THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
In the Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2015-001894
Lower Court Case No. 2011-CP-30-309

Commissioners of Public Works of the City of Laurens, South Carolina, also known as the Laurens Commission of Public Works,..Respondent,

v.

City of Fountain Inn, South Carolina,..Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues 1

Statement of the Case 2

Summary of Argument 4

Standard of Review 5

Statement of Facts 9

Argument 12

I. The undisputed evidence establishes as a matter of law that LCPW has a "designated service area" under § 5-7-60 12

II. The trial court did not find a binding territorial agreement that gave LCPW a "designated service area" under § 5-7-60 14

III. Fountain Inn's "county certification" argument is barred by the law of the case doctrine and has no merit 15

A. Fountain Inn does not challenge the trial court's ruling that no "certification" is needed to create a "designated service area" when a municipality has actually provided service in the area, thereby making it the law of this case and, in any event, § 5-7-60 clearly does not require certification for a "designated service area" established by the municipality actually providing service 16

B. Fountain Inn's "county certification" argument has no merit 18

C. Fountain Inn's "public policy" and "wisdom" arguments are matters that reside in the sole province of the General Assembly 21

D. Fountain Inn's remaining assertions about whether LCPW acquired a "designated service area" have no merit 22

IV. A "designated service area" under § 5-7-60 is not limited to existing customers and existing contracts 23

Conclusion 34

Certificate of Counsel .... N/A

TABLE OF AUTHORITIES

Cases

Adkins v. Comcar Indus., Inc.,
447 S.E.2d 228 (S.C. App. 1994) 12

Auto Owners Ins. Co. v. Rollison,
663 S.E.2d 484 (S.C. 2008) 6

Avery v. Avery,
634 S.E.2d 668 (S.C. App. 2006) 6

Ballenger v. Bowen,
443 S.E.2d 379 (S.C. 1994) 3

Blackburn v. Daufuskie Is. Fire. Dist.,
677 S.E.2d 606 (S.C. 2009) 20

Boggero v. South Carolina Dept. of Rev.,
777 S.E.2d 842 (S.C. App. 2015) 5

Brown v. Duke,
270 S.E.2d 130 (S.C. 1980) 12

Bundy v. Shirley,
772 S.E.2d 163 (S.C. 2015) 5

Carolina Power & Light, Co. v. Darlington County,
431 S.E.2d 580 (S.C. 1993) 28, 29

City of Darlington v. Kilgo,
393 S.E.2d 376 (S.C. 1990) 13, 24, 26-32

City of Spartanburg v. County of Spartanburg,
401 S.E.2d 158 (S.C. 1991) 28, 30-32

Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n,
557 S.E.2d 670 (S.C. 2001) 6

Eldridge v. Eldridge,
728 S.E.2d 24 (S.C. 2010) 17, 19, 25

Estate of Guide v. Spooner,
457 S.E.2d 623 (S.C. App. 1995) 20

Hollman v. Bulldog Trucking Co.,
428 S.E.2d 889 (S.C. App. 1993) 12

Mathis v. Hair,
594 S.E.2d 851 (S.C. App. 2002) 32-33

McClurg v. Deaton,
716 S.E.2d 887 (S.C. 2011) 19, 25

Normandy Corp. v. South Carolina Dep't of Transp.,
688 S.E.2d 136 (S.C. App. 2009) 6

Russo v. Sutton,
422 S.E.2d 750 (S.C. 1992) 12

South Carolina Dep't of Natural Resources v. Town of McClellanville,
550 S.E.2d 299 (S.C. (2001) 12

South Carolina Dep't of Transp. v. M&T Enters. of Mt. Pleasant, LLC,
667 S.E.2d 7 (S.C. App. 2008) 19

South Carolina Farm Bureau Mut. Ins. Co. v. Mumford,
382 S.E.2d 11 (S.C. App. 1989) 12

Spartanburg Sanitary Sewer Dist. v. City of Spartanburg,
321 S.E.2d 258 (S.C. 1984) 13, 25-26, 32

State v. Baucom,
531 S.E.2d 922 (S.C. 2000) 12

State v. Peak,
545 S.E.2d 840 (S.C. App. 2001) 20

State v. Petty,
241 S.E.2d 561 (S.C. 1978) 6

Timmerman v. Timmerman,
502 S.E.2d 920 (S.C. App. 1998) 6

Wallace v. Milliken & Co., 389 S.E.2d 448 (S.C. App. 1990),
aff'd as modified on other grounds, 406 S.E.2d 358 (S.C. 1991).......................................6

White Oak Manor, Inc. v. Lexington Ins. Co.,
753 S.E.2d 537 (S.C. 2014) 12

Williams v. Government Employees Ins. Co.,
762 S.E.2d 705 (S.C. 2014) 5, 6

Other Authorities

S.C. Const. art. VIII, § 16 20

S.C. Code Ann. § 4-19-10 (Rev. 1986)...27-28, 30
S.C. Code Ann. § 5-7-60 (Rev. 2004)...*passim*
S.C. Code Ann. § 23-9-420 (Rev. 2007)..32

Rule 209(a), SCACR 3
Rule 222(c), SCACR 3

BLACK'S LAW DICTIONARY (5th Ed.) (1979)...19, 24
Merriam-Webster.com 19, 24

STATEMENT OF ISSUES

1. The trial court correctly ruled that once a municipality establishes a "designated service area" for a particular service under § 5-7-60, another municipality cannot provide that service in the "designated service area," and the appellant has not challenged this ruling, thereby making it the law of this case.

2. The trial court correctly found that the respondent had provided natural gas service in the disputed area on an exclusive basis for more than two decades, and the appellant has not challenged this finding, thereby making it the law of this case.

3. The trial court correctly found that providing a particular service in an area, standing alone, is sufficient to establish a "designated service area" for that service under § 5-7-60, and this ruling is the law of the case and an additional sustaining for the appealed order.

4. The trial court correctly found that building infrastructure to provide a particular service in an area, standing alone, is sufficient to establish a "designated service area" for that service under § 5-7-60.

5. The trial court did not find that the 1992 boundary agreement was a binding and enforceable contract, nor did it rely upon any such binding effect in ruling that the respondent had a designated service area under § 5-7-60.

6. The certification envisioned by § 5-7-60 must come from the governing body of the entity that is providing the service in the area or has budgeted to do so or has applied for funds to do so.

7. The trial court correctly found that the respondent had a "designated service area" under § 5-7-60 that included the Owings Industrial Park and correctly held that the appellant could not provide natural gas service in this designated service area.

8. The undisputed evidence established, as a matter of law, that LCPW had a "designated service area" under § 5-7-60 that included the Owings Industrial Park and, therefore, any presumed error by the trial court was harmless error.

9. As an additional sustaining ground, the undisputed evidence established, as a matter of law, that LCPW had a "designated service area" under § 5-7-60 that included the Owings Industrial Park.

STATEMENT OF THE CASE

The Respondent (LCPW) brought this declaratory judgment action against the Appellant (Fountain Inn), seeking a declaration that LCPW had a "designated service area" for natural gas services and that Fountain Inn therefore could not provide gas services in this service area without LCPW's permission. At issue is the meaning and application of S.C. Code Ann. § 5-7-60 (Rev. 2004), which provides in pertinent part:

> Any *municipality* may . . . furnish any of its services . . . in areas outside the corporate limits of such municipality by contract . . ., *except* within a *designated service area* for all such services *of another municipality* . . .. [D]esignated service area shall mean an area in which the particular service *is being provided* or *is budgeted* or funds have been applied for *as certified by the governing body thereof.*

(Emphasis added).[1] If a municipality has a designated service area, another municipality cannot provide service in that area absent permission to do so. § 5-7-60.

Two questions control the merits of this appeal: (1) what are the requirements for a "designated service area," *i.e.*, what is the meaning of § 5-7-60; and (2) did LCPW meet those requirements? The trial court ruled in favor of LCPW under the following findings:

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[1] § 5-7-60 provides in full:

Any municipality may perform any of its functions, furnish any of its services, except services of police officers, 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, and in the case of electric service, except within a service area assigned by the Public Service Commission pursuant to Article 5 of Chapter 27 of Title 58 or areas in which the South Carolina Public Service Authority may provide electric service pursuant to statute. For the purposes of this section designated service area shall mean an area in which the particular service is being provided or is budgeted or funds have been applied for as certified by the governing body thereof. 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.

(Shaded areas comprise the quote in the appended text).

