THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
Hon. Eugene Griffith

Case No. 2018-CP-10-0846
Case No. 2018-CP-10-2131
Case No. 2018-CP-10-2539
Appeal No. 2019-000903

The City of Charleston, Appellant

v.

City of North Charleston and Millbrook Plantation, LLC, Respondents.

AND

Millbrook Plantation, LLC Plaintiff,

v.

City of Charleston Defendant

AND

City of Charleston Plaintiff

v.

City of North Charleston and Millbrook Plantation, LLC, Defendants.

FINAL BRIEF OF RESPONDENT CITY OF NORTH CHARLESTON

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
Hon. Eugene Griffith

Case No. 2018-CP-10-0846
Case No. 2018-CP-10-2131
Case No. 2018-CP-10-2539
Appeal No. 2019-000903

The City of Charleston, Appellant

v.

City of North Charleston and Millbrook Plantation, LLC, Respondents.

AND

Millbrook Plantation, LLC Plaintiff,

v.

City of Charleston Defendant

AND

City of Charleston Plaintiff

v.

City of North Charleston and Millbrook Plantation, LLC, Defendants.

FINAL BRIEF OF RESPONDENT CITY OF NORTH CHARLESTON

Derk Van Raalte and Brady Hair
Legal Dept., 2500 City Hall Lane
North Charleston, SC 29406
843-740-2550 derk@bradyhair.com

Attorneys for the Respondent
City of North Charleston

Other Counsel of Record:

Susan Herdina
Francis Cantwell
Daniel ("Chip") McQueeney, Jr.
50 Broad Street
Charleston, SC 29401
mcqueeneyd@charleston-sc.gov
843-724-3730
Attorneys for the City of Charleston

Bruce Miller
Bruce Miller, PA
147 Wappoo Creek Drive, Suite 603
Charleston, SC 29412

Attorney for Millbrook Plantation

TABLE OF CONTENTS

TABLE OF CASES

CASES

STATUTES

OTHER AUTHORITIES

Statement of Issues on Appeal

I. Prior Pending Proceedings Rule

A. Judge Griffith Correctly Ruled that Our Supreme Court Declined to Adopt the "Prior Pending Proceedings" Rule.

B. Charleston Was Not First In Line in Any Event

II. North Charleston Did Not Annex Land Previously Annexed by Charleston.

III. Charleston Has No Standing To Challenge This 100% Annexation.

Statement of the Case

North Charleston has no material objection regarding Appellant's procedural history.

Statement of Facts

Timing

Prior to this dispute TMS 361-00-00-006 ("Parcel 006"), was bounded to the East by North Charleston and to the West by Charleston. Both cities sought to annex the property. Parcel 006's owner asked North Charleston to annex it by the 100% method. North Charleston completed annexation of Parcel 006 on December 28, 2017. R.OA. p. 303 (Ordinance No. 2017- 083.)

Weeks later, in January of 2018, Charleston gave first reading to an annexation ordinance for the same Parcel 006 that North Charleston had previously annexed the prior year. On April 10, 2018, Charleston gave final reading to complete that ordinance.[1] By then Charleston was just closing the barn door after the horse had already escaped.

[1] Charleston City Council, at its meeting of December 19, 2017, claims to have "acted" by receiving or accepting a seventy-five percent annexation petition to take Parcel 006 against the owner's wishes. There was no annexation ordinance on the Charleston Council agenda for a reading that night. North Charleston does not believe a municipality may take official "action" by merely receiving delivery or "agreeing to accept something for possible consideration later."

Annexation Description

Unknown to North Charleston at the time Ordinance 2017- 083 was framed[2], next to unincorporated Parcel 006 lay a separate 100' shoestring parcel[3], TMS 361-00-00-006-1 ("Parcel 006-1".) Though Ordinance 2017-83 correctly listed its annexation target parcel by name (Parcel 006) and excluded any listing of Parcel 006-1 in the ordinance or map, the legal description mistakenly described Parcel 006's boundary as Ashley River Road which would conflict with Parcel 006-1. See R.OA. p. 303 (Ordinance No. 2017- 083.)

Parcel 006-1 is important here because in 2005 Charleston annexed that tract. Charleston thus argued below that the minor disparity in the Parcel 006 description in North Charleston Ordinance 2017-083 amounted to North Charleston trying to annex property already governed by Charleston.

