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SC Court of Appeals

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,

vs.

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

Respondents,

FINAL BRIEF OF APPELLANT

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Table of Contents

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 2

STATEMENT OF FACTS 2

I. Factual Background Concerning the Permit in Question 2

II. The ALC's Ruling 11

III. Gadsden Creek Can Be Preserved and Enhanced 13

ARGUMENT 24

I. THE PROPOSED PROJECT VIOLATES CRITICAL AREA REGULATION 30-12(G)(2)(B) AND THE ALC'S RULING WAS ERRONEOUS. 25

II. THE PROPOSED PROJECT VIOLATES THE CMP's COMMERCIAL DEVELOPMENT POLICIES AND THE ALC's RULING WAS ERRONEOUS 37

III. THE PROPOSED PROJECT VIOLATES REGULATORY AND STATUTORY CRITICAL AREA POLICIES AND THESE VIOLATIONS PROHIBIT THE ISSUANCE OF A CRITICAL AREA PERMIT. 40

IV. THE PROPOSED PROJECT VIOLATES THE CMP'S CRITICAL AREA POLICIES AND OTHER GENERAL POLICIES AND THESE VIOLATIONS PROHIBIT THE ISSUANCE OF A COASTAL ZONE CONSISTENCY CERTIFICATION 46

CONCLUSION 49

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases

BNSF Railway Company v. California Department of Tax and Fee Administration, 904 F.3d 755, 763 (9th Cir. 2018) 28

Bruning v. S.C. Dep't of Health & Environmental Control, 418 S.C. 537, 546-47, 795 S.E.2d 290, 295 (Ct.App. 2016) 31

Cabiness v. Town of James Island, 393 S.C. 175, 191, 712 S.E.2d 416, 425 (2011) 34

California v. Hodari D., 499 U.S. 621, 627-28, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) 29

Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) 2

Commissioners of Pub. Works v. S.C. Dep't of Health & Envtl. Control, 372 S.C. 351, 359 (Ct.App. 2007) 32

Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002) 32

Cricket Store 17, LLC v. City of Columbia Board of Zoning Appeals, 428 S.C. 270, 834 S.E.2d 209 (Ct. App. 2019) 30, 31

Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 363 n.1, 673 S.E.2d 425, 426 n.1 (2009) 34

Jennings v. Rodriguez, ___ U.S. ___, 138 S.Ct. 830, 846-47, 200 L.Ed.2d 122 (2018) 27, 28

Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) 39

Kennedy v. S.C. Retirement System, 345 S.C. 339, 352-53, 549 S.E.2d 243, 250 (2001) 30, 31

Kiawah Development Partners II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 43-44, 766 S.E.2d 707, 723 (2014) 35

Kinsey v. Champion Am. Service Center, 268 S.C. 177, 181, 232 S.E.2d 720, 722 (1977) 2

Rabon v. S.C. State Highway Dep't, 258 S.C. 154, 157, 187 S.E.2d 652, 654 (1973) 39

S.C Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 363 S.C. 67, 74, 610 S.E.2d 482, 485 (2005) 37

S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n, 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010). 26

S.C. Dept. of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) 2

Sierra Club v. S.C. Dep't of Health & Envtl. Control, 426 S.C. 236, 258-59, 826 S.E.2d 595, 567 (2019) 36

Smith v. Tiffany, 419 S.C. 548, 555-56, 799 S.E.2d 479, 483 (2017) 26

Spectre, LLC v. South Carolina Dep't of Health and Environmental Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) 32, 37, 38

Stringer v. Realty Unlimited, Inc., 97 S.W.3d 446, 448 (Ky. 2002) 31

Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) 2

Township of Tinicum v. U.S. Department of Transportation, 582 F.3d 482 (2009)........ 28, 29, 30

Wilder v. South Carolina Hwy. Dep't, 228 S.C. 448, 90 S.E.2d 635 (1955) 32

Wooten ex rel. Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) 32

Young v. Keel, 431 S.C. 554, 848 S.E.2d 67, (Ct.App. 2020) 39

Statutes

49 U.S.C. § 40116........ 29

49 U.S.C. § 5125........ 28

8 U.S.C. § 1226........ 27, 28

S.C. Code Ann. § 1-23-380........ 2

S.C. Code Ann. § 48-39-150........ 25, 40, 41, 42

S.C. Code Ann. § 48-39-20 .... 40, 45

S.C. Code Ann. § 48-39-30 .... 32, 40, 43, 44

S.C. Code Ann. § 48-39-80 37

S.C. Code Ann. §§ 48-39-10, *et seq.* 25, 37

Other Authorities

CMP Glossary at p. vi 38

CMP III.A. (8), (11) at p. III-1 38

CMP III.A.(3), (4), (8), (11) at p. III-1 47

CMP III.C.3. IV.(l)(b) 38, 40

CMP III.C.3.II.(1), (5), (8), (9) at p. III-16 38

CZMP § IV(1)(b) 40

Regulations

S.C. Code Ann. Regs. § 30-12 .... 24, 26, 27, 29, 31, 32, 33, 34, 35, 37, 39, 40

S.C. Code Ann. Regs. § 30-4 37

S.C. Code Ann. Regs. § 30-1 .... 25, 44

S.C. Code Ann. Regs. § 30-11 .... 25, 32, 40, 41, 43, 45

STATEMENT OF ISSUES ON APPEAL

1. Did the ALC err in ruling that the proposed project complies with Reg. 30-12(G)(2)(b)?
2. Did the ALC err in ruling that the proposed project complies with the commercial development policies of the South Carolina Coastal Zone Management Program document?
3. Did the ALC err in ruling that the proposed project may proceed despite violating several statutory and regulatory critical area policies?
4. Did the ALC err in ruling that the proposed project may proceed despite violating several South Carolina Coastal Zone Management Program document general and critical area policies?

STATEMENT OF THE CASE

Respondent WestEdge Foundation, Inc. ("WestEdge") applied to Respondent South Carolina Department of Health and Environmental Control ("DHEC") for a critical area permit, a coastal zone consistency certification, and a water quality certification ("permit and certifications"). After withdrawing its initial decision, DHEC staff reissued the permit and certifications on July 12, 2021. On July 26, 2021, Appellant Friends of Gadsden Creek ("FOGC" or "Appellant") filed its Request for Final Review Conference with the DHEC Board (R. pp. 45-82; Request for Final Review Conference) and on September 2, 2021, the DHEC Board denied Appellant's Request. (R. pp. 83-84; DHEC Board Decision).

Appellant filed its Request for Contested Case Hearing on October 1, 2021. (R. pp. 85-129; Petitioner's Request for Contested Case Hearing). A contested case hearing was conducted from June 6th through June 10th, 2022. The Administrative Law Court ("ALC") issued its Final Order on December 5th, 2022. (R. pp. 1-44; Final Order). Appellant filed a timely Notice of Appeal on January 3th, 2023.

STANDARD OF REVIEW

This Court may reverse or modify the ALC's decision if the substantive rights of the Appellant 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. S.C. Code Ann. § 1-23-380(5).

The appellate court "will correct the decision of the ALC if it is affected by an error of law, S.C. Code Ann. § 1-23-380(5)(d) (Supp.2010), and questions of law are reviewed de novo." S.C. Dept. of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) (citation omitted), reh'g denied (May 4, 2012) . When the evidence gives rise to but one reasonable inference the question becomes one of law for the courts to decide. Kinsey v. Champion Am. Service Center, 268 S.C. 177, 181, 232 S.E.2d 720, 722 (1977). "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)(citing Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)).

STATEMENT OF FACTS

I. FACTUAL BACKGROUND CONCERNING THE PERMIT IN QUESTION

Gadsden Creek is one of the last tidal creeks on the Charleston peninsula and is surrounded by several acres of critical area tidal wetlands. (R. p. 740, lines 6-16, pp. 1532-1553, Petitioner Exhibit 35). The creek and its wetlands serve as habitat for a variety of plant and animal species, relieve stormwater flooding, and serve as a cultural touchstone for the community.

Friends of Gadsden Creek is a South Carolina non-profit organization. (R. p. 267, lines 20-25). Members of FOGC regularly use Gadsden Creek and its tidelands for a variety of purposes. FOGC has organized educational creek walks focused on its ecological landscapes for church groups, school groups, and other individuals interested in learning about the habitat. (R. p. 269, lines 20-23; p. 652, lines 17-19). FOGC has also organized creek cleanups with several organizations, including the South Carolina Aquarium, the Ocean Conservancy, and the South Carolina Sea Grant Consortium (R p. 654, lines 19-24).

FOGC members enjoy the wildlife that use the creek and wetlands as habitat. (R pp. 278, line 22-p. 280, line 18; p. 286, lines 1-22; p. 754, line 22-p. 755, line 5). Among the many plant and animal species identified in the creek or the wetlands are Sea oxeye, Marsh Elder, cordgrass or Spartina, needle grass, periwinkle snails, fiddler crabs, blue crabs, oysters, ribbed mussels, blue herons, snowy egrets, redwing blackbirds, and turtles. (R. p. 278, line 22-p. 280, line 18, pp. 1482-1485, Petitioner's Exhibit 6). The undisputed testimony from both FOGC and DHEC reflects that the creek and tidelands are a healthy and "functional" ecosystem. (R. p. 559 line 8-p. 561, line 10; R. p. 1016, lines 16-17). Reflecting Gadsden Creek's ecological and educational value, College of Charleston Professors Dr. Barbara Beckingham and Dr. Tim Callahan "use Gadsden Creek as an outdoor environmental science classroom." (R p. 657, lines 15-20).

FIG 1: R. PP. 1487-1488; PETITIONER'S EXHIBIT 15

FIG 2: R. P. 1486; PETITIONER'S EXHIBIT 11

In addition, the organization has "held several mutual aid events" for the Gadsden Green public housing community located across the street from the creek. (R. p. 270, lines 1-6, p. 752, lines, 9-17). John Flowers is a member of Friends of Gadsden Creek and has been a resident of

Gadsden Green for about 15 years and lives "right across from" the creek. (R. p. 752, line 1-p. 753, line 2). Mr. Flowers stated that Gadsden Creek "is just a part of the community. I mean, if you like water and nature, you can't help but make a use of it, even [if] you just like . . . the scenery and the changing of the tides, and the wild birds you might see and other animals[.]" (R p. 754, line 22-p. 755, line 5). Mr. Flowers walks through Gadsden Creek and enjoys the scenery "[a]t least six or seven, maybe ten times a week." (R. p. 755, lines 6-10). Mr. Flowers said that "all of [the members of his community] walk the creek, you know, one time or another." (R. p. 756, lines 6-9). Mr. Flowers testified that he "wouldn't like to see it covered up from my personal point of view. But then as a community, I don't see how anyone could think about covering the creek up because they know it serves [as] a water reliever for us when we get floods." (R. p. 759, lines 2-7).