1. In 1992, the parties' service managers agreed to a boundary line for their respective natural gas service areas outside their city limits. (Order at 2).

2. The parties' governing bodies never ratified this agreement, but the parties voluntarily operated their systems in accordance with the boundary line for the next 20 years. (*Id.* at 2).

3. When a dispute arose about a customer along the boundary line, the parties resolved the issue by agreement. (*Id.* at 2, 7-8).

4. For the next 20 years, until 2011, LCPW provided natural gas services throughout the area on its side of the boundary line; Fountain Inn never sought to provide services in this area; and providing service is enough to establish a designated service area regardless of any alleged certification defect. (*Id.* at 2-3, 5, 7-8).

5. LCPW issued a resolution certifying that it provides natural gas service to the area defined by the boundary line, has budgeted to do so, and has expended funds to do so in accordance with § 5-7-60. (*Id.* at 5).

6. The current dispute arose in 2011 when Fountain Inn, for the first time, solicited a customer in the newly developed Owings Industrial Park, which is in LCPW's service area. (*Id.* at 3, 7-8).

Based on these findings, the trial court held that LCPW had a "designated service area":

> Therefore, the territory served by LCPW is a territory "in which the particular service [natural gas] is being provided or is budgeted or funds have been applied for as certified by the governing body thereof." S.C. Code Ann. § 5-7-60. Further, in accordance with the statute, the City of Fountain Inn may not furnish natural gas in the LCPW's designated service area without the consent of the LCPW . . ..

(Order at 5; see also *id.* at 1, 9). Fountain Inn timely appealed.[2]

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[2] In its Statement of the Case, Fountain Inn cites summary judgment materials designated for inclusion in the Record on Appeal. (Init. App. Br. at 2; App's. Designation). Summary judgment was denied, so the orders and proceedings are irrelevant to the issues on appeal. *Ballenger v. Bowen*, 443 S.E.2d 379, 379 (S.C. 1994) (denial of summary judgment decides nothing and is not reviewable on appeal, even after final judgment). Thus, these materials are irrelevant and not properly included in the Record. Rule 209(a) and 222(c), SCACR.

SUMMARY OF ARGUMENT

Applying the plain meaning of § 5-7-60 to the undisputed in this case demonstrates as a matter of law that LCPW established a "designated service area" that includes the area in dispute here (Owings Industrial Park). Thus, per § 5-7-60, Fountain Inn cannot provide natural gas service in this area without LCPW's permission. See Arg. I, *infra.*

Fountain Inn makes three basic arguments on appeal. First, it argues that the trial court erred by enforcing the boundary agreement between the parties to find that LCPW had a "designated service area" under § 5-7-60. This is a straw man argument. The trial court never found the boundary agreement was enforceable, never enforced it, and never relied on its as being an enforceable contract that created a "designated service area." Rather, the trial court noted the undisputed facts regarding the agreement as context for its factual finding that LCPW had, in fact, provided natural gas services in the disputed area for 20 years, and that Fountain Inn had never attempted to do so before the current dispute. This "fact" of actually providing service in the area is the single most common and relevant fact for establishing a designated service area under § 5-7-60. See Arg. II, *infra.*

Second, Fountain Inn argues that LCPW did not establish a "designated service area" under § 5-6-70, because the statute requires a certification from Laurens County Council, not LCPW, on whether LCPW had provided service in the area, was providing service in the area, or had budgeted funds to do so. This argument fails for several reasons, including the following: (1) it is the law of this case and the statute plainly provides that the certification requirement does not apply when a municipality establishes a designated service area by actually providing service in that area; (2) no governing body has the power or requisite knowledge to *certify* another governing body's actions, budget, or funding

applications – such certifications can only come from the governing body whose actions, budget, or funding applications are being certified; and (3) accepting Fountain Inn's argument would lead *inter alia* to the absurd result of the county having unbridled control over the establishment of a "designated service area" under § 5-7-60, and nothing in the statute evidences any such legislative intent. See Argument III, *infra*.

Third, Fountain Inn argues that a "designated service area" under § 5-7-60 is limited to existing customers with existing contracts and does not extend beyond those customers. This argument fails under the plain and ordinary meaning of "area," as well as the meaning of "service area" as used in § 5-7-60 and several other statutes. It also fails under the plain rulings by the Supreme Court in the cases cited by Fountain Inn on appeal. Moreover, acceptance of Fountain Inn's argument would frustrate the clear purpose of § 5-7-60, which is to encourage municipalities to make their services available to residents outside the municipality's corporate limits. See Arg. IV, *infra*.

STANDARD OF REVIEW

The dominant issues in this appeal are the meaning and application of § 5-7-60, which is a mixed question of law and fact. *Boggero v. South Carolina Dept. of Rev.*, 777 S.E.2d 842, 844, 845 (S.C. App. 2015). The meaning of the statute is a question of law and subject to *de novo* review. *Id.* Whether the requirements of the statute have been met is a question of fact. *Id.* Here, the evidence is undisputed, and the application of the law to undisputed facts is a question of law for the court and subject to *de novo* review. *Williams v. Government Employees Ins. Co.*, 762 S.E.2d 705, 709 (S.C. 2014).

To the extent there are disputed issues of facts, this is a declaratory judgment action, and the standard of review therefore depends on the nature of the underlying issue. *Bundy*

v. Shirley, 772 S.E.2d 163, 168 (S.C. 2015). Thus arises the question of whether an action for the interpretation and application of a statute is at law or in equity. If "at law," appellate review is limited to whether any evidence supports the ruling. *Williams*, 762 S.E.2d at 709. If "in equity," an appellate court may take its own view of the evidence but generally defers to the trial court's witness credibility determinations based on its superior position to make such determinations. *Avery v. Avery*, 634 S.E.2d 668, 671 (S.C. App. 2006).

Contrary to Fountain Inn's assertion, the general rule is that an action involving the interpretation and application of a statute is an action at law and underlying factual issues are reviewed under the "any evidence" standard of review. *Normandy Corp. v. South Carolina Dep't of Transp.*, 688 S.E.2d 136, 141 (S.C. App. 2009); *Timmerman v. Timmerman*, 502 S.E.2d 920, 921 (S.C. App. 1998); *accord Auto Owners Ins. Co. v. Rollison*, 663 S.E.2d 484, 487 (S.C. 2008) *and State v. Petty*, 241 S.E.2d 561, 562 (S.C. 1978). An equity review of factual issues is undertaken when required by the statute or when the statute includes a remedial scheme that is predominately equitable in nature. *Wallace v. Milliken & Co.*, 389 S.E.2d 448, 449 (S.C. App. 1990), *aff'd as modified on other grounds*, 406 S.E.2d 358, 360-361 (S.C. 1991).[3]

Here, the main purpose of the action is the interpretation and application of a statute. Injunctive relief is at issue, but it is ancillary in the truest sense of the word. Section 5-7-60 is the only source of Fountain Inn's power to provide gas service outside its

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[3] Fountain Inn asserts that the "underlying claim is for statutory construction and an injunction" and, therefore, "the case should be reviewed under the standard of review applicable in equity." (Init. App. Br. 5). Fountain Inn "supports" this assertion by citing *Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 557 S.E.2d 670 (S.C. 2001). The *Doe* case, however did not involve any issue on the meaning or application of a statute. It was a contract action in which the plaintiff sought damages and injunctive relief for an alleged breach of the implied covenant of good faith and fair dealing. Applying the "main purpose rule," the Court concluded that the request for injunctive relief was the dominant issue and, therefore, the case was to be reviewed under the equity standard of review.

corporate limits. If LCPW has a "designated service area" under § 5-7-60, then that same statute denies Fountain Inn the power to provide gas service in the designated service area absent LCPW's permission. In other words, the grant or denial of any injunctive relief is a foregone conclusion *after* the interpretation and application of § 5-7-60. Thus, the present action is at law and factual disputes should be reviewed under the "any evidence" standard.

In any event, the result is the same under either standard of review. Clearly, there is some evidence to support the trial court's ruling – Fountain Inn does not contend otherwise. Thus, this Court should affirm under the "any evidence" standard of review. If this Court may take its own view of the evidence, the evidence fully supports the trial court's order. Any disputed issue of fact was presented to through the competing testimony of witnesses, and this Court should not disturb the trial court's inherent and expressly noted credibility determinations in favor of its ruling.

