

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
Appellate Case No. 2013-001067

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MAY 22 2014

S.C. Supreme Court

Columbia Venture, LLC,

Appellant,

v.

Richland County,

Respondent.

**REVISED RECORD ON APPEAL
VOLUME 1 OF 13
PAGES 1 - 458**

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Defendant.

CONSENT ORDER GRANTING STAY

1. In the case of *Columbia Venture v. Federal Emergency Management Agency*, Civil Action No. 3:01-4100-24 (filed October 19, 2001), Plaintiff has appealed the Federal Emergency Management Agency's ("FEMA") final determination of the Congaree River Base Flood Elevation ("BFE").
2. On March 1, 2005, Defendant moved to stay the above-captioned action until the appeal is finally determined by the United States District Court for the District of South Carolina.
3. The Court finds that, in the interest of fair and efficient adjudication, the above-

captioned action shall be temporarily stayed until the United States District Court for the District of South Carolina issues its final decision in *Columbia Venture v. Federal Emergency Management Agency*, Civil Action No. 3:01-4100-24 (filed October 19, 2001).

4. As a result of this Stay, Defendant's Motion to Dismiss Pursuant to SCRCP 12(b)(1), Motion to Dismiss Pursuant to SCRCP 12(b)(6), and Motion to Strike shall remain pending but not subject to call for hearing, nor shall the Parties pursue any discovery that may otherwise be permitted under the applicable South Carolina Rules of Civil Procedure. In sum, the status quo is preserved and neither party loses any advantage or is otherwise prejudiced by consent to or the issuance of this Stay.
5. Once the Stay is lifted and the case is restored to the active docket, the pending motions will be thereafter scheduled for hearing prior to any discovery commencing. After the Court rules on the motions, and if further proceedings are appropriate or authorized pursuant to the South Carolina Rules of Civil Procedure, then the Court will issue an appropriate scheduling order for the conduct of any and all such additional proceedings.

THEREFORE, upon consent of the Parties and for good cause shown, the Court Orders a Stay of the above-captioned action until the United States District Court for the District Court of South Carolina has entered a final decision in *Columbia Venture v. Federal Emergency Management Agency*, Civil Action No. 3:01-4100-24 (filed October 19, 2001) such that an appeal of such a decision by any party to that action could be had to an appellate court of competent jurisdiction; or, until the Parties to the above captioned case jointly move to lift this Stay.

IT IS SO ORDERED,


Honorable Ernest J. Kinard
Circuit Court Judge

Columbia, South Carolina
This 2 day of April, 2005.

WE CONSENT:


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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Columbia Venture, LLC,
Plaintiff,

Case No. 2004-CP-40-3929

vs.

Richland County,
Defendant.

2009 DEC -2 PM 4:30
JEANETTE L. GRIER
C.C.P. & G.S.

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS
PURSUANT TO RULE 12(b)(7), SCRPC**

This matter comes before me on the Motion to Dismiss pursuant to Rule 12(b)(7), SCRPC, of defendant Richland County, in which Richland County claims that Plaintiff Columbia Venture, LLC's ("CV") Amended and Supplemental Complaint should be dismissed for failure to join the Federal Emergency Management Agency ("FEMA") as a necessary party. A hearing on this Motion was held before me on October 22, 2009. Richland County appeared through its outside attorneys, Thomas E. Lydon and M. McMullen Taylor, and its attorney Larry Smith. CV appeared through its attorneys, Manton M. Grier, James Y. Becker, and Elizabeth H. Black. Both parties submitted memoranda of law for the Court's consideration.

Factual Background

For purposes of deciding this Motion only, I accept as true the following well-pleaded allegations of CV's Amended and Supplemental Complaint ("Am. Comp."). CV is or was the owner of 4,474 acres of land along the Congaree River in Richland County. CV has alleged that it acquired this land with the distinct investment-backed expectation of developing the entire tract as a mixed-use development with an emphasis on a high-tech research development park



with additional commercial, residential, recreation, and conservation uses. Am. Comp. ¶¶ 4, 108. CV alleges that it expended large amounts of money and other resources in preparing for the development of its property, and CV had both the intent and capacity to develop its property as aforesaid. *Id.* ¶¶ 104-05. CV's land is protected from flooding by a system of levees known as the Manning levees. *Id.* ¶¶ 37-39. These levees also protect the campus and buildings of Heathwood Hall Episcopal School and the city of Columbia's wastewater treatment plant. Prior to February 20, 2002, the effective Flood Insurance Rate Map ("FIRM") for the Congaree floodplain in Richland County, dated January 19, 1994, designated the land protected by the Manning levees as Zone AE, part of the floodplain, but not part of the regulatory floodway, which in Richland County was delineated along the riverside toe of the Manning levees. *Id.* ¶¶ 41-42.

The National Flood Insurance Act of 1968 ("NFIA") empowers the director of FEMA to, among other things, identify and publish information with respect to flood prone areas, to establish or update flood-risk zone data in such areas, and to prepare maps relating to flood hazards and flood insurance. *Id.* ¶¶ 7-8. Building in a floodplain is permitted under the NFIA and the National Flood Insurance Program (NFIP). 44 C.F.R. § 60.3. The NFIP is a voluntary program in which local communities can participate. *See* Am. Comp. ¶ 7. As part of the NFIP and as detailed in the applicable provisions of the NFIA, FEMA is authorized to establish flood elevation determinations for land use purposes. *Id.* ¶ 27. FEMA uses flood elevation determinations to produce Flood Insurance Studies ("FISs") and FIRMs, which identify areas of special flood hazard and are used by local communities participating in the NFIP. *Id.* FEMA's flood mapping efforts focus on establishing base flood elevation (BFEs) based on the one-percent-annual chance flood or 100-year flood. *Id.* ¶ 28. FEMA engineers use hydrologic and

hydraulic modeling to determine the volume of the base flood and determine floodplain and floodway boundaries as well as BFEs. *Id.* FEMA regulations require local communities participating in the NFIP to adopt floodplain management regulations that prohibit the placement of structures or fill in the regulatory floodway that would cause a rise in the water surface elevations of a base flood. *Id.* ¶ 30; *see also* 44 C.F.R. § 60.3(d)(3). The regulatory floodway is the channel of the river and adjacent land areas needed to discharge or convey the waters of the base flood. Am. Comp. ¶ 24; *see also* 44 C.F.R. § 59. The NFIP is a voluntary program that makes flood insurance available to residents of participating communities with flood prone areas. Richland County participates in the program. Am. Comp. ¶¶ 7, 10.

In 1994, FEMA issued a FIRM for the Congaree River floodplain in Richland County, which became effective on January 19, 1994, and was formally adopted thereafter by ordinance of Richland County. *Id.* ¶ 41. The 1994 FIRM mapped the land protected by the Manning levee (including CV's property) as part of the floodplain but not part of the floodway, because that land was not an area of effective flow providing conveyance of flow in the general direction of flow that needs to be reserved to convey or discharge the base flood. *Id.* ¶ 42. Because the 1994 FIRM placed the regulatory floodway along the Manning levees, FEMA regulations would have permitted CV to improve its levees by demonstrating that any encroachment with the regulatory floodway (such as that caused by grading the river side of the levees to increase their width) would not cause a rise in the water surface elevation of the base flood. *See id.* ¶ 30; *see also* 44 C.F.R. § 60.3(d)(3). The 1994 FIRM was in effect when CV acquired its property.

On August 12, 1999, FEMA proposed new flood elevations determinations affecting CV's land. Am. Comp. ¶ 44. Consistent with all previously effective FIRMS, FEMA found no floodway on the Richland County side of the Congaree River landward of the Manning levees.

Id. ¶ 45. FEMA allowed an appeal period after August 12, 1999, and on September 26, 2000, FEMA issued an Appeal Resolution by which FEMA issued a new preliminary FIRM that reversed FEMA's longstanding location of the floodway in Richland County along the Manning levee, and instead designated a floodway on the landward side of the Manning levees, encompassing over 70% of CV's property. *Id.* ¶¶ 49, 55. CV took an administrative appeal from the September 26, 2000 Appeal Resolution and challenged the scientific and technical data behind FEMA's new FIRM. *Id.* ¶ 60. On August 20, 2001, FEMA issued a Final Determination essentially confirming the regulatory floodway on CV's property first proposed by FEMA on September 26, 2000. *Id.* ¶ 63. Thereafter, CV appealed FEMA's Final Determination pursuant to 42 U.S.C. § 4104(g) to the United States District Court for the District of South Carolina on October 19, 2001. *Id.* ¶ 68. Almost eight years later, in early September 2009, CV, FEMA, and the parties who intervened as defendants in the federal lawsuit entered into a stipulation of compromise settlement and dismissed the federal action with prejudice. *Id.* ¶ 78.

CV has alleged causes of action against Richland County for an unconstitutional taking of its property without just compensation and for violations of its rights as guaranteed by the United States and South Carolina Constitutions as well as by federal law under 42 U.S.C. § 1983. CV has alleged facts regarding Richland County's passage of ordinances affecting CV's land and actions taken by Richland County with regard to CV's land. CV does not allege any causes of action against FEMA nor does CV seek to hold FEMA liable for any damages it allegedly suffered.

Conclusions of Law

A party is a "necessary" party to a matter if "(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the



action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." Rule 19(a), SCRCP. A motion under Rule 12(b)(7), SCRCP "is proper where a necessary party under Rule 19 should be joined for a just adjudication of the issues." *BancOhio Nat'l Bank v. Neville*, 310 S.C. 323, 328, 426 S.E.2d 773, 776 (1993); *see also Stewart v. State Crop Pest Comm.*, 307 S.C. 133, 139, 414 S.E.2d 121, 125 (1992).

As clarified by statements of counsel for CV at the hearing held on October 22, 2009, in this lawsuit, CV is not seeking to change, nullify, or otherwise affect any of FEMA's determinations of base flood elevations or floodway. Consequently, CV does not seek any relief from FEMA. Indeed, CV already challenged FEMA's actions relative to these facts via an administrative appeal to FEMA and a later judicial appeal to the United States District Court for the District of South Carolina pursuant to 42 U.S.C. § 4104(g). CV's federal challenge to FEMA ended in September 2009. CV has alleged causes of action against Richland County for a taking of CV's land without just compensation and against Richland County for violations of CV's rights guaranteed by the Constitutions of South Carolina and the United States and under federal law. CV can have no relief from FEMA in the event CV prevails on any or all of its causes of action asserted against Richland County. CV alleges that Richland County passed the ordinances that amounted to a taking of its property without just compensation and amounted to violations of CV's constitutional rights. Consequently, in the event CV prevails against Richland County on the claims alleged in the Amended and Supplemental Complaint, complete relief can be accorded between those already parties. *See* Rule 19(a)(1), SCRCP.



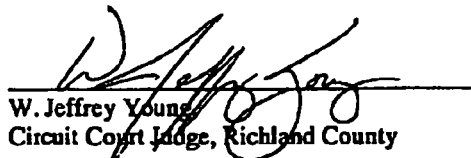
Additionally, FEMA has not claimed an interest in this action. FEMA has the ability to intervene in this litigation pursuant to 28 U.S.C. § 517, which permits the federal government to "attend to the interests of the United States in a suit pending" in either federal or state court. As FEMA has not done so, it is inferable that FEMA does not perceive that any of its interests are impaired in this lawsuit such that its absence as a party would jeopardize those interests. See Rule 19(a)(2), SCRCP. Further, participation by FEMA in this lawsuit as a witness remains available through the appropriate federal regulations. See 44 C.F.R. § 5.80.

For these reasons, FEMA is not a necessary party to this litigation under Rule 19, SCRCP. Consequently, Richland County's Motion to Dismiss pursuant to Rule 12(b)(7), SCRCP, must be denied. Based on the foregoing, it is

ORDERED, ADJUDGED, AND DECREED that Richland County's Motion to Dismiss pursuant to Rule 12(b)(7), SCRCP is DENIED.

AND IT IS SO ORDERED.

9 Nov, 2009


W. Jeffrey Young
Circuit Court Judge, Richland County

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Columbia Venture, LLC,
Plaintiff,

Case No. 2004-CP-40-3929

vs.

Richland County,
Defendant.

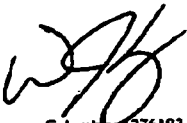
FILED
2009 DEC -2 PM 4:29
JEANETTE H. CURTIS
C.C.P. & G.S.

**ORDER DENYING DEFENDANT'S MOTION TO STRIKE
PURSUANT TO RULE 12(f), SCRCP**

This matter comes before me on the Motion to Strike pursuant to Rule 12(f), SCRCP, of defendant Richland County, in which Richland County claims that certain allegations contained in Plaintiff Columbia Venture, LLC's ("CV") Amended and Supplemental Complaint should be stricken as immaterial. A hearing on this Motion was held before me on October 22, 2009. Richland County appeared through its outside attorneys, Thomas E. Lydon and M. McMullen Taylor, and its attorney Larry Smith. CV appeared through its attorneys, Manton M. Grier, James Y. Becker, and Elizabeth H. Black. Both parties submitted memoranda of law for the Court's consideration.

Background

For purposes of deciding this Motion only, I accept as true the well-pleaded allegations of CV's Amended and Supplemental Complaint. In this lawsuit, CV has alleged four causes of action against Richland County: (1) Taking of CV's property without just compensation in violation of the United States Constitution; (2) Taking of CV's property without just compensation in violation of the South Carolina Constitution; (3) Violations of CV's substantive


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due process rights guaranteed by the United States Constitution and the South Carolina Constitution; and (4) Violation of CV's rights guaranteed by 42 U.S.C. § 1983. In this Motion, Richland County claims that certain allegations in CV's Amended and Supplemental Complaint should be stricken as immaterial in whole (paragraphs 111, 112, and 113) or in part (paragraphs 114, 115, and 126).

Conclusions of Law

Rule 12(f), SCRCP, provides "[u]pon motion pointing out the defects complained of . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous material." *See also Doe v. Doe*, 324 S.C. 492, 499, 478 S.E.2d 854, 857 (Ct. App. 1996). Rule 12(f) motions are not favored, however, and "usually should be denied unless the allegations 'have no possible relation to the controversy and may cause prejudice to one of the parties.'" *Graff v. Prime Retail, Inc.*, 172 F. Supp. 2d 721, 731 (D. Md. 2001) (quoting 5A Wright & Miller, *Federal Practice and Procedure* § 1382 (2d ed. 1990)). "[M]otions to strike should be denied if there is any doubt whether the material in question raises an issue of law or fact." *Id.*; *see also Lipsky v. Commonwealth United Corp.*, 551 F.2d 887 (2d Cir. 1976) (finding that a motion to strike asserting that allegations are immaterial should be denied unless it is shown that no admissible evidence exists to support the allegation).

Richland County has moved to strike paragraphs 111, 112, and 113 of CV's Amended and Supplemental Complaint in their entirety and to strike portions of paragraphs 114, 115, and 126 all on grounds of immateriality due primarily to Richland County's classification of these statements as due process-style statements contained within a takings cause of action. In the case of paragraph 126, the classification is reversed, as Richland County classifies a phrase in paragraph 126 as a takings type of phrase contained in a due process cause of action. As



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clarified by counsel at the hearing held on October 22, 2009, CV is pursuing a regulatory takings claim pursuant to the framework established by *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Under the *Penn Central* analysis, to state a claim for a regulatory taking, a claimant must allege the following: (1) the economic impact of the regulation resulted in serious financial loss to the claimant; (2) the regulation interfered with the claimant's distinct investment-backed expectations; and (3) the character of the governmental action is not such that the public interest in the regulation outweighs the claimant's private property interests. *Id.* at 124. Consequently, the *Penn Central* test is essentially an "ad hoc" inquiry focused on the facts of a particular situation. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). South Carolina has affirmatively adopted the *Penn Central* test for takings situations when the landowner suffers a "denial of less than all economically viable use of his property." *Byrd v. City of Hartsville*, 365 S.C. 650, 658, 620 S.E.2d 76, 80 (2005). Following *Penn Central*, South Carolina law focuses on two "especially important" circumstances: "(1) 'the economic impact on the claimant and, particularly, the extent to which the [government] has interfered with distinct investment-backed expectations,' and (2) 'the character of the governmental action.'" *Id.* (quoting *Penn Central*, 438 U.S. at 124).

CV has alleged facts in its Amended and Supplemental Complaint which call into question the legitimate "character of the governmental action," which is a part of the *Penn Central* and *Byrd* analyses for regulatory takings. For example, CV has alleged that Richland County acted arbitrarily in adopting a regulatory floodway that had no scientific or rational relationship to the base flood elevations enacted as part of the same ordinance. See Am. Comp. ¶¶ 95-96. CV has also alleged that certain actions taken by Richland County having an impact on CV's land were done with procedural irregularity, outside of regular practice, and in violation



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of South Carolina law. *Id.* ¶ 97. Consequently, CV's allegations in this regard raise questions as to whether issues of law and fact exist. A motion to strike these allegations is thus improper. *Graff*, 172 F. Supp. 2d at 731.

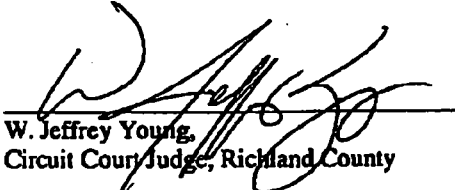
Further, the test for whether an allegation should be stricken from a pleading on grounds of immateriality is whether the paragraphs and portions of paragraphs at issue "have no possible relation to the controversy." *Id.* CV's allegations contained in paragraphs 111, 112, 113, 114, 115, and 126 contain statements related to the controversy at issue here, which centers on Richland County's actions taken with regard to CV's property. Consequently, the allegations are properly included in the CV's Amended and Supplemental Complaint.

For these reasons, Richland County's Motion to Strike pursuant to Rule 12(f), SCRCP, must be denied. Based on the foregoing, it is

ORDERED, ADJUDGED, AND DECREED that Richland County's Motion to Strike pursuant to Rule 12(f), SCRCP is DENIED.

AND IT IS SO ORDERED.

Nov 9, 2009


W. Jeffrey Young,
Circuit Court Judge, Richland County

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Columbia Venture, LLC,
Plaintiff,

vs.

Richland County,
Defendant.

Case No. 2004-CP-40-3929

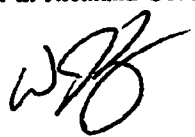
2009 DEC -2 PM 4:29
JEP C.C.P. & G.S.
RICHLAND

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS
PURSUANT TO RULE 12(b)(6), SCRPC**

This matter comes before me on the Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC, of defendant Richland County, in which Richland County claims that Plaintiff Columbia Venture, LLC ("CV") has failed to allege facts sufficient to state causes of action for (1) a total regulatory taking under the United States and South Carolina Constitutions and (2) violations of CV's substantive due process rights guaranteed by the United States and South Carolina Constitutions. A hearing on this Motion was held before me on October 22, 2009. Richland County appeared through its outside attorneys, Thomas E. Lydon and M. McMullen Taylor, and its attorney Larry Smith. CV appeared through its attorneys, Manton M. Grier, James Y. Becker, and Elizabeth H. Black. Both parties submitted memoranda of law for the Court's consideration.

Factual Background

For purposes of deciding this Motion only, I accept as true the following well-pleaded allegations of CV's Amended and Supplemental Complaint ("Am. Comp."). CV acquired 4,474 acres of land along the Congaree River in Richland County with the distinct investment-backed



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expectation of developing the entire tract as a mixed-use development with an emphasis on a high-tech research development park with additional commercial, residential, recreation, and conservation uses. Am. Comp. ¶¶ 4, 108. CV expended large amounts of money and other resources in preparing for the development of its property, and CV had both the intent and capacity to develop its property as aforesaid. *Id.* ¶¶ 104, 105. The land acquired by CV is protected from flooding by a system of levees known as the Manning levees. *Id.* ¶¶ 37-39. These levees also protect the campus and buildings of Heathwood Hall Episcopal School and the city of Columbia's wastewater treatment plant. Prior to February 20, 2002, the effective Flood Insurance Rate Map ("FIRM") for the Congaree floodplain in Richland County, dated January 19, 1994, designated the land protected by the Manning levees as Zone AE, part of the floodplain, but not part of the regulatory floodway, which in Richland County was delineated along the riverside toe of the Manning levees. *Id.* ¶¶ 41-42.

Building in a floodplain is permitted under the National Flood Insurance Act ("NFIA") and National Flood Insurance Program ("NFIP"). 44 C.F.R. § 60.3. Under the NFIA and NFIP, the living area of residences in the floodplain must be elevated above the base flood elevation ("BFE"). *Id.* The base flood is also known as the one-percent-annual chance flood or 100-year flood and is the flood on which FEMA's flood mapping efforts are based. *See* Am. Comp. ¶ 12. FEMA regulations, however, require local communities participating in the NFIP to adopt floodplain management regulations that prohibit the placement of structures or fill in the regulatory floodway that would cause a rise in the water surface elevations of a base flood. 44 C.F.R. § 60.3(d)(3). The regulatory floodway is the channel of the river and adjacent land areas needed to discharge or convey the waters of the base flood. 44 C.F.R. § 59; Am. Comp. ¶ 24. The NFIP is a voluntary program that makes flood insurance available to residents of



participating communities with flood prone areas. Richland County participates in the program. Am. Comp. ¶ 10.

Because the Manning levee was built prior to FEMA's adoption of standards for certifying levees, it is not a certified levee under FEMA's regulation, and FEMA determined that it would not prevent flooding, but would block conveyance of flow – i.e., that floodwater would pond landward of the levee but not be conveyed in the general direction of flow. *See id.* ¶¶ 42, 46-47. It was for this reason that the 1994 FIRM, which was in effect until February 20, 2002, mapped the land protected by the Manning levee as part of the floodplain but not part of the floodway, because that land was never an area of effective flow providing conveyance of flow in the general direction of flow that needs to be reserved to convey or discharge the base flood. *See id.* ¶¶ 45-47. As part of its publicly announced plans to develop its property, CV had the intent and capacity to improve the Manning levee so that it would be eligible under FEMA's regulations for certification as a levee capable of withstanding a 500-year flood. *Id.* ¶ 43. Land protected by certified levees is not mapped as part of the floodplain, and CV has alleged that it is informed and believes that no 500-year certified levee has ever failed. *Id.*

Because the 1994 FIRM placed the regulatory floodway along the Manning levees, FEMA regulations would have permitted CV to improve its levees by demonstrating that any encroachment with the regulatory floodway (such as that caused by grading the river side of the levees to increase their width) would not cause a rise in the water surface elevation of the base flood. 44 C.F.R. § 60.3(d)(3). FEMA regulations expressly provide for levees and recognize certified levees as providing protection from the base flood. *See id.* CV has alleged facts that Richland County was opposed to the development of land protected by levees and, consequently, took steps to block CV's plans to improve its levees, thereby restricting a significant portion of



CV's land as a floodplain and floodway. *See* Am. Comp. ¶ 87. Among other things, Richland County adopted a storm water ordinance that prohibited placing anything within a regulatory floodway that would impeded the flow of water. The ordinance does not permit structures or fill that would not cause a rise in the surface water elevation of the base flood and, accordingly, goes beyond what the NFIP requires. Also, CV has alleged that the ordinance expressly targeted CV's land and levees and effectively blocked CV's plans to improve its levees, while expressly exempting CV's immediate neighbors, Heathwood Hall and the city of Columbia. *See id.* ¶¶ 85-86.

Also, on August 12, 1999, when FEMA published a revised preliminary FIRM that placed the regulatory floodway along the landward toe of the Manning levee, Richland County appealed to FEMA under the NFIA without any scientific or technical support, which is required by the NFIA to support an administrative appeal. *See id.* ¶¶ 50, 52, 80. Richland County in its appeal presented no scientific or technical evidence to demonstrate that the area protected by the Manning levees was an area of effective flow and hence eligible to be included within a regulatory floodway. *See id.* ¶ 54. On September 26, 2000, FEMA issued a new revised preliminary FIRM that reversed its position on the location of the floodway and expanded it to include approximately 70% of CV's property, concluding that the area protected by the Manning levees was now an area of effective flow but with no valid scientific or technical evidence to support this conclusion. *Id.* ¶¶ 55-60. Although FEMA permitted CV to appeal the new revised preliminary FIRM with the agency, on August 20, 2001, it rejected with little explanation CV's scientific and technical evidence demonstrating that the area protected by the Manning levee is not an area of effective flow. *See id.* ¶ 63.

Thereafter, Richland County adopted the August 20, 2001 FIRM (which became



effective February 20, 2002) in order to continue its participation in the NFIP and in so doing placed what amounts to a restrictive covenant on 70% of CV's land prohibiting CV from developing that property or improving its levees. *See id.* ¶¶ 66, 88. Consequently, 70% of CV's land was reserved as a floodway for the purpose of conveying floodwater in the event of a base flood. *See id.* ¶ 5. CV has alleged that this action eliminated CV's distinct, investment-backed plans to develop its entire tract as a mixed use development. *Id.* ¶ 103.

CV has alleged that Richland County also took no reasonable steps to verify whether FEMA's recent change of position on the location of the floodway was supported by sound engineering. *Id.* As a result, CV concludes, the county has imposed a floodway on large areas of CV's property that are areas of ineffective flow that have no conveyance capacity and should not be included within a regulatory floodway. *Id.* ¶ 113. Furthermore, the County took additional steps to block CV's ability to improve its levees and develop its property. On November 18, 2005, the United States District Court vacated the 2001/2002 BFEs and floodway and reinstituted the 1995 BFEs and floodway. *Id.* ¶ 73. The County thereafter adopted a series of moratoria, which effectively denied CV the opportunity to request a building permit to improve its levees. *Id.* ¶¶ 89-93. Also, the County passed an ordinance adopting the 1995 BFEs reinstated by the federal court but, at the same time, adopting the 2001/2002 floodway, which had been vacated by the federal court. *Id.* ¶ 95. This ordinance thus imposed a floodway on CV's property that had no relationship to the BFEs affecting CV's property and was, CV alleges, irrational and completely arbitrary. *Id.* ¶¶ 95-96. In all other areas of Richland County, the regulatory floodway was based on a one foot target surcharge above the BFEs (i.e. the water surface elevation of the regulatory floodway cannot exceed the base flood elevation by more than one foot). *Id.* ¶¶ 24, 95. On CV's property, however, the floodway (water surface elevation)



was lower than the BFEs (by 3.9 feet at one cross-section). *Id.* ¶ 95 & Exhibit 12. Finally, the County, without notice to CV, other landowners, or the public at large, by a secret vote taken in executive session in violation of state law, authorized Richland County officials to apply to FEMA for a Letter of Map Revision to reinstate the vacated 2001/2002 BFEs. *Id.* ¶ 97. The County had already adopted the 2001/2002 floodway that had been vacated by the Federal court. *Id.* ¶ 95.

Conclusions of Law

Under Rule 12(b)(6), SCRCF, a defendant may move to dismiss based upon a plaintiff's failure to state facts sufficient to constitute a cause of action. *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999); *Brazell v. Windsor*, 655 S.E.2d 736, 737 (Ct. App. 2007). "A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the complaint and we must presume all well-pled facts to be true." *Gressette v. S.C. Elec. & Gas Co.*, 370 S.C. 377, 378-79, 635 S.E.2d 538, 538 (2006). "A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory." *Brazell*, 655 S.E.2d at 738.

A. Total Regulatory Taking

As clarified by counsel at the hearing held on October 22, 2009, Richland County has moved to dismiss CV's regulatory takings claim under the United States and South Carolina Constitutions only to the extent CV is alleging a total regulatory taking. As further clarified by counsel for CV, CV is not alleging a total takings claim. Both parties agree that the applicable format for analysis is contained in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) and its federal and South Carolina state law progeny. Consequently, subject to this stipulation by counsel as to the scope of CV's takings claim, Richland County's Motion to

Dismiss CV's regulatory takings claim is denied.

B. Substantive Due Process Under the United States Constitution and South Carolina Constitution

The Fourteenth Amendment of the United States Constitution states “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. Similarly, Article I, Section 3 of the Constitution of the State of South Carolina states: “The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law”

Plaintiffs adequately allege a substantive due process violation under the Fourteenth Amendment when they “demonstrate ‘(1) that they had a property or property interest; (2) that the state deprived them of this property or property interest; and (3) that the state’s action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency.’” *MLC Auto., LLC v. Town of Southern Pines*, 532 F.3d 269, 281 (4th Cir. 2008) (quoting *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995)). A substantive due process violation also occurs when local ordinances are “clearly arbitrary and unreasonable, [or] hav[e] no substantial relation to the public health, safety, morals, or general welfare.” *A Helping Hand, LLC v. Balt. County*, 515 F.3d 356, 372 (4th Cir. 2008) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). Also similarly, in the state law context, “[s]ubstantive due process protects a person from being deprived of life, liberty, or property for arbitrary reasons. To establish a substantive due process claim, a plaintiff must show he possessed a constitutionally protected property interest that was deprived by state action so far beyond the limits of legitimate governmental action, no process could cure the deficiency.”

7 

Seabrook v. Knox, 369 S.C. 191, 198, 631 S.E.2d 907, 911 (2006). Federal substantive due process standards are applicable to evaluate claims of violations of the state constitution. *Id.*

CV has alleged that it had a property interest in its land by the Congaree River and that, in connection with this property interest, it has a recognized substantive due process "right to be free of arbitrary or irrational zoning actions." *Village of Arlington Heights v. Metro. Housing Devel. Corp.*, 429 U.S. 252, 263 (1977); see also *Richardson v. Township of Brady*, 218 F.3d 508, 512 (6th Cir. 2000); see, e.g. Am. Comp. ¶ 96. Although Richland County's actions in this matter were not specifically zoning decisions, but were rather floodplain management decisions, the end result relates to a landowner's permissible use of its property and of the property rights associated with such ownership. Zoning ordinances, as well as floodway or floodplain development restrictions and other forms of floodplain or floodway management, are, as a general matter, wholly legitimate exercises of a state or local government's regulation of public health, safety, morals, or general welfare. See, e.g. *A Helping Hand*, 515 F.3d at 372. However, CV has alleged facts supporting its assertions that Richland County's land use regulations regarding its treatment of CV's property were arbitrary and an irrational way of regulating public safety. These facts, as alleged by CV, are as follows.

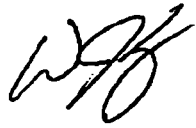
At the time when CV acquired its property, CV's land was part of the floodplain (zone AE) on the pertinent FIRM for Richland County. Am. Comp. ¶ 42. CV has alleged that even before the later FIRM, which placed approximately 70% of CV's property in a floodway, became final in February 2002, Richland County was taking steps to deprive only CV of being able to acquire a permit to improve its levees, which was a first step towards CV's development of its property. *Id.* ¶¶ 81-86. On April 17, 2001, Richland County enacted an ordinance stating that no "levees, dikes, fills, materials, structures, or obstructions" are permitted in the regulatory



floodway. *Id.* ¶ 85. The ordinance specifically exempts a school in operation before January 1, 2001 and a publicly owned wastewater treatment plant in operation before January 1, 2001. *Id.* A month later, on May 15, 2001, Richland County passed another ordinance regarding permissible uses for land in a regulatory floodway. *Id.* ¶ 86. Richland County also exempted a school and a wastewater treatment facility in operation before January 1, 2001, from compliance with this ordinance. *Id.* CV has alleged that these ordinances effectively took away CV's right to apply for any permit to improve its levees or develop its property in accordance with its plans while, at the same time, preserving those rights for CV's neighboring landowners. *See id.* CV has pointed to these decisions by Richland County as "land-use decision[s] which arbitrarily single[d] out a particular parcel for different, less favorable treatment than the neighboring ones." *Penn Central*, 438 U.S. at 132.

CV has also alleged that on November 18, 2005, the federal district court vacated FEMA's 2001 BFEs and floodway determinations (which became effective in February 2002). *Am. Comp.* ¶ 73. This Order of Vacatur reinstituted FEMA's 1994/1995 BFEs and floodway determinations, which placed the floodway along the Manning levees. *Id.* In response to the Order of Vacatur, Richland County passed a series of moratoria on the consideration of any permit regarding property "located in a flood-prone area within the Congaree River Floodplain," including CV's property. *Id.* ¶¶ 90-93. CV has alleged that Richland County acted to thwart CV's plans to improve its levees by making it impossible for CV to access a permit to do so. *See id.* ¶ 93.

CV has alleged that Richland County sought to retain the vacated 2001 floodway designation on CV's land while, at the same time, enacted the 1995 BFEs. *Id.* ¶ 95. This resulted in a lower floodway elevation than the applicable BFEs, which CV alleges was arbitrary



and illogical. *Id.* CV further alleges that the 2001 floodway adopted by the county had absolutely no relation to and was not derived from the applicable BFEs. *Id.* ¶ 96. Several days after enacting this ordinance, Richland County submitted a letter of map revision to FEMA seeking specifically to restore the vacated 2001 BFEs. *Id.* ¶ 97. CV has alleged that the vote to submit the letter of map revision, which occurred with no notice to CV or other affected land owners, was the result of a vote taken in executive session in violation of South Carolina law. *Id.* The facts alleged by CV are sufficient, at this early stage, to allege the first prong of the test for a substantive due process violation under the United States and South Carolina constitutions, namely an adequate property or property interest. See *MLC*, 532 F.3d at 281; *Seabrook*, 369 S.C. at 198, 631 S.E.2d at 911; see also *Arlington Heights*, 429 U.S. at 263.

Second, CV has alleged that Richland County deprived CV of its property interest, namely its land and its right to be free of irrational and arbitrary zoning actions. CV has alleged that by adopting storm water ordinances targeting CV's property for unfair and discriminatory treatment, by adopting the 2001 regulatory floodway covering approximately 70% of CV's property, in adopting moratoria after the floodway was invalidated by the federal court, in adopting the vacated floodway that had no rational relation to the 1995 BFEs reinstituted in the same ordinance, and by seeking to reinstate the vacated floodway in secret, Richland County has affected a deprivation of CV's property interest. *Id.* ¶ 101. CV has identified Richland County as the acting party in these allegations.

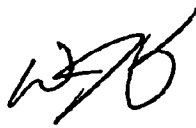
Third, CV has adequately alleged that Richland County's actions "fell so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." *MLC*, 532 F.3d at 281. Important aspects of this prong of the substantive due process test are if the "action is tainted with fundamental procedural irregularity," is directed at a single party, and



deviates from the defendant's "regular practice." *A Helping Hand*, 515 F.3d at 373 n.10.

Here, CV has alleged that various of Richland County's actions violated all three of these benchmarks. CV has alleged that its land was singled out in multiple ordinances and moratoria for no development or improvement to levees while neighboring landowners were allowed to build on or improve their land. Am. Comp. ¶¶ 85-86, 112. CV has also alleged that Richland County only attempted to verify, challenge, or otherwise critically evaluate FEMA's determinations of floodway and base flood elevations when such determinations would permit CV's proposed development plans to continue, which demonstrates procedural irregularity. See *id.* ¶ 80. Additionally, CV alleges that, even after the 2001 regulatory floodway and BFEs were vacated by the federal district court, Richland County persisted in trying to maintain the 2001 determinations rather than the 1995 determinations, which would have been more favorable to CV's development, with procedural irregularity and outside of regular practice by authorizing a Letter of Map Revision application to FEMA without notice to CV, neighboring landowners, or the public via a secret vote taken in executive session and in violation of South Carolina law. *Id.* ¶ 97. Further, CV has alleged that a member (and former chairperson) of Richland County Council, is and was a board member of the very organization leading the legal fight against CV's development and proposing discriminatory ordinances designed to eliminate CV's development plans while allowing CV's neighboring landowners to continue improvements to their land. *Id.* ¶¶ 82, 99-100. Consequently, CV has adequately alleged a cause of action for violations of its substantive due process rights guaranteed by the Fourteenth Amendment to the United States Constitution as well as violations of its substantive due process rights guaranteed by the South Carolina Constitution.

For these reasons, Richland County's Motion to Dismiss pursuant to Rule 12(b)(6),

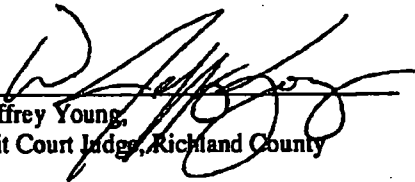


SCRCP, must be denied. Based on the foregoing, it is

ORDERED, ADJUDGED, AND DECREED that Richland County's Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP is DENIED.

AND IT IS SO ORDERED.

SW, 2009


W. Jeffrey Young,
Circuit Court Judge, Richland County

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2004-CP-40-3929

Columbia Venture, LLC,

Plaintiff,

vs.

Richland County,

Defendant.

RICHLAND COUNTY
FILED
2010 JAN -5 PM 12:35
JEANETTE W. McBRIDE
C.C.P. & G.S.

**CONSENT ORDER TO STRIKE FROM DOCKET PURSUANT TO RULE 40(j)
AND CONSENT SCHEDULING ORDER**

This matter is before the Court on the joint motion of Plaintiff Columbia Venture, LLC ("Plaintiff") and Defendant Richland County ("Defendant") (collectively referred to as the "Parties") wherein the Parties move to strike the Amended and Supplemental Complaint from the docket pursuant to Rule 40(j), SCRCP, and to enter into a consent scheduling order to facilitate the orderly conduct of the remaining portions of this litigation pursuant to the following schedule:

1. The Parties shall serve any motion to amend the pleadings by January 1, 2010.
2. The Plaintiff shall identify its expert witnesses by April 15, 2010. Such identification shall be accompanied by a written report as detailed in Rule 26(a)(2)(B), Fed. R. Civ. P.
3. The Defendant shall identify its expert witnesses by May 15, 2010. Such identification shall be accompanied by a written report as detailed in Rule 26(a)(2)(B), Fed. R. Civ. P.
4. All discovery shall be completed no later than June 15, 2010.

5. All dispositive motions shall be filed on or before July 1, 2010.
6. The Parties shall conduct mediation no later than August 1, 2010.
7. This case shall be subject to trial following the restoration of this case to the active docket not before September 1, 2010;

It further appearing that the Parties agree that if either party files any motion in this case, the moving party shall also file a motion to restore the case to the General Docket as provided in Rule 40, SCRCP;

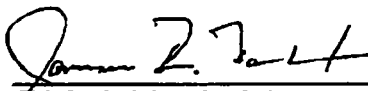
It further appearing that the Parties agree that if any of their claims are restored upon a motion made within one year of the date of entry of this Order, then the statute of limitations shall be tolled during the time the case is stricken, and any unexpired portion of the statute of limitations on the date of entry of this Order shall remain and begin to run on the date that the claim is restored;

It further appearing that the Parties agree that, upon being restored, this case shall be placed on the General Docket and proceed from that date as provided in Rule 40, SCRCP;

IT IS THEREFORE ORDERED that this case shall be stricken from the docket pursuant to Rule 40(j), SCRCP; and

IT IS FURTHER ORDERED that the schedule described above is hereby entered.

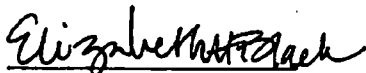
AND IT IS SO ORDERED.



Chief Administrative Judge
Fifth Judicial Circuit

December 21, 2009

WE SO MOVE AND CONSENT:



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Elizabeth H. Black

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2004-CP-40-3929

Columbia Venture, LLC,

Plaintiff,

vs.

Richland County,

Defendant.

RICHLAND COUNTY
FILED
2010 DEC 23 AM 9:44
JEAN L. P. & G.S.
C.C.P. & G.S.

**CONSENT ORDER TO RESTORE TO THE DOCKET PURSUANT TO RULE 40(j)
AND AGREEMENTS OF THE PARTIES**

This matter is before the Court on the joint motion of Plaintiff Columbia Venture, LLC and Defendant Richland County (collectively referred to as the "Parties") wherein the Parties move to restore this matter to the docket pursuant to Rule 40(j), SCRCP, under a new case number. The Parties further jointly seek a status conference at the Court's earliest possible convenience and express their desire to have this matter assigned to a single judge for handling of all proceedings, up to and including trial. The Parties also seek a status conference for purposes of entering into an amended consent scheduling order to facilitate the orderly conduct of the remaining portions of this litigation with trial to occur not before September 12, 2011. The Parties further agree that this matter is subject to priority under S.C. Code Ann. § 28-2-310(C), and that a date certain for trial as a priority matter, subject to the trial date limitation described above, shall be mutually agreed upon by both Parties.

IT IS THEREFORE ORDERED that this case shall be restored to the docket pursuant to Rule 40(j), SCRCP and will proceed under a new case number.

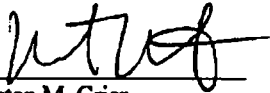
AND IT IS SO ORDERED.

Cham Bee Lee

Chief Administrative Judge
Fifth Judicial Circuit

December 20, 2010

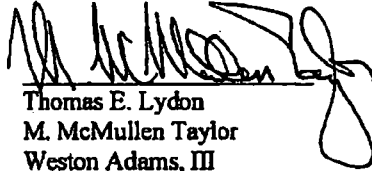
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Attorneys for Defendant

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
Case No. 2010-CP-40-8943R

Columbia Venture, LLC,

Plaintiff,

vs.

Richland County,

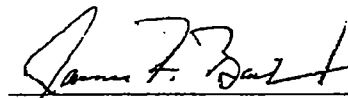
Defendant.

CONSENT ORDER OF REFERENCE

Upon the joint motion of Plaintiff Columbia Venture, LLC and Defendant Richland County, it is hereby ordered as follows:

1. This case is referred to the Honorable John Hamilton Smith, retired circuit court judge of the State of South Carolina, to serve as special referee for the purpose of receiving evidence and rendering findings of fact and conclusions of law with finality with respect to all issues and claims in this case.
2. The trial of the case shall be completed on or before September 21, 2012 and a final order of judgment shall be entered on or before November 21, 2012.
3. Any appeal from any final order or judgment issued by the special referee shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

AND IT IS SO ORDERED.



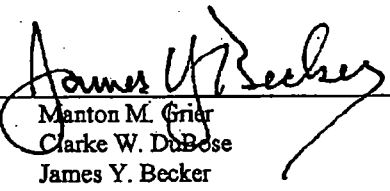
Chief Administrative Judge
Fifth Judicial Circuit

May 21, 2012

Columbia: 1656601 v.2

RICHLAND COUNTY
FILED
2012 MAY 22 AM 8:44
JEANETTE W. McBRIDE
C.O.P. & C.S.

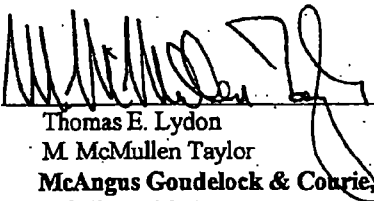
We so move and consent:

By: 

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Case No. 2010-CP-40-8943R

Columbia Venture, LLC,

Plaintiff,

vs.

Richland County,

Defendant.

RICHLAND COUNTY
FILED
2012 JUN 26 PM 2:37
JEANETTE W. MORRIS
C.C.P. & G.S.

ORDER REGARDING CERTAIN DISCOVERY MOTIONS

This matter came before the court for a hearing on June 12, 2012 on certain discovery motions filed by the respective parties as follows:

	Filing Party	Motion	Date Filed
1	Columbia Venture, LLC	Motion to Exclude Expert Testimony of Richland County's Expert Witnesses Mr. Tim Allen, Ph.D. and Mr. Michael Tighe, Esq.	03/14/2012
2	Richland County	Motion for Protective Order protecting Defendant from having to produce a witness to testify as to matters 3, 4, 6, 7, 8, 9, 10 & 11 on Exhibit A of Plaintiff's Notice of Deposition of Richland County's 30(b)(6) witness	02/13/2012
3	Richland County	Motion to Amend Complaint to Make More Definite and Certain	03/07/2012
4	Richland County	Motion for Protective Order protecting Gregory Pearce from answering certain questions posed during October 27, 2011 deposition	10/31/2011

After having reviewed the motions, memoranda, and other submissions of the parties and having heard oral argument of counsel at the hearing, with respect to each motion as numbered above, it is hereby ordered as follows:

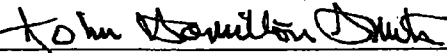
1. Plaintiff moved to exclude Defendant's newly identified expert witnesses as untimely under a scheduling order entered in January 2010. Because Plaintiff's Expert Thomas Hartnett changed his opinion regarding loss in property value provided to Defendant in April 2010, and Plaintiff failed to supplement this opinion to provide notice to Defendant that Mr. Hartnett developed a new opinion in February 2012, Defendant is entitled to put forward a new expert witness to address Mr. Hartnett's new opinion. Therefore, Defendant's expert Dr. T. Marcus Allen is allowed. However, Defendant's expert Michael Tighe is excluded. Thus, Plaintiff's Motion is hereby affirmed in part and denied in part.

2. Defendant moved for a Protective Order to limit or quash certain subjects of inquiry identified in Plaintiff's Notice of a Rule 30(b)(6) Deposition as burdensome, oppressive, unreasonably redundant, protected by privilege and/or not within the knowledge of Defendant. Of the nine topics contested, Plaintiff withdrew topic 9. Topics 3, 4, 10, and 11 are quashed. Topics 5, 6, 7, and 8 are allowed. Topic 7 is limited to pertain to the County's zoning ordinance, stormwater ordinance, and sediment and erosion control ordinances only. Thus, Defendant's Motion is hereby affirmed in part and denied in part.

3. Defendant moved to require the Plaintiff to make its Amended Complaint more definite and certain. This motion is denied except as to the issue of the date of any alleged taking of property without just compensation. At the hearing, Columbia Venture clarified that the alleged date of taking for its eminent domain claims under both the United States and South Carolina Constitutions is February 20, 2002. Without deciding whether other County actions alleged in Plaintiff's Amended Complaint are relevant to whether a regulatory taking occurred, I accept Plaintiff's date of the alleged taking without just compensation to be February 20, 2002 and find that it is unnecessary for an amended pleading to be served to confirm that.

4. The Court will take the Motion for Protective Order regarding the Deposition of Gregory Pearce and the issue of the application of the legislative privilege in this case under advisement.

AND IT IS SO ORDERED.


John Hamilton Smith
Special Referee

June 20 2012

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-40-8943R

Columbia Venture, LLC

Richland County

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: M. McMullen Taylor, Esq.

Attorney for : ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
NA		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

1874 Wm. C. Mullen, Jr.
Circuit Court Judge
~~Special Referee~~

Judge Code

June 20, 2012
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Manton M. Grier

Haynsworth Sinkler Boyd, P.A.

Post Office Box 11889

Columbia, S.C. 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

M. McMullen Taylor

McAngus Goudelock & Courie, LLC

Post Office Box 12519

Columbia, S.C. 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Columbia Venture, LLC,)

Plaintiff,)

vs.)

Richland County,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Case No. 2010-CP-40-8943R

ORDER GRANTING DEFENDANT
RICHLAND COUNTY'S
MOTION FOR PROTECTIVE ORDER

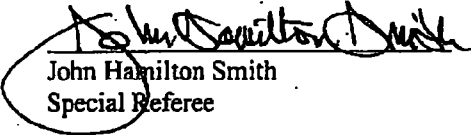
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RICHLAND COUNTY
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JENNIFER W. MCBRIDE
C.C.P. & G.S.

This matter came before this Court for hearing on Defendant's Motion for a Protective Order, filed October 31, 2011, to prevent Plaintiff from questioning Richland County Council Member, L. Gregory Pearce, Jr., regarding matters protected by legislative privilege. Having reviewed Defendant's memoranda and heard arguments from both parties, I find and conclude that legislators cannot be compelled to answer questions regarding intent, motivations, mental processes, communications or deliberations underlying legislative activity. *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 300 (D. Md. 1992); *In re Kent County Adequate Public Facilities Ordinances Litigation*, 2008 Del Ch. LEXIS 34, *19 (2008). Plaintiff's questions at issue concern legislative activity. Waiver of legislative privilege can only be found upon explicit and unequivocal renunciation of the privilege. *United States v. Helstoski*, 442 U.S. 477, 491 (1979). Mr. Pearce did not waive his legislative privilege by communicating with constituents. *Bruce v. Riddle*, 631 F.2d 272, 279-280 (4th Cir. 1980). Further, what answers Mr. Pearce may have provided during the course of his deposition do not operate as a clear and unequivocal waiver of legislative privilege. *2BD Ltd. Pshp. v. County Comm'rs*, 896 F. Supp. 528, 535 (D. Md. 1995); *Holmes v. Farmer*, 475 A.2d 976, 985 (R.I. 1984).

SCANNED

Defendant's Motion for protection is GRANTED.

AND IT IS SO ORDERED.


John Hamilton Smith
Special Referee

July 16, 2012

Yonges Island, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-40-8943R

Columbia Venture, LLC

Richland County

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: M. McMullen Taylor, Esq.

Attorney for : ☐ Plaintiff ☒ Defendant

☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
NA		\$
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If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

John W. Hamilton
Circuit Court Judge
Special Referee

Judge Code

7/16/12
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 25 day of July, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Manton M. Grier
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, S.C. 29211
ATTORNEY(S) FOR THE PLAINTIFF(S)

M. McMullen Taylor
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Post Office Box 12519
Columbia, S.C. 29211
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Jeanette W. McBride

Court Reporter:

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Columbia Venture, LLC,

Plaintiff,

vs.

Richland County,

Defendant.

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

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

**ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO DEFENDANT
PHYSICAL TAKINGS CLAIM, AND DENYING PARTIAL SUMMARY
JUDGMENT TO PLAINTIFF ON PHYSICAL TAKINGS CLAIM**

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This matter is before the Court on cross motions for partial summary judgment on Plaintiff's Physical Taking claim. Having reviewed the motions, memorandums, and other materials presented to the Court, and having heard the arguments of counsel, I find and conclude as follows:

FINDINGS OF FACT

The Parties' factual statements are substantially the same, with no disputed material fact. Defendant Richland County is a participating community within the National Flood Insurance Program ("NFIP"). The NFIP is established under the National Flood Insurance Act ("NFIA") and administered by Federal Emergency Management Agency ("FEMA"). 42 U.S.C. § 4001 *et seq.* To fulfill the purposes of the NFIA, FEMA is required to publish Flood Insurance Studies ("FIS") and Flood Insurance Rate Maps ("Flood Maps") (collectively referred to hereafter as "Flood Data") that identify flood hazard areas and the risk zones within floodplains across the United States. 42 U.S.C. § 4101(a). A special hazard area is the floodplain subject to a 100-year flood. *Id.*

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

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

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

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

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

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

Similarly, in the County Stormwater Ordinance, “any construction or other development³ ... located in an area of special flood hazard shall be in accordance with a storm drainage plan approved by the County Engineer.” § 8-18(a), Richland County Code of Ordinances (2001). An “area of special flood hazard” is defined as “any land area susceptible of being inundated by the base flood (100-Year Flood) as determined on an official ... Flood Insurance Rate Map, or other best available data.” § 8-5, Richland County Code of Ordinances (2001). The County Stormwater Ordinance sets forth certain design standards and other criteria concerning construction activities. For areas adjacent to a river or stream, “... no levees, dikes, fill materials, structures or obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway” § 8-26(h), Richland County Code of Ordinances (2001). Defendant interpreted the above-quoted language as prohibiting construction within a floodway.

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

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

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

STANDARD OF REVIEW

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

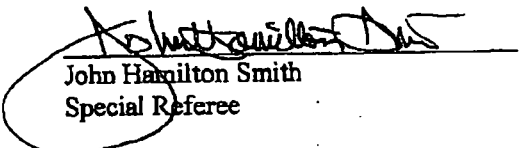
Finally, Plaintiff argues that *Hill v. City of Hanahan* is controlling precedent in South Carolina that does not depend on *Loretto* or *Penn Central*, and this case entitles it to just compensation. 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984). *Hill* does not represent modern takings jurisprudence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

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

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

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

AND IT IS SO ORDERED.


John Hamilton Smith
Special Referee

Youngs Island, South Carolina

August 7, 2012

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

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JEANETTE W. McBRIDE
C.C.P. & G.S.
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2012 SEP -4 PM 12:43

FILED

AND IT IS SO ORDERED.

John Hamilton Smith
Special Referee

Yonkers Island, South Carolina

August 30 2012

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

RICHLAND COUNTY
 FILED
 2012 SEP 11 AM 9:35
 JACQUELINE W. GORDON
 CLERK OF COURT

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

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

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

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

THE NATIONAL FLOOD INSURANCE PROGRAM

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

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

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

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

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

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

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

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

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

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

Additionally, the following maintenance requirements must be met:

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

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

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

FINDINGS OF FACT

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

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

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

Pursuant to the Zoning Ordinance, "filling of floodway areas, dumping of salvaged or scrap metal, or the placing of material or obstruction within a floodway area in such a manner as to impede free flow of water during a time of flood or in such a manner that the elevation of flood waters will be increased is prohibited." § 26-73.4(2), Richland County Code of Ordinances (1999). Similarly, in the County Stormwater Ordinance, "any construction or other development⁵ ... located in an area of special flood hazard shall be in accordance with a storm drainage plan approved by the County Engineer." § 8-55, Richland County Code of Ordinances (1994). An "area of special flood hazard" is defined as "any land area susceptible of being inundated by the base

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

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

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

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

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

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

⁶ This provision has been in the County's Stormwater Ordinance since 1981.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On or about December 13, 1999, the County Administrator appealed the Congaree River Flood Data on behalf of the community. The South Carolina Department of Natural Resources¹¹ ("SCDNR") submitted its own appeal. In his formal appeal letter to FEMA, the County Administrator stated that "all relevant appeal information from our citizens must address the scientific and technical data and methodologies" and "many of the appeals do, in fact, purport to address those specific criteria." Although there may have been some confusion as to whether SCDNR appealed on behalf of or jointly with Richland County, former Executive Director of SCDNR, John Frampton, stated in an affidavit that SCDNR appealed FEMA's Flood Data independently from Richland County, and not on behalf of Richland County. In March 2000, FEMA recognized only three appellants – SCDNR, Dr. John Grego, and an entity represented by McNair Law Firm. Richland County was not recognized as an appellant.

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

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

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

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

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

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

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

Complicating matters was the impact of FEMA's proposed floodway on existing structures located along the Congaree River. In particular, the City of Columbia's existing wastewater treatment plant was located in what was now a floodway as shown on the September 26, 2000 preliminary revised Flood Maps. The City had plans to improve its plant, and the floodway designation prevented construction in a floodway under the County's ordinances. The City's plant was important to public health and safety, both in the City and in the County. Similarly, Heathwood Hall Episcopal School ("Heathwood Hall"), a private school also located within what was now a preliminary revised floodway, faced obstacles to moving forward with its existing expansion plans. Both the City¹⁴ and Heathwood Hall approached Richland County requesting relief from the floodway designation.

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

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

¹⁵ See fn. 8, *supra*.

motion for first reading that its vote "in no way reflects Council's position on any development in [the Congaree River floodplain]."¹⁶

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

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

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

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

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

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

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

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

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

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

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

¹⁷ The County also amended its Zoning Ordinance to include this same language.

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

At the time FEMA issued these final flood maps, Columbia Venture announced its intent to proceed with the FEMA levee certification process¹⁸ in order to move forward with its Green Diamond project. However, Columbia Venture never did initiate a map revision process or seek any other land development approvals from Richland County. Instead, on October 19, 2001, Columbia Venture appealed FEMA's final determination to the United States District Court ("Appeal"). On December 12, 2002, the South Carolina Wildlife Federation, Dr. Daniel Tufford, Dr. John Grego, and the Riverland Park Neighborhood Association ("Interveners") moved to intervene in the appeal as defendants. On April 21, 2003, SELC entered an appearance on behalf of Interveners. On April 20, 2004, the Interveners' motion was granted.

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

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

¹⁸ See 44 C.F.R. § 65.10, discussed *supra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

CONCLUSIONS OF LAW

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

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

1. Substantive Due Process Claim

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Series of Moratoria Enacted in 2006

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

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

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

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

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

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

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

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

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

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

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

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

F. Submittal of Letter of Map Revision

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

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

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

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

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

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

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

G. Opposition to Green Diamond

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

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

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

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

H. *Scott v. Greenville County* is Inapplicable

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

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

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

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

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

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

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

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

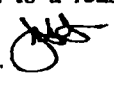
In *Williamson County*, the Supreme Court of the United States "explained the requirement that a takings claim must be ripe." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). The *Williamson County* Court held that a takings claim challenging the application of land-use regulations is not ripe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

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

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

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

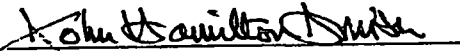
In the present case, there was no uncertainty over the land's permitted use. The County's prohibition on building in the regulatory floodway was unequivocal in its April 17, 2001 ordinance, and its exceptions (for Columbia Venture's neighboring property owners) were explicitly spelled out in the ordinance.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

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

CONCLUSION

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

AND IT IS SO ORDERED.


John Hamilton Smith
Special Referee

Yonges Island, South Carolina

September 8, 2012

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

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John Hamilton Smith
Special Referee

Yonges Island, South Carolina

February 8, 2013

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

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUCICIAL CIRCUIT

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

ORDER

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CLERK OF COURT
RICHLAND COUNTY

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

REGULATORY BACKGROUND

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

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

FLOOD HAZARD DATA

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

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

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

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

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

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

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

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

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

FLOOD MAP REVISIONS

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

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

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

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

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

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

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

RICHLAND COUNTY'S FLOODPLAIN MANAGEMENT REGULATIONS

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

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

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

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

1. County Zoning Ordinance

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

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

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

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

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

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

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

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

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

2. Storm Drainage Ordinance of 1994

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

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

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

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

...

