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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Opinion No. 27917 (S.C. Sup. Ct. filed Sept. 18, 2019)
Supreme Court Case No. 2018-001309
S.C. Ct. App. Case No. 2015-001894
Opinion No. 5559 (S.C. Ct. App. filed May 16, 2018)
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,.....Petitioner.

REPLY TO RETURN TO PETITION FOR REHEARING

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Pursuant to this Court's request under Rule 221(a), SCACR, the Petitioner (Fountain Inn) filed a Return to the Respondent's (LCPW's) Petition for Rehearing. LCPW files this Reply.

REPLY ARGUMENT

I. Fountain Inn ignores this Court's request for a response with respect to numerous issues and arguments raised in LCPW's Petition for Rehearing.

Prior to 2018, the SCACR freely permitted the filing of returns to rehearing petitions. This Court amended the SCACR in 2018 to prohibit rehearing returns unless the appellate court requested one. Despite the rarity of judicial requests for a rehearing return, Foundation Inn's perfunctory return does not address the following issues and arguments raised in LCPW's Petition for Rehearing (see Return, *passim*):

(1) This Court's ruling has sent shock waves through the local government community in South Carolina because, *inter alia*, municipal service areas created under § 5-7-60 exist throughout the State without any county certification, and the services long enjoyed by citizens in those areas are now in jeopardy. Under this Court's ruling, the counties control the creation and scope of municipal service areas. (Petition at 2). Section 5-7-60 uses the term "designated service area," which is referenced herein as "service area" or "municipal service area" for clarity.

(2) The majority's analysis and ruling overlooks the fundamental rules for writing, reading, and understanding English, *e.g.*, the absence of commas and the use of "or" in the "certification" portion of § 5-7-60. As a result, the majority has engaged in judicial legislation rather than judicial interpretation of a statute. (Petition at 5). Fountain Inn does not dispute this except to assert that this Court properly construed the statute. (Return at 3; *id.* at *passim*).[1]

[1] Fountain Inn claims that "LCPW appears to concede that a certification requirement might apply to cases 'where funds have been applied for.'" (Return at 3). This is nonsense. LCPW's position has always been that the certification applies to the "funds applied for" part of § 5-7-60 but only that part.

(3) Section 5-7-60 gives the governing body of the service area provider the power to allow service by other municipalities in the service area. It would be absurd to hold that only the county can create a municipal service area, but the municipality can grant other municipalities or political subdivisions permission to provide service in the area designated by the county without any input from or the permission of the certifying county. (Petition at 7, subpart (1)).

(4) The majority's opinion overlooks the plain meaning of "certify" and the plain inability of a county to certify municipal actions, etc., thereby leading to the absurd result that a service area can never be created under § 5-7-60. Moreover, even if a county could certify a city's conduct, etc., nothing gives a city the power to compel a certification by a county even if the city has satisfied the requirements § 5-7-60. Thus, under this Court' ruling, the county has unbridled power over the creation of municipal service areas despite the absence of anything showing a legislative intent to grant counties this sweeping power. (Petition at 7-8, subparts (2)-(3)).

(5) To provide service to a service area outside its corporate limits, a city must first build infrastructure outside its limits in that "would-be" service area. No city will do so absent some guarantee of a return on its investment, *i.e.*, a service area that is free from municipal competition on a long term basis. The only way to achieve this would be a long term agreement with the county, but this is precisely the type of agreement that Fountain Inn argues cannot be entered into by governing bodies. (Petition at 8-9, subpart (4)).

(6) The Constitution directs the General Assembly to provide for county powers by general law, and the General Assembly did so in Title 4 of the South Carolina Code. Nothing in Title 4 gives a county any power over municipal service areas and, in fact, statutes in Title 4 prohibit counties from interfering with municipal service areas. The majority ruled that a single sentence in a single statute in Title 5 of the Code (which relates solely to powers of municipalities)

created a new county power not mentioned in Title 4. Had the General Assembly intended to create this new and sweeping county power over municipal service areas, it surely would have listed that power in the general county power statute (§ 4-9-30). (Petition at 10, subpart (6)).

