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

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SC Court of Appeals

C.A. 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 REPLY BRIEF OF APPELLANT

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The sole issue for this Court to decide on appeal is whether, pursuant to S.C. Code Ann. § 5-7-60, the Laurens Commission of Public Works ("LCPW") has established a designated service area for the provision of natural gas services as shown on a map drawn by the parties in 1992 (the "1992 Map"). The City of Fountain Inn ("Fountain Inn") argues that LCPW has not established a designated service area as shown on the 1992 Map, and thus, both parties are free to compete for customers outside their respective municipal limits.

STANDARD OF REVIEW

LCPW seeks to exclude Fountain Inn from providing natural gas service in a newly developed industrial park ("industrial park" or "disputed area"). Realizing that LCPW and Fountain Inn did not and could not have made an agreement assigning natural gas territory in perpetuity, LCPW dropped its claims for breach of contract and promissory estoppel at trial. (Order at 3, n. 3, Tr. at 89:14-90:19, R. at ____). The only remaining claims were for declaratory judgment and injunctive relief based on LCPW's theory that it had established a designated service area pursuant to S.C. Code Ann. § 5-7-60 and therefore could exclude Fountain Inn from providing natural gas service on the LCPW side of the line. The trial court agreed and ordered, "LCPW has complied with the requirements to establish a territory on the southern and eastern side of the boundary line on the 1992 Map as the LCPW's designated service area for a particular service, natural gas, under S.C. Code Ann. § 5-7-60." (Order at 9, R. at ____).

Given LCPW's claim for injunctive relief accompanied by a request for statutory construction, this Court's review is in equity. The injunctive relief is not incidental—LCPW's main purpose in filing this action is its desire to enjoin Fountain Inn from competing for customers in the disputed area. Thus, an equitable standard of review

applies. *Doe v. S. Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001) (holding that since "main purpose" of action was for injunctive relief, the appellate court could take its own view of the facts).

The cases cited by LCPW are inapplicable because in those cases the question of statutory construction was coupled with relief at law. For instance, *Normandy Corp. v. South Carolina Dep't of Transp.*, 386 S.C. 393, 688 S.E.2d 136 (Ct. App. 2009) arose in the context of condemnation. As stated in *Normandy*, "[c]ondemnation actions are actions at law." *Id.* at 402, 688 S.E.2d at 141 (citing *S.C. Pub. Serv. Auth. v. Arnold,* 287 S.C. 584, 586, 340 S.E.2d 535, 537 (1986)). *Timmerman v. Timmerman*, 331 S.C. 455, 502 S.E.2d 920 (Ct. App. 1998) holds that an action seeking relief under the Omitted Spouse Statute is an action at law; importantly however, the case cited by *Timmerman* for that proposition, *Williams v. Williams*, 329 S.C. 569, 573, 496 S.E.2d 23, 25-26 (Ct. App. 1998) *rev'd on other grounds*, 335 S.C. 386, 517 S.E.2d 689 (1999), makes the crucial distinction that in a case where equitable relief is sought, as is the case here, the action is in equity. In *Auto Owners Ins. Co. v. Rollison*, 378, S.C. 600, 606-07, 663 S.E.2d 484, 487 (2008), the request for declaratory relief was tied to a contract dispute, which sounds at law. Lastly, *State v. Petty*, 270 S.C. 206, 208, 241 S.E.2d 561, 562 (1978) arose from an action for forfeiture of property. "An action for forfeiture is a civil action at law." *Ducworth v. Neely*, 319 S.C. 158, 162, 459 S.E.2d 896, 899 (Ct. App. 1995). Thus, these cases cited by LCPW are distinguishable from the instant case.

This is not an action seeking to assert a claim under a statute, but rather an action seeking injunctive relief based on the construction of a statute. As such, the standard of review is equitable and this Court is not bound by the trial court's factual findings.

Regardless, the parties are in agreement that the construction of S.C. Code Ann. § 5-7-60 presents a question of law for the Court. *See Boggero v. S. Carolina Dep't of Revenue,* 414 S.C. 277, 280, 777 S.E.2d 842, 843 (Ct. App. 2015); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.").

