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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

Columbia Venture, LLC ..... Appellant,

v.

Richland County ..... Respondent.

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STATEMENT OF ISSUES ON APPEAL

In February 1999, Appellant Columbia Venture, LLC ("Columbia Venture") purchased approximately 4,400 acres of land on the Congaree River in Richland County ("Property") that were protected from flooding by a system of levees ("Levees" or "Manning Levees") built by the Property's prior owner. Before purchasing the Property, Columbia Venture proposed to improve the Levee system to meet the certification standards of the Federal Emergency Management Agency ("FEMA") and thereafter to develop the Property as a mixed-use, residential and commercial development protected by certified levees. Columbia Venture sought specific assurances from Respondent Richland County ("Richland County" or "County") that the County, a participant in the voluntary National Flood Insurance Program ("NFIP"), would agree to accept responsibility for the annual inspection and maintenance of the Levees, a requirement for certification of levees under the NFIP.

FEMA administers the NFIP, and recognizes certified levees as providing protection from the base or 100-year flood, which FEMA uses to determine flood elevations and corresponding floodplain boundaries on official flood maps published by FEMA. Land protected by certified levees is not shown on FEMA flood maps as part of the floodplain or regulatory floodway (a portion of the floodplain determined by hydraulic modeling where building is permitted only if it will not increase flood levels during times of flood). NFIP regulations require participating communities to regulate development in floodplains and regulatory floodways but do not require participating communities to prohibit building in a floodplain or regulatory floodway, which would increase the risk of takings liability for participating communities.

Prior to Columbia Venture's purchase of the Property, all members of the Richland County Council, the governing body of the County, favored Columbia Venture's proposed development plan and agreed to accept responsibility for the Levees in a resolution adopted

unanimously on February 2, 1999, on certain conditions. The first of these conditions was that Columbia Venture physically improve the Levees to meet FEMA's certification standards. The County also communicated its agreement to FEMA in writing. Columbia Venture purchased the Property on February 19, 1999, and then moved forward with its plans to improve the Levees by hiring geotechnical engineers and other design professionals to survey and design plans for the improved Levees and proposed development. In May 1999, however, the County Administrator decided not to issue a Levee improvement permit to Columbia Venture while FEMA was in the process of revising its flood maps even though, as the County now concedes, there was no impediment to permitting the Levee improvements under the effective flood map that the County was enforcing as of the latter part of May 1999.

During this period of delay, opposition to Columbia Venture's plans developed, and the majority of the County Council became opposed to substantial development on the Property. Accordingly, a majority of the Council took steps to prevent Columbia Venture's development, and in April of 2001, the Council passed a new stormwater ordinance, the effect of which prohibited Columbia Venture from improving its Levees to resist flooding or to meet FEMA's certification standards if FEMA issued a final flood map that included the Levees in a regulatory floodway. FEMA, in fact, did so on August 20, 2001, and the County adopted this final flood map as its effective flood map six months later on February 20, 2002. After that date, the new stormwater ordinance imposed a *de facto* "no-build" zone on 70% of Columbia Venture's Property and entirely prohibited any improvement to Columbia Venture's Levees, while exempting Columbia Venture's immediate neighbors, who were allowed to build significant structures under the minimum standards of the NFIP. Although the County Council never voted to rescind the February 2, 1999 unanimous resolution or its correspondence with

FEMA communicating the agreement manifested in that unanimous resolution, the new stormwater ordinance, combined with the February 20, 2002 regulatory floodway, effectively terminated Columbia Venture's plans to develop its Property in accordance with its distinct, investment-backed expectations and caused Columbia Venture to suffer substantial economic losses.

I. The special referee erred in concluding that the County's actions did not constitute a categorical or *per se* regulatory taking of Columbia Venture's Property, because those actions are functionally equivalent to the legislative appropriation of a *de facto* "flowage" easement or servitude for conveying flood waters during major floods or, in the alternative, a conservation easement or servitude on 70% of Columbia Venture's Property.

II. The special referee erred in concluding that Columbia Venture's distinct, investment-backed expectations were not sufficient to support a regulatory takings claim under *Penn Central Transportation Co. v. New York City*, 433 U.S. 104 (1978), and its progeny because Columbia Venture, before purchasing the Property, among other things:

- diligently investigated the feasibility of its proposed development plans under NFIP regulations and existing County ordinances, as interpreted by the County officials charged with administering those ordinances;
- sought and obtained the support of the County Council for its proposed development and obtained the County's agreement to inspect and maintain the Levee system in accordance with FEMA requirements;
- sought and obtained assurances from FEMA that it would remove the floodplain and floodway designations from the Property protected by the Levee system upon upgrade and acceptance by the County;

- sought and obtained professional opinions and advice that there were no County or regulatory impediments to going forward with the proposed development; and
- obtained or committed the resources and expertise necessary to go forward with the proposed development.

III. The special referee erred in concluding that, under *Penn Central Transportation Co. v. New York City*, 433 U.S. 104 (1978) and its progeny, Richland County's prohibition on improving Columbia Venture's existing Levees (which were the only levees in the County subject to the prohibition) by making them higher or wider and its legislative imposition of a no build zone on 70% of Columbia Venture's Property in the newly expanded regulatory floodway, while exempting neighboring property also in the same regulatory floodway from those restrictions, did not unjustly and unfairly target Columbia Venture's Property.

STATEMENT OF THE CASE

This action was commenced on August 19, 2004, by Columbia Venture against Richland County, seeking to recover just compensation and damages for an alleged regulatory taking of Columbia Venture's approximately 4,400 acre Property adjacent to the Congaree River in Richland County. Original Complaint, p. 1. The action was stayed by a Consent Order dated May 2, 2005, and per the Consent Order, resumed in September 2009 following the conclusion of *Columbia Venture, LLC v. FEMA*, United States District Court Case No. 3:01-4100-JFA. In its Amended and Supplemental Complaint filed October 5, 2009 ("Complaint"), Columbia Venture asserted claims under the United States and South Carolina Constitutions for a regulatory taking of its Property without the payment of just compensation and for violations of its substantive due process rights. Complaint, p. 1. After Circuit Judge W. Jeffrey Young denied its motions to dismiss, Richland County answered the Complaint on

December 8, 2009, generally denying Columbia Venture's claims and alleging various affirmative defenses. Answer, *passim*. The action was stricken from the docket pursuant to SCRCP 40(j) by an order of January 5, 2010, which also provided for the continuation of discovery and other proceedings before it was restored to the general docket. The action was restored to the docket by an order dated December 23, 2010, and, pursuant to an Order of Reference filed May 22, 2012, referred to retired circuit judge John Hamilton Smith as special referee.

In various pre-trial rulings, the special referee denied the County's motion for summary judgment that all of Columbia Venture's claims were not ripe for decision. Order of 9/11/2012 at 1. The special referee granted, however, the County's motion for partial summary judgment dismissing Columbia Venture's substantive due process claims. *Id.* The special referee also considered cross motions for partial summary judgment and ruled in an Order filed August 9, 2012, that Richland County's actions concerning the Property did not constitute a *per se* regulatory taking under certain United States Supreme Court and South Carolina appellate court decisions. Order of 8/9/2012 at 11. Columbia Venture's remaining claim for an "ad-hoc" regulatory taking under *Penn Central*, was tried by the special referee, sitting without a jury, beginning on September 10, 2012. The record was completed in a telephone hearing held on December 20, 2012.

In an Order dated March 18, 2013, the special referee found that Richland County's actions did not constitute a regulatory taking of the Property under *Penn Central*. Analyzing the three factors established in *Penn Central*, the special referee found that Richland County's actions regarding the property caused a "significant decrease in . . . the fair market value of the land based upon its highest and best use." Order of 3/18/2013 at 60. The special referee also

found, however, that Columbia Venture's expectations regarding its development plans for the Property, which were based primarily upon its own and the prior owner's development vision for the Property, an existing regulatory regime that allowed for development, and a unanimous resolution of Richland County Council agreeing to serve as a governmental sponsor of an improved and certified Levee system protecting the Property, were not reasonable. *Id.* at 69. The special referee also found that the character of the County's actions did not unfairly and unjustly target Columbia Venture and distributed the benefits and burdens of flood regulation equally among all affected landowners, even though the ordinance specifically exempted Columbia Venture's adjacent neighbors, whose property was also in the same regulatory floodway, from the prohibition on building any economically productive structures. *Id.* at 73.

On April 18, 2013, the special referee issued an Order Denying Columbia Venture's Motion to Reconsider the Order of March 18, 2013, and Columbia Venture received written notice of the entry of this order on April 22, 2013. Columbia Venture timely filed and served its Notice of Appeal on May 20, 2013.

STATEMENT OF FACTS

I. The Property and the Levee System Prior to 1998.

Columbia Venture's Property consisted of approximately 4,400 acres along the eastern bank of the Congaree River in Richland County, South Carolina, traversed by I-77 and adjacent to the city limits of the City of Columbia. Tr. 22-23; PTE 225. Prior to Columbia Venture's purchase of the Property on February 19, 1999, the Property had been owned for decades by the late Burwell Manning and other affiliated owners. Tr. 33-34. Mr. Manning had previously improved the Property with the Levee system, which comprised three separate sections, to prevent the Property from flooding. Tr. 37-38. Although some portions of the Manning Levees date back to the early 1900s (*see* PTE 127 at CV014314), the bulk of

the Levees were built in the 1960s and 1970s by a construction company owned by Mr. Manning using the U.S. Army Corps of Engineers' manual on levee construction and guidance from the U.S. Department of Agriculture. Tr. 40-41; PTE 236 at CV014024. The Levees are approximately 20 feet in height above grade with a crest width of approximately 45 feet and extend for approximately 20 miles. Tr. 37, 61, PTE 217-24; *see also* PTE 247 at CVMcNair002516.

The Manning Levees protect not only the Property, but also the City of Columbia's wastewater treatment facility and Heathwood Hall Episcopal School ("Heathwood Hall"). Tr. 66; Omnibus Appx. at 502. Like Columbia Venture's Property, these parcels are located landward of the Manning Levees. Tr. 66. Mr. Manning sold the City the land for its wastewater treatment facility in 1967 and also donated the land to Heathwood Hall for the school's campus. Tr. 24-26. As part of the sale to the City, Mr. Manning sold the City a portion of the Levee system located just west of the wastewater treatment facility that the City agreed to maintain at its sole expense, in perpetuity, for the benefit of Mr. Manning, his successors, and assigns. Tr. 24-25; PTE 520.

While Mr. Manning owned the Property, he used it primarily for agricultural and recreational purposes. Tr. 42. He built the Levees to protect his agricultural operations and with the additional and ultimate goal of preparing the Property for large-scale development. Tr. 43. Accordingly, he built the Levees with the intention of eventually having them recognized to be 500-year levees,[1] and when I-77 was built through the Property, he negotiated an agreement with the South Carolina Department of Transportation to insure that the I-77 embankment, which ties into the Levee system, would be built to accommodate a 500-year

[1] A 500-year levee is one built to withstand a 500-year flood, or a flood with a 0.2 percent chance of occurring in any given year. PTE 230 § 8-54(g).

levee. Tr. 64-65. Soils from the Property, which were used to construct the Levees, were considered suitable by the Department of Transportation to construct the I-77 embankments. Tr. 344. Columbia Venture has continued to maintain the Levees from February 1999 to the present. Tr. 47, 54-55.

II. The National Flood Insurance Program and Richland County's Participation Therein.

Richland County is a participant in the NFIP, which is administered by FEMA pursuant to the National Flood Insurance Act ("NFIA"). Tr. 2548-51; *see generally* 42 U.S.C. § 4001 (1994) *et seq.*[2] The NFIP is a voluntary program providing subsidized flood insurance to residents of participating communities. 42 U.S.C. § 4011.[3] In administering the NFIP, FEMA conducts Flood Insurance Studies ("FISs") and publishes Flood Insurance Rate Maps ("FIRMs" or "flood maps") that are adopted by local communities, such as Richland County, that elect to participate in the NFIP. *See* 42 U.S.C. § 4101. FEMA also prescribes minimum standards (contained in 44 C.F.R. § 60.3 (1998))[4] for floodplain management regulations that must be adopted by communities participating in the NFIP. *See* 42 U.S.C. § 4102. Under its statutory mandate, FEMA focuses its flood mapping efforts on the "base flood," which the NFIP regulations define as "the flood having a one percent chance of being equalled or

[2] Many provisions of the NFIA substantively changed in mid-2012. However, citations to the NFIA and its implementing regulations in this Brief are to those provisions as they existed on the dates of the events referenced herein (chiefly 1998-2002). The then-existing statutory and regulatory schemes of the NFIA and NFIP are material to Columbia Venture's factual and legal arguments.

[3] Richland County has not always participated in the NFIP. County Administrator Cary McSwain testified that when he began his tenure at the County in 1994, Richland County was not participating in the program, although the County had been a participant in the past. Tr. 2250-51. The County subsequently began participating in the NFIP again. *Id.*

[4] Citations to the Code of Federal Regulations in this Brief are to the October 1998 version of FEMA's regulations, as those were the Code provisions being interpreted in connection with Columbia Venture's proposed development.

exceeded in any given year." 44 C.F.R. § 59.1; PTE 204 at 29. The base flood is sometimes referred to as the 100-year flood. Tr. 1191.

The NFIA authorizes FEMA to determine flood elevations for land use purposes that are used to delineate the floodplain boundaries on the FIRMs that FEMA produces. 42 U.S.C. §§ 4102 & 4104. In general, FEMA uses hydrologic models to determine the volume of the base flood for a particular river or stream, which is expressed in cubic feet per second, and hydraulic models to delineate the surface area of the floodplain and determine the water surface elevations of the base flood at various cross sections along the river or stream called base flood elevations ("BFEs"). *See* Tr. 1190-92, 1230-31. FEMA then uses the same hydraulic models to determine the surface area of the "regulatory floodway," which under FEMA regulations is part of the floodplain and defined to be "the channel of a river ... 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," which is currently, and was at all times pertinent to this matter, a minimum of one foot. 44 C.F.R. §§ 59.1, 60.3(d)(2); Tr. 1232-34. The regulatory floodway is thus derived from and based on a defined surcharge (*i.e.* one foot) above the applicable BFEs. Tr. 1234-35.

Local communities participating in the NFIP must adopt at least the minimum one-foot surcharge floodway but may adopt a more expansive floodway, which can be achieved by using a different surcharge measurement of less than one foot (*e.g.*, six inches). Tr. 1232-33. At all times relevant to this matter, Richland County's applicable ordinances defined the regulatory floodway by reference to the FEMA surcharge minimum of one foot. PTEs 230 § 8-54(s), 374 § 8-5; Pope Tr. 71-72. Both the NFIP regulations and the County's ordinances define the floodplain or flood prone area as land susceptible to flooding. 44 C.F.R. § 59.1;

PTEs 250A § 26-73.3(2), 230 § 8-54(n), 374 § 8-5.

NFIP regulations require participating communities to restrict development in floodplains and regulatory floodways, but do not require participating communities to prohibit all building in a floodplain or regulatory floodway. 44 C.F.R. § 60.3; Tr. 1236. In general, the NFIP regulations permit building in a regulatory floodway that would not increase flood levels in times of flood. Building in a floodway, however, requires the owner to supply hydrologic and hydraulic engineering studies to demonstrate no increased flood levels and is more restrictive and expensive than building in the floodplain. 44 C.F.R. § 60.3(d)(3); *see also* Tr. 2651. Specifically, the NFIP regulations provide that 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 discharge." 44 C.F.R. § 60.3(d)(3) (emphasis added). This showing is an objective engineering standard sometimes referred to as the "no-rise" standard. Tr. 1312-14. To achieve a no-rise showing, buildings typically have to be elevated on pilings or pilasters to a height above the BFE to allow floodwaters to flow beneath the building to avoid displacing the floodwaters. Tr. 2254, 2650-52. In other words, the NFIP allows building in a regulatory floodway, if it does not displace floodwater on another landowner. Substantial buildings can be built on a no-rise engineering showing. Heathwood Hall, Columbia Venture's immediate neighbor, has built a gymnasium, a middle school, a chapel, a dining hall, and a bell tower on a no-rise engineering showing. Tr. 450-54; 2254; Pope Tr. 137-38; Omnibus Appx. 503-17; PTEs 108, 109, 110, 516, 517.

Under its regulations, FEMA will also recognize levees built and certified to meet the standards of 44 C.F.R. § 65.10 as flood control structures providing protection from the base flood. Land protected by certified levees is not mapped as part of the floodplain or floodway. 44 C.F.R. § 65.10; Tr. 1247-48; PTE 018.[5] The NFIP further recognizes that certified levees may be built *in* a regulatory floodway or floodplain as a way to remove the floodway or floodplain designation from the land protected by the certified levee. 44 C.F.R. §§ 65.10, 72.1, 72.2;[6] Tr. 1247-48; PTE 018. Unlike FEMA's regulations, Richland County's ordinances do not provide a procedure for certifying levees so the land protected by the levees will be removed from the regulatory floodway and floodplain. County ordinances do, however, fully recognize and affirm the importance of levees as flood control structures (PTEs 230 § 8-72, 374 §§ 8-36 & 8-39) and require 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." PTEs 230 § 8-62(g), 374 § 8-26(g).

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[5] FEMA's 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). FEMA also requires that all operations and maintenance activities of certified levees "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).

[6] Specifically, a Letter of Map Revision, which is "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 ..." (44 C.F.R. § 72.2 (emphasis added)), is FEMA's method of redrawing the applicable flood map based on "proposed or actual manmade alterations within the floodplain, such as ... construction or modification of a bridge, culvert, levee, or similar measure ... ." 44 C.F.R. § 72.1 (emphasis added).

On January 19, 1994, FEMA issued a FIRM, which Richland County adopted as the official, effective FIRM for the County. *See* PTE 229. The Manning Levees, although substantial (*see* PTEs 217-224), were not certified levees, and in the corresponding effective FIS,[7] FEMA noted that failures of the Manning Levees were expected to occur with major floods. PTE 003 at 8; Tr. 81-82. Accordingly, on its 1994/1995 effective FIRM, FEMA designated the land protected by the Manning Levees as in a floodplain but not in a regulatory floodway, which was confined to the relatively narrow strip of land between the channel of the Congaree River and the riverside toe of the Levees. Tr. 1438-39; PTEs 003, 229. No portion of the Manning Levees was included in the regulatory floodway on the 1994/1995 effective FIRM. Tr. 79. The Manning Levees and the land protected by the Levees had never been in the regulatory floodway in FEMA's prior final mapping, dating back to 1977. Tr. 1437-38; PTE 003 at "Community Map History" after page 67.

III. FEMA's floodplain remapping efforts in 1998 and Burwell Manning's efforts to sell the Property before Columbia Venture's involvement.

In the Spring of 1998, FEMA commenced its periodic flood insurance study for Richland County (42 U.S.C. § 4101(e)) and, on June 5, 1998, released a revised preliminary FIS and FIRM[8] that showed much of the Property and the Manning Levees in a proposed

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[7] The January 19, 1994 effective FIRM (PTE 229) and the July 17, 1995 effective FIS (which revised the January 19, 1994 effective FIS but did not change the floodplain/floodway lines on the Property as shown on the January 19, 1994 effective FIRM) (PTE 003) will be referenced hereinafter as the "1994/1995 effective FIRM and FIS" and separately as the "1994/1995 effective FIRM" or "1994/1995 effective FIS."

[8] In revising flood maps under the NFIA, FEMA first issues a revised preliminary FIS and FIRM. The NFIA requires FEMA to publish the BFEs reflected in the revised preliminary FIS and FIRM in the *Federal Register* and a local newspaper in order to start a 90-day comment and appeal period. 42 U.S.C. § 4104(a) & (b). After FEMA reaches a final determination, FEMA issues a letter of final determination and the final FIS and FIRM (collectively "Final Map"), which the local community must adopt six months later. *See* PTE 523 at DEF-00001691-92. Before it publishes a revised preliminary FIS, FIRM, and the associated BFEs to start the comment and appeal period, FEMA meets with local

regulatory floodway. Tr. 160-61; PTEs 010, 237.[9] Both Richland County officials and Burwell Manning had previously learned of the existence of the revised preliminary FIRM. PTEs 012, 236. Mr. Manning had been actively marketing the Property for sale for development purposes, and on May 26, 1998, he sent a letter to the Richland County Council stating the Property would be "sold for a total new town development which will have 20± uses – 3 golf courses, parks, shopping mall, recreational facilities, etc. . . . and the total investment could reach one billion dollars . . . ." PTE 236 at CV014024. He further asked the County to oppose any proposed expansion of the floodway and indicated his desire for "permits to design and upgrade my levees." *Id.* at CV014025; *see also* PTE 008 at DEF-00000005.

Following its normal practice, FEMA held a public meeting with County officials and others on July 8, 1998, to discuss the June 5, 1998 revised preliminary FIS and FIRM. PTE 011; 42 U.S.C. § 4107. The County Administrator testified that there was "considerable immediate reaction, negative adverse reaction" to the June 5, 1998 revised preliminary FIRM. Tr. 2545. At the meeting, various questions were asked about the methodology behind the June 5, 1998 revised preliminary FIRM, especially concerning the Levees. PTE 011 at DEF-00000015-17. When asked "[w]hat would have to be done to upgrade the levees to meet

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officials and other interested citizens to discuss the revised preliminary FIS and FIRM. *See* DTE 146.

[9] The Richland County restudy followed FEMA's earlier restudy of Lexington County. On February 12, 1998, FEMA issued a revised preliminary FIS and FIRMs for Lexington County. PTEs 234, 235. FEMA determined the BFEs for the Congaree River floodplain in Lexington County based on an assumption by FEMA that the Manning Levees would *not* fail during a base flood. Tr. 1242-43; PTE 235 at COSD001-00668. The floodway in Lexington County, as mapped by FEMA from 1998 through 2002, did not materially change throughout the mapping process despite major revisions made by FEMA to the regulatory floodway in Richland County during this same time period. *Compare* PTEs 234, 283, 302, 335, 378 (Lexington FIRMs) *with* PTEs 238, 287, 306, 337, 381 (Richland FIRMs); Tr. 1257, 1263-65.

FEMAs [sic] criteria," FEMA's notes state: "FEMA's levee criteria are spelled out in 44 CFR 65.10." *Id. at* DEF-00000015. At the meeting and in conformity with FEMA's guidance, the County acknowledged it was using the June 5, 1998 revised preliminary data for regulatory and permitting purposes. *Id. at* DEF-00000017.[10]

After the July 8, 1998 meeting with FEMA, the County Administrator wrote to FEMA on July 14, 1998, "request[ing] officially that the results" of the June 5, 1998 revised preliminary FIS and FIRM "be put on hold ...." PTE 012 at DEF-00000022. The letter identified the "main area of concern" as "the existing, in place, levee system on the Congaree River protecting a substantial portion of land within Richland County." *Id.* The letter further 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 of this County, we would request the review process be put on hold." *Id.* at DEF-00000023. Burwell Manning was copied on the County Administator's letter to FEMA. *Id.* On July 22, 1998, *The State* newspaper reported that Richland County Council members were very upset with the

[10] On February 25, 1999, FEMA issued a new revised preliminary FIRM for Richland County, which it also did not publish at the County's request. PTEs 026, 504. In May of 1999, the County Administrator decided that the County would enforce the 1994/1995 effective FIRM in lieu of the February 25, 1999 revised preliminary FIRM, which was an option open to the County under FEMA's regulations. Tr. 2579, 2598-99; PTEs 004, 031 at DEF-00000296. On August 12, 1999, FEMA issued a third revised preliminary FIRM, which it published for appeal and comment; on September 26, 2000, FEMA issued a fourth revised preliminary FIRM; and on August 20, 2001, FEMA issued a final FIRM that became effective six months later on February 20, 2002. PTEs 304, 338, 381; DTEs 040, 093. The County continued to enforce the effective 1994/1995 FIRM after May 1999 in lieu of any revised preliminary FIRM while FEMA's flood mapping activities were still ongoing. Tr. 2578-79. FEMA issued its letter of final determination and final map on August 20, 2001, which the County adopted on February 20, 2002, as its new effective FIRM. PTEs 056, 057. As discussed further in the text, the Manning Levees were not in the regulatory floodway on the effective 1994/1995 FIRM but also, as discussed further in the text, the County Administrator made the decision in May of 1999 not to issue a land disturbance permit to Columbia Venture to improve the Levees until after FEMA had concluded its flood mapping activity.

extensive proposed floodway and its potential impact on economic development in the County. PTE 239. FEMA agreed by letter dated July 28, 1998, to Richland County's request to withhold publication of and "put on hold" the June 5, 1998 revised preliminary FIS and FIRM. PTE 013.

