RECEIVED
Jun 12 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2023-000006

Friends of Gadsden Creek, ... Appellant,

v.

South Carolina Department of Health and Environmental Control and WestEdge Foundation, Inc., ... Respondents.

FINAL BRIEF OF RESPONDENTS

Bradley D. Churdar, SC Bar No. 12829
Bennett W. Smith, SC Bar No. 102894
Sara V. Martinez, SC Bar No. 74822
South Carolina Department of Health and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
Tel. (843) 953-0213
churdabd@dhec.sc.gov
smithbw@dhec.sc.gov
martinsv@dhec.sc.gov

Attorneys for Respondent SCDHEC

Mary D. Shahid, SC Bar No. 1794
Michael S. Traynham, SC Bar No. 75117
Kirsten E. Small, SC Bar No. 75681
MAYNARD NEXSEN, P.C.
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
Tel. 843.577.9440
MShahid@maynardnexsen.com
MTraynham@maynardnexsen.com
KSmall@maynardnexsen.com

Attorneys for Respondent WestEdge Foundation, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Regulations

TABLE OF WITNESSES

(In Order of Transcript Appearance)

The below Table of Witnesses whose testimony is referenced in Respondents' Brief is provided to aid the Court's review, considering the length of the transcript and the ALC's numerous factual findings based at least in part on witness testimony.

Joshua Lee Robinson (FOGC Expert Witness)
Civil and environmental engineering, urban stormwater management, tidal hydrology, and hydrodynamics, and other topics

Richard Karkowski (Foundation Expert Witness)
Civil engineering with expertise in hydrology and hydraulics, stormwater management and design, stormwater quality, flood mitigation

Blair Williams (DHEC Witness)
Manager, Critical Area Permitting, Office of Ocean and Coastal Resource Management

Shannon Scaff (Foundation Witness)
City of Charleston Director of Emergency Management

Matthew Fountain (Foundation Witness)
Director of Stormwater Management, City of Charleston

Andy Ruocco (Foundation Expert Witness)
Wetland sciences, including the assessment of the function and values of wetlands, and with special expertise in assessing and controlling contamination or pollution.

Michael Maher (Foundation Witness)
CEO of the WestEdge Foundation, Inc.

Keith Waring (Foundation Witness)
Council Member, City of Charleston

STATEMENT OF ISSUES ON APPEAL

1. Did the ALC Correctly Apply S.C. Code Ann. Regs. 30-12(G)(2)(b) in Upholding the Foundation's Permit?

2. Did the ALC Correctly Find that the Coastal Zone Management Document Does Not Prohibit the Issuance of the Foundation's Permit?

3. Did the ALC Correctly Find that the Permit Was Properly Issued Under the Additional Statutory and Regulatory Provisions Cited by Appellant?

4. Did the ALC Impose the Appropriate Burden of Proof on Appellant with Respect to Feasible Alternatives?

STATEMENT OF THE CASE

This appeal arises out of Appellant Friends of Gadsden Creek's (FOGC's) challenge to Respondent South Carolina Department of Health and Environmental Control's ("DHEC's" or "Department's") issuance of a critical area permit, a Coastal Zone Consistency ("CZC") Certification, and a Section 401 Water Quality Certification ("401 Certification") (collectively, the "Permit")[1] to Respondent WestEdge Foundation, Inc. (the "Foundation"), for impacts to approximately 3.9 acres of critical area on the west side of the Charleston peninsula. The Permit authorizes the Foundation's proposed project (the "Project"), which seeks to restore the degraded cover on a former municipal landfill underlying the critical area, eliminate the discharge of leachate contamination into the tidally influenced portions of the critical area, mitigate tidal (or "sunny-day") flooding in the nearby community, and build a new stormwater management system that meets current City of Charleston (the "City") stormwater requirements and that will alleviate ongoing stormwater flooding in the vicinity. Completion of the Project would allow for additional construction within the WestEdge Development consistent with the Foundation's mission and purpose, as described in further detail herein.

[1] In accordance with the applicable regulations, the three DHEC authorizations were combined and included in a single Department document, the Permit. *See* S.C. Code Ann. Regs. 61-101(A)(7), (8). Despite there being no separate decision document related to the Department's 401 Water Quality Certification, that authorization should be considered final since FOGC has raised no legal issue in this appeal with respect to the 401 Certification. *See, e.g.*, *Forest Dunes Assocs. v. Club Carib, Inc.*, 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct. App. 1990) ("Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue.").

FOGC's Brief, with its selective recitations and misstatements of the facts developed through the administrative review process, misrepresents and minimizes the environmental, human health, and safety impacts of the severe flooding and contamination emanating from the former landfill. The Project would substantially mitigate, if not eliminate entirely, the issues of flooding and contamination. Despite FOGC's attempt to re-litigate the facts found by the ALC after a five-day contested-case hearing, this Court may not substitute its judgment for that of the ALC as to the weight of evidence on questions of fact. *See* S.C. Code Ann. § 1-23-610(B). Furthermore, to accept FOGC's attempts to show that the ALC's factual findings are clearly erroneous would require this Court to ignore large parts of the factual record, including the overwhelming majority of the technical and expert evidence and testimony, and to set aside the weight afforded that evidence by the ALC, who observed the testimony first-hand. Because a full and accurate summary of the record before the ALC is critical to a proper evaluation of the questions of law raised in this appeal, the Foundation offers the following counter-statement of the factual record.

History and Present Condition of the Creek

Prior to 1950, the area of the WestEdge Development, including the Project area, was occupied by tidal marshes and an estuarine system including a natural, tidal waterbody known locally as Gadsden Creek. But, as the ALC concluded, "the historic waterbody known as Gadsden Creek no longer exists." (R. p. 3 (Order at 3).) In the 1950s, the City began using this area as a landfill, depositing trash and debris throughout the marsh and filling in Gadsden Creek entirely. (R. pp. 2-3 (Order at 2-3).) When the landfill

was closed in or around 1970, it was capped with soil, and a manmade drainage feature was dug through the landfill to provide stormwater drainage. (R. p. 945 (Transcript of Administrative Hearing ("Tr.") 728:4-16).) While this drainage feature contains critical area subject to DHEC's permitting jurisdiction, it bears little resemblance in location, shape, or size to the historic Gadsden Creek.

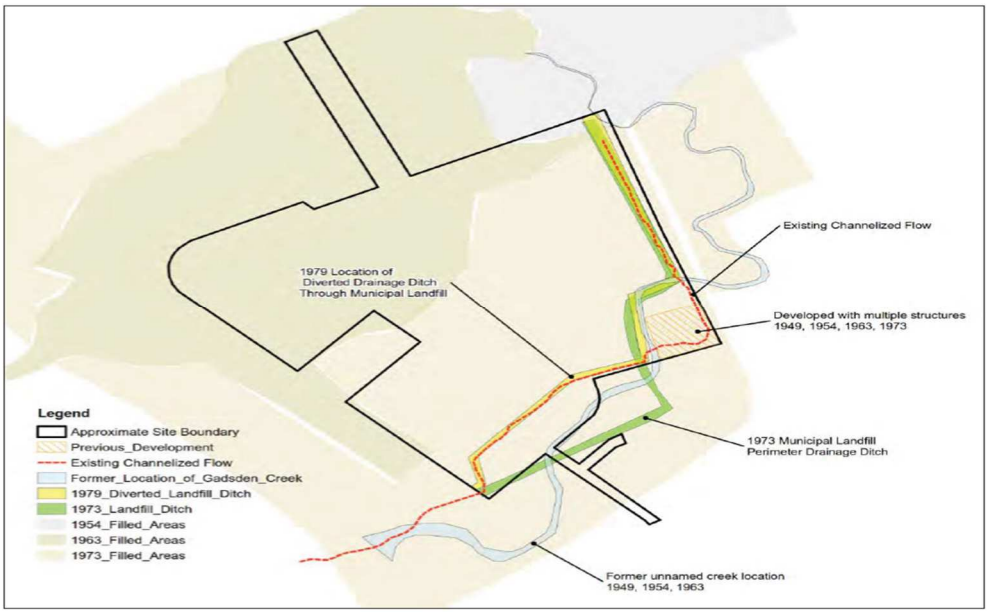

Figure 1: Foundation Ex. 35 (R. p. 2367.)

Figure 1 shows that the modern-day drainage feature crosses the footprint of the historic Gadsden Creek in only three places and lacks the sinuosity of the historical, and naturally occurring, Gadsden Creek. The uncontested evidence is that the historic Gadsden Creek was filled by the City's operation of the municipal landfill beginning in the early 1950s. (R. p. 1257-1259 (Tr. 1040:3-1042:2).) The current, man-made drainage feature was constructed through that landfill during its active use, then reconfigured or manipulated on multiple occasions. (R. p. 1185 (Tr. 968:8-11).) The ALC, sitting as fact-finder, determined that the current drainage feature is not the historical Gadsden Creek

or even a "creek" by any ordinary definition of that term. (R. p. 3 (Order at 3).) Nonetheless, in deference to clarity of the record on appeal, this brief will use the term "creek" in reference to the drainage feature.

Flooding

In the decades since the area ceased being used as an active landfill, much of the filled land within the Project area has subsided. (R. p. 836 (Tr. 619:14-22).) The tidal influence of the Ashley River has encouraged naturalization and growth of vegetation within the landfill footprint, but has also eroded the landfill cap, leaving decades-old trash and debris exposed. (R. pp. 2061-2063 (Foundation Ex. 34 at 405-07); R. p. 5 (Order at 5).) Experts for the Foundation and FOGC agreed that the creek is a conduit for tidal, or "sunny-day," flooding. (R. pp. 574, 837 (Tr. 357:25-358:19, 620:14-21).) The ALC found that "[t]he flooding [in the Project area] can be both frequent (impacting at least one lane of traffic as often as eighty days per year) and severe." (R. p. 9 (Order at 9); R. pp. 835-836 (Tr. 618:22-619:2).) The ALC found these conditions "especially disconcerting since flood waters contain dangerous chemicals and biological organisms and generally pose a threat to human health." (R. p. 9 (Order at 9).) There was general agreement by FOGC's witnesses, including its technical expert, that flood waters and urban streams are not safe for human health. (R. p. 9 (Order at 9); R. pp. 576, 674-675 (Tr. 359:5-25; 457:2-5; 458:5-9).)

