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 ..... Defendants,

Of whom Town of Awendaw is the Appellant

Reply Brief

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ARGUMENT

I. The Respondents' argument that annexation in 2009 was void *ab initio* fails because the 2004 annexation was valid.

Respondents argue that this Court can affirm the lower court "solely based on the fact that the annexation was void *ab initio*" (Respondents' Initial Brief at 31), and relies on Bostick v. City of Beaufort, 307 S.C. 347, 415 S.E.2d 389 (1992) to support that finding. Reliance on Bostick is misplaced. There the City of Beaufort used Section 5-3-150(1), the seventy-five percent method of annexation, and was found not to have complied with that section's requirements that the petition describe the area and that it be included in a plat attached thereto. The court found that the Bostick's property was not described and was not shaded on the plat attached to the petition. This was found to be a substantive defect in the petition. Here, Section 5-3-150(3) has no such requirements. The Town's acceptance of the letter signed and mailed by the Forest Service to the Town as the petition for annexing the ten foot strips described therein is not a substantive defect in the petition and the annexation of the ten foot strip in 2004 is valid. The annexation ordinance on its face is not defective and the ordinance is not void *ab initio*. The intent of the Town and the Forest Service to annex the ten foot strips is clear and unambiguous.

The primary holding of the Circuit Court was not that the annexation 2009 was void ab initio, but the erroneous holding that the town's acceptance of the Forest Service letter as a petition for all of the land described therein was municipal deception

and intentionally bad faith or fraud.[1] From this erroneous holding flows the holding that both 2004 and 2009 annexations did not happen as a matter of law and were *void ab initio*. The Respondents cite the trial court's holding that the annexations were *void ab initio* as a basis that its action was not time barred, and incorrectly admonish the Appellant for not addressing it in its Initial Brief, R.I.Br. at 31. A careful reading of the Appellant's Initial Brief, at 9-10, highlights the governing precedent, preserved by St. Andrews Public Service Dist. v. City Council of City of Charleston, 349 S.C. 602, 605, 564 S.E.2d 647 648 (2002), 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. Quinn v. City of Columbia, 303 S.C. 405, 407, 401 S.E.2d 165, 166-7 (1991). See also *Beaufort County v. Trask*, 349 S.C. 522, 527-8, 563 S.E.2d 660, 663 (Ct. App. 2002) (an annexation of property owned by the State of South Carolina in the absence of consent or signature by the State is not "void" because the municipality can perfect the annexation in compliance with the statutory procedures). Neither the Respondents nor the circuit court claimed that the annexation enabling legislation is unlawful legislation in any part or that the Town does not have the authority to annex the property. Respondents merely claim that acceptance of the petition and adoption of the annexation ordinance were "illegal or unauthorized government acts", R.I.Br. at 18.

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[1] The Respondents attempt to support their argument for standing and timeliness by appealing to the findings of the "Harrington Order," Respondents' Initial Brief at 2 fn1, where this interlocutory order was expressly not relied upon by the trial court, Final Order at 2 fn1, and where the South Carolina Supreme Court ruled that the Harrington Order does not "finally determine anything about the merits of the case." Remittitur (filed July 10, 2012).

The circuit court compounded this error of law by finding that the Town's approvals constituted *ultra vires* acts, Final Order at 12, where *ultra vires* actions are only those that are "not within the powers of a municipal corporation to make under any circumstances or for any purpose." Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 210, 417 S.E.2d 579, 582 (1992). Because the Town's ordinances are not *void ab initio* under the governing precedent, the Respondents are subject to the governing standard for equitable estoppel, for which Respondents have neither plead nor proved.

II. The Respondents' challenge of the 2004 annexation was not timely.

Respondents argue its challenge of the annexation was timely because the annexation was void. Presumably Respondents refer to the 2004 annexation since there is no dispute that the 2009 challenge was timely brought. Because the 2009 annexation was not void *ab initio*, because the 2004 annexation was valid, there is no way that the Respondents' challenge can be considered timely. Respondents argue that because the annexation by the Town was *ultra vires,* the standing of Respondents based on public importance and taxpayer standing is a correct holding of the lower court. As shown above, the annexation was not an *ultra vires* act, and Respondents have no standing to raise any grounds that their challenge of the 2009 annexation includes a timely challenge of the 2004 annexation. Moreover, the finding that Respondents have standing must fail because the very damages complained of—from a taxpayer's standpoint (assuming the Respondents' allegations that taxes would be needed to

