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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Appellate Case No. 2023-000140

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

v.

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

FINAL BRIEF OF APPELLANT

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ERRATA

On page 5 of the Final Brief of Appellant, an erroneous sentence fragment that appeared in the Initial Brief of Appellant has been struck through but not deleted.

August 11, 2023

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 2

Factual Background 2

Procedural History 7

STANDARD OF REVIEW 10

SUMMARY OF ARGUMENT 12

ARGUMENT 14

I. S.C. Const. art VIII, § 15 and Home Rule Are Not Applicable 14

II. The Amended Complaint States a Claim Against West Columbia Under the 208 Plan 18

III. The Circuit Court Correctly Determined that Factual Development Is Needed Concerning the Availability of Administrative Remedies 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Baddourah v. McMaster,
433 S.C. 89, 856 S.E.2d 561 (2021) 21

Chestnut v. AVX Corp.,
413 S.C. 224, 776 S.E.2d 82 (2015) 18, 22

Cole Vision Corp. v. Hobbs,
394 S.C. 144, 714 S.E.2d 537 (2011) 18

Doe v. Marion,
373 S.C. 390, 645 S.E.2d 245 (2007) 10

Georgetown Cnty. v. Davis & Floyd, Inc.,
426 S.C. 52, 824 S.E.2d 471 (Ct. App. 2019) 20

Hodges v. Rainey,
341 S.C. 79, 533 S.E.2d 578 (2000) 11

Hyde v. S.C. Dep't of Mental Health,
314 S.C. 207, 442 S.E.2d 582 (1994) 22

Johnson v. Fields,
616 F. App'x 599 (4th Cir. 2015) 20

Knight v. Salisbury,
262 S.C. 565, 206 S.E.2d 875 (1974) 14

McNeil v. S.C. Dep't of Corr.,
404 S.C. 186, 743 S.E.2d 843 (Ct. App. 2013) 22

Plyler v. Burns,
373 S.C. 637, 647 S.E.2d 188 (2007) 10

Skydive Myrtle Beach, Inc. v. Horry County,
426 S.C. 175, 826 S.E.2d 585 (2019) 10

Williamsburg Rural Water & Sewer Co. v. Williamsburg Cnty. Water & Sewer Auth.,
367 S.C. 566, 627 S.E.2d 690 (2006) 17

Statutes

33 U.S.C. § 1251(a) 2

33 U.S.C. § 1288(a) 2

S.C. Code Ann. § 5-31-2030 15

S.C. Code Ann. § 5-7-60 .... 15, 16, 17

S.C. Const. art. 1, § 22 23

S.C. Const. art. VIII, § 15 .... 14, 15

Rules

Rule 12(b)(1), SCRCP 9, 13, 21

Rule 12(b)(6), SCRCP 9, 10, 18

Rule 59(e), SCRCP 9

STATEMENT OF ISSUES

I. Did the circuit court err in dismissing the amended complaint on the basis of constitutional and statutory "home rule" principles that govern the relationship between the State and local governments, when no act of the General Assembly is at issue in this case?

II. Did the circuit court err in dismissing the amended complaint for failure to state a claim on which relief can be granted?

III. Was it within the circuit court's discretion to deny a motion to dismiss under Rule 12(b)(1), SCRCP, on the grounds that further factual development is needed regarding the availability and adequacy of administrative review?

STATEMENT OF THE CASE

Appellant Town of Lexington, South Carolina brought this action against Respondents City of West Columbia, South Carolina, and the Central Midlands Council of Governments ("CMCOG") seeking declaratory relief concerning Lexington's right to provide wastewater service to an area for which Lexington is the Designated Management Agency under Section 208 of the federal Clean Water Act (CWA).

Factual Background

The Clean Water Act and the 208 Plan

Congress enacted the Clean Water Act of 1972 ("CWA") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 208 of the CWA is intended to "encourag[e] and facilitat[e] the development and implementation of areawide waste treatment management plans," 33 U.S.C. § 1288(a), in recognition of 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. (R. p. 44 (Am. Compl. ¶ 8).) Under Section 208, local governments must develop a regional water quality management plan, or "208 Plan," 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. (R. p. 44 (Am. Compl. ¶ 9).)

For purposes of developing a 208 Plan for a specific geographic area in South Carolina, 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. (R. p. 44 (Am. Compl. ¶ 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. (R. p. 45 (Am. Compl. ¶ 11).)