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

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

(i) National Flood Insurance Program

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

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

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

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

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

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

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

EVENTS UNTIL PLAINTIFF'S PURCHASE OF THE PROPERTY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EVENTS AFTER PLAINTIFF'S PURCHASE OF THE PROPERTY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nelson Mullins concluded that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The purpose:

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

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

Section 8-26 Primary Drainage Channel Requirements

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

RIPENESS OF PLAINTIFF'S CLAIM

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

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

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

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

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

Palazzolo, 533 U.S. at 620.

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

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

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

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

REGULATORY TAKING

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

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

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

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

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

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

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

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

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

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

A. Economic Impact

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The Character Of The Governmental Action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

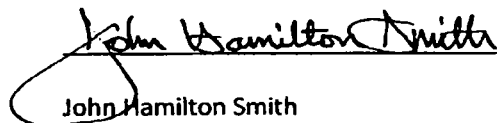
I find the character of the government action weighs in the County's favor.

Conclusion

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

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

March 18, 2013

A handwritten signature in black ink, which appears to read "John Hamilton Smith", is written over a horizontal line. The signature is fluid and cursive.

John Hamilton Smith

Special Referee

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

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

ORDER DENYING PLAINTIFF'S
MOTION TO RECONSIDER, ETC.

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

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

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

INSUFFICIENCY OF EVIDENCE

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

THE REASONABLENESS OF PLAINTIFF'S INVESTMENT BACKED EXPECTATIONS

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

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

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

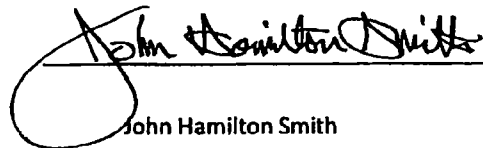
THE CHARACTER OF THE GOVERNMENTAL ACTION

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

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

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

April 18, 2013

A handwritten signature in black ink, appearing to read "John Hamilton Smith", is written over a horizontal line. To the left of the signature is a large, loopy circular mark.

John Hamilton Smith

Special Referee

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

2004 AUG 19 PM 3:13
IN THE COURT OF COMMON PLEAS

Columbia Venture, LLC,

Plaintiff,

vs.

Richland County,

Defendant.

C/A No.

Summons
(Jury Trial Demanded)

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint on the subscriber at their offices, Suite 2200, 1201 Main Street, Columbia, South Carolina 29201, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the complaint.

HAYNSWORTH SINKLER BOYD, P.A.

By: Manton M. Grier
Manton M. Grier
1201 Main Street
PO Box 11889
Columbia, SC 29211
(803) 779-3080

Attorneys for Plaintiff

August 19, 2004

STATE OF SOUTH CAROLINA	)	
COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
 Columbia Venture, LLC,	)	
	)	C/A No. 4:
Plaintiff,	)	
vs.	)	
	)	Complaint
Richland County,	)	(Jury Trial Demanded)
	)	
Defendant.	)	

Plaintiff, complaining of Defendant Richland County ("Richland County"), respectfully alleges:

INTRODUCTION

1. Plaintiff, Columbia Venture, LLC ("CV"), seeks just compensation, costs and attorneys' fees for a regulatory taking of its property rights in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 & 13 of the Constitution of the State of South Carolina and 42 U.S.C. § 1983.

PARTIES

2. CV is a South Carolina limited liability company with its principal place of business located in Columbia, South Carolina.

3. Pursuant to S. C. Code Ann. § 4-1-10, Richland County is a body politic and corporate for the purpose of being sued. Pursuant to S.C. Code Ann. § 4-9-30 and the general laws of South Carolina, Richland County has the power of Eminent Domain for county purposes and the power to provide for land use and promulgate regulations pursuant thereto.

VENUE

4. CV is the owner of approximately 4,474 acres of land located on the Congaree River in Richland County, South Carolina. This land is the subject of this action. A legal description of CV's property is attached hereto and made a part hereof, marked Exhibit A.

5. CV is aggrieved by the actions of Richland County taken after August 20, 2001, in adopting a regulatory floodway for the Congaree River in Richland County that places approximately 70% of CV's property within the regulatory floodway.

6. An action to recover for injuries to real property must be tried in the County in which the subject of the action is situated, pursuant to S. C. Code Ann. § 15-7-10.

THE NATIONAL FLOOD INSURANCE ACT OF 1968

7. The National Flood Insurance Act of 1968 (NFIA) authorizes the Director of the Federal Emergency Management Agency (FEMA) (now a part of the Department of Homeland Security) to establish and carry out a national flood insurance program to make flood insurance available at affordable rates to those areas of the country identified as being flood prone (e.g., the floodplain of a river or areas subject to tidal flooding or mud slides) but only if the communities elect to participate in the program by adopting and enforcing land use restrictions acceptable to FEMA which limit and discourage development in flood prone areas.

8. NFIA empowers the Director to, among other things, identify and publish information with respect to all floodplain areas, to establish or update flood-risk zone data in all such areas and to prepare maps relating to flood hazards and flood insurance.

9. NFIA also authorizes the Director to study and investigate laws, regulations, or ordinances relating to encroachments and obstructions in stream channels and floodways, in order to develop comprehensive criteria designed to encourage the adoption of adequate state

and local measures to restrict the development of land exposed to flood damage, guide the development of proposed construction away from such locations, and otherwise improve the long-range land management and use of flood prone areas.

10. Richland County is a participant in the National Flood Insurance Program (NFIP).

SUMMARY OF TECHNICAL AND OTHER TERMS UNDER NFIA

11. Area of special flood hazard is the land in the floodplain within a community subject to a one percent or greater chance of flooding in a given year. It thus includes the land area subject to flooding during the 100 year flood. It may be shown as Zone A on a Flood Hazard Boundary Map. 44 C.F.R. § 59.1.

12. Base Flood means the flood having a one percent chance of being equaled or exceeded in any given year [i.e., the 100 year flood]. 44 C.F.R. § 59.1.

13. Flood or flooding includes a general and temporary condition of partial or complete inundation of normally dry land areas from the unusual and rapid accumulation of runoff of surface waters from any source. 44 C.F. R. § 59.1.

14. Flood elevation determination means a determination by the Federal Insurance Administrator of the water surface elevations of the base flood, also sometimes referred to as Base Flood Elevations (BFEs). 44 C.F. R. § 59.1.

15. Flood elevation study means an examination, evaluation, and determination of flood hazards and, if appropriate, corresponding water surface elevations. 44 C.F. R. § 59.1.

16. Flood Hazard Boundary Map means an official map of a community, issued by the Administrator, where the boundaries of the flood areas having special hazards have been designated. 44 C.F. R. § 59.1.

17. Flood Insurance Rate Map (FIRM) means an official map of a community, on which the Administrator has delineated both the special hazard areas and the risk premium zones applicable to the community. 44 C.F. R. § 59.1.

18. Floodplain or flood-prone area means any land area susceptible to being inundated with water from any source. 44 C.F. R. § 59.1.

19. Floodplain management means the operation of an overall program of corrective and preventive measures for reducing flood damage, including floodplain management regulations. 44 C.F. R. § 59.1.

20. Floodplain management regulations means zoning ordinances, subdivision regulations, building codes, health regulations, special purpose ordinances (such as floodplain ordinances), and other applications of police power of the state or local community. The term describes such state or local regulations, in any combination thereof, which provide standards for the purpose of flood damage prevention and reduction. 44 C.F. R. § 59.1.

21. Floodway means that portion of the floodplain which is effective in carrying flow, within which this carrying capacity must be preserved and where the flood hazard is generally highest, *i.e.*, where water depths and velocities are the greatest. It is that area which provides for the discharge of the base flood so the cumulative increase in water surface elevation is no more than one foot. 44 C.F.R. § 9.4.

22. Levee means a man-made structure, usually an earthen embankment, designed and constructed in accordance with sound engineering practices to contain, control, or divert the flow of water so as to provide protection from temporary flooding. 44 C.F. R. § 59.1. A certified levee is one that has been approved by FEMA as meeting the requirements of 44 C.F.R. § 65.10. Land behind a certified levee is not considered to be a part of the floodway or floodplain.

23. Map means the Flood Hazard Boundary Map or the Flood Insurance Rate Map (FIRM) for a community issued by the Agency. 44 C.F. R. § 59.1.

24. Regulatory floodway means the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height. 44 C.F. R. § 59.1. Participating communities are required to adopt a regulatory floodway based on the principle that the area chosen for the regulatory floodway must be designated to carry the waters of the base flood, without increasing the water surface elevation of that flood more than one foot at any point. 44 C.F. R. § 60.3(d)(2). See also 44 C.F.R. § 9.4.

25. Scientifically incorrect means the methodology(ies) and/or assumptions which have been utilized are inappropriate for the physical processes being evaluated or are otherwise erroneous. 44 C.F.R. § 59.1.

26. Technically incorrect means the methodology(ies) utilized has been erroneously applied due to mathematical or measurement error, changed physical conditions, or insufficient quantity or quality of input data. 44 C.F.R. § 59.1.

HOW FLOODWAYS ARE DETERMINED UNDER NFIA

27. The regulatory definition of a floodway may be visualized using a river channel and an adjoining floodplain that is essentially flat. See diagram attached hereto marked Exhibit I. During a flood, the outer boundaries of the floodplain could be determined by observing the surface area of the river basin covered by the floodwater and physically marking these boundaries on the ground. The elevation (above mean sea level) of these marks would establish the base flood elevation (BFE). BFE also could be determined by actually measuring the surface elevation of the floodwater. The boundaries of the floodway, as defined in FEMA's regulations,

could then be determined by squeezing together (were it possible to do so) both sides of the floodplain boundaries (and the floodwater contained therein) until the surface elevation of the floodwater rises one foot. The point at which the compressed boundaries caused this one foot rise would be the floodway boundaries. In practice, engineers use hydrologic models to determine floodplain and floodway boundaries and BFEs, using historic flood flows and other methods, with due consideration given to topographical and other relevant factors affecting water flow.

28. Hydrologic models, which may be used for this purpose, are broadly classified as either one-dimensional (1-D) or two-dimensional (2-D). A 1-D model is based on a flow in one dimension on the horizontal plane of the river (i.e., upstream or downstream). A 2-D model allows for flows in two dimensions on the horizontal plane of the river (i.e., upstream or downstream and over the river's banks in either one or both directions or split flows). In most cases a 1-D model is adequate to determine floodway boundaries. With rivers having complex flow patterns, however, a 2-D model is needed if valid results are expected. In general, 2-D models are more expensive to construct than 1-D models but provide increased accuracy.

**PROVISIONS OF THE RICHLAND COUNTY CODE
RELATING TO FLOODPLAIN MANAGEMENT**

29. Prior to June 1, 2004, the Richland County Code of Ordinances defined floodplain and floodway as follows:

Floodplain: The areas adjoining a river, stream, watercourse, lake, or other body of standing water that have been or may be covered by floodwater. For purposes of this ordinance the floodplain is considered to be that area designated by the notation "-FP" appended to a basic district classification. This district classification is based on the floodplain as shown on the official Flood Boundary Floodway Maps, and Flood Insurance Rate Maps (Dated January 19, 1994), the accompanying Flood Insurance Study (Dated January 19, 1994), and any revisions thereto. Other

floodplain information available from local, state or federal sources can be used if the official maps do not cover that area.

Floodway. The channel of a watercourse and that portion of the adjoining floodplain required to provide for the passage of a 100-year flood with an insignificant increase in flood stage above that of natural conditions. For the purposes of this ordinance the floodway is considered to be that area designated by the notation "-FW" appended to the district classification. The district classification is based upon the floodway as shown on the official Flood Boundary Floodway Maps (Dated January 19, 1994), the accompanying Flood Insurance Study (Dated January 19, 1994), and any revisions thereto. Other floodway information available from local, state or federal sources can be used if the official maps do not designate a floodway.

Richland County Code 26-73.3.

THE MANNING LEVEE

30. A significant topographical feature known as the Manning levee is located on CV's property near the channel of the Congaree River. See diagram attached hereto marked Exhibit 2 (the term "Manning levee" as used herein consists of levee sections 1, 2 and 3).

31. The Manning levee is an earthen dike or levee, approximately 15 feet high, 100 feet wide at the bottom and approximately nine miles long, portions of which date back to the 1800's but most of such was constructed in the 1960's and 1970's. Since its completion, the Manning levee has been breached by flood waters only once, in 1976 due to improper maintenance and the improper installation of a sewer outfall line by the City of Columbia. Also, a portion of levee section 2 near Gills Creek, which was still under construction at the time, breached in 1976. Heathwood Hall Episcopal School and the wastewater treatment plant for the City of Columbia presently sit behind section 1 of the Manning levee on its landward side.

32. Under 42 U.S.C.A. §§ 4101, et seq., FEMA is given the responsibility of identifying and mapping flood prone areas and also the responsibility of updating and revising all floodplain areas and FIRMs at least once during each 5-year period.

33. In 1994 FEMA issued a FIRM for the Columbia, South Carolina, Congaree flood plain that became effective on January 19, 1994, and was formally adopted thereafter by ordinance of Richland County. The 1994 FIRM remained in effect until the new FIRM proposed by FEMA on August 20, 2001, with an effective date of February 20, 2002, was formally adopted by Richland County in June 2004 (attested by the clerk on June 16, 2004).

34. Because the Manning levee was built prior to FEMA's adoption of standards for certifying levees, it is not a certified levee under FEMA's regulations, 44 C.F.R. § 65.10, although with slight modification it could easily be certified under 44 C.F.R. § 65.10. Notwithstanding that the Manning levee is not a certified levee, neither the 1994 FIRM nor any FIRM previously issued by FEMA designated the land behind the Manning levee as a floodway.

35. As part of its publicly announced plans to develop its property, CV had the intent and capacity to improve the Manning levee so that it would be eligible under FEMA's regulations for certification as a levee capable of withstanding a 500 year flood.

FACTUAL BACKGROUND

36. On August 12, 1999, FEMA proposed new flood elevation determinations for portions of the Congaree River in Richland and Lexington Counties, South Carolina, pursuant to 42 U.S.C. § 4104, by issuing a revised preliminary Flood Insurance Study (FIS) and a revised preliminary Flood Insurance Rate Map (FIRM).

37. Pertinent to this action, in its revised preliminary FIRM dated August 12, 1999, and consistent with all previously effective FIRMs, FEMA found no floodway on the Richland County side of the Congaree River landward of the Manning levee.

38. Between FEMA's 1994 FIRM and its August 12, 1999 preliminary FIRM, FEMA had put forth at least two other preliminary maps suggesting the need to reserve floodway behind the Manning levee. In response, CV supplied FEMA with technical data and consulted with FEMA's technical contractors at their offices in Fairfax, Virginia, for the purpose of supplying scientific and technical information needed to determine the floodway boundaries for the sections of the Congaree river under study. The collective engineering judgment that emerged from that meeting was that the Manning levee was not likely to breach during the 100 year flood (or that any breach would not result in flows significant enough to warrant the designation of any floodway behind the levee). That engineering judgment and decision was the basis for FEMA's August 12, 1999, preliminary FIRM that set the floodway boundary in Richland County on the river side of the Manning levee.

39. When it issued its preliminary FIRM on August 12, 1999, FEMA, consistent with its regulations, allowed 90 days for public comment and appeals by adversely affected landowners.

40. CV is informed and believes that a number of persons who are either opposed to development in general or to CV's proposed development in particular, but most of whom are not affected land owners, appealed FEMA's August 12, 1999 preliminary FIRM in the hopes of preventing CV from developing its property.

41. CV did not appeal the August 12, 1999 preliminary FIRM because it agreed with the engineering judgment and decision implicit therein that no floodway existed behind (i.e., on the landward side of) the Manning levee.

42. Under 42 U.S.C.A. § 4104 (Flood Elevation Determinations) and FEMA's Regulations (44 C.F.R. § 67.5), the basis of an administrative appeal is restricted to "knowledge or information indicating that the elevations proposed by FEMA are scientifically or technically incorrect." 44 C.F.R. § 67.6. Also, the right of appeal is restricted to owners or lessees of real property whose property rights are adversely affected by FEMA's proposed BFEs, which are used by FEMA to, among other things, determine floodway boundaries.

43. FEMA, however, entertained appeals by persons whose property rights were not adversely affected by FEMA's determination of BFEs in the August 12, 1999 preliminary FIRM. FEMA received information from these persons that, in all but a few instances, could not be said to be based on scientific or technical information or knowledge.

44. CV is informed and believes that FEMA received no scientific or technical information from any purported appellant, or from any other source, that would have justified FEMA in reversing the engineering judgment supporting its August 12, 1999 preliminary FIRM that no floodway should be shown behind the Manning levee.

45. Nevertheless, on September 26, 2000, FEMA issued an appeal resolution proposing a new preliminary FIRM that reversed FEMA's longstanding historical location of the floodway in Richland County (riverside along the Manning levee) and designating a floodway on the landward side of the Manning levee with an average width of 4,500 feet and a maximum width of 7,200 feet. In reversing its long-held position on the location of the floodway, FEMA used an entirely different two-dimensional engineering approach that was different from submittals by any party involved in the Administrative Appeal from the August 12, 1999, preliminary FIRM.

46. FEMA used a two-dimensional (2-D) hydrologic analysis to demonstrate that water would be expected to flow behind the Manning levee during a 100 year flood based on FEMA

prescribed levee breaches that are assumed to occur. FEMA then abandoned its 2-D approach and switched to a one-dimensional (1-D) model to determine BFEs and floodway boundaries, without incorporating engineering assumptions from the 2-D model into the less accurate 1-D model. Also, the 1-D model was not calibrated to the more accurate 2-D model. In its August 12, 1999, preliminary FIRM, FEMA had used only a 1-D model that set the floodway boundary on the Richland County side of the Congaree River at the Manning levee based on FEMA's engineering judgment that no floodway was needed behind the Manning levee.

47. CV is informed and believes that FEMA changed its position for reasons that are not articulated in the public record and adopted an engineering approach that was calculated to reach a desired result: namely, that most of CV's property should be included in a floodway and restricted from development.

48. In adopting this 2-D/1-D approach, FEMA used a 2-D analysis that did not include existing physical features and was inferior for its intended purpose to determine the existence of a floodway, and FEMA improperly combined 2-D and 1-D modeling techniques by ignoring consistent data between each model. Also, since the 2-D analysis used by FEMA was inadequate to demonstrate the existence of a floodway (as opposed to flowing water) behind the Manning levee, FEMA arbitrarily assumed that a floodway existed behind the Manning levee without engineering support and FEMA arbitrarily expanded the area of effective flow shown by its 2-D model in order to include a greater portion of CV's property.

49. Because the September 26, 2000 appeal resolution used completely new technical information and materially altered FEMA's August 12, 1999 preliminary FIS and FIRM, FEMA allowed CV as an affected landowner to appeal the new preliminary FIRM first proposed by FEMA on September 26, 2000. FEMA also allowed an additional 90 days for comment and

additional submissions by other purported appellants concerning the September 26, 2000 appeal resolution.

50. Under 44 C.F.R. § 67.6(a), administrative “appellants are required to demonstrate that alternative methods or applications result in more correct estimates of base flood elevations, thus demonstrating that FEMA’s estimates are incorrect.” Accordingly, CV commissioned Exponent, Inc., a leading scientific and engineering consulting firm, to prepare an expanded 2-D model of the Congaree River floodplain using the same assumptions that FEMA made concerning breaches that might occur in the Manning levee.

51. CV’s scientific and technical evidence submitted to FEMA demonstrated that it was not necessary to reserve a floodway on the landward side of the Manning Levee.

52. On August 20, 2001, however, FEMA issued its Final Determination, rejecting substantially all of CV’s scientific and technical submittals and essentially confirming the floodway on CV’s property as shown on the preliminary FIRM first proposed by FEMA on September 26, 2000. Thereafter, pursuant to 42 USC § 4104(g), CV appealed FEMA’s August 20, 2001, final determination to the United States District Court for the District of South Carolina by complaint served and filed on October 19, 2001, and bearing the caption: Columbia Venture, LLC vs. The Federal Emergency Management Agency, Civil Action No. 3: 01-4100-24. As of this date, CV’s appeal is still pending in the district court and is unresolved.

53. By letter also dated August 20, 2001, FEMA notified T. Cary McSwain, Richland County Administrator, that FEMA’s Final Determination of BFEs for Richland County and FEMA’s FIRM dated August 20, 2001 would become effective as of February 20, 2002.

54. FEMA’s August 20, 2001 letter also states that in order to continue to participate in the NFIP, Richland County must adopt or show evidence of adoption of floodplain management

regulations that meet the standards of the NFIP regulations, 44 C.F.R. § 60.3(d). The letter also states that these regulations must be enacted in a legally enforceable document that includes the adoption of the effective FIRM and FIS report and the modifications made by the map revision effective February 20, 2002.

55. By ordinance attested by the Clerk of Council on June 16, 2004, Richland County adopted the regulatory floodway that was finally determined by FEMA on August 20, 2001 and that became effective February 20, 2002. The ordinance provides in pertinent part as follows:

SECTION II. The Richland County Code of Ordinances, Chapter 26, Zoning; Article 6, District Regulations; Section 26-73, FW and FP Flood Protective Areas; Subsection 26-73.3, Definitions; is hereby amended to redefine "Floodway" as follows:

- (3) *Floodway.* The channel of a watercourse and that portion of the adjoining floodplain required to provide for the passage of a 100-year flood with an insignificant increase in flood stage above that of natural conditions. For the purposes of this chapter, the floodway is considered to be that area designated by the notation "-FW" appended to the district classification. The district classification is based upon the floodway as shown on the official Flood Insurance Rate Map (Dated February 20, 2002), the accompanying Flood Insurance Study (Dated February 20, 2002), and any revisions thereto. Other floodway information available from local, state, or federal sources can be used if the official map does not designate a floodway.

FOR A FIRST CAUSE OF ACTION

56. CV realleges paragraphs 1 through 55 above which are incorporated herein by reference.

57. CV is aggrieved by the actions of Richland County in adopting FEMA's Final Determination of floodway because local ordinances adopted by Richland County pursuant to the NFIP virtually prohibit construction in a floodway, whereas construction, subject to certain

restrictions, is permitted in the floodplain. Also, recent ordinances adopted by Richland County effectively preclude the improvement of levees located within a floodway. Accordingly, Richland County's actions as aforesaid substantially diminish the value of CV's property and preclude CV's publicly announced plans to develop its property as a mixed use, high-tech research development park with other commercial, residential, recreational, and conservation uses.

58. CV had both the intent and capacity to develop its property as aforesaid and CV's distinct investment-backed expectations were reasonable under the circumstances.

59. CV expended large amounts of money and other resources in preparation for the development of its property, all of which are lost as a result of the actions taken by Richland County.

60. The Fifth Amendment to the United States Constitution, which is applicable to the State of South Carolina and its political subdivisions, including Richland County, by virtue of the Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

61. Government statutes, ordinances, or regulations that substantially further important public policies may nevertheless amount to a taking of private property for public use to the extent that such statutes, ordinances, or regulations frustrate the property owner's distinct investment-backed expectations.

62. CV acquired its property on the Congaree River with the distinct investment-backed expectation of developing the entire 4,474 acre tract as a mixed-use development with an

emphasis on a high tech research development park with additional commercial, residential, recreational, and conservation uses.

63. Richland County's adoption of a regulatory floodway that includes approximately 70% of CV's property has completely frustrated CV's distinct investment-backed expectation and substantially diminished the value of CV's property.

64. The character of the governmental action taken by Richland County is not such that the county can avoid compensating CV for the economic effect of its regulations on CV in eliminating CV's reasonable investment-backed expectation.

65. There is no sound engineering or scientific or technical evidence to support Richland County's adoption of the regulatory floodway proposed by FEMA as the actual floodway for the area of the Congaree River floodplain in question as that term is defined in the Richland County ordinance: *i.e.*, "the channel of [the] watercourse and that portion of the adjoining floodplain required to provide for the passage of a 100-year flood with an insignificant increase in flood stage above that of natural conditions."

66. Accordingly, Richland County's action in adopting the regulatory floodway proposed by FEMA is arbitrary. Furthermore, the County has arbitrarily exempted certain uses (such as the Heathwood Hall Episcopal School and the City of Columbia's waste water treatment plant) from the prohibition against building in a floodway.

67. Also, neither the concept of a regulatory floodway in general nor the one adopted by Richland County in particular, is confined to the area of the actual floodway. Accordingly, the floodway adopted by Richland County (which is a regulatory floodway proposed by FEMA) purports to be an actual floodway for the Congaree River but is broader than necessary to

promote the governmental purpose set forth in the county's floodway ordinance – i.e., the passage of the base flood.

68. Richland County, in arbitrarily adopting the extensive regulatory floodway proposed by FEMA, has in effect forced CV alone to bear public burdens which in all fairness and justice should be borne by the public as a whole.

69. Richland County's adoption of said regulatory floodway constitutes a regulatory taking of CV's property without just compensation or due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

70. S.C. Code Ann § 28-11-30 (3) provides that “[w]here an inverse condemnation proceeding is instituted by the owner of any right, title or interest in real property because of use of his property in any program or project, the court, rendering a judgment for the plaintiff in such proceeding and awarding compensation for the taking of property . . . shall determine and award or allow to such plaintiff, as part of such judgment . . . , such sum as will, in the opinion of the court. . . reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees actually incurred because of such proceeding.”

71. CV is informed and believes that it is entitled to recover in these proceedings just compensation for the regulatory taking of its property, plus prejudgment interest as well as its expenses as aforesaid, including attorneys' fees, and/or a judgment declaring the aforesaid Richland County floodway ordinance invalid as applied to CV.

FOR A SECOND CAUSE OF ACTION

72. CV realleges paragraphs 1 through 71 above which are incorporated hereby by reference.

73. The actions of Richland County in taking CV's property without just compensation also violate Article I, § 13 of the South Carolina Constitution, which provides in pertinent part that "private property shall not be taken . . . for public use without just compensation being first made therefor."

74. Under the South Carolina Constitution, a regulation that advances a legitimate state interest may nevertheless constitute a taking if it denies an owner of all economically viable use of his land.

75. A finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations.

76. Richland County's action as aforesaid in adopting the extensive regulatory floodway on CV's property has deprived CV of all economically viable use of all or part of its land.

77. CV is informed and believes it is entitled to recover in these proceedings just compensation for the regulatory taking of its property as aforesaid, including prejudgment interest, expenses, and attorneys' fees, and/or a judgment declaring the aforementioned Richland County floodway ordinance invalid as applied to CV.

FOR A THIRD CAUSE OF ACTION

78. CV realleges paragraphs 1 through 77 above, which are incorporated herein by reference.

79. Richland County's arbitrary adoption of a floodway that is not based on sound engineering or evidence that is scientifically or technically correct violates the substantive due

process rights of CV guaranteed by Article 1, § 3 of the Constitution of the State of South Carolina.

80. As a consequence, CV is informed and believes that it is entitled to recover in these proceedings just compensation for the regulatory taking of its property as aforesaid, including prejudgment interest, expenses, and attorneys' fees, and/or a judgment declaring the aforementioned Richland County floodway ordinance invalid as applied to CV.

FOR A FOURTH CAUSE OF ACTION

81. CV realleges paragraphs 1 through 80 above, which are incorporated herein by reference.

82. 42 U.S.C. § 1983 provides CV with a cause of action for the taking of its property under color of any state statute, ordinance, or regulation without just compensation as a deprivation of its rights or privileges secured by the United States Constitution.

83. Richland County's adoption of a regulatory floodway as aforesaid that includes approximately 70% of CV's property within the floodway and frustrates CV's distinct investment-backed expectations constitutes a deprivation of CV's rights secured by the United States Constitution under color of state law, entitling CV to the remedies provided by 42 USC § 1983.

84. The actions of Richland County acting under color of state law also have deprived CV of its rights secured by the United States Constitution in that in adopting a regulatory floodway that is not scientifically and technically correct and is without sound engineering support, Richland County has acted in an arbitrary manner, thus depriving CV of due process of law in violation of the Fourteenth Amendment.

85. 42 U.S.C. § 1983 also provides CV with the remedy of damages.

86. CV has suffered general damages resulting from the diminution in the value of its property, special or consequential damages in the form of reasonable expenditures made in preparation for its property's development, and profits lost because of CV's inability to develop its property. All of the aforementioned damages were proximately caused by the actions of Richland County, as aforesaid, acting under color of state law.

87. CV is informed and believes that it is entitled to recover under said statute reasonable compensation for the taking of its property plus prejudgment interest, as well as damages and costs, including reasonable attorneys' fees and/or a judgment declaring the aforesaid Richland County floodway ordinance invalid as applied to CV.

DEMAND FOR TRIAL BY JURY

88. CV demands a jury trial on any issue triable by jury as a matter of right.

PRAYER FOR RELIEF

CV prays that the Court inquire into the matters and things alleged herein and award CV reasonable compensation for the taking of its property, plus prejudgment interest and actual and consequential damages, together with the cost of this action including reasonable attorneys' fees, and/or a judgment declaring the aforesaid Richland County floodway ordinance invalid as applied to CV, and for such other and further relief as the court may deem just and proper.

HAYNSWORTH SINKLER BOYD, P.A.

By William C. Boyd

By Manton M. Grier
Manton M. Grier
P. O. Box 11889
Columbia, SC 29211-1889
(803) 779-3080

Attorneys for Plaintiff
August 19, 2004

EXHIBIT A

PROPERTY DESCRIPTION

PARCELS A-1, A-2, A-3, B-1, B-2, C, D and E:

All those pieces, parcels, lots or tracts of land, with improvements thereon, situate, lying and being near the City of Columbia, County of Richland, State of South Carolina, as shown and delineated on a plat of Parcel A-1 containing 340.037 acres, Parcel A-2, containing 236.585 acres, Parcel A-3 containing 15.014 acres, Parcel B-1 containing 246.574 acres, Parcel B-2 containing 8.227 acres, Parcel C containing 227.387 acres, Parcel D containing 31.657 acres, and Parcel E containing 322.323 acres, for a total of 1,427.804 acres, prepared for Burroughs & Chapin Company, Inc. and Chicago Title Insurance Company, by B. P. Barber & Associates, Inc., dated June 26, 1998, last revised February 8, 1999, and recorded in Office of the Register of Deeds for Richland County in Record Book 281 at Page 441.

PARCELS F, G, H and J:

All those pieces, parcels, lot or tracts of land, with improvements thereon, situate, lying and being near the City of Columbia, County of Richland, State of South Carolina, as shown and delineated on a plat of Parcel F containing 950.488 acres, Parcel G containing 1,917.155 acres, Parcel H containing 105.190 acres, and Parcel J containing 0.269 acres, for a total of 2,973.102 acres, prepared for Burroughs & Chapin Company, Inc. and Chicago Title Insurance Company, by B. P. Barber & Associates, Inc., dated January 22, 1999, last revised February 11, 1999, and recorded in the Office of the Register of Deeds for Richland County in Record Book 281 at page 440.

PARCEL L:

All that certain piece, parcel or lot of land, with improvements thereon, if any, situate, lying and being in the County of Richland, State of South Carolina, south of the City of Columbia, shown and delineated as Parcel L, containing 51.705 acres, on a plat of survey prepared for Burroughs & Chapin Company, Inc. and Chicago Title Insurance Company, by B.P. Barber & Associates, Inc., dated January 22, 1999, last revised February 11, 1999, and recorded in the Office of the Register of Deeds for Richland County in Record Book 281 at page 440.

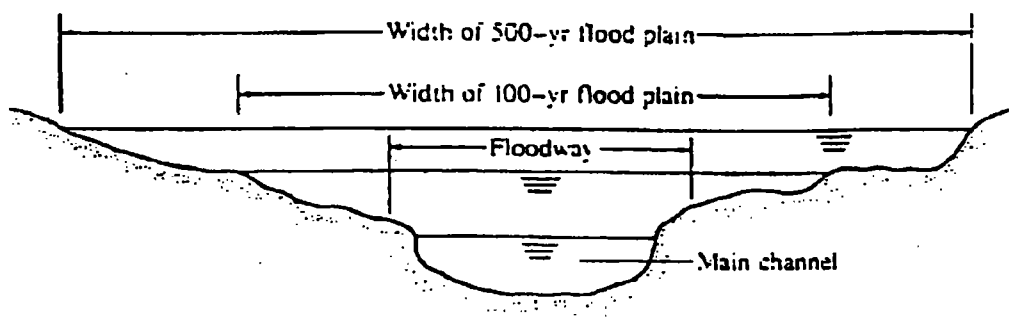
PARCEL No. 2:

All that certain piece, parcel or tract of land with improvements thereon, if any, situate, lying and being near the City of Columbia, County of Richland, State of South Carolina, and delineated on a plat of Parcel No. 2, containing 11.89 acres, more or less, prepared for Heathwood Hall Episcopal School, by Cox and Dinkins, Inc., dated April 18, 1996, last revised June 3, 1998, in the Office of the Register of Deeds for Richland County in Record Book 96 at page 614.

LESS AND EXCEPTING:

All that certain piece, parcel or tract of land with improvements thereon, if any, situate, lying and being near the City of Columbia, County of Richland, State of South Carolina, containing 2.16 acres and being shown on a plat prepared for Columbia Venture, LLC by Survey & Mapping Services of South Carolina, Inc. dated August 23, 2000 and recorded in the Office of the Register of Deeds for Richland County in Record Book 518 at page 2977.

The total acreage of all the above parcels, according to the above-referenced plats, is 4,462.341 acres.



**J. A. Roberson, J. J. Cassidy & M. H. Chaudhry,
Hydraulic Engineering at 477 (Second Edition)**

EXHIBIT 1

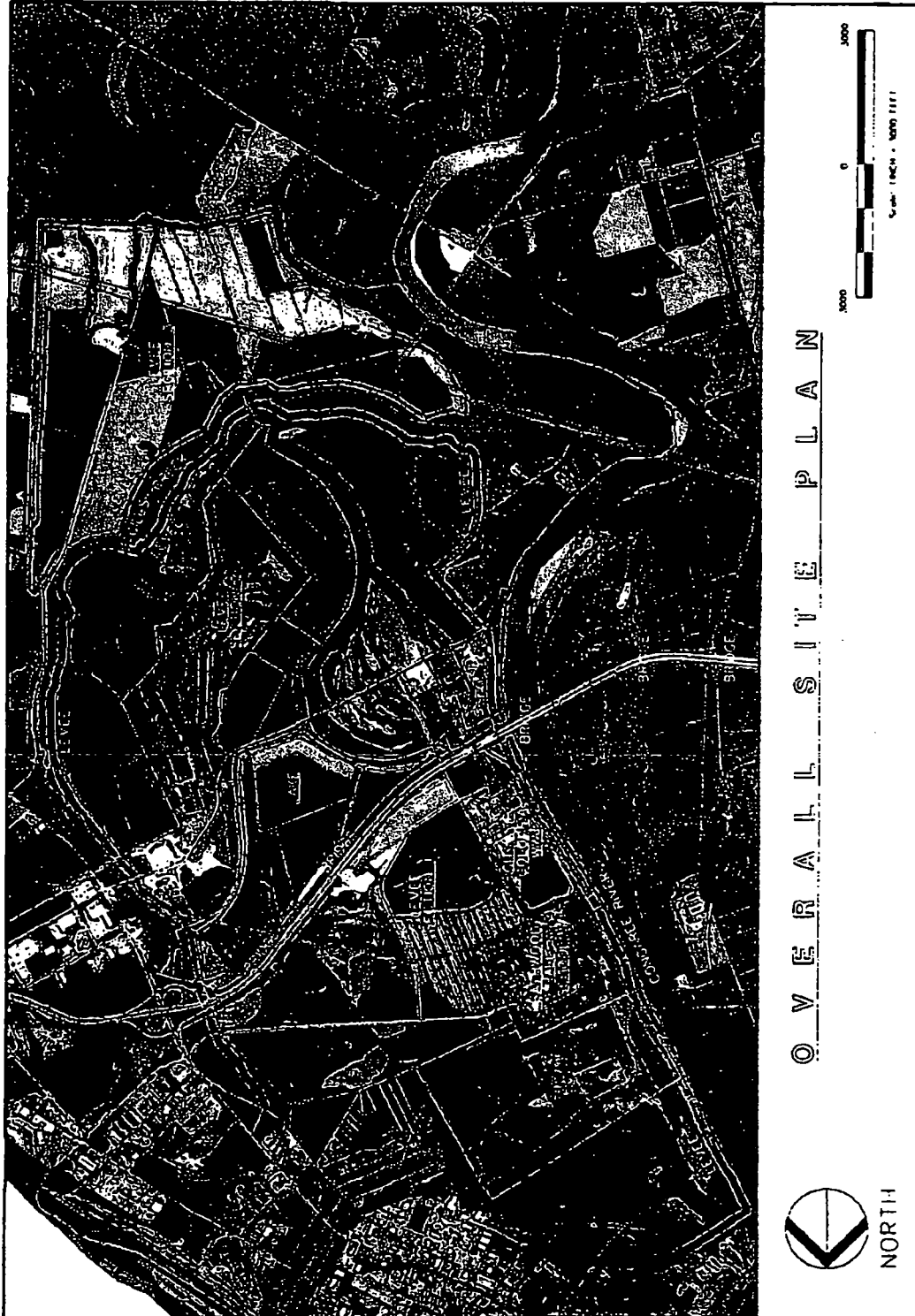


EXHIBIT 2

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Columbia Venture, LLC,

Plaintiff,

vs.

Richland County,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A No. 2004-CP-40-3929

Amended and Supplemental Complaint
(Jury Trial Demanded)

2009 OCT -5 PM 2:57

FILED

Plaintiff, complaining of Defendant Richland County ("Richland County"), respectfully alleges:

INTRODUCTION

1. Plaintiff, Columbia Venture, LLC ("CV"), seeks just compensation, costs, and attorneys' fees for a regulatory taking of its property rights in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3 & 13 of the Constitution of the State of South Carolina, and 42 U.S.C. § 1983.

PARTIES

2. CV is a South Carolina limited liability company with its principal place of business located in Columbia, South Carolina.

3. Pursuant to S. C. Code Ann. § 4-1-10, Richland County is a body politic and corporate for the purpose of being sued. Pursuant to S.C. Code Ann. § 4-9-30 and the general laws of South Carolina, Richland County has the power of Eminent Domain for county purposes and the power to provide for land use and promulgate regulations pursuant thereto.

VENUE

4. CV is, or was, the owner of approximately 4,474 acres of land located on the Congaree River in Richland County, South Carolina. This land is the subject of this action. A legal description of CV's property is attached hereto and made a part hereof, marked Exhibit 1.

5. CV is aggrieved by the actions of Richland County taken before and after August 20, 2001, in adopting a regulatory floodway for the Congaree River in Richland County that places approximately 70% of CV's property within the regulatory floodway.

6. An action to recover for injuries to real property must be tried in the County in which the subject of the action is situated, pursuant to S. C. Code Ann. § 15-7-10.

THE NATIONAL FLOOD INSURANCE ACT OF 1968

7. The National Flood Insurance Act of 1968 (NFIA) authorizes the Director of the Federal Emergency Management Agency (FEMA) (now a part of the Department of Homeland Security) to establish and carry out a national flood insurance program to make flood insurance available at affordable rates to those areas of the country identified as being flood prone (*e.g.*, the floodplain of a river or areas subject to tidal flooding or mud slides) but only if the communities elect to participate in the program by adopting and enforcing land use restrictions acceptable to FEMA which limit and discourage development in flood prone areas.

8. NFIA empowers the Director to, among other things, identify and publish information with respect to all floodplain areas, to establish or update flood-risk zone data in all such areas, and to prepare maps relating to flood hazards and flood insurance.

9. NFIA also authorizes the Director to study and investigate laws, regulations, or ordinances relating to encroachments and obstructions in stream channels and floodways, in order to develop comprehensive criteria designed to encourage the adoption of adequate state

and local measures to restrict the development of land exposed to flood damage, guide the development of proposed construction away from such locations, and otherwise improve the long-range land management and use of flood prone areas.

10. Richland County is a participant in the National Flood Insurance Program (NFIP).

SUMMARY OF TECHNICAL AND OTHER TERMS UNDER NFIA

11. Area of special flood hazard is the land in the floodplain within a community subject to a one percent or greater chance of flooding in a given year. It thus includes the land area subject to flooding during the 100-year flood. It may be shown as Zone A on a Flood Hazard Boundary Map. 44 C.F.R. § 59.1.

12. Base Flood means the flood having a one percent chance of being equaled or exceeded in any given year [*i.e.*, the 100-year flood]. 44 C.F.R. § 59.1.

13. Flood or flooding includes a general and temporary condition of partial or complete inundation of normally dry land areas from the unusual and rapid accumulation of runoff of surface waters from any source. 44 C.F.R. § 59.1.

14. Flood elevation determination means a determination by the Federal Insurance Administrator of the water surface elevations of the base flood, also sometimes referred to as Base Flood Elevations (BFEs). 44 C.F.R. § 59.1.

15. Flood elevation study means an examination, evaluation, and determination of flood hazards and, if appropriate, corresponding water surface elevations. 44 C.F.R. § 59.1.

16. Flood Hazard Boundary Map means an official map of a community, issued by the Administrator, where the boundaries of the flood areas having special hazards have been designated. 44 C.F.R. § 59.1.

17. Flood Insurance Rate Map (FIRM) means an official map of a community, on which the Administrator has delineated both the special hazard areas and the risk premium zones applicable to the community. 44 C.F.R. § 59.1.
18. Floodplain or flood-prone area means any land area susceptible to being inundated with water from any source. 44 C.F.R. § 59.1.
19. Floodplain management means the operation of an overall program of corrective and preventive measures for reducing flood damage, including floodplain management regulations. 44 C.F.R. § 59.1.
20. Floodplain management regulations means zoning ordinances, subdivision regulations, building codes, health regulations, special purpose ordinances (such as floodplain ordinances), and other applications of police power of the state or local community. The term describes such state or local regulations, in any combination thereof, which provide standards for the purpose of flood damage prevention and reduction. 44 C.F.R. § 59.1.
21. Floodway means that portion of the floodplain which is effective in carrying flow, within which this carrying capacity must be preserved and where the flood hazard is generally highest, *i.e.*, where water depths and velocities are the greatest. It is that area which provides for the discharge of the base flood so the cumulative increase in water surface elevation is no more than one foot. 44 C.F.R. § 9.4.
22. Levee means a man-made structure, usually an earthen embankment, designed and constructed in accordance with sound engineering practices to contain, control, or divert the flow of water so as to provide protection from temporary flooding. 44 C.F.R. § 59.1. A certified levee is one that has been approved by FEMA as meeting the requirements of 44 C.F.R. § 65.10. Land protected by a certified levee is not considered to be a part of the floodway or floodplain.

23. Map means the Flood Hazard Boundary Map or the Flood Insurance Rate Map (FIRM) for a community issued by the Agency. 44 C.F.R. § 59.1.

24. Regulatory floodway means the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height. 44 C.F.R. § 59.1. Participating communities are required to adopt a regulatory floodway based on the principle that the area chosen for the regulatory floodway must be designated to carry the waters of the base flood, without increasing the water surface elevation of that flood more than one foot at any point. 44 C.F.R. § 60.3(d)(2); *see also* 44 C.F.R. § 9.4.

25. Scientifically incorrect means the methodology(ies) and/or assumptions which have been utilized are inappropriate for the physical processes being evaluated or are otherwise erroneous. 44 C.F.R. § 59.1.

26. Technically incorrect means the methodology(ies) utilized have been erroneously applied due to mathematical or measurement error, changed physical conditions, or insufficient quantity or quality of input data. 44 C.F.R. § 59.1.

HOW BFEs AND FLOODWAYS ARE DETERMINED UNDER NFIA AND NFIP

27. FEMA is authorized to establish flood elevation determinations for land use purposes by 42 U.S.C. §§ 4102 & 4104, which are part of the NFIA. FEMA uses flood elevation determinations to produce Flood Insurance Studies (FISs) and Flood Insurance Rate Maps (FIRMs) which identify areas of special flood hazard and are used by local communities participating in the NFIP.

28. The NFIP is based upon the 100-year flood (also called the 1%-annual-chance-flood or base flood) as the standard level of risk. FEMA engineers use hydrologic models to first

determine the volume of the base flood that is expressed in cubic feet per second (cfs). FEMA engineers next use hydraulic models to determine the water surface elevations of the base flood (BFEs) and the water surface elevation and width of the regulatory floodway.

29. Communities participating in the NFIP must adopt FEMA's final BFEs as the minimum elevation at which the lowest floor of new construction is permitted in the floodplain. 44 C.F.R. § 60.3(d)(1).

30. By contrast, the regulatory floodway is one aspect of floodplain management that involves balancing economic gain from floodplain development against the resulting increase in flood hazard. The floodway is that portion of the floodplain that is effective in carrying flow. The regulatory floodway seeks to preserve this carrying capacity by prohibiting obstructions (*e.g.*, structures or fill) from being placed within the boundaries of the regulatory floodway, thereby displacing the carrying capacity of this floodway and causing flood waters to rise. The regulatory floodway is typically a computer-generated delineation of the part of the floodplain where the flood waters would rise one foot if the rest of the floodplain were encroached upon, as if by land fill. 44 C.F.R. § 60(d)(2). See Figure 1 (floodway schematic) attached hereto marked Exhibit 2. After the minimum regulatory floodway boundary is calculated and promulgated by FEMA, the community adopts it or may adopt a more expansive one. 44 C.F.R. § 60.1(d). The purpose of a regulatory floodway is to preserve the carrying capacity of the floodway in order to discharge the base flood by prohibiting additional development in that portion of the floodplain (*i.e.*, the regulatory floodway) that would cause the water surface elevation of future floods to rise due to continued displacement or obstruction of flood waters by development or fill. The NFIP seeks to limit construction in the floodplain and prohibit it in the regulatory floodway.

31. In practice, engineers use hydrologic models using historic flood flows and other methods to determine the volume of the base flood and use hydraulic models to determine floodplain and floodway boundaries and BFEs with due consideration given to topographical and other relevant factors affecting water flow.

32. Hydraulic models, which may be used to determine BFEs and the boundaries of the regulatory floodway, are broadly classified as either one-dimensional (1-D) or two-dimensional (2-D). A 1-D model is constructed using topographic cross-sections (*e.g.*, surveyed lines) of the floodplain. See illustration attached hereto marked Exhibit 3. A 1-D model is capable only of analyzing water flowing in one direction (*e.g.*, water flowing downstream). A 1-D model is capable of determining a single water surface elevation for each cross-section. FEMA ordinarily uses 1-D models to determine both floodplain and floodway boundaries. A 2-D model is capable of analyzing water flowing in any two dimensional directions (*e.g.*, downstream, over the bank or upstream). 2-D models are based on a two-dimensional mesh (*i.e.*, a computer generated topography), which to produce technically correct results, must replicate the existing topography. See illustration attached hereto marked Exhibit 4. 2-D models alone are capable of estimating velocities and depths of water flowing laterally over the river banks. 1-D models and 2-D models may be steady state (constant base flood volume assumed for study purposes) or unsteady state (volume of base flood varies as flood waters rise, crest and recede over time).

33. Normally, the regulatory floodway is determined using the equal reduction of conveyance method, which establishes the boundaries of the regulatory floodway by reducing the conveyance of flood water on each side of the floodplain equally. Areas of a floodplain that do not provide conveyance of flood water in the general direction of flow (*e.g.*, areas of ponding)

are considered to be areas of ineffective flow. Ineffective flow areas are not included within a regulatory floodway determined by equal reduction of conveyance. Such areas have no conveyance or carrying capacity that can be used to delineate a regulatory floodway determined by equal reduction of conveyance.

34. FEMA guidelines mandate that the equal reduction of conveyance method must be used to determine the regulatory floodway for a stream that forms the border between contiguous communities.

35. The Congaree River serves as the political boundary separating Richland and Lexington Counties.

36. Accordingly, FEMA guidelines mandate that the equal reduction of conveyance method must be used to determine the regulatory floodway for that portion of the Congaree River floodplain that includes CV's property.

THE MANNING LEVEE

37. A significant topographical feature known as the Manning levee is located on CV's property near the channel of the Congaree River. See aerial photograph attached hereto marked Exhibit 5 (the term "Manning levee" as used herein consists of levee sections 1, 2, and 3).

38. The crest of levee section 1 north of I-77, along the Congaree River varies in width from about 10 to 20 feet and in elevation from about 140 to 151 feet, which is 10 to 14 feet above original grade. The base of most of the levees at original grade is approximately 60 feet wide or greater. The City of Columbia owns the section of levee section 1 (approximately 3000 feet) that is directly west of and immediately adjacent to the city's waste water treatment plant. That section failed in two places during a flood in 1976. The cause of the two failures was

piping, where water seeps under or through the levee wall causing a section of the levee to fail. The north failure extended for a distance of about 110 feet, and the south failure extended for about 95 feet. Based on its evaluations of the levees, FEMA concluded as follows:

- Levee is composed of sandy-silt material, but there are variations within the structure.
- We do expect isolated areas of failure, but not long failures such that we would create a hydraulic flow path.
-
- This levee does not prevent flooding, but does block conveyance of flow.

39. FEMA also commissioned a geotechnical study of the levees in 2000 that further concluded that piping is the most likely mode of failure and that sheer failure itself is not a likely cause of breaching because of the relatively low height of the levees to the ground and the fact that they have gained some degree of stability through consolidation over many years. The study also concluded that it is probable that any failure would be localized and would not extend over a great length of levee.

40. Under 42 U.S.C. §§ 4101, *et seq.*, FEMA is given the responsibility of identifying and mapping flood prone areas and also the responsibility of updating and revising all floodplain areas and FIRMs at least once during each 5-year period.

41. In 1994, FEMA issued a FIRM for the Richland County, South Carolina, Congaree floodplain that became effective on January 19, 1994, and was formally adopted thereafter by ordinance of Richland County. The 1994 FIRM remained in effect until the new FIRM proposed by FEMA on August 20, 2001, with an effective date of February 20, 2002, was formally adopted by Richland County in June 2004 (attested by the clerk on June 16, 2004).

42. Because the Manning levee was built prior to FEMA's adoption of standards for certifying levees, it is not a certified levee under FEMA's regulations, 44 C.F.R. § 65.10, although with slight modification it could easily be certified under 44 C.F.R. § 65.10. Land protected from the 100-year flood by certified levees is shown on FIRMs as Zone X. Zone X is not an area of special flood hazard. Because the Manning levees were not certified levees, FEMA assumed they would be breached during a base flood and did not recognize the levees as providing protection from the base flood. Accordingly, FEMA designated the land protected by the Manning levees as Zone AE on the 1994 Richland County FIRM. Zone AE is part of the floodplain, but neither the 1994 FIRM nor any FIRM previously issued by FEMA designated the land behind the Manning levee as a regulatory floodway.

43. As part of its publicly announced plans to develop its property, CV had the intent and capacity to improve the Manning levee so that it would be eligible under FEMA's regulations for certification as a levee capable of withstanding a 500-year flood. CV is informed and believes that no 500-year certified levee has ever failed.

FACTUAL BACKGROUND

44. On August 12, 1999, FEMA proposed new flood elevation determinations for portions of the Congaree River in Richland and Lexington Counties, South Carolina, pursuant to 42 U.S.C. § 4104, by issuing a revised preliminary Flood Insurance Study (FIS) and a revised preliminary Flood Insurance Rate Map (FIRM). A copy of the August 12, 1999 revised preliminary Richland County FIRM, Map Panel 160 is attached hereto and marked Exhibit 6.

45. Pertinent to this action, in its revised preliminary FIRM dated August 12, 1999, and consistent with all previously effective FIRMs, FEMA found no floodway on the Richland County side of the Congaree River landward of the Manning levee.

46. FEMA's 1999 analysis concluded that:

the floodplain behind the agricultural dike in Richland County is modeled as ineffective flow area [no floodway] because the high grounds of the I-77 embankment and the agricultural dikes on either side of Gill's Creek intercept the floodplain at right angles to the general flow direction and offer resistance to effective flow. The available topographic data indicated that this area does not contribute to conveyance of flow in the general flow direction.

47. FEMA modeled areas landward of the Manning levee as "ineffective flow areas" in 1999 because the I-77 embankment and the Gill's Creek levees, which run perpendicular to the Congaree River, prevent floodwater entering Richland County from returning to the river. Property landward of the Manning levee was therefore not considered "floodway," because it does "not contribute to the conveyance of flow in the general flow direction," and therefore does not provide conveyance of flow that may be reduced in order to contribute to a regulatory floodway determined using the equal reduction of conveyance method, which FEMA was required to use for this section of the Congaree River floodplain.

48. FEMA's determination that the area landward of the Manning levee was an area of ineffective flow was also based, in part, on 2-D studies prepared by the United States Geological Survey (USGS) that showed that this area did not contribute to conveyance of flow in the general direction of flow.

49. When it issued its revised preliminary FIRM on August 12, 1999, FEMA, consistent with its regulations, allowed 90 days for public comment and appeals by adversely affected landowners.

50. CV is informed and believes that a number of persons who are either opposed to development in general or to CV's proposed development in particular, but most of whom are not affected landowners, appealed FEMA's August 12, 1999 revised preliminary FIRM in the

hopes of preventing CV from developing its property. On December 7, 1999, Richland County also passed a resolution authorizing the South Carolina Department of Natural Resources (SCDNR) to appeal on the county's behalf. The county resolved that it was officially appealing FEMA's August 12, 1999 flood elevation determinations until such time as the technical questions raised by the SCDNR and others were successfully resolved.

51. CV did not appeal the August 12, 1999 revised preliminary FIS and FIRM because it agreed with the determination that no floodway existed behind (*i.e.*, on the landward side of) the Manning levee.

52. Under 42 U.S.C. § 4104 (Flood Elevation Determinations) and FEMA's Regulations (44 C.F.R. § 67.5), the basis of an administrative appeal is restricted to "knowledge or information indicating that the elevations proposed by FEMA are scientifically or technically incorrect." 44 C.F.R. § 67.6. Also, the right of appeal is restricted to owners or lessees of real property whose property rights are adversely affected by FEMA's proposed BFEs, which are used by FEMA to, among other things, determine floodway boundaries.

53. FEMA, however, entertained appeals by persons whose property rights were not adversely affected by FEMA's determination of BFEs in the August 12, 1999 revised preliminary FIRM. FEMA received information from these persons that, in all but a few instances, could not be said to be based on scientific or technical information or knowledge.

54. CV is informed and believes that FEMA received no scientific or technical information from any purported appellant, or from any other source, that would have justified FEMA in reversing the conclusion supporting its August 12, 1999 revised preliminary FIRM that the area landward of the Manning levee was an area of ineffective flow and that, accordingly, no floodway should be shown behind the Manning levee.

55. Nevertheless, on September 26, 2000, FEMA issued an appeal resolution proposing a new preliminary FIRM that reversed FEMA's longstanding historical location of the floodway in Richland County (riverside along the Manning levee) and designating a floodway on the landward side of the Manning levee with an average width of 4,500 feet and a maximum width of 7,200 feet. A copy of the September 26, 2000 revised preliminary Richland County FIRM, Map Panel 160 is attached hereto and marked as Exhibit 7. In reversing its long-held position on the location of the floodway, FEMA used an entirely different two-dimensional engineering approach that was different from submittals by any party involved in the Administrative Appeal from the August 12, 1999 revised preliminary FIRM.

56. Although FEMA determined that the progression of the base flood for the Congaree floodplain was an unsteady process (*i.e.*, flood waters rise, crest, and recede over four days, and flood levels on the river side of the Manning levee, according to FEMA, go down after a breach), FEMA did not use an unsteady hydraulic model, which was required to produce scientifically and technically correct results. Rather, FEMA used a steady state, two-dimensional (2-D) hydraulic analysis to demonstrate that water would be expected to flow behind the Manning levee during a 100-year flood based on FEMA prescribed levee breaches that are assumed to occur. FEMA then abandoned its 2-D approach and switched to a steady state, one-dimensional (1-D) model to determine BFEs and floodway boundaries without incorporating engineering assumptions from the 2-D model into the less accurate 1-D model. Also, the 1-D model was not calibrated to the more accurate 2-D model. In its August 12, 1999 revised preliminary FIS and FIRM, FEMA had relied on the USGS 2-D studies showing that the area landward of the Manning levee was an area of ineffective flow that did not contribute to conveyance in the general direction of flow. To support its change of position, however, FEMA

took these same USGS 2-D studies and arbitrarily altered them to produce an arbitrary result to support FEMA's change of position on the location of ineffective flow areas in Richland County.

57. CV is informed and believes that FEMA changed its position for reasons that are not articulated in the public record and adopted a pretextual engineering approach that was calculated to reach a desired result: namely, that most of CV's property should be included in a regulatory floodway and restricted from development.

58. In adopting this 2-D/1-D approach, FEMA used a 2-D analysis derived from the earlier USGS 2-D studies that did not include existing physical features (such as bridge openings on the Lexington side of the floodplain), arbitrarily altered the topography of the floodplain by, among other things, eliminating areas of high ground on the Richland side and raising the elevation of the Lexington side overbank, used the historic flood of record rather than the base flood to determine areas of effective flow on the Richland side, and used improper friction coefficients to increase the amount of water entering Richland County. Further, in the 2-D model used to determine areas of ineffective flow, FEMA arbitrarily removed all eleven miles of the Manning levee system, contrary to the more detailed geotechnical evidence before the agency at that time that Manning levee section 1 would breach in two or three places at a width of only 120 feet each (maximum breaches totaling 360 feet). FEMA's 2-D analysis was also inferior for its intended purpose to determine the existence of a floodway, and FEMA improperly combined 2-D and 1-D modeling techniques by ignoring consistent data between each model. Also, because the 2-D analysis used by FEMA was inadequate to demonstrate the existence of areas of effective flow (as opposed to areas of ponding water) behind the Manning levee, FEMA arbitrarily assumed that a floodway existed behind the Manning levee without engineering

support, and FEMA arbitrarily expanded the area of effective flow shown by its 2-D model in order to include a greater portion of CV's property.

