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 the City of Charleston .....Respondents/Appellants,

v.

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

REPLY BRIEF OF RESPONDENT/APPELLANT NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES

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IN THE UNITED STATES

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Argument

I. There is a genuine issue of material fact as to whether North Charleston annexed a portion of the National Trust Parcel in the City of Charleston, thereby creating a genuine issue of material fact as to the standing of the National Trust.

As more fully discussed in the Brief of Respondent/Appellant National Trust for Historic Preservation ("National Trust" or "Respondent/Appellant"), there is a genuine issue of material fact as to whether the description of the annexed area in the ordinance of annexation (the "Contested Ordinance") of Appellant/Respondent City of North Charleston ("North Charleston") included a portion of property owned by the National Trust within the boundaries of Respondent/Appellant City of Charleston ("City of Charleston" and together with the National Trust, the "Respondents/Appellants"). **(National Trust App. Br.).** Contrary to the arguments of North Charleston, the National Trust does not contend that North Charleston acquired legal title to a portion of its property because the deed conveying the Acre to it referred to a plat that showed its eastern boundary extending into the National Trust Parcel. Nor does the National Trust's standing turn on the question of legal title as found by the lower court[1] and argued by North Charleston on appeal. **(North Charleston Resp. Br., pp. 6-9)**. What is material is the description of the area purportedly annexed by North Charleston in the Contested Ordinance.

The Contested Ordinance and minutes of the North Charleston Council meeting describe the area annexed as TMS #301-00-00-797. **(Aff. of MacConnell, R.pp. 240-241, Minutes of**

[1] "As a matter of law, no error in the legal description or plat for the Acre could have resulted in North Charleston obtaining ownership of any land claimed by the Plaintiffs... No matter what the property description or plat to the Acre might say, it is legally impossible for Whitfield [the grantor to North Charleston] to have conveyed North Charleston title to any of the Trust's land. Since North Charleston acquired its ownership to the Acre through a Quit Claim rather than a Warranty deed, assuming National Trust is correct that its boundary is exactly 100' from Ashley River Road rather than the 99.7' shown on the Acre plat, the result would not be that North Charleston owns any of National Trust's 100' strip property. As a matter of law, National Trust would retain its full undiminished acreage. The claimed 4" error could only reduce the amount of land obtained by North Charleston from a perfect acre to 99.999% of an acre." (**Order, R.pp. 6-7**).

December 14, 2017, p. 279; *Id.*, p. 280; *Id.*, Resolution #2017-067, R.pp. 283-284). The lower court acknowledged that this property description was the area that North Charleston intended to annex: "North Charleston City Council stated an intent to annex the property known as TMS 301-00-00-797." **(Order, R.p. 7)**. The dimensions of TMS #301-00-00-797 (the "Acre") are determined by the plat of the Acre referenced in the deed to North Charleston that establishes 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 208.81'. **(National Trust App. Br., p. 12).** It is undisputed the southwestern boundary of the National Trust Parcel is exactly 100' in width from the right of way of S.C. Highway 61. **(Deeds of conveyance from Georgia Pacific to The Nature Conservancy, R.pp. 252-254, and from The Nature Conservancy to the National Trust, R.pp. 255-257**). Respondents/Appellants submitted the Affidavit of Daniel C. Forsberg, a licensed civil engineer and land surveyor, who attested that the boundaries of TMS #301-00-00-797 are determined by the referenced plat and 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]." **(Aff. of Forsberg, ¶ 9, R.p. 245)**.

Since the annexed area included a portion of the National Trust Parcel, the National Trust submits it has statutory standing as an owner of a part of the annexed area as a matter of law. However, because standing was before the lower court on North Charleston's motion, the question on appeal is whether there was an issue of material fact as to the standing of the National Trust. The deeds, plat, and Affidavit of Forsberg establish, at a minimum, a genuine issue of a material fact as to the standing of the National Trust.

