

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LAURENS COUNTY  
In the Court of Common Pleas  
J. Cordell Maddox, Jr., Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 5559 (S.C. Ct. App. filed May 16, 2018)  
Supreme Court Case No. 2018-001309  
S.C. Ct. App. Case No. 2015-001894  
Lower Court Case No. 2011-CP-30-309

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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,.....Petitioner.

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RETURN TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. The Court of Appeals applied the correct standard of review to this case, and any error in its statement of the standard of review is harmless error, because it has no impact on the outcome of this appeal.
2. The Court of Appeals did not base its ruling on any agreement of the parties, and its references to the boundary line were based on the actual conduct of the parties over twenty years, not any notion that the boundary line was enforceable by agreement or otherwise.

## INTRODUCTION

This case involves the interpretation and application of S.C. Code Ann. § 5-7-60. The General Assembly enacted § 5-7-60 as part of the 1975 Home Rule Act, which completely rewrote the law on *inter alia* the corporate powers of municipalities. Section 5-7-60 granted municipalities two new powers. First, § 5-7-60 granted municipalities the power to provide their services to customers outside their corporate limits. Second, § 5-7-60 also granted municipalities the power to acquire a “designated service area” (DSA) for providing services outside their corporate limits in one of three ways: (1) actually providing the service in the area; (2) budgeting to provide the service in the area; or (3) certifying that funds had been applied for to provide the service in the area. Section 5-7-60 further provided that municipalities did not have the power to provide services in the DSA of another municipality absent the permission of that other municipality.<sup>1</sup>

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<sup>1</sup> § 5-7-60 provides in full (all emphasis added):

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.

Here, the basic issue is whether the respondent (LCPW) acquired a DSA for natural gas services under § 5-7-60, such that the petitioner (Fountain Inn) did not have the power to provide gas service in the same area. Two questions control this issue: (1) what are the requirements for a DSA, *i.e.*, what is the meaning of § 5-7-60; and (2) did LCPW meet those requirements?<sup>2</sup>

## **STATEMENT OF THE CASE**

Prior to 1985, LCPW received its natural gas from an 8-inch supply line that connected to the Transco national pipeline near Fountain Inn. (Appx. 349, 356, 411-412). 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. (Appx. 411). Both parties expanded their systems in their respective areas throughout the late 1980's and 1990's. (Appx. 404; 411).

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. (Appx. 349). 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. (Appx. 349-350; 356; 361; 381-382; 412-413). 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. (Appx. 108; 356; 361; 380-382; 396-397; 408; 410-415).

Also in 1985, due to the cost of the planned supply line expansion, the parties' gas system managers, the mayor of Fountain Inn, and the engineers for LCPW's expansion project met to

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<sup>2</sup> LCPW is the entity created and authorized by the City of Laurens to provide municipal utility services, including natural gas services, to customers within and outside the City's corporate limits.

discuss the future of gas services in the area around the cities and avoiding duplication of services. (Appx. 317-320; 349-350; 356; 449). The parties reached a general understanding on their respective areas, but no written agreement was reached, nor was any map drawn. (Appx. 317-320).

In October 1992, the parties' gas 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. (Appx. 103; 349-352; 365-367; 402-407; 444-447). 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. (*Id.*) *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. (Appx. 97; 357-358; 368-369). 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. (Appx. 103, 106, 108; 353-355; 367-368; 406-408). From time to time, questions arose as to which city 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 cities contracting with the particular customer.<sup>3</sup>

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

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<sup>3</sup> On appeal, Fountain Inn asserted the parties "attempted to respect the line" but "there were disagreements." (App. Br., Appx. at 27). 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.

in which the Owings Industrial Park is now located. (Appx. 355; 371-372; 376-377; 382; 416-417). Fountain Inn never solicited or served any customers in this service area, including the area in which the Owings Industrial Park is now located. (Appx. 355, 357; 367-370; 378, 379, 381; 430-431). 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, the Laurens County Development Corporation announced plans to develop an industrial park, which came to be known as the Owings Industrial Park (the Industrial Park). The entire Industrial Park was well within in LCPW's service area. (Appx. 355; 371-372; 376-377; 382; 416-417). The area within the confines of the planned park was not being served by anyone, because there was no one to serve. LCPW, however, already had supply line infrastructure in the area, and it already had customers in the general area near the Industrial Park. (Appx. 371-372; see also Appx. 355; 376-377; 416-417).

