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 Appellant.

FINAL BRIEF OF RESPONDENTS

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III Whether the trial court was correct in holding that it was illegal in 2004 for the Town to use a May 3, 1994 letter from the U.S. Forest Service as a substitute for a petition for annexation when expert testimony at the trial, which was unrebutted by any expert Testimony provided by the Town, showed that the 1994 letter did not even describe the National Forest lands at issue.

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V. Whether the trial court was correct in holding that the Town cannot invoke the statute of limitations to defend its *ultra vires* actions.

STATEMENT OF THE CASE

Introduction

This appeal involves matters of significant public importance. At its core, this case is not about a defective annexation petition; rather, this appeal is about a pattern of municipal deception, which the Appellant Town of Awendaw ("Town" or "Appellant") has admittedly engaged in for years and intends to continue. Although the Town would like to shield its deceptive actions from judicial review by relying on standing cases that apply to annexations made in good faith, the trial court rightly held that this case is properly viewed as an action for declaratory relief that Respondents were entitled to bring under the public importance exception

to standing and as taxpayers. The trial court also correctly determined that the Town cannot successfully defend its actions by claiming that the passage of time can transform an *ultra vires* act into a legal one where the Town falsely stated to the public that it had obtained a petition for annexation from the United States Forest Service ("Forest Service") – a necessary prerequisite to a valid annexation – when it never did [1] The trial court was also correct in holding that the purported annexation of a ten-foot wide strip of the Francis Marion National Forest was *ultra vires* and *void ab initio* because the Town engaged in intentional misconduct in claiming that it had received a petition for annexation when it had not and where expert testimony introduced at trial explained that the 1994 letter relied upon by the Town as a petition for annexation does not even describe the ten-foot strip of the National Forest at issue In addition, as an additional sustaining ground for upholding the lower court decision, this Court should find that the strip annexation method purportedly attempted here does not satisfy the requirements for "contiguity" as defined in S.C Code Ann. § 5-3-305. And finally, the trial court rightly declared that the municipal ordinances challenged below to annex the Nebo Tract; 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 are also *ultra vires* and *void ab initio*.

Facts

This appeal involves a series of *ultra vires* actions by the Town, beginning in 2004 with an unlawful, alleged annexation of property within the Francis Marion National Forest ("Francis Marion," "National Forest," or "Forest") and culminating in October 2009 with the purported

[1] Notably, Judge Nicholson was the second judge to rule in Respondents' favor on the same issues of standing and timeliness. Previously, in denying the Town's motion for summary judgment, Judge Kristi Lea Harrington also found in Respondents' favor, holding that Respondents did have standing and that their challenge was timely. *See* ROA 0001 – 09 (Order, Judge K.L. Harrington (Apr. 19, 2011) (hereinafter "Harrington Order")).

annexation of a 359.51-acre, privately-owned in-holding known as the "Nebo Tract" that is virtually encircled by the National Forest. ROA 0014 (Trial Court Order, Judge J.C Nicholson, Jr (July 28, 2014) (hereinafter "Order") at 1). The Nebo Tract borders some of the Francis Marion's rarest and most unique habitats. ROA 0016 (Order at 3); *see also* ROA 0291 (Affidavit of Jean B. Everett, Ph.D (hereinafter "Everett Aff.") at ¶ 5). Development of the Nebo Tract would have many detrimental effects on the Forest, the principal one being that it would interfere with the Forest Service's ability to continue using prescribed burns to manage the Francis Marion's vital long-leaf pine habitat. ROA 0292 – 93 (Everett Aff. at ¶ 10)

The Nebo Tract is presently undeveloped. It has long formed part of unincorporated Charleston County and been subject to the County's rural zoning requirements, which limit development to preserve the area's rural character. *See* ROA 0152 – 54 (Trial Transcript (Apr. 16, 2014) (hereinafter "Tr ") at 82 17-83 8, 83:21 – 84:1); ROA 0285 (Affidavit of Megan Desrosiers (hereinafter "Desrosiers Aff ") at ¶ 3).

In 2009, EBC, LLC,[2] the owner of the Nebo Tract, requested that the Town annex the Nebo Tract under the 100% petition method in S.C Code Ann. § 5-3-150(3). Under South Carolina law, annexation can be completed only through acceptance of a petition On October 1, 2009, the Town passed an ordinance purporting to accept the petition and annex the Nebo Tract *See* ROA 0185 (EBC Annexation Ordinance).

[2] At the onset of this litigation on November 25, 2009, Respondents named EBC as a defendant in this matter, and on January 22, 2009, EBC asserted counterclaims against Respondents On September 4, 2012, Respondents and EBC entered into a settlement agreement with respect to the claims brought against one another. ROA 0356 – 66 (Settlement Agreement between Respondents and EBC (Sept. 4, 2012) (hereinafter "Settlement Agreement")). However, the Town was not part of that agreement, so Respondents' claims challenging the annexation and rezoning of the Nebo Tract, as well as the development agreement and amendment to the Town's comprehensive plan, proceeded to trial

The annexation was part of an overall effort to make intensive residential and commercial development of the tract possible Accordingly, that same day, the Town also passed ordinances rezoning the Nebo Tract as a "planned development" and declaring its Comprehensive Plan amended to allow the Nebo Tract Planned Development, and approved a development agreement with EBC. *See* ROA 0221 – 25 (Town Ordinances Nos. 09-09, 09-10, & 09-11). Together these actions purportedly allow for up to 360 residential units and up to 90,000 square feet of gross floor area for commercial uses and 80,000 square feet of gross floor area for office uses. ROA 0290 – 91 (Everett Aff. at ¶ 4).

In this case, the Town has attempted to manufacture contiguity with the Nebo Tract – the third domino in a string of three unlawful annexations – by allegedly annexing a ten-foot wide strip of the Francis Marion (hereinafter the "Ten-Foot Strip of the Francis Marion" or the "Ten-Foot Strip"). The Ten-Foot Strip is part of the National Forest and is actively managed for the benefit of the public by the Forest Service. This Ten-Foot Strip is approximately 1.25 miles long, and is the first domino in this illegal chain. *See* ROA 0188 (Ten-Foot Strip Annexation Ordinance); ROA 0232 (Nebo Map) The Ten-Foot Strip 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 Respondents provided a map depicting this string of alleged annexations to the trial court. *See* ROA 0232 (Nebo Map). In sum, the annexation of the Nebo Tract relies entirely on the alleged contiguity established by the two previous illusory annexations in 2004 of the Nebo Church Tract and the Ten-Foot Strip

The Town attempted to annex each of these three tracts using the 100% petition method. For more than two months in late 2003 and early 2004, the Town repeatedly requested that the Forest Service enable the Town to annex the Ten-Foot Strip so that it could also annex the Nebo

