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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

Circuit Court Cases No. 2019-CP-10-00846, -02131, and -02539

Court of Appeals Case No. 2019-000903
Opinion No. 5966 (S.C. Ct. App. filed February 1, 2023)

Supreme Court 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.

REPLY BRIEF OF PETITIONER

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Charleston[1] submits this brief in reply to North Charleston and Millbrook's responsive brief.[2]

INTRODUCTION

In addition to readopting and reiterating its principal brief, which is incorporated herein by reference, Charleston makes the following points in reply to Respondents' arguments.

ARGUMENT

I. The circuit court and the Court of Appeals erred in holding that Charleston did not have statutory standing to challenge the 2017 Ordinance and the 2018 Ordinance.

For the first time, Respondents finally acknowledge that statutory standing to contest an annexation ordinance under the 100% petition method includes those whose proprietary interests or statutory rights are infringed. (*See* Br. of Respondents p. 10.) The 2017 Ordinance included property that had been annexed into, and therefore had been part of, Charleston since 2005. The 2017 Ordinance infringed on Charleston's statutory rights in, over, and to this area and its exclusive jurisdiction thereof.

Charleston also has statutory standing to contest the 2018 Ordinance because that ordinance was designed to destroy Charleston's statutory standing to challenge the 2017 Ordinance and to prevent it from exercising its statutory rights to annex Parcel 006.

Respondents attempt to refute Charleston's statutory standing by claiming the 2017 Ordinance did not annex what it denominates as Parcel 006-1[3]. This claim by Respondents is

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[1] Shorthand references already defined in Charleston's principal brief (e.g., "Charleston" refers to Petitioner City of Charleston; "North Charleston" refers to Respondent City of North Charleston; "Millbrook" refers to Respondent Millbrook Plantation, LLC; "Respondents" refers to North Charleston and Millbrook, collectively) are continued in this reply brief.

[2] Although, technically, North Charleston and Millbrook filed separate responsive briefs, Millbrook's brief simply joined in and adopted North Charleston's brief. Accordingly, where this reply brief refers to Respondents' brief (or Respondents' argument(s)), the reference is to North Charleston's brief (or argument(s) set forth therein).

belied not just by the detailed, written description of the area annexed but also by the findings in the 2018 Ordinance that sought to amend the 2017 Ordinance by deleting the area Charleston had already annexed (Parcel 006-1) and by the explanation of North Charleston's counsel at the circuit court hearing where the error in the description of the 2017 Ordinance was admitted. (R. pp. 217:25–218:3 ("Well, The City of North Charleston in December of 2017 annexed everything here as well as this hundred foot strip which was already in [Charleston] . . . ."); *see also* R. pp. 219:23–220:21 ("When The City of North Charleston in December annexed the Millbrook tract as everybody has mentioned, The City of Charleston's hundred foot strip was not shown on the county records and so when you go down and you check the county property records and get the TMS numbers to annex, we annexed TMS 006 which is the Millbrook TMS number and later the county came back, I think The City of Charleston notified the county that their records were wrong and the county assigned a different TMS number to that hundred foot strip on the front. . . . The City of Charleston's position is that . . . we can't fix it, that we're stuck with the county records but our position is clearly that we're supposed to rely on the county records, we did, we amended it when the county amended it.").)

Charleston does not claim statutory standing on proprietary interests, but on its statutory rights in and over the land in its jurisdiction upon which the 2017 Ordinance infringed, and its statutory rights to continue its annexation of Parcel 006.

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[3] Millbrook is the owner of the tract of land that is the subject of this litigation. Charleston County initially assigned TMS No. 3610000006 to the entire tract. Sometime during the course of this litigation, the county assigned a different TMS No. to the area of the tract that Charleston annexed in 2005, that being 3610000006 1. Respondents denominate Parcel 006 as the area it sought to annex and Parcel 006-1 as the area already in Charleston. Charleston utilizes those labels in this reply brief.

A. The 2017 Ordinance unequivocally reveals that Parcel 006-1 was included in the area that North Charleston sought to annex.

