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 Case No. 2013-000329

Harrison Partners, LLC, ... Appellant,

v.

Renewable Water Resources, ... Respondent.

RESPONDENT'S MOTION TO DISMISS

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Pursuant to Rule 224 of the South Carolina Appellate Court Rules, Respondent Renewable Water Resources ("ReWa") moves the Court for an Order dismissing the appeal of Harrison Partners, LLC ("HP"). HP can only appeal the lower court's November 16, 2012 Order ("Subject Order") on grounds, which even if reversed, would not change the lawsuit's outcome. Accordingly, ReWa moves the Court of Appeals for a dismissal of HP's appeal so as to avoid the needless expenditure of resources by both the Court and the parties.

A. HP NEVER CONTESTED FIVE (5) ALTERNATIVE GROUNDS IN THE SUBJECT ORDER, INCLUDING IN ITS MOTION TO RECONSIDER.

HP appealed the Subject Order, in which, the Circuit Court sat in an appellate capacity to consider and affirm an administrative order issued by a ReWa hearing officer. ReWa has attached the Subject Order hereto as **Exhibit A**. The lower court's order contained several alternative grounds ("Alternative Grounds"), which HP never challenged and cannot now challenge, for the first time on appeal. The Alternative Grounds included:

1. HP failed to follow the adjudicatory process and procedure required by ReWa's Sewer Use Regulation. (*Id.* at 14.)

2. Only ReWa'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, ReWa's Commission never granted such interest and Appellant conceded it had to have an easement across ReWa's land, "no matter which way [it] went." (*Id.*)

3. By operation of South Carolina's Statute of Frauds, Appellant had no right to cross ReWa's property absent a written conveyance, which it never obtained. (*Id.*)

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

5. Even if Appellant's arguments were otherwise correct, the pending ordinance doctrine would defeat Appellant's allegations. (*Id.*)

When it included such grounds, the lower court simultaneously found HP never provided the Circuit Court judge with any meaningful response to the same:

> While Respondent [ReWa] raised all such issues in its brief opposing Appellant [HP]'s grounds for appeal, Appellant provided no meaningful response to the same. Accordingly, the Court adopts such grounds as additional sustaining grounds in further support of its affirming the Hearing Officer's decision.

(*Id.*) HP likewise never challenged the Alternative Grounds after the lower court issued the Subject Order.

HP filed a motion to reconsider the Subject Order on December 7, 2012. ReWa has attached a copy of HP's motion to reconsider as **Exhibit B**. None of the grounds in HP's motion challenged (or even referenced) any of the Alternative Grounds in the Subject Order. Thus, before the lower court issued the Subject Order, HP never argued against the Alternative Grounds *and* after the Subject Order was issued, HP still never challenged any of the Alternative Grounds in the Subject Order. While HP ignored the grounds (presumably because no response existed), each of the Alternative Grounds created an independent basis to sustain the Subject Order. HP cannot now challenge the grounds for the first time on appeal.

B. UNLESS RAISED IN THE LOWER COURT, HP CANNOT CHALLENGE THE ALTERNATIVE GROUNDS ON APPEAL.

The Alternative Grounds have now ripened to finality and HP cannot raise them before the Court of Appeals. As noted *supra*, in the Subject Order, the lower court

found HP never meaningfully responded to the Alternative Grounds. (*Id.* at 14.) In light of the same, only two results can obtain, neither of which preserves the Alternative Grounds for appellate review.

HP must either admit or deny failing to respond to the Alternative Grounds. If HP concedes (as it should) that it failed to contest the Alternative Grounds below, then HP cannot now advance new arguments challenging the Sustaining Grounds. Such arguments would necessarily constitute arguments newly minted by HP and raised for the first time on appeal, which South Carolina courts expressly disallow. *See Hill v. S.C. Dep't of Health and Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("[T]o preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court."); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 780–81 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled upon by the lower court."); *Ro-Lo Enters. v. Hicks Enters., Inc.*, 294 S.C. 111, 113, 362 S.E.2d 888, 889 (Ct. App. 1987) ("We cannot grant relief on issues argued for the first time on appeal."); *Biales v. Young,* 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) ("Failure to argue is an abandonment of the issue and precludes consideration on appeal."); *Duck v. Jenkins*, 297 S.C. 136, 139, 375 S.E.2d 178, 179 (Ct. App. 1988) ("An unchallenged finding of fact will not be disturbed . . . on appeal.").

