THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESON COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2018-CP-10-0846
Case No. 2018-CP-10-2131
Case No. 2018-CP-10-2539
Appellate Case No. 2019-000903

City of Charleston, ... Appellant,

v.

City of North Charleston and Millbrook Plantation, LLC, ... Respondents.

AND

Millbrook Plantation, LLC, ... Plaintiff,

v.

City of Charleston, ... Defendant.

AND

City of Charleston, ... Plaintiff,

v.

City of North Charleston and Millbrook Plantation, LLC, ... Defendants.

FINAL BRIEF OF RESPONDENT MILLBROOK PLANTATION, LLC

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3. Did the circuit court correctly rule that North Charleston's 2017 Ordinance did not attempt to annex the 100' strip of land that had been annexed by Charleston in 2005?

STATEMENT OF THE CASE

Millbrook has no material objection regarding Appellant's procedural history.

STATEMENT OF FACTS

The circuit court granted Millbrook's Motion to Dismiss, therefore, the court assumed to be true the allegations of the Complaints. These facts were outlined by the circuit court in its Order (R. pp. 3-5) and Millbrook repeats those facts below:

1. May 10, 2005: Charleston adopted Ordinance No. 2005-93, annexing the following property into Charleston, which is a portion of the Millbrook Parcel:

> [A]n area consisting of a hundred (100) foot strip immediately contiguous to and on the northern side of Hwy. 61, located in Charleston County, South Carolina, and [] identified by the Charleston County Assessor's Office as Property Identification Number ("TMS") 361-00-00-006 and includes all marshes, public waterways and public rights-of-way, shown within the said area to be annexed as shown more fully on the map attached hereto and made a part hereof as Exhibit A.[1]

2. December 19, 2017: Charleston's Council accepted a petition signed by 75% or more of the freeholders owning at least 75% of the assessed valuation of certain

[1] City later identifies this 100' strip as TMS 361-00-00-006-1 and alleges Charleston County records showed this by December 21, 2017, which is the date on which North Charleston gave first reading to 2017 Ordinance.

real property in the area requesting annexation, which included the Millbrook Parcel.

3. December 19, 2017: Charleston's Council voted to have a public hearing on the above-referenced petition.

4. December 21, 2017: Charleston County's records showed a portion of the Millbrook Parcel lying within municipal limits of Charleston.

5. December 21, 2017: North Charleston's Council gave first reading to 2017 Ordinance, purporting to annex the Millbrook Parcel, including that portion of the Millbrook Parcel previously annexed into Charleston.

6. December 28, 2017: Charleston County's records showed a portion of the Millbrook Parcel lying within municipal limits of Charleston.

7. December 28, 2017: North Charleston's Council adopted 2017 Ordinance.

8. January 23, 2018: Charleston's Council held a public hearing on the (75%) annexation petition and gave first reading to an ordinance annexing the Millbrook Parcel.

9. March 22, 2018: North Charleston's Council adopted 2018 Ordinance, purporting to amend or supplement 2017 Ordinance by removing from 2017 Ordinance the portion of the Millbrook Parcel annexed into the Charleston in 2005.

10. April 10, 2018: Charleston's Council adopted an ordinance annexing the Millbrook Parcel into Charleston.

11. Millbrook had actual knowledge that a portion of the Millbrook Parcel was contained within the municipal limits of Charleston before Millbrook executed the annexation petition to annex the Millbrook Parcel into North Charleston.

12. North Charleston did not request information from Charleston about whether Charleston's municipal limits included a portion of the Millbrook Parcel on or

before December 19, 2017.

13. This action is brought pursuant to section 5-3-270 of the South Carolina Code, challenging 2017 Ordinance, adopted by the North Charleston's Council on December 28, 2017, purporting to annex approximately 31 acres of real property, currently designated as Charleston County TMS 361-00-00-006 and 361-00-00-006-1 (the "Millbrook Parcel"), which is more particularly described in the 2017 Ordinance.

14. This action is brought pursuant to section 5-3-270 of the South Carolina Code, challenging 2018 Ordinance, adopted by North Charleston's Council on March 22, 2018, purporting to amend and supplement 2017 Ordinance, whereby North Charleston purported to annex, upon petition of Millbrook that certain tract of land previously designated as Charleston County TMS Nos. 361-00-00-006 and presently designated as Charleston County TMS Nos. 361-00-00-006 and 361-00-00-006-1 (the "Millbrook Parcel").

15. 2017 Ordinance and 2018 Ordinance violate the statutory and proprietary rights of Charleston in that they purportedly annex land within the Charleston's corporate limits and land over which the Charleston had previously begun the process of annexation.

16. 2018 Ordinance purports to correct North Charleston's defective annexation of the Millbrook Parcel in the 2017 Ordinance, which included a portion of the Millbrook Parcel annexed to the Charleston in 2005.

STANDARD OF REVIEW

Millbrook has no material objection regarding Appellant's Standard of Review.

