

RECEIVED

Nov 15 2024

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.

APPENDIX

VOLUME II OF II
APP-492 – APP-642

G. Trenholm Walker (SC Bar No. 5777)
WALKER GRESSETTE & LINTON, LLC
66 Hasell Street
Charleston, SC 29401
(843) 727-2200

*Attorneys for Petitioner National Trust for
Historic Preservation in the United States*

Other Counsel of Record:

Frances I. Cantwell (SC Bar No. 01121)
2220 Folly Road
Charleston, SC 29412

Julia Parker Copeland (SC Bar No. 77199)
CITY OF CHARLESTON LEGAL DEPARTMENT
50 Broad Street
Charleston, SC 29401

Russell Hines (SC Bar No. 72100)
Wilbur Johnson (SC Bar No. 3062)
CLEMENT RIVERS LAW FIRM
25 Calhoun Street, Suite 400
Charleston, SC 29402

Attorneys for Petitioner City Of Charleston

J. Brady Hair (SC Bar No. 9040)
Kriston D. Neely (SC Bar No. 72855)
CITY OF N. CHARLESTON LEGAL DEPARTMENT
2500 City Hall Lane
North Charleston, SC 29406

Attorneys for Respondent City of North Charleston

INDEX TO APPENDIX

APP-Page

Index to Record on Appeal	i
Record on Appeal.	1
Brief of Appellant National Trust.....	373
Brief of Appellant City of Charleston.....	400
Brief of Appellant (Contiguity/Adjacency) City of N. Charleston.....	430
Brief of Respondent National Trust.....	442
Brief of Respondent City of Charleston.....	469
Brief of Respondent (Standing) City of N. Charleston.....	492
Reply Brief of National Trust	510
Reply Brief of City of Charleston.....	524
Reply Brief (Contiguity/Adjacency) of City of N. Charleston.....	537
Court of Appeals Op. 5965	542
Petition for Rehearing by National Trust.....	549
Petition for Rehearing by City of Charleston	572
Return by City of N. Charleston to National Trust.....	605
Return by City of N. Charleston (Standing) to City of Charleston.....	615
Reply Brief of National Trust	625
Reply Brief of City of Charleston.....	632
Order Deny Petition for Rehearing of National Trust	639
Order Deny Petition for Rehearing of City of Charleston	641

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
Hon. Eugene Griffith

Case No. 2018-CP-10-851
Appeal No. 2019-000728

RECEIVED
FEB 18 2020
SC Court of Appeals

National Trust for Historic Preservation
In the United States and The City of Charleston, Respondents/Appellants

v.

City of North Charleston, Appellant / Respondent.

**Appellant/Respondent's Combined¹⁵ Final Brief (City of North Charleston)
(STANDING)**

Derk Van Raalte and Brady Hair
Legal Dept., 2500 City Hall Lane
North Charleston, SC 29406
843-740-2550 derk@bradyhair.com

Attorneys for the Cross-Appellant
City of North Charleston

Other Counsel of Record:

Francis Cantwell, Susan Herdina,
Daniel ("Chip") McQueeney, Jr.
50 Broad Street
Charleston, SC 29401
mcqueeneyd@charleston-sc.gov
843-724-3730
Attorneys for the City of Charleston

Trenholm Walker, Esquire
Walker, Gressette, Freeman, Linton
PO Box 22167
Charleston, SC 29413
walker@WGFLAW.com
843-727-2208
Attorney for National Trust

¹⁵ The National Trust and City of Charleston each submitted similar briefs principally focused on issues surrounding standing. To further judicial economy, rather than filing two identical Response Briefs addressed to each, the City of North Charleston proposes to file this single "Combined Brief of Respondent."

INDEX

Table of Cases

Questions Presented On Appeal	1
Statement of the Case	1
Facts	1
Standard of Review	3
I. Neither the Trust nor Charleston Meet the Traditional Test for Standing Set Forth in <u>Vicary v. Town of Awendaw</u>	4
a. North Charleston Did Not Acquire Any Property Owned by the Trust	6
b. North Charleston Did Not Annex Any Property Owned by the Trust	7
II. Summary Judgment Was Appropriate Given That There Were No Disputed Questions of Material Fact	9
III. Judge Griffith Correctly Concluded that <u>Vicary</u> Does Not Provide for Special Public Interest Standing Here.....	11
Conclusion	13

TABLE OF CASES

CASES

<u>Lanier Constr. Co. v. Bailey & Yobs, Inc.</u> , 384 SC 275, 681 SE2d 909 (SC App. 2009).....	3, 11
<u>Cummins v. Varn</u> , 307 S.C. 37, 413 S.E.2d 829 (1992)	6
<u>F.C. Enterprises, Inc. v. Dibble</u> , 335, SC 260, 266 (SC App. 1999)	6
<u>Griggs v. Griggs</u> , 199 S.C. 295, 19 S.E.2d 477 (1942)	6
<u>Hutto v. Ray</u> , 192 S.C. 364, 6 S.E.2d 747 (1940).	6
<u>St. Andrews Pub. Service Distr. v. Charleston</u> , 349 S.C. 602, 564 S.E.2d 647(SC 2002)	11
<u>State v. Kinard</u> , 427 S.C. 367, 371, 831 S.E.2d 138, 140 (SC App. 2019)	7
<u>Vicary v. Town of Awendaw</u> , 425 SC 350, 822 SE2d 600 (SC 2018)	4, 11, 12

STATUTES

S.C. Code Ann. 5-3-100	2, 7, 13
------------------------------	----------

OTHER AUTHORITIES

S.C.R.Civ.P 56(c)	11
Willison on Contracts, Section 70:171, 4 th Edition	6

QUESTIONS ON APPEAL

- I. Neither the Trust nor Charleston Meet the Traditional Test for Standing Set Forth in Vicary v. Town of Awendaw.
 - a. North Charleston Did Not Acquire Any Property Owned by the Trust
 - b. North Charleston Did Not Annex Any Property Owned by the Trust
- II. Summary Judgment Was Appropriate Given That There Were No Disputed Questions of Material Fact.
- III. Judge Griffith Correctly Concluded that Vicary Does Not Provide for Special Public Interest Standing Here.

Statement of the Case

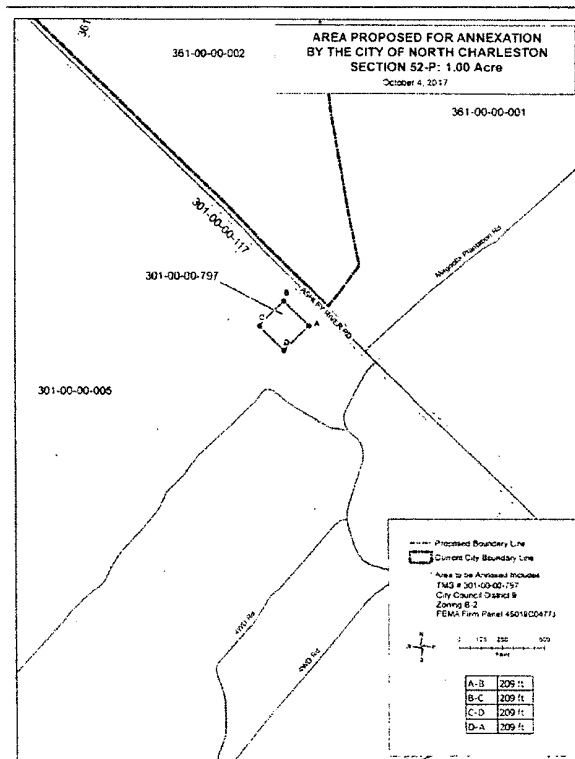
North Charleston does not object to the procedural history dates set forth in the National Trust's Statement of the Case and incorporates those dates by reference herein.

Facts

North Charleston, in late 2017, engaged in annexation activity west of the Ashley River. This began when North Charleston annexed the 113 acre Runnymede Plantation parcel (TMS 361-00-00-002) (hereinafter, "Runnymede"). ROA p. 3, Order, pg. 3, Para 7. No annexation challenge was filed. Id.

North Charleston later obtained title from Whitfield to a one-acre parcel (TMS# 301-00-00-797) (hereinafter, "the Acre") that lies about one hundred (100') feet to the Southwest of Runnymede. ROA p. 4, Order, pg. 4. Runnymede and the one-acre parcel do not share a common

boundary. As shown on the map below¹, they are separated by Ashley River Road and a slender 100' wide x 11,000' long shoestring parcel designated TMS 301-00-00-017 (hereinafter, the "Shoestring.")² ROA pp. 3-4, Order, pg. 3-4. North Charleston later annexed The Acre it owns. ROA p. 4, Order, pg. 4, Para. 12. This annexation was accomplished by way of S.C. Code Ann. 5-3-100 which authorizes only the annexation of land entirely owned by the annexing municipality.



Charleston and Trust filed annexation objections and lawsuits regarding The Acre.

The Trust most directly claims standing based on its argument that North Charleston annexed part of the Trust's Shoestring. Charleston's claim to standing is similar, but includes the

¹ This map may be found on page 3 of Judge Griffith's Order. ROA p. 3.

² All references to 100' are approximate.

wrinkle that its interest stems from prior annexation, not ownership, of the Shoestring. Thus, the annexation boundary between the Acre and the Shoestring was a key focus of the court below. The Trust and Charleston claimed a four-inch (4") boundary error creating a 1/1000th of an acre discrepancy sufficient to confer standing and invalidate everything. Judge Griffith was not persuaded. He determined that North Charleston had not annexed any acreage it did not own.

Standard of Review

North Charleston has no material objection to the cases cited by the National Trust with regard to the Standard of Review and incorporate those by reference.³ In addition, North Charleston offers Lanier Construction Co. v. Bailey & Yobs, Inc., 384 SC 275, 281, 681 SE2d 909, 913 (SC App. 2009) for the proposition that the existence of a factual dispute about immaterial matters does not invalidate the use of summary judgment.

³ North Charleston does not incorporate the argument included as the last paragraph of the National Trust's Standard of Review section.

Argument⁴

I. Neither the Trust nor Charleston Meet the Traditional Test for Standing in Vicary v. Town of Awendaw.

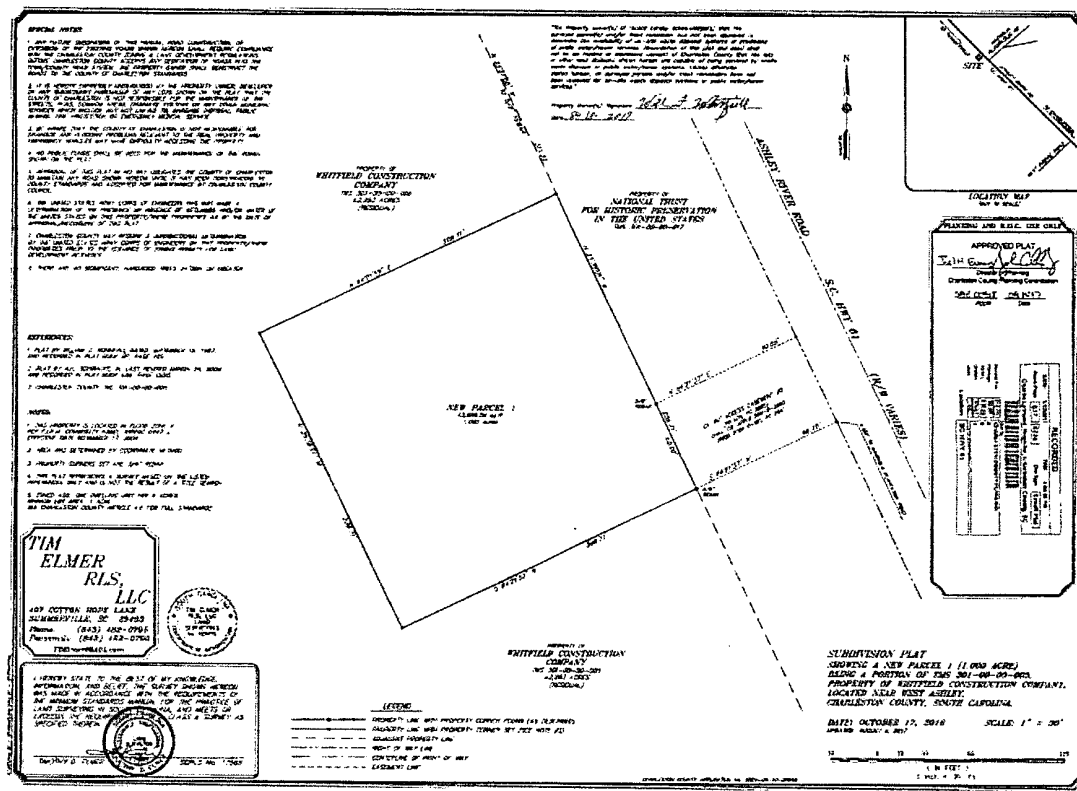
Standing is required in order to pursue an annexation challenge. Vicary v. Town of Awendaw, 425 SC 350, 822 SE2d 600 (SC 2018). The two principal groups with standing to challenge a 100% annexation are: (1) property owners of annexed land and (2) the Attorney General of South Carolina. Id. The Trust and Charleston fall into neither category and the Attorney General did not file a challenge.⁵

To gain standing, the Trust argues that one property line on The Acre's boundary was off by approximately four inches (4"), thus causing North Charleston to take ownership and annex 1/1000th of an acre of the Trust's Shoestring that had already been previously by the City of Charleston.⁶ See Complaint, Para. 28-30 and 38(b). The plat reproduced below illustrates the argument. See ROA p. 269.

⁴ The City of North Charleston analyzes the issues present in this appeal in a far less complicated fashion than Charleston or the Trust. Rather than respond point by point North Charleston offers a competing analytical framework. To the extent that North Charleston's response may not directly mention some particular case or assertion by the Trust or Charleston such a failure to mention is not intended to indicate acquiescence or agreement.

⁵ Charleston and the Trust both argue their desire to obtain general Public Interest standing. That issue will be separately addressed by North Charleston in Part III of this Brief. Additionally, Charleston argues in Part I of its Brief that South Carolina law should allow for a special third category of challenger – a municipality who's previously annexed territory is subject to later attempted annexation by another city. While such municipal standing might be a question one day in need of an answer that question is not before the Court in this current case. North Charleston did not annex Charleston territory.

⁶ It is ironic that Charleston and the Trust are arguing fiercely to get a ruling that North Charleston took land of theirs that they do NOT want taken. If their real concern was avoiding having North



This plat shows the eastern boundary line, shared in common with the Trust, as being 99.7' away from Ashley River Road. The original deed by which the Trust obtained title to the Shoestring described the Trust parcel as extending in 100' from Ashley River Road.

The Trust's attempt to claim "property owner" standing is legally insufficient because, regardless of the claimed 4" error, North Charleston did not, and does not, claim to own or have

Charleston controlling their land then the trial court's ruling, and North Charleston's agreement, would thrill them. Instead we have a bizarre situation where the Trust and Charleston are claiming that North Charleston took something never taken so as to let them argue that North Charleston isn't allowed to take it! This did not escape Judge Griffith. See ROA p.8. Order at p. 8 ("It appears disingenuous to the Court that the National Trust is not pursuing a claim to correct the error and clear the 'cloud' but is arguing that the 'cloud' gives it, and thus Charleston, the legal standing to challenge the annexation....")

annexed any portion of the Trusts' Shoestring. Since Charleston's standing claim is essentially derivative⁷, a lack of Trust standing also amounts to a lack of standing for Charleston.

a. North Charleston Did Not Acquire Any Property Owned by the Trust

As a matter of law, no error in the legal description or plat for The Acre could have resulted in North Charleston obtaining ownership of land belonging to the Trust. A grantor simply cannot bestow upon a grantee more than what the grantor owns to begin with.⁸ Thus, no matter what Whitfield's deed to North Charleston might say, the Acre deed cannot give North Charleston title to any of the Trust's land. That is even more apparent here given that North Charleston received a Quit Claim, rather than Warranty, deed to the property.⁹ Even if the Trust is correct that its boundary is 100' from Ashley River Road rather than 99.7', the result would not be that North Charleston owns any of the Trust's Shoestring parcel. As a matter of law, the Trust would retain its full undiminished acreage. Any error could only reduce the amount of land obtained by North Charleston from a perfect 1.0 acre to .999 of an acre. Accordingly, there is no way the Trust can show it owns any portion of North Charleston's Acre parcel (TMS# 301-00-00-797.)

⁷ Annexation of the Shoestring land would mean that Charleston territory was annexed.

⁸ See F.C. Enterprises, Inc. v. Dibble, 335, SC 260, 266 (SC App. 1999); Cummins v. Varn, 307 S.C. 37, 413 S.E.2d 829 (1992) (no deed can convey an interest which the grantor does not have in the land described in the deed); Griggs v. Griggs, 199 S.C. 295, 19 S.E.2d 477 (1942) (no deed can operate so as to convey a greater estate or interest than grantor has); Hutto v. Ray, 192 S.C. 364, 6 S.E.2d 747 (1940).

⁹ As explained in Williston on Contracts, "A quit claim deed only conveys a grantor's interest and implies nothing more. Indeed, a buyer's acceptance of a quit claim deed generally implies that the seller is only conveying whatever title the seller may have – which may be to a greater or lesser extent than the seller believes, or none at all." *Williston on Contracts*, Section 70:171, 4th Edition.

b. North Charleston Did Not Annex Any Property Owned by the Trust¹⁰

Judge Griffith correctly determined that North Charleston did not annex any portion of the Trust's Shoestring. This result was clear as a matter of law for several reasons.

First, as discussed above, the Whitfield deed conveying The Acre tract to North Charleston was legally incapable of conveying property owned by the Trust. That is important to determining what was annexed (the ultimate issue here) because North Charleston's annexation package described the land annexed as being co-extensive with the land North Charleston acquired. The annexation ordinance expressly stated that the area being annexed was TMS 301-00-00-797. That is the parcel number for North Charleston's acre and is totally distinct from Shoestring parcel No. 301-00-00-017 owned by the Trust. Additionally, the Ordinance specifically noted that North Charleston was annexing "approximately" 1.0 acres, thus specifically allowing for the fact that it

¹⁰ The Trust, in Part II of its Brief, seems to discuss a non-existent error. Perhaps the Trust read too much into the portion of the Order saying "that North Charleston, the party seeking annexation of the Acre, **could not** annex property that was not owned by North Charleston." Brief of National Trust, pg. 14. (emphasis added.) The Trust seems to say that Judge Griffith erred because he thought it was legally impossible for North Charleston to try to annex more than it owned. Reading the entirety of Pages 6-8 of the Order reveals that Judge Griffith made no such error. Judge Griffith concluded that North Charleston's annexation action only intended to annex the property North Charleston owned. While the Trust and Charleston disagree with that conclusion, it is not predicated on the "legal impossibility" error that the Trust may be arguing in Part II of its Brief. The Trust further muddies the water by mistakenly claiming that annexation statutes "have no provisions that the areas proposed to be annexed can only be property owned by the petitioners for annexation." S.C. Code 5-3-100 employed here tells us the rule is exactly the opposite with its title "Alternate method *when entire area owned by annexing municipality or county.*" (emphasis added.) Finally, to the extent that Part II of the Trust's Brief may be read to instead argue that the intent of North Charleston Council did not matter in terms of applying North Charleston's annexation ordinance, the Trust is simply wrong. See State v. Kinard, 427 S.C. 367, 371, 831 S.E.2d 138, 140 (SC App. 2019)("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used....")(internal citations omitted.)

Beginning at Point A, on the easternmost corner of parcel designated TMS #301-00-00-797 which is also adjacent to the present city limits line; thence, in a generally northwesterly direction a distance of 209 feet along the northeasternmost property line of parcel designated TMS #301-00-00-797 to Point B which point is on the northernmost corner of parcel designated TMS #301-00-00-797; thence, in a generally southwesterly direction a distance of 209 feet along the northwesternmost property line of parcel designated TMS #301-00-00-797 to Point C which point is on the westernmost corner of parcel designated TMS #301-00-00-797; thence, in a generally southeasterly direction a distance of 209 feet along the southwesternmost property line of parcel designated TMS #301-00-00-797 to Point D which point is on the southernmost corner of parcel designated TMS #301-00-00-797, thence, in a generally northeasterly direction a distance of 209 feet along the southeasternmost property line of parcel designated TMS #301-00-00-797 to Point A, the point of beginning with all distances being more or less.

The area proposed for annexation includes the parcel designated TMS #301-00-00-797 which shall be zoned AG, Agricultural District.

Line "A" – "B" is described as the property line that the one-acre parcel shares in common with the Trust's 100' Shoestring. Nowhere did North Charleston Council express a desire to cross over the Shoestring parcel's property line to annex any portion of the Trust's land. To the contrary, North Charleston annexation package specifically said it was annexing property wholly owned by the City. Since the point of beginning for all measurements is the property line shared in common with the Trust's 100' strip (not Ashley River Road) and the direction of measurement is away from the shared boundary of the 100' strip, any error in the location of Point A on the plat would have the result of reducing either the acreage owned and annexed by the City or the acreage retained by the grantor (Whitfield). There is no way to argue that North Charleston annexed land owned by the Trust.

II. Summary Judgment Was Appropriate Given That There Were No Disputed Questions of Material Fact

Judge Griffith's ruling was appropriate based on the same general summary judgment concepts espoused by Charleston and the Trust. Both parties seek reversal based on the idea that Judge Griffith purportedly ignored a surveyor's affidavit and other information they claim created a factual dispute entitling them to a trial. Nothing could be further from the truth. The problem

with the surveyor's affidavit and other evidence and arguments of the Trust and Charleston here wasn't that the Court didn't consider it or give it enough weight. The problem was that it didn't go to an issue material to the outcome of this action.

This isn't a case where conflicting testimony might exist about the color of a stoplight at the moment of a wreck. Everything needed to decide this case exists in the record. The North Charleston annexation ordinance says what it says. The surveys show what they show. The annexation maps show what they show. Titles to various properties say what they say. And the affidavits say what they say. The question before Judge Griffith wasn't "what happened." All that was perfectly documented. The question for Judge Griffith was "what is the legal significance of these various facts?" If one title or survey says "X", a later one says "Y", and an annexation ordinance package says "Z", what outcome does the law dictate? That is uniquely a legal question appropriate for summary judgment.¹¹

As for the much ballyhooed 4" boundary line discrepancy, it simply wasn't material. The problem for Charleston and the Trust wasn't that Judge Griffith didn't believe them or give them a chance to prove a *meaningful* 4" error, it was that he saw the 4" error had no bearing on the outcome of this case. Judge Griffith recognized that, by law, the claimed 4" error could only reduce North Charleston's acquisition from Whitfield down from 1.0 to .9999 of an acre, but in no event result in North Charleston acquiring any portion of the Trust's shoestring acreage. ROA at 6. Judge Griffith also reviewed the annexation documents and determined that North Charleston's annexation was exclusively for acreage North Charleston owned. ROA at 7. At that point, the

¹¹ While claiming error existed because of disputed facts that should have prevented Summary Judgment, Charleston turns around and elsewhere (Charleston Brief at p. 16) argues that what we face in this case is an issue of "statutory construction" where the Court must divine the intent of a plainly legible ordinance's words. That sounds like a classic use for Summary Judgment!

presence or absence of 4" error became immaterial. A factual dispute regarding an *immaterial* fact does not invalidate the use of Summary Judgment. See S.C.R.Civ.P 56(c); Lanier Construction, 384 SC 275, 281, 681 SE2d 909, 913 (“[W]e believe the trial court properly granted the Cupps’ summary judgment motion. The disputed fact of whether Mike Cupp informed Yobs that he would mark the septic tank location is not a *material* fact when determining the Cupps’ liability.”) Accordingly, Charleston and the Trust offering proof about this or other immaterial facts does not undercut the appropriateness of Summary Judgment.

III. Judge Griffith Correctly Concluded that Vicary Does Not Provide for Special Public Interest Standing Here.

The South Carolina Supreme Court has applied narrow standing rules in regard to challenges of 100% annexation. (1) Owners of annexed property and (2) the South Carolina Attorney General are those principally empowered to challenge.¹² Vicary v. Town of Awendaw, 425 SC 350, 822 SE2d 600 (SC 2018). Under this scheme the Attorney General is the one positioned to advocate for general welfare and policy concerns on behalf of the State and general public. See St. Andrews Public Service District v. Charleston, 349 S.C. 602, 604-605, 564 S.E.2d 647, 648 (SC 2002). Of course, the Vicary Court also recently recognized the possibility of Public Interest standing under exceedingly narrow conditions. Vicary, 425 SC at 359, 822 S.E.2d at 604. Charleston and the Trust now attempt to shoehorn themselves into this new Public Interest standing category.

¹² The most recent Vicary opinion also recognized standing to challenge in a special circumstance of a municipality having engaged in deceitful conduct in order to accomplish the challenged annexation. There is no allegation that North Charleston engaged in such deceit here and accordingly that provision of Vicary is not at issue in this case.

It is important to recognize just how narrow the Vicary court's new Public Interest Standing category is. After reciting the normal types of "public interest" arguments that have conferred standing in non-annexation contexts, the Vicary court specifically mentioned that our courts have previously refused to extend similar standing in annexation matters. Id. And when it did create Public Interest Standing for annexation challenges in Vicary, the court did **not** simply say that going forward it would now recognize all traditional public interest arguments as sufficient. Instead, the Vicary court noted that "the unique facts present here" showing governmental deceit. This was well summarized in the opinion's concluding paragraph:

"We recognize this Court's jurisprudence has historically carved a narrow avenue to challenge annexations carried out under the 100% annexation method. However, *when an annexing body arguably engages in underhanded conduct*, it becomes subject to a lawsuit...." Id. at 360, 605 (emphasis added).