(7) The Constitution prohibits counties from providing natural gas service anywhere in the county. Absent an express and plainly stated directive in a statute, which does not exist in Title 4 or Title 5, it is absurd to believe the General Assembly intended to give counties sweeping powers over the establishment and scope of municipal natural gas service areas, thereby allowing counties to do indirectly what they cannot do directly. (Petition at 11, subpart (7)).

(8) The majority laments that "county" customers in a municipal service area will have no choice. Unless and until a municipality (or some private provider) makes natural gas service available, the "county" customers have to find power elsewhere (*e.g.,* propane, electricity). If a municipality establishes a service area that includes "county" customers, those customers have the option of contracting with the city, or they can choose to not contract with the city and continue with their current power sources. The majority also laments cities having unfettered discretion to simply claim a service area, but this is simply wrong. To establish a service area, a city has to satisfy the requirements of § 5-7-60 by first providing the service, or budgeting to do so, or applying for funds to do – it cannot simply "claim" the service area. (Petition at 11, Arg. III).

(9) The majority wrongly concludes that LCPW's "claim" for a service area is "tethered to the 1992 Map" and accepting the claim would give formal legal effect to a contract never entered into by the parties. LCPW did not seek any enforcement of the map as an agreement, nor did it pursue any other contract theory – the map simply and only showed where the parties had in fact provided gas service for the past 20 years. In like manner, the circuit court and the Court of Appeals did not rely on any contract theory or any theory that the 1992 Map created an

agreement. The majority has therefore reversed the lower courts for rulings they never made, and rejected arguments that LCPW never made to this Court or the lower courts. (Petition at 16-17, Arg. V).

II. Fountain Inn's "county certification" argument was not properly before this Court.

Fountain Inn's "county certification" arguments were not properly before this Court under the law of the case doctrine and, more importantly, because Fountain Inn never raised any "county certification" issue in its Certiorari Petition. (Petition at 6-7, Arg. II). Fountain Inn's entire response is in a sentence fragment in a footnote: "Nor are LCPW's preservation arguments new. *See* Respondent's Brief at 15-16; Reply Brief at 3." (Return at 2, n.1).[2] Assuming Fountain Inn's cursory reference to a page in its Reply Brief is an appropriate and adequate response, it fails for the reasons set forth below.

As to whether Fountain Inn raised the "county certification" issue in its Petition for a Writ of Certiorari, Fountain Inn relies on a single paragraph from page 3 of its Reply Brief, which makes the following three assertions:

(1) Fountain asserted the following: "[T]he 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 [and] [t]hat question *includes* the construction of [§ 5-7-60] and how a designated service area may be established." (Petitioner's Reply Brief at 3) (emphasis added). Fountain Inn mis-reads its own "Question Presented" number two, which asserted the Court of Appeals had erred "in finding" a service area under § 5-7-60 "based on [the] 1992 Map" and "an

[2] Fountain Inn's complaint that LCPW's rehearing arguments are not new is nonsensical. (Return at 2, n. 1 and accompanying text). Rehearing grounds generally are limited to grounds previously raised to the court.

agreement that was not and could not be approved by" the parties.[3] Nothing in this Question hints at a "county certification" issue.

(2) Fountain Inn also asserted the following: "[C]ertainly 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)." (Petitioner's Reply Brief at 3). It is true that Fountain Inn made a "county certification" argument in its Brief of Petitioner before this Court. But that is irrelevant because, as argued in LCPW's rehearing petition, Fountain Inn never made any "county certification" argument in its certiorari petition that could "save" it failure to raise the issue in its "Questions Presented" – a fact that Fountain Inn never disputes in its Return. (See Rehearing Petition at 6-7; Return, *passim*). Fountain Inn's reliance on *Eubanks* is misplaced. That case stands for the well-established proposition that a deficiency in a Statement of Issues in an appellate brief can be cured by the arguments made in that same appellate brief. Here, to take advantage of this "cure" proposition, saving the clear deficiency in Question 2 of Fountain Inn's certiorari petition required an argument on "county certification" being made in the body of the certiorari petition itself. Fountain Inn made no such argument in its certiorari petition, and it does not claim that it did so.

