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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. 2023-000140
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.

APPELLANT TOWN OF LEXINGTON'S PETITION FOR REHEARING

INTRODUCTION

Pursuant to Rule 221, SCACR, Appellant Town of Lexington respectfully petitions for rehearing of this Court's July 1, 2026 decision. There the Court affirmed the circuit court's dismissal of Lexington's Complaint based on Rule 12(b)(6), SCRCP. This Petition asks the Court to reconsider its decision primarily for four reasons. First, the Court did not address the circuit court's impermissible resolution of contested factual allegations in a manner that is inconsistent with Lexington's Complaint. Second, although South Carolina law discourages the resolution of a novel legal question by way of a motion to dismiss, this Court decided a question of first impression on a bare pleadings record, contrary to *Kubic v. MERSCORP Holdings, Inc.*, 416 S.C.

161, 785 S.E.2d 595 (2016) and its predecessor cases. Third, the Court misapprehended South Carolina law by allowing West Columbia's unilateral annexation of territory to defeat the plain text of the 208 Plan, in which all members of the CMCOG agreed to condition an annexing municipality's right to provide sewer service on the absence of reasonably available, cost-effective service by the existing DMA. Fourth, the Court applied a line of cases concerning annexation in the context of providing electricity to annexation in the context of sewer service even though the two types of utilities are governed by distinct statutory schemes.

Each ground satisfies Rule 221 because it identifies a specific point of fact or law the Court either overlooked or misapprehended, and each is outcome-determinative. Lexington asks the Court to grant rehearing, vacate its opinion, and reverse the circuit court's Rule 12(b)(6) dismissal so that the parties may develop a record on the fact-dependent questions concerning the relationship between the provisions of a duly adopted 208 Plan and potential rights afforded by municipal annexation.

BACKGROUND

Congress enacted the Clean Water Act to restore and maintain the integrity of the Nation's waters. 33 U.S.C. § 1251(a). Section 208 requires states to develop areawide waste treatment management plans to address the fact that local water quality problems trace to sewer infrastructure that has not kept pace with development. 33 U.S.C. § 1288(a). In the four-county Central Midlands region, DHEC designated the Central Midlands Council of Governments ("CMCOG") as the planning agency. CMCOG through its constituent members adopted the current Section 208 Plan in 1997. The Plan identifies Designated Management Agencies responsible for providing wastewater service or determining the appropriate method of delivery within assigned areas. (R. 115-16.) Both Lexington and West Columbia are DMAs under the Plan. (R. 45.)

Lexington is the DMA for the US 378/I-20 area, which is at issue in this dispute. (R. 45 and 117.) The Plan directs Lexington "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. 199.) The Plan's annexation clause preserves that role even when a neighboring municipality annexes into a DMA's area, unless the annexing municipality can show both that no existing service is reasonably available and that its own service is the cost-effective means. To be clear, the members of the CMCOG have operated under the agreement for nearly thirty years that where a municipality annexes lands into another DMA's area, the annexing 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. 116 (emphasis added).)

The Plan also establishes a formal amendment process through which a DMA is able to request an amendment to its assigned area. Applicants must submit written amendment requests, provide detailed engineering and financial information, and obtain approval from CMCOG, with DHEC and EPA concurrence where required. (R. 96-100.)

On March 13, 2019, West Columbia submitted a written amendment requesting that a portion of Lexington's US 378/I-20 area be reassigned to West Columbia. (R. 48.) When it became apparent that the amendment lacked support at CMCOG, West Columbia withdrew the application. (R. 49.) West Columbia then annexed property within Lexington's designated management area and, on February 8, 2021, filed a conformance request for the same project the failed amendment would have authorized. (R. 49.) On March 22, 2021, CMCOG issued a conformance determination that allowed West Columbia to provide sewer services within the disputed territory previously assigned to Lexington without any amendment to the 208 Plan. (R.

50 and 223-26.) Lexington filed this declaratory judgment action, which the circuit court dismissed under Rule 12(b)(6), SCRCP, because it concluded that the concept of "home rule" allowed West Columbia to take over the territory without complying with the provisions of the 208 Plan. This Court held oral argument on May 5, 2026 and affirmed the circuit court on July 1, 2026.