The most recent 208 Plan covering Lexington County was adopted by CMCOG in 1997 (the "208 Plan"). (R. pp. 53-222 (Compl. Ex. A (208 Plan)).) The 208 Plan identifies Designated Management Agencies ("DMAs") that are responsible for implementing the plan within assigned management areas, including by providing wastewater service or determining the appropriate method for delivering wastewater service to that specified area. (R. pp. 115-116 (208 Plan at 55-56).) Lexington is the DMA for the US 378/I-20 area. (R. p. 45 (Am. Compl. ¶ 14); R. p. 117 (208 Plan at Fig. 3).)

Under the 208 Plan, "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." (R. p. 198 (208 Plan at 135).) More specifically, "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." (R. p. 199 (208 Plan at 136).) West Columbia is also a DMA under the 208 Plan, with a service area adjacent to the US 378/I-20 area. (R. p. 45 (Am. Compl. ¶ 17); R. p. 117 (208 Plan at Fig. 3).)

The 208 Plan provides that "[i]n the Central Midlands planning area of South Carolina, the water quality planning process under Section 208 … is the responsibility of the [CMCOG] as the designated water quality planning agency. CMCOG maintains and

periodically updates the [208 Plan] as it strives toward preserving and enhancing state water quality standards and classifications for both surface and ground water." (R. p. 61 (208 Plan at 1).)

The 208 Plan enumerates several specific goals and policies, including the following:

- Planning and developing "a timely, orderly and efficient arrangement of public sewer facilities and services to serve as a framework for urban and rural development in the Central Midlands planning area";
- Placing "the responsibility for developing a cost effective local wastewater management system on local governments within limits of the regional areawide plan"; and
- "In determining wastewater needs, the primary goal is to provide reasonable, feasible and economical wastewater service to any particular area."

(R. pp. 71, 92, 104 (208 Plan at 11, 32, 44).)

If "a proposal or project is determined to be inconsistent with the [208 Plan], an application may be made to CMCOG to amend the Plan." (R. p. 96 (208 Plan at 36).) An amendment may be either "major" or "minor," as determined by CMCOG. (*Id.*) Major amendments include those which involve "[c]hanges in … geographic management area such that the change significantly alters the provision of wastewater collection, transportation, treatment or potentially impairs water quality." (R. p. 97 (208 Plan at 37).) Amendments must be submitted in writing and must be sponsored by a DMA or the CMCOG Board. (R. pp. 96, 98 (208 Plan at 36, 38 (emphasis omitted)).) The applicant is responsible for meeting all initial submission requirements and for providing any

additional information or studies requested by the CMCOG's Environmental Planning Advisory Council ("EPAC") during the amendment process. (R. p. 98 (208 Plan at 38).)

With respect to applications for amendments, the 208 Plan provides:

> [B]efore an application can receive consideration by the CMCOG, the applicant may be required to provide information which, at a minimum where it applies, addresses the following:
>
> 1. Detailed description and scope of the project;
> 2. Preliminary engineering data regarding facility design and cost;
> 3. Financing strategy and/or feasibility analysis;
> 4. Potential fiscal or engineering impact on existing facilities, if any;
> 5. Associated environmental risks or impacts;
> 6. Project justification or need;
> 7. Summary examination of alternative options, where appropriate; and
> 8. Timing and phasing of the project and proposal.

(R. pp. 99-100 (208 Plan at 39-40).) The applicant bears "the burden of demonstrating the facts and merits of any plan amendment … subject to whatever level of review [is] issued by" CMCOG. (R. p. 100 (208 Plan at 40).)

The 208 Plan provides that "[a]fter the public information meeting, if one is held," the EPAC will present the proposed amendment, along with its recommendation and a summary of public comments, to the CMCOG Board. (R. p. 98 (208 Plan at 38).) ~~Central Midlands Council Board. The EPAC Chairman, assisted by staff, (R. p. __ (208 Plan at 38).)~~ Approval by DHEC and the federal Environmental Protection Agency may also be required before an amendment can become part of the 208 Plan. (R. p. 99 (208 Plan at 39).) Amendment decisions by CMCOG "are considered final and are given to [DHEC] for

concurrence." (*Id.*)

Also of relevance to this appeal, the 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*." (R. p. 116 (208 Plan at 56 (emphasis added)).) Also, "[b]efore DHEC can issue or re-issue a permit to construct or operate a wastewater treatment facility or related facilities in the 208 planning region, conformance with the [208 Plan] must be determined." (R. p. 100 (208 Plan at 40).)

