

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

The Honorable John Hamilton Smith, Special Referee

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S.C. Supreme Court

Case No. 2010-CP-40-8943R

COLUMBIA VENTURE, LLC, ... APPELLANT,

v.

RICHLAND COUNTY, ... RESPONDENT.

**INITIAL BRIEF
OF
RESPONDENT RICHLAND COUNTY**

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STATEMENT OF ISSUES ON APPEAL

- I. TO THE EXTENT THAT APPELLANT IS ARGUING A *PER SE* TAKING CLAIM PURSUANT TO *LUCAS v. S.C. COASTAL COUNCIL*, WHETHER APPELLATE REVIEW OF SUCH CLAIM IS PRECLUDED?
- II. WHETHER, UNDER THE PROPER STANDARD OF REVIEW OF A SUMMARY JUDGMENT ORDER, THE SPECIAL REFEREE CORRECTLY RULED THAT THE COUNTY'S LAND USE REGULATIONS AT ISSUE DOES NOT CONSTITUTE A PHYSICAL TAKING OF COLUMBIA VENTURE'S PROPERTY?
- III. WHETHER *HILL v. HANAHAN* IS DISTINGUISHABLE FROM APPELLANT'S PHYSICAL TAKING CLAIM?
- IV. WHETHER, IN A REGULATORY TAKINGS CLAIM TRIED WITHOUT A JURY, THE STANDARD OF REVIEW IS LIMITED TO CORRECTION OF ERRORS OF LAW, AND FINDINGS OF FACT ARE NOT DISTURBED UNLESS NO EVIDENCE SUPPORTS THEM?
- V. CONCERNING APPELLANT'S REGULATORY TAKINGS CLAIM, WHETHER THE SPECIAL REFEREE CORRECTLY HELD, BASED ON SOUND FINDINGS OF FACT, THAT APPELLANT LACKED REASONABLE INVESTMENT-BACKED EXPECTATIONS?
- VI. CONCERNING APPELLANT'S REGULATORY TAKINGS CLAIM, WHETHER THE SPECIAL REFEREE CORRECTLY HELD THAT THE CHARACTER OF THE GOVERNMENT ACTION WEIGHED IN FAVOR OF RICHLAND COUNTY?
- VII. CONCERNING APPELLANT'S REGULATORY TAKINGS CLAIM, WHETHER THE SPECIAL REFEREE WAS CORRECT IN DECLINING TO ACCEPT ALLEGED BAD FAITH AND "TARGETED ACTION" AS RELEVANT TO THE CHARACTER OF THE GOVERNMENT ACTION; OR IN THE ALTERNATIVE, THAT HIS WELL-SUPPORTED FINDINGS OF FACT SHOWED NO SUCH BAD FAITH OR "TARGETED ACTION"?
- VIII. AS AN ADDITIONAL SUSTAINING GROUND, WHETHER THE SPECIAL REFEREE ERRED IN CONCLUDING THAT APPELLANT SUFFERED SIGNIFICANT LOSS IN VALUE OF ITS PROPERTY?
- IX. WHETHER APPELLANT ABANDONED APPELLATE REVIEW OF THE SPECIAL REFEREE'S DUE PROCESS ORDER?

STATEMENT OF THE CASE

This is an appeal from the Special Referee's grant of summary judgment to the Respondent Richland County on Appellant Columbia Venture's physical taking claim and due process claim, as well as from the Special Referee's judgment entered in favor of Respondent Richland County on Appellant's regulatory takings claim after a non-jury trial. Columbia Venture commenced this action against Respondent on August 19, 2004, alleging that Richland County's adoption on February 20, 2002 of the Federal Emergency Management Agency's ("FEMA") Flood Insurance Rate Maps and Flood Insurance Study for unincorporated Richland County (collectively referred to as "Flood Data"), combined with the County's floodplain management regulations, constituted a taking of Columbia Venture's real property without just compensation and a violation of substantive due process. Complaint, p. 1. By Consent Order dated May 2, 2005, the action was stayed pending the outcome of *Columbia Venture, LLC v. FEMA*, United States District Court Case No. 3:01-4100-JFA. In September 2009, Columbia Venture settled its action against FEMA, and Columbia Venture filed an Amended and Supplemental Complaint on October 5, 2009. Pl. Exh. 525; Amended Complaint (Oct. 5, 2009). By an Order of Reference filed May 22, 2012, the matter was referred by consent of the parties to retired circuit judge John Hamilton Smith as Special Referee.

On September 20, 2011, Richland County moved for summary judgment of Columbia Venture's substantive due process claim. On March 14, 2012, Richland County moved for summary judgment of Columbia Venture's regulatory taking claim, and the parties filed cross-motions for summary judgment of Columbia Venture's physical taking claim. The Special Referee heard argument on the parties' summary judgment motions on July 18, 2012. Hr'g Transcript, Dispositive Motions Hearing (July 18, 2012). By order filed August 9, 2012, the

Special Referee granted Richland County summary judgment on Columbia Venture's physical taking claim, and denied Columbia Venture summary judgment on its physical takings claim. Physical Taking Order (Aug. 9, 2012). By order filed September 11, 2012, the Special Referee granted summary judgment to Richland County on Columbia Venture's due process claim and denied Richland County summary judgment on its argument that Columbia Venture's regulatory takings claim was unripe. Due Process Order (Sept. 11, 2012).

Columbia Venture's remaining regulatory taking claim was tried by the Special Referee, sitting without a jury, from September 10, 2012 through September 21, 2012, November 13, 2012 through November 16, 2012, and concluding on December 20, 2012. The Special Referee admitted over 400 trial exhibits, heard the testimony of sixteen witnesses, and admitted deposition testimony of five additional witnesses. *See* Regulatory Taking Order, p. 1. The Special Referee requested, and the parties agreed, to prepare detailed proposed orders, followed by replies to each proposed order. Tr. Vol. 15, p. 2868, line 1 – p. 2871, line 4. In its Proposed Order, Columbia Venture sought \$43 million dollars in just compensation, plus pre-judgment interest and attorney's fees. CV Proposed Order, pp. 142-145. After considering these filings, the Special Referee on March 19, 2013 issued a 74-page order explaining why he was rejecting Appellant's regulatory takings claim, and entered judgment in favor of Richland County. Regulatory Taking Order (March 19, 2013). On May 20, 2013, Columbia Venture timely filed and served its Notice of Appeal of the Physical Taking Order, Due Process Order, and the Regulatory Taking Order.

STATEMENT OF THE FACTS

Created in response to the very serious hazards to life and property associated with development in flood prone areas, the National Flood Insurance Program (“NFIP”) was established under the National Flood Insurance Act (“NFIA”) and is administered by FEMA. 42 U.S.C. § 4001 *et seq.* The purpose of the NFIA is twofold – to enable property owners to obtain affordable flood insurance, and to minimize flood losses through local land use regulation.¹ 42 U.S.C. § 4001(b) and (c). To minimize flood damage, the NFIA seeks to “encourage ... local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage,” and “guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards.” *Id.* at (e). If a community does not participate in the NFIP, the NFIA prohibits federal lending assistance for acquisition of and construction on flood-prone property located within that community, as well as federal disaster relief and federal grants for the community, and flood insurance will no longer be available to residents. 42 U.S.C. § 4106; 42 U.S.C. § 4022(a)(1). Richland County has been a participating community in the NFIP since 1981. Def. Exh. 147.

To fulfill the purposes of the NFIA, FEMA is required to publish Flood Insurance Studies (“Flood Study”) and Flood Insurance Rate Maps (“Flood Maps”) (collectively referred to hereafter as “Flood Data”) that identify flood hazard risks within floodplains. 42 U.S.C. § 4101(a); *see* Pl. Exh. 10 at COSD001-00581. A Flood Study contains the calculated depth of floodwaters, called base flood elevations, of all studied rivers and streams within a community. 44 C.F.R. § 59.1. A base flood is defined as “the flood having a one percent chance of being

¹ As of the year 2000, 14% of non-federal land in the contiguous 48 States is located within a floodplain. Def. Exh. 64 at DEF-00001892. Over 17,000 communities have flood prone areas. *Id.* Over 75% of presidentially-declared natural disasters involved flooding. *Id.* at DEF-00001893. Flood damage inflicted three to four billion dollars in costs each year. *Id.*

equaled or exceeded in any given year,” also called a 100-year flood. 44 C.F.R. § 59.1. A Flood Study enables FEMA to prepare Flood Maps that show a community’s floodplains and in particular, designate special hazard areas and risk premium zones within the floodplain applicable to the community. 44 C.F.R. § 59.1. A special hazard area is the floodplain subject to a 100-year flood. *Id.* Areas where FEMA has determined base flood elevations are shown as Zone AE. 44 C.F.R. § 64.3. Other risk zones shown on a Flood Map include Zone A, a flood hazard area without established base flood elevations, and Zone X, a flood hazard area considered to be relatively low risk because it is outside the area subject to inundation by a 100-year flood. *Id.*

Within a flood hazard zone AE, Flood Maps may also identify an area called a floodway. *See* 44 C.F.R. § 59.1. Because “encroachment on floodplains, such as structures and fill, reduces flood-carrying capacity, increases flood heights and velocities, and increases flood hazards in areas beyond the encroachment itself,” FEMA delineates a floodway comprised of “the channel of a stream, plus any adjacent floodplain areas, that must be kept free of encroachment so that the 100-year flood can be carried without substantial increases in flood heights.” Pl. Exh. 10 at COSD001-00596; 44 C.F.R. § 59.1. The greatest flood velocities and depths occur within a floodway, causing the greatest damage during a flood. Tr. Vol. 7, p. 1236, lines 7-11; Tr. Vol. 12, p. 2218, line 20 – p. 2219, line 7; Tr. Vol. 14, p. 2616, line 20 – p. 2617, line 12.

Every five years, FEMA is required to assess the need to revise Flood Data and undertake any necessary revisions of existing studies or conduct new studies as it sees fit. 42 U.S.C. § 4101(e) and (f). Flood-prone areas within Richland County had been studied and mapped by FEMA in 1981, 1985, 1987, 1989, 1994, 1995, and 2002. Pl. Exh. 10 at COSD001-00576 – COSD001-578. Flood Data can and does in fact change over time due to increases in

impermeable surface areas in the basin, changes in weather patterns, and other factors. *Compare* Def. Exh. 131 with Def. Exh. 129 and 130; Tr. Vol. 12, p. 2225, line 9 – p. 2226, line 14; Tr. Vol. 14, p. 2618, line 1 – p. 2619, line 7.

Once FEMA prepares new or revised Flood Data, FEMA issues them as preliminary documents for public review and comment, and are subject to change. Pl. Exh. 31 at DEF-00000294. Although preliminary Flood Data do not become final and effective until after public notice and any administrative appeals are resolved, under certain circumstances, communities may use FEMA's preliminary Flood Data for floodplain management purposes because FEMA considers its preliminary Flood Data to be the most current, best available data for community use up until the time that FEMA issues final Flood Data. Pl. Exh. 31 at DEF-00000293; 44 C.F.R. § 60.3(b)(4). Pursuant to FEMA Floodplain Management Bulletin 1-98, *Use of Flood Insurance Study (FIS) Data as Available Data* (Jan. 1998), FEMA advises that, in two situations, the community should use preliminary revised Flood Maps for regulating land use in a floodplain: 1) if a preliminary revised flood map shows a floodway where none previously existed, then the community should use the preliminary revised flood map as the best data available in order to protect the health, safety and property of citizens within the proposed floodway; or 2) if a preliminary revised Flood Map shows higher base flood elevations than those shown in the existing, final, effective Flood Map, then the community should use the preliminary revised flood map as the best data available in order to protect the health, safety and property of citizens within the affected area. Pl. Exh. 31 at DEF-00000296.

Once FEMA publishes preliminary Flood Data as a proposed final determination in the Federal Register and the community's local newspaper, an administrative appeal procedure is triggered. 42 U.S.C. § 4104(b). The local community receives any appeals by private persons

and forwards those appeals to FEMA. *Id.* at § 4104(c). Upon resolution of any administrative appeals, FEMA issues its Flood Data in the form of a letter of final determination.² A participating community must adopt FEMA's final Flood Data as the basis for regulating development within floodplains or face suspension from the NFIP. 44 C.F.R. § 60.3; Tr. Vol. 12, p. 2228, line 22 – p. 2229, line 15.

Participating communities are required to enact local floodplain management ordinances adopting, at a minimum, FEMA's standards for managing development within flood-prone areas. 44 C.F.R. § 60.2; 44 C.F.R. § 60.3. For example, all new construction and substantial improvements of residential structures in a flood hazard area designated as zone A or AE must be elevated to or above the base flood elevation. 44 C.F.R. § 60.3(c)(1). Within a floodway, the community must, at a minimum, "prohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway unless 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. *Id.* at (d)(3). This standard is commonly referred to as the "no-rise" standard. A community may impose more restrictive standards than FEMA's minimum standards, which FEMA encourages and which "shall take precedence." 44 C.F.R. § 60.1(d).

During the relevant time period, Richland County's floodplain management regulations were contained in more than one ordinance. The County's Zoning Ordinance, adopted in 1977 and amended thereafter, contained a Floodway and Floodplain Overlay District which used FEMA's Flood Maps to determine the areas of the County in which its provisions apply. Pl. Exh. 250a, § 26-73, Zoning Ordinance (1999). The Floodway and Floodplain Overlay District

² FEMA's final determination may be appealed to the United States District Court. 42 U.S.C. § 4104(g).

imposed land use restrictions in addition to the restrictions imposed by the property's underlying zoning designation. *Id.* at § 26-73.1, Zoning Ordinance (1999). The Floodplain Overlay Zoning District was interpreted and administered by the Zoning Administrator, an official within the County's Planning Department.³ *Id.* at § 26-502, Zoning Ordinance (1999); Tr. Vol. 13, p. 2528, lines 3-8; Tr. Vol. 13, p. 2595, lines 14-22. The County's Storm Drainage Ordinance, in effect from 1994 to April 2001, also contained standards and criteria for development within a flood hazard area as designated on FEMA's Flood Maps. Pl. Exh. 230 at DEF-00005417, § 8-62, Storm Drainage Ordinance (1994). The Storm Drainage Ordinance was administered and interpreted by the County Engineer within the County's Public Works Department. *See* Pl. Exh. 230, at DEF-00005415, § 8-57, and DEF-00005416, § 8-60; Tr. Vol. 12, p. 1309, line 23 – p. 1310, line 22. Both ordinances contained a provision governing construction within a floodway ("Floodway Provision").

The Floodway Provision of the Floodway and Floodplain Overlay Zoning District prohibited the "filling of floodway areas, dumping of salvaged or scrap material, or the placing of material or obstruction within a floodway area in such a manner as to impede free flow of water during a time of flood or in such a manner that the elevation of floodwaters will be increased." Pl. Exh. 250a, § 26-73.4(2), Zoning Ordinance (1999) (emphasis added). The second part of the test in this ordinance – the prohibition against increasing flood elevation – was the same as FEMA's "no-rise standard" which could conceivably allow construction or filling to occur in a floodway. However, the first part – the prohibition against impeding the free flow of floodwater, or "no-impede standard," - essentially prohibited construction in a floodway. Tr.

³ The County Engineer had a minor role in the administration of the Floodplain Overlay Zoning District, but he did not have responsibility for interpreting the ordinance. Pl. Exh. 250a, § 26-73.2a, Zoning Ordinance (1999) (stating that the planning department has "primary responsibility for administering and enforcing this ordinance and ... utilization of the county engineer as required by this ordinance."); Tr. Vol. 13, p. 2965, lines 14-22; Tr. Vol. 14, p. 2616, lines 8-19.

Vol. 13, p. 2528, line 23 – p. 2529, line 9; Tr. Vol. 13, p. 2593, line 2 – p. 2594, line 3; Tr. Vol. 14, p. 2615, line 1 – p. 2617, line 25. The County Planning Department interpreted the Floodway Provision within the Zoning Ordinance as prohibiting construction in a floodway. *Id.* The County's Zoning Ordinance contained a procedure for obtaining a variance from any provisions of the Ordinance.⁴ Pl. Exh. 250 at § 26-602.3, Zoning Ordinance (1999). This meant, among other things, that construction of a levee, or reconstruction and expansion of a pre-existing levee, which would necessarily impede the free flow of floodwater, was prohibited if the levee work would occur in an area included in a designated floodway.

Under the County's Storm Drainage and Flood Protection Ordinance ("Storm Drainage Ordinance"), an approved storm drainage plan was required for any land disturbance or development within a special flood hazard area. Pl. Exh. 230, § 8-50 *et seq.*, Storm Drainage Ordinance (1994). Under § 8-62(g), "all levees protecting residential structures or non-residential structures which are not floodproofed shall be designed, constructed and maintained to provide protection against the 500-year flood plus three (3) feet of freeboard." Pl. Exh. 230 at DEF-00005418. Section 8-62(h) the Storm Drainage Ordinance's Floodway Provision stated that "no levees, dikes, fill materials, structures or obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway." Pl. Exh. 230 at DEF-00005418. This Floodway Provision differed from the Floodway Provision in the Zoning Ordinance in that it included the "impede" standard only. *Id.* From 1994 to some point in 1999, the County Engineer interpreted "no-impede" to mean the same as FEMA's "no-rise" standard. Tr. Vol. 7, p. 1315, lines 9-25; Tr. Vol. 7, p. 1324, lines 7-25; Tr. Vol. 8, p. 1399, line 15 – p. 1400, line 22. In the past, the County received only three applications for land disturbance within a floodway, and all three involved construction of boating ramps or floating docks. Pl.

⁴ Columbia Venture never sought a variance under the Zoning Ordinance. Tr. Vol. 13, p. 2530, lines 8-10.

Exh. 51 at DEF-00002253. The Storm Drainage Ordinance incorporated by reference FEMA's variance provision.⁵ Pl. Exh. 230 at § 8-62(i); 44 C.F.R. § 60.6.

Within Richland County, the Broad River and the Saluda River join near downtown Columbia to form the Congaree River. Pl. Exh. 204, p. 3. The Congaree River flows alongside the City of Columbia and serves as the southern boundary between Richland and Lexington counties. *Id.* Mr. Burwell Manning, through a corporate entity, owned and farmed approximately 4,400 acres of floodplain property adjacent to the Congaree River in Richland County ("Property"). Pl. Exh. 236; Tr. Vol. 1, p. 27, lines 2-7; Tr. Vol. 1, p. 33, line 24 – p. 34, line 15; Tr. Vol. 1, p. 42, lines 9-20. The Property was protected to some degree from flooding by approximately 20 miles of agricultural levees parallel to the Congaree River and its tributary, Gills Creek. Tr. Vol. 1, p. 37, lines 20-22. The levee system was divided into three sections. Tr. Vol. 1, p. 23, line 15 – p. 24, line 5. The levees were constructed without the benefit of any geotechnical engineering analysis or oversight. Tr. Vol. 1, p. 38, line 3 – p. 40, line 22. In addition, since they were constructed prior to the advent of permitting requirements for levee construction, no government agency reviewed the design or construction plans for these levees before they were built. *Id.*

Property owned by the City of Columbia ("City"), Heathwood Hall Episcopal School ("Heathwood Hall"), and over a dozen property owners⁶ was also located behind the Manning

⁵ Under 44 C.F.R. § 60.6(a), "the community, after examining the applicant's hardships, shall approve or disapprove a request." Pursuant to variance procedures set forth in 44 C.F.R. § 60.6, a variance could be issued by the County "for new construction and substantial improvements and for other development necessary for the conduct of a functionally dependent use" provided that specified criteria are met. A variance may be granted by the County if good cause is shown, exceptional hardship exists, the variance would not cause an increase in base flood elevations or cause threats to public safety, not cause a nuisance nor result in extraordinary public expense, not cause fraud or victimization of the public, and not conflict with other local ordinances. *Id.* at (a)(3).

⁶ See Pl. Exh. 166 at DEF-00000057 (map prepared by Richland County identifying owners of property behind levee as: William Maxwell Gregg, Marchants Associates, Terrel Norris Seed Co., City of Columbia, Heathwood Hall, David M. Jordan, John W. Foster, Shemian P. Jordan, B.A. Jordan, Carmine Seeds, Inc., Charlie G. Foster, Franklin L. Claytor, Richland County, Susan Campbell, and Arthur A. Madden).

levees. Tr. Vol. 1, p. 66, lines 2-19; Tr. Vol. 1, p. 70, lines 7-21. The City purchased its property from Mr. Manning in 1967 to construct a wastewater treatment plant. Pl. Exh. 520. The City owns the levee in front of its property. Pl. Exh. 520; Pl. Exh. 500. Mr. Manning donated the property on which Heathwood Hall sits in the early 1970s. Tr. Vol. 2, p. 449, lines 11-13.

Prior to 1998, the County had adopted and applied FEMA's then effective and final Flood Data published in 1994 and 1995. Pl. Exh. 162; Pl. Exh. 3. The 1994/1995 Flood Data showed the Property, as well as the property owned by Heathwood Hall, the City of Columbia, and other property owners along the Congaree River, to be within flood hazard areas of the Congaree River, depicted as zone AE or A on FEMA's Flood Maps. Pl. Exh. 162. These flood hazard zones triggered development restrictions under Richland County's Zoning Ordinance applicable to floodplains.⁷ Under the 1994/1995 Flood Data, these properties were not located within a floodway. Tr. Vol. 1, p. 79, lines 7-21; Pl. Exh. 3.

Mr. Burwell Manning was deeply in debt to the United States Farm Service Agency due to unpaid farm loans. Tr. Vol. 1, p. 126, line 17 – p. 128, line 16. To pay off his debt, Mr. Manning sold his approximately 4,400 acres in a complicated series of real estate transactions to various investor groups with a right of re-purchase, in exchange for payment of his debt. Def. Exh. 140; Pl. Exh. 262; Tr. Vol. 1, p. 130, lines 14-20. If Mr. Manning failed to re-purchase 2,218 acres by February 17, 1999, he would lose all rights to this portion of the Property. Pl. Exh. 262; Tr. Vol. 2, p. 277, lines 10-12. If Mr. Manning failed to re-purchase the remaining acreage by July 16, 1999, he would lose all rights to the other half of his Property. Def. Exh.

⁷ Any buildings constructed within a floodplain must be protected from flood hazards by placing earthen fill to elevate the building site at least two feet above the estimated depth of a 100-year flood, or the building must be elevated on pilings at least two feet above the estimated depth of a 100-year flood. Pl. Exh. 250a, § 26-73.5(2), Zoning Ordinance (1999).

140. As 1999 approached, Mr. Manning searched for investors to purchase the Property through his right of re-purchase before his rights to the Property expired. Tr. Vol. 1, p. 136, lines 1-16.

Mr. Manning found a potential purchaser, a company called Tee-To-Green, who entered into an option agreement to buy approximately half of the 4,400 acres for \$15 million dollars. Tr. Vol. 1, p. 136, line 21 – p. 143, line 18. The purchase price was based upon an appraised value of the entire 4,400 acres at \$30 million dollars. Tr. Vol. 1, p. 140, line 24 – p. 143, line 18. However, in early 1998, FEMA announced that it was commencing a new study of the flood risks in Richland County. *See* Pl. Exh. 4 at DEF-00004861. By May 1998, the County and others learned that FEMA planned to release preliminary Flood Data that showed a substantially widened floodway along the Congaree River. *See* Pl. Exh. 8 at DEF-00000005. FEMA's preliminary Flood Data caused Tee-To-Green to withdraw its option because it could not obtain assurances from the Mannings or Richland County as to whether the agricultural levees could be improved in light of FEMA's preliminary Flood Data. Tr. Vol. 1, p. 155, line 1 – p. 156, line 10; p. 159, lines 22-24; *see also* Tr. Vol. 3, p. 562, line 8 – p. 563, line 10 (Mr. Deas Manning stating that Tee-To-Green found FEMA's preliminary flood map to be an "obvious cause for alarm.").

Mr. Manning subsequently recruited Burroughs & Chapin Company, a real estate holding and development company located in Horry County, South Carolina, as a potential investor. Tr. Vol. 3, p. 668, line 5 – p. 669, line 22. Mr. George Gregory, corporate counsel to Burroughs & Chapin Company, took the lead on behalf of Burroughs & Chapin to assess the Property. Tr. Vol. 3, p. 682, line 25 – p. 683, line 12. He worked with a team that included Lockwood Greene, an engineering firm. Tr. Vol. 3, p. 683, line 15 - p. 684, line 8. Because the deadline for Mr. Manning to re-purchase the Property and resell it to a developer was rapidly approaching, Burroughs & Chapin saw Mr. Manning's situation as offering "a narrow window of opportunity"

to obtain a large tract for development at the "right price." Tr. Vol. 3, p. 674, lines 8-14; Def. Exh. 10 at CV010679.

Burroughs & Chapin was aware while it was assessing the Property that FEMA was conducting a restudy, and already knew as early as May 1998, that:

Currently the property is designated as a floodway. It is not possible to build in a floodway according to Mr. Harry Reed of Richland County.⁸ They will not issue building permit for projects in the floodway. ... Efforts are underway to have this floodway designation reversed to the previous designation of a floodplane [sic]. You can obtain a development permit for areas within the floodplane [sic] if certain criteria are met. Def. Exh. 17, p. 4.

FEMA released its preliminary Flood Maps for unincorporated Richland County on June 5, 1998. Pl. Exh. 238; Pl. Exh. 237; Pl. Exh. 10. The Congaree River Flood Maps showed an enlarged floodway that covered almost all of the property owned by Mr. Manning, the City of Columbia, Heathwood Hall and all of the other owners of property within the Congaree River floodplain. Pl. Exh. 237; Pl. Exh. 238.

In keeping with FEMA's guidance document, FEMA FLOODPLAIN MANAGEMENT BULLETIN 1-98, *Use of Flood Insurance Study (FIS) Data as Available Data* (Jan. 1998), Richland County relied upon the preliminary June 5, 1998 Flood Map in implementing its floodplain management ordinances. Def. Exh. 142; Pl. Exh. 11; Pl. Exh. 238; Pl. Exh. 162; Pl. Exh. 12; Def. Exh. 20a, p. 3, section B. Because the June 5, 1998 preliminary Flood Map put most of Mr. Manning's Property within a floodway, the County's Floodway Provisions in effect at that time applied to any permit application for development on the Property. See Pl. Exh. 230, 250a. This meant that any construction, including construction of new levees, or reconstruction and expansion of the existing Manning levees, was prohibited. So long as FEMA's proposed floodway designation for the Manning Property remained in place, no development could occur.

⁸ Harry Reed was the County's Floodplain Coordinator within the Planning Department. Def. Exh. 31.

An environmental report prepared by Rust Environmental and Infrastructure (“Rust Report”) for Mr. Burwell Manning dated June 5, 1998 explicitly acknowledged that Richland County’s Zoning Ordinance prohibited construction in a floodway. Pl. Exh. 497 at CV013562.; *see also* CV013576 (“Before development can occur, this proposed floodway designation must be changed.”). Mr. Manning provided a copy of the Rust Report to Burroughs & Chapin, meaning that Burroughs & Chapin had the benefit of Mr. Manning’s own consultant’s assessment of the regulatory constraints in place at the time. Pl. Exh. 501.

FEMA held a public meeting on July 8, 1998 to explain its preliminary Flood Data. Pl. Exh. 11. Representatives of the City of Columbia, Lockwood Greene, Heathwood Hall, Burroughs & Chapin, and Richland County, as well as several other affected property owners, were present at the meeting. Pl. Exh. 11, pp. 2663-2664; Tr. Vol. 5, p. 893, line 16- p. 894, line 18. In explaining why FEMA had revised its previous floodway delineations for the Congaree, FEMA’s study contractors explained that they could not locate any documentation that the Manning levee met FEMA’s requirements under 44 C.F.R. § 65.10 for certification of the levee as a flood control structure. Pl. Exh. 11 at DEF-00000015.