Church Tract. *See, e g*, ROA 0197 – 99 (Deposition of William Wallace (July 2, 2010) (hereinafter "Wallace Dep.") at 32-39); ROA 0180 (Nov. 25, 2003 Letter from Dan Martin (Town) to Orlando Sutton (Forest Service) stating that earlier strip annexations "missed" the church and were based on "unclear" documentation in any event), ROA 0181 (Jan. 23, 2004 Letter from W.H. Alston (Town) to Sutton (Forest Service) reiterating that the Town "need[ed the Forest Service's] assistance" to annex the church); ROA 0182 (Feb 12, 2004 Letter from Wallace (Town) to Sutton (Forest Service) stating that annexing part of the Forest was the "only possible way" the Town could annex the Nebo Church Tract because "[t]he church [wa]s not contiguous to the existing town limits and [could not] be annexed without first annexing other parcels between it and the town boundary"); ROA 0183 (Feb. 12, 2004 Letter from Martin (Town) to Sutton (Forest Service) emphasizing the Town's "understanding that the Service is generally opposed to annexation" and attempting to reassure the Forest Service about impacts to Forest management); ROA 0199 – 200 (Wallace Dep at 39:14-16 & 42.12-43 2, describing conversations that took place between the Town and the Forest Service).

Despite this lengthy campaign, the Forest Service declined to grant the Town's requests. The Town admitted that "it turned out that they [Forest Service] would not give us anything in writing saying that they desired to be annexed." ROA 0199 (Wallace Dep. at 40:9-11). *See also* ROA 0017 (Order at 4, finding that "[a]lthough the Town represented to the public that it received a 100% petition from the Forest Service, it never did"). Not only did the local and regional Forest Service representatives refuse to request annexation of any property, they also declined to put even a neutral, no-objection position in writing. ROA 0200 (Wallace Dep. at 42:14-16, admitting that "the Forest Service would not provide [the Town] anything in writing" and reasoning this was "because it would have to go all the way to Washington").

Subsequently, three of the Town's representatives met, either in person or by telephone, and decided to make use of a decade-old letter written in 1994 from a Forest Service representative stating that the agency had "no objection" to the annexation of ambiguously-described property referenced as Forest strips (hereinafter the "1994 Letter") ROA 0240 (May 3, 1994 Letter from David Wilson (Forest Service) to Alston (Town)). ROA 0200 (Wallace Dep. at 44); ROA 0131 – 32 (Tr. at 61:21 – 62·1). At trial, Respondents' expert surveyor, Robert Lee Frank explained that the location of the strips described in the 1994 Letter does not provide a valid legal description of any property at issue in this matter and fails to describe the Ten-Foot Strip of the Francis Marion. ROA 0017 (Order at 4); ROA 0110 – 11 (Tr. at 40:21 – 41·21). Notably, at trial, the Town did not rebut Mr. Frank's testimony with any expert testimony of its own Furthermore, the Forest Service subsequently confirmed that the 1994 Letter was never intended to be a petition for annexation. *See* ROA 0237 (Feb 16, 2011 Letter from Paul Bradley (Forest Service) to Samuel Robinson (Town), stating that "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 ...").

The Town representatives were familiar with the 1994 Letter at the time they wrote the above-quoted letters pleading with the Forest Service, ROA 0200 (Wallace Dep at 43:20-44:1), but it was only after they failed to obtain the required petition from the Forest Service in 2004 that they decided to use the 1994 Letter as a means of annexing additional Forest land.

On May 10, 2004, the Town passed an ordinance stating that a "proper petition has been filed" for annexation of the Ten-Foot Strip and purporting to accept the petition ROA 0017 (Order at 4); ROA 0188 (Ten-Foot Strip Annexation Ordinance). Relying on the Ten-Foot Strip for contiguity, the Town passed another ordinance purporting to annex the Nebo Church Tract on

the same day. ROA 0187 (Nebo Church Tract Annexation Ordinance). The Town knew it did not have the authority to reach out on its own and annex the Ten-Foot Strip – as the Town itself has explained, "[t]hat'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." ROA 0025 (Order at 12, citing Wallace Dep. at 29:10-13).

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* ROA 0186 (Sept. 30, 2009 Letter 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. ROA 0203 (Wallace Dep at 55:7-19), ROA 0023 (Order at 10).

The Town has indicated in correspondence to the Forest Service and at trial that it intends to continue to rely on the 1994 Letter in the future as a purported annexation petition. *See* ROA 0181 (Jan. 23, 2004 Letter from Alston (Town) to Sutton (Forest Service) requesting use of Ten-Foot Strip to annex Nebo Church and enable "other future annexations"), ROA 0144 (Tr at 74:6-9, Wallace responding "Yes" when asked if "the town intends in the future to use this 1994 letter if it deems it necessary regardless of any petitions from the federal government to annex land").

Procedural History

Respondents brought this action on November 25, 2009 against the Town and EBC On January 22, 2009, EBC filed counterclaims against Respondents, and on December 22, 2010, EBC and the Town filed a motion for partial summary judgment against Respondents, arguing that Respondents lacked standing to mount this challenge and that such challenge was barred by

the statute of limitations. The trial court denied the motion for partial summary judgment on April 19, 2011. ROA 0001 – 09 (Harrington Order)

EBC and the Town appealed the Court's denial of their partial summary judgment motion, and that appeal was denied on November 11, 2011. Subsequently, on March 21, 2012, the Court of Appeals denied a request to rehear the appeal. EBC and the Town filed a petition for certiorari in the South Carolina Supreme Court, which was similarly denied on May 25, 2012

After the denials of their appeals by the Court of Appeals and the Supreme Court, EBC and Respondents filed a Settlement Agreement on September 6, 2012 pursuant to Rule 40(j) of the Rules of Civil Procedure in which EBC dismissed its counterclaims against Respondents, and Respondents dismissed their claims against EBC. The Town was not a party to the Settlement Agreement, and Respondents' claims against the Town remained pending.

After Respondents' motion for summary judgment against the Town was denied, the remaining claims against the Town proceeded to trial on April 16, 2014 On July 28, 2014, Judge Nicholson ruled that pursuant to the South Carolina Declaratory Judgment Act, S C Code Ann §§ 15-53-10 to 15-53-140, the annexation of the Ten-Foot Strip was void and of no effect because the Town never received a petition for annexation from the Forest Service ROA 0025 (Order at 12). 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 were also invalid because these tracts lacked contiguity with the Town. *Id.* And finally, because the annexation of the Nebo Tract did not occur as a matter of law, it followed 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 were each *ultra vires* acts and *void ab initio* ROA

0025-26 (Order at 12-13). On August 4, 2014, the Town filed a motion for reconsideration, which was denied by the trial court on September 22, 2014. ROA 0027-28 (Order Denying Town's Motion for Reconsideration, Judge Nicholson (Sept. 22, 2014)). On October 1, 2014, the Town filed a Notice of Appeal.

