THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Case No. 2016-CP-39-100
Appellate Case No. 2016-000762

MRR Pickens, LLC,.....Appellant,

v.

County of Pickens and William Cato, Weldon Clark, Robert Ballentine, Jo Johnston, Dennis Reinert, and Bob Young, Individually and in their capacity as Appointed members of the Pickens County Planning Commission,.....Respondents,

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ATTORNEYS FOR APPELLANT

Columbia, South Carolina
October 26, 2016

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STATEMENT OF THE CASE

This appeal arises out of the denial of a Motion for Emergency Temporary Injunctive Relief filed by Appellant MRR Pickens, LLC, a company with a vested right to operate a landfill in Pickens County. MRR Pickens' legal and contractual right to operate a Class Two Landfill is based on both an agreement with Respondent County of Pickens, which was entered in 2007 and amended in 2015, and a permit issued by the South Carolina Department of Health and Environmental Control ("DHEC") in 2008 and modified in 2015. Despite the legal enforceability of the agreement and permit, Respondents County of Pickens and individual members of the Pickens County Planning Commission (hereinafter collectively, "County") issued a Termination Notice ordering MRR Pickens to "cease and desist all activities" in January, 2016. Based on the irreparable harm caused by the Termination Notice, likelihood of succeeding on the merits of the litigation of its claims, and the lack of an adequate remedy at law, MRR Pickens moved for an Emergency Preliminary Injunction against the wrongful termination of its legal right to develop a Class Two Landfill. After a hearing was held on February 18, 2016, the trial court issued an order denying MRR Pickens' request for

an injunction. MRR Pickens thereafter filed a timely Motion to Reconsider and Motion Pursuant to Rule 60 for Relief which were also denied by the trial court.

STATEMENT OF THE FACTS

MRR Pickens is a South Carolina company which owns real property located at 2180 Greenville Highway, Liberty, County of Pickens, South Carolina (the "Property"). (R. p. 122, ¶ 1, 4). In 2007[1], MRR Pickens entered discussions with the County relating to a business plan for the Property. MRR Pickens offered a future service to the County: acceptance of County generated solid waste at a significantly reduced rate. In return, MRR Pickens requested the County provide full and complete cooperation to allow it to operate its commercial business—a for-profit Class Two Landfill to serve the County at a discounted rate in addition to other full-paying customers for waste generated inside or outside County or State lines.

In Spring of 2007, MRR Pickens and the County executed a Development Agreement and Host Agreement. (R. pp. 153-185 (Host Agreement is *Exhibit I*)). The Development Agreement sets forth MRR Pickens' vested rights to develop the Class Two Landfill for a period of ten years, while the Host Agreement outlines MRR Pickens' right to operate it for the life of the landfill. (R. pp. 156-159, §§ 4 & 12; pp. 194-195, ¶ 25).

In the Development and Host Agreements, MRR Pickens contracted to: (1) convey 39 acres to the County for use in its future industrial park; (2) gift to the County approximately 162 acres recently appraised for One Million One Hundred Seventy Thousand and 00/100 dollars ($1,170,000.00); (3) accept the County's Class Two Waste

[1] MRR Pickens craves reference to the "Approval Timeline" contained on page 7 of the Record. The timeline was submitted to the trial court as an accurate and succinct summary of the landfill approval process.

and other DHEC-approved waste streams at a charge of 57% less than that to be charged to its other customers; and (4) accept free of charge County curbside yard trash, Land-Clearing Debris (LCD) from development of the industrial park, and fill dirt from closure of the County's Class Two Landfill. (R. p. 157, § 8; pp. 190-195, ¶¶ 11(A)-(F), 21 & 25). In return, the County contractually committed to fully "cooperate" and provide MRR Pickens with all necessary land development and building permits and guaranteed local land use laws and its local Solid Waste Management Plan would remain consistent with the proposed use. (R. p. 157, § 9). MRR Pickens has fulfilled all its commitments to date, including the sale and gifting of the land referenced above. (R. p. 149, ¶ 13-15).

At the time of execution of the Development Agreement and MRR Pickens' application for the DHEC permit in 2008, the South Carolina regulations governing solid waste landfill permits were being revised to change the terminology by which landfills are classified and to regulate waste streams by the characteristics of the waste, not the source. In fact, the Notice of Drafting and the Proposed Regulation (S.C. Code Ann. Reg. 61-107.19) were published in the South Carolina State Register on June 23, 2006, and January 26, 2007, prior to execution of the Development Agreement. S.C. State Register, Vol. 30, Issue 6 (June 23, 2006); Vol. 31, Issue 1 (Jan. 26, 2007). On May 23, 2008, S.C. Code Ann. Reg. 61-107.19 became effective, repealing and superseding certain solid waste landfill regulations, including S.C. Code Reg. 61-107.11, which governed Construction & Demolition (C&D) and LCD Landfills ("C&D/LCD Landfills").

With the repeal of Reg. 61-107.11 and the adoption of Reg. 61-107.19, persons

were no longer able to apply for or receive a permit for a C&D/LCD Landfill in South Carolina. After May 23, 2008, DHEC issued permits for Class Two Landfills, which were able to accept C&D/LCD, as well as other approved wastes, as set forth in Reg. 61-107.19. Former Reg. 61-107.11, like the current Reg. 61-107.19, also allowed C&D/LCD Landfills to accept waste other than general C&D/LCD wastes specifically listed therein, such as coal combustion residuals (CCR), "upon DHEC approval." S.C. Code Reg. 61-107.11, Part IV.D.3.