Fountain Inn presented the testimony of one witness, Thomas Pitman, who was hired in December 2006 to be Fountain Inn's gas manager. (Tr. 90-91). He moved to South Carolina to take this job (Tr. 100), so he had very little to offer about anything that happened before his arrival. However, he did admit the following on cross-examination:

1. He had no knowledge of any attempt by Fountain Inn, prior to his arrival, to run lines into LCPW's service area. (Tr. 100).

2. He knew of no Fountain Inn lines that had been run into LCPW's service area prior to 2011. (Tr. 101).

3. He believed that Fountain Inn could provide natural gas service anywhere in the disputed area, even if LCPW was already serving customers in the area, because there was no contract or formal agreement giving LCPW a service territory and, as to § 5-7-60, he was not an attorney. (Tr. 102-103).

In short, other than being the author of this dispute by seeking to cherry-pick industrial customers in the Owings Industrial Park (Tr. 94-96), which indisputably is on LCPW's side of the boundary line, Pitman had little to offer on the relevant facts. As a result, he could not and did not dispute the testimony of LCPW's witnesses on the pertinent facts.

In stark contrast, LCPW offered the testimony of five witnesses with personal and intimate knowledge of the relevant facts:

1. Coleman Smoak worked for LCPW from 1977 to 2006, was its general manager from 1985 to 2006, represented LCPW in the 1992 boundary line meeting, and had personal knowledge of how the parties conducted themselves from 1985 to 2006, and even before that time. (Tr. 18-27, 33).

2. Carey Elliot was Fountain Inn's gas manager at all relevant times, represented Fountain Inn in the 1992 meeting, and had personal knowledge of how the parties conducted themselves from 1992 to 2005. (Tr. 34-38).

3. Irvin Satterfield worked for LCPW from 1982 to 2014, was its general manager from 2006 to 2014, and had personal knowledge of how the parties conducted themselves from 1992 to 2014. (Tr. 39-54, 66-67).

4. Eric Heath is an engineer with the firm that handled the system expansions by both parties. He worked on many of those projects, attended the 1992 meeting, and had personal knowledge of how the parties conducted themselves from 1992 to the present. (Tr. 68-78, 80-85).

5. John Young began working for LCPW in 2000, is the current general manager, and had personal knowledge of LCPW's gas service activity in the disputed area. (Tr. 85-87).

The trial court specifically and repeatedly relied on the testimony of these witnesses, thereby accepting the veracity of their testimony. (Order at 2-3, 5, 7). There is no basis in the record for disturbing the trial court's acceptance of these witnesses' credibility. In short, the weight of the evidence overwhelmingly supports the trial court's findings and, therefore, the trial court should be affirmed under either standard of review.

STATEMENT OF FACTS

Prior to 1985, LCPW received its natural gas from an 8-inch supply line built in the 1950's that connected to the Transco national pipeline near Fountain Inn. (Tr. 19, 26; 81-82). With the deregulation of natural gas in the 1980's, substantial pent up demand was released, and there was a general need to expand natural gas systems to reach these new customers. (Tr. 81). Both parties expanded their systems in their respective areas throughout the late 1980's and 1990's. (Tr. 74, 81).

By 1985, both parties had expanded their natural gas systems into the surrounding unincorporated area of Laurens County and already had a general understanding on the dividing line between their respective service areas. (Tr. 19). In 1985, LCPW planned to expand its gas supply line system by adding a 10-inch line to the Transco national pipeline and connecting it to the existing 8-inch line with a 6-inch line. (Tr. 19-20, 26 31; 51-52; 82-83). The purpose of this expansion project was three-fold: (1) to better maintain the gas supply to Laurens; (2) to expand LCPW"s natural gas capacity to serve the growing demand for natural gas service outside its corporate limits; and (3) to provide redundancy of supply for both of these needs. (Merits Order at 7; Tr. 26-27, 31; 50-52, 56-57; 78, 80-85). Also in 1985, due to the cost of the planned supply line expansion, the parties' system managers, the mayor of Fountain Inn, and the engineers for LCPW's expansion project met to discuss the future of gas services in the area around the cities and avoiding any duplication of services. (Tr. 19-20, 26; Pl. Exh. No. 4; FI's Post-Trial Reply Memo, Tabs 3-4). The parties reached a general understanding on their respective areas, but no written agreement was reached, nor was any map drawn. (FI's Post-Trial Reply Memo, Tabs 3-4).

In October 1992, the parties' managers again met to discuss the future of natural gas services in the area surrounding the two cities. The pipeline engineer for both parties also attended the meeting. By this time, both parties were expanding their natural gas systems well beyond their corporate limits. Both parties were concerned that there needed to be a clearer dividing line between their systems so as to avoid duplication of services and encroachment into each other's service area. (Merits Order at 2; Tr. 19-22; 35-37; 72-77; Pl. Exh. Nos. 1 and 2). At this meeting, the parties drew a boundary line on a map ("the 1992 Map"), with each party to provide natural gas services on its respective side of the line. (Merits Order at 2; Tr. 20-22; 35-37; 75-77 ; Pl. Exhs. 1, 1A, and 2). *It is undisputed* that the area in question here is on the LCPW side of this boundary line.

When the parties reached the boundary agreement, it was anticipated that the respective governing bodies would formally adopt the agreement, but this never happened. (Merits Order at 2; Tr. 27-28; 38-39). Nevertheless, and most importantly, *it is undisputed* that the parties provided natural gas service in accordance with the boundary line for the next twenty years. (Merits Order at 2, 5, 7; Tr. 23-25; 37-38; 76-78). From time to time, there arose questions as to which party should serve a particular natural gas customer along the boundary line. All of these "boundary disputes" were resolved by agreement, resulting in one of the parties contracting with the particular customer.[4]

As to the remainder of the service areas demarked by the boundary line, LCPW provided natural gas services throughout the service area on its side of the boundary line, including the area in which the Owings Industrial Park is now located. (Tr. 25; 41-42, 46-

[4] Fountain Inn asserts the parties "attempted to respect the line" but "there were disagreements." (Init. App. Br. 4). The undisputed evidence demonstrates something different. The parties absolutely respected the line for 20 years as neither party ever went into the other's service area. Disputes regarding customers who were on the line were resolved by agreement, thereby complying with the "permission" requirement of § 5-7-60.

47, 52; 86-87). Fountain Inn never solicited or served any customers in this service area, including the area in which the Owings Industrial Park is now located. (Tr. 25, 27; 37-38; 48, 49, 51; 100-101). The development of the Owings Industrial Park, and the resulting lure of cherry-picking industrial gas customers, was the impetus to the current dispute.

In 2011, after 20 years of each party serving its service area exclusively, Fountain Inn solicited an industrial customer (ZF), which was the first company to build a facility in the new Industrial Park. The entire Park is LCPW's service area, so this was not a boundary dispute. (Tr. 25; 41-42, 46-47, 52; 86-87). Fountain Inn's new gas manager simply believed that it could serve customers anywhere in LCPW's service area. (Tr. 102-103).

LCPW objected to Fountain Inn's solicitation – the parties met but failed to resolve the matter. (Tr. 45-46). LCPW thereafter commenced the present action and sought a preliminary injunction to prohibit Fountain Inn from soliciting customers during the pendency of the lawsuit. (Inj. Order at 1). While the injunction motion was pending, LCPW secured a contract with ZF. (*Id.* at 5). Laying the service line to ZF only took a few days, because the LCPW simply tapped into its existing 6- inch supply line in the area. (Tr. 105). This line was part of LCPW's 1985 supply line expansion project, which it had undertaken for this very purpose – to reach and serve customers in its service area.

The trial court ultimately denied LCPW's motion for a preliminary injunction. (Inj. Order). Thereafter, Fountain Inn entered a natural gas service contract with Uniscite, the second customer in the Industrial Park. To serve this customer, Fountain Inn had to build a main line into the area. (Tr. 102). This is not surprising, because Fountain Inn's supply line system, unlike LCPW's system, was not designed to serve this area. And this is not surprising, because this was Fountain Inn's first intrusion into LCPW's service area.