STANDARD FOR REHEARING

A petition for rehearing is warranted when the Court has "overlooked or misapprehended" a point of law or fact material to the decision. Rule 221(a), SCACR. A rehearing allows the Court to correct substantive errors that affect the outcome, ensure consistency with controlling precedent, and prevent inadvertent expansion or distortion of established legal principles. *See, e.g.*, *S.C. Coastal Conservation League v. Dominion Energy S.C., Inc.*, 432 S.C. 217, 219, 851 S.E.2d 699, 700 (2020) (granting petition for rehearing where the Court recognized it had misapprehended the applicable standard). According to Rule 221, rehearing does not require a showing of extraordinary circumstances. The governing inquiry is simply whether the Court overlooked or misapprehended a material point of law or fact bearing on the disposition of the appeal. See Rule 221(a), SCACR. Furthermore, a petition for rehearing is necessary to preserve an issue for inclusion in a petition for a writ of certiorari at the Supreme Court. Rule 242(d)(1), SCACR; *Mazloom v. Mazloom*, 392 S.C. 403, 709 S.E.2d 661 (2011) ("[W]e find that this portion of the question is not preserved for review because it was not raised in the petition for rehearing to the court of appeals.")

ARGUMENT

I. The Court overlooked the constraints of Rule 12(b)(6) and resolved contested factual questions that the 208 Plan itself makes dispositive.

In its Amended Complaint Lexington alleged that it was currently serving or could easily and readily serve the disputed US 378/I-20 area. (R. 50.) Lexington further alleged that West Columbia's expansion would nullify Lexington's existing infrastructure investments in the US

378/I-20 area, that the expansion is contrary to the 208 Plan's cost-effectiveness goals, and that the expansion would interfere with at least one existing Lexington service contract. (R. 50-51.) In granting West Columbia's motion to dismiss, the trial court wholly disregarded these allegations and, in fact, found "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.*" (R. 6 (emphasis added).) Because the circuit court made a factual finding that is diametrically opposed to Lexington's allegations in its Amended Complaint, the circuit court's order should be reversed. Nevertheless, this Court's decision never addresses the circuit court's clear error.

Furthermore, this Court's decision also stakes out factual positions that contradict the allegations in Lexington's Amended Complaint. The Court concludes that "even if Lexington was serving or could readily serve the disputed area, once the area was annexed by West Columbia, Lexington had no right to institute new service or to expand service in the area without West Columbia's consent." Slip op. at 2. This assertion is improper for two reasons. First, it does not make any factual determination about where Lexington's existing service could remain even if Lexington is prohibited from expanding its service within the disputed area. Second, it does not address Lexington's factual allegations concerning the application of the 208 Plan.[1] In particular, the decision outright rejects the need to amend the Federally sanctioned 208 Plan and treats the "reasonably available" and "cost effective means" conditions in the 208 Plan as a nullity, or at

[1] To the extent that this Court addresses the effect of the 208 Plan, it summarily rejects Lexington's allegations that the 208 Plan must be amended before a service provider could change; that West Columbia was aware of and attempted to comply with the amendment process until it was clear that its proposed amendment was destined to fail, and that as member of the CMCOG, West Columbia was responsible for the Plan and its implementation. (R. 47-52, 201.) Again, this is contrary to Rule 12(b)(6), which requires that all well-pled allegations in a complaint must be presumed as true. *Fabian v. Lindsay*, 410 S.C.475, 481, 765 S.E.2d 132, 136 (2014).

least as legally irrelevant. Under the standard of Rule 12(b)(6), those allegations should not be treated as irrelevant; they should be treated as absolutely true. They are critical fact questions, which the trial court and this court were required to resolve in Lexington's favor at the pleading stage.

The law in South Carolina is clear. In reviewing a Rule 12(b)(6) dismissal, a Court "must base its ruling solely on allegations set forth in the complaint," and dismissal is improper if the facts alleged "would entitle the plaintiff to relief on *any theory*." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "[T]he complaint should not be dismissed merely because the court doubts the plaintiff will prevail." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). 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).

Lexington's allegations correspond directly with the 208 Plan's annexation clause, quoted above, which provides that an annexing 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. 116.) Whether existing service is reasonably available and whether Lexington's service is the cost-effective means are quintessential fact questions. Yet, the circuit court found against Lexington without any record and without acknowledging that the Amended Complaint pleads facts in Lexington's favor on both. Moreover, while this was the central issue in Lexington's appeal, this court failed to address the Rule 12(b)(6) error at all. Instead, as is shown in more detail below, the circuit court improperly applied home rule[2] to negate Lexington's rights under the 208 Plan and this Court, which did not address home rule at all, incorrectly applied the law related to electric utilities, which are governed by a distinct statutory regime that is inapplicable to wastewater utilities.