According to DHEC's Director of Mining and Solid Waste Management, Kent Coleman, DHEC is the sole authority to determine if CCR meets the regulatory criteria to be placed in a Class Two Landfill. (R. pp. 680-685). Coleman testified DHEC has an established regulatory procedure to determine whether CCR meets the requirements for disposal in an existing Class Two Landfill. (R. pp. 684, 691). Under both the former regulation, S.C. Code R. 61-107.11, and the current regulation, S.C. Code R. 61-107.19, Class Two Landfills can accept waste other than those listed in Appendix I of the respective code sections. (R. p. 655). In fact, according to Coleman, it was proper and "very common" for a Class Two Landfill to request to add to an existing permit a waste stream, such as CCR, not listed in Appendix I, under S.C. Code R. 61-107.11. (R. pp. 648-650, 652-657, 684). Regarding coal ash, or CCR, Coleman testified it is "not a hazardous waste" and Class Two Landfills have historically been and are allowed to accept it. (R. pp. 673, 677, 683-684, 688). Coleman also confirmed upon DHEC approval, a commercial Class Two Landfill may accept waste from whoever wants to pay them. (R. pp. 663, 665).

In anticipation of the impending new landfill regulations, MRR Pickens and the

County clarified in the Development and Host Agreements "[t]he Landfill shall be constructed and operated in accordance with DHEC's rules, regulations and statutes, specifically S.C. Code Ann. Reg. 61-107.11 Part IV ***or its equivalent under any superseding regulations and S.C. Code Ann. §§ 44-96-10 et seq.***" (R. p. 189, ¶ 4 (emphasis added)).

In 2008, MRR Pickens received its current Class Two Landfill Permit[2] for the Property from DHEC pursuant to Reg. 61-107.19. (R. pp. 197-204). Given the subsequent economic downturn, MRR Pickens eventually filed a Letter of Intent and Land Use Application with the Pickens County Planning Commission ("the Commission") to construct and operate a Class Two Landfill in November, 2014. (R. pp. 207-226). The Letter of Intent stated, "[t]he project will include a commercial entrance, truck scales, scale house/office trailer (approximate dimensions 15 feet X 75 feet), ***approximately 60 acres of lined landfill disposal area***, and various sediment and erosion control structures." (R. p. 206). The Land Use Application states the proposed land use of the Property is a "SCDHEC Permitted Class 2 Landfill." (R. p. 209).

A public hearing on the application was held, and in January, 2015, MRR Pickens received its land use approval from the Commission to operate a Class Two Landfill on the Property (the "Land Use Approval"). (R. pp. 222-228). In its Letter of Intent, Land Use Application, and during the public hearing, MRR Pickens represented it was requesting approval for a Class Two Landfill, to be lined, and to be able to accept any waste allowed under its DHEC Permit. (R. pp. 148-152, ¶¶ 8-19, 38-39; R. p.231, ¶¶ 8-

[2] Contrary to the County's assertion, MRR Pickens' current permit is simply a modification of its 2008 permit and not a new permit. Only one permit exists: Class 2 Landfill Permit No. LF2-00003.

10). MRR Pickens never stated it would only take County-generated C&D/LCD waste. (R. p. 231, ¶ 9-10).[3]

Around the time of the Land Use Approval, MRR Pickens and the County also amended the Development Agreement by mutual consent. (R. pp. 235-237). The amendment's purpose was to reflect changes in superseding laws and regulations, to clarify that MRR Pickens' Permit was always a Class Two Landfill and would operate as such under R. 61-107.19, and to confirm MRR Pickens is permitted to take any Class Two waste allowed under its Permit and the current regulation, R. 61-107.19. At the time of the amendment, MRR Pickens brought to the County's attention the issue of Class Two waste versus C&D/LCD waste, and the County agreed the Development Agreement should be amended to reflect the applicability of R. 61-107.19 and its requirements. This was consistent with the terms of the Development and Host Agreements, which state: the landfill was to be constructed and operated in accordance with any DHEC regulations governing solid waste landfills that superseded those existing in March of 2007. (R. p. 161, § 18; R. p. 189, ¶ 4).

According to Kent Coleman, changes in Federal Regulations created an emerging and mandatory demand for companies to relocate CCR, which was previously placed into the ground or waterways, to be transported and stored in a lined landfill. (R. pp. 673-676, 830). However, Coleman testified that lining a Class Two Landfill does not convert the landfill to a Class Three Landfill. (R. pp. 678-679, 687). Coleman testified MRR Pickens' 2008 permit allowed the landfill to accept CCR if the waste met the threshold

[3] In fact, such a premise is contrary to MRR Pickens' willingness to accept a significant rate reduction for the County's C&D/LCD "and other DHEC-approved waste streams" as compared to "any other Landfill customer". (R. p. 190, ¶ 11(A)).

requirements. (R. p. 693). Coleman confirmed that under S.C. Code Reg. 61-107.19, Appendix I, other waste streams, such as CCR or coal ash, that demonstrate similar properties to the wastes listed in Appendix I and are approved by SCDHEC on a case-by-case basis, or waste that tests less than ten (<10) times the maximum contaminant level (MCL) as published in R. 61-58, State Primary Drinking Water Regulation, may be deposited in a Class Two Landfill.

