THE STATE OF SOUTH CAROLINA
In The Supreme Court

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. 2016-002150

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

v.

Town of Awendaw, and EBC, LLC, Defendants, of whom Town of Awendaw is the **Respondent** ..... Respondent.

RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Petitioners' petition for a writ of certiorari should be denied because the Court of Appeals' decision is consistent with this Court's precedents on standing generally and standing for annexations specifically and no novel questions of law are presented. Petitioners failed to establish the standing requirements of an infringement of proprietary rights or statutory standing to challenge the annexation of the Nebo development tract in 2009. Petitioners did not challenge the annexation of the Nebo Church tract in 2004 where the ten foot strip at issue was also annexed, and the purported challenge of it through the challenge of the Nebo development tract annexation in 2009 should not be allowed. The annexation statute speaks to the issues of timely appeals and standing. This Court has set the precedent for only a person with "an infringement of a proprietary interest or statutory standing" may challenge a 100% method annexation under S.C. Code Ann. § 5-3-150(3) (1976). *St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston,* 349 S.C. 602, 564 S.E.2d 647 (2002); *Ex parte State ex rel. Wilson v. Town of Yemassee,* 391 S.C. 565, 707 S.E. 2d 402 (2011). Petitioners' allegation and the lower court's finding of deceitful conduct by the Respondent Town of Awendaw are not supported by the facts. The Court of Appeals disagreed with that particular finding and correctly reversed the lower court. The Court of Appeals fully considered all arguments for standing of Petitioners below, and lack of deceitful conduct by Respondent precludes the public importance exception for standing proffered by Petitioners.

COUNTER-STATEMENTS OF THE QUESTIONS PRESENTED

1. The Court of Appeals' opinion is consistent with the Supreme Court precedents on standing for annexations, public importance, and taxpayer matters.

2. The Court of Appeal's opinion is consistent with the applicable legal precedents of *St. Andrews* and *Yemassee* and presents no novel legal questions.

3. The Court of Appeals' opinion is consistent with the Supreme Court precedents on standing, does not exclude all other standing precepts, and no novel issues are presented to resolve regarding statutory standing.

ARGUMENT

1. The Court of Appeals' opinion is consistent with the Supreme Court precedents on standing for annexations, public importance, and taxpayer matters.

The Court of Appeals correctly found that Petitioners had no infringement of any proprietary interest or statutory standing to challenge Respondent's 100% annexation of the Nebo development tract in 2009. Petitioners cannot show that a case or controversy exists because they have no proprietary interest that could be harmed by the annexation of the Nebo development tract in 2009, nor by the 2004 annexation of the Nebo church tract with the ten foot strip at issue. Petitioners did not even allege harm from that ten foot strip annexation until five years after it and the Nebo church tract were annexed. Only when the Nebo development tract that was proposed to be developed was annexed into the Town did Petitioners raise the 2004 annexation issue that was already five years old. The Court of Appeals could not find evidence of any infringement of a proprietary interest in the Petitioners because there wasn't any. Claims of harm to the Francis Marion National Forest, adjacent to the Nebo development tract, were at best speculative[1]. On appeal Petitioners focus primarily on their allegations of

[1] Petitioners who live in the Town also could not show any infringement to themselves as taxpayers, particularly since they resolved their objection to the Nebo development tract development and agreed it could proceed under the settlement agreement with the property owner. (*See* Appendix, at 359).

deceitful conduct by Respondent, which allegations are based solely on the acceptance by Respondent of a letter from the Forest Service enumerating the ten foot strips of its land it would allow to be annexed as a petition. The Court of Appeals appropriately found that there was no deceitful or nefarious conduct on the part of Respondent. No evidence of deception exists in the Record, only Petitioners' continual characterization of this acceptance being an illegal, nefarious, and deceitful act. Contrary to Petitioners' arguments, the acceptance of the Forest Service letter by the Town as a petition for the purpose of annexing the property described in it was not illegal or deceitful and cannot create a public importance exception to standing.