59. FEMA also said that it used the equal reduction of conveyance method to determine the regulatory floodway, as it was required to do, but, in fact, it did not. Rather, FEMA arbitrarily set the floodway encroachment stations for most of the 1-D cross-sections affecting CV's property and did not use the equal reduction of conveyance method in any meaningful sense.

60. Because the September 26, 2000 appeal resolution used completely new technical information and materially altered FEMA's August 12, 1999 revised preliminary FIS and FIRM, FEMA allowed CV as an affected landowner to appeal the new preliminary FIRM first proposed by FEMA on September 26, 2000. FEMA also allowed an additional time for comment and additional submissions by other purported appellants concerning the September 26, 2000 appeal resolution.

61. Under 44 C.F.R. § 67.6(a), administrative "appellants are required to demonstrate that alternative methods or applications result in more correct estimates of base flood elevations, thus demonstrating that FEMA's estimates are incorrect." Accordingly, CV commissioned Exponent, Inc., a leading scientific and engineering consulting firm, to prepare an expanded 2-D model of the Congaree River floodplain using the same assumptions that FEMA made concerning breaches that might occur in the Manning levee. CV also retained other engineers and experts to submit additional scientific and technical information in support of CV's administrative appeal.

62. CV's scientific and technical evidence submitted to FEMA demonstrated that it was not necessary to reserve a floodway on the landward side of the Manning levee because the area landward of the levees was an area of ineffective flow.

63. On August 20, 2001, however, FEMA issued its Final Determination, rejecting substantially all of CV's scientific and technical submittals and essentially confirming the regulatory floodway on CV's property as shown on the preliminary FIRM first proposed by FEMA on September 26, 2000. A copy of the August 20, 2001 Richland County FIRM, Map Panel 160 is attached hereto and marked as Exhibit 8.

64. By letter also dated August 20, 2001, FEMA notified T. Cary McSwain, Richland County Administrator, that FEMA's Final Determination of BFEs for Richland County and FEMA's FIRM dated August 20, 2001, would become effective as of February 20, 2002.

65. FEMA's August 20, 2001 letter also states that in order to continue to participate in the NFIP, Richland County must adopt or show evidence of adoption of floodplain management regulations that meet the standards of the NFIP regulations, 44 C.F.R. § 60.3(d). The letter also states that these regulations must be enacted in a legally enforceable document that includes the adoption of the effective FIRM and FIS report and the modifications made by the map revision effective February 20, 2002.

66. By ordinance attested by the Clerk of Council on June 16, 2004, Richland County adopted the regulatory floodway that was finally determined by FEMA on August 20, 2001, and that became effective February 20, 2002. The ordinance provides in pertinent part as follows:

SECTION II. The Richland County Code of Ordinances, Chapter 26, Zoning; Article 6, District Regulations; Section 26-73, FW and FP Flood Protective Areas; Subsection 26-73.3, Definitions; is hereby amended to redefine "Floodway" as follows:

- (3) *Floodway*: The channel of a watercourse and that portion of the adjoining floodplain required to provide for the passage of a 100-year flood with an insignificant increase in flood stage above that of natural conditions. For the purposes of this chapter, the flood way is considered to be that area designated by the notation “-FW” appended to the district classification. The district classification is based upon the floodway as shown on the official Flood Insurance Rate Map (Dated February 20, 2002), the accompanying Flood Insurance Study (Dated February 20, 2002), and any revisions thereto. Other floodway information available from local, state, or federal sources can be used if the official map does not designate a floodway.

67. A copy of the February 20, 2002 Richland County FIRM, Map Panel 160 is attached hereto and marked as Exhibit 9.

CV’S JUDICIAL APPEAL UNDER THE NFIA

68. Pursuant to 42 U.S.C § 4104(g), CV appealed FEMA’s August 20, 2001 Final Determination to the United States District Court for the District of South Carolina by Complaint filed and served on October 19, 2001, and bearing the caption: *Columbia Venture, LLC v. The Federal Emergency Management Agency*, Civil Action No. 3:01-4100.

69. FEMA filed an Answer to CV’s Complaint on August 14, 2002, and a Motion to Dismiss the Complaint on December 31, 2002.

70. On December 12, 2002, John Grego, Dan Tufford, the South Carolina Wildlife Federation, and the Riverland Park Neighborhood Association (the “Defendant-Intervenors”) filed a motion to intervene as defendants in opposition to CV’s judicial appeal.

71. The Defendant-Intervenors were principally represented by a lawyer employed by the Southern Environmental Law Center (the “SELC”), who filed motions, pleadings, and other papers on behalf of the Defendant-Intervenors opposing CV’s judicial appeal.

72. By Order dated April 20, 2004, the federal district court denied FEMA's motion to dismiss but granted the Defendant-Intervenors' motion to intervene.

73. By Order and Judgment dated November 18, 2005, the federal district court granted the motion of CV to vacate FEMA's 2001 flood elevation and floodway determinations for failure to comply with procedures mandated by law and reinstituted the 1995 flood elevation determinations.

74. Both the Defendant-Intervenors and FEMA appealed the district court's Order of Vacatur to the United States Court of Appeals for the Fourth Circuit.

75. Thereafter, while their appeals were pending, both FEMA and the Defendant-Intervenors took the position that the district court had only invalidated the 2001 BFEs and not the 2001 floodway despite the clear wording of the district court's judgment.

76. Consequently, on July 20, 2007, CV filed a motion to hold FEMA in contempt of the November 18, 2005 Order. In response to CV's motion, FEMA stated that Richland County decided to adopt the 2001 floodway via ordinance, and denied that it mandated that the county adopt the vacated floodway. Judge Seymour denied the motion to hold FEMA in contempt. However, the district court issued a text order on November 2, 2007, affirming that the November 18, 2005 Order of Vacatur had set aside FEMA's 2001 flood elevation determinations, including the floodway determination, and restated the 1995 flood elevation determinations, including the 1995 floodway.

77. Both FEMA and the Defendant-Intervenors appealed the district court's 2007 text order, and the Defendant-Intervenors filed a motion for a stay of the court's judgment pending appeal with both the district court and court of appeals, which granted a stay by text order dated

July 21, 2008, and issued an opinion on April 3, 2009, vacating the district court's Order of Vacatur and remanding the case to the district court for further proceeding.

78. Thereafter, the district court set CV's appeal for a hearing on September 9 and 10, 2009; however, on September 3, 2009, the parties entered into a stipulation of compromise settlement, and on September 8, 2009, the district court issued an Order dismissing CV's judicial appeal with prejudice. Accordingly, CV's judicial appeal pursuant to 42 U.S.C. § 4104 is now ended.

**RICHLAND COUNTY'S CONDUCT PRIOR TO THE ORDER OF VACATUR
ISSUED ON NOVEMBER 18, 2005**

79. Prior to June 1, 2004, the Richland County Code of Ordinances defined floodplain and floodway as follows:

Floodplain: The areas adjoining a river, stream, watercourse, lake, or other body of standing water that have been or may be covered by floodwater. For purposes of this ordinance the floodplain is considered to be that area designated by the notation "-FP" appended to a basic district classification. This district classification is based on the floodplain as shown on the official Flood Boundary Floodway Maps, and Flood Insurance Rate Maps (Dated January 19, 1994), the accompanying Flood Insurance Study (Dated January 19, 1994), and any revisions thereto. Other floodplain information available from local, state or federal sources can be used if the official maps do not cover that area.

Floodway: The channel of a watercourse and that portion of the adjoining floodplain required to provide for the passage of a 100-year flood with an insignificant increase in flood stage above that of natural conditions. For the purposes of this ordinance the floodway is considered to be that area designated by the notation "-FW" appended to the district classification. The district classification is based upon the floodway as shown on the official Flood Boundary Floodway Maps (Dated January 19, 1994), the accompanying Flood Insurance Study (Dated January 19, 1994), and any revisions thereto. Other floodway information available from local, state or federal sources can be used if the official maps do not designate a floodway.

Richland County Code 26-73.3.

80. By resolution dated December 7, 1999, Richland County authorized an administrative appeal from FEMA's determinations of August 12, 1999, that no floodway existed landward of the Manning levees. Implicit in this authorization is Richland County's impression that such a floodway determination was incorrect and that Richland County was critically evaluating the scientific and technical basis of FEMA's data and determinations.

81. In or around the summer of 2000, Richland County began consideration of a draft ordinance amending Chapter 8 of the Richland County Code of Ordinances, which would provide, in pertinent part, that "[n]o levees, dikes, fill materials, structures, or obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway."

82. On or about March 16, 2001, the lawyer from SELC who represented the Defendant-Intervenors in their opposition to CV's judicial appeal proposed to Richland County Council an amendment to the draft ordinance referenced in paragraph 81, *supra*, that allowed exceptions for an existing school and an existing wastewater treatment facility to build in a floodway.

83. On March 20, 2001, Richland County Council held its first reading of the draft ordinance referenced in paragraph 81, *supra*, and containing the exceptions proposed by the SELC referenced in paragraph 82, *supra*.

84. On April 3, 2001, Richland County Council held its second reading of the draft ordinance referenced in paragraph 81, *supra*, which contained two additional exceptions to the prohibition: (1) impediments approved by the county engineer prior to January 1, 2001, and (2) impediments such as minor recreation fields, picnic areas, etc.

85. On April 17, 2001, Richland County Council approved the ordinance amending Chapter 8 of the Richland County Code of Ordinances which, in final form, stated: "Notwithstanding any other provision of this Chapter, no levees, dikes, fills, materials, structures, or obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway, unless: (1) such proposed impediment is or would be part of or used by any public or private school that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway; or (2) such proposed impediment is or would be part of or used by a publicly owned wastewater treatment facility that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway; or (3) such proposed impediment is a minor recreational or playground facility or area . . . ; or (4) such impediment was approved by the County Engineer under this subsection (h), or under any predecessor provision, before January 1, 2001." This ordinance also provided that levees, dikes, dams, and similar structures could be maintained and repaired, but that no repair or maintenance could occur that "would result in a structure that would be higher or wider than it was before the need arose for such repair or maintenance."

86. On May 15, 2001, Richland County Council approved an ordinance amending Section 26-73 "FW and FP Flood Protective Areas." This amendment permitted the following uses for areas designated FW: agricultural use areas, parking and loading areas, open-air uses generally accessory to residential uses; recreation uses that are primarily open-air, such as swimming areas, golf courses, playgrounds, etc.; airport runway and landing strips; streets bridges, etc.; "[a]ny existing or future facility that is or will be a part of or used by any public or private school that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway . . . ; [and] [a]ny existing or future facility that

is or will be a part of or used by any publicly owned wastewater treatment facility that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway”

87. Prior to FEMA’s 2001 Final Determination (August 20, 2001), Richland County was taking affirmative steps to thwart CV’s development plans and its plans to improve its levees while making specific exceptions favoring certain of CV’s neighboring landowners.

88. On June 1, 2004, the Richland County Code of Ordinances was amended to include updated definitions of floodplain and floodway, which are as follows:

Floodplain: The areas adjoining a river, stream watercourse, lake, or other body of standing water that have been or may be covered by floodwater. For purposes of this chapter, the floodplain is considered to be that area designated by the notation “-FP” appended to a basic district classification. This district classification is based on the floodplain as shown on the official Flood Insurance Rate Maps (Dated February 20, 2002), the accompanying Flood Insurance Study (Dated February 20, 2002), and any revisions thereto. Other floodway information available from local, state or federal sources can be used if the official maps do not cover that area.

Floodway: The channel of a watercourse and that portion of the adjoining floodplain required to provide for the passage of a 100-year flood with an insignificant increase in flood stage above that of natural conditions. For the purposes of this chapter, the floodway is considered to be that area designated by the notation “-FW” appended to the district classification. The district classification is based upon the floodway as shown on the official Flood Insurance Rate Map (Dated February 20, 2002), the accompanying Flood Insurance Study (Dated February 20, 2002), and any revisions thereto. Other floodway information available from local, state, or federal sources can be used if the official map does not designate a floodway.

RICHLAND COUNTY'S CONDUCT AFTER THE DISTRICT COURT VACATED THE 2001 BFEs AND FLOODWAY AND REINSTATED THE 1995 BFEs AND FLOODWAY

89. After the United States District Court vacated FEMA's 2001 BFEs and floodway and reinstituted the 1995 BFEs and floodway, Richland County took steps to keep in place the vacated 2001 floodway in order to prevent CV from improving its levees and to block CV's investment-based plans to develop its property.

90. On or about February 21, 2006, Richland County adopted an ordinance declaring a 60-day moratorium "on the approval or denial of any permit submitted to Richland County for construction, development, zoning, building, disturbance of land, or for stormwater management purposes . . . on property located in a flood-prone area within the Congaree River Floodplain." CV's property was included in the area affected by the moratorium.

91. On or about May 16, 2006, Richland County passed an ordinance extending the moratorium referenced in paragraph 90, *supra*, by an additional 60 days.

92. On or about July 11, 2006, Richland County passed an ordinance extending the moratoria referenced in paragraphs 90 and 91, *supra*, by an additional 90 days.

93. These moratoria made it clear that CV would not be allowed a permit to improve its levees, which were located in the affected area.

94. On or about October 2, 2006, the Richland County Planning Commission voted not to recommend adoption of a proposed ordinance to adopt a regulatory floodway on CV's property based on the 2001 floodway.

95. On or about December 5, 2006, however, Richland County passed an ordinance adopting the 1995 BFEs but retaining the 2001 floodway, which had been vacated by the district court over a year before. The effect of this ordinance was to place a floodway on CV's property by political fiat that had no rational relationship to the BFEs made applicable to CV's property

by the ordinance. In all other areas of the county, floodways were determined based on a one foot target surcharge over the BFEs. For the area covered by this ordinance, however, the floodway elevation was not determined based on a one foot target surcharge over the BFEs but was, in fact, lower than the BFEs and completely arbitrary and irrational. Compare the floodway data table for cross-sections A through E that transverse CV's property from the 1995 FIS (copy attached marked Exhibit 10) with the same floodway data table from the 2001 FIS (copy attached marked Exhibit 11) and the hypothetical floodway data table combining the 1995 BFEs without floodway with the 2001 BFEs with floodways (copy attached marked Exhibit 12).

96. The 2001 floodway adopted by the county thus had no relation to and was not derived from the 1995 BFEs applicable to CV's property and was, accordingly, arbitrary and irrational.

97. Moreover, on or about December 7, 2006, two days after the county had adopted the 1995 BFEs and 2001 floodway, Richland County submitted a letter of map revision request to FEMA to restore the vacated 2001 base flood water surface elevations without floodway. This request was submitted by Richland County to FEMA on December 7, 2006, without notice to CV or other affected land owners, and was apparently authorized by a vote taken in executive session in violation of South Carolina law.

98. At no time after November 18, 2005, did Richland County attempt to conform its effective ordinances to the 1995 base flood elevation determinations, which were reinstituted by Judge Seymour's Order of even date. Instead, Richland County specifically requested on December 7, 2006, that FEMA adopt the 2001 Final Determination that had long been vacated by Judge Seymour.

99. In December 2007, CV learned that a member of the Richland County Council, who served as council chairperson during many of Council's debates on this issue, is and was a member of the Board of Trustees of the SELC, the corporate organization representing the Defendant-Intervenors in their opposition to CV's federal judicial appeal.

100. Based on the County's actions in passing discriminatory ordinances and moratoria specifically targeting and frustrating CV's development plans as well as the presence on the Richland County Council of a board member of the organization leading the legal challenge to CV's development plans, CV concluded in 2006 and 2007 that Richland County would never allow CV to improve its levees.

101. In an attempt to mitigate its damages, CV has been forced to sell portions of its land, and in late 2007, CV sought annexation of its remaining property into the City of Cayce. This annexation was completed on December 27, 2007. Prior to this annexation, the actions of the county in adopting a storm water ordinance(s) that targeted CV's property for unfair and discriminatory treatment, in adopting the 2001 regulatory floodway covering approximately 70% of CV's property, in adopting moratoria after the floodway was invalidated by the federal court, in adopting the 2001 vacated floodway that had no rational relation to the 1995 BFEs reinstituted by the federal court and adopted by the county, and by seeking to reinstate the vacated 2001 BFEs by filing a request with FEMA that was apparently authorized by a vote not taken in open session, which request was made without notice to CV, other affected landowners, or members of the public, all effectively eliminated CV's distinct investment-backed expectations to develop its property as a mixed use, high-tech research development park with other commercial, residential, recreational, and conservation uses and put CV in the position of having to take actions to mitigate its losses. CV is informed and believes that Richland County took the above-

described actions for the very purpose of preventing CV's announced plans to develop its property, and the county took no reasonable steps to verify that technical questions raised during the administrative appeals with FEMA had been satisfactorily resolved, that FEMA's proposed flood elevation determinations were scientifically and technically correct, that the area landward of the Manning levee was an area of effective flow, or that the proposed regulatory floodway was based on equal reduction of conveyance.

FOR A FIRST CAUSE OF ACTION

102. CV realleges paragraphs 1 through 101 above, which are incorporated herein by reference.

103. CV is aggrieved by the actions of Richland County in adopting FEMA's Final Determination of floodway because local ordinances adopted by Richland County pursuant to the NFIP, the county's storm water ordinance, and its land development code virtually prohibit construction in the floodway affecting CV's property, whereas construction, subject to certain restrictions, is permitted in the floodplain. Also, a series of ordinances adopted by Richland County effectively preclude the improvement of levees located within the floodway affecting CV's property. Accordingly, Richland County's actions as aforesaid substantially diminish the value of CV's property and preclude CV's publicly announced plans to develop its property as a mixed use, high-tech research development park with other commercial, residential, recreational, and conservation uses.

104. CV had both the intent and capacity to develop its property as aforesaid, and CV's distinct investment-backed expectations were reasonable under the circumstances.

105. CV expended large amounts of money and other resources in preparation for the development of its property, all of which are lost as a result of the actions taken by Richland County.

106. The Fifth Amendment to the United States Constitution, which is applicable to the State of South Carolina and its political subdivisions, including Richland County, by virtue of the Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

107. Government statutes, ordinances, or regulations that substantially further important public policies may nevertheless amount to a taking of private property for public use to the extent that such statutes, ordinances, or regulations frustrate the property owner's distinct investment-backed expectations.

108. CV acquired its property on the Congaree River with the distinct investment-backed expectation of developing the entire 4,474 acre tract as a mixed-use development with an emphasis on a high tech research development park with additional commercial, residential, recreational, and conservation uses.

109. Richland County's adoption of a regulatory floodway that includes approximately 70% of CV's property has completely frustrated CV's distinct investment-backed expectation and substantially diminished the value of CV's property.

110. The character of the governmental action taken by Richland County is not such that the county can avoid compensating CV for the economic effect of its regulations on CV in eliminating CV's reasonable investment-backed expectations. Richland County in effect imposed a regulatory floodway easement or restrictive covenant by ordinance that covers

approximately 70% of CV's property and has enacted ordinances designed to prevent CV from improving its levees thereby appropriating to the county the right to flood CV's property that CV previously had the right to protect from flooding and to develop.

111. There is no sound engineering or scientific or technical evidence to support Richland County's adoption of the regulatory floodway proposed by FEMA as the actual floodway for the area of the Congaree River floodplain in question as that term is defined in the Richland County ordinance: *i.e.*, "the channel of [the] watercourse and that portion of the adjoining floodplain required to provide for the passage of a 100-year flood with an insignificant increase in flood stage above that of natural conditions."

112. Accordingly, Richland County's action in adopting the regulatory floodway proposed by FEMA is arbitrary. Furthermore, the County has arbitrarily exempted certain uses (such as the Heathwood Hall Episcopal School and the City of Columbia's wastewater treatment plant) from the prohibition against building in a floodway.

113. Also, the purpose of a regulatory floodway as outlined in FEMA's regulations and in Richland County's ordinances, is to reserve the channel of the river and land adjacent to the channel of the river as an unobstructed flow corridor in order to convey or discharge the base flood without raising the water surface elevation of the base flood. The floodway adopted by Richland County, however, is broader than necessary to promote the governmental purpose set forth in the county's floodway ordinance - *i.e.*, the passage of the base flood. The regulatory floodway adopted by the county in fact includes large areas that do not convey water in the general direction of flow (*i.e.*, ineffective flow areas) that are not properly includable in a regulatory floodway determined by equal reduction of conveyance.

114. Richland County, in arbitrarily adopting the extensive regulatory floodway proposed by FEMA, has, in effect, forced CV alone to bear public burdens which in all fairness and justice should be borne by the public as a whole.

115. Richland County's adoption of said regulatory floodway constitutes a regulatory taking of CV's property without just compensation or due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

116. S.C. Code Ann § 28-11-30(3) provides that "[w]here an inverse condemnation proceeding is instituted by the owner of any right, title or interest in real property because of use of his property in any program or project, the court, rendering a judgment for the plaintiff in such proceeding and awarding compensation for the taking of property ... shall determine and award or allow to such plaintiff, as part of such judgment . . . , such sum as will, in the opinion of the court . . . reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees actually incurred because of such proceeding."

117. CV is informed and believes that it is entitled to recover in these proceedings just compensation for the regulatory taking of its property, plus prejudgment interest as well as its expenses as aforesaid, including attorneys' fees, and/or a judgment declaring the aforesaid Richland County floodway ordinance invalid as applied to CV.

FOR A SECOND CAUSE OF ACTION

118. CV realleges paragraphs 1 through 117 above which are incorporated hereby by reference.

119. The actions of Richland County in taking CV's property without just compensation also violate Article I, § 13 of the South Carolina Constitution, which provides in

pertinent part that "private property shall not be taken . . . for public use without just compensation being first made therefor."

120. Under the South Carolina Constitution, a regulation that advances a legitimate state interest may nevertheless constitute a taking if it deprives an owner of all economically viable use of his land.

121. A finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations.

122. Richland County's action as aforesaid in adopting the extensive regulatory floodway on CV's property has deprived CV of all economically viable use of all or part of its land.

123. CV is informed and believes it is entitled to recover in these proceedings just compensation for the regulatory taking of its property as aforesaid, including prejudgment interest, expenses, and attorneys' fees, and/or a judgment declaring the aforementioned Richland County floodway ordinance invalid as applied to CV.

FOR A THIRD CAUSE OF ACTION

124. CV realleges paragraphs 1 through 123 above, which are incorporated herein by reference.

125. Richland County's arbitrary adoption of a floodway that is not based on sound engineering or evidence that is scientifically or technically correct violates the substantive due process rights of CV guaranteed by the Fourteenth Amendment to the Constitution of the United States and by Article I, § 3 of the Constitution of the State of South Carolina. Also, the county's adoption of a regulatory floodway that includes large areas of ineffective flow that have no capacity to convey or discharge the base flood constitute a taking of CV's property that serves no

governmental purpose and violates the substantive due process right of CV guaranteed by the Fourteenth Amendment to the Constitution of the United States and by Article I, Section 3 of the Constitution of the State of South Carolina.

126. As a consequence, CV is informed and believes that it is entitled to recover in these proceedings just compensation for the regulatory taking of its property as aforesaid, including prejudgment interest, expenses, and attorneys' fees, and/or a judgment declaring the aforementioned Richland County floodway ordinance invalid as applied to CV.

FOR A FOURTH CAUSE OF ACTION

127. CV realleges paragraphs 1 through 126 above, which are incorporated herein by reference.

128. 42 U.S.C. § 1983 provides CV with a cause of action for the taking of its property under color of any state statute, ordinance, or regulation without just compensation as a deprivation of its rights or privileges secured by the United States Constitution.

129. Richland County's adoption of a regulatory floodway as aforesaid that includes approximately 70% of CV's property within the floodway and frustrates CV's distinct investment-backed expectations constitutes a deprivation of CV's rights secured by the United States Constitution under color of state law, entitling CV to the remedies provided by 42 USC § 1983.

130. The actions of Richland County acting under color of state law also have deprived CV of its rights secured by the United States Constitution in that Richland County, in adopting a regulatory floodway that is not scientifically and technically correct, is without sound engineering support, and that includes large areas of ineffective flow that serve no public

purpose but frustrate CV's distinct investment-backed expectations, has acted in an arbitrary manner, thus depriving CV of due process of law in violation of the Fourteenth Amendment.

131. 42 U.S.C. § 1983 also provides CV with the remedy of damages.

132. CV has suffered general damages resulting from the diminution in the value of its property, special or consequential damages in the form of reasonable expenditures made in preparation for its property's development, and profits lost because of CV's inability to develop its property. All of the aforementioned damages were proximately caused by the actions of Richland County, as aforesaid, acting under color of state law.

133. CV is informed and believes that it is entitled to recover under said statute reasonable compensation for the taking of its property plus prejudgment interest, as well as damages and costs, including reasonable attorneys' fees and/or a judgment declaring the aforesaid Richland County floodway ordinance invalid as applied to CV.

ATTORNEYS' FEES UNDER S.C. CODE ANN. § 15-77-300

134. CV realleges paragraphs 1 through 133 above, which are incorporated herein by reference.

135. S.C. Code Ann. § 15-77-300 provides that "[i]n any civil action brought by the state, any political subdivision of the state, or any party contesting state action, unless the prevailing party is the state or any political subdivision of the state, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if (1) the court finds that the agency acted without substantial justification . . . and (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust."

136. If CV prevails in this action, it will be entitled to recover its reasonable attorneys' fees and costs pursuant to S.C. Code Ann. § 15-77-300.

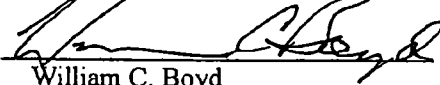
DEMAND FOR TRIAL BY JURY

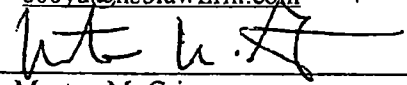
137. CV demands a jury trial on any issue triable by jury as a matter of right.

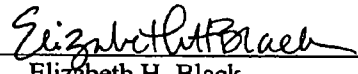
PRAYER FOR RELIEF

CV prays that the Court inquire into the matters and things alleged herein and award CV reasonable compensation for the taking of its property, plus prejudgment interest and actual and consequential damages, together with the cost of this action including reasonable attorneys' fees, and/or a judgment declaring the aforesaid Richland County floodway ordinance invalid as applied to CV, and for such other and further relief as the court may deem just and proper.

HAYNSWORTH SINKLER BOYD, P.A.

By: 
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By: 
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By: 
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PO Box 11889 (29211-1889)
Columbia, SC 29201-3226
(803) 779.3080 Tel
(803) 765.1243 Fax

Attorneys for Plaintiff

October 5, 2009

EXHIBIT A

PROPERTY DESCRIPTION

PARCELS A-1, A-2, A-3, B-1, B-2, C, D and E:

All those pieces, parcels, lots or tracts of land, with improvements thereon, situate, lying and being near the City of Columbia, County of Richland, State of South Carolina, as shown and delineated on a plat of Parcel A-1 containing 340.037 acres, Parcel A-2, containing 236.585 acres, Parcel A-3 containing 15.014 acres, Parcel B-1 containing 246.574 acres, Parcel B-2 containing 8.227 acres, Parcel C containing 227.387 acres, Parcel D containing 31.657 acres, and Parcel E containing 322.323 acres, for a total of 1,427.804 acres, prepared for Burroughs & Chapin Company, Inc. and Chicago Title Insurance Company, by B. P. Barber & Associates, Inc., dated June 26, 1998, last revised February 8, 1999, and recorded in Office of the Register of Deeds for Richland County in Record Book 281 at Page 441.

PARCELS F, G, H and J:

All those pieces, parcels, lot or tracts of land, with improvements thereon, situate, lying and being near the City of Columbia, County of Richland, State of South Carolina, as shown and delineated on a plat of Parcel F containing 950.488 acres, Parcel G containing 1,917.155 acres, Parcel H containing 105.190 acres, and Parcel J containing 0.269 acres, for a total of 2,973.102 acres, prepared for Burroughs & Chapin Company, Inc. and Chicago Title Insurance Company, by B. P. Barber & Associates, Inc., dated January 22, 1999, last revised February 11, 1999, and recorded in the Office of the Register of Deeds for Richland County in Record Book 281 at page 440.

PARCEL L:

All that certain piece, parcel or lot of land, with improvements thereon, if any, situate, lying and being in the County of Richland, State of South Carolina, south of the City of Columbia, shown and delineated as Parcel L, containing 51.705 acres, on a plat of survey prepared for Burroughs & Chapin Company, Inc. and Chicago Title Insurance Company, by B.P. Barber & Associates, Inc., dated January 22, 1999, last revised February 11, 1999, and recorded in the Office of the Register of Deeds for Richland County in Record Book 281 at page 440.

PARCEL No. 2:

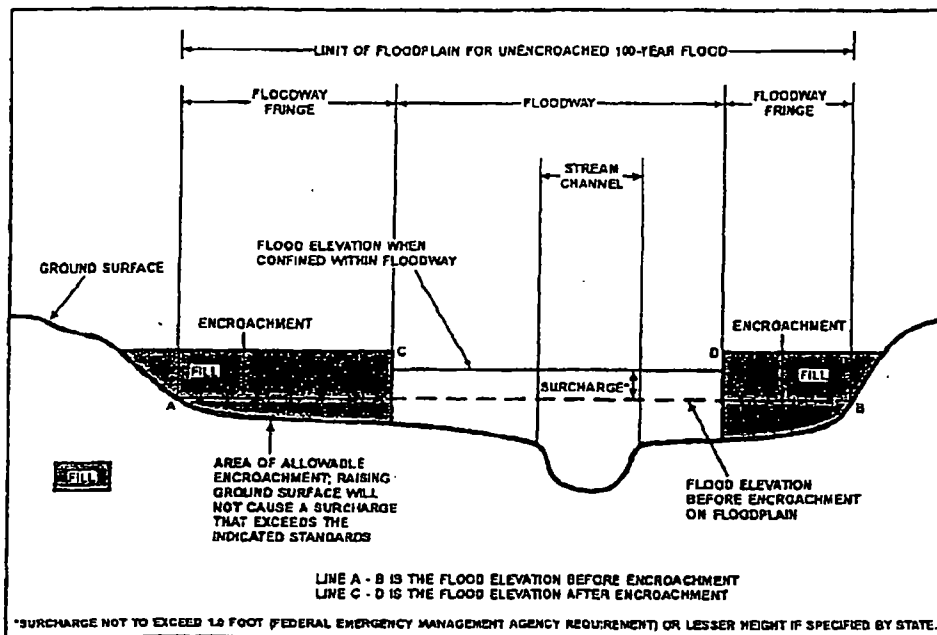
All that certain piece, parcel or tract of land with improvements thereon, if any, situate, lying and being near the City of Columbia, County of Richland, State of South Carolina, and delineated on a plat of Parcel No. 2, containing 11.89 acres, more or less, prepared for Heathwood Hall Episcopal School, by Cox and Dinkins, Inc., dated April 18, 1996, last revised June 3, 1998, in the Office of the Register of Deeds for Richland County in Record Book 96 at page 614.



LESS AND EXCEPTING:

All that certain piece, parcel or tract of land with improvements thereon, if any, situate, lying and being near the City of Columbia, County of Richland, State of South Carolina, containing 2.16 acres and being shown on a plat prepared for Columbia Venture, LLC by Survey & Mapping Services of South Carolina, Inc. dated August 23, 2000 and recorded in the Office of the Register of Deeds for Richland County in Record Book 518 at page 2977.

The total acreage of all the above parcels, according to the above-referenced plats, is 4,462.341 acres.



FLOODWAY SCHEMATIC

Figure 1

5.0 INSURANCE APPLICATIONS

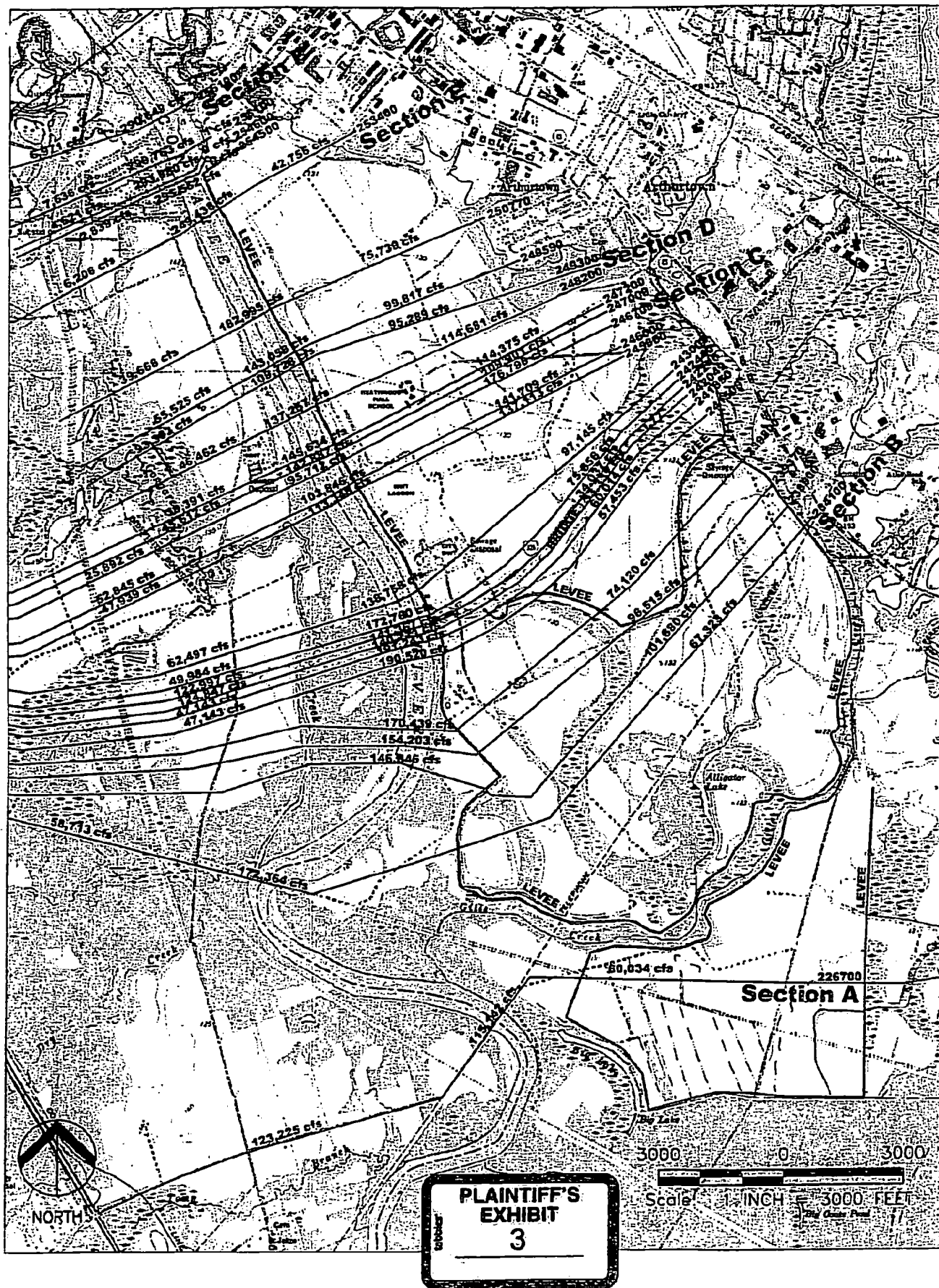
For flood insurance rating purposes, flood insurance zone designations are assigned to a community based on the results of the engineering analyses. The zones are as follows:

Zone A

Zone A is the flood insurance rate zone that corresponds to the 100-year floodplains that are determined in the FIS by approximate methods. Because detailed hydraulic analyses are not performed for such areas, no base flood elevations or depths are shown within this zone.

Zone AE

Zone AE is the flood insurance rate zone that corresponds to the 100-year floodplains that are determined in the FIS by detailed methods. In most instances, whole-foot base flood elevations derived from the detailed hydraulic analyses are shown at selected intervals within this zone.



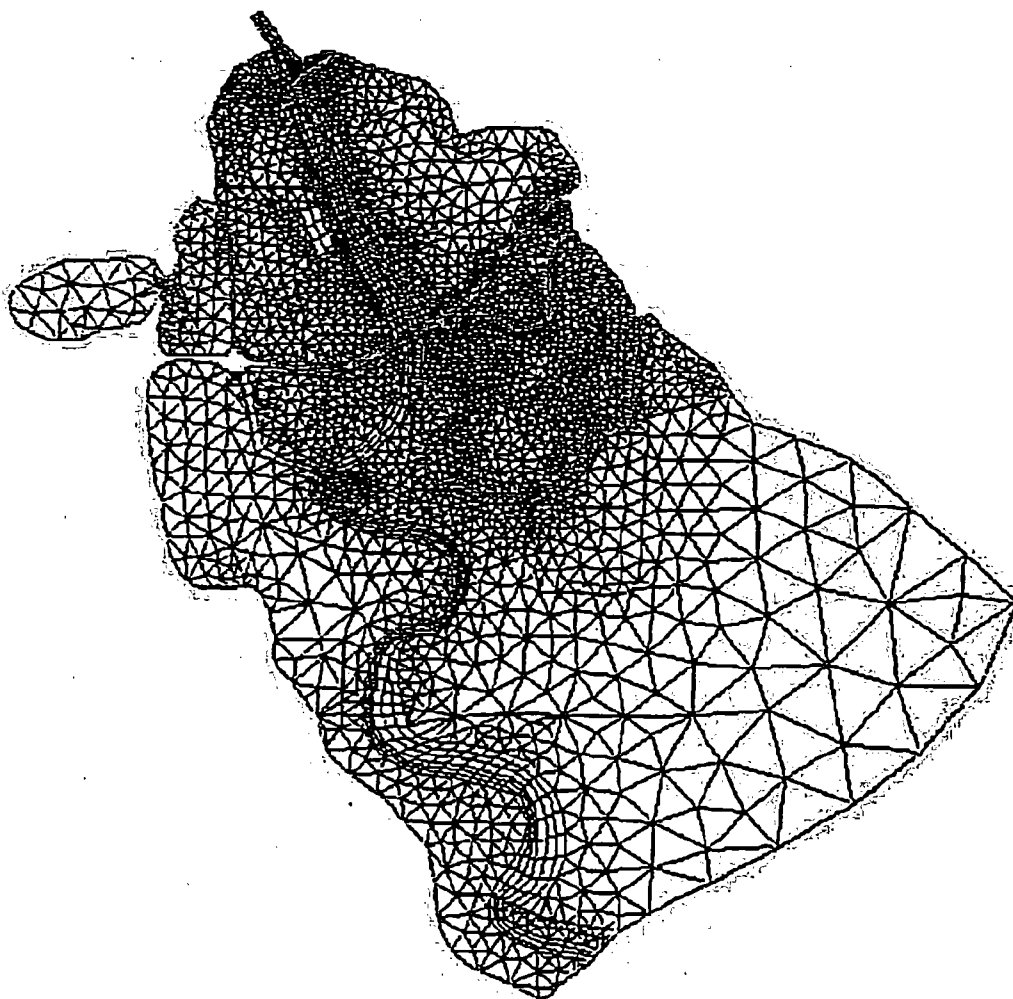


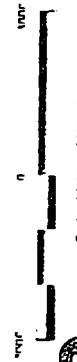
Figure 1: Mesh Representation of the Study Area.



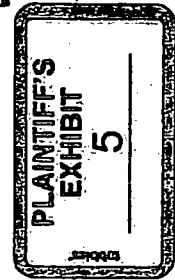


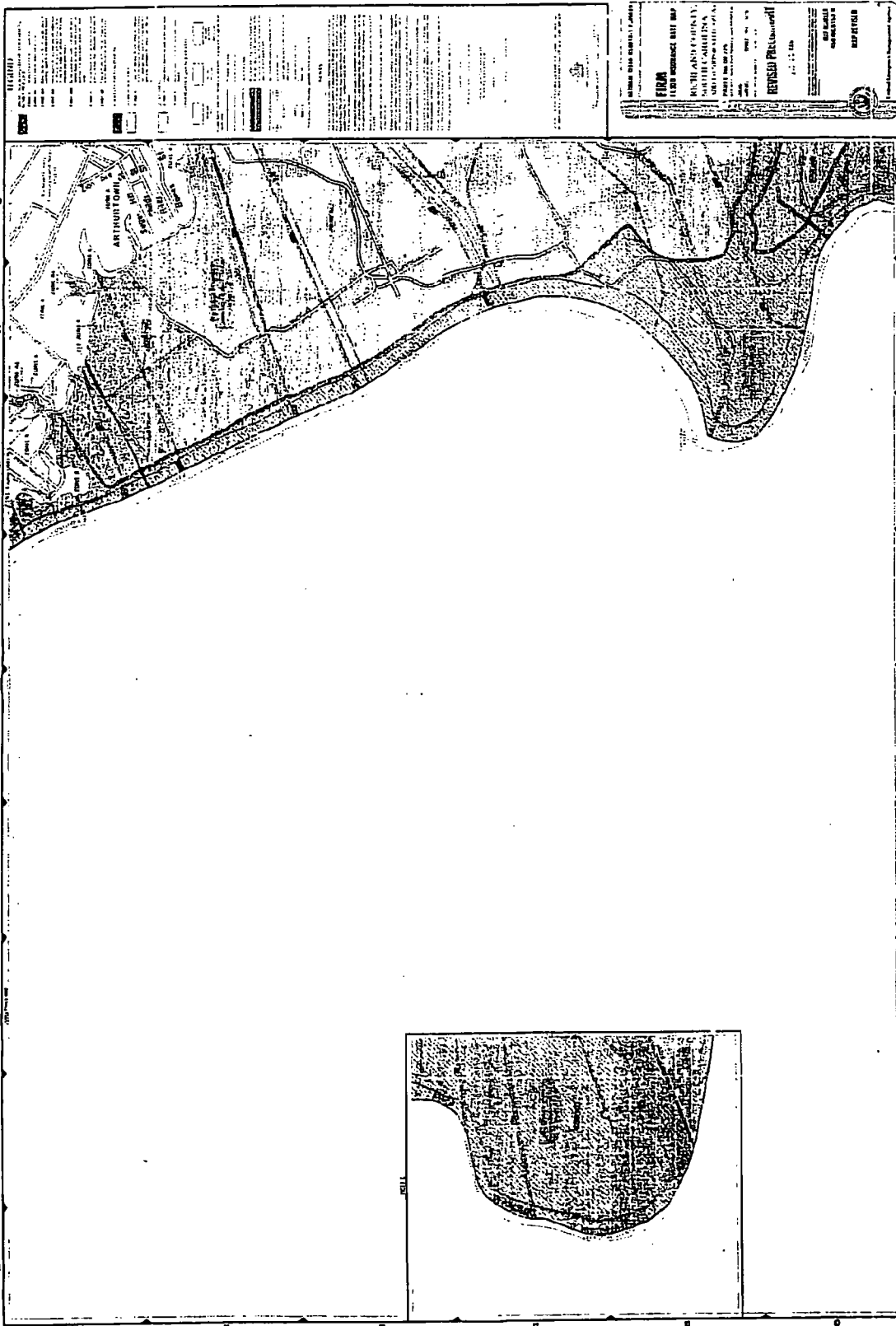
North

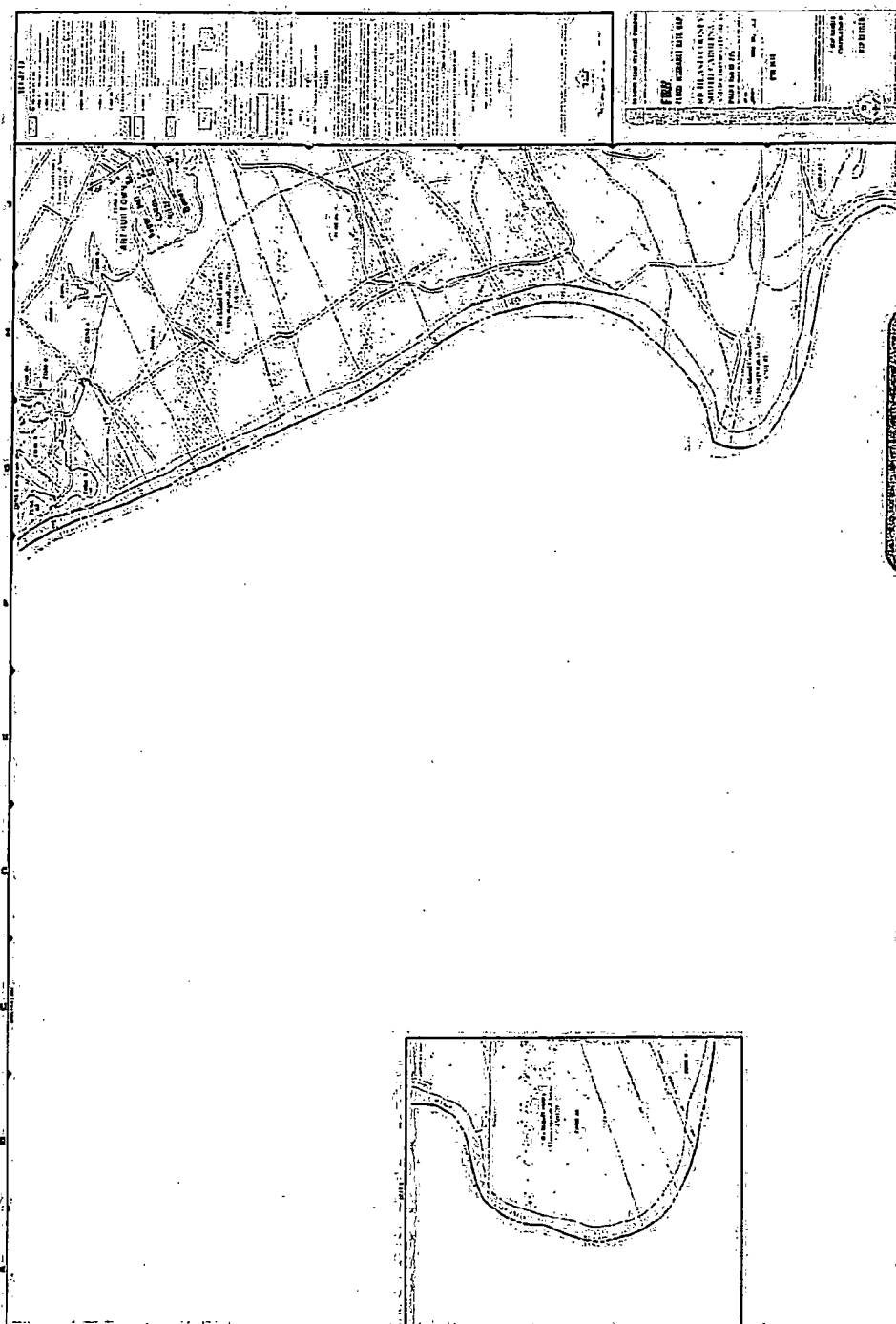
O V E R A I L S U R F I L A N

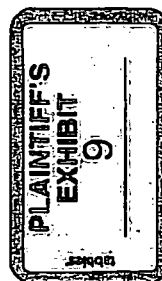
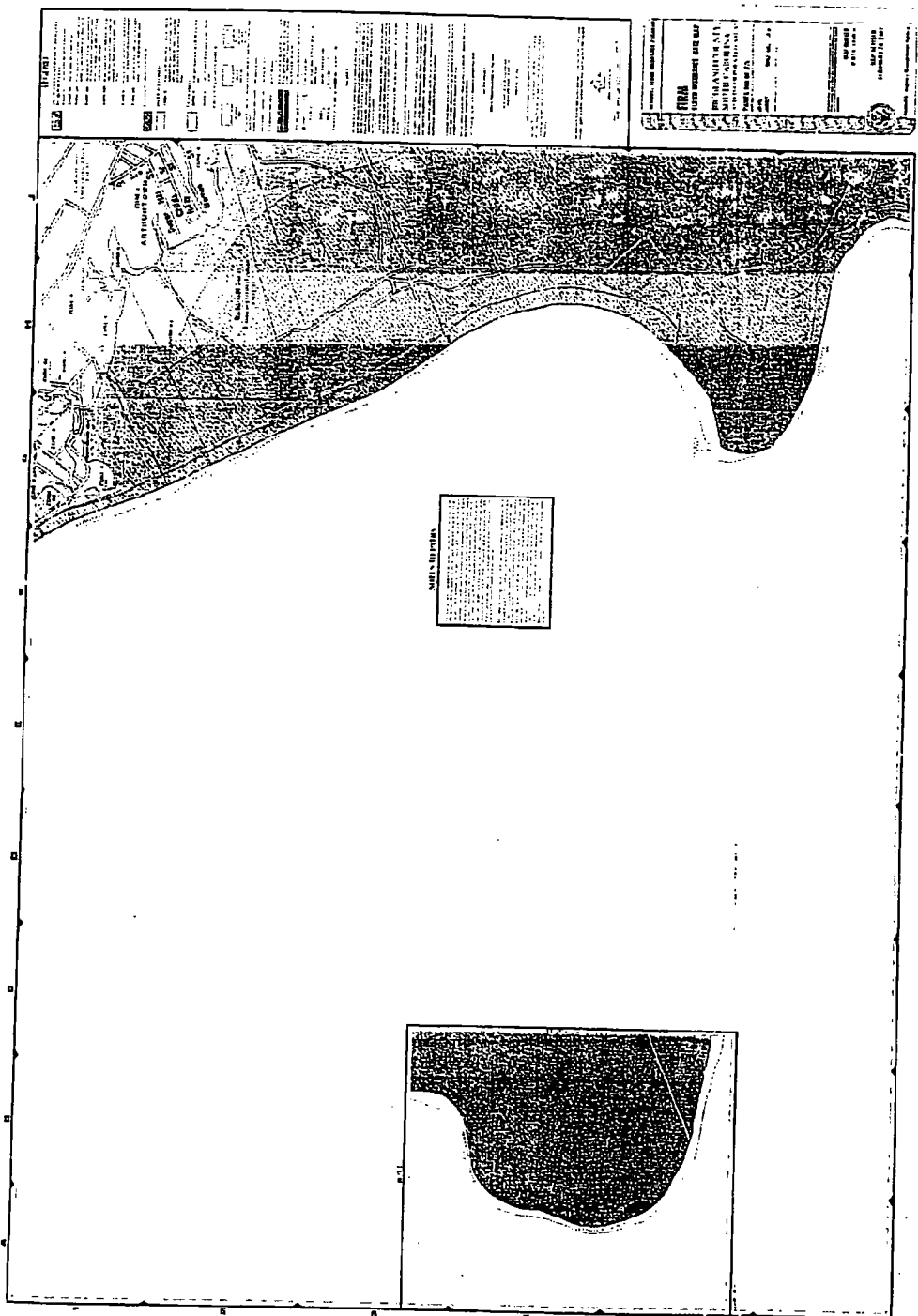


Scale - 1 inch = 1000 feet



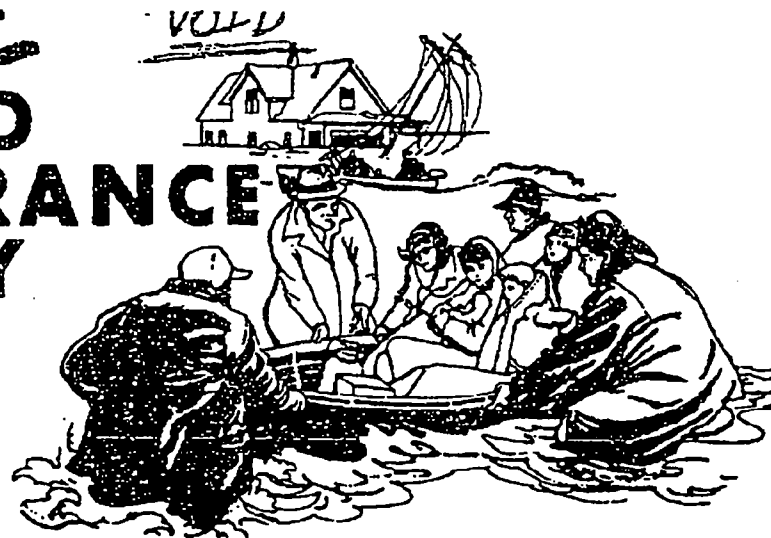






45079C

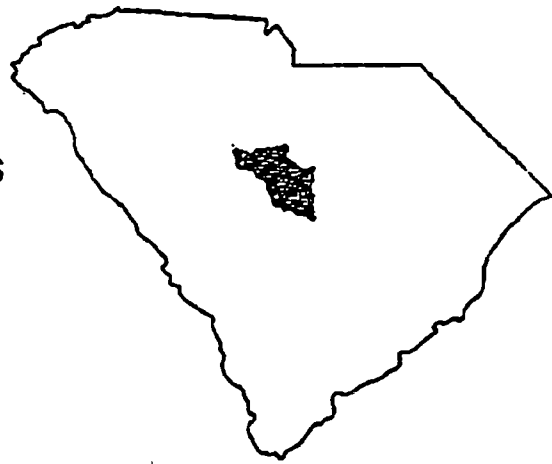
FLOOD INSURANCE STUDY



RICHLAND COUNTY, SOUTH CAROLINA AND INCORPORATED AREAS

VOLUME 1 OF 2

COMMUNITY NAME	COMMUNITY NUMBER
ARCADIA LAKES, TOWN OF	450171
COLUMBIA, CITY OF	450172
EASTOVER, TOWN OF	450173
FOREST ACRES, CITY OF	450174
IRMO, TOWN OF	450133
UNINCORPORATED AREAS	450170



REVISED:
JULY 17, 1995



Federal Emergency Management Agency

FEMA 00001

PLAINTIFF'S
EXHIBIT
10

FLOODING SOURCE		FLOODWAY			BASE FLOOD WATER SURFACE ELEVATION			
CROSS SECTION	DISTANCE ¹	WIDTH ² (FEET)	SECTION AREA (SQUARE FEET)	MEAN VELOCITY (FEET PER SECOND)	REGULATORY	WITHOUT FLOODWAY (FEET NGVD)	WITH FLOODWAY	INCREASE
Congaree River								
A	226,700	5,190	90,350	4.5	134.6	134.6	135.6	1.0
B	234,100	9,250	142,227	2.8	138.5	138.5	139.4	0.9
C	239,800	9,480	166,892	2.4	140.2	140.2	140.8	0.6
D	246,700	8,440	132,975	3.1	141.9	141.9	142.6	0.7
E	249,300	5,200	46,410	8.6	141.9	141.9	142.6	0.7
F	253,400	4,090	47,391	8.5	145.6	145.6	146.6	1.0
G	256,100	3,720	74,605	5.4	150.1	150.1	150.8	0.7
H	258,400	1,575	41,585	9.6	150.7	150.7	151.4	0.7
I	261,200	1,350	51,160	7.8	154.1	154.1	155.0	0.9
J	262,900	1,470	47,460	8.4	154.4	154.4	155.3	0.9
K	264,500	1,470	50,592	8.0	155.2	155.2	156.1	0.9
L	265,200	1,520	54,066	7.4	155.6	155.6	156.5	0.9
M	266,900	1,050	39,187	10.2	155.9	155.9	156.7	0.8
N	268,920	2,120	61,257	6.5	157.4	157.4	158.3	0.9
O	270,450	1,330	65,898	6.1	157.5	157.5	158.5	1.0
Saluda River								
A	3,300	780	18,124	5.8	159.6	159.6	160.5	0.9
B	10,870	615	9,655	10.9	168.9	168.9	169.7	0.8
C	13,600	840	15,081	7.0	175.1	175.1	176.0	0.9
D	15,300	1,014	16,808	6.2	177.3	177.3	178.1	0.8
E	17,000	805	14,412	7.3	178.9	178.9	179.6	0.7

¹feet above mouth²this width extends beyond county boundary

TABLE

FEDERAL EMERGENCY MANAGEMENT AGENCY

RICHLAND COUNTY, SC
AND INCORPORATED AREAS

FLOODWAY DATA

CONGAREE RIVER - SALUDA RIVER

BASE FLOOD

FLOOD INSURANCE STUDY

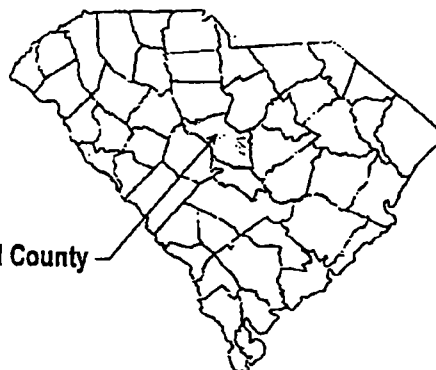
VOLUME 1 OF 2



RICHLAND COUNTY, SOUTH CAROLINA AND INCORPORATED AREAS

COMMUNITY
NAME
ARCADIA LAKES, TOWN OF
COLUMBIA, CITY OF
EASTOVER, TOWN OF
FOREST ACRES, CITY OF
IRMO, TOWN OF
UNINCORPORATED AREAS

COMMUNITY
NUMBER
450171
450172
450173
450174
450133
450170



Richland County

PROOF
AUGUST 20, 2001

REVISED:



Federal Emergency Management Agency

PLAINTIFF'S
EXHIBIT
11

FLOODING SOURCE			FLOODWAY		BASE FLOOD WATER SURFACE ELEVATION (FEET NGVD)			
CROSS SECTION	DISTANCE ¹	WIDTH ² (FEET)	SECTION AREA (SQUARE FEET)	MEAN VELOCITY (FEET PER SECOND)	REGULATORY	WITHOUT FLOODWAY ³	WITH FLOODWAY ³	INCREASE
Congaree River								
A	226.700	15.299	142.884	2.1	132.8/131.8 ⁶	131.8	132.5	0.7
B	234.100	17.106	148.962	2.0	135.3/133.9 ⁶	133.9	134.6	0.7
C	246.700	10.240 ³	133.962	2.2	139.9/137.4 ⁶	137.4	138.3	0.9
D	249.300	8.775 ³	111.152	2.7	141.7/138.1 ⁶	138.1	139.0	0.9
E	253.400	4.372	42.830	7.0	142.8/139.2 ⁶	139.2	140.2	1.0
F	256.100	626	22.108	13.5	145.7 ⁶	142.6	143.2	0.6
G	258.400	602	21.580	13.8	146.9 ⁶	144.5	145.1	0.6
H	260.400	1,148 ⁴	37.376	8.0	150.5 ⁶	148.7	149.1	0.4
I	261.200	1,314	43.450	6.9	151.7 ⁶	150.1	150.4	0.3
J	262.800	1,391	41.853	7.1	151.9 ⁶	150.4	150.8	0.4
K	264.500	1,470	43.655	6.8	152.4 ⁶	151.0	151.4	0.4
L	265.200	1,090	36.724	8.4	152.5 ⁶	151.1	151.3	0.2
M	266.900	810	30.955	9.4	152.6 ⁶	151.2	151.8	0.4
N	267.750	1,050	34.750	8.4	153.2 ⁶	151.9	152.4	0.5
O	267.850	1,437	48.866	6.0	153.2 ⁶	151.9	152.4	0.5
P	268.920	1,649	48.503	6.0	153.9 ⁶	152.7	153.2	0.5
Q	269.250	1,648	45.308	6.4	154.0 ⁶	152.7	153.2	0.5
R	270.450	2,294 ³	51.343	5.7	154.3 ⁶	153.1	153.7	0.6
S	272.010	2,293 ³	53.644	5.4	154.7 ⁶	153.6	154.1	0.5

¹Feet above mouth

²Width extends beyond county boundary

³Combined Congaree River/Congaree Creek floodway

⁴Combined Congaree River/Rocky Branch floodway

⁵Combined Saluda, Broad, and Congaree River floodway

⁶Water-surface elevation with levees/water-surface elevations without levee

⁷Water-surface elevation with levee

⁸Elevation computed without consideration of the hydraulic effects of the levee

FEDERAL EMERGENCY MANAGEMENT AGENCY

RICHLAND COUNTY, SC
AND INCORPORATED AREAS

FLOODWAY DATA

CONGAREE RIVER

TABLE 3

¹Feet above mouth

²Width extends beyond county boundary

³Combined Congaree River/Congaree Creek floodway

⁴Combined Congaree River/Rocky Branch floodway

⁵Combined Saluda, Broad, and Congaree River floodway

⁶Water-surface elevation with levee/water-surface elevations without levee

⁷Water-surface elevation with levee

⁸Elevation computed without consideration of the hydraulic effects of the levee

FEDERAL EMERGENCY MANAGEMENT AGENCY

RICHLAND COUNTY, SC
AND INCORPORATED AREAS

FLOODWAY DATA

CONGAREE RIVER

TABLE 3

Cross Section	2001/1995 Base Flood Water Surface Elevation (Feet NGVD)			
Congaree River	Regulatory	Without Floodway	With Floodway	Increase
A	134.6	134.6	132.5	- 2.1
B	138.5	138.5	134.6	- 3.9
C	140.2	140.2	138.3	- 1.9
D	141.9	141.9	139.0	- 2.9
E	141.9	141.9	140.2	- 1.7



STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Columbia Venture, LLC,)

Plaintiff,)

vs.)

