

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

John Hamilton Smith, Special Referee

Case No.: 2010-CP-40-8943R

**RECEIVED**

MAY 20 2013

**S.C. Supreme Court**

Columbia Venture, LLC,.....Appellant,

v.

Richland County,.....Respondent.

**NOTICE OF APPEAL**

Pursuant to Rule 203(d)(1)(A)(ii), SCRAP, Columbia Venture, LLC ("Columbia Venture") appeals the following judgments and orders in this matter:

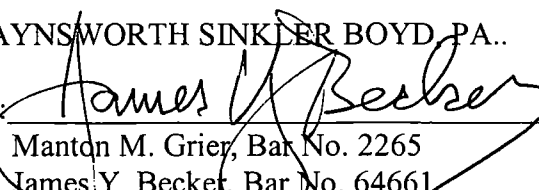
- Order Denying Plaintiff's Motion to Reconsider, Etc. dated April 18, 2013;
- Order dated March 18, 2013;
- Order Denying Plaintiff's Motion to Reconsider, Alter, or Amend dated February 8, 2013;
- Order Granting in Part and Denying in Part Defendant's Motions for Partial Summary Judgment dated Interim Order dated September 8, 2012;
- Order Denying Plaintiff's Motion to Reconsider, Alter, or Amend dated August 30, 2012; and
- Order Granting Partial Summary Judgment to Defendant on Physical Takings Claim, and Denying Partial Summary Judgment to Plaintiff on Physical Takings Claim dated August 7, 2012;

A copy of the above-referenced orders are attached to this Notice as Exhibits A-F. On April 22, 2013, Columbia Venture received written notice of the entry of the Order Denying Plaintiff's Motion to Reconsider, Etc. dated April 18, 2013.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A..

By:



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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

John Hamilton Smith, Special Referee

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Case No. 2010-CP-40-8943R

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Richland County,

Respondent,

v.

Columbia Venture, LLC,

Appellant.

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**PROOF OF SERVICE**

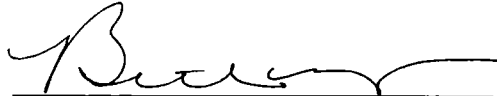
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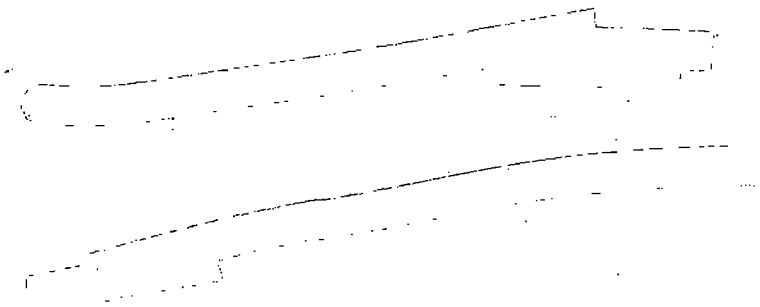
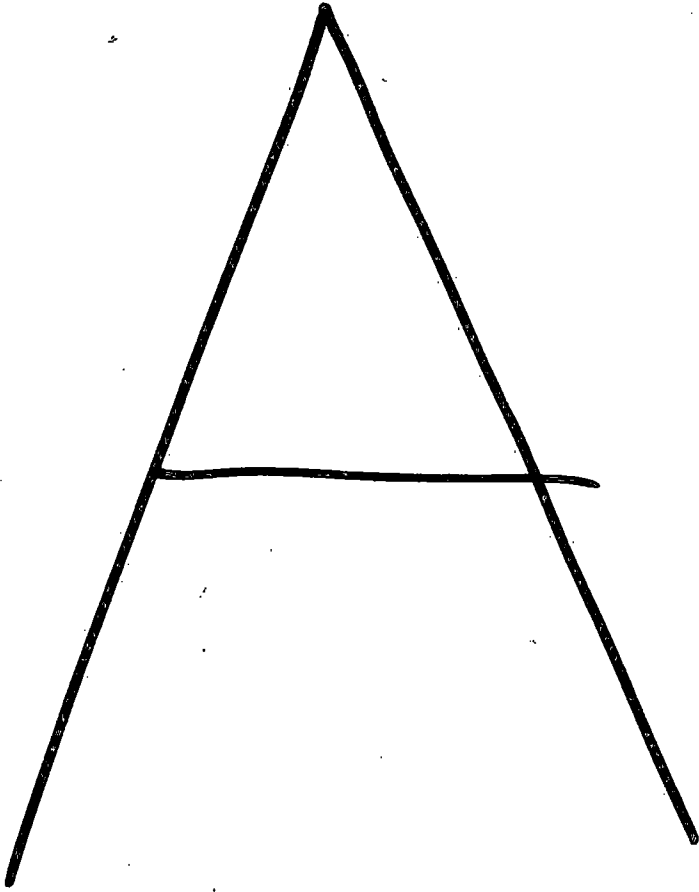
This is to certify that I caused a copy of the foregoing Notice of Appeal to be served on the following individuals by depositing a copy of the same in the United States Mail, first class, postage prepaid, and addressed as follows:

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May 20, 2013

  
Beth Valdes



STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
)  
Columbia Ventures, LLC, )  
)  
Plaintiff, )  
)  
vs. )  
)  
Richland County, )  
)  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

Civil action No. 2010-CP-40-8943R

ORDER DENYING PLAINTIFF'S  
MOTION TO RECONSIDER, ET AL.

FILED  
2013 APR 22 PM 12:50  
JEANETTE W. McBRIDE  
S.C.P. & G.S.

This matter is before the Court pursuant to the Plaintiff's Motion to Reconsider, Alter or Amend.

I have considered the Plaintiff's Motion together with the Appendix of authorities, the Defendant's Memorandum in opposition thereto, and the Plaintiff's Reply Memorandum. The Motion is based upon three grounds.

#### INSUFFICIENCY OF EVIDENCE

I have again considered my findings based upon my view of the evidence submitted and the law as set forth in the Order and conclude there is sufficient evidence to support same.

## THE REASONABLENESS OF PLAINTIFF'S INVESTMENT BACKED EXPECTATIONS

The Plaintiff's Motion and Reply Memorandum address the issue of the reliance placed by Columbia Venture on the County's resolution of February 2, 1999 and specifically the wording in the Order on page 67 that it "had no legal binding effect on the County." This was stated in the context of whether it was reasonable for the Plaintiff to have given so much weight to the Resolution in making its decision to purchase the property. The Order goes on to point out that the Resolution was adopted hurriedly as the Plaintiff was under severe time pressures and the County had little specific information about the project. Also, there had been no public input and the Resolution contained contingencies. It certainly differed from an ordinance which would require a certain number of readings, public notice, hearings, etc. before passage.

As stated in *Glasscock Co., Inc. v. Sumter County*, 361 S.C.483, 604 S.E.2d.718 (Ct. App. 2004), "...it seems to be well settled that a resolution is not a law....(and) may simply be an expression of opinion or mind." Further "...a resolution ordinarily is an act of a special or temporary character, not prescribing a permanent rule of government, but is merely declaratory of the will or opinion of a municipal corporation in a given matter."

Therefore, I decline to reconsider the conclusions set forth in the Order concerning the reasonableness of the reliance placed on the Resolution by the Plaintiff.

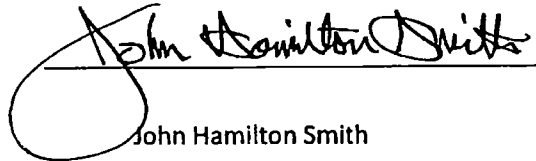
## THE CHARACTER OF THE GOVERNMENTAL ACTION

The Plaintiff contends that the Order should be reconsidered in that the action by the County is legally and factually indistinguishable from the State's action in *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003 (1992). I disagree. In *Lucas*, the Court held "that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."

Here, the Plaintiff was not deprived of all economically beneficial uses of its property. It is true that 70% has been restricted as to its use but it is not a *Lucas* type of deprivation. As set forth in the Order, the entire parcel needs to be considered. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). The Plaintiff argues that this amount of restriction should weigh in its favor in regard to the character issue. I do not find this persuasive and decline to reconsider in favor of the Plaintiff.

THEREFORE, IT IS ORDERED THAT THE PLAINTIFF'S MOTION IS DENIED.

April 18, 2013



John Hamilton Smith

Special Referee

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|-------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS      |
| COUNTY OF RICHLAND      | ) | FOR THE FIFTH JUCICIAL CIRCUIT    |
|                         | ) |                                   |
| Columbia Ventures, LLC, | ) | Civil action No. 2010-CP-40-8943R |
|                         | ) |                                   |
| Plaintiff,              | ) |                                   |
|                         | ) |                                   |
| vs.                     | ) | ORDER                             |
|                         | ) |                                   |
| Richland County,        | ) |                                   |
|                         | ) |                                   |
| Defendant.              | ) |                                   |
| _____                   | ) |                                   |

This order concerns the Plaintiff's claim for a regulatory taking of property without just compensation. The date of alleged taking is on February 20, 2002, when the Defendant adopted a new Flood Insurance Rate Map which placed approximately 70% of the Plaintiff's property within an effective regulatory floodway. In addition thereto, the plaintiff alleges that certain of the Defendant's ordinances in effect on that date, which had been amended or "reinterpreted" since the Plaintiff purchased the property, prohibited the Plaintiff from placing structures on the property within the new regulatory floodway and from improving the levee system to protect the property from flooding. The combination of these actions allegedly eliminated the Plaintiff's plans to develop its property.

In prior rulings I issued orders denying the Plaintiff's claims alleging a denial of substantive due process and that the Defendant's actions amounted to a physical taking of the Plaintiff's property. I also denied the Defendant's motion for summary judgment as to its allegations that all of the Plaintiff's claims were not ripe for decision.

The trial of this aspect of the case involved almost three weeks of "live testimony" as well as the submission of depositions of five additional witnesses. There were some 494 exhibits in all. I have considered extensive pre trial briefs and read what surely must be all of the significant state and federal decisions on regulatory takings, amounting to approximately ninety in all. Also I have studied the proposed orders and subsequent memoranda which have a cumulative total of 404 pages.

## **FINDINGS OF FACT**

The subject property consists of approximately 4,400 bucolic acres along the eastern bank of the Congaree River in Richland County. The Congaree is formed by the joining of the Broad and Saluda Rivers near downtown Columbia. The Congaree flows roughly parallel to the City of Columbia and is the southern boundary between Richland and Lexington Counties. As the Congaree enters the coastal plain south of Columbia, its floodplain widens and its course meanders.

The land had been owned for decades primarily by the late Burwell Manning through a corporate entity. It was used for agricultural and recreational purposes. In the 1960s and 1970s the property was improved by Mr. Manning with a system of additional levees in three separate sections to prevent flooding. There were some sections of the levees that were built as far back as the early 1900s. The levees extend for over 20 miles. At the time the levee work was done there was no permitting process required.

In the late 1960s a parcel was sold to the City of Columbia for the construction of a wastewater treatment plant. The City was also conveyed a portion of the levee adjacent to the plant. Mr. Manning also donated land to Heathwood Hall so that it could erect a new facility for its private school. This property is located eastward of the levee along the Congaree. Burwell Manning died several years ago but his son, Deas Manning, was very active in working with his father and testified extensively at trial.

In the 1990s, Burwell Manning was deeply in debt to the U. S. Farm Service Agency due to unpaid farm loans. In a complicated series of real estate transactions, Mr. Manning sold the approximately 4,400 acres to various investor groups in exchange for their supplying the funds from which he could pay this indebtedness. Mr. Manning retained a right to repurchase the property from these investors provided *he do so within certain time frames.*

He had to repurchase 2,218 acres by February 17, 1999 or he would forfeit all rights to that portion. He had until July 16, 1999 to repurchase the balance of the acreage or he would lose that as well.

As a result of this pressure, Mr. Manning was searching for investors to buy the property through his right of repurchase before that right expired. This led to the entry into the picture of the Plaintiff. However, before going further, it is necessary to understand the regulatory factors concerning the property.

## **REGULATORY BACKGROUND**

The National Flood Insurance Program ("NFIP") is established under the National Flood Insurance Act ("NFIA") and administered by FEMA. 42 U.S.C. § 4001 *et seq.* The purpose of the NFIA is twofold – to enable property owners to obtain affordable flood insurance, and to minimize flood losses through local land use regulation. 42 U.S.C. § 4001(b) and (c). To minimize flood damage, the NFIA seeks to "encourage ... local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage," and "guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards." *Id.* at (e).

The NFIP is a voluntary program, however, if a local community does not participate in the NFIP, *the NFIA prohibits any federal lending assistance for acquisition of and construction on any real property located within that non-participating community, prohibits disaster relief and federal grants, and flood insurance is not made available to residents.* 42 U.S.C. § 4106(a); 42 U.S.C. § 4022(a)(1).

## **FLOOD HAZARD DATA**

To fulfill the purposes of the NFIA, FEMA is required to publish Flood Insurance Studies ("FIS") and Flood Insurance Rate Maps ("Flood Maps") (collectively referred to hereafter as "Flood Data") that

identify flood hazard areas and risk zones within floodplains across the United States. 42 U.S.C. § 4101(a). Every five years, FEMA must assess the need to revise Flood Data and undertake revisions as it sees fit. 42 U.S.C. § 4101(e) and (f). A Flood Insurance Study ("FIS"), or a flood elevation study, contains the calculated height or depth of floodwaters, called base flood elevations ("BFE"), of all studied rivers and streams within a community. 44 C.F.R. § 59.1. A base flood is defined as "the flood having a one percent chance of being equaled or exceeded in any given year," also called a 100-year flood. 44 C.F.R. § 59.1.

FEMA's Flood Maps are "official map[s] of a community on which [FEMA] has delineated the special hazard areas and risk premium zones applicable to the community." 44 C.F.R. § 59.1. A special hazard area is the floodplain subject to a 100-year flood. The Flood Maps serve two purposes of the NFIP – 1) to identify and establish flood risk zones where purchase of flood insurance is required; and 2) to identify and establish flood hazard areas where local floodplain management regulations apply. Areas where FEMA has determined base flood elevations are shown as Zone AE. Other risk zones shown on a flood map include Zone A, a flood hazard area without established BFEs, and Zone X, a flood hazard area considered to be low risk.

When FEMA has determined base flood elevations within a floodplain, FEMA is able to depict on a FIRM the regulatory floodway. The floodway is generally the area posing the greatest danger to public safety. "The floodway is the channel of a stream, plus any adjacent floodplain areas, that must be kept free of encroachment so that the 100-year flood can be carried without substantial increases in flood heights." 44 C.F.R. § 59.1. Floodways are presented to participating communities "as a minimum standard that can be adopted directly or that can be used as a basis for additional floodway studies." 44 C.F.R. § 60.3(d)(2).

The NFIP regulations do not prohibit land owners from building in the floodplain or floodway. The lowest floor of residential structures built in a floodplain must be elevated at or above the BFE; enclosed areas below the lowest floor which are subject to flooding must be designed to automatically equalize hydrostatic flood forces on exterior walls. 44 C.F.R. § 60.3(c)(2) & (5). Within the adopted regulatory floodway, "encroachments, including fill, new construction, substantial improvements, and other development ... [are permitted if] it has been demonstrated through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood." 44 C.F.R. § 60.3(d)(3). This engineering showing is sometimes referred to as the "no-rise" standard. In order to achieve a no-rise showing, buildings typically have to be elevated on pilings or pilasters to a height above the BFE in order to allow floodwaters to flow beneath the building to avoid displacing the floodwaters.

Once FEMA prepares the FIS and FIRMs, they are issued as preliminary documents for review by the community and the public. 42 U.S.C. § 4104(a). These documents do not become final determinations by FEMA until FEMA publishes notice to the public and the community in a manner prescribed by the NFIA. Once FEMA publishes public notice of preliminary Flood Data, an administrative appeal period is triggered. After FEMA resolves any administrative appeals, it issues its Flood Data in the form of a letter of final determination. If an appellant is aggrieved by FEMA's final determination of base flood elevations, a judicial appeal can be pursued in the United States District Court for the district within which the community is located. 42 U.S.C. § 4104(g).

Participating communities are required to adopt and use effective Flood Maps, i.e., those that have gone through the notice and appeal procedures under 42 U.S.C. § 4104; however, participating

communities may, under certain circumstances, use FEMA's preliminary FIS and Flood Maps before they are finalized.

FEMA's Floodplain Management Bulletin 1-98 provides guidance to communities regarding use of FEMA's preliminary revised flood maps as available data for regulating floodplain development. This Bulletin advises that, in two situations, the community should use preliminary revised Flood Maps for permitting instead of the final, effective Flood Map: 1) if a preliminary revised flood map widens a floodway already shown on the final, effective Flood Map, then the community should reasonably use the preliminary revised flood map as the best data available in order to protect the health, safety and property of citizens within the affected area; or 2) if a preliminary revised Flood Map shows higher base flood elevations than those shown in the final, effective Flood Map, then the community should reasonably use the preliminary revised flood map as the best data available in order to protect the health, safety and property of citizens within the affected area.

### **FLOOD MAP REVISIONS**

FEMA regulations create multiple avenues for the revision of flood maps. See 44 C.F.R. § 65.5 (revision of hazard boundaries with no change to base flood elevations); 44 C.F.R. § 65.6 (revision of base flood elevation determinations); 44 C.F.R. § 65.7 (revision of floodway); 44 C.F.R. § 65.10 (revision to recognize levee systems as providing protection from the base flood); 44 C.F.R. § 65.12 (revision to reflect increase in base flood elevations caused by encroachments in floodway). These remedies are available to individual property owners and the local community. 44 C.F.R. § 65.4.

A property owner may seek certification from FEMA that a levee provides adequate protection from a 100-year flood. 44 C.F.R. § 65.10. If a levee meets FEMA's levee certification requirements, then flood hazard designations on land behind the levee are removed from FEMA's Flood Map, thus allowing

development to occur without the need to comply with local floodplain management regulations. Levee certification must include data and information that meets certain requirements relating to the structural design and operation of the levee. 44 C.F.R. § 65.10(b) and (c). Additionally, FEMA requires that the following maintenance requirements be met:

For levee systems to be recognized as providing protection from the base flood, the maintenance criteria must be as described herein. Levee systems must be maintained in accordance with an officially adopted maintenance plan, and a copy of this plan must be provided to FEMA by the owner of the levee system when recognition is being sought .... All maintenance activities must be under the jurisdiction of a Federal or State agency, an agency created by Federal or State law, or an agency of a community participating in the NFIP that must assume ultimate responsibility for maintenance. ... 44 C.F.R. § 65.10(d).

“This information must be supplied to FEMA by the community or other party seeking recognition of such a levee system at the time a flood risk study or restudy is conducted” or “when a map revision ... is sought based on a levee system ....” 44 C.F.R. § 65.10. In other words, a request can be made to FEMA to certify a levee by submitting the data required under 44 C.F.R. 65.10 to FEMA to be included in FEMA’s restudy; or, once FEMA’s restudy has been concluded and final Flood Data is issued, then a request to revise the Flood Data can be made through the submittal of the data required under 44 C.F.R. § 65.10 as a request for a map revision. FEMA’s map revision procedures apply when a property owner seeks to change FEMA’s effective map, meaning a map that FEMA has finalized. 44 C.F.R. § 65.4.

A Flood Map revision may be submitted by a community or an individual through a community. 44 C.F.R. § 65.4(b). In the latter case, FEMA will not review a request for a map revision unless the community has received the request but provided in writing that it declined to submit the request. Property owners may initiate a map revision process by submitting what is called a conditional letter of map revision (“CLOMR”) prior to undertaking the actual construction of levee upgrades necessary to

meet FEMA's levee certification requirements. 44 C.F.R. § 65.8. A CLOMR enables FEMA to review a property owner's proposed design and construction plans and comment in advance as to whether these plans would in fact meet FEMA's levee certification requirements. A CLOMR requires submittal of plans for construction, not for actual approval of the construction itself, but rather, to demonstrate that the FEMA requirements could be met. A CLOMR must first be submitted to the local community for review and signature. 44 C.F.R. § 65.4(b). Under FEMA's regulations, a property owner must obtain all necessary permits from the local government before applying for a CLOMR or a LOMR. 44 C.F.R. § 65.8 If FEMA issues the CLOMR, the applicant returns to the local government to obtain construction approvals consistent with the CLOMR. After the project is built, FEMA then approves a Letter of Map Revision ("LOMR") which serves to officially revise its flood maps to reflect the protection provided by the certified levee. 44 C.F.R. § 65.9.

#### **RICHLAND COUNTY'S FLOODPLAIN MANAGEMENT REGULATIONS**

Participating communities are required to comply with FEMA's minimum standards for floodplain management. 44 C.F.R. § 60.2. The community must adopt and enforce floodplain management regulations based on the Flood Data provided by FEMA. *Id.* at (h); 44 C.F.R. § 60.3. Further, a community's floodplain management regulations must meet FEMA's minimum construction standards. 44 C.F.R. § 60.3. For example, all new construction and substantial improvements of residential structures in a floodplain must be elevated to or above the base flood elevation. Non-residential structures must be elevated to or above the base flood elevation or constructed in a manner that is watertight.

Within a floodway, the community must, at a minimum, prohibit construction of any sort unless it can be demonstrated that the proposed development will not cause any increase in the base flood elevation. *Id.* at (d)(3). A community may impose more restrictive regulations than FEMA's minimum

standards, which FEMA encourages and which "shall take precedence." 44 C.F.R. § 60.1(d). Richland County did adopt more restrictive standards than FEMA's minimum standards.

Richland County's floodplain management regulations are contained in more than one ordinance. The County's Zoning Ordinance contains a Floodway and Floodplain Overlay District which overlays all property within unincorporated Richland County designated by FEMA's Flood Maps as within a floodplain or floodway. The County's Storm Drainage Ordinance, in effect from 1994 to April 2001, also contained standards and criteria for development within a flood hazard area as designated within FEMA's Flood Maps. This Storm Drainage Ordinance was substantially revised on April 17, 2001 to incorporate new water quality standards, and incorporate the County's sediment and erosion control ordinance into a comprehensive Stormwater Management, Erosion and Sediment Control Ordinance (hereinafter referred to as "Stormwater Ordinance").

#### **1. County Zoning Ordinance**

Pursuant to § 26-73 *et seq.*, the Zoning Ordinance establishes regulations applicable to property located with a floodway and/or floodplain ("Floodplain Overlay Zoning District"). § 26-73 *et seq.*, Richland County Zoning Ordinance (1999). Under the County's Zoning Ordinance, the Zoning Administrator is charged with interpreting the terms and provisions of the Ordinance and administering those terms and provisions.

The stated intent of the Floodplain Overlay Zoning District was as follows:

Certain areas within the county are subject to periodic inundation by flood waters which results or may reasonably be foreseen to result in loss of life and property, health and safety hazards, disruption of commerce and governmental services and extraordinary public expenditures for flood protection and relief, all of which adversely affect the public health, safety and general welfare. These hazards are caused or extended in part by the occupancy of flood hazard areas by uses which increase flood damage upon other lands or uses which are vulnerable to floods because they are inadequately elevated or

not otherwise protected from flood damages. It is therefore the intent of this section to lessen such hazards and losses by restricting or prohibiting uses which are dangerous to health, safety or property in times of flood or which cause excessive increases in flood heights or velocities; by requiring that uses vulnerable to floods be protected against flood hazards at the time of initial construction; and by controlling filling, grading, mineral extraction, placing of obstructions within flood channels and other activities, uses, or characteristics of uses which may increase flood damage. § 26-73.2, Floodplain Overlay Zoning District (1999).

Under its Floodplain Overlay Zoning District, a floodway was based upon "the floodway shown on FEMA's official Flood Maps and Flood Insurance Study "and any revisions thereto." *Id.* at § 26-73.3(3), Floodplain Overlay Zoning District (1999). Within a floodway, land uses are limited to agricultural and horticultural uses, parking areas, uses accessory to residential uses such as lawns and play areas, recreational uses, airport runways, and public infrastructure. § 26-73.4(3), Floodplain Overlay Zoning District (1999). A special exception may be obtained for additional uses including mining, marinas, railroads, and docks. *Id.* at (4).

The Floodplain Overlay Zoning District contained a provision governing construction within a floodway ("Floodway Provision"). Under § 26-73.4(2), "filling of floodway areas, dumping of salvaged or scrap material, or the placing of material or obstruction within a floodway area in such a manner as to impede free flow of water during a time of flood or in such a manner that the elevation of floodwaters will be increased is prohibited." This provision essentially prohibited construction in a floodway.

Even so, the Zoning Ordinance contained a variance procedure where the Board of Adjustment could grant relief from the terms of this provision. Richland County Council has no involvement in the variance procedure. Instead, the Board of Adjustment has the sole power to grant variances from the terms of the Zoning Ordinance "as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of this ordinance would result in unnecessary hardship." § 26-602.3(a)(1), County Zoning Ordinance (1999). The County must hold a public hearing on

the variance request. *Id.* at §§ 26-602.3(b)(2) and (3). Any aggrieved person may appeal a decision by the Board of Adjustment to the circuit court within thirty days after the filing of the Board of Adjustment's decision. *Id.* at § 26-604.

For property located within a floodplain but outside the floodway, any buildings constructed within a floodplain must be protected from flood hazards by placing earthen fill to elevate the building site at least two feet above the estimated depth of a 100-year flood, or the building must be elevated on pilings at least two feet above the estimated depth of a 100-year flood. § 26-73.5(2), Richland County Floodplain Overlay Zoning District (1999).

## **2. Storm Drainage Ordinance of 1994**

Under the County's Storm Drainage and Flood Protection Ordinance ("Storm Drainage Ordinance"), an approved storm drainage plan was required for any land disturbance or development within a special flood hazard area. § 8-50 *et seq.*, Storm Drainage and Flood Protection Ordinance (1994). Generally, an application for land disturbance only requires a sediment and erosion control plan providing methods for controlling soil erosion and preventing soil from entering waterways. § 8-27, Sediment and Erosion Control Ordinance (1994). However, any application for development located within an area of special flood hazard must also obtain an approved Storm Drainage Plan pursuant to the County's Storm Drainage Ordinance. § 8-55, Storm Drainage Ordinance (1994). The term "development" was defined as "any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation, or drilling operations." *Id.* at § 8-54. All words used in present tense within the Storm Drainage Ordinance were required to be construed as including future tense.

The purpose of the County's Storm Drainage and Flood Protection Ordinance was stated as follows:

In order to protect the general health, safety and welfare of the people of Richland County, South Carolina, this Storm Drainage and Flood Protection Ordinance is enacted to provide proper drainage channels, clear of obstruction, for stormwater runoff; to control pollution of streams and drainage channels by urban storm water runoff; and to prevent encroachment into natural drainage channels by buildings or other land improvements.

Under the Storm Drainage Ordinance, all "primary drainage channels ... located within or immediately adjacent to an improvement, development or subdivision shall be protected or improved by the applicant as follows":

...

(g) All levees protecting residential structures or non-residential structures which are not floodproofed shall be designed, constructed and maintained to provide protection against the 500-year flood plus three (3) feet of freeboard. ...

(h) No levees, dikes, fill materials, structures or obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway."

(i) National Flood Insurance Program

All applicable regulations of the National Flood Insurance Program are incorporated by reference herein. Richland County Storm Drainage Ordinance (1994).