Figure 1, above, shows that the creek is located within the footprint of the former municipal landfill. The creek is situated within a drainage easement held by the City (R. p. 1645 (Foundation Ex. 33)), and provides stormwater drainage for the landfill and surrounding area by conveying stormwater to the Ashley River. The tide also channels

back from the Ashley River into the creek during each tidal cycle, and has, over time, created a partially naturalized area home to various forms of flora and fauna, giving the area the superficial appearance of a natural tideland marsh.[2] The creek provides the principal stormwater drainage for the drainage basin surrounding the Project area through a single stormwater outfall at Lockwood Boulevard. (R. pp. 588-589, 1103-1104 (Tr. 371:24-372:8, 886:25-887:7).) The creek in its current form is demonstrably inadequate to properly drain the area of stormwater, as shown by the site-specific modeling performed by the Foundation's stormwater expert. (R. pp. 867-868 (Tr. 650-651).) The creek contributes to storm-related flooding under a variety of circumstances, including heavy rain events at low tide and more moderate precipitation at mid and high tides. (R. p. 16 (Order at 16); R. pp. 1092-1094 (Tr. 875:7-877:24).)

Tidal and storm-related flooding from the creek frequently impacts the intersection of Hagood Avenue and Fishburne Street, extending down Hagood and encroaching on the Gadsden Green public housing community situated east of Hagood Avenue, including into homes in that community. (R. pp. 8-9 (Order at 8, 9).) In many flooding events, this intersection and the surrounding roads are impassable by vehicular traffic, requiring alternative routes and causing stalled vehicles. (R. p. 9 (Order at 9); R. pp. 1076-1078 (Tr. 859:25-861:2).)

[2] Contrary to FOGC's suggestion (FOGC Br. at 3), DHEC did not describe the wetlands as a "healthy" ecosystem, but rather as a "functional system" with "no critical habitat identified." (R. p. 1016 (Tr. 799:16-20).)

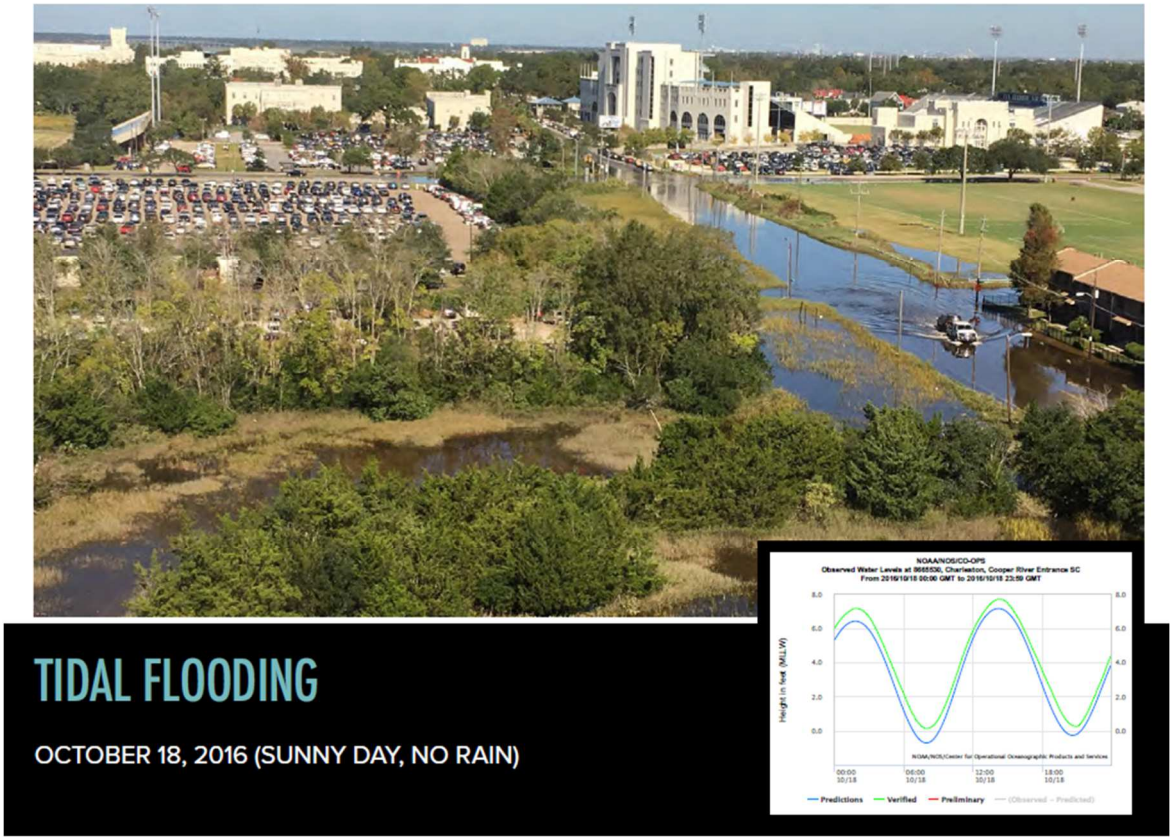

Fig. 2. Flooding Image from Foundation Ex. 40. (R. p. 2548.)

This intersection is near MUSC's hospital and employee parking facilities, the City's police headquarters, a South Carolina National Guard Armory, and three public schools (R. p. 1334 (Tr. 1117:13-24)), in addition to the Gadsden Green public housing community. (R. pp. 8, 9 (Order at 8, 9).) It is uncontested that the frequent tidal and storm-related flooding is harmful to the residents and the public in the vicinity of the Project site. (R. p. 9 (Order at 9).) One FOGC member testified that the flooding and polluted water endangers children who attend the nearby public schools, including by increasing their risk of drowning, since these students generally lack access to swimming instruction. (R. pp. 671-672 (Tr. 454:5-455:8).) Shannon Scaff, the City's Director of Emergency Management, testified that planning for and responding to incidents of

flooding at this location and others throughout the City represents a significant focus of City staff time and resources, and impassable roads and intersections during flooding events impact emergency response times. (R. pp. 1075-1076 (Tr. 858:17-859:24); R. p. 9 (Order at 9).)

Matthew Fountain, the City's Director of Stormwater Management and a professional engineer, testified to the large number of priority stormwater projects throughout the City (most associated with areas of frequent flooding), and the lack of adequate funding to address stormwater flooding at all locations where it occurs. (R. pp. 1095-1097 (Tr. 878:22-880:13).) Mr. Fountain further testified that in the absence of the Project and its associated tax-increment financing (TIF) revenues (discussed below), he was not aware of any other plan to fund a flooding fix at the Project site, and could not speculate as to when or if the City would be in a position to directly address the flooding in this area due to the number of unfunded and underfunded priority stormwater projects. (R. pp. 1115-1116 (Tr. 898:18-899:23).)

On the basis of the evidence presented, the ALC found that the flooding emanating from the creek "is a threat to public health, safety, and welfare" and that in its current condition, the creek "does not have sufficient capacity to alleviate the flooding in the area." (R. pp. 9-10 (Order at 9-10).) Moreover, "flooding is likely to become worse as sea levels rise." (R. p. 10 (Order at 10).) The ALC concluded that elimination or reduction of flooding in the Project area would be a public benefit. (R. p. 16 (Order at 16).)

Contamination

Despite FOGC's claim that "very little" of the landfill cap has eroded (FOGC Br.

at 15), the record reflects that the landfill cap throughout the creek has been eroded and degraded to the extent that landfill debris is becoming exposed. (R. p. 5 (Order at 5).) Photographic and video evidence depicted trash throughout and layered beneath the critical area. (R. pp. 2370-2372 (Foundation Ex. 35 at 30-32); R. p. 2542 (Foundation Ex. 36 (drone video)).) The Foundation's expert in wetlands sciences, Andy Ruocco, collected video footage of the critical area demonstrating the degree of waste present, and testified to finding unidentified metals, unidentified plastics, assorted building materials, and even medical wastes in the creek which he opined originated from the former operation of the landfill. (R. pp. 1200-1202 (Tr. 983:25-985:9).) The ALC found Mr. Ruocco's testimony "convincing." (R. p. 5 (Order at 5 n.4).)

Fig. 3. Close-up photo of creek from Foundation Ex. 35. (R. p. 2372.)

Fig. 4. Landfill debris in creek bed from Foundation Ex. 35. (R. p. 2371.)

Because the landfill was constructed and operated prior to the passage of the Clean Water Act and other modern environmental protections, it lacks many of the protective features now required for landfills, including a liner to collect leachate[3] and prevent public exposure to contaminants.[4] Mr. Ruocco sampled landfill leachate emanating from the creek banks at low tide, and testified to the laboratory analysis of the samples. (R. pp. 1242-1245, 1247-1249 (Tr. 1025:16-1028:7, 1030:13-1032:4).)[5] The leachate he sampled

[3] "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 associates with it." (R. p. 5 (Order at 5 n. 2).)

[4] No evidence supports FOGC's claim that the City's landfilling activity was "illegal." (FOGC Br. at 6, 7). The landfill was constructed prior to the passage of the Clean Water Act, and an after-the-fact permit by the Corps of Engineers cured any noncompliance with then-existing federal environmental law. FOGC did not offer the Corps landfill permit into evidence. As the ALC noted, "there was no evidence introduced to show the City was in violation of any laws" when the landfilling activity occurred. (R. p. 26 (Order at 26 n.17).)

