Exhibit A

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

LYNNE VICARY, KENT PRAUSE, and SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, Plaintiffs, v. TOWN OF AWENDAW, and EBC, LLC, Defendants.	)	CASE. NO. 09-CP-10-7399

ORDER

This matter was tried before the Court on April 16, 2014. For the foregoing reasons, this Court declares (1) that plaintiffs have standing to bring this challenge; (2) that this action was timely filed; and (3) that the defendant Town of Awendaw's (the "Town") purported annexation of the Ten-foot Strip of the Francis Marion National Forest (the "Ten-Foot Strip") was *void ab initio* and did not occur as a matter of law. Because the annexation of the Ten-Foot Strip did not occur as a matter of law, it follows that the Town's purported annexation on October 1, 2009 of a private in-holding in the Francis Marion National Forest known as the Nebo Tract was also *ultra vires* acts and *void ab initio*.

INTRODUCTION

In this case, the Town purported to make a series of annexations beginning in 2004 with an annexation of property within the Francis Marion National Forest and culminating in October 2009 with the annexation of a 359.51-acre, privately-owned in-holding known as the "Nebo Tract," which is virtually encircled by the National Forest. The Town attempted to create the

required contiguity between its own border and the Nebo Tract – the third domino in a string of three annexations – by annexing a ten-foot wide strip of the Francis Marion. The Ten-Foot Strip, the first domino in this chain, is allegedly contiguous with the second domino in the chain – the "Nebo Church Tract" – which purportedly connects the Nebo Tract to the Ten-Foot Strip. *See* Plaintiffs' Exhibit 11 (map depicting area and relevant tracts). The Ten-Foot Strip is part of the National Forest and is actively managed for the benefit of the public by the United States Forest Service. On October 1, 2009 – the same day the Town purported to annex the Nebo Tract – the Town also enacted ordinances to approve a development agreement for the Nebo Tract, amend the Town's Comprehensive Plan to include the agreed-upon development, and rezone the Nebo Tract for substantial residential and commercial development. *See* Plaintiffs' Exhibit 10.

On April 18, 2011, this Court denied the Town's motion for summary judgment, finding that plaintiffs had standing to bring this challenge and that no statute of limitations bar exists to preclude plaintiffs' claims. Order at 4-6 (Harrington, K.L. Apr. 19, 2011) (the "Harrington Order"). Subsequent to this ruling, the Town filed a petition for certiorari in the Supreme Court. On May 25, 2012, the Supreme Court dismissed the Town's petition as premature, saying that, generally, the denial of a motion for summary judgment is not immediately appealable. *Vicary, et al. v. Town of Awendaw, et al.*, Appellate Case No. 2012-211590 (2012). The Court explained further that the issues raised in the motion may be raised again later and reconsidered at trial. *Id.* at 1-2. At trial, the Town did raise these same issues of standing and timeliness again via two separate motions for directed verdicts.[1]

[1] Pursuant to the Supreme Court's ruling in this matter, this Court has reexamined the Harrington Order with respect to the issues of standing and timeliness. Although this Court, in its discretion, considers the evidence submitted by the plaintiffs and the defendant to Judge Harrington on standing and timeliness to be part of its record for this case, this Court does not rely on such evidence in rendering its decision here. This Court finds that the evidence submitted at trial

FINDINGS OF FACT

The individual plaintiffs Lynne Vicary and Kent Prause are residents of the Town of Awendaw. Tr. at 55:14 – 56:1; 76:14-16. These individual plaintiffs brought this challenge because they are concerned that the Town's actions will degrade the quality of life in Awendaw, harm unique natural resources, including the Francis Marion National Forest, and result in higher taxes. Tr. at 82:11 – 84:1; Defendant Exhibit 6 (Vicary Dep.) at 37:15-25. Plaintiff South Carolina Coastal Conservation League (the "League") is a 501(c)(3) organization, which has members who live in the Town. Defendant Exhibit 4 (Desrosiers Dep.) at 114:25 – 115:2. The League brought this challenge because it too is concerned about how the challenged actions of the Town would affect the environment, including the National Forest. Defendant Exhibit 4 (Desrosiers Dep.) at 33:24 – 34:17.

After it was unable to secure a petition for annexation for the Ten-Foot Strip from the U.S. Forest Service, the Town decided to make use of a decade-old letter from a U.S. Forest Service representative in South Carolina stating that the agency had "no objection" to the annexation of ambiguously-described property referenced as Forest strips. Plaintiffs' Exhibit 1 (letter dated May 3, 1994 from David W. Wilson (U.S. Forest Service) to The Honorable William E. Alston (Town)).

