STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

C.A. No. 2006-CP-10-3220

Laura Cabiness, John Langley,
Robin Bellah, Mary Mason, and
The City of Charleston, a Municipal
Corporation,

Plaintiffs,

v.

Town of James Island and Leo Simonin, Jr.,
John Dunbar, and Sim Parrish, in their
official capacity as Commissioners of the
Town of James Island Election, and Mary
Clark, as Mayor, and Joe Qualey, Bill
"Cubby" Wilder, Parris Williams and
Leonard Blank, as City Council for the
Town of James Island, all in their official
capacities and Mark Hammond in his
official capacity as the South Carolina
Secretary of State and the James Island
Alliance for Self Government,

Defendants.

ORDER

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY___

PROCEDURAL BACKGROUND

This matter came before the Court on March 31, 2008 and was heard in non-jury proceedings which lasted through April 4, 2008. The Court has considered the applicable law, the matters in the record, the testimony and exhibits at trial, and the arguments of counsel, and concludes that judgment should be, and therefore is, granted in favor of Defendants on all claims by Plaintiffs. The Court's decision regarding the Defendants' counterclaims is reported in a separate written Order.

FACTS

This is the third incorporation attempt by the Town of James Island ("Town").[1] The Town is formed on a sea island along the South Carolina coast which is known as James Island ("Island"). There are more than 20,000 parcels of land on the Island. Many of these parcels, along with marshes, waterways, and public roadways, have been annexed by the neighboring City of Charleston ("City") and the Town of Folly Beach over the past several decades.[2] Prior to the most recent incorporation attempt by the Town there remained "enclaves"[3] of unincorporated property on the Island. The present Town was formed by combining these unincorporated areas together, in some instances by using annexed or un-annexed state or county roads, public marshes and public waterways to establish contiguity under the incorporation statute.

The James Island Alliance for Self Government ("Alliance") submitted its petition for incorporation to the South Carolina Secretary of State on October 20, 2005. After review by the Secretary and the Joint Legislative Committee on Municipal Incorporation[4] ("Legislative Committee"), the Secretary of State issued commissions to Leo Simonin, Jack Dunbar and Sim Parrish ("Commissioners") to hold an election to determine if there was to be a town and to decide other issues prescribed by S.C. Code § 5-1-50. A referendum held on June 22, 2006 was in favor of the Town. The Secretary of State then issued a Certificate of Incorporation on June 28, 2006. Thereafter, an election of officers was held in which Mary Clark was elected Mayor and Joe Qualey,

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[11] The first town was declared unlawful in *Glaze v. Grooms*, 324 S.C. 249, 478 S.E.2d 841 (1996), because contiguity was established by using previously annexed marshes and waterways separating certain areas sought to be incorporated. A second town was declared void because it was formed using marshes and waterways to establish contiguity, pursuant to amendments to the incorporation statutes passed in 2000; those amendments were declared unconstitutional in *Kizer v. Clark*, 360 S.C. 86, 600 S.E.2d 529 (2004).

[2] Since the early 1970's there have been occasions where citizens of the Island themselves have requested to be annexed into the City, and more recently there have been requests by citizens for annexation into Folly Beach, so the process has not been entirely unilateral in nature.

[3] "Enclave" was a term used by one of Defendants' expert witnesses, University of South Carolina Professor *Emeritus* David Cowen, to describe unincorporated areas surrounded by other cities.

[4] The Joint Legislative Committee on Municipal Incorporation was established in an amendment to the incorporation statute contained in 2005 Act 277 to review and make recommendations to the Secretary of State concerning proposed incorporations. *See* S.C. Code § 5-1-26, 40, and 50.

Bill "Cubby" Wilder, Parish Williams and Leonard Blank were elected as members of the Town Council.

Before and after the petition for incorporation was submitted to the Secretary of State, the City of Charleston was annexing property in the unincorporated portion of the Island, with some 116 parcels being annexed after the petition was submitted. The Town of Folly Beach also continued to annex portions of unincorporated James Island prior to the incorporation petition being submitted. The record is unclear as to whether the Town of Folly Beach annexed parcels on the Island after the petition was submitted.