---

[2] North Charleston contends its annexation descriptions for Parcel 006 were drawn in faithful compliance with the then-existing County RMC maps. Subsequent to North Charleston's annexation Charleston County amended its maps to effectively reduce the size of Parcel 006 and create a never-before-mapped parcel designated TMS 361-00-00-006-1. As a result of its discovery of this Charleston County record change, North Charleston passed on March 22, 2018, Ordinance 2018-017 (the "Corrective Ordinance.") R.O.A. 307 The Corrective Ordinance confirmed the intent stated in North Charleston's original annexation – namely to annex only Parcel 006. The Corrective Ordinance further confirmed that, to the extent Charleston County records had been updated to reduce the size of Parcel 006, that the City's annexation records would be similarly reduced. Given the Rule 12(b)(6) posture of the motion before the Court, Judge Griffith did not delve into such details about when various County RMC records were updated. Instead, he properly assumed to be true the City of Charleston's allegations that County records were correct as of December 27, 2017. Since this appeal is of a Rule 12(b)(6) dismissal North Charleston's argument herein will proceed in the same vein, but it reserves the right to argue all facts should reversal occur.

[3] Back in 2005 when the City of North Charleston first annexed across the Ashley River the City of Charleston apparently annexed a curiously undevelopable one hundred (100') string along the edge of Ashley River Road parallel to North Charleston's prior boundary, the Ashley River.

Standard of Review

North Charleston has no material objection regarding Appellant's Standard of Review.

Argument

The City of Charleston lost because it lacks standing. Only an annexed landowner or the South Carolina Attorney General may challenge a 100% method annexation. Vicary v. Town of Awendaw, 417 S.C. 631, 637-38 (SC App. 2016). Charleston is neither. It offers two basic arguments to try to avoid this elephant in the room:

- Charleston claims the Prior Pending Proceedings Rule let it beat North Charleston to the punch to annex Parcel 006. The problem? That rule has never been adopted and Charleston wasn't first!
- Charleston claims that North Charleston annexed two parcels (not one) including Charleston territory. The problem? North Charleston did not!

I. Prior Pending Proceedings Rule

A. Judge Griffith Correctly Ruled that Our Supreme Court Declined to Adopt the "Prior Pending Proceedings" Rule.

Charleston faults Judge Griffith for concluding the South Carolina Supreme Court "has declined to adopt this [Prior Proceedings] rule", but in this very appeal acknowledges the South Carolina Supreme Court saying ***exactly that***. Pet. Brief at p. 7 (Quoting the Supreme Court as saying "We decline to reach the issue of whether the 'prior proceedings" rule should be adopted by this Court."[4]) While Charleston may wish for the rule to be adopted, Judge Griffith applied the law as it exists.

[4] City of Columbia v. Town of Irmo, 316 SC 193, 196, 447 SE2d 855, 857 (SC 1994).

B. Charleston Was Not First in Line in Any Event[5]

Even were the Supreme Court interested in announcing a new rule, this would hardly be the case in which to do it. Charleston claims that it commenced its annexation of Parcel 006 prior to North Charleston. Just the opposite is true.

Charleston's dating argument, based upon the December 2017 *receipt* of a 75% petition, is hardly based on official "action." Charleston "receives" an annexation petition when a landowner decides to deliver it. This cannot be City "action." Charleston could not have truthfully denied having received the petition if it tried. Once delivered to Charleston it was "received" by Charleston whether Charleston wanted to accept it or not! Acknowledging delivery or agreeing to accept something for possible consideration later does nothing to change that or constitute "action" any more than a future "agreement to agree" can constitute a contract. The only official action Charleston could take was to vote up or down an ordinance in response to the submittal.

Focusing on Charleston's action (annexation ordinance) instead of focusing on a landowner's action (petition submittal) is completely consistent with Title 5 of the South Carolina Code of Laws. SC Code Ann. 5-7-260 tells us that a municipality may take "action" by "resolution" or "ordinance." S.C. Code Ann. 5-7-260 ("In matters other than those referred to in this section council may act either by ordinance or resolution.")(emphasis added.) Action on an annexation must taken by ordinance. See S.C. Code Ann. 5-3-150. The City of Charleston's own procedure for taking action on an ordinance requires that the ordinance "shall be introduced in

---

[5] Given the 12(b)(6) setting before Judge Griffith he assumed Charleston's claim of being first in line to be correct. R.O.A. p. 8. However, under SCAR 220(c) an order may be affirmed for any ground appearing in the record. Under this authority North Charleston argues herein that Charleston's own description of the event (receipt of a petition (Pet. Brief, p. 7)) giving rise to its claimed first in line status is not sufficient even under a Prior Proceedings Rule.

writing and in the form required for final adoption" and that it must be read by council on two separate occasions. R.O.A. p.310. City of Charleston Ordinance 2-24. No statute creates a third way for city council "act" called "having a delivery dropped off", "receiving the mail", or "accepting for consideration of possible approval / disapproval later."

