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**S.C. SUPREME COURT**

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellant Case No. 2023-000930

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

v.

City of North Charleston ..... Respondent.

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**BRIEF OF PETITIONER**

**NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES**

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**ATTORNEYS FOR PETITIONER  
NATIONAL TRUST FOR HISTORIC  
PRESERVATION IN THE UNITED  
STATES**

**TABLE OF CONTENTS**

Table of Authorities ..... ii

Statement of Issues On Appeal ..... 1

Introduction.....2

Statement of The Case .....2

Statement of Facts.....6

Standard of Review.....14

Argument .....14

    I.    **The description of the property in the Contested Ordinance is the controlling consideration in determining the “territory” annexed, not whether North Charleston owned all the land described therein.....15**

    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 that the boundaries of the land annexed were different from those in the legal description in North Charleston’s annexation ordinance. ....18**

    III.   **This Court should find that the Petitioner has standing because its ownership of a portion of the territory purportedly annexed is sufficient to confer standing on an annexation challenger, and the plat of the Acre (A.p. 269) as well as the Affidavit of Forsberg (A.pp. 244-45) establish that the National Trust owns a portion of the property within the legal description of the annexation petition. ....21**

    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 the National Trust’s legislative charge to protect places of national significance, 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. ....23**

Conclusion .....27

**TABLE OF AUTHORITIES**

**CASES**

Ex parte State ex rel. Wilson, 391 S.C. 565, 707 S.E.2d 402 (2011) .....14, 16, 22, 26

Glaze v. Grooms, 324 S.C. 249, 478 S.E.2d 841, (1996) ..... 17

Natl. Tr. for Historic Preservation in U.S. v. City of N. Charleston, 439 S.C. 222,  
886 S.E.2d 487 (S.C. App. 2023), reh'g denied (May 11, 2023), cert. granted (Sept. 16, 2024)  
2, 5, 16, 18, 19, 22

S.C. Pub. Int. Found. v. Wilson, 437 S.C, 334, 878 S.E.2d 891 (2022) .....14

St. Andrews Pub. Serv. Dist. v. City Council, 349, S.C. 602, S.E.2d 647 (2002)..... 22

Vicary v. Town of Awendaw, 425 S.C. 350, 822 S.E.2d 600 (2018) .....14, 21, 24, 27

**STATUTES**

S.C. Code Ann. § 5-3-100.....1, 3, 6, 15, 16, 17, 19, 24, 25

S.C. Code Ann. § 5-3-150(3) .....8, 17

S.C. Code Ann. § 5-3-270.....3

S.C. Code Ann. § 5-3-305.....7

54 U.S.C.A. § 312102-312106.....23, 26

54 U.S.C.A. § 312102(a) .....10, 13, 23

54 U.S.C.A. § 312102(b)(2).....10, 23

54 U.S.C.A. § 312102(i) .....10

54 U.S.C.A. § 312102(k) .....10

## **STATEMENT OF ISSUES ON APPEAL**

- I. 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, the 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?
  
- II. 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?
  
- III. 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 territory improperly annexed is owned by the National Trust?
  
- IV. 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 the National Trust's congressional mandate to protect significant historic properties, North Charleston's gross violation of the laws governing annexation, and the need for future guidance on whether a municipality may cross over properties in another municipality to annex property that is neither contiguous with nor adjacent to the annexing municipality, as occurred here?

## **INTRODUCTION**

On September 16, 2024, this Court issued its order granting both Petitioners’ Petitions for Writ of Certiorari to review the decision of the Court of Appeals in Natl. Tr. for Historic Preservation in U.S. v. City of N. Charleston, 886 S.E.2d 487 (S.C. App. 2023), reh'g denied (May 11, 2023), cert. granted (Sept. 16, 2024) (the “Opinion”). The Opinion conflicts with settled principles governing standing in annexation challenges and settled principles governing municipal annexations and incorporations. In granting certiorari and reviewing the Opinion, this Court will be applying those established principles to a set of facts unlike any that has ever been before this Court in a municipal annexation matter.

This Court has addressed standing in many annexation cases, but none has involved an instance such as this one where an owner of property within the area annexed, who timely filed the necessary challenge, was denied standing despite its proprietary interest. This Court has addressed the validity of annexations conducted by municipalities in a number of contexts, but no case has yet addressed the issue of one municipality reaching over the boundary of another to annex property.

For the reasons stated below, Petitioner respectfully submits that the Court of Appeals misapplied cardinal principles of the law, and that the Opinion and the lower court’s opinion on standing should be reversed.

## **STATEMENT OF THE CASE**

On March 27, 2018, Petitioner, National Trust for Historic Preservation in the United States (“National Trust” or “Petitioner”), and the other Petitioner, City of Charleston (“Charleston”), brought this action challenging the annexation of one acre of land (the “Acre”) by Respondent, the City of North Charleston (“Respondent” or “North Charleston”) that is purportedly owned by

North Charleston. (A.p. 297)<sup>1</sup>. Petitioners asserted that the annexed land was neither adjacent to nor contiguous with North Charleston and that the annexation was void and unauthorized as a matter of law because the Acre was not owned entirely by North Charleston and was separated from North Charleston by two properties within the boundaries of Charleston. (A.pp. 32-43, 297-311). The National Trust owns one of those two properties. The other property is the right of way for Highway 61, Ashley River Road, that had also previously been annexed into Charleston. (Hrg. Tr. A.pp. 221: 1.24-222: 1.1).