Plaintiffs instituted this action on August 17, 2006, alleging various reasons why the Defendant Town of James Island was unlawfully constituted and should be declared a nullity. As a result of stipulations by the parties, the contested points at issue have been narrowed to the following: 1) that the 2005 Amendments to the municipal incorporation statute, S.C. Code § 5-1-10, *et seq.*, 2005 Act 77 ("incorporation statute" or "the Act") regarding contiguity employing publicly-owned property were unconstitutional; 2) that the paperwork submitted to the Secretary of State by the incorporator, the Alliance, insufficiently described the proposed corporate limits; 3) that certain public roads used by the Alliance to achieve contiguity were not "publicly-owned property" within the meaning of the incorporation statute; and 4) various areas proposed to be included in the Town were not contiguous as defined by the incorporation statute. The Town defendants counterclaimed, challenging the constitutionality of the 5 mile threshold and 7,000 person minimum population requirements contained in S.C. Code §5-1-30(A)(2) and (B)(1).[5]

ISSUES

[5] The plaintiffs initially had additional claims and the defendants had additional counterclaims, but these were dismissed by written stipulation filed during trial which was made a part of the record in this case.

I. Are the Amendments to the municipal incorporation statute, S.C. Code § 5-1-10, *et seq.*, 2005 Act 77, Constitutional?

II. Did the incorporation petition comply with the Act's requirements?

III. Are the public roads used by the Alliance to achieve contiguity "publicly-owned property" within the meaning of the incorporation statute?

IV. Are certain properties sought to be included in the Town contiguous as defined by the incorporation statute?

DISCUSSION

I. Constitutionality of 2005 Act 77

The Plaintiffs contend that the operation of the contiguity provisions of Act 77 in conjunction with the use and definition of publicly-owned property is and unconstitutional. Plaintiffs allege that publicly-owned property is arbitrarily defined as to only include "federally-owned, state-owned, or county-owned" property. S.C. Code § 5-1-20(2). Plaintiffs allege that allowing the use of publicly-owned property to establish contiguity between areas to be incorporated is arbitrary. §5-1-30(A)(4).

Challengers of the constitutionality of a statute face the significant burden of proof of establishing unconstitutionality beyond a reasonable doubt after all of the facts are liberally construed in the light most favorable to the constitutionality of the statute. *Gold v. South Carolina Board of Chiropractic Examiners*, 271 S.C. 74, 245 S.E.2d 117 (1978); *Kalk v. Thornton*, 269 S.C. 521, 238 S.E.2d 210 (1977). In construing an Act of the General Assembly, "all reasonable doubt must be resolved in favor of the constitutionality of the act. If a constitutional construction of a statute is possible, that construction should be followed in lieu of an unconstitutional construction." *Crow v. McAlpine*, 277 S.C. 240, 242, 285 S.E.2d 355 (1981)(quoting *Bauer v. South Carolina State Housing Authority*, 271 S.C. 219, 226, 246, 246 S.E.2d 869 (1978). "Only where an enactment

offends specific constitutional provisions beyond a reasonable doubt will we decide it unconstitutional." *Johnson v. Piedmont Municipal Power Agency*, 277 S.C. 345, 350, 287 S.E.2d 476 (1982).

Article III § 34(II) and (IV)[6]; and Article VIII, §§ 7, 8, and 10[7] of the South Carolina Constitution bar the General Assembly from creating arbitrary and irrational classifications through the enactment of special legislation designed to benefit only one county or municipality to the exclusion of others in the State. *See Kalk v. Thornton*, 269 S.C. 521, 238 S.E.2d 210 (1977). Article I, § 3 of the Constitution guarantees equal protection of the laws. The overall purpose of constitutional prohibitions against special laws is closely related to the guarantee of equal protection, which requires that all persons shall be treated alike under like circumstances and conditions. *Thompson v. S.C. Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976)(finding that an Act seemingly general in form is special in application, and thus unconstitutional, where the Act creates unreasonable classifications).

While the terms "general" and "special" legislation are not defined in the Constitution, the Supreme Court has explained that a "law is general when it applies uniformly to all persons or things within a proper class, and special when it applies to only one or more individuals or things belonging

[6] Section 34 of Article III of the South Carolina Constitution prohibits the General Assembly from enacting local or special laws concerning several subjects, including the incorporation of cities and towns. This section further prohibits the General Assembly from, in all other cases, enacting a special law where a general law can be made applicable. Finally, Section 34 indicates that "nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws." S.C. Constitution, Article III, §34(X).

[7] Article VII contains the Constitution's provisions concerning local government. Section 7 of this Article instructs the General Assembly that it shall provide by general law for the structure, organization, powers and duties of counties and shall not enact laws for a specific county or provide exemptions from the general laws for specific counties. Section 8 of Article VII concerns the incorporation of new municipalities, readjustment of municipal boundaries and the merger of municipalities. This Section requires the General Assembly to provide by general law the criteria and procedures for the incorporation of new municipalities and the merger and readjustment of boundaries of existing municipalities and prohibits the enactment of local or special laws for these purposes. Section 10 of Article VII provides a general prohibition against the enactment of any laws for a specific municipality or exempting a municipality from the otherwise applicable general laws.

to that same class." *Kizer v. Clark*, 360 S.C. 86, 92-93, 600 S.E.2d 529, 532 (2004)(citing *McKiever v. City of Sumter*, 137 S.C. 266, 135 S.E. 60 (1926)).