ZF was the first company to build a facility in the Industrial Park. After 20 years of each party serving its service area exclusively, Fountain Inn solicited ZF to provide gas services to it. Fountain Inn's new gas manager (Pittman) simply believed that Fountain Inn could serve customers anywhere, including anywhere in LCPW's service area. (Appx. 432-433).

LCPW objected to Fountain Inn's solicitation – the parties met but failed to resolve the matter. (Appx. 375-376). LCPW thereafter commenced the present action and sought a preliminary injunction to prohibit Fountain Inn from soliciting customers during the pendency of the lawsuit. (Appx. 96). While the injunction motion was pending, LCPW secured a contract with ZF. (*Id.* at 100). Laying the service line to ZF only took a few days, because LCPW simply tapped into its existing 6- inch supply line in the area. (Appx. 435). This 6-inch supply line was part of

LCPW's 1985 supply line expansion project, which it had undertaken for the specific purpose of reaching and serving customers in this area.

The circuit court ultimately denied LCPW's motion for a preliminary injunction. (Appx. 96-100). Thereafter, Fountain Inn entered a natural gas service contract with Uniscite, the second customer to build a facility in the Industrial Park. To serve this customer, Fountain Inn had to first build a main line (a/k/a supply line) into the area, so that it could then run a service line from the main line to Uniscite. (Appx. 356-357; 380-381; 432-433; 434-435; 435-436). Fountain Inn had to build a main line because its supply line system, unlike LCPW's system, was not designed to serve this area, and this was Fountain Inn's first intrusion into LCPW's service area.

At trial, Fountain Inn presented the testimony of one witness, Thomas Pitman, who was hired in December 2006 to be Fountain Inn's gas manager. (Appx. 420-421). He moved to South Carolina to take this job (Appx. 430), so he had 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. (Appx. 430).
2. He knew of no Fountain Inn lines that had been run into LCPW's service area prior to 2011 when Fountain Inn built its supply line and service line to serve Uniscite, the second customer to build a facility in the Industrial Park. (Appx. 431).
3. He believed that Fountain Inn could provide 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. As to the law set forth in § 5-7-60, he blithely stated was not an attorney. (Appx. 432-433).

In short, other than being the cause of this dispute by seeking to cherry-pick industrial customers in the Industrial Park (Appx. 424-426), which indisputably is in LCPW's general service area, 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.

LCPW offered the testimony of five witnesses with personal and intimate knowledge of the relevant facts, *including* the former gas manager for Fountain Inn and the gas system engineer that worked for both LCPW and Fountain Inn:

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. (Appx. 348-357; 363).
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. (Appx. 364-368).
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. (Appx. 369-384; 396-397).
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. (Appx. 398-408; 410-415).
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. (Appx. 415-417).

The trial court specifically and repeatedly relied on the testimony of these witnesses. (Appx. 103-104; 106; 108). Based on the undisputed testimony presented by these witnesses and the trial court's determinations of the witnesses' credibility, the trial court ruled in favor of LCPW under the following findings:

1. In 1992, the parties' service managers agreed to a boundary line for their respective natural gas service areas outside their city limits. (Appx. 103).
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 103).

3. When a dispute arose about a customer along the boundary line, the parties resolved the issue by agreement. (*Id.* at 103, 108-109).
4. For the next 20 years, until 2011, LCPW provided 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 in the area being served. (*Id.* at 103-104; 106; 108-109).
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 106).
6. The current dispute arose in 2011 when Fountain Inn, for the first time, solicited a customer in the newly developed Industrial Park, which is in LCPW's service area. (*Id.* at 104; 108-109).

Based on these findings, the trial court held LCPW had a designated service area under the provisions of § 5-7-60:

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 . . .

(Appx. at 106; see also *id.* at 102; 110). Fountain Inn timely appealed to the Court of Appeals, which affirmed the trial court. (Appx. at 1-10).

## **ARGUMENT**

Before addressing Fountain Inn's legal arguments to this Court, several of its factual statements must be addressed. First, Fountain Inn asserts the following: “There was no testimony that either party had contracts with customers *inside the area of the proposed industrial park* at the time of the announcement [that the industrial park was to be built].” (Cert. Pet. at 4) (emphasis added). This is true but analytically incomplete. Neither party had any customer contracts in this “area,” because it was fallow land. Fountain Inn seems to admit this later in its petition:

No one was serving the area in question at the time this industrial park was announced. It was undeveloped. ... [N]o one had a designated service area in terms of previous service or contracts within the disputed area because there was no need for natural gas service.