The lower court incorrectly held that the "TMS number and map [referenced in the Contested Ordinance] do not supersede a deed" and "the reference in the Annexation Ordinance

to 'TMS 301-00-00-797' is subservient to the deed as well." **(Order, R.p. 7)**. As stated earlier, the dispositive issue is not whether North Charleston gained legal title to a portion of the National Trust Parcel, as held by the lower court and argued by North Charleston, but whether the description of the area annexed included a portion of the National Trust Parcel. In the cases cited by the lower court and North Charleston, our appellate courts looked to the description of the area annexed in the annexation ordinance and did not hold that the signatories to the annexation petition could annex only the land owned by them, as held by the lower court in this case. The opposite is true. In Ex parte State ex rel. Wilson, 391 S.C. 565, 707 S.E.2d (2011), our Supreme Court held the petitioning owners annexed tidelands belonging to the state because the tidelands were part of the property described in the area annexed in the annexation petition and annexation ordinance even though the state was not a party to the annexation petition.

Similarly, the lower court erred in considering the intent of North Charleston to annex only property it legally owned to take priority over the description of the area annexed in the Contested Ordinance: "This Court finds that North Charleston's Ordinance for annexation was for the property that it owned and not any portion of the Strip or any of the municipal area of Charleston." **(Order, R.p. 7)**. Our courts have not held that the intent of the annexing party controls over the description of the area annexed. It is the description of the property annexed that is controlling. Ex parte State ex rel. Wilson, supra.

North Charleston also makes an unfounded claim that "the much ballyhooed 4" boundary line discrepancy...simply wasn't material." (**North Charleston Resp. Br., p. 10**). Our appellate courts have never established a minimum amount of acreage to convey standing under these circumstances. The test is whether ***any*** property of the challenger was annexed. The 100% method of S.C. Code Ann. § 5-3-150(3) requires just that - exactly 100%, not 99.9%. See Ex parte State

ex rel. Wilson, supra; 391 S.C. 565, 707 S.E.2d (2011); Vicary v Town of Awendaw, 425 S.C. 350, 358, 822 S.E.2d 600, 604 (2018) ("As we noted in Town of Yemassee, the 100% method, with less stringent conditions than the 75% method, is 'readily understood in light of the requirement that **all** property owners in the annexed area consent by signing the annexation petition.'")(emphasis in original). The 100% method of annexation under S.C. Code Ann. § 5-3-150(3) is directly comparable to the method of annexation invoked by North Charleston in this case; both require the annexing party to own 100% of the area annexed.

Whether property owned by the National Trust was included in the description of the area annexed by North Charleston, however small or large, is also material to whether North Charleston complied with the requirements of Section 5-3-100. Annexation under S.C. Code Ann. § 5-3-100 is only valid "[i]f the territory proposed to be annexed ***belongs entirely to the municipality seeking its annexation*** and is adjacent thereto." S.C. Code Ann. § 5-3-100 (emphasis added). If the annexed area included a portion of the National Trust Parcel, as claimed by the National Trust, then the annexation under Section 5-3-100 would be invalid as a matter of law since the area to be annexed did not belong entirely to North Charleston.

Because the record demonstrates, at a minimum, a genuine issue of material fact that the description of the area annexed by North Charleston included a portion of the National Trust Parcel in the City of Charleston, thereby creating a genuine issue of material fact as to the standing of the National Trust, the lower court erred in granting the motion for summary judgment of North Charleston on the absence of standing of the National Trust as a matter of law.

II. The National Trust has standing under the public importance exception given the historic significance of the area and the unique facts present that give rise to the need for future guidance.

A. The National Trust is Uniquely Charged with Defending Historic Preservation Interests.

Neither the lower court nor North Charleston addresses the statutorily established mission of the National Trust. The United States Congress created The National Trust in 1949 to "facilitate public participation" in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. See 54 U.S.C. § 312102(a). The National Trust has participated in hundreds of cases in federal and state courts across the nation relating to the application and interpretation of legal issues that affect the preservation of historic places. This case deals with both a historic district and a historic place.