Petitioners are inaccurate and overreaching in their characterization and description of the cases cited to support their argument for public importance standing. Petitioners cite *Baird v. Charleston County* (333 SC 519, 511 S.E.2nd 69 (1999)) and the *South Carolina Public Interest Foundation* (*South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 SC 640, 744 S.E.2nd 521 (2013)) to argue for the public importance exception to standing. *See* Petition page 5-6. Those cases are very dissimilar from the present one and do not involve discrete annexations of property as in the present case. Petitioners claim in reference to *Baird* that the "issuance of the legal hospital bonds was of public importance because it affected public health and welfare." *See* Petition at page 6. The challenge in *Baird* was to the authority of the County to issue tax exempt bonds. The present case does not involve public health or welfare or public finance, only the annexation of a ten foot strip of property with the owner's consent. Similarly, Petitioners misconstrue *Baird* and *South Carolina Public Interest Foundation* to allow any allegation of the illegal government action to be "the precise instance where the public importance exception

should apply." *See* Petition at page 6. The Supreme Court in *South Carolina Public Interest Foundation* determined that the Court itself must be "mindful that we must be cautious with this exception, lest it swallow the rule." *South Carolina Public Interest Foundation v. South Carolina Trans. Infrastructure Bank,* 403 S.C. 640, 646, 744 S.E.2d 521, 524[2]. The present case does not involve claims of unconstitutional statutes or other claims that would raise the public importance exception for standing.

The public importance exception for standing is unique in that it does not require individualized harm or particularized injury for standing to bring a declaratory judgment action if the issue is of such public importance that its resolution is required. The Court of Appeals correctly determined that there was no deception on the part of Respondent and that there was no basis for the public importance exception. *See Vicary v. Town of Awendaw*, 417 S.C. 631, 639, 790 S.E.2d 787, 791; Appendix at 465 (2016): "Respondents contend *St. Andrews* and *Yemassee* are distinguishable from the present case because those cases involved annexations carried out in good faith, not through deception. We disagree and note Respondents fail to cite any case law to support this argument." Moreover, Petitioners illogically argue that the acceptance of the Forest Service letter as a petition when it annexed the ten foot strip of land in 2004 is qualified for the public importance exception to standing because it is the annexation of a ten foot strip of a federally protected forest. Somehow the annexation will make it

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[2] "Sloan has not asserted he has suffered a particularized harm or injury as a result of section 11-43-140, but we find this case fits within the public importance exception. While we are mindful that we must be cautious with this exception, lest it swallow the rule, this is the precise instance where the public importance exception should apply. Sloan presents a colorable claim that the Board is unconstitutionally comprised, casting a cloud of illegitimacy which could marginalize the important decisions of the Board. We find resolution of this question is certainly of importance and concern to the public and therefore hold Sloan has standing to bring this challenge." *South Carolina Trans. Infrastructure Bank,* 403 S.C. 640, 646, 744 S.E.2d 521, 524.

impossible to "conserve rare, nationally important public resources in the Francis Marion National Forest." *See* Petition at page 6. The ten foot strips of the Francis Marion National Forest could not be affected by their annexation since they are not proposed for development and are entirely owned and managed by the federal government. The 2009 annexation of the Nebo development tract spurred this action, but the Nebo development tract is private property fronting on U.S. Highway 17 and adjacent to the Nebo Church and is not part of the Francis Marion National Forest.

Without a finding of fraudulent or deceitful governmental action, and without a showing by Respondents of any infringement of any proprietary interest and lacking any statutory rights, the Court of Appeals correctly applied the standard set by this Court in *St. Andrews* and *Yemassee*. While the lack of statutory standing may have been enough in and of itself for the Court to render its opinion, the Court of Appeals found Respondents had "failed to show any infringement of their own proprietary interest" and disagreed that the acceptance of the Forest Service letter as a petition was deceitful. *See Vicary v. Town of Awendaw*, 417 S.C. 631, 639, 790 S.E.2d 787, 791 (2016); Appendix at 465. The public importance exception for standing and the other bases for standing proffered by Petitioner were fully considered and the Court of Appeals correctly found Petitioners had no standing.