If the Court accepts, as it must at the Rule 12(b)(6) stage, that Lexington can readily serve the annexed area and has already made infrastructure investments there, the 208 Plan's annexation clause defeats dismissal.[3] The Court should grant rehearing to correct the trial court's improper application of Rule 12(b)(6) and remand the case so that the parties may develop the record the Plan's text makes necessary.

II. The Court overlooked the longstanding instruction that questions of first impression should not be resolved through a motion to dismiss.

This appeal presents multiple questions of first impression in South Carolina: (1) whether Article VIII, § 15 of the South Carolina Constitution has any legal effect on a water quality management plan adopted under Section 208 of the Federal Clean Water Act, 33 U.S.C. § 1288; (2) whether a municipality's annexation of property assigned to another DMA trumps the contrary provisions of a regional 208 Plan; and (3) whether statutory principals that are expressly applicable only to electrical service providers should be extended to sewer utilities. No South Carolina statute, regulation, or appellate decision addresses any of these subjects. This court's decision addresses the questions only on a pleadings record, and it does so in only three substantive paragraphs.

South Carolina law disfavors that approach. There are many South Carolina Supreme Court decisions recognizing that novel questions should be decided on a full record. For example,

[2] As Lexington noted previously, home rule is a check on the General Assembly's power over municipalities. No act of the General Assembly is at issue in this case.

[3] Although the decision does not say so explicitly, it seems the Court found that the provisions of the 208 Plan concerning annexation were immaterial based on South Carolina law. As is discussed in detail in Section III, to the extent that the Court concluded as much, it is based on the misapplication of statutes that govern only electric utilities, not sewer service providers.

in *Kubic v. MERSCORP Holdings, Inc.*, the Supreme Court reaffirmed the "general rule that important questions of novel impression should not be decided on a motion to dismiss." 416 S.C. 161, 785 S.E.2d 595 (2016). The Court cabined the exception to cases in which "the determinative facts are not in dispute." *Id.* This Court has applied the same principle. *See Chestnut v. AVX Corp.*, 413 S.C. 224, 227-28, 776 S.E.2d 82, 84 (2015) (reversing Rule 12(b)(6) dismissal because further factual development would inform the Court's adoption of a rule of first impression); *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").

This case falls within *Kubic*'s general rule, not its exception. None of the cases the Court relied on involved a Section 208 Plan, a Designated Management Agency, an areawide wastewater planning instrument, or an annexing municipality that was itself a voting member of the planning body. Moreover, the determinative facts are disputed. Whether existing Lexington service is "reasonably available" in the annexed area and whether it is the "cost effective means of providing service" are fact issues the 208 Plan itself makes dispositive, and the pleadings alone do not resolve them. (R. 116.)

Respectfully, the materiality of this error is plain. The opinion resolves a question that has never received considered treatment from a South Carolina appellate court. If the Court applies the *Kubic*, *Chestnut*, and *McNeil* rule, dismissal at the pleading stage was not the appropriate vehicle for resolution of the questions presented in Lexington's case. The parties should be permitted to develop a record before the Court decides, for the first time, how these issues should be resolved under South Carolina law.

III. The Court misapprehended the plain text of the 1997 Section 208 Plan by treating annexation as automatically extinguishing a Designated Management Agency's service rights.

The opinion finds that "annexation voids prior designations, which was the extent of Lexington's authority under the plan," citing *Blue Ridge Electric Cooperative, Inc. v. City of Seneca*, 297 S.C. 283, 290, 376 S.E.2d 514, 518 (1989); *City of Aiken v. Aiken Elec. Co-op., Inc.*, 305 S.C. 466, 468, 409 S.E.2d 403, 404 (1991); and *Berkeley Elec. Co-op, Inc. v. S.C. Pub. Serv. Comm'n*, 304 S.C. 15, 19, 402 S.E.2d 674, 677 (1991). This Court suggests that these cases stand for the proposition that annexing an area previously allocated to another utility service provider gives the annexing municipality the right to prohibit the other utility from providing service within the annexed areas. This is incorrect. All three cases state clearly that the municipality's service right post-annexation is only to *new* customers within the annexed area, *not all customers*. *Blue Ridge*, 297 S.C. at 290, 376 S.E.2d at 518 ("[W]e hold that a municipality may provide electric service to *new* customers and premises in areas it has annexed.") (emphasis added); *Aiken*, 305 S.C. at 468 ("We find that the City was within its constitutional authority to designate an electric service supplier for new customers in the annexed area and to enact ordinances affecting other suppliers of electricity."); *Berkeley*, 304 S.C. at 19 ("In Abbeville, [287 S.C. 361, 338 S.E.2d 831 (1985)] we rejected a municipality's claim that it had the right to oust an existing electric supplier upon annexation."). Lexington's Complaint specifically alleges that it was already providing sewer service in the disputed area. (R. 50-51.)

