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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

John Hamilton Smith, Special Referee

Case No. 2010-CP-40-8943R

Columbia Venture, LLC ..... Appellant,

v.

Richland County ..... Respondent.

FINAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Special Referee erred both in granting Richland County's motion for summary judgment on Columbia Venture's *per se* takings claim and in finding in favor of the County on Columbia Venture, LLC's ("Columbia Venture") *Penn Central* regulatory takings claim. For the reasons that follow, both findings should be reversed and remanded to the trial court.

By virtue of its ordinances, on February 20, 2002, Richland County appropriated an interest in Columbia Venture's Property amounting to the practical equivalent of an easement or servitude. The County's ordinances prohibited Columbia Venture from improving its Levees, which FEMA determined are likely to fail in discrete areas during major floods, and thus required Columbia Venture to reserve the portion of its Property delineated on the County's effective flood map as the regulatory floodway to serve as an unobstructed, no-build zone for the public purpose of discharging major floods. Under the United States Supreme Court's recent opinion in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), and under that Court's previous decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the County's ordinances amount to a direct legislative appropriation of an interest in Columbia Venture's Property that should have been analyzed and tried as a *per se* regulatory taking.

In addition, Columbia Venture has established entitlement to relief on its *ad hoc* regulatory takings claim under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). By virtue of its ordinances, Richland County significantly diminished Columbia Venture's common law rights of property ownership and denied to Columbia Venture its reasonable, investment-backed expectations for development of its Property, to its very significant economic loss. The County's Brief omits or misrepresents many material facts which, when put into their proper and accurate context, demonstrate that Columbia Venture

had investment-backed expectations for its Property, and those investment-backed expectations were eminently reasonable under the circumstances.

Columbia Venture's original development plan was to, without waiting on the conclusion of FEMA's periodic and ongoing floodplain mapping studies, improve its existing Levees to FEMA's certification standards and the County's levee construction standards by making the Levees higher or wider, or both, in certain places and recruiting a governmental entity or agency to accept operation and maintenance responsibility for the Levees. Once the Levees were improved and certified, the land protected by the Levees could be developed without any floodplain or floodway building restrictions. The County itself engendered Columbia Venture's expectations by virtue of a unanimous County Council resolution agreeing to accept operation and maintenance responsibility for Columbia Venture's Levees once improved and certified by FEMA on the condition that Columbia Venture improve the Levees to the appropriate standards and spend at least $30 million dollars over ten years to develop its Property. After inducing Columbia Venture's investment and purchase of the Property, the County subsequently became the *sole* impediment to Columbia Venture's fulfillment of its original development plan by passing a new stormwater ordinance prohibiting the very thing Columbia Venture required (making its Levees "higher or wider") and the adoption of a FEMA flood map placing 70% of Columbia Venture's Property, including its Levees, in a regulatory floodway. The County further allowed Columbia Venture's immediate and identically-situated neighbors to construct substantial structures in the regulatory floodway while completely denying that right to Columbia Venture. The County has severely diminished Columbia Venture's property rights and caused it to suffer extremely significant economic losses.

ARGUMENT

I. The Special Referee improperly granted summary judgment to Richland County on Columbia Venture's *per se* takings claim.

A. *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013) compels the finding that Columbia Venture suffered a *per se* taking.

In *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2593 (2013), the government informally agreed to issue the landowner a development permit on the condition that he make improvements to nearby public lands. In determining whether the state takes property by requiring the property owner to submit to a monetary exaction as part of a permitting process, the Supreme Court used a *per se* takings approach as the proper mode of analysis. *Id.* at 2600. *Koontz* reversed a decision of the Florida Supreme Court holding that *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) do not apply to monetary exactions. *Koontz*, 133 S. Ct. at 2594. The Court opened its opinion with the following foundational statement:

> Our decisions in [*Nollan* and *Dolan*] provide important protections against the misuse of the power of land-use regulation. In those cases, we held that a unit of the government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use.

Id. at 2591. The Court continued: "[W]e began our analysis in both *Nollan* and *Dolan* by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking." *Id.* at 2598-99.[1] In extending this doctrine to monetary exactions, the Court said, "[w]hatever the wisdom of such a policy, it would transfer an interest in property from the landowner to the government. For that reason, any such demand would amount to a *per se* taking similar to the taking of an easement or a lien." *Id.* at 2600. Under these circumstances, the Court declined to use *Penn*

[1] *Nollan* involved an easement for public access. 483 U.S. at 828. *Dolan* involved an easement for public access and flood control. 512 U.S. at 392.

Central's essentially *ad hoc* factual analysis. Rather the Court used "a *per se* [takings] approach" as "the proper mode of analysis under the Court's precedent."[2] *Id.*

Accordingly, the Court's starting premise is fundamental and necessary to its holding in each of these cases and to the mode of analysis that should be applied in this case. Thus, *Koontz* makes clear that Columbia Venture's claim that the County directly appropriated an interest in its land, *i.e.*, an easement, by adopting a series of ordinances is appropriately analyzed and tried as a *per se* taking. In that event, the evidence presented at trial, as in *Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984), would have addressed (1) whether Columbia Venture had a pre-existing property right to build structures on its land, (2) whether the County's ordinances denied or interfered with that property right, and, if so, (3) the sum of money required to justly compensate Columbia Venture for the interest taken by the County—just as if the County had undertaken formal condemnation proceedings to acquire the interest it directly appropriated by ordinance. Columbia Venture's investment-backed expectations, and the extent to which the County interfered with those expectations, measured under the "parcel-as-a-whole" doctrine would not be pertinent to the inquiry. *Brown v. Legal Found. of Washington*, 538 U.S. 216, 233 (2003) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.") (citation omitted).

However, the Special Referee erroneously granted summary judgment to the County on Columbia Venture's *per se* takings claim, and the case proceeded to trial solely on the issue of a regulatory taking under the *Penn Central* factors. Although *Koontz* was decided

[2] The majority in *Koontz* did not rule out the possibility of a parallel *Penn Central* claim in an appropriate case but rejected the dissenters' view that a *Penn Central* approach was the proper mode of analysis when a unit of government claims an interest in private land. *Koontz*, 133 S. Ct. at 2602-03. *Koontz* also noted that the Nollans could have pursued a *Penn Central* claim, as well. *Id.* at 2602.

after the Special Referee granted the County's motion for summary judgment, other decisions of the United States Supreme Court, notably *Nollan* and *Dolan*, and South Carolina's appellate courts, notably *Hill*, compelled the same result.[3] Based on this case law, Columbia Venture asserted below that the summary judgment materials submitted to the Special Referee raised only one reasonable inference: Columbia Venture had the existing right to build structures on its Property and improve its Levees within the area now reserved by County ordinances as a no build, regulatory floodway and that the only issue to be tried on the issue of *per se* physical takings was the amount of just compensation needed to compensate Columbia Venture for the interest (essentially a floodway or conservation easement, or both) taken in its Property. The Special Referee erred in granting summary judgment to the County, and at a minimum, the case should be remanded for further proceedings to determine just compensation and any other disputed issues of fact, if the Court concludes, from its examination of the summary judgment materials, that there are other genuine issues of material fact that need to be resolved on the issue of *per se* takings.[4]

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[3] The *per se* taking mode of analysis made explicit in *Koontz* has developed significantly over the last several decades. In *Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1979), the owners of a private pond dredged an 8-foot-deep channel connecting the pond to Maunalua Bay and the Pacific Ocean. Once connected, the Army Corps of Engineers, which had acquiesced in the proposal to build the channel, made the "naked assertion" that the pond was subject to the navigational servitude of the United States. *See id.* at 178. The Court said: "While the consent of individual officials representing the United States cannot 'estop' the United States ... it can lead to the fruition of a number of expectancies embodied in the concept of 'property' – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property ... . And even if the Government physically invades only an easement in property, it must none the less pay just compensation ... ." *Id.* at 179 (citations omitted) (emphasis added). In *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992), the Court cited *Kaiser Aetna* as an example of regulatory action "that compel[s] the property owner to suffer a physical 'invasion' of his property" and which is "compensable without case-specific inquiry into the public interest advanced in support of the restraint." Further, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546 (2005) noted that in both *Nollan* and *Dolan*, "the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking."

[4] This court reviews the granting of summary judgment under a *de novo* standard of review. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41

The County argues that it only passed ordinances regulating land use and that it did not physically invade or occupy Columbia Venture's Property or otherwise cause it to be flooded. The County's ordinances, however, pointedly reserve an interest in Columbia Venture's Property to serve a public purpose amounting to the practical equivalent of a flood easement or servitude. (R. pp. 4251, 4253, 5742). For the landowner, there is no functional distinction between government caused flooding of one's property and a regulation which requires the landowner to permanently reserve the land in an undeveloped state, so that it will flood in the future.

Koontz also refutes the County's attempt to limit *Nollan* and *Dolan* to easements that deprive the landowner of his right to exclude others. In *Koontz,* the Court held that a requirement to pay money to improve public lands in exchange for a development permit is the equivalent of an easement, even though Mr. Koontz fully retained his right to exclude others from his property. *See Koontz*, 133 S. Ct. at 2598-99. It follows that *Nollan*, *Dolan*, and now *Koontz*, stand for the proposition that if a unit of government directly appropriates an interest in a landowner's property, whether or not that interest deprives the owner of the right to exclude others, the government commits a *per se* taking that should be analyzed and tried as such. Clearly a local government having the power to pass and enforce ordinances using criminal sanctions has the power to directly appropriate an easement, servitude, or other interest in land subject to its jurisdiction, and whether the ordinance displaces the owner's

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(2008). Columbia Venture's arguments relating to the Physical Takings Order are all based on materials that were before the Special Referee at the time he issued his order of August 7, 2012, as well as his order denying Columbia Venture's motion pursuant to Rule 59(e), SCRCP. Although Columbia Venture did inadvertently cite to certain trial exhibits and trial testimony in its Initial Brief in discussing the Special Referee's grant of summary judgment, these same exhibits and testimony (by deposition) were also included in the summary judgment materials. (*See* R. pp. 5739-44). In reviewing the Special Referee's order granting summary judgment, Columbia Venture does not seek to have this Court review any testimony or exhibits that were not included in the summary judgment materials that were before the Special Referee at the time he issued his order granting summary judgment to the County on the issue of a *per se* physical taking.

right to exclude others is not determinative. Rather the test is whether the ordinance claims an interest in land to serve some public purpose. The test is satisfied when, as here, an established right of private property is eviscerated to serve a public use.[5]

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,* 130 S. Ct. 2592, 2601 (2010), the Court said that "[s]tates effect a taking if they recharacterize as public property what was previously private property." The case involved a Florida law authorizing beach restoration projects that required the establishment of "an erosion control line," which replaced the fluctuating mean high-water line as the boundary between privately owned property and state property. *Id.* at 2599. The Court assumed, and the parties agreed, that the erosion control line had been set at the preexisting mean high-water line. *See id.* at 2598. Otherwise, if the erosion-control line were established landward of that, the state would have taken property.

> If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. "[A] state, by *ipse dixit,* may not transform private property into public property without compensation . . . ."

Id. at 2602 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).[6]

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[5] Consider the equivalency between the following two hypotheticals: (A) The County commissions a survey of Columbia Venture's Property to delineate the land adjacent to the channel of the river needed to be reserved in order to discharge the base flood without increasing the water surface elevation by more than one foot in any one location and proceeds to condemn an easement over that property, which easement by its terms expressly precludes Columbia Venture from erecting any economically meaningful structures within the County's easement; (B) The County adopts a FEMA flood map delineating a regulatory floodway over Columbia Venture's Property that is exactly the same line as appears on the County's survey in hypothetical A and passes an ordinance prohibiting Columbia Venture from erecting any economically meaningful structure within the regulatory floodway, which ordinance also provides criminal sanctions for violations and other civil remedies to enforce its provisions. In practical effect, there is no difference between hypotheticals A and B, except with B, the County acquired the interest without paying for it.

[6] *See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 n.19 (2003) (Condemnation of a leasehold, in addition to the right of

Here, Richland County's floodplain management ordinances define an easement to include a "reservation by the owner of land, for the use of such land by others for a specific purpose or purposes ..." and defines the regulatory floodway to be "[t]he channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation by more than one (1) foot as identified on an official [FIRM] or other available information." (R. pp. 4251, 4253, 5742). In contrast to ordinances restricting land use in general, such as restrictions on the height of buildings, the County's ordinances incorporate by reference what is in effect a plat (the official FIRM), which includes Columbia Venture's Property, with a line drawn to delineate the property that is required to serve the public purpose of conveying flood waters in times of major floods. It is also obvious that the words "must be reserved" are directed to the owner of the property.

Thus, by force of its floodplain management ordinances, the County mandated that Columbia Venture reserve a portion of its Property (precisely delineated on the official FIRM) to serve the public purpose of a regulatory floodway to discharge the base flood. It follows that the County appropriated the equivalent of an easement or servitude for flood control over Columbia Venture's Property by force of the ordinances it adopted. Moreover, the interest the County took was the equivalent of a no-build easement, not the less invasive no-rise restriction necessary for the County's continued participation in the NFIP and the one the County imposed on Columbia Venture's immediate neighbors. (R. pp. 4265 § 8-26(h), 5742). The County enforces its floodplain management ordinances via criminal and civil sanctions of imprisonment and monetary fines. (R. pp. 4275 § 8-41, 5742).