The Storm Drainage Ordinance also contained levee maintenance standards. § 8-72, Storm Drainage Ordinance (1994). Among these standards was:

(b) Earth Embankments. Levee embankments will be maintained to not less than the design grade and section by replacing any loss of material from the crown or slopes. Ruts, washes, slides, and subsidences should be promptly repaired and the entire

embankment maintained sufficiently smooth for power mowing. Levee crowns should be graded as necessary to drain freely and prevent impoundment of rain water. All brush, trees, and other undesirable wild growth will be removed from the levee embankment. § 8-72(3)(b), Storm Drainage Ordinance (1994).

The County's Storm Drainage Ordinance did not contain an express provision authorizing any variance from the County's storm drainage or flood protection requirements. Instead, the County incorporated by reference a state variance provision applicable to stormwater management and sediment control. See 8-65 (incorporating S.C. Code Regs. 71-302). Section 72-302 contained a variance provision applicable to stormwater management requirements within the ordinance. See S.C. Code Regs. 72-302 ("The implementing agency with responsibility for plan review and approval may grant a written variance from any requirement of these regulations if there are exceptional circumstances applicable to the site such that strict adherence to the provisions of these regulations will result in unnecessary hardship and not fulfill the intent of these regulations.").

Similarly, the Ordinance adopted by reference FEMA's floodplain management regulations, which includes a mandatory variance provision. 44 C.F.R. § 60.6; see also 44 C.F.R. § 59.1 ("Variance means a grant of relief by a community from the terms of a flood plain management regulation."). Under 44 C.F.R. § 60.6(a), "the community, after examining the applicant's hardships, shall approve or disapprove a request." Pursuant to variance procedures set forth in 44 C.F.R. § 60.6, a variance could be issued by the County "for new construction and substantial improvements and for other development necessary for the conduct of a functionally dependent use" provided that specified criteria are met. A variance may be granted by the County if good cause is shown, exceptional hardship exists, the variance would not cause an increase in base flood elevations or cause threats to public safety, nor cause a nuisance or result in extraordinary public expense, nor cause fraud or victimization of the public, and not conflict with other local ordinances. *Id.* at (a)(3).

Under the Storm Drainage Ordinance, "review of the Storm Drainage Plan shall require not more than twenty working (20) days from the date of submittal until the time of decision is rendered, either approving or disapproving the plan." § 8-58(c), Richland County Storm Drainage Ordinance (1994). "If, at the end of the twenty (20) working day period, a decision has not been reached, the plan shall be deemed approved." *Id.*

#### **EVENTS UNTIL PLAINTIFF'S PURCHASE OF THE PROPERTY**

Richland County has been a participating community in the National Flood Insurance Program since 1981. On January 19, 1994, Richland County adopted as the official, effective FIRM for the County the FIRM issued by FEMA on that date. The Manning Levees, although substantial, were not certified levees, and in the effective FIS, revised July 17, 1995, FEMA noted that failures of the Manning Levees were expected to occur with major floods. The 1994/1995 effective FIS recognized that a flood on the Congaree River would be "affected by" the Levees. Accordingly, in 1994/1995 FEMA designated the land protected by the Manning Levees as being in a floodplain (Zone AE) but not a regulatory floodway. The FIRM also includes the BFEs within the various cross sections (A through E) that transect the Levee. Further, in 1994/1995 FEMA designated the relatively narrow strip of land between the channel of the Congaree River and the riverside toe of the Levees as the regulatory floodway, as it had done in all previously issued effective FIRMs. No portion of the Manning Levees was included in the regulatory floodway on the 1994/1995 effective FIRM. The Manning Levees and the land protected by the Levees had never been included in the regulatory floodway in any of FEMA's prior final mapping, dating back to 1977.

In its flood mapping activities, FEMA will recognize only levees certified pursuant to FEMA's regulations as providing protection from the base flood. 44 C.F.R. § 65.10(a). Land protected by certified levees is not considered part of the floodplain or floodway. 44 C.F.R. § 65.10; Tr. 1247-48. The standards for certifying levees include adequate design, including freeboard (*i.e.*, the levee's crest height must be two to three feet above the BFE), structural stability, and proper operation and maintenance pursuant to officially adopted plans. 44 C.F.R. § 65.10. The regulation incorporates references to the U.S. Army Corps of Engineers' manual, "Design and Construction of Levees." 44 C.F.R. § 65.10(b)(4). Pertinent to the present case is the requirement that all operations and maintenance activities "must be under the jurisdiction of a Federal or State Agency ... or an agency of a community participating in the NFIP." 44 C.F.R. § 65.10(c) & (d). The participating community, *e.g.* Richland County, "must assume ultimate responsibility for maintenance" of the levee for it to be certified by FEMA. 44 C.F.R. § 65.10(d).

Unlike FEMA's regulations, Richland County's ordinances do not provide a procedure for certifying levees so that the land protected by the levees will be removed from the floodway and floodplain. County ordinances do require, however, that "levees protecting residential structures or non-residential structures which are not floodproofed shall be designed, constructed and maintained to provide protection against the 500-Year flood plus three (3) feet of freeboard." § 8-62(g). County ordinances also require levees to be designed, constructed, and maintained in accordance with certain standards and by certain procedures. *Id.* §§ 8-64(d), 8-72.

FEMA's earlier studies and flood maps showed the Manning Property to be within flood hazard zones A and/or AE. These flood hazard zones triggered development restrictions under Richland County's Zoning Ordinance applicable to floodplains. FEMA's earlier studies placed the boundary for the regulatory floodway of the Congaree River at the riverside toe, or bottom of the side of the Manning levee facing the Congaree River.

In early 1998, FEMA announced that it was commencing a new study of Richland County. By May 1998, the County and others learned that FEMA planned to release preliminary Flood Data that showed a substantially widened floodway along the Congaree River. On May 29, 1998, Mr. Deas Manning, the son of Burwell Manning, wrote to the Richland County Administrator, Mr. Cary McSwain, seeking the County's help in opposing FEMA's new regulatory floodway for the Congaree River. He explained to Mr. McSwain that FEMA's proposed "change in the floodway would disallow ... any planned development."

FEMA's proposed preliminary Flood Data caused a potential investor to withdraw an option to purchase the Manning property because it could not obtain assurances from the Mannings or Richland County as to whether the agricultural levees could be improved in light of FEMA's preliminary Flood Data.

Burroughs & Chapin Company, a real estate holding and development company located in Horry County, South Carolina, was recruited as a potential investor. George Gregory, corporate counsel for Burroughs & Chapin Company, took the lead on behalf of Burroughs & Chapin to assess the property. He worked with a team that included Burwell Manning, Deas Manning, and Lockwood Greene, an engineering firm.

Burroughs & Chapin was aware that FEMA was conducting a restudy, and through its own due diligence, already knew as early as May 1998, that the property was to be designated as a floodway. FEMA released its preliminary Flood Insurance Rate Maps and a Flood Insurance Study for unincorporated Richland County on June 5, 1998. This preliminary flood map showed mostly higher base flood elevations than the 1995 Flood Data. It also showed an enlarged floodway that covered practically all of the property owned by Mr. Manning, the City of Columbia, Heathwood Hall and other owners of property within the Congaree River floodplain.

In keeping with FEMA's FEMA FLOODPLAIN MANAGEMENT BULLETIN 1-98, *Use of Flood Insurance Study (FIS) Data as Available Data* (Jan. 1998), Richland County intended to use the preliminary June 5, 1998 Flood Map as the basis for applying its floodplain management ordinances because the June 5, 1998 preliminary Flood Data showed mostly higher base flood elevations for the Congaree River than the 1995 effective Flood Data, and showed a widened floodway for the Congaree River. Because the June 5, 1998 preliminary Flood Map put most of Columbia Venture's Property within a floodway, the County's Floodway Provisions in effect at that time would have applied to any permit application for development in a floodplain or floodway.

An environmental report prepared by Rust Environmental and Infrastructure prepared for Burwell Manning dated June 5, 1998 stated that Richland County's Zoning Ordinance prohibited construction in a floodway. So long as FEMA's proposed floodway remained on the Manning Property, no development could occur. The report concluded that:

In order to change the proposed floodway designation, a formal maintenance program, likely through a government agency will have to be established. Sufficient levee reconstruction will then have to be undertaken. This study may involve a detailed survey of the area, and involve modeling of the river system to show that (1) the levee system will be effective and (2) that flooding will not be increased significantly in other areas of the basin as a result of the new levees. *Id.* at p. 18-19.

Mr. Manning provided a copy of this report to Burroughs & Chapin.

FEMA held a public meeting on July 8, 1998 to explain its preliminary Flood Data. Representatives of the City of Columbia, Lockwood Greene, Heathwood Hall, Burroughs & Chapin, and Richland County, as well as other several affected property owners, were present at the meeting. In explaining why FEMA departed from past floodway delineations for the Congaree, FEMA's study contractors explained that they could not locate any documentation that the Manning levee met FEMA's requirements under 44 C.F.R. § 65.10 for certification of the levee as a flood control structure.

FEMA fielded several questions from those who attended the meeting. When asked how a property owner with property within the floodway could build on his property, FEMA stated that:

FEMA regulations allow for no-rise studies to be done for any particular development. However, Richland County has adopted more stringent regulations and doesn't allow any development in the floodway (unless a variance is granted).

Mr. Gregory testified that Burroughs & Chapin did not take the new Flood Map seriously. Mr. Gregory thought the preliminary Flood Map was flawed and "had no chance of survival with any type of serious review." He believed that FEMA would not move forward with finalizing this Flood Map, and would instead issue a subsequent revised preliminary Flood Map.

If FEMA did issue another preliminary Flood Map that reverted back to the 1995 effective Flood Data, then the Property would not be in a floodway at all, and there would be no need for Burroughs & Chapin to be concerned with the County's floodway provisions. However, it that was not the case then it was of the utmost importance to upgrade the levees to certified status so that the land protected by them would be removed from the floodplain and floodway.

Soon after FEMA's public meeting to discuss its June 5, 1998 preliminary Flood Data, Cary McSwain, the Richland County Administrator, made a written request to FEMA asking that FEMA delay finalization of its June 5, 1998 preliminary Flood Data until more information was known about the status of the Manning levees. Mr. McSwain's request for delay was motivated by an interest in obtaining more time for any affected property owner to obtain and review relevant information.

In the letter, Mr. McSwain stated: "Given the magnitude of the changes, placement of over 5,000 acres into a floodway designation and the adverse impact this could cause on the economic viability, we would request the review process be put on hold." While his request would have benefitted any affected property owner, including Mr. Manning, Mr. McSwain testified that his request had nothing to do with any support or non-support of Burroughs & Chapin's development plans.

As noted above under the section dealing with regulations, both the County's Zoning and Stormwater Ordinances prohibited placing material or obstructions within a floodway "in such manner as to impede the free flow of water during a time of flood or in such a manner that the elevation of flood waters will be increased." Both Ordinances also relied on the County Engineer's input in construing their terms.

Mr. Gregory testified that he was aware during the due diligence process that the County was using the June 5, 1998 revised preliminary FIRM for floodplain management purposes and that the Levees were included in the regulatory floodway on that map. Consequently, the due diligence process included investigating the County's official position on what activities Richland County's ordinances allowed in the regulatory floodway. Certain members of the due diligence team, including Mr. Gregory, were investigating the County's position on permissible activities in a regulatory floodway. Mr. Gregory testified that he, in fact, investigated the County Engineer's interpretation of the word "impede" in the County's ordinances and that the County Engineer's office interpreted the "impede the free flow of water" language as consistent with the FEMA no-rise engineering standard.

Mr. Gregory testified that he and Mr. Tillotson, of Lockwood Greene, had conversations with the County Engineer, Mr. Pearson, and verified that the County Engineer was using the "no-rise" standard. Mr. Pearson, who served as the County Engineer from 1976 until 2005, testified that this was in fact the case. His office interpreted "impede the free flow of water" to be consistent with the FEMA "no-rise" standard. It was not until sometime after the purchase that the County Attorney advised Mr. Pearson that was not the correct interpretation and that "no impede" was to be literally construed. Mr. Pearson testified that prior to that, if a permit applicant could demonstrate a no-rise through appropriate engineering, that would be sufficient.

On February 17, 1999, Lockwood Greene gave an opinion to Mr. Gregory confirming its interpretation that the Levee improvements could be done with "no impact on the direction of the floodway or on the base flood elevations."

Mr. Gregory testified that it was the intent of Burroughs and Chapin to construct the upgraded Levees to the 500-year flood level, plus three feet of freeboard in conformance with Richland County's ordinances. Mr. Gregory further testified that Burroughs and Chapin would have built the Levees to the 500-year level even if the County did not so require in order to maximize the protection of the Property.

In the fall of 1998, Mr. George Gregory met with members of Richland County Council, including Mrs. Kit Smith, to talk about Burroughs & Chapin's plans for the property. Mrs. Smith recollected that Mr. Gregory discussed the proposed project in general terms, and provided only a preliminary sketch plan to look at. She gave no promises, commitments, or assurances to Mr. Gregory that the County would grant the necessary permits and rezoning needed to move forward with Burroughs & Chapin's plans.

Mr. Gregory also met with the County Administrator, Cary McSwain. Mr. McSwain testified that Mr. Gregory did not provide any specific details of Burroughs & Chapin's development plans for the property. He lacked sufficient information to form an opinion regarding Burroughs & Chapin's entire project. Mr. McSwain gave no assurances, promises or commitments to Burroughs & Chapin regarding project approvals.

On November 13, 1998, Burroughs & Chapin entered into a Purchase Agreement with Mr. Burwell Manning. In the Agreement, Burroughs & Chapin agreed to buy approximately 4,460 acres for \$18 million dollars. Mr. Manning would then exercise his rights to repurchase the property from local investors and convey the repurchased property to Burroughs & Chapin or another entity. The Purchase and Sale Agreement established a 60-day due diligence period wherein Burroughs & Chapin would, at

its sole discretion, conduct studies and investigations concerning title, environmental assessment and FEMA flood mapping inquiries.

At or before the expiration of this due diligence period, Burroughs & Chapin, at its sole discretion, had the option of executing a Notice of Intention to Purchase the property subject to fulfillment of conditions precedent applicable to both parties. The Purchase Agreement imposed an obligation upon Mr. Burwell Manning "to cooperate in working to insure that the Premises are not designated as a floodway."

On January 12, 1999, Burroughs & Chapin executed a Notice of Intention to Purchase, which included an additional condition precedent that "all issues related to FEMA floodway/floodplain, wetlands and the like shall have been resolved to Buyer's satisfaction in its sole discretion." The closing date was scheduled for February 11, 1999.

On January 26, 1999 and February 8, 1999, the Board of Directors of Burroughs & Chapin authorized the company to proceed with purchase of the Property based on certain criteria, including the following:

- 3) a commitment is obtained from FEMA to take the property out of the floodway classification upon dike improvements and an ongoing maintenance agreement;
- 4) that an agreement can be negotiated with Richland County to assume the maintenance of the dike system, to insure proper zoning can be achieved to implement a mixed-use project and obtain assurance that Richland County will be receptive to a development agreement, which will include some infrastructure funding via incremental tax growth grants.

On January 21, 1999, Lockwood Greene sought confirmation from the State Floodplain Coordinator at the S.C. Department of Natural Resources ("SCDNR") of a plan of action. In its letter, Lockwood Greene acknowledged that the June 5, 1998 preliminary Flood Data put the Manning Property within a floodway, and this "proposed designation as floodway limits expansion of the existing

development and prevents further development of the levee system.” It stated that owners of the Manning Property intended to take the following steps:

1. The property owners intend to upgrade the levee system to meet structural requirements set out in 44 CFR 65.10. Property owners will also have all required documentation prepared as required by 44 CFR 65.10, including operation and maintenance plans.
2. The property owners intend to request Richland County to accept the responsibility for operation and maintenance of the levee system in accordance with 44 CFR 65.10. Upon completion of the required modification to the levee system.
3. Upon certification of the levee system as a protective structure, the property owners will request, through Richland County, a letter of map revision of the current FIRM considering the levee system. It is our understanding that certification of the levee system will remove the area protected by the system from designation as a flood prone area or designation as any floodway. It will also remove the requirement for mandatory flood insurance on development.

On January 22, 1999, the State Floodplain Coordinator forwarded Lockwood Greene’s letter to FEMA with a request that FEMA answer the letter. On January 26, 1999, FEMA responded to SCDNR as follows:

If the aforementioned levee is upgraded to meet in total the applicable portions of 44 C.F.R., Part 65.10, and the construction necessary to bring the levee into compliance with State and local floodplain management requirements, then FEMA would revise the applicable FIRM to remove the Special Flood Hazard Area designation and floodway. As you are aware, should the structural modifications necessary to bring the levee into compliance with 44 CFR, Part 65.10 result in any increase in base flood elevations as a result of construction within the existing regulatory floodway of the Congaree River, the requirements of 44 CFR, Part 65.12 would also have to be met. In addition, any change in the configuration of the floodway as a result of the levee modifications will have to be done with the approval of the impacted communities.

As Mr. Gregory conceded, FEMA’s letter did not “commit” to “take the property out of the floodway classification upon dike improvements and an ongoing maintenance agreement” as Burroughs & Chapin required as part of its criteria that must be met in order to authorize purchase of the Property. Instead, FEMA merely restated its regulations concerning the steps Burroughs & Chapin

would need to take in order for FEMA to certify the levee as meeting its minimum level of flood protection needed to remove the flood hazard zones from the Manning Property.

FEMA's regulation concerning mapping of areas protected by levee systems provide a means by which FEMA will remove flood hazard zones A and AE from property behind a levee. See 44 C.F.R. § 65.10(a) ("... this section describes the types of information FEMA needs to recognize, on NFIP maps, that a levee system provides protection from the base flood ...."). It does not provide a way to revise a regulatory floodway. To revise the regulatory floodway, FEMA's letter, in an apparent reference to its regulation governing floodway revisions, cautioned that all affected communities must approve a reconfigured floodway. See 44 C.F.R. § 65.7(a)(3) (requiring approval of a floodway revision by all affected NFIP communities).

Lockwood Greene requested that Richland County agree to assume responsibility for maintenance of the levees upon certification from FEMA as an adequate flood control structure. On January 26, 1999, a Committee of Richland County Council considered Lockwood Greene's request. The Committee recommended that County Council "authorize the Council Chairman or his Designee to begin first steps of responsibility and maintenance [of the Manning levee] contingent upon engineering certification, certification by the Corps of Engineers and approval and acceptance by FEMA." This recommendation was forwarded to the next regularly scheduled County Council meeting held a week later on February 2, 1999.

A member of County Council, Kit Smith, although not a voting member of that Committee, attended the Committee meeting. She testified that she left the meeting concerned that the County had not done enough analysis of Lockwood Greene's request. Mrs. Smith said she started making phone calls people who knew about levee issues, and grew very concerned about what the County may be getting into.

As a courtesy, she explained her concerns to Burroughs & Chapin's outside counsel about the County Council taking action in a matter of days without more due diligence into issues of liability, costs, and public safety. She testified that she wanted the County to have "flexibility to conduct more research and gather more information before a final decision could be made."

However, because of the time limit involving the deadline on the repurchase by Mr. Manning of the property in a few days, Burroughs & Chapin put pressure on County Council to take action at its meeting on February 2, 1999. Mrs. Smith stated to Burroughs & Chapin's outside counsel that she would do her best to accommodate Burroughs & Chapin while at the same time, address her concerns that the County lacked sufficient information to understand the consequences of Burroughs & Chapin's request.

Mrs. Smith testified that she understood that the buyer felt it was important to have the County address the issue of the levee in some fashion before buying the property but she advised their lawyer that she felt it was being pushed too fast. Mrs. Smith stated she was concerned about the cost of maintaining the levees as well as several other issues. She testified that: "If they (the purchaser) wanted to make a bet based on an action that we would take, that was up to them."

Burroughs & Chapin's outside counsel offered to draw up a resolution and did so. Mrs. Smith testified that after reviewing the draft: "I felt the contingencies in the motion gave us the ability-gave us some maneuvering room. But this did not at all mean we were going to take the maintenance-we were not wanting to take over the levees and go forward, we had issues to be resolved." She said the proposed resolution would give them the time and leeway to further look into the situation.

Mr. Gregory testified that there was considerable pressure on to close the sale at or near February 19, 1999 because of Mr. Manning's situation. He analogized the opportunity to not being able to put Humpty Dumpty back together if the deadlines passed and Mr. Manning lost the property to various option holders. In this early stage, Mr. Gregory said the local officials with whom he discussed

the "vision" of the purchaser for an extensive mixed use development including residential, commercial and recreational uses were overwhelmingly in favor of the proposed project.

At the Council Meeting on February 2, 1999, Richland County Council unanimously adopted the following Resolution:

That the County accept responsibility for local inspection and enforcement of the the operations and maintenance plan as submitted by the owner and approved by FEMA, and if required by FEMA regulation 44 CFR 65.10, to accept operation and maintenance responsibility for the levee system contingent upon:

- (1) The property owners upgrade the levee system to meet FEMA standards as contained in 44 CFR 65.10;
- (2) The property owners prepare all required documentation including operation and maintenance plans;
- (3) Certification that the levee system, as upgraded, meets FEMA standards;
- (4) The parties, which include Richland County, the City of Columbia, and the developers, resolve the issues of the performance and funding of the operation and maintenance responsibility;
- (5) The County's acceptance of responsibility terminates if the developers of the area do not invest at least \$30,000,000 within 10 years of the date of the adoption of this motion.

Mr. Gregory, an attorney, conceded that Resolutions do not bind the enacting body to any particular course of action. He also acknowledged that obviously a Resolution does not have the legal effect of an ordinance or a contract.

The County's Resolution did not provide the outright assurances required by 44 C.F.R. § 65.10 relating to levee maintenance. Further, the County agreed to accept this responsibility if 44 C.F.R. § 65.10 required Richland County to accept responsibility for levee maintenance. 44 C.F.R. § 65.10(d) required levee systems to be maintained by a federal, state or local community; however, the regulation does not impose upon these entities any requirement that they must accept such responsibility. The decision regarding whether to accept responsibility for levee maintenance is at the discretion of the

agency or community. Further, the Resolution contained certain contingencies that must be met by either by the County or Columbia Venture or both in order for the County's acceptance to occur.

Mr. McSwain, the County Administrator at that time, testified that he understood the Resolution to allow "the Council to bring together those parties who had interest in the project to be able to discuss those issues and try to resolve issues as we went along." If the contingencies were not resolved to the County's satisfaction, then the County had a right not to go forward. Similarly, as noted above, Mrs. Smith testified that the Resolution gave the County time to fully explore issues such as liability and financing. There was no certainty that any of the contingencies listed in the Resolution could or would be met.

On February 18, 1999, Burroughs & Chapin obtained a letter from Lockwood Greene providing an assessment of the levee issue. It noted "preliminary indications" that FEMA's final Flood Maps may remove "a large portion of the property in Richland County" from the floodway. Lockwood Greene stated that "based on FEMA regulations, if the levee system is classified as a protective structure, the Special Flood Hazard Classification can be removed." With regard to the possibility that levee construction could increase the base flood elevations, Lockwood Greene stated that its interpretation of Lexington County's preliminary Flood Data "indicated" or "implied" that its contemplated levee improvements would not increase base flood elevations in Lexington County.

On February 19, 1999, Burroughs & Chapin requested and obtained from the Richland County Administrator a "non-binding" letter of understanding stating that the County would "work with the developers of the property on issues critical to the proposed development, such as zoning, tax incentive vehicles and a multi-county business park." The letter explicitly stated that it was non-binding both at the head and foot of the letter.

On February 8, 1999, Burroughs & Chapin was provided an appraisal that valued the Property at \$30 million dollars. Mr. Manning obtained an extension on the deadline to repurchase until February 25,

1999. Columbia Venture bought the Property for \$18 million dollars. Columbia Venture believed that, if it needed to exit from the project, the Property could be sold for \$30 million dollars, bringing a \$12 million dollar profit.

As of the date of purchase, FEMA's preliminary Flood Map put almost all of the Property within a floodway, and Columbia Venture did not know what FEMA's final flood map would look like. Also, Columbia Venture knew the Rust Report's conclusion that the County's Zoning Ordinance prohibited construction in a floodway. Nor did Columbia Venture know whether it could upgrade its levee to meet FEMA's levee certification requirements or the County's Levee Standard.

Columbia Venture hoped it would be able to convince FEMA to issue a new preliminary revised Flood Map showing no floodway on its Property; once FEMA finalized this map, then it planned to proceed with a request to FEMA to remove the AE flood hazard zone from the map through levee certification. However, even if the then current map did not change, Columbia Venture presented testimony that it intended to submit plans to FEMA that would hopefully allow levee certification even in the floodway by showing a "no rise" proposal.

Of course, the preferred route was to get the levees out of a floodway. Burroughs & Chapin issued a prospectus provided to potential investors explained that its first step was to submit technical data to FEMA as part of the restudy that would convince FEMA to issue a new preliminary Flood Map without a regulatory floodway extending across the Property. A confidential memorandum dated December 7, 2000 sheds light on Columbia Venture's intention when the property was purchased in February, 1999. Columbia Venture stated that its initial development plan was to "purchase the property at the right price," and then "secure appropriate flood lines from FEMA that would allow Columbia Venture to retrofit the levees ... to satisfy the requirements for a certifiable levee...."

Columbia Venture's thought process is further revealed in a Lockwood Greene progress report in which Lockwood Greene described its activities from February 1999 to July 1999 as focused "on

developing a strategy and preparing and submitting technical data to challenge FEMA's ... existing and proposed FIRM which place Venture's property in the floodway and floodplain." According to Columbia Venture's engineer, Mr. Mark Hester, this step was critical because the floodway "made the property unbuildable ... by regulation, you couldn't build in a floodway." Assuming Columbia Venture was successful in this endeavor and FEMA's preliminary revised Flood Data was not appealed, then Columbia Venture would proceed to levee improvements to meet FEMA's levee certification requirements. Lockwood Greene planned to submit a conditional letter of map revision ("CLOMR") to certify the levee soon after FEMA finalized its Flood Data. A CLOMR is issued by FEMA, not Richland County.

Levee certification would have the effect of removing FEMA's flood hazard zone AE and A from the Property. Columbia Venture could then build homes and other structures without having to elevate them above the base flood elevation, as would be required under Richland County's Zoning Ordinance if the Property was left within a Zone AE or A designated by FEMA.

### **EVENTS AFTER PLAINTIFF'S PURCHASE OF THE PROPERTY**

A few days after the closing, Columbia Venture announced ambitious plans for a one billion dollar development on the property soon to be called "Green Diamond." The initial Green Diamond plan included residential use, golf courses, an outlet mall, restaurants and hotels, offices, retail businesses, a research and development park, a retirement village, a theme park, and a wildlife expo, all to be constructed on the Congaree River floodplain.

On February 25, 1999, FEMA released a revised preliminary Flood Map that reduced the floodway in comparison to the June 5, 1998 preliminary Flood Data, but nonetheless put about 50% of Columbia Venture's Property within a floodway. Again, the county asked FEMA not to publish the map and FEMA agreed.

Columbia Venture wanted to improve the existing levees in an effort to persuade FEMA to recognize the levees as being effective in flood control. As of May 1999, the County Administrator had decided to use for permitting purposes the currently effective maps of 1995, which had no floodway on the Property, thereby opening the door for a permit application from Columbia Venture.