Under 44 C.F.R. § 65.10, a property owner may seek FEMA certification that a levee meets FEMA’s standards for providing protection from a 100-year flood. For such levees to be certified by FEMA, certain requirements relating to the structural design of the levee, and operation and maintenance of the levee, must be met. 44 C.F.R. § 65.10. The levee must be operated and maintained according to an “officially adopted” operation manual and maintenance manual under the jurisdiction of a federal or state agency or a participating local government “that must assume ultimate responsibility for maintenance.” *Id.* at (c) and (d). If FEMA certifies

a levee, the property behind the levee is remapped to remove FEMA's flood hazard zones.⁹ See Def. Exh. 59 at CV012804. However, homes and businesses located behind a levee, even a certified levee, still face the risk of flooding because there is always the possibility that a levee will fail during a flood. *Id.*; Pl. Exh. 369 at DEF-00002316. In deciding whether to "assume ultimate responsibility" for maintenance of a levee, thus allowing development to occur behind a levee, communities must decide what degree of risk to life and property, as well as what degree of risk of governmental liability, they are willing to tolerate. *Id.*; Pl. Exh. 523 at DEF-00001691.

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

FEMA regulations allow for no-rise studies to be done for any particular development. However, Richland County has adopted more stringent regulations and doesn't allow any development in the floodway (unless a variance is granted).¹⁰ Pl. Exh. 11 at DEF-00000016.

FEMA's meeting minutes also stated that Richland County was using the preliminary Flood Maps for permitting purposes. Pl. Exh. 11 at DEF-00000017. Mr. Gregory was present at this meeting. Tr. Vol. 5, p. 893, line 16 – p. 894, line 18; Tr. Vol. 5, p. 897, lines 7-17; Tr. Vol. 5, p. 898, lines 5-16.

For some reason, Burroughs & Chapin did not take the new Flood Map seriously. Tr. Vol. 3, p. 711, lines 17-21; Tr. Vol. 5, p. 896, line 20 – p. 903, line 2. Mr. Gregory thought the

⁹ FEMA's remapping of land behind a certified levee does not mean that the area behind a levee is no longer a natural floodplain subject to flooding. See generally the General Accounting Office ("GAO") report to Congress, Pl. Exh. 369, in which the GAO repeatedly describes property behind levees as within the floodplain. The effect of removing FEMA's flood hazard areas on FEMA Flood Maps is to allow construction on a floodplain that would otherwise be allowed only if the structure was elevated above the height of a 100-year flood. *Id.* at DEF-00002343. One consequence of levee certification is increased costs of flood damage to structures behind a levee because those structures are not elevated above the height of a 100-year flood. *Id.*

¹⁰ A very similar statement appeared in a newspaper article dated July 22, 1998 admitted into evidence. Pl. Exh. 551 ("Richland County's regulations are more stringent than FEMA's. If the County changed those regulations to allow development in a floodway, the cost of flood insurance could increase for all county residents who have it.").

preliminary Flood Map was flawed and “had no chance of survival with any type of serious review.” Tr. Vol. 3, p. 711, line 17-21. He believed that FEMA would not move forward with finalizing this Flood Map, and would instead issue a subsequent revised preliminary Flood Map. Tr. Vol. 5, p. 900, lines 12-21; p. 902, line 19 – p. 904, line 25.

Soon after FEMA’s public meeting to discuss its June 5, 1998 preliminary Flood Data, Mr. Cary McSwain, the Richland County Administrator, made a written request to FEMA asking that FEMA delay finalization of its June 5, 1998 preliminary Flood Data until more information was known about the status of the Manning levees. Pl. Exh. 12. FEMA agreed to this request. Pl. Exh. 13.

In the Fall of 1998, Mr. George Gregory met with members of Richland County Council, including Mrs. Kit Smith, to talk about Burroughs & Chapin’s plans for the Property. Tr. Vol. 5, p. 884, line 25 – p. 886, line 6; Tr. Vol. 5, p. 878, line 15 – p. 879, line 10; Tr. Vol. 12, p. 2276, line 16 – p. 2277, line 11. Mr. Gregory provided no details concerning Burroughs & Chapin’s development plans in these meetings. Tr. Vol. 3, p. 550, line 25 – p. 551, line 15. Mr. Gregory discussed the proposed project in general terms, and provided only a preliminary sketch plan of the project. Tr. Vol. 12, p. 2277, lines 14-24; *see also* Tr. Vol. 3, p. 698, line 19 – p. 699, line 10. In response, Mrs. Smith gave no promises, commitments, or assurances to Mr. Gregory that the County could or would grant the necessary permits and rezoning needed to move forward with Burroughs & Chapin’s plans. Tr. Vol. 12, p. 2277, line 25 – p. 2278, line 9.

Mr. Gregory also met with the County Administrator, Cary McSwain. Tr. Vol. 13, p. 2537, lines 22-24. Mr. Gregory did not provide Mr. McSwain with any details of Burroughs & Chapin’s plans for the Property. Tr. Vol. 13, p. 2537, line 25 – p. 2538, line 8. Mr. McSwain lacked sufficient information to form an opinion regarding Burroughs & Chapin’s project. Tr.

Vol. 13, p. 2515, lines 13-21. He gave no assurances, promises or commitments to Burroughs & Chapin regarding project approvals. Tr. Vol. 13, p. 2512, line 22 – p. 2513, line 15.

On November 13, 1998, Burroughs & Chapin entered into a Purchase Agreement with Mr. Burwell Manning. Def. Exh. 156. In the Agreement, Burroughs & Chapin agreed to buy approximately 4,400 acres for \$18 million dollars, if, after a 60-day due diligence period, it executed a Notice of Intention to Purchase. *Id.* at p. 1. On January 12, 1999, about one month before the expiration of Mr. Manning's opportunity to re-purchase and resell half of the Property, Burroughs & Chapin executed a Notice of Intention to Purchase. Def. Exh. 157. The closing date was scheduled for February 11, 1999, six days prior to expiration of Mr. Manning's opportunity to repurchase and resell. *Id.* at p. 2. The Property constituted Burroughs & Chapin's first major project outside Horry County. Wendel Dep. p. 9, lines 15-18. It was the first project Burroughs & Chapin had dealt with that involved FEMA issues, or levees. Tr. Vol. 5, p. 839, lines 3-9.

Meanwhile, Lockwood Greene requested that Richland County agree to assume responsibility for maintenance of the levees if FEMA eventually agreed to certify a reconstructed levee on the Manning Property as an adequate flood control structure. Pl. Exh. 14. On January 26, 1999, less than a month before Burroughs & Chapin's scheduled closing, a Committee of Richland County Council considered Lockwood Greene's request. Def. Exh. 20a. The Committee recommended that County Council "authorize the Council Chairman or his Designee to begin first steps of responsibility and maintenance [of the Manning levee] contingent upon engineering certification, certification by the Corps of Engineers and approval and acceptance by FEMA." *Id.* This recommendation was forwarded to the next regularly scheduled County Council meeting held a week later on February 2, 1999. *Id.*

Although not a voting member of the County Council Committee, Mrs. Smith attended the Committee meeting. Tr. Vol. 12, p. 2279, lines 1-9. She left the meeting concerned that the County had not done enough analysis of Lockwood Greene's request. Tr. Vol. 12, p. 2279, lines 10-12. Mrs. Smith started making phone calls to people who were knowledgeable about the risks associated with levee construction and management, and grew very concerned about what the County might be getting into. Tr. Vol. 12, p. 2279, lines 13-18; p. 2357, lines 1-23. As a courtesy, she explained her concerns to Burroughs & Chapin's outside counsel about County Council taking action in a matter of days without more due diligence into issues of liability, costs, and public safety. Tr. Vol. 12, p. 2279, line 19 – p. 2280, line 13; Tr. Vol. 12, p. 2282, line 24 – p. 2283, line 17; Tr. Vol. 13, p. 2349, lines 7-15; Tr. Vol. 13, p. 2356, lines 12-25; Tr. Vol. 13, p. 2359, lines 21-25. She wanted the County to have "flexibility to conduct more research and gather more information before a final decision could be made." Tr. Vol. 12, p. 2280, lines 20-23.

Burroughs & Chapin pressed the County to take action on February 2, 1999, which was two weeks from the deadline for Mr. Manning to repurchase the Property so he could resell it to Burroughs & Chapin. Tr. Vol. 13, p. 2408, line 25 – p. 2409, line 7. Mrs. Smith stated to Burroughs & Chapin's outside counsel that she would do her best to accommodate Burroughs & Chapin while at the same time, ensuring that her concerns that the County lacked sufficient information to understand the consequences of Burroughs & Chapin's request were addressed. Tr. Vol. 12, p. 2282, lines 6-15. Burroughs & Chapin's outside counsel offered to draft a resolution that addressed her concerns. Tr. Vol. 12, p. 2280, line 14 – p. 2281, line 15; Tr. Vol. 12, p. 2396, lines 14-25.

During the Council Meeting on February 2, 1999, the Committee offered a motion to approve its recommendation “to authorize the Council Chairman or his designee to begin first steps of acceptance of responsibility and maintenance contingent upon engineering certification, certification by the Corps of Engineers and approval and acceptance by FEMA.” Pl. Exh. 147; Tr. p. 2389, lines 13-21. Mrs. Smith introduced the resolution drafted by Burroughs & Chapin’s outside counsel as a substitute motion. *Id.*; Tr. Vol. 12, p. 2283, lines 18-21; Tr. Vol. 13, p. 2390, lines 2-5. Burroughs & Chapin’s outside counsel was present at the County Council meeting, and stood up before Council to verify by a nod of his head that he was comfortable with the resolution. Tr. Vol. 12, p. 2283, line 22 – p. 2284, line 5.

Richland County Council unanimously adopted the following Resolution (“Levee Resolution”):

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

- (1) The property owners upgrade the levee system to meet FEMA standards as contained in 44 CFR 65.10;
- (2) The property owners prepare all required documentation including operation and maintenance plans;
- (3) Certification that the levee system, as upgraded, meets FEMA standards;
- (4) The parties, which include Richland County, the City of Columbia, and the developers, resolve the issues of the performance and funding of the operation and maintenance responsibility;
- (5) The County’s acceptance of responsibility terminates if the developers of the area do not invest at least \$30,000,000 within 10 years of the date of the adoption of this motion. Pl. Exh. 147.

Mr. Gregory conceded at trial that resolutions do not normally bind the enacting body to any particular course of action.¹¹ Tr. Vol. 6, p. 975, lines 1-16. He also acknowledged that the

¹¹ See *Glasscock Co. v. Sumter County*, 361 S.C. 483, 488-489, 604 S.E.2d 718, 721 (Ct. App. 2004) (“Resolutions do not normally have mandatory or binding effect.”).

resolution was not an ordinance and not a contract. Tr. Vol. 6, p. 977, lines 1-16. The contingencies listed in the resolution were not intended to be completed in the order they were listed. Tr. Vol. 12, p. 2284, lines 11-21. There was no certainty that any of the contingencies listed in the resolution could or would be met. *See* Tr. Vol. 3, p. 599, line 14 – p. 601, line 12 (Mr. Manning conceding that he was not able to predict whether the fourth contingency could be met).

The Board of Directors of Burroughs & Chapin recognized the contingent nature of this Resolution. On February 8, 1999, after the County Council adopted the Levee Resolution, the Board of Directors of Burroughs & Chapin reiterated that one of the criteria that had to be met before it purchased the Property was “that an agreement can be negotiated with Richland County to assume the maintenance of the dike system” Def. Exh. 4 at BandC020630. Columbia Venture never sought an opinion from its attorneys regarding whether it had any protected rights under the Levee Resolution. Tr. Vol. 5, p. 936, line 10 – p. 937, line 5.

Mr. McSwain, the County Administrator, understood the Levee Resolution to allow “the Council to bring together those parties who had interest in the project to be able to discuss those issues and try to resolve issues as we went along.” Tr. Vol. 13, p. 2517, line 24 – p. 2518, line 4. If the contingencies were not resolved to the County’s satisfaction, then the County had a right not to go forward. Tr. Vol. 13, p. 2518, lines 5-8. Similarly, Mrs. Smith understood the Levee Resolution to give the County time to fully explore issues such as liability and financing. Tr. Vol. 13, p. 2400, line 8 – p. 2405, line 15.

On the scheduled closing date of February 11, 1999, Burroughs & Chapin terminated the sale. Pl. Exh. 275. Burroughs & Chapin cited as reasons for the termination failure to resolve to its satisfaction “all issues related to FEMA floodway/floodplain, wetlands and the like” and

Burroughs & Chapin's inability to "obtain financing for the project satisfactory to the Buyer in its sole discretion."¹² *Id.*; Tr. Vol. 5, p. 923, lines 11-15. Thereafter, the parties scrambled to put the deal back together before Mr. Manning lost his right to re-purchase approximately half of his property on February 25, 1999.¹³ Tr. Vol. 5, p. 922, line 16 – p. 925, line 5; Pl. Exh. 262.

On February 18, 1999, Burroughs & Chapin obtained a letter from Lockwood Greene providing an assessment of the levee issue. Pl. Exh. 208. Lockwood Greene represented that "the floodway is currently at the toe of the levee along the Congaree River," and that preliminary flood maps of June 5, 1998 were "put on hold" by FEMA. Because communities can use FEMA's preliminary Flood Maps for local land use permitting purposes, and the County had in fact determined to utilize the preliminary Flood Maps for its own permitting actions, Lockwood Greene's statement erroneously implied that the preliminary Flood Maps were inconsequential. *Id.* at CV002275. It noted "preliminary indications" that FEMA's final Flood Maps may remove "a large portion of the property in Richland County" from the floodway. *Id.* at CV002276. Lockwood Greene stated that "based on FEMA regulations, if the levee system is classified as a protective structure, the Special Flood Hazard Classification can be removed" but failed to acknowledge the barriers to levee improvement under the County's ordinances. *Id.* at CV002275. With regard to the possibility that levee construction could increase the base flood elevations, Lockwood Greene turned to Lexington County's preliminary Flood Data for some sort of answer and concluded that this Flood Data "indicated" or "implied" that its contemplated

¹² Burroughs & Chapin had trouble attracting investors in order to finance the purchase price of \$18 million dollars. See Def. Exh. 5 at BandC020605; Def. Exh. 6 at BandC020612 (Burroughs & Chapin Board of Directors agreeing to put in \$3 million dollars and expecting another \$17 million to come from other investors and discussing difficulty in obtaining those investors); Tr. Vol. 6, p. 994, line 20 – p. 995, line 5; Tr. Vol. 6, p. 966, lines 2-16.

¹³ Mr. Manning would have lost his right to over 2,000 acres of the Property on February 17, 1999; however, he negotiated an extension of the deadline to February 25, 1999. Pl. Exh. 262. Mr. Manning would have lost the remaining acreage on July 16, 1999. *Id.*

levee improvements would not increase base flood elevations in Lexington County.¹⁴ *Id.* at CV002276.

On February 19, 1999, Burroughs & Chapin obtained from the Richland County Administrator a non-binding letter stating that the County would “work with the developers of the property on issues critical to the proposed development, such as zoning, tax incentive vehicles and a multi-county business park.” Pl. Exh. 24. The letter clearly stated that it was non-binding both at the head and foot of the letter. *Id.*

On February 19, 1999, Burroughs & Chapin and Mr. Manning entered into a Reinstatement of and Amendment to Purchase and Sale Agreement. Pl. Exh. 275. In this Agreement, the purchase price was restructured such that Mr. Manning was paid approximately \$11 million in cash, with the remainder of the consideration being approximately 8,550 membership shares in Columbia Venture, LLC. *Id.* Columbia Venture was required to redeem the Manning shares at a price of \$777.78 per share, plus interest, within 14 months. Def. Exh. 144 at § 2.19, CVMcNair000971.

Burroughs & Chapin assigned its interest in the purchase agreements to Columbia Venture, LLC. Pl. Exh. 277. The members of Columbia Venture were: Burroughs & Chapin Company, NLBF, Inc., Fort Carson Family Housing, LLC, Green Diamond, LLC, Lockwood Greene Engineers, Inc., and Carolina First Corporation. Def. Exh. 144 at CVMcNair000998. Green Diamond, LLC was an entity owned by Mr. Burwell Manning and members of his family. Def. Exh. 112 at BandC000285. Columbia Venture LLC was a member-managed limited liability company. Def. Exh. 144 at CVMcNair000973, CVMcNair001005. Under Columbia Venture’s operating agreement, Burroughs & Chapin was the managing member with sole

¹⁴ At trial, Columbia Venture’s engineer admitted that, during this time frame, Lockwood Greene “didn’t quite understand the full [levee] certification process.” Tr. Vol. 12, p. 2137, line 13 – p. 2138, line 10.

authority to make most decisions on behalf of Columbia Venture.¹⁵ Def. Exh. 144 at CVMcNair000973.

Columbia Venture bought the Property for \$18 million dollars when an appraisal in the possession of Columbia Venture prior to purchase valued the Property at \$30 million dollars. Pl. Exh. 255; Tr. Vol. 5, p. 864, lines 20-25. Columbia Venture believed at the time that, if its development scheme eventually collapsed, the Property could still be sold for \$30 million dollars, which would result in a \$12 million dollar profit. Tr. Vol. 5, p. 873, lines 12-22.

At the time of purchase, Columbia Venture expected to serve as the lead developer preparing buildable sites according to a master plan, then selling those parcels to residential home builders, commercial and retail interests, and others. It hoped to reap \$97 million dollars in profit. Def. Exh. 10; Pl. Exh. 254 at CV010863. Columbia Venture's preliminary land use plan prepared prior to purchase was described by Columbia Venture as in need of improvement and intended only to be used as a guide for potential investors. Pl. Exh. 264 at CVMcNair002450. Prior to purchase, Burroughs & Chapin did not prepare any economic feasibility study regarding the proposed development. Tr. Vol. 859, line 25 – p. 860, line 23. Columbia Venture's financial analysis of the project assumed that 50% of its infrastructure costs, including the \$12 million dollar cost to improve the levee, would be covered by a public financing package. Pl. Exh. 254. On the date of purchase, Burroughs & Chapin had no assurance that the County or any other governmental entity would be able or willing to provide this level of public financial support for the project.

As of the date of purchase, FEMA's preliminary Flood Map placed almost all of the Property within a floodway. Lockwood Greene's lead engineer on Columbia Venture's project

¹⁵ In December 2003, Burroughs & Chapin stepped down as manager, and Columbia Venture contracted with Whitehouse Plantation, LLC, whose members were Hughes Development Corporation, Charles L. McCallum, and Manning Kirk & Associates, to take over the management of the company. Pl. Exh. 402.

testified that this enlarged floodway “would have made it difficult if not impossible to develop the property the way that it eventually -- that eventually [Columbia Venture] intended to develop it.” Tillotson Dep. p. 12, lines 2-18. Therefore, Columbia Venture’s plan was to first attempt to convince FEMA to issue a new preliminary revised Flood Map showing no floodway on its Property, which would have removed significant regulatory barriers to upgrading the levee and developing the property. Pl. Exh. 264 at CVMcNair002450; Pl. Exh. 120 at CV012917; Tr. Vol. 12, p. 2131, line 2 – p. 2132, line 2; Tr. Vol. 12, p. 2136, line 24 – p. 2137, line 7; Tr. Vol. 12, p. 2138, line 23 – p. 2139, line 7. Yet prior to purchase, Columbia Venture had not performed any hydrological or hydraulic analysis to gauge whether this plan was even possible. Pl. Exh. 208; Tr. Vol. 5, p. 939, lines 21-24; Tillotson Dep. p. 67, lines 9-25. As of the date of purchase, FEMA’s restudy was ongoing, and no one knew what a subsequent revised preliminary Flood Map would show. Tr. Vol. 12, p. 2127, lines 7-14.

If Columbia Venture could have persuaded FEMA to remove the floodway designation from the Property, FEMA’s flood hazard zones A and AE would still remain on the Property. Tr. Vol. 12, p. 2143, line 16 – p. 2146, line 8. These zones triggered County requirements that any structures built within these zones must be elevated above the base flood elevation. *Id.* In order to remove the A and AE zone designations, Columbia Venture’s next step would be to upgrade its levee to meet the County’s levee design standard, and to meet FEMA’s certification standards, which would have the effect of revising FEMA’s Flood Map to remove the A and AE zones. *Id.* Columbia Venture planned to initiate this map revision process through what is called a Conditional Letter of Map Revision (“CLOMR”). Pl. Exh. 120 at CV012918 and CV012925-CV012926; Pl. Exh. 264 at CVMcNAIR002450; Def. Exh. 10 at CV010679; Tr. Vol. 12, p. 2138, line 23 – p. 2139, line 25; Tr. Vol. 12, p. 2142, line 25 – p. 2143, line 5; Tr. Vol. 12, p.

2231, line 20 – p. 2232, line 6; Wendel Dep. Exh. 136, p. 5. A “CLOMR” is defined as “FEMA's comment on a proposed project that would, upon construction, affect the hydrologic or hydraulic characteristics of a flooding source and thus result in the modification of the existing regulatory floodway, the effective base flood elevations, or the Special Flood Hazard Area (SFHA).” 44 C.F.R. § 72.2 (emphasis added).

A CLOMR enables the property owner to determine from FEMA whether a project, “if built as proposed, would justify a map revision.” 44 C.F.R. § 65.8. In other words, a CLOMR application submitted by Columbia Venture would consist of plans to construct a certifiable levee. A CLOMR application does not require any prior permit approvals from the County. If FEMA found Columbia Venture’s CLOMR application acceptable, then Columbia Venture would proceed to actual reconstruction of the levee, and thereafter, request a Letter of Map Revision to actually eliminate the A and AE zones behind the levee.

As of the date of purchase, Columbia Venture was not at all prepared to submit the extensive engineering analysis required as part of a CLOMR application to certify the levees pursuant to 44 C.F.R. § 65.10. It’s engineering analysis consisted of nothing more than preliminary soils analysis and topographic survey information. Pl. Exh. 208; Tr. Vol. 5, p. 939, lines 21-24; Tillotson Dep. p. 67, lines 9-25. No geotechnical investigation of the levees had been conducted to determine if or how the levees could be improved to meet FEMA’s standards for embankment stability or embankment protection against erosion.¹⁶ See 44 C.F.R. § 65.10(b)(3) and (4). Columbia Venture did not know whether it could upgrade its levee to meet FEMA’s levee certification requirements or the County’s levee standard. Tr. Vol. 6, p. 965, line 6 – p. 966, line 22. Columbia Venture had not submitted any plans, permit applications or

¹⁶ In fact, Mr. Wilson Tillotson, the lead engineer for Lockwood Greene on this project, testified that preliminary geotechnical analysis had not been done before August 1999, almost six months after Columbia Venture purchased the property. Tillotson Dep. p. 47, lines 11-25; p. 48-52; p. 53, lines 1-15.

development agreements to Richland County for review or consideration prior to purchase. Tr. Vol. 13, p. 2516, line 20 – p. 2517, line 8.

Regarding Richland County's Floodplain Ordinances, Columbia Venture knew at the time of purchase that the Planning Department interpreted the Floodway Provision within the Zoning Ordinance to essentially prohibit construction in a floodway, including a levee upgrade. Def. Exh. 17 at CV013350; Def. Exh. 31; Pl. Exh. 497 at CV013562. Mr. Gregory testified that he understood that the County Engineer interpreted the Floodway Provision within the Storm Drainage Ordinance as meaning the same as FEMA's "no-rise" standard, which could possibly allow construction in a floodway. Nevertheless, the County Engineer did not give any assurances to Burroughs & Chapin or Columbia Venture that the project would be approved and could be developed. Tr. Vol. 8, p. 1461, lines 14-19.

In contrast to the County Engineer's interpretation, Columbia Venture's engineer understood the Storm Drainage Ordinance to prohibit construction in a floodway. Tr. Vol. 12, p. 2125, line 21 – p. 2126, line 16; Tr. Vol. 12, p. 2132, lines 3-8; Tr. Vol. 12, p. 2134, lines 9-23; Tr. Vol. 12, p. 2141, line 3 – p. 2142, line 24; *see also* Tillotson Dep. p. 12, lines 2-18. Columbia Venture also knew that FEMA viewed the County's regulations as preventing construction in a floodway. Pl. Exh. 11 at DEF-000000016.

Several days after the closing, Columbia Venture announced ambitious plans for a one billion dollar development on the property soon to be called "Green Diamond." Billed as a "city within a city," the initial Green Diamond plan included residential use, golf courses, an outlet mall, restaurants and hotels, offices, retail businesses, a research and development park, a retirement village, a theme park, and a wildlife expo, all to be constructed on the Congaree River floodplain. Pl. Exh. 264 at CVMcNair002445.

On February 25, 1999, FEMA released a revised preliminary Flood Map that reduced the floodway in comparison to the June 5, 1998 preliminary Flood Data, but nonetheless designated about 50% of Columbia Venture's Property as being within a floodway. Pl. Exh. 286, 287. Columbia Venture was surprised and dismayed by this Flood Map. Wendel Dep. p. 180, line 4 – p. 184, line 17; Wendel Dep. Exh. 136, at CV010843 – CV010844.

In the Spring of 1999, Columbia Venture wanted to perform some maintenance on its levee that would have required a land disturbance permit from the County.¹⁷ In an effort to accommodate what the County Administrator apparently saw as a reasonable request, the County Administrator agreed to use for permitting purposes the currently effective Flood Maps of 1994/1995, which had no floodway on the Property, instead of the February 25, 1999 preliminary Flood Maps. Pl. Exh. 4; Pl. Exh. 162. By using the 1995 Flood Maps, the County made it possible for Columbia Venture to seek a permit to perform this maintenance without contending with the restrictions imposed by the County's Floodway Provisions. See Pl. Exh. 250a, § 26-73.5(2)(a), Richland County Zoning Ordinance (1999).

On May 6, 1999, Lockwood Greene submitted to the County Engineer's office an application for a land disturbance permit to perform levee maintenance. Pl. Exh. 119. Columbia Venture's permit application was not intended to upgrade the levee to meet FEMA's levee certification standards. Tr. Vol. 4, p. 779, line 18 – p. 780, line 7; Tr. Vol. 2, p. 385, line 20 – p. 386, line 1; Tr. Vol. 12, p. 2161, lines 6-12. The application was submitted for the purpose of restoring some sagged and eroded sections of the levee embankment back to its original design.

¹⁷ The permit application that Columbia Venture did submit was described by Lockwood Greene as a permit for levee maintenance. See Pl. Exh. 118 at CV013152. Neither party could locate the actual plans that were included with the application, but some levee maintenance activities, such as filling sagged or eroded levee embankments to restore the levee slope to its original design, would require a land disturbance permit. See Pl. Exh. 230, § 8-15(j) (defining "land disturbance" as "any activity involving the clearing, grading, transporting, filling, and any other activity which causes the land to be exposed to the danger of erosion."); § 8-72(3)(b) (establishing as a levee maintenance standard that "levee embankments will be maintained to not less than the design grade and section by replacing any loss of material from the crown or slopes.")

Tr. Vol. 4, p. 779, line 18 – p. 780, line 7; Tillotson Dep. p. 58, line 16 – p. 59, line 23. The application was incomplete. Pl. Exh. 119. Consequently, the County disapproved the application until additional information was received. *Id.* Columbia Venture did not subsequently submit a complete application. Tr. Vol. 12, p. 2164, line 18 – p. 2165, line 5; Tr. Vol. 13, p. 2598, lines 1-6; Tr. Vol. 7, p. 1339, line 11 – p. 1340, line 19; Tr. Vol. 8, p. 1453, lines 5-19; Tr. Vol. 8, p. 1447, line 19 – p. 1448, line 19.

Lexington County became aware of Columbia Venture's permit application which prompted concerns about the consequences of Columbia Venture actually upgrading the levees to meet FEMA's certification requirements and the County's levee design standard. Tr. Vol. 15, p. 2691, lines 7-11. Mr. Charles Compton, the Lexington County Planning Director at the time, testified that levee upgrades "create[d] a scary image for Lexington County property owners." Tr. Vol. 15, p. 2691, line 21 – p. 2692, line 2. The prospect of improved levees in Richland County created a "situation where water that previously might not come would be coming towards Lexington County." Tr. Vol. 15, p. 2692, lines 3-13. Lexington County's top concern was that an upgraded levee on the Richland County side of the Congaree River would cause greater flooding in Lexington County. Tr. Vol. 15, p. 2692, line 22 – p. 2693, line 3. Lexington County expressed these concerns to Richland County officials. Tr. Vol. 15, p. 2693, lines 4-6.

