

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Friends of Gadsden Creek, )  
)  
Petitioner, )  
)  
v. )  
)  
South Carolina Department of Health and )  
Environmental Control and WestEdge )  
Foundation, Inc., )  
)  
Respondents. )  
\_\_\_\_\_ )

Docket No. 21-ALJ-07-0433-CC

FINAL ORDER

APPEARANCES:

For the Petitioner: Benjamin D. Cunningham, Esq., and Lauren Megill Milton, Esq.

For Respondent DHEC: Bradley D. Churdar, Esq., and Bennett W. Smith, Esq.

For Respondent WestEdge: Mary D. Shahid, Esq., and Michael S. Traynham, Esq.

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court (the ALC or the Court) pursuant to a request for contested case filed by Friends of Gadsden Creek (Petitioner) pursuant to section 1-23-600(A) of the South Carolina Code (Supp. 2021) and section 44-1-60 of the South Carolina Code (2018). Petitioner challenges the decision of the South Carolina Department of Health and Environmental Control (DHEC or Department) to issue WestEdge Foundation, Inc. (WestEdge) a critical area permit, a Coastal Zone Consistency Certification (CZCC), and a Section 401 Water Quality Certification (collectively, the "Permit"). The Permit, which was issued on July 12, 2021, authorized WestEdge to fill in 3.9 acres of critical area on the west side of the Charleston peninsula. Petitioner requested a final review conference with the Department's Board, which the Board denied, rendering the staff decision the final agency decision. Petitioner then filed a request for contested case hearing with this Court on October 18, 2021. The Court conducted a hearing in this matter from June 6-10, 2022.



## FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

### **Geomorphological and Cultural History of the Gadsden Creek Area**

Gadsden Creek was a tidal creek located on the westside of the Charleston peninsula that fed into the Ashley River. However, it, like the rest of the Charleston peninsula, has undergone extensive alteration in the last hundred years. For example, almost fifty percent of the Charleston peninsula has been drained or filled to “reclaim” habitable land, and Gadsden Creek is part of that story of land reclamation. This “reclamation” consisted of filling in natural marshes and other low-lying areas with whatever material was available to create more dry land. At first, the fill consisted primarily of more natural materials—dirt, building materials, offal, trash. Later, post-industrialization, land was also reclaimed using modern landfill waste that is much more hazardous. Historically, reclaimed areas frequently flood, and this has been an on-going problem on the Charleston peninsula despite redevelopment that has tried to mitigate flooding.

The westside of the Charleston peninsula where Gadsden Creek was historically located previously consisted of about one hundred acres of salt marsh with Gadsden Creek flowing through it. The creek had a natural sinuous shape. In the 1850s, the westside became incorporated and, around that time, the City of Charleston implemented a city-wide water management and drainage system for which Gadsden Creek served as a drainage outfall. The creek remained relatively intact at this time and was utilized by the local, primarily African American community. The area was used for wharves, recreational fishing, public bathing, recreational boating, and baptisms, among other things.

However, the nature of the area began to change in 1941 when the Gadsden Green public housing community was completed. At this time, the creek remained intact and older residents of the Gadsden Creek community recall fishing and crabbing in the creek. In 1965, more public housing was added through eminent domain. Single-family wood-framed homes were removed to make room for public housing. Shortly thereafter, from the 1950s to the 1970s, the City of Charleston began to use Gadsden Creek and its surrounding salt marsh as a landfill. As the landfill expanded, the creek became more and more altered by the landfill. The creek ultimately ceased to exist in its natural state and was replaced by a channelized drainage ditch that was established

along the periphery of the landfill to provide stormwater drainage to the area when the landfill was closed in the 1970s.<sup>1</sup> Upon its closing, a cap was placed on top of the landfill material, a cap that does not meet current environmental standards.

### **Present Nature of Gadsden Creek and the Surrounding Area**

The current iteration of the creek flows along a drainage easement owned and created by the City of Charleston. It was initially a manmade drainage feature, and it has been moved multiple times since its initial construction; however, portions of the creek have since naturalized and have diverted from the manmade channel. Therefore, the historic waterbody known as Gadsden Creek no longer exists. In fact, calling the current waterbody a “creek” is a misnomer because the word “creek” suggests a natural occurring stream and the current water body is more aptly described as a naturalized drainage feature. *See Creek*, MERRIAM-WEBSTER’S ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/industrial> (last visited October 31, 2022) (defining creek as “a natural stream of water normally smaller than and often tributary to a river”). Nevertheless, for the purpose of easily referencing it in this Order, I will continue to refer to the current drainage feature as Gadsden Creek.

Presently, the creek originates at the corner of Fishburne Street and Hagood Avenue, which is the lowest lying area in the vicinity and is prone to frequent flooding, causing access issues and endangering the public. The creek then flows south, paralleling Hagood Avenue to approximately the corner of Hagood Avenue and Allway Street. Across from the creek on the other side of Hagood Avenue is the Gadsden Green public housing community, which also includes a part of the Charleston Development Academy, a local elementary school. Slightly south of Allway Street, the creek veers west in a dogleg towards the Ashley River. In the area where the creek doglegs toward the river, the creek has migrated from the “ditched channel” and carved a new path, and the space between has become marsh. The creek then flows through a large culvert under Lockwood Drive before draining into the Ashley River (the Gadsden Creek outfall). On the west side of Lockwood Drive next to the outfall lies Brittlebank Park, a greenspace on the banks of the Ashley River.

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<sup>1</sup> In 1971, the Army Corps of Engineers issued the City of Charleston an after-the-fact permit for its filling of the approximately ninety-five acres that used to be Gadsden Creek and its associated salt marsh.

All parties agree that a variety of flora and fauna can be found in the re-naturalized creek. For example, the creek is home to sea ox eye, marsh elder, spartina, marsh grass, great blue herons, egrets, redwings, and there is evidence of raccoons and turtles. Generally, the presence of these types of flora and fauna are indicative of a functioning salt marsh ecosystem. Nonetheless, signs of its previous channelized bed remain. Old timber piles from a previous bulkhead are still visible lining parts of the creek bed. The bulkhead was intended to prevent the creek from having contact with the landfill but has since eroded. As a result, the creek runs over the landfill, at least in part.

#### Friends of Gadsden Creek

Friends of Gadsden Creek (FOGC) is a non-profit organization that was incorporated in South Carolina on August 20, 2021. It grew out of an effort to educate individuals about Gadsden Creek and preserve its existence. To achieve its mission, FOGC primarily engages in two types of programming: educational creek walks and creek clean-up efforts.

On educational creek walks, an FOGC member leads members of the community on a walk by and through the creek while discussing its ecological role along with its cultural history. Creek clean-ups are conducted bi-annually, and members clean up trash and otherwise engage in stewardship of the creek. To FOGC members, Gadsden Creek is an important outdoor classroom and links the community's cultural history.

FOGC members use the creek in a variety of ways. For instance, Tamika Gadsden visits Gadsden Creek once or twice a month and facilitates creek walks and Mutual Aid events. John Flowers, who has lived in the Gadsden Green community for the last fifteen years, walks by the creek six to seven times a week and enjoys watching the tide change and observing the wildlife. Dr. Mary Coster takes children from the local secondary schools to the creek to educate them about eco-literacy, African American history, geology, and human geography. Audrey Lisbon, an FOGC member, testified that when she grew up, her family would swim, fish, and crab in the creek, and continued to do so for a while after the City of Charleston began dumping in the landfill. She now sees the creek as a tool for flood prevention.

#### Contamination of the Creek

Salt marsh vegetation like the vegetation found in Gadsden's Creek provides a natural filter for pollutants because it can render harmful substances inert or process them into less harmful substances. As a result, a tidal creek like Gadsden Creek would ordinarily be a natural and valuable way to filter pollutants out of contaminated storm water and flood waters before the water drains

into the Ashley River. However, Gadsden Creek, which is subject to the daily undulations of the tide, flows, at least in part, over a landfill, and the landfill cap has eroded in places within the creek bed. Importantly, unlike modern landfills, landfills of this age did not have liners to collect leachate<sup>2</sup> and prevent it from entering the groundwater of the surrounding area. As a result, the erosion of the cap has contaminated the creek with toxic leachate from the landfill.

In a first for this Court, FOGC, ostensibly an environmental organization, tried to downplay the harm from the exposed landfill. Although FOGC's expert, Joshua Robinson,<sup>3</sup> conceded Gadsden Creek is contaminated and did not deny evidence of a degraded cap and the existence of leachate emanating from the landfill, he opined that the contaminants are not in concentrations that would be dangerous. However, I do not find a sufficient evidentiary basis for that conclusion. Rather, I find Mr. Robinson's opinions about the severity of the contamination were soundly contradicted by the testimony of WestEdge's expert, Andy Ruocco.<sup>4</sup>

Mr. Ruocco, provided drone footage of the entire 2,200-foot length of Gadsden Creek. In areas, the video shows the creek bed is cluttered with garbage that has been exposed from the landfill. Mr. Ruocco also recalled a bore hole study from 2015 in the vicinity of the creek in which about thirteen of the twenty-four boring samples showed evidence of trash. The video also shows a distinctly colored liquid, which Mr. Ruocco opined is leachate, seeping from the banks of the creek down towards the creek water. Mr. Ruocco took two samples (Sample 1 and Sample 2) from the creek bed in areas where leachate appeared to be seeping out and sent them to a third-party lab for analysis. The samples were evaluated for semi-volatile organic compounds (SVOCs), Target Analyte List (TAL) metals, and polychlorinated biphenyls (PCBs).<sup>5</sup>

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<sup>2</sup> Leachate is formed from liquids percolating through a landfill. In modern landfills, it is generally collected and sent to a wastewater treatment plant because of the high concentration of pollutants associated with it.

<sup>3</sup> Joshua Robinson is a registered engineer. The Court qualified him as an expert in civil and environmental engineering, urban storm water management, tidal hydrology and hydraulics, compound flooding, tidal creeks, salt marsh hydrology and hydrodynamics, tidal sedimentation, urban stream restoration and re-naturalization, and salt marsh physical geography and geomorphology.

<sup>4</sup> Mr. Ruocco currently works at Terracon, a national environmental consulting company, where he manages the environmental department. He has extensive experience in designing remediation plants, groundwater remediation, sediment remediation. He has frequently sampled surface water, ground water, and sediments for third-party labs to interpret. The Court qualified him as an expert in wetlands sciences with special expertise in assessing and controlling contamination or pollution. His testimony was convincing.

<sup>5</sup> Sample 2 was too small in volume to be tested for SVOCs and PCBs.