ARGUMENT

In appeals from equitable cases, the Court of Appeals may find facts in accordance with its own view by a preponderance of the evidence and reviews questions of law *de novo*. *Doe v Clark*, 318 S.C. 274, 276, 457 S.E 2d 336, 337 (1995), *Mitul Enters , L P v Beaufort Cnty Assessor*, 410 S C. 430, 433, 764 S.E.2d 720, 721-22 (Ct. App. 2014). Importantly, the applicable scope of review regarding factual findings in appeals of equitable matters "*does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses.*" *Greer v Spartanburg Technical Coll* , 338 S C. 76, 79, 524 S.E.2d 856, 858 (Ct. App 1999) (emphasis added). "Appellants have the burden of convincing this court that the trial court committed error," and "this court may affirm the trial court's ruling upon any ground appearing in the record " *Id.* at 79-80, 524 S.E 2d at 858 (citations omitted)

I. The Trial Court Correctly Ruled that Respondents Qualified for Public Importance and Taxpayer Standing.

The trial court correctly held that Respondents had standing to bring this challenge under the public importance exception to standing and as taxpayers challenging government action under the South Carolina Declaratory Judgment Act, S.C. Code Ann §§ 15-53-10 to 15-53-140 ROA 0014, 17 – 22 (Order at 1, 4 – 9). In its Order, the trial court agreed with Respondents that this case is not about a defective annexation petition or an ordinance enacted in good faith; rather, this case is about a pattern of years of municipal deception by the Town, which will

continue ROA 0018 (Order at 5). Respondents did not "seek to prove that annexations made by the Town in good faith are defective." *Id* Instead, Respondents argued below "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 " *Id.* The trial court agreed with Respondents that this case was more in line with South Carolina cases that have authorized challenges based on the public importance of the matter and where taxpayer actions have been allowed to proceed to challenge illegal government action ROA 0019 – 22 (Order at 6 – 9).

As the Supreme Court has repeatedly recognized, "*the rule of standing is not an inflexible one*." *Sloan v Wilkins*, 362 S.C. 430, 436, 608 S E.2d 579, 583 (2005) (quotations and citations omitted) (emphasis added), *abrogated by Am Petroleum Inst v S C Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009). "Standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance," *id* (quotations and citations omitted), and "[t]axpayers must have some mechanism of enforcing the law" and holding "public officials accountable for their acts " *Sloan v Dep't of Transp* , 379 S C 160, 170, 666 S.E.2d 236, 241 (2008). As explained in greater detail below, the trial court's conclusion that Respondents had public importance and taxpayer standing to bring this challenge is correct and directly in line with these Supreme Court precedents. As such, the Town's efforts to shield its deceptive actions from review by the courts of this State must fail

A. The Trial Court Correctly Distinguished the Supreme Court's *St. Andrews* Decision and its Progeny.

The Town complains that in finding that Respondents qualified for the public importance exception and taxpayer standing, the trial court "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 [the] public interest to challenge an annexation ordinance that is absolutely void." Town's Initial Brief (hereinafter "Town Br.") at 9. As explained below, the *St Andrews* line of cases, as well as *Town of Yemassee*, are clearly distinguishable.

This appeal is completely different from *St Andrews* and its progeny for the following reasons. First, *St Andrews* and *Town of Yemassee* each involved annexations that municipalities attempted to carry out in good faith, not municipal deception that is at issue here. For example, in *St Andrews*, the Supreme Court granted certiorari to consider whether municipal annexations using roadways to achieve contiguity are authorized by statute. *St Andrews Pub Serv Dist v The City Council of The City of Charleston*, 349 S.C. 602, 603, 564 S.E.2d 647, 647 (2002). In taking up this issue, the Court articulated the general rule of standing for annexation challenges. *Id.* at 604, 564 S.E.2d at 648; *see also* S.C. Code Ann §§ 5-3-150(1) and (3) The Court explained that the rules for standing vary depending on whether the method of annexation was carried out via the 75% or 100% method – under the 75% method, the challenger must be a municipality or one of its residents, or reside or own property in the annexed area, while under the 100% method, the challenger must assert an infringement of its own proprietary interests or statutory rights. 349 S.C. at 604, 564 S.E.2d at 648 In addition, the Court clarified that the better policy was to find that the only non-statutory party that may challenge a municipal annexation is the State, through a *quo warranto* action *Id* at 605, 564 S.E.2d at 648.

The Supreme Court in *Town of Yemassee* simply applied the general standing rule for 100% annexations as articulated in *St Andrews*. The *Town of Yemassee* decision involved tracts of land annexed via the 100% petition method in which the plaintiffs argued that the municipality failed to comply with the signature requirements of the 100% method. *State ex rel*

Wilson v Town of Yemassee, 391 S.C. 565, 573, 707 S.E.2d 402, 406 (2011). Specifically, the plaintiffs argued that the annexation should have been treated as made by the 75% method, as opposed to the 100% method, since the annexed lands included state-owned marshlands in addition to privately-held properties. *Id* at 573, 707 S E 2d at 406. In denying standing to the plaintiffs, the Court in *Town of Yemassee* reaffirmed the Supreme Court's general rule from *St Andrews* that "in order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights." *Id* at 572-74, 707 S.E.2d at 406-7.

As *two* circuit court judges in this matter have already recognized, both *St Andrews* and *Town of Yemassee* are clearly distinguishable because they involve fundamentally different circumstances than are present in this appeal. *See* ROA 0003 (Harrington Order at 3); ROA 0020 (Order at 7). The plaintiffs in both *St Andrews* and *Town of Yemassee* brought challenges to annexation attempts that allegedly did not comply with applicable statutory requirements. Importantly, neither of those cases included any finding that those municipalities engaged in any deceit or misrepresentation in enacting those challenged annexations. Unlike *St Andrews* and *Town of Yemassee*, this is not a case contesting 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.

Here, there was no annexation ever completed 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* ROA 0237 (Feb. 16, 2011 Letter from Bradley (Forest Service) to Robinson (Town) saying that "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 ....").

Significantly, 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* ROA 0188 (Ten-Foot Strip Annexation Ordinance, saying "WHEREAS, a proper petition has been filed with the Town Council by 100 percent of the freeholders owning 100 percent" of the Ten-Foot Strip). As Judge Nicholson explained in his Order, "[t]his case stands in sharp contrast to *Town of Yemassee* where there was no intentional deceit alleged " ROA 0020 (Order at 7).[3] For all of these reasons, the trial court properly concluded that the standing rules announced in *St Andrews* and *Town of Yemassee* simply are not applicable

B. The Trial Court Correctly Determined that Respondents Met the Standard for the Public Importance Exception for Standing.