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

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

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

FEMA respectfully asks that you delay a decision on levee construction until after the next public hearing and after all parties have had input into developing the best possible flood risk maps. ... Pl. Exh. 31.

The County followed FEMA's advice in using the February 25, 1999 Flood Data for permitting purposes. Tr. Vol. 13, p. 2583, line 16 – p. 2585, line 19. Under the February 25, 1999 Flood Data, Columbia Venture's levees were located within a floodway; thus, the County's Floodway Provisions would have applied.

In keeping with its strategy of attempting to convince FEMA to issue another revised Flood Map that would be favorable to its development plans, Columbia Venture hired experts to make its case to FEMA that the Flood Map should not show a floodway on Columbia Venture's Property. Def. Exh. 34; Def. Exh. 15; Pl. Exh. 294; Tr. Vol. 12, p. 2153, line 10 – p. 2155, line 25. After performing hydrological, hydraulic, and geotechnical analysis and conferring with FEMA, Columbia Venture's experts discovered that producing a Flood Map with no floodway on the Property was not possible. Def. Exh. 2 at CV013369. Under Columbia Venture's data submittal to FEMA, the levee would remain in the floodway, but the rest of the Property would not be in a floodway. *Id.*; Def. Exh. 37. On August 12, 1999, FEMA issued new preliminary revised Flood Data that incorporated Columbia Venture's data. Pl. Exh. 304; Pl. Exh. 305.

Because FEMA's new Flood Map would place the levee system within the floodway, and this map appeared to be moving toward finalization, the restrictions imposed by the County's

Floodway Provisions were given real attention for the first time. The County Attorney questioned the County Engineer's interpretation of "impede" in the Floodway Provision of the Storm Drainage Ordinance, advising him that the word "impede" should be interpreted according to its plain and ordinary meaning. Tr. Vol. 8, p. 1399, line 15 – p. 1401, line 11. Columbia Venture disagreed with the County Attorney. *See* Def. Exh. 151 at DEF-00002167; Pl. Exh. 507 at CV009803 – CV009804.

The deadline to submit any appeals of FEMA's August 12, 1999 Flood Data was December 13, 1999. Numerous appeals were submitted challenging FEMA's reduced floodway, including an appeal by the South Carolina Department of Natural Resources ("SCDNR"). Pl. Exh. 311. FEMA found that three appellants provided sufficient data to be recognized as appellants – SCDNR,¹⁸ Dr. John Grego, and McNair Law Firm – and thus FEMA initiated its administrative appeal process. *Id.*

Faced with this turn of events, Columbia Venture chose not to proceed with development of its Property until after FEMA issued its appeal resolution. Def. Exh. 46 at CV000883; Def. Exh. 49. After FEMA issued its appeal resolution, Columbia Venture planned to initiate discussions with the City and County regarding economic development incentives; construction, ownership, operation and maintenance of the levees; levee liability issues; annexation and zoning. Def. Exh. 46 at CV000883. Columbia Venture planned to seek annexation into the City of Columbia followed by submittal of an economic incentive package. Def. Exh. 46 at CV000885; Def. Exh. 48 at CV010671; Def. Exh. 49. Columbia Venture hoped to commence levee construction, assuming the floodplain regulatory issues could be resolved, upon approval

¹⁸ Richland County was not an appellant. Def. Exh. 45. SCDNR appealed independently of, and not on behalf of Richland County. Tr. Vol. 12, p. 2216, line 14 – p. 2217, line 4; *see also* Wendel Dep. p. 81, lines 18-21.

of the development agreement and financing package. Def. Exh. 46 at CV000885; Def. Exh. 48 at CV010671; Def. Exh. 49.

In May 2000, Columbia Venture began meeting quietly with Richland County, the City of Columbia and others in order to move the project forward. Pl. Exh. 4 at DEF-00004862; Pl. Exh. 506, p. 2; Def. Exh. 48, p. 670. The County and Columbia Venture began jointly developing a work plan. Pl. Exh. 4 at DEF-00004862. Richland County retained Nelson Mullins Riley & Scarborough (“Nelson Mullins”) to assist with legal aspects of the project. *Id.* Due to the complexity of the proposed Columbia Venture development, the County began developing a strategic approach and identifying administrative tasks and policy decisions in order to provide for “thorough due diligence.” Def. Exh. 53. Mrs. Smith, County Council chairwoman at the time, stated her goal of making sure “that Council has complete information to make informed decisions on all facets of the ... proposed development and that the public has full confidence in our efforts.” *Id.* Towards this end, the County prepared a list of issues for deliberation, including levee improvements, levee maintenance, financing of levee maintenance, and economic development incentives. Def. Exh. 54.

On August 23, 2000, the County provided Columbia Venture with a copy of its proposed revisions to its Sediment and Erosion Control Ordinance and Storm Drainage Ordinance. Def. Exh. 151 at DEF-00002125. The ordinance revisions combined its Sediment and Erosion Control Ordinance and Storm Drainage Ordinance into a comprehensive Stormwater Management, Erosion and Sediment Control Ordinance (“Stormwater Ordinance”). Pl. Exh. 112. The Stormwater Ordinance contained the same “impede” standard within its Floodway Provision. *Id.* at DEF-00002199. Because the meaning of the word “impede” remained

unsettled, the issue of interpretation of the word “impede” was added to the County’s draft work plan. Def. Exh. 133.

In June 2000, Columbia Venture borrowed \$7.5 million dollars to buy out Mr. Burwell Manning’s interest in Columbia Venture. Def. Exh. 10 at CV010680; Def. Exh. 50 at CVMcNair01045. The principal and interest was due on November 2, 2000 with an option to renew the loan until March 30, 2001 if not paid out at maturity. Def. Exh. 50 at CVMcNair01045. Columbia Venture anticipated that the appeals would be resolved with a map favorable to its development plan. Def. Exh. 10 at CV010679. Columbia Venture anticipated that it would then sell the repurchased shares to a potential investor for \$10 million dollars before its note was due. Def. Exh. 10 at CV010680. This cash infusion would give Columbia Venture working capital to proceed with its development plans. Def. Exh. 10 at CV010682.

On September 26, 2000, FEMA announced the result of the administrative appeals brought by SCDNR and others (“Appeal Resolution”). Pl. Exh. 336; Pl. Exh. 337. Much to Columbia Venture’s shock and dismay, the Appeal Resolution expanded the floodway to cover approximately 70% of Columbia Venture’s Property. Pl. Exh. 338. Based on conversations with FEMA, the County understood that, even if the County interpreted the Floodway Provision within its Stormwater Ordinance to mean “no-rise,” Columbia Venture’s project would be difficult to accomplish under the Appeal Resolution because improving the levees would likely cause a rise in base flood elevations.¹⁹ Pl. Exh. 4 at DEF-00004864. To avoid a rise in base flood elevations, Columbia Venture could move the levee further back from the Congaree River. *Id.* Otherwise, Columbia Venture would have to demonstrate that the levee upgrade would cause no adverse effect on Lexington County. *Id.*; *see also* 44 C.F.R. § 65.12. Another option

¹⁹ Columbia Venture was aware of this problem as well. *See* Wiseman Dep. p. 113, line 6 – p. 114, line 10 (stating that FEMA’s Appeal Resolution made Columbia Venture’s project difficult to accomplish).

available to Columbia Venture was to seek to redraw the floodway such that its levees were no longer within the floodway. Pl. Exh. 523, #13. Floodway revisions must meet the requirements of 44 C.F.R. § 65.7, which requires engineering analysis, and concurrence by all affected communities. *Id.*

Columbia Venture asked to be recognized as an appellant and be afforded the opportunity to submit additional data challenging the Appeal Resolution. Def. Exh. 62. FEMA agreed to Columbia Venture's request; thus, a second round of administrative appeal began. Pl. Exh. 345. As its meeting minutes reflect, Columbia Venture was hopeful that it would prevail in its appeal, resulting in final Flood Maps that would not include the broad floodway shown on the September 26, 2000 Appeal Resolution. Pl. Exh. 508; Pl. Exh. 509 and Pl. Exh. 510.

Due to the unexpected Appeal Resolution, the County suspended substantive negotiations with Columbia Venture until Columbia Venture's administrative appeal was concluded. Pl. Exh. 4, p. 4; Def. Exh. 151 at DEF-00002155. During this period, the County continued to educate itself about issues related to Columbia Venture's project "in order to make responsible, informed decisions about the Green Diamond Project." Def. Exh. 151 at DEF-00002142, DEF-00002145 – DEF-00002147, DEF-00002154. Throughout the fall of 2000, the County conducted research regarding floodplain and levee issues, and organized educational forums featuring nationally recognized experts. *Id.*; Def. Exh. 64.

In the meantime, Columbia Venture publicly revealed for the first time its preliminary concept plan and vision for the Property in order to gain support from local elected officials. Pl. Exh. 4 at DEF-00004865; Pl. Exh. 344. Further, Columbia Venture sought to persuade the County that the County Attorney's interpretation of the word "impede" in the Floodway Provision of the Storm Drainage Ordinance was incorrect. Pl. Exh. 4 at DEF-00004865. A

citizen group called the Congaree Task Force emerged, holding its first press conference opposing the project. Pl. Exh. 4 at DEF-00004865.

As part of the County's due diligence, the County asked Nelson Mullins to review the Stormwater Ordinance's new variance provision, and render an opinion concerning the meaning of the word "impede" within the Floodway Provision. Pl. Exh. 114; Def. Exh. 67; Pl. Exh. 115. The County invited Columbia Venture to offer its own legal analysis of the Floodway Provision within the Stormwater Ordinance. Def. Exh. 151 at DEF-00002157, DEF-00002158. Additionally, Nelson Mullins was asked to prepare an opinion for the County addressing potential liability assuming the County took responsibility for maintaining the levees, the levees were constructed, and a subsequent levee failure occurred ("County Legal Opinion"). *See* Def. Exh. 70, p. 2.

During this time period, Columbia Venture was experiencing financial pressure. Def. Exh. 10 at CV010680. It was not able to repay its note for its \$7.5 million dollar loan on November 2, 2000 because its potential investor decided to wait until after FEMA resolved Columbia Venture's administrative appeal. Def. Exh. 10 at CV010682. This left Columbia Venture with no cash on hand to repay the note. *Id.* Columbia Venture decided to press FEMA to accept a floodway that would allow it to upgrade its levees prior to the note's extended due date on April 2, 2001. Def. Exh. 10 at CV010682; Def. Exh. 73 at BandC020876. It also wanted to complete negotiations with the City and County for an incentive package and a development agreement by mid-2001. Def. Exh. 10 at CV010683. If it was not possible to achieve these goals, Columbia Venture would consider a variety of exit plans. *Id.* It estimated that sale of its Property as-is would yield slightly over \$26 million dollars. *Id.*; Pl. Exh. 344, p. 2.

In January 2001, Columbia Venture proposed the creation of a working group comprised of representatives from Richland County, the City of Columbia and Columbia Venture “to continue discussions and negotiations regarding details of the proposed Green Diamond Project.” Def. Exh. 151 at DEF-0002169. The County agreed to participate in the proposed working group but was not prepared to negotiate any development approvals until FEMA issued its final determination. Def. Exh. 151 at DEF-00002171; *see also* Pl. Exh. 4 at DEF-00004868 – DEF-00004869. The County suggested that the group focus on several threshold issues, including levee certification, options for structure of levee operation and maintenance, and economic development incentives. Def. Exh. 151 at DEF-00002171-DEF-00002172.

On January 12, 2001, Nelson Mullins presented its legal opinions to the County.²⁰ Def. Exh. 67; Pl. Exh. 4, p. 7. In its opinion interpreting the Floodway Provision within the Stormwater Ordinance, the opinion stated:

Applicable law provides that words should be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand an ordinance’s or statute’s operation. “Impede” has been defined to mean “to interfere with or slow the progress of,” Merriam-Webster’s Collegiate Dictionary 580 (10th ed. 2000), and “to obstruct; hinder; check; delay.” Black’s Law Dictionary 753 (6th ed. 1990). Thus, Subsection (h) would appear to prohibit any structure which would interfere with or slow the free flow of water during times of flooding, while the comparable NFIP provision would appear to allow such a structure if it would not result in any increase in flood levels during a 100-year flood. Def. Exh. 67.

²⁰ Regarding the variance provision within the Stormwater Ordinance, the draft Stormwater Ordinance contained for the first time an express variance provision applicable to storm drainage. *See* Pl. Exh. 113, § 8-25, Draft Stormwater Ordinance, *compare with* Pl. Exh. 230, § 8-50 – 8-71, Storm Drainage Ordinance (1994). Nelson Mullins raised potential problems with the variance provision as applied to the floodplain management regulations contained within the Stormwater Ordinance, and advised the County to give further consideration to the proposed variance provision as it applied to floodplain management provisions. Def. Exh. 67, p. 5-6. In the end, upon advice of counsel, the County deleted the variance provision. The EPA’s required variances were included in § 8-33, which incorporated certain DHEC regulations, including S.C. Code Regs. 72-302, a variance provision applicable to stormwater management requirements within the ordinance. FEMA’s required variance criteria was incorporated via § 8-26(i), Pl. Exh. 374.

Regarding potential liability related to levee maintenance, Nelson Mullins concluded that:

Cases against political subdivisions regarding levee maintenance, or more generally, drainage system maintenance, are not rare. In most of the reported cases that we have reviewed, the political subdivision has ultimately won, although often only after extensive litigation and appeals. In this connection, the County may be able to take certain actions to reduce the possibility of liability and/or to shift/insure risk, such as indemnity agreements, bonds, letters of credit and pre-paid insurance, but it does not appear possible to eliminate exposure for major liability. *Id.* at p. 5.

During a County Council work session held in February 2001 to review and understand the water quality provisions of the new Stormwater Ordinance, County Council asked staff for more information about the Ordinance's Floodway Provision in order to determine whether the word "impede" needed to be changed. Pl. Exh. 51. The County staff provided a research report to County Council with several options, including the option of "hold[ing] off on considering changes to this section right now, with the understanding that the section is interpreted to allow virtually no construction ... in a floodway." *Id.* at DEF-00002254. County staff informed County Council that they were working on a comprehensive floodplain management ordinance that would combine the floodplain regulations from the Zoning Ordinance and Stormwater Ordinance into a single consolidated ordinance. *Id.* Staff recommended that County Council defer any decision on the Floodway Provision until it had the opportunity to consider floodplain management regulation in a comprehensive fashion. *Id.*

However, the City of Columbia and Heathwood Hall, who both had sizable investments in structures located on their property, were not prepared to wait much longer.²¹ Tr. Vol. 3, p. 630, lines 13-20. The City had plans to improve its wastewater treatment plant, and the floodway designation, if finalized by FEMA, would have prevented construction in a floodway

²¹ In contrast, the only structures on Columbia Venture's property were barns, a grain facility, a house and an office. Tr. Vol. 3, p. 630, lines 7-12.

under the County's ordinances absent a variance. Pl. Exh. 250a; Def. Exh. 76. Heathwood Hall also decided move forward expeditiously with its existing expansion plans. Pl. Exh. 184. In March 2001, both the City²² and Heathwood Hall urged Richland County amend its Stormwater and Zoning Ordinances to allow construction to occur in a floodway. Pl. Exh. 184; Def. Exh. 76.

In response to these concerns, the Southern Environmental Law Center ("SELC") proposed to the County an amendment to the Floodway Provision for County Council's consideration that would create limited exceptions for pre-existing uses such as schools and wastewater treatment plants. Pl. Exh. 185. The County staff prepared a proposed amendment to the Floodway Provision based in part on SELC's proposal. Def. Exh. 82, p. 12. On March 20, 2001, Council gave first reading to the Stormwater Ordinance as amended to include the exceptions. Pl. Exh. 186. The amendment in effect allowed Heathwood Hall and the City's wastewater treatment plant to expand provided that they demonstrate that their expansion plans met FEMA's "no-rise" standard governing encroachments in a floodway. Def. Exh. 82, p. 12. Richland County Council expressly stated as part of its motion²³ for first reading that its vote "in no way reflects Council's position on any development in [the Congaree River floodplain]." Pl. Exh. 186.

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

While we continue to have concerns over the proposed amendment to the stormwater ordinance you are currently considering, Columbia Venture has decided that at this time our focus should be squarely on

²² The City's wastewater treatment plant was exempt from the requirements of the Stormwater Ordinance under § 8-7(e). It sought revisions to the Floodway Provision within the County's Zoning Ordinance.

²³ The County Council minutes for its March 20, 2001 meeting also included a statement by Council Member Bemice Scott, an advocate for Columbia Venture, who wanted the record to reflect her opinion that "this motion is definitely against any development in that area." Pl. Exh. 186 at DEF-00012099; Wiseman Dep. p. 146, line 8 – p. 147, line 18 (describing Mrs. Scott as a "very strong" supporter of the Green Diamond project, who talked "with everybody she could" to gain support for the project). Her statement was not made part of the Council's motion; therefore, it reflects her opinion only, which she is of course entitled to express.

producing our formal development proposal and working toward a development agreement with Richland County, Richland County School District One, and possibly the City of Columbia.

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

For these reasons, and because of your statements that votes on the stormwater ordinance should not be viewed as up or down votes on Green Diamond, we are withdrawing any active opposition to the amendment currently before you. Def. Exh. 1.

Columbia Venture defined “formal development proposal” as including a CLOMR for levee certification, which could serve as the impetus for any future revision of the Stormwater Ordinance. Wendel Dep., p. 162, line 11 – p. 164, line 11.

On April 2, 2001, Columbia Venture also provided a notebook of technical information to the City of Columbia, Richland County and Richland County School District One. Pl. Exh. 4, p. 11; Pl. Exh. 550. Columbia Venture cautioned that the information submitted was preliminary in nature and modifications may be appropriate based on the outcome of FEMA’s study, and future negotiations with local governments. Pl. Exh. 550. In its cover letter accompanying the technical report, Columbia Venture explained that a CLOMR application for levee certification could not be submitted until after FEMA finished its remapping process.²⁴ Pl. Exh. 550. Once FEMA concluded its restudy, Columbia Venture would prepare and submit the application for levee certification “reflect[ing] whatever the jurisdictional status of the Green Diamond property may be at that time.” *Id.* In addition, Columbia Venture stated that it was working on a

²⁴ See also Wiseman Dep. p. 64, line 14 – p. 65, line 6 (Columbia Venture’s project manager explaining that “you can’t provide the engineering documents for a CLOMAR until you know exactly what the FEMA engineering data is. So that was – that was changing and there was no specific data. In other words, there was no – FEMA was sending out different signals on what data to use to actually provide the CLOMAR documents or be able to use in a CLOMAR application.”).

comprehensive development proposal to be submitted in mid-April. Def. Exh. 550. Columbia Venture intended this proposal to serve as “the basis for extensive discussions and to reach agreement on how the project should proceed.” *Id.*

Subsequent to County Council’s first reading of the Stormwater Ordinance, Heathwood Hall offered its suggested revisions to certain terms in the draft ordinance in order to address its concern that there be clear authority for levee maintenance. Pl. Exh. 184; Pl. Exh. 362. Unlike the City of Columbia, Heathwood Hall did not own the levees in front of its property. Pl. Exh. 362 at DEF-00002266. Heathwood Hall wanted to make sure that any amendment to the Floodway Provision did not inadvertently call into question the right of Columbia Venture to maintain its levee. Pl. Exh. 362. The County’s legal counsel fine-tuned the language of the exceptions within the ordinance’s Floodway Provision, incorporating input from Heathwood Hall, Columbia Venture, and SELC. Pl. Exh. 4, p. 10; Def. Exh. 77. The County’s Stormwater Ordinance became effective on April 17, 2001. Pl. Exh. 374. The relevant portion of the ordinance is as follows:

- (g) All levees protecting residential structures or non-residential structures which are not floodproofed shall be designed, constructed and maintained to provide protection against the 500-year flood plus three (3) feet of freeboard. ... Any levee constructed or improved under this subsection shall also comply with the other provisions of this Chapter, including, but not limited to, subsection (h) below.
- (h) Notwithstanding any other provision of this Chapter, no levees, dikes, fill materials, structures or other obstructions that will impede the free flow of water during times of flood will not be permitted in the regulatory floodway, unless:
 - (1) such proposed impediment is or would be a part of or used by any public or private school that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway; or
 - (2) such proposed impediment is or would be a part of or used by any publicly owned wastewater treatment facility that was constructed and

- operated before January 1, 2001 on property subsequently classified as a regulatory floodway; or
- (3) such proposed impediment is a minor recreational or playground facility or area, such as, but not limited to, a boat ramp, floating dock, picnic area, soccer goal, or swing set; or
 - (4) such impediment was approved by the County Engineer under this subsection (h), or under any predecessor provision, before January 1, 2001;

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

(i) National Flood Insurance Program

All applicable regulations of the National Flood Insurance Program are incorporated by reference herein. Pl. Exh. 374, § 8-26, Stormwater Ordinance (2001).

As amended, the word “impede” within the Stormwater Ordinance was understood by all to mean that essentially no meaningful construction was permitted within a floodway. Tr. Vol. 14, p. 2617, line 17-25. The general rule of “no-impede” applied to all property within a floodway. The listed land uses within a floodway excepted from the general rule were required to meet FEMA’s minimum “no-rise” standard, and structures had to be either elevated or flood-proofed. Tr. Vol. 12, p. 2262, lines 6-14.

Richland County’s more restrictive “no-impede” standard served the interest of protecting public health and safety because FEMA’s flood maps “do not account for the continued urbanization and development of the corresponding watersheds and the resulting increase in stormwater runoff and potential flooding.” Tr. Vol. 14, p. 2618, lines 1-25. FEMA Flood Maps “rely on historical flood records and don’t project the potential of increased flooding in the future from urbanization or from the possibility of more intense storms due to climate

change.” Tr. Vol. 14, p. 2619, lines 3-7. FEMA’s regulatory floodway does not take into account future conditions. Tr. Vol. 12, p. 2225, line 18 – p. 2226, line 5. Thus, allowing encroachments within a floodway under FEMA’s minimum no-rise standard will, over time, cause base flood elevations to rise. Tr. Vol. 12, p. 2226, lines 7-14; *see also* Tr. Vol. 15, p. 2693, line 7 – p. 2694, line 12 (Mr. Compton stating that “flood conditions are constantly changing, generally rising because of increased runoff So the protection you need is going to beyond what an insurance map for that one snapshot gives you.”). By prohibiting construction within a floodway, a community “preserve[s] the flood storage capacity and keep[s] people out of harm’s way,” Tr. Vol. 12, p. 2226, lines 15-19. The County was not alone in imposing a more restrictive standard. Lexington County’s floodplain management regulations prohibited any encroachment within a floodway unless a variance was granted. Tr. Vol. 15, p. 2697, lines 12-17. As discussed above, FEMA regulations expressly encourage local floodplain regulations that go beyond the minimum standards mandated by FEMA.

Mr. Michael Criss, Richland County’s Planning Director at the time, testified that Richland County citizens, including those who own property in a floodway, benefit from the County’s more restrictive standard in the following manner:

Well, they, themselves, are directed to build out of harm’s way than would otherwise be the case. Their neighbors have to do the same, so that the neighbors aren’t causing increased flooding on the given property owner’s land. The property owner has the availability of affordable flood insurance for their own assets. Presumably they contribute fewer tax dollars to the cost of flooding. Tr. Vol. 14, p. 2619, lines 8-24.

When asked about the difference, in terms of floodplain management and flood protection, between permitting continued use of a school facility that is already located in a floodway and permitting construction of an entirely new mixed use development, Mr. Criss testified that:

Well, of course, an existing school facility would be difficult to move/relocate. It's not typically occupied 24/7, such as a residential community would be. It would still benefit from flood proofing and flood prevention measures for the safety of faculty and students and other users. Tr. Vol. 14, p. 2621, lines 12-23.

When asked about the difference, in terms of floodplain management and flood protection, between permitting continued use of a sewer plant that is already located in a floodway and permitting construction of an entirely new mixed use development, Mr. Criss testified that:

The sewer plants and water treatment plants and power plants are dependent on proximity to water. The sewer treatment plants, in particular, generally rely on gravity sewer systems that run along streaming [sic] and river corridors, so they're inherently located close to flooding sources. Mixed use communities, of course, involve homes and businesses and offices and intense infrastructure, development, to support them. ... [Mixed use communities attract] more people living, working, recreating. And a new community development in the floodplain is coming to the nuisance, is risking the exposure to the hazard that's already been established by the community. Tr. Vol. 14, p. 2621, line 24 – p. 2622, line 20.

On the same day that County Council gave third reading to the Stormwater Ordinance, the County Council provided a list of information requests to Columbia Venture “as a proactive communication letting the Company know what the County wants included in its [development] proposal.” Pl. Exh. 4, p. 12. Also on this same day, Columbia Venture requested to appear before County Council to present a development proposal. *Id.* Council scheduled time to hear Columbia Venture during its next regular meeting held on May 1, 2001. Pl. Exh. 4, p. 12.

On May 1, 2001, Columbia Venture presented to Richland County Council a document entitled “The Simple Truth About Green Diamond.” Pl. Exh. 4, p. 12; Def. Exh. 79. In “The Simple Truth About Green Diamond,” Columbia Venture proposed that its Property be added to the County’s existing Multi-County Business Park. Def. Exh. 79, p. 2. The document requested approximately \$80 million dollars in infrastructure costs to be paid through the sale of special

source revenue bonds. Def. Exh. 79, p. 2. These costs included approximately \$8 million dollars for levee construction, and \$300,000 per year for maintenance, insurance costs and permitting. *Id.* at 3. The document contained no draft ordinances relating to a multi-county business park or special source revenue bonds, and no draft development agreement. Def. Exh. 79. It did not explain what it was seeking from the County, other than the designation of the Property as a multi-county business park. *Id.* The document's discussion concerning levee construction, operation and maintenance was directed toward the City of Columbia. Def. Exh. 79, p. 2. On May 15, Columbia Venture petitioned the City of Columbia to annex its Property. Def. Exh. 84. If the City of Columbia annexed the Property, then Columbia Venture's Property would no longer be subject to the County's floodplain management ordinances.

During the summer of 2001, Columbia Venture launched an aggressive public relations campaign, including mass mailings, newspaper ads, a petition drive, a telephone survey, and television commercials. Pl. Exh. 510, p. 2; Def. Exh. 11. Columbia Venture concluded that opposition from Congaree Task Force "peaked months ago" and "now that we are building our case, they have nothing to say." Def. Exh. 11, p. 1. According to Columbia Venture's meeting minutes dated June 29, 2001, Columbia Venture planned to submit a development agreement to the City of Columbia, and expected its application for levee certification to be submitted to FEMA by the City of Columbia. Pl. Exh. 510, p. 2. By July 2001, Columbia Venture was running out of money. Pl. Exh. 510, p. 3.

On August 20, 2001, FEMA issued its final Congaree River Flood Data. Pl. Exh. 381. FEMA's final determination reaffirmed its prior decision of August 20, 2001 that put approximately 70% of Columbia Venture's Property in a floodway. Pl. Exh. 381. 3,130 acres of Columbia Venture's Property was within the floodway. Def. Exh. 99, CV000541. 1,135 acres

were outside of the floodway. Def. Exh. 99 at CV000541. Columbia Venture appealed FEMA's final determination to the United States District Court.²⁵ Am. Compl. ¶ 68.

Columbia Venture's engineers evaluated its options regarding upgrading its levees to meet FEMA certification requirements. Def. Exh. 99 at CV000467-CV000472. One engineer's preliminary analysis stated that "the net result of the [Flood Map] is that FEMA now shows a greater rise in the water level upstream of the Manning levee should it be certified," and that to avoid increased flooding upon Lexington County, the levee would need to be reconfigured. *Id.* at CV00468. Another engineer examined Columbia Venture's options and identified few levee certification options that would not cause increased flooding on the Lexington County side of the River. *Id.* at CV000471-CV000472.

