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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 REPLY BRIEF OF APPELLANT

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June 9, 2023

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STATEMENT OF ADDITIONAL FACTS

Appellant Friends of Gadsden Creek ("Appellant" or "FOGC") has already recounted the factual background of this matter extensively in its Initial Brief. Appellant will only address a few contentions made by Respondents.

Respondents South Carolina Department of Health and Environmental Control and WestEdge Foundation, Inc. ("Respondents") claim that the ALC's concerns that children had been exposed to contaminants from Gadsden Creek is supported by substantial evidence, but that is untrue. Resp. Brief at p. 12, n.7. The portion of testimony cited by Respondents is of one witness who testified that she had led creek walks and creek cleanup efforts. (R. p. 654, line 19-p. 656, line 6). There was no evidence, much less substantial evidence, that any child was exposed to any level of contamination from such activity or otherwise.

Respondents also assert that Appellant "misrepresents" the testimony of Blair Williams but Mr. Williams testified that the "majority" of the sampling results for surface water in Gadsden Creek showed it to be the equivalent of the Ashley River. (R. p. 1013, lines 17-20). And Mr. Williams deferred to the actual sampling results regarding any discrepancies. (R. p. 1013, lines 22-24).

Respondents recite certain results from the two compromised grab samples that Terracon conducted on one day. Resp. Brief at pp. 10-11. In addition to the problems with that limited sampling that Appellant discussed in its Initial Brief, Respondents do not acknowledge that the "MCL" levels cited are not for surface, or even ground water, but are instead drinking water standards. (R. p. 1269, lines 22-25). Gadsden Creek does not provide drinking water.

Appellant did not erroneously describe one of Mr. Robinson's projects because the water levels at that site operate similarly to tidal changes. As Mr. Robinson explained, the New Belgium

site is "similar to tidal inflow because those creeks are consistently under the backwater of the larger river. So in this case, the French Broad River fluctuates by as much as 20 feet. It's common that it fluctuates by … five to ten feet." (R. p. 619, lines 12-17).

With respect to Mr. Scaff's testimony, although he had "spoken at length with everyone about flooding around the city," as it related to the project area he: (1) did not recall reporting or having any conversations with City employees about flooding in the project area; (2) had not spoken with any representative of WestEdge Foundation about flooding; (3) did not recall ever being called to the intersection to address tidal flooding issues; (4) had not received any reports of the fire department experiencing emergency response interruptions or delays due to flooding at the intersection; (5) had never encountered an emergency response vehicle trapped in traffic or even slowed down at the intersection; (6) had not taken steps to alert anybody outside of his department in the City government about steps that should be taken to address flooding in the area; and (7) was not aware of any temporary measures that he or the City has taken to alleviate flooding in the area. (R. p. 1080, line 4-p. 1084, line 17). The City of Charleston's director of stormwater management, Matthew Fountain, testified that—taking the WestEdge project out of the equation—the project area will see some flood reduction just by virtue of the Spring-Fishburne drainage project. (R. p. 1087, lines 13-22, p. 1124, line 22-p. 1125, line 5).

ARGUMENT

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

In its Initial Brief, Appellant discussed how the proposed project violates Reg. 30-12(G)(2)(b)'s specific standard that allows for the dredging and filling of tidal wetlands only if the activity is water-dependent and there are no feasible alternatives. Appellant cited several cases including decisions from the Supreme Court of the United States and various Circuit Courts that

have held that even if one is granted discretion in a statute by the use of the word "may" that discretion is curtailed if a clause beginning "only if" follows with conditions. See Appellant's Brief at pp. 27-30. In response, Respondents claim that "should" allows discretion, claim that the general statement in Reg. 30-12(G)(1) regarding "public needs" applies throughout the specific standards, and invoke Reg. 30-12(G)(2)(a) as if that specific provision controls the other enumerated provisions related to dredging and filling critical areas. Appellant will address each contention in turn.

A. Regulation 30-12(G)(2)(b) Includes Conditions that are Mandatory.

Even if Reg. 30-12(G)(2)(b) did not include the phrase "only if," the use of "should" could be construed as creating a mandatory obligation regarding water-dependency and feasible alternatives. See e.g., United States v. Anderson, 798 F.2d 919, 924 (7th Cir. 1986)("[t]he common interpretation of the word 'should' is 'shall' and thus … imposes a mandatory rule of conduct"); United States v. Ray, 238 F.3d 828, 835 (7th Cir. 2001)("[i]n context, 'should' was imperative–not hortatory"); Mississippi Com'n on Judicial Performance v. Ishee, 627 So.2d 283, 287 (Miss. 1993)(quoting dictionary definition which defines "should" as "[o]bligation; duty; necessity" and reasoning that "should" "connotes a requirement, not an option"); Smith v. M.B.S. Management Services, Inc., SA-07-CA-513-OG, 2007 WL 9710835 at *2 (W.D. Tex. November 27, 2007)(arbitration agreement mandatory when agreement read "should be utilized in all cases"); State v. Waller, 259 S.W. 445, 445 (Mo. 1924)(instruction using "should" was "mandatory"); Bord v. Rubin, No. 97 Civ. 6401(MBM), 1998 WL 420777 at *4-5 (S.D.N.Y. July 27, 1998) (reporting limitation period mandatory when informational poster used "should").