(Cert. Pet. at 8). It is undisputed, however, that LCPW was already providing gas service to customers in the area, including the general area of the to-be-built industrial park, at the time of the announcement of the park. (Appx. 371-372; see also Appx. 355; 376-377; 382; 416-417). Moreover, it is also undisputed that LCPW served the first customer in this “area,” *i.e.*, it provided gas service to the first facility (ZF) built in the industrial park “area.”

Second, Fountain Inn asserts the following: “Both LCPW and Fountain Inn built new *service lines* to serve the new industrial park.” (Cert. Pet. at 4) (emphasis added). This is true but analytically incomplete. A “service line” is the small diameter pipe that connects a customer to a much larger supply line or main line. The undisputed evidence demonstrates two relevant and controlling facts. When LCPW ran a service line to ZF, it ran the service line from the already-existing 6-inch supply line in the area. (Appx. 435). LCPW built this supply line in 1985 for the specific purpose of providing gas service in the general area that included the later developed industrial park site, and it had been using this supply line to provide service to other customers in the area prior to the development of the industrial park. By contrast, when Fountain Inn ran a service line to Uniscite, it first had to build a supply line into the area of the industrial park, because it had never supplied gas service to anyone in the general area of the industrial park. In short, at the time of the announcement of the industrial park, LCPW already had infrastructure in the general area for running service lines to customers and already had customers in the general area. These undisputed facts established that LCPW already had a “designated service area” in the general area long before Fountain Inn first built a supply line and then a service line.

Third, Fountain Inn asserts the following in the context of its argument on the proper standard of review: “Fountain Inn submits there were factual issues with respect to whether service was actually being provided in the contested area.” (Cert. Pet. at 7). Fountain Inn cites no evidence to support this assertion, because there was no conflicting evidence to create any question of fact. To the contrary, as summarized above, the undisputed evidence is that no one provided gas service within the confines of the proposed industrial park, because there were no customers within those confines, but LCPW (and only LCPW) had the pre-existing infrastructure and capacity to serve that specific “area,” already had other customers in the general area of the to-be-built industrial park, and provided service to the first facility built within the confines of the industrial park. These undisputed facts established that LCPW had a designated service area under § 5-7-60 in the general area of the industrial park and within the confines of the industrial park itself before Fountain Inn sought to provide gas service in the general area or in the industrial park itself, and before Fountain Inn built any gas lines of any type in any part of the area.<sup>4</sup>

**I. The Court of Appeals applied the correct standard of review to this case, and any error in its statement of the standard of review is harmless error, because it has no impact on the outcome of this appeal.**

On appeal to the Court of Appeals, the parties disagreed on the applicable standard of review. Fountain Inn argued that this case was a matter in equity, because LCPW sought an injunction prohibiting Fountain Inn from encroaching upon LCPW’s designated service area and,

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<sup>4</sup> Throughout its Petition, Fountain Inn makes passing references to arguments made in the Court of Appeals but not encompassed within either of its two “Questions Presented” and not argued with any specificity in its petition. LCPW submits such passing references are insufficient to meet the requirements for certiorari, including the requirements that arguments be encompassed within the “Questions Presented” and that arguments be made in the body of the petition. See Rule 242(d)(2) and (d)(4), SCACR. Any attempt by Fountain Inn to cure these defects in any reply to LCPW’s return would be a futile act, because one cannot raise new issues in a certiorari reply. See *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011) (“It is axiomatic that an issue cannot be raised for the first time in a reply brief.”). To the extent Fountain Inn’s passing references to its prior briefing in the Court of Appeals are sufficient, LCPW incorporates herein its responsive arguments in its Brief of Respondent, including its arguments that issues raised by Fountain Inn to the Court of Appeals were not properly preserved for appellate review and were barred by the law of the case doctrine.

therefore, the Court of Appeals could take its own view of the evidence in deciding any issues of fact. (App. Br., Appx. 28). Fountain Inn was incorrect and, in any event, the Court of Appeals properly affirmed the trial court under any standard of review.

The dominant issue is 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 a 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, there is no question of fact, and the application of the law to undisputed facts is also a question of law for the court. *Williams v. Government Employees Ins. Co.*, 762 S.E.2d 705, 709 (S.C. 2014).