In order to improve the levees, Columbia Venture was required to obtain a land disturbance permit as well as approval of levee design and construction plans that complied with the County's Levee Standard within the Storm Drainage Ordinance. On May 6, 1999, Lockwood Greene submitted to the County Engineer's office a permit application for a land disturbance permit. Mr. Gregory testified that the application was submitted for the purpose of "beginning the process of upgrading the levee system" by "bringing it back to its original form and status," which required "some increase in height and some widening." Mr. Hester, the Lockwood Greene Engineer who actually prepared the application, testified that the permit application was to perform maintenance, not to upgrade the levees to the County's 500 year standard.

The application failed to include a complete set of plans and specifications which the county engineer, Mr. Pearson, said would be necessary before his office could consider it. It is undisputed that Columbia Venture did not have a comprehensive set of the necessary documents to support the application.

Lexington County became aware of Columbia Venture's permit application. Mr. Charles Compton, the Lexington County Planning Director at the time, testified that the prospect of improved levees in Richland County created a "situation where water that previously might not come would be coming towards Lexington County." He further stated that this situation "created a scary image for Lexington County property owners." Lexington County's top concern was that an upgraded levee on the Richland County side of the Congaree River would cause greater flooding in Lexington County. Lexington County expressed these concerns to Richland County officials.

On May 19, 1999, FEMA sent a strongly worded letter to Richland County, stating that:

We are also aware that there is interest to improve a flood control structure in the [Congaree River floodplain]. We understand that a major residential and commercial development may be proposed, and therefore encourage all affected parties to be aware of the existing flood hazards and the impacts that proposed projects in that area may have on flood hazards. It is important to ensure that such improvements do not aggravate flood hazards, while at the same time provide adequate protection to existing and any proposed development. ...

In the meantime, FEMA considers the February 25, 1999 revised preliminary FIS and FIRM to be the best available data; therefore, we encourage your county to use these maps as the basis for sound floodplain management .... If construction to enlarge the levee is permitted based on the currently effective FIS and FIRM, dated July 17, 1995, local officials may inadvertently expose individuals to more hazardous flooding conditions. This could result in increased restrictions on future development, and/or increased risk to life and property. In our opinion, permitting levee construction before resolution of all technical issues could be viewed by the affected communities and the public as usurping due process and would add additional controversy to this important matter.

FEMA respectfully asks that you delay a decision on levee construction until after the next public hearing and after all parties have had input into developing the best possible flood risk maps. ...

Later in May, 1999, Mr. McSwain, the County Administrator, after consulting with staff went further and made the decision not to issue any permits to improve the levees until after FEMA had completed the flood mapping process.

Despite this decision by the County to defer permits until FEMA finally acted, Columbia Venture continued with studies in regard to improving the levees. S&ME, an engineering company hired by Columbia venture, published its complete Preliminary Geotechnical Report – Levee Section 1 on May 21, 1999. S&ME completed the Levee Section 2 exploration and issued a geotechnical report to Lockwood

Greene on August 10, 1999. Lockwood Greene calculated the 100-year and 500-year flood elevation levels and provided the calculations to S&ME over the course of the engagement.

In the fall of 1999, Lockwood Greene instructed S&ME to design to the 500-year flood level to meet the Richland County ordinance requirements. According to testimony by S&ME's engineer, the major differences in construction between the 100- and 500-year height levels would be the raised elevation and an increase in the volume of material to be added to the landward side of the Levee in order to provide the factor of safety required by the U.S. Army Corps of Engineers. S&ME finalized its 500-year flood analysis for Levee Sections 1 and 2 on November 16, 1999. The engineer testified that the required modifications were "basically reshaping the inside face, reshaping the outside face. ... [T]here weren't any real sections where you had to relocate the levee to avoid certain areas or abandon large sections of one of the levee areas to be able to protect the rest of them."

Consequently, Columbia Venture would not have had the "complete comprehensive set of plans" the County Engineer required for a permit to upgrade the Levees until after November 16, 1999. However, as described earlier, Mr. McSwain had made the decision months earlier not to issue any permits for Levee improvements until FEMA's flood mapping process was complete.

The cost of improving the levees to the standard for a 100 year flood was estimated by Lockwood Greene in a February, 1999 report to Columbia Venture to be \$12,000,000.00. I am unaware of the cost for a 500 year flood.

As for the floodway problem, back on May 27, 1999, Lockwood Greene presented its strategy for reducing the floodway delineation on Columbia Venture's property as shown on the February 25, 1999 preliminary Flood Maps. The plan was to submit data to FEMA that showed the uncertified levees to be an "existing condition" that will hold back a 100-year flood on the Richland County side of the Congaree River and thus reduce the floodway on the Richland County side of the River.

Sensitive to impacts upon Lexington County, Lockwood Greene stated that its plan would cause no increase in base flood elevations or any enlarged floodway on the Lexington County side of the Congaree River. The strategy, however, would not keep the levee out of the floodway. Lockwood Greene's model showed the floodway extending to the landward side of the levee. Lockwood Greene cautioned that "there is always a risk during the public comment period that some additional information will be brought out that will challenge either our numbers or our strategy for development." Lockwood Greene recognized that "there are different opinions regarding the variables involved in developing the hydrological and hydraulic data used as input for the model." On August 12, 1999, FEMA issued preliminary revised Flood Data that incorporated Lockwood Greene's data. The new preliminary revised Flood Map rolled back the floodway to the landward toe of the levee and reduced base flood elevations in comparison to the 1995 effective Flood Data.

Under this preliminary revised Flood Data, Columbia Venture's levee was located within the Congaree River floodway but the rest of the Property was outside of the floodway.

In the summer of 1999, Mr. Gregory and Mr. Manning testified that substantial public opposition to the project began to surface. Mr. Manning testified that his impression of the objective of the opposition groups was to stop Columbia Venture's development. Mr. Gregory further testified that certain opponents of the project targeted Burroughs and Chapin and disparaged its reputation as a developer.

It was following FEMA's announcement of this new preliminary revised Flood Data, that the County attorney advised the County Engineer, Mr. Pearson, that the word "impede" should be interpreted according to its plain and ordinary meaning. This was deemed to mean a "no build" interpretation rather than the lesser restrictive interpretation that building could occur as long as there was "no rise" in water level.

The deadline to submit any appeals of FEMA's August 12, 1999 Flood Data was December 13, 1999. As the appeal deadline approached, Richland County received numerous appeal letters. Richland County submitted an appeal of the August 12, 1999 Flood Data on behalf of the community. Other entities also filed appeals, including the South Carolina Department of Natural Resources.

Columbia Venture was not planning to proceed with development of its Property until after FEMA issued its appeal resolution. Once FEMA issued its appeal resolution, Columbia Venture planned to initiate discussions with the City and County regarding economic development incentives; construction, ownership, operation and maintenance of the levees; levee liability issues; annexation and zoning. Columbia Venture planned to seek annexation into the City of Columbia followed by submittal of an economic incentive package. Levee construction was planned to commence upon approval of the development agreement and financing package.

As of May 5, 2000, Columbia Venture was still working on its land use plan. In May 2000, Columbia Venture began meeting quietly with Richland County, the City of Columbia and others. In June 2000, Columbia Venture, along with its public relations firm and attorneys and lobbyists, met with Richland County officials and legal counsel to discuss preliminary development issues. Columbia Venture stated its willingness to consider sharing the costs of the County's review of its project. The County and Columbia Venture began jointly developing a work plan.

Kit Smith, County Council's Chairwoman at the time, informed the Council that, due to the complexity of the proposed Columbia Venture development, the County staff had begun developing a strategic approach and identifying administrative tasks and policy decisions in order to provide for "thorough due diligence." She stated her goal of making sure "that Council has complete information to make informed decisions on all facets of the ... proposed development and that the public has full confidence in our efforts."

Toward this end, the County prepared a list of issues for deliberation, including levee improvements, levee maintenance, financing of levee maintenance, and economic development incentives.

By August 2000, Columbia Venture contemplated seeking rezoning, a development agreement, and a public financing mechanism from the County. From the City, it contemplated the City's involvement with the development agreement, and that the City would enter into a levee agreement. Additionally, Columbia Venture planned to seek annexation into the City. Columbia Venture hired several politically influential lawyers and lobbyists to help gain support for its project.

FEMA's administrative appeals resulted in new preliminary revised Flood Data issued on September 26, 2000 ("Appeal Resolution"). The Appeal Resolution expanded the regulatory floodway to cover approximately 70% of Columbia Venture's Property.

Due to the unexpected Appeal Resolution, the County suspended substantive negotiations with Columbia Venture until the Appeal Resolution was finalized. During this interim period, the County undertook efforts to educate itself about issues related to Columbia Venture's project "in order to make responsible, informed decisions about the Green Diamond Project." Throughout the fall of 2000, the County conducted its own research regarding floodplain and levee issues, and organized educational forums featuring nationally recognized experts.

FEMA provided a thirty-day comment period before it proceeded to finalize the Flood Data. Within the thirty-day comment period established by FEMA, Columbia Venture submitted comments objecting to the September 26, 2000 Appeal Resolution. Specifically, Columbia Venture took issue with FEMA's use of its hydraulic model for the landward side of the levee, also called the "Richland Model," in its delineation of the Congaree River floodway. Columbia Venture wanted the hydraulic model for the riverward side of the levee, also called the "Lexington Model" to be used to map the

regulatory floodway. It asked FEMA to delay issuing its final determination until it had the opportunity to submit additional data.

In October 2000, Columbia Venture launched a public relations campaign that publicly revealed for the first time its preliminary concept plan and vision for the property in order to gain support from local elected officials. Further, Columbia Venture sought to persuade the County that the County Attorney's interpretation of the word "impede" in the Floodway Provision of the Storm Drainage Ordinance was incorrect.

In October 2000, a citizen group called the Congaree Task Force held its first press conference opposing the project.

The County asked an outside law firm, Nelson Mullins, to prepare an opinion for the County addressing potential liability assuming the County took responsibility for maintaining the levees and once the levees were constructed there was a levee failure.

Nelson Mullins concluded that:

Cases against political subdivisions regarding levee maintenance, or more generally, drainage system maintenance, are not rare. In most of the reported cases that we have reviewed, the political subdivision has ultimately won, although often only after extensive litigation and appeals. In this connection, the County may be able to take certain actions to reduce the possibility of liability and/or to shift/insure risk, such as indemnity agreements, bonds, letters of credit and pre-paid insurance, but it does not appear possible to eliminate exposure for major liability.

On November 28, 2000, the Congaree Task Force provided County Council a legal opinion from the Southern Environmental Law Center ("SELC"), another entity which opposed the project, asserting that the variance provision within the proposed Stormwater Ordinance raised serious legal questions as applied to any variance from the County's floodplain management provisions. The County asked Nelson Mullins to review the SELC opinion and provide input.

Regarding the variance provision within the Stormwater Ordinance, Nelson Mullins' opinion raised potential problems with the variance provision as applied to the floodplain management regulations contained within the Stormwater Ordinance. Nelson Mullins advised the County to give further consideration to the proposed variance provision as it applied to floodplain management provisions

On December 4, 2000, the County asked Columbia Venture for the following:

- Cost estimates for levee construction and maintenance, including methodology for arriving at estimates.
- Copy of CLOMR prepared by Columbia Venture, including the levee design, technical analyses that prove no impact, and internal drainage design; and an indication as to which community Columbia Venture intends to request approval of the CLOMR.
- Columbia Venture's proposed means of financing and carrying out levee construction, maintenance, and repair, and specifically, who will pay for what.
- Columbia Venture's proposal/contemplation as to who ultimately will have legal title to the land on which the levees sit.
- Columbia Venture's proposal/contemplation as to who will be primarily and/or secondarily liable for any claims made in connection with harm to people and property resulting from a failure of the levees.
- Copy of levee district documents obtained by Columbia Venture from the Houston, Texas area.

On January 2, 2001, the County followed up with Columbia Venture, asking when it would receive the information it requested from Columbia Venture in December. Columbia Venture responded by stating that it was "hesitant to turn over information if we don't know where we are going." Columbia Venture thought that the "focus with the information would be to consummate a development agreement of which there are many components." It proposed that "we should set the threshold issues, get past them, then get into the details."

Columbia Venture proposed the creation of a working group comprised of representatives from Richland County, the City of Columbia and Columbia Venture "to continue discussions and negotiations regarding details of the proposed Green Diamond Project." The County agreed to participate in the proposed working group but was not yet prepared to negotiate any development approvals until FEMA issued its final determination.

On January 10, 2001, Columbia Venture proposed that the County remove from the proposed Stormwater Ordinance provisions pertaining to floodplain management, including the Floodway Provision, and enact a comprehensive floodplain management ordinance.

On January 12, 2001, Nelson Mullins presented its legal opinion to the County relative to the proper construction of the “no impede” language in the Ordinance. In its opinion interpreting the Floodway Provision, the opinion stated:

Applicable law provides that words should be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand an ordinance’s or statute’s operation. “Impede” has been defined to mean “to interfere with or slow the progress of,” Merriam-Webster’s Collegiate Dictionary 580 (10<sup>th</sup> ed. 2000), and “to obstruct; hinder; check; delay.” Black’s Law Dictionary 753 (6<sup>th</sup> ed. 1990). Thus, Subsection (h) would appear to prohibit any structure which would interfere with or slow the free flow of water during times of flooding, while the comparable NFIP provision would appear to allow such a structure if it would not result in any increase in flood levels during a 100-year flood.

In February 2001, County Council again considered the proposed Stormwater Ordinance. County staff recommended that County Council defer action on whether it should revise the “impede” language until it had an opportunity to review all aspects of floodplain management in a new comprehensive ordinance; however, if the Council felt compelled to take immediate action, County staff recommended replacement of the “impede” language with FEMA’s minimum standard for construction in a floodway.

Both the City of Columbia and Heathwood Hall had sizable investments in structures located on their property. In contrast, Columbia Ventures had very few structures on its property. The City had plans to improve its wastewater treatment plant, and the floodway designation, if finalized by FEMA, would have prevented construction in a floodway under the County’s ordinances unless a variance was obtained. Heathwood Hall, also located within what was now a preliminary revised floodway, grew

weary of waiting for FEMA to issue a final Flood Map, and decided move forward expeditiously with its existing expansion plans. Both the City and Heathwood Hall requested that Richland County amend its Stormwater and Zoning Ordinances to allow construction to occur in a floodway.

In response to these concerns, SELC proposed an amendment to the Floodway Provision that would create exceptions for existing schools and wastewater treatment plants. The County prepared a proposed amendment to the Floodway Provision that included a revised and expanded version of SELC's proposed amendment. On March 20, 2001, Council gave first reading to the Stormwater Ordinance as amended.

The amendment in effect allowed Heathwood Hall and the City's wastewater treatment plant to expand provided that they demonstrate that their expansion plans met FEMA's minimum floodplain management "no rise" standard governing encroachments in a floodway.

In addition, the proposed amendments provided that although levees can still be maintained as previously provided that no repair or maintenance will be allowed if it would result in the levee being "higher or wider than it was before the need arose for such repair or maintenance."

As amended, the word "impede" within the Stormwater Ordinance was interpreted to mean essentially no construction within a regulatory floodway with the exception noted above in re the wastewater plant and the school. This standard was more restrictive than FEMA's standard concerning encroachments in a floodway. The general rule of "no-impede" applied to all Richland County property within a regulatory floodway. Within a floodway, the greatest flood velocities and depths occur, causing the greatest damage during a flood.

Further, there would be no right to seek a variance from the provisions of the Ordinance.

On March 20, 2001, County Council gave first reading to the Stormwater Ordinance as amended. The Council expressly stated as part of its motion for first reading that its vote "in no way reflects council's position on any development in (the Congaree floodplain)."

On April 2, 2001, Columbia Venture transmitted a letter to County Council Chair Kit Smith, which stated:

While we continue to have concerns over the proposed amendment to the stormwater ordinance you are currently considering, Columbia Venture has decided that at this time our focus should be squarely on producing our formal development proposal and working toward a development agreement with Richland County, Richland County School District One, and possibly the City of Columbia.

We also appreciate your assurance, reiterated most recently at the last council meeting, that if we can reach an agreement on the development of Green Diamond, and if modifications are needed in your stormwater ordinance in order for the project to proceed, you would support the appropriate modifications at that time.

For these reasons, and because of your statements that votes on the stormwater ordinance should not be viewed as up or down votes on Green Diamond, we are withdrawing any active opposition to the amendment currently before you.

The County's Stormwater Ordinance was enacted on April 17, 2001. By this time, only two of the eleven members of County Council remained firmly committed to the Columbia Venture project. The relevant portions are as follows:

The purpose:

In order to protect the general health, safety and welfare of the people of Richland County, South Carolina, and to protect the natural assets and resources of Richland County for posterity, this Stormwater Management, Erosion and Sediment Control Chapter is enacted to protect the lands and waters from the effects of excessive soil erosion and sedimentation, to prevent siltation of streams and lakes, to prevent clogging of drainage channels, and to prevent damages to the property of adjacent landowners. In addition, it is the purpose of this Chapter to provide proper drainage channels, clear of obstruction, for stormwater runoff; to control pollution of streams and drainage channels by urban stormwater runoff; and to prevent encroachment into natural drainage

channels by buildings or other land improvements. Proper management of the quality and quantity of stormwater runoff will minimize damage to public and private property, insure a functional drainage system, promote the attainment and maintenance of water quality standards, enhance the local environment associated with the drainage system, maintain as nearly as possible the pre-development runoff characteristics of the area, and facilitate economic development while mitigating associated flooding and drainage impacts.

Section 8-26 Primary Drainage Channel Requirements

...

(g) All levees protecting residential structures or non-residential structures which are not floodproofed shall be designed, constructed and maintained to provide protection against the 500-year flood plus three (3) feet of freeboard. ... Any levee constructed or improved under this subsection shall also comply with the other provisions of this Chapter, including, but not limited to, subsection (h) below.

(h) Notwithstanding any other provision of this Chapter, no levees, dikes, fill materials, structures or other obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway, unless:

- (1) such proposed impediment is or would be a part of or used by any public or private school that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway; or
- (2) such proposed impediment is or would be a part of or used by any publicly owned wastewater treatment facility that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway; or
- (3) such proposed impediment is a minor recreational or playground facility or area, such as, but not limited to, a boat ramp, floating dock, picnic area, soccer goal, or swing set; or
- (4) such impediment was approved by the County Engineer under this subsection (h), or under any predecessor provision, before January 1, 2001;

provided, however, that any specified activities permitted above must comply with all applicable federal, state, and local requirements, including, but not limited to, 44

C.F.R. § 60.3(d)(3), as amended. Nothing in this subsection (h) shall limit provisions in this Chapter or elsewhere authorizing or requiring the maintenance and repair of levees, dikes, dams, and similar structures; provided, however, that this sentence shall not be construed as authorizing or requiring the repair or maintenance of any such structure that would be higher or wider than it was before the need arose for such repair or maintenance.

The provision relative to the requirement that levee construction be sufficient to protect against a 500 year flood is the same as that in the 1994 Ordinance.

The listed land uses excepted from the general rule must meet FEMA's minimum "no-rise" standard, and structures must be either elevated or flood-proofed.

Mr. Michael Criss, the County's Planning Director in 2001, testified that Richland County's more restrictive standard served the interest of protecting public health and safety because FEMA's flood maps "do not account for the continued urbanization and development of the corresponding watersheds and the resulting increase in stormwater runoff and potential flooding." Mr. Criss further explained that FEMA Flood Maps rely on historical flood records and don't project the potential of increased flooding in the future from urbanization. He testified that floodplain management ordinances that are more restrictive than FEMA's minimum standards provide a higher level of safety.

Mr. Criss testified that Richland County citizens, including those who own property in a floodway, benefit from the County's more restrictive standard in the following manner:

Well, they, themselves, are directed to build out of harm's way than would otherwise be the case. Their neighbors have to do the same, so that the neighbors aren't causing increased flooding on the given property owner's land. The property owner has the availability of affordable flood insurance for their own assets. Presumably they contribute fewer tax dollars to the cost of flooding.

Mr. Charles Compton, Planning Director for Lexington County, testified that protecting the regulatory floodway from any encroachments is critical from a land use planning standpoint. He said that planning according to a "worst case scenario is absolutely the best for floodplain management for a local jurisdiction".

When asked, in terms of floodplain management and flood protection, about the difference between providing the possibility of continuing use of a school facility that's located in a floodway versus the possibility of an entirely new mixed use development in a floodway, Mr. Michael Criss, former Richland County Planning Director, testified that:

Well, of course, an existing school facility would be difficult to move/relocate. It's not typically occupied 24/7, such as a residential community would be. It would still benefit from flood proofing and flood prevention measures for the safety of faculty and students and other users.

When asked, in terms of floodplain management and flood protection, about the difference between providing the possibility of continuing use of a sewer plant that's located in a floodway versus the possibility of an entirely new mixed use development in a floodway, Mr. Criss testified that:

The sewer plants and water treatment plants and power plants are dependent on proximity to water. The sewer treatment plants, in particular, generally rely on gravity sewer systems that run along streaming [sic] and river corridors, so they're inherently located close to flooding sources. Mixed use communities, of course, involve homes and businesses and offices and intense infrastructure, development, to support them. ... [Mixed use communities attract] more people living, working, recreating. And a new community development in the floodplain is coming to the nuisance, is risking the exposure to the hazard that's already been established by the community.

On the same day that County Council gave third reading to the Stormwater Ordinance, the County Council provided a list of information requests to Columbia Venture "as a proactive communication letting the Company know what the County wants included in its [development] proposal." On May 1, 2001, Columbia Venture presented to Richland County Council a document entitled "The Simple Truth About Green Diamond." The document's stated purpose was:

- To demonstrate the lack of financial and legal risk for the general public and governmental entities including Richland County, City of Columbia, and Richland One School District.
- To demonstrate that the Green Diamond Project is both safe and environmentally sensitive.

- To demonstrate the benefits and opportunities associated with this project.
- To provide an overview of the cost benefit analysis.

The document requested approximately \$80 million dollars in infrastructure costs to be paid through the sale by the County of special source revenue bonds. These costs included approximately \$8 million dollars from the bonds toward the cost of levee construction, and \$300,000 per year for maintenance, insurance costs and permitting. A lot of information was submitted but the document contained no applications for land development, no draft ordinances relating to a multi-county business park or special source revenue bonds, and no draft development agreement. *It did not* explain what it was asking specifically from the County, other than the designation of the Property as a multi-county business park.

Ms. Smith testified that Columbia Venture provided “[a] tremendous amount of data” to the County. As a result of the data received by the County from Columbia Venture and others, Ms. Smith testified that she “became opposed to intense development behind levees.” She further testified that “as time went on, it became apparent to me that we did not need – the County didn’t need to take a risk of building the levees.” The testimony was clear that Mrs. Smith by this point felt strongly and negatively about the proposed development.

On August 20, 2001, FEMA issued its final determination of Congaree River Flood Data. This put approximately 70% of Columbia Venture’s Property within a floodway. 3,130 acres of Columbia Venture’s Property was within the floodway. 1,135 acres were outside of the floodway.

Columbia Venture began exploring exit strategies. On February 20, 2002, FEMA’s August 20, 2001 Flood Data for unincorporated Richland County became effective by operation of law. Columbia Venture has stipulated that the date of alleged regulatory taking was February 20, 2002.

## **CONCLUSIONS OF LAW**

Under both the United States and South Carolina Constitutions, government cannot take private property for public use without paying the owner just compensation. U.S. Const. amend. V; S.C. Const. art. I, § 13. The *Fifth Amendment* “does not prohibit the taking of private property, but instead places a condition on the exercise of that power.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005). “In other words, it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.” *Id.* It is only when a regulation “goes too far,” that the issue of a regulatory taking arises. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

At the outset, it is important to give proper focus upon what exactly has interfered with Columbia Venture’s property interests such that a regulatory taking could have arguably occurred. A regulatory taking occurs “when a regulatory or administrative action places such burdens on the ownership of private property that essential elements of such ownership must be viewed as having been taken . . . .” *Hendler v. United States*, 36 Fed. Cl. 574, 585 (1996), *aff’d*, 175 F.3d 1374 (Fed. Cir.1999); *see also Kiriakides v. Sch. Dist.*, 382 S.C. 8, 15, 675 S.E.2d 439, 433 (2009) ( ...”a regulatory taking by its very nature necessitates the existence of some regulation, statute, ordinance, zoning law, or similar rule of law that impacts a landowner’s use of his property. In other words, regulatory takings exist only in conjunction with affirmative governmental restrictions on the use of land.”). Regulatory takings jurisprudence concerns itself with regulatory burdens imposed upon real property that significantly interferes with a property owner’s reasonable investment backed expectations.

An interest in a discretionary government benefit that enhances property value is not protected under the takings clause. *Henry v. Jefferson County Comm’n*, 637 F.3d 269, 277 (4th Cir. 2011); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 (4th Cir. 1998); *Horne v. Mayor of Baltimore*, 2008 U.S. Dist. LEXIS 123707 (D. Md. 2008). The Fourth Circuit has flatly

rejected takings claims based on a government's refusal to enhance the value of property or to exercise its discretion in a manner that provides greater profitability. *Henry v. Jefferson County Comm'n*, 637 F.3d 269, 277 (4th Cir. 2011). Thus, Columbia Venture cannot claim a regulatory taking based on the County's failure to grant a benefit such as a development agreement or an economic development incentive where, as here, the government never obligated itself to do so. See *Frall Developers, Inc. v. Bd. of County Comm'rs for Frederick County*, 2008 U.S. Dist. LEXIS 78912, 34-35 (D. Md. 2008) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.").

The County's resolution concerning levee maintenance was also a discretionary benefit. The resolution related to one of the requirements under 44 C.F.R. § 65.10 that must be met in order for FEMA to reflect on a Flood Map a levee that provides flood control protection sufficient to justify removal of flood hazard zones on property behind the levee. Nothing required Richland County to accept responsibility for operating and maintaining a private property owner's levee. Although the Resolution provides some basis for Columbia Venture to assert more than a unilateral, inchoate interest in County acceptance of maintenance responsibility, the language of the Resolution nonetheless does not obligate the County to do so.

The County agreed to accept this responsibility for levee maintenance if 44 C.F.R. § 65.10 required Richland County to accept responsibility for levee maintenance; 44 C.F.R. § 65.10(d) does not impose upon the County any requirement that it must accept such responsibility. Moreover, the resolution contained the contingency that "Richland County, the City of Columbia and Columbia Venture resolve issues of performance and funding of the operation and maintenance responsibility." This

contingency provided the County with ample discretion to ultimately decline to accept responsibility for levee maintenance if these issues were not resolved.

Consequently, Columbia Venture cannot rest its regulatory takings claims on the County's alleged failure to confer the benefit of assuming responsibility for levee maintenance. *See e.g. Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1331-1332 (Fed. Cir. 2012) (holding that plaintiff does not have property interest in a government benefit).

The proper inquiry here is whether Richland County's floodplain management ordinances as applied to Columbia Venture's Property caused a significant burden upon Columbia Venture's ability to develop its property to the extent that, under *Penn Central Transp. Co. v. New York City*, 438 U. S. 104 (1978), just compensation is due.