Second, even if the Court correctly concluded that an existing supplier was fully "oustable" according to those opinions, the opinions are based exclusively on statutory provisions found in Chapter 27 of Title 58, and are not applicable because this dispute is not about electrical service.

The Court's application of these cases also rewrites a significant part of the Plan by completely removing the part of agreement as to the effect of annexation that was reached by the members of the CMCOG, including West Columbia. Moreover, the rationale is inapplicable here. The entirety of the *Blue Ridge* decision is based on the statutory provisions in Chapter 27 of Title 58, which is applicable only to electric utilities and electric cooperatives. Unlike Chapter 27, Chapter 5 of Title 58, which expressly governs sewer utilities, makes no mention of shifting rights based on annexation or a change in "corporate limits."

Any analogy to the electric utility cases is misplaced, not only because those cases arise under Chapter 27, but also because South Carolina's broader municipal-service policy points in the opposite direction. *See South Carolina Electric & Gas Co. v. Town of Awendaw*, 359 S.C. 29, 596 S.E.2d 482 (2004) (holding "a [utility] possessing a valid territorial assignment to serve an area subsequently annexed or newly incorporated is permitted to continue serving premises in that area which were being served as of the date of the annexation or incorporation."). Section 5-7-60 protects areas where service is already being provided and even areas where service has merely been budgeted or funded. Likewise, the 208 Plan protects an existing DMA's service allocation unless the annexing municipality proves that existing service is not reasonably available and that annexation provides the more cost-effective means of service. Both provisions reject the notion that annexation alone automatically displaces existing service expectations and infrastructure investments.

The policy implicit in S.C. Code Ann. § 5-7-60 is particularly difficult to reconcile with the Court's reliance on *Blue Ridge* and the statutes applicable specifically to electric utilities. Although § 5-7-60 does not directly govern the rights created by the 208 Plan, it reflects a longstanding legislative judgment that a municipality staking a claim to a service area by contract cannot override another's right to provide service within a preexisting "designated service area." Likewise, according to the 208 Plan, annexation alone does not automatically displace existing service arrangements. The statute protects not only areas where service is presently being provided, but also areas where service is "budgeted" or where "funds have been applied for as certified by the governing body thereof." S.C. Code Ann. § 5-7-60. The 208 Plan's annexation provision advances the same policy albeit through a different mechanism. Rather than automatically transferring service rights to the annexing municipality, the Plan preserves the existing DMA's allocation unless the annexing municipality demonstrates that no existing service is reasonably available and that it provides the most cost-effective means of service. These conditions serve substantially the same function as § 5-7-60's protection of planned and funded service areas. They prevent annexation from nullifying prior service commitments, infrastructure planning, and public investment. Far from treating annexation as automatically voiding preexisting service rights, both the 208 Plan and § 5-7-60 recognize that service allocations survive the intrusion of another municipality (either via contract or annexation) unless specific conditions justify displacement.

Stated succinctly, the valid and federally sanctioned 208 Plan at issue here does not allow annexation to automatically void a DMA's rights. Rather, it sets a well-defined conditional test. The annexing municipality must demonstrate no existing service is reasonably available and is shown to be the cost effective means of providing service. (R. 116.) The condition is not surplusage nor is it contrary to existing South Carolina law. In fact, it is the mechanism by which the Plan reconciles annexation with the areawide planning goals of Section 208 and it is fully consistent with South Carolina's policy on the significance of established service territories.[4]

[4] To the extent that the electric utility statutes are instructive here, the General Assembly has long recognized the negative upheaval associated with West Columbia's proposition that annexation allows a wholesale change of service provider. In 1984 Act No. 431, the General Assembly declared that it is "the policy of South Carolina to *maintain the assignment of electric service territories* by the Public Service Commission over areas having been assigned electric suppliers under Section 58-27-640, *even when the area becomes incorporated or annexed to an existing city or town.*" (emphasis added).

Lexington quoted and emphasized this provision but the Court did not address its application nor did it identify any statute or regulation violated by this test. Instead, the Court misapplies statutes governing only electrical utilities to this current dispute.