Conversely, if HP now contends (the record notwithstanding) that it somehow contested the Sustaining Grounds, then HP never raised such grounds—as required—in its motion to reconsider. (*See* Ex. B.) To preserve its arguments in opposition, HP

had to raise them in its Rule 59 Motion and secure a ruling about the same by the Circuit Court. *Ransom v. SC Water Res. Comm'n*, 321 S.C. 211, 219, 467 S.E.2d 463, 467 (Ct. App. 1996) (Declining to address an issue not raised in response to Respondent's summary judgment motion, in the order, or in Appellant's Rule 59 motion). Accordingly, in this latter scenario too, the Sustaining Grounds have ripened to finality, since HP never secured a ruling on any basis contesting such grounds. Thus, in either scenario, the Sustaining Grounds found by this Court in affirming the administrative decision have ripened into a final, binding adjudication.

C. RIPENED TO FINALITY, THE ALTERNATIVE GROUNDS SUSTAIN THE SUBJECT ORDER ON APPEAL.

As Appellant cannot challenge the Alternative Grounds from the Subject Order, the lower court's decision should be affirmed by this Court. Where, as here, Appellant failed to raise exceptions to the alternative rulings of the lower court, such unappealed, alternative grounds sustain the lower court's ruling. *See Portman v. Garbade*, 337 S.C. 186, 190, 522 S.E.2d 830, 832 (Ct. App. 1999) ("Thus, the other grounds listed in the order are alternate grounds for dismissal of the case. Because the Attorneys failed to appeal these alternate grounds, they stand as the law of the case."); *Columbia (SC) Teachers Fed. Credit Union v. Newsome Chevrolet-Buick*, 303 S.C. 162, 164, 399 S.E.2d 444, 446 (Ct. App. 1990) ("An alternative ruling of a trial court not excepted to constitutes a basis for affirming the trial court and is not reviewable on appeal."); *Stanley v. B.L. Montague Co.*, 299 S.C. 51, 57, 382 S.E.2d 246, (Ct. App. 1989) ("An alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal."); *Moody v. McLellan*, 295

S.C. 157, 162, 367 S.E. 2d 449, 452 (Ct. App. 1988) ("An alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal"); *Nichols Motorcycle Supply, Inc. v. Regency Kawasaki, Inc.*, 295 S.C. 138, 142-143, 367 S.E.2d 438, 441 (Ct. App. 1988) (Unchallenged lower court ruling on alternate grounds constituted basis to affirm lower court); *Kolb v. Cook*, 284 S.C. 598, 603, 327 S.E.2d 379, (Ct. App. 1985) (holding appellant's failure to challenge the trial judge's alternative finding "constitutes a basis for affirming the trial court.").[1] Accordingly, HP failed to challenge any of the Alternative Grounds in the Court below; such alternative grounds now require the dismissal of HP's appeal with an order affirming the Subject Order.

[1] Moreover, where an unappealed ruling renders the issues challenged on appeal as moot, the law of the case doctrine makes it unnecessary for the Court of Appeals to reach the challenges raised on appeal. *See State v. Hough,* 319 S.C. 104, 110, 459 S.E.2d 863, 867 (Ct. App. 1996) (holding where reversal of issue would not change the result, the issue is moot, and it is unnecessary for the Court of Appeals to address it); *Jernigan v. King*, 312 S.C. 331, 335, 440 S.E.2d 379, 381-82 (Ct. App. 1993); *Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) (holding the trial court's ruling became "the law of this case," where the defendant failed to appeal it, and alternative issues were moot as "reversal would not change the result").

CONCLUSION

HP failed to challenge the Alternative Grounds cited by the lower court in support of its decision. Standing alone, such findings foreclose HP's ability to prevail on appeal. Accordingly, for the reasons stated above, the Court of Appeals should dismiss HP's appeal to avoid requiring ReWa to expend further public resources defending an appeal with only one possible outcome.

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondents, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

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April 4, 2013

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
Harrison Partners, LLC,	)	Civil Action No. 2011-CP-23-6482
Petitioner,	)	
vs.	)	
Renewable Water Resources,	)	**ORDER**
Respondent.	)	

This matter comes before the Court pursuant to a notice of appeal filed by Harrison Partners, LLC's ("Appellant"). Appellant seeks to appeal the September 1, 2011 administrative order of Renewable Water Resource's ("Respondent" or "ReWa") Hearing Officer, Michael Glenn. The Court conducted a hearing on Appellant's grounds for appeal on September 4, 2012. The Honorable Edward W. Miller presided. Appellant appeared and was represented by Attorney Robbie Childs. Respondent appeared and was represented by Rivers Stilwell and Lane Davis from Nelson Mullins Riley & Scarborough, LLP.