ARGUMENT IN REPLY

As an initial matter, LCPW appears to take the position that Fountain Inn's evidence is limited to that provided by its witness. (*See* Respondent's Brief at Standard of Review). This is simply not the case. *See Jackson v. Jackson*, 234 S.C. 291, 299, 108 S.E.2d 86, 90 (1959) ("We think the trial Judge . . . fell into error when he based his ruling upon the fact that the appellant did not put up any witnesses in his behalf. He overlooked the settled rule of law that the appellant's defense could be supplied by the witnesses for the respondent."); *Greenville Cnty. v. Stover*, 198 S.C. 240, 247, 17 S.E.2d 535, 537 (1941) ("[P]roof of a defendant's defense can be supplied by a plaintiff . . . ."); *Eargle v. Sumter Lighting Co.*, 110 S.C. 560, 566, 96 S.E. 909, 911 (1918) ("It is immaterial from whose witnesses—whether plaintiff's or defendant's—the evidence in support of an element of damage or of the cause of action or defense may come. Either party has the right to make out or to strengthen his case or defense on the examination of the witnesses of his adversary."). In this case, the law and the preponderance of the evidence as taken from all witnesses shows that the trial court erred in finding LCPW has established a designated service area pursuant to S.C. Code Ann. § 5-7-60.

I. There was not a valid boundary agreement between LCPW and Fountain Inn.

There is no dispute that both parties receive their natural gas supply from the Transco pipeline in Fountain Inn and that both parties had infrastructure near the disputed area. (Tr. at 91:22-25, 30:17-20, 103:25-104:8, R. at ____). Further, there is no dispute that the disputed area was undeveloped at the time the industrial park was announced. (*See* Tr. at 51:11-13, 80:12-18, 96:12-16, Def. Ex, 2, R. at ____). Neither party presented evidence of contracts or customers served in the disputed area prior to the establishment of the industrial park. LCPW instead presented general testimony that it served throughout its "territory" as shown on the 1992 Map. (*See* Tr. at 25:7-9, Order at 2, 5, R. at ____). It is also undisputed that **both** parties were required to build lines to serve the industrial park. (Tr. at 103:25-104:8, R. at ____).

In order to get around these undisputed facts, LCPW and the trial court relied on the 1992 Map, which allegedly reflects a boundary agreement between the parties. This is plainly reflected in the bullet points presented by LCPW in its Statement of the Case. As found by the trial court, "this Court concludes that under the language of Section 5-7-60, the area that the LCPW has served, which is on the southern and eastern side of the boundary line shown on the [1992 Map], is the LCPW's service area for furnishing natural gas . . . ." (Order at 1, R. at ____). The trial court's order does not contain any rulings specific to any customer, and instead finds that all deviations from the 1992 Map were with consent. (Order at 2, 7-8, R. at ____).[1]

[1] Respondent's brief suggests that the trial court made findings as to a specific Fountain Inn customer, Uniscite. (Respondent's Brief at I). This is not the case. The order does not include any mention of Uniscite, and Fountain Inn contends its existing contracts remain intact.

However, the 1992 Map is a nullity. It stems from an agreement that LCPW and Fountain Inn could not have made as a matter of law, and as a result, the trial court's order gives effect to an invalid agreement. In other words, LCPW is being allowed to sneak through the back door what would not fit through the front. The parties could not agree to a boundary, but LCPW has argued and the trial court found that the 1992 Map creates a boundary line—despite the fact that there was not a valid agreement and the parties could not have made such an agreement.

LCPW does not appear to dispute that the parties could not have made a long-term agreement with respect to service areas for natural gas service and makes no argument on this point. (Respondent's Brief at II). This is because the law is well-established that such an agreement would be null and void. *See, e.g., Cunningham v. Anderson Cnty.*, 402 S.C. 434, 441-50, 741 S.E.2d 545, 550-54 (Ct. App. 2013), *aff'd in part and rev'd in part on other grounds by* 414S.C. 298, n.1, 778 S.E.2d 884, n.1 (2015) (dismissing writ of certiorari on this issue). Moreover, the alleged agreement was not ratified by Fountain Inn's City Council (Tr. at 38:18-23, Order at 2, R. at ____) and was only ratified by LCPW the same day this action was filed. (Pl. Ex. 8, R. at ____).

The alleged agreement and the 1992 Map form the basis for the trial court's finding that LCPW had established a designated service area. (Order, R. at ____). The trial court adopted the 1992 Map as the boundary. LCPW's brief also relies on the alleged agreement and the 1992 Map. (*See* Respondent's Brief at Statement of Facts). In the absence of the 1992 Map and the alleged agreement, there is no basis for finding that LCPW provided service in the disputed area. The testimony only supports that LCPW

provided service in accordance with the 1992 Map, not that it had existing customers and contracts within the disputed area. Accordingly, the trial court erred in finding that LCPW provided service across the entire area reflected on the 1992 Map as the 1992 Map does not reflect any valid agreement by the parties. Quite simply, if there is no agreement, there cannot be a designated service area created along the boundary line shown on the 1992 Map.

