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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellant Case No. 2023-000930

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

v.

City of North Charleston..... Respondent.

REPLY BRIEF OF PETITIONER NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES

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Introduction

Petitioner National Trust for Historic Preservation in the United States (hereinafter, the "National Trust") submits this reply brief in response to the combined brief of the Respondent, City of North Charleston (hereinafter, "North Charleston"). Because North Charleston's primary arguments were directly addressed by both the National Trust and Petitioner City of Charleston (hereinafter "Charleston") in their initial briefs to this Court, the National Trust refers back to those briefs and will not repeat them at length here. Instead, the National Trust will direct this brief to replying to specific assertions of North Charleston that are the crux of its arguments that come down to the following:

1. Neither the One Acre Plat nor its identification as TMS #301-00-00-797 included any portion of the National Trust Parcel;
2. North Charleston does not claim title to any portion of the National Trust Parcel (TMS # 301-00-00-017);
3. North Charleston did not acquire title to any portion of the National Trust Parcel by virtue of the quitclaim deed to it on September 12, 2017, for the One Acre from Tim Whitfield Construction and Development, LLC **(App. 274-77)**;
4. North Charleston did not intend to annex, nor did it annex, any portion of the National Trust Parcel;
5. North Charleston could not annex any portion of the National Trust Parcel because it does not have title to any portion of the National Trust Parcel;

6. The Court should ignore the affidavit of Daniel C. Forsberg **(App. 242-45)** because it embodies little more than Petitioners' legal arguments and a TMS number "cannot convey title or establish property lines";
7. Public importance standing should not be bestowed on The National Trust because it "would effective reward" Petitioner's "bad" behavior described by North Charleston as "Petitioners' questionable fabrication of North Charleston's claimed taking or annexation of a four-inch strip of the Trust's property as a pretext to create standing or assert their real agenda"; and,
8. Public importance standing in annexation cases is limited to the Attorney General.

I. The National Trust has standing to challenge the annexation by North Charleston because the annexation ordinance described the area annexed to include a portion of its property. The many arguments made by North Charleston in its Brief are unavailing in surmounting this fundamental fact that is the basis for the National Trust's proprietary standing.

In discussing who may challenge annexations, this Court has held "[w]hen **located within an annexed area**, the State as a property owner, **an individual property owner,** or a registered qualified elector has sufficient standing to challenge an annexation." State ex rel. Condon v. City of Columbia, 339 S.C. 8, 14, 528 S.E.2d 408, 410–11 (2000) (bold added). In Condon, when discussing if the Attorney General had standing to bring a quo warranto action on behalf of the State challenging an annexation, this Court specifically stated that a person owning property owner, "when located within an annexed area," "has sufficient standing to challenge an annexation." 339 S.C. at 14-15, 528 S.E.2d at 410-12. The record shows that the National Trust is such an owner, despite the scattershot arguments of North Charleston.

The National Trust will first deal with the threshold contention of North Charleston that the boundaries of the Acre did not include any land owned by the National Trust.

North Charleston Argument (1): Neither the One Acre Plat nor its identification as TMS #301-00-00-797 included any portion of the National Trust Parcel;

What North Charleston fails to reckon with in all of its arguments against the proprietary standing of the National Trust is the undisputed fact that the One Acre conveyed to North Charleston includes a portion of the National Trust Parcel and that North Charleston's annexation ordinance described the area to be annexed as the parcel identified as TMS #301-00-00-797, which is the entire Acre.

The Acre conveyed to North Charleston is stated in the deed to be that real property described in the plat approved by Charleston County on September 9, 2018, recorded in Plat Book S17, Page 0224 in the RMC Office for Charleston County on September 22, 2017 (the "Acre Plat"). **(App. 269)**. "Said parcel having such size, shape, dimensions, buttings, and boundings as will by reference to said plat more fully appear." **(App. 274)**. 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. **(App. 269)**. Because the boundary of the National Trust Parcel is exactly 100 feet from the right-of-way line of S.C. Highway 61, the Acre Plat necessarily includes approximately 62 square feet of the National Trust Parcel. **(App. 242-45; App. 255-57; App. 87-88; App. 269).** North Charleston does not dispute that the deed it described the property conveyed with reference to the Acre Plat. **(Respondent's Brief, p. 5)** ("Whitfield accomplished the conveyance by recording a plat that created the Acre...and then executing a quit claim deed conveying the Acre to North Charleston by reference to the Acre Plat.").