So Vicary, while creating the possibility of Public Interest Standing for 100% annexation challenges, did so under the most narrow of circumstances. It did not open a wide door for all forms of Public Interest assertions such as the Trust and Charleston offer here.

Assertions by Charleston and the Trust that they are public stewards for good purposes does not elevate them to the narrow realm of Vicary Public Interest standing. The National Trust's status as an entity dedicated to historic preservation does not make it specially situated to challenge this annexation.¹³ Charleston's status as a sister city does not make it specially suited to bring this challenge or advance statewide policy considerations. They are certainly not better situated than the South Carolina Attorney General to undertake a challenge.

At its heart, the challenge here is that North Charleston didn't properly comply with annexation statutes. While Charleston and the Trust offer varying concerns surrounding this in an

¹³ While the consequence may touch on historic interests on which the Trust focuses, the Trust has no particular expertise in the actual issues of this legal dispute.

attempt to justify Public Interest Standing here, none are compelling. *First*, despite the Trust and Charleston's fears, this is hardly part of an impending tidal wave of cases sufficient to justify granting extraordinary standing. We have no runaway train of leapfrog annexations of increasing distance. *Second*, concerns about misapplication of a statute or improper municipal boundary changes are interests in the heartland of the State (represented by the Attorney General), not Charleston or the Trust. *Third*, the Attorney General has standing to freely challenge each and every such annexation he desires. Should the issue ever crop up again the Attorney General can address it the moment he sees fit. There is no need to grant *extraordinary* standing here to the Trust and Charleston. There is no risk of S.C. Code 5-3-100 perpetually escaping review. *Fourth*, this case involves the application of an obscure statute. It is hard to see the need for extraordinary standing to be granted here to avoid a future flood of problems under S.C. Code 5-3-100. North Charleston has been unable to find a prior reported opinion during the entire life of the statute!¹⁴

Conclusion

Judge Griffith correctly employed summary judgment and correctly determined that the Trust and Charleston lack standing to be heard with this annexation challenge. The annexation package employed by North Charleston was clear that it annexed only property owned by North Charleston, necessarily excluding any acreage owned by the Trust. Accordingly, The Trust and Charleston cannot qualify for standing in the traditional Vicary categories. The Trust and

¹⁴ It is worth a moment to separately discuss the parties' "need for future guidance" claim for Public Interest standing. Judge Griffith had no trouble issuing "guidance" on the merits even while declining to confer standing here. Judge Griffith's opinion has been widely publicized and is the subject of this appeal. It will no doubt be instructive to North Charleston and every other city in South Carolina going forward.

Charleston are also unable to articulate grounds sufficient to bring them within the extremely narrow universe of Vicary Public Interest standing for annexation challenges.

Respectfully submitted:



Derk Van Raalte and Brady Hair
Legal Dept., 2500 City Hall Lane
North Charleston, SC 29406
843-740-2550 derk@bradyhair.com

Attorneys for the Respondent
City of North Charleston

This 7th day of February, 2020

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Hon. Eugene Griffith

Case No. 2018-CP-10-851

Appeal No. 2019-000728

RECEIVED
FEB 18 2020
SC Court of Appeals

National Trust for Historic Preservation
In the United States and The City of Charleston, Appellants

v.

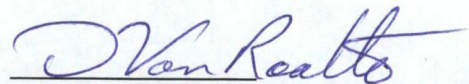
City of North Charleston,

Cross-Appellant / Respondent.

Certificate of Counsel (Briefing)

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

February 7, 2020.



Derk Van Raalte
Legal Dept., 2500 City Hall Lane
North Charleston, SC 29406
843-740-2550 derk@bradyhair.com

Attorneys for the
City of North Charleston

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No.: 2018-CP-10-851
Appellant Case No. 19-000728

RECEIVED
FEB 27 2021
SC Court of Appeals

National Trust for Historic Preservation in the United States and the
City of Charleston Respondents/Appellants,

v.

City of North Charleston Appellant/Respondent.

REPLY BRIEF OF RESPONDENT/APPELLANT NATIONAL TRUST FOR
HISTORIC PRESERVATION IN THE UNITED STATES

G. Trenholm Walker
S.C. Bar No. 5777
Walker, Gressette, Freeman, & Linton, LLC
Post Office Box 22167
Charleston, SC 29413-2167
T: (843) 727-2208
F: (843) 727-2238
walker@wgflaw.com

Anne E. Nelson
Associate General Counsel
National Trust for Historic
Preservation in the United States
2600 Virginia Ave NW, Suite 1100
Washington, DC 20037
T: (202) 588-6142
anelson@savingplaces.org

ATTORNEYS FOR
RESPONDENT/APPELLANT NATIONAL
TRUST FOR HISTORIC PRESERVATION
IN THE UNITED STATES

TABLE OF CONTENTS

Table of Authorities	iii
Argument	1
I. There is a genuine issue of material fact as to whether North Charleston annexed a portion of the National Trust Parcel in the City of Charleston, thereby creating a genuine issue of material fact as to the standing of the National Trust.....	1
II. The National Trust has standing under the public importance exception given the historic significance of the area and the unique facts present that give rise to the need for future guidance.....	5
A. The National Trust is uniquely charged with defending historic preservation interests.	5
B. Future guidance is needed given the unique facts present.....	7
Conclusion	9

Table of Authorities

CASES

<u>Ex parte State ex rel. Wilson,</u> 391 S.C. 565, 707 S.E.2d 402 (2011)	3, 7
<u>Landmarks Pres. Council of Illinois v. City of Chicago,</u> 125 Ill. 2d 164 (1988)	6
<u>St. Andrews Pub. Serv. Dist. V. City Council,</u> 349 S.C. 602, S.E.2d 647 (2002)	9
<u>Vicary v. Town of Awendaw,</u> 425 S.C. 350, 822 S.E.2d 600 (2018)	3, 7, 8, 9

STATUTES & CODES

54 U.S.C. § 312102(a)	5
S.C. Code Ann. § 5-3-100	4, 7, 8, 9, 10
S.C. Code Ann. § 5-3-150(3)	3, 4

Argument

I. There is a genuine issue of material fact as to whether North Charleston annexed a portion of the National Trust Parcel in the City of Charleston, thereby creating a genuine issue of material fact as to the standing of the National Trust.

As more fully discussed in the Brief of Respondent/Appellant National Trust for Historic Preservation (“National Trust” or “Respondent/Appellant”), there is a genuine issue of material fact as to whether the description of the annexed area in the ordinance of annexation (the “Contested Ordinance”) of Appellant/Respondent City of North Charleston (“North Charleston”) included a portion of property owned by the National Trust within the boundaries of Respondent/Appellant City of Charleston (“City of Charleston” and together with the National Trust, the “Respondents/Appellants”). (**National Trust App. Br.**). Contrary to the arguments of North Charleston, the National Trust does not contend that North Charleston acquired legal title to a portion of its property because the deed conveying the Acre to it referred to a plat that showed its eastern boundary extending into the National Trust Parcel. Nor does the National Trust’s standing turn on the question of legal title as found by the lower court¹ and argued by North Charleston on appeal. (**North Charleston Resp. Br., pp. 6-9**). What is material is the description of the area purportedly annexed by North Charleston in the Contested Ordinance.

The Contested Ordinance and minutes of the North Charleston Council meeting describe the area annexed as TMS #301-00-00-797. (**Aff. of MacConnell, R.pp. 240-241, Minutes of**

¹ “As a matter of law, no error in the legal description or plat for the Acre could have resulted in North Charleston obtaining ownership of any land claimed by the Plaintiffs... No matter what the property description or plat to the Acre might say, it is legally impossible for Whitfield [the grantor to North Charleston] to have conveyed North Charleston title to any of the Trust’s land. Since North Charleston acquired its ownership to the Acre through a Quit Claim rather than a Warranty deed, assuming National Trust is correct that its boundary is exactly 100’ from Ashley River Road rather than the 99.7’ shown on the Acre plat, the result would not be that North Charleston owns any of National Trust’s 100’ strip property. As a matter of law, National Trust would retain its full undiminished acreage. The claimed 4” error could only reduce the amount of land obtained by North Charleston from a perfect acre to 99.999% of an acre.” (**Order, R.pp. 6-7**).

December 14, 2017, p. 279; *Id.*, p. 280; *Id.*, Resolution #2017-067, R.pp. 283-284). The lower court acknowledged that this property description was the area that North Charleston intended to annex: “North Charleston City Council stated an intent to annex the property known as TMS 301-00-00-797.” (**Order, R.p. 7**). The dimensions of TMS #301-00-00-797 (the “Acre”) are determined by the plat of the Acre referenced in the deed to North Charleston that establishes that its northeastern boundary along the National Trust Parcel is 99.69’ and 99.7’ from the right of way of S.C. Highway 61 for a length of 208.81’. (**National Trust App. Br., p. 12**). It is undisputed the southwestern boundary of the National Trust Parcel is exactly 100’ in width from the right of way of S.C. Highway 61. (**Deeds of conveyance from Georgia Pacific to The Nature Conservancy, R.pp. 252-254, and from The Nature Conservancy to the National Trust, R.pp. 255-257**). Respondents/Appellants submitted the Affidavit of Daniel C. Forsberg, a licensed civil engineer and land surveyor, who attested that the boundaries of TMS #301-00-00-797 are determined by the referenced plat and that “if North Charleston annexed the Acre as described by Plat S17/0224 or as designated by TMS No. 301-00-00-797, then the land that was annexed included a small portion of the [National Trust Parcel].” (**Aff. of Forsberg, ¶ 9, R.p. 245**).

Since the annexed area included a portion of the National Trust Parcel, the National Trust submits it has statutory standing as an owner of a part of the annexed area as a matter of law. However, because standing was before the lower court on North Charleston’s motion, the question on appeal is whether there was an issue of material fact as to the standing of the National Trust. The deeds, plat, and Affidavit of Forsberg establish, at a minimum, a genuine issue of a material fact as to the standing of the National Trust.

The lower court incorrectly held that the “TMS number and map [referenced in the Contested Ordinance] do not supersede a deed” and “the reference in the Annexation Ordinance

to 'TMS 301-00-00-797' is subservient to the deed as well.” (**Order, R.p. 7**). As stated earlier, the dispositive issue is not whether North Charleston gained legal title to a portion of the National Trust Parcel, as held by the lower court and argued by North Charleston, but whether the description of the area annexed included a portion of the National Trust Parcel. In the cases cited by the lower court and North Charleston, our appellate courts looked to the description of the area annexed in the annexation ordinance and did not hold that the signatories to the annexation petition could annex only the land owned by them, as held by the lower court in this case. The opposite is true. In Ex parte State ex rel. Wilson, 391 S.C. 565, 707 S.E.2d (2011), our Supreme Court held the petitioning owners annexed tidelands belonging to the state because the tidelands were part of the property described in the area annexed in the annexation petition and annexation ordinance even though the state was not a party to the annexation petition.

Similarly, the lower court erred in considering the intent of North Charleston to annex only property it legally owned to take priority over the description of the area annexed in the Contested Ordinance: “This Court finds that North Charleston's Ordinance for annexation was for the property that it owned and not any portion of the Strip or any of the municipal area of Charleston.” (**Order, R.p. 7**). Our courts have not held that the intent of the annexing party controls over the description of the area annexed. It is the description of the property annexed that is controlling. Ex parte State ex rel. Wilson, *supra*.

North Charleston also makes an unfounded claim that “the much ballyhooed 4” boundary line discrepancy...simply wasn’t material.” (**North Charleston Resp. Br., p. 10**). Our appellate courts have never established a minimum amount of acreage to convey standing under these circumstances. The test is whether *any* property of the challenger was annexed. The 100% method of S.C. Code Ann. § 5-3-150(3) requires just that - exactly 100%, not 99.9%. See Ex parte State

ex rel. Wilson, supra; 391 S.C. 565, 707 S.E.2d (2011); Vicary v Town of Awendaw, 425 S.C. 350, 358, 822 S.E.2d 600, 604 (2018) (“As we noted in Town of Yemassee, the 100% method, with less stringent conditions than the 75% method, is ‘readily understood in light of the requirement that **all** property owners in the annexed area consent by signing the annexation petition.’”)(emphasis in original). The 100% method of annexation under S.C. Code Ann. § 5-3-150(3) is directly comparable to the method of annexation invoked by North Charleston in this case; both require the annexing party to own 100% of the area annexed.

Whether property owned by the National Trust was included in the description of the area annexed by North Charleston, however small or large, is also material to whether North Charleston complied with the requirements of Section 5-3-100. Annexation under S.C. Code Ann. § 5-3-100 is only valid “[i]f the territory proposed to be annexed *belongs entirely to the municipality seeking its annexation* and is adjacent thereto.” S.C. Code Ann. § 5-3-100 (emphasis added). If the annexed area included a portion of the National Trust Parcel, as claimed by the National Trust, then the annexation under Section 5-3-100 would be invalid as a matter of law since the area to be annexed did not belong entirely to North Charleston.

Because the record demonstrates, at a minimum, a genuine issue of material fact that the description of the area annexed by North Charleston included a portion of the National Trust Parcel in the City of Charleston, thereby creating a genuine issue of material fact as to the standing of the National Trust, the lower court erred in granting the motion for summary judgment of North Charleston on the absence of standing of the National Trust as a matter of law.

II. The National Trust has standing under the public importance exception given the historic significance of the area and the unique facts present that give rise to the need for future guidance.

A. The National Trust is Uniquely Charged with Defending Historic Preservation Interests.

Neither the lower court nor North Charleston addresses the statutorily established mission of the National Trust. The United States Congress created The National Trust in 1949 to “facilitate public participation” in the preservation of our nation’s heritage, and to further the historic preservation policy of the United States. See 54 U.S.C. § 312102(a). The National Trust has participated in hundreds of cases in federal and state courts across the nation relating to the application and interpretation of legal issues that affect the preservation of historic places. This case deals with both a historic district and a historic place.

The National Trust is deeply engaged in the Ashley River Historic District which encompasses the area purportedly annexed in this case. The National Trust owns the property adjoining the Acre (inclusive of the small portion included in the Acre’s property description), and owns and maintains for the benefit of the public Drayton Hall, both a National Trust Historic Site and a National Historic Landmark, diagonally across S.C. Highway 61 from the Acre.

Federal and state courts have found that the National Trust and other historic preservation organizations and interested persons have standing to challenge actions that may adversely impact historic resources. Specifically, the Supreme Court of Illinois has held that “in bestowing powers on the National Trust in order to further this broad national policy, Congress intended to permit the National Trust to, *inter alia*, object to the allegedly unlawful destruction of buildings...which the National Trust deems of national historic significance, even if those buildings have not been declared ‘national landmarks’.....” and determined “that Congress intended the National Trust to have standing to maintain actions such as this, and that such standing is necessary if the National

Trust is to fulfill the functions Congress intended it to fulfill.” Landmarks Pres. Council of Illinois v. City of Chicago, 125 Ill. 2d 164, 177 (1988).

Even though the purported annexation in this case does not involve the destruction of buildings, the National Trust has alleged in the Complaint that this annexation threatens the Ashley River Historic District. (**Complaint ¶ 20, R.p. 37**) (“Upon information and belief, the Defendant’s [North Charleston’s] purported annexation of the Acre through the Ordinance is part of its [North Charleston’s] larger scheme to increase its tax base and tax revenues through the annexation of land of approximately 2,200 acres known as the Whitfield Tract for suburban and urban development in the middle of the Ashley River Historic District that will forever destroy the Ashley River Historic District’s continuity, injure its historic and archaeological significance, and significantly diminish its relatively harmonious scenic natural and historic vistas.”).

The United States Congress clearly vested the National Trust with advancing the recognized national interest in historic preservation, including the protection and preservation of the nationally significant Ashley River Historic District and Drayton Hall, a National Historic Landmark. The National Trust’s legislatively declared mission of historic preservation in its charge from the United States Congress is entirely different from the purview of the South Carolina Attorney General, as further described in the National Trust’s Brief. There is no legislation instilling the Attorney General with the responsibility to protect nationally recognized historic areas nor to police annexations, as implied by North Charleston and the lower court.

Given the National Trust’s unique position, charter, and charge from the United States Congress to preserve and advance policy related to historic sites, standing should be conferred under the public importance exception.

B. Future Guidance is Needed Given the Unique Facts Present.

All parties acknowledge Vicary v. Town of Awendaw, supra, established a new narrow condition for invoking the public importance exception for standing. The National Trust asserts that this case meets the standards established in Vicary for “unique facts” and the need for future guidance to invoke the public importance exception, warranting standing for the National Trust.

This annexation challenge is not a “purely private matter” between the National Trust, the City of Charleston, and North Charleston, but “[rises] to the level of public importance” with the need for future guidance on the requirements of adjacency and contiguity under Section 5-3-100. Id. at 359. **(City of Charleston App. Br., pp. 21-24).** The requirements of adjacency and contiguity under Section 5-3-100 presented in this case have never been addressed by our Supreme Court.² **(Id.)**.

North Charleston tries to negate the need for future guidance by marginalizing Section 5-3-100, labeling it an “obscure statute” with there being “no risk of S.C. Code 5-3-100 perpetually escaping review.” North Charleston further asserts that “[s]hould this issue ever crop up again the Attorney General can address it the moment he sees fit.” **(North Charleston Resp. Br., pp. 11-13) (emphasis in original).**

The Attorney General showed no interest and took no action in this instance of an illegal annexation. There is no reason to assume the Attorney General will hop to enforcement next time an illegal annexation occurs. The only reported instance in recent annals of the Attorney General objecting to an annexation is Ex parte State ex rel. Wilson, supra, where the Attorney General showed up to protest an annexation well after the 60-day period for filing an objection expired.

² The National Trust fully supports the legal position of the City of Charleston, particularly as it relates to the applicability of the public importance exception, as set forth in the City of Charleston’s Respondent’s brief.

The reported cases do nothing to support the supposition of North Charleston that the Attorney General is riding the range of annexations and intervening to enforce the law at the sign of any annexation hijinks. Otherwise, there would not be the body of case law where other parties have taken on the cause only to have our courts tell them they have no standing and reluctantly the illegal annexation must stand.

If the lower court and North Charleston prevail in their arguments, this case will just be another one added to that list. North Charleston asks this Court for a pass even though the circuit court held “North Charleston did not lawfully annex the one acre parcel under the annexation statute.” (**Order, R.pp. 1-2**). North Charleston’s minimization of its illegal conduct in this annexation does not eliminate the need for future guidance to resolve the issue before this Court. After all, North Charleston concedes that there is an absence of reported precedent interpreting and applying Section 5-3-100. (**Appellant/Respondent’s Brief, p. 13**) (“North Charleston has been unable to find a prior reported opinion during the entire life of the statute!”).

In Vicary, the Supreme Court found that the Town of Awendaw’s use of a letter from the United States Forest Service to show consent to annexations, and its possible use in the future, satisfied the “future guidance” prong of the public importance exception. Vicary at 359-360. Here, in a similar manner, there is nothing stopping North Charleston, or other municipalities, from continuing to use Section 5-3-100, and a legally incorrect definition of adjacency, to continue to annex property that is not contiguous.

The facts of this case present the model for circumventing the law that can be used in the future. All a property owner whose land is not contiguous needs to do is convey some small piece of that acreage to the municipality. The municipality can then invoke Section 5-3-100 to annex the small piece owned by it. Voilà, the remainder of the land that was not contiguous is now

contiguous. In this manner, the municipality and the owner can reach a deal, just as they did in this case, to manufacture contiguity even if it involves jumping the boundaries of intervening land in another municipality. This capacity for repetition satisfies the “future guidance” prong of the public importance exception and warrants guidance on the interpretation of Section 5-3-100.

Further, the National Trust is not a “stranger” or “outsider” to the annexation, but is a property owner whose rights have been infringed by the purported annexation of a portion of the National Trust Parcel by North Charleston. See St. Andrews Pub. Serv. Dist. v. City Council, 349, S.C. 602, 564, S.E.2d 647 (2002). Nor is this a frivolous lawsuit—the circuit court held that “North Charleston did not lawfully annex the one acre parcel under the annexation statute.” (**Order, R. pp. 1-2, 9-10**).

The National Trust further asserts that this case includes “unique facts present” that, as suggested by Justice Hearn in Vicary, merit granting the National Trust public importance standing as discussed by the circuit court in its order. (**Order, R. pp. 9-10**). In the alternative, the National Trust requests the Court revisit the decision in St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston, 349 S.C. 602, 564 S.E.2d 647 (2002), that eliminated public importance standing where the annexation was absolutely void or patently not authorized by law.

CONCLUSION

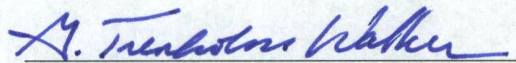
When viewed in a light most favorable to the National Trust, particularly considering the Affidavit of Forsberg, the circuit court erred in granting summary judgment when a genuine issue of material fact as to whether North Charleston annexed a portion of the National Trust Parcel in the City of Charleston. The National Trust established, at a minimum, a genuine issue of material fact for proprietary and statutory standing under settled precedent of the appellate courts of South Carolina.

In addition, the National Trust satisfies the public importance exception for standing based upon its charter from the United States Congress directed at furthering historic preservation policy and the need for future guidance related to the application of Section 5-3-100. North Charleston's argument that future guidance is not needed because there is low risk in an unlawful annexation occurring again under this section is baseless and self-serving. Clearly, the unique facts of this case call for future guidance on the use of Section 5-3-100.

For the foregoing reasons, and all the reasons in Respondent/Appellant National Trust's initial brief, the circuit court erred in finding that there was no genuine issue of material fact and that Respondents/Appellants lacked standing as a matter of law. Accordingly, the circuit court's order granting summary judgment on the absence of standing of the National Trust as a matter of law should be REVERSED.

Respectfully submitted,

February 25, 2020



G. Trenholm Walker
S.C. Bar No. 5777
Walker, Gressette, Freeman, & Linton, LLC
Post Office Box 22167
Charleston, SC 29413
T: (843) 727-2200
F: (843) 727-2238
Walker@wgflaw.com

Anne E. Nelson
Associate General Counsel
National Trust for Historic Preservation
in the United States
2600 Virginia Avenue NW, Suite 1100
Washington, DC 20037
T: (202) 588-6142
anelson@savingplaces.org

Attorneys for Respondent/Appellant National
Trust for Historic Preservation in the United States

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2019-000728

RECEIVED
FEB 27 2020
SC Court of Appeals

National Trust for Historic Preservation in the United States and the
City of Charleston Respondents/Appellants,

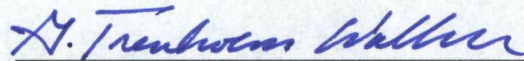
v.

City of North Charleston Appellant/Respondent.

CERTIFICATE OF COUNSEL

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

February 25, 2020



G. Trenholm Walker
S.C. Bar No. 5777
Walker Gressette Freeman & Linton, LLC
Post Office Box 22167
Charleston, SC 29413
T: (843) 727-2200

Attorney for Respondent/Appellant National Trust
for Historic Preservation in the United States

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2018-CP-10-0851
Appellate Case No. 2019-000728

RECEIVED
FEB 27 2020
SC Court of Appeals

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

Respondents/Appellants,

v.

City of North Charleston,

Appellant/Respondent.

RESPONDENT/APPELLANT CITY OF CHARLESTON'S FINAL REPLY BRIEF

Susan J. Herdina (S.C. Bar No. 13165)
Email: herdinas@charleston-sc.gov
Frances I. Cantwell (S.C. Bar No. 01121)
Email: cantwellf@charleston-sc.gov
Daniel S. ("Chip") McQueeney, Jr. (S.C. Bar No. 06802)
Email: mcqueeneyd@charleston-sc.gov
City of Charleston
50 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-3730

Attorneys for Respondent/Appellant City of Charleston

TABLE OF CONTENTS

Table of Authorities	ii
Facts	1
Standard of Review	1
Argument in Reply	2
I. NORTH CHARLESTON, LIKE THE CIRCUIT COURT, INCORRECTLY ARTICULATES THE “TRADITIONAL FRAMEWORK” FOR STANDING TO CHALLENGE A 100% ANNEXATION, IGNORING CHARLESTON’S STANDING TO ASSERT AN INFRINGEMENT OF ITS STATUTORY RIGHTS	2
II. THE CIRCUIT COURT COMMITTED AN ERROR OF LAW IN INTERPRETING NORTH CHARLESTON’S ORDINANCE, WHICH ESTABLISHES THAT CITY COUNCIL INTENDED TO ANNEX THE ACRE, AS SHOWN ON THE ACRE PLAT, DESIGNATED AS CHARLESTON COUNTY TMS NO. 301-00-00-797, WHICH INCLUDES PROPERTY PREVIOUSLY ANNEXED BY CHARLESTON	4
III. THE CIRCUIT COURT ERRED IN DENYING CHARLESTON STANDING UNDER THE PUBLIC IMPORTANCE EXCEPTION, AND NORTH CHARLESTON INACCURATELY ASSESSES THE FACTORS SUPPORTING SUCH AN EXCEPTION IN THIS CASE	6
Conclusion	8

TABLE OF AUTHORITIES

CASES

<u>Bostick v. Beaufort</u> , 307 S.C. 347, 415 S.E.2d 389 (1992)	5
<u>Ex parte State ex rel. Wilson</u> , 391 S.C. 565, 707 S.E.2d 402 (2011)	1-2
<u>Forest Acres v. Seigler</u> , 224 S.C. 166, 77 S.E.2d 900 (1953)	3
<u>Lanier Constr. Co. v. Bailey & Yobs, Inc.</u> , 384 S.C. 275, 681 S.E.2d 909 (Ct. App. 2009)	1-2
<u>St. Andrews Pub. Serv. Dist. v. City Council</u> , 349 S.C. 602, 564 S.E.2d 647 (2002)	1-3
<u>State ex rel. Condon v. City of Columbia</u> , 339 S.C. 8, 528 S.E.2d 408 (2000)	7
<u>Tovey v. Charleston</u> , 237 S.C. 475, 117 S.E.2d 872 (1961)	3
<u>Vicary v. Town of Awendaw</u> , 425 S.C. 350, 822 S.E.2d 600 (2018)	2, 6
<u>Vicary v. Town of Awendaw</u> , 427 S.C. 48, 828 S.E.2d 229 (Ct. App. 2019)	3, 5-6

STATUTES

S.C. Code Ann. § 5-3-100	6-7
--------------------------------	-----

OTHER AUTHORITIES

S.C. Atty. Gen. Op. 2005-009 (Jan. 18, 2005)	8
S.C. Atty. Gen. Op. 2017-087 (Dec. 21, 2017)	7

FACTS

Respondent/Appellant City of Charleston (“Charleston”) reaffirms the Statement of the Case, Facts, and Statement of Issues on Appeal set forth in its Appellant’s Brief.

