THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Eugene C. Griffith, Jr., Circuit Court Judge

Case No.: 2018-CP-10-851
Appellant Case No. 19-000728

National Trust for Historic Preservation in the United States and City of Charleston, ...Respondents/Appellants,

v.

City of North Charleston.....Appellant/Respondent.

RESPONDENT/APPELLANT NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES' INITIAL BRIEF

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TRUST FOR HISTORIC PRESERVATION
IN THE UNITED STATES

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II. Did the circuit court err in determining that the area annexed depended on record title rather than the description of the area annexed in the annexation resolution and in finding the subjective intent of North Charleston overrode its description of the property annexed?

III. Did the circuit court err in ruling that the National Trust lacked standing under the public importance exception to challenge the annexation of an area within the Ashley River National Register Historic District?

Statement of the Case

On December 21, 2017, Appellant/Respondent, City of North Charleston ("North Charleston"), adopted Ordinance No. 2017-080 (the "Contested Ordinance") purporting to annex real property owned by North Charleston under the statutory annexation method for instances where the entire area is owned by the annexing municipality. See S.C. Code Ann. § 5-3-100. **(Contested Ordinance).** The real property purportedly annexed by North Charleston consists of one (1) acre designated as TMS #301-00-00-797 (the "Acre").[1] Respondent/Appellant National Trust for Historic Preservation in the United States ("National Trust") did not join in the annexation petition even though the National Trust asserts a small portion of the Acre is owned by the National Trust and is within the boundaries of Respondent/Appellant City of Charleston ("City of Charleston").

On March 20, 2018, after timely noticing their intent to contest this annexation, the National Trust and the City of Charleston (collectively the "Respondents/Appellants") filed an action in circuit court challenging the annexation and asserting, inter alia, that the annexed land was not adjacent to nor contiguous with North Charleston and that the annexation was void and unauthorized as a matter of law. **(Respondents/Appellants Notice of Challenge of Annexation; Respondents/Appellants Summons & Compl.).** Lying and intervening between the corporate limits of North Charleston and the Acre are the right-of-way for S.C. Highway 61 and real property owned by the National Trust that both lie within the City of Charleston. **(Hrg. Tr. 45:24-46:1).** On April 16, 2018, North Charleston filed an answer denying these allegations,

[1] Prior to the purported annexation of the Acre, in October 2017, North Charleston annexed another parcel of real property known as Runneymede Plantation, which is a 113-acre parcel identified as TMS #361-00-00-002 (the "Runneymede Parcel") located directly across the Ashley River from the municipal boundaries of North Charleston. **(Hrg. Tr. 6:11-13)** No annexation challenge was filed by Appellants (or others) because the Runneymede Parcel is contiguous to the municipal boundaries of North Charleston.

asserting affirmative defenses and filing counterclaims against the Respondents/Appellants. **(North Charleston Answer, Affirmative Defenses and Counterclaims)**. North Charleston's counterclaim requested a declaration that the Acre did not encroach on the adjacent land owned by the National Trust. **(Id. at ¶ 61-63).** On May 17 and 21, 2018, respectively, Respondents/Appellants filed separate replies denying the counterclaims. **(National Trust Reply to Counterclaims of City of North Charleston; City of Charleston Reply to Counterclaims of North Charleston)**.

On October 9, 2018, North Charleston served: (1) its motion for partial summary judgment pursuant to Rule 56, SCRCP, requesting an order that annexations under S.C. Code § 5-3-100 do not require contiguity and that the Acre was "adjacent" to North Charleston; and (2) its motion to dismiss pursuant to Rules 12 and 56, SCRCP arguing that Respondents/Appellants lacked standing to challenge the annexation. **(North Charleston Mot. for Partial Summ. J.; North Charleston Mot. To Dismiss).** North Charleston accompanied its motions with the affidavit of Adam MacConnell who authenticated certain minutes of council, ordinances, and instruments of record attached to his affidavit. **(Aff. of MacConnell)**.

On November 9, 2018, Respondents/Appellants moved for summary judgment arguing, inter alia, that the purported annexation of the Acre was void since the Acre is not adjacent to nor contiguous with the corporate limits of North Charleston and that the Acre annexed included land owned by the National Trust within the City of Charleston. **(Respondents/Appellants Mot. for Summ. J)**. On December 6, 2018, Respondents/Appellants served the affidavit of Daniel C. Forsberg in opposition to North Charleston's motions and on December 7, 2018, served a separate memorandums in opposition to the motion to dismiss for lack of standing and a consolidated memorandum on the summary judgment motions. **(Aff. of Forsberg; National**

Trust Mem. In Opposition To Defendant's Mot. To Dismiss; City of Charleston Mem. In Opposition To Defendant's Mot. To Dismiss; Respondents/Appellants Con. Mem. On Summ. J. Mot.).