Richland County,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Case No. 2004-CP-40-3929

**NOTICE OF MOTION
AND MOTION OF DEFENDANT
RICHLAND COUNTY
TO DISMISS PURSUANT TO SCRCP
RULE 12(b)(6)**

JEANETTE W. MCARDLE
C.C.P. & G.S.

2009 OCT -9 PM 1:52

RICHLAND COUNTY
CLERK

**TO: Plaintiff Columbia Venture, LLC and its attorneys, William C. Boyd, Esquire,
Manton M. Grier, Esquire, and Elizabeth H. Black, Esquire:**

You will please take Notice that Defendant Richland County, by and through its undersigned counsel, will move before the presiding judge of the Fifth Judicial Circuit, Richland County Judicial Center, Columbia, South Carolina, on the tenth (10th) day after service thereof, or as soon thereafter as counsel may be heard, for an Order pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure ("SCRCP") dismissing certain causes of action in Plaintiff's Amended and Supplemental Complaint ("Complaint") in the above-captioned action. The grounds for this Motion are as follows:

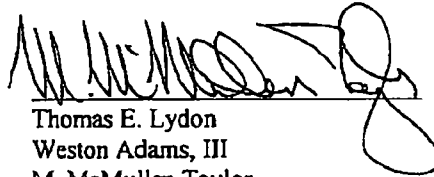
1. The Complaint fails to state facts sufficient to constitute a cause of action for a total regulatory taking under the United States Constitution and the South Carolina Constitution because the Plaintiff has not lost all value of its property.
2. The Complaint fails to state facts sufficient to constitute a cause of action for a substantive due process violation under the Fourteenth Amendment of the United States

Constitution because, as a matter of law, Defendant's actions do not fall beyond the outer limits of legitimate government action.

3. The Complaint fails to state facts sufficient to constitute a cause of action for a substantive due process violation under Article I, Section 3 of the South Carolina Constitution because, as a matter of law, Defendant's ordinances bear a reasonable relationship to a legitimate government interest.

This Motion is based upon the South Carolina Rules of Civil Procedure, applicable law, a memorandum or memoranda of law to be submitted by the Defendant at or before a hearing on this motion, and any other matters the Court may permit to be presented at the hearing on this matter.

Respectfully Submitted,



Thomas E. Lydon
Weston Adams, III
M. McMullen Taylor
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211
(803) 779-2300

Attorneys for Defendant Richland County

Columbia, South Carolina
October 9, 2009

Civil Action No. 2004-CP-40-3929

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of October, 2009 served a copy of the 12(b)(6)

Motion via hand-delivery as follows:

William C. Boyd
Haynsworth Sinkler Boyd, P.A.
1201 Main Street, 22nd Floor
Columbia, South Carolina 29201-3226



Melissa A. Divis
Legal Assistant to M. McMullen Taylor

2009 OCT -9 PM 1:52
FILED
ORLAND COUNTY
JEANETTE W. McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Columbia Venture, LLC)

Plaintiff(s))

vs.)

Richland County)

Defendant(s))

IN THE COURT OF COMMON PLEAS

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

C/A No: 2004-CP-40-3929

Plaintiff's Attorney:
William C. Boyd
Address: Post Office Box 11889
Columbia, South Carolina 29201
phone: (803) 779-3080
fax: (803) 765-1243
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Defendant's Attorney:
M. McMullen Taylor Bar No. 72848
Address: McAngus, Goudelock & Co., LLC
700 Gervais Street, Suite 300
Columbia, South Carolina 29202
phone: (803) 227-4945 fax: (803) 748-0526
e-mail: mullen.taylor@mgclaw.com

2009 OCT -9 PM 4:52
JEANIE M. BRIDGES
C.P.

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTION I and II)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: 12(b)(6) Motion

Estimated Time Needed: 15 min. Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: 25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Columbia Venture, LLC,
Plaintiff,

Case No. 2004-CP-40-3929

vs.

Richland County,
Defendant.

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTIONS TO DISMISS PURSUANT TO RULES 12(b)(6) AND 12(b)(7), SCRCP
AND MOTION TO STRIKE PURSUANT TO RULE 12(f), SCRCP**

Plaintiff, Columbia Venture, LLC (CV) files this memorandum of law in opposition to Defendant Richland County's Motions to dismiss and Motion to strike filed on October 9, 2009, pursuant to Rules 12(b)(6), 12(b)(7), and 12(f) of the South Carolina Rules of Civil Procedure.

Factual Background

As alleged in CV's Amended and Supplement Complaint ("Am. Comp."), filed on October 5, 2009, CV acquired 4,474 acres of land along the Congaree River in Richland County with the distinct investment-backed expectation of developing the entire tract as a mixed-use development with an emphasis on a high-tech research development park with additional commercial, residential, recreation, and conservation uses. Am. Comp. ¶¶ 4, 108. CV expended large amounts of money and other resources in preparing for the development of its property, and CV had both the intent and capacity to develop its property as aforesaid. *Id.* ¶¶ 104, 105.

The land acquired by CV is protected from flooding by a system of levees known as the Manning levees. *Id.* ¶¶ 37-39. These levees also protect the campus and buildings of

Heathwood Hall Episcopal School and the city of Columbia's wastewater treatment plant. Prior to February 20, 2002, the effective Flood Insurance Rate Map (FIRM) for the Congaree floodplain in Richland County, dated January 19, 1994, designated the land protected by the Manning levees as Zone AE, part of the floodplain, but not part of the regulatory floodway, which in Richland County was delineated along the riverside toe of the Manning levees. *Id.* ¶¶ 41-42.

Building in a floodplain is permitted under the National Flood Insurance Act (NFIA) and National Flood Insurance Program (NFIP). 44 C.F.R. § 60.3. The living area of residences must be elevated above the base flood elevation (BFE). *Id.* The base flood is also known as the one-percent-annual chance flood or 100-year flood and is the flood on which FEMA's flood mapping efforts are based. *See* Am. Comp. ¶ 12. FEMA regulations, however, require local communities participating in the NFIP to adopt floodplain management regulations that prohibit the placement of structures or fill in the regulatory floodway that would cause a rise in the water surface elevations of a base flood. 44 C.F.R. § 60.3(d)(3). The regulatory floodway is the channel of the river and adjacent land areas needed to discharge or convey the waters of the base flood. 44 C.F.R. § 59; Am. Comp. ¶ 24. The NFIP is a voluntary program that makes flood insurance available to residents of participating communities with flood prone areas. Richland County participates in the program. Am. Comp. ¶ 10.

Because the Manning levee was built prior to FEMA's adoption of standards for certifying levees, it is not a certified levee under FEMA's regulation, and FEMA determined that it would not prevent flooding, but would block conveyance of flow – *i.e.*, that floodwater would pond landward of the levee but not be conveyed in the general direction of flow. *See id.* ¶¶ 42, 46-47. It was for this reason that the 1994 FIRM (which was in effect until February 20, 2002)

mapped the land protected by the Manning levee as part of the floodplain but not part of the floodway, because that land was never an area of effective flow providing conveyance of flow in the general direction of flow that needs to be reserved to convey or discharge the base flood. *See id.* ¶¶ 45-47.

As part of its publicly announced plans to develop its property, CV had the intent and capacity to improve the Manning levee so that it would be eligible under FEMA's regulations for certification as a levee capable of withstanding a 500-year flood. *Id.* ¶ 43. Land protected by certified levees is not mapped as part of the floodplain, and CV is informed and believes that no 500-year certified levee has ever failed. *Id.*

Because the 1994 FIRM placed the regulatory floodway along the Manning levees, FEMA regulations would have permitted CV to improve its levees by demonstrating that any encroachment with the regulatory floodway (such as that caused by grading the river side of the levees to increase their width) would not cause a rise in the water surface elevation of the base flood. 44 C.F.R. § 60.3(d)(3). Also, no federal or state law prohibits the use of levees as flood control devices, or the development of land protected by levees. Rather, FEMA regulations expressly provide for levees and recognize certified levees as providing protection from the base flood. CV has alleged facts, however, from which it may reasonably be inferred that Richland County was opposed in principle to the development of land protected from flooding by levees and took steps to block CV's plans to improve its levees, thereby restricting a significant portion of CV's land as a floodplain and floodway. Among other things, Richland County adopted a storm water ordinance that prohibited placing anything within a regulatory floodway that would impeded the flow of water. The ordinance does not permit structures or fill that would not cause a rise in the surface water elevation of the base flood and, accordingly, goes beyond what the

NFIP requires. Also, the ordinance expressly targeted CV's land and levees and effectively blocked CV's plans to improve its levees, while expressly exempting CV's immediate neighbors, Heathwood Hall and the city of Columbia. *See* Am. Comp. ¶¶ 85-86.

Also, on August 12, 1999, when FEMA published a revised preliminary FIRM that placed the regulatory floodway along the landward toe of the Manning levee, Richland County appealed to FEMA under the NFIA without any scientific or technical support, which is required by the NFIA to support an administrative appeal. *See id.* ¶¶ 50, 52, 80. Richland County in its appeal presented no scientific or technical evidence to demonstrate that the area protected by the Manning levees was an area of effective flow and hence eligible to be included within a regulatory floodway. *See id.* ¶ 54.

Nevertheless, on September 26, 2000, FEMA issued a new revised preliminary FIRM that reversed its position on the location of the floodway and expanded it to include approximately 70% of CV's property, concluding that the area protected by the Manning levees was now an area of effective flow but with no valid scientific or technical evidence to support this conclusion. *Id.* ¶¶ 55-60. Although FEMA permitted CV to appeal the new revised preliminary FIRM with the agency, on August 20, 2001, it rejected with little explanation CV's scientific and technical evidence demonstrating that the area protected by the Manning levee is not an area of effective flow. *See id.* ¶ 63.

Thereafter, Richland County adopted the August 20, 2001 FIRM (which became effective February 20, 2002) in order to continue its participation in the NFIP and in so doing placed what amounts to a restrictive covenant on 70% of CV's land prohibiting CV from developing that property or improving its levees. *See id.* ¶¶ 66, 88. Consequently, 70% of CV's land was reserved as a floodway for the purpose of conveying floodwater in the event of a base

flood. *See id.* ¶ 5. This action eliminated CV's distinct, investment-backed plans to develop its entire tract as a mixed use development. *Id.* ¶ 103.

Richland County also took no reasonable steps to verify whether FEMA's recent change of position on the location of the floodway was supported by sound engineering. *Id.* As a result, the county has imposed a floodway on large areas of CV's property that are areas of ineffective flow that have no conveyance capacity and should not be included within a regulatory floodway. *Id.* ¶ 113. Furthermore, the County took additional steps to block CV's ability to improve its levees and develop its property. On November 18, 2005, the United States District Court vacated the 2001/2002 BFEs and floodway and reinstituted the 1995 BFEs and floodway. *Id.* ¶ 73. The County reacted by adopting a series of moratoria to deny CV a building permit to improve its levees. *Id.* ¶¶ 89-93. Also, the County passed an ordinance adopting the 1995 BFEs reinstated by the federal court but, at the same time, adopting the 2001/2002 floodway, which had been vacated by the federal court. *Id.* ¶ 95. This ordinance thus imposed a floodway on CV's property by fiat that had no relationship to the BFEs affecting CV's property and was, accordingly, irrational and completely arbitrary. *Id.* ¶¶ 95-96. In all other areas of Richland County, the regulatory floodway was based on a one foot target surcharge above the BFEs (*i.e.* the water surface elevation of the regulatory floodway cannot exceed the base flood elevation by more than one foot). *Id.* ¶¶ 24, 95. On CV's property, however, the floodway (water surface elevation) was lower than the BFEs (by 3.9 feet at one cross-section). *Id.* ¶ 95, Exhibit 12. Finally, the County, without notice to CV, other landowners, or the public at large, by a secret vote taken in executive session in violation of state law, authorized Richland County officials to apply to FEMA for a Letter of Map Revision to reinstate the vacated 2001/2002 BFEs. *Id.* ¶ 97. The County had already adopted the 2001/2002 floodway that had been vacated by the Federal

court. *Id.* ¶ 95.

In its Amended and Supplemental Complaint, CV seeks just compensation for the regulatory taking of its property rights in violation of the Takings Clauses of the United States and South Carolina Constitutions and damages for violations of its rights guaranteed by the United States and South Carolina Constitutions.

Applicable Standards of Review

I. Rule 12(b)(6), SCRCP:

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based upon a plaintiff's failure to state facts sufficient to constitute a cause of action. *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999); *Brazell v. Windsor*, 655 S.E.2d 736, 737 (Ct. App. 2007). "A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the complaint and we must presume all well-pled facts to be true." *Gressette v. S.C. Elec. & Gas Co.*, 370 S.C. 377, 378-79, 635 S.E.2d 538, 538 (2006). "A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory." *Brazell*, 655 S.E.2d at 738.

II. Rule 12(b)(7), SCRCP:

A motion under Rule 12(b)(7), SCRCP "is proper where a necessary party under Rule 19 should be joined for a just adjudication of the issues." *BancOhio Nat'l Bank v. Neville*, 310 S.C. 323, 328, 426 S.E.2d 773, 776 (1993). Under Rule 19, SCRCP, "[a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence *complete* relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as

a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest” (emphasis added).

III. Rule 12(f), SCRCF:

Rule 12(f), SCRCF, provides “[u]pon motion pointing out the defects complained of . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous material.” Rule 12(f) motions are not favored, however, and “usually should be denied unless the allegations “have no possible relation to the controversy and may cause prejudice to one of the parties.”” *Graff v. Prime Retail, Inc.*, 172 F. Supp. 2d 721, 731 (D. Md. 2001) (quoting 5A Wright & Miller, *Federal Practice and Procedure* § 1382 (2d ed. 1990)).

Legal Argument

I. CV Has Alleged Facts Sufficient to Constitute a Takings Claim Under Both the United States and South Carolina Constitutions.

Richland County contends that CV’s claims must be dismissed under Rule 12(b)(6), SCRCF, because CV has failed to allege facts sufficient to constitute either (1) a total taking under the Fifth and Fourteenth Amendments of the United States Constitution, or (2) a total taking under Article I of the South Carolina Constitution because CV has not lost all value of its property. When ruling upon Richland County’s Motion to dismiss, the court must take the facts as alleged in the Complaint as true. For the reasons that follow, Richland County’s Motion to dismiss should be denied.

a. Federal Takings Claim:

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for a public use without just compensation. U.S. Const., amend. V. The Fifth

Amendment is made applicable to the states through the Due Process Clause, which provides that no state shall "deprive any person of life, liberty or property without due process of law." U.S. Const., amend. XIV. Reserving private land for flood control purposes can amount to an unconstitutional taking. *Dolan v. City of Tigard*, 512 U.S. 374, 395-96 (1994). While a deprivation of all value of property is considered a *per se* taking, federal takings case law regularly recognizes that a taking has occurred under the Fifth Amendment when a property owner is deprived of less than all economic value.

United States Supreme Court jurisprudence clearly recognizes a claim for a regulatory taking under the Fifth and Fourteenth Amendments to the United States Constitution, the precise claim CV has asserted against Richland County. To state a claim for a regulatory taking under the federal constitution, a claimant must allege the following: (1) the economic impact of the regulation resulted in serious financial loss to the claimant; (2) the regulation interfered with the claimant's distinct investment-backed expectations; and (3) the character of the governmental action is not such that the public interest in the regulation outweighs the claimant's private property interests. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The *Penn Central* test is essentially an "ad hoc" inquiry focused on the facts of a particular situation. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002); see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) ("Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any 'set formula.' The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.") (internal citations

omitted). “[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.” *Lingle v. Chevron, U.S.A.*, 544 U.S. 528, 540 (2005); *see also Yee v. City of Escondido*, 503 U.S. 519, 523 (1992) (noting that the *Penn Central* analysis “necessarily entails complex factual assessments of the purposes and economic effects of government actions”).

The *Penn Central* three factor analysis has been modified to some extent by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Lucas* modifies *Penn Central* such that the central issue in a regulatory takings case is “the character of the governmental action, specifically whether the costs of implementing regulations designed to further the public interest in preserving the [property] should be borne by the public or by [the claimant] disproportionately.” *Moore v. United States*, 943 F. Supp. 603, 610 (E.D. Va. 1996) (construing *Lucas*). The *Lucas* Court found that a taking occurs if the regulation deprives the property owner of one of the bundle of rights he owned under state property law at purchase. *Id.* at 1020-32. If the landowner owns a fee simple interest (as *Lucas* did), the only legitimate restraint upon that interest is the power of the state to abate nuisances. Thus, if the claimant’s intended use of his property could not have been restrained under state common law principles of nuisance, then the character of the governmental action does not outweigh the private property interests of the owner, and a *taking has occurred*. *See Moore*, 943 F. Supp. at 609-10 (explaining the effect of *Lucas* upon the *Penn Central* test).

The Court in *Lucas* held that compensation is required when a regulation deprives an owner of “all economically beneficial uses” of the land. *Lucas*, 505 U.S. at 1019. *Lucas* further held that a *per se* taking has occurred if a property owner has been deprived of *all* of the

economic use of his property. *Id.* at 1014-19. In 2002, the Supreme Court in *Tahoe-Sierra* clarified that a taking could still occur when value remained in the land, and that the *Penn Central* analysis governed the evaluation of that sort of takings claim. *Tahoe-Sierra*, 535 U.S. at 330 ("Anything less than a 'complete elimination of value,' or a 'total loss,' the [*Lucas*] Court acknowledged, would require the kind of analysis applied in *Penn Central*.") (quoting *Lucas*, 505 U.S. at 1019-20, n.8). Consequently, a takings claim can still stand under federal law even if *some* value remains in the land.

In the case before this Court, CV has alleged that (1) Richland County adopted ordinances pursuant to its storm water ordinance and land development code, which virtually prohibit construction in the floodway affecting CV's property, adopted by ordinance FEMA's 2001 Final Determination of floodway, and adopted a series of moratoria precluding the improvement of the Manning levees, which resulted in serious financial loss to CV; (2) the ordinances interfered with CV's distinct investment-backed expectations; and (3) the governmental character of the ordinance does not outweigh CV's private property interests. Specifically, CV should not be forced to bear public burdens alone. *See* Am Comp. ¶¶ 103-105, 108-110. Also, CV has alleged that Richland County's ordinance adopting the 2001 floodway while at the same time adopting the 1995 Base Flood Elevations (BFEs) was arbitrary and irrational. *Id.* ¶¶ 95-96. Consequently, the governmental character of Richland County's action was arbitrary. When viewing the allegations of the Complaint as true, CV has stated a claim for a regulatory taking under the Fifth Amendment (as applicable to Richland County under the due process clause of the United States Constitution). Although CV does not and cannot maintain that its land has been rendered completely valueless (*see, e.g. id.* ¶ 86), it does allege that CV has suffered a tremendous reduction in the value of the land due to Richland County's actions,

especially when viewed in light of CV's highly developed investment-backed expectations. *See id.* ¶¶ 109-110.

Moreover, the character of the governmental action exercised in this case is not the power of the state to abate nuisance; therefore it is not a legitimate restraint upon CV's fee simple interest in land. *See Lucas*, 505 U.S. at 1029. CV's intended improvement and development of its property would not be considered a "nuisance" under South Carolina common law. Indeed, the reservation of private land for flooding and drainage constitutes a taking under South Carolina law. *Hill v. City of Hanahan*, 281 S.C. 527, 531, 316 S.E.2d 681, 684 (Ct. App. 1984) ("[T]here was a taking of Hill's land by the City; . . . the City simply wanted Hill's land for drainage and flood control purposes but this desire simply is not founded in any legal right of the City."). If Richland County seeks to avail its citizens of the lower insurance rates available under the NFLA by prohibiting CV from improving and developing its private property or to devote CV's land to flooding and drainage purposes, then Richland County must justly compensate CV for its losses.

In sum, CV has alleged facts sufficient to constitute a claim for a regulatory taking under the United States Constitution.

b. State Takings Claim:

Article I, § 13 of the South Carolina Constitution provides that: "Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor." S.C. Const. art. I, § 13. Under South Carolina law, a municipality's reservation of private land for "drainage and flood control" is a taking requiring the municipality to pay just compensation to the land owner. *Hill*, 281 S.C. at 531; 316 S.E.2d at 684. "Property in a thing consists not

merely in its ownership and possession but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements of property to that extent destroys the property itself. It must be conceded that substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right." *Id.* at 530, 316 S.E.2d at 683.

South Carolina has "embraced federal takings jurisprudence as providing the rubric" on which to analyze takings claims. *Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 604, 641 S.E.2d 437, 440 (2007); see also *Byrd v. City of Hartsville*, 365 S.C. 650, 656, 620 S.E.2d 76, 80 (2005) ("Takings analysis under South Carolina law is the same as the analysis under federal law."). Indeed, South Carolina has affirmatively adopted the *Penn Central* test when the landowner suffers a "denial of less than all economically viable use of his property." *Byrd*, 365 S.C. at 658, 620 S.E.2d at 80. "The general rule is that regulatory-takings cases require 'essentially ad hoc, factual inquiries,' balancing all relevant circumstances to determine whether the government has taken property." *Id.* (citing *Penn Central*, 438 U.S. at 124). Following *Penn Central*, South Carolina law consequently focuses on two "especially important" circumstances: "(1) 'the economic impact on the claimant, and, particularly, the extent to which the [government] has interfered with distinct investment-backed expectations,' and (2) 'the character of the governmental action.'" *Id.* (quoting *Penn Central*, 438 U.S. at 124). The character of the government action here is analogous to a restrictive covenant or easement. The South Carolina Supreme Court also clarified in *Byrd* that the *Byrd* decision "overrule[s] our prior suggestion that a property owner cannot demonstrate a taking unless he has been denied all economically viable use of his property." *Id.* at 660, 620 S.E.2d at 81.

Applying the *Penn Central* test to CV's claims for a regulatory taking under the South

Carolina Constitution, not only has CV alleged that Richland County's various ordinances, moratoria, and the adoption of the 2001 regulatory floodway had a negative impact upon CV and interfered with its investment-backed expectations, but CV has alleged that because the ordinance adopting the 2001 floodway was arbitrary and irrational given that the same ordinance adopted completely unrelated BFEs from 1995, CV has alleged facts calling into question the appropriate nature and legitimacy of the governmental action at issue.

In sum, as with the federal takings claim, when taking CV's allegations as true, CV has alleged facts sufficient to constitute a claim for a taking under the South Carolina Constitution.

II. CV Has Alleged Facts Sufficient to State Causes of Action for Substantive Due Process Violations Under the United States and South Carolina Constitutions.

Richland County also contends that CV's claims must be dismissed under SCRCP 12(b)(6) because CV has failed to allege facts sufficient to constitute a cause of action for a substantive due process violation under either the Fourteenth Amendment to the United States Constitution or Article I, Section 3 of the South Carolina Constitution. For the reasons that follow, Richland County's Motion to dismiss should be denied.

a. Substantive Due Process Under the United States Constitution:

The Fourteenth Amendment of the United States Constitution states "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. As the United States Supreme Court has stated:

Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action. . . . We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.

County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998) (internal quotations and citations omitted). Plaintiffs adequately allege a substantive due process violation under the Fourteenth Amendment when they “demonstrate ‘(1) that they had a property or property interest; (2) that the state deprived them of this property or property interest; and (3) that the state’s action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency.’” *MLC Auto., LLC v. Town of Southern Pines*, 532 F.3d 269, 281 (4th Cir. 2008) (quoting *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995)). A substantive due process violation also occurs when local ordinances are “clearly arbitrary and unreasonable, [or] hav[e] no substantial relation to the public health, safety, morals, or general welfare.” *A Helping Hand, LLC v. Balt. County*, 515 F.3d 356, 372 (4th Cir. 2008) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). The allegations of CV’s Amended and Supplemental Complaint meet all these requirements.

First, CV has alleged that it had a property interest in its land by the Congaree River and that, in connection with this property interest, it has a recognized substantive due process “right to be free of arbitrary or irrational zoning actions.” *Village of Arlington Heights v. Metro. Housing Devel. Corp.*, 429 U.S. 252, 263 (1977); see also *Richardson v. Township of Brady*, 218 F.3d 508, 512 (6th Cir. 2000); see, e.g. Am. Comp. ¶ 96. Although Richland County’s actions in this matter were not specifically zoning decisions, but were rather floodplain management decisions, the end result relates to a landowners permissible use of its property and of the property rights associated with such ownership. Zoning ordinances, as well as floodway or floodplain development restrictions and other forms of floodplain or floodway management, are, as a general matter, wholly legitimate exercises of a state or local government’s regulation of public health, safety, morals, or general welfare. See, e.g. *A Helping Hand*, 515 F.3d at 372.

However, CV has alleged facts supporting its assertions that Richland County's land use regulations regarding its treatment of CV's property were arbitrary and an irrational way of regulating public safety.

At the time when CV acquired its property (and, indeed, until February 2002), CV's land was part of the floodplain (zone AE) on the pertinent FIRM for Richland County. Am. Comp. ¶ 42. CV has alleged that even before the later FIRM, which placed approximately 70% of CV's property in a floodway, became final in February 2002, Richland County was taking steps to deprive CV, and *only* CV, of being able to acquire a permit to improve its levees, which was a first step towards CV's development of its property. *Id.* ¶¶ 81-86. On April 17, 2001, Richland County enacted an ordinance stating that no "levees, dikes, fills, materials, structures, or obstructions" are permitted in the regulatory floodway. *Id.* ¶ 85. However, the ordinance specifically exempts a school in operation before January 1, 2001 and a publicly owned wastewater treatment plant in operation before January 1, 2001. *Id.* A month later, on May 15, 2001, Richland County passed another ordinance regarding permissible uses for land in a regulatory floodway. *Id.* ¶ 86. Richland County also exempted a school and a wastewater treatment facility in operation before January 1, 2001, from compliance with this ordinance. *Id.* These ordinances effectively took away CV's right to apply for any permit to improve its levees or develop its property in accordance with its plans while, at the same time, preserving those rights for CV's neighboring landowners. *See id.* Richland County thus applied illegal "spot zoning" types of ordinances to CV's property because these decisions were "land-use decision[s] which arbitrarily single[d] out a particular parcel for different, less favorable treatment than the neighboring ones." *Penn Central*, 438 U.S. at 132.

On November 18, 2005, the federal district court vacated FEMA's 2001 BFEs and

floodway determinations (which became effective in February 2002). *Am. Comp.* ¶ 73. This Order of Vacatur reinstituted FEMA's 1994/1995 BFEs and floodway determinations, which placed the floodway along the Manning levees. *Id.* In response to the Order of Vacatur, Richland County passed a series of moratoria on the consideration of *any* permit regarding property "located in a flood-prone area within the Congaree River Floodplain," including CV's property. *Id.* ¶¶ 90-93. Again, Richland County acted to thwart CV's plans to improve its levees by making it impossible for CV to access a permit to do so. *See id.* ¶ 93.

Further, Richland County persisted in maintaining a determined focus on not allowing CV to improve its levees or develop its property. Faced with the reality that it could not circumvent the application of the 1995 BFEs to CV's land following the Order of Vacatur, Richland County sought to retain the vacated 2001 floodway designation on CV's land while, at the same time, enacted the 1995 BFEs. *Id.* ¶ 95. The convoluted result of this decision was to enact a *lower* floodway elevation than the applicable BFEs. *Id.* Consequently, the 2001 floodway adopted by the county had absolutely no relation to and was not derived from the applicable BFEs. *Id.* ¶ 96. Several days after enacting this illogical ordinance, Richland County submitted a letter of map revision to FEMA seeking specifically to restore the vacated 2001 BFEs. *Id.* ¶ 97. CV has alleged that the vote to submit the letter of map revision, which occurred with no notice to CV or other affected land owners, was the result of a vote taken in executive session in violation of South Carolina law. *Id.*

Second, CV has alleged that Richland County deprived CV of its property interest, namely its land and its right to be free of irrational and arbitrary zoning actions. By adopting storm water ordinances targeting CV's property for unfair and discriminatory treatment, by adopting the 2001 regulatory floodway covering approximately 70% of CV's property, in

adopting moratoria *after* the floodway was invalidated by the federal court, in adopting the vacated floodway that had *no rational relation* to the 1995 BFEs reinstituted in the same ordinance, and by seeking to reinstate the vacated floodway in secret deprived CV of its property interest. *Id.* ¶ 101.

Third, CV has adequately alleged that Richland County's actions "fell so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." *MLC*, 532 F.3d at 281. Important aspects of this prong of the substantive due process test are if the "action is tainted with fundamental procedural irregularity," is directed at a single party, and deviates from the defendant's "regular practice." *A Helping Hand*, 515 F.3d at 373 n.10.

Here, CV has alleged that various of Richland County's actions violated all three of these benchmarks. CV's land was singled out in multiple ordinances and moratoria for no development or improvement to levees while neighboring landowners were allowed to build on or improve their land. *Am. Comp.* ¶¶ 85-86, 112. CV has also alleged that Richland County only attempted to verify, challenge, or otherwise critically evaluate FEMA's determinations of floodway and base flood elevations when such determinations would permit CV's proposed development plans to continue, which demonstrates procedural irregularity. *See id.* ¶ 80. Additionally, CV alleges that, even after the 2001 regulatory floodway and BFEs were vacated by the federal district court, Richland County persisted in trying to maintain the 2001 determinations rather than the 1995 determinations (which would have been more favorable to CV's development) with procedural irregularity and outside of regular practice by authorizing a Letter of Map Revision application to FEMA without notice to CV, neighboring landowners, or the public via a secret vote taken in executive session and in violation of South Carolina law. *Id.* ¶ 97. Further, CV has alleged that a member (and former chairperson) of Richland County

Council, is and was a board member of the very organization leading the legal fight against CV's development and proposing discriminatory ordinances designed to eliminate CV's development plans while allowing CV's neighboring landowners to continue improvements to their land. *Id.* ¶ 82, 99-100. Such a potential conflict of interest taints the legislative process and leads to procedural irregularity.

Richland County, presumably, will argue that the state has a substantial safety interest in prohibiting development within a regulatory floodway as determined by FEMA. However, that argument is belied by the fact that Richland County's ordinance specifically excepts Heathwood Hall Episcopal School and the Columbia Wastewater Treatment plant from its prohibition on improvement and building. If the ordinance were a valid restriction based upon a legitimate state interest to protect people and property, then why would the County permit the waste water treatment plant, the largest in the State, to expand when a flood there could imperil citizens' drinking water? Additionally, if the ordinance seeks to protect lives and property from dangerous flood waters, then why would the County have excepted from its building prohibition a school full of children? What really happened is Richland County sought to eliminate CV's development plans and enacted ordinances specifically denying CV the rights to improve or develop any of its property while preserving those rights for CV's neighboring landowners. The County's actions are analogous to illegal and discriminatory spot zoning tactics held unconstitutional by the United States Supreme Court. *See Penn Central*, 438 U.S. at 132.

Further, Richland County's ordinance of December 5, 2006, is a wholly irrational approach to floodplain and floodway management. As detailed in CV's allegations, Richland County's adoption of the 2001 regulatory floodway *at the same time* as its adoption of the 1995 BFEs results in an absurd application of floodplain and floodway management principles to

CV's land. Because of Richland County's arbitrary action and in contrast to all other land in Richland County, the floodway elevation for the comparatively small area covered by the 2006 ordinance (which included all of CV's land) was *lower than the base flood elevations* adopted as part of that same ordinance. See Am. Comp. ¶ 95. There is no scientific or technical basis for this determination. Consequently, it is arbitrary and irrational, and its enactment violates CV's substantive due process rights.

All of these allegations show that Richland County acted arbitrarily, capriciously, and with the intent and desire to thwart CV's development plans. CV has adequately alleged a cause of action for violations of its substantive due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.

b. Substantive Due Process Under the South Carolina Constitution:

Article 1, § 3 of the Constitution of the State of South Carolina states: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, *nor shall any person be deprived of life, liberty, or property without due process of law*, nor shall any person be denied the equal protection of the laws" (emphasis added). "Substantive due process protects a person from being deprived of life, liberty, or property for arbitrary reasons. To establish a substantive due process claim, a plaintiff must show he possessed a constitutionally protected property interest that was deprived by state action so far beyond the limits of legitimate governmental action, no process could cure the deficiency." *Seabrook v. Knox*, 369 S.C. 191, 198, 631 S.E.2d 907, 911 (2006).

CV incorporates its arguments, *supra*, regarding Richland County's violations of CV's substantive due process rights guaranteed by the Fourteenth Amendment to the United States Constitution as violations of the Constitution of the State of South Carolina. See, e.g. *Seabrook*,

369 S.C. at 198, 631 S.E.2d at 911 (incorporating federal substantive due process standards for state constitution violations). Further, South Carolina law provides for the state or local government to condemn land for public use pursuant to The South Carolina Eminent Domain Procedure Act (SCEDPA), S.C. Code Ann. § 28-2-10 *et seq.* The SCEDPA was intended by the General Assembly "to create a uniform procedure for all exercise of eminent domain power in" South Carolina. S.C. Code Ann. § 28-2-20. Despite the SCEDPA's clear applicability to Richland County's actions taken against CV's land, Richland County did not institute an eminent domain action against CV's land despite clear South Carolina law that the reservation of a flood area or drainage is a taking of private property for which just compensation must be paid. *Hill*, 281 S.C. at 531; 316 S.E.2d at 684. Consequently, CV has been deprived of its substantive due process rights.

In sum, CV has stated facts sufficient to state a claim for a violation of its substantive due process rights under the South Carolina Constitution.

III. Plaintiff Cannot Obtain Affirmative Relief from FEMA, and FEMA is Not a Necessary Party to This Litigation.

Richland County claims in its Motion to Dismiss pursuant to Rule 12(b)(7), SCRCP, that FEMA is a necessary party to this litigation. For the reasons that follow, the Court should deny Richland County's Motion to Dismiss pursuant to Rule 12(b)(7).

A party is a "necessary" party if "(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." Rule 19(a), SCRCP; *see also Stewart v. State Crop Pest Comm.*, 307

S.C. 133, 139, 414 S.E.2d 121, 125 (1992). It is worthwhile to note that this case has been pending for five years. In those five years, FEMA has never alleged that it claims an interest in this matter or that the disposition of the case without FEMA being named a party would impair or impede any ability of FEMA to protect any interest. Indeed, FEMA could file an interest in this matter pursuant to 28 U.S.C. § 517, which permits the federal government to "attend to the interests of the United States in a suit pending" in either federal or state court. FEMA has not done so here.

CV does not seek any relief from FEMA. CV is not asking this court to modify the base flood elevations or change any determination made by FEMA. Indeed, CV has already challenged FEMA's actions relative to these facts via an administrative appeal to FEMA and a later judicial appeal to the United States District Court for the District of South Carolina pursuant to 42 U.S.C. § 4104(g). The federal challenge to FEMA is over, and the 2001 BFEs and floodway determinations are final. Nothing in this lawsuit would disturb any action of FEMA's or adversely impact anything in which FEMA has an interest. Accordingly, the outcome of this lawsuit would not subject Richland County to inconsistent obligations vis-à-vis FEMA. To the extent the instant action challenges the science behind the BFEs and regulatory floodway determined by FEMA, it challenges only Richland County's failure to make reasonable efforts to verify that the data used to make those determinations was scientifically and technically sound, especially in light of Richland County's earlier efforts to critically evaluate FEMA's 1999 determination of no floodway landward of the Manning levees. Am. Comp. ¶ 80.

CV has alleged causes of action against Richland County for a taking of CV's land without just compensation and against Richland County for violations of CV's substantive due process rights. CV has not alleged a cause of action against FEMA, and can have no relief from

FEMA in the event CV prevails on any or all of its causes of action asserted against Richland County. Richland County took CV's land; FEMA did not. Richland County violated CV's due process rights; FEMA did not. FEMA did not and cannot pass the ordinances that amounted to a taking of CV's property and deprived CV of its due process rights. Richland County—not FEMA—passed the ordinances establishing the BFEs and regulatory floodway. *See id.* ¶¶ 90-96. Richland County does not have to do so, as the National Flood Insurance Program is a voluntary program. FEMA did not compel Richland County to take the actions it did against CV's property. FEMA is not a necessary party to this litigation under Rule 19, SCRCP.

Further, the South Carolina Supreme Court has held that a federal agency who administers a federal program in conjunction with the state is not a necessary party under Rule 19, SCRCP. *Stewart*, 307 S.C. at 139-40, 414 S.E.2d at 125. In *Stewart*, the State Pest Crop Commission and several private corporations maintained that the United States Department of Agriculture (USDA) and the Animal and Plant Health Inspection Service (APHIS) were necessary parties under Rule 19, SCRCP, because the plaintiff's lawsuit under the South Carolina Boll Weevil Eradication Act might threaten the Federal Boll Weevil Eradication Program, under which the state program operated. *Id.* The South Carolina Supreme Court disagreed and held that because the actions challenged were those occurring under state law and that the federal government would have no liability under the alleged causes of action, the USDA and the APHIS were not necessary parties under Rule 19, SCRCP. *Id.* Similarly, the causes of action asserted here are causes of action directed against actions taken by Richland County and not FEMA. The NFIP and FEMA's BFE and floodway determinations are not threatened by this lawsuit in any way. To the extent FEMA has relevant information or relevant expertise in this matter, it is in the role only of a witness. Should Richland County desire to call FEMA

employees as witnesses or to subpoena FEMA documents as part of discovery, it can seek that information from FEMA pursuant to the appropriate federal regulations. See 44 C.F.R. § 5.80.

For these reasons, Richland County's Motion to Dismiss pursuant to Rule 12(b)(7) should be denied.

IV. None of Plaintiff's Allegations Should be Stricken as Immaterial Under Rule 12(f), SCRPC.

Richland County claims in its Motion to Strike pursuant to Rule 12(f), SCRPC, that certain of CV's allegations in its Amended and Supplemental Complaint should be stricken as immaterial. For the reasons that follow, none of the allegations in CV's Amended and Supplemental Complaint are immaterial, and the Court should deny Richland County's Motion to Strike pursuant to Rule 12(f).

Rule 12(f), SCRPC, provides "[u]pon motion pointing out the defects complained of . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous material." Rule 12(f) motions are not favored, however, and "usually should be denied unless the allegations "'have no possible relation to the controversy and may cause prejudice to one of the parties.'" *Graff v. Prime Retail, Inc.*, 172 F. Supp. 2d 721, 731 (D. Md. 2001) (quoting 5A Wright & Miller, *Federal Practice and Procedure* § 1382 (2d ed. 1990)). "[M]otions to strike should be denied if there is any doubt whether the material in question raises an issue of law or fact." *Id.*; see also *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887 (2d Cir. 1976) (finding that a motion to strike asserting that allegations are immaterial should be denied unless it is shown that *no admissible evidence* exists to support the allegation).

Here, Richland County has moved to strike paragraphs 111, 112, and 113 of CV's Amended and Supplemental Complaint in their entirety and to strike portions of paragraphs 114,

115, and 126 all for alleged immateriality. All of these paragraphs, save paragraph 126, discuss different aspects of CV's allegations that Richland County acted arbitrarily in adopting a regulatory floodway for which there is no sound engineering or scientific or technical evidence in support. Rather than being immaterial, the arbitrariness alleged, and the specific conduct discussed in these paragraphs, goes to the heart of CV's allegations of violations of its substantive due process rights due to Richland County's arbitrary and capricious behavior in enacting an ordinance instituting a floodway with no rational relationship to the BFEs enacted as part of that same ordinance. Further, CV has made allegations that Richland County's earlier stated desire to evaluate the evidence behind FEMA's floodway and BFE determinations when those determinations would allow CV's development plans to proceed is in deep contrast to its blind acceptance of FEMA's floodway and BFE determinations, which were vacated by the federal district court. *See Am. Comp.* ¶¶ 50, 94-98. The paragraphs and phrases Richland County seeks to strike in its Motion to Strike all revolve around CV's allegations of misconduct and substantive due process violations, and are material to those allegations. Further, Richland County seeks to strike from paragraph 126 the reference to "just compensation." Just compensation for a taking, among other relief requested, is at the heart of CV's Amended and Supplemental Complaint. Striking that language as immaterial is improper.

Richland County cannot show that the paragraphs and portions of paragraphs it seeks to strike "have no possible relation to the controversy." *Graff*, 172 F. Supp. 2d at 731. Consequently, its Motion to Strike should be denied.

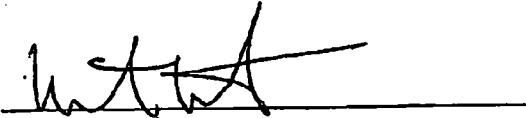
CONCLUSION

For the reasons discussed above, this Court should deny in full Richland County's (1) Motion to Dismiss pursuant to Rule 12(b)(6); (2) Motion to Dismiss pursuant to Rule 12(b)(7);

and (3) Motion to Strike pursuant to Rule 12(f), SCRCP.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

A handwritten signature in black ink, appearing to read 'M. Grier', is written over a horizontal line.

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October 21, 2009

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Columbia Venture, LLC,

Plaintiff,

vs.

Richland County,

Defendant.

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

) Case No. 2004-CP-40-3929

) **MEMORANDUM IN SUPPORT**
) **OF DEFENDANT**
) **RICHLAND COUNTY'S MOTION**
) **TO DISMISS PURSUANT TO SCRPC**
) **RULE 12(b)(6)**

TO: Plaintiff Columbia Venture, LLC and its attorneys, William C. Boyd, Esquire, Manton M. Grier, Esquire, and Elizabeth H. Black, Esquire:

Defendant Richland County, through undersigned counsel, submits this Memorandum in Support of Its Motion to Dismiss Pursuant to SCRPC Rule 12(b)(6) ("Motion to Dismiss"), which was filed with this Court on October 9, 2009. Pursuant to SCRPC Rule 12(b)(6), the Court should dismiss the Plaintiff's causes of action alleging a categorical total taking of property without just compensation and violation of substantive due process under the United States and South Carolina Constitutions against the Defendant for the reasons set forth more fully below:

INTRODUCTION

Columbia Venture, the owner of property located within the Congaree River floodplain, seeks to hold Richland County liable for allegedly taking all value of its property, and arbitrarily depriving it of its property, because Richland County has adopted flood maps issued by the Federal Emergency Management Agency ("FEMA") that Columbia Venture believes wrongly place its property within a floodway designation. The flood maps are an integral part of the

National Flood Insurance Program ("NFIP"). As a participating community in the NFIP, Richland County must adopt FEMA's flood maps in order for residents to have the opportunity to purchase flood insurance, and even more importantly, to assure availability of federally-backed mortgages in Richland County. Columbia Venture claims that Richland County should compensate them for constitutional deprivations allegedly caused by the County's continuing participation in the NFIP.

THE NATIONAL FLOOD INSURANCE ACT

The National Flood Insurance Program ("NFIP") is established under the National Flood Insurance Act ("NFIA") and administered by the Federal Emergency Management Agency ("FEMA"). 42 U.S.C. § 4001 *et seq.* In enacting the NFIA, Congress found that "annual losses throughout the Nation from floods ... are increasing at an alarming rate, largely as a result of the accelerating development of, and concentration of population in, areas of flood ... hazards." 42 U.S.C. § 4002(a)(1). To address this growing problem, Congress found that "a program of flood insurance can promote the public interest by providing appropriate protection against the perils of flood losses and encouraging sound land use by minimizing exposure of property to flood losses." 42 U.S.C. § 4001(c). The purpose of the NFIA is twofold – to enable property owners to obtain affordable flood insurance, and to minimize flood losses through local land use regulation. 42 U.S.C. § 4001(b) and (c). To minimize flood damage, the NFIA seeks to "encourage ... local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage," and "guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards." *Id.* at (e). If a local community does not participate in the NFIP, the NFIA prohibits any federal lending assistance for acquisition of and construction on any real property

located within that non-participating community. 42 U.S.C. § 4106(a). Defendant is a participating community within the NFIP.

To fulfill the purposes of the NFIA, FEMA is required to publish studies and maps that identify flood hazard areas and the risk zones within floodplains across the United States. 42 U.S.C. § 4101(a). A Flood Insurance Study ("FIS"), or a flood elevation study, contains base flood elevations ("BFE") of all studied rivers and streams within a community. 44 C.F.R. § 59.1. A base flood is defined as "the flood having a one percent chance of being equaled or exceeded in any given year." 44 C.F.R. § 59.1. Special flood hazard areas are illustrated in a Flood Insurance Rate Map ("FIRM" or "flood map") identifying various risk zones. Generally speaking, FEMA's flood maps identify the floodway and flood fringe of a water course, which is collectively called a floodplain in common parlance. A floodway is the area posing the greatest danger to public safety. FEMA designates a floodway as the land area reserved to accommodate floodwaters without causing flood depths to rise. The flood fringe is a flood prone area adjacent to the floodway that can be built upon if elevated or filled to a height above the BFE. Flood maps are used by insurers and lenders in carrying out the insurance requirements of the NFIA. 42 U.S.C. § 4104b. Additionally, local communities must adopt the FIS and flood maps as the basis from which floodplain regulations are applied and enforced. 44 C.F.R. § 60.2(h); 44 C.F.R. § 60.3.

Once FEMA prepares the FIS and flood maps, they are issued as preliminary documents for review by the community and the public. 42 U.S.C. § 4104(a). FEMA must publish the base flood elevations in the Federal Register for public comment and directly notify the chief executive officer of the local community of the proposed flood elevations. 42 U.S.C. § 4104(a). FEMA is also directed to "publish notification of flood elevation determinations in a prominent

local newspaper at least twice during the ten-day period following notification to the local government.” 42 U.S.C. § 4104(b). Any owner or lessee of real property in the community who believes his property rights to be adversely affected by the proposed elevations has a right to appeal the base flood elevations. *Id.*; 44 C.F.R. § 67.5. An appeal must be filed with the local community within 90 days after the second newspaper publication. 42 U.S.C. § 4104(b). “The sole basis for such appeal shall be the possession of knowledge or information indicating that the elevations being proposed by [FEMA] with respect to an identified area having special flood hazards are scientifically or technically incorrect.” *Id.* “Because scientific and technical correctness is often a matter of degree rather than absolute (except where mathematical error or changed physical conditions can be demonstrated), appellants are required to demonstrate that alternative methods or applications result in more correct estimates of base flood elevations” 44 C.F.R. § 67.6(a).

The local community receives all appeals by private persons and forwards the appeals to FEMA. 42 U.S.C. § 4104(c). The community itself may also appeal on behalf of affected individuals within its jurisdiction. *Id.* All appeals must be filed with FEMA within 90 days after the second publication of the base flood elevations in the local newspaper. *Id.* Appeals are resolved “within a reasonable time” by consulting with local government officials, initiating administrative hearings, or submitting the conflicting data to an independent expert body for advice. 44 C.F.R. § 67.8. FEMA must issue its final determination in writing to each appellant. 44 C.F.R. § 67.11. The sole relief granted in the event of a successful appeal is modification of FEMA’s proposed base flood elevations. 42 U.S.C. § 4104(b). However, a successful appellant is entitled to reimbursement of up to \$250,000 for engineering, surveying, or similar services incurred in connection with the appeal. *Id.* at (f).

If an appellant is aggrieved by FEMA's final determination of base flood elevations, he or she "may appeal such determination to the United States district court for the district within which the community is located." 42 U.S.C. § 4104(g). The scope of judicial review is governed by the Administrative Procedure Act ("APA"). *Id.* Under the APA, a court may set aside FEMA's decision if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). During the pendency of litigation, all final determinations are effective unless stayed for good cause shown. *Id.* A prevailing appellant may recover costs and fees, including attorney's fees. 28 U.S.C. § 2412.

Aside from this appeal process, FEMA has promulgated extensive regulations setting forth processes for a property owner to seek revisions to flood maps. Pursuant to 44 C.F.R. § 65.5, a property owner may seek revision of hazard boundaries without change to base flood elevations by submitting technical plans to elevate areas with earthen fill. Pursuant to 44 C.F.R. § 65.6, a property owner may seek revisions to base flood elevations and floodways by submitting hydrologic and hydraulic data supporting such a change. And, a property owner may seek approval to upgrade or construct a levee on its property in order to remove a floodway or flood fringe delineation from its property. 44 C.F.R. § 65.10.

As a participating community within the NFIP, Richland County must adopt a floodplain management ordinance consistent with minimum standards established by FEMA. 42 U.S.C. § 4022(a); 44 C.F.R. § 60.1(a). Otherwise, flood insurance will not be available within Richland County. *Id.* A community's floodplain management ordinance must take precedence over any less restrictive or conflicting ordinances. *Id.* at (b). Furthermore, "any flood plain management regulations adopted by a ... community which are more restrictive than the criteria [established by FEMA] are encouraged and shall take precedence." 44 C.F.R. § 60.1(d). The local

floodplain management ordinance must incorporate FEMA's FIS and FIRMs as the basis for determining the flood hazard areas governed by the ordinance. 44 C.F.R. § 60.2(h); 44 C.F.R. § 60.3.

FEMA's minimum standards for local floodplain management ordinances require the establishment of a permitting scheme for all proposed construction or development. 44 C.F.R. § 60.3. All construction within flood prone areas must be adequately anchored to prevent flotation or collapse, use flood resistant materials, and locate or design electrical, heating, plumbing and air conditioning so as to prevent floodwaters from damaging components. *Id.* at (a)(3). All new construction must be elevated above the base flood. *Id.* at (c)(2). For areas in which a floodway has been designated, local floodplain management ordinances must, at a minimum, "prohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway unless it has been demonstrated through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood discharge." *Id.* at (d)(3).

**COLUMBIA VENTURE'S PURCHASE OF FLOODPLAIN PROPERTY
AND SUBSEQUENT APPEAL OF FEMA'S CONGAREE RIVER BASE FLOOD
ELEVATIONS**

Columbia Venture purchased the subject property during the midst of a restudy of floodplain areas within Richland County, including the Congaree River floodplain. On August 12, 1999, FEMA released a revised preliminary FIS and FIRM that reduced the Congaree River floodway to the landward side of the agricultural levee on its property. Amended Compl. ¶ 45. Several individuals as well as the South Carolina Department of Natural Resources appealed this preliminary FIS and FIRM, arguing that FEMA's modeling for determining BFEs contained

technical flaws. Amended Compl. ¶ 50. After review of the appellant's data, on September 26, 2000, FEMA issued its appeal resolution which revised its BFEs to a higher flood elevation and broadened the floodway to cover approximately seventy percent (70%) of Columbia Venture's property. Amended Compl. ¶ 55. Columbia Venture disputed this appeal resolution, causing FEMA to reopen the appeal process to afford Columbia Venture an opportunity to present its data to FEMA that supported its argument that the floodway should be reduced. Amended Compl. ¶ ¶ 60, 61. After extensive examination and review of Columbia Venture's data submittals, FEMA reaffirmed its appeal resolution on August 20, 2001 and issued its final determination of the Congaree River BFEs. Amended Compl. ¶ 63. Richland County adopted FEMA's Congaree River BFEs and FIRMs on or before their effective date of February 20, 2002. Amended Compl. ¶ 79.

On October 19, 2001, Columbia Venture appealed FEMA's final determination to the United States District Court. Amended Compl. ¶ 68; *Columbia Venture, LLC v. The Federal Emergency Management Agency*, Civil Action No.: 3:01-cv-4100 (Oct. 18, 2001). Several environmental groups and individuals intervened as Defendants. Amended Compl. ¶ 70. During Columbia Venture's review of the administrative record obtained from FEMA in its appeal of the Congaree BFEs, Columbia Venture alleged a procedural flaw in FEMA's adoption of the BFEs established in the September 26th appeal resolution, and moved before the United States District Court to vacate the Congaree River BFE and floodway due to procedural error. Amended Compl. ¶ 73. On November 18, 2005, the United States District Court vacated the Congaree River BFEs due to FEMA's failure to properly notice the 2001 Congaree River BFEs in the Federal Register. *Id.*; Order of Vacatur, *Columbia Venture, LLC v. The Federal Emergency Management Agency*, Civil Action No.: 3:01-cv-4100 (November 18, 2005) (attached as Exhibit

1).¹ The Order stated that the previous BFEs issued by FEMA in 1995 were in effect until revised by FEMA pursuant to its authority under the NFIA. *Id.*

The Congaree River BFEs were vacated on procedural grounds, not on the merits. (see Exhibit 1). Thus, in January 2006, Richland County enacted a series of moratoria, cumulatively not exceeding nine months, which prohibited issuance of development permits within the Congaree River floodplain in order to give the County time to determine from FEMA whether it intended to reinstate the 2001 BFEs pursuant to its authority under the NFIA. Amended Compl. ¶ 90-92; *see also* Richland County Ordinance 009-06HR (Feb. 21, 2006) (stating that moratorium needed in order to determine from FEMA what data to apply) (attached hereto as Exhibit 2).² Toward the end of the moratoria, FEMA advised Richland County that the district court order vacated only the 2001 BFEs; the 2001 floodway remained in full force and effect. Amended Compl. ¶ 75. Thus, on December 5, 2006, the County, in order to maintain its compliance with the NFIP, revised its floodplain ordinance to adopt the old 1995 BFEs for the Congaree River floodplain, with the 2001 floodways remaining in place. Amended Compl. ¶ 95.

On November 2, 2007, the district court extended the reach of its vacatur to include the Congaree River floodway. Amended Compl. ¶ 76. FEMA and the Defendant-Interveners appealed these decisions to the Court of Appeals for the Fourth Circuit, and obtained a stay of the District Court's orders during the pendency of the appeal. Amended Compl. ¶ 77. On December 27, 2007, the City of Cayce annexed Columbia Venture's property. Amended Compl.

¹ This court may take judicial notice of federal court orders. *Meier v. Meier*, 208 S.C. 520, 527, 38 S.E.2d 762, 766 (1946).

