

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 2 OF 13
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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Columbia Venture, LLC,
Plaintiff,
vs.
Richland County,
Defendant.

Civil Action No. 2010-CP-40-8942R

2012 JUL -9 AM 10:33
FILED
RICHLAND COUNTY
CLERK ANNETTE W. MCBRIDE
C.C.P. & G.S.

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY JUDGMENT ON ITS PHYSICAL TAKINGS CLAIM**

Plaintiff Columbia Venture, LLC ("Columbia Venture") submits this memorandum in support of its Motion for Partial Summary Judgment filed March 15, 2012. Columbia Venture's motion seeks partial summary judgment on its claim that Richland County, South Carolina (the "County"), by adopting a regulatory floodway covering approximately 70% of Columbia Venture's property and prohibiting any economically meaningful development within the regulatory floodway, effected a taking of Columbia Venture's property by imposing a permanent right of easement and physical invasion of its property, and that such taking was not accompanied by payment of just compensation. For the reasons set forth below, Columbia Venture's motion should be granted.

STANDARD OF REVIEW

A trial court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," viewing the evidence and all reasonable inferences in the light

most favorable to the non-moving party. Rule 56(c), SCRCP; *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 710 S.E.2d 67 (2011).

INDISPUTABLE FACTS SUPPORTING COLUMBIA VENTURE'S MOTION

The subject property consists of approximately 4,400 acres along the eastern bank of the Congaree River in Richland County, South Carolina, adjacent to the city limits of the City of Columbia ("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 levees in three separate sections to prevent the Property from flooding (the "Manning Levees").

On January 19, 1994, Richland County adopted as the official, effective Flood Insurance Rate Map (FIRM) for the County the FIRM issued by the Federal Emergency Management Agency (FEMA) on that date. Map Panel 160 of the January 19, 1994, FIRM shows the effective regulatory floodway on the Property, and a copy is attached hereto and made a part hereof marked Exhibit A. The edge of the regulatory floodway shown on the 1994 effective FIRM, is between the eastern bank of the Congaree River and the riverside toe of the Manning Levees.¹

On or about February 19, 1999, Columbia Venture purchased the Property from Burwell Manning and the other owners.

On February 20, 2002, Richland County adopted as of that date FEMA's effective FIRM for Richland County, thereby replacing the January 19, 1994, effective FIRM. See Map Panel

¹ Map Panel 160 of the January 19, 1994, effective FIRM depicts only a portion of the Property. The regulatory floodway is the diagonally-hatched portion of the map. The Manning Levees are not depicted on the map.

160 of the February 20, 2002 effective FIRM showing the revised regulatory floodway on the Property, a copy of which is attached hereto and made a part hereof marked Exhibit B.²

The February 20, 2002 effective FIRM vastly expanded the regulatory floodway on the Property landward of the Manning Levees, in places over a mile from the river, and the regulatory floodway now covers approximately 70% of the Property. The February 20, 2002, effective FIRM included large areas of the Property that were not within the regulatory floodway on the January 19, 1994, effective FIRM.

After February 20, 2002, previously enacted Richland County ordinances, which now applied to vast portions of the Property as a result of the expansion of the regulatory floodway through adoption of the February 20, 2002, effective FIRM, prohibited Columbia Venture from placing *any* "levees, dikes, fill material, structures or obstructions that will impede the free flow of water during times of flood" within the regulatory floodway on the Property. Richland County Storm Water Management, Erosion and Sediment Control Ordinance No. 022-01HR § 8-26(h), effective April 17, 2001, ("Stormwater Management Ordinance") (a copy of which is attached hereto marked Exhibit C).³ Moreover, Columbia Venture was prohibited by the same ordinance from adding *any* fill to the Manning Levees that would make them higher or wider. *Id.* § 8-26(h).

According to the Stormwater Management Ordinance, the "Regulatory Floodway" is defined to be "[t]he channel of a river or other watercourse and the adjacent land areas that must be *reserved* in order to discharge the base flood without cumulatively increasing the water

² Map Panel 160 of the February 20, 2002, effective FIRM depicts only a portion of the Property. The regulatory floodway is the diagonally-hatched portion of the map. The Manning Levees are depicted on the map.

³ The Stormwater Management Ordinance does not prohibit certain economically insignificant structures related to or comprising a "*minor* recreational or playground facility or area, such as, but not limited to, a boat ramp, floating dock, picnic area, soccer goal, or swing set." Stormwater Management Ordinance § 8-26(h)(3), p. 17 of 28 (emphasis added).

surface elevation by more than one (1) foot, as identified on the official [FIRM] or other available information.” *Id.* § 8-5, p. 5 of 28 (emphasis added). “Easement” is defined in the same ordinance to include “*reservation* by the owner of land, for the use of such land by others for a specific purpose or purposes and which must be included in the conveyance of land.” *Id.* § 8-5, p. 3 of 28. The “100-Year/Base Flood” is defined as the flood which has a one percent chance of being equaled or exceeded in any given year. *Id.* § 8-5, p. 2 of 28.

The regulatory floodway defined by Richland County’s ordinance is the minimum required by FEMA’s regulations and is determined by a one foot surcharge over the base flood elevation (see excerpts from FEMA’s Flood Insurance Study dated February 20, 2002 and floodway schematic, copy attached hereto marked Exhibit D). FEMA regulations adopted under the National Flood Insurance Program, 42 U.S.C. § 4001, *et seq.* (“NFIP”) do allow land owners to build structures within a regulatory floodway on a showing that any such structures will not cause a rise in the levels of the base flood. Specifically, FEMA’s regulations, as a condition of allowing a community to participate in the NFIP, require that those communities “[p]rohibit 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.” 44 CFR § 60.3 (d)(3) (emphasis added). In sharp contrast, Richland County’s ordinances that applied to the Property as of February 20, 2002, as noted above, prohibit *any* economically meaningful structure or fill within a regulatory floodway that will impede the free flow of water. Stormwater Management Ordinance § 8-26(h), p. 17 of 28.

The Stormwater Management Ordinance also provided that the County Engineer shall have right-of-entry on or upon the property of any person subject to the above reservations or prohibitions "for the purposes of inspection, monitoring, sampling, inventory, examination and copying of records, and the performance of any other duties necessary to determine compliance with [the ordinance]." Stormwater Management Ordinance § 8-35, p. 24 of 28.

ARGUMENT AND CITATION OF AUTHORITIES

The indisputable practical effect of the February 20, 2002 effective FIRM and other County ordinances is to require Columbia Venture to reserve large areas of its Property landward of the Manning Levees, approximately 70% of its total acreage, to serve as an unobstructed, undeveloped, no-build zone for the purpose of conveying flood waters during flood events. The combined effect of the County's ordinances severely diminish the title and rights of ownership of the Property by prohibiting Columbia Venture from building structures or adding fill material to the Property, from being able to take reasonable measures to exclude flood water from the Property, and from being able to deny all persons a right-of-entry to the Property. Under applicable federal and state constitutional standards, this constitutes a taking requiring payment of just compensation. As discussed below, partial summary judgment on the issue that a taking has occurred is now appropriate.

I. Applicable Legal Background

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. Likewise, the South Carolina Constitution provides that "private property shall not be taken for . . . public use without just compensation being first made for the property." S.C. Const. art. I, § 13. The United States Supreme Court has repeatedly emphasized that the role of the takings

clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." See *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Prior to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), however, the United States Supreme Court had not clearly determined whether the takings clause attached to governmental actions other than direct appropriations of property.

In *Mahon*, the Court recognized that government regulation of private property may go "too far" and therefore amount to a taking. *Mahon*, 260 U.S. at 415. In a general sense, the difficult question has always been to determine what actions go "too far." But there are certain categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. Here, the relevant category is that when government requires an owner to suffer a physical invasion of property it must provide just compensation. This line of *per se* regulatory takings arises from *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In that case, the United States Supreme Court considered a New York law providing that landlords must permit cable television companies to physically occupy their properties by installing certain cable facilities. *Id.* at 421. The physical occupation at issue in *Loretto* involved "a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building," "directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof," and "two large silver boxes along the roof cables." *Id.* at 422 (internal quotations omitted). After observing that claims of regulatory takings typically involve "essentially *ad hoc*, factual inquiries," *id.* at 426 (internal quotations omitted), the United States Supreme Court stated that it had nonetheless consistently held that "when [a] physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." *Id.*

In support of this observation, the United States Supreme Court cited *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1872), which "held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking." *Loretto*, 458 U.S. at 427. In that case, the Court had held "without qualification, that 'where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking . . .'" *Id.* (quoting *Pumpelly*, 80 U.S. at 181).

Subsequent decisions have clarified that the physical occupation itself need not be permanent, so long as the right of physical occupation is permanent. For example, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Supreme Court ruled that conditioning the issuance of a building permit on the transfer of a public easement for beach access was a taking. First, the United States Supreme Court emphatically stated that "[h]ad California simply required the [property owners] to make an easement across their beachfront available to the public on a permanent basis . . . we have no doubt there would have been a taking." *Nollan*, 483 U.S. at 831. The Court further explained:

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

Nollan, 483 U.S. at 832. In other words, the fact that the easement may not be in use at any given moment is not determinative. It is the permanence of the easement itself, not the continuous use thereof, that matters.

A subsequent case, *Dolan v. City of Tigard*, 512 U.S. 374 (1994), amplifies the point. In that case, the City of Tigard required that the property owner "dedicate the portion of her

property lying within the 100-year floodplain for improvement of a storm drainage system along [a creek] and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway." *Dolan*, 512 U.S. at 380. As in *Nollan*, the United States Supreme Court began by stating a comparable hypothetical:

Without question, had the city simply required petitioner to dedicate a strip of land along [the creek] for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. Such public access would deprive petitioner of the right to exclude others, one of the most essential sticks in the bundle of rights that are commonly characterized as property.

Dolan, 512 U.S. at 384 (internal quotations omitted). It must be admitted that the Court did reserve the right to the City to engage in "land use regulation" under the standards described in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). However, the United States Supreme Court distinguished the City's action from permissible land use regulations by noting first that it was specifically targeted at Dolan (i.e., it was an "adjudicative" determination rather than a "legislative" determination), and second that the action required that Dolan "deed portions of the property to the city." *Dolan*, 512 U.S. at 385. The important point, however, is that the Court recognized (as in *Nollan*) that the imposition of an easement constitutes a permanent physical invasion and therefore a *per se* taking, notwithstanding the fact that the easement may not be in use at any particular moment.

Indeed, the United States Supreme Court has specifically recognized that the government's claim of "flowage rights" across private lands is a taking. See *Danforth v. United States*, 308 U.S. 271 (1939). In that case, the United States Supreme Court considered, among other things, a claim that the passage of the Flood Control Act of May 15, 1928, automatically effected a taking. *Id.* at 277. That Act generally permitted the federal government to "provide flowage rights for additional destructive flood waters that will pass by reason of diversions from

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

What was assumed in *Danforth* was explicitly affirmed in *United States v. Dickinson*, 331 U.S. 745 (1947), where the United States Supreme Court upheld the lower courts' judgment against the United States for the "taking of an easement *by inverse condemnation* for intermittent flooding of land." *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1353 (Fed. Cir. 2003) (emphasis added) (citing *Dickinson*, 331 U.S. at 751). As the Federal Circuit summarized:

In *Dickinson*, the government, in building a dam, raised the water level of a river, causing permanent flooding, erosion, and intermittent flooding of abutting landowners. Before the trial court, whose decision was affirmed by the United States Court of Appeals for the Fourth Circuit, the *Dickinson* landowners recovered judgments for the value of easements taken by the government to permanently flood parts of their lands, damages for erosion of the residues of their lands adjoining the flooded portions based on the cost of protective measures the landowners might have taken to prevent the erosion loss, and the value of easements for intermittent flooding of still other parts of their lands.

Id. at 1353 (internal citations omitted).

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

Here, the practical effect of the County's combined actions (discussed further below) was to in fact impose (by regulation rather than condemnation) the exact flowage rights conferred by the Flood Control Act and described in *Danforth* as the "ultimate use of the floodway."

According to the United States Supreme Court, this amounts to a taking. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *Dickinson*, 331 U.S. at 748. "[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation. . . ." *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (citing *United States v. Causby*, 328 U.S. 256 (1946) (physical invasion of airspace over landowner's property by intermittent entry of government planes amounted to a taking), and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (taking accomplished by intermittent firing of artillery shells over land)).

The South Carolina cases are in accord, without directly invoking *Loretto* or the specific typology of *per se* takings in the regulatory context. For example, the South Carolina Supreme Court has affirmed a jury verdict "for the destruction of plaintiff's bean crop in June 1961, by flood waters released in the operation of defendant's large dam and reservoir on North Saluda River in Greenville County." *Lindsey v. City of Greenville*, 247 S.C. 232, 234, 146 S.E.2d 863, 864 (1966). In that case, the City of Greenville had constructed a dam that created a large reservoir of water. The City had also made provision for discharging water from the reservoir by installing a pipe and a spillway. Ultimately, during a time of heavy rain, the reservoir flooded, a smaller dam broke, and the City began discharging water through the pipeline. Water also flowed over the spillway. The facts showed that the City's actions contributed to destroying plaintiff's crop:

It is undisputed that the lands upon which plaintiff planted his bean crop had been subject to flooding in the past when large rains occurred. There was testimony however that, apparently due to the mountainous area, the runoff was rapid and flooding had never lasted over two to four hours, with no appreciable damage to crops. It is inferable from the record that, because of the discharge of large quantities of water from defendant's dam over a long period of time, plaintiff's

crop was flooded for approximately twenty (20) hours under hot weather conditions and that such long period of flooding caused the crop to die, whereas short periods of flooding, as in the past, would not ordinarily have such effect.

Lindsey, 247 S.C. at 236-237, 146 S.E.2d at 866. Based on these facts, the Court affirmed a finding that there had been a taking.

With respect to the question of permanency, the City argued that "the flooding of plaintiff's land was temporary, not likely to occur again, and therefore lacking the element of permanency necessary to constitute a taking in the constitutional sense." *Lindsey*, 247 S.C. at 237, 146 S.E.2d at 866. The Court rejected this argument, on the basis that it was "reasonably inferable that in the normal operation of defendant's project such discharge of waters from its reservoir will be repeated in the future [and thus] constituted a 'taking' in the constitutional sense." *Lindsey*, 247 S.C. at 238, 146 S.E.2d at 867.

Similarly, in *Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984), the plaintiff Hill sued the City of Hanahan for inverse condemnation of approximately three acres of land. The Court of Appeals affirmed a jury verdict in favor of the plaintiff. The plaintiff owned around five acres of land in the City zoned by the City for multifamily dwellings. A prior land owner had allowed the highway department to excavate part of the land, which excavation left a water-collecting basin. The plaintiff had then begun to fill the basin to allow development. The City stopped the filling, in order to use the basin for flood control and drainage. The plaintiff argued that she was allowed to fill the land under the "common enemy" right to divert water from her land.

The Court concluded that this was a taking. "To deprive [a property owner] of the ordinary beneficial use and enjoyment of his property is, in law, equivalent to the taking of it, and is as much a 'taking' as though the property itself were actually appropriated." *Hill*, 281

S.C. at 530, 316 S.E.2d at 683. In short, the Court of Appeals viewed the action of the City as prohibiting filling, and thus development, in order to allow a place in which flood waters could be diverted and gathered. The federal District Court has cited *Hill* for this proposition, stating that "South Carolina courts have recognized this cause of action exists where a city denies a landowner the use of his land, as opposed to actively seizing the land for some public use." *Sea Cabin on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 828 F. Supp. 1241, 1251 (D.S.C. 1993).

Finally, it is important to note that South Carolina follows the common enemy rule with respect to the diversion of surface waters, which under applicable precedent include flood waters once they have left the channel of a water course. See *Lawton v. South Bound R.R. Co.*, 61 S.C. 548, 552, 39 S.E. 752, 753 (1901); *Baltzger v. Carolina Midland Ry. Co.*, 54 S.C. 242, 247-48, 32 S.E. 358, 359-60 (1899); William T. Toal, *Surface Water in South Carolina*, 23 S.C. L. Rev. 82, 83 (1971). Under this rule, a landowner may treat surface water as a common enemy and dispose of it or take steps to divert it as the landowner sees fit. See *Glenn v. School Dist. No. Five of Anderson County*, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). Therefore, the right to exclude flood waters from real property is part of the bundle of ownership rights and accordingly inheres in the title to the property.

B. Application of Law to Indisputable Facts.

As an introductory note, Columbia Venture's Motion for Partial Summary Judgment does not implicate several strands of precedent applicable to regulatory takings in general. First, it does not implicate the "essentially *ad hoc*, factual inquiries" that attach to alleged regulatory takings under the rubric of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Although Columbia Venture does allege that the County has effected a taking of its property under *Penn Central*, the factual questions underlying such an analysis must be resolved at trial.

Second, Columbia Venture's Motion for Partial Summary Judgment does not depend on any analysis of whether the County's actions might be said to "substantially advance legitimate state interests." *See Agins v. Tiburon*, 447 U.S. 255 (1980). Indeed, that inquiry has been roundly rejected by *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), in which case the United States Supreme Court held that "such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." *Id.* at 543 (emphasis added). Therefore, it matters not how laudable the County's goals may have been in taking Columbia Venture's property, nor how different the incidental effects may have been to other neighboring property owners (for example, Heathwood Hall and the City of Columbia),⁴ nor how compelling the NFP may be in its general application.

⁴ The prohibitions set forth in the County's Stormwater Management Ordinance on development within a regulatory floodway *specifically do not apply* to "any public or private school" or to "a publicly owned wastewater treatment facility that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway." Stormwater Management Ordinance at § 8-26(h)(1) and (2), p. 17 of 28. To Columbia Venture's information and belief, there are no other such entities in Richland County other than Heathwood Hall Episcopal School and the City of Columbia's Wastewater Treatment Facility.

What matters to the Motion for Partial Summary Judgment, instead, is only whether the County has by regulatory means taken a permanent right of intermittent physical occupation of Columbia Venture's land. This question is answered affirmatively by resort to two legal principles, both of which have been clearly endorsed by the United States Supreme Court. The first such principle is that "[a] permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property – perhaps the most fundamental of all property interests." *Lingle*, 544 U.S. at 539 (citing *Dolan*, 512 U.S. at 384, *Nollan*, 483 U.S. at 831-32; *Loretto*, 458 U.S. at 433; and *Kaiser*, 444 U.S. at 176). The second such principle is that, as observed in *Nollan* and *Dolan*, the outright imposition of an easement (either directly or by exaction) falls within this rule and is accordingly a *per se* taking.

The sole question, then, is whether the County's actions were functionally equivalent to the imposition of an easement. In South Carolina, an easement has been defined as "a right which one person has to use the land of another for a specific purpose not inconsistent with a general property in the owner, or as a servitude imposed as a burden on land. An easement gives no title to the land on which the servitude is imposed. It is, however, property or an interest in the land." *Morris v. Townsend*, 253 S.C. 628, 635, 172 S.E.2d 819, 822 (1970) (internal quotations omitted). A "servitude" is defined as

A charge or burden resting upon one estate for the benefit or advantage of another; a species of incorporeal right . . . closely corresponding to the "easement" of the common-law, except that "servitude" rather has relation to the burden or the state burdened, while "easement" refers to the benefit or advantage or the estate to which it accrues.

Black's Law Dictionary 1229 (5th ed. 1979).

Generally speaking, an easement will allow physical entry upon the land, will be permanent, and will run with the land as opposed to being personal. *See, e.g., Main v. Thomason*, 342 S.C. 79, 92, 535 S.E.2d 918, 924 (2000) (distinguishing between an easement and a license), *overruled on other grounds by Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005).

In this light, the County's several interrelated actions in this case were functionally equivalent to the condemnation of a flowage or floodway easement. The County passed an ordinance prohibiting the placement of any structures or obstructions or fill material within the regulatory floodway; denied Columbia Venture the right to improve the Manning levees by making them higher or wider; imposed a regulatory floodway over 70% of Columbia Venture's property; and then granted exemptions to similarly situated landowners in close proximity to Columbia Venture's land. As a result, Columbia Venture could not take actions to exclude floodwaters from its land; could not construct *any* economically meaningful improvements on a great majority of its land; and must suffer the physical inundation of its land with floodwaters in order to convey those floodwaters. These restrictions are permanent, run with the land, and allow a physical invasion of Columbia Venture's land.

These restrictions deny two fundamental rights that would ordinarily attach to Columbia Venture's ownership of the land. First, Columbia Venture has been denied its common law right to protect its land from the common enemy of floodwaters that have left the river channel. Second, the "no impede" standard of the storm water ordinance and the placement of a majority of Columbia Venture's land in the regulatory floodway together mean that Columbia Venture *must* suffer the *physical* invasion of its land by flood waters. Thus, Columbia Venture must effectively set its land aside as a floodway for the conveyance of water during future flood events. Clearly, the outright reservation of Columbia Venture's Property to carry floodwater

during times of flood and the prohibition of all meaningful development in the floodway is a servitude, or burden imposed on Columbia Venture's land for the benefit of other landowners whose land would flood if Columbia Venture's land does not.

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

In short, the combined effect of these interrelated actions was functionally equivalent to the outright condemnation of a floodway easement. *Danforth*, *Dickinson*, and *Dolan*, as described above, each recognize that the condemnation of a floodway easement is clearly a taking; and the practical effect of the easements considered in those cases is exactly identical to the practical effect of the County's actions challenged here. Therefore, under applicable federal precedent described above and the Fifth Amendment to the United States Constitution, such a floodway easement is categorically a permanent right of physical occupation and is therefore a *per se* taking. Indeed, governments routinely bring condemnation actions to obtain flowage

easements on private property. See, e.g., *Olson v. United States*, 292 U.S. 246, 248 (1934) (federal government filed condemnation complaint to acquire permanent flowage easement); *United States v. 10.48 Acres of Land*, 621 F.2d 338, 339 (9th Cir. 1980) (same); *Narramore v. United States*, 960 F.2d 1048, 1049 (Fed. Cir. 1992) (Corps of Engineers brought condemnation proceedings to obtain flowage easements); *Commonwealth, Dep't of Finance ex rel. Department of Fish & Wildlife Resources v. Day*, 499 S.W.2d 587, 589 (Ky. 1973) (condemnation suit by state wildlife department to obtain flowage easements); *Denver v. Hinsey*, 493 P.2d 348, 349 (Colo. 1972) (city and county instituted condemnation proceeding to obtain flowage easement along river).

South Carolina precedent is equally clear. Under *Lindsey*, *supra*, and the common enemy rule, if the County took affirmative action that denied Columbia Venture the right to protect its land from floodwaters, and then Columbia Venture's land was in fact flooded, the County would be responsible for the damage. Here, rather than running that risk, the County instead simply denied Columbia Venture the right to construct any improvements that might prevent floodwaters from damaging the property or that might be damaged by floodwaters. Stated differently, the prohibition of development by an affirmative act in order to allow subsequent flooding is functionally identical to allowing development that is later destroyed by flooding. In *Lindsey*, for example, the City might well have passed a regulation prohibiting plaintiff from farming his land because of the possibility that the land might be flooded, which act would be equivalent to allowing plaintiff to farm but periodically destroying his crop. In either case, important property rights (i.e., the abilities to use the land for development, and to exclude the common enemy of floodwater) have been taken by the government.

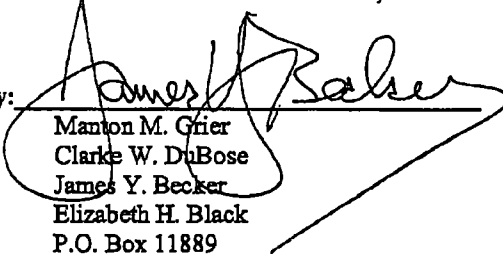
More to the point, *Hill, supra*, is decisive. In *Hill*, as described above, the City prohibited the plaintiff from filling a basin, so that the basin might continue to be used for flood control and drainage. There is simply no way to distinguish those facts from the facts at hand. Here, the County has determined that some 70% of Columbia Venture's land must be set aside to allow the conveyance of floodwaters. The County has further determined that Columbia Venture shall not be allowed to construct *any* economically meaningful improvements within that area, whether or not such improvements would cause an increase in the base flood elevations or would otherwise cause harm to any neighboring landowners. Furthermore, the County has determined that Columbia Venture may not even exercise its common law rights to protect its land from flooding by improving the existing levees. Finally, the County has by targeted action *exempted* neighboring landowners from the same standards, thereby effectively forcing Columbia Venture to alone bear the full burden.

CONCLUSION

For the foregoing reasons, Plaintiff Columbia Venture's motion for partial summary judgment on its claim that the County effected a taking of Columbia Venture's property by imposing a physical invasion of said property without payment of just compensation should be granted.

Respectfully submitted,

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July 6, 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

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

RICHLAND COUNTY
FILED
2012 JUL 16 AM 11:19
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT (PHYSICAL TAKINGS CLAIM)**

Plaintiff Columbia Venture, LLC ("Columbia Venture"), submits this Memorandum in Opposition to the Motion for Partial Summary Judgment (Physical Taking) (the "Motion") filed by Defendant Richland County (the "County") on March 14, 2012. The Motion, as supported by the County's Memorandum in Support of Motion for Partial Summary Judgment (Physical Taking) (the "County's Memorandum") dated July 6, 2012, seeks partial summary judgment against Columbia Venture's claim that the County imposed a permanent right of easement and physical invasion of Columbia Venture's property and thereby effected a taking of its property. For the reasons set forth below, the County's motion should be denied.

Summary Judgment Standard

Federal Claims. In a claim based on federal law, the standard for summary judgment is the federal standard. *Bean v. S.C. Cent. R.R. Co.*, 392 S.C. 532, 545, 709 S.E.2d 99, 105-06 (Cl. App. 2011). Rule 56(c), FRCP, provides summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In considering a motion for summary judgment, the court will view all evidence

in the light most favorable to the non-moving party. *Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir. 1991)

State Claims. Similarly, Rule 56(c), SCRPC, provides that summary judgment may be granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009).

Argument and Citation of Authorities

The County's Memorandum conflates and confuses three independent strands of Columbia Venture's argument that the County, by adopting a regulatory floodway covering approximately 70% of Columbia Venture's property and prohibiting any economically meaningful development within the regulatory floodway, effected a *per se* regulatory taking of Columbia Venture's property. First, Columbia Venture argues that under applicable federal precedent, the imposition of a floodway easement across a landowner's property is a *per se* regulatory taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Second, Columbia Venture argues that under *Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984), controlling precedent in South Carolina that does not depend on *Loretto*, the County's denial of Columbia Venture's right to exclude the common enemy of surface water is a taking. Finally, Columbia Venture argues that the County's actions were functionally equivalent to the types of affirmative actions by government that, *ex proprio vigore*, do cause flooding of private property and that have therefore been deemed takings under cases such as *Lindsey v. City of Greenville*, 247 S.C. 232, 146 S.E.2d 863 (1966).

A. Per Se Takings under *Loretto* and its Progeny

In *Loretto*, the United States Supreme Court established “that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.” *Loretto*, 458 U.S. at 426. It is important to note, however, that the government was *not* the occupier in *Loretto*; instead, the government *by regulation* required the property owner to submit to a physical occupation by a third party, namely the cable company. Indeed, as noted by the United States Supreme Court, “[a] permanent physical occupation *authorized* by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant.” *Loretto*, 458 U.S. at 432 n.9 (emphasis added). Therefore, at least with respect to this first argument, the County’s claim that it did not *cause* the occupation or *itself* occupy Columbia Venture’s property is meaningless. For that reason, the County’s citations to *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871); *United States v. Dickinson*, 331 U.S. 745 (1947); *United States v. Cress*, 243 U.S. 316 (1917); *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (2003); *Early v. South Carolina Pub. Serv. Auth.*, 228 S.C. 392, 90 S.E.2d 472 (1955); and *Bartz v. United States*, 633 F.2d 571 (Ct. Cl. 1980) are simply not relevant to the argument arising under *Loretto* and its progeny.¹ Those cases all involve claims that government action *caused* the flooding in question. The question here, however, is instead whether the County by regulation required Columbia Venture to suffer a *de facto* permanent physical occupation of its property by requiring Columbia Venture to reserve the property in an essentially undeveloped (and unprotected – *i.e.*, un-leveed) state so that it might convey floodwater for the benefit of other properties.

¹ These cases are admittedly relevant to the third strand of Columbia Venture’s argument, discussed below, that the County’s denial of Columbia Venture’s right to improve the Manning Levees is an affirmative act that effectively *causes* the flooding. That is, however, a separate and distinct argument.

Subsequent decisions further establish that an *easement* is a permanent physical occupation. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). As noted in *Nollan*, “[h]ad California simply required the [property owners] to make an easement across their beachfront available to the public on a permanent basis,” it clearly “would have been a taking.” *Nollan*, 483 U.S. at 831. The Court further explained:

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

Nollan, 483 U.S. at 832.

This conclusion necessarily follows from long-standing precedent that a government-imposed easement denies “one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). “[E]ven if the Government physically invades *only an easement in property*, it must nonetheless pay just compensation.” *Id.* at 180 (emphasis added).² As in *Loretto*, in neither *Nollan* nor *Dolan* did the government directly or indirectly *cause* the physical occupation itself. For example, in *Nollan*, the easement at issue would have allowed public access across plaintiff’s property to the beach. It did not matter whether the government *caused* certain individuals to use the access easement, or whether the users were themselves government agents. Instead, what mattered was that the government denied the plaintiff’s right to exclude those individuals. Likewise, in *Dolan*, the easements at issue were for conveyance of

² Although *Kaiser Aetna* then applied a *Penn Central* style analysis to the alleged taking at issue, the subsequent cases of *Loretto*, *Nollan*, and *Dolan* modified this analysis while retaining its core insight that a government-imposed easement is a taking.

flood waters and for pedestrian and bicycle access. Again, neither the floodwaters nor the human traffic were *caused* by the government.

The County suggests, by citation to *Sanguinetti v. United States*, 264 U.S. 146 (1924) by way of *Loretto*, that the flooding itself must be “permanent” in order to trigger the *per se* rule of *Loretto*. But *Nollan* and *Dolan* are controlling to the contrary: it is the *right* of physical occupation that must be permanent, not necessarily the occupation *itself*. Stated differently, a floodway easement is no less “permanent” because it is not continuously conveying floodwaters. In the present context, this reflects and recognizes the fact that Columbia Venture can no more build permanent structures on its land than it could if it were in fact permanently underwater. With regard to the effect upon the owner’s property rights, there is simply no functional distinction between property that is permanently flooded and property that is permanently *reserved* in an undeveloped and unprotected state for flooding. In short, the simple question under *Loretto* is whether the combined effect of the County’s actions was functionally equivalent to the imposition of a floodway easement. The answer: it is.

The County’s memorandum, however, does not address this argument. For example, the County cites *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), as a case in which the court rejected an “attempt to convert what is really a regulatory takings claim into a physical or *per se* takings claim.” *County’s Memorandum*, p.7. It must first be noted that *per se* takings under *Loretto* are in fact a species of regulatory taking, and the *Boise Cascade* court’s dichotomy is therefore a questionable one.³ The point of *Loretto* is that a regulation that requires the property owner to be permanently subject to a physical occupation, while still a regulatory

³ The United States Supreme Court’s analysis in *Yee v. City of Escondido*, 503 U.S. 519 (1992), cited in the County’s Memorandum, might be read to suggest that *per se* takings under *Loretto* are not in fact “regulatory” takings. As more recently clarified by *Lingle v. Chevron*, 544 U.S. 528, 538 (2005), however, it is clear that *per se* takings under *Loretto* fall into one of the “two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes.”

taking, does not require the application of the balancing approach established by *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Instead, in the case of a permanently and governmentally authorized physical occupation, “the character of the government action not only is an important factor in resolving whether the action works a taking but also is determinative.” *Loretto*, 458 U.S. at 426.

In *Boise Cascade Corp.*, moreover, the alleged physical occupation was premised on plaintiff’s assertion that “it was prevented from excluding spotted owls from its property; [and] was required to allow government agents to enter its property to conduct owl surveys.” *Boise Cascade Corp.*, 296 F.3d at 1352. As such, the court agreed with the lower court’s conclusion that these invasions “were transitory in character, involved no continuous governmental presence at the site and imposed no additional burdens on the property beyond the temporary curtailment of logging inherent in the permitting process itself.” *Id.* (internal quotations omitted). Thus the court had no reason to consider *Nollan* and *Dolan*, which clearly establish that an easement is a permanent physical occupation within the meaning of *Loretto*. More to the point, unlike the plaintiff in *Boise Cascade Corp.*, Columbia Venture has been subjected to a *permanent* restriction on its ability to exclude floodwaters from its property and to build any economically meaningful structure on its property, which restriction is neither “transitory” nor “temporary” and which does impose significant “additional burdens” on the property.

Likewise, the County cites *Brace v. United States*, 72 Fed. Cl. 337 (Ct. Cl. 2006), as an additional case in which the court rejected “attempts to recharacterize regulatory takings as physical takings.” *Id.* at 362. *Brace*, however, mentions *Nollan* and *Dolan* only in passing, without referring to the clear holding of those cases that an easement is a permanent physical occupation, and does so for the proposition that those cases indicate the narrowness of *Loretto*

because they “involved situations in which the landowner effectively was deprived of the right to exclude others.” *Brace*, 72 Fed. Cl. at 366. That, of course, is exactly Columbia Venture’s argument. Columbia Venture has been effectively deprived of the right to exclude the common enemy of flood waters from its land. In any event, the County ignores the two critical bases of the court’s decision in *Brace*, namely that the restriction in *Brace* was imposed by consent decree and was therefore voluntary, and that the resultant rise in surface water was not foreseeable. Here, of course, Columbia Venture emphatically did not consent to imposition of a floodway easement across its property. Moreover, it was not only foreseeable that the County’s actions would cause the passage of flood waters across Columbia Venture’s land, it was the *very purpose* of those actions.

In short, the County simply does not engage the simple syllogism that emerges ineluctably from controlling precedent: A permanent, physical occupation is a *per se* regulatory taking under *Loretto*; an easement, including a floodway easement, is a permanent physical occupation within the purview of *Loretto*; therefore, if the combined effect of the County’s actions is to impose a floodway easement on Columbia Venture’s property, then those actions are a *per se* regulatory taking.

The County offers no meaningful argument that it is not. Instead, it tangentially addresses the argument under *Loretto* in only two particulars. First, the County makes reference to the so-called “intermittent flooding cases,” see *Loretto*, 458 U.S. at 435 n.12, to suggest that if the flooding is not permanent, the *Loretto* rule is not implicated. As noted above, however, the combined effect of the County’s actions is to *permanently* subject Columbia Venture’s property to the *burden* of being flooded and undeveloped for the benefit of other properties, and that permanent subjection is the forbidden permanence.

Second, the County cites *Turner v. County of Del Norte*, 101 Cal. Rptr. 93 (Cal. Ct. App. 1972), as rejecting an argument that a zoning ordinance prohibiting permanent structures was in fact a floodway easement. *Turner* in fact supports Columbia Venture's argument by acknowledging that "[t]he government may not actually take an easement in a person's lands by designating that taking as a zoning ordinance" *Turner*, 101 Cal. Rptr. at 96. The *Turner* court concluded, however, that the zoning ordinance in question there was not tantamount to a flowage easement because it would "not increase significantly the extent to which appellants' lands would be inundated in a future flood." Here, however, the combined effect of the County's actions would in fact increase inundation of Columbia Venture's lands, among other reasons because of the County's denial of Columbia Venture's long-standing common law right to protect its property by improving its levees. Moreover, *Turner* is not controlling precedent, was decided prior to *Loretto* and its progeny, and should, if not distinguished, be rejected.

Turner is a useful case, however, insofar as it illustrates a key point. As noted by the court in *Turner*, the Army Corps of Engineers had argued that the desired flood plain management measures would "necessitate the obtaining of flowage easements." *Turner*, 101 Cal. Rptr. at 95. The County elected to proceed by zoning ordinance, with virtually identical results from the perspective of the landowner. The very purpose of regulatory takings jurisprudence, however, is to deny the ability of government to avoid paying just compensation by the simple expedient of taking property indirectly by regulation rather than directly by condemnation. For example, the County *could* have condemned a floodway easement across Columbia Venture's property under the South Carolina Eminent Domain Procedure Act, S.C. Code §§ 28-2-10 *et seq.* That act provides that the interests in property that may be condemned by government include "easements and hereditaments." S.C. Code § 28-2-30(17). In such

event, the County would obviously have been required to pay just compensation for the condemnation. In the alternative, the County could (and did) try to avoid the requirement to pay just compensation by acting through regulation rather than by condemnation. But the entire point of the law of regulatory takings, beginning with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), is to prevent government from avoiding the just compensation requirement by hiding behind the argument that its action was a mere "regulation." On this key point, the County is completely unable to identify any meaningful distinction between the condemnation of a flowage easement and the so-called "regulatory" actions here taken by the County.

A specific example may clarify the argument. Local governments may (and often do) condemn utility line easements. A sewer line easement, for example, typically extends for fifteen or twenty feet to either side of the underground sewer line in order to allow access for vehicles and maintenance equipment and to avoid placing excessive weight on the ground that may damage the line. Within that thirty- to forty-foot wide easement, then, the landowner may not construct permanent improvements. The landowner may, of course, farm within the easement, or walk across it, or otherwise frolic within it, *but he may not construct anything* within it. In short, the landowner's rights with respect to such an easement are identical to the rights of Columbia Venture within the floodway. The local government in the example obviously must pay for such an easement (even if the sewer line is not in fact installed, as such easements are often condemned well before the line is installed). But what if such local government, instead of condemning an easement, simply passed a regulation that said no landowner could build structures within a certain distance of a sewer line, whether or not such local government had an easement for that line? And what if that "certain distance" from the line

in fact covered seventy percent of a landowner's parcel? That is the question the County studiously avoids.

B. The Effect of *Hill v. City of Hanahan*

The facts of this case are indistinguishable from *Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984). *Hill* does not invoke the specific typology of *Penn Central* in general and *Loretto* in particular, and does not refer to the federal constitutional concept of *per se* regulatory takings. Indeed, the court in *Hill* observed that “an actual physical taking of property is not necessary to entitle its owner to compensation.” *Hill*, 281 S.C. at 530, 316 S.E.2d at 683. Instead, the court held, “there is a taking where the act involves the actual interference with, or the disturbance of, property rights, resulting in injuries which are not merely consequential or incidental.” *Hill*, 281 S.C. at 531, 316 S.E.2d at 683-84. Based on that analysis, the court found that the City’s attempt to set aside a flood basin by denying plaintiff’s right to fill her land was a compensable taking. Like the County, the City of Hanahan “simply wanted [plaintiff’s] land for drainage and flood control purposes.” *Hill*, 281 S.C. at 531, 316 S.E.2d at 684. Like Columbia Venture, the plaintiff in *Hill* for her part simply wanted to improve her land in a way that would be incompatible with its use for drainage and flood control purposes. The question, then, has been squarely resolved in South Carolina.

Although the County offers two unavailing distinctions, *Hill* is not distinguishable. First, the County argues that there was no “existing ordinance” in *Hill* that would prohibit the desired activity. As an initial matter, it is not clear why this distinction matters; the City of Hanahan took regulatory action to prohibit the activity just as surely as did the County. In any event, Columbia Venture was not subject to the challenged prohibition until the date of the taking, *i.e.*, February 20, 2002. Therefore, just as in *Hill*, there was here no “existing ordinance” prior to the

taking that would have denied Columbia Venture its common law rights to exclude surface waters from its property. Second, the County argues that the involvement of "an armed police officer" was dispositive in *Hill*. But the taking in *Hill* was *not* the physical presence of the police officer. The police officer was instead there to enforce the actual taking, which was the denial of plaintiff's right to fill the basin. Had Columbia Venture simply ignored the County's ordinances and started construction to improve the Manning Levees, there can be little question but that the County Engineer, whom the ordinance gives a permanent right of entry, if not the sheriff, would have eventually shown up. Stated differently, the County's argued distinction here is that because Columbia Venture complied with the law by not commencing construction to improve its Manning Levees, it should be denied the protections of the South Carolina Constitution as interpreted by *Hill*.

In addition, *Hill* conclusively demonstrates the inapplicability in South Carolina of *State ex rel. Pitz v. City of Columbus*, 564 N.E.2d 1081 (Ohio Ct. App. 1988), as cited by the County. *Pitz* involved only a temporary and erroneous denial of a building permit and is therefore easily distinguishable. More importantly, the court in *Pitz* rested its decision on the spurious basis that the challenged action worked no "deprivation of continued enjoyment of use to which the property had been devoted." *Id.* at 1086. In other words, the court's analysis would mean that a government action would *never* be a taking if it allowed the private owner to continue his *current* use of the land. This analysis is inconsistent with the entire body of takings law, is obviously wrong, and more to the point is directly contravened by *Hill*. The issue in *Hill* was of course, that the plaintiff wanted to fill the basin in order to allow a *new* use of her land – and the court nonetheless found a taking. Here, Columbia Venture wanted to improve the Manning Levees to allow a new use of its property. Factually, this case is indistinguishable from *Hill*.

C. The Effect of *Lindsey v. City of Greenville*

Finally, under abundant precedent, the government has taken property when its actions cause the flooding of private property. In South Carolina, a central case is *Lindsey v. City of Greenville*, 247 S.C. 232, 146 S.E.2d 863 (1966). As admitted in the County's Memorandum, "[i]t has long been held that government action that causes private property to be permanently flooded constitutes a physical taking." *County's Memorandum*, p. 8. This point is in addition to the argument under *Loretto*, *Nollan*, and *Dolan*, in that the *Lindsey* line of cases depends on "affirmative action by the government [that] caused flood water to encroach upon the plaintiff's land" (*County's Memorandum*, p. 8), a factor that is *not* required under *Loretto*.

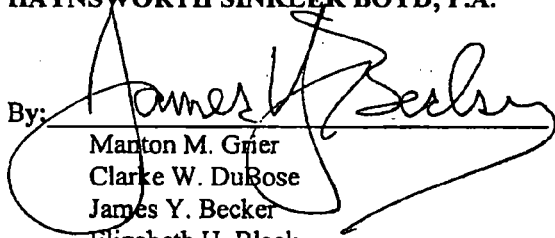
Regarding that additional factor under *Lindsey* and similar cases, the "affirmative action" of the County that causes the flooding is its coordinated, systematic effort to ensure that Columbia Venture's property is in fact used for the conveyance of water during a flood. For example, if during a flood the County entered onto private property and lowered or breached a levee to divert flood waters, that would clearly be a taking. Likewise, if during a flood the County passed a regulation requiring a private landowner itself to lower or breach a levee to divert flood water, that too would be a regulatory taking. It follows, then, that when the County denies a landowner's common law rights to improve or heighten a levee in order to exclude the common enemy of surface water, and further denies such landowner its right to construct *any* improvements whatsoever within the area to be flooded, that is a sufficient "affirmative act," expressly intended to allow the flooding of the landowner's land, to invoke the protection of *Lindsey*.

CONCLUSION

For the foregoing reasons, Defendant Richland County's motion for partial summary judgment on Columbia Venture's claim that the County effected a taking of Columbia Venture's property by imposing a physical invasion of said property without payment of just compensation should be denied, and Columbia Venture's cross-motion for summary judgment on this same claim should be granted

Respectfully submitted,

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July 13, 2012

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Columbia Venture, LLC,
Plaintiff,

vs.

Richland County,
Defendant.

Civil Action No. 2010-CV-40-8943R

2012 AUG 20 PM 1:07
JEANETTE W. MCBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

PLAINTIFF'S MOTION TO RECONSIDER, ALTER, OR AMEND

Pursuant to Rule 59(e), SCRCP, Plaintiff Columbia Venture, LLC ("Columbia Venture" or "Plaintiff") moves the Court to reconsider, alter, or amend the Court's Order Granting Partial Summary Judgment to Defendant on Physical Takings Claim, and Denying Partial Summary Judgment to Plaintiff on Physical Takings Claim ("Order"). The Order was signed on August 7, 2012, and entered by the Clerk of Court on August 9, 2012. For the reasons set forth below, the Court should reconsider the Order, withdraw the Order, and enter an amended Order as described below.

I. It is respectfully submitted that this Court should reconsider its Order because it recites various factual findings that are in dispute and, consequently, are not suitable for disposition on summary judgment.

A. In its Order the Court states: "The Parties' factual statements are substantially the same, with no disputed material fact." Order at 1. However, the parties' factual statements are not in fact the same, and the Court's Order includes a description of the National Flood Insurance Program ("NFIP") that is not contained within the Plaintiff's factual statement and with which the Plaintiff does not agree in that:

1. The NFIP is a voluntary program in which local communities, such as Richland County, are free to participate or not.

2. Regulations under the NFIP do not define the floodway or regulatory floodway as "generally the area posing the greatest danger to public safety" (Order at 2) but rather "the channel of a river or other water course 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.

3. Regulations under the NFIP permit "encroachments, including fill, new construction, substantial improvements and other development within the adopted regulatory floodway [if] it has been demonstrated through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood discharge." 44 C.F.R. § 60.3(d) (3).

4. Richland County's Stormwater Ordinance adopted April 17, 2001, and so interpreted by Richland County after that date, differs from the NFIP regulations by prohibiting Columbia Venture from placing any levees, dikes, fill materials, structures, or obstructions within the regulatory floodway while allowing its immediate neighbors to build substantial new structures within the regulatory floodway.

5. By its Stormwater Ordinance adopted April 17, 2001, and so interpreted by Richland County after that date, Richland County prohibited Columbia Venture from performing any repair or maintenance on its levees that would result in the levees being higher or wider than they were before the need arose for such repair or maintenance.

B. In its Order, the Court includes a discussion of FEMA's flood mapping activities in Richland County and its incorporated areas beginning in 1998 and Plaintiff's plans to develop its property that are subject to numerous factual disputes that are the subject of Plaintiff's regulatory takings claim and are not pertinent to Plaintiff's claim of physical takings. *See Order* at 4.

C. The Order includes the following statement regarding the County's Stormwater Ordinance: "Defendant interpreted the above-quoted language as prohibiting construction within a floodway." *Order* at 3. While Plaintiff does not dispute that Defendant ultimately interpreted the language this way, Plaintiff respectfully submits that it is a disputed issue of material fact as to when such interpretation occurred as well as the substance of earlier interpretations of this language.

D. The Order states: "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." *Order* at 9. The Court's statement raises a genuine issue of material fact that precludes an award of summary judgment to the County on the issue of physical takings. Whether Columbia Venture's assertion is too tenuous or not is certainly a factual question. In its September 26, 2000 Appeal Resolution, FEMA asked three questions:

1. Where are the dikes most likely to breach?
2. What width of breach is likely to occur?
3. How many breaches are likely to occur within the 100-year flood?

Appeal Resolution at 12; Appendix to Plaintiff's Omnibus Memorandum in Opposition to Defendant's Various Motions for Summary Judgment (Plaintiff's Appendix) at 298.

FEMA answered these questions as follows:

The first question was answered by investigating the potential for failure by piping. Piping is the most likely mode of failure, as demonstrated by the two areas that failed in 1976. Shear 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. It is possible that there could be some sloughing and sliding of the steeper landside slopes, but this would probably be due to the effect of seepage causing piping and removal of some landside toe support, as is suspected in the south failure during the 1976 flood. Dike sections that had conditions conducive to piping failure were identified; these are shown in Figure 2.

The second question was answered by considering the breaches that occurred in 1976, and considering the ratio of hydraulic head across the levee to the base width of the levee, H/L. In 1976, one breach had a width of 110 feet, while another had a width of 95 feet. The H/L ratios for a 100-year flood would be greater than those experienced in 1976. Based on the relative H/L ratio and the extensive engineering experience, it was determined that a breach would likely be about 120 feet wide.

The third question was answered by analogy to the 1976 flood. Based on the experience of the two failures in 1976, it would be reasonable to assume that a levee could fail by piping at two or possibly three weak locations during a single occurrence of the 100-year flood.

Appeal Resolution at 12-13; Plaintiff's Appendix at 298-99.

The above quoted paragraphs from the Appeal Resolution deal with levee section 1 of the Manning Levees, which fronts along the Congaree River and separates levee section 1 from levee section 2. *See* Appeal Resolution at 13, figure 2; Plaintiff's Appendix at 299. With respect to the levees that front along Gills Creek, FEMA concluded that these levees "do not have the structural strength to hold the 100-year flood waters that enter the Richland-side floodplain[, and t]he available geotechnical exploration results and the fact that the flood events in the Congaree River watershed last for 3 to 4 days adds credibility to this assumption." Appeal Resolution at 27; Plaintiff's Appendix at 313.

The flood that occurred in 1976 to which FEMA made reference was not a 100-year flood but was instead approximately a 10-year flood event. Plaintiff's Appendix at 86. Therefore, based on the summary judgment materials and considering the summary judgment standard, it is reasonable to infer that, unless Plaintiff is permitted to improve its levees, Plaintiff's land will more likely than not flood within the next five years or less. In any event, however, there is certainly a genuine issue of material fact on this issue such that it would preclude summary judgment to the County.

II. It is respectfully requested that this Court reconsider its conclusions of law regarding the relationship between appropriating an easement and physical takings law and the applicability of *Hill v. City of Hanahan*.

A. The Order conflates two distinct strands of federal takings law, and thus misapplies one of those strands. Those two strands, as described in Columbia Venture's Memorandum in Support of Motion for Partial Summary Judgment on its Physical Takings Claim and in Columbia Venture's Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment (Physical Takings Claim) (collectively, "Memoranda"), are clearly distinct. The first strand, arising under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), recognizes that when a government regulation requires a property owner to suffer a permanent physical occupation by a third party (whether or not that party is the government itself, and whether or not the government *causes* the occupation), there has been a *per se* taking. The second strand, arising under the so-called "intermittent flooding cases," establishes that if government action *causes* flooding of property, there has also been a taking.

The Order focuses primarily on this second strand, stating for example that in the cited cases "some affirmative action by the government caused the flood water to encroach upon the plaintiff's land." Order at 7. With respect to this strand, Columbia Venture's argument was that

the County's affirmative prohibition of levee improvement activities did in fact *cause* flooding by increasing the likelihood that flood waters would overtop the Manning Levees and inundate Columbia Venture's land.¹ Columbia Venture supported this argument by reference to *Lindsey v. City of Greenville*, 247 S.C. 232, 146 S.E.2d 863 (1966), a South Carolina case in the line of the intermittent flooding cases. The Order does not address this argument, namely that the combined effect of the County's regulatory actions was to substantially increase the likelihood that Columbia Venture's land would in fact be inundated with floodwaters. Most importantly, the County affirmatively denied Columbia Venture's right to improve the Manning Levees and thereby to prevent floodwaters from entering onto its land. In addition, the Order errs in failing to distinguish *Danforth v. United States*, 308 U.S. 271 (1939), the most analogous of the cited cases. In *Danforth*, the government did not construct dams or impoundments but instead caused a riverside levee to be lowered so that floodwaters would overtop it and flow within a floodway between the riverside levee and a government-constructed set-back levee some distance further from the channel. See *Danforth*, 308 U.S. at 277-79. The riverside levee was already in existence. *Id.* at 277. As argued in Columbia Venture's Motions and Memoranda, the County has acted in the same fashion here by denying Columbia Venture's right to improve the Manning Levees, thereby effectively creating a floodway easement on the landward side of the Manning Levees. Under *Danforth*, that is a taking of Columbia Venture's property.

Perhaps more importantly, the Order confuses the strand of intermittent flooding cases with the entirely separate argument arising under *Loretto*. This confusion may be clearly seen in the Order's claim that "a flood easement arises by virtue of affirmative government action that *causes* frequent or continuous flooding of the plaintiff's property." Order at 7 (emphasis added). That statement is incorrect. As explained in Columbia Venture's Memoranda, in none of *Loretto*,

¹ See also factual discussion, *supra*, at I.D.

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), or *Dolan v. City of Tigard*, 512 U.S. 374 (1994), did the government directly or indirectly *cause* the physical occupation itself. In *Loretto*, the government required the property owner to suffer the installation of the cable infrastructure, but the government did not install or cause the installation of the infrastructure itself. Likewise, in *Nollan*, the easement allowed public access across plaintiff's property to the beach. The government did not cause certain individuals to use the access easement, or use it itself. Finally, in *Dolan*, the easements at issue were for conveyance of floodwaters and for pedestrian and bicycle access. There was simply no allegation that the floodwaters or the human traffic were caused by the government. As such, the Order's statement that "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," Order at 7, is simply a misinterpretation of the applicable United States Supreme Court precedent.

Instead, the clear holding of *Loretto* is that if the government, by regulation, requires a property owner to suffer a permanent, physical occupation of its property, then there has been a *per se* regulatory taking. *Loretto*, 458 U.S. at 434-35. The relevant inquiry is not necessarily whether the government actually, in fact, physically invaded the plaintiff's property, but rather, whether the government's "interference with property can be characterized as a physical invasion by government." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citing *United States v. Causby*, 328 U.S. 256, 264-65 (1946) (holding that the government's action, characterized as the appropriation of a flight easement that diminished the value of the plaintiff's property, was "as much an appropriation of the use of the land as a more conventional entry upon it" and, consequently, was a taking)).

B. The Order further errs in rejecting the applicability of *Nollan* and *Dolan* on the basis that those cases involved "exactions," while this case does not. Columbia Venture cited *Nollan* and *Dolan* not for the exaction holding, however, but instead to establish that an easement is a permanent physical taking. That is, *Loretto* holds that a government regulation requiring a property owner to suffer a permanent physical occupation is a *per se* taking. *Id.* One possible argument would be that an easement is not "permanent" insofar as it may not be in use at any given time. The United States Supreme Court has rejected this argument:

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

Nollan, 483 U.S. at 832. *Dolan*, in turn, reached the same conclusion with respect to a floodway easement. See *Dolan*, 512 U.S. at 384. In short, Columbia Venture cited *Nollan* and *Dolan* to establish that a floodway easement is a "permanent physical occupation" within the meaning of *Loretto*.

It is true that *Nollan* and *Dolan* presented the additional "exaction" question, in that the government in each case sought to secure the easement in question as a condition to the issuance of a permit rather than imposing it by regulatory action. The government's theory in each case was that a particular action would not be a taking if it involved a mere "voluntary" dedication of an easement in exchange for a valuable permit, rather than an outright appropriation. In both cases, the United States Supreme Court concluded that even a so-called "voluntary" dedication could be considered an unconstitutional "exaction" and thus a taking. As noted in the Order, and as admitted by Columbia Venture, this case involves no such exaction requirement. But that observation is entirely beside the point. As noted in *Dolan*:

Without question, had the city simply required petitioner to dedicate a strip of land along [the creek] for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. Such public access would deprive petitioner of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property."

Dolan, 512 U.S. at 384 (internal citations omitted). Thus the question was whether the defendant city in *Dolan* could avoid this conclusion by way of an exaction. Here, the County "simply required" Columbia Venture to be subjected to a *de facto* floodway easement, and thus committed an even more paradigmatic taking than those in *Nollan* or *Dolan*. This case arises under *Loretto*, and refers to *Nollan* and *Dolan* only to the extent necessary to establish that an easement is a permanent physical occupation under *Loretto*.

And, thus, to repeat Columbia Venture's simple yet unanswered syllogism: A permanent, physical occupation is a *per se* regulatory taking under *Loretto*; an easement, including a *de facto* floodway easement, is a permanent physical occupation within the purview of *Loretto*; therefore, if the combined effect of the County's actions is to impose a *de facto* floodway easement on Columbia Venture's property, then those actions are a *per se* regulatory taking. The only availing response to this syllogism would be that the County's regulatory actions were not functionally equivalent to the condemnation of a floodway easement. The Order, however, does not even attempt to make this response.

Indeed, the Order overlooks the law of South Carolina dealing with easements or restrictive covenants (reciprocal negative easements) or other interests in land and their relationship to the holdings of *Nolan* and *Dolan*. Under South Carolina law, an easement is an interest in the land of another. See, e.g., *Morris v. Townsend*, 253 S.C. 628, 172 S.E.2d 819 (1970); *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965); see generally 125 Am. Jur. 2d Easements & Licenses in Real Property § 1 (1996). An easement can be acquired by

grant, express or implied, reservation, prescription, implication, or in the case of a government, by taking either through condemnation, appropriation, or inverse condemnation. Thus, an easement may be acquired other than by a deed recorded in the Office of the RMC, the purpose of which is to give public notice of the claimed easement. Here, Richland County directly appropriated an easement in Columbia Venture's property by adopting ordinances requiring Columbia Venture to reserve a large portion of its property undeveloped for the purpose of conveying floodwaters during the occurrence of major flood events.