On April 16, 2018, North Charleston filed an answer denying these allegations, asserting affirmative defenses, and filing counterclaims against the Respondents/Appellants. (A.pp. 47-58, 318-40). North Charleston's counterclaim requested a declaration that the Acre did not encroach on the adjacent land owned by the National Trust. (A.p. 56, at ¶ 61-63, A.pp. 56, 337-38). On May 17 and 21, 2018, respectively, Petitioners filed separate replies denying the counterclaims. (A.pp. 63-66; A.pp. 59-62).

On October 9, 2018, North Charleston filed two motions: (1) its motion for partial summary judgment under Rule 56, SCRCPP, seeking an order that annexations under S.C. Code § 5-3-100<sup>2</sup> do not require contiguity and that, even though The Acre was separated from North Charleston by two parcels in Charleston, it was nonetheless "adjacent" to North Charleston; and (2) its motion to

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<sup>1</sup> On February 15, 2018, the Petitioners served and filed their notice of challenge of the annexation in accordance with S.C. Code § 5-3-270 within sixty days of the annexation. (A.p. 30).

<sup>2</sup> Section 5-3-100 states 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. When the territory proposed to be annexed to the municipality belongs entirely to the county in which the municipality is located and is adjacent thereto, it may be annexed by resolution of the governing body of the municipality and the governing body of the county. 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 § 5-3-100 (double emphasis added).

dismiss pursuant to Rules 12 and 56, SCRCPC, arguing that Petitioners lacked standing to challenge the annexation. (A.p. 67-68). 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. (A.pp. 240-41).

On November 9, 2018, Petitioners moved for summary judgment arguing, *inter alia*, that the Acre's annexation was void because the Acre is not adjacent to nor contiguous with the corporate limits of North Charleston, and the Acre annexed included land owned by the National Trust within the City of Charleston. (A.pp. 69-72). On December 6, 2018, Petitioners served the affidavit of Daniel C. Forsberg in opposition to North Charleston's motions. (A.pp. 242-45). Forsberg, a licensed professional engineer and surveyor, stated that the territory annexed by North Charleston included a small section of land owned by the National Trust. (A.pp. 242-45).

The Honorable Eugene C. Griffith, Jr., circuit court judge, held a hearing on the motions on December 10, 2018. (A.pp. 177-239). On March 1, 2019, Judge Griffith signed a written order finding that Petitioners did not have standing to challenge the annexation. (A.pp. 1, 14). 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 [Respondents/Appellants], this Court finds that North Charleston did not lawfully annex the one acre parcel under the annexation statute." (A.pp. 1-2). Petitioners received written notice of the entry of the order on March 4, 2019; the order was re-filed on March 5, 2019. (A.pp. 15-28). On March 14, 2019, Petitioners separately filed motions to reconsider, alter, or amend the Order, that were denied by Judge Griffith in his Order filed on May 1, 2019. (A.pp. 167-76; A.pp. 155-166; A.p. 29).

On April 29, 2019, North Charleston filed a cross appeal of the order's holding that found if the Petitioners had standing, the annexation was legally invalid. (A.pp. 358-62). Charleston

served its notice of appeal on May 24, 2019, and the National Trust served its notice of appeal on May 31, 2019. (**A.pp. 363-65; A.pp. 368-69**).

After hearing oral arguments on October 11, 2022, the Court of Appeals issued its Opinion on February 23, 2023, affirming the lower court's ruling that Petitioners lacked standing. 886 S.E.2d at 489. The National Trust and Charleston timely filed petitions for rehearing on March 20, 2023, and March 30, 2023, respectively. (**Nat'l Tr. Pet. for Reh'g, A.pp. 549-62, 570; City of Charleston Pet. for Reh'g; A.pp. 572-602**). The Court of Appeals denied the petitions for rehearing on May 11, 2023. (**Order Den. Pet. for Reh'g of Nat'l Tr., A.pp. 639-40; Order Den. Pet. for Reh'g City of Charleston, A.pp. 641-42**).

The National Trust and Charleston filed their separate petitions for writ of certiorari on June 22, 2023, and July 3, 2023, respectively, (**Nat'l Tr. Pet. for a Writ of Cert. & Proof of Service; City of Charleston Pet. for a Writ of Cert. & Proof of Service**). North Charleston filed its return to the National Trust's petition on June 29, 2023, and its return to Charleston's petition on July 18, 2023. (**N. Charleston Return to the Nat'l Tr.'s Pet. for Cert.; N. Charleston Return to Charleston's Pet. for Cert**). The National Trust filed its reply brief in support of its petition on July 10, 2023, and Charleston filed its reply brief in support of its petition on July 28, 2023 (**National Trust Reply Br. in Support of Pet. For Cert.; Charleston's Reply Br. in Support of Pet. For Cert.**).