The trial court's holding that Respondents meet the test for public importance standing was also correct and should be upheld. *See* ROA 0020 – 22 (Order at 7 – 9). Indeed, it is difficult to imagine circumstances more precisely tailored to application of the public interest exception. 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 Cnty*, 380 S.C 191, 198, 669 S.E.2d 337, 341 (2008) (quotations and citations omitted). The public importance exception

[3] When the Town argued in their motion for summary judgment that Respondents lacked standing (and that their challenge was untimely), Judge Harrington agreed that this case was distinguishable from *St. Andrews* and *Town of Yemassee*. In its ruling, the court said, "[t]he statutory provisions governing standing and timing exist to serve as shields for legitimate annexation attempts. No case supports [the Town's] efforts to transform them instead into a sword that municipalities can wield to eviscerate the strict limitations on municipal authority delineated by the General Assembly." ROA 0003 (Harrington Order at 3)

recognizes that "[c]itizens must be afforded access to the judicial process to address alleged injustices." *Id* at 199, 669 S.E.2d at 341 (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* at 199, 669 S.E 2d at 341 (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* Remarkably, the Town cites to *ATC South* to support its contention that there is no overriding public concern nor need for future guidance in the case at bar. Such an argument fails for two primary reasons First, resolution of Respondents' claims is needed to conserve rare, nationally important public resources in the Francis Marion, as the trial court recognized. *See* ROA 0021 (Order at 8, stating that "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" (citing Tr. at 83:12-14)); *see also* ROA 0291, 293 (Everett Aff. at ¶¶ 5, 11, saying that "the actions taken by the Town directly threaten the long term viability of the southern portion of the Francis Marion," which "is one of the most ecologically valuable natural resources in the state (if not the entire East Coast)").[4]

Second, Respondents' claims also concern a recurring controversy likely to continue resurfacing in the future. In fact, the Town admitted to having annexed other Forest strips in the past without a petition requesting their annexation ROA 0208 (Wallace Dep. at 73 23-25,

[4] Jean B Everett, Ph.D. is a senior instructor within the Department of Biology at the College of Charleston. A longtime member of Respondent Coastal Conservation League, Dr. Everett submitted an affidavit in support of the League's standing in this matter on March 21, 2011. Dr. Everett uses the National Forest near the Nebo Tract to teach her students, and she believes the actions taken by the Town will injure her educational, professional, and recreational interests in the National Forest

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* ROA 0181 (Jan. 23, 2004 Letter from Alston (Town) to Sutton (Forest Service) requesting use of Ten-Foot Strip to annex Nebo Church and enable "other future annexations"); ROA 0144 (Tr at 74:6-9, Wallace responding "Yes" when asked if "the town intends in the future to use this 1994 letter if it deems it necessary regardless of any petitions from the federal government to annex land") Perhaps more importantly, the Town defends this practice on the grounds that a court has not yet ruled it illegal ROA 0208 (Wallace Dep. at 74:1-7). It is therefore necessary for this Court to uphold the trial court's decision to prevent the Town from employing *ultra vires* actions to expand its municipal limits into the National Forest

1. The Town's Reliance on the Supreme Court's Decision in *Freemantle* is Misplaced.

In trying to upend the trial court's holding that Respondents are entitled to public importance standing, the Town relies heavily on the Supreme Court's decision in *Freemantle v Preston*, 398 S.C 186, 728 S.E.2d 40 (2012) The Town's treatment of the *Freemantle* decision is deeply flawed, as a proper reading of *Freemantle* supports the trial court's conclusion that Respondents have public importance standing.

The Town claims that in *Freemantle* the "Supreme Court 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," and that somehow the lower court failed to apply this new test. Town Br. at 11 (quoting *Freemantle,* 398 S C. at 191, 193-94, 728 S.E.2d at 43-44) The Town goes on to contend that *Freemantle* "superseded" the cases

relied on by the trial court and "prohibits the invocation of the public importance exception based on Respondents' allegations of municipal deception." Town Br. at 11-12 [5]

If anything, the *Freemantle* decision provides a good example of how the public importance exception to standing should be applied and strongly supports the trial court's conclusion here In *Freemantle*, the Court explained that, "[f]or 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" and "[t]his nexus between the public importance exception and the need for future guidance from the Court is invariably linked to a need for and entitlement to injunctive relief." 398 S.C. at 194, 728 S.E 2d at 44 (quotations and citations omitted).

The Court in *Freemantle* found that the plaintiff lacked public importance standing because the plaintiff "sought *monetary damages for himself* in his common law causes of action, while claiming to represent the taxpayers of Anderson County." *Id*, 728 S.E.2d at 44 (emphasis added). According to the Court, the plaintiff's request for monetary damages "directly conflicts with the purpose and spirit of the public importance exception" and thus the plaintiff did not qualify for public importance standing. *Id*, 728 S.E.2d at 44

There is nothing about the *Freemantle* Court's discussion regarding the required nexus between the public importance exception and the need for future guidance or injunctive relief that would justify disturbing the lower court's finding here. In fact, the *Freemantle* Court's language on this point strongly supports the trial court's conclusion In this appeal, there is a clear and inextricable connection between the public importance of this case and the need for

[5] As an initial matter, *Freemantle* did not overrule or supersede any of the cases relied upon by the trial court in rendering its decision. There is nothing in *Freemantle* suggesting that the Court was overruling any of the cases cited by the Court on this issue.

future guidance As explained by the trial court, resolution of Respondents' claims was of high public importance and was "necessary to protect unique flora and fauna contained in the National Forest, which is owned, maintained, and conserved for the benefit of all Americans." ROA 0021 (Order at 8). Moreover, this issue of public importance is directly related to the need for future guidance since the Town admitted to having annexed other lands in the past in the same deceitful manner and indicated "an intent to do so again." *Id*[6] For these reasons, the assertion that *Freemantle* annunciated some sort of new rule that prohibits Respondents from achieving public importance standing is false.

C. The Trial Court Correctly Held that Respondents Have Standing to Challenge *Ultra Vires* Municipal Acts as Taxpayers.

The Town contends that the trial court wrongly concluded that Respondents are entitled to standing as taxpayers. A review of the relevant precedents on taxpayer standing, however, shows that Respondents were, in fact, entitled to standing as taxpayers, as the trial court determined.