North Charleston repeatedly asserts in its brief that it does not claim any portion of the National Trust Parcel and that regardless of the property description in the quitclaim deed, it could not convey title to any portion of the National Trust Parcel. The National Trust will separately address these two contentions listed above as (2) and (3).

North Charleston Argument (2): North Charleston does not claim title to any portion of the National Trust Parcel (TMS # 301-00-00-017);

In its brief, North Charleston claims it "unequivocally indicated that [it does] not claim to own, and does not claim to have annexed, any portion of Trust's Property." **(Resp't's Combined Br. 20)**.

The assertion that North Charleston does not claim to own any portion of the National Trust Parcel is incorrect. For starters, it asserts in its brief that it owns the entire Acre: "TMS #301-00-00-797 (the Acre) is owned by North Charleston." **(Resp't's Combined Br. 3)**. In its Answer North Charleston also claimed ownership to the entire Acre. **(A.pp. 47-48 ¶ 4)** ("North Charleston . . . denies that North Charleston owns **less than the entirety of the land** described generally as 'the Acre'"). North Charleston specifically describes the land as TMS 301-00-00-797. **(A.pp. 47-48 ¶ 4)** (bold added); **(A.p. 49 ¶¶ 15,17)** ("North Charleston does not admit the Plaintiffs' claimed property boundaries . . . . North Charleston denies that the legal boundary width of [the National Trust Parcel] is a perfect 100' in all locations along its length or in those areas adjacent to the Acre"). North Charleston's Answer plainly denies paragraphs 6-9 of the Complaint that allege the National Trust owns property within the Acre which North Charleston annexed.[1] **(A.pp. 47-48 ¶¶ 6-9)**; **(A.pp. 35-36 ¶¶ 6-9)**.

In addition, North Charleston went so far as to allege a counterclaim seeking a determination of title to the Acre in its favor:

59. Despite the allegations of the Plaintiffs hereabove, no portion of the North Charleston property encroaches into or upon the property of National Trust.

60. North Charleston owns its property free and clear of the claims of any third

[1] North Charleston's allegation that the National Trust Parcel is less than 100' in width in places is a curious assertion since the 1980 deeds of conveyance specifically and exactly describe the National Trust Parcel as "[t]hose certain strips or parcels of land, being 100 feet in width and immediately adjacent to the southern right-of-way of Highway 61...." **(App. 252, 255).**

parties, including the Plaintiffs....

> 63. 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.

(App. 56).

Whether North Charleston does or does not claim title to the entire Acre is a completely different question from whether the description of the area annexed included a portion of the National Trust Parcel -- the critical inquiry for purposes of determining the proprietary standing of the National Trust. **See, National Trust Brief at pp. 11-18**. Nonetheless, the emphasis that North Charleston places on ownership in its brief compelled the National Trust to set the record straight on this assertion.

> North Charleston Argument (3): North Charleston did not acquire title to any portion of the National Trust Parcel by virtue of the quitclaim deed to it on September 12, 2017, for the One Acre from Tim Whitfield Construction and Development, LLC **(App. 274-77)**;

The National Trust agrees with this assertion of North Charleston. Tim Whitfield Construction and Development, LLC was legally incapable of conveying good legal title to any portion of the National Trust Parcel to North Charleston in its quitclaim deed. However, again, the dispositive question for purposes of determining the National Trust's proprietary standing is whether the property description of the area annexed in the annexation ordinance included any portion of the National Trust Parcel, which it did: "The area proposed for annexation includes one acre identified as parcel designated TMS #301- 00-00-797.... The area proposed for annexation includes the parcel designated TMS #301-00-00-797 which shall be zoned AG, Agricultural District." **(App. 294)**. **See, National Trust Brief at pp. 18-22**.

The National Trust will next take on North Charleston's effort to refute the fact that the area described as being annexed included a portion of the National Trust Parcel.

North Charleston Argument (4): North Charleston did not intend to annex, nor did it annex, any portion of the National Trust Parcel;

The wording of the Ordinance itself undermines this contention of North Charleston. It stated that the "area proposed for annexation includes one acre identified as parcel designated TMS #301-00-00-797." **(App. 294)**. The more detailed description of the area to be annexed in the ordinance that identifies the property lines is a perfect square, with equal sides each of 209', the same as the Acre Plat, except that North Charleston rounded up the dimension of each side of 208.71' on the Acre Plat to 209'. **(App. 269, 294)**. As stated in Forsberg's Affidavit, the Acre encroaches on "62 square feet of the National Trust Property," and "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." **(App. 245).**

Both the trial court and the Court of Appeals acknowledged this fact. **(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."). Natl. Tr. for Historic Preservation in U.S. v. City of N. Charleston, 439 S.C. 222, 228, 886 S.E.2d 487, 490 (S.C. App. 2023), reh'g denied (May 11, 2023), cert. granted (Sept. 16, 2024) ("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.").

