RECEIVED

Dec 05 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2023-000778

City of Charleston, Petitioner,

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.

BRIEF OF RESPONDENT CITY OF NORTH CHARLESTON

David J. Parrish
Maynard Nexsen, PC
205 King Street, Suite 400
Charleston, SC 20401
843-720-1771
dpparish@maynardnexsen.com
Attorney for City of North Charleston

Kriston D. Neely
City of North Charleston
PO Box 190016
North Charleston, SC 29419
843-740-2553
kneely@northcharleston.org
Attorney for City of North Charleston

TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

Statement of Issues on Appeal 1

Statement of the Case 2

Standard of Review 9

Arguments 10

I. The circuit court and court of appeals properly found Charleston did not have statutory standing to challenge North Charleston's annexation of Parcel 006 because North Charleston did not attempt to annex Parcel 006-1 that had previously been annexed by Charleston 10

A. The 2017 Ordinance and 2018 Ordinance, on their face, unequivocally reflect that North Charleston did not intend to annex, and did not annex, Parcel 006-1 11

B. North Charleston's' 2017 Ordinance was lawful and valid under *Bostic v. City of Beaufort* 12

II. The circuit court and court of appeals properly rejected Charleston's request to adopt the "prior pending proceedings rule" in favor of Charleston 15

A. Charleston lacks standing under *Vicary* to argue for adoption of the prior pending proceedings rule 15

B. Charleston was not "first in line" to annex Parcel 006 17

C. Charleston is guilty of the conduct it claims the prior pending proceedings rule is needed to avoid 18

D. The North Carolina decision in *City of Burlington v. Town of Elon College* does not support Charleston's position 20

E. The corrective 2018 Ordinance does not affect the timing analysis 22

F. Any concerns about competing municipal annexations or need for "future guidance" should be addressed by the State of South Carolina (acting through the Attorney General), not by Charleston 23

Conclusion 24

TABLE OF AUTHORITIES

Cases

Bostic v. City of Beaufort, 307 S.C. 345, 415 S.E.2d 389 (1992).....12, 13, 14

City of Burlington v. Town of Elon Coll., 314 S.E.2d 534 (N.C. 1984) 20, 21

City of Charleston v. City of N. Charleston,
439 S.C. 6, 885 S.E.2d 151 (Ct. App. 2023), *cert. granted* (Sept. 16, 2024*)* 7, 8-9, 14

City of Columbia v. Town of Irmo, 316 S.C. 193, 447 S.E.2d 855 (1994) 9

Ex parte State ex rel. Wilson v. Town of Yemassee, 391 S.C. 565, 707 S.E.2d 402 (2011) 16

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).....9

S.C. Pub. Int. Found. v. Wilson, 437 S.C. 334, 878 S.E.2d 891 (2022) 9

Sherman v. Reavis, 273 S.C. 542, 257 S.E.2d 735 (1979).....19, 20

St. Andrews Pub. Serv. Dist. v. Charleston Council of City of Charleston,
349 S.C. 602, 564 S.E.2d 647 (2002) 10, 11, 15

Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987) 9

Vicary v. Town of Awendaw, 425 S.C. 350, 822 S.E.2d 600 (2018) 9, 10, 11, 15, 16, 18

Statutes, Regulations, Court Rules

Rule 12(b)(6), SCRCP 9

S.C. Code Ann. § 5-3-150.....3, 7, 8, 10, 11, 13, 14, 17, 18, 20, 23

S.C. Code Ann. § 5-7-260 18

INTRODUCTION

Respondent City of North Charleston (North Charleston) submits this Brief in response to the Brief submitted by Petitioner City of Charleston (Charleston). All of Charleston's various arguments and topic headings in its Brief fall under the general category of its claim of "standing" to challenge North Charleston's annexation of Parcel 006 owned by Respondent Millbrook Plantation, LLC (Millbrook), but Charleston essentially makes two separate arguments:

1. Charleston claims statutory standings based on North Charleston's alleged annexation of Parcel 006-1 when it annexed Millwood's Parcel 006; and

2. Charleston claims the circuit court and court of appeals erred in refusing to adopt and apply the "prior pending proceedings rule" in its favor.

In this Brief, North Charleston will follow the approach used by the circuit court and court of appeals and first address Charleston's statutory standing argument, and then address Charleston's argument regarding the prior pending proceedings rule.

Charleston's Brief argues the same issues in a number of different ways. In this Brief, North Charleston is attempting to address the issues in a more direct manner, rather than attempting to provide a point-by-point counter to each of the numerous, and often overlapping, assertions contained in Charleston's Brief. To the extent this Brief does not specifically or directly respond to a particular assertion in Charleston's Brief, it is not intended to indicate acquiescence or agreement with the assertion.

STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court and court of appeals properly find Charleston did not have statutory standing to challenge North Charleston's annexation of Parcel 006 because North Charleston did not annex any property that had previously been annexed by Charleston?

II. Did the circuit court and court of appeals properly rejected Charleston's request to adopt and apply the "prior pending procedures rule" in favor of Charleston?

STATEMENT OF THE CASE

This issue before this Court is whether the circuit court and court of appeals properly found Charleston lacks standing to challenge North Charleston's annexation of a parcel of property. The undisputed facts relevant to this matter are as follows and are divided into the facts applicable to Charleston's statutory standing claim and the facts applicable to its claim regarding the prior pending proceedings rule.

Facts applicable to Charleston's statutory standing claim

The image below is from the Charleston County GIS system and shows the two parcels of property (TMS #3610000006 and TMS #3610000006**1**) at issue in this appeal.**1**

1 This image reflects the same information shown on the GIS map appearing in the Record on Appeal (R. p. 18), but this image was pasted directly from the Charleston County GIS system to provide a cleaner and more legible view of the two parcels at issue here. For clarity, the

The larger parcel identified as TMS #3610000006 (Parcel 006) is bounded to the north by the Ashley River. The small parcel identified as TMS #36100000061 (Parcel 006-1) is approximately 100 feet wide and is bounded to the south by Highway 61 (a/k/a Ashley River Road). Both parcels are owned by Millbrook. Parcel 006-1 was annexed by Charleston in 2005.