2. This is consistent with the applicable legal precedents of *St. Andrews* and *Yemassee* and presents no novel legal questions.

Petitioners ask this Court to reverse *St. Andrews* and *Yemassee* and allow the courts of this State to find public importance standing whenever an *allegation* of deceitful conduct is made regarding an annexation under the 100% method. The desire to allow the 'exception to swallow the rule' is not warranted generally, and especially not warranted here. Inherent in the

Petition is the allegation that the Respondent knew it was being deceitful and perpetrated an illegal act by working with the Forest Service and accepting the letter sent by the Forest Service to the Respondent as a petition for annexation of the ten foot strips enumerated by the Forest Service in the letter. (*See* Appendix at 243). There is no evidence of any deceitful behavior of Respondent and its records show it followed the requisite public process for annexations[3]. This is not a challenge of the authority of a local government to issue bonds (*Baird*), nor the challenge of the constitutionality of a state statute as in *South Carolina Public Interest Foundation*. Instead, this is a challenge, five years after the fact, of an annexation of a ten foot strip of property by the 100% method using a letter from the Forest Service describing the ten foot strip being annexed into Respondent. Only when Petitioners saw a tract slated for development adjacent to the Francis Marion National Forest being annexed into the Town did they reach back five years to challenge the ten foot strip annexation; no ten foot strip was involved in the 2009 Nebo development tract annexation by the 100% method.

As the Petitioners point out on page 8 of the Petition, the Court of Appeals was well aware of the position of the Petitioners on the use of the Forest Service letter. As noted above, the Court of Appeals found no such deception and specifically disagreed with the allegation of Petitioners. Without an exception to the requirements of standing, including constitutional, statutory, and public importance exceptions, the Court correctly applied this Court's precepts in *St. Andrews* and *Yemassee* and found that Petitioners had no standing.

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[3] The Record shows the annexation of the ten foot strip at issue (*See* Appendix at 190-192 (Ordinance annexing the ten foot strip at issue); Appendix at 241 (drawing of annexed area by the Town Administrator); and Appendix at 243 (Forest Service letter describing the ten foot strip at issue)) and that such annexations have been carried out before. *See* Appendix at 242 (drawing of prior annexations of ten foot strips).

Petitioners illogically argue that *St. Andrews* and *Yemassee* are not applicable to this case. This argument is based solely on the allegation that the Forest Service letter could not have been considered a petition and that Respondent's accepting it as such was therefore conducting deceptive, nefarious governmental action and was entering into the "world of malfeasance". *See* Petition at page 8. Petitioners continue to allege bad faith on the part of Respondent but fail to make a showing that there was any such behavior. Petitioners mistakenly construe the Court of Appeals' opinion as applying *St. Andrews* and *Yemassee* to the preclusion of all other considerations of standing[4].

No proprietary interests were shown by Petitioners much less any infringement of any proprietary interest, and the only statutory party available for challenging the 100% annexation is the State. The State has not taken any action, and the facts do not support Petitioners being put in the role of a private Attorney General to challenge this annexation, nor support a public importance exception to standing. Because Petitioners could not show that they had any infringement of a proprietary interest, had no statutory standing, and could not show deceitful and illegal governmental action on the part of Respondent, there are no novel questions of law and the Petition should be denied.

3. The Court of Appeals' opinion is consistent with the Supreme Court precedents on standing, does not exclude all other standing precepts, and no novel issues are presented to resolve regarding statutory standing.