The only apparent class before us here is all areas which propose to incorporate. Within that class, all proposed municipalities may use the provisions of the Act regarding publicly-owned property, as publicly-owned property as defined exists everywhere in the state. Thus, the Act is a general law. There is no classification for whose members the provisions of the Act apply differently. The absence of a class to whom the provisions of the current Act apply differently then provides no basis for an analysis of the rationality of the choices made within the Act under a special legislation or equal protection analysis. See In re Treatment and Care of Lukabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002); Article III, § 34(X) (the General Assembly is not prohibited "from enacting special provisions in general laws" so long as the provisions are uniform in their operations).

Even accepting Plaintiff's argument that the "class" is composed of incorporating municipalities and existing municipalities annexing property, and that such a hybrid class is treated differently by the Act's provisions, there are reasonable bases for the members of such a class to be treated differently under the circumstances. "The mere fact that a statute creates a classification does not make it special legislation." *Kizer*, 360 S.C. 86, 93, 600 S.E.2d 529, 532 (2004) (*citations omitted*). Rather, where an Act's application is not uniform, the "essential inquiry is whether the legislation creates an unlawful classification." *Id.* An unlawful classification is one for which "there is no reasonable hypothesis to support it." Stated differently, the Court will not overrule the General Assembly's judgment to create a classification or special legislation where the "exigencies of a particular situation" or some "intrinsic reason...[best requires that] the law...should effect some differently from others." *Id.*

The Plaintiffs contend that the difference in the application of the Act is its allowance of the use of previously annexed property in the incorporation of a new municipality in a manner that is not permitted to be used by existing cities in their efforts to annex new properties.[8] Cities have been, and continue to be, able to achieve contiguity for annexation using public property which has not been annexed by another municipality.[9]

Simply because something is permitted during incorporation which is not allowed in annexation does not render the incorporation Amendments unconstitutional. One of these Annexation statutes and case law reveal many, many differences in the two processes, and different treatment by the Courts and the Legislature concerning the two: of which one process creates a municipality, while the other provides for the expansion of existing municipal borders.[10] *See generally*, *Whitmore v. Cass*, 213 S.C. 230, 49 S.E.2d 1 (1948), *Kizer*, 360 S.C. at 95. Declaring the Act unconstitutional because it varies from the annexation statutes would require declaring all of either statutory scheme, or both, unconstitutional because they vary in myriad details. There is no rational basis for doing so.

As additional grounds, Plaintiffs say that the Act is unconstitutional because it: a) defines as "public," for purposes of the Act, property owned by the federal, state, or county government[11] but does not include property owned by other political entities, such as school districts or public service districts; b) that the Act treats public property differently from private property; and c) that the Act fails to distinguish between size, distance and type of public property.

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[8] The 2005 Amendments make no distinction between the use of previously annexed publicly-owned property or non-annexed publicly-owned property to achieve contiguity. The Town used both.

[9] *See, e.g.* S.C. Code § 5-3-110 and 305; *Tovey v. City of Charleston*, 237 S.C. 475, 117 S.E.2d 872 (1961); *Bryant v. City of Charleston*, 295 S.C. 408, 368 S.E.2d 899 (1988); *St. Andrews Public Service District v. City of Charleston*, 339 S.C. 320, 529 S.E.2d 647 (2002).

[10] Compare S.C. Code Chapter 1 of Title 5 (incorporation process) and S.C. Code Chapter 3 of Title 5 (annexation process).

[11] S.C. Code § 5-1-20.

The preamble[12] of the Act clearly states the public policy rationale of the General Assembly as to publicly-owned property:

> Whereas, municipal boundaries are limited only by the State's statutory law requirements; and
>
> Whereas, some municipalities already extend across county lines; and
>
> Whereas, if a publicly-owned property, such as a road or waterway, is within the exclusive territory of a single municipality, that municipality could extend its boundaries across the State, preventing areas that otherwise meet the statutory requirements for municipal incorporation from attaining local self-governance; and
>
> Whereas, the General Assembly finds and declares that publicly-owned property is for the benefit of all the citizens of the State and not to be used as the exclusive territory of any one municipality.