Perhaps, the most appropriate conclusion to be reached is "the word 'should' is legally variable[.]" Dallio v. Spitzer, 343 F.3d 553, 562 (2d Cir. 2003). And this conclusion is not limited

to the word "should" as "may" has been construed as mandatory, T.W. Morton Builders, Inc. v. von Buedingen, 316 S.C. 388, 403, 450, S.E.2d 87, 95 (Ct.App. 1994); Farmers' & Merchants' Bank of Monroe, N.C. v. Fed. Reserve Bank of Richmond, VA, 262 U.S. 649, 662-63, 43 S.Ct. 651, 656 (1923)("the word 'may' is sometimes construed as 'shall'" when "the context, or the subject-matter, compels such a construction"), while "shall" has sometimes been construed as discretionary. See, e.g., Crest Pontiac Cadillac, Inc. v. Hadley, 685 A.2d 670, 676 (Conn. 1996)("use of the word 'shall,' though significant, does not invariably create a mandatory duty"). In short, context matters and, here, the presence of the limiting phrase "only if" further indicates the provision's mandatory nature.

The same "leading treatise on statutory interpretation" cited by Respondents (Resp. Brief at p. 31) is quite clear about the mandatory effect of negative, prohibitory, or exclusive terms. The treatise states that "[n]egative, prohibitory, or exclusive terms may be one of the strongest indications of whether a statute should have mandatory or directory effect." Norm J. Singer, Sutherland Statutory Construction § 57:8 (8th ed. Nov. 2022 update). Moreover, "an affirmative direction followed by a negative or limiting provision is thereby rendered mandatory." Id. Finally, "[s]tatutory language indicating that a legislature intended a particular course of action, or the like, to be exclusive usually is mandatory. Legislatures may signal such an intent by using the word 'only,' or by including a limiting clause after an affirmative direction." Id. Such is the case with respect to Reg. 30-12(G)(2)(b) in which an affirmative direction "should" is followed by a limiting provision, "only if." DHEC understood, given its representative's testimony, that it did not have discretion to ignore these limitations.

> **Question:** All right, and indeed (G)(2)(b) has the language that dredging and filling should be undertaken only if that activity is water dependent and there are no feasible alternatives, correct?
> **Answer:** Correct.

> **Question:** Meaning there is no discretion to refuse to apply the water dependency or the feasible alternatives limitation there, is there?
> **Answer:** Correct, as instructed under (b).

(R. p. 448, lines 5-16).

Respondents did not address Appellant's cases that identify the prohibitory effect of the inclusion of the "only if" phrase in the regulation beyond a cursory statement that the cases are irrelevant because "a grant of discretion ('may') can be limited by a subsequently stated condition ('only if')." Resp. Brief at p. 29. That, of course, was the point. If the phrase "only if" can limit a grant of discretion, then it is certainly capable of limiting the scope of a mandatory obligation or even a recommended course of action. In Respondents' view, apparently the use of "should" actually requires less than the even more discretionary "may." What is remarkable about the argument section of Respondents' Brief on this issue is that there is no mention whatsoever as to how the conditional language "only if" actually operates under Respondents' interpretation. Respondents treat that phrase as if it wasn't there and their interpretation would read the conditions that follow "only if" essentially into oblivion.

None of the cases Respondents cite for the proposition that the use of the word "should" indicates a "requested or recommended course of action[,]" Resp. Brief at pp. 29-31, include conditions that are introduced with the phrase "only if." United States v. Maria, 186 F.3d 65, 69 (2d Cir. 1999)("the sentence for the offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release"); Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta, 785 F.3d 710, 715 (D.C. Cir. 2015)(notice listed "general concerns" that program "should address"); Qwest Corp. v. FCC, 258 F.3d 1191, 1200 (10th Cir. 2001)(consumers "should have access to telecommunications and information services" and "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve

and advance universal service"); Cochran Indus. VA v. Meadows, 755 S.E.2d 489, 492 (Va. Ct. App. 2014)(Commission Rule 1.1 provides that "[a]n original Claim for Benefits shall be in writing, signed and should set forth" various information); Dukowitz v. Hannon Sec. Servs., 841 N.W.2d 147, 156 (Minn. 2014)("costs 'should be allowed to the prevailing party'"); Appeal of Algonquin Gas Transmission, LLC, 186 A.3d 865, 873-74 (N.H. 2018)("PUC 'should' take certain factors into consideration").