This Court granted both petitions for certiorari in its Order dated September 16, 2024. (**Order Granting Pet'rs' Pet. for Cert.**).

## STATEMENT OF FACTS

On December 21, 2017, North Charleston enacted Ordinance No. 2017-080 (the “Contested Ordinance”) to annex the Acre that was separated from North Charleston by two parcels within the boundaries of Charleston. (A.pp. 293-95). The “territory” purportedly annexed was the Acre identified in the Contested Ordinance as taxation map parcel TMS #301-00-00-797. (A.pp. 293-95)<sup>3</sup>. North Charleston enacted the annexation under S.C. Code Section 5-3-100 (A.pp. 293-95). This method of annexation applies only if “the territory proposed to be annexed to the municipality belongs *entirely* to the municipality... and is *adjacent* thereto....” S.C. Code § 5-3-100 (emphasis added).

The territory North Charleston attempted to annex, TMS #301-00-00-797, included a small portion of real property owned by The National Trust since 1980. In 1980 Georgia-Pacific deeded The Nature Conservancy 26.53 acres (A.pp. 2, 252-54). The Nature Conservancy immediately quitclaimed this 26.53 acres to the National Trust, (the “National Trust Parcel”)<sup>4</sup>. (A.pp. 2, 255-57). The quitclaim deed for the National Trust Parcel repeats the property’s description and dimensions in the deed from Georgia Pacific to The Nature Conservancy:

[T]hat certain tract or parcel of land, in fee, situate, lying and being along the southern right of way line of Highway 61, County of Charleston, State of South Carolina, containing Twenty Six and Fifty Three Hundredths (26.53) acres, more or less, and more particularly described as follows:

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<sup>3</sup> Prior to the purported annexation of the Acre, in October 2017, North Charleston annexed another parcel of real property known as Runnymede Plantation, which is a 113-acre parcel identified as TMS #361-00-00-002 (the “Runnymede Parcel”) located directly across the Ashley River from the municipal boundaries of North Charleston. It abuts the northeastern side of the Highway 61 right of way. (Hrg. Tr., A.p. 182: 1.11-13). No annexation challenge was filed by Petitioners or others because the Runnymede Parcel is contiguous to the municipal boundaries of North Charleston.

<sup>4</sup> The “National Trust Parcel” is “designated in the deeds and tax assessor records as TMS No. 301-00-00-017”. (A.p. 2). Petitioner uses the terms “National Trust Parcel”, “26.53 acres”, and “TMS # 301-00-00-017” interchangeably in this Brief.

Those 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 approximately 11,556 feet in length**, composed of three strips of land, and being along the northern boundary line of all of the property owned by Grantor along the southern right-of-way line of Highway 61 . . . . TMS No. 301-00-00-017 . . . .

(**A.pp. 252, 255**) (emphasis added). In 2005 Charleston lawfully annexed various properties including the National Trust Property. (**A.p. 2**).<sup>5</sup> Charleston also annexed the Highway 61 right of way in 2005. (**A.pp. 75, 105, 452**)<sup>6</sup>; see (**A.p. 132**) (acknowledging in an order from the Circuit Court other properties were annexed into Charleston in Ordinance No. 2005-93); (**Hrg. Tr., A.pp. 200: l. 25-201: l. 3**); (**Hrg. Tr., A.pp. 221: l. 24-222: l. 1**).

North Charleston’s attempted annexation of the Acre is but one step in a carefully crafted scheme to annex the remainder of what was formerly the Georgia-Pacific tract—approximately 2,200 acres owned by Whitfield Construction Company (“Whitfield”)—which is separated from North Charleston by the National Trust Property and the Highway 61 right of way. (**Hrg. Tr., A.pp. 221: l. 24-222: l. 1**). Whitfield subdivided the Acre from its larger tract and conveyed it to Tim Whitfield Construction and Development, LLC by deed dated August 27, 2017. (**A.pp. 269-73**). Less than a month later on September 12, 2017, Tim Whitfield Construction and Development, LLC conveyed the Acre by quitclaim deed to North Charleston for nominal consideration. (**A.pp. 274-77**).

If the annexation of the Acre were successful, Whitfield could establish contiguity with North Charleston under S.C. Code Section 5-3-305, allowing North Charleston to annex the

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<sup>5</sup> The National Trust Property was annexed properly into the City of Charleston in 2005 under Ordinance No. 2005-93. (**Order, A.p. 2**).

<sup>6</sup> “In 2005, the City Council of Charleston adopted Ordinance No. 2005-93, annexing several properties into Charleston, including the National Trust Property and the right-of-way for Highway 61 as it abuts the National Trust Property.” (**A.pp. 75, 105**).

approximately 2,200 surrounding acres owned by Whitfield under the “100%” method set forth in S.C. Code Section 5-3-150(3). S.C. Code § 5-3-150(3) (“ . . . any area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by all persons owning real estate in the area requesting annexation.<sup>44</sup>”).