IV. Columbia Venture's due diligence prior to purchase of the Property on February 19, 1999, and involvement of Richland County therein.

Mr. George T. Gregory, III, General Counsel for Burroughs and Chapin Company, Inc. ("Burroughs and Chapin"), was also in attendance at the July 8, 1998 FEMA meeting, along with several others from Burroughs and Chapin. Tr. 887-88. Burroughs and Chapin is a development company headquartered in Myrtle Beach, South Carolina and has developed various substantial commercial, residential, and recreational projects, ranging from "large acreage projects in the thousands of acres, to big-box retail, to restaurant development, to mall development, ... [to] hotels and entertainment venues." Tr. 668; *see also* Wendel 7/12/11 Tr. 10.

Burroughs and Chapin had learned of the possible opportunity to purchase the Property shortly before the July 8, 1998 meeting, and, at that time, Burroughs and Chapin was in the beginning of its due diligence process. Tr. 888-89. Mr. Gregory was assigned the task of coordinating the due diligence efforts necessary for Burroughs and Chapin to go forward with the purchase of the Property, including resolving the issues relating to the Manning Levees. Tr. 683-85. In the summer and fall of 1998, Mr. Gregory led a due diligence team comprised of himself, other employees of Burroughs and Chapin, employees of Lockwood Greene Engineers, Inc. ("Lockwood Greene"), and members of the Manning family. Tr. 683-84. Lockwood Greene was an international engineering firm headquartered in Spartanburg, South Carolina. Tr. 701.

Burroughs and Chapin saw a rare opportunity to acquire the Property and develop it as a multi-phased, mixed-use development on approximately 4,400 acres of well-maintained property located within ten minutes of the State Capitol complex and the University of South Carolina campus and football stadium. The Property had over two and a half miles of riverfront, was traversed by I-77 with access at the Bluff Road interchange and an opportunity to place another interchange on the Property, and had two airports located within five minutes of the Property. Tr. at 670-71; PTE 264 at CVMcNair002445. Mr. Gregory further testified there were multiple options for the Property given its size, the infrastructure in place, and the proximity to downtown Columbia. Tr. 670-77.

Burroughs and Chapin applied its own development industry knowledge and engaged in general market research, including inquiries in the Columbia area, as part of its early due diligence to determine whether the project was feasible. Tr. 858-64. As part of the initial planning process, Burroughs and Chapin engaged LandDesign, Inc., a well known land planning firm from North Carolina, to develop a preliminary master plan. Tr. 687-89. LandDesign's preliminary plan included athletic facilities for the University, conference centers, a variety of residential options, a research park, hotels, offices, retail centers, golf courses, and various river access points, greenways, and recreational amenities. Tr. 672-79; PTE 264 at CVMcNair002445-46 & CVMcNair002455. Burroughs and Chapin also had a financial projection prepared by an accounting firm based on five years that showed income after costs of approximately $90 million. Tr. 681-82; PTE 264 at CVMcNair002448.

Deas Manning (Burwell Manning's son and a current member of Columbia Venture's managing agent), Mr. Gregory, and Wilson Tillotson, P.E., of Lockwood Greene testified that the plan was to upgrade the Levees to certified status so the land protected by the Levees

would be removed from the floodplain and floodway in accordance with FEMA regulations. Tr. 203, 712-13; Tillotson Tr. 27; 44 C.F.R. §§ 65.10, 72.1, 72.2. The development group contemplated building "flat on the ground." Tr. 713; *see also* Tillotson Tr. 27. Indeed, Burroughs and Chapin's early concept documents describe the need "for the lev[ee] system to be fully functional and acceptable to get the subject property out of the floodplain requirements for building." PTE 264 at CVMcNair002450. Members of Richland County Council also recognized that the upgrade of the Levees to certified status would allow the Property to be fully developable. Pearce Dep. Ex. 179; Pearce Tr. 93-97, 199-200. Mr. Gregory testified that if improving the Levees to certified status was not feasible, including receipt of the FEMA-required agreements from the County, Burroughs and Chapin would not have moved forward with purchasing the Property. Tr. 871. Richland County Councilwoman Kit Smith confirmed she understood in late January and early February 1999 that without County action regarding maintenance and operation of the Levees, the purchasers would not buy the Property. Tr. 2359-61, 2405. As the due diligence process progressed, Burroughs and Chapin developed a plan for improving the Levees and a list of certain issues to be resolved prior to purchase (discussed in more detail, *infra*). Tr. 712-13.

On November 13, 1998, while the due diligence process was still ongoing, Burroughs and Chapin entered into a Purchase and Sale Agreement with Burwell Manning and two companies owned by Mr. Manning, subject to continued due diligence and various conditions. DTE 156. The option contract price for the Property was $18 million in the Purchase and Sale Agreement (DTE 156 at CV008091). Mr. Manning was facing looming deadlines in February 1999 to exercise options to reacquire large tracts of the Property or lose the opportunity to develop the entire tract altogether. *See* Tr. 624. Some months earlier and to

avoid defaulting under his mortgage financing, Mr. Manning had sold various tracts of the Property to third parties with options to repurchase expiring at or near February 19, 1999. Tr. 126-28, 130-34, 178-81, 184; PTEs 233, 262; DTE 141. Thus, there was considerable pressure on Mr. Manning to close the sale at or near February 19, 1999, and a small window of opportunity for Burroughs and Chapin to acquire all of the Property needed to pursue its development vision. Tr. 624-25.

Mr. Gregory testified that due diligence on any project of this size would include meeting with local officials to determine whether they would support the project. Tr. 694-96; *see also* Wendel 7/12/11 Tr. 77. If local officials were opposed to the project, Burroughs and Chapin would not have gone forward with the purchase. Tr. 696. Accordingly, Mr. Gregory and other members of the due diligence team met with officials of Richland County, the City of Columbia, and the University of South Carolina during the fall of 1998 and into early 1999. Tr. 697-98. Mr. Gregory met with Richland County Councilmembers Kit Smith, Bernice Scott, Paul Livingston, and Buddy Meetze, the County Administrator, the County Engineer, Columbia Mayor Bob Coble, and Lyles Glenn at the University of South Carolina. Tr. 698, 732-33, 746-47, 816, 878-79. He testified between himself and the other members of the due diligence team, the team members met with all of the members of Richland County Council. Tr. 697. He testified that he and the others described Burroughs and Chapin's vision for the Property in their meetings with County officials: an extensive mixed-use development involving residential, commercial, and recreational uses behind improved, certified levees. Tr. 698-99; *see also* PTEs 207 at CVMcNair002533, 246 at CVMcNair002445-47. The County Administrator confirmed that he understood before purchase that Burroughs and Chapin's proposal was to build an extensive mixed-use development behind certified levees. Tr. 2566-

67. Councilman Gregory Pearce similarly testified that the plan to develop behind certified levees was "something that became apparent early on in the discussion." Pearce Tr. 14, 57-58. Mr. Gregory took with him to the various meetings the early development concept plan prepared by LandDesign. Tr. 699.

Mr. Gregory testified that the local officials with whom he met were overwhelmingly in favor of the proposed development and Burroughs and Chapin's vision for the Property. Tr. 700-01. Mr. Tillotson similarly testified that the County officials with whom he discussed the project expressed no reservations about the Levee proposals. Tillotson Tr. 40-41. Also, Mr. Gregory testified that based on reports he received from the other members of the due diligence team, there was overwhelming support for the project from the community's elected officials, no opposition, and nothing to indicate there would be opposition to the proposed development in the future. Tr. 700-01, 804, 1020-21. Although Burroughs and Chapin did not publicly announce its vision for the Property before purchase, *The State* newspaper had published an article in July 1998 reporting on the FEMA flood mapping and its impact on prospective development, with emphasis placed on the Property. PTE 239. Burwell Manning had also made known his plans to develop the Property both before and during the July 8, 1998 FEMA meeting. Tr. 652-53; PTE 236. Deas Manning testified that participants at that meeting discussed the potential upgrade of the Levees and development of the Property, and there was no objection voiced as a result. Tr. 644-45, 652-53. The Property was also described in *The State* on February 2, 1999, as "land that could be developed into commercial and residential property" in conjunction with plans to upgrade the Levees and the pending request to the County to assume the maintenance responsibilities. PTE 170 at DEF-00000073. Both Deas Manning and Mr. Gregory testified there was no public opposition to the proposed

development expressed prior to purchase despite public knowledge of potential development since May 1998. Tr. 644-45, 652-53, 804.

As for the technical issues surrounding the FEMA flood mapping process and the Manning Levees, Mr. Gregory testified that Burroughs and Chapin was prepared to physically improve the Levees so they could be certified by FEMA as providing protection from the base flood and comply with Richland County's ordinances requiring levees to have a crest height equal to the water surface elevation of the 500-year flood plus three feet of freeboard. Tr. 757. Upon certification, the plan was to have the area protected by the Levees remapped pursuant to FEMA regulations to remove the floodplain and floodway designations. Tr. 1247-48; PTE 246. The height of the Levees in their current state generally exceeded the BFEs in the 1994/1995 effective FIS and FIRM and in the June 5, 1998 revised preliminary FIS and FIRM (PTE 011 at DEF-00000016), but the Levees needed to be reshaped and made wider and taller in places to comply with FEMA and County requirements. Tr. 1139-40. The general plan developed by Lockwood Greene was to reshape the Levees in their current location and not to move the Levees closer to the river. PTE 208 at CV002276. Rather, the riverside toe of the Levees would remain in its current location, and the center line of the Levees would be moved landward as needed to alter the slope of the Levees to comply with the Army Corps of Engineers' design criteria. Tr. 1130. Also, fill would be added where needed to make the Levees wider or taller. *Id.* As Mr. Gregory testified, improvement of the Levees to the required standards would necessarily involve making the Levees taller or wider, or both, in many places. Tr. 788. Correspondingly, both the County Administrator and the Assistant County Administrator, Milton Pope, testified they understood that upgrading and certifying the Levees would require the Levees to be made taller and wider. Tr. 2588-89; Pope Tr. 7, 18-19.

As the due diligence process continued, Burroughs and Chapin's plans to improve the Levees evolved to require the satisfactory resolution of three Levee-related issues prior to any purchase: (1) Richland County's agreement to allow Burroughs and Chapin to improve the Levees to FEMA and County standards that would permit their certification under NFIP regulations; (2) Richland County's agreement to accept the responsibility to maintain and monitor the Levees after improvements were made, as required by NFIP regulations; and (3) FEMA's confirmation that once the Levees were improved and accepted by the County, FEMA would remove the floodplain and floodway designations from the Property protected by the Levees. Tr. 712-13. As previously mentioned, the Levees were not within the regulatory floodway on the County's 1994/1995 effective FIRM. PTE 229. During the due diligence process, at the time of purchase on February 19, 1999, and indeed until May 1999, the County was using the most recent revised preliminary FIRM for floodplain management purposes, which included the Levees in the proposed regulatory floodway. [11] PTEs 012 at DEF-00000022, 031 at DEF-00000296.

A. Richland County's agreement to allow Burroughs and Chapin to improve the Levees to FEMA and County standards that would permit their certification under NFIP regulations.

Mr. Gregory and Deas Manning testified that the due diligence team was aware of both the FEMA certification criteria and the Richland County ordinances requiring levees to be constructed to a 500-year flood protection level plus three feet of freeboard. Tr. 546-47, 707-08, 937. Mr. Gregory testified that the team needed satisfactory answers to the following

[11] As more fully discussed in Note 10, *supra*, FEMA produced another revised preliminary FIRM on February 25, 1999, which the County used after that date instead of the June 5, 1998 revised preliminary FIRM. The Levees were within the regulatory floodway on both the June 5, 1998 and February 25, 1999 revised preliminary FIRMs. PTEs 237, 287. After May of 1999, the County elected to enforce the 1994/1995 effective FIRM in lieu of any revised preliminary FIRM. Note 10, *supra*; *see also* PTE 123 at DEF-00012042.

issues regarding the County and the developers' plans to upgrade the Levees: (1) clarifying what activities Richland County would permit in the regulatory floodway under its ordinances and, specifically, what could be done to the Levees while the County was using the June 5, 1998 revised preliminary FIS and FIRM, which included the Levees in the proposed floodway and (2) addressing Richland County's requirement that the Levees be improved to withstand the 500-year flood plus three feet of freeboard, as compared to FEMA's 100-year flood requirement. Tr. 704-09. Regarding the first issue, statements had been made at the July 8, 1998 FEMA meeting and elsewhere that County Ordinances prohibited construction in a regulatory floodway either absent a variance or altogether. *See* PTEs 011 at DEF-00000016, 497 at CV013562; DTE 017 at CV013350. Accordingly, the due diligence team needed to fully explore this issue before Burroughs and Chapin could buy the Property. Tr. 704-13, 882-84.

In 1998 and 1999, the County's effective Drainage, Erosion, and Sediment Control Ordinance (referred to in both documents and testimony as the "Stormwater Ordinance") was dated July 19, 1994, and included the following provisions:

> (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.

PTE 230 § 8-62. The 1994 Stormwater Ordinance also included a variance provision, which required the Planning Commission to "consider the opinions of ... the Richland County Engineer before deciding upon any variance or exception." PTE 230 § 8-21. The Zoning Ordinance similarly prohibited placing material or obstructions within a floodway "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." PTE 250A § 26-73.4(2). The Zoning Ordinance further required the County Engineer to review and certify his findings regarding applications to fill in the floodway "in connection with permissible uses or as a use in itself." *Id.* § 26-73.6(1)(a) (emphasis added). Such findings "shall be binding upon the zoning administrator unless overruled by the board of adjustment." *Id.* § 26-73.6(9)(a). Further, the County Engineer's office approves construction (or land disturbance) permits and holds administrative authority over the Stormwater Ordinance and over Flood Control Works. Tr. 1478; Pope Tr. 20; PTEs 230 § 8-59, 250A § 26-73.6(4). A land disturbance permit approved by the County Engineer's office would be required to improve the Levees. PTE 230 § 8-55; Pope Tr. 20-21.

Mr. Gregory testified 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 in the regulatory floodway on that map. Tr. 898. Consequently, certain members of the due diligence team, including Mr. Gregory, were tasked with investigating the County's official position on permissible activities in a regulatory floodway. Tr. 704-07.

Mr. Gregory testified his investigation with the County revealed that the County Engineer's office interpreted the "impede the free flow of water" language as consistent with the FEMA no-rise engineering standard. Tr. 704-07. Deas Manning also testified that he had previous personal experience with the County Engineer's office approving plans for land disturbance permits for projects within the regulatory floodway using the no-rise standard under the same operative ordinance language in place since 1981. Tr. 122-23.[12] He further

[12] Deas Manning has successfully developed large subdivisions and apartment complexes in Richland County and has had extensive experience in dealing with County government and staff both as a developer seeking permits and zoning changes and as a past officer of the Home Builders Association. Tr. 15-20; *see generally* Tr. 90-125. He also has served as a member of the Richland County Planning Commission, which is involved with zoning and land use planning for the County. Tr. 20, 2634.

testified that he told Mr. Gregory and other members of the due diligence team about his prior experiences. Tr. 106-08, 622. Mr. Gregory testified he and Mr. Tillotson had conversations with the County Engineer and verified the County Engineer was using the no-rise standard. Tr. 705-06, 883-84.

Ralph Pearson, who served as the County Engineer from 1976 until 2005 (Tr. 1306), testified this was in fact the case: his office interpreted "impede the free flow of water" as consistent with the FEMA no-rise standard. Tr. 1315; *see also* PTE 051 at DEF-00002253. Under the County Engineer's interpretation, if a permit applicant could demonstrate a no-rise through appropriate engineering, there would be no impediment to the free flow of water. Tr. 1314-15. The County Administrator testified he understood that the development group would need to seek and would, in fact, be seeking a permit to upgrade the Levees. Tr. 2564-65. Both the County Administrator and the Assistant County Administrator testified they were aware of the County Engineer's interpretation of "impede" as consistent with "no-rise." Tr. 2592; Pope Tr. 40. Mr. Gregory testified that he received a consistent interpretation from the County officials in the Engineer's office, the planning department, and the Administrator's office. Tr. 883-84. Mr. Gregory further testified that had Burroughs and Chapin not been satisfied with the County's response, Columbia Venture would not have bought the Property. Tr. 884.

FEMA's no-rise standard is based on the 100-year flood; consequently, to get a no-rise engineering certificate, plans and specifications must be tailored to the 100-year flood. Tr. 1016-17. The County Engineer testified his office would need "to ensure that the developer had – if he's encroaching on a regulatory floodway, that he's provided the necessary calculations to demonstrate there would be no rise as a result of this development in the 100-year flood." Tr. 1314. Lockwood Greene studied this issue in detail and on February 17,

1999, it gave an opinion to Mr. Gregory confirming its interpretation that the necessary Levee improvements could be done with "no impact on the direction of the floodway or on the base flood elevations." PTE 208 at CV002276; Tillotson Tr. 29-30. Lockwood Greene's analysis for certification purposes centered on the 100-year flood. PTE 208 at CV002276. Based on its due diligence efforts, the team concluded that the County would issue a permit for construction in a regulatory floodway, including construction required to improve the Levees to the required standards, on the no-rise engineering showing Lockwood Greene opined was feasible. Tr. 710, 712; Tillotson Tr. 29-30, 41; PTE 208 at CV002276. Mr. Gregory also testified it was always 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 (Tr. 705, 757, 942) to maximize the protection of the Property and ensuing development, and that the 500-year requirement was a "bonus" from a development standpoint. Tr. 707-08.

B. Richland County's agreement to accept the responsibility to monitor and maintain the Levees after improvements were made, as required by NFIP regulations.

To procure Richland County's agreement to accept responsibility for operation and maintenance of the Levees in accordance with FEMA regulations, Mr. Gregory and Mr. Tillotson met with the County Administrator on December 10, 1998. Tr. 714; Tillotson Tr. 18-19. Mr. Tillotson wrote the County Administrator a letter the next day and appended a list of bullet points that Lockwood Greene wanted the County to consider, including the County's Agreement "to accept responsibility for operation and maintenance of the levee system in accordance with 44 CFR65.10" after upgrade. PTE 207 at CVMcNair002533. Mr. Tillotson testified that the County Administrator reacted positively to the proposal and that he was "happy to understand that someone was looking at developing the property." Tillotson Tr. 23.

Mr. Tillotson's December 11, 1998 letter and attached list of bullet points were routed to the Richland County Land Development Administrator, Mr. Ken Knudsen, who prepared a report dated January 20, 1999, recommending action by the County Council. Tr. 2554-55; PTE 166. This report was also signed by the Assistant County Administrator and Larry Smith, Esq., the County Attorney, who affirmed that the recommended action was "within the powers and authority granted under the laws of the State of South Carolina to Richland County Council." PTE 166 at DEF-00000054. The stated purpose of the report was "to request County Council's consideration of authorizing the Council Chairman or his Designee to act on the County's behalf to communicate to FEMA the agreement by Richland County to accept the right-of-way to the levee system and responsibility to review, monitor and maintain the levee system contingent upon proper certification." *Id.* at DEF-00000055 (emphasis added). The report explained that "[d]ue to FEMA regulations any reconstruction or creation of a levee system must be done under the auspices of the governmental body having jurisdiction in the area. This necessitates that the County agrees in principal to accepting responsibility of the levee system once completed and acceptable to FEMA." *Id.* (emphasis added). Under alternatives, the Land Development Administrator listed three options for the County: (1) "[d]o nothing," and property will stay as is, undeveloped; (2) begin the process "of acceptance of responsibility and maintenance" of the Levees contingent on certification and acceptance by FEMA; or (3) "[d]efer action" and wait on "whatever action FEMA imposes upon Richland County." *Id.* at DEF-00000056. Deas Manning and Mr. Gregory testified that options one and three would not have been acceptable to Burroughs and Chapin, and it would not have purchased the Property had either of those options been endorsed by the County. Tr. 224, 717.

In his report, the Land Development Administrator recommended option number two

to the County Council: *i.e.*, that the County begin the process to accept responsibility for operation and maintenance of the Levees after certification. PTE 166 at DEF-00000056. He also appended to the report an estimate prepared by Lockwood Greene estimating the Levee maintenance cost as approximately $174,500 per year. *Id.* at DEF-00000061. The Land Development Administrator stated that the Levee maintenance "costs should be offset by the rezoning and development of these properties and the accompanying increase in the County's tax base." *Id.* at DEF-00000056.

Thereafter the Land Development Administrator's report was referred to the County's Development and Services Committee, which met on January 26, 1999. Tr. 2335-37; PTE 020 at DEF-00000064. All but one of the eleven members of the County Council were present at the meeting: five who were members of the Development and Services Committee and five who were not members of the committee. PTE 020 at DEF-00000062; Tr. 227-28; Pearce Tr. 26. Also present were the County Engineer, the County Attorney, the Assistant County Administrator, other members of the County staff, and a newspaper reporter. PTE 020 at DEF-00000062; Pearce Tr. 27. Deas Manning testified that he also made a presentation to the Development and Services Committee on January 26, 1999, regarding the general development vision for the Property in conjunction with the Committee's consideration of the Land Development Administrator's report and recommendations. Tr. 229-32. Mr. Manning testified that the comments from the members of the Committee were overwhelmingly positive. Tr. 231. During the Committee's consideration of the Land Development Administrator's report, "[a] discussion took place regarding liability to the County if the acceptance of [Levee] responsibility is agreed upon." PTE 020 at DEF-00000064; Tr. 2355-56. After due consideration, the Committee voted unanimously to send the report and its

recommendation to the entire County Council for approval at its next Regular Session meeting scheduled for the evening of February 2, 1999. PTE 020 at DEF-00000064.

Burroughs and Chapin's request to the County to accept responsibility for the Levees was covered in *The State* newspaper the morning of February 2, 1999. Tr. 2380-81; PTE 170. The article discussed Councilwoman Kit Smith's "concerns about the county's liability should the levees fail," and also stated that "County Attorney Larry Smith said he had looked into certain aspects of the liability issue but declined further comment until he gives a legal opinion to council tonight." PTE 170 at DEF-00000074; Tr. 2383-87. Also, the McNair Law Firm, who was representing Burroughs and Chapin in the Property purchase transaction, faxed an explanatory document to the County earlier that day which explains:

- what the County Council is being asked to do ("Accept operation and maintenance responsibility for the levee system");
- why the County's agreement is required ("if the levee system is to be recognized for FEMA purposes then operation and maintenance responsibility must be under the jurisdiction of the county");
- why the Council must act tonight ("If the County will commit to acceptance of the operation and maintenance of the levees, then the transaction can be closed and the investors can start the process of upgrading the levees ...");
- why the problem cannot be solved with FEMA remapping ("Even if the investors could wait for [FEMA to complete the mapping process], ... the county must accept operation and maintenance responsibility");
- what the proposed impact of the development may be ("estimated as high as $1.0 billion"),
- whether the County was being asked to approve any development now ("No ... [a]s the developers move forward in their plans, they will work with the County as any other developer would on appropriate zoning and land use approvals");
- what the County's options and costs for assuming responsibility for operation and maintenance of the levees were (estimated annual cost of $174,500); and
- how the County could handle any potential liability associated with operation and maintenance of the levee system ("there are a number of ways for the county to minimize any potential liability ...").