STANDARD OF REVIEW

North Charleston asserts that the circuit court properly awarded summary judgment on the issue of standing to North Charleston because, according to North Charleston, there are no *material* facts in dispute. Cf. Lanier Constr. Co. v. Bailey & Yobs, Inc., 384 S.C. 275, 281, 681 S.E.2d 909, 913 (Ct. App. 2009) (“The disputed fact of whether Mike Cupp informed Yobs he would mark the septic tank location is not a *material* fact when determining the Cupps’ liability.”).

In this case, there are genuine issues of *material* fact on the issue of standing. Most importantly, the undisputed evidence that Charleston annexed a portion of the Acre prior to North Charleston directly impacts the issue of standing based on well-recognized case law that a party has standing to challenge an annexation which infringes upon the former’s proprietary interests or statutory rights. See St. Andrews Pub. Serv. Dist. v. City Council, 349 S.C. 602, 604, 564 S.E.2d 647, 648 (2002) (“In order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights.”).

It is also clear that the factual issue of whether Respondent/Appellant National Trust for Historic Preservation in the United States (the “National Trust”) owned a portion of the territory annexed is material to whether the National Trust alleged an infringement of its proprietary interests and statutory rights as a result of North Charleston’s annexation. See Ex parte State ex rel. Wilson, 391 S.C. 565, 577 n.5, 707 S.E.2d 402, 408 (2011) (“The truly absurd result would be to construe the statute to allow a landowner’s property to be annexed without his consent where

the annexation purports to have been achieved by a petition of 100% of the landowners.”). Lanier is inapposite.

ARGUMENT IN REPLY

I. NORTH CHARLESTON, LIKE THE CIRCUIT COURT, INCORRECTLY ARTICULATES THE “TRADITIONAL FRAMEWORK” FOR STANDING TO CHALLENGE A 100% ANNEXATION, IGNORING CHARLESTON’S STANDING TO ASSERT AN INFRINGEMENT OF ITS STATUTORY RIGHTS.

Like the circuit court, North Charleston’s articulation of the traditional standing framework to challenge a 100% annexation mistakenly limits such standing to (1) property owners of the annexed land; and (2) the Attorney General. (No. Chas. Resp.’s Br., p. 4; R. p. 5). This articulation is incorrect because it ignores case law conferring standing upon a party asserting that a 100% annexation infringes upon its statutory rights.

“In order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights.” St. Andrews Pub. Serv. Dist. v. City Council, 349 S.C. 602, 604, 564 S.E.2d 647, 648 (2002) (emphasis added). In Vicary v. Town of Awendaw, 425 S.C. 350, 358, 822 S.E.2d 600, 603-04 (2018), the Supreme Court of South Carolina confirmed the framework articulated in St. Andrews and its progeny, while noting that the traditional framework presumes a good faith attempt to annex: “Although St. Andrews and Town of Yemassee set forth the general framework for resolving questions of standing pursuant to section 5-3-150, those cases are premised on a good faith attempt by the annexing body to comply with the statutory requirements.” (Emphasis added). Nothing in Vicary abrogates the prevailing standing framework in St. Andrews.

North Charleston also “brushes off” Charleston’s argument that a municipality has standing to challenge another municipality’s annexation of property within its corporate limits as one that “might be a question one day in need of an answer. . . .” (No. Chas. Resp.’s Br., p. 4, n. 5). But

Charleston's statement is *already* black-letter law in South Carolina. See St. Andrews Pub. Serv. Dist., 349 S.C. at 605 n.2, 564 S.E.2d at 648 (noting that City of Charleston had standing to challenge James Island's annexation, as discussed in previous decision, because James Island "purported to annex property already within the City's borders."); Forest Acres v. Seigler, 224 S.C. 166, 176, 77 S.E.2d 900, 904 (1953) (permitting a challenge to annexation of property within municipality's corporate limits, looking to case law emphasizing that detachment statutes afford "substantial right recognized in plaintiff, as a corporate entity, over its corporate territory"); Tovey v. Charleston, 237 S.C. 475, 479-80, 117 S.E.2d 872, 874 (1961) ("We have held that under our statutes governing extension and reduction of corporate limits, a portion of one municipality may not be annexed to another without submitting the question of said detachment to the voters of the municipality whose area is to be reduced.").

As set forth in Argument II of Charleston's Appellant's Brief, it is undisputed that the Acre, defined by North Charleston through reference to Charleston County TMS 301-00-00-797 (No. Chas. Resp.'s Br., p. 1), includes property owned by the National Trust. Daniel C. Forsberg, Charleston's expert land surveyor, opined: "[I]f North Charleston annexed the Acre as described by Plat S17/0224 [the "Acre Plat"] 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." (R. p. 245, ¶ 9) (emphasis added). Such expert testimony is relevant to the issue of what property is being annexed. Cf. Vicary v. Town of Awendaw, 427 S.C. 48, 54, 828 S.E.2d 229, 232-33 (Ct. App. 2019) (relying upon expert testimony of land surveyor Robert Frank that a purported annexation petition did not include a "valid legal description of any property . . ."). North Charleston concedes that, if the National Trust's property is included in the territory annexed, then "Charleston territory was annexed." (No. Chas. Resp.'s Br. p. 6, n. 7).

Charleston produced evidence creating at least a genuine issue of material fact that North Charleston's annexation of the Acre included property owned by the National Trust, i.e., property in which the National Trust has a proprietary interest; and property previously annexed by Charleston, i.e., property in which Charleston had statutory rights. The circuit court erred in concluding otherwise, and the circuit court's decision in this respect should be reversed.

II. THE CIRCUIT COURT COMMITTED AN ERROR OF LAW IN INTERPRETING NORTH CHARLESTON'S ORDINANCE, WHICH ESTABLISHES THAT CITY COUNCIL INTENDED TO ANNEX THE ACRE, AS SHOWN ON THE ACRE PLAT, DESIGNATED AS CHARLESTON COUNTY TMS NO. 301-00-00-797, WHICH INCLUDES PROPERTY PREVIOUSLY ANNEXED BY CHARLESTON.

North Charleston expends much of its brief asserting that the City Council of North Charleston intended to annex only what it owned. Arguments III and IV of Charleston's Appellant's Brief extensively address this mistaken interpretation of North Charleston's ordinance. Moreover, North Charleston's proffered interpretation of its own ordinance, adopted by the circuit court, impermissibly leaves the boundary between Charleston and North Charleston up-in-the-air.

North Charleston's interpretation of its own ordinance has been a moving target from the get-go. North Charleston's answer describes the National Trust's claim of ownership to a portion of the Acre as "unconscionable." (R. p. 56, ¶ 61). In briefing, North Charleston changed its story—asserting that, regardless of what was shown on the Acre Plat, Charleston County TMS No. 301-00-00-797 controlled what North Charleston intended to annex because the quit claim deed to North Charleston could not have conveyed more than what the grantor owned:

[T]he title conveying the one-acre tract to North Charleston was legally incapable of conveying property owned by the Trust. Thus, it is impossible to argue that any land of the Trust (previously annexed into Charleston) was annexed here. This is confirmed by reference to the annexation petition and ordinance relevant to this case. The City of North Charleston annexed the one-acre parcel by

way of Ordinance No. 2017-080. The ordinance specifically said that the area being annexed was TMS 301-00-00-797. That is the parcel number for North Charleston's acre and is totally distinct from parcel No. 301-00-00-017 owned by the Trust.

(R. p. 126).

During oral argument, North Charleston simply asserted that it annexed whatever it owned: "We respected the boundary of that parcel 117 [sic]. We said multiple times in here that we're taking property that's entirely ours." (R. p. 208, lines 15-18). The circuit court adopted this argument, even though it leaves the issue of what was annexed uncertain. (R. pp. 6-8).

Charleston has consistently asserted that the only description of the property allegedly annexed by North Charleston includes the property shown on the Acre Plat, which is the same as the property designated as Charleston County TMS No. 301-00-00-797, and which includes property owned by the National Trust and previously annexed by Charleston in 2005. (R. pp. 35-36, ¶¶ 4, 7; pp. 38-39, ¶¶ 27-28, 33; pp. 73-76). Forsberg confirmed that the Acre, as shown on the Acre Plat and as designated by TMS No. 301-00-00-797, includes a small portion of the National Trust's property. (R. p. 245, ¶¶ 8-9).

As Charleston emphasized in Argument III of its Appellant's Brief (pp. 16-17), North Charleston's reliance upon such an amorphous description of the property being annexed would constitute a fatal flaw, rendering the ordinance void. Cf. Bostick v. Beaufort, 307 S.C. 347, 350, 415 S.E.2d 389, 391 (1992) ("We find that Ordinance 0-07-89 was fatally flawed from its inception as to annexation of the Bosticks' 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."). The South Carolina Court of Appeals recently reiterated this proposition in Vicary v. Town of Awendaw, 427 S.C. 48, 55, 828 S.E.2d 229, 233 (Ct. App. 2019):

It is necessary that an actual petition for annexation exist and that the petition at the very least identify the property proposed for annexation. Based on the expert testimony [of land surveyor Robert Frank] in evidence, we find the 1994 letter failed to do so.

(Emphasis added). As a result, the Vicary court concluded: “Respondents’ challenge to the purported annexations was not barred by the statute of limitations because the passage of time cannot transform a void annexation into a valid one.” Id. at 56, 828 S.E.2d at 234.

For similar reasons, and for the reasons set forth in Arguments III and IV of Charleston’s Appellant’s Brief, the appellate court should reject North Charleston’s proffered interpretation of its own ordinance as including whatever North Charleston owns. Such an interpretation impermissibly leaves the question of what has been annexed uncertain, resulting in an invalid ordinance. The circuit court’s adoption of such an interpretation warrants reversal.

III. THE CIRCUIT COURT ERRED IN DENYING CHARLESTON STANDING UNDER THE PUBLIC IMPORTANCE EXCEPTION, AND NORTH CHARLESTON INACCURATELY ASSESSES THE FACTORS SUPPORTING SUCH AN EXCEPTION IN THIS CASE.

In addressing Charleston’s argument that Charleston should be granted standing under the public importance exception to the general framework articulated in St. Andrews, North Charleston relies upon a lack of prior case law interpreting section 5-3-100 of the South Carolina Code, concluding that section 5-3-100 is too “obscure” to countenance such standing.

North Charleston’s reliance on the lack of prior case law interpreting section 5-3-100 actually *supports* public importance standing for the purpose of future guidance. See Vicary v. Town of Awendaw, 425 S.C. 350, 359, 822 S.E.2d 600, 604 (2018) (“The linchpin of the public importance exception is the need for future guidance.”). If appellate court decisions had already addressed the issues raised in this case sufficiently, there would be no need for future guidance. The same could be said of *any* case in which the public importance exception could be applied.

Charleston's assertion of public importance standing appropriately looks to the future, not the past. As North Charleston concedes, the circuit court's ruling "has been widely publicized" (No. Chas. Resp.'s Br. p. 13, n. 14). Thus, there is little question that, without an appellate court opinion condemning the practice, other municipalities will utilize North Charleston's "leapfrog" procedure in the future.

North Charleston relies upon the Attorney General to intervene if leapfrog annexations get "out of hand." But the Attorney General recently opined that the State lacks standing to challenge an annexation unless it owns the land being annexed. See S.C. Att'y Gen. Op. 2017-087 (Dec. 21, 2017) ("Conversely, this Office has also opined that the State does not have standing to challenge an annexation of land which is does not own.").¹

Standing here would hardly be extraordinary, despite North Charleston's protestations to the contrary. Charleston is peculiarly situated to challenge North Charleston's ordinance because it is the municipality being leapfrogged. Charleston also emphasizes the record evidence that North Charleston's annexation ordinance, on its face, includes territory previously annexed by Charleston. (R. p. 245, ¶¶ 8-9).

North Charleston also argues that the portion of the circuit court's underlying order invalidating North Charleston's attempt to leapfrog under section 5-3-100 will itself provide future guidance on the issue. (No. Chas. Resp.'s Br. p. 13, n. 14). The circuit court's order provides little real guidance because the circuit court simultaneously held that only the Attorney General could challenge the annexation. Thus, it is no more binding on other municipalities than an Attorney

¹ In State ex rel. Condon v. City of Columbia, 339 S.C. 8, 14, 528 S.E.2d 408, 411 (2000), the Supreme Court of South Carolina came to the contrary conclusion: "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." (Emphasis added).

General's opinion, and the Attorney General has already rejected the exact type of annexation attempted by North Charleston here, explaining:

[I]n my opinion, the term "adjacent" as used in Section 5-3-100 should be construed in keeping with the term "contiguous" as set forth by Section 5-3-305 which is defined as "property which is adjacent to a municipality and shares a continuous border." Therefore, as to your situation regarding purchase of property which is one property removed from the city limits, such property may not be annexed as being "near." Regardless of the size of any property in between the property, in my opinion, the property to be annexed must be touching the property of the municipality. Similarly, properties "adjacent" should not be construed as two properties separate and still near. Again, in my opinion, the property to be annexed must be touching the property of the municipality.

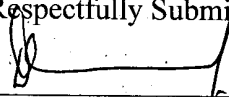
S.C. Atty. Gen. Op. 2005-009, p. 4 (Jan. 18, 2005) (emphasis added). North Charleston ignored this non-binding opinion, and there is no reason to believe that North Charleston or any other municipality would comply with the circuit court's similar conclusion when, as in the present case, the circuit court's opinion has no "teeth."

For these reasons, and as set forth in Argument V of Charleston's Appellant's Brief, the circuit court order refusing to confer public importance standing on Charleston should be reversed.

CONCLUSION

As set forth in Charleston's Appellant's Brief, and as supplemented by this Reply Brief, Charleston respectfully requests that the portion of the circuit court's order granting summary judgment to North Charleston on the issue of standing be reversed, and the case remanded to the circuit court to enter judgment in accordance with the appellate court's decision in this appeal.

Respectfully Submitted,



Susan J. Herdina (S.C. Bar No. 13165)
Corporation Counsel
E-mail: herdinaj@charleston-sc.gov

Frances I. Cantwell (S.C. Bar No. 1121)
Special Counsel
E-mail: cantwellf@charleston-sc.gov

Daniel S. ("Chip") McQueeney, Jr (S.C. Bar No. 6802)
Assistant Corporation Counsel
E-mail: mcqueeneyd@charleston-sc.gov

50 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-3730

Attorneys for Respondent/Appellant City of Charleston

February 25, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2018-CP-10-0851
Appellate Case No. 2019-000728

RECEIVED
FEB 27 2020
SC Court of Appeals

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

Respondents/Appellants,

v.

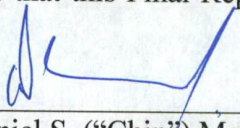
City of North Charleston,

Appellant/Respondent.

CERTIFICATE OF COUNSEL

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

February 25, 2020


Daniel S. ("Chip") McQueeney, Jr.
(S.C. Bar No. 6802)
Email: mcqueeneyd@charleston-sc.gov

City of Charleston
50 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-3730
Attorney for Respondent/Appellant City of Charleston

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Hon. Eugene Griffith

Case No. 2018-CP-10-851

Appeal No. 2019-000728

RECEIVED
FEB 18 2020
SC Court of Appeals

National Trust for Historic Preservation

In the United States and The City of Charleston, Respondents/Appellants

v.

City of North Charleston,

Appellant / Respondent.

**Reply of Appellant/Respondent (City of North Charleston)
(Contiguity / Adjacency)**

Derk Van Raalte and Brady Hair
Legal Dept., 2500 City Hall Lane
North Charleston, SC 29406
843-740-2550 derk@bradyhair.com

Attorneys for the Cross-Appellant
City of North Charleston

Other Counsel of Record:

Francis Cantwell, Susan Herdina,
Daniel ("Chip") McQueeney, Jr.
50 Broad Street
Charleston, SC 29401
mcqueeneyd@charleston-sc.gov
843-724-3730

Attorneys for the City of Charleston

Trenholm Walker, Esquire
Walker, Gressette, Freeman, Linton
PO Box 22167
Charleston, SC 29413
walker@WGFLAW.com
843-727-2208
Attorney for National Trust

INDEX

Argument	1
Reliance by Charleston and the National Trust on the Logic of <u>Town of Forest Acres v. Seigler</u> to Avoid The Plain Words of S.C. Code Ann. 5-3-305 Is Misplaced.....	1

TABLE OF CASES

CASES

<u>Town of Forest Acres v. Seigler</u> , 224 SC 166, 77 SE2d 900 (SC 1953)	1, 2
--	------

STATUTES

S.C. Code Ann. 5-3-305	1, 2
------------------------------	------

Argument

The City of North Charleston believes that, with the exception of the one point specifically addressed below, its main brief in this matter sufficiently sets forth its position regarding the adjacency / contiguity of The Acre.

Reliance by Charleston and the National Trust¹ on the Logic of Town of Forest Acres v. Seigler to Avoid The Plain Words of S.C. Code Ann. 5-3-305 Is Misplaced.

Charleston and the National Trust push Town of Forest Acres v. Seigler, 224 SC 166, 77 SE2d 900 (SC 1953) too far in their effort to avoid the plain words of S.C. Code Ann. 5-3-305. Forest Acres sets forth the unremarkable proposition that, in some circumstances, literal application of statutory amendment language may cause a variance from true legislative intent. In such instances a court should ignore common sense in order to blindly follow words changing long established rules. In other words, when reading new amendment language some thought should go to whether a change was intended or accidental. North Charleston certainly agrees with that logic. However, Charleston and the National Trust overlook the difference in circumstances between Forest Acres and the present case. Facts matter.

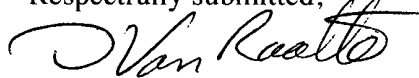
In Forest Acres the Court recognized that the amendment in question sought to “correct a patent typographical error” in the prior version of the statute and, in so doing injected even more confusion because the drafters made “no effort to go back to the original act to make the proper correction.” Forest Acres, 224 SC at 179, 77 SE2d at 906. “The effect of it all, it seems to us, is to create further ambiguity.” Id. Thus, when the Town of Forest Acres argued that the ill-framed

¹ By letter dated November 15, 2019, the National Trust elected not to file a separate Respondent’s Brief and instead joined the City of Charleston’s brief on these points. North Charleston offers this Reply to address the position of Charleston and, as a result of the National Trust and Charleston’s combined brief, the position of the National Trust.

amendment “‘clarified’ the meaning of Section 7231 so as to clearly authorize the annexation...” the Court was not convinced. Id. at 171, 902. On these facts the court concluded that a significant change in law would not be assumed from amendment language unless such an intent was clear.

The situation presented by S.C. Code 5-3-305 could not be more different. The South Carolina Legislature passed that statute for the specific purpose of providing a definition of “contiguity.” That is pretty clear from the section’s title: “Contiguous property defined.” Thus, unlike Forest Acres, there can be no question here that the South Carolina Legislature expressly intended to set forth a definition of contiguity. Also, unlike Forest Acres, there can be no argument here that the Legislature was just trying to correct a typo without intending any substantive change in the law. Prior to S.C. Code 5-3-305 there was no statutory definition of “contiguity.” Had the Legislature been content with the common law definition of “contiguous” as it existed prior to 5-3-305 it would not have needed to pass a statute at all. Clearly, then the Legislature specifically looked to set forth new guidance with the passage of this statute in year 2000. Equally unmistakable is the fact that the Legislature created a clearly worded two prong test for “contiguous” – *adjacent AND shares a continuous border* – such that “contiguous” can no longer be the same as “adjacent.”

Respectfully submitted,



Derk Van Raalte
Brady Hair
Legal Dept.
2500 City Hall Lane
North Charleston, SC 29406
843-740-2550 derk@bradyhair.com

Attorneys for the Cross-Appellant
City of North Charleston

This 7th day of February, 2020

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Hon. Eugene Griffith

Case No. 2018-CP-10-851

Appeal No. 2019-000728

RECEIVED
FEB 18 2020
SC Court of Appeals

National Trust for Historic Preservation

In the United States and The City of Charleston, Appellants

v.

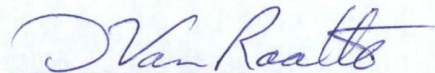
City of North Charleston,

Cross-Appellant / Respondent.

Certificate of Counsel (Briefing)

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

February 7, 2020.



Derk Van Raalte
Legal Dept., 2500 City Hall Lane
North Charleston, SC 29406
843-740-2550 derk@bradyhair.com

Attorneys for the
City of North Charleston

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

National Trust for Historic Preservation in the United
States and the City of Charleston,
Respondents/Appellants,

v.

City of North Charleston, Appellant/Respondent.

Appellate Case No. 2019-000728

Appeal From Charleston County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5965
Heard October 11, 2022 – Filed February 1, 2023

AFFIRMED

Derk Van Raalte, IV, of City of North Charleston Legal
Department, and J. Brady Hair, of Law Office of J. Brady
Hair, both of North Charleston, for
Appellant/Respondent City of North Charleston.

George Trenholm Walker, of Walker Gressette Freeman
& Linton, LLC, of Charleston; and Anne Elizabeth
Nelson, of National Trust for Historic Preservation, of
Washington, D.C., both for Respondent/Appellant
National Trust for Historic Preservation in the United
States.

Frances Isaac Cantwell, of City of Charleston Legal
Department; Julia Parker Copeland, of Hinchey Murray

& Pagliarini, LLC; and Wilbur E. Johnson and Russell Grainger Hines, both of Clement Rivers, LLP, all of Charleston, all for Respondent/Appellant City of Charleston.

WILLIAMS, C.J.: This cross-appeal involves the municipal annexation by the City of North Charleston (North Charleston) of a one-acre tract of real property. The National Trust for Historic Preservation in the United States (the National Trust) and the City of Charleston (Charleston) (collectively, Respondents) appeal the circuit court's order finding Respondents did not have standing to challenge North Charleston's annexation of the acre. North Charleston also appeals, arguing the circuit court erred in alternatively finding North Charleston did not properly annex the acre pursuant to section 5-3-100 of the South Carolina Code (2004). We affirm.

FACTS/PROCEDURAL HISTORY

In 1967, Georgia-Pacific Investment Corporation (Georgia-Pacific) obtained title to approximately 12,293 acres of real property located in Charleston County. In 1980, Georgia-Pacific conveyed approximately 26.53 acres of that property to the Nature Conservancy. The deed included the following description of the property:

Those certain strips or parcels of land, being 100 feet in width and immediately adjacent to the southern right-of-way line of Highway 61, and parallel with said Highway; and being a total of approximately 11,556 feet in length, composed of three strips of land, and being along the northern boundary line of all of the property owned by Grantor along the southern right-of-way line of Highway 61.

The Nature Conservancy immediately conveyed this property to the National Trust (the National Trust Parcel; TMS 301-00-00-017). The deed conveying the National Trust Parcel did not have a corresponding recorded plat. In 2005, Charleston annexed the National Trust Parcel.

In 1989, Georgia-Pacific conveyed to Whitfield Construction Company (Whitfield) 2,294.17 acres (the Whitfield Parcel; TMS 301-00-00-005). In 2009, Whitfield recorded plats illustrating eighteen access easements through the National Trust

Parcel (the Easement Plats), which Georgia-Pacific reserved in the deed it conveyed to the Nature Conservancy.¹

On September 22, 2017, Whitfield executed a quit claim deed conveying one acre (the Acre; TMS 301-00-00-797) of its larger parcel from Georgia-Pacific to North Charleston. Whitfield recorded a plat of the Acre (the Acre Plat) with the deed on September 22, 2017.² The deed described the Acre as part of the Whitfield Parcel.