The Honorable Eugene C. Griffith, Jr., circuit court judge, held a hearing on these motions on December 10, 2018. **(Hrg. Tr.).** On March 1, 2019, Judge Griffith signed a written order finding that Respondents/Appellants did not have standing to challenge the annexation. **(Order, p. 1).** In the same order, Judge Griffith held that "[i]n the event that [the circuit court] is found to be in error regarding its ruling of lack of standing of the [Respondents/Appellants], this Court finds that North Charleston did not lawfully annex the one acre parcel under the annexation statute." **(Order, pp. 1-2).** Respondents/Appellants received written notice of the entry of the order on March 4, 2019, which order was re-filed on March 5, 2019. **(Re-filed Order).** On March 14, 2019, Respondents/Appellants separately filed motions to reconsider, alter, or amend the Order, which were denied by Judge Griffith by Order filed on May 1, 2019. **(National Trust Mot. to Reconsid.; City of Charleston Mot. to Reconsid.; Order Denying Mots. To Reconsid.).**

On April 29, 2019, North Charleston filed a cross appeal of portions of the Order in the event that the Respondents/Appellants appealed the Order. **(North Charleston Notice of Cross Appeal).** After the circuit court's denial of their motions to reconsider on May 1, 2019, the City of Charleston served its notice of appeal on May 24, 2019, and the National Trust served its notice of appeal on May 31, 2019. **(City of Charleston Notice of Appeal; National Trust Notice of Appeal).** On June 18, 2019, North Charleston filed its Initial Brief of Cross-Appellant. **(North Charleston Initial Brief).** On October 15, 2019, the Court of Appeals issued an order setting forth a briefing schedule. **(Court of Appeals Order).**

Statement of the Facts

The annexation in question involves a continuation of the effort by North Charleston to greatly expand its historical western geographic limits, in this instance by jumping the Ashley River, S.C. Highway 61, and a two-mile-long property owned by the National Trust adjoining S.C. Highway 61 within the City of Charleston. The Acre allegedly annexed is located within a nationally recognized scenic and historic corridor and across S.C. Highway 61 from a landmark property owned by the National Trust. The Acre was donated by deed to North Charleston shortly before its purported annexation in an effort to establish contiguity with North Charleston by a property owner who wants to develop the extensive surrounding acreage owned by it into a residential subdivision. **(Aff. of MacConnell, deed dated September 12, 2018 recorded at 0673/028; Whitfield Ans. And First Amended Counterclaims. in 2018-CP-10-0848, ¶ 7-8; Hrg. Tr. 57:18-21).**

At the time it approved the annexation, North Charleston fully expected a legal challenge:

> Mr. King noted that the subject property is West of the Ashley, and if the annexation is approved a lawsuit will surely be filed against the City [of North Charleston], costing the City [of North Charleston] possibly millions of dollars. He stated his opposition to the annexation.
>
> Mr. Brinson asked and Mayor Summey confirmed that there are no current development plans, and the Mayor said that when the time comes, the City [of North Charleston] will consider development. Mayor Summey said this annexation will result in a better quality of life for current and future residents. He acknowledged that this annexation may be challenged, but that it will be well worth it to have this property under the City [of North Charleston]'s jurisdiction.

(Aff. of MacConnell, Minutes of December 14, 2017, ¶ 2).

All the properties in question are within the Ashley River Historic District (the "Historic District"), which is listed in the National Register of Historic Places (the "National Register").[2]

[2] The National Register of Historic Places is the official list of the nation's historic places worthy of preservation. Authorized by the National Historic Preservation Act and managed by the

(National Trust Mem. In Opposition To Defendant's Mot. To Dismiss, ¶ 2). The Historic District is a largely undeveloped approximately 23,000-acre area and includes historic and archaeological resources that date to the earliest settlement of Charleston in the late 1600s. **(Id., ¶ 3).** Important historic resources in the Historic District include the 11.5 mile stretch of the S.C. Highway 61 (also known as the Ashley River Road) (individually listed on the National Register and a resource that contributes to the significance of the Historic District), which has served as a major transportation route since 1691 and is known for its historic viewshed canopy of live oak trees, and Drayton Hall, a National Historic Landmark[3] owned by the National Trust, which is considered to be the earliest and finest example of Palladian architecture in the United States. **(Id.).** Since 1974, the National Trust has owned and operated[4] Drayton Hall as a National Trust Historic Site open to the public, receiving over 50,000 visitors each year. **(Respondents/Appellants Summons. & Compl., ¶ 2).** The National Register listings and the designation of Drayton Hall as a National Historic Landmark attest to the public significance of

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National Park Service, the National Register is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect America's historic and archaeological resources. 54 U.S.C. § 302101 *et. seq.* The National Register is an authoritative guide to be used by Federal, state and local governments, private groups, and citizens to identify the nation's cultural resources and to indicate what properties should be considered for protection from destruction or adverse impacts. 36 C.F.R. § 60.2. Listing in the National Register also makes property owners eligible to be considered for Federal grants for historic preservation and other Federal and state financial incentives, such as historic rehabilitation tax credits. Id. § 60.2(b), (c). A property can be removed from the National Register if the qualities which caused it to be originally listed have been lost or destroyed. 36 C.F.R. § 60.15.

