THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-06482
Appellate Docket No. 2013-000329

Harrison Partners, LLC, ...Appellant,

v.

Renewable Water Resources, ...Respondent

APPELLANT'S FINAL BRIEF

Robert C. Childs, III
2100 Poinsett Hwy., Suite D
Greenville, SC 29609
(864) 242-9997

J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292

Attorneys for the Appellant

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STATEMENT OF THE CASE

On September 9, 2009 the Appellant filed a Summons and Complaint alleging among other things that the Respondent improperly refused to grant the Appellant wastewater treatment service. On March 16, 2010 the Honorable Edward W. Miller dismissed the suit without prejudice pending an administrative hearing before the Respondent.

On March 22 and 23rd, 2011 the administrative hearing was held before hearing officer Michael D. Glenn. A subsequent deposition held on April 21, 2011, was submitted as part of the hearing record. On September 1, 2011 the hearing officer issued his decision which was received on September 6, 2011. On September 29, 2011 the Appellant filed its Summon and Complaint Appealing that Administrative decision.

On September 4, 2012 the initial appeal of this matter was heard before the Honorable Edward W. Miller. On November 16, 2012 the Court issued its order affirming the decision of the hearing officer Michael Glenn. On December 7, 2012 the Appellant filed its motion to reconsider on December 7, 2012. On January 10, 2013 the trial court denied Appellant's motion to reconsider. This appeal followed.

STATEMENT OF FACTS

Appellant is a residential subdivision developer with interests in Greenville County, South Carolina. The Respondent Renewable Water Resources ("ReWa") is the former Western Carolina Regional Sewer Authority which is a pre-home rule special purpose district managed and controlled by a nine member commission appointed through the Greenville County Legislative delegation and vested with the authority to operate trunk lines and treatment plants for the disposal of sewage for Greenville County and portions of Spartanburg, Laurens, and Anderson counties.

In 2006, Appellant undertook to develop a residential subdivision, River Trace, in the Greenville area. (R .p. 121, l. 1-11). This was within Respondent's wastewater treatment service area. Appellant planned to use a private company, Condor Environmental, LLC ("Condor") to build and operate the wastewater pump station at the subdivision. In the course of planning the development, representatives of Appellant approached Respondent and were told that they would have to annex their property into the Metropolitan Sewer Sub-district ("Metro") for sewer service from the subdivision. The Appellant completed the annexation in November 2007. (R. p. 559; p. 103, l. 2-8).

River Trace required a pump station to connect it's subdivision to the Respondent's trunk lines. (R. p. 125, l. 1-10). It had been the usual and accepted practice in Respondent's service area for a private sewer company ("PSC"), such as Condor, to operate a pump station, and then a sub-district, such as the Metro, to be responsible for the collection lines up to the pump station and from the pump station to the main trunk lines of the Respondent and then to Respondent's wastewater treatment facility. (R. p. 88, l. 4-25). The private pump station is licensed as a PSC

through the Public Service Commission. Construction and operation of the pump station are first paid by the developer and then through homeowner fees. This was a usual and accepted practice and, most importantly, was allowed under Respondent's existing regulations at the time Appellant initiated the River Trace project. (R. p. 126, l. 9-24).

After inquiry by Appellant to determine sewer availability with Respondent, on March 16, 2006, Appellant received from Brian Bishop, the engineering supervisor of Respondent, an e-mail confirming that Respondent had sufficient capacity to handle their subdivision's wastewater. The e-mail also represented that Appellant should enter into contracts with Metro and Condor, and should meet all Metro and Condor specifications. (R. p. 794).

Appellant then undertook to make all submissions and seek approval for their development from Greenville County. In May of 2006, Greenville County approved Appellant's plans for River Trace, requiring sewer service through Metro and providing that the pump station be maintained by a publicly regulated entity, such as Condor (Condor was approved by the South Carolina Public Service Commission for such services.)

After Respondent's March 16, 2006 e-mail and after the Greenville County approval, Appellant purchased the property for River Trace on June 22, 2006 for $1,022,500.00 and undertook an enormous financial obligation for its development. Appellant was annexed into Metro. Appellant then entered into legally binding and valid contracts with Condor for the PSC and contracted with Eastwood Homes to sell all the lots. They cleared the property, completed rough grading on site, installed storm drainage lines and controls and engineered and surveyed the facilities.

Five months after the e-mail in March of 2006, Appellant sent its application, with the required fee and documentation, including a connection point map located on the flag lot route selected by Respondent, to begin the approval process for the wastewater treatment services. Respondent cashed their check and accepted their application which included all of the engineering documents and the surveyed "river" route. (R. p. 209; 326; 424; 558; 675-678).

The processing of Appellant's application encountered delay and stretched into 2007. During the summer or early fall of 2007 the Director for the Respondent instructed staff to place "a hold" on the River Trace application.[1] Respondent claimed that it placed the hold on Respondent's application because it was considering a change to its policy which was believed might not allow a PSC to connect the Respondent's trunk lines. The new policy was to "outlaw" the existing private utilities and require the infrastructure to be a part of the same wastewater system with Respondent or a sewer sub-district such as Metro.

There was no public announcement of this possible policy until Respondent's January Board Meeting in 2008, almost 18 months after Appellant's annexation into the Metro Sewer District. No developers with pending plans, including Appellant, were notified of the meeting. Respondent's Board did not pass the new policy until May of 2008, almost two years after the River Trace property submitted their application package to Re-Wa for approvals. Prior to the passage of the new policy, Appellant had proposed a plan that appeared acceptable to the Respondent, no action was taken because ReWa staff had been instructed by its Director to put a hold on all pump station projects even though they were permissible under existing regulations.

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[1]A "hold" was placed on all similar pending applications, eight in total.

Despite Respondent's representations that Appellant would be grandfathered in, Appellant's continued requests for exemption from the new regulation and "grandfather" status were ultimately denied.

Under ReWa's new policy, Respondent would have to own and operate the entire system or Condor could own the entire system, but only, if Metro was willing to guarantee the entire system. Metro was not willing to do so. Appellant continued to contend that their application would be grandfathered since they applied before the effective date for the change in policy and that the policy really didn't apply to them since it applied to "out-of-district" developments and they were clearly inside the Metropolitan Sewer Service District, having paid Metro sewer district taxes for two years. Accordingly, both Metro and Re-Wa incorrectly applied a "new policy" that never actually applied to Appellant.

By August of 2009, nearly three years since Appellant submitted its application, it became obvious that no permit from the Respondent would be forthcoming. On September 9, 2009 Appellant filed an action against the Respondent alleging that the Respondent wrongfully denied the Appellant to ability to establish a private collector sewer system ("PCS"). (2009-CP-23-7710). Appellant asserted claims for breach of contract, breach of contract accompanied by a fraudulent act, unjust enrichment, negligence, negligent misrepresentation, interference with contractual rights, civil conspiracy, declaratory judgment, writ of mandamus, and a violation of the South Carolina Unfair Trade Practices Act. The Respondent's answer failed to plead the existence or failure to exhaust administrative remedies. (R. p. 62-78). Nevertheless, on October 30, 2009, the Respondent filed a motion to dismiss on the basis that Appellant failed to exhaust

administrative remedies. The Circuit Court conducted a hearing on January 19. 2010. On March 16. 2010 the Circuit Court issued its Order. (R. p. 25-31).

In its March 16, 2010 Order the Court stated "During the hearing on this matter, ReWa provided evidence of a process by which an aggrieved person may appeal the denial of a PCS permit. Specifically, the ReWa Sewer Regulations provide a hearing and reexamination process for aggrieved individuals." (R. p. 26). (Emphasis added) The Court further stated "Once a final decision is rendered, the Regulations provide any party aggrieved by a final decision of ReWa may appeal such decision to the Court of Common Pleas." (R. p. 26). The Court also provided "The Regulations provided under Section 2: Any person whose permit is denied, or is granted subject to conditions deems unacceptable shall have the right to request an Adjudicatory Hearing." (R. p. 27). The Circuit Court therefore, dismissed the 2009 suit without prejudice pending the administrative review process. (R. p. 29).

On March 21, 2011 the Appellant filed a new lawsuit against Respondent and others raising the same allegations from the lawsuit filed in 2009. (2011-CP-23-1957) The Administrative hearing was finally held on March 22 & 23, 2011.

SUMMARY OF ADMINISTRATIVE HEARING FACTS

The testimony at the hearing shows that on March 16, 2006 the Respondent notified the Appellant that they had sufficient sewer capacity to serve the property that the Appellant planned to develop ("River Trace"). (R. p. 794). Attorney and Ph.D. in Environmental Engineering, Eugene C. McCall, Jr., testified that this notification is the first step in the process of connecting a development to a sewer system in Greenville County. (R. p. 24-26). McCall formed Condor Environmental, L.L.C. because of the Respondent's previous decision to no longer accept pump

stations operated by developers into their systems. This provided a niche for Condor as an approved private wastewater utility to provide pump station ownership and operation for various subdivisions in Greenville County. (R. p. 111, l. 2-23). In fact, Re-Wa had looked to Condor to provide this valuable service and worked with them closely on many projects. Condor owned and operated 12 pump stations in Greenville County. (R. p. 112, l. 1-3). They also managed another 30 stations in the State and had a good record of operations sufficient to maintain operations on the existing pump stations they currently operate. (R. p. 112, l. 23-25).

In early 2006 Mr. McCall received a call from the Appellant about owning and operating a pump station for River Trace that culminated in a contract dated April 23, 2007. (R. p. 119, l. 1-25; p. 753-759). The process of acceptance of the PSC with the Respondent was usually four to six months. (R. p. 91, l. 10-17). A year was the longest possible time McCall had ever experienced. (R. p. 116, l. 21-25). River Trace submitted its subdivision plat that indicated its sewer system was approved provided that the PSC be approved by the public service commission.[2] Greenville County approved the plat. It is Greenville County's procedure to confirm that all the service and utility providers that are willing to service the project prior to the County's approval. (R. p. 148, l. 1-5). According to McCall, "so if it has plat approval then ReWa said 'Yes, fine'." (R. p. 148, l. 5-6). It was only with this approval that Appellant commenced work on the property and obtained encroachment permits for sewer and utilities. (R. p. 121, l. 1-11).