In *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005), the Court said "a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other 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*." As mentioned above, in *Dolan* and *Nollan*, the local governments sought to exact an easement in exchange for a permit. Importantly, however, "[i]n each case, the court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking." *Id.* at 546. That is precisely what Richland County did in this case. It was not necessary to send the sheriff to Columbia Venture to procure a deed at the point of a gun. The County by ordinance appropriated an interest in Columbia Venture's land by requiring Columbia Venture to reserve a large portion of its land as a regulatory floodway for the specific purpose of conveying floodwater and made it a crime for Columbia Venture to place any obstructions within the regulatory floodway. Consequently, the County's appropriation of a floodway easement on Columbia Venture's property constitutes a *per se* physical taking.

C. The Order further errs in concluding that “the County’s regulations operate to distribute burdens and benefits among all affected property owners,” because that conclusion is both inaccurate and irrelevant. It is inaccurate because here the entire burden has been placed upon Columbia Venture, while the entire benefit has been conferred upon neighboring landowners, most especially Heathwood Hall and the City of Columbia. It is irrelevant, first, because the antiquated idea that any action within the “police power” of the government is not a taking has been soundly rejected by the more modern cases. For example:

Instead of addressing a challenged regulation's effect on private property, the “substantially advances” inquiry [from *Agins v. City of Tiburon*, 447 U.S. 255 (1980)] probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property “for public use.” It does not bar government from interfering with property rights, but rather requires compensation in the event of otherwise proper interference amounting to a taking. Conversely, if a government action is found to be impermissible – for instance because it fails to meet the “public use” requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action.

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005) (first emphasis added; internal citation omitted). In other words, the simple fact that a government regulation is within the police power means only that such action is not wholly invalid, not that there has been no taking for which just compensation must be paid. It is irrelevant, second, because a determination of the benefits and burdens of a given regulation is not part of the inquiry under *Loretto*. Indeed, *Penn Central* clearly states that the Fifth Amendment is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” *Penn Central*, 438 U.S. at 123, which determination is not appropriate for resolution on summary judgment.

D. Even putting aside *per se* takings under *Loretto*, the Order errs in rejecting the applicability of *Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984), on the bare assertion that it “does not represent modern takings jurisprudence in South Carolina.” Order at 9. On the contrary, *Hill* has not been overruled, distinguished, or even questioned by the South Carolina courts. The Order nonetheless claims that “*Hill* has no relevance in our takings jurisprudence,” Order at 10, apparently because the four-part test established in *Gasque v. City of Conway*, 194 S.C. 15, 8 S.E.2d 871 (1940), has been since rearticulated as a two-part test in *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005). A careful reading of *Byrd*, however, reveals that the modifications to the takings test set forth in that case are not relevant to Columbia Venture’s argument. First, the *Byrd* court rejected the requirement that a taking have “some degree of permanence,” in light of the conclusion by the United States Supreme Court that even a temporary taking was compensable. *Byrd*, 365 S.C. at 657, 620 S.E.2d at 79; *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 318 (1987). Therefore, this first modification is not only irrelevant to Columbia Venture’s claim, which asserts a permanent taking, but is in fact an *expansion* of the prior test. Second, the *Byrd* court rejected the former requirement that the taking be for a “public use.” *Byrd*, 365 S.C. at 657, 620 S.E.2d at 79. Again, this modification is irrelevant to Columbia Venture’s argument. Neither Columbia Venture nor the plaintiff in *Hill* made any argument that the government’s action was not for a public use. In any event, *Byrd* retains the requirement that there be a “taking,” and *Hill* found just such a “taking” under indistinguishable facts.

Therefore, the Order’s assertion that *Hill* is no longer relevant is incorrect. On the contrary, *Hill* remains the law in South Carolina, and neither the County nor the Order has distinguished it. As such, the Court is bound to follow it. See *In re Kingsmore*, 295 B.R. 812,

817 (Bankr. D.S.C. 2002) (“[A] decision by an intermediate appellate court in South Carolina is the law of South Carolina unless that decision is subsequently reversed or overruled.”); *Hamby v. Hamby*, 315 S.C. 518, 520 (Ct. App. 1994) (A holding by an appellate court “remain[s] the law of this state unless either reversed or overruled.”).

CONCLUSION

For all of the foregoing reasons, and for the reasons and grounds set forth in Columbia Venture’s Motion for Partial Summary Judgment on its Physical Takings Claim, Memorandum in Support of Motion for Partial Summary Judgment, Memorandum in Opposition to Defendant’s Motion for Partial Summary Judgment (Physical Takings Claim), and arguments advanced during the hearing on these motions, all of which are incorporated herein by reference, it is respectfully requested that this Court issue an amended order denying the Defendant’s Motion for Partial Summary Judgment (Physical Takings Claim) and granting Columbia Venture’s Motion for Partial Summary Judgment on its Physical Takings Claim or, in the alternative, denying both the Defendant’s and Plaintiff’s motions for partial summary judgment or, in the alternative, issue an amended order incorporating the issues noted above.

[signature on following page]

Respectfully submitted,

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August 20, 2012

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Columbia Venture, LLC,

Plaintiff,

vs.

Richland County,

Defendant.

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

Plaintiff Columbia Venture's Pre-Trial Brief

Plaintiff Columbia Venture, LLC ("Columbia Venture"), submits the following pre-trial brief pursuant to Rule 16(c), SCRCP. Plaintiff does not seek a pre-trial hearing separate from the non-jury trial scheduled for the term of court beginning September 10, 2012.

1. A concise, non-argumentative statement of the facts of the case.

On or about November 13, 1998, Burroughs and Chapin Company ("B&C") and Mr. Burwell Manning executed a Purchase and Sale Agreement, subject to a number of contingencies, for 4,460 acres of land owned by Mr. Manning adjacent to the Congaree River in Richland County, South Carolina ("Property"). Over the next several months, B&C, along with employees from Lockwood Greene Engineers and others, investigated and performed due diligence on the possible purchase of the Property. Most of the Property was designated as a floodplain on the currently effective Flood Insurance Rate Map ("FIRM") dated January 19, 1994, although FEMA put forth a preliminary map in June 1998 showing most of the Property as a floodway. On July 14, 1998, however, Cary McSwain, the County Administrator for Richland County, a voluntary participant in the National Flood Insurance Program ("NFIP") administered by FEMA, officially requested that the preliminary results and mapping process be "put on hold"

due to concerns about placing 5,000 acres of land in a floodway and the adverse impact such placement could cause on the economic viability of the County. FEMA acquiesced to Mr. McSwain's request later in July 1998.

Mr. Manning had previously built a system of levees ("Manning Levees" or "Levees") to protect the Property from potential floodwaters, and B&C intended to upgrade the Levees to a certified status under FEMA's regulations in order to remove any floodplain or floodway designation. In order to recognize a levee as certified to provide protection against the waters of a base flood, FEMA regulations require a governmental agency to have jurisdictional control and maintenance responsibilities for the levee system. To that end, representatives of B&C and Lockwood Greene met with Mr. McSwain, Councilwoman Kit Smith, and others associated with Richland County and provided information to the County concerning B&C's plans to develop the Property and to request the County to consider accepting responsibility for inspection, operation, and maintenance of the Levees. On January 20, 1999, County Planning Director, Ken Knudsen, recommended to County Council that Council begin the first steps of acceptance of responsibility and maintenance of the levee system contingent on proper certification. On January 26, 1999, the Development and Services Committee voted unanimously to send acceptance of levee maintenance to the full Council for approval. On February 2, 1999, the Richland County Council met and voted unanimously to approve a resolution to accept responsibility for local inspection and enforcement of the levee system and to accept operation and maintenance responsibility for the levee system upon enumerated conditions: (1) upgrade of the levee system by the owners to FEMA standards; (2) preparation of all required documentation, including operation and maintenance plans by the owners; (3) certification that the levee system meets FEMA standards; (4) resolution of the issues of performance and funding

of the operation and maintenance system by Richland County, the City of Columbia, and the developers; and (5) investment by the owners/developers of at least \$30 million in the project over ten years. On February 17, 1999, Council Chairman Paul Livingston wrote a letter to FEMA notifying the agency that the County had agreed to accept responsibility for local inspection and enforcement of the operations and maintenance plan for the Manning Levees contingent upon certain conditions. Mr. Livingston noted the intent of the property owners to upgrade the Levees pursuant to 44 C.F.R. § 65 and further requested that the Levees be included in further mapping studies.

On January 21, 1999, Wilson Tillotson with Lockwood Greene sent a letter to FEMA, via the South Carolina Department of Natural Resources, asking for confirmation of Lockwood Greene's interpretation of FEMA requirements for certification of levees as well as confirmation of Lockwood Greene's plan to improve the Levees to a certified status. On January 26, 1999, FEMA replied to confirm Lockwood Greene's understanding that if the Levees were upgraded and certified pursuant to 44 C.F.R. § 65.10, FEMA would remove the floodplain and floodway designations from the area protected by the certified levee. On February 18, 1999, Mr. Tillotson confirmed with Mr. McSwain and Harry Reed of Richland County that once the Levees were upgraded and certified, the land protected by the Levees would be zoned as Zone X on the FEMA flood maps, and that building permits for Zone X would not be subject to any floodway or floodplain restrictions. On February 19, 1999, Mr. McSwain wrote to George Gregory of B&C that the County would work with the development group on issues critical to the proposed development, including zoning, tax incentive vehicles, and a multi-county business park.

On February 19, 1999, Columbia Venture, LLC (which included B&C, Lockwood Greene, members of the Manning Family, Carolina First Bank, and other investors) purchased

the property. Soon thereafter, preliminary development plans were announced for an extensive, multi-use development with residential, commercial, recreational, and conservation uses. Columbia Venture also began spending money to develop comprehensive levee improvement and various development plans.

The County soon began to back away from its February 2, 1999 unanimous resolution. In May 1999, Columbia Venture submitted a permit to the County to do work on the Levees, which would include adding some fill to places where the Levee had sagged or eroded. Richland County denied the permit. Meanwhile, the FEMA mapping process was ongoing, and Mr. McSwain decided not to allow any permit approvals until after the flood maps were finalized. In August 1999, FEMA issued another revised preliminary Flood Insurance Study and FIRM, which placed the floodway on the landward toe of the levees, almost back to the location on the effective FIRM from 1994/1995. On September 7, 1999, Mr. McSwain informed County Council that FEMA had advised the County to use the 1995 maps, under which the Levees were not in a regulatory floodway. Mr. McSwain also said the County could issue a maintenance permit to maintain the existing levees. In December 1999, the County appealed the August 1999 map to FEMA. The County's appeal, among others, culminated in FEMA's September 26, 2000 Appeal Resolution and another revised preliminary FIRM, which placed an expanded floodway on approximately 70% of Columbia Venture's property. In November 2000, FEMA allowed Columbia Venture to appeal the September 26, 2000 revised preliminary FIRM, and Columbia Venture thereafter submitted scientific and technical evidence to FEMA, which if accepted by FEMA, would have removed the regulatory floodway from the land protected by the Levees.

In 2000, the County began considering amendments to its existing Stormwater Management and Zoning ordinances. The ordinances as then enacted provided 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” and that “[a]ll applicable regulations of the National Flood Insurance Program are incorporated by reference herein.” Richland County Code of Ordinances § 8-62(h) & (i) (1994). The County Engineer, Ralph Pearson, interpreted this ordinance to require a project located in the regulatory floodway to meet the FEMA no-rise engineering standard for construction. By this time, opponents of Columbia Venture’s development project had surfaced and focused on the stormwater ordinance as a way to block the project. In late 2000 and early 2001, the Congaree Task Force and the Southern Environmental Law Center advocated that Council: (1) remove the variance provision of the ordinance; (2) interpret “shall not impede” as a complete building prohibition; (3) carve out exceptions for Columbia Venture’s neighboring landowners, Heathwood Hall Episcopal School and the City of Columbia’s wastewater treatment plant, wherein these landowners would only have to meet the FEMA no-rise standard for future construction; and (4) impose a definition of maintenance of levees located within a floodway that would not allow “a structure that would be higher or wider than it was before the need arose for such repair or maintenance.” Richland County Code of Ordinances § 8-26(h) (2001). Despite County staff’s recommendation to adopt the FEMA no-rise standard for the regulatory floodway, County Council adopted an ordinance incorporating all of the Congaree Task Force’s and Southern Environmental Law Center’s suggestions. Under this ordinance, both Heathwood Hall and the City of Columbia’s wastewater treatment plant have built substantial structures and expanded significantly.

On August 20, 2001, FEMA issued a Letter of Final Determination, essentially confirming the floodway proposed on September 26, 2000, which imposed a regulatory floodway on approximately 70% of Columbia Venture’s property. Columbia Venture appealed

the Letter of Final Determination to the United States District Court for the District of South Carolina.¹ By operation of its ordinances, as confirmed with FEMA, the County adopted the August 20, 2001 floodway effective February 20, 2002.

After February 20, 2002, the County took additional steps to ensure that Columbia Venture's development would never happen. In 2004, the County again considered whether to adopt FEMA's no-rise standard for building in the regulatory floodway, but declined to do so in response to lobbying efforts of Columbia Venture's opponents. In the summer of 2005, the County informed Columbia Venture that it would not allow Columbia Venture to improve its Levees, even though the Levees are used by Heathwood Hall Episcopal School, and that all Columbia Venture could do is maintain the Levees and not make them taller or wider. In November 2005, Federal Judge Margaret Seymour vacated the 2001/2002 base flood elevations and floodway, thereby reinstituting the 1994/1995 base flood elevations and floodway, which placed the regulatory floodway at the riverside toe of the levee system. Consequently, Columbia Venture's Levees were no longer in a floodway. In response, the County Council passed a series of moratoria on the consideration of building permits in the Congaree floodplain; rejected a draft of a proposed moratorium recommended by the Development and Services Committee that would allow levee improvements to certified standards; and passed an ordinance adopting the 1995 base flood elevations while retaining the 2002 floodway, resulting in a regulatory floodway for the Congaree River floodplain that was determined by fiat with no relationship to the relevant base flood elevations.

¹ Columbia Venture's appeal was settled in September 2009 and included an agreement by FEMA to remap the Congaree River within a year.

All of these actions by the County were targeted at stopping Columbia Venture's development plans for the Green Diamond property that the County Council had enthusiastically supported at the time Columbia Venture bought the Property.

2. An objective statement of the facts in controversy.

There are numerous facts in controversy, with the crux of such controversy centering on Columbia Venture's investment backed expectations and the applicable measure of damages and just compensation.

3. The legal issues involved. This includes the law applicable to the cause of action and the defense.

I. INTRODUCTION.

In this case, Columbia Venture does not seek to invalidate the National Flood Insurance Act ("NFIA") or the National Flood Insurance Program ("NFIP") or to impair the ability of local communities to engage in flood mapping and regulation. Nor does Columbia Venture assert that a local community, in electing to participate in the NFIP, necessarily takes a landowner's property by adopting flood maps that include regulatory floodways. A cursory look at FEMA's February 20, 2002, flood map panels for the County reveals that most floodways are generally confined to the channel of the river and adjacent land areas that are not suitable for development. More importantly, the NFIA and NFIP do not prohibit building within a floodway or a floodplain. Regulations promulgated by FEMA under the NFIA permit "encroachments, including fill, new construction, substantial improvements and other development within the adopted regulatory floodway [if] it has been demonstrated through hydrologic and hydraulic analysis 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). The NFIA and NFIP are thus

carefully crafted to avoid takings liability for local communities. The internal logic of the program, which is based on flood elevations determined by hydrologic and hydraulic engineering, is that one landowner is not permitted to build structures within a regulatory floodway that would displace flood waters on another landowner, but so long as a building can be engineered so as not to displace flood waters on others, the landowner is permitted to build and improve structures within the regulatory floodway.

Thus, this Court faces the limited, circumscribed question of whether a local government may engender reasonable investment-backed expectations by explicitly and publicly encouraging the purchase and development of a substantial piece of property; then, almost immediately and as part of the same course of conduct, reverse course and affirmatively seek to prohibit that development; may apply much more onerous local standards than are required or even permitted by the NFIP; and may prevent the property owner from seeking to escape that prohibition by further denying the property owner's right to improve levees in order to exclude the common enemy of flood waters that have left a water course.

II. REGULATORY TAKINGS IN GENERAL: Both the United States Constitution and the South Carolina Constitution provide that private property may not be taken for public use, without just compensation.

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This provision has been made applicable to the states by the Fourteenth Amendment to the United States Constitution. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (*citing Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)). The South Carolina Constitution provides that "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property." S.C.

Const. art. I, § 13. The South Carolina Supreme Court has indicated that “[t]aking analysis under South Carolina law is the same as the analysis under federal law.” *Byrd v. City of Hartsville*, 365 S.C. 650, 656 n.6, 620 S.E.2d 76, 79 n.6 (2005) (citing *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 306, 534 S.E.2d 270, 275 (2000)).

The role of the takings clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” See *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Prior to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the United States Supreme Court had not clearly determined whether the takings clause attached to governmental actions other than direct appropriations of property. In *Pennsylvania Coal*, the Court recognized that government regulation of private property may go “too far” and therefore amount to a taking. *Pennsylvania Coal*, 260 U.S. at 415.

In cases other than certain *per se* regulatory takings, a regulation will be subject to scrutiny under the *ad hoc*, factual inquiry set forth in *Penn Central Transp. Co v. New York City*, 438 U.S. 104 (1978). In that case, the United States Supreme Court identified factors that have particular significance to the regulatory takings analysis, including “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” and “the character of the governmental action.” *Id.* at 124.

Subsequent to *Penn Central*, the United States Supreme Court seemed to revise these factors in observing that a government action “effects a taking if [it] does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.” *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (internal citations omitted). Recently, however, the United States Supreme Court explicitly rejected the “substantially advances” test,

and made clear that for alleged regulatory takings, *Penn Central* remains the determinative inquiry. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

III. ADDITIONAL REQUIREMENTS UNDER SOUTH CAROLINA LAW: *Byrd* articulates the appropriate inquiry under South Carolina law, and imposes an additional requirement of “affirmative conduct.”

The South Carolina Supreme Court has held that there are two elements to a regulatory takings analysis: “affirmative conduct and a taking.” *Byrd*, 365 S.C. at 657, 620 S.E.2d at 80. With respect to affirmative conduct, the South Carolina courts require only that there be an affirmative act by the government giving rise to the alleged taking. As *Byrd* makes clear, regulatory action with respect to land use is obviously “affirmative conduct.” *Id.* Indeed, in *Byrd* the alleged affirmative conduct was the government’s delay in acting on a rezoning petition. That action might arguably not be affirmative, in that the complaint was about government inaction. The South Carolina Supreme Court rejected this argument, observing that “[r]egulatory delay is part of the regulatory process, so indeed it is the product of governmental action.” *Id.*

As for the second part of the South Carolina test, *Byrd* establishes that a property owner may establish the second element, a “taking,” under the generally applicable federal rules. See *Byrd*, 365 S.C. at 658-62, 620 S.E.2d at 80-82 (applying *Penn Central*; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); and *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002)).

With respect to prior South Carolina takings precedent, *Byrd* made several noteworthy modifications. First, *Byrd* expressly overruled a number of prior South Carolina decisions, but not *Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984), which remains relevant to the regulatory takings analysis under *Penn Central*, particularly with respect to the

character of the government's action. Instead, the cases overruled by *Byrd* were those cases suggesting that a taking may be found only if the regulatory action "denied all economically viable use of [plaintiff's] property." *Byrd*, 365 S.C. at 660 n.11, 620 S.E.2d at 81 n.11 (overruling *Glover v. County of Charleston*, 361 S.C. 634, 606 S.E.2d 773 (2004), and *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003)). Second, *Byrd* recognized that under *Lingle v. Chevron, U.S.A. Inc.*, 544 U.S. 528 (2005), the federal takings analysis no longer considers whether a challenged regulation substantially advances legitimate state interests. *Byrd*, 365 S.C. at 658, 620 S.E.2d at 80. Third, *Byrd* eliminated two elements of the prior four-part test for a taking, thus establishing the two elements necessary to establish a taking described above. Specifically, *Byrd* rejected the requirement that a taking have "some degree of permanence," in light of the conclusion by the United States Supreme Court that even a temporary taking was compensable. *Byrd*, 365 S.C. at 657, 620 S.E.2d at 79; *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Likewise, *Byrd* rejected the former requirement that the taking be for a "public use." *Byrd*, 365 S.C. at 657, 620 S.E.2d at 79-80. Columbia Venture asserts a permanent taking, and does not contest the public use of that taking.

IV. APPLICATION OF PENN CENTRAL FACTORS: Under the elements described in *Penn Central* as having "particular significance," Columbia Venture has suffered a regulatory taking and is entitled to just compensation.

- a. The *Penn Central* factors are not a rigid, mathematical formula, but are instead designed to further the primary question of whether "justice and fairness" require that a particular government regulatory action requires the payment of just compensation.

In *Penn Central*, the United States Supreme Court identified factors that have particular significance to the regulatory takings analysis, including "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with

distinct investment-backed expectations,” and “the character of the governmental action.” *Penn Central*, 438 U.S. at 124. In South Carolina, the courts articulate this test as having two elements: “Two circumstances are especially important: (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.’” *Byrd*, 365 S.C. at 658, 620 S.E.2d at 81 (quoting *Penn Central*, 438 U.S. at 124) (additional citations omitted).

The South Carolina Supreme Court has observed that “the United States Supreme Court [has] expressly rejected the adoption of categorical rules in the context of regulatory takings.” *Byrd*, 365 S.C. at 660, 620 S.E.2d at 81; *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (O’Connor, J., concurring) (“*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.”). Instead, the *Penn Central* factors inform the statement in *Pennsylvania Coal* that the real question is whether a regulation goes “too far.” This examination necessarily “does not lend itself to any set formula,” and whether “justice and fairness” will dictate that a regulatory action 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.” *Eastern Enters. v. Apfel*, 524 U.S. 498, 523 (1998) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). And, soon after its decision in *Penn Central*, the United States Supreme Court noted that “[t]here 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) (citations omitted).

Thus, the real question attendant to analyzing an alleged regulatory taking is whether “justice and fairness” require the payment of just compensation. That question is informed by the factors identified in *Penn Central*, but none of those factors is conclusive or subject to rigid mathematical expression. Instead, the only bright line rules emerge from the *per se* rules of *Lucas* (under which the economic impact is determinative) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (under which the character of the government action is determinative). Outside of those *per se* rules, a court should consider all relevant facts and circumstances in pursuit of the ends of “justice and fairness.”

- b. **In considering the economic impact on, and in particular the investment-backed expectations of, the property owner, the Court should evaluate the degree to which the value of the property has been diminished as against its highest and best use. Furthermore, the Court should consider not only the magnitude and timing of the investment, but also the degree to which expectations with respect to that investment are rooted in the regulatory regime in place at the time of the investment, the State’s law of property, and conduct by the government that may have engendered such expectations.**

With respect to the first factor of the *Penn Central* test, the court should consider “the value that has been taken from the property with the value that remains in the property.” *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987). Most often, this analysis is not expressed mathematically, but instead simply considers whether the economic impact is serious enough to merit compensation. Some courts, however, will conduct the analysis by considering a fraction, the numerator of which is the value of the property as it may be used subject to the government action, and the denominator of which is the value of the property as it may have been used in the absence of the government action. See, e.g., *Walcek v. United States*, 49 Fed. Cl. 248, 258 (Fed. Cl. 2001) (observing that the test “is often expressed in

the form of a fraction, the numerator of which is the value of the subject property encumbered by regulation and the denominator of which is the value of the same property not so encumbered"). There is no specific percentage diminution that will conclusively establish either that there has been or has not been a taking under *Penn Central*. Instead, "this factor, at best, contemplates an imprecise analysis [and] courts have not yet reached a consensus as to a particular, universally applicable percentage of diminution in value that establishes a taking." *Mehaffy v. United States*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012); *see also CCA Assocs. v. United States*, 91 Fed. Cl. 580, 618 (Fed. Cl. 2010) ("In determining how far is too far, there is no magic number, and no set formula.") (internal quotations omitted).

In determining the value of the property before the government action, "a property owner is entitled to have the fair market value be based upon the 'highest and best use' of the property." *Brace v. United States*, 72 Fed. Cl. 337, 350 (Fed. Cl. 2006). In an illustrative case in which the court found no taking, the court explicitly considered competing real estate appraisals that assigned values to the parcel based on the "bulk sales method" and the "discounted cash flow method." *Walcek*, 49 Fed. Cl. at 263. Although the court ultimately concluded that the plaintiff's appraisals were not convincing, the important point is that the analysis considers the value of the allegedly taken property as developed to its "highest and best use." *Id.* In other words, the determination of value explicitly refers to the property owner's investment-backed expectations, as required by the plain language of the *Penn Central* and *Byrd* tests that the economic impact analysis "particularly" includes reference to such expectations. As a second example, the Federal Court of Claims has recently stated that, with respect to a specific, proposed development, the Federal Circuit recognizes both the "subdivision development method" and the "discounted cash flow method." *Norman v. United States*, 63 Fed. Cl. 231, 271

(Fed. Cl. 2004). Thus, the court may value a “property based on the discounted stream of income the property is capable of producing over its useful economic life,” by using “[c]omparable sales . . . to establish gross revenue for the project, from which costs of development are then deducted, resulting in a stream of revenue that is then present-valued using a discount factor to derive a value for the property.” *Id.* The court further noted that “trial courts have considerable discretion to select the method of valuation that is most appropriate in light of the facts of each particular case.” *Id.* The court therefore received testimony from both plaintiff’s and defendant’s experts on the cash flow expected to be received from the proposed development. *See also Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 156 (Cl. Ct. 1990) (observing that “valuations in eminent domain proceedings may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted”) (internal quotations omitted).

Moreover, courts have explicitly 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 error in this 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. Instead, courts 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). In other words, in assigning values to the economic impact analysis, courts include the expected return from the allegedly taken property, subject to its “highest and best use” and consistent with the property owner’s investment-backed expectations.

Once the court has determined the appropriate numerator and denominator, the resulting percentage diminution may be used as a guidepost for the analysis. As mentioned above, there is, however, no “automatic numerical barrier preventing compensation, as a matter of law,” and instead the court should consider “all the relevant considerations, including percentage diminution in value, under the modern *Penn Central* approach.” *Yancey v. United States*, 915 F.2d 1534, 1541 (Fed. Cir. 1990). Cases that suggest a rigid minimum percentage diminution required to find a *Penn Central* taking are clearly contrary to the United States Supreme Court’s repeated insistence that there are no such bright line formulae for any single *Penn Central* factor and that the analysis must consider the factors not only collectively, but also as part of the larger inquiry into “justice and fairness.” As a single, determinative example, *Loretto* makes clear that the character of the government action may conclusively establish a taking irrespective of the diminution in value. See *Loretto*, 458 U.S. at 426 (1982). Surely it follows as a corollary that even outside of the *per se* rule of *Loretto*, a serious frustration of investment-backed expectations and government action of a sufficiently egregious character (*e.g.*, that is targeted at a particular property owner, that exhibits bad faith, that is akin to a physical invasion, and that requires most of the subject property to be maintained in its natural state) will compel the conclusion that a taking has occurred.

With respect to investment-backed expectations, the analysis includes not only what the property owner’s expectations might be, but whether those expectations are appropriate to the circumstances. There are at least three sources of guidance that should be consulted in assessing the property owner’s investment-backed expectations. First, “the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring).

In *Palazzolo*, the United States Supreme Court considered the extreme case in which the property owner acquired title to the property after the regulation became effective. The Court rejected a categorical rule that would automatically find no taking of property acquired after the date of the regulation, even if the transferee had notice of the regulation, reasoning that “[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.” *Palazzolo*, 533 U.S. at 628. At the other extreme, then, when a plaintiff acquires a parcel with demonstrable reliance on and due diligence into the then-current regulatory regime, that plaintiff surely has reasonable investment-backed expectations.

Second, the court should consider the extent to which “the owner’s reasonable expectations have been shaped by the State’s law of property.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). South Carolina follows the common enemy rule with respect to the diversion of surface waters, which under applicable precedent include flood waters once they have left the channel of a water course. See *Lawton v. South Bound R.R. Co.*, 61 S.C. 548, 552, 39 S.E. 752, 753 (1901); *Baltzger v. Carolina Midland Ry. Co.*, 54 S.C. 242, 247-48, 32 S.E. 358, 359-60 (1899); William T. Toal, *Surface Water in South Carolina*, 23 S.C. L. Rev. 82, 83 (1971). Under this rule, a landowner may treat surface water as a common enemy and dispose of it or take steps to divert it as the landowner sees fit. See *Glenn v. School Dist. No. Five of Anderson County*, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). Therefore, the right to exclude flood waters from real property is part of the bundle of ownership rights and accordingly inheres in the title to the property.

Third, the United States Supreme Court has recognized that actions of the government itself “can lead to the fruition of a number of expectancies embodied in the concept of ‘property’

– expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner’s property.” *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979). Here, the County’s unanimous agreement by public action to allow improvement to the levees, and its explicit and implicit encouragement of the overall plan of development, surely created reasonable, investment-backed expectations. And under this rule Columbia Venture is required to show only reasonable, investment-backed expectations, not an enforceable right based on estoppel or contract.

Finally, a property owner’s reasonable, investment-backed expectations are categorically not limited to continuation of the property’s current use. Not only would this view effectively eviscerate the entire regulatory takings analysis, it would render unnecessary any further consideration of the regulatory takings issue in such cases as *Lucas*, *Palazollo*, and *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002). In each of those cases, the property owner sought to change the current use of its property. In each case, however, the United States Supreme Court declined a facile rule that any regulatory action that allowed the continuation of the current use could not be a taking. Likewise, in *Byrd* the South Carolina Supreme Court did not even suggest that the property owner’s sole reasonable expectation was to continue its current use of the property; rather the Court considered “all relevant circumstances,” *Byrd*, 365 S.C. at 661, 620 S.E.2d at 81. The Fourth Circuit Court of Appeals has specifically rejected this view of reasonable, investment-backed expectations: “[Defendant] is mistaken in relying on cases holding that no taking occurs where regulations permit the current use of property to continue unhindered.” *National Advertising Co. v. Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991).

- c. **In considering the character of the government action, the Court should consider all relevant circumstances including the degree to which the action**

is akin to a physical invasion, is disproportionately concentrated on or targeted at a single property owner, provides the property owner with offsetting benefits, is in bad faith, or denies essential property rights.

The scope of the second element, the character of the government action, considers whether “the governmental action implicates [the] fundamental principles of fairness underlying the Takings Clause.” *Eastern Enters. v. Apfel*, 524 U.S. 498, 537 (1998). After *Lingle*, it appears that “the character factor should not inquire into the regulation’s motivation or purpose, the regulation’s value or benefit, or the correctness or effectiveness of the agency’s implementation;” rather, it should consider “the effects of a regulation on the property owner: whether the regulation targets that owner, applies retroactively to that owner, provides that owner any offsetting benefits, has caused something akin to a physical invasion, or prevents that owner from doing harm.” David W. Spohr, “*What Shall We Do With The Drunken Sailor?*”: *The Intersection Of The Takings Clause And The Character, Merit, Or Impropriety Of Regulatory Action*, 17 Southeastern Env’tl. L.J. 1 (2008).

Under this analysis, the character factor of *Penn Central* will consider whether the government action is “akin” to a physical invasion. As expressed in *Penn Central* itself, “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government.” *Penn Central*, 438 U.S. at 124. And *Loretto* distinguished between the narrow, *per se* rule for permanent physical occupations from the more general rule for invasions: “More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property.” *Loretto*, 458 U.S. at 430 (emphasis added). The relevant inquiry under *Penn Central*, then, is not whether the government action is a permanent physical occupation but whether such action may be characterized as a physical invasion. Thus, even if the County’s

actions did not cause a “permanent physical occupation” of Columbia Venture’s land under *Loretto* (which this Court has already addressed for purposes of summary judgment), the fact that the County’s regulations will unquestionably result (and are in fact designed to result) in invasion by the conveyance of floodwaters across Columbia Venture’s land is relevant to the character of the County’s action. The United States Supreme Court has in fact often recognized that a physical invasion, whether reaching the degree required by *Loretto* or not, should be considered under *Penn Central*. The standard of *Loretto* is indeed that “when the physical intrusion reaches the extreme form of a permanent physical occupation . . . ‘the character of the government action’ not only is an important factor in resolving whether the action works a taking but also is determinative.” *Loretto*, 458 U.S. at 426.

Here, the County’s action affirmatively prohibited the construction of any permanent structures or improvements on most of Columbia Venture’s land, rather than specifying certain, limited prohibited uses. The stated purpose of this prohibition is to reserve the property for invasion floodwaters – which floodwaters, of course, might be entirely excluded by the simple and feasible improvement of the levees. Whether or not this action is functionally equivalent to the direct appropriation of an easement, it should surely be characterized as the imposition of a servitude by negative regulation. Indeed, the United States Supreme Court has strongly analogized regulatory prohibitions of development to the imposition of an easement or servitude: “The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992).

Likewise, the United States Supreme Court has observed that the particular danger associated with regulations that utterly forbid development is that they “carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.” *Lucas*, 505 U.S. at 1018. As exemplary cases, the Court cited *Annicelli v. South Kingstown*, 463 A.2d 133, 140-41 (R.I. 1983), in which the government prohibited construction adjacent to a beach on the grounds of safety and open space conservation, and *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 193 A.2d 232, 240 (N.J. 1963), in which the government prohibited the filling of marshlands in order to preserve a water detention basin and to create a wildlife refuge. This observation surely applies with equal force to evaluating the character of a government action analyzed under *Penn Central*, even when the government action might not meet the *per se* rule of *Lucas*. Thus, when a government action forces a property owner to devote his land to public service (such as the imposition of a no-build zone to convey flood water), the character of that action strongly suggests a taking.

Second, analysis of the character of the government action will consider the distribution of the regulatory burden and reciprocity of advantage. *Lingle* itself notes that the inquiry must consider “the magnitude or character of the burden a particular regulation imposes upon private property rights” and “how any regulatory burden is distributed among property owners.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005). Moreover, courts have recently recognized that disparate treatment of similarly situated property owners is relevant to the character of the government action. See *Resource Invs., Inc. v. United States*, 85 Fed. Cl. 447, 519 (Fed. Cl. 2009) (“Nor can we conclude that the Corps reviewed plaintiffs’ 404 permit application with the same standards as other applications, or that plaintiffs were not singled out when improperly

subjected to the Corps' jurisdiction."'). Likewise, the inquiry may consider whether there is some "reciprocity of advantage" from the government action that confers a benefit upon the property owner. Thus, for example, one case has concluded that the character of a denial of a rezoning permit for a golf course to residential zoning favored the property owner's claim under *Penn Central*.

On these facts, we conclude that the burden of the comprehensive plan designation falls disproportionately on the property owner. The benefits of the open space provided by the golf course property are widely shared through the community, but the costs are focused solely on the property owner. We have trouble discerning any reciprocity of advantage resulting from the comprehensive plan designation for the property.

Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 640-41 (Minn. 2007). A regulation that entirely prohibits one property owner from developing its property, while conferring no benefit on that property owner and also exempting other similarly situated property owners, is surely disproportionate and non-reciprocal in character.

Third, the character of the government action depends, in part, on whether it is targeted at a specific property owner. See, e.g., *Eastern Enters. v. Apfel*, 524 U.S. 498, 537 (1998) (finding a "solution [that] singles out certain employers" a taking); *Brace v. United States*, 72 Fed. Cl. 337, 356 (Fed. Cl. 2006) (observing that the character factor of the *Penn Central* test asks, in part, "whether the action targets a particular individual").

Fourth, courts have considered evidence of bad faith in evaluating the character of a government action. For example, the United States Supreme Court has suggested that, but for the lower court's factual determination that in imposing a series of rolling moratoria the government "acted diligently and in good faith," the Court might have found a taking in "that the [government] was stalling in order to avoid promulgating" a permanent rule. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333 (2002). The South Carolina

Supreme Court has recently (and subsequent to *Lingle*) made a similar suggestion, noting in the course of a *Penn Central* analysis that “there is no evidence that the delay was the result of bad faith on the part of the City.” *Byrd*, 365 S.C at 661 n.15, 620 S.E.2d at 82 n.15. In neither case did the court suggest that such bad faith must be sufficient to independently constitute a denial of substantive due process; instead, the clear implication was that bad faith could serve as a relevant inquiry into the character of the government action.

Finally, in considering the “character” prong of *Penn Central*, the property right invaded is relevant to the character of the government action. Here, the County’s action invaded both the rights to use and to exclude others. The right to exclude others, of course, has been “universally held to be a fundamental element of the property right.” *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *see also Hodel v. Irving*, 481 U.S. 704, 716 (U.S. 1987) (“In [*Kaiser Aetna*], we emphasized that the regulation destroyed ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others.’”).

V. THE MEASURE OF JUST COMPENSATION: Columbia Venture is entitled to just compensation equal to the difference in the market value of the Property before and after the imposition of the regulatory floodway, subject to the restriction on its ability to improve the Manning Levees.

Neither the United States Constitution nor the South Carolina Constitution prohibits the taking of private property for public use. Instead, both provide that such a taking requires the payment of “just compensation.” The question here is how such just compensation is to be measured. The United States Supreme Court has made clear that the “‘just compensation’ required by the Fifth Amendment is measured by the property owner’s loss rather than the government’s gain.” *Brown v. Legal Found.*, 538 U.S. 216, 235-36 (2003) Accordingly, the property owner whose property has been taken “is entitled to be put in as good a position pecuniarily as if his property had not been taken.” *Olson v. United States*, 292 U.S. 246, 255

(1934). Stated differently, in a formulation repeatedly employed by the United States Supreme Court, “just compensation normally is to be measured by the market value of the property at the time of the taking contemporaneously paid in money.” *See, e.g., United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (internal quotations omitted).

For takings established under the *Penn Central* analysis, “the proper method is to subtract the market value of the property as encumbered by the regulation from the market value of the property without the offending regulation in place,” taking into account “the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.” *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 253 F.3d 576, 583-84 (11th Cir. 2001) (internal quotations omitted). As such, “‘just compensation’ is not limited to the value of the property as presently used, but includes any additional market value it may command because of the prospects for developing it to the ‘highest and best use’ for which it is suitable.” *United States v. 320.0 Acres of Land*, 605 F.2d 762, 781 (5th Cir. 1979). Moreover, deviating from the market value test is appropriate “when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.” *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

With respect to an actual condemnation of property, the South Carolina Eminent Domain Procedure Act requires that the value of a condemned property be determined by an appraisal. *See* S.C. Code § 28-2-70. The property owner has the right to reject the appraisal and to seek a determination either by an appraisal panel, *see* S.C. Code §§ 28-2-210 to -290, or by trial, S.C. Code §§ 28-2-310 to -370. In either case, the Act defines an appraisal to mean:

[A]n opinion as to the value of compensation payable for property, prepared by or under the direction of an individual qualified by knowledge, skill, experience, training, or education to express an opinion as to the value of the compensation. An appraisal

includes the assessment of general and specific benefits to the owner as offsets against any damages to the property.

S.C. Code § 28-2-30(2). Thus, in a condemnation action, just compensation would require the payment of the difference between the appraised value of the property prior to the taking and the appraised value of the property after the taking, considering the “general and specific benefits to the owner.” In South Carolina, direct condemnation actions and inverse condemnation actions “are treated alike under the takings clause of our State Constitution.” *Cobb v. South Carolina D.O.T.*, 365 S.C. 360, 364, 618 S.E.2d 299, 301 (2005).

VI. SECTION 1983 ACTION: Columbia Venture is entitled to damages under 42 U.S.C. § 1983 for the regulatory taking of the Property without the payment of just compensation.

Columbia Venture also seeks damages pursuant to its takings claim under 42 U.S.C. § 1983. See Amended and Supplemental Complaint ¶¶ 127-133. Section 1983 allows a civil action to recover damages for deprivation of a constitutionally protected right. *Stanley v. Kirkpatrick*, 357 S.C. 169, 176, 592 S.E.2d 296, 299 (2004). A Plaintiff can seek damages under 28 U.S.C. § 1983 for an uncompensated regulatory taking. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 721 (1999); see also *Lawyer v. Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298, 303 n. 5 (4th Cir. 2000) (noting that “most claims under the Takings Clause are alleged under § 1983”); *Elena v. Municipality of San Juan*, 677 F.3d 1, 7 (1st Cir. 2012) (explaining that “plaintiff may claim a takings violation via § 1983”).

The measure of damages under § 1983 is generally determined according to tort principles. See, e.g., *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986) (“We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution. Accordingly, when § 1983 plaintiffs seek damages for violations of constitutional rights, the

level of damages is ordinarily determined according to principles derived from the common law of torts.”) (footnote, citations, and internal quotation marks omitted).

The basic purpose of damages under 42 U.S.C. § 1983 is compensatory. *Piver v. Pender County Bd. of Education*, 835 F.2d 1076, 1082 (4th Cir. 1987). An award of compensatory damages under § 1983 “must be proportional to the actual injury incurred” *Saleh v. Upadhyay*, 11 Fed. Appx. 241, 261 (4th Cir. 2001) (internal quotations omitted). And under 42 U.S.C. §1988, a prevailing plaintiff in a § 1983 action is entitled to attorneys’ fees.

VII. RELEVANCE: Evidence of the County’s actions after the date of the taking is relevant to establish the character of the County’s action and Columbia Venture’s investment-backed expectations.

The County has wrongly argued that evidence of conduct after February 20, 2002, the date of the alleged taking, is not relevant. On the contrary, such conduct is directly relevant to the character of the County’s actions. *Penn Central* and *Byrd* both consider whether the government’s action was akin to a physical invasion, was targeted at a single property owner, or was taken in bad faith. Therefore, the same conduct might be relevant to both a substantive due process claim and a takings claim. The standard for establishing targeting and bad faith as part of the overall *Penn Central* analysis, however, is not equivalent to the exacting scrutiny applied to a substantive due process claim. Likewise, the County has wrongly argued that evidence of the intent behind its amendment of the Stormwater Ordinance is not relevant. Again, that evidence is relevant to the character of the County’s actions.

In addition, such evidence is relevant to the measure of just compensation and damages under § 1983.

4. A listing of exhibits, indicating those to which there is disagreement and a listing of witnesses who may be called and, if available, their address and phone number.

Exhibits: Columbia Venture expects a large volume of documents to be used as trial

exhibits, including many of which the parties have already stipulated as to authenticity. Columbia Venture plans to use the 212 exhibits it previously designated as deposition exhibits as trial exhibits bearing the same exhibit number for ease of reference and for clarity of the record. Additional exhibits introduced by Columbia Venture will begin at exhibit number 213.

Witnesses: Columbia Venture may call the following witnesses:

Carroll Barker
Brenda Carter
Roger Clinkscales
George Gregory
Thomas Hartnett
Mark Hester
Bob Hughes
Deas Manning
Cary McSwain
Ralph Pearson
Kit Smith
Doug Wendel
Thomas Wingard
Jim Wiseman
South Carolina Department of Natural Resources Records Custodian
Southern Environmental Law Center Records Custodian

Columbia Venture reserves the right to call any witness identified by either party in discovery.

5. Any unusual problems relating to evidence to be introduced, such as "Business Records as Evidence Act," hearsay, use of depositions, etc.

Columbia Venture may offer deposition designations of the following witnesses who are not residents of South Carolina and are beyond the subpoena power of the Court under Rule 32(a)(3)(B), SCRCF: Jim Wiseman and Wilson Tillotson. Columbia Venture may offer deposition designations of the following witnesses who were an "officer, director, or managing agent" of Richland County at the time of the taking of the deposition under Rule 32(a)(2), SCRCF: Milton

Pope and Gregory Pearce. Columbia Venture anticipates that many documents will be admitted under the business records or public records exception to the hearsay rule, found at Rule 803(6) and (8), SCRE. Columbia Venture will seek to have the Court take judicial notice under Rule 201, SCRE, of FEMA's Administrative Record and Court Ordered Supplemental Documents to the Administrative Record, as filed by the United States Attorneys' Office and FEMA in the United States District Court for the District of South Carolina, Civil Action No. 3:01-4100-10. Columbia Venture also expects evidentiary issues will arise with regard to the admissibility of certain of Defendants' proposed expert opinions. Issues may arise with regard to the admissibility of other evidence as well.

6. **Any unusual question or matter which should be brought to the attention of the court.**

None, other than the matters discussed herein.

7. **A statement that settlement negotiations were attempted before the date of the pre-trial hearing and the status of settlement negotiations.**

The parties engaged in settlement negotiations and participated in mediation but have not been able to resolve the dispute.

Pursuant to Rule 16(c), SCRCPP, counsel for Plaintiff understands that this pre-trial brief is solely for the use of the Court, and shall not be filed with or made a part of the record.

[signature on following page]

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By: _____



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September 6, 2012

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Columbia Venture, LLC,
Plaintiff,

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

vs.

Richland County,
Defendant.

Plaintiff Columbia Venture's Deposition Designation

Pursuant to Rule 32(a)(2), SCRPC, Plaintiff Columbia Venture, LLC hereby designates the entire deposition of Gregory Pearce, taken on October 27, 2011, omitting the following portions, to be offered during the trial of the case:

Page 73, Line 1 – Page 73, Line 11
Page 73, Line 23 – Page 74, Line 9
Page 166, Line 19 – Page 171, Line 18
Page 173, Line 9 – Page 190, Line 9.

In addition, the exhibits from Mr. Pearce's deposition are designated, as follows:

Plaintiff's 022
Plaintiff's 033
Plaintiff's 034
Plaintiff's 051
Plaintiff's 125
Plaintiff's 133
Plaintiff's 134
Plaintiff's 147
Plaintiff's 148
Plaintiff's 149
Plaintiff's 151
Plaintiff's 166
Plaintiff's 167
Plaintiff's 168
Plaintiff's 169
Plaintiff's 170

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Plaintiff's 191
Plaintiff's 192
Plaintiff's 193

Respectfully submitted,

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September 12, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Civil Action No. 2010-CP-40-8943R
	)	
Columbia Venture, LLC,	)	
	)	
Plaintiff,	)	DEFENDANT'S OBJECTIONS
v.	)	TO PLAINTIFF'S DESIGNATIONS
	)	TO DEPOSITION OF GREGORY
Richland County,	)	PEARCE
	)	
Defendant.	)	

Pursuant to Rule 32(a) of the South Carolina Rules of Civil Procedure, Defendant submits the following objections to the deposition of Gregory Pearce:

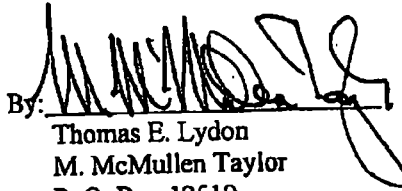
OBJECTIONS

Page 19, lines 7-9: Rule 602, lack of personal knowledge
 Page 19, lines 10-19: Rule 602, lack of personal knowledge as to time of purchase
 Page 34, lines 16-25: Rule 602, lack of personal knowledge
 Page 35, lines 1-10: Rule 602, lack of personal knowledge
 Page 38, lines 2-25: Rule 602, lack of personal knowledge
 Page 39, lines 1-16: Rule 602, lack of personal knowledge
 Page 40, lines 15-25: Rule 602, lack of personal knowledge
 Page 41, lines 1-7: Rule 602, lack of personal knowledge as to whether County staff read memorandum; Rule 701, opinion by lay witness
 Page 45, lines 7-22: Rule 602, lack of personal knowledge as to effect of Resolution on owners/purchasers
 Page 48, lines 13-25: Rule 602, lack of personal knowledge; Rule 701, opinion by lay witness; argumentative
 Page 49, lines 1-25: Rule 602, lack of personal knowledge; Rule 701, opinion by lay witness; argumentative
 Page 50, lines 1-25: argumentative; leading
 Page 51, lines 1-6: argumentative; leading
 Page 54, lines 1-25: Rule 602, lack of personal knowledge
 Page 55, lines 1-21: Rule 602, lack of personal knowledge
 Page 60, lines 12-25: Rule 802, hearsay
 Page 61, lines 1-19: Rule 802, hearsay; Rule 602, lack of personal knowledge
 Page 62, lines 1-25, Rule 602, lack of personal knowledge; leading
 Page 63, lines 1-5, leading
 Page 73, lines 1-25, protected by legislative privilege
 Page 75, lines 17-25: Rule 802, hearsay
 Page 76, lines 1-7: Rule 802, hearsay

Page 77, lines 13-25: Rule 802, hearsay
 Page 78, lines 1-25: argumentative
 Page 79, lines 1-9: argumentative
 Page 79, lines 10-25: Rule 802, hearsay
 Page 80, lines 1-7: Rule 802, hearsay
 Page 82, lines 19-25: Rule 802, hearsay
 Page 83, lines 1-25: Rule 802, hearsay
 Page 84, lines 1-13: Rule 802, hearsay
 Page 86, lines 10-25: Rule 802, hearsay
 Page 87, lines 1-17: Rule 802, hearsay
 Page 89, lines 1-6: Rule 602, lack of personal knowledge as to whether property would or would not be subject to flooding of any kind according to FEMA standards
 Page 90, lines 10-23: Rule 802, hearsay
 Page 91, lines 11-16: Rule 802, hearsay
 Page 91, lines 17-25: Rule 701, opinion by lay witness
 Page 92, line 1: Rule 701, opinion by lay witness
 Page 92, lines 18-25: Rule 802, hearsay
 Page 93, lines 1-22: Rule 802, hearsay
 Page 93, lines 23-25: Rule 602, lack of personal knowledge as to whether article was correct
 Page 94, lines 1-4: Rule 602, lack of personal knowledge as to whether article was correct
 Page 95, lines 9-23, Rule 602, lack of personal knowledge
 Page 98, lines 8-25: Rule 802, hearsay; Rule 602, lack of personal knowledge
 Page 99, lines 5-24: Rule 802, hearsay; Rule 602, lack of personal knowledge
 Page 100, lines 1-25: Rule 802, hearsay; Rule 602, lack of personal knowledge
 Page 101, lines 7-14: Rule 802, hearsay; Rule 602, lack of personal knowledge
 Page 102, lines 14-25: Rule 802, hearsay; Rule 602, lack of personal knowledge
 Page 104, lines 21-25: Rule 802, hearsay
 Page 105, lines 1-25: Rule 802, hearsay
 Page 106, lines 1-16: Rule 802, hearsay
 Page 108, lines 3-16, Rule 701, opinion by lay witness; Rule 602, lack of personal knowledge as to Risk Manager's memo
 Page 108, lines 18-25, argumentative
 Page 109, lines 1-16, Rule 701, opinion by lay witness; Rule 602, lack of personal knowledge as to Risk Manager's memo; argumentative
 Page 109, lines 17-25: Rule 602, lack of personal knowledge as to Risk Manager's memo; argumentative
 Page 110, lines 1-25: Rule 602, lack of personal knowledge; argumentative
 Page 111, lines 1-25: Rule 701, opinion by lay witness; Rule 602, lack of personal knowledge; argumentative
 Page 112, lines 1-4: Rule 701, opinion by lay witness; Rule 602, lack of personal knowledge; argumentative
 Page 115, lines 1-11: Rule 701, opinion by lay witness
 Page 118, lines 4-20: Rule 701, opinion by lay witness; leading

Page 127, lines 6-23: Rule 602, lack of personal knowledge; protected by legislative privilege
 Page 130, lines 1-25; protected by legislative privilege
 Page 137, lines 1-25: Rule 802, hearsay
 Page 137, lines 9-25: Rule 602, lack of personal knowledge as to who wrote the ordinance
 Page 138, lines 1-3: Rule 602, lack of personal knowledge as to who wrote the ordinance
 Page 138, lines 19-25: calls for legal conclusion
 Page 139, lines 1-25: calls for legal conclusion
 Page 140, lines 1-25: calls for legal conclusion
 Page 141, lines 1-25: calls for legal conclusion
 Page 151, lines 23-25: Rule 602, lack of personal knowledge
 Page 154, lines 1-25: Rule 802, hearsay
 Page 155, lines 1-25: Rule 802, hearsay
 Page 155, lines 23-25: Rule 602, lack of personal knowledge
 Page 156, lines 1-4: Rule 602, lack of personal knowledge
 Page 156, lines 7-25: Rule 602, lack of personal knowledge
 Page 157, lines 1-25: Rule 602, lack of personal knowledge
 Page 158, lines 1-11: Rule 602, lack of personal knowledge
 Page 160, lines 2-25: leading; argumentative
 Page 161, lines 17-25: Rule 602, lack of personal knowledge
 Page 162, lines 15-22: Rule 602, lack of personal knowledge
 Page 166, lines 19-25: protected by legislative privilege
 Page 167-190: protected by legislative privilege
 Page 195, lines 11-18: leading; Rule 602, lack of personal knowledge as to Columbia Venture's understanding
 Page 195, lines 22-25: leading; argumentative; protected by legislative privilege
 Page 196, lines 1-25: leading; argumentative; protected by legislative privilege
 Page 197, lines 1-23: leading; argumentative; protected by legislative privilege
 Page 198, lines 1-4: protected by legislative privilege
 Page 198, lines 8-25: leading; argumentative
 Page 199, lines 1-25: leading; argumentative
 Page 199, lines 1-25: leading; argumentative
 Page 200, lines 1-25: leading; argumentative; Rule 602, lack of personal knowledge
 Page 201, lines 1-25: leading; argumentative; Rule 602, lack of personal knowledge
 Page 202, lines 1-25: leading; argumentative; Rule 602, lack of personal knowledge
 Page 203, lines 1-25: leading; argumentative
 Page 204, lines 1-25: leading; argumentative; protected by legislative privilege
 Page 205, lines 1-25: argumentative; protected by legislative privilege
 Page 206, lines 1-25: argumentative; leading
 Page 207, lines 1-25: argumentative, leading; protected by legislative privilege

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September 14, 2012

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Columbia Venture, LLC,
Plaintiff,

vs.

Richland County,
Defendant.

Civil Action No. 2010-CV-40-8943R

FILED
2012 SEP 21 PM 3:28
JACQUELINE L. BISHOP
C.C.P. & G.S.

PLAINTIFF'S MOTION TO RECONSIDER, ALTER, OR AMEND

Pursuant to Rule 59(e), SCRCP, Plaintiff Columbia Venture, LLC ("Columbia Venture"), moves the Court to reconsider, alter, or amend the Court's Order Granting In Part and Denying in Part Defendant's Motions for Partial Summary Judgment (the "Order"). The Order was signed on September 8, 2012, and entered by the Clerk of Court on September 11, 2012. For the reasons set forth in Columbia Venture's Omnibus Memorandum In Opposition To Defendant's Various Motions for Summary Judgment ("Columbia Venture's Omnibus Memorandum") and below, the Court should reconsider the Order, withdraw the Order, and enter an amended Order as described below.

This motion is based on Columbia Venture's Omnibus Memorandum, memorandum files and attachments, arguments presented at the hearing on July 18, 2012, comments on the proposed Order, and all other pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits.

- I. It is respectfully submitted that this Court should reconsider its Order because it misapplies the applicable standards for summary judgment, ignores genuine disputes as to material facts, does not view the evidence in the light most favorable to Columbia Venture, and impermissibly draws inferences in favor of the County.

In a claim based on federal law, the standard for summary judgment is the federal standard. *Bean v. S.C. Cent. R.R. Co.*, 392 S.C. 532, 545, 709 S.E.2d 99, 105-06 (Ct. App. 2011). Rule 56(c), FRCP, provides summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” In considering a motion for summary judgment, the court will view all evidence in the light most favorable to the non-moving party. *Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir. 1991).

Similarly, Rule 56(c), SCRCF, provides that summary judgment may be granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009).

In the Order, however, the Court misapplies these applicable standards for summary judgment, overlooks or elides genuine disputes as to materials facts, does not view the evidence in the light most favorable to Columbia Venture, and impermissibly draws inferences in favor of Defendant Richland County, South Carolina (the “County”). As specific examples of instances in which the Court does so, and without limitation, Columbia Venture offers the following illustrative list:

A. The Order includes a description of the National Flood Insurance Program (“NFIP”) that is not contained within Columbia Venture’s factual statement and with which Columbia Ventures does not agree because, among other things:

1. The NFIP is a voluntary program in which local communities, such as the County, are free to participate or not.

2. The NFIP provides that "flood insurance shall not be sold or renewed under the [NFIP] within a community, unless the community has adopted adequate flood plain management regulations consistent with Federal criteria." 44 C.F.R. § 60.1(a).