ARGUMENT

I. The undisputed evidence establishes as a matter of law that LCPW has a "designated service area" under § 5-7-60.

The first question is the meaning of § 5-7-60, which is controlled by the following analytical framework:

> 1. The cardinal rule of statutory construction is to give effect to the legislature's intent, and the best evidence of that intent is the plain meaning of the words used in the text of the statute. *White Oak Manor, Inc. v. Lexington Ins. Co.*, 753 S.E.2d 537, 540 (S.C. 2014). Courts avoid interpretations that lead to absurd results in light of the statute's purpose or would defeat the legislature's intent. *Id.*
>
> 2. The wisdom of a statute is not subject to judicial review – such matters are within the sole province of the General Assembly. *South Carolina Dep't of Natural Resources v. Town of McClellanville*, 550 S.E.2d 299, 304 (S.C. (2001); *Adkins v. Comcar Indus., Inc.*, 447 S.E.2d 228, 230 (S.C. App. 1994).
>
> 3. The public policy decisions underlying a statute are likewise not subject to judicial review. *Hollman v. Bulldog Trucking Co.*, 428 S.E.2d 889, 893 (S.C. App. 1993); *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 382 S.E.2d 11, 14 (S.C. App. 1989). Public policy resides in the province of the General Assembly *Brown v. Duke*, 270 S.E.2d 130, 132 (S.C. 1980). Courts may pronounce public policy if the General Assembly has not addressed the matter. *State v. Baucom*, 531 S.E.2d 922, 925 (S.C. 2000); *Russo v. Sutton*, 422 S.E.2d 750, 753 (S.C. 1992). Once the General Assembly does so, however, the courts must not only abide by that public policy, but must also promote it. *Mumford*, 382 S.E.2d at 14.

The relevant portions of § 5-7-60 are set forth in the following language:

> Any *municipality* may . . . furnish any of its services . . . in areas outside the corporate limits of such municipality by contract . . ., *except* within a *designated service area* for all such services *of another municipality* . . .. [D]esignated service area shall mean an area in which the particular service *is being provided* or *is budgeted* or funds have been applied for *as certified by the governing body thereof.*

(Emphasis added). The clear purpose of this statute is two-fold: (1) allow municipalities to provide their services to areas outside their corporate limits; and (2) encourage them to

do so by granting a "designated service area" that excludes any other municipality. The public policy underlying this purpose is equally clear. Much of rural South Carolina does not have access to services enjoyed by municipal residents. The General Assembly enacted § 5-7-60 to encourage municipalities to make those services available. The incentive for doing so, and for undertaking the expense of doing so (*e.g.*, building infrastructure), is the grant of a designated service area that is free from competition by another municipality. The wisdom of this incentive is not subject to judicial review.

The statute is clear on what a municipality must do to obtain a "designated service area." It must provide service to the area. Alternatively, it must budget or apply for funds to do so, and thereafter certify that it has done so. The only remaining question is whether LCPW satisfied these requirements. The undisputed evidence demonstrates that it did so.

Fountain Inn's only witness was Thomas Pitman, who had no personal knowledge of the pertinent facts. The undisputed evidence at trial established the following:

1. In 1985, LCPW constructed supply line infrastructure for the purpose of providing service in its service area, and this infrastructure created excess capacity for doing so. (Tr. 26, 31). This was sufficient to create a designated service area under the Supreme Court's ruling in *Sanitary Sewer, infra.* (For a complete discussion of *Sanitary Sewer*, see Arg. IV(A), *infra.*).

2. Since 1985, LCPW has provided service in the area, has budgeted to do so, and has expended funds to do so. (*E.g.*, Pl. Exh. 8).

3. Since at least 1992, and for the next 20 years thereafter, LCPW made its service available and provided service in its service area, including the area in which the Owings Industrial Park was eventually constructed; and Fountain Inn never attempted to do so. This was sufficient to create a "designated service area" under the Supreme Court's ruling in *Kilgo, infra.* (For a complete discussion of *Kilgo*, see Arg. IV(B), *infra.*).

4. In 2011, before Fountain Inn laid any lines into its service area, LCPW issued a resolution that certified the foregoing facts per § 5-7-60.

In short, the undisputed evidence demonstrates that LCPW did everything necessary to obtain a "designated service area" under § 5-7-60, which included the Owings Industrial Park area. Accordingly, as a matter of law, Fountain Inn cannot serve anyone in this area without LCPW's permission and, therefore, Fountain Inn's service to Uniscite is and has always been in violation of § 5-7-60. Thus, the trial court did not err in finding that LCPW had a "designated service area" and that Fountain Inn cannot serve Uniscite or any other customer in that area without LCPW's permission.

II. The trial court did not find a binding territorial agreement that gave LCPW a "designated service area" under § 5-7-60.

Fountain Inn complains that the trial court impermissibly enforced the 1992 boundary agreement under the following argument:

1. "Municipalities do not have the power to divide territory outside their corporate boundaries." (Init. App. Br. 13).

2. The 1992 boundary agreement was not binding, because it was not approved by the parties' governing bodies, and any such approval would have been ineffective, because the agreement involved "governmental functions" and extended beyond the term of the parties' governing bodies without any statutory authority for doing so. (Init. App. Br. 13-5).

3. Therefore, the trial court erred when it "effectively ruled that the parties had made a binding agreement as to the disputed area" by upholding "an agreement that the parties did not and could not make," and "enter[ing] an order granting effect to an agreement the parties could not have made under South Carolina law." (Init. App. Br. 13, 15).

This is a classic straw man argument. The trial court specifically noted that no breach of contract claim was before it and that the boundary agreement had not been approved by the parties' governing bodies. (Tr. 2; 3, n.3). The trial court never based its ruling on any finding or holding that the boundary agreement was an enforceable contract that created a "designated service area" under § 5-7-60. Thus, Fountain Inn's argument has no merit.

To be sure, the trial court discussed the boundary line, but only as context for finding that LCPW had in fact provided service in the area for 20 years and that Fountain Inn had never served the area. (Order at 2-3, 5, 7-8). These findings are not based on any ruling that the boundary agreement was enforceable. Rather, the trial court correctly focused on a critical inquiry under § 5-7-60, which is whether the municipality has provided service in an area, because doing so is a principal statutory means for establishing a designated service area.

In short, the trial court knew that no contract action was before it, never found that a contract existed, never enforced any contract, and never relied on the existence of any contract to support its ruling. Rather, the trial court simply and correctly found that, under the undisputed evidence before it, LCPW had provided natural gas service in the area for more than 20 years, and Fountain Inn had never done so before the dispute at issue here.

In any event, and assuming any undue reliance on the boundary agreement by the trial court, any error was harmless. As shown in Argument I, *supra*, the undisputed evidence in this case demonstrates, as a matter of law, that LCPW has a "designated service area" under § 5-7-60 that includes the Owings Industrial Park.

III. Fountain Inn's "county certification" argument is barred by the law of the case doctrine and has no merit.

Section 5-7-60 defines a "designated service area" as one "in which the particular service is being provided or is budgeted or funds have been applied for *as certified by the governing body thereof*." (Emphasis added). Fountain Inn argues that § 5-7-60 requires a certification from the governing body of the area being served, *i.e.*, Laurens County Council, rather than LCPW. (Init. App. Br. at 8). This is Fountain Inn's only substantive argument against the trial court's ruling on the requirements of § 5-7-60, and it has no

merit. See Arg. III(B), *infra*. Moreover, it is the law of this case and the plain meaning of § 5-7-60 that the certification requirement does not apply when establishing a "designated service area" by actually providing service in the area. See Arg. III(A), *infra*. Fountain Inn also makes several public policy and wisdom arguments in support of its "certification" argument (competition, reasonable pricing, monopoly, and political accountability), but such matters are for the General Assembly, not the courts. See Arg. III(C), *infra*. Fountain makes two other assertions that also have no merit. See Arg. III(D), *infra*.

A. Fountain Inn does not challenge the trial court's ruling that no "certification" is needed to create a "designated service area" when a municipality has actually provided service in the area, thereby making it the law of this case and, in any event, § 5-7-60 clearly does not require certification for a "designated service area" established by the municipality actually providing service.

