THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly

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

West Anderson Water District, ...Appellant,

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding the West Anderson Water District ("District") could enter a valid agreement restricting the District's ability to provide water to customers located within its boundaries, its sole governmental function, that would bind future boards for at least thirty years?

2. Did the trial court err in its construction of the provisions of the Water Sale and Purchase Agreement (the "Agreement") relating to the City of Anderson's ability to provide potable water to a specific customer located within the District's boundaries?

STATEMENT OF THE CASE

The District brought this action on August 17, 2012 seeking a determination as to who has the right to provide potable water to a newly constructed manufacturing plant ("Michelin II") located within the District. (R. at 28-36). The City of Anderson ("City") answered and counterclaimed, contending that it bought the right to serve the property where Michelin II is located. (R. at 37-48).

The parties filed cross-motions for summary judgment in which each claimed it had the right to serve Michelin II under the plain and unambiguous language of the Agreement entered by the parties and others in connection with the formation of the Anderson Regional Joint Water System ("Joint System"). (R. at 53-106, 107-123). The District, citing the *City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth.*, 325 S.C. 174, 480 S.E.2d 728 (1997) line of cases, further argued that it did not have the ability to consent to allowing the City to provide service to Michelin II. Both motions were denied "as being questions of fact." (R. at 1-2).

This matter was tried before the Hon. R. Keith Kelly on August 12 and 13, 2014. Prior to trial, each party submitted a pre-trial brief addressing its legal arguments. (R. at 124-148, 149-181). The parties moved all exhibits into evidence at the start of the trial pursuant to agreement and certain in limine rulings made by the trial court. (R. at 207-1). At the close of the evidence, the District sought a directed verdict based on the arguments raised in its pre-trial brief and the evidence presented at trial. (R. at 494:23-497:6). The trial court denied the motion.

Following the presentation of evidence, the trial court provided the parties the opportunity to submit a letter and bullet point summary. (R. at 497:8-498:3, 181-185). After receiving these materials, the trial court issued an order dated September 19, 2014

("Order") based on its determinations regarding the Agreement's validity and construction. (R. at 3-24). The Order declares 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." (R. at 24). The Order dismissed the City's counterclaims with the exception of its request for a declaratory judgment based on the Agreement.[1]

After receiving the Order on September 24, 2014, the District served a timely motion to alter or amend on October 2, 2014. (R. at 192-201). The motion challenged the findings of fact and conclusions of law contained in the Order and incorporated the arguments presented by the District in its summary judgment motion and memoranda and in its pre-trial brief and post-trial submissions to the Court. (*Id.*) The trial court denied the motion by order dated October 30, 2014. (R. at 25-27). The District received written notice of the entry of this order on November 7, 2014 and timely filed this appeal on November 18, 2014.

[1] The trial court dismissed the City's counterclaim for damages based on its rulings about the Agreement. (R. at 24). The District contends this ruling was correct, even if this case is reversed. The City did not put forward any evidence of damages relating to Michelin II as shown in the testimony of Jeff Caldwell, utilities director for the City. (R. at 433:10-455:7). That testimony establishes that all of the damages claimed by the City pre-date Michelin II and were assessed based on the City's membership in the Joint System, not anything specific to Michelin II or the Michelin property. The District moved for directed verdict on this ground. (R. at 495:1-496:16).

FACTS[2]

I. The District was formed in 1971 to provide water service within its boundaries.

The West Anderson Rural Water and Sewer Company, Inc. was incorporated on July 30, 1971 "[t]o acquire, construct, maintain, operate, and provide water distribution and supply facilities . . . to individuals, farms, businesses, corporations and political subdivisions" within a defined territory. (R. at 499-503). On February 19, 1973, the Anderson County Water Authority granted the District a water franchise and included a service area description. (R. at 504-507). On October 18, 2001 and pursuant to S.C. Code Ann. § 33-36-1320, the District filed articles of conversion and became a public service district named the West Anderson Water District. (R. at 508-511). At that time, the District included a geographical description of "the public service district's service area." The District has continually served as a valid public service district ever since. (R. at 512). The members of the District's Board serve staggered terms and have changed since the time of the Agreement. (R. at 330:17-331:21).

All filed property descriptions of the District in the record include the real property where Michelin II is located. (*See* R at 499-511). The District served the Michelin site prior to the construction of Michelin I. (R. at 298:11-14). The City admits that the Michelin site "is located within Plaintiff West Anderson's geographic boundaries." (R. at 1229-1230).

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[2] As addressed in the District's post-trial motion, numerous of the findings of fact in the trial court's order paraphrase or summarize the underlying source documents. (R. at 192-201). The District disagrees with many of these characterizations and has cited to the Exhibits themselves rather than the trial court's order. To the extent these documents are unambiguous contracts, their meaning presents a question of law and this Court should not be bound by the trial court's characterizations.

II. Area water providers, including the District and the City, joined together to purchase the water system previously owned by Duke Energy Corporation.

A. The City and the District entered the Agreement.

The District was a member of the Anderson County Water Association ("Association"), which was a partnership of rural and municipal water districts providing services to customers in Anderson and Pickens Counties. In early 2000, the Association's members entered into an agreement to purchase the entire water system owned by Duke Energy Corporation ("Duke"). (R. at 1051-1111). The City was not a party to this agreement.

