

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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

Case No. 2018-CP-10-00851

Court of Appeals Case No. 2019-000728
Opinion No. 5965 (S.C. Ct. App. filed February 1, 2023)

Supreme Court Case No. 2023-000930

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

Petitioners,

v.

City of North Charleston,

Respondent.

**THE CITY OF CHARLESTON'S REPLY IN SUPPORT OF ITS
PETITION FOR A WRIT OF CERTIORARI**

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S.C. SUPREME COURT

INDEX

ARGUMENT IN REPLY 1

1. Charleston adopts the National Trust’s reply to North Charleston’s return. 1

2. North Charleston’s Argument I (that the grant of certiorari is not warranted based on the factors enumerated in Rule 242(b), SCACR) is inherently weak. In fact, it is not actually an argument against the merits of Petitioners’ positions at all, but rather a plea for the Court to simply ignore them. 1

3. North Charleston incorrectly articulates the “traditional framework” for standing to challenge a 100% annexation, ignoring Charleston’s standing to assert an infringement of its statutory rights. 3

4. North Charleston’s contention that its city council intended to annex only what North Charleston owned is unavailing, and indeed, to accept this contention is to impermissibly leave the boundary between Charleston and North Charleston in limbo. 5

5. North Charleston inaccurately assesses the factors supporting standing under the public importance exception in this case. 7

CONCLUSION 8

In further support of its petition for a writ of certiorari, Charleston¹ makes the following points in reply to North Charleston's return.

ARGUMENT IN REPLY

1. Charleston adopts the National Trust's reply to North Charleston's return.

Following the service/filing of its return to the National Trust's petition for a writ of certiorari, North Charleston served/filed a return to Charleston's petition for a writ of certiorari that simply adopts its return to the National Trust's petition as its return to Charleston's petition, too. Accordingly, except (out of an abundance of caution) to the extent that it may be somehow inconsistent with Charleston's position in this matter, Charleston hereby adopts the National Trust's reply to North Charleston's return

2. North Charleston's Argument I (that the grant of certiorari is not warranted based on the factors enumerated in Rule 242(b), SCACR) is inherently weak. In fact, it is not actually an argument against the merits of Petitioners' positions at all, but rather a plea for the Court to simply ignore them.

To be sure, as Rule 242(b) makes expressly clear, "A writ of certiorari is not a matter of right, but of sound judicial discretion" Undoubtedly, the Court is empowered to deny this or any other petition for a writ of certiorari for no reason at all, regardless of the merits. In practice, however, it does not appear that the Court is inclined to turn a blind eye to error for no better reason than because it can. *See, e.g., Branco v. Hull Storey Retail Group, LLC*, Memorandum Opinion No. 2023-MO-009 (S.C. Sup. Ct. filed May 24, 2023) (reversing, in an unpublished decision, an unpublished decision of the Court of Appeals, namely, Unpublished

¹ Shorthand references already defined in the petition are continued in this reply (e.g., "Charleston" is Petitioner the City of Charleston; the "National Trust" refers to Petitioner National Trust for Historic Preservation in the United States; "Petitioners" refers to Charleston and the National Trust, collectively; "North Charleston" is Respondent, the City of North Charleston; the "Subject Opinion" is the Court of Appeals' opinion in this matter).

Opinion No. 2021-UP-009 (S.C. Ct. App. filed January 13, 2021)). The fact that the Court regularly issues unpublished memorandum opinions, which, of course, have no precedential value, and indeed the very existence of Rule 220(b)(1), SCACR (restricting unpublished memorandum opinions to circumstances where a published opinion would have no precedential value), shows that, as the ultimate custodian of our state's judicial system, the Court's interests are not confined solely to the development of our law-giving jurisprudence but in fact encompass a broader concern for the quality of justice that system produces.

Charleston would respectfully submit that this case does indeed involve special and important reasons for granting a writ of certiorari due to the presence of issues of law as to which clarification/guidance from the Court is needed and would greatly benefit the bench and bar. Moreover, the very nature of this case, involving, as it obviously does, the competing claims of political subdivisions, necessarily impacts the public interest, which can only bolster its candidacy for review by this Court. *Cf.* Rule 245(a), SCACR (“The Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties. If the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised, the facts showing the reasons must be stated in the petition.”).