In January 2016, almost a year after receiving its Land Use Approval[4], the Commission unlawfully and without notice terminated MRR Pickens' Land Use Approval and right to conduct any and all activities on the Property (the "Termination Notice"). (R. p. 242). In the Termination Notice, the Commission instructed MRR Pickens to "cease and desist any and all activities" on the Property or face criminal prosecution, including fines and imprisonment. The Termination Notice as written does not allow MRR Pickens to continue development of its landfill or dispose of any permitted Class Two waste. (R. p. 242; R. p. 152, ¶ 35).

In reliance on the Development and Host Agreements, MRR Pickens' vested rights, and the Land Use Approval, MRR Pickens has spent approximately Three Million Nine Hundred Thousand and 00/100 dollars ($3,900,000.00) to construct and operate a Class Two Landfill on the Property. (R. p. 150, ¶ 21). MRR Pickens has also reached a preliminary agreement with a third-party to accept CCR for disposal in its Class Two

[4] Note in 2007, MRR Pickens applied for land use approval from the Commission, prior to finalizing and executing the Development and Host Agreements. The Commission approved the proposed use of the Property for a C&D/LCD Landfill (now referred to as a Class Two Landfill). (R. p. 240). After 2007, R. 61-107.11 was repealed and Pickens County adopted a Uniform Development Standards Ordinance (UDSO) (Dec. 15, 2008). As a matter of good faith, MRR Pickens reapplied for land use approval for its lined Class Two Landfill in 2015.

Landfill. (R. p. 151, ¶ 26). The CCR that MRR Pickens may accept meets the regulatory requirements for its permitted and approved Class Two Landfill. However, MRR Pickens has been informed by the generator of the CCR that it will be deemed "Non-Responsive" and considered ineligible to receive the CCR Class Two waste as a result of the County's actions in terminating its Land Use Approval. (R. p. 151, ¶ 32). The deadline for MRR Pickens to submit required documentation to accept CCR that meets its Class Two Permit requirements was on or before the end of February, 2016. (R. p. 151, ¶ 31). With this prospective contract, MRR Pickens has the potential to earn in excess of Twenty-Five Million and 00/100 dollars ($25,000,000.00) from the project over the life of the landfill. (R. p. 152, ¶ 36). In addition to monetary damages, the Termination Notice deprived MRR Pickens of the beneficial use of the Property as a Class Two landfill.

Following a hearing on February 18, 2016, the trial court issued an order denying MRR Pickens' request for Emergency Injunctive Relief. In denying MRR Pickens' request, the trial court only addressed two of the three requirements for injunctions when it erroneously found MRR Pickens failed to establish irreparable harm and failed to demonstrate there is an inadequate remedy at law. (R. p. 1). The trial court did not make a finding as to the likelihood of success on the merits of the litigation. Based on the County's admission at the hearing, the parties had a valid agreement regarding the operation of a Class Two Landfill in accordance with its DHEC permit. (R. p. 1-2; R. p. 1128, lines 3-12). However, despite the permits' allowance of "disposal of items listed in Appendix I of R. 61-107.19 and any other waste approved by DHEC for disposal in a Class Two Landfill pursuant to R. 61-107.19, Part IV, Section C.2," the trial court

proscribed MRR Pickens from accepting CCR.

MRR Pickens thereafter filed a timely Motion to Reconsider asserting the trial court erroneously enjoined MRR Pickens from accepting CCR. In proscribing the receipt of CCR *sua sponte*, the trial court both violated MRR Pickens' due process rights and exceeded its jurisdictional authority by performing DHEC's role and determining what wastes are permissible under a Class Two Permit. In addition, MRR Pickens asserted the court failed to recognize (1) loss of business satisfies the irreparable harm requirement, and (2) there is no adequate remedy of law for loss of a business opportunity, loss of business goodwill, and economic loss. The trial court denied MRR Pickens' Motion to Reconsider and held MRR Pickens mischaracterized the CCR proscription as an injunction when it was actually a "clarification" of the court's provision allowing MRR Pickens to continue to conduct business. (Order denying Motion to Reconsider, p.1).

Due to the urgent nature of MRR Pickens' injunction request, the deposition of DHEC Representative Kent Coleman could not be taken until after the trial court issued its order denying the Motion for Emergency Injunctive Relief. In order to present this crucial testimony to the trial court, MRR Pickens submitted an additional Motion for Relief pursuant to Rule 60 based on Coleman's deposition testimony. Taking a restrictive reading of Rule 60, the trial court denied MRR Pickens' motion because the court's Order is not a "final order." (R. p. 5). This appeal follows.

STANDARD OF REVIEW

The power of the court to grant an injunction is in equity. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006); *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 603 S.E.2d 905 (2004). "In an

action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence." *Inlet Harbour v. S.C. Dep't of Parks, Rec. & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). However, "the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001). "[W]hen an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and the reason for its decision." *Dearybury v. Dearybury*, 351 S.C. 278, 283, 569 S.E.2d 367, 369 (2002).

ARGUMENTS

I) THE TRIAL COURT ERRED IN FAILING TO FIND THE THREE REQUIREMENTS FOR GRANTING A PRELIMINARY INJUNCTION WERE MET.