PTE 252; Tr. 246-47. Finally, at some point on February 2, 1999, County risk manager David Chambers sent a memorandum to the County Attorney and the County Administrator

recommending against accepting liability relating to levees. PTE 146; Pope Tr. 15.

In its deliberations regarding the Development and Services Committee report on the evening of February 2, 1999, the full Richland County Council held "[a] discussion ... regarding the acceptance responsibility, maintenance of the levee system, and the effect on the taxpayers." PTE 147 at DEF-00012032. After these discussions, the Council voted unanimously to adopt a substitute resolution proposed by Councilwoman Smith, PTE 147 at DEF-00012033, which provided:

> [That the County] accept responsibility for local inspection and enforcement of the levee system, and if required by FEMA, to accept operation and maintenance responsibility for the system contingent upon the following:
>
> (1) The property owners upgrade the levee system to meet FEMA standards;
> (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, including 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 $30,000,000.00 within ten years of the date of the adoption of this motion.

Id. at DEF-00012032-33; Tr. 2392-93.[13]

Paul Livingston, the Chairman of Richland County Council, followed the Council's unanimous resolution with a letter to FEMA on February 17, 1999, stating that "Richland County, by action of its governing body, the County Council, has agreed to accept responsibility for local inspection and enforcement of the operations and maintenance plan for the levee system as submitted by the owner and approved by FEMA contingent upon" the conditions outlined in his letter, which are materially similar to the first four conditions in the

[13] The substitute resolution was crafted by Councilwoman Smith along with Mike Ey, Esq. of the McNair Law Firm, during or after a meeting with Mr. Ey, Mr. Gregory, and Deas Manning. Tr. 735-43, 2279-82

County's February 2, 1999 resolution, the first of which was that Columbia Venture improve the Levees to certified standards. PTE 022 at DEF-0000079 (last emphasis in original). The Chairman also stated that the "property owners intend to upgrade the levee system to comply with the requirements of FEMA regulation 44 CFR 65 for protective structures" and requested that FEMA "consider the existing levee system in any current or future calculation of floodway for this area." *Id.* at DEF-00000079-80. On February 26, 1999, the County Administrator again reiterated the County's agreement in a letter to FEMA, stating: "Richland County has agreed to be the inspector, provide monitoring and review and enforcement after the rebuilding of the levees has been approved and accepted." PTE 026 (emphasis added).

C. FEMA's confirmation that once the Levees were improved and accepted by the County, FEMA would remove the floodplain and floodway designations from the Property protected by the Levees.

On January 20, 1999, a few days before the Development and Services Committee met, Mr. Tillotson wrote a letter to Lisa Holland of the South Carolina Department of Natural Resources, the state representative of FEMA for the NFIP, outlining Burroughs and Chapin's plan to improve the Levees to certified standards and to ask for the County's agreement to accept responsibility for the inspection and maintenance of the Levees once certified. PTE 246 at CVMcNair002223-24. Ms. Holland forwarded Mr. Tillotson's letter to FEMA via a letter asking for "an answer by Tuesday, January 26, 1999 because the potential buyers want assurances prior to purchase." PTE 017 at CV-SCDNR 00046. In response to Ms. Holland's letter, Matthew Miller of FEMA wrote a letter dated January 26, 1999, stating that if the Levees were improved to certified standards, met all the requirements of 44 CFR § 65.10, and did not, as improved, cause a rise in the base flood levels or a reconfiguration of the floodway, then FEMA would remove the floodplain and floodway designations from the land protected

by the Levees. PTE 549 at CV014035. A copy of Mr. Miller's letter was sent to Mr. Tillotson and Mr. Gregory, as well as the County. *See id.*; PTE 018.

On February 17, 1999, Mr. Tillotson also gave Mr. Gregory Lockwood Greene's engineering judgment that the Levees could be improved without causing a rise in the levels of the base flood or a reconfiguration of the floodway. PTE 208 at CV002276. That opinion was confirmed by the testimony of Carroll Barker, a hydrologic and hydraulic engineer, that the Levees could be improved sufficiently to certify them under FEMA standards without causing a rise in the levels of the base flood or a reconfiguration of the floodway. Tr. 1240, 1244-45. Mr. Barker also testified that his opinion would not change if the Levees were improved to withstand a 500-year flood plus three feet of freeboard. Tr. 1245-46.

Mr. Gregory also negotiated a nonbinding Memorandum of Understanding with the County via the County Administrator, whereby Richland County "agree[d] to work with the development group on issues that are critical to the proposed development such as zoning, tax incentive vehicles and a multi-county business park."[14] PTE 024. In return, Mr. Gregory agreed that the development group would work with the County in its visioning process and forthcoming "Town and Country" Comprehensive Land Use Plan. Tr. 762-65; PTE 024.

As of February 1999, 3,120.762 acres of the Property, mostly in Levee Sections 1 and 2, were zoned D-1 (large tracts on the fringe of urban growth expected to be rezoned with

[14] Richland County had an existing multi-county business park with Fairfield County dating back to at least 1996, and County staff and Council members were familiar with the process for and requirements of a multi-county business park. Tr. 2417-20, 2568. Douglas Wendel, the CEO of Burroughs and Chapin, testified that although a multi-county business park represented an attractive possibility for both the County and Columbia Venture, Columbia Venture was prepared to secure alternative financing and proceed with the development should the County decide against using a multi-county business park to finance the development's infrastructure. Wendel 7/12/11 Tr. 125-26. From Burroughs and Chapin's perspective, the project's feasibility did not hinge on the multi-county business park issue. *Id.* at 125.

more intensely developed classification). Tr. 483-84; PTEs 250A § 26-62.1, 499. Another 1,277.48 acres of the Property, primarily in Levee Section 3, were zoned RU-Rural. Tr. 485-86; PTE 499. Forty acres were zoned as M-1, light industrial, and ten acres were zoned as RS-3 single family residential. Tr. 486-87; PTE 499. Columbia Venture intended to have the Property rezoned later based on Planned Unit Development zoning. Tr. 910.

With the County's February 2, 1999 unanimous resolution, the January 26, 1999 letter from FEMA, the February 17, 1999 judgment and opinion of Lockwood Greene that there were no impediments to removing the floodway and floodplain designations from the Property protected by the Levees regardless of whether the Levees were in a regulatory floodway or not, the County Administrator's nonbinding Memorandum of Understanding, and other findings and conclusions drawn from its due diligence efforts, Burroughs and Chapin went forward and finalized the investment group, Columbia Venture, LLC, to buy and develop the Property. Tr. 771-72; Wendel 7/12/11 Tr. 131-32. The transaction closed on February 19, 1999. Tr. 306, 767.

Mr. Gregory testified that the members of Columbia Venture had the expertise, know-how, experience, and financial resources to develop the Property as envisioned. Tr. 774-78. The members of Columbia Venture on February 19, 1999, were: Burroughs and Chapin; NLBF, LLC; Fort Carson Family Housing, LLC; Lockwood Greene; Green Diamond, LLC; and Carolina First Corporation. PTE 326 at CVMcNair000998. Besides the development and engineering experience held by Burroughs and Chapin and Lockwood Greene, Fort Carson Family Housing, LLC was an LLC held by Regent Partners in Atlanta, which had experience developing office buildings, hotels, apartment complexes, and student housing. Tr. 678, 776. Carolina First Bank would be "a headline representative of the project from the financing

standpoint for future development." Tr. 777-78. Green Diamond, LLC was Burwell Manning's LLC,[15] and Burroughs and Chapin considered the Mannings' knowledge of the Property and on-site presence valuable. Tr. 777. NLBF, LLC was an LLC owned by a private investor, Dr. Wade Nichols. Tr. 775. Representatives of Columbia Venture testified the development group was committed to spending the money required to improve the Levees and otherwise proceed with the development activities. Tr. 738-41; Tillotson Tr. 43.

V. Columbia Venture's development activities shortly after purchase, permit application for Levee reconstruction, and the County's decision to delay consideration of construction permits.

Columbia Venture began its efforts to develop the Property soon after purchase with particular focus on the Levee upgrade. *See, e.g.* PTE 502 at CV005079; Tillotson Tr. 16. On March 10, 1999, Lockwood Greene, on behalf of Columbia Venture, hired the engineering firm S&ME to do geotechnical work in preparation for the Levee upgrades on an expedited basis. Tr. 1107. By May 2, 1999, S&ME had made a preliminary report of its exploration of Levee Section 1, after obtaining numerous soil borings and soil samples (Tr. 1114; PTEs 127 at CV014316, 527 at 2), and determined that "[t]he materials comprising the Levees [were] adequate for use in construction of a stable levee." PTE 127 at CV014320; Tr. 1127. S&ME concluded that the Levee, with maintenance and clearing of vegetation, would provide a significant factor of protection against the 100-year flood. PTE 127 at CV014320.

In early May 1999, Columbia Venture submitted a permit to do some remedial work on Levee Section 1. Tr. 378-81; PTE 118; Tillotson Tr. 58-59, 73-74. The original application with its accompanying plans and drawings has been lost, but the weight of the testimony reveals that Columbia Venture contemplated heavy construction and excavation that would

[15] Green Diamond was the name of an individual who was a long time employee of Burwell Manning. The development project was named after Mr. Diamond. Tr. 326-27.

have increased the height of the Levees in some places. PTEs 004 at DEF-00004861 (May 1999 entry), 118 at CV013149-51; Tr. 385-86, 779-80, 1329-30; Tillotson Tr. 59, 73; Wendel 10/25/11 Tr. 7; Wendel Dep. Ex. 042. Both Deas Manning and the County Engineer testified that a permit was not required to do routine maintenance on the Levees, such as removing trees or filling in holes. Tr. 55, 57-59, 1335. Anything beyond such routine maintenance, however, would be considered construction requiring a permit. Tr. 2587-88; Pope Tr. 35-37. Columbia Venture's permit application was rejected as incomplete by the County Engineer's office on May 13, 1999. PTE 119. The May 13, 1999 rejection letter stated that the permit could not be issued "until a complete set of plans, and specifications" were provided, including "100 year Flood Information, levee crossections and elevations, [and] soils analysis." *Id.* at DEF-00000287. According to the County Engineer, he would only consider a levee improvement application that was "self-sufficient where [the improved levee system] could act for protection of the development on its own." Tr. 1343. The County Engineer testified that he would need a "complete comprehensive set of plans before [his office] would issue approval for a phase of the levee project." *Id.* As of early May 1999, Columbia Venture did not yet have the "complete comprehensive set of plans" for the Levee system upgrade that the County Engineer required. Tr. 1390-91; Tillotson Tr. 54-55; Wendel 10/25/11 Tr. 32-34.

After the permit application was turned down as incomplete on May 13, 1999, but later on in May 1999, the County Administrator, after consulting with County staff, made the completely unexpected decision not to issue any permits to improve the Levees until after FEMA had completed the ongoing flood mapping process. Tr. 2579, 2598-99; PTE 004 at DEF-0004861 (May 1999 entry). FEMA had written the County Administrator a letter on May 19, 1999, asking the County not to issue any permits to improve the Levees until after

FEMA's upcoming meeting to discuss its revised preliminary maps and the resolution of all technical issues. PTE 031 at DEF-00000292. The County Administrator agreed to this request, decided, and announced publicly, that the County would not issue any permits in the area with which FEMA was concerned (namely, the Property and the Levees). Tr. 2592; Wendel Dep. Ex. 042 at DEF-00000304. This decision was not just to delay permits until after FEMA's next public meeting to discuss technical issues with the revised preliminary maps as suggested by FEMA (PTE 031 at DEF-00000292), but not to issue *any* permits to improve the Levees until after FEMA had *completed* its flood mapping efforts, which did not occur until after August 20, 2001. Tr. 2578-79. The County Engineer also concluded in or around May 1999 that his office would not issue any permits to improve the Levees until FEMA had issued a final map or until the County Administrator instructed otherwise. Tr. 1354-56, 1399.

Mr. Gregory testified that Columbia Venture was very concerned about the County's new position on permit approvals in the early summer of 1999, specifically referencing newspaper articles before the end of June where, it appeared to him, that the County's position was "to wait on FEMA." Tr. 988-89; *see also* Wendel Dep Ex. 042. Mr. Gregory analogized the County's position in the summer of 1999 to option 3 in the Land Development Administrator's January 20, 1999 report (defer action pending FEMA decision). Tr. 988. Mr. Gregory testified that if the County had endorsed option 3 at that time, Burroughs and Chapin would not have purchased the Property. Tr. 717; *see also* PTE 252 at DEF-00008252 ("Can't this problem be solved with FEMA remapping? No"). Deas Manning also testified that after May 1999, the County deferred action on the permit issue in favor of waiting on FEMA to act. Tr. 400-01. The County Administrator further confirmed that his May 1999 decision was not to issue any permits for construction that would be required to upgrade the levees to FEMA

standards until after FEMA had finished its floodmapping efforts. Tr. 2587-90; *see generally* Tr. 2576-80.

By that time, however, Columbia Venture had already purchased the Property and spent a considerable amount of money and effort on engineering and other development planning. Accordingly, Columbia Venture elected to continue with its development activities after the County denied the permit application and announced its position to not consider permit applications while the flood mapping process was ongoing. S&ME published its complete *Preliminary Geotechnical Report – Levee Section 1* with appendices on May 21, 1999. Tr. 1122; PTE 527 at 3. The analysis and upgrade plan presented in the report was designed to the FEMA standards for certification set forth in 44 C.F.R. § 65.10. Tr. 1136. It included levee cross sections, levee elevations, and soils analysis and was designed to the U.S. Army Corps of Engineers' standards. Tr. 1136-37. This analysis would also have applied to a no-rise showing necessary for building in a regulatory floodway as required by the County Engineer. *See* Tr. 1314. On May 3, 1999, S&ME began a two-phase inspection of Levee Section 2 similar to its work on Levee Section 1. PTE 527 at 2. S&ME completed the Levee Section 2 exploration and issued a geotechnical report to Lockwood Greene on August 10, 1999. *Id.* at 3. 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. Tr. 1126-27.

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. Tr. 1137, 1146. S&ME finalized its 500-year flood analysis for Levee Sections 1 and 2 on November 16, 1999. Tr. 1146; PTEs 211, 527 at 4. The required modifications were "basically reshaping the inside face [and] 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." Tr. 1150. In essence, the construction required to upgrade the Levees was to the landward side of the Levee. Tr. 1129. The center line of the Levee would move away (further inland) from the river and floodway boundary of the 1994/1995 effective FIRM. Tr. 1130. The November 16, 1999 plans provided to Lockwood Greene exceeded the U.S. Army Corps of Engineers' standards in terms of crest height, but equaled the Corps's stability factors. Tr. 1151. The November 16, 1999 plans included levee cross sections, elevations, soils analyses, and a quality control document for construction of the Levees. Tr. 1151-52. Columbia Venture paid S&ME $144,969.62 in 1999 for its engineering work. PTE 521 at CV004409. After receipt of S&ME's November 16, 1999 report, Lockwood Greene was in position to have grading plans made based on S&ME's cross sections, complete the wetlands survey (which was already underway (PTE 308 at CV012836)), obtain a construction permit, and prepare a maintenance and operation plan to complete the Levee upgrade. Tr. 1151-52. As described above, however, the County Administrator and the County Engineer had decided months earlier not to issue any permits for Levee improvements until FEMA completed its flood mapping process.

During 1999, Columbia Venture also commissioned a market study (PTE 299) and highest and best use analysis (PTE 301) performed by Haddow and Company ("Haddow"). Tr. 770. Haddow was retained to assist Columbia Venture in helping "formulate the optimal development strategy." PTE 301 at CV003868. Columbia Venture also later engaged Edward D. Stone and Associates, a land planning firm from Florida, to design a comprehensive master development plan for the Property. PTEs 314, 319, 320, 553.

VI. The County's appeal of the August 12, 1999 revised preliminary FIS and FIRM, which was favorable to Columbia Venture, and the rising opposition to Columbia Venture's development plans.

On August 12, 1999, FEMA issued another revised preliminary FIS and FIRM, which moved the proposed floodway to the landward toe of the Manning Levees. PTEs 304, 305; Tr. 404, 789-90. The land protected by the Levees was classified as floodplain, the same categorization as the 1994/1995 effective FIRM. PTEs 229, 304. In contrast to the June 5, 1998 and February 25, 1999 revised preliminary data, FEMA published the August 12, 1999 revised preliminary FIS and FIRM, thereby initiating the 90 day appeal and comment period under the NFIA.[16] Tr. 784; 42 U.S.C. § 4104(b). Because the map was favorable to Columbia Venture's development plans, Columbia Venture did not appeal. Tr. 789-90. However, in response to publication of this data, public opposition to Columbia Venture's development plans began to develop, and on December 7, 1999, Richland County Council unexpectedly passed a resolution in which it "officially appeal[ed] the findings of the [August 12, 1999] study in the name of the community of Richland County ...." PTE 311 at DEF-00000500-01.

FEMA's regulations require the community (here, Richland County) to collect and forward to FEMA all of the individual appeals of the BFEs that it receives. 44 C.F.R. § 67.7(b). FEMA's regulations also require the community to evaluate the appeals it receives and determine whether "the evidence presented is sufficient to justify an appeal on behalf of such persons by the community in its own name." 44 C.F.R. § 67.7(c).[17] A community is thus

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[16] FEMA did not publish the BFEs in the *Federal Register* in August and September 1999 as required by statute, but it did publish the BFEs in the newspaper. PTE 061 at CV015101.

[17] "The sole basis of appeal under [FEMA's regulations] 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 County submitted no scientific or technical information in support of its own appeal. *See* DTE 045 at DEF-00001295.

not required to appeal to FEMA in its own name; it can simply forward the private appeals it receives to FEMA. *See* 42 U.S.C. § 4104(c) ("Whether or not the community decides to appeal ..."). The NFIA directs FEMA to treat appeals by the community differently from appeals not undertaken by the community and gives weight to the community's stance on the merits of appeals. 42 U.S.C. § 4104(d) & (e); 44 C.F.R. § 67.9(a). Indeed, Mr. Barker, an expert hydrologist who has had extensive experience dealing with FEMA and the flood mapping process, testified that FEMA considers the input and desires of the local community in its mapping decisions. Tr. 1288, 1304.

The County's official appeal of the August 12, 1999 FIRM in its own name was a concrete indication of a change in its attitude toward Columbia Venture's development plans, and it prompted the Land Development Administrator to question how the County could "disagree" with the floodway lines that had "been changed back to essentially 1994 levels" in light of the County Administrator's July 14, 1998 request that FEMA put the mapping process on hold. PTE 125 at 2. The Land Development Administrator questioned whether public opinion, rather than scientific or technical evidence, was the motivating factor behind the County's potential appeal. *Id.* Other entities appealed the August 12, 1999 map, including the South Carolina Department of Natural Resources. DTE 044 at DEF-00012652. Mr. Gregory also recognized that the County's attitude toward the development had cooled. He testified that he was bewildered with the County's appeal because in 1998, "Richland County very much wanted to get the floodway off of the property behind the levee." Tr. 793. Now that the floodway was removed from the Property behind the Levee, the County was "appealing their [own] map." *Id.*

Without a permit, Columbia Venture could not begin the construction needed to

upgrade the Levees. Columbia Venture, however, had no alternative at that point but to continue moving forward with its development plans. Columbia Venture continued to update its engineering analyses and options with various data with the ultimate goal of submitting a permit to improve the Levees to Richland County in furtherance of removing the floodway and floodplain designation from the Property. Wiseman Tr. 62-63; PTE 323 at CV001030-33. Columbia Venture also began negotiations with Richland County regarding a development agreement and agreement related to costs. Wiseman Tr. 77, 93-95; Wiseman Dep. Exs. 162, 172.

In response to the appeals filed in December 1999, on September 26, 2000, FEMA released its "Appeal Resolution for Congaree River in Richland and Lexington Counties, South Carolina" and yet another revised preliminary FIS and FIRM. PTEs 204, 336, 338. The September 26, 2000 revised preliminary FIRM expanded the proposed floodway to encompass approximately 70% of the Property. PTE 338. Because the Congaree River serves as the political boundary between Richland and Lexington Counties, FEMA's guidelines require that the regulatory floodway be determined using the equal reduction of conveyance method, whereby an equal volume of conveyance is reduced on either side of the river to produce the one-foot surcharge, regulatory floodway. Omnibus Appx. at 102-03; PTE 204 at iii. In producing its August 12, 1999, revised preliminary FIRM (and all previously issued effective FIRMs), FEMA recognized that the Manning Levees were not certified levees under the NFIP regulations and would likely fail in discrete areas during a base flood, but that the remaining Levees would block conveyance of flow through the Richland County floodplain. Omnibus Appx. at 266-67; PTE 204 at 12; *see also* PTE 004 at DEF000004861 (July 1998 entry). Thus, although FEMA designated the land behind the Levees as part of the floodplain, FEMA did not

consider it to be an area of effective flow and accordingly, not part of a regulatory floodway determined using the equal reduction of conveyance method. FEMA considers effective flow to be water flowing at a velocity of one foot per second or greater. PTE 204 at 19. In its September 26, 2000 Appeal Resolution, FEMA reversed itself and concluded that the land behind the Levees was an area of effective flow and conveyance. *Id.* at 23; Tr. 799-800. Based on its geotechnical investigation, FEMA concluded that during a base flood Levee Section 1, which includes approximately six miles of Levee, would breach in two, possibly three, weak locations, each breach approximately 120 feet wide. PTE 204 at 13, 19. FEMA concluded that the most likely mode of failure was by piping (*i.e.*, water seeping through the wall of the Levee) as opposed to overtopping and that "shear failure itself is not likely because of the relatively low height of the levees to the ground, and the fact that they have gained some degree of stability over time.' *Id.* at 12. Columbia Venture's plan was to upgrade the entire 20 miles of Levee system and not just those areas that FEMA identified as being likely to experience discrete breaches in a major flood.

FEMA also commissioned two dimensional hydraulic studies (as distinguished from the less sophisticated, and less expensive, one dimensional hydraulic models that FEMA typically uses in its flood insurance studies). *See* Omnibus Appx. at 104. From these two dimensional studies FEMA concluded that approximately 28,000 cfs (9.6 percent of the total Congaree discharge of 292,000 cfs) would enter the Richland County floodplain through two breaches (120 feet wide each) in Levee Section 1's river levee and be conveyed through the large (1,320 feet wide) I-77 relief bridge. PTE 204 at 19-23.

By letter dated November 22, 2000, FEMA allowed Columbia Venture to administratively appeal the new revised preliminary FIS and FIRM. PTE 345; *see generally*

Tr. 796-802. Columbia Venture commissioned Exponent, Inc., a leading hydraulic engineering firm with expertise in two dimensional hydraulic modeling, to conduct extensive two dimensional hydraulic studies that challenged FEMA's conclusion that the area behind the Levees was not an area of ineffective flow. Tr. 798-99; *e.g.* PTE 550 at DEF-00002951 – DEF-00002956. Columbia Venture submitted this scientific and technical evidence to FEMA to support its administrative appeal that showed no conveyance of water landward of the Levees and, consequently, no floodway (determined by equal reduction of conveyance) on the Property landward of the Levees. DTE 062; PTE 550 at DEF-00002951 – DEF-00002956; Tr. 798-802.

The September 26, 2000 revised preliminary FIS and FIRM included BFEs that were lower than the BFEs in the 1994/1995 effective FIS and FIRM. PTE 533. Thus, according to FEMA guidance, the County had the option to continue to use the 1994/1995 effective FIS and FIRM until FEMA issued its final map. PTE 031 at DEF-00000296; PTE 523 at DEF-00001691. As previously noted, however, neither the County Administrator nor the County Engineer would allow a permit to upgrade the Levees while the FEMA flood mapping effort was ongoing even though the operative map did not include the Levees in a regulatory floodway.

