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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF LEXINGTON | )<br>)<br>) | IN THE COURT OF COMMON PLEAS<br>ELEVENTH JUDICIAL CIRCUIT |
| Town of Lexington, South Carolina,<br><br>Plaintiff,<br><br>vs.<br><br>City of West Columbia, South Carolina, and The Central Midlands Council of Governments,<br><br>Defendants. | ) | Civil Action No. 2021CP3201321<br><br>ORDER GRANTING MOTION TO DISMISS UNDER RULE 12(B)(6) SCRCP, AND DENYING THE MOTION TO DISMISS UNDER RULE 12(B)(1) |

The City of West Columbia, joined by the Central Midlands Council of Governments, moves to dismiss the Amended Complaint. The Court agrees that this case is foreclosed by the South Carolina Constitution. The motion to dismiss under Rule 12(b)(6), SCRCP, is granted, without prejudice. The court finds that it is premature to determine the issues related to waiver and failure to exhaust administrative remedies, and the motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is denied.

## BACKGROUND

As alleged in the Amended Complaint, Lexington and West Columbia are members of the Central Midlands Council of Governments (CMCOG), which is an affiliation of several counties and municipalities that assists with infrastructure planning and support for its members. Among the CMCOG's duties is to serve as the planning agency under Section 208 of the federal Clean Water Act ("CWA"), responsible for development and implementation of a plan for wastewater management within the Central Midlands region. (Am. Compl. ¶¶ 7–11.)

The following timeline from the Amended Complaint and undisputed facts is helpful in reviewing the case.

**1972** "In 1972, Congress enacted the Clean Water Act ("CWA") for the purpose of restoring and maintaining the 'chemical, physical and biological integrity of the Nation's waters.'" Am. Compl. ¶ 7 (quoting 33 U.S.C.A. § 1251). "The purpose of Section 208 of the CWA was to encourage and facilitate the development and implementation of area-wide wastewater management plans to address the fact that local water quality problems at the time were a result of sewer/waste treatment infrastructure not keeping pace with urban growth and development." *Id.* ¶ 8. "Section 208 of the CWA required local governments to develop a regional planning and policy framework for attaining national water quality goals as set forth in the CWA, with a focus on eliminating the discharge of pollutants into navigable waters by developing regional wastewater systems and consolidating existing facilities ("208 Plan")." *Id.* ¶ 9. "For purposes of developing a 208 Plan for a specific geographic area in South Carolina, the state, through the South Carolina Department of Health and Environmental Control ("DHEC"), may serve as the planning agency[,] or [DHEC] may designate planning agencies to serve that function." *Id.* ¶ 10. "For the geographic area covering Richland, Lexington, Newberry, and Fairfield counties, the CMCOG is the designated planning agency, serving in this capacity under a Memorandum of Understanding with DHEC." *Id.* ¶ 11.

**1997** "The latest 208 Plan covering Lexington County was adopted by the CMCOG in 1997 (the "1997 208 Plan")." *Id.* ¶ 12; *see also id.* Ex. A, 1997 208 Plan. "The 1997 208 Plan names designated management agencies ("DMAs") that are responsible for implementing the 208 Plan within assigned management areas, including providing wastewater service or determining the appropriate method of delivery of wastewater service to that specified area." *Id.* ¶ 13; *see also id.* at Ex. A, 1997 208 Plan at 55-56.[1] "The 1997 208 Plan names Lexington as the DMA for the

[1] Citations to the 1997 208 Plan refer to the actual page number(s) of the Plan itself, as opposed to the page number of the PDF attachment of the Plan to Town of Lexington's Amended Complaint.

US 378/I-20 area." *Id.* ¶ 14; *see also id.* Ex. A, 1997 208 Plan at Fig. 3.

"The 1997 208 Plan provides that 'each [DMA] and its facilities is set up to be the major provider for each area and act as [a] general coordinator of wastewater collection, transportation[,] and treatment.'" *Id.* ¶ 15 (quoting *Id.* at Ex. A, 1997 208 Plan at 135). "Pursuant to the 1997 208 Plan, 'Lexington is to implement the provisions of the plan for the prescribed management area, while eliminating and consolidating the number of dischargers through the development of a regional wastewater transportation system with final treatment at the Cayce WWTP [Wastewater Treatment Plant].'" *Id.* ¶ 16 (quoting *Id.* at Ex. A, 1997 208 Plan at 136). "West Columbia is also a DMA under the 1997 208 Plan, with a service area adjacent to the US 378/I-20 area." *Id.* ¶ 17; *see also id.* Ex. A, 1997 208 Plan at Fig. 3.