The trial court's finding that MRR Pickens failed to establish irreparable harm and failed to demonstrate there is an inadequate remedy at law is error and requires reversal of the trial court's order. The evidence before the trial court constituted a *prima facie* showing that MRR Pickens (1) will suffer irreparable harm if the injunction is not granted; (2) will likely succeed on the merits of the litigation; and (3) lacks an adequate remedy at law. *Scratch Golf Co.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907. MRR Pickens is not required to prove an absolute legal right when seeking a preliminary injunction, only a "fair question" to raise as to the existence of such a right. *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009); *Williams v. Jones*, 92 S.C. 342, 75 S.E. 705, 710 (1912). The purpose of an injunction is to preserve the status quo and prevent possible irreparable injury to a party pending litigation. *Powell v. Immanuel*

Baptist Church, et al., 261 S.C. 219, 199 S.E.2d 60 (1973). A moving party is only required to make a "*prima facie*" showing of the elements, not that it will ultimately prevail. *AJG Holdings, LLC*, 382 S.C. 43, 674 S.E.2d at 509. A preliminary injunction is reasonably necessary to protect the legal rights of MRR Pickens pending in this action.

A) POTENTIAL OF IRREPARABLE HARM

MRR Pickens will sustain irreparable harm as a result of the Termination Notice and the County's refusal to allow MRR Pickens to accept waste that is approved by DHEC. An injunction is necessary and proper to prohibit the overreach of the County. "The sole purpose of a temporary injunction is to . . . avoid possible irreparable injury to a party pending litigation." *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 600, 553 S.E.2d 110 (2001). "Irreparable injury does not mean that the injury is beyond the possibility of compensation in damages." Flanagan, J., *South Carolina Civil Procedure*, 3rd Ed. (S.C. Bar 2010) p. 533.

Irreparable harm exists in circumstances where there is misappropriation or denial of the use of property, regulatory taking of one's property rights, or the loss of business. In *Levine v. Spartanburg Regional Services District*, 367 S.C. 458, 626 S.E.2d 38 (Ct. App. 2005), the South Carolina Court of Appeals held that injunctive relief should be granted in cases to prevent the loss of a business opportunity, loss of business goodwill, and economic loss which threatens the existence of a movant's business. The *Levine* opinion noted "the potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction" and "loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction." *Id.* at 42 n.3 (citing *Campbell Inns, Inc. v.*

Banholzer, Turnure & Co., 148 Vt. 1, 527 A.2d 1142, 1146 (1987); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 200 (Tex. App. 2005)).

If this Court enforces in part or in whole the County's Termination Notice, then the potential of irreparable harm to MMR Pickens is clear. MRR Pickens' only business is the operation of a Class Two Landfill on the Property. MRR Pickens is properly permitted with DHEC and has entered into agreements with the County to operate its Class Two Landfill without limitation. Because the County wants to prohibit MRR Pickens from accepting CCR waste, the County is attempting to prevent MRR Pickens from conducting lawful business on the Property. By taking away the right to operate as a Class Two Landfill, the County prevents MRR Pickens from pursuing and procuring business opportunities, including, but not limited to, disposal of CCR, or risk going to jail.

The negative impact of the Termination Notice has already manifested in lost business opportunities for MRR Pickens. Prior to the issuance of the Termination Notice, MRR Pickens reached a preliminary agreement with a third-party to accept permitted and approved CCR for disposal in its Class Two Landfill. (R. p. 151, ¶ 26). However, the generator of the CCR informed MRR Pickens that it will be deemed "Non-Responsive" and considered ineligible to receive the CCR Class Two waste as a result of the County's actions in terminating its Land Use Approval. (R. p. 151, ¶ 32).

The above example is simply one of a number of missed business opportunities, the magnitude and potential of which cannot be identified or precisely quantified given the broad impact of the County's actions. As set forth in the Verified Complaint and the affidavit testimony, the Termination Notice prevents MRR Pickens from contracting with

any third parties. Each day the County's Termination Notice is allowed to drastically limit the scope of MRR Pickens' Class Two Permit by prohibiting the receipt of CCR, MRR Pickens continues to miss business opportunities and goodwill and will not be conceived as a viable business to any third party. MRR Pickens has already lost contracts and will continue to lose contracts and business opportunities with third parties for waste disposal allowed by its Class Two Permit. Additionally, the full effect of the Termination Notice prohibits MRR Pickens from constructing the landfill and accepting any waste, regardless of CCR. In fact, from the moment the Termination Notice was issued to the date this brief was filed, MRR Pickens' business has been completely shut down by the County's continued interference with the Development Agreement. The County has even refused to provide MRR Pickens with a development permit, as it was required to provide under the Agreement. MRR Pickens has and will continue to suffer irreparable harm if the injunction is not granted and it is not allowed to fully operate under its Permit for a Class Two Landfill.

B) LIKELIHOOD OF SUCCESS ON THE MERITS

In erroneously denying MRR Pickens an injunction, the trial court failed to make a finding as to the requirement of likelihood of success on the merits of the litigation. At the preliminary injunction stage, the proof of likelihood of success on the merits for the moving party is a relatively low standard. The ultimate determination of the case on the merits should not be considered. "When a *prima facie* showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." *Compton v. South Carolina Dep't of Corr.*, 392 S.C. 361, 709 S.E.2d 639, n.3 (2011). Thus, in determining whether a

preliminary injunction is appropriate, the Court is not to consider the merits of the case, "except in so far as they may enable the court to determine whether a *prima facie* showing has been made." *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969). When a *prima facie* showing has been made entitling movant to injunctive relief, a Court will grant an injunction "without regard to the ultimate determination of the case on the merits." *Id.* As the County conceded that MRR Pickens has an enforceable contract to operate a Class Two Landfill, MRR Pickens has a strong likelihood of success on the merits.