According to the U.S. Forest Service, the agency did not intend for its letter of May 3, 1994 to constitute a petition of the federal government to annex National Forest lands, which are owned in their entirety by the federal government and administered by the Forest Service. Plaintiffs' Exhibit 14 (letter dated Feb. 16, 2011 from Paul L. Bradley (U.S. Forest Service) to

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provides ample support for this Court's findings on standing and timeliness. Moreover, consistent with these findings, this Court hereby denies the Town's motions for directed verdicts.

Mayor Samuel N. Robinson (Town)). Further, the Town failed to establish that the strips of National Forest land described in the May 3, 1994 letter include the Ten-Foot Strip at issue in this case. According to the testimony of Robert Lee Frank, a registered land surveyor, the location of the strips described in the 1994 letter is unclear, as the letter is too vague to provide a valid legal description of any property. Tr. at 40:21 – 41:21.

Even though the Forest Service never submitted a petition for annexation relating to the Ten-Foot Strip, the Town passed an annexation ordinance anyway stating that "a proper petition has been filed" for annexation of the Ten-Foot Strip of the Francis Marion and purporting to accept an annexation petition. Plaintiffs' Exhibit 8 at 3 (Annexation Ordinance dated May 10, 2004). Although the Town represented to the public that it received a 100% petition from the Forest Service, it never did. *See* Plaintiff Exhibit 9 (Town Dep.) at 40:9-11 (admitting that "it turned out that they [the Forest Service] would not give us anything in writing saying that they desired to be annexed")).

CONCLUSIONS OF LAW

I. Plaintiffs have Standing

The Town argues that the plaintiffs in trying to establish standing have "put the cart before the horse" by arguing about substantive defects in the annexation of the properties at issue "while ignoring the threshold issue" of standing. Defendant Town of Awendaw's Motion for Directed Verdict on the Issue of Standing at 3. Citing *State ex rel. Wilson v. Town of Yemassee*, 391 S.C. 565, 707 S.E.2d 402 (2011), the Town asserts under South Carolina law that annexation ordinances have the presumption of validity and that plaintiffs have wrongly asked this Court to look beyond the ordinances and weigh their validity. The Town also argues under *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014) that plaintiffs lack

standing because they allege injuries that are not particular to any one individual and instead describe general grievances suffered by the public as a whole. Defendant Town of Awendaw's Supplemental Memorandum of Law on Issue of Injury/Standing at 3.

Plaintiffs, on the other hand, assert that this case is not about a defective annexation petition; rather, plaintiffs contend this case is about a pattern of municipal deception in which the Town has admittedly engaged in for years and intends to continue doing so. Plaintiffs argue that they do not seek to prove that annexations made by the Town in good faith are defective; rather, plaintiffs seek a declaration under the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to 15-53-140, that the alleged annexation of the Ten-Foot Strip of the National Forest never happened as a matter of law because the Town never received – despite its representations to the contrary – the required petition for annexation. *See* Second Amended Compl., Prayer for Relief. As such, plaintiffs contend they have statutory standing under the South Carolina Declaratory Judgment Act and public interest standing in light of the unique nature of this case.

In support of standing, plaintiffs rely on the line of cases authorizing taxpayer challenges to government action, which have been upheld under the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to 15-53-140. *See* S.C. Code Ann. § 15-53-30 ("Any person ... whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder") (emphasis added); *see also Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) (holding that taxpaying citizen of Greenville County had a direct interest in the County abiding by procurement procedures set out in the County code); *Sloan v. School District of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000)

(finding taxpayer in Greenville County had standing to sue as an individual taxpayer who had interest in the proper use and allocation of tax receipts by the school district and saying "[a] taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina," and taxpayers in the past have been held to "constitute a class specially damaged" by illegal, *ultra vires* acts).

This Court finds that the plaintiffs have standing to bring this action because this case is more in line with *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000); and *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004), than those cited by the Town. *See Wilson v. Town of Yemassee*, 391 S.C. 565, 707 S.E.2d 402 (2011) and *Carnival Corp. v. Historic Ansonborough Neighborhood Assoc.*, 407 S.C. 67, 753 S.E.2d 846 (2014).