#### **RIPENESS OF PLAINTIFF'S CLAIM**

A regulatory taking claim is not ripe until the plaintiff has given the government an opportunity to make a final decision regarding the application of the regulation at issue. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985); *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 406-407 (4th Cir. 2007)

"As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established." *Palazzolo v. Rhode Island*, 533 U.S. 606, 621, (2001). This is because, "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 348 (1986).

The ripeness test is a fact-sensitive inquiry. *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 350 (2<sup>nd</sup> Cir. 2005). The *Williamson County* Court held that a takings claim challenging the application of land-use regulations is not ripe unless “the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” *Williamson County*, 473 U.S. at 186.

The Supreme Court revisited and distinguished the *Williamson County* decision in *Palazzolo*, in which the Court held that:

While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.

*Palazzolo*, 533 U.S. at 620.

The *Palazzolo* decision stated further that the “[r]ipeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities ... only if there is uncertainty as to the land’s permitted use.” *Id.* at 622.

In the present case, there was no uncertainty over the land’s permitted use. On April 17, 2001, Richland County enacted an ordinance stating that “no levees, dikes, fills, materials, structures, or obstructions that will impede the free flow of water during times of flood” are permitted in the regulatory floodway and, at the same time, interpreted the phrase “impede” to mean “no build.” The amended Stormwater Ordinance also prevented owners of levees within a regulatory floodway from making improvements which would increase the height or width of the levee. *Id.* The adoption of FEMA’s February 20, 2002, effective FIS and FIRM combined with the amended stormwater ordinance

effectively ended Columbia Venture's chances to obtain a permit to improve its Property. As the County has conceded, "the meaning of the word 'impede' ... clearly meant no construction."

The County's prohibition on building in the regulatory floodway was unequivocal and was explicitly spelled out in the ordinance. As in *Palazzolo*, after the County adopted FEMA's delineation of the floodway in its FIRM to include the property, the permissible uses of the property were "known to a reasonable degree of certainty." In such circumstances, the *Williamson County* ripeness doctrine is "inapposite," and Columbia Venture's claim is not premature. See *Nat'l Adver. Co. v. Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991).

### REGULATORY TAKING

In *Penn Central*, the United States Supreme Court identified three factors that it found particularly significant: the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action.

Under *Penn Central*, the evaluation of regulatory takings comprises "essentially ad hoc, factual inquiries." *Penn Central*, 438 U.S. at 124. Thus, "the process for evaluating a regulation's constitutionality [under the Takings Clause] involves an examination of the 'justice and fairness' of the governmental action." *Eastern Enters. v. Apfel*, 524 U.S. 498, 523 (1998). This examination necessarily "does not lend itself to any set formula," and whether "justice and fairness" will dictate that a regulation results in a compensable taking is "essentially ad hoc and fact intensive" and depends largely on whether it is "disproportionately concentrated on a few persons." *Id.* (citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)).

The question of justice and fairness is informed by the factors identified in *Penn Central*, but none of those factors is conclusive or subject to rigid mathematical expression. “There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.” *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (internal citations omitted); *see also Dunes West*, 2013 S.C. LEXIS 2 at \*56 (“[T]he United States Supreme Court repeatedly has declined to identify a specific threshold of interference with property rights below which no taking occurs and above which there is a taking.”); *Byrd v. The City of Hartsville, et al.*, 365 S.C. at 660, 620 S.E.2d at 81 (“[T]he United States Supreme Court [has] expressly rejected the adoption of categorical rules in the context of regulatory takings.”).

This Court is, therefore, mindful of the United States Supreme Court’s counsel that courts must undertake a “careful examination and weighing of all of the relevant circumstances in [their] context” to determine whether a taking has occurred. *Palazzolo*, 533 U.S. at 636.

“Under the *Penn Central* test, satisfying any single factor does not decide the inquiry in favor of the plaintiff, but instead allows the *Penn Central* inquiry to continue; yet, failing to satisfy a factor will usually mean that a *Penn Central* claim will fail.” *Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447, 511 (Fed. Cl. 2009); *see also Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999) (holding that plaintiff’s lack of reasonable investment-backed expectations disposed of claim without examining other factors). A plaintiff alleging a regulatory taking faces a heavy burden. *Keystone Bituminous*, 480 U.S. at 493; *see also Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (the party alleging a regulatory taking bears the burden of proving all of the elements of same.).

The United States Supreme Court has found “untenable” the argument that a taking has occurred simply because a property owner shows “that they have been denied the ability to exploit a

property interest that they heretofore had believed was available for development.” *Penn Central*, 438 U.S. at 130. “A governmental entity is not required to permit a landowner to develop property to the full extent he might desire or be charged with an unconstitutional taking of the property.” *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 347 (1986). “The impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking.” *Kiriakides v. Sch. Dist. of Greenville County*, 382 S.C. 8, 16, 675 S.E.2d 439, 443 (2009); *see also Woods v. State*, 314 S.C. 501, 504, 431 S.E.2d 260, 261 (Ct. App. 1993) (stating that loss in value “must be different in kind and not merely in degree from that sustained by the public generally.”).

“The takings clause . . . does not charge the government with guaranteeing the profitability of every piece of land subject to its authority.” *Taub v. City of Deer Park*, 882 S.W. 824, 826, 1994 Tex. LEXIS 10837, \*5 (1994). “Purchasing and developing real estate carries with it certain financial risks, and it is not the government’s duty to underwrite this risk as an extension of obligations under the takings clause.” *Id.* Constitutional law does not require the state to guarantee a bad investment. *Palazzolo v. State*, 2005 R.I. Super. LEXIS 108 (R.I. Super. Ct. 2005).

The *Penn Central* factors must be applied to the plaintiff’s whole parcel. *Penn Central Transp. Co. v. New York City*, 438 U.S. at 130-131; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002); *Sea Cabins on Ocean IV Homeowners Ass’n, Inc. v. City of North Myrtle Beach*, 345 S.C. 418, 430, 548 S.E.2d 595, 601 (2001). “Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” *Penn Central*, 438 U.S. at 130-131; *Tahoe-Sierra*, 535 U.S. 302, 327 (2002). Instead, the court focuses on the entire parcel, with all property rights arising from it, in determining a regulation’s impact upon property. *Id.* “Consideration of the property as a whole is

particularly important because ... a regulatory taking does not occur unless there are serious financial consequences." *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007).

#### **A. Economic Impact**

In order to establish a regulatory taking, the plaintiff must show significant economic loss caused by the regulatory imposition. *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007). "The requirement of severe economic deprivation comes from the nature of regulatory takings claims, which lack the typically obvious and undisputed predicate of a physical invasion or appropriation of private property by the government and are in essence, a claim that a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation." *Id.* The economic impact of the regulation "is intended to ensure that not every restraint imposed by government to adjust the competing demands of private owners would result in a takings claim." *Walcek v. United States*, 49 Fed. Cl. 248, 258 (2001).

With respect to the valuation of a specific, proposed development, the Federal Court of Claims (which has exclusive jurisdiction over all significant takings claims against the United States, 28 U.S.C. §§ 1346, 1491) has recently stated that the Federal Circuit, to which it answers (28 U.S.C. § 1295(a)(3)), recognizes both the "subdivision development method" and the "discounted cash flow method" of valuation. *Norman v. United States*, 63 Fed. Cl. 231, 271 (2004).

"An analysis of the economic impact of the governmental action requires a comparison of the market value of the property immediately before the governmental action with the market value of that same property immediately after the action. *Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115, 123 (2003). "Courts have definitively rejected an approach under which the change in value would be based entirely on the price paid for the property and the price for which the property was later sold. *See, e.g.,*

*Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1432-33 (9th Cir. 1996). The “value” of a property

may be more or less than the owner’s investment. He may have acquired the property for less than it’s worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner’s bargain. . . . It is the property, and not the cost of it, that is safeguarded by state and federal constitutions.

*Olson*, 292 U.S. at 255 (emphasis supplied).

The error in the cost-as-value approach, among other things, is that it gives effect to neither the investment-backed expectations of the property owner nor the economically viable *use* of the property absent the regulation. But courts must consider the *use* to which a property may be put in light of the United States Supreme Court’s question: “For what is the land but the profits thereof?” *Lucas*, 505 U.S. at 1017 (internal quotations and alterations omitted). “It must be conceded that the substantial value of property lies in its use.” *Painter*, 231 S.C. at 60, 97 S.E.2d at 73.

The plaintiff must demonstrate severe loss in value in order for his regulatory takings claim to be compensable. *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007).

Prior to purchasing the Property, Burroughs and Chapin commissioned an updated appraisal letter dated February 8, 1999, which was prepared by Jerry R. Adkins, MAI. This appraisal report confirmed the highest and best use of the Property as “mixed commercial and residential planned unit development of a portion of the property and for speculative holding for the remaining portion until adequate demand is present and the first phase has been absorbed.”

The updated appraisal letter dated February 8, 1999, "reconfirms a *minimum* value of \$30,000,000" for the subject property. Mr. Adkins used a development approach in his appraisal. In his report, Mr. Adkins described this approach as follows:

This involves elements of all the traditional valuation approaches. Cost Approach techniques were utilized to estimate the cost of obtaining approvals, engineering, construction of roads, etc., and other sales costs during the estimated sellout of the parcels. Sales Comparison Approach techniques were utilized in estimating the market prices for typical commercial and residential development parcels. Income Capitalization Approach techniques were used to discount the net sales process to a present value indication after deductions for sales costs and developers' profit.

Mr. Adkins's appraisal was not based on any specific development plan for the Property, but rather simply estimated gross sales of approximately 716 acres per year at \$19,479 per acre over a six year period.

Mr. Thomas F. Wingard, MAI, is a real estate appraiser in Columbia, South Carolina, and he testified for Columbia Venture as an expert witness. In offering his opinions, Mr. Wingard was asked to assume that as of an effective date of February 20, 2002, Richland County ordinances effectively prohibited improvement of the Manning Levees on Columbia Venture's Property to FEMA standards for certification and limited 70% of the Property to agricultural and minor recreational uses, and thus accomplished a regulatory taking of Columbia Venture's Property.

Mr. Wingard testified regarding numerous attributes of the Property which made it both unique and valuable, including the following: a large contiguous acreage tract; close proximity to downtown Columbia, South Carolina, the University of South Carolina, Columbia campus, South Carolina state and federal government offices, two airports, two interstate highways and miles of frontage on the Congaree River and Interstate 77. Mr. Wingard and another professional real estate appraiser in

Columbia were engaged by Columbia Venture in 2002 to prepare an appraisal of the Property for a proposed conservation easement on the entire subject Property. Columbia Venture was considering a conservation easement for the Property as a potential exit strategy for its investment after the regulatory taking became effective on February 20, 2002. The conservation easement appraisal, which was introduced into evidence at trial, was designed to calculate the value of the Property both before and after the dedication of a conservation easement, which would have prohibited, in perpetuity, any future development of the Property, and thus limited its future uses to agriculture and minor recreation. These limited uses are also the only remaining possible uses of the approximately 70% portion of the Property in the regulatory floodway after February 20, 2002.

Mr. Wingard compared a conservation easement, where a donor actually puts restrictions on property usage in perpetuity, to an inverse condemnation or regulatory taking. In valuing the Property before the regulatory taking, it was concluded that the highest and best use of the Property was for a mixed use development.

To estimate the fair market value of the Property before the taking, the development approach, which is also known as the subdivision valuation approach, was used. The development approach calculates the estimated future gross sales revenues from the development and subdivision of the property and the subsequent sales of the subdivided parcels to end users, and then after deducting costs of development, administration, and marketing, calculates the present value of those net cash flows using an appropriate discount rate.

A comprehensive land development plan prepared by another entity for Columbia Venture was utilized as the basis of the Wingard appraisal of the Property before the regulatory taking. In their professional opinion, this plan represented the highest and best use for the Property. According to the conservation easement appraisal, the plan included a total of 35 different parcels proposed for the

following uses: single-family residential, multi-family residential, and commercial (including office, retail, research and development, etc.). The appraisers calculated comparable sales prices for each of the separate lots (if any) within each of these 35 parcels and also estimated an absorption period for each parcel, totaling approximately 15 years for all of the lots or parcels to be developed and sold. The appraisers calculated the estimated costs of sales, which included the following costs: marketing and sales commissions, development and administrative costs, bond and financing costs, real estate taxes and homeowner's association dues on unsold units, and other costs. After deducting the costs and entrepreneurial profit from the anticipated sales revenues, the appraisers arrived at a net cash flow representing the amount paid to the owner or investor in the Property. The present value of these net cash flows was then calculated using a discount rate.

The land development plan also included golf course sites, school sites, agricultural lands and contributory acreage (roads, buffer areas, parks, and other natural areas) that were valued according to the comparable sales approach rather than the development approach. The estimated fair market value of the subject Property before the proposed conservation easement was given at \$142,000,000.

This estimate of value before the regulatory taking also assumed that the project infrastructure for a portion of the project would be paid for through the use of special source revenue bonds issued pursuant to a statutorily authorized multi-county business park. The portion of the infrastructure to be financed in this manner was described as "levee work and water, waste water, storm water and streets, principally for that portion of the project associated with the research park." At trial, Mr. Wingard explained that the road and utility infrastructure financed through the multi-county business park revenue bonds were the "main thoroughfares, the entrance areas, and the spine roads that extend through the development." However, the project infrastructure costs associated with the secondary

roads and the residential developments would be paid for by the developer and were accounted for in the development costs deducted from the sales revenues in the appraisal.

The conservation easement appraisal also included an estimated fair market value of the Property "as is" on October 15, 2002, or after the taking imposed by the County's actions. For this valuation, the appraisers used only a Sales Comparison Approach. This "as is" valuation did not distinguish between the land that was located in the regulatory floodway and the land located outside the regulatory floodway (which is still located in a floodplain), but rather calculated an aggregate value of all of the subject Property's 4,400 +/- acres at \$2,500 per acre, or a total of \$11,000,000.

A major problem with this appraisal is that it assumes, without any basis, that a significant portion of the infrastructure costs will be paid for through the placement of the Property within a multi-county business park and the issuance of special source revenue bonds. Mr. Wingard testified that Columbia Venture instructed him to accept as true that Richland County would grant the multi-county business park incentive. He admitted that he had no experience with obtaining a multi-county business park incentive, never read the statutory authority for multi-county business parks, or how a multi-county business park is formed. As a result of Mr. Wingard's assumption, the Conservation Easement Appraisal does not include the costs to construct infrastructure, including the levees, within its valuation.

Columbia Venture contemplated up to \$80 million dollars in infrastructure costs to be paid through special source revenue bonds issued pursuant to the property's status as a multi-county business park. Mr. Wingard acknowledged that his working file contained Columbia Venture's \$80 million dollar list of infrastructure costs it hoped would be paid through special source revenue bonds. Mr. Wingard testified that his appraised value of \$142 million dollars would not hold if the *multi-county* business park was not in place. If Richland County did not place the property into a *multi-county*

business park, Mr. Wingard conceded that his property valuation would be flawed. Mr. Wingard testified that if the \$80 million dollars was paid by the developer without any multi-county business park, then \$80 million dollars would have to be deducted from the \$142 million dollar property valuation, leaving the Property valued at \$62 million dollars

Likewise, the Conservation Easement Appraisal makes assumptions that the project would receive a multitude of permits or approvals from Richland County and FEMA. See *Brace v. United States*, 72 Fed. Cl. 337, 351 (Fed. Cl. 2006) (“In assessing the feasibility of the project, [appraiser] did not determine whether needed approvals - among them, not only the zoning changes allowing for much smaller lots, but also design, sewage, environmental, utility and road permits and approvals - could be obtained from the half dozen or more Federal, state and local authorities with sometimes interlocking jurisdiction over various aspects of the property.”).

His consideration of whether development of the Property was legally permissible made no mention of any regulatory prohibitions or obstacles relating to construction within a floodway or floodplain. As with the appraiser in *Brace v. United States*, Mr. Wingard “did not really determine the feasibility of using the property as a subdivision, but merely valued the property based on the assumption that such a use was feasible.” *Brace v. United States*, 72 Fed. Cl. 337, 353 (Fed. Cl. 2006).

Mr. Wingard’s conservation easement appraisal was a prediction or forecast of how, in his opinion, the development would proceed to completion in 15 years. He recognized that changes in the start date, completion date and the economy could dramatically affect his numbers. He had not looked at any developments built behind levees to determine whether that would affect values.

To his knowledge, no buyer had been found who would buy the conservation easement with the \$138,000,000 tax deduction based on his appraisal. In addition, he knew of no use that had been

made of his appraisal and no IRS approval of his valuation of the conservation easement had been sought.

Mr. Wingard also prepared an appraisal of the subject property dated March 14, 2005, which was prepared for Carolina First Bank, a member of and mortgage lender to Columbia Venture, LLC. The bank's appraisal was prepared for purposes of a loan transaction for an FDIC insured bank. Mr. Wingard testified that market conditions had not changed significantly between February 20, 2002, and the date of this appraisal, and that the value opinion contained in the appraisal would be appropriate to consider for estimating the value of the subject Property after the assumed regulatory taking.

Through use of the sales comparison appraisal methodology, this appraisal estimated the value of the subject Property at \$3,200 per acre on average, for a total of \$14,115,000. Mr. Wingard testified that though both the conservation easement appraisal and the bank appraisal were informative to the analysis, the more accurate estimate of the subject Property's value after the assumed regulatory taking was the \$11,000,000 *as is* valuation in the conservation easement appraisal.

This Bank Appraisal, values all 4,410 acres of Property as the same, without distinguishing between property located within a floodway and property located outside of the floodway. The Bank Appraisal's value of \$3,200 per acre for the 70% of the Property within the floodway may be defensible; however, valuing the remaining 30%, or 1,135 acres, of property outside the floodway as the same as the floodway property artificially depresses the value of the Property.

Columbia Venture also called Thomas F. Hartnett as an expert. Mr. Hartnett is a licensed real estate appraiser. However, he did not appraise the Manning Property before or after the alleged taking or at any time. He did not offer any opinion of value as such. Mr. Hartnett testified that he had reviewed the appraisal relative to the conservation easement and thought that proper procedures were

followed by Mr. Wingard. However, Mr. Hartnett went on to testify that Mr. Wingard's numbers were too high and that a willing buyer could not be found who would pay Columbia Venture \$142,000,000 to do the project. Mr. Hartnett's own words were:

"But I don't think, as I just told you, you're going to find somebody with 142 million dollars on their hip that will buy that property. No sir, I don't think so."

Mr. Hartnett testified to an alternative value calculation, providing "merely" "mathematical calculations to determine what" he thought "was just compensation or difference in value." In order to arrive at a valuation of the Property before the alleged taking, Mr. Hartnett borrowed information from the appraisal of the Defendant's expert, Mr. Jake Knight, whose appraisal is discussed below. Mr. Knight had opined that there were 1,225 acres outside the floodway, which was subject to being developed and which had a value of \$15,000 per acre. Mr. Hartnett took this \$15,000 per acre figure and extrapolated \$15,000 per acre figure to apply to the other 3,175 acres to conclude that the 4,400 acre tract had a value of \$66,000,000. However, since the levees would have to be upgraded at a cost of \$12,000,000 in order for the entire tract to be developed, \$12,000,000 should be deducted from \$66,000,000, leaving according to Mr. Hartnett, \$51,900,000 as the Property's value before the alleged regulatory taking.

For a valuation of the Property after the alleged taking, Mr. Hartnett took from the Wingard Bank Appraisal that the 4,400 acres were worth \$3,100 per acre for a total of \$14,000,000+- for the entire tract. Subtracting \$14,000,000 from \$51,900,000, Mr. Hartnett concluded that the loss in value was \$40,000,000.

Mr. Hartnett also used \$3,200 per acre from the Wingard bank appraisal and multiplied \$3,200 by the 4,400 acres, for a total of \$14,000,000. This per acre value was based upon the entire 4,400 acres being valued as farmland and not subject to being developed. However, it was undisputed that there

were 1,225 acres of land outside the floodway and the highest and best use of the 1,225 acres was as developed property, not farm land. Mr. Wingard never appraised the 1,225 acres as being land outside the floodway and subject to being developed. Therefore, the appraised value in the Wingard Bank Appraisal is understated by whatever the 1,225 acres of land outside the floodway would be worth if valued based on their highest and best use as a developed property

Richland County put forward an appraisal of Columbia Venture's Property prepared by Mr. Knight showing its value before the date of alleged taking as \$33 million dollars and as \$28 million dollars after the date of alleged taking. However, Mr. Knight assumed that appropriate permits can be eventually obtained in order "to ultimately develop the property with some type of mixed use development or sell the property in the 'as is' state with the due diligence in place as of the date of appraisal to allow a market participant to develop the property with a mixed use development."

The subject property was used for agricultural and recreational uses prior to the adoption of the regulations by the County and can still be used for those purposes. That, of course, is not controlling as the Plaintiff is entitled to the value based upon the highest and best use to which the property could reasonably have been placed without the regulations. It is clear that would have been for mixed use development.

Although I cannot find that a precise percentage of diminution in value is shown by the conflicting evidence, I do conclude that there is a significant decrease in value of the fair market value of the land based upon its highest and best use. This factor, therefore, is in the Plaintiff's favor.

**B. The Extent To Which The Regulations Have Interfered With Distinct Investment-Backed Expectations**

The second factor of the *Penn Central* - the interference with distinct investment backed expectations - is a "way of limiting takings recoveries to owners who (can) demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Loveladies Harbor*, 28 F.3d at 1177. See also *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994) (the requirement of investment backed expectations "limits recovery to owners who can demonstrate that they bought the property in reliance on the nonexistence of the challenged regulation.") This factor encompasses two related elements: first, the extent of the plaintiff's investment in reliance on the regulatory scheme in place at the time of the purchase; and second, the extent to which the regulation of the property was foreseeable. See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006. These expectations must be reasonable – "(a) 'reasonable investment backed expectation' must be more than a 'unilateral expectation or an abstract need.'"

"Individuals purchasing property who reasonably should have been aware of the existence or impending existence of a regulatory regime negatively impacting the value of the property are deemed to have assumed the economic risk associated with that regime....Regarding the expansion of preexisting regulatory regimes, the Supreme Court has noted that 'those who do business in (a) regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end....' Because the market can anticipate regulatory developments, it follows that reasonable expectations may extend beyond legal restrictions already in place and encompass the foreseeable creation of a new regulatory program or the expansion of an existing program." *Walcek v. United States*, 49 Fed. Cl. 248 (2001).

Here the Plaintiff argues that it invested in the property with the expectation that it would be permitted to develop it fully. It is clear this was its subjective intent, but was it reasonable under the circumstances?

Columbia Venture bears the burden of establishing that it had reasonable investment-backed expectations at the time it purchased the property. *Cienega Gardens v. United States*, 503 F.3d 1266, 1288 (Fed. Cir. 2007). "A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). "For government regulation to constitute a taking, the property owner must objectively demonstrate the existence of investment-backed expectations." *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, \_\_\_ S.C. \_\_\_, 2013 S.C. LEXIS 2 (Jan. 9, 2013). The test is an objective inquiry focusing on what is "foreseeable as a reasonable possibility even if not foreseeable as a certainty," given the regulatory regime existing as of the date land is purchased. *Cane Tennessee Inc. v. United States*, 63 Fed. Cl. 715, 730 (Fed. Cl. 2005); *see also Mehaffy v. United States*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012) (courts "must consider what a party's reasonable objective expectations were in the property; the party's subjective expectations for the property should not be considered.") (emphasis added). "Property owners may not establish a taking simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, \_\_\_ S.C. \_\_\_, 2013 S.C. LEXIS 2 (Jan. 9, 2013).

The regulatory regime in place at the time the plaintiff acquires the property shapes the reasonableness of investment-backed expectations. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001); *Mehaffy v. United States*, 2012 U.S. App. LEXIS 25178 (Fed. Cir. 2012) ("...reasonable investment-backed expectations are measured at the time the claimant acquires the property."). Recovery under a takings analysis is limited to property owners who can demonstrate reliance on a regulatory scheme that would

allow their development plans to proceed unhindered. *Mehaffy v. United States*, 2012 U.S. App. LEXIS 25178 (Fed. Cir. 2012); *Norman v. United States*, 429 F.3d 1081, 1093 (Fed. Cir. 2005); *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, \_\_\_ S.C. \_\_\_, 2013 S.C. LEXIS 2 (Jan. 9, 2013).

It is difficult for a plaintiff to prove reasonable investment-backed expectations in property that it voluntarily purchased in the face of a regulatory impediment. *Norman v. United States*, 429 F.3d 1081, 1088 (Fed. Cir. 2005); see e.g. *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (“In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land.”); *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004) (holding that the statutory scheme in place at time of purchase made the government’s decision that property was unsuitable for mining reasonably foreseeable; thus, plaintiff lacked reasonable investment-backed expectations). Indeed one who purchases property with knowledge of an existing or impending restraint “assumes the risk of economic loss.” *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1364 (Fed. Cir. 2001); *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999); *Walcek v. United States*, 49 Fed. Cl. 248, 268 (Fed. Cl. 2001). “In such a case, the owner presumably paid a discounted price for the property” and “[c]ompensating him for a taking would confer a windfall.” *Id.*

Moreover, an expectation to develop property within an uncertain regulatory environment is not reasonable. “The knowledge that circumstances affecting property might change may be “enough to extinguish any reasonable expectation for takings purposes.” *Paradissiotis v. United States*, 49 Fed. Cl. 16, 22 (Fed. Cl. 2001). When a party moves forward with a transaction in light of actual or constructive knowledge of changing regulatory circumstances, “[t]he fact that his risk-taking turned out badly for him does not render it a taking in violation of the Fifth Amendment.” *Paradissiotis v. United States*, 304 F.3d 1271, 1276 (Fed. Cir. 2002).

Here, a reasonable developer in the position of Columbia Venture would know that floodplain development is inherently risky. Flood protection is costly, never-ending and has unintended consequences. Within a floodway, the greatest flood velocities and depths occur, causing the greatest damage during a flood. A reasonable developer in Columbia Venture's position would know that the extensive NFIP regulations and the County's floodplain management regulations were enacted in response to the hazards of development within flood prone areas. 42 U.S.C. § 4001. Even a cursory look at the National Flood Insurance Act would show that every five years, FEMA must assess the need to revise Flood Maps and undertake revisions as it sees fit. 42 U.S.C. § 4101(e) and (f). Flood Maps can and do change over time. Flooding, flood damage and floodplain management are real issues with serious consequences. Thus, at the outset, Columbia Venture's investment-backed expectations of extensive development on a floodplain are necessarily diminished by the backdrop of uncertainty, risk, and regulatory limitations associated with floodplain development.

Also, at the time Columbia Venture purchased the Property, the County had in place a Floodway and Floodplain Overlay Zoning District. This zoning district overlays the general zoning designation of property within unincorporated Richland County. The Floodplain Overlay Zoning District contained a provision governing construction within a floodway ("Floodway Provision"). Under § 26-73.4(2), "filling of floodway areas, dumping of salvaged or scrap material, or the placing of material or obstruction within a floodway area in such a manner as to impede free flow of water during a time of flood or in such a manner that the elevation of floodwaters will be increased is prohibited." Testimony from the County Administrator and County Planning Director established that this provision essentially prohibited construction in a floodway. "The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason." *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App.

2000). Documents entered into evidence establish that Columbia Venture knew, prior to purchase, of the Floodplain Overlay Zoning District and how it was interpreted.

