THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-7399
Appellate Case No. 2014-002118

Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League, Respondents,

.....

v.

Town of Awendaw, and EBC, LLC
Of whom Town of Awendaw is the Defendants Appellant.....

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case began with a Complaint for declaratory judgment and injunctive relief brought by Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League ("Respondents"), against defendants Town of Awendaw (the "Town") and EBC, LLC d/b/a/ EBCSC, LLC ("EBC"), of whom the Town is the Appellant, on November 25, 2009 seeking to invalidate the October 1, 2009 Ordinances approved by Appellant that rezoned a parcel of land known as part of the Nebo Tract in Charleston County, South Carolina, authorized a development agreement for the Nebo Tract, and amended Appellant's Comprehensive Plan regarding the Nebo Tract. The First and Second Amended Complaints sought to also invalidate the annexation of the Nebo Tract through a challenge of the annexation of US Forest Service land and Mount Nebo Church[1] property more than five (5) years prior to the Nebo Tract annexation.

The circuit court's order of July 24, 2014 (the "Final Order") found that, based on Respondents' allegations of certain intentional misconduct and illegal action by the Appellant, Respondents acquired taxpayer standing and the public importance exception from the constitutional standing requirements to pursue the challenge of the 2004 annexations by the Appellant of a 10-foot strip of United States Forest Service property and the property of the Mount Nebo Church, and the 2009 ordinances of Appellant that annexed the Nebo Tract and approved a Comprehensive Plan amendment, rezoning, and a development agreement for the Nebo Tract. The circuit court also ruled that the statute of limitations for challenging the 2004 Annexation Ordinances was tolled and that

[1] Mount Nebo Church has not been made a party to this action. Its property was annexed with the ten (10') foot strip of Forest Service property in 2004, and is contiguous to the Nebo Tract. If upheld, the circuit court's ruling will remove the Church property from the Town.

Appellant was estopped from asserting the statute of limitations defense based on Respondents' allegations of certain fraudulent representations by Appellant regarding the annexation petition utilized in conjunction with the 2004 annexation of the Forest Service property ("1994 Petition").

The trial court reviewed Respondents' claim against the 2004 annexation of the ten (10') foot strip of Forest Service property, finding that because Appellant had not received a petition that meets the substantive requirements of S.C. Code Ann. § 5-3-150 (3) as construed by the court, that the annexation was *void ab initio*, that the annexation of the Nebo Tract failed because the invalidation of the 2004 Forest Service and Nebo Church annexation deprived the Nebo Tract of the required contiguity, and that the ordinances concerning the development agreement, rezoning and Comprehensive Plan for Nebo Tract were each *ultra vires* acts and *void ab initio* because the Nebo Tract annexation did not occur as a matter of law.

Following is the procedural history of the case, which was heard before the lower court without a jury.

A Notice of the Intention to Contest Extension of the Town was filed by Respondents on November 25, 2009. The Summons and Complaint was filed on November 25, 2009 for declaratory judgment and injunctive relief alleging non-compliance with the Local Development Agreement Act, violation of the procedures for amendment of the Town Comprehensive Plan, and arbitrary rezoning. A First Amended Complaint was filed on December 22, 2009 for declaratory judgment and injunctive relief alleging the Nebo Tract annexation was void for various reasons, non-compliance with

the Local Development Agreement Act, violation of the procedures for amendment of the Town Comprehensive Plan, and arbitrary rezoning.

Appellant Answered the First Amended Complaint on January 22, 2010 raising eleven (11) affirmative defenses. Respondents filed a Second Amended Complaint on April 23, 2010 for declaratory judgment and injunctive relief alleging the Nebo Tract annexation was void for various reasons, non-compliance with the Local Development Agreement Act, violation of the procedures for amendment of the Town Comprehensive Plan, and arbitrary rezoning. Appellant answered the Second Amended Complaint on May 21, 2010 incorporating its answer to the First Amended Complaint and answering only the revised paragraphs of the Complaint.

Defendant EBC and Appellant filed a Motion for Partial Summary Judgment on December 22, 2010. Respondent filed a Motion for Partial Summary Judgment on March 11, 2011. Defendant EBC's and Appellant's Motion for Partial Summary Judgment was denied on April 19, 2011. An Order denying Appellant's Motion for Reconsideration was entered on July 19, 2011. An Order denying Respondent's Motion for Partial Summary Judgment was filed on September 17, 2013.

Appellant's Notice of Appeal of the denial of its Motion for Partial Summary Judgment was filed with the Court of Appeals on July 29, 2011. An Order remitting the case from the Court to the lower court was entered on July 10, 2012, which Order included denial of Appellant's Petition for Re-Hearing.

A Stipulation for Dismissal and Settlement Agreement as to Defendant EBC was filed September 6, 2012[2]. A non-jury trial was held April 16, 2014. The Final Order was issued on July 24 and filed on July 28, 2014.

Appellant filed a Motion for Reconsideration on August 6, 2014. An Order denying Appellant's Motion for reconsideration was entered on September 22, 2014.

A Consent Order for Substitution of Appellant's Counsel was filed on September 23, 2014, and issued by the lower court on October 16, 2014.

