THE STATE OF SOUTH CAROLINA
In the Court of Appeals



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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly

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C.A. No. 2012-CP-04-02770

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West Anderson Water District, .....Appellant,

v.

City of Anderson, South Carolina, .....Respondent.

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# INITIAL REPLY BRIEF OF APPELLANT

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## ARGUMENTS IN REPLY

At its heart, this appeal involves whether the City of Anderson ("City") is entitled to serve potable water to a new Michelin North America, Inc. ("Michelin") plant ("Michelin II") located within the West Anderson Water District ("District"). The City argues that the District provided broad consent to allow the City to serve an entire industrial tract located within the District for the thirty year term of the Water Sale and Purchase Agreement ("Agreement") executed by the parties in 2002, regardless of the customer or the nature of the customer's contract. The District contends that it provided only a narrow consent relating to a then-existing Michelin plant ("Michelin I") that was served pursuant to a contract between Duke Energy Corporation ("Duke") and Michelin. The District is not seeking to undo the Agreement or to walk away from the commitments it made at that time, but rather is seeking to prevent the City from enlarging the Agreement beyond its original scope to include additional contracts and customers.[1]

### I. The documents executed at the time of the Agreement only include the contract to serve Michelin I.

It is not disputed that Michelin II is situated within the District and outside the City's limits. Nor is it disputed that, as a general rule, a city may only act within its limits. *See Childs v. City of Columbia*, 87 S.C. 566, 570, 70 S.E. 296, 298 (1911).

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[1] Contrary to the implication in Footnote 1 of the City's brief, the trial court did not make a finding that the City proved damages of $391,639.45. The trial court dismissed the City's counterclaim for damages, and the District contends that ruling was correct even if this Court reverses the trial court's determination on the merits of the right to serve issue. As established by the cross-examination of Jeff Caldwell, the City did not incur any expenses that were specific to providing service to Michelin II. (Tr. at 286:10-308:7, R. at ____).

There are two general statutory provisions that allow a city to provide water service to an area outside its municipal boundaries, S.C. Code Ann. §§ 5-7-60 & 5-31-1910. Both of these statutes tie the service not to an area but to specific contracts between the municipality and customers.[2] As set forth in § 5-7-60,

> Any municipality may perform any of its functions, furnish any of its services, . . . , and make charges therefor and may participate in the financing thereof in areas outside the corporate limits of such municipality **by contract** with any individual, corporation, state or political subdivision or agency thereof or with the United States Government or any agency thereof, subject always to the general law and Constitution of this State regarding such matters, **except within a designated service area for all such services of another municipality or political subdivision, including water and sewer authorities, . . . . *Provided,* however, the limitation as to service areas of other municipalities or political subdivisions shall not apply when permission for such municipal operations is approved by the governing body of the other municipality or political subdivision concerned.**

(emphasis added). Nothing in this section gives a municipality the exclusive right to serve territory outside its municipal limits.[3] Instead, this section is geared toward consent as to individual contracts between municipalities and customers located outside the city limits and within the service area of another provider.

The Agreement was entered in connection with the purchase of Duke's water system by the Anderson County Joint Municipal Water System ("Joint System") and the City. The Joint System purchased the wholesale system as set forth in the Second Amendment to the Asset Purchase Agreement. (Def. Ex. 26, R. at ____). As discussed in the District's Appellant's brief, the City purchased the "retail assets" as set forth in the Asset Sale Agreement. (Def. Ex. 27, R. at ____). These two agreements plainly set forth

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[2] As correctly noted by the City in Footnote 7 of its brief, § 5-31-1910 is not applicable in this case because the area in question is not contiguous with the City.

[3] As reflected in Section I(B) of the City's brief and in apparent recognition of these statutory provisions, the City is not arguing that it purchased service area from Duke.

the assets acquired from Duke. Included among those assets is the contract to serve Michelin I. (*See* Def. Exs. 26 and 27 at 1, ¶ 2.2, Ex. A, Schedule 5 (5.5), R. at ____). The Michelin I contract was the only industrial contract within the District specified as part of that sale. Thus, the only consent that the District provided at the time of the Agreement with respect to S.C. Code Ann. § 5-7-60 was to the contract for service to Michelin I.

