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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2020-001043

Town of Lexington South Carolina, ... Respondent,

v.

Patty Cox Wingard, as Trustee for PLCW Trust,
and Scott's Furniture Company, Inc. Appellants.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
Town of Lexington South Carolina,	)	Case No.: 2018-CP-32-03352
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	(NON-JURY)
Patty Cox Wingard, as Trustee for PLCW	)	
Trust, and Scott's Furniture Company, Inc.,	)	
	)	
Defendants.	)	
	)	

Plaintiff, Town of Lexington, South Carolina ("the Town"), filed a Declaratory Judgment action to determine whether it has the right to terminate water services to a property owned by, Defendant Patty C. Wingard, as Trustee for PLCW Trust, ("PLCW Trust") located at 705 North Lake Drive ("subject property"). A bench trial was held on October 17 – 18, 2019. Clifford O. Koon, Esq. represented the Plaintiff and James Edward Bradley, Esq. represented the Defendants.

BACKGROUND

The Town is a municipality in the State of South Carolina that provides water and sewer services through utilities owned by the Town. The Town has a policy of requiring utility customers who receive water and sewer services to petition to be annexed into the Town if the Town becomes contiguous to their property. The property at 705 North Lake Drive is owned by the PLCW Trust which leases the property to Scott's Furniture Company.

The Town filed this declaratory judgment action pursuant to S.C. Code Ann. § 15-53-20 claiming a right to terminate water service to the subject property upon reasonable notice. The PLWC Trust and Scott's Furniture Company deny the Town's right to terminate water service claiming that such a right violates the contract between the Town and Henry Wingard executed on September 30, 1961. Additionally, the Defendants argue that the October 13, 1961 Town resolution requires the Town to sell water to the subject property without requiring annexation as a precondition of the sale. The Defendants also seek attorney's fees if successful.

SUMMARY OF EVIDENCE

The parties stipulated to the following facts: (1) Scott's Furniture Store is contiguous to the Town; (2) Patty C. Wingard is the trustee of the PLCW Trust; and (3) the PLCW Trust owns the

subject property. Six witnesses testified at the hearing: John D. Hanson, Patty C. Wingard, Bryson Scott, Thomas "Tom" Wingard, Georgia Wingard Berger, and James A. Lutz.

John Hanson, Director of Planning, Building, and Technology for the Town, testified he is familiar with the Town's annexation policy. The policy requires out-of-town utility customers to annex into the Town, if the property is contiguous to the Town, as a requirement to receive utility service. Mr. Hanson testified that an out-of-town utility customer whose property is not contiguous to the Town at the time utility service begins, may receive utility service only if the out-of-town customer signs an agreement to have the property annexed upon becoming contiguous. The utility service is provided at a higher rate than those customers located in the Town. Hanson identified Scott's Furniture on a county map contiguous to the Town. Pl. Ex. 3.

Patty C. Wingard, the widow of Henry Wingard and co-trustee of the PLCW Trust, testified that her late husband, in 1961, built the two-inch water line on Hamilton Street to service the residential portion of Lakewood, a subdivision he developed. She remembered seeing the two-inch water line being installed in front of her house on the corner of Hamilton Street and Georgia Lane. Hamilton Street is two blocks from the Scott's Furniture property and runs parallel to Northwood Road. Northwood Road lies between the Scott's Furniture and Hamilton Street.

Bryson Scott ("Scott"), co-owner of Scott's Furniture Company, testified that his father built the furniture store at its present location in 1962 and the Town has provided water service at Scott's Furniture since then. Scott took over the business in 1978. The property was initially used as a student parking lot by Lexington High School, which at the time was located across the street from the Scott's Furniture property. There was a gas station near the property that was owned by Henry Wingard.

Tom Wingard, son of Henry and Patty Wingard, testified about the 2013 letter he received from the Town seeking to annex the subject property. Pl. Ex. 3. As the executor of the PLCW Trust, Tom replied to the Town's letter, expressing that PLCW did not consent to be annexed into the Town. Def. Ex. 4. Tom testified about several drawings, tax maps, plats, and other documents showing the Lakewood subdivision and the location of Scott's Furniture. The Scott's Furniture property is a parcel in Block "E" of Lakewood Subdivision.

Georgia Wingard Berger, daughter of Henry and Patty Wingard and co-trustee of the PLCW Trust, testified she became aware of the contract between Henry Wingard and the Town in 2013. She knew her father, Henry Wingard, provided water lines to the Town in exchange for

water service to his properties. She was only four years old when the property was developed. Georgia's testimony was cumulative to the testimony of her brother, Tom Wingard.

James Allen Lutz ("Lutz"), Utility Director for the Town of Lexington, has worked for the Town for twenty-nine years and is responsible for maintaining the Town's water systems. He testified the water line in question was constructed in 1961 and completed in 1962. When the Town and Henry Wingard entered the agreement in 1961, the Town permitted Henry Wingard to dig up the existing two-inch water line and replace it with a six-inch water line. Further, Lutz testified that in 2006, the Town replaced the two-inch water lines with six-inch water lines to accommodate growing demands. According to Lutz, there is a requirement for utility customers to annex into the Town to receive water service if the property becomes contiguous to the Town. Lutz does not know when the Town created this policy.

EXHIBITS

Plaintiff's Exhibit 1 – Town of Lexington GIS

Plaintiff's Exhibit 2 – 1962 map of water distribution system for the Town of Lexington

Plaintiff's Exhibit 3 – County GIS Town of Lexington

Plaintiff's Exhibit 4 – 2013 Letter from Town of Lexington to Henry Wingard regarding annexation of property at 705 N. Lake Drive

Defendant's Exhibit 1 – October 13, 1961 Town of Lexington Resolution between Henry Wingard and Mayor J.K. Addy

Defendant's Exhibit 2 – September 30, 1961 Agreement between Henry Wingard and Mayor J.K. Addy

Defendant's Exhibit 3 – 2013 Letter from the Town of Lexington regarding annexation of property at 705 North Lake Drive

Defendant's Exhibit 4 – Letter from Thomas Wingard in response to the 2013 annexation letter from the Town of Lexington

Defendant's Exhibit 5 – 1958 Plat of Subdivision of Lakewood

Defendant's Exhibit 6 – 1972 Plat of Lakewood Subdivision, Block E

Defendant's Exhibit 7 – Aerial map of Town of Lexington limits

Defendant's Exhibit 8 – County map of the Lakewood Subdivision

FINDINGS OF FACT

Based upon the testimony and the exhibits presented, this Court makes the following findings of fact:

1. On September 30, 1961, Henry Wingard and J. K. Addy, the Mayor of Lexington, signed an Agreement ("Agreement") permitting Henry Wingard to connect a six-inch water line onto the Town's existing water line with the goal of extending the water system into the "Lakewood Area – George Lane Road." Def. Ex. 2.

2. The Agreement provided that the Town, "shall maintain said line after it is completed and agrees to sell water to the Party of the Second Part within the limits of its existing water system." Def. Ex. 2.
3. On October 13, 1961, the Lexington Town Council passed a resolution executed by Henry Wingard, the Mayor, and Councilmen present, granting Henry Wingard permission to "take up the present 2-inch water main where the new 6-inch water main was put and install the 2-inch on Hamilton Street." Def. Ex. 1.
4. The resolution also stated, "It is agreed that the Town shall maintain said water line after it is completed and it is further agreed that the Town shall afford water services to the party of the second part, their heirs and assigns within the limits of the Town's water system at the prevailing water rates charged by the Town." Def. Ex. 1.
5. After entering into the agreement and resolution, Henry Wingard installed a two-inch water main on Hamilton Street at his own expense. The Town also had the right to tap onto the water line and incorporate it into its water distribution system. Def. Ex. 1.
6. The parties operated under the agreement and resolution for over fifty-five years. During this time, the Town continued to sell water to Henry Wingard, and upon his death in 2006, the Town continued to sell water to his heirs as owners of the property located at 705 North Lake Drive.
7. In 2013, the Town sent a letter asking the owners of the property to sign a petition to be annexed within the Town's limits. Def. Ex. 3.
8. The PLCW Trust declined to do so based upon the long standing arrangements with the Town to provide water services for the subject property. Def. Ex. 4.

CONCLUSIONS OF LAW

Plaintiff brought this action pursuant to South Carolina's Uniform Declaratory Judgment Act ("the Declaratory Judgment Act"), which grants the court "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20. "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Thompson v. State*, 415 S.C. 560, 565, 785 S.E.2d 189, 191 (2016). A justiciable controversy is a "real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical, or

abstract character." *Id.* The Court should liberally construe and administer the Declaratory Judgment Act. *Id.*; see also S.C. Code Ann. § 15-53-130.

The Town argued it has the right to discontinue water service to the Scott's Furniture property unless annexed into the Town's limits. Further, the Town argued the contract between the Town and Henry Wingard may be terminated upon reasonable notice to the other party. Notice of the Town's intent to terminate water service to Scott's Furniture property if not annexed into the Town's limits was provided to Defendants in 2013. The Defendants, however, argue the contract is enforceable because the resolution stated that, "the Town shall afford water services to the party of the second part [Henry Wingard], their heirs and assigns." Def. Ex. 1.

The Town relied on *Childs v. Columbia*, 87 S.C. 566, 70 S.E. 296 (1911), in which the plaintiff sued the City of Columbia ("City") alleging the City, in an agreement 10 years earlier, would furnish his residence and other structures he owned with water. The agreement did not have any provision for duration or termination. At his own expense, Childs built water lines from his properties and connected it to the City's distribution mains. After serving the plaintiff's properties for ten years as out-of-town customers, the City imposed an out-of-town rate several times higher than the in-town-rate. Childs argued he was entitled to the same rate charged to in-town customers.

The Supreme Court held that "the city was under no public duty to furnish water to the plaintiff at reasonable rates or to furnish it at all." *Childs*, 87 S.C. at 566, 70 S.E. at 298. According to the Court, the "fatal defect of the complaint is that it alleges a contract indefinite as to the price and duration of the service, conferring no right on the plaintiff to require the service of the city beyond the day fixed by reasonable notice of its intention to increase the rate charged, or to cease altogether to furnish water." *Id.* 87 S.C. at 566, 70 S.E. at 299 (emphasis added). The Court determined the only "reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other." *Id.*, 87 S.C. at 566, 70 S.E. at 298. The Supreme Court reasoned that "where the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually." *Id.*

Historically, "perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract." *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201

(1994). In this case, the September 30, 1961 agreement states, "the Town shall maintain said line after it is completed and agrees to sell water to [Henry Wingard] within the limits of its existing water system." The agreement lacks specific duration. As in *Childs*, the agreement between parties expressed no period for its duration and no definite time can be implied from the nature of the contract or from the circumstances surrounding it. Based upon the document, the only reasonable intention to be drawn is that the contract may be terminated by either party, after reasonable notice of his intention to the other. The Town provided notice to the Defendants of its intent to discontinue water service to the Scott's Furniture property if it was not annexed into the Town's limits.

PLCW Trust and Scott's Furniture Company argues the Agreement between the Town and Henry Wingard is enforceable because the Town agreed to provide services to Mr. Wingard's "heirs and assigns." Defendants relied on *Creswell v. Bank of Greenwood*, 210 S.C. 47, 41 S.E.2d 393 (1947), and argue the Supreme Court construed the words "heirs and assigns" to mean a permanent gift of fee simple interest in the conveyance of land. Defendants misread this case. The deed in *Creswell* stated, "To be his, his heirs and assigns forever." *Creswell* 210 S.C. at 47, 41 S.E.2d at 395 (emphasis added). The construction of these words in the deed "leave no room for speculation upon the intent of the grantor." *Creswell*, 210 S.C. at 55, 41 S.E.2d at 397. The deed clearly shows the intention of the grantor to divest himself completely of possession by its terms including the word "forever", which signifies perpetuity.

The Agreement between Henry Wingard and the Town does not contain the express terms creating the perpetual nature of the agreement. More specifically, the agreement and the resolution are completely devoid of any term of duration. As stated in *Childs*, "the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other." 87 S.C. at 572, 70 S.E. at 298. The Town gave the Defendants reasonable notice of its intent to disconnect water service if the Defendants did not annex into the Town. The Town has the right to terminate water service if the Defendants do not petition to be annexed within the Town's limits.

IT IS THEREFORE DECLARED AND ORDERED that the Town is within its lawful rights to demand that Defendants agree to annex the Scott's Furniture property as a requirement for the Town to continue to provide water service to the property.

IT IS FURTHER ORDERED that upon continued refusal of Defendants to agree to annexation of the Scott's Furniture property, the Town is authorized to terminate water service to the property after 90 days from the date of this order.

Signature page to follow.



Lexington Common Pleas

Case Caption: Town Of Lexington South Carolina VS Patty C Wingard Trustee
Plcw Trust , defendant, et al
Case Number: 2018CP3203352
Type: Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee

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ELECTRONICALLY FILED - 2020 May 04 10:30 AM - LEXINGTON - COMMON PLEAS - CASE#2018CP3203352

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
Town of Lexington South Carolina,	)	Case No.: 2018-CP-32-03352
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
Patty Cox Wingard, as Trustee for PLCW	)	
Trust, and Scott's Furniture Company, Inc.,	)	
	)	
Defendants.	)	
	)	

Patty Cox Wingard, as Trustee for PLCW Trust, and Scott's Furniture Company, Inc. ("Defendants") filed a Rule 59(e) Motion and Motion for Reconsideration, in response to the Court's Order filed on May 4, 2020. Town of Lexington South Carolina ("Plaintiff") responded to Defendant's Motion to Reconsider.

DISCUSSION

Defendants seek reconsideration of the Order arguing: (1) the Court did not rule on the Defendant's counterclaim to return the water line if the Contract was rescinded by the Town; and (2) the Court erred when it decided that the words "heirs and assigns" contained in the Agreement between Wingard and the Town do not create a permanent agreement.

1. Defendants' Counterclaim

The Defendants brought a counterclaim asserting: if the Agreement is not enforceable, the Town must return the consideration given – ownership and control of the water lines – to it for entering into the Agreement. (Def. Ans. ¶19(d), (e)). Defendants, in their Answer, wanted the Court to declare that the Wingard family owned the water lines that were the subject of the 1961 Agreement and the 1961 Resolution. (Ans. ¶19(f)) Further, the Wingard family was seeking to charge a reasonable fee for the Town using the water line to deliver water to its customers. (Ans. ¶19(g)). The Defendants argue the Court did not address the counterclaim in the May 4, 2020 Order.

The Town argues that the two documents – the 1961 Agreement and the 1961 Resolution (collectively "1961 Agreements") – relate to different water lines. (Pl. Response p. 2-3). The 1961 Agreement allowed Wingard to connect a six inch line to the new six inch line the Town was

installing in 1961 along Northwoods Road to extend water to the Lakewood area - Georgia Lane Road. The Town's water project, called Northwoods Waterline Project, began in 1961 and was finished in 1962. The project installed six inch water lines from Wessinger Drive to Highway 378 and 565 feet on a portion of Northwoods to Hamilton Street.

The October 1961 Resolution allowed Wingard to "take up" the old two inch line along Northwoods Road (which was replaced by the Town's six inch line). The Resolution further allowed Wingard to use the old two inch line on Hamilton Street to provide water service to Lakewood subdivision. The Lakewood subdivision was developed north of Northwoods Road, except Block E, where Scott's Furniture is located, which is on the south side of Northwoods Road. The two inch line Wingard installed on Hamilton Street does not touch or intersect the property upon which Scott's Furniture Store sits.

Defendants Exhibit 5 is a 1958 plat of the Lakewood subdivision. It shows that Hamilton Street runs parallel to Northwoods Road (delineated on the plat as S.C. Hwy. No S-32-392). The October 1961 Resolution referencing the two inch line to be installed on Hamilton Street has no relationship to the September 1961 Agreement that involves the six inch line Wingard installed on Georgia Lane to connect to the Town's line on Northwoods Road. Georgia Lane Road intersects both Hamilton Street and Northwoods Road. All of these streets are north of the Scott's Furniture property. Georgia Lane Road and Northwoods Road intersect at the rear entrance of Scott's Furniture property.

Scott's Furniture property is serviced by the six inch line on Northwoods Drive that was installed by the Town during the 1961 Northwoods Waterline Project. When Scott's Furniture property was developed in 1972, the lines from the property were connected to the six inch line on Northwoods Drive. The 1961 Agreements do not refer to any property contiguous to the Town. The Town is not seeking to annex the property affected by the 1961 documents. Wingard received the benefit of his bargain.

Defendants assert that the contract was rescinded and therefore, they are entitled to be returned to the *status quo ante*. Rescind, as it relates to a contract amounts to the unmaking of the contract, or undoing of it from the beginning, not merely a termination. *Black's Law Dictionary* (5th Ed. 1979). It is declaring the contract void in its inception, putting an end to it as though it never was. *Id.* The parties performed under the 1961 Agreements. They received benefit from the agreements since 1961. The sole issue before the Court was to construe the contract and

determine whether the Town was required to continue to provide water service in perpetuity. The parties cannot be returned to the *status quo ante*.

Based upon the interpretation of the agreements between the parties, the allegations in the Defendants' Answer and Counterclaim are inconsistent with those documents and the decision of the Court, thus must be denied.

2. Perpetuity of the 1961 Agreement

The Court determined the 1961 Agreement is silent as to express terms creating a perpetual nature of the agreement. After careful consideration of the record in this case and the arguments raised by Defendants, this Court is unable to discover any new material fact or principle of law that was either overlooked or disregarded in the previous Order on this issue.

ORDER

Therefore, it is **ORDERED** that Defendants' Counterclaim is **DENIED** and the Motion to Reconsider is also **DENIED**.

AND IT IS SO ORDERED!

Signature page to follow.



Lexington Common Pleas

Case Caption: Town Of Lexington South Carolina VS Patty C Wingard Trustee
Plcw Trust , defendant, et al
Case Number: 2018CP3203352
Type: Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee, Chief Administrative Judge
for 2020

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1	State of South Carolina	)	In the Court
2	County of Lexington	)	Of Common Pleas
3	Town of Lexington	)	Case No.: 2018-CP-32-03352
4	South Carolina,	)	
5	Plaintiff,	)	
6	vs.	)	Transcript of Record
7	Patty C. Wingard Trustee	)	
8	Plcw Trust, et al.,	)	
9	Defendants.	)	

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25

October 17 and 18, 2019
Lexington, South Carolina

BEFORE:

The Honorable Alison Lee, Judge

APPEARANCES:

Clifford O. Koon, Junior, Esquire
Attorney for the Plaintiff

James Edward Bradley, Esquire
Attorney for the Defendants

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1 OCTOBER 18, 2018

2 WITNESS PAGE

3 ALLEN LUTZ

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9 EXHIBITS

10 PLAINTIFF'S

11	NO.	DESCRIPTION	ID	EVDS.
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12	1	Color Topographical Map	4	10
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13	2	Black and White Topographical Map	4	10
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14	3	Topographical Map Printed 6/24/13	4	10
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15	4	Letter 6/24/13	61	72
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16 DEFENDANTS'

17	NO.	DESCRIPTION	ID	EVDS.
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18	1	Agreement 10/13/61	18	18
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19	2	Agreement 9/30/61	18	18
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20	3	Letter Town of Lexington 7/23/13	57	57
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21	4	Letter 7/30/13	57	57
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22	5	Topographical Map	65	65
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23	6	Map 7/25/72	93	94
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24	7	Color Map	98	98
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25	8	Black and White Map	101	101
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1 Thereupon, the following proceedings were had,

2 BAILIFF: All rise.

3 THE COURT: Good morning everyone. Thank you. Be
4 seated.

5 MR. KOON: Your Honor, if I could approach the
6 clerk. I have previously pre-marked two maps and we have
7 since that time talked about a third map that I think
8 will help the Court. Could I approach the clerk and have
9 it premarked?

10 (Whereupon, Plaintiff's Exhibit #1, #2, #3 marked
11 for identification.)

12 THE COURT: Yes. Good morning everyone. We're here
13 on docket number 2018-CP-32-03352, Town of Lexington,
14 South Carolina versus Patty C. Wingard, Trustee, Plcw
15 Trust. The plaintiff is represented by Cliff Koon. The
16 defendant is represented by Ward Bradley and Sierra
17 Carini. We are here today for a non jury trial on an
18 action involving a declaratory judgment relating to some
19 contracts relating to water services. And so 403s?

20 (Raising hand.)

21 THE COURT: Okay. And hopefully this will qualify
22 for what you are looking for for your 403s. Otherwise
23 you may just have to make an appearance tomorrow morning
24 when we finish up and that way you can change what you're
25 looking for. We'll work on it.

1 Counsel, we've had a brief conversation about some
2 of the issues in chambers. Basically just as background
3 information, it is a non jury trial so I have read your
4 pretrial briefs that have been submitted to me and I'm
5 familiar with them. If you would like to make an opening
6 statement, you're certainly welcome to do so otherwise we
7 can get to the point.

8 MR. KOON: Your Honor, as far as the plaintiff is
9 concerned I think the combination of the briefs and the
10 in chambers, I don't believe The Town needs an opening
11 statement.

12 THE COURT: Okay. And basically just so everybody
13 is not wondering that we had some secret discussions in
14 chambers, our conversations in chambers basically related
15 to what was in the pretrial briefs just giving me some
16 background information about the case.

17 MR. BRADLEY: Judge, I would like to speak briefly,
18 but I promise I won't take too long.

19 THE COURT: Okay.

20 MR. BRADLEY: I'm sure if I do, you'll let me know.

21 MR. KOON: Your Honor, if he's going to do one, I
22 would like the chance to reply.

23 THE COURT: Okay.

24 MR. BRADLEY: That's fine with me, Judge. I'm here
25 today with the Wingard family and who I've got here is

1 Georgia Wingard. This is Henry Wingard's daughter, and
2 Henry Wingard is gonna be, I guess, the central player
3 here, but he's deceased. His widow Patty Wingard, next
4 to her is Bryson Scott who is the owner of Scott's
5 Furniture who is the lessee of the property that we're
6 talking about here, and behind them are Cliff and Tom
7 Wingard who are Henry Wingard's sons, and so this goes
8 back to an agreement The Town made with Henry Wingard on
9 October 31st -- no, October 13th, 1961 which is attached
10 as Exhibit B to our answer and crossclaim. Do you have a
11 copy, Judge, or would you like a copy?

