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,

---

APPELLANT'S FINAL REPLY BRIEF

Jessica L. Gooding (S.C. Bar # 101210)
Goings Law Firm, LLC
Email: jgooding@goingslawfirm.com

Robert F. Goings (S.C. Bar # 74855)
Goings Law Firm, LLC
914 Richland Street, Suite A-101
Columbia, South Carolina 29201
Telephone: (803) 350-9230
Facsimile: (877) 789-6340
Email: rgoings@goingslawfirm.com

Jessica J.O. King (S.C. Bar #11202)
A. Keith McAlister, Jr. (S.C. Bar # 78213)
Williams Mullen
1441 Main Street, Suite 1250
Columbia, South Carolina 29201
Telephone: (803) 567-4000
Facsimile: (803) 567-4601
Email: jking@williamsmullen.com
Email: kmcalister@williamsmullen.com

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
October 26, 2016

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,

---

APPELLANT'S FINAL REPLY BRIEF

Robert F. Goings (S.C. Bar # 74855)
Goings Law Firm, LLC
914 Richland Street, Suite A-101
Columbia, South Carolina 29201
Telephone: (803) 350-9230
Facsimile: (877) 789-6340
Email: rgoings@goingslawfirm.com

Jessica J.O. King (S.C. Bar #11202)
A. Keith McAlister, Jr. (S.C. Bar # 78213)
Williams Mullen
1441 Main Street, Suite 1250
Columbia, South Carolina 29201
Telephone: (803) 567-4000
Facsimile: (803) 567-4601
Email: jking@williamsmullen.com
Email: kmcalister@williamsmullen.com

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
October 26, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Rules

STATEMENT OF THE CASE

Respondents' Initial Brief does not address the actual issues on appeal. This appeal is not about whether or not Appellant MRR Pickens, LLC ("MRR Pickens") is legally allowed to accept any particular waste, including coal combustion residuals (CCR) or coal ash, at its Class Two Landfill located off of Highway 93 in Pickens County (the "Property"). Rather, the issues on appeal are simple:

1. Whether the Trial Court Judge improperly denied MRR Pickens' request for an injunction;

2. Whether the Trial Court improperly ordered limits on MRR Pickens' Class Two Landfill Permit; and

3. Whether the Trial Court should have considered new evidence revealed in discovery.

Whether CCR is allowable in a Class Two Landfill in South Carolina and specifically at Appellant's site in Pickens County may be determined at the Administrative Law Court. While Respondents would like to blur the issues by arguing what CCR is and where it should and should not be deposited, MRR Pickens is not asking this Court to make that determination. MRR Pickens is simply asking this Court to determine if the Trial Court should have temporarily lifted Pickens County's January 11, 2016 Termination Notice to allow MRR Pickens to pursue business opportunities that would be irreparably lost if this motion is denied.

STATEMENT OF THE FACTS

FACT 1: MRR Pickens has Always Been Permitted to Accept Class Two Waste.

Since 2008, MRR has held a permit from the South Carolina Department of Health and Environmental Control (DHEC) for a Class Two Landfill under DHEC Permit

LF2-00003 ("the Class Two Landfill").[1] MRR Pickens has never held a DHEC permit for a "Construction and Demolition, Land Clearing Debris Landfill." Respondents know this for two reasons: (1) it has a copy of the 2008 Permit; and (2) with advice of counsel, it recently agreed to amend the 2007 Development Agreement between the parties to replace "C&D/LCD" waste with "Class Two Waste." (R. p. 209).

FACT 2: Class Two Waste Automatically Includes but is Not Limited to the Wastes Listed on Appendix I of the Solid Waste Permitting Regulations.

Respondents are correct – MRR Pickens is allowed to and plans to accept C&D/LCD waste at its Class Two Landfill because C&D/LCD waste is a Class Two Waste. (R. p. 149, ¶ 11). However, C&D/LCD is *not* the only Class Two Waste, and MRR Pickens never contracted with or represented to the Respondents that it would be the only waste stream accepted at its Class Two Landfill. (R. p. 150, ¶ 18). The items listed on Appendix I of Regulation 61-107.19 [2] are automatically allowed, but other waste streams can be allowed as well, if they have similar characteristics to those listed:

> Part IV. Class Two Landfills. Part IV establishes minimum criteria for all landfills used for the disposal of: waste as outlined in Appendix I of this regulation; **other wastes not listed in Appendix I that demonstrate similar properties to the wastes listed and are approved by the Department on a case-by-case basis**; or, wastes that test less than ten (<10) times the maximum contaminant level (MCL) as published in R.61-58, State Primary Drinking Water Regulation current at the time of submittal of the permit application.