ADMINISTRATIVE & PROCEDURAL BACKGROUND

The same dispute, albeit under a different caption, originally came before the Court on January 17, 2010. (*See* R. at 2-6.)[1] At that hearing, ReWa moved to dismiss Appellant's claims for failure to exhaust administrative remedies. (*See* R. at 5-6.) Respondent argued, and the Court agreed, that ReWa's Sewer Use Regulation outlined a detailed process whereby

[1] The caption for Appellant's initial lawsuit was: *Harrison Partners, LLC & Grant Estates, LLC v. Western Regional Sewer Authority, Raymond Orvin, Renewable Water Resources, Brian Bishop, JD Martin, Metro Sewer Subdistrict, Joe Thompson, and Mike Dickson:* C.A. No. 2009-CP-23-1770. (*See* R. at 2-6; R. at 21-38.)

a party could appeal decisions regarding the denial (or granting subject to conditions) of a Sewer Flow Acceptance Permit. (*See* R. at 5.) Governed by the procedures contained in the South Carolina Administrative Procedures Act (S.C. Code § 1-23-300), ReWa's Sewer Use Regulation allows aggrieved would-be permittees to appeal adverse decisions to: (1) first, a Hearing Officer; (2) secondly, to the Board of Commissioners; and (3) then to the Court of Common Pleas. (R. at 5.)

On March 16, 2010, the Circuit Court issued an Order dismissing the Parties' dispute without prejudice. (R. at 2-6.) In reference to Plaintiff's original Complaint, the Court found: "Plaintiffs' claims all rely upon the premise that ReWa improperly denied its request to operate a [Private Collector Sewer System]." (R. at 3.) The Court further found: "ReWa provided evidence of a process by which an aggrieved person may" appeal decisions relating to sewer use permits and private collector systems. (R. at 5.) Accordingly, the Court found: "that Plaintiff's claims against the ReWa Defendants be dismissed without prejudice pending Plaintiff's exhaustion of the administrative review process provided in the ReWa Regulations." (R. at 6.) Appellant did not move the Court to reconsider its March 16, 2010 Order, nor did Appellant appeal the Order. Accordingly, the Court's unappealed March 16, 2010 thereafter became final.

Pursuant to the Court's March 19, 2010 Order, the Parties proceeded to the ReWa Administrative Process. (*See* R. at 7-18.) Former Judge Michael A. Glenn presided as the designated Hearing Officer. (*See* R. at 18.) The Parties conducted substantial discovery in the administrative process. Hearing Officer Glenn then held an adjudicative hearing on March 23-25, 2011, lasting three (3) days and including the full direct and cross examinations of six witnesses, three from each side. (*See* R. at [i] – [iii].) The Parties submitted over forty

exhibits into the record and entered additional testimony, by consent, after the hearing. (*See* R. at 873-887.) Both Parties were allowed to submit written closings but Appellant elected not to do so, although Appellant did submit a proposed Order. (R. at 1093-1100.) In total, the parties compiled an eleven hundred (1100) page record in this case.

GROUNDS FOR APPEAL

Appellant has raised four (4) grounds on appeal. They are:

Issue #1: Did the Hearing Officer err in making numerous findings in the "Factual Background" of his decision?

Issue #2: Did the Hearing Officer err in not finding ReWa caused delays to Appellant's project and Appellant never completed its application for a flow acceptance permit?

Issue #3: Did the Hearing Officer err by finding the Appellant had no vested rights relating to receiving sewer service on the Subject Project?

Issue #4: Did the Hearing Officer err by failing to rule on the issue of the Contract Clauses of the United States and South Carolina Constitutions?

For the reasons set forth below, the Court affirms the decision of the Hearing Officer.

FINDINGS OF THE COURT

Issue #1: The Hearing Officer Grounded His Decision With Ample Factual Support.

First, as to Issue #1, the Court finds that several of the factual findings challenged by Appellant, for want of factual basis, would not materially change the Hearing Officer's decision even if, as Appellant contends, no factual basis supported the same. Appellant, for example, challenges the Hearing Officer's finding that Appellant knew no public sewer was offered in the area where it purchased the tract of land at issue. Appellant similarly takes exception to the Hearing Officer's findings about: whether basin-wide planning had been completed in the area in question; whether the Metropolitan Sewer Subdistrict declined to own he force main and pump station in question; whether collaboration with another developer

caused additional delays; and whether the peculiarities of Appellant's project caused problems in identifying a viable route for the sewer main running from Appellant's property. (*See* App. Brief, pp. 18-19.)