Columbia Venture started exploring exit strategies. Tr. Vol. 4, p. 810, lines 6-7; Def. Exh. 9; Def. Exh. 99. In early 2002, Columbia Venture decided to pursue an agreement with the City of Columbia for a scaled-back project to upgrade only Levee Section 1 which would allow Columbia Venture to develop 1,500 acres.²⁶ Def. Exh. 99 at CV000530, CV000534; Def. Exh. 104, p. 2; Def. Exh. 105; Def. Exh. 108. However, members of City Council were divided over this proposal, and it appears that the City of Columbia chose not to accept Columbia Venture's proposal. *Id.* The City of Columbia eventually declined to annex Columbia Venture's Property. Tr. Vol. 13, p. 2524, lines 8-21.

Columbia Venture also looked at selling the Property.²⁷ Def. Exh. 99 at CV000541. It believed it could sell its Property within the floodway for \$3,067 per acre, and most of its Property outside of the floodway for \$18,500 per acre, for a total of approximately \$26 million

²⁵ See the Special Referee's Due Process Order for a full account of events that transpired relating to Columbia Venture's judicial appeal.

²⁶ Columbia Venture believed that the scaled-back project of upgrading only Levee Section 1 would not cause any rise in base flood elevation. *See* Def. Exh. 106 at BandC020848.

²⁷ Columbia Venture eventually sold approximately 3,000 acres for \$10.4 million dollars. Def. Exh. 128.

dollars. *Id.*; see also Def. Exh. 99 at CV000542. Columbia Venture received an offer from Florida Rock Industries to buy 360 acres for approximately \$3.3 million dollars. Def. Exh. 103. Additionally, Columbia Venture received an offer to buy the whole Property for approximately \$26 million dollars. Def. Exh. 109.

Columbia Venture's examination of its options revealed that the Property retained value in spite of the new Flood Map. It had in hand a plan to make \$10 million dollars by developing the whole Property as a recreational hunt club. Def. Exh. 110. Columbia Venture estimated that it could realize approximately \$47 million dollars if it developed approximately 995 acres of its non-floodway Property. Def. Exh. 12. It estimated that it could probably gain a probable net return of approximately \$20 million dollars by establishing the Property as a wetlands mitigation bank. Def. Exh. 14.

Columbia Venture ultimately decided to prepare a plan for placing a conservation easement on the Property. *Id.*; Def. Exh. 99 at CV000532-CV000535. It planned to then sell Columbia Venture to an investor for approximately \$32 million dollars, who would then be the owner of Columbia Venture's Property and thus claim the tax deduction associated with the conservation easement on the Property. Def. Exh. 9; Def. Exh. 112. Columbia Venture prepared an appraisal of the Property for the purpose of establishing the value of the tax deduction allowed by the Internal Revenue Service.²⁸ Def. Exh. 104 at BandC000642; Tr. Vol. 8, p. 1490, line 19 – p. 1491, line 11. This plan never reached fruition.

On February 20, 2002, FEMA's August 20, 2001 Flood Data for unincorporated Richland County became effective by operation of law. Pl. Exh. 56, Pl. Exh. 57, Pl. Exh. 391, Pl. Exh. 392.

²⁸ One of the reasons why Columbia Venture pursued its appeal of FEMA's final determination was because the value of the appraisal prepared for the conservation easement was "dependent on this tract being developable." "If we withdraw [the appeal], our appraisal values would be exponentially reduced." Def. Exh. 113 at BandC020452.

Columbia Venture never submitted a formal development proposal to the County or any other application to the County for development of its property.²⁹ Tr. Vol. 3, p. 552, lines 17-22; Tr. Vol. 3, p. 602, lines 15-25; Tr. Vol. 3, p. 656, lines 1-21; Tr. Vol. 13, p. 2497, line 24 – 2498, line 16; Tr. Vol. 13, p. 2516, line 20 – p. 2917, line 8; Tr. Vol. 13, p. 2461, line 5 – p. 2465, line 10; Def. Exh. 1; Def. Exh. 79; Def. Exh. 81. In looking back on the failed Green Diamond project, the Board of Directors of Burroughs & Chapin described FEMA’s change of position as a result of SCDNR’s appeal and “vocal protest from numerous anti-growth environmental groups” as the reasons for the project’s failure. Def. Exh. 13, p. 7. No mention was made of any actions by Richland County that had caused the project to fail. *Id.*; Tr. Vol. 6, p. 1005, line 8 – p. 1007, line 18. The Board expressed the view that it had learned many lessons, one of which was not to pursue a project that was purely speculative in nature. Def. Exh. 13, p. 7.

ARGUMENTS

1. INTRODUCTION

Appellant, aware of the danger of flooding of the lands owned by the Manning family along the Congaree River, and also aware of the significant, evolving regulatory and other obstacles to development of the property, decided to proceed with the purchase of the Manning property in the hope of reaping enormous profits from a major real estate development. At the outset, prior to its decision to purchase the property, Appellant knew that FEMA was in the process of remapping the extent of the floodway (the most dangerous and therefore most restricted portion of the floodplain), and indeed that FEMA had already made a preliminary determination to expand the floodway to include most of the Manning lands. In entering into this investment, Appellant acted in great haste, because it sought to take advantage of a “narrow

²⁹ Upon petition by Columbia Venture, the City of Cayce annexed the Property on December 27, 2007. Tr. Vol. 3, p. 504, lines 6-15; Tr. Vol. 6, p. 1077, line 17 – p. 1078, line 11.

window” of time during which the Manning family could exercise its right to repurchase the property at the “right price” and transfer title to the property to Appellant. As a result Appellant did not take the time and care that a developer would ordinarily take in determining the viability of its development plans before embarking of a project of this size and complexity. Appellant knew that it was embarking on a risky venture, but after superficially weighing the potential upside potential of its investment against the potential downside, decided to proceed rather than abandon the project altogether.

A central element of Appellant’s development plan from the outset was the planned improvement of preexisting agricultural levees on the Property in the hope of obtaining federal approval to exempt property behind the levees from stringent floodplain regulation. However, that strategy was contingent on the Respondent *voluntarily* agreeing to take on the substantial responsibility and financial liabilities and risks associated with maintaining the reconstructed levees in perpetuity. No such unconditional commitment from the Respondent was in place when Appellant decided to purchase the property, and the Respondent never agreed to make such a firm commitment during the course of this long running dispute.

Appellant’s levee strategy was also contingent on it being able to persuade FEMA that constructing larger levees within the floodway would not cause an increase in the base flood elevations, a patently difficult test to meet, as its own engineers came to realize. While Appellant hoped that it could certify its levee without causing an increase in base flood elevations, the crucial question was whether FEMA would agree with this assessment, a question to which Appellant did not have an answer when it decided to purchase the property and indeed to which it has never received an answer.

In addition, Appellant was well aware that the Respondent already imposed relatively strict land use controls on development within floodways and it had no basis for knowing, at the time it purchased the property, whether FEMA would ultimately conclude that the property it was purchasing comprised floodway or not. While the Respondent further tightened its regulatory restrictions on floodplain development in general during the course of this this long-running controversy, as FEMA regulation explicitly encouraged, these further restrictions were foreseeable and in any event were not the cause, much less the only cause, of the failure of this speculative real estate venture.

Appellant's failure to follow through with its grandiose and risky plan had nothing to do with actions of Respondent. Instead, Appellant's gamble on the Property simply failed to pay off. Its gamble failed because FEMA's restudy took far longer than it expected due to two rounds of administrative appeals, including Appellant's own appeal. Its financial plan anticipated selling Mr. Manning's repurchased shares in Columbia Venture at a profit, thereby giving Appellant a cash infusion to proceed with development. Appellant, however, failed to attract an investor in light of the uncertainty engendered by FEMA's restudy. As a result, Appellant was forced to saddle itself with approximately \$10 million dollars in debt in order to repurchase Mr. Manning's shares and pay for expensive consultants, lawyers and engineers working to fight FEMA while at the same time spinning a rosy picture of how building a massive development on a floodplain was a great idea. Appellant ran out of money because it could not get all the moving parts of its risky plan to coalesce in the short time frame it set for itself. Appellant's effort to blame Richland County for its failures is unavailing.

While Appellant failed in its goal of achieving a major profit, its real estate investment was hardly rendered valueless. Appellant paid \$18,000,000 for the property. Several years later,

after it became apparent that Appellant could not obtain the necessary commitments and approvals to proceed with the project, the property retained value, as shown in Appellant's own analyses as well as an appraisal valuing Appellant's Property after the alleged taking at \$28 million dollars.

In spite of this retained value, Appellant sought to hold Richland County as an involuntary guarantor of its bad business investment by bringing takings and substantive due process claims against Respondent, demanding over \$43 million dollars in compensation. The Special Referee unerringly rejected on summary judgment Appellant's attempt to create a new, unprecedented *per se* takings claim and Appellant's attempt to cast Respondent's actions as a violation of the *Due Process Clause*. Appellant's remaining regulatory takings claim was tried without a jury before the Special Referee. Based on the many specific factual findings made by the Special Referee after an exhaustive three week trial and reflected in a deliberate and comprehensive ruling, there is no basis for Appellant's claim that it suffered a compensable taking of private property. Accordingly, this Court should affirm the Special Referee's rulings rejecting Appellant's claims.

2. COLUMBIA VENTURE'S "TOTAL TAKING" ARGUMENTS

Early in the course of this litigation, Appellant stipulated that its claims against the Respondent did not include a *per se* total taking under *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), as reflected in an order denying the County's motion to dismiss any total taking claim under *Lucas*. Order Denying Defendant's Motion to Dismiss Pursuant to Rule 12(b)(6), p. 6 (filed Dec. 2, 2009). The order stated that, "as further clarified by counsel for CV, CV is not alleging a total takings claim. Consequently, subject to this stipulation by counsel as to the scope of CV's takings claim, Richland County's Motion to Dismiss CV's regulatory takings claim is

denied.”³⁰ *Id.* Consistent with its stipulation, Appellant did not argue any *Lucas* claim during the non-jury trial. In fact, Appellant’s pre-trial brief and proposed order concerning its regulatory taking claim stated that the *Penn Central* test was the “appropriate framework” for deciding its taking claim, not the *Lucas* test. Pl. Pre-Trial Brief, p. 9 (Sept. 6, 2012); Pl. Proposed Order, p. 99 (Feb. 4, 2013).

In its Motion to Reconsider the Special Referee’s Regulatory Takings Order, Appellant raised for the first time a confusing argument that the Special Referee should reconsider his conclusions under *Penn Central*’s “character of the government action” element because the “government action in this case is factually and legally indistinguishable” from *Lucas* in that the County’s ordinances prohibited all economically beneficial use of its Property. Pl. Mot. Reconsider Order Entered March 19, 2013, p. 7 (filed March 29, 2013). The County asserted that this argument was not raised during trial or within its post-trial filings; therefore, it could not be considered.³¹ *Dixon v. Dixon*, 362 S.C. 388, 299, 608 S.E.2d 849, 854 (2005) (issue raised for the first time in a post-hearing motion is not preserved); *Eaddy v. Oliver*, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001) (“A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial”); Def. Opp. Pl. Mot. Reconsider (April 8, 2013). The Special Referee nevertheless addressed Appellant’s argument by summarily rejecting its invitation to frame the “character of the government action” factor under *Penn Central* as akin to *Lucas*. Order Denying Pl. Mot. to Reconsider, p. 3 (filed April 22, 2013).

³⁰ The Special Referee was provided a copy of this order. Parties’ Joint Submission of Case Documents to Judge Smith for Review (July 2012).

³¹ In opposing Columbia Venture’s Motion to Reconsider, the County did not remind the Special Referee of Columbia Venture’s stipulation. However, the County saw no need to do so because Columbia Venture appeared to be merely attempting to stretch the “character of the government action” factor of *Penn Central* into something that resembles *Lucas*’ “total taking” test without the requirement of showing actual loss of all value.

As part of its arguments asserting that the Respondent committed a *per se* regulatory taking, Appellant now argues that, under *Lucas*, the County's regulations "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 Appellant of all economically beneficial uses of its floodway property except farming." CV Initial Brief, p. 73.

This Court should reject Appellant's *Lucas* claim as contrary to Appellant's stipulation, or at the very least, unpreserved for appellate review. Appellant's stipulation to the Court below, memorialized in an order, must mean something. "Absent an agreement of the parties to do so, a stipulation cannot be set aside simply because a litigant no longer wants to be bound by its terms." 73 AM JUR 2D *Stipulations* § 12. The Respondent did not agree to set aside the stipulation. Although this Court may have the inherent authority to void a stipulation, courts should not do so if such action would be manifestly unjust or unfair to the opposing party. *Id.* Here, it would be manifestly unjust for this Court to even entertain Appellant's *Lucas* claim when the Respondent, relying on the stipulation, never believed it had to fully argue the substance and contours of *Lucas*.

Should this Court choose to review Appellant's *Lucas* claim, it lacks merit. To establish a taking under *Lucas* the claimant must demonstrate that the regulation is so onerous that it has the "extraordinary" effect of denying the owner all economic use of the property. *Lucas*, 505 U.S. 1003, 1017 (1992); *see also Tahoe Sierra*, 535 U.S. 302, 330 (2002) (explaining that the *Lucas* rule "would not apply if the diminution in value were 95% instead of 100%."). In determining whether a "total taking" occurred, this Court must examine whether Appellant lost all value in its parcel as a whole. *See Tahoe-Sierra*, 535 U.S. 302, 331 (2002) ("The starting point for the court's analysis should have been to ask whether there was a total taking of the

entire parcel.”). The relevant parcel here is approximately 4,400 acres of Property located within the Congaree River floodplain. To establish a *Lucas* “total taking” claim, Appellant must demonstrate a total wipe-out of all economic value of its 4,400 acres of Property. *Id.* at 330. “Anything less than a ‘complete elimination of value,’ or a ‘total loss,’ ... would require the kind of analysis applied in *Penn Central*.” *Id.*

Appellant cannot show a total loss in value because all the property appraisals entered as evidence show that value remained in the Property after the date of the alleged taking. Pl. Exh. 394; Pl. Exh. 425, Pl. Exh. 195. Appellant’s own estimation of property value after the date of alleged taking was \$26 million dollars. Def. Exh. 99 at CV000541. Since February 20, 2002, Appellant sold almost 3,000 acres of its Property, much of it in a floodway, for almost \$10 million dollars. Def. Exh. 128. An investor offered to purchase all of Appellant’s Property for \$26 million dollars. Def. Exh. 111. Appellant had in its possession a proposal to develop the entire parcel into a recreational hunt club with an estimated \$10 million dollar return on investment. Def. Exh. 110. It also estimated that development of 994 acres of non-floodway property could generate approximately \$47 million dollars in revenue. Def. Exh. 12. This evidence defeats any notion that the County’s regulations took all value of Appellant’s Property. Not only did Columbia Venture retain significant value in its 1,200 acres of non-floodway property, but it also retained value in its floodway property. Consequently, Appellant’s eleventh-hour *Lucas* claim is entirely unavailing.

3. THE PHYSICAL TAKING ORDER

Columbia Venture and Richland County filed cross-motions for partial summary judgment on Columbia Venture’s claim that the County’s adoption of FEMA’s Flood Maps, combined with regulations restricting the use of property within a floodway, constitute a *per se*

physical taking. Pl. Motion Partial Summary Judgment (filed March 14, 2012); Def. Mot. Summary Judgment on Physical Taking Claim (filed March 14, 2012). After extensive briefing on Columbia Venture's physical taking claim followed by a hearing, the Special Referee granted summary judgment to the County and denied summary judgment to Columbia Venture. Physical Takings Order (filed Aug. 9, 2012). This ruling should be affirmed.

Appellant's physical takings claim reflects a fundamental misunderstanding of takings law. Contrary to established law, Appellant seeks to characterize the Respondent's regulatory restrictions on floodplain development as a *per se* physical taking in order to avoid the more nuanced, fact-dependent regulatory takings test established in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Appellant argues, in a creative but unavailing fashion, that the Respondent's floodplain management ordinances amount to a physical taking because it imposes a flowage easement on its Property. In reality, the Respondent's regulations impose garden variety restrictions on the use of property, and they neither impose nor authorize a physical appropriation or occupation of Appellant's land. The Respondent will address the standard the Court should apply in reviewing Physical Takings Order. Then the Respondent will explain why Appellant's challenges to the Special Referee's rejection of the physical takings claim are mistaken.

a. The proper standard of review does not entail de novo review of facts, and certainly not consideration of facts never presented to the Special Referee as part of Appellant's physical takings claim.

On appeal from the grant of the summary judgment motion, this Court applies the same standard that the Special Referee was required to apply under Rule 56(c), SCRCP. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule

56(c), SCRCF; *Southeast Toyota Distribs., LLC v. Jim Hudson Superstore, Inc.*, 387 S.C. 508, 512, 693 S.E.2d 33, 35 (Ct. App. 2010). If the appellant can point to actual disputes over truly material questions of fact, then the appellate court must remand the claim to the trial court for further development of the facts. *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 173, 577 S.E.2d 428, 436 (2003). If the appellant argues that the court below committed an error of law, the appellate court reviews questions of law *de novo*. *Southeast Toyota Distribs., LLC v. Jim Hudson Superstore, Inc.*, 387 S.C. 508, 512, 693 S.E.2d 33, 35 (Ct. App. 2010).

The Physical Takings Order included those facts which the Special Referee found “relevant, determinative of the issues and undisputed.” *Bowen v. Lee Process Sys. Co.*, 342 S.C. 232, 236-238, 536 S.E.2d 86, 89 (Ct. App. 2000). Appellant does not dispute any facts referenced in the Physical Takings Order. Instead, Appellant, in attempting to challenge the Physical Taking Order decided on summary judgment, cites to evidence not even presented to the Special Referee as part of the parties’ summary judgment arguments concerning Appellant’s physical taking claim.³² Appellant cannot offer facts for this Court to consider in reviewing the Special Referee’s Physical Taking Order that were not put before the Special Referee for his consideration of the parties’ motions for summary judgment on the physical taking claim. Accordingly, all of the extraneous evidence cited by Appellant in its Initial Brief addressing its physical takings claim, pp. 60-85, should be rejected as not properly before this Court.

³² For example, Appellant cites to the regulatory takings trial transcript and trial exhibits, and the Regulatory Takings Order as evidence supporting its physical takings appeal, evidence which obviously could not possibly have been before the Special Referee in deciding the parties’ summary judgment motions argued months before the regulatory takings trial took place. See CV Initial Brief, pp. 61, 65, 75, 77, 78, 79, 81 (citing to trial transcript as, for example, “Tr.1325-26,” trial exhibits as, for example PTE 374, and the Regulatory Takings Order as “Order of 3/18/2013”). And Appellant relies on evidence submitted to the Special Referee solely in support of its arguments opposing the County’s other summary judgment arguments. See CV Initial Brief, pp. 61, 62, 65, 70, 79, 80, 84 (citing to its Omnibus Appendix submitted in opposition to the County’s other summary judgment arguments). Compare with evidence cited in Plaintiff’s Memorandum in Support of Mot. for Partial Summary Judgment in its Physical Taking Claim (filed July 6, 2012), Plaintiff’s Memo in Opposition to Defendant’s Mot. for Partial Summary Judgment (Physical Takings Claim) (filed July 13, 2012), and Transcript of Mot. Hearing (July 18, 2012).

b. Appellant failed as a matter of law to establish a physical taking claim under Loretto.

Modern takings jurisprudence draws an important, clear distinction between permanent physical occupations of private property and regulatory restrictions on the use of private property. The distinction is often outcome-determinative because a permanent physical occupation generally results in a *per se* taking, without regard to the economic impact of the government action, while a regulatory restriction on the use of property results in a finding of a taking only in “extreme circumstances.” See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (“We have frequently suggested that governmental land-use regulation may under extreme circumstances amount to a ‘taking’ of the affected property.”). Appellant’s physical takings claim is governed by the United States Supreme Court’s decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). In *Loretto*, the United States Supreme Court established that a permanent physical occupation of private property is a *per se* taking. *Id.* Importantly, “the holding of *Loretto* is quite narrow.” *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002); see also *Tahoe-Sierra*, 535 U.S. 302, 325 (2002) (“physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights” than regulatory restrictions on the use of property). *Loretto* “applies only to permanent physical occupations either by the government or by a third party acting under government authority.” *Id.* A physical taking requires physical possession, and occurs when the government itself actually occupies the property or requires the landowner to submit to actual physical occupation. *Stearns Company, LTD v. United States*, 396 F.3d 1354 (Fed. Cir. 2005).

Government action causing private property to be permanently flooded unquestionably constitutes a physical taking. *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871); *United States v.*

Dickinson, 331 U.S. 745 (1947); *Early v. South Carolina Pub. Serv. Auth.*, 228 S.C. 392, 90 S.E.2d 472 (1955). In cases finding that government-induced flooding in effect imposed a flood easement, some affirmative action by the government caused the flood water to encroach upon the plaintiff's land. See *United States v. Dickinson*, 331 U.S. 745, 747 (1947) (stating that the federal government impounded the Kanawha River to improve navigability, causing permanent flooding of adjoining private property); *United States v. Cress*, 243 U.S. 316, 328 (1917) (finding that the government's construction of a lock and dam system on the Kentucky River caused backwaters to frequently flood private property); *Brace v. United States*, 72 Fed. Cl. 337, 362 (Fed. Cl. 2006) *affirmed* 250 Fed. Appx. 359 (Fed. Cir. 2008) *cert. denied* 552 U.S. 1258 (2008) (collecting cases demonstrating that government must cause flooding in order for a *Loretto*-type taking to occur).

Appellant cannot establish a physical taking claim based upon inundation of its Property with water because there is no evidence whatsoever that the Respondent has caused (or will cause) flooding to occur on Appellant's Property. Unlike *Pumpelly* or *Dickinson*, the Respondent has not built a dam or otherwise impounded the Congaree River. The Respondent has not cast floodwaters upon Appellant's Property, nor has the Respondent required Appellant to submit to flooding caused by a third party. And this Court may take judicial notice that the Respondent is incapable of bringing about an Act of God such as a natural flood. As the Special Referee recognized, the fact that the Respondent has not caused flooding to occur on Appellant's Property means that the Respondent has not destroyed Appellant's property right that *Loretto* aims to protect – the right to hold and possess its Property, including its right to exclude others – and therefore, no physical taking has occurred. This lack of physical occupation is fatal to Appellant's physical taking claim.

Appellant contends that under *Penn Central*, the Respondent may be liable for a physical taking if an ordinance adopted by the government can be characterized as a physical invasion. CV Initial Brief, p. 70. In making this argument, Appellant is referring to a statement in *Penn Central*, in the discussion of the “character” factor in the three-part *Penn Central* analysis, that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, *see, e. g., United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Penn Central*, 438 U.S. 104, 124 (1978).

Appellant is seriously mistaken in believing that this passage can support its effort to convert a regulatory takings case into a physical takings case. The *Penn Central* decision predates the *Loretto* decision establishing the special *per se* rule for permanent physical occupations. Thus, the language quoted above simply reflects the fact that, prior to *Loretto*, whether a government action involved a physical occupation was one factor to consider in addressing whether a government action amounted to a taking under the general *Penn Central* inquiry. In addition, this language from *Penn Central* does not alter the fact that modern takings doctrine requires courts to differentiate between government actions involving permanent physical occupations and government restrictions on the use of property. *See Tahoe-Sierra*, 525 U.S. at 322-25. As discussed, the United States Supreme Court has established clear guidelines for distinguishing between permanent physical occupations and regulatory restrictions on the use of property, and this distinction cannot be evaded simply by “characterizing” what is in reality a restriction on the use of property as a physical occupation of private property.³³

³³ Appellant’s citation to *Arkansas Game*, in which the Court explains that “a permanent physical occupation of property *authorized* by government is a taking,” adds nothing to its argument. *Arkansas Game*, 133 S. Ct. 511, 518

Citing *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 522 (2012), Appellant asserts that government action foreseeably resulting in flooding, or intended to cause flooding, constitutes a physical taking. CV Initial Brief, p. 70. Physical invasion of its Property is a foreseeable result of the Respondent's Stormwater Ordinance, Appellant argues, because the Respondent's prohibition against adding fill material or other obstructions within a floodway means that Appellant cannot prevent its levee from failing during a flood. CV Initial Brief, p. 70. But the County's Stormwater Ordinance did not prevent Appellant from maintaining the condition of its levee so that it can hold back floodwaters; in fact, the Ordinance required proper maintenance of levees. See § 8-38, Stormwater Ordinance (2001). Appellant's statement that the County's Stormwater Ordinance forced it to suffer flood damage does not stand up to a fair reading of the Ordinance. More fundamentally, to whatever extent the Respondent has regulated the construction and maintenance of levees, as well as other land uses on the Property, it has simply regulated the use of property, not physically occupied it.

Moreover, a mere allegation of foreseeability of flooding does not make the Respondent liable for physically occupying Appellant's Property with floodwater. In *Arkansas Game*, the foreseeability that the Court referred to involved occasions when a government-built structure caused flooding of the plaintiff's property. 133 S.Ct. 511, 522 (2012). In order to constitute a taking rather than a tort, the plaintiff must prove that the government's action in constructing or operating a structure or carrying out some activity was intended to cause flooding on the plaintiff's property, or at least that such flooding was foreseeable. *Id.* Nothing in *Arkansas Game* suggests that the mere foreseeability that a natural flood could occur and damage property should impose liability on a government. Further, nothing in *Arkansas Game* suggests that the

(2012) (emphasis added). To the extent that Appellant suggests that the Court's use of the word "authorize" somehow reflects a different test than that set forth in *Loretto*, Appellant is mistaken. In support of this statement, the *Arkansas Game* Court cites to *Loretto*. *Arkansas Game*, 133 S. Ct. 511, 518 (2012).

question of foreseeability applies to a fact situation such as here where the Respondent did not build a structure that caused flooding, but simply enacted an ordinance restricting use of property within a floodway. *See Arkansas Game*, 133 S. Ct. 511, 522 (2012) (stating that foreseeability of the government's invasion of property is relevant to the takings inquiry before it). To constitute a physical taking, Appellant must show affirmative action by the Respondent that effectuated a flood. Nothing in *Arkansas Game* changes this analysis.

In an effort to avoid this very obvious problem, Appellant tries to concoct a new theory of *per se* regulatory takings by patching together concepts borrowed from *Nollan v. California Coastal Comm'n*, 483 U. S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), *Dolan v. City of Tigard*, 512 U. S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) and scraping together generalized, unsupported legal conclusions that land use regulations are tantamount to an easement. In other words, Appellant asked the Special Referee, and now this Court, to ignore established takings jurisprudence and forge some new, unprecedented category of *per se* takings. Appellant's freewheeling approach to its physical takings claim helps explain why it seeks to convince this Court that there are few rules or magic formulas in determining whether a taking occurred.³⁴ CV Initial Brief, p. 59.

In *Nollan*, the government required that the plaintiffs convey a public right-of-way across their beachfront to allow public access as a condition for issuance of a permit to demolish and rebuild a residence on the property. *Nollan*, 483 U.S. 825, 828 (1987). The plaintiffs challenged this condition as a taking. *Id.* at 829. In reviewing the case, the United States Supreme Court started with the premise that, "had California simply required the Nollans to make an easement

³⁴ During the motion hearing, Columbia Venture cautioned the court "not to get too hung up on whether or not the claim of a *per se* regulatory taking fits exactly into [one of the four takings tests set out in *Lingle v. Chevron, USA*]." Dispositive Motion Hearing Tr. p. 7-10 (July 18, 2012). "The basis of Columbia Venture's motion is that the County's actions, taken in their entirety, deprived Columbia Venture of essential uses of its property that fit into the category of a *per se* regulatory taking defined by *Loretto*, *Nollan*, *Dolan* and *Dickinson*." *Id.* at p. 10.

across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking,” because the effect of such a right-of-way would have destroyed the plaintiff’s right to exclude others from their property. *Id.* at 831-832. In *Dolan*, the Court merely reiterated that government imposition of a requirement to establish a public bike path and greenway impinged upon the property owner’s right to exclude. *Dolan*, 512 U. S. 374, 393 (1994). From this rather unremarkable proposition, Appellant argues that the Respondent’s floodplain management regulations create a “de facto” easement by “legislative fiat.” *See* CV Initial Brief, pp. 60-68.