(1) MRR Pickens Has a Vested Contractual Right to Operate a Class Two Landfill

MRR Pickens has a vested right to operate a Class Two Landfill on the Property. MRR Pickens has been lawfully provided a Class Two Permit issued by the State of South Carolina. MRR Pickens' Class Two Permit specifically allows "disposal of the items listed in Appendix I of R. 61-107.19 and any other waste approved by [DHEC] for disposal in a Class Two Landfill pursuant to R. 61-107.19, Part IV, Section C.2." (R. p. 202). MRR Pickens has entered into binding Development and Host Agreements, as amended, to allow it to construct and operate its commercial landfill. The County contractually gave MRR Pickens the 10-year vested right to develop a Class Two Landfill on the Property. (R. p. 177-180, ¶¶ 4 & 12). The parties agreed "[t]he Landfill shall be constructed and operated in accordance with DHEC's rules, regulations and statutes, specifically S.C. Code Ann. Regs 61-107.11 Part IV or its equivalent under any superseding regulations and S.C. Code Ann. §§ 44-96-10 *et seq.*" (R. p. 177, ¶ 4. (emphasis added)). Both R. 61-107.11 Part IV, D.3 and its superseding regulation, which is applicable to the landfill, R. 61-107.19, allow a landfill

such as MRR Pickens to accept waste other than C&D/LCD, if first approved by DHEC. According to DHEC Representative Coleman, MRR Pickens' 2008 permit allowed the landfill to accept CCR. (R. p. 693).[5]

These aforementioned written agreements with the County allowed MRR Pickens to operate a Class Two Landfill on the Property, and these property rights are vested. On January 12, 2015, the Planning Commission held a public meeting and unanimously approved MRR Pickens' Land Use Approval request. The Land Use Approval did not place any conditions on the approval, including limiting conditions on the type of Class Two waste that could be disposed of in the landfill, as only DHEC has the authority to determine whether CCR and other wastes that meet regulatory requirements may be placed in a Class Two Landfill. (R. p. 680-681, 684-685). As a result, MRR Pickens actively began the development of its Class Two Landfill, until it received the Termination Notice. To date, MRR Pickens has spent approximately Three Million and 00/100 dollars ($3,900,000.00) for the approved use of the Property.

In negotiating the Development Agreement, Host Agreement and any amendments thereto, the County was a sophisticated party represented by legal counsel. In fact, the County has operated its own Class Two Landfill and been subject to the same DHEC regulations applicable here.[6] (*See* R. p. 175). Furthermore, during negotiations with MRR Pickens, the County hired outside legal counsel with a large South Carolina law firm known to be knowledgeable on State environmental solid waste permitting laws and regulations.

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[5] DHEC has allowed unlined Class 2 landfills to accept CCR for years.
[6] The County could conceivably accept CCR in its Class Two Landfill, if approved by DHEC.

However, in issuing the Termination Notice in January, 2016, the County falsely accused MRR Pickens of exceeding the authority of a Class Two Landfill by attempting to accept CCR waste. The futility of the County's position and error in the trial court's order is evidenced in the testimony of Kent Coleman. Coleman confirms DHEC is the sole authority to determine if CCR meets the regulatory criteria to be placed in a Class Two Landfill. (R. pp. 680-681; 684-685). He also unequivocally confirms MRR Pickens' 2008 permit allows the landfill to accept CCR[7]. (R. p. 693).

Despite the County's incorrect position taken in the Termination Letter, there should be no dispute that MRR Pickens is lawfully acting under its existing Class Two Permit. In fact, the County apparently knew full well a Class Two Landfill is allowed to accept forms of CCR waste when, during the pendency of this case, it lobbied the General Assembly to *change* the law to place limitations on CCR waste in a Class Two Landfill. Additionally, in the Termination Notice, the County falsely accuses MRR Pickens of failing to represent that the landfill would be lined. The Letter of Intent given

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[7] In addition to Coleman's testimony, reported interviews with DHEC confirm that CCR waste is permissible under MRR Pickens' solid waste permit:
Greenville News (12/28/15): DHEC spokesman Jim Beasley said public notice will be given prior to the agency making a final decision on MRR's request to increase the volume of waste it can take. But DHEC already approved the company's request to install a synthetic liner, which would allow it to take in coal ash, as long as its level of toxicity doesn't exceed certain parameters, he said.
FoxCarolina (2/11/16): The Department of Health and Environmental Control said coal ash can be dumped in a level 2 landfill and many citizens are concerned about what this could mean for the county.
The State (2/13/16): The Department of Health and Environmental Control says the Pickens County dump will be designed to adequately protect the environment. DHEC required a liner for the landfill proposed by MRR near Liberty. A 2015 federal law also requires new coal ash landfills to be lined. "A synthetic liner is more environmentally protective," agency spokeswoman Cassandra Harris said in an email Friday night. But DHEC acknowledged late Friday that 12 Class 2 landfills already are taking ash, only three of which have liners. (R. pp. 244-251).

to the County in November 2014 clearly states the site would have "approximately 60 acres of **lined landfill** disposal area." (R. p. 206 (emphasis added)).