West Columbia's Attempt to Expand Its Wastewater Treatment System

On September 26, 2018, West Columbia submitted a 208 Water Quality Management Plan Conformance Request ("Conformance Request") for an upgrade and expansion of its wastewater system along the US 378 corridor. (R. p. 48 (Am. Compl. ¶ 32).) The area for which West Columbia submitted the Conformance Request is inside Lexington's designated management area as set forth in the 208 Plan. (R. p. 48 (Am. Compl. ¶ 34).)

On March 13, 2019, West Columbia submitted a written request for an amendment to the Management Agency Area map in the 208 Plan ("Proposed Amendment"). (R. p. 48 (Am. Compl. ¶ 35).) The purpose of the Proposed Amendment was to (1) address the current Conformance Request, and (2) provide future guidance for future expansion and improvements to the West Columbia wastewater system. (R. p. 49 (Am. Compl. ¶ 36).) The Proposed Amendment included (1) a detailed description and scope of the project; (2) preliminary engineering data regarding facility design and cost; (3) financing strategy

and/or feasibility analysis; (4) potential fiscal or engineering impact on existing facilities, if any; (5) associated environmental risks or impacts; (6) project justification or need; (7) a summary examination of alternative options, where appropriate; and (8) the timing and phasing of the project and proposal. (R. p. 49 (Am. Compl. ¶ 37).)

West Columbia presented the Proposed Amendment to the CMCOG on March 13, 2019, but it became apparent that there was insufficient support for its passage. (R. p. 49 (Am. Compl. ¶ 38).) Realizing that the proposal was destined to fail, West Columbia withdrew the application for amendment. (R. p. 49 (Am. Compl. ¶ 39).)

After abandoning the Proposed Amendment, West Columbia annexed property in the US 378/I-20 area—which, again, is within *Lexington's* designated management area. (R. p. 49 (Am. Compl. ¶ 40).) Following this annexation, and notwithstanding the previous failure of the Proposed Amendment, West Columbia filed a renewed Conformance Request with the CMCOG on February 8, 2021 for the previously proposed expansion of its sewer collection system along Highway 378. (R. p. 49 (Am. Compl. ¶ 41).) Even though West Columbia had previously sought an amendment of the 208 Plan for a substantially identical project, it did not seek an amendment of the 208 Plan in filing its Conformance Request in 2021. (R. p. 49 (Am. Compl. ¶ 42).) On March 22, 2021, without any amendment to the 208 Plan, CMCOG issued a Memorandum and Conformance Determination for the West Columbia sewer expansion project. (R. p. 50 (Am. Compl. ¶ 43); R. pp. 223-226 (Conformance Determination).)

Procedural History

Believing that the Conformance Determination directly contravened the plain

language of the 208 Plan and thus was beyond the authority of the CMCOG, Lexington commenced this action by filing a complaint against West Columbia on April 22, 2021, seeking a declaratory judgment that:

> (a) West Columbia's proposed expansion would require a major amendment to the 1997 208 Plan;
>
> (b) West Columbia is in violation of the 1997 208 Plan because it has refused to follow the procedures set forth to amend said Plan in order to expand its wastewater system along the US 378 corridor;
>
> (c) West Columbia is in violation of the 1997 208 Plan because its proposed expansion along the US 378 corridor would usurp Lexington's designated service area where wastewater service from Lexington is already reasonably available;
>
> (d) West Columbia is in violation of the 1997 208 Plan because its proposed expansion along the US 378 corridor would create cost and other inefficiencies contrary to the stated goals of the 1997 208 Plan; [and]
>
> (e) Pursuant to the 1997 208 Plan, Lexington is entitled to provide wastewater service or determine an appropriate wastewater service delivery system to the US 378/I-20 area annexed by West Columbia.

(R. pp. 29-30 (Compl. ¶ 48).)

West Columbia moved to dismiss the complaint, arguing in part that CMCOG was an essential party to the case. (R. p. 33 (Mot. to Dismiss at 3).) The circuit court conducted a virtual hearing on West Columbia's motion to dismiss on June 16, 2022. (R. pp. 290-320 (Hr'g Tr.).) On July 14, 2022, Lexington filed an amended complaint that added CMCOG as a defendant and sought additional declaratory relief, namely, a declaration that "[t]he March 22, 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. pp. 235-244 (CMCOG Answer)), but West

Columbia again moved to dismiss. (R. pp. 227-230 (Mot. to Dismiss Am. Compl.).)