As discussed in the National Trust's Brief, North Charleston's stated intent to annex only the portion of the Acre owned by it is not controlling; what governs is the description of the area annexed in the ordinance. **See, National Trust Brief at pp. 18-20.**

This Court and lower courts of this State have always relied on the description of the area

to be annexed for purposes of determining proprietary standing. See St. Andrews Public Service Dist. v. City Council of the City of Charleston, 349 S.C. 602, 606, 564 S.E.2d 647,649 ("the record establishes that all the challenged properties touch—albeit via annexed roadways in some cases—property already within the limits of the City of Charleston."); Bostick v. City of Beaufort, 307 S.C. 347, 350, 415 S.E.2d 389, 391 (1992) (finding an annexation petition "flawed from its inception" because the annexing party omitted "descriptions for the area to be annexed"); see also Vicary v. Town of Awendaw, 427 S.C. 48, 54, 828 S.E.2d 229, 232 (Ct. App. 2019) ("The [circuit] court further held the 1994 letter was not a petition and did not contain a valid legal description of any property. . . . We find the circuit court properly determined there was no petition requesting annexation").

The record unequivocally describes the territory North Charleston sought to annex as TMS # 301-00-00-797, with boundaries derived from the Acre Plat recorded at book S17, page 0244. **(App. 274, 293-96)**.

The annexation ordinance purported to annex the Acre pursuant to S.C. Code Section 5-3-100. **(A.pp. 293-95)**. This statute specifically requires that the "territory **proposed** to be annexed ***belongs entirely*** to the municipality." S.C. Code Ann. § 5-3-100 (emphasis and double emphasis added). This statute does not say that the proposed area can belong "mostly" or "all but sixty-two square feet" belong to the municipality. Id. It *requires* ownership in totality. North Charleston and the courts below confuse the concept of ownership with the description of the area annexed in the ordinance.

The National Trust moves next to North Charleston's assertion, in the alternative, that even if the description of the area annexed included a portion of the National Trust Parcel, it could not annex that portion because it did not own it.

> North Charleston Argument (5): North Charleston could not annex any portion of the National Trust Parcel because it does not have title to any portion of the National Trust Parcel;

As a matter of law, this assertion is incorrect. As already discussed, what controls is the description in the annexation petition or annexation ordinance. A good example that contradicts North Charleston's argument can be found in Ex parte State ex rel. Wilson, 391 S.C. 565, 707 S.E.2d 402 (2011), where the annexing parties described the area annexed to include marshlands owned by the State of South Carolina. This Court upheld the annexation of the tidelands even though not owned by the annexing parties because they were included in the description of the area annexed.

North Charleston's argument would effectively "blue pencil" proprietary standing from this Court's legal precedent. Under North Charleston's argument, even if a petitioning property owner under the 100% method in S.C. Code Ann. § 5-3-150(3) included property not owned by it, the owner of that property could not challenge the annexation because the court would hold the annexing party can only annex the property it owns regardless of the description of another's property in the petition of the area annexed. That is not the law.

The National Trust will next address to North Charleston's maneuver to escape the fact that the description of the area annexed included a portion of the National Trust Parcel by trying to discredit Forsberg, a licensed engineer and surveyor.

> North Charleston Argument (6): The Court should ignore the affidavit of Daniel C. Forsberg (App. 242-45) because it embodies little more than Petitioners' legal arguments, and a TMS number "cannot convey title or establish property lines";

In its brief to this Court, North Charleston assails for the first time the affidavit of Forsberg. **(Resp't's Combined Br. 18-20).** North Charleston is incorrect in asserting that "Petitioners cite to their Forsberg Affidavit as binding legal authority for their claim that North Charleston annexed

a four-inch strip of the Trust's property." **(Resp't's Combined Br. 18).** As his Affidavit shows, Forsberg is a licensed surveyor and engineer in South Carolina qualified to render opinions in his fields of expertise. **(App. 242-5).** He did just that. He did not render a legal opinion.