The Notice of Appeal was filed and served on October 1, 2014.

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[2] Because Defendant EBC and Respondents voluntarily settled their claims and counterclaims, EBC was dismissed from the case below. Stipulation of Dismissal. Therefor the Statement of the Case procedural history does not include the EBC pleadings related to its defense and counterclaims.

ARGUMENT

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE RESPONDENTS HAVE STANDING TO CHALLENGE THE ANNEXATION ORDINANCE.

A. Standard of Review.

Depending on the nature of the underlying controversy, a declaratory judgment suit is either equitable or legal in nature. See, e.g., Ballenger v. City of Inman, 336 S.C. 126, 130, 518 S.E.2d 824, 826-7 (Ct. App. 1999) (internal citation omitted). The Respondents challenge the validity of Appellant's ordinances to annex property, to rezone it and to approve a development agreement. The remedy sought by the Respondents, the invalidation of the ordinances adopted by the Town, sounds in equity. See, e.g., Myers v. Patterson, 315 S.C. 248, 251, 433 S.E.2d 841, 843 (1993) (a suit to restrain public officers from taking actions unauthorized by law sounds in equity); Bethel M. E. Church v. City of Greenville, 211 S.C. 442, 444-5, 45 S.E.2d 841, 842 (1947) (a suit to declare void a resolution by city council to vacate a portion of a street is a suit in equity). In an action at equity tried by a judge without a jury, an appellate court may reverse the circuit court's findings of facts in accordance with its own view of the preponderance of the evidence. Lambries v. Saluda County Council, 409 S.C. 1, 8, 760 S.E.2d 785, 788 (2014) (internal citation omitted). Additionally, as Respondents' basis for seeking to void the ordinances involves the interpretation of a statute, an appellate court will review that question of law *de novo*. Id.

Moreover, a municipal ordinance is valid and upon review should be upheld if the municipality had the "power to enact the local ordinance" and if the ordinance is "consistent with the Constitution and general law of the State." Aakjer v. City of Myrtle Beach, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010) (internal citation omitted);

Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 197 (2002) (internal citation omitted). Our Supreme Court precedent has been long established that a municipal annexation can be deemed "void" only where the specific provision of Title V, Chapter 3 of the South Carolina Code of Laws authorizing the annexation is unlawful. St. Andrews Pub. Serv. Distr. v. City Council of Charleston, 349 S.C. 602, 605, 564 S.E.2d 647, 648 (2002) (citing Quinn v. City of Columbia, 303 S.C. 405, 401 S.E.2d 165 (1991) (overruled in other part in St. Andrews). See also Beaufort County v. Trask, 349 S.C. 522, 527-8, 563 S.E.2d 660, 663 (Ct. App. 2002). The circuit court erred as a matter of law in finding that the 2004 and 2009 Annexations are *void ab initio* because neither Respondents nor the circuit court claimed that the annexation procedure established in S.C. Code Ann. § 5-3-150 (3) is unlawful in any part.

Where the 2004 Annexation ordinance is complete and unambiguous on its face, Tr. Pl. Ex. No. 8 pp. 3-4 (Apr. 16, 2014), the circuit court cannot as a matter of law consider extrinsic or parol evidence to contradict it, and it erred as a matter of law in relying entirely on parol evidence to invalidate it, Final Order pp. 3, 4, 7, 8, 10-12. Horry Tel. Coop., Inc. v. City of Georgetown, 408 S.C. 348, 354, 759 S.E.2d 132, 135 (2014) ("[m]unicipal records properly authenticated or verified are the only competent evidence of the proceedings of the transactions of governing bodies" (quoting Berkeley Elec. Coop., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992))). South Carolina precedent holds that an objection to parol evidence can be first raised on appeal because its admission is prohibited by a rule of substantive law, not merely by a rule of evidence. Muckelvaney v. Liberty Life Ins. Co., 261 S.C. 63, 198 S.E.2d 278 (1973); In re Estate of Holden, 343 S.C. 267, 539 S.E.2d 703, (2000). See II.B., infra.

B. Respondents Have No Statutory Standing and the Only Non-Statutory Party Which May Challenge a Municipal Annexation is the State of South Carolina Acting in Public Interest to Challenge an "Absolutely Void" Annexation Ordinance.

Respondents neither claim nor establish statutory standing to challenge the 2009 Nebo Tract Annexation or the bootstrapped challenge of the 2004 Annexation. Under S.C. Code Ann. § 5-3-270 a plaintiff challenging an annexation must be a "person interested therein." Under long standing precedent a statutory "challenger must assert an infringement of its own proprietary interests or statutory rights." St. Andrews Pub. Serv. Distr. v. City Council of Charleston, 349 S.C. 602, 604, 564 S.E.2d 647, 648 (2002) (citing State by State Budget & Control Bd. v. City of Columbia, 308 S.C. 487, 489, 419 S.E.2d 229, 230 (1992)). Respondents have not alleged or shown any infringement of their own proprietary interests or statutory rights arising out of any annexation ordinances, and therefore do not have statutory standing under S.C. Code Ann. § 5-3-270 to challenge any of them. Respondents cannot acquire statutory standing based solely on the South Carolina Uniform Declaratory Judgments Act, and the circuit court should have "reject[ed] any averment" by Respondents that the "proceeding under the Declaratory Judgment Act has any impact on [the] standing analysis." Bodman v. State, 403 S.C. 60, 67 n1, 742 S.E.2d 363, 366 n1 (2013); see also County of Lexington, S.C. v. City of Columbia, 303 S.C. 300, 301 400 S.E.2d 146, 147 (1991) (a plaintiff cannot acquire statutory standing merely by pursuing a statutory declaratory judgment).[3]