The samples substantially exceeded the EPA's drinking water standards for TAL metals. For example, the EPA's maximum contaminant level (MCL) for lead in safe drinking water is 15 micrograms per liter (mg/l). Mr. Ruocco's first sample contained 15,000 mg/l of lead, which is 1,000 times higher than the MCL. In addition, the MCL for arsenic is 10 parts per billion and the first sample contained 1,100 parts per billion. Similarly, for chromium, the MCL is 100 and the sample had 2,300. Even more problematic was the presence of mercury at eleven times the MCL. Mercury is not a metal that is generally found in the natural environment and typically indicates a problem.<sup>6</sup> Sample 1 also contained detectable levels of SVOCs, although they did not exceed the listed MCLs, and of PCBs, which were in excess of applicable screening values used by the National Oceanic and Atmospheric Administration (NOAA).

These samples were some of the most contaminated samples Mr. Ruocco had ever taken, too concentrated to be consistent with storm water contamination. Rather, the high concentration of toxins was more consistent with leachate. Although, Mr. Ruocco acknowledged more samples would be needed to create a complete picture of landfill contamination, in his opinion, Gadsden Creek is severely compromised, and the only logical step is to cap the landfill to prevent exposure.

Mr. Karkowski, WestEdge's other expert, similarly found evidence of contamination. In his review of two water quality studies from the Project area, he saw two contaminants that are not common in storm water and more consistent with leachate from a landfill. Moreover, Charleston City Council commissioned its own study of the alleged contamination and, as a result of that study, voted to support the WestEdge Project to cap the landfill by filling in the creek.

The Department is likewise concerned that hazardous material is seeping out from the eroded portions of the old landfill cap. Because of its concerns, in reviewing the permit for this case, it consulted with its Brownsfields<sup>7</sup> section. However, despite the Department's purported concerns, the Department's representative at trial was not aware of: (1) the Department receiving any reports of the public being harmed by the landfill, (2) the Department acting in any way to protect the public from the landfill during the pendency of this permit, or (3) the Department collecting samples from the landfill or the eroded areas to assess the contamination levels. The Department nevertheless asserts the landfill needs to be capped to protect the health, safety, and

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<sup>6</sup> This sampling was not an exclusive list of the metals that exceeded the EPA's MCL's in Mr. Ruocco's sample from the creek bed.

<sup>7</sup> The term Brownsfields is generally used to describe previously developed contaminated land.

welfare of the public. It further states that filling in the creek would provide a permeant cap that would protect the public and the environment from harm.<sup>8</sup>

All parties agreed the landfill cap has eroded in places, although the extent of the erosion is disputed. Regardless, I find the video evidence, combined with the sampling results and results of other studies, shows that the landfill cap has eroded in some areas of the creek bed and Gadsden Creek is being contaminated by trash and leachate from the landfill. Moreover, while all the experts agreed that storm water can carry contaminants including toxic metals, I further find that the levels of contamination in the sample taken by Mr. Ruocco indicates that leachate is present. The areas of leachate sampled by Mr. Ruocco were in the creek bed. While the leachate was seeping from dry banks at the time of collection, it was clear the leachate was draining towards the creek water, and, during higher tides, those parts of the bank would be submerged. Therefore, the contamination is being spread to other parts of the creek and to areas subject to flooding by the creek. Also, contamination is being carried out to the Ashley River through the tidal cycle.

Mr. Ruocco nevertheless did not sample the creek's water and compare those results to MCL for surface water as opposed to drinking water. Accordingly, the full extent and nature of the contamination in creek water and during tidal events is unknown. However, that does not render the contamination any less hazardous or concentrated at its points of origin. As FOGC's witnesses explained to this Court, children and adults are brought to the creek—the source of the contamination—for educational walks. As a result, it appears they have been exposed to the toxic substances seeping from the landfill. Indeed, the sample results showed the presence of high levels of lead, which the Court takes judicial notice is especially toxic to children.

Overall, I find the evidence shows the contamination from the landfill in Gadsden Creek is a threat to the health, safety and welfare of the public and the environment.

### Flooding

Generally, areas that were once salt marsh tend to have issues with flooding. Salt marshes are areas of transition between the high ground and tidally influenced water. They naturally buffer uplands areas from tides and can slow and store large volumes of not just tidal water but

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<sup>8</sup> The Department further admitted the City of Charleston is responsible for upkeep of the closed landfill in accordance with its "after the fact" permit issued by the Army Corps of Engineers. Blair Williams testified "the Department understands that the city is a responsible entity for maintaining this cap, and it hasn't. However . . . the city I think is making efforts under this permit application to put the cap in place . . . ."

stormwater, thus providing a natural defense against flooding. When they are removed, the buffer between the uplands and tidally influenced waters is lost and so is the capacity to store water from storms or tidal events. This leaves the highlands more susceptible to flooding, especially where the salt marsh was reclaimed. As a result, reclaimed areas, like the area around Gadsden Creek, are more susceptible to flooding.

The historical Gadsden Creek salt marsh covered approximately 100 acres. Now the creek and remaining marsh cover a little less than four acres; thus, much of the area's natural buffer against flooding is gone yet it is still subject to daily tides via the Ashley River coming in and out through the Lockwood culvert. The loss of this natural buffer and the introduction of more impervious surfaces through development means more runoff and less natural area to absorb tidal and storm water. Additionally, FOGC's expert, Mr. Robinson, estimates that the Gadsden Creek area has subsided approximately three feet because of the landfill compaction, which also makes the area more susceptible to flooding.

Based upon the characteristics of the area, it is not surprising that the Westside, Gadsden Green, and the Project area experience several types of flooding, including storm water flooding, sunny day flooding, and compound flooding. Storm water flooding occurs when there is too much rain for the drainage system to handle on its way to the Ashley River. Sunny day flooding occurs when unusually high tides inundate the Creek through the Ashley River. Finally, compound flooding occurs when a rain event combines with a tidal event, which exacerbates the flooding that might be caused by either event individually.

Paradoxically, when the creek was ditched in the 1970s, the intent was to make it more efficient for getting water out of the City; however, it also let more tidal water in, which exacerbated the flooding. The culvert under Lockwood Road was enlarged in the later 1990s with the same intent to allow more storm water out, which again increased efficiency in both directions. Furthermore, there has been a severe increase in sunny day flooding in the last five years compared to the last twenty years. King tides<sup>9</sup> have been increasing and so have significant rainfall events.

Currently, flooding causes significant problems in the area. One of the areas most prone to flooding is the intersection of Fishburne Road and Hagood Avenue. Fishburne and Hagood are major roadways in the City of Charleston. In addition to being immediately adjacent to a large

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<sup>9</sup> King tides are exceptionally high tides.

public housing community, the intersection of Hagood and Fishburne is situated in close proximity to:

- an MUSC parking lot
- the City's police headquarters,
- a South Carolina National Guard Armory,
- three public schools: Burke High School, Simmons-Pinckney Middle School,
- and the Charleston Development Academy.

Flooding on these roads thus not only impacts the public generally but emergency vehicles which need unencumbered use of these roads. Flood waters have also not only disrupted traffic and access to the area and these facilities, but the waters have also entered homes in the Gadsden Green community.

The City of Charleston's Director of Emergency Management, Shannon Scaff, explained that the Hagood-Fishburne area is designated as a "vulnerable" flood area by the City. The flooding can be both frequent (impacting at least one lane of traffic as often as eighty days per year) and severe. The City is already stretched thin with its funding for addressing and resolving the many flooding and storm water issues in Charleston. All funding for the next five years has already been allocated. Keith Waring, a member of the Charleston City Council, also testified that flooding is a huge concern, and the area where the permitted project will be located is particularly impacted by flooding.

In fact, several FOGC's members agreed that flooding is a problem in the area and that flood waters are contaminated and unsafe. FOGC members also agreed flooding is especially bad at Hagood Avenue and Fishburne Road and in the Gadsden Green Community. Audrey Lisbon, President of the Westside Neighborhood Association, testified her house was raised to a safer elevation because of flooding in the area. Additionally, sometimes she must move cars to higher streets to avoid them stalling out in flood waters. However, not everyone who lives in the area has the advantage of modifying their home, and, while some people have the luxury of avoiding the Charleston peninsula during floods, those that live there cannot. This is especially disconcerting since the flood waters contain dangerous chemicals and biological organisms and generally pose a threat to human health.

I therefore find that flooding is a threat to public health, safety, and welfare in the Gadsden Creek area. Moreover, I find that Gadsden Creek, in its current condition, does not have sufficient

capacity to alleviate the flooding in the area as evidenced by the on-going flooding despite the creek's presence. Additionally, flooding is likely to become worse as sea levels rise.

### **The WestEdge Development**

The WestEdge Development (the Development) is a multi-phase undertaking to redevelop a western portion of the Charleston peninsula in the Gadsden Creek area. The Development area is bounded by Fishburne Road to the north, Hagood Road to the east, Spring Street to the south, and the Ashley River to the west. The Gadsden Creek area was chosen for the WestEdge Development because of its proximity to the Medical University of South Carolina (MUSC) and its potential to become a mixed-use development.

The WestEdge Foundation (WestEdge), originally known as the Horizon Foundation, is a 501(C)(3) and 509(a)(2) nonprofit that was created through a collaboration between the City of Charleston and MUSC. WestEdge's purpose is to support, fiscally and through programs, the City of Charleston and MUSC. In particular, it was created to advance the charitable, educational, scientific, research and clinical activities of MUSC, and to support the City's goals of economic development and improving quality of life.

To advance WestEdge's goals, the Development area was designated a Tax Incremental Financing (TIF) district in 2008. TIF districts are creatures of statute, and they are intended to facilitate redevelopment of blighted areas by allowing bonds to be taken out against future tax revenues once redevelopment is completed. The idea is to facilitate development in areas where, but for the TIF district, the area would not be redeveloped under normal market conditions.

TIF funding is restricted to use for publicly owned facilities or projects that will have an overarching public benefit or provide public infrastructure. It cannot be used to support private development. As applied to this Development, TIF funds are essential because those funds will pay for the "horizontal infrastructure," such as storm water infrastructures and roadways.<sup>10</sup> At the time the TIF ordinance was passed, it was estimated the redevelopment would cost \$155,472,000; it assumed approximately \$100,000,000 would be supplied by the TIF and other financing would come from community block grants, etc. In the Development area, the infrastructure upgrades needed to address the subsidence, flooding, and contamination from the underlying landfill would

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<sup>10</sup> On the other hand, private developers would fund the "vertical infrastructure," to include the buildings that will be constructed on the Project site.

be cost prohibitive without the TIF. The current infrastructure needed to redevelop the area includes storm water drainage infrastructure, additional roads and road repair, utilities (communications and electricity), transit connectivity, and sidewalks. The TIF ordinance also states that the original intent of the Development was to preserve the wetlands and integrate them into “a cohesive network of green spaces and civic places” within the development. Despite these intentions to preserve the wetlands (i.e., the creek), because of height restrictions<sup>11</sup> and density requirements, the only feasible option to make the Development economically viable was to fill in the creek.