[5] The ALC noted that "[i]n a first for this Court, FOGC, ostensibly an environmental organization tried to downplay the harm from the exposed landfill." (R. p. 5 (Order at

contained lead at 15,000 parts per billion—over 1,000 times the EPA-established maximum contaminant level (MCL)—arsenic at over 100 times the MCL, and chromium at 23 times the MCL. (R. pp. 1247-1249 (Tr. 1030:13-1032:4).) The samples also contained mercury—which is not commonly identified at elevated levels in any environmental media he has sampled—at more than 11 times the MCL, and polychlorinated biphenyls (PCBs), highly toxic compounds that were outlawed in the United States in the 1970s. (*Id.*) In Mr. Ruocco's expert opinion, the only possible source of these contaminants at these elevated concentrations was the landfill. (R. p. 1251 (Tr. 1034:16-20).) While FOGC offered general testimony that all urban creeks are contaminated to some degree, and certain contaminants could be expected to wash into the creek with storm runoff from nearby parking lots (R. pp. 558-559 (Tr. 341:12-342:2)), the Foundation's stormwater expert, Richard Karkowski, testified that the contaminants identified in the leachate samples were inconsistent with what would be expected in typical urban stormwater runoff. (R. p. 848 (Tr. 631:13-21).)

FOGC conducted no sampling of its own and offered no substantive evidence to contradict Mr. Ruocco's findings.[6] Nor did FOGC offer any evidence to address the public

5).) Indeed, FOGC strenuously opposed admission of any evidence of sampling results, contaminants, and contamination levels. (*E.g.*, R. pp. 847-854, 1245-1246 (Tr. 630:6-637:24, 1028:9-1029:12).) These efforts appear to be a tacit admission that FOGC claim that the amount of contamination from the landfill is overstated, will not bear scrutiny.

[6] FOGC misrepresents Blair Williams's testimony regarding the similarity between surface water sampling of the creek and that of the Ashley River. (FOGC Br. at 23.) Mr. Williams testified that some surface water sampling of the two bodies showed differences. (R. p. 1013 (Tr. 796:19-21).) Moreover, the import of any similarity or

health concerns associated with taking school children into such a contaminated setting. This testimony deeply troubled the ALC.[7] (R. p. 1476 (Tr. 1259:14-24 ("Now, I'm not going to say I'm shocked by y'all's position … but this thing's going through a landfill and the evidence I've seen, bringing children in the area. Finding out about the lead level or potential lead level exposure … Concerned.")); R. p. 7 (Order at 7).) The ALC determined the appropriate weight to afford the evidence in the record, and found that Mr. Ruocco's testimony "soundly contradicted" that of FOGC's expert. (R. p. 5 (Order at 5).) FOGC's expert agreed that the leachate from the landfill is mixing with water within the creek, but attempted to minimize the severity of the contamination. (R. p. 574 (Tr. 357:15-24).) As the ALC determined, this contamination is carried to the Ashley River through the tidal cycle (R. p. 7 (Order at 7)), and when the creek overflows and causes flooding, some portion of the leachate flows out with the flood and creates a potential for public exposure to the landfill contaminants. (R. p. 7 (Order at 7); R. pp. 854-855 (Tr. 637:25-638:15).) Further, as found based on the testimony of FOGC's witnesses, children and adults are brought to the creek itself for educational walks, creating further potential for exposure to landfill contaminants. (R. p. 7 (Order at 7).)

---

difference between the Ashley River's water quality of that of the creek cannot be determined, since FOGC did not offer any surface water sampling results into evidence.

[7] FOGC brushes off the ALC's concerns, blithely asserting that there was no evidence children had "actually been exposed to contaminants in or from Gadsden Creek." (FOGC Br. at 24.) FOGC disregards the testimony of one of its own members regarding taking children for "creek walks" in the partially naturalized, but still highly contaminated, area. (R. pp. 654-656 (Tr. 437:19-439:6).) The ALC's concerns regarding children's exposure to contaminants were not only "laudable," but legitimate and supported by substantial evidence.

The ALC found the testimony of Charleston City Council Member Keith Waring particularly compelling as it related to concerns about contamination. (R. p. 16 (Order at 16).) Mr. Waring testified that he initially believed the creek could and should be preserved but that his views changed when he learned more about the levels of contamination. (R. p. 16 (Order at 16).) After reviewing Mr. Ruocco's sampling from the site, Mr. Waring urged the City Council to engage its own environmental consultant for a second opinion. (R. p. 1404 (Tr. 1187:12-18).) City Council commissioned that study, and the consultant presented its findings at a council meeting held July 28, 2020, which Mr. Waring understood to verify the contaminated conditions of the creek. (R. p. 1428 (Tr. 1211:9-22).) Mr. Waring believed that the conditions needed prompt attention for the protection of all Charleston citizens. (R. p. 1426 (Tr. 1209:2-23).) Following the consultant's presentation, the City Council found exigent circumstances to add an item to the agenda, and then voted unanimously[8] to support the Project and the Foundation's application for the Permit. (R. pp. 1424-1426 (Tr. 1207:16-1209:1).)

On the basis of the evidence presented, the ALC found the contamination emanating from the landfill is "a threat to the health, welfare, and safety of the public and the environment." (R. p. 7 (Order at 7).) The ALC concluded that eliminating the public exposure to contamination would constitute a public benefit. (R. p. 16 (Order at 16).)

[8] There was one abstention due to a conflict of interest, but otherwise the Council and the mayor voted unanimously to support the Permit. (R. pp. 1425-1426 (Tr. 1208:6-1209:1).)

The Foundation and the WestEdge Development

The Project is one phase of a larger development commonly referred to as "the WestEdge Development" which grew out of a cooperative relationship between the Medical University of South Carolina (MUSC) and the City. (R. p. 10 (Order at 10).) In or around 2004, while conducting long-term strategic planning, MUSC identified challenges to its ongoing presence and continued growth on the Charleston peninsula, caused in part by the constraints of being surrounded on most sides by existing development. (R. pp. 1309-1310 (Tr. 1092:5-1093:17).) In an effort to support MUSC, the largest single employer and the largest source of medical care on the peninsula (R. pp. 1310-1311 (Tr. 1093:17-1094:22)), a collaborative working group made up in part of City and MUSC staff was formed, and led to the formation of the Foundation in 2011. (R. p. 1304 (Tr. 1087:3-18).)

The Foundation is a 501(c)(3) and 509(a)(2)[9] nonprofit entity organized for charitable, scientific, and educational purposes. (R. p. 1306 (Tr. 1089:3-7); R. p. 10 (Order at 10).) The Foundation was specifically incorporated to support the missions of the City and the MUSC Foundation,[10] particularly as related to the redevelopment of a geographic area near MUSC's hospital and the surrounding medical district (*i.e.*, the WestEdge Development). (R. pp. 1305-1306 (Tr. 1088:23-1089:23).) The intent of the WestEdge

[9] A 509(a)(2) entity is a nonprofit created to support public agencies. (R. p. 1306 (Tr. 1089:5-7).)

[10] The MUSC Foundation is, itself, a 501(c)(3) and 509(a)(2) non-profit incorporated to support the mission of MUSC. (R. p. 1308 (Tr. 1091:1-5).)

Development is to support the MUSC medical district by providing housing, commercial areas, and research facilities complementary to the functions of the medical district, and to support the City by addressing certain public infrastructure and quality of life needs for the surrounding community. (R. p. 10 (Order at 10); R. pp. 1305-1307 (Tr. 1088:18-1090:21).)

The geographic area where development efforts are focused is the Horizon Tax Increment Financing ("TIF") District.[11] The Horizon TIF District was originally created and approved by the City in 2008 for the purposes of addressing the "blighted area" conditions, including dilapidation, obsolescence, deterioration, excessive vacancies, potential or actual environmental hazards, and lack of storm drainage facilities. (R. p. 10 (Order at 10); R. p. 1490 (FOGC Ex. 25, at 1)); *see* S.C. Code Ann. § 31-6-30(1). The statutes authorizing the creation of a TIF district recognize a de facto "but for" test—that the area within a TIF district will not improve but for the infrastructure investment made possible by tax increment financing. (R. p. 10 (Order at 10)); *see* S.C. Code Ann. § 31-6-20(A)(5). Other specific quality-of-life needs identified in the formation of the TIF District included road improvements, utilities, green spaces, transit connectivity, and access to retail grocery and pharmacy options. (R. pp. 1323-1324, 1331-1332 (Tr. 1106:24-1107:22, 1114:7-1115:9).)

Subsequent to the approval of the Horizon TIF District, construction of the

[11] The Horizon TIF District includes the entire Project footprint, which is primarily located in the area between Brittlebank Park and MUSC bounded by Fishburne Street, Lockwood Drive, Spring Street, and Hagood Avenue. (R. p. 1515 (FOGC Ex. 25, at Ex. A-1).)

WestEdge Development began in 2015, resulting in the construction of three buildings: 10 WestEdge, 22 WestEdge, and 99 WestEdge (R. p. 804 (Tr. 587:1-22)), which include research facilities associated with MUSC, residential units occupied by MUSC employees and patients (R. p. 1359 (Tr. 1142:9-19)), a grocery store and pharmacy, retail, office space, and parking. (R. pp. 1331-1332 (Tr. 1114:10-1115:22).) Earlier phases of the WestEdge Development also included the construction of roads and stormwater infrastructure necessary to allow for the construction and use of those buildings, and improved stormwater drainage facilities and traffic improvement on Lockwood Boulevard. (R. p. 1369 (Tr. 1152:13-25).)