Solid Waste Mgmt., S.C. Reg. 61-107.19 (DHEC May 23, 2008), Part IV(A)(1) & (A)(4).

DHEC will only allow MRR Pickens to accept waste streams at its Class Two Landfill that meet the characteristics required for a Class Two Landfill. The characteristics in the waste (i.e., lack of toxicity), not the source of the waste, determine if

[1] The 2008 permit refers to Appendix I of R. 61-107.19, which applies to Class Two Landfills.
[2] Statutory Authority derives from S.C. Code Ann. § 44-96-10 et seq.

it is acceptable in a Class Two Landfill. CCR is not a "Special Waste" and not prohibited in Class Two Landfills. The CCR that MRR Pickens preliminarily agreed to accept for disposal meets the necessary characteristics for a Class Two Landfill. (R. p. 151, ¶ 27).

FACT 3: In November 2014, MRR Pickens filed a Letter of Intent and Land Use Application with the Pickens County Planning Commission ("the Commission") requesting to construct and operate a Class Two Landfill with lined landfill disposal area.

When MRR Pickens was ready to begin construction on the project contemplated in 2007 and permitted by DHEC in 2008, it sent a Letter of Intent (R. p. 206) and a Land Use Application (R. pp. 208-221) to the Commission. The Letter of Intent stated, "[t]he project will include . . . ***approximately 60 acres of lined landfill disposal area***, and various sediment and erosion control structures." (R. p. 206 (emphasis added)). The Land Use Application states the proposed land use of the Property is a "SCDHEC Permitted Class 2 Landfill." (R. p. 209). After a public hearing, in January 2015, the Commission unanimously approved the project. (R. pp. 222 – 228).

FACT 4: MRR Pickens' 2015 Minor Permit Modification did not change its allowable waste streams.

In August of 2015, DHEC issued a Minor Permit Modification to MRR Pickens to allow for a new design with liner. MRR Pickens is not required to install a liner when it constructs the Class Two Landfill; it simply has **the option** to do so. DHEC views the addition of a liner as a minor modification, which does not require public notice or opportunity for comment. (R. pp. 684-685, 700-702, 712-713). Adding a liner does not automatically allow a facility to accept waste streams outside those listed in Appendix I of the Solid Waste Permitting Regulations. (R. p. 678; R. p. 232, ¶ 20).

FACT 5: MRR Pickens' Representations to the Pickens County Planning Commission in 2015 were Truthful.

At the 2015 Planning Commission Development Permit Public Meeting, MRR Pickens correctly stated the following facts:

- MRR Pickens plans to construct and develop a Class Two Landfill in Pickens County, as was the case in 2008;
- MRR Pickens' allowable waste stream has not changed since 2008, and MRR Pickens will only accept what DHEC determines to be Class Two Waste;
- MRR Pickens may line the Class Two Landfill (R. p. 206); and
- A liner is not required in a Class Two Landfill. (R. p. 344).

FACT 6: Respondents Took MRR Pickens Property and Are Prohibiting MRR Pickens Any Development or Use of it.

On January 11, 2016, Respondents demanded that Appellant MRR Pickens "cease and desist any and all activities at the proposed site." (R. p. 242). Respondents terminated MRR Pickens' use of the Property and prohibited it from any activities onsite. *Id.* Respondents took this drastic step based on media reports and prior to any notice to MRR Pickens. *Id.* In the Termination Notice, the Commission informed MRR Pickens that it would face criminal prosecution, including fines and imprisonment if it did not "cease and desist any and all activities" on the Property. The Termination Notice 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).

FACT 7: MRR Pickens Will Experience Loss of Business opportunities as a Result of Respondents' Overly Broad Termination of its Land Use Approval.