Since the TIF was enacted, WestEdge has facilitated the redevelopment of part of the Development area, to include the construction of three buildings and two improved roads. Specifically, 10 WestEdge houses a Publix grocery store, a parking deck, and 350 apartments on top of retail. 22 WestEdge is a research and lab building with ground floor retail that currently has a biotech company as a tenant and offices associated with MUSC and its activities. 99 WestEdge, “the Caroline,” includes ground-floor retail, a parking deck, and private apartments.

WestEdge is also aware of gentrification issues and underserved existing residents. With this in mind, the Development’s master plan includes a commitment not to displace existing residences. The area has been re-zoned so that any residential development built in the district must either be work-force (affordable) housing or the residential development must submit a fee-in-lieu to support affordable housing elsewhere in the City. Thus far, two residential projects on the WestEdge site have contributed \$2.9 million to the City’s affordable housing program as fees-in-lieu. WestEdge also worked to bring a grocery store to the area.

#### Proposed Project Under Permit

The next proposed phase of the WestEdge Development is the phase associated with the current permitted project at issue in this case (the Project). This phase furthers WestEdge’s goals to address the flooding and contamination issues of the area and to improve the quality of life in the Westside and increase the marketability of properties in the area.

In this phase, WestEdge proposes to fill in Gadsden Creek to repair the failing landfill cap and to improve the current storm water infrastructure to prepare the area for redevelopment. Specifically, it seeks to fill 2.866 acres of critical area, excavate 0.088 acres of critical area

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<sup>11</sup> The City enacted a new overlap that restricted building heights in the area in 2011.

(3,442 ft<sup>3</sup>) to cap the landfill, and then excavate another 0.969 acres of critical area (3,949 ft<sup>3</sup>) to cap the landfill and create a natural storm water conveyance next to Hagood Avenue.

After the filling is complete, the Project area will be utilized for public infrastructure, the naturalized storm water feature, and a mixed-used development consistent with the character and mission of the WestEdge's goals. To offset its impact to Gadsden Creek (its total elimination), WestEdge will purchase mitigation credits for wetlands along the Ashley River in Kings Grant, which will result in approximately twenty to twenty-five acres of wetlands being restored.

FOGC nevertheless points out that a part of the Development area is owned by an entity called Rushmark, LLC. Rushmark bought the property from the South Carolina Research Authority, which was part of the original Horizon Foundation but then left. However, Rushmark has not participated in the permitting or certification process before the Department. Furthermore, the Department is not aware of what Rushmark intends to do with its parcel once the tidelands are filled.

#### *Excavation and Capping of the Landfill*

WestEdge proposes to fill in Gadsden Creek to cap the landfill in order to upgrade and install the new storm water system. The landfill will be excavated and disturbed to lay new storm water pipes and create a new outfall off Fishburne Road. It will also be disturbed to create the storm water conveyance.

Mr. Robinson is concerned that moving the storm and flood water control to a more closed system under the ground, combined with the natural subsidence of the area, will create more technical, maintenance and structural problems in the future because of the landfill. A closed storm water system relies more on buried drainage solutions rather than surface solutions. As a result, closed systems are more likely to have hidden problems, clogs, etc., that are not easily discoverable. Here, the weight of the landfill, decomposition of parts of the landfill, and the added weight of roads, additional soil, and buildings, could exacerbate this natural subsidence of the area, making the area more unstable. Mr. Robinson is therefore concerned that if the new pipes are buried within this area without proper piling support, etc., then the pipes will be more likely to break and leak, allowing leachate and trash from the landfill to come in contact with groundwater.

Nonetheless, Mr. Karkowski addressed these concerns and explained the piping will be engineered to address the poor siting material. He referenced using stone piles driven into the Cooper morrow to support infrastructure to anchor it in a more stable layer, although it was unclear

whether this technique would be used in this project or simply used as an example. Regardless, because some of the pipes will be laid within the landfill, including piping to create the new Fishburne outfall, the piping system will be constructed using special management techniques to contain possible contamination where the landfill is excavated. I find the new storm water piping can be engineered to limit the influence of subsidence and the danger of future leaks.

#### *Storm Water Infrastructure and Flood Control*

Instead of using Gadsden Creek as the primary drainage pathway/outfall for the surrounding basin, the Project will create a new engineered outflow system with three outfalls. The new system will offset the loss of storage capacity from filling in the creek with increased flow capacity and efficiency. The primary outfall will remain at the Lockwood culvert. A second outfall will be created at the southeast area of the Development that will tie into the Spring-Fishburne Deep Tunnel System,<sup>12</sup> and this part of the drainage system will convey storm water only. A third outfall will be built in the northwest area of the Development and empty into the Ashley River near the baseball stadium (the Fishburne outfall). The introduction of these new outfalls will allow the current drainage basin, which is approximately 200 acres, to be divided into smaller basins so that water from storm and flood events will not be concentrated at one outflow, currently Gadsden Creek outfall at the Lockwood culvert.

Further, WestEdge intends to excavate an area of the creek that currently parallels Hagood Avenue to create a “conveyance” of water that will be a natural feature in conjunction with the new drainage system. This feature will not be a just a retention pond, per se, because water will flow through it.

The Project will utilize mechanical treatment for storm water. A vortex system will separate oil and grease and floatable sediments while a vaulted filter will separate out metals, biologics, and other particulates. These man-made treatment systems will be utilized because, although salt marsh wetlands are excellent natural filtration systems, they are not a legally approved method for the treatment of storm water.

Based upon a conservative modeling of the new system, the Project will improve drainage in the Fishburne area and eliminate sunny day flooding. The City of Charleston’s Director of

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<sup>12</sup> The Spring-Fishburne Deep Tunnel System is a major storm water infrastructure project being undertaken by the City of Charleston. It is a system of pipes that convey storm water out of the City using pumps that are incompatible with sea water; accordingly, use of the system is restricted to storm water.

Storm Water management agreed that, at a minimum, the Project will not worsen storm water in the area, and it will improve sunny day flooding. The City's Director also believes the Project has the potential to relieve compound flooding near the Development site as well.

Nevertheless, Mr. Robinson testified WestEdge's model showed flooding would increase along Hagood Avenue at high tide during 25-year, 50-year, and 100-year storms. More broadly, Mr. Robinson opined that the Project would worsen storm water flooding in the area. In his opinion, the Project would result in more run-off with less storage capacity, which results in increased storm water flooding and compound flooding. Mr. Robinson also noted the model was not verified or calibrated to the site conditions. Mr. Karkowski agreed that the stormwater projections were not calibrated but explained that calibration regarding this type of project is typically not done and the conservative parameters used for the Project eliminated its need.

Despite Mr. Robinson's issues with the model, and his assertion that he would have approached the Project differently, Mr. Robinson conceded the storm water modeling and engineering were performed with ordinary skill and due diligence. He took no exception to the storm water calculations that were prepared. With such a concession, it is challenging for the Court to find the weak points of the model—the potential for increased flooding in a few areas and lack of calibration—render the modeling useless or flawed to the point of unreasonableness. Moreover, I find the evidence shows that while the new system may result in increased storm water flooding in a few limited areas, the overall effect of the system will be to significantly reduce or eliminate sunny day flooding, and possibly compound flooding too, without worsening storm water issues.

#### Concerns and Support for the Project

Stakeholders, from the federal level to the local community, have reacted to the Project. Both the South Carolina Department of Natural Resources (SCDNR) and the U.S. Fish and Wildlife Service (USFWS) objected to the Project. In contrast, the National Marine Fisheries Service (NMFS) originally objected to the Project but is now supportive. Although the Department relayed concerns that filling in the creek would eliminate essential fish habitat, the reasons and evidentiary basis for these agencies' support or disapproval of the Project were not addressed at the hearing.

WestEdge has reached out and engaged with the local community before the development of the WestEdge site began. WestEdge has never had the support of FOGC. However, until

recently they had the support of most of the area developments including the Westside Neighborhood Association, and local developments like Gadsden Green, Hampton Park Terrace, and the Bristol. The Westside Neighborhood Association, upon change of leadership, nevertheless recently withdrew its support for the Project. Audrey Lisbon, President of the Westside Neighborhood Association, explained the neighborhood withdrew its support because it wants an old 2008 conceptual design for the Project area to be implemented in which the creek would become a public park.<sup>13</sup>

### *Concerns*

Several members of FOGC are concerned that filling the creek will prevent them from using and enjoying Gadsden Creek. These members either pass the creek on their commutes or walk by it, taking enjoyment from its natural aspects and wildlife. FOGC members are also concerned that eliminating Gadsden Creek will permanently remove the last remnant of an important cultural and historical resource in a community that has systematically been deprived of its natural resources because of environmental racism and gentrification. In particular, Tamika Gadsden is worried the type of new development and jobs planned for the area will displace the area's middle- and working-class families who may not be able to afford the higher taxes and high-priced luxury residential buildings. Similarly, Dr. Coster is concerned how the African American students in the area will react psychologically if the creek is eliminated. Finally, several FOGC members were concerned about how elimination of the creek would affect flooding in the area; it is their belief and understanding that the creek is a useful tool in flood management.

FOGC has some valid concerns. Access to natural resources is valuable to communities, and the Court is certainly not a proponent of eliminating them for no good reason. Indeed, it is clear to this Court that Gadsden Creek, in its historic manifestation as a sinuous natural creek and marsh ecosystem was very important to the local community. However, the modern iteration of Gadsden Creek unfortunately represents a blighted fragment of the pristine resource it once was. Moreover, the impact of the landfill cannot be ignored. In particular, the Court is struck by the fact that children in the public housing area are being exposed to the contamination by the creek. Therefore, although the Court empathizes with the concerns of FOGC and the local community,

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<sup>13</sup> However, Ms. Lisbon did not explain how the 2008 plan would resolve the issues before this Court. Moreover, from this Court's review of the record, the 2008 plan was merely conceptual and appears to call for the filling of the Gadsden Creek in order to create an elevated stormwater feature.

the environmental consequences of the exposed landfill, including contaminated flood waters, must be dealt with.

Additionally, while Gadsden Creek undoubtedly helps to absorb and curb flooding, its current capacity is inadequate to sufficiently mitigate the flooding in the area. Therefore, while its elimination without replacement by the engineered storm water and drainage system would, indeed, result in increased flooding as FOGC members fear, I do not find the elimination of the creek with the proposed new system will cause increased flooding.