On August 17, 2022, the circuit court entered an order granting West Columbia's motion and dismissing the amended complaint under Rule 12(b)(6), SCRCP, for failure to state a claim on which relief could be granted. (R. pp. 1-14 (Order of 8/17/2022).) The court reasoned that because West Columbia had annexed the area in question, it was entitled under the South Carolina Constitution to determine who would provide sewer services to customers within its (newly acquired) municipal boundaries. (R. p. 10 (Order of 8/17/2022, at 10).) However, the circuit court denied West Columbia's alternative motion to dismiss under Rule 12(b)(1), SCRCP, for failure to exhaust administrative remedies, finding it was "not proper at the pleadings stage to determine the issues of waiver or failure to exhaust administrative remedies." (R. p. 12 (Order of 8/17/2022, at 12).)

Lexington timely moved to alter or amend or for reconsideration pursuant to Rule 59(e), SCRCP. (R. pp. 264-266 (Mot. to Alter or Amend).) The parties submitted written briefs on the motion in accordance with a scheduling order issued by the circuit court. (R. p. 15 (Form 4 Order of 9/26/2022).) On December 30, 2022, the circuit court issued a written order denying Lexington's Rule 59(e) motion. (R. pp. 18-20 (Order of 12/30/2022).) Lexington filed a timely notice of appeal on January 27, 2023. (R. p. 321 (Notice of Appeal).)

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). The circuit court, and this Court on appeal, "must base its ruling solely on allegations set forth in the complaint." *Id.* Dismissal is improper if the facts alleged "would entitle the plaintiff to relief on *any theory*." *Id.* (emphasis added). A Rule 12(b)(6) motion tests "the sufficiency of a pleading stating a claim; it is not a vehicle for addressing the underlying merits of the claim." *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (2019). "[T]he complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007).

The key issues on appeal concern the scope of municipal home rule authority under the South Carolina Constitution and statutory law and whether Lexington has exhausted its administrative remedies. Deciding these questions will require the construction and application of statutory and constitutional provisions. As the Supreme Court has explained:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citations & internal quotation marks omitted).

SUMMARY OF ARGUMENT

The circuit court dismissed Lexington's amended complaint based on its finding that Home Rule provides a municipality with "veto" power over the provision of wastewater service by any other entity. This ruling effectively nullifies the 208 Plan with respect to the designation of geographic service areas, and therefore inherently conflicts with the federal CWA. The development of area-wide management plans under Section 208 of the CWA is intended to address the provision of wastewater service and the protection of water quality, and the 208 Plan enumerates specific goals and policies under the umbrella of the CWA's authority, including the goal of establishing and maintaining a cost-effective local wastewater management system. Importantly, the 208 Plan does not allow a municipality to thwart its goals and policies by the expedient of annexation. An annexing municipality "has the right to provide service to [the annexed] area, *provided no existing service is reasonably available and is shown to be the cost effective means of providing service.*" (R. p. 116 (208 Plan at 56 (emphasis added)).)

Full discovery and presentation of evidence would have demonstrated the financial outlays undertaken by Lexington, allowing a fully informed determination as to whether there was existing, cost-effective service reasonably available in the annexed area. The circuit court's interpretation of Home Rule to give an annexing municipality total authority over wastewater service in the area, regardless of a DMA's efforts already underway to serve the annexed area, directly conflicts with the CWA's goal of orderly development of sewer infrastructure. Therefore, the decision of the circuit court should be reversed.

Additionally, the circuit court correctly denied West Columbia's motion to dismiss under Rule 12(b)(1). Dismissal at the pleadings stage is properly denied where, as here, factual development is needed for flesh out the issues, even if the ultimate resolution of the case will turn on a question of law.

ARGUMENT

I. S.C. Const. art VIII, § 15 and Home Rule Are Not Applicable

The circuit court erred in dismissing Lexington's Amended Complaint on the basis of West Columbia's "home rule" authority in the annexed area. The court relied on a provision of the South Carolina Constitution:

> No law shall be passed *by the General Assembly* granting the right to construct and operate in a public street or on public property … sewer or gas works for public use, or to lay mains for any purpose … without first obtaining the consent of the governing body of the municipality.