Whitfield seeks to annex its 2,200 acres into North Charleston to convert this undeveloped acreage into residential subdivisions because the property is currently zoned as agricultural by Charleston County. (**A.pp. 347-48**). Whitfield alleges it has a contract to sell five hundred acres to a developer who is also interested in purchasing an additional five hundred acres. (**A.pp. 347-48**). Charleston County’s zoning allows one unit per two acres; North Charleston’s zoning will allow eight units per acre.<sup>7</sup> If successful, the annexation ploy of Whitfield and North Charleston would allow *sixteen times* more houses per acre than what Charleston County currently allows.

The Whitfield property and the National Trust Parcel are within the Ashley River Historic District (the “Historic District”). (**A.p. 87**). This district is listed in the National Register of Historic Places, making it not just important to this State, but also significant on a national level. See (**Nat’l Tr. Mem. In Opp’n To Def.’s Mot. To Dismiss, A.p. 87**); (**Pet’rs’ Writ of Cert., p. 5-6 nn.3-5**). Specifically, the Historic District consists of over 20,000 acres of “largely undeveloped land” that is home to “historic and archaeological resources that date to the earliest settlement of Charleston in the **late 1600s.**” (**Nat’l Tr. Mem. In Opp’n To Def.’s Mot. To Dismiss, A.p. 88**) (bold added). Included in this territory is an 11.5-mile stretch of S.C. Highway 61, also known as

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<sup>7</sup> Charleston County permits only one house per eight acres for single family residential developments (i.e. up to 276 houses here). (**A.pp. 347-49**). Whereas North Charleston permits a density of two houses per acre in single-family residential developments (i.e. up to 4,427 houses here). (**A.pp. 353-56**).

Ashley River Road, that is individually noted by the National Register as a place of historic significance. (**Nat'l Tr. Mem. In Opp'n To Def.'s Mot. To Dismiss, A.p. 88**). This route, adorned with a lush canopy of live oaks, has been an integral travel route since 1691. (**Nat'l Tr. Mem. In Opp'n To Def.'s Mot. To Dismiss, A.p. 88**). Additionally, historic Drayton Hall, one of the last and best examples of original Palladian architecture in the United States, owned by the National Trust, is just off Highway 61. (**Nat'l Tr. Mem. In Opp'n To Def.'s Mot. To Dismiss, A.p. 88 & nn. 1-2**). The National Trust Parcel is across from the entrance to Drayton Hall and runs in a northwesterly direction along Highway 61. (**A.p. 88**).