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[3] Respondents neither claim nor establish statutory standing to challenge the 2009 or 2004 annexations under the applicable standard. Moreover, Respondents neither claim nor establish statutory standing: under S.C. Code Ann. § 6-29-760 (C), granting standing to an "owner of adjoining land or his representative" to challenge the 2009 Nebo Tract Rezoning; under Chapter 29 of Title 6 of the South Carolina Code of Laws to challenge municipal ordinances to adopt or amend the Comprehensive Plan; or

Where the circuit court found that Respondents are entitled to pursue their challenges against the 2009 Nebo Tract Annexation and the 2004 Annexation based on taxpayer standing and the public importance exception from the general standing requirements, Final Order pp. 6 & 8, it violated the bright-line precedent of a three-prong test perfected by the South Carolina Supreme Court in a trilogy of rulings, prescribing that the only non-statutory party which may challenge any municipal annexation is the State of South Carolina when acting in public interest to challenge an annexation ordinance that is absolutely void. St. Andrews Pub. Serv. Distr. v. City Council of City of Charleston, 349 S.C. 602, 605, 564 S.E.2d 647, 648 (2002); State ex rel. Condon v. City of Columbia, 339 S.C. 8, 14, 528 S.E.2d 408, 411 (2000); Quinn v. City of Columbia, 303 S.C. 405, 407, 401 S.E.2d 165, 166-7 (S.C. 1991) (overruled in part in St. Andrews)[4].

In St. Andrews the Court firmly closed the door to private parties who claim non-statutory standing (such as taxpayer standing) or the public importance exception to challenge municipal annexations: "We now overrule Quinn, and *hold* that the *only non-statutory party which may challenge a municipal annexation is the State*, through a quo warranto action. In our view, the better policy is to limit 'outsider' annexation challenges to those brought by the State 'acting in the public interest.'" Id. at 605, 564 S.E.2d at 648

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under Chapter 31 of Title 6 of the South Carolina Code of Laws to challenge the 2009 Nebo Tract Development Agreement.

[4] Appellant argued correctly to the circuit court that the applicable law on standing in such annexation cases is primarily the St. Andrews case in its brief in support of its Motion for Directed Verdict on Standing, Court's Tr. Exh. 1. However, the circuit court summarily dismissed those defenses in a footnote, Order pp. 2,3, and determined that Respondents had standing without any reference whatsoever to this controlling jurisprudence. Nowhere in its Final Order did the circuit court explain why the controlling precedent of the St. Andrews case would not apply in this case.

(overruling, in part, Quinn v. City of Columbia, 303 S.C. 405, 401 S.E.2d 165 (1991)) (emphases added). That the State of South Carolina can invoke the public importance exception as a non-statutory party in a quo warranto action was previously acknowledged in State ex rel. Condon v. City of Columbia, 339 S.C. at 14, 528 S.E.2d at 411, and that an annexation ordinance cannot be deemed "absolutely void" unless the specific annexation enabling provision of Title V, Chapter 3 of the South Carolina Code of Laws is found to be unlawful, in Quinn v. City of Columbia, 303 S.C. at 407, 401 S.E.2d at 166-7. During the decade following St. Andrews, there have been only two reported annexation cases, of which State ex rel. Wilson v. Town of Yemassee, 391 S.C. 565, 707 S.E.2d 402 (2011) emphasized the need for strict adherence to the narrowly defined public importance exception from the general standing rules.[5] Id. at 572-4, 707 S.E.2d 402 at 406-7.

Because Respondents fail to meet the first prong of the St. Andrews test—none of them is the State of South Carolina—they are unambiguously prohibited from pursuing their annexation claims under the exclusive standing framework established in St. Andrews over a decade ago. Instead, Respondents argue and the court found that the Quinn door closed in St. Andrews should be re-opened to these non-statutory, private-party plaintiffs whose claims it found to be distinguished from St. Andrews and from Town of Yemassee on the basis that the claim against the 2004 Annexation was intentionally deceitful conduct by Appellant. Order, p. 5-7.

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[5] The other case, Town of Summerville v. City of North Charleston, 378 S.C. 107, 662 S.E.2d 40 (2008) examined an annexation pursuant to S.C. Code Ann. § 5-3-150 (1) which includes broader statutory standing provisions than § 5-3-150 (3) utilized by Appellant here.