MRR Pickens has reached a preliminary agreement with a third-party to accept CCR for disposal in its Class Two Landfill. (R. p. 151, ¶ 26). The CCR that MRR

Pickens may accept meets the regulatory requirements for its permitted and approved Class Two Landfill. *Id.* However, MRR Pickens will be deemed "Non-Responsive" and considered ineligible to receive the CCR Class Two waste as a result of the Respondents' actions in terminating its Land Use Approval. (R. p. 151, ¶ 32). With this prospective contract, MRR Pickens had the potential to earn in excess of $25,000,000.00 from the project over the life of the landfill. (R. p. 151, ¶ 36). Furthermore, the Termination Notice deprives MRR Pickens of good will, other business opportunities, and the beneficial use of the Property as a Class Two landfill.

FACT 8: The SC Coal Ash Law Passed After the Commission Sent the Termination Notice is Not an Absolute Ban on the Disposal of Coal Ash in a Class Two Landfill.

In its Initial Brief, Respondents emphasize that a new law, S.C. Code Ann. § 58-27-255, the South Carolina Coal Ash Law ("SCCAL"), is a complete bar to the deposit of CCR in a Class Two Landfill.[3] However, the SCCAL lists exceptions that allow CCR to be deposited in a Class Two Landfill. Thus, S.C. Code Ann. § 58-27-255 does not resolve this appeal because: (1) Respondents have ordered that Appellant cease and desist *all* construction and operations in Pickens County, not only operations related to CCR; and (2) whether South Carolina law permits Class Two Landfills to accept CCR under certain circumstances is relevant to the merits of this case, but not dispositive.

FACT 9: To date, Pickens County has refused to allow MRR so much as a development permit.

In spite of Respondents' concession that the parties have a valid contract that

[3] During the hearing on MRR Pickens' Motion for Preliminary Injunction, Respondents' counsel informed the Court that legislation was likely to pass that would nullify the dispute between the parties by banning the disposal of CCR in all Class Two Landfills in South Carolina. (R. pp. 1126-1127). The legislation that counsel was referring to has since been passed into law, but Appellant disagrees with Respondents' counsel as to the effect of that law.

gives MRR Pickens the right to do business in Pickens County, Respondents have refused to permit MRR Pickens to continue any activity, including building its facility throughout this litigation.

LEGAL ARGUMENT

I. APPELLANT ADEQUATELY SET FORTH PRIMA FACIE EVIDENCE OF IRREPARABLE HARM, LIKELIHOOD OF SUCCESS ON THE MERITS AND INADEQUATE REMEDY AT LAW.

In their Brief, Respondents recognize that a preliminary injunction should be granted to "preserve the status quo." p.17. However, Respondents argue that the parties should be required to return to the status quo as it existed in 2008, prior to MRR Pickens beginning to develop the Class Two Landfill or pursuing contracts to dispose of CCR. *Id.* However, a Motion for Preliminary Injunction does not provide a mechanism for erasing the last eight years. To preserve the status quo, the court must reinstate the rights MRR Pickens enjoyed immediately prior to the Land Use Termination – for example, the right to access and develop its Property as a Class Two Landfill. MRR Pickens asked the lower court to maintain the status quo by lifting the termination and "cease and desist" on all activities on the site. (R. pp. 1107-1110). As pointed out during that hearing, even if the injunction were granted, the CCR waste to which Respondents object could not be accepted for approximately a year following the grant of the injunction, giving ample time for the underlying issues in this case to be decided on the merits. (R. p. 1084)..

Because Appellant MRR Pickens raised at least a "fair question" that it would suffer irreparable harm in the absence of a preliminary injunction, that it is likely to succeed on the merits at trial, and that it has no adequate remedy at law, it was error for the trial court to deny Appellant's Motion for Preliminary Injunction. *See AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009).

A. APPELLANT MRR PICKENS ESTABLISHED POTENTIAL FOR IRREPARABLE HARM

Respondents point to no evidence in the record to rebut MRR Pickens' proof of irreparable harm. Respondents do not deny that the Termination Notice: (1) prohibits MRR Pickens from being considered for a project that could potentially produce $25,000,000.00 in revenues; (2) prohibits MRR Pickens from bidding or competing for other waste disposal contracts or business opportunities; or (3) as written, completely deprives MRR Pickens of any beneficial use of its Property.