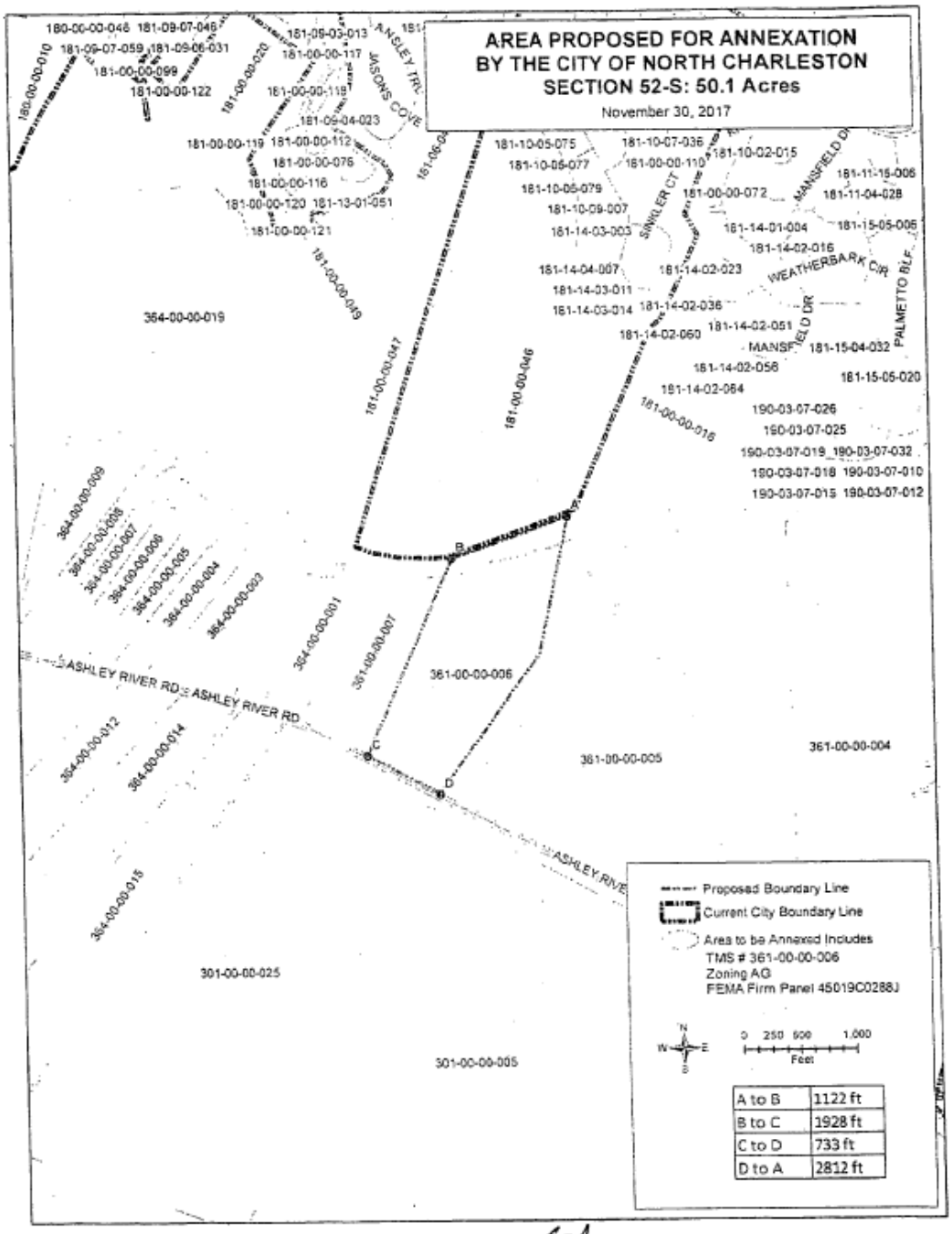
In 2017, Parcel 006 was located within an unincorporated area of Charleston County. The owner of Parcel 006 (Millbrook) submitted a petition for North Charleston to annex that parcel pursuant to the 100% owner consent to annexation procedure in S.C. Code Ann. § 5-3-150(3). In December 2017, North Charleston adopted Ordinance No. 2017-83 to annex Parcel 006 (the 2017 Ordinance) (R. pp. 30-32).

The 2017 Ordinance included a map showing the annexed property. The map was prepared using the Charleston County GIS map system. Importantly here, it is undisputed that when the 2017 Ordinance was prepared, the GIS system did not reflect Parcel 006-1.**2** Therefore, the map (R. p. 32) included with the 2017 Ordinance appeared as follows and did not show the 100-foot wide Parcel 006-1:

[Map appears on next page]

undersigned counsel added the two hand-drawn circles appearing on the image to identify those two parcels for discussion in this Brief.

2 The confusion over Parcel 006-1 apparently arose because in 2005, Charleston annexed a 100-foot wide strip *within* undivided Parcel 006; i.e., TMS 3610000006). (See R. pp. 270-71). Therefore, apparently the GIS system originally reflected TMS-006 as containing both the 100-ft wide strip annexed to Charleston and the larger portion of the parcel that remained within an unincorporated area. The Charleston County GIS system later identified that 100-foot wide strip with its own separate TMS Number (TMS #3610000006**1**; i.e., Parcel 006-1).



R. p. 032

For that same reason, the legal description of the annexed property (Parcel 006) contained in the 2017 Ordinance described Parcel 006 as extending all the way to Highway 61 (Ashley River Road). (R. p. 13). Again, emphasis is placed on the fact that, at that time, the 100-foot wide Parcel 006-1 did not appear on GIS system map.