First, like the plaintiffs in the taxpayer line of cases, the individual plaintiffs and members of the League are municipal taxpayers who will be called upon to pay for expanded services required to serve the Nebo development that the Town has purportedly annexed and rezoned. The Supreme Court has confirmed that there is a strong public interest in allowing taxpayers, just like the plaintiffs here, to bring suit to prevent the expenditure of public funds to support *ultra vires* acts. *Sloan*, 356 S.C. at 547-51, 590 S.E.2d at 346-48. Moreover, unlike the *Carnival* case, in which the Court found within the specialized pleadings context of nuisance and ordinance enforcement claims that plaintiffs failed to set forth an injury that was different from the injury suffered by the public generally, the injury to the individual plaintiffs here as taxpayers is peculiar to a class of persons within the Town, as opposed to the public at large. *Id.* at 550, 590 S.E.2d at 348.

Second, unlike the *Town of Yemassee* decision, which involved a challenge to an irregularity or good-faith error in accepting an annexation petition or quibbling over whether an annexation was made through the 75% or 100% petition method, there was no annexation ever completed in the case at bar because the owner of the Ten-Foot Strip – the U.S. Forest Service – never took the action necessary to initiate the process. Instead of a 100% petition method, there was in effect a 0% petition method. *See* Plaintiffs' Exhibit 14 (letter dated Feb. 16, 2011 from Paul Bradley (Forest Service) to Mayor Robinson (Town) ("the Forest Service did not intend for the letter of May 3, 1994, to constitute 'a petition of the federal government' to annex National Forest lands ....").

Third, this case is further distinguishable from the *Town of Yemassee* decision because plaintiffs here have alleged intentional bad faith on the part of the Town. According to plaintiffs here, not only did the Forest Service not submit a petition for the Ten-Foot Strip, but the Town – after failing to convince the Forest Service to give it what it wanted – turned around and issued an ordinance that falsely stated that the Town had received a petition. *See* Plaintiffs' Exhibit 8 at 3 (Annexation Ordinance dated May 10, 2004 saying "a proper petition has been filed with the Town Council by 100 percent of the freeholders owning 100 percent" of the Ten-Foot Strip). This case thus stands in sharp contrast to *Town of Yemassee* where there was no intentional deceit alleged.

Finally, as in the *Sloan* line of cases, plaintiffs here also meet the test for public importance standing. According to the South Carolina Supreme Court, "[s]tanding 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." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). The public importance exception

recognizes that "citizens must be afforded access to the judicial process to address alleged injustices." *Id.* (quoting *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)). It entails a careful, case-by-case balancing of the interests of judicial economy on the one hand and the need to ensure checks against abuses of government power on the other. *Id.* (cautioning against overly formalistic standing analysis).

In *ATC South*, the Supreme Court addressed the public interest exception in the zoning context and explained that the "key" to this balancing is "whether a resolution is needed for future guidance." *Id.* Here, resolution of plaintiffs' claims is necessary to protect unique flora and fauna contained in the National Forest, which is owned, maintained, and conserved for the benefit of all Americans. Tr. at 83:12-14.

Moreover, plaintiffs' claims also concern a recurring controversy likely to continue resurfacing in the future. In fact, the Town admits to having annexed other National Forest strips in the past without a petition requesting their annexation. *See* Plaintiffs' Exhibit 9 (Town Dep.) at 73:23-25 (stating that "the Town has done this on several occasions."). And, its correspondence with the Forest Service indicates an intent to do so again. *See* Plaintiffs' Exhibit 3 (letter dated Jan. 23, 2004 from Mayor Alston to Forest Service requesting use of Ten-Foot Strip to annex Nebo Church and enable "other future annexation[s]"). Perhaps more importantly, the Town defends this practice on the grounds that a court has not yet ruled it illegal. Plaintiffs' Exhibit 9 (Town Dep.) at 74:1-7. For these reasons, plaintiffs have established they meet the public importance exception to maintain an action to ask this this Court to declare whether the Town's practice of expanding its municipal limits into the National Forest

is *ultra vires*. *See, e.g.*, *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69 (1999) (applying exception due to public interest in resolving challenge to *ultra vires* acts).[2]

For these reasons, this Court finds that plaintiffs have standing to seek a declaration regarding the legality of the challenged actions as this is a matter that is of such public importance as to require resolution for future guidance.