C. The Public Importance Exception from the Standing Requirements is not Applicable.

An exception from the statutory and Constitutional standing requirements based on particularized injury may be granted to a plaintiff where the issue raised is of such public importance that its resolution is needed for future guidance. Freemantle v. Preston, 398 S.C. 186, 193-4, 728 S.E.2d 40, 44 (2012) (citing ATC South, Inc. v. Charleston County, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)(internal citations omitted). In Freemantle, our Supreme Court South articulated a strict two-prong test for evaluating the "need for future guidance" which does not exist independently of the plaintiff's (1) "need for" and (2) "entitlement to" injunctive relief. Id. at 194, 728 S.E.2d at 44. Freemantle also prohibits Respondents from achieving the public importance exception based on their allegations of municipal fraud. Id. 398 S.C. at 191 & 193-4, 728 S.E.2d at 43-44 (ruling that claims of collusion, breach of fiduciary duties, illegal gift of county funds, misfeasance, malfeasance, conspiracy, violations of public policy, and of violations of the South Carolina Freedom of Information Act by a resident taxpayer challenging a county's expenditure of public funds did not "warrant invocation of the public importance exception").

Instead of the applicable test, the circuit court improperly relied upon a standing framework previously utilized in procurement and taxpayer cases where a private party could acquire standing to challenge allegedly illegal governmental acts, Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); Sloan v. School Dist. of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), which framework has been superseded by Freemantle and is not applicable to annexation claims in the first place as the only the State of South Carolina is authorized by St. Andrews to pursue a

non-statutory public interest claim. The circuit court erred as a matter of law where it found, persuaded by Respondents' allegations of "municipal deception", "intentional bad faith", "intentional deceit," "unclean hands" and "misrepresentation" by Appellant, Final Order at 5, 7, 10, that Respondents are entitled to the public importance exception to pursue their challenge of the 2004 and 2009 annexations, where Respondents neither pleaded nor established either prong of the Freemantle test, and where Freemantle prohibits the invocation of the public importance exception based on Respondents' allegations of municipal deception.

The circuit court erred by finding that "future guidance" is needed to "protect unique flora and fauna contained in the National Forest which is owned, maintained, and conserved for the benefit of all Americans," and that such guidance can be achieved by resolving "whether the Town's practice of expanding its municipal limits into the National Forest is *ultra vires*", Final Order at 8—9, where Respondents have failed to prove any injury to the National Forest arising out of the 2009 or 2004 Annexations[6]. The Nebo Tract is not part of the National Forest, and the ten (10') foot strip of Forest Service land cannot be developed. There is no "entitlement to" injunctive relief based on the facts presented below. Moreover, no "future guidance" is needed to resolve a "recurring controversy likely to continue resurfacing in the future" against the Town's use of the 1994 Petition because Respondents cannot point to any South Carolina legal authority that prohibits the use of the 1994 Petition under S.C. Code Ann. § 5-3-150 (3)

[6] Moreover, Respondents actually agreed to the development of the Nebo Tract, extension of the development agreement and the rezoning in the Stipulation of Dismissal of EBC and Respondents. Stipulation pp. 4-6.

or that constrains a municipality from working with landowners to reach agreement and consensus on an annexation of their property under that section.

D. Respondents Fail to Meet the Test for Constitutional Standing.

If the St. Andrews bar to Respondents challenge is considered not to apply, Respondents fail to meet the three requirements established for constitutional standing: "(1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision." Sloan v. Greenville County, 356 S.C. 531, 549, 590 S.E.2d 338, 348 (S.C. Ct. App. 2003) (citing Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594,at 601, 550 S.E.2d 287,at 291 (2001) (internal citations omitted) Respondents claim that the injury to their taxpayer and environmental concerns arises out of the "development" of the Nebo Tract, Tr. Tr. 77:8-78:3, but no "development" of the Nebo Tract would occur without some future "*independent action of some third party not before the court*", ATC South, Inc. v. Charleston County, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (U.S. 1992) (emphasis added). The circuit court abused its discretion in finding that Respondents have standing to challenge the 2004 and 2009 Annexations because the "resolution of plaintiffs' claims is necessary to protect unique flora and fauna contained in the National Forest," Final Order p. 8, where the record is uncontroverted that the injury alleged by Respondents is entirely hypothetical and unsubstantiated, where the court did not find that the Respondents had demonstrated any injury to the National Forest arising out of the 2004 or 2009 Annexation Ordinances or any Appellant action to substantiate their constitutional

standing or public interest claim, and where the Respondents conceded that no development has been approved for the Nebo Tract by the Town since 2009, Tr. Tr. p. 77:20-24 (Apr. 16, 2014). Moreover, the Stipulation of Dismissal with EBC and Respondents allows the very development complained of. Stipulation, pp.4-6. Therefore, there is no injury that can be redressed by the court's decision.