[3] National Historic Landmarks ("NHLs") are historic places that hold exceptional national significance and receive heightened protection under Section 110(f) of the National Historic Preservation Act. 54 U.S.C. § 306107. Authorized by the Historic Sites Act of 1935, the Secretary of the Interior designates these places as exceptional because of their abilities to illustrate the United States' heritage. Today, there are only about 2,600 NHLs in the United States. See http://www.nps.gov/articles/roots-of-the-national-historic-landmarks-program.htm (accessed Sept. 16, 2019).

[4] As of January 1, 2015, the Drayton Hall Preservation Trust operates the site on behalf of the National Trust pursuant to a set of legal agreements.

the preservation and protection of the properties and landscapes within the Historic District.[5] In addition to Drayton Hall, the National Trust owns other parcels in the Historic District that were primarily acquired and are held for conservation purposes. **(National Trust Mem. In Opp. To Defendant's Mot. To Dismiss, ¶ 2-3).**

The National Trust's land holdings in this area include a two-mile long strip of property, 100' in width, butting up to the western side of S.C. Highway 61 that is designated as Charleston County TMS #301-00-00-017 (the "National Trust Parcel"). **(Aff. of Forsberg, ¶ 3).** The National Trust Parcel, along with the right-of-way for S.C. Highway 61, are within the City of Charleston and lie between the municipal boundary of North Charleston and the Acre. **(National Trust Mem. In Opp. To Defendant's Mot. To Dismiss, Annexation Area Overview Maps, ¶ 15-16; Hrg. Tr. 45:24-46:1).** The Nature Conservancy conveyed the National Trust Parcel to the National Trust by deed dated January 28, 1980, recorded in RMC Office for Charleston County in Book O121 at Page 209 (the "National Trust Deed"), for the purpose of protecting the historic character and context of the Historic District and the viewsheds along the historic Ashley River Road. **(Aff. of Forsberg, Deed into National Trust recorded at 0121/209, ¶ 17-19; National Trust Mem. In Opp. To Defendant's Mot. To Dismiss, ¶ 6-7).**

The National Trust Deed conveyed a parcel of 26.53 acres, more or less, more particularly described as "[t]hose certain strips or parcels of land, being 100 feet in width and immediately adjacent to the southern right-of-way line of Highway 61, and parallel with said

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[5] The Court may take judicial notice of these listings. See National Register of Historic Places, Ashley River Historic District, Charleston County, South Carolina, available at: http://www.nationalregister.sc.gov/dorchester/S10817718009/S10817718009.pdf and http://www.nationalregister.sc.gov/dorchester/S10817718009/S10817710158BI.pdf (additional documentation and boundary increase); Ashley River Road, available at http://www.nationalregister.sc.gov/dorchester/S10817718010/S10817718010.pdf; and Drayton Hall, available at http://www.nationalregister.sc.gov/charleston/S10817710005/S10817710005.pdf.

Highway, and being a total of 11,556 feet in length...." **(Aff. of Forsberg, Deed into National Trust at 0121/209, ℙ 17-19).** The National Trust Parcel is located across from the entrance to Drayton Hall and slightly to the north running along the historic Ashley River Road. **(National Trust Mem. In Opp. To Defendant's Mot. to Dismiss, ℙ 3).** Both of the National Trust's properties of interest to this appeal (the National Trust Parcel and Drayton Hall) are located within the City of Charleston's municipal boundaries. The City of Charleston annexed the National Trust Parcel in 2005. **(Order, ℙ 2).** This uncontested fact is pivotal to questions relating to the validity of the attempted annexation by North Charleston.

The National Trust Deed was subject to certain reservations of easements included in the prior deed conveying the National Trust Parcel from Georgia-Pacific Investment Company ("Georgia-Pacific") to The Nature Conservancy dated January 2, 1980 (the "Nature Conservancy Deed"). **(Aff. of Forsberg, ℙ 3).** The reservation of easements was limited to eighteen easements with the specific purpose "of permitting Grantor, and its successors and assigns, vehicular and pedestrian access from its real property to Highway 61, over and across the [National Trust Parcel], and for installation of utility lines or facilities." **(Id., Deed into The Nature Conservancy recorded at O121/206, ℙ 13-16).** On May 15, 2009, the Whitfield Construction Company recorded a plat in RMC Office for Charleston County in Book L09, Page 228, identifying the easement locations across the National Trust Parcel (the "2009 Plat"). **(Id., Plat L09/0225, ℙ 28-33).** To the best of its knowledge, the National Trust had no knowledge of the chosen locations of the reserved easements prior to the recording of the 2009 Plat. **(Order, ℙ 5).** The National Trust has owned the National Trust Parcel for thirty-nine years, of which fourteen were under (and continue to be under) the jurisdiction of the City of Charleston.