The County's floodplain management ordinances thus are easily distinguished from the general land use regulations implicated in the cases cited by the County at pages 61-62 of

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possession, gives the government "the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property ....").

its Brief.[7] In none of these cases did a unit of government pass an ordinance, enforceable by criminal sanctions, mandating a property owner to reserve a portion of his land, identified by reference to a plat, to serve the public purpose of conveying flood waters in times of flood and prohibiting the property owner from building any structures in the area required to be reserved. Furthermore, the County eliminated Columbia Venture's property right under South Carolina law to take reasonable measures to exclude from its land the public enemy of surface water. Based on its scientific and technical studies, FEMA concluded that Columbia Venture's Levees will fail in discrete areas during a major flood. (R. pp. 3480-81, 5742, 5874). Without the ability to improve its Levees to make them higher or wider in places, Columbia Venture is thus condemned to have its Property physically invaded by floodwaters during major floods.[8]

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[7] *Stearn Co. v. United States*, 396 F.3d 1354 (Fed. Cir. 2005) *cert. denied* 546 U.S. 875 (2005) (plaintiff failed to exhaust administrative remedies by failing to seek a compatibility determination under the Surface Mining Control and Reclamation Act of 1977 that would have allowed it to use its easement to mine its mineral estate in the Daniel Boone National Forest in spite of the determination by the Office of Surface Mining that it did not have a valid existing right to mine); *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002) (injunction issued by U.S. District Court prohibiting Boise from logging without first obtaining an Incidental Take Permit under the Endangered Species Act, which prohibits taking endangered species (here, spotted owls), by, among other things, significant degrading of habitat, amounted to a prohibition of logging without a permit, not a taking); *Southview Assoc. Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992) (decision by Vermont Environmental Board to turn down request to develop 23 acres of an 88 acre tract of mountain property because it would adversely impact a 44 acre deer habitat was without prejudice to plaintiff's right to submit an alternate proposal to develop the 88 acre tract; judgment of district court that plaintiff failed to state a claim for physical taking was affirmed on ripeness grounds); *Brace v. United States*, 72 Fed. Cl. 337 (Ct. Cl. 2006) *aff'd*, 250 F. App'x. 359 (Fed. Cir. 2007) (plaintiff who agreed to a consent decree requiring him to remediate acres of wetlands that he filled without a permit in violation of federal law did not have a takings claim against the United States because the consent decree, to which he agreed, was, in his view, overbroad); *Jensen v. City of Everett*, 2001 Wash. App. LEXIS 2749 (Ct. App. 2001) (plaintiffs cut trees without permit in violation of city ordinance, which regulates environmentally sensitive areas and requires prior city approval of alteration of natural environment) (unpublished opinion).

[8] The apt analogy is to a bridge that connects a barrier island to the mainland that the federal government has determined is defective and likely to fail at some point. But the County, which has adopted safety standards for bridge construction and maintenance, not only does not mandate that the bridge owners bring the bridge in compliance with the county's

B. The County improperly draws inferences of disputed issues of fact in its favor.

The County argues that its "stormwater ordinance did not prevent [Columbia Venture] from maintaining its levees so that it can hold back floodwaters" and that "a mere allegation of foreseeability of flooding does not make [the County] liable for physically occupying [Columbia Venture's] property with flood water." County Brief p. 58. This is demonstrably false. In the summary judgment materials submitted to the Special Referee, Columbia Venture included a number of technical hydrologic, hydraulic, and geotechnical studies, including FEMA's technical report dated September 26, 2000, in which FEMA concluded, based on its two-dimensional hydraulic studies and its geotechnical evaluation of the Levees, that "it would be reasonable to assume that the levee could fail by piping at two or possibly three weak locations during a single occurrence of the 100-year flood." (R. pp. 3481, 5742). Moreover, with only two breaches, FEMA's two-dimensional studies "show that approximately 9.6 percent [29,300 cfs] of the total Congaree River discharge [293,000 cfs] will enter the Richland County side of the floodplain through the two breaches." (R. pp. 3489, 5742). Columbia Venture also submitted with the summary judgment materials FEMA's July 17, 1995 FIS in which FEMA discusses Levee breaches that occurred during the last 10-year flood:

> During a flood in October 1976, which was approximately a 10-year flood, the levee directly west of the sewage treatment facility was breached in two places and the area within the levee was flooded. The breaches have since been repaired; however, a major flood on the Congaree River could be expected to cause similar failures of the levee at other locations.

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standards but forbids them from doing so, fearing that an improved bridge will lead to more development of the barrier island. If the county is concerned about future development of the island, it should approach the issue directly from the standpoint of land use regulation, not indirectly by forbidding the improvement of a defective and unsafe bridge.

(R. pp. 3041, 5739). On August 20, 2001, FEMA issued its LFD, stating that it "remain[ed] convinced that the existing dike will breach, and as a result, significant flow under Interstate 77 in the Richland overbank will result." (R. p. 5874).

On the *per se* takings issue, Columbia Venture is entitled to draw all reasonable inferences from the summary judgment materials in its favor, and the only reasonable inference that can be drawn from these materials is that Columbia Venture's Levees, unless improved to make them higher or wider in places, will fail during a major flood and not necessarily a 100-year flood. A 10-year flood or less may be all that is required to expose Columbia Venture's Property to flooding. But if there were any doubt about the issue, the Special Referee should have denied both motions for summary judgment and continued that issue for trial.

The County quotes *Koontz* for the proposition that "[i]nsisting 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." County Brief at 15.[9] The County argues that the NFIP seeks to internalize the externalities of building in a floodplain or floodway by imposing construction standards and restrictions on persons wishing to build there. But the NFIP permits building in a floodway that does not displace floodwater. 44 C.F.R. § 60.3(d)(3).[10] Also, neither in support of its motion for summary judgment on the issue of *per se* taking (nor at trial for that matter) did the County introduce evidence that it was necessary from the standpoint of public safety, internalizing externalities, or preventing a nuisance to deny Columbia Venture the

[9] Thus, it would have been constitutional for the County to condition PUD zoning on Columbia Venture's agreement to dedicate land for an interchange that would be needed to handle the increased traffic caused by the development. *See Koontz*, 133 S. Ct. at 2595. Also, in its resolution agreeing to accept responsibility for the Levees under the NFIP regulations, the County conditioned its agreement on Columbia Venture's agreement to physically improve the Levees and invest at least $30 million in the project over ten years. (R. pp. 3326-27, 5740).

[10] All citations to the NFIP and NFIA are to those provisions as they existed from 1998-2002.

right to use no-rise engineering and construction to build economically meaningful structures in the regulatory floodway, while at the same time affording that right to Columbia Venture's immediate neighbors. As discussed in detail below, it was not concerns of public safety or externalities that prompted the County to exempt Heathwood Hall and the City from the prohibition on floodway building. Rather, it was nothing more than the Council's concern for the convenience of those two landowners – they had plans to expand their facilities and would have been inconvenienced by such a prohibition. The County also produced no evidence at the summary judgment stage or at trial that allowing Columbia Venture to improve its Levees would increase flood levels.

The obvious conclusion from the County's conduct is that it did not want Columbia Venture to improve its Levees because improved Levees might lead to development in the areas protected by the improved Levee system. Rather than address the issue of land use directly, the County addressed it indirectly by mandating that Columbia Venture maintain Levees in a condition that will lead to the flooding of Columbia Venture's Property during a major flood as well as the property of Heathwood Hall and the City's waste water treatment plant.

The County and the Special Referee also state that the regulatory floodway is the area of the floodplain generally posing the greatest danger to public safety. County Brief pp. 5, 76; (R. p. 164). Of course, the regulatory floodway by definition includes the channel of the river where the danger of rapidly moving floodwater is greatest. (R. pp. 4253, 5742). But the regulatory floodway may, depending on the topography, include land that is not proximate to the channel of the river. For Richland County, the regulatory floodway is determined by a hydraulic model based on a one foot surcharge over the BFE. (*See id.*) The floodway is thus unique to each piece of riparian property and may include land that would be considered remote from the channel of the river—not the essentially homogenous floodway characterized

by swiftly moving water making building hazardous to public safety, as characterized by the County. Indeed, in communities that have adopted a zero-rise floodway, the floodway will include the entire floodplain. The Court need only look at any of FEMA's flood maps in this case to realize that the regulatory floodway impacts different property owners differently. In those cases where the regulatory floodway hugs the channel of the river, it may include only land not suitable for building. In Columbia Venture's case, however, the regulatory floodway imposed on February 20, 2002, extends over one mile from the river in places. To put this in perspective, consider oceanfront property and a regulation prohibiting a property owner from building a house over one mile from the ocean. Certainly public safety considerations have not prevented Heathwood Hall from building substantial buildings within the regulatory floodway based on the no-rise engineering standard of the NFIP.[11]

In its Brief, Columbia Venture also points out that the NFIA and NFIP are carefully designed not to expose participating communities to takings liability by not requiring them to prohibit construction in a floodplain or floodway. The County does not dispute this fact.[12]

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[11] The reason for the expansive floodway on Columbia Venture's Property has less to do with hydraulics and topography and more to do with the I-77 embankment that transverses Columbia Venture's Property roughly perpendicular to the river and the decision made by SCDOT during the highway's construction to place a large 1,320 feet wide relief bridge in the middle of the floodplain rather than closer to the river. (*See* R. pp. 3491, 5742). The purpose of the relief bridge is to allow surface water to flow under the highway from one side of the embankment to the other. But in establishing the boundary of the regulatory floodway on Columbia Venture's property, FEMA determined that it should be extended to include the large I-77 relief bridge, which is located in the middle of the floodplain roughly one mile from the river. "It was determined that the floodway should extend landward of Manning's dike in Richland County, and should allow for flow through the large relief bridge." (*Id.*)

[12] As one commentator has warned, "building codes, elevation requirements, restrictions in the floodway, and grading codes statutes are probably immune from successful 'facial' takings challenges. FEMA, however, must be particularly cautious not to encourage their participating communities to enact per se moratoria on all buildings in covered areas. ... The NFIP does not establish an absolute ban on construction in flood zones. Even the most restrictive NFIP regulation, that which 'bans' development in the floodway, permits development in the floodway if it can be demonstrated that neither flood level, frequency of flood, nor severity of flood damages would increase. ... [A]n NFIP statute unequivocally banning *all* building might simply go too far." Saul Jay Singer, *Flooding the Fifth*

The NFIP regulations permit flood proofed construction in a floodplain with habitable space elevated above the BFE and similar construction in a regulatory floodway engineered and constructed not to displace floodwater on other landowners. 44 C.F.R. § 60.3. In fact, one obvious purpose of the NFIP is to empower local communities to exploit their resources in flood prone land by making flood insurance and loans from federally insured lending institutions available to residents of those areas. 42 U.S.C. § 4002(b). Also, if the community adopts the minimum standards of the NFIP, flood damage occurring during major floods will be minimized or eliminated. After the floodwaters recede, living areas, which are required to be elevated above the BFE, will be undamaged and any structures within a regulatory floodway will not have caused an increase in the BFEs for other landowners. The irony is that if a local community wished to discourage building in flood prone areas, it could do so by simply electing not to participate in the NFIP, as no federally-based lending or other such resources would be available to such construction projects. 42 U.S.C. § 4002(a)(2) (describing how the availability of federal financial assistance is "often [a] determining factor[]" in land development).

The County misleadingly asserts that "[t]o hold that a physical taking occurs merely by virtue of a local government fulfilling its obligations under the [NFIP] would have a profound chilling effect upon local and state participation in the NFIP." County Brief at 64. Columbia Venture has never claimed that a local community risks incurring takings liability by adopting the minimum standard of the NFIP including regulatory floodways. The Court need only look at the photographs of the gymnasium, middle school, chapel, and bell tower that Heathwood Hall has built in a regulatory floodway under the NFIP no-rise engineering standard to understand the extent to which Columbia Venture could have developed its Property under the NFIP regulations but for the actions taken by the County. (*See* R. pp.

Amendment: The National Flood Insurance Program and the "Takings" Clause, 17 B.C. Envtl. Aff. L. Rev. 323, 362 (1990).

5950-62). The County did not just fulfill its obligations under the NFIP. Rather, it went well beyond those obligations and passed new ordinances to stop Columbia Venture's development by prohibiting improvement of its Levees and prohibiting the building of any economically meaningful structures on 70% of its Property.

C. *Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984), is fully consistent with modern *per se* takings law.

The County argues that *Hill* is outmoded. *Hill*, however, is not a regulatory takings case.[13] Rather *Hill* is a *per se* takings case that is fully consistent with *Koontz, Nollan*, and *Dolan*. In *Hill*, the town stopped Mrs. Hill from filling a ditch on her property that the town wished to use for flood control and drainage. 281 S.C. at 528, 316 S.E.2d at 682. Thus, the issues for trial under a *per se* takings mode of analysis were: (1) does Mrs. Hill have the right to build on that portion of her property and (2) if so, what is the amount of just compensation that the town is required to pay Mrs. Hill measured by the value of the interest it claims in her land. *See id.* at 530-31, 316 S.E.2d at 683-84.

The County further attempts to distinguish *Hill* asserting that a policeman showed up to stop Mrs. Hill from filling the ditch on her property. It is unclear from the court's opinion whether the town made a naked assertion of an interest in Mrs. Hill's property, as in *Kaiser Aetna*, or whether the policeman was enforcing a town ordinance prohibiting Mrs. Hill from filling the ditch. It makes no difference. If after February 20, 2002, Columbia Venture had undertaken improvements to its Levees in violation of the County's ordinances, a deputy

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[13] The County asserts that "*Hill* simply ... failed to consider the takings claim in the context of the property as a whole." County Brief at 69. But "[c]oncepts such as 'parcel of the whole' are meaningless in this context [physical takings]." *Brace*, 72 Fed. Cl. at 358 (collecting cases); *see also Brown*, 538 U.S. at 233. Both the County and the Special Referee cite dicta from *Brace*, a decision by a single judge of the Court of Claims that is unremarkable on its facts. The plaintiff, who signed a consent decree requiring him to remediate wetlands that he filled without permission, did not have a takings claim against the United States. *Brace*, 72 Fed. Cl. at 360.

sheriff would have shown up in due course to stop the construction, and Columbia Venture would have faced criminal sanctions. (*See* R. pp. 4274-75 §§ 8-40 & 8-41, 5742).

D. The County's prohibitions on improving Columbia Venture's Levees and Property were permanent.

At several places in its Brief the County obliquely suggests that its ordinances should be viewed as a temporary taking because they were always subject to repeal or amendment. This suggestion finds no support in takings law. Otherwise any statute, ordinance, or regulation that effects a taking, regardless of its permanent nature (*e.g.*, *Loretto*), would be analyzed as a temporary taking. *Hendler v. United States*, 952 F.2d 1364, 1376-77 (Fed. Cir. 1991). A temporary moratorium, or ordinance or regulation that by its express terms is intended to have a definite ending point, is conceptually different from an ordinance intended to be permanent. *Tahoe-Sierra*, which involved a temporary moratorium on building around Lake Tahoe, was analyzed as such – *i.e.*, a temporary taking. 535 U.S. at 311-12. There was nothing temporary, however, about the ordinances the County adopted in this case.[14] They were intended to be permanent, and the fact that any ordinance is subject to repeal does not transform an ordinance, which is intended to be permanent, into a temporary measure.