"A taxpayer's standing to challenge unauthorized or illegal government acts has been repeatedly recognized in South Carolina." *Sloan v Sch Dist of Greenville Cnty*, 342 S C. 515, 520, 537 S E.2d 299, 301 (Ct App. 2000). *See also Sloan v Dep't of Transp*, 379 S C. at 169, 666 S.E.2d at 241 (same). "For a plaintiff to have taxpayer standing, the party must demonstrate some overriding public purpose or concern to confer standing to sue on behalf of her fellow taxpayers." *Sloan v Greenville Cnty*, 356 S C 531, 549, 590 S E 2d 338, 347 (Ct. App 2003).

[6] The Town also argues that "*Freemantle* . . prohibits Respondents from achieving the public importance exception based on their allegations of municipal fraud," Town Br. at 11, but the Town fails to point to any language in *Freemantle* that would dictate such a result. As explained above, while it is true that the Supreme Court rejected the plaintiff's assertion of public importance standing in *Freemantle*, it did so based on the particular facts of that case where there was no relationship between the professed public importance and the monetary relief sought 398 S.C at 194, 728 S.E 2d at 44.

Further, a party seeking to establish standing must generally show that (1) the plaintiff has suffered an injury in fact; (2) the injury and the conduct complained of are causally connected; and (3) it is likely, rather than merely speculative, that the injury will be redressed by a favorable decision." *Id* at 549, 590 S.E.2d at 348 (citations and internal quotations omitted)

The *Sloan v School District of Greenville County* decision provides a good example of how the injury requirement has been satisfied in the context of a declaratory judgment action brought by a taxpayer. In that case, the plaintiff brought an action against the school district seeking a declaratory judgment that the district violated its procurement regulations by entering construction contracts without following the required sealed bidding procedure *Id* at 517-18, 537 S.E.2d at 300 The plaintiff had no private interest in the contracts and had not submitted a bid for the construction work. *Id.* at 518, 537 S.E.2d at 300 The court held first that plaintiff had standing to sue as an individual taxpayer because taxpaying citizens of Greenville County have a "direct interest in the proper use and allocation of tax receipts by the District" and that the injury is one in which the taxpayers of the county – not the public at large – are the individual sufferers *Id* at 522, 537 S E 2d at 303 According to the court, "taxpayers constitute a class specially damaged by the alleged unlawful act and therefore have a special interest in the subject matter of the suit, distinct from that of the general public." *Id* at 519-20, 537 S E.2d at 301 (citations and quotations omitted). *See also Sloan v Greenville Cnty*, 356 S.C. at 551, 590 S E.2d at 349 (finding plaintiff had standing to sue where plaintiff had a substantial interest in whether county followed procurement procedures and where "[r]esolution of this issue will likely have an impact on government practices beyond the confines of the case itself").

The trial court was correct in finding that this case is analogous to the *Sloan* line of cases in the following ways First, Respondents here have challenged illegal or unauthorized

government acts. Second, like the *Sloan* plaintiffs, the individual Respondents and members of Respondent S.C. Coastal Conservation League are municipal taxpayers who would be called upon to pay for expanded services required to serve the Nebo development. Respondents have expressed reasonable concerns that the challenged actions, including the unlawful annexations and the rezoning of the Nebo Tract for intensive residential and commercial development, will require the expenditure of public funds, as the Town would need, for example, to upgrade the electric service – which is currently inadequate to serve such a large development – and provide for a sewer line or package sewer treatment plant. *See* ROA 0016 (Order at 3); ROA 0255 (Deposition of Lynne Vicary (Sept. 27, 2010) (hereinafter "Vicary Dep ") at 37.15-25). *See also* ROA 0313 (Affidavit of Lynne Vicary (hereinafter "Vicary Aff.") at ¶ 6, explaining that she is worried the proposed Nebo Tract will make it too expensive for her to continue living in her home and that costs of additional municipal services, such as sewer and additional landfill capacity, will be passed on to current residents); ROA 0255 (Vicary Dep at 37 23-25, expressing similar concerns); ROA 0307 (Affidavit of Kent Prause (hereinafter "Prause Aff.") at ¶ 6, expressing similar concerns); ROA 0280 – 81 (Affidavit of James Cubie (hereinafter "Cubie Aff ") at ¶ 7, expressing similar concerns about increased taxes). For these reasons, this appeal is squarely in line with *Sloan* and its progeny, and the trial court was right to find that Respondents had taxpayer standing.

In trying to overturn the trial court's holding that Respondents lack taxpayer standing, the Town argues that Respondents' injuries will actually be caused by a third party developer, not the Town itself. *See* Town Br. at 13 However, this argument ignores the fact that Respondents' injuries are directly caused by the increase in development density permitted by the Town's unlawful annexations and subsequent rezoning. If the property remains within Charleston

County's jurisdictional limits, the development density will be greatly reduced, thus alleviating the injuries Respondents will suffer. Because the Town's purported annexations and rezoning are the but for cause of Respondents' injuries, upholding the trial court's invalidation of these actions will redress those injuries, regardless of any action by a third party developer [7]

The Town also contends that "[a]ny *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)" Town Br at 14 This argument also falls flat As an initial matter, although the *ATC* Court rejected ATC's claim of taxpayer standing in that particular case, nowhere in the *ATC* decision does the Supreme Court expressly abolish or overrule the *Sloan* line of cases

Further, if for some reason this Court were to find that *ATC* now requires taxpayers to show a more concrete and particularized injury than the injury complained of in *ATC*, the trial court's decision on taxpayer standing should still stand, as Respondents here have alleged specific injuries in addition to those that they have suffered as taxpayers. ROA 0152 – 54 (Tr. 82:11-84:1, Respondent Kent Prause testifying at trial that he is injured by the Town's actions allowing for far greater intensity of development on the Nebo Tract) *See also* ROA 0251

[7] The Town also suggests that the Settlement Agreement reached between Respondents and EBC "allows the very development complained of." Town Br at 14; *see also id.* at 12, n. 6. This argument is a red herring. The Town overlooks the fact that the Settlement Agreement explicitly states that it "*does not* resolve any of the claims that have been asserted by the [Respondents] against the defendant Town of Awendaw ("Town")." ROA 0356 (Settlement Agreement at 1) (emphasis added). The Settlement Agreement does not resolve any issues related to the Town's unlawful actions, including the purported annexation of the Nebo Tract, the development agreement between EBC and the Town, the rezoning of the Nebo Tract, or the amendment to the Town's Comprehensive Plan. Although Respondents and EBC dismissed all claims brought against one another, Respondents' claims against the Town were preserved and allowed to proceed to trial with the understanding that if the trial court ruled for Respondents, all of the challenged ordinances could be declared *void ab initio* and the Nebo Tract would remain within Charleston County under the County's rural zoning scheme

(Deposition of Kent Prause (Sept. 27, 2010) (hereinafter "Prause Dep.") at 50:5-18, explaining how the extent of growth and development threatens to impact the natural resources he enjoys, such as the National Forest).[8]

Moreover, even if this Court were to find that *ATC* overruled the *Sloan* line of cases and that taxpayer standing no longer exists under South Carolina law, this Court should still uphold the trial court's decision by reaffirming that Respondents qualify under the public importance exception for standing given the threat to the National Forest and the Town's insistence that they will keep treating the 1994 Letter from the U S. Forest Service as a petition for annexation until a Court directs them to do otherwise.