During this time, Michelin North America, Inc. ("Michelin") sought to build a plant within the District ("Michelin I"). Duke entered into negotiations with Michelin to be its water provider, and the District objected. (R. at 221:10-19). Although the District contested Duke's right to provide service to Michelin I, the District ultimately did not bring legal action pending the closing of the transaction with Duke as to the entire water system. (R. at 221:20-222:2). As negotiations with Duke continued, the Anderson Regional Joint Water System ("Joint System")[3] was formed to purchase the wholesale component of the Duke water system and the City separately purchased Duke's retail water system. (R. at 228:9-15, 1051-1111).

On or about March 21, 2002, constituent entities of the Joint System, including the City and the District, entered into the Agreement. (R. at 1051-1111). The term of the

[3] The Joint System was organized under the provisions of S.C. Code Ann. § 6-25-5 *et seq.*, as a joint water system to serve the interests of its members, its citizens, and its customers and to accommodate the desires of its members in projects and financings. The Joint System was formed "for the purpose of planning, financing, developing, constructing, acquiring, improving, enlarging, selling, leasing, maintaining and operating water facilities within the service areas of its respective members." (R. at 1054).

Agreement was thirty years, expiring on July 15, 2032. At the time of the Agreement, the City was allocated 10.46 million gallons per day ("MGD") (32.7 % of the system's capacity), and the District was allocated 2.24 MGD (7.0% of the system's capacity).[4] (R. at 1095).

The District and the City each look to different provisions of the Agreement to support their arguments that they are entitled to serve Michelin II, a new facility located on the same tract of land as Michelin I. The District's arguments rest on the following language, which is the only provision in the Agreement that mentions Michelin:

> **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). (R. at 1055-1056) (emphasis added). The provisions at the beginning of the Agreement, including the above-quoted language, were included as consideration for the Agreement by operation of the following language: "**NOW, THEREFORE**, in consideration of the premises hereinabove set forth and the agreements of the parties hereunder, Seller and Purchasers agree as follows . . . ." (R. at 1057).

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[4] In March 2002, Michelin owned and operated a single rubber processing plant located entirely within the boundaries of the District, Michelin I. At that time, the projected usage for Michelin of .55 MGD was limited to that anticipated for Michelin I. (R. at 675).

The City points to § 6.02 of the Agreement found in the Article titled "Miscellaneous" ("Map Clause"). This section provides, "[i]n order to successfully plan and finance additions to each Purchaser's System, and to avoid future disputes, the parties have agreed upon a Territorial Map of the territories of the parties to the Agreement in order to set out the areas each intends to serve. The Territorial Map is attached hereto as Exhibit D." (R. at 1088). This paragraph does not contain the phrase "service area."

The Agreement further contains a severability clause providing that in the event any provision is found to be illegal or invalid, the remainder of the Agreement will remain intact. (R. at 1090-1091). Concurrent with the Agreement, the City and the Joint System entered an Operating Agreement that sets forth the groundwork for the parties' joint use of the newly acquired Duke water system, including the wholesale system purchased by the Joint System and the retail system purchased by the City. (R. at 1077-1078, 1040-1051).

B. The City purchased specified retail assets from Duke that did not include franchises or territory.

As set forth in the Second Amendment to Asset Purchase Agreement between Duke and what would become the Joint System and the Asset Sale Agreement between Duke and the City, the City only purchased specified "retail assets", including water mains and pipes and certain contracts (including Duke's contract to provide service to Michelin I). (*See* R. at 913-948 at 1, ¶ 2.2, Ex. A, Schedule 5, 949-1039 at 1, ¶ 2.1, Ex. A, Schedule 5). "Retail assets" for purposes of these documents included those items listed in Exhibit A to the Agreements, which reads as follows:

> (a) All water mains and pipes used in the Seller's water system in Anderson County, South Carolina that are (i) owned by the Seller or in

which the Seller has an ownership interest and (ii) located within the area described on Schedule 1 attached hereto, but excluding the water mains and pipes described on Schedule 2 attached hereto (the water mains and pipes that are included in the Retail Assets are referred to herein as the "Retail Mains and Pipes");

(b) All recorded and unrecorded water distribution and water transmission easements, rights of way and rights of encroachment to the extent the same contain (but only to the extent the same contain) Retail Mains and Pipes and are: (i) owned by the Seller or in which the Seller has an ownership interest; (ii) located within the area described on Schedule 1 attached hereto; and (iii) used by the Seller in connection with the Retail Mains and Pipes;

(c) All fire hydrants, meters and valves that are (i) owned by the Seller in which the Seller has an ownership interest and (ii) connected to and served by the Retail Mains and Pipes;

(d) The fixed assets listed on Schedule 3 attached hereto;

(e) The Real Property (including the improvements thereon) listed on Schedule 4 attached hereto;

(f) All of the Seller's rights under all Contracts relating exclusively to the Retail System, including those Contracts listed on Schedule 5 attached hereto, other than any rights arising as a result of the breach of any such Contracts prior to the Closing Date and other than any Excluded Contracts;

(g) All of the Seller's books, files, records, documents, data, plans, proposals and all other recorded knowledge, whether in written, electronic, visual or other form, related exclusively to the Retail Business; and

(h) All Accounts Receivable.

The Retail Assets shall not include any other assets including (i) any water main or pipe associated with the Duke Water System to the extent the same is located outside of the geographic area described on Schedule 1 attached hereto; (ii) any land, building or structure, water storage tank or facility or associated pumping and related equipment not otherwise included above in the Retail Assets, including the Duke Water System water treatment plant and related assets; and (iii) any easement, right of way or other right appurtenant to or otherwise associated with any of the assets described in (i) and (ii) in this sentence.