#### *Support*

The most persuasive evidence given regarding concerns about the Project was from Keith Waring, a member of the Charleston City Council. Councilman Waring has lived in Charleston his whole life, and when he was a child, he observed the creation of landfill as he crossed the bridge into Charleston. Initially, he was against filling Gadsden Creek because he enjoys fishing in creeks, although he had never fished in Gadsden Creek. But, after WestEdge presented the Project to City Council and communicated the consequences of the landfill cap's erosion, he became concerned. Because of his concerns, he convinced City Council to commission its own, independent study of the creek. The results of the study, which was conducted by General Engineering Laboratories or GEL, confirmed Councilman Waring's concerns about the failing landfill cap and raised concerns about the City's liability in the Project area. City Council, including Councilman Waring, then unanimously voted to support the Project, including filling Gadsden Creek. Councilman Waring would support preserving the creek if the threat of contamination from the landfill and flooding could also be resolved, but he is not aware of the viable funding to accomplish all these goals. The Court found Councilman Waring's change of mind to be a particularly compelling because it was based upon observations of a long-time resident of the area, a person who appears genuinely concerned about the citizens in that area, and the City's Council's own, independent investigation of the creek and the concerns raised by that study.

#### Conclusions

I conclude the evidence shows that the Project would reduce the flooding associated with storm water and tidal events, including compound flooding. I also find the evidence shows that the Project would resolve the issue of contamination from the landfill. Importantly, I find that the resolution of these issues are public benefits.

## **Alternative Designs**

### WestEdge Alternatives

WestEdge considered three alternative locations for the Development and one “Do Nothing” alternative. In evaluating the alternative locations, WestEdge generally evaluated whether a location lent itself to a multi-use development that enhanced the medical district, improved the surrounding community, and created a positive economic impact. More specifically, the location had to meet the following parameters: (1) within three miles of MUSC; (2) at least thirty contiguous acres (to be economically feasible as a TIF); (3) conformity with the City of Charleston’s plan; (4) properly zoned; (5) accessible and accessible to utilities; and (6) in the public interest.

The first off-site location WestEdge considered was the Magnolia site, a former superfund site. The Magnolia site was not available and already had on-going plans for development. The second alternative location WestEdge considered was the Laurel-Island Site, a former landfill located near the Ravenel Bridge. While this site met the requirements for distance from MUSC and parcel size, it had limited accessibility and previous attempts to develop it failed because of lack of access. The third offsite alternative WestEdge considered was the State Ports Authority Site at Union Pier Terminal. This property met the location and size requirements but was already subject to planning for another development.

The “Do Nothing” alternative was considered and rejected because it would not fulfill the goals of the Project to have a multi-use development that enhanced the medical district, improved the surrounding community, and created a positive economic impact. WestEdge determined that leaving the creek as-is would not be advisable because of the levels of contamination identified; as a result, it concluded development would be less environmentally damaging and fulfill the goals of the Project.

Additionally, although it was not an alternative presented as part of the permit proposal, the parties discussed WestEdge’s 2008 conceptual design at the hearing, which was the design the Westside Neighborhood Association hoped would be implemented. This concept design included a naturalized feature of Gadsden Creek but would have still involved filling in a substantial amount of the creek and creating a storm water feature. However, WestEdge determined the plan was not practical due to complications with elevating the grade of the natural feature along Hagood Avenue and running utilities.

Finally, as the TIF ordinance shows, WestEdge initially intended to preserve the creek and use it to enhance the area; therefore, at one time this was an alternative. Nevertheless, a new height overlay and density requirements rendered preservation of the creek economically unviable. Therefore, retaining the creek could jeopardize the economic feasibility of the Development.

#### FOGC Alternatives

The alternatives proposed by FOGC center on retaining and restoring Gadsden Creek. FOGC would like to see the creek restored so it can not only function as an ecological system but provide natural drainage and flooding protection and be a public amenity that people can enjoy. FOGC concedes that while preserving the creek and addressing the flooding and contamination issues before the Court would take creativity, it believes that retaining the creek will be more beneficial in the long run than destroying it. Consistent with this objective, FOGC disagrees with how the Project will address the challenges facing the area but does not dispute that issues are present. For example, FOGC's expert, Mr. Robinson, agreed that flood waters are not safe for people and eliminating the flooding at Hagood Avenue and Fishburne Road would be a public benefit. But he does not believe filling the creek is the best solution. FOGC presented four alternatives to the Project's proposal to fill in Gadsden Creek: (1) elevating the road(s), (2) installing berm(s), (3) employing a muted tide-gate, and (4) restoring and re-naturalizing the creek.

#### *Elevating the Roads*

FOGC proposed elevating roads, like Hagood Avenue, to reduce the impacts of flooding while preserving the creek. The roads around the creek have settled about three feet and raising these roads up would reduce the traffic problems caused by flooding. However, the parties disagreed about how much the roads would have to be elevated to be effective. In Mr. Robinson's opinion, the roads would only need to be elevated to about "knee high" to address flooding that is about 1.5 to 2 feet deep. In contrast, Mr. Karkowski opined that Hagood Avenue sits at approximately elevation 3, and to comply with current regulatory requirements, the road would have to be raised approximately five feet to elevation 7.5. He estimated raising a section of the road to that height would cost approximately \$30 million.

Raising the roads, and only the roads, would create logistical issues. For instance, the roads would be higher than the surrounding land, which would still be flooded, including the Gadsden Green community. The elevated roads would impact the visual appearance of the area and the utilities infrastructure that run below them, including sewers. Moreover, some of the roads that

would need to be elevated are controlled by the South Carolina Department of Transportation (SCDOT) and not the City of Charleston; any alternation of these roads would require the approval of SCDOT, who is not currently involved in this Project. Involving SCDOT would thus significantly complicate the Project even if it were financially feasible.

I do not find that elevating the roads is a suitable or practical option in the context of this Project. It would not solve the greater flooding issue, yet it would require extensive alteration of not only roads, but underlying infrastructure, and coordination with a stakeholder that may not agree with the suggested alternative. While it could be a part of a solution with other tools for addressing flooding, its costs are large with minimal benefit. The new outfalls, while also expensive and challenging, will provide a much more comprehensive solution to the flooding in the area. Additionally, elevating the roads will not solve the problem of landfill contamination.

#### *Berms*

FOGC also advocated for using berms or site walls to address flooding without filling in the creek. Like elevating the roads, this alternative does not provide a solution to the flooding problem. The berms would be placed alongside flood-prone roads to prevent floodwater or storm water from encroaching onto them, but they would not increase the area's capacity to absorb and drain those flood waters. Mr. Karkowski explained that the berm would need to be five feet tall and about 4,500 feet long parallel to Hagood Avenue at a cost of about \$1-2,000 per foot. Mr. Robinson did not necessarily disagree with the cost but noted that the berm would only need to be about 2,000-2,500 feet, which would substantially reduce the overall cost as estimated by Mr. Karkowski.

Gadsden Creek itself is only 2,200 ft; therefore, the berm(s) would probably be shorter than Mr. Karkowski estimated. Nevertheless, since the berms would displace rather than absorb the floodwaters, the Court is left to speculate what flooding may occur elsewhere as a result of this alternative. Additionally, installing the berms would disrupt public access and viewing of the creek area where they were placed. Also, the berms would be limited in size and function by the available space on either side of Hagood Avenue. Therefore, although berms could help prevent flooding from spilling onto Hagood Avenue, Fishburne Street, and possibly the Gadsden Green community, with a greater number of king tides, berms (at least on their own) are more like Band-Aids than permanent solutions to an increasing problem. And, again, this alternative does not solve the issue of landfill contamination.

### *Muted Tide-Gate*

FOGC advocates for installing a muted tide-gate to address the flooding and as an alternative to filling in the creek. The muted tide-gate would be placed in the box culvert under Lockwood Road to control floodwaters entering the creek while allowing storm water to exit. Muted tide-gates reduce, but do not eliminate flow into a storm water system during high tide, in contrast to a regular tide gate which shuts off flow completely. Regular tide gates have been used in South Carolina. In Charleston specifically, the City uses tide gates in many areas to alleviate tidal flooding. Still, the use and acceptability of muted tide gates is more questionable. In fact, the City has resisted using muted tide gates.

Furthermore, the Lockwood culvert is particularly large, approximately 8ft by 5ft. Because of its size, Mr. Karkowski explained it is doubtful a muted tide gate exists that is big enough to fit the Lockwood culvert and it is likewise doubtful that a regulatory body would approve a muted tide gate for the Lockwood culvert. Mr. Karkowski also does not believe a tide-gate would address two of the problems the Project seeks to solve: (1) storm water flooding and (2) landfill contamination. Nevertheless, it appears a muted tide gate could help reduce sunny day flooding if it fit the culvert. However, since the Lockwood culvert is already struggling to handle the volume of water coming in and out, downsizing it would not help, particularly with the drainage of storm water, which a muted tide gate would disrupt. Yet, with the proposed new Fishburne Outfall, it is possible that the watershed basin for the creek could be reduced to a volume that could be handled with a muted tide gate. Unfortunately, this option was not sufficiently explained enough for this Court to make a determination whether such a combination of tools would resolve the flooding issues, and the matter of the landfill contamination remains.

### *Restoring and Naturalizing the Creek*

FOGC advocates for creek restoration and naturalization as a viable alternative in combination with one of the other alternatives mentioned above. FOGC asserted restoration of the creek would address the landfill and water quality concerns while one or a combination of the alternatives suggested above would address flooding. Although preserving and restoring a creek can be challenging, Mr. Robinson believes Gadsden Creek can be saved and restored using techniques similar to those he has utilized in the past. For example, Mr. Robinson helped

daylight<sup>14</sup> Smith Branch Creek in Columbia, South Carolina, which he estimated cost a couple million dollars. Smith Branch was an urban stream that had been channelized into a culvert in the 1950s and 1960s. Mr. Robinson worked with the City of Columbia, the Department, and the Army Corps of Engineers, to oversee the multi-phase daylighting project, which required consideration of urban runoff, flooding, and pollutants. Nevertheless, the Smith Branch Creek project did not deal with tidal issues. Thus, although the project was in a flood plain and had previously been channelized, it simply is not analogous to the wide-ranging issues presented by Gadsden Creek and its partial channelization over a landfill.

In Mr. Robinson's opinion, the landfill cap is still largely in place and the salt marsh at Gadsden Creek has expanded to form an even more robust natural cap on top of the landfill. He contends that where erosion has occurred, the cap can be restored, and measures can be taken to avoid landfill contamination. Specifically, he suggests creating a new cap by digging down into the landfill to remove the old soil and replace them with new soil and vegetation. He averred that a barrier could be used along the length of the creek by creating an underground concrete wall, a clay liner, or a sheet pile structure that would create a wall between the landfill and surface waters. However, he offered no examples in which these techniques have actually been used to allow the flow of water over or next to a landfill. Overall, he estimated the cost of restoring and re-naturalizing the creek would be about \$1,000 per linear foot. Gadsden Creek is a little over 2,000 ft. Therefore, the estimated cost would be approximately \$2 million. Mr. Robinson also cited a recent project of replanting a tidal creek and estimated the cost of re-vegetating the creek to be approximately \$1-2 million for seven acres of creek. Therefore, according to Mr. Robinson's estimates, Gadsden Creek could be restored and re-naturalized for less than \$5 million.