The court further erred in finding that because the taxpayer injury alleged by the Respondents would be shared by "a class of persons within the Town" it entitles them to standing to challenge the 2004 and 2009 Annexation Ordinances as illegal governmental acts under Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) and Sloan v. School Dist. of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000). Final Order p. 6. Any Sloan averment of taxpayer standing pursuant to an injury that is shared by all of the jurisdiction's taxpayers was overruled by the Supreme Court in ATC South, Inc. v. Charleston County, 380 S.C. 191, 198, 669 S.E.2d 337, 340-41 (2008) (where the alleged fiscal injury to the plaintiff taxpayer arising out of a property rezoning approval is common to all property owners in the county, the "feature of commonality defeats the constitutional requirement of a concrete and particularized injury" (citing U.S. Supreme Court in Frothingham v. Mellon, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923)), and again in Freemantle v. Preston, 398 S.C. 186, 191 and 193-4, 728 S.E.2d 40, 43-44 (2012) (where the resident taxpayer challenged an allegedly excessive actual expenditure of public funds by the county, the alleged injury was common to all taxpayers of the county and that commonality defeated the constitutional requirement of a concrete and particularized injury required to establish taxpayer standing).

E. The Challenges of the Remaining Three Ordinances Are Moot.

The circuit court did not review the merits of the counts in Respondents' Second Amended Complaint regarding the ordinances (a) to approve the development agreement for the Nebo Tract; (b) to amend the Town's Comprehensive Plan; and (c) to rezone the Nebo Tract. Instead, the court found that these ordinances were *ultra vires* acts and *void ab initio*, Final Order pp. 12, 13, based on its invalidation of the 2004 annexation of the ten (10') foot strip of United States Forest Service land and the resulting absence of contiguity by the Nebo Tract to any incorporated area of the Town.

Because defendant EBC is not a party to this appeal and was dismissed as a party to the proceedings below prior to the trial, Appellant has not permitted any development authorized by the Nebo Tract Development Agreement Ordinance even though the Stipulation of Dismissal between EBC and Respondents would allow it. The challenge of the Development Agreement Ordinance would seem to be moot for purposes of this appeal.

Likewise, the challenge to the Nebo Tract rezoning ordinance would appear to be moot for purposes of this appeal, because the vesting of the planned development zoning entitlement is directly derived from the Nebo Tract development agreement and Respondents achieved a settlement with EBC on this issue. Finally, because of the statutory requirement that municipalities update their Comprehensive Plans periodically, the Town is soon required to undertake such update that will give the Respondents as well as the public at large with the opportunity to comment on the Comprehensive Plan provisions for the Nebo Tract. Therefore, the challenge to the amendment of the Comprehensive Plan would appear to be moot for purposes of this appeal as well.

Therefore, the Town is not including arguments on appeal concerning the circuit court order concerning its voiding of these other three ordinances concerning the Nebo Tract, but only the 2004 and 2009 Annexation Ordinances. To the extent this Court overturns the circuit court over its finding that the annexations in 2009 and 2004 are void and deems Respondents' challenges to the other ordinances are not moot, the Court could remand to the circuit court for a hearing on the merits for each other ordinance. However, this Court could also determine from the record that Respondents abandoned or failed to prove their case on the other ordinances and overturn the circuit court's ruling on them.

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE WAS NO PETITION FOR THE 2004 ANNEXATION.

A. The Circuit Court Committed an Error of Law by Adopting New Substantive Requirements for Annexation Petitions Where the Legislature is Silent.

The circuit court erred as a matter of law by construing S.C. Code Ann. § 5-3-150 (3) to include requirements for annexation petitions that conflict with the plain language of that section. Therefore the circuit court committed an error of law in finding that the 1994 Petition is not a "petition" under S.C. Code Ann. § 5-3-150 (3), and consequently invalidating the 2004 Annexation, and by extension the 2009 Nebo Tract Annexation, as *void ab initio*. S.C. Code Ann. § 5-3-150 (3) does not mandate a particular form for a petition, but provides:

> Notwithstanding the provisions of subsections (1) and (2) of this section, any area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by all persons owning real estate in the area requesting annexation. Upon the agreement of the governing body to accept the

petition and annex the area, and the enactment of an ordinance declaring the area annexed to the municipality, the annexation is complete. No member of the governing body who owns property or stock in a corporation owning property in the area proposed to be annexed is eligible to vote on the ordinance. This method of annexation is in addition to any other methods authorized by law.

Where the legislature is clearly capable of differentiating between the substantive petition requirements among the various separate statutory annexation procedures,[7] the court erred as a matter of law by obliterating the legislative differentiation of § 5-3-150 (3) by superimposing certain requirements that are expressly confined to § 5-3-150 (1) and others that are based on no South Carolina authority.[8] German Evangelical Lutheran

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[7] South Carolina legislature has expressly prescribed specific and different substantive requirements for petitions to annex multicounty park property; property of the State of South Carolina; and property annexed pursuant to less than unanimous consent. S.C. Code Ann. §§ 5-3-115, -140, -150 (1), and -300. Just as intentionally, the legislature rejected such specific requirements for petitions or for petitions used to annex property upon a unanimous consent (the procedure utilized by the Town), S.C. Code Ann. § 5-3-150 (3), or to annex property belonging to a corporation, school district, religious group, or to the federal government (an alternative procedure also available to the Town), S.C. Code Ann. §§ 5-3-120, -130, -140, and -260. Not even a petition but merely jurisdictional "consent" is required for the annexation of right-of-way area § 5-3-110. Similarly, it has been suggested that under § 5-3-150 (3) utilized by the Town in conjunction with the 2004 USFS Annexation, "consent" by the property owner is sufficient to meet the requirement of a signed petition. 62 Op. Att'y Gen. 2001 (1966), 1966 WL 9296 (S.C.A.G.).