As Appellant has already noted, the critical area statutes and regulations both mention concerns that the two conditions in Reg. 30-12(G)(2)(b) address. Other than subsection (2)(b), there is no other provision of Reg. 30-12(G) which addresses the waterfront location siting consideration so reading out the mandatory nature of this condition is at odds with the overall purpose of the statutory and regulatory policy.

The other aspect of Respondents' refusal to acknowledge the mandatory conditions that follow "only if" in the regulation is that it would allow for filling and altering tidal wetlands even if there are feasible alternatives that could avoid those impacts. This would contravene the policy that focuses on taking "all feasible safeguards ... to avoid adverse environmental impacts resulting from a project[.]" S.C. Code Ann. Regs. 30-11(B)(9).

Respondents argue that DHEC could have used "shall" instead of "should" and that the use of "should" means that the conditions that follow are not mandatory. First, including the conditions after "only if" addresses the issue. DHEC could have used "should" or "shall" or even "may" but so long as the "only if" clause was included, those conditions had to be applied. Second, using "shall" or "must" in the sentence makes little structural sense given that the Department has already acknowledged that "[d]redging and filling in wetlands can always be expected to have adverse environmental consequences." S.C. Code Regs. 30-12(G)(1). If one replaces "should" with "shall"

or "must" then the provision would read that "[d]redging and filling in wetland areas shall (or must) be undertaken only if that activity is water-dependent and there are no feasible alternatives." Such a structure could be interpreted as somehow mandating filling in wetlands provided that certain conditions are met when it has already been acknowledged that the practice is "always" expected to have adverse environmental consequences" such that it is "discourage[d.]" S.C. Code Regs. 30-12(G)(1). Instead, the better practice is to include mandatory conditions which follow "only if" and still maintain the flexibility to discourage the wetland dredging or filling even if those conditions are satisfied.

Finally, Respondents' claim that Appellant's plain language interpretation of Reg. 30-12(G)(2)(b) would lead to absurd results because it would "force the surrounding community to live with flooding and contamination in perpetuity." Resp. Brief at p. 31. Appellant's interpretation does not necessitate such a conclusion. Appellant's plain language reading of (G)(2)(b) simply requires that in order to fill and dredge the critical area wetlands associated with Gadsden Creek, the activity be water-dependent and there are no feasible alternatives. That is consistent with the aims of the critical area regulations and statutes.

Respondents attempt to position the proposed project as the only option that could ever address the issues that the City of Charleston created in the area. Respondents claim that Appellant "miscontrue[d] the ALC's actual finding" and that Appellant's "interpretation of Reg. 30-12(G)(2)(b) would preclude ALL solutions, a plainly absurd result." Resp. Brief at p. 32. As Appellant noted in its Initial Brief, it has proposed feasible solutions not foreclosed by the plain language of Reg. 30-12(G)(2)(b). These solutions to the issues that the City created are also not proposed for the same nonwater-dependent purpose as those of Respondent, WestEdge. Appellant does not propose to build nonwater-dependent development over critical area wetlands that have

been filled and dredged. Thus, although some of the "same permits" such as a critical area permit and certifications, may be needed, the purpose behind those permits would be different. As a review of the critical area regulations reveals, the intent or purpose for which some action is proposed is often determinative of whether it may be allowed. Mr. Robinson explained that "one of the first questions that regulators will ask is what is it that you propose and what is the intent of the project. So those two things are paired together. So oftentimes, this same type of solution would be viewed differently depending on the intent behind the solution." (R. p. 1457, line 24-p. 1459, line 8).

It is Respondents' interpretation that would lead to absurd results. The ALC rejected DHEC's use of Reg. 30-12(M) which governs the siting of nonwater-dependent structures in or above critical area tidelands and waters. (R. pp. 31-33, Final Order). Regulation 30-12(M)(2) provides that "[n]onwater-dependent structures, including buildings, houses, or offices that float shall be prohibited from being constructed, moored, or otherwise placed in or over tidelands and coastal water critical areas unless there is no significant environmental impact, an overriding public need can be demonstrated, and no feasible alternatives exist." Despite its rejection of the application of Reg. 30-12(M) here, the ALC and Respondents would allow fewer protections for critical area tidelands where filling or dredging is proposed than those tidelands in which nonwater-dependent structures are simply sited above. For the latter, there must not only be a demonstration of no feasible alternatives and an overriding public need but also that no significant environmental impact results from the siting. Where for the former, even requiring a lack of feasible alternatives would be discretionary. An interpretation which allows fewer restrictions on the elimination of critical area tidelands by filling and dredging than a less harmful practice that allows for the continued existence of the tidelands is absurd.