Additionally, in S.C. Code § 5-1-22 the General Assembly affirmed the public policy for the incorporation of publicly-owned property:

> The General Assembly finds and declares the following to be the public policy of the State of South Carolina:
>
> (1) publicly-owned property may be incorporated or annexed by a municipality as provided by the state's statutory law; however, publicly-owned property is for the benefit of all citizens of the State and is not the exclusive territory of any one municipality; and
>
> (2) incorporation or annexation of publicly-owned property does not confer or convey to a municipality control over the publicly-owned property that in any way:
>
> (a) interferes with the superior authority of the federal, state, or county government; or

[12] In determining legislative intent, the Court may be guided by a statute's preamble. *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994).

(b) prevents an area seeking to be incorporated from using the publicly-owned property to establish contiguity as provided in Section 5-1-30(A)(4).

It is clear from the foregoing that the General Assembly had a clear legislative purpose in selecting the types of property to be used by a new municipality in its efforts to incorporate. For example, the definition of "publicly-owned property" is intended to include all governmentally held property that is for the benefit of all the citizens of the State. Thus, in identifying the "owner" of publicly-owned property, the General Assembly set forth the obvious general categories (federal, state, and county) so as to insure all publicly-owned property was included. It is no impediment to constitutionality that every possible identity of government enterprise was not specifically enumerated - such would be impossible and unrealistic. It is commonly understood and anticipated that the innumerable political subdivisions and agencies which were not specifically delineated are naturally included as a function of proper statutory interpretation, in keeping with the intent of the legislature. These other governmental entities are simply arms of the federal, state, or county government, which were "formed for the more effectual or convenient exercise of political power within the 'political' localities." *Dillon Catfish Drainage Dist. v. Bank of Dillon*, 143 S.C. 178, 184, 141 S.E. 274 (1928)(quoting *State v. Englewood Drainage District*, 41 N.J. Law, 154). The key variable, as specifically noted by the General Assembly, is whether the property is held by the government for the benefit of all the citizens of the State. If the statute were to be construed to exclude any governmental entity that holds property for the public benefit, then the intent of the legislature would be frustrated. The "true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose." *Jackson v. Charleston Cty. Sch. Dist.*, 316 S.C. 177, 181, 447 S.E.2d 859 (1994). A "court should not consider a particular clause in a statute as being construed in isolation, but

should read it in conjunction with the purpose of the whole statute and the policy of the law." *Jones v. State Farm Auto Mut. Auto Ins. Co.*, 364 S.C. 222, 232, 612 S.E.2d 719 (Ct. App. 2005). Courts will "reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280 (2000).

Plaintiffs' also challenge the Act's omission of municipal-owned property from the definition of publicly-owned property. The stated intent of the legislature was to prevent a municipality from using property belonging to all citizens of the state from being used to serve the will of only the municipal citizens. It is a totally different matter when the city owns the property. It is rational to indulge a city in its purposes by allowing it to use its own property for its own benefit. It protects that city's sovereignty to do so. However, the city cannot insult the sovereignty of the county, state or federal government by using those entities' public property for the city's sole purposes, to the detriment of the greater public.

In the Preamble and the text of the Act, the General Assembly has clearly articulated rational bases to support its definitions of publicly-owned property and the use of such property in achieving contiguity in the municipal incorporation context. The fact that the Act fails to distinguish between size, distance and type of public property and that the Act treats public property differently from private property does not render it unconstitutional. The General Assembly need not exhaust every facet of publicly-owned property in order for its definitions and intent to be perfectly clear. The Amendments contained in 2005 Act 77 are constitutional.

II. Compliance of the Incorporation Petition with Statutory Requirements

Plaintiffs challenge the incorporation petition's compliance with the Act's requirement that the proposed municipality's corporate limits be set out. S.C. Code § 5-1-24(A)(1). They claim that

because the petition did not specifically identify each property which would be included (or excluded) from the proposed town, the corporate limits were insufficiently defined.

The Town's petition first described the corporate limits by reference to waterways which generally bound James Island (the "metes and bounds" description).[13] Then it "specifically exclude[d] all property legally annexed into the City of Folly Beach and the City of Charleston, and specifically exclude[d] those properties for which contiguity is not established pursuant to § 5-1-30(A)(4)..."

Plaintiffs are challenging the accuracy of the petition on the basis that the map of the boundaries of the Town and a TMS list of parcels within the boundaries,[14] as submitted to the South Carolina Secretary of State's office, included certain properties which were only after the fact determined to be within the political boundaries of the City of Charleston or the Town of Folly Beach. The TMS list includes approximately 121 properties that had been annexed by the City and the Town of Folly Beach before the petition was submitted. After the petition was submitted, the City annexed an additional 116 properties which were on the TMS list or the map.