Notably, Mr. Robinson believes the previous studies of surface water in the Gadsden Creek area do not indicate the landfill contamination is as concentrated or as concerning as WestEdge purports. Moreover, in his opinion, one of the best ways to remediate a landfill is to place plants that filter pollution as a barrier between the landfill, the creek, and the Ashley River. Marsh plants are already present at Gadsden Creek and more can be planted to increase the filtering capacity of the creek. Mr. Robinson also believes that if Gadsden Creek is not filled, then it has the capacity to handle the storm water from the site, including the increase in storm water from increased runoff

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<sup>14</sup> To daylight a creek means to bring a creek that was previously moved underground into a culvert back to the surface.

volume. He maintains Gadsden Creek should have sufficient capacity, in particular, once the Spring-Fishburne Deep Tunnel System is implemented and the watershed basin feeding into Gadsden Creek is reduced in size.

In contrast, Mr. Karkowski explained that excavating the landfill and capping it properly to preserve the creek and prevent the creek from exposing the landfill would be more expensive than filling in the creek. He estimated the cost of such a project to be in the tens of millions. He also rejected Mr. Robinson's suggestion that if the creek were left intact and tidally influenced, the Spring-Fishburne Deep Tunnel System could be used to take some of the drainage burden away. Indeed, the creek's tidally influenced water would prevent it from being connected to the tunnel system because the tunnel system cannot operate with tidally influenced waters. Therefore, if the creek is preserved, then only one new outfall could be added to provide some drainage relief—the Ashley River outfall by the baseball stadium. Overall, Mr. Karkowski opined that preserving and restoring the creek is not a feasible alternative. Similarly, in Mr. Ruocco's opinion, restoring the creek is not a feasible or reasonable alternative because of the level of contamination. He does not think restoration is the least impactful environmental alternative.

Here the estimates for the creek restoration cost are quite different. However, FOGC simply failed to carry its burden that its projected costs were realistically feasible. I found Mr. Karkowski's and Mr. Ruocco's opinions to be more persuasive.

#### Conclusion

In a perfect world, preserving and restoring the creek would clearly be the desired outcome. The creek is a valuable resource. But this is a very unique situation, and the creek is tainted by a landfill that must be dealt with. Although conceivably, a cap could be engineered that would allow the creek bed to run directly over or next to the landfill without a threat of erosive exposure, FOGC failed to convince this Court that possibility is realistically safe. It is also possible that some combination of new outfalls and a tide gate could address the flooding issues if the creek was restored, but again FOGC failed to prove its combinations would be a reasonably effective proposal.

Moreover, the Court is still left with lingering questions about the long-term effectiveness of FOGC's engineered solution to preserve the creek since water is erosive and the area is subsiding. In contrast, filling in the creek provides certainty about the long-term effectiveness of a cap. Additionally, the cost of preserving the creek, as estimated by the experts, is between five

million to tens of millions. Here, without more concrete evidence about how effective and expensive the creek’s preservation would be compared to the cost of the current Project,<sup>15</sup> the more persuasive evidence before the Court is that preserving the creek will jeopardize the financial feasibility of the entire WestEdge Development. And, as discussed above, the goals of the Development—to improve storm water drainage infrastructure, facilitate additional roads and road repair, improve and add utilities, and increase transit connectivity—are public benefits that are in the public interest.

When the threat of contamination of the landfill is combined with a concern about the success of the TIF if FOGC’s proposed solutions to preserving the creek are used, only one feasible solution remains, and unfortunately it is to fill in the creek. Filling in the creek as the Permit requests is the only way to (1) ensure the landfill will stop threatening the health, safety, and welfare of people and the environment, (2) address the flooding issues, which are also a threat to public health, and (3) maintain the financial viability of the WestEdge Development and its many public benefits.

### **ISSUES**<sup>16</sup>

1. Whether DHEC issued the permit in violation of regulation 30-12(G)(2)(a) and (b) of the South Carolina Code of Regulations and the Commercial Development Policies of the Coastal Zone Management Plan (CZMP).

2. Whether DHEC issued the permit in violation of several critical area statutory policies, Regulation 30-11, and the CZMP.

3. Whether DHEC issued the 401 Water Quality Certification in violation of regulation 61-101 of the South Carolina Code of Regulations.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact, I conclude the following as a matter of law:

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<sup>15</sup> While Mr. Robinson and Mr. Kardowski gave quite different estimates for the creek restoration, this Court does not know how much the current design costs. Without comparative costs, it is hard for the Court to gauge what “expensive” means and whether it is prohibitively so. Ultimately, this lack of evidence weighed against the Petitioner.

<sup>16</sup> FOGC raised six issues to the Court. The Court has combined the first three issues because they involve the same regulation and sections of the Coastal Zone Management Plan (CZMP) that overlap with that regulation. Therefore, it was more efficient to analyze them together. Similarly, the Court combined issues four and five because they also involved a regulation and its comparable CZMP policies.

### Standard of Review

Pursuant to the Administrative Procedures Act, the ALC is the fact finder in this case and conducts its review *de novo*. *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010). The burden of proof in a contested case hearing is by the preponderance of the evidence. *Nat'l Health Corp. v. S.C. Dep't of Health & Envtl. Control*, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). "In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof." *DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct. App. 2017), *reh'g denied* (Jan. 11, 2018). When applicable, the Court "shall give consideration to the provisions of § 1-23-330 with regards to the Department's specialized knowledge." S.C. Code Ann. § 44-1-60(F)(2) (2018).

Additionally, "[t]he qualification of a witness as an expert in a particular field is within the sound discretion of the trial judge." *Smoak v. Liebherr-America Inc.*, 281 S.C. 420, 422, 315 S.E.2d 116, 118 (1984). Where the expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative weight. *Berkeley Electric Coop. v. Pub. Service Comm'n*, 304 S.C. 15, 402 S.E. 2d 674 (1991). Furthermore, the trier of fact is not compelled to accept an expert's testimony, but he may give it the weight and credibility he determines it deserves. *Florence County Dep't of Social Services v. Ward*, 310 S. C. 69, 425 S. E.2d 61 (Ct. App.1992). The trier of fact may accept one expert's testimony over that of another. *S.C. Cable Television Ass'n v. Southern Bell Telephone and Telegraph Co.*, 308 S. C. 216, 417 S. E.2d 586 (1992).

### Regulation 30-12(G): Dredging and Filling

FOGC argues the Department violated regulatory law when it granted the permit to fill in Gadsden Creek and its associated wetlands. Specifically, FOGC argues that subsections 30-12(G)(2)(a) and (b) prohibit the creek and its wetlands from being filled because WestEdge's Project is strictly for private gain and constructing the Project is a nonwater-dependent activity. S.C. Code Regs. Ann. 30-12(G)(2)(a)-(b) (Supp. 2022).

Regulation 30-12 governs project standards for tidelands and coastal waters. Gadsden Creek and its associated wetlands are critical area tidelands under the regulatory scheme. S.C. Code Ann. Regs. 30-1(D)(51) (2011) (defining tidelands to mean "all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to

coastal waters and are an integral part of the estuarine systems involved”). The regulatory scheme specifically discourages the dredging and filling of wetlands because it “can always be expected to have adverse environmental consequences.” Reg. 30-12(G)(1). However, the regulatory scheme also recognizes there are cases where such “unavoidable environmental effects are justified if legitimate public needs are to be met.” *Id.* Nevertheless, “simply because the State permits alterations in limited circumstances does not change the fact that altering tidelands remains the exception to the rule. The State, through the General Assembly, has adopted the policy that the public interest is usually best served by preserving tidelands in their natural state.” *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 29, 766 S.E.2d 707, 715 (2014).

Subsection 30-12(G)(2)(a)

Under the specific standards for dredging and filling, subsection 30-12(G)(2)(a) provides:

The creation of commercial and residential lots **strictly for private gain** is not a legitimate justification for the filling of wetlands. Permit applications for the filling of wetlands and submerged lands for these purposes **shall be denied**, except for erosion control, see R.30-12(C), or boat ramps, see R.30-12(B). All other dredge and fill activities not in the public interest will be discouraged.

(emphasis added).

FOGC argues filling in the creek as part of the Project will create one parcel within the larger Development that will be used strictly for private gain in contravention of this regulation. Specifically, FOGC refers to the parcel within the Development owned by Rushmark, LLC. FOGC contends that once the creek is filled in, Rushmark will develop its property strictly for private gain.

There was no testimony or evidence introduced to show what Rushmark intends to do with its parcel after the creek is filled in. Although it is plausible that Rushmark will develop it for private gain, in this instance FOGC bears the burden of proof to substantiate this assumption. But even if Rushmark were to develop its parcel for private gain, the Project must be considered as a whole. The subsection refers to “the creation of commercial and residential lots **strictly for private gain.**” Reg. 30-12(G)(b)(1). Rushmark’s parcel is only a small component within the grand scheme of the Development that will be affected by the permitted Project. The Project as a whole will provide significant public benefits, including eliminating or significantly reducing flooding in

the area, capping the landfill, and upgrading the area utilities to make the area more desirable for development, including the development of research facilities associated with MUSC.<sup>17</sup>

Nevertheless, the Court realizes that while the “horizontal infrastructure” WestEdge seeks approval for in this Permit is in the public’s interest, the Development area is ultimately destined to be developed into a mixed-use development by private developers. Thus, this Project cannot be looked at myopically. However, the TIF district was created to redevelop a blighted area for the public benefit, and ultimately attracting private development is a necessary part of its goal; indeed, funding the public infrastructure for the Project is dependent upon increased tax revenues from privately developed lots in this under-serviced area of Charleston. This project therefore marries public and private interests to revitalize an area, and I do not find this marriage of interests transforms the Project into one that is “strictly” for private gain. Therefore, I find FOGC failed to show by a preponderance of the evidence that the permitted project contravenes this subsection. *Nat’l Health Corp.*, 298 S.C. at 373, 380 S.E.2d at 841 (holding the burden of proof in a contested case hearing is by the preponderance of the evidence).

Subsection 30-12(G)(2)(b)

Subsection 30-12(G)(2)(b) provides that “[d]redging and filling in wetland areas should be undertaken only if that activity is water-dependent<sup>18</sup> and there are no feasible alternatives.” The parties agree that the Project is not water-dependent; however, they disagree whether the permitted project’s nonwater-dependent status completely prohibits the creek from being filled under this subsection.