Respondents cannot dispute MRR Pickens' evidence regarding the 25-million-dollar project.[4] Rather, they argue that because there are other "contingencies," there is no evidence proving MRR Pickens was guaranteed to proceed with the project if the Respondents had not taken away the use of its Property. However, courts have established that lost business opportunities in general can form the bases for irreparable harm in an action for injunction. *See, e.g., HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 699 S.E.2d 699 (2010) (holding that suffering a restriction to the use of one's property rights is irreparable by money damages); *Levine v. Spartanburg Reg'l Servs. Dist.*, 367 S.C. 458, 626 S.E.2d 38, 42 (Ct. App. 2005) (quoting *Campbell Inns, Inc. v. Banholzer Turnure & Co.*, 148 Vt. 1, 527 A2d 1142, 1146 (1987)) ("The potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction."). If the lower court is affirmed, this established precedent would be effectively overturned.

[4] Respondents refer to the loss of this business opportunity as the "linchpin" of Appellant's irreparable harm argument, but this characterization misses the mark. The "linchpin" of the argument is MRR Pickens' being deprived of the right to operate its business, missing out on any and all business opportunities, and being unable to earn good will in the community and industry. The 25-million-dollar project is offered as an example of the type of opportunities MRR Pickens is missing out on and to give credence to MRR Pickens' statements that there are opportunities available.

1) Respondents' Arguments are an Improper Attempt to Regulate Solid Waste Landfills

Respondents admit in their Initial Brief that irreparable harm can exist in circumstances where there is a misappropriation or denial of the use of property or regulatory taking. However, Respondents erroneously argue that MRR Pickens does not have a "right" to dispose of a Class Two Waste, which may include CCR, on its Property. Resp. Brief, p. 18. MRR Pickens has a right operate a Class Two Landfill and to accept whatever waste streams DHEC determines to be Class Two Waste, and that right necessarily includes the right to apply.

DHEC is the sole authority to determine what waste streams are acceptable in a Class Two Landfill under the DHEC Solid Waste Permitting Regulations and the South Carolina Solid Waste Policy and Management Act. *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); (R. p. 680-681, 684-685). DHEC has a regulatory procedure for determining whether a waste stream meets the requirements for disposal in an existing Class Two Landfill. (R. p. 684, 691). Instead of following the law, the County is attempting to usurp the role of DHEC in determining what wastes should be allowed in a Class Two Landfill in South Carolina.

Respondents argue that (1) MRR is proposing to use the Property as a "coal ash dumping ground;" (2) this proposed use is not a "permitted use" of the Property; and (3) therefore, MRR cannot argue denial of beneficial use of its Property. Resp. Brief, p. 18. To support this, Respondents argue CCR is a "Special Waste," and therefore prohibited under the County's Solid Waste Management Plan. Resp. Brief, pp. 18-19. The record

does not support a finding that CCR is a "Special Waste." Respondents simply offered the opinion—through affidavit testimony from C. Wesley Hulsey[5]—that CCR should be treated as a "Special Waste." However, in April of 2015, prior to the hearing on MRR Pickens' Injunction Motion, the United States Environmental Protection Agency (EPA), the federal agency charged with regulating the disposal of solid and hazardous wastes, considered treating CCR as "Special Waste," but determined that CCR should not be so designated. In promulgating the final rule regulating the disposal of CC, the EPA explained:

> [EPA] first solicited comments on the regulation of CCR in a proposed rule published in the **Federal Register** on June 21, 2010. This proposal, under the Resource Conservation and Recovery Act (RCRA), addressed the risks from disposal of CCR generated from the combustion of coal at electric utilities and from independent power producers. Two regulatory options were proposed. Under the first option, EPA proposed to list CCR **as special waste** subject to regulation under subtitle C of RCRA, when destined for disposal in landfills or surface impoundments. . . . Under the second option, EPA proposed to regulate the disposal of CCR under subtitle D of RCRA by issuing minimum national criteria . . . . After reviewing all the comments and additional data received, EPA is promulgating this final rule to regulate the disposal of CCR as solid waste under subtitle D of RCRA.