After FEMA released the Appeal Resolution on September 26, 2000, Councilmembers Kit Smith and Greg Pearce decided that the County would formally "suspend[] substantive negotiations with Columbia Venture until a FEMA decision has been made." DTE 066 at DEF-00001955; PTEs 004 at DEF-00004864, 556 at DEF-00002233; Tr. 2447. Nevertheless, Columbia Venture continued to provide information to Richland County in late 2000 and early 2001, including providing its development concept plan to the County Council on November

21, 2000, and information regarding development behind levees. PTEs 004 at DEF-00004865-66, 576; DTE 160.

VII. Richland County's Amendment of its Stormwater and Zoning Ordinances.

In mid-2000, the County began to consider amendments to its Stormwater Ordinance in response to new requirements of the National Pollutant Discharge Elimination System permitting process. DTE 051. After the release of the Appeal Resolution on September 26, 2000, public opposition to Columbia Venture's development plans intensified. Pearce Dep. Ex. 180 at DEF-00001816-17. These opponents of Columbia Venture's development plans identified the pending amendments to the Stormwater Ordinance as a way to possibly thwart the development plans if FEMA's final map included the Levees in the regulatory floodway. *Id.* at DEF-00001817. In October 2000, County staff described the opposition groups as "focused on this stormwater ordinance as the way to sink the B&C project" and that the Stormwater "[O]rdinance is the battleground for the B&C project." *Id.* An early draft of the proposed ordinance amendments contained a variance provision at Section 8-25 and retained the same language regarding "impede the free flow of water" at Section 8-27(h) and (i) that was contained in Section 8-62(h) and (i) of the then-effective Stormwater Ordinance. PTEs 113 at DEF-00001529-30 & DEF-00001533, 230 § 8-26(h) & (i). Opposition groups opposed including a variance in the new ordinance and challenged the interpretation of "impede the free flow of water" as the FEMA no-rise standard (the County Engineer's long held view in administering the existing ordinance). They argued instead for a total prohibition on any construction within a regulatory floodway without the possibility of a variance. *See* PTE 114.

During the summer and fall of 2000, County Council leadership (Councilmembers Smith and Pearce) decided that the County would not consider Columbia Venture's plans to

upgrade the Levees until after the County took a definitive position on the meaning of the "impede" language of the proposed Stormwater Ordinance *(i.e.*, whether to affirm the County Engineer's long held view or vote for the new interpretation advanced by the opposition). PTE 004 at DEF-00004865; Pearce Dep Ex. 180 at DEF-00001817. Two of the main organizations opposing Columbia Venture's development plans were the Congaree Task Force, which was formed in October 2000, and the Southern Environmental Law Center. Tr. 422-23; PTE 004 at DEF-00004865; Wiseman Tr. 84, 118; Pearce Tr. 103. The Congaree Task Force sent a Memorandum to Richland County Council on November 28, 2000, advocating the County delete the variance provision from the draft amendments to the Stormwater Ordinance because of its belief "that no developer should be allowed a variance from the provisions of 8-27(h) because development in the floodway should not be encouraged." PTE 114 at DEF-00001951. J. Blanding Holman, a lawyer with the Southern Environmental Law Center, sent a similar letter to Councilwoman Smith, the then-current chairperson of Richland County Council. *Id.* at DEF-00001952-53. On December 4, 2000, the Assistant to the County Administrator confirmed it would be recommended to Council that the variance provision be removed. PTE 346 at DEF-00001958. The variance provision was, in fact, removed from the draft ordinance of December 7, 2000, despite a County staff member's memorandum stating the variance section was "required by the EPA." PTE 112 at DEF-00002175-76 & DEF-00002195-96. The final version of the new Stormwater Ordinance enacted on April 17, 2001, did not contain a variance provision. PTE 374.

After six deferrals beginning on July 19, 2000 (Tr. 1426; PTE 112 at DEF-00002174), the amendments to the Stormwater Ordinance finally came before Richland County Council for first reading on March 20, 2001. PTE 186 at DEF-00012099-100. At this meeting, the

Council considered a comprehensive report from the County staff, which included the recommendations of the staff and the County Engineer, to explicitly confirm the FEMA no-rise engineering standard as the interpretation of "impede the free flow of water." Tr. 1431-32; PTEs 051 at DEF-00002252-57, 186 at DEF-00012099-100. Potentially affected landowners Columbia Venture and Heathwood Hall had also advocated for the FEMA no-rise standard and adoption of FEMA's model ordinances. PTE 184 at DEF-00002246; DTE 072; Tr. 2426. Heathwood Hall asked the County not to "single Heathwood out for special treatment" and expressed a desire to "treat all county landowners equally." PTE 184 at DEF-00002246; Pearce Tr. 135. Instead, a majority of the Richland County Council voted for an amendment drafted by the Congaree Task Force and the Southern Environmental Law Center that interpreted "impede" as a complete prohibition on building in the regulatory floodway yet carved out exceptions for a pre-existing school and wastewater treatment facility, thus rejecting the County staff's recommendations. PTEs 183, 185, 186 at DEF-00012099-100; Pearce Tr. 139.[18] The school and wastewater treatment facility could build in a floodway upon showing a no-rise. PTEs 183 at DEF-00002244, 185 at DEF-00002249.

Councilmember Bernice Scott stated at the March 20, 2001 meeting:

> "[T]his motion is definitely against any development in that area. We have had landowners on top of landowners that came before us today to tell us to take out just those two entities. What we are doing to landowners is saying we don't need you there, but we are going to take care of the school, the City and the Wastewater Treatment Plant."

[18] Councilwoman Smith initially agreed with the staff and County Engineer's recommendation of a no-rise standard, but expressed concern that the Congaree Task Force would not be agreeable. PTE 004 at DEF-00004869. On March 19, 2001 (one day before first reading), however, Councilwoman Smith informed County staff that she was supporting the amendment proposed by the Congaree Task Force, which also informed the staff that it had the votes to pass the amendment. *Id.* at DEF-00004870.

PTE 186 at DEF-00012099. The minutes also state that "Ms. Scott wanted the record to reflect 'that this is a first step for a lawsuit because this is definitely wrong.'" *Id.* at DEF-00012100. In an internal Richland County memorandum, the County Engineer affirmed that under the proposed amendment passed in first reading on March 20, 2001, "[m]aintenance to levees in a floodway would be permitted if it did not alter the configuration or cross section of the levee. ... Increasing the height or width of a levee would not be permitted." PTE 117 (emphasis in original). The County had long known that any improvement to and FEMA certification of the Levees would require them to be made higher and wider. Tr. 2588-89; Pope Tr. 18-19.

The version of the ordinance that passed second reading on April 3, 2001, retained the exceptions for pre-existing schools and wastewater treatment facilities and contained further amendments, including a provision that specifically prohibited repair or maintenance work on any levee "to the extent that such repair or maintenance would result in a structure that was higher or wider than it was before the need arose for such repair or maintenance." DTE 082 at 15; PTEs 191 at DEF-00012108, 360. The April 3, 2001 meeting minutes state: "Ms. Scott wanted the record to reflect that the ordinance is against Burroughs and Chapin." PTE 191 at DEF-00012108.

Third reading of the Stormwater Ordinance occurred on April 17, 2001. PTE 190 at DEF-00012114. The version of the ordinance finally adopted by an 8-3 vote of the members of Richland County Council was:

> (h) Not withstanding any other provision of this Chapter, 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, unless:
>
> (1) such proposed impediment is or would be 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 part of or used by a 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 section shall not be construed as authorizing or requiring the repair or maintenance of any such structure to the extent that such repair or maintenance would result in a structure that would be higher or wider than it was before the need arose for such repair or maintenance.

(i) *National Flood Insurance Program*: All applicable regulations of the National Flood Insurance Program are incorporated by reference herein.

Id., PTE 374 § 8-26 (emphasis added). The revised Stormwater Ordinance did not contain a variance provision. On May 15, 2001, the County also amended its Zoning Ordinance to permit a school and a wastewater treatment facility as acceptable uses in the regulatory floodway. DTE 087 at DEF-00002531-32. Councilmembers Pearce and Smith testified that the County's actions had the effect of singling out Heathwood Hall and the wastewater treatment plant. Pearce Tr. 135; Tr. 2426. When the amended Stormwater Ordinance was adopted on April 17, 2001, the effective regulatory floodway stopped at the riverside toe of the Levees. PTE 229. Consequently, the campus of Heathwood Hall, the City of Columbia's wastewater treatment facility, the vast majority of Columbia Venture's land, and the Levee system itself were not in an effective regulatory floodway.

Columbia Venture continued to provide information to the County in the face of the pending and enacted amendments to the Stormwater and Zoning Ordinances, as FEMA had not

yet resolved Columbia Venture's administrative appeal, and the Levees were not, at that time, in an effective regulatory floodway. PTEs 550, 554, 580, 581; DTE 093. Councilwoman Smith testified that Columbia Venture provided "[a] tremendous amount of data" to the County. Tr. 2477. Because of the data received by the County from Columbia Venture and others, Councilwoman Smith testified she "became opposed to intense development behind levees." Tr. 2478. 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." Tr. 2480.[19]

VIII. Effect of Final Flood Map and Richland County Ordinances on Columbia Venture.

On August 20, 2001, FEMA issued its final map confirming the regulatory floodway proposed in the September 26, 2000 revised preliminary FIRM, which covered approximately 70% of Columbia Venture's Property. DTE 093; PTEs 381, 382. In a two page technical report, FEMA rejected Columbia Venture's scientific and technical evidence, including Exponent's extensive two dimensional hydraulic studies, saying: "After reviewing the data submitted during the comment period, we remain convinced that the existing dike will breach, and as a result, significant flow under Interstate 77 in the Richland overbank will result." Omnibus Appx. at 385. Pursuant to correspondence between FEMA and Richland County, the County's then-existing ordinances automatically adopted the final map and the accompanying FIS six months later on February 20, 2002. PTEs 056, 057.

On February 20, 2002, the applicable Stormwater Ordinance, as amended in April 2001, prohibited in the regulatory floodway any "levees, dikes, fill materials, structures or

[19] Councilwoman Smith had harbored these feelings for some time. Indeed, she testified that even though she voted in favor of accepting the maintenance and operations responsibility for the Levees on February 2, 1999 (Tr. 2393) and that she knew that Burroughs and Chapin was relying on that County action in purchasing the Property (Tr. 2359-61), she would sometimes vote in favor of an issue so that she could seek to defeat it later. Tr. 2393.

obstructions that will impede the free flow of water during times of flood," which the County Council expressly intended to prohibit anything solid regardless of whether it would cause a rise in flood levels, except specific exceptions for a school, a wastewater treatment facility, a minor recreational or playground facility, or an impediment approved by the County Engineer prior to January 1, 2001. PTE 374§ 8-26(h). The revised Stormwater Ordinance also specifically prohibited making a levee in the regulatory floodway higher or wider. *Id.* Deas Manning testified that as of February 20, 2002, the Manning Levees were the only levees in Richland County in a regulatory floodway. Tr. 448. No other witness could identify any other levees in Richland County located in a regulatory floodway other than the Manning Levees. *See* Tr. 2434-35. As of February 20, 2002, Richland County's interpretation of "impede" had also changed from the no-rise engineering standard long applied and endorsed by the County Engineer in administering the old ordinance to a no-build standard by action of the County's governing body. Tr. 803-04, 1325.

According to Mr. Barker, it would have been possible under the February 20, 2002 effective FIRM and the no-rise standard of 44 C.F.R. § 60.3(d)(3) to improve the Levees sufficiently to certify them under FEMA standards and to comply with Richland County's levee construction requirements. Tr. 1301-02. It would not be possible, however, to improve the Levees under the County ordinances that existed on February 20, 2002, because any improvement of the Levees would require them to be made higher and wider, an action specifically and pointedly prohibited in Richland County's amended Stormwater Ordinance. *See* PTE 374§ 8-26(h). Indeed, in 2005 Columbia Venture, in an effort to salvage a portion of its plan for Levee Section 1, presented reasoned arguments to the County that it should be permitted to upgrade Levee Section 1 under Heathwood Hall's legislative exemption, because

the entire levee was being "used" by the school to protect its facilities from flooding. PTE 430. The County summarily rejected this request reminding Columbia Venture that it could not make the levees wider or taller. PTE 157.

As of December 31, 2002, Columbia Venture had spent $37,961,036, calculated according to generally accepted accounting principles, in purchasing the Property and pursuing its land development plans and activities for the Property. Tr. 2780-89, 2855.

On or about January 13, 2003, Councilwoman Smith stated to *The State* newspaper that the reason Columbia Venture's development would not happen is "a question of geography." Tr. 2484; PTE 397 at DEF-00002759. She also stated to *The State* that Columbia Venture "couldn't have done anything different that would have made it [the development] happen." Tr. 2484-85; PTE 397 at DEF-00002759. In addition, Councilman Pearce testified that although neither the Property itself nor FEMA's regulations changed from 1999 to 2001, his "perception of [the Congaree R]iver and how it operated had significantly changed ... from 1999 to 2001." Pearce Tr. 160. The evidence further reveals that Councilwoman Smith felt strongly and negatively about Columbia Venture and its managing member, Burroughs and Chapin, writing during the process of Council's consideration of the Levees and proposed development that Columbia Venture's development was a "zircon of greed" and that Burroughs and Chapin was "fraudulent," "fakes," "elitist," "unethical," "corporate welfare pimps," and "should be sent packing from Richland County." PTE 350; Tr. 2485-89.

From its perspective, Columbia Venture found itself embroiled in a political fight over the development of its Property shortly after December 1999 that continued well into 2002 and beyond. Columbia Venture perceived Ms. Smith and Mr. Pearce as the leaders of a rejectionist wing that developed on Council, sided with the opposition, and ultimately persuaded a

majority of the Council to oppose development of Columbia Venture's Property. *See* Wiseman Tr. 49-50, 83-84, 89-90, 152. In 2000 and 2001, Ms. Smith and Mr. Pearce served as chair and vice-chair of the Council, respectively (*see, e.g.* PTE 186 at DEF-00012096), and together made a number of decisions on behalf of the entire Council adverse to the interests of Columbia Venture. After FEMA released the Appeal Resolution on September 26, 2000, the two together made the decision for the County Council as a whole to suspend negotiations with Columbia Venture until after FEMA had issued a final map. PTE 004 at DEF-00004864. The two also, again on behalf of the entire Council, made the decision in the fall of 2000 not to consider Columbia Venture's plans to upgrade the Levees until after issues on floodway development under the proposed Stormwater Ordinance had been resolved. *Id.* at DEF-00004865.

Columbia Venture's suspicions that Ms. Smith and Mr. Pearce were working closely with opposition groups turned out to be well founded. In 2003, Ms. Smith was elected to the board of the Southern Environmental Law Center and served on its litigation approval committee. Omnibus Appx. at 390, 393. The Southern Environmental Law Center represented intervenors opposing Columbia Venture in both its Administrative and Judicial Appeals of FEMA's August 20, 2001 final map. *Id.* at 475-77. After her election to the board of trustees, Councilwoman Smith regularly communicated with counsel for the Southern Environmental Law Center about both policy for Richland County as well as specifically about Columbia Venture's Green Diamond project and the Southern Environmental Law Center's legal strategy. PTEs 417, 560; Omnibus Appx. 402, 403, 442, 443, 444, 604-05. Assistant County Administrator (and from 2005 forward, County Administrator) Milton Pope did not know that Councilwoman Smith was serving on the Southern Environmental Law Center

litigation approval committee. Pope Tr. 5-7, 117.

Mr. Pearce and Ms. Smith also worked closely with opposition groups in 2005 and 2006 to defeat a proposal passed by the Development and Services Committee that would have allowed Columbia Venture to upgrade the Levees to certified standards. Mr. Pearce, who served as a member of the Development and Services Committee at the time, leaked confidential information to opposition groups concerning the strategy to defeat the proposal, which grew out of the County's response to the federal court's 2005 Judgment vacating the 2001/2002 BFEs and floodway. Pope Dep. Ex. 148. In November 2005 the United States District Court for the District of South Carolina vacated FEMA's 2001/2002 flood elevation determinations and floodway due to the Agency's failure to observe procedures mandated by law.[20] PTEs 061, 062. At that point, the Levees were no longer within a regulatory floodway under the 1994/1995 FIRM reinstated by the District Court and no longer subject to the no-build restrictions of the 2001 Stormwater Ordinance, The County, however, took the position that the Federal Court had only invalidated the 2001/2002 BFEs, and not the 2001/2002 regulatory floodway that was hydraulically derived from the vacated 2001/2001 BFEs.[21]

The County also responded to the federal court's judgment by adopting a series of moratoria on issuing permits to build in that portion of the Congaree floodplain which included Columbia Venture's Property. PTEs 067, 449, 452. When the first of these moratoria was reported out of the Development and Services Committee, it included a provision that would

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[20] The District Court's Judgment was subsequently reversed by the United States Court of Appeals for the Fourth Circuit that held that the Agency's failure to first publish its BFE's in the *Federal Register* was harmless error under the APA. *Columbia Venture, LLC v. S.C. Wildlife Fed'n*, 562 F.3d 290, 295 (4th Cir. 2009).

[21] The Federal Court's Judgment expressly states that the Court vacated the 2001 BFE's and floodway (PTE 062), but County personnel claimed never to have read the Court's judgment. Omnibus Appx. 524. In any event, a vacatur of the 2001/2002 BFEs in the nature of things vacated the 2001/2002 regulatory floodway.

have allowed Columbia Venture to upgrade its Levees to FEMA standards. PTEs 133, 150. That provision was eliminated on a motion made by Kit Smith and approved by a majority vote of the full Council. PTE 135 at DEF-00012152-53. Indeed, Columbia Venture was the only landowner with which the County was concerned in adopting these moratoria. Pope Dep. Ex. 148; Pope Tr. 121-22.

Finally, in December 2006, the County passed a permanent ordinance that adopted the 1994/1995 BFEs currently being enforced by FEMA and, at the same time, the 2001/2002 regulatory floodway that was not hydraulically derived from or related to the 1994/1995 BFEs. PTE 081. The County in effect imposed a regulatory floodway on Columbia Venture's property by legislative fiat. Under the December 2006 ordinance, the BFEs were irrationally higher than the water surface elevation of the regulatory floodway, an impossibility given the statutory definition of regulatory floodway in the County's ordinances and FEMA's regulations (*i.e.,* the water surface elevation of the regulatory floodway is defined to be no greater than one foot above the water surface elevation of the base flood at any point). *See* Complaint, Ex. 12.

ARGUMENT AND CITATION OF AUTHORITIES

I. Introduction.

Columbia Venture presents the paradigmatic case of a regulatory taking under *Penn Central* and its progeny. A politically motivated faction of Richland County Council, acting in concert with and at the behest of special interest groups, imposed by regulation the equivalent of both a flood control and a conservation easement on Columbia Venture's Property, eliminating Columbia Venture's common law rights of property ownership and denying to Columbia Venture its investment-backed expectations for development of the Property, to its very significant economic loss.

The anti-Columbia Venture faction on County Council effected this taking on February 20, 2002, by adopting the final flood map that included the Levees in a regulatory floodway, thereby making its earlier amendment of the Stormwater Ordinance an insurmountable barrier to Columbia Venture's plans – plans that but for County Council's actions could have gone forward under the no-rise standard utilized by FEMA and recommended by the County staff, without in any way impairing Richland County's continued participation in the NFIP. But for the amended Stormwater Ordinance's prohibition on levee improvements in floodways and no-build restriction, Columbia Venture could have proceeded with its plans, exercising its common law rights of property ownership to develop the Property. Because of the County's actions, Columbia Venture's development plans and the value of its multi-million dollar investment in those plans and the Property were eliminated. The actions taken by a majority of the County Council underscore the lesson that political power, unrestrained by our constitutional guarantees, encourages a local government to favor one political interest over another without regard to the property rights of the disfavored group. Columbia Venture lost a political fight it did not and could not foresee when it purchased the Property on February 19, 1999.

Environmental or other special interest groups that seek to interfere with a property owner's use of his land have at least four options: (1) they can raise money and purchase the property; (2) they can raise money and purchase a conservation easement over the property; (3) they can persuade the government to spend tax dollars to buy the property or a conservation easement; or (4) they can persuade the government to adopt regulations that restrict the use or development of the property – in effect, to impose a conservation easement by law – without regard to the property interests of the owner. The political coalition that arose to oppose

Columbia Venture chose and successfully pursued that fourth option. And in the political fight that developed over the project, the opposition and their supporters on Council ignored the property interests of Columbia Venture. Of course, that fourth option is always the most financially attractive to opponents of development, as the cost of the regulation is borne by the property owner and not the public at large.[22]

Without the encouragement and agreement of Richland County to support its proposed development, Columbia Venture would never have bought the Property and spent millions of dollars to proceed with its plans to develop it. Justice and fairness now demand that the County compensate Columbia Venture for County Council's having adopted regulations after Columbia Venture's purchase of the Property that were calculated and intended to eliminate, and did in fact eliminate, Columbia Venture's investment-backed expectations that the County engendered in the first instance. Because a majority of Richland County Council decided to conserve Columbia Venture's Property from development and to prohibit development protected by certified or improved levees, it is only fair that all citizens of the County share in the burden necessary to achieve that goal and not place the burden disproportionately – indeed, solely – on Columbia Venture.

Columbia Venture does ***not*** challenge the NFIA or the NFIP, either facially or as applied, or seek to impair the ability of local communities to engage in flood mapping and floodplain regulation. Nor does Columbia Venture assert that a local community, in electing to participate in the NFIP, necessarily takes a landowner's property by adopting flood maps that include regulatory floodways. Unlike Richland County's ordinances that applied to Columbia

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[22] Indeed, a concern of some environmental activists is that local governments might be constrained in restricting development if they are required to compensate the land owner. That concern may well be the unarticulated basis of some lower court decisions finding against a taking. But in this case, the County simply went "too far."

Venture's Property as of February 20, 2002, the NFIA and NFIP do not prohibit building economically meaningful structures within a floodway. FEMA's regulations specifically do permit "encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway" if the construction can be completed without causing a rise in flood levels. 44 C.F.R. § 60.3(d)(3) (emphasis added). The NFIP also specifically permits constructing levees to protect land from flooding and to reconfigure the boundaries of the regulatory floodplain and floodway. 44 C.F.R. §§ 72.1, 72.2. The NFIA and NFIP are thus carefully crafted to avoid takings liability for local communities. The internal logic of the program, which is based on flood elevations and floodplain boundaries determined by hydrologic and hydraulic engineering, is that one landowner is not permitted to build structures within a regulatory floodway that would displace flood waters on another landowner, but if as a building can be engineered so as not to displace flood waters on others, the landowner may build and improve structures within the regulatory floodway. Columbia Venture could have and would have proceeded with its development plans, if only it had been allowed to do so under the NFIP standards.

II. Standard of Review.

This appeal focuses solely on whether the special referee erred in determining there was not a regulatory taking, This determination raises a question of law for the Court. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013); *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 171, 714 S.E.2d 869, 877 (2011) ("[I]n an inverse condemnation case, the trial judge will determine whether a claim has been established ... ."") (citation omitted); *Ex Parte Brown*, 393 S.C. 214, 224, 711 S.E.2d 899, 904 (2011) ("The question of a taking is one of law."). As such, this Court's review is *de*

novo, "with no particular deference to the circuit court." *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

III. Summary of the law of regulatory takings.

"[P]rivate property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V The United States Supreme Court has repeatedly emphasized the role of this limitation on governmental power is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *E.g. Armstrong v. United States*, 364 U.S. 40, 49 (1960). The prohibition also applies to the states. U.S. Const. amend. XIV; *see Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (*citing Chi., B. & Q. R.. Co. v. Chicago*, 166 U.S. 226 (1897)).[23]

"As its text makes plain, the Takings Clause 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) (quotation omitted). "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.* at 536-37 (quotation omitted). The Takings Clause analysis does not depend on any analysis of whether the government's actions—its restrictions on the rights to use private property—might be said to "substantially advance legitimate state interests." *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Indeed, that inquiry has been roundly rejected in *Lingle*, where the

[23] The South Carolina Constitution similarly and separately provides that "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property." S.C. Const. art. I, § 13(A). This Court has ruled that the "[t]akings analysis under South Carolina law is the same as the analysis under federal law." *Byrd v. City of Hartsville*, 365 S.C. 650, 656 n.6, 620 S.E.2d 76, 79 n.6 (2005) (*citing Westside Quik Shop, Inc. v. Stewart*, 341 S.C 297, 306, 534 S.E.2d 270, 275 (2000)).