“An easement has been defined as a right which one person has to use the land of another for a specific purpose not inconsistent with a general property in the owner, or as a servitude imposed as a burden on land.” *Morris v. Townsend*, 253 S.C. 628, 635, 172 S.E.2d 819, 822 (1970). “A servitude creates both a burden and a benefit.” *RESTAT 3D OF PROP: Servitudes*, § 1.1. In a general sense, land use ordinances bear resemblance to easements in that the right of a property owner to use her property is burdened by regulatory limitations. Reflecting the burdens and benefits inherent in land use regulation, courts have long recognized that property is held under an implied limitation upon use of property by the government’s legitimate exercise of police power. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992) (“It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.”); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013) (“Insisting that landowners internalize the negative externalities of their

conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.”).

However, land use ordinances lack the degree of permanency that easements have because land use ordinances do not run with the land. *See* AM JUR 2D *Municipal Corp., Counties, Other Political Subdivision* § 353 (“The operation or effectiveness of an ordinance may be terminated by the repeal of the statute under the authority of which it was enacted.”). Nor do land use ordinances create a right of the government to use land. Instead, land use ordinances are legislation of general applicability that limits the uses of land by private property owners. *Dolan*, 512 U.S. at 385. The Respondent’s floodplain management ordinances prohibit placement within a floodway any structure or fill material, including levees, that would impede the free flow of floodwater. *See e.g.* § 8-27(h), Stormwater Ordinance (2001). Like any other land use ordinance, the Respondent’s Stormwater Ordinance and Zoning Ordinance merely limits how a property owner may use his property. Contrary to Appellant’s view, it does not create or reserve a right inuring to the Respondent to occupy or invade Appellant’s Property.³⁵

Many other courts across the country have rejected similar efforts by landowners to manufacture *per se* physical takings claims out of regulations restricting permitted uses of private property. *Stearns Co. v. United States*, 396 F.3d 1354, 1357 (Fed. Cir. 2005) *cert. denied* 546 U.S. 875 (2005) (rejecting argument that legislation regulating mining operates as a physical taking as “little more than an incredible attempt to transform a regulatory taking claim into a *per se* physical taking.”); *Boise Cascade Corp. v. United States*, 556 F.3d 1339, 1353-54 (Fed. Cir.

³⁵ *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 153 (1978) (describing “appellants’ related contention that a taking must be found to have occurred whenever the land-use restriction may be characterized as imposing a “servitude” on the claimant’s parcel” as a “fallacy.”); *Henry v. Jefferson County Comm’n*, 637 F.3d 269, 277 (4th Cir. 2011) (rejecting characterization of land use regulations as comparable to physical invasion); *Tennessee Scrap Recyclers Assoc. v. Henry*, 556 F.3d 442, 453 (6th Cir. 2009) (rejecting argument that limitations on use of property in effect grants a permanent easement because “regulations of a party’s use of its property are not physical takings.”).

2002) (rejecting claim that land use restriction authorized physical invasion of property by the endangered spotted owl); *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 92-95 (2nd Cir. 1992) (rejecting physical takings claim based on theory that regulation prohibiting property owner from excluding deer on his property amounted to a government-authorized permanent invasion of deer); *Brace v. United States*, 72 Fed. Cl. 337, 363-366 (Ct. Cl. 2006) *affirmed* 250 Fed. Appx. 359 (Fed. Cir. 2007) *cert. denied* 552 U.S. 1258 (2008) (“Courts have made short shrift of attempts to re-characterize regulatory takings as physical takings, rejecting fanciful efforts to invoke the more strict regime associated with the latter doctrine.”); *Jensen v. City of Everett*, 2001 Wash. App. LEXIS 2749, *19 (Ct. App. 2001) (rejecting plaintiff’s argument that “ordinance physically invaded his property by requiring him ‘to submit to the physical occupation’ of his land by vegetation.”).

Appellant also suggests that the Respondent’s floodplain management regulations amount to a conservation easement imposed upon its Property to preserve or protect natural resources. CV Initial Brief, p. 64. Because this argument was not raised in Appellant’s memoranda addressing its physical taking claim or during the summary judgment hearing, it is not preserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

To the extent that this Court addresses Appellant’s novel theory, the same reasoning set forth above applies to a conservation easement. Pursuant to S.C. Code Ann. § 27-8-10(1), a conservation easement is defined as “a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations” The term “holder” is defined in relevant part as “a governmental body empowered to hold an interest in real property under the laws of this State or the United States.” *Id.* at (2)(a). A land use ordinance prohibiting property owners from

placing encroachments within a floodway cannot logically be deemed a conservation easement making the Respondent a holder of a right to impose a burden on that property. Again, land use ordinances do not confer upon the government a right or interest in private property.

Moreover, conservation easements are created by a written instrument and “must be recorded in the same manner as other easements.” S.C. Code Ann. § 27-8-30(A). “No right or duty in favor of or against a holder ... arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance in the office of the register of deeds for each Respondent where the land burdened by the conservation easement lies.” *Id.* at (B). “An interest in real property in existence at the time a conservation easement is created is not impaired by the easement unless the owner of the interest is a party to the conservation easement or consents to it.” *Id.* at (D). In other words, conservation easements apply to individual properties, and must be affirmatively accepted by the holder and the property owner in the form of a recorded instrument. Land use ordinances have none of the characteristics of a conservation easement. *C.f. Brace v. United States*, 72 Fed. Cl. 337, 364 (2006) (comparing characteristics of conservation easement to a challenged consent decree and rejecting plaintiff’s assertion that the consent decree amounted to a conservation easement).

As a last gasp, Appellant asserts that the Respondent’s authority to make warrantless inspections for compliance with the Stormwater Ordinance is further evidence and indeed, “can be explained only in the context” of a “de facto” easement. CV Initial Brief, p. 66. Contrary to Appellant’s contention, the Respondent’s authority to inspect drainage and stormwater control structures on private property has no relation to any “de facto” easement. If infrastructure constructed pursuant to an approved stormwater plan is part of a public drainage system, actual recorded easements specifically granting access for inspection and maintenance serve as the

basis for lawful entry. § 8-21(b)(5), Stormwater Ordinance (2001). Moreover, under the Fourth Amendment, government entry upon private property for inspection and compliance purposes may be lawfully accomplished without an easement or other prior consent. *Lesueur-Richmond Slate Corp. v. Fehrer*, 666 F.3d 261, 264 (4th Cir. 2012). In any event, County inspections under its Stormwater Ordinance do not constitute a physical taking. *Tennessee Scrap Recyclers Assoc. v. Henry*, 556 F.3d 442 (6th Cir. 2009); *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002); *Hoeck v. City of Portland*, 57 F.3d 781, 787 (9th Cir. 1995) *cert denied* 516 U.S. 1112 (1996).

Finally, it is important to note that the United States Supreme Court has repeatedly cautioned that “government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law, ... and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values.” *Penn Central*, 438 U.S. 104, 124-125 (1978). “Land-use regulations are ubiquitous and most of them impact property values in some tangential way -- often in completely unanticipated ways.” *Tahoe-Sierra*, 535 U.S. 302, 324 (2002). “Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford.” *Id.*

To hold that a physical taking occurs merely by virtue of a local government fulfilling its obligations under the National Flood Insurance Program (“NFIP”) would have a profound chilling effect upon local and state participation in the NFIP. If faced with the prospect of paying taxpayer funds to every property owner whose property falls within a flood hazard zone or floodway, local governments would face an impossible dilemma: either stay in the NFIP and cripple themselves financially by paying landowners every time a property winds up in a

floodway or floodplain, or withdraw from the NFIP and thereby cripple the local economy by depriving its citizenry of the ability to obtain flood insurance, obtain federally-backed loans within flood hazard areas, and receive federal disaster relief. 42 U.S.C. § 4106; 42 U.S.C. § 4022(a)(1); 44 C.F.R. § 59.2; 44 C.F.R. § 59.24(d). Under either of these scenarios, Richland County “could hardly go on.”

“Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and [the United States Supreme Court has] long sustained such regulations against constitutional attack.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013). In the context of floodplain management, where the NFIA seeks to “constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses,” a key principle driving the NFIA is that property owners who choose to develop in a floodplain should be required to “internaliz[e] the negative externalities,” of building in a hazardous area by complying with restrictive and expensive construction standards, and even to forego construction in a floodway. *See* Tr. Vol. 14, p. 2650, line 11 – p. 2652, line 11. This type of restriction is entirely appropriate because a property owner does not have “an unfettered right to pursue a business detrimental to the public health, safety, and welfare.” *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 97, 596 S.E.2d. 917, 923 (2004). A property owner “has no right to misuse his own land [by building in a floodway] to the severe detriment of another.” *Usdin v. New Jersey*, 173 N.J. Super. 311, 331, 14 A.2d 280, 290 (N.J. Super. 1980). A landowner has no right to erect and maintain any structure which in times of flood will “throw the water or current upon or against the lands or other property of other persons to their injury.” 50 AM JUR 2D *Levees and Flood Control* § 13.

Plaintiffs often seek to characterize a land use regulation as a physical taking in order to avoid the more nuanced inquiry found in *Penn Central*. Yet courts have wisely rejected such fanciful efforts because doing so would make *Penn Central* obsolete. See *Brace v. United States*, 72 Fed. Cl. 337, 366 (Fed. Cl. 2006) (“If the mere recognition of a property owners’ obligations under the [Clean Water Act] gave rise to a servitude and, in turn, a physical taking, then virtually every regulation of a piece of property ... would result in a takings. Such is not the law.”). The Special Referee correctly and wisely held that the County’s floodplain management ordinances do not constitute a physical taking.

c. Hill v. Hanahan is of no help to Appellant.

Appellant argues that the case of *Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984), is “dispositive” of its physical taking claim. CV Initial Brief, p. 81. The Special Referee correctly ruled that *Hill* is not consistent with modern takings jurisprudence that this Court has subsequently adopted and therefore does not govern this case. Physical Taking Order, p. 9 (Aug. 9, 2012).

In *Hill v. City of Hanahan*, the plaintiff owned five acres zoned for multi-family uses. 281 S.C. 527, 528, 316 S.E.2d 681, 682 (Ct. App. 1984). A prior owner of the property had allowed the highway department to excavate a part of the property, leaving a man-made pond on the property. *Id.* The plaintiff, the current owner of the property, was in the process of filling the pond on her property when the city ordered her to cease filling activities. *Id.* at 528, 683. Plaintiff alleged that the City’s order prevented her from exercising her common law right under the “common enemy” doctrine to divert or remove diffuse surface waters from her property. *Id.* at 528-529, 682. The trial court ruled that the plaintiff had a common law right to fill the pond, and that the city’s interference with this right constituted a taking. The Court of Appeals

affirmed this ruling, stating that “property in a thing consists not merely in its ownership and possession but in the unrestricted right of use, enjoyment and disposal.” *Id.* at 530, 683.

The Court of Appeals reviewed the takings claim based on the analytic framework established in *Gasque v. Town of Conway*, 194 S.C. 15, 8 S.E.2d 871 (1940). Under *Gasque*, a taking occurred “where the [government] act involves the actual interference with, or the disturbance of, property rights, resulting in injuries which are not merely consequential or incidental,” “for a public use,” and the ensuing damage “is permanent ... and growing out of a positive act or aggressive step.” *Gasque v. Town of Conway*, 194 S.C. 15, 23, 8 S.E.2d 871, 874 (1940). The *Hill* Court held that the City’s cease and desist order constituted a taking because it represented an “actual interference with, or the disturbance of, property rights, resulting in injuries which are not merely consequential or incidental.” *Hill*, at 531, 684. *Hill*’s analysis is outdated for two reasons.

First, the notion that there is a broad, unfettered right to use property, reflected in *Gasque* and later, in *Hill*, is out of step with modern takings doctrine. The Court of Appeals in *Hill* held that the plaintiff had a common law right to fill the pond, stating that “property in a thing consists not merely in its ownership and possession but in the unrestricted right of use, enjoyment and disposal.” *Id.* at 530, 683 (emphasis added). This broad unrestricted right of use articulated by the Court of Appeals had its roots in a due process case decided in *Henderson v. City of Greenwood*, 172 S.C. 16, 172 S.E. 689 (1934). In *Gasque v. City of Conway*, the South Carolina Supreme Court applied this same notion in the context of a takings claim. 194 S.C. 15, 21, 8 S.E. 2d 871, 873 (1940).

Whatever support there may have been for the notion that a property owner has a constitutional right to make unfettered use of his property, that is clearly not the law today. The

last time this Court cited approvingly to the *Gasque* view of property rights was in 1963. See *Sease v Spartanburg*, 242 S.C. 520, 131 S.E.2d 683 (1963) (“Property in a thing consists not merely in its ownership and possession but in the unrestricted right of use, enjoyment and disposal.”). In modern takings jurisprudence, it is well settled that the government’s exercise of police power may indeed impair the use of property and such impairment does not necessarily rise to the level of a compensable taking. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (“The property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.”); *Kiriakides v. Sch. Dist. of Greenville County*, 382 S.C. 8, 16, 675 S.E.2d 439, 443 (2009) (“The impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking.”). Thus, Appellant’s attempt, by invoking the outdated decision in *Hill*, to claim a broad unrestrained right to use its Property, is not consistent with the modern law of regulatory takings.

Second, *Hill*’s analysis is outdated because it omits several important elements of modern takings law. The *Hill* Court ruled that a taking arose from the entry of an armed police officer onto the plaintiff’s property to stop her from filling the pond. *Hill*, 281 S.C. 527, 531, 316 S.E.2d 681, 684 (Ct. App. 1984). While it is not entirely clear from the court’s opinion, it appears that the police officer was acting to enforce a land use regulation. *Hill*, at 529, 683. Today, government entry upon private property to enforce a land use regulation is generally not viewed as amounting to a physical occupation “even where the government’s activity has a permanent effect.” *Hoeck v. City of Portland*, 57 F.3d 781, 787 (9th Cir. 1995) *cert denied* 516 U.S. 1112 (1996). Modern takings law would require further inquiry into whether the action of the police officer was intermittent or transitory, thus warranting analysis under *Penn Central*, or

whether it was permanent, thus constituting a *per se* physical taking under *Loretto*. See *Loretto*, 458 U.S. 419, 456 (1982) (“Not every physical invasion is a taking. ... [T]emporary limitations are subject to a more complex balancing process to determine whether they are a taking.”). If the physical invasion was temporary, the extent of the government’s interference with the property owner’s reasonable investment-backed expectations would have to be assessed in light of the parcel as a whole. *Penn Central*, 438 U.S. 104, 130-131 (1978). *Hill* simply ignored whether the invasion was merely temporary and how that might affect the takings analysis, and failed to consider the takings claim in the context of the property as a whole.

Since *Hill* was decided, this Court has turned to the United States Supreme Court’s taking tests to decide takings claims under the South Carolina Constitution. In *Sea Cabins on the Ocean IV Homeowner’s Assoc. v. City of Myrtle Beach*, this Court articulated and adopted the modern principles of takings law in conformity with rules set forth by the United States Supreme Court. 345 S.C. 418, 430, 548 S.E.2d 595, 601 (2001) (stating various takings tests including *Loretto*, *Penn Central*, and *Lucas*). In *Byrd v. City of Hartsville*, this Court made clear that “takings analysis under South Carolina law is the same as the analysis under federal law.” 365 S.C. 650, 664, fn. 6 620 S.E.2d 76, 79 fn. 6 (2005).

In light of the evolution of South Carolina takings law since 1984 when *Hill* was decided, the Special Referee committed no error in concluding that *Hill* does not represent modern takings jurisprudence in South Carolina, and instead, reviewed Appellant’s physical takings argument under *Loretto*. See *Orangeburg County Democratic Party v. South Carolina State Election Comm’n*, 324 S.C. 108, 112, 477 S.E.2d 707, 709 (1996) (stating that prior case law is not controlling when present circumstances are entirely different from time prior case law decided).

“The last expression of the Court is controlling as against prior opinions.” *Coleman v. Page’s Estate*, 202 S.C. 486, 490, 25 S.E.2d 559, 560 (1943).

Moreover, the facts in this case are distinguishable from those in *Hill*. In *Hill*, an “armed policeman” physically invaded the plaintiff’s property, yet Appellant can point to no actual physical invasion by the Respondent. *Hill*, 281 S.C. 527, 531, 316 S.E.2d 681, 684 (Ct. App. 1984). In *Hill*, there was surface water actually in existence on the plaintiff’s property that the plaintiff was in the process of removing. *Id.* at 528, 682. No comparable situation exists here. In *Hill*, the Court found that the City “wanted Hill’s land for drainage and flood control purposes.” *Id.* at 531, 684. Here, the Respondent’s Stormwater Ordinance and Zoning Ordinance simply limit a property owner’s uses of property within a floodway and floodplain; they do not go so far as to appropriate Appellant’s property for drainage and flood control purposes. Because the facts of *Hill* are so plainly distinguishable from the facts of this case, the Special Referee committed no error in declining to follow *Hill*.

4. THE REGULATORY TAKING (*PENN CENTRAL*) ORDER

Penn Central Transp. v. New York City applies to an alleged regulatory taking where the *per se* takings tests do not apply. 438 U.S. 104 (1978); *Lingle v. Chevron, USA*, 544 U.S. 528, 538 (2005). In determining whether a regulatory taking occurred, three factors are particularly significant: “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” as well as “the character of the governmental action.” *Penn Central*, 438 U.S. 104, 124 (1978). The *Penn Central* factors must be applied to the plaintiff’s whole parcel. *Penn Central*, 438 U.S. at 130-131; *Tahoe-Sierra*, 535 U.S. 302, 327 (2002); *Sea Cabins*, 345 S.C. 418, 430, 548 S.E.2d 595, 601 (2001).

The Special Referee concluded that the investment-backed expectations factor and the character of the government action factor both supported rejection of the *Penn Central* claim, and therefore the Special Referee ruled that the *Penn Central* claim failed, even though he believed that the economic impact factor supported the *Penn Central* claim. Respondent agrees with the conclusions that neither the investment expectations factor nor the character factor support Appellant's *Penn Central* claim, and submits that the Special Referee properly rejected the *Penn Central* claim based on those conclusions. However, Respondent asserts that the Special Referee erred in concluding that the economic impact factor supported the Appellant's claim. Correcting for that error, and recognizing that all three of the *Penn Central* factors, properly considered, weigh against the takings claim, it becomes even more apparent that the Special Referee correctly ruled against Appellant on its *Penn Central* claim.

a. Appellant's attempt to make this Court a finder of fact is contrary to the proper standard of review; or in the alternative, introduction of certain facts is unpreserved for appellate review or irrelevant.

Appellant's regulatory takings claim under *Penn Central* was tried before the Special Referee without a jury. A takings claim is an action at law. *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 305, 737 S.E.2d 601, 614 (2013). "Whether a taking that is compensable under the Fifth Amendment has occurred is a question of law that is based on factual determinations." *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1365 (Fed. Cir. 2004). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Associates, Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "The rule is the same whether the judge's findings are made with or without, a reference." *Id.* "The judge's findings are equivalent to a jury's findings in a law

action.” *Id.* “An appellate court’s scope of review extends merely to the correction of errors of law.” *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414 (2009).

Appellant seemingly ignores this standard of review. In its Initial Brief, Appellant puts forward a plethora of facts that were raised to and rejected by the Special Referee. Appellant’s Initial Brief even includes evidence not introduced at trial. Appellant’s attempt to have this Court consider facts not considered by the Special Referee, or facts that the Special Referee considered but rejected, is contrary to this Court’s standard of review. Under the proper standard of review, Appellant is limited to either challenging a finding of fact as lacking any evidentiary support, or challenging a legal conclusion as an error of law. This Court should disregard Appellant’s attempt to essentially retry this case.

As an example of Appellant’s efforts to turn this Court into a trier of fact, Appellant introduced at trial evidence that purportedly supported its efforts to malign an elected official, former Richland County Council Member Kit Smith, and in its post-trial filings, described Mrs. Smith’s words and actions as “infused with malice and bad faith.” Pl. Memo Resp. Def. Proposed Order, pp. 25-27 (March 8, 2013). After hearing the testimony of Mrs. Smith, and considering the parties’ proposed findings of fact and conclusions of law relating to this issue, the Special Referee rejected Appellant’s characterization.³⁶ *See* Tr. Vol. 13, pp. 2307-2507; Pl. Proposed Order, pp. 133-136; Pl. Memo Resp. Def. Proposed Order, pp. 25-27 (March 8, 2013);

³⁶ Aside from the Special Referee’s factual determination, as a matter of law, “every presumption shall be indulged in favor of the good faith and ordinary common sense of a legislative body” *Columbia v. Alexander*, 125 S.C. 530, 541, 119 S.E. 241, *19 (1923). In addition, Columbia Venture brought its claims against Richland County, not Mrs. Smith individually. Under 42 U.S.C. § 1983, actions of employees or elected officials of a government cannot be held against a government defendant unless the plaintiff proves that such actions constitute a policy or custom of the government entity. *St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988). Identifying a policy or custom “ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may be fairly said to be those of the municipality.” *Old St. George’s LLC v. Bianco*, 2009 U.S. Dist. LEXIS 129396, *14-15 (S.D. N.Y. 2009); *see also Cleveland v. City of Cocoa Beach*, 2003 U.S. Dist. LEXIS 28054 (M.D. Fla. 2003) (holding that mayor’s conduct “represented individual behavior, rather than official City policy” because the whole legislative body is charged with setting policy, not an individual legislator).

Def. Proposed Order, pp. 91-94 (Feb. 4, 2013); Regulatory Taking Order, pp. 69-73. Yet Appellant, in its Initial Brief, continues its quest to cast Mrs. Smith, and to a lesser degree, Richland County Council Member Gregory Pearce, as dishonorable or ill-intentioned, and impermissibly asks this Court to re-examine the record to make such a finding. CV Initial Brief, pp. 51-53, 114.

Also, Appellant has stipulated that the date of alleged taking in this case is February 20, 2002. *See* Order Regarding Certain Discovery Motions (June 26, 2012). During trial, the Respondent objected on the basis of relevance to Columbia Venture's attempt to question witnesses concerning events that took place after February 20, 2002. Tr. Vol. 6, p. 1048, line 6 – p. 1060, line 9. The events that Columbia Venture sought to include in the record concerned judicial decisions of the United States District Court in Columbia Venture's appeal of the Congaree River Flood Data, and legislative actions of the County from January 3, 2006 through December 5, 2006. *Id.* The Special Referee said he "was not inclined to consider that as being relevant,"³⁷ but allowed Columbia Venture to enter exhibits for the record. *Id.* In its Proposed Order and Memorandum in Response to the County's Proposed Order, Columbia Venture did not include any argument relating to these exhibits or even include these exhibits as evidence in the findings of fact. The Special Referee's Order did not refer to this evidence.

In its Initial Brief, however, Appellant trots out these exhibits, and complains of Respondent's legislative actions that took place long after the alleged date of taking.³⁸ CV Initial

³⁷ In *Byrd v. City of Hartsville*, this Court rejected the property owner's effort to characterize multiple actions of the city as a single course of conduct constituting a taking. 365 S.C. 650, 657-658, 620 S.E.2d 76, 80 (2005). Each government action must be considered under *Penn Central* individually. *Id.* Under the reasoning of *Byrd*, these ordinances enacted subsequent to February 20, 2002 are not relevant to Appellant's takings claim and should be disregarded as having no bearing on a *Penn Central* analysis of the County's Floodplain Management Ordinances at issue here. *See* Tr. Vol. 2, pp. 264-270.

³⁸ Also, on page 52 of its Initial Brief, Appellant refers to a deposition exhibit 148 concerning legislative activities of Council Member Gregory Pearce in 2005 and 2006. This exhibit was excluded by the Special Referee as protected

Brief, p. 114. Because Appellant's Proposed Order, Memorandum in Response to the County's Proposed Order, and Motion to Reconsider did not raise these ordinances as relevant to its arguments under *Penn Central*, Appellant's use of the County's legislative actions in 2006 are not preserved for appellate review. See Pl. Proposed Order (Feb. 4, 2013); Pl. Mem. Resp. Def. Proposed Order (March 8, 2013); Pl. Mot. Reconsider (March 29, 2013); *Elam v. S.C. DOT*, 361 S.C. 9, 23, 602 S.E.2d 772, 780 (2004).

Additionally, Columbia Venture cites to facts not even introduced at trial as support for its arguments concerning the Regulatory Takings Order. CV Initial Brief, pp. 107, 108, 112, 115. On these pages Columbia Venture cites to an "Omnibus Appendix" that was submitted to the Special Referee during the summary judgment hearing. See Dispositive Motion H'rg Tr. p. 126, lines 12-15 (July 18, 2011). These documents were not admitted into evidence during the regulatory takings trial, and thus Respondent was not given the opportunity to challenge their admissibility or relevance, or offer testimony to rebut or explain their substance. The Special Referee never took these documents into consideration in relation to Appellant's regulatory takings claim. This Court should disregard Appellant's attempt to inject these and other facts it did not introduce at trial for this Court's consideration of the Regulatory Takings Order. *Elam v. S.C. DOT*, 361 S.C. 9, 23, 602 S.E.2d 772, 780 (2004).

b. The Special Referee's conclusion that Appellant lacked reasonable investment-backed expectations is well supported by the facts and the law.

"A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). "For government regulation to constitute a taking, the property owner must objectively demonstrate the existence of investment-backed expectations." *Dunes West Golf Club, LLC v.*

under legislative privilege. See Def. Mem. Supp. Protective Order (June 12, 2012); Order Granting Def. Mot. Protective Order (July 20, 2012). Therefore, it is improper for Appellant to use this exhibit.

Town of Mt. Pleasant, 401 S.C. 280, 319, 737 S.E.2d 601, 622 (2013). The test is an objective inquiry focusing on what is “foreseeable as a reasonable possibility even if not foreseeable as a certainty,” given the regulatory regime existing as of the date land is purchased. *Cane Tennessee Inc. v. United States*, 63 Fed. Cl. 715, 730 (Fed. Cl. 2005); *see also Mehaffy v. United States*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012) (courts “must consider what a party’s reasonable objective expectations were in the property; the party’s subjective expectations for the property should not be considered.”) (emphasis added). “Property owners may not establish a taking simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development.” *Dunes West*, 401 S.C. 280, 320, 737 S.E.2d 601, 622 (2013). “A property owner’s reasonable investment-backed expectations are defined at the time the property is purchased.” *Norman v. United States*, 63 Fed. Cl. 231, 267 (Fed. Cl. 2004). In determining whether Appellant’s expectations were reasonable, the Special Referee correctly concluded that they were not.

1) The Special Referee properly found and concluded that the hazards of floodplain development diminished Appellant’s expectations.

A highly relevant factor in defining a party’s reasonable expectations is “whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property.” *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004). Appellant proposed a risky undertaking of constructing a massive development on a floodplain, thus triggering an extensive NFIP regulatory scheme enacted in response to the hazards of development within flood prone areas. 42 U.S.C. § 4001. By their nature, floods pose a serious risk to human life and property, and flooding causes billions of dollars in damage each year in the United States. Given the risks associated with flooding, governments at all levels have adopted regulatory measures, including land use restrictions, to limit exposure to

flood damage. Because it proposed a massive development in an area already identified as flood prone, the Appellant should have anticipated that it might well confront numerous complicated regulatory obstacles. When Appellant in fact encountered such entirely predictable obstacles, Appellant could not conceivably contend that these regulatory restrictions interfered with a reasonable expectation that it would not be subject to such restrictions.