As explained by DHEC Representative Coleman, DHEC is the sole authority to determine if CCR meets the regulatory criteria to be placed in a Class Two Landfill. (R. pp. 680-681; 684-685). **The County is not allowed to usurp the role and responsibility of DHEC in administering and enforcing solid waste regulations, and the County cannot dictate what types of Class Two waste that MRR Pickens is allowed to accept.** By taking MRR Pickens' Property and prohibiting it from running its business, the County is attempting to overrule DHEC and State and Federal law to determine what type of waste is acceptable in the Class Two Landfill. This is in direct violation of the contractual Development and Host Agreements between MRR Pickens and the County and a taking of MRR Pickens' Property without consideration. The terms of the contract are clear and MRR Pickens will prevail at trial on the issue of breach of contract by the County as well as its other causes of action.

The County lacks the authority to revoke the Land Use Approval. This constitutes a clear breach of the Development and Host Agreements and a deprivation of its rights to operate a Class Two Landfill. Based on MRR Pickens' vested legal rights and its contractual rights to use the Property for a Class Two Landfill, MRR Pickens has made a *prima facie* case for success on the merits.

(2) The USDO Does Not Provide for Termination/Revocation of the Land Use Approval

In the Termination Notice, the Commission stated it was terminating the Land Use Approval "pursuant to the authority granted under the Unified Development Standards Ordinance ("UDSO") Section 1504(d)", and directed MRR Pickens "to cease

and desist any and all activities at the proposed site until such time as you have presented sufficient information to the Commission of your intention to strictly comply with our 2007 and 2015 land use approval and receive a renewal of your permit from the Commission." (R. pp. 242-243).

Section 1504(d) of the UDSO *only* allows for written notification to an alleged violator of an actual observed violation of a land use development ordinance or a condition of a land use approval by the Building Official or Code Enforcement Officer inspecting the Property. The written notification may include a "cease and desist order" to demand "discontinuance of illegal use" observed by said official or officer.

As stated above, no Building Official or Code Enforcement Officer employed by the County has notified MRR Pickens that a provision of the USDO is being violated. (R. p. 150, ¶ 25). There is no allegation in the Termination Notice that MRR Pickens is violating any provisions of the Development Ordinance. (R. pp. 242-243). The 2015 Land Use Approval did not place any conditions on the type of Class Two waste that could be disposed of in the landfill. (R. p. 228). Therefore, the Commission has no legal basis to issue a "cease and desist" order or otherwise threaten MRR Pickens with imprisonment.

C) NO ADEQUATE REMEDY AT LAW EXISTS

The third element for a preliminary injunction is a showing of "no adequate remedy at law." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). South Carolina law is well established that no adequate remedy at law exists in cases involving loss of a business opportunity, loss of business goodwill, and economic loss that could threaten the very existence of a plaintiff's

business. *Levine*, 626 S.E.2d 38, 367 S.C. 458. If a company loses its privilege to conduct business, its practice and livelihood may be lost before claims can be finally adjudicated. *Id.* at 43. "When privileges are terminated, damages will be difficult, if not impossible, to ascertain, and . . . therefore [a company] shall have the right to an injunction or other equitable relief." *Id.* (internal citations omitted). South Carolina law also holds that the no adequate remedy at law element is met when the use or enjoyment of one's property rights are restricted. *See Hhhunt Corp. v. Town of Lexington*, 389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010) (holding that a money damages cannot provide an adequate remedy for the restriction to real property).

The trial court erred in finding MRR Pickens failed to demonstrate there is an inadequate remedy at law. Here, the Termination Notice clearly prevents *any activity at or use of* the Property and threatens MRR Pickens with civil fines and criminal punishment in an attempt to strong-arm MRR Pickens into not accepting Class Two waste allowed by law. While it may attempt to recoup damages from the County for its unlawful actions, business opportunities have been and will continue to be permanently lost. There is simply no adequate remedy at law to prevent the loss of a business opportunity, loss of business goodwill, and economic loss which threaten the existence of MRR Pickens' business. As the court in *Levine* recognized, it is difficult to quantify pecuniary losses that relate to goodwill or an action that threatens the very existence of one's business. Therefore, the trial court's order should be reversed and the County should be fully enjoined from enforcing the Termination Notice.

II) THE TRIAL COURT ERRONEOUSLY ENJOINED MRR PICKENS FROM ACCEPTING COAL ASH.

The trial court committed reversible error when it stated in its Order: "For further

clarification, the Plaintiff is specifically proscribed from dumping any coal ash at the subject dump site during the pendency of this action." (Order p. 2). Although the trial court correctly recognizes that MRR Pickens has a permit to operate a Class Two Landfill in Pickens County, it went too far by erroneously enjoining the lawful scope of the Class Two Permit by prohibiting coal combustion residuals (CCRs) or Coal Ash. The Class Two Permit includes CCR or coal ash, as this type of waste is permitted under MRR Pickens' Landfill Permit Number LF2-00003 ("Permit"), as issued in 2008 and modified in 2015.[8] The erroneous limitation of the Class Two Landfill permit by the trial court constitutes a wrongful injunction against MRR Pickens.