Supreme Court held that "such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." *Lingle*, 544 U.S. at 543 (emphasis added).

Thus, "[t]he general rule ... is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Governmental regulation of private property is subject to scrutiny under the *ad hoc*, factual inquiry of *Penn Central Transportation. Co. v. New York City*, 438 U.S. 104 (1978), in which the Supreme Court identified general factors that have "particular significance" to the regulatory takings analysis, including: (1) "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," and (2) "the character of the governmental action." *Id.* at 124.

Since *Penn Central*, the Supreme Court has identified several specific situations, or categories, in which the character of the governmental action alone determines the takings inquiry and signifies a *per se* regulatory taking. In these situations, the Supreme Court has "drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking." *Ark. Game & Fish Comm'n v. United States*, 133 S.Ct. 511, 518 (2012) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (emphasis added). "So, too, is a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land." *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). Finally, "adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit" are another species of

a categorical or *per se* regulatory taking. *Lingle*, 544 U.S. at 546. This last category is exemplified by *Dolan v. City of Tigard,* 512 U.S. 374 (1994), in which a "permit to expand a store and parking lot [was] conditioned on the dedication of a portion of the relevant property for a 'greenway,' including a bike/pedestrian path," and *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), in which a "permit to build a larger residence on beachfront property [was] conditioned on dedication of an easement allowing the public to traverse a strip of the property between the owner's seawall and the mean high-tide line." *Lingle*, 544 U.S. at 546; *see also Koontz v. St. Johns River Water Mgmt. Dist.,* 2013 U.S. LEXIS 4918, *34 (June 25, 2013) (stating unequivocally that government action requiring a landowner to make improvements to nearby public land "would transfer an interest in property from the landowner to the government" and "would amount to a *per se* taking similar to the taking of an easement or a lien") (emphasis added).

"In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests," the Supreme Court "has recognized few invariable rules." *Ark. Game & Fish*, 133 S.Ct. at 518. "[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." *Id.* As the Supreme Court stated in *United States v. Dickinson*, 331 U.S. 745 (1947):

> The Constitution is intended to preserve practical and substantial rights, not to maintain theories. . . . Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.

Id. at 748 (internal quotations and citations omitted).

Although the Supreme Court has acknowledged that its "regulatory takings jurisprudence cannot be characterized as unified," the Court also notes that the inquiries reflected in *Loretto*, *Lucas*, and *Penn Central* "share a common touchstone." *Lingle*, 544 U.S.

at 539. "Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." *Id.* (emphasis added).

IV. Richland County's legislative imposition of a *de facto* no-build, flowage or conservation easement on approximately 70% of Columbia Venture's Property constitutes a categorical or *per se* regulatory taking.

A. The indisputable net practical effect and intention of the County's ordinances is to permanently reserve Columbia Venture's floodway Property in an undeveloped, unprotected state so that it will carry floodwaters in times of flooding.

On February 20, 2002, Richland County adopted FEMA's effective FIRM, thereby replacing the January 19, 1994 effective FIRM, on which the regulatory floodway boundary was placed at the riverside toe of the Manning Levees. The February 20, 2002 effective FIRM vastly expanded the regulatory floodway on the Property landward of the Manning Levees, in places over a mile from the river, and the regulatory floodway now covers approximately 70% of the Property, including the Levees themselves.

After February 20, 2002, the County's new Stormwater Ordinance, which was passed in April 2001, now applied to vast portions of the Property because of the expanded regulatory floodway and prohibited Columbia Venture from placing within the expanded regulatory floodway any "levees, dikes, fill material, structures or obstructions that will impede the free flow of water during times of flood." PTE 374 § 8-26(h). This identical language had been formerly interpreted by the County Engineer in administering the previous Stormwater Ordinance to be consistent with the FEMA no-rise standard under the NFIP (*i.e.*, if the obstruction did not cause a rise in flood levels, it did not impede the free flow of water). Tr. 1315; *see also* PTE 051 at DEF-0002253. In passing the new Stormwater Ordinance in April

of 2001, however, the County Council did so with the expressed intent of rejecting the County Engineer's long held interpretation of these words in the old ordinance, embracing instead an interpretation that prohibited anything solid. *See* Tr. 1325-26. Thus, the regulatory floodway that impacted Columbia Venture after February 20, 2002, was not a FEMA no-rise floodway consistent with the objectives and internal logic of the NFIP based on hydraulic and hydrologic engineering, but rather a prohibition of placing anything solid in the regulatory floodway.

Moreover, Columbia Venture was prohibited by the same ordinance from adding any fill to the Manning Levees that would make them higher or wider (PTE 374 § 8-26(h)), which is exactly what was necessary to improve the Levees to FEMA's certification standards or to simply improve the Levees to withstand major floods, regardless of whether certification under the NFIP was the ultimate goal. Indeed, in August 2001, FEMA concluded on the basis of its geotechnical and hydraulic studies that the Levees would breach and convey floodwater behind the Levees. Omnibus Appx. at 385; PTE 204 at 13.[24] Thus, the effect of the County's actions on February 20, 2002, was to appropriate, not a NFIP no-rise floodway, but rather a flowage easement across 70% of Columbia Venture's property. "Easement" is defined in the Stormwater Ordinance to include "reservation by the owner of land, for the use of such land by others for a specific purpose or purposes . . . ." PTE 374 § 8-5 (emphasis added). During a base flood, Columbia Venture can, according to FEMA, expect its Levees to fail in two or

[24] Columbia Venture does not concede (nor has it ever conceded) that FEMA's conclusion is scientifically or technically correct. Indeed, Columbia Venture maintains that the most reliable and sound scientific evidence, most of which it commissioned from leading engineering firms, conclusively shows no area of conveyance landward of the Levees. Tr. 796-802. Nevertheless, it is undisputed that improvement and certification of the Levees in conformance with FEMA's regulations and Richland County's ordinances as planned by Columbia Venture would eliminate the weak areas in the levees identified by FEMA in its geotechnical investigation (PTE 204 at 13)and provide far more protection for the Property, the wastewater treatment plant, and Heathwood Hall than any of those properties currently enjoy.

three weak areas and 70% of its Property to be physically occupied by floodwater flowing in a hydraulic corridor from the breaches through the large (1,320 feet) I-77 relief bridge. Omnibus Appx. 385. And the County has thoroughly prohibited Columbia Venture from doing anything to prevent this flooding and has forced Columbia Venture to reserve its land for purposes of conveying this floodwater.

The Stormwater Ordinance does not prohibit certain economically insignificant structures related to or comprising 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." PTE 374 § 8-26(h)(3) (emphasis added). The Ordinance does exempt certain agricultural practices, which allow farming of the land. *Id.* § 8-20. But the ordinance's exemptions for other structures and activities are effectively meaningless because any such structures or operations "[may] not impede the flood-carrying capacity of a regulatory floodway." *Id.*

The indisputable net practical effect of the County's regulatory action requires Columbia Venture to reserve large areas of its Property landward of the Manning Levees, approximately 70% of its total acreage, to serve as an unobstructed, undeveloped, no-build zone for the express and intended purpose of conveying flood waters during flood events. The only economically productive use that remains is agriculture and "minor" recreational uses. Columbia Venture is thus prohibited from converting its Property for any higher and better, *i.e.*, more economically productive, use. Columbia Venture is also prohibited from improving its Levees, which FEMA predicts will fail during a 100-year flood. Omnibus Appx. at 385. Thus, even if Columbia Venture does farm its Property, it cannot prevent the crops from being destroyed by flood.

B. The net practical effect of the County's ordinances is functionally equivalent to imposing a flowage, flood, or conservation easement under South Carolina common law and denies other common law property rights.

Given the aforementioned indisputable facts, the takings analysis should begin and end with a single question: Were the County's actions functionally equivalent to the imposition or inverse condemnation of a flowage (flood) or conservation easement? The government's appropriation of an easement by regulation without the payment of just compensation is a *per se* regulatory taking. *Koontz*, 2013 U.S. LEXIS 4918, *34.

In South Carolina, an easement has been defined to include "a servitude imposed as a burden on land." *Morris v. Townsend*, 253 S.C. 628, 635, 172 S.E.2d 819, 822 (1970). "An easement gives no title to the land on which the servitude is imposed. It is, however, property or an interest in the land." *Id.*; *see generally* 25 Am. Jur. 2d Easements & Licenses § 1 (1996). The Restatement (Third) of Property considers the term "easement" to mean all affirmative easements, while a negative easement is a restrictive covenant. Restatement (Third) of Property: Servitudes § 1.2 (2000). A negative easement, or restrictive covenant, is "a negative covenant that limits permissible uses of the land," and a negative covenant "requires the covenantor to refrain from doing something." *Id.* § 1.3. An easement can be acquired by grant, express or implied, reservation, prescription, implication, or in the case of a government, by taking either through condemnation, appropriation, or inverse condemnation. 12 S.C. Juris. Easements §§ 5-14 (2008). Thus, an easement may be acquired other than by a recorded deed, the purpose of which is to give public notice of the claimed easement. *Id.* § 15.

A "flowage easement" is a "perpetual right, power, [and] privilege ... occasionally to overflow, flood, and submerge ... land." *Narramore v. United States*, 960 F.2d 1048, 1051

(Fed. Cir. 1992). Additionally, the term "flood easement" is used to mean an easement utilized for flood control purposes. *May v. United States*, 80 Fed. Cl. 442, 443-44 (2008).

All 50 states have adopted the Uniform Conservation Easement Act, which defines a conservation easement as:

> [A] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

William R. Ginsberg & Michael Allan Wolf, *Powell on Real Property* § 4-34A.01 (2013); *see* S.C. Code Ann. § 27-8-20 (2007). Under South Carolina's statute, "[a] person or entity empowered to condemn may condemn a conservation easement for other public purposes" pursuant to applicable state or federal law. S.C. Code Ann. § 27-8-80. A conservation easement impairs the title of the landowner and deprives the landowner of the right to develop his or her property but, unlike easements for public access, the landowner retains the right to farm and exclude others from the property. *See id.* § 27-8-20(1)(b).

Finally, it is important to note that South Carolina follows the common enemy rule with respect to the diversion of surface waters, which under applicable precedent include flood waters once they have left the channel of a water course. *See Lawton v. S. Bound R.R. Co.*, 61 S.C. 548, 552, 39 S.E. 752, 753 (1901); *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 260, 701 S.E.2d 33, 35 (2010) (citing to *Lawton* and emphasizing that surface water is owing to "fortuitous natural causes."); William T. Toal, *Surface Water in South Carolina*, 23 S.C. L. Rev. 82, 83 (1971).[25] Under this rule, a landowner may treat surface water as a

[25] In the *Lawton* case, the definition of surface water includes "occasional outbursts of water, which in time of freshet ... inundate the country." *Lawton*, 61 S.C. at 552, 39 S.E. at 753. A freshet is defined as "a great rise or a flood or overflowing of a stream caused by heavy rains

common enemy and dispose of it or take steps to divert it as the landowner sees fit. *See Glenn v. School Dist. No. Five of Anderson County*, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). Therefore, the right to exclude flood waters from real property is part of the bundle of ownership rights and accordingly inheres in the title to the property. Even though the Levees are substantial existing features, have provided a great deal of flood protection for 50 years, and would need no major reworking to be physically certifiable under 44 C.F.R. § 65.10, FEMA expects them to fail as outlined in August 2001. Omnibus Appx. at 385; PTE 204 at 13. Further, the weak areas identified by FEMA could easily have been reinforced under the FEMA no-rise standard (Tr. 1240) and, but for those weak areas, it would not have been necessary to reserve a hydraulic flow path landward of the Levee system. Thus, Richland County's prohibition on making Columbia Venture's existing Levees higher or wider requires Columbia Venture's land to be flooded and denies Columbia Venture's common law rights to divert surface water.

In this light, the County's several interrelated actions in this case were functionally equivalent to the condemnation of a flowage (flood control) or conservation easement. The County passed an ordinance prohibiting the placement of any structures or fill material within the regulatory floodway, denied Columbia Venture the right to improve the Manning Levees by making them higher or wider, and imposed a no-build zone over 70% of Columbia Venture's Property. As a result, Columbia Venture could not take actions to exclude floodwaters from its land, could not construct any economically productive improvements on a great majority of its land, and must suffer the physical inundation of the great majority of its land with floodwaters in order to convey those floodwaters. These restrictions are permanent

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or melted snow." Webster's Third New International Dictionary 910 (1993). Surface water thus includes flood waters which are no longer part of the channel of a water course.

and run with the land. A flowage or flood control easement arises because the land must be reserved for flooding and allowed to flood. A conservation easement arises because the land must be reserved in an undeveloped, unproductive, and unprotected state. Columbia Venture's land is burdened by servitudes, both positive (suffer the invasion of floodwater) and negative (no improvements to the Manning Levees and no construction of solid structures).The County has thus appropriated an easement on Columbia Venture's Property via inverse condemnation.

As a further indication that the County's actions amounted to the functional equivalent of condemning an easement, the County's Stormwater Ordinance gives the County Engineer right of entry to the property, without a warrant, to monitor compliance through inspection, monitoring, and sampling. PTE 374 § 8-35. Such access, in derogation of Columbia Venture's constitutional property rights, can be explained only in the context of an easement, because entry onto private property by government officials, like criminal searches, is governed by the warrant requirement of the Fourth Amendment. *See Camara v. Municipal Court of S.F.*, 387 U.S. 523, 534 (1967); *Michigan v. Tyler*, 436 U.S. 499, 504-508 (1978) ("The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. ... These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment.").

C. The United States Supreme Court has specifically recognized that a government's claim of "flowage rights" across private lands is a taking.

In *Danforth v. United States*, 308 U.S. 271 (1939), the United States Supreme Court considered, among other things, a claim that the passage of the Flood Control Act of May 15, 1928, automatically effected a taking. *Id.* at 277. That Act generally permitted the federal government to "provide flowage rights for additional destructive flood waters that will pass by

reason of diversions from the main channel of the Mississippi River" and for the Secretary of War "to cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which . . . are needed in carrying out this project." *Id.* at 278 (internal quotations omitted). The most noteworthy implication of *Danforth* is that both the challenged legislation and the United States Supreme Court took it for granted that actually securing the right to flood land by way of "flowage rights" would of course be a taking.

What was assumed in *Danforth* was explicitly affirmed in *Dickinson*, where the United States Supreme Court upheld the lower court's judgment against the United States for the "taking of an easement by inverse condemnation for intermittent flooding of land." *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1353 (Fed. Cir. 2003) (emphasis added) (citing *Dickinson*, 331 U.S. at 751). As the Federal Circuit summarized:

> In *Dickinson,* the government, in building a dam, raised the water level of a river, causing permanent flooding, erosion, and intermittent flooding of abutting landowners. Before the trial court, whose decision was affirmed by the United States Court of Appeals for the Fourth Circuit, the *Dickinson* landowners recovered judgments for the value of easements taken by the government to permanently flood parts of their lands, . . . and the value of easements for intermittent flooding of still other parts of their lands.

Id at. 1353 (internal citations omitted). According to the Federal Circuit, the holding of *Dickinson* is succinctly stated: "[G]overnment actions may not impose upon a private landowner a flowage easement without just compensation." *Id.* [26]

[26] Indeed, governments routinely bring condemnation actions to obtain flowage easements on private property. *See, e.g., Olson v. United States*, 292 U.S. 246, 248 (1934) (federal government filed condemnation complaint to acquire permanent flowage easement); *United States v. 10.48 Acres of Land*, 621 F.2d 338, 339 (9th Cir. 1980) (same); *Narramore*, 960 F.2d at 1049 (Corps of Engineers brought condemnation proceedings to obtain flowage easements); *Commonwealth v. Day*, 499 S.W.2d 587, 589 (Ky. 1973) (condemnation suit by state wildlife department to obtain flowage easements); *Denver v. Hinsey*, 493 P.2d 348, 349 (Colo. 1972) (city and county instituted condemnation proceeding to obtain flowage easement along river).

Here, the practical effect of the County's combined actions was to in fact impose (by regulation rather than condemnation) the exact flowage rights conferred by the Flood Control Act and described in *Danforth* as the "ultimate use of the floodway." *Danforth*, 308 U.S. at 283. According to the United States Supreme Court, this amounts to a taking. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *Dickinson*, 331 U.S. at 748.

D. Under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and other cases, virtually any physical invasion of private property authorized or required by government is a *per se* regulatory taking.

The special referee, in considering the parties' cross motions for partial summary judgment and ruling on the issue of whether Richland County's actions are a *per se* regulatory taking, held that "a flood easement arises by virtue of affirmative government action that causes frequent or continuous flooding of the plaintiff's property." Order of 8/9/2012 at 7. And because the County's "regulations have not caused any flooding or other physical intrusion upon [Columbia Venture's] property," they were not a categorical or *per se* regulatory taking. *Id.* This ruling is erroneous because United States Supreme Court decisions unequivocally hold that when government permanently authorizes or requires a physical invasion of private property, even if the invasion is not accomplished by government itself, is only intermittent, or is only "reasonably foreseeable," it must provide just compensation.

In *Loretto*, the Supreme Court considered a New York law providing that landlords must permit cable television companies to physically occupy private properties by installing certain cable wires and other facilities. *Loretto*, 458 U.S. at 421.[27] After observing that claims

[27] The physical occupation at issue in *Loretto* involved "a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building,"

of regulatory takings typically involve "essentially *ad hoc*, factual inquiries," *id.* at 426 (internal quotations omitted), the Supreme Court stated that it had nonetheless consistently held that "when [a] physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." *Id.*

Importantly, in *Loretto*, the government required the property owner to suffer the installation of the cable infrastructure, but the government did not install or cause the installation of the infrastructure itself. *Id.* at 423-24. Likewise, in *Nollan*, the required easement allowed public access across plaintiff's property to the beach. The government did not cause any individuals to use the access easement or use it itself. *See Nollan*, 483 U.S. at 832. Finally, in *Dolan*, the required easements at issue were for conveyance of floodwaters and for pedestrian and bicycle access. There was simply no allegation that the floodwaters or the human traffic were caused by the government. *See Dolan*, 512 U.S. at 394. As such, the special referee's holding that "in order to constitute a per se physical taking of a flood easement, Columbia Venture must show that the County's . . . Stormwater Ordinance actually caused flooding on its property as opposed to merely restricting the property owner's use," Order of 8/9/2012 at 7, is clearly a misinterpretation of the applicable United States Supreme Court precedent.

Instead, the clear holding of *Loretto* is that if the government, by regulation, requires a property owner to suffer a permanent, physical occupation of its property, then there has been a *per se* regulatory taking. *Loretto*, 458 U.S. at 434-35. The relevant inquiry is not necessarily whether the government actually, in fact, physically invaded the plaintiff's property, but rather, whether the government's "interference with property can be characterized as a physical

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"directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof," and "two large silver boxes along the roof cables." *Id.* at 422 (internal quotations omitted).

invasion by government." *Penn Central*, 438 U.S. at 124 (emphasis added) (citing *United States v. Causby*, 328 U.S. 256, 264-65 (1946) (holding that the government's action, characterized as the appropriation of a flight easement that diminished the value of the plaintiff's property, was "as much an appropriation of the use of the land as a more conventional entry upon it" and, consequently, was a taking)). As the Supreme Court noted in one of its recent takings cases, "permanent physical occupation of property authorized by government is a taking." *Ark. Game & Fish*, 133 S.Ct. at 518 (emphasis added). Also "relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action." *Id.* at 522 (citing *John Horstmann Co. v. United States*, 257 U.S. 138, 146, (1921)).

Here, physical invasion of Columbia Venture's Property by floodwater is unquestionably the intended, foreseeable result that is specifically and permanently authorized by Richland County in the face of FEMA's prediction that the unimproved Levees will fail in the event of a 100-year flood. Omnibus Appx. at 385. Thus, FEMA has determined that it is reasonably foreseeable that 70% of Columbia Venture's land will convey flood waters during a base flood given the current, unimproved status of the Levee system. It is the existence of Columbia Venture's Levees and Richland County's prohibition against improving them that gives rise to a flowage or flood control easement in this case. If Columbia Venture were able to improve its Levees, its Property landward of the Levees would not convey floodwater during a major flood. Without improving the Levees, however, it is foreseeable and predicted by FEMA that 70% of Columbia Venture's Property will convey floodwater during major floods and thus be physically occupied by floodwater during times of major flooding. Richland County has prohibited improving Property that could be improved to keep it from

flooding so that it will serve in its unimproved state to convey floodwaters during times of major flooding. Richland County has thus appropriated by ordinance an easement over Columbia Venture's Property for the purpose of conveying floodwater.

An easement appropriated by government need not be permanently in use, *i.e.*, flooded, at any given time to qualify as permanent and a *per se* taking. As the United States Supreme Court has stated in considering the easement demanded by the government in *Nollan*:

> We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

Nollan, 483 U.S. at 832.[28] *Dolan*, in turn, reached the same conclusion with respect to an easement intended to convey floodwaters. *See Dolan*, 512 U.S. at 384. In short, *Nollan* and *Dolan* establish that an easement intended to convey floodwaters is a "permanent physical occupation" within the meaning of *Loretto*. And in *Arkansas Game and Fish*, the Supreme Court reaffirmed that "government-induced flooding of limited duration may be compensable." 133 S.Ct. at 519; *see also Lindsey v. City of Greenville*, 247 S.C. 232, 238, 146 S.E.2d 863, 867 (1966) (affirming a regulatory taking of plaintiff's crop on the basis that it was "reasonably inferable that in the normal operation of defendant's [dam] project such discharge of waters from its reservoir will be repeated in the future [and thus] constituted a 'taking' in the constitutional sense") (emphasis added).

It is true that *Nollan* and *Dolan* presented the additional "exaction" question, in that the government in each case sought to secure the easement in question as a condition to the issuance of a permit rather than imposing it by regulatory action. *See Koontz*, 2013 U.S. LEXIS 4918 at *29-30. The government's theory in each case was that a particular action

[28] The Nollans also could have pursued a *Penn Central* claim. *Koontz*, 2013 U.S. LEXIS 4918 at *40.

would not be a taking if it involved a mere "voluntary" dedication of an easement in exchange for a valuable permit, rather than an outright appropriation. *See id.* at *32. In both cases, the United States Supreme Court concluded that even a so-called "voluntary" dedication could be considered an unconstitutional "exaction" and thus a taking. *Id.* While this case involves no such exaction requirement, that observation is entirely beside the point. "In each case, [*Nollan* and *Dolan*] the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking." *Lingle*, 544 U.S. at 546; *see also Koontz*, 2013 U.S. LEXIS 4918 at *29. Here, the County "simply appropriated" a *de facto* flowage easement on 70% of Columbia Venture's Property by legislative fiat, and thus committed an even more paradigmatic taking than those in *Nollan* or *Dolan*. In neither case was the government action remotely close to being as severe as the action by Richland County as it affected Columbia Venture. Neither Nollan nor Dolan was denied permission to build what they wanted to build on their properties; neither Nollan nor Dolan had more than a small percentage of their properties affected; and neither Nollan nor Dolan had any plan to use or develop the affected portions of their properties.[29] Yet, in both cases, the United States Supreme Court held that the government action was a taking that required payment of just compensation. It is, to say the least, difficult to construct a coherent theory of constitutional interpretation by which the *Nollan* and *Dolan* cases would be characterized as takings and deny that same characterization to Columbia Venture.

