . . ." (No. Chas. Resp.'s Br., p. 4, n. 5). But

Charleston's statement is *already* black-letter law in South Carolina. See St. Andrews Pub. Serv. Dist., 349 S.C. at 605 n.2, 564 S.E.2d at 648 (noting that City of Charleston had standing to challenge James Island's annexation, as discussed in previous decision, because James Island "purported to annex property already within the City's borders."); Forest Acres v. Seigler, 224 S.C. 166, 176, 77 S.E.2d 900, 904 (1953) (permitting a challenge to annexation of property within municipality's corporate limits, looking to case law emphasizing that detachment statutes afford "substantial right recognized in plaintiff, as a corporate entity, over its corporate territory"); Tovey v. Charleston, 237 S.C. 475, 479-80, 117 S.E.2d 872, 874 (1961) ("We have held that under our statutes governing extension and reduction of corporate limits, a portion of one municipality may not be annexed to another without submitting the question of said detachment to the voters of the municipality whose area is to be reduced.").

As set forth in Argument II of Charleston's Appellant's Brief, it is undisputed that the Acre, defined by North Charleston through reference to Charleston County TMS 301-00-00-797 (No. Chas. Resp.'s Br., p. 1), includes property owned by the National Trust. Daniel C. Forsberg, Charleston's expert land surveyor, opined: "[I]f North Charleston annexed the Acre as described by Plat S17/0224 [the "Acre Plat"] 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. p. 245, ¶ 9) (emphasis added). Such expert testimony is relevant to the issue of what property is being annexed. Cf. Vicary v. Town of Awendaw, 427 S.C. 48, 54, 828 S.E.2d 229, 232-33 (Ct. App. 2019) (relying upon expert testimony of land surveyor Robert Frank that a purported annexation petition did not include a "valid legal description of any property . . . ."). North Charleston concedes that, if the National Trust's property is included in the territory annexed, then "Charleston territory was annexed." (No. Chas. Resp.'s Br. p. 6, n. 7).

Charleston produced evidence creating at least a genuine issue of material fact that North Charleston's annexation of the Acre included property owned by the National Trust, i.e., property in which the National Trust has a proprietary interest; and property previously annexed by Charleston, i.e., property in which Charleston had statutory rights. The circuit court erred in concluding otherwise, and the circuit court's decision in this respect should be reversed.

II. THE CIRCUIT COURT COMMITTED AN ERROR OF LAW IN INTERPRETING NORTH CHARLESTON'S ORDINANCE, WHICH ESTABLISHES THAT CITY COUNCIL INTENDED TO ANNEX THE ACRE, AS SHOWN ON THE ACRE PLAT, DESIGNATED AS CHARLESTON COUNTY TMS NO. 301-00-00-797, WHICH INCLUDES PROPERTY PREVIOUSLY ANNEXED BY CHARLESTON.

North Charleston expends much of its brief asserting that the City Council of North Charleston intended to annex only what it owned. Arguments III and IV of Charleston's Appellant's Brief extensively address this mistaken interpretation of North Charleston's ordinance. Moreover, North Charleston's proffered interpretation of its own ordinance, adopted by the circuit court, impermissibly leaves the boundary between Charleston and North Charleston up-in-the-air.

North Charleston's interpretation of its own ordinance has been a moving target from the get-go. North Charleston's answer describes the National Trust's claim of ownership to a portion of the Acre as "unconscionable." (R. p. 56, ¶ 61). In briefing, North Charleston changed its story—asserting that, regardless of what was shown on the Acre Plat, Charleston County TMS No. 301-00-00-797 controlled what North Charleston intended to annex because the quit claim deed to North Charleston could not have conveyed more than what the grantor owned:

> [T]he title conveying the one-acre tract to North Charleston was legally incapable of conveying property owned by the Trust. Thus, it is impossible to argue that any land of the Trust (previously annexed into Charleston) was annexed here. This is confirmed by reference to the annexation petition and ordinance relevant to this case. The City of North Charleston annexed the one-acre parcel by

> way of Ordinance No. 2017-080. The ordinance specifically said that the area being annexed was TMS 301-00-00-797. That is the parcel number for North Charleston's acre and is totally distinct from parcel No. 301-00-00-017 owned by the Trust.

(R. p. 126).

During oral argument, North Charleston simply asserted that it annexed whatever it owned: "We respected the boundary of that parcel 117 [sic]. We said multiple times in here that we're taking property that's entirely ours." (R. p. 208, lines 15-18). The circuit court adopted this argument, even though it leaves the issue of what was annexed uncertain. (R. pp. 6-8).

Charleston has consistently asserted that the only description of the property allegedly annexed by North Charleston includes the property shown on the Acre Plat, which is the same as the property designated as Charleston County TMS No. 301-00-00-797, and which includes property owned by the National Trust and previously annexed by Charleston in 2005. (R. pp. 35-36, ¶¶ 4, 7; pp. 38-39, ¶¶ 27-28, 33; pp. 73-76). Forsberg confirmed that the Acre, as shown on the Acre Plat and as designated by TMS No. 301-00-00-797, includes a small portion of the National Trust's property. (R. p. 245, ¶¶ 8-9).