Additional support for Appellant's plain language construction of Reg. 30-12(G)(2)(b) is that it would be consistent with the commercial development policies of the CMP which employs very similar language for the same purpose—to preclude filling or permanently altering wetlands. It would be remarkable if the CMP commercial policies offered more protections for wetlands throughout the coastal zone for commercial projects but the critical area policies offered fewer. Additional bases related to this point will be discussed supra.

B. Regulation 30-12(G)(1)'s General Statements are Incorporated into the Specific Standards of Reg. 30-12(G)(2).

Respondents' reliance on Reg. 30-12(G)(1), which recognizes that certain dredging or filling of critical area wetlands may be "justified if legitimate public needs are to be met" is unavailing. What Respondents fail to acknowledge is that the "specific standards" that are listed in Reg. 30-12(G)(2) identify under what circumstances "public needs" may justify certain activities. Subsection (G)(2)(a) is one section which precludes the "creation of commercial and residential lots strictly for private gain" while subsection (G)(2)(g) states that "[a]pplications for 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 difference between demonstrating that the creation of a lot is not "strictly for private gain" and demonstrating that dredging is supported by "an overriding public interest" is vast and necessitates the use of specific language to identify what level of public need must be demonstrated in order to fulfill the specific requirement.

In addition to violating the plain meaning rule, Respondents' contention that a general "public needs" exception runs throughout subsection (G)(2) violates the rule that specific language controls general language. For example, (G)(2)(d) states that "[d]redging and excavation shall not create stagnant water conditions, lethal fish entrapments, or deposit sumps or otherwise contribute

to water quality degradation[.]" There is no basis to conclude that this prohibition could be ignored just because (G)(1) stated that certain dredging of critical area wetlands may be justified to meet "legitimate public needs." If the drafters had intended for the general "public needs" to permeate throughout Reg. 30-12(G)(2) they would not have chosen to address the issue in certain subsections expressly and not in others.

Respondents' quotation from State ex rel. Medlock v. South Carolina Coastal Council, 289 S.C. 445, 346 S.C.2d 716 (1986), is unhelpful to its argument regarding Reg. 30-12(G)(1). Resp. Brief at p. 26. As Appellant has noted, Reg. 30-12(G)(2) addresses those instances where public need may be considered in the "specific standards" in that subsection. What Respondents fail to note in their discussion is that the regulation subsection at issue in that case, Reg. 30-12(G)(2)(g), specifically requires that "an overriding public interest" be "demonstrated" in order to approve applications for "dredging in submerged and wetland areas for purposes other than access, navigation, mining, or drainage[.]" Medlock, 289 S.C. at 450. The Court did not find an "overriding public interest in the construction of the new dikes contemplated by the permit." Id. at 451. Reg. 30-12(G)(2)(b) does not contain similar language regarding the necessity of demonstrating "an overriding public interest."

Respondents claim that "DHEC [never] considered Reg. 30-12(G) to prohibit the types of activities contemplated in the Permit[,]" Respondent's Brief at p. 27, but that is incorrect. In its review, DHEC concluded that Reg. 30-12(G)(2)(b) precluded filling and dredging in the critical area for this project and had to rely on Reg. 30-12(M) to find that 30-12(G)(2)(b) was satisfied. Mr. Williams, as the DHEC representative, testified that "If the other – if there are other standards in the regulations [that] were not available as it relates to non-water dependent structures [which is 30-12(M)] you're correct. The project would not be consistent with (G)(2)(b)." (R. p. 424, line

23-425, line 20). As stated earlier, the ALC held that Reg. 30-12(M) does not apply here. (R. pp. 31-33, Final Order).

C. Regulation 30-12(G)(2)(a) does not Trump Reg. 30-12(G)(2)(b).

Respondents' discussion of the history of Reg. 30-12(G)(2)(a) is of no consequence because whether DHEC determined that the creation of commercial or residential lots cannot be "for private gain" or just not "strictly for private gain" doesn't affect the import of Reg. 30-12(G)(2)(b) which applies to all critical area wetlands regardless of whether the fill or dredging creates a lot. And the limitations on fill or dredging contained in Reg. 30-12(G)(2)(b) are also not an outright prohibition on critical area wetland fill. Certainly, the conditions act to discourage the filling or dredging of critical area wetlands while also reinforcing the critical area policies. S.C. Code. Ann. Regs. 30-11(B)(1), (8)-(9).