80 *Fed. Reg.* 21302, 21303 (April 17, 2015). The County conveniently ignores the fact that EPA has determined CCR is not a "Special Waste" and therefore, only needs to meet "minimum national criteria" for disposal. *Id.*[6]

The record establishes that MRR Pickens proposed use, at all times since 2008, has been as a Class Two Landfill. In fact, the County conceded that in 2008, DHEC

[5] Respondents want to present this information as expert opinion testimony, but of course, given the early stage of this litigation, no court has qualified Mr. Hulsey or any of the other witnesses who provided affidavits as experts in their respective fields.

[6] As discussed in further detail below, the issue of whether CCR is a "special waste" is properly determined by DHEC and any appeal is properly made to the Administrative Law Court pursuant to the South Carolina Administrative Procedures Act.

determined, and Pickens County agreed, that MRR Pickens' proposed use of the Property as a Class Two Landfill was consistent with local zoning, land use ordinances and solid waste management plans.

B. APPELLANT MRR PICKENS ESTABLISHED LIKELIHOOD OF SUCCESS ON THE MERITS

Respondents do not directly address the likelihood of success on the merits in its Initial Brief, other than to say the "record before the court supports that it is the Respondents, not MRR who will likely succeed on the merits." Resp. Initial Brief., p. 21. The merits of this case, however, do not relate to Respondents' opinions regarding what is allowed under MRR Pickens' permit. Rather, the merits of this case center on Respondents' breach of contract and a regulatory taking – subjects Respondents have chosen to ignore in their arguments to date.

Respondents conceded to the trial court that it entered into an agreement with MRR Pickens for a landfill in compliance with the DHEC permit issued in 2008, (R. p. 1128), and the trial court confirmed the parties had a valid agreement regarding the operation of a Class Two Landfill, R. p. 1-2. Further, the DHEC permit issued in 2008 and modified in 2015 gave MRR Pickens the right to build and operate a Class Two Landfill. (R. p. 198). Respondents' absolute termination of its Land Use Approval and MRR Pickens' vested right to operate a Class Two Landfill for the last seven to eight months violates the Development Agreement between the parties, equates to an unconstitutional taking of MRR Pickens' Property, and violates MRR Pickens' due process rights. These facts are undisputed in the record. Therefore, based on the findings already made by the trial court, MRR Pickens is likely to succeed on the merits of its breach of contract and constitutional challenges.

C. APPELLANT MRR PICKENS ESTABLISHED THAT NO ADEQUATE REMEDY AT LAW EXISTS

The trial court did not directly address in its Order whether MRR Pickens established a lack of adequate remedy at law. Similarly, Respondents did not address the issue in their Initial Brief. MRR Pickens admits it is pursuing monetary damages for loss of business opportunities and costs to date to develop the Property as a Class Two Landfill. However, as discussed above, monetary damages alone *cannot* repair the loss of goodwill, damage to its business reputation, and the loss of other potential business opportunities associated with MRR Pickens being unable to utilize its property and operate its business– losses which cannot be remedied and which it cannot quantify. *See, e.g., HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 699 S.E.2d 699 (2010); *Levine v. Spartanburg Reg'l Servs. Dist.*, 367 S.C. 458, 626 S.E.2d 38, 42 (Ct. App. 2005). Since January 11, 2016, MRR Pickens has been prohibited from pursuing contracts for the disposal of new or existing Class Two Waste streams, been precluded from using its property, and suffered unquantifiable damages for lost business opportunities and loss of good will.

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

At the hearing on the preliminary injunction, the parties agreed that MRR Pickens had a vested right to build and operate a Class Two Landfill. In addition, MRR Pickens agreed, in the spirit of resolution, that, if the injunction were granted, it would not accept any CCR waste into its landfill until such time that this case could be heard on the

merits.[7] Thus, if the injunction had been granted, MRR Pickens would have been allowed to continue constructing the landfill and to accept other waste streams. Instead, the trial court denied MRR Pickens' Motion and erroneously memorialized what the parties agreed to in the hearing, thereby muddying the facts in this litigation and effectively enjoining MRR Pickens from accepting waste streams related to coal ash. Because the order misinterprets the DHEC permits as a matter of law and misstates the concessions made during the hearing, MRR Pickens is asking this Court to reverse the trial court's order.