As Charleston emphasized in Argument III of its Appellant's Brief (pp. 16-17), North Charleston's reliance upon such an amorphous description of the property being annexed would constitute a fatal flaw, rendering the ordinance void. Cf. Bostick v. Beaufort, 307 S.C. 347, 350, 415 S.E.2d 389, 391 (1992) ("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."). The South Carolina Court of Appeals recently reiterated this proposition in Vicary v. Town of Awendaw, 427 S.C. 48, 55, 828 S.E.2d 229, 233 (Ct. App. 2019):

> It is necessary that an actual petition for annexation exist and that the petition at the very least identify the property proposed for annexation. Based on the expert testimony [of land surveyor Robert Frank] in evidence, we find the 1994 letter failed to do so.

(Emphasis added). As a result, the Vicary court concluded: "Respondents' challenge to the purported annexations was not barred by the statute of limitations because the passage of time cannot transform a void annexation into a valid one." Id. at 56, 828 S.E.2d at 234.

For similar reasons, and for the reasons set forth in Arguments III and IV of Charleston's Appellant's Brief, the appellate court should reject North Charleston's proffered interpretation of its own ordinance as including whatever North Charleston owns. Such an interpretation impermissibly leaves the question of what has been annexed uncertain, resulting in an invalid ordinance. The circuit court's adoption of such an interpretation warrants reversal.

III. THE CIRCUIT COURT ERRED IN DENYING CHARLESTON STANDING UNDER THE PUBLIC IMPORTANCE EXCEPTION, AND NORTH CHARLESTON INACCURATELY ASSESSES THE FACTORS SUPPORTING SUCH AN EXCEPTION IN THIS CASE.

In addressing Charleston's argument that Charleston should be granted standing under the public importance exception to the general framework articulated in St. Andrews, North Charleston relies upon a lack of prior case law interpreting section 5-3-100 of the South Carolina Code, concluding that section 5-3-100 is too "obscure" to countenance such standing.

North Charleston's reliance on the lack of prior case law interpreting section 5-3-100 actually *supports* public importance standing for the purpose of future guidance. See Vicary v. Town of Awendaw, 425 S.C. 350, 359, 822 S.E.2d 600, 604 (2018) ("The linchpin of the public importance exception is the need for future guidance."). If appellate court decisions had already addressed the issues raised in this case sufficiently, there would be no need for future guidance. The same could be said of *any* case in which the public importance exception could be applied.

Charleston's assertion of public importance standing appropriately looks to the future, not the past. As North Charleston concedes, the circuit court's ruling "has been widely publicized . . . ." (No. Chas. Resp.'s Br. p. 13, n. 14). Thus, there is little question that, without an appellate court opinion condemning the practice, other municipalities will utilize North Charleston's "leapfrog" procedure in the future.

North Charleston relies upon the Attorney General to intervene if leapfrog annexations get "out of hand." But the Attorney General recently opined that the State lacks standing to challenge an annexation unless it owns the land being annexed. See S.C. Att'y Gen. Op. 2017-087 (Dec. 21, 2017) ("Conversely, this Office has also opined that the State does not have standing to challenge an annexation of land which is does not own.").[1]

Standing here would hardly be extraordinary, despite North Charleston's protestations to the contrary. Charleston is peculiarly situated to challenge North Charleston's ordinance because it is the municipality being leapfrogged. Charleston also emphasizes the record evidence that North Charleston's annexation ordinance, on its face, includes territory previously annexed by Charleston. (R. p. 245, ¶¶ 8-9).

North Charleston also argues that the portion of the circuit court's underlying order invalidating North Charleston's attempt to leapfrog under section 5-3-100 will itself provide future guidance on the issue. (No. Chas. Resp.'s Br. p. 13, n. 14). The circuit court's order provides little real guidance because the circuit court simultaneously held that only the Attorney General could challenge the annexation. Thus, it is no more binding on other municipalities than an Attorney

[1] In State ex rel. Condon v. City of Columbia, 339 S.C. 8, 14, 528 S.E.2d 408, 411 (2000), the Supreme Court of South Carolina came to the contrary conclusion: "We hold that the State, provided it is acting in the public interest, has standing to bring a quo warranto action challenging the annexation of property it does not own." (Emphasis added).

General's opinion, and the Attorney General has already rejected the exact type of annexation attempted by North Charleston here, explaining:

> [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. 2005-009, p. 4 (Jan. 18, 2005) (emphasis added). North Charleston ignored this non-binding opinion, and there is no reason to believe that North Charleston or any other municipality would comply with the circuit court's similar conclusion when, as in the present case, the circuit court's opinion has no "teeth."

For these reasons, and as set forth in Argument V of Charleston's Appellant's Brief, the circuit court order refusing to confer public importance standing on Charleston should be reversed.

CONCLUSION

As set forth in Charleston's Appellant's Brief, and as supplemented by this Reply Brief, Charleston respectfully requests that the portion of the circuit court's order granting summary judgment to North Charleston on the issue of standing be reversed, and the case remanded to the circuit court to enter judgment in accordance with the appellate court's decision in this appeal.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

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

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