"The 1997 208 Plan provides that '[w]here a municipality annexes lands into another designated management agency's area, the municipality has the right to provide service to that area, ***provided no existing service is reasonably available and is shown to be the cost effective means of providing service***.'" *Id.* ¶ 30 (quoting *Id.* at Ex. A, 1997 208 Plan at 56) (emphasis added).

**2018** West Columbia requested a conformity determination from the CMCOG for a sewer line it intended to build to serve an area along the Highway 378/I-20 corridor. (*Id.* ¶ 32.) At the time, this area was outside of the municipal limits of West Columbia, and under the 208 Plan, the Town of Lexington was the designated management agency for this area. (*Id.* ¶ 14.) Thus, at that time, in order for West Columbia to serve this area, a major Plan Amendment of the 208 Plan would have been required. (*Id.* ¶ 22.) West Columbia filed a request for a plan amendment, but no final action was taken on it, and West Columbia withdrew that request. (*Id.* ¶¶ 35–39.) West Columbia subsequently annexed the area into its municipal boundaries.

**2021** Following annexation, West Columbia filed another request for a conformity determination with the CMCOG for the area in question. (*Id.* ¶ 41.)

**March 17, 2021** The CMCOG contacted Lexington seeking comments on the request and providing an opportunity to object to it. (Central Midlands Section 208 Plan Conformance Review Form and attachments, Am. Compl., Exhibit B.)

**March 18, 2021** The CMCOG forwarded the maps and other documents supporting the request to Lexington's town manager and scheduled a call to discuss it. (*Id.*)

**March 22, 2021** The town manager wrote that the Town "had no comments." (*Id.*) That same day, the CMCOG issued its determination that West Columbia's proposed construction conformed to the existing Section 208 Plan because the expansion is "within the municipal limits of the City of West Columbia." (*Id.*; *see also* Am. Compl. ¶ 43 and Exhibit A.) Because the area had been annexed into West Columbia, Central Midlands did not require West Columbia to request a major Plan Amendment. (Am. Compl. ¶42.) The CMCOG concluded that by virtue of the annexation, no Plan Amendment was required and that West Columbia had become the designated management agency for the area in question. (Central Midlands Ans. ¶ 32.)

**April 22, 2021** Lexington filed this suit, claiming that there is "uncertainty" about whether Lexington can provide sewer service within West Columbia's territory, and asked the Court to declare that "Lexington is entitled to provide wastewater service or determinate an appropriate wastewater service delivery system to the US 378/I-20 area annexed by West Columbia." (Am. Compl. ¶ 53(f).) The CMCOG was not named as a party.

**June 23, 2021** West Columbia filed its first motion to dismiss.

**July 14, 2021** The complaint was amended to add CMCOG as a defendant.

**July 26, 2021** West Columbia filed the pending motion to dismiss.

**October 8, 2021** South Carolina Regulations require DHEC to be the final word on whether a proposed wastewater construction permit is in conformity with the relevant Section 208 Plan. S.C. Code Ann. Regs. 61-67.100(E)(1), (8). Accordingly, the CMCOG forwarded its conformity determination to DHEC staff. DHEC staff issued a construction permit to West Columbia. Lexington did not seek administrative review of this permit decision.

## DISCUSSION

West Columbia now moves to dismiss this case, arguing that the South Carolina Constitution gives West Columbia the authority to provide utility services within its own boundaries. West Columbia also argues that even if its authority to provide sewer services within its borders can be challenged, the appropriate avenue for doing so would have been to file a timely request for administrative review of the DHEC construction permit, which Lexington did not do. The Court addresses each argument in turn.

### I. Home Rule

The South Carolina Constitution guards municipalities from encroachment and overreach by their neighbors. It provides that no law "shall be passed by the General Assembly" that allows for the construction or operation of sewer lines for any purpose, "without first obtaining the consent of the governing body of the municipality in control of the streets or public places proposed to be occupied for any such or like purpose." S.C. Const. art. VIII, § 15. As noted above, DHEC (a state agency which operates under statutes and regulations adopted by the General Assembly) is the final word on whether a proposed wastewater construction permit is in conformity with the relevant Section 208 Plan. S.C. Code Ann. Regs. 61-67.100(E)(1), (8).[2]

[2] Lexington raises the issue that the laws in question in this case were not enacted by the General Assembly. However, there are a number of cases where local governments have sued concerning regulations and procedures implemented by State agencies. At this point, unless there is further correction or clarification provided, this court construes this contest as one to which Article VIII, § 15 applies.