The National Trust is deeply engaged in the Ashley River Historic District which encompasses the area purportedly annexed in this case. The National Trust owns the property adjoining the Acre (inclusive of the small portion included in the Acre's property description), and owns and maintains for the benefit of the public Drayton Hall, both a National Trust Historic Site and a National Historic Landmark, diagonally across S.C. Highway 61 from the Acre.

Federal and state courts have found that the National Trust and other historic preservation organizations and interested persons have standing to challenge actions that may adversely impact historic resources. Specifically, the Supreme Court of Illinois has held that "in bestowing powers on the National Trust in order to further this broad national policy, Congress intended to permit the National Trust to, *inter alia,* object to the allegedly unlawful destruction of buildings...which the National Trust deems of national historic significance, even if those buildings have not been declared 'national landmarks'....." and determined "that Congress intended the National Trust to have standing to maintain actions such as this, and that such standing is necessary if the National

Trust is to fulfill the functions Congress intended it to fulfill." Landmarks Pres. Council of Illinois v. City of Chicago, 125 Ill. 2d 164, 177 (1988).

Even though the purported annexation in this case does not involve the destruction of buildings, the National Trust has alleged in the Complaint that this annexation threatens the Ashley River Historic District. **(Complaint ¶ 20, R.p. 37)** ("Upon information and belief, the Defendant's [North Charleston's] purported annexation of the Acre through the Ordinance is part of its [North Charleston's] larger scheme to increase its tax base and tax revenues through the annexation of land of approximately 2,200 acres known as the Whitfield Tract for suburban and urban development in the middle of the Ashley River Historic District that will forever destroy the Ashley River Historic District's continuity, injure its historic and archaeological significance, and significantly diminish its relatively harmonious scenic natural and historic vistas.").

The United States Congress clearly vested the National Trust with advancing the recognized national interest in historic preservation, including the protection and preservation of the nationally significant Ashley River Historic District and Drayton Hall, a National Historic Landmark. The National Trust's legislatively declared mission of historic preservation in its charge from the United States Congress is entirely different from the purview of the South Carolina Attorney General, as further described in the National Trust's Brief. There is no legislation instilling the Attorney General with the responsibility to protect nationally recognized historic areas nor to police annexations, as implied by North Charleston and the lower court.

Given the National Trust's unique position, charter, and charge from the United States Congress to preserve and advance policy related to historic sites, standing should be conferred under the public importance exception.

B. Future Guidance is Needed Given the Unique Facts Present.

All parties acknowledge Vicary v. Town of Awendaw, supra, established a new narrow condition for invoking the public importance exception for standing. The National Trust asserts that this case meets the standards established in Vicary for "unique facts" and the need for future guidance to invoke the public importance exception, warranting standing for the National Trust.

This annexation challenge is not a "purely private matter" between the National Trust, the City of Charleston, and North Charleston, but "[rises] to the level of public importance" with the need for future guidance on the requirements of adjacency and contiguity under Section 5-3-100. Id. at 359. **(City of Charleston App. Br., pp. 21-24)**. The requirements of adjacency and contiguity under Section 5-3-100 presented in this case have never been addressed by our Supreme Court.[2] **(Id.)**.

North Charleston tries to negate the need for future guidance by marginalizing Section 5-3-100, labeling it an "obscure statute" with there being "no risk of S.C. Code 5-3-100 perpetually escaping review." North Charleston further asserts that "[s]hould this issue ever crop up again the Attorney General can address it the moment he sees fit." **(North Charleston Resp. Br., pp. 11-13) (emphasis in original)**.

The Attorney General showed no interest and took no action in this instance of an illegal annexation. There is no reason to assume the Attorney General will hop to enforcement next time an illegal annexation occurs. The only reported instance in recent annals of the Attorney General objecting to an annexation is Ex parte State ex rel. Wilson, supra, where the Attorney General showed up to protest an annexation well after the 60-day period for filing an objection expired.

[2] The National Trust fully supports the legal position of the City of Charleston, particularly as it relates to the applicability of the public importance exception, as set forth in the City of Charleston's Respondent's brief.

