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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable William P. Keesley
Circuit Court Judge

Appellate Case No. 2023-0140
Circuit Court Case No. 2021-CP-32-01321

Town of Lexington, South Carolina. ..... Appellant,

v.

City of West Columbia, South Carolina, and The Central Midlands Council of Governments, ... Respondents.

FINAL BRIEF OF RESPONDENTS

WOMBLE BOND DICKINSON (US) LLP

Belton T. Zeigler
Belton.zeigler@wbd-us.com
M. Todd Carroll
todd.carroll@wbd-us.com
Bryant S. Caldwell
bryant.caldwell@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Respondent City of West Columbia

The Shissias Law Firm, LLC

Alexander G. Shissias
Alex@shissiaslawfirm.com
1727 Hampton Street
Columbia, South Carolina 29201
(803) 540-3090

Attorney for Central Midlands Council of Governments

Columbia, South Carolina
August 10, 2023

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STATEMENT OF ISSUES ON APPEAL

1. The South Carolina Constitution and Code of Laws prohibit municipalities from encroaching into another municipality's boundaries to provide various services, including wastewater services. Nevertheless, the Town of Lexington claims that it is entitled to provide sewer service within West Columbia's boundaries. The circuit court dismissed Lexington's claims. Was that ruling correct?

2. West Columbia followed the statutory procedures for securing a wastewater construction permit from the South Carolina Department of Health and Environmental Control ("DHEC"). When Lexington was given an opportunity to object or participate in those proceedings, it declined to do so. And then it failed to appeal the decision to approve West Columbia's permit to the Administrative Law Court. Does Lexington's waiver of any objections and its failure to exhaust available administrative remedies provide additional sustaining grounds for the circuit court's dismissal order?

COUNTER-STATEMENT OF THE CASE

This case involves the claim by one municipality that it has the right to prevent another municipality from providing sewer service to its own citizens and within its own corporate boundaries even over the objection of that municipality which is ready, willing and able to provide service. As the circuit court recognized, this case can be instantly resolved by reference to the South Carolina Constitution whose municipal Home Rule provisions vest cities and towns with the exclusive right to determine who can provide wastewater and other utility services within their boundaries and to prevent other cities and towns from displacing their service.

Wastewater Planning and Regulation. Under South Carolina law, DHEC must issue permits for the construction of new sewer lines. *See* S.C. Code Ann. § 48-1-110. To obtain a permit, the applicant must demonstrate conformity with a DHEC-approved regional water quality management plan. *See* S.C. Code Ann. Regs. 61-67.100(E)(1), (8). Such water quality plans are designated as "Section 208 Plans" in reference to Section 208 of the Federal Clean Water Act of 1972, 33 USCA § 1288. The Federal Clean Water Act imposed a nationwide requirement that point source discharges into the waters of the United States required National Pollution Discharge Elimination System (NPDES) permits. Section 208 conditions the issuance of NPDES permits on states implementing regional planning for sewer treatment systems. *Id.* As a matter of federalism, the Clean Water Act and Section 208 leave the creation, substance and enforcement of each state's 208 Plan to state law. *See, id.*

As provided for in Section 208, DHEC has designated the Central Midlands Council of Governments ("CMCOG") as the regional water quality planning agency for Fairfield, Lexington, Newberry, and Richland Counties. *See,* 33 USCA § 1288(a)(5); *see generally, Carolina Water Serv., Inc. v. S.C. DHEC*, Dkt. No. 94-ALJ-07-329-CC, 1999 SC ENV LEXIS 143, at *20 (S.C.

Admin. L.C. 1999). As a regional council of governments, CMCOG is organized under S.C. Const. Art. VII, § 15 which authorizes such councils "to study, and make recommendations on matters or affecting the public health, safety, general welfare, education, recreation, pollution control, utilities, planning, development and such other matters as the common interest of the participating governments may direct." Under the Constitution, CMCOG's sole power is to make "studies and recommendations . . . on behalf of and directed to the participating governments." *Id.*

S.C. Code Ann. § 6-7-140(7) further defines the statutory power of regional councils of government as follows:

> After coordination with the appropriate State, local and Federal agencies, the regional council of government may adopt such plans and programs as it may from time to time prepare. ***Such plans and programs as are adopted shall constitute the recommendations of the regional council of government***.)