S.C. Const. art. VIII, § 15 (emphasis added). This provision, by its plain terms, applies only to laws passed by the General Assembly. Indeed, the fundamental purpose of home rule was to remove *from the General Assembly*, and transfer to local governing bodies, the power to handle the normal day-to-day affairs of local government. *See Knight v. Salisbury*, 262 S.C. 565, 571, 206 S.E.2d 875, 877 (1974) (explaining that Article VIII was "prompted by the feeling that Columbia should not be the seat of county government, and that the General Assembly should devote its full attention to problems at the state level").

The circuit court acknowledged that there was no act of the General Assembly at issue in this case, yet nonetheless held that this Constitutional provision applies and prevents Lexington from providing wastewater services within its service area under the 208 Plan. (R. p. 5 (Order at 5 n.2).) The circuit court reasoned that Article VIII applied because "there are a number of cases where local governments have sued concerning regulations and procedures implemented by State agencies," and DHEC is "a state

agency which operates under statutes and regulations adopted by the General Assembly." (R. p. 5 (Order at 5 & n.2).) This reasoning is flawed, however, because acts of the General Assembly regulating DHEC's operations simply are not at issue here; this case does not concern the powers of the State versus the powers of local governments. The circuit court's application of Article VIII to decide the issues in this case stretches too far.

The circuit court also erred in relying on upon two provisions of the Home Rule Act, S.C. Code Ann. § 5-31-2030 and S.C. Code Ann. § 5-7-60. Neither statute provides authority for the court's ruling.

First, § 5-31-2030 merely provides that municipalities may adopt ordinances with respect to the discharge of sewage and the use of any sewer system operated by the municipality. S.C. Code Ann. § 5-31-2030(3). Specifically, it states:

> 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 use of privies, septic tanks and other sewage facilities within the municipality.

Id. It is uncontroversial that a municipality may regulate the "*discharge* of sewage" and require "*the use of*" sewage facilities within the municipality. *Id*. (emphasis added.) However, the statute does not speak to *the right to provide* such services. Indeed, to the extent § 5-31-2030 even mentions a municipality's operation of a sewer system, it is expressly qualified by "from time to time." Not only is this this provision limited to the *operation* of sewage facilities, but by its plain terms it does not envision, much less require,

that the municipality will necessarily or always be the operator of such facilities. Thus, the circuit court erred in interpreting this statute as granting an exclusive right to municipalities to own and provide wastewater services with their municipal limits.

Second, § 5-7-60 merely recognizes that a municipality may provide services outside of its corporate limits by contract, "except within a designated service area for all such services of another municipality or political subdivision, including water and sewer authorities." S.C. Code Ann. § 5-7-60. It provides:

> Any municipality may perform any of its functions, furnish any of its services, … 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 …. For 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.

Id.

Section 5-7-60 is concerned with the circumstances in which a municipality may furnish services outside its municipal boundaries, but the area at issue in this case was annexed by West Columbia, and thus lay *inside* its municipal boundaries. Section 5-7-60 says nothing about any right West Columbia may have to provide wastewater services in the disputed area. It is equally plain that § 5-7-60 does not apply to any right Lexington

may have to provide sewer services in the disputed area, because the right alleged by Lexington is established by the 208 Plan, under which Lexington is the DMA for the area in question. On this, the statute is silent. Because Lexington does not claim to possess such right by virtue of being a municipality, but rather as a DMA under the terms of the 208 Plan, § 5-7-60 is not controlling.

Even if § 5-7-60 did speak to this issue (which it does not), this Court nevertheless should find that Lexington has stated a valid claim because, pursuant to the 208 Plan, Lexington has a written agreement with West Columbia concerning the provision of wastewater services to the disputed area. Indeed, the circuit court itself "recognize[d] the entry of a pact by local governments related to the CMCOG" for purposes of the 208 Plan.[1] (R. p. 8 (Order of 8/17/2022, at 8).) Moreover, the 208 Plan constitutes approval by West Columbia that Lexington would be the DMA to provide wastewater services in the disputed area. Such approval further authorizes Lexington to provide wastewater services in the disputed area because § 5-7-60 provides that "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." S.C. Code Ann. § 5-7-60.