12 THE COURT: I do.

13 MR. BRADLEY: Do you have one there? Thanks so
14 much. All right. So --

15 THE COURT: Well, actually I may be --

16 MR. BRADLEY: I have one if I can approach.

17 THE COURT: The answer and counterclaim? Yes. I
18 do.

19 MR. BRADLEY: Here, I'll bring it to you. And you
20 can have an extra copy for --

21 THE COURT: I've got both the agreement and the
22 information from The Town.

23 MR. BRADLEY: Okay. The one I want to talk about
24 because it's the last one which I think is really what's
25 at issue here is attached as Exhibit B to our answer and

1 counterclaim. So this agreement as it says October 13th,
2 1961, and The Town has stipulated that this is admissible
3 into evidence, is a resolution of The Town council, you
4 can see it's signed by the mayor and the four council
5 members as well as the clerk and it's signed by Henry
6 Wingard and it says that he will put in a two inch water
7 main on Hamilton Street. That's his end of the deal.
8 And that The Town will have the right to operate this two
9 inch water main. I'm paraphrasing, but that's
10 essentially what it says.

11 And then it says after it is completed and The Town
12 shall maintain the water line after it's completed. This
13 is at the bottom. And is further agreed that The Town
14 shall afford water services to the party of the second
15 part which is Henry Wingard, their heirs and assigns
16 within the limits of The Town's water system at the
17 prevailing water rates charged by The Town, and that's
18 all we want The Town to do, that is to provide water
19 services to Henry Wingard's heirs and assigns within the
20 limits of The Town's water system at the prevailing water
21 rates. All we want is them to honor the last sentence of
22 that contract that The Town entered on October 13th,
23 1961.

24 So what happened was in 2013 The Town wrote a letter
25 to Tom Wingard and said we know that the Scott's

1 Furniture property is on The Town water system, but
2 you're not a part of The Town. We want to annex you so
3 we are sending you this petition in which you will agree
4 to be annexed. And Tom Wingard wrote them back and said
5 I don't want to be annexed into The Town. I don't agree
6 to be annexed into The Town, and the Town agreed by way
7 of this resolution signed by The Town council that The
8 Town would sell water to me as the heir of Henry Wingard
9 and therefore I'm not gonna sign a petition to be annexed
10 so they didn't get annexed because, of course, The Town
11 can't annex them unless they agree to it.

12 So last year The Town brought this lawsuit and the
13 lawsuit is basically a declaratory judgment action that
14 says, hey, you have to either agree to be annexed into
15 The Town or we want permission to shut your water off.
16 We want permission to not do what this contract says
17 we're supposed to do. And so we answered and said you
18 agreed you would do this and all we want is for The Town
19 to honor its word and its promise that was made to Henry
20 Wingard regarding him and his family and if you aren't
21 going to do what you say is in this contract, then we
22 should get this water line back because that was part of
23 the deal is that Henry Wingard was gonna give this water
24 line to The Town for it to serve its residents with water
25 and The Town was gonna water to Henry Wingard and his

1 heirs and if The Town is not gonna give water to Henry
2 Wingard and his heirs, if The Town wants to rescind this
3 contract, The Town has got to give the water line back to
4 them and so we would like a deed back on the water line
5 and that way we can charge The Town rent on that water
6 line or decide to turn it off or do whatever we want to
7 do with our water line if The Town isn't gonna do what
8 they're supposed to do.

9 Finally, we served a claim for attorney's fees under
10 the South Carolina act that allows a party when it's sued
11 by the state to recover attorney's fees which, of course,
12 would have to be determined in the event that we are
13 successful.

14 Now, I think we've agreed on a few things that will
15 speed up the trial of this case and that is this: That
16 The Town is contiguous to the Scott's Furniture property
17 which is at 705 North Lake Drive. So we agree to that so
18 they don't need to prove it. And, in fact, we admitted
19 to it in our pleadings. The property itself, the
20 ownership of the property is in an entity of which Patty
21 Wingard is the trustee which is called the Plcw Trust.
22 And I think we've agreed -- and I'll let Mr. Koon speak
23 to this if he has a different understanding -- that that
24 trust owns the property. And I think we've agreed that
25 that trust is an heir or assigned of Henry Wingard. I

1 don't think there's any argument about that at all. And
2 I think we've agreed that this agreement, the October
3 13th agreement which is attached to our pleadings is
4 admissible into evidence, so I would ask as a preliminary
5 matter that it be admitted and that the September
6 agreement which is attached as Exhibit 8 to our pleadings
7 is admissible into evidence, and that agreement is dated
8 September 30th, 1961.

9 So I think those are our five stipulations. Maybe
10 Mr. Koon can speak to those if he disagrees or to confirm
11 that that is correct on the record and when he's done
12 speaking I'll give a copy of each of those exhibits to
13 the court reporter so he can enter them into the record.

14 Thank you, Your Honor. Unless the Court has
15 questions, that's what I have to say.

16 THE COURT: Mr. Koon, anything you want to say at
17 this point?

18 MR. KOON: Briefly, Your Honor. I have pre-marked
19 three maps Plaintiff's Exhibits 1, 2, and 3 for
20 identification. I believe Mr. Bradley has indicated he
21 will not object to admitting those so I would like to
22 offer those for admission at this point, Your Honor.

23 THE COURT: Have you looked at those, Mr. Bradley?

24 MR. BRADLEY: I consent to that, Judge.

25 THE COURT: Okay. So they're admitted.

1 MR. KOON: All right. The other thing, Your Honor,
2 is this case kind of puts me in an awkward position.
3 I've got a couple friends sitting over there, although
4 one of them looks at me now like I might be a former
5 friend, but I traded with Henry Wingard at his service
6 station and then I later traded with Tom Wingard at a
7 different service station and I consider him a friend.
8 Bryson Scott I have known even longer. We went to church
9 together. He's the retiring owner of Scott's Furniture
10 Company.

11 Your Honor, the letter that Mr. Bradley mentioned
12 was written by Tom Wingard to The Town was dated July
13 30th, 2013. That's how long we tried to avoid bringing
14 this lawsuit and I've got a file here of documents about
15 what Lakewood Subdivision is and, Your Honor, we're gonna
16 be arguing some things that Mr. Bradley said as
17 assumptions shouldn't be assumed at all. Our witness
18 that's gonna testify tomorrow will testify that the
19 exhibit that talks about a two inch water line on
20 Hamilton Street, our witness will testify that Hamilton
21 Street is at least two blocks to the north of the subject
22 property and it services a subdivision that was developed
23 by Mr. Henry Wingard. It's a different line, has nothing
24 to do with Scott's Furniture Company.

25 If you flip over, there is mention, Mr. Wingard

1 having also asked for permission to tie into The Town's
2 six inch water line so that he could serve the Lakewood
3 area, Georgia Lane Road and, of course, our witness
4 tomorrow will testify that the Lakewood area and Georgia
5 Lane Road are both, depending on how far you go on
6 Georgia Lane Road it starts at about a block from this
7 property and it goes all the way down to the creek which
8 is probably two thirds of a mile. So we're talking
9 apples and oranges here.

10 There's no doubt that these documents were prepared.
11 There's no doubt that they were signed by folks and
12 attested to by folks that, no disrespect intended,
13 they're all deceased, and so there's gonna probably be
14 some serious issues about the parol evidence rule and so
15 forth. My witnesses won't try to say, well, this
16 agreement doesn't really say what it says. What my
17 witnesses are gonna say is they're talking about a
18 different sewer line. They're talking about, Mr. Wingard
19 had a lot of land when he was alive and I assume that's
20 why he put it in trust for his family, but he developed
21 this Lakewood Subdivision and at one time it was, the
22 sewer in Lakewood Subdivision was provided by Lakewood
23 Sewer which I think at one time was owned by Mr. Wingard.
24 So that's The Town's main point is we're trying to
25 compare apples and oranges here, and we've been trying as

1 diplomatically as we could to tell the family that since
2 October the 13th - I mean July the 30th of 2013 and that
3 has resulted in this suit.

4 Now, if Your Honor should find that the two inch
5 Lakewood water line does, in fact, service the Scott's
6 Furniture Company, then we have a lot of issues about can
7 a long deceased mayor and council members bind a
8 municipality forever in a vaguely worded one sentence
9 contract and we don't even agree there's a contract. We
10 think it's basically an agreement to build that line and
11 an agreement for us to put water in that line. If it is
12 a contract, we feel that it's terminable upon reasonable
13 notice because it does not have a termination date. And
14 as Your Honor knows, you can't have a contract that goes
15 on in perpetuity. They've had over 50 years already.
16 The other thing, Your Honor, is that -- Well, I think
17 everything else I would say has been covered, Your Honor.
18 Thank you.

19 THE COURT: Mr. Koon, you may call your first
20 witness.

21 MR. KOON: I call John Hanson.

22 THE COURT: Step forward please to be sworn.

23 MR. KOON: May I retrieve the exhibits, Your Honor?

24 THE COURT: Yes. I think they're all sitting on the
25 table.

1 Thereupon,

2 JOHN HANSON

3 after having been first duly sworn, testified as follows,

4 THE CLERK: Please have a seat. Once you're seated,
5 state your full name for the record.

6 THE WITNESS: John Drake Hanson, D-r-a-k-e
7 H-a-n-s-o-n.

8 DIRECT EXAMINATION

9 BY MR. KOON:

10 Q. Mr. Hanson, where do you work?

11 A. I work for the Town of Lexington.

12 Q. In what capacity?

13 A. I'm the director of planning, building and
14 technology.

15 Q. And how long have you been so employed?

16 A. Eight years.

17 Q. Where did you work before that?

18 A. The Town of Irmo.

19 Q. In what capacity?

20 A. I was the town administrator.

21 Q. How long did you work for them?

22 A. Nine years.

23 Q. Now, your current position in Lexington involves
24 what?

25 A. Uhm, for these purposes all the annexations are

1 generated through our department, but we also run the building
2 department, business licensing, mapping.

3 Q. All right. And as director of that department are
4 you familiar with The Town's annexation policies?

5 A. Yes, sir. I am.

6 Q. And what are the policies in regard to water service
7 or sewer service to a piece of property that is out of town?

8 A. Properties that are, that utilize The Town's
9 utilities are subject to annexation at the point that they
10 become contiguous to The Town limits.

11 Q. All right, sir. Now, do you know whether or not
12 this property is contiguous?

13 A. It is.

14 Q. Also under your direction do you keep maps of The
15 Town and it's environs?

16 A. I do. Yes, sir.

17 Q. I'm gonna show you Plaintiff's Exhibits 1 and 3 and
18 ask you if you're familiar with them?

19 A. Yes, sir. Yes, sir. I am.

20 Q. Are they kept in the normal course of your business
21 with The Town?

22 A. Yes, sir. We have a staff member that keeps all the
23 maps for The Town and generates new maps.

24 Q. And who is that?

25 A. His name is Lloyd Dillon.

1 Q. Does he work under your supervision?

2 A. He does.

3 Q. All right. Now the maps that have been entered into
4 evidence, do they come from the maps that you just discussed
5 kept by Mr. Dillon?

6 A. This one appears to have been one generated from our
7 town GIS system. This one I actually generated from the
8 county's GIS map.

9 Q. And the one from the county's GIS which is exhibit
10 number 3, it has a blue piece of property in the middle. What
11 is that for?

12 A. That is the subject property we're discussing today,
13 the Scott's Furniture property.

14 Q. All right. This map also locates Northwood Road,
15 Hamilton Street, and Georgia Lane; is that correct?

16 A. Yes, sir. It does.

17 Q. All right. With the Court's permission, if you
18 would turn around and just show the Judge the position of the
19 subject property, Scott's Furniture Company with Georgia Lane
20 and Hamilton Street.

21 A. (Indicating) This is Georgia Lane, this is Cherokee
22 Trail and this is Hamilton Street and this is the subject
23 property.

24 THE COURT: And those streets are marked on the map?

25 THE WITNESS: Yes, ma'am.

1 MR. KOON: Yes, ma'am.

2 BY MR. KOON:

3 Q. Now, is it true that Hamilton Street is about two
4 blocks away from the subject property?

5 A. Yes, sir.

6 Q. And is it also true that Hamilton Street is north of
7 the subject property?

8 A. Yes, sir.

9 Q. Is it also true that the topography of the land
10 going north from Scott's Furniture Company trails downhill to
11 14 Mile Creek?

12 A. Yes, sir. I believe it does.

13 Q. So Georgia Lane runs all the way down to the creek
14 and so does Cherokee Trail?

15 A. I believe that is correct. I know Cherokee Trail
16 does. I have never been down Georgia Lane.

17 Q. Georgia Lane is parallel to Cherokee Trail; is that
18 right?

19 A. Yes, sir.

20 Q. So Hamilton basically connects those two, Cherokee
21 Trail and Georgia Lane?

22 A. That is correct.

23 Q. And it's downhill from the subject property?

24 A. Yes, sir.

25 MR. KOON: Your Honor, I believe that's all I

1 have.

2 THE COURT: Any cross?

3 MR. BRADLEY: Thank you, Judge. Before I begin, I
4 would like to mark these two exhibits that I talked about
5 in opening. Would that be acceptable?

6 MR. KOON: No objection.

7 THE COURT: All right.

8 MR. BRADLEY: Just for the record, I'm introducing
9 as exhibit 1 an October 13th, 1961 contract between Henry
10 Wingard and The Town of Lexington signed by all the
11 council members and as exhibit 2 a document entitled
12 Agreement and dated September 30th, 1961 and signed by
13 Henry Wingard as well as the mayor of The Town John Addy.

14 (Whereupon, Defendants' Exhibits #1 and #2 marked
15 and admitted.)

16 THE COURT: And they're both admitted.

17 MR. BRADLEY: Yes, ma'am. Thank you. And I also
18 want to make sure, I talked about these five stipulations
19 that we all agreed on in my opening, but I didn't get a
20 consent that The Town did agree to them. I thought that
21 we had. I just wanted to get that on the record.

22 MR. KOON: Let me make sure. Which five are we
23 talking about?

24 MR. BRADLEY: The Town is contiguous to the
25 property, the Plcw Trust owns the property, the Plcw

1 Trust is an heir or assigned of Henry Wingard, and then
2 the other two we just did which are the two exhibits.

3 MR. KOON: Yes, Your Honor, we'll stipulate to those
4 five things.

5 MR. BRADLEY: All right. Excellent. Thank you so
6 much.

7 CROSS EXAMINATION

8 BY MR. BRADLEY:

9 Q. Mr. Hanson, do you have a map up there of The Town
10 and the Scott's Furniture property at 705 North Lake Drive?
11 Is it up there with you?

12 A. (Indicating.)

13 Q. So you're looking at Plaintiff's Exhibit 1; is that
14 right?

15 A. Yes, sir.

16 Q. And it shows where Scott's Furniture is right there
17 on North Lake Drive, 705?

18 A. Yes, sir.

19 Q. And the colored parcels are actually part of The
20 Town; is that correct?

21 A. That's correct.

22 Q. And the places that aren't colored are not part of
23 The Town, right?

24 A. Yes, sir.

25 Q. Okay. So lots and lots of the property that's

1 around the Scott's Furniture property is not part of The Town.
2 In fact, most of it isn't, right?

3 A. I don't know that that's necessarily accurate. Some
4 of this on here that's white is actually in town. It's how
5 the map was generated.

6 Q. I thought only the colored parts were in town?

7 A. No, sir. This is a more accurate representation of
8 what's in town, the tan here, everything that's tan.

9 Q. Well, why are some on exhibit 1 different colors
10 then?

11 A. I don't know. I haven't asked our mapping guy why
12 he generated the map this way.

13 Q. You really don't understand why it's all those
14 different colors?

15 A. I don't know why he generated it that way.

16 Q. Okay. All right. And you don't agree then that the
17 white areas are not part of The Town? Is that what you're
18 saying?

19 A. No. What I'm saying is this map does not show some
20 of the areas that are in town.

21 Q. Well, let me make sure I understand. Exhibit 1
22 shows the Scott's Furniture property, right?

23 A. This property here in the bottom corner here is
24 Gold's Gym or Muve Fitness now. That is in town. It's not
25 shown on this map.

1 Q. Okay. So there's just a problem with the map
2 somewhere?

3 A. Correct. This would be a more accurate
4 representation of what's in The Town limits.

5 Q. All right. Okay. And you never talked to the
6 Wingards or their family about this before the lawsuit was
7 brought?

8 A. No, sir.

9 Q. And you don't know anybody in The Town who has?

10 A. Not to my knowledge.

11 Q. Right. The only thing that happened was six years
12 ago Brad Cunningham wrote a letter to Tom Wingard as far as
13 you know?

14 A. Yes. Actually I think I was the first one to write
15 a letter to him but yes.

16 Q. Like six years ago or something?

17 A. That would be correct.

18 Q. All right. But you're familiar with The Town's
19 annexation policies?

20 A. Yes, sir.

21 Q. And you know that The Town can't annex property if
22 the Wingards don't agree to be in The Town, right? You have
23 to have their permission?

24 A. They would have to sign a petition. Yes, sir.

25 Q. They have to basically ask The Town to be annexed by

1 way of petition?

2 A. Yes, sir.

3 Q. And you've said unless you sign this petition, we're
4 gonna turn your water off? That's what this lawsuit is all
5 about, right?

6 A. As town council's policy, direction is that if
7 you're using The Town's utilities, you're subject to being
8 annexed.

9 Q. Right. But that's not what you threatened to do?
10 You threatened, you said if you don't agree to petition to be
11 in The Town, we're gonna turn the water off? That's why you
12 brought the lawsuit.

13 A. That's - that's The Town council's position is that
14 is a potential remedy.

15 Q. But as a representative of this town you brought the
16 lawsuit saying ask us to be a member of The Town or we're
17 gonna turn your water off. That's what you're asking the
18 Court to do.

19 A. Essentially, yes, sir.

20 Q. Okay. All right. And you've read Defendants'
21 Exhibit 1, right?

22 A. The first time I saw it was an hour ago.

23 Q. You never even saw this contract?

24 A. No, sir. Once I issued the initial letter it was
25 turned over to our legal department.

1 Q. You wrote a letter, it's been six years and you
2 never even looked at the contract The Town made with the
3 Wingards?

4 A. No, sir. As I said, once I issued the initial
5 letter, their attorneys were involved and it was turned over
6 to our legal department.

7 Q. No, sir. There's been no attorney involved until
8 you sued them.

9 A. Uhm --

10 MR. KOON: Counsel is arguing with the witness, Your
11 Honor.

12 BY THE WITNESS:

13 A. My recollection is that we received a letter from an
14 attorney.

15 BY MR. BRADLEY:

16 Q. Okay. All right. So when you looked at this an
17 hour ago, you've read it now, correct?

18 A. Yes, sir.

19 Q. All right. And you're an honest person, aren't
20 you?

21 A. Yes, sir.

22 Q. You do what you promise to do, don't you?

23 A. I do.

24 Q. It's your policy to keep your word to people?

25 A. That's correct.

1 Q. Isn't it The Town's policy to honor its agreements
2 as well?

3 A. As was stated earlier, I'm not sure that that's
4 accurate and I'm not in a position to argue that.

5 Q. I'm not here to argue. I'm questioning.

6 A. I'm the planning director.

7 Q. You can't say whether it's The Town's policy to
8 honor its agreement?

9 A. Sure it is.

10 Q. Okay. So we now know that The Town's policy as a
11 representative of The Town is to honor the agreements it
12 makes, right?

13 A. Certainly.

14 Q. Okay. All right. And you would agree that Scott's
15 Furniture is within the limits of The Town's water system?

16 A. Yes, sir.

17 Q. No question about that?

18 A. Yes, sir.

19 Q. And you would agree that The Town has said it shall
20 afford water services to the party of the second part, their
21 heirs and assigns within the limits of The Town's water
22 system. Doesn't it say that?

23 A. The agreement doesn't say that they won't abide by
24 the policies that are associated with that.

25 Q. I didn't ask you what the agreement doesn't say. I

1 asked you what the agreement does say. Doesn't the agreement
2 say The Town shall afford water to Wingard his heirs and
3 assigns within the limits of its water system?

4 A. Yes, sir.

5 Q. Okay. And The Town has been doing that for 58
6 years?

7 A. Yes, sir.

8 Q. And The Town has now decided it's not gonna do that
9 anymore. That's why it brought this lawsuit.

10 A. It may not have been contiguous at the time that the
11 agreement was signed.

12 Q. I didn't ask you about contiguity. I didn't ask
13 that at all. I asked if The Town has now decided it's not
14 gonna do what it promised in this agreement?

15 A. That would be a policy decision on behalf of The
16 Town council. It's above my pay grade.

17 Q. That's been made, right?

18 A. That's what the paper says.

19 Q. Right.

20 A. But it doesn't say that you aren't subject to the
21 policies of the water system. Policies of the water system
22 change all the time because of Federal mandates and everything
23 else.

24 Q. Federal mandates don't have anything to do with
25 this, do they?

1 A. I'm using that as an example.

2 Q. You just made it up. It doesn't have anything to do

3 --

4 A. So if a Federal mandate came down that said that we
5 had to do X on the water system, they would have to comply as
6 well.

7 Q. Sure. But Federal mandates has nothing to do with
8 this case.

9 A. But The Town's council's policy is that you will
10 annex.

11 Q. No. My question is, do Federal mandates have
12 anything to do with this case?

13 A. I'm just using that as an example.

14 Q. The answer is no, isn't it, Mr. Hanson?

15 A. Not in this case. No, sir.

16 Q. Right. You just made it up, right?

17 A. I'm using it as an example --

18 Q. That has nothing to do with this case?

19 A. I'm using it as an example of how --

20 MR. KOON: Your Honor, if counsel would quit
21 interrupting the witness.

22 BY THE WITNESS:

23 A. -- of how a policy may change in 58 years.

24 BY MR. BRADLEY:

25 Q. Right. Certainly. Has The Town offered to give the

1 Wingards the two inch water main back that was part of this
2 deal?

3 A. I'm not privy to what negotiations have occurred
4 over the last five years.

5 Q. But you can agree that by bringing this lawsuit The
6 Town is violating the contract it signed?

7 A. I believe that it's stated that it's arguable as to
8 whether that's a contract.

9 Q. You don't think this is a contract?

10 A. No. I was just listening to the opening
11 statement.

12 Q. Well, is it? What do you call this?

13 A. I'm not a lawyer.

14 Q. Okay. Well, you just tell me what you call this and
15 I'll call it whatever you want.

16 A. It appears to be an agreement to put in a water
17 line.

18 Q. Good. Would you agree that The Town is not honoring
19 the terms of the agreement to put in the water line?

20 A. Not necessarily. No. I wouldn't agree with that.

21 Q. Okay. Doesn't this agreement say The Town is
22 supposed to provide water to Wingard and his heirs within the
23 limits of The Town's water system?

24 A. It would but the policies --

25 Q. Is that what it says?

1 A. -- have changed in 58 years and it requires
2 annexation.

3 Q. But the agreement doesn't say anything about
4 annexation, right?

5 A. I don't know where The Town limits were in '61 --

6 Q. That's not my question.

7 A. -- so that may not have been contemplated.

8 Q. Mr. Hanson, my question is, this agreement doesn't
9 say anything about annexation policies, does it?

10 A. It does not.

11 Q. You're trying to add something onto this agreement
12 that wasn't there, right?

13 A. I'm not -- That's - The Town council changed their
14 policies since that agreement was made.

15 Q. Right. So The Town has now decided it's not gonna
16 honor this agreement?

17 A. The Town has decided to honor that agreement. It
18 has to be annexed.

19 Q. So it's decided to change this agreement because the
20 agreement doesn't say anything about being annexed, does it?