Appellant offers no explanation why any such findings materially impact the outcome of the administrative hearing. And, the Court fails to see how any of the factual recitations (as cited in the Administrative Order's "Factual Background," R. at 8-11) would materially change the ultimate ruling of Hearing Officer Glenn. Accordingly, the Court declines to disrupt the Hearing Officer's ruling based upon arguments lacking any materiality.

Second, even if such challenged findings proved material, ample evidence supports the Hearing Officer's factual findings now challenged by Appellant. Sitting in an appellate capacity, this Court must review the Hearing Officer's determinations under the standard of review prescribed by the South Carolina Administrative Procedures Act ("APA").[2] "Under the APA, [this Court cannot] substitute its judgment for that of [the Hearing Officer] as to the weight of the evidence on questions of fact." *Leventis v. South Carolina Dep't of Health & Environmental Control*, 340 S.C. 118, 130, 530 S.E.2d 643, 649-50 (Ct. App. 2000) (quoting *Ballenger v. Dep't of Health and Environmental Control*, 331 S.C. 247, 251, 500 S.E.2d 183, 185 (Ct. App. 1998); S.C. Code § 1-23-300(e).

The Hearing Officer's factual determinations should be affirmed unless clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Id.*

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[2] ReWa's Sewer use Regulation incorporates the hearing process, guidelines, and standard of review set forth in the South Carolina Administrative Procedures Act ("APA"). (*See* R. p. 1031, ReWa Sewer Use Reg. § 6.1, ¶ 2 ("[U]nder same guidelines applied to state agencies which are set forth in S.C. Code § 1-23-300(c).") The APA constrains a reviewing court from upsetting an agency's factual determinations, unless they are "(c) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code § 1-23-380(e).

"The possibility of drawing two inconsistent conclusions from the evidence" will not mean the Hearing Officer's conclusion was unsupported or improper. *Waters v. South Carolina Land Res. Conservation Comm'n.*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) (quoting *Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n.*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). The "burden is on the [Appellant] to prove convincingly that the [Hearing Officer's] decision is unsupported by the evidence." *Id.; see also Tennis v. S.C. Dep't. Soc. Servs.*, 355 S.C. 551, 558 (Ct. App. 2003).

Applying the aforementioned standards to this case, the Court finds substantial evidence supported the factual findings challenged by Appellant. (*See* Brief of App., pp. 18-19, Subsections A through E.) Indeed, contrary to Appellant's assertions, ample evidence of record exists to support the factual findings now challenged by Appellant in Issue #1.[3] On the

[3] An illustrative but non-exhaustive summary of the evidence of Record supporting the factual findings challenged by Appellant in Issue 1 includes: R. at 632: 8-25; R. at 633: 1-8 (Testimony of ReWa Engineering Supervisor Brian Bishop discussing basin-wide planning in subject basin as typical especially, when as here, no public sewer is in the basin.); R. 441: 4-8 (Indicating "when the development came on the table, there wasn't a plan for how that whole area would be handled."); R. at 438: 15-18 ("I think a lot will depend on how development occurs in the basin and how it works out, you know, with growth."); R. at 88: 4-25 ("[T]he sewer subdistricts said they weren't taking [pump stations] anymore."); R. at 109: 7-10 (Condor planned to own the pump station and force main because Metro did not want to own them.); R. at 95: 1-16 (Manifold main for both developments "kind of a unique issue here" causing, "an engineering coordination problem" and "question[s] for the design engineers for" each project); R. at 95: 1-16 ("meaning there's two separate submittals"); R. at 596: 4-16 (discussing atypical nature of manifold line); R. at 596: 21-25 (second project at least a year behind); R. at 816, Ex. 21; R. at 878 (p. 23: 2-22); R. at 993 (unanswered Request to Admit #7 stating: "The owners of the Riversway development" objected to one route "due to cost reasons."); R. at 822, Ex. 26 (reflecting uncertainty how two projects would build force main as of 4/14/08); R. at 96: 4-7 (reflecting project proposed unusual engineering aspects); R. at 229: 13-17 (discussing atypical manifold); R. at 596: 4-7 (Never approved project with similar engineering); R. at 596: 14-16 (Never permitted force main on ReWa property); R. at 596: 23-25; R. at 597: 1-2 (Collaborating project developer one year behind Appellant). Respondent cites additional evidence in its brief, *see* Respondent Brief, pp. 30-36, which the Court incorporates by reference in further support of the instant order.

other hand, many of the citations to the Record made by Appellant appear to be unfounded. The Court declines to address every one of the individual points in dispute. Any point not specifically addressed herein should be deemed as reviewed and found inadequate to upset the Hearing Officer's weighing of the evidence. Accordingly, as to Issue #1, the Court finds Appellant has failed to prove "convincingly that the [Hearing Officer's] decision was unsupported by the evidence." *Waters*, 321 S.C. at 219.