3. The NFIP further requires that, for participating communities, the applicable regulations must be applied uniformly. "[A] community's flood plain management regulations . . . must be legally-enforceable, applied uniformly throughout the community to all privately and publicly owned land within flood-prone, mudslide (i.e. mudflow) or flood-related erosion areas, and the community must provide that the regulations take precedence over any less restrictive conflicting local laws, ordinances or codes." *Id.* § 60.1(b).

4. Regulations under the NFIP do not define the floodway or regulatory floodway as "the area within a floodplain posing the greatest danger to public safety" (Order at 3) but rather "the channel of a river or other water course 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.

5. The NFIA and NFIP regulations do not prohibit building in a floodplain or floodway. *E.g.*, 44 C.F.R. § 60.3(c)(1) ("[A]ll new construction and substantial improvements of residential structures within Zones A1-30, AE and

AH [floodplain] zones on the community's FIRM [must] have the lowest floor (including basement) elevated to or above the base flood level")

6. Regulations under the NFIP permit "encroachments, including fill, new construction, substantial improvements and other development within the adopted regulatory floodway [if] it has been demonstrated through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood discharge." 44 C.F.R. § 60.3(d) (3).

7. Richland County's Stormwater Management, Erosion, and Sediment Control Ordinance as amended on April 17, 2001 (the "Stormwater Ordinance"), and so interpreted by Richland County after that date, differs from the NFIP regulations by prohibiting Columbia Venture from placing any levees, dikes, fill materials, structures, or obstructions within the regulatory floodway while allowing its immediate neighbors to build substantial new structures within the regulatory floodway.

8. By its Stormwater Ordinance, as interpreted by Richland County after April 17, 2001, the County prohibited Columbia Venture from performing any repair or maintenance on its levees that would result in the levees being higher or wider than they were before the need arose for such repair or maintenance.

B. The Order accepts at face value the County's proffered explanation for its interpretation of the word "impede" in the Floodway Provision (Order at 8).

C. The Order further accepts at face value the County's description of and explanation for the allegedly "controversial" nature of Columbia Venture's project, including a contested reference to "attention" to the "enormous size" of the proposed project and other "important public policy issues" (Order at 11).

D. The Order disregards genuine issues of material fact and makes inferences that favor the County in describing the reason for and nature and scope of the County's appeal of the proposed flood data in December of 1999 (Order at 11-13).

E. The Order likewise elides genuine issues of material fact and makes further inferences in favor of the County in describing the County's interpretation of and response to the word "impede" in the Floodway Provision (Order at 14-15) and in describing the exemption of the City of Columbia and Heathwood Hall Episcopal School from the no-impede standard (Order at 15).

F. The Order accepts the County's proffered rationale for the April 17, 2001 amendment of the Stormwater Ordinance to prohibit any construction in a floodway or improvements to the levees, an amendment which excepted Columbia Venture's neighboring landowners (Order at 15-17). In doing so, the Order disregards evidence submitted by Columbia Venture that the amendment to the Stormwater Ordinance was targeted at Columbia Venture and drafted by opponents of Columbia Venture's development. The Order does not address any government interests served by the Stormwater Ordinance's prohibition on making the levees taller or wider, and indeed no legitimate basis for such a prohibition has been offered by the County.

G. The Order recites testimony from Richland County Council Member Kit Smith that her directorship with the Southern Environmental Law Center, an opponent of Columbia

Venture's development plans, posed no conflict of interest (Order at 18). Conversely, the Order omits evidence submitted by Columbia Venture of political animus directed at Columbia Venture and its development plans by this council member.

H. The Order accepts as true the County's proffered justification for the December 5th, 2006 vote by County Council to adopt the Base Flood Elevations established by the 1994 flood maps, but nonetheless use the same floodway established in the August 2001 FIRM, contrary to the federal judicial order vacating the floodway (Order at 18-23). Moreover, the Order wholly credits the County's alleged distinction between the 2005 Order and the 2005 Judgment, as well as the County's claim that the issue was "procedural error" rather than "technical merits" (Order at 18-19). The Order omits evidence submitted by Columbia Venture that County regulations prohibit adopting a floodway that is unrelated to the BFE, and evidence that Columbia Venture was the only property owner, i.e. potential permit applicant, of concern to Richland County during this period.

II. It is respectfully requested that this Court reconsider its conclusions of law regarding the application of the substantive due process standard and its rejection of cases relied upon by Columbia Venture.

The Order misapplies the applicable standards for substantive due process in numerous ways, for the reasons set forth in Columbia Venture's Omnibus Memorandum.

In addition, and without limitation, the Order ignores binding precedent providing content to the analysis of whether a government act is arbitrary, unreasonable, and not substantially related to a legitimate governmental interest. Specifically, a court should consider whether (1) the action is tainted with fundamental procedural irregularity; (2) the action is targeted at a single party, and (3) the action deviates from or is inconsistent with the defendant's regular practice. *MLC Auto., LLC v. Town of S. Pines*, 532 F.3d 269, 281 (4th Cir. 2008); *see also A Helping*

Hand, LLC v. Baltimore County, 515 F.3d 356 (4th Cir. 2008); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983).

The Order further errs in considering each of the County's actions in an atomistic fashion, with separate headings and discrete analysis of individualized events, rather than recognizing a continuing, sustained course of conduct designed and intended to thwart Columbia Venture's development plans.

The Order errs in continuing to draw factual inferences in favor of the County and summarily dispensing with genuine disputes of material facts. To cite a single example, and without limitation, the Order concludes that an internal County memorandum questioning the legitimacy of the County's appeal was "immaterial" and could support "no reasonable inference" impugning the County's intent in filing the appeal (Order at 28).

Finally, the Order never addresses one of Columbia Venture's core arguments, which is that the County imposed much more onerous local standards than are required or even permitted by the NFIP. Instead, the Order considers the adoption of the FEMA flood data as if such adoption resulted in only the imposition of the restrictions inherent in the NFIP (Order at 32-33). Columbia Venture has argued, presented evidence, and identified genuine disputes of material fact that the County voluntarily and intentionally went beyond those standards in seeking to completely block Columbia Venture's development plans.

CONCLUSION

For all of the foregoing reasons, and for the reasons and grounds set forth in Columbia Venture's Omnibus Motion And Omnibus Memorandum In Opposition To Defendant's Various Motions For Summary Judgment and arguments advanced during the hearing on this motion and memorandum, all of which are incorporated herein by reference, it is respectfully requested that

this Court issue an amended order denying the County's various motions for summary judgment, or, in the alternative, issue an amended order incorporating the issues noted above.

In addition to the arguments and materials listed above, Columbia Venture reserves the right to file additional materials and a memorandum of law in support of this motion.

Respectfully submitted,

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September 21, 2012

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.

PLAINTIFF'S PROPOSED ORDER

I. Introduction

Plaintiff, Columbia Venture, LLC ("Columbia Venture"), seeks to recover just compensation and damages for a regulatory taking of its property located adjacent to the Congaree River in Richland County, South Carolina, that occurred on February 20, 2002. On that date, the defendant, Richland County ("County" or "Richland County"), adopted a new effective Flood Insurance Rate Map ("FIRM") that for the first time placed approximately 70% of Columbia Venture's property within an effective regulatory floodway. County ordinances in effect on that date, which had been amended or reinterpreted in the three years since Columbia Venture purchased its property, prohibited Columbia Venture from placing any structures within the newly expanded regulatory floodway and from improving the system of levees protecting its property from flooding. The combination of the County's ordinance adopting the February 20, 2002 effective FIRM and the amended ordinance prohibiting the placement of any structures or levee improvements in the regulatory floodway eliminated Columbia Venture's plans to

develop its property as a mixed use residential and commercial development behind upgraded and certified levees.

In its Amended and Supplemental Complaint filed October 5, 2009, Columbia Venture asserts claims under the United States and South Carolina Constitutions for a taking of its property without the payment of just compensation and for violations of its substantive due process rights. Columbia Venture also asserts a claim under 42 U.S.C. § 1983. Columbia Venture also seeks pre-judgment interest and recovery of its attorneys' fees and costs.

This matter was referred to me by the Order of The Honorable James Barber, Chief Administrative Judge for the Fifth Judicial Circuit, filed May 22, 2012.

In prior rulings, the Court denied the County's motion for summary judgment that all of Columbia Venture's claims were not ripe for decision. The Court granted, however, the County's motions for summary judgment eliminating Columbia Venture's substantive due process claims and denying Columbia Venture's claim (and motion for summary judgment) that the County's actions amounted to a physical taking of Columbia Venture's property. Columbia Venture's remaining claims were tried by the Court sitting without a jury beginning on September 10, 2012, pursuant to the Order of Reference.

During the course of the trial, the Court heard and considered the testimony of sixteen witnesses: nine called by Columbia Venture (Deas Manning, George Gregory, Robert Hughes, John Lessley, Carroll Barker, Ralph Pearson, Thomas Wingard, Thomas Hartnett, and J. Robert Calliham) and seven called by the County (George Knight, Mark Hester, Lisa Jones, Kit Smith, Cary McSwain, Michael Criss, and Charles Compton) over a period of fourteen days; received and considered a total of 355 trial exhibits; received

and considered the designated deposition testimony of five witnesses (Gregory Pearce, Milton Pope, Wilson Tillotson, Douglas Wendel, and James Wiseman); and received and considered 139 designated deposition exhibits. The parties also provided the Court with extensive pre-trial briefs and copies of pertinent cases and other authorities cited in the parties' briefs.

Pursuant to Rule 52, SCRCP, the Court publishes its finding of fact and conclusions of law. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent any conclusions of law constitute findings of fact, they are so adopted.

II. Findings of Fact

A. The Property and the Levee System Prior to 1998. Columbia Venture's property consisted of approximately 4,400 acres along the eastern bank of the Congaree River in Richland County, South Carolina, adjacent to the city limits of the City of Columbia ("Property"). Tr. 21-22; PTE 225.¹ Prior to Columbia Venture's purchase of the Property on February 19, 1999, the Property had been owned for decades by the late Mr. Burwell Manning and other affiliated owners. Tr. 33-34. In the 1960s and 1970s, Mr. Burwell Manning improved the Property with a system of levees in three separate levee sections to prevent the Property from flooding (the "Manning Levees" or "Levees"). Tr. 37-38. Although some portions of the Manning Levees date back to the early 1900s (*see* PTE 127 at CV014314), the bulk of the Levees were built in the 1960s and 1970s by Mr. Burwell Manning and Mr. Frank McCauley, a registered surveyor, vice president, and development coordinator for General Construction Utilities, a construction

¹ Citations to the trial transcript are designated as "Tr. ____." Plaintiff's and Defendant's trial exhibits are designated "PTE" and "DTE," respectively.

company owned by Mr. Burwell Manning that did highway work, built airports and industrial park infrastructure, and did work on the City of Columbia's wastewater treatment plant. Tr. 27, 38-39. The testimony indicated that there was no permitting process for levee construction at the time Mr. Burwell Manning and Mr. McCauley built the Levees. Tr. 40. Mr. Burwell Manning and Mr. McCauley used the U.S. Army Corps of Engineers' manual on levee construction and guidance from the U.S. Department of Agriculture in building the Levees, according to Mr. Burwell Manning's son, Mr. Deas Manning ("Mr. Manning"), and correspondence from Mr. Burwell Manning. Tr. 40-41; PTE 236 at CV014024.

As a teenager, Mr. Manning worked on the Levees during their construction and has been involved with maintaining the Levees for over 30 years since their completion and through the present day as the Managing Agent of Columbia Venture. Tr. 47, 54-55. Mr. Manning worked for his father until 1984, has been engaged in real estate development in Richland County since the 1980s, represented his father as the broker in the sale of the Property to Columbia Venture, and served as an advisor to his father during the time he was a member of Columbia Venture. Tr. 14-20, 40, 48-49, 135. He has successfully developed large subdivisions and apartment complexes in Richland County and has had extensive experience in dealing with County government and staff both as a developer seeking permits and zoning changes and as a past officer of the Home Builders Association. Tr. 15-20; *see generally* Tr. 90-125. Mr. Manning also has served as a member of the Richland County Planning Commission, which is involved with zoning and land use planning for the County. Tr. 20, 2634.

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

During the time Mr. Burwell Manning owned the Property, he used it primarily for agricultural and recreational purposes. Tr. 42. He built the Levees to protect his agricultural operations and with the additional and ultimate goal of preparing the Property for large-scale development. Tr. 43; *see also* PTE 520 (reserving the right of Burwell Manning to "enter onto" the Levees sold to the City for "such purpose" as later raising the height of the Levees "by [Burwell Manning] at his expense."). Mr. Manning testified that in 1974, he took a trip to St. Louis, Missouri to better understand development using levee systems, including viewing a major flood on the Mississippi River and evaluating how highways impact levee systems. Tr. 35-36. Mr. Manning also testified that when Interstate 77 was constructed through the Property, his father negotiated with and eventually entered into an agreement with the South Carolina Department of Transportation to insure that the height of the interstate would be built to accommodate a levee system built to the 500-year flood level instead of the 100-year flood level. Tr. 64-

65. He also testified that soils from the Property were found suitable to use and were, in fact, used to construct the I-77 embankments that transect the Property. Tr. 344. He further testified that the Levees are approximately 20 feet in height above grade with a road on top approximately 45 feet wide and extend for over 15 miles. Tr. 37, 61; PTEs 217, 218, 219, 220, 221, 222; *see also* PTE 247 at CVMcNair002516 (length of all three Levee sections is 84,000 feet or 15.9 miles).

B. The National Flood Insurance Program and Richland County's Participation Therein. Richland County is a participant in the National Flood Insurance Program ("NFIP"), which is administered by the Federal Emergency Management Agency ("FEMA") pursuant to the National Flood Insurance Act ("NFIA"). Tr. 2250-51; *see generally* 42 U.S.C. § 4001 *et seq.*² The NFIP is a voluntary program providing flood insurance to residents of participating communities that is enabled by the NFIA. 42 U.S.C. § 4011. In the context of administering the NFIP, FEMA publishes FIRMs and Flood Insurance Studies ("FISs") that are adopted by local communities, such as Richland County, that elect to participate in the NFIP. *See* 42 U.S.C. § 4101. FEMA also prescribes minimum standards (contained in 44 C.F.R. § 60.3)³ for floodplain management regulations that must be adopted by communities participating in the NFIP. *See* 42 U.S.C. § 4102.

² I note that many provisions of the NFIA substantively changed in mid-2012. However, citations to the NFIA in this Order are to those provisions as they existed on the dates of the events referenced herein (chiefly 1998-2002). The then-existing statutory and regulatory schemes of the NFIA and NFIP are material to the factual and legal findings of this Court.

³ Citations to the Code of Federal Regulations in this Order are to the October 1998 version of FEMA's regulations, as those were the C.F.R. provisions being interpreted in connection with Columbia Venture's development.

Under its statutory mandate, FEMA focuses its flood mapping efforts on the base flood, which is defined in the NFIP regulations as the flood having a one percent chance of being equaled or exceeded in any given year. 44 C.F.R. § 59.1. The base flood is sometimes referred to as the 100-year flood. Tr. 1191. As FEMA has stated: “The NFIP is based upon the 100-year flood as the standard level of risk. ... Mapping flood hazards based on a flood less probable than the 100-year event [e.g., a 500-year flood] would contradict the NFIP’s statutory mandate and be inconsistent with decades of Nationwide Practice.” PTE 204 at 29.

Under the NFIA, FEMA is authorized to determine flood elevations for land use purposes that are used to delineate the floodplain boundaries on the various FIRMs that FEMA produces. 42 U.S.C. §§ 4102 & 4104. In general, FEMA uses hydrologic models to determine the volume of the base flood for a particular river or stream, which is expressed in cubic feet per second, and hydraulic models to delineate the surface area of the floodplain and determine the water surface elevations of the base flood at various cross sections along the river or stream that are called base flood elevations (“BFEs”). See Tr. 1190-92, 1230-31. FEMA then uses the same hydraulic models to determine the surface area of the regulatory floodway, which under FEMA regulations is defined to be the channel of the river and the adjacent land area 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. The minimum designated height is currently, and was at all times pertinent to this matter, one foot. 44 C.F.R. § 60.3(d)(2). The hydraulic models used by FEMA have the capacity to generate floodway boundaries based on a target surcharge above the BFE. Tr. 1234-35. A target surcharge of one foot

would generate the minimum floodway currently prescribed by FEMA's NFIP regulations. 44 C.F.R. § 60.3(d)(2). A target surcharge of less than one foot would generate a more expansive floodway. Tr. 1232-33. Local communities participating in the NFIP are required to adopt the minimum one-foot surcharge floodway but are free to adopt a more expansive floodway, which can be achieved by using a surcharge of less than one foot (e.g., six inches). Tr. 1232-33. At all times relevant to this matter, Richland County's applicable ordinances defined the regulatory floodway by reference to the FEMA surcharge minimum of one foot. PTEs 230 § 8-54(s), 374 § 8-5 at DEF-00012747.001; Pope Tr. 71-72.⁴ FEMA defines a floodplain or flood-prone areas as "any land area susceptible to being inundated by water from any source." 44 C.F.R. § 59.1. Similarly, the County's ordinances define a floodplain as "[t]he areas adjoining a river, stream, watercourse, lake, or other body of standing water that have been or may be covered by floodwater," (PTE 250A at DEF-00012800.002) and a flood prone-area as "[t]he area of land susceptible to being inundated by a flood." PTEs 230 § 8-54(n), 374 at DEF-00012746.001.

The NFIP regulations do not prohibit land owners from building in the floodplain or floodway. Tr. 1236; 44 C.F.R. § 60.3. 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

⁴ Citations to deposition designations are cited as "Last Name Tr. ____."

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. Tr. 1312-14. 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. Tr. 2650-52. Since February 20, 2002, when the campus of Heathwood Hall, Columbia’s wastewater treatment facility, and most of Columbia Venture’s Property were placed into an effective regulatory floodway, Heathwood Hall has constructed substantial buildings, including a gymnasium (PTEs 108, 517), a middle school (PTEs 109, 516), and a chapel (PTE 110) on a no-rise showing. Tr. 450-54, 2254; Pope Tr. 137-38. It is more expensive to elevate construction to meet a no-rise standard than to build on grade. Tr. 2651-52.

On January 19, 1994, Richland County adopted as the official, effective FIRM for the County the FIRM issued by FEMA on that date. *See* PTE 229. The Manning Levees, although substantial, were not certified levees, and in the effective FIS, revised July 17, 1995,⁵ FEMA noted that failures of the Manning Levees were expected to occur with major floods. PTE 003 at 8; Tr. 81-82. The 1994/1995 effective FIS recognized that a flood on the Congaree River would be “affected by” the Levees. PTE 003 at 8. Accordingly, in 1994/1995 FEMA designated the land protected by the Manning Levees

⁵ The January 19, 1994 effective FIRM and the July 17, 1995 effective FIS will be referenced hereinafter as the “1994/1995 effective FIRM and FIS” and separately as the “1994/1995 effective FIRM” or “1994/1995 effective FIS.”

as being in a floodplain (Zone AE)⁶ but not a regulatory floodway. PTE 229. The FIRM also includes the BFEs within the various cross sections (A through E) that transect the Levee. Tr. 1253, 1263; PTE 229. 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. Tr. 1438-39; PTEs 003, 229. No portion of the Manning Levees was included in the regulatory floodway on the 1994/1995 effective FIRM. Tr. 79. The Manning Levees and the land protected by the Levees had never been included in the regulatory floodway in any of FEMA's prior final mapping, dating back to 1977. Tr. 1437-38; PTE 003 at "Community Map History" after page 67.

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; PTE 018. 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

⁶ FEMA defines Zone AE as a special flood hazard area inundated by the 100-year flood in which base flood elevations have been determined. PTE 229. "Zone AE is the flood insurance rate zone that corresponds to the 100-year floodplain that are determined in the Flood Insurance Study by detailed methods. In most instances, whole-foot base flood elevations derived from the detailed hydraulic analysis are shown at selected intervals within this zone." PTE 003 at 65-66.

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.” PTE 230 § 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.

Richland County has not always been a participant in the NFIP. Mr. Cary McSwain, the former County Administrator, testified that when he began his tenure at the County in 1994, Richland County was not participating in the program, although the County had been a participant in the past. Tr. 2250-51. The County subsequently began participating in the NFIP again. Tr. 2250-51. Richland County has adopted ordinances designed to comply with FEMA’s floodplain management regulations as required for NFIP participants. *See, e.g.*, PTEs 056, 057. Relevant to the present case is the County’s Drainage, Erosion, and Sediment Control Ordinance (referred to in both documents and testimony as the “Stormwater Ordinance”) enacted July 19, 1994, which prohibits fill materials, structures, or obstructions within a regulatory floodway “that will impede the free flow of water during times of flood ...” PTE 230 § 8-62(h). This ordinance further

states that “[a]ll applicable regulations of the National Flood Insurance Program are incorporated by reference herein.” PTE 230 § 8-62(i). Similarly, the County’s zoning ordinance prohibits filling or 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.” PTE 250A § 26-73.4. The zoning ordinance defines the floodplain and floodway by specific reference to “the official Flood Boundary Floodway Maps (Dated January 19, 1994), the accompanying Flood Insurance Study (Dated January 19, 1994), and any revisions thereto.” PTE 250A § 26-73.3(2) & (3).

At all times pertinent to Columbia Venture’s acquisition of the Property, the County Engineer, Ralph Pearson, P.E., interpreted the words “impede the free flow of water” to be consistent with the FEMA “no-rise” standard contained in 44 C.F.R. § 60.3(d)(3). Tr. 1315; PTE 051 at DEF-00002253. Mr. Pearson confirmed that it was his office’s position that “if you could demonstrate a no-rise, then you weren’t impeding the free flow of water.” Tr. 1315.

C. The FEMA floodplain remapping efforts in 1998, Mr. Burwell Manning’s efforts to sell the Property before Burroughs and Chapin’s involvement, and early due diligence related thereto. On June 5, 1998, FEMA released a revised preliminary FIS and FIRM for Richland County that showed much of the Property to be in a proposed regulatory floodway. Tr. 160-61; PTEs 010, 237. Previously, on February 12, 1998, FEMA had issued a revised preliminary FIS and FIRMs for Lexington County. PTEs 234, 235. The BFEs for the Congaree River floodplain in Lexington County were determined by FEMA based on an assumption by FEMA that the Manning Levees would

not fail during a base flood. Tr. 1242-43; PTE 235 at COSD001-00688. The floodway in Lexington County, as mapped by FEMA from 1998 through 2002, did not significantly change throughout the mapping process despite major revisions made by FEMA to the regulatory floodway in Richland County during this same time period. *Compare* PTEs 234, 283, 302, 335, 378 (Lexington FIRMs) *with* PTEs 238, 287, 306, 337, 381 (Richland FIRMs); Tr. 1257, 1263-65.

In revising flood maps under the NFIA, FEMA first issues a revised preliminary FIS and FIRM. Pursuant to the NFIA, the BFEs reflected in the revised preliminary FIS and FIRM must be published in the *Federal Register* and a local newspaper in order to start a 90-day appeal and comment period. 42 U.S.C. § 4104. After resolving all appeals, FEMA will issue a letter of final determination (“LFD”) and the final FIS and FIRM, which the local community must adopt six months after the date of the LFD. *See* PTE 523 at DEF-00001691-92. FEMA has published official guidance on the use of data from revised preliminary studies by local communities participating in the NFIP. PTE 031 at DEF-00000293-99.

Pursuant to FEMA’s guidance, communities can always use the effective FIS and FIRM when enforcing floodplain management regulations for areas that have been previously studied in detail, such as those areas designated as Zone AE. PTE 031 at DEF-00000296. For Zone AE, “[t]he NFIP floodplain management criteria do not require communities to use BFE and floodway data from a draft or preliminary Flood Insurance Restudy” *Id.* (emphasis in original). In certain instances, however, FEMA recommends that communities use preliminary data as the best available data. FEMA recommends that communities use the BFEs and floodway data from preliminary studies

where the BFEs increase over the BFEs in the effective FIS and FIRM. *Id.* However, “[i]n cases where BFEs decrease, the community should not use this [preliminary] information to regulate floodplain development until the LFD has been issued” *Id.* (emphasis in original).

On June 23, 1998, FEMA wrote a letter to the County regarding the use of the June 5, 1998 preliminary data. DTE 146. FEMA stated: “The BFEs of the study will not replace those provided for streams addressed in the effective FEMA FIS, and as shown on the FIRMs, until and unless the study is incorporated into your Flood Damage Prevention Ordinance. Nonetheless, the community should utilize the elevations in the study for regulatory purposes if they exceed those identified on the current FIRMs.” *Id.* at DEF-00000011 (emphasis in original); *see also* PTE 031 at DEF-00000296. Mr. McSwain testified that FEMA’s guidance to the County on which FIRM to use was what the County should do. Tr. 2583-85. The BFEs on the June 5, 1998 revised preliminary FIRM and FIS were generally higher than the BFEs on the County’s 1994/1995 effective FIRM and FIS. Tr. 1299; PTEs 003 at Floodway Data Congaree River-Saluda River (after page 25), 010 at COSD001-00598. Consequently, it would be appropriate under FEMA’s standards to use the June 5, 1998 revised preliminary data for regulatory enforcement. Tr. 1298-99.

Before it publishes a revised preliminary FIS, FIRM, and the associated BFEs to start the comment and appeal period, FEMA meets with local officials and other interested citizens to discuss the revised preliminary FIS and FIRM. *See* DTE 146. Following its normal practice, FEMA met with officials of Richland County and others on July 8, 1998, to discuss the revised preliminary FIS and FIRM that FEMA released on

June 5, 1998. PTE 011. Mr. McSwain testified that there was “considerable immediate reaction, negative adverse reaction” to the June 5, 1998 revised preliminary FIRM. Tr. 2545. At the July 8, 1998 meeting, various questions were asked about the methodology behind the June 5, 1998 revised preliminary FIRM, especially concerning the Levees. PTE 011 at DEF-00000015-17. When asked “[w]hat would have to be done to upgrade the levees to meet FEMA’s [sic] criteria,” FEMA’s notes state: “FEMA’s levee criteria are spelled out in 44 CFR 65.10.” PTE 011 at DEF-00000015. At the July 8, 1998 meeting and in conformity with FEMA’s guidance, the County acknowledged that it was using the June 5, 1998 revised preliminary data for regulatory and permitting purposes. PTE 011 at DEF-00000017.

Both Richland County officials and Mr. Burwell Manning had learned of the existence of the revised preliminary FIRM prior to the July 8, 1998 meeting. PTEs 012, 236. Mr. Burwell Manning had been actively marketing the Property for sale for development purposes, and Mr. Manning testified that the Mannings learned of the proposed floodway on the Property in connection with due diligence by a prospective purchaser performed for the potential purchase of the Property in the late spring and early summer of 1998. Tr. 155. On May 26, 1998, Mr. Burwell Manning sent a letter to the Richland County Council stating that the Property would be “sold for a total new town development which will have 20± uses – 3 golf courses, parks, shopping mall, recreational facilities, etc. . . . and the total investment could reach one billion dollars” PTE 236 at CV014024. Mr. Burwell Manning asked the County to oppose any proposed expansion of the floodway and indicated his desire for “permits to design and upgrade my levees.” *Id.* at CV014025. Mr. Manning testified that soon after his father

sent the May 26, 1998 letter, Mr. McSwain contacted him for more specific information on the development project possibilities. Tr. 166. On May 29, 1998, Mr. Manning faxed the requested information to Mr. McSwain, including an "Information Sheet" for a "4,500 Acre Master Planned Development," including a variety of contemplated uses. PTE 008 at DEF-00000004. The fax also included a discussion of the "FEMA Floodway Issue" and reiterated the Mannings' request that Richland County "[o]ppose any change in the floodway lines." *Id.* at DEF-00000005.

Following the July 8, 1998 meeting with FEMA, Mr. McSwain wrote to FEMA on July 14, 1998, "request[ing] officially that the results" of the June 5, 1998 revised preliminary FIS and FIRM "be put on hold" PTE 012 at DEF-00000022. Mr. McSwain identified the "main area of concern" as "the existing, in place, levee system on the Congaree River protecting a substantial portion of land within Richland County." *Id.* Mr. McSwain's letter further stated: "Given the magnitude of the changes, placement of over 5,000 acres into a floodway designation and the adverse impact this could cause on the economic viability of this County, we would request the review process be put on hold." *Id.* at DEF-00000023. Mr. Burwell Manning was carbon copied on Mr. McSwain's letter to FEMA. *Id.* On July 22, 1998, *The State* newspaper reported that Richland County Council members were very upset with the extensive proposed floodway and its potential impact on economic development in the County. PTE 239. FEMA agreed by letter dated July 28, 1998, to Richland County's request to withhold publication of and "put on hold" the June 5, 1998 revised preliminary FIS and FIRM. PTE 013.

D. Due diligence prior to Columbia Venture's purchase of the Property on February 19, 1999, and involvement of Richland County therein. Mr. George Gregory, General Counsel for Burroughs and Chapin Company, Inc. ("Burroughs and Chapin"), was also in attendance at the July 8, 1998 FEMA meeting, along with several others from Burroughs and Chapin. Tr. 887-88. Burroughs and Chapin is a development company headquartered in Myrtle Beach, South Carolina, and has developed various substantial commercial, residential, and recreational projects, ranging from "large acreage projects in the thousands of acres, to big-box retail, to restaurant development, to mall development, ... [to] hotels and entertainment venues," such as Broadway at the Beach. Tr. 668; *see also* Wendel 7/12/11 Tr. 10. Mr. Gregory holds a BS degree with an emphasis in finance and an MBA from Winthrop University, an MA in accounting from the University of South Carolina, and a JD from the University of South Carolina School of Law. He worked for the Touche Ross accounting firm in Atlanta and the Nelson Mullins law firm in Columbia before going to work for Burroughs and Chapin in 1995. Tr. 664-67.

Mr. Gregory testified that Burroughs and Chapin had learned of the possible opportunity to purchase the Property shortly before the July 8, 1998 meeting, and, at that time, Burroughs and Chapin was in the beginning of its due diligence process. Tr. 888-89. Mr. Gregory was assigned the task of coordinating the due diligence efforts necessary for Burroughs and Chapin to go forward with the purchase of the Property, including resolving the issues relating to the Manning Levees. Tr. 683. In the summer and fall of 1998, Mr. Gregory led a due diligence team comprised of himself, other employees of Burroughs and Chapin, employees of Lockwood Greene Engineers, Inc.

("Lockwood Greene"), and members of the Manning family. Tr. 683-84. Lockwood Greene was an international engineering firm headquartered in Spartanburg, South Carolina. Tr. 701.

In his testimony, Mr. Gregory described the vision that Burroughs and Chapin held for acquiring and developing the Property. Burroughs and Chapin saw a rare opportunity to develop a multi-phased, mixed-use development on approximately 4,500 acres of well maintained property located within ten minutes of the State Capitol complex and the University of South Carolina campus and football stadium. The Property had over two and a half miles of riverfront, was traversed by Interstate 77 with access at the Bluff Road interchange and an opportunity to place another interchange on the Property, and had two airports located within five minutes of the Property. Tr. at 670-71; PTE 264 at CVMcNair002445. Mr. Gregory further testified that there were multiple options for the Property given its size, the infrastructure in place, and the proximity to downtown Columbia. Tr. 670-77.

Mr. Gregory testified that Burroughs and Chapin applied its own development industry knowledge and engaged in general market research, including inquiries in the Columbia area, as part of its early due diligence to determine whether the project was feasible. Tr. 858-64. As part of the initial planning process, Mr. Gregory testified that Burroughs and Chapin engaged LandDesign, Inc., a well known land planning firm from North Carolina, to develop a preliminary master plan. Tr. 687-89. LandDesign's preliminary plan included athletic facilities for the University, conference centers, a variety of residential options, a research park, hotels, offices, retail centers, golf courses, and various recreational options. PTE 264 at CVMcNair002455. Specifically,

Burroughs and Chapin's early concept documents envisioned: "motels, fast food restaurants, convenience stores, banks, service centers, offices and [an] information center at the prime interchange at Bluff Road and I-77;" "hotels, restaurants, retail, conference center, meeting space offices and entertainment" at an underpass west of I-77; "hotel sites, an outlet mall, specialty retailing, theme restaurants, entertainment conference center and meeting space" around a 60-acre lake at an underpass east of I-77; high-rise office buildings along interstate frontage; "a research and development style park and corporate park campuses" west of I-77; a "South Campus (USC) Park and continuing educational buildings, [] possible coliseum site and related facilities;" "[o]utward bound schools nature area, river access, fishing, parks, trails and camping area;" residential areas, including condominiums and student housing; a marina village, river access, and recreation parks; green areas, greenways, roadways, wetlands and lake and jogging paths, lakes and supporting facilities; three 18-hole golf courses; and a commercial driving range. Tr. 672-79; PTE 264 at CVMcNair002445-46. Burroughs and Chapin also had a financial projection prepared by an accounting firm based on five years that showed income after costs of approximately \$90 million. Tr. 681-82; PTE 264 at CVMcNair002448.

Mr. Manning, Mr. Gregory, and Mr. Wilson Tillotson, P.E., of Lockwood Greene testified that it was of utmost importance to upgrade the Levees to certified status so that the land protected by the Levees would be removed from the floodplain and floodway. Tr. 203, 712-13; Tillotson Tr. 27. The development group could not develop the Property the way they envisioned so long as it stayed a flood prone area. Tillotson Tr. 27. Burroughs and Chapin's early concept documents describe the need "for the levy system

to be fully functional and acceptable to get the subject property out of the floodplain requirements for building.” PTE 264 at CVMcNair002450. It was the understanding of Mr. Manning, Mr. Gregory, and Mr. Tillotson that removing the floodplain and floodway designation would allow building to occur on grade. Tr. 519, 679-80, 713; Tillotson Tr. 22. Members of Richland County Council also recognized that the upgrade of the Levees to certified status would allow the Property to be fully developable. Pearce Dep. Ex. 179;⁷ Pearce Tr. 93-97, 199-200. Mr. Gregory testified that if improving the Levees to certified status was not feasible, including receipt of the FEMA-required agreements from the County, Burroughs and Chapin would not have moved forward with purchasing the Property. Tr. 871. Councilwoman Kit Smith confirmed that she understood in late January and early February 1999 that without County action regarding maintenance and operation of the Levees, the purchasers would not buy the Property. Tr. 2359-61, 2405. As the due diligence process progressed, Burroughs and Chapin developed a plan for improving the Levees and a list of certain issues to be resolved prior to purchase (discussed in more detail, *infra*). Tr. 712-13.

On November 13, 1998, while the due diligence process was still ongoing, Burroughs and Chapin entered into a Purchase and Sale Agreement with Mr. Burwell Manning, Eastern Corn and Grain Company, Inc., and Overlook, Inc. (two companies owned by Mr. Burwell Manning), subject to continued due diligence and various conditions. DTE 156. Burroughs and Chapin also had an appraisal of the Property in the amount of \$30 million performed in March 1998, and then later updated and confirmed in February 1999. PTE 255 at CV005993-95 & CV006007-10. The option

⁷ Designated deposition exhibits are cited as “Last Name Dep. Ex. ____.”

contract price for the Property was \$18 million in the Purchase and Sale Agreement (DTE 156 at CV008091), which was substantially below the \$30 million appraisal. Mr. Burwell Manning was facing looming deadlines in February 1999 to exercise options to reacquire large tracts of the Property or lose the opportunity to develop the entire tract altogether. Tr. 624. In order to avoid defaulting under his mortgage financing, Mr. Burwell Manning, some months earlier, had sold various tracts of the Property to third parties with options to repurchase expiring at or near February 19, 1999. Tr. 126-28, 130-34, 178-81, 184; PTEs 233, 262; DTE 141. Thus, there was considerable pressure on Mr. Burwell Manning to close the sale at or near February 19, 1999, and a small window of opportunity for Burroughs and Chapin to acquire all of the Property needed to pursue its development vision. Tr. 624-25. Mr. Gregory analogized the opportunity to not being able to put Humpty Dumpty back together if the deadlines passed and Mr. Burwell Manning lost the Property to various option holders. Tr. 674.

Mr. Gregory further testified that due diligence on any project of this size would include meeting with local officials to determine whether local officials would support the project. Tr. 694-96; *see also* Wendel 7/12/11 Tr. 77. If local officials were opposed to or not in favor of the project, Burroughs and Chapin would not have gone forward with the purchase. Tr. 696. Accordingly, Mr. Gregory and other members of the due diligence team met with officials of Richland County, the City of Columbia, and the University of South Carolina during the fall of 1998 and into early 1999. Tr. 697-98. Mr. Gregory testified that he personally met with Richland County Councilmembers Kit Smith, Bernice Scott, Paul Livingston, and Buddy Meetze, County Administrator Cary McSwain, Columbia Mayor Bob Coble, and Lyles Glenn at the University of South

Carolina. Tr. 698, 732-33, 878-79. He testified that between himself and the other members of the due diligence team, the team members met with all of the members of Richland County Council. Tr. 697. He testified that he and the others described Burroughs and Chapin's vision for the Property in their meetings with County officials – an extensive mixed use development involving residential, commercial, and recreational uses behind certified levees. Tr. 698-99; *see also* PTEs 207 at CVMcNair002533, 246 at CVMcNair002445-47. Mr. McSwain confirmed that he understood prior to purchase that Burroughs and Chapin's proposal was to build an extensive mixed-use development behind certified levees. Tr. 2566-67. Councilman Gregory Pearce similarly testified that the plan to develop behind certified levees was "something that became apparent early on in the discussion." Pearce Tr. 14, 57-58. Mr. Gregory took with him to the various meetings the early concept plan prepared by LandDesign. Tr. 699.

Mr. Gregory testified that the local officials with whom he met were overwhelmingly in favor of the proposed development and Burroughs and Chapin's vision for the Property. Tr. 700-01. Mr. Tillotson similarly testified that the County officials with whom he discussed the project expressed no reservations about the levee proposals. Tillotson Tr. 40-41. Also, Mr. Gregory testified that based on reports he received from the other members of the due diligence team, there was overwhelming support for the project from the community's elected officials, no opposition, and nothing to indicate there would be opposition to the proposed development in the future. Tr. 700-01. Although Burroughs and Chapin did not publicly announce its vision for the Property prior to purchase, *The State* newspaper had published an article in July 1998 reporting on the FEMA flood mapping and its impact on prospective development, with emphasis

placed on the Property. PTE 239. Mr. Burwell Manning had also made known his plans to develop the Property both before and during the July 8, 1998 FEMA meeting. Tr. 652-53; PTE 236. Mr. Manning testified that participants at that meeting discussed the potential upgrade of the Levees and development of the Property, and there was no objection voiced as a result. Tr. 644-45, 652-53. The Property was also described in *The State* on February 2, 1999, as "land that could be developed into commercial and residential property" in conjunction with plans to upgrade the Levees and the request to the County to assume the maintenance responsibilities. PTE 170 at DEF-00000073. Both Mr. Manning and Mr. Gregory testified that there was no public opposition to the proposed development expressed prior to purchase despite public knowledge of potential development since May 1998. Tr. 644-45, 652-53, 804.

As for the technical issues surrounding the FEMA flood mapping process and the Manning Levees, Mr. Gregory testified that Burroughs and Chapin was prepared to physically improve the Levees so that they could be certified by FEMA as providing protection from the base flood and comply with Richland County's ordinances requiring levees to have a crest height equal to the water surface elevation of the 500-year flood plus three feet of freeboard. Tr. 757. Upon certification, the area protected by the Levees should be remapped as removed from the floodplain and floodway. Tr. 1247-48. The height of the Levees in their current state generally exceeded the BFEs in the 1994/1995 effective FIS and FIRM and in the June 5, 1998 revised preliminary FIS and FIRM. (PTE 011 at DEF-00000016), but the Levees needed to be reshaped and made wider and taller in places to comply with FEMA and County requirements. Tr. 1127. The general plan developed by Lockwood Greene was to reshape the Levees in their current location and

not to move the Levees closer to the river. PTE 208 at CV002276. Rather, the riverside toe of the Levees would remain in its current location, and the center line of the Levees would be moved landward as needed to alter the slope of the Levees to comply with the Army Corps of Engineers' design criteria. Tr. 1130. Also, fill would be added where needed to make the Levees wider or taller. Tr. 1130. As Mr. Gregory testified, improvement of the Levees to the required standards would necessarily involve making the Levees taller and wider in many places. Tr. 788. Correspondingly, both Mr. McSwain and then-Assistant County Administrator Milton Pope testified that they understood that certifying and upgrading the Levees would require the Levees to be made taller and wider. Tr. 2588-89; Pope Tr. 7, 18-19.

Mr. Gregory testified that as the due diligence process continued, Burroughs and Chapin's plans to improve the Levees evolved to require the satisfactory resolution of three Levee-related issues prior to any purchase: (1) Richland County's agreement to allow Burroughs and Chapin to improve the Levees to FEMA and County standards that would permit their certification under NFIP regulations; (2) Richland County's agreement to accept the responsibility to maintain and monitor the Levees after improvements were made, as required by NFIP regulations; and (3) FEMA's confirmation that once the Levees were improved and accepted by the County, FEMA would remove the floodplain and floodway designations from the Property protected by the Levees. Tr. 712-13. As previously mentioned, the Levees were not within the regulatory floodway on the County's 1994/1995 effective FIRM. PTE 229. The County, however, was using the June 5, 1998 revised preliminary FIRM for floodplain management purposes pursuant to FEMA's guidance because the June 5, 1998 revised

preliminary BFEs were higher than the effective BFEs. PTEs 012 at DEF-00000022, 031 at DEF-00000296. The Levees were within the regulatory floodway on the June 5, 1998 revised preliminary FIRM. PTE 237.

In conjunction with the first issue (Richland County's agreement to allow improvement of the Levees), Mr. Gregory and Mr. Manning testified that the due diligence team was aware of both the FEMA certification criteria as well as the Richland County ordinances requiring levees to be constructed to a 500-year flood protection level plus three feet of freeboard. Tr. 546-47, 707-08, 937. Mr. Gregory testified that the team needed satisfactory answers to the following issues regarding the County and the developers' plans to upgrade the Levees: (1) clarifying what activities Richland County would permit in the regulatory floodway under the operative ordinance language; (2) addressing Richland County's requirement that the Levees be improved to withstand the 500-year flood plus three feet of freeboard, as compared to FEMA's 100-year flood requirement; and (3) determining what could be done to the Levees while the County was using the June 5, 1998 revised preliminary FIS and FIRM. Tr. 704-09.

In 1998 and 1999, the effective Stormwater Ordinance was dated July 19, 1994, and included the following:

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

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

PTE 230 § 8-62. The 1994 Stormwater Ordinance also included a variance provision at Section 8-21, which required the Planning Commission to "consider the opinions of the Soil and Water Conservation District and the Richland County Engineer before deciding

upon any variance or exception.” PTE 230 § 8-21. The Zoning Ordinance also 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.” PTE 250A § 26-73.4. The Zoning Ordinance further mandated that the County Engineer must review and certify his findings regarding applications to fill in the floodway. PTE 250A § 26-73.6(1)(a). The County Engineer’s findings “shall be binding upon the zoning administrator unless overruled by the board of adjustment.” PTE 250A § 26-73.6(9)(a). Further, the County Engineer’s office is responsible for approving construction (or land disturbance) permits. Tr. 1478; Pope Tr. 20. A land disturbance permit approved by the County Engineer’s office would be required to improve the Levees. PTE 230 § 8-55; Pope Tr. 20-21.

Mr. Gregory testified 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. Tr. 898. Consequently, the due diligence process included investigating the County’s official position on what activities Richland County’s ordinances allowed in the regulatory floodway. Tr. 704-07. Certain members of the due diligence team, including Mr. Gregory, were tasked with investigating the County’s position on permissible activities in a regulatory floodway. Tr. 705. 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. Tr. 704-07. Further, Mr. Manning testified that he had previous personal experience with the County

Engineer's office approving plans for land disturbance permits for projects within the regulatory floodway using the no-rise standard under the same operative ordinance language in place since 1981. Tr. 122-23. He further testified that he told Mr. Gregory and other members of the due diligence team about his prior experiences. Tr. 106-08, 622. Mr. Gregory testified that he and Mr. Tillotson had conversations with the County Engineer, Mr. Pearson, and verified that the County Engineer was using the no-rise standard. Tr. 705-06, 883. Mr. Pearson, who served as the County Engineer from 1976 until 2005 (Tr. 1306), 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. Tr. 1315, 1323-25; *see also* PTE 051 at DEF-00002253. Mr. Pearson testified that under his interpretation, if a permit applicant could demonstrate a no-rise through appropriate engineering, there would be no impediment to the free flow of water. Tr. 1315. Mr. McSwain testified that he understood that the development group would need to seek and would, in fact, be seeking a permit to upgrade the Levees. Tr. 2564. Both Mr. McSwain and Mr. Pope testified that they was aware of the County Engineer's interpretation of "impede" as consistent with "no-rise." Tr. 2592; Pope Tr. 40. Mr. Gregory testified that he received a consistent interpretation from the County officials in the engineer's office, the planning department, and the administrator's office. Tr. 883-84. Mr. Gregory further testified that had Burroughs and Chapin not been satisfied with the response from the County officials, Columbia Venture would not have bought the Property. Tr. 884.

FEMA's no-rise standard is based on the 100-year flood; consequently, to get a no-rise certificate, plans and specifications must be tailored to the 100-year flood. Tr. 1016-17. Mr. Pearson testified that his office would need "to ensure that the developer

had – if he’s encroaching on a regulatory floodway, that he’s provided the necessary calculations to demonstrate there would be no rise as a result of this development in the 100-year flood.” Tr. 1314. On February 17, 1999, and after extensive study, 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.” PTE 208 at CV002276; Tillotson Tr. 29-30. Lockwood Greene’s analysis for certification purposes centered on the 100-year flood. PTE 208 at CV002276. As a result of its due diligence efforts, the team concluded that the County would issue a permit for construction in a regulatory floodway, including construction required to improve the Levees to the required standards, on the no-rise engineering showing Lockwood Greene opined was feasible. Tr. 710, 712; Tillotson Tr. 29-30, 41; PTE 208 at CV002276. Regardless of the analysis required to show a no-rise under 44 C.F.R. § 60.3(d)(3) and the work Lockwood Greene did prior to purchase to opine that improvements of the Levees were feasible on a no-rise analysis, 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. Tr. 705, 757, 942. 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 and ensuing development, and that the 500-year requirement was a “bonus” from a development standpoint. Tr. 707-08.

In conjunction with the second issue identified by Mr. Gregory (Richland County’s agreement to accept responsibility for operation and maintenance of the Levees in accordance with FEMA regulations), Mr. Gregory and Mr. Tillotson met with Mr.

McSwain on December 10, 1998. Tr. 714; Tillotson Tr. 18-19. Mr. Tillotson wrote Mr. McSwain a letter the next day and appended a list of bullet points that Lockwood Greene wanted the County to consider and include in a letter to FEMA. PTE 207. The bullet points were as follows:

- Property owners intend to upgrade the levee system to meet the structural requirements as specified in 44 CFR 65.10.
- At the completion of the upgrade, Richland County agrees to accept responsibility for operation and maintenance of the levee system in accordance with 44 CFR 65.10.
- Based on the above, and the existing levee system being in place, we request relocation of the proposed floodway on the Richland County side of the Congaree River to the current map located which is the line of the dike.
- Upon certification of the levee system as a protective structure, Richland County will request a letter of map revision of the current FIRM.
- It is our understanding that certification of the levee system will remove the area protected by the system from designation as flood prone area or as any floodway.
- We request FEMA confirmation of the above plan and understanding.

PTE 207 at CVMcNair002533. Mr. Tillotson testified that Mr. McSwain reacted positively to the proposal and he understood that Mr. McSwain was "happy to understand that someone was looking at developing the property." Tillotson Tr. 23.

Mr. Tillotson's December 11, 1998 letter and attached list of bullet points were routed to the Richland County Land Development Administrator, Mr. Kenneth Knudsen, who prepared a report dated January 20, 1999, recommending action by the County Council. Tr. 2554-55; PTE 166. The purpose of Mr. Knudsen's report was "to request County Council's consideration of authorizing the Council Chairman or his Designee *to act on the County's behalf to communicate to FEMA the agreement by Richland County to accept the right-of-way to the levee system and responsibility to review, monitor and*

maintain the levee system contingent upon proper certification." PTE 166 at DEF-00000055 (emphasis added). Mr. Knudsen explained that "[d]ue to FEMA regulations any reconstruction or creation of a levee system must be done under the auspices of the governmental body having jurisdiction in the area. *This necessitates that the County agrees in principal to accepting responsibility of the levee system once completed and acceptable to FEMA.*" *Id.* (emphasis added). His report addresses the six bullet points attached to Mr. Tillotson's December 11, 1998 letter:

1. *Property owners intend to upgrade the levee system.....the approximate cost of this is in excess of six million dollars.*
2. *County agrees to accept responsibility for operation and maintenance.....this is shown as a preliminary cost estimate of approximately \$174,500 annually. (see attachment)*
3. *Request the relocation of the proposed Floodway.....this will bring the entire area back to the "G" series map. (the original FEMA map)*
4. *Upon certification.....the County must be the one requesting the map revision.*
5. *Certification of levee system.....self explanatory.*
6. *We request FEMA confirmation.....prior to acceptance of any responsibility the County must have the assurance of FEMA that once all the steps outlined on the levee system are completed, the levee system will be acceptable.*

Id. at DEF-00000055-56. Under alternatives, Mr. Knudsen listed three options for the County:

- (1) Do nothing, area will stay as is and any expansion or development within the affected area will be prohibited.
- (2) ... [B]egin first steps of acceptance of responsibility and maintenance contingent upon engineering certification, certification by the Corps of Engineers and approval and acceptance by FEMA.
- (3) Defer action, this would mean the County awaits whatever action FEMA imposes upon Richland County.

Id. at DEF-00000056. Mr. Manning and Mr. Gregory testified that options one and three would not have been acceptable to Burroughs and Chapin, and Burroughs and Chapin

would not have purchased the Property had either of those options been endorsed by the County. Tr. 224, 717.

In his report, Mr. Knudsen recommended option number two to the County Council: *i.e.*, that the County begin the process to accept responsibility for operation and maintenance of the Levees after certification. PTE 166 at DEF-00000056. Mr. Knudsen also appended to his report an estimate prepared by Lockwood Greene estimating the cost of the annual maintenance for the Levees to be approximately \$174,500 a year. *Id.* at DEF-00000061. Mr. Knudsen stated that the “costs [for annual maintenance] should be offset by the rezoning and development of these properties and the accompanying increase in the County’s tax base.” *Id.* at DEF-00000056. In his report, Mr. Knudsen also notes that the Property is subject to the June 5, 1998 revised preliminary FIRM, which placed a large floodway over the Property and the Levees themselves. *Id.* at DEF-00000055. The report acknowledged that the County was using the 1998 map for the issuance of building permits, and unless that map was changed, the Property could not be developed. *Id.* He stated that Mr. McSwain, as County Administrator and Chief Flood Official, had requested that FEMA place the 1998 revised preliminary FIRM on hold. *Id.*

Mr. Knudsen’s report was approved by Mr. Larry Smith, the County Attorney, as “within the powers and authority granted under the laws of the State of South Carolina to Richland County Council.” *Id.* at DEF-00000054. It was also signed by a member of the County’s financial staff. *Id.* Councilwoman Kit Smith testified that she interpreted the financial officer’s signature as his assessment that there were no “major financial problems” with the recommendation. Tr. 2344. Thereafter Mr. Knudsen’s report was referred to the Development and Services Committee for consideration. Tr. 2342-43.

The Development and Services Committee met on January 26, 1999, and unanimously voted to send Mr. Knudsen's report and recommendation to the entire Council for approval. PTE 020 at DEF-00000064. All but one of the eleven members of the County Council were present at the meeting: five who were members of the Development and Services Committee and five who were not members of the committee. PTE 020; Tr. 227-28; Pearce Tr. 26. Also present were the County Engineer, Ralph Pearson, the County Attorney, Larry Smith, and other members of the County staff. PTE 020 at DEF-00000062; Pearce Tr. 27. Mr. Manning testified that he also made a presentation to the Development and Services Committee on January 26, 1999, in conjunction with the Committee's consideration of Mr. Knudsen's report and recommendations regarding the general development vision for the Property. Tr. 229-32. Mr. Manning testified that the comments from the members of the Committee were overwhelmingly positive. Tr. 229-32. In the course of the Committee's consideration of Mr. Knudsen's report, "[a] discussion took place regarding liability to the County if the acceptance of responsibility is agreed upon." PTE 020 at DEF-00000064; Tr. 2355-56. Further, "Mr. Meetze requested Mr. McSwain to follow up on information on the County's qualifications for obtaining insurance from FEMA for liability." PTE 020 at DEF-00000064.

On the evening of February 2, 1999, during its scheduled Regular Session meeting, the full Richland County Council considered the Development and Services Committee's recommendation that the Council "begin first steps of acceptance of responsibility and maintenance" for the Levees "contingent upon engineering certification, certification by the Corps of Engineers and approval and acceptance by

FEMA.” PTE 147 at DEF-00012032. After discussion, the Council unanimously approved the following substitute resolution proposed by Councilwoman Kit Smith:

[That the County] accept responsibility for local inspection and enforcement of the levee system, and if required by FEMA, to accept operation and maintenance responsibility for the system contingent upon the following:

- (1) The property owners upgrade the levee system to meet FEMA standards;
- (2) the property owners prepare all required documentation, including operation and maintenance plans;
- (3) certification that the levee system, as upgraded, meets FEMA standards;
- (4) The parties, including Richland County, the City of Columbia and the developers, resolve the issues of the performance and funding of the operation and maintenance responsibility;
- (5) The County’s acceptance of responsibility terminates if the developers of the area do not invest at least \$30,000,000.00 within ten years of the date of the adoption of this motion.

Id. at DEF-00012032-33.

The resolution that the Council approved unanimously on February 2, 1999, was crafted by Councilwoman Smith along with Mr. Mike Ey, Esq. of the McNair Law Firm, who was representing Burroughs and Chapin in the Property purchase transaction, during or after a meeting with Mr. Ey, Mr. Gregory, and Mr. Manning. Tr. 735-43, 2279-82. The testimony varies on who exactly was involved in crafting the resolution and how it transpired, but the testimony is consistent that both Ms. Smith and representatives of Burroughs and Chapin were satisfied with the finished product. Tr. 738, 2396. Among other things, Mr. Gregory agreed on behalf of Burroughs and Chapin to improve the Levees and to invest \$30 million in the development project over ten years. Tr. 737-38. Ms. Smith confirmed that the \$30 million investment clause originated with the County. Tr. 2371. Mr. Pearce testified that the \$30 million investment promised by the

development group was "what made this a very special project." Pearce Tr. 46-47. Mr. Gregory testified that he agreed to the \$30 million investment clause in exchange for the condition in the draft motion that the County would accept responsibility for inspection and maintenance of the Levees. Tr. 738. Thereafter, Ms. Smith made the motion that she had worked out with Mr. Ey as a substitute motion at the Council's meeting on February 2, 1999, and it passed unanimously. Tr. 2392-93; Pearce Tr. 48.

In conjunction with the vote on the resolution on the evening of February 2, 1999, the McNair Law Firm faxed an explanatory document to the County during the day on February 2, 1999, prior to the County Council meeting that evening. PTE 252; Tr. 246-47. The document stated as follows:

What is the County Council asked to do?

Accept operation and maintenance responsibility for the levee system pursuant to federal regulation contingent upon: (1) property owners upgrading the levee system to meet FEMA standards (presently estimated to cost \$6-\$8 million); (2) property owners preparing all required documentation including operation and maintenance plans; and (3) certification that the levee system, as upgraded, meets FEMA standards.

...

Why must the County do this?

FEMA recognizes in its flood hazard and risk mapping effort only those levee systems that meet, and continue to meet, minimum design, operation, and maintenance standards. The standards include a requirement that "all operations must be under the jurisdiction of ... an agency of a community participating in the NFIP" and "all maintenance activities must be under the jurisdiction of ... an agency of a community participating in the NFIP that must assume ultimate responsibility for maintenance." This means that if the levee system is to be recognized for FEMA purposes then operation and maintenance responsibility must be under the jurisdiction of the county.

Why must the Council act tonight?

Transactions involving a substantial portion of the property are set to close within the next seven to ten days. Development of the property is dependent upon how it is treated for FEMA purposes. Without county action to begin the first steps in changing the FEMA status of the property, the investors will have to evaluate whether they desire to proceed without a resolution of the FEMA issue.