Mr. McCall testified that in November 2007, some one year and eight months following

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[2]Condor was already licensed as a PSC by the public service commission at that time.

the issuance of the capacity letter, approval of the subdivision plat, purchase of the property, design of the components and numerous surveys the Respondent started mentioning the idea of prohibiting PSC pumping station connections and replacing it with themselves since the Respondent "ought to be making money on the pump stations." (R. p. 127, l. 10-p. 105, 1. 9; p. 128, l. 24-p. 129, l. 4). At this point Respondent had committed to a pump station, either to the Metropolitan connector line or all the way up to the treatment plant, which was standard practice at that time. (R. p. 126, l. 15-24).

According to Mr. McCall, while the River Trace application was still being considered, in early 2008, nearly two years into the process that should have lasted at most a year, the Respondent officially began considering the enactment of the new policy, which would end the PSC pump station connections to their system. (R. p. 140, l. 7-21). The new regulations would essentially prohibit split ownership of the system between a private and public utility. (R. p.131, l. 18-25). Although the question of retroactive application of the proposed regulation had not been determined by the Board, "every time something would be finalized by the developer, the Respondent would come up with a new wrinkle, no we can't have that. The last wrinkle "was that [ReWa] basically told us that they weren't going to allow the force main owned by a private utility coming onto ReWa property." Despite the fact that it was standard practice to do so and no objection had been raised previously. In fact, Re-Wa routinely encouraged the use of private easements and provided access to their system and data to facilitate the process. In other words, the new regulations were a complete "180" from the practice prevailing at the time Appellant's application was submitted.

On May 5, 2008 the Respondent passed a resolution adopting the new policy which

effectively abolishes the PSC pump stations. (R. p. 761). The Respondent proposed that it would own and operate Appellant's planned pump station at twice the price charged by McCall's group. (R. p. 143, l. 1-13).

McCall questioned whether the new regulations were retroactive to River Trace and the six other pending PSC projects. He testified "And in talking with Mr. Stillwell, I said 'Well, the reg's not fair, but even if we live with the reg going forward, it shouldn't apply to these seven projects.' And he said, 'Well if you want to come to the Board and make your presentation, do it.'." (R. p. 144, l. 21-p. 1145, l. 1).

McCall raised the application of the new regulations to River Trace and six other projects to the ReWa Board. The issue was placed on the Board's agenda. (R. p. 145, l. 1-7). At the Board meeting there was a presentation with the Board asking few questions. The Board reached no decision at the meeting on the application of the new regulations to those projects substantially underway. (R. p. 145, l. 11-16). McCall stated "And I should say today, I have never gotten the decision from the Board on that --- those --- that request. So they never decided, but effectively they've killed the projects by dragging them out so long." (R. p. 146, l. 12-16). Nevertheless despite the failure of the Respondent's Board to determine the applicability of the new regulation to existing projects, the Respondent continues to retroactively apply it to the Appellant. Moreover, the policy never applied to the Harrison Partners because they were within the service area of Metropolitan Sewer District and the new policy only applied the developments outside of a service district. Despite Respondents concession at the administrative hearing that that Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892

(S.C.App. 2000) was controlling in this case. (R. p. 150, l. 21-p. 151, l. 2). The Respondents and the Board fail to recognize the impropriety of the regulation.

Scott Bolo an engineer and an officer and owner, of Appellant, testified that Appellant had built their entire business plan for River Trace premised upon this usual practice by Respondent of using the PSC for the pumping station. (R. p. 213, l. 7-17). Bolo stated that when they received the March 16, 2006 e-mail from the Respondent the Respondent knew that Condor was going to own and operate the force main. (R. p. 281, l. 11-22; p. 794). Early on in the process Respondent's chief engineer Brian Bishop told the Appellant that they had met the engineering requirements for connection to the Respondent's trunk line. (R. p. 290, l. 19-24). At no time during the process did Respondent inform the Appellant that new regulations were being considered which would cut off any pending projects and completely change "the way that the force main people, the collector system and treatment people interact". (R. p. 290, l. 24-p. 291, l. 10). Respondent never explained how they could impose a regulation that would not have applied to the Appellant had Re-Wa simply processed Appellant's application and issued the permit timely.

Bolo testified they were completely vested in the project by the time they had their engineering drawings complete. (R. p.220, l. 18-25). Although, they had never had a project that took more than eight months for final sewer approval, the project seemed to progress smoothly and there was no indication that Respondent would interfere with their plans. (R. p. 228, l. 11-19; p. 233, l. 11-20). The Appellant purchased the property and executed mortgages, contracted with Condor, obtained encroachment permits, cleared, surveyed, lined up builders, contracted with Eastwood Home to sell all the lots and finalized negotiations with Metro for a connecting point,

all by the end of March of 2007. (R. p. 773-781; p. 432, l. 2-10; p. 233, l. 21-p. 234, l. 8). The Appellant complied with every request of the Respondent for information, design and data throughout the process and provided valuable survey and engineering reports to Re-Wa in anticipation of a connection. (R. p. 254, l. 11-p. 256, l. 25).

On February 9, 2007 the Respondent confirmed that the encroachments for connection, PCS ownership of the force main, final plans and profiles could be submitted. (R. p. 795). All that remained was the permit to construct from the South Carolina Department of Health and Environmental Control ("SCDHEC"). (R. p. 795). The Appellant finalized the ownership of the force, the final plans, profiles and requested a "willingness to serve" letter from Respondent for SCHEC on February 17, 2007. (R. p. 796; p. 290, l. 16-p. 314, l. 3).

Despite the submissions by Appellant, the Respondent needlessly drew out the process. (R. p. 332, l. 8-13). As of March 21, 2007 the project was 100% design complete and Metro had approved the plans. (R. p. 432, l. 2-10). However, by August of 2007 the Respondent was still unwilling to finalize the route of the connector and allegedly imposed new security measures for their property that prevented Condor from owning the forced main on the Respondent's property. (R. p. 824). Another connection point with Metro was available but Metro refused connection citing the regulation by Re-Wa and line issues. In November of 2007 Respondent began discussions with area sewer service providers concerning prohibiting PCS connections to their system. (R. p. 128, l. 24-p. 129, l. 4). Unbeknownst to the Appellant, the Respondent had "flagged" their application as early as August of 2007 and put a "hold" on processing of Appellant's pump station and encroachment. Despite the fact that the board did not authorize this action it had been ordered by the Executive Director of Respondent Ray Orvin ("Orvin").

(R.p.481, l. 1-12).

After numerous proposals and counter-proposals and continuing engineering requests and survey demands the Appellant forwarded the finalized connector route to the Respondent on January 9, 2008. (R. p. 379, l. 15-p. 380, l. 23; p. 807). The surveyed route was determined to be acceptable at the time. All these demands by Respondent were "straw dogs" intended to delay the project. (R. p. 381, l. 9-22). The Respondent also continued to refuse to grant of an easement up to and through May 5, 2008 when the new regulations were imposed. (R. p. 413, l. 12-21).

When the Respondent's consideration of new regulations became public, Bolo specifically asked whether the new regulations would apply to the Appellant's project: "I held up the regulation and said, 'This doesn't apply to us because we're not outside the sewer district.' Mr. Orvin (director of Respondent) said, and I quote, in front of 20 people, 'Well we think you are.' " (R. p. 237, l. 18-23). As a result, Appellant requested an Adjudicatory Hearing before the Board concerning whether or not the new regulation was retroactive and they appeared before the Respondent Board concerning that question in November of 2008. (R. p. 265, l. 9-20). However, no decision was ever made by the Board and the never voted on the issue or issued a resolution. (R. p. 267, l. 1-4).

Respondent's director, Orvin was approached by staff about the Appellant's submission in August of 2007. (R. p. 481, l. 1-12). Orvin testified that the Respondent became concerned about the proliferation of PSC force main stations in late October of 2007. (R. p. 487, l. 10-18). Orvin decided to "chat with the Board" about the situation. (R. p. 487, l. 19-23). According to his testimony Orvin gave developers "a window of opportunity" between August of 2007 and November or December of 2007 to get everything in and approved concerning PSC force main

stations before the regulation change. (R. p. 485, l. 21-p. 486, l. 6). The matter was discussed with the Board in November of 2007 but the board had no idea about how it was ultimately going to address the issue through amended regulations. (R. p. 493, l. 21-p. 494, l. 12). The Board never even considered formal adoption of the regulation change until May of 2008. And again, the regulation never applied to HP or many of the other "in the pipeline" for a permit. (R. p. 761). Respondent admitted its enforcement of the new policy that had yet to be authorized by Respondent's Board.

Although he had assumed the authority to impose "a window of opportunity" for developers to get everything in and approved before the end of December of 2007, some five months before the regulations were enacted he contended at the hearing that he had no authority to determine "grandfather" status following passage of the regulation. (R. p. 485, l. 21-p.486, l. 6; p. 515, l. 23-25). Despite this window of opportunity the Respondent held up all applications as early as November of 2007 and continuing through until new regulations were adopted six or seven month later in May of 2008. (R. p. 520, l. 9-25). Orvin admitted that he had personally made the decision and instructed the engineering managers to hold the applications in process:

Q. (Appellant's counsel) So even before it was enacted, you were told, and you did, hold up on any approvals?
A. (Orvin) On the pump station.
Q. On the pump station. And the pump station was clearly a part of the River Trace application approval, wasn't it?
A. There were several of them that had pump stations that's correct.
Q. And you were told to hold up on all of them?
A. On the pump station section of it.
Q. That stack that Brian brought to you were the people that were what we've been calling in the pipeline at the time?
A. Yeah.
(R. p. 520, l. 18-p. 521, l. 13).