Issue 2: **Ample Evidence Shows ReWa Did Not Cause Appellant's Delays and Appellant Never Submitted a Complete Permit Application.**

As to Issue #2, Appellant was similarly required, but did not, prove the Hearing Officer's findings were "unsupported by the evidence." *See Waters, 321 at 219; see also supra discussion.* According to Appellant, the Hearing Officer erred by not finding ReWa caused delays to Appellant's project and further erred when concluding Appellant never completed its permit application by submitting information required by ReWa. Contrary to Appellant's assertions, however, the Court finds substantial evidence supported both aspects of the Hearing Officer's decision.

First, of the "two year" delay cited by Appellant (*see* Brief of App., p. 20), substantial evidence reflects the first eighteen months of delay resulted because Appellant failed to provide ReWa with information concerning its initial route (referred to by the Parties as the Flag Lot Route).[4] After the problems with the Flag Lot were discovered, ReWa immediately began

[4] At the project's inception, the evidence of Record reflects as follows: Bishop instructed Appellant to specify the initial route before completing substantial engineering work. (*See* R. at 805, Ex. 13.) Bishop sought to help Appellant avoid spending a lot of time and money until the route was approved. (R. at 578: 2-12.) Correspondence during the eighteen month period reflects Bishop repeatedly requested information about the location of the Flag Lot Route. (*See e.g.*, R. at 806, Ex. 14; R. at 807-808, Ex. 15.) Despite Bishop's requests, Appellant failed to specify the route location until August of 2007, nearly eighteen months after Bishop first

working with Appellant to identify an alternative route. Through no fault of ReWa, the alternative route (named by the Parties as the "Bishop Proposal") was rejected, even though viable. (*See* R. at 332: 14-21; *see also* R. at 993 (Unanswered Request for Admission #9.) A three month delay ensued before ReWa helped Appellant identify a final route (called the "River Route"). Appellant settled upon the River Route in late November of 2007.

The evidence of Record demonstrates the River Route was, in turn, delayed for three reasons. First, another governmental entity (not ReWa) raised concerns about Bolo's engineering calculations. (R. at 631: ll. 22-25; 632: 1-7; *see also* R. at 993 (Unanswered Request for Admission #10.) Second, Appellant began entertaining plans to build two force mains on ReWa's property (not one) but never disclosed this fact until mid January of 2008. (*See* R. p. 821, Ex. 25.) Third, the evidence reflects that Appellant and its collaborator, Riversway, never agreed how to design the force main across ReWa's property and, therefore, never completed finalized plans for the same. (*See* R. p. 822, Ex. 26.)[5] Thus, the Court finds

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requested the route. (R. p. 189, ll. 20-25); (R. p. 453, lines 5-8) (Route identified to Bishop in August 2007 timeframe because, "he'd come to me in August about that.") Even then, Appellant never submitted an easement application or the required surveys. (R. at 589: 4-18; R. at 130: 20-24 (No application for ReWa encroachment since no final plans.) Appellant similarly failed to submit engineering plans for the Flag Lot Route. (R. at 586: 18-25; p. 587: 1; R. at 130: 8-10.) When Appellant finally disclosed the proposed route to Bishop, he walked the route within only a few days with Appellant's surveyor, Mike Deaton. (R. at 604: ll. 14-23.) While walking the route, it became obvious to both Bishop and Deaton the route was not viable. (R. at 813, Ex. 20; R. at 608.) Bishop notified Appellant of the problems either the same day or next morning. (R. at 609: 2-7; R. at 813, Ex. 20; R. at 608.) Importantly, the problems with the Flag Lot Route could have been detected as early as March of 2006, had Appellant followed Bishop's instruction and supplied the requested information. (R. at 609: 22-25.)

[5] ReWa's Executive Director, Ray Orvin, did testify the Board, at some point in late 2007, instructed staff not to approve private pump stations without further Board input. But, the testimony clearly was that ReWa's personnel were instructed to continue working with Appellant (and others) to finalize permit applications at all times prior to the Sewer Use Regulation's Amendment. (R. at 639: 12-16) (Never instructed to stop work); (R. at 492: 1-8)

the Hearing Officer did not err when he found ReWa did not cause the delays afflicting Appellant's project.