The 2017 Ordinance annexed Parcel 006, as shown on the Charleston County tax maps at the time of its enactment. At that time, Parcel 006 was shown as bordering on the northern right-of-way line of Highway 61. As Charleston had annexed the portion or Parcel 006 within 100' of the northern right-of-way line of Highway 61 in 2005, the 2017 Ordinance undoubtedly included land within the jurisdiction of the Charleston.

After Charleston County amended the TMS No. of Parcel 006 to reflect what Charleston had previously annexed to, wit: Parcel 006-1, North Charleston introduced and passed the 2018 Ordinance in an effort to cure the defect in the Ordinance 2017 by deleting the land Charleston had already annexed, then designated as Parcel 006-1. Reference to the 2017 Ordinance property description of the area annexed as extending to and along the northern right-of-way of Highway 61, the findings of the 2018 Ordinance, and the candid admission of North Charleston's counsel before the circuit court prove the point.

Respondents chose to rely on Charleston County maps in the annexation of Millbrook's property. That those maps ultimately proved to be faulty cannot be the basis for denying Charleston its statutory standing. Charleston had no hand in the creation or administration of those maps. Moreover, Respondents are charged with knowledge of local ordinances, including the 2005 ordinance annexing a portion of Parcel 006. *See LaBruce v. N. Charleston*, 268 S.C. 465, 467, 234 S.E.2d 866, 867 (1977) ("Cognizance of city ordinances is presumed."). The fact that Respondents overlooked Charleston's 2005 Ordinance or did not otherwise make appropriate inquiry in drafting the 2017 Ordinance are matters of their own making.

The record clearly reflects that Charleston has statutory standing to contest the 2017 Ordinance. The same holds true as to the 2018 Ordinance. The 2018 Ordinance was enacted in

a deliberate attempt to cure the 2017 Ordinance and to destroy Charleston's statutory standing and its statutory right to annex the remainder of Parcel 006, a process already underway before North Charleston took any action on either of its ordinances. As the 2018 Ordinance infringes on Charleston's statutory rights to annex, Charleston has the requisite interest and every right to contest it.

B. *Bostick v. City of Beaufort*[4] does not support North Charleston's contention that the 2017 Ordinance is lawful.

Bostick provides no safe harbor to Respondents. It stands for the proposition that substantive defects in annexation proceedings cannot be cured by way of corrective ordinance. The defect found substantive in *Bostick* was the failure of the 75% annexation petitions and attached maps to describe Bostick's property.[5] The *Bostick* Court found the omission of the property from the petitions and maps to be substantive, and the annexation as to Bostick void.

Here, the 2017 Ordinance was defective for wrongly including within the area to be annexed land that was already in Charleston (Parcel 006-1) and other land upon which Charleston had already commenced annexation proceedings (the remainder of Parcel 006). The facts compel a finding that these delicts must be deemed substantial, the reason being, as will be argued, *infra*, when attempted corrective measures were taken by North Charleston, Charleston was well underway in its annexation of Parcel 006. To give efficacy to the 2018 Ordinance not only rewards Respondents for carelessness but also undermines and frustrates Charleston's ability to exercise its statutory right to annex Parcel 006.

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[4] 307 S.C. 347, 415 S.E.2d 389 (1992).

[5] The record does not contain the annexation petition of Millbrook. The only map in the record is attached to the ordinance and shows the annexed area extending to Highway 61. (R. p. 305.)

II. This Court should adopt the "prior pending proceedings" rule.

Contrary to what Respondents imply, the prior pending proceedings rule is neither novel nor obscure. It is a common law doctrine that establishes clear standards between municipalities competing to annex the same property. It is founded on the public policy of promoting an orderly administration of government. It is recognized as the majority rule in municipal annexation jurisprudence. The facts of this case provide the quintessential circumstances to allow this Court to establish guidance regarding its application.

A. *Vicary v. Town of Awendaw*[6] has no bearing on Charleston's "standing" to argue for the adoption of the prior pending proceedings rule.