Respondents do not acknowledge that subsections Reg. 30-12(G)(2)(a) and (G)(2)(b) may be read together without nullifying either or the general statements in 30-12(G)(1). As stated earlier, 30-12(G)(1)'s general statement regarding "public needs" is addressed in several of the specific standards that follow. Subsection (G)(2)(a) says that one cannot fill wetlands to such an extent that a commercial or residential lot is created strictly for private gain. Subsection (G)(2)(b) says that fill of any amount of critical area wetlands, whether it meets the threshold of creating a lot or not, cannot occur unless the activity is water-dependent and there are no feasible alternatives. Certainly, a project could call for the fill of some critical area wetlands and not trigger the "lot" requirement of (G)(2)(a), but it would still have to be water-dependent and the applicant would have to demonstrate that no feasible alternatives existed—and even then, the activity would still be discouraged. Alternatively, if the fill of critical area wetlands was extensive enough to create a

lot, then the project could not be strictly for private gain (unless for erosion control), and would have to satisfy the water-dependency and feasible alternative requirements.

In their crusade to rely on a separate provision, Respondents erroneously claim that Reg. 30-12(G)(2)(a) allows filling for "residential and commercial projects" provided the projects are " *not* solely for private gain but also serves the public interest." Respondents' Brief, p. 27. That statement is not accurate not only because of (G)(2)(b) but also because Reg. 30-12(G)(2)(a) is not so broad to apply to all "residential and commercial projects." It only applies if there is sufficient fill to create a lot. Respondents insinuate that Reg. 30-12(G)(2)(a) somehow overrides 30-12(G)(2)(b) and cite Hodges v. Rainey for the proposition that, "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Resp. Brief, p. 27. That maxim is typically invoked where, as in Hodges, there is a list or enumeration of instances where a broader conferred power is specifically limited. Hodges v. Rainey, 341 S.C. 79, 86-87, 533 S.E.2d 578, 581-82 (2000)(list of appointees that could be removed from office only under certain circumstances did not extend to appointees to offices not listed). One would not apply the maxim to distinguish the applicability among the list of exclusions or conditions to determine if one were effective while another was not. Here, 30-12(G)(2) lists specific standards for dredging and filling critical area wetlands and each of those provisions is operative.

D. Regulation 30-12(G)(2)(b) is not Satisfied Because There are Feasible Alternatives.

It is remarkable that Respondents devote another section of their Brief to discuss the feasible alternatives issue instead of placing it within the discussion of the two provisions that actually include that requirement. While Respondents give short shrift to the water-dependency requirement of Reg. 30-12(G)(2)(b), they treat the feasible alternatives requirement as more

mandatory. There is no reason to make such a distinction as both are equally mandatory and Respondent, WestEdge can satisfy neither.

One error the ALC made on this issue is that it placed the burden of proof regarding feasible alternatives on Appellant. (See R. p. 22, Final Order ("FOGC simply failed to carry its burden that its projected costs were realistically feasible"); p. 31 ("FOGC failed to show by a preponderance of the evidence that there is a feasible alternative to the permitted project that would save the creek and the tidelands")). The reason the ALC held Appellant failed to satisfy this perceived burden was because it determined that the alternatives proposed by Appellant were not economically feasible. (R. p. 36, Final Order)("While it is possible from an engineering perspective to restore the creek, protect it from the landfill, and address some flooding issues to an extent, that possibility is not a feasible alternative when balanced against the economic viability of the Development.").

As Appellant stated in its Initial Brief, Respondent WestEdge failed to offer any substantive evidence that any of Appellant's alternatives were economically infeasible. In response, Respondents have stated that WestEdge offered evidence concerning feasible alternatives "both before DHEC and then at the ALC." Any evidence that WestEdge offered to DHEC regarding feasible alternatives is irrelevant unless WestEdge also offered this same evidence for the truth of the matter asserted before the ALC.