Second, the Court likewise finds the Hearing Officer did not err when he found Appellant failed to submit a complete permit application to ReWa. Initially, if Appellant did submit the finalized materials necessary for issuance of a Flow Acceptance Permit, then Appellant failed to introduce them to the Hearing Officer, as they appear nowhere in the Record. By contrast, ReWa submitted an abundance of evidence demonstrating Appellant, in fact, never completed its permit application.

The evidence of Record reflects that at the time of the regulatory amendment in May of 2008, Appellant had not: finalized its engineering plans for the force main, submitted an application for an easement across ReWa's land, had not finalized an agreement for the ownership of force mains and pump station with the public entities, and had not obtained a Flow Acceptance Permit. (*See* R. at 635-637; *see also* R. at 993 (Unanswered Requests for Admissions ##14, 15, and 18.) Moreover, the Hearing Officer cited Exhibits 13, 14, 15, 17, 18, 23, and 26 as documentary evidence reflecting Appellant failed to provide the information needed to obtain a Flow Acceptance Permit as first identified to Appellant by Bishop in Exhibit 13 from March of 2006. (R. at 12-14.) Bishop's testimony likewise confirms ReWa never received the required information and as of May of 2008, Appellant's project file remained "substantially incomplete." (R. at 637: 1-4.) Accordingly, as to Issue 2, Appellant has not "convincingly" proved the Hearing Officer's factual findings are "unsupported by the

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(Instructed to continue working with Appellant "to get all of their paperwork in" and let Board evaluate.) No evidence of Record indicates ReWa's Board would not have granted the Flow Acceptance Permit, had Appellant's application ever been completed. Moreover, in the instance of Appellant, Board approval was required in any event, as Appellant required an easement from ReWa to complete its project. (R. 261: 1-4.) Only the Board could have granted the easement. (*See infra.*)

evidence." *Waters v. South Carolina Land Res. Conservation Comm'n,* 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

Issue 3: The Hearing Officer Did Not Err By Finding Appellant Lacked Vested Rights and That ReWa Did Not Retroactively Apply its Regulation.

The Court finds Appellant's claims both hinge *and* fail upon a previously unstated theory of vested rights. The Court notes Appellant never pleaded the Vested Rights issue. (*See* R. at 21-38.) On the appeal, Appellants argue that ReWa should have grandfathered its project under the Amendment to the Sewer Use Regulation, altogether allowing Appellant to escape the effect of the Sewer Use Regulation's May 5, 2008 Amendment. (*See* Brief of App., p. 40.) Stated differently, Appellant contends it had a legal right to be grandfathered under ReWa's Sewer Use Regulation before its amendment. Yet, no legal basis exists for such a request since an incomplete permit application, as a matter of law, fails to vest the rights of a would-be permittee.

Consistent with the Hearing Officer's ruling, without a complete permit application, a putative permittee's rights do not vest, since it would be impossible to determine *what* rights vested. (*See* R. at 17; *see also* R. at 637: 5–25; R. at 638: 1) (ReWa had insufficient information from Appellant even to know what it would be grandfathering.) As the leading local government law treatise notes:

> [A]n application for a permit made before a zoning ordinance becomes effective gives in itself no right to a use excluded by the ordinance. Indeed, generally speaking, no preliminary proceedings to the obtaining of a permit give rise to any vested right to pursue a use in a zoned district.

8 *McQuillin Mun. Corp.* § 25:179.24 (3d ed.). This analysis applies here thereby foreclosing Appellant's vesting claims.

The Court finds the evidence reflects Appellant never submitted a finalized permit application and, therefore, had no vested rights prior to ReWa's May 5, 2008 amendment to the Sewer Use Regulation. As discussed *supra*, the evidence of record shows Appellant:

- Never submitted a finalized set of engineering plans for any proposed route;
- Never even applied for the necessary right of ways across ReWa's Plant property;
- Never executed an agreement with public utilities about the ownership of the proposed private pump station and force mains.

(R. at 635: 14–25; R. at 636: 25) (Appellant never submitted: finalized engineering plans for any proposed route, applications for right of way from ReWa, and never executed final agreement among service providers.)