II. The Town's Argument that the Other Challenged Ordinances Relating to the Nebo Tract are Moot is Erroneous.

The Town asserts that the trial court did not review the merits of Respondents' Amended Complaint regarding the ordinances (a) to approve the development agreement for the Nebo

[8] The Town claims that these injuries are "hypothetical and unsubstantiated," and that Respondents have failed to "demonstrate[] any injury to the National Forest." Town Br. at 13 However, it is well-established that in cases involving harm to natural resources, it is not necessary to prove that the harm has already occurred, rather, "plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Friends of the Earth, Inc v Laidlaw Envtl Servs (TOC), Inc*, 528 U S 167, 183 (2000) (internal citations omitted). *See also Ocean Advocates v U S Army Corps of Eng'rs*, 402 F 3d 846, 860 (9th Cir. 2005) ("an increased risk of harm can itself be injury in fact for standing, and nothing necessitates a showing of existing environmental harm .. [T]o require actual evidence of environmental harm, rather than an increased risk based on a violation of [a] statute, misunderstands the nature of environmental harm..." (internal citations and quotations omitted)); *Cent Delta Water Agency v U S*, 306 F 3d 938, 950 (9th Cir. 2002) ("as the Fourth Circuit noted in *Gaston Copper*, plaintiffs need not wait until the natural resources are despoiled before challenging the government action leading to the potential destruction"). These injuries are caused by the illegal annexation of properties by the Town and the resulting change in zoning to allow for increased development density, which would harm the environment and the National Forest and would not occur but for the Town's illegal actions. A ruling from this Court upholding the trial court's order would redress Respondents' injuries by maintaining the Nebo Tract within the jurisdictional limits of Charleston County and maintaining its rural density zoning.

Tract; (b) to amend the Town's Comprehensive Plan; and (c) to rezone the Nebo Tract, Town Br. at 15, and that these claims are now moot, *id.* at 15-16 This argument has no merit.

As explained by the trial court, the Town, like any other municipality in South Carolina, only has the powers granted to it by Article VIII of the South Carolina Constitution ROA 0023 – 24 (Order at 10 – 11, citing *Hospitality Ass'n v Cnty of Charleston*, 320 S.C. 219, 225-26, 464 S.E.2d 113, 117-18 (1995)). Actions outside these powers are void and have no effect. ROA 0024 (Order at 11, citing *Bostick v City of Beaufort*, 307 S.C. 347, 350, 415 S E.2d 389, 391 (1992)). The Town lacks the authority to annex property unless it is contiguous with the Town's border and the Town receives a petition from the owner of the property requesting annexation. In order to annex the Nebo Tract, the Town tried to manufacture contiguity via the Ten-Foot Strip and the Nebo Church Tract. Because the annexation of the Ten-Foot Strip never occurred as a matter of law, there never was any contiguity between the Town and the Nebo Tract Further, since the Nebo Tract is not within the Town's jurisdiction (and never has been), it is axiomatic that the Town lacked the authority to enact the ordinances identified above. The challenges to these ordinances are not moot. To the contrary, the trial court correctly held that these ordinances purportedly enacted by the Town on October 1, 2009 are each *ultra vires* and *void ab initio*. ROA 0025 – 26 (Order at 12 – 13).

III. The Trial Court Properly Concluded that there was No Petition for the 2004 Annexation and that the Town Engaged in Deceitful Conduct.

The Town next argues that the trial court committed legal error by imposing heightened requirements to determine if a proper petition for annexation was made here, and by relying on a 2011 letter from the Forest Service explaining that it never intended the 1994 Letter to be an annexation petition Both of these arguments are flawed; the trial court properly determined that there was no petition requesting annexation as required by the plain language of § 5-3-150(3),

and its consideration of the 2011 letter to buttress this conclusion was proper. The trial court also properly concluded that the Town engaged in deceitful conduct and this Court should affirm that finding.

A. The Trial Court Did Not Impose Heightened Requirements in Determining That There was No Petition for Annexation Here.

The Town first argues that "[t]he 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." Town Br. at 16. The Town contends that "§ 5-3-150(3) does not mandate a particular form for a petition," *id*, and that the court "superimpos[ed] certain requirements that are expressly confined to § 5-3-150(1)," *id* at 17.

Contrary to the Town's argument, the trial court never referenced or applied the requirements for annexation petitions made pursuant to § 5-3-150(1). Instead, the trial court based its ruling on the plain language of § 5-3-150(3) *See* ROA 0024 (Order at 11) As the trial court explained, section § 5-3-150(3) requires a "petition '*requesting annexation* ""[9] *Id* (emphasis in original) The trial court concluded that "[i]t is undisputed that the Town never received anything from the Forest Service requesting annexation of the Ten-Foot Strip." *Id.* In other words, the trial court did not hold that the petition failed to satisfy certain technical elements required for annexation petitions, but instead simply found that there was no legitimate petition for annexation at all. In the words of the trial court, "[t]he 1994 letter the town tried to

[9] The Town contends that "[t]he 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 . . " Town Br. at 18. This is a particularly bizarre argument given that the plain language of the statute uses this exact phrasing *See* S.C. Code Ann. § 5-3-150(3) ("[A]ny 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.") (emphases added).

use as a 'petition' is no such thing." *Id*; *see also id* ("As a matter of law, annexation of the Ten-Foot strip never occurred because it could not be accomplished without a petition."), ROA 0016 (Order at 3, saying that the 1994 Letter is "a decade-old letter...stating that the agency had 'no objection' to the annexation of ambiguously-described properties" that the Town decided to use after it could not obtain a petition requesting annexation).

The Town takes issue with the trial court's reference to expert testimony from Mr Robert Lee Frank, a land surveyor, explaining that the 1994 Letter does not contain an adequate description of the land for purposes of annexation. *See* Town Br. at 17, n. 8. The Town argues that by referring to this testimony, the court imposed stricter requirements for annexation petitions than those found in § 5-3-150(3). While the trial court did reference Mr. Frank's testimony, this reference was in addition to its main holding that there was never a petition requesting annexation as required by § 5-3-150(3). In any case, Mr. Frank's testimony further supports the court's conclusion that the 1994 Letter was not an annexation request because it did not properly identify the land to be annexed. It is common sense that any annexation petition – not just those provided for in §§ 5-3-150 (1) and (2) – must define the property to be annexed so that it is identifiable. In sum, the court's holding that there was no petition requesting annexation – which properly applies S.C. Code Ann § 5-3-150(3) to the facts here and does not impose any heightened requirement for annexation petitions – should be affirmed.

