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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
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 REPLY BRIEF OF APPELLANT

J. David Black, SC Bar No. 68499
Michael S. Traynham, SC Bar No. 75117
Alexandra H. Austin, SC Bar No. 102646
Kirsten E. Small, SC Bar No. 75681
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
Telephone: 803.771.8900
Facsimile: 803.253.8277
Dblack@nexsenpruet.com
MTraynham@nexsenpruet.com
AAustin@nexsenpruet.com
KSmall@nexsenpruet.com

Attorneys for Town of Lexington, South Carolina

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ARGUMENT

This appeal presents important and unresolved questions regarding the interrelationship between the federal Clean Water Act ("CWA"), which addresses the provision of wastewater services though an area-wide management plan, and a municipality's authority to provide such services to areas added to its corporate boundaries via annexation. The answer to the dilemma is found in the 1997 Water Quality Management Plan for the Central Midlands Region (the "208 Plan"), which provides that that when "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"* and that any permit "to construct or operate a wastewater treatment facility or related facilities in the 208 planning region" must conform to the terms of the 208 Plan. (R. pp. 100, 116 (208 Plan at 40, 56 (emphasis added)).)

Appellant Town of Lexington ("Lexington") brought the underlying declaratory judgment action against the City of West Columbia ("West Columbia") and the Central Midland Council of Governments ("CMCOG") to vindicate its rights under the 208 Plan. Lexington alleged in its amended complaint—and the circuit court was required to accept as true—that the annexed area is "within Lexington's designated management area and is either (1) currently served by Lexington or (2) can easily and readily be served by Lexington." (R. p. 50 (Am. Compl. ¶ 48).) In light of this and other allegations in Lexington's amended complaint, the circuit court erred in granting West Columbia's motion to dismiss.

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

In dismissing Lexington's amended complaint, the lower court reasoned in part that because West Columbia had annexed the area in question, the "home rule" provision of the South Carolina Constitution, S.C. Const. art. VIII, § 15, entitled it to provide service to the newly annexed area. (R. pp. 8-9 (Order of 8/17/2022, at 8-9).) Lexington argued before the circuit court and in its opening brief before this Court that the constitutional home rule provision does not apply here. Article VIII, § 15 provides:

> 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.

(emphasis added).

West Columbia complains that Lexington "does not support this argument with any case law." (Resp. Br. at 12.) However, there is no need for case law when the text of the Constitution is plain. *See Davis v. Cnty. of Greenville*, 313 S.C. 459, 463, 443 S.E.2d 383, 385 (1994) ("When construing the constitution, the Court applies rules similar to those relating to the construction of statutes," which means that "[t]he Court must give clear and unambiguous terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." (citing *McKenzie v. McLeod*, 251 S.C. 226, 161 S.E.2d 659 (1968)). Article VIII, § 15 prohibits the General Assembly from enacting laws that infringe upon a municipality's "home rule" authority. However, there is no act of the General Assembly at issue here.

West Columbia also contends that because political subdivisions "may only

exercise the authority vested in them by state law … everything that any of the parties in this case does necessarily involves 'an act of the General Assembly.'" (Resp. Br. at 12-13.) However, the constitutional text does not refer to an action that *involves* an act of the General Assembly; it refers to a "law … passed by the General Assembly." S.C. Const. art. VIII, § 15. As written, therefore, this constitutional provision limits the General Assembly's ability to interfere in a municipality's affairs but it does not speak to the issue in this litigation, which concerns the parties' respective rights under the 208 Plan, not the validity of any law passed by the General Assembly.

The cases cited in West Columbia's brief as grounds for applying Article VIII, § 15 are distinguishable because they concern either the validity of a particular statute, non-municipal service providers, or an assignment of rights by the Public Service Commission (elected by the General Assembly) pursuant to its statutory authority to regulate territorial assignments. *See Berkeley Elec. Coop., Inc. v. S.C. Pub. Serv. Comm'n*, 304 S.C. 15, 19-20, 402 S.E.2d 674, 676-77 (1991) (holding that a municipality's right of consent under Article VIII, § 15 includes the right to grant franchises); *Williamsburg Rural Water & Sewer Co. v. Williamsburg County Water & Sewer Auth.*, 367 S.C. 566, 627 S.E.2d 690 (2006) ("*Williamsburg II*") (holding that constructive consent under S.C. Code Ann. § 33-35-90 conferred an exclusive right);[1] *City of Aiken v. Aiken Elec. Coop.*, 305 S.C. 466, 468, 409