Against this backdrop, Charleston cannot prevail based on "receipt." Receipt is not "legal proceedings first instituted." It may reflect action by a landowner, but it is not government "action" (i.e. a reading of an "ordinance" or "resolution".)

Agreeing to accept a document is no different. This is particularly true in this instance where Section 5-3-150's requirement that an ordinance be passed means that "acceptance" of a petition expressly has no bearing on ultimate approval or rejection.[6]

Before Charleston ever even had a public hearing and gave first reading on its annexation ordinance, the City of North Charleston fully completed passage of its own earlier annexation. Considering the fact that our Supreme Court previously declined to adopt the Prior Proceedings rule, the fact pattern here is hardly the place for this Court to try to predict a reversal of prior Supreme Court guidance.

---

[6] Other than perhaps signaling staff administratively to frame an ordinance for possible later consideration, the phrase "agreement to accept the petition" cannot have any legal significance in terms of annexation approval. Charleston City Council would clearly be free to vote down an annexation ordinance even after "agreeing to accept a petition", making clear that accepting a petition has no legal significance at all. This conclusion is actually consistent with the City of Charleston's own online guidance to property owners interested in annexation. On its own website Charleston unambiguously explains "How to Annex. To annex into the City of Charleston, your property must be: - approved by the City Council – Contiguous or 'touching' the city limits." ROA p. 311. https://www.charleston-sc.gov/839/Annexation-Eligibility . Charleston lists only one step by Council (approval), not the two (i.e. "accept petition" *and* "approve ordinance") it argues for this appeal.

II. North Charleston Did Not Annex Land Previously Annexed by Charleston.

North Charleston's original annexation ordinance was clear – it sought to annex the unincorporated land known as Parcel 006. That is exactly what it did. Charleston's argument is that North Charleston annexed both unincorporated Parcel 006 and the separate incorporated Parcel 006-1. However, North Charleston's ordinance listed only Parcel 006 as the parcel annexed. Parcel 006-1 was nowhere listed. Similarly, the accompanying annexation map showed Parcel 006 and nowhere listed a Parcel 006-1. Judge Griffith found that noteworthy. See ROA p. 10 (Order at Pg. 10 of 11.)

Admittedly, North Charleston's boundary description contained a factual error - it described the Parcel 006 boundary line as reaching Ashley River Road, and in that sense overlooked Parcel 006-1. However, the intent of North Charleston's council here was easy to discern. The Ordinance identified Parcel 006 by name and made no reference to Charleston's Parcel 006-1. That is unmistakable. Regarding the Ordinances' other description of Parcel 006, that description ended with the phrase "all distances being more or less." ROA p. 10 (Order of Judge Griffith, Pg. 10 of 11.) North Charleston Council told the world that if the boundaries of Parcel 006 might be slightly smaller described in the Ordinance, so be it. Here we are dealing with a roughly three percent (3%) annexation area disparity. That is hardly reversible error where the ordinance otherwise identified by the target parcel perfectly by name and expressly provided that boundary deviations might exist.

Charleston cannot reasonably fault North Charleston for the corrective ordinance. ROA p. 307 (Ord. 2018-17.) At the time of the initial ordinance North Charleston's paperwork reflected known public information. When updated information came to light, a potential for confusion arose. To alleviate any confusion North Charleston did the right thing – it updated its public

records to reflect updated County information. In so doing it expressly confirmed its original intent to annex only Parcel 006 (as stated in the original annexation) and disavowed any claim to lands previously annexed by Charleston under a different TMS number never mentioned in North Charleston's ordinance. It is hard to imagine what more could or should have been done. North Charleston does not claim land previously annexed by Charleston. Charleston cannot manufacture standing by pointing to a dispute that does not exist.

III. Charleston Has No Standing To Challenge This 100% Annexation.

Standing is required in order to pursue an annexation challenge. Vicary, 417 S.C. at 637-38. There are only two groups with standing to challenge a 100% annexation: (1) property owners of annexed land and (2) the Attorney General of South Carolina. Id.[7] Charleston falls into neither category.[8]

It is uncontested that North Charleston annexed Parcel 006 by way of the 100% method. It is uncontested that Charleston is not the owner of Parcel 006. (That property is owned by Respondent Millbrook Plantation, LLC. who asked North Charleston to annex it.) It is uncontested that Charleston is not the South Carolina Attorney General. Finally, it is uncontested that the South Carolina Attorney General did not file an objection and is not a party to this action. Application

---

[7] Vicary v. Town of Awendaw, 417 S.C. at 637-638("Our case law provides that 'to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights,' and the State of South Carolina is the only non-statutory party which may challenge a municipal annexation. *See St. Andrews*, 349 S.C. at 604–05, 564 S.E.2d at 648.")