B. The Trial Court Properly Considered the 2011 Forest Service Letter.

The Town next argues that Respondents should not be allowed to introduce the 2011 U.S Forest Service letter explaining that the Forest Service never intended for its 1994 Letter to constitute a petition to annex National Forest lands. The Town argues that this is impermissible

parol evidence because it is "proof of intent by a different person years after the clear understanding of it between the parties." Town Br. at 19.

This argument lacks merit for several reasons. First, the 2011 letter is not parol evidence because it is not being used to demonstrate the original intent of the parties in a contract dispute. Rather, this case concerns the propriety of the Town's purported annexation of National Forest lands and seeks equitable relief. On these facts, the parol evidence rule is inapplicable *See Wells Fargo Bank Minn , Nat'l Ass'n v Luther*, No. 2005-UP-123, 2005 WL 7083446 at *4, n. 3 (S.C. Ct. App Feb. 17, 2005) ("[T]he parol evidence rule only applies to the construction of written agreements... In this case, we are not construing a written agreement, but determining the extent of an equitable mortgage and fashioning a remedy in equity. Thus, we are not bound by the parol evidence rule.") (internal citation omitted). Second, even if the 2011 letter is considered parol evidence, it is admissible to establish allegations of fraud in the execution or inducement of a written contract. *See U S Leasing Corp v Janicare, Inc* , 294 S.C. 312, 316-17, 364 S E 2d 202, 205 (Ct. App. 1988) Respondents alleged such deceit in the Town's attempt to annex here, and thus the 2011 letter is admissible to support these allegations Likewise, the 2011 letter is admissible given the ambiguity, at best, in the 1994 Letter. *See Penton v J F Cleckley & Co* , 326 S.C 275, 280, 486 S E 2d 742, 745 (1997) (holding that where a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties). For all of these reasons, the Court should disregard the Town's arguments that the 2011 letter is improper parol evidence.[10]

[10] In addition to these reasons, it is worth noting that the Town did not raise a legal objection to the introduction of this evidence at trial. *See* ROA 0162 – 63 (Tr. at 92 – 93)

C. The Trial Court Properly Concluded that the Town Engaged in Deceitful Conduct.

The Town next takes issue with the trial court's finding that the Town engaged in deception or misrepresentation in falsely claiming to have a petition for the 2004 annexation. *See* ROA 0017, 24 (Order at 4, 11) This argument is nothing more than a rehashing of the prior two points – that, in the Town's view, it had a proper petition for annexation and the 2011 Forest Service letter cannot be used to demonstrate otherwise. As such, the Court should disregard the argument for the reasons stated above

The Court should also reject this argument because the trial court properly concluded that the Town had engaged in deceitful conduct Contrary to the Town's suggestion, the facts in the record adequately demonstrate this. It is undisputed that the Town was unable to obtain a proper annexation petition for the Ten-Foot Strip from the Forest Service. *See* ROA 0199 (Wallace Dep. at 40:9-11, Town admitting that "it turned out that they [Forest Service] would not give us anything in writing saying that they desired to be annexed"); ROA 0200 (Wallace Dep at 42:12-16, same). It is also undisputed that, despite the failure to obtain an annexation request in writing, on May 10, 2004, the Town passed an ordinance stating that a "proper petition has been filed" for annexation and purporting to accept the petition. ROA 0017 (Order at 4); ROA 0188 (Ten-Foot Strip Annexation Ordinance) As the trial court concluded, "[a]lthough the Town represented to the public that it received a 100% petition from the Forest Service, it never did." ROA 0017 (Order at 4). *See also* ROA 0134, 137 (Tr at 64, 67:2-5).

Thus, as the trial court concluded, the record clearly supports a finding that the Town engaged in deceitful conduct. This Court should not disturb the trial court's well-reasoned factual findings on appeal. *See Greer v Spartanburg Technical Coll* , 338 S.C. at 79, 524 S.E.2d at 858 (holding that the court's broad scope of review of factual findings in equity cases "does

not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses" and that the court "may affirm the trial court's ruling upon any ground appearing in the record").

IV. The 1994 Letter of the Forest Service Does Not Even Describe the Ten-Foot Strip of the National Forest.

The trial court also properly held that the 1994 Letter relied upon by the Town as a petition for annexation for the Ten-Foot Strip fails to include a sufficient description of property ROA 0025 (Order at 12). At trial, Respondents presented the expert testimony of Robert Lee Frank, a registered land surveyor in the state of South Carolina ROA 0108 – 10 (Tr at 38 10 – 40:11) In his testimony, Mr. Frank explained that he was asked to examine the descriptions of properties included in the 1994 Letter, which the Town relied on as a petition for annexation for the Ten-Foot Strip. ROA 0110 – 11 (Tr. at 40:12 – 41:11) Mr Frank testified that the description of properties in the 1994 Letter was not sufficient for carrying out the purported annexation of the Ten-Foot Strip for one primary reason – the 1994 Letter does not describe the Ten-Foot Strip of the Francis Marion. ROA 0111 – 12 (Tr at 41:9 – 42:22).

Mr. Frank's testimony was unrebutted at trial by any expert testimony presented by the Town Mr. Bill Wallace, the Town Administrator, testified regarding the descriptions contained in the 1994 Letter, yet he was not qualified as an expert at trial. Mr. Wallace testified that he believes the descriptions in the letter are clear, but even he conceded that the language in the 1994 Letter would not suffice for a legal transaction ROA 0121 (Tr. at 51:19 – 22).

This Court should affirm the trial court's holding that the 1994 Letter did not include a sufficient description of the Ten-Foot Strip and that the annexation of the Ten-Foot Strip was *ultra vires* and *void ab initio* not only because the trial court had the opportunity to review the credibility of the witnesses at trial, but also for the additional reason that the Town failed to rebut

Mr Frank's expert testimony with any expert testimony of its own. ROA 0025 (Order at 12). *See, supra, Greer v Spartanburg Technical Coll*, 338 S.C. at 79, 524 S.E.2d at 858

V. This Court Should Affirm the Trial Court on the Additional Sustaining Ground that a Strip Annexation Cannot Satisfy the Requirements of Contiguity under South Carolina Law.

This Court should 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. *See I'On, LLC v Town of Mt Pleasant*, 338 S.C. 406, 526 S E 2d 716 (2000) (saying respondent, as prevailing party in the trial court, may raise on appeal any additional reasons the appellate court should affirm the trial court's ruling, regardless of whether those reasons have been presented to or ruled on by the trial court). A narrow, ten-foot strip cannot provide the "continuous border" necessary for contiguity under South Carolina law *See* S.C. Code Ann § 5-3-305.