Respondent never gave notice of the meeting at which ReWa first brought up the changes to their policy which would kill the projects of Harrison Partners and seven others that had been in the pipeline waiting for a plan review for a considerable period of time (years). (R. p.521-522). As a consequence of Re-Wa's failure to notify the people most effected, none of these developers, including the Appellant, attended the meeting. (R. p. 521). And ultimately none of them were successful in obtaining service or completing the developments. Some of the developers were bankrupt as well.

During the permitting process the Respondent raised various issues to stall the Appellant, one such issue arose over easements and encroachment permits. According to the Respondent's director the granting of an easement or encroachment permit is a Board function. (R. p. 498, l. 16-p. 490, l. 2). According to Orvin the staff could reject an easement or encroachment requests, but only the Board can approve them. (R. p. 490, l. 2-5). Since, Metro was aware of the pending regulations and prevented a connection to their lines by Condor; Appellant needed and requested an easement or encroachment permit to connect the Condor pump station to Respondent's trunk line. Although that request was never actually rejected by staff, in an attempt to stall the Appellant's project, Orvin never submitted any of the Respondent's multiple requests for the permit to the Board. (R. p. 527). Despite Appellant's River Route being "okay", and Appellant still having a clear "window of opportunity" under the existing regulations to have its plan approved, the Respondent simply shelved plans to prevent Appellant from being able to proceed in violation of existing written policies and norms. (R. p. 527, l. 1-21).

Orvin further testified that public hearings were held on the proposed PSC connection regulations in January and April of 2008. The proposed regulations went through several

different drafts most particularly definitions and provisions concerning "in district" and "out-of-district" service and provisions for the private and public sector. (R. p. 498, l. 4-15). During this time Orvin instructed Re-Wa staff to hold off on the review and final approval of Appellant's project and all other projects "in the pipeline". At that time Respondent was aware of the contract between the Appellant and Condor. (R. p. 503, l. 2-23).

Although Orvin testified that he did not have authority to make the decision as to whether the Appellant would be grandfathered under any change in the regulations, he clearly had assumed the authority to permit projects during this "opportunity window" for developers who were substantially committed and "in-the-pipeline". Despite the projects being in compliance within the existing regulations, Respondent, nevertheless, "held up" the Respondent's pump station portion of their application without telling them. (R. p. 520, l. 9-14; p. 527, l. 12-21; R. p. 486, 1. 16-18). Ultimately, none of the seven or eight projects were permitted that were in pipeline, including the Appellant's. (R. p. 134; 311; 318; 396.

Metro was responsible for most of the technical review relating to pumping stations. Although, the Respondent had no reason to believe that the Appellant had not submitted all of the necessary plans for Metro to complete their portion of review, the Respondent "held-up" their approval until the new regulations went into effect. (R. p. 528, l. 17-p. 552, l. 3).

Joe E. Willis was also a developer and testified about the Appellant's companion development known as Grant Estates ("Grant"). (R. p. 552, l. 12-25). Grant also received a capacity letter from the Respondent about the same time as the Appellant. (R. p. 554, l. 22-25). Grant proceeded to grade their site and started installing utilities. (R. p. 555, l. 2-9). They also were working on plans to submit to Respondent and retained Condor for their project as well. (R.

p. 555, l. 2-21).

Like the Appellant, Grant submitted their plans and their check to Respondent before any discussion of new regulations, only to find out later that their plans would not be reviewed until the Respondent's Board considered whether it would change the existing regulations on PSC pump station connections. (R. p. 558, l. 17-24). Like Appellant, Grant attempted unsuccessfully to have the Respondent review his plans during this supposed window of opportunity. (R. p. 561, l. 9-25).

As they did with the Appellant, the Respondent led Willis to believe that Grant would be grandfathered in under the new regulations:

> And during this time, you know, my phone – my conversations with Brian was that – you know, 'Listen, guys, the Board's going to meet. They're going to figure out what they're going to do with pump stations in the future. And I feel confident – I feel sure you guys – you're not the only ones out there. You'll be grandfathered in and be allowed to proceed with your project." (R. p. 561, l. 16-24).

As a result of those conversations Grant proceeded "full steam ahead". (R. p. 561, l. 24-25). Grant bought the $600,000.00 to $700,000.00 property (Appellant paid over $1,000,000.00 for their property), mass graded the property and installed all their storm drains. (R. p. 562, l. 2-5). Because Grant had already cut and filled their property he was in the same position as the Appellant being unable to have septic permitted by the South Carolina Department of Health and Environmental Control ("DHEC"). (R. p. 562, l. 1-11). Respondent's effectively killed Grant along with Harrison Partners and all of the other projects in the pipeline at that time.

Willis testified that, "Ray Orvin said it was his decision personally to stop any project with a pump station, and he did that against advice of his counsel, who's in this room now." (R.

p. 563, l. 1-4). Willis further stated:

> But this letter I received stated that it was at their – that if a piece of property – if a project was in their service area but outside of one of their subdistricts, then at their sole discretion, that's how this would be handled. But per their request, I was annexed into one of their subdistricts, so this new policy still did not apply to my project and it still did not get reviewed. And till this day, I don't think my project's been reviewed. Has it?"

(R. p. 563, l. 11-22).

Mr. Willis summarized the dilemma of the Appellant and the six other developers as by addressing the initial capacity letter as follows:

> Well, you know, here's the thing. Short answer, yes, but there's a longer answer which goes back to all these continued delays which just killed my fricking project. They gave me a letter that – stating that, you know, 'Here – we've got capacity for your project and here's what you need to do to tie into our system.' Nowhere in that letter did it state that I needed to make sure Metropolitan's Subdistrict would own and operate my pump station. That was never brought up to me." Stillwell asked, "That was a change?" Mr. Willis continues to state, "That was a change. Okay, so they took eight months after they decided they were going to change to come up with a change. So then I said 'Fine. If you're going to own and operate my pump stations, what's going to be the cost?' The initial response was, 'We don't know." So I'm their customer and the way they're going to treat – they're supposed to be in this county for – to help grow – do planned controlled growth which would be beneficial to everybody in the county. And I'm their customer and they tell me they're going to provide this service to me. Then they say, 'No, were not. Here's the new service.' And I said, 'Well, what does the new service cost?' And they don't know, so they spent eight months coming up with a new plan, but thy still didn't have a complete plan. They don't have the price.

(R. p. 569, l. 16-p. 570, l. 19).

Like the Appellant, Willis lost over a $1,000,000.00 as a result of the "held-up" application, new regulation and the failure to "grandfather" his project. (R. p. 570, l. 20-p. 571, l. 8).

Respondent's Engineering Supervisor Brian Bishop testified that the Respondent had

knowledge of the proposed route for Appellant's connection to their system prior to March 16, 2006. (R. p. 603, l. 1-24). As early as March 16, 2006, Bishop had knowledge that the Appellant's plan to cross Re-Wa property would require Bishop to submit the plan for Board approval. (R. p. 607, l. 20-24). Bishop confirmed that the Respondent approved the surveyed route of the connection across Respondent's property without Board approval in January of 2008. (R. p. 595, l. 10-19; p. 654, l. 19-p. 655, l. 4). Appellant spent time and money engineering and survey studies in anticipation of an easement and connection.

Bishop admitted that three of the four connection route changes proposed by the parties during the course of the project were proposed by Respondent. (R. p. 672, l. 17-22). Although Bishop denied having received from Appellant certain required plans and calculations, those same plans were discovered in the Respondent's possession during the trial when the Appellant looked over and saw them sitting on counsel's table. (R. p. 699-701; Oversized Ex. 36.) Bishop confirmed that the Appellant had, as of October 10, 2006, tendered the monies and materials required to commence the approval process with the Respondent. (R. p. 675, l. 5-11). Bishop also admitted in his testimony that he testified at his deposition that he saw plans that were almost complete and he never gave his input to the Appellant as to whether or not those submissions were acceptable to the Respondent. (R. p. 682, l. 5-25). As early as November of 2007 Bishop was instructed to not give any final approvals on Appellant's project. (R. p. 687, l. 2-24). He confirmed that documentation was first submitted to Metro then from Metro to the Respondent. (R. p. 689, l. 5-17). Lastly, Bishop admitted that prior to his direction to "hold-up" his approval process he had received the final survey and engineering submission of the "river route" connection to their facilities and that the Respondent had agreed to the "river route" (R. p.

692, l. 4-13; p. 690, l. 17-23).

The second in command for the Respondent, Dr. Stephen B. Graef, testified that he became familiar with the project in the fall of 2007. (R. p. 795, l. 23-25). Graef asked to meet with the developers. (R. p. 707, l. 20-24). Graef confirmed that the 'river route" connection had been offered by the Respondent and the parties were in agreement on the concept. (R. p. 710, l. 10-23). Graef testified that the Respondent's would have a $318,000.00 one-time cost, and $35,000.00 a year annual cost under their offer to own and operate the entire sewer system of the project if the project de-annexed from Metro and the developer paid those amounts. (R. p. 718, l. 18-p. 720, l. 7; p. 836). The April 23, 2007 contract of the Appellant with Condor provided for payment of the up front amount of only $10,250.00 with monthly payment of $25.00 per lot connected to the system and an initial $1,500.00 per month after the pump station startup. (R. p. 753- p. 759). Graef admitted that it wasn't entirely fair to apply the new regulations to projects already in progress and that the Appellant acted in good faith and cooperation during the project. (R. p. 739, l. 15-p. 740, l. 13; p. 740, l. 14-p. 742, l. 23).

The testimony of William J. Alexander, IV was introduced at the hearing by way of deposition. Mr. Alexander is an developer with Windsor Aughtry and testified that they entered into a contract with Harrison Partners to share a force main and pump station to the Re-Wa property in February of 2006 when they requested and received the capacity letter from Respondent. (R. p. 855; p. 32, l. 12-15). They took an interest in property and closed on the contract in September of 2008. (R. p. 855; p. 32, l. 22-23). Just like Mr. Alexander, the Appellant was advised initially that they had to be annexed into the Metropolitan Sewer Sub-District to proceed with their project and that was done. (R. p. 861; p. 861/35, l. 15-23). Like Appellant,

Alexander was never able to permit his project or obtain a permit and Alexander's project ultimately failed as well.