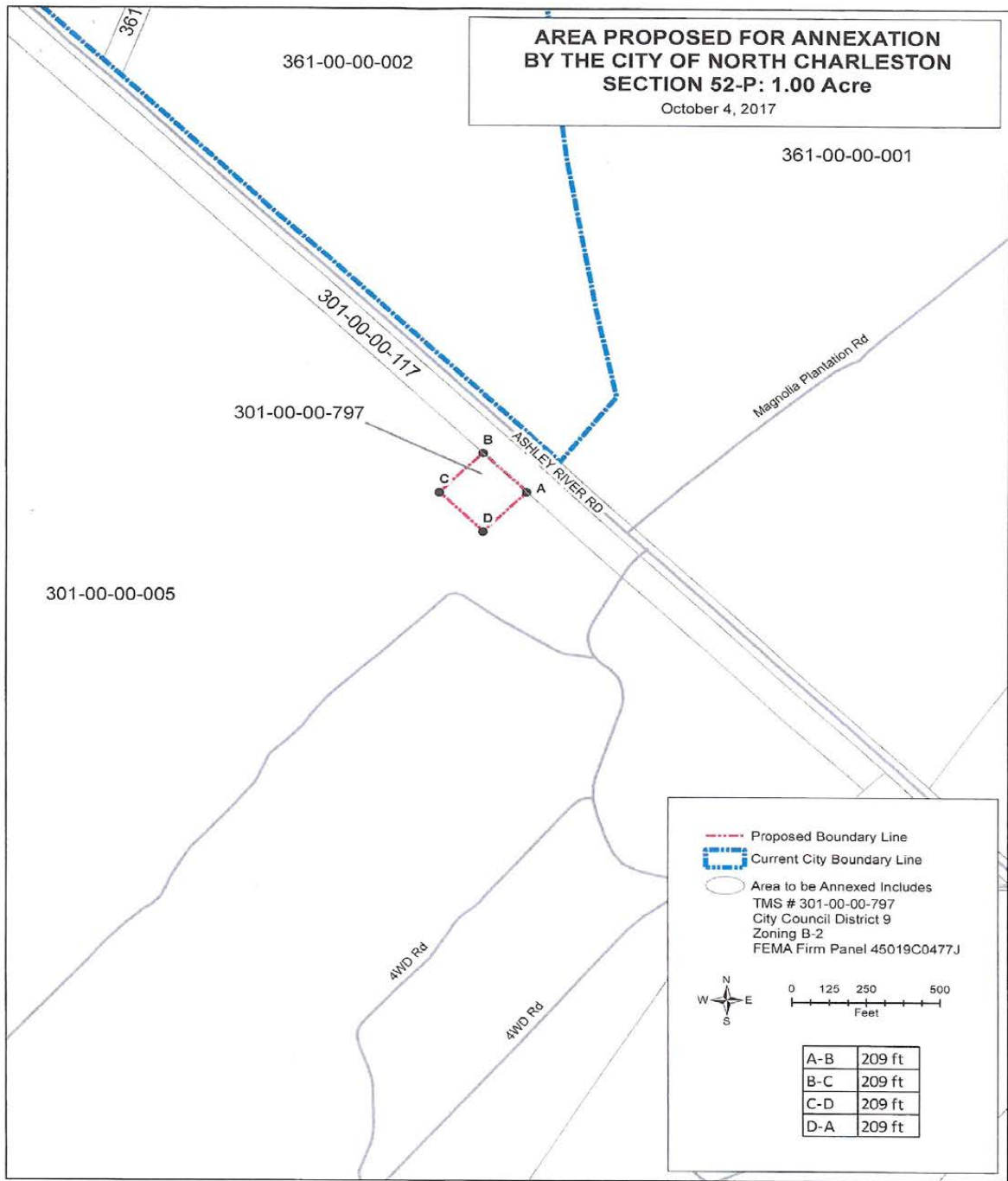


**(Photographs at A.pp. 87-88).**

Hosting over 50,000 visitors each year, the National Trust has owned and maintained Drayton Hall since 1974. (**Summons. & Compl., A.p. 35**). Drayton Hall is designated as a National Historic Landmark, as noted by the National Register, attesting to its historical and cultural importance on a national level. (**Nat'l Tr. Mem. In Opp'n To Def.'s Mot. To Dismiss, A.p. 88**). The federal legislation establishing the National Trust charges it with a duty to "further the policy enunciated in chapter 3201 of this title, and to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest". 54 U.S.C.A. § 312102(a). Among their enumerated duties are the duties to "preserve and administer sites, buildings, and objects for [the] public['s] benefit." Id. § 312102(b)(2). Congress specifically vests the National Trust with the power to "acquire . . . and hold . . . any real property, or any estate or interest in real property . . . as may be necessary and proper in carrying into effect the purposes of the National Trust," and to "sue and be sued in its corporate name." Id. § 312105(c), (g). In addition to executing contracts in furtherance of its mission, Congress gives the National Trust the broad authority to "do *any and all lawful acts* necessary or appropriate to carry out the purposes for which the National Trust is created." Id. § 312102(i), (k). This duty extends to preserving and protecting historic landscapes and structures within the Ashley River Road Historic District.

The National Trust Parcel is one hundred feet wide and runs along the southern boundary of Highway 61 for almost two miles along Whitfield's property, separating it from Highway 61 (**Aff. of Forsberg, A.p. 244**). The National Trust Parcel is designated as Charleston County TMS # 301-00-00-017. (**A.p. 2**); (**Aff. of Forsberg, A.p. 244**). The National Trust Parcel constitutes a vegetated buffer along Highway 61 that contributes to the Historic District and the natural viewsheds and foliage along the historic Ashley River Road. (**A.pp. 242-45; A.pp. 255-57; A.pp. 87-88**).

A threshold question to the National Trust’s assertion of standing based on its ownership of the National Trust Parcel is what “territory” did North Charleston purport to annex. 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”). (**A.pp. 242-45; A.pp. 255-57; A.pp. 87-88, Plat recorded at S17/0224, A.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. Because the width of the National Trust Parcel is exactly 100 feet, the plat of the Acre includes approximately 62 square feet of the National Trust Parcel. ( **A.pp. 242-45; A.pp. 255-57; A.pp. 87-88; Ap. 269**). The County designated the Acre as TMS 301-00-00-797. (**Id.**). Below is the map accompanying the Contested Ordinance (**A. 293-95**):



The Contested Ordinance states “the area proposed for annexation includes one acre identified as parcel designated TMS #301-00-00-797.” (A.p. 294). According to the Affidavit of Daniel

Forsberg, the licensed professional engineer and surveyor, the annexed territory as described in the Contested Ordinance included a small portion of the National Trust Parcel:

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 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.

**(A.p. 245).**The National Trust did not consent to the annexation of the Acre, nor does it desire for North Charleston to annex any portion of the National Trust Parcel, particularly since the National Trust Parcel lies within Charleston and cannot be annexed into North Charleston. **(Order, A.p. 5).** Because the territory annexed includes a portion of its property, the National Trust has proprietary standing.

An alternative basis for National Trust's standing lies in the public importance exception, as more fully explained below. Unlike private conservation and preservation organizations, the Congress of the United States established the National Trust and imbued it with the mission of protecting and preserving historical places of national significance. 54 U.S.C.A. § 312102(a). As alleged in the complaint, the proposed annexation of the Acre and the foreseeable annexation of the remainder of the 2,200 acres into North Charleston will damage the character of the Drayton Hall National Historic Landmark, the Historic District, and the National Scenic Highway known as Ashley River Road (Highway 61), causing injury-in-fact to the National Trust. **(Compl., A.pp. 299-307, ¶¶ 1, 6-7, 42-43, 46).**

## **STANDARD OF REVIEW**

A motion to dismiss for lack of standing inherently challenges a court's subject matter jurisdiction. S.C. Pub. Int. Found. v. Wilson, 437 S.C 340, 878 S.E.2d 891, 894 (2022). The party seeking to establish standing has the burden of proving it. Vicary v. Town of Awendaw, 425 S.C. 350, 822 S.E.2d 600, 602 (2018). The existence of subject matter jurisdiction is a question of law, and this Court is not required to proffer deference to the courts below. Id.