Tim Whitfield Construction and Development LLC (a related entity to the Whitfield Construction Company, which are together hereinafter referred to as "Whitfield") transferred the Acre, the parcel subject to this annexation challenge, to North Charleston for five dollars on September 12, 2017, by deed recorded in the RMC Office for Charleston County in Book 0673, Page 028 on October 16, 2018 (the "Acre Deed"). **(Aff. of Forsberg, Deed into North Charleston recorded at 0673/028, ¶ 41-15).** Whitfield subdivided the Acre from its much larger 2,200-acre tract, which is designated as TMS 301-00-00-005 (the "Whitfield Parcel") that Whitfield acquired from Georgia-Pacific on July 14, 1989.[6] The Acre, the Whitfield Parcel, and the National Trust Parcel were originally part of the same tract of land owned by Georgia-Pacific.

The Acre Deed identifies the land conveyed as that property described in the plat for the Acre approved by Charleston County on September 9, 2018, and recorded in Plat Book S17, Page 0224 in the RMC Office for Charleston County on September 22, 2017 (the "Acre Plat"). **(Id., Plat recorded at S17/0224, ¶ 34-35).** The Acre Plat shows the northeastern boundary of the Acre that abuts the National Trust Parcel in two separate locations as 99.7' and 99.69' from the right-of-way line of S.C. Highway 61, thereby including a total of approximately 62 square feet of the National Trust Parcel for its entire length. **(Id., ¶ 4).** The Acre Plat describes the Acre and, as a result, TMS 301-00-00-797 to include a portion of the National Trust Parcel. **(Id.)**.

North Charleston purportedly adopted the Contested Ordinance under the auspices of section 5-3-100 of the South Carolina Code, which provides, in pertinent part:

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[6] Whitfield desired to have the Whitfield Parcel annexed into North Charleston because it was a condition of the sale of 500-acres of the Whitfield Parcel to a residential developer. See ¶ 50-51 of Whitfield's Answer and First Amended Counterclaim in Circuit Court Case No. 2018-CP-10-2073, a related case.

> If the territory proposed to be annexed belongs entirely to the municipality seeking its annexation and is adjacent thereto, the territory may be annexed by resolution of the governing body of the municipality.... Upon the adoption of the resolutions required by this section and the passage of an ordinance to that effect by the municipality, the annexation is complete.

The Contested Ordinance described the area to be annexed as "one acre identified as parcel designated TMS #301-00-00-797," that includes a portion of the National Trust Parcel. The National Trust did not consent to the annexation of the Acre, nor does it desire for any portion of the National Trust Parcel to be annexed into North Charleston, particularly since the National Trust Parcel lies within the City of Charleston. **(Order, ¶ 5)**.

Standard of Review

A motion to dismiss under Rule 12 is treated as a motion for summary judgment under Rule 56 if affidavits are considered, as occurred below. Rule 12(b), SCRCP ("If...matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56..."). The circuit court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). In determining whether any triable issues of fact exist, the lower court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988). "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit *a mere scintilla of evidence* in order to withstand a motion for summary judgment." Hancock v. Mid-S. Mgt. Co., Inc., 381 S.C. 326, 330, 673

S.E.2d 801, 803 (2009) (emphasis added).

On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

Because the ruling below was on a motion for summary judgment and not after a trial on the merits, the lower court was required to accept as true the allegations supporting the National Trust's ownership of a portion of the land annexed as set forth in the affidavit presented by Respondents/Appellants. Instead, the lower court incorrectly disregarded the averments in that affidavit, ruled as a matter of law that the annexation could only include property owned by North Charleston regardless of the description of the property annexed, and granted North Charleston's summary judgment motion for lack of standing.

Argument

I. The circuit court erred in not applying the standard for summary judgment and erred in granting North Charleston's motion for summary judgment on lack of standing where the affidavit submitted by the National Trust created a genuine issue of fact that the property annexed included property owned by the National Trust.

The standing issue was before the circuit court on North Charleston's motion to dismiss that was converted to a motion for summary judgment by the parties' submission of affidavits. Here, North Charleston did not provide any evidence in its supporting affidavit or otherwise to contradict the National Trust's Affidavit of Daniel C. Forsberg, a licensed civil engineer and land surveyor, that the Acre described in the annexation included a portion of the National Trust's property. **(Aff. of Forsberg)**. This proof established the National Trust's standing or, at a minimum, a genuine issue of material fact as to its standing.

The threshold question is, what property did North Charleston purport to annex? The attachments to the affidavit of Adam McConnell submitted by North Charleston establish that the property annexed was TMS #301-00-00-797 that is in turn described by the survey of the Acre referenced in the deed to North Charleston. **(Aff. of MacConnell).**