Ms. Audrey Lisbon is a member of FOGC and the current president of the Westside Neighborhood Association. (R. p. 371, lines 18-20, p. 379, lines 14-18). As part of her campaign, she advocated for saving and beautifying Gadsden Creek. (R p. 379, line 25-p. 380, line 14). Ms. Lisbon testified that she desires to keep Gadsden Creek so the flood water can "get out" of her neighborhood. (R. p. 388, lines 14-17).

Although Gadsden Creek and its wetlands remain public resources, its scope was once much broader. Instead of four acres of critical area and a channelized tidal creek, Gadsden Creek and its associated wetlands spanned almost 100 acres. (R. p. 521, lines 6-9). The Charleston City Council and its engineers were well aware that Gadsden Creek provided a benefit to the community because it served as a tidal drain for that area. (R. p. 731 line 18-p. 732, line 3). In addition, Professor Christina Butler, FOGC's expert historian, testified that the predominantly African-American residents in the Westside community of Charleston used Gadsden Creek and its marsh

area for many recreational activities including for "wharves, recreational fishing and recreational boating, sailing and rowing" and "public bathing[,]" and even cultural activities like baptisms. (R. p. 727, lines 14-24, p. 724 line 20-p. 725 line 6).

FIG 3: R. P. 1489; PETITIONER'S EXHIBIT 16

What happened to this vast expanse of wetlands is indefensible. In the 1950s, the City of Charleston began to fill Gadsden Creek and its wetlands with trash in an effort to create more buildable land on the Charleston peninsula. (R. p. 521, lines, 6-9, p. 945, lines 4-16). The City had filled in other wetlands throughout the peninsula on many occasions over Charleston's long life. (R. p. 701, lines 19-22).

The City of Charleston illegally filled between 95 and 100 acres of marsh in the area. (R. p. 521, lines 6-9). The unpermitted filling of Gadsden Creek and its wetlands violated the Rivers and Harbors Act. (<u>See</u> R. p. 444, lines 13-18, p. 945, lines 6-8, p. 1152, lines 13-22). Members of the local African-American community were still using Gadsden Creek and its wetlands despite the City's efforts. (R. p. 376, lines 6-12). FOGC member Audrey Lisbon grew up in the Westside neighborhood and recalled her and her community's use of Gadsden Creek during that time. (R.

p. 371, lines 6-14, p. 376, lines 6-12). Ms. Lisbon testified that in the 1960s she and many others in her community used to swim, crab and fish in the original iteration of Gadsden Creek despite the landfilling. (R. p. 374, line 25-p. 375, line 16, p. 376, lines 6-12). She stated that "[t]here w[ere] a lot of things we did at Gadsden Creek that we enjoyed during that time." (R. p. 375, lines 15-17). Nevertheless, given the landfill's proximity to residences, Charleston City Council Member Keith Waring agreed that the residents in the area have been subjected to environmental racism since the 1950s. (R. p. 1439, lines 15-24).

The Department of the Army issued an after-the-fact permit to the City of Charleston regarding its illegal filling of the wetlands and channelization of the creek in 1971. (R. p. 945, lines 6-8).[1] The after-the-fact permit required the City to maintain the landfill cap and prevent any contamination from escaping. (R. p. 1006, line 25-p. 1007, line 4, p. 1440, lines 20-24).

In a misguided effort to ostensibly benefit the area, the City of Charleston received permission in the mid-1990s from DHEC to enlarge the culvert through which Gadsden Creek flows from the Ashley River. (R. p. 919, line 16-p. 920, line 8). The culvert size was increased presumably to allow for more stormwater to exit the peninsula through Gadsden Creek. (R. p. 920, lines 4-8). The enlarged culvert also, however, allowed more tidal water to inundate the area. (R. p. 528, lines 3-18). Councilmember Waring stated that the City of Charleston has been aware of flooding in the project area for decades. (R. p. 1439, lines 5-7).

The City of Charleston and the MUSC Foundation first began discussing plans to develop certain parcels in the Westside neighborhood at least by the early 2000s. (R. p. 1311, line 25-p. 1312, line 2). The Horizon Project Foundation was formed in or around 2011 and is now composed of two supported (or supporting) organizations, the City of Charleston and MUSC Foundation. (R.

[1] The Corps has concluded that despite the extensive filling, Gadsden Creek is the channelized version of the previous iteration of Gadsden Creek. (R. p. 330, lines 11-20).

p. 1304, lines 11-12, p. 1306, lines 9-12). Most of the current project area consists of parcels owned by the City of Charleston, a smaller amount owned by the MUSC Foundation, and one parcel owned by Rushmark LLC, a private real estate corporation. (R. pp. 1561, 1582, Petitioner's Exhibit 75 at pp. 27:9-13; 27:24-28:1; 161:1-6). Mr. Maher described the WestEdge Foundation as a "collaboration between the City of Charleston and the Medical University and its foundation." (R. p. 1304, lines 8-11).

The City of Charleston is intertwined with WestEdge. The City of Charleston (and the MUSC Foundation) loans WestEdge money, provides capital to WestEdge on an annual basis for operations, and has dedicated several parcels of real property to WestEdge. (R. pp. 1561, 1562, Petitioner's Exhibit 75 at pp. 27:2-28:5; 28:8-29:23). The City of Charleston is also responsible for paying back WestEdge for expenditures for infrastructure improvements through bond issuance. (R. pp. 1565, 1566, Petitioner's Exhibit 75 at pp. 61:14-25; 72:16-20). The Charleston City Council has four seats on the WestEdge Board, including the Mayor and Councilmember Dudley Gregorie who has supported the project on City Council. (R. p. 1564, Petitioner's Exhibit 75 at p. 45:20-23).

Charleston City Council member Keith Waring testified that the City of Charleston has been heavily involved in the WestEdge project. (R. p. 1439, line 2-4). Mr. Maher, CEO of WestEdge, testified about conversations between WestEdge and the City of Charleston's legal team and that WestEdge received comments from city attorneys with respect to permit submissions. (R. p. 1382, line 13-p. 1383, line 3). Mr. Maher provided information to the City of Charleston to use in briefing on the City's liability regarding the project area. (R. p. 1384, lines 1-6). Mr. Maher described conveying edits on the permit application from the City of Charleston to his team to use in submissions. (R. p. 1384, line 19-p. 1385, line 4). Ultimately, Mr. Maher stated

that WestEdge is obligated to support "the goals and missions of the two supported organizations." (R. p. 1307, lines 6-15).

The proposal at issue here is the latest phase of the WestEdge development. (R. p. 1331, lines 10-24, p. 1332, lines 11-15). Ultimately, WestEdge proposes to build a mixed use commercial development over several acres of land including "[f]ill[ing] 2.866 acres of tidelands critical area within a drainage system known as Gadsden Creek[,]" excavating 0.088 acres of tidelands critical area, and excavating another 0.969 acres of tidelands critical area. (R. p. 1537, Petitioner's Exhibit 35). During the hearing, DHEC's Blair Williams testified that the "proposal was for a mixed use development that – that requests to dredge and fill critical area tidelands." (R. p. 948, line 24-p. 949, line 1). Mr. Williams stated that "looking at the actual request before us and the purpose of the project, the Department determined that the activity is not water dependent." (R. p. 949, lines 20-23). Mr. Maher testified at the hearing that most of the buildings that will be located in current critical areas are mixed use buildings including for office space and retail. (R. p. 1390, lines 14-25).

DHEC's Bureau of Water witness, Mr. Charles Hightower, similarly testified that this proposal was not, as the Army Corps of Engineers had also concluded, water dependent. (R. p. 1046, lines 14-19, p. 1058, lines 18-21). The ALC likewise concluded that the proposal is not water-dependent. (R. pp. 26, 29, Final Order).

This proposal has been met with considerable resistance. The current Westside Neighborhood Association President (and FOGC member), Ms. Audrey Lisbon, opposes the elimination of Gadsden Creek and stated that the historic connection she and her community have felt with the creek would be lost if the current version of the creek and its wetlands are eliminated.

(R. p. 378, lines 2-4, p. 379, line 14-p. 380, line 14). Numerous Westside residents have shared their desire that Gadsden Creek be restored and turned into a park. (R. p. 383, lines 2-4).

FOGC member Tamika Gadsden, in speaking with the nearby community about the difference between visiting Gadsden Creek and Brittlebank park, noted that visiting Brittlebank park "doesn't hold the same memories that we've learned from people who have – again, who have crab[bed] off the creek. People like entrepreneurs who are still over there, like Mr. B. who used to crab and fish on that creek. It doesn't hold the same importance. They don't talk about Brittlebank, they talk about the Gadsden Creek." (R. p. 354, lines 12-21). In addition to FOGC, the Charleston Area Justice Ministries opposes the current project as well. (R. p. 640, lines 3-18).

Resistance has not been limited to citizens and citizen groups. The South Carolina Department of Natural Resources and the United States Fish & Wildlife Service both submitted public comments to DHEC, and both opposed the elimination of Gadsden Creek. (R. p. 1015, lines 14-16, p. 1016, lines 6-9). The proposal is even contrary to the City ordinance that established the tax increment financing (TIF) district which is to fund this project. The ordinance incorporates a Concept Plan which provides that "the current concept considers protecting the wetlands so that they can continue to define the character of the open areas of the redevelopment area. [. . .] Maintaining the wetlands could also provide desirable recreational opportunities within a more urbanized district." (R. p. 1526, Petitioner Exhibit 25 at p. A-3).

The proposal is also contrary to the Dutch Dialogues, recently hosted by the City of Charleston, to obtain guidance and recommendations from local, national, and international experts in how to live with many of the water issues of a coastal city. (R. p. 514, line 13-p. 515, line 7). Appellant's expert witness, Joshua Robinson, and his firm, participated in the Dutch Dialogues. (R. p. 515, lines 4-10). Councilmember Waring stated that he was supportive of the

City of Charleston's efforts concerning the Dutch Dialogues. (R. p. 1440, line 25-p. 1441, line 23). Charleston City Council adopted the final report and recommendations of the Dutch Dialogues. (R. p. 1441, lines 18-23). The Dutch Dialogues recommendations informed the City of Charleston's new comprehensive plan. (R. 1126, p. lines 4-8).