Here, at the time of purchase, FEMA's restudy was ongoing. A preliminary Flood Map put almost all of the Property within a floodway, and Columbia Venture did not know what FEMA's final Flood Map would look like.

Yet prior to purchase, Columbia Venture had made very little investment in actual engineering analysis of its levee. Columbia Venture did not know if it could convince FEMA to issue a Flood Map with no floodway. Columbia Venture did not know whether it could upgrade its levee to meet FEMA's levee certification requirements. It did not know whether Richland County would ultimately accept responsibility for maintenance. It did not even have the financial resources in hand to undertake levee construction; in fact, Columbia Venture expected this cost to be paid through public financing.

The County's Storm Drainage Ordinance also contained a floodway provision, which contained different language than that found in the Floodplain Overlay Zoning District. The Storm Drainage Ordinance provided that "no levees, dikes, fill materials, structures or obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway." Columbia Venture argues that it reasonably relied upon the County's Storm Drainage Ordinance in effect at the time it purchased the Property. It called the County Engineer, Mr. Ralph Pearson, to testify that he had, prior to purchase, interpreted the word "impede" within the Floodway Provision of the Storm Drainage Ordinance to mean the same as FEMA's no-rise standard for encroachments within a floodway. Through the testimony of Mr. Gregory and Mr. Manning, Columbia Venture sought to prove that it knew of Mr. Pearson's interpretation at the time of purchase; thereby establishing that its expectation to upgrade its levee under FEMA's no-rise standard was reasonable. Although witnesses testified as to knowledge of the County Engineer's interpretation, the scope and complexity of Columbia Venture's

project would reasonably require more than a verbal exchange with the County Engineer. *See e.g. Embassy Real Estate Holdings, LLC v. D.C. Mayor's Agent For Historic Preservation*, 944 A.2d 1036, 1054 (D.C. 2008) ("One who is about to embark on such an expensive and complex project requiring significant demolition, alteration and new construction of a known historic property would require more than a casual statement that the [Historic Preservation Officer] had 'no intent at the time' to designate the property as an historic landmark before proceeding on that premise."). Columbia Venture made no effort to obtain any written confirmation of the County's interpretation, nor did it seek a legal opinion from its own legal counsel.

Further, the Storm Drainage Ordinance provided an appeal process where an interpretation of the County Engineer's interpretation could be challenged. Appeals were heard and decided by the Richland County Planning Commission. A review of the Storm Drainage Ordinance calls into question the County Engineer's interpretation; consequently, an appeal was reasonably foreseeable, as well as an outcome rejecting the County Engineer's interpretation.

As previously set forth, the County's legal opinion addressing the word "impede" concluded that:

Applicable law provides that words should be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand an ordinance's or statute's operation. "Impede" has been defined to mean "to interfere with or slow the progress of," Merriam-Webster's Collegiate Dictionary 580 (10<sup>th</sup> ed. 2000), and "to obstruct; hinder; check; delay." Black's Law Dictionary 753 (6<sup>th</sup> ed. 1990). Thus, Subsection (h) would appear to prohibit any structure which would interfere with or slow the free flow of water during times of flooding, while the comparable NFIP provision would appear to allow such a structure if it would not result in any increase in flood levels during a 100-year flood.

It was not reasonable for Columbia Venture to expect that it could upgrade its levee under the County's Storm Drainage Ordinance when the levees were located within a floodway.

As for reliance on the Resolution passed by the County Council shortly before the purchase of the property relative to the County assuming maintenance of the levees so that Columbia Venture could improve them I find it misplaced and not reasonable. First, Columbia Venture must have known this was a gamble. It was a Resolution only and had no legal binding effect on the County. There had been virtually no public input at that point and the Resolution itself contained contingencies. What occurred here was that as the huge size of the project became known to the public opposition began to build. Questions were raised as to safety issues and the desirability of building such a large development behind levees. The County also had liability concerns. They sought legal advice concerning these issues and became uneasy. Also, it was not until much later that the extent of financial support sought by Columbia Venture through the County's creation of a tax district became known.

Columbia Venture faced an uncertain path forward with very little technical data and a complex regulatory scheme. Even Burroughs & Chapin's Board of Directors admitted that Green Diamond was "purely speculative in nature." This complex array of moving parts, all of which needed to fall in place in order for Columbia Venture to be able to develop its Property to the extent that it hoped for, made Columbia Venture's investment backed expectations unreasonable. "A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

Legislative bodies are charged with protecting the safety and welfare of the people to whom they are responsible. Here the Council became convinced that that duty was best served by the adoption of the FEMA flood maps as well as by amending the Ordinances relating to the placement of structures in the floodway. This was achieved by the restriction on enlarging the size of existing levees and eliminating the granting of variances.

Columbia Venture, in view of common knowledge relative to the right and practice of governmental bodies to change their direction as further information is received and in response to the public will, should have foreseen what could have reasonably occurred in regard to the adoption of the FEMA maps and the extension of restrictions to add limits on development within the floodway.

The test for reasonable investment backed expectations is whether, from an objective standpoint, a reasonable developer in the shoes of Burroughs & Chapin should have taken on a massive development on a floodplain under the facts of this case. *See Mehaffy v. United States*, 102 Fed. Cl. 755, 765-766 (Fed. Cl. 2012) ("The critical question is what a reasonable owner in the plaintiff's position should have anticipated."). Here, it would have been reasonable to have either entered into an option agreement or entered into a purchase agreement with contingencies that a favorable Flood Map would be finalized and certain approvals would be obtained.

In sum, when a party moves forward with a transaction in light of actual or constructive knowledge of changing regulatory circumstances, "[t]he fact that his risk-taking turned out badly for him does not render it a taking in violation of the Fifth Amendment." *Paradissiotis v. United States*, 304 F.3d 1271, 1276 (Fed. Cir. 2002). That is exactly what Columbia Venture did here. An owner who bought with knowledge of impediments to his development plans has no reliance interest, or, in other words, has assumed the risk of any economic loss. *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999). Richland County is not, and should not be, "an involuntary guarantor of a property owner's gamble that he could develop the land as he wished despite the existing regulatory structure." *Mehaffy v. United States*, 2012 U.S. Claims LEXIS 10, 38-39 (Fed. Cl. 2012).

Therefore, I find that Columbia Venture lacked reasonable investment backed expectations.

### **C. The Character Of The Governmental Action**

The third prong of the *Penn Central* analysis addresses the character of the government action. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). This element examines the magnitude of the burden a particular regulation imposes upon private property rights and how a regulatory burden is distributed among property owners. *Id.* at 542; *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, \_\_\_ S.C. \_\_\_, 2013 S.C. LEXIS 2 (Jan. 9, 2013). The public purpose that is served by the government's regulations is an important consideration. *Brace v. United States*, 72 Fed. Cl. 337, 356 (Fed. Cl. 2006); *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, \_\_\_ S.C. \_\_\_, 2013 S.C. LEXIS 2 (Jan. 9, 2013). "The character of the governmental action factor requires a court to consider the purpose and importance of the public interest underlying a regulatory imposition," and whether the burdens imposed by the regulation are "so wholly disproportionate to the burdens other individuals face in a highly regulated society that some people are being forced 'alone to bear public burdens which, in all fairness and justice, must be borne by the public as a whole.'" *Maritrans Inc. v. United States*, 342 F.3d 1342, 1356-57 (Fed. Cir. 2003).

There can be no question that the County's floodplain management regulations serve an important public purpose of flood protection. The stated purpose of the Stormwater Ordinance was "to protect the general health, safety and welfare of the people of Richland County, South Carolina, ... and to prevent damages to the property of adjacent landowners. Pl. Exh. 374, § 8-1, Stormwater Ordinance (2001).

Similarly, the intent of the County's Floodplain Overlay Zoning Ordinance was to "lessen such hazards and losses by restricting or prohibiting uses which are dangerous to health, safety or property in

times of flood or which cause excessive increases in flood heights or velocities ....” A floodway poses the greatest danger to life and property. The County’s prohibition against construction in a floodway provides a greater margin of safety to County citizens, that serves to “preserve the flood storage capacity” of rivers and streams and “keeps people out of harm’s way.” This important function weighs in favor of the County. Government action that serves to prevent harm to public safety may impose burdens on a property owner, but burdens caused by harm prevention are typically not compensable. *Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447, 518 (Fed. Cl. 2009).

The County’s Floodway Provisions prohibiting construction in floodways constituted the general rule applicable to all property in Richland County located within a regulatory floodway. As of 2001, approximately 16,500 acres of property within Richland County were located within a regulatory floodway. “A taking does not take place if the prohibition applies over a broad section of land and thereby secures an average reciprocity of advantage.” *Penn Central*, 438 U.S. 104, 147 (1978). The fact that the County’s regulation only affects floodways and not all property within Richland County does not change this conclusion. See *Mehaffy v. United States*, 102 Fed. Cl. 755, 769 (Fed. Cl. 2012) (holding that wetlands regulations “are generally applicable to all similarly situated property owners and can in no way be viewed as being directed at plaintiff.”); *Cummins v. Robinson Twp.*, 283 Mich. App. 677, 720, 770 N.W.2d 421, 448 (Ct. App. 2009) (... “provisions regarding flood-plain construction ... apply equally to all landowners with property similarly situated in flood-prone areas.

Thus, plaintiffs are both benefited and burdened like other similarly situated property owners ...”; *First English Evangelical Lutheran Church v. County of L.A.*, 210 Cal. App. 3d 1353, 1370 (Cal. App. 2d Dist. 1989) (holding that flood protection ordinance’s purpose of protecting public safety; [m]oreover, the lives it seeks to save and the injuries it strives to prevent are not only those on other properties but on appellant’s property as well.”). The County’s prohibition on construction in a floodway burdens

owners of property within a floodway, but they are also benefitted because their neighbors cannot build on a floodway either, thus avoiding flood damages. Reduction in potential flood damage represents a cost savings to these property owners, not only saving costs they would have to incur to repair flood damage but also savings realized through reduced cost to the County in response, rescue, evacuation, and other functions undertaken during a flood. Richland County's Floodway Provisions serves to keep people out of harm's way.

Columbia Venture has contended that excepting the City of Columbia's Wastewater Treatment Plant and Heathwood Hall from the "no impede" requirement in the Stormwater Ordinance and instead allowing the "no rise" standard is disparate treatment showing that its property has been singled out. Both the City and Heathwood Hall had built extensive structures prior to FEMA's expansion of the Congaree River floodway. The new floodway posed a significant obstacle to the future viability of these existing uses. In contrast, Columbia Venture had no pre-existing structure or businesses located on its property and the new floodway did not prevent it from continuing its existing use.

Unlike the City's plant and the school, whose structures were either occupied by employees or students during work or school hours, Columbia Venture wanted to build an extensive development of residences, shopping centers, restaurants, hotels and a retirement village on its property. These uses involve significantly more people occupying structures for longer time periods than the limited uses of a school and wastewater treatment plant. During a time of flood, evacuation of a school and plant demands less government resources and poses a smaller risk to life and property than an entire residential and commercial development. These are significant distinctions and do not support the claim that Columbia Venture was singled out.

In an effort to create a disproportionate burden, Columbia Venture asserts that the County's Floodway Provision placed a unique and draconian limitation upon it and it alone by prohibiting not only

construction in a floodway, but also its ability to maintain its levee. The specific portion of the provision states that:

Nothing in this subsection (h) shall limit provisions in this Chapter or elsewhere authorizing or requiring the maintenance and repair of levees, dikes, dams, and similar structures; provided, however, that this sentence shall not be construed as authorizing or requiring the repair or maintenance of any such structure that would be higher or wider than it was before the need arose for such repair or maintenance.

The County's levee maintenance standards allow and in fact require that levees are maintained to "not less than the design grade and section by replacing any material lost from the crown or slopes." Therefore, Columbia Venture could replace eroded or sagged earthen material to restore the levee's width or height.

The "higher or wider" phrase that Columbia Venture complains of does not change this result. Starting with the statement that "nothing in this subsection ... shall limit provisions in this Chapter ... authorizing ... maintenance and repair of levees," the proviso simply seeks to make clear that repair of erosion and so forth means maintaining a levee or dam at its designed height and width. The proviso does not, as Columbia Venture would have this court believe, force Columbia Venture to watch its levee erode away or fall apart. The Floodway Provision must be construed in light of the intended purpose of the statute. *Tempel v. S.C. State Election Comm'n*, 400 S.C. 374, 735 S.E.2d 453, \*4 (2012). Given that the purpose of the County's floodplain ordinances is to protect life and property, an interpretation of the Floodway Provision that prevents Columbia Venture from repairing its flood control structure would yield an absurd result.

Also relevant is the evidence in this case indicating that Columbia Venture's plans to improve its levee would likely cause increased flooding in Lexington County. A landowner does not have "an unfettered right to pursue a business detrimental to the public health, safety, and welfare." *Denene*,

*Inc. v. City of Charleston*, 359 S.C. 85, 97, 596 S.E.2d 917, 923 (2004). It is well established in South Carolina that, although a landowner has the right to protect its property from flooding, it has no right to do anything that will increase the risk of flooding on a neighbor's or downstream owner's property. See, e.g., *Johnson v. Williams*, 238 S.C. 623, 633, 121 S.E.2d 223, 228 (1961) (explaining that the "the obstruction of the flow of a natural watercourse, if it results in damage to an adjoining landowner, is actionable"), citing *Lawton v. South Bound R.R. Co.*, 61 S.C. 548, 39 S.E. 752 (1901); *Ballentine v. Hammond*, 68 S.C. 153, 162, 46 S.E. 1000, 1003 (1904) (landowners do not have the same right to "fight off flood water" as they do with surface water, which is considered a common enemy). A property owner "has no right to misuse his own land [by building in a floodway] to the severe detriment of another." *Usdin v. New Jersey*, 173 N.J. Super. 311, 331, 414 A.2d 280, 290 (N.J. Super. 1980).

The South Carolina Supreme Court's recent case, *Dunes West Golf Club, LLC v. Town of Mount*, is both instructive and controlling. \_\_\_\_ S.C. \_\_\_\_, 2013 S.C. LEXIS 2 (Jan. 9, 2013). In its analysis of the character of the government action, the court examined several factors. *Id.* at \*60-61. The court looked at whether the ordinance at issue applied broadly. *Id.* Here, like the ordinance at issue in *Dunes West*, the County's floodplain management ordinances applied county-wide to all floodways and floodplains. The Court looked at the purpose of the ordinance. Here the County's floodplain management ordinances also have a legitimate and important purpose. *Dunes West* examined whether the ordinance abridged the property-owner's existing use of his property or the right to sell his property. Here, as also found in *Dunes West*, the County did not abridge Columbia Venture's present use or any rights to sell its Property. Also, FEMA regulations provide for map revisions that may be used to reduce the extent of a floodway and/or flood hazard areas upon property.

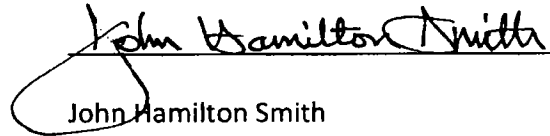
I find the character of the government action weighs in the County's favor.

### **Conclusion**

I conclude that neither the adoption of the FEMA maps by the County nor the amendment and interpretation of its Ordinances have resulted in a taking of the Plaintiff's property. Rather I find that, guided by the three tiered *Penn Central* analysis, the actions of the County result only in a noncompensable diminution in the value of the Plaintiff's property.

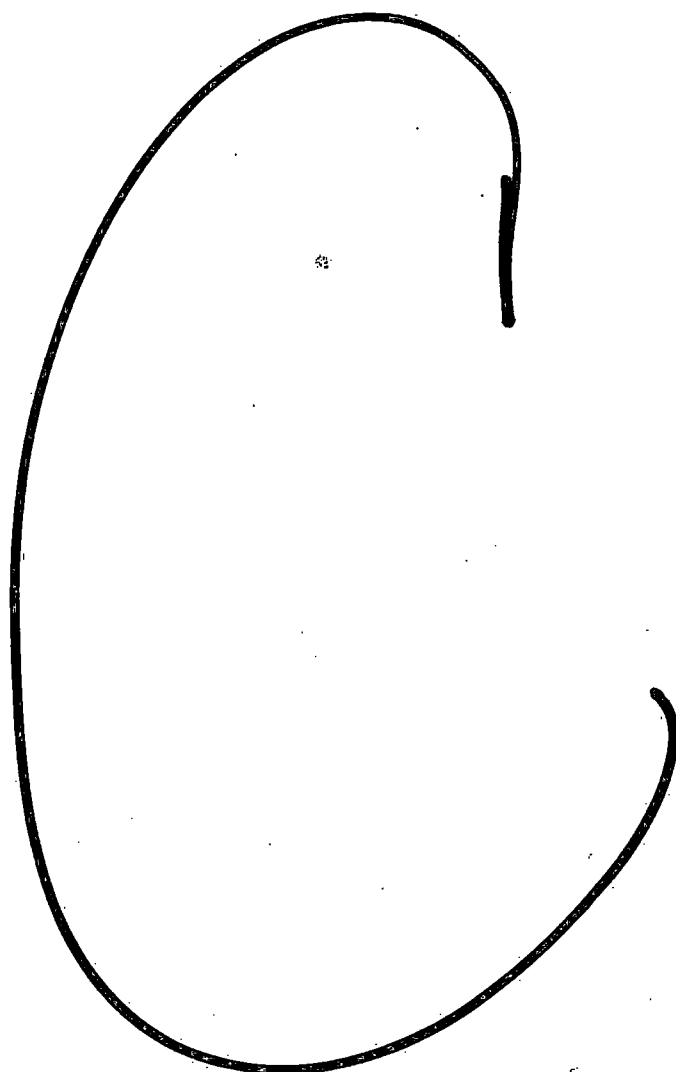
THEREFORE, I FIND IN FAVOR OF THE DEFENDANT, AND IT IS SO ORDERED.

March 18, 2013

A handwritten signature in black ink, reading "John Hamilton Smith", is written over a horizontal line. The signature is fluid and cursive, with the first name "John" being particularly prominent.

John Hamilton Smith

Special Referee



) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT

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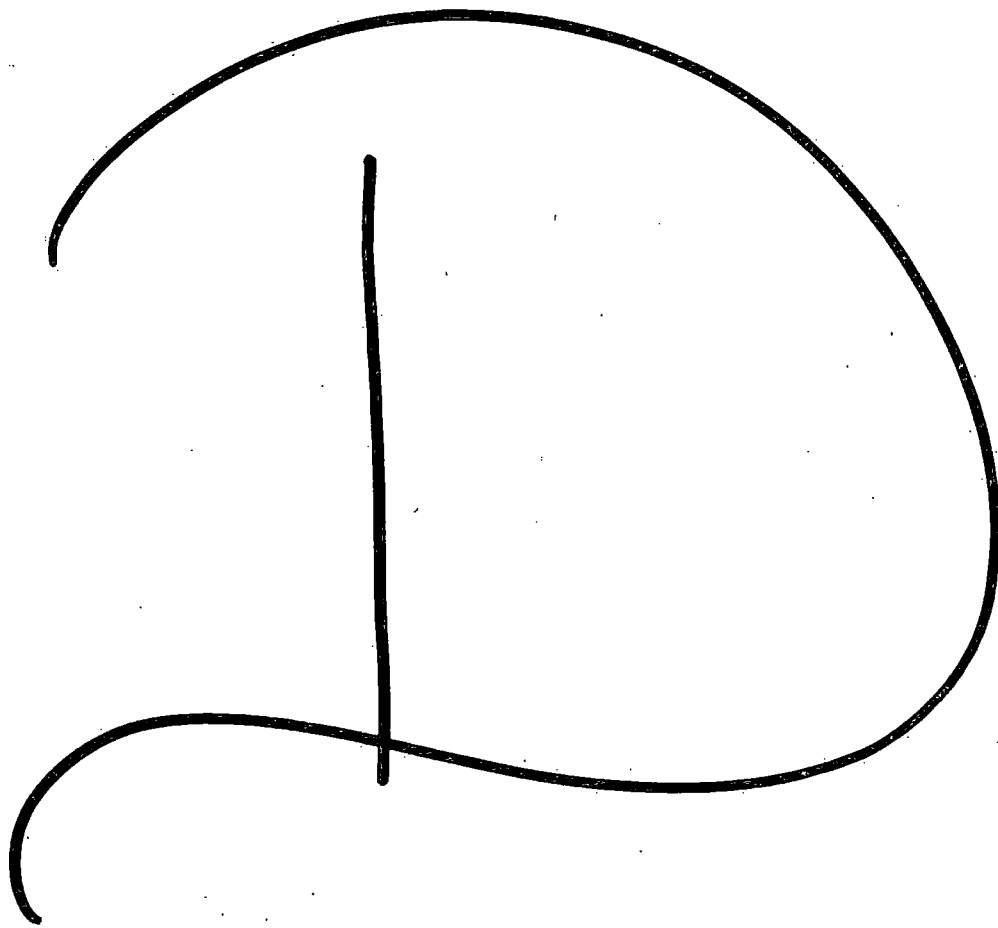
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JEANETTE W. MARRIS  
C.C.P. & G.S.  
land Motions for

Plant Motions for

  
John Hamilton Smith  
Special Referee

Yonges Island, South Carolina

February 8, 2013



|                         |   |                                   |
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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS      |
|                         | ) | FOR THE FIFTH JUDICIAL CIRCUIT    |
| COUNTY OF RICHLAND      | ) |                                   |
|                         | ) |                                   |
| Columbia Venture, LLC,  | ) | Civil Action No. 2010-CP-40-8943R |
|                         | ) |                                   |
| Plaintiff,              | ) |                                   |
|                         | ) |                                   |
| vs.                     | ) |                                   |
|                         | ) |                                   |
| Richland County,        | ) |                                   |
|                         | ) |                                   |
| Defendant.              | ) |                                   |

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S  
MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

This matter is before the Court on Defendant's Motions for Partial Summary Judgment on Plaintiff's substantive due process claim based on lack of a protected property interest and failure to meet the requisite standard of egregious government conduct; and Defendant's Motion for Partial Summary Judgment on Plaintiff's regulatory takings claim based on lack of ripeness.<sup>1</sup> Having reviewed the motions, memorandums, and other materials presented to the Court, and having heard the arguments of counsel, I grant Defendant's Motion for Partial Summary Judgment on Plaintiff's substantive due process claim, and deny Defendant's Motion for Partial Summary Judgment on its ripeness defense to Plaintiff's regulatory taking claim, as more fully discussed below.

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<sup>1</sup> Defendant filed two separate motions addressing Plaintiff's substantive due process claims. One motion focused on the threshold element of a protected property interest ("Motion for Summary Judgment (Lack of Protected Property Interest/Lack of Final Decision)), and another motion addressed the remaining elements of a substantive due process claim (Motion for Partial Summary Judgment (Due Process)). Defendant's Motion for Summary Judgment (Lack of Protected Property Interest/Lack of Final Decision) also sought to dismiss Plaintiff's regulatory takings claim due to lack of a final decision by Richland County as to the impact of its regulations upon Plaintiff's property. This Order renders a decision on arguments raised in both of Defendant's Motions. A separate order decides the Parties' cross-motions for summary judgment on Plaintiff's claim of a physical taking.

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 RICHLAND COUNTY  
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Because this case involves facts inextricably tied to the National Flood Insurance Program (“NFIP”), this Order first addresses relevant provisions of the NFIP, and then proceeds to findings of material fact and conclusions of law.

### **THE NATIONAL FLOOD INSURANCE PROGRAM**

The NFIP is established under the National Flood Insurance Act (“NFIA”) and administered by FEMA. 42 U.S.C. § 4001 *et seq.* The purposes of the NFIA include the following: (1) to “authorize a flood insurance program by means of which flood insurance, over a period of time, can be made available on a nationwide basis . . . ;” (2) to “encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses . . . ;” and (3) to “guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards.” 42 U.S.C. § 4001(d) & (e).

To fulfill the purposes of the NFIA, FEMA is required to “identify and publish information with respect to all flood plain areas . . . which have special flood hazards,” and “establish or update flood-risk zone data in all such areas.” § 4101(a)(1) and (2). FEMA accomplishes this requirement by publishing Flood Insurance Studies (“FIS”) and Flood Insurance Rate Maps (“Flood Maps”) (collectively “Flood Data”) that identify flood hazard areas and the risk zones within floodplains across the United States. 42 U.S.C. § 4101(a). A FIS, or a flood elevation study, “means an examination, evaluation and determination of flood hazards and, if appropriate, corresponding water surface elevations . . . .” 44 C.F.R. § 59.1. “Water surface elevation” is defined as the “height . . . of floods of various magnitudes and frequencies in the floodplains of . . . riverine areas.”

*Id.* A FIS” contains base flood elevations (“BFE”), of studied rivers and streams within a community. 44 C.F.R. § 59.1. A base flood is defined as “the flood having a one percent chance of being equaled or exceeded in any given year.” 44 C.F.R. § 59.1. FEMA’s Flood Maps are “official map[s] of a community on which [FEMA] has delineated both the special hazard areas and risk premium zones applicable to the community.” 44 C.F.R. § 59.1. A special hazard area is the floodplain subject to a 100-year flood. *Id.* Within a floodplain, FEMA may also delineate the regulatory floodway, which is defined as “the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height.” *Id.* Generally speaking, the regulatory floodway is the area within a floodplain posing the greatest danger to public safety. Every five years, FEMA must assess the need to revise Flood Data and undertake revisions as it sees fit. 42 U.S.C. § 4101(e) and (f).

Once FEMA prepares the FIS and Flood Maps, they are issued as preliminary documents for review by the community and the public at large. “In establishing projected flood elevations for land use purposes with respect to any community pursuant to section 1361 [42 USCS 4102], the Director shall first propose such determinations by publication for comment in the Federal Register, by direct notification to the chief executive officer of the community, and by publication in a prominent local newspaper.” 42 U.S.C. § 4104(a).<sup>2</sup> “Any owner or lessee of real property within a community where a

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<sup>2</sup> In July 2012, the United States Congress amended this provision to state: “ In establishing projected flood elevations and designating areas having special flood hazards for land use purposes with respect to any community pursuant to section 1361 [42 USCS § 4102], the Administrator shall first propose such determinations and designations by publication for comment in the Federal Register, by direct notification to the chief executive officer of the community, and by publication in a prominent local newspaper.” However, this revision has no bearing on the facts of this case, and is only noted for purposes of accuracy.

proposed flood elevation determination has been made ... who believes his property rights to be adversely affected by the ... proposed determination, may file a written appeal of such determination with the [community's chief executive officer] ... within ninety days of the second newspaper publication of [FEMA's] proposed determination." 44 C.F.R. § 67.5(a). "The sole basis of appeal ... shall be the possession of knowledge or information indicating that the elevations proposed by FEMA are scientifically or technically incorrect." 44 C.F.R. § 67.6(a). The local community receives all appeals by private persons and forwards those appeals to FEMA. 42 U.S.C. § 4104(c). "The community shall review and consolidate all such appeals and issue a written opinion stating whether the evidence presented is sufficient to justify an appeal on behalf of such persons by the community in its own name." *Id.* FEMA then decides appeals through various administrative means. *Id.* at § 4104(e); *see also* 44 C.F.R. § 67.8. "Any appellant aggrieved by any final determination ... may appeal such determination to the United States district court for the district within which the community is located." 42 U.S.C. § 4104(g). "During the pendency of any such litigation, all final determinations ... shall be effective ... unless stayed by the court for good cause shown." *Id.*

Participating communities are required to comply with FEMA's minimum standards for floodplain management. 44 C.F.R. § 60.2. The community must adopt and enforce floodplain management regulations based on the Flood Data provided by FEMA. *Id.* at (h); 44 C.F.R. § 60.3. The Flood Maps serve to delineate flood hazard areas that are subject to the community's floodplain management regulations.