Although experts may not render legal opinions in most instances, a qualified expert may render an opinion even if it goes to the ultimate factual issue. Vortex Sports & Ent., Inc. v. Ware, 378 S.C. 197, 207, 662 S.E.2d 444, 450 (Ct. App. 2008). Here the factual issue created by North Charleston is whether the area described to be annexed included a portion of the National Trust Parcel. As is evident from a review of Forsburg's Affidavit, he does not "simply reflect[] Petitioners' legal argument'" as argued by North Charleston. Forsberg identifies all the pertinent documents of record, explains Charleston County's tax mapping system, and comes to his opinion based on these facts and his expertise, without a single mention of a legal principle. **(App. 242-5).** His factual conclusion, based on the property description in the annexation ordinance, that "the land that was annexed included a small portion of the National Trust Property" is a far cry from the portions of the affidavit of Professor John Freeman that this Court rejected as constituting little more than a legal argument of the reasons the trial court should deny summary judgment in Dawkins v. Fields, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003).

As pointed out by the National Trust in its Brief, Forsberg's Affidavit is entitled to the same weight as that afforded by the Court of Appeals to the testimony of the surveyor in Vicary v. Town of Awendaw, 427 S.C. 48, 54, 828 S.E.2d 229, 232 (Ct. App. 2019).

The National Trust agrees with North Charleston that Charleston County's designation of a TMS number for a parcel cannot convey title. That is obvious. That is also not what the National Trust nor Forsberg is asserting. As made plain by his Affidavit, the County's TMS number is derived from the legal description of the parcel as set out in the most recently recorded deed or

plat, in this instance Plat S17/0224, the Acre Plat. As such, TMS No. 301-00-00-797, the Acre, is the parcel described in the Acre Plat. **(App. 244).**

Although North Charleston makes many arguments, all dealt with above, it does not challenge the settled legal principle that a person owning property within the annexed area has standing to challenge the annexation. State ex rel. Condon v. City of Columbia, 339 S.C. 8, 14, 528 S.E.2d 408, 410–11 (2000). Nor, does it contend that the property owned by the challenger must be a certain minimum amount, a proposition never advanced by this Court. For the reasons stated above and those in its earlier Brief, the National Trust respectfully requests that this Court reverse the Court of Appeals and find the National Trust has proprietary standing.

II. North Charleston does not directly argue against the basis for statutory standing or public importance standing asserted by Charleston based on the violation of its statutory interests.

North Charleston asserts that the patent illegality of its annexation does not have anything to do with standing. **(Resp't's Combined Br. 9)** ("The validity of the annexation regarding Petitioners' (sic) 'leapfrog' annexation claims are not before this Court.") North Charleston may be correct with respect to proprietary standing, but is incorrect that its misdeeds cannot be considered in determining whether the annexation violated the statutory rights of Charleston. Charleston expands on these statutory rights that are trampled by this annexation in its discussion of its public importance standing. **(Charleston Br. pp. 22-25)**. North Charleston's annexation of the Acre that required the unprecedented gymnastic of reaching over two parcels within Charleston clearly infringes on the statutory powers of Charleston and should be a basis for finding it possesses either statutory standing or public importance standing.

III. The National Trust's statutory charge to protect and preserve historic places of national significance uniquely qualifies it for public importance standing to challenge this annexation that the trial court determined was patently invalid due to the absence of contiguity. The Attorney General does not hold these interests, much less a statutory charge to protect these values.

The National Trust is an organization created by the United States Congress to advocate on behalf of historic preservation and to protect threatened places of national historical significance, as explained in the National Trust's initial brief. **(National Trust Brief at pp. 23-4).** Its legislative charge and its ownership of Drayton Hall, a National Historic Landmark located across Highway 61 from the Acre, and the National Trust Parcel set it apart from other possible challengers with respect to this illegal annexation that is admitted to be the first step in annexing and upzoning the adjoining 2200 acres for intense residential development in this National Historic District. The National Trust will not repeat its argument in its initial brief supporting public importance standing here, but rather will take on the new premises asserted by North Charleston against granting the National Trust public importance standing.

While North Charleston has not engaged in the same type of nefarious conduct that led to this Court's determination of public importance standing in Vicary v. Town of Awendaw, 425 S.C. 350, 822 S.E.2d 600 (2018), it did reach over two properties in Charleston to annex non-contiguous property that the lower court found was not lawful under the annexation statute. **(App. 1-2).** There is a complete lack of precedent in this state approving such an annexation in any context. Yes, not nefarious conduct, but not legal conduct either.