II. LCPW has not established a designated service area with respect to the disputed area.

Fountain Inn has argued throughout this case that LCPW has not created a designated service area with respect to the disputed area because it was not serving customers there and because there was no certification from the governing body of that area as to the provision of service, budgeting of funds, or application for funds.[2] The parties have a fundamental dispute about the construction of S.C. Code Ann. § 5-7-60.

Fountain Inn agrees with LCPW that "that 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." (Respondent's Brief at I). "[C]ourts may not enlarge by construction the language of a clear and unambiguous statute." *Jordan v. Montgomery Ward & Co.*, 442 F.2d 78, 82 (8th Cir. 1971). As stated by the South Carolina Supreme Court:

> [C]ourts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not

[2] A review of the record shows that Fountain Inn has been consistent in making these arguments before this Court and before the trial court. (Pre- and Post- Trial Briefs, Motion to Reconsider, R. at ____). As such, Fountain Inn has fully appealed the trial court's determination that LCPW established a designated service area as defined by the 1992 Map and the law of the case doctrine is inapplicable.

> within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws. There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive, and the judicial.

Laird v. Nationwide Ins. Co., 243 S.C. 388, 395, 134 S.E.2d 206, 209 (1964) (quotation omitted); *Bentley v. Spartanburg County*, 398 S.C. 418, 426, 730 S.E.2d 296, 301 (2012) ("[W]e are interpreters not legislators and are bound by the language of [the statute] as written."). Therefore, the focus here is on the language of the statute.

As set forth in the S.C. Code Ann. § 5-7-60, "[a]ny municipality may perform any of its functions, furnish any of its services . . . and make charges therefor and may participate in the financing thereof in areas outside the corporate limits of such municipality by contract . . . ." Thus, the statute is designed to allow a municipality to provide its services outside its limits by contract.

The statute then creates a limited exception to this general rule as follows:

> except within a designated service area for all such services of another municipality or political subdivision . . . . 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.

As an exception, this portion of the statute should be narrowly construed in order to give effect to the statute's primary goal—allowing municipalities to provide services outside their boundaries by contract. *See Olmstead v. Shakespeare*, 348 S.C. 436, 441, 559 S.E.2d 370, 373 (Ct. App. 2002); 82 C.J.S. *Statutes* § 371 (a),(c) (1999) ("Since an exception must be construed in conformance with the purpose and meaning of the statute in which it is contained, all doubts and implications must be resolved in favor of the general statute or rule, rather than in favor of the exception."). **Under the plain language of the statute, service by contract outside municipal boundaries is the rule and designated service areas are the exception.** LCPW has flipped this rule on its head and argued that the primary focus should be the creation of designated service areas rather than the ability of municipalities to provide services outside their municipal boundaries by contract.

The general rule of service by contracts makes sense given the common law backdrop for services extended by cities outside their limits. Such service is not mandatory, is controlled by contracts, and is not subject to any requirement of reasonableness. *Childs v. City of Columbia*, 87 S.C. 566, 570, 70 S.E. 296, 298 (1911); *Sloan v. City of Conway*, 347 S.C. 324, 330-31, 555 S.E.2d 684, 687 (2001). In addition, cities have a duty to prioritize revenues for their taxpayers over the needs of non-resident customers. *Calcaterra v. City of Columbia*, 315 S.C. 196, 197, 432 S.E.2d 498, 499 (Ct. App. 1993). In such a case, if service is limited to contracts, customers are free to pursue other providers in the event they are unhappy with the service or the rates charged. Thus, Fountain Inn's policy arguments are absolutely consistent with the plain language of the

statute and the policies underlying home rule. It is LCPW's arguments that are inconsistent.

The language of the exception requires two things in order to establish a designated service area: (1) "an area in which the particular service is being provided or is budgeted or funds have been applied for"; and (2) "as certified by the governing body thereof." S.C. Code Ann. § 5-7-60. The requirement that the certification be made by the governing body for the area is consistent with the general principles of home rule, which was designed to bring local government back to local governing bodies rather than concentrating those powers in the county's legislative delegation. *Knight v. Salisbury*, 262 S.C. 565, 571, 206 S.E.2d 875, 877 (1974) ("It is clearly intended that home rule be given to the counties and that county government should function in the county seats rather than at the State Capitol. If the counties are to remain units of government, the power to function must exist at the county level."). The designated service area exception was designed to protect existing customer contracts and municipal or special purpose district boundaries, not act as an offensive tool for the creation of extra-territorial monopolies. *See Spartanburg Sanitary Sewer Dist. v. City of Spartanburg*, 283 S.C. 67, 321 S.E.2d 258 (1984).