Importantly, the trial court held that MRR Pickens ***conceded*** to "operate under the constraints and allowances of the subject permit issued November 3, 2008, during the pendency of this action" with the ***incorrect conclusion*** that the 2008 Permit prohibits coal ash. This was an abuse of discretion because MRR Pickens never conceded or stipulated that the 2008 Permit prohibited coal ash. This finding is not supported in the record. "A stipulation will not be enforced if it is contradictory and confusing and stands in the way of a true determination of the parties' rights or where it is subject to different constructions and there is a disagreement as to what was intended to be included therein." *Suddeth v. Knight*, 280 S.C. 540, 544-45, 314 S.E.2d 11, 14 (Ct. App. 1984). Further, "the court must construe [a stipulation] like a contract, i.e., interpret it in a manner consistent with the parties' intentions." *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 30, 507 S.E.2d 328, 337 (1998). The interpretation of a stipulation is addressed to the

[8] As previously noted, MRR Pickens has not been issued two (2) permits nor are the referenced permits separate and distinct. Only one permit exists: Class 2 Landfill Permit No. LF2-00003.

sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *Id.* 31, 507 S.E.2d at 337.

It is erroneous for the trial court to place in an order a binding "concession" that MRR Pickens never made nor asserted. Instead, MRR Pickens clearly argued that it was capable of accepting coal ash under the applicable regulations and the regulatory process that govern its Permit. (R. pp. 1073-1074, 1105-1109, 1130-1133; R. pp. 440-442). To that end, Appendix I of R. 61-107.19 permits waste streams to include CCR. As of result of the trial court's ruling, MRR Pickens is deprived of the lawful administrative process through DHEC, who must determine what is acceptable Class Two waste, and deprived of the lawful administrative procedure of a permit contest through DHEC.

A) Coal Ash or CCR as a Waste Stream is and Always Has Been Allowed under MRR Pickens' DHEC Class Two Landfill Permit Number LF2-00003.

The Permit as written in 2008 and as modified in 2015 *both* permit CCR. According to DHEC representative Coleman, MRR Pickens' 2008 permit allowed them to accept coal combustion residuals if the waste met the threshold requirements. (R. p. 693). Further, he confirmed that "If MRR submitted a waste characterization for coal ash, showing it less than ten times the MCL . . . DHEC [would] potentially allow it to dispose of coal ash in the Pickens 2 landfill." (R. p. 700).

The 2008 version of the Permit was issued under the current Solid Waste Management Regulations, Reg. 61-107.19, promulgated, administered, and enforced by DHEC. Part I of Reg. 61-107.19 states: "This regulation establishes minimum standards for the site selection, design, operation, and closure of all solid waste landfills and structural fill areas. Disposal of waste under the purview of this regulation is based on

the waste's chemical/physical properties and is not dependent upon the source of generation with the exception of municipal solid waste that shall be disposed in Class Three landfills." The language in the Permit as written in 2008 states: "This permit is limited solely to the disposal of items listed in Appendix I of R. 61-107.19." (R. p. 377). A waste stream, such as CCR or coal ash, is included in Appendix I of R. 61-107.19 as the Appendix provides that "[a]cceptable wastes may be generated by construction, demolition, land-clearing, industrial, and/or manufacturing activities, and/or obtained from segregated commercial waste." R. 61-107.19, App. I (emphasis added). Under Part IV.A of R. 61-107.19, Appendix I includes waste streams such as CCR that demonstrate similar properties to the wastes listed and are approved by DHEC on a case-by-case basis, or waste that tests less than ten (<10) times the maximum contaminant level (MCL) as published in R. 61-58, State Primary Drinking Water Regulation, referred to as the "waste characterization" test. As a result of the trial court improperly enjoining MRR Pickens, the Court is effectively preventing MRR Pickens from accepting waste that falls within the DHEC's waste characterization profile.

As presented to the trial court and confirmed by the deposition of Kent Coleman, MRR Pickens' Permit would allow CCR or coal ash in both its 2008 version or its recently modified version. During the hearing and on reconsideration, MRR Pickens clarified that CCR or coal ash is a waste stream that falls within its Permit under R. 61-107.19. (R. pp. 1073-1074, 1105-1109, 1130-1133; R. pp. 440-442). Specifically, CCR or coal ash falls within MRR Pickens' permitted DHEC Class Two Landfill because it is waste that tests less than ten (<10) times the maximum contaminant level (MCL) as referenced above. This is the accepted threshold for a Class Two Landfill in South

Carolina. In fact, CCR or coal ash is and has been accepted in Class Two Landfills or its equivalent for nearly 25-30 years[9] in South Carolina under DHEC oversight and authorization. (*See* R. pp. 402-403; R. p. 203).

Despite the plain language of the applicable regulation and the fact that nothing in the Permit excludes CCR or coal ash, the trial court's Order erroneously singles out CCR or coal ash, and treats this type of Class Two waste as prohibited under the Permit. In doing so, the Order constitutes an injunction against MRR Pickens from accepting waste otherwise allowable under its DHEC Permit. This constitutes reversible error.

B) MRR Pickens Should Not be Enjoined by the Court *Sua Sponte*.

The trial court erred in *sua sponte* entering an order that enjoins MRR Pickens. MRR Pickens was the only movant before the Court and without proper notice or motion, a trial court cannot *sua sponte* enjoin the moving party. Rule 65(e), SCRCP, prohibits an injunction that suspends a business unless proper notice of that purported action is provided. The trial court's Order suspends MRR Pickens' business of accepting CCR and other waste streams allowed by DHEC. If the trial court intends to proactively limit the Class Two Landfill Permit, then MRR Pickens should be allowed to present evidence, including testimony from DHEC officials, that CCR or coal ash is an acceptable Class Two waste allowed under MRR Pickens' lawful permit issued in 2008 and as written

[9] Santee Cooper's "Class 2 Landfill currently accepts [CCRs including] flue gas emissions (FGD) control residuals, bottom ash, fixated fly ash, and boiler slag." (R. p. 402). The "Class 2 Landfill is regulated under DHEC's Solid Waste Management regulations. It was originally permitted in 1982 and began receiving CCRs in 1984." (*Id.* at p. 8). CCR meeting regulatory criteria and approved by DHEC has always been Class Two waste as prescribed by R. 61-107.19, Appendix I, and has been allowed in at least 12 Class Two Landfills across the State. (R. p. 250). CCR is not Class Three waste or special waste.

under its 2015 modification. MRR Pickens' due process rights have been violated and it suffers additional harm by the trial court's limitation of the Permit. The trial court's *sua sponte* proscription against accepting coal ash is clear error requiring reversal of the denial of MRR's request for an injunction. This Court should reverse this Order, and at the very least, require the trial court to grant MRR Pickens a new hearing.