(emphasis supplied.)

CMCOG issued the current 208 Plan for Fairfield, Lexington, Newberry, and Richland Counties in 1997 and on an ongoing basis conducts initial conformance reviews for sewer construction permits being sought from DHEC in those counties. These reviews result in a conformity letter which permit applicants submit to DHEC as a part of their sewer construction permit applications. But DHEC is required to make the final determination of conformity with regional water quality plans. *See* S.C. Code Ann. § 48-1-110; S.C. Code Ann. Regs. 61-67.100(E)(1), (8).

West Columbia's Proposed Sewer Line. In 2020, West Columbia requested a conformity determination for a sewer line it intended to build to serve its citizens and customers in an area along the Highway 378/I-20 corridor within the boundaries of West Columbia. (R. p. 49 (Am. Compl. ¶¶ 40–41.).) Under the Plan, various public entities are designated as wastewater service providers in their service areas. The area in question had been designated as being within

Lexington's service area, but West Columbia annexed the area into its municipal boundaries. (R. p. 49, Am. Compl. ¶ 40.). On March 17, 2021, CMCOG contacted Lexington requesting comments on the request and providing an opportunity to object to it. (R. pp. 37-41, Central Midlands Section 208 Plan Conformance Review Form and attachments).) On March 18, 2021, CMCOG forwarded the maps and other documents supporting the request to Lexington's town manager and scheduled a call to discuss it. (*Id.*) On March 22, 2021, the Town manager wrote that the Town "had no comments." (*Id.*) That same day, 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." (R. p. 35, Determination; R. p. 50, Am. Compl. ¶ 43.)

Litigation Commenced. Two months after CMCOG issued its written determination, Lexington filed this suit, claiming that there is "uncertainty" about whether Lexington can provide sewer service within West Columbia's municipal boundaries, and asked the circuit 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." (R. p. 52, Comp. ¶ 53(f).))

In the interim, DHEC reviewed CMCOG's conformity determination and issued the requested construction permit, which has been final and unappealable since October 2021. (R. p. 263, Ex. B to Mot. to Dismiss Am. Compl.)[1]

On July 14, 2022, Lexington filed an amended complaint that added CMCOG as a defendant and sought additional declaratory relief, including a declaration that "[t]he March 22,

[1] The Court may take judicial notice of this agency decision. *See* Rule 201(b), SCRE (explaining that courts can take judicial notice of facts that are "not subject to reasonable dispute"); *id.* 201(f) ("Judicial notice may be taken at any stage of the proceeding").

2021 CMCOG Conformance Determination is beyond the CMCOG's authority and contrary to the plain language of the 208 Plan." (R. p. 51, Am. Compl. ¶ 53(a).)

CMCOG answered the amended complaint (R. p. 238, CMCOG Answer), and West Columbia again moved to dismiss under Rules 12(b)(1) and 12(b)(6), SCRCP. (R. p. 227, Mot. to Dismiss Am. Compl.)

On August 17, 2022, the circuit court granted the motion to dismiss the amended complaint under Rule 12(b)(6), SCRCP. (R. p. 1, August 17, 2022 Order).) Judge Keesley reasoned that because West Columbia annexed the area in question, "state law gives municipalities control over providing sewer services to customers within their city boundaries." (R. p. 10, August 17, 2022 Order at 10.) The circuit court denied West Columbia's alternative motion to dismiss pursuant to Rule 12(b)(1), SCRCP, for failure to exhaust administrative remedies, holding that it was "not proper at the pleadings stage to determine the issues of waiver or failure to exhaust administrative remedies." However, in a footnote, the circuit court noted:

> 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.

(R. pp. 12-13, August 17, 2022 Order at 12–13.)

Lexington filed a motion to alter or amend the judgement, which was denied. (R. p. 264, Mot. to Alter or Amend; R. p. 18, Order Denying Mot. to Alter or Amend.) In that denial, Judge Keesley noted that Lexington was using a Rule 59 motion to argue for the first time it needed additional discovery, but even if Lexington had properly raised that argument, it did not change

the ruling that "once West Columbia annexed the area in question, it had the right to provide wastewater treatment services within all areas of its corporate limits." (R. pp. 15-16, Order Denying Mot. to Alter or Amend at 1–2).) This appeal followed.