(R. at 922, 990). Exhibit A included a Schedule 1, which was titled "Description and Geographic Area of Retail Mains and Pipes." (R. at 924-926, 991-993). That description references "the Michelin Plant property." (R. at 925, 992). As noted by the trial court,

the map attached to the Agreement mirrors the one attached to these agreements, which shows the location of the retail assets. (*Compare* R. at 1110-1111 *with* R. at 927).[5]

The term "contract" as defined in the Asset Sale Agreement excludes "permits." (R. at 956). The term "permits" includes "all licenses, permits, authorizations, registrations, certificates of occupancy, **franchises** and approvals of any nature issued by any Governmental Authority . . . ." (R. at 958 (emphasis added)).

III. Michelin adds a second plant on its property located within the District.

In 2012, nearly ten years after the parties entered into the Agreement, Michelin announced plans to build a second plant on its property located within the District. The City asserted its right to serve Michelin II without seeking any additional consent from the District. (R. at 1216-1217, 235:2-13). The District informed the City that it objected to the City's provision of water and related services to Michelin II and told the City that any service the City provided to the new facility was at its own risk. (*See* R. at 515, 516, 333:5-334:14). This action followed.

Michelin II is now operational and being served by the City pursuant to a new contract with a separate meter and separate billing from Michelin I. (R. at 1218-1221, 1222-1225, 441:4-20). The District stands ready to provide potable water service to Michelin II and has the requisite capacity and approvals. (R. at 517-519, 241:13-23, 305:15-22).

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[5] In Paragraphs 12 and 13 of the trial court's findings of fact, the trial court incorrectly characterizes this narrative and map as service area descriptions, but instead the plain language of these documents shows that these descriptions show the whereabouts of the conveyed retail assets. William McCoy, the co-project manager for the Joint System agreed that "it would be fair to say that the attached map shows where the retail mains and pipes are located." (R. at 304:3-5). This court is free to address errors relating to these unambiguous contracts as the construction of these documents are a matter of law, not a question of fact.

STANDARD OF REVIEW

On appeal from a declaratory judgment action, the Court looks to the basis of the claim for declaratory relief to determine whether the case is legal or equitable in nature. *Gordon v. Colonial Ins. Co.*, 342 S.C. 152, 155, 536 S.E.2d 376, 378 (Ct. App. 2000). Here, the root of the underlying claim is for construction of a contract, and thus, it is subject to review as an action at law. *See Jacobs v. Serv. Merch. Co.*, 297 S.C. 123, 127, 375 S.E.2d 1, 3(Ct. App. 1988). As such, this Court reviews the trial court's rulings to determine if they are supported by any evidence or governed by an error of law. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

In contract cases, construction of an unambiguous contract is a matter of law for the Court. *Pearson v. Church of God*, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996); *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 676, 301 S.E.2d 142, 144 (1983). If a contract is ambiguous, however, its construction becomes a question of fact. *Small v. Springs Indus., Inc.*, 292 S.C. 481, 483, 357 S.E.2d 452, 454 (1987).

ARGUMENTS

At trial, the City and the District painted two very different pictures of the Agreement, which was made in 2002 when Michelin I was a new facility. The District argued it provided grudging consent to the City's service of Michelin I so that the Agreement would go through. (*See* R. at 232:2-12). The City argued it purchased as "service area" the property owned by Michelin at the time of the Agreement. (*See* R. at 403:24-25). The trial court accepted the City's argument in full and issued an order that went beyond merely deciding the issue of which entity would serve Michelin II to find "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." (R. at 24).

As will be shown below, the City and the District did not and could not have made a valid agreement ceding territory from the District to the City for a thirty-year term. Therefore, the trial court erred as a matter of law in finding there is a valid agreement between the parties for the City to serve the entire property owned by Michelin regardless of the use or the occupant for the term of the Agreement.[6]

I. The City and the District could not have entered a valid agreement by which the City acquired the right to serve customers within the District for the thirty-year term of the Agreement.

A. The District cannot transfer service areas within its boundaries in such a way as to bind successor boards.

1. Any agreement that binds successor boards of a political subdivision with respect to a governmental function is invalid.

South Carolina courts have repeatedly struck down as invalid contracts entered into by governmental entities that bind their successor bodies or councils through contracts when those contracts relate to a governmental function of that governmental body. *See, e.g.*, *Cunningham v. Anderson Cnty.*, 402 S.C. 434, 441-50, 741 S.E.2d 545, 550-54 (Ct. App 2013); *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*"),

[6] The trial court's ruling purports to extend beyond the issue of Michelin II to cover any use of the property owned by Michelin for the term of the Agreement. The Order further contains language relating to industrial sites located within the Starr-Iva Water and Sewer District. Those sites were not part of this case, and in fact, are the subject of a separate lawsuit currently pending in the District of South Carolina. *Starr-Iva Water & Sewer Dist. v. City of Anderson*, No. 8:12-cv-02365 (D.S.C. filed Aug. 17, 2012). For these reasons and as raised in its post-trial motion, the District contends the Order is overbroad and includes matter not before the trial court.

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). The trial court committed an error of law in failing to apply this rule in this case.

Contracts for governmental functions are separate and distinct from proprietary contracts, which do not suffer from the same limitations. "For purposes of determining the validity of a contract requiring or involving a particular action by a municipality, the test for whether the action is governmental or proprietary should be 'whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.'" *City of Beaufort* at 179-80, 480 S.E.2d at 731 (quoting *Cowart I* at 133, 459 S.E.2d at 881).