In October 2017, North Charleston annexed 113 acres (the Runneymede Parcel; TMS 361-00-00-002), without challenge. On December 21, 2017, North Charleston annexed the Acre, pursuant to section 5-3-100, by Ordinance 2017-080 (the Annexation Ordinance). Runneymede and the Acre are separated by Highway 61 and the National Trust Parcel.

In March 2018, Respondents filed a summons and complaint challenging North Charleston's annexation of the Acre, arguing the Acre was not contiguous to North Charleston. North Charleston answered, counterclaimed, and subsequently filed (1) a motion for partial summary judgment, asserting section 5-3-100 does not require contiguity and (2) a motion to dismiss Respondents' complaint for lack of standing. Respondents also filed a motion for summary judgment, arguing the annexation of the Acre was void because (1) the Acre was not contiguous or adjacent to North Charleston and (2) the Acre included a portion of the National Trust Parcel, which was already annexed into Charleston.

The circuit court held a hearing on the motions and issued an order dismissing Respondents' complaint for lack of standing. The court alternatively found that should this court find Respondents had standing to challenge the annexation, North Charleston failed to properly annex the Acre because it was not adjacent to the municipality. All parties filed motions to reconsider pursuant to Rule 59(e), SCRCF, which the circuit court denied. This cross-appeal followed.

¹ The Nature Conservancy deed stated "the foregoing conveyance is subject to the reservation by Grantor of certain easements over and across the foregoing real property, . . . [s]aid easements shall be limited to eighteen (18) in number, and each separate easement shall be limited to a total of sixty feet (60') in width."

² In mapping the dimensions of the Acre Plat, the surveyor relied on the Easement Plats and the original plat recorded with the deed conveying the Whitfield Parcel. Both the Easement Plats and the Acre Plat have width variations regarding the boundary lines between the National Trust and Whitfield parcels.

ISSUES ON APPEAL

- I. Did the circuit court err in dismissing Respondents' action because it found Charleston and the National Trust lacked standing to challenge North Charleston's annexation of the Acre?
- II. Did the circuit court err in alternatively finding that North Charleston failed to lawfully annex the Acre pursuant to section 5-3-100?

STANDARD OF REVIEW

"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).

LAW/ANALYSIS

I. STANDING

A. Statutory Standing

Respondents argue the circuit court erred in dismissing their claims challenging the annexation for lack of standing because the Acre contained a portion—four inches—of the National Trust Parcel, which Charleston annexed in 2005. Therefore, Respondents assert North Charleston's annexation violated their statutory and proprietary rights. Respondents further maintain the circuit court improperly dismissed their claims because a question of fact existed as to whether the Acre included a portion of the National Trust Parcel. We disagree.

Chapter Three of Title Five of the South Carolina Code addresses a municipality's ability to extend its corporate limits and annex additional areas. Chapter Three contains various methods of annexation that a municipality can employ. Specifically, section 5-3-100 provides:

If the territory proposed to be annexed *belongs entirely* to the municipality seeking its annexation and is adjacent thereto, the territory may be annexed by resolution of the

governing body of the municipality. When the territory proposed to be annexed to the municipality belongs entirely to the county in which the municipality is located and is adjacent thereto, it may be annexed by resolution of the governing body of the municipality and the governing body of the county. Upon the adoption of the resolutions required by this section and the passage of an ordinance to that effect by the municipality, the annexation is complete.

§ 5-3-100 (emphasis added).

In its order, the circuit court found North Charleston did not claim to annex or own any portion of the National Trust Parcel and any deviations in the legal description or plat did not affect Charleston's or the National Trust's ownership rights. The order stated:

No matter what the property description or plat to the Acre might say, it is legally impossible for Whitfield to have conveyed to North Charleston title to any of the [National] Trust's land. Since North Charleston acquired its ownership to the Acre through a Quit Claim rather than a Warranty deed, assuming National Trust is correct that its boundary is exactly 100' from Ashley River Road rather than the 99.7' shown on the Acre plat, the result would not be that North Charleston owns any of National Trust's 100' strip property. As a matter of law, National Trust would retain its full undiminished acreage. The claimed 4" error could only reduce the amount of land obtained by North Charleston from a perfect acre to 99.999% of an acre.

The circuit court therefore found Respondents lacked standing to challenge the annexation because North Charleston only intended to annex the property that it owned. Thus, Respondents did not "have the requisite ownership to challenge the annexation."

We agree with the circuit court. Section 5-3-100 is a method for annexation when the municipality *wholly owns* the property to be annexed. *See id.* ("If the territory proposed to be annexed *belongs entirely* to the municipality seeking its annexation

and is adjacent thereto, the territory may be annexed by resolution of the governing body of the municipality." (emphasis added)). Here, North Charleston annexed the Acre pursuant to section 5-3-100 via the Annexation Ordinance. Thus, although 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. Further, the legal description in the Annexation Ordinance stated North Charleston sought to annex property "consisting of *approximately* 1.0 acres." (emphasis added). Even if North Charleston believed it owned the contested four inches, it would be of no consequence. *See F.C. Enters., Inc. v. Dibble*, 335 S.C. 260, 266, 516 S.E.2d 459, 462 (Ct. App. 1999) ("The courts of South Carolina have traditionally followed the property rule that a purchaser cannot purchase more than his grantor owns."); *Cummings v. Varn*, 307 S.C. 37, 42, 413 S.E.2d 829, 832 (1992) ("No deed can convey an interest which the grantor does not have in the land described in the deed, even though by its terms the deed may purport to do so.").

Accordingly, we hold the circuit court properly found Respondents lacked standing to challenge North Charleston's annexation of the Acre. *See Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996) ("The general rule is that a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing."); *Wilson*, 437 S.C. at 341, 878 S.E.2d at 895 ("If a plaintiff lacks standing, he does not have the right to proceed to the merits of his claim against the defendant.").

B. Public Importance Exception

Respondents assert the circuit court erred in finding they did not have standing to challenge the annexation via the public importance exception. We disagree.

"This Court has consistently acknowledged that even without an allegation of particularized injury, 'standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.'" *Wilson*, 437 S.C. at 341, 878 S.E.2d at 895 (quoting *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)). However, our jurisprudence has also established that public interest standing is rarely utilized within the context of annexation disputes. *See St. Andrews Pub. Serv. Dist. v. City Council of Charleston*, 349 S.C. 602, 605, 564 S.E.2d 647, 648 (2002) ("[T]he better policy is to limit 'outsider' annexation challenges to those brought by the State 'acting in the public interest.'"). When considering whether a party has standing under the public interest doctrine,

appellate courts must make this determination "*without regard to the merits* of the underlying claim." *Vicary*, 425 S.C. at 358, 822 S.E.2d at 603 (emphasis added).

We find the circuit court did not err in holding Respondents did not have standing under the public interest doctrine. Although we acknowledge our precedent has not yet addressed whether the term "adjacent" within section 5-3-100 requires contiguity, which is specifically required for municipal annexations under section 5-3-150, Respondents have failed to demonstrate that North Charleston's annexation of the Acre incites anything more than a boundary dispute between two municipalities. Further, the absence of a challenge to the annexation by the State is illustrative of the State's position on whether the matter rises to a level of public concern. Respondents have also failed to show any deceitful conduct by North Charleston that would necessitate finding standing under the public interest doctrine. *See Vicary*, 425 S.C. at 358, 822 S.E.2d at 604 ("We do not believe the General Assembly intended to preclude standing where there is a credible allegation that the annexing body engaged in deceitful conduct.").

Based on the foregoing, we find Respondents lack standing to challenge the annexation of the Acre by North Charleston; therefore, further consideration of the matter by this court is foreclosed.³

CONCLUSION

Accordingly, the circuit court is

AFFIRMED.

THOMAS, J., and LOCKEMY, A.J., concur.

³ In its appellate brief, North Charleston states that should this court affirm the circuit court's dismissal of Respondents' claims, then consideration of its issue on appeal—the validity of the annexation—is unnecessary. We agree. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

RECEIVED

Mar 20 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No.: 2018-CP-10-851
Appellant Case No. 19-000728

National Trust for Historic Preservation in the United States and the
City of Charleston.....Respondents/Appellants,

v.

City of North Charleston.....Appellant/Respondent.

**PETITION FOR REHEARING OF RESPONDENT/APPELLANT NATIONAL
TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES**

G. Trenholm Walker (S.C. Bar No. 5777)
Walker, Gressette & Linton, LLC
Post Office Box 22167
Charleston, SC 29413-2167
T: (843) 727-2208
F: (843) 727-2238
Email: Walker@wglfirm.com

ATTORNEYS FOR
RESPONDENT/APPELLANT NATIONAL
TRUST FOR HISTORIC PRESERVATION IN
THE UNITED STATES

INTRODUCTION AND OVERVIEW

Pursuant to Rule 221(a), SCACR, Respondent/Appellant National Trust for Historic Preservation in the United States (the “National Trust”) petitions for a rehearing of Opinion No. 5965, dated February 1, 2023, (hereinafter the “Opinion”), copy attached as Exhibit 1. Rehearing is warranted because the Opinion overlooks and misapprehends fundamental legal principles that govern the issues on appeal. This Court’s failure to apprehend the legal ramifications of this case and its significance is best manifested in the Court’s statement that Respondents/Appellants “failed to demonstrate that North Charleston’s annexation of the Acre incites anything more than a boundary dispute between two municipalities.” Opinion at 7. It is far more than that.

Unmentioned in the Opinion is that this case involves a patently illegal annexation where one municipality (North Charleston) annexed property that is not only not contiguous to its boundary but also separated from that municipality by two parcels located in another municipality (Charleston). Unbroken legal precedent in this state prohibits a municipality from extending its boundaries over the boundaries of another municipality. Contrary to what the Opinion suggests in the comment quoted above, the boundaries of Charleston are well established and not in dispute in this case. They were definite and uncontested. Likewise, it is definite and uncontested that there are two parcels within the boundaries of Charleston between the boundary of North Charleston and the Acre purportedly annexed by it.

Upholding this annexation upends the entire body of South Carolina jurisprudence on the sovereignty of existing boundaries of municipalities and the bedrock principle that a municipality cannot tread over properties in another municipality to annex a parcel. These are foundational precepts of municipal law in South Carolina. Their intentional violation, as occurred in this case, has never been upheld by our appellate courts.

At stake in this case is far more than a simple “boundary dispute.” The future of a National Scenic Highway and a National Historical Landmark are at stake. The record is clear that the joint purpose of Whitfield Construction Company (“Whitfield”) and North Charleston for this annexation is to increase sixteen-fold the allowed residential density in this important rural forested area. Whitfield admits it carved out the Acre from its 2214.6-acre parcel (TMS #301-00-00-005) **(R. p. 317)** that it seeks to annex into North Charleston to obtain a permitted density for single-family residential development of two houses per acre (i.e., up to 4427 new houses) from North Charleston because the current zoning of Charleston County allows a density of only one house per eight acres (i.e., up to 276 new house) in this historic area along Highway 61, a *two-lane* road designated as National Scenic Highway, and across Highway 61 from Drayton Hall, a National Historic Landmark. **(R. pp. 347-9, 353-6).**

In upholding the lower court’s determination that the National Trust lacked standing as a matter of law, this Court mistakenly confused the question of ownership with the question of what property was described in the annexation ordinance. The two are entirely separate. The unbroken precedent on annexation in South Carolina is that the area described in the annexation petition or ordinance is controlling as to the property annexed, not whether the annexing party has legal title to the entire area described in the annexation petition or ordinance.

Additionally, in considering the question of the area annexed, this Court relied upon the subjective intent of North Charleston. This Court determined North Charleston’s intent was to annex only land it owned regardless of the description in the annexation petition. There is no precedent in South Carolina that the Court may consider extrinsic evidence of the annexing party’s intent in determining that the property actually annexed was something other than that described in the annexation petition or ordinance.

The law in South Carolina grants standing to the owner of any portion of the area described in the annexation petition regardless of the size of that portion. The National Trust is the owner of a portion of the real property annexed and, therefore, has standing.

Turning to the public importance of conferring standing on the National Trust and Charleston in this case, the Court mistakenly defaulted to the Attorney General as the bellwether for whether a potentially invalid annexation involves a matter of public importance.¹ Whether a legal issue is of such public importance as to warrant standing is for the court to determine, not the Attorney General. The Attorney General already has standing to challenge any annexation regardless of its legality. St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston, 349 S.C. 602, 564 S.E.2d 647 (2002). Using the inaction of the Attorney General as a proxy against the public importance of an illegal annexation eliminates standing based on public importance in annexation cases. A survey of the leading precedent of our appellate courts on annexation or incorporation by municipalities shows that this state's Attorney General rarely, if ever, lifts a finger in these matters because they involve municipal issues not the affairs of the state. Case in point is Vicary v. Town of Awendaw, 425 S.C. 350, 359, 822 S.E.2d 600, 604 (2018) in which our state supreme court invoked the public importance exception for standing even though the Attorney General was nowhere in sight despite what the court described as "deceitful conduct" by the annexing municipality. 822 S.E.2d 604.

Finally, the National Trust respectfully submits that this Court overlooked the posture of the case. The matter was before the lower court on cross motions for summary judgment.

¹ In places in its discussion the Opinion described this basis for standing as the "public interest doctrine." Opinion p. 7. As described by our state supreme court in the decision cited by this Court in the Opinion, this legal principle for standing is known as the "public importance exception." Vicary v. Town of Awendaw, 425 S.C. 350,359, 822 S.E.2d 600, 604 (2018).

Charleston submitted the affidavit of Daniel Forsberg, a licensed engineer and land surveyor, in support of its motion. His affidavit plainly states that the property described in the annexation petition included a portion of the National Trust property. (**R. pp. 242-5**). For this reason alone, summary judgment in favor of North Charleston on standing was improper.

GROUND FOR REHEARING

- 1. The legal precedent that a property owner can convey title to only property owned by it is not controlling. The question is what was the exact property described in North Charleston's annexation ordinance, not whether North Charleston had legal title to all the property described in the annexation ordinance which clearly it did not.**

The question of whether the National Trust has proprietary standing turns on the description of the "territory" or "area" that was annexed. The territory or area annexed is solely determined by the legal description in the annexation petition or annexation ordinance. Despite what the circuit court and this Court imply, there is no statute or judicial precedent that the description of the area or territory annexed is necessarily limited to the property owned by the property owner(s) submitting the annexation petition or the municipality seeking to annex territory under S.C. Code §5-3-100.²

For example, in Ex parte State ex rel. Wilson, 391 S.C. 565, 707 S.E.2d 402 (2011) cited by this Court and the lower court, the Supreme Court specifically noted that the annexation petition included public trust tidelands of the State that were not owned by the annexing petitioner. The Supreme Court did not rule that public trust tidelands were not annexed because the petitioner did not own them. Rather, the Supreme Court held they were indeed annexed because they were

² "If the territory proposed to be annexed belongs entirely to the municipality seeking its annexation and is adjacent thereto, the territory may be annexed by resolution of the governing body of the municipality and the governing body of the county. Upon the adoption of the resolutions required by this section and the passage of an ordinance to that effect by the municipality, the annexation is complete." S.C. Code § 5-3-100.

described as the “area” to be annexed in the annexation petition but that the Attorney General’s effort to challenge the annexation failed because he asserted he did not bring the challenge within the allowed statutory period:

The State, which is the presumptive owner of the annexed marshlands, did not sign the petition. Notwithstanding the absence of the State’s consent to the annexation, the annexation ordinance recites that the Town received a petition signed ‘by all persons owning real estate’ in the annexed area....

....Where the State holds title to real property in the area to be annexed, it is a ‘person[] owning real estate’ within the meaning of section 5-3-150(3) and its signature is required to accomplish an annexation by 100% petition....

By its plain language, section 5-3-150(3) requires the signatures of ‘all persons owning real estate in the area requesting annexation.’...

This annexation did not comply with the requirements of the 100% petition method. The State was the presumptive owner of the annexed marshlands and the Town did not provide the State with prior notice of the annexation or obtain the State’s signature on the petition. Nevertheless, the State’s challenge of the annexation is time-barred.

Id. at 569-78, 707 S.E.2d at 404-409.

This Court mistakenly states in the Opinion that “...North Charleston did not claim to annex or own any portion of the National Trust Parcel....” Opinion at 4. The Court is incorrect with respect to its assertion that North Charleston did not claim to annex or own any portion of the National Trust Parcel. In describing the territory annexed as TMS # 301-00-00-797, North Charleston in fact did claim to annex a slight portion of the National Trust Parcel as explained more fully in Part 3, infra.³

³ As indicated in its Counterclaim, North Charleston also contends it has ownership of the portion of the National Trust Parcel included in the One Acre. See, North Charleston Answer and Counterclaim, ¶113 (“North Charleston seeks a determination of its fee simple title in this action and further, that the Plaintiffs are forever barred from claiming any right title, or interest in North Charleston’s property.”) (**R. p. 338**). However, this dispute over ownership is entirely separate from the question of whether the description of the territory annexed included a portion of the National Trust Parcel.

2. Consideration of extrinsic evidence of North Charleston’s subjective intent is without precedent in annexation law in South Carolina and should not have been relied upon to determine the boundaries of the land annexed were different from those in the legal description in North Charleston’s annexation ordinance.

Section 5-3-100 does not state that the intention of the municipality determines the territory annexed when there is a conflict between that intent and the actual description of the territory annexed. Both this Court and the circuit court looked to this intent to circumvent the undisputed fact that the territory annexed by North Charleston included 62 square feet of the National Trust property that is within the City of Charleston. (*Aff. of Forsberg*, ¶ 6, 8, and 9, R. pp. 244-5).

The focus is entirely on the description of the territory or area to be annexed rather than ownership. Section 5-3-100 states: “If the *territory proposed to be annexed* belongs entirely to the municipality seeking its annexation and is adjacent thereto, the territory may be annexed by resolution of the governing body of the municipality and the governing body of the county. S.C. Code § 5-3-100 (emphasis added). What Section 5-3-100 does not state is that regardless of a municipality’s description of the territory proposed to be annexed, only that portion it owns will be considered as being annexed under Section 5-3-100, which is the interpretation adopted by this Court and the circuit court.

Likewise, S.C. Code Ann. § 5-3-150(3) governing annexation under the 100% rule that refers to “a petition signed by all persons owning real estate in the *area requesting annexation*” and to “the agreement of the governing body to accept the petition and annex *the area*....” S.C. Code Ann. § 5-3-100 (double emphasis added). The statute does not state that regardless of the area described to be annexed, the only area annexed is that area owned by the property owners petitioning for annexation.

Even if extrinsic evidence of intent were allowed to be considered, for which there is no precedent, the record establishes a genuine issue of material fact as to intent that prevents summary judgment.

Nowhere does the annexation ordinance state that the intent of North Charleston is to annex only the property it owns.⁴ The closest is the statement that “THE PROPERTY TO BE ANNEXED BELONGS ENTIRELY TO THE CITY OF NORTH CHARLESTON.” (**R. p. 293**). However, the property to be annexed is described eleven times in Ordinance #2017-080 as TMS #301-00-00-797(**R.p. 293-4**). As stated in the Affidavit of Daniel Forsburg, a licensed engineer and land surveyor in South Carolina, because the territory annexed was TMS #301-00-00-797, it included 62 square feet of the National Trust’s property:

5. Charleston County maintains a tax mapping system whereby parcels of land are assigned a number for purposes of tracking ownership and assessment values. The tax map sequence (TMS) number is derived from the legal description of the parcel as set out in the most recently recorded deed or plat. The legal description for the Acre references Plat S 17 /0224.

6. ...As a result, Charleston County has assigned a tax map sequence (TMS) number to this property, that being TMS No The purported width of the National Trust's property is shown as 99.69 feet on the north side and 99. 7 feet on the south side. As a result, 62 square feet of the National Trust Property appears to have been included in the Acre.. 301-00-00-797....

8. Based on the records I have reviewed to date, it appears, to a reasonable degree of certainty based on my education and experience as a Professional Engineer and Land Surveyor, that the Acre overlaps the National Trust Property, encroaching on 62 square feet of the National Trust Property.

9. Based on the records I have reviewed to date, it appears, to a reasonable degree of certainty based on my education and experience as a Professional Engineer and Land Surveyor, that, if North Charleston annexed the Acre as described by Plat S 17 /0224 or as designated by TMS No. 301-00-00-797, then the land that was annexed included a small portion of the National Trust Property.

⁴ This Court found significant that the “legal description in the Annexation Ordinance stated North Charleston sought to annex property ‘consisting of approximately 1.0 acres.’ (emphasis added).” Opinion at 5. The language referenced by the Court, however, is not the legal description. The legal description of the territory annexed is set forth in detail immediately after that statement and describes the boundaries of TMS #301-00-00-797. (**R. 294**).

(R.pp. 244-5).

Because the intent of the annexing property owner or municipality is not admissible to vary the description of the area or territory proposed to be annexed, and because even if it were improperly considered there is a genuine issue of material fact as to that intent, the circuit court erred in granting North Charleston summary judgment on standing, and this Court should reconsider and vacate the Opinion.

3. **The plat of the Acre (R. p. 269) as well as the Affidavit of Forsberg (R.pp. 244-5) established that the National Trust owns a portion of the property within the legal description of the annexation petition sufficient to confer standing on the basis of its proprietary interest.**

There is no dispute that the deed conveying the Acre to North Charleston relied on the plat of the Acre recorded at Book S17, p. 0244 for the legal description of the Acre.

ALL that certain piece, parcel or tract of land, together with any improvements thereon, situate, lying and being in the County of Charleston, State of South Carolina, being shown and designated as "**New Parcel 1, 43,559.59 sq. ft., 1.000 acres**", on that certain plat entitled "SUBDIVISION PLAT SHOWING A NEW PARCEL 1 (1.000 ACRE) BEING A PORTION OF TMS 301-00-00-005, PROPERTY OF TIM WHITFIELD CONSTRUCTION AND DEVELOPMENT LLC., LOCATED NEAR WEST ASHLEY, CHARLESTON COUNTY SOUTH CAROLINA" prepared by Tim Elmer, RLS, LLC, dated October 17, 2016, and recorded on September 22, 2017, in the Charleston County RMC Office in Plat Book S17, Page 0224. Said parcel having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

(R. p.274) (emphasis in original).

This plat of the Acre provides the "size, shape, dimensions, buttings and boundings" of TMS #302-00-00-797, the territory that North Charleston annexed in Ordinance #2017-080. (R. pp. 293-4). The circuit court acknowledged that "the 2009 [P]lat had width variations of a few inches here and there, *so too did the 2017 plat of the Acre.*" (R.p. 4)(emphasis added). North Charleston has acknowledged the "four-inch discrepancy" along the northeastern boundary for a length of 208.71 feet. (Hrg. Tr., R.p. 185) (R. p. 269). This Court also noted that the plat of the

Acre includes this long sliver of the National Trust property. **Opinion at 6** (“Thus, although 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.”) However, regardless of North Charleston’s intent the territory annexed is *described as* TMS #302-00-00-797 with boundaries shown on the Plat recorded at Book S17, Page 0244. Those boundaries include a portion of the National Trust Parcel.

Our courts have never held that a property owner must hold title to a minimum amount of acreage in the area annexed to have proprietary standing to challenge an annexation. The only requirement is that some of the owner’s property be described in the annexed area. Here the description of the territory annexed did just that. For that reason, the National Trust has standing. The lower court erred in determining that the National Trust did not create an issue of fact as to its standing and did not have standing as a matter of law.

- 4. Even if the National Trust’s proprietary interest did not bestow standing on it, which it does, the National Trust and Charleston demonstrated a basis for public importance standing, given North Charleston’s gross violation of the laws governing annexation and the need for future guidance on whether a municipality may cross over properties in another municipality to annex property. The public importance exception is not limited to instances involving deceitful conduct as suggested in the Opinion.**

Vicary v. Town of Awendaw, *supra*, established a new narrow exception for invoking the public importance exception for standing in annexation challenges, but did not change the test for public importance standing. The National Trust asserts that this case meets the standards established in Vicary for “unique facts” and the need for future guidance to invoke the public importance exception, warranting standing for the National Trust and Charleston. Additionally, whether the Attorney General undertakes to challenge an annexation is not the litmus test for whether an annexation involves an issue of public importance.

In Vicary, the Supreme Court found that the Town of Awendaw’s use of a letter from the United States Forest Service to show consent to annexations, and its possible use in the future, satisfied the “future guidance” prong of the public importance exception. Vicary at 359-360. Here, in a similar manner, there is nothing stopping North Charleston, or other municipalities, from continuing to use Section 5-3-100, and a legally incorrect definition of adjacency, to continue to annex property that is not separated from it by parcels in another municipality.

This annexation challenge is not a “purely private matter” between the National Trust, the City of Charleston, and North Charleston, but “[rises] to the level of public importance” with the need for future guidance on the requirements of adjacency and contiguity under Section 5-3-100. Id. at 359. (**City of Charleston App. Br., pp. 21-24**). The requirements of adjacency and contiguity under Section 5-3-100 presented in this case have never been addressed by our Supreme Court.⁵ (**Id.**).

North Charleston tries to negate the need for future guidance by marginalizing Section 5-3-100, labeling it an “obscure statute” with there being “no risk of S.C. Code 5-3-100 perpetually escaping review.” North Charleston further asserts that “[s]hould this issue ever crop up again the Attorney General can address it the moment he sees fit.” (**North Charleston Resp. Br., pp. 11-13**) (**emphasis in original**). North Charleston’s minimization of its illegal conduct in this annexation does not eliminate the need for future guidance to resolve the issue before this Court. After all, North Charleston concedes that there is an absence of reported precedent interpreting and applying Section 5-3-100. (**Appellant/Respondent’s Brief, p. 13**) (“North Charleston has been unable to find a prior reported opinion during the entire life of the statute!”).