STANDARD OF REVIEW

I. Dismissal Under Rule 12(b)(6), SCRCP

Rule 12(b)(6), SCRCP, tests the legal sufficiency of a complaint. Under this rule, the Court should dismiss a claim if it fails "to state facts sufficient to constitute a cause of action." *Id.* When evaluating a motion under this rule, the Court is not to read unalleged facts into the pleadings, *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005), nor need it credit the claimant's legal conclusions or predicate act labels, *Builder Mart of Am., Inc. v. First Union Corp.*, 349 S.C. 500, 512, 563 S.E.2d 352, 358 (Ct. App. 2002). An appellate court applies the same standard as the circuit court when reviewing dismissal. *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013).

II. Interpretation of Statutes

This Court reviews the circuit court's interpretation of the South Carolina statutes *de novo*. *Jennings v. Jennings*, 401 S.C. 1, 4, 736 S.E.2d 242, 243 (2012).

ARGUMENTS AND AUTHORITIES

At its core, the Town of Lexington is attempting to prevent the City of West Columbia from providing wastewater services to its citizens within the City of West Columbia. It does not cite to a single case from South Carolina or anywhere else in the United States that actually stands for such a proposition. And that is no surprise; in South Carolina, as a matter of state constitutional

law, municipalities have the right to serve within their own boundaries. Judge Keesley rightly dismissed this case, and his decision should be affirmed.

I. The circuit court correctly determined that the South Carolina Constitution, the South Carolina Code of Laws, and an unbroken line of case law from the South Carolina Supreme Court protect West Columbia from Lexington's attempt to displace West Columbia's right to provide sewer services to its citizens.

The circuit court held that the South Carolina Constitution and "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." (R. p. 10, Order at 8, 10.) This conclusion is unassailable.

The South Carolina Constitution jealously guards the right of municipalities to make their own decisions concerning utility services and to serve citizens within their boundaries where they so choose. It provides that no law "shall be passed" that allows for the construction or operation of streets, rails, telephone infrastructure, electrical lines, water lines, sewer lines, gas lines, or other "mains 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.

The South Carolina 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) ("The basic premise upon which [two additional Supreme Court decisions] rest is a municipality's right of consent under S.C. Const. art. VIII, § 15."); *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).

This constitutional protection extends 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, Section 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).

This fundamental point of Home Rule does not stop in the Constitution; the General Assembly has specifically memorialized these protections for municipalities in the South Carolina Code as well. For instance, state law 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), and it requires a municipality to seek permission from another before providing "any of its services" in the territory of the other municipality, *id.* § 5-7-60. Lexington has obtained no such permission.

South Carolina Code Ann. § 5-7-60 specifically forbids one municipality from encroaching into another's territory for providing certain services, including sewer services, unless "permission for such municipal operations is approved by the governing body of the other municipality or political subdivision concerned." And the statute says that the provision of such services is "subject always to the general law and Constitution of this State regarding such matters." *Id.*

Local government and Home Rule could not function otherwise. A municipality must be able to count on providing its own infrastructure and services to residents without outsiders poaching potential customers or interfering with the municipality's ability to manage affairs within its own boundaries. But by the express allegations of the Amended Complaint, that is precisely what Lexington is attempting to do.

Here, Lexington admits that West Columbia annexed the area in dispute more than two years ago. (R. p. 49, Am. Compl. ¶ 40.) In reviewing West Columbia's conformity application, CMCOG recognized that West Columbia was simply expanding sewer services to customers within the boundaries of the municipality itself. (R. p. 223, *id.* at Exhibit B). Nevertheless, Lexington asks the Court to declare that Lexington "is entitled to provide wastewater service" within West Columbia over West Columbia's objection. (R. p. 52, *id.* ¶ 53(f).) An unbroken line of South Carolina constitutional, statutory, and judicial authority directly rejects Lexington's position.

To bypass all of this authority, Lexington argues, first, that the Home Rule provisions of the South Carolina Constitution are inapplicable here because there are "no act[s] of the General Assembly at issue in this case." (Lexington's Br. at 15.) Lexington does not support its argument with any case law, and that absence is not surprising, as the argument ignores the fundamental point that everything a municipality does must be pursuant to a state law. Lexington can only serve the area in question by violating the statute.