With respect to the service at issue here, "South Carolina's courts have repeatedly held that a municipality's provision of water service to residents and non-residents is a governmental function." *Id.* at 179, 480 S.E.2d at 731; *Calcaterra v. City of Columbia*, 315 S.C. 196, 197, 432 S.E.2d 498, 499 (Ct. App. 1993). "This rule should hold especially true" for an entity like the District, "which has as its sole function" the provision of water service. *City of Beaufort* at 180, 480 S.E.2d at 732 (holding that a contract relating to the sale of water involved a governmental function of a public service district). If the governmental body has "as its sole function" the provision of water service, "public policy surely demands" that such an entity's right to provide water within its own boundaries "be left relatively unimpaired." *Id.* On this point, *City of Beaufort* relied heavily on *G. Curtis Martin Invest. Trust v. Clay*, 274 S.C. 608, 266 S.E.2d 82 (1980), stating as follows:

> *Clay* suggests that **the provision of utility service, or at least the decision whom to serve, constitutes an exercise of police power**

> **(clearly governmental) that may not be delegated**. *Clay* also suggests that **the provision of utility service is especially governmental in nature where the municipal entity at issue was formed for the specific purpose of providing such service**. Like the North Charleston Sewer District, [Beaufort-Jasper Water & Sewer] Authority was formed for the specific purpose of providing utility service in a particular service area. Furthermore, like the contested provision of the contract in *Clay*, the Contested Clauses here deprive Authority of the ability to serve persons they would have the right to serve but for the Contested Clauses, which make Authority's right to serve contingent upon Municipalities' desire to serve the customers. **Under these circumstances, the Contested Clauses are unlawful as a delegation of governmental power not only because they bind future governing boards of Authority, but also because of the nature of the delegation of power itself.**

Id. at 180-81, 480 S.E.2d at 732 (emphasis added).

In *City of Beaufort*, the invalid provision was contained in a long-term contract for the sale of water from Beaufort-Jasper Water & Sewer Authority ("BJWSA") to the City of Beaufort. *Id.* at 177, 480 S.E.2d at 730. That contract was made pursuant to express statutory authorization contained in BJWSA's enabling legislation, 1954 S.C. Acts No. 784. *Id.* at 176, 480 S.E.2d at 730. Act No. 784 empowered BJWSA "to enter into contracts for the sale of water, upon such terms as the parties shall approve, with persons, private corporations, municipal corporations, public bodies, public agencies, and with the United States Government, or any agencies thereof," and "to make contracts of all sorts and to execute all instruments necessary or convenient for the carrying on of the business of the Authority." 1954 S.C. Acts No. 784, §§ 4, 4(14), 4(16). Nevertheless, the Supreme Court ruled that the particular contractual provision restricting the district from serving in certain areas was invalid, even though contained in an otherwise valid contract. *City of Beaufort* at 182, 480 S.E.2d at 732-33. Thus, an *ultra vires* contractual provision cannot be saved by embedding it in an otherwise authorized contract, such as the Agreement.

2. The delegation of governmental power at issue here would substantially compromise the central, primary junction of the District.

City of Beaufort recognized an exception to this general rule only where the "central, primary function" of a district is not "substantially compromised." *Id.* at 180 n.4, 480 S.E.2d at 732 n. 4. The Order found that this exception applied because the provision of water to the Michelin site does not "substantially compromise" the District's authority because only one tract is in dispute. (R. at 22-24).

With regard to the impact necessary to constitute a "substantial compromise," the *Clay* case is instructive. There, the offending provision only related to a subdivision's treatment system that was not yet connected to the district's main system. *See Clay* at 610-11, 266 S.E.2d at 84. Indeed, the offending provision there did not prevent service completely but only prevented it by tie-in to a particular plant; and even that restriction expired by its terms once the subdivision system was connected to the district's other system components. *See id.* Nevertheless, that temporary restriction limited to just a small fraction of the district's territory was held invalid. *See id.* Here, the trial court went well beyond the scenario described in *Clay* and ruled that the District could completely compromise its sole governmental function by consenting to allow another entity to serve a portion of the District for at least thirty years. This ruling constitutes an error of law in light of the long-stranding precedent cited above.

This ruling minimizes both the size of the tract and the lucrative nature of industrial water service and fails to consider the nature of the delegation of board power at issue, which necessarily implicates the District's "central, primary function"—the provision of water service to all customers within its boundaries. As such, the District could not alienate that right in such a way as to bind successor boards. The Order

completely impairs the District's ability to perform its "central, primary function." Taken to its logical end, the trial court's ruling would allow one board to give away all of the District's territory and there would be nothing a successor board could do about it.

Given the term of the Agreement, any provision relating to the territory of the District would necessarily bind future District boards and implicate a governmental function. Therefore, the Agreement, if interpreted to apply to the District's performance of its governmental function entirely within its own territory, is to that extent *ultra vires* and unenforceable.

3. No statute clearly authorizes the District to bind successor boards with respect to the provision of water within the District.

The Supreme Court has noted an additional exception to the general rule prohibiting governmental bodies from binding successor bodies concerning governmental functions. *Cowart II* at 241, 478 S.E.2d at 838. This exception, first noted in *Newman*, applies "where the enabling legislation clearly authorizes the local governing body to make a contract extending beyond its members' own terms." *Cowart II* at 241, 478 S.E.2d at 838 (citing *Newman* at 23, 46 S.E.2d at 255). The test for this exception is as follows: "the enabling legislation must clearly authorize a contract **regarding a governmental function** for a term beyond the terms of the members of the local governing body." *Id.* at 242, 478 S.E.2d at 838 (emphasis in original).

