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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.

RETURN TO PETITION FOR REHEARING

As requested by the Court, the City of Fountain Inn ("Fountain Inn") submits this return in response to the petition for rehearing submitted by the Commissioners of Public Works of the City of Laurens, South Carolina, also known as the Laurens Commission of Public Works ("LCPW"). Fountain Inn contends the court correctly construed S.C. Code Ann. § 5-7-60 and correctly found that LCPW was not serving the disputed area at the time this action was filed. For both of these reasons, the Court was correct in reversing the lower courts' determinations that LCPW had established a designated service area that included the disputed area and could exclude Fountain Inn from serving customers in that area.

INTRODUCTION

The arguments raised in the Petition are not new.[1] Fountain Inn will not repeat the arguments raised in its Petitioner's Brief and Reply Brief here, but incorporates those arguments by reference.

LCPW and Fountain Inn disagree about whether S.C. Code Ann. § 5-7-60 is primarily designed to allow cities to serve outside their boundaries by contract or whether it is primarily designed to allow cities to create extra-territorial monopolies free from political or regulatory oversight. LCPW again seeks to focus exclusively on the "designated service area" language rather than the statute as a whole.

S.C. Code Ann. § 5-7-60 solely relates to a municipality's ability to serve outside its city limits. Nothing about this section alters a city's ability to serve within its limits. Moreover, nothing about the Court's decision grants any new powers to counties or upsets the general rule allowing cities to serve outside their boundaries by contract. The opinion simply provides that the certification for purposes of establishing a designated service area must come from the governing body of that area. That will not always be a county (it just so happens that Laurens County is the governing body in this case). In many cases, it would be a special purpose district. When one city seeks to provide service within another city's boundaries, it could be another municipality.

In addition, there is no inherent problem with allowing multiple providers to serve an area. With respect to the service at issue in this case (natural gas), private natural gas companies compete with municipal gas providers. *Glendale Water Corp. of Florence v. City of Florence*, 274 S.C. 472, 474, 265 S.E.2d 41, 42 (1980)). Fountain Inn competes with Piedmont Natural Gas, and in those cases, the customer has a choice of providers. (App. at 429:17-25). The facts in this case

[1] Nor are LCPW's preservation arguments new. *See* Respondent's Brief at 15-16; Reply Brief at 3.

also show that LCPW has lines in Fountain Inn, because it buys its natural gas from the Transco pipeline located within Fountain Inn's city limits. (App. at 360:14-361:14; 411:21-412:5; 421:22-25). Contrary to the dire scenarios presented in the Petition, these lines have all existed together for many years without incident.

ARGUMENT IN RESPONSE

I. The certification required for creating a designated service area under S.C. Code Ann. § 5-7-60 must be made by the "governing body thereof."

These arguments were all before the Court. The Court has correctly determined that the plain language of the statute reflects that the creation of a designated service area requires the certification of the "governing body thereof." This construction gives meaning to the statute as a whole and is consistent with the general principles of home rule.

LCPW appears to concede that a certification requirement might apply to cases "where funds have been applied for." As found by the Court, the statute is unambiguous and the certification requirement applies to all of the methods for creating a designated service area. Under this approach, potential customers and municipalities can easily determine if an area is part of a designated service area for a particular service by consulting the governing body. If the governing body wishes to certify a designated service area in favor of a municipality, the governing body of the area in question could certainly obtain that information from the municipality and make that certification.

The Court's ruling does not make county governments the sole arbiter of municipal service within unincorporated areas. As discussed above, the county will not always be the governing body for the service in question in the area in question. In addition, the statute and the case law show that designated service areas under this statute may be created in favor of different types of political subdivisions, not just municipalities. The more frequent case is that a municipality seeks

to serve within the designated service area of a special purpose district. *See, e.g., Spartanburg Sanitary Sewer Dist. v. City of Spartanburg*, 283 S.C. 67, 321 S.E.2d 258 (1984).

Moreover and as illustrated by this case, not all unincorporated areas are within a designated service area for a particular service. Municipalities remain free to serve outside their limits by contract unless those areas are within an established designated service area. Nothing on the face of the statute is designed to incentivize designated service areas for any provider, much less the broad extra-territorial municipal monopolies advocated by LCPW. LCPW's arguments are all prefaced on the idea that there is a preference for designated service areas, but that intent does not appear in the statute. Instead, the statute focuses on the right to serve by contract, which is preserved by the Court's opinion in this case.

In addition, LCPW fails to mention that municipalities are not required to serve anyone outside their boundaries. 12 *McQuillin Mun. Corp.* § 34:112 (3d ed.) (citing *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911)). When a municipality undertakes to do so by contract, a city is not required to charge reasonable rates but rather "is to be guided by the best interests of the municipality and has an obligation to sell [its service] for the highest price obtainable." *Calcaterra v. City of Columbia*, 315 S.C. 196, 197, 432 S.E.2d 498, 499 (Ct. App. 1993). Thus, under LCPW's theory, it could proclaim a designated service area and then cherry pick exactly the customers it wished to serve at whatever price it wished to charge, leaving all others in the cold in perpetuity (literally in this case). That cannot have been the intent of the legislature.

Lastly, the creation of the designated service area is separate and apart from later decisions about who may serve within that designated service area. The parties do not dispute that once a designated service area is created; no other municipal provider may enter new contracts within that area absent permission from the other "municipality or political subdivision concerned." Thus,

the requirements for creating a designated service area do not conflict with the portion of the statute relating to the permission to serve within an established designated service area.

II. Precedent supports the Court's ruling.

Both parties have extensively briefed the cases cited by the Court. The Court disagreed with LCPW's interpretation. For the reasons previously presented, Fountain Inn believes the Court's ruling is correct. *See* Petitioner's Brief at 20-23.

III. LCPW was not serving the area in question.

As Fountain Inn has argued throughout this case, no one was serving the area in question. It was undeveloped. The only way LCPW could argue it was providing service there was by reference to the 1992 Map, which it admits was a nullity. The statements from LCPW's counsel at oral argument on this point were telling. Without reference to the 1992 Map, he could not place any boundaries on what LCPW was claiming a designated service area. *See* http://media.sccourts.org/videos/2018-001309.mp4 beginning at 22:26. Thus, even if the Court were inclined to revisit the construction of S.C. Code Ann. § 5-7-60 and to determine that no certification is required as to "an area in which the particular service is being provided," the Court was correct in reversing the Court of Appeals in this case because the service was not being provided in this area. *See* Petitioner's Brief at 17-23.

CONCLUSION

For these reasons and those previously presented, the Petition for Rehearing should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the *Petitioner's Return to Petition for Rehearing* on the following parties on this the 15th day of October 2019, by mailing a copy of the same via United States Mail, postage prepaid, to the following:

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