The Supreme Court has consistently construed this constitutional protection to be a municipality's "right of consent" to any unauthorized infrastructure encroaching on its territory. *See, e.g.*, *Berkeley Elec. Coop., Inc. v. S.C. PSC*, 304 S.C. 15, 19, 402 S.E.2d 674, 677 (1991); *see also Williamsburg Rural Water & Sewer Co. v. Williamsburg County Water & Sewer Auth.*, 357 S.C. 251, 260–61, 593 S.E.2d 154, 159 (Ct. App. 2003) (referring to Article VIII, Section 15 as providing local governments with a "veto power" and a "constitutional shield" against "intrusion" into their areas by other providers), *rev'd in unrelated part by* 367 S.C. 566, 627 S.E.2d 690 (2006).

South Carolina allows service providers to continue to provide services that they provided before annexation. Lexington argues that it already has infrastructure in the DMA for the US 378/I-20 area. It is the court's understanding that no Lexington infrastructure is located in the area annexed by West Columbia. The issue of determining whether Lexington's current infrastructure constitutes "existing service" that is "reasonably available and is shown to be the cost effective means of providing service" under the Rule 208 plan is discussed below.

The protections under Article VIII, §15 extend into annexed areas. *See, e.g.*, *City of Aiken v. Aiken Elec. Coop.*, 305 S.C. 466, 468, 409 S.E.2d 403, 404 (1991) (describing Article VIII, § 15 as providing municipalities with "constitutional autonomy" for the provisions of services, and concluding that "the City was within its constitutional authority to designate an electric service supplier for new customers in the annexed area"); *cf. City of Rock Hill v. S.C. PSC*, 308 S.C. 175, 178–79, 417 S.E.2d 562, 564–65 (1992) (holding that Rock Hill did not have a constitutional right to provide electric service to a commercial customer because "[t]he area in question has not been annexed," and remanding the matter "to provide for a reasonable time for the City to either annex the area" or to consent to the provision of electricity by a different provider).

The General Assembly has enacted legislation that requires residents within a municipality to use the municipality's sewer system if the municipality so chooses, S.C. Code Ann. § 5-31-2030(3). South Carolina law requires a municipality to seek permission from another before providing "any of its services" in the territory of another municipality, *id.* § 5-7-60.

> **SECTION 5-31-2030.** Powers of municipalities enumerated.
> Each council is empowered by ordinance duly adopted: . . .
> (3) To prescribe and enforce regulations (a) requiring persons who shall be residents of the municipality to make use of any sewer system which the municipality shall from time to time operate; and (b) generally with respect to the discharge of sewage and the use of privies, septic tanks and other sewage facilities within the municipality.

> **SECTION 5-7-60.** Municipality authorized to perform any of its functions or to furnish any of its services; charges and financing.
> 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. (emphasis added)

West Columbia argues, and the Court agrees, that local government and Home Rule allow a municipality to be able to count on the ability to provide its own infrastructure and utility services to residents without the possibility of outside public or private providers encroaching on that right

or interfering with the municipality's ability to manage affairs within its own boundaries. Lexington admits that West Columbia annexed the area in dispute more than two years ago. (Am. Compl. ¶ 40.) West Columbia is expanding sewer services to its citizens within the annexed area. (*Id.* at Exhibit A.) Nevertheless, Lexington asks the Court to declare that Lexington "is entitled to provide wastewater service" within West Columbia over West Columbia's objection. (*Id.* ¶ 53(f)). While the court understands the reasoning for that position and recognizes the entry of a pact by local governments related to the CMCOG, it ultimately would be contrary to municipality control to prevent West Columbia from constructing a sewer system within is geographical boundaries, except where and to the extent that other providers have already established service.

Lexington cites the Supremacy Clause of the United States Constitution. This court has not seen an indication that federal law prescribes how a state must select among competing municipalities with respect to which can provide wastewater services to a given area. Indeed, the CMA yields to state authority to make determinations about implementation of the Act. Without a conflict between federal and state law, the Supremacy Clause plays no role. *See, e.g.*, *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 186–87, 525 S.E.2d 872, 877–78 (2000) (explaining the limited circumstances where federal law preempts state law and rejecting each argument because that case, as here, lacked any conflict between the two).

A mechanism was set up pursuant to the CWA that involves a determinative role for CMCOG and DHEC concerning which services may be established in a given area. Lexington was identified for this disputed area twenty-five years ago, but Lexington has not identified a provision of the CWA that cannot be satisfied if West Columbia is permitted to service the disputed area. The stated purpose of the CWA is to establish a coordinated mechanism concerning environmentally acceptable means of discharging effluent into waterways. There appears to be no

argument that the stated purpose of the CWA to avoid further water contamination appears to be met if West Columbia provides sewer service to residents within its boundaries. West Columbia and Lexington would be subject to the same DHEC environmental requirements.