Given this backdrop, it stands to reason that the local government for the area in question must be the one providing any certifications with respect to services for its citizens. LCPW seeks to remove the local "governing body thereof" from the equation. Such a result would be absurd and is inconsistent with home rule and the plain language of the statute.

LCPW's argument, when taken to its logical end, would allow a city to establish a designated service area in any area of the state simply by budgeting funds to provide such service, provided someone else was not already serving there. Counsel for LCPW acknowledged the possible extremes to which a designated service area might be carried under its construction when he mused at trial "does this mean it goes on forever, does this mean we can go all the way to Charleston." (Tr. at 110:5-7, R. at ____). By way of example under LCPW's approach, LCPW could certify a designated service area in Charleston County and exclude others from serving there without ever entering a contract or ever providing a service as long as the area was not a part of the designated service area of another entity. This cannot be the rule.

Based on its argument, LCPW contends it is somehow in a better position to certify as to service to the citizens of Laurens County than Laurens County Council. This is notwithstanding the inherent conflict of interest between non-citizen customers and citizen customers.

LCPW has also pointed to its own certification. (Pl. Ex. 8, R at ____). This resolution was issued the same day this action was filed. Moreover, the certifications are based on the entire boundary line shown on the 1992 Map. There are no specific certifications as to the disputed area with respect to customers served or expenditures made or budgeted.[3] Thus, LCPW attempted to proclaim a designated service area by fiat

[3] Similar to the testimony about service provided, the testimony with respect to funds and budgeting relates to LCPW's entire area and not the disputed area specifically. (Tr. at 86:13-23, R. at ____). The disputed area coincidentally lies along LCPW's supply lines, which have their terminus within Fountain Inn. (Tr. at 81:21-84:3, Pl Ex. 6, R. at ____). Again, LCPW's argument on this point rests on the 1992 Map. LCPW spent funds to maintain a supply of natural gas to its system, but it has not identified any customers in the disputed area.

the very day this action was filed. This cannot be the way S.C. Code Ann. § 5-7-60 was designed to operate.

Even if this Court agrees with LCPW that no certification is required in cases where service is already being provided, there is no evidence that LCPW was actually providing service to customers in the disputed area. Instead, LCPW presented evidence that it generally served the entire area on its side of the line as shown in the 1992 Map. As discussed above, the 1992 Map is a nullity and cannot serve as the basis for an argument that service was being provided in the disputed area in the absence of evidence of actual customer contracts.

As argued by Fountain Inn in its Appellant's Brief, the case law supports its construction of the statute when the facts of each case are properly considered. Moreover, this case adds a new wrinkle to the existing case law: How does S.C. Code Ann § 5-7-60 operate when two municipalities seek to serve the same customers outside their municipal boundaries? Fountain Inn cites the rule from the statute, which allows service by contract. LCPW and the trial court look to the exception, which provides for designated service areas . However, as shown above and in Fountain Inn's Appellant's Brief, the exception is inapplicable here. As a result, both Fountain Inn and LCPW should be able to compete for customers within the disputed area.

CONCLUSION

Fountain Inn is not arguing the disputed area is its designated service area. Instead, it is arguing that the disputed area is not in anyone's designated service area, and therefore LCPW, Fountain Inn, and any other natural gas provider are free to compute for those customers under the plain language of S.C. Code Ann. § 5-7-60. For these reasons and those presented in its Appellant's Brief, the trial court's rulings should be reversed.

Respectfully submitted,

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February 3, 2016
Greenville, South Carolina

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J. Cordell Maddox, Jr., Circuit Court Judge

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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,

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have this 4th day of February, 2016, caused the foregoing *Initial Reply Brief of Appellant City of Fountain Inn, South Carolina* to be served via U.S. mail, postage prepaid on counsel of record at the addresses shown below:

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February 4, 2016

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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
C.A. No.: 2011-CP-30-309
Appellate Case No. 2015-001894
HSB File No.: 29772.0031

Dear Ms. Kitchings:

Enclosed herewith for filing is an original and one (1) copy of the *Initial Reply Brief of Appellant City of Fountain Inn, South Carolina* regarding the above-referenced case together with a Proof of Service. Please file the originals and return a clocked copy to me via my courier.

Sincerely yours,

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill

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