The proposed development of the property is on hold until the FEMA issue can be resolved. If the county will commit to the acceptance of the operation and maintenance of the levees, then the transaction can be closed and the investors can start the process of up-grading the levees as required by FEMA and the next steps for the development of the property can begin.

Can't this problem be solved with FEMA remapping?

No. FEMA is currently remapping the area and the remap is expected to be released within the next four to six weeks. ... Even if the investors could wait for this process to occur and be completed, the investors would be faced with the same issue then – the county must accept operation and maintenance responsibility if the area is to be removed from a designation as either a floodway or floodplain.

What is the proposed impact of the development of this property?

The proposed investment in the area is estimated as high as \$1.0 billion. After development is completed, preliminary projections indicate approximately 3,125 direct new jobs with a direct payroll of approximately \$65 million. Projections on property taxes from the investment exceed \$14 million. The development would consist of multiple land uses including retail, commercial, residential and recreational.

Is the County being asked to approve any development on the property?

No. Although the purchasers of the property envision a substantial residential and commercial development in the area, Council is not being asked to approve it now. As the developers move forward in their plans, they will work with the County as any other developer would on the appropriate zoning and land use approvals.

If the County accepts responsibility for operation and maintenance, does it have any options for fulfilling the responsibilities?

Yes. The County appears to have a full range of options available to satisfy the requirement for operation and maintenance of the levee system. The County could fulfill the responsibility in whole or in part with in-house resources or by contract with private vendors. The County could consider the creation of a special entity (such as a special tax district, a levee district, or a county agency, board or commission) for fulfilling the responsibilities.

How is the County going to pay for the operation and maintenance costs?

Annual cost for operating and maintaining the levee system is estimated at \$174,500. Revenue from expected development would more than offset this cost. Whether from general or special levies, ample revenue could be generated.

If the County accepts operation and maintenance responsibility, isn't the County also accepting any associated liability?

The federal regulation does not state that the jurisdiction accepting operation and maintenance responsibility also accepts certain liabilities. Even if there is liability associated with the acceptance, under the South Carolina Tort Claims Act, a governmental body's liability is limited (\$300,000 single occurrence; \$600,000 aggregate). Moreover, there are a number of ways for the County to minimize any potential liability, for example, purchase insurance (state law requires political subdivisions to procure tort liability insurance) and operate and maintain the levee system in accordance with FEMA standards.

PTE 252 (emphasis in original).

Burroughs and Chapin's request to the County to accept responsibility for the Levees was covered in *The State* newspaper the morning of the February 2, 1999 meeting. Tr. 2380-81; PTE 170. The article discussed Ms. Smith's "concerns about the county's liability should the levees fail," and also stated that "County Attorney Larry Smith said he had looked into certain aspects of the liability issue but declined further comment until he gives a legal opinion to council tonight." PTE 170 at DEF-00000074; Tr. 2383-87. On February 2, 1999, County risk manager David Chambers sent a memorandum to Mr. McSwain and Mr. Smith recommending against accepting liability

relating to levees. PTE 146 at CV014265; Pope Tr. 15. In its deliberations on February 2, 1999, the Council held “[a] discussion ... regarding the acceptance responsibility, maintenance of the levee system, and the effect on the taxpayers.” PTE 147 at DEF-00012032. After these discussions, the Council voted unanimously to adopt the substitute resolution proposed by Ms. Smith. PTE 147 at DEF-00012033.

Mr. Paul Livingston, the Chairman of Richland County Council, followed the Council’s unanimous resolution with a letter to FEMA on February 17, 1999, stating that “Richland County, by action of its governing body, the County Council, has agreed to accept responsibility for local inspection and enforcement of the operations and maintenance plan for the levee system as submitted by the owner and approved by FEMA contingent upon” the conditions outlined in his letter, which are materially similar to the first four conditions in the County’s February 2, 1999 resolution, the first of which was that Columbia Venture improve the Levees to certified standards. PTE 022 at DEF-0000079 (emphasis in original). Mr. Livingston also requested that FEMA “consider the existing levee system in any current or future calculation of floodway for this area.” *Id.* at DEF-0000080. Mr. Gregory testified that Burroughs and Chapin most likely received a copy of this letter prior to closing. Tr. 771. On February 26, 1999, Mr. McSwain reiterated the County’s agreement in a letter to FEMA, stating: “Richland County has agreed to be the inspector, provide monitoring and review and enforcement after the rebuilding of the levees has been approved and accepted.” PTE 026.

In conjunction with the third item on Mr. Gregory’s list (confirmation from FEMA of the development group’s understanding of FEMA regulations and the Levee improvement plan), on January 20, 1999, a few days before the Development and

Services Committee met, Mr. Tillotson wrote a letter to Ms. Lisa Holland of the South Carolina Department of Natural Resources, the state representative of FEMA for purposes of the NFIP, outlining Burroughs and Chapin's plan to improve the Levees to certified standards and to ask for the County's agreement to accept responsibility for the inspection and maintenance of the Levees once certified. PTE 246 at CVMcNair002223. In the letter, Mr. Tillotson states that he has "been asked to represent [Richland County and the City of Columbia] in any clarifications of the FEMA regulations particularly 44 CFR 65.10." *Id.* Mr. McSwain was carbon copied on the letter, and testified that he did not object to Ms. Holland or Mr. Tillotson regarding the contents of the letter. Tr. 2558-59. Similarly, Mr. Tillotson testified that he did not remember Mr. McSwain objecting to Mr. Tillotson's indication that Lockwood Greene was speaking on behalf of Richland County. Tillotson Tr. 26. Ms. Holland forwarded Mr. Tillotson's letter to FEMA via a letter asking for "an answer by Tuesday, January 26, 1999 because the potential buyers want assurances prior to purchase." PTE 017 at CV-SCDNR 00046. In response to Ms. Holland's letter, Mr. Matthew Miller of FEMA wrote a letter dated January 26, 1999, stating that if the Levees were improved to certified standards, met all the requirements of 44 CFR § 65.10, and did not, as improved, cause a rise in the base flood levels or a reconfiguration of the floodway, then FEMA would remove the floodplain and floodway designations from the land protected by the Levees. PTE 549 at CV014035.

A copy of Mr. Miller's letter was sent to Mr. Tillotson and Mr. Gregory, as well as the County. *See* PTEs 018, 019. On February 17, 1999, Mr. Tillotson also gave Mr. Gregory Lockwood Greene's engineering judgment that the Levees could be improved without causing a rise in the levels of the base flood or a reconfiguration of the floodway.

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

Mr. Gregory also negotiated a nonbinding Memorandum of Understanding with the County via Mr. McSwain, whereby Richland County "agree[d] to work with the development group on issues that are critical to the proposed development such as zoning, tax incentive vehicles and a multi-county business park." PTE 024. In return, Mr. Gregory agreed that the development group would work with the County in its visioning process and forthcoming Comprehensive Land Use Plan. Tr. 762-65; PTE 024. Mr. Gregory testified that Burroughs and Chapin viewed their responsibilities under the Memorandum of Understanding to be acted upon in good faith. Tr. 766-67. Douglas Wendel, the CEO of Burroughs and Chapin, testified that he reviewed the Memorandum of Understanding prior to closing, and, based on his experience as a former county administrator and current developer, understood that "there would be give and takes and there would be some flexibility" in what ultimately occurred with the development, but "felt there was a good comfort level" because Mr. McSwain "said that he'd work with us." Wendel 7/12/11 Tr. 162-65.

Mr. Manning testified that as of February 1999, 3,120.762 acres of the Property, primarily in Levee Sections 1 and 2, were zoned D-1. Tr. 483-84; PTE 499. Under Richland County's zoning ordinance in effect at the time, a D-1 zoning classification:

is intended to provide for large tracts of land located primarily on the fringe of urban growth where the predominant character of urban development has not yet been fully established, but where the current characteristics of use are predominantly residential, agricultural, or semi-development with scattered related uses. It is further recognized that future demand for development land will generate requests for amendments and zone designations to remove land from the D-1 classification and place it into other more intensely developed classifications as a more natural consequence of urban expansion.

Tr. 483-84; PTEs 250A § 26-62.1, 499. Mr. Manning further testified that 1,277.48 acres of the Property, primarily in Levee Section 3, was zoned RU-Rural. Tr. 485-86; PTE 499. Forty acres was zoned as M-1, light industrial, and ten acres was zoned as RS-3 single family residential. Tr. 486-87. Columbia Venture intended to eventually have the Property rezoned based on Planned Unit Development ("PUD") zoning. Tr. 910.

Richland County had an existing multi-county business park with Fairfield County dating back to at least 1996, and County staff and Council members were familiar with the process for and requirements of a multi-county business park. Tr. 2417-20, 2568. Prior to purchase, and as a condition to purchase, Burroughs and Chapin needed to "obtain assurances that Richland County will be receptive to a development agreement, which will include some infrastructure funding via incremental tax growth grants." DTE 003 at BandC020568. Mr. Wendel testified that although a multi-county business park represented an attractive alternative for both the County and Columbia Venture, Columbia Venture was prepared to secure alternative financing and proceed with the development should the County decide against using a multi-county business park to finance the development's infrastructure. Wendel 7/12/11 Tr. 125-26. From Burroughs and Chapin's perspective, the project's feasibility did not hinge on the multi-county business park issue. Wendel 7/12/11 Tr. 125.

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

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

development.” Tr. 777-78. Green Diamond, LLC was Mr. Burwell Manning’s LLC,⁸ and Burroughs and Chapin considered Mr. Burwell Manning’s knowledge of the Property and on-site presence valuable. Tr. 777. NLBF, LLC was an LLC owned by a private investor, Dr. Wade Nichols. Tr. 775. Representatives of Columbia Venture testified that the development group was committed to spending the money required to improve the Levees and otherwise proceed with the development activities. Tr. 738-41; Tillotson Tr. 43.

E. Columbia Venture’s development activities shortly after purchase, permit application for Levee work, and the County’s decision to delay consideration of construction permits. On February 25, 1999, FEMA released a new revised preliminary FIS and FIRM. PTEs 285, 286. The County again asked FEMA not to publish the map, and FEMA ultimately agreed; the February 25, 1999 FIRM was never published. PTEs 026, 027, 504. Because the February 25, 1999 FIRM had applicable BFEs that were generally higher than the 1994/1995 effective FIRM, FEMA encouraged the use of the preliminary data for floodplain management purposes. Tr. 1298; DTE 146 at DEF-00000011; PTE 031 at DEF-00000296. However, FEMA did not mandate the use of the preliminary data because the 1994/1995 effective FIRM included both Zone AE and a designated floodway. PTE 031 at DEF-00000296.

Columbia Venture began its efforts to develop the Property soon after purchase with particular focus on the Levee upgrade. *See, e.g.* PTE 502 at CV005079; Tillotson Tr. 16. On March 10, 1999, Lockwood Greene, on behalf of Columbia Venture, hired the

⁸ Green Diamond was the name of an individual who was a long time employee of Burwell Manning. The project subsequently became known as “The Green Diamond.” Tr. 326-27.

engineering firm S&ME to do geotechnical work in preparation for the Levee upgrades on an expedited basis. Tr. 1107. As testified by John Lessley, P.E., of S&ME, by April 5, 1999, S&ME had completed the first phase of its exploration of Levee Section One, which was a physical assessment of the Levees "to assess their condition and to note locations of substandard levee or penetrations, pipes that needed maintenance, that sort of thing." Tr. 1113-14; PTEs 294, 527 at 2. On May 2, 1999, S&ME had made a preliminary report of the second phase of its exploration of Levee Section One, which was "the actual drilling and sampling of the levee to determine what types of materials were in the levee and in the foundation." Tr. 1114; PTEs 127, 527 at 2. For its preliminary report, S&ME obtained 51 borings along the Levee crest, typically advanced all the way through the Levee fill and into the underlying natural soil to a depth equal to the Levee height. PTE 127 at CV014316. As part of the drilling operation, S&ME obtained 300 samples of Levee soils and 215 samples of bearing soils, each of which was evaluated in the field and laboratory. *Id.* "The materials comprising the Levees [were found to be] adequate for use in construction of a stable levee." *Id.* at CV014320; Tr. 1127. S&ME concluded that the Levee, with maintenance and clearing of vegetation, would provide a significant factor of safety varying between 1.1 and 1.4 against sliding failure under the 100-year flood elevations. PTE 127 at CV014320.

In early May 1999, Columbia Venture submitted a permit to do some remedial work on Levee Section 1. Tr. 378-81; PTE 118; Tillotson Tr. 58-59, 73. The original application with its accompanying plans and drawings has been lost, but the weight of the testimony reveals that Columbia Venture contemplated heavy construction and excavation that would have increased the height of the Levees in some places. PTEs 004

at DEF-00004861 (May 1999 entry), 118 at CV013149-51; Tr. 385-86, 779-80, 1329-30; Tillotson Tr. 59, 73; Wendel 10/25/11 Tr. 7; Wendel Dep. Ex. 042 at DEF-00000303. Both Mr. Manning and Mr. Pearson testified that a permit was not required to do routine maintenance on the Levees, such as removing trees or filling in holes. Tr. 55, 57-59, 1335. Anything beyond such routine maintenance, however, would be considered construction requiring a permit. Tr. 2587-88; Pope Tr. 35-37. Columbia Venture's permit application was rejected as incomplete by the County Engineer's office on May 13, 1999. PTE 119. The May 13, 1999 letter stated that the permit could not be issued "until a complete set of plans, and specifications" were provided, including "100 year Flood Information, levee crosssections and elevations, [and] soils analysis." PTE 119 at DEF-00000287. According to Mr. Pearson, he would only consider a levee improvement application that was "self-sufficient where it [the improved levee system] could act for protection of the development on its own." Tr. 1343. Mr. Pearson testified that he would need a "complete comprehensive set of plans before [his office] would issue approval for a phase of the levee project," including internal drainage for the Levee system. Tr. 1343. It is undisputed that as of early May 1999, Columbia Venture did not have the "complete comprehensive set of plans" for the upgrade of the Levee system that Mr. Pearson considered necessary. Tr. 1390-91; Tillotson Tr. 54-55; Wendel 10/25/11 Tr. 32-34.

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

that the County not issue any permits to improve the Levees until after its upcoming meeting to discuss its revised preliminary maps and the resolution of all technical issues. PTE 031 at DEF-00000291. In the interim, FEMA, consistent with its official guidance, asked the County to use the February 25, 1999 revised preliminary FIRM and FIS which, as discussed earlier, contained higher BFEs than the 1994/1995 effective FIS and FIRM. PTEs 031 at DEF-00000291 & DEF-00000296, 229, 285. Mr. McSwain initially decided to use the February 25, 1999 revised preliminary FIRM for enforcing the County's floodplain ordinances but later decided to use the 1994/1995 effective FIS and FIRM instead because they were final, having gone through the appeal and comment period, whereas the revised preliminary data had not. PTE 004 at DEF-00004861 (May 1999 entry); Tr. 2577-78. However, he also made the decision, and announced it publicly, that the County would not issue any permits in the area with which FEMA was concerned. Tr. 2592; Wendel Dep. Ex. 042 at DEF-00000304. Mr. McSwain's decision was not just to delay permits until after FEMA's next public meeting to discuss technical issues with FEMA's revised preliminary maps as suggested by FEMA (PTE 031 at DEF-00000291), but not to issue any permits to improve the Levees until after FEMA had completed its flood mapping efforts, which did not occur until after August 20, 2001. Tr. 2578-79. Mr. Pearson also concluded in May 1999 or shortly thereafter that the County Engineer's office would not issue any permits to improve the Levees until FEMA had issued an LFD or until the County Administrator instructed him otherwise. Tr. 1354-56, 1399. Mr. Pearson testified that neither Mr. McSwain nor Larry Smith, the County Attorney, ever told him he could issue a permit to Columbia Venture for Levee improvements. Tr. 1440.

Mr. Gregory testified that Columbia Venture was concerned about the County's new position on permit approvals in the early summer of 1999, specifically referencing newspaper articles before the end of June where, it appeared to him, that the County's position was "to wait on FEMA." Tr. 988-89; *see also* Wendel Dep Ex. 042. Mr. Gregory analogized the County's position in the summer of 1999 to option 3 in Mr. Knudsen's January 20, 1999 report. Tr. 988. Mr. Gregory testified that if the County had endorsed option 3 prior to purchase, Burroughs and Chapin would not have purchased the Property. Tr. 717; *see also* PTE 252 at DEF-00008252 ("Can't this problem be solved with FEMA remapping? No"). Mr. Manning also testified that after May 1999, the County deferred action on the permit issue in favor of waiting on FEMA to act. Tr. 400-01. Nevertheless, Columbia Venture persisted in its development activities after the County denied the permit application and announced its position to not consider permit applications while the flood mapping process was ongoing. S&ME published its complete Preliminary Geotechnical Report – Levee Section 1 with appendices on May 21, 1999. Tr. 1122; PTE 527 at 3. The analysis and upgrade plan presented in the May 21, 1999 report was designed to the FEMA standards for certification set forth in 44 C.F.R. § 65.10. Tr. 1136. It included levee cross sections, levee elevations, and soils analysis and was designed to the U.S. Army Corps of Engineers' standards. Tr. 1136-37. This analysis would also have been applicable to a no-rise showing necessary for building in a regulatory floodway. *See* Tr. 1314. On May 3, 1999, S&ME began a two-phase inspection of Levee Section 2 similar to its prior work on Levee Section 1. PTE 527 at 2. S&ME completed the Levee Section 2 exploration and issued a geotechnical report to Lockwood Greene on August 10, 1999. *Id.* at 3. Lockwood Greene calculated

the 100-year and 500-year flood elevation levels and provided the calculations to S&ME over the course of the engagement. Tr. 1126-27.

In the fall of 1999, Lockwood Greene instructed S&ME to design to the 500-year flood level to meet the Richland County ordinance requirements. Tr. 1137, 1146. The soil borings, soils analysis, and other general geotechnical work S&ME performed for the 100-year analysis remained the same in the 500-year analysis. Tr. 1141. According to Mr. Lessley, 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. Tr. 1139-40. S&ME finalized its 500-year flood analysis for Levee Sections 1 and 2 on November 16, 1999. Tr. 1146; PTEs 211, 527 at 4. The November 16, 1999 report categorized the "recommended remedial, rehabilitation, and modifications design and construction measures for the levee" as "relatively minor when considering upgrade of the existing levee system from protection of agricultural land to protection of residential/commercial development." PTE 211 at CV013688. Mr. Lessley 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." Tr. 1150.

Mr. Lessley further testified that the construction required to upgrade the Levees would, in essence, involve construction and improvements to the landward side of the Levee. Tr. 1129. Consequently, the center line of the Levee would move away from the river and floodway boundary of the 1994/1995 effective FIRM. Tr. 1130. The

November 16, 1999 plans provided to Lockwood Greene exceeded the U.S. Army Corps of Engineers' standards in terms of crest height, but equaled the stability factors of the Corps of Engineers. Tr. 1151. The November 16, 1999 plans included levee cross sections, elevations, soils analyses, and a quality control document for construction of the Levees. Tr. 1151-52. Mr. Lessley testified that Lockwood Greene would have had to have grading plans made based on S&ME's cross sections, a wetlands survey (which was already underway (PTE 308 at CV012836)), a construction permit, and a maintenance and operation plan in order to complete the Levee upgrade. Tr. 1151-52. Mr. Lessley testified that Lockwood Greene was capable of doing the required additional work to upgrade the Levee. Tr. 1152. Mr. Lessley testified that based on the November 16, 1999 S&ME report, it was physically possible to improve the Levees to the 500-year design standard of Richland County. Tr. 1174-75. Columbia Venture paid S&ME \$144,969.62 in 1999 for its engineering work. PTE 521 at CV004409. 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 and Mr. Pearson had made the decision months earlier not to issue any permits for Levee improvements until FEMA's flood mapping process was complete.

In March 1999, the County had facilitated and encouraged FEMA to accommodate Columbia Venture's "full evaluation" of FEMA's data underlying the February 25, 1999 revised preliminary FIS and FIRM and forthcoming "presentation of [Columbia Venture's] conclusions." PTE 027. As allowed by FEMA's regulations and in conjunction with its review and analysis of FEMA's data, Columbia Venture also

provided various technical analyses to FEMA during the course of the FEMA mapping process in the summer of 1999. PTE 120 at CV012918; DTE 037; Tillotson Dep. Ex. 212; 44 C.F.R. § 65.10.

During 1999, Columbia Venture also commissioned a market study (PTE 299) and highest and best use analysis (PTE 301) performed by Haddow and Company ("Haddow"). Tr. 770. According to Haddow, it was retained to assist Columbia Venture in helping "formulate the optimal development strategy." PTE 301 at CV003868. Columbia Venture also later engaged Edward D. Stone and Associates ("EDSA"), a land planning firm from Florida, to design master and comprehensive development plans for the development. PTEs 314, 319, 320, 553. Mr. Manning testified that the development of EDSA's conceptual use plans "was an ongoing process" with "numerous alternatives presented." Tr. 499. Mr. Gregory testified that the amounts of money Columbia Venture paid to both Haddow and EDSA were "significant." Tr. 809. Columbia Venture's general ledger reveals that Columbia Venture paid Haddow \$43,558.67 for its services in 1999 and paid EDSA \$171,155.03 for its services in 2000. PTE 521 at CV004406-07.

On August 12, 1999, FEMA issued another revised preliminary FIS and FIRM, which moved the floodway to the landward toe of the Manning Levees and was favorable to Columbia Venture and its plans to develop the Property. PTEs 304, 305; Tr. 404, 789-90. The land protected by the Levees was classified as floodplain, the same categorization as the 1994/1995 effective FIRM. PTEs 229, 304. In contrast to the June 5, 1998 and February 25, 1999 revised preliminary data, FEMA published the August 12, 1999 revised preliminary FIS and FIRM, thereby initiating the 90 day appeal and

comment period under the NFIA.⁹ Tr. 784; 42 U.S.C. § 4104(b). The BFEs in the August 12, 1999 revised preliminary study were lower than the BFEs on the effective FIRM. PTE 533. Accordingly, FEMA instructed the County to use the 1994/1995 effective FIRM for permitting purposes (*see* PTE 031 at DEF-00000296), and Mr. McSwain advised the Council on September 7, 1999, that FEMA had told him to use the effective FIRM until the new FIRM and FIS became final, which was estimated to occur in early 2000. PTE 123 at DEF-00012042. Mr. Knudsen confirmed the current use of the 1994/1995 effective FIRM for floodplain management purposes in his November 30, 1999 memorandum to County Councilman Greg Pearce. PTE 125 at 1. As discussed earlier, the Manning Levees were not within the regulatory floodway on the 1994/1995 effective FIRM. Mr. McSwain stated publicly in September 1999 that Columbia Venture could be granted a permit to maintain the Levees under the 1994/1995 effective FIRM (PTE 123 at DEF-00012042), and Mr. McSwain further testified that the necessity of such a permit would be determined by the County Engineer's office. Tr. 2586-87. Heavy construction of the type required to upgrade the Levees, however, would not be considered maintenance and would not be permitted until the FEMA flood mapping process concluded. Tr. 2587-88.

Also, in the summer of 1999, Mr. Gregory and Mr. Manning testified that public opposition to the project began to surface. Tr. 420-21, 804. Mr. Manning testified that his impression of the objective of the opposition groups was to stop Columbia Venture's development. Tr. 423. Mr. Gregory further testified that certain opponents of the project

⁹ Although not pertinent to the findings in this matter, for purposes of accuracy, FEMA did not publish the BFEs in the *Federal Register* in August and September 1999 as required by statute, but it did publish the BFEs in the newspaper. PTE 061 at CV015101.

targeted Burroughs and Chapin and disparaged its reputation as a developer. Tr. 807. This negative campaign had apparently begun prior to November 30, 1999, the date Mr. Knudsen questioned the reputation of Burroughs and Chapin and whether public opinion, rather than scientific or technical evidence, was the motivation behind the County's potential appeal of FEMA's August 12, 1999 revised preliminary FIRM. PTE 125 at 2.

F. The County's appeal of the August 12, 1999 revised preliminary FIS and FIRM and the rising opposition to Columbia Venture's development plans. On December 7, 1999, Richland County Council passed a resolution in which it "officially appeal[ed] the findings of the [August 12, 1999] study in the name of the community of Richland County" PTE 311 at DEF-00000500. In his letter transmitting this resolution to FEMA, Mr. McSwain stated: "The Richland County Council has adopted on December 7, 1999 a Resolution by which it officially appeals the findings of the Flood Insurance Study" *Id.* at DEF-00000498. The Council officially appealed the August 12, 1999 revised preliminary FIS and FIRM despite not yet having received any individual or community appeals as of the date of the resolution. PTE 034 at DEF-00000430.

FEMA's regulations require the Community (here, Richland County) to collect and forward to FEMA all of the individual appeals of the BFEs that it receives. 44 C.F.R. § 67.7(b). FEMA's regulations also require the Community to evaluate the appeals it receives and determine whether "the evidence presented is sufficient to justify an appeal on behalf of such persons by the community in its own name." 44 C.F.R. § 67.7(c). A community is thus not required to appeal to FEMA in its own name; it can simply forward the private appeals it receives to FEMA. 42 U.S.C. § 4104(c) ("Whether

or not the community decides to appeal ...”). Pursuant to statute, FEMA treats appeals by the community differently from appeals not undertaken by the community and gives weight to the community’s stance on the merits of appeals. 42 U.S.C. § 4104(d) & (e); 44 C.F.R. § 67.9(a). “The sole basis of appeal under [FEMA’s regulations] shall be the possession of knowledge or information indicating that the elevations proposed by FEMA are scientifically or technically incorrect.” 44 C.F.R. § 67.6(a).

In its resolution appealing the August 12, 1999 BFEs, the County stated that the South Carolina Department of Natural Resources and others had raised issues calling into question the scientific and technical validity of the August 12, 1999 FIRM and FIS. PTE 311 at DEF-00000500. Because the County did not submit any scientific or technical information in support of its own appeal, FEMA acknowledged the appeal “expressed” by the County but did not recognize the County as an official appellant. DTE 045 at DEF-00001295. FEMA considers all nontechnical, nonscientific comments as protests. PTE 204 at 1. Also, Mr. Barker, who has had extensive experience dealing with FEMA and the flood mapping process, testified that FEMA considers the input and desires of the local community in its mapping decisions. Tr. 1288, 1304.

The County’s official appeal of the August 12, 1999 BFEs in its own name signaled a change in the County’s attitude toward Columbia Venture’s development plans that prompted Mr. Knudsen, the Land Development Administrator, to question how the County could “disagree” with the floodway lines that had “been changed back to essentially 1994 levels” in light of Mr. McSwain’s July 14, 1998 request that FEMA put the mapping process on hold. PTE 125 at 2. Mr. Knudson questioned whether public opinion, rather than scientific or technical evidence, was the motivating factor behind the

County's potential appeal. *Id.* Other entities appealed the August 12, 1999 map, including the South Carolina Department of Natural Resources. DTE 044 at DEF-00012652. Because the map was favorable to Columbia Venture's development plans, Columbia Venture did not appeal. Tr. 789-90.

Mr. Gregory also recognized that the County's attitude toward the development had cooled. He testified that he was bewildered with the County's appeal because in 1998, "Richland County very much wanted to get the floodway off of the property behind the levee." Tr. 793. Now that the floodway was removed from the Property behind the Levee, the County was "appealing their own map." Tr. 793. Columbia Venture, however, had no alternative at that point but to move forward. Columbia Venture continued to update its engineering analyses and options with various data with the ultimate goal of submitting a permit to improve the Levees to Richland County in furtherance of removing the floodway and floodplain from the Property. Wiseman Tr. 62-63; PTE 323 at CV001030-33. Columbia Venture also began negotiations with Richland County regarding a development agreement and agreement related to costs. Wiseman Tr. 77, 93-95; Wiseman Dep. Exs. 162, 172. As of June 15, 2000, documents shared between Columbia Venture and Richland County anticipated that the development agreement, infrastructure financing documents, including a multi-county business park ordinance, and zoning amendments would be submitted and approved by the end of calendar year 2000. DTE 137. Columbia Venture also provided various information, including confidential and proprietary information, to the County regarding environmental studies, wetlands delineations, and other information in response to the County's requests. PTE 555. Drafts on the various agreements were exchanged between

Columbia Venture and Richland County in August 2000. Wiseman Dep. Exs. 172, 174; PTE 004 at DEF-00004863. Columbia Venture shared its concept plan with County staff on September 5, 2000. PTE 004 at DEF-00004863. Further, the County and Columbia Venture finalized the process agreement and were close to a final cost agreement when County Council was briefed on the matter during executive session on September 19, 2000. *Id.* at DEF-00004863-64.

In response to the various appeals filed in December 1999, on September 26, 2000, FEMA released its "Appeal Resolution for Congaree River in Richland and Lexington Counties, South Carolina" and yet another revised preliminary FIRM and FIS. PTEs 204, 336, 338. The September 26, 2000 revised preliminary FIRM expanded the proposed floodway to encompass approximately 70% of the Property. PTE 338. By letter dated November 22, 2000, FEMA allowed Columbia Venture to administratively appeal the new revised preliminary FIRM and FIS. PTE 345. Columbia Venture submitted scientific and technical evidence to FEMA in support of its administrative appeal that showed no conveyance of water landward of the Levees. DTE 062; Tr. 798-802. The September 26, 2000 revised preliminary FIS and FIRM included BFEs that were lower than the BFEs in the 1994/1995 effective FIS and FIRM. PTE 533. Thus, according to FEMA guidance, the County should continue to use the 1994/1995 effective FIRM and FIS until FEMA issued its LFD. PTE 031 at DEF-00000296. FEMA further confirmed the use of the 1994/1995 effective FIS and FIRM for floodplain management decisions in an October 10, 2000 letter that included the following answer to a question asked by Council Chairwoman Kit Smith: "According to the NFIP regulations, a community may use its effective FIRM for floodplain management purposes until FEMA

issues a Letter of Final Determination finalizing the preliminary FIRM. After that, the community should use the FIRM defined by the Letter of Final Determination as best available data for floodplain management.” PTE 523 at DEF-00001691. However, as previously noted, neither the County Administrator nor the County Engineer would allow a permit to upgrade the Levees while the FEMA flood mapping effort was ongoing.

After FEMA released the Appeal Resolution on September 26, 2000, the County “suspend[ed] substantive negotiations with Columbia Venture until a FEMA decision has been made.” DTE 066 at DEF-00001955; PTEs 004 at DEF-00004864, 556 at DEF-00002233; Tr. 2447. Nevertheless, Columbia Venture continued to provide information to Richland County in late 2000 and early 2001, including providing its concept plan to the County Council on November 21, 2000, and information regarding development behind levees. PTEs 004 at DEF-00004865-66, 576; DTE 160. Upon viewing the preliminary plan in the fall of 2000, Councilman Pearce stated to *The State* newspaper: “It will knock your socks off. It’s beautiful.” Pearce Dep. Ex. 179 at CV018435; Pearce Tr. 94. In February 2001, certain confidential documents that Columbia Venture had submitted to Richland County were released to the press and members of the Congaree Task Force, one of the groups opposing Columbia Venture’s development plans. DTE 150; Tr. 2445. As Mr. Jim Wiseman, Columbia Venture’s then project manager, testified, the release of the confidential information gave Columbia Venture the impression that “it was clear that some of the council members were expressly against the project and were using information that had been submitted to the county to be detrimental to the project.” Wiseman Tr. 152. The evidence suggests that at least one

council member released the confidential information. PTE 004 at DEF-00004868; Tr. 2445.

G. Amendment of the Stormwater and Zoning Ordinances. The County began to consider amendments to its Stormwater Ordinance during mid-2000 in response to new requirements of the National Pollutant Discharge Elimination System Permit. DTE 051. An early draft of the proposed revisions contained a variance provision at Section 8-25 and retained the same language regarding “impede the free flow of water” at Section 8-27(h) and (i) that was contained in Section 8-62(h) and (i) of the then-effective Stormwater Ordinance. PTEs 113 at DEF-00001533, 230 § 8-26(h) & (i). After the release of the Appeal Resolution on September 26, 2000, public opposition to Columbia Venture’s development plans intensified. Pearce Dep. Ex. 180 at DEF-00001816-17. These opponents of Columbia Venture’s development plans identified the pending amendments to the Stormwater Ordinance as a way to possibly thwart the development plans if FEMA’s LFD included the Levees in the regulatory floodway. *Id.* at DEF-00001817. In October 2000, County staff described the opposition groups as “focused on this stormwater ordinance as the way to sink the B&C project (by County not revising the provision)” and that the Stormwater “[O]rdinance is the battleground for the B&C project.” *Id.* Ms. Smith testified that she understood the import of the interpretation of the Stormwater Ordinance on Columbia Venture’s Levee upgrade plans during 2000. Tr. 2441-42. During the summer and fall of 2000, however, County Council leadership decided that the County would not consider Columbia Venture’s plans to upgrade the Levees until after the County took a definitive position on the meaning of the “impede”

language of the Stormwater Ordinance. PTE 004 at DEF-00004865; Pearce Dep Ex. 180 at DEF-00001817.

Two of the main organizations opposing Columbia Venture's development plans were the Congaree Task Force, which was formed in October 2000, and the Southern Environmental Law Center. Tr. 422-23; PTE 004 at DEF-00004865; Wiseman Tr. 84, 118; Pearce Tr. 103. Mr. Wiseman testified that he understood that "some of the council members" were involved with the opposition groups in some capacity. Wiseman Tr. 154-55. The Congaree Task Force sent a Memorandum to Richland County Council on November 28, 2000, advocating that the County delete the variance provision from the draft amendments to the Stormwater Ordinance because of the Congaree Task Force's belief "that no developer should be allowed a variance from the provisions of 8-27(h) because development in the floodway should not be encouraged." PTE 114 at DEF-00001951. J. Blanding Holman, a lawyer with the Southern Environmental Law Center, sent a similar letter to Kit Smith, the then-current chairperson of Richland County Council. *Id.* at DEF-00001952-53. On December 4, 2000, the Assistant to the County Administrator confirmed that it would be recommended to Council that the variance provision be removed. PTE 346 at DEF-00001958. The variance provision was, in fact, removed from the draft ordinance of December 7, 2000, despite a County staff member's memorandum stating that the variance section was "required by the EPA." PTE 112 at DEF-00002175-76 & DEF-00002195-96. The final version of the stormwater ordinance enacted on April 17, 2001, did not contain a variance provision. PTE 374.

The County hired George Wolfe, Esq. to advise the County regarding levee issues and the meaning of the word "impede" in the County's Stormwater Ordinance. PTE 004

at DEF-00004867-68. On January 23, 2001, Mr. Wolfe presented his “legal opinion on [the] County’s floodway provision to [the] Development and Services Committee.” *Id.* at DEF-00004868. County staff emailed this legal opinion, which expressly claims the attorney-client privilege, to Mr. Holman with the Southern Environmental Law Center at 2:13 p.m. that same day. PTE 578. County staff also emailed Mr. Wolfe’s separate legal opinion regarding levee liability to Mr. Holman a few minutes earlier at 2:11 p.m. PTE 577. Mr. Wolfe’s memorandum regarding levee liability stated in bold that the memorandum was protected by the work product doctrine and attorney-client privilege and, additionally, that the memorandum “is being transmitted to Richland County for its sole benefit and use.” *Id.* at SELC000030. No evidence was presented to show that these legal memoranda were contemporaneously shared with Columbia Venture.

In addition, Mr. Pearson testified that at some point in time after Columbia Venture purchased the Property (and most likely well after August 1999), the County Attorney, Larry Smith, informed him that he was no longer allowed to interpret the “impede” language in the County’s ordinances to be consistent with the FEMA no-rise standard. Tr. 1324-25, 1400. Instead, Mr. Smith told him to apply a literal definition to the word “impede” such that virtually anything would impede the free flow of water and, hence, would not be allowed in a regulatory floodway. Tr. 1325-26. Instead of the no-rise engineering standard, Mr. Pearson subsequently applied a “language standard” of impede, which he equated to a “no build” standard. Tr. 1325.

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

Pearson testified that the deferrals were related to the issue of the meaning of "impede" in the Stormwater Ordinance. Tr. 1427. On March 20, 2001, a majority of the Richland County Council declined to follow the recommendations of the County staff, including the County Engineer, to adopt the FEMA no-rise interpretation of "impede the free flow of water." Tr. 1431-32; PTEs 051 at DEF-00002257, 186 at DEF-00012099-100. Affected landowners Columbia Venture and Heathwood Hall had also advocated for the FEMA no-rise standard and adoption of FEMA's model ordinances. PTE 184 at DEF-00002246; DTE 072 at DEF-00002057; Tr. 2426. Heathwood Hall also asked the County not to "single Heathwood out for special treatment" and expressed a desire to "treat all county landowners equally." PTE 184 at DEF-00002246; Pearce Tr. 135. Instead, a majority of the Richland County Council voted for an amendment drafted by the Congaree Task Force and the Southern Environmental Law Center that interpreted "impede" as a prohibition on building in the regulatory floodway yet carved out exceptions for a pre-existing school and wastewater treatment facility. PTEs 183, 185, 186 at DEF-00012099-100; Pearce Tr. 139. The school and wastewater treatment facility could build in a floodway upon showing a no-rise. PTEs 183 at DEF-00002244, 185 at DEF-00002249. According to a chronology prepared by County staff, Mr. Robert Adams of the Congaree Task Force stated in a meeting with Heathwood Hall on March 19, 2001, the day before first reading, that the Congaree Task Force had the votes on County Council to pass the amendment drafted by the Congaree Task Force, including the vote of Ms. Smith. PTE 004 at DEF-00004870.

Councilmember Bernice Scott stated at the March 20, 2001 meeting: "[T]his motion is definitely against any development in that area. We have had landowners on

top of landowners that came before us today to tell us to take out just those two entities. What we are doing to landowners is saying we don't need you there, but we are going to take care of the school, the City and the Wastewater Treatment Plant." PTE 186 at DEF-00012099. The minutes also state that "Ms. Scott wanted the record to reflect 'that this is a first step for a lawsuit because this is definitely wrong.'" *Id.* at DEF-00012100. In an internal Richland County memorandum, Mr. Pearson, the County Engineer, affirmed that under the proposed amendment passed in first reading on March 20, 2001, "[m]aintenance to levees in a floodway would be permitted if it did not alter the configuration or cross section of the levee. ... Increasing the height or width of a levee would not be permitted." PTE 117 (emphasis in original). The County had long known that any improvement of the Levees would require them to be made higher and wider. Tr. 2588-89; Pope Tr. 18-19; *see also* Wiseman Dep. Ex. 161 (notes of a County staff member describing a June 2000 meeting between the County and Columbia Venture where Columbia Venture explains its levee design as widening and raising the Levee).

Second reading was held on the Stormwater Ordinance amendments on April 3, 2001. PTE 191 at DEF-00012107-08. On the day before second reading, Mr. Wiseman wrote a letter to Council Chairwoman Kit Smith regarding the proposed amendments to the Stormwater Ordinance. Mr. Wiseman wrote in pertinent part as follows:

We also appreciate your assurance, reiterated most recently at the last council meeting [March 20, 2001] 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 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.

PTE 365 at DEF-00002272. Mr. Wiseman testified that the vote on the stormwater ordinance was, in fact, “seen in the press and [by] members of the opposition as – as a victory and that Richland County had in fact turned the project down.” Wiseman Tr. 179. County records show that the Congaree Task Force had, as Mr. Wiseman described, claimed “victory, calling [the vote on first reading] a test vote on Green Diamond.” PTE 004 at DEF-00004870. During April 2001, Columbia Venture personnel met “with various Council Members privately to determine level of support.” PTE 004 at DEF-00004871.

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

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

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

(1) such proposed impediment is or would be part of or used by any public or private school that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway, or

(2) such proposed impediment is or would be part of or used by a publicly owned wastewater treatment facility that was constructed and operated before January 1, 2001 on property subsequently classified as a regulatory floodway; or

(3) such proposed impediment is a minor recreational or playground facility or area, such as, but not limited to, a boat ramp, floating dock, picnic area, soccer goal, or swing set, or

(4) such impediment was approved by the County Engineer under this subsection (h), or under any predecessor provision, before January 1, 2001;

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

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

PTEs 190 at DEF-00012114, 374 at DEF-00012759.001. The revised Stormwater Ordinance did not contain a variance provision. PTE 374. On May 15, 2001, the County amended its Zoning Ordinance to permit a school and a wastewater treatment facility as uses in the regulatory floodway. DTE 087 at DEF-00002531-32. Councilmembers Greg Pearce and Kit Smith testified that the County's actions in passing the amended

Stormwater Ordinance had the effect of singling out Heathwood Hall and the wastewater treatment plant. Pearce Tr. 135; Tr. 2426. At the time the revised Stormwater Ordinance was adopted on April 17, 2001, the effective regulatory floodway stopped at the riverside toe of the Levees. PTE 229. Consequently, the campus of Heathwood Hall, the City of Columbia's wastewater treatment facility, the vast majority of Columbia Venture's land, and the Levee system itself were not in an effective regulatory floodway.

Columbia Venture continued to provide information to the County in the face of the pending and enacted amendments to the Stormwater and Zoning Ordinances. PTEs 550, 554, 580, 581; Wiseman Dep. Ex. 215. Columbia Venture's administrative appeal of the September 26, 2000 revised preliminary FIS and FIRM was still pending with FEMA until August 20, 2001, when FEMA issued its LFD. DTE 093. Included in the information provided to the County was Columbia Venture's request of \$79,757,793 in public infrastructure financing via the multi-county business park financing vehicle. PTE 581 at CV005815-16. Of the total figure, \$55,007,753 represented funds for basic infrastructure: upgrading the Levees, maintaining the Levees, constructing roads, bridges, the water, waste water, natural gas, electrical, and fiber optics systems, mitigating wetland and environmental issues, and various engineering and geotechnical work. *Id.* at CV005597, CV005816. The remaining \$24,750,040 was allocated to improvements for existing adjacent communities and a special economic development account to attract additional investment in the proposed technology park. *Id.* at CV005597. The timing of the funding requests was spread over 15 years. *Id.* at CV005820. Columbia Venture estimated the total public revenue generated by the development to be over \$2 billion; consequently, the funds requested for basic

infrastructure represented less than three percent of the total anticipated revenue, and the total funds requested from the multi-county business park financing vehicle represented less than four percent of the total anticipated revenue. *Id.* at CV005593, CV005597, CV005599.

Ms. Smith testified that Columbia Venture provided “[a] tremendous amount of data” to the County. Tr. 2477. 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.” Tr. 2478. She further testified that “as time went on, it became apparent to me that we did not need – the County didn’t need to take a risk of building the levees.” Tr. 2480.

On or about January 13, 2003, Ms. Smith stated to *The State* newspaper that the reason Columbia Venture’s development was not going to happen is “a question of geography.” Tr. 2484; PTE 397 at DEF-00002759. Ms. Smith also stated to *The State* that Columbia Venture “couldn’t have done anything different that would have made it [the development] happen.” Tr. 2484-85; PTE 397 at DEF-00002759. In addition, Mr. Pearce testified that although neither the Property itself nor FEMA’s regulations changed from 1999 to 2001, his “perception of [the Congaree R]iver and how it operated had significantly changed ... from 1999 to 2001.” Pearce Tr. 160. The evidence further reveals that Ms. Smith felt strongly and negatively about Columbia Venture, writing at some point during the process that Columbia Venture’s development was, among other derogatory terms, a “zircon of greed” and that “Burroughs and Chapin should be sent packing from Richland County.” PTE 350; Tr. 2485-90.

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

Venture. On August 20, 2001, FEMA issued its LFD confirming the regulatory floodway proposed in the September 26, 2000 revised preliminary FIRM, which covered approximately 70% of Columbia Venture's Property. DTE 093; PTEs 381, 382. Pursuant to correspondence between FEMA and Richland County, the County's then-existing ordinances automatically adopted the LFD and the accompanying FIS and FIRMs six months later on February 20, 2002. PTEs 056, 057. "Communities are given six months from the date of the LFD in which to adopt the revised FIS and FIRM. This is in keeping with FEMA's statutory obligation to provide a reasonable time for the community to adopt floodplain management regulations consistent with the final flood elevation determinations." PTE 031 at DEF-00000298. Thus, revised preliminary FIRMs are not to be considered revisions to effective FIRMs until six months after the LFD has been issued. "Floodplain management ordinances generally contain [a reference to] the current effective FIS and FIRM [and] may include [language incorporating by reference] any subsequent amendments thereto (*i.e.*, to include any subsequent revised FIS and FIRM); however, this language should not be used as the basis for a community to use the preliminary FIS prior to the issuance of the LFD." *Id.* This language is sufficient, however, for a community to adopt the final FIS and FIRM six months after the LFD. PTEs 056, 057. Consequently, the expanded floodway became effective on February 20, 2002, and Richland County adopted this floodway by regulation on that date. Prior to February 20, 2002, the effective regulatory floodway was limited to the land between the Congaree River and the riverside toe of the Levees.

On February 20, 2002, the applicable Stormwater Ordinance, as amended in April 2001, prohibited any "levees, dikes, fill materials, structures or obstructions that will impede the free flow of water during times of flood" in the regulatory floodway except specific exceptions for a school, a wastewater treatment facility, a minor recreational or playground facility, or an impediment approved by the County Engineer prior to January 1, 2001. PTE 374 at DEF-00012759.001. The revised Stormwater Ordinance also specifically prohibited making a levee located in the regulatory floodway higher or wider. *Id.* Mr. Manning testified that as of February 20, 2002, the Manning Levees were the only levees in Richland County located in a regulatory floodway. Tr. 448. No other witness could identify any other levees in Richland County located in a regulatory floodway other than the Manning Levees. See Tr. 2434-35. As of February 20, 2002, Richland County's interpretation of "impede" had also changed from the no-rise standard to a no-build standard by action of the County's governing body. Tr. 803-04, 1325.

According to Mr. Barker, it would have been possible under the February 20, 2002 effective FIRM and the no-rise standard of 44 C.F.R. § 60.3(d)(3) to improve the Levees sufficiently to certify them under FEMA standards. Tr. 1301-02. It would not be possible, however, to improve the Levees under the County ordinances that existed on February 20, 2002, because, as Mr. Pearson testified, a flag pole, a fence post, or "virtually anything that is solid" would be prohibited in the regulatory floodway as an impediment to the free flow of water under the no-build interpretation. Tr. 1325. Further, it is undisputed that any improvement of the Levees would require them to be made higher and wider, an action specifically and pointedly prohibited in Richland County's amended Stormwater Ordinance. See PTE 374 at DEF-00012759.001.

I. Property Valuation and Damages. Columbia Venture presented evidence regarding its purchase price for the Property, the amount it spent attempting to develop the Property, and expert opinion testimony regarding the measure of its investment backed expectations for developing the Property and the fair market value of the Property before and after the regulatory taking. Columbia Venture's witnesses included a certified public accountant, J. Robert Calliham, and two real estate appraisers, Thomas F. Wingard, MAI, and Thomas F. Hartnett, GAA, CRB. Columbia Venture also submitted an appraisal report of Jerry R. Adkins, MAI, which it obtained prior to purchasing the Property. PTE 255. Richland County presented expert opinion testimony regarding the fair market value of the Property before and after the regulatory taking. The County's expert witness was George E. Knight, Jr., MAI.

Mr. Calliham is a certified public accountant with the accounting firm of Smith, Sapp, Bookhout, Crumpler & Calliham, in Myrtle Beach, South Carolina. Tr. 2759-60. Mr. Calliham supervised the preparation of audited financial statements of Columbia Venture, LLC's business operations from its inception through December 31, 2004, and testified regarding the audited financial statements for the four years ending December 31, 1999, through December 31, 2002. Tr. 2762-66; PTEs 199, 203, 349, 396. The statements were prepared by staff members working under Mr. Calliham's direct supervision, and he reviewed the supporting work papers for the financial statements, and he also would have performed the final review on the financial statements before the reports were signed. Mr. Calliham personally signed all but one of the four audit reports admitted into evidence. Tr. 2765-66. Mr. Calliham and his staff prepared the audited financial statements in accordance with generally accepted accounting principles. PTEs

199 at CV003732, 203 at CV008978; 349 at CV005432; 396 at CV009080; Tr. 2798-2800.

Mr. Calliham also prepared several separate work papers and analyses or compilations of information contained in the audited financial statements and the closing documents for Columbia Venture's purchase of the Property. PTEs 572, 573, 574, 575. These financial statements and other exhibits were offered to demonstrate the following information: (1) the amount that Columbia Venture paid for the Property (as opposed to the amount that Burroughs & Chapin contracted to pay Mr. Burwell Manning for the Property); (2) the total investment made by Columbia Venture through December 31, 2002, in purchasing and attempting to develop the Property, and (3) the effect on Columbia Venture's financial statements of its repurchase of Mr. Burwell Manning's membership shares in Columbia Venture, LLC. Tr. 2769.

Though Burroughs and Chapin had originally contracted with Mr. Burwell Manning to purchase the Property for \$18 million in cash (DTE 156 at CV008091), the purchase agreement was amended prior to closing and also assigned by Burroughs and Chapin to Columbia Venture, LLC. Tr. 2857-58; PTEs 275 at CVMcNair000250-53, 277. At the closing, Mr. Burwell Manning received \$10,806,539 in cash and agreed to accept \$6,650,000 of the purchase consideration in the form of membership shares in Columbia Venture, LLC, which were received by Green Diamond, LLC, an entity owned by Mr. Burwell Manning. PTEs 275 at CVMcNair000250-51, 326 at CVMcNair000998. In addition, Burroughs and Chapin received \$6,000,000 in membership interests in Columbia Venture, LLC in exchange for assigning its contract to purchase the property from Mr. Burwell Manning to Columbia Venture. PTE 326 at CVMcNair000998.

Columbia Venture also incurred \$126,452 in closing costs, bringing the total purchase price for the Property paid by Columbia Venture, LLC, calculated according to generally accepted accounting principles, to \$23,582,991. PTEs 203 at CV008981, 572; Tr. 2774-76. In accepting the \$23.58 million purchase price for financial statement reporting purposes, Mr. Calliham relied upon the appraisal dated March 26, 1998, and updated February 8, 1999, prepared by Jerry R. Adkins, MAI. PTE 255; Tr. 2859.

Mr. Calliham further testified that from inception through the end of calendar year 2002, Columbia Venture was in the developmental stage of its operations, which required that all land development costs be capitalized, rather than expensed, for financial statement reporting purposes. *See* Tr. 2763-64, 2811-12. Columbia Venture acquired a large tract of real estate expecting to develop and subdivide it, and to offer smaller parcels for sale to others. The company would thus remain in the developmental stage until the Property had been developed and subdivided, and the company was ready to offer the Property for sale or lease to others. Tr. 2763-64. Therefore, generally accepted accounting principles require that Columbia Venture capitalize development costs, permanent improvements, and property taxes related to the Property. *See* Tr. 2855. Development costs include the costs of services of land planners, architects, and engineers. Tr. 2777-78. Development costs which are capitalized according to generally accepted accounting principles also include legal fees and other costs related to obtaining governmental permits and permission to develop the Property, including development agreements and flood map revisions. Tr. 2857. Mr. Calliham testified that as of December 31, 2002, Columbia Venture had spent \$37,961,036, calculated according to

generally accepted accounting principles, in purchasing the Property and pursuing its land development plans and activities for the Property. Tr. 2780-89, 2855.

Mr. Calliham also testified that in the year 2000, the other members of Columbia Venture, LLC repurchased the membership shares held by Mr. Burwell Manning's entity, Green Diamond, LLC for \$7,418,150.85, which provided a \$788,405 profit on Mr. Burwell Manning's investment in the shares, according to generally accepted accounting principles. Tr. 2789-95.

Prior to purchasing the Property, Burroughs and Chapin commissioned an updated appraisal letter dated February 8, 1999, for a previous appraisal report dated March 26, 1998, which was prepared by Jerry R. Adkins, MAI. PTE 255 at CV005993-95. 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." *Id.* at CV006056. The updated appraisal letter dated February 8, 1999, noted as follows:

Significant governmental actions have occurred during the past 12 months affecting the property. Shortly after our first appraisal, FEMA revised the Richland County Flood Insurance maps reclassifying most of the property from flood plain to floodway. Thus prohibiting any development on the property. On February 2, 1999, the Richland County Council agreed to assume maintenance of 20± miles of upgraded levees protecting the property. The revised FEMA maps will remove most of the appraised property from the 100 year flood plain, permitting full development. The revised flood maps and county levee maintenance increase the desirability of the property for development. The rate of absorption should increase because engineering, insurance, construction, legal, and surveying costs should significantly decline.

Id. at CV005993.

The updated appraisal letter dated February 8, 1999, "reconfirms a *minimum* value of \$30,000,000" for the subject property. *Id.* (emphasis supplied). Mr. Adkins used a development approach in his appraisal. *Id.* at CV006056-60. 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.

Id. at CV006056.

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. *Id.* at CV006060; Tr. 1745.

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. Tr. 1488-90. Mr. Wingard was also asked to present and explain appraisal work product that he and others had previously prepared for Columbia Venture and its members related to the subject Property. Tr. 1490.

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, and two interstate highways; and miles of frontage along the Congaree River and Interstate 77. Tr. 1509.

Mr. Wingard and Martin H. Van Sant, SRA, another professional real estate appraiser in Columbia with 37 years of appraisal experience (Tr. 1491), 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. Tr. 811. 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 only. Tr. 1492-93; PTE 394. 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. *See* DTE 087 at DEF-00002531-32 (listing the limited uses available to property designed as floodway). Mr. Wingard compared a conservation easement, where a donor actually puts restrictions on property usage in perpetuity, to an inverse condemnation or regulatory taking. Tr. 1492, 1503. He further testified that the value estimate before the conservation easement measured Columbia Venture's distinct,

investment-backed expectations for purchasing the subject Property and developing it according to the EDSA land development plan in conjunction with the necessary zoning changes and major infrastructure financing provided through a multi-county business park. Tr. 1492-93, 1620.

Though the effective date of the conservation easement appraisal is October 15, 2002 (PTE 394 at CV006289), this is only slightly more than eight months after the date of the regulatory taking. Mr. Wingard testified that this short period of time, compared to the 15 year development and sales period encompassed by the appraisal, would not affect his ultimate opinions of value. Tr. 1501-02. He also testified that the conservation easement appraisal was an appropriate substitute for an appraisal of the Property before and after the assumed regulatory taking. Tr. 1622.

In valuing the Property before the regulatory taking, Van Sant and Wingard concluded that the highest and best use of the Property was for a mixed use development. Tr. 1548-51. In making this determination, they also reviewed and relied upon a separate Market Research report dated July 1999, and a Highest and Best Use Analysis dated August 1999, both of which were prepared by Haddow. Tr. 1544-47; *see* PTEs 299, 301.

To estimate the fair market value of the Property before the taking, these appraisers also utilized the development approach, which is also known as the subdivision valuation approach. This approach is a standard valuation technique that is recognized by the appraisal profession and the banking industry. Tr. 1570, 1789. 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. Tr. 1566-70. Mr. Wingard testified that this was the only appropriate valuation approach to utilize in these circumstances, as it would measure, as accurately as was possible, Columbia Venture's investment backed expectations in purchasing and attempting to develop the Property. Tr. 1769, 1789.

Van Sant and Wingard utilized the comprehensive land development plan prepared by EDSA as the basis of their appraisal of the Property before the regulatory taking. In their professional opinion, this plan represented the highest and best use for the Property. Tr. 1497; *see also* PTE 553. The EDSA plan also complimented Richland County's Town and Country comprehensive land use plan and would help prevent urban sprawl in the area. Tr. 1511-16, 1524. According to the conservation easement appraisal, the EDSA 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.). PTE 394 at CV006366, CV006418, CV006468. 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. For these parcels, the appraisers also deducted a developer's or entrepreneurial profit of 13%. Tr. 1571-86. After deducting the aforementioned 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 an appropriate discount rate of 10%. Tr. 1577-78.

The EDSA land development plan also included golf course sites, school sites, agricultural lands (parcels 45 through 65 comprising 1,693 acres in Levee Section 3), 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. See PTE 394 at CV006460-66, CV006593-6610.

Van Sant and Wingard then added the appraised value of all of the above described land parcels contained in the EDSA land development plan, calculated according to the respective appraisal methodologies, and estimated a fair market value of the subject Property before the proposed conservation easement of \$142,000,000. PTE 394 at CV006295, CV006654; Tr. 1580-81, 1621.

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." PTE 394 at CV006302. 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." Tr. 1552-53. 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. Tr. 1552-63, 1575-76, 1583-85.

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. PTE 394 at CV006644-53; Tr. 1624-25. For this valuation, the appraisers used only a Sales Comparison Approach. PTE 394 at CV006645. 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. PTE 394 at CV006653; Tr. 1624-31.