[8] The court relies upon the trial testimony by Mr. Robert Lee Frank, a registered land surveyor, Tr. Tr. pp. 40:12-41:21 (Apr. 16, 2014) in finding that the 1994 USFS Petition "does not even contain a valid legal description of any property and is too vague to describe any identifiable strip", Final Order at 12, where S.C. Code Ann. § 5-3-150 (2) specifically mandates that the substantive requirements of a "legal description" and "a description of the area to be annexed" apply only to those certain and entirely different proceedings under § 5-3-150 (1), not utilized in the 2004 USFS Annexation. The court furthered this error in finding that the "Town failed to establish that the strips of National Forest land described in the [1994 Petition] include the Ten–

Church of Charleston v. City of Charleston, 352 S.C. 600, 607, 576 S.E.2d 150, 153 (2003) (finding that where the legislature has exempted certain real properties from improvement districts, the court cannot expand that class). The 2004 Petition, that is, the 1994 U.S. Forest Service letter, Tr. Exh. 1, is signed by the Forest Service as owner of the property annexed describing its property to be annexed. The long history of use of the letter as the petition without objection by anyone,[9] including the U.S. Forest Service, provides a basis to construe the letter as a petition for purposes of accomplishing what the statute clearly provides, that is, a simple mechanism for a property owner and a municipality to agree on annexation without any public involvement beyond the passage of local legislation, the Annexation Ordinance, to accomplish it. The ruling that a petition must be "requesting annexation" to be complete, Final Order p. 11, is not consistent with the plain language of or the Legislative intent for this section, and is not logical when the clear agreement between property owner/Forest Service and municipality/Appellant is that annexation will occur.

B. The Circuit Court Erred by Relying Upon Extrinsic Evidence as a Basis for Its Decision.

Respondents claim that the 2004 Annexation was not accomplished pursuant to a "petition" as stated on the face of the 2004 Annexation Ordinance and introduced a 2011 letter from an employee of the U.S. Forest Service, Tr. Exh. 14, to attempt to show the

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Foot Strip at issue in this case," Final Order p. 4, where it's not the Town's burden to do so and not required by § 5-3-150 (3). Ballenger v. City of Inman, 336 S.C. 126, 131, 518 S.E.2d 824, 827 (Ct. App. 1999) ("The burden is upon the party attacking the annexation to show that there has not been a compliance with the law."). Moreover, the area was clearly described. Tr. P. 51:14 – 53:14.

[9] No challenges were brought against any of the other six annexations of U.S. Forest Service property pursuant to the 1994 Petition that took place between 1994 and 2009. Tr. Tr. pp. 51:2 – 53:14; 60:9 – 61:4; 86:25 – 87:9; Def. Tr. Ex. No. 2 (Apr. 16, 2014).

signature of the Forest Service on the 1994 Petition was not intended to be used for annexation. With respect to the "proceedings of the transactions of governing bodies" such as the Town, the "only competent evidence" consists of "[m]unicipal records property authenticated or verified." Horry Tel. Coop., Inc. v. City of Georgetown, 408 S.C. 348, 354, 759 S.E.2d 132, 135 (2014) (quoting Berkeley Elec. Coop., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992)). The letter is clearly parol evidence and reliance on it by the circuit court is an error of law. Allowing such proof of intent by a different person years after the clear understanding of it between the parties cannot be upheld. South Carolina precedent holds that an objection to parol evidence can be first raised on appeal because it's admission is prohibited by a rule of substantive law, not merely by a rule of evidence. Muckelvaney v. Liberty Life Ins. Co., 261 S.C. 63, 198 S.E.2d 278 (1973) In re Estate of Holden, 343 S.C. 267, 539 S.E.2d 703, (2000). Admitting the parol evidence procured by the Respondent in 2011 regarding the 1994 Petition to overturn the 2004 Annexation is reversible error. Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992).

III. THE CIRCUIT COURT ERRED IN FINDING THAT APPELLANT FALSELY CLAIMED THAT IT HAD A PROPER PETITION TO ANNEX THE US FOREST SERVICE PROPERTY.

The circuit court erred by finding that the Appellant falsely claimed to have a petition for the 2004 Annexation. There was no intentional deceit or misrepresentation by Appellant that it used the 1994 letter from the Forest Service to be a petition. Tr. Tr. p. 50:18 – 51:16; p. 64:21 – 65:9. Respondents claimed and the circuit court agreed that the letter was not a petition under § 5-3-150 (3). The legal issue on appeal concerns this statute and Appellant's use of the affirmative act of the Forest Service of signing and sending the letter as discussed with Appellant. Until the 2011 correspondence from a

different employee attempted to construe the intent of the letter supplied to Appellant in 1994, the Forest Service has never indicated an issue or objection to the use of or withdrawn its 1994 Petition, or objected to any of the annexations by the Town in reliance on the 1994 Petition. Appellant communicated with the Forest Service prior to using the 1994 Petition when it was used in 1994, 1995, twice in 1996, and 1997 before it was used again in 2004. Tr. Tr. p. 56:18 – 57:12. Respondent's allegation and the circuit court's finding that use of the 1994 Petition was "intentional deceit" or misrepresentation must fail under the construction of the statute and the facts in the Record[10]. The ruling is derived solely from an impermissible interpretation of the statute.