The evidence indicates that both the map and the TMS list came directly from Charleston County in response to a request for documents showing all unincorporated areas on James Island. Leonard Blank, a member of the Alliance and current Town councilman, testified that he went to the

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[13] The Petition for Incorporation metes and bounds language describes the area to be incorporated as follows:

> "The Town of James Island boundary shall include the geographical area within boundaries beginning at the Atlantic Ocean at the mouth of the convergence of the Stono River and Folly River, thence , commencing due North across the marsh to Green Creek, thence West on Green Creek to the Stono River, thence generally North along the Stono River to Elliott's Cut, thence through Elliott's Cut to Wappoo Creek, thence through Wappoo Creek to the Ashley River, thence seaward through the Ashley River to Charleston Harbor, thence through the Charleston Harbor seaward to Schooner Creek, thence through Schooner Creek to Clark Sound, thence through Clark Sound to Secessionville Creek, thence through Secessionville Creek to Folly Creek, thence through Folly Creek to the man made canal encompassing Oak Island (the "canal"), thence through the canal to Oak Island Creek, thence through Oak Island Creek to Folly Creek, thence through Folly Creek to Folly River, thence to the point of beginning..."

[14] The list of TMS numbers has created considerable controversy, as to whether it was to include or exclude properties from the town. In light of the statutes requirements, the Court considers the TMS list to be ancillary to whether the Town's "corporate limits" were defined sufficiently to meet the requirements of the statute.

County offices on five separate occasions, and obtained 5 different maps, trying to keep up with the annexations. Mary Clark, a member of the Alliance and current Mayor of the Town, testified that she asked the County for the most up to date list of TMS numbers for properties on James Island which had not been annexed.

Carolyn Hatcher, of the Secretary of State's office, testified that the only statutory or regulatory requirements were that there be a map and a description of the proposed corporate limits. A list of TMS numbers was not required, nor could she had insisted upon one. Her testimony was that the Petition met the requirements and received the approval of the Secretary of State and the Legislative Committee.

The Court finds the incorporation petition to be in material compliance with the requirements of the incorporation statute. It described the outer boundaries of the proposed town and excluded annexed or non-contiguous properties. In light of the testimony that there are over 20,000 individual parcels on James Island, that the City had annexed approximately 9,000 of them, that a survey would have been prohibitively expensive, and that every governmental unit involved appeared to have difficulty in determining the jurisdiction over these myriad parcels in light of the continual annexations on James Island, the Court concludes that it was reasonable to describe the proposed corporate limits as the Alliance did. The Court further finds that it was reasonable to depend on the information provided by the County itself when submitting the incorporation petition and that due diligence was used to try to obtain the most accurate information available. Further, the Town can ultimately be described with certainty once the issues of contiguity are decided.

III. Whether Certain Roads Used to Achieve Contiguity are "Publicly-Owned Property."

Plaintiffs contend that certain public roadways employed by the Alliance to establish contiguity are not "publicly-owned property" because deeds in fee simple absolute have not been

produced for each section of road so employed.[15] The Court finds that there is no such degree of ownership required to establish that the roads are "publicly-owned property."

S.C. Code § 5-1-30(A)(4) identifies the effect of "publicly-owned property" on contiguity. The term "publicly-owned property" also appears in S.C. Code § 5-1-22[16] and is defined in § 5-1-20(2).[17] The preamble to Act 77 identifies publicly-owned property "such as a road or waterway." Nowhere is there a requirement that publicly-owned property be owned by the public to any degree of ownership, such as in fee simple absolute.

Every roadway identified by the Plaintiffs has been established as belonging to the public in some fashion or another: by deed, or grant of right of way, or easement, or dedication by plat. In each instance the grant of ownership for the roadway is forever. Each identified roadway is currently being maintained and used by the public as a roadway, either under the authority of the South Carolina Department of Transportation or the County of Charleston. There is no evidence that anyone is paying taxes for the land under the roadways, nor are they assigned tax map identification numbers by the county, nor is there any evidence that any private owner is claiming any interest in the land under the roads in a manner inconsistent with the use of publicly-owned property as described by the Act. In fact, when the identified sections of roads were annexed by the City, no

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[15] Defendants conducted a search to find documentation concerning the roads' status, paying Eric Stewart, a title abstracter, to perform the search. At trial Plaintiffs called Mr. Stewart to testify. His testimony indicated that documents of title were not always filed for roads or highways on James Island, or, if filed, were not always filed where they were supposed to be.

[16] **SECTION 5-1-22.** Public policy for incorporation of publicly-owned property established.