In 2000, the South Carolina General Assembly codified the definition of contiguous for purposes of annexation as follows.

> For purposes of this chapter, "contiguous" means property which is *adjacent to a municipality and shares a continuous border Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another*, however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, *which but for the intervening connector would be adjacent and share a continuous border*, the intervening connector does not destroy contiguity.

Id (emphases added).

Section 5-3-305 altered the prior law as it had been judicially interpreted and applied, which had considered lands to be contiguous and subject to annexation even though they were separated by significant distances as long as any connecting right of way, road, or other strip of

land in between was annexed as well. Section 5-3-305 now requires that the border of the annexed land be both adjacent *and* continuous to the boundaries of the annexing municipality

The Nebo Tract is not contiguous with the municipal limits of the Town of Awendaw, as provided by Section 5-3-305. *See* ROA 0232 (Nebo Map), ROA 0189 (Map depicting Ten-Foot Strip and Nebo Church Tract) Because the Ten-Foot Strip of the Francis Marion is not adjacent *and* continuous with the limits of the Town, it cannot provide contiguity with the Nebo Church Tract and, in turn, the Nebo Tract. As such, the purported annexation of the Nebo Tract is void, not authorized by law, and is an *ultra vires* act of the Town on this additional sustaining ground.[11]

VI. The Trial Court's Holding that the Respondents' Action was Timely Must be Upheld.

As an initial matter, there is no dispute that Respondents 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. The Town argues though, that because Respondents did not challenge the 2004 annexations of the Ten-Foot Strip

[11] Notably, the question of whether the strip annexation here satisfies the requirements of Section 5-3-305 is of considerable public importance and will arise again in similar contexts but continuously avoid review if not answered in this case. This and other similar purported annexations are greatly expanding the boundaries of municipalities into remote rural areas through an illegal interpretation of Section 5-3-305 by pretending there is contiguity when there is none and creating imaginary corridors that are not separately platted parcels and are solely the contrivance of municipalities. A ruling on this important public issue is necessary for guidance in this case and for future guidance in other similar cases.

and the Nebo Church Tract within the statute of limitations, they are barred from raising those arguments at this juncture.

With respect to the Ten-Foot Strip and the Nebo Church Tract, the trial court's holding regarding timeliness was two-fold. The trial court's first and primary holding was that Respondents' challenges to those purported annexations were not barred by the statute of limitations because there was never a valid act to annex these properties, and "the passage of time cannot transform a void and unauthorized annexation into a valid one." ROA 0022 (Order at 9). As the trial court explained, this is because municipalities like the Town have only the powers granted them by Article VIII of the South Carolina Constitution and by state legislation. ROA 0023 (Order at 10, citing *Hospitality Ass'n*, 320 S.C at 225-26, 464 S E.2d at 117-18). Actions outside these powers are void and have no effect. *See Bostick*, 307 S.C. at 350, 415 S.E.2d at 391. In *Bostick*, the Court explained that in the annexation context, procedural or technical deficiencies – such as the omission of a date – may be retroactively corrected, but where, as here, an annexation is "fatally flawed" and a "nullity upon origination," no subsequent action makes it valid. *Id.* at 350, 415 S.E.2d at 391. Thus, because there was no valid annexation of the Ten-Foot Strip or Nebo Church Tract, the statute of limitations does not bar Respondents' claims. *See* ROA 0022 – 23 (Order at 9 – 10); *see also Cabazon Band of Mission Indians v City of Indio, Cal* , 694 F.2d 634, 637-38 (9th Cir. 1982) (holding that a plaintiff "was not required to take action within any prescribed statutory time to establish invalidity" where a city attempting to complete an annexation "had no authority to act at all" absent requisite federal consent); *People ex rel Forde v Town of Corte Madera*, 115 Cal.App.2d 32, 38, 251 P.2d 988, 991 (1952) ("no life can be breathed into... void... [annexation] proceedings by the failure to contest them").

The trial court's secondary holding as to why Respondents' arguments regarding the Ten-Foot Strip and Nebo Church Tract were not time-barred relied on equitable principles. In the words of the trial court, "statutes of limitations 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." ROA 0023 (Order at 10). The trial court also concluded that even if the statute of limitations applied, the Town was prevented by principles of equity from asserting such a defense because it engaged in deceitful conduct. *See id.*

Tellingly, on appeal, the Town never mentions the first and primary holding – that the annexations were *void ab initio* and a challenge to them was not barred for this reason. Instead, the Town focuses exclusively on the court's equitable estoppel and tolling holdings. The Town argues that the court erred because Respondents cannot satisfy the technical requirements of estoppel laid out in *American Legion Post 15 v Horry County*, 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009). But this completely misses the point for several reasons First, the trial court's holding can be affirmed solely based on the fact that the annexation was *void ab initio* and thus no statute of limitations applied Additionally, the test articulated in *American Legion* was not designed to apply to factual settings like the present, where an act by a government entity is null and void from the outset and the government has misrepresented the action it has taken to the public. This Court need not reach the strict 3-prong estoppel test of *American Legion*, and should disregard the Town's hypertechnical arguments that Respondents did not "plead[] nor prove[]" the elements of estoppel. Town Br at 23.

The Town's arguments regarding tolling are similarly unpersuasive. Where, as here, a court determines that a party has acted in bad-faith and engaged in intentional deception, the court may apply equitable principles to limit affirmative defenses. *See Hooper v Ebenezer Sr*

Servs & Rehab Ctr, 386 S.C. 108, 116-17, 687 S E.2d 29, 33 (2009) ("The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other...[E]quitable tolling may be applied where it is justified under all the circumstances.") (internal citations and quotations omitted).

In sum, the Court should affirm on the grounds that the statute of limitations is simply not a bar on these facts, where the annexations are void and the Town engaged in intentionally deceitful conduct.

CONCLUSION

This Court should affirm the trial court's ruling that the annexation of the Ten-Foot Strip was void and of no effect because the Town never received a petition for annexation from the Forest Service for this strip of the National Forest and because the 1994 Letter from the Forest Service did not even describe the Ten-Foot Strip at issue 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 Moreover, as an additional sustaining ground, this Court should clarify that strip annexations, such as the one attempted here, do not satisfy the requirements for contiguity as defined in S.C Code Ann § 5-3-305. And finally, because the annexation of the Nebo Tract did not occur as a matter of law and this property has never been successfully brought under the Town's jurisdiction, this Court should sustain the lower court's declaration 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 were each *ultra vires* acts and *void ab initio*.

Respectfully submitted this 4th day of May, 2015

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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 Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel in this action with a copy of Respondents' Final Brief as indicated below by mailing a copy of the same by U S Mail, postage prepaid to the following:

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