West Columbia made an initial effort to provide sewer outside of its municipality in the disputed area. It withdrew that effort. It annexed into the area, and it obtained approval of the CMCOG and DHEC to place sewer services inside the city limits. Lexington was notified. Again, it is understandable that Lexington chose to rely upon the 1997 designation of the area, but the court cannot overlook that annexation changed the evaluation.

Under South Carolina Code Ann. Regs. 61-67.100(E)(8)(a), DHEC cannot issue a wastewater construction permit that conflicts with the 208 Plan: "All engineering reports and construction permit applications shall be reviewed to determine if they conflict with the applicable 208 Water Quality Management Plan, except those projects identified in subsection 67.100.E.8.b below." Moreover, DHEC was required to make an independent determination that West Columbia's requested permit was in conformity with the Section 208 Plan, rather than simply delegating that decision-making authority to Central Midlands. *See, e.g., Se. Res. Recovery, Inc. v. S.C. DHEC*, 358 S.C. 402, 407–08, 595 S.E.2d 468, 471 (2004) (requiring DHEC to make an independent determination of consistency with local solid waste management plans, rather than relying on a county's "letter of consistency").

Under the document that assigned the disputed area to Lexington, the continuation of the right to control sewer services within a management anticipates changes due to annexation. There is a caveat: "[w]here a municipality annexes lands into another designated management agency's area, the municipality [here, West Columbia] has the right to provide service to that area, ***provided no existing service is reasonably available and is shown to be the cost effective means of***

***providing service***." The only indication is that CMCOG and, ultimately, DHEC are the entities that make that determination. Lexington knew that West Columbia was seeking to expand sewer service into Lexington's management area. It knew about the application by the municipality that had annexed into that area. It was notified about what was being proposed and elected not to challenge it, except through this lawsuit filed after the determination had been made.

The CWA requires local agencies to craft a plan for providing certain services, including wastewater services, and then to implement the plan **in accordance with state law**. *See generally N. Colo. Water Conservancy Dist. v. Bd. of County Comm'rs*, 482 F. Supp. 1115, 1118–19 (D. Colo. 1980) (holding that "[t]he Clean Water Act provides for designation of planning agencies, but the planning process and ***the powers that are exercised therein are matters of state law***" when remanding a dispute involving the implementation of a Section 208 Plan due to a lack of a sufficient federal nexus) (emphasis added).

In South Carolina, state law gives to municipalities control over providing sewer services to customers within their city boundaries. South Carolina laws do not conflict with the federal CWA. Accordingly, the Court finds that West Columbia's motion is granted, and this case is dismissed pursuant to Rule 12(b)(6), SCRCP, without prejudice.

## II. Administrative Review

As an additional argument, West Columbia asserts that the action should be dismissed under Rule 12(b)(1), SCRCP for lack of subject matter jurisdiction two grounds. First, on the ground that Lexington failed to avail itself of the correct administrative review process. It is asserted that Lexington could have responded to and challenged the CMCOG's review and challenged the DHEC permitting process and appeal from the decision. The argument is that, even if the court were to deny the Home Rule argument and allow the case to proceed on the theory that

Lexington is entitled to provide sewer service within West Columbia, there was a failure to pursue administrative remedies.[3]

This case is at the pleadings stage. The responsive pleadings filed were motions to dismiss. Paragraph 45 of Lexington's amended complaint asserts that the 208 Plan provides for public participation in making any amendment to the Plan and requires DHEC concurrence for such an amendment, neither the 208 Plan nor any state statute provides for administrative review or other due process for a party aggrieved by a CMCOG Conformance Request decision.

There is a difference between subject matter jurisdiction and exhaustion of administrative remedies. As Lexington argued, "Subject matter jurisdiction is defined as the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 100, 674 S.E.2d 524, 528 (Ct. App. 2009) (citations omitted). "This authority is distinct from the doctrine of exhaustion of administrative remedies, which is generally considered a rule of policy, convenience[,] and discretion, rather than one of law, and is not jurisdictional." *Id.* at 100, 674 S.E.2d at 529 (citation omitted). "Additionally, the doctrine of exhaustion of administrative remedies is often leveraged to avoid interference with the orderly performance of administrative functions." *Id.* (citation omitted). The Court of Appeals in *Capital City* stated that "a failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction." *Id.* (citation omitted).