The General Assembly finds and declares the following to be the public policy of the State of South Carolina:
(1) publicly-owned property may be incorporated or annexed by a municipality as provided by the state's statutory law; however, publicly-owned property is for the benefit of all citizens of the State and is not the exclusive territory of any one municipality; and
(2) incorporation or annexation of publicly-owned property does not confer or convey to a municipality control over the publicly-owned property that in any way:
(a) interferes with the superior authority of the federal, state, or county government; or
(b) prevents an area seeking to be incorporated from using the publicly- owned property to establish contiguity as provided in Section 5-1-30(A)(4).

private citizen or entity signed the annexation petition for the annexed road segments as a "person owning read estate in the area requesting annexation." S.C. Code § 5-1-150(3).

It appears that the roads identified by the Plaintiffs are all "owned" to the requisite degree by the state or county government, and that recognizing this ownership is consistent with the purposes of Act 77 and the meaning of the statute as a whole. Accordingly, the Court finds that each of the road areas identified by the Plaintiffs are "publicly-owned property" within the meaning of the Act.

IV. Whether Certain Identified Properties Are Contiguous as Defined by the Act.

S.C. Code § 5-1-30(A)(4) requires that "the area proposed to be incorporated is contiguous as defined and described in this item." The City contends that certain parcels sought to be included in the Town are not contiguous (the "contested parcels"). These properties were depicted in the color blue on Plaintiff's Exhibit 13 and are enumerated in Plaintiff's Exhibit 10.

In its petition setting out the proposed municipal corporate limits, the Alliance specifically excluded "those properties for which contiguity is not established pursuant to § 5-1-30(A)(4)." The Secretary of State, and this Court, have determined that this method of describing the corporate limits was appropriate under the Act's requirements; accordingly, if this Court were to agree with the City that the contested parcels were not contiguous, the impact would be only to exclude those properties from the Town. Per the uncontested testimony,[18] there would remain a sufficient population in the geographically reduced Town to allow its formation under the threshold contained in §5-1-30(B)(1).

Prior to the Incorporation referendum, the Alliance identified certain properties whose residents should not be allowed to vote in the referendum. The Town concedes that these property

[17] "Publicly-owned property" means any federally-owned, state-owned, or county-owned land or water area. S.C. Code § 5-1-20(2).

[18] The Town's expert, Dr. David Cown, testified that even without the inclusion of the contested property, there would remain more than 7,000 people in the proposed Town.

are not contiguous and should be excluded. By Tax Map Identification Number ("TMS"), these properties are:

334-03-00-017
334-00-00-026
334-00-00-028
334-00-00-029
334-00-00-009
340-03-00-010
340-03-00-014
426-15-00-039
426-15-00-040
337-00-00-005
337-00-00-006
337-00-00-007
337-00-00-008
337-00-00-003
337-00-00-181
337-00-00-004
454-06-00-133
454-06-00-025
454-06-00-003
431-02-00-159
427-09-00-078
427-06-00-087
427-06-00-076
427-06-00-067[19]

The Town concedes that some of the contested parcels identified by the City are not contiguous and should not be included in the Town. Those parcels, identified by TMS Number are:

428-16-00-053
341-00-00-025
426-03-00-071
343-01-00-010
454-01-00-097
424-10-00-032
450-00-00-021[20]
450-00-00-011, 450-00-00-013, and 450-00-00-019[21]

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[19] These properties were identified to the Charleston County Board of Elections and Voter Registration via correspondence dated June 6, 2006 from a member of the Alliance prior to the Referendum. Plaintiff's Exhibit 9.
[20] This is Fort Sumpter National Monument, which was conceded by Defendants to be outside the "metes and bounds" description of the corporate limits of the Town.

Contiguity in its simplest form, where properties directly touch each other, is not at issue. What is at issue is the application of contiguity using publicly-owned property as allowed by the Act. This Court must determine the proper application of the definition of contiguity consistent with the purposes of the statute.

The Plaintiff raises no application issues concerning the use of public waterways or marshes to establish contiguity in the formation of the Town. Instead, the Plaintiff's objections stem from the employment of certain sections of public roadway to establish contiguity between parcels and whole subdivisions of unannexed property on James Island. This Court has already dealt with Plaintiffs contention that the sections of roadway identified are not "publicly-owned property" and has found that they are indeed "publicly-owned property" as contemplated by the incorporation statute. The Plaintiffs' position is that even if these roadways are publicly-owned, they nevertheless are not configured in such a manner as to establish contiguity for the contested parcels.