At trial, Fountain Inn argued that LCPW's certification resolution was defective, because it came too late, *i.e.*, it was issued "just as this lawsuit was being filed." (Order at 9). The trial court found that the resolution merely certified the undisputed fact that, for twenty years, "LCPW [was] acting as the only provider of natural gas service in the area." (*Id.*). The trial court then rejected Fountain Inn's defective certification argument because, "[u]nder the statute, *Spartanburg Sanitary Sewer District* and *Kilgo*, providing the particular service in question is enough to establish a designated service area." (*Id.*) (emphasis added). In short, the trial court held that providing service in an area was enough to establish a "designated service area," even without a certification from the governing body. Fountain Inn never challenges this ruling on appeal and therefore, right or wrong, it

is the law of this case, and it moots Fountain Inn's "county certification" argument. *Eldridge v. Eldridge*, 728 S.E.2d 24, 28 (S.C. 2010).[5]

In any event, the "certification" requirement in § 5-7-60 plainly does not apply when the designated service area is established by actually providing the service in the area. The language at issue is the following: "[D]esignated service area shall mean an area in which the particular service *is being provided* **or** <u>is budgeted or funds have been applied for as certified by the governing body thereof</u>. § 5-7-60 (all emphasis added). As the differently emphasized language shows, the statute sets forth two separate ways to establish a "designated service area." First, a service area is established by actually providing the service in the area ("service is being provided"). There is no need to certify this, because it is an existing and demonstrable fact of actual service. Second, a service area can be established without having actually provided the service if it is certified that providing the

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[5] The trial court had made the same ruling earlier in its order:

> What is important about *Kilgo* to this case is that *under the language of Section 5-7-60 . . .*, the cities had the right to control provision of a service outside the cities' corporate limits where the cities were already providing that service by contract, and *the **only requirement** for designating that area was that the municipality was serving it.*

(Order at 7) (all emphasis added). The trial court previously made similar rulings throughout its order:

(1) [T]his Court concludes that *under the language of Section 5-7-60*, the *area* that LCPW *has served . . . is* the LCPW's *designated service area* for furnishing natural gas, and that the City of Fountain Inn may not provide natural gas service in that area without the permission of the LCPW." (Order at 1) (emphasis added).

(2) "*Based upon the language of Section 5-7-60*, the Court agrees that the *area served* by LCPW . . *is* the LCPW's '*designated service area*' for natural gas service." (Order at 5) (emphasis added).

(3) "In [*Sanitary Sewer*], the *fact* that the Sewer District had the facilities in place *to provide service* to that area *qualified it as* the Sewer District's 'designated service area.'" (Order at 6) (emphasis added).

(See also Order at 7-8, noting throughout that actually providing a service established a designated service area, *citing and applying Mathis, Sanitary Sewer,* and *Kilgo*).

service "is budgeted or funds have been applied for." Budgeting or applying for funds indicates an intent to provide the service in an area in the future, and that intent is sufficient to create a service area if it is certified by the governing body that has budgeted to do so or has applied for funds to do so. Thus, certification is needed only when the service is not already being provided but is planned and intended to be provided in the future. Thus, the trial court was correct when it held that "providing the particular service in question is enough to establish a designated service area" and that "*the **only requirement** for designating that area was that the municipality was serving it.*" (Order at 7, 8) (all emphasis added). In any event, and assuming that Fountain Inn has challenged the trial court's ruling, and assuming further that the certification requirement applies to providing service, Fountain Inn's "county certification" argument has no merit.

B. Fountain Inn's "county certification" argument has no merit.[6]

LCPW issued a resolution that certified the following: (1) it is providing and has continuously provided natural gas service to the disputed area since 1985; (2) it has budgeted to provide service in this area; and (3) it has applied funds of its gas system to provide that service. (Pl. Exh. 8). The trial court found that this resolution satisfied the certification requirement in § 5-7-60 (Order at 5) and later held that this requirement did not apply when service had actually been provided. (See Arg. III(A), *supra*).

Fountain Inn argues that Laurens County Council must issue the certification. This is Fountain Inn's only "certification" argument, and it has no merit for several different

[6] For the remainder of this Argument III, it is assumed that the certification requirement in § 5-7-60 applies when a municipality establishes a designated service area by actually providing service in the area.

reasons. Thus, it is the law of this case that LCPW's resolution otherwise satisfied the certification requirements of § 5-7-60.[7]

The plain and ordinary meaning of "certify" is to "*authenticate* or *vouch* for a thing in writing, [and to] *attest as being true* or as represented." BLACK'S LAW DICTIONARY (5th Ed.) at 207 (1979) (emphasis added).[8] Manifestly, one governing body cannot authenticate, vouch for, or attest to the truth of another governing body's actions, budget, expenditures, or funding applications. Fountain Inn never explains how Laurens County Council could ever do so, and the reason is simple – Laurens County Council does not have the power or requisite knowledge to certify anything done by LCPW and, therefore, it is impossible for Laurens County Council to issue the certification envisioned by § 5-7-60.[9]

It is absurd to suggest that the General Assembly intended the establishment of a designated service area to rest upon the doing of an impossible act, because it would result in there never being a designated service area under § 5-7-60. Thus, the only reasonable reading of § 5-7-60 is that the certification must come from the governing body whose

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[7] At trial, Fountain Inn argued that LCPW's resolution came too late. The trial court rejected this argument (Order at 9), and Fountain Inn does not pursue it on appeal, thereby abandoning it. *South Carolina Dep't of Transp. v. M&T Enters. of Mt. Pleasant, LLC*, 667 S.E.2d 7, 15 (S.C. App. 2008). Fountain Inn's only argument is that the statute required a certification from Laurens County Council. As a result, it is the law of this case that LCPW's resolution otherwise satisfied the certification requirement of the statute. *Eldridge v. Eldridge*, 728 S.E.2d 24, 28 (S.C. 2010). Any attempt to resurrect the "timing" argument or otherwise challenge the certification by way of a reply brief would be futile, because an issue cannot be raised for the first time in a reply brief. *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011). In any event, § 5-6-70 imposes no timing requirements, and it is undisputed that LCPW issued the certification before Fountain Inn obtained any customer in or laid any gas line into LCPW's service area.

[8] See also merriam-webster.com, giving the full definition of "certify" as "to attest *authoritatively*" and "to attest as *being true*." (Emphasis added).

[9] All of this dovetails with the plain meaning of "designate," which is to "indicate, select . . . or set apart for a purpose" and to "make known." BLACK'S LAW DICTIONARY (5th Ed.) at 402 (1979) (emphasis added). By undertaking the actions specified in § 5-7-60 and thereafter certifying that it had done so, LCPW made known that it had selected and set apart an area for the purpose of providing natural gas service in the area. See also merriam-webster.com, giving the full definition of "designate" as "to indicate and set apart for a specific purpose" and "to point out the location of."

conduct, budget, or funding application is being certified. Accordingly, Fountain Inn's "county certification" argument has no merit.

Moreover, were it true that Laurens County Council has the power and knowledge to *certify* LCPW's conduct and budget, requiring a county certification would nevertheless lead to an absurd result. LCPW does not have the power to compel Laurens County Council to certify anything, much less the actions and budget of LCPW itself. Nothing in § 5-7-60 requires Laurens County Council to issue the certification if requested by LCPW, even if LCPW indisputably establishes the facts to be certified. Thus, under Fountain Inn's argument, Laurens County Council would have unbridled control over the creation of a designated service area in the county. Nothing in § 5-7-60 even hints at granting such power to counties, and if the General Assembly intended for a county council to be the sole arbiter of designated service areas within the county, "surely it would have said so," particularly in a "municipal power" statute. *Blackburn v. Daufuskie Is. Fire. Dist.*, 677 S.E.2d 606, 609 n.5 (S.C. 2009); *accord Estate of Guide v. Spooner*, 457 S.E.2d 623, 624 (S.C. App. 1995). Also, the state constitution expressly prohibits counties from providing any gas services in the county. S.C. Const. art. VIII, § 16. Making a county the sole arbiter over a service that it cannot itself provide makes no sense, and it leads to the absurd and unconstitutional result of the county doing indirectly what the constitution prohibits it from doing directly. See *State v. Peak*, 545 S.E.2d 840, 844 (S.C. App. 2001) (axiomatic that courts avoid interpretations of statutes that would lead to unconstitutional results).

Finally, reading a "county certification" requirement into § 5-7-60 would frustrate and interfere with the General Assembly's purpose in providing for a "designated service area," which is to encourage municipalities to provide services outside their corporate

limits. No municipality would spend its time, money, and resources to establish a "designated service area" under Fountain Inn's "county certification" theory unless it was confident that the county council would thereafter issue the requisite certification. The only way to achieve this would be a long-term, "designated service area" agreement with the county before providing the service or spending money to provide the service. But this is precisely the type of agreement that Fountain Inn argues cannot be made by a governing body, because it would extend beyond the tenure of the governing body's members. Moreover, § 5-7-60 plainly requires an after-the-fact certification. The only logical source for this certification is the governing body that has provided the service, budgeted to do so, or applied for funds to do so.

C. Fountain Inn's "public policy" and "wisdom" arguments are matters that reside in the sole province of the General Assembly.