[1] West Columbia cites the decision of the Court of Appeals, *Williamsburg Rural Water & Sewer Co. v. Williamsburg County Water & Sewer Auth.*, 357 S.C. 251, 593 S.E.2d 154 (Ct. App. 2003) ("*Williamsburg I*"). In *Williamsburg I*, the Court of Appeals held that although the "constitutional shield" of Article VIII, § 15 was removed by the County's "constructive consent" under S.C. Code Ann. § 33-35-90, Williamsburg Water's rights

S.E.2d 403, 404 (1990) (holding that the Public Service Commission did not have exclusive jurisdiction over electric co-op's claim of entitlement to a franchise to serve customers within annexed parts of the co-op's service area)); *City of Rock Hill v. S.C. Pub. Serv. Comm'n*, 308 S.C. 175, 179, 417 S.E.2d 562, 564 (1992) (holding that where city had annexed land surrounding an industrial property, it was not being unconstitutionally "forced" to consent to use of its streets and public property; the city had no right to prove power unless it annexed the industrial property).

West Columbia further argues the South Carolina Constitution applies because there is an associated state statute at issue, namely, S.C. Code Ann. § 5-7-60. (Resp. Br. at 11.) That statute provides that a municipality may provide services *outside* its corporate limits "by contract" except when within a "designated service area." S.C. Code Ann. § 5-7-60. It is not relevant here because this dispute does not involve service outside municipal boundaries or within a "designated service area." The authority claimed by Lexington is pursuant to its status as the DMA under the 208 Plan, and thus § 5-7-60 has no bearing on this case.

Nevertheless, and even assuming *arguendo* that they are applicable, neither S.C. Const. art. VIII, § 15 nor S.C. Code Ann. § 5-7-60 is dispositive of Lexington's claims because, as recognized by the circuit court, Lexington has a "pact" with West Columbia pursuant to the 208 Plan, under which it has permission to provide wastewater services

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were not exclusive. *Williamsburg I*, 357 S.C. at 260-63, 593 S.E.2d at 159-161. In *Williamsburg II*, the Supreme Court reversed the Court of Appeals on the latter point, holding that the County's constructive consent gave Williamsburg Water exclusive rights. *Williamsburg II*, 367 S.C. at 572, 627 S.E.2d at 693.

in the disputed area. (R. p. 8 (Order of 8/17/2022, at 8 (stating the governments at issue entered into a "pact" with the CMCOG, the designated planning agency for this geographical area, for purposes of the 208 Plan)).) That pact contains express terms governing the circumstances under which a municipality annexing land in another DMA's area has the right to provide service to the area. The existence or nonexistence of those circumstances presented a disputed factual issue, improper for resolution on a motion to dismiss.

II. The Circuit Court Correctly Declined to Dismiss for Failure to Exhaust Administrative Remedies

West Columbia urges the Court to affirm on the alternative ground that Lexington failed to exhaust its administrative remedies. (Resp. Br. at 15 (citing Rule 220(c), SCACR).) This argument takes two forms. First, West Columbia argues that Lexington waived "any argument before the circuit court" by not objecting when the CMCOG requested Lexington's input on CMCOG's forthcoming approval of West Columbia's conformance request. (Resp. Br. at 16.) Second, West Columbia argues that Lexington failed to pursue administrative review of DHEC's issuance of a wastewater construction permit. (Resp. Br. at 17.) The circuit court properly ruled "that it is 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).)

A. Consideration Is Limited to the Allegations of the Amended Complaint

West Columbia's memorandum in support of its motion to dismiss included two attachments: CMCOG's conformance determination and related email correspondence

between CMCOG and Lexington (Exhibit A);[2] and the wastewater construction permit issued by DHEC (Exhibit B). (R. p. 263.) West Columbia relied on these documents—particularly, the email correspondence and DHEC permit—to support its arguments regarding waiver and exhaustion. (R. p. 250 (Mem. in Support of West Columbia's Mot. to Dismiss, at 6).) West Columbia again relies on these materials in its brief to this Court. (Resp. Br. at 16.)

