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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

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,.....Petitioner.

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

The Laurens Commission of Public Works ("LCPW") brought this action to exclude the City of Fountain Inn ("Fountain Inn") from competing for contracts to provide natural gas service to a newly formed industrial park in northern Laurens County. In its Petition, Fountain Inn has argued that the Court of Appeals applied the wrong standard of review and that when this case is reviewed under the proper standard, the law and the evidence support a finding that LCPW did not establish a designated service area with respect to the area in question.

I. The facts of this case should be reviewed under a preponderance of the evidence standard.

A. LCPW brought this case to enjoin Fountain Inn from competing for natural gas customers in a newly established industrial park.

LCPW continues to argue that this action sounds at law because it seeks to determine rights under a statute. (Respondent's Brief at 12). That is not the law of this state. The cases cited by LCPW on this point sounded at law because the relief sought was legal. (*See* Petitioner's Brief at 8). Although Fountain Inn agrees that construction of a statute presents an issue of law, that determination is not determinative of the standard of review. Instead, the Court must look to the main purpose of the action, which was to exclude Fountain Inn from providing natural gas service in a previously unserved area of northern Laurens County. As such and set forth in the Brief of Petitioner, the standard of review is in equity.

B. When the correct standard of review is applied, the preponderance of the evidence shows that the area in question was not the designated service area of LCPW.

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 5-6). 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.").

The evidence presented at trial establishes each of the following points: (1) there was not a valid agreement setting territorial boundaries between the parties (App. at 103; 336:20-25; Respondent's Brief at 27); (2) the area that became the disputed industrial park was undeveloped at the time it was announced and did not include natural gas customers of either LCPW or Fountain Inn (App. at 381:11-13; Respondent's Brief at 9); and (3) the source for LCPW's natural gas is the Transco line within Fountain Inn's municipal limits and, as a result, LCPW necessarily had infrastructure in the northern Laurens County (App. at 360:17-24). The issue then becomes whether a boundary line drawn on the 1992 Map should be given effect such that LCPW could be deemed to be providing service to the area in question. Fountain Inn argues that because the parties could not have made an agreement setting a boundary in perpetuity, the map reflecting that "agreement" is a nullity and cannot be the basis for establishing a designated service area.

To the extent this presents an issue of fact, Fountain Inn believes that the preponderance of the evidence shows no one was serving the area in question and therefore no one could claim a designated service area there. Moreover, there was no evidence that any party had budgeted or spent funds to provide service to that area (again, it was unserved) and there was not any certification made by the governing body thereof (Laurens County). The testimony recited by

LCPW goes to LCPW's whole system and not the specific area in question. For these reasons, Fountain Inn believes that application of the wrong standard of review by the Court of Appeals was not harmless error.

II. LCPW has not established a designated service area as a matter of law or a matter of fact.

In its opening brief, Fountain Inn has fully briefed the arguments on the merits presented by LCPW. It does not undertake to repeat those arguments here, but rather to address certain points raised in LCPW's Respondent's Brief.

Fountain Inn's arguments related to whether LCPW has established a designated service area are all preserved and fairly before this Court. With respect to issue preservation, a review of the record shows that Fountain Inn has been consistent in making these arguments before the trial court, the Court of Appeals, and this Court. (App. at 11-17; 20-38; 77-92; 242-54; 268-92; 303-23; 324-26). 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.

Similarly, the second question presented in Fountain Inn's petition for a writ of certiorari relates to the finding of a designated service area by the Court of Appeals and the trial court. That question includes the construction of S.C. Code Ann. § 5-7-60 and how a designated service area may be established. Moreover, Fountain Inn expressly incorporated all of its arguments before the Court of Appeals in its petition for a writ of certiorari. As a result, and certainly when considered with the Brief of Petitioner as a whole, there is no question but that these issues are all fairly before this Court. *See Eubank v. Eubank*, 347 S.C. 367, 373 n.2, 555 S.E.2d 413, 416 n.2 (Ct. App. 2001) (finding that Statement of Issues on Appeal should be read in conjunction with argument in assessing issue preservation).

Fountain Inn has consistently argued that LCPW has not established a designated service area because the 1992 Map was a nullity, no one was providing service to the area in question, and the governing body for the area (Laurens County) has not made any kind of certification. Thus, LCPW did not establish any part of the designated service area test set forth in § 5-7-60.

Although § 5-7-60 as a whole relates to the ability of municipalities to provide service outside their borders, the designated service area provision and its certification requirement clearly includes other types of governmental entities. This construction is the only reasonable one because if a municipality is serving outside its borders, it is necessarily within the area of some other governmental entity, such as a county or a special purpose district. There is nothing preventing a County from making the requisite certifications under § 5-7-60 if the County Council deems such a certification appropriate. Fountain Inn contends this is the construction required by the plain language of the statute, which references the "governing body thereof" with respect to the area. The City of Laurens is not the governing body of unincorporated Laurens County, and therefore, any certification would have to be made by Laurens County, which would in turn be politically accountable for any negative repercussions of that decision.

LCPW's arguments relating to its alleged designated service area all hinge on the 1992 Map. If the map is given effect, LCPW argues that it has provided service throughout the area shown on the map and therefore that it has established a designated service area. Fountain Inn, on the other hand, argues that LCPW and Fountain Inn did not and could not reach an enforceable agreement that would give the 1992 Map any efficacy. This is why Fountain Inn continues to raise the contractual issue and why LCPW continues to downplay it. If the 1992 Map is a nullity, there is no evidence that LCPW was serving the area in question.

CONCLUSION

As set forth in 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. That general rule, however, is subject to a caveat designed to protect areas where another entity is already serving or an area where a third party has budgeted funds or applied for funds as certified by the governing body of that area. The caveat is to protect investment and prevent ouster, not create extra-territorial monopolies for municipalities. It is not an incentive as argued by LCPW, but rather a limit on the general power conferred by this section.

The conflicting views of the parties relating to the construction of § 5-7-60 are illustrated by the answer to the following question: can two municipalities carve up undeveloped areas outside their boundaries in perpetuity as designated service area without a binding agreement or involvement by the governing body for the area in question? LCPW argues yes; Fountain Inn argues no.

For all of these reasons and those presented in the Brief of Petitioner, the opinion of the Court of Appeals in this matter should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the *Reply Brief of Petitioner City of Fountain Inn's* on the following parties on this the 18th day of March 2019, by mailing a copy of the same via United States Mail, postage prepaid, to the following:

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