The construction of a statute governing annexation is also a question of law that the appellate court must resolve without deference to the lower court. Ex parte State ex rel. Wilson, 391 S.C. 565, 570, 707 S.E.2d 402, 405 (2011).

## **ARGUMENT**

Petitioner has demonstrated that it has both proprietary standing and public importance standing. Both the lower court and the Court of Appeals erred in determining that the National Trust does not have proprietary standing. Both incorrectly found a portion of the National Trust Parcel was not described in the territory annexed, incorrectly considered parol evidence of the alleged intent of North Charleston to annex only the land that it owned, and incorrectly ignored the affidavit of Daniel Forsberg stating the territory annexed includes a portion of the National Trust Parcel. Petitioner also qualifies for public importance standing considering the case's unusual circumstances, the national significance of the historic properties, the foreseeable consequences of the annexation on the properties, and the federal statutory mandate creating the National Trust which charges it with preserving and protecting these historic places for the benefit of the public of the United States.

This Court's decision will determine the future of an area declared to be of national historical significance. Petitioner National Trust entreats this Court to recognize its proprietary and

public importance standing to challenge this patently illegal annexation that violates both the wording of Section 5-3-100 and settled law requiring true contiguity for annexation. The decision of this Court will provide future guidance and eliminate the future unlawful encroachment of one municipality upon another through the device of Section 5-3-100.

**I. The description of the property in the Contested Ordinance is the controlling consideration in determining the “territory” annexed, not whether North Charleston owned all the land described therein.**

In determining proprietary standing, the property described as the territory or area to be annexed in the petition or ordinance controls. Whether the annexing party holds legal title to all the described land is not dispositive. The lower court and the Court of Appeals incorrectly determined that an annexing party may annex only property that it owns regardless of the legal description of the territory or area annexed. The property description in the Contested Ordinance clearly states the territory annexed was TMS #301-00-00-797, which encompasses the Acre subdivided from the 2,200 acres (plat recorded at book S17, page 224 (the “Acre Plat”)) whose eastern boundary extends onto the National Trust Parcel. (**A.pp. 269, 283-85**). Because the National Trust owns a portion of the land described to be annexed, the National Trust has proprietary standing.

It is undisputed that the Acre annexed contains sixty-two square feet of the National Trust Parcel. The Court of Appeals dealt with this nettlesome fact by adopting and repeating the rationale of the lower court which states the property description in the Contested Ordinance did not govern because 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 at 490. Like the lower court, the Court of Appeals cited case law noting a deed cannot convey title to land not owned by the grantor regardless of the property's description. Nat'l Tr., 439 S.C. at 228, 886 S.E.2d at 490. In so doing, both courts incorrectly confuse the question of who owns property with the question of what property was actually annexed.

The question of whether the National Trust has proprietary standing turns on the description of the annexed "territory" or "area" in the Contested Ordinance, not whether the quitclaim deed for the Acre actually conveyed legal title to the sixty-two square feet of the National Trust Parcel within the Acre to North Charleston. Despite what the circuit court and the Court of Appeals 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 petition or the municipality seeking to annex territory under S.C. Code Section 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 the public trust tidelands were not annexed because the petitioner did not own them. Rather, this Court held the land was annexed because the land was described as the "area" to be annexed in the petition, but 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 404-09. See also Glaze v. Grooms, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996) (noting that the area to be annexed and not the ownership of the property is what conferred standing upon the challengers).

The focus for proprietary standing rests on the description of the territory or area to be annexed rather than ownership. Here, 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 annexed under Section 5-3-100. This is the interpretation the Court of Appeals and the circuit court adopt.

Likewise, S.C. Code Ann. section 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 at 490. That is incorrect. By describing the territory as TMS #301-00-00-797, North Charleston in fact *did* claim to annex a portion of the National Trust Parcel, explained more fully below.<sup>8</sup>

Precedent of this Court dictates the description of the area or territory annexed controls what land a municipality attempts to annex. There is no precedent stating the area or territory annexed can only be that which the annexing party, in this case North Charleston, owns regardless of the property’s description in the petition or ordinance. The Court of Appeals disregarded decisions of this Court when it held that the property description in the Contested Ordinance did not matter, since North Charleston could only annex property it owned. Because the Contested Ordinance describes territory that includes a portion of the National Trust Parcel, as attested by Forsberg, the National Trust has proprietary standing and the territory annexed was not *entirely* owned by North Charleston.<sup>9</sup>

**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 that the boundaries of the land annexed were different from those in the legal description in North Charleston’s annexation ordinance.**

The supposed intent of the annexing party is not a relevant consideration that allows a court

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<sup>8</sup> As indicated in North Charleston’s 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 (N. Charleston Ans. and Countercls., A.p. 338, ¶ 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.”). However, the ownership dispute is entirely separate from the question of whether the description of the territory annexed includes a portion of the National Trust Parcel.