Importantly, TIF revenues are to finance all of the "horizontal development," such as stormwater infrastructure and roadways , that has occurred as part of the WestEdge Development, and that is proposed as part of the Project. (R. p. 10 (Order at 10); R. pp. 1321-1323 (Tr. 1104:4-1106:16).) Foundation CEO Michael Maher explained that TIF financing requires a baseline assessment of property values within a TIF district before redevelopment occurs, and sets aside the incremental increases in property taxes from that redevelopment to be utilized for public purposes, including the infrastructure improvements necessary to allow for the redevelopment within a TIF district. (R. pp. 1321-1323 (Tr. 1104:6–1106:18).) Without the eventual redevelopment within the TIF District, there is no increase in property value, and thus no TIF revenue. (R. pp. 1321-1322 (Tr. 1104:25-1105:16).) As Mr. Maher further explained, the necessary redevelopment cannot occur without the horizontal infrastructure, creating a "chicken and egg" problem. (R. pp. 1322-1323 (Tr. 1105:17-1106:06).) The solution—bonding against these

future TIF revenues--allows the infrastructure to be financed and constructed *before* the actual redevelopment that increases the taxable value of land within the district. (R. pp. 1322-1323 (Tr. 1105:19–1106:18).) As the ALC ultimately found, "the infrastructure upgrades needed to address the subsidence, flooding, and contamination from the underlying landfill would be cost prohibitive without the TIF." (R. pp. 10-11 (Order at 10-11); R. p. 1333 (Tr. 1116:9-24).) This conclusion was supported by testimony from multiple witnesses that there is no other identified funding source to address these public needs. (R. pp. 1115-1116, 1433-1434 (Tr. 898:18-899:1; 1216:22-1217:5).) The ALC concluded that the only practicable and economically feasible option to address the flooding and landfill contamination was through the Project's intended use of TIF funding. (R. pp. 10-11, 31, 42 (Order at 10-11, 31, 42); R. p. 1333 (Tr. 1116:9-24).)

The Permitted Project

The Project requires a critical area permit for the filling of 2.866 acres of tidelands critical area within the creek itself, a further impact of 0.088 acres of critical area for excavation below the bottom elevation of the creek for construction of an impervious cap in an existing outfall, and an additional 0.969-acre impact from excavation near the intersection of Hagood and Fishburne for construction of another impervious cap to support a public amenity stormwater basin. (R. p. 1537 (FOGC Ex. 35 at 6).) These impacts, all within the limits of the City's former sanitary landfill (*see* Fig. 1, *supra*), would allow for the long-term resilient capping of the landfill, the elimination of tidal influence and tidal flooding in the Project area, and the installation of a new engineered stormwater drainage system. The Project would also disconnect portions of the drainage basin

currently draining through the landfill into a single Lockwood Drive outfall, and direct that flow through two new outfalls: one at Fishburne Street and one connecting a portion of the basin to the City's Deep Tunnel System at Spring Street[12]. (R. p. 1609 (Foundation Ex. 10); R. pp. 1103, 1105-1109 (Tr. 886:7-24, 888:17-892:18).)

Joshua Robinson, FOGC's technical expert, conceded that the Project would alleviate tidal flooding[13] in the area around the Project and that it would alleviate stormwater flooding in certain conditions. (R. p. 580 (Tr. 363:3-15).) While Mr. Robinson expressed concerns that stormwater flooding under some circumstances might be worse with the proposed system, he did not provide any specifics on what those circumstances might be. By contrast, the Foundation's engineering expert, Mr. Karkowski, testified based on his extensive experience with designing and constructing stormwater management systems in areas subject to tidal flooding and with on-site specific stormwater modelling that the designed system will improve local stormwater management, reduce incidents of stormwater flooding in the Project area, and interrupt and help prevent sunny-day flooding, reducing its frequency. (R. pp. 863-865 (Tr. 646:22-648:15).) City staff also testified that the Foundation will be legally *required* to demonstrate

[12] The partial connection to the Deep Tunnel System, which would divert a portion of the current stormwater drainage basin from the Project area, cannot occur as long as the tidal influence to the creek remains. (R. p. 1106 (Tr. 889:18-24).)

[13] FOGC erroneously describes one of Mr. Robinson's prior projects, New Belgium Brewery in Asheville, North Carolina, as addressing "tidal flooding." (FOGC Br. at 14.) Mr. Robinson agreed at trial, however, that this site is not tidally influenced (R. p. 619 (Tr. 402:58)), and that he had never worked on a site that involved the conflux of tidal flooding, stormwater flooding, and an exposed landfill (R. p. 578 (Tr. 361:15-18).)

an improvement in stormwater management over present conditions as a prerequisite to construction of the Project under applicable City stormwater ordinances. (R. pp. 1111-1112 (Tr. 894:20-895:11).)

Alternatives Analysis

FOGC contends that the Foundation did not introduce evidence of the alternatives it considered. (FOGC Br. at 13.) This assertion is utterly false. As part of the joint application for a Corps 404 permit and for the Permit at issue here, the Foundation was required to provide an analysis of potential alternatives for the purpose of determining if any feasible alternatives to the Project exist which could achieve the Project purposes while being less environmentally damaging than the proposed Project. (R. p. 1229 (Tr. 1012:4-23).) The Foundation submitted an alternatives analysis to the Department as part of its application for the Permit, and submitted the 404 application as evidence in the contested case. (R. pp. 1678-1699 (Foundation Ex. 34 at 16-37).) The analysis explored both off-site and on-site alternatives based on several specified criteria critical to the success of the underlying purposes of the Project. (R. pp. 1682-1685 (Foundation Ex. 34 at 20-23).) Those purposes include developing research facilities, housing, commercial areas, and supporting infrastructure; advancing economic development and quality of life in the area; and serving and enhancing the functions of the City's medical district surrounding MUSC. (R. p. 1679 (Foundation Ex. 34 at 17).) Mr. Ruocco also provided lengthy testimony regarding the off-site and on-site alternatives considered by the Foundation, including expert testimony regarding why a "restoration" of the creek as urged by FOGC is not the "least environmentally damaging alternative." (R. pp. 1229-1240 (Tr. 1012:4-

1023:12).) Testimony further established that "feasibility" includes consideration of the environmental, economic, and technological suitability of the proposed activity and alternatives, and also encompasses the concepts of "reasonableness and likelihood of success **in achieving the project goal or purpose**." (R. p. 42 (Order at 42 (emphasis added)); R. pp. 593, 868-869 (Tr. 376:4-15, 651:24-652:12).) DHEC reviewed the Foundation's alternatives analysis and concluded that the Foundation met its burden in demonstrating there were no feasible alternatives to the Project which would achieve its purposes while being less environmentally damaging. (R. pp. 1047-1048 (Tr. 830:18-831:9).) There was ample evidence in the record from which the ALC ultimately concluded that there were no feasible alternatives. (R. pp. 23, 31, 41 (Order at 23, 31, 41).)

FOGC presented no evidence of how its purported alternatives would achieve the Project's goals or purposes. FOGC's engineering expert, Mr. Robinson, offered four concepts which he described as feasible alternatives to the Project: raising the roads around the Project site; building a berm around the creek; restoring or renaturalizing the creek; or implementing a muted tide gate at the Lockwood culvert. (R. p. 633 (Tr. 416:8-22).) However, he provided no engineering designs, documented cost estimates, or other specific details on the implementation of any of these potential alternatives, nor was any evidence presented as to how the unknown cost of these supposed alternatives would be financed in the absence of TIF funding. (R. pp. 601, 635 (Tr. 384:3-22, 418:5-13).)

Mr. Karkowski's expert testimony provided a point-by-point refutation of FOGC's proposals, addressing the various reasons why each one would not be feasible for legal, technical, economic, or other reasons. (R. pp. 870-873 (Tr. 653:15-656:21 (infeasibility of

renaturalization)); R. pp. 873-878 (Tr. 656:22-661:14 (infeasibility of building berms)); R. pp. 878-882 (Tr. 661:16-665:18 (infeasibility of raising roads)); R. pp. 882-889 (Tr. 665:17-672:8 (infeasibility of muted tide gates)).) For example, Mr. Karkowski provided multiple reasons why it would not be feasible to restore or renaturalize the creek, most notably, the cost and the failure of this proposal to adequately address stormwater drainage and containment of landfill contamination. (R. pp. 870-873 (Tr. 653:15-656:21).) Mr. Robinson's description of renaturalizing the creek, while lacking in specific details, contemplated narrowing the creek. (R. pp. 594-596 (Tr. 377:15-379:4).) Mr. Karkowski testified that the existing drainage channel is inadequate for stormwater runoff and that narrowing the creek would exacerbate existing flooding conditions. (R. p. 871 (Tr. 654:12-24).) Similarly, Mr. Ruocco testified that leaving the creek intact was not the least environmentally damaging alternative because of the continued contamination issue. (R. p. 1259 (Tr. 1042:3-14).) The ALC specifically noted that Mr. Ruocco's and Mr. Karkowski's expert opinions were more persuasive than that of Mr. Robinson. (R. p. 22 (Order at 22).) "[T]he 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 Cty. Dep't of Social Servs. v. Ward*, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992).

Sitting as the fact-finder and weighing the evidence before it, the ALC concluded that there is only one feasible alternative that addresses the landfill contamination threatening public health and welfare, the continuing flooding issues which threaten public health and safety, and the myriad other public benefits which are the underlying purposes of the Project: capping the landfill by filling the creek and proceeding with the

Project as outlined in the Permit. (R. p. 23 (Order at 23).)