Dating back to March of 2006, ReWa informed Appellant of these prerequisites to obtaining a Flow Acceptance Permit at the onset of the process. (*See* R. at 805–808; R. at 810, Ex. 13, 14, 15, & 17; R. at 636: 15–19). As a consequence, Appellant's failure to submit a complete application, as a matter of law, fails to vest any rights to obtain a Flow Acceptance Permit prior to the Sewer Use Regulation's amendment. *See In re Ross*, 151 Vt. 54, 557 A.2d 490 (1989); *City of Aspen v. Marshall*, 912 P.2d 56 (Colo. 1996); *Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986). Accordingly, substantial evidence supports the Hearing Officer's findings regarding the vesting of rights.

Appellant also questions the Hearing Officer's reliance upon the *Friarsgate* decision and instead insists the opinion of *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) controls. The Court finds the *Vulcan*

decision is inapposite to the instant facts in a number of ways. Accordingly, the Court rejects Appellant's reliance on *Vulcan.*

In *Vulcan*, Greenville County sought to impose *post facto* prohibitive zoning *after Vulcan* already commenced a nonconforming use it could pursue as a matter of right. *Id.* at 498. Here, the alleged nonconforming use (i.e., the incomplete plans submitted in Appellant's Flow Acceptance Permit Application) *was* the nonconforming use Appellant sought to commence, but could not, because a Flow Acceptance Permit never issued. In *Vulcan*, the Respondent did not need to obtain a grant of a real property interest (*i.e.*, easement) before it could commence its nonconforming use. Here, Appellant concedes all of its plans for use required ReWa's Board to convey an easement before it could obtain a Flow Acceptance Permit and a DHEC permit to commence its nonconforming use in the first instance. (R. 261: 1-4.)[6] Notably, ReWa had no legal obligation (ever) to grant an easement to Appellant.

In *Vulcan*, the Respondent only needed an operating permit from DHEC before it could commence mining granite on its property. *Id.* at 498. Unlike Appellant, the *Vulcan* Respondent had fully completed its DHEC application for an operating permit over a year before the County enacted the prohibitive zoning. *Id.* at 484 & 486. Here, Appellant's project file remained substantially incomplete when ReWa amended its Regulation and remains so, to date. (R. at 637: 2-4) Moreover, the *Vulcan* Court acknowledged the nonconforming use only vests if "already in existence at the time his property is zoned..." *Id.* at 498. In the instant case, the nonconforming use could not exist in advance of the issuance of an easement and

[6] Appellant spends considerable time discussing the lack of an effective date in the ReWa's Amended Sewer Use Regulation. (*See* Brief of App., p. 11.) Apparently, Appellant has not actually analyzed the Regulation, as it clearly contains an effective date. (*See* R. at 1048.)

Flow Acceptance Permit. In short, ReWa did not apply its Amended Sewer Use Regulation retroactively. Accordingly, the Court affirms the Hearing Officer's decision.

Issue 4: The Hearing Officer Did Not Err By Finding ReWa's Amended Sewer Use Regulation Did Not Violate the Contracts Clause of the State and Federal Constitutions.

The Court finds Appellant's statements concerning alleged Contract Clause violations lack any merit. According to Appellant, "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." (Appellant's Brief, p. 30.) The Court fails to see where Appellant ever raised this issue prior to the appeal.

Even after Respondent argued the issue cannot be raised for the first time on appeal, Appellant failed to supply the Court with any citation to the Record indicating where such grounds were previously pled and argued. Indeed, the issue appears nowhere in Appellant's Complaint from the proceeding below. (*See* R. at 19-38; *see also* R. at 15 ("[Appellant] has offered no evidence to contest the validity of the amended Sewer Use Regulation.")[7] The Court finds Appellant cannot raise the issue for the first time on appeal. *Elam v. S.C. DOT*, 361 S.C. 9, 23 (2004).

Second, in evaluating legislative acts such as the Amended Sewer Use Regulation; "every presumption is made in favor of...constitutionality." *Knotts v. S.C. Dep't of Nat. Resour.*, 348 S.C. 1, 558 S.E.2d 511 (2002). A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable

[7] Appellant never filed the necessary pleading to commence the administrative process. Nonetheless, the Hearing Officer allowed Appellant to proceed and used the original "complaint filed in the Court of Common Pleas." (R. at 12.)

doubt." *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999); *see also Beaufort County v. State*, 353 S.C. 240, 242 (2003). Thus, the Court finds Appellant was required, but did not, prove "beyond a reasonable doubt" how ReWa's Sewer Use Regulation runs afoul of the State and Federal Contract Clauses.[8]

Finally, so long as ReWa's Sewer Use Amendment aimed to accomplish a "reasonable and necessary...public purpose," then, no constitutional infraction exists, even if everything else alleged by Appellant proved true. *Hodges v. Rainey*, 341 S.C. 79, 93, 533 S.E.2d 578, 585 (2000). The Hearing Officer made specific findings regarding the reasonability and necessity of the amendment based upon evidence presented. (*See* R. at 9-10 (Amendment designed to foreclose "long-term viability risks, environmental risks, and risks to development.); *see also* R. at 901: 21-25; R. at 902: 1-16.)