[1] Notably, West Columbia has never denied the existence of an agreement between the parties concerning the provision of wastewater services in the disputed area, nor has it denied that the 208 Plan constitutes a contract. Assuming *arguendo* that Article VIII applies, this is sufficient to demonstrate consent by West Columbia. *See Williamsburg Rural Water & Sewer Co. v. Williamsburg Cnty. Water & Sewer Auth.*, 367 S.C. 566, 572 & n.6, 627 S.E.2d 690, 693 & n.6 (2006) (constructive consent or the equivalent of consent are sufficient for purposes of S.C. Const. art. VIII, § 15).

II. The Amended Complaint States a Claim Against West Columbia Under the 208 Plan

In ruling on West Columbia's motion to dismiss pursuant to Rule 12(b)(6), the circuit court was required to base its ruling solely on, and assume the truth of, the allegations set forth in the amended complaint. *See Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015); *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 148, 714 S.E.2d 537, 539 (2011). Thus, the circuit court was required to accept as true Lexington's allegation that "[a]ll land annexed by West Columbia within Lexington's designated management area is either (1) currently served by Lexington or (2) can easily and readily be served by Lexington." (R. p. 50 (Am. Compl. ¶ 48).) The circuit court was further required to accept as true Lexington's allegations that "expansion of West Columbia's sewer service area as proposed would isolate Lexington infrastructure in other portions of its designated management area and nullify investments made by Lexington to expand sewer infrastructure within the US 378/I-20 area"; that "[t]he economic consequences of West Columbia's expansion efforts would be contrary to the 1997 208 Plan's goals of developing efficient and cost effective local wastewater management systems"; and that "West Columbia's expansion into the US 378/I-20 area would interfere with Lexington's ability to perform at least one contract with another utility service for provision wastewater service to customers in the US 378/I-20 area." (R. pp. 50-51 (Am. Compl. ¶¶ 49-51).)

The circuit court was required to accept such allegations as true, but did not. It correctly recognized that under the 208 Plan, the right to control sewer service within a

designated management area does not change due to annexation where existing service "*is reasonably available and is shown to be the cost effective means of providing service***.**" (R. pp. 9-10 (Order of 8/17/2022, at 9-10) (emphasis original).) However, the court then incorrectly undertook to determine "whether Lexington's current infrastructure constitute[d] [such] 'existing service.'" (R. p. 6 (Order of 8/17/2022, at 6).) Without the benefit of a developed factual record or any discovery, it went on to hold that it did not. (R. pp. 6, 9-10 (Order of 8/17/2022, at 6, 9-10).)

The circuit court based its ruling on "[its] understanding that no Lexington infrastructure is located in the area annexed by West Columbia." (R. p. 6 (Order of 8/17/2022, at 6).) However, full discovery would have allowed Lexington to demonstrate the financial outlays it had already undertaken related to the annexed area. Only then would the circuit court have been in a position to determine whether there was existing service reasonably available which was the cost-effective alternative. The court held that "[t]he only indication is that CMCOG and, ultimately, DHEC are the entities to make that determination," (R. pp. 6, 10 (Order of 8/17/2022, at 6, 10)), apparently taking CMCOG's issuance of a Conformance Determination and DHEC's approval of a construction permit as *prima facie* evidence that existing service was not reasonably available which was the cost effective alternative. However, the record contains no evidence that CMCOG or DHEC considered whether wastewater was already reasonably available or the cost effective means of providing service, much less that such determination, had it been made, was correct. Without discovery, the circuit court could not have determined the factors considered by CMCOG in issuing its Conformance Determination, nor the degree

of reliance placed on CMCOG's decision by DHEC in making subsequent permitting decisions. This is particularly troublesome in light of the circuit court's recognition that there are issues "concerning the methodology that is available [for Lexington] to assert rights under the [208] Plan and to contest [CMCOG's and DHEC's] actions taken that allowed West Columbia to obtain a construction permit within the area designated to Lexington." (R. p. 12 (Order of 8/17/2022, at 12).)

Nevertheless, because it was required to accept Lexington's allegations as true, the circuit court should not have reached the merits of these issues in ruling on West Columbia's motion. *See, e.g.*, *Johnson v. Fields*, 616 F. App'x. 599, 600 (4th Cir. 2015) ("The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint; importantly, a Rule 12(b)(6) motion does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." (internal quotation marks omitted)). The circuit court's ruling was improper under the applicable Rule 12(b)(6) standard, and was effectively a premature grant of summary judgment. The record is devoid of any basis from which the circuit court could have resolved the disputed factual issues in this case, and Lexington is entitled to full and fair discovery on these issues.