support the Nebo Tract development)[2], the very basis of the Circuit Court's ruling (final Order, page 6; Respondent Initial Brief at 9)—were resolved by the Settlement Agreement both signed by both the Developer/Land Owner EBC and Respondents. Paragraph 3 of the Settlement Agreement provides for a package treatment plant for sewage disposal that would preclude use of the Town's system; Paragraph 5 of the Settlement Agreement allows rezoning and development of the property as planned; and Paragraph 7 of the Settlement Agreement extends the term of the Development Agreement for the duration of the litigation with EBC (Exhibit A, Settlement

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[2] Uncontroverted testimony by Respondent Coastal Conservation League establishes that it was not familiar with this publicly available information about the positive effect of the Nebo Tract development to the Town and its taxpayers, nor made any efforts to asses the accuracy of its taxpayer injury claims:

Q. ... And is this a position that CCL takes, that the development of Nebo tract or similar developments could raise -- have the effect of raising the property tax?
A. It's a claim that we make, yes, urn-hum.
...
Q. And have you commissioned any study that would substantiate that claim -
A. No.
...
Q. [The Permar study] is on that issue, is it not?
A. Yes, it is.
Q. Do you have any disagreement with the conclusions of that study?
A. I'm not familiar enough to say.
Q. Okay. Are you familiar with the conclusion of that study to the effect that, in fact, the development will generate more revenues than the costs of the infrastructure?
A. I'm not familiar -- I mean, I have - I remember at the time that we had discussed that, but I also know that in other cases that we've been dealing with over the years that there are studies similar to that and that we always have to look at the specifics of what exactly they're measuring and what the claims are in the analysis and the numbers, basically, before we agree or disagree with a study like that.
...
A. I don't remember that we said one way or the other whether we agree with it. I remember that we discussed having somebody possibly analyze the study, but I don't think we ever did that.

Plaintiff's Suppl. Exhibit 8 105:3 - 107:13 (deposition of Megan Desrosiers, Nov. 9, 2010) (filed Mar. 22, 2011).

Agreement, to Stipulation of Dismissal). Only the claim that the development of private property, the Nebo Tract, as now agreed to by Respondents in the Settlement Agreement, would endanger the Francis Marion National Forest remains, making the challenge of the ten foot strip moot. Such claims of injury cannot stand under the taxpayer standing granted by the Circuit Court. Respondents are in no different stance than other taxpayers regarding such erroneous claims of injury to their enjoyment of the National Forest.

Moreover, the record is entirely void of any evidence of any specific type of concrete and particularized environmental injury to the National Forest or to any of the Respondents, and of any evidence of when such injury might occur.[3] The respondents concede that no development has been approved for the Nebo Tract by the Town since

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[3] Paintiff's Suppl. Exhibit 1., par. 5-7 (affid. James M. Cubie, March 15, 2011) (filed March 22, 2011):

If the Nebo Tract is developed in the manner proposed, I believe it will have severe impacts on the Francis Marion. .. I believe that the introduction of homes, businesses, cars, and trucks will displace wildlife populations. I am also concerned that construction activities on the Nebo Tract will negatively impact the Wando River. ... I believe the United States Forest Service will be unable to burn the Forest in order to maintain important fire-dependant habitats, such as the longleaf pine ecosystem. ... I am concerned that a traffic light would have to be installed on Highway 17, which would also serve to lengthen my commuting time. ... I believe there will be increased taxes imposed on property owners to construct and maintain the facilities and services that will be needed to support this project, and I do not think the tax revenues from the project would offset the additional costs.

Plaintiff's Suppl. Exhibit 5., par. 9 - 11 (affid. Richard D. Porcher, Ph.D., March 16, 2011) (filed March 22, 2011):

With residential and commercial development comes more people, more noise, more water use, more water pollution, more air pollution, more habitat disruption, more roads, etc. ... Second, intensive development adjacent to or within the Forest will likely result in physical harm to the Forest. ... The development of tracts like the Nebo Tract will likely result in the discharge of harmful runoff, which can flow offsite and degrade aquatic resources in the Forest. ... it can be expected that the introduction of greater levels of development in close proximity to the Forest will undermine the Forest Service's ability to manage the Forest.