Both Mr. Maher and Mr. Robinson noted that the Dutch Dialogues team ultimately recommended against the filling of Gadsden Creek, instead recommending its revitalization and use as a nature-based solution for water management. (R. p. 539, lines 4-12, p. 1376, lines 2-14). Thus, the proposed project is inconsistent with the opinions of worldwide flooding experts. (R. p. 517, lines 1-9). Instead, the proposed project is located in a tidal flood plain and would destroy a healthy, functional ecosystem. (R. p. 559, line 8-p. 561, line 10, p. 569, lines 18-24, p. 1122, lines 21-24).

Despite the Dutch Dialogues recommendation and over the objections of FOGC, state and federal resource agencies, and many other members of the public, DHEC issued this critical area permit and coastal zone consistency and water quality certifications to allow for the destruction of Gadsden Creek and several acres of critical area wetlands. (R. pp. 1532-1553, Petitioner's Exhibit 35).

Among the injuries and detriments various members of FOGC testified to if the project goes forward, all testified that they would be deprived of their use of Gadsden Creek. Thus, the project would eliminate opportunities for aesthetic enjoyment, wildlife habitat and observation, educational programs, and the project would preclude stormwater from exiting the area through Gadsden Creek. (See R. p. 298, line 7-p. 299, line 24, p. 374, lines 17-19, p. 377, line 1-p. 378, line 21).

II. THE ALC'S RULING

The ALC justified its approval of the proposed project because it perceived a need to address flooding in the area and contamination emanating from the former landfill. (R. p. 36, Final Order). Neither of these bases is a proper justification for eradicating tidal wetlands and a tidal creek, both because the project violates the plain language of applicable regulations and policies and because doing so contravenes public policy by incentivizing environmental degradation. The City of Charleston created both of the issues WestEdge (and the ALC) is using as an excuse for the project.

With respect to perceived concerns about the landfill, the City of Charleston remains responsible under its permit to prevent contaminants from leaving the landfill site. (R. p. 1440, lines 20-24). DHEC confirmed that under the "after the fact" permit, the City of Charleston is obligated to maintain the landfill cap regardless of the outcome of this permit challenge. (R. p. 1006, line 21-p. 1007, line 3).

Belying the alleged concerns regarding the landfill, Councilmember Waring stated that he was unaware of whether the City had ever sought money to clean or restore Gadsden Creek from other funding sources. (R. p. 1439, line 25-p. 1440, line 15). Likewise, Mr. Fountain, who works for the City in its stormwater department, stated that he was unaware of any city money that had been budgeted to clean or revitalize Gadsden Creek. (R. p. 1128, lines 3-6). Remarkably, Mr. Maher testified that he was aware that the City of Charleston had received funds as part of its Spring-Fishburne tunnel project for cleaning up Gadsden Creek but Mr. Maher was unaware of the City moving forward with any effort to utilize those funds to clean up Gadsden Creek. (R. p. 1386, line 18-p. 1389, line 5). What happened to those funds is unknown. (R. p. 1389, lines 3-5). No evidence of any effort by the City of Charleston to clean or otherwise revitalize Gadsden Creek was offered.

Mr. Robinson stated that the tidal flooding that the project area sometimes experiences is due to the filling of the former marsh. (R. pp. 523-528). The tidal flooding is caused, in part, from the settling of the land from the former landfill which allows the water "to return to [its] natural extent." (R. p. 524, line 18-p. 525, line 9). The other aspect is the creek channel was formerly sized in proportion to the surrounding marsh which could absorb a greater amount of tidal inundation. (R. p. 525, line 18-p. 526, line 15). The increased tidal flooding in the area is caused, at least in part, by the City's deliberate enlargement of the Gadsden Creek culvert to allow stormwater to flow out faster. (R. p. 527, line 11-p. 528, line 13). The change in the culvert size both allowed stormwater to exit faster but also allowed more tidal water to flood the area. (R. p. 528, line 19-p. 529, line 20). In short, the City's actions, by filling the marsh and the later culvert enlargement, caused the tidal flooding experienced by the area.

Any concern about stormwater flooding in the area prior to its alteration by the City was unlikely because of "the couple hundred acres of land that drained naturally into the salt marsh or the area that was historically the full expanse of Gadsden Creek[.]" (R. p. 521, lines 21-25).

To his knowledge, Councilmember Waring stated that the City of Charleston has never tried to address flooding in the area previously and that the City of Charleston has not attempted any temporary solutions to preclude flooding in the area. (R. p. 1439, line 25-p. 1440, line 7).

III. Gadsden Creek Can Be Preserved and Enhanced

Despite the clear language of the regulations and policies that restrict wetland fill or excavation, WestEdge did not introduce evidence of alternatives it considered. WestEdge introduced a feasible alternatives report but only offered it to show that it had been submitted to DHEC staff during the permitting phase of the project. (R. p. 1226, line 17-p. 1227, line 11). DHEC did not offer any testimony or evidence about feasible alternatives other than Mr. Williams's

recounting offsite alternatives submitted by WestEdge to DHEC in the permitting process. (R. p. 966, line 8-p. 970, line 12). Although FOGC is not the party proposing to destroy Gadsden Creek and its wetlands, FOGC introduced evidence of several alternatives to the current proposal that would address various site concerns while still maintaining Gadsden Creek and its associated critical area wetlands.

a. ALTERNATIVES TO ADDRESS THE FLOODING CONCERN

Unlike the alleged contamination, there is evidence that flooding sometimes occurs in the area but that concern can be addressed in several ways. One alternative advocated by FOGC was the revitalization and re-naturalization of Gadsden Creek. Petitioner's expert witness, Joshua Robinson is a professional engineer with a Masters degree in Civil and Environmental Engineering from Georgia Tech and extensive experience addressing the very issues that the ALC was concerned about here. (R. p. 456, lines 8-11, p. 458, lines 6-8, p. 461, line 8-p. 467, line 22, p. 474, line 5-p. 479, line 4). Mr. Robinson designed the conceptual plan for the New Belgium brewery that addressed extensive tidal flooding of a creek over a former landfill; he has worked at Dewees Island to address compound flooding issues involving stormwater and tidal flooding and he worked on the Church Creek hydrology study that involved flood control berms to address tidal and stormwater flooding and which was incorporated into the Dutch Dialogues final report. (R. p. 476, line 2-p. 479, line 11, p. 474, line 5-p. 475, line 22, p. 467, line 23-p. 472, line 7).

The ALC rejected this option by concluding that "FOGC simply failed to carry its burden that its projected costs were realistically feasible." (R. p. 22, Final Order). The ALC's conclusion is remarkable for several reasons. First, it placed the burden with respect to the feasibility of this alternative squarely on FOGC even though WestEdge has the burden to demonstrate the lack of feasible alternatives. Second, the ALC rejected the testimony of the only expert witness who has

actually performed the type of rehabilitative work proposed in this alternative with respect to cost. (R. p. 461, line 14-p. 479, line 4). Third, the ALC determined, despite a lack of evidence, that the alternative was not "realistically feasible." (R. p. 22, Final Order). WestEdge offered no evidence that any option proposed by FOGC would be financially infeasible. Mr. Karkowski offered testimony about the potential cost of this proposal but that is not the same thing as providing evidence that the proposal would be financially unfeasible. That type of evidence had to come from WestEdge itself. No witness offered testimony that WestEdge could not afford this or any other alternative that preserved Gadsden Creek and its wetlands.

The ALC was also mistaken to conclude that Gadsden Creek needed to be connected to the Spring-Fishburne Deep Tunnel System. The ALC reasoned that "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." (R. p. 22, Final Order). One of the points of the renaturalization alternative of Gadsden Creek is the prevention of the tidal flooding that could preclude tying part of the area to the Spring-Fishburne tunnel system. The use of renaturalization in connection with a tide gate also precludes tidal flooding. The ALC even acknowledged this when it stated that "[i]t is possible that some combination of new outfalls and a tide gate could address the flooding issues if the creek was restored" but the ALC then said that "FOGC failed to prove its combinations would be a reasonably effective proposal." (R. p. 22, Final Order). Apart from the conclusory nature of this statement, the ALC apparently desired FOGC to prove that its alternatives were effective to a virtual certainty but failed to elaborate on what type of proof FOGC was expected to offer. (R. p. 22, Final Order). The evidence showed, and the ALC agreed, that very little of the cap area has eroded. The evidence also showed that WestEdge proposes to excavate a portion of the landfill area to allow for a stormwater feature on site so clearly

remediation is not only possible but expected. (R. p. 920, line 22-p. 921, line 10, pp. 1532-1553, Petitioner's Exhibit 35).

Mr. Robinson testified that "the simplest, most common [alternative] is a measure that the City of Charleston is implementing elsewhere on the peninsula, which is simply to take the areas where the water is spilling onto the roadway . . . and build[] some sort of simple berm or site wall just a couple of feet tall. This has recently been done along East Bay Street in Charleston and prevented . . . flood waters during large tides from spilling over and onto the road." (R. p. 530, lines 6-17). This alternative was suggested in the context of the Dutch Dialogues discussions by international experts. (R. p. 635, line 23-p. 636, line 3).

The ALC stated that "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." (R. p. 19, Final Order). The ALC was speculating when it considered this potential issue but the reasoning also reveals a fundamental misunderstanding of the berm alternative. The berm alternative prevents tidal flooding from inundating the area. There is no evidence that this preclusion would worsen flooding elsewhere. Indeed, it would be concerning if a short berm along Gadsden Creek could increase flooding when a large portion of the entire Charleston peninsula, including the area around Gadsden Creek, is proposed to be encircled by a storm surge wall. As for the management of stormwater, the proposed design has stormwater routed elsewhere from Gadsden Creek. Even Mr. Karkowski admitted that stormwater could be taken under the development to discharge into the Ashley River. (R. p. 913, lines 8-12).

What is concerning is Mr. Robinson testified that the proposed project will worsen flooding in the area in certain circumstances. (R. p. 534, lines 19-20). This testimony was based, in part, on "the Applicant's modeling results [] which indicate slightly higher water levels at some storm

events, some tide– combinations of rainfall and tide along … Hagood." (R. p. 534, line 23-p. 535, line 2). The modeling results submitted by WestEdge in Respondent's Exhibit 26 show increased water levels along Hagood at high tide during a 25-year storm, a 50-year storm and the same for a 100-year storm. The modeling also showed an increase in water levels during a king tide along Hagood for a 10-year storm, a 25-year storm, and a 50-year storm. (R. p. 1586, Respondent WestEdge's Exhibit 26).