Procedural History

DHEC issued the Permit on July 12, 2021 and FOGC filed a Request for Final Review Conference with the DHEC Board on July 26, 2021. The DHEC Board denied the request on September 2, 2021, and FOGC filed a Request for Contested Case Hearing with the ALC on October 1, 2021. The Foundation filed a Motion for Expedited Hearing on October 20, 2021 (R. p. 177 (Motion for Expedited Hearing)), and a hearing on the same was held November 18, 2021. The Motion was supported by affidavits from the Mayor of the City of Charleston, the President of MUSC, the President and CEO of the Charleston Housing Authority, and others attesting to the flooding damage to the Gadsden Green Community, the flooding problems plaguing the Medical University and hindering its multiple functions, the presence of contaminants flowing from the landfill, and the necessity of stormwater improvements. (R. pp. 177-193 (Motion for Expedited Hearing and Affidavits).)

The ALC, Judge Ralph King Anderson, III, presiding, resolved the Motion for Expedited Hearing by setting a hearing date agreeable to all parties and conducted a contested-case hearing on June 6-10, 2022, receiving testimony from eighteen witnesses and considering more than thirty exhibits from all parties. On December 5, 2022, the ALC issued a carefully reasoned Order upholding the Permit. This appeal followed.

STANDARD OF REVIEW

"The ALC presides over all hearings of contested DHEC permitting cases and, in such cases, serves as the fact-finder and is not restricted by the findings of the administrative agency." *Bailey v. S.C. Dep't of Health & Envtl. Control*, 388 S.C. 1, 4, 693 S.E.2d 426, 428 (Ct. App. 2010). "[T]he ALC is authorized to make a final determination—after a final agency decision and subject to judicial review—as to whether an administrative agency should have granted or denied a particular permit." *Engaging & Guarding Laurens Cty.'s Env't (EAGLE) v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014).

This Court's review of the ALC's Order is governed by S.C. Code Ann. § 1-23-610(B), which provides:

> The review of the [ALC]'s order must be confined to the record. The court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control, 428 S.C. 189, 199-200, 833 S.E.2d 451, 457 (Ct. App. 2019). "When the evidence conflicts on an issue, the court's substantial evidence standard of review defers to the findings of the fact-finder." *Be Mi, Inc. v. S.C.*

Dep't of Revenue, 408 S.C. 290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014). "In determining whether the ALC's decision was supported by substantial evidence, this court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached." *EAGLE*, 407 S.C. at 342, 755 S.E.2d at 448.

ARGUMENT

I. The ALC Correctly Applied S.C. Code Ann. Regs. 30-12(G)(2)(b)

A. Regulation 30-12(G) Allows for the Project

The ALC identified "[w]hether DHEC issued the [P]ermit in violation of" S.C. Code Ann. Regs. 30-12(G)(2)(a) and (b) as a legal issue pivotal to resolution of the contested case. (R. p. 23 (Order at 23).) FOGC contends that Reg. 30-12(G)(2)(b) absolutely prohibits the filling authorized by the Permit, because it requires both that the proposed activity is water dependent and that there are no feasible alternatives. (FOGC Br. at 26-27.) However, the long-established rule is that a statute or regulation should be interpreted not in a vacuum, but in the context of the entire law. *See, e.g.*, *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Regulation 30-12(G)(1) allows for the placement of fill in tidal wetlands if "legitimate public needs are met," and Reg. 30-12(G)(2)(a) authorizes dredge and fill activities in the public interest so long as the project is not solely for the creation of commercial and residential properties strictly for private gain. These provisions would be nullified and, in the instant case, legitimate public needs will not be addressed at all, if Reg. 30-12(G)(2)(b) is read as an outright prohibition on dredge and fill for non-water dependent activities, as FOGC proposes. For

the reasons discussed below, it cannot be read as urged by FOGC.

A review of the different iterations of Reg. 30-12(G) through the years is instructive as to its intended meaning. The current version of the regulation, adopted in 1995, provides in relevant part:

> (1) Development of wetland areas often has been considered synonymous with dredging and filling activities. Dredging and filling in wetlands can always be expected to have adverse environmental consequences; therefore, the Department discourages dredging and filling. **There are cases, however, where such unavoidable environmental effects are justified if legitimate public needs are to be met.**
>
> (2) The specific standards [for filling][14] are as follows:
>
> > (a) 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;**
> >
> > (b) Dredging and filling in wetland areas should be undertaken only if that activity is water-dependent and there are no feasible alternatives[.]

(Emphasis added); *see* S.C. State Register Vol. 19, Issue 6, at 327-28 (June 23, 1995). Like the 1995 revision, Reg. 30-12(G) as initially adopted in 1978 provided that "all other dredge and fill activities not in the public interest will be discouraged." S.C. State Register Vol. 2, Issue 15, at 77-78 (June 7, 1978). In 1981, the regulation was amended so that 30-12(G)(2)(a) constituted an outright prohibition: "The creation of commercial and residential lots for private gain is not a legitimate justification for the dredging and filling of tidelands. **Permits for the dredging and filling of tidelands and submerged lands for**

[14] Regulation 30-12(G)(2) includes additional standards for dredging (subsections (c) through (l)) that are omitted as these standards are inapplicable to the Permit.

these purposes shall be denied." S.C. State Register Vol. 5, Issue 13, at 63-64 (June 16, 1981) (emphasis added). The 1995 amendment of the regulation reinstated the more permissive phrasing of the original, 1978 version. The 1981 revision also omitted the modifier "strictly" for private gain, which was similarly added back in 1995. Thus, from 1981-1995, Reg. 30-12(G) expressly prohibited filling to create private or residential lots, regardless of whether undertaken "strictly for private gain" and without the exceptions for erosion control, boat ramps, and activities in the public interest that appear in the 1978 and 1995 versions. This history demonstrates that DHEC understood how to prohibit, outright, any fill in tidal wetlands for commercial and residential construction and imposed that prohibition for 14 years, eliminating it in 1995.

The South Carolina Supreme Court has opined that "Coastal Council Regulation 30-12(G)(1) recognizes that dredge and fill operations create adverse environmental impacts and for this reason, this section discourages these activities **except in cases that are justified by a legitimate public need**." *State ex rel. Medlock v. S.C. Coastal Council*, 289 S.C. 445, 450, 346 S.E.2d 716, 719 (1986) (emphasis added).[15] In that case, the Court concluded that there was no public interest or need in the project that was the subject of the appeal. This statement of the Supreme Court is consistent with the ALC's analysis of the application of Reg. 30-12(G)(1), albeit under drastically different sets of facts.

During the approximately seven years that this permit application was under review by the Charleston District Army Corps of Engineers and DHEC, neither the

[15] This case involved the loss of 50 acres of tidal wetlands through construction of embankments in the marsh.

Foundation nor DHEC ever considered Reg. 30-12(G) to prohibit the types of activities contemplated in the Permit. Regulation 30-12(G)(1) recognizes that filling is permissible when "legitimate public needs" justify the environmental harm. Additionally, Reg. 30-12(G)(2)(a) prohibits filling for residential and commercial projects that are *solely* for private gain, and in so doing allows for such development activity when—as is the case here—it is *not* solely for private gain but also serves the public interest. *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction '*expressio unius est* ***exclusio*** *alterius*' or '*inclusio unius est* ***exclusio*** *alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'"). Since submitting its permit application, the Foundation has pursued the Permit under the general statements in Reg. 30-12(G)(1) and the specific standard in Reg. 30-12(G)(2)(a), and neither the Foundation nor DHEC has ever considered Reg. 30-12(G)(2)(b) to prohibit development activities that are otherwise permissible under Reg. 30-12(G)(1) or (G)(2)(a).

"The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible." *Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017). Moreover, "[t]he 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." *Laurens Cnty. Sch. Dist. 55 & 56 v. Cox,* 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992) (internal quotation marks omitted). Here, the legislative intent is clear in the text of Reg. 30-12(G)(1) that dredge and fill activities addressing "legitimate public needs" are justified and permitted, despite their adverse environmental consequences. (R. p. 29 (Order at 29).) The ALC made specific factual

findings that the Project will meet legitimate public needs. (R. p. 16 (Order at 16).) At least three witnesses qualified to address public needs testified regarding the importance of the Foundation's efforts to remediate tidal flooding in the area: Matt Fountain, the City of Charleston's Director of Stormwater, and a licensed Professional Engineer; Keith Waring, long-time member of City Council; and Shannon Scaff, City Director of Emergency Management. Their testimony supports the remedies provided by the Project for the flooding and contamination issues, and the significant public benefits to be derived from implementation of these remedies. Moreover, FOGC's own witnesses agreed that flooding is a problem that must be addressed in and around the Project area. (R. pp. 315-316, 349-350, 367, 669 (Tr. 98:20-99:15, 132:24-133:15, 150:4-16; 452:5-20).)

Regulation 30-12(G)'s inclusion of references to "legitimate public needs," "public interest," and "private gain" all point to a legislative policy decision that, in light of the inevitable "adverse environmental consequences" of dredge and fill activities, the bar for authorizing such activities should be high. Recognizing this, the ALC noted that to qualify for fill under Reg. 30-12(G), a project would have to involve "unique and singular circumstances" and thus be the exception, rather than the rule. (R. p. 30 (Order at 30).) As acknowledged by experts on both sides, as well as DHEC staff, the Project at issue here is that unique and singular set of circumstances, involving stormwater flooding, tidal flooding, and an exposed landfill. (R. pp. 578, 817, 889, 1028 (Tr. 361:15-18, 600:7-21, 672:9-25, 811:2-11).) It is precisely the kind of project envisioned in Reg. 30-12(G)(1), and the ALC was correct in concluding that the Permit did not violate the regulation.