As stated in the minutes of North Charleston City Council meeting on December 14, 2017, "The City proposes to annex ***one parcel identified as TMS #301-00-00-797*** in Charleston County." **(Aff. of MacConnell, Minutes of December 14, 2017, ¶ 2)** (double emphasis added). "The next item on the agenda was the first reading of an Ordinance proposed to annex an area known as 52-P, ***identified as Charleston County TMS #301-00-00-797***, and make it part of present City Council District 9, Zoned AG, Agricultural District." **(Id., ¶ 3)** (double emphasis added). "The area proposed for annexation includes ***one acre identified as parcel designated TMS #301-00-00-797***." **(Id., Resolution #2017-067)** (double emphasis added). The dimensions of the Acre that is TMS #301-00-00-797 show that its northeastern boundary along the National Trust Parcel is 99.69' and 99.7' from the right of way of S.C. Highway 61 for a length of 208.71'. **(Id., Plat recorded at S17/0224 dated 9-14-17).** The Acre necessarily includes a portion of the National Trust Parcel that was established as 100' in width from the right of way of S.C. Highway 61 in the deed from the common Grantor. **(Aff. of MacConnell, Deed into The Nature Conservancy at 0121/206, Deed into National Trust at 0121/209; Order, ¶ 2; Respondents/Appellants Cons. Mem. On Summ. J. Mots., ¶ 3).**

In opposition to North Charleston's motion on standing, Forsberg attested the annexation included a portion of the National Trust Parcel, averring, in part:

> The deed to the National Trust for the [National Trust Parcel] was made subject to the right of [Georgia-Pacific] to create 18 easements for access from S.C. Highway 61 across the [National Trust Parcel]. Plats L09/0225-0229 lay out these access easements. Plat S17/0225 also shows Access Easement #3, as shown

> on Plat L-09/0225, running from Highway 61 across the National Trust's property to [the] Acre. The purported width of the National Trust's property is shown as 99.69 feet on the north side and 99.7 feet on the south side. As a result, 62 square feet of the [National Trust Parcel] appears to have been included in [the] Acre.

(Aff. of Forsberg, ¶ 1-3).

Moreover, in light of these uncontroverted facts, Mr. Forsberg concluded:

> Based on the records I have reviewed to date, it appears, to a reasonable degree of certainty based on my education and experience as a Professional Engineer and Land Surveyor, that [the] Acre overlaps the [National Trust Parcel], ***encroaching on 62 square feet of the [National Trust Parcel].***
>
> Based on the records I have reviewed to date, it appears, to a reasonable degree of certainty based on my education and experience as a Professional Engineer and Land Surveyor, that, if North Charleston annexed the Acre as described by Plat S17/0224 or as designated by TMS No. 301-00-00-797, then ***the land that was annexed included a small portion of the [National Trust Parcel].***

(Id., ¶ 3) (double emphasis added).

Viewing the evidence in the light most favorable to the non-moving party, the National Trust presented far more than the needed scintilla of evidence to withstand the motion for summary judgment on standing. Lord v. D & J Enterprises, Inc., 407 S.C. 544, 558, 757 S.E.2d 695, 702 (2014). At a minimum, because summary judgment is a drastic remedy, and where, as here, discovery was not complete, summary judgment is never appropriate where further inquiry into the facts of the case would have been helpful to clarify application of the law. Id. at 553, 757 S.E.2d at 699.

North Charleston's mere allegation that "it did not claim any ownership of the strip owned by the National Trust" is irrelevant. **(Order, ¶ 5-6).** The question is not whether North Charleston asserted title to a portion of the National Trust Parcel as held by the circuit court. **(Id., ¶ 6).** The question is whether the area described in the annexation included any property owned by the National Trust. It did. North Charleston's assertion as to its intent cannot overcome the

uncontroverted Affidavit of Forsberg who determined that North Charleston's annexation of the Acre did encroach on the National Trust Parcel and the National Trust's proprietary rights.

The circuit court acknowledged that "the 2009 [P]lat had width variations of a few inches here and there, so too did the 2017 plat of the Acre." **(Id., ℙ 4).** Furthermore, North Charleston has acknowledged the "four-inch discrepancy." **(Hrg. Tr., ℙ 9).** These width variations in the legal description of the plats and cited in the Contested Ordinance as the area to be annexed are sufficient to determine, in the light most favorable to the National Trust, that a portion of the National Trust Parcel was purportedly annexed by North Charleston.

Finally, the circuit court's reliance on what it considered to be a relatively minor encroachment of four inches contradicts the circuit court's earlier finding on page 5 of the Order that no encroachment occurred. **(Order, ℙ 5 & 9).** This acknowledgment, however, is proof of the National Trust's proprietary rights and standing. The circuit court's rejection of this proof in its standing analysis provides another instance of the circuit court misapplying the standard for summary judgment that all evidence be viewed in the National Trust's favor. There was a genuine issue of material fact that the area purportedly annexed included a portion of the National Trust Parcel, and the circuit court erred in granting North Charleston's motion for summary judgment on the basis of standing.

II. The circuit court erred in determining that the area annexed depended on record title rather than the description of the area annexed in the annexation resolution and in finding the subjective intent of North Charleston overrode its description of the property annexed.