North Charleston subsequently discovered the error in the GIS map and in March 2018 adopted the following "correcting ordinance" (the 2018 Ordinance) (R. pp. 34-36) to clarify that the 2017 Ordinance did not annex Parcel 006-1:

Ordinance #2018-017

AN ORDINANCE

CORRECTING ORDINANCE #2017-083 TO CONFORM TO A RECENT CHANGE IN THE COUNTY TMS MAPPING

Whereas, The City of North Charleston recently annexed Parcel TMS #361-00-00-006; and

Whereas, the clearly expressed intent of the ordinance was to annex parcel 006; and

Whereas, based upon then-existing Charleston County TMS mapping data, the accompanying map and legal description described Parcel TMS #361-00-00-006 as extending all the way to Ashley River Road; and

Whereas, County TMS mapping data has recently been corrected to reflect the existence of a sub-parcel, TMS #361-00-00-0061; and

Whereas, it was North Charleston's intent to annex unincorporated parcel TMS #361-00-00-006, not TMS #361-00-00-061; and

Whereas, the attached ordinance would amend Ordinance #2017-083 to make the boundaries consistent with this intent and consistent with the now-corrected County data for parcel -006.

Now, Therefore, Be it Ordained by the Mayor and Council, in Council assembled, that Ordinance #2017-083 be hereby amended to clarify the *exclusion* from annexation of any portion of property now shown on County tax map records as TMS #361-00-00-0061 (a 100' deep strip parallel to Ashley River Road as shown on the map herein), with all other portions of Ordinance #2017-083 to remain unchanged.

THE WITHIN ORDINANCE SHALL BE EFFECTIVE IMMEDIATELY UPON ITS RATIFICATION BY CITY COUNCIL.

Ordained in City Council this 22nd day of March, in the Year of Our Lord, 2018, and in the 241st year of Independence of the United States of America.

R. KEITH SUMMEY, MAYOR

APPROVED AS TO FORM:

LEGAL COUNSEL

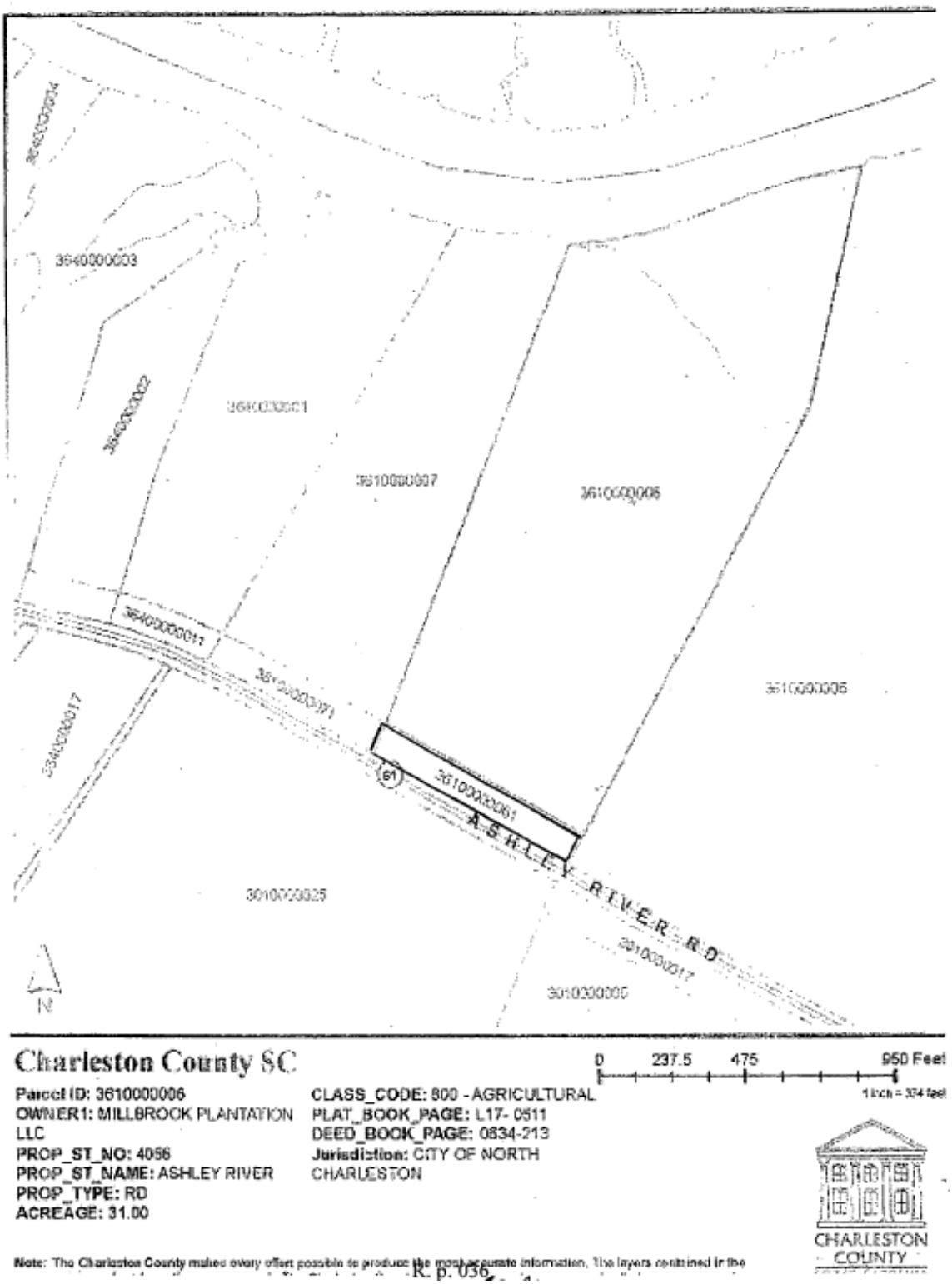
ATTEST:

ELLEN CLARK, MUNICIPAL CLERK

R. p. 034

Exhibit 2

(R. p. 34). The 2018 Ordinance also included a copy of the by then corrected and updated map from the GIS system that showed Parcel 006-1 (R. p. 36):



In this appeal, Charleston claims statutory standing based on its assertion that North Charleston's 2017 Ordinance annexing Parcel 006 also annexed Parcel 006-1, which had already been annexed by Charleston in 2005. The circuit court rejected that theory and the court of appeals affirmed:

> We therefore affirm the circuit court's finding that the 2017 Ordinance was lawful as it did not attempt to annex Parcel 006-1 but, instead, attempted to clarify its intent to annex only Parcel 006. Consequently, Charleston's argument that it possesses standing based on infringement of its statutory and proprietary rights is moot.