B. The ALC Correctly Construed Reg. 30-12(G)(2)(b)

FOGC argues that the language of Reg. 30-12(G)(2)(b)—"Dredging and filling in wetland areas should be undertaken only if that activity is water-dependent and there are no feasible alternatives"—states a "threshold prohibition" on all dredging and filling that is not water-dependent. (FOGC Br. at 26.) As the ALC aptly noted, however, it is important that the regulation uses the term "should," since it is a precatory term indicating a requested or recommended course of action, rather than a mandatory term such as "shall." (R. pp. 27-28 (Order at 27-28 (citing *Johnston v. S.C. Dep't of Labor, Licensing, & Reg.*, 365 S.C. 293, 296-97, 617 S.E.2d 363, 364 (2005)).) "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." (R. p. 28 (Order at 28 (*citing United States v. Concord Mgmt. & Consulting, LLC*, 317 F. Supp. 3d 598, 611 (D.D.C. 2018)).)

FOGC further argues that the phrase "only if" in Reg. 30-12(G) imposes a "mandatory limitation" that operates as a de facto prohibition on dredging and filling for nonwater-dependent activity. (FOGC Br. at 27.) In making this argument, FOGC relies on inapposite decisions examining statutes using the phrasing "may … only if." *See Jennings v. Rodriguez*, 138 S. Ct. 830, 846-47 (2018); *BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 763 (9th Cir. 2018); *Twp. of Tinicum v. U.S. Dep't of Transp.*, 582 F.3d 482, 488 (3d Cir. 2009); *Cricket Store 17, LLC v. Bd. of Zoning Appeals*, 428 S.C. 270, 276-277, 834 S.E.2d 209, 212 (Ct. App. 2019). These cases merely stand for the proposition, not relevant here, that a grant of discretion ("may") can be limited by a subsequently stated condition

("only if"). *See* 3 Sutherland Statutory Constr. § 57:10 (8th ed.) ("[T]he word 'may' ordinarily does not connote a command, but instead imports permissive conduct and confers discretion."). In contrast, the operative word in Reg. 30-12(G)(b)(2) is "should," which "indicates a recommended course of action" among available alternatives. *Id.* Therefore, any qualification of such a recommendation (e.g., "should … only if …") does not create a prohibition on the action contemplated but only a limitation on the recommendation. Notably, FOGC provides no case law or other authority interpreting "should" in the manner it urges, nor does it address the compelling juxtaposition of "should" in Reg. 30-12(G)(2)(b) and the mandatory "shall" elsewhere in Reg. 30-12. (R. p. 28 (Order at 28).)

While the issue appears to be novel in South Carolina, numerous federal and state courts in other jurisdictions that have considered statutory construction involving the word "should" have ruled similarly to the ALC. For example, the Second Circuit Court of Appeals held, in interpreting the Federal Sentencing Guidelines, that:

> Webster's Dictionary defines the phrase "should be" as something "that ought to be." Webster's Third New Int'l Dictionary 2104 (1st ed.1993). *See also* Black's Law Dictionary 1379 (6th ed. 1990) ("[The word 'should'] ordinarily impl[ies] duty or obligation; *although usually no more than an obligation of propriety or expediency.*") (emphasis added). In contrast, the word "shall" is "used to express a command or exhortation," and is "used in laws, regulations, or directives to express what is mandatory." Webster's Dictionary, at 2085. *See also* Black's Law Dictionary, at 1375 ("As used in statutes, contracts, or the like, this word is generally imperative or mandatory."). Thus, 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. In the absence of a clear manifestation of intent on the part of the Sentencing Commission to attribute to "should" a meaning contrary to the common one, the term should be given its usual meaning.

United States v. Maria, 186 F.3d 65, 70 (2d Cir. 1999); *see also, e.g.*, *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 718 (D.C. Cir. 2015) ("The use of language like 'may' and 'should' … suggests that the provisions are meant to be 'precatory, not mandatory.'"); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) ("The term 'should' indicates a recommended course of action, but does not itself imply the obligation associated with 'shall.'); *Cochran Indus. VA v. Meadows*, 755 S.E.2d 489, 492 (Va. Ct. App. 2014) ("[T]he word 'should' ordinarily … implies no more than expediency … [and is] directory only.'"); *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 156 (Minn. 2014) ("The use of the word "should" in a rule or statute is not mandatory."); *Appeal of Algonquin Gas Transmission, LLC*, 186 A.3d 865, 874 (N.H. 2018) ("The use of the word 'should' allows the [agency] to exercise its discretion and judgment[.]"). Moreover, the leading treatise on statutory interpretation concludes that "the term 'should' indicates a recommended course of action, but does not itself imply the obligation associated with 'shall.'" 3 Sutherland Statutory Construction § 57:10. The ALC appropriately construed Reg. 30-12(G)(2)(b) as not prohibiting filling activities, like the Project, which serve legitimate public needs.

C. FOGC's Construction Would Lead to Absurd Results

The ALC found as fact that the only feasible alternative to address the flooding and contamination is to fill the creek (R. p. 23 (Order at 23).) But if FOGC's interpretation of Reg. 30-12(G)(2)(b) is correct, it *prohibits* that activity, forcing the surrounding community to live with the flooding and contamination in perpetuity. Substantial evidence exists to support the ALC's findings regarding available solutions for the

problems of flooding and contamination, but a conclusion that Reg. 30-12(G)(2)(b) prohibits the actions needed to address these public problems prevents the only feasible fix. This fact in itself constitutes the kind of absurd result courts must reject. (R. p. 30 (Order at 30).) The absurdity is compounded when the regulation read in its entirety specifically reserves the ability to address matters that would benefit the public, and then is interpreted to prevent the only feasible remedy to a public harm. "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intent." *State v. Taylor,* 411 S.C. 294, 301, 768 S.E.2d 71, 75 (Ct. App. 2014) (internal quotation marks omitted). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *State v. Sweat,* 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008).

Citing *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 425 (2011), FOGC contends that the ALC's conclusions on absurdity are "merely conjectural." (FOGC Br. at 34.) But this argument misconstrues the ALC's actual finding. The ALC used FOGC's purported alternative—restoration of the creek—as an example to illustrate that *any* fix that addresses the flooding and contamination issues in tandem would necessarily require fill to be placed in the critical area, implicating the same permitting regulations that are at issue in this matter. (R. p. 30 (Order at 30).) The ALC rightly concluded, not that the FOGC's specific "solution" would create absurd results, but that FOGC's interpretation of Reg. 30-12(G)(2)(b) would preclude ALL solutions, a plainly absurd result. (R. p. 30 (Order at 30).)

In any event, the absurdity that results from FOGC's interpretation of Reg. 30-12(G)(2) is hardly conjectural. This situation has existed for decades, and the ALC found that "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." (R. p. 30 (Order at 30).) FOGC's engineering expert agreed even his proposed renaturalization would require placing fill in critical areas, and thus require at least some of the same permits required by the Project. (R. p. 597 (Tr. 380:3-9).) Mr. Karkowski testified that, were a fix attempted by the City, it would require the same permitting sought here, along with a substantial outlay of resources. (R. p. 890 (Tr. 673:1-20).) Mr. Fountain testified that the City of Charleston has no "plan B" to address the existing public harms at the Project site in the absence of the TIF funds produced by the Project. (R. pp. 1115-1116 (Tr. 898:18-899:1).) Michael Maher testified that the presence of the landfill underlying the entire WestEdge Development makes any infrastructure construction considerably more expensive – in some cases ten times more expensive - than such infrastructure would be on a less complex site. (R. p. 1333 (Tr. 1116:9-25).) The history of the Project area and the length of time this Project has spent in permitting supports the ALC's conclusion that interpreting Reg. 30-12(G) as urged by FOGC would force Charleston residents to continue living with contamination and flood conditions indefinitely. Adhering to FOGC's interpretation of Reg. 30-12(G) will absolutely lead to the absurd results feared by the ALC, and this Court must avoid such an interpretation.

II. The Coastal Zone Management Program Document Does Not Prohibit the Project

FOGC relies on policies for commercial development as set forth in the Coastal Zone Management Program Document ("CZMPD") without the context provided in the CZMPD.[16] Such context includes the definition of "critical areas":

> The critical areas of South Carolina are the coastal waters, tidelands, beaches and primary ocean-front sand dunes seaward of the boundary line determined by the Coastal Council. (See Chapter III, p. 111-5 and definitions on this page.) In these areas the Coastal Council has **direct jurisdiction** for permits to perform any alteration.

(Glossary, CZMPD p. v. (emphasis added).)

References to direct permitting authority within the critical area recur throughout the CZMPD. Residential Development, CZMPD Chapt. III – 17 ("In the critical areas the Coastal Council has direct permitting authority and shall apply the following rules and regulations …."); Commercial Development, CZMPD Chapt. III-41 ("Any commercial activities and associated development **which alter a critical area** require a permit from the Coastal Council. Commercial buildings and structures must meet the requirements of the Final Rules and Regulations for Permitting to obtain a Coastal Council permit." (emphasis added)) The CZMPD consistently recognizes the difference between applying its provisions in the critical area where the Department has direct authority, and applying its provisions in the coastal zone outside the critical area for purposes of certification of a project.

[16] https://scdhec.gov/environment/your-water-coast/ocean-coastal-resource-management/south-carolina-coastal-zone (last visited April 3, 2023).

In a July 1995 update and excerpt to the CZMPD,[17] issued immediately following the June 1995 amendments to the critical area regulations, the language of the Commercial Development policy relied on by FOGC was altered to clarify that "(2) [w]ithin the critical areas of the coastal zone OCRM has direct permitting authority and shall apply the current OCRM Regulations (printed under separate cover) when making decisions on direct permit applications." 1995 Excerpt of CZMPD Chapt. III-28. While the 1995 Excerpt Document was not reviewed and approved by the General Assembly as was the original CZMPD in 1979, the document remains the most current, public-facing guidance DHEC has offered to the public on how its coastal policies are applied. As its Preface makes clear: "[a]ny noticeable differences in the language of the full [CZMPD] and this excerpted version are due to **changes in law, reorganization of State government, or minor editorial changes which in no way alter the goals, objectives and policies adopted by the S.C. General Assembly.** The **sole intent** of this excerpt is to **provide all users with a more useable, manageable and updated policy document**." 1995 Excerpt of CZMPD p. iv (emphasis added). This clearly conveys DHEC's long-standing view that, whatever enforceability the CZMPD may have on its own, its policies must give way to *regulations* in the critical areas where they apply.