C) DHEC is the Sole Authority to Determine what Wastes are Acceptable Class Two Waste under MRR Pickens' Class Two Permit.

As testified by DHEC Representative Coleman and confirmed in case law, only DHEC can determine what types of waste are acceptable under its permit. (R. p. 680-681, 684-685). *Greeneagle, Inc. v. S.C. Dep't of Health & Evtl. Control*, 399 S.C. 91, 730 S.E.2d 869 (Ct. App. 2012) (holding that DHEC has sole authority to issue, deny, revoke, or modify permits); S.C. Code Ann. §§ 44-96-260(1)&(2) (2015). As *Greeneagle* states, DHEC is final arbiter and charged with authority to determine if waste meets environmental classifications. *Id.* Should there be a conflict as to whether CCR is allowable under the Permit, then this dispute is only proper for DHEC to determine and, if timely, the South Carolina Administrative Law Courts to adjudicate. *Id.*; S.C. Code Ann. §§ 44-1-60 & 1-23-600(D) (2015). The trial court lacks jurisdiction to limit or modify MRR Pickens' lawfully granted Permit and overstepped its authority by holding that MRR Pickens must comply with its 2008 permit (and not its 2015 modified version[10]), and that its 2008 permit does not allow the acceptance of CCR. Thus, the Order of the trial court should be reversed because MRR Pickens has a Class Two Permit and only DHEC and, if necessary, the South Carolina Administrative Law Court, has

[10] The Court's order, as written, requires MRR Pickens to violate its current permit terms.

authority to determine the nature and scope of the Permit and R. 61-107.19.

III) THE TRIAL COURT SHOULD HAVE CONSIDERED TESTIMONY FROM DHEC OBTAINED IN DISCOVERY.

In order to present the testimony of Kent Coleman, DHEC's Director of Mining and Solid Waste Management, that was obtained in discovery, MRR Pickens filed a Motion captioned under Rule 60(b)(2), SCRCP. The trial court erred in denying the Rule 60 Motion because it construed Rule 60 to only apply to a "final order." However, Rule 60 plainly states it applies to "a final judgment, **order** or proceeding." (emphasis added). The word "final" modifies "judgment," not the word "order". As Rule 60 applies to an "order or proceeding" in addition to a "final judgment", it serves as the proper mechanism whereby the trial court should reconsider its Order.

A Rule 60 motion is proper in this case. Regardless of the applicability of Rule 60, the trial court should have considered the testimony from DHEC. The DHEC testimony confirmed that the 2008 Permit included CCR as a waste stream. Because this motion was heard prior to the availability of any discovery, the Coleman deposition could not have been provided to the court at the hearing. Coleman's testimony that MRR Pickens' permit has always allowed the acceptance of CCR directly contradicts the trial court's Order. That Order, though interlocutory in nature, makes a binding determination of the crux of the case – that coal ash is, according to the trial court, prohibited under the 2008 permit and MRR Pickens conceded to this limitation. The language in the Order that the 2008 Permit prohibits CCR significantly prejudices MRR Pickens during the pendency of this litigation, especially when testimony from DHEC confirms that the trial court was incorrect in its interpretation. As discussed above, MRR Pickens never conceded this fact, and the trial court erroneously memorialized a binding concession that

MRR Pickens never made. With the denial of the Motion to Reconsider and the Rule 60 Motion, this erroneous interpretation coupled with a "binding concession" that was never made is now arguably the law of the case. Out of fairness and to prevent MRR Pickens from continuing to incur irreparable harm, the trial court should consider Coleman testimony before finally determining the key issue during the pendency of this case.

CONCLUSION

For the reasons stated above, MRR Pickens respectfully requests this Court reverse the trial court and find a temporary injunction is necessary to protect its legal and contractual right to operate a Class Two Landfill in accordance with standards promulgated by DHEC and free from political interference by the County. The trial court should have granted MRR Pickens an injunction, and at the very least, should not have *sua sponte* enjoined MRR Pickens in a court order from accepting coal ash for its Class Two Landfill.

[SIGNATURE PAGE TO FOLLOW]

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October 26, 2016
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Case No. 2016-CP-39-100
Appellate Case No. 2016-000762

MRR Pickens, LLC,.....Appellant,

v.

County of Pickens and William Cato, Weldon Clark, Robert Ballentine, Jo Johnston, Dennis Reinert, and Bob Young, Individually and in their capacity as Appointed members of the Pickens County Planning Commission,
.....Respondents,

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Final Brief on Respondents by mailing a copy of the same, via United States Mail on October 26, 2016, to the following:

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR and the August 13, 2007 Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

[SIGNATURE PAGE TO FOLLOW]

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