John Boyette testified as a Commissioner on the Respondent's Board. (R. p. 872, l. 12-20). Mr. Boyette testified that Mr. Orvin had informed the Board about the Appellant's project plans to run a sewer line through their treatment plant site. (R. p. 875, l. 2-10). Orvin submitted the Appellant's request for the easement or right-of-way to the Board, but provided no details at all about the route. (R. p. 877, l. 6-18). The Board took no action on the route.

On November 5, 2007 the Operations and Planning Committee of Respondent's Board recommended to the Full Board for the staff to define a policy for ownership of pump stations and force mains to bring it back in December. (R. p. 883, l. 6-10). The Board understood that it was not customary to enforce regulations that haven't gone into effect. (R. p. 897, l. 7-14). It is unclear whether or not the Board even knew of the "hold" that had been applied to the Appellant's plans. Although, at the same time, the committee recommended to the Board that Mr. Orvin be directed to enter into negotiations with Appellant's representatives. (R. p. 927). Neither of these two recommendations was adopted by Respondent's Full Board and neither the Committee nor the Full Board directed that pending projects with PSC connections be suspended from review. (R. p. 927-928). Therefore, any actions that Orvin took were of his own accord. The staff while purportedly acting upon the November 2007 committee recommendation concerning negotiations with Appellant waited a year or more before making any offers to the Appellant. (R. p. 900, l. 1-9). Ultimately, the costs proved to be more than any of the developers awaiting service in the pipeline could pay. No projects have been connected under this "new policy."

The Respondent had no policy or regulation prohibiting private pump station connections either before or during their consideration of the new regulation. (R. p. 88-92, l. 12-15). In its May 2008 decision the Full Board did not even consider the impact of the new regulations on the economic viability of the six or seven projects "in the pipeline" Mr. Boyette stated that the disastrous impact of the new regulation on those projects "didn't enter -- it certainly did not enter into our decision making process as to what we did or did not do. (R. p. 906, l. 17-25). Commissioner Boyette testified that in November of 2008 after passage of the May 2008 regulations the Commission was descended upon by people asking to be "grandfathered" from the regulations. (R. p. 893, l. 11-22). The Board never decided officially whether or not the existing PSC connection projects would be "grandfathered" or if the new regulations applied to them at all. (R. p. 894, l. 13-18; p. 922, l. 22-24).

Subsequent to the their effective date the Respondent enforced the new regulations retroactively against the Appellant knowing that the enforcement against projects "in the pipeline" interfered with the existing contract between the Appellant and Condor and ultimately killed their projects. (R. p. 914, l. 19-p. 915, l. 20). Moreover, Respondent was made aware of the fact that the policy did not apply to these projects, but Respondent refused to acknowledge the obvious and improper miss-interpretation of the policy.

Bolo summarized Re-Wa's actions as follows:

> No. The reason it was important to ReWa was because you were delaying the process to implement a retroactive law, violating the Constitution of the United State of America. That's why it was important. It was a subterfuge designed to draw out the process. Look, you had 20 other - seven other developments that didn't have any technical challenge, and you wouldn't let them connect either, right? They didn't connect. No one did. Mr. Davis asks, this email is from March 21, 2007, right? Mr. Bolo replies, it is. Mr. Davis states, March 21, 2007 reflects

that you hadn't sent in the easement application yet. Mr. Bolo replies, Well, maybe because you all hadn't approved the route. You - see it's a catch-22. How can we submit a permit for a route you won't approve. We kept designing the route, engineering it, engineering completing it, and then we go to submit it and you say, "Oh, wait, we got an ownership issue," or "Oh, wait, we have a location issue." You know, you just put a bag over our heads, punch us in the face, and then sent us off to do another bidding and it was endless tasks like that time and time and time again. But no, you never allowed us - we were there. Mr. Stilwell could have just signed the encroachment permits, given them to Condor. We were done. That was it, but you didn't allow that to happen.

(R. p.332, l. 6-p. 333, l. 9).

ARGUMENT

I. THE HEARING OFFICER ERRED IN NUMEROUS FINDINGS OF FACTS IN ITS "FACTUAL BACKGROUND" THAT ARE UNSUPPORTED BY EVIDENCE AS FOLLOWS:

1. The hearing officer erroneously found that the Appellant bought the property in question although it knew no public sewer service was available. (R. p. 31). The record in this case shows that the Appellant purchased the subject property on June 21st, 2006 for $1,022,500.00 (Greenville County Deed Book 2212, p.192-193). This was after they received the March 16, 2006 e-mail from the Respondent that the Respondent had the capacity to accept the sewer system for the subdivision which Condor was going to own and operate the force main and Metro had approved annexation of the land into the sewer service district. (R. p. 281, l. 11-22; p. 794). The purchase was also after Respondent's chief engineer Brian Bishop told the Appellant that they had met the engineering requirements for connection to the Respondent's trunk line. (R. p. 290, l. 19-24). The basin containing the Appellant's project is under the plan administered by the ACOG which is shown as a service area of Re-Wa. (R. p. 418). Appellant therefore knew service was available under the existing regulations as long as it met the normal engineering criteria. There was no evidence shown why the Appellant would have reason to believe that the plans would be denied.

2. The hearing officer erred in finding that population densities in the basin, to which the Appellant was to connect with, did not yet justify studying how to sewer the area for basin-wide planning purposes. (R. p. 32). The record simply fails to support this factual finding. The record shows basin wide studies by Roger and Callcott (R. p. 713, 1. 2-7), as well as the pump station

study (R. p. 467, 1. 19-25). Moreover, at the Appalachian Council of Government (ACOG) hearing there was a 20 year plan for the basin presented in which the Harrison Property was shown to be inside the present service area. (R. p. 362-363). The In-Site Group also prepared a basin study for Metro with Joe Thompson. (R. p. 257). There were no less than four studies of the area relevant to the Appellant's plan. (R. p. 394-395). Had Appellant been outside the service area it would have had other remedies through ACOG, but Re-Wa argued that the Appellant had to come through them.

3. The hearing officer erred in finding that "While [Appellant's] land would be annexed into the Metropolitan Sewer Sub-District's ("Metro") service area; Metro declined to own and maintain the force main and pump station. (R. p. 32). The record shows that land was made part of the Metropolitan Sewer District and the issue of Metro ever owning or maintaining the force main and pump station arose only *after* the Appellant executed a contract with Condor on April 23, 2007 to provide the force main and pump station services. The Respondent "held-up" Appellant's application for two and one-half years then applied the new May 8, 2008 policy requiring sole ownership of the collection system and the force main and pump station retroactively to the Appellant before Metro considered owning and maintaining the force main and pump station. Even under the terms of the new regulations the Appellant should qualify for service as the Appellant's project was entirely inside the Respondent's Metropolitan service district and the policy affected only projects outside the districts. (R. p. 753; p. 761; p. 520, l. 18-p. 521, l. 13).

4. The hearing officer erred in finding that the companion development (Windsor Aughtry - Riversway) "meant compounding the difficulties: two sets of engineers, two sets of plans, twice

the routing problems, twice as many engineering issues, different sets of right of ways, twice the likelihood of delays and negotiating two sets of agreements between the public and private parties participating in the sewer service. The record shows no evidence that the existence of separate projects compounded the difficulties relative to the approval of Appellants' project. Each time engineering issues were raised they were answered by the owner's engineering consultants and it was found they were generally compliant with all requests. The testimony was clear that the delays in the project were from Appellant being "held-up" by the Respondent under the old regulations and subsequently its retroactive application of the new regulations. Despite the Respondent's proposal of numerous routes to connect to their system both projects had hired the necessary consultants and met all of the engineering requirements of both Re-Wa and Metro. (R. p. 687, l. 2-24; p. 692, l. 4-13; p. 690, l. 17-23). The record therefore fails to support the hearing officer's factual findings in this regard.

5. The hearing officer erred in finding that: "The peculiarities of the project led to [Appellant] pursuing various routes and options over a several year period. The evidence in the record reflected three primary routes: one referred to as the 'Flag Lot Route'; a second called the 'Bishop proposal'; and a third dubbed as the 'River Route'." The record shows that the Respondent proposed three of the four routes discussed during the course of the project. It further shows that the Appellant didn't "pursue" various routes and options over a several year period, but rather was forced to consider other routes and options only as a delay tactic. The Respondent intentionally "held up" its application, despite the fact that the Appellant qualified under the regulations in existence during that time. Any peculiarities of the Appellant's project were the result of Re-Wa's intentional hold on the plans before the new regulations went into effect and

its retroactive application after they went into effect. (R. p. 672, l. 17-22). The various plans were the result of Re-Wa's direct act of delay tactics to force a hold on the Applicant's application, and indirectly by causing the Appellant to be turned away by Metro due to the new policy. The hearing officer's findings as to the underlying cause which necessitated the Appellant's attempts under various plans are therefore in error.

II. THE COURT ERRED IN FINDING APPELLANT CAUSED DELAYS IN THE PROJECT AND THAT APPELLANT NEVER COMPLETED ITS APPLICATION FOR A FLOW ACCEPTANCE PERMIT.

The record shows that the Respondent, through its director Orvin, placed a "hold" on the approval of all PSC connections as early as August 2007. Orvin admitted intentionally causing at least a nine month delay by putting the "hold" on the Appellant's processing until after the regulation was amended in May of 2008. Without any notice, the Appellant was placed on a secret "hold" during a period of time that its project qualified under the existing regulations. The secret "hold" order by the executive director stopped the review of all engineering plans and the application process for the Appellant and others substantially invested in the permitting process. Unaware of the secret hold, the Appellant could not know what additional things it could do to complete within what was claimed to be a "window of opportunity" under the then existing regulations.

While the hearing officer found that the Appellant had not completed its application, the record shows that in light of the secret hold, there was nothing Appellant could have done that would have achieved any different results. Re-Wa accepted payment for a plan review and permit yet never reviewed the plan. None of the other projects that submitted plans were reviewed. Some of these projects represented no technical challenge but also had an "incomplete

submittal" because without a review they could never get a flow acceptance letter from Re-Wa which meant they were all "incomplete".