In reviewing this matter, the ALC was bound to make a de novo determination regarding the matters in controversy pursuant to the APA. See S.C. Code Ann. § 1-23-600(B) (Supp. 2015); Brown v S.C. Dep't of Health and Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). A trial de novo is one in which "the whole case is tried as if no trial whatsoever had been had in the first instance." National Health Corporation v. S.C. Dep't of Health and Envtl. Control, 298 S.C. 373, 378 n. 1, 380 S.E.2d 841, 844 n. 1 (Ct.App.1989)(citing *Black's Law Dictionary* (5th

Ed.1979)). The standard of proof used by the Court in weighing the evidence and making a decision on the merits during a contested case proceeding is the preponderance of the evidence. See S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2018) ("Unless otherwise provided by statute, the standard of proof in a contested case is by a preponderance of the evidence."). "A 'preponderance of the evidence' is evidence which convinces as to its truth." Gorecki v. Gorecki, 387 S.C. 626, 633, 693 S.E.2d 419, 422 (Ct. App. 2010)(quoting Dubose v. Dubose, 259 S.C. 418, 424, 192 S.E.2d 324, 331 (1972)).

As to the evidence it actually offered before the ALC, Respondent WestEdge did not introduce evidence of onsite feasible alternatives "which convinces as to its truth." Id. What WestEdge introduced and what WestEdge cites repeatedly in its Brief was an application, Respondent's Exhibit 34, that was introduced "not for the truth of anything that it contains but to demonstrate that WestEdge did provide information to the Department[.]" (R. p. 1226, line 12-p. 1227, line 11)(emphasis added)). The ALC admitted Exhibit 34 "[w]ith [that] caveat." (R. p. 1227, lines 7-11). That does not constitute an adequate feasible alternatives analysis where WestEdge bore the burden of demonstrating there were no feasible alternatives to filling critical area wetlands under various regulations and policies at the ALC in a de novo proceeding. 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); Sierra Club v. S.C. Dep't of Health & Env't Control, 426 S.C. 236, 258–59, 826 S.E.2d 595, 67 (2019)(environmental group bore the burden to prove its case, licensee bore an overarching burden to satisfy the regulatory requirements necessary to earn its license); see also (R. p. 432, lines 22-23 (Department confirming the burden is on the applicant to demonstrate there are no feasible alternatives)).

The only other evidence that Respondents cite regarding onsite alternatives, which is the issue, is the testimony of Mr. Ruocco in which he discusses, very briefly, the 2008 concept plan that was a "very high level conceptual plan[.]" (R. p. 1234, line 12-p. 1236, line 6). Mr. Ruocco did not discuss the economic feasibility of any alternative relative to WestEdge's financial situation. Instead, Mr. Ruocco noted that "we had discussed the use of a muted tide gate, which has come up in testimony. That solves sunny day flooding issues only if it was actually technologically possible." (R. 1237, lines 17-20). Of course, there was extensive evidence that a muted tide gate is technologically feasible. (R. 1451, line 14-p. 1453, line 8, p. 1456, line 23-p. 1457, line 9).

Otherwise, Respondents seem content to try to mischaracterize Mr. Robinson's analyses to contrast them with those of Mr. Karkowski,[1] and claim that Appellant's alternatives, despite the extensive testimony about each, were somehow "half-formed notions[.]" Resp. Brief at pp. 45-46. The ALC did not consider Appellant's alternatives so lightly but instead concluded they would likely allow for Gadsden Creek to be revitalized while still addressing flooding. (R. p. 36, Final Order). The ALC concluded that Appellant's alternatives weren't economically feasible but Appellant did not bear the burden to prove an absence of feasible alternatives, WestEdge did. And WestEdge offered no substantive evidence that any of Appellant's alternatives were financially infeasible.

The ALC erroneously placed the burden regarding feasible alternatives on Appellant even though the burden was on WestEdge to establish that no feasible alternatives exist. (R. p. 31, Final

[1] Mr. Robinson undertook extensive analyses regarding the practicability and cost of his alternatives and testified as to the cost for those which Mr. Karkowski offered testimony about expense. (R. p. 1461, line 22-1474, line 25). Mr. Robinson did much more than simply "review Mr. Karkowski's report" concerning flooding. He actually calculated the storage capacity of Gadsden Creek and its tidelands. (R. p. 535, lines 2-16). For a full discussion of Mr. Robinson's actual work regarding alternatives see Appellant's Initial Brief at pp. 14-24.

Order). Placing the burden on FOGC regarding feasible alternatives was an error of law and arbitrary and capricious.

The ALC's ruling regarding Reg. 30-12(G)(2)(b) was an error of law, not supported by substantial evidence, an abuse of discretion, based on a clearly erroneous determination of facts and requires reversal.

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

Likely because they realize they cannot satisfy the provision, Respondents don't even bother to cite the actual commercial development policy of the CMP that Appellant argued precludes the issuance of the Coastal Zone Consistency Certification. Instead, Respondents recite general statements from the CMP regarding critical areas and its applicability thereto and then claim that "the language of the Commercial Development policy relied on by FOGC was altered...." Resp. Brief at p. 35. That, again, is inaccurate. The language that Appellant has relied upon and continues to rely upon is found in Commercial Policy (1)(b) which applies throughout the coastal zone and states that "[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). That was not altered whatsoever in 1995.