[29] In *Nollan*, the State of California granted a property owner a permit to build on his beachfront property in exchange for his granting a narrow public-access walking easement across his property along the beach, below his seawall but above the mean high tide line. 483 U.S. at 828. In *Dolan*, the City of Tigard granted the property owner a permit to expand her store and to pave a parking lot in exchange for her dedicating her land lying in the floodplain along an adjacent creek for a stormwater management system and another adjacent strip for a pedestrian/bicycle path, amounting in total to about 10% of her property. 512 U.S. at 380.

Columbia Venture's *per se* regulatory taking argument is contained in this simple yet unanswered syllogism: A permanent, physical occupation is a *per se* regulatory taking under *Loretto*; an easement, including a *de facto* flowage easement, by which land is reserved to convey floodwaters in times of flood, is a permanent physical occupation within the purview of *Loretto*; therefore, if the combined effect of the County's actions is to impose a *de facto* flowage easement on Columbia Venture's Property, then those actions are a *per se* regulatory taking. *See Koontz*, 2013 U.S. LEXIS at *34 (an easement is a *per se* taking). The only countervailing response to this syllogism would be that the County's regulatory actions were not functionally equivalent to the condemnation of a flowage easement, which neither the special referee's Orders nor the County have even attempted.

E. Richland County's ordinances are both legally and factually indistinguishable from the government action that was found to be a *per se* regulatory taking in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)

The County's Stormwater Ordinance should be deemed a *per se* regulatory taking for the additional reason that it prohibits construction of any habitable or economically productive structures in the regulatory floodway and thus deprives Columbia Venture of all economically beneficial uses of its floodway property except farming. This effect is the functional equivalent of a conservation easement and is legally and factually indistinguishable from the severe restrictions on the use of property that the United States Supreme Court found to be a regulatory taking in *Lucas*.

In *Lucas*, the challenged governmental action was the 1988 Beachfront Management Act, S.C. Code Ann. §§ 48-39-10 to -360 (effective July 1, 1988) ("Beachfront Management Act" or "the Act"). *Lucas v. S.C. Coastal Council*, 309 S.C. 424, 425, 424 S.E.2d 484, 485 (1992). Under the Act, the South Carolina Coastal Council ("Coastal Council") "was charged

with establishing new baselines and setback lines" for construction on the South Carolina Coast. *Id.* Mr. Lucas's two lots, on which he desired to build "habitable structures," were located entirely seaward of the baseline and setback line established by the Coastal Council pursuant to the Act. *Id.* Thus, as a consequence, Mr. Lucas's desired uses of the lots was prohibited by section 48-39-300 of the Act:

> "No new construction is allowed seaward of the baseline. No new recreational amenities may be constructed, placed, or otherwise made to appear seaward of the setback line. . . . Nothing herein prohibits the construction of fishing piers or structures, which enhance beach access, seaward of the baseline if permitted by the [Coastal] council."

S.C. Code Ann. § 48-39-300 (as effective July 1, 1988).[30]

The Beachfront Management Act "had the direct effect of barring [Mr. Lucas] from erecting any permanent habitable structures on his two parcels," *Lucas*, 505 U.S. at 1006 (emphasis added), and "provided no exceptions." *Id.* at 1009. The United States Supreme Court reviewed the *Lucas* case based on the trial court's finding that the Act's "permanent ban on construction . . . 'deprived Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and rendered them valueless.'" *Id.* (emphasis added) (quoting trial court's order). The Supreme Court found this governmental action to be a *per se* regulatory taking, *id.* at 1027, "unless Coastal Council [could] demonstrate that Lucas's intended use of his land was not part of the bundle of rights inhering in his title" under state common law principles. *Lucas*, 309 S.C. at 427, 424 S.E.2d at 486. The Supreme Court also noted: "It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on [Mr. Lucas's] land; they rarely support

[30] The full archived bill establishing the Act is available in the South Carolina Legislative Council's online archives at http://www.scstatehouse.gov/sess107_1987-1988/bills/3713.htm (last visited July 24, 2013).

prohibition of the 'essential use' of land." *Lucas*, 505 U.S. at 1031 (citing *Curtin v. Benson*, 222 U.S. 78, 86 (1911)) (emphasis added).

On remand of the *Lucas* case, this Court characterized the issue for further consideration as "whether Coastal Council possesses the ability under the common law to prohibit Lucas from constructing a habitable structure on his land." *Lucas*, 309 S.C. at 427, 424 S.E.2d at 486. This Court found that there was no basis under South Carolina common law by which the Coastal Council "could restrain Lucas's desired use of his land," *i.e.*, to build "habitable," economically "productive" structures. *Id.*

As the special referee noted in its March 18, 2013 Order, "Columbia Venture wanted to build an extensive development of residences, shopping centers, restaurants, hotels and a retirement village on its property." Order of 3/18/2013 at 71. The special referee further observed that "[t]hese uses involve significantly more people occupying structures for longer time periods than" for the neighboring property owners, Heathwood Hall and the City of Columbia. *Id.* (emphasis added). Columbia Venture, thus, like Mr. Lucas, wanted to build "habitable," economically "productive" structures on its land.

There is no question that Richland County's actions prevented Columbia Venture from constructing such structures on 70% of its Property, as the County's amended Stormwater Ordinance, prohibited building anything solid (Tr. 1325-26) in the newly expanded regulatory floodway, other than a "boat ramp [or] floating dock." PTE 374 § 8-26(h)(3). Just as the Beachfront Management Act imposed a "no-build zone" or "conservation easement" on property located seaward of a government established baseline, the County's ordinances in place on February 20, 2002, regulating construction and uses in the regulatory floodway imposed virtually identical prohibitions on building habitable structures and other

economically valuable uses of real property located riverward of a government established floodway line.

In considering the applicability of *Lucas* to the facts of this case, the special referee held that a *Lucas* taking requires the property owner "to sacrifice all economically beneficial uses in the name of the common good," and that the takings analysis must also consider and account for the 30% of the Property that was not burdened with the "no-build" restrictions. Order of 4/18/2013 at 3 (emphasis in original). These conclusions are misplaced for two reasons.

First, Mr. Lucas did not suffer the deprivation of all economically beneficial uses of his property. He retained recreational uses, he specifically could have built a fishing pier, and he presumably retained agricultural uses, such as a flower or vegetable garden.[31] The gravamen of *Lucas* is that the owner was denied the "essential use" of his land, *i.e.*, "the erection of any habitable or productive improvements." *Lucas*, 505 U.S. at 1031. Indeed, almost a decade after *Lucas*, in *Palazzolo*, the Supreme Court held that a takings claim is ripe when "there is no indication that any use involving any substantial structures or improvements would have been allowed," 533 U.S. at 625 (emphasis added), and further held that the "determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed." *Id.* at 630 (emphasis added). Columbia Venture's post-regulation permitted uses of its land in the regulatory floodway are, in all practical respects, identical to Mr. Lucas's post-regulation permitted uses, *i.e.*, extremely limited to minor recreational and agricultural uses. Moreover, the restrictions imposed on

[31] Columbia Venture can, and does, farm its Property. But in comparison to Mr. Lucas's situation, that difference is purely a function of the size of Columbia Venture's Property (4,400 acres) relative to the size of Mr. Lucas's property (two beachfront lots). In each situation, the government imposed restrictions on the "essential use" of property are virtually identical.

Columbia Venture's land—no filling and no building in a floodway—are also essentially identical to the restrictions imposed on the landowner in *Palazzolo*, where the challenged regulations "bar[red] petitioner from engaging in any filling or development activity on the wetlands." *Id.* at 621.

Second, the special referee incorrectly mixed its modes of analysis, because in its March 18, 2013 Order, ruling on the application of the *Penn Central* factors to the facts of this case, the special referee cited *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002), for the proposition that "[t]aking[s] jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Order of 3/18/2013 at 50.[32] The special referee then does precisely this in its April 18, 2013 Order by holding that Columbia Venture's Property should be divided into two discrete segments, a floodway parcel comprising 70% of its total acreage and a floodplain parcel with 30% of the total acreage, for purposes of conducting the takings analysis in this case. Order of 4/18/2013 at 3.

In its March 18, 2013 Order, the special referee properly "focuse[d] on the entire parcel, with all property rights arising from it, in determining a regulation's impact upon property." Order of 3/18/2013 at 50 (emphasis added). The special referee further stated that "[c]onsideration of the property as a whole is particularly important . . . because a regulatory taking does not occur unless there are serious financial consequences." *Id.* at 50-51 (emphasis added). And in considering Columbia Venture's entire Property, the special referee properly found that that the County's actions had caused "a significant decrease in . . . the fair market

[32] As this Court has noted: "[T]he United States Supreme Court has consistently refused to separate an owner's property into a portion which is impacted by the challenged regulation and a portion which is not, and define the relevant parcel as including only the former." *Dunes W.*, 401 S.C. at 311, 737 S.E.2d at 617.

value of the land based upon its highest and best use," and that "this [*Penn Central*] factor, therefore, is in the Plaintiff's favor." *Id.* at 60 (emphasis added). This conclusion of a significant decrease in the value of the Property as a result of the County's Ordinance is well supported by the evidence in the record. *See generally* Tr. 1482-1908 (testimony of Thomas F. Wingard and Thomas F. Hartnett); PTEs 394, 425.

The special referee's ruling in this regard also misses the point that Columbia Venture's reasonable, County-induced, investment-backed expectation was to remove both the floodway and floodplain classifications from virtually all of its Property by improving the Manning Levees to FEMA's certification standards. *See* PTE 264 at CVMcNair002450. The County's additional prohibition on levee improvements, *i.e.*, making them higher or wider, made it impossible for Columbia Venture to realize this primary objective as well as the lesser objective of simply preventing its Property from flooding.

Lucas also provides other essential guidance that compels the conclusion of a *per se* regulatory taking in this case.

> The "total taking" inquiry . . . will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike . . . [whether] a particular use has long been engaged in by similarly situated owners . . . [and whether] other landowners, similarly situated, are permitted to continue the use denied to the claimant.

Lucas, 505 U.S. at 1030-31 (internal citations omitted). There is no evidence in the record that Columbia Venture's proposed development posed any harm to any public lands or adjacent private property. In fact, the opposite is true, as the improvement of Columbia Venture's Levees would have greatly benefitted Heathwood Hall and the wastewater treatment plant by providing a much higher level of protection against flooding of the wastewater

treatment plant and the attendant water pollution that would occur if it was flooded. And the only expert engineering testimony and evidence on the topic, and thus the only competent evidence, demonstrated that the Levees could be improved to FEMA's and the County's construction standards without causing an increase in the BFEs or any change in the floodway or floodplain configuration on the Lexington County side of the Congaree River. Tr. 1240, 1244-45. Certification of the Levees would remove the BFEs and floodway behind the Levees in Richland County. Tr. 2145.

Columbia Venture's proposed development was socially valuable, as it involved converting the property for its "essential use," *i.e.*, "the erection of any habitable or productive improvements." *Lucas*, 505 U.S. at 1031. Moreover, all five of the professional real estate appraisers who testified or whose appraisal work product was admitted in evidence opined that that the Property's highest and best use was for some type of "mixed use development." Tr. 1497, 1551, 1823-24, 1842-43, PTEs 195 at DEF-00012298, 255 at CV006056, 394 at CV006295. And one of those appraisers offered unrebutted testimony specifically noting that Columbia Venture's proposed development furthered the objectives of Richland County's own Town and Country comprehensive land use plan. Tr. 1513-16.

Any alleged harm of increased flood risk, and the attendant property loss and damage, could have been easily avoided by allowing improvement of the Levees to the County's engineering standards. In the alternative, such harm could have been avoided by allowing any building or other structures on Columbia Venture's land to be elevated, such as Heathwood Hall was allowed to do in constructing numerous significant habitable and productive improvements on its property since February 20, 2002, including a middle school, a gymnasium, a chapel, a dining hall, and a bell tower. Omnibus Appx. at 502-17.

Regarding whether "a particular use has long been engaged in by similarly situated owners," *Lucas*, 505 U.S. at 1030-31, Columbia Venture's proposed but then prohibited development plan involved the construction of habitable and economically productive structures for a variety of mixed uses (primarily residential, office, retail, and recreational). Virtually identical property uses had long been engaged in by Columbia Venture's immediately adjacent neighbors in the regulatory floodway, whose physical structures included office buildings, classroom buildings, gymnasiums and athletic structures, dining halls, a chapel, and a sewer treatment plant. *See* Omnibus Appx. at 502-17.

Finally, "that [these] other landowners [Heathwood Hall and the wastewater treatment plant], similarly situated, are permitted to continue the use denied to" Columbia Venture, is telling in the analysis of whether a *Lucas* "total taking" has occurred. *Lucas*, 505 U.S. at 1031. It is also particularly telling in light of the NFIP regulations which require that a participating "community's flood plain management regulations ... appl[y] uniformly throughout the community to all privately and publicly owned land within flood-prone ... areas." 44 C.F.R. § 60.1(b) (emphasis added).

The Supreme Court has observed that the particular danger associated with regulations that utterly forbid development is that they "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1018.[33] Thus, when a government action forces a

[33] As exemplary cases, the *Lucas* Court cited *Annicelli v. Town of South Kingstown*, 463 A.2d 133, 140-41 (R.I. 1983), in which the government prohibited construction adjacent to a beach on the grounds of safety and open space conservation, and *Morris County Land Improvement Co. v. Parsippany-Troy Hills Twp.*, 193 A.2d 232, 240 (N.J. 1963, in which the government prohibited the filling of marshlands in order to preserve a water detention basin and to create a wildlife refuge. The *Annicelli* and *Morris County* courts found the governmental entities liable for unconstitutional takings. *Annicelli*, 463 A.2d at 141; *Morris County*, 193 A.2d at 241-42.

property owner to devote his land to public service, the character of that action strongly suggests a taking. Here, the County's actions affirmatively imposed a no-build zone on most of Columbia Venture's land, rather than specifying certain, limited prohibited uses. The stated purpose of this prohibition is to reserve the Property for invasion by floodwaters – which floodwaters, of course, might be entirely excluded by the simple and feasible improvement of the Levees in compliance with the FEMA no-rise standard. Tr. 1244-48. This action may be unequivocally characterized as the imposition of a servitude by negative regulation. In *Lucas*, the Supreme Court specifically analogized regulatory prohibitions of development to imposing an easement or servitude: "The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation." *Lucas*, 505 U.S. at 1018-19.

F. The special referee incorrectly rejected valid South Carolina precedent as dispositive of the Takings Clause analysis in this case.

The special referee also erred in rejecting the applicability of *Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984), on the bare assertion that it "does not represent modern takings jurisprudence in South Carolina." Order of 8/9/2012 at 9. In *Hill*, the plaintiff Hill sued the City of Hanahan for inverse condemnation of approximately three acres of land. The plaintiff owned approximately five acres of land in the City zoned by the City for multifamily dwellings. A prior land owner had allowed the highway department to excavate part of the land, which left a water-collecting basin. The plaintiff had then begun to fill the basin to allow development. The City stopped the filling in order to use the basin for flood control and drainage. The plaintiff argued that she was allowed to fill the land under the "common enemy" rule to divert water from her land. *Hill*, 281 S.C. at 528-29, 316 S.E.2d at

682.

The Court of Appeals, affirming a jury verdict in favor of Hill, concluded that this was a taking. "To deprive [a property owner] of the ordinary beneficial use and enjoyment of this property is, in law, equivalent to the taking of it, and is as much a 'taking' as though the property itself were actually appropriated." *Id. at* 530, 316 S.E.2d at 683. In short, the Court of Appeals viewed the action of the City as prohibiting filling, and thus development, to allow a place in which flood waters could be diverted and gathered. The federal District Court has cited *Hill* for this proposition, stating that "South Carolina courts have recognized this cause of action exists where a city denies a landowner the use of his land, as opposed to actively seizing the land for some public use." *Sea Cabin on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 828 F. Supp. 1241, 1251 (D.S.C. 1993). Indeed, in finding a taking, *Hill* held that "the City simply wanted Hill's land for drainage and flood control purposes but this desire simply is not founded in any legal right of the City." *Hill*, 281 S.C. at 531, 316 S.E.2d at 684.

Hill has not been overruled, distinguished, or even questioned by the South Carolina appellate courts.[34] The Order nonetheless claims that "*Hill* has no relevance in our takings jurisprudence." Order of 8/9/2012 at 10. *Hill* remains the law in South Carolina, and neither the County nor the special referee have distinguished it. As such, the special referee was bound to follow it. *Hamby v. Hamby*, 315 S.C. 518, 520, 445 S.E.2d 656, 657 (Ct. App. 1994) (a holding by an appellate court "remain[s] the law of this state unless either reversed or overruled").

[34] The South Carolina Court of Appeals has repeatedly cited *Hill*, most recently in 2008, for the proposition that in an inverse condemnation case, a property owner is competent to testify about property valuation. *See Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 562, 671 S.E.2d 79, 87 (Ct. App. 2008). *Hill* has also been cited in an Eminent Domain treatise as an example of inverse condemnation. 2A-6 *Nichols on Eminent Domain* at 6.03 (2012).

G. Columbia Venture has the same *per se* regulatory takings claim that the late Burwell Manning would have had if he had never sold his property.

One way to analyze Columbia Venture's *per se* or categorical takings claim is to assume, for the purposes of analysis, that Burwell Manning never sold his Property. Mr. Manning built the Levee system in the 1960s and 1970s to protect his Property from flooding and always had the intention and expectation of improving the Levees so that they could withstand a 500-year flood and protect the substantial, mixed use, residential and commercial development that was his vision for the Property. Tr. 36, 64-65.

On February 20, 2002, however, the County imposed a regulatory floodway on 70% of Mr. Manning's Property, including most of his Levee system. But the regulatory floodway that became effective on that day was not a FEMA, no-rise floodway, but rather a no-build, no improve zone that would have prohibited Mr. Manning from developing 70% of his property. In effect, the County had appropriated by ordinances a conservation easement on 70% of Mr. Manning's property requiring that it remain undeveloped, while permitting his immediate neighbors to fully develop their property consistent with the NFIP regulations. It is understandable why Mr. Manning would not perceive any benefit to him in this arrangement. Although Mr. Manning could still farm and exclude others from his property, he would have retained those same incidents of ownership had the County instead condemned a conservation easement over 70% of his land. *See* S.C. Code Ann. § 27-8-20. A conservation easement nevertheless deprives the owner of the right to develop his or her land and is without question a taking that requires the payment of just compensation. *See id.* § 27-8-80.

Further, after February 20, 2002, Mr. Manning would have been prohibited from improving his Levees to make them wider or taller. Mr. Manning had built the Levees to protect his Property from flooding with the expectation of upgrading them to 500-year levees.

Now, however, he was left with Levees that FEMA, based on scientific and technical evidence, was convinced would fail during major floods in several weak areas. In its September 26, 2000 Appeal Resolution, FEMA discusses in detail the geotechnical and hydraulic studies that led it to this conclusion. PTE 204 at 12-29. In its subsequent administrative appeal, Columbia Venture commissioned and submitted to FEMA sophisticated two dimensional hydraulic modeling and other technical evidence to challenge FEMA's conclusion. Tr. 801-02. FEMA rejected that evidence in its August 20, 2001 Technical Report saying: "After reviewing the data submitted during the comment period, we remain convinced that *the existing dike will breach*, and as a result, *significant flow under Interstate 77, in the Richland overbank will result*." Omnibus Appx. at 385 (emphasis added). Thus, after February 20, 2002, from Mr. Manning's standpoint, the County had appropriated by a series of ordinances, an easement or servitude over 70% of his property for the purpose of carrying flood water during major floods, and during major floods he could expect his Levees to breach in several places and 70% of his property to be physically occupied by flood water moving in a hydraulic flow path. The point here is that Mr. Manning would have had a takings claim against the County as of February 20, 2002, and Columbia Venture as his successor in title has that same claim under *Palazzolo*. *Palazzolo*, 533 U.S. at 627-28.

This analysis avoids issues that distracted the special referee and led him to an erroneous conclusion. Whether or not Columbia Venture would have been successful in certifying its Levees under the NFIP is a separate issue. At a minimum, Columbia Venture, as did Mr. Manning, had the right to protect its Property from flooding under South Carolina common law and the NFIP's no-rise regulations by improving its Levees, where needed, to make them wider or taller in order to prevent them from failing during a major flood. The

County took away that right on February 20, 2002, by adopting an effective flood map, which combined with County ordinances enacted in April 2001, prohibited Columbia Venture from improving its Levees to make them wider or taller. The County's motivation for taking these actions and whether they served a public purpose are also irrelevant to the categorical or *per se* regulatory takings analysis. Columbia Venture, just as Burwell Manning would have been, is entitled to just compensation for the County's having appropriated a flowage or conservation easement over its property.[35]

V. Columbia Venture's expectations of improving the Levees and developing its Property were distinct, investment-backed, induced by significant County actions, and thus reasonable under the circumstances.

A. The County's Ordinances specifically and significantly interfered with Columbia Venture's legitimate and specific investment-backed expectations for the Property.

That Columbia Venture had legitimate, specific, and documented expectations for the Property that went well beyond its existing agricultural use is not seriously disputed. Columbia Venture expected and intended to upgrade the Levees and, upon upgrade and certification by FEMA as a levee providing protection from the base flood, to build a mixed-use, multi-phased residential, commercial, and recreational development on grade (*i.e.*, outside of any building prohibitions applicable to floodplain or floodway land and neither building elevated structures or requiring fill). PTEs 246 at CVMcNair002223; 252.

[35] The special referee never reached the issue of just compensation or what measure of just compensation would be appropriate under Columbia Venture's claim for a *per se* taking and whether it would be measured differently under Columbia Venture's regulatory takings claim pursuant to *Penn Central* and its progeny. Those issues are not before the court on appeal but Columbia Venture notes that, at a minimum, the measure of just compensation under Columbia Venture's claim for a *per se* taking should correspond to that measure of just compensation that would be due if the County had proceeded with formal condemnation proceedings to condemn a conservation or flowage easement over Columbia Venture's Property.

Furthermore, the undisputed evidence shows that those expectations were backed by significant investments, including pre-purchase due diligence that included certain preliminary engineering review of the Levees (*see* PTE 208 at CV002276), preliminary concept and financial plans and estimates (*see* PTE 264 at CVMcNair002447-55), the acquisition itself, and extensive post-acquisition development costs (*e.g.* PTE 521). A few weeks after purchase, in March 1999, Columbia Venture hired engineers to begin work on upgrading and certifying the Levees, and soon thereafter commissioned a market study and the design of comprehensive development plans for the Property. By December 31, 2002, Columbia Venture had spent $37,961,036.00, calculated according to generally accepted accounting principles, in purchasing the Property and pursuing its land development plans and activities for the Property.[36] Tr. 2788.

It is also beyond dispute, and the special referee so held, that the County's Stormwater Ordinance and other actions significantly interfered with those expectations by virtue of the following actions: (1) enacting a new Stormwater Ordinance with the express intent of prohibiting any construction in a regulatory floodway and rejecting the County Engineer's long-standing interpretation of the phrase "impede the free flow of water during times of flood" (under the prior ordinance) as being consistent with the FEMA "no-rise" standard; (2) amending its ordinances in such a way as to codify the "no-build" interpretation of "impede" and, at the same time, carve out exceptions for similarly situated landowners; (3) amending the Stormwater Ordinance to prohibit making any levees in a regulatory floodway "higher or wider" and eliminating the variance provision; and (4) adopting FEMA's final FIRM on February 20, 2002, which placed, for the first time, an effective regulatory floodway on

[36] Although some part of this expenditure may have occurred after the alleged taking was completed on February 20, 2002, the great majority occurred prior to that date.

approximately 70% of Columbia Venture's Property. *See* Order of 3/18/2013 at 47-48. Moreover, as previously noted, the special referee, in analyzing the extensive and conflicting expert appraisal evidence regarding the economic impact of the County's amended and reinterpreted Stormwater Ordinance, specifically and correctly found that the Ordinance caused a "significant decrease in . . . the fair market value of the land based upon its highest and best use." *Id. at* 60 (emphasis added).