ARGUMENT

1. The circuit court correctly ruled that Charleston had no standing to challenge a 100% annexation.

Standing, in a 100% annexation case, has been directly addressed in *Quinn v. City of*

Columbia, 303 S.C. 405, 401 S.E.2d 165 (1991). *Quinn's* facts are very similar to the present action. City of Columbia, like North Charleston, had adopted an ordinance approving a 100% annexation of land in the Harbison area. Irmo,[2] like Charleston, attempted to adopt an ordinance annexing the same land through the 75% method. Columbia filed a 12(b)(6) motion to dismiss. The court stated, "The sole issue we need address is that of Respondents' *standing*." *Id.*, at 406, 401 S.E.2d at 166 (emphasis added). The court then analyzed the allegations as follows:

> City's annexation of this property was pursuant to subsection (3) of S. C. Code Ann. § 5-3-150, the "100% method," which provides, in part: any area or property which is contiguous to a city or town may be annexed to the city or town by filing with the municipal governing body a petition signed [***3] by all persons owning real estate in the area requesting annexation. Upon the agreement of the governing body to accept the petition and annex the area, and the enactment of an ordinance declaring the area annexed . . . the annexation shall be complete and [an] . . . election. . . shall not be required.
>
> Unlike subsection (1) of § 5-3-150, the "75% method," subsection (3) makes no provision for aggrieved *residents* to challenge an annexation.

Id., at 406-07, 401 S.E.2d at 166.

Thus, just like City of Columbia's annexation was complete upon the enactment of the ordinance, Millbrook's annexation into North Charleston was complete on December 28, 2017. This was completed prior to Charleston adopting its ordinance on April 10, 2018. Charleston lacks standing to challenge this 100% annexation.

South Carolina courts have made the standing issue even clearer in a later action in which Charleston was a party. Not only has the South Carolina Supreme Court ruled that a municipality has no standing to challenge a 100% annexation, but held "the only non-statutory party which may challenge a municipal annexation is the State, through a *quo warranto* action." *St. Andrews Pub.*

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[2] Irmo was a respondent with *Quinn*.

Serv. Dist. v. City Council of the City of Charleston, 349 S.C. 602, 605, 564 S.E.2d 647, 648 (2002).

Thus, Charleston not only lacks the essential requirement of standing in this action, the only party legally able to challenge the annexation by North Charleston is the State of South Carolina. Charleston is not the State; thus, this court should affirm the circuit court.

2. The circuit court correctly ruled that the Supreme Court of South Carolina has declined to adopt the "Prior Pending Proceedings" Rule.

Charleston alleges that it began the annexation of TMS #361-00-00-006 before North Charleston began its annexation proceedings.[3] Charleston argues this under what has been called the "prior pending proceedings" rule. In *City of Columbia v. Town of Irmo*, 316 S.C. 193, 447 S.E.2d 855 (1994) the Supreme Court of South Carolina declined to rule on its efficacy, explaining: "We decline to reach the issue of whether the 'prior pending proceedings' rule should be adopted by this Court . . . . Here, there is no showing that Irmo commenced **valid legal** proceedings prior to the effective date of City's Ordinances 90-30 and 90-31." *Id.* at 196, 447 S.E.2d at 857 (emphasis in original).

The Supreme Court of South Carolina has declined to adopt this rule as the law in this state, and the circuit court likewise declined to adopt it. Charleston argues that North Carolina has adopted it, therefore, South Carolina should follow; however, South Carolina has often declined

[3] Charleston argues that it started its 75% annexation on December 19, 2017. It infers that North Charleston and Millbrook, after this date, initiated 100% annexation proceedings in an effort to beat Charleston to the finish line. First, it is obvious that if Millbrook submitted a 100% annexation petition to North Charleston that it did not sign the 75% annexation petition to Charleston. Second, the record includes evidence that Millbrook had initiated annexation proceedings with North Charleston as early as November 30, 2017. See Order Granting Motion to Dismiss, Exhibit 1 (map attached Area Proposed for Annexation by the City of North Charleston dated **November 30, 2017**) (R. p. 14). Thus, Millbrook was already in discussion with North Charleston regarding 100% annexation several weeks before Charleston accepted the 75% annexation petition without any notice to Millbrook. This is a blatant abuse of property owner's rights.

to follow its neighbor to the north. In contract law, North Carolina has adopted the "Blue Pencil Rule" whereby the court rewrites illegal portions of the contract to make them legal. South Carolina has steadily declined to adopt the Blue Pencil Rule on the grounds that the parties should stand or fall as they have written the contract.

Likewise, this court should continue to decline to adopt the prior pending proceedings' rule because it can be used to subvert the landowner of his property rights. In this case, it is clear from the petition received by Charleston at its January 2018 Public Hearing that Millbrook had already exercised its property rights by annexing in North Charleston. Charleston arguing that the prior pending proceedings' rule should become the law of this state will be interfering with the property rights of individual landowners.