The reported cases do nothing to support the supposition of North Charleston that the Attorney General is riding the range of annexations and intervening to enforce the law at the sign of any annexation hijinks. Otherwise, there would not be the body of case law where other parties have taken on the cause only to have our courts tell them they have no standing and reluctantly the illegal annexation must stand.

If the lower court and North Charleston prevail in their arguments, this case will just be another one added to that list. North Charleston asks this Court for a pass even though the circuit court held "North Charleston did not lawfully annex the one acre parcel under the annexation statute." **(Order, R.pp. 1-2)**. North Charleston's minimization of its illegal conduct in this annexation does not eliminate the need for future guidance to resolve the issue before this Court. After all, North Charleston concedes that there is an absence of reported precedent interpreting and applying Section 5-3-100. **(Appellant/Respondent's Brief, p. 13)** ("North Charleston has been unable to find a prior reported opinion during the entire life of the statute!").

In Vicary, the Supreme Court found that the Town of Awendaw's use of a letter from the United States Forest Service to show consent to annexations, and its possible use in the future, satisfied the "future guidance" prong of the public importance exception. Vicary at 359-360. Here, in a similar manner, there is nothing stopping North Charleston, or other municipalities, from continuing to use Section 5-3-100, and a legally incorrect definition of adjacency, to continue to annex property that is not contiguous.

The facts of this case present the model for circumventing the law that can be used in the future. All a property owner whose land is not contiguous needs to do is convey some small piece of that acreage to the municipality. The municipality can then invoke Section 5-3-100 to annex the small piece owned by it. Voilà, the remainder of the land that was not contiguous is now

contiguous. In this manner, the municipality and the owner can reach a deal, just as they did in this case, to manufacture contiguity even if it involves jumping the boundaries of intervening land in another municipality. This capacity for repetition satisfies the "future guidance" prong of the public importance exception and warrants guidance on the interpretation of Section 5-3-100.

Further, the National Trust is not a "stranger" or "outsider" to the annexation, but is a property owner whose rights have been infringed by the purported annexation of a portion of the National Trust Parcel by North Charleston. See St. Andrews Pub. Serv. Dist. v. City Council, 349, S.C. 602, 564, S.E.2d 647 (2002). Nor is this a frivolous lawsuit—the circuit court held that "North Charleston did not lawfully annex the one acre parcel under the annexation statute." **(Order, R. pp. 1-2, 9-10)**.

The National Trust further asserts that this case includes "unique facts present" that, as suggested by Justice Hearn in Vicary, merit granting the National Trust public importance standing as discussed by the circuit court in its order. **(Order, R.pp. 9-10)**. In the alternative, the National Trust requests the Court revisit the decision in St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston, 349 S.C. 602, 564 S.E.2d 647 (2002), that eliminated public importance standing where the annexation was absolutely void or patently not authorized by law.

CONCLUSION

When viewed in a light most favorable to the National Trust, particularly considering the Affidavit of Forsberg, the circuit court erred in granting summary judgment when a genuine issue of material fact as to whether North Charleston annexed a portion of the National Trust Parcel in the City of Charleston. The National Trust established, at a minimum, a genuine issue of material fact for proprietary and statutory standing under settled precedent of the appellate courts of South Carolina.

In addition, the National Trust satisfies the public importance exception for standing based upon its charter from the United States Congress directed at furthering historic preservation policy and the need for future guidance related to the application of Section 5-3-100. North Charleston's argument that future guidance is not needed because there is low risk in an unlawful annexation occurring again under this section is baseless and self-serving. Clearly, the unique facts of this case call for future guidance on the use of Section 5-3-100.

For the foregoing reasons, and all the reasons in Respondent/Appellant National Trust's initial brief, the circuit court erred in finding that there was no genuine issue of material fact and that Respondents/Appellants lacked standing as a matter of law. Accordingly, the circuit court's order granting summary judgment on the absence of standing of the National Trust as a matter of law should be REVERSED.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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