The Court of Appeals correctly applied the holdings of *St. Andrews* and *Yemassee* to conclude the Petitioners had not suffered any infringement of their own proprietary interest or

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[4] Petitioners further misread the Court of Appeals opinion as it recites the background of the case as containing factual conclusions that the Town "purportedly" used the 100% method and that the ten foot strips described in the Forest Service letter were not present in this case. Petition at pages 8-9. These were not factual conclusions made by the Court but merely a recitation of the facts/procedural background presented to the Court of Appeals.

statutory rights and thus, and did not have standing. As presented above, Petitioners are asking this Court to overturn the applicable precedent and allow a challenger to have standing whenever an *allegation* of deceit is pled in a 100% method annexation. In addition, Petitioners claim that multiple bases for establishing standing, namely statutory standing, constitutional standing and public importance exception standing are precluded by the Court of Appeals' opinion in conflict with this Court's many rulings on standing. *See* Petition at page 10. By implication as well as directly Petitioners claim *St. Andrews* and *Yemassee* preclude the other possible bases for standing and only allow the statutory standing of the State to challenge 100% method annexations in this State. Yet in the same breath Petitioners cite the Court of Appeals finding that Petitioners had not shown an "*infringement of their own proprietary interests* or statutory rights" (emphasis added) and thus "are prohibited from challenging the Town's annexations pursuant to *St. Andrews* and *Yemassee*". *Id.* As presented above, without any proprietary interests or other direct stake in the annexation, no statutory standing, and no finding of deceitful governmental conduct, there is no reasonable basis for any finding of standing. The criteria and factors in the precedents for a finding of a public importance exception are not present here[5]. Petitioners stretch their inaccurate interpretation of the Court of Appeals' opinion to portray it and *St. Andrews* and *Yemassee* as a complete bar to consideration of other standing precepts. The Petitioners claim the lack of a specific standing provision in S.C. Code Ann. § 5-3-150(3) (1976) means that this Court has made up the statutory standing requirement in these cases and the Court of Appeals should not have

[5] It should be noted that the 100% method of annexation involves communication and a relationship between a property owner and a municipal government. If the property owner disagrees with the municipality in the annexation of the owner's property, the owner has standing to object and take action as its proprietary interests are clear and present. That did not happen here after multiple annexations of ten foot strips.

followed them as precedent. Clearly this Court has provided its reasoned and correct interpretation of the statute in its application of this Section:

> The ordinance recites that the annexation was achieved using the 100% petition method. If we went behind that assertion without a proper plaintiff, we would be inviting a sliding scale for standing: the more meritorious a claim appears, the more relaxed the standing requirement would be. We rejected such reasoning when we overruled *Quinn v. City of Columbia. See St. Andrews Public Service District,* 349 S.C. at 605, 564 S.E.2d at 648 (overruling the *Quinn* rule that a stranger to an annexation may challenge the annexation if the ordinance is "absolutely void"). Adhering to our precedent, we must determine standing without regard to the merits of the underlying claim.

Ex parte State ex rel. Wilson v. Town of Yemassee, 391 S.C. 565, 574-75, 707 S.E.2d 402, 407 (2011).

Therefore the allegation of Petitioners that "contrary to the holding of *St. Andrews* and *Town of Yemassee,* there is no "statutory standing" for 100% method annexations" (Petition at page 12) is incorrect, as is Petitioners' allegation that "*Yemassee's* holding would apply equally to all forms of annexations other than the 75% method, the only annexation method for which the statute provides clear, affirmative language limiting who may file a challenge." (*See* Petition at page 13). Likewise Petitioners allege that "the Court of Appeals has created a rule where all of these forms of annexation would be essentially unreviewable by harmed citizens just because each of the respective annexation sub-provisions is silent on who can file a challenge." *See* Petition at page 14. Petitioners' argument that these absurd results flow from this Court's precedent as applied in this case has no merit, particularly since Petitioners cannot show any infringement of any proprietary interest or harm. The Court of Appeals reviewed all

arguments of Petitioners and correctly applied the holdings of *St. Andrews* and *Yemassee* to conclude the Petitioners had not suffered any infringement of their own proprietary interest or statutory rights and thus, did not have standing.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

By: _____

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November 21, 2016

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, 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: RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 21, 2016