⁵ The National Trust fully supports the legal position of the City of Charleston, particularly as it relates to the applicability of the public importance exception, as set forth in the City of Charleston’s Respondent’s brief.

Contrary to North Charleston's assertions, if this annexation stands, what occurred in this case under section 5-3-100 will become the judicially sanctioned loophole for annexation by one municipality across the boundary of another municipality. This decision provides the formula. Suppose a property owner wants to annex into one municipality but is confronted with parcels of land in another municipality intervening between her property and that municipality, as in this case. All the property owner has to do to circumvent the cardinal rule of contiguity is convey some small piece of her acreage to the municipality. The municipality can then invoke Section 5-3-100 to annex the small piece owned by it despite the intervening land of the other municipality. Once this leapfrog annexation is complete, the property owner can annex the remainder of her land because it is contiguous to the small portion that was earlier annexed. The remainder of her land that was not contiguous is now contiguous to the small parcel conveyed to the annexing municipality. This capacity for repetition satisfies the "future guidance" prong of the public importance exception and warrants guidance on the interpretation of Section 5-3-100.

Whether the Attorney General sees fit to challenge an annexation is not the barometer of whether an illegal annexation like this one, as the lower court found,⁶ involves matters of public importance. The Attorney General is frankly not interested in these municipal matters. One of the few, if only reported instances where the Attorney General objected to an annexation is Ex parte State ex rel. Wilson, supra, which proves the point. Because there is no process for timely notification to the Attorney General, he showed up late, and the annexation that was otherwise invalid because 100% of the property owners did not join in the petition for annexation was upheld.

⁶ "North Charleston did not lawfully annex the one acre parcel under the annexation statute." (Order, R.pp. 1-2).

There is no statute requiring that an annexing municipality notify the Attorney General of annexations at any time, even when it commits an illegal annexation like this one. It is particularly perplexing that this Court and the lower court have embraced North Charleston’s argument that the failure of the Attorney General to become involved means the illegal annexation per se has no public importance *when there is **nothing in the record** to show that the Attorney General was notified of the annexation of the Acre in a timely manner*, much less considered it and consciously chose not to contest it.

In concluding that this case has no public importance implication, both this Court and the lower court overlook the federal statutory mandate to the National Trust to protect and preserve historic places. The National Trust was chartered by the United States Congress in 1949 to advocate on behalf of historic preservation, including places like this National Historic District and Drayton Hall, a National Historic Landmark owned by the National Trust located across Highway 61 from the National Trust Parcel that was purportedly partially annexed by North Charleston. (54 U.S.C. §§ 312102-312106 (2015); **Mem. National Trust in Opposition to Defendant’s Mot. to Dismiss, R.pp. 95-96**). Further, the National Trust is not a “stranger” or “outsider” to the annexation, but is a property owner whose rights have been infringed by the purported annexation of a portion of the National Trust Parcel by North Charleston. See St. Andrews Pub. Serv. Dist. v. City Council, 349, S.C. 602, 564, S.E.2d 647 (2002). Nor is this a frivolous lawsuit—the circuit court held that “North Charleston did not lawfully annex the one acre parcel under the annexation statute.” (**Order, R. pp. 1-2, 9-10**).

This case has “unique facts present” that, as suggested by Justice Hearn in Vicary, merit granting the National Trust and Charleston public importance standing as discussed by the circuit court in its order. (**Order, R.pp. 9-10**).

CONCLUSION

Based on the foregoing, the National Trust respectfully requests that this Court grant its Petition for Rehearing, vacate the Opinion, and issue a new decision reversing the lower court and holding that the circuit court erred in finding that there was no genuine issue of material fact and the Respondents/Appellants lacked standing as a matter of law.

Respectfully submitted,

March 20, 2023



G. Trenholm Walker (S.C. Bar No. 5777)
Walker, Gressette & Linton, LLC
Post Office Box 22167
Charleston, SC 29413
T: (843) 727-2200
F: (843) 727-2238
Walker@wglfirm.com

Attorneys for Respondent/Appellant
National Trust for Historic Preservation in
the United States

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

National Trust for Historic Preservation in the United
States and the City of Charleston,
Respondents/Appellants,

v.

City of North Charleston, Appellant/Respondent.

Appellate Case No. 2019-000728

Appeal From Charleston County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5965
Heard October 11, 2022 – Filed February 1, 2023

AFFIRMED

Derk Van Raalte, IV, of City of North Charleston Legal
Department, and J. Brady Hair, of Law Office of J. Brady
Hair, both of North Charleston, for
Appellant/Respondent City of North Charleston.

George Trenholm Walker, of Walker Gressette Freeman
& Linton, LLC, of Charleston; and Anne Elizabeth
Nelson, of National Trust for Historic Preservation, of
Washington, D.C., both for Respondent/Appellant
National Trust for Historic Preservation in the United
States.

Frances Isaac Cantwell, of City of Charleston Legal
Department; Julia Parker Copeland, of Hinchey Murray

& Pagliarini, LLC; and Wilbur E. Johnson and Russell Grainger Hines, both of Clement Rivers, LLP, all of Charleston, all for Respondent/Appellant City of Charleston.

WILLIAMS, C.J.: This cross-appeal involves the municipal annexation by the City of North Charleston (North Charleston) of a one-acre tract of real property. The National Trust for Historic Preservation in the United States (the National Trust) and the City of Charleston (Charleston) (collectively, Respondents) appeal the circuit court's order finding Respondents did not have standing to challenge North Charleston's annexation of the acre. North Charleston also appeals, arguing the circuit court erred in alternatively finding North Charleston did not properly annex the acre pursuant to section 5-3-100 of the South Carolina Code (2004). We affirm.

FACTS/PROCEDURAL HISTORY

In 1967, Georgia-Pacific Investment Corporation (Georgia-Pacific) obtained title to approximately 12,293 acres of real property located in Charleston County. In 1980, Georgia-Pacific conveyed approximately 26.53 acres of that property to the Nature Conservancy. The deed included the following description of the property:

Those certain strips or parcels of land, being 100 feet in width and immediately adjacent to the southern right-of-way line of Highway 61, and parallel with said Highway; and being a total of approximately 11,556 feet in length, composed of three strips of land, and being along the northern boundary line of all of the property owned by Grantor along the southern right-of-way line of Highway 61.

The Nature Conservancy immediately conveyed this property to the National Trust (the National Trust Parcel; TMS 301-00-00-017). The deed conveying the National Trust Parcel did not have a corresponding recorded plat. In 2005, Charleston annexed the National Trust Parcel.

In 1989, Georgia-Pacific conveyed to Whitfield Construction Company (Whitfield) 2,294.17 acres (the Whitfield Parcel; TMS 301-00-00-005). In 2009, Whitfield recorded plats illustrating eighteen access easements through the National Trust

Parcel (the Easement Plats), which Georgia-Pacific reserved in the deed it conveyed to the Nature Conservancy.¹

On September 22, 2017, Whitfield executed a quit claim deed conveying one acre (the Acre; TMS 301-00-00-797) of its larger parcel from Georgia-Pacific to North Charleston. Whitfield recorded a plat of the Acre (the Acre Plat) with the deed on September 22, 2017.² The deed described the Acre as part of the Whitfield Parcel.

In October 2017, North Charleston annexed 113 acres (the Runneymede Parcel; TMS 361-00-00-002), without challenge. On December 21, 2017, North Charleston annexed the Acre, pursuant to section 5-3-100, by Ordinance 2017-080 (the Annexation Ordinance). Runneymede and the Acre are separated by Highway 61 and the National Trust Parcel.

In March 2018, Respondents filed a summons and complaint challenging North Charleston's annexation of the Acre, arguing the Acre was not contiguous to North Charleston. North Charleston answered, counterclaimed, and subsequently filed (1) a motion for partial summary judgment, asserting section 5-3-100 does not require contiguity and (2) a motion to dismiss Respondents' complaint for lack of standing. Respondents also filed a motion for summary judgment, arguing the annexation of the Acre was void because (1) the Acre was not contiguous or adjacent to North Charleston and (2) the Acre included a portion of the National Trust Parcel, which was already annexed into Charleston.

The circuit court held a hearing on the motions and issued an order dismissing Respondents' complaint for lack of standing. The court alternatively found that should this court find Respondents had standing to challenge the annexation, North Charleston failed to properly annex the Acre because it was not adjacent to the municipality. All parties filed motions to reconsider pursuant to Rule 59(e), SCRPC, which the circuit court denied. This cross-appeal followed.

¹ The Nature Conservancy deed stated "the foregoing conveyance is subject to the reservation by Grantor of certain easements over and across the foregoing real property, . . . [s]aid easements shall be limited to eighteen (18) in number, and each separate easement shall be limited to a total of sixty feet (60') in width."

² In mapping the dimensions of the Acre Plat, the surveyor relied on the Easement Plats and the original plat recorded with the deed conveying the Whitfield Parcel. Both the Easement Plats and the Acre Plat have width variations regarding the boundary lines between the National Trust and Whitfield parcels.

ISSUES ON APPEAL

- I. Did the circuit court err in dismissing Respondents' action because it found Charleston and the National Trust lacked standing to challenge North Charleston's annexation of the Acre?
- II. Did the circuit court err in alternatively finding that North Charleston failed to lawfully annex the Acre pursuant to section 5-3-100?

STANDARD OF REVIEW

"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).

LAW/ANALYSIS

I. STANDING

A. Statutory Standing

Respondents argue the circuit court erred in dismissing their claims challenging the annexation for lack of standing because the Acre contained a portion—four inches—of the National Trust Parcel, which Charleston annexed in 2005. Therefore, Respondents assert North Charleston's annexation violated their statutory and proprietary rights. Respondents further maintain the circuit court improperly dismissed their claims because a question of fact existed as to whether the Acre included a portion of the National Trust Parcel. We disagree.

Chapter Three of Title Five of the South Carolina Code addresses a municipality's ability to extend its corporate limits and annex additional areas. Chapter Three contains various methods of annexation that a municipality can employ. Specifically, section 5-3-100 provides:

If the territory proposed to be annexed *belongs entirely* to the municipality seeking its annexation and is adjacent thereto, the territory may be annexed by resolution of the

governing body of the municipality. When the territory proposed to be annexed to the municipality belongs entirely to the county in which the municipality is located and is adjacent thereto, it may be annexed by resolution of the governing body of the municipality and the governing body of the county. Upon the adoption of the resolutions required by this section and the passage of an ordinance to that effect by the municipality, the annexation is complete.

§ 5-3-100 (emphasis added).

In its order, the circuit court found North Charleston did not claim to annex or own any portion of the National Trust Parcel and any deviations in the legal description or plat did not affect Charleston's or the National Trust's ownership rights. The order stated:

No matter what the property description or plat to the Acre might say, it is legally impossible for Whitfield to have conveyed to North Charleston title to any of the [National] Trust's land. Since North Charleston acquired its ownership to the Acre through a Quit Claim rather than a Warranty deed, assuming National Trust is correct that its boundary is exactly 100' from Ashley River Road rather than the 99.7' shown on the Acre plat, the result would not be that North Charleston owns any of National Trust's 100' strip property. As a matter of law, National Trust would retain its full undiminished acreage. The claimed 4" error could only reduce the amount of land obtained by North Charleston from a perfect acre to 99.999% of an acre.

The circuit court therefore found Respondents lacked standing to challenge the annexation because North Charleston only intended to annex the property that it owned. Thus, Respondents did not "have the requisite ownership to challenge the annexation."

We agree with the circuit court. Section 5-3-100 is a method for annexation when the municipality *wholly owns* the property to be annexed. *See id.* ("If the territory proposed to be annexed *belongs entirely* to the municipality seeking its annexation

and is adjacent thereto, the territory may be annexed by resolution of the governing body of the municipality." (emphasis added)). Here, North Charleston annexed the Acre pursuant to section 5-3-100 via the Annexation Ordinance. Thus, although 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. Further, the legal description in the Annexation Ordinance stated North Charleston sought to annex property "consisting of *approximately* 1.0 acres." (emphasis added). Even if North Charleston believed it owned the contested four inches, it would be of no consequence. See *F.C. Enters., Inc. v. Dibble*, 335 S.C. 260, 266, 516 S.E.2d 459, 462 (Ct. App. 1999) ("The courts of South Carolina have traditionally followed the property rule that a purchaser cannot purchase more than his grantor owns."); *Cummings v. Varn*, 307 S.C. 37, 42, 413 S.E.2d 829, 832 (1992) ("No deed can convey an interest which the grantor does not have in the land described in the deed, even though by its terms the deed may purport to do so.").

Accordingly, we hold the circuit court properly found Respondents lacked standing to challenge North Charleston's annexation of the Acre. See *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996) ("The general rule is that a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing."); *Wilson*, 437 S.C. at 341, 878 S.E.2d at 895 ("If a plaintiff lacks standing, he does not have the right to proceed to the merits of his claim against the defendant.").

B. Public Importance Exception

Respondents assert the circuit court erred in finding they did not have standing to challenge the annexation via the public importance exception. We disagree.

"This Court has consistently acknowledged that even without an allegation of particularized injury, 'standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.'" *Wilson*, 437 S.C. at 341, 878 S.E.2d at 895 (quoting *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)). However, our jurisprudence has also established that public interest standing is rarely utilized within the context of annexation disputes. See *St. Andrews Pub. Serv. Dist. v. City Council of Charleston*, 349 S.C. 602, 605, 564 S.E.2d 647, 648 (2002) ("[T]he better policy is to limit 'outsider' annexation challenges to those brought by the State 'acting in the public interest.'"). When considering whether a party has standing under the public interest doctrine,

appellate courts must make this determination "*without regard to the merits of the underlying claim.*" *Vicary*, 425 S.C. at 358, 822 S.E.2d at 603 (emphasis added).

We find the circuit court did not err in holding Respondents did not have standing under the public interest doctrine. Although we acknowledge our precedent has not yet addressed whether the term "adjacent" within section 5-3-100 requires contiguity, which is specifically required for municipal annexations under section 5-3-150, Respondents have failed to demonstrate that North Charleston's annexation of the Acre incites anything more than a boundary dispute between two municipalities. Further, the absence of a challenge to the annexation by the State is illustrative of the State's position on whether the matter rises to a level of public concern. Respondents have also failed to show any deceitful conduct by North Charleston that would necessitate finding standing under the public interest doctrine. *See Vicary*, 425 S.C. at 358, 822 S.E.2d at 604 ("We do not believe the General Assembly intended to preclude standing where there is a credible allegation that the annexing body engaged in deceitful conduct.").

Based on the foregoing, we find Respondents lack standing to challenge the annexation of the Acre by North Charleston; therefore, further consideration of the matter by this court is foreclosed.³

CONCLUSION

Accordingly, the circuit court is

AFFIRMED.

THOMAS, J., and LOCKEMY, A.J., concur.

³ In its appellate brief, North Charleston states that should this court affirm the circuit court's dismissal of Respondents' claims, then consideration of its issue on appeal—the validity of the annexation—is unnecessary. We agree. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

RECEIVED

Mar 20 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2019-000728

National Trust for Historic Preservation in the United States and the
City of Charleston Respondents/Appellants,

v.

City of North Charleston Appellant/Respondent.

PROOF OF SERVICE

I certify that I have served the **Petition for Rehearing of Respondent/Appellant National Trust For Historic Preservation In The United States** by electronic mail, on March 20, 2023, addressed to the attorneys of record:

Derk Van Raalte, IV
City of North Charleston Legal Dept.
2500 City Hall Lane
N. Charleston, SC 29406
dvrpalmetto@gmail.com

J. Brady Hair
Law Office of Brady Hair
P.O. Box 61896
North Charleston, SC 29419
brady@bradyhair.com
Attorneys for Appellant/Respondent
City of North Charleston

Julia P. Copeland
Frances I. Cantwell
City of Charleston Legal Department
50 Broad Street

Charleston, SC 29401
copeland@charleston-sc.gov
fcantwell054@gmail.com

Wilbur Johnson
Russell G. Hines
Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29401
wjohnson@ycrlaw.com
rhines@ycrlaw.com

Attorneys for Respondent/Appellant The City of Charleston



Nancy Jane Dennis
Paralegal

RECEIVED

Mar 20 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2018-CP-10-00851
Appellate Case No. 2019-000728

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

Respondents/Appellants,

v.

City of North Charleston,

Appellant/Respondent.

THE CITY OF CHARLESTON'S PETITION FOR REHEARING

CLEMENT RIVERS, LLP
Wilbur E. Johnson (SC Bar No. 3062)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
wjohnson@ycrlaw.com
rhines@ycrlaw.com
(843) 720-5488

and

Frances I. Cantwell (SC Bar No. 1121)
Julia P. Copeland (SC Bar No. 77199)
CITY OF CHARLESTON
Legal Department
50 Broad Street
Charleston, South Carolina 29401
fcantwell054@gmail.com
copelandj@charleston-sc.gov
(843)-724-3730

Attorneys for the City of Charleston

NOW COMES Respondent/Appellant the City of Charleston (“Charleston”), by and through its counsel of record, pursuant to Rule 221(a), SCACR, following the filing of this Honorable Court’s opinion in this appeal (the “Subject Opinion”), which affirmed the circuit court, and hereby petitions the Court to rehear this matter.

INTRODUCTION

This appeal concerns a contest to an annexation ordinance (the “Contested Ordinance”) enacted by Appellant/Respondent, the City of North Charleston (“North Charleston”), under the auspices of S.C. Code Ann. § 5-3-100, which, in pertinent part, provides as follows: “If the territory proposed to be annexed *belongs entirely* to the municipality seeking its annexation and is *adjacent* thereto, the territory may be annexed by resolution of the governing body of the municipality” (emphasis added).

Without question, the property that the Contested Ordinance describes as being annexed into North Charleston (the “Acre”) does not belong entirely to North Charleston, but rather includes a small portion of property (the “Overlapped Area”) that is part of a larger parcel (the “National Trust Property”) that is owned by Respondent/Appellant National Trust for Historic Preservation in the United States (the “National Trust”) and is already within Charleston’s corporate limits.¹ Moreover, and likewise without question, the Acre is separated from North Charleston’s corporate limits by SC Highway 61 and the National Trust Property.

The circuit court rejected Respondents’ challenge to the Contested Ordinance for lack of standing. In affirming the circuit court via the Subject Opinion, this Court cloaked North Charleston with jurisdiction over property that is not contiguous with its corporate limits and

¹ Hereinafter, “Respondents” refers to Charleston and the National Trust, collectively.

condoned one municipality leap-frogging the boundaries of another in pursuing an annexation. Most respectfully, the Subject Opinion is erroneous, and the Court should rehear this matter, because it overlooked and/or misapprehended a number of material points, as set forth herein.

BACKGROUND

In 1967, Georgia-Pacific Investment Company (“GPIC”) acquired title to more than 12,000 acres of land, including real property lying to the southwest of SC Highway 61. (R. p. 2 ¶ 1, p. 242 ¶ 4.a, pp. 246–250.) On January 2, 1980, GPIC conveyed a portion of this property, namely, the National Trust Property, to The Nature Conservancy. (R. p. 2 ¶ 2, p. 243 ¶ 4.c, pp. 251–54.) On January 28, 1980, The Nature Conservancy conveyed the National Trust Property to the National Trust. (R. p. 2 ¶ 2, p. 240 ¶ 4.c, p. 243 ¶ 4.d, pp. 255–57.) Both deeds describe the National Trust Property as follows:

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

Those certain strips or parcels of land, being 100 feet in width and immediately adjacent to the southern right-of-way line of Highway 61, and parallel with said Highway, and being a total of approximately 11,556 feet in length, composed of three strips of land, and being along the northern boundary line of all of the property owned by Grantor along the southern right-of-way line of Highway 61

(R. p. 252, p. 255.) The deed from GPIC also reserved to GPIC the right to establish eighteen (18) easements across the National Trust Property to provide access from Highway 61 to the remainder of GPIC’s property. (R. pp. 253–254.) At the time, Charleston County designated the

National Trust Property as TMS No. 301-00-00-017. (R. p. 2 ¶ 2, p. 252, p. 255.) In 2005, Charleston annexed the National Trust Property. (R. p. 2 ¶ 5, pp. 37–38 ¶¶ 17 & 23, pp. 49–50 ¶ 17, p. 50 ¶ 23; pp. 301–302 ¶ 13, p. 303 ¶ 21, p. 320 ¶ 13, p. 321 ¶ 21.)

In 1989, GPIC conveyed its remaining property, consisting of 2,294.17 acres, to Whitfield Construction Company. (R. p. 2 ¶ 4, p. 243 ¶¶ 4.e & f, p. 258, pp. 259–263.) The deed to Whitfield expressly refers to the deed from GPIC to The Nature Conservancy in providing that sixteen (16) of the easements reserved such were being assigned to Whitfield. (R. p. 261.)

In 2009, Whitfield recorded plats (the “Easement Plats”) showing eighteen (18) separate access easements running through the National Trust Property. (R. p. 3 ¶ 6, p. 243 ¶ 4.g, pp. 264–268.) The Easement Plats show the width of the National Trust Property as variable, in some places being less than the 100-foot width stated in the deed to the National Trust, and in some places being in excess of the 100-foot width stated in the deed to the National Trust. (R. pp. 264–268.) The Easement Plats also contain the following disclaimer: “THIS PLAT IS TO SHOW THE LOCATIONS OF THE EXISTING ACCESS EASEMENTS ONLY[.] THIS IS NOT A BOUNDARY SURVEY.” (R. pp. 264–268); *see also* S.C. Code Regs. Ann. § 49-430.C(14) (defining “boundary survey”).

At the time the Easement Plats were created, the National Trust Property was located in Charleston. (R. p. 243 ¶ 4.g, p. 244 ¶ 6, pp. 263–268.) Nothing on the plats indicates that the National Trust or Charleston reviewed and approved the plats, the location of the easements, or the width of the National Trust Property. (R. p. 5 ¶ 13, p. 243 ¶ 4.g, p. 244 ¶ 6, pp. 263–268.)

In 2017, Whitfield created the Acre, shown as “New Parcel 1” on Plat S17/0224 (the “Acre Plat”). (R. p. 243 ¶¶ 4.g & h, p. 244 ¶ 6, p. 269.) Adam MacConnell, a project manager for North Charleston, confirmed that the Acre Plat shows Charleston County TMS No. 301-00-

00-797. (R. p. 240 ¶¶ 2 & 4.d, p. 244 ¶ 5, p. 269.) The Acre Plat utilized the Easement Plats to establish the boundaries for the Acre. (R. p. 4 ¶ 11, p. 244 ¶¶ 5–6, p. 269.)

The Acre Plat shows “Access Easement #3,” as created by the Easement Plats, running from Highway 61 across the National Trust Property to the property corners of the Acre. (R. p. 244 ¶ 6, p. 264, p. 269, p. 303 ¶ 23, p. 322 ¶ 23.) The stated width of the National Trust Property on the Easement Plats for Access Easement #3 and on the Acre Plat is shown as 99.69 feet on the north side and 99.7 feet on the south side. (R. p. 244 ¶ 6, p. 264, p. 269.) This width conflicts with the stated width of the National Trust Property as being 100 feet from the southern right-of-way line of Highway 61, as delineated in the National Trust’s title history, resulting in an overlap, or encroachment, of the Acre onto National Trust Property. (R. pp. 244 ¶¶ 6–7, p. 245 ¶ 8.)

As attested to by Daniel C. Forsberg, a professional engineer and land surveyor licensed by the State of South Carolina with over 39 years of experience, (1) the Acre Plat includes approximately 62 square feet of the National Trust Property as part of the Acre; (2) the Acre overlaps the National Trust Property, encroaching on 62 square feet of the National Trust Property; and (3) TMS No. 301-00-00-797 includes a small portion of the National Trust Property. (R. pp. 242 ¶¶ 1–2, p. 244 ¶ 6, p. 245 ¶ 8.)

After recording the Acre Plat, Whitfield conveyed the Acre, by reference to the Acre Plat, to Tim Whitfield Construction and Development LLC, which then conveyed the Acre, by deed incorporating the Acre Plat (the “Acre Deed”) to North Charleston. (R. p. 244 ¶¶ 4.i & j, pp. 270–277.)

On December 21, 2017, North Charleston adopted Ordinance No. 2017-080 (i.e., the Contested Ordinance), which purports to annex an acre of land (i.e., the Acre), designated as

Charleston County TMS No. 301-00-00-797, located southwest of SC Highway 61, also known as Ashley River Road. (R. pp. 293–295.) Again, North Charleston adopted the Contested Ordinance under the auspices of § 5-3-100, which is only available as an alternate method of annexation when “the territory proposed to be annexed *belongs entirely* to the municipality seeking its annexation and is *adjacent* thereto” (R. p. 293 (emphasis added).)² In the Contested Ordinance, North Charleston represents that the Acre “belongs entirely” to North Charleston. (R. p. 293.)