City of Charleston v. City of N. Charleston, 439 S.C. 6, 13, 885 S.E.2d 151, 154–55 (Ct. App. 2023), *cert. granted* (Sept. 16, 2024).

Facts applicable to Charleston's claim under the prior pending proceedings rule

North Charleston and Charleston introduced their desire to annex Millbrook's Parcel 006 within two days of each other. North Charleston sought to annex Parcel 006 based on the property owner's (Millbrook's) 100% consent pursuant to S.C. Code § 5-3-150(3). In contrast, Charleston sought to annex Parcel 006 as part of its annexation of a larger area based on 75% of the affected property owners' consent pursuant to section 5-3-150(1).[3] The following is a timeline of their respective annexation proceedings:

2005	Charleston annexed a 100-foot wide right-of-way strip in Parcel 006 (TMS# 3610000006), which the GIS system later separately identified as Parcel 006-1 (TMS #3610000006**1**). (R. p. 3 ¶ 1).
December 19, 2017	Charleston city council meeting – Council voted to accept a petition signed by 75% of affected property owners requesting annexation of an area that included Parcel 006, among others. Council also voted to have a public hearing on the matter as required by section 5-3-150(1). (R. p. 3 ¶ 2, 3).

[3] Millbrook was not one of the 75% of affected property owners that that petitioned for the annexation.

December 21, 2017	North Charleston city council meeting – Council gave first reading to the 2017 Ordinance to annex Parcel 006 based on the property owner's 100% consent to the annexation pursuant to section 5-3-150(3). (R. p. 3 ¶ 5).
December 28, 2017	North Charleston city council gave final reading and adopted the 2017 Ordinance annexing Parcel 006. (R. p. 3 ¶ 7).
January 23, 2018	Charleston city council held a public hearing on the 75% annexation petition and gave first reading to an ordnance annexing the area, which included Parcel 006. (R. pp. 3-4, ¶8).
February 15, 2018	Charleston filed a notice of intent to contest North Charleston's annexation of Parcel 006. (R. p. 40).
March 22, 2018	North Charleston city council adopted the 2018 Ordinance to correct and amend the 2017 Ordinance to reflect removal of Parcel 006-1 from the scope of the description of Parcel 006 annexed in the 2017 Ordinance. (R. p. 4 ¶ 9).
March 27, 2018	Charleston filed underlying lawsuit in this appeal challenging North Charleston's 2017 Ordinance annexing Parcel 006. (R. p. 44).

Based on the foregoing events, Charleston claims that, pursuant to a novel common law doctrine known as the "prior pending proceedings rule",[4] its process for annexation of Parcel 006 based on the 75% of owner consent procedure in section 5-3-150(1) trumps North Charleston's annexation of Parcel 006 based on the 100% owner consent procedure in section 5-3-150(3). The circuit court rejected that theory, and the court of appeals affirmed:

> Charleston argues that before North Charleston gave first reading to either the 2017 Ordinance or the 2018 Ordinance, Charleston's City Council already accepted a petition to annex Parcel 006 and ordered a public hearing on the matter. According to Charleston, under the common law "prior jurisdiction doctrine" also called the "prior pending proceedings rule," this entitled Charleston to complete the annexation without interference. However, our supreme court has previously

[4] Also sometimes referred to as the "prior pending jurisdiction doctrine."

> declined to address whether these common law doctrines apply in South Carolina. *See City of Columbia v. Town of Irmo*, 316 S.C. 193, 196, 447 S.E.2d 855, 857 (1994) ("We *decline to reach the issue* of whether the 'prior pending proceedings' rule *should be adopted by this Court.*" (emphases added)). As such, the circuit court did not err in holding that Charleston lacks current or existing precedent supporting this alternative argument for standing.

City of Charleston, 439 S.C. at 13–14, 885 S.E.2d at 155.

Charleston filed a petition for writ of certiorari asking this Court to review the decision of court of appeals on both the statutory standing and prior pending proceedings rule issues.

STANDARD OF REVIEW

This matter is before this Court on Charleston's appeal of the court of appeals' decision affirming the circuit court's order granting North Charleston's Rule 12(b)(6), SCRCP, motion to dismiss Charleston's complaint based on lacking of standing to challenge North Charleston's annexation of Parcel 006. A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and viewed in the light most favorable to the plaintiff. *See Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). "A motion to dismiss for lack of standing challenges the court's subject matter jurisdiction." *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022). "Whether subject matter jurisdiction exists is a question of law, which this [c]ourt is free to decide with no particular deference to the circuit court." *Id.* "The party seeking to establish standing has the burden of proving it." *Vicary v. Town of Awendaw*, 425 S.C. 350, 355, 822 S.E.2d 600, 602 (2018). "There is a presumption in favor of regularity in annexation proceedings." *City of Columbia v. Town of Irmo*, 316 S.C. 193, 196, 447 S.E.2d 855, 857 (1994).

Moreover, "The appellate court may affirm any ruling, order, decision, or judgment on any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; *accord I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420–21, 526 S.E.2d 716, 723 (2000) (The appellate court may

review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. . . . This approach is in keeping with the view, as expressed in Rule 220(c), SCACR, that an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal. An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies.") (citations and footnotes omitted).

ARGUMENTS

I. The circuit court and court of appeals properly found Charleston did not have statutory standing to challenge North Charleston's annexation of Parcel 006 because North Charleston did not attempt to annex Parcel 006-1 that had previously been annexed by Charleston.