2009, Tr. Tr. p. 77:20-24 (Apr. 16, 2014), have "presented no evidence their opportunity to view and enjoy the [natural resource] would be diminished," and their injury is conjectural because "it is not certain" that the Town's actions will result in the scope and scale of environmental injury hypothesized by the Respondents. Sea Pines Ass'n for Protection of Wildlife, Inc. v. South Carolina Dept. of Natural Resources, 345 S.C. 594, 602, 550 S.E.2d 287, 292 (2001).

Respondents argue that Freemantle v. Preston, 398 S.C. 186, 728 S.E.2nd 40 (2012) applies to support its argument (Initial Brief Respondents at 16) but only presents terms of public importance based on alleged injury to the Francis Marion National Forest. The ten foot strip of Forest Service lands annexed by the Town in 2004 will see no development whatsoever. The private land, the Nebo Tract, that was annexed in 2009 may see development, but unless such development is a nuisance such that it could be enjoined as a matter of underlying property law in South Carolina, no injunctive relief can be supported. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Clearly, private property adjacent to the National Forest can be developed, as it has in many other instances, and such development cannot be found to be a nuisance. Finally, there can be no standing when the injury complained of has been settled away.

III. The Respondents' request for the additional sustaining ground that a strip annexation cannot satisfy the requirements of contiguity is contrary to governing precedent.

In violation of the governing precedent, Respondents request that the Court affirm the trial court's ruling on the additional sustaining ground that "a strip annexation cannot satisfy the requirements of the statutory definition of contiguity in

any event" because "[a] narrow, ten-foot strip cannot provide the 'continuous border' necessary for contiguity under South Carolina law." Respondents' Initial Brief at 28. Respondents cite S.C. Code Ann. § 5-3-305 and point out that its definition of "contiguous property" was last codified in 2000, and argue that the word "adjacent" in the statutory requirement nullifies the remaining provisions of the statutory section which provide that intervening elements do not destroy contiguity that exists "but for" for the intervening elements and that "adjacency" to the incorporated area is somehow a separate and superseding requirement for contiguity. As cited by the Respondents' Initial Brief, their own trial exhibit (Plaintiffs' Exhibit 11) establishes that the 2004 annexation is adjacent and contiguous to the incorporated Town of Awendaw precisely as allowed by S.C. Code Ann. § 5-3-305 for the intervening element of US HWY 17.

Respondents fail to acknowledge the subsequent case law that has construed the requirement of "contiguous property" as codified in S.C. Code Ann. § 5-3-305. Under the governing precedent of St. Andrews, 349 S.C. at 606, 564 S.E.2d at 649, "the sole requirement for annexation is contiguity" and no separate demonstration of adjacency of some sort is required. Where "two parcels touch even at just one point, they are contiguous" for the purpose of the statutory requirement of contiguity, and "even when two properties touch at one point, the border they share is continuous" and the Court cannot read into the definition a requirement that the "parcels' boundaries must overlap to some degree." Cabiness v. Town of James Island, 393 S.C. 176, 196 n8, 712 S.E.2d 416, 427 n8 (2011). The 2000 codification of the definition in no way expands the Court's authority to construe the statute, and the Court cannot impose additional requirements not established in the statute, such as requirements of "substantial physical

touching" or "a common boundary." Bryant v. City of Charleston, 295 S.C. 408, 410, 368 S.E.2d 899, 900 (1988) (*cited in* St. Andrews, 349 S.C. at 606, 564 S.E.2d at 649, reiterating the sole requirement of contiguity). Neither does the codification expand the Court's authority to construe the requirement of contiguity to prohibit the annexation of properties that are linear in shape, where, as codified "[t]here is no limitation in our annexation statute as to the extent or shape of the territory which may be annexed and there is nothing from which any such limitation may be implied." Tovey v. City of Charleston, 237 S.C. 475, 483-4, 117 S.E.2d 872, 876 (1961).

CONCLUSION

Respondents have failed to show that the lower court's ruling that the Town of Awendaw engaged in a pattern of municipal deception that makes the annexation ordinance void *ab initio* should be affirmed. This Court should overturn the lower court and uphold the annexation.

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March 16, 2015

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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):

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March 16, 2015

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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 Reply Brief in regard to the above-referenced matter. We would ask that you file the original and return the clocked-in copy in the enclosed envelope.

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

Very truly yours,

Newman Jackson Smith

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

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