Mr. Robinson's conclusion was also based on his own study about the storage capacity of Gadsden Creek and its associated wetlands. (R. p. 535, lines 2-10). This assessment showed "that Gadsden Creek offers significantly more storage volume than the proposed storm sewer system." (R. p. 535, lines 2-16). "[A]ccording to the application[,] the runoff would increase slightly, but it's over such a large area that [the] slight increase in runoff really sort of adds up. So the proposed condition would produce more runoff and offer less area – or less volume storage. And the current condition is less runoff and more volume storage." (R. p. 535, line 22-p. 536, line 2).

Mr. Robinson testified that the proposed elimination of Gadsden Creek, as a stormwater conduit, necessitates the additional stormwater outfalls. Based upon his "review of the documents[,]these other connections and outfall points are required *because* Gadsden Creek is being filled. The Gadsden Creek channel where it is now is a natural low point in that valley[.] So once that's filled to make way for new development that water has to go somewhere." (R. p. 555, lines 2-17) (emphasis added). In other words, "the new storm sewer system and those things are . . . endeavoring to replace the functions [that] Gadsden Creek is … already performing." (R. p. 555, lines 20-22). If the creek and wetlands are eliminated, that would remove a stormwater conduit and stormwater storage for the rest of the basin. (R. p. 556, line 19-p. 557, line 11).

Mr. Fountain was unaware of how a future phase of the WestEdge development, including the phase at issue here, would comply with the master stormwater plan or what construction methods the applicant would use to meet the regulatory requirements concerning stormwater management. (R. p. 1120, lines 1-10, p. 1121, lines 8-13). Mr. Fountain stated that "we have not seen if the construction details will meet the requirements of that master plan. That's correct." (R. p. 1122, lines 2-5).

The ALC also noted concerns that a berm would disrupt public access and viewing of the creek (R. p. 19, Final Order) as if that was equivalent to a proposal that would allow for the total destruction of the creek and wetlands. The ALC again noted that the alternative did not "solve the issue of landfill contamination" (R. p. 19, Final Order) but that issue was addressed in the remediation discussion.

Another alternative provided by Mr. Robinson was the installation of a tidal restriction device. He testified that "there's a variety of different types[s] of flow restriction devices, different types of tide gates that . . . have been developed specifically for these sort of ecological cases where ecosystems need to have normal hydrologic exchange during most events . . . ." (R. p. 531, lines 8-16). This restriction could be implemented at the Lockwood culvert to prevent too much tidal water from entering Gadsden Creek and flooding the area. (R. p. 531, lines 16-19). Mr. Robinson testified that "tide gates are used quite a lot" along the coast of South Carolina. (R. p. 532, line 24-p. 533, line 14).

Mr. Karkowski conceded that the use of a muted tide gate could preclude tidal flooding in the area if one was installed that was large enough for the culvert. (R. p. 919, lines 1-12). Mr. Karkowski recognized that the culvert through which Gadsden Creek flows had been enlarged

previously by the City of Charleston and agreed that engineering solutions could be innovated to meet the dimensions of the culvert. (R. p. 919, line 16-p. 920, line 8, p. 935, lines 1-4).

The ALC determined that the tide gate alternative "could help reduce sunny day flooding if it fit[s] the culvert." (R. p. 20, Final Order). The ALC had concerns about whether downsizing the culvert would lead to a disruption of storm water drainage. (R. p. 20, Final Order). The ALC eventually ruled that the 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." (R. p. 20, Final Order). The so-called contamination issue was addressed with the re-naturalization alternative.

The ALC's stormwater concern is not supported by the record and ample evidence demonstrated that a muted tide gate could be designed to address stormwater drainage. First, extensive evidence established that Gadsden Creek's storage capacity exceeds that of the proposed development. (R. p. 535, lines 2-16). This storage together with the drainage improvements related to the Spring-Fishburne project are sufficient to address stormwater concerns because that project is removing approximately 100 acres from the drainage basin regardless of this project. (R. p. 550, line 6-p. 552, line 15). Second, the ALC's determination that the muted tide gate would "disrupt" stormwater drainage is not supported by any evidence. The muted tide gate would be closed at very high tide but the high tide would already interfere with stormwater drainage with or without a muted tide gate. (R. p. 551, line 23-p. 552, line 15). Even WestEdge's stormwater system is disrupted at high tide (R. p. 928, lines 5-10). The tide gate itself does not disrupt stormwater outflow. Instead, it allows for extensive storage capacity. (R. p. 551, line 23-p. 552, line 15). Third, within the muted tide gate alternative, the evidence showed that a gate could be built to size the

current culvert such that there would not be any diminishment of stormwater capacity. (R. p. 1451, line 14-p. 1452, line 22, p. 1456, line 23-p. 1457, line 9).

With respect to the size of tide gates, Mr. Robinson stated that he had "seen similarly sized muted tide gates as a general term used up and down the South Carolina coast in a variety of settings, other large muted tide gates . . . that are used . . . nearby the [site] and [that he had conducted] research [] over a number of years for other projects of similar size, trying to understand what products are available, what things can be fabricated . . . ." (R. p. 1452, line 5-p. 1453, line 8). Mr. Robinson stated that he had "checked with a variety of manufacturers and . . . investigated several of the projects in large systems similarly sized to this culvert at Lockwood and [he had] no doubt that something could be made quite feasibly and . . . relatively inexpensively." (R. p. 1452, line 22-p. 1453, line 8).

The ALC's flawed rationale as to cost and financial feasibility infected virtually all of its feasible alternative analyses and bears mentioning. The ALC stated that "without more concrete evidence about how effective and expensive the creek's preservation would be compared to the cost of the current Project, the more persuasive evidence before the Court is that preserving the creek will jeopardize the financial feasibility of the entire WestEdge Development." (R. p. 23, Final Order). There was no evidence that preserving the creek would jeopardize the financial feasibility of the entire WestEdge development. Of course, this phase isn't even the entirety of the WestEdge development but even as to this phase, the evidence presented was that this project would persist even without addressing Gadsden Creek. When Mr. Maher was asked if the WestEdge development could continue without the permits at issue, he responded that "we would certainly continue." (R. p. 1335, lines 20-23).

b. Alternatives to Address the Water Quality Concern

There was no evidence of any widespread contamination emanating from Gadsden Creek. Instead, the evidence showed that the landfill cap is largely still in place. Mr. Robinson testified that "there's a lot of areas where the salt marshes ha[ve] expanded . . . because the water has been moving in or bringing in sediments. But now you've got the cap and then on top of the cap pluff mud, you know, marsh – natural sediments that have formed on top of the cap. And then you have marsh vegetation growing on that pluff mud . . . you've got . . . spartina, cord grass, glasswort." (R. p. 562, lines 4-13). Mr. Williams testified that only portions of the former cap have eroded but not the entire cap. (R. p. 1005, lines 14-22). Mr. Karkowski agreed that the landfill cap had not eroded entirely and that only a few areas of the cap had eroded along the creek channel. (R. p. 920, lines 9-21).

Mr. Robinson testified at length about the benefits Gadsden Creek's salt marsh is having on water quality. The salt marsh is "nature's best way to filter and clean pollutants. That's one of its main functions." (R. p. 565, lines 9-11). Marsh vegetation makes harmful pollutants inert or converts them into less dangerous substances through chemical processes. (R. p. 565, lines 14-18). Phytoremediation is "an actual active part of landfill close out process [and] many communities [] have taken former landfills and planted them with wetland vegetation" to remove pollutants. (R. p. 565, lines 21-25). The four acres of vegetation in the project area is "having a beneficial effect, whether it's physically filtering out the pollution but also before the water makes it to the Ashley River, those pollutants are residing in contact with the root zone and the leaf zone of those plants and breaking down harmful substances to make the water cleaner before it leaves and goes into the Ashley River." (R. p. 566, lines 10-19). Mr. Robinson has used these techniques in projects on which he's worked, including the Smith Branch project in Columbia, South Carolina. (R. p. 566,

lines 22-25). Mr. Karkowski admitted that wetlands "can and do" filter or attenuate pollution. (R. p. 935, line 10).

WestEdge's expert, Andy Ruocco, conceded that "we just don't have the data to conclude that the entire reach of these wetlands is on top of the landfill." (R. p. 1191, lines 7-10). Mr. Ruocco confirmed, however, that another boring study conducted by S&ME in 2015 showed several boring locations in and along Gadsden Creek that found no trash at a depth of five feet. (R. p. 1261, line 15-p. 1262, line 8). Of the 24 samples taken, almost half, 11 samples, showed no evidence of any trash underneath. (R. p. 1262, line 21-p. 1263, line 4).

Consistent with Mr. Ruocco's testimony, Mr. Robinson agreed that the landfill cap had eroded to some degree along some of the "bed of the creek" but he also stated that the cap could be restored while still keeping Gadsden Creek and its wetlands. (R. p. 561, line 18-562, line 2, p. 563, line 1-p. 564, line 4). Mr. Robinson testified that he was familiar with similar restoration efforts including the Smith Branch system in Columbia which was "a dumping ground for the hospital campus for many years in that wetlands system." (R. p. 563, lines 7-12). "That [landfill] material could be removed and . . . new soils could be put on, on the banks and additional vegetation. There's all sorts of natural erosion control methods that could be used to [] protect the soft sediments [] of the stream banks while the vegetation is growing in." (R. p. 563, lines 16-23). The proposed plan envisions some potential remediation of landfill materials given the plans for the stormwater feature at the corner of Hagood and Lockwood. (R. p. 922, line 11-p. 923, line 16). The ALC concluded only that "the landfill cap has eroded in places within the creek bed." (R. p. 5, Final Order).

The evidence on which the ALC relied with respect to the alleged contamination of Gadsden Creek amounts to two grab samples obtained by Mr. Ruocco collected on one day. (R.

pp. 5-6, Final Order). Mr. Ruocco testified that if the sampling had occurred at high tide, then the sample would have been surface water instead of a more concentrated sample, and his aim was not to have surface water dilute his sample. (R. p. 1264, lines 3-12). Mr. Ruocco had not sampled for contaminants in a tidal creek previously in his career. (R. p. 1266, lines 7-11). He also admitted that there were solids in the samples taken, that suspended solids can increase the contamination in sample readings, and that he could not discount the effect of suspended solids or turbidity in the sampling results. (R. p. 1268, lines 12-21, p. 1269, lines 4-12). Mr. Ruocco stated that the sampling "was not something that we really put a lot of planning into." (R. p. 1271, lines 10-13).