In light of the impossibility of having an application accepted under any circumstances, there is no basis for the hearing officer to conclude that there was anything further that the Appellant needed to do to further the application process. It would not be possible to process other aspects of the project since the final approval of the connection to the Respondent was the only issue left to be completed and that processing was placed on indefinite hold. Re-Wa killed seven projects, including the Appellant's by stopping them from being able to connect to the sewer.

Subsequent to the secret hold on permitting as early as November of 2007, the Respondent didn't offer any alternative proposal until early 2009, which ultimately was never accepted by any of the parties. As a result, the plans for the Appellant, Grant Estates, or any other of the projects caught in the trap of the secret hold and retroactive application of the new regulations were ever reviewed or approved. (R. p. 722, 1. 2-7).

The record shows that Re-Wa, through Bishop, notified Scott Bolo of the requirement for sewer service in his March 16, 2006 capacity letter. Whether all of the requirements were ever met by the Appellant is irrelevant since the only obstacle that the Appellant could not overcome was the Respondent's secret "hold" and retroactive and improper application of the new regulations. Because Metro had agreed to handle the collection line for the subdivision the Appellant would have ultimately been permitted but for ReWa shelving the application and freezing the whole permitting process.

The hearing officers' reliance on e-mails between February and March of 2007 for the

proposition that the Appellant failed to comply with requirements is misplaced. These e-mails show that from March of 2006 the Respondent requested no additional information and only responded to Appellant's inquires in February of 2007. (R. p. 794; p. 794; p. 795). Furthermore, the evidence showed that the July 3, 2007 e-mail of Ashley Hornung was never responded to by Respondent. (R. p. 808).

The hearing officer's decision rests on an implicit finding that a survey had been requested for sixteen months, when in fact a "survey map" was requested only in February of 2007. (R.Ex.14, p.806). The decision of the hearing officer states that by e-mail of March 21, 2007 Bolo acknowledged Appellants failure to comply with requirements. (R. p. 800). To the contrary, that e-mail states the following:

> "Thanks for your correspondence. Appreciate your taking the time to look over the plans. The Metro comments were integrated into the engineering drawings you are reviewing. So as far as comments from Metro and design we have been through this process. Hopefully the Metro review has the drawings where they are ready for your comments and corrections. We are collecting the DOT encroachment permit and finalizing the WCRSA easement forms forwarded. These last two items should be complete soon. It has been a long process and we appreciate your help in working out the details. Please do not hesitate to contact me if you need anything else from us in the interim."

(R. p. 800).

The hearing officer also appears to place weight on the January 8, 2008 e-mail from Hornung. This e-mail however was sent during the "hold" period imposed by Respondent and was in response to negotiations. (R. p. 807). The hearing officer also placed weight on the April 14, 2008 letter of Mr. Fogleman concerning Riversway Subdivision, which was also during the "hold". This letter actually confirms that Respondent was already requiring sole ownership of gravity line, pump stations and force mains even before the regulation was passed in May of

2008. (R. p. 811). What the hearing officer overlooked is the virtual lack of any responsiveness to Appellants requests as shown by the record. (R. p. 794-811). At least by November of 2007 Re-Wa wasn't giving Appellant any comments on Appellant's plan as it clearly had no intention to review the plans at that point. Any communications by Re-Wa past that point can only be construed as intentionally misleading.

Contrary to the hearing officer's findings, the Respondent submitted at least three different routes to connect to Re-Wa property, each of which required a survey. Although the Committee directed Respondent to negotiate with the Appellant in November of 2007 the Respondent waited a year before doing so. The Respondents own witness Dr. Graef, when asked about when the river route was even offered as an alternative by Respondent said "Eventually" (R. p. 709, 1. 20-22). Their own staff testified the passing of the regulation "shut some doors for - a door for the developer." (R. p. 711, 1. 16-20). Likewise, there is no evidence whatsoever that any document or submission that the Respondent requested to finish their approval of connection under the existing regulations before the August 2007, "hold" was not submitted to them. Even assuming arguendo that the Respondent had requested additional documents, submitting them would not have changed the outcome since the Respondent had shelved the application with no intention of processing it. The hearing officer's reliance on anything requested of the Appellant as a requirement for the application process is in error when the record is clear that the Respondent had no intention of processing the application during the window of opportunity prior to the change in regulations. This is clear in that none of the other projects "in the pipeline" were reviewed.

III. THE COURT ERRED IN FINDING THAT THE APPELLANT HAD NO VESTED RIGHT IN RECEIVING SEWER SERVICE ON THE SUBJECT PROJECT.

The hearing officer's decision is based on a finding that "[Appellant] has offered no evidence to contest the validity of the amended Sewer Use Regulation." The issue does not however turn on the validity of the new regulations. The issue turns on whether the Respondent intentionally stalled the Appellant's application process to prevent the Appellant's application from being considered under existing regulations that allowed the use of Appellant's planned use of pumping stations.

In ruling that the Appellant had no vested rights in the permitting process, the hearing officer erroneously relied on the holding in Friarsgate vs. Town of Irmo, 290 SC 266, 349 SE2d 891 (Ct. App. 1986). During the hearing even Respondent admitted that Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (S.C.App. 2000) was controlling in this case. (R. p. 150, l. 21-p. 151, l. 2). In addition to the record not supporting his findings, the hearing officer's decision is based on an error of law.

The record shows that The Appellant had completed the application process sufficiently to have a vested right in a permit. Rights vested when the Appellant sufficiently met the requirements to be granted a permit. The only document shown to be missing from a complete package for any of the projects that submitted plans to Re-Wa was the flow acceptance letter which can only be provided by Re-Wa itself. Beginning in February of 2006, the Appellant worked diligently in completing detailed engineering designs which were submitted to Metropolitan Sewer District. (R. p. 226). Over the course of three years the Appellant continued to comply with changes in the plans as proposed by ReWa, including completing work for Re-

Wa to survey the site and study their basin. (R. p. 227). In September of 2007, the Appellant had surveyed two routes suggested by ReWa. (R. 225-226). By January of 2008, the Appellant completed all of the engineering work on the River Route. (R. 222-224; 767). In other words, any and all requirements to complete the process which were within the Appellant's control were completed. The survey work was completed. The engineering data was provided to ReWa and The Appellant paid for the review in anticipation of receiving service. (R. p. 224).

In similar situations where regulations have changed during the permit application process, courts have looked to see what efforts the applicant has expended in determining whether rights have vested. The courts have rejected the theory that no rights can vest until a permit is issued. Instead courts have focused efforts of applicant up to the change in regulations. In particular, courts have examined the financial commitment made up to that point by the applicant. The investment of funds or lack thereof, has been held as a controlling factor in the vesting of rights prior to a change in use regulations. *See* City Ice Delivery Co. v. Zoning Board of Adjustment of Charleston, 262 S.C. 161, 203 S.E.2d 381 (1974). In City Ice the Court held that where there had been no expenditure of funds by the applicant towards the non-conforming use, there was no vesting of rights to the permit before the change in the zoning law. Here, the record clearly shows that the Appellant had invested over a million dollars in the property alone. It then had to hire experts, obtain numerous surveys and reports, and meet the repeated demands of the Respondent in its attempts to obtain a permit. Under City Ice, the Appellant's substantial financial investment makes clear that its rights vested, especially during a time that it could have been legally permitted but for the secret hold on its application by the Respondent.

Leading up to January of 2008 when it first publicized its intent to consider a new policy

concerning pumping stations, ReWa never revealed that it had no intention of permitting any plan involving a pumping station. (R. p. 227). It was not until after December of 2007, months after the Appellant submitted completed plans, application and a check, that ReWa told the Appellant that it was not going to review its plans because they intended to change policy at some point in the future. (R. p. 558-559). In determining whether rights have vested prior to a change in regulations, courts have considered the reasonableness of the applicant's actions in light of any disclosures by the permitting entity. Where a permitting entity made timely disclosures of anticipated changes in the rules, the court held that rights could not vest where an applicant failed to act timely in light of notice of the pending change in the regulations. *See* Whitfield v. Seabrook, 259 S.C. 66, 190 S.E.2d 743 (1972). Here, the Respondent gave no notice of the potential change in the regulations and intentionally made up excuse after excuse to delay the application and then shelved the Appellant's application to allow time to run out and the rules change before it considered the application. Under Whitfield, Appellant's actions were consistent with the information it was provided by the Respondent. Appellant's rights in the permit therefore vested.

The right to utilize one's property to conduct a lawful business becomes entitled to constitutional protection against otherwise valid legislative restrictions as to locality by city's zoning ordinance, or becomes 'vested' within the full meaning of that term, when, prior to enactment of such restrictions, owner has in good faith substantially entered on performance of a series of acts necessary to accomplishment of end intended. *See* Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 493-94, 536 S.E.2d 892, 899 (Ct.App.2000). Both City Ice and Whitfield are discussed in Vulcan. All of which support the

Appellant's claim that its right to a permit fully vested prior to the Respondent changing its Sewer Use Regulations as to pumping stations.

In addition to having vested prior to the change in regulations, the Appellant is further entitled to a permit based on the additional efforts it made in reliance on the Respondent's representations subsequent to learning of the proposed changes in regulations. Even after the implementation of the new policy, ReWa told the Appellant "that they would work it out, that it would be okay." (R. p. 228, l. 18-19). At the ReWa Board Meeting Appellant was told that ReWa would "work it out" and leading Appellant to believe that its project would be "grandfathered in". (R. p. 174, l. 2-11).