The question for determination by this Court is: were Columbia Venture's distinct, investment backed expectations reasonable under the circumstances? As the special referee noted: "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." *Id.* at 62 (citing *Cane Tenn. Inc. v. United States*, 63 Fed. Cl. 715, 730 (Fed. Cl. 2005)). Several factors relevant to that analysis, as discussed below, demonstrate that Columbia Venture's expectations were eminently reasonable.

B. The regulatory regime in place at the time Columbia Venture purchased the property would have allowed both the improvement of the Levees and the proposed development of the Property.

At the time Columbia Venture acquired the Property on February 19, 1999, the regulatory regime in place unambiguously would have allowed both the improvement of the Levees and the proposed development of the Property. *See Palazzolo*, 533 U.S. at 633 (O'Connor, J. concurring) (describing how the regulatory regime in place at the time of purchase helps inform the reasonableness of any investment-backed expectations). Regarding the improvement of the Levees, the unrebutted testimony established that Columbia Venture reasonably understood that Richland County's then-existing ordinances would have allowed improvement of the Levees under FEMA's "no-rise" standard (Tr. 704-07) and that the County

Engineer himself admitted that he interpreted the ordinances in that fashion both prior to Columbia Venture's purchase of the Property and at the time Columbia Venture applied for a land disturbance permit in May of 1999. Tr. 1315. Indeed, the County Engineer deemed the permit as incomplete and denied it on that basis—not because the Manning Levees were located within a regulatory floodway on FEMA's revised preliminary FIRM. PTE 119; Tr. 2203-04. In rejecting the permit, the County Engineer also stated that 100-year flood information, which would be required to demonstrate a no-rise, would have to be supplied. PTE 119.

There is simply nothing that is inherently suspect about the County Engineer's interpreting the words "impede the free flow of water during times of flood," as being consistent with the no-rise standards of the NFIP. Indeed, the opposite is true: the Engineer's interpretation is consistent with the internal logic of the NFIP that is grounded in hydraulic and hydrologic engineering as well as County ordinances specifically incorporating the NFIP's regulations. PTE 230 § 8-62. Also, both the County Administrator and Assistant County Administrator testified that they were aware of the County Engineer's interpretation of the County's ordinances as being consistent with the NFIP's no-rise standard. Tr. 2592; Pope Tr. 40. The County Engineer's no-rise interpretation was certainly not a secret within the County's Administrative branch, the branch of County government authorized by law to "execute the policies, directives and legislative actions of the [County] council." S.C. Code Ann. § 4-9-630(2) (1986); *see also* Richland County Code of Ordinances § 2-87 (1989) (granting to the county administrator the power and duty to "see that all ordinances, resolutions and orders of the council ... are faithfully executed"); PTE 051 at DEF-00002253.

The evidence further established that the County Council voted unanimously to allow

Columbia Venture to improve the Levees, subject to certain contingencies that it itself thwarted, and that the County would thereafter "accept responsibility for local inspection and enforcement of the levee system, and if required by FEMA, to accept operation and maintenance responsibility for the system." PTE 147 at DEF-00012032. Consequently, Columbia Venture reasonably understood that its Levee improvement plans were permissible regardless of whether Richland County was using the June 5, 1998 revised preliminary FIRM (Levees *in* proposed regulatory floodway) or the 1994/1995 effective FIRM (Levees *out* of the effective regulatory floodway) for permitting purposes.

The unrebutted evidence also demonstrates that, at the time of Plaintiff's purchase, over 70% of the Property was Zoned D-1, *i.e.*, "large tracts of land located primarily on the fringe of urban growth" where "future demand for developable land will generate requests . . . to remove land from the D-1 classification and place it into other more intensely developed classifications," as well as some smaller areas already zoned for M-1 (Light Industrial) and RS-3 (Single Family Residential).[37] PTE 499. That zoning profile demonstrates that development of the Property in the manner that Columbia Venture intended was not only Columbia Venture's expectation, but was Richland County's expectation as well. Further, at all times material to this action, Richland County ordinances specifically allowed both residential and non-residential structures to locate behind levees. PTEs 230 § 8-62(g), 374 § 8-26(g). Consequently, all manner of development behind appropriately constructed and maintained levees was contemplated by Richland County.

[37] The remainder of the Property, zoned RU-Rural (for agricultural use), sat primarily in Levee Section 3 that was not proposed for immediate improvement and not part of the initial planned development. Tr. 485-86, 1618-19; *see also* PTE 581 at CV005588.

Columbia Venture also presented expert testimony from Mr. Barker that improvement of the Levees under the no-rise standard was achievable, confirming the pre-purchase opinion of Lockwood Greene. Tr. 1240, 1244-45; PTE 208 at CV002276. Moreover, FEMA's regulations specifically allowed for the construction of levees, in regulatory floodways, both as protection against floodwater and as a specific device for reconfiguring the location of the regulatory floodway and floodplain on existing Flood Insurance Rate Maps (as confirmed in writing by FEMA). 44 C.F.R. §§ 72.1, 72.2; PTE 018. In short, the regulatory regime—including both County and FEMA requirements—in existence on February 19, 1999, would have allowed the improvement of the Levees and the subsequent development of the Property consistent with Columbia Venture's investment-backed expectations.

C. Richland County's unanimous resolution and other actions confirming its intention to allow improvement of the Levees and to act as a governmental sponsor of the Levees reasonably and foreseeably induced Columbia Venture's expectations for and purchase of the Property.

Another, and in this instance compelling, factor for assessing the reasonableness of the owner's expectations is whether the government itself induced those expectations. The Supreme Court has recognized that actions of the government itself "can lead to the fruition of a number of expectancies embodied in the concept of 'property' – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979); *see also Dunes W.*, 401 S.C. at 319-20, 737 S.E.2d at 622 (noting that "there is no evidence that the Town took any action or made any representation which served to increase Appellant's expectations or led Appellant to believe that residential use would be forthcoming").

Here, the County's unanimous agreement by public action to allow improvement and

certification of the Levees, and its explicit and implicit encouragement of the overall plan of development, surely created reasonable, investment-backed expectations. Until the Richland County Council reversed direction, manifested concretely by its December 7, 1999 appeal of the August 12, 1999 revised preliminary FIRM, its entire course of conduct fostered Columbia Venture's reasonable, investment-backed expectations:

- On July 14, 1998, after receipt of correspondence from the Manning family informing the County of the proposed and intended development (PTEs 008, 236), the County Administrator officially requested that FEMA put the flood mapping process on hold. PTE 012. The County Administrator publicly identified the County's main concern as the Property, the Levees, and the "adverse impact" the floodway designation on the Property could have "on the economic viability of this County." *Id.*

- Mr. Gregory and other members of the due diligence team met with County officials in late 1998 and early 1999, discussed the plan and intent to develop an extensive mixed-use development behind certified levees, and encountered *no* opposition and, to the contrary, clear support. Tr. 744-49.

- In January 1999, the County was well aware of, and participated in, the development group's communications to and from FEMA confirming the regulatory requirements for upgrading the Levees to certified status. PTEs 018, 246, 549.

- County staff researched the development group's request that the County assume operation and maintenance responsibility for the Levees, weighed the pros and cons, and recommended that the County assume such responsibility. PTE 166. County staff expressed no reservations in this recommendation.

- The Development and Services Committee unanimously approved the staff's recommendation and enthusiastically supported the proposed project. PTE 020 at DEF-00000064; Tr. 229-32.

- On February 2, 1999, the full County Council unanimously approved a resolution to "accept responsibility for local inspection and enforcement of the levee system, and if required by FEMA, to accept operation and maintenance responsibility for the levee system contingent upon" certain contingencies, the first of which was that the property owner upgrade the Levees. The property owner was also obligated to spend $30 million developing the Property over the next ten years. PTE 147 at DEF-00012032-33.

- In February 1999, both the Council Chairman and the County Administrator wrote to FEMA stating affirmatively that the County had "agreed" to accept responsibility for the Levee system as outlined in and authorized by the February 2, 1999 unanimous resolution. PTEs 022, 026.

- On February 19, 1999, the County Administrator wrote a nonbinding Memorandum of Understanding to the development group stating that Richland County "agree[d] to work with the development group on issues that are critical to the proposed development such as zoning, tax incentive vehicles, and a multi-county business park." PTE 024.[38]

See generally supra pp. 15-33.

In reliance on these undisputed actions of Richland County, Columbia Venture closed the acquisition of the Property on February 19, 1999. Clearly, at that time Columbia Venture had reasonable expectations that Richland County would allow it to improve the Levees and develop the Property. Those expectations were based on extensive due diligence and on individual, collective, and corporate action of the County. Indeed, to that point Richland County had expressed no opposition whatsoever to the proposed development of the Property and had actively cooperated with Columbia Venture in engendering expectations with respect to the upgrade of the Levees and subsequent development of the Property. Thus, this is not at all a case where the Property owner had merely a "'unilateral expectation or an abstract need.'" *Dunes W.*, 401 S.C. at 319, 737 S.E.2d at 622 (internal citations and quotations omitted.

In short, the irrefutable evidence strongly supports that Richland County itself directly and specifically induced Columbia Venture's reasonable, investment-backed expectations with respect to both improvement of the Levees and development of the Property.

[38] The fact that this agreement was styled as a nonbinding Memorandum of Understanding does not negate Columbia Venture's right to rely on it nor the reasonableness of the expectations it engendered. Indeed, the South Carolina Court of Appeals has concluded that such an agreement, accompanied by demonstrated inducement and reliance, might create a contract. *See Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 396 S.C. 338, 345, 721 S.E.2d 455, 458-59 (Ct. App. 2011). Whether or not the nonbinding Memorandum of Understanding in this case was a contract, Columbia Venture has demonstrated that it induced reasonable expectations under *Penn Central* and its progeny.

D. Columbia Venture sought and obtained the County's agreement to serve as a governmental sponsor of improved and certified Levees specifically to eliminate the risk of any change in the regulatory regime.

The special referee found that it is "difficult to prove reasonable investment-backed expectations in property that it voluntarily purchased in the face of a regulatory impediment." Order of 3/18/2013 at 63 (emphasis added). As demonstrated above, there was no regulatory impediment to Columbia Venture's Levee improvement and development plan at the time of purchase; in fact, there was express legislative and regulatory support in the form of a unanimous council resolution, among other things. But even assuming, *arguendo*, that there was some existing regulatory impediment, the Supreme Court has categorically rejected any rule that "[a] purchaser or a successive title holder . . . is deemed to have notice of an earlier enacted restriction and is barred from claiming that it effects a taking." *Palazzolo*, 533 U.S. at 626. In *Palazzolo*, the Supreme Court considered the extreme case in which the property owner acquired title to the property after the regulation became effective. *Id.* at 627.[39] The *Palazzolo* court held that a takings claim could proceed, even if the transferee had notice of the challenged regulation, reasoning that "[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id.* at 628. Thus, whether a landowner has notice of "regulatory impediments" is not relevant to the analysis of the reasonableness of their expectations. And at the other extreme, when, as here, a plaintiff acquires a parcel with demonstrable reliance on and due diligence into the then-current regulatory regime along with specific written assurances by the government regarding the proposed development, that plaintiff surely has reasonable investment-backed expectations.

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[39] Years earlier in 1982, the Supreme Court in *Loretto*, 458 U.S. at 421-22, found a *per se* regulatory taking where the plaintiff property owner bought the property after the challenged regulatory action, *i.e.*, the installation of cable TV wiring, had already occurred.

Moreover, and again assuming *arguendo*, that there was some regulatory obstacle to Columbia Venture's development plan, then the Richland County Council, as well as the County staff, are certainly charged with knowing the parameters of the County's regulatory regime and the existence of any alleged "regulatory impediments." A legislative body, such as Richland County Council, is presumed to know the state of the law when it acts. *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) (holding "[t]here is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects"). And if such regulatory impediments did exist, and it was also, as the special referee concluded, "not reasonable for Columbia Venture to expect that it could upgrade its levee under the County's [Stormwater] Ordinance when the levees were located within a floodway,"[40] Order of 3/18/2013 at 66, then it was also unreasonable, if not deceptive and in bad faith, for the County staff not to have noted the existence of these "regulatory impediments" to Columbia Venture's proposal (that would need to be addressed and possibly changed by Council) when it made its report to the County's Development and Services Committee. It was also unreasonable, if not deceptive and in bad faith, for the County's Development and Services Committee to unanimously recommend to County Council that it agree to serve as the governmental sponsor of those Levees, once improved; for the County Council to unanimously and publicly vote to do so; and for the Council Chairman to send a letter to FEMA confirming the agreement, if indeed there were "regulatory impediments" standing in the way of the proposed development.

[40] The special referee's finding that the Levees were "located within a floodway" is also demonstrably incorrect, based on the undisputed evidence at trial and based on an earlier statement in the special referee's order acknowledging that, at the time Columbia Venture purchased its property, only a "preliminary" flood map placed the levees in a floodway and only the outcome of that flood mapping process was uncertain. Order of 3/18/2013 at 65.

Certainly, a citizen is entitled to expect from its government officials the same good faith and fair dealing that the common law demands of private citizens interacting with each other.

The special referee also incorrectly held that Columbia Venture "move[d] forward with the transaction in light of actual or constructive knowledge of changing regulatory circumstances," and thus the "expectation to develop property within an uncertain regulatory environment is not reasonable." Order of 3/18/2013 at 63. The only thing that was changing and uncertain at the time Columbia Venture purchased the Property was the final location of the floodway boundary in FEMA's periodic and ongoing floodplain mapping process, not the existing regulatory regime. As demonstrated above, at the time of purchase, the Levees were not in a regulatory floodway on the effective FIRM and the "no impede" language in the County's Stormwater Ordinance was admittedly interpreted by the County Engineer (who approved all land disturbance permits and to whom interpretive authority was granted in the ordinance (PTE 230 § 8-59)) as equivalent to the FEMA "no-rise" engineering standard, thus allowing no-rise construction in a regulatory floodway. Further, even if the final map were to place the Levees in a regulatory floodway, FEMA's regulations specifically allowed the construction of levees, in regulatory floodways, both as protection against floodwater and as a specific device for reconfiguring the location of the regulatory floodway and floodplain on flood maps and removing levees and the land protected by the levees from floodplain and floodway designations and the attendant restrictions. 44 C.F.R. §§ 65.10, 72.1, 72.2.

The special referee also erroneously concluded that 'a reasonable developer . . . would know that floodplain development is inherently risky" and that 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." Order of 3/18/2013 at 64. This conclusion is unfounded for numerous reasons. First, at no time did Columbia Venture ever propose to construct its development on land classified as a floodplain. At all times, Columbia Venture intended to build behind certified levees—the certification of which would *remove* the floodplain classification from the land. Second, Columbia Venture was not planning to construct entirely new, untested levees, but rather merely to upgrade and certify existing levees that had already provided a significant degree of flood protection since the 1960s. Third, there was already extensive development of a wastewater treatment plant and a 300 acre private school behind the existing Levees, both of which would benefit immensely by improved Levees. Fourth, FEMA's and the County's regulations specifically provided for the construction of levees as providing protection from flooding and flood risks, and the evidence in the record is that no properly maintained and certified Levee at the 500-year flood level that Columbia Venture proposed to build had ever failed. PTE 576 at CV000340. And finally, if any such alleged risks of development in the floodplain were so apparent, then Richland County should never have voted unanimously to be the governmental sponsor of the improved Levees, when the very purpose of improving the Levees was to allow extensive development behind them. Certainly levees are extensively used throughout the United States to protect flood prone land from flooding (*e.g.*. Augusta, Georgia) (Tr. 703; Pearce Tr. 200), and it cannot be the case that a developer who plans to build or improve levees with the support of the local communities has unreasonable expectations simply because the levees, prior to upgrade and certification by FEMA, are located in a floodplain.

Indeed, as Mr. Gregory and others testified, the express purpose of Columbia Venture's pre-purchase due diligence, and specifically the request for the County's endorsement of the

Levee improvement plan and agreement to serve as a governmental sponsor, was to confirm the parameters of the existing regulatory regime and to confirm that the County would not act in the future to change that regulatory regime. *See* Tr. 884, 940-41. Moreover, witnesses for Columbia Venture testified that it was of utmost importance to upgrade the Levees to certified status so that the land protected by the Levees would be removed from the floodplain and floodway and that Columbia Venture would not have purchased the Property if the certification of the Levees was not feasible or if the County failed to embrace the proposed development. Tr. 203, 573-74, 712-13, 871, 886-87; Tillotson Tr. 27. Representatives of Richland County confirmed that they understood the importance of upgrading the Levees to the development group both prior to and after Columbia Venture purchased the Property. Tr. 2359-61, 2405, 2566-67; Pearce Tr. 93-97, 199-200. Mr. Gregory, Deas Manning, and Mr. Tillotson all testified that heavy and extensive due diligence efforts were devoted to the Levee improvement and certification issue, including investigating the County's interpretation of its ordinances related thereto. Tr. 203, 712-13; Tillotson Tr. 27.

E. Columbia Venture's expectations for the property were consistent with South Carolina's law of property and the prior owner's expectations for developing the Property.

Another factor for determining the reasonableness of the property owner's investment-backed expectations is the extent to which "the owner's reasonable expectations have been shaped by the State's law of property." *Lucas*, 505 U.S. at 1016 n.7. As demonstrated conclusively in Section IV.E, Columbia Venture's plans for its Property were totally compatible with and indeed supported by South Carolina common law.

The undisputed evidence also conclusively demonstrates that Columbia Venture's expectations were shaped by the prior owner's long standing and publicly known plans for

development of the Property. Beginning since at least the 1960s, the prior owner, Burwell Manning, undertook construction of the Levees not only with the intention of protecting his agricultural operations and recreational uses but also preparing the Property for future development. Mr. Manning further negotiated with and eventually entered into an agreement with the South Carolina Department of Transportation to ensure that the height of Interstate 77 would be built to accommodate a levee system built to the 500-year flood level instead of the 100-year flood level. Tr. 64-65. Further, the Mannings clearly expressed their family's long held desire to improve the Levees and develop the property in the May 26, 1998 letter to the members of Richland County Council and in the May 29, 1998 letter to the County Administrator. PTEs 008, 236.

F. The special referee erred in finding that Columbia Venture could not reasonably rely on the County's February 2, 1999 unanimous resolution regarding Columbia Ventures levee improvement and development plans.

The special referee found that Columbia Venture unreasonably relied on the County's unanimous resolution of February 2, 1999, because, as a resolution and not an ordinance, the agreement manifested by the County "had no legal binding effect on the County." Order of 3/18/2013 at 67. This is contrary to applicable and binding precedent, which requires only that plaintiffs demonstrate they had reasonable, investment-backed expectations regarding their property and how government might act in the future. *See, e.g. Ark. Game & Fish*, 133 S. Ct. at 522. Indeed, if a unanimously passed resolution of a county council is not a valid basis upon which citizens might plan their personal and business affairs, then businesses seeking to locate in our state need to be forewarned in their dealings with county governments and are likely to locate elsewhere. But even assuming, for the moment, but without conceding, that the resolution was not legally binding, it is not determinative of the takings analysis in this case.

Under *Palazzolo*, Columbia Venture would have a claim for a taking, even if it had never obtained and relied on the Council's resolution, as would Burwell Manning, if he had never sold the Property to Columbia Venture. *Palazzolo*, 533 U.S. at 628. The April 2001 Stormwater Ordinance, applied to the Property on February 20, 2002, constitutes a taking, regardless of the identity of the owner or when the claim is brought, because regulatory "enactments [which] are unreasonable . . . do not become less so through passage of time or title." *Id. at* 627. See discussion in Part IV. G. *supra*.

The special referee's holding that Richland County's resolution "had no legal binding effect" is clearly erroneous under state law. Under South Carolina state law:

> All counties of the State ... have authority to enact regulations, resolutions, and ordinances, ... including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them.

S.C. Code Ann. § 4-9-25 (Supp. 2012) (emphasis added). This Court has construed this statutory authority as a "broad grant of power ... limited only by the requirement that the regulation, resolution, or ordinance be consistent with the Constitution and general law of this State." *Hospitality Ass'n of S.C., Inc. v. City of Charleston*, 320 S.C. 219, 226, 464 S.E.2d 113, 118 (1995) (emphasis added); see also *S.C. State Ports Authority v. Jasper County*, 368 S.C. 388, 401-02, 629 S.E.2d 624, 631 (2006) (affirming county can establish a marine terminal and contract with a developer via a resolution). Because state law clearly authorizes counties to act in a legally binding fashion by resolution in the conduct of a county's business affairs, why then should citizens of that county not be entitled to reasonably rely on such actions? The answer, of course, is that they should be so entitled to rely and regularly do so rely, as Columbia Venture did in this instance. Richland County complied with its own

ordinances in passing the February 2, 1999 unanimous resolution because it was "passed by a majority vote of those members of the Council present and voting," and was subsequently entered into the minutes of the Council. *See* PTE 147.[41]

Moreover, Richland County certainly believed itself to have entered into the agreement reflected in the resolution after it was passed. Both the Council Chairman and the County Administrator used the word "agree" in describing the County's February 2, 1999 resolution to FEMA. PTEs 022, 026. The resolution was effectively passed and manifested the County's agreement, the purpose of which was to induce Columbia Venture to purchase the property and secure assurances from FEMA that the Agency would change the flood maps to make the development proposed by Columbia Venture possible.

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[41] Richland County's own ordinances are, as they should be, in accord with the state law. In 1972, the Richland County Council established "a formal system to be hereafter employed by the County Council of Richland County of enacting, recording and preserving the official actions of the Council pursuant to the authority vested in it by the Constitution and laws of the state." Richland County Ord. No. 6, 1972 § 1. "No action hereafter taken by the Council shall have force and effect unless the same is accomplished in accordance with this division." *Id.* Consequently, actions taken by the council that are "accomplished in accordance with this ordinance" would presumably have "force and effect." Subsequent sections of the ordinance allow the County Council to pass ordinances (§ 2), regulations (§ 3), and actions (§ 4). An "action" is defined as "[a]ny other official decision, proclamation, motion, resolution, administrative action or routine business involving or requiring consent or decision of the Council" other than an ordinance or regulation. *Id.* § 4 (emphasis added). "Actions," including resolutions, "may be passed by a majority vote of those members of the Council present and voting." *Id.* "Such action shall be effective upon its official entry in the minutes of the council, which shall be a permanent public record." *Id.* "All ordinances, regulations and actions of the Council shall be deemed published and public notice thereof shall be effective as of the date the formalities of enactment hereinabove provided are complied with, and are entered into the minutes of the council." *Id.* § 5. According to the current version of Richland County's Code of Ordinances, to which the County directs the public on its website, this section was amended in 1976 and now reads (as it did in 1999): "All ordinances, regulations, resolutions and actions of the council shall be deemed published and public notice thereof shall be effective as of the date the formalities of enactment hereinabove provided are complied with, and are entered into the minutes of the council." Richland County Code of Ordinances § 2-43 (emphasis added).)