Contrary to what Respondents appear to contend, the adoption of the prior pending proceedings rule would not create a new category of challengers capable of contesting an annexation. Respondents claim the rule would create a new category of challengers to 100% annexations, i.e. "non-owners" of the annexed property. (Br. of Respondent p. 16.) This is simply not the case. Charleston refers the Court to the argument in its principal brief that those who have standing to contest a 100% annexation are (1) those whose proprietary interests or statutory rights have been infringed; (2) the Attorney General; and (3) those who can demonstrate nefarious conduct or demonstrate the need for public importance standing. (Br. of Petitioner pp. 15–24.) Charleston also refers the Court to page 10 of Respondents' brief where it affirmatively asserts that challengers meeting the requirements of categories (1) and (2), above, have standing in 100% annexations. (Br. of Respondents p. 10.)

Respondents' argument on this issue is premised on Charleston not being a property owner of land annexed by the 2017 and 2018 Ordinances. A property owner is not the sole

[6] 425 S.C. 350, 822 S.E.2d 600 (2018).

person who has standing to contest a 100% annexation. Standing is also recognized for those whose statutory rights are infringed by an annexation. Charleston wholly fits that bill.

The prior pending proceedings rule does not create a new category of annexation challengers. If anything, it is consistent this Court's precedent as to whom may contest a 100% annexation, by recognizing, as between municipalities competing to annex the same territory, the one that has first exercised its statutory rights and taken the first public procedural step under the applicable annexation statute has priority to proceed and continue under the statute without interference from the other.

B. Charleston was first in line to annex Parcel 006.

Before North Charleston made any attempt to annex Parcel 006 or any portion of it, Charleston had voted to accept and consider the annexation of Parcel 006 under the 75% petition method of annexation and voted to notice the statutorily required public hearing. Under S.C. Code Ann. § 5-3-150(1), these are the first procedural steps required before annexing under the 75% method.

Though a zoning case, *Sherman v. Reavis*, 273 S.C. 542, 546, 257 S.E.2d 735, 737 (1979), is instructive as to this Court's precedent as to when an ordinance is considered pending. *Sherman* held that "[a]n 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." *Id.*

Sherman noted the procedures then in effect to accomplish a rezoning, which required notice, a public hearing, and the adoption of an ordinance. *Id.* at 533–44, 257 S.E.2d at 736. Charleston annexed Parcel 006 under § 5-3-150(1), which also requires notice, a public hearing and the adoption of an ordinance.

The record reveals that on December 19, 2017, Charleston City Council (1) resolved to consider the annexation petition of Parcel 006 and other properties therein and (2) ordered the scheduling of the statutorily required public hearing on the annexation. These public procedural steps are the first and only steps a governing body could take under § 5-3-150(1). These first procedural public steps are consistent with those that triggered the application of the pending ordinance doctrine in *Sherman* and those that triggered the application of the prior pending proceedings rule in the treatises and case law cited in Charleston's principal brief. (Brief of Petitioner pp. 10–15).

North Charleston did not act on its petition to annex Parcel 006 or 006-1 until December 21, 2017, two days after Charleston had commenced its proceedings. The annexation procedure utilized by North Charleston did not require any procedural step other than acting on an ordinance, which it did. This action by North Charleston, however, does not in any manner diminish or otherwise affect the actions Charleston had taken first.[7]

Respondents' contention that Charleston did not initiate action when it agreed to consider the 75% petition and order the scheduling of a public hearing is unavailing. Charleston did exactly what § 5-3-150(1) requires before acting on a petition. It is true that ordinances must be in writing and in a form required for adoption, but Charleston was not acting on an ordinance on December19, 2017. The statute precluded doing so prior to the public hearing. What Charleston did on December 19, 2017, was to accept a petition to annex what is now designated as Parcel

[7] Respondents note that the record does not contain evidence of the published notice or other notifications required by the statue. It must be remembered that this case was decided on Millbrook's 12 (b)(6), SCRCP, motion, where the allegations of the pleadings and all reasonable inferences therefrom must be construed in a light most favorable to the nonmoving party, Charleston. That the record does not have contain the notices is not the fault of Charleston, as it could not go beyond the pleadings.