21 A. Correct.

22 Q. All right. You weren't even -- Were you born when
23 this agreement was done?

24 A. No, sir.

25 Q. Okay. So you don't have anything - you can't say

1 anything that this agreement was supposed to say, can you?

2 A. I cannot.

3 Q. Anything about annexed is just something you're
4 adding on after the agreement was done, right?

5 A. Town council's policy has changed since then.

6 Q. Right.

7 A. I'm not adding anything.

8 Q. So The Town is trying to change the agreement it
9 promised to do?

10 A. I can't speak to what the policy was then, but I
11 would agree with you that it's not mentioned in that
12 document.

13 Q. So The Town has decided it's not gonna honor this
14 agreement?

15 MR. KOON: Was that a question, Your Honor?

16 MR. BRADLEY: It is. It's a question.

17 BY MR. BRADLEY:

18 Q. The Town has decided it's not gonna honor the
19 agreement, Defendants' Exhibit 1?

20 A. The Town is going to honor the agreement to provide
21 water subject to the policies that The Town has for all
22 customers on the water system.

23 Q. The Town will only honor this agreement if the
24 Wingards petition The Town to be in The Town, right?

25 A. That is The Town's policies.

1 Q. But it's not in this agreement anywhere. You just
2 made it up later, right?

3 A. It is not in the agreement. That's correct.

4 Q. So this agreement, the one you're looking at, the
5 one that y'all stipulate something The Town agreed to do, The
6 Town is not going to follow it and that's why it brought this
7 lawsuit?

8 A. Is that a question?

9 Q. Yes. Is that true?

10 A. It is subject to the policies of the service
11 provisions which are subject to change.

12 Q. Where does it say in this agreement that it's
13 subject to change at The Town's whim?

14 A. I wouldn't say that would be a whim. That's been
15 The Town's policy for decades.

16 Q. Where does it say that it's subject --

17 A. It doesn't say.

18 Q. -- to change at The Town's policy?

19 A. It does not say that.

20 Q. So my question is just this: By bringing this
21 lawsuit The Town has decided to break its agreement with
22 Mr. Wingard and his family, right?

23 A. I think I have answered that.

24 Q. Well, what's that answer?

25 A. Still we're not saying - we're not saying that water

1 would not be provided. We're saying that water would be
2 provided subject to the policies of the water system.

3 Q. That's not in this agreement, is it?

4 A. No. It's not in the agreement.

5 Q. Okay. So it's not -- The Town is not honoring this
6 agreement, is it?

7 A. The agreement is to provide water.

8 Q. Right. With no other requirements, right?

9 A. They are not written in that document. That's
10 correct.

11 Q. Exactly. So now The Town has decided not to honor
12 this agreement, right?

13 MR. KOON: Your Honor, he's asked this about six
14 times and he hasn't gotten the answer he wants. He can't
15 keep asking it.

16 THE COURT: Move on.

17 BY MR. BRADLEY:

18 Q. Okay. All right. Has The Town offered to give the
19 water line back that's in this agreement to the Wingards?

20 A. Not that I'm aware of. No, sir.

21 Q. This water line on Hamilton Street, The Town is
22 using it right now as we sit here.

23 A. That would be yes. I believe that is correct.

24 Q. So The Town wants to keep the water line but not do
25 what it promised to do?

1 A. We're back to the same question. We're providing
2 water to the subject property.

3 Q. Well, is The Town gonna give back the water line
4 when it requires the Wingards to be in town to get water?

5 A. That would be a decision for town council.

6 Q. So The Town wants to keep its benefit of the
7 bargain, but not deliver the benefit to the Wingards, is that
8 what's going on?

9 A. I think that they're providing water. We are
10 providing water.

11 Q. I understand as we sit here The Town is providing
12 water, but the whole purpose of this lawsuit you asked to turn
13 the water off.

14 A. We're asking the property owner to abide by the same
15 policy that everyone else on the system has to abide by.

16 Q. Everybody else who didn't put a water line in place
17 for The Town and entered a contract with The Town, right?

18 A. I would be -- I assume that's correct. Yes, sir.

19 Q. All right. Do you know what the word heirs means?

20 A. Yes.

21 Q. What does it mean?

22 A. Your children or grandchildren.

23 Q. Right. There's no question about that. Everyone
24 knows that, right?

25 A. Right.

1 Q. What about the word assigns, do you know what that
2 word means?

3 A. I believe that means that you can assign the
4 agreement to different property owners or a different owner at
5 some point.

6 Q. There's really no question about that either, right?
7 Not from you.

8 A. I'm not competent on the definition but I believe
9 that's correct.

10 Q. Yeah. And so we agree that Scott's Furniture, 705
11 North Lake Drive is within the limits of The Town's water
12 system?

13 A. Yes, sir.

14 Q. All right. And we agree that The Town is providing
15 water to this property for 58 years, right?

16 A. That's my understanding. Yes, sir.

17 Q. Pursuant to this contract, right?

18 A. Ostensibly. Yes.

19 Q. Or this agreement?

20 A. Yes, sir. I would agree.

21 Q. All right. And you would agree that Henry Wingard
22 did everything he was supposed to do under this agreement to
23 provide a water line, exhibit 1?

24 A. That would be an assumption. I don't know Henry
25 Wingard. Never met him. I don't know what the terms of that

1 agreement particularly mean with regard to water line
2 construction or any of that so I don't know.

3 Q. You don't agree that he installed the two inch water
4 line like he was supposed to?

5 MR. KOON: Objection, Your Honor. He says he
6 doesn't know.

7 BY THE WITNESS:

8 A. That's --

9 THE COURT: Hold on. Hold on.

10 MR. KOON: I don't know if he was born in 1961.

11 MR. BRADLEY: My questions is --

12 BY THE WITNESS:

13 A. I was not.

14 BY MR. BRADLEY:

15 Q. Is the water line on Hamilton Street installed?

16 A. I believe that's correct.

17 Q. Okay. Well, we know this contract, exhibit 1, says
18 Wingard is gonna install a two inch water line on Hamilton
19 Street, right?

20 A. Correct.

21 Q. And we know there's a two inch water line on
22 Hamilton Street, right?

23 A. Yes, sir.

24 Q. So is it safe to assume that Henry Wingard installed
25 the two inch water line on Hamilton Street?

1 A. Yes, sir.

2 Q. And it's still working like it's supposed to?

3 A. As far as I know.

4 Q. And it's part of The Town's system?

5 A. Yes, sir.

6 Q. And the only thing in exhibit 1 that Wingard is
7 supposed to do is install that water line and essentially let
8 The Town have it, right?

9 A. That's what the document says. Yes, sir.

10 Q. And that's what he did, right?

11 A. I believe so. Yes, sir.

12 Q. All right. And it still works. It's a great water
13 line. Nothing wrong with it.

14 A. I don't know that.

15 Q. Do you know of anything that's wrong with it?

16 A. I'm not the utility director.

17 Q. Right. But you don't know of anything wrong with
18 it?

19 A. Nor would I.

20 Q. Okay. All right. And you agree that The Town is
21 capable and continuing to supply water to the Scott's
22 Furniture property, right?

23 A. That would be an assumption. I believe that's
24 correct. Yes, sir.

25 Q. And the water bill has been paid like clockwork for

1 58 years?

2 A. I don't know that.

3 Q. Okay. And you would agree that in this exhibit 1,
4 this agreement to provide water, there's no provision for The
5 Town to turn the water off, right?

6 A. There's nothing in there that says that. No, sir.

7 Q. Right. And there's nothing in there that says that
8 the Wingards, his heirs or assigns have to agree to be annexed
9 into The Town?

10 A. There's nothing in that document that says that.

11 Q. So who made the decision to bring this lawsuit?

12 A. I believe that would be a town council decision.

13 Q. So there should be a resolution where they voted to
14 sue the Wingards?

15 A. No, sir. That would be through The Town
16 administrator.

17 Q. Who is The Town administrator?

18 A. His name is Britt Poole.

19 Q. So Britt Poole is who would have made the decision
20 to sue the Wingards?

21 A. I believe so. Yes, sir.

22 Q. Do you know if he ever saw this contract exhibit 1
23 that you haven't seen?

24 A. I don't know.

25 Q. All right. Do you know whether The Town could give

1 the water line back on Hamilton Street to the Wingard
2 family?

3 A. I do not know that either.

4 Q. Okay. But the water line that Mr. Wingard put in is
5 a part of The Town's water system even as we sit here,
6 right?

7 A. I believe that's --

8 MR. KOON: Your Honor, asked and answered.

9 THE COURT: I'm gonna sustain that objection.

10 MR. BRADLEY: All right. I don't have any more
11 questions. Thank you, Judge.

12 THE COURT: Any redirect?

13 MR. KOON: Yes, Your Honor, please.

14 REDIRECT EXAMINATION

15 BY MR. KOON:

16 Q. The contract leaves a lot of things out, doesn't
17 it?

18 A. Yes, sir.

19 Q. The alleged contract. It's really like one
20 paragraph and if it weren't for the signatures, it would be
21 like half a page, right?

22 A. That's what it looks like. Yes, sir.

23 Q. All right. So does it have a termination clause?

24 A. No. I don't believe it does.

25 Q. It doesn't?

1 A. No, sir.

2 Q. Does that mean according to Mr. Bradley's theory
3 that it can never be terminated?

4 MR. BRADLEY: Your Honor --

5 BY THE WITNESS:

6 A. I don't think any --

7 MR. BRADLEY: -- I would object to this. He's cross
8 examining his own witness on what the law is.

9 MR. KOON: Well, Your Honor, I think I'm entitled --

10 MR. BRADLEY: It's cross examination.

11 MR. KOON: I think I'm entitled, Your Honor, because
12 he --

13 THE COURT: I think he can ask some questions in
14 reference to the things that you asked him on cross
15 examination so I'll allow it on redirect, maybe phrased
16 differently, but I'll allow it.

17 BY MR. KOON:

18 Q. Take a look at that and see if that has a clause in
19 there that says this contract runs forever.

20 A. It does not.

21 Q. Take a look at that alleged contract and see if it
22 contains the clause that says who notice is to be given if
23 there are any problems with the contract.

24 A. No, sir.

25 Q. So under Mr. Bradley's theory if something went

1 wrong out there, the Wingard family wouldn't even be able to
2 give notice to The Town. Is that what the contract says?

3 A. I'm sorry. I misunderstood the question.

4 Q. Well, Mr. Bradley asked you what this contract does
5 not have. I'm asking you if it does not also have a lot of
6 contract provisions that these recent law graduates would know
7 are in a contract, like notice, like termination clause?

8 A. From my experience that is correct.

9 Q. And you don't find them here?

10 A. This looks like a recitation of council minutes to
11 me.

12 Q. All right. Now, Mr. Bradley asked you about giving
13 back a sewer line. Or excuse me, a water line. Now, if this
14 contract deals with a two inch line on Hamilton Street, why
15 would The Town give that line back when it's annexing a
16 completely different piece of property on North Lake Drive?

17 A. I'm not sure. I don't know why we would do that.

18 Q. All right. Well, using Mr. Bradley's analysis is
19 that in the contract?

20 A. It is not.

21 Q. Does it say anywhere in there that we would give a
22 different line back?

23 A. No, sir.

24 Q. All right. Now, he asked you several times if this
25 was in the limits of The Town's water system. Now, is that

1 one paragraph document clear on what the limits means?

2 A. I don't think the document addresses the limits of
3 The Town at all.

4 Q. All right. Could that refer to geographical limits
5 and also capacity limits?

6 A. If you're asking that question with regard to a
7 utility system, it could mean town limits or where our service
8 area is. Yes. I believe so.

9 Q. And The Town has a service area for utilities?

10 A. That's correct.

11 Q. And could that also mean that?

12 A. It could.

13 Q. All right. And The Town has a limit on its capacity
14 for serving water, doesn't it?

15 A. It does.

16 Q. Could that mean capacity?

17 A. It could.

18 MR. KOON: All right. I think that's all I have,
19 Your Honor.

20 THE COURT: Do you know whether the property located
21 on 705 North Lake, whether The Town provided water
22 service back in 1961 to that location?

23 THE WITNESS: I do not know for sure. No, ma'am.

24 THE COURT: That's all I have. You may step down.

25 MR. KOON: Your Honor, we have one or two more

1 witnesses that by agreement would have to testify in the
2 morning, Your Honor. Other than that we're finished for
3 this morning.

4 THE COURT: Subject to additional witnesses
5 tomorrow, that's Mr. Dillon and Mr. Lutz; is that
6 correct?

7 MR. KOON: Yes, ma'am. It could be cut down to one
8 based on the testimony this morning.

9 THE COURT: Mr. Bradley, do you have witnesses you
10 would like to present at this time?

11 MR. BRADLEY: I would like with the Court's
12 permission to take a quick break and discuss this matter
13 with my clients.

14 THE COURT: Yes. That's fine. We can do that.
15 Let's take about a ten minute break. Is that enough
16 time?

17 MR. BRADLEY: Yes, ma'am.

18 THE COURT: We'll be back.

19 (Short break.)

20 BAILIFF: All rise. Court is back in session.

21 THE COURT: Thank you. Be seated.

22 MR. BRADLEY: Judge, we're ready to call
23 witnesses.

24 THE COURT: Okay. You may call your witness.

25 MR. BRADLEY: Our first witness will be Patty

1 Wingard who is Henry Wingard's window. I would ask the
2 Court's permission to put a chair at the base of the
3 witness stand. I'm concerned she might have trouble with
4 the steps. Would that be acceptable?

5 THE COURT: That's fine as long as we can move the
6 microphone over to her.

7 MR. BRADLEY: We'll do our best to talk loud, Judge.

8 MR. KOON: May it please the Court, before he starts
9 with this witness, could I have the Court instruct her
10 that she can't testify to anything that her late husband
11 said. This is a very awkward term, but that would be in
12 violation of the dead man rule and would also be
13 hearsay.

14 THE COURT: Mr. Bradley.

15 MR. BRADLEY: Judge, I wasn't planning to ask her
16 that, but I think what I'm going to ask her is her
17 personal knowledge of this agreement with The Town, so
18 I'm not asking for her discussions with her husband.

19 MR. KOON: Well, Your Honor, that's fine. I'm glad.
20 Sometimes witnesses will just blurt out things that
21 aren't really answers to the questions and I would just
22 ask the Court to instruct her that she can't testify to
23 anything that her late husband said.

24 MR. BRADLEY: Judge, I'm not trying to get that out
25 of her. I have enough faith in the Court that if

1 something comes in, out of her mouth that you don't think
2 is admissible or credible, that you're not gonna put any
3 weight to it. We don't have a jury here. But I'm not
4 going there so...

5 THE COURT: Yeah. I'll just -- Ms. Wingard, I'll
6 just caution you that we're interested in what you know
7 about these events and not what you may have discussed
8 with your late husband or with other family members so it
9 should be limited basically to your interactions with The
10 Town and what you know. When we're done, I don't know
11 whether it will reach over to that --

12 PATTY WINGARD: I'll talk loud.

13 THE COURT: There you go. You'll just be locked in
14 for a little bit.

15 Thereupon,

16 PATTY C. WINGARD
17 after having been first duly sworn, testified as follows,

18 THE CLERK: Please have a seat. Once you're seated,
19 state your full name for the record.

20 THE WITNESS: Patty C. Wingard.

21 DIRECT EXAMINATION

22 BY MR. BRADLEY:

23 Q. Ms. Wingard, I believe you're Henry Wingard's widow;
24 is that correct?

25 A. Correct.

1 Q. Yes, ma'am. And these are your children here George
2 and Cliff and Tom?

3 A. These children. Three children. Yes.

4 Q. All right. I'm gonna --

5 MR. BRADLEY: May I approach the witness, Your
6 Honor?

7 THE COURT: Yes.

8 BY MR. BRADLEY:

9 Q. (Proffering.) Ms. Wingard, I have shown you what's
10 marked as Defendants' Exhibit 1 which is a document from The
11 Town dated October 13th, 1961. Have you seen that agreement
12 before?

13 A. Yes.

14 Q. How do you know about that agreement?

15 A. Well, I was there.

16 MR. KOON: Excuse me, Your Honor. I'm having a
17 little trouble hearing her.

18 MR. BRADLEY: She said I was there.

19 MR. KOON: Excuse me, will you. I'm sorry. Let me
20 get in the jury box, Your Honor.

21 THE COURT: You can move over that way or you can
22 just roll your chair over that way or borrow the chair so
23 we don't have to move the witness around.

24 MR. KOON: All right. Thank you, Your Honor.

25 THE COURT: Y'all just take a deep breath

1 everyone.

2 THE WITNESS: Certainly.

3 MR. BRADLEY: Yes, ma'am.

4 BY MR. BRADLEY:

5 Q. Okay. Ms. Wingard, how do you know about that
6 agreement?

7 A. I don't - I was - I was included in knowing what my
8 husband did and he worked in front of the house with putting
9 water lines and the sewage lines both of which he gave to The
10 Town. And did I answer the question or --

11 Q. I think so. How long have you known about that
12 agreement?

13 A. Oh, since 1961.

14 Q. All right. Did your husband actually put in the
15 water line like that agreement says he supposed to do?

16 A. Yes. He did.

17 Q. And did you all let The Town have those water
18 lines?

19 A. Yes.

20 Q. Has The Town been supplying water to you and your
21 family since that time?

22 A. Yes.

23 Q. And this property that the furniture store is on,
24 705 North Lake, is that property owned by you and your
25 trust?

1 A. Yes.

2 Q. Does it get water from The Town now?

3 A. Yes.

4 Q. All right. And what is it that you're asking The
5 Town to do and the Court to order here? What do you want them
6 to do?

7 A. To me I would like them to honor The Town council at
8 that time signature and by husband's.

9 MR. BRADLEY: I don't have any more questions.
10 Thank you so much, Ms. Wingard.

11 CROSS EXAMINATION

12 BY MR. KOON:

13 Q. Ms. Wingard, I just have a couple of questions.
14 First of all, you said that your husband worked in front of
15 the house putting in sewer lines.

16 A. Mm-hmm.

17 Q. Excuse me. Water lines?

18 A. Water line. Mm-hmm.

19 Q. Where was the house?

20 A. Where it is now.

21 Q. Where is it now?

22 A. On the corner of Hamilton Street and Georgia Lane.

23 Q. Okay. Now, if you don't mind, I'm gonna ask you to,
24 you don't have to get up, I think the Judge already knows
25 where these are, but I want to show you Plaintiff's Exhibit

1 number 3.

2 A. Okay.

3 MR. KOON: Permission to approach the witness, Your
4 Honor.

5 THE COURT: Yes.

6 BY MR. KOON:

7 Q. Now, I'll represent to you, and Mr. Bradley can tell
8 you if I'm wrong, but this outlined in blue right here is the
9 Scott's Furniture Company building, okay?

10 A. Mm-hmm.

11 Q. And do you see on the bottom, actually the top of
12 the map you've got Georgia Lane going down this way toward 14
13 Mile Creek?

14 A. Yes.

15 Q. Is the position of your house shown on this map?

16 A. Yes, sir. But I'm not very good at -- I would think
17 --

18 Q. You can just point it out.

19 A. -- that -- Well, Barr-Price Funeral Home is
20 somewhere and I'm right behind it.

21 Q. You're right behind Barr-Price Funeral Home?

22 A. Right. Not the building. The parking lot.

23 Q. Okay. Well, if I represent to you that Barr-Price
24 Funeral Home is over here at the corner of Georgia Lane and
25 Northwood, would you point out where your house would be?

1 A. Well, my house would be right here (indicating.)

2 MR. KOON: Okay. And, Your Honor --

3 THE COURT: Have her put an X where she thinks her
4 house is.

5 MR. KOON: Okay.

6 BY MR. KOON:

7 Q. Take my pen and put an X where your house is.

8 A. Well, as I said, I'm not very good.

9 Q. Let me get you something to bear down on.

10 A. All right. Show me again where Barr-Price is.

11 Q. Okay. Barr-Price is right here at the corner of
12 Georgia Lane and Northwood.

13 A. Okay. The building would be about here --

14 Q. Probably.

15 A. -- and parking would be here and I would be right
16 here (indicating.)

17 Q. All right. Well, that's the --

18 A. That's my house.

19 Q. Well, actually that's the Barr property. That's the
20 Barr Funeral Home property.

21 A. Oh.

22 Q. Would this be where your house would be.

23 A. Oh, okay. Yeah.

24 Q. Just put an H there. Just make an H where your
25 house is.

1 A. Okay. (Witness complies.)

2 MR. KOON: That's about as good as I could have done
3 so don't worry about it. Your Honor, if I could show
4 you, this is the H right here (indicating.)

5 BY MR. KOON:

6 Q. So your house is about two blocks away from the
7 Scott's Furniture building?

8 A. Yes.

9 Q. And that's where you saw your husband putting in
10 this line?

11 A. Mm-hmm. Mm-hmm. Around in Hamilton Street.

12 Q. And that's because your husband was developing some
13 residential property down north of your house --

14 A. That's correct.

15 Q. -- Is that right?

16 A. That's correct.

17 MR. KOON: Okay. Thank you, ma'am. That's all I
18 have.

19 THE COURT: Any redirect?

20 MR. BRADLEY: Just quickly.

21 REDIRECT EXAMINATION

22 BY MR. BRADLEY:

23 Q. Ms. Wingard, did anyone from The Town ever contact
24 you before they sued you?

25 A. No, sir.

1 MR. BRADLEY: That's all, ma'am. That's all the
2 questions I have.

3 MR. KOON: Well, I have some, Your Honor.

4 THE COURT: Yes, sir.

5 RECROSS EXAMINATION

6 BY MR. KOON:

7 Q. Ms. Wingard, are you aware that I personally called
8 your son Tom before this lawsuit?

9 A. You called me and asked me for Tom's telephone
10 number.

11 Q. I called you and asked you for Tom's telephone
12 number?

13 A. Right.

14 Q. All right. And are you aware that I talked to Tom
15 before this lawsuit was brought?

16 A. I don't remember that.

17 MR. KOON: Okay. All right. Thank you.

18 THE COURT: Thank you. You may call your next
19 witness.

20 MR. BRADLEY: Thank you, Your Honor. We call Bryson
21 Scott.

22 Thereupon,

23 BRYSON WAYNE SCOTT

24 after having been first duly sworn, testified as follows,

25 THE CLERK: Please have a seat. Once you're seated,

1 state your full name for the record.

