

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )  
Town of Lexington South Carolina, )  
Plaintiff, )  
v. )  
Patty Cox Wingard, as Trustee for PLCW )  
Trust, and Scott's Furniture Company, Inc., )  
Defendants. )

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-32-03352

**ORDER  
(NON-JURY)**



Plaintiff, Town of Lexington, South Carolina ("the Town"), filed a Declaratory Judgment action to determine whether it has the right to terminate water services to a property owned by, Defendant Patty C. Wingard, as Trustee for PLCW Trust, ("PLCW Trust") located at 705 North Lake Drive ("subject property"). A bench trial was held on October 17 – 18, 2019. Clifford O. Koon, Esq. represented the Plaintiff and James Edward Bradley, Esq. represented the Defendants.

**BACKGROUND**

The Town is a municipality in the State of South Carolina that provides water and sewer services through utilities owned by the Town. The Town has a policy of requiring utility customers who receive water and sewer services to petition to be annexed into the Town if the Town becomes contiguous to their property. The property at 705 North Lake Drive is owned by the PLCW Trust which leases the property to Scott's Furniture Company.

The Town filed this declaratory judgment action pursuant to S.C. Code Ann. § 15-53-20 claiming a right to terminate water service to the subject property upon reasonable notice. The PLWC Trust and Scott's Furniture Company deny the Town's right to terminate water service claiming that such a right violates the contract between the Town and Henry Wingard executed on September 30, 1961. Additionally, the Defendants argue that the October 13, 1961 Town resolution requires the Town to sell water to the subject property without requiring annexation as a precondition of the sale. The Defendants also seek attorney's fees if successful.

**SUMMARY OF EVIDENCE**

The parties stipulated to the following facts: (1) Scott's Furniture Store is contiguous to the Town; (2) Patty C. Wingard is the trustee of the PLCW Trust; and (3) the PLCW Trust owns the

subject property. Six witnesses testified at the hearing: John D. Hanson, Patty C. Wingard, Bryson Scott, Thomas "Tom" Wingard, Georgia Wingard Berger, and James A. Lutz.

John Hanson, Director of Planning, Building, and Technology for the Town, testified he is familiar with the Town's annexation policy. The policy requires out-of-town utility customers to annex into the Town, if the property is contiguous to the Town, as a requirement to receive utility service. Mr. Hanson testified that an out-of-town utility customer whose property is not contiguous to the Town at the time utility service begins, may receive utility service only if the out-of-town customer signs an agreement to have the property annexed upon becoming contiguous. The utility service is provided at a higher rate than those customers located in the Town. Hanson identified Scott's Furniture on a county map contiguous to the Town. Pl. Ex. 3.

Patty C. Wingard, the widow of Henry Wingard and co-trustee of the PLCW Trust, testified that her late husband, in 1961, built the two-inch water line on Hamilton Street to service the residential portion of Lakewood, a subdivision he developed. She remembered seeing the two-inch water line being installed in front of her house on the corner of Hamilton Street and Georgia Lane. Hamilton Street is two blocks from the Scott's Furniture property and runs parallel to Northwood Road. Northwood Road lies between the Scott's Furniture and Hamilton Street.

Bryson Scott ("Scott"), co-owner of Scott's Furniture Company, testified that his father built the furniture store at its present location in 1962 and the Town has provided water service at Scott's Furniture since then. Scott took over the business in 1978. The property was initially used as a student parking lot by Lexington High School, which at the time was located across the street from the Scott's Furniture property. There was a gas station near the property that was owned by Henry Wingard.

Tom Wingard, son of Henry and Patty Wingard, testified about the 2013 letter he received from the Town seeking to annex the subject property. Pl. Ex. 3. As the executor of the PLCW Trust, Tom replied to the Town's letter, expressing that PLCW did not consent to be annexed into the Town. Def. Ex. 4. Tom testified about several drawings, tax maps, plats, and other documents showing the Lakewood subdivision and the location of Scott's Furniture. The Scott's Furniture property is a parcel in Block "E" of Lakewood Subdivision.

Georgia Wingard Berger, daughter of Henry and Patty Wingard and co-trustee of the PLCW Trust, testified she became aware of the contract between Henry Wingard and the Town in 2013. She knew her father, Henry Wingard, provided water lines to the Town in exchange for

water service to his properties. She was only four years old when the property was developed. Georgia's testimony was cumulative to the testimony of her brother, Tom Wingard.