(3) Finally, Fountain also asserted the following: "Moreover, Fountain Inn expressly incorporated all of its arguments before the Court of Appeals in its petition for a writ of certiorari." (Petitioner's Reply Brief at 3). Fountain Inn does not cite any portion of its certiorari petition to support this assertion, but it apparently relies on the following assertion in its certiorari petition:

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[3] Question 2 stated in its entirety: "Did the Court of Appeals err in *finding* that [LCPW] had established a designated service area pursuant to S.C. Code Ann. § 5-7-60 and could exclude Fountain Inn from entering contracts in an unincorporated area of Laurens County that had previously been undeveloped land *based on a 1992 Map* drawn by the parties in furtherance of *an agreement that was not and could not be approved by the respective City Councils*?" (Cert. Pet. at p. 2, Question 2) (emphasis added).

"[Fountain Inn] incorporates the arguments presented to the Court of Appeals here and would ask that it be permitted to raise those issues before this Court." (Certiorari Petition at p. 9). If this is an appropriate and adequate ground for certiorari, most future certiorari petitions will and should be no more than one sentence. The SCACR, however, clearly requires a certiorari petition that directs this Court's attention to specific errors allegedly committed by the Court of Appeals, and the blanket incorporation of prior arguments in briefs before the Court of Appeals does not and cannot satisfy this requirement. See generally Rule 242(d), SCACR.

As to the law of the case doctrine, and assuming Fountain Inn first properly presented these questions in its certiorari petition (which it did not), there are two specific issues: (1) Fountain Inn's failure to challenge the trial court's ruling in its brief before the Court of Appeals; and (2) Fountain Inn's failure to challenge the Court of Appeals' ruling in its brief before this Court. See Rehearing Petition at p. 6, Arg. II(1) and II(2)). Rather than respond with any specificity in its Return, Fountain Inn again relies on the summary incorporation of a single paragraph from page 3 of its Reply Brief, and that paragraph summarily opposes application of the law of the case doctrine based on the following citations to the Appendix: "App. At 11-17; 20-38; 77-92; 242-54; 268-92; 303-23; 324-26." (Reply Brief at 3). A review of these citations reveals a complete failure to address the law of the case arguments made by LCPW:

(1) App. 11-17 is Fountain Inn's Petition for Rehearing in the Court of Appeals. Manifestly, nothing therein does not and cannot cure a failure to make an argument in Fountain Inn's Brief of Appellant before the Court of Appeals or its Brief of Petitioner in this Court.

(2) App. 20-38 is Fountain Inn's entire Brief of Appellant in the Court of Appeals. Manifestly, any argument therein does not and cannot cure a failure to make an argument in Fountain Inn's Brief of Petitioner in this Court. Moreover, Fountain Inn cites its entire brief

because it cannot cite any specific page that specifically challenged the trial court's ruling, which is the absolute requirement for avoiding the law of the case doctrine. Fountain Inn apparently hopes this Court will review the entire brief and find something that it could not find itself to avoid affirmance under the law of the case doctrine, *i.e.*, a specific argument that specifically challenges the trial court's ruling.

(3) App. 77-92 is Fountain Inn's entire Reply Brief in the Court of Appeals. It is axiomatic that an argument for reversal cannot be made for the first time in a reply brief and, therefore, nothing in the reply brief can cure the failure to make a specific argument in the appellant's brief, which Fountain Inn did not make and cannot (and does not) cite. Manifestly, any argument in the Reply Brief before the Court of Appeals does not and cannot cure a failure to make an argument in Fountain Inn's Brief of Petitioner in this Court.