The County makes light of the provisions in its ordinances that give County personnel the right to access Columbia Venture's Property to inspect its Levees, not to insure compliance with County standards on levee construction and maintenance, but to make certain Columbia Venture does not improve its Levees to meet those standards. With a utility easement, such as an underground water line, the owner retains the right to exclude others from the property encumbered by the easement, typically with the exception of utility employees. So it is also with the County's ordinances. Columbia Venture has no right to

[14] The County's actions taken after November 2005 in reaction to the United States District Court's judgment vacating FEMA's 2001/2002 BFEs and floodway determinations manifested the County's intent not to change its floodplain management ordinances in any way that would have allowed Columbia Venture to improve its Levees. *See* discussion at pages 48-50 of Appellant's Final Brief.

exclude County personnel from its Property. (R. pp. 4272 § 8-35, 5742). In *Boise Cascade*, the Federal Circuit distinguished what amounted to a temporary trespass by federal employees to look for spotted owls – "though obviously, sanctioned by the district court['s] [five month preliminary injunction] and therefore not unlawful – rather than a permanent occupation or easement of some kind." 296 F.3d at 1355. The court contrasted this temporary access with the "quasi-permanent right of entry provided to government workers who monitored and maintained [essentially permanent monitoring wells which] led us to apply the *per se* takings theory of *Loretto.*" *Id.* at 1356 (referring to *Hendler*, 952 F.2d at 1376). There is nothing temporary about the County's floodplain management ordinances and the permanent right of the County Engineer and other County employees to access Columbia Venture's Property to monitor enforcement and compliance with the County's prohibition on building within the regulatory floodway on Columbia Venture's Property or improving its Levees.

The County misses the point in arguing that a conservation easement is not a conservation easement unless it complies with South Carolina's conservation easement statute.[15] The interest that the County appropriated in Columbia Venture's land by the

[15] The County also argues that Columbia Venture failed to raise its conservation easement argument below. Not so. (R. pp. 1001-05). In addition, the County argues that Columbia Venture's prior stipulation that it has not lost *all value* of its Property precludes consideration of its *Lucas*-based arguments. This represents both a mischaracterization and a misunderstanding of Columbia Venture's stipulation. The stipulation was that this was not a case where the tract was left with zero value. The County's Motion to Dismiss Columbia Venture's Amended and Supplemental Complaint was based on the alleged grounds that "the Plaintiff has not lost *all value* of its property." (R. p. 250 (emphasis added)). "This Motion *only* seeks to dismiss Columbia Venture's claim of a total taking *of all economic value* ...." (R. p. 289 (emphasis added)). Columbia Venture stipulated this was true—the land was not rendered completely valueless. (R. p. 263 ("Although CV does not and cannot maintain that its land has been rendered completely valueless ...")). Columbia Venture concedes, as it has throughout this litigation, the Property may still be used as farmland. This, however, is separate and distinct from Columbia Venture's arguments on appeal relating to whether there was a categorical regulatory taking because it cannot build economically meaningful structures on the Property. Columbia Venture did not buy the Property with the expectation of farming it, just as Mr. Lucas did not buy his two oceanfront lots with the expectation of sunbathing. Rather, Mr. Lucas and Columbia Venture both bought with the expectation of building structures. Indeed, the contours of *Lucas* were argued at the summary judgment

adoption of its ordinances is the practical equivalent of a conservation easement in that it prohibits Columbia Venture from developing its land within the regulatory floodway and requires Columbia Venture to leave that land in its natural state. An easement or servitude that requires an owner to leave land in its natural state is no less an easement or servitude despite the fact that the owner retains the right to farm the land or exclude others from his property. And the courts have found physical takings where the government has acquired an interest in land that is the practical equivalent of an easement, lien, or servitude. *Koontz*, 133 S. Ct. at 2600. "The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing development uses . . . suggest the practical equivalence in this setting of negative regulation and appropriation." *Lucas,* 505 U.S. at 1018-19. Columbia Venture's point is not that the County acquired a conservation easement by eminent domain under state law, but rather that it appropriated by ordinance an interest in Columbia Venture's Property that is the practical equivalent of a conservation easement without paying for it.

II. Columbia Venture is entitled to relief on its regulatory takings claim under *Penn Central.*

A. The standard of review is *de novo.*

The issue of whether there has been a taking raises a question of law for the Court. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013); *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 171, 714 S.E.2d 869, 877 (2011) ("[I]n an inverse condemnation case, the trial judge will determine whether a claim has been established ... ."") (citation omitted); *Ex Parte Brown*, 393 S.C. 214, 224, 711 S.E.2d 899, 904 (2011) ("The question of a taking is one of law. The question of what constitutes [just compensation] under the circumstances would be one of fact, subject to an abuse of discretion standard of review."). As

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hearing. (R. pp. 1011-17). Columbia Venture thus has not made any arguments contrary to its earlier stipulation.

such, this Court's review is *de novo*, "with no particular deference to the circuit court." *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007); *see also Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41.

The County does not dispute this, but mistakenly relies instead on decisions dealing with the general standard of review for factual questions in actions at law (as opposed to suits in equity). That standard applies to questions of fact in law cases that are ordinarily submitted to the jury under instructions from the court (or to the court by consent), not questions of law which are never properly submitted to the jury, such as the one presented here. "This was not a finding of fact, but a conclusion of law, which is reviewable by this court." *Bolt v. Sullivan*, 173 S.C. 24, 33, 174 S.E. 491, 495 (1934) (rejecting respondent's argument that the Court could not disturb findings of special referee and circuit court relating to determining the parties' interests in land). Thus, the standard of review applicable to questions of fact in a law case, as cited by the County, is inapplicable.[16]

B. The County misrepresents or omits myriad important facts in its Initial Brief.

As with all *ad hoc* factual inquiries under the *Penn Central* analysis, the accuracy of the facts is of paramount importance. The County's rendition of the core underlying facts in its analysis of each *Penn Central* factor is seriously flawed and not supported by the record as a whole.

1. The County seriously mischaracterizes its regulatory regime in place at the time Columbia Venture purchased the Property.

Columbia Venture agrees with the County that two provisions of the County's ordinances—the Storm Drainage Ordinance and the Zoning Ordinance—controlled

[16] Columbia Venture has not abandoned its arguments relating to due process, but instead has incorporated those arguments into its analysis regarding the character of the government action component of its *Penn Central* argument. The same evidence supports both arguments. For that reason, Columbia Venture properly noticed an appeal of the Due Process Order, to the extent it is inconsistent with Columbia Venture's arguments relating to the character of the County's actions.

development in a regulatory floodway on February 19, 1999, the date Columbia Venture purchased the Property. Contrary to the County's assertions, however, neither provision was interpreted by the County official charged with such interpretation to prohibit construction in a floodway during Columbia Venture's extensive pre-purchase due diligence. Indeed, the *possibility* of interpreting "impede" as "no build" only arose as opposition to Columbia Venture's plans developed in 2000, and, as County staff recognized, became "focused on this stormwater ordinance as the way to sink the B&C project." (R. p. 5678).

The County even concedes that "[t]he restrictions imposed by the County's floodway provisions were given real attention for the first time" after August 12, 1999, the date FEMA issued for publication a new revised preliminary FIRM—almost six months after Columbia Venture bought the Property. County Brief p. 29.[17] The County's present interpretation of its ordinance is of recent vintage and was not manifested during the time Columbia Venture conducted its due diligence. Rather, the County attempts to rewrite the historical interpretation of its ordinance by citing third party hearsay comments that Columbia Venture investigated during its due diligence through interviewing the County officials actually charged with ordinance interpretation. Consequently, as Columbia Venture learned in its due diligence and at all times pertinent to Columbia Venture's acquisition of the Property, Richland County permitted construction on property classified as a floodway. It thus made no difference to Columbia Venture for investment decision purposes whether the County was using the effective FIRM (no floodway on Levees) or the revised, preliminary FIRM of June

[17] The evidence the County cites is dated 2001—not 1999—and while the County Engineer could not precisely date the County Attorney's challenge to his long-time "no-rise" interpretation, it was sometime after August 12, 1999. (R. pp. 1877-78, 1914); *see also* County Brief p. 30-31 (citing Defendant's Trial Exhibit 133 (R. pp. 5557-62), an August 29, 2000 County document, to describe the interpretation of "impede" as "unsettled" at that time). Columbia Venture is unaware of any evidence suggesting that this issue was the subject of debate in 1999.

5, 1998 (floodway on Levees)[18] for floodplain/floodway management decisions, because the County allowed construction in the most onerous and restrictive classification.

The County concedes, as it must, that Ralph Pearson, P.E., the County Engineer from 1976 until 2005, interpreted "impede the free flow of water" as consistent with the FEMA "no-rise" standard, an engineering standard allowing floodway construction if hydrologic and hydraulic engineering show that construction can occur without displacing the waters of the base flood. *See* 44 C.F.R. § 60.3(d)(3). The County then attempts to siphon all relevance from the County Engineer's admission by claiming that the Engineer was unauthorized to make that interpretation and that Columbia Venture was unreasonable in relying on the Engineer's interpretation even in the face of corroborating testimony from both the County Administrator and Assistant County Administrator. (*See* R. pp. 2781, 2962). The County's own documents and the testimony of its own witnesses, as well as logic and common sense, completely undermine the County's argument, which also exceeds the Special Referee's findings.

As recognized by the Special Referee (R. p. 119), the County Engineer had interpretive authority of the floodway construction provisions in both the Storm Drainage and Zoning Ordinances in effect on February 19, 1999. The County Engineer was charged with approving plans and permit applications made under the Storm Drainage Ordinance for construction or development in a floodplain or floodway. (R. p. 3580 § 8-55; *see also* R. p. 3176). The Zoning Ordinance requires "utilization of the county engineer as required by this ordinance." (R. p. 3645 § 26-73.2a). Section 26-73.6, titled "Review by county engineer,"

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[18] The County argues that "Burroughs & Chapin did not take [this map] seriously." County Brief p. 15. This is not true and is not supported by the testimony the County cites. Mr. Gregory was primarily testifying as to his impression of how the attendees at the FEMA meeting, including Richland County and various engineers, viewed the June 5, 1998 revised preliminary FIRM. (R. p. 1646). Burroughs and Chapin certainly took the map seriously, as they engaged in extensive due diligence to understand what construction and development Richland County would allow under that map. (R. pp. 1489-97).

directs that the County Engineer must review proposals for "a. Filling in –FW areas in connection with permissible uses or *as a use in itself.* b. All special exceptions within –FW areas." (R. p. 3650 § 26-73.6(1) (emphasis added)). Further, the County Engineer is responsible for "reviewing applications for actions relating to the construction of" Flood Control Works, such as levees. (R. pp. 3651-52 § 26-73.6(4)). The County Engineer's findings on these issues are "binding upon the zoning administrator unless overruled by the board of adjustment." (R. p. 3654 § 26-73.6(9)(a)). The plain language of both ordinances clearly gives the County Engineer far more than the "minor" administrative role the County admits.[19]

The County repeatedly claims that "impede" in the Zoning Ordinance "essentially prohibited" construction in a floodway. County Brief pp. 8, 26, 82, 85.[20] These statements beg the question of why the County "agreed" to allow Columbia Venture to upgrade the Levees on February 2, 1999, when the Levees were located in a regulatory floodway under the flood maps then being used by the County. (*See* R. pp. 3111, 3130-31, 3133). The County's *post hoc* interpretation also ignores the clear language of the Zoning Ordinance provisions dealing with floodways. For example, the Zoning Ordinance affirmatively authorizes "[f]illing in –FW [floodway] areas in connection with permissible uses or as a use in itself." (R. p. 3650 § 26-73.6(1)(a)). If the Zoning Ordinance prohibited construction in a floodway, why does this section exist? Richland County had permitted projects in the

[19] Indeed, County staff went to the Engineer for answers to questions about levee improvement plan requirements and other floodway ordinance interpretation issues. (R. p. 5607; *see also* R. p. 3258).

[20] For support, the County cites the testimony of the County Administrator and the former Planning Director who began work in August 2001. (R. p. 2804). The 2001 Planning Director is incompetent to testify as to how ordinances were interpreted in 1999. The County Administrator is not charged with interpreting the Zoning Ordinance, and further has admitted to knowing that the County Engineer interpreted "impede" as "no rise" in 1999. (R. p. 2781).

floodway on a no-rise showing prior to 1999. (R. p. 3176).[21] If the Zoning Ordinance prohibited construction in a floodway, how did these projects receive permits? The County cannot answer these simple, logical questions because the County simply did not prohibit building in a floodway until well after Columbia Venture purchased the Property. The County's contentions should be viewed as what they are: a *post hoc* rationale and litigation strategy to defeat Columbia Venture's takings claim, developed only after the County changed its mind about Columbia Venture's project. No one from the County raised these issues in 1999 when the County Council was fully on board with the proposed development, and, as the Special Referee found, the County in 2001 passed *new* ordinances, which had the effect of ending Columbia Venture's plans to improve its Levees. (R. pp. 147-48).

The County asserts that Columbia Venture should not have accepted the County Engineer's unambiguous opinion that floodway construction was permitted on a no-rise standard in Richland County. County Brief pp. 85-86. Instead, and to support its *post hoc* interpretation, the County claims that Columbia Venture should have relied instead on hearsay statements in its possession, but pre-dating its own due diligence, from FEMA (R. p. 3110), Rust Environmental (a consultant to a previous potential purchaser, Tee-to-Green) (R. p. 4834),[22] and a statement attributed to Harry Reed, the County's floodplain coordinator, about

[21] The County asserts that only three projects, involving boat ramps or boat docks, had been approved in the past, but fails to mention the dam that the County Engineer approved for Bridge Creek in the 1980s. (R. pp. 1244-45).