² This court may take judicial notice of legislative facts when deciding on the constitutionality of legislation. Danny R. Collins, *SOUTH CAROLINA EVIDENCE*, p. 198 (2d ed. SC Bar 2000). Local ordinances "shall be admitted into evidence in such courts and shall constitute prima facie evidence of the genuineness of the same, provided the clerk of such municipality certifies to the correctness of the same." S.C. Code Ann. § 19-3-10. The attached ordinance is a certified correct copy.

¶ 101. Thus, Richland County no longer has any jurisdiction to regulate or exercise other police power over Columbia Venture's use of its property.

In 2009, the Fourth Circuit reversed the District Court decision, holding that FEMA's procedural error was harmless. *Columbia Venture, LLC v. S.C. Wildlife Federation*, 562 F.3d 290, 294 (4th Cir. 2009). The Court remanded for determination of Columbia Venture's substantive claims that FEMA's BFE determinations were scientifically and technically incorrect. *Id.* at 295. On remand, the District Court scheduled a hearing on September 9 and 10, 2009, to consider Columbia Venture's arguments that the Congaree BFEs were flawed. Days before the hearing date, Columbia Venture settled the appeal with FEMA and the Defendant-Intervenors. In the settlement, Columbia Venture agreed to dismiss its appeal with prejudice, and FEMA agreed to initiate a restudy of the Congaree River floodplain, as it is already required to do under the NFIA. (attached hereto as Exhibit 3).³ Pursuant to 42 U.S.C. § 4101(e) and (f), FEMA must assess the need to revise and update all flood maps every five years, and undertake revisions if FEMA deems necessary.

STANDARD OF REVIEW

"Generally, in considering a Rule 12(b)(6), SCRPC, motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the complaint." *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 67, 651 S.E.2d 305, 307 (S.C. 2007). "The motion may not be sustained if the facts alleged in the complaint and the inferences that can be drawn therefrom would entitle the plaintiff to any relief under any theory." *Id.*

Plaintiff alleges that Defendant's legislative enactments incorporating FEMA's erroneous FIS and FIRMs effect of total taking of its property and violate its substantive due process rights.

³ This Court may take judicial notice of a federal Order. *Meier v. Meier*, 208 S.C. 520, 527, 38 S.E.2d 762, 766 (1946).

South Carolina courts will not declare a state law or ordinance unconstitutional “unless its repugnance to the constitution is clear and beyond a reasonable doubt.” *Sojourner v. Town of St. George*, 383 S.C. 171, 175, 679 S.E.2d 182, 185 (2009). “Every presumption is made in favor of a statute’s constitutionality.” *Id.* “The scope of review should be limited in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid.” *Id.* In addition, the South Carolina Constitution requires that the “Constitution and all laws concerning local government shall be liberally construed in their favor.” S.C. Const. VIII, § 17.

Further, Plaintiff appears to be making a facial challenge to Defendant’s ordinances. A facial challenge is a claim that the law is incapable of any valid application. *In re Amir X.S.*, 371 S.C. 380, 385, fn. 3, 639 S.E.2d 144, 146, fn. 3 (2006); *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). To successfully challenge legislation on its face, the plaintiff must show that “no set of circumstances exists under which the Act would be valid.” *West Virginia v. United States HHS*, 289 F.3d 281, 295 (2002). “The fact that [an Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid” *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, Plaintiff faces “an uphill battle” in challenging Richland County’s ordinances. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 496 (U.S. 1987).

ARGUMENTS

I. COLUMBIA VENTURE'S CLAIM OF A TOTAL TAKING

The takings clause of the Fifth Amendment to the United States Constitution states: “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. In addition, the South Carolina Constitution provides, “except as otherwise provided in this Constitution, private property shall not be taken for ... public use without just compensation being first made therefore.” S.C. Const. Art. I, § 13. The takings analysis under South Carolina law is the same as the analysis under federal law. *Byrd v. City of Hartsville*, 365 S.C. 650, 656, 620 S.E.2d 76, 79, n.6 (2005).

Columbia Venture alleges a regulatory taking of its property without just compensation because “Richland County’s adoption of a regulatory floodway that includes approximately 70% of CV’s property has completely frustrated CV’s distinct investment-backed expectations and substantially diminished the value of CV’s property.” Amended Compl. ¶ 109. Additionally, Columbia Venture asserts that adoption of the Congaree River floodway “has deprived CV of all economically viable use of all or part of its land.” Amended Compl. ¶ 122.

In *Lucas v. S.C. Coastal Council*, the court established a categorical taking rule that a taking has occurred, and compensation due, when a regulation denies all economic value of land. 505 U.S. 1003, 1015 (1992). If total taking has not occurred, the Court engages in a balancing test focusing on three factors - the magnitude of the ordinance’s economic impact upon the property; the degree it interferes with reasonable investment-backed expectations, and the character of the ordinance. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). This Motion only seeks to dismiss Columbia Venture’s claim of a total taking of all economic value under the United States Supreme Court’s categorical taking rule established in *Lucas v. S.C. Coastal*

Council, 505 U.S. 1003 (1992). Columbia Venture's remaining "partial" takings claim, analyzed under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), is not the subject of this Motion.

At the outset, it is important to dispel Columbia Venture's notion that "a finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations." Amended Compl. ¶ 121. Under *Lucas*, the question is not "whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all ... economically viable use of his land." *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072-73 (11th Cir. 1996). "The loss of the ability to develop or use the land as originally intended is not a categorical taking if another economic use for the land is available, even if the value of the use is less than the value attached to the owner's desired use." *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 67, 481 S.E.2d 460, 464 (1997) (citing to *Andrus v. Allard*, 444 U.S. 51, 64-67 (1979) and *Goldblatt v. Hempstead*, 369 U.S. 590, 593-94 (1962)); see also *Whaley v. Dorchester County Zoning Bd. of Appeals*, 337 S.C. 568, 578, 524 S.E.2d 404, 409 (1999) ("A zoning classification is not an unconstitutional, compensable taking simply because it denies to a landowner the highest and best use of its property."). Therefore, to establish a total taking, Columbia Venture must allege that Richland County's actions have totally eliminated all economically viable use that the property may be put, yet Columbia Venture's own allegations state otherwise.

Columbia Venture has alleged that Richland County's Floodplain Overlay District has deprived it of "all economically viable use" of its property because Richland County's ordinances "prohibit construction in the floodway ..., whereas construction, subject to certain restrictions, is permitted in the floodplain." Amended Compl. ¶ 122. The Congaree River

floodway covers 70% of Columbia Venture's property, leaving 30% in the flood fringe. Amended Compl. ¶¶ 5, 101, 109, 110. Thus, Columbia Venture's own allegations belie its cause of action for a total taking because it admittedly can build on a third of its property. Columbia Venture is allowed to build residential or commercial structures so long as these structures are elevated and flood-proofed or the ground level must be raised by earthen fill to a height above the base flood elevation. Richland County Code of Ordinances, § 26-104(d)(2)(a) and (b). The Floodplain Overlay District does not affect the underlying zoning designations of property within a flood fringe. For example, if property is zoned commercial, the Floodplain Overlay District does not interfere with that zoning designation; the ordinance merely requires elevation or fill in order to construct commercial buildings.

Although approximately 70% of Columbia Venture's property is located in a floodway, Columbia Venture can still make use of this portion. Under Richland County's Floodplain Overlay District, property located within a floodway may be used for agricultural and horticultural uses; parking and loading areas; open-air uses generally accessory to residential uses, such as lawns, gardens, play areas, and parking areas; recreational uses that do not substantially impede water flow, such as swimming areas, fishing areas, boating docks, parks, trails, nature preserves, golf courses, driving ranges, and tennis courts; airport runways; and wastewater treatment outlets, water supply intakes, sewage lines and utility lines that create no rise in the base flood elevation. Richland County Code of Ordinances, § 26-104(d)(2)(i)(1).

Columbia Venture may argue that the County has affected a total taking of its property located within the floodway portion only. However, under the "parcel as a whole" doctrine, the extent of economic loss is determined by the degree of interference with rights in the parcel as a whole. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). "Taking

jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978). Instead, the court focuses on the entire parcel, with all property rights arising from it, in determining a regulation’s economic impact upon property. *Id.*; *Sea Cabins on Ocean IV Homeowners Ass’n, Inc. v. City of North Myrtle Beach*, 345 S.C. 418, 430, 548 S.E.2d 595, 601 (2001).

For example, in *Palazzolo v. Rhode Island*, a developer sought to develop three parcels totaling approximately 20 acres. 533 U.S. 606, 614 (2001). The property was located mostly in tidal marshlands, but some buildable uplands existed on the property. *Id.* The developer proposed to fill in the marshland in order to construct homes on the lots. *Id.* The State permitting authority denied the application. *Id.* at 615. The developer then filed an action alleging a taking of his property without just compensation, alleging that the state’s action “deprived him of all economically beneficial use of his property.” *Id.* The state argued that a total taking had not occurred because the uplands portion of the property could still be improved. *Id.* at 630. The Court agreed, stating that the property’s upland value of \$200,000 “does not leave the property economically idle.” *Id.* (internal quotations omitted). The developer’s total taking argument failed.

The same result is applicable to Columbia Venture’s claim of a total taking. Columbia Venture alleges that approximately thirty percent of its property is not in a floodway, which means that Columbia Venture is free to build whatever it chooses so long as the ground level is filled or the buildings are elevated. Columbia Venture cannot carve out the portion of its property designated as a floodway and claim that the County has taken all of the value of its floodway property. Furthermore, Columbia Venture may use its floodway for agricultural

purposes, docks, golf courses, and other low-impact uses that nonetheless confer value. Thus, Columbia Venture's claim that Richland County has taken all economically viable use of its property must be dismissed.

II. COLUMBIA VENTURE'S SUBSTANTIVE DUE PROCESS CLAIMS

Columbia Venture alleges that Richland County's adoption of the 2001 FIS and flood maps is arbitrary because, in the opinion of Columbia Venture, the flood maps were not based on sound engineering or evidence. Thus, according to Columbia Venture, Richland County's compliance with the NFIA in adopting FEMA's allegedly erroneous FIS and flood map in 2001 constitutes a violation of Columbia Venture's substantive due process rights. Amended Compl. ¶ 125. Columbia Venture also alleges that "the county's adoption of a regulatory floodway that includes large areas of ineffective flow that have no capacity to convey or discharge the base flood ... violates the substantive due process right of CV guaranteed by the Fourteenth Amendment to the Constitution of the United States and by Article I, Section 3 of the Constitution of the State of South Carolina." *Id.* Presumably, Columbia Venture is asserting that the County's good faith revision of its Floodplain Overlay District in 2006 to adopt the 1995 BFEs while leaving the 2001 floodway intact in order to maintain its compliance with the NFIP also violates its substantive due process rights. Moreover, Columbia Venture appears to assert that some sort of improper motive, procedural irregularity and departure from common practice on the part of Richland County establishes a substantive due process violation. Richland County argues that, as a matter of law, taking Columbia Venture's allegations as true, Columbia Venture fails to show that Richland County's actions amount to substantive due process violations under either the United States Constitution or the South Carolina Constitution.

A. Substantive Due Process under the United States Constitution

Under the United States Constitution, to establish a substantive due process claim, the plaintiff must show deprivation of a property interest in a manner that “falls so far beyond the outer limits of the legitimate governmental action that no process could cure the deficiency.” *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995); *Harbit v. City of Charleston*, 382 S.C. 383, ___, 675 S.E.2d 776, 782 (Ct. App. 2009). The Due Process clause is designed “to prevent government from abusing its power, or employing it as an instrument of oppression.” *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992). It acts as a limitation upon government power, but it does not guarantee any affirmative obligation that property interests are not harmed through other means. *Id.* The Due Process Cause does not impose upon government a duty of care analogous to state tort law. *Id.* at 128; *Covenant Media of S.C., LLC v. City of North Charleston*, 493 F.3d 421, 436 (4th Cir. 2007).

1) Cognizable Property Interest

In making a substantive due process claim (both facial and as-applied), the plaintiff must allege and establish a cognizable property interest rooted in state law. *Greenspring Racquet Club Inc. v. Baltimore County*, 70 F. Supp.2d 598, 607 fn. 13 (D. Md. 1999), *reversed on other grounds by* 2000 U.S. App. 27207 (4th Cir. 2000) (unpublished). “The person claiming the property interest must have a ‘legitimate claim of entitlement’ to it.” *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992). In the land development context, such a claim of entitlement may arise from local government permitting schemes. “A clear entitlement exists in a permit when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.” *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992). Government discretion in conferring a benefit defeats any claim of entitlement to

develop property. *Id.* Thus, Columbia Venture must do more than simply assert that it cannot to do what it pleases with its property. See *Harbit v. City of Charleston*, 382 S.C. 383, ___ 675 S.E.2d 776, 782 (Ct. App. 2009) (stating that a property owner's expectation of developing property not enough to create property interest). Columbia Venture must show an entitlement or benefit that was denied. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992); *Worsley Companies, Inc. v. Town of Mt. Pleasant*, 339 S.C. 51, 55, 528 S.E.2d 657, 660 (2000). It has failed to do so.

Columbia Venture alleges that it owns property and that it announced plans to develop this property. Amended Compl. ¶¶ 4, 43. It also claims that Richland County's ordinances frustrated its development plans. Amended Compl. ¶ 100. Under South Carolina law, a property owner has a right to ownership, possession and use of his or her property. *Gwynette v. Myers*, 237 S.C. 17, 24, 115 S.E.2d 673, 676 (1960). Nevertheless, Richland County's actions have done nothing to deprive Columbia Venture of ownership interests. Columbia Venture continues to fully exercise its rights to devise, exclude and sell its property. In fact, Columbia Venture states in its Complaint that it has indeed sold portions of its property. Amended Compl. ¶ 101. As far as use of its property, Columbia Venture has not alleged that the County's actions deprived Columbia Venture of making use of its property in the same manner it was used at the time of purchase. Columbia Venture concedes as much, stating that Richland County's ordinances do not prevent it from maintaining its existing levee. Amended Compl. ¶ 85.

Instead of alleging deprivation of these basic attributes of property ownership, Columbia Venture seemingly alleges that it possesses a cognizable property interest in its proposed development plans. However, a nebulous claim of an unfettered right to develop property is not protected by the substantive due process clause. See *Truax v. Corrigan*, 257 U.S. 312, 348

(1921) (That the right to conduct a lawful business, and thereby acquire pecuniary profits, is property, is indisputable. ... [However,] ... no person has a vested interest in any rule of law, entitling him to have it remain unaltered for his benefit.”); *Md. Port Admin. v. Premier Auto. Servs.*, 492 F.3d 274, 283 (4th Cir. 2007) (“The recognition of ... a broad right to do business, would be akin to that recognized in *Lochner v. New York*, 198 U.S. 45 (1905), and its progeny, which the Supreme Court has long since refused to recognize.”) (internal quotations omitted); *Harbit v. City of Charleston*, 382 S.C. 383, __ 675 S.E.2d 776, 782 (Ct. App. 2009) (“A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property.”); *Denene v. City of Charleston*, 359 S.C. 85, 97, 596 S.E.2d 917, 923 (2004) (“No one has unfettered right to pursue a business detrimental to the public health, safety and welfare.”). “A property right will not be recognized as cognizable under the due process doctrine if the person claiming the right has a mere abstract need or desire for, or unilateral expectation of the claimed right.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *Worsley Companies, Inc. v. Town of Mt. Pleasant*, 339 S.C. 51, 55, 528 S.E.2d 657, 660 (2000). Such an inchoate property interest is not protected under the due process clause.

Even if this Court examined the Complaint to glean from its allegations any deprivation of an entitlement or benefit, none can be found. Under state law, a property owner may acquire a vested interest in an existing zoning designation if certain requirements are met. *Pure Oil Div. v. City of Columbia*, 254 S.C. 28, 34, 173 S.E.2d 140 (1970); *see also* S.C. Vested Rights Act, S.C. Code Ann. § 6-29-1510 *et seq.* Pursuant to section 26-53(i) of the Richland County Code of Ordinances, a property owner who is issued a development permit by the County acquires a vested right in development of his or her property according to the terms of the permit for a two-

year period of time, with the option to extend the vested time period up to five additional years. Columbia Venture has not alleged that it sought County approval of an application to rezone, build or otherwise develop, or upgrade its levee. Columbia Venture did not allege any claim of a vested right under any of these laws.

It could be that Plaintiff may be asserting that the County's adoption of FEMA's Congaree River flood maps arbitrarily deprived it of a cognizable property interest in a particular flood hazard designation. If this is what Columbia Venture believes, it is essentially arguing that all property owners within the Congaree River floodplain have a vested property interest in avoiding the designation of floodway on their property. Not only is this argument untenable, but plainly absurd, for several reasons.

First, a so-called interest in property remaining in a flood fringe designation on a federally imposed FIRM is not grounded in state law, but rather federal law. See *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992) (stating that property interests traditionally created from state law). Even if federal law was applicable here, no property owner possesses a cognizable property interest in one flood hazard zone over another. Pursuant to 42 U.S.C. § 4101(c), FEMA must assess the need to revise and update its flood maps every five years. Upon a determination that revision is needed, or upon the request of a state or local government, FEMA must undertake a new study. *Id.* at (f). FEMA is required by law to reassess its flood maps every five years, and revise its flood maps if it finds revision necessary. 42 U.S.C. § 4101(e) and (f). In short, the discretion given to FEMA to assess and revise flood maps vitiates any argument of a legitimate entitlement to a particular flood zone. See *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir. 1995) (holding that "any significant discretion conferred upon the [government] defeats the claim of a property interest."). No assurance is given to any property

owner that a particular flood map will remain the same. See e.g. *Harbit v. City of Charleston*, 382 S.C. 383, __ 675 S.E.2d 776, 782 (Ct. App. 2009)(stating that property owner had no property interest in a particular zoning designation); *Sag Harbor Port Assocs. v. Village of Sag Harbor*, 21 F. Supp. 2d 179, 183 (E.D. N.Y. 1998) (holding that, as a matter of law, no vested interest exists in an existing zoning classification because zoning classifications change over time). And a property owner has no property interest in merely being “left alone” by the government. *Adams v. Village of Wesley Chapel*, 2006 U.S. Dist. LEXIS 72471, *10-11 (W.D. N.C. 2006).

Second, Columbia Venture may be arguing that it is entitled to a less dangerous flood hazard designation at the expense of other surrounding property owners. If the floodway is removed from Columbia Venture’s property, then the floodway must go somewhere else, on other properties, placing others at more risk from floods. No property owner has a right to “misuse his own land [by building in floodway] to the severe detriment of another.” *Usdin v. State of New Jersey*, 173 N.J. Super. 311, 330, 414 A.2d 280, 289 (1980).

Because Columbia Venture has failed to allege a cognizable property interest, its substantive due process claim must be dismissed for failure to state a claim for which relief can be granted.

2) Nature of Government Action

Even if a cognizable property interest exists, no substantive due process violation has occurred unless the state action falls “so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency.” *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 288 (4th Cir. 1998). “In other words, government action offends substantive due process only where the resulting deprivation of life, liberty, or

property is so unjust that no amount of fair procedure can rectify it.” *Id.* According to Columbia Venture, Richland County’s compliance with the NFIA in adopting FEMA’s allegedly erroneous FIS and flood map in 2001 within its Floodplain Overlay District is “so far beyond the outer limits of legitimate government action” that relief under the due process clause is warranted. Amended Compl. ¶ 125. Columbia Venture also alleges that that the County’s good faith revision of its floodplain ordinance in 2006 upon the advice of FEMA in order to maintain its compliance with the NFIP represents another incident of extreme unjustness that demands relief. *Id.* Moreover, Columbia Venture appears to assert that some sort of improper motive or procedural irregularity has driven Richland County’s actions, which allegedly establishes a substantive due process violation. Amended Compl. ¶¶ 65, 66, 82, 83, 84, 85, 86, 87, 89, 90-100. Columbia Venture’s Amended Complaint has failed to state facts sufficient to show that Richland County’s actions were so far out of bounds that its substantive due process rights were unjustly trampled upon.

a) *Richland County’s Adoption of FEMA’s 2001 FIS and FIRMs within its Floodplain Overlay District*

There is no question that Richland County’s Floodplain Overlay District serves a legitimate government purpose. The ordinance’s stated purpose for regulating floodplains is as follows:

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

elevated or not otherwise protected from flood damages. In order for owners of property located within the county that is subject to periodic inundation to obtain flood damage insurance through the National Flood Insurance Program, the United States government, by statute and through regulations promulgated by the Federal Emergency Management Agency (FEMA) requires that the county enact floodplain regulations designed to reduce the amount of potential flood losses. It is, therefore, the intent of this section to lessen such hazards and losses and ensure insurance coverage by those affected property owners by restricting or prohibiting uses that are dangerous to health, safety, or property in times of flood or that cause excessive increases in flood heights or velocities. This shall be accomplished by requiring that uses vulnerable to floods be protected against flood hazards at the time of initial construction, and by controlling filling, grading, mineral extraction, placing of obstructions within the flood channels, and other activities, uses, or characteristics of use which may increase flood damage.

Richland County Ordinance No. 074-04HR, codified at § 26-104(a), Richland County Code of Ordinances (attached hereto as Exhibit 4)⁴

Courts that have addressed the legitimacy of the government interest in floodplain management conclude unanimously that ordinances restricting development in a floodplain in order to protect public health and safety clearly serves a legitimate government purpose. See e.g., *DDA Family Ltd. P'ship v. City of Moab*, 2006 U.S. Dist. LEXIS 32667, *30-31 (D. Utah 2006) (local floodplain ordinance clearly a legitimate exercise of police power; *Gove v. Zoning Bd. of Appeals of Chatham*, 444 Mass. 754, 761, 831 N.E.2d 865, 870 (Mass. 2005) (same); *Bank v. Illinois Dep't of Transp.*, 144 Ill.2d 210, 226, 579 S.E.2d 815, 821-22 (1991) (same); *Fortier v. City of Spearfish*, 433 N.W.2d 228, 231, 1988 S.D. LEXIS 175, *7 (1988) (same); *Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville*, 308 N.C.

⁴ This court may take judicial notice of legislative facts when deciding on the constitutionality of legislation. Danny R. Collins, *SOUTH CAROLINA EVIDENCE*, p. 198 (2d ed. SC Bar 2000) Local ordinances "shall be admitted into evidence in such courts and shall constitute prima facie evidence of the genuineness of the same, provided the clerk of such municipality certifies to the correctness of the same." S.C. Code Ann. § 19-3-10. The attached ordinance is a certified correct copy.

255, 262, 302 S.E.2d 204, 209 (1983) (same); *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 233, 284 N.E.2d 891, 899 (1972) (same). Moreover, the NFIP advances a legitimate government interest. *Texas Landowners Rights Assoc. v. Harris*, 453 F. Supp. 1025, 1032 (D.D.C. 1978). Undeniably, Richland County's floodplain management ordinance passes muster as serving a legitimate government purpose.

Columbia Venture alleges that the County's "arbitrary adoption of a floodway that is not based on sound engineering or evidence that is scientifically or technically correct" violates its substantive due process rights. Amended Compl. ¶ 125. Even assuming the flood map is scientifically inaccurate, the county's adoption of FEMA's FIS and flood maps as part of its Floodplain Overlay District does not translate into a conclusion that the County's action was arbitrary and capricious. The Due Process Clause is not a guarantee against incorrect or ill-advised decisions. *Collins v. City of Harker Heights*, 503 U.S. 115, 130 (U.S. 1992); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 829 (4th Cir. 1995) (zoning decision based upon erroneous evidence does not constitute a substantive due process violation). Thus, Columbia Venture's allegations of a substantive due process claim arising from the County's adoption of so-called erroneous flood maps fail to state a claim as a matter of law.

In *Sylvia Dev. Corp. v. Calvert County*, the plaintiff sought to develop a tract of rural property into a single family subdivision. 48 F.3d 810, 815 (4th Cir. 1995). He filed an application with the County to rezone the property to allow higher residential density. *Id.* The County denied the rezoning due to significant public opposition to changing the rural character of the area. The plaintiff challenged the County's decision in state court. *Id.* at 816. The state court reversed the County's decision based on lack of substantiated evidence to support its decision. *Id.* at 817. The state litigation caused an eleven-month delay in obtaining the

necessary zoning approval, which caused the plaintiff to lose the property at issue. *Id.* He then brought several constitutional claims against the County in federal court, including a substantive due process violation allegedly resulting from the County's denial of the rezoning without any evidence to support its decision. *Id.* The Court rejected this claim, stating that, even though the County's decision was flawed due to purely speculative evidence, the County nonetheless properly acted within its police power to zone property. *Id.* at 829. The fact that the County relied on flawed analysis failed to establish a violation of due process. *Id.*

Other courts have arrived at the same conclusion. In *Crider v. Bd. of County Comm'rs of Boulder*, the plaintiffs challenged on substantive due process grounds the County's intergovernmental agreement that placed its property in a rural preservation district. 246 F.3d 1285, 1287 (10th Cir. 2001). In support of their claim, the plaintiff argued that the County's decision was based on improper motive, and erroneous information. *Id.* at 1289. The court explained that "the arbitrary and capricious standard in the context of zoning "does not mean simply erroneous." *Id.* at 1290. In *WMX Technologies, Inc. v. Gasconade County*, a landfill brought a substantive due process challenge to a county's adoption of a solid waste management ordinance, alleging that the ordinance was arbitrary and unreasonable because "no scientific basis exists to suggest that its provisions further any legitimate public interest" and that the ordinance "was enacted merely to 'deep-six' their expansion plans." 105 F.3d 1195, 1200-1201 (8th Cir. 1997). In rejecting this argument, the court stated that "the means by which an ordinance comes to pass ... is irrelevant to the question of whether the substance of the ordinance is constitutionally infirm on its face." *Id.* at 1201. "Due process does not require a legislative body to perform any particular studies or prepare any particular analysis to justify its decisions." *Id.* The court asks only whether "a conceivable rational relationship exists between

the ordinance and legitimate government ends.” *Id.* Similarly, in *Tonkovich v. Kansas Bd. of Regents*, a law professor argued that the University Board of Regents allegedly made erroneous findings concerning unethical conduct which violated his substantive due process rights. 159 F.3d 504, 530 (10th Cir. 1998). The Board argued that “the fact that they did not agree with [plaintiff] on every issue and did not ultimately find in his favor cannot form the basis of a substantive due process claim.” *Id.* The Court agreed, holding that “incorrect or ill-advised” decisions do not rise to the level of a substantive due process violation. *Id.*

And in a case even more on point, a developer brought a substantive due process claim against a village, asserting that the village’s floodplain management ordinance violated his due process rights because the ordinance was based on erroneous flood data. *Terrace Knolls, Inc. v. Dalton*, 571 F. Supp. 1086, 1089 (N. D. Ohio 1983). The court denied the claim, stating that the ordinance’s enactment caused by incorrect facts “does not transform it into a violation of substantive due process.” *Id.* at 1092. Clearly, Columbia Venture’s allegations that the County’s adoption of allegedly erroneous flood maps fail to state a cause of action for a substantive due process violation.

Furthermore, even if the floodway is inaccurate, it is nonetheless reasonable for the County to adopt FEMA’s FIS and FIRMs in light of the prospect of suspension from the NFIP that would occur if the County did not adopt the FIS and FIRMs. Under 44 C.F.R. § 59.24(d), a participating community that “repeals its flood plain management regulations, allows its regulations to lapse, or amends its regulations so that they no longer meet the [NFIP] minimum requirements shall be suspended from the [NFIP].” Suspension from the NFIP causes the community to be ineligible for sale of flood insurance. *Id.* Most importantly, if a community does not participate in the NFIP, federal lending assistance is not available within that

community. 42 U.S.C. § 4106. Therefore, if Richland County, according to Columbia Venture's concept of fairness and due process, had refused to adopt FEMA's FIS and FIRMs, or subsequently repealed FEMA's FIS and FIRMs, then no property owner in the County would be able to purchase flood insurance nor obtain a loan for purchase or construction, not even Columbia Venture. Ironically, under this scenario, Columbia Venture's development plans would be very difficult if not impossible to accomplish.

b) *Richland County's Amendment of the Floodplain Overlay District to Adopt the 1995 Congaree River BFEs*

Likewise, Richland County's ordinance amending its Floodplain Overlay District to adopt the 1995 Congaree River BFE while maintaining the effectiveness of the 2001 Congaree River floodway serves a legitimate government purpose in protecting public health, safety and welfare. (See Exhibit 4, and Richland County Ordinance No. 114-06HR, attached hereto as Exhibit 5). The amendment was a rational response to the unexpected twists and turns of Columbia Venture's FEMA appeal. As stated above, Columbia Venture alleged a procedural flaw in FEMA's adoption of the BFEs established in the September 26th appeal resolution, and moved before the United States District Court to vacate the Congaree River BFE and floodway due to procedural error. Amended Compl. ¶ 73. On November 18, 2005, the District Court vacated the Congaree River BFEs due to FEMA's failure to properly notice the 2001 Congaree River BFEs in the Federal Register. *Id.*; Order of Vacatur, *Columbia Venture, LLC v. The Federal Emergency Management Agency*, C/A No.: 301410010 (November 18, 2005). The Order stated that the previous BFEs issued by FEMA in 1995 were in effect until revised by FEMA pursuant to its authority under the NFIA. *Id.*

In January 2006, Richland County enacted a series of moratoria, cumulatively not exceeding nine months, which prohibited issuance of development permits within the Congaree

River floodplain in order to give the County time to determine from FEMA whether it intended to re-publish the 2001 BFEs pursuant to its authority under the NFIA. Amended Compl. ¶¶ 90-92; see also Exhibit 2. FEMA eventually advised Richland County that the Order vacated only the 2001 BFEs, not the 2001 floodway. Amended Compl. ¶ 75. Consequently, in December 2006, Richland County revised its floodplain ordinance to reflect that the 1995 BFEs governed the Congaree River floodplain. (See Exhibit 5).⁵ Over a year later, the United States District Court entered a text order clarifying that its previous Order of Vacatur also vacated the 2001 Congaree River floodway. Amended Compl. ¶ 76. Both the 2005 Order of Vacatur and this subsequent text order were appealed to the Fourth Circuit of Appeals. Amended Compl. ¶ 77. The Court of Appeals granted Defendant-Intervenors' motion to stay the district court's orders pending appeal. *Id.* In 2009, the Fourth Circuit Court of Appeals reversed the District Court's vacatur of the Congaree River BFEs and floodway. *Columbia Venture, LLC v. S.C. Wildlife Federation*, 562 F.3d 290, 295 (4th Cir. 2009).

Columbia Venture asserts that County's use of 1995 Congaree River BFEs and 2001 Congaree River floodway placed "a floodway on CV's property by political fiat that had no rational relationship to the BFEs made applicable to CV's property by the ordinance." Amended Compl. ¶ 95. From Columbia Venture's own stated chronology of events, it is obvious that Richland County's amendment of its floodplain ordinance was a rational response to the District Court's Order of Vacatur. Nothing in the initial Order of Vacatur stated that the 2001 floodway was vacated along with the BFEs.⁶ Taking the advice of FEMA that the 2001 floodway

⁵ This court may take judicial notice of legislative facts when deciding on the constitutionality of legislation. Danny R. Collins, *SOUTH CAROLINA EVIDENCE*, p. 198 (2d ed. SC Bar 2000) Local ordinances "shall be admitted into evidence in such courts and shall constitute prima facie evidence of the genuineness of the same, provided the clerk of such municipality certifies to the correctness of the same." S.C. Code Ann. § 19-3-10. The attached ordinance is a certified correct copy.

⁶ Despite Columbia Venture's emphatic allegation that the Order of Vacatur unequivocally vacated the 2001 floodway, the Order itself simply stated that the BFEs were vacated. It is reasonable to conclude that the floodway

remained in effect is quite reasonable, given that FEMA is the administrator of the NFIP. Importantly, as Columbia Venture states in its Amended Complaint, the Fourth Circuit reversed the District Court's vacatur of both the 2001 BFEs and floodway, thus vindicating the County's position that the 2001 floodways remained in effect. Amended Compl. ¶ 77. In short, Columbia Venture's own Amended Complaint lays out a rational basis for the ordinance amendment. So long as the County's ordinance can be justified by "any circumstance or government interest," Columbia Venture's substantive due process claim must fail. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995). Columbia Venture may disagree with that basis, but it certainly does not "fall so far beyond the outer limits of the legitimate governmental action that no process could cure the deficiency."

Even assuming the District Court Order indeed nullified the 2001 FIRMs, a mistaken interpretation of a court order does not rise to the level of a substantive due process violation. *Robinson v. City of Seattle*, 830 P.2d 318, 323 (Wash. 1992). In *Robinson v. City of Seattle*, several county ordinances imposing impact fees were invalidated in state court as constituting an *ultra vires* act. *Id.* The City of Seattle had similar ordinances, yet the City Attorney distinguished its fee structure from the invalidated county fees, and advised that the ruling in any event did not apply to the city because it was not a party to the case, and continued enforcement of its ordinances. *Id.* Subsequently, a court determined that its previous ruling concerning the invalidity of a certain fee structure applied to the City and held the City in contempt. *Id.* at 325. The plaintiffs then brought a 1983 action against the City, alleging that the City's repeated enforcement of clearly invalid ordinances were a substantive due process violation. *Id.* at 326.

was untouched by the Order in light of 42 U.S.C. § 4104, which clearly states that a property owner may only appeal FEMA's determinations of BFEs. *See also County of Monmouth v. FEMA*, 2009 U.S. Dist. LEXIS 87953, *12 (D. N.J. 2009) (holding that § 4104 of the NFIP is a limited waiver of sovereign immunity applying only to appeal of BFEs; the APA does not waive immunity for appeal of a floodway).

The Court opined that “a city cannot be held liable ... for the mere enforcement of an unconstitutional or void ordinance in the nature of a police power regulation.” *Id.* at 334. Similarly, in *Central Airlines, Inc. v. United States*, an airline brought a substantive due process claim based on allegations that the Federal Aviation Administration incorrectly interpreted its regulations in a manner that caused a loss of almost eight million dollars. 138 F.3d 333, 334 (8th Cir. 1998). The court quickly rejected this claim, stating that a mistaken interpretation of law “is nothing more than a misjudgment ... that falls far short of the arbitrary, capricious and flagrant conduct that must be present to establish a substantive due process claim.” *Id.* at 335. The same holds true here.

Moreover, Columbia Venture’s allegation that the use of the 2001 floodway with the 1995 BFEs was arbitrary and irrational is misplaced. A due process inquiry asks whether the County’s adoption of the 1995 BFEs while leaving the 2001 floodway intact bears a rational relationship to the purposes of the floodplain ordinance, not whether the BFEs and floodway bear a rational relationship to each other. The broad 2001 floodway undoubtedly furthers the interest of protecting public health and safety. There is nothing irrational about taking greater steps to protect public safety above the bare minimum. FEMA’s regulations make clear that local ordinances with more restrictive protections are encouraged. 44 C.F.R. § 60.1. Richland County is not required to “even select the best or the least restrictive method of attaining its goals so long as the means selected are rationally related to those goals.” *Richardson v. Township of Brady*, 218 F.3d 508, 514 (6th Cir. 2000).

c) *Columbia Venture’s Allegations of Improper Motive, Procedural Irregularity and Unprecedented Practice*

Finally, Columbia Venture attempts to cobble together a series of Richland County actions that together are designed to suggest a substantive due process claim under *Scott v.*

Greenville County, 716 F.2d 1409 (4th Cir. 1983). In *Scott*, a real estate developer sought to construct a low-income housing complex. *Id.* at 1412. After acquiring a purchase option for the property and obtaining the necessary federal subsidy funds for the project, Scott submitted detailed building plans to Greenville County for an “informal courtesy review” prior to formal submission of a permit application. *Id.* The County informed Scott that his plans conformed to the City’s building and zoning requirements. *Id.* Soon thereafter, neighborhood opposition arose to low-income housing in the area. *Id.* This opposition was allegedly motivated by racial discrimination. *Id.* Greenville County Council, at the urging of opponents to the project, then took extraordinary steps to thwart Scott’s project. *Id.* First, the County Council directed its planning officials to halt all processing of building permits pending within the particular area of the project. *Id.* This “freeze order” directly contravened provisions of the County’s zoning ordinance that barred County Council involvement in the issuance of permits. *Id.* at 1413. Second, the County Council initiated a rezoning of the area to a classification that prohibited multi-family housing. *Id.* at 1412. After lengthy legal wrangling in state court, Scott brought a substantive due process claim, among others, against the County in federal court. *Id.* at 1413.

The Fourth Circuit, after determining that Scott possessed a property interest in a building permit, held that he “was deprived of his building permit by the extraordinary and unlawful intervention of the county’s highest governing body into the issuance process.” *Scott*, at 1419. The Court explained that a government action “which is tainted with fundamental procedural irregularity,” and driven by racial discrimination amounted to an actionable denial of due process. *Id.* (internal quotations omitted).

The Fourth Circuit was faced with a similar situation in *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008). There, the plaintiff sought to open a methadone

clinic in Baltimore County. *Id.* at 358. A suitable piece of property was found, and the plaintiff asked the County whether a methadone clinic met its zoning requirements at that particular location. *Id.* The County notified the plaintiff in writing that the zoning designation for the site permitted operation of a methadone clinic. *Id.* Relying on this information, the plaintiff acquired the property and set about the process of obtaining the necessary federal and state certifications. *Id.* Soon, the surrounding neighborhood voiced strong opposition to the clinic. *Id.* at 359. The County Councilman representing the district where the clinic would be located actively assisted the opposition group. *Id.* This councilman introduced an ordinance creating a new zoning category for methadone clinics which was only allowed by special exception in a commercial zoning district. *Id.* The County then informed the plaintiff that it had erred in previously informing him that no permit or plan was needed from the County, and required him to submit a site plan and parking plan in order to obtain an occupancy permit. *Id.* at 360. After submitting these plans and other documentation requested by the County, the County finally issued an occupancy permit. *Id.* That same day, the County Council enacted the ordinance restricting the location of methadone clinics. *Id.* The ordinance contained several unprecedented aspects. The ordinance was passed in a much shorter time period than normal practice. *Id.* Additionally, the ordinance's effectiveness was immediate rather than the normal effective date of forty-five days after enactment. *Id.* And, the ordinance was revised on third reading to deny any grace period for compliance except for those clinics in operation prior to the ordinance's effective date. *Id.* After the County took enforcement action against the plaintiff, the plaintiff brought suit in federal court alleging violation of substantive due process. *Id.* at 361.

The district court found the County liable for violation of the plaintiff's substantive due process rights under *Scott*. On appeal, the Court affirmed that a substantive due process claim

may exist by showing arbitrary and unreasonable action as evidenced by action “that is tainted with fundamental procedural irregularity,” “that is targeted at a single party,” and “deviates from or is inconsistent with the defendant’s regular practice.” *Id.* at 373.

These factors were once again applied in *MLC Auto., LLC v. Town of Southern Pines*, 532 F.3d 269 (4th Cir. 2008). In *MLC*, the plaintiff located property suitable for constructing an automobile dealership, and obtained written confirmation from the Town that this parcel’s zoning designation allowed such use. *Id.* at 273. Only an architectural compliance permit and a building permit would be needed. *Id.* In reliance on the Town’s confirmation, the plaintiff bought the property, and obtained a letter of intent for a franchise. *Id.* After submitting his application for the architectural compliance permit, neighborhood opposition grew to the location of an automobile dealership in the area. *Id.* In an unprecedented move, residents filed a petition before the Town to rezone plaintiff’s property to a district that prohibited automobile dealerships. *Id.* Also, the Town took a greater length of time than normal to approve the architectural compliance permit. *Id.* at 274. After the permit was issued, the Town rezoned the plaintiff’s property, preventing him from using the property for an automobile dealership. *Id.* This action was taken without the requisite determination of consistency with the Town’s comprehensive land use plan. *Id.* at 275. The court noted that the plaintiff’s property right was questionable given that he did not receive a building permit. *Id.* at 284. However, assuming that a property interest was established, the court stated as dicta that the *Scott* factors of procedural irregularities, targeted government action, and out of the ordinary practice were present. *Id.* at 282.

These three cases reveal common facts. All three plaintiffs had obtained a permit from which a property interest could or did arise, or at least assurances that a permit would issue. In

all three cases, the government initially informed the plaintiffs that the proposed use complied with zoning requirements, and the plaintiffs relied on this information to their detriment. Moreover, the government took extraordinary steps to actively, affirmatively snatch the ability to develop away from the plaintiffs. And the government's actions were driven by an impermissible motive, either racial animus, or discrimination against an undesirable land use.

None of these common facts are found in Columbia Venture's allegations. Columbia Venture has not alleged that it has a vested interest in a permit, nor detrimentally relied upon any assurance by Richland County that the flood maps would remain unchanged. Columbia Venture has not alleged that the County conferred a benefit only to later snatch it away. And the allegations it does make, assuming that they are true, simply do not reach the degree of "fundamental procedural irregularity," unprecedented break from normal practice, or the denial or revocation of a development approval driven by improper motive.

In an effort to state a claim that establishes these factors, Columbia Venture makes several allegations relating to procedural irregularity. The County disputes these allegations, but obviously, for the purposes of this Motion, they must be accepted as true. In paragraphs 65 and 66, Columbia Venture suggests that, after FEMA issued its final determination of the Congaree River BFEs, Richland County was required by NFIP regulations to adopt FEMA's FIS and FIRMs by February 20, 2002, yet did not do so until June 16, 2004. Amended Compl. ¶¶ 65, 66, 79, 88. This allegation of failure to adopt FEMA's 2001 FIS and FIRMs, if true, is not helpful to Columbia Venture because such failure would actually benefit Columbia Venture, not hurt it, because the flood maps in effect prior to 2001 placed a significantly smaller floodway on Columbia Venture's property. Further, Columbia Venture alleges that the County adopted the 1995 BFEs while retaining the 2001 floodway against the advice of the Planning Commission.

Amended Compl. ¶ 94. Nothing in Columbia Venture's allegation points to any ordinance provision that requires County Council to accept the Planning Commission's recommendations. Columbia Venture also alleges that Richland County Council violated state law by approving a submittal of a Letter of Map Revision to FEMA for the reestablishment of the 2001 BFEs in executive session without public notice. Amended Compl. ¶ 97. None of these allegations, even if true, rise to the level found in *Scott*, where the County Council flouted the law by prohibiting its staff from issuing a permit to Scott, in direct violation of its own zoning ordinance. Nor does it reach the same degree of unprecedented practice such as that found in *A Helping Hand*, where the rezoning ordinance departed from normal practice by making the ordinance effective immediately, passing the ordinance in record time, or revising the ordinance on third reading; or that described in *MLC*, where residents filed a petition to rezone the plaintiff's property.

Moving on to the second factor in *Scott* of targeted action driven by improper motive, Columbia Venture suggests that Richland County singled it out by enacting an amendment to its floodplain ordinance that allowed the City of Columbia's wastewater treatment plant and Heathwood Hall Episcopal School to expand while making no such exception for Columbia Venture. Amended Compl. ¶¶ 81-87. Additionally, Richland County enacted a series of moratoria that suspended approval or denial of any development permit for property located within the Congaree River floodplain until FEMA provided the County with guidance as to compliance with the NFIP in the aftermath of the District Court's vacatur of the Congaree River BFEs. Amended Compl. ¶¶ 90-93. Columbia Venture alleges that the moratoria was one of several steps the County took "to keep in place the vacated 2001 floodway in order to prevent CV from improving its levees and to block CV's investment-based plans to develop its property." Amended Compl. ¶ 89. These allegations fail to support any contention that

Richland County directed its actions solely at Columbia Venture. And none of Columbia Venture's allegations come close to the targeted action motivated by racial animus, as in *Scott*, or undesirable use, as in *A Helping Hand*.

This factor of singular treatment contemplates more than enacting legislation of the kind that Columbia Venture describes. In *Scott*, the County's action was clearly and positively targeted at the plaintiff. In contrast, nowhere has Columbia Venture alleged, nor can it, that Richland County Council issued some directive to halt any pending permit issued to Columbia Venture. And Richland County's legislation enacting moratoria is simply not comparable to the actions taken by Greenville County Council in *Scott* or by Baltimore County in *A Helping Hand*. Richland County's moratoria were legislative enactments that applied to the entire Congaree River floodplain, not just to Columbia Venture's property.

Furthermore, Richland County's exceptions to its prohibition on construction within a floodway for the City of Columbia wastewater treatment plan and Heathwood Hall bears no imprimatur of unfairly singling out Columbia Venture. As is obvious from the very terms of the exceptions, Richland County's exceptions applied to the two existing uses most affected by FEMA's 2001 floodway. In other words, the exceptions applied to existing built environments, i.e., improved property. In contrast, Columbia Venture merely had plans to develop its property. Nothing in Richland County's exceptions impaired Columbia Venture's existing use of its property, and Columbia Venture concedes as much by acknowledging that the ordinance amendment expressly allowed continued maintenance of its levees. Amended Compl. ¶ 85.

As yet another suggestion of unfair, targeted treatment, Columbia Venture attempts to inject the common theme found in *Scott*, *A Helping Hand*, and *MLC* of neighborhood opposition to its proposed development plans in a floodplain. In paragraph 54 of its Amended Complaint,

Columbia Venture alleges that it "is informed and believes that a number of persons who are either opposed to development in general or to CV's proposed development in particular, but most of whom were not affected landowners, appealed FEMA's August 12, 1999 revised preliminary FIRM in hopes of preventing CV from developing its property." Yet here, the allegation is that opponents of Columbia Venture merely appealed FEMA's BFEs. Columbia Venture makes no allegation that Richland County's actions were driven by citizen opposition, much less citizen opposition of the nature described in *Scott* or *A Helping Hand*.

In paragraph 99, Columbia Venture intones that "a member of the Richland County Council, who served as council chairperson during many of the Council's debates on [its proposed development], is and was a member of the Board of Trustees of the [Southern Environmental Law Center], the corporate organization representing the Defendant-Intervenors in their opposition to CV's federal judicial appeal." It is not at all clear exactly what significance Columbia Venture assigns to this allegation, especially since it fails to state whether this relationship existed during any time period relevant to its claims. Nor does the allegation identify what makes this sort of relationship improper. For the purposes of this Motion, however, Richland County will infer that Columbia Venture takes this relationship between a member of Richland County Council and the SELC as an insinuation of some amorphous, improper motive or nefarious alignment of forces against its development plans. If Columbia Venture is indeed implying targeted action, its implication is far too attenuated to bear any fruit for Columbia Venture. Compare to *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356, 359 (4th Cir. 2008) (describing role of county council member in active opposition to location of a methadone clinic). More to the point, organized opposition to a proposed development, in and of itself, does not implicate the due process clause. In a democracy, citizens opposed to a

development for legitimate reasons, such as the wisdom of building a massive development on a floodplain, are entitled to organize and exert political pressure on their elected officials. *Gardner v. City of Baltimore*, 969 F.2d 63, 72 (4th Cir. 1992).

In sum, Richland County's ordinances serve a legitimate government purpose of protecting public health and welfare, and its restrictions are rationally related to that purpose. None of Columbia Venture's allegations amount to government action "so arbitrary and irrational, so unjustified by any circumstances or government interests," that "no process could cure the deficiency." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995). In fact, Columbia Venture had, and still has, means of redress for its allegations of faulty flood maps. Columbia Venture had a legitimate avenue to vindicate an interest in a flood fringe designation through its appeal in federal court. However, Columbia Venture chose to dismiss its appeal against FEMA with prejudice in return for \$75,000 and a restudy of the Congaree River floodplain. In addition, FEMA regulations provide a means by which Columbia Venture may seek a change in the scope of the floodway on its property. See 44 C.F.R. § 65.5 (establishing process by which property owner may seek revision to floodway); 44 C.F.R. § 65.10 (establishing process by which property owner may certify levee as providing protection from base flood). Columbia Venture has never sought relief under these regulations. Surely, this Court cannot hold Richland County liable for arbitrarily depriving Defendant of a property interest, when Columbia Venture held (and still holds) the keys to its own proverbial jail cell. Columbia Venture's logic seems to twist the fairness aspect of the due process clause from the constitutional intent of protecting the individual from capricious government action, to a self-serving intent of protecting its own capriciousness at the expense of the public good.

Consequently, this Court should dismiss Columbia Venture's claim of substantive due

process violations under the United States Constitution.

B. Substantive Due Process under the South Carolina Constitution

Due process analysis under the South Carolina Constitution is virtually the same as that under the United States Constitution. To support a substantive due process violation under the South Carolina Constitution, a party must show “he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.” *Worsley Companies Inc. v. Town of Mt. Pleasant*, 339 S.C. 51, 55, 528 S.E.2d 657, 660 (2000). Under the South Carolina Constitution, the standard for reviewing all substantive due process challenges to ordinances is whether the ordinance bears a reasonable relationship to any legitimate interest of government. *Id.* “The power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the court’s function to pass upon the wisdom or expediency of municipal ordinances or regulations. *Harbit v. City of Charleston*, 382 S.C. 383, ___, 675 S.E.2d 776, 780 (Ct. App. 2009). The validity of a local government’s decision-making concerning its zoning ordinance, as is the case here, must be upheld “if the propriety of that decision is even ‘fairly debatable.’” *Id.*

In determining whether a cognizable property interest exists under the South Carolina Constitution, South Carolina courts apply the same “entitlement test” as required under the United States Constitution. “The person claiming the property interest must have a “legitimate claim of entitlement’ to it.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Worsley Companies, Inc. v. Town of Mt. Pleasant*, 339 S.C. 51, 55, 528 S.E.2d 657, 660 (2000). In the land development context, such a claim of entitlement may arise from local government permitting schemes. “A clear entitlement exists in a permit when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.”

Worsley Companies, Inc. v. Town of Mt. Pleasant, 339 S.C. 51, 55, 528 S.E.2d 657, 660 (2000). Government discretion in conferring a benefit defeats any claim of entitlement to develop property. *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004). As discussed above, Columbia Venture has not alleged that it has a vested right in a permit or other development approval. Therefore, Columbia Venture fails to state a claim for a substantive due process violation under the South Carolina Constitution.

Columbia Venture may turn to *Painter v. Town of Forest Acres* to support an argument that it possesses a cognizable property interest. In actuality, *Painter* and other early due process cases only bolster Richland County's argument that Columbia Venture has failed to state a cognizable property interest. In *Painter*, an owner of a drive-through restaurant challenged a city ordinance that restricted hours of operation. 231 S.C. 56, 97 S.E.2d 71 (1957). The plaintiff alleged that the restriction caused a loss of fifty percent of his business. *Id.* at 60, 72. The court declared that "a municipal corporation cannot make a business a nuisance by merely declaring it to be such," and "property consists not merely in its ownership and possession but an unrestricted right of use, enjoyment, and disposal." *Id.* The important distinction here is that, in *Painter*, the plaintiff had an ongoing, existing business, not some mere plan for establishing a business. *Id.* at 60, 73. Similarly, in *Henderson v. City of Greenwood*, a property owner entered into a lease of her property next to a railroad track whereby the lessee would construct a building on her property, which she would retain at the conclusion of the term of the lease. 172 S.C. 16, 18, 172 S.E. 689, 689 (1934). The lessee obtained a building permit for construction of the building. The city subsequently revoked the permit and enacted an ordinance prohibiting construction on property adjacent to railroad tracks. *Id.* The court held that the ordinance violated substantive due process because it deprived the plaintiff of her property interest in her

existing lease. *Id.* Neither of these cases, nor others of similar ilk, support a property interest in a mere expectation of developing property. While Columbia Venture may have purchased its property with an expectation that it could develop it, expectation alone is insufficient to establish a violation of constitutional rights. *Harbit v. City of Charleston*, 382 S.C. 383, __ 675 S.E.2d 776, 782 (Ct. App. 2009).

Under the South Carolina Constitution, the standard for reviewing all substantive due process challenges to ordinances is whether the ordinance bears a reasonable relationship to any legitimate interest of government. *Id.* “The power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the court's function to pass upon the wisdom or expediency of municipal ordinances or regulations. *Harbit v. City of Charleston*, 382 S.C. 383, __, 675 S.E.2d 776, 780 (Ct. App. 2009). The validity of a local government's decision-making concerning its zoning ordinance, as is the case here, must be upheld “if the propriety of that decision is even ‘fairly debatable.’” *Id.*

As with Columbia Venture's substantive due process claims under the United States Constitution, Richland County's Floodplain Overlay District and its subsequent amendment to adopt the 1995 BFEs clearly serve a legitimate government purpose of protecting public health and safety, and the adoption of FEMA's BFEs and FIRMs within this ordinance bears a reasonable relationship to that legitimate government purpose. (See Exhibits 4 and 5). Columbia Venture has failed to rebut the presumption of the constitutional validity of these enactments. See *Sojourner v. Town of St. George*, 383 S.C. 171, 176, 679 S.E.2d 182, 185 (2009) (stating that South Carolina courts will not declare a state law or ordinance unconstitutional “unless its repugnance to the constitution is clear and beyond a reasonable

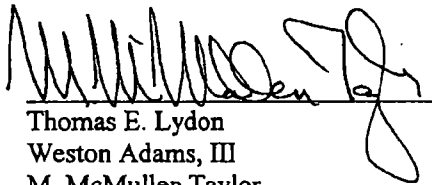
doubt.”). Even if FEMA’s Congaree River floodway is flawed, the act of simply adopting flawed data does not rise to the level of a substantive due process violation. *See e.g. Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 815 (4th Cir. 1995) (reliance of flawed analysis fails to establish a substantive due process claim); *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 530 (10th Cir. 1998) (holding that “incorrect or ill-advised” decisions do not rise to the level of a substantive due process violation). Likewise, Richland County’s amendment to its Floodplain Overlay District was rationally related to a legitimate purpose of maintaining its participation in the NFIP. While Columbia Venture may believe that the County’s actions amounted to open, irrational defiance against Columbia Venture’s development plan, the more plausible rationale is that Richland County did what it thought best by adopting the 1995 BFEs in accordance with the District Court’s vacatur. Columbia Venture asserts that Richland County violated its substantive due process rights by failing to adopt the 1995 floodway, in spite of the fact that the vacatur was silent on the issue of the floodway. Consistent with the County’s arguments raised against Columbia Venture’s federal substantive due process claim, the legislative enactments undertaken by Richland County are “at the least ‘fairly debatable’ and is not “so unreasonable as to impair or destroy citizen’s constitutional rights.” *Knowles v. Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 643 (1991).

CONCLUSION

Columbia Venture has failed to state a claim for a total raking under *Lucas v. Coastal Council* because its own allegations reveal that not all economically viable use has been taken from its property, and well-settled takings jurisprudence prohibit the severance of Columbia Venture’s floodway property from its developable flood fringe property in order to establish a total taking. Moreover, Columbia Venture has failed to state a claim for substantive due process

violations under either the United States or the South Carolina Constitutions. Columbia Venture has not alleged deprivation of cognizable property interest in any manner "so unjustified by any circumstances or interests," that "no process could cure the deficiency." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995). Richland County's actions must be upheld if the propriety of the County's actions are even "fairly debatable." Unquestionably, the County's actions as alleged by Columbia Venture fail to state a claim for which relief may be granted.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Thomas E. Lydon', is written over a horizontal line.

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Attorneys for Defendant Richland County

Columbia, South Carolina
October __, 2009

Civil Action No. 2004-CP-40-3929

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of October, 2009 served a copy of the
**MEMORANDUM IN SUPPORT OF DEFENDANT RICHLAND COUNTY'S MOTION
TO DISMISS PURSUANT TO SCRCR RULE 12(b)(6)** via hand-delivery as follows:

Manton M. Grier
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, South Carolina 29211

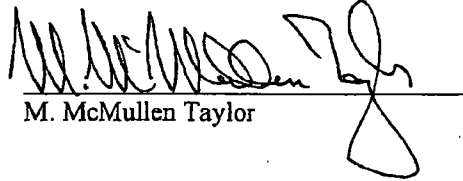

M. McMullen Taylor

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Columbia Venture, LLC,	)	
Plaintiff,	)	
	)	
and	)	C/A No. 3:01-4100-MBS
	)	
Heathwood Hall Episcopal School,	)	
Plaintiff-Intervenor,	)	
	)	
v.	)	ORDER OF VACATUR
	)	
The Federal Emergency Management	)	
Agency,	)	
Defendant,	)	
	)	
and	)	
	)	
South Carolina Wildlife Federation,	)	
Riverland Park Neighborhood Association,	)	
Dr. John Grego, and Dr. Daniel Tufford,	)	
Defendant-Intervenors.	)	

This matter is before the court on a motion to vacate filed by Columbia Venture, LLC ("CV") on August 22, 2005. In its motion, CV requested that the court vacate the revised flood elevation determinations for the Congaree River that were promulgated by the Federal Emergency Management Agency ("FEMA") in 2001. FEMA filed its memorandum in opposition to CV's motion to vacate on September 9, 2005. South Carolina Wildlife Federation, Riverland Park Neighborhood Association, Dr. John Grego and Dr. Dan Tufford ("Defendant-Intervenors") also filed a memorandum in opposition to CV's motion to vacate on September 9, 2005. CV filed a response to FEMA's memorandum in opposition on September 21, 2005. CV also filed a response to Defendant-Intervenors' memorandum in opposition on September 21, 2005. Defendant-

Intervenors filed a surreply to CV's response on September 29, 2005. Plaintiff-Intervenor Heathwood Hall Episcopal School ("Heathwood Hall") did not file a response to CV's motion. The court held oral arguments on the motion on October 31, 2005.