MRR Pickens' DHEC permit was issued in 2008 and modified in 2015, but it only has a single permit. Despite the DHEC permit's language allowing "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's February 22, 2016 Order proscribed MRR Pickens from beginning construction of a Class Two Landfill as permitted by DHEC, pursuing business opportunities, and finally, specifically proscribed it from accepting CCR. This injunction against MRR Pickens was unwarranted. First, the trial court provided no justification for reinstating the status quo that existed in 2008 when the Pickens County Planning Commission unanimously approved Appellant's plan in January 2015 and consented to amend the Development agreement in April 2015. Second, the trial court committed reversible error when it stated that to allow MRR Pickens to operate under the constraints and allowances of the Permit issued November 3, 2008 would prohibit acceptance of CCR or coal ash. MRR Pickens ***never*** conceded that the 2008 permit prohibited MRR Pickens from

[7] MRR Pickens did not concede that it lacked a *right* to accept CCR, at present or at any point in the past, based on the DHEC permit and agreements between the parties. It simply agreed that it would not exercise that right until a court confirmed that such a right existed.

accepting CCR or coal ash, and this finding is not supported in the record.

Only DHEC can determine what types of waste are acceptable under its permit. (*See* 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). In fact, since the hearing on MRR Pickens' Injunction Motion, Respondents have exercised the right to appeal the DHEC permit, as modified in 2015, in the Administrative Law Court. *See Pickens County vs. South Carolina DHEC and MRR Pickens, LLC*, ALJ Case No: 16-ALJ-07-0164-CC. Therefore, if MRR Pickens was granted an injunction and relief from the Termination Notice, MRR Pickens would be required to operate the Class Two Landfill on the Property under whatever terms of the Permit are ultimately decided through the proper administrative appeal process. The Trial Court should be reversed to allow the appeal of the permit itself to go through the proper administrative and appellate review.

III. THE TRIAL COURT IMPROPERLY REFUSED TO CONSIDER ADDITIONAL EVIDENCE PRESENTED IN APPELLANT'S RULE 60 MOTION.

On March 28, 2016,[8] MRR Pickens filed a Rule 60 Motion asking the Court to consider sworn testimony of a DHEC employee, Mr. Kent Coleman,[9] and therefore, reconsider its denial of MRR Pickens' Motion. On March 28, 2016, the Court denied MRR Pickens' Rule 60 Motion. Then, nine (9) days after the Order, Respondent Pickens County filed its Response, attaching additional pages of the Coleman transcript. Because the trial court did not consider Respondents' Response, it cannot be properly considered

[8] The Motion is dated March 14, 2016, but was not actually filed until March 28, 2016.
[9] This deposition was taken on March 8, 2016.

by this Court on appeal.

The trial court's denial of MRR Pickens' Motion for relief under Rule 60(b) was error because (1) the motion was properly made and (2) MRR Pickens established that it was entitled to relief from the trial court's order.

A. The Trial Court Erred in Refusing to Address MRR Pickens' Rule 60(b) Motion on its Merits.

Federal courts regularly allow Motions for relief from preliminary injunction orders under Rule 60(b) because "the preference is to hear matters on their merits and, when deciding a Rule 60(b) motion, courts should generally resolve all factual doubts in favor of the party seeking relief." *United Statesnile Ltd. v. Stormiptv*, No. 2: 13-cv-00067 (D.N.J., Sept. 16, 2014) ("A party may obtain relief from an order entering a preliminary injunction through making a motion under Rule 60(b)."); *see also FTC v. Lalonde*, 545 F. App'x 825, 833 (11th Cir. 2013) (analyzing whether defendant was entitled to Rule 60(b) relief from a stipulated preliminary injunction); *Petties v. Dist. of Columbia*, 662 F.3d 564 (D.C. Cir., 2011) (reversing and remanding district court's denial of a Rule 60(b) motion where the court failed to adequately address the motion on its merits); *Precision Fitness Equipment, Inc. v. Nautilus, Inc.*, No. 08-cv-01228-CMA-KLM, 2009 WL 2169361, at *1 (D. Colo. July 29, 2009) (citing *Cessna Fin. Corp. v. Bielenberg Masorry Contracting, Inc.*, 715 F.2d 1442, 1445 (10th Cir. 1983)) (applying Rule 60(b) to determine whether to grant relief from a preliminary injunction order).