As explained in the National Trust's initial brief, this Court did not limit public importance standing to instances where the municipality engaged in nefarious conduct in an annexation. The Court held in Vicary that the nefarious conduct rose to such a level as to trigger public importance standing. In Vicary, the Court addressed two issues: (1) may third parties without statutory

standing challenge a municipality's annexation when the municipality engaged in nefarious conduct, and (2) may a party have standing under the public importance exception when the issue is of such importance as to require future guidance. See generally, Vicary, 425 S.C. 350, 822 S.E.2d 600 (2018). Although not clearly marked by headings, the Court bifurcated these issues and answered both in the affirmative. Id. 425 S.C.at 350-59, 822 S.E.2d at 600-604 (holding that outsiders had standing to challenge an annexation where the annexing party engaged in nefarious conduct); id. at 425 S.C. at 359-360, 822 S.E.2d at 604-05 (addressing whether the citizens **"also had standing under the public importance exception"** to sue the town) (bold added). For the reasons stated in the National Trust's initial brief, the issue before the Court is of such importance and capable of repetition that future guidance is warranted, and the Court should recognize that the National Trust has public importance standing.

In opposition, North Charleston attacks the National Trust in making what is tantamount to an unclean hands argument:

> The only potentially nefarious conduct present here arises from Petitioners' questionable fabrication of North Charleston's claimed taking or annexation of a four-inch strip of the Trust's property as a pretext to create standing to assert their real agenda. Granting Petitioners' request for public importance standing here would effectively reward bad their own behavior....

(Resp't's Combined Br. 22).

The National Trust will speak to this argument next:

> North Charleston Argument (7): Public importance standing should not be bestowed on The National Trust because it "would effective reward" Petitioner's "bad" behavior described by North Charleston as "Petitioners' questionable fabrication of North Charleston's claimed taking or annexation of a four-inch strip of the Trust's property as a pretext to create standing or assert their real agenda."

There is no basis for North Charleston's assertion that the National Trust is guilty of bad behavior in asserting a challenge to an illegal annexation in the exercise of its charge from the

United States Congress and in protection of it property interests. As far as the so-called "real agenda" of the National Trust, it is no more than to carry out its statutory responsibilities to protect and preserve endangered places of national historical significance that include the Ashley River Road Historic District.

The other argument of North Charleston that the National Trust will address separately in this brief concerns its refrain that the Attorney General is the only person who should be granted public importance standing.

> North Charleston Argument (8): Public importance standing in annexation cases is limited to the Attorney General.

Public importance standing in annexation cases is not limited to the Attorney General, as Vicary demonstrates. For the reasons covered in the National Trust's initial brief, the reaction of the Attorney General is not the bellwether for whether an annexation is of public importance. Additionally, particular to this case, the Attorney General does not have the same statutory responsibilities and interests of the National Trust and, in fact, has no responsibility whatsoever to protect and preserve historic places of national significance and educate the public about them.

It is also important to keep in mind that the standing this Court has granted the Attorney General is not based on the public importance exception but instead on the Attorney General's inherent authority to bring a quo warranto action. State ex rel. Condon v. City of Columbia, 339 S.C. 8, 14, 528 S.E.2d 408, 411 ("We hold that the State, provided it is acting in the public interest, has standing to bring a quo warranto action challenging the annexation of property it does not own."). As this Court pointed out in State ex rel. Condon: "A quo warranto action is rooted in the common law writ designed to test whether a person exercising power is legally entitled to do so. It is an ancient prerogative right through which the state acts to protect itself and the good of the public generally, and may be used to test the legality of exercise of powers by municipal

corporations." Ibid. This right is entirely different from public importance standing.

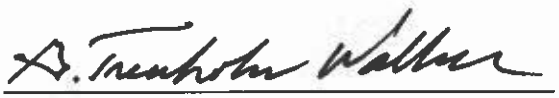
For these reasons and those covered in its initial brief, the National Trust submits that this Court should reverse the lower court and Court of Appeals and determine that the National Trust has public importance standing.

CONCLUSION

The National Trust respectfully requests that this Court reverse the decisions of the lower court and the Court of Appeals, hold that it has both proprietary standing and, in the alternative, public importance standing, and affirm the lower court's determination that this purported annexation is unlawful per se.

Respectfully submitted,

December 4, 2024
Charleston, South Carolina



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
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Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5965 (S.C. Ct. App. filed February 1, 2023)

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PROOF OF SERVICE

I certify that I have served the **REPLY BRIEF OF PETITIONER NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES** on December 4, 2024, addressed to the attorneys of record via electronic mail:

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