Respectfully, the Court's misapprehension of South Carolina as to this issue is not complicated. If the 208 Plan's requirement means what it says, Lexington's Amended Complaint pleads facts that satisfy the requirement, and dismissal based merely on the pleadings . Thus, the Court should grant rehearing, give the 208 Plan's text its plain meaning, and reverse the circuit court's dismissal.

IV. The Court misapprehended or overlooked the doctrine of consent established by the Supreme Court in *Williamsburg*.

The Court's opinion rejects Lexington's consent argument, but it does so without engaging the Supreme Court's holding in *Williamsburg* that constructive consent may satisfy Article VIII, § 15. *Williamsburg Rural Water & Sewer Co. v. Williamsburg County Water & Sewer Authority*, 367 S.C. 566, 627 S.E.2d 690 (2006). That opinion is the Supreme Court's most recent and most directly analogous application of Article VIII, § 15 in the water and sewer context, and it recognizes that constructive consent satisfies the constitutional provision. *Id.* at 572 & n.6, 627 S.E.2d at 693 & n.6. Lexington raised *Williamsburg* Argument I of its brief. (Final Br. 17 n.1.)

If home rule considerations apply to this case, *Williamsburg* also applies because it is undisputed that West Columbia participated in the creation of and exercised the amendment provision of the 208 Plan (until it recognized that the proposed amendment was destined to fail), which designates Lexington as the DMA for the US 378/I-20 area. While Lexington disagrees that the constitutional home rule provisions are applicable, the allegations concerning West Columbia's participation with the CMCOG and the 208 Plan, at the pleading stage, are at least sufficient to state a claim that West Columbia gave the constructive consent potentially required by Article

VIII, § 15. Lexington has clearly alleged, and West Columbia has not disputed, that West Columbia was represented on the CMCOG (R. 54.). West Columbia was clearly aware of the Plan's requirement that it seek an amendment of the service area because it instituted the amendment process. Again, at least at the pleading stage, these facts are a clear indication of West Columbia's consent to Lexington's designation as the service provider in the disputed area.

In *Williamsburg*, the Supreme Court recognized that consent was given when the challenging county had been provided notice of utility's plan to provide water and sewer service to a certain area within the county and the county failed to timely object. *Id.* at 572. On the other hand, in this case, the Court summarily rejected that West Columbia has consented (thereby rejecting the factual allegations in the Amended Complaint) to Lexington's service territory without addressing *Williamsburg's* recognition of constructive consent or explaining why constructive consent is inapplicable here.

Again, this is a material aspect of the appeal. If *Williamsburg* allows for constructive consent, the constitutional foundation that ostensibly supports the dismissal of Lexington's Amended Complaint collapses. At a minimum, the pleading-stage record does not permit rejection of Lexington's consent theory as a matter of law. The Court should reconsider its decision, reverse the circuit court's dismissal, and remand the case for development of the factual record.

CONCLUSION

For the reasons stated, Lexington respectfully requests that the Court grant rehearing, withdraw its opinion filed July 1, 2026, reverse the circuit court's Rule 12(b)(6) dismissal, and remand the case to the circuit court. The Court overlooked or misapprehended material issues of law and fact. The opinion does not address the circuit court's Rule 12(b)(6) errors, resolves novel issues on an undeveloped record, relies on electric-utility authorities arising under a different statutory scheme, and does not address Lexington's constructive consent theory under *Williamsburg*. Rehearing is therefore warranted under Rule 221.

Respectfully Submitted,

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City of West Columbia, South Carolina, and The Central Midlands
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PROOF OF SERVICE

The undersigned hereby certifies that on July 16, 2026, a copy of **Appellant Town of Lexington's Petition for Rehearing** was served on all counsel of record via email containing the above referenced documents to counsels' individual AIS email addresses listed below:

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July 16, 2026

Via Hand-Delivery and Email:
The Honorable Jenny Abbott Kitchings
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Re: Town of Lexington v. City of West Columbia
Appellate Case No. 2023-000140

Dear Mrs. Kitchings:

Enclosed for filing in the *Town of Lexington v. City of West Columbia, Appellate Case No. 2023-000140*, please find one copy of Appellant's Petition for Rehearing and Proof of Service. Additionally, Check No. 529316 in the amount of $50.00 which covers the required filing fee is being hand-delivered to your office.

By copy of this correspondence via email, we are providing all counsel of record with a copy of this correspondence. Should you have any questions or concerns, please feel free to contact me at the number provided above.

With warm regards, I remain

Very truly yours,

Adam J. Neil

AJN/tc
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