In its analysis of proprietary standing, the circuit court reasoned that North Charleston, the party seeking annexation of the Acre, could not annex property that was not owned by North Charleston. **(Id., ℙ 6-7).** The circuit court recognized the discrepancy in the 2009 Plat locating the access easements and the Acre Plat creating the Acre and TMS #301-00-00-797, which

included that a small portion of the National Trust Parcel was included in the platted description of the Acre, but found that the discrepancy did not make a difference because North Charleston did not own it (if North Charleston's contentions are true) and did not intend to annex land it did not own. **(Id., ¶ 4 & 6-7).**

The statutes governing annexation focus on the area to be annexed. These statutes have no provisions that the areas proposed to be annexed can only be property owned by the petitioners for annexation. The statutes also make no reference to the intent of the annexation petitioner. Their focus is entirely on description of the territory or area to be annexed. Section 5-3-100 looks at the "territory proposed to be annexed."[7] This is akin to S.C. Code Ann. § 5-3-150(3) governing annexation under the 100% rule that refers to "a petition signed by all persons owning real estate in the ***area requesting annexation***" and to "the agreement of the governing body to accept the petition and annex ***the area***...." S.C. Code Ann. § 5-3-100 (double emphasis added).

For example, in Ex parte State ex rel. Wilson, 391 S.C. 565, 707 S.E.2d 402 (2011) cited by the parties and the circuit court in this case, much of the Supreme Court's opinion there dealt with who had standing to contest the annexation of public trust tidelands that were described in the area annexed. The Supreme Court noted as follows:

> The State, which is the presumptive owner of the annexed marshlands, did not sign the petition. Notwithstanding the absence of the State's consent to the annexation, the annexation ordinance recites that the Town received a petition signed 'by all persons owning real estate' in the annexed area....

[7] "If the territory proposed to be annexed belongs entirely to the municipality seeking its annexation and is adjacent thereto, the territory may be annexed by resolution of the governing body of the municipality and the governing body of the county. Upon the adoption of the resolutions required by this section and the passage of an ordinance to that effect by the municipality, the annexation is complete." S.C. Code § 5-3-100.

> ....Where the State holds title to real property in the area to be annexed, it is a 'person[ ] owning real estate' within the meaning of section 5-3-150(3) and its signature is required to accomplish an annexation by 100% petition....
>
> By its plain language, section 5-3-150(3) requires the signatures of 'all persons owning real estate in the area requesting annexation.'...
>
> This annexation did not comply with the requirements of the 100% petition method. The State was the presumptive owner of the annexed marshlands and the Town did not provide the State with prior notice of the annexation or obtain the State's signature on the petition. Nevertheless, the State's challenge of the annexation is time-barred.

Id. at 569-78, 707 S.E.2d at 404-409.

The Supreme Court did not hold that the parties to the annexation petition and the governmental body approving the annexation had no ability to annex property the petitions did not own. To the contrary, the Supreme Court found that the annexation petitioners had indeed annexed the tidelands they did not own under the 100% method but that the South Carolina Attorney General, the sole party with standing to challenge the annexation of the public trust tidelines, did not assert its objection in a timely manner under the controlling statutes.

Similarly, in this case, the question of proprietary standing turns on whether the National Trust presented a genuine issue of material fact that the National Trust owned a portion of the area annexed. The area annexed was described in the Contested Ordinance as "TMS 301-00-00-797" and "as shown on a map prepared by the GIS Department for purposes of this annexation, dated October 4, 2017, being the legend 'Area Proposed For Annexation By The City Of North Charleston Section 52-P.'" **(Aff. of MacConnell, Ordinance #2017-080).** The Contested Ordinance goes on to specifically describe the area annexed as the property in the precise survey that includes a portion of the National Trust Parcel:

> Beginning at Point A, on the easternmost corner of parcel designated TMS #301-00-00-797 which is also adjacent to the present city limits line; thence, in a generally northwesterly direction a distance of 209 feet along the northeasternmost property line of parcel designated TMS #301-00-00-797 to Point B which point is on the northernmost corner of parcel designated TMS

> #301-00-00-797; thence, in a generally sourthwesterly direction a distance of 209 feet along the northwesternmost property line of parcel designated TMS #301-00-00-797 to Point C which point in on the westernmost corner of parcel designated TMS #301-00-00-797; thence, in a generally southeasterly direction a distance of 209 feet along the southwesternmost property line of parcel designated TMS #301-00-00-797 to Point D which point is on the southernmost corner of parcel designated TMS #301-00-00-797, thence, in a generally northeasterly direction a distance of 209 feet along the southeasternmost property line of parcel designated TMS #301-00-00-797 to Point A, the point of beginning with all distance being more or less.

(Id.).

The TMS parcel reference includes a portion of the National Trust Parcel. Engineer and surveyor Forsberg avers in his affidavit that "[t]he tax map sequence (TMS) number is derived from the legal description of the parcel as set out in the most recently recorded deed or plat. **(Aff. of Forsberg, ¶ 3).** The legal description for the Acre references Plat S 17 /0224. As a result, Charleston County has assigned a tax map sequence (TMS) number to this property, that being TMS No. 301-00-00-797." **(Id., ¶ 5)**.

Because, at a minimum, there is a genuine issue of material fact that the territory annexed included property owned by the National Trust, North Charleston was not entitled to summary judgment on the question of the National Trust's proprietary standing. Whether North Charleston was mistaken about the Acre Plat or only intended to annex the property it owned does not override the description of the area annexed in the annexation resolution and Contested Ordinance.