DHEC witness Blair Williams confirmed this view of how the policies of the CZMPD and the agency's regulations should be applied in the critical area. (R. p. 987 (Tr. 770:4-13).) The commercial policy upon which FOGC relies is inconsistent with the critical

[17] https://scdhec.gov/sites/default/files/docs/HomeAndEnvironment/Docs/OCRM_Policies_Procedures.pdf (last visited April 3, 2023).

area permitting regulation adopted in 1995, which provides that "[d]redging and filling in wetland areas **should** be undertaken only if that activity is water-dependent and there are no feasible alternatives." S.C. Code Ann. Regs. 30-12(G)(2)(b) (emphasis added.)

As noted above, Reg. 30-12(G) was amended in 1995 so that dredging and filling to create commercial and residential lots is prohibited only when undertaken "*strictly* for private gain." Since Reg. 30-12(G) is the most recent expression of legislative intent on this issue, the current version of Reg. 30-12(G), controls over the version of the CZMPD cited by FOGC. *See Eagle Container, LLC v. County of Newberry*, 366 S.C. 611, 629, 622 S.E.2d 733, 742 (Ct. App. 2005) ("Under the 'last legislative expression' rule, where conflicting provisions exist, the last in point of time or order of arrangement, prevails."). The 1995 Excerpt of the CZMPD further underlines that DHEC policy must shift with changes to the controlling law—in this case, Regulation 30-12(G).

All of this is consistent with the ALC's conclusion that, to the extent any conflict exists between the CZMPD and the critical area regulations, the regulations should control. (R. p. 34 (Order at 34 (*citing Spectre, LLC v. DHEC,* 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 by ALC))). This conclusion does not undermine prior case law determining that the CZMPD is enforceable, but clarifies that a "collection of policies … derived from statutory and regulatory law" cannot

contradict and supersede a statute or regulation promulgated by the General Assembly. (R. p. 34 (Order at 34).)

The ALC determined that the commercial policy relied on by FOGC speaks to the same subject matter as Reg. 30-12(G), and therefore they are "*in pari materia* and must be construed together, if possible, to produce a single, harmonious results." (R. p. 34 (Order at 34 (*citing Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000)).) In light of the ALC's correct determination that the regulation must prevail in cases of conflict, as well as the fact that the "last legislative expression"—indeed, the *only* legislative expression between the two—is found in Reg. 30-12(G), the only harmonious result is to recognize the agency discretion inherent in the Regulation, allowing for activities such as this Project where legitimate public needs are addressed.

III. The Project was Properly Permitted Under All Other Regulations and Statutes.

FOGC next contends that the Project violates S.C. Code Ann. §§ 48-39-20, 30, 150, and S.C. Code Ann. Regs. 30-11,[18] as well as S.C. Code Ann. § 48-39-150(A)(1), (3), (5), (8)-(10). FOGC relies specifically on legislative findings reflected in § 48-39-20(D) and (E). Sections 48-39-20 and 48-39-30 "require a balancing of competing interests when development is contemplated along our precious coastal resources. While economic interests are relevant, relying on tax revenue or increased employment opportunities is not sufficient justification for eliminating the public's use of protected tidelands." *S.C. Coastal Cons. League v. S.C. Dep't of Health & Envtl. Ctrl.*, 434 S.C. 1, 15, 862 S.E.2d 72, 79

[18] S.C. Code Ann. Regs. 30-11 mirrors the statutory considerations in S.C. Code Ann. § 48-39-150.

(2021). Such a balancing of competing interests would certainly appear to be within the purview of the fact-finder in each individual case. Here the ALC found multiple public benefits associated with the Permit unrelated to any economic benefits that might be derived. (R. pp. 16, 44 (Order at 16, 44).)

The ALC and DHEC considered each policy and finding set forth in S.C. Code Ann. §§ 48-39-20 and 48-39-30. (R. pp. 35-38 (Order at 35-38).) Section 48-39-20(D) concerns the ecologic fragility of fish, shellfish, and other marine resources which may be impacted by man's alterations. As DHEC testified, and as required by the Permit, the dredge and fill activities contemplated by the Project must take place during winter months (periods of low biological activity) and at low tide, thus minimizing the environmental impact to those marine resources. (R. p. 1016 (Tr. 799:16-23).) Section 48-39-20(E) states: "[i]mportant 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." While there may be naturalized features characteristic of the former Gadsden Creek in the critical area, from an ecological point of view, the Project site is heavily polluted. From a scenic point of view, the entire area has been found to be blighted. And, the area in question is not natural, as it was manipulated several times over the decades to accommodate the City's trash and stormwater runoff from the landfill and surrounding area. And, as thoroughly established in the evidence before the ALC, the Project is not an "ill-planned development," but a long-needed and long-considered solution to a multitude of legitimate public needs. At its core, the Project addresses a

public hazard (flooding) and a public health risk (contamination) and restores a blighted area. In claiming the Project is inconsistent with legislative findings and policies, FOGC misapprehends the source of harm: it is not a result of the Permit but rather is a result of landfilling activity pre-dating the Clean Water Act some sixty years ago.

Moreover, the Project is wholly consistent with many of the legislative policies not specifically argued by FOGC. For example, S.C. Code Ann. § 48-39-30(B)(1) sets forth state policy "[t]o promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvements with due consideration for the environment." Eliminating flooding and contamination within the Project area constitutes both an economic and social improvement for the impacted residents. Similarly, § 48-39-30(D) provides that "[c]ritical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people." As the ALC concluded, the Project creates numerous public benefits as compared to the status quo conditions at the Project site. (R. p. 23 (Order at 23).)

FOGC further claims the Permit "violates"[19] six of the "ten "general

[19] Section 48-39-150(A) requires that "in determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in § 48-39-20 and § 48-39-30, and be guided by the following general considerations." It is difficult to accept a description of DHEC's actions as **violating** these sections, as these are considerations enumerated to provide guidance. DHEC must consider these matters and is compliant with the requirement upon a demonstration of consideration, which showing was made in the hearing below.

considerations"[20] (FOGC Br. at 40-41) for granting or denying a permit:

> (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.

S.C. Code Ann. § 48-39-150(A). The ALC extensively analyzed the Project in light of these considerations, and determined that the Project was properly permitted by DHEC. (R. pp. 35-37 (Order at 35-37).) DHEC witness Blair Williams also testified regarding the application of § 49-39-150(A)'s considerations in review of the Permit application. (R. p. 1014 (Tr. 797:20-25).) As relates to (A)(1), Mr. Williams testified that the Project is not water dependent. (R. p. 955 (Tr. 738:17-23).) With respect to sub-part (A)(3), Mr. Williams acknowledged that the project would "fill that entirety of that drainage system" and remove the existing habitat. (R. pp. 1016-1017 (Tr. 799:23-800:1).) He testified that the cap had eroded, there was seepage of hazardous materials. (R. p. 980 (Tr. 763:2-15).) He

[20] As previously noted, these general considerations are echoed verbatim in Reg. 30-11(B), which FOGC also asserts the Project "violates." The foregoing analysis therefore applies to FOGC's regulatory and statutory arguments equally.

considered that to be a "pretty real potential harm to the public." (R. p. 980 (Tr. 763:13-15).) He determined that public benefits are derived from "addressing the flooding issue, both tidal flooding, as well as a storm event flooding, and the potential exposure of contaminants to the public by filling this drainage system and addressing the settling and eroding, a cap, by re-establishing that cap with this fill." (R. pp. 964-965 (Tr. 747:20-748:1).) While he examined the impact on public access to these specific critical area acres under sub-part (A)(5), he saw a greater benefit in addressing the contamination and flooding. (R. pp. 950-951 (Tr. 733:8-734:2).) He stated that an adverse environmental impact is occurring as a result of the landfill exposure. (R. p. 952 (Tr. 735:14-24).) He described the degree of erosion of the cap as "significant." (R. p. 980 (Tr. 763:6-15).) Reestablishment of the cap will address this impact. *See* S.C. Code Ann. § 48-39-150(A)(8), (9); (R. p. 963 (Tr. 746:3-19).) He described a balancing decision-making process of weighing public benefit against environmental impact. (R. pp. 964-965 (Tr. 747:18-748:15).) In each analysis, improving the existing situation was preferable to preserving the existing situation. The substantial evidence in the record supports Mr. Williams's conclusions, and those of the ALC, with respect to the "ten general considerations."

IV. The ALC Did Not Improperly Shift the Burden of Proof to FOGC

The ALC found that there was no demonstration of a feasible alternative to replace the Foundation's plan of filling the creek. (R. pp. 41-44 (Order at 41-44).) As relates to alternatives presented to the ALC from Joshua Robinson, FOGC's engineer, FOGC claims that the ALC improperly "placed the burden with respect to the feasibility of this alternative squarely on FOGC even though WestEdge had the burden of demonstrating

lack of feasible alternatives." (FOGC Br. at 14.) This assertion ignores the fact that the Foundation had already made an appropriate demonstration, both before DHEC and then at the ALC, that there are no feasible alternatives to the proposed Project, and that the overall burden of proof before the ALC fell squarely on FOGC.