006 and the other properties on the petition and order, or resolve, if you will, the scheduling of a public hearing.

C. Charleston did not engage in any misconduct in accepting the annexation petition which included Parcel 006 or in amending its agenda to do so.

Respondents seek to create an issue where none exists in an effort to discredit the legitimate actions of Charleston's City Council.

Charleston did amend its agenda at the December19, 2017, meeting. It was entitled to do so. South Carolina Code Ann. § 30-4-80 of the Freedom of Information Act only proscribes amending an agenda without 24 hours' notice if the item added can be finally adopted with but one vote. Section 5-3-150(1) requires myriad steps before an annexation becomes final, among them being notices, a public hearing, and the enactment of an ordinance. Charleston simply added the item to its agenda and authorized the action necessary to enable it to proceed under the statute. Charleston has never denied or sought to downplay the amendment of the agenda on the Council meeting held on December 19, 2017. However, if Respondents are to direct this Court to what they say are "admissions" on this issue to somehow lend credence that Charleston engaged in misconduct, they should direct the Court to all "admissions." Charleston's Answer and Counterclaims (R. pp. 55–56 ¶¶ 36–43) and Reply to Counterclaims (R. pp. 72–75 ¶¶ 12–32) detail the actions of Charleston's City Council and staff at the meeting and substantiate compliance with § 30-4-80 of the Freedom of Information Act.

Respondents' attempt to disparage Charleston because of what they improperly call the "last minute surprise oral decision, without required public notice" should be disregarded. Respondents may not like the consequences of what occurred at the December 19, 2017, meeting, but they have made no showing that anything done ran afoul of the law.

Respondents' reliance on the advanced stage of proceedings in S*herman*, 273 S.C. 542, 257 S.E.2d 735, to escape the application of the prior pending proceedings rule falls short. It is not the "stage" of proceedings that invokes the protection of the prior pending proceedings rule. It is the taking of the first public procedural step that does.

Sherman examined the "pending ordinance doctrine," applicable in matters of zoning. The *Sherman* Court was very clear on the events triggering the doctrine. *Id.* 273 S.C. at 547, 257 S.E.2d at 738 ("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."). This language is instructive as to the action required to trigger the protection of what could be described as a parallel doctrine in the field of annexation, the prior pending proceedings rule, to wit: accepting the annexation petition and advertising its intent to hold the public hearing.

Footnote 7 of Respondents' brief requires scrutiny. (Br. of Respondent p. 20 n.7.) As an initial matter, all actions of Charleston's City Council were taken in open, public session, thus advising publicly its acceptance of the petition and its intent to hold a public hearing. To the extent that Respondents seek to imply that newspaper notice had not been run prior to its first reading of the 2017 Ordinance, the proceeding before the circuit court was a Rule 12 (b)(6) motion on the issue of standing, where all reasonable inferences are required to favor Charleston. What Respondents seem to imply is nothing more than pure speculation.

D. The facts of this case are on all fours with *City of Burlington v. Town of Elon College*[8].

Respondents continue to try to shift the focus of the prior pending proceedings rule to the stage of the annexation proceedings, when the rule directs that focus be on the first public

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[8] 310 N.C. 723, 314 S.E.2d 534 (N.C. 1984).

procedural step of the particular method of annexation. Under § 5-3-150(1), the first public procedural steps have to be the acceptance of the petition and ordering the statutorily required public hearing. The statute requires these undertakings before a council can otherwise move forward on the petition. That the City of Burlington had taken additional steps beyond the initial one before the competing annexation of the Town of Elon College came along, does not change the analysis of when the protection of the prior pending proceedings rule is triggered. Indeed, the discussion of the North Carolina Court, in its application of the rule, focused on the first public procedural step, not how far along the Town of Burlington had gotten before the Town of Elon came on the scene. The *Burlington* Court deemed the passage of a Resolution of Intent to Annex sufficient to acquire prior jurisdiction over the area in dispute.