Resolutions are but one way that counties in South Carolina can choose to govern their affairs, make policy, and interact with citizens. Under the circumstances of this case, state statutes, and Richland County's own ordinances, the February 2, 1999 unanimous resolution publicly reflected the "consent and decision" of the County Council, and thus was binding on Richland County and also, even more importantly, engendered reasonable investment-backed expectations in Columbia Venture.[42]

Moreover, the government actions that interfered with Columbia Venture's investment-backed expectations were not the County's rescinding its unanimous resolution and agreement. That never happened and would not, without more, have stopped Columbia Venture's development, because the Levees could have been upgraded under the FEMA no-rise standard to eliminate flooding. Rather, the County's prohibition on improving the Levees and resulting imposition of an easement or servitude over Columbia Venture's Property eliminated its development plans. If the County had directly appropriated a conservation or flowage easement over Columbia Venture's Property, the practical effect would have been the same, only more transparent. Columbia Venture would have been prevented from developing its Property in the name of conservation or from improving its Levees to reserve a hydraulic flow path landward of the Levees to convey flood waters during major floods.

VI. Richland County's prohibition on improving Columbia Venture's existing Levees by making them higher or wider and its legislative imposition of a "no-build" zone on 70% of Columbia Venture's Property located in a newly-expanded regulatory floodway, while exempting neighboring property also located in the same regulatory floodway, unjustly and unfairly targeted Columbia Venture's Property.

The *Penn Central* inquiry next turns to the "character" of the County's actions,

[42] As the Eleventh Circuit has held in a regulatory takings analysis, a significant "expenditure *in reliance on the resolution* [allowing a planned wood-chipping development] underscores the importance of the original resolution." *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1488 (11th Cir. 1988) (emphasis added).

considering whether "the governmental action implicates [the] fundamental principles of fairness underlying the Takings Clause." *E. Enters. v. Apfel*, 524 U.S. 498, 537 (1998). This requires an examination of the government's action through the lens of justice and fairness, rather than a mathematical examination of a loss in a property's value. A contrary view would allow a government to simply disregard private property rights with impunity whenever it deemed the economic impact of a regulation to be beneath some arbitrary threshold.

A. The special referee erred in considering the public purpose of Richland County's regulations.

In its March 18, 2013 Order, the special referee repeatedly but erroneously considered "the purpose and importance of the public interest underlying" the County's Stormwater Ordinance and floodplain regulations, Order of 3/18/2013 at 69, and found that "this important function weighs in favor of the County." *Id.* at 70. The special referee also held that "Government action that serves to prevent harm to the public safety may impose burdens on a property owner, but burdens caused by harm prevention are typically not compensable." *Id.*

This holding is entirely incorrect, because the antiquated idea that any action within the government's "police power" which "substantially advances" the public health, safety, or welfare is not a taking has been emphatically rejected by the Supreme Court. *Lingle*, 544 U.S. at 542 (qualifying *Agins*, 447 U.S. at 260). Any such inquiry into the public purpose and benefits of government regulation "is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." *Id.* at 543 (emphasis added). In other words, the simple fact that a government regulation is within the police power means only that such action is not wholly invalid, not that there has been no taking for which just compensation must be paid. *Id.*

B. The County's Ordinance requires physical invasion of Columbia Venture's Property and severely restricts common law rights of use inherent in the Property.

In considering the "character" prong of *Penn Central*, and closely related to the *Loretto* and *Lucas* analysis, is the "magnitude or character of the burden a particular regulation imposes upon private property rights," *Lingle*, 544 U.S. at 542 (emphasis in original). And especially pertinent here, the right to exclude others has been "universally held to be a fundamental element of the property right." *Kaiser Aetna*, 444 U.S. at 179-80; *see also Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("In [*Kaiser Aetna*], we emphasized that the regulation destroyed 'one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others.'").

As demonstrated in Section IV above, the character of the County's Stormwater Ordinance is functionally equivalent to the condemnation of a flood control or conservation easement, which requires intermittent physical invasion of Columbia Venture's property by floodwaters and the County Engineer, thus denying the right to exclude others. The Ordinance also denies Columbia Venture's common law property rights by severely restricting economically productive uses of the Property.

C. The County's regulatory actions impose severe burdens on Columbia Venture's property and deliver no reciprocity of advantage.

Another important "character" factor is the distribution of the regulatory burden and reciprocity of advantage. *Lingle* notes that the inquiry must consider "how any regulatory burden is distributed among property owners." *Lingle*, 544 U.S. at 542 (emphasis in original). Courts have also recognized that disparate treatment of similarly situated property owners is relevant to the character of the government action. *See Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 519 (2009) ("Nor can we conclude that the Corps reviewed plaintiffs' 404 permit

application with the same standards as other applications, or that plaintiffs were not singled out when improperly subjected to the Corps' jurisdiction."); *Dunes W.*, 401 S.C. at 317, 737 S.E.2d at 620 (analyzing the character of the government action and noting that the "restrictions are applicable to all golf courses throughout the Town"). Likewise, the inquiry may consider whether there is some "reciprocity of advantage" from the government action that confers a benefit upon the property owner. *Dunes W.*, 401 S.C. at 317, 737 S.E.2d at 621; *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 640-41 (Minn. 2007) (holding that the "benefits of the open space provided by" denying a golf course owner a rezoning permit for residential development "are widely shared through the community, but the costs are focused solely on the property owner" with no "reciprocity of advantage").

A regulation that entirely prohibits one property owner from developing its property, while conferring no benefit on that property owner and also exempting other similarly situated property owners, is plainly disproportionate and non-reciprocal in character. Here, the County's actions disparately – indeed, entirely – placed the regulatory burden of its actions on Columbia Venture and granted no reciprocity of advantage. In particular, the County's exemption of similarly situated neighboring landowners in the same regulatory floodway – who, ironically, would themselves have benefitted from the additional protection afforded by the improved Levees – demonstrates that the entire regulatory burden was intended to be and was, in fact, placed on Columbia Venture.

In analyzing this factor, the special referee noted that the County's ordinance "prohibiting construction in floodways constituted the general rule applicable to all property in Richland County located within a regulatory floodway," and that Columbia Venture was "both benefitted and burdened like other similarly situated property owners." Order of 3/18/2013 at

70 (emphasis added). The special referee also concluded that 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." *Id.* at 70-71 (emphasis added).

Of course, this conclusion is demonstrably incorrect, because Columbia Venture's immediate neighbors can and did build significant structures in the regulatory floodway. The conclusion is also patently absurd, because here, the entire burden of the floodway regulation has been placed upon Columbia Venture, which cannot build any economically productive structure on 70% of its land, while its immediate neighbors, whose property is directly adjacent to the river and thus closer to the flooding source, can build any variety of structures from scratch pursuant to a no-rise engineering standard on 100% of their land owned before or after February 20, 2002. The City has, and Heathwood Hall could, acquire no-build land from Columbia Venture and thereby free it from the County's no-build restrictions and open it up to no-rise construction. *See* Tr. 2928-29. Columbia Venture also cannot improve its existing Levees. How Columbia Venture obtains any "benefit" or "reciprocity of advantage" whatsoever from this regulatory action is beyond reason. This is not at all a situation where a property owner enjoys both the benefits and the burdens of the typical restrictive covenant, such as a subdivision restriction that requires homes to be built within a certain square footage range or forbids parking boats in front yards. In those situations, the neighboring landowners truly are "benefitted and burdened" in the exact same fashion. Here, Columbia Venture effectively had a conservation easement imposed on its land and received no payment or any other "reciprocity of advantage" in return.

Finally, the special referee seemed to take solace in the fact that "approximately 16,500

acres of property within Richland County were located within a regulatory floodway," and that "the County's regulations only affects floodways and not all property within Richland County." Order of 3/18/2013 at 70.[43] Of course, this is scant solace for Columbia Venture, but in any event, the standard is not whether the regulation applies to a large amount of land within the government's jurisdiction, but whether the regulation so unfairly and unjustly burdens and restricts the affected property owner that a taking has occurred and just compensation is due.

D. The County's regulatory actions were targeted, in bad faith, to prevent Columbia Venture's planned development, not to further the goals of the National Flood Insurance Program.

The examination of the character of the government action also includes whether the government action is targeted at a specific property owner. *See, e.g., E. Enters.*, 524 U.S. at 537 (finding a "solution [that] singles out certain employers" a taking); *Brace v. United States*, 72 Fed. Cl. 337, 356 (2006) (observing that the character factor of the *Penn Central* test asks, in part, "whether the action targets a particular individual"). The record is replete with evidence clearly supporting the conclusion that the County's actions were targeted, from beginning to end, at Columbia Venture.

The legislative history of the April 2001 Stormwater Ordinance leaves no doubt that the County intended that ordinance to block Columbia Venture's development plans and preserve most of Columbia Venture's land in its undeveloped state, while, at the same time, disturbing its neighbors as little as possible. If the County had been truly concerned with

[43] The County has a total area of 487,600 acres, of which 16,516 acres (or 3.39%) are classified as floodway. PTE 051 at DEF-00002252. Columbia Venture's Property includes approximately 3,080 floodway acres, or approximately 18.65% of the total floodway acres in the County. As "some of the total floodway acreage lies within municipalities" not subject to the County's jurisdiction, the percentage of the County-governed floodway acreage owned by Columbia Venture is much greater. *See id.*

issues of liability for levee failures, it could have rescinded its resolution agreeing to be the governmental sponsor of the Levees under 44 C.F.R. § 65.10 pursuant to its ordinances. Ord. No. 6, 1972 § 9; *see also* Richland County Code of Ordinances § 2-47. Columbia Venture could then perhaps have found another governmental sponsor for the Levees upon agreement with that political entity. That, however, would not have satisfied the political groups opposed to Columbia Venture who wanted the Property left undeveloped. Indeed, to satisfy these groups, it would not have been enough to prohibit building new structures in a regulatory floodway. That would have left the door open for Columbia Venture to improve its Levees under FEMA's no-rise standard, which would open up the land protected by the Levees for development once FEMA removed the floodway and floodplain designation, assuming Columbia Venture could find another governmental sponsor.

In addition, the no-impede (*i.e.*, no-build) standard would not have been sufficient to foreclose any possibility of development. The crest height of Levee Section I along the river (with a crest width of approximately 45 feet) exceeded the BFEs on FEMA's September 26, 2000, revised preliminary FIRM. PTE 204 at 29; Omnibus Appx. 262-64. Thus, the crest of the Levees would (according to FEMA's hydraulic studies) remain dry during a base flood. Accordingly, Columbia Venture could reasonably make the case that adding dirt to or landward of areas that remain dry during a base flood could in no way impede the free flow of water during times of flood.[44]

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[44] This is not a hypothetical exercise. Over *two years* after the taking occurred, the Southern Environmental Law Center objected to *any* potential amendment to the County's ordinances that could *conceivably* allow Columbia Venture to even argue that it could improve its Levees. As the Southern Environmental Law Center wrote to the County Administrator on March 4, 2004, "[t]he problem with a no-rise standard is that the operator of the agricultural dikes [*e.g.*, Columbia Venture] might argue that major restoration of the dikes would cause no rise to the BFE, since the BFE already assumes, in some sense, that the dikes will work. The operator would claim that fill in the floodway to repair the levees would cause 'no-rise'

The no-impede (*i.e.*, no-build) standard posed a different problem to Heathwood Hall and the City's wastewater treatment plant. The political solution adopted by a majority of the Council was to create exceptions for those two entities. PTEs 004, 183, 185. But the exceptions could be problematic to Columbia Venture's opponents. The City of Columbia (which owned a portion of Levee Section I) and Heathwood Hall (which unquestionably used all of Levee Section I to protect its property) could seek to improve Levee Section I under their exceptions to the no-impede (*i.e.* no-build) standard asserting that an improved levee qualified as an "impediment [that] is or would be ... used by any [school or wastewater treatment facility] that was constructed and operated before January 1, 2001, on property subsequently classified as a regulatory floodway ... ." PTE 374 § 8-26(h). If the city or school were able to improve the Levees (perhaps with funds supplied by Columbia Venture), then the doors would be open for FEMA to remove the floodplain and floodway designations from the property protected by Levee Section I and for Columbia Venture's project to go forward at least in part. But the County made sure all of these doors were closed by adding language to the Stormwater Ordinance (after first reading) to prohibit improving levees to make them higher or wider. *See* PTEs 191, 360. There was simply no possible way for Columbia Venture to avoid this prohibition, as the County made clear in 2005. PTEs 157, 430.

Moreover, the *post hoc* reasons advanced by the County to justify its adoption of the new Stormwater Ordinance in April 2001 (a county-wide ordinance to prohibit any structure in a regulatory floodway) fall short of explaining why the County found it necessary to prohibit improving the only levees in the county that were within a proposed regulatory floodway on a

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and would, therefore, not be prohibited under the proposed language." Omnibus Appx. at 421 (emphasis added). By this time, of course, Councilwoman Smith was on both the Richland County Council as well as the board of trustees and litigation approval committee of the Southern Environmental Law Center. Omnibus Appx. at 390, 393, 402, 403; Tr. 2493.

FEMA flood map. The only credible explanation is that a majority of the council members changed their minds and decided to no longer support Columbia Venture's levee-protected development and instead to take affirmative steps to stop it in such a way that 70% of Columbia Venture's Property would remain undeveloped.

The minutes of County Council for April 3, 2001, during the debate over the new Stormwater Ordinance, reflect that one of the Councilmembers, Ms. Bernice Scott, "wanted the record to reflect that the [new Stormwater] [O]rdinance is against Burroughs & Chapin." PTE 191 at DEF-00012108. Further, County staff and council members recognized as early as October 2000 (six months before the new Stormwater Ordinance was enacted) that opponents of Columbia Venture's development (some formed for the specific and sole purpose of stopping the development) had targeted the pending Stormwater Ordinance amendment and the County Engineer's interpretation of "impede" as their strategy to thwart the development. Pearce Dep. Ex. 180. County staff classified the pending amendment as the "battleground" over Columbia Venture's development. *Id.* With full knowledge of the opposition groups' goals of eliminating Columbia Venture's development plans, the County ultimately adopted a version of the Stormwater Ordinance drafted and endorsed by Columbia Venture's opponents and specifically tailored to eliminate the ability to make levees located in a regulatory floodway "higher or wider." *See id.*; PTEs 004, 114, 117, 183, 185, 186, 190, 191, 346, 360, 577, 578.

The special referee agreed with the County's arguments that the exemptions afforded to Heathwood Hall and the City of Columbia did not, in fact target Columbia Venture, but rather reflected Richland County's determination that a school and a wastewater treatment plant "whose structures were occupied [only] during work or school hours" could be more easily

evacuated in times of flood and would therefore present a lesser risk than would a residential area. Order of 3/18/2013 at 71; Tr. 2274, 2621. But the exemption, as written, would allow residential uses by Heathwood Hall (including, for example, faculty or dormitory housing should the school begin accepting boarding students) subject to a no-rise standard, but would utterly deny lower-risk activities (such as commercial businesses) on Columbia Venture's Property. *See* PTE 374 § 8-26(h). The exemption, in other words, is both overly narrow and overly broad to countenance Richland County's explanation.

The County's argument here, and the special referee's holding, is also a *post hoc* rationalization, as there was no evidence presented that the elements of this argument in any way informed the deliberations of the County at the time the County Council considered and adopted the new Stormwater Ordinance and, one month later, the Zoning Ordinance. Indeed, the hotly debated Stormwater Ordinance, as amended in April 2001, retained the permissibility for "levees protecting residential structures." *Id.* § 8-26(g). It is incongruous for the County to argue that opposition to allowing residential development behind levees prompted the disparate treatment between Columbia Venture on one hand and Heathwood Hall and the City on the other when the County affirmatively retained the ability to build residences behind levees in the same ordinance section banning Columbia Venture from improving its Levees or otherwise building anything in a regulatory floodway. Further, the County knew prior to Columbia Venture's purchase of the Property that the developers envisioned residential uses behind certified Levees, and the County made no objection at that time. *See* PTE 252. Additionally, no evidence was presented that the County informed Columbia Venture that its concerns hinged on allowing residential construction behind levees, but that it would support a development devoted to non-residential uses behind certified levees. Instead, the County

pursued and implemented a no-build standard for Columbia Venture regardless of the anticipated or proposed use.

The special referee also concluded that both "the City and Heathwood Hall had built extensive structures" and the "new floodway posed a significant obstacle to the[ir] future viability." Order of 3/18/2013 at 71. "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." *Id.* While this conclusion is technically true, it ignores the extensive planned structures which Columbia Venture specifically proposed to the County, prior to seeking its agreement to serve as the governmental sponsor of the improved levee system that would have protected not only Columbia Venture's planned structures, but also its neighbors' existing structures. It also ignores the considerable resources Columbia Venture expended in pursuing its development plans prior to being stopped by the County's actions.

It is also true that a property owner's reasonable, investment-backed expectations are categorically not limited to continuation of the property's existing use. Not only would such a view effectively eviscerate the entire regulatory takings analysis, it would render unnecessary any further consideration of the regulatory takings issue in *Penn Central* and in such cases as *Lucas*, *Palazzolo*, and *Tahoe-Sierra*. In each of those cases, the property owner sought to *change* the property's current use. In each case, however, the United States Supreme Court declined a facile rule that any regulatory action that allowed the continuation of the current use could not be a taking. *E.g. Tahoe-Sierra*, 535 U.S. at 312-13 (changing from vacant land to homes). Similarly, in *Dunes West*, although this Court noted that the "primary" expectation was the continuation of the existing use, the Court did not treat the issue as dispositive. Instead, this Court also examined the concreteness of the owner's expectations, the owner's

investigation as to feasibility, and whether the government took actions to increase the owner's expectations regarding development. *Dunes W.*, 401 S.C. at 320-21, 737 S.E.2d at 622.[45]

The special referee further concluded that the County's ordinances allow maintenance of the Manning Levees in their current state and do not "force Columbia Venture to watch its levee[s] erode away or fall apart." Order of 3/18/2013, at 72. Again, while technically true, this conclusion entirely misses the point that Columbia Venture's distinct, investment-backed, and County-induced expectation was to improve the Levees to FEMA's certification standards by making them higher and wider, not to maintain them in their existing condition. And according to FEMA's own flood insurance study, which the County adopted as of February 20, 2002, the Levees, in their existing condition, will fail during the occurrence of the base flood. Omnibus Appx. at 385. Columbia Venture achieves little, and the purpose of the NFIP is not fostered, by maintaining structures that will not provide adequate protection from the base flood. So while Columbia Venture may not be forced to watch it Levees erode away or fall apart, eventually, it will be forced to watch them fail during the occurrence of a base flood.

The special referee also erroneously considered as relevant to the "character" of the government action, "the evidence in this case indicating that Columbia Venture's plans to improve its levee would likely cause increased flooding in Lexington County." Order of 3/18/2013 at 72. The special referee did not cite any such evidence in the record, because there is none. The only competent expert testimony on this subject came from two sources: Mr. Wilson Tillotson, P.E., of Lockwood Greene Engineers, and Mr. Carroll Barker, an expert hydrologist. Both witnesses testified that Columbia Venture could have improved the Manning Levees to meet the NFIP requirements for certified levees under FEMA's "no-rise"

[45] Further, in *Byrd* this Court did not even suggest that the property owner's sole reasonable expectation was to continue its current use of the property. Rather the Court considered "all relevant circumstances." *Byrd*, 365 S.C. at 661, 620 S.E.2d at 81.

engineering standards without causing a rise in the base flood elevations or a reconfiguration of the floodway in Lexington County. Tr. 1240, 1242-45; Tillotson Tr. 29-30; PTE 208. The record is devoid of any competent evidence to refute this testimony. Even so, it is no defense to a takings claim that Richland County perceived a public purpose in prohibiting Columbia Venture from improving its levees in order to benefit Lexington County.

Finally, courts have considered evidence of bad faith in evaluating the character of a government action. The United States Supreme Court has suggested that, but for the lower court's factual determination that in imposing a series of rolling moratoria the government "acted diligently and in good faith," the Court might have found a taking in "that the [government] was stalling in order to avoid promulgating" a permanent rule. *Tahoe-Sierra*, 535 U.S. at 333. Likewise, the United States Court of Appeals for the Fourth Circuit has clearly included within the character element the question of whether a challenged governmental action was "inequitable and illegitimate." *Acorn Land, LLC v. Balt.County*, 402 Fed. Appx. 809, 817 (4th Cir. 2010) (per curiam) (noting a finding that "the Council arbitrarily and capriciously blocked [plaintiff]'s efforts to amend its water/sewer petition," and that the "complaint plausibly pleads that the Council's actions constituted an illegitimate and inequitable attempt to prevent [plaintiff] from developing its property"); *see also Cooley v. United States*, 324 F.3d 1297, 1307 (Fed. Cir. 2003) ("In conducting a Penn Central analysis, the trial court may weigh whether the [defendant's] conduct evinces elements of bad faith."). In none of these cases did the court suggest that such bad faith must be sufficient to independently constitute a denial of substantive due process; instead, the clear implication was that bad faith could serve as a relevant inquiry into the character of the government action in a

takings analysis.[46] For its part, this Court has recently made a similar suggestion, noting in the course of a *Penn Central* analysis that "there is no evidence that the delay was the result of bad faith on the part of the City." *Byrd*, 365 S.C at 661 n.15, 620 S.E.2d at 82 n.15.

Here, the record is replete with indicia of bad faith actions targeted specifically at Columbia Venture. In addition to the instances noted above, the record also reflects that Richland County passed a series of moratoria on any construction in a regulatory floodway when the United States District Court, in November 2005, vacated the February 20, 2002 effective FIRM and restored the 1994 effective FIRM, and thus removed the Manning Levees and virtually all of Columbia Venture's property from the regulatory floodway and all associated building and levee improvement restrictions. PTEs 061, 062. The record further reflects that the Councilmember who served as Council Chairwoman during the period when County Council acted to block Columbia Venture's development referred to Columbia Venture and/or its members at various times as "fraudulent," "fakes," "elitists," "unethical," "should be sent packing from Richland County," "a zircon of greed," "corporate welfare pimps," and analogous to a horror movie character. Tr. 2276, 2488-96; PTE 350. She also served on the

[46] Columbia Venture maintains that the actions taken by the County Council to target and stop Columbia Venture's development meet the high threshold needed to establish a violation of substantive due process. Indeed, the continuing nature of this conduct after February 20, 2002 (*supra* at pp. 50-53) highlights the continuing injury to Columbia Venture. These actions, which, among other things, impermissively involved the County Council in permitting issues, violated Columbia Venture's substantive due process rights. This same conduct (regardless of whether or not it meets the threshold of a substantive due process violation) also establishes the character of the governmental action necessary to make out a regulatory takings claim, and for this reason, and to limit the issues for consideration on appeal, Columbia Venture has chosen not to brief and argue substantive due process as a separate and distinct issue.

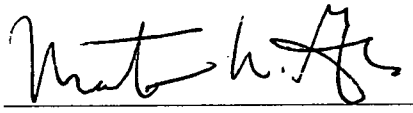
Board of Trustees of an organization publicly and officially opposed to Columbia Venture. Omnibus Appx. 390, 475-77.

The evidence compels a finding that the actions of the County were targeted to the detriment of Columbia Venture, and further that prevention of flood damage was not the motivating factor behind the County's actions, inasmuch as the County acted to prevent Levee improvements that would have protected not only Columbia Venture's Property but also the properties of the City of Columbia and of Heathwood Hall even though the only expert testimony presented indicated that such improvements could be made in accordance with all FEMA and all non-targeted County levee requirements. This evidence demonstrates that the County's actions were taken in bad faith, not to further the goals of the NFIA and the NFIP, but instead to thwart the development of the Property.

CONCLUSION

For all of the above reasons, the County's Stormwater Ordinance of April 2001 simply went "too far" and effected a regulatory taking of Columbia Venture's Property. Columbia Venture thus requests that this Court remand this action to the lower court for a determination of just compensation.

Respectfully submitted,



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July 25, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

John Hamilton Smith, Special Referee

Case No. 2010-CP-40-8943R
Appellate Case No. 2013-001067

Columbia Venture, LLC, Appellant,

v.

Richland County, Respondent.

CERTIFICATE OF SERVICE

This is to certify that I caused a copy of the foregoing Initial Brief of Appellant and Designation of Matter to be served on the following individuals in the manner expressed below and addressed as follows:

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