2 THE WITNESS: Bryson Wayne Scott, B-r-y-s-o-n
3 S-c-o-t-t.

4 DIRECT EXAMINATION

5 BY MR. BRADLEY:

6 Q. Mr. Scott, what do you do for a living?

7 A. I own Scott's Furniture.

8 Q. How long have you owned that?

9 A. It's been in the family since 1972. My dad is the
10 one who started the business. My brother and I took it over
11 when my dad died in '78 so I have been co-owner since '78.

12 Q. The building that it's in, when was that building
13 built?

14 A. 1972. There was an addition built about six years
15 later than that.

16 Q. Before the building where Scott's Furniture sits was
17 built, what was on that property?

18 A. It was trees and a sandy parking lot for the school
19 across from it. It was the high school at that time so
20 juniors and seniors would park across the street where that
21 building is now.

22 Q. Do you have water service at Scott's Furniture?

23 A. Yes, sir.

24 Q. When was the water service hooked up?

25 A. From the beginning, 1972.

1 Q. Do you know of anybody that's ever signed anything
2 petitioning to get into The Town for that property?

3 A. No. There was never any. No, sir.

4 Q. No requirement as far as you know?

5 A. No, sir.

6 Q. All right. And there's a gas station there nearby
7 that property, wasn't there?

8 A. Right next to it. Yes, sir.

9 Q. If you were to stand on the road and look at Scott's
10 Furniture, which side, your right or your left would that gas
11 station have been on?

12 A. Right hand side.

13 Q. And how long - when was that gas station built?

14 A. It was before my time. Indirectly I heard 1958.

15 Q. And did the gas station have water to it as well?

16 A. Yes.

17 Q. That gas station was owned by the Wingard family as
18 well, wasn't it?

19 A. Yes.

20 Q. Do you have, are you part of The Town sewer
21 system?

22 A. No. We have a septic system.

23 Q. How long has it had a septic system?

24 A. Since 1972.

25 MR. BRADLEY: No more questions. Thank you, Judge.

1 THE COURT: Any cross?

2 CROSS EXAMINATION

3 BY MR. KOON:

4 Q. Mr. Scott, you and I have been friends a long time,
5 haven't we?

6 A. Yes, sir.

7 Q. Used to go to church together?

8 A. Yes, sir.

9 Q. And your brother Paul went to school with my wife.
10 Did I call you before this lawsuit started and give you
11 a heads up and talk with you?

12 A. Cliff, I think it was in the process when you called
13 me.

14 Q. Had you been served with it?

15 A. Well, you told me it was coming.

16 Q. That's right. That's what I call a heads up,
17 right?

18 A. You did.

19 Q. All right. And you told me you didn't care one way
20 or the other because you were retiring?

21 A. I said I didn't have a dog in the fight because I
22 don't know what it means to be annexed by The Town.

23 Q. And you don't have a dog in the fight today, do
24 you?

25 A. I appreciate all that the Wingards are trying to

1 do.

2 Q. All right. Do you see any reason for water service
3 to have been hooked up to that property when it was trees and
4 a sandy parking lot?

5 A. No.

6 Q. All right. And so do you know for a fact that the
7 first time this subject property got water service was when
8 your dad built that building in 1972?

9 A. I would assume that to be correct.

10 MR. KOON: All right. Thank you.

11 THE COURT: Any redirect?

12 MR. BRADLEY: No, ma'am. Can we have Mr. Scott
13 excused from Court at his leisure?

14 MR. KOON: No objection.

15 THE COURT: You may be excused. Thank you very
16 much.

17 MR. BRADLEY: Thank you, Mr. Scott.

18 THE COURT: You may call your next witness.

19 MR. BRADLEY: Thank you, Your Honor. Call Tom
20 Wingard.

21 Thereupon,

22 THOMAS HAMILTON WINGARD

23 after having been first duly sworn, testified as follows,

24 THE CLERK: Please have a seat. Once you're seated,
25 state your full name for the record.

1 THE WITNESS: My name is Thomas Hamilton Wingard.

2 MR. KOON: Your Honor, we would like him also to be
3 instructed that he can't testify to anything he might
4 have heard his father say.

5 THE COURT: Yes, sir, and that would apply.

6 THE WITNESS: I'll do my best.

7 DIRECT EXAMINATION

8 BY MR. BRADLEY:

9 Q. Tom, Henry Wingard is your daddy?

10 A. That's correct.

11 Q. And Patty is your momma?

12 A. That's correct.

13 Q. How long have you known about this agreement with
14 The Town?

15 A. I was a teenager.

16 Q. When did you first learn that The Town was not gonna
17 do what it promised to do or was trying not to?

18 A. 2013.

19 Q. Did you get a letter from the Town lawyer then?

20 A. I did.

21 MR. BRADLEY: May I approach, Your Honor?

22 THE COURT: Yes, sir.

23 MR. BRADLEY: Judge, I have a copy for you, if you
24 would like.

25 THE COURT: That would be nice. Thank you.

1 MR. BRADLEY: (Proffering.) Yes, ma'am. You're the
2 most important person. You got to know.

3 BY MR. BRADLEY:

4 Q. So, Tom, this document I have handed you dated July
5 23, 2013, a letter from The Town attorney that you received?

6 A. Yes, sir.

7 Q. How did you get this letter? It's addressed to
8 Henry.

9 A. I was the executor of his estate.

10 Q. Okay. And at this point this is right after your
11 daddy died that you were dealing with this?

12 A. Several years. He died in 2006. I would like to
13 correct something. According to this letter I probably got
14 notification that they wanted us to annex in 2012.

15 Q. Okay. All right. Did you agree to be annexed?

16 A. Did not.

17 Q. Did you know about The Town's contract with your
18 family when you received this letter?

19 A. Yes. I did.

20 Q. Is that why you did not agree to be annexed?

21 A. That's the main reason. Didn't feel I had to.

22 Q. Did you ignore this letter or did you respond to
23 it?

24 A. I responded to it.

25 MR. BRADLEY: Your Honor, may I approach the

1 witness?

2 THE COURT: Yes.

3 MR. BRADLEY: Wait. I would like to mark that
4 exhibit as Defendants' Exhibit 3.

5 MR. KOON: The letter from Mr. Cunningham?

6 MR. BRADLEY: Yes, sir.

7 MR. KOON: No objection.

8 MR. BRADLEY: And put it into evidence.

9 THE COURT: It will be admitted.

10 MR. BRADLEY: Thank you, Your Honor.

11 (Whereupon, Defendants' Exhibit #3 marked and
12 admitted.)

13 BY MR. BRADLEY:

14 Q. All right. Tom, I'm showing you a document with
15 your name on it dated July 30th, 2013. Do you recognize that
16 document?

17 A. Yes. I do.

18 Q. What is that?

19 A. It's a response to the letter I received from Brad
20 Cunningham.

21 MR. BRADLEY: I would like to put that into
22 evidence, Your Honor, as Defendants' Exhibit 4.

23 MR. KOON: No objection, Your Honor.

24 THE COURT: It's admitted.

25 (Whereupon, Defendants' Exhibit #4 marked and

1 admitted.)

2 BY MR. BRADLEY:

3 Q. Tom, did you write that letter?

4 A. I did.

5 Q. Was this in response to exhibit 3 that you received
6 from Brad Cunningham?

7 A. Yes.

8 Q. Okay. What was your position at this time six years
9 ago?

10 A. I was executor of my father's estate.

11 Q. And you knew about the contract with The Town at the
12 time, right?

13 A. Yes. I did.

14 Q. And you told - did you tell Mr. Cunningham about
15 that?

16 A. I think I did in this letter.

17 Q. Right. Did you ever receive a response to your
18 letter July 30th, 2013?

19 A. No.

20 Q. When was the next time you heard something from The
21 Town about any of this?

22 A. Mr. Clifford Koon called me on a Thursday telling me
23 he wanted to give me a heads up that they were suing basically
24 my mother.

25 Q. Did anyone ever call you or respond to your letter

1 or talk to you about this at all?

2 A. No.

3 Q. Did you ever have a lawyer involved in this before
4 your mama got sued?

5 A. Did not.

6 Q. Do you know of any correspondence from a lawyer that
7 would have gone to Mr. Hanson or The Town or anybody like
8 that?

9 A. No, sir.

10 Q. Do you know whether or not The Town council has
11 actually authorized this lawsuit?

12 A. My understanding is they didn't.

13 MR. BRADLEY: I don't have any more questions.

14 Thank you.

15 THE COURT: Cross.

16 CROSS EXAMINATION

17 BY MR. KOON:

18 Q. I don't know how you feel about me now. You've been
19 looking at me kind of hard today. We've been friends a long
20 time, too, haven't we?

21 A. Yes, sir.

22 Q. And I used to trade at your service station?

23 A. You did.

24 Q. And I called you and told you that I didn't want to
25 serve your elderly mother and I asked you to let me know what

1 to do. Isn't that why I called you?

2 A. You told me you were giving me a heads up, but I
3 found out that afternoon. My wife does title work for a
4 living and she looked up the lawsuit and the lawsuit had been
5 filed on a Tuesday before you called me on a Thursday.

6 Q. And it wasn't served until when?

7 A. It was served a month later probably.

8 Q. Served a month later after I told you that I
9 wouldn't appreciate somebody serving my elderly mother and
10 that's why I gave you a heads up, right?

11 A. I don't remember my mother being mentioned in that
12 conversation.

13 Q. All right. Well you may have forgotten. Let me
14 show you another letter and ask you if you have received
15 that?

16 A. I don't recall having received that.

17 Q. You don't deny receiving it?

18 A. I don't deny receiving it either.

19 MR. KOON: All right. Your Honor, we would like to
20 offer this as our next exhibit. It's a letter from John
21 Hanson to Henry C. Wingard, Box 458, Lexington, South
22 Carolina, 29072 dated June 24th, 2013.

23 THE COURT: Any objection? Any objection?

24 MR. BRADLEY: I'm sorry, Judge. I was daydreaming.
25 No objection.

1 THE COURT: It will be admitted.

2 MR. KOON: And I have no further questions, Your
3 Honor.

4 THE COURT: Yes, sir.

5 (Whereupon, Plaintiff's Exhibit #4 marked and
6 admitted.)

7 THE COURT: Yes, sir.

8 MR. BRADLEY: Just briefly.

9 REDIRECT EXAMINATION

10 BY MR. BRADLEY:

11 Q. Tom, that letter that Mr. Koon just gave you, that's
12 the letter that you were talking about that you didn't have a
13 copy of that you received when we started?

14 A. The letter from Mr. Hanson?

15 Q. Yes, sir.

16 A. I don't recall having received that letter, but I'm
17 not gonna say I didn't.

18 MR. BRADLEY: No other questions.

19 THE COURT: One moment. Just let me take a look and
20 make sure I don't have any questions.

21 EXAMINATION

22 BY THE COURT:

23 Q. Mr. Wingard, you're obviously familiar with the
24 Scott's Furniture property?

25 A. Yes, ma'am.

1 Q. Obviously. And according to Plaintiff's Exhibit
2 number 3 that blue box is the Scott's Furniture building?

3 A. That is correct.

4 Q. Can you tell me, you've indicated in your letter
5 exhibit number 4 that your father developed the property
6 involving Scott's Furniture, the former Lake Road Service
7 Company site?

8 A. Yes, ma'am.

9 Q. And Lakewood Subdivision and the First Reliance Bank
10 site formerly the Western Steer as well as the Hess gas
11 station and Chapman's Jewelry. Can you show me on that --

12 A. It's not on here. Some of it is. The gas station
13 would be right beside it. The bank is right here. There's a
14 gas station here and Chapman's Jewelry is across the street.

15 Q. Okay. And so Chapman's Jewelry is off of the map?

16 A. Yes.

17 Q. And the gas station is underneath the sticker?

18 A. It's basically off the map, too.

19 Q. It's off the map. Okay. And what we're talking --
20 When I look at the map, we're looking at property that's to
21 the right of the blue box?

22 A. That's correct.

23 Q. And then directly across the street from that piece
24 of property at the corner of Georgia Lane and --

25 A. Hamilton Street. No. Northwood Drive.

1 Q. -- Northwood Drive and then --

2 A. 378 and 6. Can I make a statement about this?

3 Q. Yes, sir.

4 A. They talked earlier about what's in town and what's
5 not in town. If you will bring that map on down here, most of
6 it is in town.

7 THE COURT: Okay. Thank you. No further questions.
8 Before you leave, do you need to ask any additional
9 questions?

10 MR. KOON: No, Your Honor.

11 MR. BRADLEY: No, ma'am.

12 THE COURT: Okay. Thank you. Thank you very much.

13 THE WITNESS: Thank you.

14 THE COURT: You may call your next witness.

15 MR. BRADLEY: Thank you, Your Honor. The Defendants
16 calls Georgia Berger.

17 Thereupon,

18 GEORGIA BERGER

19 after having been first duly sworn, testified as follows,

20 THE CLERK: Please have a seat. Once you're seated,
21 state your full name for the record.

22 THE WITNESS: Georgia Wingard Berger, B-e-r-g-e-r.

23 DIRECT EXAMINATION

24 BY MR. BRADLEY:

25 Q. Georgia, I believe Patty is your mama; is that

1 right?

2 A. That's right.

3 Q. And Henry Wingard was your father?

4 A. He was.

5 Q. And Tom and Cliff are brothers?

6 A. They are.

7 Q. Okay. All right. And you grew up right in this
8 area?

9 A. I did.

10 Q. Are you familiar with this agreement with The
11 Town?

12 A. Yes.

13 Q. How long have you known about it?

14 A. I think I have known about it since 2013.

15 Q. What is your understanding of what the agreement
16 was?

17 A. The agreement was that my father would provide
18 certain services and water lines in exchange for being able to
19 get water to his properties.

20 MR. BRADLEY: May I approach the witness, Your
21 Honor?

22 THE COURT: Yes.

23 BY MR. BRADLEY:

24 Q. (Proffering.) Georgia, I'm showing you a document
25 that says it was filed February 8th, 1958 with the Clerk of

1 Court. Well, with the Clerk of Court and then also with the
2 deeds office and it says plat of subdivision of Lakewood. Do
3 you see that?

4 A. Yes.

5 Q. Have you seen this document before?

6 A. Yes.

7 Q. What is this document?

8 A. This is, uhm, the plat that was drawn up for my
9 father by C.D. Caughman to delineate the lots that he wanted
10 to sell on the property that he had purchased.

11 MR. BRADLEY: Your Honor, we would like to put that
12 into evidence as the next Defendants' Exhibit.

13 MR. KOON: No objection, Your Honor.

14 THE COURT: It's admitted.

15 (Whereupon, Defendants' Exhibit #5 marked and
16 admitted.)

17 BY MR. BRADLEY:

18 Q. Georgia, can you show us on this map where is
19 Scott's Furniture?

20 A. Scott's Furniture is in Block E.

21 Q. Do you have a pen with you? Can you write just a
22 little S on there?

23 A. (Witness complies.) Put an S on here?

24 Q. That sounds like a good. Thank you. That would be
25 excellent. It looks like one of these streets actually says

1 Georgia on it. Do you see that?

2 A. I do.

3 Q. Is that a coincidence?

4 A. No. I was about four years old when my father named
5 that for me.

6 Q. So you have your own road. That's nice.

7 A. I also got hurt on that road a few times.

8 Q. Okay. Can you see where you lived? Is that on this
9 plat or not?

10 A. Yes.

11 Q. Where would y'all's house be?

12 A. A. Where the A is in Block A, also where the C and
13 the K of the block are. I believe it's a double lot where the
14 house is.

15 Q. Does it have a 5 and a 4 on it?

16 A. It does.

17 Q. Just put a W right there.

18 A. (Witness complies.)

19 Q. Where is Hamilton Street? Can you point that out?

20 A. Hamilton Street is just to the North of that going
21 from east to west.

22 Q. So your lots would have been on Georgia Lane and
23 Hamilton Street on the corner of those two?

24 A. On the southwest corner. Yes.

25 Q. Is it your understanding that your father put the

1 water line in at Hamilton Street?

2 A. That's my understanding.

3 Q. Did you ever hear from anybody with The Town before
4 y'all got sued?

5 A. Not before that Thursday. I think Tom referred
6 Cliff Koon to me. I didn't receive a call. Tom called and
7 said that he would be calling. I was driving across country
8 so I called him.

9 MR. BRADLEY: Okay. No more questions. Thank you.

10 CROSS EXAMINATION

11 BY MR. KOON:

12 Q. So you called me a month before this lawsuit was
13 brought and we talked about it?

14 A. I called you in October.

15 Q. You heard your brother say it was a month when I
16 called him and gave him the heads up. Is that when he gave
17 you --

18 A. That's not what I heard him say.

19 Q. -- my number?

20 A. No.

21 Q. Well, he said what he said. Okay. But, in fact, we
22 did talk for a period before this lawsuit was brought, didn't
23 we?

24 A. No. When I called Tom after you and I got off the
25 phone, he had his wife research and we found that you had

1 already filed the lawsuit before we talked.

2 Q. Had it been served?

3 A. We were never served. I immediately got on the
4 phone, found an attorney and I assume that Mr. Bradley was
5 served, but we were never served.

6 Q. But you filed responsive pleadings?

7 A. We certainly did.

8 Q. And that's why we're here. All right. Do you still
9 have your last exhibit. Have you got Defendants' Exhibit
10 number 5 in front of you?

11 A. (Indicating.) Yes.

12 Q. Now, you have indicated that the Scott's Furniture
13 Company is in Block E where you put a blue S.

14 A. That's correct.

15 Q. All right. And right next to it is a square piece
16 of property that was owned apparently in 1958 by Mr. James
17 Dreher; is that correct?

18 A. That's what it says.

19 Q. Now, Block E was where your daddy's Exxon station
20 was, wasn't it?

21 A. Block E is two pieces now. It was divided into the
22 Scott's piece and the station piece which is now Take 5.

23 Q. I got you. But your father ran an Exxon station at
24 the corner of North Lake and Northwood, right?

25 A. That's right.

1 Q. And it was kind of a - it wasn't a square shaped
2 piece of property. It was kind of, for lack of a better term,
3 kind of an odd shaped piece of property?

4 A. I'm sure geometry has a word for it.

5 Q. Probably. I was pretty good in geometry, but I have
6 forgotten it all. So I want you to look at what's been marked
7 as Plaintiff's Exhibit number 1. Have you seen this before?

8 A. No.

9 Q. All right. You see North Lake Drive?

10 A. I do.

11 Q. Do you see Northwood?

12 A. I do.

13 Q. Do you see the piece that we're talking about?

14 A. That's where the gas station used to be.

15 Q. That's where the gas station used to be. And it's
16 roughly the same shape as the front part of Block E, isn't
17 it?

18 A. Right. It's part of Block E.

19 Q. Did you listen to the testimony that said that this
20 rectangular piece was the Scott's Furniture piece?

21 A. Yes. That's the Scott's Furniture piece.

22 Q. Okay. Put Scott's Furniture on that piece.

23 A. (Witness complies.)

24 MR. KOON: Okay If. I could show these to Your
25 Honor.

1 BY MR. KOON:

2 Q. So isn't it true then that the part that you've
3 marked Scott's corresponds with not with your daddy's service
4 station property but it corresponds with Mr. Dreher's
5 rectangular property; isn't that true?

6 A. No. That is not true.

7 Q. We'll let the Judge look at it. And could I have
8 that exhibit? Let the Judge look at that one, too.

9 A. (Proffering.)

10 MR. KOON: And if I may, Your Honor, I would just
11 point out that it's undisputed that the gas station was
12 right here at this corner.

13 BY THE WITNESS:

14 A. There is another lot behind Scott's Furniture and
15 that station lot as well.

16 BY MR. KOON:

17 Q. But even though the lot that you pointed out as your
18 father's gas station lot is roughly the shape of, on that old
19 exhibit, is roughly the shape of that same lot on the new
20 exhibit, wouldn't it make sense that the Scott's Furniture
21 property would be the rectangular property that was owned by
22 Mr. Dreher?

23 A. No. It doesn't make sense to me because I don't
24 believe my father purchased anything from Mr. Dreher although
25 I might be mistaken.

1 MR. KOON: Well, you could be mistaken. Thank you.
2 That's all I have.

3 THE COURT: Any redirect?

4 MR. BRADLEY: No, ma'am.

5 THE COURT: You may step down. Thank you.

6 THE WITNESS: Thank you.

7 THE COURT: You may call your next witness.

8 MR. BRADLEY: Those are all of the defense
9 witnesses, Your Honor.

10 THE COURT: Is there anything else we need to take
11 up today at this particular point?

12 MR. KOON: Not from The Town, Your Honor.

13 MR. BRADLEY: I don't think so because they haven't
14 really rested their case.

15 THE COURT: I understand.

16 MR. BRADLEY: I guess we'll take up this tomorrow
17 and we'll decide if we need to add anything by way of
18 reply and we can do those tomorrow.

19 THE COURT: Okay. We can go off the record for
20 this.

21 (Discussion off the record.)

22 THE COURT: We were off the record. That's why. Go
23 ahead.

24 MR. KOON: Well, this is just for scheduling. With
25 the stipulation of the documents and so forth I think

1 I'll cut my witness to one tomorrow.

2 THE COURT: Okay.

3 MR. KOON: Be relatively short direct.

4 THE COURT: And that would be Mr. Lutz?

5 MR. KOON: Yes, ma'am.

6 THE COURT: Okay. Thank you.

7 MR. BRADLEY: Thank you, Your Honor.

8 MR. KOON: Thank you, Your Honor.

9 THE COURT: See everyone tomorrow. Leave whatever
10 you want to leave here. We'll see you at 10:00 tomorrow
11 morning. Make sure that we have all the exhibits before
12 you leave. Make sure nobody picked up anything.

13 (Whereupon, court was adjourned for the day at 12:15
14 p.m.)

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1 OCTOBER 18, 2019

2 THE COURT: Good morning. At this point I think we
3 are ready to continue on this matter. As I recall where
4 we left off is that the plaintiff had additional
5 witnesses; is that correct?

6 MR. KOON: Yes, Your Honor, we have cut that down to
7 one.

8 THE COURT: Anything we need to take up before we
9 get started?

10 MR. BRADLEY: I have one quick issue with the Court.
11 Actually two quick issues. First of all, I didn't know -
12 I don't know how the system works, but I didn't know if
13 we could turn up the volume just a little bit.
14 Ms. Wingard had a hard time hearing us yesterday, so if
15 someone has a volume switch and doesn't do too much of a
16 problem, we could turn it up a little bit we would
17 appreciate that.