This interpretation of the rule is consistent with the "policy of [South Carolina] to resolve cases on the merits." *Caldwell v. Wiquist*, 402 S.C. 565, 575, 741 S.E.2d 583, 588 (Ct. App. 2013) (citing *Rochester v. Holiday Magic, Inc.*, 253 S.C. 147, 152, 169 S.E.2d 387, 390 (1969) (noting that the statute applicable to vacating a default judgment "should

be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits.")).

B. The Trial Court Erred in Failing to Consider the Deposition Testimony and Grant MRR Pickens' Motion.

Respondents' Initial Brief makes much of the "lack of evidence" that Mr. Coleman's testimony – or some substitute for the same – could not be reasonably acquired or discovered prior to the trial court ruling on the Motion for Preliminary Injunction. This argument is nonsensical given the timeline in this case. From the time the Commission drafted the Termination Notice until the preliminary injunction hearing took place was 38 days. When one considers the months and years often spent in the discovery phase of litigation, there is hardly a need for explanation as to why Mr. Coleman could not be deposed prior to the Motion being heard. Further, Respondents' counsel previously agreed that there had not been time to get additional information from DHEC related to this case. During the hearing on MRR Pickens' Motion for Preliminary Injunction, counsel for Respondents indicated more than once that he was not able to address certain aspects of this case because he had not yet had the opportunity to depose any DHEC officials or employees. (R. p. 1091-1092, 1100).

CONCLUSION

For the reasons stated above, MRR Pickens respectfully requests that 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 on the Property.

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,

Robert F. Goings (S.C. Bar # 74855)
Goings Law Firm, LLC
914 Richland Street, Suite A-101
Columbia, South Carolina 29201
Telephone: (803) 350-9230
Facsimile: (877) 789-6340
Email: rgoings@goingslawfirm.com

Jessica J.O. King (S.C. Bar #11202)
A. Keith McAlister, Jr. (S.C. Bar # 78213)
Williams Mullen
1441 Main Street, Suite 1250
Columbia, South Carolina 29201
Telephone: (803) 567-4000
Facsimile: (803) 567-4601
Email: jking@williamsmullen.com
Email: kmcalister@williamsmullen.com

ATTORNEYS FOR APPELLANT

October 26, 2016
Columbia, South Carolina

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 Reply Brief on Respondents by mailing a copy of the same, via United States Mail, on October 26, 2016, to the following:

Gary W. Poliakoff, Esquire
Poliakoff & Associates, P.A.
PO Box 1571
Spartanburg, SC 29304

Amy M. Snyder, Esquire
Clarkson, Walsh, Terrell, & Coulter, P.A.
PO Box 6728
Greenville, SC 29606

Matthew K. Johnson, Esq.
Ogletree, Deakins, Nash, Smoak, & Stewart, P.C.
PO Box 2757
Greenville, SC 29602

Robert F. Goings
Counsel for Appellant

October 26, 2016
Columbia, South Carolina

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,

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]

Respectfully submitted,

By: _____

Robert F. Goings, Esquire (S.C. Bar # 74855)
Goings Law Firm, LLC
914 Richland Street, Suite A-101
Columbia, South Carolina 29201
Telephone: (803) 350-9230
Facsimile: (877) 789-6340
Email: rgoings@goingslawfirm.com

Jessica J.O. King (S.C. Bar #11202)
A. Keith McAlister, Jr. (S.C. Bar # 78213)
Williams Mullen
1441 Main Street, Suite 1250
Columbia, South Carolina 29201
Telephone: (803) 567-4000
Facsimile: (803) 567-4601
Email: jking@williamsmullen.com
Email: kmcalister@williamsmullen.com

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
October 26, 2016