If the court understands the situation correctly, the time has expired for Lexington to pursue the administrative remedies that West Columbia claims were available. So, dismissal without

[3] West Columbia argues that Lexington's failure to object when invited to do so by Central Midlands operates as a waiver of any argument before this Court. *See generally State v. Burnett*, 226 S.C. 421, 425, 85 S.E.2d 744, 746 (1954) ("Where a party has the option to object or not, as he sees fit, the failure to exercise the option when the opportunity therefor presents itself must, in fairness to the court and to the adverse party, be held either to constitute a waiver of the right to object, or to raise an estoppel against the subsequent exercise thereof." (quoting 3 Am. Jur. 25, *Appeal and Error* § 246)).

prejudice would effectively be dismissal with prejudice. Dismissal on this ground should not be made at the pleading stage based on this record.

The second ground puts aside the issue of exhaustion of administrative remedies, and West Columbia claims that the only proper means to bringing this matter before the circuit court would have been through seeking a writ of certiorari.[4] The court does not agree with that argument, though it does not rule on whether or not declaratory judgment is a proper vehicle to make this type of challenge, nor specify what other types of actions might be appropriate.

Accepting that Lexington did not request to be notified of DHEC's permit decision and did not request administrative review of the permit decision,[5] and that DHEC remains the sole permitting authority for wastewater construction permits, issues have been raised concerning the methodology that is available to assert rights under the Plan and to contest actions taken that allowed West Columbia to obtain a construction permit within the area designated to Lexington.

This court finds that it is not proper at the pleadings stage to determine the issues of waiver or failure to exhaust administrative remedies.[6] The motion to dismiss this case for lack of subject matter jurisdiction under Rule 12(b)(1), SCRCP, is denied.

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[4] It is asserted that, if Central Midlands' conformity determination was a final decision giving rise to procedural due process rights and if there were no other avenue for Lexington to seek review administratively, Lexington's proper recourse would have been to file a petition for a writ of certiorari from this Court. *See, e.g.*, *League of Women Voters v. Litchfield-by-the-Sea*, 305 S.C. 424, 427, 409 S.E.2d 378, 380 (1991) (holding that when a decision giving rise to procedural due process rights is not subject to the Administrative Procedures Act, it is reviewable through "an action for writ of certiorari"), *rev'd in unrelated part by Brown v. S.C. DHEC*, 348 S.C. 507, 560 S.E.2d 410 (2002). Lexington never sought such a writ. It is argued that the term "certiorari" when used in the common law sense of the writ, refers to the order that the reviewing court transmits requiring compilation of the record of the decision below. One of the complaints of Central Midlands was that by failing to timely object, Lexington deprived staff of the ability to respond and to prepare a record for review. Instead, Lexington filed this action under the declaratory judgment statute for *de novo* review, not appellate review.

[5] Lexington could have requested that DHEC notify it of any permit decision, and DHEC would have been required to notify it of the permit decision by certified mail so it could seek administrative review. S.C. Code Ann. § 44-1-60 (E)(1). Lexington made no such request.

[6] West Columbia's position is that, had Lexington sought administrative review before DHEC, it would have been able to litigate the same issues before the Administrative Law Court, and it would have access to the appellate courts

## CONCLUSION

The South Carolina Constitution and related statutes protect West Columbia's ability to provide services within its municipal boundaries, even where it has recently annexed an area into those boundaries. Accordingly, the Court grants this motion and dismisses this matter without prejudice pursuant to Rule 12(b)(6), SCRCP. The motion to dismiss under Rule 12(b)(1), SCRCP is denied.

AND IT IS SO ORDERED.

[Judge's electronic signature follows on separate page]

as well. Pursuant to South Carolina Code § 44-1-60(E)(2), DHEC's permit decision became final and unappealable as a matter of law on October 23, 2021, as no one filed a request for a Final Review Conference with the DHEC Board during the fifteen-day appeal period. *A.O. Smith Corp. v. S.C. DHEC*, 428 S.C. 189, 204–05, 833 S.E.2d 451, 459–60 (Ct. App. 2019). Lexington certainly was on notice of the requirement that West Columbia obtain a DHEC construction permit, and as counsel for Central Midlands has argued, the only reason to seek a conformity determination is to obtain a DHEC wastewater permit.

Lexington Common Pleas

**Case Caption:** Town Of Lexington, South Carolina VS City Of West Columbia, South Carolina , defendant, et al

**Case Number:** 2021CP3201321

**Type:** Order/Dismissal

Circuit Judge (Code #2050)

s/ William P. Keesley