Despite the circuit court's failure to do so, this Court must accept the truth of Lexington's allegations in reviewing the circuit court's dismissal of the amended complaint. *See Georgetown Cnty. v. Davis & Floyd, Inc.*, 426 S.C. 52, 56, 824 S.E.2d 471, 473 (Ct. App. 2019) Accepted as true, Lexington's allegations state a valid claim against West Columbia under the 208 Plan.

III. The Circuit Court Correctly Determined that Factual Development Is Needed Concerning the Availability of Administrative Remedies

West Columbia also moved to dismiss pursuant to Rule 12(b)(1), SCRCP, arguing that the circuit court lacked subject matter jurisdiction because (1) Lexington purportedly failed to exhaust available administrative remedies by not challenging CMCOG's review and DHEC's issuance of a permit; and (2) instead of filing a declaratory judgment action in circuit court, Lexington should have filed a petition for a writ of certiorari from the Supreme Court. (R. pp. 10-12 (Order of 8/17/2022, at 10, 12).) The circuit court denied this motion, holding that further development of the factual record was needed regarding issues raised by Lexington concerning the availability and adequacy of administrative review of a CMCOG conformance determination. This ruling was correct and should be affirmed.[2]

As to West Columbia's claim that Lexington failed to exhaust its administrative remedies, the circuit court noted that Lexington's amended complaint alleged:

> While the 208 Plan provides for public participation in making any plan amendment 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 Review decision.*

(R. p. 50 (Am. Compl. ¶ 45 (emphasis added)).) Since "a failure to exhaust administrative remedies goes to the prematurity of the claim, not subject matter jurisdiction," the circuit

[2] If the circuit court had *granted* the motion based on West Columbia's arguments under Rule 12(b)(1), this Court's review would be *de novo* because "[t]he question of subject matter jurisdiction is a question of law for the court." *Baddourah v. McMaster*, 433 S.C. 89, 96, 856 S.E.2d 561, 565 (2021) (internal quotation marks omitted).

court observed that in light of West Columbia's contention that "the time has expired for Lexington to pursue the administrative remedies that West Columbia claims were available," a dismissal without prejudice (to exhaust administrative remedies) "would effectively be dismissal with prejudice. Dismissal on this ground should not be made at the pleading stage based on this record." (R. pp. 11-12 (Order of 8/17/2022, at 11-12).)

The circuit court also refused to dismiss on the basis of West Columbia's argument that Lexington was required to file a petition for writ of certiorari instead of a complaint for declaratory judgment. The court determined that "issues have been raised concerning the methodology that is available to assert rights under the [208 Plan] and to contest actions taken that allowed West Columbia to obtain a construction permit within the area designated to Lexington." (R. p. 12 (Order of 8/17/2022, at 12).)

The circuit court acted well within its discretion in determining that further factual development is needed on these issues, even though they may ultimately be decided as a matter of law. *See Chestnut*, 413 S.C. at 228, 776 S.E.2d at 84 (reversing Rule 12(b)(6) dismissal because further development of the facts would inform the Court's determination of what rule to adopt with respect to "stigma damages"); *see also McNeil v. S.C. Dep't of Corr.*, 404 S.C. 186, 192, 743 S.E.2d 843, 846 (Ct. App. 2013) (recognizing prior decisions reversing 12(b)(6) dismissals "because the allegations were novel and deserved further development of the facts"). The rule in South Carolina is that a complaint should not be dismissed for failure to exhaust when there is a dispute concerning the *adequacy* of the available remedies. *See Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). Moreover, the South Carolina Constitution provides that "[n]o person

shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard … and he shall have in all such instances the right to judicial review." S.C. Const. art. 1, § 22. Lexington's amended complaint alleges that "neither the 208 Plan nor any state statute provides for administrative review or other due process for a party aggrieved by a CMCOG Conformance Review decision." (R. p. 50 (Am. Compl. ¶ 45).)

CONCLUSION

For the reasons set forth above, the dismissal of Lexington's amended complaint should be reversed.

Respectfully submitted,

August 11, 2023
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
William P. Keesley, Circuit Court Judge

Appellate Case No. 2023-000140

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the foregoing Final Brief of Appellant complies with Rule 211(b), SCACR.

August 11, 2023

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