"'Contiguous' means adjacent properties which share a continuous border." S.C. Code § 5-1-30(A)(4). "If a publicly-owned property intervenes between two areas proposed to be incorporated together, which but for the intervening publicly-owned property would be adjacent and share a continuous border, the intervening publicly-owned property does not destroy contiguity." *Id.*

The "area" sought to be incorporated must be contiguous. *Id.* "Publicly-owned property may be incorporated or annexed by a municipality..." S.C. Code §5-1-22(1). Annexation of publicly-owned property does not "prevent an area seeking to be incorporated from using the publicly-owned property to establish contiguity as provided in Section 5-1-30(A)(4)." S.C. Code § 5-1-22(2)(b).

Taken together, the clear meaning of the statute is that contiguity is not destroyed where areas to be incorporated are separated by spatially intervening publicly-owned property, whether or

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[21] These last three parcels are segments of Morris Island, which was conceded by Defendants to be outside the "metes and bounds" description of the corporate limits of the Town.

not the intervening publicly-owned property is being incorporated. Therefore, intervening publicly-owned property would not destroy contiguity if the Incorporators chose to include it in the proposed municipality.[22] Intervening publicly-owned property would not destroy contiguity if the Incorporators chose not to include it in the proposed municipality. Neither would publicly-owned property destroy contiguity if it had been previously annexed, and thus could not be incorporated into the new municipality because it was already part of another municipality.

There were approximately two days of detailed testimony including numerous maps and exhibits which addressed contiguity issues. The contiguity of each of the contested parcels, or groups of contested parcels, was explored at great length.[23] In light of the testimony, the exhibits, the matters in the record and the applicable law, the Court finds that the Defendants' version of contiguity and its application to the contested parcels is consistent with the definition of contiguity in the Act and with the Act's purposes.

Defendants demonstrated for each contested parcel or group of contested parcels that the parcels were separated only by previously annexed publicly owned property, but for which the areas to be incorporated would be adjacent and share a continuous border. The chief difference between the Town's interpretation of contiguity involving previously annexed publicly-owned property and the City's interpretation is that the Town focused on the "area" to be incorporated, while the City focused on parcels to be incorporated.[24] Other than this distinction the parties differ very little in

[22] Parts of the areas the Town sought to incorporate were publicly-owned property, including roadways.

[23] Both parties' Geographic Information Systems ("GIS") experts, Tracy McGee on behalf of the City and Dr. Cowen on behalf of the Town, testified at length about contiguity. Each witness was cross-examined extensively. Ms. McGee identified the contested parcels in the color blue on Plaintiffs' Exhibit 13 and also focused on the contested parcels in Plaintiffs' Exhibit 10, slides 159 through 264, asserting Plaintiffs' version of contiguity and its application to the contested parcels. Defendants cross-examined Ms. McGee using Defendants' Exhibit 2 and Dr. Cowan's presentation, Defendant's Exhibit 19A to assert Defendants' version of contiguity and its application to the contested parcels. (For exhibits in the form of digital presentations, both parties submitted hard copies and compact discs of the presentations. Each format was given its own exhibit number.)

[24] Parts of these areas the Town sought to incorporate were publicly-owned property, namely roadways.

their interpretation of contiguity. Both agree that the area or parcel to be incorporated must be adjacent and share a continuous border. Both agree that adjacent means in close proximity one to the other, and both agree that there is a continuous border if the properties touch at more than one point, or would touch but for intervening publicly-owned property. The parties agree that the proper procedure is to determine contiguity based on the smallest identifiable portion of the parcel or area to be incorporated, and how that discrete area or parcel relates to or connects with another area to be incorporated, if separated by publicly-owned property which is not being incorporated. The real disagreement arises from the Plaintiffs' position that publicly-owned property cannot be used to achieve contiguity, or as stated by the Plaintiffs' GIS expert, Tracy McGee, that the Town cannot "run down roads" in order to connect parcels together.

Act 77 specifies that publicly-owned property can be incorporated and that publicly-owned property may be used to establish contiguity. *See* § 5-1-22(b) and 30(A)($). The Town demonstrates contiguity for each of the disputed parcels by connecting a part of a roadway to another part of a roadway. Each of the roadway segments is itself contiguous to the disputed parcels identified by the City. The roadway segments themselves are only separated, in these instances, by previously annexed publicly-owned roadway segments, which but for the previously annexed publicly-owned roadway segments would be adjacent and would share a continuous border.

So the dispute boils down to whether publicly-owned property can itself be an "area" to be incorporated. The Act states that publicly-owned property can be employed to establish contiguity. This is also consistent with the interpretations of contiguity previously made by our Supreme Court.