18 Second, I just want to clarify one thing. Tom asked
19 me this this morning. We can put him back up if there's
20 a requirement of it. I think Tom said something about
21 serving papers. There's no question here that we've
22 accepted service of this lawsuit and Tom didn't mean to
23 say that his mom had received papers because she was
24 never served as far as we know. I think I accepted
25 service or Clifton, I can't even remember, but Tom had

1 said something along those lines and I think he was
2 troubled that he felt later that it was incorrect so he
3 just wanted me to clarify it on the record. If Mr. Koon
4 would like to put him up on the witness stand to clarify
5 it, I'd be glad to. I don't think it makes any
6 difference to the merits of the case but he was concerned
7 that he had been in court and he said something that was
8 incorrect. He wanted me to clarify it for the record,
9 Judge.

10 MR. KOON: It doesn't matter, Your Honor. I know
11 Tom. I think he probably just forgot. I don't think he
12 was trying to slicker anybody, but basically when I
13 called him, my mother was still alive and I knew that
14 Tom's mother was the trustee and I didn't want to just
15 serve her with papers and upset her without her children
16 knowing about it because I wouldn't want anybody to do
17 that to my mother. That's part of what the conversation
18 was about with Tom so basically when they retained Mr.
19 Bradley, we did work it out that he would accept service
20 on behalf of the trustee. That's not a problem.

21 THE COURT: Okay. So there's not a question that
22 the parties weren't served or anything along those lines.
23 It's not gonna be an issue. It's been raised - so far
24 it's not raised in the defenses or anything else?

25 MR. BRADLEY: That's absolutely correct, Judge.

1 THE COURT: Okay. That's fine. Anything else we
2 need to take up?

3 MR. KOON: Not from The Town, Your Honor.

4 MR. BRADLEY: No, ma'am. Thank you.

5 THE COURT: Then you may call your next witness.

6 MR. KOON: Your Honor, we call Mr. Allen Lutz,
7 L-u-t-z.

8 THE COURT: Step forward, sir, please to be sworn.
9 Thereupon,

10 ALLEN LUTZ

11 after having been first duly sworn, testified as follows,

12 THE CLERK: Please have a seat. Once you're seated,
13 state your full name for the record.

14 THE WITNESS: James Allen Lutz, A-l-l-e-n L-u-t-z.

15 MR. KOON: Your Honor, may I retrieve the exhibits?

16 THE COURT: Yes.

17 DIRECT EXAMINATION

18 BY MR. KOON:

19 Q. Mr. Lutz, where do you work?

20 A. I work for The Town of Lexington, sir.

21 Q. How long have you been so employed?

22 A. This current time 29 years.

23 Q. What is your capacity?

24 A. I am the director of utilities.

25 Q. How long have you been director of utilities?

1 A. I've been director for 20 years.

2 Q. So the other nine years you worked in utilities but
3 not as director?

4 A. I was assistant director those other nine.

5 Q. What are your duties as director of utilities?

6 A. I'm responsible for the operation and maintenance
7 of The Town's water and sewer systems.

8 Q. Do you keep maps and drawings of the utilities that
9 are included within The Town system?

10 A. Yes. I do.

11 Q. Are they kept under your supervision?

12 A. Yes, sir.

13 Q. Are they kept in the ordinary course of The Town's
14 business?

15 A. Yes, sir.

16 All right. I'm gonna hand you a copy of what's been
17 introduced into evidence as Plaintiff's Exhibit number 2.

18 MR. KOON: If I may approach, Your Honor.

19 THE COURT: Yes.

20 BY MR. KOON:

21 Q. Did you retrieve this drawing from your records?

22 A. Yes, sir. I did. It's from our as built plans.

23 Q. As built plans for what?

24 A. The Northwood water line project.

25 Q. That was a project built by The Town?

1 A. By The Town. Yes, sir.

2 Q. When was it built?

3 A. Records, drawings, it was actually constructed in
4 '61 and finalized in '62. 1962.

5 Q. What month in '61 was it started?

6 A. I'm trying to read the date here, sir. August of
7 '61.

8 Q. Now, would you describe the line, the water line
9 that's depicted in that drawing?

10 A. There was an extension, it probably extended from
11 about Wessinger Drive to Highway 378.

12 Q. All right. How far is that?

13 A. That's probably about a half a mile roughly.

14 Q. If somebody described that as 565 feet, would that
15 be accurate?

16 A. No, sir. That would have been a portion of the
17 line. That would have been from Northwood to Hamilton Street
18 about 500 and some odd feet.

19 Q. Now, I also want to show you what has been offered
20 as Plaintiff's Exhibit number - excuse me, Defendants' Exhibit
21 number 1 and Defendants' Exhibit number 2.

22 MR. KOON: If I may approach, Your Honor.

23 THE COURT: Yes.

24 BY MR. KOON:

25 Q. All right. First of all, let's start with

1 Defendants' Exhibit number 1 which is on The Town of Lexington
2 letterhead. Have you seen that before?

3 A. Actually I seen this in your office.

4 Q. All right. So let me ask you, as the director of
5 utilities for 20 years, are you familiar with the different
6 areas where The Town's lines are laid?

7 A. Yes, sir.

8 Q. Now, Defendants' Exhibit number 1 refers to a two
9 inch water main where the new six inch water main was put and
10 installed a two inch on Hamilton Street, et cetera, et cetera.
11 Is that document talking about the line that provides water
12 service to Scott's Furniture Company?

13 A. No, sir.

14 Q. And are you familiar with where Scott's Furniture
15 Company is?

16 A. Yes, sir.

17 Q. What makes you say that that document does not
18 describe the water line that provides water service to Scott's
19 Furniture Company?

20 A. Scott's Furniture Company is served off a six inch
21 line, not a two inch line.

22 Q. Which six inch line?

23 A. Out of Northwood itself.

24 Q. Is that the line depicted on Plaintiff's Exhibit
25 number 2?

1 A. Yes, sir.

2 Q. All right. I'm gonna also show you Defendants'
3 Exhibit number 2 and ask you if you've seen that?

4 A. Yes, sir. I did briefly seen this before.

5 Q. You saw it in my office when we looked it over?

6 A. Yes, sir.

7 Q. All right. Now, let me ask you a question about
8 that one. It says that it's to permit the party of the second
9 part which is Henry C. Wingard to tie onto The Town's existing
10 water line in order to extend said water system into the area
11 of Lakeland - into the - I can't read that part, but it says
12 Lakewood area-Georgia Lane Road. Are you familiar with what
13 that's talking about?

14 A. I presume that's where he tied the water lines in
15 the Lakewood service area and tied on at Hamilton Street,
16 extended two inch on Georgia Lane, Hamilton Road.

17 Q. Do you know how far Hamilton Street is from Scott's
18 Furniture Company?

19 A. From Scott's Furniture Company itself probably a
20 good 700 feet from Scott's.

21 Q. All right. And between the two inch line that's
22 mentioned in Plaintiff's Exhibit number 1 - I mean Defendants'
23 Exhibit number 1 and the six inch line that you're talking
24 about, in order to use the two inch line for Scott's Furniture
25 Company you would have to go right by the six inch line,

1 right?

2 A. Correct, sir.

3 Q. Would there be any sense in doing that?

4 A. No, sir.

5 Q. Have you ever in all of your years in utility work,
6 have you ever gone across one line to provide service that
7 could be provided by that line --

8 A. No, sir.

9 Q. -- with another line?

10 A. No, sir.

11 Q. Is there a technical reason why you wouldn't want to
12 do that?

13 A. The cost.

14 Q. Are you gaining anything by doing that?

15 A. No. You're not gaining anything. No, sir.

16 Q. All right. Now, you weren't here yesterday, but I'm
17 gonna represent to you, and counsel can correct me if I'm
18 wrong, yesterday there was a question asked of Mr. Hanson
19 about whether this two inch line is still in the ground and
20 still functioning. Can you answer that question?

21 A. No, sir. The two inch lines are not in operation.
22 They have been abandoned.

23 Q. All right. And they were abandoned under your
24 watch?

25 A. Yes, sir.

1 Q. Let me show you something just to highlight that
2 point. I'm gonna show you Defendants' Exhibit number 5 which
3 is a 1958 plat of the Lakewood subdivision. Have you seen
4 that?

5 A. Just briefly this morning, sir.

6 Q. All right. Now, would you point out, if you can
7 orient yourself, where on that map, on that plat is Scott's
8 Furniture Company?

9 A. It has to be in this general area here, sir.

10 MR. KOON: For the record, Your Honor, he's pointing
11 to a rectangle labeled James Dreher.

12 BY MR. KOON:

13 Q. And just for the sake of the record, would you take
14 my pen and initial your initials there in that rectangle?

15 A. (Witness complies.)

16 Q. Let me ask you one more question before I show this
17 to the Judge. The same document contains something called
18 Block E. Now, based upon your experience in this area and
19 your looking at this map and other maps that are in evidence,
20 do you know what actually is in Block E?

21 A. Currently it's an oil change facility.

22 Q. What was it when you first started working at
23 Lexington?

24 A. Lake Road Exxon.

25 Q. That was Mr. Henry C. Wingard's Exxon station?

1 A. Yes, sir.

2 Q. Would you take my pen and put your initials in Block
3 E?

4 A. (Witness complies.)

5 MR. KOON: Your Honor, may I show you this?

6 THE COURT: Yes, sir.

7 MR. KOON: (Proffering.) This is Block E testified
8 to earlier and this is the Dreher property.

9 THE COURT: Yes, sir.

10 BY MR. KOON:

11 Q. Now, final group of questions. Going back to
12 Defendants' Exhibit number 2 -- Excuse me. I've got the wrong
13 one. Do you still have 2? Defendants' Exhibit number 2,
14 Mr. Lutz, it mentions hooking a six inch line in the area of
15 Georgia Lane to the existing six inch line. Could you tell
16 the Court what the existing six inch line would be based on
17 your review of the maps and your records?

18 A. The existing would have to be the six inch line on
19 Northwood to go down to Georgia Lane.

20 THE COURT: I'm sorry. I didn't hear the last
21 part.

22 BY THE WITNESS:

23 A. To go down to Georgia Lane. Going down Georgia
24 Lane. Excuse me.

25 BY MR. KOON:

1 Q. Well, you testified earlier that the existing six
2 inch went from Wessinger Drive to 378.

3 MR. BRADLEY: Your Honor, I object to Mr. Koon
4 telling the witness what to say. He can't lead him like
5 this. He's got to ask him open ended questions. He's
6 just saying stuff and the man is agreeing with it.

7 MR. KOON: I'll rephrase it, Your Honor.

8 BY MR. KOON:

9 Q. In Plaintiff's Exhibit number 2 where you pointed
10 out the line that was finished in 1962, where did you indicate
11 that that line began and ended?

12 A. Begins roughly Wessinger Drive and ends at Highway
13 378. A short extension of it went on Georgia Lane to Hamilton
14 Street.

15 Q. Now, according to these documents that were
16 introduced by the plaintiff, did that short extension of it,
17 was it 565 feet?

18 A. Roughly about 565 feet. Yes, sir.

19 Q. Did you scale the maps to determined whether that's
20 accurate or not?

21 A. I did scale it this morning and I rough scaled it to
22 554 is what I pulled.

23 Q. So Defendants' Exhibit number 2 is basically talking
24 about hooking those two inch lines --

25 MR. BRADLEY: Once again, Judge, Mr. Koon is not the

1 witness. He's got to ask questions. He's just telling
2 Mr. Lutz what to say and Mr. Lutz is agreeing with him.

3 THE COURT: Just make it in the form of a
4 question.

5 BY MR. KOON:

6 Q. All right. Does the six inch line mentioned in
7 Defendants' Exhibit number 2 refer to an extension which
8 allows the two inch lines in Lakewood to hook up to The Town's
9 --

10 A. Yes, sir. It does.

11 Q. -- long sewer line that runs from Wessinger Drive to
12 378?

13 A. Yes, sir. It does allow a connection for two inch
14 at Hamilton Street.

15 Q. So that would have been even where Georgia Lane
16 is?

17 A. Yes, sir.

18 Q. And I believe it's been established, but basically
19 is it north of the line depicted on Plaintiff's Exhibit number
20 2?

21 A. That is north. Yes, sir.

22 Q. All right. And is Plaintiff's Exhibit number 2
23 north of Scott's Furniture?

24 A. Yes, sir. It is.

25 Q. So as you testified earlier, in order to get the two

1 inch line hooked up to Scott's Furniture, you'd have to go
2 over the already existing six inch line that belonged to The
3 Town?

4 A. That's correct.

5 MR. KOON: That's all I have, Your Honor.

6 THE COURT: Could I see that exhibit please?

7 MR. KOON: I'm sorry. Which one?

8 THE COURT: Plaintiff's Exhibit 2.

9 MR. KOON: (Proffering.)

10 THE COURT: Any cross, Mr. Bradley?

11 MR. BRADLEY: Yes, ma'am.

12 CROSS EXAMINATION

13 BY MR. BRADLEY:

14 Q. Mr. Lutz, I think you were looking at what I would
15 think of as a sewer line drawing or water line drawing. Is
16 that what it is?

17 A. Water main. Yes, sir.

18 THE COURT: Here.

19 MR. BRADLEY: Thank you, Judge. Let me give it to
20 Mr. Lutz.

21 BY MR. BRADLEY:

22 Q. I think you said those are the water mains put in
23 around 1961; is that right?

24 A. They were constructed in 1961 and finally permitted
25 and records drawing was done in 1962, sir.

1 Q. So it was built in 1961?

2 A. It was under construction in 1961.

3 Q. The same time The Town entered the contract with
4 Henry Wingard?

5 A. Yes, sir.

6 Q. So obviously in 1961 when all of these drawings that
7 you were talking about were being drawn The Town councilmen
8 knew about those drawings, right?

9 MR. KOON: Objection, Your Honor. He has no way of
10 knowing what these long deceased people knew about.

11 THE COURT: Rephrase the question.

12 MR. BRADLEY: Certainly.

13 BY MR. BRADLEY:

14 Q. The water lines you talked about that were built in
15 1961 were built by The Town?

16 A. Correct, sir.

17 Q. Authorized by The Town?

18 A. Yes, sir.

19 Q. Under the authority of The Town council?

20 A. Yes, sir.

21 Q. The agreement that says Mr. Wingard, his heirs and
22 assigns are supposed to get water was also signed and
23 authorized by The Town, correct?

24 A. Correct.

25 Q. By The Town council?

1 A. Yes, sir. From what I have read.

2 Q. In 1961?

3 A. Yes, sir.

4 Q. When those water lines you are taking about were
5 being built?

6 A. Correct.

7 Q. And so don't you think The Town knew about this
8 contract and it would know about the water lines as well that
9 were all authorized by The Town council?

10 A. Yes, sir.

11 MR. KOON: Same objection.

12 THE COURT: I'll overrule it.

13 BY MR. BRADLEY:

14 Q. Okay. Let's take a look at this contract, exhibit
15 1. Do you have it in front of you, Mr. Lutz?

16 A. No, sir.

17 THE COURT: Which exhibits are you looking for?

18 MR. BRADLEY: Defendants' exhibits.

19 THE COURT: So these are Defendants' Exhibit 1, 2,
20 and 5.

21 MR. BRADLEY: Excellent. Thanks, Judge. Sorry.

22 BY MR. BRADLEY:

23 Q. So you have in front of you now Defendants' Exhibit
24 1, right?

25 A. Yes, sir.

1 Q. And you agree that this was a contract entered by
2 The Town?

3 A. Yes, sir.

4 Q. And you agree that the two inch water main was
5 installed by Henry Wingard just like he promised?

6 A. Yes, sir.

7 Q. And you agree that the contract required The Town to
8 provide water to Mr. Wingard?

9 A. Yes, sir.

10 Q. His heirs and assigns?

11 A. Yes, sir.

12 Q. Within the limits of The Town's water system?

13 A. Yes, sir.

14 Q. All right. And you agree that Scott's Furniture is
15 within the limits of The Town's water system?

16 A. It is within the limits of The Town's water system.
17 Yes, sir.

18 Q. Yes, sir. Absolutely. No question about that, is
19 there?

20 A. No, sir.

21 Q. All right. And you know what the word heirs means,
22 don't you?

23 A. Yes, sir.

24 Q. What does that mean?

25 A. Any family, remaining family.

1 Q. Yes, sir. And you know what the word assigns means,
2 don't you?

3 A. The word what, sir?

4 Q. I'm sorry.

5 A. Which word, sir?

6 Q. Assigns.

7 A. Assigns. Yes, sir.

8 Q. What does assigns mean?

9 A. Given to.

10 Q. Right. And you're an honest person, aren't you?

11 A. Yes, sir.

12 Q. You show up every day and do your job?

13 A. Yes, sir.

14 Q. You expect The Town to pay you for doing your job
15 the way you're supposed to?

16 A. Yes, sir.

17 Q. That's your commitment to The Town?

18 A. Yes, sir.

19 Q. And The Town's commitment to you?

20 A. Yes, sir.

21 Q. And don't you agree that when The Town makes a
22 promise, it should do what it says?

23 A. Oh, yes, sir.

24 Q. And in exhibit 1 The Town promised to sell water to
25 Henry Wingard, his heirs and assigns within the limits of The

1 Town's water system, right?

2 A. Yes. It does.

3 Q. Don't you think that's what The Town should do?

4 A. But, sir, this mentions a two inch line. This
5 service is off a six inch line.

6 Q. But the agreement doesn't say we agree to sell under
7 a two inch line. It says we agree to supply water.

8 A. Yes, sir.

9 Q. It doesn't limit it to the two inch line, does it?

10 A. I don't see that. No, sir.

11 Q. Right. So by the clear language of this agreement
12 The Town ought to keep selling water that way, shouldn't it?

13 A. Yes, sir.

14 Q. Thank you. And I want to talk to you briefly about
15 -- Let me do this first. Mr. Lutz, I'm showing you what is a
16 plat of this corner here that Mr. Koon asked you about
17 recorded in the deeds office. Do you recognize that?

18 A. This is the first time I've seen this, sir.

19 Q. But you recognize this intersection, don't you?

20 A. Yes, sir. I do.

21 Q. You know where it says Lexington High School --

22 MR. KOON: Objection, Your Honor. This document
23 hasn't been authenticated.

24 MR. BRADLEY: It's an official record --

25 MR. KOON: Well --

1 MR. BRADLEY: -- stamped by the Clerk of Court. We
2 can go downstairs and pull it out of the deeds records if
3 Mr. Koon has questions about it. It's an official
4 document. It's exempt from the hearsay rule, if you want
5 me to bring the Clerk in to testify about it.

6 MR. KOON: Well, also, Your Honor, it wasn't
7 provided in the pretrial brief. First time I've seen it
8 is right now.

9 THE COURT: And you need to mark it for
10 identification please.

11 MR. BRADLEY: All right. We would like to mark this
12 as the next Defendants' Exhibit. I think it's
13 Defendants' Exhibit 6. I would point out that Mr. Koon
14 has introduced documents that weren't in his pretrial
15 brief and he's the one who started this nonsense about
16 Mr. Wingard --

17 MR. KOON: Object to that.

18 THE COURT: Rephrase your -- rephrase.

19 MR. BRADLEY: Right. He's the one that is trying to
20 tell the Court that Mr. Wingard didn't own the land to
21 Scott's Furniture by looking at a plat.

22 MR. KOON: No, ma'am.

23 MR. BRADLEY: I'm trying to clarify that.

24 MR. KOON: No, ma'am. What I'm saying is the
25 Scott's Furniture Company was not in the Lakewood

1 Subdivision, has never been in the Lakewood Subdivision.
2 I didn't say Mr. Wingard didn't own it. As a matter of
3 fact, I think he probably did. I think he still does own
4 it or the trust still owns it. I resent, first of all,
5 being labeled as presenting nonsense. I think this trial
6 has gone almost to the end without that kind of stuff and
7 I hope Your Honor will admonish him about that. The
8 other thing is I've got a client to represent here and
9 we've been very forthcoming with showing him all the
10 stuff we have and he's just showed me this the moment
11 that he wants to put it into evidence.

12 THE COURT: Let me just back this all up. There's
13 no jury here so I don't need any posturing in order to be
14 able to make any points. I understand perfectly the
15 issue as it relates to this plat as well as the other
16 documents that show the property. There appears to be a
17 question based upon testimony that has been presented in
18 this case as to which parcel was identified as Scott's
19 Furniture, the parcel in which Scott's Furniture is on
20 and I understand the way the plats appear that there
21 could have been some misinterpretation, some overlap. I
22 don't have any problem with trying to clarify exactly
23 which one. I think I know which one based upon documents
24 that have been presented, but that's the only issue here.
25 Now, courtesy, you should have shown it to him.

1 MR. BRADLEY: I agree. You're right, Judge.

2 THE COURT: And frankly I don't particularly care
3 for any personal attacks that seem to go back and forth
4 intentionally or unintentionally. I think we need to be
5 very careful with our words and what we say.

6 MR. BRADLEY: I agree and I apologize to Mr. Koon.
7 I should not have called his argument nonsense. That was
8 rude of me and that's not called for by a lawyer. I'm
9 sorry.

10 THE COURT: So other than the claim, Mr. Koon, that
11 this has not been properly authenticated, are you still
12 going with that objection at this particular point?

13 MR. KOON: Your Honor, I'll withdraw that. I may
14 have some objections to some questions that he might ask
15 this witness about that drawing, but as far as I'll
16 withdraw the authentication objection.

17 THE COURT: Thank you. Please put a sticker on it
18 and hand him the document to put a sticker on it.

19 MR. BRADLEY: Yes, ma'am.

20 (Whereupon, Defendants' Exhibit #6 marked for
21 identification.)

22 BY MR. BRADLEY:

23 Q. Mr. Lutz, we're looking at Defendants' Exhibit 6 --

24 MR. BRADLEY: We would like to put that into
25 evidence, Judge.

1 THE COURT: Any objection to it?

2 MR. KOON: No, Your Honor.

3 THE COURT: All right. It's admitted.

4 BY MR. BRADLEY:

5 Q. Mr. Lutz, you're familiar with this corner, aren't
6 you?

7 A. Yes, sir.

8 Q. Where it says Lexington High School, that's
9 actually, is it a middle school now?

10 A. Correct, sir.

11 Q. All right. And you can see this sort of, it's
12 almost a triangle of property there that's subdivided into
13 three parcels?

14 A. Yes, sir.

15 Q. The upper triangle that says 1 on it, that's where
16 the service station was and where the Take 5 is now?

17 A. Yes, sir.

18 Q. The lower parcel that says 2 on it, that's where
19 Scott's Furniture is?

20 A. Yes, sir.

21 Q. And below it it says plat of subdivision at Block E
22 of Lakewood, doesn't it?

23 A. Yes, sir. It does.

24 Q. So as you look at this, would you agree that where
25 Scott's Furniture sits now is the same place as Block E of the

1 Lakewood Subdivision?

2 A. I would have to look back at the plat to agree,
3 sir.

4 Q. Okay. Let's take a look at it.

5 MR. KOON: I'm gonna object, Your Honor. He's not
6 been qualified as any kind of a real estate expert. I
7 don't think he would be able to give an opinion on what a
8 plat does or does not say as a matter of law.