The requirement of a "petition" as part of the various annexation procedures authorized by Title V, Chapter 3 of the S.C. Code of Laws must be construed to enable the federal agency and the annexing municipality to act as authorized by the specific statutory section. Duke Power Co. v. Laurens Elec. Coop., Inc., 344 S.C. 101, 106-7, 543 S.E.2d 560, 563 (Ct. App. 2000) (a construction of a statute cannot render it futile or superfluous) (citing TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998)). The court compounded these errors of law in finding that "the Town had no authority to reach out on its own accord" to seek out the 2004 USFS Annexation, Final Oder p. 12, where the Town is authorized by the law to actively pursue annexations, Ballenger v. City of Inman, 336 S.C. 126, 129, 518 S.E.2d 824, 826 (Ct. App. 1999) (a petition brought to a residence by a municipal employee for the

[10] The circuit court states the Respondents' assertions are not about a defective annexation petition, but about a pattern of municipal deception. Final Order, p. 5. This assertion is countered by the lack of proof of any such intentions, and by the forty-five (45) years of relevant experience of Appellant's Director of Planning and now Town Administrator. Tr. Tr. p. 45:5 – 48:24.

purpose of soliciting signatures is valid), and in finding that "Section 5-3-150 authorizes the Town only to accept annexation petitions and does not allow involuntary annexations", Final Order at 12, where subsection (1) of the section authorizes annexations based on less than unanimous consent. The circuit court further erred in failing to consider the particular clause in which the term "petition" appears and how it relates to the entirety of the annexation enabling legislation codified in Title V, Chapter 3 of the S.C. Code of Laws. Hughes v. Western Carolina Reg. Sewer Auth., 386 S.C. 641, 646-47, 689 S.E.2d 638, 641 (Ct. App. 2010) (When confronted with an undefined term in a statute, a court will consider the language of the particular clause in which the undefined term appears and also its meaning in conjunction with the purpose of the whole statute.). Where the same word appears more than once in a statute, it can have different meanings as necessary to "avoid an absurd result." Smalls v. Weed, 293 S.C. 364, 370, 360 S.E.2d 531, 534 (Ct. App. 1987). The circuit court reached an absurd result where it construed the annexation petition requirements under § 5-3-150(3) in a manner that conflicts with the express consent of the Forest Service, a construction that makes the annexation of federally owned property under § 5-3-150(3) impossible and that could not have been intended by the South Carolina Legislature. Moreover, the interpretation of the statute by the circuit court cannot turn the Forest Service's and Appellant's understanding and use of the 1994 Petition, based on ten years of experience with it between 1994 and 2004, into an action that it was not. Appellant had no intention to deceive anyone, and did not evidence any intentional misrepresentation of its use of the 1994 Petition with the Forest Service or the public. Tr. Tr. p. 86:25 – 87:9. The circuit court's finding of municipal deception is clear error and must be reversed.

IV. THE CIRCUIT COURT ERRED IN FINDING THAT THE TOWN IS ESTOPPED FROM ASSERTING A STATUTE OF LIMITATIONS DEFENSE WHERE THE RESPONDENTS FAILED TO PLEAD AND PROVE THE REQUIRED ELEMENTS FOR EQUITABLE ESTOPPEL.

The circuit court committed an error of law in finding that Appellant is estopped from asserting a statute of limitations defense against Respondents' challenge of the 2004 Annexation "[g]iven the Town's misrepresentation" regarding the 1994 petition, Final Order p. 10, where Respondents failed to plead and prove the common law elements for equitable estoppel. The circuit court improperly applied Republic Contracting Corp. v. S. C. Dept. of Highways and Pub. Transp., 332 S.C. 197, 503 S.E.2d 761, (Ct. App. 1998) to Respondents' equitable claims by analyzing the alleged substantive merits of these claims, Final Order p. 10, where the two prongs of the Republic Contracting test require a showing that (1) the intent of Appellant was to delay the appeal by these specific Respondents, and that (2) these specific Respondents delayed their appeal in reliance on Appellant's communications with them. Id. at 211, 503 S.E.2d at 768-9. Republic Contracting is limited to the context of construction liability cases, id. at 212, 769, and expressly rejected by Town of Yemassee in the annexation context. 391 S.C. at 578, 707 S.E.2d at 409. In fact, Republic Contracting directly supports Appellant's statute of limitations defense, because neither Appellant nor the Town of Yemassee "induc[ed] the [Respondents] either to believe that an amicable adjustment of the claim will be made without suit or to otherwise forbear exercising the right to sue" or "lulled [Respondent] into a sense of security, preventing it from filing suit before the running of the statute of limitations." Id. Respondents expressed no objections to the 2004 annexation, for over five years, not until 2009, when reaching back to it was necessary in the absence of independent justifications to attack the 2009 Nebo Tract annexation. Pl. Tr. Ex. No. 9 p.