Standing is required in order to pursue an annexation challenge. *See, e.g., Vicary,* 425 S.C. at 355, 822 S.E.2d at 602. As both the circuit court and court of appeals correctly observed and applied, in annexation matters under section 5-3-150(3) where all (100%) of the owners of the annexed property have consented to the annexation, this Court's well-established precedent restricts—and rightfully so—the ability of "outsiders" or "strangers" who do not own the annexed property (also referred to as "non-statutory parties") to challenge the annexation. Accordingly, beginning with *St. Andrews Pub. Serv. Dist.* in 2002 and continuing through *Vicary* in 2018, this Court has consistently held that, absent nefarious conduct by an annexing body, "outsiders" or "strangers" who have legal standing to challenge an annexation under the 100% owner consent procedure in section 5-3-150(3) is limited to two categories of challengers:

1. Challengers who can show "an infringement of their proprietary interests or statutory rights" as required to meet the statutory standing requirement (hereinafter "statutory standing"); and

2 The State of South Carolina, through its Attorney General, acting in the public interest in a *quo warranto* action.

See St. Andrews Pub. Serv. Dist. v. Charleston Council of City of Charleston, 349 S.C. 602, 605, 564 S.E.2d 647, 648 (2002); *Vicary,* 425 S.C. at 359, 822 S.E.2d at 604.

Here, Charleston does not fall into either category. Charleston does not own Parcel 006 (it is owned by Millbrook). It is uncontested that North Charleston annexed Parcel 006 with Millbrook's consent under the 100% owner consent procedure in section 5-3-150(3). The Attorney General did not file a challenge. There is no allegation of nefarious conduct by North Charleston in this matter.

Application of *Vicary* and its predecessor cases to the facts of this matter is clear: Charleston lacks standing to challenge the North Charleston annexation of Parcel 006. To avoid this inevitable result, Charleston attempts to claim statutory standing based on its claim that North Charleston's 2017 Ordinance annexing Parcel 006 also "annexed" Parcel 006-1, which had been previously annexed by Charleston in 2005. Both the circuit court and court of appeals correctly rejected that claim.

A. The 2017 Ordinance and 2018 Ordinance, on their face, unequivocally reflect that North Charleston did not attempt to annex, and did not annex, Parcel 006-1.

North Charleston's 2017 Ordinance was clear: it sought to annex the unincorporated land known as Parcel 006. That is exactly what it did. Charleston's argument is that North Charleston annexed *both* unincorporated Parcel 006 and the separate incorporated Parcel 006-1. However, North Charleston's 2017 Ordinance listed only Parcel 006 as the parcel being annexed. Parcel 006-1 was nowhere listed. Similarly, the accompanying annexation map showed a parcel labeled TMS #36100000**6** and nowhere listed parcel TMS #3610000061. Judge Griffith found that noteworthy. (R. p.10) ("The 2017 Ordinance never makes any claim to annex TMS #361-00-00-006-1.").

Admittedly, the boundary description in the 2017 Ordinance contained an error based on the then existing GIS system records: it described the Parcel 006 boundary line as reaching Highway 61 (a/k/a Ashley River Road), and in that sense overlooked Parcel 006-1. However, the intent of North Charleston was easy to discern. The 2017 Ordinance identified Parcel 006 by name and made no reference to Parcel 006-1. Moreover, the 2017 Ordinance's legal description of Parcel 006 ended with the phrase "with all distances being more or less." (R. p. 13). In the 2017 Ordinance, North Charleston told the world that the boundaries of Parcel 006 might be slightly smaller than described in the ordinance. Here we are dealing with a roughly three percent (3%) annexation area disparity. That is hardly reversible error where the ordinance otherwise identified the target parcel perfectly by name (i.e., TMS #361000006) and expressly noted that some boundary deviation might exist.

Further, in an abundance of caution and to eliminate any possible confusion or concern, when North Charleston discovered the GIS system error regarding the existence of Parcel 006-1, it promptly enacted the 2018 Ordinance to make it crystal clear that North Charleston did not intend to annex, had not attempted to annex, and had not annexed, Parcel 006-1. Therefore, the circuit court properly found, and the court of appeals properly affirmed, that the 2017 Ordinance and 2018 Ordinance, on their face, unequivocally reflected that North Charleston did not attempt to annex, and had not annexed, Parcel 006-1, which defeats Charleston's claim of statutory standing.

B. North Charleston's' 2017 Ordinance was lawful and valid under *Bostic v. City of Beaufort.*

In an effort to cling to statutory standing, Charleston cites *Bostic v. City of Beaufort*, 307 S.C. 345, 415 S.E.2d 389 (1992), as supporting Charleston's claim that the confusion surrounding the TMS Numbers rendered North Charleston's 2017 Ordinance "fatally defective" so as to render

it null and void. (Charleston's Brief p. 23). Charleston's reliance on *Bostic* is misplaced, because *Bostic* actually supports North Charleston's position.

Bostic involved a municipal annexation based on 75% of the affected property owners' consent under section 5-3-150(1), which requires compliance with statutorily mandated notice and public hearing procedures in order to annex non-consenting owners' property against their will. The Bostics were the non-consenting property owners and challenged the City of Beaufort's annexation of their property based on two defects in the annexing ordinance: (1) the annexation petitions were not dated, and (2) none of the annexation petitions contained a description of the Bostics' property, and their property was not shaded on the annexation plat as was the other area proposed for annexation. *Id.* at 348, 415 S.E.2d at 390.

In *Bostic*, this Court affirmed the master's finding that the latter defect rendered the ordinance void as to the Bostics' property. *Id*. at 350, 415 S.E.2d at 391. In so doing, this Court drew a distinction between an annexation ordinance that has a fatal "substantial" flaw and one that has a harmless procedural or technical deficiency capable of correction:

> Procedural or technical deficiencies in an ordinance may be corrected by a subsequent ordinance, but not substantive defects. We conclude that omission of the date from two of the petitions constituted a technical flaw in Ordinance 0–07–89. This flaw was corrected by Ordinance 0–31–89, which effectively ratified the valid portion of Ordinance 0–07–89.
>
> Conversely, the omission of descriptions for the area to be annexed and failure to also shade such property on the plat which shows shaded the area to be annexed is a substantive defect in the petitions. We find that Ordinance 0–07–89 was fatally flawed from its inception as to annexation of the Bostics' 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.

Id.