The trial court cited three statutory provisions as authorizing the District to consent to allowing the City to serve within its boundaries: S.C. Code Ann. §§ 5-7-60, 33-36-1310, and 6-25-5, *et seq.* (R. at 16). However, courts may only consider the District's enabling legislation in determining whether consent is authorized. *Cowart II* at 242, 478 S.E.2d at 838 ("[T]he enabling legislation must clearly authorize a contract

regarding a governmental function for a term beyond the terms of the members of the local governing body.") (emphasis in original).

The District's enabling legislation is found in S.C. Code Ann. § 33-36-1310, *et seq*. Thus, any reference to titles 5 or 6 are not applicable to this analysis.

The first section discussed by the trial court, § 5-7-60, relates to the powers and functions of a municipality. Although this provision applies to the City, it is inapplicable to the District, which was created pursuant to § 33-36-1310, *et seq.* This statute is not found in the enabling legislation for the District and merely allows a municipality to provide services outside its boundaries under certain conditions with permission. It does not change the powers of other entities such as the District, nor does it indicate any power to enter *ultra vires* agreements. Nothing in this statute provides any indication that a district may enter an agreement changing its boundaries that would bind successor governing boards, much less the clear authorization required by *Cowart II*. Accordingly, the trial court erred in finding that this provision authorizes the District to do anything, much less that it authorizes the District to enter contracts relating to its sole governmental function that would bind future boards.

The trial court then turned to the portion of the South Carolina Code allowing a South Carolina not for profit corporation to convert to a public service district "for exclusive purposes of participating in a joint municipal water system." S.C. Code Ann. § 33-36-1310. It is under this chapter that the District was formed. The trial court found the enabling legislation authorized the action in question based on § 33-36-1360(A), and specifically language in subsections (9) and (11) that states that entities like the District may enter into contracts "of short or long duration" and may "make contracts of all kinds

and execute all instruments or documents necessary or convenient to carry out the business of the district." This language, however, falls short of "clearly authorizing" a contract "regarding a governmental function" that goes "beyond the terms" of the District's board members.

In *City of Beaufort*, BJWSA's enabling legislation gave BJWSA powers that were just as broad, if not broader, than those found in § 33-36-1360. Specifically, the Authority's enabling legislation provided the following broad grant of authority:

> **SECTION 4. Powers further.**—The Authority shall be **fully empowered** to acquire, construct, operate, maintain, improve and extend facilities which would enable it to obtain fresh water in large volume, and to distribute and sell the same, subject to the limitations set forth in Section 3, to persons, firms, corporations, municipal corporations, political divisions, and the United States Government, or any agencies thereof, at any point within its Service Area. To that end, the Authority shall have the following powers:
>
> (14) Subject to the provisions of Section 3, to enter into contracts for the sale of water, upon such terms as the parties thereto shall approve, with persons, private corporations, municipal corporations, public bodies, public agencies, and with the United States Government, or any agencies thereof.
>
> (16) To **make contracts of all sorts and to execute all instruments necessary or convenient** for the carrying on of the business of the Authority.
>
> (25) **To do all other acts and things necessary or convenient** to carry out any function or power committed or granted to the Authority.

1954 S.C. Acts No. 784, §§ 4, 4(14), 4(16), and 4(25) (emphasis added). Despite this broad grant of power, the Supreme Court held that BJWSA, whose "sole function" was the provision of water service, was not authorized to bind future successor bodies by restricting their rights to provide water to residents within Beaufort-Jasper counties. *City of Beaufort* at 180, 480 S.E.2d at 732. Similarly, this Court in *Cunningham* found that a

statute allowing a county council to "employ [a county manager] for a definite term" was not sufficiently specific to authorize a lame duck county council to enter a three-year contract with a county manager. *Cunningham* at 448, 741 S.E.2d at 553 (holding that to satisfy *Cowart II*, the statute must clearly authorize a term extending beyond the terms of the current governing body).

The same analysis applies here. Nothing in the District's enabling legislation overrules or is inconsistent with the rule of *City of Beaufort*. *See* 2001 S.C. Acts No. 78. A broad general power to contract is not sufficient to satisfy the test set forth in *Cowart II* as applied in *City of Beaufort* and *Cunningham*. Such a rule does not render these provisions meaningless as the District can enter contracts for non-governmental functions for a short or long duration.

It is irrelevant for purposes of this argument whether the District is "attempt[ing] to avoid contractual obligations that it made more than a decade ago." (R. at 19). The District disagrees with this characterization, but even assuming that the trial court is correct, this characterization will not save an invalid contract clause. The same argument was made in *City of Beaufort*, and while the Supreme Court was sympathetic to the City of Beaufort in that case, that sympathy was not enough to change the result. As stated there,

> [the] Authority benefited from these contracts for years, and we find it somewhat disingenuous for Authority now to argue that it lacked power to delegate its ability to serve Beaufort and Jasper Counties. Nevertheless, we are compelled to base our decision on controlling legal principles, which dictate that the Contested Clauses represent an unlawful delegation of governmental power.

Id. at 177 n.2, 480 S.E.2d at 730 n 2. The trial court noted this footnote on page 22 of the Order, but failed to recognize the result reached in *City of Beaufort*. In addition, in this

case, the District continues to consent to the City's service of Michelin I. It contests the City's efforts to serve within the District's territory outside that limited consent. Further, the City was cognizant of this issue at the time it entered the Agreement, and it chose to go forward despite the risk. (R. at 429:20-430:9, 513-514). Thus, the District does not believe there is anything disingenuous about its arguments here.