(4) App. 242-254 is Fountain Inn's pre-trial brief that it filed with the circuit court prior to trial. App. 268-292 is Fountain Inn's memorandum of law filed with the circuit court in support of its post-trial motions for judgment. App. 303-323 is Fountain Inn's reply memorandum filed in the circuit court to support of its post-trial motions for judgment. App. 324-326 is Fountain Inn's motion to amend the trial court's order ruling in favor of LCPW. Manifestly, arguments in these trial court documents do not and cannot cure a failure to make arguments in Fountain Inn's Brief of Appellant before the Court of Appeals or its Brief of Petitioner in this Court.

In short, Fountain never demonstrates that the law of the case doctrine should not be applied to this case. Indeed, Fountain Inn never cites anything specific in its Brief of Appellant before the Court of Appeals or its Brief of Petitioner before this Court. This is quite telling, because making a specific and identifiable argument in both of those briefs is essential to avoiding affirmance under the law of the case doctrine.

III. The majority's analysis of the opinion in *Kilgo* and subsequent opinions is based upon a mistaken reading of *Kilgo* and those subsequent opinions.

The majority distinguishes *Kilgo*[4] as being decided solely on the basis of the contractual provisions in § 5-7-60 without any consideration of the service area provisions in § 5-7-60.[5] As set forth in exacting detail in LCPW's Petition for Rehearing, the majority misread *Kilgo* and the subsequent opinions cited by the majority. Those cases actually demonstrate that the existence of the physical service area, not simply contracts, was and remains a guiding principle in applying § 5-7-60, and that service areas are not limited to existing contracts or existing customers. (Petition at 12-16, Arg. IV). Fountain Inn's only response is a reference to pages 20-23 of its Petitioner's Brief before this Court. (Return at 5, Part II). A review of those pages demonstrates that Fountain Inn has again failed to respond LCPW's petition despite this Court's request for a response.

The majority cited *Sloan*[6] and *Calaterra*[7] as support for a limited reading of *Kilgo* and its precedential value. As argued by LCPW, nothing in either case supports any erosion of the ruling in *Kilgo*; neither case cites or discusses *Kilgo*; neither case involved the creation, existence, or scope of a city service area under § 5-7-60. The only "city" issue was the complaint that the cities charged non-city customers more than city customers. In short, *Sloan* and *Calcaretta* have nothing to do with the issues in the present case. Although Fountain Inn discusses these cases at pages 20-21 of its Petitioner's Brief, it never responds to the analysis argued in LCPW's Rehearing Petition.

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

[5] "*Kilgo* is easily distinguished. *Kilgo* involved a dispute between a county and a city which was resolved with reference to only the contract provision of section 5-7-60, without any consideration of the existence and implications of the designated service area provisions of the statute." Adv. Sh. at 13 (emphasis added).

[6] *Sloan v. City of Conway*, 555 S.E.2d 684 (S.C. 2001).

[7] *Calcaterra v. City of Columbia*, 432 S.E.2d 498 (S.C. App. 1993).

The majority ruled that LCPW's misplaced its reliance on *Spartanburg Sanitary Sewer Service Dist. v. City of Spartanburg*, 321 S.E.2d 258 (S.C. 1984). The salient point in *Sanitary Sewer*, upon which the trial court relied, was that a political subdivision could create a statutory service area by building infrastructure in the area, even if it did not have existing customer contracts in that area. The undisputed facts in this case are that LCPW had already constructed infrastructure (supply lines) in the area that included the future Industrial Park for the specific purpose of providing service in that non-city area. Indeed, to serve any customer in the Industrial Park, LCPW simply had to connect a service line to the existing supply line and run the service line to the customer. In stark contrast, to reach a customer in the Park, Fountain Inn had to first build infrastructure in the area, *i.e.*, it had to build a new supply line after the commencement of this action, and then run a service line from the newly built supply line to a customer in the Park. Although Fountain Inn mentions *Sanitary Sewer* at page 21 of its Petitioner's Brief, it does not address the LCPW's argument that *Sanitary Sewer* stands for the proposition that building infrastructure in an area, standing alone and without any existing customers, is sufficient to create a service area that includes the future customers in that area.