ReWa repeatedly represented that they would allow the Appellant access to their system. As a result, the Appellant continued to spent time and money on pursuing different routes proposed by ReWa to the benefit of Re-Wa. Only after years of this did Re-Wa finally say that they would not grant an easement to allow Appellant access over its property to connect to the main. Up until that time ReWa, repeatedly represented that it would work out a plan with the Appellant. As early as August of 2007 the Appellant, unaware of the Respondent's secret agenda, was trying in good faith to work out easements with ReWa. (R. p. 316). ReWa, however, would never allow Appellant to finalize the easements. (R. p. 316). As the record shows, ReWa intentionally made it impossible for Appellant to obtain the necessary easements. (R. p. 316). At that point, the Appellant had finalized plans and was 100% design complete, and only needing easements to be approved for the permit under the existing regulations. (R. p. 324-327). ReWa led the Appellant to believe that it would grant easements across its property. (R. p. 378). As a result, the Respondent's argument that its refusal to grant an easement controls the issue of

vesting is flawed.

Had the Respondent timely disclosed its intention to deny an easement, the Appellant could have adjusted to a plan that did not require crossing ReWa property. The Respondent, chose not to disclose its ultimate intentions to the Appellant. It should not benefit afterwards as a result of the Appellant's good faith reliance based on what it was led to believe.

In applying the law, the hearing officer misinterpreted the holding of Friarsgate. In Friarsgate, the court looked to whether building five units on property vested the right to be permitted for additional buildings. Friarsgate turned on a finding that the applicant could have obtained building permits for all fourteen buildings in the project prior to enactment of the zoning ordinance but chose not to because the decision to build the entire project was contingent on the financial success of the first five units. If market response to the first units was poor, the project would not be completed. Thus, at the time the zoning ordinance was enacted, Friarsgate had no firm commitment to build the project. In contrast to Friarsgate, the Appellant had fully committed to the project for which it had spent well over a million dollars. The record shows that the Appellant had, in good faith, (1) made a substantial change of position in relation to the land, (2) made substantial expenditures, and (3) incurred substantial obligations. *cf.*, Friarsgate, at 269. In light of the Respondent's intentional denial of the permitting process until the law changed, the hearing officer's reliance on the Friarsgate for the proposition the Appellant couldn't vest unless and until a permit was issued constitutes an error of law.

The hearing officer's concluded that [the Appellant] "failed to complete and submit the required documents to obtain a Flow Acceptance Permit before May 5, 2008. Without a complete application and finalized plan, Respondent's Commission had nothing before it to

confer grandfathered status and [Appellant] had no vested rights." This conclusion is in direct conflict with the Supreme Court's reasoning in Vulcan:

> A landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare." F.B.R. at 527, 402 S.E.2d at 191. Vulcan expended nearly $2 million to find granite on the 585 acre Princeton site, arranged for the removal of fifteen acres of overburden to expose the granite for extraction, and was merely awaiting a mine operating permit from DHEC when the restrictive zoning stopped the development. "Acts of a landowner in development of his land, in order to require a finding that he has acquired a vested right to continue development as a nonconforming use, should rise beyond mere contemplated use or preparation.... "101A C.J.S. Zoning & Land Planning § 161 at 495 (1979) (emphasis added). Accordingly, Vulcan's pre-zoning development of the site established a nonconforming use. *See also* 101A C.J.S. Zoning and Land Planning § 64 at n. 80 (1979) ("Right to utilize one's property to conduct a lawful business becomes entitled to constitutional protection against otherwise valid legislative restrictions as to locality by city's zoning ordinance, or becomes 'vested' within the full meaning of that term, when, prior to enactment of such restrictions, owner has in good faith substantially entered on performance of a series of acts necessary to accomplishment of end intended....").

Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 493-94, 536 S.E.2d 892, 899 (Ct.App.2000).

The evidence and testimony clearly showed that Respondent was fully aware that Appellant made all of its plans and relied upon its ability to set up its wastewater system using a pump station. Respondent's March 16th e-mail clearly identified and anticipated Appellant's use of a pumping station through Condor and Metro. Respondent was provided early on with a copy of the executed Condor contract and they were aware of the contractual relationship that existed prior to consideration of a new policy on pumping stations. (R. p. 686-687). This was an important component of the Appellant's plan. While Re-Wa proposed to service the plan itself,

the service cost by Re-Wa was so high as to be economically unfeasible. So much so that none of the projects in the pipeline were able to connect by this plan. (R. pp. 94-95; 355; 418; 508-509; 572-573).

Mr. Bolo testified that Appellant had entered into a contract with a builder and also entered into a contract with Condor. At this time, there were several other applications, from other entities for other developments, pending with Respondent. All of the applications were submitted during a time when Respondent's regulations allowed a private provider to operate a pump station, and a sewer sub-district to handle the sewer service to Respondent. Several other developments were in the same situation and none were able to obtain a plan review. R. 89; 118; 134; 164; 42; 144; 145; 166; 188; 141; 142; 311; 318-320.

From the fall of 2006 through the summer of 2007, Appellant, at Respondent's instructions, explored and developed plans for running their sewer line through at least three different possible routes from the subdivision to the Respondent's facility. This was testified to by Scott Bolo and admitted by Respondent employees, including Respondent's executive director, Ray Orvin. This included engineering and surveying work, all done by, and at the expense of, Appellant. Brian Bishop, of Respondent, admitted that all of the changes came from Respondent. First one route would be explored by Appellant, and then Respondent would reject that route and demand that Appellant explore another. This was occurring for months, during which time Appellant was continuing to bear the expense of the development but could not move forward. There was testimony from more than one witness that the process usually only took from three to six months.

Under the new policy, Appellant could not fulfill its contract with Condor to build and

operate the pump station or with Metro to operate the sewer lines. Mr. Orvin, Respondent's executive director, admitted that, in November of 2007, all Respondent employees, including Brian Bishop, were told to "hold up" on all the applications for pump stations which were pending. In January of 2008, the Respondent's consideration of a new policy was first made public. At several public Respondent meetings and hearings, numerous people testified and asked Respondent not to change their policy.

There was testimony from Bolo, on behalf of the Appellant and McCall, of Condor, that many individuals and entities came before Respondent or communicated with Respondent, explaining how the change in policy was unfair and how it would ruin their projects. In addition, there was testimony from Mr. Ernie Willis, the developer of another project that was awaiting approval, that the change in policy was disastrous for his project.

Significantly, it was requested of Respondent that, even if they planned to change their policy, those applications already pending be "grandfathered" in under the old policy and be allowed to build their systems as planned. It was explained that, after so much time had gone by, and so much effort and expense had been put into the pending developments, the change would literally kill the projects and bankrupt the developers. Respondent, however, refused to decide if "grandfather" applied to the pending applicants. Respondents own representative, Mr. Graef, admitted that such a decision was "not 100% fair." Mr. John Boyette, a chairman of the Board for Respondent, admitted that Respondent did not consider "grandfathering" applicants at the time of the change. He also testified that Respondent did not even consider the effect upon those applicants, including Appellant, when making their decision to change. Mr. Boyette also admitted that the change was "unforeseen and unforeseeable" to those applicants. This would

include Appellant.

It wasn't until May of 2008, that the policy change was officially put into effect when the Respondent adopted new regulations. It is important to note that, even though the official change was not enacted by Respondent until May of 2008, as discussed above, it was secretly put into effect in August of 2007, more than nine months before official enactment and perhaps as early as late2006 when Re-Wa changed the route for the first time; effectively stopping the project for months while Re-Wa would identify another route. As discussed above, both Mr. Orvin and Mr. Bishop of Respondent admitted that they were instructed to "hold off" on all pump station applications in 2007. Even more concerning is the fact that the new policy or regulation was applied to projects outside of Re-Wa's service district. Both the Appellant and Grant properties are situated entirely within Re-Wa's service district such that these projects should be exempt from the change in regulations. (R. p. 842; 846; 991; 903-906; 822; 841).

During the secret freeze on the processing of applications the Respondent submitted a proposal to Appellant for the River Trace wastewater system to be run entirely by Respondent. The testimony was unanimous, however, that the costs were much higher than Appellant had planned and budgeted. Even Respondent's employees admitted this. There was testimony that the proposed new costs were at least twice as much or more than Appellant's original expected costs under its plan to use Condor and Metro. Mr. Willis, another developer awaiting approval on a separate subdivision, testified that Respondent's costs were "significantly higher" than those upon which the developers were planning. Under Respondent's proposed cost schedule, the developments were unworkable. Not one of the effected projects was able to go forward due to the unreasonable cost of Re-Wa's plan. Ultimately, due to the inability to proceed, the Appellant

had its property foreclosed upon, causing great financial hardship to the partners. All due directly to the secret freeze on applications intended to allow the regulations to change so projects wouldn't qualify, and the Respondent's subsequent refusal to "grandfather" the Appellant's project.

Mr. Willis summarized the dilemma faced by the Appellant's and others similarly situated:

> "You can go by the rules, but when you got an individual personally changing the rules, there are no rules. So in - sometimes in '08, about eight month after I submitted my plans for review, I received a letter of the policy change of ReWa stating that - you know, that basically it was their sole discretion what to do with pump stations. But this letter I received stat that it was at their - that if a piece of property - if a project was in their service area but outside of one of their subdistricts, then at their sole discretion, that's how this would be handled. But per their request, I was annexed into one of their subdistricts, so this new policy still did not apply to my project and it still did not get reviewed. And till this day, I don't think my project's been reviewed. Has it?'

(R. p. 563, l. 4 - 1.21).

The testimony and evidence was clear that all the "in the pipeline" projects were "vested" in their rights to continue under the regulations existing at the time of their applications. The Appellant didn't fail to adequately proceed with their project along with all six other. All were prevented from proceeding during a window of opportunity when the regulations would have allowed their projects to be properly permitted.

Furthermore, the new regulations did not even state their effective date nor that they would be retroactive. S.C. Code Ann. § 6-11-1230(3) addresses the power of sewer commissions as follows:

> (3) To prescribe and enforce regulations (a) requiring all persons to whom it shall be available to make use of any sewer system which the district shall from time to

> time operate; and (b) generally with respect to the discharge of sewage and the use of privies, septic tanks and any other type of sewage facilities within the district. Any such regulations shall, however, become effective only after they have been adopted by resolution of the commission, a certified copy thereof has been recorded in the office of the register of deeds, or, if none, in the office of the clerk of court of common pleas for each county in which such sewer system lies, a copy posted in the courthouse of each such county, and notice of the adoption of such resolution has been published at least once a week for three successive weeks in a newspaper having general circulation in the district. The published notice shall specify in brief the scope of the regulations and shall state the date on which the same shall become effective.