9 THE COURT: What was the question again?

10 MR. BRADLEY: Yes, Judge. My question was, if he
11 would agree that Scott's Furniture is in Block E. And
12 the reason I'm asking that question is because Mr. Koon
13 got him to identify Scott's Furniture as being on
14 property owned by Mr. Dreher and it's not so I'm trying
15 to respond to what Mr. Koon put into evidence.

16 MR. KOON: Your Honor, the difference is some of
17 their witnesses agreed with me that the Dreher property
18 might, I believe one of his witnesses said I might have
19 made a mistake. So it's very unclear at this point and I
20 don't believe that this witness is qualified to give it
21 any clarity if that calls for an opinion.

22 THE COURT: I think he can look at the documents and
23 determine whether or not he was mistaken or not mistaken
24 or doesn't know at all so I'm going to overrule the
25 objection.

1 BY MR. BRADLEY:

2 Q. Mr. Lutz, now that you've seen exhibit 6 which shows
3 the subdivision of Block E and you're familiar with this
4 intersection and now that you've looked at the earlier plat of
5 Lakewood Subdivision, would you agree that Scott's Furniture
6 is in Block E of the Lakewood Subdivision plat?

7 A. It appears to be that, sir.

8 Q. So when you wrote down that Scott's Furniture was in
9 property owned by Mr. Dreher on that original plat, do you
10 think that was a mistake?

11 A. Yes, sir.

12 Q. All right. Thank you, Mr. Lutz. Mr. Lutz, I'm
13 showing you what I believe to be a drawing from the county's
14 GIS system which shows the city limits of The Town of
15 Lexington. Does that appear to be what I've handed you?

16 MR. KOON: I'm gonna object, Your Honor. This is
17 not a document that's certified with any kind of
18 government stamp. It's not authenticated.

19 THE COURT: Is there not some other document that's
20 already been admitted that is an exhibit in this case
21 that shows the same thing? I'm just asking.

22 MR. BRADLEY: Yes, Your Honor. In fact, Mr. Hanson
23 who testified yesterday testified to the map and
24 sealings. All this is, is a farther out image of what
25 Mr. Hanson put in yesterday and I'm asking him to

1 authenticate it as to whether he knows where the city
2 limits are.

3 MR. KOON: Well, I don't think this witness can
4 authenticate it, Your Honor.

5 THE COURT: If you will use the other exhibit and
6 determine whether or not he has any knowledge of what the
7 city limits are, The Town limits are.

8 BY MR. BRADLEY:

9 Q. Mr. Lutz, are you familiar with The Town limits for
10 The Town of Lexington?

11 A. Somewhat. Not any detail because my service extends
12 well beyond The Town.

13 Q. All right. So you don't recognize the document I've
14 shown you as showing The Town limits?

15 A. I do. I have seen this before online.

16 Q. Right. And you recognize that that's a copy of a
17 picture of the county's records showing The Town limits for
18 The Town of Lexington?

19 A. Yes, sir.

20 MR. BRADLEY: With that in mind, Judge, we would
21 like to put that into evidence as Defendants' Exhibit
22 7.

23 MR. KOON: I'll withdraw the objection based on
24 that.

25 THE COURT: All right.

1 (Whereupon, Defendants' Exhibit #7 marked and
2 admitted.)

3 BY MR. BRADLEY:

4 Q. Okay. Mr. Lutz, on Defendants' Exhibit 7 the areas
5 that are in yellow, do you recognize those?

6 A. Yes, sir.

7 Q. Would those be within The Town limits or not within
8 The Town limits?

9 A. Those would not be in The Town limits, sir.

10 Q. The yellow is not in The Town limits or the yellow
11 is in The Town limits?

12 A. I'm trying to decipher the map.

13 Q. Yes, sir.

14 A. Within the yellow boundary are out of town.

15 Q. The colored is out of town?

16 A. As I said, I don't use these maps, sir.

17 Q. Okay. All right. Well, if you can't say beyond
18 that.

19 A. I cannot.

20 Q. Okay. All right. Mr. Lutz, I'm showing you a
21 document that I believe is taken from the county's website
22 that shows the plats for Scott's Furniture and the Take 5 Oil
23 Change. Are you familiar with that?

24 A. That's the first I've seen this but yes.

25 Q. All right. But you're familiar with the county's

1 platting system and this appears to have come from it, doesn't
2 it?

3 MR. KOON: I'm gonna object, Your Honor. First of
4 all, there's an authentication problem here. The other
5 thing is, what they're saying is Scott's Furniture on
6 this document does not comport in shape to the Scott's
7 Furniture that's shown on documents that were entered
8 yesterday. It looks like it might have come from the
9 county. I don't know. But it's inaccurate and I would
10 object on that basis. There's a little tale on the end
11 of the Scott's Furniture property that's not shown on
12 this purported map.

13 MR. BRADLEY: Judge, I would just like to finish
14 trying to lay the foundation with the witness if I might.

15 THE COURT: If he cannot identify it, then there's
16 an authentication problem.

17 BY MR. BRADLEY:

18 Q. Mr. Lutz, you're familiar with the county's GIS
19 service and this platting service? You've seen that before,
20 haven't you?

21 A. Yes, sir. I have.

22 Q. And this appears to be drawn directly from that,
23 doesn't it?

24 A. Yes, sir.

25 MR. BRADLEY: We would like to put that into

1 evidence as Defendants' Exhibit 8.

2 MR. KOON: Well, appears to be drawn I don't think
3 is gonna cut it, Your Honor. Plus it doesn't help the
4 issue of the thing not being accurate. If Your Honor
5 will look at the exhibit where Scott's Furniture
6 yesterday was in blue.

7 THE COURT: I don't have any of those exhibits so I
8 can't tell you.

9 MR. KOON: Your Honor, if we could retrieve the
10 Plaintiff's Exhibits. Plaintiff's Exhibit number 3, Your
11 Honor, if I may show it to you.

12 THE COURT: What's that other one down there?

13 MR. KOON: This one? This one is Plaintiff's
14 Exhibit Number 1 (proffering.) But you will see that was
15 admitted yesterday without objection and it shows a
16 extension on the back of the Scott's Furniture property
17 which appears to be a driveway, but that's not on what
18 he's trying to introduce now.

19 THE COURT: Mr. Bradley, did you take a look at this
20 one?

21 MR. BRADLEY: Yes, ma'am. I've seen that and it
22 does have a tag. The reason that I wanted to introduce
23 this really --

24 THE COURT: No. I'm showing you a different one.

25 MR. BRADLEY: I'm sorry.

1 THE COURT: It's different than the one with the
2 tale on it.

3 MR. BRADLEY: Yes, ma'am. I'll do what you say.

4 THE COURT: Counsel.

5 (Side bar off the record.)

6 THE COURT: I'll allow you to use it only for that
7 purpose, not necessarily accept it one way or the other.

8 (Side bar off the record.)

9 MR. BRADLEY: So let's put that in as exhibit 8.

10 THE COURT: That's my copy.

11 MR. KOON: And, Your Honor, I just wanted to say --

12 THE COURT: Your objection is noted for the record.

13 MR. KOON: Well, I just wanted to say just for the
14 sake of the record your ruling was it can go in only for
15 the purpose of showing that it has Lakewood printed on
16 it.

17 THE COURT: Yes, sir.

18 MR. KOON: Okay.

19 (Whereupon, Defendants' Exhibit #8 marked and
20 admitted.)

21 BY MR. BRADLEY:

22 Q. Mr. Lutz, I'm showing what's marked as Defendants'
23 Exhibit 8. You see there it says Scott's Furniture in the
24 middle?

25 A. Yes, sir.

1 Q. And it says Lakewood right on that same plat?

2 A. Yes, sir. I do see that.

3 Q. Just like the earlier plat of the Lakewood Division
4 showed Scott's Furniture at Block E?

5 A. Yes, sir.

6 MR. BRADLEY: I don't have any more questions.

7 Thank you, Mr. Lutz.

8 MR. KOON: Nothing further, Your Honor. And The
9 Town rests.

10 THE COURT: I might have a few questions.

11 MR. KOON: I'm sorry, Your Honor. I do have one
12 question if you will let me do it.

13 THE COURT: Yes, sir.

14 REDIRECT EXAMINATION

15 BY MR. KOON:

16 Q. Maybe two. Mr. Lutz, Defendants' Exhibit number 7
17 was handed to you.

18 A. Yes, sir.

19 Q. And he asked you if this was, if this showed the
20 limits of The Town, The Town limits in this area?

21 A. It does show the limits. Like I said then I don't
22 use it enough to know which, if the highlighted is in or
23 out.

24 Q. All right. Well, then let me just ask you some
25 specific questions about some specific areas on this. Libby

1 Lane doesn't appear to be boarded in yellow, does it?

2 A. No, sir. It doesn't.

3 Q. Is Libby Lane in The Town limits?

4 A. I do know that's in the city, The Town limits.

5 Q. What about Coventry Drive, Rauch Street, Stuart Lane
6 and Cheshire Road, they're not covered in yellow, are they?

7 A. No, sir. They're not. They are in town.

8 Q. They are in town. So is this an accurate portrayal
9 of The Town limits?

10 A. I would think so. Yes, sir. Yes. It is.

11 Q. All right. But some of these are not in The Town,
12 correct?

13 A. There are some, yes, sir, that's not in town.

14 MR. KOON: All right. Thank you. That was all,
15 Your Honor.

16 EXAMINATION

17 BY THE COURT:

18 Q. Mr. Lutz, I have a couple of questions. I became
19 totally confused relating to the two inch and the six inch.

20 A. Okay.

21 Q. In 1961 when I guess, did you say that Lakewood was
22 being developed at that time?

23 A. I know this water line was being constructed started
24 in 1961, in August of '61 by the as built plans and completed
25 in February of 1962.

1 Q. Okay. The documents that were presented to you
2 earlier that talked about a two inch line --

3 A. Yes, ma'am.

4 Q. -- a two inch water main, Defendants' Exhibit right
5 there, that one, it talks about, and I think that's
6 Defendants' Exhibit number 1 at the bottom?

7 A. Yes, ma'am.

8 Q. Okay. What I read is that the council give Mr.
9 Henry Wingard the permission to take up the present two inch
10 water main where the new six inch water main was put and
11 install the two inch on Hamilton Street. And so what I
12 gathered from that is that there was an existing two inch
13 line, he was allowed to dig that up and put it on Hamilton
14 Street; is that correct? Is that what actually occurred?

15 A. That's what it sounds, but there was no lines
16 there on Northwood to connect to until this six inch was
17 installed.

18 Q. And then the two inch was designed to connect what
19 was then The Town's six inch line or what The Town put in or
20 the water line and was gonna connect it to Hamilton and other
21 portions of the Lakewood Subdivision?

22 A. Correct.

23 Q. So if I understand correctly, the lines that were
24 installed for Lakewood were put in by The Town or were put in
25 by Wingard?

1 A. The ones that were installed for Lakewood?

2 Q. Yes.

3 A. The two inch was installed by Lakewood, but I have
4 no plans of those lines.

5 Q. But they were connected to the six inch line?

6 A. That's correct.

7 Q. And if I heard you correctly, you said that they are
8 now all six inch lines?

9 A. Yes, ma'am. They were replaced in 2006.

10 Q. By The Town?

11 A. Yes, ma'am.

12 Q. And at the time that they were replaced then the two
13 inch lines were no longer --

14 A. Were abandoned. Yes, ma'am.

15 Q. Does that include the two inch lines from, that
16 would have been installed on Hamilton that would have
17 connected to the system originally?

18 A. Yes, ma'am.

19 Q. So all the two inch lines, anything that was two
20 inch was replaced with the six inch or had a six inch that
21 would connect to it?

22 A. Yes, ma'am.

23 Q. Are you familiar with the requirement or is there a
24 requirement that in order to receive city water, The Town of
25 Lexington water and being on their services that you have to

1 annex into The Town?

2 A. There's annexation agreements. Yes, ma'am.

3 Q. Do you know when they first started?

4 A. That I do not know.

5 Q. Do you know whether this map which is Defendants'
6 Exhibit number 7 is designed to show those, whether it's
7 designed to show those portions that have been annexed in or
8 that are on town water?

9 A. That should be. Yes, ma'am. But it's not just,
10 say, town water because we exceed, well exceed The Town limits
11 with water and sewer service.

12 Q. But does everybody, does every property that
13 receives town water, is it currently being annexed into The
14 Town?

15 A. No. But it's required to sign an agreement
16 though.

17 Q. And so what's the difference, if you know?

18 A. The difference?

19 Q. Between signing the agreement. I take it to me that
20 means that if you sign the agreement, you're gonna get annexed
21 in?

22 A. At some point, but it has to be contiguous, I do
23 know that.

24 Q. So if they're not contiguous then they're not -
25 they're not --

1 A. Then they're not annexed.

2 Q. Do you know if the portions of Lakewood down 378 and
3 North Lake Boulevard and Hamilton Street and Georgia Lane are
4 contiguous?

5 A. The majority is contiguous. Yes, ma'am.

6 Q. Can you tell me specifically whether when Lakewood,
7 the water lines were installed in the Lakewood Subdivision for
8 lack of a better word that that included the Scott's Furniture
9 property, the property where Scott's Furniture now sits?

10 A. That -- I was not here when that was done, ma'am, so
11 I could not say.

12 Q. And so do you have any maps or any information to
13 show whether there were any two inch lines that connected the
14 property on which Scott's Furniture sits to the water lines
15 done by the city?

16 A. No, ma'am. The one exhibit you had here -- Excuse
17 me. I'm sorry. It does not show it on here. These are all
18 six inch lines is what it shows on this exhibit 2.

19 Q. And that's Plaintiff's Exhibit number 2.

20 A. That's the line, the lower section of this, the plan
21 was the Northwood line.

22 Q. Can you show me?

23 A. This is Northwood. This is 378. This is Northwood
24 going back up towards Wessinger as I discussed earlier.

25 Q. Okay. Do you know what road this is?

1 A. This is Highway 378.

2 Q. I thought this one was 378?

3 A. I'm sorry. Yes. Excuse me. Let me get my bearings
4 straight, ma'am. All right. I think I have this thing turned
5 upside down. Oh, I apologize. This is 378. This is Georgia
6 Lane going back to Northwood. Northwood going back to
7 Wessinger.

8 Q. So Wessinger is on the left-hand side of exhibit
9 number 2?

10 A. Yes, ma'am.

11 Q. And Georgia Lane comes out the top on the right-hand
12 side?

13 A. Yes, ma'am.

14 Q. And the long street that goes across the top of the
15 exhibit is --

16 A. Northwood.

17 Q. -- Northwood. And the long line that goes across
18 the bottom is?

19 A. This is another street altogether. It's immaterial
20 to this.

21 Q. So 378 is not depicted on this one?

22 A. This is 378. It should be marked there.

23 Q. This one is Georgia Lane?

24 A. Georgia Lane. Yes, ma'am.

25 Q. Okay. And so Northwood is also known as secondary

1 Highway 392?

2 A. That I'm not sure about the number.

3 Q. Okay. One last question. If this is, on the
4 right-hand side of the page on exhibit 2, if this is 378
5 coming down kind of diagonal --

6 A. Yes, ma'am.

7 Q. -- there's a six inch main that goes somewhere along
8 that portion of the highway?

9 A. It's actually on the opposite side of Highway 378 at
10 that time and tied into the six inch, tied into the
11 existing.

12 Q. And the existing would have come off of
13 Northwood's?

14 A. Yes. Extending from Wessinger to 378 is where it
15 tied together.

16 Q. So the six inch main would have served all of the
17 property assuming everyone tied into it off individual
18 property and connected, that's where they would connect to?

19 A. Yes, ma'am.

20 THE COURT: Thank you. I don't think I have any
21 additional questions at this time. Anybody else have any
22 additional questions?

23 MR. KOON: No, Your Honor.

24 MR. BRADLEY: No, ma'am.

25 THE COURT: Thank you very much.

1 THE WITNESS: Thank you, ma'am.

2 THE COURT: Just leave all those exhibits there.
3 Thank you. Mr. Koon, you said the plaintiff rests?

4 MR. KOON: We do, Your Honor. Can we excuse
5 Mr. Lutz and let him go back to work?

6 THE COURT: Any objection?

7 MR. BRADLEY: Absolutely not, Judge.

8 THE COURT: Thank you. You're excused. Is there
9 anything further from the defense?

10 MR. BRADLEY: Your Honor, I would ask a moment's
11 recess to speak with my clients.

12 THE COURT: Certainly. Let's take a ten minute
13 break. Meanwhile we'll make sure we have all the
14 exhibits in.

15 (Short break.)

16 THE COURT: Yes, sir. Have you got anything you
17 wish to take up? Any additional witnesses?

18 MR. BRADLEY: No, ma'am. The defense rests. We're
19 ready to close, Judge.

20 THE COURT: Okay.

21 MR. BRADLEY: I don't think, because this is a non
22 jury, that you need to hear any motions. We'll just roll
23 it all into our closing argument unless you feel
24 otherwise.

25 THE COURT: That's fine, unless you just, instead of

1 doing closing arguments just submit me an order.

2 MR. BRADLEY: I'll do whatever is easier for the
3 Court. I'm happy to do both, either or whatever you
4 want.

5 THE COURT: I think, and to the extent that there
6 are motions or issues that you would like for me to
7 consider that would be a motion, I would be happy to do
8 that. I can probably - I'm probably at the point where I
9 can make some findings of fact. I am a little more
10 concerned with the legal portions of it and in particular
11 the issues that were raised about the contract.

12 MR. BRADLEY: I'm prepared to address that today or
13 however the Court wants to. I'm ready to discuss it. I
14 have some cases to submit if that's what the Court would
15 like to hear. I'm up for whatever you want. I just
16 thought rather than making motions and then doing closing
17 arguments and submitting briefs, if we just all three
18 roll it into one. I don't want to waive anything I
19 should have to make by way motions, But it seems -- I
20 don't want to offend the Appellate Courts, but I just
21 don't like saying the same thing over and over again.

22 THE COURT: Can we do this: Can we just have you
23 roll it all into a proposed order and then if I've got
24 questions or I need to talk about it, we can either do,
25 if you don't need a record necessarily, we can do it by

1 telephone conference or if you need a record, then we can
2 schedule a short hearing like I did with my folks this
3 morning?

4 MR. KOON: If that's what you prefer, Your Honor,
5 that's fine with The Town.

6 MR. BRADLEY: Yes, ma'am. We'll be happy to do it
7 by way of proposed order.

8 THE COURT: That would be great, if you say what, 20
9 days?

10 MR. BRADLEY: Yes, ma'am.

11 THE COURT: 20. Is that enough?

12 MR. KOON: Yes, ma'am.

13 THE COURT: Submit them both. If you really need to
14 do a reply, I'll give you a little bit of time to do a
15 reply, but just in case there's some arguments made that
16 you haven't heard before or you don't anticipate.

17 MR. KOON: All right. Thank you, Your Honor.

18 MR. BRADLEY: Yes, ma'am.

19 THE COURT: But thank you all. It's been an
20 education and I'm still learning. I'm sure I'll learn
21 some more. As long as I can get copies of the exhibits
22 which I think I can, I have several of them, but I'll
23 make sure I get copies of them. I'll get the clerk to
24 copy them for me.

25 MR. BRADLEY: Thank you, Judge. I would like to

1 make - maybe I'll just scan with my phone to make sure I
2 have all the ones with the numbers the right way because
3 I didn't have the index exactly right before we leave
4 today.

5 THE COURT: That's fine. If you really feel like
6 you need to make one, an argument, I'll hear it but...

7 MR. BRADLEY: You're the one who has to make the
8 decision. I'm happy to do it your way, Judge.

9 MR. KOON: And I agree. It's either/or with me. I
10 wouldn't want to argue and do a proposed order. It's
11 either/or based on your preference.

12 THE COURT: Let's do a proposed order. Do not eFile
13 it. Send it to me in word format document email. I can
14 print them out and then read and tinker. And whatever
15 cases you cite, I'll make sure that I read those because
16 I think I need to do some reading on this one.

17 MR. BRADLEY: Yes, ma'am. Thank you for your
18 courtesy and your time and your consideration.

19 THE COURT: Thank you very much for your efforts and
20 for the presentation. I appreciate it from both of you.
21 Okay.

22 WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.
23
24
25

1 CERTIFICATE OF REPORTER

2 (STATE OF SOUTH CAROLINA)

3 (COUNTY OF LEXINGTON)

4
5 I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,
6 and Official Circuit Court Reporter for the Eleventh Judicial
7 Circuit in and for the State of South Carolina, do hereby
8 certify that I reported the proceedings in the before
9 captioned case in the Court of Common Pleas in and for the
10 State of South Carolina on the 17th and 18th day of October,
11 2019.

12 I FURTHER CERTIFY that the forgoing 113 pages
13 constitute a true and accurate record of said proceedings.

14 I FURTHER CERTIFY that I am neither related, counsel
15 to, nor of interest to any party hereto.

16 IN WITNESS WHEREOF, I have hereunto set my hand at
17 Lexington County, this 22nd day of September, 2020.

18
19 By:s/Steven E. LeBlanc

20 _____
21 Steven E. LeBlanc, Sr., R.P.R.
22 Eleventh Circuit Court Reporter
23 State of South Carolina.
24
25

COUNTY OF LEXINGTON

CLERK OF COURT

IN THE COMMON PLEAS / GENERAL SESSIONS / FAMILY COURT

CASE NO. 2019CP32-03352

JUDGE Lee

CT. REP. Steve LeBlanc

DATE 10/17

CLOCK - IN AREA

(NOTES)

- (1) _____
- (2) _____
- (3) _____

PLAINTIFF

VS.

DEFENDANT

TOWN OF Lexington

Patty C. Wingard Trust

Atty. Clifford O. Koon, Jr.

Atty. James Edward Bradley

NO.	ID.	EV.	DESCRIPTION	NO.	ID.	EV.	DESCRIPTION
1		✓	COLOR TOPO MAP	1		✓	AGREEMENT 10-13-61
2		✓	BLACK + WHITE TOPO MAP	2		✓	AGREEMENT 9-30-61
3		✓	TOPO MAP PRINTED 6-24-13	3		✓	LETTER 7-23-13 TOWN LEXINGTON
4		✓	LETTER 6-24-13	4		✓	LETTER 7-30-13
				5		✓	TOPO MAP
				6		✓	MAP 7-25-72
				7		✓	COLOR MAP
				8		✓	BLACK + WHITE MAP

CT. REP. Steve LeBlanc

REC. BY. [Signature]

VERIFIED _____

TITLE Deputy Clerk

TITLE _____

WHITE: COURT RECORDS * YELLOW: EVIDENCE VAULT * PINK: FILE

LCF 661 (1/05)

J. K. ADDY, Mayor

P. H. CAUGHMAN, CLERK AND TREASURER
OFFICE PHONE EL 6-2785

TOWN of LEXINGTON

P. O. BOX 307

SOUTH CAROLINA

COUNCIL

L. B. ADDY, SR.
W. J. BROWN
P. H. CAUGHMAN
JOHN H. HITE, JR.
MARION C. JUMPER
W. P. MADDEN

October 13, 1961

Motion made and Seconded:- That the Council give Mr. Henry C. Wingard permission to take up the present 2 inch water main where the new 6 inch water main was put and install the 2 inch on Hamilton Street according to Engineering specifications at Mr. Henry C. Wingard's expense. That the Town shall have the right and privilege of making any other taps to said line and the complete extension is to be considered property of the Town of Lexington and be under its exclusive control and maintenance. It is agreed that the Town shall maintain said water line after it is completed and it is further agreed that the Town shall afford water Services to the party of the second part, their heirs and assigns within the limits of the Town's water system at the prevailing water rates charged by the Town.