In its motion, CV contends that FEMA failed to comply with the procedures required by federal law when it enacted its 2001 flood elevation determinations for the Congaree River. Pursuant to 5 U.S.C. § 706, this court must "hold unlawful and set aside agency action, findings, and conclusions found to be—(D) without observance of procedure required by law. . . ." After a careful review of the record, this court finds that FEMA failed to comply with 28 U.S.C. § 4104(a). For the reasons enumerated herein, FEMA's 2001 base flood elevation determinations are null and void. This matter is remanded to FEMA for further administrative action consistent with this order.

GOVERNING STATUTE

Through the National Flood Insurance Act of 1968 ("NFIA"), as amended, 42 U.S.C. §§ 4001-4129, Congress has delegated to FEMA the authority to promulgate flood hazard determinations. Congress specifically limited the scope of FEMA's authority by providing a scheme with which FEMA must comply when proposing or modifying flood elevation determinations. See 42 U.S.C. § 4104. Section 4104(a) requires that FEMA must "first propose [its flood elevation] determinations for comment in the Federal Register, by direct notification to the chief executive officer of the community, and by publication in a prominent local newspaper." 42 U.S.C. § 4104(a). Section 4104(b) requires that FEMA "shall publish notification of flood elevation determinations in a prominent local newspaper at least twice during the ten-day period following notification to the local government. During the ninety-day period following the second publication, any owner or lessee of real property within the community . . . may appeal [FEMA's] determination to the local

government.” 42 U.S.C. § 4104(b). The NFIA provides that the sole basis for an appeal shall be the possession of knowledge or information indicating that the proposed determinations are scientifically or technically incorrect. Id.

During the appeals period, private persons are directed to make their appeals to the chief executive officer of the community. 42 U.S.C. § 4104(c). The community is directed to review and consolidate the appeals and issue a written opinion stating whether the evidence presented is sufficient to justify an appeal on behalf of such persons by the community in its own name. Id. Even if the community decides not to appeal FEMA’s determination, individual appeals are to be sent to FEMA as they are received by the community. Id. FEMA is expected to conduct a de novo review of the appeals from private persons and issue a written opinion to be sent to the chief executive officer of the community and to each individual appellant. 42 U.S.C. § 4104(d). After review of appeals from private persons and appeals from property owners, FEMA may finalize its flood elevation determinations. 42 U.S.C. § 4104(e). FEMA is authorized to resolve any appeals “by consultation with officials of the local government involved, by administrative hearing, or by submission of the conflicting data to an independent scientific body or appropriate Federal agency for advice.” Id. Any reports and information used by FEMA in making its final determination should be made available for public inspection and judicial review in the event that the determination is appealed to a United States district court. Id.

The district court’s review of FEMA’s determination is limited to the scope of review enumerated in the Administrative Procedures Act (“APA”), 5 U.S.C. § 706. See 42 U.S.C. § 4104(g). The APA provides, inter alia, that a reviewing court shall--

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--

- (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2).

While CV has alleged that FEMA's determination is unlawful on several grounds, its motion to vacate is based solely on the allegation that FEMA did not observe procedures required by law. See 5 U.S.C. § 706(2)(D).

FACTS

CV is a South Carolina limited liability company with its principal place of business in Columbia, South Carolina. Complaint at ¶ 5. CV is engaged in the business of developing commercial real estate. Id. ¶ 39. At all times relevant to the events described herein, CV owned 4,474.512 acres of land in Richland County along the Congaree River. Id. In 1999, CV announced its plans "to build a high tech research development park on this property projected to cost in excess of \$4 billion." Id. ¶ 58. CV alleges that a number of persons and groups were and remain opposed to this proposed development. Id. ¶ 59.

On August 12, 1999, FEMA issued its proposed base flood elevation determinations for portions of the Congaree River in Richland and Lexington Counties, South Carolina. Complaint, ¶ 52. Consistent with all previously issued base flood elevation determinations, the proposed map found no floodway on the landward side of the Manning levee, which is located on the Richland

County side of the Congaree River. Id. ¶ 53. These initial determinations were satisfactory to CV because it “agreed with the engineering judgment implicit therein that no floodway existed behind the Manning levee.” Id. ¶ 60. As such, CV did not appeal the August 12, 1999 proposed base flood elevation determinations. In an effort to apprise the community of its proposed flood elevation determinations and to elicit feedback, FEMA held a meeting on August 19, 1999, to present its proposed base flood elevation determinations for the Richland County area of the Congaree River. Plaintiff’s Memorandum in Support of Plaintiff’s Motion to Vacate, Exhibit 5. On September 1, 1999, FEMA mailed a letter to Mr. T. Cary McSwain, Richland County Administrator, advising him of proposed modifications to the flood elevation determinations. Id. In this letter, FEMA indicated that public notification would be given in The State newspaper on or about September 7, 1999 and September 14, 1999. Id. FEMA also indicated that the required notice would be published in the Federal Register but did not provide an exact date of publication. Id. FEMA enclosed its proposed August 12, 1999 base flood elevation determinations with its September 1, 1999 letter to the county. Id.

FEMA published its first notice in The State on September 7, 1999. Id. at Exhibit 7. FEMA published its second notice in The State on September 14, 1999. Id. at Exhibit 7. FEMA referenced the August 12, 1999 proposed flood elevation determinations in the publications. Id. The ninety-day appeals period detailed in 42 U.S.C. § 4104(b) began on September 14, 1999, the date of the second publication in The State. The appeals period ended on December 13, 1999. No notice was published in the Federal Register during this time period.

On September 26, 2000, FEMA issued an appeal resolution reversing its previous base flood elevation determinations and designating a floodway on the landward side of the Manning levee but

did not publish this resolution for public comment in the Federal Register. Complaint, ¶ 64. According to CV, FEMA unreasonably adopted a different engineering approach as a deliberate effort to restrict development on most of CV's property. Id. ¶ 66. After September 26, 2000, FEMA allowed an additional 90 days for comment and additional submissions by CV and other interested persons concerning the September 26, 2000 appeal resolution. Id. ¶ 68. CV provided a myriad of technical data for FEMA's review, including expert reports from a scientific and engineering consulting firm. Id. ¶ 69. FEMA reviewed the appeals and decided not to modify its September 26, 2000 base flood elevation determinations. Id. ¶ 85. As further explained herein, these claims have not been examined by this court, and the scope of the court's review is limited to CV's procedural claims, rather than its scientific or technical challenges.

FEMA published the Federal Register Notice, Proposed Rules Federal Emergency Management Agency Proposed Flood Elevation Determinations in the Federal Register on February 16, 2001. 66 FR 10653 (Feb. 16, 2001). For reasons unascertainable by the court, FEMA referenced the August 12, 1999 proposed flood elevation determinations in the publication, rather than its September 26, 2000 revised findings. The comment period set forth in the Federal Register was "ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community." Id. Accordingly, the comment period ended on December 13, 1999, which was over a year before notice was given in the Federal Register.

FEMA issued its final determination on August 20, 2001 and adopted its September 26, 2000 appeal resolution for the Congaree River in Richland and Lexington Counties, South Carolina.

PROCEDURAL HISTORY

CV appealed FEMA's August 20, 2001 final determination pursuant to 42 U.S.C. § 4104(g).

In its complaint, CV challenged the technical and scientific aspects of FEMA's final determination and contended that FEMA's conclusions were invalid pursuant to 5 U.S.C. § 706(2)(A) (permitting a reviewing court to set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Complaint, ¶¶ 33-35. CV did not challenge the procedural aspects of FEMA's final determination pursuant to 5 U.S.C. § 706(2)(D) in its complaint.

DISCUSSION

This case has been pending before the court for over four years. The case was first before the Honorable Matthew J. Perry and was re-assigned to the undersigned on July 17, 2004. During this time, the court has grappled with numerous contentious discovery disputes between the parties because FEMA has resisted disclosing the administrative record relating to its decision-making process. At the heart of these disputes has been the question of whether certain documents within FEMA's control are protected by privilege, including those afforded to an attorney/client, work product, and the deliberative process. In an effort to resolve these disputes, the court has reviewed portions of the administrative record in camera. In addition, the court has directed FEMA on several occasions to produce portions of the administrative record for CV's review. The last discovery dispute was not resolved until August 2005.

Once the entire administrative record was compiled, it became evident that FEMA's administrative procedures for publishing notice of its 2001 base flood elevation determinations were flawed. Although claims pursuant to 5 U.S.C. § 706(2)(D) normally would be raised in an initial pleading, the court permitted CV to argue its August 22, 2005 motion to vacate given the unique facts surrounding the belated disclosure of information in this case.

Timing of Publication of Notice in the Federal Register

The issue before the court centers on whether FEMA filed the required notice in the Federal Register as required by Section 4104(a). As noted above, this section provides that “[i]n establishing projected flood elevations for land use purposes with respect to any community pursuant to section 4102 of this title, the Director shall first propose such determination by publication for comment in the Federal Register, by direct notification to the chief executive officer of the community, and by publication in a prominent local newspaper.” 42 U.S.C. § 4104(a). CV does not challenge the timeliness of the newspaper publications or the notification of the chief executive officer of the community. CV contends that the 2001 flood elevation determinations must be set aside because FEMA failed to publish its proposed flood elevation determinations in the Federal Register prior to the appeals period enumerated in Section 4104(b). Plaintiff’s Memorandum in Support of Plaintiff’s Motion to Vacate, p. 5. FEMA claims its notice in the Federal Register complied with the statute because it was filed before the determinations became final. Defendant FEMA’s Memorandum in Opposition to Plaintiff’s Motion to Vacate, pp. 7-8.

Publication of a notice in the Federal Register is a central part of the agency decision-making process because it gives notice to the public at-large of pending agency action. CV contends that Section 4104(a) requires that FEMA publish in the Federal Register to “notify the public at-large, the United States, the world, if you will, and solicit comments.” Transcript of Hearing on October 31, 2005, p. 25. FEMA’s understanding of the purpose of publication in the Federal Register appears to comport with CV’s explanation. *Id.* at 35 (adding that “all that is required by the statute is that prior to establishing or making final your flood hazard determinations, you have got to let the world know that you are doing this.”).

In addressing CV's challenge to FEMA's interpretation of Section 4101(a), the court applies the two-step analysis established in Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984). The court must first ask "whether Congress has directly spoken to the precise question at issue." Id. at 842-43. If Congress has spoken on the issue, the court's inquiry is complete, and the court must "give effect to the unambiguously expressed intent of Congress." Id. If Congress has not clearly spoken, the court must decide whether FEMA's interpretation is a "permissible construction of the statute." Id.

The plain language of Section 4101(a) requires that FEMA publish a notice in the Federal Register, in the local newspaper, and give notice to the CEO of the community whenever it creates a projected flood elevation determination. While the statute does not explicitly provide a timeframe in which this must be done, Congress's use of the introductory phrase "[i]n establishing projected flood elevations for land use purposes" makes Congress's intent clear, and the court need not consider whether FEMA's interpretation is a permissible construction of the statute. See 42 U.S.C. § 4101(a). The two operative words in the introductory phrase of the statute are "establishing" and "projected." The American Heritage College Dictionary defines the verb "establish" as "to bring about or generate." AMERICAN HERITAGE COLLEGE DICTIONARY 469 (3d ed. 2000). The same source defines the verb "project" as "to calculate, estimate, or predict" for the future. Id. at 1094. By extension, the adjective "projected" refers to flood elevations that "are calculated, estimated, or predicted for the future."

In the context of Section 4101(a), the introductory phrase makes it clear that FEMA must comply with the requirements of the subsection at the time that its "calculated, estimated, or predicted" determinations are "brought about or generated" and not at the time that those determinations are being finalized. In its simplest form, this means that FEMA must publish notice

in the Federal Register, in the local newspaper, and must provide notice to the CEO of the community pursuant to 42 U.S.C. § 4101(a) at the moment that it has a proposal for the affected landowners, community, and public to consider. While the court does not interpret Section 4101(a) to require that all three notices must be published prior to the appeals period enumerated in 42 U.S.C. § 4101(c)-(e), it does find that the notices should be published relatively contemporaneously to allow both landowners and the public to consult with the community at some point during the appeals period.

In the case at bar, FEMA did not provide an adequate opportunity for the public at-large to comment on the proposed base flood elevation determinations. As noted above, the required notice was not published in the Federal Register until February 16, 2001, which was over a year after the appeals period had expired. Since FEMA informed the public in its notice that the time to comment was tied to the 1999 appeals period, its publication in the Federal Register was not in compliance with Section 4101(a).

Harmless Error

FEMA claims that its failure to comply with Section 4101(a) is harmless to the extent that CV was not prejudiced and was able to actively participate in the administrative process. Defendant FEMA's Memorandum in Opposition to Plaintiff's Motion to Vacate, pp. 8-14. In Friends of Iwo Jima v. National Planning Commission, 176 F.3d 768 (4th Cir. 1999), the Fourth Circuit Court of Appeals applied the harmless error rule and held that certain notice deficiencies may be excused if those deficiencies were not prejudicial. *Id.* at 774 (citing Air Canada v. Dep't. of Trans., 148 F.3d 1142, 1156 (D.C. Cir. 1998)). In addition, the APA provides that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706.

The court finds that CV has made a prima facie showing of prejudice. By the time that the public at-large received official notice in the Federal Register, the comment period already had expired. As such, FEMA was deprived of critical feedback from persons and groups who did not have access to The State or were otherwise unaware of the proposed changes. Moreover, CV was deprived of the opportunity to elicit support from the public at-large in its challenge of FEMA's proposed base flood elevation determinations. In addition, this court has found that FEMA provided erroneous information regarding the date that the notice was published in the Federal Register. This contravenes both the letter and spirit of Section 4101(a).

FEMA also intimates that its error is harmless because the public had notice of its rule-making through extensive publication on FEMA's website. Unless Congress amends Section 4104(a) to allow for notification of the public at-large through alternative means, such as the Internet, a failure to publish a notification for comment in the Federal Register cannot be cured through alternate forms of publication. See 42 U.S.C. § 4104(a); cf. 42 U.S.C. § 4101(h) (permitting FEMA to provide notice by publication in the Federal Register or by "another comparable method."). Therefore, the court declines to examine whether alternate forms of notice might satisfy the requirement of Section 4104(a).

Failure to Exhaust

FEMA also argues that CV's claim is barred because CV failed to exhaust its administrative remedies by raising its procedural claim during the appeal. Generally, exhaustion is an important requirement because it gives an agency the opportunity to rule and correct a problem prior to judicial review. See Barry v. Barchi, 443 U.S. 55, 63 (1978). Nevertheless, it is well-settled that the exhaustion requirement often is frustrated in cases challenging the substance of an agency's remedy

or procedure, rather than its findings or conclusions. Id. (citing Gibson v. Berryhill, 411 U.S. 564, 575 (1973)). As such, CV will not be required to bring its defective notice claim before FEMA prior to it being resolved by this court.

CONCLUSION

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

IT IS SO ORDERED.

/s/ Margaret B. Seymour
United States District Court

Columbia, South Carolina
November 18, 2005

EXHIBIT 2

CERTIFIED TRUE COPY
ATTEST: *Michelle Orley*
TITLE: *Asst. Clerk*
DATE: *10/20/09*

BOOK 019 PAGE 907

STATE OF SOUTH CAROLINA
COUNTY COUNCIL FOR RICHLAND COUNTY
ORDINANCE NO. 009-06HR

AN ORDINANCE ESTABLISHING A TEMPORARY MORATORIUM ON
APPROVAL OF FLOODPLAIN MANAGEMENT PERMITS FOR
DEVELOPMENT OR CONSTRUCTION WITHIN A PORTION OF THE
CONGAREE RIVER FLOODPLAIN.

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

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

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

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

THEREFORE, BE IT ENACTED THAT:

SECTION I. Richland County Council hereby declares a moratorium on the approval or denial of any permit submitted to Richland County for construction, development, zoning, building, disturbance of land, or for stormwater management purposes, as defined within Chapter 26 of the Richland County Code of Ordinances, on property located in a flood-prone area within the Congaree River Floodplain.

Congaree River Floodplain means the geographic area shown on Flood Insurance Rate Map panels 0091, 0092, 0094, 0160, 0178 and 0190 for Unincorporated Richland County.

Flood-prone means any land area susceptible to being inundated by water from the overflow of inland waters, or the unusual and rapid accumulation or runoff of surface waters from any source.

This moratorium does not apply to permit applications for maintenance of existing structures, levees or buildings.

SECTION II. The Richland County Attorney and Interim Administrator, and/or their designees or agents, shall, before this Ordinance expires, make reasonable efforts to determine from FEMA or by other reasonable and necessary means, how Richland County will maintain compliance with the NFIP in light of the Order entered by the United States District Court, South Carolina Division, on November 18, 2005, in the case of *Columbia Venture v. Federal Emergency Management Agency*. The Richland County Attorney and Interim County Administrator shall report their findings to Richland County Council as soon as practicable before the expiration of this Ordinance.

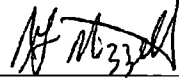
SECTION III. If any section, subsection, or clause of this Ordinance shall be deemed to be unconstitutional or otherwise invalid, the validity of the remaining sections, subsections, and clauses shall not be affected thereby.

SECTION IV. All ordinances or parts of ordinances in conflict with the provisions of this Ordinance are superseded during the time this Ordinance is effective.

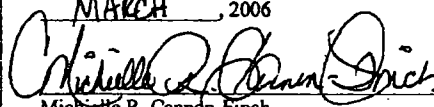
SECTION V. This Ordinance shall be effective immediately upon adoption by Richland County Council.

SECTION VI. This Ordinance shall expire sixty (60) days following the date of adoption of this Ordinance, or until rescinded by Richland County Council, whichever is earlier.

RICHLAND COUNTY COUNCIL

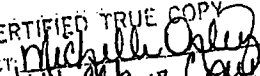
BY: 
Anthony G. Mizzell, Chair

Attest this the 17th day of

MARCH, 2006

Michelle R. Cannon-Finch
Clerk of Council

RICHLAND COUNTY ATTORNEY'S OFFICE


Approved As To LEGAL Form Only
No Opinion Rendered As To Content

CERTIFIED TRUE COPY
ATTEST: 
TITLE: Asst. Clerk of Council
DATE: 10/20/09

First Reading: January 3, 2006
Second Reading: January 17, 2006
Public Hearing: February 21, 2006
Third Reading: February 21, 2006

EXHIBIT 3

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Columbia Venture, LLC,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
Heathwood Hall Episcopal School,	)	
	)	
Plaintiff-Intervenor	)	
	)	
vs.	)	C/A No. 3:01-4100-JFA
	)	
The Federal Emergency Management	)	
Agency,	)	
	)	
Defendant,	)	
	)	
South Carolina Wildlife Federation,	)	
Riverland Park Neighborhood Association	)	
Dr. John Grego and Dr. Dan Tufford,	)	
	)	
Defendant-Intervenors.	)	

STIPULATION OF COMPROMISE SETTLEMENT

In return for Columbia Venture's (CV's) and Plaintiff-Intervenor's dismissal with prejudice of the Complaint and any outstanding claims or appeals against FEMA currently pending or which could have been brought pursuant to litigation:

1. Within one year from the execution of this Stipulation of Compromise Settlement and the dismissal with prejudice from the Court, FEMA will initiate a restudy of the areas that are subject to the lawsuit consistent with applicable statutory, regulatory and agency standards including the National Flood Insurance Act (NFIA), its implementing regulations, and Agency specifications and guidance;

2. FEMA agrees that nothing in this Stipulation of Compromise Settlement prevents CV from filing a Letter of Map Revision (LOMR) in conformance with the NFIA and its implementing regulations.

3. FEMA will pay to CV the sum of \$75,000.00 upon execution by CV and the Plaintiff-Intervenor of an Order of Dismissal, as provided hereinabove.

4. CV agrees to withdraw/dismiss all pending FOIA requests to FEMA and agrees not to file any FOIA requests seeking documents related to the above-captioned lawsuit.

STIPULATED AND AGREED to this 4th day of September, 2009.

By: s/ William C. Boyd

William C. Boyd, Esq., Fed. ID No. 1432
Manton M. Grier, Esq., Fed. ID No. 2461
Elizabeth H. Black, Esq., Fed. ID No. 10088
Haynsworth Sinkler Boyd, P.A.
1201 Main Street, 22nd Floor
Columbia, South Carolina 29201
Counsel for Plaintiff, Columbia Venture, LLC

By: s/ J. P. Strom, Jr.

J. P. Strom, Jr., Esq., Fed. ID No. 5400
3000 S. Beltline Blvd.
Columbia, South Carolina 29201
Counsel for Plaintiff-Intervenor, Heathwood Hall Episcopal School

By: s/ W. Walter Wilkins

W. Walter Wilkins, Esq., Fed. ID No. 7726
U.S. Attorney
Barbara M. Bowens, Esq., Fed. ID No. 4004
Civil Division Chief
J. Douglas Barnett, Esq., Fed. ID No. 2144
Assistant U.S. Attorney
United States Attorney's Office
1441 Main Street, Suite 500
Columbia, South Carolina 29201

By: Lynda Pilgrim

Jordan S. Fried, Esq.
Associate Chief Counsel for Litigation
Barbara Montoya, Esq.
Deputy Associate Chief Counsel
Lynda Pilgrim, Senior Trial Attorney
Federal Emergency Management Agency
500 C Street, Suite 840
Washington, DC 20472
Counsel for FEMA

By: s/ J. Blanding Holman

J. Blanding Holman, IV, Esq., Fed. ID No. 9805

Southern Environmental Law Center

38 Broad Street, Suite 200

Charleston, South Carolina 29401

Counsel for Defendant-Intervenors, South Carolina Wildlife Federation, Riverland
Park Neighborhood Association, Dr. John Grego, and Dr. Dan Tufford

Columbia: 1253540 v.1

EXHIBIT 4

CERTIFIED TRUE COPY
ATTEST: *Michelle O'Neil*
TITLE: *Ordinance No. 074-04HR*
DATE: *11/20/09*
g. Coltrane

STATE OF SOUTH CAROLINA
COUNTY COUNCIL FOR RICHLAND COUNTY
ORDINANCE NO. 074-04HR

AN ORDINANCE AMENDING THE RICHLAND COUNTY CODE OF ORDINANCES, SO AS TO ADOPT THE RICHLAND COUNTY LAND DEVELOPMENT CODE; AND TO DELETE SECTION 2-221 OF CHAPTER 2: ADMINISTRATION; AND TO DELETE CHAPTER 8: STORMWATER MANAGEMENT, EROSION AND SEDIMENT CONTROL, CHAPTER 22: LAND DEVELOPMENT REGULATIONS, AND CHAPTER 27: LANDSCAPE REQUIREMENTS; AND AMENDING CHAPTER 26: ZONING.

Pursuant to the authority by the Constitution of the State of South Carolina and the General Assembly of the State of South Carolina, BE IT ENACTED BY RICHLAND COUNTY COUNCIL:

BOOK: 019 PAGE: 95

SECTION I. The Richland County Code of Ordinances; Chapter 2, Administration; Article V., County Departments; Division 4, Planning and Development Services; Section 2-221, Uniform Addressing Systems; is hereby amended by the deletion of the language contained therein. The Code of Ordinances shall thereafter reference Section 2-221 as "Reserved".

SECTION II. The Richland County Code of Ordinances; Chapter 8, Stormwater Management, Erosion and Sediment Control, is hereby amended by the deletion of the language contained therein and the substitution of the following language:

CHAPTER 8: RESERVED

SECTION III. The Richland County Code of Ordinances; Chapter 22, Land Development Regulations, is hereby amended by the deletion of the language contained therein and the substitution of the following language:

CHAPTER 22: RESERVED

SECTION IV. The Richland County Code of Ordinances; Chapter 27, Landscape Requirements, is hereby amended by the deletion of the language contained therein and the substitution of the following language:

CHAPTER 27: RESERVED

SECTION V. The Richland County Code of Ordinances; Chapter 26, Zoning, is hereby amended by the deletion of the language contained therein and the substitution of the following language:

CHAPTER 26:
LAND DEVELOPMENT

ARTICLE I. GENERAL PROVISIONS

Sec. 26-1. Title.

This chapter shall be known and may be cited as the Land Development Code of Richland County, South Carolina.

Sec. 26-2. Purpose and scope.

- (a) *Purpose.* The regulations contained in this chapter have been adopted in accordance with the comprehensive plan for Richland County, South Carolina, and for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general

CERTIFIED TRUE COPY

ATTEST:

TITLE:

DATE:

Michelle G. Cole
Asst. Clerk of Council
10/20/09

furnished to the airport manager for advice as to the aeronautical effects of the variance. If the airport manager does not respond to the notification within fifteen (15) days after receipt, the board of zoning appeals may act on its own to grant or deny the application.

(f) *Nonconforming uses.*

- (1) *General.* The regulations prescribed by this section shall not be construed to require the removal, lowering, or other change or alteration of any structure or tree not conforming to the regulations as of the effective date of this chapter, or otherwise interfere with the continuance of a nonconforming use. However, the owner of any existing nonconforming structure or tree is hereby required to permit the installation, operation, and maintenance thereon of such markers or lighting as shall be deemed necessary by the county to indicate to the operators of aircraft in the vicinity of the airport the presence of such airport obstruction. Such markers shall be installed, operated, and maintained at the expense of the county.

(2) *Abandoned or destroyed.*

BOOK 019 PAGE 203

- a. *Structure.* Whenever the zoning administrator determines that a nonconforming structure has been destroyed or torn down beyond seventy-five percent (75%) of its most recent appraised value, no permit shall be granted that would allow such structure to exceed the applicable height limit or otherwise deviate from the zoning regulations.
- b. *Tree.* Whenever the zoning administrator determines that a nonconforming tree has been destroyed, torn down, decayed or deteriorated, below the applicable height limit, no permit shall be granted that would allow another tree to be planted which would exceed the applicable height limit or otherwise deviate from the regulations contained in this section.

Sec. 26-103. C Conservation Overlay District.

- (a) *Purpose.* The C Overlay District is intended to provide for safe, suitable development along designated water resources throughout Richland County. It is intended to allow development that will assist in the preservation of views from the water and of the water resources, is consistent with the shoreline areas that surround these features, and will provide adequate measures of safety to property and life during periodic flooding.
- (b) *Applicability/establishment.* The C Overlay District shall function as an overlay district providing additional requirements to the regulations of the underlying general use zoning classification(s), and shall only be applied to individual water resource areas after study and rezoning by the Richland County Council.
- (c) *Permitted uses, permitted uses with special requirements, and special exceptions.* The C Overlay District may contain several different underlying general use zoning classifications. All uses permitted in the underlying zoning district shall be permitted in the C Overlay District. Provided, however, when the provisions of this section impose higher standards than are required for that zoning classification, the provisions of this section shall apply. Furthermore, additional overlay districts may be affixed to the general zoning district (e.g. the Floodplain Overlay District). Provisions of any or all overlay districts must be satisfied. However, in the case of conflict between overlay district regulations, the stricter regulations shall apply.

(d) *Development standards.*

- (1) *Dimensional regulations.* Uses within the C Overlay District shall comply with the regulations of the underlying district, except uses on lots abutting a water resource. For uses on lots abutting the water, a water resource yard shall be provided as a setback within which no structures, except approved uncovered docks, shall be erected. A setback from the top of the bank of the water resource shall be required for a distance of twenty percent (20%) of the lot depth (measured at the time of site plan approval), with a maximum setback of fifty (50) feet and a minimum setback of twenty (20) feet. Existing continuous tree stands shall be preserved to stabilize the water resource banks. Walkways, trails, access areas, and similar activities may occur within the water resource yard.
- (2) *Landscaping/bufferyard standards.* Landscaping and bufferyards shall be provided in accordance with Section 26-176 of this chapter. Species suitable for a riparian environment shall be utilized for required landscaping and buffering in a C Overlay District.
- (3) *Parking/loading standards.* Parking and loading facilities shall be as required in Section 26-173 and Section 26-174 of this chapter. Shared parking arrangements and common parking areas are encouraged in the C Overlay District; however, in no instance are parking or loading areas permitted in the water resource yard.
- (4) *Sidewalk and pedestrian amenities.* Sidewalks and other pedestrian amenities shall be provided as required by Section 26-179 of this chapter. Public pedestrian trail/greenway easement segments designed and approved as part of the site approval process may be provided in lieu of sidewalks. The County shall not use its power of eminent domain to condemn private land within a C Overlay District for the purpose of creating a public pedestrian trail/greenway easement segment.
- (5) *Signs.* Signs shall be regulated by the requirements of Section 26-180 of this chapter.
- (6) *Recreational/open space standards.* Open space shall be provided for new developments and expansions of existing developments in accordance with the provisions established in Section 26-184 of this chapter.

Sec. 26-104. FP Floodplain Overlay District.

- (a) *Purpose.* Certain areas within Richland County are subject to periodic inundation by floodwater, which results or may be reasonably foreseen to result in loss of life or property, health and safety hazards, disruption of commerce and governmental services, and extraordinary public expenditures for flood protection and relief, all of which adversely affect the public health, safety, and general welfare of the citizens of Richland County. These hazards are caused or extended in part by the occupancy of flood hazard areas by uses that increase flood damage upon other lands, or uses that are vulnerable to floods because they are inadequately elevated or not otherwise protected from flood damages. In order for owners of property located within the county that is subject to periodic inundation to obtain flood damage insurance through the National Flood Insurance Program, the United States government, by statute and through regulations promulgated by the Federal Emergency Management Agency (FEMA) requires that the county enact floodplain regulations designed to reduce the

amount of potential flood losses. It is, therefore, the intent of this section to lessen such hazards and losses and ensure insurance coverage by those affected property owners by restricting or prohibiting uses that are dangerous to health, safety, or property in times of flood or that cause excessive increases in flood heights or velocities. This shall be accomplished by requiring that uses vulnerable to floods be protected against flood hazards at the time of initial construction, and by controlling filling, grading, mineral extraction, placing of obstructions within the flood channels, and other activities, uses, or characteristics of use which may increase flood damage.

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- (b) *Applicability/establishment.* The FP Overlay District shall function as an overlay district providing additional requirements to the regulations of the underlying general use zoning classification(s). It shall be applied to those areas designated on the Federal Emergency Management Agency's Flood Insurance Study, dated February 20, 2002, with accompanying Flood Insurance Rate Maps (FIRM), dated February 20, 2002, and any revisions thereto, as areas of special flood hazard. In addition to other required development approvals, development applicants subject to the FP Overlay District must also receive a floodplain development permit from the county's flood coordinator. Review of developments subject to these requirements shall be conducted as part of the review for a grading or land development permit, whichever is applicable.
- (c) *Permitted uses, permitted uses with special requirements, and special exceptions.*
 - (1) *General:* Any use permitted outright, with special requirements, or permitted as an accessory use in the general use district(s) to which the FP Overlay District is affixed to, is permitted; provided that such use complies with all applicable regulations set forth below and in the other sections of this chapter. (See however, restrictions for development in the designated floodway as set forth in subsection (d)(2)i. below). All applications for land development permits for uses permitted in the FP Overlay District shall be reviewed by the flood coordinator in accordance with the requirements of subsection (d) below. Before the planning department may issue a land development permit, a floodplain development permit must be issued. The findings and recommendations of the flood coordinator shall be binding upon the planning department unless otherwise appealed.
 - (2) *Permitted special exceptions.* Any use listed as a special exception in the general use district(s) to which the FP Overlay District is affixed to may be permitted by the Richland County Board of Zoning Appeals as set forth in Section 26-56 of this chapter; provided that such uses comply with all applicable regulations set forth below and in the other sections of this chapter. (See, however, restrictions for development in the designated floodway as set forth in subsection (d)(2)i. below). All applications for special exceptions in the FP Overlay District shall be reviewed by the flood coordinator prior to review by the board of zoning appeals in accordance with the requirements of subsection (d) below. Before the board of zoning appeals may approve a special exception, a floodplain development permit must be issued. The findings and recommendations of the flood coordinator shall be binding upon the board of zoning appeals.

(d) *Standards in the floodplain.*

(1) *General standards.*

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- a. *Alternative sites.* Where alternative locations exist, development shall not occur in the floodplain due to the inherent hazards and risks involved. Before a permit is issued, the applicant shall demonstrate that new structures cannot be located out of the floodplain and that encroachments onto the floodplain are minimized. New development, if permitted in the area of special flood hazard, shall minimize disruption to shorelines, stream channels, stream banks, and the regulatory floodway.
- b. *General reasons for disapproval of flood development permit application.* New construction, substantial improvements, or other development (including fill) shall not be approved in a special flood hazard area if it does any of the following:
 1. Adversely affects the capacity of channels or floodways of any watercourse in the floodplain area to convey the regulatory flood or any flood of more frequent occurrence.
 2. Would measurably increase, based on FEMA-approved hydrologic models, flood flows or flood heights, or increase flood damage upon off-site properties during the occurrence of the regulatory flood or any flood of more frequent occurrence.
 3. Would individually or cumulatively, when combined with all other existing and anticipated development (assuming an equal degree of encroachment for a significant reach on both sides of the watercourse), increase flood levels or expose additional upstream, downstream, or adjacent properties to adverse flood effects due to flooding during the regulatory flood or any flood of more frequent occurrence.
 4. Increases velocities or volumes of floodwaters to the extent that significant erosion of floodplain soils would occur either on the subject property or on some other property upstream or downstream.
 5. Does not provide compensatory storage for any measurable loss of flood storage capacity.
- c. *Encroachments that result in increase in flood levels.* Any encroachment in special flood hazard areas, including fill, new construction, substantial improvements, and other development that would result in any increase in flood levels during the occurrence of the regulatory flood or any flood of more frequent occurrence shall be prohibited.
- d. *Anchoring.* All new construction and/or substantial improvements shall be designed and anchored to prevent flotation, collapse, or lateral movement of the structures.
- e. *Materials/methods to be used.* All new construction and/or substantial improvements shall be constructed with flood resistant materials and utility equipment resistant to flood damage. All new construction and/or substantial

improvements shall be constructed by methods and practices that minimize flood damages.

- f. *Electric, ventilation, plumbing, heating, and air conditioning equipment.* Electric, ventilation, plumbing, heating, and air conditioning equipment (including ductwork), and other service facilities, shall be designed and elevated two (2) feet above the base flood elevation so as to prevent water from entering or accumulating within the components during conditions of flooding as specifically provided for below:

BOOK 019 PAGE 207

1. *When not substantial improvement.* The replacement of existing electrical, ventilation, plumbing, heating, and air conditioning equipment (including ductwork) and other service facilities, that do not constitute a substantial improvement, are encouraged to be elevated at least two (2) feet above the base flood elevation, but they may be located at the original location and elevation.

2. *New construction and substantial improvement.* All electrical, ventilation, plumbing, heating, and air conditioning equipment (including ductwork), and other service facilities, for new construction or substantial improvement must be elevated at least two (2) feet above the base flood elevation.

3. *Outdoor faucets.* The requirements listed above do not preclude the installation of outdoor faucets for shower heads, sinks, hoses, etc. as long as cut off devices and back flow devices are installed to prevent contamination to the service components and thereby minimize any flood damages to the building.

- g. *Water and sanitary sewage systems.* All new and replacement water supply and sanitary sewage systems shall be designed to minimize or eliminate infiltration of flood waters into the systems and discharges from the sanitary sewage systems into flood waters.

- h. *On-site waste disposal systems.* On-site waste disposal systems shall be located and constructed to avoid impairment to them or contamination from them during flooding.

- i. *Foundation systems.* Hydrodynamic pressure must be considered in the design of any foundation system when velocity waters or the potential for debris flow exists. If flood velocities are excessive (greater than five (5) feet per second), foundation systems other than solid foundation walls should be considered so that obstructions to damaging flood flows are minimized.

- j. *Non-conforming buildings or uses (see also Article X. of this chapter on nonconforming uses generally).* Non-conforming buildings or uses may not be enlarged, replaced, or rebuilt unless such enlargement or reconstruction is accomplished in conformance with the provisions of this section. Provided, however, nothing in this section shall prevent the repair, reconstruction, or replacement of an existing building or structure located totally or partially within the floodway, if the bulk of the building or structure below base flood elevation in the floodway is not increased, and provided that

such repair, reconstruction, or replacement meets all of the other requirements of this section. Reconstructions or replacements of existing buildings or structures shall be placed with their longitudinal axis parallel to the predicted direction of the flow of flood waters or be placed so that their longitudinal axis are on lines parallel to those of adjoining structures so as to offer the minimum resistance to the flow of floodwaters.

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- k. *American with Disabilities Act (ADA).* A building must meet the specific standards for floodplain construction as outlined in subsection (d)(2) below, as well as any applicable ADA requirements. The cost of improvements required to meet the ADA provisions shall be included in the costs of the improvements for calculating substantial improvement.

(2) *Specific standards*

- a. *Residential construction.* New construction or substantial improvement of any residential structure (including manufactured homes) shall have the lowest floor elevated no lower than two (2) feet above the base flood elevation. No basements are permitted. Should solid foundation perimeter walls be used to elevate a structure, openings sufficient to facilitate the unimpeded movements of floodwaters shall be provided in accordance with subsection f. below.
- b. *Nonresidential construction.* New construction or substantial improvement of any commercial industrial, or nonresidential structure shall have the lowest floor (including basement), or mechanical and utility equipment, elevated no lower than two (2) feet above the level of the base flood elevation or be flood-proofed to a level no lower than two (2) feet above the level of the base flood elevation, provided that all areas of the building (including mechanical and utility equipment) below the required elevation are watertight with walls substantially impermeable to the passage of water, and use structural components having the capability of resisting hydrostatic and hydrodynamic loads and the effects of buoyancy. Should solid foundation perimeter walls be used to elevate a structure, openings sufficient to facilitate the unimpeded movements of floodwaters shall be provided in accordance with subsection f. below. A land surveyor, engineer, or architect authorized by law to certify such information shall certify that the standards of this subsection are satisfied. Flood-proofed structures shall have an approved maintenance plan with an annual exercise as required by FEMA. The maintenance plan must be approved by the flood coordinator and notification of the annual exercise shall be provided to same.
- c. *Foundation protection.* A land surveyor, engineer, or architect authorized by law to certify such information shall develop or review the structural design, specifications, and plans for the foundation of all new buildings and shall certify that the design and methods of construction are in accordance with accepted practices to withstand flotation, collapse, lateral movement, erosion, scour, undermining, and the effects of water and wind acting simultaneously on all building components during the occurrence of the base flood.

d. *Manufactured homes.*

1. *Substantially damaged homes.* Manufactured homes that are on sites outside a manufactured home park or subdivision, in a new manufactured home park or subdivision, in an expansion to an existing manufactured home park or subdivision, or in an existing manufactured home park or subdivision, which have incurred "substantial damage," must be subsequently elevated on a permanent foundation such that the lowest floor of the manufactured home is elevated no lower than two (2) feet above the base flood elevation and must be securely anchored to an adequately anchored foundation system to resist flotation, collapse, and lateral movement.

2. *Existing manufactured homes.* Manufactured homes proposed to be placed or substantially improved on sites in an existing manufactured home park or subdivision that are not subject to the provisions of subsection d.1. above, must be elevated so that the lowest floor of the manufactured home is elevated no lower than two (2) feet above the base flood elevation, and must be securely anchored to an adequately anchored foundation to resist flotation, collapse, and lateral movement.

3. *Anchoring.* Manufactured homes shall be anchored to prevent flotation, collapse, or lateral movement. For the purpose of this requirement, manufactured homes must be anchored to resist flotation, collapse, or lateral movement in accordance with Section 19-425.42 of the *South Carolina Manufactured Housing Board Regulations*, effective date May 25, 1990, as amended. Additionally, when the elevation requirement would be met by an elevation of the chassis at thirty-six (36) inches or less above the grade at the site, the chassis shall be supported by reinforced piers or other foundation elements of at least equivalent strength. When the elevation of the chassis is above thirty-six (36) inches in height, an engineering certification is required.

4. *Evacuation plan for parks and subdivisions.* An evacuation plan indicating vehicular access and escape routes for residents of manufactured home parks and subdivisions located in or surrounded by an area of special flood hazard must be developed. The owner of the manufactured home park or subdivision shall be responsible for filing this plan with the flood coordinator and shall see that each tenant thereof has received an evacuation plan prior to the tenant's moving into the manufactured home park or subdivision. This plan shall be approved by the flood coordinator and the local emergency preparedness coordinator.

e. *Recreational vehicles.* Recreational vehicles placed on sites within a floodplain shall either be on site for fewer than one hundred and eighty (180) consecutive days and be fully licensed and ready for highway use, or meet the general standards listed in subsection (d)(1) above, as well as the

BOOK 019 PAGE 209

standards for manufactured housing in subsection (d)(2)d. above. A recreational vehicle is ready for highway use if it is on wheels or a jacking system, is attached to the site only by quick disconnect type utilities and security devices, and has no permanently attached additions.

- f. *Elevated buildings.* New construction or substantial improvements of elevated buildings that include fully enclosed areas formed by foundation and other exterior walls and are used solely for the parking of vehicles, building access, or limited storage in an area other than a basement, and are subject to flooding, shall be designed to preclude finished space and be shall designed to automatically equalize flood forces on exterior walls by allowing for the entry and exit of floodwaters.

1. *Designs for elevated buildings.* Designs for complying with this requirement must either be certified by a land surveyor, engineer, or architect authorized by law to certify such information, or meet the following minimum criteria:

- [a] Provide a minimum of two (2) openings on different walls having a total net area of not less than one (1) square inch for every square foot of enclosed area subject to flooding;
- [b] The bottom of all openings shall be no higher than one (1) foot above grade;
- [c] Openings may be equipped with screens, louvers, valves, or other coverings or devices, provided they permit the automatic flow of floodwaters in both directions; and
- [d] Fill placed around foundation walls shall be graded so that the grade inside the enclosed area is equal to or higher than the adjacent grade outside the building on at least one side of the building.

2. *Access to enclosed area.* Access to the enclosed area shall be the minimum necessary to allow for parking of vehicles (garage door) or limited storage of maintenance equipment used in connection with the premises (standards exterior door) or entry to the living area (stairway or elevator).

3. *Interior portion of enclosed area.* The interior portion of such enclosed area shall not be partitioned or finished into separate rooms, except to enclose a limited storage area. In addition, the interior portion must be void of utilities, except for essential lighting as required, and cannot be temperature controlled. One wet location switch and/or outlet connected to a ground fault interrupt breaker may be installed below the required lowest floor elevation as specified in subsections (d)(2) a., b., and d. above.

4. *Construction materials.* All construction materials below the required lowest floor elevation, as

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specified in subsections (d)(2) a., b., and d. above, shall be of flood resistant materials.

- g. *Temporary structures.* Certain types of temporary structures (e.g. fruit stands, construction site offices, portable toilets, etc.) may be situated temporarily on flood-prone property without having to comply with the elevation or flood-proofing criteria of subsections (d)(2) a. and b. above, respectively, provided that the following criteria are met:

1. *Temporary development permit procedure.* All applicants must submit to the flood coordinator, prior to the issuance of a temporary development permit, a written plan for the removal of any temporary structures or development in the event of a hurricane or flash flood warning notification. The plan shall be reviewed and approved in writing, and must include the following information:

- [a] A specified time period that the temporary use will be permitted;
- [b] The name, address, and phone number of the individual responsible for the removal of temporary structures or development;
- [c] The time frame for removal of any structures in the event of a flooding event, with a minimum of seventy-two (72) hours before landfall of a hurricane or immediately upon flood warning notification;
- [d] Unless movable by the owner, a copy of the contract or other suitable instrument with a trucking company to ensure the availability of removal equipment when needed;
- [e] Designation, accompanied by documentation, of a location outside the floodplain where any temporary structure will be moved; and
- [f] A plan to restore the area to its natural condition once the temporary permit expires or the temporary use is terminated, whichever is first.

2. *Structure mobility.* The structure is mobile, or can be made so, and is capable of being removed from the site with a maximum of four (4) hours warning.

3. *Time on property.* The structure will not remain on the property for more than one hundred and eighty (180) days.

- h. *Accessory structures.* An accessory structure or garage, the cost of which is greater than \$1,000.00 must comply with the elevated structure requirements of subsection (d)(2) a. and b. above. When accessory structures of \$1,000.00 or less are to be placed in the floodplain, the following criteria shall be met:

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BOOK 019 PAGE 212

1. *Not for habitation.* Accessory structures shall not be used for human habitation (including work, sleeping, living, cooking, or restroom areas);
2. *Flood damage potential.* Accessory structures shall be designed to have low flood damage potential;
3. *Placement.* Accessory structures shall be constructed and placed on the building site so as to offer the minimum resistance to the flow of floodwaters;
4. *Anchoring.* Accessory structures shall be firmly anchored to prevent flotation, collapse, or lateral movement of the structure;
5. *Service facilities.* Service facilities, such as electrical and heating equipment, shall be installed in accordance with subsection (d)(1) f. above; and
6. *Openings.* Openings to relieve hydrostatic pressure during a flood shall be provided below base flood elevation in conformance with subsection (d)(2) f. above.

i. *Floodways.* The following provisions shall apply within the floodway areas:

1. *Permitted uses, excluding buildings.* The following uses shall be permitted in areas designated floodway areas, but only if such uses are permitted within the basic district to which the FP overlay is appended, and excluding buildings in connection with such uses:
 - [a] Agricultural and horticultural uses, and plant nurseries.
 - [b] Parking and loading areas.
 - [c] Open-air uses generally accessory to residential uses, such as lawns, gardens, play areas, and parking areas.
 - [d] Recreational uses which are primarily open-air uses and which do not offer a substantial impediment to water flow, such as swimming areas, fishing areas, beaches, boat launching ramps, floating docks, life guard stations, parks, playgrounds, play fields, picnic grounds, wildlife or nature preserves, hiking trails, horseback riding trails, golf courses, driving ranges, archery ranges, and tennis courts.
 - [e] Airport runways and landing strips.
 - [f] Streets, bridges, overhead utility lines, storm drainage facilities, sewerage lines, waste treatment plant outlets, water supply intake structures, and electronic transmission structures; provided that the structure is demonstrated, by hydraulic and hydrologic analysis performed with standard engineering practice and reviewed and approved by the

County Floodplain Coordinator, to cause no rise in the base flood elevation as established by the Flood Insurance Study and further provided that:

- [1] All structures are designed and constructed to minimize infiltration by floodwaters; and
- [2] The lowest horizontal member of bridges, excluding pilings or columns, is elevated at least one foot above the base flood elevation and the superstructure attached thereto is designed to resist flotation, collapse, and lateral movement due to the effects of wind and water loads acting simultaneously on all structural components.

- 2. *Permitted uses, other.* The following uses shall be permitted in areas designated floodway areas, but only if such uses are permitted within the basic district to which the FP overlay is appended:

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- [a] Any existing or future facility that is or will be a part of or used by any public or private school that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway;
- [b] Any existing or future facility that is or will be a part of or used by any publicly owned wastewater treatment facility that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway.

- j. *Fill.* Fill is discouraged because its use removes storage capacity from floodplains. Elevating buildings by other methods must be considered. An applicant shall demonstrate, using a registered engineer, that fill is the only alternative to raising the building to at least two (2) feet above the base flood elevation, and that the amount of fill used will not affect the flood storage capacity or adversely affect adjacent properties. Any change to the flood flow within a regulatory floodplain through fill must be approved by FEMA in addition to review by the flood coordinator

- 1. *Floodway.* Filling of floodway areas, dumping of salvaged or scrap material, or the placing of material or obstruction within a floodway area in such a manner as to impede free flow of water during a time of flood or in such a manner that the elevation of flood waters will be increased is prohibited.
- 2. *Nontidal wetlands or waters.* Fill activities may not take place in nontidal wetlands or waters without the required state and federal permits.
- 3. *Dredged material.* Dredged material may be used as fill only upon certification of suitability by a land surveyor, engineer or architect authorized by law to

certify such information. Landfills, rubble fills, dumps, and sanitary fills are not permitted in the floodplain.

4. *Standards.* Fill used to support structures must comply with ASTM Standard D-698, and its suitability to support structures certified by a land surveyor, engineer, or architect authorized by law to certify such information.
5. *Fill slopes.* Fill slopes shall be no greater than two (2) horizontal to one (1) vertical. Flatter slopes may be required where velocities may result in erosion.
6. *Effect on neighboring properties.* The use of fill shall not increase flooding or cause drainage problems on neighboring properties.
7. *Compensating excavations.* The volume of space occupied by any authorized fill below the base flood elevation shall be compensated for and balanced by a hydraulically equivalent volume of excavation taken from below the base flood elevation. All such excavations shall be constructed to drain freely to the watercourse. No area below the waterline of a pond or other body of water can be credited as a compensating excavation.

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- k. *Critical facilities.* Construction of critical facilities is prohibited in the five hundred (500) year floodplain (A, 1AE and X500 Zones on the FIRM).
- (e) *Standards for streams not having established base flood elevations and/or floodways.* Located within the areas of special flood hazard are small streams where no base flood elevation data have been provided or where no floodways have been identified. The following provisions apply to these areas:
- (1) *Activity within one hundred (100) feet of the stream bank.* No encroachments, including fill, new construction, substantial improvement, or other development shall be permitted within one hundred (100) feet of the stream bank unless certification (with supporting technical data by a land surveyor, engineer, or architect authorized by law to certify such information) is provided demonstrating that such encroachments shall not result in any increase in flood levels during the occurrence of the base flood discharge. Such data shall be submitted to the flood coordinator.
 - (2) *Elevation.* In special flood hazard areas without base flood elevation data, new construction or substantial improvements of structures shall be elevated so that the lowest floor is no less than three (3) feet above the highest adjacent grade at the building site.
- (f) *Standards for subdivision/ planned development community/ large-scale development proposals.* The following standards pertain to subdivisions and planned development communities or other large-scale development proposals that equal or exceed the lesser of fifty (50) lots or five (5) acres:
- (1) *General.* All subdivisions, planned development communities, and large-scale development proposals shall be consistent with the need to minimize or eliminate flood damage. Base flood elevation data provided through hydrologic and hydraulic modeling performed in

accordance with FEMA standards showing that there is no rise in the base flood elevation for the community and no risk to human health and welfare shall be provided. All such developments shall be designed so as not to create or increase the level of flooding existing at the time of development.

- (2) *Public utilities.* All subdivisions, planned development communities, and large scale development proposals shall have public utilities and facilities, such as sewer, gas, electric and water systems, located and constructed to minimize or eliminate flood damage.

- (3) *Access.* An access road above the base flood elevation shall be provided for all subdivision, planned development community, or other large-scale development proposals to allow emergency access to flooded areas during flood conditions.

- (4) *Drainage.* All subdivision, planned development community, or other large-scale development proposals shall have adequate drainage, in compliance with all other applicable code regulations provided to reduce or eliminate exposure to flood hazards.

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- (g) *Standards for areas of shallow flooding (AO and AH Zones).* Located within the areas of special flood hazard are areas designated as shallow flooding. The following provisions shall apply within such areas:

- (1) *Residential structures.* All new construction and substantial improvements of residential structures shall have the lowest floor (including basement) elevated above the highest adjacent grade at least as high as the depth number specified in feet on the FIRM. If no depth number is specified, the lowest floor (including basement) shall be elevated at least three (3) feet above the highest adjacent grade.

- (2) *Nonresidential structures.* The lowest floor (including the basement) for all new construction and substantial improvements of nonresidential structures shall meet one of the following standards:

- a. *Elevation.* The nonresidential structure(s) shall be elevated above the highest adjacent grade at least as high as the depth number specified in feet on the FIRM. If no depth number is specified, the lowest floor (including basement) shall be elevated at least three (3) feet above the highest adjacent grade; or,

- b. *Construction.* The nonresidential structure(s), together with attendant utility and sanitary facilities, must be designed so that below the base flood elevation the structure is watertight with walls substantially impermeable to the passage of water and with structural components having the capability of resisting hydrostatic and hydrodynamic loads and effects of buoyancy. A land surveyor, engineer or architect authorized by law to certify such information shall submit a certification to the flood coordinator that the standards of this section are satisfied. There shall be adequate drainage paths around structures on slopes to guide floodwaters around and away from the proposed structures.

- (h) *Standards for levees.*

- (1) *General standards.* All levees protecting residential structures or nonresidential structures that are not flood-proofed shall be

designed, constructed, and maintained to provide protection against the 500-year flood, plus three (3) feet of freeboard. Flood elevations shall be as shown on the latest Flood Insurance Rate Maps as determined by appropriate hydrologic methods. Any levee constructed or improved under this subsection shall also comply with the other applicable provisions of Section 26-203 of this chapter.

(2) *Specific standards.*

a. *Design and construction.* Design and construction shall be in accordance with U.S. Army Corps of Engineers' Manual EM 1110-2-1913 (31 March 1978) *Design and Construction of Levees*. The design and construction of drainage systems within levees shall be in accordance with the U.S. Army Corps of Engineers' Manual EM 1110-2-1413 (15 Jan 1987) *Hydrologic Analysis of Interior Areas*. A South Carolina Registered Professional Engineer shall certify that he has been involved in the design, construction, and inspection phases and shall certify that the construction meets requirements of the Corps of Engineers.

b. *Records.* Owners of levees will perform the necessary and required maintenance and provide appropriate records to the county engineer. These records shall include:

1. Signed agreements of perpetual operation and maintenance between the constructor and/or owner and Richland County;
2. As-built construction plans sealed by a South Carolina Registered Professional Engineer;
3. A description of the levee maintenance program in accordance with Levee Maintenance Standards and Procedures of Richland County (see subsection (h)(3) below); and
4. Periodic maintenance reports as required by the county engineer.

(3) *Maintenance standards and procedures.* Levees shall be maintained as necessary to ensure serviceability against flood at all times, as follows:

a. *Sod growth.* Maintenance of a sturdy sod growth on levee embankments is highly important, as sod is one of the most effective means of protecting the levee against erosion from rain, water current, and wavewash. Periodic mowing with tractor-operated equipment is essential to maintaining a good sod growth, and shall be done at such intervals as necessary to keep down weeds and other noxious growth and to prevent the grass height from exceeding twelve (12) inches. However, the grass shall not be mowed to a height of less than two (2) inches. The number of mowings required each season will depend on local conditions. The last mowing of the season will be accomplished under conditions that allow the grass to obtain a height of approximately eight (8) inches to ten (10) inches entering the winter season. Mowing will be performed to a distance of at least five (5) feet beyond the toe of the levee or berm. Burning grass and weeds is not permitted in the levee maintenance program, except during

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3. Relief wells,

2. Toe drainage systems,

1. Drainage structures through the levee,

herein are:
most common of the facilities and appurtenances referred to open freely and that the gaskets are in good condition. The pumping. Check valves shall be inspected to ensure that they wells shall be rehabilitated by cleaning, surging, and determine the extent of deterioration. Critically deteriorated, extended period of time may have to be tested by pumping to during periods of high water. Wells that do not flow for an prior to high water season. Relief wells shall be checked checked carefully and repaired as necessary, immediately appurtenances that operate only during high water must be repair and/or inspected at least annually. Facilities and through the levee shall be maintained in a good state of facilities and appurtenances that are constructed on, over, or Miscellaneous levee facilities and appurtenances. Levee

condition.
replaced as necessary to maintain the road surface in good where roads cross levees. Road surfacing material shall be necessary to correct any encroachment into the levee crown and grade as designed. Maintenance shall be performed as washes. Ramp embankments shall be maintained in the section roadway shaped properly and free of ruts, pockets, and including ramps, shall be bladed as necessary to keep the Roads and ramps. Access roads to and on the levees,

levee shall be removed promptly.
high water, any debris deposited on the river side slope of the the levee. Refuse dumps are not permitted. Following each and storage of materials or equipment are not permitted on that levees are not encroached upon. Buildings, structures, Prevention of encroachment. Care shall be taken to assure

made to exterminate the burrowing animals.
material and sodded. To prevent recurrence, effort shall be burrows, when found, shall be backfilled with compacted be maintained free of all types of animal burrows. Animal Animal burrows. Levees and adjacent landward areas shall

embankment.
undesirable growth shall be removed from the levee impoundment of rainwater. All brush, trees, and other be graded as necessary to drain freely and prevent sufficiently smooth for power mowing. Levee crowns shall promptly repaired and the entire embankment maintained slopes. Ruts, washes, slides, and subsidence should be designed, by replacing any material lost from the crown or maintained to not less than the grade and section, as Earth embankments. Levee embankments shall be

on levee embankments for erosion control.
shall be completed frequently enough to sustain sod growth brush control on levees and berms. Reseeding and fertilizing as-needed basis is permissible and desirable for weed and During the growing season, spraying with herbicides on an appropriate seasons when it is not detrimental to sod growth.

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TESTED
DATE: 10/20/09
Asst. Clerk of Court

4. Levee slope protection and protection on dike ends,
5. Gates, cattle guards, and fences, and
6. Siphons and pipe crossings.

- (4) *Inspection.* Frequent inspections are essential to a good levee maintenance program. In addition to the formal inspections required by the county engineer, inspections will be made prior to the beginning of the flood season, during and immediately following each high water period, and at such intermediate times as necessary to ensure satisfactory care of the levee.

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Sec. 26-105. RD Redevelopment Overlay District.