The Special Referee explicitly found that floods happen and the number of floods is increasing. Regulatory Taking Order, p. 64; Def. Exh. 64 at DEF-00001932. FEMA's Flood Maps can and do change over time, putting property within a floodway when no floodway existed previously. Regulatory Taking Order, p. 64; 42 U.S.C. § 4101(e) and (f); *compare* Def. Exh. 131 with Def. Exh. 129 and 130. Within a floodway, the greatest flood velocities and depths occur, causing the greatest damage during a flood. Regulatory Taking Order, p. 64; Tr. Vol. 12, p. 2218, line 12 – p. 2219, line 1. In order to develop property within a floodway or floodplain, a property owner must contend with complex federal and local regulations intended to discourage such development and protect people from harm. Regulatory Taking Order, p. 64; 42 U.S.C. § 4001(e). Flooding, flood damage and floodplain management are real issues with serious consequences and Appellant was undoubtedly aware of this reality. Regulatory Taking Order, p. 64; Def. Exh. 64; Tr. Vol. 15, p. 2689 – p. 2695; Tr. Vol. 12, p. 2274, lines 12-21. Because evidence supports the Special Referee's findings, his findings cannot be disturbed on appeal. Given the serious problem the NFIP was intended to address, the Special Referee correctly concluded Appellant's expectations of extensive development in a floodplain were necessarily diminished by the backdrop of risk of harm associated with flooding and floodplain development.

Contrary to Appellant's attempt to portray floodplain development, and particularly flood control structures, as routine and harmless, levee construction raises weighty considerations for local governments to contend with. Flood protection is costly, never-ending and has unintended consequences. Regulatory Taking Order, p. 64; Def. Exh. 64 at DEF-00001932. Homes and businesses located behind a levee, even a certified levee, still face the risk of flooding, and flood damage behind a levee can be even more costly than damage to structures unprotected by levees. Pl. Exh. 369 at DEF-00002316. In deciding whether to "assume ultimate responsibility" for maintenance of a levee under 44 C.F.R. § 65.10, thus allowing development to occur behind a levee, communities must decide what degree of risk to life and property they are willing to tolerate. *Id.* And communities must grapple with funding and liability issues associated with levee construction and maintenance. These issues have real consequences to public health, safety and welfare. Appellant had no basis to expect that Richland County would disregard these serious risks simply to facilitate its investment objectives.

2) Appellant's speculative plan of action fails to provide any real foundation for reasonable investment-backed expectations.

The Special Referee found that as of the date of purchase, Appellant's plan was to first convince FEMA to issue a new preliminary revised Flood Map showing no floodway on its Property. Regulatory Taking Order, p. 27. Ample evidence supports this finding. Pl. Exh. 264, p. 2450; Pl. Exh. 120, p. 1; Tr. Vol. 12, p. 2131, line 2 – p. 2132, line 2; Tr. Vol. 12, p. 2136, line 24 – p. 2137, line 7; Tr. Vol. 12, p. 2138, line 23 – p. 2139, line 7. The Special Referee also found, based on the evidence, that Appellant had not performed one iota of hydrological or hydraulic analysis prior to purchase to ascertain whether this plan was even possible. Regulatory Taking Order, p. 26, 27. Prior to purchase, Appellant had obtained only preliminary soils

analysis and topographic survey information, and a preliminary cost estimate to improve the levees. Pl. Exh. 208; Tr. Vol. 5, p. 939, lines 21-24; Tillotson Dep. p. 67, lines 9-25. The evidence shows, and the Special Referee so found, that no one knew what a subsequent revised preliminary Flood Map would show. Regulatory Taking Order, p. 27; Tr. Vol. 12, p. 2127, lines 7-14. If Appellant produced data purporting to show no floodway on its Property and FEMA accepted this data, then this new preliminary revised Flood Map could always be appealed by some other property owner. Regulatory Taking Order, p. 28; *see* 42 U.S.C. § 4104. The outcome of such an appeal would be uncertain.

If Appellant could successfully manage to put in place a final Flood Map showing no floodway on its Property, Appellant's worries would be far from over. Evidence supports and the Special Referee so found, that FEMA's flood hazard zones A and AE would still remain on the Property. Regulatory Taking Order, p. 28; Tr. Vol. 12, p. 2143, line 16 – p. 2146, line 8. These zones trigger County requirements that any structures built within these zones must be elevated above the base flood elevation. *Id.* In order to remove the A and AE zones, Appellant would have to upgrade its levee to meet FEMA's certification standards. *Id.*

However, evidence supports and the Special Referee so found, that Appellant had not performed any geotechnical analysis of its levee prior to purchase to determine if or how its agricultural levees could meet FEMA's certification requirements. Regulatory Taking Order, pp. 30-31, 65; Tillotson Dep. p. 47, lines 11-25; p. 48-52; p. 53, lines 1-15. The evidence supports and the Special Referee so found that Appellant did not know whether it could upgrade its levee to meet FEMA's levee certification criteria. Regulatory Taking Order, p. 27; Tr. Vol. 6, p. 965, line 6 – p. 966, line 22. Appellant's levee certification submittal to FEMA would have to include an official commitment by a federal, state or local government to accept ultimate responsibility

for the maintenance of the levee. *See* 44 C.F.R. § 65.10; 44 C.F.R. § 72.2; 44 C.F.R. § 65.8. The Special Referee found, based upon evidence presented, that prior to purchase, Appellant had in hand a Resolution from Richland County that enabled the County to walk away from accepting responsibility for levee maintenance. Regulatory Taking Order, pp. 25-26; Pl. Exh. 147; Tr. Vol. 13, p. 2518, lines 5-8; Tr. Vol. 12, p. 2280, lines 20-23. Appellant did not know if Richland County would ultimately accept levee maintenance responsibility. Regulatory Taking Order, p. 26; *see* Tr. Vol. 3, p. 599, line 14 – p. 601, line 12.

If FEMA issued a final Flood Map with a floodway on the Property, then Appellant's path forward would become much more difficult. *See* Regulatory Taking Order, p. 22; Pl. Exh. 8. In order to develop the entire Property as it envisioned, Appellant would have to rely on FEMA accepting a revision of the Flood Map based upon levee certification in order to remove both the AE and A flood hazard zones and the floodway. *Id.* Appellant would have to demonstrate that its levee as upgraded would not cause increased flooding in Lexington County. Because the levee would be located in the floodway, Appellant would be forced to contend with the County's Floodway Provisions within its Floodplain Management Ordinances if it wanted to certify its levees which plainly posed a significant obstacle.

Even assuming for a moment that the County had adopted FEMA's requirement that construction could occur in a floodway if engineering analysis demonstrated that the construction would not cause any increase in base flood elevations on the Congaree River, Appellant had no engineering analysis at the time of purchase confirming or even estimating that levee construction could be done without increasing base flood elevations. On the day before closing on the Property, Burroughs & Chapin received a letter from Lockwood Greene in which it merely stated that FEMA's preliminary Flood Data "implied" that levee improvements would

not cause an increase in base flood levels. Pl. Exh. 208 at CV002276. Lockwood Greene's opinion was not based on any hydrologic and hydraulic analysis examining the impact of a heightened and widened levee on base flood levels. Its opinion was based upon reviewing a Flood Insurance Study that was not even final, and hazarding a guess. Aside from this rather significant problem, Appellant would also have to secure the County's agreement to accept responsibility for levee maintenance, which was far from certain.

As this daunting regulatory maze shows, Appellant faced an uncertain path forward, full of twists and turns and possibly even dead-ends, with unknown outcomes, in order for its grandiose development plan to come to fruition. "A 'pie in the sky' plan cannot provide the foundation for a reasonable investment-backed expectation." *Warren Trust & Marietta Trust v. United States*, 107 Fed. Cl. 533, 570 (Fed. Cl. 2012).

3) The County's regulatory scheme made Appellant's expectations unreasonable.

The regulatory regime in place at the time the plaintiff acquires the property shapes the reasonableness of investment-backed expectations.³⁹ *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001). It is difficult for a plaintiff to prove reasonable investment-backed expectations in property that it voluntarily purchased in the face of a regulatory impediment. *Norman v. United States*, 429 F.3d 1081, 1088 (Fed. Cir. 2005); *Westside Quick Shop v. Stewart*, 341 S.C. 291, 305, 534 S.E.2d 270, 274 (2000). An expectation to develop property within an uncertain regulatory environment is not reasonable. "The knowledge that circumstances affecting property might change may be "enough to extinguish any reasonable expectation for takings purposes." *Paradissiotis v. United States*, 49 Fed. Cl. 16, 22 (Fed. Cl. 2001); *see also Appollo Fuels, Inc. v.*

³⁹ Appellant argues that, under *Palazzolo*, notice of an existing regulation does not bar a property owner's takings claim. CV Initial Brief, p. 93. While true, the issue here is not whether Columbia Venture's knowledge of an existing regulatory scheme bars a takings claim. As *Palazzolo* also made clear, the existing regulatory scheme in place prior to purchase is a relevant consideration in determining reasonable investment-backed expectations. *Palazzolo v. Rhode Island*, 533 U.S. 606, 635-636 (2001).

United States, 381 F.3d 1338 (Fed. Cir. 2004) (holding that the statutory scheme in place at time of purchase made the government's decision that property was unsuitable for mining reasonably foreseeable; thus, plaintiff lacked reasonable investment-backed expectations). When a party moves forward with a transaction in light of actual or constructive knowledge of changing regulatory circumstances, "[t]he fact that his risk-taking turned out badly for him does not render it a taking in violation of the Fifth Amendment." *Paradissiotis v. United States*, 304 F.3d 1271, 1276 (Fed. Cir. 2002). "The likelihood of regulatory restraint is especially high" when the plaintiff's proposed activity poses a risk of harm to the public. *Rith Energy v. United States*, 270 F.3d 1347, 1351 (Fed. Cir. 2001).

This Court is bound by the Special Referee's well-supported findings of fact showing the uncertainties Appellant was facing. *Townes Associates, Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). At the time Appellant purchased the Property, FEMA's preliminary Flood Map put practically all of its Property within a floodway, and the County was using this preliminary Flood Map for permitting purposes, thus triggering the County's floodplain management regulations. Regulatory Taking Order, pp. 16-17; Def. Exh. 142; Pl. Exh. 11; Pl. Exh. 238; Pl. Exh. 162; Pl. Exh. 12; Def. Exh. 20a, p. 3, section B. When FEMA released this preliminary Flood Map, Mr. Manning's investment prospect, Tee-To-Green, withdrew its option to purchase the Manning Property because it could not obtain assurances from Richland County that the Property could be developed. Regulatory Taking Order, p. 16; Tr. Vol. 1, p. 155, line 1 – p. 156, line 10; *see also* Tr. Vol. 3, p. 562, line 8 – p. 563, line 10. Speaking objectively, Tee-To-Green's decision should have influenced any developer's expectations as to whether it could successfully develop the Property.⁴⁰

⁴⁰ The fact that Burroughs & Chapin had trouble attracting other investors to finance the purchase price of \$18 million dollars also indicates the riskiness of its development plans. *See* Def. Exh. 5 at BandC020605; Def. Exh. 6

Under the Floodway Provision of the County Floodway and Floodplain Overlay Zoning District, in effect on the date of purchase, “filling of floodway areas, dumping of salvaged or scrap material, or the placing of material or obstruction within a floodway area in such a manner as to impede free flow of water during a time of flood or in such a manner that the elevation of floodwaters will be increased [was] prohibited.” Regulatory Taking Order, p. 10; Pl. Exh. 250a, § 26-73.4(2), Zoning Ordinance (1999). Based upon sound evidence, the Special Referee found that this provision essentially prohibited construction in a floodway. Order, p. 10; Tr. Vol. 13, p. 2528, line 23 – p. 2529, line 9; 2617, lines 17-25; Tr. Vol. 13, p. 2593, line 2 – p. 2594, line 3. An environmental report in the possession of Burroughs & Chapin prior to purchase stated that Richland County’s Zoning Ordinance prohibited construction in a floodway. Regulatory Taking Order, p. 17; Pl. Exh. 497 at CV013562. In the course of its due diligence, Burroughs & Chapin learned directly from FEMA that the County did not allow construction in a floodway. Regulatory Taking Order, p. 18; Pl. Exh. 11 at DEF-00000016. Burroughs & Chapin also learned from the County’s Floodplain Coordinator that the County did not allow construction in a floodway. Def. Exh. 17 at CV013350; Def. Exh. 31.

Appellant ignores this evidence. Instead, it argues that the Property’s underlying zoning designation of D-1 would have allowed development to occur. CV Initial Brief, p. 89. The County’s Floodway and Floodplain Overlay Zoning District within its Zoning Ordinance served to impose additional limitations upon Appellant’s basic or underlying zoning restrictions. Pl. Exh. 250a, § 26-73.1, Zoning Ordinance (1999). Burroughs & Chapin knew that the Floodway and Floodplain Overlay Zoning District applied to its Property, and Appellant cannot simply

at BandC020612 (Burroughs & Chapin Board of Directors agreeing to put in \$3 million dollars and expecting another \$17 million to come from other investors and discussing difficulty in obtaining those investors); Tr. Vol. 6, p. 994, line 20 – p. 995, line 5; Tr. Vol. 6, p. 966, lines 2-16. Ultimately, the purchase price was revised to require only \$11 million dollars in cash with the remaining \$7 million paid via an equity interest in Columbia Venture, to be repurchased by Columbia Venture.

wish away the ample evidence supporting the Special Referee's finding that the County's Floodway and Floodplain Overlay Zoning District posed a significant obstacle to Appellant's expectations.

Further, Appellant asserts that the Floodway Provision of the Respondent's Storm Drainage Ordinance could reasonably be interpreted to mean the same as FEMA's minimum standard, even though Appellant's engineer looked at the County's Floodway Provision within its Storm Drainage Ordinance and read it as prohibiting construction in a floodway. Tr. Vol. 12, p. 2125, line 21 – p. 2126, line 16; Tr. Vol. 12, p. 2132, lines 3-8; Tr. Vol. 12, p. 2134, lines 9-23; Tr. Vol. 12, p. 2141, line 3 – p. 2142, line 24; CV Initial Brief, pp. 87-88. Section 8-62(h) set forth the Storm Drainage Ordinance's Floodway Provision, which stated that "no levees, dikes, fill materials, structures or obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway." Pl. Exh. 230 at DEF-00005418. In contrast, FEMA's minimum standard required communities to "prohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway unless it has been demonstrated through hydrologic and hydraulic means 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).

"The question of reasonable expectations can be resolved ... by the examination of the legal regime existing at the time of the action or acquisition." *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1350 (Fed. Cir. 2004). The word "impede" was not defined in the Storm Drainage Ordinance; consequently, the word "impede" must be defined according to its customary meaning. See § 8-54, Storm Drainage Ordinance (1994) ("The following definitions

apply to words and terms used in this Ordinance. All other words shall have their customary meaning.”). According to Collins English Dictionary, “impede” is defined as “to restrict or retard in action, progress, etc.; hinder, obstruct.” See *Murphy v. S.C. Dep’t of Health & Envtl. Control*, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012) (determining customary meaning of undefined term by referring to the dictionary). Reading the Storm Drainage Ordinance as a whole, the dictionary definition of “impede” is consistent with the stated purpose of the Ordinance to prevent “encroachment into natural drainage channels by buildings or other land improvements,” and the duty imposed upon applicants to carry out improvements or development located within or immediately adjacent to rivers or streams “in a manner that will not interfere with or restrict the flow of water” § 8-50, § 8-62(a), Storm Drainage Ordinance (1994). See *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011) (“Courts should consider not merely the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the whole purpose of the statute and the policy of the law.”).

In contrast, FEMA’s minimum “no-rise” standard states that encroachments, including fill, new construction, substantial improvements, and other development within a regulatory floodway is prohibited “unless 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) (emphasis added). The County’s standard prohibited encroachments that restrict the free flow of floodwater; whereas, FEMA’s standard prohibits encroachments that cause an increase in the height or depth of floodwaters. Given this distinction, the County’s “no-impede” standard is clearly distinguishable from

FEMA's standard. Although a court generally gives deference to an agency interpretation of its own regulations, where, as is the case here, the plain language of the Storm Drainage Ordinance was contrary to the County Engineer's interpretation, a court will reject the County Engineer's interpretation. *Brown v. South Carolina Dep't of Health and Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002). The County's Storm Drainage Ordinance prohibited what Appellant sought to accomplish.

Moreover, a developer of a project of this magnitude would normally require more than a verbal exchange with the County Engineer concerning whether the Storm Drainage Ordinance allowed it to proceed with levee certification. *See e.g. Embassy Real Estate Holdings, LLC v. D.C. Mayor's Agent For Historic Preservation*, 944 A.2d 1036, 1054 (D.C. 2008) ("One who is about to embark on such an expensive and complex project requiring significant demolition, alteration and new construction of a known historic property would require more than a casual statement that the [Historic Preservation Officer] had 'no intent at the time' to designate the property as an historic landmark before proceeding on that premise."). FEMA publicly stated that "Richland County [had] adopted more stringent regulations and [did not] allow any development in the floodway (unless a variance is obtained)." Pl. Exh. 11 at DEF-000000016. Appellant's own engineer read the Floodway Provision of the Storm Drainage Ordinance to essentially prohibit development in a floodway. Tr. Vol. 12, p. 2132, lines 3-8. If a reasonable developer was about to spend \$18 million dollars on floodway property, it would seek a definitive resolution of the legal issue before investing millions of dollars. Appellant neither sought a legal opinion from the County nor solicited outside legal advice. Tr. Vol. 5, p. 936, line 10 – p. 937, line 5. Had Appellant actually reviewed the Floodway Provision objectively, it would have had serious doubts about the County Engineer's interpretation.

Even if it was reasonable for Appellant to accept with no reservation the County Engineer's interpretation, the Special Referee found that the Storm Drainage Ordinance provided an appeal process where an interpretation of the County Engineer's interpretation could be challenged. Regulatory Taking Order, p. 66; Pl. Exh. 230, § 8-59, County Storm Drainage Ordinance (1994). Appeals were heard and decided by the Richland County Planning Commission. *Id.* As the Special Referee correctly concluded, a review of the Storm Drainage Ordinance called into question the County Engineer's interpretation. Consequently, an appeal was reasonably foreseeable, as well as an outcome rejecting the County Engineer's interpretation. It was also reasonably foreseeable that the County Attorney would object to the County Engineer's interpretation, which did in fact occur. Tr. Vol. 7, p. 1323, line 19 – p. 1324, line 20. It was reasonably foreseeable that the County would ultimately abide by its legal counsel's interpretation of the Floodway Provision that essentially barred development in the floodway. Accordingly, it was unreasonable for Appellant to expect that it could upgrade its levee when it was located within a floodway.⁴¹ See *Mehaffy v. United States*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012) (courts “must consider what a party’s reasonable objective expectations were in the property; the party’s subjective expectations for the property should not be considered.”) (emphasis added).

As a last resort, Appellant accuses Respondent of deception and bad faith in failing to inform Appellant of these regulatory impediments. CV Initial Brief, p. 94. The evidence establishes, and the Special Referee so found, that Appellant already knew that the Floodway

⁴¹ Appellant argues that the County Council's adoption of its Levee Resolution on February 2, 1999 concerning levee certification provides Columbia Venture with a basis to “reasonably understand that its Levee improvement plans were permissible” even with its Property under FEMA's preliminary Flood Map of June 5, 1998. This argument is baseless in light of the County staff report to County Council concerning Lockwood Greene's request to accept levee maintenance responsibility, which was a public document, stating that structures could not be placed in a floodway. Def. Exh. 20a at DEF-00000055.

Provision in the County's Zoning Ordinance prevented Appellant from improving its levees so long as its levees were within a floodway. Regulatory Taking Order, pp. 17, 27; Pl. Exh. 8 at DEF-000000005; Def. Exh. 17 at CV013350; Pl. Exh. 497 at CV013562; Pl. Exh. 11 at DEF-000000016. The evidence establishes, and the Special Referee so found, that Appellant already knew or should have known that the meaning of the Floodway Provision of the County's Storm Drainage Ordinance was uncertain, and the County Engineer's interpretation was inconsistent with the plain language of the Floodway Provision. Regulatory Taking Order, p. 19, 28, 64, 66; Pl. Exh. 8; Pl. Exh. 11 at DEF-000000016; Tr. Vol. 12, p. 2132, lines 3-8; Tr. Vol. 7, p. 1323, line 12 - p. 1324, line 25; Tr. Vol. 8, p. 1399, line 15 – p. 1401, line 15. What is more, *Penn Central*'s element of reasonable investment-backed expectations does not require the Respondent to defend its actions as reasonable. It is Appellant who bears the burden of establishing that its expectations at the time of purchase were reasonable. *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999). This Court should recognize Appellant's argument for what it is – a poor attempt to deflect its own failures upon Respondent.

One who buys property with knowledge of regulations posing an obstacle to his development expectations assumes the risk of economic loss. *Mehaffy v. United States*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012). "In such a case, the owner presumably paid a discounted price for the property" and "[c]ompensating him for a taking would confer a windfall." *Id.* "To hold otherwise would turn the Government into an involuntary guarantor of the property owner's gamble that he could develop the land as he wished despite the existing regulatory structure." *Id.* Here, Appellant did indeed buy the Property at a discounted price, as evidenced by the purchase

price of \$18 million dollars compared with an appraised value of \$30 million dollars.⁴² That Appellant lost its gamble does not render its risk-taking a violation of the *Takings Clause*. *Paradissiotis v. United States*, 304 F.3d 1271, 1276 (Fed. Cir. 2002).

4) The Special Referee did not err in rejecting Appellant's claims that the County induced it to purchase the Property.

Appellant asserts that Respondent's "course of conduct" induced Appellant's expectations that it could improve its levee and develop its Property. CV Initial Brief, p. 90. Appellant raised this argument to the Special Referee, who rejected Appellant's characterization. *Compare* CV Proposed Order, pp. 117-122 *with* Regulatory Taking Order, pp. 60-69. The Special Referee's findings of fact are supported by the evidence and his conclusions of law are sound.

Appellant argues that a letter sent by the County Administrator to FEMA asking that FEMA delay finalization of its June 5, 1998 preliminary Flood Data induced Appellant to purchase the Property. CV Initial Brief, p. 91; Pl. Exh. 12. The Special Referee found that Mr. McSwain's request for delay was motivated by an interest in obtaining more time for any affected property owner to obtain and review relevant information, and had nothing to do with any support or non-support of Burroughs & Chapin's development plans. Regulatory Taking Order, p. 18. The Special Referee's findings are supported by the testimony of the County Administrator. Tr. Vol. 13, p. 2544, line 10 – p. 2545, line 12; Tr. Vol. 13, p. 2545, lines 13-16. This Court is bound by that finding. *Townes Associates, Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). To characterize Mr. McSwain's letter to FEMA as "explicit and

⁴² Columbia Venture's purchase price of \$18 million dollars was agreed upon after the June 5, 1998 preliminary Flood Maps were issued and after the Rust Report stated that the County prohibited construction in a floodway. This \$18 million dollar purchase price was significantly lower than the appraised value of \$30 million dollars. In comparison, Tee-To-Green's purchase price of \$15 million dollars for approximately half of the Property was agreed upon before FEMA issued its preliminary Flood Maps, and the purchase price is in line with the \$30 million dollar appraisal of 4,600 acres. Tr. Vol. 1, p. 136, line 21 – p. 143, line 18.

implicit encouragement” of Appellant’s development plans is merely a subjective belief based on nothing more than the fact that Mr. Manning, along with other affected property owners, were copied on the letter. Pl. Exh. 12; Tr. Vol. 1, p. 176, line 18 – p. 177, line 15; *Dunes West*, 401 S.C. 280, 320, 737 S.E.2d 601, 622 (2013); *Mehaffy*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012).

As additional purported evidence of inducement, Appellant turns to evidence that Mr. Gregory and other members of Burroughs & Chapin’s due diligence team met with members of County Council prior to purchase of the Property, and heard “clear support” of Burroughs & Chapin’s plan “to develop an extensive mixed-use development behind certified levees.” CV Initial Brief, p. 91. However, the Special Referee found that, in these meetings, no details concerning development plans were provided. Regulatory Taking Order, p. 20. Evidence supports his finding. Tr. Vol. 3, p. 550, line 25 – p. 551, line 15; Tr. Vol. 13, p. 2537, line 22 – p. 2538, line 3. The Special Referee found that Burroughs & Chapin provided to County officials only a preliminary land use plan. Regulatory Taking Order, p. 20. Evidence supports his finding. Tr. Vol. 3, p. 550, line 25 – p. 551, line 15; Tr. Vol. 3, p. 698, line 25 – p. 699, line 15. Finally, the Special Referee found that none of the County officials who spoke with Burroughs & Chapin prior to purchase and testified at trial – former Council Member Mrs. Smith, former County Administrator Mr. McSwain, and former County Engineer Ralph Pearson - gave any promises, commitments, or assurances to Burroughs & Chapin that the County would grant the necessary permits and approvals needed to move forward with Burroughs & Chapin’s plans. Tr. Vol. 8, p. 1461, lines 14-19 (Mr. Pearson); Tr. Vol. 12, p. 2277, line 25 – p. 2278, line 9 (Mrs. Smith); Tr. Vol. 13, p. 2512, line 22 – p. 2513, line 15 (Mr. McSwain). This Court is bound by these findings of fact and they undercut Appellant’s argument that meetings with

County Council members induced purchase of the Property or otherwise engendered reasonable investment-backed expectations.

It is not reasonable to rely on initial responses by individual elected officials to a general, preliminary vision of the Property as the basis for buying the Property, not because elected officials are untrustworthy, but rather, because their response may change and evolve once land use decisions are put before them as a legislative body in the exercise of their police power.⁴³ *C.f. Greenville County v. Kenwood Enters.*, 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003) (“As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy.”); *S.C. Dep’t of Social Services v. Parker*, 275 S.C. 176, 178, 268 S.E.2d 282, 283 (1980) (“While the State may be subject to the doctrine of estoppel in its contractual relations, that doctrine will not be applied to deprive it of the due exercise of its police power or to thwart its application of public policy.”) (internal citation omitted). Based on an objective review, Appellant’s claim that informal contact with individual members of County Council induced it to spend millions of dollars in a land purchase is simply not reasonable. *Dunes West*, 401 S.C. 280, 320, 737 S.E.2d 601, 622 (2013); *Mehaffy*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012).

Appellant argues that “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,” and this County awareness and participation induced Appellant’s reasonable investment-backed expectations. CV Initial Brief, p. 91. It cites to letters from Lockwood Greene to SCDNR, SCDNR to FEMA, and FEMA to SCDNR regarding FEMA’s regulatory requirements for levee certification as support for its

⁴³ See Tr. Vol. 13, p. 2480, line 17 – p. 2481, line 21.

argument. *Id.* These letters were not addressed to the County, and the County was copied on only one of the letters. *See* Pl. Exh. 246; Pl. Exh. 18; Pl. Exh. 549.

Although Lockwood Greene's letter states to SCDNR that it was "asked to represent" the County, Mr. McSwain, the County Administrator at the time, testified that he did not authorize Lockwood Greene to make any such representation. Tr. Vol. 13, p. 2536, line 19 – p. 2537, line 21. Appellant offered no evidence to contradict his testimony. Tr. Vol. 13, p. 2557, line 20 – p. 2559, line 11. None of these letters demonstrate any participation by the County in Lockwood Greene's efforts to obtain any confirmation from FEMA. Further, merely being copied on a letter or otherwise having a copy of a letter, cannot reasonably be characterized as the County being "well aware of" what Appellant was attempting to accomplish with FEMA. Based on these paltry facts, Appellant cannot legitimately argue that the County's peripheral, if any, involvement in Lockwood Greene's overture to FEMA had anything to do with Appellant's expectations, much less engendering reasonable expectations. *See Mehaffy*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012).

Appellant then turns to the County's Levee Resolution of February 2, 1999 as evidence of County inducement to buy the Property. It argues that the County staff and Council Committee recommendation to accept levee maintenance responsibility with no reservations served to induce Columbia Venture. *See* CV Initial Brief, p. 91. However, these recommendations were not followed by County Council.⁴⁴ Mrs. Smith introduced a substitute motion, in the form of a resolution, which had the effect of superseding the Committee's motion. *Id.*; Tr. Vol. 12, p. 2283, lines 18-21; Tr. Vol. 13, p. 2390, lines 2-5. The substance of this resolution was different than the staff recommendation and the Committee recommendation.