By Henry C. Wingard
Property Owner

By J. K. Addy
Mayor of Town of Lexington

By William P. Madden
Councilman

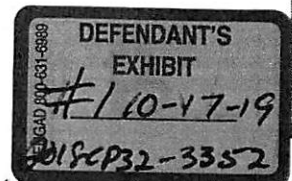
ATTEST P. H. Caughman
Clerk & Treasurer.
Town of Lexington

By John H. Hite, Jr.
Councilman

By L. B. Addy, Sr.
Councilman

By W. J. Brown
Councilman

By _____
Councilman



Scanned by CamScanner

180

STATE OF SOUTH CAROLINA }
COUNTY OF LEXINGTON }

A G R E E M E N T

This Agreement made and concluded at Lexington, South Carolina, this 30 day of September, 1961, by and between the Town of Lexington, hereinafter referred to as the Town, and Henry C. Shingler hereinafter referred to as the Party of the Second Part,

WITNESSETH: That the Town does, for and in Consideration of the premises hereinmentioned, agree to permit the Party of The Second Part, to connect a 6 water line onto the Town's existing water line in the Town of Lexington Area in order to extend said water system into the area of the Shingler area - Lexington Rd.

That the Party of the Second Part shall pay for the cost of construction said 6 line, including the cost of materials and labor, which line is to be not over \$1044.28
2 1/2 of the total 565 ft. feet, more or less in length.

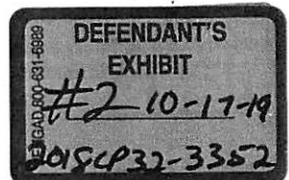
That the Town shall have the right and privilege of making any other taps to said line and the complete extension system is to be considered property of the Town of Lexington and under its exclusive control and maintenance.

That the Town shall maintain said line after it is completed and agrees to sell water to the Party of the Second Part within the limits of its existing water system.

That the consideration for this Agreement is the mutual benefit to the Town and the Party of the Second Part.

Witness our hands and seals this 30 day of

Sept 1961.



Scanned by CamScanner

IN the Presence of,

E. C. Addy

James F. Addy

as to Party of the Second Part.

TOWN OF LEXINGTON

By: [Signature]
Mayor

PARTY OF SECOND PART.

By: [Signature]

181

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

PERSONALLY appeared before me E. C. Addy
and made oath that he saw the within

Mayor of the Town of Lexington, South Carolina, sign, seal and
as his act and deed deliver the within written Agreement for
the uses and purposes therein mentioned and that he with
James F. Addy witnessed the execution thereof.

SWORN to before me this

30 day of Sept. 1961 E. C. Addy

[Signature] (L.S.)
Notary Public for S.C.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

PERSONALLY appeared before me E. C. Addy
and made oath that he saw the within named James F. Addy

Party Of The Second Part, sign, seal and as
his act and deed, deliver the within Agreement for the uses and
purposes therein mentioned, and that he with James F. Addy
witnessed the execution thereof.

SWORN to before me this

30 day of Sept. 1961 E. C. Addy

[Signature] (L.S.)
Notary Public for S.C.

Recorded Under Notary of Mich. A.D. 1962 9:15 P.M.
HULMES C. ORRIS, C. C. C. P. & O. S.

MAYOR
T. Randall Halfacre

MAYOR PRO-TEM
Hazel Livingston

COUNCIL
Dana Frazier
Steve MacDougall
Kathy Mason
Todd Shewchuk
Ted Stumbolitis

TOWN OF LEXINGTON



TOWN ADMINISTRATOR
D. Scott Poole

MAILING ADDRESS
Post Office Box 397
Lexington, SC 29071

INFORMATION
803-534-1164
www.lexsc.com

FAX
803-534-4462

July 23, 2013

Henry C. Wingard
P.O. Box 458
Lexington, SC 29071

re: Annexation of Property at 705 North Lake Drive

Dear Mr. Wingard:

It is my understanding you recently received an Annexation Petition from Zoning Administrator John Hanson, but have not returned your signed petition. I am advised that the Town wishes to continue to pursue this annexation. Therefore, I have enclosed another Annexation Petition for your convenience.

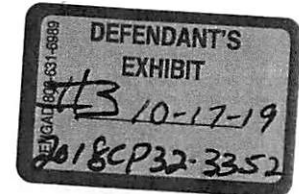
The Town's policy of providing water and/or sewer service to out of town customers conditioned upon annexation has been in practice for some time. The policy is based upon South Carolina Supreme Court decisions stating that the Town has no duty to furnish water/sewer service to customers outside its corporate borders, and that requiring annexation as a condition for service to those outside its borders is a valid practice. Therefore, I ask that you please sign and return this letter within thirty (30) days from today's date. Failure to return the signed Petition prior to the deadline may result in legal action and/or termination of utility service to the property.

The Town staff will be happy to answer any further questions you may have, and we look forward to the chance of welcoming you into the Town and having the chance to be of further service to you.

Sincerely,

Brad Cunningham
Town Attorney

enc.



STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON) PETITION

Henry C. Wingard, being the sole owner(s) of the real estate described herein, do(es) hereby petition and request the Town of Lexington to annex and include within the corporate limits of the Town of Lexington the area herein described. This petition and request for annexation is made pursuant to Section §5-3-150 of the South Carolina Code of Laws. The tract of land hereby requested for annexation is described as follows:

SEE ATTACHED LEGAL DESCRIPTION FOR METES AND BOUNDS

TMS# 004319-05-001

Street Address: 705 North Lake Drive, Lexington, SC 29072

Also included shall be all portions of any State or County street, road or right of way which abut or adjoin the above-described property.

The Petitioner respectfully requests the Town Council to grant this Petition for annexation (plat attached), and that the property be zoned _____.

DATE OF SIGNATURE:

Henry C. Wingard

By: _____
Its: _____

_____, 20____.

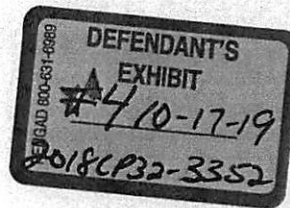
Of that piece, parcel or lot of land situate, lying and being near the town of Lexington
Lexington Township, Lexington County, and state aforesaid, containing One and forty-two
hundredths acres, more or less, and being bounded on the northeast by lands of George
W. Corley, Sr. on which it measures Two hundred, seventy-three feet and five inches; on
the southeast by State Highway No. 6 measuring thereon One hundred Ninety-three feet;
on the southwest by Lot No. 3, other lands of Ethel A. Dreher and E. G. Dreher on which
it measures Three hundred, one foot, and five inches; on the northwest by lands of the
said George W. Corley, Sr., measuring thereon Two hundred and thirty-five feet.

The same being the identical lot of land conveyed to me by E. G. Dreher and Ethel A. Dreher
by their deed dated the 27th day of February 1946, and recorded in the office of the
Clerk of Court of Lexington County, said state, in Deed Book '5-T', page 595

Thomas H. Wingard
P.O. Box 458
Lexington, S.C. 29071

July 30, 2013

Mr. Brad Cunningham
Town of Lexington
P.O. Box 397
Lexington, S.C. 29071



Re: Henry C. Wingard Annexation of property letter

Dear Mr. Cunningham,

In response to your letter dated July 23, 2013. The property at 705 North Lake Drive is the home of Scott's Furniture Co., as it has been since the year 1971.

My father, Mr. Henry C. Wingard, developed the property of and around this site, including but not limited to Scott's, the former Lake Road Service Co. site, the entire subdivision known as Lakewood subdivision, The First Reliance Bank site 'formerly Western Steer Steakhouse', the present Hess gas station and the building presently used as Chapman's Jewelry.

In 1961, Dad, installed all of the water lines to these properties at his own expense and was provided a letter from the Town of Lexington which stipulated that his properties, in that area would be supplied with water. This letter from the town does not require annexation, is transferable to heirs and assigns, and contains no expiration date. I have enclosed a copy of the agreement for your convenience.

Mr. Cunningham, as you know, or should know, the Scott's Furniture building is connected only to Lexington's water service (not sewerage) and the Town does not have a right to force annexation of this property. Dad also built and operated the Lakewood Utility Co.. which provided the sewer for his properties, we gave this entire system to the Town and the town took over the operation of the system as well as the revenue generated from it's customers. I may be corrected, however it is my belief that the transition of this system to the Town did not obligate any of Lakewood Utility's existing customers to annex into Town.

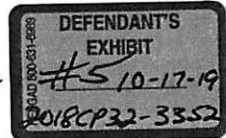
Our family loves this town and want to support the town, as we always have. We are willing to support the town by paying the exorbitant out of town utility rates that we pay.

Should the Town desire to pursue any annexation of any of Dad's properties, or former properties without the unpressured consent of the present owners, I intend to fight for the 'right to water' that the then duly elected officials of the Town promised my father in return for the extension of water lines into the unincorporated area of 'Lakewood Subdivision'.

Any further communication about any properties titled to Henry C. Wingard should be addressed to me, Thomas H. Wingard at the above address. I may also be reached at 803-414-0730.

Thank You,

Tom Wingard



FILED
FEB 8 10 24 AM '58
HULMES C. DREHER
CLERK OF COURT
LEXINGTON, S.C.

Scale 1" = 200'
m.d.

Plat of Subdivision of LAKEWOOD

located about 200yds. northeast of Lexington, in
School District No. 1, Lexington County, S.C. Being
the property of Henry C. Wingard and reference
is made to plats prepared by Karl B. Shuler, Sur.,
dated April 15, 1954 and J. O. Hallman, Sur., dated Mar.
23, 1954 (2 plats) and Aug. 18, 1954. All blocks except "G" surveyed by me

Surveyed April and Dec. 1956
and Jan. 1958.

Plat drawn Jan. 10, 1958

By: C. D. Caughman, Reg. Sur.

C. D. Caughman

o denotes iron pin unless otherwise designated



Recorded this 2nd day of Feb. A.D. 1958 at 10:28 AM
Holmes C. Dreher, C. C. P. & G. S.

DEFENDANT'S
EXHIBIT
#6 10-18-19
1018C P32-3352

153

JUN 25 4 49 PM '72

CLEPA & COURT
LEXINGTON COUNTY
CHAS. H. SHEALY

Wingard

EXEMPT FROM THE
SUBDIVISION REGULATIONS

JUN 10 1972

Lexington Co. Planning Staff

Plot of subdivision of Block "E" of
Lakewood

located about 200 yds northeast of Lexington, in School District No. 1, Lexington County, S.C. Being a portion of the property of Henry C. Wingard See original plot prepared by me on June 10, 1958.

Surveyed June 12, 1972

Pat. # 1000000 June 12, 1972

By: C. D. Cunningham, Aug 5, 1901
W. H. Cunningham

25 July of July. 72 4:49 p.m.
CHARLES R. SHAW, C. C. C. P. & Q. B.

Surfaced 11/10/1901 = 7.





DEFENDANT'S
EXHIBIT
#710-15-19
2018-03-23-33

RECORD ON APPEAL 137

Fox
Chase
Farridge
Run

004319-05-002
B lot
002
9344 plat 129

004319-05-003
A lot
003
18216 plat 315
TAKE 5 OIL CHANGE

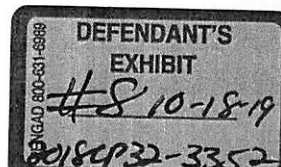
LAKEWOOD
44 BK 41 PG
BK PG

004319-05-001
C lot
001
9344 plat 129
SCOTTS FURNITURE

004319-05-004
7 lot
004
279G plat 607
GLOW SALON & SPA

004319-05-009
3 lot
009
205G:119 plat 2

004319-05-008
lot
008
6060 plat 187
ALLSOUTH FEDERAL CREDIT UNION



RECORD ON APPEAL 138

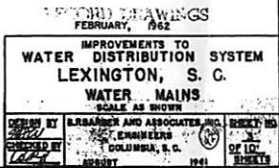
N Lake Dr

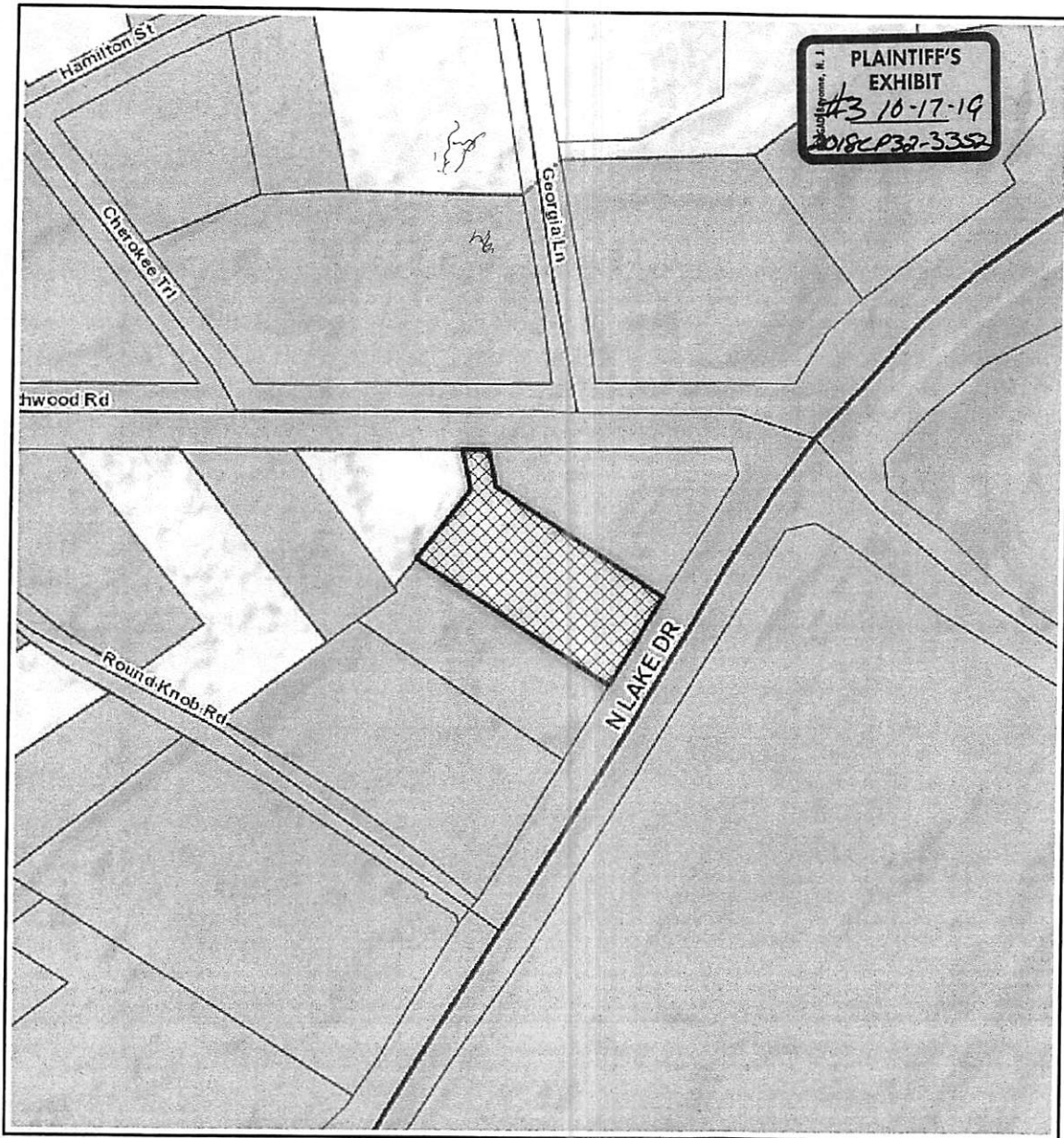
004333-01-024
lot
024
34G plat 1



RECORD ON APPEAL 139

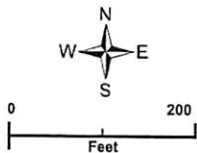
Рудод-Вейсмане, М. Ј





Lexington County Scott's Furniture

Printed: Jun 24, 2013



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MAYOR
T. Randall Halfacre

TOWN OF LEXINGTON

TOWN ADMINISTRATOR
D. Britt Poole

MAYOR PRO-TEM
Hazel Livingston

MAILING ADDRESS
Post Office Box 397
Lexington, SC 29071

COUNCIL
Danny Frazier
Steve MacDougall
Kathy Maness
Todd Shevchik
Ted Stambolitis

INFORMATION
803-359-4164
www.lexsc.com

FAX
803-359-4460



June 24th, 2013

Mr. Henry C. Wingard
PO Box 458
Lexington, SC 29072

Re: Annexation of property at 705 N. Lake Drive

Dear Mr. Wingard:

Pursuant to the Town's utility policies, in order to receive service, applicants outside the corporate Town limits must agree to annexation of their property when it becomes eligible. Your property is eligible for annexation.

The Town's policy of providing water and/or sewer service to out of town customers conditioned upon annexation has been in practice for some time. The policy is based upon South Carolina Supreme Court decisions stating that the town has no duty to furnish water/sewer service to residents outside its corporate borders, and that requiring annexation as a condition for service to those outside its borders is a valid practice.

Enclosed please find an Annexation Petition for your property. Please return your signed Annexation Petition to me within ten days of the date of this letter, or contact me if you have questions or concerns about this process. If the Town does not hear from you regarding this matter, you may be subject to termination of service and/or legal action to enforce the contractual provisions of your Terms of Service Agreement.

Sincerely,

John Hanson
Director of Planning, Building and Technology

cc: Brad Cunningham, Municipal Attorney

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

TOWN OF LEXINGTON SOUTH
CAROLINA,
Plaintiff

COMPLAINT FOR DECLARATORY
JUDGEMENT
(NON JURY)

vs.

Patty Cox Wingard, as Trustee for PLCW
Trust, and Scott's Furniture Company, Inc.
Defendants.

The Plaintiff, complaining of the Defendant, would respectfully show unto this Court:

1. The Plaintiff (hereinafter "the Town") is a municipality and political subdivision of the State of South Carolina located within the County of Lexington.
2. The Defendant Wingard (hereinafter "Wingard") is, upon information and belief, a citizen and resident of the County of Lexington who owns or occupies certain property as trustee for the PLCW Trust which is the subject of this action (hereinafter "subject property").
3. As part of its operation as a municipality, the Town owns and operates water and sanitary sewer systems ("hereinafter "utilities"). The Town's utility customers may reside within or without the Town's boundaries. Some utility customers receive both water and sanitary sewer service from the Town. Some utility customers

receive only one of the two services offered, depending on their needs. Service rates for the various categories are set by the Town Council.

4. Pursuant to policy first placed into effect by practice in July, 1983 and ratified by written policy enacted on March 3, 2003, the Town requires new customers outside of the Town limits to sign a water and/or sewer service agreement before they are connected to the utilities operated by the Town. This agreement requires the new customers to annex into the Town if the new customer's property is contiguous to the Town. If the new customer's property is not contiguous at the time of the application for utility service, then the agreement calls for the new customer to annex if and when the subject property later becomes contiguous.
5. The Town is informed and believes that PLCW Trust is the owner of the subject property located at 705 North Lake Drive, Lexington, S.C. 29072. The subject property is also denominated as TMS# 004319-05-001). Defendant Scott's Furniture Company, Inc. is, upon information and belief, the lessee of the subject property and, therefore, may have an equitable interest in this action.
6. The Subject Property has now become contiguous to the Town , but remains outside of the Town limits. Pursuant to the policy described in Paragraph four(4) herein, the Town has demanded in writing that PLCW Trust apply for annexation of the Subject Property into the Town.
7. As of the date of this writing, PLCW Trust has refused and continues to refuse to comply with the Town's lawful demands to annex the Subject Property.
8. Pursuant to the well-established Common Law of South Carolina, a municipality is

under no duty of furnish utility service to any entity outside its corporate limits absent a valid contract to do so.¹ No contract exists between the Town and PLCW Trust other than a purchase agreement between Lakewood Utilities, Inc. and the Town which makes no mention of annexation. Therefore, the Town is informed and believes that it may terminate the utility service to the Subject Property upon reasonable notice.

9. Also pursuant to the well-established Common Law of South Carolina, a municipality may require annexation of a parcel of property as a condition for providing utility service to such property.²

10. The issues between the parties constitute a justiciable controversy and entitles the parties to a declaratory judgment pursuant to § 15-53-20, Code of Laws of South Carolina. Said declaratory judgment will terminate uncertainty between the parties as to their respective rights, status, and other legal relations relative to the following issues:

- a) Does the Town have the right to terminate water service to the Subject Property upon reasonable notice?
- b) If so, what period of time would constitute reasonable notice?
- c) Does the Town have the right to require annexation of the Subject Property into the Town as a requirement for providing water and/or sanitary sewer service to the Subject Property?

¹See Childs vs City of Columbia 87 S.C 566, 70 S.E. 296 (1911)

²See Sloan vs City of Conway 347 S.C.324, 555 S.E. 2nd 684 (2011)

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Court look into the issues presented and determine the relative rights, status, and other legal relationships between the parties and for such other and further relief as the Court may deem just and proper.

Lexington, S.C.
September 17, 2018

Bradford T. Cunningham, Esq.
Clifford O. Koon, Jr., Esq.
Attorneys for the Town of Lexington
By:

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
Town of Lexington South Carolina,	)	C/A No. 2018-CP-32-03352
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANTS ANSWER AND
	)	COUNTERCLAIM
Patty Cox Wingard, as Trustee for PLCW	)	
Trust, and Scott's Furniture Company, Inc.	)	
	)	
Defendants.	)	
_____	)	

The Defendants answer the Complaint as follows:

FOR A FIRST DEFENSE

1. Unless specifically admitted in this answer the Defendants deny each and every allegation of the Complaint.

FOR A SECOND DEFENSE

2. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

3. The Defendants admit the allegations of Paragraphs 1, 2 and 3.

4. In response to Paragraph 4, the Defendants are without sufficient knowledge or information to form a belief as to the truth or accuracy of these allegations and therefore deny these allegations.