The email correspondence and DHEC permit should be disregarded by the Court. "It is a well-settled principle that in resolving a Rule 12(b)(6) motion to dismiss, the court is limited to a consideration of the allegations contained within the four corners of the complaint." *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 559, 713 S.E.2d 604, 608 (2011). West Columbia argued before the circuit court that the extraneous materials were properly considered because its waiver and exhaustion arguments went to the question of subject matter jurisdiction. (R. p. 247 (Mem. in Support of West Columbia's Mot. to Dismiss, at 3 n.2 (citing *Baird v. Charleston County*, 333 S.C 519, 529, 511 S.E.2d 69, 74 (1999), for the proposition that evidence outside the pleadings may be considered on a motion to dismiss for lack of subject matter jurisdiction)).)

West Columbia appears to have abandoned this position on appeal, and wisely so.[3] Subject matter jurisdiction "is distinct from the doctrine of exhaustion of

[2] The conformance determination, but not the email correspondence, was attached as Exhibit B to Lexington's amended complaint. (R. pp. 223-226 (Am. Compl. Ex. B).)

[3] West Columbia has also abandoned its argument below that Lexington was required to file a petition for writ of certiorari instead of a complaint for declaratory judgment. (R. p. 12 (Order of 8/17/2022, at 12 (concluding that "issues have been raised concerning the methodology that is available to assert rights under the [208 Plan] and to contest actions

administrative remedies, which is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 100, 674 S.E.2d 524, 529 (Ct. App. 2008) (internal quotation marks omitted). Exhaustion of administrative remedies "goes to the prematurity of a case, not subject matter jurisdiction." *Id.* (internal quotation marks omitted). Thus, dismissal for failure to exhaust arises under Rule 12(b)(6), SCRCP, not under Rule 12(b)(1), SCRCP, and it is not proper to consider matters outside of the pleadings. *See id.* at 101, 674 S.E.2d at 529.

B. The Circuit Court Did Not Abuse Its Discretion

Exhaustion of remedies is required and precludes original resort to the circuit court only when an administrative agency is granted exclusive jurisdiction by the express terms of a statute. *See Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001); *see also Capital City*, 382 S.C. at 101, 674 S.E.2d at 529 (citing *Unisys Corp.* for this proposition). That is not the case here; indeed, West Columbia fails to identify any statute reserving exclusive jurisdiction to DHEC or any other agency. Consequently, the question for this Court is whether the circuit court abused its discretion in declining to dismiss based on a purported failure to exhaust. *See Capital City*, 382 S.C. at 101, 674 S.E.2d at 529. It plainly was not an abuse of discretion for the court to deny dismissal on this basis.

As Lexington explained in its opening brief, the circuit court correctly observed

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taken that allowed West Columbia to obtain a construction permit within the area designated to Lexington.")).)

that it would be pointless to dismiss so that Lexington could exhaust its administrative remedies. No such remedies were available because "the time has expired for Lexington to pursue the administrative remedies that West Columbia claims were available"; therefore, 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 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 v. AVX Corp.*, 413 S.C. 224, 228, 776 S.E.2d 82, 84 (2015) (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 administrative remedies 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).)

West Columbia's contention that discovery will not change the outcome (Resp. Br. at 18), is meritless. Lexington's amended complaint alleges 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).) Lexington further alleged 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";
- "[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 all of these factual allegations as true for purposes of ruling on the motion to dismiss. The circuit court failed to do so, as explained in Lexington's opening Brief. (Appellant's Br. at 18-19.) At present, the record is devoid of any evidence concerning the financial outlays Lexington has already undertaken related to the annexed area—facts that are critical to the question of whether there was existing service reasonably available which was the cost effective alternative.

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

s/ *J. David Black*

J. David Black, SC Bar No. 68499
Michael S. Traynham, SC Bar No. 75117
Alexandra H. Austin, SC Bar No. 102646
Kirsten E. Small, SC Bar No. 75681
MAYNARD NEXSEN, PC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
Telephone: 803.771.8900
Facsimile: 803.253.8277
Dblack@maynardnexsen.com
MTraynham@maynardnexsen.com
AAustin@maynardnexsen.com
KSmall@maynardnexsen.com

Attorneys for Appellant Town of Lexington, South Carolina

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CERTIFICATE OF COUNSEL

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

August 11, 2023

s/*Kirsten E. Small*

Kirsten E. Small, SC Bar No. 75681
Maynard Nexsen, PC
104 S. Main Street, 9th Floor
Greenville, SC 29601
(864) 370-2211
KSmall@maynardnexsen.com

Attorney for Appellant Town of Lexington