The Contested Ordinance describes the Acre utilizing the same measurements depicted on the Acre Plat and states “the area proposed for annexation includes one acre identified as parcel designated TMS #301-00-00-797.” (R. p. 294.) The legal description in the Contested Ordinance describes the property being annexed by reference to the “easternmost,” “northernmost,” “westernmost,” and “southernmost” corners of TMS No. 301-00-00-797. (R. p. 294.) The boundary lines in this legal description include the “northeasternmost,” “northwesternmost,” “southwesternmost,” and “southeasternmost” property lines of TMS No. 301-00-00-797. (R. p. 294.) The map incorporated into the Contested Ordinance identifies the parcel being annexed as 301-00-00-797. (R. p. 295.) According to Forsberg, “if North Charleston annexed the Acre . . . as designated by TMS No. 301-00-00-797, then the land that was annexed included a small portion of the National Trust Property.” i.e., the Overlapping Area. (R. p. 246 ¶ 9.) Forsberg’s affidavit was not refuted.

² Absent a basis to accomplish an annexation via one of the alternate methods provided in S.C. Code Ann. §§ 5-3-100, -110, -115, -120, -130, -140, or -150, a municipality has to utilize the annexation procedure set forth in S.C. Code Ann. § 5-3-300. To be clear, North Charleston wrongfully utilized the alternate method in § 5-3-100 where it did not apply, and North Charleston did not attempt to utilize any other procedure.

Pursuant to S.C. Code Ann. § 5-3-270, on February 16, 2018, the National Trust and Charleston filed and served a notice of intent to challenge the Contested Ordinance, and, on March 20, commenced an action challenging the Contested Ordinance. (R. pp. 30–46.) The complaint sought a determination that the Contested Ordinance was invalid because (1) the Acre did not “belong entirely” to North Charleston, (2) the Contested Ordinance included property owned by the National Trust since 1980 and previously annexed by Charleston in 2005, (3) the Acre was not contiguous or adjacent to North Charleston’s municipal limits, and (4) the Contested Ordinance violated the long-standing public policy against “leap frog” annexations. (R. pp. 40–41 ¶ 38.)

The National Trust alleged standing to challenge the Contested Ordinance based on its ownership of a portion of the property being annexed and under the “public importance exception” to the general framework for standing to challenge municipal annexations. (R. p. 35 ¶¶ 4-6, p. 39 ¶ 32, pp. 39–40 ¶ 35.) Charleston alleged standing to challenge the Contested Ordinance because Charleston previously annexed a portion of the Acre in 2005 and because the purported annexation would permit North Charleston to “leap frog” over privately-owned territory previously annexed by Charleston. (R. p. 39 ¶¶ 33–34, pp. 39–40 ¶ 35.)

North Charleston answered the complaint on April 17, 2018, interposing a general denial and asserting affirmative defenses that the National Trust and Charleston did not have standing and that the complaint failed to state a claim. (R. pp. 47–58.) North Charleston also asserted a counterclaim, requesting a declaration that it was the sole owner of the Acre. (R. p. 55 ¶ 57, pp. 55–56 ¶ 58, p. 56, ¶¶ 59-63, p. 57 ¶¶ b–c.) Charleston and the National Trust replied to the counterclaims on May 17, 2018, and May 21, 2018, respectively. (R. pp. 59–66.)

North Charleston moved to dismiss the complaint pursuant to Rule 12, SCRPC, and Rule 56, SCRPC, arguing that the National Trust and Charleston lacked standing to challenge the Contested Ordinance. (R. p. 68.) Simultaneously, North Charleston moved for partial summary judgment, arguing that the Acre was “adjacent to” its municipal limits, as a matter of law. (R. p. 67.) The National Trust and Charleston later moved for summary judgment based on, among other things, the lack of contiguity or adjacency between the Acre and North Charleston’s municipal limits. (R. pp. 69–72.) The circuit court heard these motions on December 10, 2018, and requested that the parties prepare proposed orders, which the parties then submitted. (R. pp. 130–154, pp. 236:17–237:8.)

On March 1, 2019, the circuit court entered an order (the “Original Order”) dismissing the complaint and finding that neither the National Trust nor Charleston had standing to challenge the Contested Ordinance. (R. pp. 1–14.) The circuit court also held: “In the event that this Court is found to be in error regarding its ruling of lack of standing of the Plaintiffs, this Court finds that North Charleston did not lawfully annex the one acre parcel under the annexation statute.” (R. pp. 1–2.) The circuit court refiled the Original Order on March 5, 2019 (the “Refiled Order”). (R. pp. 15–28.) As used herein, references to the “Order” include the “Original Order” and the “Refiled Order,” which are identical.

On the issue of standing, the circuit court limited standing to challenge an annexation, in the absence of an allegation of deceitful conduct, to (1) the owners of the property being annexed and (2) the Attorney General. (R. p. 5.) The circuit court also concluded, as a matter of law, that the Contested Ordinance did not attempt to annex any property owned by the National Trust. (R. pp. 7–8.) With respect to the public importance grounds for standing, the circuit court held that only the Attorney General could contest a “leap frog” annexation on public importance grounds,

and that only an allegation of “deceitful conduct” would support standing in favor of the National Trust or Charleston. (R. pp. 8–9.)

Charleston received written notice of entry of the Original Order on March 4, 2019, and written notice of the entry of the Refiled Order on March 6, 2019. (R. p. 155.) On March 14, 2019, Charleston and the National Trust served separate motions to reconsider the Original Order and the Refiled Order as they pertained to the issue of standing. (R. pp. 155–176.) The circuit court denied both motions by order entered on May 1, 2019 (the “Reconsideration Order”). (R. p. 29.) Charleston received written notice of entry of the Reconsideration Order on May 2, 2019. (R. p. 363.)

On April 29, 2019, North Charleston filed a “Notice of Cross Appeal” of the circuit court’s decision on adjacency, conditioned upon the National Trust or Charleston filing a “primary appeal.” (R. pp. 358–362.) On May 24, 2019, Charleston served a Notice of Appeal of the Original Order, the Refiled Order, and the Reconsideration Order. (R. pp. 363–367.) On May 31, 2019, the National Trust served a Notice of Appeal of the Original Order, the Refiled Order, and the Reconsideration Order. (R. pp. 368–371.)

This appeal timely followed,³ and in due course, it was briefed and made ready for decision. Following oral argument on October 11, 2022, this Court decided the appeal on February 1, 2023, via the Subject Opinion, affirming the circuit court.

This petition for rehearing timely follows.

³ (R. pp. 358–371.)

STANDARD OF REVIEW

Although North Charleston originally couched its motion as a motion to dismiss based on a lack of standing, the circuit court considered “the pleadings, affidavits, exhibits, memoranda, and arguments of counsel,” before granting the motion. (R. p. 1.) “A trial court may properly grant a motion for summary judgment when ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000) (quoting Rule 56(c), SCRPC).

“Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.” *Id.* “In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.” *Id.* at 378-79, 534 S.E.2d at 692. “An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC.” *Id.* at 379, 534 S.E.2d at 692.

ARGUMENT

- I. In affirming the circuit court, this Court overlooked and/or misapprehended a number of material points.**
 - A. This Court erred in affirming the circuit court where the circuit court erred in limiting standing to challenge the Contested Ordinance to a property owner of the annexed land or the Attorney General.**

The circuit court committed an error of law in determining that, absent deceitful conduct, the only parties who may challenge a 100% annexation are the owners of the annexed land and the Attorney General. (R. p. 5.) Charleston agrees that the owner of real property being annexed

has standing to challenge any attempt to annex its own property. However, the test for standing includes not only those asserting an infringement of “proprietary interests,” but also those asserting an infringement of “statutory rights.” The Supreme Court of South Carolina has repeatedly recognized statutory and proprietary rights of municipalities over properties within their jurisdiction, including the right to contest annexations of property within their municipal limits.

“The general rule is that a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing.” *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996); *see also St. Andrews Pub. Serv. Dist. v. City Council*, 349 S.C. 602, 604, 564 S.E.2d 647, 648 (2002) (“In order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights.”). The common phraseology arises from case law addressed specifically to the standing of political subdivisions. *See County of Lexington v. Columbia*, 303 S.C. 300, 300, 400 S.E.2d 146, 147 (1991) (recognizing that, in the absence of “an issue of overriding public concern,” a political subdivision seeking to challenge a municipal annexation “must allege an infringement of its own interests or statutory rights to establish standing.”).

It is axiomatic that a municipality has standing to challenge the annexation of property already lying within such municipality’s corporate limits. *See Forest Acres v. Forest Lake*, 226 S.C. 349, 359, 85 S.E.2d 192, 196 (1954) (Town of Forest Acres had standing to challenge purported detachment of property without its consent); *Forest Acres v. Seigler*, 224 S.C. 166, 176, 77 S.E.2d 900, 904 (1953) (permitting challenge to annexation of property within municipality’s corporate limits, looking to case law emphasizing that detachment statutes afford “substantial right recognized in plaintiff, as a corporate entity, over its corporate territory”);

Tovey v. Charleston, 237 S.C. 475, 479-80, 117 S.E.2d 872, 874 (1961) (“We have held that under our statutes governing extension and reduction of corporate limits, a portion of one municipality may not be annexed to another without submitting the question of said detachment to the voters of the municipality whose area is to be reduced.”).

Since 2005, Charleston has had the statutory right to exclusive municipal jurisdiction over the portion of the Acre owned by the National Trust and previously annexed by Charleston (i.e., the Overlapped Area), as well as proprietary functions and interests of governmental dominion and control over this property, to include matters pertaining to taxation, land use, and the like. *See, e.g.*, S.C. Code Ann. § 5-7-30 (listing municipality’s statutory rights with respect to property within its boundaries); S.C. Code Ann. § 5-21-110 (right to levy and collect taxes on personal and real property); S.C. Code Ann. § 5-7-80(1) (authority to abate nuisances); S.C. Code Ann. § 6-29-330(A) (“A municipality may exercise the powers granted under the provisions of this chapter in the total area within its corporate limits.”); S.C. Code Ann. § 6-1-950 (establishing procedure for imposing development impact fee); S.C. Const. Ann. Art. VIII, § 15 (outlining constitutional right of municipal consent); S.C. Code Ann. § 5-3-150(1) (statutory right to annex property under 75% Annexation Method); S.C. Code Ann. § 5-3-280 (prescribing procedure under which corporate limits may be reduced).

In affirming the circuit court, this Court dismissed the Overlapped Area as a mere boundary dispute between Charleston and North Charleston. In doing so, it overlooked and/or misapprehended the consequences of that dispute. As an initial matter, that Charleston proved a boundary dispute as a result of the Contested Ordinance is, alone, sufficient to accord standing, as the very nature of the dispute implicates its statutory rights to property within its jurisdiction. Second, the record, in demonstrating the boundary dispute arises from the Overlapped Area

being owned by the National Trust and within Charleston corporate limits, brings to front and center whether the annexation could comply with the requirement of § 5-3-100 that the area annexed be “belong[ed] entirely” by the annexing municipality. In short, the very existence of the boundary dispute created by the ordinance implicates infringement of Charleston’s and the National Trust’s proprietary interests and statutory rights, cloaking each with standing.

Charleston duly alleged and produced evidence that the Contested Ordinance included property previously annexed to Charleston. Charleston therefore has standing under well-established case law in South Carolina, as, most respectfully, this Court (and the circuit court) should have found.

B. This Court erred in affirming the circuit court where the circuit court erred in granting summary judgment to North Charleston where the record establishes at least a genuine issue of material fact that the Acre includes a portion of the National Trust Property, which was annexed into Charleston in 2005.

According to the circuit court, “North Charleston City Council stated an intent to annex the property known as TMS 301-00-00-797.” (R. p. 7.) The circuit court thus described the issue for determination as “what land is actually part of that parcel.” (R. p. 7.) The circuit court then declared that a “TMS number and map do not supersede a deed.” (R. p. 7.) “Thus, the reference in the [Contested Ordinance] to ‘TMS 301-00-00-797’ is subservient to the deed as well.” (R. p. 7.)

The disconnect with this ruling is that the record evidence creates at least a genuine issue of material fact that the Acre Deed, the Acre Plat, and TMS No. 301-00-00-797 include property owned by the National Trust and annexed by Charleston in 2005. In fact, Forsberg’s affidavit is the only evidence of “what is included in that parcel.” (R. p. 242 ¶¶ 1–2, pp. 244–245.)

A party opposing summary judgment is entitled to have the evidence and all reasonable inferences drawn therefrom viewed in the light most favorable to it. *See David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) (“In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.”). It is well-recognized that even testimony from an *unlicensed* surveyor is admissible on the question of the proper boundary between two properties. *See Williams v. Moore*, 400 S.C. 90, 102, 733 S.E.2d 224, 230 (Ct. App. 2012) (“While Coker was not a licensed land surveyor, the trial court found his training and experience qualified him as an expert as to the boundary line in this case, and we do not see any reason to doubt that qualification.”); *cf.* S.C. Code Ann. § 27-1-20 (permitting circuit court to appoint surveyors at nomination of parties in disputes involving title or boundaries).

Forsberg opines, to a reasonable degree of certainty based on his education and experience that “if North Charleston annexed the Acre as described by Plat S17/0224 [the Acre Plat] 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.” (R. p. 245 ¶ 9 (emphasis added).) Forsberg refers to the area shown on the Acre Plat as the “Acre” (R. p. 243 ¶ 4.h, p. 269); explains that the Acre Deed conveys the property described on the Acre Plat to North Charleston (R. p. 244 ¶¶ 4.j & I, p. 269–277); and also concludes, to a reasonable degree of certainty based on his education and experience, that “the Acre overlaps the National Trust Property, encroaching on 62 square feet of the National Trust Property.” (R. p. 245 ¶ 8.)

It is undisputed that, if the National Trust Property is part of the Acre, so is the territory previously annexed by Charleston in 2005. (R. p. 124, n. 4). Even the circuit court recognized: “In 2005, the City Council of Charleston adopted Ordinance No. 2005-93, annexing several

properties into Charleston’s municipal limits, including the National Trust Property, TMS No. 301-00-00-017.” (R. p. 2 ¶ 5).

The facts cited by Forsberg could not more clearly bear this out. The National Trust Property is 100 feet wide and hugs the southern right-of-way line of Highway 61, a circumstance that has existed since 1980. (R. p. 243 ¶¶ 4.c & d, pp. 252–257.) The National Trust Property is in the City of Charleston, a circumstance that has existed since 2005. (R. p. 38 ¶ 23, p. 50 ¶ 23.) The Acre Deed incorporates by reference the Acre Plat, which shows the northeastern-most boundary line of the Acre commencing at points 99.69 and 99.7 feet from the southern right-of-way of Highway 61. (R. p. 269, pp. 274–277.) These numbers are what they are, and demonstrate on their face that the property described in the deed to North Charleston includes a portion of National Trust Property, which Property is within the municipal limits of Charleston. (R. p. 245 ¶ 9.)

Instead of considering Forsberg’s affidavit, the circuit court apparently reasoned that, because a grantor cannot convey an interest in land greater than what the grantor owns, the Acre Deed could not convey any portion of the National Trust Property to North Charleston, and because the Contested Ordinance recited that the property described therein “belongs entirely” to North Charleston, the Contested Ordinance only annexed land owned by North Charleston, regardless of how the annexed property was actually described. (R. pp. 6–7.)

This reasoning misapplies the general principles of real property law. The rules for interpreting a deed are the same as those for interpreting contracts, and it is the intention of the parties at the time the deed is executed that controls, not after-discovered extrinsic evidence. *See Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391 (1987) (“In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes

some well-settled rule of law or public policy.”); *Klapman v. Hook*, 206 S.C. 51, 56, 32 S.E.2d 882, 883 (1945) (“The vital question is the intent of the grantor at the time the deed is executed.”).

There is no legal or factual support for the circuit court’s apparent conclusion that TMS No. 301-00-00-797 included some subset of the property described as being conveyed to North Charleston in the Acre Deed, as shown on the Acre Plat. There is no evidence that Charleston County mapped 301-00-00-797 by something other than the legal description in the Acre Deed, and, even if there were, Forsberg’s affidavit explains that the “tax map sequence (TMS) number is derived from the legal description of the parcel as set out in the most recently recorded deed or plat.” (R. p. 244 ¶ 5.)

Forsberg continued: “The legal description for the Acre references Plat S17/0224 [the Acre Plat].” (R. p. 244 ¶ 5.) “As a result, Charleston County has assigned a tax map sequence (TMS) number to this property, that being TMS No. 301-00-00-797.” (R. p. 244 ¶ 5.) “[I]f North Charleston annexed the Acre as described on [the Acre Plat] 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.” (R. p. 245 ¶ 9.) This at least establishes a genuine issue of material fact as to whether Charleston County mapped TMS No. 301-00-00-797 utilizing the Acre Deed and the Acre Plat or some other parcel.

The circuit court also relied on the rule that a purchaser may not convey more than he owns to support an interpretation of the Acre Deed that the grantor intended to convey something less than what is shown on the Acre Plat. (R. p. 6.) But this rule is not one of interpretation or construction. Rather, it is a rule of priority utilized in deciding boundary disputes and quiet title

actions.⁴ The cases cited by the circuit court in favor of the proposition bear this out. *See F.C. Enters. v. Dibble*, 335 S.C. 260, 266, 516 S.E.2d 459, 462 (Ct. App. 1999) (concluding that purchaser at tax sale purchased subject to lease and option because tax deed could convey only what delinquent owner held at the time of tax sale); *Cummings v. Varn*, 307 S.C. 37, 42, 413 S.E.2d 829, 832 (1992) (recognizing plaintiffs could not recover against defendant in possession of tract because plaintiffs could not show perfect chain of title); *Griggs v. Griggs*, 199 S.C. 295, 301, 19 S.E.2d 477, 479 (1942) (holding that grantee, who held perfect paper title to premises prior to acquiring conditional deed from grantor, should prevail even against allegations that conditional deed was invalid because grantor had no title to convey under the conditional deed); *Hutto v. Ray*, 192 S.C. 364, 366, 6 S.E.2d 747, 748 (1940) (finding in favor of plaintiffs because grantee of Hutto could take only Hutto's life estate in premises). In the present case, the rule clearly favors the National Trust's claim that it owns a portion of the Acre. But it contributes nothing to the determination of what the grantor intended to convey to North Charleston via the Acre Deed.

Additionally, the circuit court mistakenly relied upon the quitclaim nature of the Acre Deed. Again, this confuses the issue of interpreting a deed with the issue of determining the impact or effect of the deed in light of other claims to the same property. *See Martin v. Ragsdale*, 71 S.C. 67, 76, 50 S.E. 671, 674 (1905) ("The authorities are conflicting as to whether a person can interpose the defense of purchaser for valuable consideration without notice, when

⁴ There are many inherent problems with converting this rule into one of interpretation or construction. The most obvious is that the evidence required to determine what the grantor owned at the time of the conveyance would impermissibly go beyond the four corners of the deed to determine what the parties intended. *See Gardner*, 293 S.C. at 25, 358 S.E.2d at 392 ("The intention of the grantor must be found within the four corners of the deed."). There is also no question that, in a lawsuit between the grantor and North Charleston over title to the land described in the Acre Deed, North Charleston would prevail notwithstanding this rule.

he derives his title from one holding under a mere quit claim deed.”). It also conflates the quantity of the land described in the deed with the quality of the right, title, or interest being conveyed.

Here, the issue is what land is included in the Acre Deed, the Acre Plat, TMS No. 301-00-00-797, and the Contested Ordinance, not the extent or quality of title North Charleston acquired by virtue of its deed. See *Milton P. Demetre Family Ltd. P’ship v. Beckmann*, 413 S.C. 38, 55, 773 S.E.2d 596, 605 (Ct. App. 2014) (“A quitclaim deed is a lawful means of conveying title.”); *Mulherin-Howell v. Cobb*, 362 S.C. 588, 601, 608 S.E.2d 587, 594 (Ct. App. 2005) (“A quitclaim deed does not guarantee the quality of title, but only conveys that which the grantor may lawfully convey.”).

While North Charleston and the circuit court give much weight to a reference in the Acre Deed to “p/o TMS No. 301-00-00-005,” the tax map sequencing (TMS) number assigned by Charleston County to the property owned by Whitfield, this reference is not contained within the legal description of the property, and the explicit incorporation of the Acre Plat to show the “size, shape dimensions, buttings and boundings” of the Acre controls over the general recitation of the TMS number for the purported parent tract. See S.C. Code Ann. § 30-5-250 (when a recorded deed refers to a recorded plat, “such reference shall be equivalent to setting forth in extenso in such deed . . . the boundaries, metes, courses or distances of such real estate as may be delineated or shown on any such plat . . .”).

In affirming the circuit court, this Court dismissed overlooked and/or misapprehended the posture of the case, that being a motion for summary judgment. Respondents were only required to demonstrate a scintilla of evidence that the ordinance infringed on their respective proprietary interests or statutory rights, or that the case warranted standing pursuant to the public interest

doctrine. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (“[W]e hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.”). The record is clear that this burden was met.

The record unequivocally establishes the boundaries of the National Trust Property. The record unequivocally establishes that the National Trust Property includes the Overlapped Area. The record unequivocally establishes that the National Trust Property was annexed to Charleston in 2005, including the Overlapped Area. The record unequivocally establishes that the Contested Ordinance includes the parcel identified by TMS No. 301-00-00-797. The record unequivocally establishes that TMS No. 301-00-00-797 includes a portion of the Overlapped Area, which is owned by the National Trust. The totality of these unequivocal facts show that the Contested Ordinance included property that North Charleston did not own and that was already in Charleston’s corporate limits. This result, in and of itself, far exceeds the scintilla of evidence standard required to withstand a motion for summary judgment. This result, in and of itself, implicates the statutory rights of Charleston to jurisdiction over properties within its boundaries, required for standing to contest an annexation ordinance.

Charleston proffered more than sufficient evidence to demonstrate that land within its municipal borders was included in the Contested Ordinance, cloaking it with standing to challenge the Contested Ordinance. At the very least, viewing the evidence and all reasonable inferences that may be drawn from it in the light most favorable to Charleston, there exists in the record a genuine issue of material fact on the overlap, rendering the award of summary judgment to North Charleston erroneous, as, most respectfully, this Court (and the circuit court) should have found.

C. This Court erred in affirming the circuit court where the circuit court erred in interpreting the Contested Ordinance to include only property belonging to North Charleston and lying outside Charleston’s municipal limits.

The issue before the circuit court was what land was encompassed by the Contested Ordinance, a matter of statutory construction. “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Bayle v. S.C. DOT*, 344 S.C. 115, 122, 542 S.E.2d 736, 739 (Ct. App. 2001). “Under the plain meaning rule, it is not the court’s place to change the meaning of a clear and unambiguous statute.” *Id.* “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Id.* at 122, 542 S.E.2d at 739–40. “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” *Id.* at 122, 542 S.E.2d at 740. “Therefore, the courts are bound to give effect to the expressed intent of the legislature.” *Id.*

It was North Charleston’s responsibility to ensure the sufficiency of the legal description of the property being annexed, not Charleston’s. *Cf. Bostick v. Beaufort*, 307 S.C. 347, 350, 415 S.E.2d 389, 391 (1992) (“We find that Ordinance 0-07-89 was fatally flawed from its inception as to annexation of the Bosticks’ 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.”); 2 McQuillin *The Law of Municipal Corporations* § 7.5 (3d ed. 2006) (“The description of municipal boundaries or of municipal territory is invalid and ineffective where it is indefinite and uncertain”).

The Contested Ordinance affirmatively states the territory annexed includes TMS No. 301-00-00-797, the tax map number assigned to the property surveyed on the Acre Plat. (R. pp. 293–95.) The legal description of the area to be annexed by the Contested Ordinance identifies

the corners of the property to be annexed as based on the “easternmost,” “northernmost,” “westernmost,” and “southernmost” corners of TMS No. 301-00-00-797. (R. p. 294.) The property lines of the annexed area reference the “northeasternmost,” “northwesternmost,” “southwesternmost,” and “southeasternmost” property lines of TMS No. 301-00-00-797. (R. p. 294.) The map attached to the Contested Ordinance identifies the area to be annexed as “301-00-00-797.” (R. p. 295.)

North Charleston was thus unequivocal in establishing that North Charleston intended to annex TMS No. 301-00-00-797,” which Forsberg explained includes “a small portion of the National Trust Property.” (R. p. 245 ¶ 9.) In this respect, even the circuit court held: “North Charleston City Council stated an intent to annex the property known as TMS 301-00-00-797. (R. p. 7.)

North Charleston’s after-acquired knowledge regarding the state of its title also does not negate that the property description in the Contested Ordinance is the controlling factor of the extent of the land included in the annexed area. Legislation is construed in light of conditions obtaining at the time of enactment, not based on after-acquired knowledge of the governing body. *See Durant v. Bennett*, 54 F.2d 634, 639 (D.S.C. 1931) (“As has been pointed out by the Supreme Court in many cases, a statute must be construed . . . in the light of the condition obtaining at the time the statute was passed.”); *see also State ex rel. Attorney Gen. v. Kizer*, 164 S.C. 383, 387, 162 S.E. 444, 449 (1932) (adopting *Durant* as the opinion of the South Carolina Supreme Court).

In affirming the circuit court, this Court overlooked and/or misapprehended the import of the undeniable facts in the record as it pertained to standing and instead focused on the effect of the deed by which North Charleston acquired title to the Acre. The extent or quality of title

conveyed by the deed, however, is a separate and distinct issue from what property was described in, and annexed by, the Contested Ordinance. While North Charleston may have thought it owned the area described by the ordinance, it simply did not. And while it is true that a grantor can only convey title to land in which (s)he has an interest, that premise does not preclude an area of property mistakenly believed to be owned being erroneously included in an annexation petition and ordinance, which is what the record unequivocally reveals to have occurred.