The ordinance in *Bostic* was deemed fatally flawed because it failed to comply with the fundamental requirements of section 5-3-150(1), which requires that an annexation based on a 75% owner petition "must contain a description of the area to be annexed and there shall be attached to the petition a plat of the area to be annexed." In other words, as noted by the court of appeals in this case: "[*Bostic*] found the *omission* of the property description for the area to be annexed and the failure to show this area on the plat was substantive because it was in direct contravention of subsection 5-3-150(1)'s statutory requirements." *City of Charleston*, 439 S.C. at 12, 885 S.E.2d at 154. (emphasis in original).

In contrast to the situation in *Bostic*, here North Charleston's 2017 Ordinance was a 100% owner consent annexation under section 5-3-150(3). The 2017 Ordinance *described* the property to be annexed, Parcel 006, and annexed that property with the full consent of its owner, Millbrook. The 2017 Ordinance did not claim to annex any other parcel. As noted by the court of appeals, "[T]he 2017 Ordinance does not omit the property description but inadvertently incorporates Parcel 006-1 (a parcel that did not exist at the time North Charleston drafted the 2017 Ordinance.)" *City of Charleston*, 439 S.C. at 12, 885 S.E.2d at 154.

The fact that the 2017 Ordinance did not reflect the then unknown Parcel 006-1, *which was not the parcel being annexed*, did not affect any other owner or properties and constituted a mere non-substantial "technical deficiency" that was correctable, and was corrected, in the 2018 Ordinance. When the existence of Parcel 006-1 was discovered, North Charleston did the right thing by updating its public records via the 2018 Ordinance to expressly confirm its original intent to annex only Parcel 006 (as stated in the original

2017 Ordinance) and disavow any claim of annexation of Parcel 006-1 previously annexed by Charleston. Charleston cannot manufacture standing based on a claim of annexation of a parcel that was never annexed, which North Charleston expressly and publicly confirmed.

II. The circuit court and court of appeals properly rejected Charleston's request to adopt the "prior pending proceedings rule" in favor of Charleston.

In apparent recognition that it lacks statutory standing to challenge North Charleston's annexation of Parcel 006, Charleston urges this Court to adopt the novel prior pending proceedings rule and apply it to undo North Charleston's completed annexation of Parcel 006. The circuit court and court of appeals correctly declined to do so. This case can be readily resolved based on well-establish precedent and existing, black-letter law, which is what the circuit court and court of appeals used. The prior pending proceedings rule is not necessary to the determination of this matter, and the facts of this case do not provide a platform that would allow this Court to offer clear, easily applicable guidance as a "rule" to carry forward.

A. Charleston lacks standing under *Vicary* to argue for adoption of the prior pending proceedings rule.

As a threshold matter, by advocating for adoption of the prior pending proceedings rule, Charleston is effectively asking this Court to ignore its well-established precedent and create a new exception or category of outsiders (i.e., non-affected property owners) who can challenge a municipal annexation. Such an extraordinary action is not needed or warranted here.

Since the 2002 decision in *St. Andrews Pub. Serv. Dist.*, absent nefarious conduct[5] by an annexing body, this Court has consistently limited "outsider" annexation challenges to those

[5] *Vicary* recognized a public importance exception to the rule against outsider annexation challenges where the annexing body (the Town of Awendaw) had repeatedly engaged in a pattern of blatantly *nefarious conduct* by falsely using a letter from the United States Forest Service to claim consent to annexation of forest property in at least eight separate annexations over a number

brought by the State, acting in the public interest. *See Ex parte State ex rel. Wilson v. Town of Yemassee*, 391 S.C. 565, 707 S.E.2d 402 (2011); *Vicary*, 425 S.C. at 358, 822 S.E.2d at 603-04. The State of South Carolina, acting through the Attorney General, is in the best position to fairly assess any potential impact of an annexation ordinance on the public interest and act if warranted, free from the bias associated with an outsider challenger's narrow, one-sided views and personal agenda.

North Charleston completed the process of annexing Parcel 006 when it completed the second (final) reading adopting the 2017 Ordinance on December 28, 2017. North Charleston had fully annexed Parcel 006 before Charleston filed this case on March 27, 2018, attempting to challenge that annexation. There is no allegation of nefarious conduct by North Charleston in this matter, and the Attorney General did not file a challenge to the 2017 Ordinance. Accordingly, this Court's well-established precedent as set forth in the line of cases extending through *Vicary* unequivocally closes the door on Charleston's standing to challenge the 2017 Ordinance. Charleston is attempting to pry that door open using the prior pending proceedings rule.

By urging this Court to adopt the prior pending proceedings rule, Charleston is attempting to use that rule as a means to create a new exception or category of outsiders (i.e., non-owners of the annexed property) who can challenge a municipal annexation in the absence of nefarious conduct. Such drastic action is not necessary or appropriate here.

---

of years, and the town's administrator testified that the town "fully intended to use [the letter] again in the future if necessary." *Vicary*, 425 S.C. at 359, 822 S.E.2d at 604.

B. Charleston was not "first in line" to annex Parcel 006.

Even if this Court were to consider the prior pending proceedings rule, Charleston did not commence a valid annexation proceeding before North Charleston. Charleston claims it commenced its annexation of Parcel 006 prior to North Charleston, but the record shows the opposite is true. Charleston was not first by any legally valid marker.

Charleston claims it was "first in line"—by virtue of being the first to take some act or action—and thus won the "race" to initiate annexation of Parcel 006 when it for the first time broached that subject at the Charleston city council meeting on December 19, 2021. (Charleston's Brief p. 8). Charleston claims that meeting constitutes an official "act" or "action" that vested it with first-in-line status. Contrary to Charleston's position, Charleston did not initiate an annexation action at that meeting; instead, Charleston merely voted to accept a 75% owner annexation petition and schedule a public hearing. In other words, at that meeting, Charleston only agreed to *accept* the request and begin the process of *considering* the request after public notice and opportunity to challenge and debate the topic. Charleston's acknowledging delivery or agreeing to "accept" the petition for possible consideration at a later date does not constitute an "action" that justifies its claim of priority based on being first in line to annex the property.