FOGC contends the language of subsection 30-12(G)(2)(b) absolutely prohibits the dredging and filling of wetlands unless two conditions are met: (1) the activity is water-dependent and (2) there are not feasible alternatives. Here, because the activity is not water dependent, FOGC argues subsection 30-12(G)(2)(b) is an absolute bar to the filling in of Gadsden Creek.

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<sup>17</sup> FOGC nevertheless argued that several of these public benefits touted by this project are solutions to problems originally created by this City of Charleston’s past actions—i.e., the landfill and ill-conceived reclamation of lands that flood—and therefore these solutions should not be used as public benefits to justify further environmental impacts to critical areas. At the outset, FOGC provided no legal authority for this position. Second, there was no evidence introduced to show the City was in violation of any laws at the time these problems were created. Third, no matter the origin of the problems, fixing them is a public benefit.

<sup>18</sup> Water-dependent means “a facility which can demonstrate that dependence on, use of, or access to coastal waters is essential to the functioning of its primary activity.” S.C. Code Ann. Regs. 30-1(53).

The Department and West Edge submitted a Joint Proposed Order in which they argue the Department has the discretion under the subsection to allow the wetlands to be filled in even if the permitted activity is nonwater-dependent. They argue the term “should” in subsection 30-12(G)(2)(b) gives the Department discretion to approve a project despite the conditions in that subsection as long as the project is consistent with subsection 30-12(G) as a whole. In this case, the Department approved the project under subsection 30-12(G) as a whole and subsection 30-12(M), which governs nonwater-dependent structures.

The interpretation of the meaning of these regulatory sections requires the Court to engage in statutory interpretation. “Regulations are interpreted using the same rules of construction as statutes.” *Murphy v. S.C. Dep’t of Health & Env’t Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “Under the plain meaning rule, it is not the court’s place to change the meaning of a clear and unambiguous statute. *Id.* “All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” *Bass v. Isochem*, 365 S.C. 454, 469, 617 S.E.2d 369, 377 (Ct. App. 2005).

#### *Should*

Subsection 30-12(G)(2)(b) has two qualifying terms. It provides that the filling of wetland areas “should” be undertaken “only if” the activity meets the conditions concerning water-dependency and feasibility. The word “should” can be used to express an obligation, or to express propriety, or what is expected. *Should*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/should> (last visited Nov. 1, 2022). WestEdge argues the definition of “should” is therefore precatory—a requested or recommended action—instead of mandatory like the word “shall.” See *Johnston v. S.C. Dep’t of Lab., Licensing, & Regul., S.C. Real Est. Appraisers Bd.*, 365 S.C. 293, 296–97, 617 S.E.2d 363, 364 (2005) (“The term ‘shall’ in a statute means that the action is mandatory.”). I find this interpretation is reasonable and consistent with the ordinary meaning of “should” and its legal interpretation. See *U.S. v. Maria*, 186 F.3d 65 (2nd Cir. 1999) (explaining “the common meaning of ‘should’ suggests or recommends a course of action, while the ordinary understanding of ‘shall’ describes a course of action that is mandatory”); 3 SUTHERLAND STATUTORY CONSTRUCTION § 57:10 (8th ed.) (advising

the term “should” is used to indicate “a recommended course of action, but does not itself imply the obligation associated with ‘shall’”). Moreover, the legislature’s juxtaposition of “should” and “shall” in the same subsection—30-12(G)—indicates the legislature intended them to be used differently. *See, e.g., United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598, 611 (D.D.C. 2018) (“Although the use of ‘should’ instead of ‘shall’ is not ‘automatically determinative,’ it is particularly striking here because ‘shall’ is used twice in the very same sub-provision, seven times in the same provision, and throughout the Special Counsel regulations.” (internal citation omitted)).

Based upon the ordinary dictionary definition of “should,” the legal interpretations cited above, and the drafters’ juxtaposition of “should” and “shall” in the same subsection, I conclude that “should” indicates a recommended or directory course of action rather than the imperative mandate of “shall.” *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (“[W]e must give the words found in the statute their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.”). Returning to the regulation, if we replace “should” with “recommend,” it is easier to see the directory nature of the provision: dredging and filling in wetland areas is recommended to be undertaken only if that activity is water-dependent and there are no feasible alternatives. *See* Reg. 30-12(G)(2)(c). Stated another way, dredging and filling in wetland areas is not recommended to be undertaken if that activity is nonwater-dependent or there are feasible alternatives.

However, FOGC argues the directory nature of the regulation is limited by the phrase “only if.” FOGC argues the phrase “only if” is a mandatory limiting phrase that removes any discretion the Department may have been afforded by the use of the word “should.”<sup>19</sup> I disagree with FOGC’s interpretation. As it is used in this provision, “only if” strictly limits when action is recommended based on meeting two prerequisites—(1) the activity is water-dependent and (2) there are no feasible alternatives. *See Twp. of Tinicum v. U.S. Dep’t of Transp.*, 582 F.3d 482, 488 (3d Cir. 2009) (holding the phrase “‘only if’ describes a necessary condition, not a sufficient condition” and “[a] necessary condition describes a prerequisite”). It does not modify the word “should,” which comes before these conditions. Therefore, subsection 30-12(G)(b)(2) remains

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<sup>19</sup> Although FOGC questioned Mr. Williams regarding this issue during the hearing, FOGC did not make this argument in its Motion for Summary Judgment. Additionally, neither West Edge nor the Department addressed the operation of the phrase “only if” in their proposed orders.

directory in nature. Thus, under subsection 30-12(G)(2)(b), dredging and filling are not recommended where, as here, the activity is nonwater-dependent; however, dredging and filling are not completely foreclosed.

The Department, and thus this Court, has the discretion under subsection 30-12(G)(2)(b) to determine whether to allow the Project to move forward although it is not generally recommended. The question that must be answered in this case is when this Court can exercise its discretion and approve a project even though the condition of water-dependency is not met. I find that when it is appropriate to depart from the conditions in subsection 30-12(G)(2)(b) can be determined by looking at the regulation as a whole, and in particular, subsection 30-12(G)(1) and subsection 30-12(G)(2)(a).

#### Subsections (G)(1) and (G)(2)(a)

Although the Department initially found this Project is not consistent with subsection 30-12(G)(2)(b), it determined it nonetheless had discretion to approve the Project because it found the Project was consistent with 30-12(G) as a whole. In order to find the Project consistent with regulation 30-12 as a whole, the Department interpreted subsection 30-12(G)(1) justified approving the Project.

As previously mentioned, subsection 30-12(G)(1) provides general guidance for how subsection 30-12(G) should be interpreted as a whole. *See Bass*, 365 S.C. at 471, 617 S.E.2d at 378 (“A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.”); *Laurens Cnty. Sch. Districts 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992) (“The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose.”) Subsection 30-12(G)(1) provides that the filling of wetlands can always be expected to have adverse environmental consequences and is therefore discouraged. *See id.* However, it nonetheless allows for the filling of wetlands where “such unavoidable environmental effects **are justified if legitimate public needs are to be met.**” *Id.* (emphasis added). Thus, although the legislature discourages the filling of wetlands, it recognizes there are times when that filling is accepted for an overriding public need to be met. This phrasing suggests that dredging and filling are allowed when the need cannot be met any other way—there is no alternative to filling and dredging that will meet the need. This sentiment is further reflected in the last sentence of subsection of 30-12(G)(2)(a), which sets forth that fill activities should be

discouraged if they are not in the public interest. *See also* S.C. Code Regs. Ann. 30-12(G)(2)(g) (“Applications for dredging in submerged and wetland area for purposes other than access, navigation, mining, or drainage shall be denied, unless an overriding public interest can be demonstrated.”). Accordingly, the dredging and filling of wetlands should only be allowed if the prerequisites of subsection 30-12(G)(b)(2) are met unless there is an overriding public need that cannot be met without dredging and filling.

This is a case in which there is an overriding public need that cannot be met without dredging and filling the wetlands. Here, the creek and its attendant tidelands flow next to and over a landfill that has been exposed and is leaking leachate into the tidelands. Although the tide may dilute the leachate, it also spreads it throughout the reach of the creek and its flood waters. Therefore, anything that comes into contact with the creek waters or its flood waters—including plants, animals, storm water, or members of the public—is exposed to the toxic leachate to some extent. Protecting the public and the environment from the leachate is certainly a legitimate public need. *See* Reg. 30-12(G)(1).

Moreover, based upon the evidence presented to this Court, to repair the landfill cap, regardless of whether the creek is preserved or not, the creek and the tidelands will have to be dredged and filled to some extent. For example, even if this Court adopts FOGC’s alternative of restoring and re-naturalizing the creek, the restoration would necessitate excavation and likely some filling of the creek to repair the landfill cap and install a protective barrier between the creek and the landfill. Therefore, to avoid the absurd result that could not be intended by the legislature—to leave a landfill exposed and leaching into tidelands—I find subsection 30-12(G) provides the Department with the authority to allow this Project under the unique and singular circumstances of this case. *See State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff’d as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010) (“A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.”); *see also Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (“[T]he courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.’”).

Lastly, I find that in order to both repair the landfill cap and ensure the financial viability of the WestEdge Development, the creek cannot be reasonably and feasibly preserved. As

explained in the Findings of Fact, the only practicable and economically feasible solution is the one proposed by WestEdge and approved by the Department in the Permit. Accordingly, I find FOGC failed to show by a preponderance of the evidence that there is a feasible alternative to the permitted project that would save the creek and the tidelands. *See Nat'l Health Corp.*, 298 S.C. at 373, 380 S.E.2d at 841 (holding the burden of proof in a contested case hearing is by the preponderance of the evidence).

#### Subsection 30-12(M)

Once the Department determined it had discretion to permit the Project under subsection 30-12(G), it turned to subsection 30-12(M) to apply it as a standard for nonwater-dependent structures. The Department's witness, Mr. Blair Williams, explained it as follows:

There is an exception that directs you to look at the non-water dependent provisions. It's basically, it says under 30-12-G(1), that there are cases, however, where such unavoidable environmental effects are justified if legitimate public needs are to be met. . . . And in looking that, then since it's non-water dependent, we go to the non-water dependent provisions, specific project standards, which is under 30-12-M.

I find that although application of this subsection was made in good faith, it was misplaced. The Department sought a standard under which to evaluate the Project, and since the filling activity is nonwater-dependent, it looked to the subsection of regulation 30-12 that governs nonwater-dependent structures. However, I find the plain language of the subsection shows the legislature did not intend for "fill" to be treated as a "structure." Accordingly, I do not find the application of the subsection to be appropriate. Notably, in its Joint Proposed Order, the parties seem to agree that the application of subsection 30-12(M) was unnecessary to permit the Project.