Further, a community's floodplain management regulations must meet FEMA's minimum construction standards. 44 C.F.R. § 60.3. For example, all new construction

and substantial improvements of residential structures in a floodplain must be elevated to or above the base flood elevation. *Id.* at (c)(1). Non-residential structures must be elevated to or above the base flood elevation or constructed in a manner that is watertight. *Id.* at (3). Within a floodway, the community must, at a minimum, prohibit construction of any sort unless it can be demonstrated that the proposed development will not cause any increase in the base flood elevation. *Id.* at (d)(3). A community may impose more restrictive regulations than FEMA's minimum standards, which FEMA encourages and which "shall take precedence." 44 C.F.R. § 60.1(d).

Property owners have multiple ways in which to seek revisions to Flood Data. A property owner may seek certification from FEMA that a levee provides adequate protection from a 100-year flood. 44 C.F.R. § 65.10. If a levee meets FEMA's levee certification requirements, then the floodplain and floodway designation on land behind the levee is removed from FEMA's Flood Map, thus allowing development to occur without the need to comply with local floodplain management regulations. *Id.* Levee certification must include data and information that meet certain requirements relating to the structural design and operation of the levee. 44 C.F.R. § 65.10(b) and (c). Additionally, the following maintenance requirements must be met:

For levee systems to be recognized as providing protection from the base flood, the maintenance criteria must be as described herein. Levee systems must be maintained in accordance with an officially adopted maintenance plan, and a copy of this plan must be provided to FEMA by the owner of the levee system when recognition is being sought .... All maintenance activities must be under the jurisdiction of a Federal or State agency, an agency created by Federal or State law, or an agency of a community participating in the NFIP that must assume ultimate responsibility for maintenance. ... *Id.* at (d).

“This information must be supplied to FEMA by the community or other party seeking recognition of such a levee system at the time a flood risk study or restudy is conducted” or “when a map revision ... is sought based on a levee system ....” 44 C.F.R. § 65.10.

Flood Map revisions also may be accomplished through a request to FEMA for a Letter of Map Revision (“LOMR”). 44 C.F.R. § 65.4(b). A property owner or the community itself is entitled to submit a LOMR for revisions of base flood elevations and special flood hazard area boundaries, which is accomplished by providing FEMA with specific data and analysis as required by regulation. 44 C.F.R. § 65.4 – § 65.9.

### **FINDINGS OF FACT**

Within Richland County, the Broad River and the Saluda River join near downtown Columbia to form the Congaree River. The Congaree River flows roughly parallel to the City of Columbia and serves as the southern boundary between Richland and Lexington counties. The Congaree, as it flows through the City of Columbia area, is marked by bluffs and a relatively straight channel confined by underlying granite. As the Congaree River enters the coastal plain south of Columbia, its floodplain widens, and its course meanders.

Along and within this floodplain lie large tracts of property historically used for farming. Columbia Venture’s property consists of approximately 4,400 acres along the eastern bank of the Congaree River in Richland County, South Carolina (“Property”). The Property was assembled in various separate purchases beginning in the 1960s by Mr. Burwell Manning and other owners; and in subsequent years, Mr. Manning improved the Property with a system of existing levees in three separate sections to prevent the Property from flooding (the “Manning Levees” or “Levees”).

Richland County participates in the NFIP. Richland County's floodplain regulations are found in its Floodway and Floodplain Overlay Zoning Ordinance (hereinafter referred to as "Zoning Ordinance") and its Stormwater Management, Erosion and Sediment Control Ordinance (hereinafter referred to as "Stormwater Ordinance").<sup>3</sup> Richland County adopts FEMA's Flood Data as part of its Zoning Ordinance. Under its Zoning Ordinance, a floodway was based upon "the floodway shown on the official Flood Boundary Floodway Maps (Dated January 19, 1994), the accompanying Flood Insurance Study (Dated January 19, 1994), and any revisions thereto."<sup>4</sup> § 26-73.3(3), Richland County Code of Ordinances (1999).

Pursuant to the Zoning Ordinance, "filling of floodway areas, dumping of salvaged or scrap metal, or the placing of material or obstruction within a floodway area in such a manner as to impede free flow of water during a time of flood or in such a manner that the elevation of flood waters will be increased is prohibited." § 26-73.4(2), Richland County Code of Ordinances (1999). Similarly, in the County Stormwater Ordinance, "any construction or other development<sup>5</sup> ... located in an area of special flood hazard shall be in accordance with a storm drainage plan approved by the County Engineer." § 8-55, Richland County Code of Ordinances (1994). An "area of special flood hazard" is defined as "any land area susceptible of being inundated by the base

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<sup>3</sup> In November 2004, Richland County re-codified, with amendments and revisions, all of its land development ordinances, including its Stormwater and Zoning Ordinances, into one comprehensive land development code. The Zoning and Stormwater Ordinances at issue in this case concern provisions enacted prior to this re-codification.

<sup>4</sup> The phrase "and any revisions thereto" served to automatically adopt any subsequent FIS and Flood Maps that FEMA issued, including FEMA's July 17, 1995 revision and the February 20, 2002 revision at issue here. This automatic adoption clause was recognized and accepted by FEMA as meeting its requirements that the County adopt FEMA's flood data. In June 2004, as part of a substantive revision, the FIS and flood map reference was updated to expressly identify the February 20, 2002 data "and any revisions thereto."

<sup>5</sup> "Construction" is defined as "any building or erection of a structure, or any physical site preparation for same." § 8-54, Richland County Code of Ordinances (1994). "Development" is defined as "any man-made change to improved or unimproved real estate, including, but not limited to buildings, or other structures, mining, dredging, filling, grading, paving, excavation, or drilling operations." *Id.*

flood (100-Year Flood) as determined on an official ... Flood Insurance Rate Map, or other available information.” § 8-54, Richland County Code of Ordinances (1994). For areas adjacent to a river or stream, “no levees, dikes, fill materials, structures or obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway.”<sup>6</sup> § 8-62(h), Richland County Code of Ordinances (1994) (hereinafter referred to as “Floodway Provision”).

Various County staff interpreted the word “impede” differently. The County’s Floodplain Coordinator read the provision to mean no construction in a floodway.<sup>7</sup> The County Engineer read the provision to mean that construction could occur in a floodway if FEMA’s minimum standard was met.<sup>8</sup> Columbia Venture’s engineer testified that he understood the County’s ordinances to prohibit construction in a floodway, and he was not aware of the County Engineer’s interpretation. FEMA read the County’s floodway provisions to mean no allowance of “any development in the floodway (unless a variance is obtained).”

Flood hazard areas within unincorporated Richland County were studied and mapped by FEMA in 1981, 1985, 1987, 1989, 1994 and 1995. These earlier studies and flood maps showed the Congaree River floodway south of the City of Columbia extending to the riverside toe of the Manning Levee existing on Columbia Venture’s

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<sup>6</sup> This provision has been in the County’s Stormwater Ordinance since 1981.

<sup>7</sup> See also Columbia Venture’s own planning document, “Congaree Property Development Scenario,” which states that “currently the property is designated as a floodway. ... It is not possible to build in a floodway according to Mr. Harry Reed with Richland County. They will not issue building permits for projects within the floodway.”

<sup>8</sup> FEMA’s regulations prohibit any encroachments or development in the floodway “unless it has been demonstrated through hydrologic and hydraulic means performed in accordance with standard engineering practice that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood discharge.” 44 C.F.R. § 60.3(d)(3). However, a community may allow encroachments in the floodway that do increase flood levels if the community “first applies for a conditional FIRM and floodway revision, fulfills the requirements for such revisions ... and receives the approval of the Administrator.” *Id.* at (d)(4).

Property. In 1998, FEMA commenced a new study of Richland County, and on July 5, 1998, FEMA publicly released its new preliminary revised FIS and Flood Maps. FEMA's new study included several changes from the past FIS and FIRMs, the most significant of which was an enlarged floodway along the Congaree River. FEMA departed from past floodway delineations for the Congaree because the Manning Levee did not meet FEMA's requirements under 44 C.F.R. § 65.10 for certification of the levee as a flood control structure providing protection against the 100-year flood. As a result, the Congaree River floodway expanded substantially, placing the Manning Property entirely within the floodway. Even so, FEMA indicated that if the levee was upgraded to meet its regulatory requirements, the Flood Maps could be revised to remove the floodway from the Manning Property and reconfigure the floodway elsewhere. Richland County and the City of Columbia asked FEMA to postpone finalization of this preliminary revised FIS and FIRMs until an evaluation of the Manning Levee had been completed.

Prior to and during 1998, the Manning Family was attempting to sell approximately 4,400 acres of the Property for various financial reasons. Burroughs & Chapin Company, a real estate holding and development company in Myrtle Beach, South Carolina approached the Manning Family concerning potential purchase and development of the Property. In November 1998, Burroughs & Chapin Company entered into a Notice of Intent to purchase the Manning property, knowing that in order to develop how they wanted to, the Levee would have to be improved to meet FEMA's levee certification requirements. In an effort to meet FEMA's levee certification requirement regarding levee maintenance, Burroughs & Chapin Company approached

Richland County to seek its agreement that it would accept responsibility for maintaining the levees. On February 2, 1999, Richland County Council unanimously adopted the following resolution:

That the County accept responsibility for local inspection and enforcement of the operations and maintenance plan as submitted by the owner and approved by FEMA, and if required by FEMA regulation 44 CFR § 65.10, to accept operation and maintenance responsibility for the levee system contingent upon:

- (1) The property owners upgrade the levee system to meet FEMA standards as contained in 44 CFR § 65.10;
- (2) The property owners prepare all required documentation including operation and maintenance plans;
- (3) Certification that the levee system, as upgraded, meets FEMA standards;
- (4) The parties, which include Richland County, the City of Columbia, and the developers, resolve the issues of the performance and funding of the operation and maintenance responsibility;
- (5) The County's acceptance of responsibility terminates if the developers of the area do not invest at least \$30,000,000 within 10 years of the date of the adoption of this motion.

On or about February 19, 1999, Columbia Venture, LLC, an entity comprised of Burroughs & Chapin Company and other investors, purchased the Property. The initial plan was very extensive, and included multiple land uses including office, commercial, residential, and recreational. The proposed development, which eventually became known as the "Green Diamond" development, was described as a "city within a city."

On February 25, 1999, FEMA released another preliminary revised FIS and FIRM for Richland County, which reduced the Congaree River floodway from covering all of the Property to covering about half of the Property. Richland County asked FEMA to hold off on finalizing this map so that interested parties could better understand FEMA's data and modeling. Columbia Venture provided FEMA with results of its own

analysis, and asked that FEMA delay its public meeting and publication of the maps until FEMA had an opportunity to review Columbia Venture's complete analysis. FEMA agreed to delay finalization of its preliminary Flood Data.

On August 12, 1999, FEMA released another revised preliminary FIS and FIRM that incorporated Columbia Venture's data, resulting in a reduction of the proposed Congaree River floodway to the landward side of the Manning Levee. On August 19, 1999, FEMA held a public meeting for this preliminary revised Flood Data, triggering the public notice procedure for the finalization of the Flood Data.<sup>9</sup> The deadline for submitting any appeals of the Flood Data to Richland County was December 14, 1999.

By this time, Columbia Venture's Green Diamond project had become a controversial issue. In part, the public attention to Green Diamond was due to its enormous size. It was to be the largest development in the history of Richland County. Additionally, the location of the property within a floodplain raised important public policy issues. Several individuals and groups organized campaigns to oppose Green Diamond, including the South Carolina Wildlife Federation, Sierra Club, Audubon Society, Southern Environmental Law Center ("SELC"), and a local citizen group called Congaree Task Force.

As the December 14, 1999 deadline for appealing the August 12, 1999 Flood Data approached, the County received a large volume of letters, comments, and other documents styled as formal appeals. On December 7, 1999, County Council provided

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<sup>9</sup> As described by the United States District Court in its Order of Vacatur of November 18, 2005, FEMA failed to publish the required notice of the BFEs in the Federal Register, thus not ultimately triggering the public notice provision for finalizing the Flood Data. This statement is not pertinent to the issues before the Court on these motions, but is included for accuracy of the record only.

guidance and direction to the County Administrator as to how and whether the County should appeal. The County Council resolved as follows:

WHEREAS, FEMA has produced three different versions of a Flood Insurance Study for Richland County, South Carolina; and

WHEREAS, the Flood Insurance Study for Richland County, South Carolina, will have a tremendous impact on future development potential of the lands adjacent to the Congaree River; and

WHEREAS, the Flood Insurance Study for Richland County, South Carolina, will have a tremendous impact on the safety of the lives and property of Richland County residents; and

WHEREAS, the Flood Insurance Study for Richland County, South Carolina, will have a tremendous impact on the environment and habitat of Richland County; and

WHEREAS, numerous professionals and citizens and Lexington County have raised valid question [sic] about the technical accuracy of the flood insurance study; and

WHEREAS, the South Carolina Department of Natural Resources is completing a review of the Flood Insurance Study and will supply to FEMA technical data that raises valid questions about the Flood Insurance Study.

THEREFORE, BE IT HEREBY RESOLVED THAT RICHLAND COUNTY COUNCIL officially appeals the findings of the study in the name of the community of Richland County until such time as the technical questions raised by the South Carolina Department of Natural Resources and others are satisfactorily resolved; and

BE IT FURTHER RESOLVED THAT RICHLAND COUNTY expresses its appreciation to FEMA for its diligence and patience in the interest of our citizenry; and

BE IT FURTHER RESOLVED THAT RICHLAND COUNTY expresses its willingness to designate the South Carolina Department of Natural Resources to appeal on behalf of Richland County or jointly with Richland County, provided however that if the information submitted does not rise to the level of appeal as evaluated by South Carolina Department of

Natural Resources and the County Administrator, the information shall be forwarded to FEMA, but not as an official appeal;<sup>10</sup> and

BE IT FURTHER RESOLVED THAT RICHLAND COUNTY directs that this resolution be forwarded to FEMA with all information submitted for consideration, including that information provided by the South Carolina Department of Natural Resources.

On or about December 13, 1999, the County Administrator appealed the Congaree River Flood Data on behalf of the community. The South Carolina Department of Natural Resources<sup>11</sup> ("SCDNR") submitted its own appeal. In his formal appeal letter to FEMA, the County Administrator stated that "all relevant appeal information from our citizens must address the scientific and technical data and methodologies" and "many of the appeals do, in fact, purport to address those specific criteria." Although there may have been some confusion as to whether SCDNR appealed on behalf of or jointly with Richland County, former Executive Director of SCDNR, John Frampton, stated in an affidavit that SCDNR appealed FEMA's Flood Data independently from Richland County, and not on behalf of Richland County. In March 2000, FEMA recognized only three appellants – SCDNR, Dr. John Grego, and an entity represented by McNair Law Firm. Richland County was not recognized as an appellant.

After a lengthy administrative appeal process, on September 26, 2000, FEMA issued its appeal resolution which broadened the floodway to cover approximately seventy percent (70%) of Columbia Venture's property. On November 22, 2000, FEMA "agree[d] to consider Columbia Venture an appellant" of the September 26, 2000 appeal resolution, thereby launching another round of administrative appeal.

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<sup>10</sup> The minutes of its December 7, 1999 meeting reflect that Richland County Council added this latter proviso as part of its motion to approve this resolution.

<sup>11</sup> SCDNR, through its Flood Mitigation Program, serves as the State coordinating agency for implementation of the floodplain management aspects of the NFIP in South Carolina.

During this same general time period, the County Public Works staff submitted to County Council amendments to the Stormwater Ordinance that were required under the County's recently issued National Pollutant Discharge System ("NPDES") Permit to regulate stormwater. Aside from considering the changes required by the NPDES permit, the proposed ordinance amendments provided County Council with an opportunity to resolve the question of the meaning of "impede" within its Floodway Provision.<sup>12</sup> A Richland County Council Member sought a legal opinion regarding the proper interpretation of the word "impede." The County also sought and received comments from Columbia Venture regarding interpretation of the Floodway Provision.<sup>13</sup> In January 2001, the County's legal counsel provided its opinion that the word "impede" meant essentially no construction in a floodway. County Council received this opinion and input from others, and deliberated as to whether, and if so, how it should ultimately resolve the question. During a work session held in February 2001, County staff recommended that County Council defer action on whether it should revise the "impede" language until it had an opportunity to review all aspects of floodplain management in a new comprehensive ordinance; however, if the Council felt compelled to take immediate action, County staff recommended replacement of the "impede" language with FEMA's minimum standard for construction in a floodway. The Congaree Task Force and SELC both urged County Council to make no revisions to the existing "impede" language as

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<sup>12</sup> County Council is the ultimate arbiter as to interpretation of its own legislation. *See* McSwain Dep., p. 49, line 25; p. 50, lines 1-7. ("The ultimate interpretation is the policy of the County Council as these documents are created and promulgated. And as issues come forward they are reviewed in terms of what interpretative behaviors are existent and whether they are correct in terms of the intent or whether they need to be revised.").

<sup>13</sup> Columbia Venture, in written comments to the County, stated that its "request and suggestion is that the [Floodway Provision] should be deleted from the proposed ordinance and that these matters should be dealt with separately and concurrently in a comprehensive flood plain management ordinance ...."

interpreted by the County's legal counsel in order to provide the greatest protection against flood hazards.

Complicating matters was the impact of FEMA's proposed floodway on existing structures located along the Congaree River. In particular, the City of Columbia's existing wastewater treatment plant was located in what was now a floodway as shown on the September 26, 2000 preliminary revised Flood Maps. The City had plans to improve its plant, and the floodway designation prevented construction in a floodway under the County's ordinances. The City's plant was important to public health and safety, both in the City and in the County. Similarly, Heathwood Hall Episcopal School ("Heathwood Hall"), a private school also located within what was now a preliminary revised floodway, faced obstacles to moving forward with its existing expansion plans. Both the City<sup>14</sup> and Heathwood Hall approached Richland County requesting relief from the floodway designation.

In response to these concerns, SELC proposed an amendment to the Floodway Provision that would create limited exceptions for existing schools and wastewater treatment plants. Columbia Venture opposed this amendment. On March 20, 2001, Council gave first reading to the Stormwater Ordinance as amended to include SELC's proposed language. The amendment in effect allowed Heathwood Hall and the City's wastewater treatment plant to expand provided that they demonstrate that their expansion plans meet FEMA's minimum floodplain management standard governing encroachments in a floodway.<sup>15</sup> Richland County Council expressly stated as part of its

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<sup>14</sup> The City's wastewater treatment plant was exempt from the requirements of the Stormwater Ordinance under § 8-7(e). It sought revisions to the County's Zoning Ordinance, which contained a substantially similar section regarding encroachments in a floodway as found within the Stormwater Ordinance.

<sup>15</sup> See fn. 8, *supra*.

motion for first reading that its vote “in no way reflects Council’s position on any development in [the Congaree River floodplain].”<sup>16</sup>

Heathwood Hall initially advocated for replacing the Floodway Provision with FEMA’s minimum standard as the general rule, but subsequent to County Council’s first reading of the Stormwater Ordinance, it offered its suggested revisions intended to address issues regarding certain terms within the proposed exceptions and its concern that there be clear authority for levee maintenance. Heathwood Hall’s structures were located behind the Manning Levee, and it wanted to make sure that any amendment to the Floodway Provision did not inadvertently call into question the right of property owners to maintain their levee.

Prior to second reading of the ordinance, Columbia Venture transmitted a letter to County Council Chair Kit Smith, which stated:

While we continue to have concerns over the proposed amendment to the stormwater ordinance you are currently considering, Columbia Venture has decided that at this time our focus should be squarely on producing our formal development proposal and working toward a development agreement with Richland County, Richland County School District One, and possibly the City of Columbia.

We also appreciate your assurance, reiterated most recently at the last council meeting, that if we can reach an agreement on the development of Green Diamond, and if modifications are needed in your stormwater ordinance in order for the project to proceed, you would support the appropriate modifications at that time.

For these reasons, and because of your statements that votes on the stormwater ordinance should not be viewed as up or down votes on Green Diamond, we are withdrawing any active opposition to the amendment currently before you.

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<sup>16</sup> The County Council minutes for its March 20, 2001 meeting also include a statement by Council Member Bernice Scott, an advocate for Columbia Venture, who wanted the record to reflect her opinion that “this motion is definitely against any development in that area.” Her statement was not made part of the Council’s motion; therefore, it reflects her opinion only, which she is of course entitled to express.

County Council fine-tuned the language of the exceptions within its Floodway Provision, incorporating Heathwood Hall's comments, and review by the County's legal counsel. The County's amendments to its Stormwater Ordinance became effective on April 17, 2001. Amendments to the Floodway Provision in its final form are as follows:<sup>17</sup>

Notwithstanding any other provision of this Chapter, no levees, dikes, fill materials, structures or other obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway, unless:

- (1) such proposed impediment is or would be a part of or used by any public or private school that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway; or
- (2) such proposed impediment is or would be a part of or used by any publicly owned wastewater treatment facility that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway; or
- (3) such proposed impediment is a minor recreational or playground facility or area, such as, but not limited to, a boat ramp, floating dock, picnic area, soccer goal, or swing set; or
- (4) such impediment was approved by the County Engineer under this subsection (h), or under any predecessor provision, before January 1, 2001;

provided, however, that any specified activities permitted above must comply with all applicable federal, state, and local requirements, including, but not limited to, 44 C.F.R. § 60.3(d)(3), as amended. Nothing in this subsection (h) shall limit provisions in this Chapter or elsewhere authorizing or requiring the maintenance and repair of levees, dikes, dams, and similar structures; provided, however, that this sentence shall not be construed as authorizing or requiring the repair or maintenance of any such structure that would be higher or wider than it was before the need arose for such repair or maintenance.

FEMA announced its appeal resolution on August 20, 2001. Overall, the floodway remained essentially the same as the appeal resolution of September 26, 2000.

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<sup>17</sup> The County also amended its Zoning Ordinance to include this same language.

FEMA's final Flood Data became legally effective on February 20, 2002. By virtue of an automatic adoption clause within its Zoning Ordinance, Richland County adopted the final FIS and FIRMs on their effective date of February 20, 2002.

At the time FEMA issued these final flood maps, Columbia Venture announced its intent to proceed with the FEMA levee certification process<sup>18</sup> in order to move forward with its Green Diamond project. However, Columbia Venture never did initiate a map revision process or seek any other land development approvals from Richland County. Instead, on October 19, 2001, Columbia Venture appealed FEMA's final determination to the United States District Court ("Appeal"). On December 12, 2002, the South Carolina Wildlife Federation, Dr. Daniel Tufford, Dr. John Grego, and the Riverland Park Neighborhood Association ("Interveners") moved to intervene in the appeal as defendants. On April 21, 2003, SELC entered an appearance on behalf of Interveners. On April 20, 2004, the Interveners' motion was granted.

On November 8, 2003, the Board of Directors of the SELC elected Kit Smith, a member of Richland County Council, as a member of its Board. Ms. Smith testified that her membership on the Board of the SELC did not conflict with her duties as a member of Richland County Council. Ms. Smith further testified that she only discussed issues regarding Columbia Venture with SELC that were of public record. She testified that if she ever had a conflict of interest, her "higher duty would be to the Council and that I would resign or take a leave of absence from SELC should the positions compete."

Columbia Venture's Appeal continued for years. On August 22, 2005, Columbia Venture filed a Motion to Vacate "FEMA's Final [2001] BFEs and Floodway determinations for the Congaree River." On November 18, 2005, the United States

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<sup>18</sup> See 44 C.F.R. § 65.10, discussed *supra*.

District Court rendered its decision on Columbia Venture's Motion ("2005 Order"), concluding that:

Because FEMA failed to comply with procedures required by federal law, the court must set aside FEMA's 2001 base flood determinations for the Congaree River in Richland County pursuant to 5 U.S.C. § 706. Accordingly, the 2001 base flood elevation determinations are null and void. By operation of law, the 1995 base flood elevation determinations are in effect until FEMA revises them pursuant to its authority under the NFIA. This matter is hereby remanded to FEMA for further proceedings consistent with this order. CV's motion to vacate is granted. The case is dismissed without prejudice.

The 2005 Order expressly vacated the base flood elevations, but did not expressly vacate the floodway, whereas the court's entry of judgment stated that the Court had "heard and granted the plaintiff's motion to vacate the 2001 Final Base Flood Elevations and Flood way Determinations for the Congaree River flood plain promulgated by FEMA." ("2005 Judgment"). This discrepancy caused confusion among Richland County staff as to what exactly had been vacated. The County sought guidance from FEMA as to what was vacated and how the County should proceed in terms of maintaining compliance with the NFIP. Because the vacatur was due to a procedural error, not the technical merits of flood data, Richland County wanted to know whether FEMA was planning to republish the data in the Federal Register to rectify the problem. Also important to know was whether FEMA intended to appeal the decision. The County raised these questions with FEMA's Regional Office in January 2006; however, the County was referred to FEMA's headquarters in Washington D.C. Richland County made telephone calls and sent letters and emails to FEMA Headquarters, with no meaningful response.

Faced with this state of affairs, on February 21, 2006, Richland County enacted a temporary moratorium on approval of permits for development or construction within the Congaree River floodplain. Specifically, the moratorium applied to all properties located within six FIRM panels covering the Congaree floodplain, not just Columbia Venture's Property. The ordinance's intent and purpose was stated as follows:

Whereas, Richland County is a participating community in the National Flood Insurance Program ("NFIP") administered by the Federal Emergency Management Agency ("FEMA"). Pursuant to 44 C.F.R. § 60.3, FEMA must provide a participating community with data upon which floodplain management regulations shall be based. To be a participating community, Richland County is required by 44 C.F.R. § 60.2(h), to adopt and apply this data for enforcement of floodplain management regulations in unincorporated Richland County; and

Whereas, on November 18, 2005, the United States District Court, South Carolina Division, in the case of Columbia Venture v. Federal Emergency Management Agency, Case Number 3:01-4100-MBS, entered a Written Order vacating the Congaree River base flood elevations as revised by the Federal Emergency Management Agency ("FEMA") on August 20, 2001 and effective on February 20, 2002; and

Whereas, the Court's Order rendered null and void the Congaree River base flood elevations as promulgated by FEMA on August 20, 2001 and effective February 20, 2002. Consequently, pursuant to 44 C.F.R. § 60.3, FEMA must provide sufficient data upon which Richland County's floodplain regulations are to be based as they apply to the Congaree River floodplain. To date, FEMA has not provided the required data, and

Whereas, a moratorium on construction and development in flood-prone areas of the Congaree River is needed to protect public health, safety and welfare, and to allow the County time to determine what actions may be needed to maintain compliance with the NFIP.

The "moratorium did not apply to permit applications for maintenance of existing structures, levees or buildings." The moratorium expired on April 21, 2006, 60 days after its effective date.