James Allen Lutz ("Lutz"), Utility Director for the Town of Lexington, has worked for the Town for twenty-nine years and is responsible for maintaining the Town's water systems. He testified the water line in question was constructed in 1961 and completed in 1962. When the Town and Henry Wingard entered the agreement in 1961, the Town permitted Henry Wingard to dig up the existing two-inch water line and replace it with a six-inch water line. Further, Lutz testified that in 2006, the Town replaced the two-inch water lines with six-inch water lines to accommodate growing demands. According to Lutz, there is a requirement for utility customers to annex into the Town to receive water service if the property becomes contiguous to the Town. Lutz does not know when the Town created this policy.

### **EXHIBITS**

Plaintiff's Exhibit 1 – Town of Lexington GIS

Plaintiff's Exhibit 2 – 1962 map of water distribution system for the Town of Lexington

Plaintiff's Exhibit 3 – County GIS Town of Lexington

Plaintiff's Exhibit 4 – 2013 Letter from Town of Lexington to Henry Wingard regarding annexation of property at 705 N. Lake Drive

Defendant's Exhibit 1 – October 13, 1961 Town of Lexington Resolution between Henry Wingard and Mayor J.K. Addy

Defendant's Exhibit 2 – September 30, 1961 Agreement between Henry Wingard and Mayor J.K. Addy

Defendant's Exhibit 3 – 2013 Letter from the Town of Lexington regarding annexation of property at 705 North Lake Drive

Defendant's Exhibit 4 – Letter from Thomas Wingard in response to the 2013 annexation letter from the Town of Lexington

Defendant's Exhibit 5 – 1958 Plat of Subdivision of Lakewood

Defendant's Exhibit 6 – 1972 Plat of Lakewood Subdivision, Block E

Defendant's Exhibit 7 – Aerial map of Town of Lexington limits

Defendant's Exhibit 8 – County map of the Lakewood Subdivision

### **FINDINGS OF FACT**

Based upon the testimony and the exhibits presented, this Court makes the following findings of fact:

1. On September 30, 1961, Henry Wingard and J. K. Addy, the Mayor of Lexington, signed an Agreement ("Agreement") permitting Henry Wingard to connect a six-inch water line onto the Town's existing water line with the goal of extending the water system into the "Lakewood Area – George Lane Road." Def. Ex. 2.

2. The Agreement provided that the Town, "shall maintain said line after it is completed and agrees to sell water to the Party of the Second Part within the limits of its existing water system." Def. Ex. 2.
3. On October 13, 1961, the Lexington Town Council passed a resolution executed by Henry Wingard, the Mayor, and Councilmen present, granting Henry Wingard permission to "take up the present 2-inch water main where the new 6-inch water main was put and install the 2-inch on Hamilton Street." Def. Ex. 1.
4. The resolution also stated, "It is agreed that the Town shall maintain said water line after it is completed and it is further agreed that the Town shall afford water services to the party of the second part, their heirs and assigns within the limits of the Town's water system at the prevailing water rates charged by the Town." Def. Ex. 1.
5. After entering into the agreement and resolution, Henry Wingard installed a two-inch water main on Hamilton Street at his own expense. The Town also had the right to tap onto the water line and incorporate it into its water distribution system. Def. Ex. 1.
6. The parties operated under the agreement and resolution for over fifty-five years. During this time, the Town continued to sell water to Henry Wingard, and upon his death in 2006, the Town continued to sell water to his heirs as owners of the property located at 705 North Lake Drive.
7. In 2013, the Town sent a letter asking the owners of the property to sign a petition to be annexed within the Town's limits. Def. Ex. 3.
8. The PLCW Trust declined to do so based upon the long standing arrangements with the Town to provide water services for the subject property. Def. Ex. 4.

**CONCLUSIONS OF LAW**

Plaintiff brought this action pursuant to South Carolina's Uniform Declaratory Judgment Act ("the Declaratory Judgment Act"), which grants the court "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20. "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Thompson v. State*, 415 S.C. 560, 565, 785 S.E.2d 189, 191 (2016). A justiciable controversy is a "real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical, or

abstract character." *Id.* The Court should liberally construe and administer the Declaratory Judgment Act. *Id.*; see also S.C. Code Ann. § 15-53-130.

The Town argued it has the right to discontinue water service to the Scott's Furniture property unless annexed into the Town's limits. Further, the Town argued the contract between the Town and Henry Wingard may be terminated upon reasonable notice to the other party. Notice of the Town's intent to terminate water service to Scott's Furniture property if not annexed into the Town's limits was provided to Defendants in 2013. The Defendants, however, argue the contract is enforceable because the resolution stated that, "the Town shall afford water services to the party of the second part [Henry Wingard], their heirs and assigns." Def. Ex. 1.