5. In response to Paragraph 5, the Defendants admit that the PLCW Trust owns property located at 705 North Lake Drive, Lexington, South Carolina 29072. The Defendants

admit that Scott's Furniture Company, Inc., leases this property from the Trust. The Defendants deny the remaining allegations of Paragraph 5.

6. In response to Paragraph 6, the Defendants admit that the property is outside of the town limits. The Defendants admit that the property has only recently become contiguous to the town as implied by this paragraph. The Defendants deny the town has a made a demand upon the Trust for annexation. The Defendants deny the remaining allegations of Paragraph 6.

7. In response to Paragraph 7, the Defendants deny that the town has made a demand upon the Trust and denies that the town has a lawful right to do so. The Defendants deny the remaining allegations of Paragraph 7.

8. The Defendants deny the allegations of Paragraph 8. Further responding to the allegations of Paragraph 8, there is an agreement between the town and the Wingard family that the town would agree to provide water at the prevailing rates with no requirement of annexation. The Defendants plead this agreement which is attached as Exhibit B to this answer and counterclaim in further response to Paragraph 8. The Defendants deny the remaining allegations of Paragraph 8. In particular, the Defendants deny that the town has a right to terminate the utility service to the property.

9. The Defendants deny the allegations of Paragraph 9.

10. In response to Paragraph 10, the Defendants admit that the town has brought this lawsuit. The Defendants deny that there is a justiciable controversy. The Defendants deny that the town has a right to terminate water service in violation of the contract the town entered. The Defendants do not believe any response is necessary to the question of reasonable notice as the town has no right to terminate water service. The Defendants deny that the town has a right to annex the property or condition its providing of water service on annexation of the property.

FOR A THIRD DEFENSE

11. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

12. The Defendants move for their costs and attorney's fees as set forth in South Carolina Code Section 15-53-100 and 15-77-300.

FOR A FOURTH DEFENSE AND FIRST COUNTERCLAIM

13. The town entered into an agreement with Henry Wingard, his heirs and assigns as set forth in Exhibit B. This agreement was adopted formally by the town in the resolution attached as Exhibit A.

14. This agreement required that the town sell water at "within the limits of the town's water system at the prevailing water rates charged by the town."

15. Neither the agreement nor the resolution required that the Wingards consent to annexation.

16. This lawsuit is a violation of the town's resolution and the agreement entered pursuant to that resolution requiring that the town sell water to Henry Wingard's heirs and assigns from the town's water system.

17. Furthermore, as a condition of this agreement, Henry Wingard agreed to install a six inch water line for the town and give control of this water line to the town.

18. The agreement for the town to sell water at prevailing rates was conditioned upon Henry Wingard's grant of the water system and installation of the water system for the town.

19. The Defendants seek an Order of the Court holding as follows:

- a. That this lawsuit is a violation of the resolution and agreement entered by the town and that the town is not entitled to require annexation as set forward in this lawsuit.
- b. That the attached resolution requires the town to sell water to the property without requiring annexation as a precondition of the sale.
- c. That the attached contract entered with the town requires that the town sell water to the property without agreeing on annexation as part of the sale.
- d. That if the agreement is found to not be enforceable, the town must return the consideration given to it for entering into the agreement.
- e. That this consideration includes the ownership and control of the water lines.
- f. That if the town does not honor the agreement it made, the Court declare that the Wingard family is the owner of the water lines as set forth in the resolution and contract.
- g. That the Wingard family be allowed to charge a reasonable fee for the use of their water lines as well as a fee to the town for using their water lines to deliver water and charge money to its customers.

WHEREFORE, the Defendants having answered and counterclaimed against the Town of Lexington ask that the Court award attorney's fees and costs in replying to this matter and that it enter the relief sought in the counterclaim.

[Signature page to follow.]

MOORE TAYLOR LAW FIRM, P.A.

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West Columbia, South Carolina

October 24, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
Town of Lexington South Carolina,	)	C/A No. 2018-CP-32-03352
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANTS' RULE 59(E) MOTION
	)	AND MOTION FOR
Patty Cox Wingard, as Trustee for PLCW	)	RECONSIDERATION
Trust, and Scott's Furniture Company, Inc.,	)	
	)	
Defendants.	)	
_____	)	

I. INTRODUCTION

The Defendants move for reconsideration of the Court's May 4, 2020, order finding in favor of the Plaintiff on the following grounds:

1. The Court did not rule on the Defendants' counterclaim for return of the water line if the Contract was rescinded by the Town; and
2. The Court erred when it decided that the words "heirs and assigns" contained in the Agreement between Wingard and the Town do not create a permanent agreement.

II. DISCUSSION

1. **THE COURT DID NOT RULE ON MS. WINGARD AND SCOTT'S FURNITURE'S COUNTERCLAIM.**

a. **The Contract and Resolution**

The Town sued Ms. Wingard and Scott's Furniture for a determination that it did not have to honor the Contract and Resolution it entered to supply water to Henry Wingard, "their heirs and assigns." The Contract recites that the consideration entered is for the "mutual benefit to the Town and the Party of the Second Part (Wingard)." (September 30, 1961, Contract entered as Defendants' exhibit 1 at trial and attached as exhibit A to this motion.) The Contract recites that

Wingard will install a six inch water line to the Lakewood Subdivision. It also states that the Town shall have the right to extend and tap on to the line as well as the duty to maintain the line.

The Resolution entered October 13, 1961, recites the same exchange of consideration and indicates that the Town “shall afford water Services to the party of the second part (Wingard), their heirs and assigns within the Town’s water system.” (October 13, 1961, Resolution entered as Defendants’ exhibit 2 and attached as exhibit B to this motion).

Thus, the parties’ agreement contemplated the Town selling water to Wingard, his heirs and assigns, in exchange for the Town’s right to use the water line and tap on to it.

Through the lawsuit and the Court’s order, both the Town and the Court have indicated that the Town does not have a continuing obligation to sell water to Wingard’s heirs and assigns as the agreement states. As a result, the Court ruled that ‘The contract may be terminated by either party, after reasonable notice of intent to the other.’” (May 4, 2020, Order, p. 6.)

Thus, the Court allows the Town to rescind the Agreement and keep the benefit of the bargain, but denies the benefit of the bargain to Wingard, his heirs and assigns.

If the agreement is rescinded, the Town must return the consideration it received to Wingard’s heirs and assigns. That is, it must give the water line back and disconnect the taps it made pursuant to the agreement. Otherwise, the Town retains the benefit of the agreement in perpetuity but denies the benefit of the agreement to Wingard’s heirs and assigns. This result is inequitable and the reason Ms. Wingard counterclaimed for a return of the water line.

In short, the Town has sought and received the benefit of rescission of the agreement without returning the consideration it received.

When rescission is granted as a remedy, parties are entitled to a return to the *status quo ante*. *First Equity Inv. v. United Service Corp.* 299 S.C. 491, 496, 386 S.E.2d 245, 248 (1989).

Recession entitles a party to a return of consideration. *Id.* Without a return of consideration, the Town will be unjustly enriched at the expense of Ms. Wingard. “A party is unjustly enriched when it has and maintains benefits ... which in justice and equity belong to another.” *Dema v. Tenet Physician Servs. – Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009).

Ms. Wingard brought her counterclaim for a return of the consideration under the agreement. The Court did not rule on her counterclaim. In addition, the Court’s ruling allows the Town to keep the consideration it received in the bargain in perpetuity, but denies the same consideration to Wingard, his heirs and assigns. As a result, the Court should grant Ms. Wingard’s counterclaim and return the consideration to her.

2. THE COURT ERRED WHEN IT DECIDED THAT THE AGREEMENT BETWEEN WINGARD AND THE TOWN DOES NOT CONTAIN TERMS SETTING FORTH THE DURATION OF THE AGREEMENT BECAUSE THE AGREEMENT SPECIFIES WATER TO BE SOLD TO WINGARD, HIS HEIRS AND ASSIGNS.

The Court erred when it ruled that the September 30, 1961, Contract and the October 13, 1961, Resolution are terminable at will because they do “not contain the express terms creating the perpetual nature of the agreement.” (May 4, 2020, Order, p. 6).

The Court improperly relied only on the September 30, 1961, Contract to conclude that the agreement was indefinite as to time. The October 13, 1961, Resolution of Town Council states the Town agrees to sell water to “the Party of the second part, (Wingard) **their heirs and assigns....**” (October 13, 1961, Resolution attached at exhibit B) (emphasis added). These two documents should be read together to determine the whole agreement between the parties. *See, Wilbur Smith and Associates v. National Bank of South Carolina*, 274 S.C 296, 263 S.E.2d 643 (1980) (“[W]here the instruments have not been executed simultaneously but relate to the same

subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole.”).

The Court erroneously relied upon *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911) to allow the Town to rescind the Contract. In *Childs*, a non-resident water customer sought an injunction to prevent the City of Columbia from cutting off his water based upon a contract between the City and him. The Supreme Court concluded that the contract was not enforceable because it did not define a term at all as follows:

Where the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually.

Id.

In Ms. Wingard’s case, the parties did express an intent that the Contract continue indefinitely. The Resolution passed by Town Council obligates the Town to sell water to Wingard, “their heirs and assigns.”

In addition, the Town and the Wingards honored the contract for almost sixty years showing by their conduct that they intended it to be perpetual. As a result, the Trial Court improperly relied upon *Childs* because the facts surrounding the Wingard transaction show that it was intended to be perpetual whereas the facts in the *Childs* case did not.

In fact, the Resolution indicates that “the Town shall afford water to the party of the second part, (Wingard) **their heirs and assigns** within the limits of the Town’s water system.” (Resolution, Ex. B) (emphasis added).

The Court erroneously concluded that because the Resolution says “heirs and assigns” but does not include the word “forever” that it is terminable at will by the Town. In reaching this

conclusion, the Court ignored the words “heirs and assigns” and gave them no meaning at all. In fact, the legally accepted meaning of the term “heirs and assigns” is a perpetual grant.

First, the Court completely disregarded the words “heirs and assigns” in concluding the Resolution is indeterminate as to time. The common meaning of “heirs and assigns” in a grant indicates that the term exceeds the life of the party receiving the grant; thus, creating fee simple ownership which is inheritable and assignable as the words suggest. *See Black’s Law Dictionary* (11th ed. 2019). If “heirs and assigns” does not mean a perpetual agreement, then it means nothing in the Resolution as there is no other meaning for the phrase. The Court should read the Resolution to give affect to all of its provisions and not treat the words, “heirs and assigns” as if they do not exist or have no meaning. *See, Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329, S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citing 17A Am. Jur. 2d Contracts § 385 (1991)) (“Documents will be interpreted so as to give effect to all of their provisions, if practical”).

Second, the established legal meaning of “heirs and assigns” is a grant beyond the lifetime of the grantee. The South Carolina Supreme Court has often affirmed that the words “heirs and assigns” indicates an assignable, permanent interest. In *Gressette v. South Carolina Elec. and Gas*, 370 S.C. 377, 635 S.E.2d 538 (2006), the Court held that the language “heirs and assigns” in a commercial easement indicates assignability. *Id.* at 383, 635 S.E.2d at 541 (citing *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965) (parties may make an easement in gross assignable by the terms of the instrument; commercial easement in gross assignable where language included “successors and assigns”); *Douglas v. Medical Investors*, 256 S.C. 440, 182 S.E.2d 720 (1971) (easement in gross assignable where language included “his heirs and assigns”)).

Likewise, in *Wilbur Smith and Associates v. National Bank of South Carolina*, 274 S.C. 296, 263 S.E.2d 643 (1980), the Supreme Court held the language “heirs and assigns” bound the estate of a property holder to a contract signed before his death. Wilcox DesChamps signed a listing agreement with Wilbur Smith and Associates to sell his property. The agreement contained language purporting to bind Mr. DesChamps’ “heirs and assigns.” Mr. DesChamps’ personal executor argued that these words were mere surplusage and did not bind his estate to the contract. In contrast, the Supreme Court found that the language “heirs and assigns” was not mere surplusage, that it had a well understood meaning, and that it bound the estate to the contract entered by Mr. DesChamps before his death.

The South Carolina Court of Appeals has interpreted the words “heirs and assigns” similarly. In *Green Tree Servicing v. Williams*, 377 S.C. 179, 659 S.E.2d 193 (Ct. App. 2008), it addressed a fee simple determinable created by the words “heirs and assigns.” Ms. Garvin deeded land to her granddaughter with the restriction that it would revert to “Grantor or Grantor’s heirs and assigns, in fee simple” if the granddaughter failed to use it for residential purposes. The granddaughter borrowed money on the land from Green Tree and defaulted. When Green Tree foreclosed, the Court of Appeals found the operative language created a reversion to the “Grantor or Grantor’s heirs and assigns” which was superior to the mortgage.

In *Bennett v. Investors Title*, 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006), the Court of Appeals set forth the common law requirements for a permanent fee simple general warranty deed. These requirements include “that the purchaser, *his heirs and assigns*, shall quietly enjoy the land.” *Id.* at 592, 635 S.E.2d at 656 (emphasis added). Thus, a common law fee simple conveyance uses the term “heirs and assigns” to indicate that it is a permanent conveyance.

In *Dorrell v. Florence District No. One*, 288 S.C. 246, 341 S.E.2d 797 (Ct. App. 1986) (Bell, J.), the Court interpreted the language “heirs and assigns” to include the wife of the deceased grantor. Olin Dorrell conveyed a tract of property to the school district indicating that if the property was used for anything other than a school, the district would pay liquidated damages to “Olin Dorrell, his heirs and assigns.” After Mr. Dorrell’s death, the school district ceased using the property for school purposes. The Court found that it owed the liquidated damages to his widow Thelma Dorrell, his heir.

Both the South Carolina Supreme Court and the South Carolina Court of Appeals have held the words “heirs and assigns” to indicate a permanent grant of right. The Trial Court erred by finding that these words have no meaning in the Resolution such that it created a contract the Town could rescind at will. Neither the Supreme Court nor the Court of Appeals require the additional language “forever” to create a permanent grant as the Trial Court’s ruling suggests. Thus, this Court is in error and should reconsider its decision of May 4, 2020 and enforce the agreement between the parties as written giving affect to all the language in the Resolution including the term “heirs and assigns.”

III. CONCLUSION

The Defendants respectfully ask that the Court reconsider its ruling of May 4, 2020 for the following reasons:

1. The Court did not rule on the Defendants’ counterclaim for return of the water line which was provided as consideration in the contract the Town wishes to rescind; and
2. The Court erred by concluding that the words “heirs and assigns” are mere surplusage and do not indicate a permanent grant because they do not include the word “forever.”

Respectfully submitted,

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West Columbia, South Carolina

May 13, 2020

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
2018CP3203352

TOWN OF LEXINGTON, SOUTH
CAROLINA,

Plaintiff

PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO
RECONSIDER

vs.

PATTY C. WINGARD, as Trustee for
PLCW TRUST, AND SCOTT'S
FURNITURE COMPANY, INC.

Defendants.

TO: THE DEFENDANT(S) NAMED ABOVE:

By way of Return to Defendants' Motion to Reconsider, Plaintiff respectfully offers the following. Defendants stated two grounds for their Motion which shall be dealt with in this Return in the order in which they appear in the Defendants' Motion.

I

Does Defendant's Responsive Pleading Contain a True Counterclaim and, if so, did the Court actually overlook it?

First, Defendants erroneously state that the Court failed to rule upon their putative Counterclaim. A cursory review of the Defendants' "Counterclaim" reveals that it sets forth no new matter not contained in the Complaint or Defendants' Answer. The Complaint and Defendants' Answer sufficiently place the issues upon

PLCW TRUST RETURN

1

which the case was tried and upon which the Court ruled. In essence, the Complaint alleges that Plaintiff is no longer bound to sell water to the Defendants. The Answer alleges that Plaintiffs are bound to continue to sell water to Defendants in perpetuity and requests attorneys' fees. At best, the "Counterclaim" is a superfluous explanation of Defendant's reasons for defending this action as set out in their responsive pleading .

By ruling as it did, the Court declared in favor of Plaintiff which is an express rejection of the arguments raised by the Defendants, both in their Answer and repeated in their "Counterclaim". In order to comply with the spirit of Rule 59, Defendants are implying that the Court must have overlooked the "Counterclaim" because it did not refer to it directly by the name given to it by Defendants. However, a close reading of the order reveals that the Court's legal analysis carefully considered every issue that Defendants raised in defense of the Declaratory Judgement action and rejected them based on applicable case law. Childs vs. City of Columbia 87 S.C. 566, 70 S.E. 296 (1911)

In their effort to show that the Court overlooked the "Counterclaim", Defendants simply repeat their attempt, as they did at trial, to lump the September, 1961 Agreement between Henry Wingard (Wingard) and the Mayor of Lexington with the October, 1961 Resolution of the Town Council, which referenced a different water line. These documents were not part of the same agreement. In fact, the Resolution was not an agreement at all. Wingard was not a member of Town Council. He could not have been a party to a Counsel resolution.

Also, the September agreement, as explained at trial by the Town's witness, Allen Lutz, was merely to allow Wingard to attach a six inch line to the new six inch line the Town was building in 1961 along Northwoods Road. The September agreement is silent about the two inch line referenced in the October resolution. The October resolution allowed Wingard to "take up" the Town's old two inch line along Northwood road which was replaced by the Town's new six inch line. The resolution further allowed Wingard to use the old two inch line to provide water service to Lakewood. Lakewood is a residential subdivision which Wingard built starting along Hamilton Street North of Northwood Road. Hamilton Street does not touch or intersect the property upon which Scott's Furniture Store sits. Hamilton Street runs parallel to Northwood Road. The Scott's Furniture property sits on North Lake Drive across from what is now Lexington Middle School. Therefore, the October 1961 Resolution referencing a two inch line to be installed on Hamilton Street has nothing to do with the September 1961 Agreement which involves six inch lines on Northwood Road. Defendant's attempts to lump the two actions together as one Agreement must fail, as was recognized by the Court.

Assuming, arguendo, that the Resolution could be construed as an agreement of some kind, it does not mention, and does not involve, the Scott Furniture property which is the subject of this litigation. It involves only the two inch line into Lakewood, the Hamilton Road residential subdivision built by Henry Wingard. This line was "taken up" by Wingard and used to supply water to his residential development. The Scott's Furniture property was served by the

Northwood Road water line from the time it was leased and developed by witness Bryson Scott's father. That property was never served by the two inch line referenced in the resolution because the two inch line was disconnected and moved to Lakewood at least ten years before the furniture store was built.

Defendant's second stated ground likewise fails under the applicable case law. A Rule 59 Motion, as elucidated under Rule 60 and applicable case law, must be based upon new matter which was not brought up at trial through no fault of Movant or trial evidence which was overlooked by the trial court. A Movant may also ask the Trial Court to reconsider an issue which the Trial Court misunderstood, failed to apply, consider, or rule on an issue. Elam vs. SCDOT 361 S.C. 9 60 2S.E.2d 972,780 (2004); Atlantic Builders and Contractors vs. Lewis 398 S.C. 323 730 S.E.2d (2011). None of these grounds are available or persuasive for the Defendants in the instant case.

II

Did the Court correctly rule that Henry Wingard, his heirs and assigns, were not entitled to an agreement in perpetuity?

As the Court correctly pointed out, the September, 1961 agreement is silent as to the term of the agreement. Under the prevailing and well-settled case law in South Carolina, such agreements are terminable at will by either party upon reasonable notice. Childs vs. City of Columbia, Supra. It is undisputed that Plaintiff gave Defendants notice of its intent to terminate the Agreement in 2013 unless the

Scott's Furniture Property was annexed into the Town of Lexington. In an effort to defeat the reasoning of Childs and cases which follow it, Defendants have attempted to lump the September Agreement and the October Resolution together as one agreement. Their argument then takes the erroneous position that, taken together, these documents entitle Defendants to water service to the Scott's Furniture Property in perpetuity. The argument fails for the following reasons:

First, as pointed out above, the October Resolution is not an agreement at all. It is an action of the Town Council disposing of a two inch line taken out of service when it was replaced by a new six inch line on Northwood Road by the Plaintiff in 1961-1962. Wingard's signature on the resolution is superfluous. The Resolution merely allowed Wingard to remove the old unused two inch pipe on Northwood Road and use it to build a water line to his Lakewood residential subdivision.

Second, the Scott's Furniture Property lay undeveloped until the furniture store was built over ten years after Wingard "took up" the unused two inch pipe and moved it to Lakewood. According to Defendant's own witness, Bryson Scott, the Scott's Furniture Property was never served by the two inch line which was the only subject of the October resolution. Therefore, water service to the Scott's Furniture Property could not have been the object of the October resolution.

Third, as the Court correctly pointed out in her Order, South Carolina law disfavors agreements in perpetuity. Such an agreement will not be upheld unless the agreement expressly provides that an agreement in perpetuity is contemplated by the

parties. [See page 5 of the Court's May 4th Order]

Assuming, arguendo, that the October resolution could be deemed to be part of the same agreement with Wingard, it provides no support for Defendants' claim of a perpetual right to water service because it leaves out the crucial operative word "forever." The full term "heirs and assigns forever" would be necessary to convey a perpetual right to water service for Wingard's heirs and assigns. Cresswell vs. Bank of Greenwood 210 S.C.47 41SE.2d 393(1947)

Finally, this Declaratory Judgement Action only involves the Scott's Furniture Company Property which is contiguous to the limits of the Town of Lexington. There is no mention of the Lakewood Subdivision residential property in the Complaint. No demand has been made to annex the Lakewood residential property, most of which is not contiguous to the Town Limits.

III

Do Defendants' misconstrue the nature of the instant Complaint as an action for Rescission?

Defendants use the words "rescission" and "rescind" no less than six times in their Motion. Neither the Complaint nor the "Counterclaim" pray for rescission in the instant case. Defendants apparently confuse the terms "terminate" and "rescind."

In this confusion, Defendants seem to believe that the Court's declaration in the instant case entitles them to a return to the status quo ante. [See the beginning of this argument on page two of Plaintiff's motion] While it is true that a rescission of a contract places the parties in the same position as they were if the contract had not existed ab initio,

this argument leads to an absurd result and one unfavorable to the Defendants. If the Courts declaration is deemed to be a rescission, then the return to the status quo ante would require Defendants to return the two inch pipe to the Town of Lexington. Because the original two inch pipe no longer exists according to Witness Allen Lutz, this would indeed be a Herculean task for Defendants. It would also mean that water service to the Scott's Furniture Property would not exist.

Rather than entertain Defendants' Rescission arguments leading to an absurd result, Plaintiff urges the Court to deny the Motion and let its well-reasoned Order stand.

Respectfully Submitted,

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By:

October 24, 2020

/s/ Clifford O. Koon, Jr.
Attorneys for Defendant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

May 25, 2021

RECEIVED
May 25 2021
SC Court of Appeals

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