With respect to such policy determinations, then, the Court will, "properly defer to [ReWa's] legislative judgments as the necessity and reasonability" of the Amended Sewer Use Regulation. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, 97 S.Ct. 1505, 1515 (1977). Accordingly, when the Court filters the evidence of Record through Appellant's burden of beyond a reasonable doubt and properly accords deference to ReWa's legislative authority, the decision of the Hearing Officer should be affirmed.

Additional Sustaining Grounds:

As raised by Respondent, the Court finds several additional sustaining grounds exist to affirm the decision of the Hearing Officer. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C.

[8] Appellant argues that the Court should show ReWa less deference because the Amended Sewer Use Regulation impairs a contract to which it is a party. (*See* Appellant's Brief, p. 32) The Court finds no evidence of Record demonstrating that ReWa's Amended Sewer Use Regulation impairs any existing contract to which ReWa was a party. Appellant did not provide the Court with any citation to the Record to support any such contention.

406, 526 S.E.2d 716 (2000) ("Under the present rules, a respondent—the"winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.") Those grounds include:

- Appellant failed to follow the adjudicatory process and procedure required by ReWa's Sewer Use Regulation. (*See* Respondent's Brief, pp. 52-56.)

- Only ReWa'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, ReWa's Commission never granted such interest and Appellant conceded it had to have an easement across ReWa's land, "no matter which way [it] went." (R. at 261: 1-4; *see also* Respondent's Brief, pp. 56-58.)

- By operation of South Carolina's Statute of Frauds, Appellant had no right to cross ReWa's property absent a written conveyance, which it never obtained. (*See* Respondent's Brief, p. 58.)

- The doctrine of equitable estoppel has no application under the instant facts. *See Berkley Electric Co-Op, Inc. v. Town of Mount Pleasant,* 308 S.C. 205, 417 S.E.2d 579 (1992). (*See also* Respondent's Brief, pp. 58-60.)

- Even if Appellant's arguments were otherwise correct, the pending ordinance doctrine would defeat Appellant's allegations. (*See* Brief of Resp., pp. 60-61.)

While Respondent raised all such issues in its brief opposing Appellant's grounds for appeal, Appellant provided no meaningful response to the same. Accordingly, the Court adopts such grounds as additional sustaining grounds in further support of its affirming the Hearing Officer's decision.

For the reasons set forth above, the Court **AFFIRMS** the decision of Hearing Officer Michael Glenn dated September 1, 2011.

IT IS SO ORDERED.

Honorable Edward W. Miller
Judge, Thirteenth Judicial Circuit

Greenville, South Carolina

11/16, 2012

EXHIBIT B

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIME

) CASE NO.: 2011-CP-23-6482

Harrison Partners, LLC) 2012 DEC -7 A 9:41 **MOTION AND ORDER INFORMATION**
Plaintiff,) **FORM AND COVERSHEET**
vs.)
)
Renewable Water Resources)
Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Robert C. Childs, III, Bar No. 1218 Address: 2100 Poinsett Hwy., Suite D, Greenville Phone: 864-242-9997Fax 864-242-9914 E-mail: Robert@LawyerChilds.comOther: _____	Rivers Samuel Stilwell and Lane Whittaker Davis , Bar No. _____ Address: PO Box 10084, Greenville, SC 29603 Phone: _____ Fax_____ E-mail: _____Other: _____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider
Estimated Time Needed: N/A Court Reporter Needed: ☐ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff /☐ Defendant 12/4/12 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT
2012 DEC -7 A 9:40
)
Harrison Partners, LLC) C. A. No.: 2011-CP-23-6482
Plaintiff,)
) **CERTIFICATE OF SERVICE**
v.)
)
Renewable Water Resources.)
Defendant.)

I, the undersigned paralegal, of the law offices of Childs Law Firm, do hereby certify that I have served all counsel of record this 4th day of December, 2012, in this action with a copy of the pleading(s) herein below specified by hand delivering a copy of the same to the following address:

Pleadings:

Motion to Reconsider

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Honorable Edward W. Miller
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Stacy P. Timothy Paralegal to
Robert C. Childs, III

Greenville, SC
Date: 12/4/12