The Town relied on *Childs v. Columbia*, 87 S.C. 566, 70 S.E. 296 (1911), in which the plaintiff sued the City of Columbia ("City") alleging the City, in an agreement 10 years earlier, would furnish his residence and other structures he owned with water. The agreement did not have any provision for duration or termination. At his own expense, Childs built water lines from his properties and connected it to the City's distribution mains. After serving the plaintiff's properties for ten years as out-of-town customers, the City imposed an out-of-town rate several times higher than the in-town-rate. Childs argued he was entitled to the same rate charged to in-town customers.

The Supreme Court held that "the city was under no public duty to furnish water to the plaintiff at reasonable rates or to furnish it at all." *Childs*, 87 S.C. at 566, 70 S.E. at 298. According to the Court, the "fatal defect of the complaint is that it alleges a contract indefinite as to the price and duration of the service, conferring no right on the plaintiff to require the service of the city beyond the day fixed by reasonable notice of its intention to increase the rate charged, or to cease altogether to furnish water." *Id.* 87 S.C. at 566, 70 S.E. at 299 (emphasis added). The Court determined the only "reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other." *Id.*, 87 S.C. at 566, 70 S.E. at 298. The Supreme Court reasoned that "where the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually." *Id.*

Historically, "perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract." *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201

(1994). In this case, the September 30, 1961 agreement states, "the Town shall maintain said line after it is completed and agrees to sell water to [Henry Wingard] within the limits of its existing water system." The agreement lacks specific duration. As in *Childs*, the agreement between parties expressed no period for its duration and no definite time can be implied from the nature of the contract or from the circumstances surrounding it. Based upon the document, the only reasonable intention to be drawn is that the contract may be terminated by either party, after reasonable notice of his intention to the other. The Town provided notice to the Defendants of its intent to discontinue water service to the Scott's Furniture property if it was not annexed into the Town's limits.

PLCW Trust and Scott's Furniture Company argues the Agreement between the Town and Henry Wingard is enforceable because the Town agreed to provide services to Mr. Wingard's "heirs and assigns." Defendants relied on *Creswell v. Bank of Greenwood*, 210 S.C. 47, 41 S.E.2d 393 (1947), and argue the Supreme Court construed the words "heirs and assigns" to mean a permanent gift of fee simple interest in the conveyance of land. Defendants misread this case. The deed in *Creswell* stated, "To be his, his heirs and assigns forever." *Creswell* 210 S.C. at 47, 41 S.E.2d at 395 (emphasis added). The construction of these words in the deed "leave no room for speculation upon the intent of the grantor." *Creswell*, 210 S.C. at 55, 41 S.E.2d at 397. The deed clearly shows the intention of the grantor to divest himself completely of possession by its terms including the word "forever", which signifies perpetuity.

The Agreement between Henry Wingard and the Town does not contain the express terms creating the perpetual nature of the agreement. More specifically, the agreement and the resolution are completely devoid of any term of duration. As stated in *Childs*, "the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other." 87 S.C. at 572, 70 S.E. at 298. The Town gave the Defendants reasonable notice of its intent to disconnect water service if the Defendants did not annex into the Town. The Town has the right to terminate water service if the Defendants do not petition to be annexed within the Town's limits.

**IT IS THEREFORE DECLARED AND ORDERED** that the Town is within its lawful rights to demand that Defendants agree to annex the Scott's Furniture property as a requirement for the Town to continue to provide water service to the property.

**IT IS FURTHER ORDERED** that upon continued refusal of Defendants to agree to annexation of the Scott's Furniture property, the Town is authorized to terminate water service to the property after 90 days from the date of this order.

*Signature page to follow.*



Lexington Common Pleas

**Case Caption:** Town Of Lexington South Carolina VS Patty C Wingard Trustee  
Plcw Trust , defendant, et al  
**Case Number:** 2018CP3203352  
**Type:** Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee



\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*  
NOTICE OF ELECTRONIC FILING [NEF]

---

**A filing has been submitted to the court RE:** 2018CP3203352

**Official File Stamp:** 05-04-2020 10:30:01 AM  
**Court:** CIRCUIT COURT  
Common Pleas  
Lexington  
**Case Caption:** Town Of Lexington South Carolina VS Patty C Wingard Trustee Plcw Trust , defendant, et al  
**Document(s) Submitted:** Order/Other Order/Other  
**Filed by or on behalf of:** Alison Lee

This notice was automatically generated by the Court's auto-notification system.

---

**The following people were served electronically:**

Clifford O. Koon, Jr. for Town Of Lexington South Carolina  
Bradford T. Cunningham for Town Of Lexington South Carolina  
James Edward Bradley for Patty C Wingard Trustee Plcw Trust et al

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**