During this time, FEMA appealed the 2005 Order and Judgment to the United States Court of Appeals for the Fourth Circuit. No stay of the order was sought by any of the parties. Richland County continued to seek guidance from FEMA concerning appropriate actions to maintain compliance with the NFIP. FEMA provided no guidance. On May 16, 2006, the County adopted another 60-day moratorium. On July 11, 2006, it passed another extension of the moratoria for an additional 90 days, until Columbia Venture's appeal was settled, or until FEMA provided sufficient data, or until the County adopted FEMA-approved data, whichever occurred earlier.

On August 30, 2006, Richland County received a letter from FEMA, acknowledging the status of its February 20, 2002 BFEs in light of the 2005 Order, and stating:

Currently, the parties to the lawsuit are participating in a Fourth Circuit Court of Appeals mediation in an effort to resolve the issues in the lawsuit. Since this process is ongoing, and may definitively resolve the matter if successful, there has been no occasion for FEMA to take a formal action. If the mediation fails to resolve the litigation, FEMA will take other action as appropriate.

In any event, FEMA continues to recommend communities adopt and enforce floodplain management regulations commensurate with the best flood data that is available to the community. The National Flood Insurance Program establishes "minimum" flood protection standards, but supports and encourages the adoption of standards that provide a higher level of protection to reduce the devastating effects of flooding. It is important to note that the Court's November 18, 2005, Order substituted the 1995 BFEs for the Richland County BFEs contained in the February 16, 2001 Federal Register Notice, but did not otherwise change the chargeable flood insurance rates for Richland County that continue to be based on the effective Flood Insurance Rate Map dated February 20, 2002.

Subsequent communication between Richland County and FEMA's regional office, manifested in an email dated October 17, 2006, yielded more detailed guidance. According to FEMA, the 2005 Order vacated only the 2002 Congaree River BFEs, not the 2002 Congaree River floodway. FEMA advised that the County must adopt the 1995 Congaree River BFEs but it could not adopt the 1995 Congaree River floodway because FEMA regulations require the County to adopt data furnished by FEMA as the minimum requirements underlying the County's floodplain regulations. FEMA considered the 2002 floodway to be the minimum data it provided for use by the County. Because FEMA considered the 2002 floodway to be the minimum data, the County could not adopt the 1995 floodway because the 1995 floodway was smaller than the 2002 floodway. In other words, the 1995 floodway was less restrictive than the 2002 floodway and therefore, fell below FEMA's minimum requirements. 44 C.F.R. § 60.1(d).

On December 5, 2006, Richland County passed an ordinance adopting 1995 BFEs for the Congaree River floodplain, while keeping the 2002 Congaree floodway in place. In addition, in order to rectify the discrepancy between the 1995 BFEs and the 2002 FIRMs, the County submitted an application to FEMA for a Letter of Map Revision ("LOMR")<sup>19</sup> to put back in place the 2002 BFEs. In 2007, FEMA determined that the County's request should be processed as a Physical Map Revision ("PMR")<sup>20</sup> and closed

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<sup>19</sup> Under 44 C.F.R. § 72.2, a LOMR is defined as "FEMA's modification to an effective Flood Insurance Rate Map (FIRM) ...." "LOMRs are generally based on the implementation of physical measures that affect the hydrologic or hydraulic characteristics of a flooding source and thus result in the modification of the existing regulatory floodway, the effective base flood elevations, or the [Special Flood Hazard Area]." *Id.* "The LOMR officially revises the FIRM or FBFM, and sometimes the Flood Insurance Study (FIS) report, and, when appropriate, includes a description of the modifications." *Id.* "The LOMR is generally accompanied by an annotated copy of the affected portions of the FIRM, FBFM, or FIS report." *Id.*

<sup>20</sup> Under 44 C.F.R. § 72.2, a PMR is defined as "FEMA's physical revision and republication of an effective FIRM, FBFM, or FIS report." "PMRs are generally based on physical measures that affect the hydrologic or hydraulic characteristics of a flooding source and thus result in the modification of the existing regulatory floodway, the effective base flood elevations, or the [Special Flood Hazard Area]." *Id.*

processing of the County's LOMR. In September 2007, FEMA issued preliminary Flood Data for the Congaree River that sought to reinstitute the 2002 BFEs through the PMR process, and in October 2007, published its proposed BFEs in the Federal Register.

On November 2, 2007, the United States District Court issued a text order clarifying that its 2005 Order vacated both the 2002 Congaree River BFEs and floodway ("2007 Order"). Shortly thereafter, the United States District Court found that FEMA's publication of Congaree River BFEs pursuant to its processing of its PMR did not comply with its 2005 and 2007 Order. On January 24, 2008, FEMA, in turn, withdrew the BFEs published in the Federal Register in October 2007. 73 F.R. 4156 (Jan. 24, 2008). In an effort to reinstitute the 2002 Congaree River BFEs in a manner satisfactory to the Court, FEMA developed new preliminary Flood Data that served to reinstate the 2002 Congaree River BFEs and floodway. However, upon a motion by the Interveners to stay the 2005 and 2007 Orders pending the outcome of Columbia Venture's appeal, the Fourth Circuit Court of Appeals granted the stay on April 29, 2008. The stay had the effect of keeping in place the 2002 Flood Data until Columbia Venture's appeal was decided. In light of this action, FEMA elected not to continue processing the preliminary Flood Data.

On December 27, 2007, the City of Cayce annexed the Property upon petition by Columbia Venture.

In 2009, the Fourth Circuit Court of Appeals reversed the District Court's vacatur of the Congaree River BFEs and floodway, holding that FEMA's procedural error was harmless. *Columbia Venture, LLC v. S.C. Wildlife Federation*, 562 F.3d 290, 294 (4<sup>th</sup> Cir. 2009). The Court remanded for determination of Columbia Venture's substantive

claims that FEMA's BFE determinations were scientifically and technically incorrect. *Id.* at 295. Columbia Venture settled the appeal with FEMA and the Defendant-Interveners.

### STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC. "The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). However, the opposing party may not rest upon mere allegations or denials, but must respond with specific facts showing a genuine issue of material fact. *Id.* A grant of summary judgment is "completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg. Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). Speculation and "inferential leaps" are insufficient to defeat a motion for summary judgment. *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010). Only actual disputes over truly material facts will defeat a properly plead motion for summary judgment. *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 173, 577 S.E.2d 428, 436 (2003).

### CONCLUSIONS OF LAW

In regards to Plaintiff's substantive due process claim, even when viewing the facts in a light most favorable to the Plaintiff, Defendant's Motion for Partial Summary Judgment as to Plaintiff's due process claim is granted. In regards to Defendant's argument that Plaintiff's regulatory taking claim is unripe due to the Plaintiff's failure to

provide Defendant with an opportunity to make a final decision as to the impact of its regulations upon Plaintiff's contemplated development plan, I conclude that the permissible uses of the Plaintiff's Property were known to a reasonable degree of certainty, and any further action by the Plaintiff would have been futile; therefore, Defendant's Motion for Partial Summary Judgment as to its ripeness defense is denied.

### **1. Substantive Due Process Claim**

In order to establish a substantive due process claim under the United States Constitution, a plaintiff must prove 1) a deprivation of property or a property interest, 2) by a government entity, 3) in a manner that "falls so far beyond the outer limits of the legitimate governmental action that no process could cure the deficiency." *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4<sup>th</sup> Cir. 2002); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4<sup>th</sup> Cir. 1995); *Harbit v. City of Charleston*, 382 S.C. 383, 394, 675 S.E.2d 776, 782 (Ct. App. 2009). "In other words, government action offends substantive due process only where the resulting deprivation of life, liberty, or property is so unjust that no amount of fair procedure can rectify it." *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 288 (4<sup>th</sup> Cir. 1998). The Due Process Clause is designed "to prevent government from abusing its power, or employing it as an instrument of oppression." *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992).

In order to prove a substantive due process claim in a land use context, such as this case, a plaintiff "must show that the challenged actions had 'no foundation in reason and [were] a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper

sense.” *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4<sup>th</sup> Cir. 1995). A substantive due process claim can “survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state’s traditional police power.” *Id.* “Only the most egregious official conduct can be said to be arbitrary in the constitutional sense.” *International Assoc. of Machinists & Aerospace Workers v. Haley*, 2012 U.S. App. LEXIS 9175, \*16 (4<sup>th</sup> Cir. 2012).

Due process analysis under the South Carolina Constitution is virtually the same as that under the United States Constitution. To support a substantive due process violation under the South Carolina Constitution, a party must show “he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.” *Worsley Companies Inc. v. Town of Mt. Pleasant*, 339 S.C. 51, 55, 528 S.E.2d 657, 660 (2000); *see also Harbit v. City of Charleston*, 382 S.C. 383, 394, 675 S.E.2d 776, 780 (Ct. App. 2009), *citing Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4<sup>th</sup> Cir. 1995). If an ordinance bears a reasonable relationship to any legitimate interest of government, then a plaintiff’s substantive due process claim fails. *Worsley Companies*, 339 S.C. at 55, 528 S.E.2d at 660. “The power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the court’s function to pass upon the wisdom or expediency of municipal ordinances or regulations. *Harbit*, 382 S.C. at 394, 675 S.E.2d at 780. The validity of a local government’s decision-making concerning its land use ordinances, as is the case here, must be upheld “if the propriety of that decision is even ‘fairly debatable.’” *Id.*

**A. The County's Appeal of FEMA's Preliminary Revised Flood Data of August 12, 1999**

Pursuant to 42 U.S.C. § 4104(b), "any owner of property located within the [County] who believes his property rights to be adversely affected by [FEMA's] proposed determination may appeal such determination to the [County]." The County is required to "review and consolidate all such appeals and issue a written opinion stating whether the evidence presented is sufficient to justify an appeal on behalf of such persons by the community in its own name." *Id.* at (c). The County received over 700 pages of comments and analysis from residents of Richland County. On December 7, 1999, County Council expressed an intent to appeal the August 12, 1999 Flood Data. On or about December 14, 1999, the County Administrator officially appealed the Flood Data on behalf of the community.

Richland County argues that its appeal fell squarely within its discretion under 42 U.S.C. § 4104(c), and it had a legitimate basis to do so given its conclusion that some of the citizen submittals to the County were sufficient to justify the County's appeal. Columbia Venture argues that the appeal was "effectuated without any technical justification" and "contrary to FEMA regulations." However, the evidence Columbia Venture put forward fails to support this contention. *David v. McLeod Reg. Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) (A grant of summary judgment is "completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner."). The testimony of the County Engineer merely established that he did not review the citizen submittals prior to the County's appeal. Other cited testimony refers to a different time period and subject matter altogether.

Columbia Venture points to an internal County memorandum in which a County staff member responds to a Council Member's questions regarding the FEMA appeal process. In this memorandum, the staff member raised questions about whether a County appeal would be appropriate. The staff person expressly noted that his questions reflected his "opinion only and does not represent any official stance of either the Planning Staff or Richland County." I find this evidence to be immaterial, and even assuming for the moment that this evidence presents a material fact, I find that no reasonable inference can be made from this evidence regarding the County's intent or motivation regarding its appeal. This memorandum makes clear that the concern the author raises is his own personal thoughts.

Richland County has shown a legitimate basis to appeal the August 12, 1999 Flood Data. And Columbia Venture has failed to show that the appeal "had no foundation in reason and was a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4<sup>th</sup> Cir. 1995); *Worsley Companies Inc. v. Town of Mt. Pleasant*, 339 S.C. 51, 55, 528 S.E.2d 657, 660 (2000). Therefore, no substantive due process violation exists here.

Furthermore, FEMA did not recognize Richland County as an appellant; thus, even if no legitimate basis for the County's appeal existed, the County's appeal caused no harm to Columbia Venture. Without a showing of how the County's appeal ultimately caused some deprivation of its property interests, Columbia Venture's claim that the County appeal violated its substantive due process rights clearly fail. See *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4<sup>th</sup> Cir. 2002) (stating that, in order to

establish a substantive due process claim, a plaintiff must prove 1) a deprivation of property or a property interest, 2) by a government entity, 3) in a manner that “falls so far beyond the outer limits of the legitimate governmental action that no process could cure the deficiency”).

**B. Richland County’s Adoption of Exceptions for Certain Existing Uses Within its Zoning Ordinance and Stormwater Ordinance**

On April 17, 2001, Richland County adopted amendments to its stormwater ordinance that kept its “impede” standard as the general rule, and also created a limited exception for two existing land uses that had long-standing structures situated within FEMA’s proposed Congaree River floodway – the City of Columbia’s wastewater treatment plant and Heathwood Hall. Both the City of Columbia and Heathwood Hall had built extensive structures in the Congaree River floodplain prior to FEMA’s new study of Richland County flood hazard areas. Richland County argues that its exceptions applicable to the City and Heathwood Hall have a rational basis in protecting the existing investments and capital improvement plans of the City and Heathwood Hall, while at the same time, maintaining for the protection of public safety restrictions on how and to what extent they could expand within a floodway. Columbia Venture asserts that the County’s amendments to the Stormwater Ordinance were driven by opposition to Green Diamond. For the reasons stated in section G of this Order, *infra*, I find Columbia Venture’s argument unavailing.

The City wastewater treatment plant serves to protect public health and safety. The County’s exception allowing the City to proceed with its plans to improve the plant also serves to protect public health and safety by assuring future wastewater treatment capacity. Columbia Venture must show that the County’s exception allowing the City to

meet the region's future wastewater treatment needs had "no foundation in reason" and was an "arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4<sup>th</sup> Cir. 1995); *see also Worsley Companies Inc. v. Town of Mt. Pleasant*, 339 S.C. 51, 55, 528 S.E.2d 657, 660 (2000) (stating that, if an ordinance bears a reasonable relationship to any legitimate interest of government, then a plaintiff's substantive due process claim fails). This it has failed to do.

Like the City of Columbia, Heathwood Hall had long-standing structures on its property within the Congaree River floodplain. The County's exception applicable to Heathwood Hall serves to protect the existing investments and expansion plans of Heathwood Hall while continuing to protect public safety. The County's exception for Heathwood Hall therefore had a rational basis. Again, Columbia Venture has failed to show that the County's exception allowing Heathwood Hall to proceed with its capital improvements had "no foundation in reason" and was an "arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4<sup>th</sup> Cir. 1995); *see also Worsley Companies Inc. v. Town of Mt. Pleasant*, 339 S.C. 51, 55, 528 S.E.2d 657, 660 (2000).

Columbia Venture argues that the County's exceptions allowing the City and Heathwood Hall to proceed with their expansion plans, while leaving it subject to the general prohibition against construction in a floodway, is irrational. Although the City wastewater treatment and Heathwood Hall's structures were located behind the same

levee system as Columbia Venture, I nonetheless conclude that the County's exceptions rested upon rational distinctions.

Both the City and Heathwood Hall had built extensive structures prior to FEMA's expansion of the Congaree River floodway. The new floodway posed a significant obstacle to the future viability of these existing uses. In contrast, Columbia Venture had no pre-existing structure or businesses located on its property, and the new floodway did not prevent it from continuing its existing use. Unlike the City's wastewater treatment plant and Heathwood Hall, whose structures were either occupied by employees or students during work or school hours, Columbia Venture wanted to build an extensive development of residences, shopping centers, restaurants, hotels, and a retirement village on its property. These uses involve significantly more people occupying structures for longer time periods than the limited uses of a school and a wastewater treatment plant. During a time of flood, evacuation of a school and wastewater treatment plant demands less government resources and poses a smaller risk of loss of life or property than an entire residential and commercial development. Given these distinctions, it cannot be said that the County's exceptions had "no conceivable rational relationship to the exercise of the state's traditional police power." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4<sup>th</sup> Cir. 1995); *see also Harbit v. City of Charleston*, 382 S.C. 383, 392, 675 S.E.2d 776, 781 (2009).

In the context of the due process analysis, the County had legitimate reasons to take the actions that it did and these actions fell within its power to protect public health and safety. The County's actions in providing an exception to Heathwood Hall and the City of Columbia while leaving Columbia Venture in the same position as all other

property owners within the Congaree River floodway, does not constitute a substantive due process violation.

**C. Richland County's Adoption and/or Use of FEMA's 2002 FIS and FIRMs within its Zoning Ordinance and Stormwater Ordinance**

Richland County argues that its adoption of FEMA's 2002 Flood Data as part of its Zoning Ordinance and its use of FEMA's 2002 Flood Data in the administration of its Stormwater Ordinance has a rational relationship to the protection of public health and safety; therefore, Columbia Venture's claim of any substantive due process violation due to such adoption and/or use must fail as a matter of law. I agree.

There can be no question that Richland County's adoption and/or use of FEMA's finally determined Flood Data within its Zoning Ordinance and Stormwater Ordinance serves a legitimate government purpose. The Flood Maps serve to delineate flood hazard areas that are subject to the community's floodplain management regulations. In order to meet FEMA's minimum standards for local government compliance with the NFIP, the County must adopt FEMA's Flood Data as the basis for determining which areas in the County are subject to its floodplain management regulations. 44 C.F.R. § 60.3. The NFIP advances a legitimate government interest. *Texas Landowners Rights Assoc. v. Harris*, 453 F. Supp. 1025, 1032 (D.D.C. 1978).

Compliance with the NFIP requirements for local floodplain management serves a legitimate government purpose of protecting public health and safety. *See e.g., DDA Family Ltd. P'ship v. City of Moab*, 2006 U.S. Dist. LEXIS 32667, \*30-31 (D. Utah 2006) (local floodplain ordinance clearly a legitimate exercise of police power); *Gove v. Zoning Bd. of Appeals of Chatham*, 444 Mass. 754, 761, 831 N.E.2d 865, 870 (Mass. 2005) (same); *Bank v. Illinois Dep't of Transp.*, 144 Ill.2d 210, 226, 579 S.E.2d 815, 821-

22 (1991) (same); *Fortier v. City of Spearfish*, 433 N.W.2d 228, 231, 1988 S.D. LEXIS 175, \*7 (1988) (same); *Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255, 262, 302 S.E.2d 204, 209 (1983) (same); *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 233, 284 N.E.2d 891, 899 (1972) (same).

Even assuming Columbia Venture is correct that the County adopted “a floodway that is not based on sound engineering or evidence that is scientifically or technically correct,” it still cannot prevail on its substantive due process claim. The Due Process Clause is not a guarantee against incorrect or ill-advised decisions. *See WMX Tech., Inc. v. Gasconade County*, 105 F.3d 1195, 1200-01 (8<sup>th</sup> Cir. 1997) (explaining that the “due process does not require a legislative body to perform any particular studies or prepare any particular analysis to justify its decisions”); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 829 (4<sup>th</sup> Cir. 1995) (zoning decision based upon erroneous evidence does not constitute a substantive due process violation).

#### **D. Series of Moratoria Enacted in 2006**

In the aftermath of the United States District Court’s 2005 Order of Vacatur, Richland County enacted a series of moratoria that suspended approval or denial of any development permit for property located within the Congaree River floodplain, which in total did not exceed nine months. The building moratoria prohibited issuance of development permits within the Congaree River floodplain in order to give the County time to sort out the impact of the 2005 Order and to determine whether FEMA intended to re-publish the 2001 BFEs pursuant to its authority under the NFIA. The moratoria applied to all property within the Congaree River floodplain, not just Columbia Venture’s property.

C

The County asserts that the moratoria served the legitimate purposes stated within the ordinances, namely to assure compliance with the NFIP and maintain adequate flood protection and therefore, pass muster under the Due Process Clause. Columbia Venture argues that the moratoria were driven by opposition to Green Diamond, either from citizens or from individual Council Members, with intent to thwart any efforts of Columbia Venture to improve its levees. For reasons stated in Section G of this Order *infra*, I find Columbia Venture's argument unavailing.

The County had ample reason to suspend temporarily any development permit approvals in the Congaree River floodplain due to the uncertainties associated with the 2005 Order. Columbia Venture has failed to show that the moratoria had "no foundation in reason" and was an "arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4<sup>th</sup> Cir. 1995); *see also Worsley Companies Inc. v. Town of Mt. Pleasant*, 339 S.C. 51, 55, 528 S.E.2d 657, 660 (2000) (stating that, if an ordinance bears a reasonable relationship to any legitimate interest of government, then a plaintiff's substantive due process claim fails).

#### **E. Ordinance Adopting 1995 BFEs While Leaving 2002 Floodway in Place**

In the wake of the United States District Court's 2005 Order, FEMA advised Richland County that the 2005 Order vacated only the 2002 BFEs, not the 2002 floodway. Consequently, in December 2006, Richland County adopted the 1995 BFEs while leaving the 2002 Congaree floodway in place. So long as the County's ordinance can be justified by "any circumstance or government interest," *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4<sup>th</sup> Cir. 1995), Columbia Venture's substantive due

process claim must fail. *See also Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004) (... “the standard for reviewing all substantive due process challenges to state statutes, including economic and social welfare legislation, is whether the statute bears a reasonable relationship to any legitimate interest of government.”). Because FEMA, the administrator of the NFIP, advised Richland County that it could not reinstitute the 1995 floodway without violating minimum NFIP standards for participating communities, the County’s enactment of the ordinance is justified by its interest in maintaining compliance with NFIP requirements, which in turn enables County residents to obtain flood insurance and federal lending assistance. The ordinance also serves the legitimate purposes of the County’s Zoning Ordinance to protect public health, safety and welfare.

Columbia Venture argues that the County’s interest in maintaining compliance with the NFIP is mere pretext for its real motivation to prevent Columbia Venture from improving its levees. Columbia Venture has not put forward evidence suggesting that Richland County’s basis for enacting the ordinance was pretextual. Even if it had produced such evidence, because the ordinance also serves the legitimate purpose of protecting public health safety and welfare, Columbia Venture’s substantive due process claim fails. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4<sup>th</sup> Cir. 1995); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004).

Columbia Venture urges this Court to conclude that the 2005 Order, read together with its Motion to Vacate and the 2005 Judgment, clearly vacated the 2002 floodway, and that the County’s ordinance was irrational in that it defied the 2005 Order. In considering a motion for summary judgment, “the evidence and all reasonable inferences must be

viewed in the light most favorable to the non-moving party.” *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). However, interpretation of the decision of the United States District Court is not the relevant inquiry here. Instead, it is County’s understanding of the 2005 Order that is relevant. Evidence produced by Richland County shows that County staff had not seen the 2005 Judgment, and they were confused about the meaning of the 2005 Order. Additionally, FEMA had advised the County that the United States District Court had not vacated the 2002 Floodway. Given this evidence, I cannot conclude that the County’s ordinance was irrational or lacked any legitimate basis in the proper exercise of its legislative power. At best, the County’s ordinance was based on a mistaken interpretation of a court order, which does not rise to the level of a substantive due process violation. *Robinson v. City of Seattle*, 830 P.2d 318 (Wash. 1992).

Columbia Venture alleges that Richland County’s use of the 2002 floodway in conjunction with the 1995 BFEs produced an arbitrary and irrational result by failing to meet the County’s definition of a “regulatory floodway” within its Stormwater Ordinance. A due process inquiry asks whether the County’s adoption of the 1995 BFEs while leaving the 2002 floodway intact bears a rational relationship to the purposes of the floodplain ordinance, not whether the BFEs and floodway bear a rational relationship to each other. The broad 2002 floodway furthers the interest of protecting public health and safety. FEMA’s regulations make clear that local ordinances with more restrictive protections are encouraged. 44 C.F.R. § 60.1. In order to withstand a substantive due process challenge, Richland County is not required to “even select the best or the least restrictive method of attaining its goals so long as the means selected are rationally

related to those goals.” *Richardson v. Township of Brady*, 218 F.3d 508, 514 (6th Cir. 2000).

Furthermore, to the extent Columbia Venture is alleging that Richland County’s adoption of the 1995 BFEs along with the 2002 FIRMs is arbitrary and capricious because they are mismatched or somehow irreconcilable, Columbia Venture is confusing the standard for arbitrary and capricious acts in the constitutional sense with the arbitrary and capricious standard employed in other contexts. The inquiry into arbitrariness under the Due Process Clause is completely distinct from and far narrower than the inquiry into arbitrariness under state law. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827-829 (4<sup>th</sup> Cir. 1995); *see also Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 288 (4<sup>th</sup> Cir. 1998); *Locust Valley Enterp., LLC v. Upper Saucon Township*, 2008 U.S. Dist. LEXIS 53232 \*26 (E.D. Pa. 2008). Columbia Venture has not produced evidence that would meet the proper test for a substantive due process violation.

#### **F. Submittal of Letter of Map Revision**

In 2007, Richland County submitted a Letter of Map Revision (“LOMR”) to FEMA in an effort to restore the vacated 2002 base flood elevations. Richland County acted well within its discretion in submitting its LOMR in order to get definitive information from FEMA regarding the best available data to regulate the Congaree River floodplain. I see no substantive due process violation here.

Columbia Venture asserts that the LOMR constituted an *ultra vires* act in several respects, which also supports a substantive due process violation. Columbia Venture asserts that Richland County authorized this LOMR “without notice to CV, other

landowners, or the public at large” and “by a secret vote taken in executive session in violation of state law” with the intent to circumvent the United States District Court’s 2005 Order. I find Columbia Venture’s arguments under *Watrous v. Town of Preston*, 2011 U.S. Dist. LEXIS 47584 (D. Conn. 2011), *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 789 (2<sup>nd</sup> Cir. 2007), and *Mont Belvieu Square v. City of Mont Belvieu*, 27 F. Supp. 2d 935, 944 (S.D. Tex. 1998), to be unpersuasive. Under *Watrous*, *Cine SK8*, and *Mont Belvieu*, a showing of government action that exceeds its authority, without more, may serve as a basis for a substantive due process violation. These cases are inconsistent with my reading of substantive due process cases decided in the Fourth Circuit Court of Appeals. See e.g. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827-829 (4<sup>th</sup> Cir. 1995); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 288 (4<sup>th</sup> Cir. 1998); *Scott v. Greenville County*, 716 F.2d 1409 (4<sup>th</sup> Cir. 1983).

Even if *ultra vires* acts could support a substantive due process claim, Columbia Venture has failed to present evidence showing that the County took action that exceeded its authority. To survive a motion for summary judgment, Columbia Venture cannot rest upon mere allegations, but must respond with specific facts showing a genuine issue of material fact. *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). Columbia Venture’s assertion that the County Council violated state law by approving the submittal of the LOMR in executive session has no basis in fact. Instead, Mr. Milton Pope, the County Administrator, explained that, although he briefed County Council in executive session about what his office was doing with regard to the LOMR, he did not need County Council authorization in order to proceed with the application to FEMA, and the decision to submit the LOMR was made by him. Columbia Venture has not put

forward any evidence disputing Mr. Pope's testimony that County Council did not take action in executive session, and Columbia Venture has not provided any legal basis for its claim that the County Council was required to take a public vote on whether to submit the LOMR, as opposed to the decision properly being an administrative decision within the purview of the County Administrator.

Columbia Venture also argues that the LOMR submittal was *ultra vires* because FEMA decided to treat the LOMR request as a Physical Map Revision. The County possessed the authority to submit the LOMR. 44 C.F.R. § 65.6. FEMA's decision to proceed under a different path does not make the County's LOMR submittal an action that exceeded the County's authority.