At page 22 of its Petitioner's Brief, Fountain Inn summarily and only asserts that *Kilgo* and *Carolina Power*[8] stand for the proposition that service areas under § 5-7-60 are limited to existing customers with existing contracts. However, as shown in LCPW's Rehearing Petition in great detail, those cases actually hold that the entire area and all persons in that area are part of the service area, including any potential customers who do not have an existing contract. (Petition at 12-15). Fountain Inn never responds to LCPW's arguments on the actual meaning of and rulings

[8] *Carolina Power & Light Co. v. Darlington County*, 431 S.E.2d 580 (S.C. 1993).

in *Kilgo* and *Carolina Power*, which are based on the facts established and analysis actually used in both cases. (Return and Petitioner's Brief, both *passim*).[9]

IV. Fountain Inn's "not serving" argument has not merit.

In its Argument III, Fountain Inn summarily asserts that, even if one assumes that certification is not required for an area being served, LCPW's service area could not include the area now occupied by the Industrial Park, because that area was undeveloped at the time that LCPW's service area was created. (Return at 5). This argument has no merit.

First, the undisputed facts in this case are that LCPW had built infrastructure in the area for the specific purpose of providing service to future customers in the area and that it was already serving customers in the general area when the Industrial Park was announced and built. (See Appx. 371=372; see also *id.* at 355; 376-377; 416-417). Indeed, this infrastructure (new supply line) was so close to the future Industrial Park that LCPW simply ran a service line from that pre-existing supply line to the first occupant of the Industrial Park. And as this Court held in *City of Spartanburg*, building service infrastructure in an area is sufficient to create a service area, even if customers do not yet exist in that area. See n. 9, *infra*.

Second, Fountain Inn's argument is simply a variant of its argument that service areas under § 5-7-60 are limited to existing customers with existing contracts. As demonstrated in LCPW's review of the actual analysis and ruling in *Kilgo* and *Carolina Power*, a service area is

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[9] At pages 22-23 of it Petitioner's Brief, Fountain Inn discusses the opinion in *City of Spartanburg v. County of Spartanburg*, 401 S.E.2d 158 (S.C. 1991), arguing that this Court's reliance on the absence of a contract in *City of Spartanburg* supported a narrow reading of *Kilgo*. LCPW did not discuss this case in its Rehearing Petition, because this Court did not cite it. To the extent Fountain Inn is here relying on its reading of this case, it is mistaken for numerous reasons. Most notably, there was no "service area" at issue in *City of Spartanburg*, because the city had specifically disavowed the existence of any service area outside its corporate limits. For a fuller discussion of this case, see LCPW's Brief of Respondent in this Court at pages 32-34.

not limited to existing customers with existing contracts, and it includes present and future potential customers in the area who do not have a service contract.

Finally, the undisputed fact in this case is that Fountain Inn was the first to provide service in the Industrial Park. Thus, even under Fountain Inn's myopic view of § 5-7-60, the area of the Industrial Park is part of LCPW's service area.

V. This Court has improperly invaded the public policy province of the General Assembly.

Section 5-7-60 reflects a clear public policy choice by the General Assembly to use a "municipal monopoly" to incentivize cities to provide services outside their corporate limits to the benefit of citizens living outside the city's limits. The majority bolsters its reading of public policy concerns like political accountability, preventing monopolies, encouraging price competition, etc. Such considerations, however, are beyond this Court's purview because: (1) public policy is the province of the General Assembly; (2) the wisdom of a statute is not subject to judicial review; and (3) the public policy underlying a statute is likewise not subject to judicial review. See Petition at 9-10, subpart (5)). Fountain Inn never responds specifically, but it scatters some assertions throughout its Return that may touch on this matter without focusing on it.