The trial court's last citation on this point is to S.C. Code Ann. § 6-25-5, *et seq.* This chapter relates to joint water systems such as ARJWS. Again, it is not the enabling authority for the District. The trial court correctly points out that the powers and duties listed in title 33, chapter 36 and title 6, chapter 25 are similar. *Compare* S.C. Code Ann. § 33-36-1360 *with* S.C. Code Ann. § 6-25-100. However, title 6, chapter 25 provides additional language in S.C. Code Ann. § 6-25-128 expressly stating 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. If that were the case, one board could essentially contract away the District's entire territory if it so chose and any successor board would have no recourse. Therefore, this statute does not satisfy the test of *Cowart II* either.

The arguments raised by the District as to the District's ability to provide service to customers within its boundaries in no way undermines the Agreement as a whole. The Agreement has a severability clause that allows the Agreement to remain in place in the

event any portion is found to be invalid. (R. at 1090-1091). Further, the capacity and funding matters referenced by the trial court are expressly authorized by § 6-25-128, and no party has argued those portions of the Agreement are invalid.

For all of these reasons, the trial court erred in ruling that "§ 33-36-1360 should be read to sanction contracts entered into by a public service district that extend beyond the term of its current board." (R. at 22).

4. The canons of statutory construction further support a finding that the General Assembly has not abrogated the rules set forth in *Cowart* and later cases.

The statutes cited by the trial court are no more expansive and provide no additional powers to the District than do the laws of this state with respect to other districts, cities, or counties. *Compare* S.C. Code Ann. § 33-36-1360 (powers of the District) *with* 1954 S.C. Acts No. 784 § 4 (powers of BJWSA). For many years, South Carolina Courts have held that notwithstanding the broad grant of powers given by Home Rule and enabling legislation for governmental entities, governing bodies may not bind future bodies on matters relating to governmental functions. When viewed through the canons of statutory construction, this long-standing precedent presents yet another reason why the statutes cited by the trial court do not give the District the ability to bind successor boards. *See Cunningham* at 448, 741 S.E.2d at 552-53.[7]

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[7] In *Cunningham,* the Court of Appeals provided the following discussion:

> In any event, we do not view the language . . . as *clearly* authorizing the "definite term" to extend beyond the terms of the outgoing council members. Therefore, it does not fall within *Newman*'s exception to the prohibition against binding successor governing bodies. *See Cowart II,* 324 S.C. at 241, 478 S.E.2d at 838 ("*Newman* allows an exception, however, where the enabling legislation *clearly authorizes* the local governing body to make a contract extending beyond its members' own terms." (emphasis added)); *see also 16 Jade St., LLC v. R. Design Const.*

First, the case law of this state "remains in full force and effect in South Carolina unless changed by clear and unambiguous legislative enactment." *Singleton v. State*, 313 S.C. 75, 83, 437 S.E.2d 53, 58 (1993); *see State v. Carson*, 274 S.C. 316, 319, 262 S.E.2d 918, 920 (1980) ("[T]he common law will not be impliedly changed, but only by clear and unambiguous legislative enactment will the settled rules of common law be eroded."). The law will presume "that no change in the common law was intended by any statute unless the language employed clearly indicates such intention. The rules of the common law are not to be changed by doubtful implication, or overturned except by clear and unambiguous language." *Coakley v. Tidewater Const. Corp.*, 194 S.C. 284, 284, 9 S.E.2d 724, 726 (1940). As stated in *Brewer v. Brewer*,

> [t]he legislature in the enactment of a statute will not be presumed to intend to overturn long established principles, unless such intention is made clearly to appear by express declaration or by necessary implication.

> *Co.*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012), *reh'g granted* (May 7, 2012) (holding that if a statute is in derogation of a common law right, it must be strictly construed and not extended in application beyond clear legislative intent); *Doe v. Marion*, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004), *aff'd*, 373 S.C. 390, 645 S.E.2d 245 (2007) ("[A]ny legislation [that] is in derogation of common law must be strictly construed and not extended in application beyond clear legislative intent."); *id.* ("Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable."); *State v. Prince*, 316 S.C. 57, 66, 447 S.E.2d 177, 182 (1993) ("[I]t is presumed that no change in common law is intended unless the Legislature explicitly indicates such an intention by language in the statute." (citing *Nuckolls v. Great Atl. & Pac. Tea Co.*, 192 S.C. 156, 161, 5 S.E.2d 862, 864 (1939))); *Nuckolls*, 192 S.C. at 161, 5 S.E.2d at 864 (holding that it is presumed that no change in the common-law was intended by the legislature's enactment of a statute on the same subject unless the language employed clearly indicates such an intention); *id.* ("[T]he rules of the common-law are not to be changed by doubtful implication, or overturned except by clear and unambiguous language.").

Id. at 448, 741 S.E.2d at 552-53.

> To the contrary, the legislature will be presumed not to intend to overturn the long established principles of law, and the statute will be so construed, unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication, and the language employed admits of no other reasonable construction.

242 S.C. 9, 24, 129 S.E.2d 736, 743-44 (1963) (quoting Am. Jur. 333, Section 340).

Second, the "General Assembly is presumed to be aware of the common law when enacting legislation." *Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005). Moreover, there "is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *State v. Corey D.*, 339 S.C. 107, 112, 529 S.E.2d 20, 23 (2000); *see also Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) ("Buttressing a plain reading of the statute is the Legislature's inactivity on the issue over the last forty years []. The Legislature is presumed to be aware of this Court's interpretation of its statutes. When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation.") (internal citation omitted).

It would have been easy enough for the General Assembly to have provided that entities like the District may enter into contracts beyond the terms of governing bodies with respect to portions of their service area to be served by other municipalities or districts. The General Assembly did not do that, and courts may not do what the General Assembly did not.

B. The City's ability to serve outside its corporate limits is limited by statute to narrow situations that are not satisfied here.