Fountain Inn makes the following "public policy" and "wisdom" arguments in support of its "county certification" argument:

1. A municipality is not required to charge reasonable rates when providing services outside its corporate area. (Init. App. Br. 7).[10]

2. Imposing a "county certification" requirement promotes political accountability, because "Laurens County Council would be *politically accountable* with respect to the *service provided* and *any rates charged*," whereas LCPW is not. (*Id.* at 8-9, 10) (emphasis added).

3. Competition between Fountain Inn and LCPW would benefit customers by protecting them against "*unreasonable rates* [charged] by a *monopolist* that is *not politically accountable* to those customers."(*Id.* at 10) (emphasis added).

[10] Fountain Inn's point here is unclear since it, as a municipality itself, would be constrained by the same duty. If Fountain Inn is arguing that "municipal competition" would lower prices despite this duty, the General Assembly's decision to grant a "municipal monopoly" under § 5-7-60 is not subject to judicial review. In any event, there is no evidence and no argument that LCPW has charged or is charging unreasonable prices.

In short, Fountain Inn argues that imposing a "county certification" requirement for a "designated service area" would benefit the customers in the area, because it would protect against unreasonable pricing through competition or some reasonable rate requirement imposed by the county on the municipality. All of this is a cleverly disguised attack on the wisdom of § 5-7-60 and the legislative public policy decisions underlying it. Such matters are not subject to judicial review. It was and is for the General Assembly to balance the pros and cons of pricing, competition, and the like in deciding whether one municipality should have the right to serve an area to the exclusion of another municipality.

D. Fountain Inn's remaining assertions about whether LCPW acquired a "designated service area" have no merit.

Fountain Inn makes two other assertions that have no merit within its "county certification" argument. It first asserts that the General Assembly could not have intended that LCPW could "proclaim" a monopoly in an area outside its corporate limits. (Init. App. Br. 8-9). That is not what happened here. LCPW did not acquire its "designated service area" by proclamation. Rather, as required the statute and correctly found by the trial court, LCPW established its "designated service area" by actually providing services in the area, by actually budgeting to provide such services, by actually expending funds to do so, and by thereafter certifying all of this. The "designated service area" does not give LCPW a monopoly, but it does preclude another municipality from providing the same service in the area. The wisdom of the General Assembly's decision to grant this "municipal monopoly" in a "designated service area" is not subject to judicial review.

Fountain Inn next asserts that "LCPW has not budgeted funds specifically for providing service in the area where the new industrial park is located" and has only

"budgeted funds to maintain a safe and consistent supply of gas to the City of Laurens and all LCPW customers." (Init. App. Br. 9). This argument fails for several reasons:

1. The undisputed evidence is that LCPW has provided service in the area, including the area in which the industrial park is now located. (Tr. 41). Thus, it matters not whether LCPW budgeted funds for this specific area, because providing service in the area is one of the ways to establish a designated service area under § 5-7-60.

2. Fountain Inn's argument focuses on the construction of the original supply line to Laurens in the 1950's and asserts the 1985 expansion project was also for serving the City of Laurens. (Init. App. Br. 9, citing Tr. 30, ll. 14-25 and Tr. 31, ll. 1-14). Fountain Inn simply ignores the overwhelming and uncontradicted testimony that the 1985 supply line expansion project was also for constructing infrastructure to serve the LCPW's service area outside its corporate limits. (Tr. 26-27, 31; 50-52, 56-57; 78, 80-85). It also ignores the undisputed testimony that this supply line infrastructure was used to provide gas service to ZF, the first customer in the Owings Industrial Park.

3. Fountain Inn's argument rests upon the erroneous assumption that § 5-7-60 envisions specifically budgeting for a very specific area as opposed to budgeting generally for providing services in a general area. Reading this limitation into the statute would frustrate the clear purpose of the statute, which is to encourage municipalities to make their services available to general areas, not just specific customers. The incentive of a "designated service area" becomes virtually meaningless if it is limited to actual customers or only those very specific areas for which the municipality has very specifically budgeted.

Finally, Fountain Inn argues that a "designated service area" is limited to existing customers with existing contracts. This argument has no merit. See Arg. IV, *infra*.

IV. A "designated service area" under § 5-7-60 is not limited to existing customers and existing contracts.

The trial court discussed three appellate court opinions and concluded that these cases supported its decision that LCPW had a "designated service area" under § 5-7-60, including its ruling that providing service is enough itself to establish a designated service

area without any certification thereof. (Order at 5-8) (See Arg. III(A), *supra*). Fountain Inn contends that these cases are distinguishable and support its arguments when read as a whole (Init. App. Br. 11-13). Fountain Inn reviews these cases and others to conclude:

> Thus, the inquiry in these cases *focuses* on customer *contracts* and protection of *existing customer* rights. The evidence in this case shows that neither party had *existing* contracts within the proposed industrial park; *thus*, either party should be free to pursue those customers pursuant to § 5-7-60.
>
> Municipalities do have the power to divide territory outside their corporate boundaries. They may enter *contracts* as allowed by § 5-7-60 and other statutes, but *otherwise*, the powers of a municipality are *limited* to the *area within its limits*. The trial court erred in ruling otherwise.

(Init. App. Br. at 13) (emphasis added).[11] In short, Fountain Inn argues that a "designated service area" under § 5-7-60 is limited to existing contracts and existing customers. This argument fails for several reasons:

1. It ignores the plain meaning of "area," which is a "territory" or "region." BLACK'S LAW DICTIONARY (5th Ed.) at 97 (1979) (emphasis added).[12] And it ignores the plain holding in *Kilgo, infra*, that a municipality's designated service area is not limited to existing customers with existing contracts.

2. This argument, like the earlier-noted "specific budget" argument, is based on an erroneously narrow view of a "designated service area" that would frustrate the clear purpose of the statute, which is to encourage municipalities to make their services available to general areas, not just specific customers. The incentive of a "designated service area" becomes meaningless if it is limited to existing customers with existing contracts.

3. This argument also ignores the undisputed evidence that LCPW was already serving customers in the general area of the Industrial Park (Tr. 41) and that LCPW contracted with the first customer in the Industrial Park (ZF) and installed the first service line to the Park before Fountain Inn acquired the second customer (Uniscite) or installed any line to serve the Park.

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[11] Fountain Inn's reference to "dividing territory" harkens back to its argument that the trial court erroneously enforced the 1992 boundary agreement, but that was not the trial court's ruling. See Arg. II, *supra*.

[12] See also merriam-webster.com, giving the full definition of "area" as including "a geographic region."

Finally, as demonstrated below, Fountain Inn's argument hinges upon its erroneous reading of the cases cited in support of its argument.

A. *Spartanburg Sanitary Sewer Dist. v. City of Spartanburg*, 321 S.E.2d 258 (S.C. 1984).

In *Sanitary Sewer*, the defendant ("the city") sought to expand its sewer service beyond its corporate limits and into an adjacent sewer district ("the district"), which was empowered to provide sewer service directly to customers in the area by a 1970 Act. Relying on the subsequent 1975 Home Rule Act that enacted § 5-7-60, the city argued that § 5-7-60 gave it authority to extend its sewer service beyond its corporate limits and into the district's service area. The Supreme Court held that § 5-7-60 precluded the city from doing so under the following analysis: (1) § 5-7-60 precludes a municipality from serving an area outside its corporate limits if that area is in the "designated service area" of another political subdivision; (2) the district had already constructed main lines as infrastructure in the area to handle the waste water generated in the area; (3) the district thus had a "designated service area" under §5-7-60 in the disputed area; and (4) under § 5-7-60 itself, the city could not provide sewer services in the area. 321 S.E.2d at 260-261.

Here, the trial court cited *Sanitary Sewer* for the salient point that building infrastructure in an area for serving the needs of the area creates a "designated service area" under § 5-7-60. (Order at 5-6, 7). The same facts are present here, because the undisputed testimony is that a major purpose of LCPW's 1985 supply line expansion project was to create the supply infrastructure for providing natural gas service in the area.[13]

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[13] In *Sanitary Sewer*, the city argued that it could more economically serve certain areas. The Court rejected this argument. 321 S.E.2d at 261. Fountain Inn made similar arguments but the trial court rejected them. (Order at 8). Fountain Inn does not challenge this ruling, thereby making it the law of this case that cannot be challenged later by reply brief. *Eldridge*, 728 S.E.2d at 28; *McClurg*, 716 S.E.2d at 888 n.2.