## II. The Agreement and the contemporaneous documents discuss service to a customer, not to a "site."

The Agreement only references Michelin once, as follows:

> **It is presently intended by the parties hereto that the City of Anderson will serve** (1) two industries, BASF and Owens-Corning, located within the boundaries of Starr-Iva Water and Sewer District; and (2) **the industrial facilities of Michelin, which are located within the boundaries of West Anderson Water District.** Both Starr-Iva Water and Sewer District and West Anderson Water District consent to the City of Anderson's providing such service to these industries. **However, such consent is strictly limited to the provision of service to these named industrial customers and no further provision of service by the City of Anderson shall be made to any customer located within the boundaries of Starr-Iva Water and Sewer District or within West Anderson Water District without the written consent of such Purchaser.**

("Michelin Clause). (Pl. Ex. 5 at 2-3, R. at ____) (emphasis added). As acknowledged by the City, this was a specifically negotiated clause designed to address a disagreement between the parties. In the Facts section of it brief, the City states that this issue was resolved by December 7, 2001. This resolution is reflected in a letter written by the City attorney on that date, which states, "The City will serve the Michelin plant which is to be located in the West Anderson District. The City will not utilize the 24-inch line to serve other customers within the West Anderson Water District." This letter is consistent with the testimony of Steve Wilson, the general manager of the District, who testified that it

was his understanding that the Agreement pertained to the Michelin I plant. (Tr. at 138:14-143:24, R. at ____). The Michelin Clause was added to the next draft of the Agreement dated December 15, 2001, and it appeared in all subsequent drafts and the executed Agreement. (Pl. Exs. 19, 23-25, Def. Ex. 5, R. at ____).

Thus, and contrary to the arguments of the City, these documents reference customers and facilities, not sites. Moreover, the Michelin Clause provides that it is to be "strictly limited." The trial court's order and the City's argument have expanded this clause well beyond its terms by providing that the City has the exclusive right to serve potable water to any customer on the property owned by Michelin at the time of the Agreement for the duration of the Agreement.

## III. The City has yet to offer any construction of the Agreement that gives the Michelin Clause any meaning.

The City's brief offers no treatment or analysis of the Michelin Clause, nor does it explain how its argument and the Court's construction can be reconciled with the language that the "consent is strictly limited to the provision of service to these named industrial customers and no further provision of service by the City of Anderson shall be made to any customer located within the boundaries of Starr-Iva Water and Sewer District or within West Anderson Water District without the written consent of such Purchaser." (Pl. Ex. 5 at 2-3, R. at ____). The District consented to Michelin I. It continues to consent to Michelin I. It does not consent to an additional customer served by a separate meter under a separate contract (Michelin II). (Def. Exs. 48-49, R. at ____; Tr. at 294:4-20, R. at ____).

There is no way to reconcile the language of this clause with the trial court's ruling "that the City is entitled to provide potable water and related services to the

Michelin Site as that site is shown on the Territorial Map that is attached to the Agreement as Exhibit D during the term of the Agreement." (Order at 22, R. at ____). This ruling is not limited by customer, facility, ownership, or contract and allows the City to serve any customer on the property. As such, the ruling does not reflect the limited consent contained in the Agreement.

## IV. The District could not consent to the broad "service area" argued by the City.

As set forth above, the District and the City disagree about the nature of the consent found in the Agreement. Moreover, the District could not have provided the consent urged by the City even if that had been the intent at the time because a governmental entity cannot enter contracts that bind its successor councils when those contracts relate to a governmental function of that governmental entity. *See, e.g., Cunningham v. Anderson Cnty.*, 402 S.C. 434, 441-50, 741 S.E.2d 545, 550-54 (Ct. App 2013) *cert. granted* August 22, 2014; *City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth.*, 325 S.C. 174, 178-82, 480 S.E.2d 728, 731-32 (1997); *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 131-36, 459 S.E.2d 876, 880-83 (Ct. App. 1995) ("*Cowart I*"), *aff'd* 324 S.C. 239, 241-42, 478 S.E.2d 836, 837-38 (1996) ("*Cowart II*"); *Newman v. McCullough*, 212 S.C. 17, 25-26, 46 S.E.2d 252, 256 (1948). Any such agreement would be *ultra vires* and unenforceable.