The alteration to the policy referred to by Respondents was to subsection (2) of the commercial policies which, in the original CMP document addressed "Nonwater-dependent structures," CMP III.C.E.IV(2)(a), (b) at p. III-41. The language employed is very similar to that employed in Regs. 30-12(M) and 30-13(D) at the time (indeed both provisions are expressly cited in the CMP). Now, however, the current language of Reg. 30-12(M) is more restrictive than that employed in the initial CMP policy and the language relating to the placement of "Nonwater-

dependent structures" on "primary sand dunes or beach areas" is now found at Reg. 30-13(P), also with more restrictive language than that employed in the initial CMP policy. Therefore, not only did the alteration not affect the policy at issue here, the policies that were changed also did not affect this proposal. It would have been unnecessary for the Department to copy the critical area policies back into the CMP because they were already in the critical area regulations.

Next, Respondents assert that the commercial policy Appellant relies upon and which has not changed "is inconsistent with the critical area permitting regulation adopted in 1995" which is Reg. 30-12(G)(2)(b). Resp. Brief at p. 36. In actuality, Appellant's reading of the commercial policy and Reg. 30-12(G)(2)(b) is thoroughly consistent. A plain language reading of both restricts wetland fill or dredging (permanent excavation) unless the activity is water-dependent and there are no feasible alternatives. The only difference is the scope of applicability because the critical area regulation applies to any project proposing dredging or filling critical area wetlands while the CMP policy applies not just to critical areas but throughout the coastal zone but then only to commercial development proposals that seek to fill or dredge wetlands.

Respondents next invoke the "last legislative expression rule" to argue that the 1995 amendment of Reg. 30-12(G)(2)(a) controls over the CMP commercial policy (1)(b). Resp. Brief at p. 36. The case Respondent cites was actually reversed by the Supreme Court of South Carolina, Eagle Container Co., LLC v. County of Newberry, 379 S.C. 564, 666 S.E.2d 892 (2008). In that decision, the Court stated that "[t]he last legislative expression rule, however, 'is purely an arbitrary rule of construction and is to be resorted to only when there is clearly an irreconcilable conflict, and all other means of interpretation have been exhausted.'" Id. at 572 (quoting Feldman v. S.C. Tax Comm'n, 203 S.C. 49, 54, 26 S.E.2d 22, 24 (1943)). Ultimately, the Court held that there was "no irreconcilable conflict" because the portions of the ordinance "serve different

functions." Id. Here, there is no conflict because both the commercial policy of the CMP and Reg. 30-12(G)(2)(a) can be complied with and because Reg. 30-12 (G)(2)(a) addresses a different, more extensive scenario (the creation of lots) than the CMP commercial policy. There is also no conflict on a broader scale, as already noted, between Reg. 30-12(G)(2)(a) and (b) and both are consistent with the CMP's commercial development policies.

Appellant already addressed the ALC's erroneous use of *in pari materia* and will not belabor the point here except to note that Respondents are mistaken when they claim that "the *only* legislative expression between the two–is found in Reg. 30-12(G)[.]" Resp. Brief at p. 37. In Spectre, LLC v. South Carolina Dep't of Health and Environmental Control, 386 S.C. 357, 369-70, 688 S.E.2d 844, 850 (2010), the Supreme Court of South Carolina, in discussing the promulgation of the CMP and the commercial policy at issue here, noted that the Coastal Zone Management Act "required DHEC to submit the final version of the CMP to the Governor and General Assembly for approval[]" and that "DHEC developed the CMP and promulgated it in accordance with the requirements of S.C. Code Ann. § 48-39-90." The Court further stated that "the language of § 48-39-80 supports DHEC's view that the General Assembly meant the CMP policies themselves to be enforceable in the consistency review of state and federal permits." Id. at 851. Indeed, the Court went so far as to remark that the General Assembly created "a separate and more rigorous procedure for promulgation of the CMP" as opposed to promulgation of regulations under the Administrative Procedures Act because, unlike regulations under the latter framework, "the General Assembly and Governor [had to] affirmatively approve of the CMP before it [became] effective." Id. at 852.

The CMP in general, and the commercial policy at issue here, was subjected to a rigorous review and was endorsed by a strong legislative expression of approval. The Court in Spectre held

that it is enforceable throughout the coastal zone for CZC certifications and it is enforceable here as well.

The commercial project at issue here is subject to the limitations on the fill or permanent alteration of wetlands in the coastal zone. The project is not water-dependent and there are feasible alternatives. Therefore, 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.