Fountain Inn acknowledges the Supreme Court's ruling that the district's actions of building main line infrastructure gave rise to a "designated service area" under § 5-7-60 (Init. App. Br. 11), but then argues as follows:

> LCPW could make similar arguments if Fountain Inn sought to provide services within the City of Laurens; however, in this case, LCPW is not the governing body with respect to the area in question. Therefore, it has not established a designated service area.

(Init. App. Br. 11-12). Fountain Inn apparently reads *Sanitary Sewer* as based on issues of crossing political subdivision boundaries and being the governing body for the area. There is no such ruling in *Sanitary Sewer*, which explains why Fountain Inn cites no part of *Sanitary Sewer* to support its argument. (See Init. App. Br. at 11-12).[14]

In short, the trial court correctly read and applied the salient point in *Sewer District*, to-wit: that the construction of infrastructure in the area for providing service in the area satisfies the definition of "designated service area" under § 5-7-60. That is precisely what happened here. Fountain Inn's attempt to avoid this salient point has no support in the Supreme Court's actual analysis and ruling. Moreover, the ruling in *Sewer District* provides no support for Fountain Inn's argument that a "designated service area" is limited to existing customers with existing contracts. To the contrary, the Supreme Court found that building infrastructure in the area, with no mention of any existing customer or contracts in the area, gave rise to a "designated service area" under § 5-7-60.

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[14] Returning to the actual language of *Sanitary Sewer*, the Court rejected the city's § 5-7-60 claim as follows: (1) the Court noted that the city based its claim on § 5-7-60; (2) then quoted § 5-7-60; and (3) then found that the district had the power to construct a sewer system in the area and had built the infrastructure for doing so. 321 S.E.2d at 260-261. The Court then applied § 5-7-60: "The Sewer District *thus would* fit the definition of a *designated service area*, and the City *would therefore* be precluded from extending its collection lines to areas outside its corporate limits *absent permission* from the Sewer District." 321 S.E.2d at 261 (emphasis added). The foregoing represents the entirety of the Court's analysis and ruling. It is a straightforward application of § 5-7-60 to the facts that had nothing to do with any notion of crossing corporate boundaries of a political subdivision or who is the governing body of the designated service area.

B. *City of Darlington v. Kilgo*, 393 S.E.2d 376 (S.C. 1990).

In *Kilgo*, the plaintiff ("the city") had a "designated service area" for fire protection under § 5-7-60 that extended outside the city's corporate limits, as measured by five road miles from the city's fire station. 393 S.E.2d at 377; see also *id.* at 379 (Goolsby, A.A.J., dissenting).[15] Thereafter, pursuant to S.C. Code Ann. § 4-19-10 (Rev. 1986), which was enacted in 1984 after the 1975 enactment of § 5-7-60, the defendant ("the county") passed an ordinance creating a county-wide fire protection district that included the city's "designated service area." *Id.* at 377. The city sued, and the trial court granted summary judgment to the city, holding that the county's fire district could not include the city's service area without the city's consent. *Id.* The Supreme Court affirmed.

Section 4-19-10 gave counties the power to create a county fire district but further provided that the county's "service *area*" could not include an "*area*" already being served by another political subdivision. *Id.* at 377-378 (emphasis added). The county argued that the city's service area did not qualify for protection under § 4-19-10, because the city's limited service in the area did not qualify as a "service area" under § 4-19-10. The dissent agreed with this argument, *id.* at 379-382, but the majority expressly rejected it as follows:

> [The] legislative intent [in § 4-19-10] was to allow municipalities to continue to offer fire protection services in *areas* previously served under contract, and that such *areas* could not be included in any county district plan without prior agreement with the municipality.

Id. at 378 (emphasis added). Thus, the majority held that "the five-mile radius protected by the [city] under contract constitutes a 'service *area*.'" *Id.* (emphasis added). The majority also held that there was no conflict between the county's power under § 4-19-10

[15] *Kilgo* involved two cities (Darlington and Hartsville) with the same five-mile radius "designated service area." For ease of reference, this brief refers to them jointly as "the city."

and "the [city's] *statutory rights under* § 5-7-60." *Id.* at 378-379 (emphasis added). If there was "an existing municipal service *area* within the county," the county could not include that area in its fire district absent an agreement with the city. *Id.* at 379 (emphasis added).

The dispute between the dissent and the majority illuminates the salient point in *Kilgo*. The city had contracts with only one-third of the customers in the area. 321 S.E.2d at 377 n.1, 379-380. The dissent concluded that the "service area" protection afforded by § 4-19-10 extended only to those customers but did not otherwise extend to the five-mile radius area claimed by the city, *i.e.*, the county could include any part of the five-mile radius in its district except for customers with existing municipal contracts. *Id.* at 380-381. The majority rejected this conclusion, holding that the city's service area included the entire five-mile radius area, because the city contracted with customers in the area and made its service available in the area. *Id.* at 378-379.

Here, the trial court relied on *Kilgo* for this salient point, *i.e.*, that "the only requirement for designating [a service] area was that the municipality was serving it [and] that area included the entire area in which the service was made available by contract and not just to customers with whom the [city] had existing contracts." (Order at 7). The facts are the same here – LCPW is providing service to existing customers in the disputed area and makes it service available in the area.

On appeal, Fountain Inn blithely ignores the salient ruling in *Kilgo*. After making summary references to the Supreme Court's ruling therein, Fountain Inn argues that two subsequent cases make it clear that the protection afforded by § 5-7-60 is limited to customers with existing contracts. (Init. App. Br. 12-13). Those cases are *Carolina Power* and *City of Spartanburg*, both *infra*. Fountain Inn simply misreads these cases.

1. <u>*Carolina Power & Light, Co. v. Darlington County*, 431 S.E.2d 580 (S.C. 1993)</u>.

In *Carolina Power*, the county created a fire protection district and imposed taxes on the property in the district. The plaintiff (CP&L) brought a tax protest suit against the county, arguing that it was not properly included in the district. CP&L argued that it was in the City of Hartsville's ("the city") fire protection service area by contract, this being the same five-mile radius designated service area approved in *Kilgo, supra.*

Two controlling facts distinguished *Carolina Power* from *Kilgo*. First, CP&L was not in the city's service area, which was defined as the area within five-road miles from the city's fire station. CP&L was within five miles "as the crow flies," but it was not within five-road miles of the city's fire station and therefore not in the city's service area. 431 S.E.2d at 581 & n.1. Second, in addition to not being in the city's service area, CP&L did not have a valid fire service contract with the city. *Id.* at 582-584. Thus, the Supreme Court upheld the trial court's denial of CP&L's tax protest.[16]

Importantly, nothing in *Carolina Power* changed the salient point in *Kilgo*, *i.e.*, that the city's service area included the entire five-road miles radius area and not just the customers with whom the city had existing contracts. Indeed, the Supreme Court went to some length to make it clear that CP&L was not within the service area that it upheld in *Kilgo*, which included the entire area and not just customers with existing contracts.

On appeal, Fountain Inn argues that *Carolina Power* stands for the proposition that only an existing customer with an existing contract is to be protected by § 5-7-60. (Init. App. Br. 12-13). There simply is no such ruling in *Carolina Power*. To the contrary, the

[16] There was an agreement between the city and CP&L, but it was not an enforceable contract, because *inter alia* it was signed by the fire chief, who did not have the capacity to enter the contract on behalf of the city. Thus, CP&L did not have a fire services contract with the city. 431 S.E.2d at 581-583.

only reasonable reading of *Carolina Power* is that the Supreme Court reaffirmed its ruling in *Kilgo* on the scope of the city's service area as being the entire five-road mile area and not just where the city had existing customers with existing contracts. CP&L could not take advantage of this ruling in *Kilgo*, because it was not within the city's service area. Thus, to potentially exclude itself from the county's fire district, CP&L had to prove the existence of a valid fire service contract with the city, but it failed to do so. CP&L therefore was in the county's district and had to pay the property taxes imposed by the county.