The conservation easement appraisal is a well-researched and comprehensive appraisal analysis, totaling over 280 pages without considering the appendices. PTE 394. It took approximately five months to complete, and the research work product filled two bankers boxes. Columbia Venture paid \$200,000 for the appraisal report. Tr. 1493-95. Conservation easements must be prepared in accordance with U.S. Treasury regulations and must withstand the scrutiny of the Internal Revenue Service. Tr. 1496-97.

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. PTE 425 at CV006100; Tr. 1635-37. The bank's appraisal was prepared for purposes of a loan transaction for an FDIC insured bank. Tr. 1636. 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. Tr. 1638, 1643. 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. Tr. 1654. 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. Tr. 1648, 1657.

Columbia Venture, LLC also presented the testimony of Thomas F. Hartnett, GAA, CRB, a real estate appraiser located in Charleston, South Carolina, who also testified as an expert witness. Mr. Hartnett reviewed the aforementioned appraisals prepared by Messrs. Van Sant and Wingard. He also reviewed the appraisal prepared by the County's real estate appraisal expert witness, George E. Knight, Jr., MAI.

Mr. Hartnett agreed with Mr. Wingard's testimony that the Property is unique and valuable due to its large contiguous undeveloped acreage, immediately adjacent to a large metropolitan area, a major state university, South Carolina's state capitol complex, a metropolitan airport, and interstate and river frontage. Tr. 1818-19. Mr. Hartnett compared the Property and the EDSA land development plan to the Daniel Island development in Charleston, South Carolina. *Id.*

Mr. Hartnett also agreed that the highest and best use for the Property prior to the regulatory taking was for a mixed use development. Tr. 1823-24. He also agreed it was reasonable, for the purposes of preparing the conservation easement appraisal, to utilize the EDSA land development plan as the basis of the development approach appraisal

methodology, to assume that the appropriate zoning changes would be granted in order to effect the EDSA plan, and to assume that the major infrastructure costs of the development would be financed through the multi-county business park financing vehicle. Tr. 1823-33.

Mr. Hartnett further testified that the Van Sant and Wingard conservation easement appraisal, with an effective date of October 15, 2002, was sufficiently close to the date of the regulatory taking in this case of February 20, 2002, that it would be an effective proxy or substitute for an appraisal valuing the Property before and after the date of the regulatory taking. Tr. 1836-40. Mr. Hartnett testified that the conservation easement appraisal, in estimating the fair market value of the subject Property before the regulatory taking, appropriately utilized the development or subdivision valuation approach, and that it was properly applied in this instance according to accepted standards in the appraisal profession. Tr. 1843. Mr. Hartnett testified that the value conclusion of \$142 million before the regulatory taking was well supported based upon the methodology used, the data used regarding comparable sales and absorption periods, and the assumptions of the multi-county business park financing vehicle, the implementation of the EDSA land development plan, the improvement of the Levees, and any necessary zoning changes. Tr. 1843-44. Mr. Hartnett agreed that the \$142 million figure accurately measured Columbia Venture's investment backed expectations for the Property. Tr. 1904-05.

Mr. Hartnett also reviewed Mr. Wingard's appraisal for Carolina First Bank dated March 14, 2005, and testified that this appraisal, like the conservation easement appraisal, was properly prepared according to professional appraisal standards, utilized the

appropriate appraisal methodology, utilized the correct highest and best use of agriculture and minor recreational uses, and was otherwise well-supported and reasonable in its value conclusion of \$14.115 million. Tr. 1847-49. Mr. Hartnett testified further that this appraisal, based on the timing adjustments for the comparable sales utilized in the appraisal, was sufficiently close to the date of the regulatory taking in this case to allow the bank appraisal to substitute for a valuation of the Property after the regulatory taking. Tr. 1845-47.

Based on his review of the appraisal prepared by Mr. George Knight, the County's real estate appraisal expert witness, Mr. Hartnett prepared an alternative calculation of the value before the regulatory taking, that did not assume the implementation of the EDSA land development plan, the use of multi-county business park financing, or any zoning changes. Tr. 1907. He agreed with Mr. Knight's sales comparables and conclusions that "high" land in the general area of the subject property, *i.e.*, land without any floodway or floodplain restrictions, would be worth \$15,000 per acre. Tr. 1852-83. He then assumed the improvement of the Levees to FEMA standards such that the entire 4,400 acres would be removed from any floodway or floodplain restrictions and the resulting value would be \$66 million ($\$15,000 \times 4,400 \text{ acres} = \$66,000,000$). Tr. 1853-54. From this number, he subtracted the cost of improving the levees of approximately \$12 million to arrive at a value before the taking of \$54,000,000. Tr. 1854. Subtracting the value of the property after the taking of approximately \$14.1 million, results in a value differential before and after the regulatory taking of approximately \$40 million. Tr. 1855.

Mr. George E. Knight, Jr., MAI, a real estate appraiser in Columbia, South Carolina, testified as an expert witness on behalf of Richland County. Mr. Knight prepared an appraisal report dated May 21, 2010, of the subject Property. PTE 195 at DEF-00012294. Mr. Knight appraised the Property both before and after an assumed regulatory taking as of February 20, 2002. *Id.* at DEF-00012298. For the value before the taking, Mr. Knight estimated the market value of the Property “where it was [in] the development process at that point” to be \$33,800,000. Tr. 1938. For the value after the taking, Mr. Knight “looked at the property with the flood maps in place and the assumption that the levees were not improved and would not be improved,” and found the market value to be \$28,200,000. Tr. 1938-39.

In his appraisal report, Mr. Knight set forth several relevant “Assumptions and Limiting Conditions” as follows:

All required licenses, certificates of occupancy, consents, or other legislative or administrative authority from any local, state or national government or private entity or organization have been or can be obtained or renewed for any use on which the value estimate contained in this report is based.

In cases of proposed projects, all permits and governmental regulations are assumed to be secured and/or complied with.

PTE 195 at DEF-00012302 (emphasis supplied).

In his valuation of the Property before the assumed regulatory taking, Mr. Knight found that the highest and best use for the Property was for “mixed use development.” *Id.* at DEF-00012298; Tr. 1943-47. And in addressing Columbia Venture’s intended use of the Property, Mr. Knight stated variously throughout his report that “it was always the intent of Columbia Venture to go through the regulatory process of levee certification which would have resulted in a revision of FEMA’s effective FIRMs of 2002 to eliminate

the floodway and floodplain designations behind the levee system.” PTE 195 at DEF-0012315.

In examining the four criteria of the highest and best use of the property, Mr. Knight wrote as follows:

“Legal permissibility: . . . It is clear from the development plans that have been formulated and discussions the developers had with Richland County, that the likelihood of some type of development plan being approved is probable. . . . Therefore, the legal permissibility of the property as of the date of the appraisal is for some type of development.” *Id.* at DEF-00012324.

“Physical possibility: . . . As of the effective date of the appraisal, before the final adoption of the FEMA flood maps on February 20, 2002, the physically possible use of the property is for the institution of some type of development plan with a mixed use development.” *Id.*

In addressing the financial feasibility of mixed use development for the Property, Mr. Knight stated: “It is clear at this point that the financial feasibility of some type of large scale development does appear to be a feasible use of the property. However, the financial feasibility of these development plans can only be tested if the assumptions are made that all permits [are] in place, the property is entitled, and they have received anywhere from \$50,000,000 to \$80,000,000 from the multi-county business park incentive. None of these things have occurred as of the effective date of the appraisal. *It is reasonable for the developer to continue to invest in having the property entitlements obtained.*” *Id.* at DEF-00012324-25 (emphasis supplied).

Finally, Mr. Knight concluded that the “maximally productive use of the property . . . is to continue with the entitlement phase of the process 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.” *Id.* at DEF-00012325.

However, despite repeatedly acknowledging that development of the Property was reasonable and should be pursued, and despite stating that “[i]n cases of proposed projects, all permits and governmental regulations are assumed to be secured and/or complied with,” Mr. Knight did not use a development approach or subdivision valuation approach in estimating the market value because he concluded that there was not “sufficiently verifiable information available at the time.” Tr. 1949-50. Therefore, he ultimately utilized a novel, non-standard appraisal approach in which he simply added the purchase price of the Property, which Mr. Knight testified was “about \$18.4 million” and which he confirmed as “market value” by analysis of allegedly comparable sales, plus the amount that he estimated Columbia Venture had spent attempting to develop the Property through December 31, 2001, plus an estimated return of 25% on a bulk sale of the Property. Tr. 1950-54, 2032.

In confirming the \$18.4 million “market value” of the sale of the property from Mr. Burwell Manning to Columbia Venture, Mr. Knight used four comparable sales, the first two of which were for a 2,349 acre development in Augusta, Georgia, and another large development, Palmetto Bluff, in Bluffton, South Carolina. Tr. 2022-24. Even though most or all of the planned development had already been completed on both of these tracts, Mr. Knight utilized only the raw land sale as a comparable and did not value

any of the net income from the development and sales activities. *Id.* The third “comparable” sale was for approximately 1,000 acres in Chester, South Carolina, which, in Mr. Knight’s view, was comparable to the subject Property (4,400 contiguous acres bisected by an interstate highway, close to a major university, the state capitol, and the state’s largest city) because it was “a large acreage tract on a river.” Tr. 2025-26. The fourth “comparable” sale was of a tract sold to the Big Lake Hunt Club and was adjacent to the subject Property. All of the acreage of this “comparable” tract was in the floodway and no development of that property was even proposed or possible. Tr. 2026-27. In comparing these sales to the subject Property, Mr. Knight made no quantitative or qualitative adjustments. Tr. 2028-29.

In calculating Columbia Venture’s expected profit from purchase and disposition of the Property, Mr. Knight used an expected profit of 25%, which was actually derived, not from any proposed or reasonably possible sale of the fee simple interest in the 4,400 acre tract, but from a proposed sale of a minority membership interest in Columbia Venture, LLC, that never materialized. Tr. 2038-48.

Mr. Knight admitted on cross examination that his appraisal approach did not conform to any of the three recognized methods for subdivision or land development valuation set forth in the book *Subdivision Valuation*, by Don M. Emerson, Jr., MAI, SRA, and published in 2008 by the Appraisal Institute, which Mr. Knight himself cited in his report. PTE 195 at DEF-00012326; Tr. 1988-2011. This is so, even though Mr. Knight has previously used one or more of these recognized approaches in numerous subdivision valuation assignments, including virtually the exact same approach utilized

by Van Sant and Wingard in the conservation easement appraisal of the EDSA land development plan for the subject Property. Tr. 2011-22.

Mr. Knight further admitted on cross-examination that he did not attempt to value any possible development and subdivision plan for the Property, even though he had a copy of the EDSA land development plan and the Van Sant and Wingard conservation easement appraisal, which contained a detailed description of the EDSA plan. Tr. 2054, 2096-98. He also admitted that he did not actually attempt to value Columbia Venture's distinct investment backed expectations in purchasing and attempting to develop the Property. Tr. 2048. He also conceded that his valuation approach did not actually value the Property put to any possible human use known to the appraisal profession. Tr. 2050-52. Finally, Mr. Knight conceded that he did not actually appraise the highest and best use of the Property, but only what Columbia Venture "could sell the property for in its [current] state." Tr. 2054.

In his valuation of the Property after the regulatory taking, Mr. Knight did not value the Property in the aggregate, but rather he separately valued the approximately 1,225 acres that were located outside the regulatory floodway, but which are still predominantly in the floodplain, and the approximately 3,175 acres located in the regulatory floodway. Tr. 2055. In valuing these two separate tracts, Mr. Knight used the comparable sales methodology.

For the 1,225 non-floodway acres, Mr. Knight utilized five comparable sales, one of which was a 535 acre tract in Aiken County that was sold for a tire manufacturing plant. PTE 195 at DEF-00012362-63. The other four comparables were land sales for proposed residential developments, many of which had been commenced or completed at

the time of Mr. Knight's appraisal. *Id.* at DEF-00012364. These sales ranged in size from 4,400 gross acres to 1,000 gross acres, and all of them included a mixture of land that was "not usable," *i.e.*, located either in floodway, floodplain, or wetlands areas, and "usable" land, which was located outside of any such areas. *Id.* Though Mr. Knight did make some qualitative and quantitative adjustments for each of these sales in making his analysis and reconciliation of the sales prices, Mr. Knight utilized the value of the "usable acres" of the land, *i.e.*, land that was outside any floodplain and wetlands areas, as opposed to the gross acreage of each sale, to derive the "comparable" sales value. *Id.* at DEF-00012365. This means that he was actually comparing the sales of non-floodplain properties to the subject 1,225 acres of Columbia Venture's property, the vast majority of which is located in a floodplain. Tr. 2069. Nevertheless, "[f]or the 1,225 acres outside of the floodway, [Mr. Knight] reconciled on a value of \$15,000 per acre" for the valuation after the regulatory taking. PTE 195 at DEF-00012365.

For the 3,175 floodway acres, Mr. Knight used five comparable sales. Though these sales ranged in time from May 20, 2003, to June 18, 2009, at prices ranging from \$2,055 to \$3,500 per acre, Mr. Knight made no quantitative or qualitative adjustments for the timing of these sales, or for any other attribute of the sales or the properties. Tr. 2069-73.¹⁰ The first comparable sale, "Record ID 4507" to the "Big Lake Hunt Club" was actually also used by Mr. Knight in his valuation of the subject property *before* the regulatory taking. Tr. 2069-70. All of the other four comparable sales were sales by

¹⁰ In his appraisal report, Mr. Knight stated "the only adjustment considered for the sales is the market conditions (time adjustment)." PTE 195 at DEF-00012385. However, in the Comparable Land Sales Chart set forth on the previous page of his report, there were no adjustments made for any of the comparable sales on the row for "Market Conditions(Time)." *Id.* at DEF-00012385.

Columbia Venture of portions of the subject Property, and all of those sales were for per acre prices that were less than the price Columbia Venture actually paid for the Property. Tr. 2070-72. In his analysis of these “comparable” sales, Mr. Knight “concluded a value of \$3,100 per acre for the 3,175 acres within the floodway area based upon the most recent sale of Beckham Swamp Road – Big Lake [Hunt Club] at a price of \$3,142.”¹¹ PTE 195 at DEF-00012385.

Mr. Knight then calculated a final “reconciled value” for the entire Property after the assumed regulatory taking by combining the estimated value of the land inside and outside the floodway, for a total of \$28,200,000. *Id.*

J. Summary of Findings of Fact. From the above evidence, I find that the County took actions prior to February 19, 1999, to induce Columbia Venture to purchase the Property on that date with the expectation of developing the Property as a multi-phased, mixed use, commercial and residential development behind improved, certified levees. On February 2, 1999, the County agreed to accept the responsibility under 44 C.F.R. § 65.10 to operate and maintain the Levees on certain conditions, the first of which was that Columbia Venture physically improve the Levees to meet FEMA standards. The Council Chairman, Mr. Livingston, wrote a letter to FEMA on February 17, 1999, announcing to FEMA the County’s agreement regarding the Levees and confirming to FEMA the property owners’ intent to upgrade and certify the Levees and the County’s cooperation therein.

I find that Columbia Venture’s investment-backed expectations were based on the following: all members of the County Council were overwhelmingly in favor of the

¹¹ Though Mr. Knight stated this comparable sale dated May 20, 2003, was “the most recent sale,” it was actually the earliest of all five sales. PTE 195 at DEF-00012385.

proposed development prior to purchase, which Columbia Venture promoted as a multi-phased, mixed use development involving commercial, residential, and recreational uses, protected by levees certified by FEMA to provide protection from the base flood; the County Council voted unanimously to accept responsibility for the Levees under 44 C.F.R. § 65.10 on certain conditions that Columbia Venture was prepared to meet; the Council's unanimous vote was taken after issues such as liability for levee failure and the costs of levee maintenance were considered and discussed and in response to the favorable recommendation of the County's land development administrator and the County's Development and Services Committee; the chairman of the County Council and County Administrator advised FEMA in writing of the County's agreement to accept the Levees; FEMA wrote that it would remove the floodplain and floodway designations from the land protected by the Levees once the Levees were improved and accepted by the County; Lockwood Greene advised Columbia Venture that in its professional opinion, the Levees could be improved without causing a rise in the level of the base flood (which was the standard under FEMA's regulations and the County's applicable ordinances, as interpreted by the County Engineer, if the Levee improvements had to be permitted under the June 5, 1998 revised preliminary FIRM); Lockwood Greene further advised Columbia Venture that the necessary physical improvements could be made to the Levees without causing a reconfiguration of the floodway and that there were no impediments to removing the floodway and floodplain designations from the Property; the Manning family and Burroughs and Chapin had publicly ventilated their plan to develop the Property behind the Levees, and there was no public opposition to the project prior to the purchase; the County Administrator had expressed the County's willingness in good faith

in a nonbinding memorandum of understanding to work with Columbia Venture on issues such as zoning, a multi-county business park, and tax incentive financing; and the members of Columbia Venture had the necessary experience, expertise, and financial resources to carry through with the proposed development.

I also find that after Columbia Venture acquired the Property, the County took actions that interfered with Columbia Venture's investment-backed expectations. Specifically I find that the County took actions that prevented Columbia Venture from meeting the first condition in the County's February 2, 1999 resolution and Mr. Livingston's letter to FEMA dated February 17, 1999: namely, making physical improvements to the Levees sufficient to certify them under FEMA standards and comply with the County's floodplain management ordinances. The "no impede/no rise" issue is only significant in terms of Columbia Venture's investigation prior to purchase to verify that the County could issue a permit under the applicable ordinances if the County continued to use the June 5, 1998 revised preliminary FIRM for permitting purposes. The County Engineer interpreted the words "impede the free flow of water" to be consistent with the FEMA no-rise standard, and Columbia Venture could have obtained a permit to improve the Levees under the June 5, 1998 revised preliminary FIRM on showing a no rise under 44 C.F.R. § 60.3(d)(3). The "no impede/no rise" issue did not arise until after FEMA issued a new revised preliminary FIRM with an expanded floodway on September 26, 2000, and opponents of the project focused on the issue as a way to stop the development and challenged the County Engineer's long-standing interpretation of the word "impede" in the County's ordinances dealing with floodplain management. Prior to September 26, 2000, the County Engineer's interpretation of the

“impede” language was not significant because in May of 1999, the County Administrator made the decision to use the 1994/1995 effective FIRM as the map to enforce the County’s floodplain ordinances (and not a revised preliminary map). Under the 1994/1995 effective FIRM, the Manning Levees were not located within the regulatory floodway.

The County Administrator’s decision to use the 1994/1995 effective FIRM was permissible under FEMA guidance because the 1994/1995 effective FIRM included Zone AE and a designated floodway. Also, FEMA instructed the County to use the 1994/1995 effective FIRM after August 12, 1999, when FEMA issued a new revised preliminary FIRM that contained BFEs that were lower than the BFEs contained in the 1994/1995 effective FIRM and FIS. Columbia Venture’s application to do some work on the Levees in May of 1999 was turned down, not because the Levees were within a regulatory floodway on a revised preliminary FIRM, but rather because the application, in the opinion of the County Engineer’s office, was incomplete. It was after the application had been turned down as incomplete that the County Administrator and the County Engineer made the decision not to issue any permits until after FEMA had completed its flood mapping study, which did not occur until August 20, 2001, when FEMA issued the LFD.

The County’s decisions not to issue any permits until after FEMA had completed its flood mapping necessarily delayed Columbia Venture’s plans to improve the Levees and allowed political opposition to the project to develop and grow. The County’s decision to officially appeal in its own name the August 12, 1999 revised preliminary FIRM that was favorable to Columbia Venture’s development plans also signaled a change in the County’s attitude toward the project from one in favor of the project to one

that opposed any opportunity for Columbia Venture to improve the Levees, which was the key initial piece of Columbia Venture's development plans. According to the testimony of Mr. Barker, and as demonstrated by FEMA's repeated actions in acquiescence to the County's requests, FEMA is sensitive and reactive to the desires of the local community in its flood mapping.

Also after September 26, 2000, the County bowed to political pressure from groups opposing Columbia Venture's development and took steps to prevent Columbia Venture from improving its Levees if FEMA ultimately included the Levees within a regulatory floodway on its final FIRM. On April 17, 2001, the County amended the County Stormwater Ordinance to prevent any improvements to a levee located within a regulatory floodway that would make the levees wider or taller. It also amended its Zoning Ordinance a few weeks later to conform to the amended Stormwater Ordinance. Thus, when FEMA issued the LFD on August 20, 2001, which the County adopted six months later on February 20, 2002, Columbia Venture was effectively prevented from improving its Levees. In amending the Stormwater Ordinance, the County Council also rejected the County Engineer's recommendation and prior interpretation of the word "impede" to be the FEMA no-rise standard in favor of a no-build standard. At the same time, the County Council excepted Columbia Venture's immediate neighbors, Heathwood Hall and the City of Columbia's wastewater treatment plant, from the no-build standard, even though their properties were protected by the same Levees as Columbia Venture's Property. As of February 20, 2002, the Manning Levees were the only levees in Richland County located in a regulatory floodway. The actions of the County singled out Columbia Venture and directly interfered with and precluded

Columbia Venture's plans to develop its Property behind certified levees as a mixed use, multi-phased commercial and residential development.

According to the testimony of Mr. Barker, the NFIP no-rise requirement of 44 C.F.R. § 60.3(d)(3) would not have prevented Columbia Venture from making physical improvements to the Levees sufficient to certify them under 44 C.F.R. § 65.10 even under FEMA's final FIRM dated August 20, 2001. The regulatory floodway shown on that final FIRM was less extensive than the one shown on the revised preliminary FIRM dated June 5, 1998. It was rather the combination of the County's amended and reinterpreted ordinances relating to floodplain management and the adoption of the August 20, 2001 FIRM on February 20, 2002, that prevented Columbia Venture from making any physical improvements to the Levees that would make them taller or wider, which would have been required to bring the Levees up to certifiable standards.

As the Court will explain in further detail in the following section of this Order, Columbia Venture had eminently reasonable, investment-backed expectations of improving the Levees and developing the Property. Those expectations were specifically induced by numerous actions of Richland County. In specific reliance on Richland County's actions, Columbia Venture spent \$37,961,036, through the end of 2002 and calculated according to generally accepted accounting principles, in purchasing the Property and pursuing its land development plans and activities for the Property. Columbia Venture had reasonable expectations of profiting from development of the Property in the range of \$142,000,000, calculated according to accepted appraisal methods. After February 20, 2002, as a direct result of Richland County's legislative actions to prohibit improvements of the Levees, the Property was worth only

approximately \$11,000,000, again calculated according to accepted appraisal methods. Richland County's actions were specifically directed at Columbia Venture, thwarted Columbia Venture's common law property rights, provided no benefit to Columbia Venture, and were taken, not to further the goals of the NFIA and the NFIP, but instead to thwart the development of the Property. Therefore, I find that the economic impact on Columbia Venture as a result of the County's actions was substantial, unwarranted, and constitutes a taking of its property for which just compensation is due.

III. Conclusions of Law

A. Jurisdiction and Venue. Columbia Venture has asserted, among other claims, that its private property has been taken by Richland County without payment of just compensation, in violation of U.S. Const. amend. V and S.C. Const. art. I, § 13 (the "Takings Claim"). South Carolina circuit courts have jurisdiction over the Takings Claim (S.C. Const. art. V, § 11); and venue in Richland County is proper (S.C. Code Ann. § 15-7-10(1)). Columbia Venture has also asserted a claim under 42 U.S.C. § 1983, premised on the same facts and violation of the same federal constitutional right. Jurisdiction of and venue for the § 1983 claim are proper under the same provisions of law as the Takings Claim.

B. Basis of the Claim. "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The United States Supreme Court has repeatedly emphasized that the role of this limitation on governmental power is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). The prohibition is also applicable to the states. U.S.

Const. amend. XIV; see *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)).

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

C. Subject of the Claim. It is uncontroverted that, at the time of the alleged taking, Columbia Venture had purchased and owned the Property in fee simple. That fee simple ownership is a property interest protected by the Takings Clause.¹²

¹² Richland County had suggested that the property interest at stake is Columbia Venture’s interest in a particular permit or zoning application. (Richland County’s Memorandum in Support of Motion for Summary Judgment (Lack of Protected Property Interest/Lack of Final Decision), June 6, 2012, p. 15 *et seq.*; Richland County’s Memorandum in Support of Motion for Summary Judgment on Plaintiff’s Substantive Due Process Claims, July 9, 2012, p. 16 *et seq.*). That argument was made with respect to the due process claims that were originally a part of the case. To the extent that Richland County continues to assert it, the argument confuses the standard for a substantive due process claim and the standard for a takings claim. A substantive due process claim does require the identification of a constitutionally protected property or liberty interest. This Court gave summary judgment to Richland County on Columbia Venture’s substantive due process claim, however, and that standard is no longer relevant to the remaining Takings Claim. See discussion in fn. 14 below of *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). As stated in *Olson v. United States*, 292 U.S. 246, 255 (1934) (emphasis supplied), “*It is the property . . . that is safeguarded by state and federal constitutions.*” An owner, even if he has no plans for use or re-purposing of his own, is

I conclude that Columbia Venture has a constitutionally protected property interest sufficient to support its Takings Claim.

D. Scope of Property Interest. The Court must also determine the scope of the property that is at issue. *See, e.g. Dunes West Golf Club LLC v. Town of Mount Pleasant*, No. 27208, Op. 2013 S.C. LEXIS 2 at *38 (Sup. Ct., Jan. 9, 2013) (discussed further, below). Although severance of a property into discrete parcels for takings analysis may be appropriate under certain circumstances in which justice and fairness so require, *see id.* at *38-40, I find that the circumstances of this case do not warrant severance of the Property into segments. Therefore, it is appropriate to consider the parcel as a whole; *i.e.*, the entire Property consisting of approximately 4,400 acres along the eastern bank of the Congaree River adjacent to the City of Columbia.

E. Regulatory Takings. “[P]roperty consists not merely in its ownership and possession but an unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements to that extent, destroys the property itself.” *Painter v. Forest Acres*, 231 S.C. 56, 60, 97 S.E.2d 71, 73 (1957). Thus, a taking “may result from government-imposed limitations on the use of private property.” *See Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011) (quoting *Byrd*, 365 S.C. at 656, 620 S.E.2d at 79). An owner of private property enjoys “the common law right to use private property so as to realize its highest utility.” *City of Myrtle Beach v. Juel P. Corp.*, 344 S.C. 43, 47, 543 S.E.2d 538, 540 (2001) (quoting *Purdy v. Moise*, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953)).

nonetheless protected. *See Boom Co. v. Patterson*, 98 U.S. 403, 408 (1879), cited more fully in text below.

The United States Supreme Court has been of the same view at least since 1922, when it recognized that government regulation of private property may amount to a taking. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). A government regulation will be deemed a regulatory taking if it is “so onerous that its effect is tantamount to a direct appropriation or ouster.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

The South Carolina Supreme Court has identified two elements in a regulatory takings analysis: “affirmative conduct and a taking.” *Byrd*, 365 S.C. at 657, 620 S.E.2d at 80.

With respect to affirmative conduct, the South Carolina courts require only that there be an affirmative act by the government giving rise to the alleged taking. *See id.* As *Byrd* makes clear, regulatory action with respect to land use is “affirmative conduct.” *Id.* In *Byrd* the alleged affirmative conduct was the government’s delay in acting on a rezoning petition. Rejecting the argument that delay is merely inaction rather than affirmative conduct, the South Carolina Supreme Court observed that “[r]egulatory delay is part of the regulatory process, so indeed it is the product of governmental action.” *Id.*

I find that the County’s adoption of FEMA’s revised FIRM on February 20, 2002, its amendment of its Stormwater Management Ordinance on April 17, 2001, together with numerous other actions taken by the County specifically with respect to development of the Property, satisfies the requirement in *Byrd* of “affirmative conduct.”

Byrd further holds that a property owner may establish the second element, a “taking,” under applicable federal Takings Clause jurisprudence. *See Byrd*, 365 S.C. at 658-61, 620 S.E.2d at 80-82 (applying *Penn Central Transp. Co. v. New York City*, 438

U.S. 104 (1978); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); and *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002)).¹³

The Takings Claim remaining after this Court's rulings on the parties' various summary judgment motions is, under applicable federal Takings Clause jurisprudence, governed by *Penn Central*. In that case, the United States Supreme Court identified two factors that have particular significance in the regulatory takings analysis, one being "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," and the other being "the character of the governmental action." *Penn Central*, 438 U.S. at 124, *adopted in Byrd*, 365 S.C. at 658, 620 S.E.2d at 80; *see also Lingle*, 544 U.S. at 528.¹⁴

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

¹³ *Byrd* specifically overruled any suggestion in prior South Carolina cases that a taking may be found only if the challenged regulatory action "denied *all* economically viable use of [plaintiff's] property," a requirement not found in the federal case law. *Byrd*, 365 S.C. at 660 n.11, 620 S.E.2d at 81 n.11 (emphasis supplied) (overruling to that extent contrary indications in *Glover v. County of Charleston*, 361 S.C. 634, 606 S.E.2d 773 (2004), and *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003)).

¹⁴ In *Agins v. City of Tiburon*, the United States Supreme Court had seemed to revise the *Penn Central* factors, observing that a government action "effects a taking if [it] does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." 447 U.S. 255, 260 (1980) (internal citations omitted). In *Lingle*, however, the United States Supreme Court explicitly rejected the "substantially advances" test and made clear that for alleged regulatory takings, *Penn Central* remains the determinative inquiry. *Lingle*, 544 U.S. at 532. In particular, the United States Supreme Court distinguished a takings analysis from a due process analysis and noted that the *Agins* "formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." *Id.* at 540.

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*, 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 (O’Connor, J., concurring).

The South Carolina Supreme Court recently undertook a *Penn Central* analysis in considerable detail. See *Dunes West*, 2013 S.C. LEXIS 2. In that case, the plaintiff in 2005 acquired a 256-acre golf course in order to continue the operation of the golf course for the benefit of the plaintiff's contiguous residential development and apparently with an inchoate idea of converting some indeterminate portions of the perimeter area of the golf course into additional residential lots. *Id.* at *2-3. Before the plaintiff took steps or expended any appreciable amount of money or effort to further that idea, however, the defendant Town of Mount Pleasant in 2006 amended its zoning ordinance to restrict all existing golf courses within the Town to only recreational and conservation uses. *Id.* at *1-2. The owner, two years later, twice sought rezoning of portions of the golf course property (including areas actually within the field of play), but was twice denied. *Id.* at *10-13. The property owner then brought suit alleging violations of equal protection and due process and an uncompensated taking. *Id.* at *13.

After defining the relevant parcel as the entire 256-acre golf course (for, among other reasons, its having been used as a unit, purchased as a unit, mortgaged as a unit, owned by a separate corporate entity the name of which indicated a golf purpose, with only a vague and apparently belated idea of converting some indeterminate portion into peripheral residential lots), the South Carolina Supreme Court then held that an evaluation of the *Penn Central* factors was the appropriate analytical method to determine whether a taking had occurred and proceeded to perform that analysis. *Id.* at *35-69.

I conclude that the *Penn Central* framework discussed above, as interpreted in South Carolina, provides the appropriate framework to assess Columbia Venture's claims.

I note that the *Penn Central* ad hoc line of analysis is distinct from the three *per se* regulatory takings lines: (1) deprivation of substantially all economically beneficial use (*Lucas*, 505 U.S. at 1003); (2) physical occupation (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)); and (3) compulsory exaction as a condition of permitting use or development (*Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). *Penn Central* “necessarily entails complex factual assessments of the purposes and economic effects of government actions,” rather than “appl[ication of] a clear rule,” as would be the case in the *per se* lines. *Tahoe-Sierra*, 535 U.S. at 323.

But this observation does not foreclose comparisons between the impacts in one line of cases and those in the other. Indeed, remaining cognizant of such analogies is entirely appropriate in order to avoid creating from a single, unified constitutional prohibition two fundamentally divergent regimes that treat citizens and their properties with a gross disparity explainable only by the respective skill levels of various government bodies in manipulating – “arbitraging,” if you will – the differences between two such regimes.

F. Application of *Penn Central* Factors. As noted above, in *Penn Central*, the United States Supreme Court identified two factors that have particular significance to the regulatory takings analysis: “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct

investment-backed expectations” and “the character of the governmental action.” *Penn Central*, 438 U.S. at 124. Given that the South Carolina Supreme Court has recently and thoroughly analyzed an alleged regulatory taking through the *Penn Central* lens in *Dunes West Golf Club LLC v. Town of Mount Pleasant*, I therefore begin my analysis with regard to the application of the *Penn Central* factors undertaken by the *Dunes West* Court and note some important distinctions between the situation in *Dunes West* and the case before this Court.

With regard to the character of the governmental action, the South Carolina Supreme Court in *Dunes West* emphasized that the Town’s re-zoning district “applied to all golf course properties in the Town” and that the new golf course zoning district was “not a permanent and immutable prohibition against residential use; rather, the . . . Ordinance represents the implementation of a controlled process through which the Town may evaluate future use conversion and ensure existing recreational uses are not abrogated or converted in an inappropriate manner.” *Dunes West*, 2013 S.C. LEXIS 2 at *59-61.

In this regard, at least, the situation in which Columbia Venture finds itself is substantially different. A key element of Richland County’s actions that made further development impossible was Richland County’s explicit amendment of its Stormwater Ordinance to prohibit making levees located in a regulatory floodway higher or wider. PTE 374 at DEF-00012759.001. As noted above, however, the only levees affected were the Levees that protected the Property when the County adopted FEMA’s effective FIRM on February 20, 2002. Thus, rather than being uniformly applicable, the act complained of here was targeted against a particular landowner. Moreover, unlike the Town of Mt.

Pleasant's ordinance, the prohibition on levee improvement was not an invitation to come in with plans to support a request for a variance (as some golf course owners had successfully done in Mt. Pleasant); rather, the amended Stormwater Ordinance prohibiting levee improvement (which had expressly deleted a variance provision in an earlier version) was a "permanent and immutable prohibition against" making a levee located in a regulatory floodway higher or wider and, indeed, building anything on Columbia Venture's Property. *See Dunes West*, 2013 S.C. LEXIS 2 at *59-61.

With respect to the economic impact on the *Dunes West* property owner, the South Carolina Supreme Court found a diminution in value from \$4 million down to \$3.5 million, representing only a 12.5% percent impact. *Id.* at *61-64. Here again, the impact on Columbia Venture is different by a substantial order of magnitude. The most reliable and best-substantiated testimony as to the diminution in the investment-backed expectation of value suffered by Columbia Venture (see discussion above and below) is that it was from \$142 million to \$11 million – a difference of \$131 million or over 92%.

Finally, with respect to the investment-backed expectations of the *Dunes West* property owner, the South Carolina Supreme Court found that "the record is devoid of any evidence showing [the property owner] substantially relied or materially altered its position based on the prior PD zoning or its desire to develop residentially a portion of the Golf Course Property," and that "the only objective, overt act appearing in the record is Appellant's informal identification of potential future home sites, and to the extent any costs were incurred during that process, Appellant failed to submit any such evidence." *Id.* at *66-67. Furthermore, the South Carolina Supreme Court noted, the property owner "failed to show any concrete steps taken in furtherance of prospective residential

development [but instead held only] a unilateral expectation unsupported by the kind of solid evidence necessary to establish a regulatory taking.” *Id.* at *68. Most importantly for this case, the South Carolina Supreme Court explained:

In acquiring the valuable Golf Course Property, [the property owner] only casually approached the idea of converting a portion of the property to residential development and never submitted any formal development plan or subdivision plat to the Town in furtherance of its abstract desire. Further, [the property owner] did not investigate, prior to purchase or anytime thereafter, the feasibility of the desired development – thus, it is clear Appellant’s unilateral development expectations did not take into account the wetlands, easements, or substantial changes to the golf course that would be required. Moreover, there is no evidence that the Town took any action or made any representation which served to increase Appellant’s expectations or led Appellant to believe that residential use would be forthcoming. To the contrary, [the property owner] knew, before purchasing the Golf Course Property, that public sentiment regarding any residential development would be a factor in its approval, notwithstanding the prior PD zoning designation.

Id. at 65-66.

On virtually every aspect of this part of the analysis, as well, the experience of and evidence presented by Columbia Venture, as found in detail above, is diametrically opposed to that of the Dunes West Golf Club, LLC.

Thus, *Dunes West* is quite far removed from the case now before this Court. Although the procedural steps followed by the South Carolina Supreme Court in its *Dunes West* analysis and the law that it applied are incumbent on this Court, the outcome of that analysis is not controlling here due to the great difference in virtually every aspect of the underlying facts that the Supreme Court found material in *Dunes West*. So while Dunes West Golf Club, LLC, was determined not to have suffered a taking, the analysis in that case actually provides strong support to the claims of Columbia Venture and, in any event, provides no basis for short-circuiting a full *Penn Central* analysis to the

detriment of Columbia Venture's claim. I therefore turn to an evaluation of the *Penn Central* factors.

1. Economic impact and investment-backed expectations. The first *Penn Central* inquiry examines the economic impact of Richland County's actions on Columbia Venture's Property, in particular the interference of Richland County's actions with Columbia Venture's investment-backed expectations. For this, the Court compares "the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987).

This analysis does not invoke mathematical precision but is one of the "important guideposts that lead to the ultimate determination whether just compensation is required." *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring). The most relevant South Carolina cases likewise expressly reject categorical rules. *See, e.g., Dunes West*, 2013 S.C. LEXIS 2 at *61 ("Although a comparison of values before and after a regulatory action is relevant, it is by no means conclusive.") (quoting *Keystone Bituminous*, 480 U.S. at 490); *Byrd*, 365 S.C. at 660, 620 S.E.2d at 81 (stating that "the United States Supreme Court [has] expressly rejected the adoption of categorical rules in the context of regulatory takings"); *Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984).

In determining the value of the property before the government action, "[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." *Olson v. United States*, 292 U.S. 246, 255 (1934). Pre-taking value "does not depend upon the uses to which [the owner]

has devoted his land, but is to be arrived at upon just consideration of all the uses for which it is suitable” so long as there is a “reasonable possibility that the owner could use his tract . . . for that use.” *Id.* at 255, 256-257.

The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

Boom Co. v. Patterson, 98 U.S. 403, 408 (1879).

This long-standing principle, developed in determining value in outright condemnation cases, is also applied by courts undertaking a *Penn Central* analysis to determine the occurrence of a taking in the first place (see *Brace v. United States*, 72 Fed. Cl. 337, 350 (2006) (“A property owner is entitled to have the fair market value be based upon the ‘highest and best use’ of the property.”), and, indeed, in all Takings Clause contexts. See *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1100 (N.D. Cal. 2007) (inverse condemnation: “A property owner is entitled to have the fair market value of his property determined by his property’s highest and best use before the taking.”); *McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110, 1128 (Nev. 2006) (*per se* taking by physical occupation: “[T]he market value of the property should be determined by reference to the highest and best use for which the land is available and for which it is plainly adaptable.”).

That the determination of value thus explicitly refers to the property owner’s investment-backed expectations comes as no surprise, as it is required by the plain language of the *Penn Central* and *Byrd* tests that the economic impact analysis

“particularly” includes reference to such expectations.

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). Thus, the court may value a “property based on the discounted stream of income the property is capable of producing over its useful economic life,” by using “[c]omparable sales . . . to establish gross revenue for the project, from which costs of development are then deducted, resulting in a stream of revenue that is then present-valued using a discount factor to derive a value for the property.” *Id.* The court further noted that “trial courts have considerable discretion to select the method of valuation that is most appropriate in light of the facts of each particular case.” *Id.* The *Norman* court therefore received testimony from both plaintiff’s and defendant’s experts on the cash flow expected to be received from the proposed development.

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 its 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 parties have introduced substantial evidence at trial with respect to the value of the Property prior to the alleged regulatory taking. This Court concludes that the appropriate valuation is that demonstrated in the appraisal provided by Messrs. Martin H. Van Sant and Thomas F. Wingard dated November 6, 2002, which establishes that the value of the Property prior to the taking and subject to its best and highest use as a mixed use development was \$142,000,000. That value, based on a subdivision development method using a discounted cash flow approach approved in *Norman v. United States*, was consistent with and supported by Columbia Venture's reasonable investment-backed expectations, as described both above and further below. The valuation offered by the County's expert, on the other hand, was based on a methodology that is not approved nor recognized in the literature that either side submitted to the Court, nor mentioned in the *Norman* court's discussion of appraisal methodologies. It simply took purchase price plus post-purchase expenditures (in other words, cost) and arbitrarily increased that figure

by an ultimately unfounded factor of 25%, thereby directly violating the *Olson* precepts quoted above.

The parties further introduced substantial evidence at trial with respect to the value of the Property after the alleged regulatory taking. This Court concludes that the appropriate valuation is that demonstrated in the appraisal provided by Messrs. Martin H. Van Sant and Thomas F. Wingard dated November 6, 2002, which established that the value of the Property subsequent to the taking was \$11,000,000.

In short, the diminution in value in the instant case was far more substantial than in *Byrd* (in which the diminution was not expressed mathematically, but involved merely a delay in a requested rezoning application) or in *Dunes West* (in which the South Carolina Supreme Court found a diminution, assuming all facts in favor of the property owner, from \$4 million down to \$3.5 million). Although this Court again declines to establish a bright-line threshold for the requisite diminution in value, it is incontrovertible that a diminution of \$131,000,000 is significant.¹⁵

¹⁵ Some courts focus their analysis on “a fraction, the numerator of which is the value of the subject property encumbered by regulation and the denominator of which is the value of the same property not so encumbered.” *Walcek v. United States*, 49 Fed. Cl. 248, 258 (2001). There is, however, no “automatic numerical barrier preventing compensation, as a matter of law,” and instead the court should consider “all the relevant considerations, including percentage diminution in value, under the modern *Penn Central* approach.” *Yancey v. United States*, 915 F.2d 1534, 1541 (Fed. Cir. 1990). “[T]his factor, at best, contemplates an imprecise analysis [and] courts have not yet reached a consensus as to a particular, universally applicable percentage of diminution in value that establishes a taking.” *Mehaffy v. United States*, 102 Fed. Cl. 755, 765 (2012); see also *CCA Assocs. v. United States*, 91 Fed. Cl. 580, 618 (2010) (“In determining how far is too far, there is no ‘magic number,’ and no set formula.”) (internal quotations omitted). Although the courts have never established a rigid threshold, recent case law suggests that a fifty percent diminution in value may be sufficient if the other factors are met. See *CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011). As noted earlier, in the present case the diminution in value (from \$142 million to \$11 million) was a diminution of over

I therefore conclude that the economic impact of the County's actions on Columbia Venture's Property was substantial, supporting a finding that a taking has occurred.

The Court next examines Columbia Venture's reasonable investment-backed expectations for the Property. That Columbia Venture had legitimate, specific, and documented expectations for the Property is not disputed. Furthermore, the evidence at trial showed that those expectations were backed by significant investments, including pre-purchase diligence that included certain preliminary engineering review of the Levees (see PTE 208), preliminary concept and financial plans and estimates (see PTE 264 at CVMcNair002447-55), the acquisition itself, and extensive post-acquisition development costs. Soon after purchase, in 1999, Columbia Venture hired engineers to begin work on upgrading and certifying the Levees, and commissioned a market study and the design of comprehensive development plans for the property. See discussion above. As described earlier in this Order, by December 31, 2002, Columbia Venture had spent \$37,961,036.00, calculated according to generally accepted accounting principles, in purchasing the Property and pursuing its land development plans and activities for the Property. Although some part of this expenditure may have occurred after the alleged taking was completed on February 20, 2002, the great majority occurred prior to that date.

Having found that Columbia Venture had distinct investment-backed expectations for the property, the Court now turns to the reasonableness of those expectations. The timing and magnitude of the investment by plaintiff are critical components of this

92%, while the diminution in value in *Dunes West*, from \$4 million down to \$3.5 million (assuming all facts in favor of the *Dunes West* plaintiff) was only 12.5%.

inquiry. A law review article offered by defendant Richland County emphatically makes this point:

Yet another perspective on the expectations issue focuses on when the property was purchased and for what purpose. The paradigmatic case of dashed expectations posited by the property rights movement is represented by David Lucas, who purchased two lots for development along the South Carolina shore for approximately \$ 1,000,000, and then, only a few years later, was prohibited from developing the lots by new state legislation. An arguably different case is presented by the long-time owner who purchased property well before the regulatory constraints were put in place, devoted the property to a particular use for many years, and is now confronted with a new regulation barring conversion of the property to some more profitable use.

John D. Echeverria, *Making Sense of Penn Central*, 23 U.C.L.A. J. Envtl. L. & Pol'y 171, 185 (2005).¹⁶ Columbia Venture's claim is clearly in the nature of the described "paradigmatic case of dashed expectations" in that it acquired the Property for development (representing a significant investment), and then, beginning even less than "a few years later," was affirmatively denied those expectations. Moreover, unlike the property owner in *Dunes West*, Columbia Venture, when it purchased the Property, did not believe that "the purchase price . . . was a fair price for the [existing use of the Property] itself," nor did Columbia Venture consider "any development value of the surrounding acreage to be 'a gift' which was not reflected in the purchase price." *Dunes West*, 2013 S.C. LEXIS 2 at *62. Instead, the timing and magnitude of Columbia

¹⁶ In citing *Making Sense of Penn Central*, I note that courts should be mindful of overreliance on scholarly articles. Professor Echeverria, for example, serves as an advocate for local governments and environmental concerns in regulatory takings cases and has seriously posed the question (and generally answered in the negative) of whether "partial regulatory takings" even exist under *Penn Central*. See John D. Echeverria, *Do Partial Regulatory Takings Exist?*, in American Bar Association, Section of State and Local Government Law, *Taking Sides on Takings Issues: Public and Private Perspectives* (Thomas E. Roberts, ed., 2002). In short, Professor Echeverria generally represents the segment of scholarship protective of local government action and hostile to claims of regulatory takings. Nonetheless, on certain points *Making Sense of Penn Central* is instructive for the case at hand.

Venture's investment, together with the evidence at trial, squarely demonstrate that Columbia Venture's investment in and acquisition of the Property was taken with the distinct expectation of the specifically described development. Columbia Venture was, in fact, formed for the sole purpose of purchasing and developing the Property.

Of course, the analysis includes not only what the property owner's expectations might be, but whether those expectations are appropriate to the circumstances. There are at least three factors that should be analyzed in determining the reasonableness of the property owner's investment-backed expectations.

First, "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations." *Palazzolo v. Rhode Island*, 533 U.S. at 633 (O'Connor, J., concurring). In *Palazzolo*, the United States Supreme Court considered the extreme case in which the property owner acquired title to the property after the regulation became effective. The Court rejected a categorical rule that would automatically find no taking of property acquired after the date of the regulation, even if the transferee had notice of the regulation, reasoning that "[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id.* at 628. At the other extreme, then, when a plaintiff acquires a parcel with demonstrable reliance on and due diligence into the then-current regulatory regime, that plaintiff surely has reasonable investment-backed expectations.

This Court's findings of fact establish that, at the time Columbia Venture acquired the Property on February 19, 1999, the regulatory regime in place would have allowed both the improvement of the Levees and the proposed development of the Property. The

testimony offered at trial established, with respect to the improvement of the Levees, that Columbia Venture reasonably understood that Richland County's then-existing ordinances regarding floodplain management would have allowed improvement of the Levees under FEMA's "no-rise" standard and that the County Engineer interpreted the ordinances in that fashion. Columbia Venture presented testimony from Mr. Carroll Barker that improvement of the Levees under the no-rise standard was achievable, confirming the pre-purchase opinion of Lockwood Greene. PTE 208 at CV002276. The testimony further established that the County agreed, by unanimous action, that it would allow Columbia Venture to improve the Levees, subject to certain contingencies that it itself thwarted, and that the County would thereafter "accept responsibility for local inspection and enforcement of the levee system, and if required by FEMA, to accept operation and maintenance responsibility for the levee system." PTE 147 at DEF-00012032. Consequently, Columbia Venture reasonably understood that its Levee improvement plans were permissible regardless of whether Richland County was using the June 5, 1998 revised preliminary FIRM or the 1994/1995 effective FIRM for permitting purposes.

Furthermore, the evidence demonstrates that, at the time of Plaintiff's purchase, over 70% of the Property was Zoned D-1, *i.e.*, "large tracts of land located primarily on the fringe of urban growth" where "future demand for developable land will generate requests . . . to remove land from the D-1 classification and place it into other more intensely developed classifications," as well as some smaller areas already zoned for M-1

(Light Industrial) and RS-3 (Single Family Residential).¹⁷ PTE 499. That zoning profile demonstrates that development of the Property in the manner that Columbia Venture intended was not only Columbia Venture's expectation, but was Richland County's expectation as well. Further, at all times material to this action, Richland County ordinances specifically allowed both residential and non-residential structures to locate behind levees. PTEs 230 § 8-62(g), 374 at DEF-00012758.001. Consequently, all manner of development behind appropriately constructed and maintained levees was contemplated by Richland County.

I conclude that Columbia Venture's investment-backed expectations were reasonable in light of the regulatory regime in place at the time it acquired the Property, i.e. Columbia Venture's expectation that it could proceed under the then-existing regulatory scheme with the improvement of the Levees and the planned development of the Property was a reasonable one.

The second factor the court should consider in determining the reasonableness of the property owner's investment-backed expectations is the extent to which "the owner's reasonable expectations have been shaped by the State's law of property." *Lucas*, 505 U.S. at 1016 n.7. South Carolina follows the common enemy rule with respect to the diversion of surface waters, which under applicable precedent include flood waters once they have left the channel of a water course. See *Lawton v. S. Bound R.R. Co.*, 61 S.C. 548, 551-52, 39 S.E. 752, 753 (1901); *Baltzeger v. Carolina Midland Ry. Co.*, 54 S.C. 242, 247-48, 32 S.E. 358, 359-60 (1899); William T. Toal, *Surface Water in South*

¹⁷ The remainder of the Property, zoned RU-Rural (for agricultural use), sat primarily in Levee Section 3 that was not proposed for immediate improvement and not part of the initial planned development. Tr. 485-86, 1618-19; see also PTE 581 at CV005588.

Carolina, 23 S.C. L. Rev. 82, 83 (1971). Under this rule, a landowner may treat surface water as a common enemy and dispose of it or take steps to divert it as the landowner sees fit. See *Glenn v. School Dist. No. Five of Anderson County*, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). Therefore, the right to exclude flood waters from real property is part of the bundle of ownership rights and accordingly inheres in the title to the Property.

It is, moreover, entirely reasonable for a property owner such as Columbia Venture to understand that its state common law right to exclude waters from its Property is a substantial and essential right that will be protected and enforced. Denying that right—requiring that waters be *allowed* onto a property owner’s land—has long been recognized as a compensable taking. In *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871), a taking was found after a government-constructed dam caused a lake to rise and overflow onto private property. “[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution” *Id.* at 181. Nor should it make any difference that the invasion is accomplished by denying the property owner’s common law rights rather than by construction of a dam. The Takings Clause “plac[es] the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them.” *Id.* at 177. Allowing a government to “destroy [private property’s] value . . . without making any compensation . . . would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext

of the public good, which had no warrant in the laws or practices of our ancestors.” *Id.* at 177-78 (emphasis supplied).

Hill v. City of Hanahan is instructive on this issue. The plaintiff in *Hill* sued for inverse condemnation of approximately three acres of land. *Hill*, 281 S.C. at 528, 316 S.E.2d at 682. The Court of Appeals affirmed a jury verdict in favor of the plaintiff. *Id.* at 532, 316 S.E.2d at 684. The plaintiff owned approximately five acres of land zoned by the City for multifamily dwellings. *Id.* at 528, 316 S.E.2d at 682. A prior land owner had allowed the highway department to excavate part of the land, which excavation left a water-collecting basin. *Id.* The plaintiff had then begun to fill the basin to allow development, but the City stopped the filling in order to use the basin for flood control and drainage. *Id.* The plaintiff argued that she was allowed to fill the land under the “common enemy” right to divert water from her land. *Id.* at 528-29, 316 S.E.2d at 382.

The Court concluded that this denial of the common law right to exclude invasive surface waters was a taking. “To deprive [a property owner] of the ordinary beneficial use and enjoyment of his property is, in law, equivalent to the taking of it, and is as much a ‘taking’ as though the property itself were actually appropriated.” *Id.* at 530, 316 S.E.2d at 683. In short, the Court of Appeals viewed the action of the City as prohibiting filling, and thus development, in order to allow a place in which flood waters could be diverted and gathered.

The federal District Court for the District of South Carolina has cited *Hill* for this proposition, stating that “South Carolina courts have recognized this cause of action exists where a city denies a landowner the use of his land, as opposed to actively seizing the land for some public use.” *Sea Cahin on the Ocean IV Homeowners Ass’n v. City of*

N. Myrtle Beach, 828 F. Supp. 1241, 1251 (D.S.C. 1993). Similarly, in *United States v. Dickinson*, 331 U.S. 745 (1947), the United States Supreme Court held that intermittent flooding of private land can constitute a taking of an easement, stating, “[p]roperty is taken in the constitutional sense when inroads are made upon an owner’s use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.” 331 U.S. at 748.

This Court’s findings of fact demonstrate that the prior owner of the Property, beginning since at least the 1960s, undertook construction of the Levees not only with the intention of protecting his agricultural operations and recreational uses but also preparing the Property for future development. The prior owners of the Property further negotiated with and eventually entered into an agreement with the South Carolina Department of Transportation to ensure that the height of Interstate 77 would be built to accommodate a levee system built to the 500-year flood level instead of the 100-year flood level. This Court’s findings of fact further demonstrate that, when Columbia Venture acquired the Property, it reasonably expected that it would be allowed to improve the Levees in order to remove the Property from not only the regulatory floodway but also the floodplain entirely. This expectation was rooted in and expressed by Columbia Venture’s significant investment in the Property, which was, in fact, specifically induced by action of Richland County, as discussed below. Moreover, witnesses for Columbia Venture testified that it was of utmost importance to upgrade the Levees to certified status so that the land protected by the Levees would be removed from the floodplain and floodway and that Columbia Venture would not have purchased the Property if the certification of the Levees was not feasible or if the County failed to embrace the proposed development.

Representatives of Richland County also testified that they understood the importance of upgrading the Levees to the development group both prior to and after Columbia Venture purchased the Property. Mr. Gregory, Mr. Manning, and Mr. Tillotson all testified that heavy and extensive due diligence efforts were devoted to the Levee improvement and certification issue, including investigating the County's interpretation of its ordinances related thereto.

Richland County's subsequent successful efforts to prevent Columbia Venture from improving the Levees were directly comparable to the City of Hanahan's refusal to allow the plaintiff to fill a basin in *Hill*. In both cases, the infringed right was the right to exclude the common enemy of floodwaters from the allegedly taken land, and in both cases the government denied that right in order to reserve the subject property for the conveyance or retention of floodwaters.

This Court concludes that the State's (and the County's) existing laws of property rights support the conclusion that Columbia Venture had reasonable, investment-backed expectations that it would be allowed to improve the Levees to exclude the common enemy of floodwaters from its land and therefore develop the Property in accordance with its extensive development plans.

The third factor to be analyzed in assessing the reasonableness of the owner's expectations is whether the government itself induced those expectations. The United States Supreme Court has recognized that actions of the government itself "can lead to the fruition of a number of expectancies embodied in the concept of 'property' – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." *Kaiser Aetna v.*

United States, 444 U.S. 164, 179 (1979). Likewise, the Supreme Court of South Carolina examines whether the government induced the expectations of the property owner in assessing the reasonableness of an owner's investment-backed expectations. See *Dunes West*, 2013 S.C. LEXIS 2 at *65-66 (noting that "there is no evidence the Town took any action or made any representation which served to increase Appellant's expectations or led Appellant to believe that residential use would be forthcoming").

Here, the County's unanimous agreement by public action to allow improvement and certification of the Levees, and its explicit and implicit encouragement of the overall plan of development, surely created reasonable, investment-backed expectations. Until Richland County reversed direction later in 1999, manifested concretely in its December 7, 1999 appeal of the August 12, 1999 revised preliminary FIRM, but certainly not limited to this expression, its entire course of conduct fostered Columbia Venture's reasonable, investment-backed expectations. As early as July 8, 1998, Mr. McSwain wrote to FEMA "request[ing] officially that the results" of the June 5, 1998 revised preliminary FIS and FIRM (which, for the first time, would place the bulk of the Property within the regulatory floodway) "be put on hold" PTE 012. Mr. McSwain's letter further stated: "Given the magnitude of the changes, placement of over 5,000 acres into a floodway designation and the adverse impact this could cause on the economic viability of this County, we would request the review process be put on hold." *Id.* The evidence shows that Mr. McSwain wrote to FEMA after he received two written requests from members of the Manning family asking the County to oppose the June 5, 1998 revised preliminary FIS and FIRM and including preliminary development concept documents. PTEs 008, 236. The County's advocacy to FEMA for the Levee improvements and the

removal of the large proposed floodway from the Property continued up to and after February 19, 1999. PTEs 022, 026, 027.