Political subdivisions—the Town of Lexington, the City of West Columbia, and CMCOG—may only exercise the authority vested in them by state law. *See St. Andrews Pub. Serv. Dist. Comm'n v. Comm'rs of Public Works*, 289 S.C. 68, 71, 344 S.E.2d 857, 858 (Ct. App. 1986) ("However, a political subdivision of a state, not being a sovereign itself, has no inherent power

of eminent domain and may not exercise the power except pursuant to a grant by the legislature."). Accordingly, everything that any of the parties in this case does necessarily involves an "act of the General Assembly." And, most on-point, South Carolina Code § 5-7-60 is an "act of the General Assembly" that forbids one municipality from encroaching on another's corporate boundaries for provision of wastewater services. Lexington's argument that a court should allow it to provide wastewater services within West Columbia's corporate boundaries in direct contravention of the South Carolina Constitution and the State Code fails as a matter of law.

So, too, does its fallback argument that West Columbia's provision of wastewater services within its own corporate boundaries somehow violates the Section 208 Plan for the region. (Lexington's Br. at 17.) Once again, Lexington does not support its argument with any case law. And, once again, that absence is not surprising, as it assumes that the municipalities and CMCOG can enter into an agreement to violate the Home Rule provisions of the State Constitution and State Code. They obviously cannot use their limited authority to override the State Constitution. *See, e.g., O'Brien v. S.C. ORBIT*, 380 S.C. 38, 43–45, 668 S.E.2d 396, 398–400 (2008) (striking a city's attempt to invest retirement funds in equity securities in violation of the Constitution); *see generally* S.C. Code Ann. § 5-7-30 (authorizing municipalities to "enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State"). Even if CMCOG were to attempt to issue a conformity letter in contradiction to the Home Rule provisions of the Constitution, or draft a 208 Plan that violates them, it would not have the power to do so. CMCOG's constitutional powers are limited to issuing "studies and recommendations . . . on behalf of and directed to the participating governments and other governmental instrumentalities which operate programs within the jurisdiction of the participating governments." S.C. Const. art. VII, § 15. DHEC is obligated to make an independent determination that a wastewater construction

permit is consistent with the 208 Plan under S.C. Code Ann. Regs. 61-67.100(E)(1), (8). *See, e.g., Se. Res. Recovery, Inc. v. S.C. DHEC*, 358 S.C. 402, 407–08, 595 S.E.2d 468, 471 (2004) (DHEC is required to make an independent determination of consistency with local solid waste management plans, rather than relying on a county's "letter of consistency").

Nor can Lexington credibly argue that West Columbia consented to a 208 Plan that violated its Home Rule rights. CMCOG is governed by a Board of Directors which takes official action on its behalf by majority vote. (http://centralmidlands.org/wp-content/uploads/BY-LAWS-Revised-April-23-2020.pdf. Accessed May 26, 2023.). Of its 51 members, West Columbia has one vote. (https://centralmidlands.org/about-us/board-members.html#content Accessed May 26, 2023.). The governance structure of CMCOG refutes any claim that all of its members have assented to each of its actions, as Lexington seeks to argue.

Likewise, a Section 208 Plan is not governed by federal law, as Lexington suggests, but instead is implemented in accordance with state law, just as the circuit court recognized in its dismissal order. *See, e.g.*, *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 there in are matters of state law***") (emphasis added); Op. S.C. Att'y Gen., 2008 S.C. AG LEXIS 91, at *9 n.1 (June 3, 2008) ("We note that if section 208 of the Clean Water Act vested authority in a planning agency to make decisions as to whether or not a particular entity may receive a permit, ***the COG cannot exercise authority not provided to it under state law***." (citing *North Colorado Water*, 482 F. Supp. at 1118)) (emphasis added).[2]

[2] Puzzlingly, Lexington suggests that South Carolina Code Ann. § 5-7-60 is "silent" as to the impact of a Section 208 Plan on the scope of one municipality's authority to breach the boundaries of another. (Lexington Br. at 17.) But the statute is not "silent"; it forbids unauthorized

Accordingly, Lexington's suggestion that members of the CMCOG Board were able to contract around the Constitution through the Section 208 Plan fails as a matter of law. The Court should reject Lexington's challenge to the circuit court's dismissal order as a result. There is simply no lawful basis for Lexington's claim to be able to provide wastewater services within West Columbia's boundaries over West Columbia's objection—Lexington does not identify any such legal authority in its opening brief, and its generic argument regarding the Rule 12(b)(6) standard does not create a legal basis for its position.