Like Irmo in *City of Columbia*, Charleston had not commenced **valid legal** proceedings prior to the effective date of North Charleston's 2017 Ordinance. Scheduling a public hearing is not valid legal proceedings. Charleston commenced its valid legal proceedings on January 23, 2018, which was almost one month after North Charleston had granted Millbrook's request to be annexed into North Charleston.

Thus, this court should not adopt the Prior Pending Proceedings Rule, or, in the alternative, rule that Charleston had not commenced valid legal proceedings prior to the effective date of North Charleston's 2017 Ordinance.

3. The circuit court correctly ruled that North Charleston's 2017 Ordinance did not attempt to annex the 100' strip of land that had been annexed by the Charleston in 2005.

In the complaints, Charleston made numerous references to the 2017 Ordinance and the 2018 Ordinance. Although Charleston did not attach those to the Complaints, Charleston made the ordinances, through its arguments, an essential element of each of its causes of action.

"[A]llowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based." *See Brazell v Windsor*, 384 S.C. 512, ___, 682 S.E. 2d 824, 826 (2009). The 2017 Ordinance and the 2018 Ordinance are statutes of North Charleston. "[T]he interpretation of a statute is a question of law . . . ." *Catawba Indian Tribe of S.C. v State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Thus, the circuit court properly took Charleston's allegations, which it considered to be true, interpreted the Ordinances, and applied the law.

Charleston alleges that the 2017 Ordinance purports to annex approximately 31 acres of real property, currently designated as Charleston County TMS 361-00-00-006 and 361-00-00-006-1 (the "Millbrook Parcel"), which is more particularly described in the 2017 Ordinance. According to Charleston, the 100' strip that Charleston annexed in 2005 is TMS 361-00-00-006-1. Charleston makes no claim that it annexed in 2005 the portion known as TMS 361-00-00-006.

In examining 2017 Ordinance, North Charleston stated, "An ordinance . . . annexing an area known as 52-S in Charleston County (**TMS #361-00-00-006**) . . . as shown on a map dated November 30, 2017 . . . . (emphasis added). Following the legal language of the ordinance, the property description is given. Included in the description are six (6) references to "TMS #361-00-00-006" while there are no references to TMS #361-00-00-006-1, which is the 100' strip that had been annexed into Charleston in 2005. At the end of the description, it ends with the phrase "all distances being more or less." *Id.* The 2017 Ordinance then states, "**The area proposed for annexation includes the parcel designated TMS #361-00-00-006.**"[4] (emphasis added). (R. pp.

[4] The map that is part of 2017 Ordinance also states, "Area to be annexed includes TMS # 361-00-00-006." It makes no reference to TMS #361-00-00-006-1. (R. p. 14).

12-13). The map that is part of Ordinance 2017 shows TMS #361-00-00-006, but fails to include TMS #361-00-00-006-1)R. 14).

The 2017 Ordinance never makes any claim to annex TMS # 361-00-00-006-1. The circuit court found that North Charleston did not attempt, in the 2017 Ordinance,[5] to annex property (the 100' strip) that was part of Charleston. Without this, Charleston's complaints failed to state any valid claim for relief.

Appellant argues that the circuit court failed to grant it every reasonable doubt. Charleston argues that when North Charleston adopted the 2017 ordinance that TMS # 361-00-00-006-1 was not in the county records, but that by the time it filed its first Complaint, March 27, 2018, TMS # 361-00-00-006-1 was in the records. Regardless of whether it was in the records or not, North Charleston's 2017 Ordinance only annexed TMS # 361-00-00-006.

Under a motion to dismiss, Charleston is entitled to every *reasonable* doubt, but not every scintilla of a doubt that it tries to create.

ADOPT BY REFERENCE

Pursuant to S.C. Appellate Court Rule 208(b)(6), Millbrook adopts by reference the Initial Brief of Respondent City of North Charleston.

CONCLUSION

The circuit court was correct in holding that Charleston has no standing to challenge a 100% annexation. This court should not adopt the Prior Proceedings Rule, or, in the alternative, it should determine that Charleston had not commenced valid legal proceedings prior to North Charleston adopting the 2017 Ordinance, or that Millbrook had started annexation proceedings

[5] Charleston also alleged that the 2018 Ordinance purported to correct the 2017 defective Ordinance. Because the circuit court found the 2017 Ordinance not to be defective, the court found that argument to be moot.

before action by Charleston. Lastly, the circuit court was correct in finding that the 2017 Ordinance did not attempt to annex TMS # 361-00-00-006-1.

This court should affirm the circuit court and remand this case for the circuit court to consider an award to Millbrook of its reasonable attorneys' fees pursuant to S.C. Code Ann. § 15-77-300.

Respectfully submitted:

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February 17, 2020

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CERTIFICATE OF COUNSEL

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

February 13, 2020

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