As discussed above, Mr. Gregory and other members of the due diligence team also met with officials of the County, the City of Columbia, and the University of South Carolina, including Richland County Councilmembers Kit Smith, Bernice Scott, Paul Livingston, and Buddy Meetze; Columbia Mayor Bob Coble; and Lyles Glenn of the University of South Carolina. The evidence also shows that Mr. Gregory and the other members of the due diligence team met with all of the members of Richland County Council. Columbia Venture described its vision for the Property in these meetings. Mr. Gregory testified that local officials with whom he met were overwhelmingly in favor of the proposed development of the Property. Based on reports Mr. Gregory received from the other members of the due diligence team, there was clear support for the project from the community's elected officials, no opposition, and nothing to indicate there would be obstacles to the proposed development. Tr. 700-01, 747-49.

With respect to improvement of the Levees, Richland County Land Development Administrator Kenneth Knudsen recommended by report dated January 20, 1999, that the County begin the process to assume responsibility for inspection and maintenance of the Levees after certification. PTE 166 at DEF-00000056. Mr. Knudsen also appended to his report an estimate prepared by Lockwood Greene estimating the cost of the annual maintenance for the Levees to be approximately \$174,500 a year. *Id.* at DEF-00000061. Mr. Knudsen stated that the "costs [for annual maintenance] should be offset by the rezoning and development of these properties and the accompanying increase in the County's tax base." *Id.* at DEF-00000056. The Richland County Attorney and a County

financial officer approved this report (*Id.* at DEF-00000054), whereupon it was sent to the Richland County Development and Services Committee, which in turn unanimously approved the report on January 26, 1999. PTE 020 at DEF-00000064. Finally, on February 2, 1999, the full Richland County Council unanimously approved a resolution that the County would “accept responsibility for local inspection and enforcement of the levee system, and if required by FEMA, to accept operation and maintenance responsibility for the levee system contingent upon” certain contingencies (PTE 147 at DEF-00012032-33), which contingencies the County itself later thwarted by affirmatively denying Columbia Venture the right to “upgrade the levee system to meet FEMA standards.”

By authority of that unanimous vote and pursuant to the recommendation of the Development and Services Committee and Mr. Knudsen, Richland County Council Chairman Paul Livingston sent a letter to FEMA on February 17, 1999, stating that the County had “agreed to accept responsibility for local inspection and enforcement of the operation and maintenance plan for this levee system as submitted by the owner and approved by FEMA, contingent upon” the conditions outlined in his letter, the first of which was that Columbia Venture improve the Levees to certified standards. PTE 022 (emphasis in original). Mr. Livingston further urged FEMA to “consider the existing levee system in any current or future calculation of floodway for this area” and expressed the County’s understanding that certification of the Levee would allow “the area protected by the [Levee to] be removed from designation as Special Flood Hazard Area (Zone AE or A).” *Id.* Earlier on January 26, 1999, FEMA, responding to a letter from Mr. Tillotson outlining the plans to improve the Levees and to ask Richland County to

assume operation and maintenance responsibilities for the Levees, confirmed that it would remove the floodway and floodplain designation from the land protected by the Levees if the development group took the steps outlined in Mr. Tillotson's letter. PTE 549. As noted earlier, Mr. McSwain was carbon copied on Mr. Tillotson's letter to FEMA, and the County received a copy of FEMA's January 26, 1999 letter. PTEs 018, 246.

As the final part of due diligence related to Richland County's acceptance of the Levees and of the general development plan prior to Columbia Venture's acquisition of the Property, Mr. Gregory negotiated a nonbinding Memorandum of Understanding with the County via Mr. McSwain, whereby Richland County "agree[d] to work with the development group on issues that are critical to the proposed development such as zoning, tax incentive vehicles, and a multi-county business park."¹⁸ PTE 024. In return, Mr. Gregory agreed that the development group would work with the County in development of the County's vision and its forthcoming Comprehensive Land Use Plan. *Id.*

In reliance on these actions of Richland County, Columbia Venture closed the acquisition of the Property on February 19, 1999. Clearly, at that time Columbia Venture had reasonable expectations that Richland County would allow it to improve the Levees

¹⁸ The fact that this agreement was styled as a nonbinding Memorandum of Understanding does not negate Columbia Venture's right to rely on it nor the reasonableness of the expectations it engendered. Indeed, the South Carolina Court of Appeals has concluded that such an agreement, accompanied by demonstrated inducement and reliance, might create a contract. *See Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 396 S.C. 338, 345, 721 S.E.2d 455, 458-59 (Ct. App. 2011). Whether or not the nonbinding Memorandum of Understanding in this case was a contract, Columbia Venture has demonstrated that it induced reasonable expectations under *Penn Central*.

and develop the Property. Those expectations were based on extensive due diligence and on individual, collective, and corporate action of the County. Indeed, to that point Richland County had expressed no opposition whatsoever to the proposed development of the Property and had actively cooperated with Columbia Venture in engendering expectations with respect to the development of the Property. Thus, this is not at all a case where the Property owner had “unilateral development expectations.” *See Dunes West*, 2013 S.C. LEXIS 2 at *65.

In short, the evidence strongly supports, and I hereby find, that Richland County itself directly and specifically induced Columbia Venture’s reasonable, investment-backed expectations with respect to development of the Property.

Finally, I note that a property owner’s reasonable, investment-backed expectations are categorically not limited to continuation of the property’s current use. Not only would such a view effectively eviscerate the entire regulatory takings analysis, it would render unnecessary any further consideration of the regulatory takings issue in *Penn Central* itself and in such cases as *Lucas*, *Palazzolo*, and *Tahoe-Sierra*. In each of those cases, the property owner sought to *change* the current use of its property. In each case, however, the United States Supreme Court declined a facile rule that any regulatory action that allowed the continuation of the current use could not be a taking. Similarly, in *Dunes West*, although the Supreme Court of South Carolina noted that the “primary” expectation was the continuation of the existing use, the Court did not treat the issue as dispositive. Instead, the Court in *Dunes West* also examined the concreteness of the owner’s expectations, the owner’s investigation as to feasibility, and whether the government took actions to increase the owner’s expectations regarding development.

Dunes West, 2013 S.C. LEXIS 2 at *64-68. Further, in *Byrd* the South Carolina Supreme Court did not even suggest that the property owner's sole reasonable expectation was to continue its current use of the property. Rather the Court considered "all relevant circumstances." *Byrd*, 365 S.C. at 661, 620 S.E.2d at 81.

This refusal to limit expectations to existing use is not new. The United States Supreme Court, in the *Boom Co.* and *Olson* cases, from 1879 and 1934 respectively and quoted above, made explicit that the value to be compensated is not the value of the current use but the value of the use that could reasonably be made, whether by the current owner or by someone else in the market. *Olson*, 292 U.S. at 255; *Boom Co.*, 98 U.S. at 408.

The Court next turns to the County's interference with Columbia Venture's reasonable, investment-backed expectations, which were, as discussed above, to upgrade the Levees and, upon upgrade and certification by FEMA as a levee providing protection from the base flood, to build a mixed use, multi-phased residential, commercial, and recreational development on grade (*i.e.*, outside of any building prohibitions applicable to floodplain or floodway land). By virtue of the following actions, the County's regulations prohibited Columbia Venture from improving its Levees as of February 20, 2002: (1) re-interpreting the "impede" language in its ordinances as a literal prohibition on building instead of applying the County Engineer's long-standing interpretation of the phrase consistent with the FEMA no-rise standard; (2) amending its ordinances in such a way as to codify the "no build" interpretation of "impede" and, at the same time, carve out exceptions for similarly situated landowners; (3) amending the Stormwater Ordinance to prohibit making any levees in a regulatory floodway "higher or wider" and eliminating

the variance provision; and (4) adopting FEMA's final FIRM on February 20, 2002, which placed, for the first time, an effective regulatory floodway on approximately 70% of Columbia Venture's Property.

Therefore this Court concludes that Columbia Venture had reasonable investment-backed expectations with respect to the development of the Property; that those expectations were denied by affirmative action of the County, and that therefore this element of the *Penn Central* analysis supports the conclusion that the County took the Property without just compensation.

2. **Character of the Government Action.** The *Penn Central* inquiry next turns to the character of the County's actions, considering whether "the governmental action implicates [the] fundamental principles of fairness underlying the Takings Clause." *Eastern Enters.*, 524 U.S. at 537. Therefore, even after *Lingle*, the character element requires an examination of the government's action through the lens of justice and fairness, rather than a purely mathematical examination of the diminution in a property's value. A contrary view would allow a government to simply disregard private property rights with impunity whenever it deemed the economic impact of a regulation to be beneath some arbitrary threshold.

"A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *Penn Central*, 438 U.S. at 124. *Loretto* distinguished the narrow, *per se* rule for permanent physical occupations from the more general rule for invasions: "More recent cases confirm the distinction between a permanent physical *occupation*, a physical *invasion* short of an occupation, and a regulation that merely restricts the use of property." *Loretto*, 458 U.S. at 430 (emphasis

supplied). *Loretto* makes clear, however, that the character of the government action may conclusively establish a taking regardless of diminution in value. See *Loretto*, 458 U.S. at 426. It follows that even outside of the *per se* rule of *Loretto*, a serious frustration of investment-backed expectations and government action of a sufficiently egregious character (e.g., that is targeted at a particular property owner, that exhibits bad faith, that is akin to a physical invasion, and that requires most of the subject property to be maintained in its natural state) will compel the conclusion that a taking has occurred.

Relevant to the inquiry under *Penn Central* is not whether the government action is a *permanent physical occupation* but whether such action may be *characterized* as a physical invasion. *Loretto* requires that “when the physical intrusion reaches the *extreme* form of a permanent physical occupation . . . ‘the character of the government action’ not only is an important factor in resolving whether the action works a taking but also is *determinative*.” *Loretto*, 458 U.S. at 426 (emphasis supplied). The United States Supreme Court, however, has explicitly recognized that a physical invasion, whether reaching the degree required by *Loretto* or not, should be considered as part of the character analysis. *Penn Central*, 438 U.S. at 124 (“A ‘taking’ may more readily be found when the interference with property can be characterized as a *physical invasion* by government . . .”) (emphasis supplied). Thus, even if the County’s actions did not cause a “permanent physical occupation” of the Property (which this Court has already addressed for purposes of summary judgment), the fact that the County’s regulations will unquestionably result (and are in fact designed to result) in maintaining Columbia Venture’s land in an undeveloped state to permit invasion of it by the conveyance of floodwaters is relevant to the character of the County’s action.

Indeed, since this Court denied Columbia Venture's motion for summary judgment alleging a *per se* taking under *Loretto*, the United States Supreme Court has reasoned that "[b]ecause government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable." *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 519 (2012). Therefore, despite the fact that Richland County's denial of Columbia Venture's well-established common law right to improve the Levees (and thereby exclude the common enemy of flood waters) might not cause *permanent* flooding of the Property, it does and is intended to allow periodic, temporary flooding. This government-imposed setting aside of land for the conveyance of floodwaters (and its accompanying outright prohibition of any improvements whatsoever) is manifestly "akin to a physical invasion" under *Arkansas Game & Fish*.

Also instructive here is a comparison of facts to results in two of the main cases in United States Supreme Court Takings Clause jurisprudence, *Nollan*, 483 U.S. 825 and *Dolan*, 512 U.S. 374. In *Nollan*, the State of California granted a property owner a permit to build on his beachfront property in exchange for his granting a narrow public-access walking easement across his property along the beach, below his seawall but above the mean high tide line. 483 U.S. at 828. In *Dolan*, the City of Tigard granted the property owner a permit to expand her store and to pave a parking lot in exchange for her dedicating her land lying in the floodplain along an adjacent creek for a stormwater management system and another adjacent strip for a pedestrian/bicycle path, amounting in total to about 10% of her property. 512 U.S. at 380.

In neither case was the government action remotely close to being as severe as the action by Richland County as it affected Columbia Venture. Neither Nollan nor Dolan was denied permission to build what they wanted to build on their properties. Neither Nollan nor Dolan had more than a small percentage of their properties affected. Neither Nollan nor Dolan had any plan to use or develop the affected portions of their properties. Yet, in both cases, the United States Supreme Court held that the government action was a taking that required payment of just compensation. It is, to say the least, difficult to construct a coherent theory by which a single constitutional provision can categorize the *Nollan* and *Dolan* situations as takings and deny that same characterization to Columbia Venture.

Indeed, “[i]n each case [*Nollan* and *Dolan*], the Court began with the premise that had the government simply appropriated the easement in question, there would have been a *per se* physical taking.” *Lingle*, 544 U.S. at 546. In granting the County’s motion for summary judgment that there was not a physical taking, I concluded that the County’s adoption of an expansive no-build floodway on Columbia Venture’s Property on February 20, 2002, was not a direct appropriation of a floodway easement. But although the County’s actions were not technically a direct appropriation, it is certainly fair and reasonable to characterize those actions as highly analogous to, indeed, functionally equivalent to, an ordinance-imposed, involuntary no-build easement to convey floodwaters or as an ordinance-imposed, involuntary conservation easement over Columbia Venture’s property. Under the *Penn Central* analysis, that is the relevant inquiry – How may the government’s conduct be fairly characterized?

The United States Supreme Court has observed that the particular danger associated with regulations that utterly forbid development is that they “carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.” *Lucas*, 505 U.S. at 1018. As exemplary cases, the *Lucas* Court cited *Annicelli v. South Kingstown*, 463 A.2d 133, 140-41 (R.I. 1983), in which the government prohibited construction adjacent to a beach on the grounds of safety and open space conservation, and *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 193 A.2d 232, 240 (N.J. 1963), in which the government prohibited the filling of marshlands in order to preserve a water detention basin and to create a wildlife refuge. The *Annicelli* and *Morris County* courts found the governmental entities liable for unconstitutional takings. *Annicelli*, 463 A.2d at 141; *Morris County*, 193 A.2d at 241-42. This observation applies with equal force to evaluating the character of a government action analyzed under *Penn Central*, even when the government action might not meet the *per se* rule of *Lucas*. Thus, when a government action forces a property owner to devote his land to public service (such as the imposition of a no-build zone to convey flood water), the character of that action strongly suggests a taking.

Notably, the NFIA and NFIP do not prohibit building within a floodway or a floodplain. Regulations promulgated by FEMA under the NFIA permit “encroachments, including fill, new construction, substantial improvements and other development within the adopted regulatory floodway [if] it has been demonstrated through hydrologic and hydraulic analysis 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). The NFIA and NFIP are thus crafted to avoid takings liability for local communities. The internal logic of the program, which is based on flood elevations determined by hydrologic and hydraulic engineering, is that one landowner is not permitted to build structures within a regulatory floodway that would displace flood waters onto another owner’s land, but so long as a building can be engineered so as not to displace flood waters on others, the landowner is permitted to build and improve structures within the regulatory floodway. In addition, the NFIP regulations require that a “community’s flood plain management regulations ... be legally-enforceable, applied uniformly throughout the community to all privately and publicly owned land within flood-prone ... areas.” 44 C.F.R. § 60.1(b).

For context, a commentator who favors flood control regulation and who “coordinates the rate and rule effort underlying the NFIP” has observed:

In conclusion, despite decisions in *First English* and *Keystone*, building codes, elevation requirements, restrictions in the floodway, and grading codes statutes are probably immune from successful “facial” takings challenges. FEMA, however, must be particularly cautious not to encourage their participating communities to enact per se moratoria on all buildings in covered areas.

The NFIP will also be immune to “as applied” takings challenges. The NFIP does not establish an absolute ban on construction in flood zones. Even the most restrictive NFIP regulation, that which “bans” development in the floodway, permits development in the floodway if it can be demonstrated that neither flood level, frequency of flood, nor severity of flood damages would increase. Reading between the lines in *Keystone*, one could argue that had Pennsylvania enacted a statute completely eroding the Keystone Association’s right to mine, such statute might have been found to be a taking. Similarly, an NFIP statute unequivocally banning all building might go simply too far.

Saul Jay Singer, *Flooding the Fifth Amendment: The National Flood Insurance Program and the “Takings” Clause*, 17 B.C. Envtl. Aff. L. Rev. 323, 362 (1990). Indeed, the NFIA and the NFIP recognize that Richland County was entitled to and could have

provided for the conveyance of floodwaters even in a floodway by adherence to a “no rise” standard rather than a “no impede/no build” standard (as reinterpreted in April 2001), thereby evading the very risk of “simply” going “too far” identified above. Indeed, in connection with the Stormwater Ordinance amendments in early 2001, Richland County staff researched the floodplain management ordinances of other counties in South Carolina. PTE 051 at DEF-00002253-54. According to the research, no South Carolina county cited imposed a “no build” standard, as most followed the FEMA no-rise and, if they were more restrictive, still provided for variances. *Id.* at DEF-00002254. The County Administrator’s staff and the County Engineer recommended a no-rise standard to County Council, but the Council instead passed a “no build” standard except for specific landowners located adjacent to Columbia Venture. PTE 374 at DEF-00012759.001. Council also acquiesced to the request of Columbia Venture’s opponents to delete the variance provision from the Stormwater Ordinance. PTEs 114, 346.

Here, the County’s actions affirmatively prohibited the construction of any structures or improvements on most of Columbia Venture’s land, rather than specifying certain, limited prohibited uses. The stated purpose of this prohibition is to reserve the Property for invasion by floodwaters – which floodwaters, of course, might be entirely excluded by the simple and feasible improvement of the Levees in compliance with the FEMA no-rise standard. Tr. 1244-48. This action may be unequivocally characterized as the imposition of a servitude by negative regulation. The United States Supreme Court has strongly analogized regulatory prohibitions of development to the imposition of an easement or servitude: “The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands

preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.” *Lucas*, 505 U.S. at 1018.

I conclude that the severe character of the limitations imposed on the Property by the County support a finding that a taking occurred.

Also relevant to the examination of the character of the government action is the distribution of the regulatory burden and reciprocity of advantage. *Lingle* notes that the inquiry must consider “the magnitude or character of the burden a particular regulation imposes upon private property rights” and “how any regulatory burden is distributed among property owners.” *Lingle*, 544 U.S. at 542. Moreover, courts have recently recognized that disparate treatment of similarly situated property owners is relevant to the character of the government action. See *Resource Invs., Inc. v. United States*, 85 Fed. Cl. 447, 519 (2009) (“Nor can we conclude that the Corps reviewed plaintiffs’ 404 permit application with the same standards as other applications, or that plaintiffs were not singled out when improperly subjected to the Corps’ jurisdiction.”). The Supreme Court of South Carolina in *Dunes West* also examined the even-handedness of the application of government regulation when examining the character of government action in its regulatory takings analysis. *Dunes West*, 2013 S.C. LEXIS 2 at *60 (analyzing the character of the government action and noting that the “restrictions are applicable to all golf courses throughout the Town”). Likewise, the inquiry may consider whether there is some “reciprocity of advantage” from the government action that confers a benefit upon the property owner. *Id.* at *61. Thus, for example, one case has concluded that the

character of a denial of a rezoning permit for a golf course to residential zoning favored the property owner's claim under *Penn Central*.

On these facts, we conclude that the burden of the comprehensive plan designation falls disproportionately on the property owner. The benefits of the open space provided by the golf course property are widely shared through the community, but the costs are focused solely on the property owner. We have trouble discerning any reciprocity of advantage resulting from the comprehensive plan designation for the property.

Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 640-41 (Minn. 2007). A regulation that entirely prohibits one property owner from developing its property, while conferring no benefit on that property owner and also exempting other similarly situated property owners, is disproportionate and non-reciprocal in character.

I conclude that the County's actions disparately – indeed, entirely – placed the regulatory burden of its actions on Columbia Venture and granted no reciprocity of advantage. In particular, as discussed further below, the County's exemption of similarly situated neighboring landowners – who would themselves have benefitted from the additional protection afforded by the improved Levees – demonstrates that the entire regulatory burden was intended to be and was, in fact, placed on Columbia Venture.

The examination of the character of the government action also includes whether the government action is targeted at a specific property owner. *See, e.g., Eastern Enters.*, 524 U.S. at 537 (finding a “solution [that] singles out certain employers” a taking); *Brace*, 72 Fed. Cl. at 356 (observing that the character factor of the *Penn Central* test asks, in part, “whether the action targets a particular individual”).

The evidence at trial clearly supports the conclusion that the County's actions were targeted, from beginning to end, at Columbia Venture. First, certain actions of the County (such as opposing the large floodway in the June 5, 1998 revised preliminary

FIRM and encouraging the development of the Property) were taken not only to allow development of the Property to occur but to affirmatively encourage Columbia Venture in purchasing and developing it. But then, and only after Columbia Venture performed extensive due diligence, sought and secured the support of local officials and Richland County Council, acquired the Property, and invested significant amounts of money and effort, Richland County reversed course and targeted its actions to affirmatively prohibit the development of the Property. Specifically, the County decided to delay consideration of a permit by Columbia Venture to improve the Levees until after the FEMA flood mapping process concluded, appealed the August 12, 1999 revised preliminary FIRM that would have been more favorable to Columbia Venture (and would have essentially retained the status quo represented by the 1994/1995 effective FIRM), reinterpreted and then amended its ordinances regarding floodplain management, exempted neighboring landowners from the same “no build” restrictions placed on Columbia Venture, and legislatively prohibited improvement of the Levees. Of particular significance is the fact that as of February 20, 2002, the Levees were the only levees in Richland County located in a regulatory floodway.

The minutes of County Council for April 3, 2001, during the debate over the Stormwater Ordinance amendment, reflect that one of the Councilmembers, Ms. Bernice Scott, “wanted the record to reflect that the [Stormwater] [O]rdinance [amendment] is against Burroughs & Chapin.” PTE 191 at DEF-00012108. Burroughs and Chapin was, at all times relevant to this action, the lead member and most publicly visible member of Columbia Venture. Further, County staff and council members recognized as early as October 2000 (six months before the Stormwater Ordinance was amended) that

opponents of Columbia Venture's development (some formed for the specific and sole purpose of stopping the development) had targeted the pending Stormwater Ordinance amendment and the County's interpretation of "impede" as their strategy to thwart the development. Pearce Dep. Ex. 180. County staff classified the pending amendment as the "battleground" over Columbia Venture's development. *Id.* With full knowledge of the opposition groups' goals of eliminating Columbia Venture's development plans, the County ultimately adopted a version of the Stormwater Ordinance drafted and endorsed by Columbia Venture's opponents and specifically tailored to eliminate the ability to make levees located in a regulatory floodway "higher or wider." *See id.*; PTEs 004, 114, 117, 183, 185, 186, 190, 191, 346, 360, 577, 578. The record further reflects that the Councilmember who served as Council Chairwoman during the period when County Council acted to block Columbia Venture's development referred to Columbia Venture and/or its members at various times as "fraudulent," "fakes," "elitists," "unethical," "should be sent packing from Richland County," "corporate welfare pimps," and analogous to a horror movie character. Tr. 2276, 2488-96; PTE 350.

I conclude that the targeted character of the County's actions supports a finding that a taking occurred.

Fourth, courts have considered evidence of bad faith in evaluating the character of a government action. The United States Supreme Court has suggested that, but for the lower court's factual determination that in imposing a series of rolling moratoria the government "acted diligently and in good faith," the Court might have found a taking in "that the [government] was stalling in order to avoid promulgating" a permanent rule. *Tahoe-Sierra*, 535 U.S. at 333. Likewise, the United States Court of Appeals for the

Fourth Circuit has clearly included within the character element the question of whether a challenged governmental action was “inequitable and illegitimate.” *Acorn Land, LLC v. Balt. County*, 402 Fed. Appx. 809, 817 (4th Cir. 2010) (per curiam) (noting a finding that “the Council arbitrarily and capriciously blocked [plaintiff]’s efforts to amend its water/sewer petition,” and that the “complaint plausibly pleads that the Council’s actions constituted an illegitimate and inequitable attempt to prevent Acorn from developing its property”); see also *Cooley v. United States*, 324 F.3d 1297, 1307 (Fed. Cir. 2003) (“In conducting a *Penn Central* analysis, the trial court may weigh whether the [defendant’s] conduct evinces elements of bad faith.”). In none of these cases did the court suggest that such bad faith must be sufficient to independently constitute a denial of substantive due process; instead, the clear implication was that bad faith could serve as a relevant inquiry into the character of the government action.

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

As noted above, the evidence adduced at trial compels a finding that the actions of the County were targeted to the detriment of Columbia Venture. Moreover, the evidence also compels a finding that prevention of flood damage was not the motivating factor behind the County’s actions, inasmuch as the County acted to prevent consideration of Levee improvements that would have protected not only Columbia Venture’s Property but also the properties of the City of Columbia and of Heathwood Hall even though the most reliable expert testimony presented indicated that such improvements could be

made in accordance with all FEMA and all non-targeted County levee requirements. For its part, Richland County has argued that the exemptions afforded to Heathwood Hall and the City of Columbia reflected Richland County's determination that a school and a wastewater treatment plant could be more easily evacuated in times of flood and would therefore present a lesser risk than would a residential area. Tr. 2274, 2621. But the exemption, as written, would allow residential uses by Heathwood Hall (including, for example, dormitory housing should the school begin accepting boarding students) subject to a no-rise standard, but would utterly deny lower-risk activities (such as commercial businesses) on Columbia Venture's Property. The exemption, in other words, is both overly narrow and overly broad to countenance Richland County's explanation.

The County's argument here is also apparently a *post hoc* rationalization, as there was no evidence presented at trial that the elements of this argument in any way informed the deliberations of the County at the time that County Council considered and adopted the amended Stormwater Ordinance and, one month later, the Zoning Ordinance. Indeed, the hotly debated Stormwater Ordinance, as amended in April 2001, retained the permissibility for "levees protecting residential structures." PTE 374 at DEF-00012758.001. It is incongruous for the County to argue that opposition to allowing residential development behind levees prompted the disparate treatment between Columbia Venture on one hand and Heathwood Hall and the City on the other when the County affirmatively retained the ability to build residences behind levees in the same ordinance section banning Columbia Venture from improving levees or otherwise building anything in a regulatory floodway. Further, the County knew prior to Columbia Venture's purchase of the Property that the developers envisioned residential uses behind

certified Levees, and the County made no objection at that time. *See* PTE 252. Additionally, no evidence was presented at trial that the County informed Columbia Venture that its concerns hinged on allowing residential construction behind levees, but that it would support a development devoted to non-residential uses behind certified levees. Instead, the County pursued and implemented a no-build standard for Columbia Venture regardless of the anticipated or proposed use.

I conclude, based on the significant evidence at trial, that the County's actions were taken in bad faith, not to further the goals of the NFIA and the NFIP, but instead to thwart the development of the Property.

Finally, in considering the “character” prong of *Penn Central*, the property right invaded is relevant to the character of the government action. Here, the County's action invaded both the right to use and the right to exclude others. The right to exclude others, of course, has been “universally held to be a fundamental element of the property right.” *Kaiser Aetna*, 444 U.S. at 179-80; *see also Hodel v. Irving*, 481 U.S. 704, 716 (1987) (“In [*Kaiser Aetna*], we emphasized that the regulation destroyed ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others.’”). As noted in the discussion of whether a regulation is akin to a physical invasion, *supra*, the express and intended purpose of the County's placing the majority of the Property in a floodway while also denying Columbia Venture's right to improve the Levees, was to reserve the Property for the conveyance of floodwaters. Thus, this regulatory action denied both the right to use the Property and the right to exclude others from the Property.

I conclude that the nature of the property rights invaded by the County's actions support a finding that the County's actions constitute a taking of the Property without just compensation.

Accordingly, I conclude that the character of Richland County's action is supportive of the finding of a taking without just compensation.

G. Conclusion on Takings Liability. I conclude that Columbia Venture sustained significant economic impact as a result of the County's actions; that the County thwarted Columbia Venture's reasonable, investment-backed expectations; and that the character of Richland County's actions was that of a taking.

I therefore conclude that the County has taken Columbia Venture's property. I also find that no compensation has been paid therefor.

H. Ripeness Defense.¹⁹ As an affirmative defense to Columbia Venture's takings claim, 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)." Richland County's Motion for Summary Judgment on All Claims, March 14, 2012. In *Williamson County*, the Supreme Court of the United States "explained the requirement that a takings claim must be ripe." *Palazzolo*, 533 U.S. at 618. 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

¹⁹ This Court previously denied the County's motion for summary judgment based on the County's argument that Columbia Venture's claims for a regulatory taking and under 42 U.S.C. § 1983 are unripe for review.

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 Supreme Court applied the facts of *Palazzolo* to determine there was no ripeness issue under the doctrine of *Williamson County*:

The rulings of the Council interpreting the regulations at issue, and the briefs, arguments, and candid statements by counsel for both sides, leave no doubt on this point: On the wetlands there can be no fill for any ordinary land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point.

Id. at 621. The Court noted “the unequivocal nature of the wetland regulations at issue” 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 619, 621. 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, because it allowed certain specific landowners to build in a regulatory floodway upon showing a no-rise under FEMA’s regulations, reinterpreted the phrase “impede” to mean “no build.” PTE 374 at DEF-00012759.001. 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 clearly took away Columbia Venture’s right to obtain a permit to improve its Property. As the County has conceded, “the meaning of the word ‘impede’ ... clearly meant no construction.”²⁰

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 defined the floodway to include the Property, the permissible uses of the Property were “known to a reasonable degree of certainty.” Thus, Columbia Venture’s claims ripened when Richland County for the first time made the Property part of the effective regulatory floodway by its adoption of the new effective FIRM on February 20, 2002. *Palazzolo*, 533 U.S. at 620. The affirmative deletion of a variance provision from the amended Stormwater Ordinance and its highly specific and limited exceptions (which applied specifically to Columbia Venture’s neighboring wastewater treatment plant and school), conclusively demonstrated that there was no prospect of relief for Columbia Venture. Once placed in the regulatory floodway with its total building prohibition, Columbia

²⁰ See Richland County’s Memorandum in Support of Motion for Summary Judgment (Lack of Protected Property Interest / Lack of Final Decision) at 10.

Venture's only option under the Stormwater Ordinance was to comply and abandon development of the Property. In such circumstances, the *Williamsburg 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).

I conclude that Richland County's placing of the Property in the effective regulatory floodway on February 20, 2002, thereupon subjected the Property to the language of Section 8-26(h) of the Stormwater Ordinance (PTE 374 at DEF-00012759.001), which unambiguously deprived Columbia Venture of its property interests, thus making Columbia Venture's Takings Claim ripe, and that Columbia Venture had at that time no further obligation to attempt to obtain any permit, variance, or other authorization to proceed or to exhaust any other potential avenues of relief.

I. Measure of Damages.

1. Just Compensation. Neither the United States Constitution nor the South Carolina Constitution prohibits the taking of private property for public use; instead, both mandate that such a taking requires the payment of "just compensation." The remaining question, then, is how such just compensation is to be measured. As an initial matter, the United States Supreme Court has made clear that the "'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain." *Brown v. Legal Found.*, 538 U.S. 216, 235-36 (2003).

Accordingly, then, the property owner whose property has been taken "is entitled to be put in as good a position pecuniarily as if his property had not been taken." *Olson*, 292 U.S. at 255. Stated differently, in a formulation repeatedly employed by the United States Supreme Court, "just compensation normally is to be measured by 'the market

value of the property at the time of the taking contemporaneously paid in money.” *See, e.g., United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984).

With respect to an actual condemnation of property, the South Carolina Eminent Domain Procedure Act requires that the value of a condemned property be determined by an appraisal. *See* S.C. Code Ann. § 28-2-70. The property owner has the right to reject the appraisal and to seek a determination either by an appraisal panel, *see id.* §§ 28-2-210 to -290, or by trial, *id.* §§ 28-2-310 to -370. In either case, the Act defines an appraisal to mean:

[A]n opinion as to the value of compensation payable for property, prepared by or under the direction of an individual qualified by knowledge, skill, experience, training, or education to express an opinion as to the value of the compensation. An appraisal includes the assessment of general and specific benefits to the owner as offsets against any damages to the property.

Id. § 28-2-30(2). Thus, in an inverse condemnation action, just compensation requires the payment of the difference between the appraised value of the property prior to the taking and the appraised value of the property after the taking, considering the “general and specific benefits to the owner.” *Id.* Given that in South Carolina, direct condemnation actions and inverse condemnation actions “are treated alike under the takings clause of our State Constitution,” *Cobb v. S.C. Dept. of Transp.*, 365 S.C. 360, 364, 618 S.E.2d 299, 301 (2005), this Court will apply this approach to just compensation in this case.

This Court has already determined for purposes of finding the extent to which the County interfered with Columbia Venture’s reasonable investment backed expectations that the value of the Property prior to the taking was \$142 million and that the value of the Property after the taking was \$11 million. However, the Property at the time of the

taking was not fully developed nor had all contingencies, whether related to government action or otherwise, been definitively provided for. I therefore find it appropriate to undertake an inquiry into the actual value of the Property in the then current state of development with remaining contingencies. For this, I find that the pre-taking valuation prepared by Columbia Venture's expert appraiser Mr. Thomas Hartnett to be the most persuasive evidence on that issue. As described above in the Findings of Fact, Mr. Hartnett determined that the pre-taking value of the Property in its current condition but protected by upgraded and certified Levees (without, however, assuming implementation of the EDSA development plan, zoning changes, or multi-county business park financing), net of the cost of improving the Levees, was \$54 million. The difference between that pre-taking value and the previously-found post-taking value of \$11 million, is \$43 million.²¹

I therefore conclude that Columbia Venture is entitled to an award of just compensation for the taking of its Property in the amount of \$43 million.

2. § 1983 Damages. Columbia Venture also seeks damages pursuant to its takings claim under 42 U.S.C. § 1983. Section 1983 allows a civil action to recover damages for deprivation of a constitutionally protected right. *Stanley v. Kirkpatrick*, 357 S.C. 169, 176, 592 S.E.2d 296, 299 (2004). A Plaintiff can seek damages under 42 U.S.C. § 1983 for an uncompensated regulatory taking. *City of Monterey v. Del Monte*

²¹ I note for the sake of comparison and as a "reality-check," that taking the well-documented pre-taking value derived by Mr. Wingard of \$142 million, and subtracting from it the multi-county business park bond proceeds anticipated as part of the development plan (approximately \$80 million (PTE 581 at CV005816)) leaves a pre-taking value net of bond financing of approximately \$62 million. The relative closeness of this figure to Mr. Hartnett's calculation provides the Court with some additional level of confidence in the justice of Mr. Hartnett's figure.

Dunes, 526 U.S. 687, 721 (1999); *see also Lawyer v. Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298, 303 n.5 (4th Cir. 2000) (noting that “most claims under the Takings Clause are alleged under § 1983”); *Elena v. Municipality of San Juan*, 677 F.3d 1, 7 (1st Cir. 2012) (explaining that “plaintiff may claim a takings violation via § 1983”).

The measure of damages under § 1983 is generally determined according to tort principles. *See, e.g., Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986) (“We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution. Accordingly, when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.”) (footnote, citations, and internal quotation marks omitted).

The basic purpose of damages under 42 U.S.C. § 1983 is compensatory. *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076, 1082 (4th Cir. 1987). “An award of compensatory damages under § 1983 “must be proportional to the actual injury incurred.” *Saleh v. Upadhyay*, 11 Fed. Appx. 241, 261 (4th Cir. 2001) (internal quotations omitted).

I therefore conclude that the measure of just compensation is also an adequate and proportional measure of damages under 42 U.S.C. § 1983.

3. Pre-judgment Interest. I also find that Columbia Venture is entitled to pre-judgment interest due to the length of time since the taking occurred, approximately 11 years ago. Pre-judgment interest is appropriate both under federal takings law and South Carolina law of just compensation.

In federal takings claims, “[w]hen payment of fair market value is deferred for a period following the taking, ‘something more than fair market value is required to make the property owner whole, to afford him ‘just compensation.’” *Schneider v. County of San Diego*, 285 F.3d 784, 789-90 (9th Cir. 2002) (citing *Albrecht v. United States*, 329 U.S. 599, 602 (1947); *Jacobs v. United States*, 290 U.S. 13, 17 (1933); *Phelps v. United States*, 274 U.S. 341, 344 (1927); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923)). This element of compensation is measured in terms of reasonable interest. *Id.* at 790 (citing *Albrecht*, 329 U.S. at 602; *Seaboard Air*, 261 U.S. at 306).

Similarly, under South Carolina law, “the purpose of awarding interest is to compensate the landowner for the delay in the monetary payment that occurred after the property has been taken.” *Vick v. S.C. Dept. of Transp.*, 347 S.C. 470, 480-81, 556 S.E.2d 693, 699 (Ct. App. 2001) (inverse condemnation case) (quoting *S.C. Dept. of Transp. v. Faulkenberry*, 337 S.C. 140, 149, 522 S.E.2d 822, 826 (Ct. App. 1999)). In assessing interest, “the court may ... consider the market rate of interest rather than the statutory legal rate, if that will be required to compensate the plaintiff fully.” *Id.* at 481, 556 S.E.2d at 699 (citing 11 S.C. Juris. Damages § 8(a)).

Based on the foregoing authority, and absent any compelling reason in the record to deviate from the statutory rate for pre-judgment interest, I find that Columbia Venture is entitled to pre-judgment interest at the statutory rate of 8.75% provided by S.C. Code Ann. § 34-31-20(a) from February 20, 2002, the date of the taking, to the date of entry of this Order. See, e.g., *Seaboard Air*, 261 U.S. at 306 (finding use of South Carolina’s statutory interest rate was a “palpably fair and reasonable method” of providing just compensation in eminent domain action).

4. Attorneys' Fees and Costs. Under 42 U.S.C. § 1988, a prevailing plaintiff in a § 1983 action is entitled to attorneys' fees. Prevailing on a ground other than § 1983 does not preclude an award of attorneys' fees under § 1988. If § 1983 would have been an appropriate basis for relief, then the party is entitled to attorneys' fees under § 1988 even if relief was actually awarded on another ground. *See Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980).²² In addition, a property owner who prevails in a condemnation action is entitled to attorneys' fees. *See* S.C. Code Ann. §§ 28-2-510(B), 28-11-30. As noted earlier, South Carolina treats direct condemnation actions and inverse condemnation actions "alike under the takings clause of our State Constitution," *Cobb*, 365 S.C. at 364, 618 S.E.2d at 301. Finally, a reasonable attorneys' fee may be awarded where, as here, a party prevails in a lawsuit contesting action taken by a political subdivision of the State of South Carolina without "substantial justification," *i.e.* without a "reasonable basis in law and fact." S.C. Code Ann. § 15-77-300; *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006) (awarding attorneys' fees to citizen and taxpayer who brought declaratory judgment action against county pursuant to S.C. Code Ann. § 15-77-300).

I find that, having established that it suffered a compensable taking under the United States and South Carolina Constitutions, having demonstrated that the County's failure to pay just compensation for the Property that it has taken lacked a reasonable basis in law and fact, and having been awarded by this Court just compensation therefor,

²² Under 42 U.S.C. § 1988, both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969). "The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." *Id.*

Columbia Venture is entitled to an award of a reasonable attorneys' fee in an amount to be determined by way of motion to be submitted by Columbia Venture within ten days of the entry of this Order. See Rutland v. Holler, Dennis, Corbett, Ormond & Garner, 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct. App. 2006) (trial court retains jurisdiction for attorneys' fees motion for ten days after issuance of written order pursuant to Rule 59(e), SCRPC).

And it is so Ordered.

John Hamilton Smith
Special Referee, Fifth Judicial Circuit

_____, 2013

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,	)	
	)	DEFENDANT'S
vs.	)	PROPOSED ORDER
	)	
Richland County,	)	
	)	
Defendant.	)	

This action for an alleged regulatory taking of property without just compensation came before me as Special Referee. The action was tried from September 10, 2012 through September 21, 2012; from November 13, 2012 through November 16, 2012; and concluded on December 20, 2012. For the reasons stated below, I find that the Plaintiff has failed to prove that a regulatory taking has occurred. As a result the Plaintiff is not entitled to just compensation nor any damages under 42 U.S.C. § 1983. Accordingly, judgment is entered in favor of the Defendant.

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). 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 the 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. *Id.* 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. *See* 42 U.S.C. § 4012a; 44 C.F.R. § 64.3(b) (stating that mandatory purchase of flood insurance applies in certain identified flood risk zones); 44 C.F.R. § 60.3 (stating that FEMA "will provide the data upon which floodplain

management regulations shall be based.”). 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. Structures located on property within certain risk zones, including zones A or AE, are required to obtain flood insurance. 44 C.F.R. § 64.3(b).

When FEMA has determined base flood elevations within a floodplain, FEMA is able to also depict on a FIRM the regulatory floodway. The floodway is generally the area posing the greatest danger to public safety. Tr. Vol. 12, p. 2218, line 12 – p. 2219, line 1. “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.” Pl. Exh. 10, p. 24; 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.” Pl. Exh. 10, p. 24; 44 C.F.R. § 60.3(d)(2).

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. Within 90 days from the last public notice published, any owner or lessee of real property in the community who believes his property rights to be adversely affected by the proposed base flood elevations has a right to pursue an administrative appeal of the base flood elevations. 42 U.S.C. § 4104(b); 44 C.F.R. § 67.5. Once 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, he or she may bring a judicial appeal 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 litigation, all final determinations are effective unless stayed for good cause shown. *Id.*

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. Pl. Ex. 31. 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. *Id.* at pp. 4-5.

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 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 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. *Id.* 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). 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. *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). 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. Pl. Exh. 250a, Zoning Ordinance (1977 as amended through 1999). 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. Pl. Exh. 230, Storm Drainage Ordinance (1994). 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"). Pl. Exh. 374, Stormwater Ordinance (2001).

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.¹ Pl. Exh. 250a, § 26-502, Zoning Ordinance (1999).

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. Pl. Exh. 250a, § 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."² *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

¹ Richland County Council is prohibited from intruding upon the Zoning Administrator's authority to interpret the Zoning Ordinance. *See Id.* at § 26-501 ("... [T]he function of the county council under this ordinance shall not include hearing and deciding questions of interpretation and enforcement which may arise").

² 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. *See* Pl. Exh. 56; Pl. Exh. 57.

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. Tr. Vol. 13, p. 2528, line 23 – p. 2529, line 9; 2617, lines 17-25; Tr. Vol. 13, p. 2593, line 2 – p. 2594, line 3.

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." Pl. Exh. 250a, § 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. Pl. Exh. 250a, § 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.³ Pl. Exh. 230, § 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. Pl. Exh. 230, § 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. *Id.* at § 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. See § 8-53(c), ("words used in the present tense shall include the future.").

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

³ Under the County's Sediment and Erosion Control Ordinance, a grading permit was required prior to undertaking any "land disturbance." Pl. Exh. 230, § 8-16, Sediment and Erosion Control Ordinance (1994). "Land disturbance" was defined as "any activity involving the clearing, grading, transporting, filling, and any other activity which causes the land to be exposed to the danger of erosion." *Id.* at § 8-15.

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. Pl. Exh. 230, 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, not cause a nuisance nor result in extraordinary public expense, not cause fraud or victimization of the public, and not conflict with other local ordinances. *Id.* at (a)(3).

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." Pl. Exh. 230, § 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.*

3. Stormwater Ordinance of 2001

The purpose of the County's Stormwater Ordinance enacted on April 17, 2001 was as follows:

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. Pl. Exh. 374, 8-1, Stormwater Ordinance (2001).

The County's Stormwater Ordinance contained the same relevant provisions specified above with the exception of the following relevant revisions and additions:

Section 8-23 Approval or disapproval of Stormwater Management Plan

...

(c) Review of the Stormwater Management Plan Review [sic] shall require twenty (20) working days or less from the date of submittal until the time a decision is rendered, either approving or disapproving the plan. However, if the County Engineer or designee determines that size and scope of the proposed plan requires additional time for adequate review, the review period shall be extended as determined appropriate by the County Engineer or designee, but in no event shall the review period exceed forty-five (45) working days. If at the end of the forty-five (45) working day period a decision has not been reached, the plan shall be deemed approved; provided, however, the applicant may waive this requirement and consent in writing to the extension of that period.

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. *Id.*

The Stormwater Ordinance also incorporated by reference certain regulations administered by the South Carolina Department of Environmental Control pursuant to the South Carolina Stormwater Management and Sediment Reduction Act of 1991” Pl. Exh. 112, § 8-33, Stormwater Ordinance. The Stormwater Ordinance also incorporated by reference the U.S. Environmental Protection Agency’s NPDES regulations adopted by the South Carolina

Department of Health and Environmental Control, including S.C. Code Reg. 61-9.122. Pl. Exh. 374, § 8-33. Both of these regulations contained variance provisions applicable to stormwater management criteria within the ordinance.

Like the Storm Drainage Ordinance, the Stormwater Ordinance incorporated by reference all applicable regulations of the National Flood Insurance Program. Pl. Exh. 374, § 8-26(i), Stormwater Ordinance (2001). The Stormwater Ordinance also contained the same levee maintenance provision as set forth in the Storm Drainage Ordinance.

FINDINGS OF FACT

After careful review of the evidence presented at trial, I make the following findings of fact:

1. Within Richland County, the Broad River and the Saluda River join near downtown Columbia to form the Congaree River. Pl. Exh. 204, p. 3. The Congaree River flows roughly parallel to the City of Columbia and serves as the southern boundary between Richland and Lexington counties. *Id.* As the Congaree River enters the coastal plain south of Columbia, its floodplain widens, and its course meanders. Pl. Exh. 204, p. 3.
2. Mr. Burwell Manning, through a corporate entity, owned and farmed approximately 4,460 acres of floodplain property adjacent to the Congaree River in Richland County ("Property"). Pl. Exh. 236; Tr. Vol. 1, p. 27, lines 2-7; Tr. Vol. 1, p. 33, line 24 – p. 34, line 15; Tr. Vol. 1, p. 42, lines 9-20. The Property was protected by approximately 20 miles of agricultural levees parallel to the Congaree River and its tributary, Gills Creek. Tr. Vol. 1, p. 37, lines 20-22.
3. Property owned by the City of Columbia, Heathwood Hall Episcopal School, the Mannings, and other private property owners were located behind the levees. Tr. Vol. 1,

- p. 66, lines 2-19; Tr. Vol. 1, p. 70, lines 7-21. The City of Columbia owned the levee in front of its property. Pl. Exh. 520; Pl. Exh. 500. The Mannings owned the levees on its property and in front of Heathwood Hall.
4. Mr. Burwell Manning was deeply in debt to the United States Farm Service Agency due to unpaid farm loans. Tr. Vol. 1, p. 126, line 17 – p. 128, line 16. In a complicated series of real estate transactions, Mr. Manning sold his approximately 4,460 acres to various investor groups in exchange for payment of his debt. Def. Exh. 140; Pl. Exh. 262; Tr. Vol. 1, p. 130, lines 14-20. Mr. Manning retained a right to re-purchase the Property from these investors within certain time frames. *Id.*; Tr. Vol. 1, p. 130, lines 14-20. If Mr. Manning failed to re-purchase 2,218 acres by February 17, 1999, he would lose all rights to this portion of the Property. Pl. Exh. 262; Tr. Vol. 2, p. 277, lines 10-12. If Mr. Manning failed to re-purchase the remaining acreage by July 16, 1999, he would lose all rights to the other half of his Property. Def. Exh. 140.
 5. As 1999 approached, Mr. Manning continued searching for investors to purchase the Property through his right of re-purchase before his rights to the Property expired. Tr. Vol. 1, p. 136, lines 1-16.
 6. Richland County has been a participating community in the National Flood Insurance Program since 1981. Def. Exh. 147. Flood hazard areas within Richland County have been studied and mapped by FEMA in 1981, 1985, 1987, 1989, 1994 and 1995. Pl. Exh. 10, p. 3.
 7. 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.⁴ 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. Tr. Vol. 1, p. 79, lines 7-21; Pl. Exh. 3.

8. In early 1998, FEMA announced that it was commencing a new study of Richland County. See Pl. Exh. 4, p. 1.
9. By May 1998, the County and others learned that FEMA planned to release preliminary Flood Data that showed a substantially widened floodway along the Congaree River. See Pl. Exh. 8; Pl. Exh. 236.
10. 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. Pl. Exh. 8. He explained to Mr. McSwain that FEMA's proposed "change in the floodway would disallow ... any planned development." *Id.* at p. 4. He did not recall receiving any written response from the County. Tr. Vol. 1, p. 3-6.
11. 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. Tr. Vol. 1, p. 155, line 1 – p. 156, line 10; see also Tr. Vol. 3, p. 562, line 8 – p. 563, line 10 (Mr. Deas Manning stating that Tee-To-Green found FEMA's preliminary flood map to be an "obvious cause for alarm.").

⁴ Any buildings constructed within a floodplain must be protected from flood hazards by placing earthen fill to elevate the building site at least two feet above the estimated depth of a 100-year flood, or the building must be elevated on pilings at least two feet above the estimated depth of a 100-year flood. Pl. Exh. 250a, § 26-73.5(2), Richland County Floodplain Overlay Zoning District (1977 as amended through 1999).

12. Burroughs & Chapin Company, a real estate holding and development company located in Horry County, South Carolina, was recruited as a potential investor. Tr. Vol. 3, p. 668, line 5 – p. 669, line 22.
13. Mr. George Gregory, corporate counsel to Burroughs & Chapin Company, took the lead on behalf of Burroughs & Chapin to assess the Property. Tr. Vol. 3, p. 682, line 25 – p. 683, line 12. He worked with a team that included Mr. Burwell Manning, his son Deas Manning, and Lockwood Greene, an engineering firm. Tr. Vol. 3, p. 683, line 15 - p. 684, line 8.
14. Burroughs & Chapin was aware that FEMA was conducting a restudy, and through its own due diligence, already knew as early as May 1998, that:

Currently the property is designated as a floodway. It is not possible to build in a floodway according to Mr. Harry Reed of Richland County.⁵ They will not issue building permit for projects in the floodway. ... Efforts are underway to have this floodway designation reversed to the previous designation of a floodplane [sic]. You can obtain a development permit for areas within the floodplane [sic] if certain criteria are met. Def. Exh. 17, p. 4.
15. FEMA released its preliminary Flood Insurance Rate Maps and a Flood Insurance Study for unincorporated Richland County on June 5, 1998. Pl. Exh. 238; Pl. Exh. 237; Pl. Exh. 10.
16. 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. Pl. Exh. 237; Pl. Exh. 238.

⁵ Harry Reed was the County's Floodplain Coordinator within the Planning Department. Def. Exh. 31.

17. FEMA's guidance document, FEMA FLOODPLAIN MANAGEMENT BULLETIN 1-98, *Use of Flood Insurance Study (FIS) Data as Available Data* (Jan. 1998), was known to the County at least by June 23, 1998. Def. Exh. 146, p. 2.
18. 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 Data⁶, and showed a widened floodway for the Congaree River. Def. Exh. 142; Pl. Exh. 11; Pl. Exh. 238; Pl. Exh. 162; Pl. Exh. 12; Def. Exh. 20a, p. 3, section B.
19. 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.
20. An environmental report prepared by Rust Environmental and Infrastructure ("Rust Report") prepared for Mr. Burwell Manning dated June 5, 1998 stated that Richland County's Zoning Ordinance prohibited construction in a floodway. Pl. Exh. 497, p. 4. So long as FEMA's proposed floodway remained on the Manning Property, no

⁶ Compare the effective July 17, 1995 base flood elevations with the preliminary base flood elevations for Congaree River cross-sections A-E with the base flood elevations for Congaree River cross sections A-E in the June 5, 1998:

1995 Regulatory BFE	June 5, 1998 Regulatory BFE
A 134.6	136.3
B 138.5	138.9
C 140.2	141.0
D 141.9	141.8
E 141.9	144.5

Pl. Exh. 3, Pl. Exh. 10, Pl. Exh. 286, Table 3.

development could occur. *Id.*; see also p. 18 ("Before development can occur, this proposed floodway designation must be changed."). 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.

21. Mr. Manning provided a copy of the Rust Report to Burroughs & Chapin.⁷ Pl. Exh. 501.
22. FEMA held a public meeting on July 8, 1998 to explain its preliminary Flood Data. Pl. Exh. 11. Representatives of the City of Columbia, Lockwood Greene, Heathwood Hall, Burroughs & Chapin, and Richland County, as well as other several affected property owners, were present at the meeting. Pl. Exh. 11, pp. 2663-2664; Tr. Vol. 5, p. 893, line 16- p. 894, line 18.
23. 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. Pl. Exh. 11, p. 2.
24. 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

⁷ The Report was included as a due diligence document in the closing documents relating to the sale of the Property. Pl. Exh. 501.

regulations and doesn't allow any development in the floodway (unless a variance is granted).⁸ Pl. Exh. 11, p. 3.

25. Mr. Gregory testified that Burroughs & Chapin did not take the new Flood Map seriously. Tr. Vol. 3, p. 711, lines 17-21; Tr. Vol. 5, p. 896, line 20 – p. 903, line 2. Mr. Gregory thought the preliminary Flood Map was flawed and “had no chance of survival with any type of serious review.” Tr. Vol. 3, p. 711, line 17-21. He believed that FEMA would not move forward with finalizing this Flood Map, and would instead issue a subsequent revised preliminary Flood Map. Tr. Vol. 5, p. 902, line 19 – p. 904, line 25.
26. 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.
27. If necessary, Mr. Gregory concluded that the Floodway Provisions could be dealt with by seeking a variance, requesting that the County change its ordinances, or by the County ignoring its ordinances and just giving them a permit to develop. Tr. Vol. 3, p. 708, line 7 – p. 709, line 11.
28. Soon after FEMA's public meeting to discuss its June 5, 1998 preliminary Flood Data, Mr. Cary McSwain, the Richland County Administrator, made a written request to FEMA asking that FEMA delay finalization of its June 5, 1998 preliminary Flood Data until more information was known about the status of the Manning levees. Pl. Exh. 12.

⁸ A very similar statement was found in a newspaper article dated July 22, 1998 admitted into evidence. Pl. Exh. 551 (“Richland County's regulations are more stringent than FEMA's. If the County changed those regulations to allow development in a floodway, the cost of flood insurance could increase for all county residents who have it.”).

29. 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. *See* Tr. Vol. 13, p. 2544, line 10 – p. 2545, line 12. 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. Tr. Vol. 13, p. 2545, lines 13-16. FEMA agreed to this request. Pl. Exh. 13.
30. In the Fall of 1998, Mr. George Gregory met with members of Richland County Council, including Mrs. Kit Smith, to talk about Burroughs & Chapin's plans for the Property. Tr. Vol. 5, p. 884, line 25 – p. 886, line 6; Tr. Vol. 5, p. 878, line 15 – p. 879, line 10; Tr. Vol. 12, p. 2276, line 16 – p. 2277, line 11. No details concerning development plans were provided. Tr. Vol. 3, p. 550, line 25 – p. 551, line 15. Mrs. Smith recollected that Mr. Gregory discussed the proposed project in general terms, and provided only a preliminary sketch plan to look at. Tr. Vol. 12, p. 2277, lines 14-24; *see also* Tr. Vol. 3, p. 698, line 19 – p. 699, line 10. 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. Tr. Vol. 12, p. 2277, line 25 – p. 2278, line 9.
31. Mr. Gregory also met with the County Administrator, Cary McSwain. Tr. Vol. 13, p. 2537, lines 22-24. Mr. McSwain testified that Mr. Gregory did not provide any details of Burroughs & Chapin's plans for the Property. Tr. Vol. 13, p. 2537, line 25 – p. 2538, line 8. He lacked sufficient information to form an opinion regarding Burroughs & Chapin's project. Tr. Vol. 13, p. 2515, lines 13-21. Mr. McSwain gave no assurances,

promises or commitments to Burroughs & Chapin regarding project approvals. Tr. Vol. 13, p. 2512, line 22 – p. 2513, line 15.

32. Mr. Gregory testified that to a person, everyone with whom he discussed the project, including county officials, were overly enthusiastic and very receptive to the proposed project. However, on cross-examination, when the court asked with whom the conversations were with, he answered that:

THE WITNESS: Yes, sir. Your Honor, it was 13 years ago, and as much as I would like to think I could recall conversations verbatim, I cannot do so.”
Tr. Vol. 3, p.706, lines 15-18.