The City does not contest that the Agreement here implicated the District's sole governmental function. Instead, it argues that it was a minor delegation. As evidenced by the long history of dispute over service to this large industrial tract, the provision of potable water service to an industrial customer is not a minor matter in terms of either the size of the tract or the importance of the business. The only governmental service of the

District is the provision of water service within its boundaries. *City of Beaufort* at 180, 480 S.E.2d at 732. As such, "public policy surely demands" that the District's right to provide water within its own boundaries "be left relatively unimpaired." *Id.* The District's board at the time of the Agreement could not take that power to decide whom to serve away from later boards. Just as in *City of Beaufort* and *G. Curtis Martin Invest. Trust v. Clay*, 274 S.C. 608, 266 S.E.2d 82 (1980), the District would have the ability to serve Michelin II but for the City's construction of the Agreement, which the City argues completely strips the District of any right to serve any customer located on that property for the thirty year duration of the Agreement. Accordingly, as in those cases, such an agreement is invalid.

The City further argues that the District's enabling legislation allows it to enter agreements that would bind successor boards. In making this argument, the City relies on S.C. Code Ann. § 33-36-1360(A)(9), which provides that an entity like the District can enter contracts of "short or long duration." Although the cases cited by the District do not contain identical language, they all contain the rule that a governmental entity may not enter contracts that bind successor boards as to governmental functions unless clearly authorized by the enabling legislation. *Cowart II* at 242, 478 S.E.2d at 838. The language cited by the City does not meet this rule. *See Cunningham* at 447, 741 S.E.2d at 552 (finding that provision allowing a county council to employ an administrator for "a definite term" failed to provide the requisite clear authorization needed to bind successor council members to an agreement implicating a governmental function).

Contrary to the City's argument, the District does not seek to dismantle the Joint System. Indeed, the enabling legislation behind the Joint System provides the kind of

clear authorization contemplated under the *Cowart* line of cases. S.C. Code Ann. § 6-25-128 states that a joint water system may enter into contracts "concerning the sale or purchase of capacity and output from a project" for up to 50 years. Thus, the term of the Agreement is authorized and appropriate as it relates to the sale of water by the Joint System. However, this statute does not make any provision for a member district to enter an agreement that changes its boundaries or its ability to serve customers within those boundaries, much less to enter into an agreement that would bind successor boards on this point.

## CONCLUSION

For these reasons and those contained in the District's Appellant's brief, the trial court erred in ruling that "the City is entitled to provide potable water and related services to the Michelin Site as that site is shown on the Territorial Map that is attached to the Agreement as Exhibit D during the term of the Agreement." The District did not and could not consent to allowing the City the unfettered right to serve a portion of its territory for thirty years. Therefore, the trial court's order should be reversed and this case should be remanded for entry of judgment in the District's favor.

Respectfully submitted,

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June 1, 2015

THE STATE OF SOUTH CAROLINA
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C.A. No. 2012-CP-04-02770

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**PROOF OF SERVICE**

I certify that I have served the *Initial Reply Brief of Appellant, West Anderson Water District* and *Additional Designation of Matter to be Included in the Record on Appeal of Appellant, West Anderson Water District* on June 1, 2015, by mailing copies of the same via United States Mail, postage prepaid, to the following:

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June 1, 2015



The Honorable Jenny Abbott Kitchings
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Re: *West Anderson Water District v. City of Anderson, South Carolina*
Case No.: 2012-CP-04-02770
Appellate Case No.: 2014-002488
HSB No.: 13924.0003

Dear Ms. Kitchings:

Enclosed herewith for filing is an original and one (1) copy each of the *Initial Reply Brief* and *Additional Designation of Matter to be Included in the Record on Appeal of Appellant, West Anderson Water District* regarding the above-referenced case together with a Proof of Service. Please file the originals and return a clocked copy to me in the enclosed self-addressed stamped envelope.

Very truly yours,

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill

SPS/jmb
Enclosures

cc: Frank H. Gibbes, III
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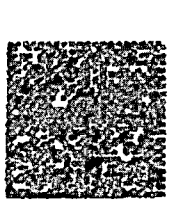




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