Although not determinative of its proprietary standing, the lower court seemed to give weight to its notion that it was incumbent on the National Trust to bring a legal action to clear title if it believed the Acre Plat included a portion of its property. The National Trust would point out that the circuit court apparently overlooked that the question of title has in fact been raised in this litigation. **(Hrg. Tr. 33:7-34:12).** North Charleston has counterclaimed against the National Trust in 2018-CP-10-00-851 for a declaration that it has title to all portions of the Acre. **(North**

Charleston's Answer and Counterclaim, ¶¶ 59-60) ("Despite the allegations of the Plaintiffs hereabove, no portion of the North Charleston property encroaches into or upon the property of National Trust. North Charleston owns its property free and clear of the claims of any third parties, including the Plaintiffs.").

The lower court committed legal error in its concluding that the area purportedly annexed must be determined by the legal title of North Charleston and its expressions of intent in the Contested Ordinance rather than by the actual property description of the annexed area in the Contested Ordinance.

III. The circuit court erred in ruling that the National Trust lacked standing under the public importance exception to challenge the annexation of an area within the Ashley River Historic District.

A. Protection of Historic Preservation Interests

Although the National Trust has proprietary standing based on North Charleston's encroachment of the National Trust's proprietary rights, the circuit court also misapprehended the state of the law, namely Vicary v. Town of Awendaw, 425 S.C. 350, 822 S.E.2d 600 (2018), and Vicary's application to the National Trust in ruling that the National Trust lacks public importance standing.

First of all, unlike the parties seeking to invoke public importance in the cases cited by the circuit court, the National Trust is clearly invested with advancing the recognized national interest in historic preservation. The National Trust was chartered by the United States Congress in 1949 to advocate on behalf of historic preservation, including places like the Historic District and Drayton Hall, which is, as discussed above, a National Historic Landmark owned by the National Trust and located in close proximity to the National Trust Parcel that was partially

annexed by North Charleston. **(54 U.S.C. §§ 312102-312106 (2015); Mem. National Trust in Opposition to Defendant's Mot. to Dismiss, ℙ 10-11).**

The circuit court's statement that the National Trust only articulated "good deeds" in support of its public importance standing overlooks that these actions were listed as examples of similar advocacy to demonstrate the National Trust's vigilant advancement of the declared national interest in historic preservation that is its charge from the United States Congress. **(Order, ℙ 8; National Trust Mem. In Opp. To Defendant's Mot. To Dismiss, ℙ 11-12).** The circuit court's characterization is especially ironic in light of the fact that the National Trust Parcel was acquired in 1980 in fee simple ownership for the express purpose of protecting the historic context of the entire Historic District in perpetuity, including the portion of the natural Historic District that North Charleston wishes now to convert to sprawling subdivisions, far beyond what Charleston County's zoning would have allowed. **(Id., ℙ 6-7).** The circuit court also ignored the National Trust's long history of legal engagement in the pursuit of historic preservation and of ownership of historic property in the immediate area. **(Id., ℙ 10-11).**

Further, the South Carolina Attorney General's interest is far different from the public interests promoted by the National Trust. The South Carolina Attorney General does not have a statutory charter from the United States Congress, which determined that nationally significant historic places should be preserved by the National Trust. There is nothing in the statutes of this state or case law that instill the South Carolina Attorney General with protecting the public interest in historic preservation. Historic preservation is outside of the Attorney General's "job description." The National Trust submits the circuit court erred in holding that the inaction of the South Carolina Attorney General is determinative of whether this case involves a matter of public importance. The circuit court's error is compounded in this case where there is utterly

nothing in the record to demonstrate the South Carolina Attorney General was fully apprised of the material facts associated with these annexations and made a deliberate decision not to intercede. Thus, there is a genuine issue of material fact as to the National Trust's standing based on the public interest versus the different interests served by the South Carolina Attorney General.

B. Need for Future Guidance on Requirements of Adjacency and Contiguous under Section 5-3-100.

The circuit court also misapprehending the need for "future guidance," which is inextricably connected to the public need. Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). The fact that North Charleston, by the circuit court's own admission, leapfrogged illegally over the City of Charleston's municipal wall—created by the National Trust Parcel that was previously annexed by the City of Charleston in 2005—and attempted an annexation by the 100% owned by a municipality method with a legally flawed definition of contiguity creates an undisputed incentive for other municipalities to follow North Charleston's lead. **(Order, ¶ 13).** North Charleston's conduct, therefore, creates a dangerous incentive for a messy patchwork of annexations statewide, as well as harm to the private property and statutory rights of South Carolina residents and property owners throughout the state. Respectfully, these are the type of "unique facts" Justice Hearn suggested in Vicary merited recognition of public importance standing and that the circuit court commented in its Order. **(Id., ¶ 8-9).** Therefore, the unusual facts of this case provide a second basis for finding that the National Trust has public importance standing.