Duke did not and could not sell service areas or territories to the City because Duke received its franchise from the Public Service Commission, which lacks jurisdiction

with respect to municipalities. *See Glendale Water Corp. v. City of Florence*, 274 S.C.472, 474, 265 S.E.2d 41, 42 (1980); S.C. Code Ann. § 58-5-30. Thus, Duke could not have transferred the franchise to the City, even in the absence of the contractual definitions excluding franchises discussed above. Instead, the City purchased certain designated retail assets. The District has not made any claim to the retail assets the City purchased from Duke, including the contract to serve Michelin I. Instead, the District seeks to protect its right to provide water service within its boundaries.

Moreover, the City could not purchase "service area" outside its boundaries. As a rule, a city may only act within its municipal limits. *See Childs v. City of Columbia*, 87 S.C. 566, 566, 70 S.E. 296, 298 (1911) ("All powers and privileges conferred by the Constitution and statutes on municipal corporations must be held to be limited in their exercise to the territory embraced in the municipal boundaries and for the benefit of the inhabitants of the municipality, unless the Constitution or statute expressly provides that such powers and privileges may be exercised beyond the corporate boundaries, or for the benefit of nonresidents.").

Here, there are two statutes that allow cities to provide water outside the city limits under limited circumstances. However, neither of these statutes allows a city to acquire territory as found by the trial court. The City can only serve within the District by contract and with the District's consent. *See* S.C. Code Ann. §§ 5-7-60 & 5-31-1910. Section 5-7-60 allows a city to sell water outside its municipal limits if it has (1) a contract with a customer, and (2) if the customer in question is "within a designated service area" of another political subdivision, the municipality may serve "when permission for such municipal operations is approved by the governing body of the other

municipality or political subdivision concerned." Section 5-31-1910 provides that a city may enter contracts for water service with non-resident, contiguous customers provided those contracts do not exceed two years in duration.

These statutes show there are numerous problems with the trial court's ruling that the City purchased "service areas." The following facts are undisputed: (1) Michelin II is within the boundaries of the District; (2) Michelin II receives water through a new tap and pursuant to a new and different contract than Michelin I; (3) Michelin II is not within or contiguous to the City's boundaries; and (4) the District's governing board has never given permission for the City to serve Michelin II. As such, the trial court's construction of the Agreement is controlled by an error of law to the extent it holds that the City purchased service areas. *See Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 210, 417 S.E.2d 579, 582 (1992) (finding a City's agreement in contravention of a statute to be illegal).

For all of these reasons, the Order should be reversed.

II. The City does not have a contractual right to serve Michelin II.

Only one provision of the Agreement expressly treats Michelin and the District's consent for the City to serve within its boundaries, the Michelin Clause. Margaret Pope, primary author of the Agreement, testified that this provision was added because the parties had become distrustful of each other and suspicious about who would provide service to which customers. (R. at 485:15-23). At the time of these discussions, counsel for the City sent a letter to counsel for the District stating, "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 any other customers within the West Anderson Water District." (R. at 719). This confirms that the discussion, at that time, related to service to

the then-existing Michelin plant. The testimony at trial reflected that there was no contemporaneous discussion regarding future uses of the property. (R. at 327:6-15).

On its face, the Michelin Clause is a limited consent and references "industrial facilities" and "customers." It does not include any reference to the property as a whole or to additional or different customers or facilities. The trial court's Order does not include any treatment of the Michelin Clause in its Conclusions of Law, other than noting it found the Agreement to be ambiguous based on the language of the Michelin Clause and the Map Clause. (R. at 11). The Order would allow the City to serve any customer, whether it is Michelin or not, located within the shaded area on the map attached to the Agreement. This construction is patently inconsistent with the narrow consent provided in the Michelin Clause.

The trial court's construction expands the consent contained in the Michelin Clause beyond its terms to cover the whole site, regardless of use or customer. This is directly contrary to the language used in the Michelin Clause. It would have been easy enough for the parties to specify that the consent related to the Michelin property as a whole. If that were the intent, the Agreement could have simply made reference to the TMS number or a metes and bounds description for the Michelin property and stated that the right to serve customers within this area was being transferred to the City.[8] Given the plain language and narrow scope of this provision, the trial court committed an error of law in failing to give it any meaning.

[8] The District argues that this was not done because the District would not have agreed (and did not agree) to such a transfer and such an agreement would be *ultra vires* and void as a matter of South Carolina law.

A. General principles of contract interpretation support the District's construction of the Agreement.

Generally, contract language must be construed according to its plain meaning. *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994). If the language is clear and unambiguous, it determines the rights and obligations of the parties as a matter of law and no additional evidence will be considered. *Id.* However, "the subject matter and purpose of the contract are to be considered in ascertaining the intention of the parties and the meaning of the terms they have used . . . [T]he dry words of the contract should, if possible, be so interpreted as to subserve, not subvert, such intention." *Dibble v. Dibble*, 248 S.C. 165, 181, 149 S.E.2d 355, 364 (1966). "Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail. . . ." *Parker v. Byrd*, 309 S.C. 189, 193, 420 S.E.2d 850, 853 (1992). Moreover, contracts must be interpreted as a whole "so as to give effect to all of their provisions." *Reyhani v. Stone Creek Cove Condo II Horizontal Prop. Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997).

In determining whether an ambiguity exists, the contract is read as a whole document so that an ambiguity cannot be created by pointing out a single sentence or clause. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). "[A]n ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double

meaning." *Carolina Ceramics, Inc. v. Carolina Pipeline Co.*, 251 S.C. 151, 155-56, 161 S.E.2d 179, 181 (1968).