[22] The County repeatedly insists that Tee-to-Green withdrew its purchase option because it could not obtain assurances about upgrade of the Levees in light of the June 5, 1998 revised preliminary FIRM. County Brief pp. 12, 81. The County did not call any representative of Tee-to-Green to testify, so Tee-to-Green's full reasoning is unknown. The County does, however, omit a critical fact from its rendition. Tee-to-Green was operating under vastly different deadlines than was Burroughs and Chapin. During Tee-to-Green's due diligence period, the late Burwell Manning was facing a July 1998 deadline under his option contracts. (R. p. 5564). In July 1998, however, payments and negotiations occurred to extend the redemption deadline into 1999—Burroughs and Chapin's operative deadline. (R. pp. 5582-87). Burroughs and Chapin engaged in far more comprehensive due diligence after July 1998, including diligence specific to levee improvements in a floodway under County ordinances. (R. pp. 1631-34). Thus, any attempt to paint Burroughs and Chapin as

which no witness could testify (R. pp. 1939-40, 5191),[23] all of which gave different versions of the County's position on construction in a floodway. County Brief p. 82.[24]

The non-hearsay testimony at trial of persons actually involved with Columbia Venture's pre-purchase due diligence with the County, however, is undisputed, and clearly demonstrates that representatives of the development group went directly to the County Engineer and learned first-hand his position that construction in a floodway was permitted on a no-rise standard. (R. pp. 1488-91, 1633-34). County witnesses, including the Engineer himself, the County Administrator, and the Assistant County Administrator, and official County documents confirmed this long-standing, unquestioned, and unchallenged interpretation. (R. pp. 1875, 2781, 2962, 3176; *see also* R. p. 3060 (May 1999 entry: "....The recent map places the levees in the floodway, which requires greater restrictions on construction. ...")). Mr. Gregory testified that he received a consistent interpretation from *all* County officials with whom he discussed ordinance interpretation, and, if he had not, "that issue would have been ferreted out to the very end." (R. p. 1634). If Columbia Venture was

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irresponsible based on Tee-to-Green's actions mischaracterizes the factual background during which each respective party was acting.

[23] Notably, the Zoning Ordinance gives review authority to the county flood coordinator for "[a]ll applications for zoning permits for uses permitted within –FP areas." (R. pp. 3648-49 § 26-73.5(3)). No mention is made of the county flood coordinator for review of projects in –FW areas. That review is reserved for the County Engineer alone. (*See* R. pp. 3647-48 § 26-73.4(4), 3650 § 26-73.6(1)). The County also failed to call Mr. Reed to testify.

[24] The County further cites the testimony of Mark Hester, one of Columbia Venture's engineers, for the proposition that the County prohibited construction in a floodway at the time of purchase. However, Mr. Hester testified that he was not part of the due diligence team assigned to discuss matters with County officials, including the County Engineer, prior to purchase. (R. pp. 2446-47). Accordingly, he testified that he was unaware of the County Engineer's interpretation of "no-impede" as the FEMA "no-rise" standard. (R. pp. 2430-31, 2446-47). He further did not testify about the time frame for his understanding of the County ordinances. He applied it to specific maps that were dated (*e.g.* R. p. 2409), but provided no context for the timeframe that he himself understood the prohibition to be in effect. Indeed, Mr. Hester was involved with the project over a long time period and was certainly aware of the County's stormwater ordinance passed in April 2001 and its prohibition against building in a floodway, except for Heathwood Hall and the City's wastewater treatment plant. Mr. Hester's testimony is thus of no use to the County to establish both the actual regulatory regime and Columbia Venture's understanding of it on February 19, 1999.

not satisfied with the County's position, "we would have never closed." (*Id.*) Mr. McSwain testified that he knew that Columbia Venture would be seeking a permit to upgrade the Levees. (R. pp. 2753-54). If the County in 1999 truly interpreted its ordinances to prohibit construction in a regulatory floodway in the manner the County now claims, *i.e.*, Columbia Venture would not have been able to secure the applicable permits to improve its Levees, its failure to disclose such interpretation to Columbia Venture over the *months* of admitted due diligence and back and forth discussion with County officials is the height of bad faith by the County.

Even in the face of this countervailing evidence, the County claims that Columbia Venture should have disregarded the County Engineer, the County Administrator, and the Assistant County Administrator and relied instead on the dictionary definition of "impede," which it claims is inconsistent with the FEMA no-rise standard.[25] In the context of FEMA regulations, which are specifically incorporated into the Storm Drainage Ordinance (R. p. 3583 § 8-62(i)), and the hydraulic and hydrologic engineering undergirding the entire NFIP, construing "impede" as "no-rise" is eminently reasonable, as explained by the County Engineer himself. (*See* R. pp. 1874-75). FEMA itself construed "impede" in that manner in a letter to Richland County, suggesting that building standards under the NFIP "could mandate that buildings *do not impede flood flow, such as construction elevated on piles to allow flow under the buildings.*" (R. p. 4902 (emphasis added)).

The County further argues that the mere existence of the appeal process in the Zoning Ordinance and the mere possibility that the County Attorney could review the ordinance language make Columbia Venture's reliance on the consistent interpretation it received from

[25] The question of the appropriate interpretation of "impede" is not a question of law for the Court to decide in this matter, such that the rules articulated in *Brown v. S.C. Department of Health & Environmental Control*, 348 S.C. 507, 560 S.E.2d 410 (2002) apply. Instead, the relevant considerations are how the County was *actually* interpreting the word "impede" in its ordinance and how that interpretation impacted the Property.

County officials unreasonable. County Brief p. 85. This argument is absurd and belied by the actual facts.[26] Under the County's reasoning, no expectation to develop land would *ever* be reasonable because appeal provisions exist in myriad ordinances.

Finally, Columbia Venture did not stop its pre-purchase due diligence with confirming the County Engineer employed a "no-rise" standard for construction in a floodway. Columbia Venture then sought and secured a unanimous resolution from the full Richland County Council, requiring Columbia Venture to improve its Levees pursuant to NFIP standards as a condition for the County's agreement to accept the operation and maintenance responsibility for the Levees. (R. pp. 3326-27). As the County Administrator testified, the County Council is the ultimate authority on the interpretation of the County's ordinances. (R. pp. 2783-84). If the Council disagrees with the manner in which the administrative staff is construing and administering County ordinances, Council has the power to change such interpretations by changing the ordinance—which is exactly what Council did in 2001 by rejecting the County Engineer's prior interpretation of the ordinance and the County staff's recommendation that the County formally adopt the NFIP no-rise engineering standard. (R. pp. 3180, 3258, 3376). It is thus misleading for Richland County to represent here that Columbia Venture relied solely on the oral advice of the County Engineer when it, in fact, went much further and secured a unanimous resolution that, in essence, intent, and effect, allowed and endorsed levee construction in a floodway.

[26] The County Attorney certified as being within the powers and authority of County Council the request for County action in January 1999 (R. p. 3346), which led to the recommendation of the Development and Services Committee and the February 2, 1999 unanimous resolution of Council whereby the County agreed to maintain the Levees on the condition, among others, that Columbia Venture physically improve them. The County Attorney thus made no challenge to constructing levees in a floodway as somehow out of compliance with the County's ordinances when that precise issue arose in early 1999.

2. The County fundamentally misconstrues and misrepresents Columbia Venture's original development plan and ignores the effect of the County's actions in preventing Columbia Venture from implementing its plan.

a. The County misrepresents Columbia Venture's investment-backed plans to improve and certify the Levees prior to any mapping change and subsequent development.

The County repeatedly misrepresents Columbia Venture's development plan as building a large, mixed-use development *in a floodplain.* County Brief pp. 26, 48, 76. At no time did Columbia Venture ever propose building a development on a floodplain.[27] Indeed, Columbia Venture's earliest documents reflect the need "to get the subject property out of the floodplain requirements for building." (R. p. 3812). Wilson Tillotson, Deas Manning, and George Gregory all testified that the development envisioned by Columbia Venture—developing "flat on the ground"—would not have been possible with the building restrictions in place on floodplain property, which is how the Property was classified on the 1994/95 effective FIRM. (R. pp. 1292, 1405, 1463-64, 1496-97, 2979).

Columbia Venture's well-documented and repeatedly communicated pre- and immediately-post purchase plan was to (1) commence work to upgrade and certify the Levees; (2) thereafter, apply to FEMA for a LOMR, the issuance of which would amend the flood map to remove the floodway and floodplain designations from the Levees and Property;[28] and

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[27] The County attempts to get around this fundamental misstatement by citing to a document not in the record. County Brief fn. 9 & p. 77 (citing PTE 369, specifically DEF-00002343). PTE 369 (R. pp. 4246-48), as submitted to the Special Referee, was a 3-page summary of a report and did not include the actual report the County purports to cite. On a related note, the County states that Columbia Venture's Initial Brief improperly refers to Pope Dep. Ex. 148 (R. pp. 5671-72), an email chain between Councilman Pearce and some of Columbia Venture's opponents. Questions posed to Mr. Pearce about the email chain were excluded from the record, but not the email itself. (R. pp. 38-39, 383-437, 534, 536-39, 1390-91).

[28] A LOMR is a "Letter of Map Revision," the process by which FEMA modifies its effective flood maps based on "the implementation of physical measures [such as a levee meeting the requirements of 44 C.F.R. § 65.10] that affect the hydrologic or hydraulic characteristics of a flooding source and thus result in the modification of the existing regulatory floodway, the effective base flood elevations, or the [Special Flood Hazard Area]." 44 C.F.R. §§ 72.1, 72.2. A CLOMR, or "Conditional Letter of Map Revision," is a slight variation on this plan

then (3) begin construction of the development built flat on the ground.[29] (R. pp. 3499-3500, 3632-34, 3668-69). Nowhere in these critical communications to Richland County or FEMA did Columbia Venture express a desire to secure a "favorable map" to upgrade the Levees prior to actually upgrading the Levees—or any other variation on its plan. Multiple witnesses, including County witnesses, affirmed Columbia Venture's plan. (R. pp. 1268, 1296-1308, 1346-50, 1358-60, 1408-09, 1430, 1497, 1499, 1501-02, 1511-14, 1526-31, 1625-26, 1683, 2542-49, 2743-48, 2978, 2980, 3002; *see also* R. p. 3121 (SCDNR personnel describing Columbia Venture as seeking "assurances that if the levee is upgraded to meet the standards outlined in 44 CFR 65.10 ... that the levee would be recognized by FEMA and FEMA would approve a map revision *submitted through the normal process*" (emphasis added)). Under FEMA's regulations, land protected by a certified levee will be classified as Zone X and removed from all of the floodway and floodplain building restrictions upon certification and remapping via a map revision, or LOMR. (R. p. 3125); 44 C.F.R. §§ 65.5, 65.9.[30]

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wherein FEMA first comments on a proposal prior to construction. LOMRs occur after construction. *Id.*

[29] Columbia Venture's plans evolved as post-purchase events unfolded, driven chiefly by the County's changing positions. (*See* R. p. 3010). Indeed, the special referee recognized that persuading FEMA to issue a more favorable map (the theory to which the County doggedly clings) was only one of various alternative strategies that Columbia Venture was pursuing after purchase. (R. p. 127).

[30] The County further repeatedly misrepresents Columbia Venture's pre-purchase due diligence and disclosure of its plans, calling it "pie in the sky" and painting the picture of an unreasonable developer. This is not at all supported by the record. Multiple witnesses affirmed the disclosure of a mixed-use development involving commercial, residential, recreational, and other uses behind certified levees, including Councilwoman Smith, who testified that she reviewed an impressive land use map prior to purchase that showed proposed locations of roads, residential areas, and commercial areas. (R. pp. 2529-30; *see also* R. pp. 1471-73, 1481-83, 2755-56, 2938, 2944-45, 3807-17). Columbia Venture also engaged in market research and had other financial analyses prepared prior to purchase. (R. pp. 1465-66, 1610-11, 3670-3789, 3807-20). Columbia Venture used the expressions of support it received at its meetings with County officials as a springboard to request the official County action manifested in the February 2, 1999 resolution. The pre-purchase meetings, on their own, did not give rise to Columbia Venture's expectations. They were simply part of a comprehensive due diligence process, culminating in a unanimous Council endorsement of the project.

Nevertheless, and ostensibly to characterize Columbia Venture's actions as complying with its *post hoc* interpretation of its ordinances, the County repeatedly misrepresents Columbia Venture's plan as to first "convince" FEMA to issue a new map showing no floodway on the Property, thus allowing for Levee construction, and only then to upgrade the Levees with a new map in place to remove the BFEs from the Property behind the Levees. County Brief pp. 24, 77-79. Nothing in the cited exhibits or testimony supports the County's assertions.[31]

Indeed, given the regulatory scheme in place at the time of purchase, it would be illogical for Columbia Venture to seek a different map because the County's regulations, as interpreted by applicable and authorized County personnel, would allow Columbia Venture to improve its Levees regardless of whether the applicable FIRM showed the Levees in a regulatory floodway. (R. pp. 1875-78). If the County chose to use the 1994/95 effective FIS

[31] PTE 264 (R. p. 3812) simply tasks Lockwood Greene with developing a plan of action. The actual plan of action was as represented in PTEs 166 (R. pp. 3346-53), 207 (R. pp. 3499-3500), 246 (R. pp. 3632-34), and 252 (R. pp. 3668-69). PTE 120 (June/July 1999) (R. pp. 3269-84), and DTE 010 (December 2000) (R. p. 5148) both post-date Columbia Venture's purchase, and therefore do not represent Columbia Venture's pre-purchase plan and also were drafted after the County decided to issue no Levee construction permits until FEMA finished its flood mapping. Further, DTE 010 (R. pp. 5148-52) is a financial planning document. The County chooses to cite selectively from Mr. Hester's testimony to attempt to establish that Columbia Venture's plan at the time of purchase was contrary to the plan explained in PTEs 166 (R. pp. 3346-53), 207 (R. pp. 3499-3500), 246 (R. pp. 3632-34), and 252 (R. pp. 3668-69). However, Mr. Hester's testimony—viewed as a whole—is fully consistent with a plan at the time of purchase to improve the Levees as the underlying impetus to changing the map via a LOMR. As he testified, "[o]nce [the Levees are] constructed, then the mapping would be changed." (R. p. 2415). Also, the Levee "would have to be certified for it to change the mapping" and "[t]he mapping will not change until they're actually constructed." (R. p. 2420). Mr. Hester further equated removing the floodway with obtaining a LOMR or CLOMR: "If we got the map changed and the floodway rolled back? The floodway rolled back? Are you saying have a letter of map revision obtained or a CLOMR obtained?" (R. p. 2408). Notably, the County did not ask Mr. Hester any questions about the pre-purchase communications to Richland County and FEMA that actually laid out the plan of action. Mr. Hester also carefully couched his testimony as "depend[ent] on the dates." (R. p. 2411). Taken as a whole and with the important caveat that Mr. Hester's role with Columbia Venture was "specific sort of engineering tasks, to review technical data, that type of thing," and not broader policy or strategy (R. pp. 2405, 2444), Mr. Hester's testimony is consistent with Columbia Venture's plan at purchase to first upgrade the Levees and then proceed with a LOMR.