33. On cross-examination, Mr. Gregory was vague and non-specific about meetings and the subjects of meetings with county officials. Tr. Vol. 5, p. 880-882.
34. On November 13, 1998, Burroughs & Chapin entered into a Purchase Agreement with Mr. Burwell Manning. Def. Exh. 156. In the Agreement, Burroughs & Chapin agreed to buy approximately 4,460 acres for \$18 million dollars. *Id.* at p. 1. Mr. Manning would then exercise his rights to repurchase the property from local investors and convey that repurchased property to Burroughs & Chapin or another entity. *Id.* 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. *Id.* at p. 2. The Agreement required that the Property be rezoned prior to closing to allow for mixed use development.⁹ *Id.* at p. 4. At or before the expiration of this due diligence period, Burroughs & Chapin, at its sole discretion, had the option of executing a Notice

⁹ Mr. Wendel, chief executive officer of Burroughs & Chapin, described this clause as giving Burroughs & Chapin an “out” if we didn’t want to go through with the property.” Wendel Dep. p. 75, lines 6-22. *See also* Tr. p. 575, lines 1-19 (Mr. Deas Manning agreeing that rezoning clause “was a contingency that gave [Burroughs & Chapin] a get-out-of-jail-free card.”).

of Intention to Purchase the property subject to fulfillment of conditions precedent applicable to both parties. *Id.* The Purchase Agreement imposed an obligation upon Mr. Burwell Manning "to cooperate in working to insure that the Premises is not designated as a floodway." *Id.* at p. 8.

35. 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." Def. Exh. 157. The closing date was scheduled for February 11, 1999. *Id.* at p. 2.

36. The Property constituted Burroughs & Chapin's first major project outside Horry County. Wendel Dep. p. 9, lines 15-18. It was the first project Burroughs & Chapin had dealt with that involved FEMA issues, or levees. Tr. Vol. 5, p. 839, lines 3-9.

37. 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:

- 1) that Burroughs & Chapin would secure a 30% ownership interest, 20% of which without a cash contribution, and the remaining 10% based on a \$3 million dollar cash contribution, and Burroughs & Chapin would seek four investors to contribute a total of at least \$17 million dollars in cash;
- 2) Burroughs & Chapin would serve as lead developer and manage the project for a fee of 5% of net profits;
- 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." Def. Exh. 3; Def. Exh. 4.

38. 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. Pl. Exh. 246.¹⁰ 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." *Id.* 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 [sic].
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. Pl. Exh. 246.

39. On January 22, 1999, the State Floodplain Coordinator forwarded Lockwood Greene's letter to FEMA with a request that FEMA answer the letter. Pl. Exh. 17. 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

¹⁰ Lockwood Greene stated in the letter that it was representing the City of Columbia and Richland County in seeking clarifications concerning FEMA's levee certification regulation, 44 C.F.R. § 65.10. Pl. Exh. 246. The County Administrator denied that he authorized Lockwood Greene to represent Richland County. Tr. Vol. 13, p. 2537, lines 3-21.

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. Pl. Exh. 18.

40. 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. Tr. Vol. 6, p. 964, line 21 – p. 966, line 12. 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.

Id.

41. 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).

42. 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. Pl. Exh. 166.
43. On January 26, 1999, a Committee of Richland County Council considered Lockwood Greene's request. Def. Exh. 20. The Committee recommended that County Council "authorize the Council Chairman or his Designee to begin first steps of responsibility and maintenance [of the Manning levee] contingent upon engineering certification, certification by the Corps of Engineers and approval and acceptance by FEMA." *Id.* This recommendation was forwarded to the next regularly scheduled County Council meeting held a week later on February 2, 1999.
44. Although not a voting member of the County Council Committee, Mrs. Smith attended the Committee meeting. Tr. Vol. 12, p. 2279, lines 1-9. She left the meeting concerned that the County had not done enough analysis of Lockwood Greene's request. Tr. Vol. 12, p. 2279, lines 10-12. Mrs. Smith started making phone calls people who knew about levee issues, and grew very concerned about what the County may be getting into. Tr. Vol. 12, p. 2279, lines 13-18; p. 2357, lines 1-23.
45. 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. Tr. Vol. 12, p. 2279, line 19 – p. 2280, line 13; Tr. Vol. 12, p. 2282, line 24 – p. 2283, line 17; Tr. Vol. 13, p. 2349, lines 7-15; Tr. Vol. 13, p. 2356, lines 12-25; Tr. Vol. 13, p. 2359, lines 21-25. She wanted the County to have "flexibility to conduct more research and gather more information before a final decision could be made." Tr. Vol. 12, p. 2280, lines 20-23.

46. Burroughs & Chapin pressed the County to take action on February 2, 1999. Tr. Vol. 13, p. 2408, line 25 – p. 2409, line 7. Mrs. Smith stated to Burroughs & Chapin's outside counsel that she would do her best to accommodate Burroughs & Chapin while at the same time, address her concerns that the County lacked sufficient information to understand the consequences of Burroughs & Chapin's request. Tr. Vol. 12, p. 2282, lines 6-15. Burroughs & Chapin's outside counsel offered to draft a resolution that addressed her concerns. Tr. Vol. 12, p. 2280, line 14 – p. 2281, line 15; Tr. Vol. 12, p. 2396, lines 14-25.
47. During the Council Meeting on February 2, 1999, the Committee offered a motion to approve its recommendation "to authorize the Council Chairman or his designee to begin first steps of acceptance of responsibility and maintenance contingent upon engineering certification, certification by the Corps of Engineers and approval and acceptance by FEMA." Pl. Exh. 147; Tr. p. 2389, lines 13-21. Mrs. Smith introduced the resolution as a substitute motion, which had the effect of superseding the Committee's motion.¹¹ *Id.*; Tr. Vol. 12, p. 2283, lines 18-21; Tr. Vol. 13, p. 2390, lines 2-5.
48. Burroughs & Chapin's outside counsel was present at the County Council meeting, and stood up before Council to verify by a nod of his head that he was comfortable with the resolution. Tr. Vol. 12, p. 2283, line 22 – p. 2284, line 5.
49. 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

¹¹ For this reason, the recommendations and other analysis of Lockwood Greene's request contained in the County staff report to County Council has no relevance. See Def. Exh. 20a. The resolution adopted by County Council is bears no resemblance to the Committee recommendation, nor does it fall into any of the staff's identified alternatives. Thus, the report does not provide any helpful indication of the County Council's intent at the time.

owner and approved by FEMA, and if required by FEMA regulation 44 CFR 65.10, to accept operation and maintenance responsibility for the levee system contingent upon:

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

50. Mr. Gregory conceded that resolutions do not bind the enacting body to any particular course of action.¹² Tr. Vol. 6, p. 975, lines 1-16. He also acknowledged that the resolution was not an ordinance and not a contract. Tr. Vol. 6, p. 977, lines 1-16.
51. The County's resolution did not provide the outright assurances required by 44 C.F.R. § 65.10 relating to levee maintenance.
52. 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.¹³ The decision regarding whether to accept responsibility for levee maintenance is at the discretion of the agency or community.

¹² See *Glasscock Co. v. Sumter County*, 361 S.C. 483, 488-489, 604 S.E.2d 718, 721 (Ct. App. 2004) ("Resolutions do not normally have mandatory or binding effect.").

¹³ Nothing in 44 C.F.R. § 65.10(d) limits the choice of local government entity to only that local government that exercises jurisdiction over the property. For example, the City of Columbia, who already owned and maintained its levee, could have served as the government entity to accept maintenance responsibility.

53. 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. Pl. Exh. 147.
54. Mr. McSwain 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." Tr. Vol. 13, p. 2517, line 24 – p. 2518, line 4. If the contingencies were not resolved to the County's satisfaction, then the County had a right not to go forward. Tr. Vol. 13, p. 2518, lines 5-8.
55. Similarly, Mrs. Smith testified that the resolution gave the County time to fully explore issues such as liability and financing. Tr. Vol. 13, p. 2400, line 8 – p. 2405, line 15.
56. The contingencies listed in the resolution were not intended to be completed in the order they were listed. Tr. Vol. 12, p. 2284, lines 11-21.
57. There was no certainty that any of the contingencies listed in the resolution could or would be met. *See* Tr. Vol. 3, p. 599, line 14 – p. 601, line 12 (Mr. Manning conceding that he was not able to predict whether fourth contingency could be met.).
58. On February 8, 1999, Burroughs & Chapin was provided an appraisal that valued the Property at \$30 million dollars. Pl. Exh. 255.
59. On the appointed closing date of February 11, 1999, Burroughs & Chapin terminated the sale. Pl. Exh. 275. The reasons cited as cause for the termination included failure to resolve to Burroughs & Chapin's satisfaction "all issues related to FEMA floodway/floodplain, wetlands and the like" and that Burroughs & Chapin "obtain financing for the project satisfactory to the Buyer in its sole discretion." *Id.*; Tr. Vol. 5, p. 923, lines 11-15.

60. Thereafter, the parties worked to put the deal back together. Tr. Vol. 5, p. 922, line 16 – p. 625, line 5.
61. On February 17, Burroughs & Chapin obtained a letter from County Council Chairman Paul Livingston to FEMA that restated the Council's Levee Resolution in slightly different language, and included additional statements not contained in the resolution. Pl. Exh. 22; Tr. Vol. 1, p. 281, line 13 – p. 285, line 17.
62. Nothing in County Council's minutes authorized Mr. Livingston to write the letter. Pl. Exh. 147.
63. On February 18, 1999, Burroughs & Chapin obtained a letter from Lockwood Greene providing an assessment of the levee issue. Pl. Exh. 501; Pl. Exh. 208. Lockwood Greene based its analysis on a levee upgrade to a levee design contrary to Richland County's standard for levee design. *Id.* It represented that "the floodway is currently at the toe of the levee along the Congaree River," and that preliminary flood maps of June 5, 1998 were "put on hold" by FEMA. 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.
64. On February 19, 1999, Burroughs & Chapin obtained from the Richland County Administrator a non-binding letter stating that the County would "work with the

developers of the property on issues critical to the proposed development, such as zoning, tax incentive vehicles and a multi-county business park." Pl. Exh. 24. The letter clearly stated that it was non-binding both at the head and foot of the letter.

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

66. On February 19, 1999, Burroughs & Chapin and Mr. Manning entered into a Reinstatement of and Amendment to Purchase and Sale Agreement.¹⁴ Pl. Exh. 275. In this Agreement, the purchase price was modified such that Columbia Venture paid approximately \$11 million in cash, with the remainder of the consideration being approximately 8,550 membership shares in Columbia Venture, LLC. *Id.* Columbia Venture was required to redeem the Manning shares at a price of \$777.78 per share, plus interest, within 14 months. Def. Exh. 144, § 2.19. Burroughs & Chapin assigned its interest in the purchase agreements to Columbia Venture, LLC. Pl. Exh. 277.

67. The members of Columbia Venture were: Burroughs & Chapin Company as managing member, NLBF, Inc., Fort Carson Family Housing, LLC, Green Diamond, LLC,¹⁵ Lockwood Greene Engineers, Inc., and Carolina First Corporation. Def. Exh. 144, CVMcNair000998.

¹⁴ Mr. Manning would have lost his right to over 2,000 acres of the Property on February 17, 1999; however, he negotiated an extension of the deadline to February 25, 1999. Pl. Exh. 262. Mr. Manning would have lost the remaining acreage on July 16, 1999. *Id.*

¹⁵ Green Diamond, LLC was an entity owned by Mr. Burwell Manning and members of his family. Def. Exh. 112, p. B-2.

68. Columbia Venture was capitalized by cash contributions from Burroughs & Chapin,¹⁶ NLFB, LLC, and Carolina First Corporation totaling \$11 million dollars, which was used to pay the cash purchase price to Mr. Manning. Def. Exh. 144, CVMcNair000998. Columbia Venture's operating agreement also listed as initial capital contributions the value of engineering services up to \$2 million dollars to be provided by Lockwood Greene. *Id.* Additionally, Columbia Venture's operating agreement assigned a \$6 million dollar value to Burroughs & Chapin's purchase contracts as a capital contribution. In keeping with the Restated Purchase Agreement's terms, Green Diamond LLC acquired 8,550 Class A shares in Columbia Venture, valued at \$6.65 million dollars, in return for its contribution of 4,422.807 acres of property. *Id.*
69. Columbia Venture LLC was a member-managed limited liability company. Def. Exh. 144, § 3.1, CVMcNair000973, CVMcNair001005. Under its operating agreement, Burroughs & Chapin was the managing member with sole authority to make most decisions on behalf of Columbia Venture.
70. The deeds of conveyance to Columbia Venture conveyed the Property to Columbia Venture subject to several exceptions in both the granting clause and habendum clause, including "all applicable zoning and other land use regulations or restrictions of any political subdivision or governmental agency having jurisdiction over the Premises."¹⁷ Pl. Exh. 266; Pl. Exh. 268; Pl. Exh. 269; Pl. Exh. 270; Pl. Exh. 271; Pl. Exh. 273.
71. The deeds also excepted the conveyance of riparian rights. *Id.*

¹⁶ Initially, Burroughs & Chapin did not intend to contribute any cash to the deal, but two days before the originally scheduled closing date, it agreed to contribute \$3 million dollars. Tr. Vol. 6, line 5 – p. 994, line 8.

¹⁷ This exception was not just an exception to the Seller's warranty. A separate warranty clause repeated this exception.

72. Columbia Venture bought the Property for \$18 million dollars when an appraisal valued the Property at \$30 million dollars. Pl. Exh. 255; Tr. Vol. 5, 864, lines 20-25.
73. Columbia Venture figured that, if it needed to exit from the project, the Property could be sold for \$30 million dollars, reaping a \$12 million dollar profit. Tr. Vol. 5, lines 12-22.
74. At the time of purchase, the actual investment in the property made by the members of Columbia Venture at the time of purchase was approximately eleven million dollars. Pl. Exh. 280; Pl. Exh. 279.
75. With this investment, Columbia Venture expected to serve as the lead developer preparing buildable sites according to a master plan, then selling those parcels to residential home builders, commercial and retail interests, and others. Def. Exh. 10.
76. Mr. Gregory admitted that, prior to purchase, there was no economic feasibility study was done regarding the proposed development. Tr. Vol. 859, line 25 – p. 860, line 23. He also admitted that exit strategies were developed, one of which was to pay \$18,000,000.00, then sell it for its appraised value of \$30,000,000.00, realizing a profit of \$12,000,000.00. Tr. Vol. 873, lines 15-22.
77. Columbia Venture's financial analysis of the project assumed that its infrastructure costs would be reduced by 50% due to a public financing package paying for \$23 million dollars. Pl. Exh. 254.
78. Columbia Venture's engineers were unaware of the County's Levee Standard. Tr. Vol. 6, p. 958, line 12 – p. 959, line 10.

79. Burroughs & Chapin planned to upgrade its Levee to a design standard of protection against a 100-year flood, which did not meet the County's Levee Standard.¹⁸ Pl. Exh. 247 (Lockwood Greene letter dated Jan. 21, 1999 providing cost estimate for upgrade to FEMA standards); Pl. Exh. 208. The estimated cost of this levee upgrade was approximately \$12 million dollars, in order to remove the floodplain designation from its Property.¹⁹ Pl. Exh. 208. Columbia Venture expected this \$12 million dollar cost, along with millions of dollars in other infrastructure costs, to be paid by someone else, either through government grants, or municipal bonds secured by special sources of public revenue. Pl. Exh. 254; Def. Exh. 10. It expected to be able to meet FEMA's levee certification requirements without causing a rise in base flood elevations.²⁰ Pl. Exh. 18.
80. As of the date of purchase, FEMA's restudy was ongoing.
81. As of the date of purchase, Columbia Venture faced an uncertain path forward with very little technical data and a complex regulatory scheme.
82. As of the date of purchase, the meeting minutes of the Board of Directors of Burroughs & Chapin reflect that it were aware of the open issues regarding FEMA's Flood Maps. See Def. Exh. 4; Def. Exh. 5; Def. Exh. 6; Def. Exh. 7.

¹⁸ Columbia Venture continued to plan for a 100-year levee design for months after purchase, finally reaching the decision to upgrade its levee to meet the County's Levee Standard in November 1999. In light of this evidence, Mr. Gregory's testimony that, at the time of purchase, Burroughs & Chapin and/or Columbia Venture planned to upgrade its levee to meet the County's Levee Standard, is not credible.

¹⁹ Mr. Gregory testified that "at no point, I can assure you, had we ever planned to do anything less than the 500-year level, plus three feet of freeboard." Tr. Vol. 5, p. 941, line 3 - p. 942, p. 19. However, ample evidence exists to the contrary. Tr. Vol. 6, p. 951, line 14 - p. 963, line 4; Pl. Exh. 208; Pl. Exh. 247, Pl. Exh. 503; Pl. Exh. 307; Def. Exh. 8; Pl. Exh. 323.

²⁰ Because Richland County is not FEMA, Columbia Venture's expectation regarding compliance with FEMA's regulations is irrelevant for purposes of this litigation. See Tr. Vol. 4, p. 739, lines 4-13 (Mr. Gregory stating that Columbia Venture was prepared to seek FEMA certification of levees, and that "we would have gone about doing that obviously through FEMA.").

83. 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. *See* Tr. Vol. 12, p. 2127, lines 7-14 (Mr. Hester testifying that he had no way of knowing whether June 5, 1998 preliminary Flood Data would ultimately be finalized by FEMA).
84. At the time of purchase, Columbia Venture knew the Rust Report's conclusion that the County's Zoning Ordinance prohibited construction in a floodway. Pl. Exh. 497, p. 4.
85. As of the date of purchase, Columbia Venture's engineering analysis was scanty. It had only preliminary soils analysis and topographic survey information, and a cost estimate to improve the levees to a standard that did not meet the County's levee design standard. Pl. Exh. 208; Tr. Vol. 5, p. 939, lines 21-24; Tillotson Dep. p. 67, lines 9-25. No evidence was offered that Columbia Venture had conducted any geotechnical investigation of the levees in order to determine if or how the levees could be improved to meet FEMA's standards for embankment stability or embankment protection against erosion prior to purchase.²¹ *See* 44 C.F.R. § 65.10(b)(3) and (4). When asked specifically about due diligence done prior to the purchase of the property, Mr. Tillotson, the lead Lockwood Green engineer working for Burroughs & Chapin said they had done "really just some preliminary analysis and some preliminary documentation." When asked what he meant by "preliminary analysis and preliminary documentation," he testified that "it was a review of existing documents on the property and -- and just familiarizing with the property and then making some preliminary estimates for -- for development of the property." Tillotson Dep. p. 67, lines 6-25.

²¹ In fact, Mr. Wilson Tillotson, the lead engineer for Lockwood Greene on this project, testified that preliminary geotechnical analysis had not been done before August 1999, almost six months after Columbia Venture purchased the property. Tillotson Dep. p. 47, lines 11-25; p. 48-52; p. 53, lines 1-15.

86. As of the date of purchase, Columbia Venture did not know whether it could upgrade its levee to meet FEMA's levee certification requirements or the County's Levee Standard. Tr. Vol. 6, p. 965, line 6 – p. 966, line 22.
87. Prior to or as part of the closing, Burroughs & Chapin did not seek from its attorneys any legal opinion regarding the impact of the County's Storm Drainage Ordinance, or whether Columbia Venture had any protected rights under the County Council Resolution concerning levee maintenance. Tr. Vol. 5, p. 936, line 10 – p. 937, line 5.
88. As of the date of purchase, Columbia Venture had not submitted any plans, permit applications or development agreements to Richland County for consideration. Tr. Vol. 13, p. 2516, line 20 – p. 2517, line 8.
89. As of the date of purchase, Columbia Venture intended to first 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. Pl. Exh. 264; Pl. Exh. 120; Def. Exh. 10. Ample evidence supports this finding. Burroughs & Chapin's prospectus²² 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. Pl. Exh. 264, p. 2450; Tr. Vol. 12, p. 2131, line 2 – p. 2132, line 2; Tr. Vol. 12, p. 2136, line 24 – p. 2137, line 7; Tr. Vol. 12, p. 2138, line 23 – p. 2139, line 7; Wendel Dep. p. 48, line 20 – p. 49, line 20. In a confidential memorandum dated December 7, 2000 that explained its initial development plan, Columbia Venture stated that its plan was to

²² Under securities laws, this prospectus was required to be truthful. 15 U.S.C. § 771(a)(2). Therefore, prospectuses are particularly reliable in determining a property owner's expectations. *Cienega Gardens v. United States*, 503 F.3d 1266, 1291 (Fed. Cir. 2007).

"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"²³ Def. Exh. 10. In Lockwood Greene's progress report to Columbia Venture, 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 the Venture's property in the floodway and floodplain." Pl. Exh. 120, p. 1. 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." Tr. Vol. 12, p. 2132, lines 3-8. 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 pursuant to 44 C.F.R. § 65.10. Pl. 264, p. 2450; Def. Exh. 10, p. 1; Tr. Vol. 12, p. 2138, line 23 – p. 2139, line 25; Tr. Vol. 12, p. 2142, line 25 – p. 2143, line 5; Wendel Dep. Exh. 136, p. 5. Lockwood Greene planned to submit a conditional letter of map revision ("CLOMR") to certify the levee soon after FEMA finalized its Flood Data. Pl. Exh. 120, p. 2925-2926.

90. A CLOMR is issued by FEMA, not Richland County. Tr. Vol. 12, p. 2231, line 20 – p. 2232, line 6.
91. Levee certification would have the effect of removing FEMA's flood hazard zone AE and A from the Property. Tr. Vol. 12, p. 2143, line 16 – p. 2146, line 15; Pl. Exh. 208, p. 3. Columbia Venture could then build homes and other structures without having to

²³ Mr. Wendel, chief executive of Burroughs & Chapin, confirmed that this document accurately described Columbia Venture's initial plan. Wendel Dep. p. 128, line 17 – p. 129, line 14.

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.²⁴

92. The letter to FEMA from Mr. Paul Livingston, Chairman of Richland County Council at the time, dated February 17, 1999 suggests the same strategy. Pl. Exh. 22. He requested that FEMA "consider the existing levee system in any current or future calculation of floodway for this area." *Id.* at p. 2. He also explained his understanding that "upon certification of the levee system as a protective structure the area can be removed from designation as a Special Flood Hazard Area (Zone AE or A)." *Id.*
93. Columbia Venture's subsequent actions confirm this strategy. Columbia Venture hired consultants to prepare technical data supporting a reduced floodway, and did in fact submit that data.
94. Days later, 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. Pl. Exh. 264, CVMcNair002445. Columbia Venture had not prepared or obtained any analysis of whether these uses were economically feasible. Tr. Vol. 5, p. 860, lines 15-23.

²⁴ See Pl. Exh. 250a, § 26-73.5(2)(a), Richland County Zoning Ordinance (1999); Pl. Exh. 208, p. 3 (due diligence document dated Feb. 18, 1999 explaining that once flood hazard zone AE is removed from property through levee certification, property then under FEMA's zone X which allows construction with no restrictions).

95. 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. Pl. Exh. 286, 287.
96. Mr. Wendel, chief executive officer of Burroughs & Chapin, was taken aback by this Flood Map. Wendel Dep. Exh. 136, p. 2. He felt "ambushed" by the Flood Map because he thought FEMA and Richland County were both in agreement with Burroughs & Chapin. Wendel Dep. p. 193, lines 12-15; p. 194, lines 12-16.
97. Mr. Wendel understood that, if the levees remained in a floodway, any improvements to the levee would push a larger floodway onto Lexington County. Wendel Dep. p. 193, lines 12-15; p. 194, lines 12-16.
98. Mr. Wendel understood that the Flood Maps must be redrawn before it could apply for a levee upgrade to certify the levees. Wendel Dep. Exh. 136, p. 5.
99. Faced with this problem, Mr. Wendel decided that "Richland County must join hands with us," and fight the February 25, 1999 preliminary Flood Maps. Wendel Dep. Exh. 136, p. 5. He wanted the County Administrator to ignore the February 25, 1999 preliminary Flood Maps so that the County could issue a permit to "strengthen" the levees. Wendel Dep. Exh. 136, p. 8.
100. In March and April 1999, Columbia Venture hired experts in the area of FEMA flood mapping and geotechnical engineering. Def. Exh. 15; Def. Exh. 24; Def. Exh. 25; Def. Exh. 34; Tr. p. 2152, lines 14-25.
101. S&ME, a geotechnical engineering firm, was approached on March 10, 1999 and engaged on March 24, 1999 to conduct a series of geotechnical explorations and

investigations. Tr. Vol. 7, p. 1107, lines 6-10; Tr. Vol. 7, p. 1153, lines 2-7; Pl. Exh. 294; Pl. Exh. 528; Pl. Exh. 127; Pl. Exh. 307; Pl. Exh. 211.

102. S&ME's geotechnical exploration reports dated April 5, 1999 and May 2, 1999 were solely intended to help Lockwood Greene convince FEMA that the Congaree River floodway should be reduced. *See* De f. Exh. 15 (stating that its report was solely intended to show that levees were "substantial and have sufficient stability to retain/impede the flow of Congaree flood waters."); Pl. Exh. 294, p. 4 (stating that purpose of the report was "solely for the determination of the significance of the existing levee embankments on flood routing analyses necessary to establish major flood event (100-year return frequency storm event) water surface elevations of the adjacent Congaree River."); Pl. Exh. 127 (stating that report was prepared "relative to potential flood protection and impact upon flood routing."). S&ME concluded that Levee Section 1 "must be considered a significant topographic feature in establishing anticipated maximum water level elevations of significant storm events such as the 100-year return frequency storm events" and recommended that the "maximum floodwater elevations" for the 100-year flood be based upon the presence of Levee Section 1. Pl. Exh. 127, p. 5.
103. S&ME's Reports of April 5, 1999 and May 2, 1999 were intended to convince FEMA that Levee Section 1 was a "topographic feature" strong enough and stable enough to hold back to some degree the conveyance of floodwaters across Columbia Venture's Property.²⁵ Hydraulic modeling of the flow of a 100-year flood has an effect on the size

²⁵ In explaining its August 12, 1999 Flood Data, FEMA stated that it considered the Manning levees to have some effect on flow conveyance, and this assumption was based in large part on reports submitted by S&ME that evaluated the levee's stability. Pl. Exh. 204, p. 12. Upon review of the S&ME reports, FEMA concluded that the levees were likely to fail, but "would still block conveyance through the Richland County floodplain." *Id.*

of a floodway. *See* Pl. Exh. 204, p. 2 (FEMA stating that assumptions made in HEC-2 hydraulic model of the Congaree River effect both the BFEs and the floodway delineation.”).

104. 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. Pl. Exh. 4.
105. 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. Tr. Vol. 7, p. 1311, line 19 – p. 1312, line 11; Tr. Vol. 7, line 19-25; *see also* Pl. Exh. 430 (Haynsworth Sinkler Boyd letter stating that Columbia Venture needed a grading permit, erosion and sediment control plan, and stormwater management design plan in order to “maintain” its levee to the County’s Levee Standard). Columbia Venture was also required to obtain a zoning permit. Tr. Vol. 13, lines 6-16; Tr. Vol. 14, lines 7-14; *see also* Pl. Exh. 430 (Haynsworth Sinkler Boyd letter stating that levee “maintenance” was subject to the County’s Floodplain Overlay District, requiring a floodplain development permit).
106. On May 6, 1999, Lockwood Greene submitted to the County Engineer’s office a permit application for a land disturbance permit. Pl. Exh. 119.
107. Neither party was able to locate the actual plans that were submitted.
108. 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.” Tr. Vol. 4, p.

779, line 18 – p. 780, line 7. Mr. Manning testified that the application was intended to “begin the process of bringing [the levee] into compliance with 44 CFR.”). Tr. Vol. 2, p. 385, line 20 – p. 386, line 1. Mr. Tillotson, the lead Lockwood Greene engineer for Columbia Venture, testified that the application was intended to perform maintenance which involved “restoring the levees to -- to a more uniformed [sic] location to take out for some wash-outs. And there actually had been some excavation done. Part of the levee had even been removed I think for some drainage purposes, something like that, and they'll restore that.” Tillotson Dep. p. 59, lines 15-21. Mr. Hester, another 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 standards. Tr. Vol. 12, p. 2161, lines 6-12. Mr. Wendel testified that the permit was intended to perform maintenance such as clearing trees and vegetation, unclogging pipes, and leveling uneven sections. Wendel Dep. (Oct. 25, 2011) pp. 7, lines 6-24; p. 25, lines 3-21; p. 28, lines 9-15.

109. The application failed to include a complete set of plans and specifications.²⁶ Pl. Exh.

119. Consequently, the County disapproved the application until additional information

²⁶ The County Engineer was shown a geotechnical report dated May 21, 1999, not previously produced to the County, that included cross-section drawings for the levees based on a 100-year design standard. Tr. Vol. 8, p. 1384, line 18 – p. 1389, line 4. When asked if, hypothetically, he had received this report, would the County have had sufficient information to constitute a complete application, the County Engineer said no. Tr. Vol. 8, lines 10-20. He testified that the report was “nothing more than a geotechnical report, which would be an integral part of what the engineer would need to prepare a complete set of construction plans, which is what we were looking for, and the specifications.” Tr. Vol. 8, p. 1390, lines 20-25. The County Engineer said he would need a final set of construction plans, which “for a project of this magnitude ... would be a massive set of plans and calculations and specifications.” Tr. Vol. 8, p. 1390, line 25 – p. 1391, line 8. On November 16, 1999, S&ME submitted to Columbia Venture a geotechnical exploration of Levee Section 1 and 2 that provided “general recommendations” for remedial construction on the levees to bring them to a 500-year design level. Pl. Exh. 211, p. 61. The report contained cross-section drawings depicting this remedial work. Pl. Exh. 128; Tr. Vol. 7, p. 1347, line 4 – p. 1349, line 25. Mr. Pearson testified that these drawings would be part of what would be included in a permit application. Tr. Vol. 7, p. 1350, line 23 – p. 1351, line 23. But, he said, “what they would have to do would go a lot further than this.” Tr. Vol. 7, p. 1351, lines 19-25.

was received. *Id.* In its disapproval letter to Lockwood Greene, the County Engineer's Office also called attention to the County's Levee Standard. *Id.*

110. Mr. Hester of Lockwood Greene testified that he did not recall knowing about the County's Levee Standard prior to receipt of the County's disapproval letter. Tr. Vol. 12, p. 2162, line 8 – p. 2163, line 14.
111. Mr. Gregory claimed that the application was subsequently resubmitted. Tr. Vol. 4, p. 783, lines 18-25.
112. Columbia Venture's engineer, Mark Hester, who prepared the application that was rejected by the County for being incomplete, testified that he did not recall submitting another application, and he could not find any record of resubmittal in Lockwood Greene's records. Tr. Vol. 12, p. 2164, line 18 – p. 2165, line 5. The County Administrator testified that he was not aware of any application submitted other than the incomplete application. Tr. Vol. 13, p. 2598, lines 1-6. The County Engineer, Ralph Pearson, did not recall receiving any resubmittal. Tr. Vol. 7, p. 1339, line 11 – p. 1340, line 19; Tr. Vol. 8, p. 1453, lines 5-19. Had there been a resubmittal, there would have been a paper trail. Tr. Vol. 8, p. 1447, line 19 – p. 1448, line 19. I find that Columbia Venture has failed to show that a resubmittal occurred.
113. Lexington County became aware of Columbia Venture's permit application. Tr. Vol. 15, p. 2691, lines 7-11. 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." Tr. Vol. 15, p. 2692, lines 3-13. He further stated that this situation "create[d] a scary image for Lexington County property owners." Tr. Vol. 15, p. 2691,

line 21 – p. 2692, line 2. Lexington County's top concern was that an upgraded levee on the Richland County side of the Congaree River would cause greater flooding in Lexington County. Tr. Vol. 15, p. 2692, line 22 – p. 2693, line 3.

114. Lexington County expressed these concerns to Richland County officials. Tr. Vol. 15, p. 2693, lines 4-6.

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

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

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

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

116. The County followed FEMA's advice in using the February 25, 1999 Flood Data for permitting purposes. Tr. Vol. 13, p. 2583, line 16 – p. 2585, line 19.

117. 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. Def. Exh. 2. The plan, devised in partnership with S&ME and

other consultants, 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. *Id.*

118. 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. Def. Exh. 2. The strategy, however, would not keep the levee out of the floodway. *Id.* Lockwood Greene's model showed the floodway extending to the landward side of the levee. *Id.* 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." *Id.* 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." *Id.*
119. On August 12, 1999, FEMA issued preliminary revised Flood Data that incorporated Lockwood Greene's data. Pl. Exh. 304; Pl. Exh. 305. 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. Pl. Exh. 533; Pl. 304; Pl. Exh. 162.
120. 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. Pl. Exh. 304.

121. Following FEMA's announcement of this new preliminary revised Flood Data, the County Engineer publicly stated that he interpreted the word "impede" within the Floodway Provision of the Stormwater Ordinance to mean the same as FEMA's "no-rise" standard. At trial, Mr. Pearson testified that he had equated "impede" with "no-rise" and confirmed a statement attributed to him in The State Newspaper dated August 20, 1999 in which he said - "I think we can demonstrate no-rise. But I'm going to let the attorneys make that call." Tr. Vol. 7, p. 1323, lines 12-25; Tr. Vol. 7, p. 1324, lines 7-25; Tr. Vol. 8, p. 1399, line 15 - p. 1400, line 22. However, the County Attorney advised him that the word "impede" should be interpreted according to its plain and ordinary meaning. Tr. Vol. 7, p. 1323, line 19 - p. 1324, line 20.
122. County Council minutes dated September 7, 1999 stated that FEMA had advised the County to use the effective map of 1995 for permitting purposes until FEMA finalized its Flood Data. Pl. Exh. 123; *see also* Pl. Exh. 533 (showing that Aug. 12, 1999 BFEs were lower than July 17, 1995 BFEs).
123. The deadline to submit any appeals of FEMA's August 12, 1999 Flood Data was December 13, 1999.
124. As the appeal deadline approached, Richland County received numerous appeal letters. Pl. Exh. 311.
125. Richland County submitted an appeal of the August 12, 1999 Flood Data on behalf of the community. *Id.*
126. Upon reviewing the appeals, FEMA only recognized three appellants - SCDNR, Dr. John Grego, and McNair Law Firm. Pl. Exh. 45.

127. SCDNR appealed independently of, and not on behalf of Richland County. Tr. Vol. 12, p. 2216, line 14 – p. 2217, line 4; *see also* Wendel Dep. p. 81, lines 18-21.
128. As reflected in a planning document dated March 27, 2000, Columbia Venture was not planning to proceed with development of its Property until after FEMA issued its appeal resolution. Def. Exh. 46, CV000883; Def. Exh. 49. After FEMA issued its appeal resolution, Columbia Venture planned to initiate discussions with the City and County regarding economic development incentives; construction, ownership, operation and maintenance of the levees; levee liability issues; annexation and zoning. Def. Exh. 46, CV000883. Columbia Venture planned to seek annexation into the City of Columbia followed by submittal of an economic incentive package. Def. Exh. 46, p. CV000885; Def. Exh. 48, p. 671; Def. Exh. 49.
129. Levee construction was planned to commence upon approval of the development agreement and financing package. Def. Exh. 46, p. 885; Def. Exh. 48, p. 671; Def. Exh. 49.
130. As of May 5, 2000, Columbia Venture was still working on its land use plan. Def. Exh. 48, p. 1.
131. In May 2000, Columbia Venture began meeting quietly with Richland County, the City of Columbia and others. Pl. Exh. 4, p. 2.; Pl. Exh. 506, p. 2; Def. Exh. 48, p. 670.
132. 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. Pl. Exh. 4, p. 2. Columbia Venture stated its willingness to consider sharing the costs of the County's review of its project. *Id.* The County and Columbia Venture began jointly developing a work plan. *Id.*

133. Richland County retained Nelson Mullins Riley & Scarborough ("Nelson Mullins") to assist with legal aspects of the project. Pl. Exh. 4, p. 2.
134. Mrs. Kit Smith, the 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." Def. Exh. 53. 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." *Id.*
135. Towards this end, the County prepared a list of issues for deliberation, including levee improvements, levee maintenance, financing of levee maintenance, and economic development incentives. Def. Exh. 54.
136. On August 23, 2000, the County provided Columbia Venture with a copy of its proposed revisions to its Sediment and Erosion Control Ordinance and Storm Drainage Ordinance. Def. Exh. 151, DEF-00002125.
137. The ordinance revisions combined its Sediment and Erosion Control Ordinance and Storm Drainage Ordinance into a comprehensive Stormwater Management, Erosion and Sediment Control Ordinance ("Stormwater Ordinance"). Pl. Exh. 112.
138. The substantive revisions pertained to water quality criteria and other provisions required by the S.C. Health and Environmental Control ("DHEC") relating to enforcement of the County's new stormwater management responsibilities under a National Pollutant Discharge Elimination System ("NPDES") permit issued by DHEC. Pl. Exh. 112.

139. In the proposed Stormwater Ordinance, a new variance provision was included. Pl. Exh. 112, DEF-00002195, § 8-24.
140. The County and Columbia Venture recognized that the issue of interpretation of the Floodway Provision needed final resolution, and added the issue to their jointly drafted work plan. Def. Exh. 133.
141. In June 2000, Columbia Venture borrowed \$7.5 million dollars to buy out Mr. Burwell Manning's interest in Columbia Venture. Def. Exh. 10; Def. Exh. 50. The principal and interest was due on November 2, 2000 with an option to renew until March 30, 2001 if not paid out at maturity. Def. Exh. 50, p. 2.
142. Columbia Venture anticipated that the appeals would be resolved with a map favorable to its development plan. Def. Exh. 10. Columbia Venture anticipated that it would then sell the repurchased shares to a potential investor for \$10 million dollars before the November 2, 2000 due date. Def. Exh. 10; Def. Exh. 50, p. 1. This cash infusion would give Columbia Venture working capital to proceed with its development plans. Def. Exh. 10.
143. By August 2000, Columbia Venture contemplated seeking rezoning, a development agreement, and a public financing mechanism from the County. Def. Exh. 55. From the City, it contemplated the City's involvement with the development agreement, and the City would enter into a levee agreement. *Id.* Additionally, Columbia Venture planned to seek annexation into the City. *Id.*
144. Columbia Venture hired several politically influential lawyers and lobbyists to help gain support for its project. Pl. Exh. 4, p. 3.

145. FEMA's administrative appeals resulted in new preliminary revised Flood Data issued on September 26, 2000 ("Appeal Resolution").²⁷ Pl. Exh. 336; Pl. Exh. 337. The Appeal Resolution expanded the regulatory floodway to cover approximately 70% of Columbia Venture's Property. Pl. Exh. 338.
146. Richland County, as well as Columbia Venture, was surprised at the Appeal Resolution. Pl. Exh. 4, p. 4.
147. On September 26, 2000, FEMA informed the County that Columbia Venture's project would be difficult to accomplish. Pl. Exh. 4, p. 4. Under this map, FEMA believed that Columbia Venture could not improve its levees without creating a rise in base flood elevations. *Id.* To avoid a rise in base flood elevations, Columbia Venture could move the levee further back from the Congaree River. *Id.* Otherwise, Columbia Venture would have to demonstrate that the levee upgrade would cause no adverse effect on Lexington County. *Id.* at p. 4; *see also* 44 C.F.R. § 65.12. Another option available to Columbia Venture was to seek to redraw the regulatory floodway such that its levees were no longer within the floodway. Pl. Exh. 523, #13. Floodway revisions must meet the requirements of 44 C.F.R. § 65.7, which requires engineering analysis, and concurrence by all affected communities. *Id.*
148. Due to the unexpected Appeal Resolution, the County suspended substantive negotiations with Columbia Venture until the Appeal Resolution was finalized. Pl. Exh. 4, p. 4; Def. Exh. 151, DEF-00002155. During this interim period, the County

²⁷ Initially, FEMA stated that it would resolve the appeal through consultation with the affected local governments. Pl. Exh. 45; *see also* 44 C.F.R. § 67.8 (stating that FEMA shall resolve appeals by "consultation with officials of the local government, or by administrative hearings . . . , or by submission of the conflicting data to an independent scientific body or appropriate Federal agency for advice."). However, the evidence in this case does not indicate that this consultation occurred. Instead, due to the complexity of the issues involved, FEMA resolved the appeals through performance of additional analysis and development of a new hydraulic model of the Congaree River which was peer reviewed by the United States Geologic Survey. Pl. Exh. 204, p. ii, 2, 6.

- 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." *Id.*
149. Throughout the fall of 2000, the County conducted its own research regarding floodplain and levee issues, and organized educational forums featuring nationally recognized experts. *Id.* at p. 5 and 6.
150. FEMA provided a thirty-day comment period before it proceeded to finalize the Flood Data. Pl. Exh. 523, DEF-00001692; Def. Exh. 62.
151. Within the thirty-day comment period established by FEMA, Columbia Venture submitted comments objecting to the September 26, 2000 Appeal Resolution and asked to be recognized as an appellant. Def. Exh. 62. 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. *Id.*; see also Pl. Exh. 204, p. 28. 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. Pl. Exh. 344, p. 1; Def. Exh. 62. It asked FEMA to delay issuing its final determination until it had the opportunity to submit additional data. *Id.* Columbia Venture anticipated that all this could be done within two months. Def. Exh. 62, p. 4.
152. 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. Pl. Exh. 4, p. 5; Pl. Exh. 344, p. 1.

153. Further, Columbia Venture sought to persuade the County that the County Attorney's interpretation of the word "impede" in the Floodway Provision of the Storm Drainage Ordinance was incorrect. Pl. Exh. 4, p. 5.
154. In October 2000, a citizen group called the Congaree Task Force held its first press conference opposing the project. Pl. Exh. 4, p. 5.
155. On November 3, 2000, Columbia Venture provided the County with a legal opinion from Winston & Strawn law firm addressing whether a local community would incur any liability as a result of submitting a CLOMR to certify the levees. Def. Exh. 63. The legal opinion contemplated that either the City or the County would submit the CLOMR to FEMA. *Id.* at p. 6.
156. The Winston & Strawn opinion gave little attention to the issue of potential liability relating to actual operation and maintenance of the levees. Def. Exh. 63 at pp. 25-29. Mrs. Kit Smith, Richland County Council Chairperson, provided the Winston & Strawn Opinion to the County's outside counsel, Nelson Mullins Riley & Scarborough ("Nelson Mullins"), to review. *See* Def. Exh. 70, p. 6. The County asked Nelson Mullins to prepare an opinion for the County addressing potential liability assuming the County took responsibility for maintaining the levees, the levees were constructed, and a subsequent levee failure would occur ("County Legal Opinion"). *Id.* at p. 2.
157. On November 28, 2000, the Congaree Task Force provided County Council a legal opinion from the Southern Environmental Law Center ("SELN") 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. Pl. Exh. 114.

158. The County asked Nelson Mullins to review the SELC opinion and provide input. Def. Exh. 67; *see also* Pl. Exh. 346 (stating that on December 1, 2000 the County met with its legal counsel to discuss the variance issue).
159. During County Council's Committee meeting held on November 28, 2000, County Council Member Bernice Scott requested a legal opinion on the meaning of the word "impede" within the Storm Drainage Ordinance. *Id.* at p. 6; Pl. Exh. 115.
160. The County invited Columbia Venture to offer its own legal analysis of the Stormwater Ordinance. Def. Exh. 151, DEF-00002157, DEF-00002158.
161. 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. Def. Exh. 151 at DEF-00002155.
162. By December 2000, Columbia Venture was experiencing financial pressure. Def. Exh. 10. It was not able to repay its note to repay Carolina First for its \$7.5 million dollar loan on November 2, 2000 because its potential investor decided to wait until after FEMA resolved the Columbia Venture's administrative appeal. Def. Exh. 10, p. 4. This left Columbia Venture with no cash on hand to repay the note when it became due in March 2001. *Id.*

163. Columbia Venture decided to try to push FEMA to accept a floodway that would allow it to upgrade its levees prior to the note's due date on March 30, 2001. Def. Exh. 10, p. 4.
164. It also wanted to complete negotiations with the City and County for an incentive package and a development agreement by this same date. Def. Exh. 10, p. 5.
165. If it was not possible to achieve these goals by March 30, 2001, Columbia Venture would consider a variety of exit plans. Def. Exh. 10, p. 5. It estimated that sale of its Property as-is would yield slightly over \$26 million dollars. *Id.*; Pl. Exh. 344, p. 2.
166. In January 2001, Columbia Venture managed to obtain an extension of time until April 2, 2001 to repay its loan. Def. Exh. 73, BandC020876. It set a goal of having the FEMA issues completed by July 2001. *Id.* Columbia Venture's managing member, Burroughs & Chapin, believed it had a "majority advantage on County and City Council." *Id.*
167. 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. Def. Exh. 151, DEF-00002161.
168. Columbia Venture responded by stating that it was "hesitant to turn over information if we don't know where we are going." Def. Exh. 151, DEF-00002164. Columbia Venture thought that the "focus with the information would be to consummate a development agreement of which there are many components." *Id.* It proposed that "we should set the threshold issues, get past them, then get into the details." *Id.*
169. Columbia Venture proposed the creation of a working group comprised of representatives from Richland County, the City of Columbia and Columbia Venture "to

continue discussions and negotiations regarding details of the proposed Green Diamond Project." Def. Exh. 151, DEF-0002169.

170. 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. Def. Exh. 151, DEF-00002171; *see also* Pl. Exh. 4, p. 8-9 (On February 6, 2000, Bernice Scott requests staff to schedule a meeting with Richland County, City of Columbia, Lexington County, City of Cayce, City of West Columbia, School District One and Columbia Venture). The County suggested that the group focus on several threshold issues, including levee certification, options for structure of levee operation and maintenance, and economic development incentives. Def. Exh. 151, DEF-00002171-DEF-00002172.
171. 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. Def. Exh. 72.
172. On January 12, 2001, Nelson Mullins presented its legal opinions to the County. Def. Exh. 67; Pl. Exh. 4, p. 7.
173. 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.²⁸ Def. Exh. 67.

174. Regarding the variance provision within the Stormwater Ordinance, the opinion raised potential problems with the variance provision as applied to the floodplain management regulations contained within the Stormwater Ordinance. Def. Exh. 67, p. 5-6. Nelson Mullins advised the County to give further consideration to the proposed variance provision as it applied to floodplain management provisions. *Id.*
175. In Nelson Mullin's opinion²⁹ regarding potential liability related to levee maintenance, Nelson Mullins concluded that:

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

176. On February 4, 2001, the County's stormwater services manager recommended that section 8-25, the express variance provision, be deleted from the Stormwater Ordinance. Pl. Exh. 112, DEF-00002175.
177. 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

²⁸ The County waived confidentiality of this opinion. The stormwater opinion was discussed publicly during the County Council's Development & Services Committee held on January 23, 2001. Pl. Exh. 4, p. 8. *See also* Pl. Exh. 507 (Minutes of Columbia Venture meeting held January 26, 2001 where stormwater opinion was discussed); Pl. Exh. 578 (Email from County dated January 23, 2001 to SELC attaching stormwater opinion).

²⁹ The County waived confidentiality of this opinion. The levee liability opinion was provided to Columbia Venture, SELC and others. Def. Exh. 88 (Haynsworth Sinkler Boyd memorandum dated June 22, 2001 specifically referring to Nelson Mullins' levee liability opinion and responding to conclusions made in it); Pl. Exh. 577 (Email from County dated January 23, 2001 to SELC attaching levee liability opinion); Pl. Exh. 4 (noting that County provided levee liability opinion to the Governor's Office).

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. Pl. Exh. 51.

178. Both the City of Columbia and Heathwood Hall had sizable investments in structures located on their property.³⁰ Tr. Vol. 3, p. 630, lines 13-20.
179. 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. Pl. Exh. 250a; Def. Exh. 76.
180. 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. Pl. Exh. 184.
181. Both the City³¹ and Heathwood Hall requested that Richland County amend its Stormwater and Zoning Ordinances to allow construction to occur in a floodway. Pl. Exh. 184; Def. Exh. 76.
182. 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. Pl. Exh. 185.
183. The County prepared a proposed amendment to the Floodway Provision that included a revised and expanded version of SELC's proposed amendment. Def. Exh. 82, p. 12.

³⁰ In contrast, the only structures on Columbia Venture's property were barns, a grain facility, a house and an office. Tr. Vol. 3, p. 630, lines 7-12.

³¹ The City's wastewater treatment plant was exempt from the requirements of the Stormwater Ordinance under § 8-7(c). 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.

184. On March 20, 2001, Council gave first reading to the Stormwater Ordinance as amended. Pl. Exh. 186.
185. 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 standard governing encroachments in a floodway. Def. Exh. 82, p. 12.
186. Richland County 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 River floodplain]." Pl. Exh. 186.
187. Subsequent to County Council's first reading of the Stormwater Ordinance, Heathwood Hall 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. Pl. Exh. 184; Pl. Exh. 362. 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 Columbia Venture to maintain their levee. Pl. Exh. 362.
188. 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. Def. Exh. 1.

189. Columbia Venture defined "formal development proposal" as including a CLOMR, which would serve as the impetus for revising the Stormwater Ordinance. Wendel Dep., p. 162, line 11 – p. 164, line 11.
190. On April 2, 2001, Columbia Venture also provided a notebook of technical information to the City of Columbia, Richland County and Richland County School District One. Pl. Exh. 4, p. 11; Pl. Exh. 550. Columbia Venture cautioned that the information submitted was preliminary in nature and modifications may be appropriate based on the outcome of FEMA's study, and future negotiations with local governments. Pl. Exh. 550.
191. In its cover letter accompanying the technical report, Columbia Venture explained that the County's request for a CLOMR application could not be provided until after FEMA finished its remapping process. Pl. Exh. 550. Once FEMA concluded its restudy, Columbia Venture would prepare and submit the CLOMR application "reflect[ing] whatever the jurisdictional status of the Green Diamond property may be at that time." *Id.*
192. In its cover letter accompanying the technical report, Columbia Venture stated that it was working on a comprehensive development proposal to be submitted in mid-April. Def. Exh. 550. Columbia Venture intended this proposal to serve as "the basis for extensive discussions and to reach agreement on how the project should proceed." *Id.*

193. Meanwhile, the County's legal counsel fine-tuned the language of the exceptions within its Floodway Provision, incorporating input from Heathwood Hall, Columbia Venture, and SELC. Pl. Exh. 4, p. 10; Def. Exh. 77.
194. The County's Stormwater Ordinance became effective on April 17, 2001. Pl. Exh. 374.
195. As amended, the word "impede" within the Stormwater Ordinance was interpreted to mean essentially no construction within a regulatory floodway. Tr. Vol. 14, p. 2617, line 17-25. This standard was more restrictive than FEMA's standard concerning encroachments in a floodway. *Id.*
196. The general rule of "no-impede" applied to all Richland County property within a regulatory floodway.
197. 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. Tr. Vol. 12, p. 2262, lines 6-14.
198. Within a floodway, the greatest flood velocities and depths occur, causing the greatest damage during a flood. Tr. Vol. 12, p. 2218, line 12 – p. 2219, line 1.
199. 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." Tr. Vol. 14, p. 2618, lines 1-25.
200. 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 or from

the possibility of more intense storms due to climate change.” Tr. Vol. 14, p. 2619; lines 3-7.

201. 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. Tr. Vol. 14, p. 2619, lines 8-24.

202. FEMA’s regulatory floodway does not take into account future conditions. Tr. Vol. 12, p. 2225; line 18 – p. 2226, line 5.

203. Thus, allowing encroachments within a floodway under FEMA’s minimum no-rise standard will, over time, cause base flood elevations to rise. Tr. Vol. 12, lines 7-14. By prohibiting construction within a floodway, a community “preserve[s] the flood storage capacity and keep[s] people out of harm’s way,” *Id.* at lines 15-19.

204. Floodplain management ordinances that are more restrictive than FEMA’s minimum standards provide a higher level of safety. Tr. Vol. 12, p. 2228, lines 19-21.

205. The County’s floodplain management regulations became in effect the same as Lexington County’s floodplain management regulations. Tr. Vol. 15, p. 2697, lines 12-17; Tr. Vol. 15, p. 2702, lines 7-25.

206. 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. Tr. Vol. 15, p. 2694, line 21 – p. 2696, line 2; *see also* Tr. Vol. 15, p. 2725, lines 2-10 (Mr. Compton stating that planning according to a “worst case scenario is absolutely the best for floodplain management for a local jurisdiction”).

207. 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.
Tr. Vol. 14, p. 2621, lines 12-23.

208. 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.

209. On the same day that County Council gave third reading to the Stormwater Ordinance, the County Council provided a list of information requests to Columbia Venture "as a proactive communication letting the Company know what the County wants included in its [development] proposal." Pl. Exh. 4, p. 12. Also on this same day, Columbia Venture requested to appear before County Council to present a development proposal.

Id. Council scheduled time to hear Columbia Venture during its next regular meeting held on May 1, 2001. Pl. Exh. 4, p. 12.

210. On May 1, 2001, Columbia Venture presented to Richland County Council a document entitled "The Simple Truth About Green Diamond." Pl. Exh. 4, p. 12; Def. Exh. 79.

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. Def. Exh. 79, p. 1.

211. In "The Simple Truth About Green Diamond," Columbia Venture proposed that its Property be added to the County's existing Multi-County Business Park. Def. Exh. 79, p. 2. The levees would be conveyed to a non-profit corporation qualified for tax-exempt bond financing allowed under state law governing multi-county business parks. *Id.* The non-profit corporation would be responsible for improving, operating and maintaining the levees. *Id.*

212. The document requested approximately \$80 million dollars in infrastructure costs to be paid through the sale of special source revenue bonds. Def. Exh. 79, p. 2. These costs included approximately \$8 million dollars for levee construction, and \$300,000 per year for maintenance, insurance costs and permitting. *Id.* at 3.

213. 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. Def. Exh. 79.

214. 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. Def. Exh. 79.
215. The document's discussion concerning levee construction, operation and maintenance was directed toward the City of Columbia. Def. Exh. 79, p. 2.
216. On May 15, 2001, Columbia Venture submitted an annexation petition to the City of Columbia. Def. Exh. 84; Tr. Vol. 13, p. 2523, lines 18-22.
217. On May 22, 2001, the Green Diamond Task Force convened for the first time. Def. Exh. 85. Members of the Task Force included elected officials of the City, County and School District. *Id.*
218. The Green Diamond Task Force adopted a work plan which identified three threshold issues concerning the project: 1) approval of levee improvements through a CLOMR; 2) annexation; and 3) multi-county business park incentive. Def. Exh. 85, DEF-00002475.
219. During the summer of 2001, Columbia Venture launched an aggressive public relations campaign, including mass mailings, newspaper ads, a petition drive, a telephone survey of public opinions, and television commercials. Pl. Exh. 510, p. 2; Def. Exh. 11.
220. Columbia Venture concluded that opposition from Congaree Task Force "peaked months ago" and "now that we are building our case, they have nothing to say." Def. Exh. 11, p. 1.
221. The Green Diamond Task Force scheduled a meeting on June 25, 2001. The purpose of the meeting was to hear presentations from the County, City, and Columbia Venture regarding the levees and the multi-county business park incentives. See Pl. Exh. 4, p. 14-15 (County preparing to present background information on the multi-county business park incentive; City preparing to present basic information regarding levees).

222. During this Green Diamond Task Force meeting, outside counsel for the County, Parker Poe Adams & Bernstein LLP ("Parker Poe"), presented background information regarding multi-county business parks. Def. Exh. 89.
223. Parker Poe explained that "under the State Constitution, property located within a Park is exempt from property tax, but owners of property within a Park are required to pay a fee-in-lieu of tax equal to the *ad valorem* taxes that would have otherwise been due on the property." Def. Exh. 89, CV012968. "As a result, State law permits local governments ... to issue special source revenue bonds (SSRBs) payable from the fee-in-lieu of tax revenues generated from property located in a Park." *Id.* The bonds may be used to pay for project-related infrastructure costs. *Id.* State law also permits local governments to grant special source revenue credits, where the property owner's fee-in-lieu of taxes is reduced as a credit to the property owner in order for the property owner to reimburse itself or pay for infrastructure projects. *Id.* Special source revenue credits are the more popular vehicle. *Id.* "Companies with large up-front costs would prefer to use an SSRB." *Id.* at CV012969. "In an SSRB transaction, the bonds are sold and the money is immediately available." *Id.*
224. Between 1991 and 2000, a total of 555 new or expanded economic development projects occurred in Richland County. Def. Exh. 90, p. 3. Of these 555 projects, Richland County agreed to place only 36 within its multi-county business park. *Id.* at p. 7.
225. As of June 25, 2001, Richland County had never issued special source revenue bonds. Def. Exh. 90, p. 9.