II. Plaintiffs' Action was Timely Filed

In addition to arguing lack of standing, the Town also argued at trial that plaintiffs missed the 90-day deadline to challenge the 2004 annexations of the Ten-Foot Strip and the Nebo Church Tract. Defendant Town of Awendaw's Motion for Directed Verdict on the Issue of Statute of Limitations at 1. As an initial matter, there is no dispute that plaintiffs timely challenged the purported annexation of the Nebo Tract. As required by statute, plaintiffs filed a Notice of Intention to Contest Extension of Town of Awendaw's Municipal Limits on November 25, 2009, within 60 days of the purported annexation of the Nebo Tract on October 1, 2009, and also filed their First Amended Complaint to add plaintiffs' annexation claims on December 22, 2009, within 90 days of the purported Nebo Tract annexation. *See* S.C. Code Ann. § 5-3-270.

Further, with respect to the purported annexations of the Ten-Foot Strip and the Nebo Church Tract, it is axiomatic that the passage of time cannot transform a void and unauthorized annexation into a valid one. *Bostick v. Beaufort*, 307 S.C. 347, 350, 415 S.E.2d 389, 391 (1992)

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[2] The *Carnival* decision is distinguishable on this point as well. In *Carnival*, the Supreme Court found that the plaintiffs did not have public importance standing. That conclusion was premised largely on the Court's view that the *Carnival* case "presents no issue of the constitutionality or legality of government action." *Carnival Corp.*, 753 S.E.2d at 853. That is not the situation here where the crux of plaintiffs' case is that the Town is engaged in illegal government action involving the National Forest, which the Town says it will continue.

(holding that a "fatally flawed" annexation petition renders an annexation ordinance "a nullity upon origination," and cannot be retroactively validated).

Further, statutes of limitation are not automatic bars to claims, but rather, they are affirmative defenses that can be waived and are subject to equitable doctrines, including estoppel and tolling. *See, e.g., Republic Contracting Corp. v. S.C. Dep't of Highways & Pub. Transp*, 332 S.C. 197, 503 S.E.2d 761 (Ct. App. 1998). Both doctrines apply here. Here, plaintiffs have shown that the Town has unclean hands in issuing the annexation ordinance for the Ten-Foot Strip because the Town falsely claimed that the U.S. Forest Service had "filed" a "proper petition" for annexation. Plaintiffs' Exhibit 8 at 3 (Annexation Ordinance dated May 10, 2004). Moreover, the Town itself did not even notify Charleston County that it had assumed control over the Ten-Foot Strip and Nebo Church Tract *until October 2009* – a full five years after the alleged annexations were consummated. *See* Plaintiffs' Exhibit 8 (letter dated Sept. 30, 2009 from Samuel Brown (Town) to Cathy Franks (Charleston County Planning Department). As a result, as of October 2009, Charleston County had not removed the Ten-Foot Strip or Nebo Church Tract from its maps. Plaintiffs Exhibit 9 (Town Depo.) at 55:7-19. Given the Town's misrepresentation and failure to provide notice regarding these annexations, this Court finds that the Town is estopped from asserting a statute of limitations defense and the time period for challenging the 2004 annexations is tolled.

III. Merits

Because this Court finds that plaintiffs have standing to bring this action and that this action was timely filed, the Court reaches the merits of this case.

Municipalities like the Town have only the powers granted them by Article VIII of the South Carolina Constitution and by state legislation. *Hospitality Ass'n v. Cnty. of Charleston*,

320 S.C. 219, 225-26, 464 S.E.2d 113, 117-18 (S.C. 1995). Actions outside these powers are void and have no effect. *See Bostick*, 307 S.C. at 350, 415 S.E.2d at 391 ("If an ordinance enacted by a municipality is beyond its powers, no subsequent action in relation thereto by the municipality can give it validity.").

The Town lacks the authority to annex non-contiguous property. S.C. Code Ann §§ 5-3-150 and -305 (allowing annexation of only contiguous property and defining contiguity). Because the Nebo Tract is not contiguous with the Town, the Town lacked authority to annex it, and its attempt to do so is void. The same is true with respect to Nebo Church. The Town could topple both of these "dominos" and bring them within its bounds only by jumping across the Forest, and it proved unable to obtain the cooperation from the Forest Service necessary to annex the intervening National Forest land. Its intentional misconduct in claiming to have received a petition that did not exist was *ultra vires*. Accordingly, the ordinance purporting to annex the Ten-Foot Strip was void *ab initio*.