To the extent there are disputed issues of facts (and there are none under the undisputed evidence in this case), 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 credibility determinations based on its superior position to make such determinations. *Avery v. Avery*, 634 S.E.2d 668, 671 (S.C. App. 2006).

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). Section 5-7-60 does not require an “equity review” of factual issues, and it is not part of a remedial scheme that is predominantly equitable in nature. Thus, the instant action is at law and subject to the “any evidence” standard of review.

Fountain Inn argued 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.” (App. Br., Appx. 28). Fountain Inn “supported” 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,” this 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.

Here, any injunctive relief in this case is ancillary in the truest sense of the word and therefore does not satisfy the “main purpose rule” even if it applied. Section 5-7-60 is the only source of Fountain Inn’s power to provide gas service outside its 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 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 to the controlling question of whether the statute grants Fountain Inn the power to provide service in the area. Thus, the present action is at law and 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 the Court of Appeals 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 and the affirmance of that order by the Court of Appeals. Any disputed issue of fact had to be presented through the competing testimony of witnesses (but there was no competing testimony), and this Court should not disturb the trial court's inherent and expressly noted credibility determinations on the witnesses' testimony. Assuming there is any competing evidence on any relevant question of fact, the evidence overwhelmingly supports the ruling of the trial court and the Court of Appeals' affirmance of that ruling.

The Court of Appeals applied the correct standard of review. Any presumed error to the contrary is harmless, because the trial court's order must be affirmed under any standard of review.

**II. The Court of Appeals did not base its ruling on any agreement of the parties, and its references to the boundary line were based on the actual conduct of the parties over twenty years, not any notion that the boundary line was enforceable by agreement or otherwise.**

The gist of Fountain Inn's second question presented and its argument in support thereof is that the trial court and the Court of Appeals accepted the 1992 Map as establishing an enforceable boundary line by agreement of the parties but such agreements are not enforceable. (Cert. Pet. at 2; 8-9). The trial court, however, did not rest its ruling on any claim or finding of an enforceable boundary agreement, nor did the Court of Appeals affirm the trial court on the basis of any enforceable boundary agreement.

On appeal to the Court of Appeals, Fountain Inn complained that the trial court had impermissibly enforced a 1992 boundary agreement under the following argument:

1. “Municipalities do not have the power to divide territory outside their corporate boundaries.” (App. Br., Appx. 36).
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. (*Id.* at 36-38).
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.” (*Id.* at 36, 38).

This was 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. (Appx. 103; 104, n.3). The trial court never based its ruling on any finding or holding that the boundary agreement was an enforceable contract or agreement that created a “designated service area” under § 5-7-60.

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. (Appx. 103-104; 106; 108-109). These findings are not based on any ruling that there was an enforceable boundary agreement. 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 the 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.

The Court of Appeals affirmed the trial court's ruling under the same analysis without reliance on any enforceable boundary agreement:

The record contains evidence the two parties generally observed the boundary provided by the Map. **Because** LCPW has been providing natural gas service in the area, *it has established a designated service area.*

(Appx. at 9) (all emphasis added). The Court of Appeals, like the trial court, relied on the conduct of the parties and the undisputed evidence on who provided service where and when to find that LCPW had a designated service area. Neither court relied on the existence or enforceability of any boundary line agreement. Indeed, the Court of Appeals specifically noted that it did not reach any "contract" issue for this reason: "As we affirm **because** the designated service area was *created by the two parties observing* the limits over a period of many years, *not by the Map creating a binding contract*, we do not reach this issue." (Appx. at 9, n.9) (all emphasis added).

The trial court and the Court of Appeals relied on the undisputed evidence of who first provided service in the area generally, and in the specific area of the Industrial Park. This undisputed evidence, standing alone, demonstrated that LCPW had a designated service area under the express terms of § 5-6-70 without regard to any purported agreement between the parties.<sup>5</sup>

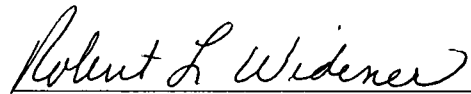
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<sup>5</sup> Here, as elsewhere in its petition, Fountain Inn makes passing references to other issues raised in the trial court and the Court of Appeals. These arguments are not properly before this Court and have no merit. See n. 4, *supra*.

## CONCLUSION

For the reasons stated, respondent asks the Court to deny the petition for a writ of certiorari.

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