- (a) *Purpose.* The RD Overlay District is intended to promote the revitalization of existing blighted commercial strips and residential areas while encouraging reinvestment in and reuse of areas in a manner consistent with the Comprehensive Plan for Richland County. Revitalization initiates housing and economic opportunities, which promotes socially vibrant centers of community life through the coordinated efforts of public, private and community organizations.
- (b) *Applicability/establishment.* The RD Overlay District may be approved and designated by County Council if two or more of the following conditions or circumstances are evident:
 - (1) Loss of retail, office, and/or industrial activity, use or employment;
 - (2) Forty percent (40%) or more of households are low-income households;
 - (3) A predominance of residential or nonresidential structures that are deteriorating or deteriorated;
 - (4) Abandonment of residential or nonresidential structures;
 - (5) Environmentally contaminated land;
 - (6) The existence of unsanitary or unsafe conditions that endanger life, health, or property;
 - (7) Deterioration in public improvements, such as streets, street lighting, curbs, gutters, sidewalks, related pedestrian amenities, and parks and recreational facilities;
 - (8) Recent occurrence of a disaster; or
 - (9) Any combination of factors that substantially impairs or arrests the sound growth and economic development of government, or adversely affects the public, health, safety, or general welfare due to the redevelopment area's present condition and use.
- (c) *Permitted uses, permitted uses with special requirements, and special exceptions.* Reserved.
- (d) *Development standards.*
 1. *Redevelopment Plan Requirement.* A Redevelopment Plan shall be submitted for approval prior to designating an RD Overlay District, and shall include, without limitation, a capital improvement plan

SECTION VIII. Conflicting Ordinances. All ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

SECTION IX. Effective Date. The provisions of Section VI. (Interim Procedures) of this ordinance shall be effective from and after November 9, 2004. All other provisions of this ordinance shall be effective from and after July 1, 2005.

RICHLAND COUNTY COUNCIL

BY: Bernice G. Scott
Bernice G. Scott, Chair

ATTEST THIS THE 7TH DAY

OF DECEMBER, 2004.

Michelle R. Cannon-Finch
Michelle R. Cannon-Finch
Clerk of Council

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RICHLAND COUNTY ATTORNEY'S OFFICE

Anne R. Linder
Approved As To LEGAL Form Only
No Opinion Rendered As To Content

CERTIFIED TRUE COPY
ATTEST: Michelle G. Scott
TITLE: Asst. Clerk of Council
DATE: 10/20/09

First Public Hearing:	February 10, 2004
Second Public Hearing:	March 16, 2004
First Reading:	March 16, 2004
Third Public Hearing:	July 13, 2004
Second Reading:	October 19, 2004
Third Reading:	November 9, 2004

EXHIBIT 5

CERTIFIED TRUE COPY

ATTES

TITLE

DATE

Michelle R. Cannon-Finch
10/20/09

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STATE OF SOUTH CAROLINA
COUNTY COUNCIL FOR RICHLAND COUNTY
ORDINANCE NO. 114-06HR

AN ORDINANCE AMENDING THE RICHLAND COUNTY CODE OF ORDINANCES; CHAPTER 26, LAND DEVELOPMENT; ARTICLE V, ZONING DISTRICTS AND DISTRICT STANDARDS; SECTION 26-104, FP FLOODPLAIN OVERLAY DISTRICT; SUBSECTION (B), APPLICABILITY/ESTABLISHMENT; SO AS TO ADOPT THE 1995 BASE FLOOD ELEVATIONS ALONG THE CONGAREE RIVER.

Pursuant to the authority granted by the Constitution and the General Assembly of the State of South Carolina, BE IT ENACTED BY THE RICHLAND COUNTY COUNCIL:

SECTION I. The Richland County Code of Ordinances, Chapter 26, Land Development; Article V, Zoning Districts and District Standards; Section 26-104, FP Floodplain Overlay District; Subsection (b), Applicability/establishment; is hereby amended to read as follows:

- (b) *Applicability/establishment.* The FP Overlay District shall function as an overlay district providing additional requirements to the regulations of the underlying general use zoning classification(s). It shall be applied to those areas designated on the Federal Emergency Management Agency's Flood Insurance Study, dated February 20, 2002, with accompanying Flood Insurance Rate Maps (FIRM), dated February 20, 2002, as areas of special flood hazard. Provided, however, those base flood elevation determinations that were included in the Federal Emergency Management Agency's Flood Insurance Study, dated July 17, 1995, shall apply along the Congaree River only. Floodplain and floodway boundary determinations along the Congaree River will be based on those boundaries depicted in the FIRM dated February 20, 2002, derived from the Federal Emergency Management Agency's Flood Insurance Study, dated February 20, 2002. In addition to other required development approvals, development applicants subject to the FP Overlay District must also receive a floodplain development permit from the county's flood coordinator. Review of developments subject to these requirements shall be conducted as part of the review for a grading or land development permit, whichever is applicable.

SECTION II. Severability. If any section, subsection, or clause of this ordinance shall be deemed to be unconstitutional or otherwise invalid, the validity of the remaining sections, subsections, and clauses shall not be affected thereby.

SECTION III. Conflicting Ordinances Repealed. All ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

SECTION IV. Effective Date. This ordinance shall be enforced from and after December 5, 2006.

RICHLAND COUNTY COUNCIL

BY:

Anthony G. Mizzell
Anthony G. Mizzell, Chair

ATTEST THIS THE 19TH DAY

OF DECEMBER, 2006

Michelle R. Cannon-Finch
Michelle R. Cannon-Finch
Clerk of Council

Richland County Attorney's Office
Amelia R. Schindler
Approved As To LEGAL Form Only.
No Opinion Rendered As To Content.

First Reading: September 19, 2006
Public Hearing: October 24, 2006
Second Reading: October 24, 2006
Third Reading: December 5, 2006

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Civil Action No. 2004-CP-40-3929
Columbia Venture, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANT RICHLAND COUNTY'S
	)	ANSWER TO PLAINTIFF'S
	)	FIRST AMENDED AND
	)	SUPPLEMENTAL COMPLAINT.
Richland County,	)	
	)	
Defendant.	)	

COMES NOW Defendant Richland County, hereby answering Plaintiff Columbia Venture's Complaint as follows:

1. Answering Paragraph 1, Defendant admits that Columbia Venture ("CV") is seeking just compensation, costs and attorney's fees for an alleged regulatory taking of its property, but denies any legal conclusions or allegations that Defendant is liable for a regulatory taking of CV's property.
2. Defendant admits the allegations contained in Paragraph 2.
3. Defendant admits the allegations and legal conclusions contained in Paragraph 3.
4. Answering Paragraph 4, Defendant admits that CV owns real property located on the Congaree River in Richland County, South Carolina. Answering further, Defendant denies that CV currently owns approximately 4,474 acres.
5. Answering Paragraph 5, Defendant admits that CV is aggrieved by actions alleged within its Complaint. Answering further, Defendant denies any legal conclusions made that imply liability on the part of Defendant.
6. Defendant admits the allegations set forth in Paragraph 6.

7. Defendant admits the allegations contained in Paragraph 7.
8. Defendant admits the allegations contained in Paragraph 8.
9. Defendant admits the allegations set forth in Paragraph 9.
10. Defendant admits the allegations contained in Paragraph 10.
11. Defendant admits that Paragraph 11 contains the definition of "Area of Special Flood Hazard" found in 44 C.F.R. § 59.1.
12. Defendant admits that Paragraph 12 contains the definition of "Base Flood" found in 44 C.F.R. § 59.1.
13. Defendant admits that Paragraph 13 contains in part the definition of "Flood or Flooding" found in 44 C.F.R. § 59.1.
14. Defendant admits that Paragraph 14 contains the definition of "Flood Elevation Determination" found in 44 C.F.R. § 59.1.
15. Defendant admits that Paragraph 15 contains in part the definition of "Flood Elevation Study" found in 44 C.F.R. § 59.1.
16. Defendant admits that Paragraph 16 contains in part the definition of "Flood Hazard Boundary Map" found in 44 C.F.R. § 59.1.
17. Defendant admits that Paragraph 17 contains the definition of "Flood Insurance Rate Map" found in 44 C.F.R. § 59.1.
18. Defendant admits that Paragraph 18 contains the definition of "Floodplain or Flood-Prone" found in 44 C.F.R. § 59.1.
19. Defendant admits that Paragraph 19 contains in part the definition of "Floodplain Management" found in 44 C.F.R. § 59.1.
20. Defendant admits that Paragraph 20 contains the definition of "Floodplain

Management Regulations" found in 44 C.F.R. § 59.1.

21. Defendant admits that Paragraph 21 contains the definition of "Floodway" found in 44 C.F.R. § 9.4.
22. Defendant admits that Paragraph 22 contains the definition of "Levee" found in 44 C.F.R. § 59.1. Further answering Paragraph 22, Defendant admits that a levee meeting the standards found in 44 C.F.R. § 59.1 is commonly referred to as a certified levee. Further answering Paragraph 22, Defendant admits that land behind an accredited levee would not be designated by FEMA as a floodway. Further answering Paragraph 22, Defendant denies that land behind an accredited levee would no longer be considered part of a floodplain.
23. Defendant admits that Paragraph 23 contains the definition of "Map" contained in 44 C.F.R. § 59.1.
24. Defendant admits that Paragraph 24 contains the definition of "Regulatory Floodway" found in 44 C.F.R. § 59.1. Further answering Paragraph 24, Defendant admits that, where FEMA has provided data from which the community may designate a floodway, participating communities must adopt a floodway that does not increase the base flood elevation more than one foot.
25. Defendant admits that Paragraph 25 contains the definition of "Scientifically Incorrect" found in 44 C.F.R. § 59.1.
26. Defendant admits that Paragraph 26 contains the definition of "Technically Incorrect" found in 44 C.F.R. § 59.1.
27. Answering Paragraph 27, Defendant admits that the National Flood Insurance Act ("NFIA") requires FEMA to establish base flood elevations and that participating

communities must use FEMA's FIS and FIRMs. Answering further, Defendant denies all remaining allegations within Paragraph 27.

28. Answering Paragraph 28, Defendant admits that the National Flood Insurance Program ("NFIP") utilizes the 100-year flood as the basic measure of risk. Answering further, Defendant is without knowledge or information sufficient to form a belief as to the remaining allegations stated in Paragraph 28.
29. Defendant admits the allegations contained in Paragraph 29.
30. Answering Paragraph 30, Defendant admits that the floodway is generally defined as that portion of the floodplain that is effective in carrying flow, and that the regulatory floodway, generally speaking, seeks to preserve the carrying capacity by prohibiting obstructions from being placed within the regulatory floodway that cause floodwaters to rise. Answering further, Defendant admits that participating communities must adopt floodways issued by FEMA or seek revisions to the floodway pursuant to 44 C.F.R. § 65.7. Answering further, Defendant admits that the NFIP seeks to limit construction within a floodplain. Answering further, Defendant denies any remaining allegations or conclusions of law set forth in Paragraph 30.
31. Answering Paragraph 31, Defendant is without knowledge or information sufficient to form a belief as to the allegations stated in Paragraph 31.
32. Answering Paragraph 32, Defendant is without knowledge or information sufficient to form a belief as to the allegations stated in Paragraph 32.
33. Answering Paragraph 33, Defendant is without knowledge or information sufficient to form a belief as to the remaining allegations stated in Paragraph 33.

34. Answering Paragraph 34, Defendant is without knowledge or information sufficient to form a belief as to the remaining allegations stated in Paragraph 34.
35. Defendant admits the allegations contained in Paragraph 35.
36. Answering Paragraph 36, Defendant is without knowledge or information sufficient to form a belief as to the allegations stated in Paragraph 36.
37. Defendant admits the allegations contained in Paragraph 37.
38. Answering Paragraph 38, Defendant is without knowledge or information sufficient to form a belief as to the allegations stated in Paragraph 38.
39. Answering Paragraph 39, Defendant is without knowledge or information sufficient to form a belief as to the allegations stated in Paragraph 39.
40. Defendant admits the allegations contained in Paragraph 40.
41. Defendant admits that the previously effective Flood Insurance Study ("FIS") and corresponding Flood Insurance Rate Maps ("FIRMs") dated January 19, 1994 was adopted by Richland County by ordinance in conformity with the NFIP. Answering further, Defendant admits that FEMA issued a new Richland County FIS and corresponding FIRMs on August 20, 2001, with an effective date of February 20, 2002. Answering further, Defendant denies the remaining allegations set forth in Paragraph 41.
42. Answering Paragraph 42, Defendant admits that the Manning levee is not accredited by FEMA. Answering further, Defendant is without knowledge and information sufficient to form a belief as to the allegation that, with slight modification, the Manning levee could easily be certified. Further answering Paragraph 42, Defendant admits that Zone X is one risk zone used by FEMA to depict land protected by an

accredited levee. Further answering Paragraph 42, Defendant admits that FEMA could not recognize the unaccredited Manning levee as offering protection from the base flood, and therefore, designated the property located behind the Manning levee as Zone AE in the 1994 FIRM. Further answering Paragraph 42, Defendant admits that the land behind the Manning levee had not been designated as a floodway on the 1994 FIRM nor previously issued FIRMs.

43. Defendant is without knowledge or information sufficient to form a belief as to the allegations stated in Paragraph 43.
44. Defendant admits the allegations contained in Paragraph 44.
45. Defendant admits the allegations contained in Paragraph 45.
46. Defendant is without knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 46.
47. Defendant is without knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 47.
48. Defendant is without knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 48.
49. Defendant admits the allegations contained in Paragraph 49.
50. Answering Paragraph 50, Defendant admits that a number of persons appealed FEMA's August 12, 1999 revised preliminary FIRM. Further answering Paragraph 50, Defendant admits that Richland County Council adopted a resolution appealing FEMA's August 12, 1999 revised preliminary FIS, and expressed a willingness to designate the South Carolina Department of Natural Resources to appeal on behalf of Richland County. Richland County is without knowledge or information sufficient to

form a belief as to the remaining allegations set forth in Paragraph 50.

51. Defendant admits the allegations set forth in Paragraph 51.
52. Answering Paragraph 52, Defendant admits that, under 42 U.S.C. § 4104 and 44 C.F.R. § 67.5, the sole basis of an appeal of FEMA's base flood elevations is possession of knowledge or information indicating that the base flood elevations are scientifically or technically incorrect. Answering further, Defendant admits that base flood elevations are used as part of FEMA's analysis in delineating a floodway. All other allegations and legal conclusions set forth in Paragraph 52 are denied.
53. Defendant is without knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 53.
54. Defendant is without knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 54.
55. Answering Paragraph 55, Defendant admits that FEMA's appeal resolution expanded its August 12, 1999 Congaree River floodway. Answering further, Defendant is without knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 55.
56. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained within Paragraph 56.
57. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained within Paragraph 57.
58. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained within Paragraph 58.
59. Defendant is without knowledge or information sufficient to form a belief as to the

allegations contained within Paragraph 59.

60. Answering Paragraph 60, Defendant admits that FEMA allowed CV to appeal the September 26, 2000 appeal resolution, and allowed additional time for all appellants to comment and provide additional submissions to FEMA. Answering further, Defendant is without knowledge or information sufficient to form a belief as to the remaining allegations.
61. Answering Paragraph 61, Defendant admits that 44 C.F.R. § 67.6(a) states in part that "appellants are required to demonstrate that alternative methods or applications result in more correct estimates of base flood elevations, thus demonstrating that FEMA's estimates are incorrect." Answering further, Defendant admits that CV hired Exponent, Inc. to submit technical data to FEMA in connection with CV's appeal of the September 26, 2000 appeal resolution. Answering further, Defendant is without information or knowledge sufficient to form a belief as to the remaining allegations set forth in Paragraph 61.
62. Defendant is without information or knowledge sufficient to form a belief as to the allegations set forth in Paragraph 62.
63. Answering Paragraph 63, Defendant admits that FEMA issued its Final Determination on August 20, 2001. Answering further, Defendant is without knowledge or information sufficient to form a belief as to the remaining allegations set forth in Paragraph 63.
64. Defendant admits the allegations set forth in Paragraph 64.
65. Defendant admits the allegations set forth in Paragraph 65.
66. Answering Paragraph 66, Defendant denies that Richland County Council adopted

the August 20, 2001 FIRMs by ordinance enacted on June 16, 2004.

- 67. Answering Paragraph 67, Defendant admits that Plaintiff attached a copy of FEMA's FIRM of Richland County, Panel 160, as an exhibit to its Complaint.
- 68. Defendant admits the allegations set forth in Paragraph 68.
- 69. Defendant lacks sufficient knowledge or information to form a belief as to the allegations in Paragraph 69.
- 70. Answering Paragraph 70, Defendant admits that John Grego, Dan Tufford, the South Carolina Wildlife Federation and Riverland Park Neighborhood Association moved to intervene as defendants in Plaintiff's appeal. Answering further, Defendant is without knowledge or information sufficient to form a belief as to the date of such motion to intervene.
- 71. Defendant admits the allegations set forth in Paragraph 71.
- 72. Defendant is without information sufficient to form a belief as to the allegations contained in Paragraph 72.
- 73. Answering Paragraph 73, Defendant admits that, on November 18, 2005, the United States District Court vacated the Congaree River base flood elevations on procedural grounds and reinstituted the 1995 Congaree River base flood elevations. Answering further, Defendant denies the allegation and legal conclusion that, on November 18, 2005, the United States District Court vacated the Congaree River floodway.
- 74. Defendant admits the allegations set forth in Paragraph 74.
- 75. Answering Paragraph 75, Defendant admits that FEMA took the position that the United States District Court did not vacate the Congaree River floodway. Answering further, Defendant denies the legal conclusion that the United States District Court's

Judgment clearly vacated the Congaree River floodway. Answering further, Defendant is without knowledge or information sufficient to form a belief as to the remaining allegations within Paragraph 75.

76. Answering Paragraph 76, Defendant admits that CV sought to hold FEMA in contempt of the November 18, 2005 Order and that the United States District Court denied CV's motion to hold FEMA in contempt. Defendant further admits that the United States District Court issued a text order clarifying that both the 2001 base flood elevations and floodway for the Congaree River were vacated. Answering further, Defendant admits that the United States District Court, through its November 18, 2005 Order, reinstated the 1995 Congaree River base flood elevations, and through its text order of November 2, 2007, reinstated the 1995 Congaree River floodway. Answering further, Defendant is without knowledge or information sufficient to form a belief as to what FEMA stated in response to CV's motion to hold FEMA in contempt.
77. Defendant admits the allegations set forth in Paragraph 77.
78. Defendant admits the allegations set forth in Paragraph 78.
79. Defendant admits the allegations set forth in Paragraph 79.
80. Answering Paragraph 80, Defendant admits that Richland County Council, by resolution dated December 7, 1999, appealed FEMA's revised preliminary FJS and FIRMs. Answering further, Defendant denies the remaining allegations and legal conclusions set forth in Paragraph 80.
81. Answering Paragraph 81, Defendant admits that, in the summer of 2000, it began consideration of revisions to its stormwater ordinance in order to comply with its

National Pollutant Discharge Elimination System stormwater permit. Defendant denies the remaining allegations set forth in Paragraph 81 to the extent that the allegations imply that the quoted portion of Defendant's ordinance was added by virtue of the above-referenced revisions.

- 82. Defendant admits the allegations set forth in Paragraph 82.
- 83. Defendant admits that Richland County Council gave first reading to revisions to its stormwater ordinance that included exceptions for existing schools and publicly owned wastewater treatment plants. Defendant denies that Richland County Council's exceptions were identical to the language proposed by the Southern Environmental Law Center.
- 84. Defendant admits the allegations set forth in Paragraph 84.
- 85. Defendant admits the allegations set forth in Paragraph 85.
- 86. Defendant admits the allegations set forth in Paragraph 86.
- 87. Defendant denies the allegations set forth in Paragraph 87.
- 88. Defendant admits that Richland County Council gave third reading to a comprehensive land development code on June 1, 2004 that included a Floodplain Overlay District, which contained the definitions of floodway and floodplain alleged in Paragraph 88.
- 89. Defendant denies the allegations set forth in Paragraph 89.
- 90. Defendant admits the allegations set forth in Paragraph 90.
- 91. Defendant admits the allegations set forth in Paragraph 91.
- 92. Defendant admits the allegations set forth in Paragraph 92.
- 93. Defendant admits that the moratoria had the effect of prohibiting issuance of permits

that would allow CV to improve its levees, but denies any allegation or legal conclusion that the moratoria was intended to single out CV for treatment different from any other property located within the Congaree River floodplain.

94. Defendant admits the allegations set forth in Paragraph 94.
95. Answering Paragraph 95, Defendant admits that Richland County Council enacted an ordinance adopting the 1995 Congaree River base flood elevations, with the 2001 Congaree River floodway remaining in effect. Answering further, Defendant is without information or knowledge sufficient to form a belief as to how FEMA determines the extent of floodways. Answering further, Defendant denies the remaining allegations and legal conclusions set forth in Paragraph 95.
96. Defendant denies the allegations and legal conclusions set forth in Paragraph 96.
97. Answering Paragraph 97, Defendant admits that it submitted to FEMA a request for a letter of map revision to restore the 2001 base flood elevations for the Congaree River on or about December 7, 2006. Answering further, Defendant admits that it submitted the request for a letter of map revision without advance notice to property owners, but denies any allegation that no notice of the requested letter of map revision would have been provided to the public. Answering further, Defendant denies all remaining allegations and legal conclusions set forth in Paragraph 97.
98. Answering Paragraph 98, Defendant admits that it submitted to FEMA a request for a letter of map revision on or about December 7, 2006 to restore the 2001 Congaree River base flood elevations. Answering further, Defendant denies all remaining allegations set forth in Paragraph 98.
99. Defendant is without information or knowledge sufficient to form a belief as to the

allegations set forth in Paragraph 99.

100. Answering Paragraph 100, Defendant denies that it passed discriminatory ordinances and moratoria specifically targeting and frustrating CV's development plans. Answering further, Defendant is without information or knowledge sufficient to form a belief as to the remaining allegations set forth in Paragraph 100.
101. Answering Paragraph 101, Defendant admits that CV sold portions of its property and that the City of Cayce annexed its property on December 27, 2007. Answering further, Defendant denies the remaining allegations and legal conclusions set forth in Paragraph 101.
102. Answering Paragraph 102, Defendant reasserts and incorporates its answers to Paragraphs 1 through 101 above.
103. Answering Paragraph 103, Defendant admits that its series of moratoria prohibited issuance of permits for development within the Congaree River floodplain. Answering further, Defendant denies the remaining allegations and legal conclusions set forth in Paragraph 103.
104. Answering Paragraph 104, Defendant is without information sufficient to form a belief as to the allegation that CV possessed both the intent and capacity to develop its property. Answering further, Defendant denies all remaining allegations and legal conclusions set forth in Paragraph 104.
105. Answering Paragraph 105, Defendant is without information or knowledge sufficient to form a belief as to the allegation that CV expended large sums of money and other resources in preparation for development of its property. Answering further, Defendant denies the remaining allegations and legal conclusions set forth in

Paragraph 105.

106. Defendant admits the statement of law set forth in Paragraph 106.
107. Defendant denies the legal conclusion set forth in Paragraph 107.
108. Defendant is without information or knowledge sufficient to form a belief as to the allegations set forth in Paragraph 108. Answering further, Defendant denies any legal conclusions set forth in Paragraph 108 concerning reasonable investment-backed expectations.
109. Defendant denies the allegations and legal conclusions set forth in Paragraph 109.
110. Defendant denies the allegations and legal conclusions set forth in Paragraph 110.
111. Defendant is without information or knowledge sufficient to form a belief as to the allegations and legal conclusions set forth in Paragraph 111.
112. Defendant denies the allegations and legal conclusions set forth in Paragraph 112.
113. Defendant denies the allegations and legal conclusions set forth in Paragraph 113.
114. Defendant denies the allegations and legal conclusions set forth in Paragraph 114.
115. Defendant denies the allegations and legal conclusions set forth in Paragraph 115.
116. Defendant admits that Paragraph 116 contains provisions of S.C. Code Ann. § 28-11-30(3).
117. Defendant denies the legal conclusions set forth in Paragraph 117.
118. Answering Paragraph 118, Defendant reasserts and incorporates its answers to Paragraphs 1 through 117 above.
119. Defendant denies the allegations and legal conclusions set forth in Paragraph 119.
120. Defendant denies the allegations and legal conclusions set forth in Paragraph 120.
121. Defendant denies the allegations and legal conclusions set forth in Paragraph 121.

122. Defendant denies the allegations and legal conclusions set forth in Paragraph 122.
123. Defendant denies the allegations and legal conclusions set forth in Paragraph 123.
124. Answering Paragraph 124, Defendant reasserts and incorporates its answers to Paragraphs 1 through 123 above.
125. Defendant denies the allegations and legal conclusions set forth in Paragraph 125.
126. Defendant denies the allegations and legal conclusions set forth in Paragraph 126.
127. Answering Paragraph 127, Defendant reasserts and incorporates its answers to Paragraphs 1 through 126 above.
128. Defendant denies the allegations and legal conclusions set forth in Paragraph 128.
129. Defendant denies the allegations and legal conclusions set forth in Paragraph 129.
130. Defendant denies the allegations and legal conclusions set forth in Paragraph 130.
131. Defendant denies the allegations and legal conclusions set forth in Paragraph 131.
132. Defendant denies the allegations and legal conclusions set forth in Paragraph 132.
133. Defendant denies the allegations and legal conclusions set forth in Paragraph 133.
134. Answering Paragraph 134, Defendant reasserts and incorporates its answers to Paragraphs 1 through 133 above.
135. Defendant admits that Paragraph 135 contains provisions of S.C. Code Ann. § 15-77-300.
136. Defendant denies the allegations and legal conclusions and allegations set forth in Paragraph 136.
137. Defendant admits that CV demands a jury trial on any issue triable by jury as a matter of right.
138. Answering Plaintiff's Prayer for Relief, Defendant denies all allegations and legal

conclusions therein and further denies that CV is entitled to any relief.

**FOR A FIRST DEFENSE
AS TO ALL CAUSES OF ACTION**

139. To the extent that any allegation of the Complaint is not expressly admitted, modified or explained, it is denied.

**FOR A SECOND DEFENSE
AS TO ALL CAUSES OF ACTION**

140. To the extent that Plaintiff alleges as-applied constitutional challenges, these challenges are unripe.

**FOR A THIRD DEFENSE
AS TO ALL CAUSES OF ACTION**

141. Claims concerning Defendant's enacted moratoria are barred by the statute of limitations.

**FOR A FOURTH DEFENSE
AS TO ALL CAUSES OF ACTION**

142. To the extent that Defendant's adoption of FEMA's August 20, 2001 FIS and FIRMs are relevant to any claim, Plaintiff is barred from claiming that the flood data contained therein is scientifically and technically incorrect by virtue of the doctrine of res judicata.

**FOR A FIFTH DEFENSE
AS TO ALL CAUSES OF ACTION**

143. To the extent that Plaintiff is seeking punitive damages, Defendant is not subject to punitive damage awards under 42 U.S.C. § 1983.

**FOR A SIXTH DEFENSE
AS TO ALL CAUSES OF ACTION**

144. Plaintiff's allegations of non-legislative action taken on behalf of Defendant fail to

amount to any official policy or custom; thus, recovery under 44 U.S.C. § 1983 for these actions is unavailable.

**FOR A SEVENTH DEFENSE
AS TO ALL CAUSES OF ACTION**

145. All or some of Plaintiff's alleged damages are not proximately caused by Defendant's actions; thus, some or all of Plaintiff's alleged damages pursuant to 42 U.S.C. § 1983 is not recoverable against Defendant.

**FOR AN EIGHTH DEFENSE
AS TO TAKINGS CAUSES OF ACTION**

146. Plaintiff lacked reasonable investment-backed expectations concerning its proposed development of its property.

**FOR A NINTH DEFENSE
AS TO TAKINGS CAUSES OF ACTION**

147. Background principles of property law bar Plaintiff's claims of a regulatory taking.

**FOR A TENTH DEFENSE
AS TO TAKINGS CAUSES OF ACTION**

148. Plaintiff has not lost all or substantially all of economically viable use of its property.

**FOR AN ELEVENTH DEFENSE
AS TO SUBSTANTIVE DUE PROCESS CAUSES OF ACTION**

149. Annexation of Plaintiff's property by the City of Cayce has mooted Plaintiff's substantive due process claims.

**FOR A TWELFTH DEFENSE
AS TO SUBSTANTIVE DUE PROCESS CAUSES OF ACTION**

150. Plaintiff lacks a cognizable property interest rooted in state law.

**FOR A THIRTEENTH DEFENSE
AS TO SUBSTANTIVE DUE PROCESS CAUSES OF ACTION**

151. Defendant's actions fail to fall so far beyond the limits of legitimate governmental

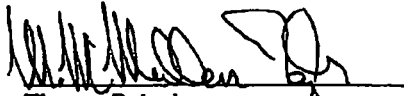
action that no process could cure the deficiency.

**FOR A FOURTEENTH DEFENSE
AS TO SUBSTANTIVE DUE PROCESS CAUSES OF ACTION**

152. Defendant's actions are reasonably related to a legitimate government purpose, or are otherwise fairly debatable.

WHEREFORE, having fully answered, Defendant prays the Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

Respectfully Submitted,



Thomas E. Lydon
Weston Adams, III
M. McMullen Taylor
McAngus Gondek & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211
(803) 779-2300

Attorneys for Defendant Richland County

Columbia, South Carolina
December 8, 2009

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

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Case No. 2010-CP-40-8943R

**NOTICE OF MOTION
AND MOTION OF DEFENDANT
RICHLAND COUNTY FOR
SUMMARY JUDGMENT
OF PLAINTIFF'S DUE PROCESS
CLAIMS**

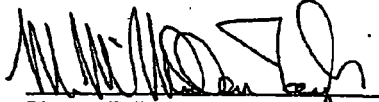
TO: Plaintiff Columbia Venture, LLC and its attorneys, William C. Boyd, Esquire, Manton M. Grier, Esquire, Clarke DuBose, Esquire, James Y. Becker, Esquire, and Elizabeth H. Black, Esquire:

You will please take Notice that Defendant Richland County, by and through its undersigned counsel, will move before the presiding judge of the Fifth Judicial Circuit, Richland County Judicial Center, Columbia, South Carolina, on the tenth (10th) day after service thereof, or as soon thereafter as counsel may be heard, for summary judgment pursuant to Rule 56(b) of the South Carolina Rules of Civil Procedure ("SCRCP"), seeking a ruling that denies Plaintiff's state and federal claims for violations of substantive due process as a matter of law because the material facts of this case fail to demonstrate that Plaintiff was arbitrarily and capriciously deprived of a cognizable property interest, or that that Plaintiff had a property interest that Defendant deprived it of in a manner that "fell so far beyond the outer limits of the legitimate governmental action that no process could cure the deficiency."

This Motion is based upon the South Carolina Rules of Civil Procedure, applicable law, a memorandum or memoranda of law with attached affidavits, depositions, and other exhibits, to

be submitted by the Defendant at least two days before a hearing on this Motion, and any other matters the Court may permit to be presented at the hearing on this matter.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Thomas E. Lydon', written over a horizontal line.

Thomas E. Lydon
M. McMullen Taylor
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211
(803) 779-2300

Attorneys for Defendant Richland County

Columbia, South Carolina
September 20, 2011.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Columbia Venture, LLC,)

Plaintiff,)

vs.)

Richland County,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Case No. 2010-CP-40-8943R

**NOTICE OF MOTION
AND MOTION OF DEFENDANT
RICHLAND COUNTY
FOR PROTECTIVE ORDER**

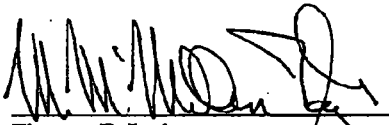
**TO: Plaintiff Columbia Venture, LLC and its attorneys, William C. Boyd, Esquire,
Manton M. Grier, Esquire, James Y. Becker, Esq., Clarke DuBose, Esquire, and
Elizabeth H. Black, Esquire:**

You will please take Notice that Defendant Richland County, by and through its undersigned counsel, will move before the presiding judge of the Fifth Judicial Circuit, Richland County Judicial Center, Columbia, South Carolina, on the tenth (10th) day after service thereof, or as soon thereafter as counsel may be heard, for an Order pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure ("SCRCP") protecting L. Gregory Pearce, member of Richland County Council, from answering certain questions posed by Plaintiff during a deposition taken October 27, 2011 based on legislative privilege. Attached hereto is a copy of the portions of the deposition of L. Gregory Pearce wherein this matter was raised and the corresponding Plaintiff's exhibits at issue.

Pursuant to Rule 11(a), the undersigned affirm that consultation with opposing counsel would serve no useful purpose, as is clear from the attached deposition transcript excerpts.

Should this Court grant this Motion, Defendant seeks recovery of costs and fees incurred in relation to this Motion.

Respectfully Submitted,



Thomas E. Lydon
M. McMullen Taylor
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Post Office Box 12519
Columbia, South Carolina 29211
(803) 779-2300

Attorneys for Defendant Richland County.

Columbia, South Carolina
October 31, 2011.

1 (EXCERPT FROM GREGORY PEARCE DEPOSITION 10/27/11)

2 BY MR. BECKER:

3 Q. Okay. You were on the Development &
4 Services Committee on December 20th, 2005; is that
5 right?

6 A. Yes, sir.

7 Q. Do you recall attending that meeting?

8 A. No, sir. Forgive me, I was shown this
9 last week.

10 Q. Okay.

11 A. All right. I mean, I saw -- I remember
12 it now, but I didn't remember it then.

13 Q. But you do now? You have a recollection
14 of that meeting?

15 A. Not what -- I obviously attended the
16 meeting.

17 Q. Okay. The only item for action,
18 according to this agenda, other than approval --

19 A. Excuse me. Excuse me. I don't know
20 whether this is the meeting or not that I -- I was
21 on the committee, I did attend this, and I don't
22 know whether I have seen this -- I did not see this
23 particular document, I don't believe.

24 Q. Okay. Well, it's been produced to us
25 from the County in discovery.

1 A. But it's the document. I mean, it's a
2 document that is correct, it's the minutes of the
3 meeting and the agenda. And a report of -- I
4 believe it's a report of what happened in the
5 meeting.

6 Q. Well, those are the minutes of the
7 previous meeting, but attached to them are -- as
8 Pages 4 and 5 are the item that was for action on
9 the meeting of December 20th, 2005.

10 A. Right.

11 Q. Excuse me, 4, 5 and 6 -- Pages 4, 5 and
12 6. The only item for action of the committee on the
13 meeting at five p.m. on December 20th, 2005 was that
14 emergency ordinance; is that correct?

15 A. According to the agenda, that's correct.

16 Q. And let's look at the ordinance that was
17 being submitted for consideration by the committee.
18 It's, again, Pages 4, 5 and 6 of the attached
19 minutes -- actually, Pages 4, 5 and 6 of this
20 document. It mentions in the second whereas clause
21 the case I described a little while ago, Columbia
22 Venture versus Federal Emergency Management Agency.
23 It says: Whereas, on November 18, 2005, the United
24 States District Court, South Carolina Division, in
25 the case of Columbia Venture versus Federal

1 Emergency Management Agency, Case Number -- and it
2 lists the number --- entered a written Order vacating
3 the Congaree River base flood elevations as revised
4 by the Federal Emergency Management Agency on August
5 20th, 2001 and effective on February 20th, 2002.

6 Did I read that correctly?

7 A. Yes, sir.

8 Q. Why was it necessary for the Development
9 & Services Committee to consider an ordinance
10 establishing a temporary moratorium on approval of
11 floodplain management permits in response to that
12 order?

13 MS. TAYLOR: Objection. I think you're
14 treading on legislative privilege. Do not answer.

15 MR. BECKER: I'm just asking him for his
16 opinion. I'm not asking him to discuss anything
17 that he discussed in -- with any other legislative
18 member. I'm just asking for his personal opinion of
19 why this was so important.

20 MS. TAYLOR: And I think that's covered
21 under legislative privilege.

22 MR. BECKER: Are you going to instruct
23 him not to answer?

24 MS. TAYLOR: I already did.

25 BY MR. BECKER:

1 Q. Okay. Are you going to follow that
2 instruction?

3 A. I don't know what I'm supposed to do
4 with that.

5 MS. TAYLOR: I instruct you not to
6 answer.

7 BY MR. BECKER:

8 Q. Are you going to refuse to answer my
9 question?

10 A. My attorney has instructed me not to
11 answer your question.

12 Q. Okay. So you're not going to?

13 A. Per --

14 Q. Per her instructions?

15 A. Per my attorney.

16 Q. All right. Well, let's go -- let's move
17 on to the --

18 MR. BECKER: Mullen, when we get into
19 the next exhibit I think you're going to see that
20 Mr. Pearce has already had discussions about what
21 happened at this meeting and why with Mr. Wislinski
22 and Mr. Adams and Grego and others in e-mail
23 communications. Are you still going to instruct him
24 not to answer this question?

25 MS. TAYLOR: Depends on looking at the

1 exhibit before we have the...

2 MR. BECKER: I think you need to
3 strongly consider whether or not you're going to
4 rest on that objection. It's Plaintiff's Exhibit
5 148.

6 MS. TAYLOR: Can Tommy and I have a
7 brief little discussion?

8 MR. BECKER: Yes.

9 (Off-the-record conference.)

10 MR. BECKER: Mullen, if you insist on
11 resting on legislative privilege and I have to go --
12 you know, argue against a motion for protective
13 order that you'll have to file and I win, I'm going
14 to ask for my time and costs. I just want you to
15 know that.

16 MS. TAYLOR: I believe the rules allow
17 you to do that.

18 MR. BECKER: Yeah. So if you want -- if
19 you want to rest on your legislative privilege --
20 and I'm going to do it. I'm telling you now that
21 I'm going to go forward and I'm going to go argue it
22 in front of the judge and I'm going to show him this
23 e-mail. So if you want to rest on it go ahead, but
24 I'm going to ask for my costs because I think that
25 in light of the extensive communications that he's

1 had about the purpose of this emergency moratorium,
2 the discussion that he's had with other people about
3 what occurred during the executive session, that any
4 claim of legislative privilege pertaining to why
5 that committee may have passed this moratorium has
6 been waived.

7 So I just want you to know, I don't want
8 to -- I don't want to -- I think it's wrong for you
9 to instruct him not to answer and I feel strongly
10 enough about it to tell you that if you're going to
11 rest on it I'm going to ask for our costs and fees
12 associated with dealing with the motion -- if we're
13 victorious, of course.

14 MS. TAYLOR: Jamie, I just told you
15 that -- I mean, this e-mail that's before you I'm
16 not going to object to questioning Mr. Pearce as far
17 as his recollection of what's stated in this e-mail.

18 I'm objecting to your question which was
19 a general question as to, you know, why Mr. Pearce
20 or why the committee made a legislative decision.
21 And I think that legislative decisions can include
22 much more deliberate aspects than simply what's
23 contained in this e-mail, so I think I feel pretty
24 good about the position.

25 But I want to make clear if you think

1 that I am going to instruct Mr. Pearce not to answer
2 any questions about simply what's stated here in
3 this e-mail, I'm not instructing him to -- dealing
4 with this particular exhibit, 148.

5 MR. BECK: Yeah. The question I had to
6 him was a general one.

7 MS. TAYLOR: Why don't you pose it
8 before we --

9 MR. BECKER: I already did and you
10 instructed him not to answer and that was why was it
11 necessary, in your opinion, for the County to pass a
12 temporary moratorium on approval of floodplain
13 management permits within a floodway?

14 MS. TAYLOR: Well, I think --

15 MR. BECKER: And you instructed him not
16 to answer. I think --

17 MS. TAYLOR: I think, Jamie, you look at
18 the ordinance itself it answers that question. And
19 I think this e-mail here really doesn't provide any
20 more information.

21 MR. BECKER: Well, if the ordinance
22 itself answers the question, why can't Mr. Pearce
23 testify about it?

24 MS. TAYLOR: Because I think what you're
25 asking him for is his thoughts and reasoning as to

1 why he chose or why the committee chose to make the
2 decision that did outside of what's clearly and
3 plainly stated on the face of the ordinance.

4 MR. BECKER: Okay. Well, let's -- we
5 can move on. You've already instructed him not to
6 answer.

7 Q. And let's move on, Mr. Pearce, to
8 Exhibit 148 which is a series of e-mails that you
9 exchanged with a Mr. Robert C. Wislinski.

10 A. I believe it's just one.

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1 (EXCERPT FROM GREGORY PEARCE DEPOSITION 10/27/11)

2 BY MR. BECKER:

3 Q. Well, let's look -- look on the next
4 page, Page 2 of Exhibit 148. This is an e-mail
5 thread that began with an e-mail from Robert
6 Wislinski to Robert Adams and others, dated December
7 21st, 2005, in which he forwarded to you on December
8 21st, 2005 at 7:30 p.m. Do you see that?

9 A. Okay. All right. Yes.

10 Q. You see at the very --

11 A. Yes, sir. I see.

12 Q. It started off original message?

13 A. All right.

14 Q. And then moving up from that.

15 A. So that -- this -- I'm sorry. We
16 can't -- this is the original message?

17 Q. Right. It says -- you see where it says
18 original message right there? (Indicating.)

19 A. Yes, sir.

20 Q. Okay. That was an e-mail from Robert
21 Wislinski to Robert Adams and others, dated December
22 21st, 2005 at 4:39 p.m. Do you see that?

23 A. Yes, sir. I see that.

24 Q. Right up above that is an indication
25 that this e-mail was forwarded to you --

1 A. To me.

2 Q. By Bob Wislinski with a carbon copy to
3 Robert Adams at 7:30 p.m. Do you see that?

4 A. Yes, sir.

5 Q. All right. Let's start with the
6 original message. Mr. Wislinski -- now, he was a
7 member of the Congaree Task Force; is that correct?

8 A. I believe that's correct. He's also a
9 constituent of mine.

10 Q. And Robert Adams was a member of the
11 Congaree Task Force, too?

12 A. That's correct, and he's a constituent
13 of mine.

14 Q. Right, The message says from
15 Mr. Wislinski to Mr. Adams: I just finished talking
16 to Greg Pearce (Robert Adams is talking to him, too)
17 and Damon Jeter -- to him, too and Damon Jeter. In
18 reaction to the recent court decision throwing out
19 the newest flood map, Council passed a 60-day
20 moratorium for floodway development out of one of
21 its committees last night in order to do due
22 diligence and make sure they have a workable flood
23 map. I may be getting this wrong, it's been a while
24 since I worked with this material.

25 The problem is that Damon Jeter added a

1 provision on this ordinance in committee that allows
2 the current owners of affected property to begin
3 repairs to any levees under current county law.
4 Damon claims he did this to give it the full measure
5 out of committee and onto Council (Bernice S. was
6 going to kill it in committee and have the votes to
7 do so). He had a prepared typed ordinance but
8 claims he's had no conversations with CV developers
9 and that the amendment was his own idea. Other
10 friends on council think this is problematical.

11 Did I read all that correctly?

12 A. Yes, sir.

13 Q. Looking back at Exhibit 149.

14 A. Is that in here?

15 Q. Yes -- keep going.

16 A. Yeah, it is.

17 Q. Is that the typed provision that
18 Mr. Wislinski was referring to in that e-mail?

19 A. I have no way of knowing that.

20 Q. Okay. Well --

21 A. I mean, it says what he says here.

22 Q. Right.

23 A. That's all I can tell you.

24 Q. Okay.

25 A. I don't know if it's the same one.

1 Q. Did you have -- you obviously had a
2 conversation with Mr. Wislinski on December 21st,
3 2005 -- or prior to December 21st, 2005 at 4:39
4 p.m.; is that right?

5 A. Prior to December -- it says I did.

6 Q. Well, he said you had a conversation
7 with him, because he said: I just finished talking
8 to Greg Pearce.

9 A. Yeah.

10 Q. So you must have spoken with him prior
11 to the time he wrote this e-mail; right?

12 A. According to this it says I did. I
13 don't remember talking to him.

14 Q. He couldn't have gotten the information
15 about what happened at the Development & Services
16 committee meeting from anyone other than somebody
17 that was there?

18 A. That's correct.

19 Q. And you and Damon Jeter were both there;
20 right?

21 A. That's correct.

22 Q. So do you think -- are you the one who
23 told him about the -- what he says in this e-mail?

24 A. In this e-mail?

25 Q. Mm-hmm.

1 A. I don't recall.

2 Q. You don't recall if you're the one who
3 told him that or not?

4 A. No, sir.

5 Q. But he wasn't at that meeting that
6 occurred back on December 20th, 2005 at five p.m.?

7 A. Mr. Wislinski?

8 Q. Yeah.

9 A. I don't know.

10 Q. You don't think so?

11 A. I just don't know.

12 Q. Don't know at all. Okay. But you
13 were --

14 A. Yes, sir.

15 Q. So what -- the moratorium that was
16 considered in the meeting that night was -- is
17 mentioned here in Exhibit 133. And that moratorium,
18 if you look on the bottom of what is marked Page 4
19 of that exhibit: Therefore be it enacted that
20 Richland County Council hereby declares a moratorium
21 on the approval or denial of any permit submitted to
22 Richland County for construction, development,
23 zoning, building, disturbance of land or for
24 stormwater management purposes. Did I read that
25 correctly?

1 A. Yes, sir.

2 Q. So this is the -- this is the moratorium
3 that was before the committee that night?

4 A. Yes, sir.

5 Q. And it would have prohibited the
6 approval or denial of any permit.--

7 A. That's correct.

8 Q. For construction of -- within a
9 floodway; is that right?

10 A. That's what it says, yes, sir.

11 Q. And apparently, according to
12 Mr. Wislinski who had talked to you about what
13 happened at the meeting, Bernice Scott was going to
14 kill this moratorium in the committee and had the
15 votes to do it?

16 A. We're talking about...

17 Q. We're talking about --

18 A. This?

19 Q. The original e-mail message, we're still
20 on that.

21 A. All right. (Reading.) That's what it
22 says.

23 Q. Okay. Mr. Jeter added a provision in
24 the ordinance that would have allowed the current
25 owners of affected property -- and that would be --

1 that would be Columbia Venture; right?

2 A. It doesn't say there but it goes down --
3 it mentions them later so I would assume that's what
4 he's talking about, yes.

5 Q. Well, it says allows the current owners
6 of affected properties to begin repairs --

7 A. On levees.

8 Q. -- on levees.

9 A. Columbia Ventures was the only
10 company...

11 Q. That had levees?

12 A. That was going to do any work on any
13 levies, that's correct.

14 Q. Okay. So he was referring to Columbia
15 Venture?

16 A. Yes, sir.

17 Q. So it appears that Mr. Wislinski's
18 assessment of the situation was that as long as
19 Mr. Jeter's amendment to that moratorium was in
20 place that Columbia Venture could have begun repairs
21 or improvements to their levees under current County
22 law; is that right?

23 A. If this is Mr. Jeter's amendment, that's
24 correct.

25 Q. Okay. In fact, it went even further

1 than that if this was, indeed -- Exhibit 149 was,
2 indeed, what the Jeter amendment was, it said: The
3 moratorium does not apply to permit applications for
4 maintenance of existing structures, levees or
5 buildings or to bring existing levees into
6 compliance with Richland County ordinances and/or
7 standards of the Army Corps of Engineers applicable
8 to certified levees.

9 Correct?

10 A. Yes, sir.

11 Q. So it would have allowed improvements to
12 the levees to bring them up to Federal standards; is
13 that right?

14 A. I believe that's correct.

15 Q. Okay. So that's the Jeter amendment?

16 A. Yes.

17 Q. And the Jeter amendment was part of the
18 moratorium resolution as it was passed by the County
19 Development & Services Committee on the evening of
20 December 20th, 2005; correct?

21 A. Yes, sir.

22 Q. So if the moratorium with the Jeter
23 amendment was passed by the full County Council,
24 then Columbia Venture would have been able to move
25 forward, improve its levees and seek certification

1 of them pursuant to Federal law?

2 A. That would follow.

3 Q. Okay. All right. Let's move on to the
4 first page of Exhibit 148.

5 A. Mm-hmm.

6 Q. This is your response to Mr. Wislinski
7 at 9:36 p.m. that night. I'm going to go ahead and
8 read the first two paragraphs into the record.

9 MS. TAYLOR: Wait. I think this meeting
10 was on December 20th and wasn't this e-mail the
11 21st?

12 MR. BECKER: Yeah. He -- he responded
13 to Mr. Wislinski on the same day as he got the
14 original e-mail.

15 MS. TAYLOR: I'm sorry. I thought I was
16 correcting you saying that this e-mail was sent the
17 night of the committee meeting, and the committee
18 meeting met on the 20th and the date on here was the
19 21st.

20 MR. BECKER: Right. No, let's clarify
21 all that.

22 Q. I think you understood that; right,
23 Mr. Pearce? That the committee meeting had occurred
24 the day before on the evening of December 20th and
25 all of these e-mail exchanges between you and

1 Mr. Wislinski were occurring the following evening
2 on December 21st, 2005?

3 A. Yes, sir.

4 Q. Okay. All right. Your response back to
5 Mr. Wislinski at 9:36 that evening of the 21st,
6 December 21, 2005, you write: Bob. When we came
7 out of executive session I honestly believed I was
8 sunk. Sunk as in I was the only person who would
9 vote to pass the proposed ordinance. My belief was
10 based on what the other committee members said
11 during the exec session portion of the meeting. I
12 also completely failed to take into account a
13 Council rule that permits an item defeated in a
14 committee to be brought to the full Council if three
15 members of Council sponsored the item. Before we
16 could vote Damon Jeter came down to my seat, showed
17 me his proposal for the addendum and said he thought
18 Bernice would buy into that. Since the moratorium
19 ordinance does not become a law until passed by the
20 full Council, my thinking was getting it before
21 Council was the most important thing to do (again
22 believing this was the only way to get it before
23 full Council.) It passed as amended and moves on.
24 Hopefully, the full Council will pass the ordinance
25 as drafted by our lawyers.

1 Did I read all of that correctly?

2 A. Yes, sir.

3 Q. Now, do you admit that this is -- you
4 sent this e-mail to Mr. Wislinski?

5 A. I did not recall sending this to
6 Mr. Wislinski until I saw this last week. But it is
7 my e-mail address, it looks to be original, does not
8 look to be fabricated so I, apparently, did send
9 this.

10 Q. Okay. And in it you're describing to
11 Mr. Wislinski what occurred during the executive
12 session portion of that meeting.

13 A. No, sir. I don't believe I did that.
14 When I came out of executive session we were getting
15 ready to take a public vote, that was a public vote
16 and I don't believe -- I did not discuss any -- who
17 said what in executive session, what was -- you
18 know, I commented on my own vote and my sense that,
19 you know, nobody else was going to vote with me.

20 But I certainly didn't -- in my mind I
21 didn't say anything about the content -- I didn't
22 say who was -- anything that was discussed in that
23 room. Now, I had -- I did discuss what happened
24 after we came out and what my belief was, but that
25 was my opinion. I don't believe that I said

1 anything that would report anything that went on
2 inside an executive session.

3 Q. Okay.

4 A. And that's my personal belief.

5 Q. All right. It's clear from this e-mail
6 that you wanted the full Council to pass the
7 ordinance without the Jeter amendment in it; is that
8 right?

9 A. That's absolutely correct.

10 Q. So you were not in favor of giving
11 Columbia Venture an opportunity to move forward with
12 improvement of its levees up to FEMA and Federal
13 standards?

14 A. That's absolutely correct, nor did I
15 believe that anyone else should have been permitted
16 to apply. If this had passed it would have opened
17 the door for other parties to permit permits in
18 flood prone areas, and I did not believe that was in
19 the best interests of the County. The maps were set
20 aside based on a technicality, not based on any --
21 and it goes on to read in the document my reasoning
22 of why I did not feel it was a good idea to pass
23 that -- the moratorium as amended. I'd be glad
24 to --

25 Q. No, you've explained it in that second

1 paragraph and I can read that.

2 A. This was not -- as I mentioned earlier,
3 I had other people that were having problems with
4 the flood thing and, to me, we did not know what was
5 going on. We didn't know whether the judge was
6 going to -- this was a temporary set aside, we were
7 going to get new maps, and it just was going to
8 create all manner of problems for the County.

9 This wasn't targeted against -- I wasn't
10 targeting against anyone -- one group or one issue,
11 although the person that wrote me, of course, was
12 concerned about Columbia Ventures.

13 Q. Well, let's go back and look at the
14 Jeter amendment. The -- it's saying, if you will,
15 look back at Exhibit 149. It says: The moratorium
16 does not apply to permit applications for
17 maintenance of existing structures in the floodway,
18 doesn't it; right?

19 A. Moratorium does not -- does not apply to
20 existing structures.

21 Q. Permit applications for maintenance of
22 existing structures.

23 A. All right.

24 Q. Now, there were plenty of people in the
25 floodway who had existing structures; right? The

1 City of Columbia wastewater treatment plant?

2 A. Right.

3 Q. Correct? The Heathwood Hall Episcopal
4 school?

5 A. Correct.

6 Q. They had what, about \$150 million worth
7 of existing structures in the floodway at that time?

8 A. That's right.

9 Q. And it would have been good for them to
10 obtain permits to maintain those existing
11 structures, wouldn't it?

12 A. (Reading.) That's correct.

13 Q. And they had a levee that protects the
14 school. You know that, don't you?

15 A. Yes, sir.

16 Q. And perhaps they would have wanted to
17 improve or repair those levees; correct?

18 A. That's possible.

19 Q. What would be wrong with allowing
20 Heathwood Hall to maintain its existing structures?

21 A. Nothing wrong with them maintaining the
22 exist...

23 Q. Then what would be wrong with the Jeter
24 amendment?

25 A. It was a period -- the period there --

1 we had no way of knowing what the floodway situation
2 would turn out. And how can you -- it just did not
3 make any sense to me to just -- to have people
4 changing things in floodways when it could very well
5 be that they were simply going to create problems
6 for themselves later on.

7 I mean, what if Heathwood Hall, for
8 example -- you mentioned them. What if they had
9 built their gymnasium on the ground instead of
10 elevating it? And then the floodway -- then it
11 would have been put back -- and the map had come
12 back in the floodway and then Heathwood Hall would
13 have been -- you know, they would have had this
14 potentially hazardous building, according to FEMA.

15 Q. Well, we're talking about here
16 maintenance of existing structures, not building a
17 new one.

18 A. Okay. This is what it is and that's my
19 best recollection of what my position was about
20 that. And I don't know of any further way to answer
21 your question.

22 Q. In the second paragraph of your e-mail
23 response to Mr. Wislinski, in the final sentence --
24 well, in the sentence before that you say: It,
25 referring to the moratorium, will either need a

1 two-thirds majority vote of Council to put it into
2 effect on an "emergency" (i.e. immediate) basis or
3 three readings and a public hearing to get it
4 through on a regular basis. If it goes this latter
5 route of three readings that would push it well into
6 February which may be too late to make any
7 difference.

8 What did you mean by that sentence?

9 A. I have no idea what I meant by that.
10 The phrase too late to make any difference I do not
11 understand -- I do not know why that was written
12 that way.

13 Q. Is it possible that Columbia Venture
14 could have come forward and submitted a permit
15 application to improve or repair its levees?

16 A. I have -- is it possible?

17 Q. Yeah.

18 A. I guess that would be possible, yes.

19 Q. Is that what you were referring to?

20 A. I do not recall that that had anything
21 to do with that sentence, no, sir.

22 Q. You clearly wanted to prevent -- you and
23 other members of Council who -- and we'll get into
24 how this was dealt with by the full County Council.
25 But it's clear, isn't it, that the vote on the

1 emergency moratorium with the Jeter amendment, a
2 vote for the moratorium with the Jeter amendment
3 would have allowed the three existing property
4 owners with land in the floodway -- Columbia
5 Venture, Heathwood and the City wastewater treatment
6 plant.

7 A. And one other -- at least one other
8 person that I know of.

9 Q. Who was that?

10 A. John Foster, who owns property on the
11 opposite side of --

12 Q. Right.

13 A. -- Interstate 77.

14 Q. That farmland down there?

15 A. Yes, sir.

16 Q. It's all farmland; right?

17 A. Well, he has -- he had contacted me
18 about construction of a horse barn.

19 Q. Okay. Anything else other than the
20 horse barn?

21 A. Well...

22 Q. Would building a horse barn on his
23 property have created a problem?

24 A. I don't know that it would or had. I'm
25 just saying he con --

1 Q. How many horses --

2 A. You asked me if there were other people
3 that would be affected, that was your question, and
4 I'm answering it was those people and this person
5 over there.

6 Q. Okay. How many horse barn -- how many
7 horses did he plan to keep down there?

8 A. I have no idea.

9 Q. Was it just for his own personal horses
10 and use of horses?

11 A. I have no idea. I can't...

12 Q. He wasn't planning to put any office
13 buildings there, was he?

14 A. It was -- as I recollect he wanted to
15 know if he had to build a two-story horse barn,
16 something to that effect; all right? To get him
17 above -- he has a house down there, it was an old
18 family farm house. He wanted to make some
19 improvements to the property.

20 Q. Well, that's an existing structure;
21 right?

22 A. I guess it would be, yes.

23 Q. So under the Jeter amendment --

24 A. I didn't know that he wanted to
25 construct something else. I do not know.

1 Q. Okay. Well, if I need to I'll go ask
2 him.

3 A. That would be fine.

4 Q. But the Jeter amendment would have
5 allowed him to obtain a permit to maintain the old
6 family place down there on his property, wouldn't
7 it?

8 A.. I guess it would, yes, sir.

9 Q. And it would have allowed either the
10 City wastewater treatment plant or Heathwood Hall or
11 Columbia Venture to apply for a permit application
12 to improve the existing levees that protected their
13 property, wouldn't it?

14 A. Yes.

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**RICHLAND COUNTY COUNCIL
DEVELOPMENT & SERVICES COMMITTEE**

Bernice G. Scott Joyce Dickerson Greg Pearce Damon Jeter, Chair Doris Corley
District 10 District 2 District 6 District 3 District 1

*December 20, 2005
5:00 PM*

Richland County Council Chambers
County Administration Building
2020 Hampton Street

Call to Order

Approval of Minutes – November 29, 2005: Regular Session Meeting [Pages 2 – 3]

Adoption of Agenda

I. Items for Action

- A. Emergency Ordinance Establishing a Temporary Moratorium on Approval of Floodplain Management Permits for Development or Construction Within a Portion of the Congaree River Floodplain [Pages 4 – 6]**

II. Items for Discussion / Information

There are no items for discussion/information.