⁴⁴ County Council is not bound to follow the recommendation of its committees. *F.B.R. Investors v. County of Charleston*, 303 S.C. 524, 527-528, 402 S.E.2d 189, 191 (Ct. App. 1991).

The County's Levee Resolution, in contrast to the Council Committee's recommendation to proceed with accepting responsibility for levee maintenance, manifested an intent to step back from a rushed decision, giving the County the time and the means to walk away from any responsibility for an improved levee if it ultimately chose to do so.⁴⁵

Moreover, as the Special Referee so found, the Levee Resolution was drafted in a manner that provided the County with the ability to avoid altogether any acceptance of responsibility for levee maintenance. Regulatory Taking Order, p. 25. The Levee Resolution stated that the County accepted "responsibility for local inspection and enforcement of the levee system,"⁴⁶ and if required by FEMA, to accept operation and maintenance responsibility for the system contingent upon" five conditions. Regulatory Taking Order, p. 25; Pl. Exh. 147 at DEF-00012032 (emphasis added). The County agreed to accept this responsibility if 44 C.F.R. § 65.10 required Richland County to accept responsibility for levee maintenance. 44 C.F.R. § 65.10(d) requires levee systems to be maintained by a federal, state or local community; however, the regulation does not impose upon these entities any requirement that they must accept such responsibility. Nothing in 44 C.F.R. § 65.10(d) limits the choice of local government entity to only that local government that exercises jurisdiction over the property. For example, the City of Columbia, who already owned and maintained a portion of the same levee system, could have served as the government entity to accept maintenance responsibility.

Also, the evidence supports, and the Special Referee so found, that there was no certainty that all the contingencies contained in the Levee Resolution would or could be met. Regulatory Taking Order, p. 26; Tr. Vol. 3, p. 599, line 14 – p. 601, line 12. In particular, the fourth

⁴⁵ See Tr. Vol. 13, pp. 2388 – 2413; Tr. Vol. 13, p. 2504, line 16 – p. 2505, line 15.

⁴⁶ The only definitive commitment made by County Council was to accept "responsibility for local inspection and enforcement of the levee system." The County's Storm Drainage Ordinance in effect at the time already enabled the County to inspect levees for compliance with maintenance standards, and to enforce these provisions. Pl. Exh. 230, § 8-72 and § 8-69, Storm Drainage Ordinance (1994).

contingency – that the County, City and Appellant resolve issues of performance and funding of the operation and maintenance responsibility – required agreement among three entities on who was going to own, operate and maintain the levee and how operation and maintenance in perpetuity would be funded.⁴⁷ See Tr. Vol. 13, p. 2400, line 8 – p. 2405, line 15. Liability issues associated with these activities would necessarily have to be considered. *Id.* As Mr. Manning conceded, the complexity of this contingency made its outcome uncertain. Tr. Vol. 3, p. 599, line 14 – p. 601, line 12. In fact, these issues were never definitely resolved by the parties.

Mr. Gregory conceded that resolutions, unlike ordinances or contracts, do not bind the enacting body to a permanent, enforceable course of action.⁴⁸ Regulatory Taking Order, p. 25; Tr. Vol. 6, p. 975, lines 1-16; Tr. Vol. 6, p. 977, lines 1-16. The Board of Directors of Burroughs & Chapin understood this as well. After the County adopted its Levee Resolution, the Board of Directors of Burroughs & Chapin resolved that certain criteria that must be met in order to purchase the Property, one of which was “that an agreement can be negotiated with Richland County to assume the maintenance of the dike system” Def. Exh. 4 at BandC020630. Hence, Appellant cannot legitimately argue that the Levee Resolution induced the purchase of the Property.

⁴⁷ Appellant unilaterally asserts that the levee upgrade itself was the first contingency to accomplish. CV Initial Brief, p. 91. Appellant’s insistence that the first listed contingency was the first to be accomplished is a subjective expectation and thus cannot be considered to be a reasonable investment backed expectation. *Mehaffy*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012). A reasonable developer in the shoes of Columbia Venture would have wanted resolution of who would be performing the operation and maintenance and how that would be paid for, before levee improvements are made. It is pointless to spend millions of dollars to improve the levee if uncertainty exists regarding responsibilities associated with operating and maintaining it once constructed. Additionally, a reasonable developer would want the second contingency of preparing all required documentation concerning levee certification accomplished prior to the first contingency.

⁴⁸ Appellant makes much out of the legal status of resolutions, claiming that the Special Referee erred by holding that resolutions do not have legal binding effect on the County. CV Initial Brief, pp. 98-99. The Special Referee did not hold that resolutions have no binding effect, only that “a Resolution does not have the legal effect of an ordinance or contract.” Regulatory Taking Order, p. 25. The Special Referee clarified, in his Order Denying Columbia Venture’s Motion to Reconsider, that this statement was made “in the context of whether it was reasonable for the Plaintiff to have given so much weight to the Resolution,” when “a resolution is not a law,” but merely “an expression of will or opinion.” Order Denying Plaintiff’s Motion to Reconsider, p. 2 (April 22, 2013).

Appellant claims it relied upon letters from the County Council Chairman and the County Administrator to FEMA, which Appellant describes as expressing to FEMA the County's affirmative agreement to accept responsibility for levee maintenance. CV Initial Brief, p. 91. The letter from the County Administrator was dated after Appellant's purchase of the Property; thus Appellant could not have relied upon it prior to purchase. Pl. Exh. 26. The letter from the Council Chairman merely paraphrased the Levee Resolution, which, as explained above, was full of contingencies. Pl. Exh. 22. Mr. Gregory could not say for sure that Burroughs & Chapin had a copy of the letter prior to purchase of the Property. Tr. Vol. 4, p. 771, lines 3-13. Even if Burroughs & Chapin did have a copy, the letter merely informed FEMA of the County's Levee Resolution; it did not make anything certain about levee certification. Any reliance on this letter is unreasonable.

Finally, Appellant argues that it relied upon a clearly non-binding letter from the County Administrator to Mr. Gregory whereby the County agreed "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." CV Initial Brief, p. 92. Reliance on a letter that expressly stated that it was non-binding both at the head and foot of the letter is not reasonable. Appellant's suggestion that this letter could very well constitute a binding contract in spite of the express words to the contrary is untenable. Appellant's reliance on *Stevens & Wilkinson of S.C. v. City of Columbia* for this proposition is of no help because the memorandum of understanding in that case did not contain express statements that it was non-binding, and the County's letter included no classic contract language. 396 S.C. 338, 721 S.E.2d 455 (Ct. App. 2011).

Although *Dunes West* noted that the government's representations to the property owner may be relevant in assessing investment backed expectations, those government-induced

expectations must nonetheless be reasonable. *Dunes West*, 401 S.C. 318, 319-320, 737 S.E.2d 601, 622 (2013). For a sophisticated developer such as Appellant to claim that the County induced it to buy the Property based upon the County Administrator's letter to FEMA, the County Council's initial impressions of a preliminary land use plan, a Levee Resolution full of contingencies, third-party letters to SCDNR and FEMA, and the County Administrator's clearly non-binding letter to Burroughs & Chapin, simply underscores the weakness of its claim of reasonable investment backed expectations.⁴⁹

5) Appellant's claim that state property law and Mr. Manning's expectations made its expectations reasonable is contrary to well-established law.

Appellant claims that the "extent to which the owner's reasonable expectations have been shaped by the State's law of property" is a recognized factor in determining reasonable investment-backed expectations. CV Initial Brief, p. 97. It cites to a footnote in *Lucas v. S.C. Coastal Council* as support for this factor. *Id.* In footnote 7, Justice Scalia suggested a possible way of modifying the traditional parcel as a whole rule, an idea the Court thoroughly rejected in subsequent decisions. *See e.g. Tahoe-Sierra*, 535 U.S. 302, 331 (2002).

⁴⁹ Appellant claims that "the undisputed evidence shows" that its expectations concerning its Property were backed by "significant investments, including pre-purchase diligence that included preliminary engineering review of the Levees (see PTE-208), 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)." CV Initial Brief, p. 86. For the purposes of the reasonable investment-backed expectation prong of *Penn Central*, Appellant's post-acquisition development costs are not relevant. *Cienega Gardens v. United States*, 503 F.3d 1266, 1288 (Fed. Cir. 2007). The Special Referee further found that Appellant "did not even have the financial resources in hand to undertake levee construction; in fact, Appellant expected this cost to be paid through public financing." Regulatory Takings Order, p. 65. The evidence amply supports the Special Referee's findings of fact. Pl. Exh. 208; Tr. Vol. 5, p. 939, lines 21-24; Tillotson Dep. p. 67, lines 9-25; Def. Exh. 10; Pl. Exh. 254 at CV010851 and CV010863. Appellant obviously had no entitlement to discretionary federal and state grants or tax incentives to facilitate its development scheme. Because evidence exists in the record supporting the Special Referee's finding, this Court is bound by that finding. *Townes Associates, Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Appellant's expectations must be viewed in light of its minimal investment into what it knew was the keystone to its ability to even proceed with its massive development plan.

More generally, Appellant is mistaken in asserting that any interference with common law property interests interferes with investment-backed expectations for the purpose of a takings analysis. Simply proving a common law property interest is different from being able to claim an interference with investment backed expectations. As Justice Scalia said, “the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). Appellant’s theory is inconsistent with settled law regarding the balance between private property interests and public regulatory authority.

Appellant asserts that Mr. Burwell Manning’s expectation of future development on the Property somehow has bearing on whether Appellant’s expectations at the time of purchase were reasonable. In analyzing reasonable expectations, the expectations of prior property owners are irrelevant. *Norman v. United States*, 429 F.3d 1081, 1093 (Fed. Cir. 2005); *Mehaffy v. United States*, 102 Fed. Cl. 755, 766 (Fed. Cl. 2012). Appellant had no investment backed expectations derived from Mr. Manning because Appellant had not invested in the Property during the time Mr. Manning owned it. In determining reasonable investment backed expectations, a court looks at “only the expectations that a reasonable person in plaintiff’s position would have had upon acquiring the subject property.” *Mehaffy*, 102 Fed. Cl. at 766.

c. The Special Referee correctly concluded that the character of the Respondent’s Floodplain Management Ordinances weighed in favor of the County.

The third prong of the *Penn Central* analysis addresses the character of the government action. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). This element examines the magnitude of the burden a particular regulation imposes upon private property rights and how a regulatory burden is distributed among property owners. *Id.* at 542; *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 315, 737 S.E.2d 601, 620 (2013). The public purpose

that is served by the government's regulations is a relevant consideration. *Brace v. United States*, 72 Fed. Cl. 337, 356 (Fed. Cl. 2006); *Dunes West*, 401 S.C. 316, 737 S.E.2d 601, 620 (2013). "The character of the governmental action factor requires a court to consider the purpose and importance of the public interest underlying a regulatory imposition," and whether the burdens imposed by the regulation are "so wholly disproportionate to the burdens other individuals face in a highly regulated society that some people are being forced 'alone to bear public burdens which, in all fairness and justice, must be borne by the public as a whole.'" *Maritrans Inc. v. United States*, 342 F.3d 1342, 1356-57 (Fed. Cir. 2003). As such, courts will look to see whether a regulation effects a "reciprocity of advantage While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." 480 U.S. at 491; *see also Dunes West*, at 316, 620.

The Special Referee correctly ruled that the character of the government action weighed in favor of Respondent. Regulatory Taking Order, p. 73. In considering the character of the Respondent's floodplain management ordinances, the Special Referee recognized the purpose of the County's floodplain management ordinances and examined the distribution of burdens and benefits inherent within these ordinances. *Id.* at pp. 69-70. The Special Referee, after considering Appellant's arguments that bad faith was a relevant factor in determining the character of the government action, rejected Appellant's argument. *See id.*, pp. 69-73; Pl. Proposed Order, p. 133-136; Pl. Mem. Resp. Def. Proposed Order, pp. 26-32 (March 8, 2013). The Special Referee also rejected Appellant's related argument that the Respondent "singled out" Appellant for disparate treatment. *Id.* Appellant argues that the Special Referee erred as a matter of law in considering the harm-preventing purpose of the County Floodplain Management Ordinances and evidence of potential harm caused by an improved levee, in holding that the

County's Floodplain Management Ordinances did not unfairly target or burden its Property, and in rejecting bad faith as a relevant factor. The Special Referee committed no error.

- 1) The Special Referee properly considered the harm-preventing purpose of the County's Floodplain Management Ordinances.

In analyzing the character of the County's Floodplain Management Ordinances, the Special Referee found that these Ordinances served an important purpose of preventing harm caused by flooding, as evidenced by the stated purpose and substantive content of each ordinance. Regulatory Taking Order, p. 69; Pl. Exh. 374, § 8-1, Stormwater Ordinance (2001); Pl. Exh. 250a, § 26-73.2, Zoning Ordinance (1999). Although "the mere purpose of the government action being beneficial or deriving from an intent to help the public does not immunize the government's actions under this prong of *Penn Central*," inquiry into the purpose of the regulation is nonetheless an appropriate consideration in examining the character of the government action. *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 517 (Fed. Cl. 2009); *see also Dunes West*, 401 S.C. 280, 315-316, 737 S.E.2d 601, 620 (2013). Relevant to this inquiry is whether the regulation at issue serves to prevent harm to the public. *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 518 (Fed. Cl. 2009).

Citing to *Lingle v. Chevron USA, Inc.*, Appellant asserts that consideration of the harm-preventing purpose of the County's Floodplain Management Ordinance constitutes an error of law. CV Initial Brief, p. 102. *Lingle* held that the question of whether government action substantially advances legitimate government interests is a due process inquiry, and has no place in examining "the magnitude or character of the burden a particular regulation imposes upon private property rights." *Lingle*, 544 U.S. 528, 542 (2005). In addressing the "character of the government action" element, the *Lingle* Court identified as a relevant consideration whether the regulation "amounts to a physical invasion or instead merely affects property interests through

some public program adjusting the benefits and burdens of economic life to promote the common good.” *Lingle*, 544 U.S. 528, 539 (2005). In “adjusting the benefits and burdens of economic life,” this Court cannot ignore the “common good” or put in another way, the public purpose of the government action. The due process inquiry of whether government action furthers a legitimate government interest is not the same as balancing the relative importance of what the government action aims to achieve against the economic harm the government action may cause the property owner.

Whether a regulation serves to prevent harm has long been part of the calculus of deciding a regulatory takings claim. See e.g. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 489 (1987); *Richards v. City of Columbia*, 227 S.C. 538, 548, 88 S.E.2d 683, 687 (1955). “*Lingle* neither addressed nor disturbed *Penn Central*’s consideration of the health and safety aspect of ... regulations.” *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1279 (Fed. Cir. 2009) rehearing denied en banc 2009 U.S. App. LEXIS 24529 (Fed. Cir. 2009), cert denied 559 U.S. 935 (2010). In weighing the benefits, burdens, and distribution of a regulation, “there is little doubt that it is appropriate to consider the harm-preventing purpose of a regulation in the context of the character prong of a *Penn Central* analysis.” *Rose Acre Farms*, at 1260. Government action that serves to prevent harm to public safety may impose burdens on a property owner, but burdens caused by harm prevention are typically not compensable. *Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447, 518 (Fed. Cl. 2009). This is appropriate because such regulation serves to prevent harm to the public, whereas eminent domain serves to take private property that is useful to the public. *S. Kemble Fischer Realty Trust v. Board of Appeals*, 9 Mass. App. Ct. 477, 482, 402 N.E.2d 100, 104 (App. Ct. 1980) cert denied sub nom 449 U.S. 1011 (1980).

In comparing the potential economic loss to Appellant against the interests served by County's restrictive floodplain management regulations, the Special Referee correctly held that the harm-preventing purpose of the County's Floodplain Ordinances is an important consideration weighing in the County's favor. There can be no greater public value than saving lives and preventing costly damage to property in the event of a natural disaster.

- 2) The Special Referee properly considered evidence indicating that Appellant's proposed levee improvements could very well have caused actual harm to the people and property of Lexington County.

The Special Referee also found relevant the evidence in the case "indicating that Columbia Venture's plans to improve its levees would likely cause increased flooding in Lexington County." Regulatory Takings Order, p. 72. So long as any evidence supports the Special Referee's finding, it shall not be disturbed on appeal. *Townes Associates, Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Contrary to Appellant's contention that no evidence supports this finding, evidence in the record unquestionably supports the Special Referee's finding.

The Lexington County Planning Director, Mr. Compton, testified that the prospect of improved levees in Richland County created a "situation where water that previously might not come would be coming towards Lexington County." Tr. Vol. 15, p. 2692, lines 3-13. He further stated that this situation "create[d] a scary image for Lexington County property owners." Tr. Vol. 15, p. 2691, line 21 – p. 2692, line 2. Lexington County's top concern was that an upgraded levee on the Richland County side of the Congaree River would cause greater flooding in Lexington County. Tr. Vol. 15, p. 2692, line 22 – p. 2693, line 3. Although Mr. Compton was not an engineer, a nationally-recognized engineer who the County invited to speak at a public forum about levee and flood policy, stated as an "immutable rule" that "moving water off one location causes it to go to another." DEF. Exh. 64 at DEF-00001903. As a matter of common

sense, a properly designed and maintained levee would block floodwater from inundating property behind it, and push that floodwater somewhere else.

Mr. Compton's fear was not at all far-fetched. In 2000, based on conversations with FEMA, the County understood that Appellant's project would be difficult to accomplish under the Appeal Resolution because improving the levees would likely cause a rise in base flood elevations. Pl. Exh. 4, p. 4. To avoid a rise in base flood elevations, Appellant could move the levee further back from the Congaree River. *Id.* Otherwise, Appellant would have to demonstrate that the levee upgrade would cause no adverse effect on Lexington County. *Id.* at p. 4; *see also* 44 C.F.R. § 65.12. Appellant was aware of this problem as well. *See* Wiseman Dep. p. 113, line 6 – p. 114, line 10 (stating that FEMA's Appeal Resolution made Columbia Venture's project difficult to accomplish); Wiseman Dep. p. 210, line 18- p. 211, line 4 (stating that FEMA's final map made levee certification "very difficult.").

In 2001, Appellant discussed the idea of reconfiguring a portion of the levee to a location further back from the Congaree River in order to avoid "mitigation on the Lexington and Cayce side and minimize a negative impact of any levee system adjustments" Pl. Exh. 509 at CV007987. After FEMA issued its final Flood Map on August 20, 2001, one of Appellant's engineers from Exponent, Inc., concluded that Appellant could not improve its levees in their existing location without causing increased base flood elevations in Lexington County. Def. Exh. 99 at CV000468. Appellant's other engineering firm, Lockwood Greene, also concluded that levee improvements would increase base flood elevations unless the levee was relocated further away from the Congaree River or some sections of the levee were not improved.⁵⁰ *Id.* at

⁵⁰ At trial, Appellant put forward an expert, Mr. Carroll Barker, who opined that levee certification would not have caused base flood levels to increase. The Special Referee heard his testimony and considered Appellant's arguments relating to his testimony, but ultimately rejected Mr. Barker's testimony, presumably because the Special Referee did not find Mr. Barker to be credible. "Credibility determinations regarding testimony are a matter for the finder of

CV000471. This evidence leaves no doubt that Appellant's planned levee upgrade could very well have harmed Lexington County.

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

3) The burdens and benefits inherent within the Respondent's Stormwater Ordinance were fairly distributed.

The County's Floodway Provisions prohibiting construction in floodways constituted the general rule applicable to all property in Richland County located within a floodway. The Special Referee found, and evidence so supports, that "as of 2001, at least 16,500 acres of

fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal." *RRR, Inc. v. Toggas*, 378 S.C. 174, 182, 662 S.E.2d 438, 442 (Ct. App. 2008).

property within Richland County were located within a regulatory floodway.”⁵¹ Regulatory Taking Order, p. 70. Pl. Exh. 51, p. 1. “A taking does not take place if the prohibition applies over a broad section of land and thereby secures an average reciprocity of advantage.” *Penn Central*, 438 U.S. 104, 147 (1978). Appellant’s burden was widely shared with thousands of acres of floodway property located within Richland County. *See Cummins v. Robinson Twp.*, 283 Mich. App. 677, 720, 770 N.W.2d 421, 448 (Ct. App. 2009) (... “provisions regarding flood-plain construction ... apply equally to all landowners with property similarly situated in flood-prone areas. Thus, plaintiffs are both benefited and burdened like other similarly situated property owners”). The County’s prohibition on construction in a floodway burdens owners of property within a floodway, but the Special Referee also found, again supported by the evidence, that they are also benefitted because all others similarly situated cannot build in a floodway either, thus avoiding flood damages. Regulatory Taking Order, p. 71; Tr. Vol. 14, p. 2619, lines 8-24. Reduction in potential flood damage represents a cost savings to these property owners, not only saving costs they would have to incur to repair flood damage but also tax savings realized through reduced cost to the County in response, rescue, evacuation, and other functions undertaken during a flood. *Id.*

Appellant attempts to avoid this conclusion by comparing itself to two of its neighbors, Heathwood Hall Episcopal School and the City of Columbia, both of which were beneficiaries of certain narrow exceptions to the Respondent’s general rule prohibiting construction within a floodway. Appellant argues it was disproportionately burdened because it was not allowed to build in a floodway under the Respondent’s ordinances but the City of Columbia and Heathwood

⁵¹ This figure does not include the floodways newly designated within FEMA’s 2002 Flood Maps. Therefore, the actual floodway acreage as of February 20, 2002 is greater than 16,000 acres. Although this figure does not exclude property within municipal corporate limits, the acreage within unincorporated Richland County nonetheless greatly exceeds property within incorporated areas.

Hall, also behind the levee, were allowed under exceptions applicable to them, to build within a floodway so long as they could demonstrate that their construction plans did not cause base flood elevations to rise. Appellant ignores the fact that thirteen other neighboring property owners were located behind the levees. Pl. Exh. 166 at DEF-00000057. These other property owners were subject to the same general rule under the Floodway Provision as Appellant. Thus, Appellant's attempt to cast itself as the lone burdened property owner within its self-described class of neighboring property owners does not comport with the evidence. Most of the other property behind the levee was burdened just like Appellant's Property.

Moreover, the Special Referee found that the City and Heathwood Hall were not similarly situated to Appellant. Regulatory Taking Order, p. 71. Ample evidence supports this finding. Unlike the City's wastewater treatment plant and Heathwood Hall, whose structures were either occupied by employees or students during work or school hours, Appellant wanted to build an extensive development of residences, shopping centers, restaurants, hotels, and a retirement village on its property. Tr. Vol. 14, p. 2621, line 12 – p. 2622, line 20. These uses involve significantly more people occupying structures for longer time periods than the limited uses of a school and a wastewater treatment plant. *Id.* During a time of flood, evacuation of a school and wastewater treatment plant would demand less government resources and pose a smaller risk of loss of life or property than an entire residential and commercial development. *See id.* These findings cannot be disturbed on appeal. *Townes Associates, Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

As further evidence, Appellant owned unimproved Property within the Congaree River floodplain that it bought during FEMA's restudy, thereby assuming the risk that its Property would be designated as a floodway. Pl. Exh. 238; Pl. Exh. 11; Tr. Vol. 3, p. 630, lines 7-12.

Appellant came, in effect, to the nuisance. In contrast, the City purchased its property in 1967, and Mr. Burwell Manning donated the property on which Heathwood Hall sits in the early 1970s, well before Richland County joined the NFIP in 1981. Pl. Exh. 520; Def. Exh. 147; Tr. Vol. 2, p. 449, lines 11-13. At the request of the City and Heathwood Hall, the County essentially grandfathered their long-standing uses while still maintaining a high level of protection. Pl. Exh. 184; Pl. Exh. 362; Def. Exh. 76. Appellant's proposed development were not the same as the City's and Heathwood Hall's established uses.

Appellant argues that its burden and benefit must be "in the exact same fashion" as other similarly situated property owners in order for the character of the government action to weigh in favor of the Respondent. The law does not require what Appellant demands. In *Penn Central*, the property owner complained that the law in question did "not impose identical or similar restrictions on all structures located in particular physical communities," and thus, imposed an inequitable distribution of benefits and burdens. 438 U.S. 104, 133-134 (1978). In rejecting this contention, the Court explained that "legislation designed to promote the general welfare commonly burdens some more than others" and that fact does not make the government liable for a regulatory taking. *Id.* "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens ... in excess of the benefits received." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 521 (1987).

Lastly, the burden that the County's Floodplain Regulations imposed upon Appellant is not as severe as Appellant describes.⁵² In considering the character of the government action, the

⁵² Appellant argues that under *Penn Central*'s character of the government action element, 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." CV Initial Brief, p. 103. The same arguments Respondent made *supra*, regarding the lack of any flooding on Appellant's property, and addressing *Penn Central*'s character element in light of *Loretto*, applies here as well.

plaintiff's whole parcel must be taken into account. *Norman v. United States*, 63 Fed. Cl. 231, 286 (Fed. Cl. 2004). Under the County's Zoning Ordinance and Stormwater Ordinance, any encroachment in the floodway that would impede the free flow of floodwater was prohibited. This rule applied to 70% of Appellant's Property. The remaining thirty percent of Appellant's Property, or approximately 1,200 acres, was within zones AE or A, but outside of the floodway. Under the County's Zoning Ordinance and Stormwater Ordinance, filling, grading, and excavating property within zones AE or A was permissible provided that certain standards were met, and residential or commercial structures could be built so long as they were raised above the base flood elevation and/or adequately flood-proofed. Pl. Exh. 250a, § 26-73.5, § 26-73.6(3) and (4). Because 1,200 acres of Appellant's Property was developable, Appellant's statement that the County's Floodway Provision entirely prevented it from developing its Property is inaccurate and misleading. CV Initial Brief, p. 104.

- 4) The Special Referee properly rejected bad faith as a relevant factor in this case, and properly rejected Appellant's related arguments that the Respondent targeted, singled out, or otherwise thwarted its development plans.

Appellant contends that evidence of bad faith is relevant to the character of the government action. CV Initial Brief, p. 113. The Special Referee considered this argument and rejected it. Compare CV Proposed Order, pp. 133-136 and Pl. Resp. Def. Proposed Order, pp. 25-33 with Regulatory Taking Order, pp. 69-73. There are good reasons why this Court should reject bad faith as irrelevant under *Penn Central's* character of the government action.

First, in a regulatory takings context, courts have considered the question of unfairness, unreasonableness or bad faith in a very narrow line of cases involving issues not present here. Most of these cases concern the question of whether the plaintiff's takings claim is ripe for judicial review. To ripen a takings claim, the plaintiff must obtain a final decision from the government; however, a property owner may be excused from the final decision requirement if

he meets his burden of proving that obtaining a final decision would be a futile act. *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987); *Moore v. Sumter County Council*, 300 S.C. 270, 272, 387 S.E.2d 455, 457 (1990).

Futility may be established when the government attempts to avoid making a final decision by forcing the property owner to jump through “repetitive and unfair” administrative hoops. *Palazzolo v. Rhode Island*, 533 U.S. 606, 621, (2001). Similarly, extraordinary delay in government decision-making may give rise to a regulatory taking even without a final decision by the government. *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1366 (Fed. Cir. 2004). In order for delay to be deemed extraordinary, evidence of bad faith by the government in its delay is relevant. *Id.* In these two situations, courts differentiate between government procedure that is normal and fair and government procedure that is extraordinary and unfair in order to determine if the plaintiff should be excused from obtaining a final decision from the government.