S.C. Code Ann. § 6-11-1230(3).

In the present case the resolution states no effective date whatsoever and thus can't possibly be retroactively applied. Based upon this statutory requirement it is questionable if those regulations are even effective now. Certainly a clear reading of the regulation implies that since the Appellant was already within Metro's district the new regulation didn't apply to them at all.

Since the Appellant had a vested right to connect to the Respondent's system pursuant to the old regulations, that right was taken in violation of the takings clauses of the United States and South Carolina Constitutions. The policy (imposed as regulation) was improperly enforced and that act prohibited the project(s) from proceeding under the proper regulatory framework which Appellant had vested rights in. In determining whether governmental regulation violates the takings clause, the Court will consider the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998). The Takings Clause provides that private property shall not be taken for public use without just compensation. Rick's Amusement, Inc. v. State, 351 S.C. 352, 357, 570 S.E.2d 155, 157 (2001). Similarly, to prove a denial of substantive due process, a party must show that he was arbitrarily

and capriciously deprived of a cognizable property interest rooted in state law. Worsley Co. v. Town of Mount Pleasant, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000).

Here, the Appellant sought a permit for a plan which included the use of a pumping station, which was lawful at that time. Under the regulations in force at that time, he was entitled to a permit. But for the Respondent's actions in halting the application process, the Applicant would have obtained the permit. To now deny the permit deprives the Appellant of the intended legal use of his land and thus depriving him of a constitutionally protected right.

Certainly, Appellants entitlement to connect their development under the old regulations is undisputed. Obviously anyone within the service area that qualifies under the new regulations would be entitled to a connection. There would be no reason to "hold" the Appellant's application if they weren't entitled to connect under the old regulation. Although the Respondent raises multiple issues about "routes" and crossing of treatment plant property the Respondent cannot point to one statute, rule or regulation that would disqualify a particular route or prohibit the customary joint use of rights of way that are enjoyed by a multitude of private as well as public utilities such as phone, cable, electric, water, sewer, gas and cellular companies.

Therefore, the hearing officer erred in not finding that the Appellant had a vested property right that was taken in violation of its rights under United States and South Carolina Constitutions, and that the retroactive application of the new regulations to Appellant were unlawful and did not appear to apply at the time of enactment or even today.

IV. THE HEARING OFFICER ERRED IN FAILING TO RULE ON THE ISSUE OF THE CONTRACT CLAUSE OF THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS.

As pointed out many times in the testimony there existed two contracts with the Appellant

and third parties prior to the enactment of the new regulation. The testimony was clear that this enactment impaired those contracts.

Both the South Carolina Constitution and the United States Constitution bar states and their municipalities and quasi-municipal corporations from passing laws that impair the obligations of contracts. Section 4 of Article 1 of the South Carolina Constitution states: "No ... law impairing the obligation of contracts ... shall be passed...." In interpreting the Contract Clause of the South Carolina Constitution, the South Carolina Supreme Court has followed federal precedent construing the federal Contract Clause. G-H Ins. Agency v. Continental Ins. Co., 278 S.C. 241, 246, 294 S.E.2d 336, 339 (1982) ("The mandate of the state and federal constitutions relating to impairment of contracts is basically the same."). Alston v. City of Camden, 322 S.C. 38, 471 S.E.2d 174 (S.C. 1996).

Article 1, section 10 of the United States Constitution provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters or Marque and Reprisal; coin Money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto law, or *Law impairing the Obligation of Contracts*, or grant any Title of Nobility.

U.S. Const. art. I, § 10, cl. 1 (emphasis added). See also S.C. Const. art. I, § 4.

Appellant argued at the hearing that the enactment of the new regulations impaired its contract with Condor and Eastwood, thus violating the Contract Clause of the United States Constitution and South Carolina Constitution. To establish a contract clause violation, Appellant must show To establish a contract clause violation, Appellant must show: (1) the existence of a contract; (2) the law changed actually impaired the contract and the impairment was substantial; and (3) the law was not reasonable and necessary to carry out a legitimate government purpose.

Hodges v. Rainey, 341 S.C. 79, 93, 533 S.E.2d 578, 585 (2000). *See also generally* U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (in considering contract clause claim, court must ascertain, among others, whether the State law has in fact operated as a substantial impairment of a contractual relationship); Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (same); Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304, 43 S.Ct. 354, 67 L.Ed. 664 (1923) ("The compensation to which the owner is entitled is the full and perfect equivalent of the property taken."); South Carolina Dep't of Transp. v. Faulkenberry, 337 S.C. 140, 522 S.E.2d 822 (Ct.App.1999).

A law is viewed as substantially impairing a contract, for Contract Clause analysis, where it alters the reasonable expectations of the contracting parties. Hodges, 341 S.C. at 94, 533 S.E.2d at 585-86.

There was no factual dispute that Appellant had two valid contracts. There was no factual dispute the law, or as in this case the new policy actually impaired both contracts and completely abrogated the Condor contract. Therefore, the only issue remaining would be the reasonableness and necessity of the new regulation applying to the Appellant.

Again, by its own language the new regulation may not apply to the Appellant since there is no effective date nor does it state that it applies to existing applications. Moreover, the policy clearly did not apply to the applicants within a sewer service district (Appellant was within the Metropolitan District). The only justification to apply this new regulation to the Appellant is to avoid "holding the bag" for the Appellant when the Respondent is allegedly holding the bag for twelve pump stations none of which have failed. Additionally, Condor's principal, Mr. McCall, testified that the reserves for the Appellant were sufficient to provide redundancy and a safe

operating margin.

The only justification that one can believe about the regulation was McCall's testimony that the Respondent simply wanted the money. That is not justification for the reasonableness and necessity of a new regulation. The other arguments raised at the hearing are theoretical scenarios that are not based in any fact other than some man running his own sewer collection and treatment facility unconnected to the Respondent on some mountain called the "Altamont" case. The relevancy of the Altamont case is obscure at best since it involved the Respondent agreeing to be a trustee over a defunct private residential sewer system for the EPA and DHEC when they weren't legally obligated to do so. (R. p. 477, l. 3-7). There are dozens of these systems in operation by Condor and other utilities companies within Re-Wa service area. Condor has a good operational record with Re-Wa and had been a preferred vendor of Re-Wa prior to this change of policy that attacked Condor and other private utilities.

For a law to survive scrutiny under the Contract Clause when the law substantially impairs a contract, it must be "reasonable and necessary to accomplish a legitimate public purpose." Citizens for Lee County v. Lee County, 308 S.C. 23, 30, 416 S.E.2d 641; *accord* Baltimore Teachers Union, 6 F.3d at 1018. When a governmental agency acts to impair a purely private contract, "courts properly defer to legislative judgments as to the necessity and reasonableness of a particular measure." United States Trust Co. v. New Jersey, 431 U.S. 1, 17, 97 S.Ct. 1505, 1515, 52 L.Ed.2d 92, 106 (1977). However, when the agency impairs a contract to which it is a party, less deference is due the legislative judgment Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727, 736 (1978). Since this new regulation affected a transaction that the Respondent was going to be a party to when finalized less deference should be

given to their judgment. Therefore, the Court should pay little deference to any legislative judgments of necessity and reasonableness in this case, because the Respondent's self-interest is implicated, even though the contract at issue is purely a private contract.

The United States Supreme Court has said that heightened scrutiny is appropriate when a governmental agency's self-interest is at stake. United States Trust Company, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92. Traditional analysis of reasonableness and necessity focuses on such issues as (1) whether an emergency exists justifying the impairment; (2) whether the law was enacted to protect a basic societal interest, rather than a favored group; (3) whether the law is narrowly tailored to the emergency at hand; (4) whether the imposed conditions are reasonable; and (5) whether the law is limited to the duration of the emergency. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727, 736 (1978); G-H Ins. Agency, 278 S.C. 241, 294 S.E.2d 336. Of course, there need not be an emergency situation before a state may pass a law impairing a private contract. *See* Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727.

There is no indication in the record that an emergency situation existed, so factors (1), (3), and (5), listed above, do not apply. Furthermore factors (2) and (4) have not been satisfied. Likewise nothing about this new regulation affects the public health or environment since it was a purely economic interest in not "holding the bag" for a defunct PSC. Furthermore, this alleged problem with PSC connections, is one created by Respondents own regulations. Therefore, the trial officer clearly erred in failing to rule on the contract clause claims and finding there is no constitutional infirmity relative to this regulation. It clearly violated the Contract Clause of our Constitutions.

IV. THE CIRCUIT COURT ERRED IN FINDING ADDITIONAL SUSTAINING GROUNDS.

The circuit court upheld the decision of the hearing officer based on five arguments included in the Respondent's circuit court brief.

1. The circuit court erred in holding that Appellant failed to follow the adjudicatory process and procedure required by Re-Wa's Sewer Use Regulation.

Procedurally, the Respondent's argument on this issue is not an additional sustaining ground. The issue of whether Appellant followed the proper adjudicatory process in initiating the case before the hearing officer was ruled on by the hearing officer in Appellant's favor. The hearing officer specifically ruled that the Appellant had sufficiently complied with Re-Wa's Sewer Use Regulations to place the case before the hearing officer. The Respondent did not appeal the hearing officer's ruling on Appellant's compliance with the applicable regulations. It therefore became the law of the case. The circuit court therefore erred in ruling on an issue which was not properly before it.