In contrast, just two days later, on December 21, 2017, North Charleston held *first reading* on an actual *ordinance* (the 2017 Ordinance) to annex Parcel 006 at a regularly schedule city council meeting. When North Charleston subsequently gave final reading and adopted the 2017 Ordinance to formally annex Parcel 006 on December 28, 2017, Charleston had not even held the statutorily required public hearing to consider annexation of that parcel as required by section 5-3-150(1).[6]

[6] The record is also devoid of any indication that Charleston had even begun to initiate the required public notice of the hearing by publishing notice of the hearing in a newspaper and

Charleston did not initiate an annex action when it agreed to accept and in the future consider the 75% owner consent annexation petition at the December 19, 2021 city council meeting. Municipal corporations must act by a resolution or ordinance. *See* S.C. Code Ann. § 5-7-260 (listing "*acts"* that are required to be done by ordinance, and providing that in other matters municipal council "*act* either by ordinance or resolution.") (emphasis added). Action on an annexation must be taken by ordinance. *See* section 5-3-150. Charleston's own procedure for taking action on an ordinance requires that the ordinance "shall be introduced in writing and in the form required for final adoption" and that it must be read by council on two separate occasions. (City of Charleston Ordinance 2-24; R. p. 310). Neither the South Carolina Municipal Corporation code nor Charleston's own procedure creates a third way for Charleston city council to "act" on an owner annexation petition by merely receiving the petition or accepting it for future consideration of possible approval or disapproval.

C. Charleston is guilty of the very conduct it claims the prior pending proceedings rule is needed to avoid.

Charleston's brief appears to suggest or imply that North Charleston somehow jumped in line ahead of North Charleston to annex Parcel 006. In actuality, the record reflects that *Charleston* intentionally jumped the starter's gun in an effort to get a false head start and jump in the front of the annexation line—which is the very conduct Charleston now claims the prior pending proceedings rule is desperately needed to avoid.

Charleston claims its December 19, 2021 city council meeting was the start of the race to annex Millbrook's Parcel 006. Charleston's required publicly published agenda for that city

---

performing the other public notice and owner notification requirements of section 5-3-150(1). *Cf. Vicary*, 425 S.C. at 355, 822 S.E.2d at 602 ("The party seeking to establish standing has the burden of proving it.").

council meeting did not mention that it would consider annexing Millbrook's property against its wishes. North Charleston's counterclaims in this case describe in detail how Charleston failed to provide public notice that it would consider accepting an annexation petition that included Millbrook's Parcel 006 at the December 19, 2017 city council meeting, and describe in detail how Charleston city council orally amended its agenda and considered that topic at the very end of the meeting. (R. p. 55 ¶ 36 – p. 56 ¶ 43). In its reply to those counterclaims, *Charleston admits that happened.* (R. p. 72 ¶ 12 – p. 73 ¶ 19).

Charleston's actions do not merit its claim of victory based on it allegedly being first in line under the prior pending proceedings rule. To accept Charleston's claim of priority will open the door to attempts to game the system for being first in line by withholding required prior public notice and using last minute, end-of-meeting, surprise oral agenda additions, which is exactly what Charleston did here and now claims first-in-line priority under the prior pending proceedings rule.

By no conceivable twist or stretch of the facts was Charleston city council's last minute surprise oral decision, without the required public notice, to consider the 75% owner annexation petition at the end of the December 19, 2021, city council meeting an "advanced stage" of the annexation process. *Cf. Sherman v. Reavis*, 273 S.C. 542, 544, 257 S.E.2d 735, 736 (1979) ("It is clear that the process of rezoning the newly annexed "Neck" area had reached an *advanced stage* of this statutory procedure at the time the Shermans [applied for a building permit]. . . . [They] applied for their permit several weeks after notice was published concerning the public hearing to be held on the rezoning of the "Neck", after the hearing before Planning and Zoning Commission,

and five days before Charleston Council gave favorable first reading to an ordinance adopting the recommendations of the Commission") (emphasis added).[7]

D. The North Carolina decision in *City of Burlington v. Town of Elon College* does not support Charleston's position.

Charleston relies on a North Carolina decision in *City of Burlington v. Town of Elon Coll*., 314 S.E.2d 534 (N.C. 1984), as decisive authority for Charleston's assertion of priority under the prior pending proceedings rule based on Charleston's claim that it took the first step to initiate a valid public annexation proceedings at its December 19, 2017 city council meeting. (Charleston's Brief pp. 11-12). Charleston's claimed first step at that meeting was not advanced, public, or valid.

As discussed above, Charleston city council's last minute, end-of-meeting, oral surprise announcement that it was accepting and would later *consider* an involuntary 75% annexation petition was done without any prior public notice and without the required prior publication of that item on its meeting agenda. Its last minute surprise action could hardly be deemed a public or valid first procedural step sufficient to vest it with first-in-line rights.

Moreover, Charleston's avoids discussing the advanced stage of the valid public annexation proceedings that had occurred to prompt the *Burlington* court to find the City of Burlington was first in line to annex an area and had the right to complete that process despite the

---

[7] Interestingly, Charleston's Brief (at p. 14) makes references *Sherman* as supporting Charleston's position here. If this Court were to apply the prior pending zoning ordinance doctrine at issue in *Sherman* to this facts of this case, North Charleston would clearly prevail, because when North Charleston had a first public reading on the 2017 Ordinance, Charleston had not publicly advertised, much less held, a public hearing on its consideration of adopting the 75% annexation petition. *See Sherman*, 273 S.C. at 546, 257 at 737–38) ("An ordinance is legally pending when the governing body has resolved to consider a particular scheme of rezoning and has *advertised* to the public its intention to hold public hearings on the rezoning.") (emphasis added). At the December 19, 2017 meeting, Charleston's city council merely agreed, without the required prior public notice, to accept a 75% owner annexation petition. Charleston had not scheduled, or even advertised, a public hearing as required by section 5-3-150(1). That is a far cry from the advanced stage of the pending and publicly advertised public proceedings and hearing presented in *Sherman*.