and FIRM (which was the County's option) (R. p. 3142), the Levees were in a floodplain but not a floodway. Consequently, an upgrade could be permitted by the County Engineer's office. If, however, the County chose to use the 1998 revised preliminary FIS and FIRM for floodplain management decisions (which was also the County's option (*id.*) and what the County actually chose to do (R. p. 3115)), the Levees were in a floodway. The Levees could thus be upgraded based on a no-rise engineering showing. Lockwood Greene extensively studied the no-rise issues and opined prior to purchase that a no-rise could be shown. (R. pp. 2979-80, 3504). Consequently, as of the time of purchase, there was no need for Columbia Venture to secure any different map than the ones already in play.[32]

Columbia Venture's immediate post-purchase actions confirm its intent to upgrade the Levees with its own money as the first step in the development process. Less than a month after purchase, Columbia Venture contracted with S&ME to begin the geotechnical levee design work on an expedited basis. (R. pp. 1731, 1777, 2976-77, 2980). S&ME thereafter commenced work, completed the Levee Section 1 analysis in May 1999 and the Levee Section 2 analysis by November 1999. (R. pp. 1745, 1769, 4905-08). Columbia Venture paid S&ME $144,969.62 for its 1999 engineering work. (R. p. 4896). Although Columbia Venture's Levee improvement plans evolved to encompass potential partial public funding as the process dragged on (caused chiefly by the County's decision to delay the necessary

[32] The County states that the use of a flood map is tied to *either* increased BFEs *or* a larger floodway, an argument adopted by the Special Referee. County Brief p. 6; (R. p. 106). This is incorrect. FEMA's guidance to NFIP communities for using a revised preliminary map for Zone AE is tied solely to the BFEs. (R. pp. 1860-61, 3142, 5593-96). The County *always* had the option of using the effective data in lieu of the preliminary data. (R. p. 3142). However, FEMA advises communities to use the map (effective or preliminary) that contains the higher BFEs. (*Id.*) Further, if a floodway has not previously been designated for the river or stream at issue, FEMA advises the community to enforce the now-designated floodway. This second scenario did not apply to the Property here because the effective map contained a floodway. Indeed, FEMA consistently advised the County from 1998 until 2001 to use the map with the higher BFEs for floodplain management decisions. (R. pp. 3286, 4901, 5593-96). From August 12, 1999, until August 20, 2001, the 1994/95 effective map had the higher BFEs (R. p. 4926), hence FEMA's advice to the County to use the 1994/95 effective map during that time period.

permits, discussed in detail below), the initial Levee improvement plan was intended to be funded by Columbia Venture, contrary to the County's assertions. (R. pp. 1676 (Mr. Gregory: "If [the cost of Levee improvements] had gone to 30 million, [Columbia Venture] would have still updated the levees based on the opportunity behind them to be able to build flat."), 2547 (Councilwoman Smith: Columbia Venture did not request any potential funding for Levee improvements until "months down the path."), 2983, 2996-97, 3502-14, 5058-81).

b. The County completely ignores the critical fact and effect of the County Administrator's May 1999 decision to delay permits for Levee construction.

Tellingly, the County's brief omits entirely the County Administrator's admitted decision in late May 1999 to delay permits for Levee improvements until after FEMA finished its flood mapping. As emphasized in Columbia Venture's Initial Brief and recognized by the Special Referee, this decision to delay made it impossible for Columbia Venture to move forward with its original plans to upgrade the Levees as the necessary first step in its development project as ratified by the County in its unanimous February 2, 1999 resolution. (R. p. 131). By the time FEMA finished its flood mapping in August 2001, of course, Richland County had affirmatively changed its ordinances to ban any construction whatsoever in a floodway and pointedly prohibited making any levees in a floodway higher or wider.

The County instead suggests that the County Administrator was actually accommodating Columbia Venture in its Levee improvement permitting plans. County Brief at 27. There is no evidence to support these assertions, and it is not supported by the Special Referee's findings. (R. pp. 129-30). Rather, the County's own records and the testimony of its own witnesses establish that: (1) Columbia Venture submitted an application for a permit to perform work on the Levees on or about May 6, 1999 (R. pp. 3260-64); (2) on May 13, 1999, the County Engineer's office turned the permit application down as "incomplete" (R. p.

3267-68); (3) on May 19, 1999, FEMA wrote the County a letter suggesting that its February 25, 1999 revised preliminary FIRM should be used prior to a final determination and asking the County to "delay a decision on levee construction until after the next public meeting ..." (R. pp. 3137-38); and (4) the County Administrator decided to accede to FEMA's request to delay Levee construction approvals, but, instead of waiting until "after the next public meeting," as suggested by FEMA, the County Administrator decided to wait until FEMA finished the entire flood mapping process, which did not end until August 20, 2001. (R. pp. 2767-68).

The County Administrator's "no permits" decision is of critical importance because there was no possible way for Columbia Venture to upgrade the Levees and then secure a LOMR without a permit under its original plan (R. pp. 3499-3500, 3632-34, 3668-69), nor could Columbia Venture approach FEMA for a CLOMR, a post-purchase alternative plan (*see* R. pp. 5084-87), because CLOMRs require the applicant to have all permits in hand before seeking a CLOMR. 44 C.F.R. §§ 65.5(a)(4)(iii), 65.8.[33] Indeed, the County Administrator's decision in May was at cross purposes with the unanimous resolution the County Council passed just a few months before because it blocked any attempt by Columbia Venture to upgrade the Levees, the first condition listed in the resolution—and a condition to be fulfilled *solely* by Columbia Venture. Thus, even though Columbia Venture was procuring extensive and expensive geotechnical engineering and was essentially ready by November 1999 to begin the Levee construction with the "complete comprehensive set of plans" the County

[33]The County states affirmatively and without citation to any authority, however, that "[a] CLOMR application does not require any prior permit approvals from the County." County Brief p. 25. This is false and contrary to the Special Referee's findings. (R. p. 108). FEMA requires a property owner to obtain all necessary permits from the local government before applying for a CLOMR or a LOMR. 44 C.F.R. § 65.8 ("The data required to support [a CLOMR request] are the same as those required for final revisions under §§ 65.5, 65.6, and 65.7, except as-built certification is not required."). All three of the referenced sections of 44 C.F.R. § 65.8 include the requirement that "[t]he participating community *has issued permits* for all existing or proposed construction or other development ... ." 44 C.F.R. §§ 65.5(a)(4)(iii), 65.6(a)(14)(iii), 65.7(b) (emphasis added).

Engineer required (R. pp. 1774-75, 1893), the County's decision to issue no permits for the Levees prevented Columbia Venture from moving forward with its original plan. Indeed, the County's decision effectively forced Columbia Venture to "wait on FEMA," which, had the County endorsed that option when it considered the County's options prior to Columbia Venture's purchase, Columbia Venture would not have bought the Property. (R. pp. 1307, 1501).

The County was also, at that time, enforcing the 1994/95 effective FIRMs (and did so from sometime in May 1999 until August 20, 2001 (R. pp. 2768-74, 3060) for all construction purposes in the County other than Columbia Venture's Levees. (*See* R. pp. 2765, 2781, 2787-88). Indeed, other County landowners would need to know what map was in effect for their own construction and land use purposes. The County could have issued Columbia Venture a permit for Levee construction in the effective *floodplain* during this span of over two years (subject, of course, to less onerous restrictions for floodplain development) but for the County Administrator's decision not to. The County entirely ignores the vital and central role the County Administrator's decision played in its taking of Columbia Venture's Property.

3. The County fundamentally misconstrues the County Council's February 2, 1999 unanimous resolution to accept jurisdiction over and responsibility for operation and maintenance of the Levees.

The County concedes that its February 2, 1999 unanimous resolution was a "definite commitment made by County Council ... to accept 'responsibility for local inspection and enforcement of the Levee system.'" County Brief p. 92, fn. 46. This "definite commitment" was communicated to FEMA by Council Chairman Paul Livingston in his February 17, 1999 letter and by the County Administrator in his February 26, 1999 letter. (R. pp. 3130-31, 3133). Mr. McSwain testified that his letter's reference to the County's agreement to accept responsibility for the inspection, monitoring, review, and enforcement of the Levees after upgrade referred specifically to the County's agreement manifested in the February 2, 1999

resolution. (R. p. 2761). He wrote the letter to FEMA requesting that FEMA not publish for appeal and comment its February 25, 1999 revised preliminary FIRM in part because of the County's agreement with Columbia Venture. (*See* R. p. 3133). The primary purpose of that agreement was to satisfy the requirement of the NFIP regulations for certifying levees that a public agency accept responsibility for their maintenance and inspection, which was a necessary condition for Columbia Venture's plans to upgrade the Levees to certified status. (R. p. 1628). Without such a commitment from the County, Columbia Venture would not have bought the Property. (*Id.*)[34]

Despite this concession and the recognition that the text of legislative enactments serves as "the best evidence of legislative intent or will" (County Brief p. 112, fn. 54), the County's Brief in other places distorts the context and plain language of the County's February 2, 1999 resolution. The County improperly cites only the opinion testimony of Mr. McSwain and Councilwoman Smith in interpreting the resolution as something less than the agreement reflected in its plain language and in official, contemporaneous descriptions of it.[35]

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[34] The County's attempt to weaken its agreement reflected in the resolution into just a commitment to enforce its ordinances fails, as well. First, if the County already had an obligation to act vis-à-vis the Levees pursuant to an ordinance, why did it need to pass a resolution agreeing to comply with its own ordinance? Second, like FEMA's regulations for certified levees, the County's Storm Drainage Ordinance contained detailed construction and other standards for levees. (R. pp. 3583 § 8-62(g), 3585-86 § 8-64(d)). If the County affirmatively committed to enforce its levee standards with regard to the Levees via this resolution, the County has conceded that it was fully permissible under the regulatory scheme in place on February 19, 1999, to upgrade and build in a floodway and that Columbia Venture's plans to do so were reasonable and engendered by the resolution. For example, was the County going to fine or prosecute Columbia Venture for having substandard levees (R. p. 3588 § 8-69(a)) if the County, at the same time, prohibited their improvement? A commitment to enforce certain regulations certainly encompasses a promise to allow the one so regulated to actually comply with the regulations and not to, in the future, serve as the sole obstacle to such compliance.

[35] Chairman Livingston to FEMA on February 17, 1999: "Richland County, **by action of its governing body**, the County Council, **has agreed** to accept responsibility for local inspection and enforcement of the operations and maintenance plan for the levee system as submitted by the owner and approved by FEMA contingent upon: [4 contingencies]." (R. p. 3130 (emphasis in bold added)). The County Administrator to FEMA on February 26, 1999: "Richland County **has agreed** to be the inspector, provide monitoring and review and

Mr. McSwain gave the opinion that the resolution only allowed "interested parties" to come together to discuss issues and resolve them as they went along. (R. p. 2716). Ms. Smith opined that the resolution gave the County the opportunity to further explore liability and financing. (R. pp. 2495-96, 2602).

The plain language of the resolution does not support either of these *post hoc* interpretations, which do not even rise to the level of legislative history. The only portion of the resolution to which Mr. McSwain's testimony could even arguably apply is contingency number 4, stating: "[t]he parties, including Richland County, the City of Columbia and the developers, resolve the issues of the performance and funding of the operation and maintenance responsibility." (R. p. 3326). Mr. Gregory, however, testified that had the issue become a sticking point with the government entities, the development group would have been willing to absorb the entire cost of the maintenance responsibility, which was estimated to be only approximately $174,500 per year. (R. p. 1514). Importantly, no other "interested parties" other than the "property owners" were involved in the necessary first step of "upgrad[ing] the levee system to meet FEMA standards." (R. p. 3326). The full burden of that initial step—as well as steps two and three, which are component parts of the upgrade process—were placed on the property owners. Of course, the $30,000,000.00 investment pledged by the developers in step five—"what made this a very special project" (R. p. 2942)—had to be borne by the property owners alone.[36] Mr. McSwain's testimony here also conflicts with his letter to FEMA on February 26, 1999, stating what Richland County had *agreed* to do. (R. pp. 2761, 3133). As for Ms. Smith's post hoc interpretation, the word

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enforcement after the rebuilding of the levees has been approved and accepted." (R. p. 3133 (emphasis added)).

[36] Since the property owners either had complete responsibility (items 1, 2, 3, and 5) or were willing to take on complete responsibility (item 4), the County's arguments about certainty and timing are irrelevant. *See* County Brief p. 20. The County also ignores that only Richland County could issue the necessary permits to allow Columbia Venture to fulfill the first contingency of upgrading the Levees, and that, beginning in May 1999, it refused to do so.

"liability," or any synonym for it, is not even mentioned in the resolution.[37] The County's *post hoc* characterizations should be rejected as contrary to the resolution's plain language.

The County does, however, parse the introductory clause of the resolution to such an extent that the County effectively argues that the resolution—as conceived, passed, and later confirmed in writing—was actually a nullity and could never be fulfilled. County Brief p. 92. The County argues that "[t]he County agreed to accept this [operation and maintenance] responsibility if 44 C.F.R. section 65.10 required *Richland County* to accept responsibility for levee maintenance." *Id.* (emphasis added). And, the County argues, because nothing in FEMA's regulations *requires Richland County itself* (as opposed to another governmental body) to accept that responsibility (*id.*), the County can wriggle out of its agreement scot-free after securing a $30 million commitment from a citizen. (*See* R. pp. 3326-27). Such an interpretation, however, would require a tortured reading of both the resolution and the FEMA regulation which the resolution was intended to address. The entire point of 44 C.F.R. § 65.10 is to provide for the *certification* of levees, which is *precisely* what the development group wanted to do, and what they *repeatedly* made known to County representatives over months of due diligence before the evening of February 2, 1999. (*See* R. pp. 3346-53, 3499-3500, 3632-34, 3668-69). To be certified, the operation and maintenance activities of the levee "*must* be under the jurisdiction of a Federal or State Agency ... or an agency of a community participating in the NFIP." 44 C.F.R. § 65.10(c) & (d) (emphasis added). There is no ambiguity in FEMA's regulations that to have a certified levee, the local jurisdiction is, in fact, required to accept the maintenance and operation activities. The County understood that the developers' goal was to build a development behind certified levees. (R. pp. 2755-56, 2938, 2944-45). Richland County fully exercised its discretion to accept operations and

[37] The County spent time and energy evaluating what its role would entail—including liability issues—on and before February 2, 1999. (R. pp. 3128, 3323, 3326).

maintenance responsibility for the Levees as required by FEMA when it voted unanimously on February 2, 1999, to do so.