In *St. Andrews Public Service Dist. v. City Council of Charleston*, 349 S.C. 602, 564 S.E.2d 647 (2002), a challenge was made to contiguity similar to the City's challenge in this instance. In *St. Andrews*, however, the City took the position that where it was also annexing roadways touching

properties to be annexed, the roadways so annexed established contiguity with the properties being annexed. Our Supreme Court stated: "the record establishes that all the challenged properties touch - albeit via annexed roadways in some cases - property already within the limits of the City of Charleston. The fact that the City and the properties share a common boundary is sufficient to establish contiguity." 349 S.C. at 606.

Here, all of the contested parcels touch - albeit via incorporated roadways in some cases - property sought to be included in the Town. The Town has shown that contiguity between the contested parcels and the uncontested portions of the Town is established because the only thing separating the areas to be incorporated is previously annexed publicly-owned property. Therefore the Court finds that the contiguity requirements of the Act are satisfied and the Defendants' version of contiguity and its application to the contested parcels is consistent with the definition of contiguity in the Act and with the Act's purposes.

CONCLUSION

Based on the testimony at trial, the matters in the record, and the applicable law, the Court finds that 2005 Act 77 is constitutional. The Court further finds that the Town's Incorporators complied with the statutory requirements for submission in their petition for Incorporation as well as in describing the corporate limits of the Town. Further, the Court finds that the segments of roadway contested by the City are publicly-owned property as contemplated by Act 77. Finally, contiguity for the disputed parcels has been achieved, consistent with the definition contained in the Act and its stated policy and purpose. The Town is validly formed and is a legal municipality with all the privileges, powers, and immunities of a South Carolina municipality, subject to any limitations as provided by law.

It remains, then, only to set forth the final boundaries of the Town, consistent with the description contained within the Petition for Incorporation and the applicable law as interpreted in this Order. Much effort has been made by the parties to determine parcels which are not eligible to be a part of the Town by virtue of their having been previously annexed or because they are not contiguous. Rather than repeat the exhaustive list of TMS numbers here, the Court orders that the Town of James Island shall consist of those properties within the metes and bounds description contained in the Petition, specifically excluding properties which were annexed by any town or city prior to June 28, 2006, and specifically excluding properties for which contiguity has not been established.

No later than 60 days after the entry of this Order, the parties shall jointly compile a list of TMS numbered properties which should be included in the Town consistent with the rulings in this Order. This list of properties by TMS number, along with all unannexed publicly-owned property as interpreted herein contained within the metes and bounds area described in the Petition, and excepting those properties for which contiguity is not established, enumerated below, shall constitute the corporate limits of the Town of James Island.

To the extent that the parties cannot agree on the identities of all previously-annexed properties or areas by the deadline, the parties shall present to this Court by the deadline a list of the properties or areas in dispute, which dispute shall be resolved by hearing or by briefs as the Court prescribes.

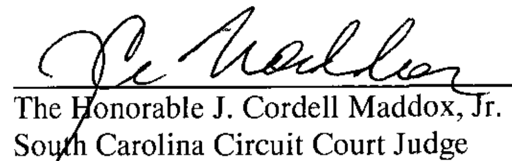
As to non-contiguous properties, the Town concedes that the following are not contiguous and should not be included in the Town:

334-03-00-017
334-00-00-026
334-00-00-028
334-00-00-029

334-00-00-009
340-03-00-010
340-03-00-014
426-15-00-039
426-15-00-040
337-00-00-005
337-00-00-006
337-00-00-007
337-00-00-008
337-00-00-003
337-00-00-181
337-00-00-004
454-06-00-133
454-06-00-025
454-06-00-003
431-02-00-159
427-09-00-078
427-06-00-087
427-06-00-076
427-06-00-067
428-16-00-053
341-00-00-025
426-03-00-071
343-01-00-010
454-01-00-097
424-10-00-032
450-00-00-021
450-00-00-011
450-00-00-013
450-00-00-019

It is therefore Ordered that these properties be excluded from the corporate limits of the Town of James Island.

IT IS SO ORDERED.



The Honorable J. Cordell Maddox, Jr.
South Carolina Circuit Court Judge

11/5, 2008

State of South Carolina
The Circuit Court of the Tenth Judicial Circuit

J. CORDELL MADDOX, JR.
JUDGE

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November 5, 2008

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, #106
Charleston, SC 29401

Re: 2006-CP-10-3220
Laura Cabiness et al v Town of James Island et al

Dear Honorable Armstrong:

Please find enclosed an order for the above reference case that has been signed by Judge Maddox.

I would appreciate it if you would file this in your office and provide certified copies to the attorneys of record.

Thank you for your assistance in this matter. With kindest regards,

Sincerely,

Cindy Hicks
Cindy Hicks
Secretary to Judge Maddox

/ch
enclosure