65:11 – 13 (Apr. 16, 2014). The Respondents neither pleaded nor established any communications with Appellant within the 90-day appeal period following the 2004 annexations that would have persuaded them to delay their challenges against Appellant. Mere allegations by Respondents of "municipal deception", "intentional bad faith", "intentional deceit," "unclean hands" and "misrepresentation" by the Appellant concerning the 1994 Petition, as found by the circuit court, Final Order at 5, 7, 10, are not sufficient as a matter of law under Republic Contracting to estop Appellant's defense of statute of limitations.

Moreover, a decade after Republic Contracting relied upon by the circuit court, American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009) stated the three-prong test that plaintiffs are required to meet to overcome the statute of limitations defense, cautioning that equitable tolling is "reserved for extraordinary circumstances" and "rarely applied" in this state. Id. at 582-3, 674 S.E.2d 181 at 184 (citing Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct. App. 2008); *See also* Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 119, 687 S.E.2d 29, 34 (2009).). The circuit court erred as a matter of law in finding Appellant is estopped from raising the statute of limitations defense when there is no evidence to support the requirements for estoppel: "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position." Id. (citing Morgan v. S.C. Budget & Control Bd., 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008)). Moreover, Respondents neither pleaded nor proved that as to the 2004 Annexation that their "delay in bringing the action was induced" by

the Appellant, an element required before the Appellant "may be estopped from claiming the statute of limitations as a defense." Id. (citing Wiggins v. Edwards, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994)). Clearly a challenge of the 2004 Petition in the 2004 Annexation was of no interest to any of Respondents until the Nebo Tract was annexed in 2009. More telling is the fact that Appellant had, with Forest Service knowledge each time, used the same Petition for six (6) other annexations of property described in the 1994 Petition since 1994 with no objections. Tr. Tr. p. 56:18 – 57:12. Even if Respondents somehow had standing to appear before the circuit court, the court erred by ruling that equitable estoppel applies to Appellant's statutory defenses.

V. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE STATUTORY TIME PERIOD FOR CHALLENGING THE 2004 USFS ANNEXATION WAS TOLLED.

The circuit court committed an error of law in finding that the time period for challenging the 2004 Annexation is tolled "[g]iven the Town's misrepresentation and failure to provide notice regarding these annexations" Final Order at 10. In Ex parte State ex rel. Wilson v. Town of Yemassee, 391 S.C. 565, 578, 707 S.E.2d 402, 409 (2011) the South Carolina Supreme Court expressly rejected this "discovery rule" proposed by the plaintiffs there—including the Respondent Coastal Conservation League—that expands the operation of the post-annexation notice provision established in S.C. Code Ann. § 5-3-90 by staying the commencement of the 90-day appeal period until the provision of the notices to the former local jurisdiction, Charleston County. Final Order, p. 10. The late notices given to Charleston County provide no basis whatsoever for tolling the statutory limitation for challenging the annexation. No rights of Respondents can be harmed in any way by a late notice between governmental bodies concerning property of third parties. Moreover, the record contains evidence

conclusively establishing that the 2004 Annexation and the 2004 Mt. Nebo Church Annexation were published in accordance with the applicable statutory requirements, causing the commencement of the 90-day limitations period upon the final reading of the ordinances on May 10, 2004. Tr. Tr. pp. 54:1-55:3; p. 64:6-17[11]; Pl. Tr. Ex. No. 8 pp. 2-3; Pl. Tr. Ex. No. 9. The tolling of the statute of limitations must be reversed.

CONCLUSION

Based on the foregoing, Town of Awendaw respectfully requests that this Court reverse the Order of the Circuit Court.

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[11] The 2004 annexation ordinance adopted by the Town received first reading on April 15, 2004 and final reading on May 10, 2004, all readings at Town Council meetings were open to the public and the meeting agendas were posted in advance of the meetings, and no public hearing on these annexation ordinances is required under § 5-3-150 (3) or by any other provision of Title 5 of S.C. Code of Laws.

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Attorney for Town of Awendaw

Charleston, South Carolina
January 5, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-7399
Appellate Case No. 2014-002118

Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League, ... Respondents,

v.

Town of Awendaw, ... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Town of Awendaw, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Initial Brief of Appellant

Counsel Served: Attorneys for Respondents

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January 5, 2015

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League v. Town of Awendaw
Civil Action No.: 2009-CP-10-07399
Appellate Case No.: 2014-002118
NMRS File No.: 44743/01500

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal in regard to the above-referenced matter. We would ask that you file the originals and return clocked-in copies to us via our courier.

By copy of this letter to counsel of record in this matter, we are serving them with copies.

Very truly yours,

Newman Jackson Smith

Newman Jackson Smith

NJS:csf
Enclosures
cc: (all via U.S. mail w/enc.)

W. Jefferson Leath, Jr., Esq.
Christopher K. DeScherer

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JAN 05 2015
SC Court of Appeals