As a matter of law, the annexation of the Ten-Foot strip never occurred because it could not be accomplished without a petition. Under Section 5-3-150, an annexation can become "complete" only upon acceptance of a petition "*requesting annexation*." S.C. Code Ann. § 5-3-150(3) (emphasis added). It is undisputed that the Town never received anything from the Forest Service requesting annexation of the Ten-Foot Strip. The 1994 letter the Town tried to use as a "petition" is no such thing. The term "petition" is commonly understood and construed by legal authorities to mean "[a] formal written request addressed to some governmental authority" or "[a] written address, embodying an application or prayer" from the submitter to some authority. Blacks Law Dictionary 1145 (6th ed. 1990).

Because Section 5-3-150 authorizes the Town only to accept annexation petitions and does not allow involuntary annexations, the Town had no authority to reach out of its own accord and grab the Ten-Foot Strip. As the Town itself has explained, "That's not the way the process works. The town does not send people a request and say, we want you to annex. The person who owns the property *asks* [through] a petition to the town to annex their property." Plaintiffs' Exhibit 9 (Town Dep.) at 29:10-13 (emphasis added).

Further, the 1994 letter does not even contain a valid legal description of any property and is too vague to describe any identifiable strip. What description it does contain is too unclear to be reasonably relied on in any event. Tr. at 40:21 – 41:21. And, the Town admits that in 2004, the Forest Service declined to provide "anything in writing" documenting an official position on annexation of the Ten-Foot Strip. Plaintiffs' Exhibit 9 (Town Dep.) at 42:15. The Town also understood that anything authoritative would need to come from Washington D.C., not the South Carolina representative who authored the 1994 letter. *Id.* at 42:16. The Town was thus aware that it could not legitimately rely on the decade-old letter as authoritative or reflective of the Forest Service's 2004 position.

CONCLUSION

This Court declares pursuant to the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to 15-53-140, that the annexation of the Ten-Foot Strip was void and of no effect because the Town never received a petition of annexation from the United States Forest Service. Because the annexation of the Ten-Foot Strip was *ultra vires* of the Town's authority, the subsequent annexations of the Nebo Church Tract and the Nebo Tract fail because these tracts lack contiguity with the Town. And finally, this Court declares further that because the annexation of the Nebo Tract did not occur as a matter of law, it follows that the other

ordinances enacted by the Town on October 1, 2009 to (1) approve a development agreement for the Nebo Tract, (2) amend the Town's Comprehensive Plan to include the agreed-upon development, and (3) rezone the Nebo Tract are each *ultra vires* acts and *void ab initio*.

IT IS SO ORDERED.

J. C. Nicholson, Jr.
Judge, Ninth Judicial Circuit

Charleston, South Carolina

Date: 7/24/14

Exhibit B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CA. NO. 09-CP-10-7399
LYNNE VICARY, KENT PRAUSE, and SOUTH CAROLINA COASTAL CONSERVATION LEAGUE,	)	
Plaintiffs,	)	ORDER ON DEFENDANT AWENDAW'S MOTION FOR RECONSIDERATION
v.	)	
TOWN OF AWENDAW, and EBC, LLC,	)	
Defendants.	)	

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter was tried before the Court on April 16, 2014. On July 24, 2014, this Court issued an order in favor of Plaintiffs, declaring, among other things, (1) that Plaintiffs had standing to bring this challenge; (2) that this action was timely filed; and (3) that the Defendant Town of Awendaw's (the "Town") purported annexation of the Ten-foot Strip of the Francis Marion National Forest was *void ab initio* and did not occur as a matter of law. On August 4, 2014, the Town filed a motion for reconsideration pursuant to Rules 59(e) and 62 of the South Carolina Rules of Civil Procedure.

In its motion for reconsideration, the Town requests that the Court reconsider its order invalidating the annexation of the Ten Foot Strip because the Town alleges that Plaintiffs challenge was not timely. Motion at 1. The Town also asks this Court to reconsider whether Plaintiffs have standing to mount this challenge. *Id.*

Having considered the papers filed by the parties, the Court finds that the arguments raised by the Town in its motion for reconsideration have been considered by this Court and are addressed in this Court's prior Order. There is nothing in the Town's motion that weighs in

favor of disturbing this Court's prior ruling; and therefore, the Town's motion for reconsideration is hereby denied.

IT IS SO ORDERED.

J. C. Nicholson, Jr.
Judge, Ninth Judicial Circuit

Charleston, South Carolina 29401

Date: 9/18/14