For example, Fountain Inn asserts that it reads § 5-7-60 as primarily allowing cities to serve outside their corporate limits but LCPW views it as primarily designed to create service "extra-territorial monopolies free from political or regulatory oversight." (Return at 2). It has always been LCPW's position, however, that the purpose of the statute is to give cities the power to provide service outside their limits and to encourage them to do so by giving them a municipal service area in exchange for doing so.

VI. Fountain Inn's remaining "points" have no merit.

Throughout its Return, Fountain Inn makes numerous "points" that have no merit. These meritless points are addressed below:

(1) Fountain Inn asserts that § 5-7-60 does not alter a city's ability to serve within its limits. (Return at 2). This is true but irrelevant – LCPW has never argued otherwise and, more importantly, neither the trial court nor the Court of Appeals ruled otherwise.

(2) Fountain Inn summarily asserts that this Court's decision does not grant any new powers to counties. (Return at 2, 3-4). To the contrary, however, this court's decision has given counties unbridled discretion over whether and to what extent any municipal service area can exist in the unincorporated areas of the county.

(3) Fountain Inn asserts that it will not always be a county that is the "governing body" which must certify the municipal service area, because it could be a special purpose district. (Return at 2, 3-4). Any special purpose district would be created by separate statute, and Fountain Inn cites no authority for the proposition that a special purpose district could fulfill is statutory duty to provide services by certifying a municipal service area within the special purpose district. Nothing in § 5-7-60 gives a special purpose district the power to do so. Moreover, special purpose district boards are not the "governing body" of the area as that term is properly understood – the board of the district simply has the power to exercise the service powers granted by the statute creating the district – it has no "governing" powers. In any event, none of this is relevant here. There is no special purpose district involved here. The only possible "governing" bodies are the county and the city – the only reasonable reading of § 5-7-60 in this case is that the county's governing body is not the one that must issue any certification required by § 5-7-60.

(4) In a seemingly related assertion, Fountain Inn claims that § 5-7-60 allows the creation of service areas in favor of different types of political subdivisions, not just cities. (Return at 3). This is manifestly erroneous. Section 5-7-60 is a municipal power statute, and nothing in it purports to authorize or control the creation of any service area for non-municipal entities. Any such authority manifestly would be granted by a different statute, *e.g.*, a statute creating a special purpose district.

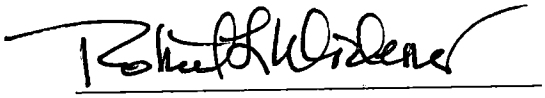
(5) Fountain Inn argues that, under LCPW's theory, a city could "proclaim" a designated service area but thereafter serve only some customers in the area and refuse to serve others, leaving those unserved customers without any service. (Return at 4). LCPW has never advanced this theory – there is no evidence and has never been any argument that LCPW ever refused to serve anyone in its service area –LCPW has never argued it could create a service area by simple proclamation – LCPW has always argued that creating a service area required compliance with one or more of the three methods identified in § 5-7-60.

(6) Lastly, Fountain Inn asserts that "the requirements for creating a designated service area do not conflict with the portion of the statute relating to permission to serve within an established service area." (Return at 5). LCPW agrees and has never argued otherwise.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in LCPW's Petition for Rehearing and Brief of Respondent before the Court, LCPW respectfully requests that this Court grant rehearing, withdraw its opinion in this matter, and issue an amended opinion that affirms the Court of Appeals and the Circuit Court.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of Burr & Forman, LLP, certify that I served the Reply to Return to Petition for Rehearing, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to Petitioner's counsel at the addresses shown below, on October 22, 2019:

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