> For critical area permitting, DHEC uses a regulatory definition of "feasible."
>
> As used within these rules and regulations (e.g., "unless no feasible alternative exists"), feasibility is determined by the Department with respect to individual project proposals. Feasibility in each case is based on the best available information, including, but not limited to, technical input from relevant agencies with expertise in the subject area, and consideration of factors of environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives. Use of this word includes, but is not limited to, the concept of reasonableness and likelihood of success in achieving the project goal or purpose. "Feasible alternatives" applies both to locations or sites and to methods of design or construction, and includes a "no action" alternative.

S.C. Code Ann. Regs. 30-1(D)(23).

The South Carolina Supreme Court has held, regarding the meaning of "feasible" in the context of the DHEC's water quality certification regulations:

> Given that the term "feasible alternative" is not defined within the regulations, the ALC concluded that "feasible' is equivalent to 'practicableness,' a term utilized by the Corps of Engineers which means "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose." 40 C.F.R. § 230.10(a)(2). Applying the "practicableness" meaning to the facts, we find substantial evidence to support the ALC's conclusion that no "feasible alternatives" existed with less adverse results.

Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 643, 723 S.E.2d 191, 196 (2012). As discussed above, the Foundation provided a detailed alternatives analysis as part of the application for the Permit, and Andy Ruocco testified at length regarding that analysis and its conclusions—that there are no less environmentally damaging

alternatives which would meet the purposes of the project. (R. pp. 1229-1240 (Tr. 1012:4-1023:12).) When the FOGC presented alternatives to the Court, its burden of proof was to demonstrate that Mr. Robinson's alternatives were feasible, as defined above, and practicable as recognized by the Supreme Court. FOGC could also have demonstrated that the Foundation rejected alternatives that were in fact feasible and may have less environmental impact. The ALC cannot find that an alternative exists to replace those considered by the Foundation unless that alternative satisfies the regulatory definition of "feasible." FOGC's engineer, Joshua Robinson, identified specific "alternatives" favored by FOGC but did no analysis of them to demonstrate feasibility or practicability. The Foundation's engineering expert, Mr. Karkowski, testified at length regarding the amount of analysis that was required to address the flooding and contamination within the Project area. (R. pp. 858, 858-859, 863, 865 (Tr. 641:3-15, 641:22-642:8, 646:19-21, 648:2-5); R. pp. 1585-1608 (Foundation Ex. 26).) The only analysis that FOGC's engineer performed related to flooding was to review Mr. Karkowski's report. (R. pp. 579-580 (Tr. 362:17-363:2).) In identifying what FOGC considered to be better alternatives than those outlined in the Permit, Mr. Robinson acknowledged that he had not prepared studies to support these alternatives or assessed cost feasibility. (R. pp. 600-601 (Tr. 383:21-384:22).) In addition to "restoration" of the creek, Mr. Robinson suggested the use of a "muted tide gate" but was unfamiliar with the permitting process associated with such installation and had no experience with these devices in South Carolina. (R. p. 607 (Tr. 390:4-8).) He suggested raising the elevation of the surrounding roads, but had not assessed the cost

and acknowledged that the roads may be controlled by other entities than the City or the Foundation. (R. pp. 612-613 (Tr. 395:10-396:18).)

S.C. Administrative Law Court Rule 29(C), addressing "Burden of Proof," provides that "[i]n matters involving the assessment of civil penalties, the imposition of sanctions, or the enforcement of administrative orders, the agency shall have the burden of proof." As a practical matter, other contested cases, such as a permit challenge, impose that burden on the challenging party.

> The standard of proof in an administrative hearing of a contested case is by a preponderance of the evidence. In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof. Additionally, the burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence.

Sierra Club v. S.C. Dep't of Health & Envtl. Control, 426 S.C. 236, 257, 826 S.E.2d 595, 606 (2019) (internal quotation marks & citations omitted).

Mr. Robinson identified what he considered to be alternatives to restoring the cap and filling the creek, but without considering whether an alternative was feasible or had any potential of "achieving the project goal or purpose." As the party challenging an agency's issuance of the Permit, FOGC had the burden of proving that there were less impactful alternatives that were **feasible** and could satisfy the project purpose. Contrary to FOGC's argument, a conclusion related to whether an alternative is feasible must be supported by the party offering the alternative.

In *Murphy*, *supra*, the appellant argued that "the unrebutted testimony of her professional engineer, who identified a series of site designs, demonstrated that feasible alternatives were available and certification should have been denied." In rejecting

Murphy's argument, the Supreme Court held:

> Although Strickland opined that there were several alternatives the District could employ, the ALC found problems with all of them. His proposals to move the parking lot off the stream involved the construction of an expensive pedestrian bridge and required a decrease in the number of much needed parking spaces. He also proposed the use of expensive alternatives such as wetlands or underground retention as opposed to detention pools to deal with stormwater management. Moreover, the ALC noted that Strickland had spent only 40–60 hours considering these alternative designs and had visited the site only once for two hours. The ALC also found that he had not had an opportunity to review the stormwater plans, drainage calculations, or the findings regarding the parking needs of the District.
>
> Given the careful study of alternatives by DHEC and the District, and the ALC's thorough consideration of Murphy's expert testimony, we find substantial evidence to support the ALC's conclusion that no feasible alternatives existed.

396 S.C. at 643-44, 723 S.E.2d at 197.

Similarly, Mr. Karkowski has spent years assessing, designing, and modeling a stormwater system for the Foundation. This amount of analysis cannot be overlooked when compared to the proposals provided by FOGC's engineer, which he readily admitted included no engineering work, designs, cost estimates, or other real world evaluation of the asserted "alternatives." Had FOGC come into court with a design for restoration, estimate of costs, and data indicating how restoration might impact episodic flooding, then FOGC could be in a potentially different position. Instead, it offered ideas that were not fully developed or analyzed and therefore would not satisfy the regulatory requirement of feasibility. To the extent that there was an initial burden on the Foundation to show that no feasible alternatives to the Project exist, there is ample evidence in the record that the Foundation met that burden before DHEC and the ALC,

and that the ALC's determinations in regard to the lack of feasible alternatives are fully supported. FOGC cannot, by tossing out half-formed notions and calling them "alternatives," shift its overall burden of proof in this matter—to establish by a preponderance of the evidence that the Permit was improperly issued—to the Foundation to prove FOGC's every utterance is infeasible.

CONCLUSION

The evidence and testimony presented in the contested case hearing overwhelmingly supports the ALC's factual findings that: (1) flooding emanating from the creek "is a threat to public health, safety, and welfare" and that "flooding is likely to become worse" (R. pp. 9-10 (Order at 9-10)); (2) contamination emanating from the landfill through the creek is "a threat to the health, welfare, and safety of the public and the environment" (R. p. 7 (Order at 7)); (3) the elimination or reduction of these issues would constitute a public benefit (R. p. 16 (Order at 16)), and (4) the Project, as set forth in the challenged Permit, is the only way to ensure these issues are addressed. (R. p. 23 (Order at 23).) The ALC's legal conclusion that the Project is permissible under Reg. 30-12(G)(2)(b) is based on the proper application of the rules of statutory interpretation to the Regulation as a whole, rather than "the phraseology of an isolated section or provision." *Laurens Cnty. Sch. Dist. 55 & 56,* 308 S.C. at 174, 417 S.E.2d at 561. (R. p. 29-30 (Order at 29-30).) The ALC also found, after considering all the evidence in the record, that FOGC's construction of Reg. 30-12(G)(2)(b) would prohibit *any* potential remedy to the public health threats of flooding and landfill contamination represented by the creek, and properly rejected such an absurd result. (R. p. 30 (Order at 30).)

FOGC's argument that the CZMPD prohibits the issuance of the Permit fails for multiple reasons, not least of which is that any conflict between the CZMPD and a critical area permit must be resolved in favor of the promulgated regulation. (R. p. 34 (Order at 34).) The ALC also considered the general considerations of Reg. 30-11 and § 48-39-150, as well as the policy statements of § 48-39-20 and § 48-39-30 and, sitting as fact-finder, balanced the competing interests represented by those provisions to find that the Project's protection of public health, welfare, and safety outweighs any perceived adverse impact. (R. pp. 35-40 (Order at 35-40).)

The ultimate burden of persuasion in this matter fell to FOGC to "prove convincingly that the agency's decision is unsupported by the evidence." *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). They failed to do so. (R. p. 42 (Order at 42).) The Department's issuance of the Permit authorizing the Foundation's Project was proper, and the decision of the ALC should be affirmed.

Respectfully submitted,

s/*Mary D. Shahid*

Mary D. Shahid, SC Bar No. 1794
Michael S. Traynham, SC Bar No. 75117
Kirsten E. Small, SC Bar No. 75681
MAYNARD NEXSEN, P.C.
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
Tel. 843.577.9440
MShahid@maynardnexsen.com
MTraynham@maynardnsexsen.com
KSmall@maynardnexsen.com

Attorneys for Respondent WestEdge Foundation, Inc.

Bradley D. Churdar, SC Bar No. 12829
Bennett W. Smith, SC Bar No. 102894
Sara V. Martinez, SC Bar No. 74822
South Carolina Department of Health and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
Tel. (843) 953-0213
churdabd@dhec.sc.gov
smithbw@dhec.sc.gov
martinsv@dhec.sc.gov

Attorneys for Respondent SCDHEC

June 12, 2023
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2023-000006

Friends of Gadsden Creek, ... Appellant,

v.

South Carolina Department of Health and Environmental Control and WestEdge Foundation, Inc., ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

June 12, 2023

s/*Kirsten E. Small*

Kirsten E. Small, SC Bar No. 75681
Maynard Nexsen, PC
104 S. Main Street, 9th Floor
Greenville, SC 29601
(864) 370-2211
KSmall@maynardnexsen.com

Attorney for Respondent WestEdge Foundation, Inc.