Subsection 30-12(M) governs nonwater-dependent structures. The subsection notes that "[n]onwater-dependent structures . . . have been built in the past on pilings, moored or in other ways situated over coastal water and/or tideland critical areas" and "[t]hese structures are a serious threat to the values set forth in Section 48-39-20(E)." S.C. Code Ann. Regs. 30-12(M)(1). It further instructs that "[n]onwater-dependent structures, including buildings, houses, or offices that float shall be prohibited from being constructed, moored, or otherwise placed in or over tidelands and coastal water critical areas unless there is no significant environmental impact, an overriding public need can be demonstrated, and no feasible alternatives exist." S.C. Code Ann. Regs. 30-12(M)(2). The Department has interpreted the fill in this case to be a "nonwater-dependent structure" that will be placed "in or over" tidelands (the creek). I find this interpretation to be

unsound.<sup>20</sup> *See Bass*, 365 S.C. at 471–72, 617 S.E.2d at 378 (“Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.”).

To interpret fill as a nonwater-dependent structure is a strained reading of the plain meaning of these words. *See CFRE, LLC*, 395 S.C. at 74, 716 S.E.2d at 881 (“[W]e must give the words found in the statute their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.”). Subsection 30-12(M)(1) describes structures “built in the past on pilings, moored or in other ways situated over coastal water and/or tideland critical areas.” S.C. Code Ann. Regs. 30-12(M)(1). Similarly, subsection 30-12(M)(2) describes structures to include “buildings, houses, or offices that float” and prohibits these from being “constructed, moored, or otherwise placed in or over tidelands and coastal water critical areas.” The type of structures described in this subsection are very different from “fill.” This makes sense since subsection 30-12(G) is the subsection that governs “fill,” and this subsection governs nonwater-dependent structures.

Additionally, sub-regulation 30-12(M) discusses placing structures over and in tidelands and coastal waters—like a houseboat—not placing fill in tidelands such that the tidelands are completely eliminated. For example, in *330 Concord St. Neighborhood Ass'n v. Campsen*, the Court of Appeals reviewed a permit issued under regulation 30-12(M) for a restaurant (nonwater-dependent structure) placed, in part, within the critical area. 309 S.C. 514, 424 S.E.2d 538 (Ct. App. 1992). The Court of Appeals determined “[t]he environmental impact is the effect on primary productivity from shading caused by the restaurant. Shading would affect organisms that use sunlight for photosynthesis.” *Id.* at 516, 424 S.E.2d at 539. The Court of Appeals’ determination echoes the concerns articulated in the Coastal Zone Management Plan (CZMP), section IV(2)(a), which provides the following guidance:

Nonwater-dependent structures such as parking garages, apartments, restaurants, and shops have been built in the past on pilings over wetland areas. Such construction presents unnecessary encroachment on the aquatic ecosystem by shading out the underlying vegetation. Nonwater-dependent structures shall be

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<sup>20</sup> I also note that the Department’s interpretation of subsection 30-12(M) is not a long-standing one. *See Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 149, 694 S.E.2d 525, 530–31 (2010) (“An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language.”). Mr. Williams acknowledged that subsection 30-12(M) has never been used to allow the filling of tidelands for a nonwater-dependent structure in his tenure at the Department where he has been employed since 2008.

discouraged from being sited over water and/or wetland areas. Only when public need is demonstrated and no feasible alternative sites are available should consideration be given towards approval of the proposed structure. [R.30-12(M)]

I conclude the plain language of the subsection, the examples of covered structures under the subsection, and the impacts the subsection seeks to avoid, all demonstrate that subsection 30-12(M) governs nonwater-dependent structures that are sited over wetlands or critical areas. *See CFRE, LLC*, 395 S.C. at 74, 716 S.E.2d at 881 (“[W]e must give the words found in the statute their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.”); *Bass*, 365 S.C. at 471–72, 617 S.E.2d at 378 (“Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.”). To the extent the subsection mentions nonwater-dependent structures being “otherwise placed in” critical area tidelands, I find this refers to pilings being placed in the critical area, but not the structure itself being placed in the critical area such that the critical area is eliminated.

Because I reject this Department’s interpretation and application of subsection 30-12(M) to this case, I likewise reject its application of CZMP § IV(2)(a) to this case. I find the Department’s authority under subsection 30-12(G) was sufficient to allow the dredging and filling of the wetlands.

#### CZMP Commercial Development Policies

FOGC argues the Project is inconsistent with the Commercial Development policies of the CZMP; in particular, Chapter III Management of Coastal Resources, section IV(1)(b).<sup>21</sup> This section provides:

Commercial proposals which require fill or other permanent alternation of salt, brackish or freshwater wetlands **will be denied** unless no feasible alternatives exist and the facility is water-dependent. Since these wetlands are valuable habitat for wildlife and plant species and serve as hydrologic buffers, providing for storm water runoff and aquifer recharge, commercial development is discouraged in these

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<sup>21</sup> The Department found this section of the CZMP to be inapplicable because it relied, instead, on CZMP § IV(2)(a), the section governing nonwater-dependent structures that I just rejected. Under the Department’s theory, because this project is located in a critical area, it is governed by the “critical area” commercial policies in CZMP § IV(2) rather than the more general “coastal zone” commercial policies under CZMP § IV(1). This argument might hold some water if CZMP § IV(1)(b) did not clearly and necessarily deal with the critical area (the filling of salt and brackish waters)<sup>21</sup> or if the Department did not acknowledge considering CZMP § IV(1)(c) in its evaluation of this Project, which is a policy from the allegedly in-applicable “coastal zone” commercial policies section. Therefore, the Department cannot argue that one policy deals more specifically with critical areas than the other. Thus, the Department’s interpretation of the CZMP is no help in resolving the conflict between CZMP § IV(1)(b) and subsection 30-12(G)(b)(2).

areas. The cumulative impacts of the commercial activity which exists or is likely to exist in the area will be considered.

CZMP § IV(1)(b) (emphasis added). This policy clearly mirrors subsection 30-12(G)(2)(b); however, instead of using the phrase “should be undertaken only if” it uses the phrase “will be denied unless.” Thus, we must resolve any conflict between the regulation and the CZMP. “It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.” *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). Furthermore, “[b]ecause we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative.” *Amisub of S.C., Inc. v. S.C. Dep't of Health & Env't Control*, 407 S.C. 583, 598, 757 S.E.2d 408, 416 (2014).

The CZMP, while enforceable on its own, is a collection of policies, and it was derived from statutory and regulatory law. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 35–36, 766 S.E.2d 707, 719 (2014) (“Under the CZMA, DHEC was required to develop a comprehensive coastal zone management program—the CZMP—for the coastal zone, and was given responsibility to enforce and administer the CZMP. . . DHEC was also required by statute to promulgate regulations to execute the CZMP.”); *Spectre, LLC v. S.C. Dep't of Health & Env't Control*, 386 S.C. 357, 369, 688 S.E.2d 844, 850 (2010) (“[T]he General Assembly enacted the CZMA which required DHEC to ‘develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program **in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter.**’” (citing S.C. Code Ann. § 48–39–80) (emphasis added)). Accordingly, I find that to the extent the regulation and CZMP conflict, the regulation should control. Therefore, although the CZMP uses stronger language, in order to construe it together with its sister regulation for a harmonious result, I find CZMP § IV(1)(b) must also be interpreted to give the Department discretion in its application like in regulation 30-12(G)(b)(2). *See Joiner ex rel. Rivas*, 342 S.C. at 109, 536 S.E.2d at 375. I do not find the Project is inconsistent with CZMP § IV(1)(b).

### **Other Regulatory and Statutory Considerations**

#### Regulation 30-11

Regulation 30-11 provides general guidelines for all critical areas. S.C. Code Ann. Regs. 30-11 (2011). The preface to regulation 30-11 states:

The critical areas are of vital importance to the State, and there is strong and growing pressure for the development of these areas. The Department has established these rules and regulations for permit applications in an effort to reduce the irreversible loss of productive tidelands, coastal waters, beaches, and dunes while meeting long-range State development needs.

Reg. 30-11(A). To assess the potential impacts of projects in critical areas, regulation 30-11 lists policy considerations that are derived from the legislature's policy statements in section 48-39-20, section 48-39-30, and section 48-39-150 of the South Carolina Code. FOGC contends filling in the creek is inconsistent with several of the policy considerations, including the following:

- (1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water;
- (3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs, or clams or any marine life or wildlife, or other natural resources in a particular area, including but not limited to water and oxygen supply;
- (5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational coastal resources;
- (8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards;
- (9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project;
- (10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

Reg. 30-11(B).

As to the first consideration, FOGC argues the Project does not require a waterfront location nor will it be economically enhanced by a waterfront location. I agree with FOGC that the Project does not require a waterfront location and will not be economically enhanced by its proximity to water. Nevertheless, this is but one consideration of many and is ultimately outweighed by the public benefit gained by approving the project.

Regarding the third consideration, FOGC argues filling in the creek will destroy the oysters, crabs, and other wildlife that call the creek home, which certainly affects the production of these species. The Project will completely eliminate the production of oysters and crabs and any other flora and fauna in the creek which is an unfortunate outcome. However, under the unique circumstances of this case, the elimination of these resources is necessary to protect the public and the environment from the landfill and ensure the Development is viable. These considerations

outweigh the consideration of the loss of wildlife and plant resources especially in light of the danger created by their nexus with an exposed landfill.

Turning to the fifth consideration, FOGC argues that filling the creek will eliminate existing public access to the creek. Again, this is an unfortunate outcome that the Court does not consider lightly, but under the unique circumstances of this case, filling in the creek is the best way to protect wildlife and the public from the threat of the landfill.

Considerations eight and nine similarly address the extent to which adverse environmental impacts may or may not be able to be avoided by reasonable safeguards. FOGC argues the adverse environmental impact of eliminating the creek can be avoided by implementing reasonable safeguards to protect the creek from the landfill during its restoration and by utilizing a tide gate at the Lockwood culvert. While it is possible from an engineering perspective to restore the creek, protect it from the landfill, and address some flooding issues to an extent, that possibility is not a feasible alternative when balanced against the economic viability of the Development. Here, preserving the creek renders the Development unable to support the TIF financing goals and, thus, it would not be worth pursuing the Development at all. Furthermore, although FOGC's alternatives are appealing, the evidence cannot establish their collective viability. Ultimately, I find that filling in the wetlands is a more effective, less costly way to manage the landfill and allows the Development to be an economically successful means to achieve the public benefit of reducing flooding and the proliferation of contamination from the landfill.

Finally, consideration ten addresses the extent to which the proposed use could affect the value and enjoyment of adjacent owners. As FOGC argues, the Project will negatively affect the value and enjoyment of adjacent owners who enjoy viewing, exploring, and viewing the creek and its wildlife. However, filling in the creek will also alleviate fears of encountering contaminated water and soil from the landfill. This is a worthwhile environmental result, even if it is not a visually aesthetic outcome.