Lastly, FEMA ultimately decided not to process the County's LOMR; thus, the County's LOMR caused no harm to Columbia Venture. Without a showing of how the County's LOMR ultimately caused some deprivation of its property interests, Columbia Venture's claim that the County's LOMR violated its substantive due process rights clearly fail. See *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4<sup>th</sup> Cir. 2002) (stating that, in order to establish a substantive due process claim, a plaintiff must prove 1) a deprivation of property or a property interest, 2) by a government entity, 3) in a manner that "falls so far beyond the outer limits of the legitimate governmental action that no process could cure the deficiency").

#### **G. Opposition to Green Diamond**

Columbia Venture repeatedly argues that all of the County's actions described above were driven by either citizen opposition to Green Diamond, or opposition by a County Council Member, and this opposition to its proposed development amounts to a

substantive due process violation. Although community opposition was evident, the mere fact of opposition to a proposed development does not implicate the Due Process Clause. *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, 827-829 (4<sup>th</sup> Cir. 1995); *Locust Valley Golf Club, Inc. v. Upper Saucon Township*, 2008 U.S. Dist. LEXIS 53232, \*38 (E.D. Penn. 2008). “The formulation and application of land use policies ... frequently involve heated political battles, which typically pit local residents against developers ....” *Sylvia*, at 828. “It is not pernicious *per se* for a [local government] to be influenced by political pressure in the community.” *Id.* at 829. In a democracy, citizens opposed to a development for legitimate reasons are entitled to organize and exert political pressure on their elected officials. *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, 828-829 (4<sup>th</sup> Cir. 1995); *Gardner v. City of Baltimore*, 969 F.2d 63, 71-72 (4<sup>th</sup> Cir. 1992). The evidence does not suggest that such opposition was based on any reasons other than concern about the risks of development within a floodplain, which is clearly a legitimate land use concern.

Even if I assume that opposition from any source was driven by some irrational or improper purpose, so long as any legitimate purpose exists for the County’s actions, as is the case here, Columbia Venture’s substantive due process claim must fail. *Henry v. Jefferson County Commission*, 637 F.3d 269, 279 (4<sup>th</sup> Cir. 2011); *Crider v. Bd. of County Comm’rs of Boulder*, 246 F.3d 1285, 1289-90 (10<sup>th</sup> Cir. 2001); *Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3<sup>rd</sup> Cir. 2004); *WMX Technologies, Inc. v. Gasconade County*, 105 F.3d 1195, 1200-1201 (8<sup>th</sup> Cir. 2001); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827-829 (4<sup>th</sup> Cir. 1995); *Gardner v. City of Baltimore*, 969 F.2d 63, 71 (4<sup>th</sup> Cir. 1992); *Locust Valley Golf Club, Inc. v. Upper Saucon Township*, 2008 U.S. Dist. LEXIS

53232, \*38 (E.D. Penn. 2008); *see also* *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004); *Cf. Bibco Corp. v. City of Sumter*, 332 S.C. 45, 53, 504 S.E.2d 112, 117 (1998).

#### **H. *Scott v. Greenville County* is Inapplicable**

Relying on *Scott v. Greenville County*, 716 F.2d 1409 (4<sup>th</sup> Cir. 1983) and its progeny, *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356 (4<sup>th</sup> Cir. 2008), and *MLC Auto., LLC v. Town of Southern Pines*, 532 F.3d 269 (4<sup>th</sup> Cir. 2008), Columbia Venture argues that it has adduced sufficient evidence to withstand the County's motion for summary judgment on its substantive due process claim. I disagree.

*Scott*, *A Helping Hand* and *MLC Auto* are distinguishable because Columbia Venture failed to "show that the challenged actions had 'no foundation in reason and [were] a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4<sup>th</sup> Cir. 1995). *Scott* and its progeny do not establish a different substantive due process rule than that found in *Sylvia*. These cases simply establish the following indicators that the government's action may fall beyond the outer limits of legitimate government action – 1) the action is targeted at a single party; 2) the action is tainted with fundamental procedural irregularity; and 3) the action deviates from or is inconsistent with the defendant's regular practice. *MLC Auto., LLC v. Town of Southern Pines*, 532 F.3d 269, 281 (4<sup>th</sup> Cir. 2008). Evidence supporting all three factors must be present in order to withstand summary judgment. *Id.* at 283. But when the Defendant has come forward with evidence of a rational basis for government action in furtherance of a legitimate government purpose,

as the County has done here, there is no need to consider the *Scott* factors. *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4<sup>th</sup> Cir. 2002).

*Scott*, *A Helping Hand*, and *MLC Auto* stand for the proposition that government action to intentionally prevent an otherwise lawful land use solely on the basis of community distaste for that particular land use does not serve a legitimate government purpose. *MLC Auto., LLC v. Town of Southern Pines*, 532 F.3d 269, 282 (4<sup>th</sup> Cir. 2008); *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 441 (4<sup>th</sup> Cir. 2002). The opposition described in these cases did not raise legitimate land use concerns such as increased traffic or noise. Instead, angry citizens in *A Helping Hand* said that the proposed methadone clinic would draw “criminals and undesirable neighbors.” 515 F.3d 356, 367-68 (4<sup>th</sup> Cir. 2008). Vocal opponents in *MLC Auto* said “the last thing they wanted was to have a cheesy car dealership with a giant gorilla on the roof.” 532 F.3d 269, 275 (4<sup>th</sup> Cir. 2008). And in *Scott*, the community opposition to low-income housing was seen by the court as driven by “illegitimate political or at least personal motives” aimed at racial minorities who may reside there. 716 F.2d 1419 (4<sup>th</sup> Cir. 1983). In other words, the citizen opposition in these facts was motivated by discrimination, personal aesthetic preferences, or other improper basis. And it was this evidence of citizen opposition based on improper motives that explained the impartial actions of the government. If evidence had been produced in these cases showing that the government’s action was rationally related to a legitimate exercise of police power, then the substantive due process claim would fail. *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4<sup>th</sup> Cir. 2002).

In *Tri-County Paving*, the plaintiff wanted to construct an asphalt plant in Ashe County, North Carolina. 281 F.3d 430 (4<sup>th</sup> Cir. 2002). The County informed the property owner that an asphalt plant at the proposed site did not violate any zoning ordinances. *Id.* at 434. Citizen opposition to the proposed plant quickly arose. The plaintiff submitted a request for a building permit. *Id.* The County required additional information before it would issue the permit. *Id.* Meanwhile, two citizen opposition groups requested that the proposed asphalt plant be placed on the County Commission agenda for discussion. *Id.* At this meeting, a “spirited public debate” ensued, after which the County gave first reading to a one-year moratorium on construction of asphalt plants. *Id.* at 435. Near the end of the moratorium, the County enacted an ordinance which created a new permit requirement for polluting industries. *Id.* The plaintiff alleged that the County’s actions constituted a substantive due process violation. *Id.* at 438-439. In rejecting the plaintiffs’ substantive due process claim, the Fourth Circuit found that the “county’s actions clearly did not fall beyond the outer limits of legitimate governmental action, but instead, its “actions were rationally related to a legitimate government purpose,” *i.e.*, exercise of its police power. *Id.* at 440. Moreover, the Fourth Circuit held that its ruling in *Tri-County* was entirely consistent with its decision in *Scott* because, in *Scott*, the County’s “action was not related to any legitimate interest such as protecting the health or welfare of county residents,” whereas in *Tri-County* it was. *Id.* at 441. The same is true in the instant case – there can be no legitimate dispute that Richland County’s actions are related to protecting the health, safety and welfare of county residents.

The Congaree Task Force, SELC and others (including any individual County Council Member) opposed Green Diamond for reasons squarely within the County's interests in protecting public health and safety. The evidence presented in this case shows that opponents raised legitimate land use concerns such as the risk that extensive development on a floodplain poses to public health and safety. Columbia Venture has not adduced any countervailing evidence.

**2. Columbia Venture's Regulatory Taking Claim is Ripe for Adjudication.**

Richland County argues that Columbia Venture failed to obtain a final decision regarding the application of land use regulations to its property as required under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Columbia Venture argues that its takings claim is ripe for review because there was no uncertainty as to the permissible use of its property following the enactment of the stormwater ordinance and adoption of the regulatory floodway on its property.

In *Williamson County*, the Supreme Court of the United States "explained the requirement that a takings claim must be ripe." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). The *Williamson County* Court held that a takings claim challenging the application of land-use regulations is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County*, 473 U.S. at 186. The Supreme Court revisited and distinguished the *Williamson County* decision in *Palazzolo*, in which the Court held that:

While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the

discretion to permit any development, *or the permissible uses of the property are known to a reasonable degree of certainty*, a takings claim is likely to have ripened.

*Palazzolo v. Rhode Island*, 533 U.S. at 620. The Court noted “the unequivocal nature of the wetland regulations at issue,” *id.* at 619, and found that “the Council's decisions make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands.” *Id.* at 621. Further, the “[r]ipeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities ... *only if there is uncertainty as to the land's permitted use.*” *Id.* at 622.

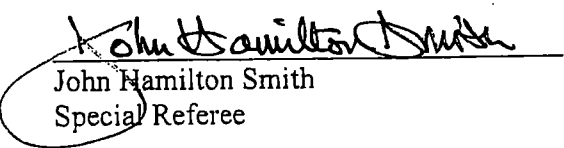
In the present case, there was no uncertainty over the land's permitted use. The County's prohibition on building in the regulatory floodway was unequivocal in its April 17, 2001 ordinance, and its exceptions (for Columbia Venture's neighboring property owners) were explicitly spelled out in the ordinance. As in *Pallazollo*, the permissible uses of the property were “known to a reasonable degree of certainty,” and Columbia Venture's claims had ripened when its Property was placed into the effective regulatory floodway. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).

It is clear that any further action by the Plaintiff would have been futile and that the permissible uses of the Plaintiff's property were known to a reasonable degree of certainty. Columbia Venture's ~~regulatory taking claim is ripe.~~ *claims are ripe.* 

## CONCLUSION

Therefore, it is ORDERED that Defendant's Motion for Partial Summary Judgment on Plaintiff's substantive due process claim is hereby GRANTED. By virtue of this decision, Defendant's Motion for Partial Summary Judgment as to the lack of a property interest protected by the Due Process Clause is moot. Defendant Richland County's Motion for Partial Summary Judgment on its ripeness defense to Plaintiff's regulatory taking claim is DENIED. This Order is intended to solely rule on the claim under the Due Process Clause, and is not a ruling on the factual and legal issues presented in the Plaintiff's regulatory taking case.

AND IT IS SO ORDERED.

  
John Hamilton Smith  
Special Referee

Yonges Island, South Carolina

September 8, 2012

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) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT.

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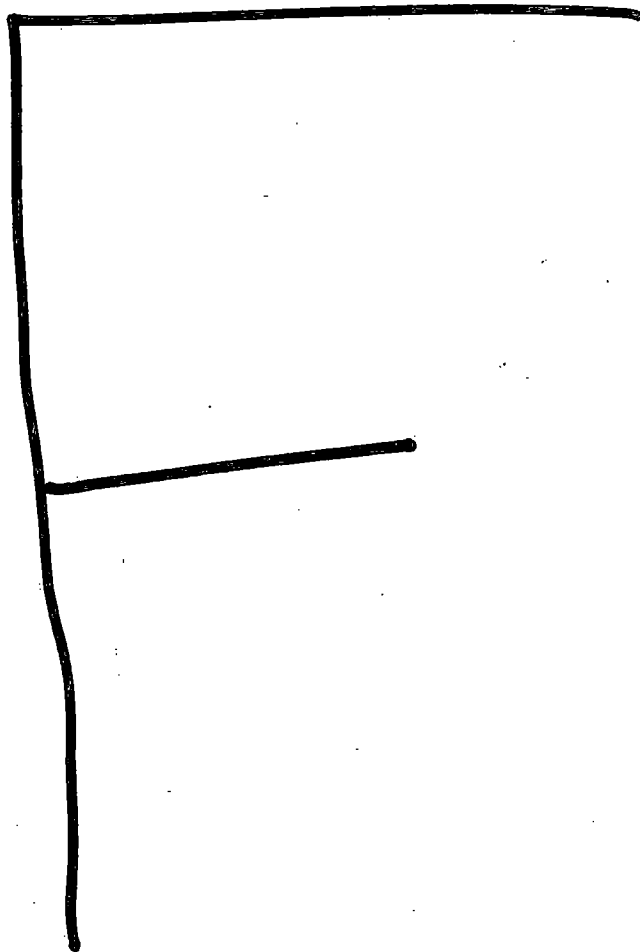
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August 29, 2012

  
John Hamilton Smith  
Special Referee

Yonkers Island, South Carolina

August 30, 2012



) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT

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) Civil Action No. 2010-CP-40-8943R

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Within a floodplain, FEMA may also delineate the floodway, generally the area posing the greatest danger to public safety.

Participating communities must adopt and enforce floodplain management regulations based on the Flood Data provided by FEMA. 44 C.F.R. § 60.3. The Flood Maps serve to delineate flood hazard areas that are subject to the community's floodplain management regulations. Richland County's floodplain regulations are found in its Floodway and Floodplain Overlay Zoning Ordinance (hereinafter referred to as "Zoning Ordinance") and its Stormwater Management, Erosion and Sediment Control Ordinance (hereinafter referred to as "Stormwater Ordinance").

Under its Zoning Ordinance, a floodway is based upon "the floodway shown on the official Flood Boundary Floodway Maps (Dated January 19, 1994), the accompanying Flood Insurance Study (Dated January 19, 1994), and any revisions thereto."<sup>1</sup> § 26-73.3(3), Richland County Code of Ordinances (2001).<sup>2</sup> The County's Zoning Ordinance permitted the following uses in a floodway: agricultural and horticultural uses, plant nurseries, parking and loading areas, open-air uses accessory to residential uses such as lawns, play areas and parking areas; recreational uses which do not offer a substantial impediment to water flow such as swimming areas, fishing areas, beaches, boat ramps, parks, playgrounds, wildlife or nature preserves, hiking trails, golf

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<sup>1</sup> The phrase "and any revisions thereto" served to automatically adopt any subsequent FIS and flood maps that FEMA issued, including FEMA's February 20, 2002 FIS and flood maps. This automatic adoption clause was recognized and accepted by FEMA as meeting its requirements that the County adopt FEMA's flood data. In June 2004, as part of a substantive revision, the FIS and flood map reference was updated by Richland County Council to expressly identify the February 20, 2002 data "and any revisions thereto."

<sup>2</sup> On November 11, 2004, the County Council enacted a revision and reorganization of its land use regulations, which renumbered and added substantive provisions to the Floodway and Floodplain Overlay Zoning Ordinance, and incorporated all development and zoning regulations, including its Stormwater Ordinance, into a comprehensive Land Development Code. Within this Land Development Code, the provisions adopting or using FEMA's Flood Data remained substantially the same. This Order only refers to the ordinances in effect at the time that Columbia Venture alleges that the taking occurred, February 20, 2002.

courses and tennis courts; airport runways; streets, bridges, utility lines, storm drainage facilities, sewage lines, waste treatment outlets and water intake structures; facilities used by existing public or private schools, and facilities used by existing publicly owned wastewater treatment plants. *Id.* at § 26-73.4(3). Other uses were allowed by special exception, including car sales lots, mining, marinas, railroads, docks, and piers. *Id.* at (4). In a floodplain, any use permitted in its underlying zoning district was permitted so long as such uses were elevated by earthen fill, elevated on pilings or flood-proofed. *Id.* at 26-73.5(2).

Similarly, in the County Stormwater Ordinance, “any construction or other development<sup>3</sup> ... located in an area of special flood hazard shall be in accordance with a storm drainage plan approved by the County Engineer.” § 8-18(a), Richland County Code of Ordinances (2001). An “area of special flood hazard” is defined as “any land area susceptible of being inundated by the base flood (100-Year Flood) as determined on an official ... Flood Insurance Rate Map, or other best available data.” § 8-5, Richland County Code of Ordinances (2001). The County Stormwater Ordinance sets forth certain design standards and other criteria concerning construction activities. For areas adjacent to a river or stream, “... no levees, dikes, fill materials, structures or obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway ....” § 8-26(h), Richland County Code of Ordinances (2001). Defendant interpreted the above-quoted language as prohibiting construction within a floodway.

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<sup>3</sup> “Construction” is defined as “any building or erection of a structure, or any physical site for the building or erection of a structure.” § 8-5, Richland County Code of Ordinances (2001). “Development” is defined in part as “any man-made change, including clearing, tree removal, grubbing, stripping, dredging, grading, mining, drilling, excavating, paving, transporting and filling of land.” *Id.*

These provisions applied to all properties located within a floodway or areas of special flood hazard, with certain limited exceptions not relevant to this analysis.

Every five years, FEMA must assess the need to revise Flood Data and undertake revisions as it sees fit. 42 U.S.C. § 4101(e) and (f). In 1998, FEMA initiated a new study of flood hazard areas within unincorporated Richland County. As this study was proceeding, on or about February 19, 1999, Plaintiff Columbia Venture purchased approximately 4,400 acres of property located within the Congaree River floodplain, and announced ambitious plans for extensive development on the property, including residential and commercial uses. FEMA's new study of the Congaree River floodplain was the subject of two rounds of administrative appeals which culminated in revised Flood Data that placed approximately seventy percent (70%) of Plaintiff Columbia Venture's property in the Congaree River floodway rather than just being in the floodplain. See FEMA Flood Insurance Rate Map, Richland County, South Carolina, Panel 160 (Feb. 20, 2002). Upon Richland County's adoption of this revised Flood Data, Richland County's Zoning and Stormwater Ordinances prevented Columbia Venture from improving or developing its property located within the floodway.

#### STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. "The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). A grant of summary judgment is "completely appropriate when a properly supported motion sets

forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg. Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

### CONCLUSIONS OF LAW

The Fifth Amendment of the United States Constitution provides that private property shall not “be taken for public use, without just compensation.” Similarly, article I, section 13 of the South Carolina Constitution provides that private property “shall not be taken ... for public use without just compensation being first made for the property.” The United States Supreme Court has instructed that a plaintiff “may proceed under one of the ... theories discussed above – by alleging a physical’ taking, a *Lucas*-type ‘total regulatory taking,’ a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005).

“The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.” *Lingle*., 544 U.S. at 537. Over time, the United States Supreme Court has recognized that government regulation of private property may be so severe that the effect is tantamount to a direct government appropriation or invasion and thus, compensable. Clearly, given the traditional notion of the takings clause serving to compensate property owners for physical occupation or invasion by the government, a regulation requiring a property owner to submit to a permanent physical invasion of his or her property, is a per se taking, and just compensation is due. *Lingle*, 544 U.S. at 538 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982).

If a regulation completely deprives a property owner of all economic use of his or her property, and no “background principles of nuisance and property law independently

restrict the owner's intended use of the property," a per se taking has occurred, and just compensation is due. *Lingle*, 544 U.S. at 528; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992).

In the context of government demands that a property owner dedicate an easement allowing public access to his property as a condition of obtaining a development permit, such an exaction is a compensable taking if the exaction involves a dedication of property "so onerous that, outside the exaction context, there would be deemed per se physical takings." *Lingle*, 544 U.S. at 547; *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987).

In all other situations, the issue of whether a compensable regulatory taking occurred is decided according to factors set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Lingle*, 544 U.S. at 538. South Carolina courts have embraced federal taking jurisprudence as providing the rubric under which to analyze whether an interference with someone's property interests amounts to a constitutional taking. *Byrd v. City of Hartsville*, 365 S.C. 650, 656 n. 6, 620 S.E.2d 76, 79 (2005).

Plaintiff contends that Defendant's adoption of FEMA's Flood Data, which delineated approximately 70% of its property within a floodway, in combination with Defendant's floodplain management regulations that prohibit construction in a floodway, amount to a de facto flood easement taken by Defendant that is tantamount to a physical taking.

It has long been held that government action that causes private property to be permanently flooded constitutes a physical taking under the Takings Clause. *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871); *United States v. Dickinson*, 331 U.S. 745, 748

(1947). In cases finding that government-induced flooding in effect imposed a flood or flowage easement, some affirmative action by the government caused the flood water to encroach upon the plaintiff's land. See *Dickinson*, 331 U.S. at 747 (explaining that when the federal government impounded the Kanawha River to improve navigability, causing permanent flooding of adjoining private property, the government in effect took a flood easement); *United States v. Cress*, 243 U.S. 316, 327-328 (1917) (holding that the government's construction of a lock and dam system on the Kentucky River caused backwaters to frequently flood private property, resulted in the United States taking an easement to overflow it with water); *Ridge Line, Inc. v. United States*, 346 F.3d 1354-55 (Fed. Cir. 2003) (the government's construction of a post office caused increased stormwater runoff to flood private property located downhill, in effect taking a flowage or flood easement).

As these cases illustrate, a flood easement arises by virtue of affirmative government action that causes frequent or continuous flooding of the plaintiff's property. Thus, in order to constitute a per se physical taking of a flood easement, Columbia Venture must show that the County's Zoning Ordinance and/or Stormwater Ordinance actually caused flooding on its property as opposed to merely restricting the property owner's use. *Loretto*, 458 U.S. at 427-428. The Defendant's regulations have not caused any flooding or other physical intrusion upon Plaintiff's property.

Plaintiff argues that actual flooding is not a critical element of the *Loretto* rule. Relying on *Nollan v. California Coastal Comm'n*, *Dolan v. City of Tigard*, *Danforth v. United States*, and *United States v. Dickinson*, Columbia Venture urges this court to conclude that the Defendant's regulations impose a permanent right of Defendant to flood

its property, even though no flooding has occurred, and this alleged permanent right of Richland County to flood its property amounts to "the functional equivalent of condemning a flowage or floodway easement." *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *United States v. Dickinson*, 331 U.S. 745 (1947); *Danforth v. United States*, 308 U.S. 271 (1939). I find this theory unavailing. *Nollan* and *Dolan* are almost identical in their "exactions" requiring the landowners to dedicate land for the use of the public and thereby preventing the landowners from exercising the right to exclude others. That is not what is faced by the Plaintiff in this action.

The County's regulations serve to restrict how an owner of property located within a floodplain or floodway may use their property, and does not confer a right on the government to flood Plaintiff's private property. I conclude that regulation of use through legislation of general applicability cannot reasonably be construed as creating a servitude on Columbia Venture's property. *See Dolan*, 512 U.S. at 385 (stating that land use regulations of general applicability differ from a government requirement that a property owner deed portions of her property to the city). Instead, the County's regulations operate to distribute burdens and benefits among all affected property owners. *See Summerville v. Pressley*, 33 S.C. 56, 11 S.E. 545, \*1 (1890) ("If the owner suffers injury by restraints imposed upon the use of his property in the exercise of the police power, he is presumed to be compensated for such injury by sharing in the general benefits intended and calculated to be secured by the exercise of such power"). Columbia Venture conflates the burdens and benefits inherent in land use regulations with the burdens and benefits associated with a grant or reservation of an easement upon a particular parcel. Columbia Venture's theory of a physical taking fails to fit into the

narrow per se physical taking rule of *Loretto*. *The Stearns Co., Ltd. v. United States*, 396 F.3d 1354, 1357 (Fed. Cir. 2005).

Similarly, relying on *Lindsey v. City of Greenville*, Columbia Venture argues that the County's regulations deny it the right to defend against floodwaters, thereby causing flooding of its property. 247 S.C. 232, 146 S.E.2d 863 (1966). I disagree with Columbia Venture's proposition that legislation preventing a property owner from taking action should be equated with affirmative action by the County to allow flooding. *Lindsey* is no different from *Dickinson* and other physical occupation cases where private property was flooded by direct government action. *Lindsey*, 247 S.C. at 240-41, 146 S.E.2d at 867 ("We think that it is reasonably inferable from this record that the destruction of plaintiff's crop resulted not from the mere fact of flooding, but directly and proximately from the accumulation of flood waters in the defendant's reservoir and discharging them in such volume and for such time as to cause flooding for a prolonged period beyond that which normally resulted from heavy rains"). Under *Lindsey*, the government must still directly cause actual flooding of private property in order to find a per se physical taking. Columbia Venture's explanation that the County's ordinances in effect deny a right to defend against floodwater, thus allowing flooding to occur, is too tenuous to support a physical takings claim.

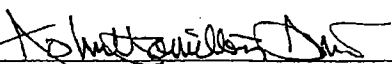
Finally, Plaintiff argues that *Hill v. City of Hanahan* is controlling precedent in South Carolina that does not depend on *Loretto* or *Penn Central*, and this case entitles it to just compensation. 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984). *Hill* does not represent modern takings jurisprudence in South Carolina. Relying on *Gasque v. City of Conway*, 194 S.C. 15, 8 S.E.2d 871 (1940), the *Hill* court found that the City's actions

constituted a compensable taking. 281 S.C. at 531, 316 S.E.2d at 684. In *Gasque*, a compensable taking occurred if the following factors were met: 1) the alleged taking involved actual interference with property rights; 2) caused by a positive or aggressive act by the government in furtherance of a public purpose; 3) resulting in damage or impairment; 4) that was in some degree permanent. 194 S.C. at 23, 8 S.E.2d at 874. This test has changed significantly over time such that *Hill* has no relevance in our takings jurisprudence. See *Brabham v. Sumter*, 275 S.C. 597, 598, 274 S.E.2d 297 (1981) citing to *Gasque v. City of Conway*, 194 S.C. 15, 23, 8 S.E.2d 871, 874 (1940) (“...a taking involves the actual interference with, or the disturbance of, property rights, resulting in injuries which are not merely consequential or incidental.”); *Berry’s on Main, Inc. v. City of Columbia*, 277 S.C. 14, 15, 281 S.E.2d 796, 797 (1981) (stating that the South Carolina test for a taking requires a showing of 1) an affirmative, positive, aggressive act by the government; 2) causing a taking of property 3) for a public purpose and 4) have some degree of permanence). The test now has two elements: 1) affirmative conduct and 2) a taking. *Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 79 (2005).

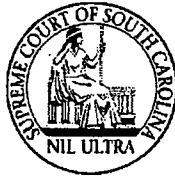
To determine whether a taking occurred, the South Carolina Supreme Court has articulated and adopted modern principles of takings law in conformity with rules set forth by the United States Supreme Court. See *Sea Cabins on the Ocean IV Homeowner’s Assoc. v. City of North Myrtle Beach*, 345 S.C. 418, 430, 548 S.E.2d 595, 601 (2001) (stating various taking rules under *Loretto*, *Penn. Central*, *Lucas*, and *Nollan*). Columbia Venture’s attempt to fashion a wholly new takings theory is unavailing.

Therefore, it is ORDERED that Plaintiff Columbia Venture's Motion for Partial Summary Judgment on its Physical Taking Claim is hereby DENIED, and Defendant Richland County's Motion for Partial Summary Judgment on Plaintiff's Physical Taking Claim is GRANTED.

AND IT IS SO ORDERED.

  
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John Hamilton Smith  
Special Referee

Yonkers Island, South Carolina  
August 7, 2012



# The Supreme Court of South Carolina

Haynsworth Sinkler Boyd

05/20/2013

## RECEIPT #68453

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|--------------------------------|-------------------------------------|
| <b>Fee Type:</b>               | Case Initiation Fee                 |
| <b>Amount:</b>                 | \$100.00                            |
| <b>Payment Type:</b>           | Check                               |
| <b>Reference No:</b>           | 293079                              |
| <b>Check/Money Order Date:</b> | 05/17/2013                          |
| <b>Comments:</b>               | Columbia Venture v. Richland County |