<sup>9</sup> The National Trust maintains that, separate from it, the City of 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 brief for further elaboration of this distinct alternative ground for standing.

to reform the description of the area or territory purportedly annexed by the petition or ordinance.

Section 5-3-100 does not state that the intention of the municipality determines the annexed territory when there is a conflict between that intent and the actual description of the territory. Both the Court of Appeals and the circuit court looked to what they believed North Charleston's *intent* was in the courts' efforts to circumvent the undisputed fact the territory annexed by North Charleston includes sixty-two square feet of the National Trust Parcel that is within 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 at 490 (emphasis added).

No precedent in the annexation opinions of this Court endorse the proposition that the reviewing court can go outside the annexed area's description to derive the intent of the annexing municipality, and neither court cites to authority supporting this consideration. 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.<sup>10</sup> The closest indicia of North Charleston's intent is the recitation of the statutory prerequisite under section 5-3-100 that "THE PROPERTY TO BE ANNEXED BELONGS ENTIRELY TO THE CITY OF NORTH CHARLESTON." (A.p. 293). However, the property to be annexed is described *eleven* times in Ordinance #2017-080 as TMS #301-00-00-

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<sup>10</sup> 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 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. (A.p.294).

797. (A.pp. 293-94). As stated in the Affidavit of Forsberg, a licensed engineer and land surveyor, because the territory annexed is described as TMS #301-00-00-797, it necessarily included sixty-two 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. As a result, Charleston County has assigned a tax map sequence (TMS) number to this property, that being TMS No. 301-00-00-797.

6. ... The deed to the National Trust for the National Trust Property was made subject to the right of GPIC to create 18 easements for access from S.C. Highway 61 across the National Trust Property. Plats L09/0225-0229 lay out these access easements. Plat S 17 /0224 also shows Access Easement #3, as shown on Plat L09/0225, running from Highway 61 across the National Trust's property to the Acre. 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.

\* \* \* \*

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 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.

(A.pp. 244-45).

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 what each believed to be the subjective intent of North Charleston rather than the description of the territory annexed are contrary to the settled law of this Court and without precedent in the context of annexation challenges.

**III. This Court should find that the Petitioner has standing because its ownership of a portion of the territory purportedly annexed is sufficient to confer standing on an annexation challenger, and the plat of the Acre (A.p. 269) as well as the Affidavit of Forsberg (A.pp. 244-45) establish that the National Trust owns a portion of the property within the legal description of the annexation petition.**

There is no dispute that the deed conveying the Acre to North Charleston incorporated the Acre Plat 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.

**(A.p. 274)** (emphasis in original).

As discussed above, Petitioners submitted the Affidavit of Forsberg, a licensed engineer and surveyor, who attests the territory annexed includes a portion of the National Trust Parcel. **(A.pp. 242-245)**. Neither the lower court nor the Court of Appeals should have disregarded this sworn statement of a qualified surveyor. Forsberg's opinion is entitled to no less deference and consideration than the testimony of surveyor Robert Frank on the description of the property purportedly annexed, which the lower court and Court of Appeals found persuasive in striking down Awendaw's annexation in Vicary v. Town of Awendaw, 427 S.C. 48, 54, 828 S.E.2d 229, 232 (Ct. App. 2019).

The Acre Plat provides the "size, shape, dimensions, buttings and boundings" of TMS #302-00-00-797, the territory North Charleston annexed in Ordinance #2017-080. **(A.pp. 293-94)**. Both the circuit court and Respondent have acknowledged that the Acre Plat includes a portion of

the National Trust Parcel. (A.p. 4) (“the 2009 [P]lat had width variations of a few inches here and there, *so too did the 2017 plat of the Acre.*”) (emphasis added); (Hrg. Tr., A.pp. 185: l. 19-186: l. 7) (“the plat showed . . . a four-inch discrepancy . . . the metes and bounds said that it was 99.7 off of Ashley River Road.”). This “discrepancy” results in the boundary along the northeastern side of the parcel being 208.71 feet. See (A.p. 269). In addition to the Affidavit of Fosberg, establishing that TMS #301-00-00-797 contains sixty-two square feet of the National Trust Property, the Court of Appeals also acknowledged the relevant plats contain the National Trust’s property. (A.pp. 244-45); see Section II.B and accompanying text; Nat’l Tr., 439 S.C. at 228, 886 S.E.2d at 490 (“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.”).

Regardless of what Respondent *intended*, Respondent describes the territory annexed in the Contested Ordinance specifically as TMS #301-00-00-797 and has the boundaries recited on the Acre Plat recorded at book S17, page 0244. (A.pp. 274, 293-96). This description—acknowledged by the circuit court, the Court of Appeals, and the Respondent—includes a portion of the National Trust Parcel. In Wilson, this Court held that if one owns a portion of the area described in the annexation petition, then he has proprietary standing to challenge the annexation. See Wilson, 707 S.E.2d at 406; see St. Andrews Pub. Serv. Dist. v. City Council, 349 S.C. 602, 605, 564 S.E.2d 648 (2002). (“In order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights.”).