The Court gave credence to the annexation ordinance verbiage that the area annexed was “approximately” an acre. The plain wording of the Contested Ordinance says, “the area proposed for annexation includes one acre identified as parcel designated TMS #301-00-00-797.” (R. p. 294.). Without question, TMS No. 301-00-00-797 includes the Overlapped Area. Moreover, an acre of land contains 43,560 square feet. The dimensions of the area annexed is 43,681 square feet, or approximately an acre, consistent with the verbiage of the ordinance.

The circuit court committed an error of law in interpreting the Contested Ordinance. The Contested Ordinance unequivocally attempted to annex property owned by the National Trust and annexed by Charleston in 2005. As a result, the circuit court erred in finding that Charleston lacked standing to challenge the Contested Ordinance, which infringes upon Charleston’s proprietary interests and statutory rights over the portion of the Acre owned by the National Trust. As a result, the circuit court’s ruling that Charleston lacks standing to challenge the Contested Ordinance should be reversed, as, most respectfully, this Court should have found.

D. This Court erred in affirming the circuit court where the circuit court erred in ruling that North Charleston did not claim ownership over any portion of the National Trust Property by ignoring North Charleston’s repeated allegations that North Charleston owned the entirety of the acre.

The reasoning of the circuit court is further misinformed because it is influenced, in part, on an erroneous factual finding that North Charleston was not claiming ownership to any portion of the National Trust Property. (R. p. 5.) The circuit court also suggested that the issue of title to the Acre was “not a question of fact that this Court is tasked to resolve since the issue was not requested as relief in the pleadings.” (R. p. 8.) Such is simply not the case. In fact, the circuit court’s analysis of what property is included in the Acre Deed and within TMS No. 301-00-00-797 directly contradicts this conclusion. (R. pp. 6–7.)

The National Trust and Charleston asserted that the National Trust owned a portion of the property shown on the Acre Plat (R. p. 269), described in the Acre Deed (R. pp. 274–77), designated as Charleston County TMS No. 301-00-00-797, and purportedly annexed under the Contested Ordinance. (R. p. 39 ¶¶ 31–32.) The complaint defines the Acre as “real property designated as TMS 301-00-00-797.” (R. p. 35 ¶ 4.) In its answer, North Charleston also defines TMS No. 301-00-00-797 as the “Acre.” (R. pp. 47–48 ¶ 4.) But North Charleston denies every single allegation in the complaint relating to the National Trust’s ownership of a portion of the Acre. (R. pp. 47–48 ¶ 4, p. 49 ¶ 15, p. 51 ¶ 28, p. 52 ¶ 31.)

North Charleston also counterclaimed seeking “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.” (R. p. 56 ¶ 63.) In fact, North Charleston’s counterclaims accuse the National Trust and Charleston of making “unconscionable claims and pretensions against North Charleston’s title, claiming that boundaries to North Charleston’s property were other than those established by survey or deed and encroaches onto National

Trust’s property.” (R. p. 56 ¶ 61 (emphasis added).) North Charleston’s prayer for relief similarly placed title at issue in this action by clearly requesting a determination as to ownership of the Acre. (R. p. 57 ¶¶ b & c.) Thus, at least as late as April 17, 2018, when North Charleston filed its answer, North Charleston claimed that it owned the Acre.

North Charleston cannot have it both ways. It cannot claim sole ownership of TMS No. 301-00-00-797 for purposes of quieting title, accuse the National Trust and Charleston of making “unconscionable” assertions against such title, and then disavow ownership of any portion of TMS No. 301-00-00-797 that may overlap with the National Trust Property in an effort to defeat the National Trust’s standing argument. *See Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997) (precluding parties from adopting a position in conflict with one earlier taken in the same litigation).

To the extent North Charleston concedes that the National Trust, not North Charleston, holds title to a portion of the property described in the Acre Deed, shown on the Acre Plat, or designated as TMS No. 301-00-00-797, then the circuit court’s decision on standing should be reversed and judgment entered against North Charleston because the Contested Ordinance infringes on the National Trust’s proprietary interests, the Contested Ordinance infringes on Charleston’s proprietary interests and statutory rights, and the territory annexed did not “belong entirely” to North Charleston.

Here, again, in affirming the circuit court, the Court overlooked and/or misapprehended the import of the undeniable facts in the record as it pertained to standing and instead focused on the effect of the deed by which North Charleston acquired title to the Acre. The extent or quality of title conveyed by the deed, however, is a separate and distinct issue from what property was described in, and annexed by, the Contested Ordinance. While North Charleston may have

thought it owned the area described by the ordinance, it simply did not. And while it is true that a grantor can only convey title to land in which (s)he has an interest, that premise does not preclude an area of property mistakenly believed to be owned being erroneously included in an annexation petition and ordinance, which is what the Record unequivocally reveals to have occurred.

And, again, the Court gave credence to the annexation ordinance verbiage that the area annexed was “approximately” an acre. The plain wording of the Contested Ordinance says it “the area proposed for annexation includes one acre identified as parcel designated TMS #301-00-00-797.” (R. p. 294.). Without question, TMS No. 301-00-00-797 includes the Overlapped Area. Moreover, an acre of land contains 43,560 square feet. The dimensions of the area annexed is 43,681 square feet, or approximately an acre, consistent with the verbiage of the ordinance.

And, again, the record unequivocally establishes the boundaries of the National Trust Property. The record unequivocally establishes that the National Trust Property includes the Overlapped Area. The record unequivocally establishes that the National Trust Property was annexed to Charleston in 2005, including the Overlapped Area. The record unequivocally establishes that the Contested Ordinance includes the parcel identified by TMS No. 301-00-00-797. The record unequivocally establishes that TMS No. 301-00-00-797 includes a portion of the Overlapped Area, which is owned by the National Trust. The totality of these unequivocal facts show that the Contested Ordinance included property that North Charleston did not own and that was already in Charleston’s corporate limits. This result, in and of itself, far exceeds the scintilla of evidence standard required to withstand a motion for summary judgment. This result,

in and of itself, implicates the statutory rights of Charleston to jurisdiction over properties within its boundaries, required for standing to contest an annexation ordinance.

In any event, however, North Charleston's allegations not only establish that the issue of ownership of the Acre has been submitted to the Court for resolution, but also emphasize that, even at the time it filed its answer, North Charleston *believed* it owned the Acre, as shown on the Acre Plat, in the Acre Deed, and by reference to TMS No. 301-00-00-797. Thus, it is clear that, when North Charleston attempted to annex the Acre, it intended to annex the Acre as shown on the Acre Plat, as described in the Acre Deed, and by reference to TMS No. 301-00-00-797. Because this territory includes property owned by the National Trust and previously annexed by Charleston, the circuit court erred in finding that Charleston lacked standing to challenge the Contested Ordinance, as, most respectfully, this Court should have found.

E. This Court erred in affirming the circuit court where the circuit court erred in holding that Charleston lacked standing to challenge the contested ordinance in order to protect the integrity of its borders.

Even if the appellate court agrees with the circuit court that, as a matter of law, the Contested Ordinance attempted to annex only territory belonging entirely to North Charleston, such territory is physically separated from the corporate limits of North Charleston by land in Charleston, that being Highway 61 and the National Trust Property. (R. p. 3 ¶ 8.) If not judicially vetted, the Contested Ordinance will establish that one municipality, by acquiring property outside its limits and then annexing it under the device of section 5-3-100, can ignore the borders of another. If not judicially vetted, the Contested Ordinance will establish precedent that a municipality may undertake annexations that jump over, or "leap-frog," the corporate limits of another municipality, as and when convenient.

The public importance exception has been relaxed under discreet, limited circumstances when future guidance is paramount. The facts of this case qualify as such a circumstance. “In numerous recent cases, this Court has found that standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.” *Davis v. Richland Cty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). “The linchpin of the public importance exception is the need for future guidance.” *Vicary v. Town of Awendaw*, 425 S.C. 350, 359, 822 S.E.2d 600, 604 (2018).⁵ “An appropriate balance between the competing policy concerns underlying the issue of standing must be realized.” *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

“Citizens must be afforded access to the judicial process to address alleged injustices.” *Id.* “On the other hand, standing cannot be granted to every individual who has a grievance against a public official.” *Id.* “Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.” *Id.* “For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.” *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008).

While the “nefarious conduct” alleged against the Town of Awendaw in *Vicary* is not at all present here, this case, like *Vicary*, involves novel issues, inextricably connected to the public need for court resolution for future guidance. These issues will also escape judicial review, absent standing being conferred under the “public importance” exception, and the factual scenario posed by this case is subject to being repeated in other locales across the State. On the

⁵ As stated, *Vicary* emphasized that the “linchpin” for “public importance” standing is the extent to which future guidance is necessary. In this respect, the circuit court erroneously interpreted *Vicary* as adopting a “bright-line” test that *only* an allegation of deceitful conduct triggers such standing.

other hand, governments would not be subject to “numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits,” if Charleston were granted standing to proceed under the particular circumstances of this case. *See id.*

Charleston, as the municipality whose boundaries are being leaped, is particularly well suited to assert the public importance exception here, ensuring that standing is not granted to “every individual who has a grievance.” The Supreme Court of South Carolina has recognized the standing of a municipality to contest cases when another entity attempts to include properties within its jurisdiction, or claimed to be so. *See Forest Acres v. Forest Lake*, 226 S.C. 349, 359, 85 S.E.2d 192, 196 (1954) (concluding Town of Forest Acres may maintain action to invalidate purported detachment of its territory via annexation by Forest Lake).

The same must hold true for maintaining the sanctity of a municipality’s borders. A municipal border establishes a jurisdictional line that serves as a barrier to expansion by nearby municipalities. It establishes and preserves to a municipality an area for future growth into contiguous properties. If municipal borders can be leap-frogged, they become essentially meaningless. If not inherent in its right of home rule, the statutory scheme of annexation and its judicial interpretation devolve to Charleston the right to maintain the integrity of its borders, to include the right to exclude other municipalities, like North Charleston, from establishing a foothold in areas of growth that its boundaries establish. A sound public policy demands that municipalities have access to the courts to protect their boundary rights, and this Court should so hold.

The circuit court has already issued a ruling denying the ability of one municipality to “leap frog” another under the auspices of the “adjacent to” requirement in section 5-3-100, concluding: “As a matter of law, adjacency under § 5-3-100 of the South Carolina Code is

destroyed when privately-owned property lying within another municipality's corporate limits intervenes between the area to be annexed and the existing limits of the annexing municipality.” (R. p. 13.) In other words, whatever the term “adjacent to” means in section 5-3-100, it is destroyed, as a matter of law, by intervening property within another municipality.

There is no case interpreting section 5-3-100 or any State precedent authorizing one municipality to “leap frog” another municipality's boundaries, absent affirmative legislative authority. In the absence of an adjudication of these issues, municipalities will be given no guidance as to when section 5-3-100 applies, especially when, as in the present case, the annexing municipality asserts that the term “adjacent to” means “near” or “in close proximity.” It is also easy to see how a municipal “turf war” could ensue if the term “adjacent” is left undefined or so broadly interpreted. A ruling in favor of Charleston on the issue of standing—and on the merits—may effectively end such practice altogether.

As a result, such a ruling would not only serve the need for “future guidance” imperative to application of a “public importance” exception, but also decrease—not increase—the number of potential lawsuits involving similar annexation attempts. Therefore, it appears imperative, of significant public importance, and in furtherance of maintaining sound public policy, that standing be accorded to Charleston to challenge the Contested Ordinance. *See ATC*, 380 S.C. at 199, 669 S.E.2d at 341 (“The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of ‘future guidance’ that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance.”).

In affirming the circuit court, the court overlooked and/or misapprehended the application of the public interest doctrine. The existence of the Overlapped Area incites more than a demarcation of boundaries. The existence of the Overlapped Area implicates Charleston's

statutory rights in, to and over the Area, the linchpin of annexation standing. That the state did not challenge the annexation ordinance is not dispositive on the issue of whether this case sufficiently rises to a level of public concern. Myriad cases have accorded standing to parties other than the state when matters are of public importance. The prospect of a novel issue arising again and need for future guidance on that issue have been the cornerstone of the analysis. The Court acknowledges the unanswered question posed by North Charleston's interpretation and application of § 5-3-100, a situation certainly capable of recurring and requiring guidance for the future. The consequence of North Charleston's interpretation and application of § 5-3-100 opens the door for one municipality leapfrogging the boundaries of another, a situation unprecedented in the annexation jurisprudence of this State, and one that most certainly is capable of recurring and requiring future guidance.

CONCLUSION

For the foregoing reasons, along with any other or further reason(s) set forth in its appellate briefs already on file, the entirety of which it hereby adopts and incorporates herein by reference and reiterates/reasserts in support hereof—as well as any other or further reason(s) set forth by the National Trust in its appellate briefs already on file or in its petition for rehearing, the entirety of which Charleston adopts to the extent not inconsistent with its position in this matter⁶—Charleston asks this Honorable Court to grant the instant petition, to rehear this matter, to withdraw the Subject Opinion, and to decide this appeal anew via an opinion that reverses the circuit court's determination that it lacks standing to challenge the Contested Ordinance.

<SIGNED ON THE FOLLOWING PAGE>

⁶ *Cf.* Rule 208(b)(6), SCACR (“In cases involving more than one appellant or respondent, including cases consolidated for appeal, any number of parties may join in a single brief, and any party may adopt by reference all or any part of the brief of another.”).

Respectfully submitted,

By: s/Russell G. Hines
CLEMENT RIVERS, LLP
Wilbur E. Johnson (SC Bar No. 3062)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
wjohnson@ycrlaw.com
rhines@ycrlaw.com
(843) 720-5488

and

Frances I. Cantwell (SC Bar No. 1121)
Julia P. Copeland (SC Bar No. 77199)
CITY OF CHARLESTON
Legal Department
50 Broad Street
Charleston, South Carolina 29401
fcantwell054@gmail.com
copelandj@charleston-sc.gov
(843)-724-3730

Attorneys for the City of Charleston

Charleston, South Carolina

March 20, 2023

RECEIVED

Mar 20 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2018-CP-10-00851
Appellate Case No. 2019-000728

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

Respondents/Appellants,

v.

City of North Charleston,

Appellant/Respondent.

PROOF OF SERVICE

CLEMENT RIVERS, LLP
Wilbur E. Johnson (SC Bar No. 3062)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
wjohnson@ycrlaw.com
rhines@ycrlaw.com
(843) 720-5488

and

Frances I. Cantwell (SC Bar No. 1121)
Julia P. Copeland (SC Bar No. 77199)
CITY OF CHARLESTON
Legal Department
50 Broad Street
Charleston, South Carolina 29401
fcantwell054@gmail.com
copelandj@charleston-sc.gov
(843)-724-3730

Attorneys for the City of Charleston

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for the City of Charleston, hereby certify that **THE CITY OF CHARLESTON'S PETITION FOR REHEARING** was served on March 20, 2023, on all parties to this matter via emailing (see attached) a copy of the same to the following:

Frances I. Cantwell, Esquire
fcantwell054@gmail.com
Julia P. Copeland, Esquire
copelandj@charleston-sc.gov

Additional Counsel for the City of Charleston

G. Trenholm Walker, Esquire
walker@wglfirm.com
Ann E. Nelson, Esquire
anelson@savingplaces.org

*Attorneys for the National Trust for Historic
Preservation in the United States*

J. Brady Hair, Esquire
brady@bradyhair.com
Derk Van Raalte, IV, Esquire
dvanraalte@northcharleston.org

Attorneys for the City of North Charleston

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)
Attorneys for the City of Charleston

Charleston, South Carolina

March 20, 2023

RECEIVED

Mar 28 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Hon. Eugene Griffith

Case No. 2018-CP-10-851

Appeal No. 2019-000728

National Trust for Historic Preservation

In the United States and The City of Charleston, Respondents/Appellants

v.

City of North Charleston,

Appellant / Respondent.

Appellant / Respondent City of North Charleston's Reply to

National Trust's Petition for Rehearing

Derk Van Raalte, Kris Neely

Brady Hair

Legal Dept., 2500 City Hall Lane

North Charleston, SC 29406

843-740-2550

dvanraalte@northcharleston.org

kneely@northcharleston.org

brady@bradyhair.com

Attorneys for the Cross-Appellant

City of North Charleston

Other Counsel of Record:

Francis Cantwell, Esquire

2220 Folly Road

Charleston, SC 29412

Fcantwell054@gmail.com

Trenholm Walker, Esquire

Walker, Gressette, Freeman, Linton

PO Box 22167

Charleston, SC 29413

walker@WGFLAW.com

843-727-2208

Russell Hines, Esquire
Wilbur Johnson, Esquire
Clement Rivers Law Firm
25 Calhoun Street, Suite 400
Charleston, SC 29402

Julia Parker Copeland, Esquire
City of Charleston Legal Dept.
50 Broad Street
Charleston, SC 29401

Attorneys for the City of Charleston

Anne Nelson, Esquire
2600 Virginia Ave NW
Suite 1100
Washington, DC 20037

Attorneys for National Trust

**Appellant / Respondent City of North Charleston's Reply to the National Trust's Petition
for Rehearing¹**

Just as in responding to the City of Charleston's Petition in this case, this Court need not go further than the South Carolina Rules of Appellate Procedure to demonstrate why the National Trust's Petition must also be denied:

“A petition for rehearing ... shall state with particularity the points supposed to have been overlooked or misapprehended by the court.” SCAR 221(a)

Instead of doing this, the National Trust has simply recycled its arguments from the original appeal. Just as with the City of Charleston Petition, the National Trust here doesn't hone in on any particular point this Court got wrong. It simply relitigates the key points on which it lost previously. That this Petition is a re-hash is inescapable:

Compare:

National Trust's Petition for Rehearing Ground 1

“The legal precedent that a property owner can convey title only to property owned by it is not controlling. The question is what was the exact property described in North

¹ The City of North Charleston herein argues why the Petition for Rehearing should not be granted. A Petition for Rehearing is a procedural vehicle and North Charleston's arguments here respond on that basis. Regarding the underlying merits, the City of North Charleston would incorporate by reference as if set forth fully herein both this Court's prior opinion and North Charleston's prior appellate briefs and oral arguments.

Charleston's annexation ordinance, not whether North Charleston had legal title to all the property described in the annexation ordinance which clearly it did not." P. 5

With:

Reply Brief of Respondent / Appellant National Trust on Appeal

"Contrary to the arguments of North Charleston, the National Trust does not contend that North Charleston acquired legal title to a portion of its property because the deed conveying the Acre to it referred to a plat that showed its eastern boundary extending into the National Trust Parcel. North does the National Trust's standing turn on the question of legal title as found by the lower court and argued by North Charleston on appeal. ... What is material is the description of the area purportedly annexed by North Charleston in the contested ordinance."² P. 1.

National Trust's Petition for Rehearing Ground 2

"Consideration of extrinsic evidence of North Charleston's subjective intent³ is without precedent in annexation law of South Carolina and should not have been relied upon to determine the boundaries of the land annexed were different than those in the legal description in North Charleston's annexation ordinance." P. 7

² Internal footnote omitted.

³ North Charleston notes with some amusement that the so-called "extrinsic evidence" is the actual Contested Ordinance. The ordinance being challenged is not "extrinsic", it is the subject of the entire dispute.

With:

(Final) Brief of Respondent / Appellant National Trust's Argument II

“The circuit court erred in determining that the area annexed depended on record title rather than the description of the area annexed and in finding that the subjective intent of North Charleston overrode its description of the property annexed.” P. ii

And

Reply Brief of Respondent / Appellant National Trust on Appeal

“[T]he lower court erred in considering the intent of North Charleston to annex only property it legally owned to take priority over the description of the area annexed in the Contested Ordinance.” P. 3.

National Trust's Petition for Rehearing Ground 3

“The Plat of the Acre (R. p. 269) as well as the Affidavit of Forsberg (R. pp. 244-5) established that the National Trust owns a portion of the property within the legal description of the annexation petition sufficient to confer standing on the basis of its proprietary interest.” P. 9.

With:

(Final) Brief of Respondent / Appellant National Trust's Argument

“This proof [the Affidavit of Forsberg] established the National Trust's standing or, at a minimum, a genuine issue of material fact as to its standing.” National Trust Final Brief, p. 12.

AND

Reply Brief of Respondent / Appellant National Trust on Appeal Heading I

“There is a genuine issue of material fact as to whether North Charleston annexed a portion of the National Trust Parcel in the City of Charleston, thereby creating a genuine issue of material fact as to the standing of the National Trust.” P. 1

National Trust Petition for Rehearing Ground 4

“Even if the National Trust’s proprietary interest did not bestow standing on it, which it does, the National Trust and Charleston demonstrated a basis for public importance standing, given North Charleston’s gross violation of the laws governing annexation and the need for future guidance on whether a municipality may cross over properties in another municipality to annex property. The public importance exception is not limited to instances involving deceitful conduct as suggested in the Opinion.” P. 10

With:

(Final) Brief of Respondent / Appellant National Trust’s Argument

“The fact that North Charleston ... leapfrogged illegally over the City of Charleston’s municipal wall ... and attempted an annexation ... with a legally flawed definition of contiguity creates an undisputed incentive for other municipalities to follow North Charleston’s lead.... North Charleston’s conduct, therefore, creates a dangerous incentive for a messy patchwork of annexations statewide, as well as harm to the private property and statutory rights of South Carolina residents and property owners.... Respectfully, these are the type of ‘unique facts’ Justice Hearn suggested in Vicary merited recognition of public importance standing....” PP. 20-21.

AND

Reply Brief of Respondent / Appellant National Trust on Appeal Heading II

“The National Trust has standing under the public importance exception given the historic significance of the area and the unique facts present that give rise to the need for future guidance.” P. 5.

A Petition for Rehearing does not allow a litigant to re-argue the appeal as attempted here. Our own Supreme Court was crystal clear about this in Kennedy v. SC Retirement System, 564 S.E.2d 322, 349 S.C. 531, 532 (SC 2001):

“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)). Appellants had the opportunity to present their arguments and evidence when this case was originally heard by the trial court.”

And this rule is not changing. See Herron v. Century BMW, 719 S.E.2d 640, 643, 395 S.C. 461, 466 (SC 2011)(Citing Kennedy for the proposition “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.”)

So the most basic response to the National Trust’s Petition for Rehearing grounds is this – the National Trust did an admirable job briefing the matter below, so much so that the arguments it seeks to raise now for Rehearing were considered by this Court before the Opinion issued. To the extent that the arguments supporting Petitioner’s arguments may have changed somewhat in this most recent brief, that too is not allowed. See Kennedy,

564 S.E.2d 322, 349 S.C. 531, 532 (“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended....” and “The argument was not considered because it was never presented to this Court.”)

Conclusion

North Charleston’s position in response to the National Trust here is precisely the same as in its response to the City of Charleston. Decisions of this Court have meaning. They are not simply “jump balls” for litigants to perpetually bat back and forth through the air with no finality. While Rule 221(a) serves an important role to allow for focused correction of points overlooked it does not allow for endless soup-to-nuts relitigation of a case already decided. Petitioner’s request must be denied.

This 28 day of March, 2023



Derk Van Raalte

Kris Neely

Brady Hair

City of North Charleston Legal

2500 City Hall Lane

North Charleston, SC 29406

843-740-2550

kneely@northcharleston.org

dvanraalte@northcharleston.org

brady@bradyhair.com

RECEIVED

Mar 28 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Hon. Eugene Griffith

Case No. 2018-CP-10-851

Appeal No. 2019-000728

National Trust for Historic Preservation

In the United States and The City of Charleston, Respondents/Appellants

v.

City of North Charleston,

Appellant / Respondent.

Certificate of Service for Reply to National Trust's Petition for Rehearing

Certificate of Service

I certify that I have served the Appellants and the Hon. Jenny Abbott Kitchings either electronically or by depositing a copy of the following documents:

Reply to Petition for Rehearing by National Trust

In the care of the United States Postal Service, postage prepaid, addressed either directly or to their respective attorneys of record as follows:

Hon. Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Other counsel of record:

Trenholm Walker
walker@wgflaw.com

Anne Nelson, Esquire
anelson@savingplaces.org

Attorneys for National Trust

Wilbur Johnson, Esquire
wjohnson@ycrlaw.com

Russell Hines
Rhines@ycrlaw.com

Francis Cantwell, Esquire
Fcantwell054@gmail.com

Julia Parker Copeland, Esquire
copelandj@charleston-sc.gov
Attorneys for Charleston

This 28 of March, 2023



Derk Van Raalte
Kris Neeley
Brady Hair
North Charleston Legal Dept
2500 City Hall Lane
North Charleston, SC 29406
843-740-2550
dvanraalte@northcharleston.org
kneely@northcharleston.org
brady@bradyhair.com

Counsel for North Charleston

RECEIVED

Mar 28 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
Hon. Eugene Griffith

Case No. 2018-CP-10-851
Appeal No. 2019-000728

National Trust for Historic Preservation
In the United States and The City of Charleston, Respondents/Appellants

v.

City of North Charleston, Appellant / Respondent.