Mr. Ruocco was not sampling or attempting to sample surface water, groundwater, or drinking water at Gadsden Creek but the samples were compared to surface water standards, groundwater standards, and drinking water standards. (R. p. 1269, line 13-p. 1270, line 7). Because of their nonpoint source nature, Mr. Ruocco stated that it is "extremely difficult to determine the source of these contaminants [found in the sampling]." (R. p. 1252, lines 15-17). The ALC even concluded that "the full extent and nature of the contamination in creek water and during tidal events is unknown[]" but the ALC's rationale was that the sample should have been compared to surface water even though, again, the sample was not of surface water. (R. p. 7, Final Order). Moreover, every expert witness and Mr. Williams agreed that contaminants, including heavy metals, may enter Gadsden Creek via stormwater. (R. p. 558, line 12-p. 559, line 2, p. 931, line 19-p. 932, line 7, p. 1012, line 21-p. 1013, line 8, p. 1273, line 20-p. 1274, line 6, p. 1274, lines 22-25, p. 1275, lines 4-8). The ALC's finding on this point is contrary to the only evidence regarding surface water that was adduced in the hearing. Blair Williams, DHEC's witness, testified that the surface water sampling of Gadsden Creek yielded results that are the same as the Ashley River. (R. p. 1013, lines 17-21).

Mr. Williams was unaware of any report of a member of the public being harmed by pollutants from Gadsden Creek. (R. p. 1012, lines 5-8). DHEC has not issued any advisories to the public about a threat to public health due to contaminants in Gadsden Creek. (R. p. 1013, line 25-p. 1014, line 3). Nor has DHEC required the City of Charleston to address any public health issues associated with its lack of maintenance of the landfill cap. (R. p. 1014, lines 11-15). Mr. Hightower stated that the condition of the landfill did not affect the water quality certification evaluation. (R. p. 1049, line 20-p. 1050, line 1).

There was no evidence that any children or adults had actually been exposed to contaminants in or from Gadsden Creek. The ALC's concern for the public is laudable but its findings must still be based on evidence and there was no evidence of actual exposure of the public much less children to any level or any contaminant—including lead. (R. p. 7, Final Order).

Given Mr. Robinson's testimony and what WestEdge is proposing related to other areas to be excavated, there is no real dispute that any potential pollution from Gadsden Creek can be remediated and contained while still keeping the creek and its wetlands.

ARGUMENT

There are two provisions that have similar requirements for the fill or permanent alteration of wetlands or tidelands that apply here. Critical area regulation 30-12(G)(2)(b) and commercial policy (1)(b) of the Coastal Zone Management Program document both require that in order to fill critical area wetlands, the proposal must be water-dependent and there can be no feasible alternatives. It is undisputed that the current project is not water-dependent. This fact alone precludes satisfaction of these requirements and requires reversal. In addition, there are feasible alternatives to the current project as well. Either way, these provisions have not been satisfied and the ALC's ruling to the contrary requires reversal.

Moreover, the ALC acknowledged that this proposal violates several general critical area policies as well as several polices of the Coastal Zone Management Program document that apply to all projects and critical area projects. These violations likewise preclude the issuance of the critical area permit and the coastal zone consistency certification here.

I. THE PROPOSED PROJECT VIOLATES CRITICAL AREA REGULATION 30-12(G)(2)(b) AND THE ALC'S RULING WAS ERRONEOUS.

The General Assembly passed the Coastal Zone Management Act in 1977. S.C. Code Ann. §§ 48-39-10 to -360 ("CZMA" or "the Act"). Among the aims of the legislation was "to provide for the protection and enhancement of the State's coastal resources." S.C. Code Regs. § 30-1 (A)(1). The applicable regulations acknowledge that "critical areas are of vital importance to the State, and there is strong and growing pressure for the development of these areas." S.C. Code. Ann. Regs. § 30-11(A). The regulations recognize that critical area tidelands are utilized as "habitat as well as a source of food" for "many birds and other forms of wildlife[,]" as well as their function as "aesthetic, recreational and educational resources[.]" S.C. Code Ann. Regs. § 30-1(B)(2), (5). The regulations further acknowledge that these "unique natural resource areas face increasing land development pressure and negative impacts from human activities in and around them." S.C. Code Ann. Regs. § 30-1 (B)(6).

Among the criteria DHEC must consider before determining whether to issue a critical area permit are three that are directly related to the subsection at issue here: "[t]he extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water; [] [t]he extent of any adverse environmental impact that cannot be avoided by reasonable safeguards; [] [t]he extent to which all feasible safeguards are taken to avoid adverse environmental impacts resulting from a project[.]" S.C. Code. Ann. Regs. 30-11(B)(1), (8)-(9); S.C. Code Ann. § 48-39-150 (B)(1), (8)-(9).

Regulation 30-12 sets forth specific standards for different categories of projects in tidelands and coastal waters. Relevant here, subsection (G) governs proposals to dredge or fill critical area tidelands.[2] Initially, this subsection establishes that dredging and filling is discouraged by DHEC because "[d]redging and filling in wetlands can always be expected to have adverse environmental consequences . . . ."[3] S.C. Code Ann. Regs. § 30-12 (G)(1). The Regulation later provides a threshold prohibition before listing conditions for dredging and filling activities once they are permitted: "Dredging 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). The critical area permit at issue here purports to allow dredging and filling of critical area wetlands so the proposed activities must comport with this specific subsection.

The plain meaning of this regulation is that dredging and filling critical area wetlands should occur "only if" the activity is both water-dependent and there are no feasible alternatives and there is no need for any other interpretation. Smith v. Tiffany, 419 S.C. 548, 555-56, 799 S.E.2d 479, 483 (2017)("statutory interpretation begins (and often ends) with the text of the statute in question. Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning.")(citations omitted). The same interpretative canons that apply to statutes also apply to regulations. S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n, 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010). The ALC determined that the proposed project is not water dependent and recognized the "parties agree that

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[2] The critical area regulations define "tidelands" as "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...." S.C. Code Ann. Regs. § 30-1 (D)(51).

[3] DHEC equates excavation of wetlands to dredging in applying Reg. 30-12. (R. p. 421, lines 20-24).

the Project is not water-dependent[.]" (R. pp. 26, 29, Final Order). Therefore, under the plain language of Reg. 30-12(G)(2)(b), the dredging and filling of the critical area wetlands proposed here is prohibited by this regulation.[4]

Instead of simply applying the regulation as written, the ALC reasoned that the use of "should" in the regulation indicated that it was permissive or "directory" instead of mandatory. (R. p. 28, Final Order). The ALC then stated that the "only if" phrase did not alter the "directory" nature of the regulation because of the initial use of the word "should." (R. pp. 28-29, Final Order). The ALC continued that "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." (R. p. 29, Final Order). Neither DHEC nor the ALC has discretion because the limiting phrase "only if" means that water-dependency is a necessary condition that had to be met in order for the dredging or filling of critical area wetlands to occur. In fact, DHEC stated that it had no discretion to refuse to apply the water dependency and feasible alternatives limitations found in Reg. 30-12(G)(2)(b). (R. p. 448, lines 5-16).

Courts have repeatedly held that the phrase "only if" is a mandatory limitation despite the inclusion of a permissive term earlier. For example, in Jennings v. Rodriguez, the Supreme Court of the United States addressed statutory language containing an "only if" limitation in an immigration setting. ___ U.S. ___, 138 S.Ct. 830, 846-47, 200 L.Ed.2d 122 (2018). The statute in question, 8 U.S.C. § 1226(c)(2), provides that the Attorney General "may release" a particular class of aliens "'*only if* the Attorney General decides' both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger or flight risk." Id. at 846 (emphasis

[4] DHEC relied on the application of Reg. 30-12(M) to find this project satisfied Reg. 30-12(G)(2)(b). (R. p. 424, line 23-p. 425, line 20; p. 956, line 4-p., 957, line 9). The ALC correctly rejected the improper use of Reg. 30-12(M) in its decision. (R. pp. 31-33, Final Order).

in original). The Court specifically rejected the respondent's argument that the limitation of release for "witness-protection purposes does not imply that other forms of release are forbidden.". Id. at 847. "By expressly stating that the covered aliens may be released 'only if' certain conditions are met, 8 U.S.C. § 1226(c)(2), the statute expressly and unequivocally imposes an affirmative *prohibition* on releasing detained aliens under any other conditions." Id. (emphasis in original). The use of the permissive "may" earlier in the statute did not convert the later mandatory affirmative prohibition to a permissive consideration.

In BNSF Railway Company v. California Department of Tax and Fee Administration, the Ninth Circuit, in analyzing a provision of the Hazardous Materials Transportation Act ("HMTA"), similarly concluded that inclusion of "only if" in the statute was a limit on the scope of authorization. 904 F.3d 755, 763 (9th Cir. 2018). The provision at issue stated that "[a] State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material . . . ." Id. at 761 (quoting 49 U.S.C. § 5125(f)(1)). The court reasoned as follows:

> [a] plain-language analysis of the HMTA tells us that § 5125(f)(1) affirmatively authorizes a State to charge a fee for transportation of hazardous materials, subject only to the qualification that the fee be 'fair.' The syntactical structure of § 5125(f)(1)--a person or entity 'may' perform some act 'only if' some criterion is satisfied–is used repeatedly and consistently in the HMTA. As used in the HMTA, the 'may' phrase affirmatively authorizes the performance of the specified act by a person or entity. The 'only if' phrase limits the scope of that authorization.

Id. at 763-64 (additional citations omitted).

In discussing its reasoning, the Ninth Circuit referred to the Third Circuit's decision in Township of Tinicum v. U.S. Department of Transportation. Id. at 762-63 (citing 582 F.3d 482 (2009)). That case was also cited by the ALC. The ALC construed the decision in Tinicum as

supporting its conclusion that the phrase "only if" did "not modify the word 'should,' which comes before these conditions. Therefore, subsection 30-12(G)(b)(2) [sic] remains directory in nature." (R. pp. 28-29, Final Order). The ALC misapprehended the actual holding and reasoning of the Third Circuit in Tinicum, however, because that decision supports Appellant's contention regarding the restrictive nature of "only if" in the context of Reg. 30-12(G)(2)(b).