II. Lexington waived its ability to object to West Columbia's proposed wastewater permit, and its arguments are procedurally barred as a matter of law because it failed to exhaust any of the administrative procedures available to it.

In addition to affirming Judge Keesley's straightforward application of the Home Rule provisions of the South Carolina Constitution and Code of Laws, the Court may also affirm the dismissal based on any ground appearing in the record. Rule 220(c), SCACR. An equally-straightforward basis for dismissing Lexington's attempt to encroach on West Columbia's corporate territory exists on the face of the record: Lexington did not seek administrative review of DHEC's wastewater construction permit for the project.[3]

Prior to issuing its determination that West Columbia's requested expansion of its sewer system complied with the Section 208 Plan, CMCOG affirmatively sought input from Lexington

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encroachment, period. The statute incorporates by reference the Constitution's protections, and it expressly states that the only time one municipality can encroach on another's service territory is by permission, which has not happened here—precisely as Judge Keesley held in its order dismissing this case. (R. p. 8, Aug. 17 Order at 8 (recognizing that Lexington seeks a declaration that it may provide services in West Columbia "over West Columbia's objection," which would be "contrary to municipality control" under South Carolina law).)

[3] The circuit court denied West Columbia's motion to dismiss on a different basis, but it acknowledged that that "the time has expired for Lexington to pursue the administrative remedies," and that Lexington did not request to be notified of any DHEC decision. (R. p. 11-12, Order at 11–12).)

on that issue. Lexington stayed silent. It offered no objections, as reported in the memo accompanying CMCOG's decision:

> With the intention of promoting cooperation and coordination among management agencies and service providers, CMCOG staff makes all reasonable efforts to communicate with all parties when reviewing 208 conformance requests that may impact multiple management agencies or service providers. During the review of this conformance request, CMCOG communicated the preliminary determination of conformance with the Town of Lexington prior to issuing approval. The Town of Lexington did not object to CMCOG's determination that the project was in conformance with the 208 Plan.

(R. p. 223, Am. Compl. at Exhibit B.) What is more, in response to follow ups from CMCOG staff, Lexington affirmatively stated that it did not have "any questions or comments" regarding the proposed decision. (R. p. 259, Ex. A to Memo in Support of Mot. to Dismiss.)

Standing alone, Lexington's failure to object when invited to do so by CMCOG operates as a waiver of any argument before the circuit court, even if one were to assume *arguendo* that CMCOG's action was a final decision giving Lexington the right to seek declaratory judgment. *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)).

As stated *supra*, Lexington's route for seeking review for what it believes was the issuance of a wastewater construction permit that did not conform with the 208 Plan was with DHEC. Lexington failed to timely request administrative review of the DHEC construction permit based on the conformity determination issued by CMCOG. DHEC issued the requested permit in October 2021. (R. p. 263, Ex. B to Memo in Support of Mot. to Dismiss.).)

DHEC's permit decision is subject to a detailed review process. First, agency staff must consider the permit application and all materials, exhibits, and comments it received in response to the application. S.C. Code Ann. § 44-1-60(D). Lexington provided no comments or objections.

Once DHEC staff reaches a decision, the agency must provide notification of that decision "to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified." *Id.* § 44-1-60(E)(1)). Lexington never requested such notification.

From there, "[t]he staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person." *Id.* § 44-1-60(E)(2). Lexington never requested further review of the staff decision.

Administrative review of the permit decision, and the 208 conformity determination included with the application required Lexington to timely request review before the DHEC Board and then the Administrative Law Court, and it failed to take action. Accordingly, Lexington failed to avail itself of ***any*** administrative procedures, and its time for doing so has long expired. All of this is apparent from the record below, and it provides an additional basis for affirming dismissal of this case for failure to exhaust administrative remedies and for lack of appellate jurisdiction pursuant to South Carolina Code Ann. § 1-23-380, which requires a party to "exhaust[] all administrative remedies available within the agency" before seeking judicial intervention.[4]

[4] Lexington's failure to seek administrative review of DHEC's permit decision also precludes Lexington from collaterally attacking that decision through the doctrines of issue and claim preclusion. *See, e.g.*, *Perry v. SLED*, 310 S.C. 558, 562, 426 S.E.2d 334, 336 (Ct. App. 1992) ("It is well settled that under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of issues addressed by that tribunal in a collateral action. . . . Perry cannot raise in this civil suit under a separate cause of action the same issues that the Grievance Committee decided.").