Next, FOGC argues filling in the creek is also inconsistent with another guideline in regulation 30-11, which provides the reviewer should consider “[t]he extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.” Reg. 30-11(C)(1). FOGC argues the Project contravenes this guideline because the permitted actions will increase stormwater flooding in some instances, and it will disturb the general character of the area, which includes a deep historical connection with

Gadsden Creek and its marshlands. I disagree with FOGC and find the Project and the permitted actions are consistent with this guideline. The area where the permitted activities will be taking place is already developed and the permitted area is surrounded by developed areas; therefore, this redevelopment project is unlikely to have the effect of snowballing into more development. Additionally, while the area has a strong historical connection to the creek, the creek, as it currently exists, is a fragmented and tainted version of the original Gadsden Creek that once curved through a hundred-acre marsh. Therefore, the general character of the area is not of pristine and intact tidelands. Rather, it is primarily an aging and blighted developed area that has a fragmented, naturalized drainage ditch running over and around a landfill. The creek certainly is a feature of this area, but it no longer defines it like it once did.

Section 48-39-30

FOGC argues the permitted actions are inconsistent with the State's policies as set forth in subsections 48-39-30(B)(1) and (2) of the South Carolina Code (2008). These subsections provide:

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;

FOGC contends these statements evince the legislature's intent to protect, preserve, restore, and enhance fragile coastal resources like the creek at issue in this case. The Court does not disagree with this interpretation, and it certainly supports preserving and restoring tidelands generally. However, this case involves a landfill that is contaminating the creek and resolving that threat to both the public and the environmental is a consideration that weighs heavily where this Court might otherwise find this policy statement controlling. As a result, although this Project may not fulfill many of the goals of these policy statements, to the extent it promotes the economic and social improvement of citizens by creating an environmentally safe, economically revitalized

area, those purpose outweigh the other negative impacts. Unfortunately, that is the price that must be paid to protect the health, welfare, and safety of the public and the environment from the landfill.

#### Section 48-39-20

Next, FOGC argues the permitted project is inconsistent with subsections 48-39-20(D) and (E) of the South Carolina Code (2008). These subsections contain the following findings made by the legislature:

(D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.

(E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.

As to subsection (D), FOGC argues that fish, shellfish, and other living marine resources and wildlife have been documented to use the creek as habitat and are vulnerable to destruction. Unfortunately, the living marine resources and wildlife in the creek will be completely eliminated. This is an unfortunate result of capping the landfill, but it is necessary to protect the greater public and the environment.

Regarding subsection (E), FOGC argues the ecological, cultural, natural, and scenic characteristics of the creek also support denying the permit. FOGC argues the creek, even in its diminished and fragmented state, is a functioning ecosystem that is providing habitat for a variety of flora and fauna. Additionally, the creek has a strong connection to the cultural heritage of the area and serves an aesthetic function for many local residents. Again, the Court does not dispute that the creek has the characteristics and values cited in subsection (E). However, the current iteration of the creek, even if it has re-naturalized, is not the historic waterbody that defined this area culturally. It is a naturalized drainage ditch that is contaminated. The ill-planned development that is threatening the area arises from the past development of a landfill in the creek and its marshlands, not the current redevelopment of this area.

In sum, the Court recognizes this Project contravenes several of this this State's tidelands policies, but there is an overriding reason justifying this deviation in this particular case.

#### **Other Considerations Under the CZMP**

Some of the goals of the CZMP that FOGC highlights as a lens through which this Court should evaluate the permitted project's compliance with the CZMP are the following:

(3) To protect and sustain the unique character of life on the coast that is reflected in its cultural, historical, archeological, and aesthetic values.

(4) To promote increased recreational opportunities in coastal areas and increased public access to tidal waters in a manner which protects the quality of coastal resources and public health and safety.

(8) To encourage new water-dependent activities to locate in shoreline areas where adverse social, economic and environmental impacts can be minimized and to encourage the inland siting of facilities which are not water-dependent.

(11) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations.

CZMP § III(A). Using these goals as a lens, FOGC argues the permitted project is inconsistent with the following CZMP considerations:

(2) The extent to which the project will have adverse impacts on the “critical areas” (beaches, primary ocean-front sand dunes, coastal waters, tidelands.

(7) The possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area.

CZMP § III(C)(3).

As to subsection III(A), the permitted project will have an adverse impact on the critical area tidelands in the Project area because it will completely eliminate them. The Court does not weigh this effect lightly, but it also does not weigh the threat of the landfill and its contamination of the creek lightly. Furthermore, the “unique character” of this area is significantly diminished by the fact that the creek traverses over or next to a landfill. The landfill also certainly diminishes, or should diminish, the “recreational opportunities” offered by the creek which appears to be more of a public hazard rather than a resource that protects “public health and safety.” Under these circumstances, the elimination of the critical area is the wisest, most economically feasible way to protect the health, welfare, and safety of the public and the environment. CZMP § III(C)(3), subsection (7) is essentially identical to the consideration the Court already addressed in Reg. 30-11(C)(1), and the Court adopts its analysis from that section and applies it here.

Next, FOGC also argues the permitted project is inconsistent with the following CZMP considerations:

(1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.

(5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.

(8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

CZMP § III(C)(3)(II). These considerations are substantially similar to the considerations this Court already addressed under regulation 30-11(B). The Court adopts its previous analysis under regulation 30-11(B) and applies it here. Even through the more detailed lens of the CZMP's goals, this Court concludes that the protection of the health, safety, and welfare of the public and the environment necessitates a result that in many ways is contrary to the tidelands policies of this State.

### **Regulation 61-101**

Pursuant to the Clean Water Act, Section 401, an applicant for a federal permit which may result in a discharge (i.e. fill) to jurisdictional waters, must first obtain a certification from the State in which the discharge originates that the discharge will comply with applicable state and federal water quality requirements. 33 U.S.C.A. § 1341 (Westlaw Edge through P.L. 117-214). South Carolina Regulation 61-101 establishes the procedures and policies for implementing the certification process. S.C. Regs. Ann. 61-101 (2011). Subsection (F)(3) requires the Department to consider the following factors when assessing the water quality impacts of a proposed project:

- (a) whether the activity is water dependent and the intended purpose of the activity;
- (b) whether there are feasible alternatives to the activity;
- (c) all potential water quality impacts of the project, both direct and indirect, over the life of the project including:
  - (1) impact on existing and classified water uses;
  - (2) physical, chemical, and biological impacts, including cumulative impacts;
  - (3) the effect on circulation patterns and water movement;
  - (4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

Reg. 61-101(F)(3).

FOGC argues these considerations tend to show the project should not have been certified because it is nonwater-dependent, and there are feasible alternatives to eliminating the tidelands and flora and fauna. FOGC also contends the cumulative impacts will result in an increase in

storm water under certain conditions. I agree that the project is a nonwater-dependent project, and that is a consideration. However, as I concluded above, there are no feasible alternatives to eliminating the tidelands, which leaves us with the unfortunate results that there will be a biological impact on the species that live in and around the creek. Furthermore, capping the landfill by filling the creek will also eliminate the contamination of the waters from the landfill, which would otherwise be distributed to the Ashley River and to the surrounding upland areas during the frequent floods. Also, I did not find FOGC presented evidence concerning the storm water studies which convincingly indicated that the Project will cause an overall increase in storm water. Rather, the Project is likely to decrease storm water overall and significantly lessen tidal flooding. Overall, I do not find that an analysis of these considerations indicates the permit should not be certified in this case.

FOGC further argues that the permitted project cannot comply with a subsequent subsection, (F)(5), and the certification must therefore be denied. This subsection lists circumstances under which the “certification will be denied,” including, in relevant part:

- (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired;
- (b) there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses;

Reg. 61-101(F)(5).

Beginning with subsection (a), FOGC argues that the certification must be denied under this subsection because eliminating the creek will permanently alter the aquatic ecosystem in the vicinity of the project and impair or eliminate its function. Our Supreme Court addressed the meaning of vicinity in *Murphy v. South Carolina Department of Health & Environmental Control*, when it found:

Using this accepted meaning of the word vicinity, the regulation clearly includes more than just the project; it logically incorporates the surrounding area. Moreover, a reading to the contrary would render it impossible to ever obtain a certification to fill a portion of a stream as the functions and values of that area would always necessarily be eliminated.

396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012). In keeping with this definition of vicinity that contemplates more than the project area, the Department looked at the surrounding area as well, to include the areas immediately across Lockwood Boulevard and Fishburne Street, which include substantial areas of similar tidelands that are adjacent to the Ashley River. Because these tidelands

would not be disturbed by the proposed project, the Department determined the function and value of the aquatic ecosystem in the vicinity of the area would not be eliminated or impaired.

Nevertheless, FOGC argues that the vicinity is limited to the creek and its attendant tidelands because this is a separate area and habitat that is unconnected to the marshlands along the Ashley River. Based on its interpretation of vicinity, it argues the ecosystem's function will be eliminated or impaired.

I find the Department's interpretation and application of this regulation is deserving of deference because it is more consistent with the Supreme Court's interpretation of vicinity as larger than the project area. *See id.*; *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (“We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation.”).

Lastly, as to subsection (b), as already discussed extensively in this case, I do not find there is a feasible alternative. In order to both repair the landfill cap and ensure the financial viability of the WestEdge Development, the creek cannot be reasonably and feasibly preserved. As explained above, the only practicable and economically feasible solution that will protect the public and the environment from the landfill is the one proposed by WestEdge and approved by the Department in the Permit. *See* S.C. Code Regs. Ann. 30-1(D)(23) (Supp. 2022) (defining “feasibility” to be determined on an individual basis based upon, in part, “consideration of factors of environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives,” and “the concept of reasonableness and likelihood of success in achieving the project goal or purpose”). Therefore, the certification need not be denied under subsection(b).

### CONCLUSION

This was a challenging case, and the Court does not lightly approve of the elimination of critical area tidelands that are so integral to the health, welfare, and vibrancy of our natural ecosystem here in South Carolina. However, this case presents a unique hurdle of a naturalized drainage ditch for a landfill that is now being contaminated by that landfill. Based upon the above, I conclude FOGC failed to show by a preponderance of the evidence that the Department erred in granting WestEdge the Permit. *See Anonymous (M-156-90)*, 329 S.C. at 375-76, 496 S.E.2d at 19.

**ORDER**

Based upon the above Findings of Fact and Conclusions of Law:

**IT IS THEREFORE ORDERED** that the Department's issuance of the Permit is  
AFFIRMED.

**AND IT IS SO ORDERED.**



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Ralph King Anderson, III  
Chief Administrative Law Judge

December 5, 2022  
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Stephanie Perez, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



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Stephanie Perez  
Judicial Law Clerk

December 5, 2022  
Columbia, South Carolina