The Third Circuit was tasked with determining whether a township's ordinance was consistent with the Anti-Head Tax Act ("AHTA") in Tinicum. 582 F.3d at 484. There are several prohibitions of the AHTA codified in 49 U.S.C. § 40116(b) while subsection (c) provides that "[a] State or political subdivision of a State may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft only if the aircraft takes off or lands in the State or political subdivision as part of the flight." Tinicum argued, in part, that subsection (c) operates as a savings clause for a tax that would otherwise be subject to the AHTA prohibition provided subsection (c) and the other provisions of the AHTA are satisfied. Tinicum, 582 F.3d at 488. The Third Circuit disagreed. Id. at 488-89.

The court highlighted the inclusion of the phase "only if" in the relevant subsection and distinguished "only if" from a statute that just included the word "if." Id. at 488. "This distinction makes a difference" because "[t]he phrase 'only if' describes a necessary condition, not a sufficient condition." Id. (citing California v. Hodari D., 499 U.S. 621, 627-28, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991)). Using a baseball analogy, the court wrote that "[u]sing the 'only if' form: a team may win the World Series *only if* it makes the playoffs. But, a team's meeting the necessary condition of making the playoffs does not guarantee that the team will win the World Series." Id. (emphasis in original). Of course, the necessary condition must still be satisfied because a team cannot win the World Series without first making the playoffs. Put another way, "[s]ubsection (c),

by invoking 'only if,' describes a necessary condition. It provides that a tax on a subject flight that lacks a ground nexus to the taxing jurisdiction cannot pass AHTA muster (regardless of whether the tax falls within the categorical ban), but it says nothing about the fate of a tax on a subject flight that *does have* such a nexus." Id. at 489.

Specifically addressing the import of the word "may" in subsection (c), the court stated that "Tinicum's cases emphasizing the permissive nature of the word 'may' simply are inapposite. They discuss statutes that do not contain the 'only if' connective or similar restrictive language." Id. at 489. The decision in Tinicum does not, as the ALC ruled, support characterizing the "restrictive" language in the regulation at issue here as less than mandatory, regardless of the use of "should" prior to the restrictive phase. Instead, the court in Tinicum actually held that even if one satisfies the necessary conditions that follow "only if," that does not entitle one to perform the requested act because the necessary conditions are not sufficient conditions.

This Court has addressed how the inclusion of mandatory language in connection with "may" in a statute affects interpretation. In Cricket Store 17, LLC v. City of Columbia Board of Zoning Appeals, this Court was tasked with interpreting the following statute: "No variance from any of the provisions of this section may be granted by the [Board]. No special exception regarding any of the requirements of this section may be granted by the [Board]." 428 S.C. 270, 275, 834 S.E.2d 209, 211 (Ct. App. 2019). The appellant contended that the use of the word "may" in the context of these statutory provisions meant that "the Board had the discretion to grant its request for a special exception" and the circuit court's ruling to the contrary was erroneous. Id.

The Court began its analysis by quoting the decision in Kennedy v. S.C. Retirement System: "The use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other

meaning . . . ." Id. at 276 (quoting Kennedy, 345 S.C. 339, 352-53, 549 S.E.2d 243, 250 (2001)) (additional quotation marks omitted). The Court then invoked the following reasoning from another case: "[W]here other words are used in connection with 'shall,' 'must,' may[,] or 'might,' which clearly indicate mandatory or directory construction, as the case may be, we have never ignored the force of the descriptive or qualifying language.'" Id. (quoting Stringer v. Realty Unlimited, Inc., 97 S.W.3d 446, 448 (Ky. 2002)(additional citation omitted)); see also, Bruning v. S.C. Dep't of Health & Environmental Control, 418 S.C. 537, 546-47, 795 S.E.2d 290, 295 (Ct. App. 2016) (use of the permissive or "may" portion of the provision "does not automatically render the requirements of this [mandatory] provision optional").

Despite the inclusion of "may" in the statute twice, the Court affirmed the circuit court's decision, and reasoned as follows:

> use of the term 'no' at the beginning reveals the intent that the variances or special exceptions to the ordinance not be allowed. South Carolina case law has recognized the term 'may' does not exclusively connote discretionary conduct when construing it so would violate legislative intent. Furthermore, the rules of construction indicate the court is not to give words a tortured meaning. To construe this ordinance as discretionary requires one to read out the word 'no' in a way that contorts its plain meaning and renders it superfluous.

Cricket Store 17, LLC, 428 S.C. at 276-77.

In this case, construing Reg. 30-12(G)(2)(b) as discretionary reads out the mandatory limiting phase "only if that activity is water-dependent and there are no feasible alternatives" and is therefore contrary to the plain language of the regulation. Furthermore, such a construction is contrary to the legislative intent to "protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations[,]" and ignores the critical area policy that decisions should be based on "[t]he extent to which the activity requires a waterfront

location or is economically enhanced by its proximity to the water." S.C. Code Ann. § 48-39-150(A)(1); S.C. Code Regs. 30-11(B)(1). "When interpreting a regulation, we look for the plain, ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand the regulation's operation." Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002) (citations omitted); see also Commissioners of Pub. Works v. S.C. Dep't of Health & Envtl. Control, 372 S.C. 351, 359 (Ct. App. 2007).

The ALC attempted to bolster (or insulate) its rejection of the plain language of Regulation 30-12(G)(2)(b) by referring to a general provision in the regulation, Reg. 30-12(G)(1), and two other specific provisions, 30-12(G)(2)(a) and (G)(2)(g). The ALC's reasoning violates yet another statutory canon of construction—namely that specific pronouncements control over general statements. Spectre, LLC v. South Carolina Dep't of Health and Environmental Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) ("Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute, and given such effect.") (citing Wilder v. South Carolina Hwy. Dep't, 228 S.C. 448, 90 S.E.2d 635 (1955) and Wooten ex rel. Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999)). Instead of applying Reg. 30-12(G)(2)(b)'s "specific standard," the ALC used the general statements made in Reg. 30-12(G)(1) and the specific standard of 30-12(G)(2)(a) as justification to ignore the specific prohibition. (R. p. 29, Final Order).

Neither provision justifies the rejection of the plain text of the regulation. Subsection (G)(1) recognizes that "[d]redging and filling in wetlands can always be expected to have adverse consequences; therefore, the Department discourages dredging and filling." This provides

rationale for the prohibitions contained in 30-12(G)(2)(b) and elsewhere in section (G)(2). The section continues as follows: "[t]here are cases, however, where such unavoidable environmental effects are justified if legitimate public needs are to be met." S.C. Code Regs. 30-12(G)(1). The regulation then lists "specific standards" which have already incorporated those general tenets. Certain specific regulatory standards consider public needs such as 30-12(G)(2)(a), which prohibits the "creation of commercial or residential lots strictly for private gain" and notes that "[p]ermit applications for . . . these purposes shall be denied, except for erosion control . . . or boat ramps . . . .All other dredge or fill activities not in the public interest will be discouraged[.]" Similarly, subsection (G)(2)(g) states that "dredging in submerged and wetland areas for purposes other than access, navigation, mining or drainage shall be denied, unless an overriding public interest can be demonstrated." The drafters were perfectly capable of including references to overriding public interests in the "specific standards," including (G)(2)(b), but they did not. Nor did they intend for a general, all-encompassing public need exception to permeate the entirety of 30-12(G)(2) specific project standards when they included references in certain provisions, such as 30-12(G)(2)(a) and (g), but not others, such as 30-12(G)(2)(b). There is a distinction even among the subsections that do gesture toward this interest as one subsection, 30-12(G)(2)(a), merely requires that the creation of the lot not be "strictly for private gain" while another, 30-12(G)(2)(g), limits dredging to certain purposes "unless an overriding public interest can be demonstrated."

The ALC also attempted to invoke the "absurd" result exception to support its tortured interpretation of Reg. 30-12(G)(2)(b). The ALC reasoned that if the re-naturalization of Gadsden Creek would "necessitate excavation and likely some filling of the creek to repair the landfill cap and install a protective barrier" then "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." (R. p. 30, Final Order). This rationalization not only is mistaken about how courts should address the "absurd result" analysis but also wrongly uses an alternative that preserves Gadsden Creek as an excuse to sanction its destruction for commercial development.

The restoration and revitalization of Gadsden Creek is not what is proposed by WestEdge. One cannot use an alternative proposal that has different aims to support a claim that the application of plain language leads to an absurd result. Cabiness v. Town of James Island, 393 S.C. 175, 191, 712 S.E.2d 416, 425 (2011) ("A merely conjectural absurdity is not enough; the results must be 'so patently absurd that it is clear that the [General Assembly] could not have intended such a result.'") (quoting Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 363 n.1, 673 S.E.2d 425, 426 n.1 (2009)). The option to re-naturalize Gadsden Creek was proposed by Appellant. That could involve the addition of sinuosity or added bends in the creek or not but that would not result in filling the creek such that it is removed. The purpose and scope of the current proposal is entirely different.

What WestEdge has proposed and what the ALC's decision sanctions is the filling and excavation of critical area wetlands so that commercial buildings may be erected where acres of critical area now exist. If one utilizes the actual proposal, the application of the plain language of the relevant regulation still leads to a reasonable result. That is because applying the plain language of Reg. 30-12(G)(2)(b) furthers the legislative policies recognized in both the critical area regulations and those findings and policies of the Coastal Zone Management Act. Indeed, in another section of its Order, the ALC recognized that this proposed project violates several critical area policies. See Discussion III., infra.

Just because applying the plain language of Reg. 30-12(G)(2)(b) would prevent WestEdge from doing precisely what it wants does not mean that the result is "absurd." No evidence indicates that cleaning up Gadsden Creek would be precluded by Regulation 30-12, nor is that the proper inquiry because the applicant sought permission to fill in the creek, not clean it up. The purpose for which one undertakes an activity changes the regulatory analysis. Whether the applicable law allows the activity to take place depends on the restrictions on such activities throughout Regulation 30-12(G). Mr. Robinson stated that a tide gate proposed for flood-related or other exigent circumstances receives "a very different regulatory interpretation than if we're trying to change the hydrology specifically to make room for new commercial development." (R. p. 1457, line 24-p.1459, line 14). The "after the fact" permit, and also, likely, the Federal Resource Conservation and Recovery Act, already requires the City of Charleston to preclude pollution that escapes the former landfill regardless of the current proposal and whether it satisfies provisions of Regulation 30-12(G) that relate to critical area wetlands.