Anticipating this argument, Lexington has argued that more discovery is needed in order to address any potential waiver or failure to exhaust its administrative remedies. (Lexington Br. at 21–23.) Not so, as no discovery could possibly change the analysis.

The territory in dispute is indisputably within West Columbia's corporate boundary. The South Carolina Constitution and the South Carolina Code of Laws indisputably give West Columbia sole discretion as to whether it wants to allow Lexington to provide services within West Columbia's territory. West Columbia has indisputably refused to give that consent and intends to provide those services itself. And Lexington indisputably failed to speak up even once when CMCOG performed its work, or when DHEC issued the permit.

The circuit court recognized in its dismissal order, Lexington could have—but did not—requested to be notified of a DHEC's permit decision on this application, and it could have—but did not—request administrative review after DHEC issued the permit, at which point it could have raised the arguments it raises here. (R. p. 12-13, Order at 12–13.)[5] But it did not make any objections, and the time for doing so has now closed. S.C. Code Ann. § 44-1-60(E)(2).

Accordingly, this Court can affirm the dismissal below based on Lexington's waiver of all objections to West Columbia moving forward with its sewer system, and based on Lexington's failure to engage—much less exhaust—the administrative remedies that the General Assembly established for review of DHEC staff decisions. Lexington's generic request for "discovery" regarding the COG's and DHEC's administrative review process in an apparent attempt to

[5] Though Lexington failed to engage in the administrative process with Central Midlands's recommendation by appealing DHEC's wastewater permit, it now recognizes the proper way to involve itself in DHEC matters. (*See* R. p. 283, September 8, 2022 Request from Lexington to DHEC (seeking to be notified of a forthcoming wastewater permitting decision involving nearby parcels that were also annexed into West Columbia).) The fact that Lexington has engaged in the administrative process in other instances confirms the inescapable point that it is not entitled to any relief in this forum.

collaterally attack those administrative procedures is far too late and is barred as a matter of law. *See, e.g.*, *Perry v. SLED*, 310 S.C. 558, 562, 426 S.E.2d 334, 336 (Ct. App. 1992) ("It is well settled that under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of issues addressed by that tribunal in a collateral action. . . . Perry cannot raise in this civil suit under a separate cause of action the same issues that the Grievance Committee decided.").

CONCLUSION

The circuit court's dismissal order accurately stated and applied the law governing the constitutional protections afforded to municipalities to provide services to their own constituents within their own corporate boundaries. Lexington's attempts to ignore the South Carolina Constitution, the South Carolina Code of Laws, and several controlling appellate decisions—for which it cites not a single supporting decision—should be denied. Accordingly, the Court should affirm the circuit court's order dismissing this case.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: */s/ Bryant Caldwell*

Belton T. Zeigler
South Carolina Bar 5754
belton.zeigler@wbd-us.com
M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
Bryant S. Caldwell
S.C. Bar No. 102206
bryant.caldwell@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Respondent City of West Columbia

THE SHISSIAS LAW FIRM, LLC

s/ Alexander Shissias
Alexander G. Shissias, SC Bar #11610
Alex@shissiaslawfirm.com
1727 Hampton Street
Columbia, South Carolina 29201
803.540-3090

Attorney for Respondent Central Midlands Council of Governments

Columbia, South Carolina
August 10, 2023

CERTIFICATE OF COMPLIANCE

The undersigned hereby certify that this Final Brief complies with Rule 211(b), SCACR.

WOMBLE BOND DICKINSON (US) LLP

By: */s/ Bryant Caldwell*
Belton T. Zeigler
South Carolina Bar 5754
belton.zeigler@wbd-us.com
M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
Bryant S. Caldwell
S.C. Bar No. 102206
bryant.caldwell@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Respondent City of West Columbia

THE SHISSIAS LAW FIRM, LLC

s/ Alexander Shissias
Alexander G. Shissias, SC Bar #11610
Alex@shissiaslawfirm.com
1727 Hampton Street
Columbia, South Carolina 29201
803.540-3090

Attorney for Respondent Central Midlands Council of Governments

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