**Appellant / Respondent City of North Charleston's Reply to
City of Charleston Petition for Rehearing
(Standing)**

Other Counsel of Record:
Francis Cantwell, Esquire
2220 Folly Road
Charleston, SC 29412
Fcantwell054@gmail.com

Derk Van Raalte, Kris Neely,
Brady Hair
Legal Dept., 2500 City Hall Lane
North Charleston, SC 29406
843-740-2550
dvanraalte@northcharleston.org
kneely@northcharleston.org
brady@bradyhair.com
Attorneys for the Cross-Appellant
City of North Charleston

Trenholm Walker, Esquire
Walker, Gressette, Freeman, Linton
PO Box 22167
Charleston, SC 29413
walker@WGFLAW.com
843-727-2208

Russell Hines, Esquire
Wilbur Johnson, Esquire
Clement Rivers Law Firm
25 Calhoun Street, Suite 400
Charleston, SC 29402

Julia Parker Copeland, Esquire
City of Charleston Legal Dept.
50 Broad Street
Charleston, SC 29401

Attorneys for the City of Charleston

Anne Nelson, Esquire
2600 Virginia Ave NW
Suite 1100
Washington, DC 20037

Attorneys for National Trust

**Appellant / Respondent City of North Charleston's Reply to City of Charleston's Petition
for Rehearing¹**

This Court need not go further than the South Carolina Rules of Appellate Procedure to demonstrate why this Petition must be denied:

“A petition for rehearing ... shall state with particularity the points supposed to have been overlooked or misapprehended by the court.” SCAR 221(a)

Instead of doing this, the Petitioner has regurgitated its ENTIRE argument from the original appeal. In other words, Petitioner doesn't hone in on any particular point this Court got wrong, according to the Petitioner this Court got the wrong answer *to every single issue and argument* that Charleston presented in its appellate briefs and oral argument. North Charleston is reminded of the famous scene in the movie “A Few Good Men” when trial counsel's response to an overruled objection is to immediately raise the same objection, but this time “strenuously object.” There trial counsel's litigation partner talks her through the absurdity:

"I strenuously object?" Is that how it's done? Hm? "Objection, your Honor."
"Overruled" "No, no. I STRENUOUSLY object." "Oh. You strenuously object.
Then I'll take some time and reconsider." Lt. Weinberg, A Few Good Men²

¹ The City of North Charleston herein argues why the Petition for Rehearing should not be granted. A Petition for Rehearing is a procedural vehicle and North Charleston's arguments here respond on that basis. Regarding the underlying merits, the City of North Charleston would incorporate by reference as if set forth fully herein both this Court's prior opinion and North Charleston's prior appellate briefs and oral arguments.

² Columbia Pictures ; Castle Rock Entertainment ; screenplay, Aaron Sorkin ; producers, David Brown, Rob Reiner, Andrew Scheinman ; director, Rob Reiner. A Few Good Men. Culver City, CA :Columbia TriStar Home Video, 2001

This is exactly what Petitioner is doing here. The Petitioner has failed to identify any ground not previously presented to the Court or any position previously misapprehended. It simply restates the same points as heard on appeal, but using even more pages.

Compare:

City of Charleston Motion for Reconsideration Ground I(A)

“This Court erred in affirming the circuit court where the circuit court erred in limiting standing to challenge the Contested Ordinance to a property owner of the annexed land or the Attorney General.” P. 9

With:

Respondent / Appellant City of Charleston’s Final Appellant’s Brief Issue 1³

“Did the circuit court commit an error of law in limiting standing to challenge an annexation under Section 5-3-100 of the South Carolina Code to a property owner of the annexed land or the Attorney General?” P. iv

City of Charleston Motion for Reconsideration Ground I(B)

“This Court erred in affirming the circuit court where the circuit court erred in granting summary judgment to North Charleston where the record establishes at least a genuine issue of material fact that the Acre includes a portion of the National Trust Property, which was annexed into Charleston in 2005.” P. 12

³ Respondent / Appellant City of Charleston’s Final Appellant’s Brief at pg. iv. (Original text in all caps changed in this series of list entries to conventional capitalization for ease of reading.)

With:

Respondent / Appellant City of Charleston's Final Appellant's Brief Issue 2

“Did the circuit court commit an error of law in granting summary judgment to North Charleston based on a purported lack of standing despite record evidence establishing at least a genuine issue of material fact that the territory to be annexed includes a portion of the National Trust Property annexed by Charleston in 2005?”

P. iv

City of Charleston Motion for Reconsideration Ground I(C)

“This Court erred in affirming the circuit court where the circuit court erred in interpreting the Contested Ordinance to include only property belonging to North Charleston and lying outside Charleston's municipal limits.” P. 19

With:

Respondent / Appellant City of Charleston's Final Appellant's Brief Issue 3

“Did the circuit court commit an error of law in interpreting North Charleston's annexation ordinance to include only property belonging to North Charleston and lying outside Charleston's municipal limits?” P. iv

City of Charleston Motion for Reconsideration Ground I(D)

“This Court erred in affirming the circuit court where the circuit court erred in ruling that North Charleston did not claim ownership over any portion of the National Trust Property by ignoring North Charleston's repeated allegations that North Charleston owned the entirety of the acre.” P. 22

With:

Respondent / Appellant City of Charleston's Final Appellant's Brief Issue 4

“Did the circuit court commit an error of law in finding that North Charleston did not claim ownership over any portion of the National Trust’s property despite North Charleston’s repeated allegations that North Charleston owned the entirety of the property to be annexed?” P. iv

City of Charleston Motion for Reconsideration Ground I(E)

“This Court erred in affirming the circuit court where the circuit court erred in holding that Charleston lacked standing to challenge the contested ordinance in order to protect the integrity of its borders.” P. 25

With:

Respondent / Appellant City of Charleston's Final Appellant's Brief Issue 5

“Did the circuit court commit an error of law in holding that Charleston lacked standing to challenge North Charleston’s annexation ordinance in order to protect the integrity of its borders when such standing would provide future guidance to other municipalities and decrease the potential for future litigation?” P. iv

A Petition for Rehearing does not allow for this transparent effort to re-argue the appeal. Our own Supreme Court was crystal clear about this in Kennedy v. SC Retirement System, 564 S.E.2d 322, 349 S.C. 531, 532 (SC 2001):

“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the

petition for rehearing to have the case tried in the appellate court a second time.” Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)). Appellants had the opportunity to present their arguments and evidence when this case was originally heard by the trial court.”

And this rule is not changing. See Herron v. Century BMW, 719 S.E.2d 640, 643, 395 S.C. 461, 466 (SC 2011)(Citing Kennedy for the proposition “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.”)

To the extent that the arguments supporting Petitioner’s regurgitated bullet points may have changed somewhat in this most recent brief, that too is not allowed. See Kennedy, 564 S.E.2d 322, 349 S.C. 531, 532 (“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended....“ and “The argument was not considered because it was never presented to this Court.”)

Conclusion

Decisions of this Court have meaning. They are not simply “jump balls” for litigants to perpetually bat back and forth through the air with no finality. While Rule 221(a) serves an important role to allow for focused correction of points overlooked it does not allow for endless soup-to-nuts relitigation of a case already decided. Petitioner’s request must be denied.

This 28 day of March, 2023



Derk Van Raalte

Kris Neely

Brady Hair

City of North Charleston Legal

2500 City Hall Lane

North Charleston, SC 29406

843-740-2550

kneely@northcharleston.org

dvanraalte@northcharleston.org

brady@bradyhair.com

RECEIVED

Mar 28 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Hon. Eugene Griffith

Case No. 2018-CP-10-851

Appeal No. 2019-000728

National Trust for Historic Preservation

In the United States and The City of Charleston, Respondents/Appellants

v.

City of North Charleston,

Appellant / Respondent.

**Certificate of Service for Reply to City of
Charleston's Petition for Rehearing**

Certificate of Service

I certify that I have served the Appellants and the Hon. Jenny Abbott Kitchings either electronically or by depositing a copy of the following documents:

Reply to Petition for Rehearing by City of Charleston

In the care of the United States Postal Service, postage prepaid, addressed either directly or to their respective attorneys of record as follows:

**Hon. Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211**

Other counsel of record:

Trenholm Walker
walker@wglfirm@com

Anne Nelson, Esquire
anelson@savingplaces.org

Attorneys for National Trust

Wilbur Johnson, Esquire
wjohnson@ycrlaw.com

Russell Hines, Esquire
rhines@ycrlaw.com

Francis Cantwell, Esquire
Fcantwell054@gmail.com

Julia Parker Copeland, Esquire
copelandj@charleston-sc.gov

Attorneys for Charleston

This 28 of March, 2023



Derk Van Raalte
Kris Neeley
Brady Hair
North Charleston Legal Dept
2500 City Hall Lane
North Charleston, SC 29406
843-740-2550
dvanraalte@northcharleston.org
kneely@northcharleston.org
Brady@bradyhair.com

Counsel for North Charleston

RECEIVED

Apr 03 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No.: 2018-CP-10-851
Appellant Case No. 19-000728

National Trust for Historic Preservation in the United States and the
City of Charleston Respondents/Appellants,

v.

City of North Charleston Appellant/Respondent.

**REPLY OF RESPONDENT/APPELLANT NATIONAL TRUST FOR HISTORIC
PRESERVATION IN THE UNITED STATES TO
THE RETURN OF CITY OF NORTH CHARLESTON TO
PETITION FOR REHEARING**

G. Trenholm Walker (S.C. Bar No. 5777)
Walker, Gressette & Linton, LLC
66 Hasell Street
Charleston, SC 29401
T: (843) 727-2208
F: (843) 727-2238
Email: Walker@wglfirm.com

ATTORNEYS FOR
RESPONDENT/APPELLANT NATIONAL
TRUST FOR HISTORIC PRESERVATION IN
THE UNITED STATES

Pursuant to Rules 221(a) and 240(f), SCACR, Respondent/Appellant National Trust for Historic Preservation in the United States (the “National Trust”) files this Reply to the Return of City of North Charleston to the National Trust’s Petition for Rehearing of Opinion No. 5965, dated February 1, 2023.

In its Return, North Charleston seeks preemptory denial of the National Trust’s Petition on procedural grounds. North Charleston points to judicial precedent that “[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” Herron v. Cent. BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011). **Return at p. 7.** The National Trust agrees. However, this standard has no application to the Petition filed by the National Trust.

As explained by our Supreme Court in Herron, this precept merely restates the fundamental principle that an appealing party cannot raise an issue for the first time on appeal, much less for the first time in a petition for rehearing. This holding addresses South Carolina’s “issue preservation requirements.” 719 S.E.2d 643. The National Trust is not raising any issues for the first time in its Petition. In fact, North Charleston goes to great length to show that the important legal points in the National Trust’s Petition were contained in its briefs to this Court.

The National Trust also agrees that a petition for rehearing must show points supposedly overlooked or misapprehended by the Court. Checker Yellow Cab Co., Inc. v. Checker Cab and Parcel Serv., Inc., 287 S.C. 608, 612, 340 S.E.2d 549, 552 (S.C. App. 1986). The National Trust does just that in its Petition.

In its Petition, the National Trust identifies important facts and legal precedent that this Court either overlooked or misapprehended in the Opinion. Nowhere does the Opinion mention

that North Charleston reached over two properties in the City of Charleston to purportedly annex the Acre, or that no appellate court of this state has ever upheld a municipality annexing or incorporating within its limits property that is separated by other property in another municipality. As another example, the Opinion omits any reference to the Affidavit of Daniel Forsberg attesting that the annexed “territory” was TMS # 301-00-00-797 that includes 62 square feet of the National Trust Parcel or that this Affidavit creates, at a minimum, a genuine issue of material fact as to the standing of the National Trust. **R. pp. 242-5.**

The Petition also brings up dispositive legal principles that the National Trust respectfully submits this Court overlooked or misapprehended. There is no legal precedent that an annexing party, here North Charleston, can *only* annex property that it owns, regardless of whether the description of the area or territory annexed in the annexation ordinance includes property North Charleston does not own. The standing analysis turns on whether the description of the territory annexed included the property of a party challenging the annexation; here it did. Neither the circuit court nor this Court can “blue pencil” the description of the territory annexed to remove the portion of the National Trust Parcel included in TMS # 301-00-00-797.

As explained in the Petition, this Court also overlooked that there is no judicial precedent allowing the court reviewing an annexation challenge to rely on the territory it believes the annexing municipality *intended* to annex, a subjective inquiry, instead of the actual description of the territory annexed in the ordinance, an objective inquiry. The Court’s supposition as to North Charleston’s subjective intent is the extrinsic evidence the National Trust asserts should not have been considered. The National Trust is not arguing the annexation ordinance itself was improper extrinsic evidence as North Charleston mistakenly asserts in its Return. **Return at p. 4, fn. 2.**

Similarly, the Opinion overlooks that a property owner has proprietary standing if *any* of its property is described in the annexation petition or annexation ordinance. Instead, the Court decided that “although 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.” **Opinion at p. 6.** There is no legal precedent allowing a court determining standing to disregard property owned by the challenging party that is part of the area or territory annexed, no matter how small and no matter the intent of the annexing municipality.

Finally, on the question of standing based on public importance, the Court overlooked and never mentioned the important historical designations of the surrounding lands. All the properties in question are within the Ashley River Historic District that is listed in the National Register of Historic Places. On the opposite side of Highway 61 from the Acre sits Drayton Hall, a National Historic Landmark, that is owned by the National Trust. Nor does the Court mention that the admitted purpose of the annexation is to increase the residential density from one house per eight acres, the maximum under Charleston County’s zoning, to two houses per acre, the maximum under North Charleston’s zoning, to the detriment of this historic district. Last, the Court does not mention in its discussion of public importance standing that upholding this annexation flies in the face of a long line of precedent enforcing the important public policy prohibiting municipalities from annexing property located on the far side of properties that are in another municipality.

For the foregoing reasons and those stated in its Petition for Rehearing, the National Trust respectfully requests that the Court grant its Petition for Rehearing.

April 3, 2023



G. Trenholm Walker (S.C. Bar No. 5777)

Walker, Gressette & Linton, LLC

66 Hasell Street

Charleston, SC 29401

T: (843) 727-2208

F: (843) 727-2238

Email: Walker@wglfirm.com

Attorneys for Respondent/Appellant National
Trust for Historic Preservation in the United
States

RECEIVED

Apr 03 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2019-000728

National Trust for Historic Preservation in the United States and the
City of Charleston Respondents/Appellants,

v.

City of North Charleston Appellant/Respondent.

PROOF OF SERVICE

I certify that I have served the **Respondent/Appellant National Trust for Historic Preservation in the United States' Reply to Appellant/Respondent's Reply to Petition for Rehearing** by electronic mail, on April 3, 2023, addressed to the attorneys of record via electronic mail:

Derk Van Raalte, IV
City of North Charleston Legal Dept.
2500 City Hall Lane
N. Charleston, SC 29406
dvrpalmetto@gmail.com

J. Brady Hair
Law Office of Brady Hair
P.O. Box 61896
North Charleston, SC 29419
brady@bradyhair.com
Attorneys for Appellant/Respondent
City of North Charleston

Julia P. Copeland
Frances I. Cantwell
City of Charleston Legal Department
50 Broad Street
Charleston, SC 29401
copeland@charleston-sc.gov
fcantwell054@gmail.com

Wilbur Johnson
Russell G. Hines
Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29401
wjohnson@ycrlaw.com
rhines@ycrlaw.com

Attorneys for Respondent/Appellant The City of Charleston



Nancy Jane Dennis
Paralegal

RECEIVED

Apr 04 2023

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2018-CP-10-00851
Appellate Case No. 2019-000728

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

Respondents/Appellants,

v.

City of North Charleston,

Appellant/Respondent.

**THE CITY OF CHARLESTON'S REPLY TO THE RETURN
TO ITS PETITION FOR REHEARING**

CLEMENT RIVERS, LLP
Wilbur E. Johnson (SC Bar No. 3062)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
wjohnson@ycrlaw.com
rhines@ycrlaw.com
(843) 720-5488

and

Frances I. Cantwell (SC Bar No. 1121)
Julia P. Copeland (SC Bar No. 77199)
CITY OF CHARLESTON
Legal Department
50 Broad Street
Charleston, South Carolina 29401
fcantwell054@gmail.com
copelandj@charleston-sc.gov
(843)-724-3730

Attorneys for the City of Charleston

Pursuant to Rules 221(a) and 240(f), SCACR, in further support of its pending petition for rehearing of this matter (the “Petition”), Respondent/Appellant the City of Charleston (“Charleston”) submits this reply to the return to the Petition filed by Appellant/Respondent, the City of North Charleston (“North Charleston”).

Pointing to the language in Rule 221(a) that “[a] petition for rehearing . . . shall state with particularity the points supposed to have been overlooked or misapprehended by the court,” the gist of the return is North Charleston’s contention that the Petition should be denied for noncompliance with Rule 221(a), because it “doesn’t hone in on any particular point this Court got wrong” and “regurgitate[s] [Charleston’s] ENTIRE argument from the original appeal.” (Return p. 3 (emphasis in original).) Respectfully, this contention is unavailing, as it is based on a misapprehension of both Rule 221(a) and the Petition itself.

The same rules of construction used to interpret statutes apply to the interpretation of court rules. *Huck v. Oakland Wings, LLC*, 422 S.C. 430, 435, 813 S.E.2d 288, 290 (Ct. App. 2018). Thus, court rules must be given a reasonable and practical construction and read in a sense that harmonizes with their subject matter and accords with their general purpose. *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 621–22, 611 S.E.2d 297, 301–02 (Ct. App. 2005). Additionally, with particular respect to procedural rules, they “should not be written or interpreted to create a trap for the unwary lawyer or party” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004).

North Charleston’s criticism of the Petition is misplaced. Besides its reliance on an unduly narrow view of Rule 221(a), it overlooks the interplay between Rule 221(a) and Rule 242, SCACR (addressing certiorari to the Court of Appeals), which, in subsection (d)(2), expressly limits the questions that may be presented in a petition for a writ of certiorari to “[o]nly

those questions raised in the Court of Appeals and in the petition for rehearing” Indeed, in its order limiting extensions of time in cases seeking certiorari to review a decision of the Court of Appeals, the Supreme Court specifically cites Rule 242(d)(2) in support of its reasoning for why less time should be needed to prepare a cert petition, because of the necessary overlap between the content of the cert petition and what was already argued to the Court of Appeals. (S.C. Sup. Ct. Order No. 2014-07-16-01 (filed July 16, 2014) (“Under Rule 242(d)(2), SCACR, ‘[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.’ Therefore, in most cases, the preparation of the petition and return will involve no more than taking the arguments already made in the briefs before the Court of Appeals, putting in the additional case history information, and updating and checking the citations.”).)

“In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended *their argument*.” *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a)) (emphasis added). Far from being improper under the South Carolina Appellate Court Rules, the so-called “regurgitat[ion]” of Charleston’s appellate arguments in the Petition is indeed necessary, both for it to attempt to demonstrate to this Court that it has overlooked and/or misapprehended them and for it to preserve them for potential Supreme Court review.

Moreover, the Petition does in fact identify the points that Charleston respectfully contends the Court overlooked and/or misapprehended. (*See, e.g.*, Charleston Petition for Rehearing p. 11 ([Re: Argument I.A.] “In affirming the circuit court, this Court dismissed the Overlapped Areas as a mere boundary dispute”); *id.* at p. 17 ([Re: Argument I.B.] “In affirming the circuit court, this Court . . . overlooked and/or misapprehended the posture of this

case”); *id.* at p. 20 ([Re: Argument I.C.] “In affirming the circuit court, this Court overlooked and/or misapprehended the import of undeniable facts in the record as it pertained to standing”); *id.* at p. 23 ([Re: Argument I.D.] “Here, again, in affirming the circuit court, the Court overlooked and/or misapprehended the import of the undeniable facts in the record as it pertained to standing”); *id.* at p. 28 ([Re: Argument I.E.] “In affirming the circuit court, the [C]ourt overlooked and/or misapprehended the application of the public interest doctrine.”).

Lastly, North Charleston is mistaken in suggesting that its position is supported by case law instructing that “[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” (Return pp. 6–7 (quoting *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 and *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011)).) This is simply an expression of the fundamental principle that appeals are not re-trials and an appealing party cannot raise a point for the first time on appeal, much less for the first time in a petition for rehearing. The principle is of no help to North Charleston here, where, as indeed North Charleston itself goes to great length to show, it is in no way violated by the Petition.

So, again, for the foregoing reasons, along with those already set forth in the Petition—as well as any other or further reasons set forth in the reply of Respondent/Appellant National Trust for Historic Preservation in the United States, the entirety of which Charleston adopts to the extent not inconsistent with its position in this matter¹—Charleston asks this Honorable Court to grant the Petition, to rehear this matter, to withdraw the Subject Opinion, and to decide this

¹ *Cf.* Rule 208(b)(6), SCACR (“In cases involving more than one appellant or respondent, including cases consolidated for appeal, any number of parties may join in a single brief, and any party may adopt by reference all or any part of the brief of another.”).

appeal anew via an opinion that reverses the circuit court's determination that it lacks standing to challenge the Contested Ordinance.

Respectfully submitted,

By: s/Russell G. Hines
CLEMENT RIVERS, LLP
Wilbur E. Johnson (SC Bar No. 3062)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
wjohnson@ycrlaw.com
rhines@ycrlaw.com
(843) 720-5488

and

Frances I. Cantwell (SC Bar No. 1121)
Julia P. Copeland (SC Bar No. 77199)
CITY OF CHARLESTON
Legal Department
50 Broad Street
Charleston, South Carolina 29401
fcantwell054@gmail.com
copelandj@charleston-sc.gov
(843)-724-3730

Attorneys for the City of Charleston

Charleston, South Carolina

April 4, 2023

RECEIVED

Apr 04 2023

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2018-CP-10-00851
Appellate Case No. 2019-000728

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

Respondents/Appellants,

v.

City of North Charleston,

Appellant/Respondent.

PROOF OF SERVICE

CLEMENT RIVERS, LLP
Wilbur E. Johnson (SC Bar No. 3062)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
wjohnson@ycrlaw.com
rhines@ycrlaw.com
(843) 720-5488

and

Frances I. Cantwell (SC Bar No. 1121)
Julia P. Copeland (SC Bar No. 77199)
CITY OF CHARLESTON
Legal Department
50 Broad Street
Charleston, South Carolina 29401
fcantwell054@gmail.com
copelandj@charleston-sc.gov
(843)-724-3730

Attorneys for the City of Charleston

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for the City of Charleston, hereby certify that **THE CITY OF CHARLESTON'S REPLY TO THE RETURN TO ITS PETITION FOR REHEARING** was served on April 4, 2023, on all parties to this matter via emailing (see attached) a copy of the same to the following:

Frances I. Cantwell, Esquire
fcantwell054@gmail.com
Julia P. Copeland, Esquire
copelandj@charleston-sc.gov

Additional Counsel for the City of Charleston

G. Trenholm Walker, Esquire
walker@wglfirm.com
Ann E. Nelson, Esquire
anelson@savingplaces.org

*Attorneys for the National Trust for Historic
Preservation in the United States*

J. Brady Hair, Esquire
brady@bradyhair.com
Derk Van Raalte, IV, Esquire
dvanraalte@northcharleston.org

Attorneys for the City of North Charleston

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)
Attorneys for the City of Charleston

Charleston, South Carolina

April 4, 2023

The South Carolina Court of Appeals

National Trust for Historic Preservation in the United
States and the City of Charleston,
Respondents/Appellants,

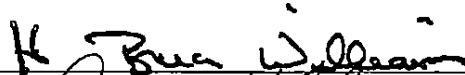
v.

City of North Charleston, Appellant/Respondent.

Appellate Case No. 2019-000728

ORDER

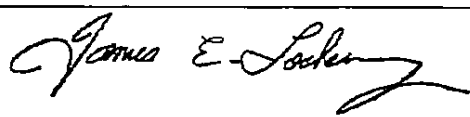
After careful consideration of the petition for rehearing filed by National Trust for Historic Preservation in the United States, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



A.J.

Columbia, South Carolina

cc:
Derk Van Raalte, IV, Esquire
J. Brady Hair, Esquire

FILED
May 11 2023

Frances Isaac Cantwell, Esquire
George Trenholm Walker, Esquire
Anne Elizabeth Nelson, Esquire
Julia Parker Copeland, Esquire
Wilbur E. Johnson, Esquire
Russell Grainger Hines, Esquire
The Honorable Eugene C. Griffith, Jr.

The South Carolina Court of Appeals

National Trust for Historic Preservation in the United
States and the City of Charleston,
Respondents/Appellants,

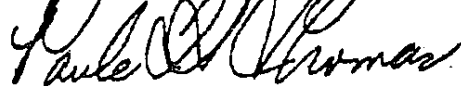
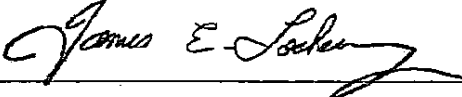
v.

City of North Charleston, Appellant/Respondent.

Appellate Case No. 2019-000728

ORDER

After careful consideration of the petition for rehearing filed by the City of Charleston, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 A.J.

Columbia, South Carolina

cc:

Derk Van Raalte, IV, Esquire

J. Brady Hair, Esquire

Frances Isaac Cantwell, Esquire

FILED
May 11 2023

George Trenholm Walker, Esquire
Anne Elizabeth Nelson, Esquire
Julia Parker Copeland, Esquire
Wilbur E. Johnson, Esquire
Russell Grainger Hines, Esquire
The Honorable Eugene C. Griffith, Jr.