III. Items Pending Analysis

There are no items pending analysis.

Adjournment

Staffed by: Joe Cronin



DEF-00012280

Minutes Of



Richland County Council
Development and Services Committee
November 29, 2005
5:00 PM

In accordance with the Freedom of Information Act, a copy of the agenda was sent to radio and TV stations, newspapers, persons requesting notification, and was posted on the bulletin board located in the lobby of the County Administration Building.

Members Present:

Chair: Damon Jeter
Member: Bernice G. Scott
Member: Joyce Dickerson
Member: L. Gregory Pearce, Jr.

Absent: Daris M. Corley

Others Present: Milton Pope, Monique Walters, Michelle Onley, Larry Smith, Tony McDonald, Ashley Jacobs, Roxanne Matthews, Joe Cronin, Chief Harrell, Michael Criss, Kendall Johnson, Susan Britt, Stephany Snowden, Jennifer Dowden, Amelia Linder, Denny Phipps, Sherry Wright-Moore, John Cloyd

CALL TO ORDER

The meeting was called to order at approximately 5:03 p.m.

APPROVAL OF MINUTES

October 25, 2005 (Regular Session) - Ms. Dickerson moved, seconded by Mr. Pearce, to approve the minutes as submitted. The vote in favor was unanimous.

ADOPTION OF AGENDA

Mr. Pearce moved, seconded by Ms. Dickerson, to adopt the agenda. The vote in favor was unanimous.

PRESENTATION

Northeast Columbia Soccer Association (NECSA): Mr. Ron Tryon - Mr. Ron Tryon from Park Pos Law Firm gave an overview of what this association is doing for the children in the Richland County community. He also advised Council that there is a need for additional land to expand their program.

I. ITEMS FOR ACTION

- A. Resolution Endorsing the Blueprint on Homelessness – Mr. Pearce moved, seconded by Ms. Dickerson, to forward this item to Council with a recommendation for approval. The vote in favor was unanimous.
- B. Acceptance of DHEC Used Oil and Waste Tire Grants – Ms. Scott moved, seconded by Mr. Pearce, to forward this item to Council with a recommendation for approval. The vote in favor was unanimous.
- C. Solid Waste Collector Rate Increase Request & Extension of Contracts
Ms. Scott moved, seconded by Mr. Pearce, to go into Executive Session.

Council went into Executive Session at approximately 5:25 p.m. and came out at approximately 5:48 p.m.

Mr. Pearce moved, seconded by Ms. Dickerson, to come out of Executive Session. The vote in favor was unanimous.

Ms. Scott moved, seconded by Ms. Dickerson, to forward to Council the staff's recommendation of a rate increase for solid waste collection contracts in Service Areas 5A, 5B and 7, and to amend the collections budget accordingly. The vote in favor was unanimous.

II. ITEMS FOR INFORMATION/DISCUSSION

- A. Sease Road Update – The information was included in Council's packet. This item is in regard to the Friarsgate community new entrance/exit that is to be constructed next year.

ADJOURNMENT

Ms. Scott moved, seconded by Ms. Dickerson, to adjourn.

The meeting adjourned at approximately 5:50 p.m.

Submitted by,

Damon Jeter
Chair

The minutes were transcribed by Michelle M. Onley

STATE OF SOUTH CAROLINA
COUNTY COUNCIL FOR RICHLAND COUNTY
ORDINANCE NO. ____-05HR

**AN EMERGENCY ORDINANCE ESTABLISHING A TEMPORARY MORATORIUM
ON APPROVAL OF FLOODPLAIN MANAGEMENT PERMITS FOR DEVELOPMENT
OR CONSTRUCTION WITHIN A PORTION OF THE CONGAREE RIVER
FLOODPLAIN.**

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

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

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

WHEREAS, the absence of sufficient data from FEMA concerning the Congaree River Floodplain constitutes an emergency; and

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

THEREFORE, BE IT ENACTED THAT:

SECTION I. Richland County Council hereby declares a moratorium on the approval or denial of any permit submitted to Richland County for construction, development, zoning, building, disturbance of land, or for stormwater management purposes, as defined within Chapter 26 of the Richland County Code of Ordinances, on property located in a flood-prone area within the Congaree River Floodplain.

Congaree River Floodplain means the geographic area shown on Flood Insurance Rate Map panels 0091, 0092, 0094, 0160, 0178 and 0190 for Unincorporated Richland County.

Flood-prone means any land area susceptible to being inundated by water from the overflow of inland waters, or the unusual and rapid accumulation or runoff of surface waters from any source.

This moratorium does not apply to permit applications for maintenance of existing structures, levees or buildings.

SECTION II. The Richland County Attorney and Interim Administrator, and/or their designees or agents, shall, before this Ordinance expires, make reasonable efforts to determine from FEMA or by other reasonable and necessary means, how Richland County will maintain compliance with the NFIP in light of the Order entered by the United States District Court, South Carolina Division, on November 18, 2005, in the case of *Columbia Venture v. Federal Emergency Management Agency*. The Richland County Attorney and Interim County Administrator shall report their findings to Richland County Council as soon as practicable before the expiration of this Ordinance.

SECTION III. If any section, subsection, or clause of this Ordinance shall be deemed to be unconstitutional or otherwise invalid, the validity of the remaining sections, subsections, and clauses shall not be affected thereby.

SECTION IV. All ordinances or parts of ordinances in conflict with the provisions of this Ordinance are superseded during the time this Ordinance is effective.

SECTION V. This Ordinance shall be effective immediately upon adoption by Richland County Council.

SECTION VI. This Ordinance shall expire sixty-one (61) days following the date of adoption of this Ordinance, or until rescinded by Richland County Council, whichever is earlier.

RICHLAND COUNTY COUNCIL

BY: _____
Anthony G. Mizzell, Chair

Attest this the ____ day of
_____, 2005

Michelle R. Cannon-Finch
Clerk of Council

5

DEF-00012284

RICHLAND COUNTY ATTORNEY'S OFFICE

Approved As To LEGAL Form Only
No Opinion Rendered As To Content

Blan Holman

From: Robert C. Wislinski [wizworks@mindspring.com]
Sent: Thursday, December 22, 2005 9:53 AM
To: Kevin Fisher; Robert Adams; Weston Adams; John Grego; Dell Isham; Dan Tufford; Bob Guild; Blan Holman; Angela Vinay
Subject: more info on levee situation from Greg Pearce

-----Original Message-----

From: Greg Pearce [mailto:g_pearce@bellsouth.net]
Sent: Wednesday, December 21, 2005 9:36 PM
To: wizworks@mindspring.com
Subject: Re: richland county council and levees

Bob:

When we came out of Executive Session, I honestly believed I was sunk - "sunk" as in I was the only person who would vote to pass the proposed ordinance. My belief was based on what the other committee members said during the exec session portion of the meeting. I also completely failed to take into account a Council rule that permits an item defeated in a committee to be brought to the full council if three (3) members of Council sponsor the item. Before we could vote, Damon Jeter came down to my seat, showed me his proposal for the addendum and said he thought Berrice would buy into that. Since the moratorium ordinance does not become "law" until passed by the full Council, my thinking was getting it before Council was the most important thing to do (again believing this was the only way to get it before full Council). It passed as amended and moves on. Hopefully, the full Council will pass the ordinance as drafted by our lawyers.

Please understand that we still do not have an ordinance on the books related to the Congaree floodway other than the one that is based on maps that have been thrown out by the Federal Judge. Nothing has really changed as a result of action by the D&S Committee. Just because this committee moved an amended ordinance forward does not mean it has become "law". It will either need a 2/3 majority vote of Council to put it into effect on an "emergency" (ie, immediate) basis or three readings and a public hearing to get it through on a regular basis. If it goes this latter route of three readings that would push it well into February which may be too late to make any difference.

Both our staff and our lawyers believe that a 60 day moratorium was in the best interests of the county to avoid any confusion during this period of "unknowns" and "uncertainty". No one seems to know exactly where we are with respect to flood maps or who is going to do what next. If you think you are confused, you should try listening to the various lawyers going through their scenarios of "what if this" or "what if that". A moratorium makes sense for the county in that it lets the smoke clear, lets various appeals get filed and, most importantly, gives FEMA time to take some definitive action on how they will proceed. Also, keep in mind that the judge never ruled on the "science" (ie, facts, figures, calculations, etc) of FEMA's maps. The judge only ruled that FEMA failed to follow the correct procedures in putting the maps into effect.

I'm not certain whether I have answered your question or not but these are basically the "facts" as I understand them. Now, if you want me to "speculate" on what is going on behind the scenes, I doubt that you have enough time between now and Christmas for me to go through all of the various "theories" that I could propose about that.

Greg

----- Original Message -----

1/3/2006



SELC000263

14504012

From: Robert C. Wislinski
To: Greg Pearce
Co: Robert Adams
Sent: Wednesday, December 21, 2005 7:30 PM
Subject: richland county council and levees

Greg: FYI: I ask why forward this to council with the levee addendum? Do ya'll's lawyers think there's any legal benefit? Why not kill the moratorium in committee? Trying to figure this out. Thanks for your help!!!!

Bob

-----Original Message-----

From: Robert C. Wislinski [mailto:wizworks@mindspring.com]
Sent: Wednesday, December 21, 2005 4:39 PM
To: Robert Adams; Angela Viney; Ann Timberlake; Ben Gregg; Blain Holman; Bob Guld; Dan Tufford; Dell Isham; Dick Watkins; John Greco; Kevin Fisher; Nancy Stone-Cullum; Rich Scharf; Virginia Sanders; Weston Adams
Subject: richland county council and levees

I just finished talking to Greg Pearce (Robert Adams is talking to him too) and Damon Jeter. In reaction to the recent court decision throwing out the newest floodmap, Council passed a 60 day moratorium for floodway development out of one of its committees last nite (no press attention) in order to do due diligence and make sure they have a workable flood map. I may be getting this wrong. Its been awhile since I worked with this material.

The problem is that Damon Jeter added a provision on this ordinance in committee that allows the current owners of affected property to begin repairs to any levees under current county law. Damon claims he did this to get it the full measure out of committee and onto council (Bernice S. was going to kill it in committee and had the votes to do so). He had a prepared typed ordinance, but claims he's had no conversations with CV developers and that the amendment was his own idea. Other friends on council think this is problematical.

This matter is going to full council. I'd like some of the lawyers to tell us what's going on. I think the levee gambit is politically (separate from legal) a real problem for this PRwise and the developers. We should talk and quickly. Thanks.

Bob Wislinski
WizWorks, LLC
P.O. Box 5052
Columbia SC 29250
Phone: 803-783-8417
Fax: 803-783-8247
Cell: 803-318-6804

1/3/2006

SELC000264

DEC. 20, 2004

PROPOSED AMENDMENT TO ORDINANCE
SECTION 1, PARAGRAPH 4.

This moratorium does not apply to permit applications for maintenance of existing structures, levees or building or to bring existing levees into compliance with Richland County ordinances and/or standards of the Army Corps of Engineers applicable to certified levees.



Smith 109

1 (EXCERPT FROM GREGORY PEARCE DEPOSITION 10/27/11)

2 BY MR. BECKER:

3 Q. All right. Take a look, then, at this
4 next exhibit which is 18 -- excuse me, 33. This is
5 a resolution that was -- and we'll get to this in a
6 minute with the next exhibit which is Number 34 --
7 in fact, why don't I go ahead and give you those?
8 These are the minutes of a meeting -- Exhibit 34 are
9 the minutes of a County -- Richland County Council
10 regular session meeting held on December 7, 1999 at
11 which the resolution, which is marked as Exhibit 33,
12 was considered.

13 And to cut to the chase of that exhibit,
14 it says be it -- at the bottom paragraph of Exhibit
15 33 on the first page: Be it further resolved that
16 Richland County expresses its willingness to
17 designate SC DNR to appeal on behalf of Richland
18 County or jointly with Richland County. Provided
19 however that if the information submitted does not
20 rise to the level of appeal as evaluated by South
21 Carolina Department of Natural Resources and the
22 County Administrator, the information shall be
23 forwarded to FEMA, but not as an official appeal.

24 Did I read that correctly?

25 A. Yes, sir.

1 Q. All right. If you look at Exhibit 34,
2 which are the minutes of the County Council meeting
3 held December 7, '99 on Page 4 of that document,
4 there's a discussion about FEMA. Do you see that
5 portion --

6 A. Yes, sir.

7 Q. -- of the minutes?

8 A. Beginning with Mr. McSwain reported on
9 the FEMA study?

10 Q. Mm-hmm. Yes, sir. So it's clear from
11 those minutes that the subject of whether or not the
12 County should appeal or participate in an appeal or
13 designate some other body to appeal on its behalf
14 was the subject of considerable discussion at that
15 meeting that night; is that right?

16 A. Yes, sir.

17 Q. Ultimately, the resolution that we just
18 examined was -- was passed by the County, as you can
19 see on the next page of that exhibit which is Page
20 5. So the County voted in favor of appealing the
21 latest flood map and you were opposed to the -- to
22 the appeal. Do you know why you voted --

23 A. Can --

24 Q. -- in opposition to that?

25 MS. TAYLOR: I will object based on

1 legislative privilege. Do not answer.

2 MR. BECKER: I think he's...

3 Q. You did vote not to appeal the -- not to
4 designate DNR as the -- to appeal on the County's
5 behalf; is that correct?

6 A. If you give me a moment to review the
7 resolution.

8 Q. Well, I mean, it says there that you
9 opposed it.

10 A. Yes, sir, but I want to make sure the
11 way you said -- specifically what I'm opposed to and
12 I don't -- according to the minutes, that's correct.
13 I did oppose that.

14 Q. Mm-hmm.

15 MR. BECKER: Okay. You're going to
16 direct him not to answer my question about why he
17 voted that way?

18 MS. TAYLOR: That's right..

19 MR. BECKER: All right. Well, we'll
20 take it up later, but you probably need to go ahead
21 and file, you know, a motion for protective order.
22 I may not oppose it later on, but if that's the
23 position you want to take you should plan to go
24 ahead and file it.

25 MS. TAYLOR: I'll do it.

COUNTY OF RICHLAND
STATE OF SOUTH CAROLINA

A RESOLUTION

A RESOLUTION BY RICHLAND COUNTY COUNCIL

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

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

WHEREAS, Richland County Council supports growth and development in the County that brings a higher quality of life to its residents; and,

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

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

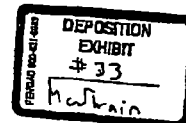
WHEREAS, numerous professionals and citizens and Lexington County have raised valid questions about the technical accuracy of the flood insurance study; and,

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

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

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

BE IT FURTHER RESOLVED THAT RICHLAND COUNTY expresses its willingness to designate SC DNR to appeal on behalf of Richland County or jointly with Richland County. Provided however that if the information submitted does not rise to the level of appeal as evaluated by South Carolina Department of Natural Resources and the County Administrator, the information shall be forwarded to FEMA, but not as an official appeal; and,



DEF-00000501

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

SIGNED AND SEALED, this the _____ day of _____, 1999,
in a meeting duly assembled.

Paul Livingston
Chair, Richland County Council

T. Cary McSwain

T. Cary McSwain
County Administrator, Richland County

ATTEST:

Michelle Cammon-Finch
Clerk of Council

CERTIFIED TRUE COPY

ATTEST: *Michelle Cammon-Finch*
TITLE: *Clerk of Council*
DATE: *12/18/99*

Adopted 12/7/99

**RICHLAND COUNTY COUNCIL
REGULAR SESSION
DECEMBER 7, 1999
6:00 P.M.**

MEMBERS PRESENT: Paul Livingston, Chair; Joseph McEachern, Co-Vice Chair; J.D. "Buddy" Maeize, Co-Vice Chair; Susan Brill; Anthony G. Mizzell; Stephen F. Morris; L. Gregory Pearce Jr.; Bernice G. Scott; Kit Smith; Thelma M. Tillis; James Tuten

OTHERS PRESENT: Michelle Cannon-Finch, Tonya Durham, Marshella Washington, Stephanie Thompson, Milton Pope, Pam Davis, Tony McDonald, Ash Miller, Judy Carter, Ralph Pearson, Sam Misenheimer

CALL TO ORDER

The meeting was called to order at approximately 6:15 p.m.

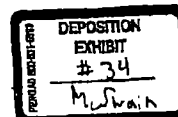
INVOCATION

The invocation was given by the Honorable Mr. Jim Tuten.

CITIZEN'S INPUT

The following spoke during Citizen's Input:

- Mr. Edwin Pearson spoke regarding the Confederate Flag.
- Ms. Gale Robinson spoke in opposition of a Community Care Home in her community.
- Ms. Donna Turner spoke in opposition of a Community Care Home in her community.
- Ms. Elizabeth Davis spoke in opposition of a Community Care Home in her community.
- Ms. Carolyn Byars spoke in opposition of a Community Care Home in her community.
- Mr. Joe Arnet spoke regarding the Solid Waste Contract.
- Councilman Sam Davis spoke in opposition of a Community Care Home on Park Street.
- Ms. Catherine Trinnall spoke in opposition of a Community Care Home on Park Street. (Several residents attended the meeting to show opposition.)
- Mr. Vernon Kirkpatrick spoke in opposition of discussing the Proclamation regarding the Confederate Flag.
- Mr. Louis Dartington spoke regarding the minutes with the issue of Nathaniel Walker.
- Ms. Mildred Myers spoke regarding the Chaplins-Burrough Development (FEMA issue).



**Richland County Council
Regular Session
December 7, 1999
Page Two**

-Mr. Chris Bungamer spoke in opposition of a Community Care Home in the community.

Regular Session: November 16, 1999

Mr. Mizzell moved, seconded by Mr. Morris, to reconsider the minutes regarding the Nathaniel Walker zoning item for Third Reading item. The vote in favor was unanimous.

Mr. Mizzell moved, seconded by Mr. Morris, to instruct the Zoning Department to properly post this item for Third Reading. The vote in favor was unanimous.

Ms. Scott moved, seconded by Ms. Tillis, to approve the minutes as amended. The vote in favor was unanimous.

Zoning Public Hearing: November 23, 1999

Ms. Smith moved, seconded by Ms. Scott, to approve the minutes. The vote in favor was unanimous.

ADOPTION OF AGENDA

Mr. Pearce requested to go into Executive Session after the Administrator's Report to discuss a legal questions regarding FEMA.

Mr. Mizzell requested to add under Economic Development Report the following: a Resolution for Project Harvey and a Resolution consenting to an assignment to one or more affiliated entities.

Ms. Smith requested to add a Report of the Administrator's Task Force as item-7.

After discussion, Ms. Smith withdraw her request stating that she would petition to add this item to the Special Called Meeting on December 8th.

Mr. Morris requested to add a Resolution on two-thirds vote to raise taxes on this agenda or add at the next Regularly Called Meeting of Council.

After discussion, Mr. Morris withdrew his request.

Richland County Council
Regular Session
December 7, 1999
Page Three

EMPLOYEE SERVICE CERTIFICATES

Mr. McSwain stated that there were no certificates to be presented at this time.

APPROVAL OF PROCLAMATIONS

Proclamation by Richland County stating that it is the sense of the Richland County Council that the South Carolina General Assembly should act to remove the Confederate Naval Jack Flag from the State House in Columbia, South Carolina [LIVINGSTON]

Ms. Scott moved, seconded by Ms. Smith, to approve the Proclamation.

Mr. Morris directed the attention to the second Proclamation made by Mr. Pearce.

The vote was as follows:

Favor	Oppose
Smith	Morris
Mizzell	Pearce
Livingston	Meetze
McEachern	Brill
Scott	Tuten
Tillis	

The motion passed.

Proclamation encouraging the Governor and the South Carolina General Assembly to relocate the Confederate Flag [PEARCE]

Mr. Pearce withdrew his request.

Proclamation honoring Eagle Scout Christopher Bennett Altman for his achievement in gaining the highest level of Scouting and for his service to the Community [BRILL]

Ms. Brill stated that his recognition ceremony would be held on December 31st.

Mr. McEachern moved, seconded by Mr. Pearce, to approve this

Richland County Council
Regular Session
December 7, 1999
Page Four

Proclamation commending Clemente Flemming (LIVINGSTON)

Ms. Smith moved, seconded by Mr. McEachern, to approve the Proclamation. The vote in favor was unanimous.

REPORT OF COUNTY ADMINISTRATOR

County Government Finance Advisory Committee

Mr. McSwain reminded Council that on December 16th there would be a Committee Meeting regarding a local task force for County Government Finance Advisory Committee. He stated that the meeting would be held in the Back Conference Room on the 4th Floor at 6:00 p.m.

Mr. Livingston requested for this information to be placed on the Council Calendar.

FEMA

Mr. McSwain reported on the FEMA Study. He stated that an all-day workshop would be held in Richland County regarding input on this issue at the end of the 90-day period. He stated that he has not received any individual or community appeals. He named some of the appeal requirements by FEMA.

A discussion took place.

Mr. George Gregory of Burroughs and Chapin Company spoke regarding this issue and the time that FEMA has proposed to be drawn. He stated that the County could do the one of the following: nothing, appeal if information meets the criteria, or forward information to FEMA for consideration.

Mr. Pearce moved, seconded by Mr. Mizell, to go into Executive Session to discuss a legal matter. The vote in favor was unanimous.

Council went into Executive Session at approximately 8:10 p.m. and came out at approximately 8:25 p.m.

It was moved and seconded to come out of Executive Session. The

Richland County Council
Regular Session
December 7, 1999
Page Five

Ms. Smith offered an amendment to the Resolution which was stated as follows: "Provided however that if the information submitted does not rise to the level of appeal as evaluated by South Carolina Department of Natural Resources and the County Administrator, the information shall be forwarded to FEMA, but not as an official appeal."

Ms. Smith moved, seconded by Mr. Mizzell, to approve the Resolution as amended.

Mr. Tuten requested to change "officially appeal" to "respectfully appeal".

Mr. Morris made a substitute motion to direct Mr. McSwain to gather all of the appropriate data and make the determination according to the law.

The motion died for a lack of a second.

Mr. Meetze called for the question. The vote in favor of the call for the question was unanimous.

The vote for the Resolution as amended was as follows:

<u>Favor</u>	<u>Oppose</u>
Smith	Morris
Mizzell	Pearce
Livingston	Meetze
McEachern	Tuten
Brill	
Tillis	
Scott	

The motion passed.

Committee Meetings

Mr. McSwain requested to suspend the Committee Meetings for the month of December with the contingency that if any urgent matter comes up, he be allowed to contact the Chair.

Mr. McEachern moved, seconded by Ms. Smith, to accept the Administrator's recommendation. The vote in favor was unanimous.

Richland County Council
Regular Session
December 7, 1999
Page Six

Consideration on Incentives for a Telecommunications Company
- PUBLIC HEARING

Mr. Livingston stated that no one signed up to speak for the Public Hearing.
Mr. Morris moved, seconded by Mr. Mizzell, to approve this item for Third Reading. The vote was in favor. Ms. Smith opposed.

Ordinance prohibiting through truck traffic on Congress Road -
PUBLIC HEARING

Mr. Livingston stated that no one signed up to speak for the Public Hearing.

Mr. Morris moved, seconded by Mr. Meetze, to approve this item for Third Reading. The vote in favor was unanimous.

Request for funding for Improvements to the Hampton-Preston
Manston - PUBLIC HEARING

Mr. Livingston stated that no one signed up to speak for the Public Hearing.

Mr. Pearce moved, seconded by Mr. Mizzell, to approve this item for Third Reading. The vote in favor was unanimous.

Carolina Ceramics and SMI Owens Multi-County Industrial Park
Status - PUBLIC HEARING

Mr. Livingston stated that no one signed up to speak for the Public Hearing.

Mr. Morris moved, seconded by Mr. Mizzell, to approve this item for Third Reading. The vote in favor was unanimous.

Request by Lake Murray Tourism for \$10,000.00 for Marketing
Plan - PUBLIC HEARING

Mr. Livingston stated that no one signed up to speak for the Public Hearing.

Mr. Meetze moved, seconded by Mr. Morris, to approve this item for Third Reading. The vote in favor was unanimous.

Richland County Council
Regular Session
December 7, 1989
Page Seven

Siemens Diesel Systems Technology: Ordinance authorizing
execution and delivery of lease agreement - PUBLIC HEARING

Mr. Livingston stated that no one signed up to speak for the Public Hearing.

Mr. Morris moved, seconded by Mr. McEachern, to approve this item for Second Reading. The vote in favor was unanimous.

89-049MA, Eural Dial, From D-1 to C-2, Rabon Road, TMS 17116-02-01

Mr. Morris moved, seconded by Ms. Scott, to approve this item for Second Reading. The vote in favor was unanimous.

99-050MA, Deas Manning, From RU to PUD, Old National Highway and Two Notch Road, TMS 28900-01-13; 25800-03-02; 25800-03-05 and 32

Mr. Morris moved, seconded by Ms. Scott, to approve this item for Second Reading. The vote in favor was unanimous.

99-051MA, Johnnie Johnson, From RU to PUD, Wessinger and Hiller Roads, TMS 00513-01-03 and 01404-03-01

Mr. Morris moved, seconded by Ms. Scott, to approve this item for Second Reading. The vote in favor was unanimous.

Request for new position: Motor Voter Clerk for the Voter Registration Department - PUBLIC HEARING

Mr. Livingston stated that no one signed up to speak for the Public Hearing.

Ms. Scott moved, seconded by Ms. Tillis, to approve for Second Reading. The vote was in favor. Mr. Morris opposed.

FIRST READING ITEM

Amendment to the Zoning Ordinance, Section 26-61.4(2) of the Richland County Zoning Ordinance to delete special exceptions to permit commercial uses in the RU (Rural) zoning district. (Planning Commission recommends approval)

Richland County Council
Regular Session
December 7, 1999
Page Eight

Construction, Inc., for the purpose of implementing the Burdell Drive/Stone Street Drainage Project. The vote in favor was unanimous.

Award of contract for the Crystal Drive Drainage Project

Ms. Brill stated that the committee recommended approval of deferring of the Stoops Creek Drainage Project in order to provide funds for the Crystal Drive Drainage Project and an award of contract in the amount of \$188,275.00 to the low bidder, G.H. Smith Construction, Inc. The vote in favor was unanimous.

Ordinance for a six-month moratorium on the construction of outdoor advertising signs

Ms. Brill stated that the committee recommended that Council give First Reading approval to a six-month moratorium on the construction of outdoor advertising signs. The vote in favor was unanimous.

Ordinance amendment to the unsafe building code

Ms. Brill stated that the committee recommended that Council give First Reading approval to an ordinance amendment to the unsafe building code extending the authority of the building inspector beyond residential buildings. The vote in favor was unanimous.

Community Master Plan for the Olympia, Granby and Whaley Street Communities

Ms. Brill stated that the committee recommended an endorsement of a proposal to expend \$14,000.00 to contract with the River Alliance to initiate community forums and create a master plan for the Granby, Whaley, and Olympia communities.

A discussion took place.

Mr. Morris made a substitute motion to approve this with allocated funds.

The motion died for a lack of a second.

The vote in favor of the main motion was in favor. Mr. Morris opposed.

REPORT OF ADMINISTRATION AND FINANCIAL STATEMENT

Richland County Council
Regular Session
December 7, 1999
Page Nine

Ms. Smith moved, seconded by Mr. Mizell, to create a committee to relocate another property for the community care home and to direct staff to assist. The vote was in favor. Mr. Morris abstained.

Mr. Tuten requested for Mr. Smith to look into the matter of the desaturation of neighborhoods with Community Care Homes.

Mr. McSwain appointed Ms. Mullen Taylor, Assistant to the County Administrator, to assist Ms. Elliott in finding another home.

Resolution opposing passage of Senate Bill 398

Mr. McEachern stated that the committee recommended approval of a Resolution opposing passage of a bill limiting the use of new technologies by existing County staff.

A discussion took place regarding this issue.

The vote was in favor. Mr. Morris, Mr. Pearce, Ms. Scott, Ms. Tills opposed.

Budget Amendment for vehicle tax relief

Mr. McEachern stated that the committee recommended that Council give First Reading approval to a request for a budget amendment in the amount of \$20,160.00 to reprogram County computers to comply with new State car tax credit legislation. The vote in favor was unanimous.

Software service maintenance agreement for Register of Deeds Office

Mr. McEachern stated that the committee recommended that Council approve an agreement for software service maintenance with Team Information Advantage in the amount of \$46,284.00. The vote in favor was unanimous.

Purchase of 21 Crown Victorias for Sheriff's Department

Mr. McEachern stated that the committee recommended that Council approve a request in the amount of 4538,801.45, to be expended through a State Contract. The vote in favor was unanimous.

~~Resolution of Board of County Commissioners for Sheriff's Department~~

Richland County Council
Regular Session
December 7, 1999
Page Ten

Purchase of Two Jeep Cherokees for Sheriff's Department

Mr. McEachern stated that the committee recommended that Council approve a request in the amount of \$43,763.30 to be expended through a State Contract, covered by the STOP - Violence Against Women Program Grant match. The vote in favor was unanimous.

Purchase of Two Jeep Cherokees for Sheriff's Department

Mr. McEachern stated that the committee recommended that Council approve a request in the amount of \$43,763.30 to be expended through a State Contract, 75% covered by the Alternative Schools Grant and 25% by the County's match. The vote in favor was unanimous.

Purchase of 120 Motorola portable radios for Sheriff's Department

Mr. McEachern stated that the committee recommended that Council approve a request in the amount of \$308,151.20 to be expended through a State Contract, 80% covered by grant and 10% by the County's match. The vote in favor was unanimous.

Accommodations Tax request by the Columbia Community Concert Band

Mr. McEachern stated that this item was forwarded to Council with no recommendation.

Mr. Meitze moved, seconded by Mr. Mizzell, to approve in the amount of \$2,400.00. The vote in favor was unanimous.

REPORT OF ECONOMIC DEVELOPMENT COMMITTEE

Resolution identifying a proposed investment of \$9,200,000.00 by Project Harvey and other matters related thereto

Mr. Mizzell stated that the Committee recommended approval of this Resolution. The vote in favor was unanimous.

Resolution consenting to an assignment to one or more affiliated entities.

Mr. Mizzell stated that the Committee recommended approval of this

Richland County Council
Regular Session
December 7, 1999
Page Eleven

EXECUTIVE SESSION ITEM

Ordinance authorizing Council to award a contract for Solid
Waste disposal to one Vendor for three or more service areas -
PUBLIC HEARING

Council went into Executive Session at approximately 10:10 p.m.
and came out at approximately 10:35 p.m. to discuss a legal
matter regarding the Solid Waste Contract.

Mr. McEachern moved, seconded by Mr. Meetze, to come out of
Executive Session. The vote in favor was unanimous.

Mr. McEachern moved, seconded by Ms. Scott, to approve the
ordinance.

The vote was in favor. Mr. Morris opposed.

Ms. Scott moved, seconded by Ms. Tillis, to reject all bids in areas 1
and 4 and renegotiate the contracts with the current contractor
consistent with the low bidder and to award consistent with bids areas
5 and 7 to Cloud Sanitation, who was the low bidder. The vote was in
favor. Mr. Morris opposed.

ADJOURNMENT

Mr. McEachern moved, seconded by Ms. Scott, to adjourn at
approximately 10:40 p.m. The vote in favor was unanimous.

Paul Livingston, Chair

Joseph McEachern, Co-Vice Chair

J.D. "Buddy" Meetze, Co-Vice Chair Susan Brill

Anthony G. Mizzell

Stephen F. Morris

DEF-00000438

9951

Richland County Council
Regular Session
December 7, 1998
Page Twelve

James Tuten

The minutes were transcribed by Marshelka G. Washington

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Columbia Venture, LLC,)

Plaintiff,)

vs.)

Richland County,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Case No: 2010-CP-40-8943R

**NOTICE OF MOTION
AND MOTION OF DEFENDANT
RICHLAND COUNTY
FOR SUMMARY JUDGMENT
ON CLAIM OF PHYSICAL TAKING**

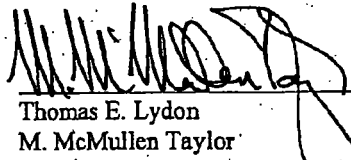
TO: Plaintiff Columbia Venture, LLC and its attorneys, William C. Boyd, Esquire, Manton M. Grier, Esquire, Clarke DuBose, Esquire, James Y. Becker, Esquire, and Elizabeth H. Black, Esquire:

You will please take Notice that Defendant Richland County, by and through its undersigned counsel, will move before the presiding judge of the Fifth Judicial Circuit, Richland County Judicial Center, Columbia, South Carolina, on the tenth (10th) day after service thereof, or as soon thereafter as counsel may be heard, for partial summary judgment pursuant to Rule 56(b) of the South Carolina Rules of Civil Procedure ("SCRCP") concerning Plaintiff's claim that Defendant's actions constitute a *per se* physical taking of its property without just compensation under the United States Constitution and the South Carolina Constitution. Specifically, Defendant seeks a ruling that denies Plaintiff's claim of a *per se* physical taking as a matter of law because the undisputed facts of this case fail to give rise to a permanent physical occupation of Plaintiff's property by or on the authority of the Defendant.

This Motion is based upon the South Carolina Rules of Civil Procedure, applicable law, a memorandum or memoranda of law to be submitted by the Defendant at or before a hearing on

this Motion, and any other matters the Court may permit to be presented at the hearing on this matter.

Respectfully Submitted,


Thomas E. Lydon
M. McMullen Taylor
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211
(803) 779-2300

Pope D. Johnson, III
JOHNSON & BARNETTE, LLP
P.O. Drawer 11209
Columbia, SC 29211-1209
803-799-9791
803-253-6084 (fax)
pdjohnson@johnsonbarnette.com

Attorneys for Defendant Richland County

Columbia, South Carolina
March 14, 2012.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Columbia Venture, LLC,)

Plaintiff,)

vs.)

Richland County,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Case No. 2010-CP-40-8943R

**NOTICE OF MOTION
AND MOTION OF DEFENDANT
RICHLAND COUNTY
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ON CLAIM OF REGULATORY
TAKING**

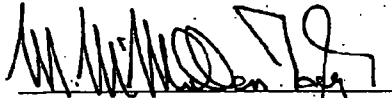
TO: Plaintiff Columbia Venture, LLC and its attorneys, William C. Boyd, Esquire, Manton M. Grier, Esquire, Clarke DuBose, Esquire, James Y. Becker, Esquire, and Elizabeth H. Black, Esquire:

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This Motion is based upon the South Carolina Rules of Civil Procedure, applicable law, a memorandum or memoranda of law to be submitted by the Defendant at or before a hearing on this Motion, and any other matters the Court may permit to be presented at the hearing on this

matter.

Respectfully Submitted,



Thomas E. Lydon
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pdjohnson@johnsonbarnette.com

Attorneys for Defendant Richland County

Columbia, South Carolina
March 14, 2012.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Columbia Venture, LLC,)

Plaintiff,)

vs.)

Richland County,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Case No. 2010-CP-40-8943R

**NOTICE OF MOTION
AND MOTION OF DEFENDANT
RICHLAND COUNTY
FOR SUMMARY JUDGMENT
ON ALL CLAIMS**

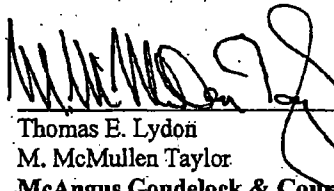
TO: Plaintiff Columbia Venture, LLC and its attorneys, William C. Boyd, Esquire, Manton M. Grier, Esquire, Clarke DuBose, Esquire, James Y. Becker, Esquire, and Elizabeth H. Black, Esquire:

You will please take Notice that Defendant Richland County, by and through its undersigned counsel, will move before the presiding judge of the Fifth Judicial Circuit, Richland County Judicial Center, Columbia, South Carolina, on the tenth (10th) day after service thereof, or as soon thereafter as counsel may be heard, for summary judgment pursuant to Rule 56(b) of the South Carolina Rules of Civil Procedure ("SCRCP") concerning Plaintiff's claim that Defendant's actions constitute a taking of its property without just compensation and a violation of substantive due process under the United States Constitution and the South Carolina Constitution. Specifically, Defendant seeks a ruling granting summary judgment in Defendant's favor on the grounds that 1) Plaintiff lacked a protected property interest in upgrading its levees, which was a prerequisite to realization of Plaintiff's contemplated development plans; and/or 2) Plaintiff failed to obtain a final decision regarding the application of land use regulations to its property as required under *Williamson County Regional Planning Commission v Hamilton Bank*,

473 U.S. 172 (1985).

This Motion is based upon the South Carolina Rules of Civil Procedure, applicable law, a memorandum or memoranda of law to be submitted by the Defendant at or before a hearing on this Motion, and any other matters the Court may permit to be presented at the hearing on this matter.

Respectfully Submitted,



Thomas E. Lydon
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pdjohnson@johnsonbarnette.com

Attorneys for Defendant Richland County

Columbia, South Carolina
March 14, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Case No. 2010-CP-40-8943R

Columbia Venture, LLC

Plaintiff,

vs.

Richland County,

Defendant.

**COLUMBIA VENTURE, LLC'S NOTICE OF
MOTION AND MOTION FOR
PARTIAL SUMMARY JUDGMENT**

2012 MAR 15 AM 11:36
FILED
RICHLAND COUNTY
CLERK OF COURT
J. L. G. S.

TO: M. McMullen Taylor, Esq., Thomas Lydon, Esq., Weston Adams, III, Esq. and Pope D. Johnson, III, Attorneys for Defendant Richland County

You will please take notice that on or after ten days from the date of service hereof upon you, or as soon thereafter as counsel may be heard, the undersigned, as counsel for the plaintiff, Columbia Venture, LLC ("Plaintiff" or "Columbia Venture"), will move before a resident or presiding judge for the Richland County Court of Common Pleas for an order of partial summary judgment pursuant to Rule 56, SCRPC, on the issue of whether defendant Richland County ("Defendant" or "County") effected a taking of Columbia Venture's property without the payment of just compensation.

The grounds for this motion are that the actions of the County in adopting, effective February 20, 2002, FEMA's August 20, 2001 final Flood Insurance Study (FIS) and Flood Insurance Rate Map (FIRM) for the Congaree River floodplain in Richland County, placed a regulatory floodway over approximately 70% of Columbia Venture's property, thus reserving this property as an unobstructed corridor to convey flood waters during major flood events. During such flood events, Columbia Venture's land within the regulatory floodway will be physically occupied by flood water, and such a governmentally mandated reservation of land to

be restricted from development to serve the public purpose of flood control, be flooded, and convey flood waters during flood events (in effect a flooding easement) constitutes a taking of private property for a public use under South Carolina law for which the land owner must be paid just compensation. There is no genuine issue of material fact, and Columbia Venture is entitled to judgment in its favor as a matter of law in that: (1) Columbia Venture owned certain real property in Richland County; (2) the County adopted the August 20, 2001 final FIS and FIRM effective February 20, 2002; (3) said FIS and FIRM placed approximately 70% of Columbia Venture's property within a regulatory floodway to be restricted from development to convey floodwaters in the event of a major flood; (4) County ordinances as interpreted and in effect on February 20, 2002, prohibited encroachments within a regulatory floodway that would impede the free flow of water making the regulatory floodway in effect a no-build zone, yet the County specifically exempted Columbia Venture's direct neighbors—Heathwood Hall Episcopal School and the City of Columbia's Wastewater Treatment Plant—from complying with the no-build requirement; (5) the County repeatedly refused overtures from Columbia Venture to upgrade and improve its levees to certifiable standards and later passed moratoria directed towards any such overtures, thus prohibiting Columbia Venture from taking reasonable steps to protect its property from flooding; (6) under South Carolina law, the restriction of land from development by the government so that such land may be physically flooded and convey flood waters during the event of a flood amounts to a taking of private property; and (7) the County failed to pay just compensation to Columbia Venture for the taking of Columbia Venture's property.

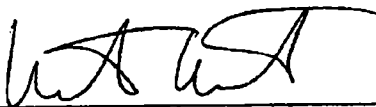
The legal issue raised by this motion is based on the laws of South Carolina and of the United States relating to *per se* physical takings by direct governmental appropriation of private

property or regulatory authorization of a physical invasion of private property interests pursuant to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and its progeny, which is distinct from the law of South Carolina and the United States relating to regulatory takings under the rubric of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) and its progeny. This motion is made without prejudice to Columbia Venture's legal arguments under the *ad hoc* factual inquiry for regulatory takings under *Penn Central* or any other causes of action detailed in Columbia Venture's Amended and Supplemental Complaint of October 5, 2009.

This motion is based on the South Carolina Rules of Civil Procedure, applicable law, the pleadings, written responses to discovery requests, deposition testimony, other documents and materials produced during the discovery in this case, and any such other or further memoranda or materials as Columbia Venture may present to this Court.

Respectfully submitted,

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March 14, 2012

ARGUMENT

In order for an elected member of a legislative body to discharge his public trust successfully, "it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." Steven F. Huefner, *The Neglected Value Of The Legislative Privilege In State Legislatures*, 45 WM MARY L.REV. 221, 228 (2003). It is of fundamental importance that our elected officials have the "freedom of unfettered, creative deliberation," and "broad protection from the resentments that their policymaking will inevitably occasion." *Id.* The legislative privilege arises from these important principles to protect and preserve separation of powers among the three branches of government. *Id.* at 232; *Pressley v. Lancaster County*, 343 S.C. 696, 707; 542 S.E.2d 366, 371 (Ct. App. 2001) ("Judicial inquiry into legislative motivation is to be avoided ... such inquiries endanger the separation of powers doctrine, representing a substantial judicial intrusion into the workings of other branches of government.") (internal citations and quotations omitted); *see also Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 fn. 7 (2001) (stating that a legislator cannot testify as to legislative intent). Under the legislative privilege, legislators cannot be compelled to answer questions regarding their motivation, mental processes, opinions, communications, deliberations or other discussions underlying legislative actions. *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 300 (D. Md. 1992); *In re Kent County Adequate Public Facilities Ordinances Litigation*, 2008 Del. Ch. LEXIS 34, *19 (2008).

South Carolina courts have indicated that the privilege is broad and absolute, stating without reservation that it was inappropriate to depose an individual legislator for the purpose of challenging a legislative action of the full legislative body. *Bear Enterprises v. County of*

Greenville, 319 S.C. 137, 139 (Ct. App. 1995); *Greenville County v. Kernwood Enterprises*, 353 S.C. 157 (2003). In *Bear Enterprises*, the Court noted that it was “aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision.” *Id.* “The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise.” *Id.* “If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the polls, not the courts.” *Id.* These cases represent a strongly worded recognition of legislative privilege to prevent questioning of legislators regarding matters falling within the sphere of legislative activity. South Carolina courts have not addressed the contours of legislative privilege; thus federal and other state case law will serve as persuasive authority.

The threshold issue in determining the applicability of legislative privilege is whether a legislator is acting “within the sphere of legitimate legislative activity.” *Alexander v. Holden*, 66 F.3d 62, 65 (4th Cir. 1995). The privilege does not attach to actions taken in a non-legislative capacity. *Id.* The question of whether an act is legislative turns on the nature of the act. *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998). An action is legislative if the facts involve generalizations concerning policy or state of affairs and the establishment of a general policy affecting the larger population.” *Id.* at 66; see also *A Helping Hand, LLC v. Baltimore County*, 295 F. Supp.2d 585, 591 (D. Md. 2003) (“The action is legislative is the facts involve generalizations concerning a policy or state of affairs affecting the larger population.”); *U.S. Equal Employment Opp. Comm. v. Washington Suburban Sanitary Comm.*, 666 F. Supp.2d . 526, 533 (D. Md. 2009) (same). “A legislative act involves policy-making rather than mere administrative application of existing policies.” *Marylanders for Fair Representation, Inc. v.*

Schaefer, 144 F.R.D. 292, 300 (D. Md. 1992).

Preparing, reviewing, and voting on ordinances is “quintessentially legislative.” *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998); *see also Conway v. City of Greenville*, 254 S.C. 96, 104; 173 S.E.2d 648, 652 (1970) (stating that enacting zoning ordinance clearly a legislative function). Exercise of police power to protect public health and safety is also a legislative function. *State ex. rel. George v. City Council of Aiken*, 42 S.C. 222, 238; 20 S.E. 221, 227 (1894). Policy decision-making regarding land use, even if not made by ordinance, is a legislative function. *Pressley v. Lancaster County*, 343 S.C. 696, 707; 542 S.E.2d 366, 371 (Ct. App. 2001). Other examples of actions falling within the legislative sphere include adoption of written policies, discussing and planning policy decisions with staff, and speaking to the press or constituents about legislative actions. *Bruce v. Riddle*, 631 F.2d 272, 279-280 (4th Cir. 1980) (meeting with constituents or interest groups). *Johnson v. Metropolitan Government of Nashville*, 2009 U.S. Dist. LEXIS 56538, *5 (D.C. M.D. Tn. 2009) (adoption of civil service policy).

a. The Proposed Ordinance and Constituent Email

The first issue presented is a question posed to Mr. Pearce about a proposed ordinance under consideration by a Council Committee. Pearce Depo. p. 2, lines 11-14. Columbia Venture’s counsel asked Mr. Pearce “why was it necessary for the Development and Services Committee to consider an ordinance establishing a temporary moratorium on approval of floodplain permits in response to [a federal district court order vacating the Congaree River flood elevations]?” *Id.* at p. 3, lines 8-12. Clearly, questions regarding Mr. Pearce’s thoughts, mental impressions, and rationale regarding passage of this ordinance are protected by legislative privilege.

Columbia Venture's counsel then put forward an email written by a constituent of Mr. Pearce that asked Mr. Pearce about a proposed amendment to the ordinance prepared by another Council Member. Pearce Depo. p. 1, lines 20-25; p. 2, lines 1-13; Exh. 148. Communications between a legislator and a constituent or an interest group also falls within the sphere of legislative activity. *Bruce v. Riddle*, 631 F.2d 272, 279-280 (4th Cir. 1980). Thus, questioning Mr. Pearce about the email at issue also is protected by legislative privilege.

Columbia Venture may argue that Mr. Pearce's responses regarding this email constitute a waiver of his legislative privilege. At the outset, it is important to emphasize that communications between a legislator and his constituents do not waive the legislative privilege. In fact, such communication is squarely within the sphere of legislative activity. *Bruce v. Riddle*, 631 F.2d 272, 279-280 (4th Cir. 1980). Meeting with constituent groups is "part and parcel of the modern legislative procedure." *Id.* Furthermore, production of a document in the course of litigation does not operate to waive the privilege. *Pittston Coal Group v. International Union, United Mine Workers of Am.*, 894 F. Supp. 275, 279 (W.D. Va. 1995). Here, the email was produced by a third party pursuant to a subpoena, which further negates any argument that merely producing a document containing expressions of legislative activity constitutes a waiver. Therefore, any argument that the email, in and of itself, waives legislative privilege, necessarily fails.

Waiver of legislative privilege "can be found only after an explicit and unequivocal renunciation of the protection." *United States v. Helstoski*, 442 U.S. 477, 491, 99 S. Ct. 2432, 2440 (1979); see also *Miles-Un-Ltd, Inc. v. Town of New Shoreham*, 917 F. Supp. 91, 100 (D. N.H. 1996) (noting that legislative "immunity does not attach if there has been a waiver. Such a waiver must be explicit, however"); *Northfield Dev. Co., Inc. v. City of Burlington*, 136 N.C.

App. 272, 283, 523 S.E.2d 743, 750 (N.C. Ct. App. 2000) (requiring that any waiver of legislative or quasi-judicial privilege be explicit); *Wilkins v. Gagliardi*, 219 Mich. App. 260, 270, 556 N.W.2d 171, 177 (Mich. Ct. App. 1996) (holding that "constitutional immunity cannot be waived by inference, but must be waived explicitly").

Waiver rules governing other testimonial privileges do not apply when the independence and integrity of a co-equal branch of government is at stake. *United States v. Helstoski*, 442 U.S. 477, 490 (1979); *State of New Jersey v. Township of Lyndhurst*, 650 A.2d 840, 844-845 (N.J. 1994). Therefore, even answering questions during discovery regarding legislative activity is not a clear and unequivocal renunciation of legislative privilege. See *2BD Ltd. Pshp. v. County Comm'rs*, 896 F. Supp. 528, 535 (D. Md. 1995) (holding that answering questions regarding legislative activities during discovery does not constitute clear and unequivocal renunciation); *Greenburg v. Collier*, 482 F. Supp. 200, 203 (E.D. Va. 1979) (holding that affidavit describing legislation did not constitute clear and unequivocal renunciation); *State of New Jersey v. Township of Lyndhurst*, 650 A.2d 840, 844-845 (N.J. 1994) (submittal of affidavit as part of litigation does not constitute waiver); *Holmes v. Farmer*, 475 A.2d 976, 985 (R.I. 1984) (deposition testimony of legislators regarding legislative activities do not constitute waiver). Therefore, merely sitting for a deposition does not waive the privilege.

Most of Columbia Venture's questioning regarding this email involved reading aloud to Mr. Pearce the content of the email and asking Mr. Pearce if such reading was accurately stated. Pearce Depo. p. 2, lines 14-25; p. 3, lines 1-12; p. 5, lines 15-25; p. 6, lines 1-22; p. 10, lines 1-25; p. 11, lines 1-2. Columbia Venture summarized some portions of the email and asked if his summary was correct. Pearce Depo. p. 7, lines 17-24; p. 8, lines 1-22. Surely, Mr. Pearce's responses of "it says what he says here," and "that's what it says" does not constitute an explicit

and unequivocal waiver of his legislative privilege.

Columbia Venture went on to ask if the email response from Mr. Pearce was describing discussions in executive session. Pearce Depo., p. 11, lines 10-25; p. 12, lines 1-4. Mr. Pearce stated that nothing in the email indicated to him that he had revealed confidential communications made in executive session. *Id.* Again, merely pointing out his belief that Columbia Venture's assumption was inaccurate does not rise to a clear and unequivocal waiver of his legislative privilege.

Then the following exchange occurred relating to the same ordinance:

Q: So you were not in favor of giving Columbia Venture an opportunity to move forward with improvement of its levees up to FEMA and Federal standards?

A: That's absolutely correct, nor did I believe that anyone else should have been permitted to apply. If this had passed it would have opened the door for other parties to permit permits in the flood prone areas, and I did not think that was in the best interest of the County. Pearce Depo., p. 12, lines 5-19.²

At this point, Mr. Pearce answered the question in a way that could arguably effectuate a waiver of his legislative privilege as to that particular question. Compare *United States v. Helstoski*, 442 U.S. 477, 490 (1979) (holding that legislator's testimony before grand jury and voluntary submittal of documents addressing legislative activity could not waive privilege) with *Alexander v. Holden*, 66 F.3d 62, 68 (1995) (noting that legislators clearly waived privilege when they testified extensively in depositions). However, due to the South Carolina court's

² This exchange continues on from pp. 12-19, wherein Columbia Venture counsel argued with Mr. Pearce about his statement that the ordinance wasn't targeted to thwart Columbia Venture's interests.

emphasis on separation of powers as the basis for the privilege, Defendant asserts that the South Carolina Supreme Court would follow *Helstoski*, based on the sound reasoning of the Supreme Court of Rhode Island.

In *Holmes v. Farmer*, the Rhode Island Supreme Court addressed the question of whether responses by a legislator during a deposition constituted waiver of legislative privilege. 475 A.2d 976, 985 (1984). The Court explained that the privilege has two purposes:

...first, to preserve the constitutional structure of separate, coequal and independent branches of government ... and second, to protect individual legislators from executive and judicial oversight that realistically threatens to control his conduct as a legislator. The privilege protects the institution of the Legislature itself from attack by either of the other co-equal branches of government. At the same time it protects the individual legislator personally from attack either by another branch of government or from a majority within the Legislature itself.

The Court went on to reject the proposition that a legislator's testimony in a deposition waived his legislative privilege because waiver would undermine the protection of the legislative body that the privilege affords. *Id.* "To allow an individual legislator to waive the institution's privilege would be to allow one to act on behalf of the whole in waiving the protection of a significant bulwark of our constitutionally mandated system of government." *Id.* The same rationale holds true here.³

³ The Fourth Circuit Court of Appeals has expressed similar reservations in *S.C. Education Assoc. v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989). There, the court was disturbed by the prospect of accepting testimony of various state legislators regarding the intent of the S.C. General Assembly in passing a contested law. *Id.* The Court stated that "it is axiomatic that if motivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant." *Id.* Quizzing individual legislators regarding their motivations in supporting or opposing legislation is "inimical to the independence of the legislative branch and inconsistent with the constitutional concept of separation of powers." *Id.*

Even if Mr. Pearce's response to this particular question is deemed a waiver of his legislative privilege; this waiver cannot serve as a blanket waiver of his privilege as to any question intruding on Mr. Pearce's legislative activities because there is there is no explicit waiver as to all questions when he chooses to answer one question. See *Wilkins v. Gagliardi*, 219 Mich. App. 260, 270, 556 N.W.2d 171, 177 (Mich. Ct. App. 1996) (holding that "constitutional immunity cannot be waived by inference, but must be waived explicitly").

b) The Resolution

Columbia Venture's counsel turns to a Resolution of Richland County Council adopted December 7, 1999 and asked Mr. Pearce why he voted against the Resolution. Pearce Depo. p. 2, lines 17-24. An objection was made based upon legislative privilege. As discussed above, legislative privilege attaches to actions that are legislative in nature, meaning that an action by a legislative body establish policy with prospective effect that has general applicability. *A Helping Hand, LLC v. Baltimore County*, 295 F. Supp.2d 585, 591 (D. Md. 2003) ("The action is legislative is the facts involve generalizations concerning a policy or state of affairs affecting the larger population."); *U.S. Equal Employment Opp. Comm. v. Washington Suburban Sanitary Comm.*, 666 F. Supp.2d . 526, 533 (D. Md. 2009) (same). "A legislative act involves policy-making rather than mere administrative application of existing policies." *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 300 (D. Md. 1992). Our courts have held that exercise of police powers to protect public health and safety, as well as decisions involving land use, are legislative functions. *State ex. rel. George v. City Council of Aiken*, 42 S.C. 222, 238; 20 S.E. 221, 227 (1894) (holding that exercise of police power is a legislative function). *Pressley v. Lancaster County*, 343 S.C. 696, 707; 542 S.E.2d 366, 371 (Ct. App. 2001) (holding that policy decision-making regarding land use, even if not made by ordinance, is a legislative function).

Here, the Resolution sets forth a policy statement regarding whether the County would appeal FEMA's flood data as it is entitled to do pursuant to 42 U.S.C. § 4104, at its discretion. The County Council's decision to appeal FEMA's data may seem on the surface to be a judicial appeal, not a legislative action; however, it was not an appeal, for it gives conditions that must be met in order for an appeal by the County Administrator to be taken. The Resolution expresses its policy that the County Council supports growth and development, and recognizes the impact that FEMA's new flood data would have on development and quality of life. *See Pearce Depo., Exh. 33.* Recognizing the important issues of protecting health and safety and encouraging growth and development, the Resolution expresses intent to appeal FEMA's flood data if the technical data provided to the County is determined by the South Carolina Department of Natural Resources and the County Administrator to be sufficient to constitute an appeal. *See Pearce Depo., Exh. 33.* If this condition doesn't occur, the Resolution states that Richland County will not appeal. *Id.* Thus, the Resolution sets forth a way for the County to move forward during a time when it was unclear what action the County would finally take. The Resolution provided a policy decision concerning land use that had prospective effect impacting the entire County; therefore, it is legislative in nature. *Pressley v. Lancaster County*, 343 S.C. 696, 707; 542 S.E.2d 366, 371 (Ct. App. 2001) (holding that policy decision-making regarding land use, even if not made by ordinance, is a legislative function).

CONCLUSION

For the Reasons stated above, this court should grant protection to The Honorable Greg Pearce from being compelled to answer questions impinging upon his legislative privilege.

Respectfully Submitted,



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Attorneys for Defendant Richland County

June 11, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Columbia Venture, LLC,)

Plaintiff,)

Richland County,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

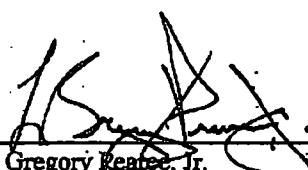
Civil Action No. 2010-CP-40-8943R

**AFFIDAVIT OF
L. GREGORY PEARCE, JR.**

I, L. Gregory Pearce, Jr., being competent to testify as to the matters herein, and being duly sworn, do hereby testify to the following matters within my personal knowledge:

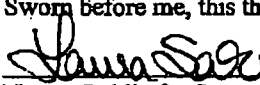
1. I have served on the Richland County Council from 1999 to the present.
2. As a member of Richland County Council during all times relevant to the above-captioned matter, I hereby invoke legislative privilege concerning all legislative actions or activity undertaken by Richland County Council, whether undertaken by individual Council Members, or as a legislative body, that are the subject of or related to the above-captioned matter.

FURTHER AFFIANT SAYETH NOT.



L. Gregory Pearce, Jr.
Richland County Council Member, District 6
810 Hampton Hill Road
Columbia, South Carolina 29209
783-8792

Sworn before me, this the 7 day of November, 2011.



Notary Public for State of South Carolina
My Commission expires 3/20/2018

Laura Sabo
Notary Public State of South Carolina
My commission expires March 20, 2018.