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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2023-000006

Friends of Gadsden Creek,

Appellant,

v.

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

Respondents.

**JOINT MOTION TO CERTIFY APPEAL TO
SOUTH CAROLINA SUPREME COURT**

Appellant Friends of Gadsden Creek (“FOGC”) and Respondents South Carolina Department of Health and Environmental Control (“DHEC”) and WestEdge Foundation, Inc. (the “Foundation”), pursuant to Rule 204(b), SCACR, respectfully move for certification of this appeal for immediate review by the South Carolina Supreme Court. Immediate review by the Supreme Court is warranted because this appeal involves an issue of significant public interest and a legal principle of major importance. Moreover, it is a near-certainty that the losing party will seek further review from this Court.

BACKGROUND

At issue in this appeal is a permit granted to the Foundation by DHEC, allowing

the Foundation to fill in 3.9 acres of critical area in the Westside neighborhood of the Charleston peninsula, known as Gadsden Creek (the “Project”). FOGC opposes the Project and seeks to preserve Gadsden Creek and improve its hydrological and ecological functionality.

Procedural History

On July 12, 2021, DHEC granted the Foundation’s application for a critical area permit, a coastal zone consistency certification, and a water quality certification (collectively, the “Permit”). On July 26, 2021, FOGC filed its Request for Final Review Conference with the DHEC Board. DHEC denied the request on September 2, 2021.

FOGC filed its Request for Contested Case Hearing on October 1, 2021. A contested case hearing was conducted from June 6th through June 10th, 2022 before the Administrative Law Court (“ALC”). On December 5, 2022, the ALC issued a lengthy order affirming the Permit. FOGC timely filed its Notice of Appeal on January 3th, 2023. The Record on Appeal and the parties’ final briefs have been filed and the case is awaiting calendaring for oral argument.

Factual Background

The situation at the core of this appeal is unfortunate. Historically, Gadsden Creek meandered through 100 acres of salt marsh and “was utilized by the local, primarily African-American community ... for wharves, recreational fishing, public bathing, recreational boating, and baptisms, among other things.” (Order at 2.) Beginning in the 1950s, however, the City of Charleston began filling Gadsden Creek and the surrounding marsh with various materials, altering the creek as the landfill expanded until it

eventually was channelized into its current state to further the City's goal of creating more buildable land despite the loss of dozens of acres of marsh. The waterway now known as "Gadsden Creek" channeled stormwater from the landfill and surrounding area and has grown and become more naturalized over time. (Order at 3.) The dirt cap placed on the landfill when it was closed in the 1970s has eroded in certain areas, exposing decades-old fill material, including some trash and debris. At the same time, the Foundation alleges that contaminants are leaching from the former landfill.

The ALC found that Gadsden Creek as it now exists is contaminated by leachate from the landfill due to settlement of the landfill, rising tide levels, and erosion of the landfill cap. (Order at 5; *see id.* at 6 (discussing extent of contamination).) Such contamination "is a threat to the health, safety and welfare of the public and the environment." (Order at 7.) Additionally, even in the absence of these contaminants, the frequency and intensity of sunny day flooding, associated with extremely high tides, continues to overwhelm existing stormwater controls and itself poses "a threat to public health, safety, and welfare in the Gadsden Creek area." (Order at 9.) FOGC has disputed these findings in its briefing and contends that they are not supported by the evidence introduced during the contested case hearing.

The WestEdge Development is a long-term effort to redevelop a portion of the Charleston peninsula in the Gadsden Creek area, portions of which have already been completed. (Order at 10-11.) The goal is to redevelop an area near the Medical University of South Carolina (MUSC) hospital and the surrounding medical district to alleviate

constraints on the growth of MUSC, which is the largest single employer and largest source of medical care on the peninsula. If filling of the critical area is completed, there are various commercial, residential, and public infrastructure development projects contemplated for what is now critical area.

The Project is the next phase of development. Gadsden Creek provides the principal stormwater drainage for the drainage basin surrounding the Project area, but it is sometimes inadequate. In fact, water from the creek channel contributes to storm-related flooding under certain conditions, including heavy rain events at low tide and more moderate precipitation at mid and high tides. On occasion, the creek may serve as a conduit by which the Project area may be subject to sunny day flooding not associated with rain events. The Project proposes to fill critical area wetlands which will result in the elimination of tidal influence and tidal flooding through the creek channel in the Project area. The Project also proposes the installation of a new engineered stormwater drainage system, the adequacy of which has been challenged by FOGC.

Despite its changed nature, community residents still value Gadsden Creek and use it in various ways. It is home to “a variety of flora and fauna,” including “sea ox eye, marsh elder, spartina, marsh grass, great blue herons, egrets, redwings,” and possibly raccoons and turtles. (Order at 4.) Residents walk by the creek, observe the wildlife, and watch the tide change. Another resident uses the creek area as an outdoor classroom, teaching such subjects as “eco-literacy, African American history, geology, and human geography.” (Order at 4.)

The Project has attracted substantial public attention, both in support and in opposition. (Order at 14-16.) Among other things, “FOGC members are ... concerned that eliminating Gadsden Creek will permanently remove the last remnant of an important cultural and historical resource in a community that has systematically been deprived of its natural resources because of environmental racism and gentrification.” (Order at 15.)