2. City of Spartanburg v. County of Spartanburg, 401 S.E.2d 158 (S.C. 1991).

The plaintiff ("the city") provided fire service for several years by contract to Draper, an industrial plant located outside the city limits but "bounded on all sides by property within [the city's] limits." *Id.* at 159. In other words, Draper was a county island within the sea of the city's limits. The city enacted an ordinance whereby it would provide fire services to contiguous areas only by annexation into the city. *Id.* at 159. The contract between the city and Draper lapsed, and Draper declined annexation. *Id.* Thus, there was no service contract between Draper and the city. More importantly, after the city adopted the ordinance, the city only provided fire services within its corporate limits. *Id.*

In 1988, pursuant to § 4-19-10, the defendant ("the county") created the Draper Corporation Fire Service Area, which encompassed only the Draper plant, and then contracted with Glendale Area Fire District to provide fire service in the Draper Area. *Id.* at 159 The city sued, challenging the validity of the Draper Corporation Fire Service Area and seeking an injunction against its continued existence. *Id.* The Supreme Court summarily rejected the city's argument under the following analysis: (1) as a general rule, a city has no standing to challenge a county's creation of a special purpose district that is

not within the city's limits; (2) to have standing, a city "must allege an infringement of its own proprietary interest *or statutory rights*," but the city "alleged no such infringement"; and (3) there was no existing contract between Draper and the city, "and this case is *clearly distinguishable* from our recent decision in [*Kilgo, supra*]." *Id.* (emphasis added).

Kilgo was "clearly distinguishable" because, unlike the city in *Kilgo*, the city in *City of Spartanburg* did not have a service area outside its corporate limits. Rather, by force of its own 1987 ordinance, the city's service area was limited to its corporate limits as they then existed or were thereafter expanded by annexation.

Fountain Inn argues that *City of Spartanburg* is similar to *Carolina Power,* an apparent reference to its meritless argument that *Carolina Power* changed the rule in *Kilgo* and limited the scope of a § 5-7-60 "designated service area" to existing customers with existing contracts. To support this argument, Fountain Inn asserts that *City of Spartanburg* "*distinguished* [*Kilgo*] and found that a city could not challenge the creation of a [fire service district] outside its corporate limits with respect to a former city customer with which the city no longer had an existing agreement." (Init. App. Br. 13) (emphasis added).

The Supreme Court, however, did not "distinguish *Kilgo*" – rather, it distinguished *City of Spartanburg* from *Kilgo*. The is not mere semantics, because it makes clear that the Supreme Court did not alter the ruling in *Kilgo*. Moreover, what distinguished the two cases was that the city in *Kilgo* had a service area outside its corporate limits and the city in *City of Spartanburg*, by force of its own 1987 ordinance, did not. Thus, because Draper was outside the city's limits, was not in the city's service area, and was not under contract with the city, the city did not and could not allege an infringement of its statutory rights and therefore did not have standing to challenge the creation of the fire district. This was

the actual ruling of the Supreme Court in *City of Spartanburg*, and nothing changed the salient ruling in *Kilgo,* which the trial court correctly applied here.

C. *Mathis v. Hair*, 594 S.E.2d 851 (S.C. App. 2002).

In *Mathis*, there was a dispute over the allocation of funds from the South Carolina Fireman's Insurance and Inspection Fund ("the Fund") between the city and county fire departments. The central issue was the meaning of "service area" as used in S.C. Code Ann. § 23-9-420 (Rev. 2007), because the allocation was based on the property values in the "service area" of each fire department. Section 23-9-40 did not define "service area," and the county treasurer concluded that the allocation should be based on the corporate limits of the city and county, even though the city provided fire service to areas within the county district pursuant to a contract with the county. The trial court agreed with the county treasurer, but the Court of Appeals reversed under the following analysis: (1) the plain and ordinary meaning of service area "is the *area* where the fire department provides services"; (2) this meaning is bolstered by that term as used and defined in other statutes and cases, including § 5-7-60 and *Kilgo, supra*; and (3) therefore, the funds must be allocated between the city and county fire departments based on property values within the areas that each actually provides fire service. 594 S.E.2d at 854.

Here, the trial court simply and correctly noted that the Court of Appeals defined "service area" under § 23-9-420 by relying in part on the definition in § 5-7-60, to-wit: "an *area* in which the service is being provided." (Order at 7) (emphasis added). Thus, the trial court correctly concluded that *Mathis*, like *Sanitary Sewer* and *Kilgo*, supported its ruling

that LCPW's designated service area under § 5-7-60 included "the *entire area* in which the LCPW provides service by contract." (Order at 7-8) (emphasis added).[17]

On appeal, in a footnote, Fountain Inn correctly notes that *Mathis* did not arise under § 5-7-60, then accuses the trial court of failing to provide the full context of *Mathis*, then quotes *Mathis*, and then summarily and without explanation asserts that "*Mathis* is consistent with Fountain Inn's arguments relating to § 5-7-60 and [*Kilgo*]." (Init. App. Br. 11 at n.5). There simply is no such "consistency." *Mathis*, like all of the other cases, concerned the "area" in which services were being provided, not simply the location of existing customers with existing contracts. More importantly, like all of the prior cases, *Mathis* again made it clear that providing service in an area was the key factor in defining the existence and scope of a statutory "service area."

[17] The facts in *Mathis* were somewhat complicated. The Fund operated in the following manner: (1) The Fund was financed by payments from all fire insurers in South Carolina equaling 1% of all premiums received by the insurer, accompanied by a report that allocated the payment according to the county where the insured property was located; (2) the insurers made their payments to the state treasurer, who in turn disbursed the funds to the county treasurers in accordance with the county allocation report from the insurers; and (3) the country treasurer then disbursed the funds to local fire departments based on S.C. Code Ann. § 23-9-420 (1989), which required disbursements on the basis of the assessed value of real estate improvements "within the *service areas* of the fire department." 594 S.E.2d at 852 (emphasis added). The controversy focused on the meaning of "service area" as used in § 23-9-420, which did not define the term. *Id.* at 852, 854. The controversy arose under the following facts: (1) the county had seven tax districts, all of which received fire services from either the city fire department or the county fire department; (2) two of the tax districts were within the city's limits, and the city fire department provided fire service to the entirety of both of these districts; (3) the remaining five tax districts were within the unincorporated area of the county, but the city fire department provided fire service to some of these areas pursuant to a contract with the county; (4) the county treasurer determined that "service area," as used in § 23-9-420, meant the area within the city's limits and the area within the unincorporated areas of the county, and she therefore divided and disbursed the Fund based on the relative assessed property values within the city's limits and those in the unincorporated area of the county; and (5) the city fire department challenged this allocation, contending that the disbursement to it must include the assessed value of the properties in the county where the city fire department provided fire service, *i.e.*, the city fire department argued that its "service area," as used in § 23-9-420, included the county areas where the city provided fire service. 594 S.E.2d at 852-853. There was disagreement over which department provided service to which area so, after reversing the trial court's affirmance of the county treasurer's action, the Court of Appeals remanded for a factual determination of this question, with the Fund disbursement to thereafter be allocated accordingly. *Id.*

CONCLUSION

The undisputed evidence demonstrates as a matter of law that LCPW has established a "designated service area" under the plain meaning of § 5-7-60. For this reason, and for the other reasons set forth above, it is respectfully submitted that this Court should affirm the appealed order.

Respectfully Submitted,

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Columbia, SC
January 13 , 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2015-001894
Case No. 2011-CP-30-309

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JAN 14 2016

SC Court of Appeals

Commissioners of Public Works of the
City of Laurens, South Carolina, also known as the
Laurens Commission of Public Works, ...Respondent,

v.

City of Fountain Inn, South Carolina,...Appellant.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Initial Brief of Respondent and Designation of Matter to be Included on Appeal, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to Appellant's counsel at the addresses shown below, on January 13, 2016:

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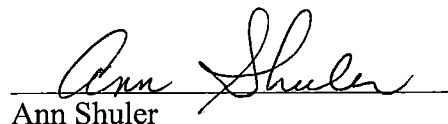

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JAN 14 2016

SC Court of Appeals

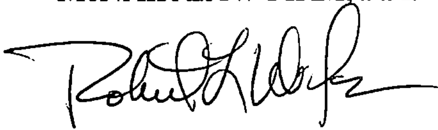
Re: Commissioners of Public Works of the City of Laurens, South Carolina, also known as the Laurens Commission of Public Works v. City of Fountain Inn, South Carolina
Appellate Case No. 2015-001894

Dear Madam Clerk:

Enclosed for filing, please find the original and two copies of the Respondent's Initial Brief and Designation of Matter in the above referenced appeal. Please file the Brief and Designation and return a file stamped copy to me in the return envelope provided. By copy of this letter, we are serving counsel for the Appellant with a copy of same.

Respectfully yours,

McNAIR LAW FIRM, P.A.



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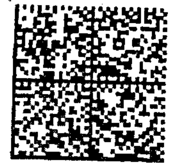

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