Factually, the Respondent has argued that the Appellant failed to initiate the adjudicatory process in compliance with ReWa's Sewer Use Regulations. In this case, the Appellant initiated its action by the filing of a complaint in the circuit court. The case was dismissed without prejudice by the circuit court for failure to exhaust administrative remedies and then presented to the hearing officer who adjudicated the case based on the allegations raised in the original complaint. Respondent raised the issue before the hearing officer as to whether the case could proceed procedurally under the original complaint from the circuit court. The hearing officer adjudicated the issue of whether or not the circuit court complaint was sufficient to initiate and

carry the action before the hearing officer within the requirements of the Respondent's regulations. Specifically, the hearing officer addressed the issue of the Appellant's compliance with Paragraph 9 of Re-Wa's Sewer Use Regulations. In his decision the hearing officer found that Appellant's "position was fully set forth in the complaint filed in the Court of Common Pleas. The essential requirements of Paragraph Nine (9) were met and the lack of strict compliance did not interfere with Re-Wa's ability to defend the case aggressively and thoroughly." (R. p. 35). The hearing officer therefore ruled that the Appellant's claims were properly before him. The Respondent did not appeal from this finding. An unchallenged ruling, right or wrong, becomes the law of the case. *See* Carolina Chloride, Inc. v. Richland County, 394 S.C. at 172, 714 S.E.2d at 878. As a result, the circuit court erred in finding that the Appellant's claims were not properly before the hearing officer as an additional sustaining ground.

2. The circuit court erred in holding that Appellant could never have a vested interest in the project plans because Respondent never granted an easement and that Appellant had no other options available to it.

As an additional sustaining ground the circuit court held: "Only Re-Wa's Commission could grant to Appellant an interest in land owned by ReWa. Until such time, Appellant could never obtain a vested interest in project plans. Yet, Re-Wa's Commission never granted such interest and Appellant conceded it had to have an easement across Re-Wa's land, "no matter which way [it] went." (R. p. 14).

Appellant incorporates herein all of the forgoing arguments relating to vesting. As set forth above, Appellant had completed the application process sufficiently to have a vested right in a permit. Rights vested when the Appellant sufficiently met the requirements to be granted a permit. Beginning in February of 2006 Appellant worked diligently in completing detailed

engineering designs which were submitted to Metropolitan Sewer District. (R. p. 226). Over the course of years Appellant continued to react to changes proposed in the plans as suggested by the Respondent. (R. p. 227). In September of 2007 the Appellant had surveyed at least two routes suggested by the Respondent. (R. p. 225-226; 770). By January of 2008 the Appellant had completed all of the engineering work on the River Route. (R. p. 222-224; 767). The survey work was completed. The engineering data was provided to ReWa and the Appellant paid for the review in anticipation of receiving service. (R. p. 224). During all of this time, and up until the new policy was put into effect, ReWa never revealed that they were not going to allow Appellant's original plan to let Condor handle the pumping station. (R. p. 227). It was not until after Appellant had submitted completed plans, application and a check to ReWa that it was told by ReWa that the plans were not going to be reviewed because ReWa intended to change policy pertaining to pumping stations. (R. p. 558-559).

Even after the implementation of the new policy, ReWa represented "that they would work it out, that it would be okay." (R. p. 228, l. 18-19). Even at the ReWa Board Meeting Appellant was told that ReWa would "work it out" and led Appellant to believe that the Appellant would be "grandfathered in". (R. p. 174, l. 2-11). Moreover, Appellant believes that the policy never applied to them due to the fact that they were located within the service district.

Additionally, the Appellant never conceded that it had to have an easement "no matter which way [it] went." Respondent's argument in the circuit court, apparently adopted by the circuit court as a basis for the additional sustaining ground, was taken out of context. The record shows that the Appellant had at least one plan which did not require an easement and to which ReWa initially responded favorably. (R. p. 326). As a result of Re-Wa's favorable response, the

Appellant spent considerable time and money working on developing this plan which was later rejected due to the passage of the new regulation. As a result, the circuit court erred in finding that ReWa did not delay the project or that the Appellant failed to sufficiently complete the application process. This factual contention is bolstered by the fact that none of the other projects "in the pipeline" awaiting permits were able to obtain a review or any feedback on their application despite complete engineering submittals.

3. The circuit court erred in holding that by operation of South Carolina's Statute of Frauds; Appellant had no right to cross Re-Wa's property absent a written conveyance, which it never obtained.

Appellant incorporates all of its foregoing arguments here. While it is uncontested that ReWa never executed an easement, an easement was not essential to connection as the record shows at least one plan that was considered that would have allowed connection to the system that did not require access to Re-Wa property. Had the Respondent timely informed Appellant of its intention not to grant an easement, the Appellant would have been able to pursue alternative plans not requiring access to the Respondent's property. As a result, the circuit court's reliance on the whim of the Respondent in granting or denying an easement to the Appellant is irrelevant under the facts of the case.

As more fully argued above the Appellant had at least one non-easement plan and certainly could have pursued others had the Respondent not repeatedly represented that they would allow access to the Appellant. Respondent was in the Metropolitan Sewer District and could have required them to connect to their system. The Appellant in turn spent time and money on pursuing different routes proposed by Re-Wa, most of which involved easements, but only because the Respondent led the Appellant to believe that they were viable. Only after years of this

did Re-Wa finally say that they would not grant an easement and allow access over its property to connect to the main. Re-Wa represented repeatedly that it would work out a plan with The Appellant. The Appellant reached the point by August of 2007 where it was trying in good faith to work out easements with ReWa. (R. p. 316). Re-Wa however, would never allow The Appellant to finish the easements. (R. p. 316). Re-Wa intentionally made it impossible for The Appellant to finish the easements. (R. p. 316). The Appellant finalized plans and was 100% design complete with only easements left which Re-Wa continued to deny. (R. p. 324-327). Re-Wa led The Appellant to believe that it would grant easements across its property. (R. p. 378).

As more fully set forth above the Appellant had a vested right in the intended use of its land, and the permit necessary for such use. The record shows at least one plan was contemplated which did not require a grant of an easement by the Respondent. Additionally, had the Respondent timely notified the Appellant that it had no intentions of granting an easement, the Appellant could have pursued other plans prior to the change in regulations relating to pumping stations. The circuit court therefore erred in basing an additional sustaining ground on the premise that the Appellant could never connect without an easement from the Respondent.

4. The doctrine of equitable estoppel has no application under the instant facts. *See* Berkley Elec. Coop, Inc. v. Town of Mount Pleasant, 308 S.C. 205, 209-11, 417 S.E.2d 579, 582-83 (1992).

The case relied upon by the circuit court does not apply under the facts of this case. Berkley turned on a finding that estoppel may not be based upon an illegal act. In Berkley the Town of Mount Pleasant's granting of a franchise was in contravention of the law. Because the franchise was illegally granted, and the franchisee charged with knowledge of the law, the franchisee was not allowed to claim equitable estoppel. *See* Byars v. Cherokee County, 237 S.C.

548, 118 S.E.2d 324 (1961). Here the equitable estoppel claim arises from the actions of Re-Wa in repeatedly representing the acceptability of various routes which included access to or through Re-Wa property. The Appellant then expended considerable time, effort, and expense in attempts to pursue the suggested routes rather than alternative routes such as those not requiring an easement from the Respondent. Despite meeting the requirements for various routes, Re-Wa repeatedly denied, delayed and ultimately just shelved any consideration of The Appellant's project.

The essential elements of equitable estoppel are (1) lack, on the part of the one claiming estoppel, of the knowledge and means of knowledge of the truth as to the facts and circumstances upon which his claim of estoppel is predicated: in this case, at some point within the window of regulatory opportunity, Re-Wa decided it would not grant Appellant a permit and intentionally delayed The Appellant until it implemented a policy change. (2) conduct, representations, or silence of the party estopped, amounting to misrepresentation or concealment of facts: Throughout years of The Appellant diligently attempting to meet Re-Wa's ever changing demands, Re-Wa never gave any indication of its intent to ultimately change its policy and deny The Appellant a permit. (3) reliance upon such conduct, representations, or silence: Despite the constant changes demanded of Re-Wa, The Appellant continued to expend time and money attempting to meet a plan it perceived to be to Re-Wa's liking; and (4) resulting action, to its detriment, by the party claiming the estoppel: The end result being that Re-Wa delayed The Appellant until Re-Wa changed its policy resulting in the ultimate failure of The Appellant's project. *See* Lewis v. City of North Myrtle Beach, 297 S.C. 170, 375 S.E.2d 327 (Ct.App. 1988).

5. The pending ordinance doctrine did not apply.

Here the pending ordinance doctrine only applies to action occurring after an ordinance is considered "legally pending." *See* Sherman v. Reavis, 273 S.C. 542, 257 S.E.2d 735 (1979). An ordinance is considered legally pending "when the governing body has resolved to consider a particular legislative scheme and has advertised to the public its intention to conduct public hearings on the matter. *See* Sherman. ReWa did not conduct public hearings on the proposed changes in its Sewer Use Regulations cited as a basis for the ultimate denial of The Appellant's application until January and April of 2008. The pending ordinance doctrine could therefore not apply to any acts complained of occurring prior to January of 2008.

The record in this case shows that the acts complained of occurred prior to January 2008. The record shows that ReWa placed a secret "staff hold" on permits involving pumping stations at least as early as November 2007. At that time the Appellant believed it had submitted everything requested of it by the Respondent. At that time however, Re-Wa chose not disclose to The Appellant Re-Wa's intent to hold permits until the regulations changed. Instead, it allowed The Appellant to believe it was still considering the Appellant's application. The Respondent's actions were dilatory at best, more accurately, outright deceptive. Re-Wa's dilatory behavior continued through to January of 2008 when the ordinance in question became "legally pending". Since the dilatory actions of ReWa proceeded January of 2008, the pending doctrine ordinance cannot be applied in defense of Re-Wa's actions. Moreover, since the new policy never applied to the Appellant (due to the Appellant being within the service district) the pending doctrine ordinance does not apply to this very day.

CONCLUSION

Based on the foregoing the decision of the circuit court and hearing officer should be reversed.

Respectfully submitted,

Robert C. Childs, III
2100 Poinsett Hwy., Suite D
Greenville, SC 29609
(864) 242-9997

J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292

Attorneys for the Appellant

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