B. The Agreement is not ambiguous.

As argued by the District, the only fair reading of the Agreement is that the District agreed to allow the City to serve a single industrial facility within its borders and that there was no such consent as to other customers or facilities. In the Michelin Clause, the Agreement provides narrow language allowing the City to serve "the industrial facilities of Michelin, which **are located** within the boundaries of West Anderson Water District." (Emphasis added). This clause is worded in the present tense and clearly only allows service by the City to facilities located in the District at the time of the Agreement. (R. at 1055-1056). The District's consent is limited to "providing such service to these industries." That consent is not subject to a broad reading as set forth in the next sentence, "[h]owever, 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."

The above quoted language from the Agreement is not a mere recital, but rather is part of the consideration for the Agreement as a whole. As such, it carries the same force and effect as any other provision of the Agreement. *See M & M Group, Inc. v. Holmes*, 379 S.C. 468, 475-76, 666 S.E.2d 262, 266 (Ct. App. 2008).

The trial court disregarded this clause and instead focused exclusively on the Map Clause. As set forth above, the map attached to the Agreement as Exhibit D simply shows the real property where the specifically identified industrial facilities were located

at the time of the Agreement. It does not and cannot change the boundaries of the member districts, nor can it be read to confer consent beyond the express terms of the Michelin Clause. As set forth in the Agreement, the map merely shows areas where each party to the agreement "intends to serve." Accordingly, the inclusion of the map does not render the Agreement ambiguous, nor does it change the boundaries of the member entities. This construction is bolstered by the District's arguments that the District and the City could not have reached an agreement wherein the District essentially would have ceded its territory to the City.

C. The trial court failed to consider the applicable canons of construction and the language of the Agreement in its analysis.

As argued above, the trial court's construction renders portions of the Agreement *ultra vires* and unenforceable. Such a construction is improper given the plain language construction proposed by the District. "An agreement capable of an interpretation which will make it valid or legal will be given such interpretation if the agreement is ambiguous. Such interpretation is preferred to one which renders it invalid." *Romanus v. Biggs*, 214 S.C. 145, 152, 51 S.E.2d 503, 505 (1949). If an agreement can be read in one of two ways, one of which is fully valid and enforceable and the other of which is not, a court must construe the contract in favor of validity. Therefore, the trial court erred in its construction of the Agreement.

The trial court's construction runs contrary to the basic principles set forth in *City of Beaufort* and the statutory provisions regarding when a city may provide service outside its boundaries. Because this construction is in derogation of the District's sovereignty and encroaches upon the District's boundaries, this Court should construe this language of the Agreement strictly and only affirm on this interpretation issue if

there is clear and convincing evidence to support it. *See, e.g., Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 100, 106, 712 S.E.2d 395, 398 (2011).

In addition, the trial court's focus on the Map Clause to the exclusion of the Michelin Clause renders the portion of the Agreement specifically addressing the District's limited consent with respect to Michelin I completely meaningless. If the City bought as "service area" the entire tract owned by Michelin at the time of the Agreement, what meaning could the Michelin Clause possibly have? If the City "owned" the territory, why would it need the District's consent to provide water there under any circumstances? Such a construction would violate the rule that contracts must be construed in their entirety so as to give effect to all parts of the contract. *Reyhani* at 212, 494 S.E.2d at 468.

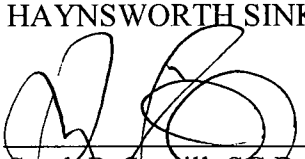
The City could not and did not purchase territory from Duke. Instead it purchased retail assets. Included among those assets was the Duke contract to provide service to Michelin I. In the Agreement, the District expressly consented to the continued service to the Michelin facilities that were located within the District at the time of the Agreement. It did not and has not provided consent to any additional service. Therefore, the trial court's order is in error.

CONCLUSION

For the reasons stated above, 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." (R. at 24). The District asks that the Court reverse the Order and remand this matter for entry of judgment in favor of the District.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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July 16, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly

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

RECEIVED
JUL 17 2015
SC Court of Appeals

West Anderson Water District, ...Appellant,

v.

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

CERTIFICATE OF COMPLIANCE

I certify that the final appellant's brief and reply brief in this matter comply with Rule 211(b), SCACR and the April 15, 2014 Order of the South Carolina Supreme Court relating to personal data identifiers.

Respectfully submitted,

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July 16, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
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The Honorable R. Keith Kelly

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

West Anderson Water District, ...Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served the following documents on Respondent on July 17 2015, by mailing copies of the same via United States Mail, postage prepaid, to the following address:

Frank H. Gibbes, III, Esquire
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Spartanburg, SC 29302

DOCUMENTS SERVED

1) Final Reply Brief of Appellant, West Anderson Water District;

2) Final Brief of Appellant, West Anderson Water District;

3) Certificate of Compliance; and

4) Certificate of Appellant.

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July 17, 2015

HAND DELIVERED
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

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, please find the following:

1) Original, unbound Final Reply Brief of Appellant, West Anderson Water District, together with sixteen (16) bound copies;

2) Original, unbound Final Brief of Appellant, West Anderson Water District, together with sixteen (16) bound copies;

3) Original, unbound Record on Appeal with included Certificate of Appellant, together with fifteen (15) bound copies;

4) Original and one copy of the Certificate of Compliance; and

5) Original and one copy of the Proof of Service.

I would appreciate you having the originals filed and returning clocked copies to me via my courier.

Very truly yours,

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill

SPS/jmb
Enclosures

cc: Frank H. Gibbes, III