Respondents have not disputed that this proposed project is contrary to many of the critical area policies as discussed in Appellant's Initial Brief. See Resp. Brief at p. 38. The ALC's findings on this issue were express and it concluded that "this Project contravenes several of this this [sic] State's tidelands policies[.]" (R. p. 38, Final Order). Respondents instead argue that Appellant "misapprehends the source of the harm" and claim that the harm "is not the result of the Permit but rather is a result of landfilling activity pre-dating the Clean Water Act some sixty years ago." Resp. Brief at p. 39. It is Respondents who misapprehend Appellant's argument because the instances of harm Appellant enumerated, and which the ALC acknowledged, stem directly from authorizing the destruction of the critical area wetlands at issue here and include the destruction of habitat, the loss of public access to tidal wetlands, and other actual public detriments which include worsening flooding as shown by Respondent WestEdge's own modeling results.

Respondents argue, in essence, that the so-called public benefits they claim the project delivers trumps any other policy violations. Resp. Brief at p. 41. First, the alleged public benefits are largely illusory because there is a lack of evidence of widespread contamination and the

evidence shows that flooding will, in certain cases, be worse with the project. Second, there are feasible alternatives that may address these concerns without sacrificing the public trust resources. Third, there is no authority that one policy consideration may outweigh several contraventions of other policies. In fact, there is authority that a single policy violation is sufficient to deny a critical area permit.

In White v. South Carolina Dep't of Environmental Control this Court affirmed an ALC's determination that a proposed dock constituted a material harm to the policies of the Coastal Zone Management Act when it found the proposed dock violated one critical area policy, S.C. Code Ann. § 48-39-150(A)(10), because the proposed dock would negatively affect the use and enjoyment of adjacent owners. 392 S.C. 247, 257-58, 708 S.E.2d 812, 817-18 (2011), overruled in part on other grounds, Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, LLC, 422 S.C. 211, 810 S.E.2d 856 (2018). The material harm aspect of the decision was specific to the regulation in question, S.C. Code Ann. Regs. 30-12(A)(1)(p), which states that "the Department may allow construction [of a dock] closer than 20 feet or over extended property lines where there is no material harm to the policies of the Act." Schweirs v. South Carolina Dep't of Health & Envtl. Control, 429 S.C. 43, 55, 837 S.E.2d 730, 736 (2019)(reversing ALC denial of a dock permit where there was no substantial evidence to support ALC's conclusion of material harm in violation of S.C. Code Ann. § 48-39-150(A)(10)). There is no such requirement that the ALC find the violations create a "material harm" to the policies here. Multiple violations of the critical area policies at issue would suffice even if Appellant has shown and the ALC has acknowledged that they are materially harmed.

Respondents' reliance on S.C. Coastal Cons. League v. S.C. Dep't of Health & Envtl. Ctrl. is unavailing because the Court in that case merely recognized that the ALC relied "on a largely

illusory benefit to support its public interest analysis" as there was already a move to protect the park at issue there and this avenue had been abandoned so that the applicant could then claim its project offered a public benefit. 434 S.C. 1, 14, 862 S.E.2d 72, 79 (2021). That is also the case here not only because of what is stated above but also because the City of Charleston maintains its obligation to limit any contamination from the former landfill under its after-the-fact permit and through other federal statutes, and the City of Charleston, the evidence showed, had money budgeted to clean Gadsden Creek but declined to do so. (R. p. 1006, line 25-p. 1007, line 4, p. 1386, line 18-p. 1389, line 5, p. 1440, lines 20-24).

Respondents' claim that the policy in S.C. Code Ann. § 48-39-30(B)(1) supports the project is wrong because that policy requires "due consideration for the environment" which has not occurred here. Respondents' reliance on S.C. Code Ann. § 48-39-30(D) is likewise unhelpful to them because that policy requires that the critical area be "used" to provide "the maximum benefit to the people." Here, the proposed project would not put the critical area to any use, it would require its destruction. Instead, the public uses, and is benefitted by, the critical area tidelands where it watches animals, reflects, and educates, and also has stormwater leave the area through the creek, among other beneficial uses.

The ALC recognized that this project violates many of the critical area statutory and regulatory policies and Respondents apparently similarly recognize this fact. Nevertheless, 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.

Respondents did not address this issue. As many of the CMP policies are consistent with the critical area policies discussed above, presumably Respondents wish to rely on that section to the extent those policies overlap but Appellant did not see that stated. It is unknown whether or how Respondents wish to respond to those CMP policies that are not encompassed within similar statutory and/or regulatory critical area policies.

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 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,

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

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