Town of Ellington College's subsequent initiation of a competing annexation. The advanced stage of the City of Burlington's annexation proceedings were recited by that court as follows:

> - On 19 April 1983 [Sic-Date format as appears in original], the City Council of the City of Burlington at its regular meeting adopted a resolution of intent to consider the annexing an area.
>
> - City of Burlington prepared a report setting forth plans and specifications for the above-mentioned area, including maps and plans to provide municipal services to the area. The report was adopted by the City Council of Burlington at its regular meeting on 3 May 3 1983.
>
> - A Notice of Public Hearing to consider the annexation was published in the Burlington Times-News, a proper newspaper for such advertising, on 2 May, 9 May, 16 May and 23 May 1983. The notice indicated that a hearing would be held on 7 June 1983, and that the report of the City Council on annexation would be available in the office of the City Clerk of the City of Burlington for public inspection at least fourteen (14) days prior to 7 June 1983, the date of the public hearing.
>
> - On or about 16 May 1983, the Town of Elon College received voluntary petitions for annexation from a number of owners of property situated in the territory included in the proposed area of annexation of the City of Burlington and its Aldermen called for and ordered a public hearing on the voluntary petitions for annexation of the property for 7:30 p.m., 31 May 1983.

City of Burlington, 314 S.E.2d at 535.

In contrast to the advanced stage of the valid public proceedings that had already occurred in *Burlington*, here the Charleston city council meeting on December 19, 2017, only constituted—at best—a first tentative step to consider the petition, and it did that as a last minute oral surprise with no public notice. When two days later North Charleston held its public first reading on the 2017 Ordinance on December 21, 2017, Charleston had not held the required public hearing to contemplate its competing annexation, and the record is devoid of any indication that Charleston had even scheduled and advertised its required hearing. *Burlington* does not support Charleston's argument and instead supports the proposition that Charleston's claim of priority is invalid based on its attempt to initiate an annexation by surprise and without any prior public notice.

Finally, Charleston's theory on how it took first steps appears to violate its own procedural ordinances. *See* Charleston Ord. 2-24; R. p. 310 (requiring that proposed ordinances be "introduced in writing and in the form required for final adoption."). Therefore, while the *Sherman* and *Burlington* cases may provide a potential test for application of the prior pending proceedings rule, Charleston fails that test.

In short, Charleston had not taken any valid public action—much less a properly noticed and advertised public action—on annexation of Parcel 006 within the contemplation of the prior pending proceedings rule before North Charleston city council had completed a *public first and second reading* and voted to approve an actual *ordinance* (the 2017 Ordinance) to annex Parcel 006 at the request of the property owner (Millbrook).

E. The corrective 2018 Ordinance does not affect the timing analysis.

Charleston also fails in its effort to claim first in line status by using the date of North Charleston's 2018 corrective ordinance as the reference point to determine who was first in line. Charleston attempts to characterize North Charleston's 2018 Ordinance as being a second attempt to "annex" Parcel 006, by which time Charleston claims to have annexed that parcel. (Charleston's Brief Section I.C.4 at p. 21) (claiming, "North Charleston twice attempted to annex the Millbrook Parcel [006] using the 100% annexation method."). The problem with that argument is that the 2018 Ordinance was not an annexation ordinance. North Charleston had fully completed annexation of Parcel 006 on December 28, 2017 (the 2017 Ordinance). The 2018 Ordinance did not annex any property and was not styled as an annexation ordinance. It was a corrective ordinance designed to correct details to reflect the recent updates to the GIS system and was even labeled as being a "Correcting Ordinance." (R. p. 16).

F. Any concerns about competing municipal annexations or need for "future guidance" should be addressed by the State of South Carolina (represented by the Attorney General), not by Charleston.

Despite Charleston's claimed need for "future guidance" on the issue, there is no tidal wave of competing municipal annexation cases. Any concerns about competing annexations should be addressed by the State of South Carolina (represented by the Attorney General), not by Charleston. The right to address concerns about municipal annexation matters lies squarely within the province of the State (represented by the Attorney General), not with Charleston. The Attorney General has standing freely to challenge each and every annexation if he desires or deems that "future guidance" is needed. If ever future guidance from this Court is needed, the State of South Carolina (acting through the Attorney General), is the appropriate party to ask for such.

Of course, the South Carolina Legislature is ultimately in the best position to address any concerns it may have with the application of its annexation statues.

In summary, Charleston is challenging North Charleston's fully completed 100% owner consent annexation of Parcel 006 under section 5-3-150(3). Consideration of the prior pending proceedings rule is not needed or appropriate here, and this Court should adhere to its existing well-established precedent limiting standing to challenge a 100% annexation to the State of South Carolina Attorney General, who is in the best position to fairly analyze and assess any potential concerns or need for future guidance if the need for such ever arises. The prior pending proceedings rule is not necessary to the determination of this matter, and this is not the proper case to consider adopting that novel rule.

CONCLUSION

The circuit court and court of appeals correctly assessed and applied the applicable law to the undisputed facts of the case and found Charleston lacked statutory standing to challenge North Charleston's annexation of Millbrook's Parcel 006. They also properly declined Charleston's invitation to ignore this Court's well-established precedent and create a new exception or category of outsiders (i.e., non-owners of the annexed property) who can challenge a municipal annexation by adopting the novel prior pending proceedings rule, which is inapplicable and not warranted under the facts of this case. Accordingly, the grant of standing sought by Charleston should be denied, and this Court should affirm the decision of the court of appeals and remand this case to the circuit court to dismiss the case. In accordance with Rules 208(b)(2) and 220(c), SCACR, North Charleston also requests that this Court affirm the decision of the court of appeals on any other grounds appearing in the record.

Respectfully submitted,

/s David J. Parrish
David J. Parrish
Maynard Nexsen, PC
205 King Street, Suite 400
Charleston, SC 20401
843-720-1771
dpparish@maynardnexsen.com
Attorney for City of North Charleston

s/Kriston D. Neely
Kriston D. Neely
City of North Charleston
PO Box 190016
North Charleston, SC 29419
843-740-2553
kneely@northcharleston.org
Attorney for City of North Charleston

December 5, 2024