Other than these two issues, both related to ripeness and not *Penn Central*, bad faith has rarely made an appearance in regulatory takings law. In *Cooley v. United States*, the court, borrowing the concept of “extraordinary delay” from cases involving ripeness, noted that the government’s extraordinary delay in acting on a permit application may constitute a taking. *Cooley v. United States*, 324 F.3d 1297, 1306-1307 (Fed. Cir. 2003). And in *Byrd v. City of Hartsville*, this Court considered the plaintiff’s argument that the city’s delay in acting on his rezoning request caused him to lose his opportunity to sell the property at issue for development. 365 S.C. 650, 660, 620 S.E.2d 76, 78 (2005). *Byrd* held that, “in the context of regulatory delay, the *Penn Central* inquiry is whether the delay ever became unreasonable” and suggested in a

footnote that bad faith was a relevant consideration in the context of regulatory delay. 365 S.C. 650, 661, fn. 15, 620 S.E.2d 76, 81 (2005) *citing to Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1366 (Fed. Cir. 2004). Unlike the plaintiffs in *Cooley* and *Byrd*, Appellant has neither alleged nor argued below, and the evidence certainly does not establish, that extraordinary delay caused by the Respondent is the basis for its taking claim.

Additionally, Appellant cites to an unpublished decision deciding a Rule 12(b)(6) motion, *Acorn Land, LLC v. Baltimore County*, 402 Fed. Appx. 809, 813 (4th Cir. 2010), in support of its argument that bad faith is relevant in considering the character of the County's action. CV Initial Brief, p. 113. As it was required to do in deciding a Rule 12(b)(6) motion, the court accepted "the well-pleaded facts in Acorn's complaint as true and recite[ed] them in the light most favorable to Acorn." *Id.* at 811. In addressing the defendant's motion to dismiss Acorn Land's regulatory takings claim, the court did find "that Acorn has plausibly pled that the character of the Council's actions was inequitable and illegitimate" due to Acorn's complaint stating "that the circuit court decided the Council arbitrarily and capriciously blocked Acorn's efforts to amend its water/sewer petition," which "cast a shadow over the Council's later decision to rezone Acorn's property." *Acorn Land*, at 817. The court held that the plaintiff "sufficiently pled a regulatory takings claim that is plausible on its face." *Id.* This case appears to be an anomaly. No subsequent Fourth Circuit Court of Appeals or District Court decision has cited this case for the proposition that arbitrary and capricious conduct is relevant in a regulatory takings claim. *Acorn Land* is best viewed as simply denying a motion to dismiss based upon review of alleged facts in a light most favorable to the plaintiff. It does not go so far as to create any binding precedent upon this Court.

Second, the only United States Supreme Court case even suggesting that bad faith could be a relevant theory under a *Penn Central* claim was *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333 (2002), in which the Court stated in dicta that “were it not for the findings of the District Court that TRPA acted diligently and in good faith, we might have concluded that the agency was stalling” To support this theory, the Court relied upon *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999), in which the government put the plaintiff through five years of a series of denials of nineteen different site plans for development.

However, in *Lingle*, the Court jettisoned the due process considerations found in *Del Monte Dunes* as an improper test under the *Takings Clause*. *Lingle*, 544 U.S. 528, 543 (2005). A due process inquiry into whether a regulation may be so arbitrary or irrational that it fails to serve a legitimate purpose “is not a valid method of discerning whether private property has been taken for purposes of the Fifth Amendment” because it “reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights.” *Id.* at 542. Nor does a due process inquiry “provide any information about how any regulatory burden is distributed among property owners.” *Id.* “The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation.” *Id.* at 543 (emphasis in original). In pointing out the practical difficulties of courts deciding whether a particular regulation served a legitimate state interest, the Court noted that judicial “deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established” *Id.* at 545.

Lingle's holding and underlying rationale undermines the bad faith theory derived from *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999). See John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 202 (2005) ("Because *Lingle* has repudiated the substantially advances test relied upon in *Del Monte Dunes*, the bad faith theory derived from that decision is certainly undermined."). Under the *Lingle* Court's reasoning, an inquiry into whether a government engaged in bad faith towards a property owner would not help courts determine the extent that a regulation burdens a property owner, or how the burden is distributed. A regulation imposed in bad faith may nonetheless broadly distribute burdens and benefits upon property owners. Further, judicial deference to the reasons for government action is evident in the presumption under takings law that the "government has acted in pursuit of a valid public purpose." *Lingle*, at 543. *Lingle* provides a strong rationale against consideration of bad faith under *Penn Central*'s character of the government action factor.

Lastly, and in any event, the Special Referee made well-supported findings of fact showing good faith actions by the County, thus making consideration of Appellant's argument of bad faith irrelevant. Based on sound evidence, the Special Referee found that the County committed to a deliberative and informed decision-making process relating to Columbia Venture's proposed development. Regulatory Taking Order, p. 33-34, 36; Def. Exh. 53; Def. Exh. 54; Def. Exh. 151 at DEF-00002155; Pl. Exh. 4 at DEF-00004865; Pl. Exh. 557. The Special Referee found, and the evidence supports, that the County used outside legal counsel to advise the County regarding floodplain management issues and Columbia Venture's project. Order, pp. 35-37; Pl. Exh. 4, p. 2; Def. Exh. 70; Def. Exh. 67; Def. Exh. 69. Good faith may be shown by obtaining the advice of legal counsel. See *Liquid Dynamics Corp. v. Vaughan Co.*,

449 F.3d 1209, 1225 (Fed. Cir. 2006). The Regulatory Takings Order makes numerous findings of fact showing forthright communication between the County and Columbia Venture, all of which are well-supported by the evidence in this case. Regulatory Taking Order, p. 33, 35, 36, 37, 39, 42; Tr. Vol. 12, p. 2279, line 19 – p. 2280, line 13; Tr. Vol. 12, p. 2282, line 6 – p. 2283, line 17; Tr. Vol. 13, p. 2349, lines 7-15; Tr. Vol. 13, p. 2356, lines 12-25; Tr. Vol. 13, p. 2359, lines 21-25; Def. Exh. 1; Def. Exh. 51; Def. Exh. 63; Def. Exh. 72; Def. 149; Def. Exh. 151; Pl. Exh. 4; Pl. Exh. 550; see also Tr. Vol. 13, pp. 2453-2455. Evidence of “regular contact” between the parties regarding plaintiff’s proposed plan shows that defendant did not act in bad faith. *Aloisi v. United States*, 85 Fed. Cl. 84, 97 (Fed. Cl. 2008).

As a close cousin to its bad faith arguments, Appellant strenuously argues that the Respondent’s adoption of its Stormwater Ordinance in 2001 “leaves no doubt” that the Respondent intended to target or single out Appellant. CV Initial Brief, pp. 106-112. The Special Referee rejected this contention. CV Initial Brief, p. 109. The Floodway Provision of the Stormwater Ordinance contained the same “no-impe” language as the County’s prior Storm Drainage Ordinance in effect at the time Appellant purchased the Property. *Compare* Pl. Exh. 230 at DEF-00005418, § 8-62(g) Storm Drainage Ordinance (1994) *with* Pl. Exh. 374 at DEF-00012759.001, § 8-26(h), Stormwater Ordinance (2001). The only difference between the two was the addition within the Stormwater Ordinance of limited exceptions to the general rule that prohibited obstructions within a floodway that would impede the free flow of water during times of flood. Pl. Exh. 374 at DEF-00012759.001, 8-26(h), Stormwater Ordinance (2001). Appellant was subject to the “no-impe” standard under both ordinances. It is difficult to understand how the Respondent’s Stormwater Ordinance could possibly “target” Appellant when

its Property fell under the general “no-impede” standard that most every other floodway property in the County was subject to as well.⁵³

Appellant asserts that the “legislative history” of the County’s passage of the Stormwater Ordinance “leaves no doubt” that the intent of the County Council in enacting the ordinance was to block Columbia Venture’s development plans. CV Initial Brief, p. 106. Columbia Venture’s assertion is based upon speculation into the motives of County Council. *Id.* at 107. Questioning the County’s motivations for enacting its Stormwater Ordinance has no place in a takings analysis.⁵⁴ See *Lingle*, 544 U.S. 528, 543 (2005) (“... the *Takings Clause* presupposes that the government has acted in pursuit of a valid public purpose.”); *Rith Energy v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) (rejecting argument that permit was denied due to political pressures as improper under a takings analysis). “Local land-use decisions are about the accommodation of competing interests” *Henry v. Jefferson County Comm’n*, 637 F.3d 269, 279 (4th Cir. 2011). Appellant complains that it did not receive the same benefit as the City of Columbia and Heathwood Hall, and somehow this accommodation by County Council of the

⁵³ Appellant goes on to advance an absurd and totally unsupported theory never argued before the Special Referee, that, because the “impede” standard still left a door open for Columbia Venture to pursue levee improvements, County Council wanted to make sure Columbia Venture could never improve its levees by inserting an additional requirement that Columbia Venture could not improve its levees to be taller or wider. CV Initial Brief, p. 108. This argument is unpreserved for review. Moreover, Appellant misconstrues the proviso it refers to. The proviso was added at the request of Heathwood Hall to make clear that the Floodway Provision did not prohibit maintenance of existing levees. Pl. Exh. 362. The County’s levee maintenance standards allow and in fact require that levees are maintained to “not less than the design grade and section by replacing any material lost from the crown or slopes.” Pl. Exh. 374, § 8-38(b), Stormwater Ordinance (2001). The “higher or wider” phrase that Columbia Venture complains of does not change this result. Starting with the statement that “nothing in this subsection ... shall limit provisions in this Chapter ... authorizing ... maintenance and repair of levees,” the proviso simply seeks to make clear that repair of erosion and so forth means maintaining a levee or dam at its designed height and width. The proviso had nothing to do with improving a levee, i.e., construction to meet the County’s levee design standard and FEMA’s levee certification requirements.

⁵⁴ “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” *Knotts v. S.C. Dep’t of Natural Res.*, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002). The Stormwater Ordinance’s stated intent was to “protect the general health, safety, and welfare of the people of Richland County.” Pl. Exh. 374, § 8-1, Stormwater Ordinance (2001). The fact that this ordinance contained exemptions and exceptions does not defeat the ordinance’s intent. Appellant’s efforts to argue otherwise raises questions concerning the effectiveness of the ordinance which is a due process inquiry, and not a proper takings inquiry. See *Lingle*, 544 U.S. 543.

interests of the City and Heathwood Hall should be viewed harshly simply because the exceptions were initially proposed by groups opposed to Appellant's plans. Appellant obviously disagrees with how the County responded to the requests of the City and Heathwood Hall, "but not getting everything one wants ... does not a taking make." *Henry*, 637 F.3d 269, 279 (4th Cir. 2011).

Subsequent actions do not support Appellant's contention that the Respondent was acting to thwart its development plans. On the same day that County Council gave third reading to the Stormwater Ordinance, the County Council provided a list of information requests to Appellant "as a proactive communication letting the Company know what the County want[ed] included in its [development] proposal." Pl. Exh. 4, p. 12. Also on this same day, Appellant requested to appear before County Council to present a development proposal. *Id.* Council scheduled time to hear Appellant during its next regular meeting held on May 1, 2001. Pl. Exh. 4, p. 12. The County agreed, in conjunction with the City of Columbia and Richland School District One, to take part in a "Green Diamond Task Force" to learn more about and consider aspects of Columbia Venture's proposed development. Def. Exh. 85; Pl. Exh. 4, p. 6. The County's efforts to prepare itself for negotiations with Columbia Venture and work with Columbia Venture to facilitate a negotiation process does not indicate "targeted action" to thwart Columbia Venture's development plans.

d. As an additional sustaining ground, the Special Referee, with all due respect, erred in concluding that Appellant suffered substantial economic loss.

It is a well settled tenet of takings law that the government's exercise of police power in regulating land use can and will impair property values, and such impairment is part and parcel of land ownership in a modern society. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) ("It seems to us that the property owner necessarily expects the uses of his property to be

restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied limitation and must yield to the police power.”). “Mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.” *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993); see also *Dunes West*, 401 S.C. 280, 317, 737 S.E.2d 601, 621 (2013) (“United States Supreme Court decisions sustaining land-use regulations uniformly reject the proposition that diminution in property value, standing alone, can establish a taking.”). “... While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In order to distinguish between a regulation that merely diminishes property value and a regulation that “goes too far,” a mainstay of takings jurisprudence under *Penn Central* is that the regulatory imposition at issue must have an extreme effect on property value. See *Lingle*, 544 U.S. 528, 540 (explaining that “the *Penn Central* inquiry turns in large part ... upon the magnitude of a regulation’s impact”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019-20 n.8 (1992) (suggesting that a 95% diminution in value would not constitute a taking under *Penn Central*).

To determine the extent of economic loss, courts are required to make a comparison between the fair market value of the property before the date of the alleged taking and the fair market value of the property after the date of alleged taking. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115, 123 (Fed. Cl. 2003); *Brace v. United States*, 72 Fed. Cl. 337, 349-350 (Fed. Cl. 2006). “... Specific findings of fact about the effects of the legislation on the plaintiffs are necessary to complete the analysis of the economic impact factor.” *Cienega Gardens v. United States*, 331 F.3d 1319, 1341

(Fed. Cir. 2003). Otherwise, a court is unable to ascertain whether, in all fairness to the government, just compensation is due.

The Special Referee erred when he held as a matter of law that the economic loss element weighed in Appellant's favor because its Property experienced "a significant decrease in the fair market value of the land based upon its highest and best use." Regulatory Taking Order, p. 60. "The terms 'substantial' and 'significant' [are] insufficient to convey the extent of diminution necessary to support a taking. *Noghrey v. Town of Brookhaven*, 48 A.D.3d 529, 532 (N.Y. App. Div. 2d Dep't 2008). To conclude that the extent of Columbia Venture's economic loss was "significant," without quantifying the loss, divorces *Penn Central*'s economic loss element from its purpose of identifying "those regulations whose effects are functionally comparable to government appropriation or invasion of private property." *Lingle*, 544 U.S. 528, 542 (2005).

A conclusion that the economic loss factor weighs in favor of Appellant merely on the basis that reduction in property value was "significant" suffers from the same infirmity of impreciseness that *Lingle* took pains to correct in holding that the due process test of "substantially advances" was an improper and unhelpful consideration under the *Penn Central* analysis. See *Lingle*, 544 U.S. 528, 542 (2005) (explaining that the use of "substantially advances" in prior takings cases was "regrettably imprecise"). Determining economic loss simply by concluding that devaluation of the property at issue was "significant" casts the economic loss factor into subjective territory where courts could hold governments liable for a regulatory taking based upon personal sensibilities. Property owners would naturally assert that most any reduction in property value is "significant" and this uncertain landscape brought about by subjective determinations of economic loss would wreak havoc on the ability of government to regulate land use. See *Andrus v. Allard*, 444 U.S. 51, 65 (1979) ("To require compensation

[whenever there is economic loss] would effectively compel the government to regulate by purchase.”) (emphasis in original). The Special Referee’s conclusion that *Penn Central’s* economic loss factor weighs in Appellant’s favor should be reversed as an error of law.

In the alternative, the Special Referee erred by failing to make findings of fact concerning the actual extent of economic loss. At trial, the parties presented appraisals of the Property to demonstrate the extent of economic loss. Appellant relied upon an appraisal prepared by Mr. Wingard on November 6, 2002 for the purpose of placing a conservation easement on the property (“Conservation Easement Appraisal”), as well as another appraisal prepared by Mr. Wingard on March 14, 2005 at the request of a bank (“Bank Appraisal”). Pl. Exh. 394; Pl. Exh. 425. The County relied on an appraisal prepared by Mr. Knight specifically for the purpose of determining economic loss in this litigation (“Knight Appraisal”). Pl. Exh. 195. The Special Referee found all of these appraisals flawed in various ways.

Relying on the valuation of the Property within the Conservation Easement Appraisal before any easement would be placed on the Property, Appellant sought to establish that the fair market value of its Property before February 20, 2002 was \$142 million dollars, based upon Appellant’s grandiose land use plan. Pl. Exh. 394 at CV006295. The Special Referee found this appraisal defective because it made unreasonable or unsupported assumptions. Regulatory Takings Order, pp. 56-57. The Conservation Easement Appraisal’s value was propped up by an assumption, without any basis, that the County would issue \$80 million dollars in special source revenue bonds to fund infrastructure within the development, thereby eliminating substantial costs that would otherwise be reflected in the valuation. Pl. Exh. 394, p. 9; Tr. Vol. 9, p. 1665, line 16 – p. 1666, line 15. Mr. Wingard testified that his valuation of \$142 million dollars would

not hold up if he eliminated the assumption of the \$80 million dollar infrastructure cost being covered by the County instead of the developer. Tr. Vol. 9, p. 1624, lines 3-6.

Additionally, the Special Referee found that the Conservation Easement Appraisal did not adequately determine whether development of the Property was legally permissible. The Conservation Easement Appraisal made unsupported assumptions that the project would receive a multitude of permits or approvals from Richland County and FEMA. *See Brace v. United States*, 72 Fed. Cl. 337, 351 (Fed. Cl. 2006) (“In assessing the feasibility of the project, [appraiser] did not determine whether needed approvals - among them, not only the zoning changes allowing for much smaller lots, but also design, sewage, environmental, utility and road permits and approvals - could be obtained from the half dozen or more Federal, state and local authorities with sometimes interlocking jurisdiction over various aspects of the property.”). Mr. Wingard assumed that Columbia Venture would prevail in its pending litigation against FEMA. Pl. Exh. 394, p. 10. His consideration of whether development of the Property was legally permissible made no mention of any regulatory prohibitions or obstacles relating to construction within a floodway or floodplain. *Id.* at p. 55. As with the appraiser in *Brace v. United States*, Mr. Wingard “did not really determine the feasibility of using the property as a subdivision, but merely valued the property based on the assumption that such a use was feasible.” *Brace v. United States*, 72 Fed. Cl. 337, 353 (Fed. Cl. 2006). “In terms of weight, then, [Mr. Wingard’s] ultimate opinion of value is virtually devoid of factual moorings, depriving it of virtually any evidentiary value. *Id.*; *see also Moore v. United States*, 61 Fed. Cl. 73, 78 (Fed. Cl. 2004) (rejecting appraisal value that did not adequately account for zoning restrictions).

Importantly, the Special Referee found that Appellant’s expert witness, Mr. Thomas Hartnett, actually recanted his opinion that Mr. Wingard’s methodology was sound, stating that

he did not think the Property was worth \$142 million dollars. Regulatory Taking Order, p. 59; Tr. Vol. 10, p. 1842, line 1 – p. 1843, line 17; Tr. Vol. 10, p. 1848, line 25 – p. 1849, line 8; Tr. Vol. 10, p. 1894, lines 15-20; Tr. Vol. 10, p. 1897, line 12 – p. 1898, line 12. Clearly, the Special Referee rejected the “pre-taking value” within the Conservation Easement Appraisal as inaccurate and not credible. Regulatory Taking Order, pp. 58-59.

In examining the Knight Appraisal, the Special Referee criticized its valuation of the Property as \$33 million dollars before the date of alleged taking because Mr. Knight did not appraise the Property as if it was fully developed. Regulatory Taking Order, p. 60. The Special Referee also criticized Mr. Knight’s use of the cost approach in appraisal methodology to arrive at the “pre-taking” value. Regulatory Taking Order, p. 52. The Special Referee rejected Mr. Knight’s “pre-taking” value.

Mr. Hartnett, apparently trying to salvage the situation, offered what he described not as an actual appraisal but “merely mathematical calculations” of what he thought the “pre-taking” value of the Property was. Regulatory Taking Order, p. 59; Tr. Vol. 10, p.1850, lines 10-23. In order to arrive at a valuation of the Property before the alleged taking, Mr. Hartnett borrowed information from the appraisal of Mr. Knight. *Id.*; Tr. Vol. 10, p. 1851, line 14 – p. 1853, line 12. In Mr. Knight’s analysis of the property after the alleged taking, he had opined that there were 1,225 acres outside the floodway, which was subject to being developed and which had a value of \$15,000 per acre. *Id.* Mr. Hartnett took this \$15,000 per acre figure and extrapolated \$15,000 per acre figure to apply to the other 3,175 acres to conclude that the 4,400 acre tract’s value was \$66,000,000. *Id.*; Tr. Vol. 10, p. 1853, line 23 – p. 1854, line 3. Mr. Hartnett then deducted \$12 million dollars in levee construction costs, leaving according to Mr. Hartnett, \$51,900,000 as the Property’s value before the alleged regulatory taking. *Id.*; Tr. Vol. 10,

p.1854, line 4 - p.1856, line 4. The Special Referee did not criticize or discount Mr. Hartnett's pre-taking calculation. Regulatory Taking Order, p. 59.

Turning to post-taking valuations of the Property, the Special Referee found the Conservation Easement Appraisal's "after" value of \$11 million dollars to be inaccurate. Regulatory Taking Order, p. 58. This post-taking valuation artificially depressed the value of Appellant's Property by failing to take into account the highest and best use of the 1,225 acres of Appellant's non-floodway property. *Id.* The Bank Appraisal's post-taking value of \$14 million dollars suffered from the same flaw. Regulatory Taking Order, p. 58; Tr. Vol. 9, p. 1624, line 15 – p. 1626, line 20. Mr. Hartnett's "mathematical calculation" of property value after the alleged taking used the Bank Appraisal as his post-taking value, which, as already noted, was flawed. Regulatory Taking Order, p. 58.

The only post-taking valuation that remained unscathed was Mr. Knight's post-taking valuation. In valuing the Property after the alleged date of taking, the Knight Appraisal took into account the higher value of property located outside the floodway. Mr. Knight undertook a comparable sales analysis of five similarly situated properties to determine valuation of Appellant's 1,225 acres outside the floodway. Pl. Exh. 195 at pp. 53-69, 89; Tr. Vol. 10, p. 1956, line 12 – p. 1958, line 24. After making an adjustment to account for differing sale dates, Mr. Knight concluded that the property outside the floodway had a value of \$15,000 per acre. He then valued the 3,175 acres within the floodway at \$3,100 per acre based upon a comparable sales analysis. *Id.* Mr. Knight's valuation of the Property after the alleged taking totaled \$28 million dollars. *Id.* The Special Referee accepted this valuation, as suggested in the Order's acceptance of Mr. Knight's post-taking valuation of non-floodway property. Regulatory Taking Order, p. 59.

“ ... Specific findings of fact about the effects of the legislation on the plaintiffs are necessary to complete the analysis of the economic impact factor.” *Cienega Gardens v. United States*, 331 F.3d 1319, 1341 (Fed. Cir. 2003). After reviewing this evidence, the Special Referee stated that he “could not find that a precise percentage of diminution in value is shown by the conflicting evidence.” The Special Referee’s finding that the evidence was not capable of discerning a pre-taking and post-taking value is not supported by the facts, and thus, constitutes error. As shown above, the Special Referee rejected all pre-taking valuations except for the pre-taking value of approximately \$52 million dollars. He also rejected all post-taking valuations except for the post-taking valuation of \$28 million dollars. Thus, the extent of economic loss was capable of determination. Based upon the difference between \$52 million dollars and \$28 million dollars, the extent of economic loss was approximately 46% loss in the value of Appellant’s Property.

A reduction in property value of only 46% is not severe enough to weigh in favor of Appellant. See e.g. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019-20 n.8 (1992) (suggesting that a 95% diminution in value would not constitute a taking); *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (no taking despite 91.4% reduction in value); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (no taking despite 78% loss in value); *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1349 (Fed. Cir. 2001) (no taking where value of coal reduced by 91%); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3rd Cir. 1987) *cert. denied* 482 U.S. 906 (1987) (no taking despite 90% loss in value); *Haas v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) *cert denied* 445 U.S. 928 (1980) (no taking despite 95% reduction in value); *Warren Trust & Marietta Trust v. United States*, 2012 U.S. Claims LEXIS 1493 (Fed. Cl. 2012) (82% diminution in value not enough to establish taking); *Lost Tree Vill.*

Corp. v. United States, 100 Fed. Cl. 412, 439 (Fed. Cl. 2011) (58.4% loss in value insufficient to give rise to a taking); *Walcek v. United States*, 49 Fed. Cl. 248 (Fed. Cl. 2001) (no taking where value diminished by 59.7%). The Special Referee erred when he found that a comparison of pre-taking and post-taking values was unascertainable.

5. APPELLANT HAS ABANDONED APPELLATE REVIEW OF THE DUE PROCESS ORDER

Appellant noticed an appeal of the Special Referee's Due Process Order. However, in its Initial Brief, Appellant failed to set forth in its statement of the issues on appeal any issue pertaining to the Due Process Order. Further, other than a conclusory statement made in a footnote, Appellant made no argument in its Initial Brief that the Special Referee erred in granting summary judgment to the Respondent on the due process claim. Indeed, Appellant states in its Initial Brief that it "has chosen not to brief and argue substantive due process as a separate and distinct issue." CV Initial Brief, p. 114, fn. 46. Appellant has thus abandoned appellate review of the Special Referee's Due Process Order.

Under Rule 208(b)(1)(B), SCACR, an appellant must, in the Initial Brief, set forth the issues to be considered by the appellate court. No point will be considered which is not set forth in the statement of issues on appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003); *Langehans v. Smith*, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001). Although rules of issue preservation should not be applied in a rigid, "hyper-technical manner," it is a basic tenet of the law that an appellate court cannot rule on issues not presented to it. *Herron v. Century BMW*, 395 S.C. 461, 469-470, 719 S.E.2d 640, 644-645 (2011). Here, Appellant's statement of the issues on appeal does not raise any issue concerning the Due Process Order and Appellant's decision to omit this issue precludes appellate review of the Due Process Order. Otherwise, the County would be forced to guess what facts or legal conclusions Appellant may

dispute, and waste judicial resources by significantly lengthening this Initial Brief when Appellant could very well have complied with the Rules of Appellate Practice.

In Appellant's statement of issues on appeal, it states that the Special Referee "erred in concluding that, under *Penn Central Transportation Co. v. New York City*, 433 U.S. 104 (1978), Richland County ... did not unjustly and unfairly target Appellant's Property." CV Initial Brief, p. 4. Appellant cannot fairly claim that this statement raises due process issue that, while normally deficient to preserve appellate review, can be cured if made "reasonably clear" from its arguments. See *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant's arguments.") (emphasis in original). *Penn Central* involves a regulatory taking claim, not a substantive due process claim. Appellant is clearly referring to the Regulatory Taking Order, not the Due Process Order. And Appellant cannot explain away its unequivocal statement that it "has chosen not to brief and argue substantive due process as a separate and distinct issue." CV Initial Brief, p. 114, fn. 46.

If a party fails to raise arguments with supporting authority in the Initial Brief, then such arguments are deemed abandoned on appeal. *Atl. Coast Builders & Contrs., LLC v. Lewis*, 398 S.C. 323, 337, fn. 1, 730 S.E.2d 282, 284 (2012); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). Appellant is precluded from using its reply brief to argue any grounds for reversal of the Due Process Order because all issues must be raised and argued in its Initial Brief. See *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 153, 494 S.E.2d 449, 460 (Ct. App. 1997) ("... an appellant may not use the reply brief to argue issues not argued in

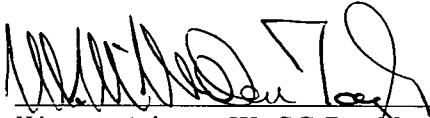
the appellant's initial brief."'). Appellant has abandoned appellate review of the Due Process Order.

Should this Court decide otherwise, Respondent asserts that the Due Process Order rests on sound reasoning and conclusions of law and thus should be upheld.

CONCLUSION

For the reasons explained above, Respondent respectfully asks this Court to: 1) reject Appellant's *Lucas* claim as contrary to the Appellant's stipulation; 2) uphold the Special Referee's Physical Taking Order; 3) uphold the Special Referee's judgment in favor of Respondent on Appellant's regulatory takings claim; and 4) decline review of the Special Referee's Due Process Order due to Appellant's failure to raise in its Initial Brief any issues or arguments concerning this Order.

Respectfully submitted,



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October 28, 2013

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

The Honorable John Hamilton Smith, Special Referee

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

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COLUMBIA VENTURE, LLC,.....APPELLANT,

v.

RICHLAND COUNTY,.....RESPONDENT.

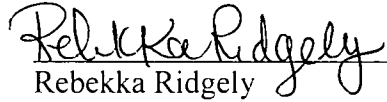
PROOF OF SERVICE

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