Conclusion

In making the ruling below the circuit court lost sight that the motion for summary judgment required the circuit court to consider the affidavit of the National Trust as to its individualized injury and other allegations of standing in the light most favorable to the National Trust. A genuine issue of fact clearly exists as to whether a portion of the National Trust Parcel was purportedly annexed by North Charleston.

The circuit court also made clear legal errors. Specifically, the lower court erred in holding that North Charleston could only annex area it had legal title to rather than the description of the area annexed in the Contested Ordinance, and in considering the intent of North Charleston as opposed to the property description. The circuit court also erred in ruling against the National Trust on its grounds for standing when the National Trust undoubtedly has statutory standing as an injured property owner and propriety standing as the national organization with a mission to save historic places.

Based on the foregoing, the circuit court erred in finding that there was no genuine issue of material fact and the Respondents/Appellants lacked standing as a matter of law. Accordingly, the circuit court's decision should be REVERSED.

Respectfully submitted,

November 15, 2019

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November 15, 2019

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Honorable Jenny Abbott Kitchings
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Re: National Trust & City of Charleston v. City of North Charleston
Appellate Case No. 2019-000728
WGFL File No. : 8081.001

Dear Ms. Kitchings:

Enclosed please find the Respondent/Appellant National Trust's Initial Brief, Designation of Matter, and Proof of Service.

Thank you for filing the enclosures with the Court. With kind regards, I am,

Sincerely yours,

WALKER, GRESSETTE, FREEMAN, & LINTON, LLC

G. Trenholm Walker

Enclosures (As Stated)

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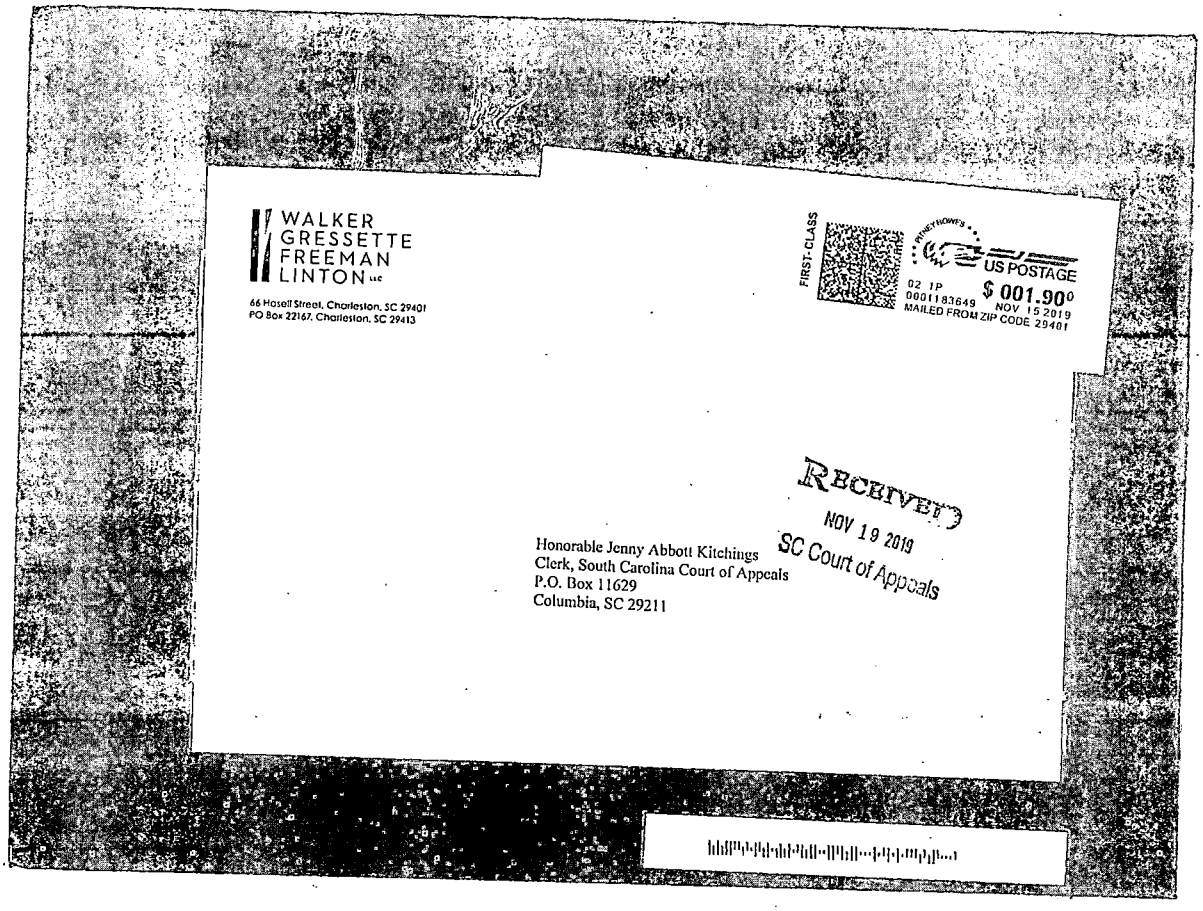

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