After reviewing the principles underpinning the rule, the court held:

> Applying the foregoing principles to the facts of the instant case leads inevitably and indisputably to the conclusion that plaintiff City of Burlington, by adopting its Resolution of Intent to Annex on 19 April 1983, took the 'first mandatory public procedural step in the statutory process" and thereby acquired prior jurisdiction of the disputed areas. Consequently, any subsequent attempts by defendant Town of Elon College to acquire jurisdiction were null and void.

Burlington, 310 N.C. at 728, 314 S.E.2d at 537.

Ironically, Respondents' urged construction of the rule would result in the very consequences the rule is designed to prevent. If, as Respondents seem to argue, the rule cannot be invoked until a public hearing is conducted or the reading of an ordinance is accomplished, the 75% method of annexation is subject to being undermined at the whim of a disgruntled property owner seeking refuge in the municipality offering the better deal. This is so because of the mandatory 30-day notice requirement of § 5-3-150(1). There is no such public hearing requirement under the 100 % method of annexation.

Both of the annexation methods authorized by § 5-3-150 are lawful, equal proceedings. Unless the prior pending proceedings rule under the 75% method is triggered by the acceptance of the petition and ordering the public hearing, property owners and councils availing themselves of this method find themselves in limbo, holding their breaths while the notice period runs in hopes that another municipality will not sweep in with an annexation under the 100% method. This is exactly what Respondents are advocating and exactly what they did.

E. Charleston bases its first-in-line status on the actions its city council took at its December19, 2017, meeting.

The timing of both the 2017 Ordinance and 2018 Ordinance are in play. First reading of the 2017 Ordinance and the 2018 Ordinance occurred subsequent to Charleston initiating proceedings to annex Parcel 006. The nut of this case boils down to whether Charleston had statutory standing to contest an ordinance infringing on its statutory rights (the 2017 Ordinance) and statutory standing to challenge the ordinance designed to destroy that statutory standing and its statutory rights to proceed with its annexation of Parcel 006 (the 2018 Ordinance).

Because the 2017 Ordinance attempted to annex land already in Charleston, Charleston had statutory standing to challenge it, as the ordinance infringed on its statutory rights to exclusive jurisdiction over properties within its limits. Because the 2018 Ordinance was aimed at destroying Charleston's statutory standing to contest the 2017 Ordinance and prevent it from exercising its statutory right to continue its ongoing efforts to annex Parcel 006, the Ordinance infringed on Charleston's statutory rights as well.

Respondents urge the Court to ignore what transpired at Charleston's December 19, 2017, meeting because those actions were not somehow sufficient to trigger the prior pending proceedings rule. Respondents also urge the Court to ignore Charleston's actions between the December meeting and the time of its enactment of the 2018 Ordinance, those being, holding the

public hearing and giving first reading to an ordinance to annex Parcel 006 and the remaining properties included on the petition, the very actions Respondents have advanced as necessary to invoke the prior pending proceedings rule. An ordinance is effective only after two readings. S.C. Code Ann. § 5-7-270. Respondents offer no legal basis for moving the effective date of the 2018 Ordinance to a time prior to its second reading.

F. This case poses issues of significant public importance with statewide ramifications in the field of municipal annexation, and this Court should take them up and decide them to provide the guidance needed in this case and in those that are capable of following.

This Court should decline Respondents' invitation that it defer to the Attorney General or the General Assembly in resolving the issues raised by the facts of this case. That there is no "tidal wave of competing annexations" is no justification to decline to decide a novel issue of law, particularly when the issue is capable of rising again and again. The Court need not wait on tidal waves to form. The facts of this case beg for resolution of the circumstances that give rise to the application of the prior pending proceedings rule. The rule, being the application of a doctrine of common law, is squarely within the province of this Court. This Court should adopt the rule and apply it to the facts of this case or remand it with instructions as to its application.

CONCLUSION

For the reasons set forth in its principal brief and this reply brief, Charleston respectfully requests that the Court of Appeals (and, in turn, the circuit court) be reversed and that this Court adopt the prior pending proceedings rule and either apply it to the facts of this case or remand the matter with instructions that the prior pending proceedings rule applies and with instructions as to the application of the rule.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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