ARGUMENT

Rule, 204(b), SCACR, provides:

[i]n any case which is pending before the Court of Appeals, the Supreme Court may, in its discretion, on motion of any party to the case, on request by the Court of Appeals, or on its own motion, certify the case for review by the Supreme Court before it has been determined by the Court of Appeals.

The Rule continues, “Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance.” Both criteria are met here.

A. This Appeal Involves an Issue of Significant Public Interest

This appeal involves balancing the need for flood mitigation to support economic growth and opportunities for South Carolina citizens against the preservation of a cultural and historical resource important to the community. As the ALC noted in its order, “[s]takeholders, from the federal level to the local community, have reacted to the Project,” both in support and in opposition. (Order at 14.) The high degree of public interest is demonstrated by an internet search for “Gadsden Creek,” which will return multiple news articles as well as other web content concerning this matter.

The ALC found that “members of FOGC are concerned that filling the creek will prevent them from using and enjoying Gadsden Creek” and “that eliminating Gadsden Creek will permanently remove the last remnant of an important cultural and historical resource in a community that has systematically been deprived of its natural resources because of environmental racism and gentrification.” (Order at 15.)

The other side of the equation is the Foundation’s claim that the Project will address frequent flooding in the area. Gadsden Creek provides the principal stormwater drainage for the drainage basin surrounding the Project area, but it is sometimes inadequate. Tidal water from the creek channel may contribute to storm-related flooding under certain circumstances, including heavy rain events at low tide and more moderate precipitation at high tides. The Foundation claims that the Project is necessary to alleviate the flooding and to protect the community from contamination from the landfill. FOGC claims that the evidence does not show contamination, that the Project will worsen flooding in the area in several circumstances and that, regardless, there are other options, including some used in South Carolina, to address both issues.

The impact of this appeal reaches far beyond the parties. As posited by the Foundation and discussed above, the genesis of the WestEdge Development was a desire to provide growing room to MUSC Hospital, and that desire is ongoing. The outcome of this appeal will impact numerous stakeholders, including local residents of the Gadsden Green and Westside communities, the City of Charleston, and the several schools that are present in the area near this Project. It may also affect employees and patients at MUSC .

Additionally, the issues here are likely of interest to persons who have no relationship to MUSC or the Gadsden Creek area. Flooding is a problem across the Charleston peninsula, and there is a substantial possibility that similar issues, where the needs of development conflict with preservation of culture, heritage and public trust ecological resources, will arise in the future.

B. This Appeal Involves a Legal Principle of Major Importance

Certification is also appropriate on the basis that this appeal will establish a legal precedent that will significantly and unavoidably impact numerous subsequent cases. The core legal challenge to the Permit is whether it is compatible with statutory and regulatory safeguards intended to protect vulnerable coastal and tidal wetlands—particularly S.C. Code Ann. Regs § 30-12(G), which concerns dredging and filling. Regulation 30-12(G) provides, in part:

(1) Dredging and filling can always be expected to have adverse environmental consequences; therefore, [DHEC] discourages dredging and filling. There are cases, however, where such unavoidable environmental effects are justified if legitimate public needs are to be met.

(2) The specific standards are as follows:

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

(b) Dredging and filling in wetland areas should be undertaken only if that activity is water-dependent and there are no feasible alternatives; ...

Id. (internal cross-references omitted).

FOGC contends that because the Project is not water-dependent,¹ it is absolutely prohibited according to the plain language of Reg. 30-12(G)(2)(b).² The ALC, however, ruled that DHEC has discretion to “approve a project even though the condition of water-dependency is not met” and that “when it is appropriate to depart from the conditions in subsection 30-12(G)(2)(b) can be determined by looking at the regulation as a whole, and in particular, subsection 30-12(G)(1) and 30-12(G)(2)(a).” (Order at 29.)

Although both parties recognize in their briefs that this is a matter of regulatory construction, and while the basic rules of statutory construction apply to regulations and have long been settled in South Carolina, the interpretive question presented in this appeal has far-reaching consequences. South Carolina, with 187 miles of coastline,³ is one of the fastest growing states in the country.⁴ Development pressures will only continue, and it seems inevitable that DHEC will again be required to consider a project that is not water-dependent but which involves circumstances where there is a claim that it will bestow a public benefit. Whether the regulation at issue provides DHEC with discretion to approve such projects is of critical importance to citizens who value preservation of critical area wetlands and the public trust resources they provide and those who prioritize development and infrastructure which is intended to address coastal flooding.

¹ It is undisputed that the Project is not water-dependent.

² Alternatively, FOGC maintains that there are feasible alternatives.

³ <https://www.britannica.com/place/South-Carolina>

⁴ <https://thehill.com/changing-america/resilience/smart-cities/3785388-southern-states-grew-fastest-in-2022-census-data-shows/>

A ruling by this Court is needed to clarify the existing law and to guide future decision-making.

CONCLUSION

For the foregoing reasons, the parties jointly request entry of an order certifying this appeal for review by the Supreme Court pursuant to Rule 204(b).

Respectfully submitted on this, the 28th day of August, 2023

[SIGNATURE PAGES FOLLOW]

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PROOF OF SERVICE

I certify that I certify that I have served the Joint Motion to Certify Appeal to the South Carolina Supreme Court Appellant Friends of Gadsden Creek by emailing a copy to the following counsel of record for Appellant using the primary email address listed in the Attorney Information System:

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August 28, 2023

s/ Kirsten E. Small

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