The County also attempts to make hay of testimony from Mr. Gregory that the resolution was not an ordinance and not a contract. County Brief at 93. However, a complete picture of Mr. Gregory's testimony is that the County's actions manifested an intent to enter into a unilateral contract. (R. p. 1704). In addition, the County, by its actions, prevented Columbia Venture from being able to perform its part of the bargain.[38] Mr. Gregory also testified:

> [A] We came in very good faith to Richland County, and I think, at a bare minimum, you know, we had a right to believe that they would be truthful and fair in their dealings with us, as we were with them. I do not think that's an unreasonable thing to assume from one of the seats of government in the state capital in the center of the state.
>
> Q. Are you saying [Richland County] was not truthful with Burroughs & Chapin?
>
> A. I'm saying that they did not follow through on the things they agreed to do with Burroughs & Chapin.

(R. p. 1627). The Court should not accept the County's characterizations of the February 2, 1999 unanimous resolution agreeing to accept responsibility for operation and maintenance of the Levees. It is contrary to the plain language of the resolution, the federal regulations incorporated therein, and the context in which it was unanimously passed.[39]

Overall, the County characterizes the status of Columbia Venture's way forward with the County as of the date of purchase as "a daunting regulatory maze." County Brief p. 80.

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[38] *Cf. Cont'l Mortg. Investors v. Quail Run Assocs.*, 280 S.C. 409, 417, 312 S.E.2d 272, 277 (Ct. App. 1984) ("It is settled that a party who precludes the other from performing under the contract cannot avail himself of such non-performance.").

[39] The County attempts to characterize Burroughs and Chapin's understanding of the resolution as something "less than" an agreement by citing to corporate minutes of February 9, 1999, reiterating a condition for purchase that "an agreement can be negotiated with Richland County to assume maintenance of the dike system ...." (R. p. 5098-99). However, this was just the recitation of the corporation's resolution, and echoed language from previous meeting minutes (R. pp. 5088, 5093-94–January 26, 1999) and future meeting minutes (R. pp. 5101-03–February 15, 1999). No inference comes from the simple recitation of criteria that Burroughs and Chapin would need for closing.

No regulatory "maze" existed on February 19, 1999, much less a daunting one. The extensive due diligence Columbia Venture undertook was focused on understanding and confirming the existing regulatory scheme. That due diligence revealed that the most onerous construction standard Richland County would conceivably impose on Levee construction would be the FEMA no-rise. Lockwood Greene opined that the Levees could be upgraded on a no-rise showing, a conclusion affirmed by Engineer Carroll Barker—and one which the County has not rebutted. (R. pp. 1821-25, 3504). The County also agreed to accept the Levees as required under FEMA regulations upon the certification of the Levees and Columbia Venture's $30 million pledged investment. Mr. Gregory testified that any lingering "uncertainties" on February 19, 1999, related only to the normal construction delays for the Levee improvements—not Columbia Venture's ability to obtain a permit from the County to do so. (R. p. 1662). The due diligence team had resolved all of its identified issues prior to closing because, as Mr. Gregory testified, if the team had not been satisfied with the County's official interpretation of its ordinances, the February 2, 1999 resolution, and other due diligence items, Columbia Venture "would have never closed" on the property. (R. p. 1634).

4. The County's 2001 floodway construction ordinances improperly targeted Columbia Venture and its Levees and do not comply with the NFIP.

a. Convenience and improper targeting—not enhanced safety—motivated the County's amendment of its Stormwater Ordinance in Spring 2001.

In 2001, the County improperly decided to treat identically situated floodway property differently for development purposes based solely on the identity of the property owner. Heathwood Hall and the City of Columbia were favored; Columbia Venture was not.[40] This

[40] The County attempts to get around the targeted nature of the County's restrictions on Columbia Venture by arguing that 13 other property owners were subject to the same floodway restrictions as Columbia Venture. County Brief p. 104. This is inaccurate and unsupportable with the evidence in the record. The County cites for support PTE 166 (R. p. 3349), which contains a barely legible (in some places illegible) list of property owners

disparate treatment runs afoul of FEMA's regulations, which state that the County's floodplain and floodway "regulations must be legally-enforceable, applied uniformly throughout the community to all privately and publicly owned land within flood-prone ... areas ...." 44 C.F.R. § 60.1(b). Allowing some landowners to build new, substantial, and economically meaningful structures in the floodway, while simultaneously denying that right to a neighboring landowner in the same floodway, is not a uniform application of the County's regulations. Ms. Smith fully recognized the disparate treatment the Council enacted. (R. p. 2628).

The County tries, unsuccessfully, to circumvent this obvious and improper inconsistency in two ways. First, it contends that its disparate treatment was due to harm prevention. Harm prevention, however, was not the County's concern in 2001. Rather, the evidence only identifies the inconvenience to Heathwood and the City that would result by imposing a no-build ordinance that would threaten expansion plans for both landowners. (R. pp. 3068-69, 3361-64, 4241-45, 5386). No mention was made in any contemporaneous evidence of harm prevention as the reason for exempting Heathwood Hall and the City from the no-build requirements. Indeed, had harm prevention been the County's goal, no conceivable reason exists to treat these equally situated landowners differently. Under the County's current reasoning, all floodway construction is harmful, so why would Heathwood and the City be permitted to engage in harmful activities? This argument also ignores the abundant evidence that Columbia Venture, like Heathwood and the City, had existing

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potentially impacted by FEMA's June 5, 1998 revised preliminary FIRM, which proposed a large floodway essentially to Bluff Road. (R. p. 3626). FEMA was no longer considering this proposed floodway as of February 25, 1999, and the floodway imposed on February 20, 2002, was far more modest than the one depicted in PTE 166. (R. pp. 3349, 4294). No record evidence exists as to who precisely was in the February 20, 2002 floodway. In addition, two of the landowners the County identifies—Gregg and Jordan—were cooperating with Columbia Venture, and their properties were incorporated into some of Columbia Venture's development designs. (*See* R. pp. 1200-01, 4167-74, 5267-68). However, Columbia Venture was certainly the landowner the County was concerned with as the "most visible" landowner potentially applying for a permit in the February 20, 2002 floodway. (R. p. 2964).

infrastructure (20 miles of Levees) and plans to improve both its Levees and its Property. With every pertinent landowner of concern to the County asking for accommodation for their land improvement projects, the County singled out *only* Columbia Venture and completely barred its ability to improve its land in any economically significant way while accommodating its immediately adjacent neighbors. The County's argument also ignores the simple and obvious fact that the best way to prevent harm and to protect existing and future assets is to allow for Levee upgrade and certification.[41]

Second, the County claims that Heathwood and the City were not similarly situated to Columbia Venture because of the respective uses to which their properties were to be put. This is logically incorrect, and inconsistent with the case law the County cites, which focuses on property itself and not its potential uses. *Cummins v. Robinson Twp.*, 770 N.W.2d 421, 448 (Mich. Ct. App. 2009). The *land* itself was all part of the same regulatory floodway. The County further ignores the well-established fact that Columbia Venture's Levee improvement plans would remove the floodplain designation from *all* of the land behind the Levees, including Heathwood's and the City's property. Thus, any concerns about density, time of occupation, etc. for floodplain property that the County recites on page 104 of its Brief would be eliminated completely. There is also no evidence in the record to suggest that this rationale informed the County's decision in 2001 to prohibit Columbia Venture from making its Levees higher or wider and to ban all construction in a floodway for Columbia Venture. The Special Referee cited no evidence, and the County only cites the testimony of Michael Criss, who was not even employed by Richland County in April 2001.[42] In fact, it was never communicated

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[41] The County inaccurately argues that Heathwood Hall was the driving force behind the County's ban on making levees in floodways higher or wider. County Brief pp. 39, 112. While Heathwood Hall asked the County to ensure that levee maintenance could still occur, the draft language proposed by Heathwood (R. p. 4244) only mentions maintenance and does not contain the no "higher or wider" language enacted by the County. (R. p. 4265 § 8-26(h)).

[42] Mr. Criss, who has no qualifications or training to authenticate his opinions, testified that it would be easier to evacuate a school rather than residences. (R. p. 2802). The point is

to Columbia Venture that only a non-residential development might be permissible behind certified levees. Columbia Venture was only told that it could do nothing to improve its Levees and develop its Property.

b. The County's ordinances banning construction in regulatory floodways conflict with FEMA's regulations.

The County also claims FEMA's regulations encouraged its prohibitions on floodway construction. While FEMA's regulations provide "[a]ny community may exceed the minimum criteria ... by adopting more comprehensive flood plain management regulations" and that any local regulations "which are more restrictive than [FEMA's minimums] are encouraged and shall take precedence," (44 C.F.R. § 60.1(d)), the County's argument that its regulations prohibiting construction in a floodway comply with this section omits a key provision. FEMA limits the "more comprehensive food plain management regulations" that it encourages to those "utilizing the standards such as contained in subpart C of this part." *Id.* The purpose of Subpart C "is to encourage the formation and adoption of overall comprehensive management plans for flood-prone ... areas. While adoption ... of these standards is not mandatory, the community shall completely evaluate these standards." 44

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specious. Columbia Venture's Levees are dry levees; that is, there is no water from the river that is in constant contact with the riverside face of the Levees. The channel of the river is some distance from the riverside toe of the Levees. (*See, e.g.* R. p. 3345). It is only during periods of major flooding (10-100 year floods) that water would reach the riverside toe of the Levees. According to FEMA, during a base flood on the Congaree River, the flood waters would start to rise, crest, and recede over a three to four day period. (R. p. 3495). Accordingly, the Levees would be dry at all times except during the three to four days of a major flood, which on average has a one to ten percent chance of occurring in any given year. The last major flood, which according to FEMA was a 10-year flood, occurred in 1976. (R. pp. 3480-81). It follows that evacuation of the school, waste water treatment plant, and any residential or commercial buildings would be a relatively simple process. As soon as the flood waters reached the riverside toe of the Levees, residents and others could be advised, if necessary, to leave and return three to four days later after the flood waters had receded. This process is minor when compared to previous evacuations of entire towns and communities during hurricanes.

C.F.R. § 60.21.[43] Flood prone areas are covered in 44 C.F.R. § 60.22, and the only mention of an outright prohibition on floodway building is of "plants or facilities in which hazardous substances are manufactured." 44 C.F.R. § 60.22(18). Other provisions implicitly and explicitly endorse floodway construction. *E.g. id.* § 60.22(12) ("For riverine areas, requiring subdividers to furnish delineations for floodways before approving a subdivision."). In short, nothing in FEMA's regulations about "more restrictive" yet still NFIP compliant standards encourages communities to ban outright all construction in a regulatory floodway.[44]

Further, the "more stringent" regulations actually endorsed by FEMA are tied to the calculations of the permissible rise in the BFEs that will establish a regulatory floodway under a community's regulations. FEMA provides:

> Normally, the floodway will include the stream channel and that portion of the adjacent land areas required to pass the 100-year flood discharge without cumulatively increasing the water-surface elevation at any point more than 1.0 foot above that of the pre-floodway condition. If the state in which the study is being performed has established *more stringent regulations for the maximum rise* in water-surface elevations, through legally enforceable statutes, then these regulations shall apply.

(R. p. 5812 (emphasis added)). This can be accomplished by defining the regulatory floodway as no more than a 6-inch rise or even a 0-inch rise, which would make the regulatory floodway coterminous with the floodplain. (*See* R. pp. 1811-12). Richland County failed to enact a more stringent floodway in compliance with FEMA's requirements. At all

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[43] Indeed, the County specifically *declined* to engage in comprehensive floodplain management regulations in 2001, despite being encouraged to do so by the County staff. (R. p. 3180).

[44] Mr. Criss's and Ms. Jones's testimony that prohibiting building in a floodway will somehow keep floodwaters from rising over time is simply misinformed. Only no-rise construction is permitted in a floodway under the NFIP's minimum standards. Construction, or fill, is permitted in a floodplain even if it will displace water. (*See, e.g.*, R. p. 3048). Increased runoff from parking lots and whether it could lead to an increase in the volume of the base flood requires knowledge of hydrologic engineering, which Ms. Jones does not have. (R. pp. 2471-72).

times, it kept its maximum rise at one foot. (R. pp. 3579 § 8-54(s), 4253 § 8-5 ("Regulatory Floodway" definition)).[45]

5. Columbia Venture's Levee upgrade plans would have no effect on the floodway, floodplain, or base flood elevations in Lexington County.

Richland County contends that any improvements to the Levees would affect the floodway in Lexington County, thus rendering the development project impermissible per FEMA's regulations. County Brief pp. 28, 100-02. No credible or competent evidence exists to support this contention. Both the Special Referee and the County drew the conclusion that Lexington County was concerned that improving the Levees might increase flooding there from the testimony of Charles Compton, the Planning Director for Lexington County. But there was no competent evidence that improving the Levees would result in increased flood levels in Lexington County. In fact the opposite was true. In all of FEMA's pertinent flood mapping of Lexington County, FEMA assumed that the Levees would hold (*i.e.* block flow in Richland County during the base flood) in determining the BFEs for Lexington County.[46] (R. pp. 1798-99, 1821-24, 2825-30, 2845-46). Therefore, improvement and certification of the Levees would not cause a rise in the BFEs in Lexington County.

In order to improve its Levees under the minimum standards of the NFIP (assuming the Levees were in a floodway), Columbia Venture would be required to demonstrate through accepted hydraulic and hydrologic engineering that such improvements would not increase flood levels during a base flood. 44 C.F.R. § 60.3(d)(3). Carroll Barker, an engineer with extensive experience in hydrologic and hydraulic modeling and FEMA flood mapping,

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[45] The County claims that its total prohibition on floodway construction for Columbia Venture is similar to Lexington County's floodway restrictions. County Brief p. 41. This is false. Lexington County provides a variance procedure. (R. p. 2818). Richland County went out of its way to ensure that no variance procedure exists for Columbia Venture.