Regardless of its lack of water dependency, this project also fails to satisfy Reg. 30-12(G)(2)(b) because feasible alternatives exist. The ALC's determination on feasible alternatives was beset with several errors. The ALC erroneously placed the burden on Appellant even though the burden was and is on WestEdge to establish that no feasible alternatives exist. (R. p. 31, Final Order). WestEdge, not FOGC, bore the burden to demonstrate the absence of feasible alternatives before the ALC given the language of both 30-12 and the CMP policies at issue. Kiawah Development Partners II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 43-44, 766 S.E.2d 707, 723 (2014) (burden with respect to lack of feasible alternatives on the respondent at the contested case hearing level due to the language of applicable regulation); see also Sierra Club v. S.C. Dep't of Health & Envtl. Control, 426 S.C. 236, 258-59, 826 S.E.2d 595, 567 (2019)

("Although Sierra Club undoubtedly bore the burden of proving its case, Chem-Nuclear nevertheless bore an overarching burden to satisfy the regulatory requirements necessary for Chem-Nuclear to earn its license"). Placing the burden on FOGC regarding feasible alternatives was an error of law and arbitrary and capricious.

The ALC compounded its error by concluding 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." (R. p. 30, Final Order). Elsewhere, the ALC likewise concluded that "preserving the creek will jeopardize the financial feasibility of the entire WestEdge Development." (R. p. 23, Final Order). The record lacks any substantive evidence to support this conclusion. Of course, this conclusion also presupposes that it is not feasible for WestEdge to continue without impacting Gadsden Creek and its wetlands but that is contradicted by Mr. Maher's testimony that Westedge "would certainly continue" even if it lacked the critical area permit and certifications.

Even if FOGC bore the burden of proof with respect to feasible alternatives, FOGC provided ample evidence of feasible alternatives that would have allowed for the preservation of Gadsden Creek. The ALC's only concern at this stage was the "repair [of] the landfill cap[,]" (R. p. 30, Final Order), but the ALC had already limited its conclusion regarding erosion of the cap to "places within the creek bed." (R. p. 5, Final Order). Regardless, extensive evidence, as outlined in the factual section, established that the limited cap erosion could be repaired without jeopardizing the feasibility of the entire WestEdge development which has already begun. Moreover, FOGC presented additional evidence of alternatives that could address flooding concerns such as the installation of a tidal restriction device, the construction of a berm, and the revitalization of Gadsden Creek to a proper size. Elsewhere, the ALC even acknowledged that

"[w]hile 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." (R. p. 36, Final Order). Therefore, the ALC found feasible alternatives that would avoid or minimize the dredging or filling of critical area wetlands but rejected them solely because of cost. There was no substantive evidence that the cost of keeping Gadsden Creek would endanger the economic viability of the development.

The ALC's determination that this project complied with Regulation 30-12(G)(2)(b) was an error of law, based on a clearly erroneous determination of certain facts, not supported by substantial evidence, and an abuse of discretion. The ALC's decision on this issue should be reversed.

II. THE PROPOSED PROJECT VIOLATES THE CMP's COMMERCIAL DEVELOPMENT POLICIES AND THE ALC's RULING WAS ERRONEOUS.

Permits for construction in the coastal zone are governed by what is commonly referred to as the Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 to -360 ("CZMA" or "the Act"), and the policies promulgated in the Coastal Zone Management Program Document ("CMP"). The Department's Office of Ocean and Coastal Resource Management is charged with enforcing South Carolina's coastal zone policies and reviewing applications for certifications in the coastal zone. S.C. Code Ann. § Regs. 30-4(C) (2011); S.C Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 363 S.C. 67, 74, 610 S.E.2d 482, 485 (2005). The CZMA requires the Department to evaluate certain state and federal permits for consistency with the CMP. S.C. Code Ann. § 48-39-80(B)(11). The Supreme Court of South Carolina has held that "the CMP . . . is valid and enforceable." Spectre, LLC v. South Carolina Dep't of Health and Environmental Control, 386 S.C. 357, 373, 688 S.E.2d 844, 852 (2010). Moreover, the Court in

Spectre held that one of specific policies at issue here, which limits the fill of wetlands in commercial development settings, is enforceable. Id. at 365-68.

The objectives of CMP include, among others, a desire "[t]o encourage the inland siting of facilities which are not water-dependent" and "[t]o protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations." CMP III.A. (8), (11) at p. III-1. In addition to those objectives, DHEC must also consider the following policies, among others, with respect to projects proposing critical area alterations: "[t]he extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water[;] [t]he extent to which the development could affect existing public access to tidal and submerged lands . . . or other recreational coastal resources[;] [t]he extent of any adverse environmental impact which cannot be avoided by reasonable safeguards[;] [t]he extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project[.]" CMP III.C.3.II.(1), (5), (8), (9) at p. III-16. These objectives and policy considerations, which will be evaluated more fully later, provide an underpinning for the application of the particular commercial policy here.

Under commercial development policy (1)(b), "[c]ommercial proposals which require fill or other permanent alteration of salt, brackish or freshwater wetlands will be denied unless no feasible alternatives exist and the facility is water-dependent." CMP III.C.3. IV.(l)(b). As in the case of the regulations, "Water-Dependent" is defined in the CMP glossary as follows: "[a] facility which can demonstrate dependence on, use of, or access to, coastal waters is vital to the functioning of its primary activity." CMP Glossary at p. vi. As stated in the previous section, this proposal for a mixed-use development is not water-dependent as that term is defined in both the CMP and the critical area regulations. (R. pp. 26, 29, Final Order). Therefore, under the express language of the

CMP policy relating to commercial development and applicable here, fill and excavation of the tidal wetlands is prohibited and the project should not have been certified as consistent with the CMP.

The ALC recognized that 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.'" (R. p. 34, Final Order). The ALC then invoked an interpretation cannon and stated 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." (R. p. 34, Final Order (quoting Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000))). As this Court has stated, "[l]ike many interpretive canons, *in pari materia* is a tool courts may turn to only when the statutory ground is uncertain." Young v. Keel, 431 S.C. 554, 848 S.E.2d 67, (Ct. App. 2020) (citing Rabon v. S.C. State Highway Dep't, 258 S.C. 154, 157, 187 S.E.2d 652, 654 (1973) (*in pari materia* "may be applied where there is an ambiguity to be resolved and not where, as in this case, the meaning of the statute is clear and unambiguous")). The language of the CMP commercial policy is clear and there is no need to consult the regulation to clarify an uncertain ground. The proposed project violates the commercial development policy of the CMP in the same way and manner it violates Reg. 30-12(G)(2)(b); it is not water dependent and there are feasible alternatives that would avoid the destruction of wetlands. Appellant incorporates its arguments in the prior section on those issues by reference.

If one did consult the regulation for clarity, the ALC's conclusion still does not follow. Applying the *in pari materia* canon here would necessitate construing the similar provisions together so that the water dependency and feasible alternatives limitations apply in both circumstances. Both provisions apply mandatory language, requiring water-dependency and the

absence of feasible alternatives before dredging and filling is allowed in the critical area. See S.C. Code Ann. Regs. 30-12(G)(2)(b) (using mandatory "only if" language to require the two elements); CMP III.C.3. IV.(l)(b) (using mandatory "will be denied *unless*" language to require the two elements (emphasis added)). The ALC reasoned that its interpretation of the regulation controlled and "although the CZMP uses stronger language . . . 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) [sic]." (R. p. 34, Final Order). Thus, the ALC construed virtually identical provisions to reach disharmony, (R. p. 34, Final Order) ("to the extent the regulation and CZMP conflict, the regulation should control"), and then used that disharmony to ignore the plain language of the commercial policies to conclude that the CMP policy "must also be interpreted to give the Department discretion in its application[.]" (R. p. 34, Final Order). Despite the evident inconsistency with the express provisions of the commercial development policy, the ALC concluded that it did "not find the Project inconsistent with CZMP § IV(1)(b)." (R. p. 34, Final Order). That conclusion was wrong. The project is not water-dependent and there are feasible alternatives. The Coastal Zone Consistency Certification should not have been issued and the ALC's decision was an error of law, arbitrary and capricious, clearly erroneous and not supported by substantial evidence. It should be reversed.

III. THE PROPOSED PROJECT VIOLATES REGULATORY AND STATUTORY CRITICAL AREA POLICIES AND THESE VIOLATIONS PROHIBIT THE ISSUANCE OF A CRITICAL AREA PERMIT.

A critical area permitting decision must comply with several policies that are found in S.C. Code Ann. §§ 48-39-20, -30, -150. The critical area regulations mandate that DHEC be guided by both the policy statements, findings and pronouncements in S.C. Code Ann. §§ 48-39-20, -30 and expressly incorporates policies from S.C. Code Ann. § 48-39-150. S.C. Code Ann. Regs. § 30-11(B), (C).

A. This Proposal Violates Reg. 30-11 and § 48-39-150 Policies.

Among the criteria DHEC must consider before determining whether to approve or deny a critical area permit are the following: "[t]he extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water; [] [t]he 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; [] [[t]he extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and [] other recreational coastal resources; [] [t]he extent of any adverse environmental impact that cannot be avoided by reasonable safeguards; [] [t]he extent to which all feasible safeguards are taken to avoid adverse environmental impacts resulting from a project; [t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners." S.C. Code. Ann. Regs. 30-11(B)(1), (3), (5), (8)-(10); S.C. Code Ann. § 48-39-150 (B)(1), (3), (5), (8)-(10).

As to these policies, the evidence showed that the mixed-use development did not require a waterfront location and there was no evidence that it would be economically enhanced by proximity to water. The evidence established that crabs and oysters live in Gadsden Creek and that the destruction of Gadsden Creek and its tidelands would negatively affect the production of those species. (R. p. 279, lines 17-19). The evidence showed that numerous members of the public and FOGC use and recreate in Gadsden Creek and its tidelands and the proposal would deprive the public of access to these public trust tidal and submerged lands and a coastal recreational resource.