This Court has never held 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 is 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 and Court of Appeals erred in determining that the National Trust did not have proprietary 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 the National Trust's legislative charge to protect places of national significance, 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 National Trust is far more than an ordinary citizen. It is a legislatively created entity that is charged by law with preserving sites of national historical importance. Moreover, it owns two properties in this Historic District that will be harmed if this annexation is upheld. Finally, the legal issue of whether one municipality can jump over the boundaries of another municipality to annex property is one of public importance, capable of repetition, that invites future guidance.

In refusing to bestow public importance standing on the National Trust, both the Court of Appeals and the lower court failed to consider the National Trust's unique status and mission. The National Trust was chartered by the United States Congress in 1949 to advocate on behalf of historic preservation, including protecting increasingly scarce places like this National Historic District and Drayton Hall, a National Historic Landmark 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, A.pp. 95-96**). Congress established the National Trust to "further the policy enunciated in [federal preservation law], and to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest". 54 U.S.C.A. § 312102(a). Among their enumerated duties are to "preserve and administer sites, buildings, and objects for [the] public['s] benefit." *Id.* § 312102(b)(2).

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; the National Trust will suffer an injury in fact to its statutory, historic preservation interests if 4,000 houses are built if the annexation is upheld. *See St. Andrews*, 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, A.pp. 1-2, 9-10**). While the National Trust’s legislative mandate is an important factor in whether it qualifies for public importance standing, what seals it in this case is that it has asserted injury in fact to its two properties if this annexation is upheld. (**Compl., A.pp. 299-307, ¶¶ 1, 6-7, 42-43, 46**).

The unusual facts of this case satisfy the standard for granting public importance standing discussed by this Court in *Vicary v. Town of Awendaw*, 425 S.C. 350, 822 S.E.2d 600, 602 (2018). In *Vicary* the Court discussed the need for “unique facts” and the need for future guidance to invoke the public importance exception. This case easily satisfies this test.

In *Vicary*, this Court found that Awendaw’s repeated 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*, 425 S.E.2d at 359-60. 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.

Vicary, 822 S.E.2d at 359. The requirements of adjacency and contiguity under Section 5-3-100 presented in this case have never been addressed by this Court.<sup>11</sup>

North Charleston attempts to negate the need for future guidance by marginalizing Section 5-3-100, labeling it an “obscure statute” with “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.” (**N. Charleston Resp. Br., A.pp. 506-07**) (**emphasis in original**). North Charleston’s minimization of its illegal conduct in this annexation effort 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 and applying Section 5-3-100. (**N. Charleston Resp. Br., A.p. 507**) (“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, Section 5-3-100 will become the judicially sanctioned loophole for annexation by one municipality across the boundary of another municipality. If 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, the property owner can simply circumvent the cardinal rule of contiguity by conveying 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 owner’s land because it is contiguous to the small portion that was earlier annexed. This capacity for repetition satisfies the “future

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<sup>11</sup> 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 this Court.

guidance” prong of the public importance exception and warrants guidance on the interpretation of Section 5-3-100.

Despite what the lower court and the Court of Appeals stated, there is no precedent from this Court that the test of public importance in annexation cases is whether the state Attorney General mounts a challenge. This rationale would eliminate public importance standing altogether. 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 the annexation that was otherwise invalid because 100% of the property owners did not join in the petition for annexation was upheld.

The lower court’s and Court of Appeals’ invented litmus test 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.

To ignore the importance of this case would also overlook the responsibility conferred on the National Trust to protect and preserve properties with inherent historical value. For the past 75 years, Congress has charged the National Trust to advocate on behalf of the properties and landscapes that have shaped our Nation’s history. **54 U.S.C. §§ 312102-312106 (2015), Mem. Nat’l Tr. in Opp’n to Def’s Mot. to Dismiss, A.pp. 95-96**). Just as the U.S. Forest Service had a

vested interest in preventing the annexation of its land for the institution of a “planned development”<sup>12</sup> in Vicary, here, the National Trust has an interest in protecting this historic land from future development.

Therefore, given the federal statutory mission of the National Trust, the occurrence of this threatening annexation in an Historic District, and the National Trust’s ownership of properties that will be adversely affected, the National Trust has public importance standing under these unique facts that present a question of public importance capable of repetition that beckons for future guidance from this Court.

### CONCLUSION

Based on the foregoing, Petitioner National Trust respectfully requests that this Court **REVERSE** the decision of the Court of Appeals finding that the Petitioners do not possess standing, and **AFFIRM** the lower court’s determination that this purported annexation is unlawful per se.

October 16, 2024  
Charleston, South Carolina

Respectfully submitted,



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<sup>12</sup> The Court in Vicary considered the future harm the planned development would cause to the land annexed from the U.S. Forest Service. Notably, in their decision they included the importance of the testimony of one of the petitioners who “testified as to the potential future harm caused by developing the property. He noted the unique species of animals, as well as the overall use and enjoyment of the National Forest, which nearby development could threaten. Additionally, development potentially threatened the Forest Service’s ability to conduct prescribed fire burnings necessary to maintain the health of the forest.” Vicary v. Town of Awendaw, 425 S.C. 350, 355, 822 S.E.2d 600, 602 (2018).

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