[8] Charleston argues in favor of a third category of standing for cases where one municipality claims to annex property already incorporated into another municipality. As discussed in the previous section, that did not occur in this case. Thus standing analysis for Charleston's further involvement in this challenge is governed by Vicary. There is no need to speculate about whether the Supreme Court would expand standing based on a scenario not before the Court in this case.

of Vicary to these facts is clear: Charleston lacks standing to challenge the annexation of main Parcel 006.

Conclusion

Charleston's appeal must be denied. It cannot invalidate North Charleston annexation of Parcel 006 by use of the Prior Proceedings Rule because (a) that rule is not the law of South Carolina and (b) Charleston was not first in any event. Charleston cannot invalidate North Charleston's action (or claim standing for further challenges) based upon North Charleston's annexation of Parcel 006-1 because North Charleston did not annex that Sub-parcel. No other standing for challenges exists and the appeal should be denied.

Respectfully submitted:

Derk Van Raalte and Brady Hair
Legal Dept., 2500 City Hall Lane
North Charleston, SC 29406
843-740-2550 derk@bradyhair.com

Attorneys for the Respondent
City of North Charleston

This 4th day of February, 2020

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
Hon. Eugene Griffith

Case No. 2018-CP-10-0846
Case No. 2018-CP-10-2131
Case No. 2018-CP-10-2539
Appeal No. 2019-000903

The City of Charleston, Appellant

v.

City of North Charleston and Millbrook Plantation, LLC, Respondents.

AND

Millbrook Plantation, LLC Plaintiff,

v.

City of Charleston Defendant

AND

City of Charleston Plaintiff

v.

City of North Charleston and Millbrook Plantation, LLC, Defendants.

Certificate of Counsel (Briefing)

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

February 4, 2020.

Derk Van Raalte
Legal Dept., 2500 City Hall Lane
North Charleston, SC 29406
843-740-2550 derk@bradyhair.com

Attorneys for the Cross-Appellant
City of North Charleston

Derk Van Raalte and Brady Hair
Legal Dept., 2500 City Hall Lane
North Charleston, SC 29406
843-740-2550 derk@bradyhair.com

Attorneys for the Respondent
City of North Charleston

Other Counsel of Record:

Susan Herdina
Francis Cantwell
Daniel ("Chip") McQueeney, Jr.
50 Broad Street
Charleston, SC 29401
mcqueeneyd@charleston-sc.gov
843-724-3730
Attorneys for the City of Charleston

Bruce Miller
Bruce Miller, PA
147 Wappoo Creek Drive, Suite 603
Charleston, SC 29412

Attorney for Millbrook Plantation

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
Hon. Eugene Griffith

Case No. 2018-CP-10-0846
Case No. 2018-CP-10-2131
Case No. 2018-CP-10-2539
Appeal No. 2019-000903

The City of Charleston, Appellant

v.

City of North Charleston and Millbrook Plantation, LLC, Respondents.

AND

Millbrook Plantation, LLC Plaintiff,

v.

City of Charleston Defendant

AND

City of Charleston Plaintiff

v.

City of North Charleston and Millbrook Plantation, LLC, Defendants.

Certificate of Counsel (Briefing)

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

February 4, 2020.

Derk Van Raalte
Legal Dept., 2500 City Hall Lane
North Charleston, SC 29406
843-740-2550 derk@bradyhair.com

Attorneys for the Cross-Appellant
City of North Charleston

Derk Van Raalte and Brady Hair
Legal Dept., 2500 City Hall Lane
North Charleston, SC 29406
843-740-2550 derk@bradyhair.com

Attorneys for the Respondent
City of North Charleston

Other Counsel of Record:

Susan Herdina
Francis Cantwell
Daniel ("Chip") McQueeney, Jr.
50 Broad Street
Charleston, SC 29401
mcqueeneyd@charleston-sc.gov
843-724-3730
Attorneys for the City of Charleston

Bruce Miller
Bruce Miller, PA
147 Wappoo Creek Drive, Suite 603
Charleston, SC 29412

Attorney for Millbrook Plantation