The evidence showed that feasible safeguards exist that could avoid adverse environmental impacts from the project. Among the alternatives proposed that would allow for the continued existence of Gadsden Creek and its tidelands were the revitalization of Gadsden Creek, the

implementation of a tidal restriction device at the Lockwood culvert, and/or the installation of a berm along Hagood Avenue to preclude flooding. There was evidence that any contamination from the landfill could be remedied while still maintaining Gadsden Creek and its tidelands. There was also evidence that the filling and excavation of Gadsden Creek would negatively affect the use and enjoyment of adjacent owners. Filling Gadsden Creek and its tidelands would preclude any use or enjoyment from adjacent owners—such as Ms. Lisbon. Moreover, the evidence was that the stormwater management plan for this project actually increases stormwater flooding for adjacent owners. Additional discussion regarding feasible safeguards and alternatives is found in the Fact section and the first Argument section, supra, and is incorporated herein by reference.

S.C. Code Ann. § 48-39-150(B) states that DHEC may only issue a critical area permit if, after considering the views of various parties, "the department finds that the application is not contrary to the policies specified in this chapter[.]" This request is contrary to policies in this statute as even the ALC concluded. As to the waterfront consideration, the ALC stated that it "agree[s] with FOGC that the Project does not require a waterfront location and will not be economically enhanced by its proximity to water." (R. p. 35, Final Order). With respect to the elimination of habitat policy, the ALC stated that 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." (R. p. 35, Final Order). The ALC also concluded that filling the creek will eliminate existing public access but stated that "this is an unfortunate outcome that the Court does not consider lightly" but then reasoned that "filling in the creek is the best way to protect wildlife and the public from the threat of the landfill." (R. pp. 35-36, Final Order). There is no evidence that wildlife is threatened by Gadsden Creek or its wetlands. To the contrary, the evidence showed that the creek is a functional, healthy ecosystem. Removing it will not "protect wildlife" just as

removing it will not protect the public from a threat. Neither DHEC nor the City of Charleston has ever warned the public about any threat from Gadsden Creek. And there was evidence that any potential issue regarding the landfill may be forestalled. Indeed, the City is already obligated to do so.

The ALC was mistaken in its evaluation of several other policies. Regulation 30-11(B) (8) and (9) addresses avoidance and feasible safeguards. The ALC essentially stated that while an engineering solution could be devised to protect the creek and address flooding, keeping this critical area would threaten "the economic viability of the Development." (R. p. 36, Final Order). As stated earlier, no substantive evidence supports this conclusion.

The ALC wrote that "[a]s FOGC argues, the Project will negatively affect the value and enjoyment of adjacent owners who enjoy 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." (R. p. 36, Final Order). There was no testimony from any adjacent residents attesting to "fears of encountering contaminated water and soil from the landfill." In contrast, members of the community (and FOGC members) testified extensively about using and enjoying Gadsden Creek and its tidelands for a variety of purposes.

B. This Proposal Violates § 48-39-30 Policies.

The ALC's decision violates several additional statutory policies. Among the General Assembly's specific policies memorialized in S.C. Code Ann. § 48-39-30 that the Coastal Zone Management Act must implement are the following: "(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; [and] (2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations[. . . .]" S.C. Code Ann. § 48-39-30 (B)(1), (2).

These policies highlight the desire of the legislature to protect the sensitive and fragile critical area but also reveal that restoration and enhancement for the present and future must be considered. Thus, even if Gadsden Creek and its tidelands are not pristine, the statute does not support abandoning their protection. The fragility of the critical area means that it may be more susceptible to degradation but the evidence was that the marsh was thriving and providing abundant habitat for a variety of species. This reality is echoed in S.C. Code Regs. 30-1 (B)(4) in which DHEC recognized that coastal marshes "perform a valuable waste treatment function since the dense vegetation acts as a filter, trapping sediments and pollutants which enter as run-off from the upland areas."

The ALC also agreed that S.C. Code Ann. § 48-39-30(2) "evince[s] the legislature's intent to protect, preserve, restore, and enhance fragile coastal resources like the creek at issue in this case." (R. p. 37, Final Order). While the ALC did "not disagree" that this provision "certainly supports preserving and restoring tidelands generally[,]" the ALC ultimately disregarded it and instead claimed that the proposal would "protect the health, welfare, and safety of the public and the environment from the landfill." (R. pp. 37-38, Final Order). Again, it bears mentioning that the environment will be harmed by this proposal, not helped. As for the safety and health of the public, there was no evidence that DHEC has done anything to warn or protect the public from Gadsden Creek at any time. Also, the evidence showed that the proposal will actually worsen flooding in

the area. The ALC was mistaken in its evaluation of this provision and did not acknowledge the import of the other policy which envisions restoring and enhancing critical area for present and future generations. Certainly, this project violates that policy.

C. This Proposal Violates § 48-39-20 Policies.

Among the legislative findings that Reg. 30-11 incorporates into consideration here and which weigh against the issuance of the critical permit are the following: "[t]he 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[; and] [i]mportant ecological, cultural, natural, geological and scenic characteristics . . . in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values." S.C. Code Ann. § 48-39-20 (D), (E). As stated earlier, the fish, shellfish, and other living marine resources and wildlife have been documented to use Gadsden Creek and its tidelands as habitat. This finding supports the preservation of Gadsden Creek.

The ecological, cultural, natural, and scenic characteristics also support denying the critical area permit. The testimony demonstrated the ecological and natural characteristics of Gadsden Creek and its tidelands as a "functional system" that is providing habitat for a variety of plants and animal species. The undisputed evidence was that many members of FOGC use and enjoy Gadsden Creek and its tidelands for aesthetic or scenic purposes. Finally, there was extensive undisputed evidence about the cultural importance of Gadsden Creek to the community both historically and presently. Historically the Westside community used and enjoyed Gadsden Creek for religious services, for food provision, and for leisure. Indeed, the community still enjoys the creek and finds it culturally significant, unlike the more recently created Brittlebank park that is situated further

west and which lacks the cultural significance and history of Gadsden Creek. FOGC members Ms. Lisbon, Mr. Flowers and Ms. Gadsden all testified regarding this aspect of the creek.

The ALC recognized that "this Project contravenes several of this this [sic] State's tidelands policies" but did not hold that these violations prohibit the project. Instead, the ALC concluded that "there is an overriding reason justifying this deviation in this particular case." (R. p. 38). The ALC did not refer to any particular critical area policy that supported this acknowledged deviation. Nor did the ALC explain how allowing a project that clearly contravenes numerous critical area policies is proper.

To summarize these various determinations, the ALC was correct that this project violates many of the critical area statutory and regulatory policies. The ALC erred regarding its evaluation of some of these policies and it erred when it held that these violations did not require denial of the critical area permit. The ALC's decision on this issue was clearly erroneous, an error of law, not supported by substantial evidence, and arbitrary and capricious. It requires reversal.

IV. THE PROPOSED PROJECT VIOLATES THE CMP'S CRITICAL AREA POLICIES AND OTHER GENERAL POLICIES AND THESE VIOLATIONS PROHIBIT THE ISSUANCE OF A COASTAL ZONE CONSISTENCY CERTIFICATION.

Included among the CMP policies applicable to all projects, consideration must be given to the following: "[t]he extent to which the project will have adverse impacts on the 'critical areas' (beach/dune system, coastal waters, tidelands)[;] [and] [t]he possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area[.]" CMP III.C.3.(2), (7). The proposed project will have an adverse impact on the critical area and it seeks to remove almost 4 acres of critical area. As noted earlier, the long-range and cumulative effects of the project negatively affect the general character of the area

because the project results in the destruction of a culturally significant coastal water resource and increases stormwater flooding in the community under certain circumstances.

In addition to those guidelines, DHEC must also consider among the following policies with respect to projects proposing critical area alterations: "[t]he extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water[;] [t]he extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources[;] [t]he extent of any adverse environmental impact which cannot be avoided by reasonable safeguards[;] [t]he extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project[;]" and "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners." CMP III.C.3.II.(1), (5), (8), (9), (10).

These policies should be evaluated with an eye toward the objectives of CMP which include a desire "[t]o protect and sustain the unique character of life on the coast that is reflected in its cultural, historical, archeological, and aesthetic values[;] [t]o 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 [;] [t]o encourage the inland siting of facilities which are not water-dependent" and "[t]o protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations." CMP III.A. (3), (4), (8), (11) at p. III-1.

The project does not "require[] a waterfront location" and is not "economically enhanced by proximity to the water[.]" This is also consistent with the lack of water-dependency discussed above. The development affects "existing public access to tidal or submerged lands" because several acres of tidal lands would be removed. The removal of the tidal creek and marsh negatively

"affect[s] the value and enjoyment of adjacent owners" in the Westside community and the "economic stability" of the surrounding minority and low-income community will be jeopardized because of the inevitable increase in property taxes which is what is presumed to occur to pay for many of these improvements. There has been no demonstration that any "feasible" or "reasonable safeguards" have been taken to avoid this extensive adverse environmental impact from the project. Instead, the evidence is that there are feasible alternatives that would avoid extensive adverse environmental impacts from the project by allowing for the preservation of the creek and tidelands while still addressing any issues associated with flooding or contamination.

The ALC correctly concluded that "the permitted project will have an adverse impact on the critical area tidelands in the Project area because it will completely eliminate them." (R. p. 39, Final Order).

The ALC adopted its analysis regarding several of the CMP policies that are "substantially similar to the considerations th[e] Court already addressed under regulation 30-11(B)." (R. pp. 39-40, Final Order). To the extent these policies are similar or identical, Appellant adopts its arguments in Section III, supra, and incorporates them herein. The ALC recognized that this proposal violates multiple policies of both the CMP and the critical area regulations. The ALC stated that "[e]ven 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 in [sic] contrary to the tidelands policies of this State." (R. p. 40, Final Order).

As with the ALC's decision regarding several critical area regulatory and statutory policies, the ALC was correct when it concluded that this project violates many of the relevant CMP policies but erred in failing to hold that those violations required a denial of a coastal zone consistency

certification. These decisions were errors of law, arbitrary, arbitrary and capricious, contrary to substantial evidence and clearly erroneous. Therefore, the ALC's decision requires reversal.

CONCLUSION

WHEREFORE, Appellant Friends of Gadsden Creek respectfully requests this Court issue an Opinion reversing the Final Order of the Administrative Law Court.

Respectfully submitted,

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2023-000006

Friends of Gadsden Creek, ...Appellant,

vs.

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

CERTIFICATE OF COUNSEL

I hereby certify that Appellant, Friends of Gadsden Creek's Final Brief and Final Reply Brief comply with SCACR 211(b) in that all references to the Record on Appeal have been revised and only typographical errors have been corrected.

Respectfully submitted,

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