In any event, however, the error below (first by the circuit court, then by the Court of Appeals) is itself enough to warrant this Court's attention. North Charleston's argument based on Rule 242(b) is inherently weak. It is not in fact an argument that there was no error, but rather a plea for the Court to simply ignore the error. It is not in fact an argument against the merits of Petitioners' positions, but rather a plea for the Court to simply ignore them. Most respectfully, Charleston submits that the reason why the first thing North Charleston wants is for

the merits to be ignored is because the last thing it wants is for the merits to be considered.

3. North Charleston incorrectly articulates the “traditional framework” for standing to challenge a 100% annexation, ignoring Charleston’s standing to assert an infringement of its statutory rights.

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. (Return p. 6.) This 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), this Court 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 the Court’s decision in *Vicary* abrogates the prevailing standing framework in *St. Andrews*.

Without question, a municipality has standing to challenge another municipality’s annexation of property within its corporate limits. *See St. Andrews*, 349 S.C. at 605, 564 S.E.2d at 648 n.2 (noting that the City of Charleston had standing to challenge James Island’s annexation 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 already explained in Charleston’s petition, the Acre, defined by North Charleston through reference to Charleston County TMS 301-00-00-797, 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 . . .”). Indeed, North Charleston has already conceded that, if the National Trust’s property is included in the territory annexed, then “Charleston territory was annexed.” (North Charleston’s Combined Final Brief [to the Court of Appeals] p. 6 n.7 (“Annexation of the Shoestring land would mean that Charleston territory was annexed.”).) To concede this is to concede that Forsberg’s affidavit, and the small portion of the National Trust Property that he opines was included in the annexation, is *material*, because, if any Charleston territory was annexed by North Charleston, Charleston has standing to challenge North Charleston’s annexation of property within its corporate limits.

At a minimum, 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 already annexed by Charleston, i.e., property in which Charleston has statutory rights. The circuit court erred in concluding otherwise, the Court of Appeals erred in affirming the circuit court, and such error should be corrected.

4. North Charleston's contention that its city council intended to annex only what North Charleston owned is unavailing, and indeed, to accept this contention is to impermissibly leave the boundary between Charleston and North Charleston in limbo.

On its face, North Charleston's ordinance establishes that its 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. Yet, North Charleston asserts that its city council intended to annex only what North Charleston owned. Charleston's petition already addresses why this interpretation of the ordinance is flawed. Moreover, this flawed interpretation of the ordinance, which has been mistakenly accepted by the circuit court and, in turn, the Court of Appeals, impermissibly leaves the boundary between Charleston and North Charleston in limbo.

North Charleston's interpretation of its own ordinance has been a moving target from the beginning. 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 to the circuit court, 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.) Then, during oral argument before the circuit court, 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, and the Court of Appeals affirmed the circuit court, 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.)

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 Court of

Appeals reiterated this proposition in *Vicary*:

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.

427 S.C. at 55, 828 S.E.2d at 233 (emphasis added). Consequently, the Court of Appeals 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 already set forth in Charleston’s petition, this 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 Court of Appeals’ affirmance of the circuit court’s adoption of such an interpretation warrants reversal.

5. North Charleston inaccurately assesses the factors supporting standing under the public importance exception in this case.

In addressing Charleston’s argument that it 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. (Return p. 15.)

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*, 425 S.C. at 359, 822 S.E.2d at 604 (“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" (Return p. 15 n.13.) Thus, there is little question that, without judicial condemnation of the practice, other municipalities will utilize North Charleston's "leapfrog" procedure in the future.

North Charleston assures us that the Attorney General's ability to intervene is enough to keep leapfrog annexations from getting out of hand. Of course, in doing so, it implicitly acknowledges not only that leapfrog annexations are capable of repetition but also that they can be a problem. Moreover, it highlights the existing uncertainty: When is a leapfrog annexation a problem? Surely, a definitive answer from this Court, or even guidance in this regard, would be a meaningful development of our state's jurisprudence that could only serve to further the interests of justice and judicial (as well as municipal) economy.

CONCLUSION

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

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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