[46] This fact undercuts the County's generalizations about how FEMA's flood maps "do not account for continued urbanization and development" or "account for future conditions." County Brief pp. 40-41. Lexington County's maps certainly did.

testified that improvements to the Levees could have been made under any of the FEMA flood maps in this case without causing a rise in flood levels. (R. p. 1819).[47] Mr. Barker explained that the combined Richland County and Lexington County Congaree floodplain is over five miles wide and that the Levees are shown as a thin vertical line on the topographic cross-sections in the hydraulic model used to map the floodplain and floodway and determine the base flood elevations. (R. pp. 1819-25). Physically improving the Levees would not materially increase the thickness of the line representing the Levees in the topographic cross sections of the model and would not result in an increase in the BFEs or a change in the floodplain or floodway lines. (*Id.*)

Further, Mr. Compton, who is not a hydraulic engineer and has no expertise in hydraulic modeling (R. p. 2819), testified that he was simply concerned that improving the Levees might lead to increased flooding in Lexington County. (R. pp. 2812-13). While Mr. Compton may have been concerned at one point in time, on November 14, 2000, the Lexington County Council passed a resolution which "considered the long range economic implications of the floodway elevations and the models prepared by FEMA configuring the proposed floodway as it affects Lexington County and the economic development opportunities" and "the critical impact, both commercially and residentially, of these elevations and floodways on the wastewater treatment facilities serving Lexington County and

[47] Mr. Barker's testimony confirms Lockwood Greene's pre-purchase due diligence conclusions. (R. p. 3504). The County attacks this due diligence with the mistaken presumption that Lockwood Greene relied on preliminary data for Lexington County. It did not. The February 1998 BFEs proposed by FEMA for Lexington County and to which Lockwood Greene refers were published by FEMA pursuant to 42 U.S.C. § 4101, thereby triggering the 90-day appeal and comment period, which ended in August 1998. Neither Lexington County nor any other party appealed these BFEs. (R. pp. 2825-27). Consequently, the Lexington data had gone through the appeal and comment period without challenge. 42 U.S.C. § 4104. The County also cites Mr. Hester's testimony for the proposition that Lockwood Greene did not fully understand the certification process. However, Mr. Hester was testifying about an extremely early document describing the due diligence necessary to move forward with Levee improvements. (R. pp. 1603-05, 3812). By the time Columbia Venture purchased the Property, Lockwood Greene had confirmed the certification process with FEMA in writing. (R. pp. 3121-25, 3502-14, 3632-34).

this region." (R. p. 4945). The "Lexington County Council request[ed] that FEMA's Notice of Final Determination reflect a floodway for property in and on the Lexington County side of the Congaree River that is determined using the Lexington BFE HEC 2 model." (*Id.*) The evidence is undisputed that the "Lexington BFE HEC 2 model" to which this resolution refers modeled a scenario setting the BFEs and floodway for Lexington based on the assumption that the Levees would not breach and that water would not flow behind them during a base flood. (R. pp. 1821-24, 2825-30, 2845-46). The effect of this model is the same as assuming that the Levees were already improved and certified. (*See* R. pp. 1798-99). As Mr. Hester testified, the effect of Levee certification would be to remove the Richland County BFEs from behind the Levee with no impact on Lexington County. "Since the Lexington side of the river was already set with the levee being in, it was pretty much already done. ..." (R. p. 2438). Consequently, Lexington County's concerns with the improvement of the Levees were resolved long before FEMA's LFD in August 2001.[48]

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[48] The following technical data provides background for some complications in the Levee improvement plans created by the September 26, 2000 Appeal Resolution. In his Order, the Special Referee found that Columbia Venture's submittal to FEMA in the fall of 2000 wanted to use the so-called Lexington model rather than the so-called Richland model. (R. pp. 134-35). The issue that the Special Referee refers to is this: FEMA used one HEC-2 hydraulic model to establish the BFEs in Lexington County that was programmed not to allow flood waters to flow landward of the Levees. In other words, the BFEs in Lexington County were determined based on the assumption that the Levees would not fail or breach during a base flood. This was the so-called Lexington model. FEMA then reprogrammed the model to permit water to flow landward of the Levees during a base flood to establish the BFEs for Richland County. This is the so-called Richland model. FEMA then used the Richland model to determine the floodway for both Richland and Lexington Counties. (*See* R. pp. 3464-98). The result was an anomaly, according to Mr. Barker, in that in Lexington County the water surface elevation of the floodway was below the BFE, contrary to accepted practice and the NFIP regulations. (R. pp. 1856-57); 44 C.F.R. §§ 59.1 & 60.3(d)(2). Mr. Barker also testified that this issue would not have impacted the no-rise analysis under any of the FEMA maps but it would have made it more difficult to obtain a CLOMR without reconfiguring the Levees. (R. p. 1863). Indeed, this is the complication that Mr. Wiseman referred to in his testimony. (R. pp. 3027-28). In Mr. Barker's opinion, however, a CLOMR could be successfully obtained only with more difficulty. (R. p. 1863). For this reason, Columbia Venture advocated to FEMA to use the Lexington model to establish the regulatory floodway in Lexington. By virtue of their resolutions, the Lexington County Council and the Cayce City Council, both of which favored Columbia Venture's proposed development, agreed with

6. No variance was available for Columbia Venture's Levee improvements after February 20, 2002.

The County argues that Columbia Venture could have received a variance from the no-build and no higher or wider levees in a floodway restrictions under either "FEMA's variance provision," or DHEC regulations incorporated into the April 2001 Stormwater Ordinance. County Brief pp. 10, 35. The County is incorrect. Neither source provides a variance for the Levee improvements Columbia Venture sought to undertake.

FEMA regulations do not provide a variance procedure. The FEMA regulation on which the County relies, 44 C.F.R. § 60.6(a), simply supplies guidance for when and under what conditions a community can grant a variance consistent with the NFIP. It does not *ex proprio vigore* create a variance procedure, nor does it require that the community itself create and make available a variance procedure. In fact, 44 C.F.R. § 60.6(a)(3)(iii) explicitly prohibits the granting of a variance unless it will not "conflict with existing local laws or ordinances." (emphasis added). In April 2001, County Council made absolutely certain that improvements to levees in a floodway would conflict with existing local laws and ordinances. (R. p. 4265 § 8-26(h)). Of course, the provision that would have permitted a variance from these provisions, Section 8-25 of the earlier draft, was specifically and intentionally removed by the County in early December 2000, to make sure that a variance would not be available to a developer seeking to develop property classified as in a regulatory floodway. (R. pp. 3255-57, 4222-23). If this FEMA regulation was truly understood by the County as a free-standing variance option, why was all the thought and discussion put into the removal of the variance provision from the April 2001 Stormwater Ordinance; why did Heathwood Hall and the City require a specific exemption to the amended ordinance? (*See* R. pp. 3255-57, 4222-23; *see also* R. p. 5365).

Columbia Venture and requested FEMA to use the Lexington model to determine the floodway elevation in Lexington County. (R. pp. 4945, 4947).

The South Carolina DHEC regulations incorporated into the Stormwater Ordinance (R. p. 4271 § 8-33) are also inapplicable. Variances are only available for specific DHEC regulations ("*these* regulations") and not Richland County ordinances (S.C. Code Ann. Regs. § 72-302(c)) or concern only "applicable effluent limitation requirements or time deadlines" of the Clean Water Act or "any discharge inconsistent with a plan" under the Clean Water Act. S.C. Code Ann. Regs. §§ 61-9.122.2(b) & 122.4(g)(1). These provisions have nothing to do with levee construction standards or the availability of any variance to the applicable construction standards. Columbia Venture clearly could not have applied for a levee construction variance under these provisions.

C. Columbia Venture has established its entitlement to relief under all prongs of *Penn Central.*

1. Columbia Venture's investment-backed expectations were eminently reasonable under the circumstances.

The Special Referee and the County stress that development in a floodplain is inherently risky. This observation, even if accepted, is certainly not sufficient to draw the conclusion that Columbia Venture's development expectations were unreasonable. Many aspects of contemporary life and property are regulated to some extent, and the expectations for property are certainly shaped by the benefits and burdens of regulatory regimes. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617-19 (2001). Floodplain and floodway development is no different in that the NFIP creates a framework built on hydraulic and hydrologic engineering principles that permits, encourages, and guides development in flood prone areas so long as floodwaters will not be displaced on other landowners. Indeed, there is nothing inherently suspect about the ability to construct economically meaningful structures in flood prone areas when an entire federal program is established to oversee and instruct such development. This is especially true when the project at issue (improving levees to certified status) would remove the protected property from classification as a flood prone area. Just

because such development must rely on sophisticated engineering and is often more costly does not mean that a developer with the appropriate experience, technical expertise, and financial resources seeking to develop land in an NFIP community has any less of a reasonable expectation to be able to develop that land than a developer of non-flood prone land. It is certainly foreseeable that communities like Richland County would want to participate in the NFIP and that they would pass and interpret floodplain management ordinances in accordance with the NFIP. That is what Columbia Venture sought to understand in its due diligence process, what was confirmed in conversations with County personnel, a unanimous vote of County Council, and in official County documents, and upon which Columbia Venture relied in purchasing the Property.[49]

The County and the Special Referee are also guilty of extreme hindsight bias in asserting, in effect, that Columbia Venture should have foreseen the County's total about-face and every adverse event (most created or encouraged by the County) in the three year span from February 19, 1999, through February 20, 2002:

- the County Administrator's May 1999 decision not to issue permits for Levee improvements;

[49] The County alleges that subjecting property to regulation *necessarily* diminishes expectations. County Brief pp. 75, 80-81, 83. The most that can be said of the cases the County cites for support, however, is that they stand for the unremarkable proposition that the reasonableness of the investment-backed expectations is informed by the existing regulatory scheme at issue. *E.g. Paradissiotis v. United States*, 304 F.3d 1271, 1276 (Fed. Cir. 2002) (holding that expectations in 1990 to obtain and retain stock options in company controlled by Libyan government was unreasonable given 1986 executive orders banning commerce with Libya and freezing assets of Libyan government). Here, as described above, the County's regulatory scheme in existence on February 19, 1999, would allow improvement of the Levees under the most onerous possible classification of a floodway. The "critical question" for any post-purchase regulatory change "is whether *extension of existing law* could be foreseen as reasonably possible." *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1350 (Fed. Cir. 2004) (quotations omitted) (emphasis added). Under the facts of this case and the effort Columbia Venture went to to confirm the parameters of both FEMA and Richland County's regulations, it was completely unforeseeable to Columbia Venture that Richland County would, in 2001, enact ordinances that go beyond and are conceptually out of sync with the NFIP and the County's unanimous February 2, 1999 resolution by outrightly prohibiting building *anything* in the floodway *and* making levees located in a floodway "higher or wider."

- the County's decision to appeal in its own name the flood map that the County itself had been instrumental in creating (R. pp. 3115-16, 3133-36, 4144-47, 4858);

- the opposition that arose to Columbia Venture's development despite public reports of the Property's development potential prior to purchase (R. pp. 1484-85, 1577, 1705-06, 3355-57, 3624-25, 3628-31);

- the County's 2001 rejection of its longstanding floodway construction ordinance interpretation in favor of a "no build" floodway for Columbia Venture but not its more favored and immediate neighbors pursuant to requests from opposition groups; and

- the pointed prohibition on making levees located in a floodway higher or wider—the precise action Columbia Venture had to take to fulfill its responsibilities under the County's February 2, 1999 resolution and the necessary first step in moving forward with development of its Property.

This is not the law, and Columbia Venture—like all property owners—is not required to be clairvoyant. *See, e.g. Walcek v. United States*, 49 Fed. Cl. 248, 269 (Ct. Cl. 2001). Either the County was not being truthful with Columbia Venture prior to February 2, 1999, in numerous exhibitions of support or it simply changed its mind about allowing Columbia Venture to develop its Property as a mixed-use development behind certified levees in a manner Columbia Venture could not have foreseen on February 19, 1999.[50]

Citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) and *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (2013), the County argues that Columbia Venture did not have an objective expectation nor did it have something "more than a unilateral expectation or an abstract need." County Brief pp. 74-75. The overwhelming weight of the evidence demonstrates Columbia Venture had both objective and verifiable

[50] A theme running through the County's Brief is that Columbia Venture was somehow underfunded, broke, and out of money. Though completely irrelevant to whether a regulatory taking occurred, this theme finds no support in the Special Referee's findings and ignores the substantial resources of Columbia Venture's members, including Burroughs and Chapin, Lockwood Greene, Carolina First, and Regent Partners. (R. pp. 1547-51). The County also, again, ignores the actions that it took beginning in May 1999 to thwart Columbia Venture's investment-backed expectations of upgrading the Levees and moving forward with its development vision.

expectations for its Property, induced by the County itself,[51] and far more than an abstract need or unilateral expectations.[52] Columbia Venture had a unanimous resolution of the governing body of the County providing assurances that the County would allow improvement of the Levees to certifiable standards under the NFIP and accept operation and maintenance responsibility once Columbia Venture physically improved them. Under these circumstances, Columbia Venture could not reasonably foresee that the County Council would pass an ordinance prohibiting Columbia Venture from improving the Levees to the NFIP standards.

2. The character of the government action weighs in favor of Columbia Venture.

> [T]he character of the governmental action . . . examines the challenged restraint under the lens of state nuisance law. If the regulation prevents what would or legally could have been a nuisance, then no taking occurred . . . . Here the courts must inquire into the degree of harm created by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented . . . . If the state nuisance law does

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[51] This Court has stated that, to show objective investment-backed expectations, a property owner needs "to show ... concrete steps taken in furtherance of prospective ... development." *Dunes W.*, 401 S.C. at 320, 737 S.E.2d at 622. The property owner in *Dunes West* "only casually approached the idea" of residential development and "did not investigate, prior to purchase or anytime thereafter, the feasibility of the desired development," nor did "the Town [take] any action or [make] any representation which served to increase [developer's] expectations or led [developer] to believe that residential use would be forthcoming." *Id.* at 319-320, 737 S.E.2d at 622. Columbia Venture's and the County's actions here are demonstrably and materially different.

[52] This language comes from *Ruckelshaus* under very different and distinguishable facts. In *Ruckelshaus*, Monsanto submitted data that it considered to be a trade secret to the EPA in support of its application to register a pesticide label. 467 U.S. at 998. At that time the statute did not provide assurances that the EPA would safeguard trade secret information. *Id.* at 992. Accordingly, if the EPA used Monsanto's data in support of applications to register other pesticide labels or publicly disclosed such data, Monsanto did not suffer a taking of its intellectual property without compensation. *Id.* at 1008. The court said that Monsanto's unilateral expectation that its trade secrets would be protected or that its abstract need to protect its trade secret information did not give rise to a reasonable investment-backed expectation. *Id.* at 1010. However, the statute was amended to provide assurances that the EPA would protect trade secret information, and the court said that disclosure of trade secret information under the amended statute could constitute a taking. *Id.* at 1010-11. The governmental assurance that the information would be safeguarded gave rise to a reasonable investment-backed expectation. *Id.*

> not justify the restraint, the court must proceed to the remaining [*Penn Central*] criteria.

Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994) (citations omitted); *see also Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), *rehearing en banc denied* 231 F.3d 1365 (Fed. Cir. 2000). "In mounting a background principles defense under *Lucas,* defendant is required to 'do more than proffer the legislature's declaration that the uses [plaintiff] desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas* [so use your own as not to injure another's property]." *Casitas Municipal Water Dist. v. United States*, 102 Fed. Cl. 443, 458 (2011) (diversion of water necessary to supply fish ladder analyzed as a physical taking) (quoting *Lucas*, 505 U.S. at 1031). The County's arguments fail under this standard. The County does not argue that Levee improvements would create a nuisance under South Carolina law. Also, the Special Referee did not find facts that would lead to the conclusion that improving the Levees would result in a nuisance under South Carolina law.

In addition, the County's and Special Referee's suggestion that Columbia Venture enjoyed a reciprocal advantage from the adoption of the County's floodplain ordinances is beyond all reason. "Reciprocity of advantage is an important consideration, and may even be an essential, where the state's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects . . . or upon adjoining owners, as by party wall provisions." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 422 (1922) (Brandeis, J. dissenting) (citations omitted). For example, with a broadly based zoning ordinance, one homeowner in a residential neighborhood is prohibited from operating a business out of his home, but so are all of his neighbors in his zoning district.[53] The majority

[53] Michael Criss testified that Columbia Venture was prohibited from building in a regulatory floodway but so were its neighbors. (R. p. 2800). This, of course, is not true. Heathwood

in *Pennsylvania Coal*, of course, held that although "property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. The act that went "too far" prohibited Pennsylvania Coal from exercising its rights to mine its coal under plaintiff's residence. The Court distinguished legislation requiring mine owners to leave a pillar of coal at the edge of their property line to constitute a barrier (the equivalent of a party wall) "sufficient for the safety of the employees of either mine in case the other [mine] should be abandoned and allowed to fill with water." *Id.* The Court recognized that these laws "secured an average reciprocity of advantage" for each mine owner. *Id.* But even the dissenting justice recognized that this doctrine has limits and should not be used to judge laws that do not confer benefits on every property owner in the neighborhood. "There was no reciprocal advantage to the owner prohibited from using his oil tanks . . . ; his brickyard . . . ; his livery stable . . . ; his billiard hall . . . ; his oleomargarine factory . . . ; [or] his brewery . . . ." *Id.* at 422 (Brandeis, J. dissenting) (citations omitted). In this case there was no reciprocal advantage whatsoever to Columbia Venture from the ordinances prohibiting it from improving its Levees or building any economically meaningful structures on 70% of its Property. Rather, Columbia Venture has been forced to bear a burden that in all fairness should be shared by all citizens of Richland County.

Accordingly, the Special Referee erred in concluding that Columbia Venture should not prevail on the "character" factor of *Penn Central*.

Hall and the City are permitted to build in a regulatory floodway under the no-rise engineering standard of the NFIP, and Heathwood Hall has, in fact, built a middle school, a gymnasium, a chapel, and a bell tower, all in the regulatory floodway. There is no difference in practical effect from result achieved by the County's ordinances and illegal spot zoning. Also, Columbia Venture is the only property owner in Richland County impacted by the County's prohibition against making levees located in a regulatory floodway wider or taller. (R. p. 1382).

3. The economic impact on Columbia Venture is severe.[54]

"[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and degree to which it interferes with legitimate property interests." *Lingle*, 544 U.S. at 540. "*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether compensation is required." *Palazzolo*, 533 U.S. at 618 (O'Connor, J. concurring). Indeed, there is no case that requires the fact finder to specify the precise percentage by which an ordinance or regulation devalues a property owner's land, and the County cites no such case in its Brief.

The evidence fully supports the Special Referee's finding that the County's ordinances caused Columbia Venture an economic impact sufficient to satisfy *Penn Central.* The County asserts that the diminution in the value of Columbia Venture's property was only 46%. County Brief p. 120. To calculate this percentage, the County uses the post-taking valuation of its appraiser, Mr. Knight ($28 million), and the conservative pre-taking appraisal of Mr. Hartnett ($52 million). Contrary to the County's assertion, the Special Referee did not accept Mr. Knight's post-taking opinion of value because he assumed that Columbia Venture would eventually be able to obtain the permits necessary to develop the Property, an assumption not warranted by the permanent nature of the County's ordinances and its attitude not to change them.[55] (R. p. 160). The evidence on the post-taking value of the Property offered by Columbia Venture ranged from $10 million (the opinion of real estate developer, Robert Hughes) (R. p. 1725) to $14 million, which was drawn from an appraisal done by Mr.

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[54] The County argues that the Court should reverse the Special Referee's finding that Columbia Venture suffered substantial economic loss as an additional sustaining ground. As discussed herein, under controlling decisions of the United States Supreme Court and this Court, the Special Referee was not required to specify the exact percentage of economic loss. If the County believed otherwise, it should have filed a motion under SCRCP 59(e). Having failed to do so, the County has not preserved this issue for appellate review.

[55] *See* discussion at pages 48-50 of Appellant's Final Brief.

Wingard in the ordinary course of business for Carolina First Bank and not for this litigation. (R. p. 4723). Also, that appraisal was governed by federal banking law and regulations that provide severe sanctions for fraudulent appraisals. (*See* R. p. 4707); *see generally* 12 U.S.C. § 1818(i) & (j) (2012). Using that post-taking value, and Mr. Hartnett's pre-taking value, Columbia Venture's loss exceeds 73%.

The County also cites a number of cases with parenthetical comments that suggest a 58.4% to 95% diminution in property values is insufficient to establish a regulatory taking.[56] The County also cites a footnote in *Lucas* that, according to the County, suggests a 95% diminution in value would not constitute a taking. The majority in *Lucas,* however, clearly stated that any diminution of less than 100% (*e.g.*, 95%) must be analyzed under the *Penn Central* factors—not that a diminution of value of 95% could never constitute a *Penn Central* regulatory taking.[57] The Supreme Court has made clear that the *Penn Central* analysis is an

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[56] The County cites two United States Supreme Court cases: *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (owner prohibited from operating a brickyard by comprehensive zoning ordinances effective after annexation but not from mining clay for purpose of making bricks at another location; thus, owner's estimate of loss not accepted by court and court's opinion gives no percentage of loss it found determinative) and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (validity of comprehensive zoning ordinance upheld without accepting the property owner's claimed loss in value; "[T]he record goes no further than to show, as the lower court found, that the normal, and reasonably to be expected, use and development . . . is for general trade and commercial purposes . . ."; court's opinion gives no percentage of loss it found determinative). Neither of these cases involved a taking claim (in both, the property owner challenged the constitutionality of the ordinance but did not seek just compensation), and neither case specifically decides the percentage of loss but only repeats the allegations of loss by the complaining landowner. The two cases have been cited for the proposition that "mere diminution in value of a property, however serious, is insufficient to demonstrate a taking." *See Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1973). Columbia Venture does not contend that mere diminution in value constitutes a taking without consideration of the other factors of *Penn Central*'s regulatory takings analysis. However, it is indisputable, and the Special Referee so found, that the diminution in value suffered by Columbia Venture is substantial.

[57] In footnote 8 of the *Lucas* opinion, cited by the County, Justice Scalia also makes the point, not helpful to the County, that a land owner whose property is reduced to 5% of its former value by, for example, the building of a new highway, recovers nothing, whereas a land owner whose property is taken to build the new highway recovers in full. *Lucas*, 505 U.S. at 1019

ad hoc factual inquiry governed by the individual facts of each case informed by the *Penn Central* factors. *Lucas*, 505 U.S. at 1015. Thus, it is not meaningful to abstract percentages of diminished value (often drawn from the property owner's unproved allegations of value) from different cases, involving different facts and different statutes, ordinances, or regulations each manifesting a different character of governmental action.[58] *See also United States v.*

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n.8. In this example, the government imposes no restrictions on the first landowner's use of his land by regulation or otherwise.

[58] The lower appellate court cases cited by the County at pages 120-21 of its brief also do not stand for the proposition that there exists a threshold of economic impact, isolated from the other *Penn Central* factors, that must be met to establish a taking. In *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1358 (Fed. Cir. 2001), Rith had acquired two coal leases in Tennessee for $33,500 from which it mined 35,700 tons at $14 per ton for a profit of $500,000 until its permit was suspended by the U.S. Office of Surface Mining (OSM) for violations of the Surface Mining Control and Reclamation Act of 1977. Unable to devise a satisfactory reclamation plan, Rith sued for a taking in the Court of Claims, which held that the mining prohibited by the OSM amounted to a nuisance under Tennessee law and granted summary judgment to the United States. *See Rith Energy, Inc. v. United States*, 44 Fed. Cl. 108 (Fed. Cl. 1999). The Federal Circuit, which affirmed on other grounds, rejected Rith's categorical takings claim saying that all the coal that Rith had already mined under the permit had to be considered in assessing the economic impact on Rith's investment backed expectations. *Rith*, 247 F.3d at 1362-63. Rith had already realized a profit of $500,000 on an initial investment of $33,500. *Id.*

In *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3d Cir. 1987) *cert. denied* 482 U.S. 906 (1987), a developer sued in federal court under 42 U.S.C. § 1983 alleging a temporary taking resulting from the rezoning (from industrial to agricultural) of 37 acres of a 128 acre tract that was held to be invalid as spot zoning by a Pennsylvania state court. The district court dismissed the complaint for failure to state a claim, and the Third Circuit affirmed. *Id.* at 1025. In parsing the allegations of the complaint, the court noted that the plaintiff had alleged a substantial diminution in the value of the 37 acres but had failed to allege a substantial devaluation of the parcel as a whole. *Id.* at 1031. These cases certainly do not stand for the proposition that there is no taking where an owner's economic loss is less than 90% as suggested by the County.

In *Hass v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) *cert. denied* 445 U.S. 928 (1980), the court simply accepted as true the valuation evidence most favorable to Hass in affirming a summary judgment upholding a comprehensive zoning ordinance with height limitations and density controls. The court rejected "the proposition that diminution in property value, standing alone, can establish a taking." *Id.* at 1120. The court also said:

> Hass' property has not been singled out from other Russian Hill properties and made to bear a disproportionate economic burden. The record contains not the slightest suggestion that the land use regulations at issue involved "reverse spot" zoning. On the contrary, the land use controls were part of a comprehensive plan . . . . All of

Cress, 243 U.S. 316, 328 (1917) ("[I]n the present case [government-caused flooding of riverfront properties], the value is impaired to the extent of only one half. But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.").

CONCLUSION

For the reasons explained in Columbia Venture's Initial Brief and this Reply Brief, the Special Referee's grant of summary judgment to the County on Columbia Venture's *per se* takings claim should be reversed, summary judgment on the *per se* takings claim should be

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> Hass' neighbors are subject to the same restrictions upon future development of their property as those imposed upon Hass . . . .

Id. at 1121.

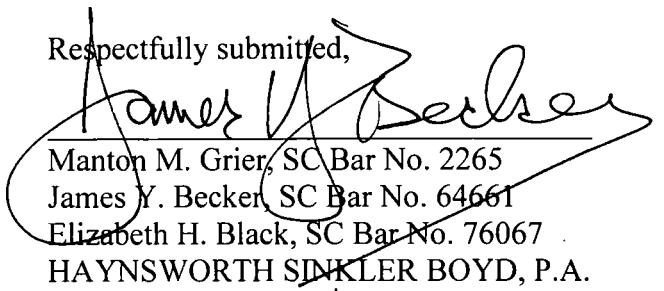
The County also cites two cases from the Federal Court of Claims, which are decisions by a single trial judge and are distinguishable on their facts. In *Warren Trust & Marietta Trust v. United States*,107 Fed. Cl. 533 (Fed. Cl. 2012), the Trusts were successors in title to land formerly leased to the United States prior to 1946 and used as a bombing range. The Court of Claims judge held that the government did not in any manner restrict or attempt to restrict the use of the Trusts' property by issuing a final site inspection report dealing with the inspection of the site for unexploded bombs at formerly used defense sites pursuant to the federal law. *Id.* at 560. The final site inspection report stated that although no munitions or explosives of concern were found, it could not rule out the possibility that such might exist. The judge concluded that "the trusts have not pointed to any language in the Final SI Report that restricts their access to or use of the Range Property in any way." *Id.* Accordingly, the judge's lengthy discussion of the law of regulatory takings was completely unnecessary to her decision.

In *Walcek*, 49 Fed. Cl. at 248, the Court of Claims judge considered all of the *Penn Central* factors as part of her *ad hoc* factual inquiry in arriving at the conclusion that no taking occurred when the Army Corps of Engineers failed to grant a requested permit for a 77-lot development that would have allowed the full development of federal wetlands on plaintiff's property (14.5 acres of which 13.2 acres were federally regulated wetlands) but instead only issued a limited permit for a 28-lot development that allowed only a scaled down development. In addition to the diminution in values between the 77-lot and 28-lot developments, the court also considered "that plaintiffs would derive an economic profit of at least $305,000, or approximately twice their investment, were they to proceed with the proposed [28-lot] development." *Id.* at 267.

The third decision of the Federal Court of Claims cited by the County has been overruled by the Federal Circuit and has no precedential value. *Lost Tree Village Corp. v. United States,* 100 Fed. Cl. 412, 439 (Fed. Cl. 2011), rev'd, 707 F.3d 136 (Fed. Cir. 2013).

granted to Columbia Venture, and this matter should be remanded to the trial court for a determination of the just compensation due to Columbia Venture. In the alternative, summary judgment for the County on the *per se* takings claim should be reversed and remanded for trial. In addition, the Special Referee's finding that Columbia Venture is not entitled to relief on its regulatory takings claim under *Penn Central* should be reversed and remanded for a determination of the just compensation due to Columbia Venture.

Respectfully submitted,



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May 22, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

John Hamilton Smith, Special Referee

Case No. 2010-CP-40-8943R

Columbia Venture, LLC, Appellant,

v.

Richland County, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

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PROOF OF SERVICE

Pursuant to Rule 211(a), SCACR, I hereby certify that one copy of the printed and bound Final Brief of Appellant and Final Reply Brief of Appellant in the above-referenced matter were served on Respondent by hand-delivery to Respondent's attorneys at the following address:

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