226. Of the 36 businesses within Richland County's multi-county business park, 18 received special source revenue credits. Def. Exh. 90, p. 10. These credits issued ranged from \$150,000 to \$2.2 million dollars. *Id.* at p. 9.
227. Richland County treated special source revenue credits on a "case by case basis" as inducements to secure new jobs and investment. Def. Exh. 90, p. 9. Special source revenue credits were granted "based on committed investment with clawbacks." *Id.*
228. Columbia Venture proposed approval of funding \$80 million dollars in infrastructure supporting non-residential properties within Green Diamond using special source revenue bonds. Pl. Exh. 554.
229. Economic development incentives such as the multi-county business park are normally given to a company that will invest in land, buildings and equipment within the community and commit to creating a certain number of jobs. Def. Exh. 85, DEF-00002476. With Green Diamond, the County was asked to "give incentives to a company who proposes to use the incentive to develop land for companies to locate." *Id.* Columbia Venture was asking the County to depart from its customary practice in providing incentives. *Id.*
230. The County's legal counsel and economic development advisors had reservations about whether the multi-county business park incentive should be given to real estate developers. Tr. Vol. 13, p. 2522, line 19 – p. 2523, line 8.
231. According to Columbia Venture's meeting minutes dated June 29, 2001, Columbia Venture planned to submit a development agreement to the City of Columbia, and expected its CLOMR for levee certification to be submitted by the City of Columbia.

- Pl. Exh. 510, p. 2. By asking the City to submit the CLOMR to FEMA, Columbia Venture was also asking the City to accept responsibility for levee maintenance.
232. The Green Diamond Task Force also held meetings on June 28, 2001 and July 9, 2001. Pl. Exh. 4, p. 16.
233. By July 2001, Columbia Venture was running out of money. Pl. Exh. 510, p. 3. It needed \$1 million dollars in loans from its members in order to meet cash demands through September. *Id.*
234. On August 20, 2001, FEMA issued its final determination of Congaree River Flood Data. Pl. Exh. 381.
235. Once a final determination is issued, FEMA advises communities to use the Flood Data defined within the final determination during the six-month period between the issuance of the final determination and the date the final determination becomes the effective Flood Data that communities must adopt and use. Pl. Exh. 523, ¶ 14.
236. FEMA's final determination put approximately 70% of Columbia Venture's Property within a floodway. Pl. Exh. 381.
237. 3,130 acres of Columbia Venture's Property was within the floodway. Def. Exh. 99, CV000541. 1,135 acres were outside of the floodway. *Id.*
238. Columbia Venture started looking at exit strategies. Tr. Vol. 4, p. 810, lines 6-7; Def. Exh. 9; Def. Exh. 99.
239. Columbia Venture's engineers evaluated its options regarding a CLOMR. Def. Exh. 99. Levee upgrade and certification could be accomplished without causing a rise in the base flood elevations by constructing a new levee at the floodway boundary, but this option would only allow 30% of its Property available for development in a manner that

avoided elevating structures. *Id.* at CV000471. Relocating the levee at some other distance further away from the Congaree River would likely cause a rise in base flood elevations, thus requiring mitigation of a few structures downstream. *Id.* Mr. Hester concluded that seeking to upgrade and certify the levees using the Lexington County Model could be accomplished without causing a rise in base flood elevations, but FEMA would likely not approve this approach. *Id.*

240. Burroughs & Chapin, as Columbia Venture's managing member, had "no desire to spend additional dollars or for management to invest their time resources towards improving the Manning levees or to obtain approval for a multi-county business park with the exception of possibly paying a pro rata share of a levee upgrade." Def. Exh. 100, BandC020961.
241. Columbia Venture looked at selling the Property. Def. Exh. 99, p. CV000541. It believed it could sell its Property within the floodway for \$3,067 per acre, and most of its Property outside of the floodway for \$18,500 per acre, for a total of \$24,361,350.00. *Id.*
242. Because the Property had a considerable pocket of granite lying underneath, it also considered selling the Property to a mining company. Def. Exh. 9, CV000546. Florida Rock Industries offered to buy 360 acres for \$3,360,000.00. Def. Exh. 103.
243. On August 31, 2001, Columbia Venture chose a dual course of action. Pl. Exh. 511, p. 5; Def. Exh. 99, CV000530. Because Columbia Venture concluded that it had to upgrade the levee in order to recoup its investment, it decided to pursue an upgrade of Levee Section 1 that would protect the City of Columbia's wastewater treatment plant

and allow Columbia Venture to develop 1,500 acres. Def. Exh. 99, CV000530, CV000534; Def. Exh. 104, p. 2; Def. Exh. 108.

244. This plan involved the City of Columbia contributing \$8,750,000.00 to construct the levee upgrade, bearing the engineering costs of preparing a CLOMR, and submitting the CLOMR to FEMA. Def. Exh. 105, CV004016; Def. Exh. 108. A non-profit corporation would be formed to construct the levee. *Id.* at CV004015. The non-profit corporation would protect Columbia Venture from liability relating to construction.³² *Id.* The City would accept the responsibility for operation and maintenance of the upgraded levee. Pl. Exh. 511, p. 5. Columbia Venture would offer dirt and land to the City of Columbia in exchange for annexation and a development agreement. Def. Exh. 104, p. 2. A special tax district would be formed to assess property owners for the cost of levee maintenance. Def. Exh. 105, CV004017.
245. At the same time, Columbia Venture decided to prepare a plan for placing a conservation easement on the remaining Property. *Id.*; Def. Exh. 99, CV000532-CV000535. It planned to then sell all of its membership interests to an investor for approximately \$32 million dollars, who would then be able to claim the tax deduction associated with the conservation easement on the Property. Def. Exh. 9; Def. Exh. 112.
246. In October 2001, Columbia Venture brought a judicial appeal of FEMA's final determination.
247. Columbia Venture continued to seek approval from the City of Columbia to upgrade and certify some or all of its levees. Def. Exh. 106, p. 1. However, members of City Council were divided over the issue. *Id.* Based on the absence of evidence to the

³² To the extent Columbia Venture downplays the County's concern about levee liability issues, Columbia Venture's own liability analysis clearly shows it shared the County's concern. Def. Exh. 105, CV004019.

contrary, it appears that the City of Columbia chose not to accept Columbia Venture's proposal concerning improvement of Levee Unit 1.

248. The City of Columbia declined to annex Columbia Venture's Property. Tr. Vol. 13, p. 2524, lines 8-21.
249. On February 20, 2002, FEMA's August 20, 2001 Flood Data for unincorporated Richland County became effective by operation of law. Pl. Exh. 57.
250. Columbia Venture has stipulated that the date of alleged regulatory taking was February 20, 2002.
251. In 2002, Columbia Venture was provided an economic analysis of an option to develop a recreational club on its Property. Def. Exh. 110. The plan was to establish 150 home sites and a master lodge. *Id.*, CV003679. Net income was estimated to be approximately \$14 million dollars. *Id.* at CV003681.
252. In 2002, Columbia Venture received an offer to purchase Columbia Venture's Property for \$26 million dollars. Def. Exh. 111.
253. On November 6, 2002, Columbia Venture obtained an appraisal of its Property for purposes of a conservation easement. Pl. Exh. 394. The appraisal concluded that the Property's market value before the proposed conservation easement was \$142 million dollars. *Id.*
254. In 2003, Columbia Venture estimated that traditional development of its Property located outside of the floodway consistent with its land use land use plan could yield approximately \$47 million dollars after payment of infrastructure costs. Def. Exh. 12.
255. In 2003, Columbia Venture estimated that it could, under the 2002 Flood Map, develop big residential lots, create a wetlands mitigation bank, and develop artificial wetlands to

filter wastewater discharges, with a probable net return of approximately \$49 million dollars.³³ Def. Exh. 14; Tr. Vol. 6, 1090, line 25 – p. 1091, line 8.

256. Columbia never submitted a formal development proposal to the County. Wendel Dep. p. 161, line 18 – p. 162, line 8.
257. Columbia Venture did not submit any other application to the County for development of its property. Tr. Vol. 3, p. 552, lines 17-22; Tr. Vol. 3, p. 602, lines 15-25; Tr. Vol. 3, p. 656, lines 1-21; Tr. Vol. 13, p. 2497, line 24 – 2498, line 16; Tr. Vol. 13, p. 2516, line 20 – p. 2917, line 8; Def. Exh. 1; Def. Exh. 79; Def. Exh. 81.
258. In looking back on the failed Green Diamond project, the Board of Directors of Burroughs & Chapin described FEMA's change of position as a result SCDNR's appeal and "vocal protest from numerous anti-growth environmental groups" as the reason for the project's failure. Def. Exh. 13, p. 7. No mention was made of any actions by Richland County that had caused the project to fail. *Id.*; Tr. Vol. 6, lines 8-16. The Board learned many lessons, one of which was not to pursue a project that is purely speculative in nature. Def. Exh. 13, p. 7.
259. On March 14, 2005, Columbia Venture obtained an appraisal of its Property, as-is, without any zoning changes or improvements, at the request of a bank. Pl. Exh. 425. The appraisal concluded that the Property's market value was approximately \$14 million dollars. *Id.*

³³ In spite of the fact that he and his employees prepared these options as ways to make money, Mr. Robert Hughes testified on redirect that the wetlands mitigation and constructed wetlands for wastewater treatment were pointless because they were prohibited by the County's Stormwater Ordinance. Tr. Vol. 6, p. 1090, line 1 – p. 1091, line 11. Mr. Hughes drew a self-serving legal conclusion that is not supported by the ordinance itself. FEMA's variance provision, incorporated by reference in the ordinance, could have allowed these activities. Also, Columbia Venture could have contracted with a local government to perform the actual construction. Any agency with the power of imminent domain was exempt from the ordinance. Pl. Exh. 374, § 8-7(e), Richland County Stormwater Ordinance (2001).

260. In 2010, Richland County obtained an appraisal of Columbia Venture's Property addressing the extent of Columbia Venture's economic loss as of February 20, 2002. Pl. Exh. 195. It concluded that the Property's market value before February 20, 2002 was approximately \$34 million dollars. *Id.* It concluded that the Property's market value after February 20, 2002 was approximately \$28 million dollars. *Id.* The difference in value before February 20, 2002 and after February 20, 2002 was \$5.6 million dollars, or approximately 17% loss in value. *Id.*
261. Since February 20, 2002, Columbia Venture sold almost 3,000 acres of its Property for a total of approximately \$10.5 million dollars. Def. Exh. 128.

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.³⁴ 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

³⁴ Columbia Venture cannot argue that the County and Columbia Venture never explored these issues. See Def. Exh. 53; Def. Exh. 63; Def. Exh. 67; Def. Exh. 88; Def. Exh. 79; Pl. Exh. 581.

Columbia Venture's ability to develop its property to the extent that, under *Penn Central*, just compensation is due.

I. COLUMBIA VENTURE'S CLAIM IS UNRIPE.

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); *Moore v. Sumter County Council*, 300 S.C. 270, 272, 387 S.E.2d 455, 457 (1990). "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). It is "a factual determination taking into account all relevant statutes, ordinances, and regulations, that the decisionmaker has arrived at a final determination with respect to the permit applicant's use of her property." *DLX, Inc. v. Kentucky*, 381 F.3d 511, 525 (6th Cir. 2004). "And, to prove that a final decision was indeed reached, the facts of the case must be clear, complete, and unambiguous." *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). The question of ripeness is a matter within the sound discretion of the trial judge. *Stanton v. Town of Pawleys Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992).

To establish a ripe regulatory takings claim, the property owner must, at the very least, submit a formal development application for review and response by the defendant.³⁵ *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986); *Acorn Land, LLC v. Baltimore County*, 402 Fed. Appx. 809, 813 (4th Cir. 2010); *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991) *cert. denied*, 502 U.S. 866 (1991). "Informal efforts to gain approval for land development are insufficient, by themselves, to constitute final government action." *Goldfine v. Kelly*, 80 F. Supp. 2d 153, 160 (S.D.N.Y. 2000); *see also Unity Ventures v. County of Lake*, 841 F.2d 770, 775 (7th Cir. 1988) (holding that Mayor's communication to plaintiff that he would not consent at that time to the requested connection to the city's sewer system failed to meet ripeness requirement); *Celentano v. West Haven*, 815 F. Supp. 561, 569 (D. Conn. 1993) (stating that efforts to negotiate an informal resolution of a zoning dispute does not constitute a final government decision).

If the regulatory scheme at issue prohibits the development proposed but relief is available through a variance, then the property owner must pursue a variance in order to ripen his claim. *Acorn Land, LLC v. Baltimore County*, 402 Fed. Appx. 809, 814 (4th Cir. 2010). "The term 'variance' is not definitive or talismanic; it encompasses other types of permits or actions [that] are available and could provide similar relief." *Mayhew v. Town of Sunnysdale*, 964 S.W.2d 922, 930 (Tx. 1998) *cert. denied* 526 U.S. 1144 (1999). "The variance requirement is therefore applied flexibly in order to serve its purpose of giving the governmental unit an

³⁵ If this initial application is denied, the property owner must resubmit modified plans that attempt to satisfy the local government's objections to the use or development as initially proposed. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986); *Monte Dunes at Monterey, Ltd v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990); *see also Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978) ("Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal."). "The final decision requirement is not satisfied when a developer submits, and a land use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted." *Palazzolo v. Rhode Island*, 533 U.S. 606, 619 (2001).

opportunity to grant different forms of relief or make policy decisions which might abate the alleged taking." *Id.*

The final decision requirement applies even where a regulation appears on its face to be highly restrictive. *S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 503 fn. 5 (9th Cir.1990) *cert. denied* 502 U.S. 943 (1991). "One reason for this is that local agencies have wide authority to grant relief which might keep the regulation from denying the owner a reasonable economic return." *Id.* "The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." *Id.* "This flexibility is obviously useless if property owners abandon their applications after rejection by civil servants with narrow authority and before seeking relief from a body with broader powers." *Id.*

A plaintiff may avoid the requirement of submitting even a meaningful application if the regulations at issue do not confer any discretion to permit development or the permissible uses of the property is known to a reasonable degree. *Palazzolo v. Rhode Island*, 533 U.S. 606, 619 (2001). In this situation, the final decision requirement is satisfied because requiring a plaintiff to even submit an application in this situation would be pointless. *Id.* Generally speaking, if an ordinance restricting land use does not include the opportunity to seek an administrative variance or exemption, then the government lacks discretion to provide relief. *New Pulaski Co. Ltd. Pshp. v. Mayor & City Council of Baltimore*, 2000 U.S. App. LEXIS 17492 (4th Cir. 2000); *see also National Advertising Co. v. Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991) (claim is ripe when "ordinance did not establish any variance or administrative review procedures through which sign owners might obtain relief."). The demand for finality is satisfied when

there is "no question ... about how the regulations at issue apply to the particular land in question." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997).

In all other situations, a plaintiff must, at the very least, submit a meaningful application to the defendant. *Fourth Quarter Props. IV v. City of Concord*, 127 Fed. Appx. 648, 651 (4th Cir. 2005); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 525 (6th Cir. 2004); *Gilbert v. City of Cambridge*, 932 F.2d 51, 61-62 (1st Cir. 1991); *Eide v. Sarasota County*, 908 F.2d 716, 726-727 (11th Cir. 1990); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379 (9th Cir. 1988) *cert. denied*, 488 U.S. 851 (1988); *Unity Ventures v. County of Lake*, 841 F.2d 770, 776 (7th Cir. 1988) *cert. denied*, 488 U.S. 891 (1988).

If the government then fails to make a final decision on an initial or subsequent application, a property owner may avoid the final decision requirement only if he meets his burden of proving that obtaining a final decision would be a futile act. Futility may be established when the defendant has "dug in its heels" and made clear that all applications would be denied. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 350 fn. 7 (1986); *Acorn Land, LLC v. Baltimore County*, 402 Fed. Appx. 809, 814 (4th Cir. 2010).

To demonstrate futility, Columbia Venture bears the burden of proving, "by more than mere allegations, the futility of pursuing any of the steps needed to obtain a final decision." *Del Monte Dunes at Monterey, Ltd v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987) *cert. denied*, 484 U.S. 1043 (1988). Any reasonable doubt as to whether the futility exception applies should be resolved against the party asserting futility. *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991) *cert. denied*, 502 U.S. 866 (1991). Futility must be "all but certain" for the exception to apply. *Ecogen, LLC v. Town of Italy*, 438 F. Supp. 2d 149, 160-161 (W.D.N.Y. 2006); *see also Brown*

v. *James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010) ("Futility, however, must be demonstrated by a showing comparable to the administrative agency taking a hard and fast position that makes an adverse ruling a certainty.").

A. County Discretion to Permit Development

A plaintiff may avoid the requirement of submitting even a meaningful application if the regulations at issue do not confer any discretion to permit development or the permissible uses of the property is known to a reasonable degree. *Palazzolo v. Rhode Island*, 533 U.S. 606, 619 (2001); *Acorn Land, LLC v. Baltimore County*, 402 Fed. Appx. 809, 814 (4th Cir. 2010). As of the date of alleged taking, Columbia Venture's property was subject to the County's floodplain management regulations within its Stormwater Ordinance and Zoning Ordinance.

Even so, by virtue of incorporation of applicable FEMA regulations, the Stormwater Ordinance contained FEMA's criteria for a variance from the Floodway Provision. § 8-26(i), Richland County Code of Ordinances (2001). Under 44 C.F.R. § 60.6(a), a "community, after examining the applicant's hardships, shall approve or disapprove a [variance] request." The County possessed the discretion under this regulation to allow Columbia Venture to improve its levees under a "no-rise" standard. Indeed, FEMA specifically identified 44 C.F.R. § 60.6 as a means by which Richland County could grant a variance to its floodplain management regulations. Def. Exh. 59, #15. No evidence exists suggesting that Columbia Venture considered the variance option, although it certainly had the means and expertise through its engineers and consultants to know about FEMA's variance regulation and inquire with County about seeking a variance.

On June 30, 2000, Columbia Venture requested that the County revise its floodway regulations to articulate a no-rise standard. Pl. Exh. 4, p. 2. Evidence in this case shows that

the County was willing to revise the Floodway Provision. Pl. Exh. 4, pp. 2, 3, 5; Def. Exh. 68; Def. Exh. 69. The County anticipated that an ordinance revision would occur after Columbia Venture submitted its proposed development agreement. Def. Exh. 1; Pl. Exh. 4, p. 5. Further, Columbia Venture understood 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, [the County] would support the appropriate modifications at that time." Def. Exh. 1. Under the facts of this case, an ordinance amendment to revise the Floodway Provision was a discretionary action that the County possessed and was willing to exercise. *See Mayhew v. Town of Sunnydale*, 964 S.W.2d 922, 930 (Tx. 1998) *cert. denied* 526 U.S. 1144 (1999) ("The term 'variance' is not definitive or talismanic; it encompasses other types of permits or actions [that] are available and could provide similar relief."). Because Columbia Venture never put forward a formal development agreement, it never afforded the ability for the County to exercise its discretion in amending its Stormwater Ordinance.

As explained above, the County's Zoning Ordinance contained a Floodway Provision that prohibited construction in a floodway. Tr. Vol. 13, p. 2528, line 12 – p. 2529, line 9; Vol. 14, p. 2615, line 1 – p. 2617, line 25; Pl. Exh. 250a, § 26-73.4(2), Richland County Floodplain Overlay Zoning District (1999). Nevertheless, the Zoning Ordinance contained a variance provision giving the County the discretion to grant relief from this prohibition. Pl. Exh. 250a, § 26-602.3(a)(1), Richland County Floodplain Overlay Zoning District (1999); Tr. Vol. 13, p. 2529, lines 6-12.

For these reasons, Columbia Venture cannot escape the ripeness requirement merely by showing that "the regulations at issue do not confer any discretion to permit development or the permissible uses of the property are known to a reasonable degree. *Palazzolo v. Rhode Island*,

533 U.S. 606, 619 (2001); *Acorn Land, LLC v. Baltimore County*, 402 Fed. Appx. 809, 814 (4th Cir. 2010). Consequently, Columbia Venture bears the burden of demonstrating that grounds for futility are sufficiently supported by the evidence in this case.

B. Columbia Venture Failed to Submit a Meaningful Application

The only formal application that Columbia Venture submitted to Richland County was an application for a land disturbance permit in May 1999. Pl. Exh. 119. The application was incomplete. Columbia Venture's incomplete application does not meet the ripeness requirement. *Howard W. Heck & Assocs. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998); *Aloisi v. United States*, 85 Fed. Cl. 84, 94 (Fed. Cl. 2008); *Frick v. City of Salina*, 290 Kan. 869, 893-895, 235 P. 3d 1211, 1227-1229 (2010). Columbia Venture apparently did not resubmit a complete application. Therefore, Columbia Venture has failed to meet even the threshold requirement under the ripeness doctrine.

Generally, it is only when a property owner has fulfilled the threshold obligation of submitting a complete, meaningful application to the County that any remaining futility exception may apply. *Fourth Quarter Props. IV v. City of Concord*, 127 Fed. Appx. 648, 651 (4th Cir. 2005); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 525 (6th Cir. 2004); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 353 n.7 (2nd Cir. 2005); *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991) *cert. denied*, 502 U.S. 866 (1991); *Eide v. Sarasota County*, 908 F.2d 716, 726-727 (11th Cir. 1990); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379 (9th Cir. 1988) *cert. denied*, 488 U.S. 851 (1988); *Unity Ventures v. County of Lake*, 841 F.2d 770, 776 (7th Cir. 1988) *cert. denied*, 488 U.S. 891 (1988). The futility exception "serves only to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be

approved." *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990) *cert. denied* 502 U.S. 943 (1991). "The futility exception does not alter an owner's obligation to file one meaningful development proposal." *Id.*

C. Columbia Venture Failed to Meet any other Futility Exception to the Final Decision Requirement

Columbia Venture contends that Richland County exhibited through a pattern of conduct that it has "dug in its heels" and made clear that all applications would be denied. It points to decisions or actions that arguably infer intent to deny Columbia Venture even an opportunity to submit even a single application. I conclude that Columbia Venture has failed to meet its burden.

1. The County Administrator's Statement Regarding a "Maintenance Permit"

On August 12, 1999, FEMA issued new preliminary Flood Maps that removed the floodway from Columbia Venture's property. Under this Flood Data, Columbia Venture faced no barriers under the County's ordinances.³⁶ Columbia Venture points to the minutes of County Council's meeting held on September 7, 1999, in which Mr. McSwain reported to County Council that a maintenance permit could be issued under this August 12, 1999 preliminary revised flood map. Pl. Exh. 123. Columbia Venture interprets Mr. McSwain's reference to a "maintenance permit" as meaning that the County would approve only a permit for levee maintenance, not levee improvements, effectively foreclosing its ability to proceed with its levee improvement plans.

³⁶ See Pl. Exh. 31; Pl. Exh. 533 (FEMA's Floodplain Management Bulletin 1-98 encouraged communities to use its currently effective Flood Map instead of a preliminary Flood Map when the base flood elevations were higher on the currently effective Flood Map. The 1995 base flood elevations were higher than the August 12, 1999 preliminary base flood elevations; therefore, the recommended practice would be to use the 1995 effective Flood Map for permitting purposes.)

Columbia Venture reads too much into Mr. McSwain's statement. The minutes simply state that "it was noted that under the 1995 maps, the County could issue a maintenance permit to maintain the existing levees." Pl. Exh. 123. This statement does not define what "maintenance" means, nor does it say that the County would deny a permit to construct the levees to meet county standards. See e.g. Tr. p. 1407, lines 12-17. Mr. McSwain's statement, even if interpreted to mean that the County would not issue a permit for levee improvements, cannot be read to go so far as to create an unyielding policy of the County. See *Church & Tower, Inc. v. Miami-Dade County*, 11 F. Supp. 2d 1376, 1379 (S.D. Fla. 1998) *affirmed* 214 F.3d 1354 (11th Cir. 2000) (rejecting futility based upon the views of government officials because these views are not static). Mr. McSwain's statement is not sufficient to find that the County "dug in its heels" and refused to consider a permit application to improve the levees. *Del Monte Dunes at Monterey, Ltd v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990) (To demonstrate futility, the landowner bears the burden of proving, "by more than mere allegations, the futility of pursuing any of the steps needed to obtain a final decision.").

2. The County's Appeal of FEMA's August 12, 1999 Flood Data

In December 1999, Richland County appealed FEMA's preliminary revised Flood Data issued August 12, 1999. Columbia Venture argues that this administrative appeal constituted an effort to thwart any submittal of an application for land disturbance associated with its levee. Pl. Exh. 311; Tr. p. 638, lines 6-11; p. 789, line 15 – p. 790, line 7. However much Columbia Venture attempts to make County Council's appeal all about Columbia Venture, the County's obligation under 42 U.S.C. § 4104(c) required the County to "review and consolidate all [appeals by private persons] and issue a written opinion stating whether the evidence presented is sufficient to justify an appeal on behalf of the community in its own name." The County's

fulfillment of this obligation cannot be construed as an effort to thwart Columbia Venture's plans.

Columbia Venture asserts that the County appealed without the benefit of the County Engineer's review of the private appeals to determine their merit, and the absence of technical review violated the County's requirements under 42 U.S.C. § 4104(c). *See* Tr. p. 1412, line 22 – p. 1414, line 16; p. 1418, line 2 – p. 1419, line 2. According to Columbia Venture, this omission is proof of the County's true intent behind the County's appeal, i.e., to prevent Columbia Venture from pursuing levee improvements. Columbia Venture's argument is unavailing.

The appeal requirement under 42 U.S.C. § 4104 merely calls for submittal of information that *indicates* scientific or technical error, and the County is to determine if this information is *sufficient* to justify an appeal by the County. (emphasis added). The statute does not require the exacting standards that Columbia Venture seeks to impose on the County.³⁷ The County's appeal recognized that private appeals must have a technical or scientific basis, and concluded that many of the appeals met these criteria. Pl. Exh. 311. The fact that FEMA's review of the private appeals resulted in its recognition of three appellants puts to rest any argument that none of the appeals had merit. Def. Exh. 45.

Furthermore, FEMA did not recognize Richland County as an appellant. Def. Exh. 45; Tr. p. 2217, lines 2-4. FEMA recognized the S.C. Department of Natural Resources ("SCDNR"), Dr. John Grego, and McNair Law Firm as formal appellants. Def. Exh. 45. SCDNR appealed independently from Richland County. Tr. p. 2216, line 14 – p. 2217, line 1. Thus, Richland County's appeal was inconsequential.

³⁷ Additionally, the County Engineer testified that his staff lacked the expertise to verify technical aspects of FEMA's Flood Data. Tr. Vol. 8, p. 1419, lines 3-8.

3. The County's Stormwater Ordinance

On September 26, 2000, FEMA resolved the appeals of SCDNR, Dr. Grego and McNair Law Firm by issuing preliminary Flood Data that designated 70% of Columbia Venture's property within a floodway. Thirty days later, Columbia Venture appealed this appeal resolution, causing FEMA to engage in a second round of administrative appeals. FEMA advised the County that it could use the 1995 effective Flood Maps for permitting purposes while its final determination was pending.

Columbia Venture argues that the County's amendments to its Stormwater Ordinance in 2001 intended to thwart its efforts to submit an application for levee improvement. While it could be inferred that the Congaree Task Force's opposition to changes in the Stormwater Ordinance was intended to prevent Columbia Venture from developing its property, that same motivation cannot be assigned to Richland County Council. As part of its minutes for its meeting held March 20, 2001, County Council's first reading of the Stormwater Ordinance amendments included an expression of its intent that its vote "in no way reflects Council's position on any development in this area." Pl. Exh. 186.

On the same day that County Council gave third reading to the Stormwater Ordinance, the County Council provided a list of information requests to Columbia Venture "as a proactive communication letting the Company know what the County wants included in its [development] proposal." Pl. Exh. 4, p. 12. Also on this same day, Columbia Venture requested to appear before County Council to present a development proposal. *Id.* These actions do not support Columbia Venture's argument that the Stormwater Ordinance created a barrier to Columbia Venture.

Furthermore, at the time, Richland County had no way of knowing whether FEMA's final Flood Maps would even include a large floodway on Columbia Venture's Property.³⁸ Under these circumstances, it is difficult to conclude that County Council's adoption of its amended Floodway Provision was intended to prevent Columbia Venture from doing anything. It was only when FEMA issued its final determination on August 20, 2001 that anyone knew whether the County's Floodway Provision would even have an impact on property within the Congaree River floodplain.

D. Any Argument of Extraordinary Delay Cannot Ripen Columbia Venture's Claim

Extraordinary delay in government decision-making may give rise to a regulatory taking even without a final decision by the government. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1347 (Fed. Cir. 2002); *see also Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1366 (Fed. Cir. 2004); *Byrd v. City of Hartsville*, 365 S.C. 650, 660, 620 S.E.2d 76, 81 (2005). In order delay to be extraordinary, evidence of bad faith by the government in its delay is relevant. *Id.*; *Byrd* at 661, 82, fn. 15. Additionally, since "delay is inherent in complex regulatory permitting schemes," we should examine "the nature of the permitting process as well as the reasons for any delay" to determine if the delay is disproportionate to the regulatory permitting scheme from which it arises. *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1366 (Fed. Cir. 2004). A year or two of delay, without bad faith, is exceedingly unlikely to be extraordinary. *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 510 (Fed. Cl. 2009). In examining the facts of this case, I conclude that no extraordinary delay in the County's decision-making occurred.

³⁸ As Columbia Venture's meeting minutes reflect, it was optimistic that the final Flood Maps would not include the broad floodway shown on the September 26, 2000 appeal resolution. Pl. Exh. 508; Pl. Exh. 509 and Pl. Exh. 510.

In early 1999, FEMA's preliminary Flood Maps put Columbia Venture's property within a floodway, thus triggering the County's Floodway Provisions. During May 1999, the County Administrator decided to delay any decision on permit applications for land disturbance within a flood hazard area until after FEMA published final flood maps. Pl. Exh. 4; Tr. Vol. 13, p. 2576, lines 3-18. Further, at some point during May – July of 1999, the County Engineer came to the conclusion that he would not issue a land disturbance permit until FEMA had concluded its ongoing flood-mapping process, or he was directed by the County Administrator to use other FEMA flood data. Tr. Vol. 7, p. 1353, line 24 – p. 1356, line 5; Tr. Vol. 8, p. 1392, line 8 – p. 1393, line 22. These statements fall short of establishing extraordinary delay.

Mr. Pearson's position concerning permitting only refers to his thinking in May through July 1999. No testimony was elicited, nor documents introduced, suggesting that Mr. Pearson maintained his position taken in May 1999 until FEMA's final determination in August 2001, over two years later. Similarly, the County Administrator's decision to postpone permitting decisions until after FEMA finalizes its Flood Maps was a decision made in May 1999. Again, no testimony was elicited, nor documents introduced, suggesting that Mr. McSwain maintained his position taken in May 1999 until FEMA's final determination in August 2001. This court cannot assume that the County would have continued this position in the future. *See Church & Tower, Inc. v. Miami-Dade County*, 11 F. Supp. 2d 1376, 1378-1379 (S.D. Fla. 1998) *affirmed* 214 F.3d 1354 (11th Cir. 2000) ("The Court cannot assume that the statements attributed to the Mayor and Manager in the press are sufficient to predict how the County will act in the future."). Columbia Venture has not proved that the decisions by Mr. Pearson and Mr. McSwain were intended to apply for two years.

Even if Columbia Venture produced sufficient evidence to establish this point, the County's staff decisions cannot trump its own ordinances. *See e.g. McCrowey v. Zoning Bd. of Adjustment*, 360 S.C. 301, 306, 599 S.E.2d 617, 619 (Ct. App. 2004) ("The zoning administrator did not have the authority to alter or waive the zoning ordinance in question."). Under the Sediment and Erosion Control and Storm Drainage Ordinances, a permit must be issued on demand if the County fails to reach a decision on the erosion and sediment control plan and/or a storm drainage plan after twenty working days have passed. §§ 8-20 and 8-58(c), Richland County Code of Ordinances (1994); *see also* Tr. Vol. 13, p. 2533, line 24 – p. 2534, line 7. Thus, the Storm Drainage and Sediment and Erosion Control Ordinances would simply operate to automatically grant applications after twenty days had passed without a decision in spite of Mr. Pearson's position that he would not issue a permit under the Storm Drainage Ordinance, or Mr. McSwain's decision to defer permit decisions.

The evidence presented shows that Columbia Venture did not intend to proceed with development of its Property until after FEMA finished its study and issued final Flood Data. Def. Exh. 46, CV000883; Def. Exh. 49. Notably, Columbia Venture's meeting minutes during this time period do not reflect any discussion about submitting a permit application prior to a final determination by FEMA; instead, the minutes reflect Columbia Venture's focus on its administrative appeal of FEMA's September 26, 2000 preliminary revised Flood Data, and how it could possibly proceed with levee construction in the event that it was not successful in its administrative appeal challenging FEMA's expanded floodway.³⁹ During this time period, the County actually asked Columbia Venture for its plans for levee improvements, but Columbia

³⁹ *See e.g.* Pl. Exh. 507, p. 2 ("Mr. Wiseman explained that, once FEMA has approved an acceptable map, infrastructure work could begin."); Pl. Exh. 508, p. 2 (discussing the scenario of how to proceed with levee construction if the September 2000 map prevailed as the end result of Columbia Venture's administrative appeal, noting that its strategy "would put the floodway on the Lexington side of the river so the project could move forward with levee upgrade/construction.").

Venture said that it would be best to wait until FEMA concluded its study. Def. Exh. 66; Def. Exh. 81. Delay associated with FEMA's decision-making cannot be held against the County.

Even when looking at evidence concerning decision-making within Richland County Council's land use authority, I fail to see any extraordinary delay. To the contrary, the County, upon the instigation of Columbia Venture, promptly geared up to review and consider Columbia Venture's development plans in May and June of 2000. Pl. Exh. 4, p. 2.; Def. Exh. 53; Def. Exh. 54. In response to FEMA's unexpected appeal resolution on September 26, 2000, the County did temporarily suspend any substantive negotiations with Columbia Venture; however, this decision was reasonable in light of its knowledge that FEMA did not believe that Columbia Venture could improve its levees without causing increased base flood elevations in Lexington County. Pl. Exh. 4, p. 4. Further, in January 2001, the County agreed to take part in the Green Diamond Task Force along with the City of Columbia and Richland School District One. Def. Exh. 151, DEF-0002169, DEF-0002171.

During this process, the County by itself or in combination with the City and School District made numerous information requests. There is nothing unreasonable about the County seeking information from Columbia Venture, especially in light of the potential impacts to the environment and to public safety that Columbia Venture's project entailed. *See Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1367 (Fed. Cir. 2004) ("Furthermore, given that the BLM was faced with a possible environmental and health hazard, we do not want to encourage hasty decisionmaking by the Government. Given the critical importance of the decision relating to the issuance of the ADPs and the complexity of the decision-making process established under the WIPP Act, the BLM's delay does not constitute an extraordinary delay."); *Aloisi v. United States*, 85 Fed. Cl. 84, 93 (Fed. Cl. 2008) ("When reviewing the length of time alleged to

be extraordinary, government agencies dealing with complex regulatory schemes should be afforded significant deference in determining what additional information is required to satisfy statutorily imposed obligations.”).

Similarly, I see no bad faith here. The County and Columbia Venture maintained constant communication. *See e.g.* Def. Exh. 151. The County offered relevant information to Columbia Venture. Def. Exh. 151. The County retained and used outside legal counsel to review ordinances, and provide reasoned legal opinions. Pl. Exh. 4, p. 2; Def. Exh. 70; Def. Exh. 67; Def. Exh. 67; Def. Exh. 69. The County agreed to Columbia Venture’s request to participate in the Green Diamond Task Force, and allowed generous time during County Council meetings to talk about its Property. *Id.*; Pl. Exh. 4. The County sought out Columbia Venture’s opinions concerning its Stormwater Ordinance. Def. Exh. 72; Pl. Exh. 4, p. 10. These actions indicate the lack of bad faith.⁴⁰ *See Aloisi v. United States*, 85 Fed. Cl. 84, 97 (Fed. Cl. 2008) (stating that evidence of “regular contact” between the parties regarding plaintiff’s proposed plans is evidence that defendant did not act in bad faith).

Columbia Venture argues that hostile comments made by County Council Member Kit Smith show bad faith. *See* Tr. p. 2478, line 6 – p. 2481, line 21; p. 2485, line 3 – p. 2490, line 22; p. 2494, line 3 – p. 2497, line 10. Courts are reluctant to find bad faith on the part of government officials “in light of the fact that government officials are presumed to carry out their duties in good faith, and it takes well-nigh irrefragable proof to overcome this presumption.” *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir.

⁴⁰ *See also* Wiseman Dep. p. 82, lines 13-23 (Wiseman stating that County staff worked with him in good faith); Def. Exh. 54 (stating Richland County’s commitment to a due diligence process “that is fair to the private business interests and to the public ...”); Def. Exh. 71, p. 2 (Columbia Venture’s project manager thanking County staff member’s “courteous assistance to Columbia Venture throughout this endeavor.”); Def. Exh. 151, email dated Nov. 21, 2000 (Columbia Venture’s project manager commending County staff “on wanting to know the facts.”); Def. Exh. 153 (Columbia Venture’s project manager stating that he and County staff “have maintained an active communication channel that has been straight forward and very productive.”).

2002); *Moore v. United States*, 943 F. Supp. 603, 614 (E.D. Va. 1996); *see also Columbia v. Alexander*, 125 S.C. 530, 541, 119 S.E. 241, *19 (1923) (... "every presumption shall be indulged in favor of the good faith and ordinary common sense of a legislative body"). "In the cases where the court has considered allegations of bad faith, the necessary 'irrefragable proof' has been equated with evidence of some specific intent to injure the plaintiff." *Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 198-199 (Ct. Cl. 1976). "The plaintiffs must present clear and convincing evidence to overcome the presumption that the government acted in good faith." *Aloisi v. United States*, 85 Fed. Cl. 84, 96-97 (Fed. Cl. 2008).

Columbia Venture's efforts to cast Richland County Council member Kit Smith as manipulative, deceitful and hateful fail to overcome this presumption of good faith. The evidence in this case does not establish a specific intent of Mrs. Smith to injure Columbia Venture. For example, Columbia Venture makes much about a newspaper article dated November 30, 2007 reporting that Columbia Venture petitioned the City of Cayce for annexation. Pl. Exh. 474; Tr. Vol. 13, p. 2494, lines 3-11. In the article, after stating that a federal judge recently reinstated the Congaree River Flood Maps of 1995 as part of Columbia Venture's appeal of the 2002 Flood Data, Mrs. Smith was quoted as saying: "It's kind of like Chucky, the movie ... [t]hey thought he was dead, and he keeps coming back." *Id.* Mrs. Smith explained that her intent was to make the point, albeit clumsily, that issues surrounding Columbia Venture seemed to continuously pop up. Tr. Vol. 13, p. 2494, line 8 – p. 2496, line 4. I find her testimony to be forthright and credible. Columbia Venture takes her statement as an accusation that it was "a voodoo doll that's inhabited by the soul of a serial killer." Tr. Vol. 13, p. 2494, lines 8-18. Columbia Venture stretches Mrs. Smith's statement beyond what can be reasonably construed from her words.

In addition, Columbia Venture introduced an undated personal paper of Mrs. Smith that was her private expression of frustration regarding Columbia Venture's political strategy, which she saw as unfair and contrary to her interest in open and deliberative policy-making. Pl. Exh. 350; Tr. Vol. 13, p. 2485, line 19 – p. 2490, line 22. This document was never circulated publicly. Tr. Vol. 13, p. 2490, lines 17-22. In it, Burroughs & Chapin was described in unflattering terms. Pl. Exh. 350; Tr. Vol. 13, p. 2485, line 19 – p. 2490, line 22. Columbia Venture would have this court infer that Mrs. Smith's writing reflects her true motivation to run Columbia Venture out of Richland County. See Tr. Vol. 13, p. 2489, lines 7-21. Given the context in which Mrs. Smith wrote this document, I cannot conclude that her comments demonstrate bad faith. Cf. *Kennedy v. Credit Cent., Inc.*, 2011 U.S. Dist. LEXIS 150704, *38 (D.S.C. 2011) (“[Defendant] may have had numerous private reasons for being hostile or unresponsive, including frustration with the plaintiff's performance or as an incident to nothing more than a bad day personally. A jury may not guess about it.”).

Moreover, Mrs. Smith was only one Council Member out of an eleven-member Council. Tr. Vol. 13, p. 2294, lines 13-19. Although she served as chairperson of the Council in 2000 and 2001, that position gave her no control over how the Council as a whole voted. Tr. Vol. 12, p. 2294, lines 10-19. Columbia Venture brought its claims against Richland County, not Mrs. Smith individually. Under 42 U.S.C. § 1983, actions of employees or elected officials of a government cannot be held against a government defendant unless the plaintiff proves that such actions constitute a policy or custom of the government entity. *St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988). Identifying a policy or custom “ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may be fairly said to be those of the municipality.” *Old St. George's*

LLC v. Bianco, 2009 U.S. Dist. LEXIS 129396, *14-15 (S.D. N.Y. 2009); *see also Cleveland v. City of Cocoa Beach*, 2003 U.S. Dist. LEXIS 28054 (M.D. Fla. 2003) (holding that mayor's conduct "represented individual behavior, rather than official City policy" because the whole legislative body is charged with setting policy, not an individual legislator). Columbia Venture has failed to show that Mrs. Smith's personal thoughts constitute an official policy or custom of Richland County.

Columbia Venture's regulatory takings claim is unripe. It never submitted any land use application to the County other than an incomplete application for land disturbance. Contrary to Columbia Venture's arguments, Columbia Venture did not intend to submit any applications for levee improvement until after FEMA finalized its Flood Data, and then only after it negotiated a multi-county business park agreement and a development agreement, and was annexed by the City of Columbia. All of this, of course was contingent upon FEMA finalizing a Flood Map that would allow it to improve its levee without harming Lexington County. Once FEMA issued its final Flood Data, Columbia Venture concluded that it would pursue other options to realize a return on its investment, none of which involved Richland County. Columbia Venture cannot lay at Richland County's feet its failure to see its development plans come to fruition when it abandoned its original plan of action. *See S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 503 (9th Cir. 1990) *cert. denied* 502 U.S. 943 (1991) ("Those who have not followed available routes of appeal cannot claim to have obtained a 'final' decision, particularly if they have foregone an opportunity to bring their proposal before a decisionmaking body with broad authority to grant different forms of relief or to make policy decisions which might abate the alleged taking."). Even if I hold otherwise, Columbia Venture nonetheless has failed to establish that Richland County's actions effected a regulatory taking.

II. COLUMBIA VENTURE HAS FAILED TO ESTABLISH A REGULATORY TAKING

In *Penn Central Transp. v. New York City*, the United States Supreme Court identified three factors that it found particularly significant: “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” as well as “the character of the governmental action.” 438 U.S. 104, 124 (1978). “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 issue of whether a taking occurred is a question of law for the Court. *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, ___ S.C. ___, 2013 S.C. LEXIS 2 (Jan. 9, 2013).

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 Loss

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).

"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). "The economic analysis is often expressed in the form of a fraction, the numerator of which is the value of the subject property encumbered by regulation and the denominator of which is the value of the same property not so encumbered." *Brace v. United States*, 72 Fed. Cl. 337, 349-350 (Fed. Cl. 2006).

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). No taking has been found even when regulations reduced property value by as much as 90%. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019-20 n.8 (1992) (suggesting that a 95% diminution in value would not constitute a taking); *Hadachek v. Sebastian*, 239 U.S.

394 (1915) (no taking despite 91.4% reduction in value); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (no taking despite 78% loss in value); *Walcek v. United States*, 49 Fed. Cl. 248 (Fed. Cl. 2001) (no taking where value diminished by 59.7%); *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1349 (Fed. Cir. 2001) (no taking where value of coal reduced by 91%); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3rd Cir. 1987) *cert. denied*; 482 U.S. 906 (1987) (no taking despite 90% loss in value); *Haas v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) *cert denied* 445 U.S. 928 (1980) (no taking despite 95% reduction in value); *Warren Trust & Marietta Trust v. United States*, 2012 U.S. Claims LEXIS 1493 (Fed. Cl. 2012) (82% diminution of value not enough to establish taking); *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 439 (Fed. Cl. 2011) (58.4% loss in value insufficient to give rise to a taking).

To establish the value of its Property before February 20, 2002, Columbia Venture relies on an appraisal prepared on November 6, 2002 for the purpose of showing market value prior to the placement of a conservation easement on the Property ("Conservation Easement Appraisal"). Pl. Exh. 394. This Appraisal is significantly flawed for several reasons. First, Columbia Venture's Conservation Easement Appraisal was prepared for purposes other than determination of economic loss in a regulatory taking context. See Pl. Exh. 394, p. 1 (stating purpose of appraisal "to estimate, for federal income tax purposes, the market value of 4,410.916 acres"). Second, Columbia Venture's appraisals were prepared without consideration of the relevant date of alleged taking – February 20, 2002. See *Warren Trust & Marietta Trust v. United States*, 2012 U.S. Claims LEXIS 1493 (Fed. Cl. 2012) (holding that appraisal valuing property relative to date that is not date of alleged taking is "significant defect").

Third, this appraisal 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. Pl. Exh. 394, p. 9. He testified that Columbia Venture instructed him to accept as true that Richland County would grant the multi-county business park incentive. Tr. Vol. 9, p. 1665, line 16 – p. 1666, line 15. 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. Tr. Vol. 9, p. 1716, line 11 – p. 1718, line 8. Mr. Wingard testified that he was unaware that Richland County had never approved issuance of special source revenue bonds for a project within a multi-county business park. Tr. Vol. 9, p. 1727, lines 17-20; *see also* Def. Exh. Def. Exh. 90, p. 9. As a result of Mr. Wingard's bald assumption, the Conservation Easement Appraisal does not include the costs to construct infrastructure, including the levees, within its valuation. Tr. Vol. 9, p. 1722, lines 7-17.

Columbia Venture contemplated up to \$80 million dollars in infrastructure costs to be paid for 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. Tr. Vol. 9, p. 1720, line 11 – p. 1721, line 10. Mr. Wingard testified that his appraised value of \$142 million dollars would not hold if the multi-county business park was not in place. Tr. Vol. 9, p. 1624, lines 3-6. If Richland County did not place the Property into a multi-county business park, Mr. Wingard conceded that his property valuation would be invalid. Tr. Vol. 9, p. 1727, lines 17-25. 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. Tr. Vol. 9, p. 1722, line 7 – p. 1723, line 14. Although he testified that he identified the multi-county business park as an extraordinary assumption within the Appraisal, no such disclosure exists within the Appraisal. Tr. Vol. 9, p. 1723, line 7 – p. 1724, line 12; *see* Pl. Exh. 394, p. 3-5 (list of assumptions did not include multi-county business park); p. 54-56 (referring to development of property as financially feasible due to multi-county business park, with no limiting assumptions whatsoever). This reason alone is sufficient to reject Columbia Venture's asserted property value of \$142 million dollars as fundamentally flawed. *See Brace v. United States*, 72 Fed. Cl. 337, 351-352 (Fed. Cl. 2006) (rejecting appraisal due to appraiser's unproven and suspect assumptions, including assumption that Town would pay the cost of paving South Hill Road).

Likewise, the Conservation Easement Appraisal makes unsupported assumptions that the project would receive a multitude of permits or approvals from Richland County and FEMA. *See Brace v. United States*, 72 Fed. Cl. 337, 351 (Fed. Cl. 2006) ("In assessing the feasibility of the project, [appraiser] did not determine whether needed approvals - among them, not only the zoning changes allowing for much smaller lots, but also design, sewage, environmental, utility and road permits and approvals - could be obtained from the half dozen or more Federal, state and local authorities with sometimes interlocking jurisdiction over various aspects of the property."). Mr. Wingard assumed that Columbia Venture would prevail in its pending litigation against FEMA. Pl. Exh. 394, p. 10. His consideration of whether development of the Property was legally permissible made no mention of any regulatory prohibitions or obstacles relating to construction within a floodway or floodplain. *Id.* at p. 55. As with the appraiser in *Brace v. United States*, Mr. Wingard "did not really determine the

feasibility of using the property as a subdivision, but merely valued the property based on the assumption that such a use was feasible.” *Brace v. United States*, 72 Fed. Cl. 337, 353 (Fed. Cl. 2006). “In terms of weight, then, [Mr. Wingard’s] ultimate opinion of value is virtually devoid of factual moorings, depriving it of virtually any evidentiary value. *Id.*; see also *Moore v. United States*, 61 Fed. Cl. 73, 78 (2004) (rejecting appraisal value that did not adequately account for zoning restrictions).

Mr. Wingard’s Conservation Easement Appraisal is simply not credible. 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. Tr. Vol 10, p.1704, line 9-25. However, Mr. Wingard also admitted that: (1) he had never done a developmental appraisal as a project of the magnitude of the Green Diamond project; (2) he had not studied or reviewed any similar project that had been built; (3) he had no basis for establishing a 15 year period to develop the property; (4) although he recognized that changes in the start date, completion date and the economy could dramatically affect his numbers, he failed to consider this in his analysis. Tr. Vol 9, p.1700, line 1 to p.1703, line 20; Tr. Vol 9, p.1707, line 7 to p.1712, line 3. Columbia Venture paid him \$247,000 for valuing the conservation easement. Tr. Vol 9, p.1670, line 8 to p.1671, line 7. However, 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. To his knowledge, no use had been made of his appraisal and no IRS approval of his valuation of the conservation easement had been sought. Tr. Vol 9, p.1677, line 1-17. He had not looked at any developments built behind levees to determine whether the levees might impact price. Tr. Vol 10, p.1714, line 10 to p.1715, line 23. He utilized a cost to upgrade the levees to a 100-year flood standard but had no cost to meet Richland County’s more stringent 500 year flood

standard. Tr. Vol 9, p.1729, line 3-25. Finally and importantly, he admitted that in hindsight, his numbers were wrong and that he had done nothing to correct them:

“Q: Isn’t it correct that because of what has occurred in the market means that the numbers you predicted were not correct?

A: Yes, sir, that would be correct.

Q: And they would have to be refigured in hindsight and reworked, wouldn’t they?

A: Yes.

Q: And you haven’t done that, have you?

A: No, sir, I have not.” Tr. Vol 9, p.1741, line 8-16.

Similarly, Columbia Venture’s Bank Appraisal, used to show the Property’s value after the alleged taking, contain serious flaws. Pl. Exh. 425. Like the Conservation Easement Appraisal, the Bank Appraisal was not prepared for the purpose of establishing economic loss relative to a regulatory taking, but rather, for the purpose of determining collateral for a federally related bank loan. Pl. Exh. 426, p. 10. And, the Bank Appraisal was not prepared to reflect the date of alleged taking. *See Warren Trust & Marietta Trust v. United States*, 2012 U.S. Claims LEXIS 1493 (Fed. Cl. 2012) (holding that appraisal valuing property relative to date that is not date of alleged taking is “significant defect”).

The Bank Appraisal, like the Conservation Easement Appraisal, suffers from a larger problem than even these defects already identified. The Bank Appraisal, also prepared by Mr. Wingard, 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 sold approximately 13 acres of Property outside of any floodplain or floodway for \$85,000 per acre. Def. Exh. 128. It estimated it could sell the entire 1,135 acres

located outside of the floodway for \$16,550,000.00 at an average price per acre of \$18,500.00, and sell the 3,130 acres within the floodway for \$9,600,000.00 at an average price per acre of \$3,100.00. Def. Exh. 99, CV000542. Yet Mr. Wingard's Bank Appraisal does not reflect this distinction.

Columbia Venture also called Thomas F. Hartnett as an expert. Mr. Hartnett is a licensed real estate appraiser. Tr. Vol 10, p.1807, line 15 to p.1815, line 2. 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. Tr. Vol 10, p.1850, line 14-17; Tr. Vol 10, p.1869, line 4-7. Instead, on direct, he testified that Conservation Easement Appraisal by Mr. Wingard was done properly. Tr. Vol 10, p.1842, line 1 to p.1843, line 17. He testified that based on his review of the Conservation Easement Appraisal:

"It's my opinion that based on the data employed in their report and their analysis of that data, that the discounted present value of the property, assuming a highest-and-best use of planned mixed development, was as shown in their report, 142 million dollars.

All I'm saying is based on the method that they used, the data that they used, and their treatment of that data, that they arrived at a well-supportable and logical conclusion of 142 million dollars, which I concurred. So, yes, sir, my answer is yes." Tr. Vol 10, p.1842, line 13-24.

As to the Wingard Bank Appraisal, Mr. Hartnett testified:

"A: Once again, based on the data that he had contained in his report, the methodology which he used and the treatment of the data which he had in his report, I believe that he reached a proper conclusion that was well supported and reasonable in his appraisal of the property for the bank.

Q: Do you have any criticism of Mr. Wingard's bank appraisal?

A: No, sir, I don't." Tr. Vol X, p.1848, line 25 to p.1849, line 8.

On cross-examination, Mr. Hartnett recanted his testimony on direct. He admitted that while he had initially opined that the values and opinions of Mr. Wingard were correct and well done, he had since abandoned those opinions.

"Q: And so there's no mystery or question about it. That is a report that you have since abandoned -

A: That's correct." Tr. Vol X, p.1894, line 15-20.

He testified, in part reading from his deposition:

"A: Because you have to read the whole thing. What I can - I will just try to read the last part. I think it says in the last paragraph, 2, it is therefore my conclusion that based upon appraisals of the property that were made by reputable and eminently qualified real estate appraisers, the reduction in the market value as a result of the actions taken by Richland County is 127 million dollars.

Based upon this appraisal and the data that was contained in the appraisal, he treated it correctly. He used a proper approach. All that's stated in here. I outlined for you what I relied on, but I don't think the property is worth 147 million dollars.

And I told you that in the last - and I told you that in the last two weeks. I arrived at what I think is a whole - is the whole situation. It's a taking. So I don't think that it's correct any longer; no, sir...

Because that purpose -

Q: Whoa, whoa. Keep reading.

A: All right. Okay. So to say I abandoned it, yeah, I will abandon it, but I don't think - I don't think it's worth 147 million dollars." Tr. Vol 10, p.1897, line 12 to 1898, line 12.

Mr. Hartnett testified 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. Tr. Vol 10, p.1869, line 12 to 1870, line 3. 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." Tr. Vol 10, p.1872, line 15-18.

Thus, although Mr. Hartnett had initially opined Mr. Wingard's analysis was correct and proper, he reversed his opinion and then criticized the opinion of Mr. Wingard, stating that no one would pay \$142,000,000 to develop the Property.

Mr. Hartnett also testified to an alternative value calculation, providing "merely" "mathematical calculations to determine what" he thought "was just compensation or difference in value." Tr. Vol 10, p.1850, line 18-23. 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. 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. Tr. Vol. 10, p.1853, line 15 - p.1856, line 11. 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, or approximately 77% loss in value.

Mr. Hartnett's mathematical calculation is based on using appraisals done by two appraisers who did their appraisals for different purposes. Appraisers licensed by the State of South Carolina are governed by USPAP. Tr. Vol 10, p.1694, line 13 - p.1696, line 15. No USPAP authority was provided that it was appropriate to draw opinions of value by using

appraisals done by different appraisers for different purposes. However, even if it were or is appropriate to do so, Mr. Hartnett's mathematical calculation nevertheless cannot be a basis for establishing or quantifying an economic loss.

Mr. Hartnett's mathematical calculation lacks a sufficient factual basis for the calculation to be considered. He used Mr. Knight's figure of \$15,000.00 per acre for land which was outside the floodway (1,225 acres) and could be developed and he applied it to the entire 4,400 acres. However, Mr. Knight never provided an opinion of value for the remaining 3,375 acres, based upon it being able to be developed. Mr. Hartnett admitted that he had not done any appraisal and was offering no opinions of value himself. Therefore, there is no appraisal that concluded that the 3,175 acres were worth \$15,000 per acre. 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. Tr. Vol 10, p.1879, line 21 - p.1880, line 2. 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 was 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. Tr. Vol 10, p.1884, line 8 - p.1885, line 13. 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.

Given these substantial flaws, I reject Mr. Hartnett's calculation. Even assuming that Mr. Hartnett's mathematical calculation constitutes any sort of credible, appropriately supported valuation, his conclusion of a 77% loss in value is not enough to show substantial economic loss. *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (no taking despite 91.4% reduction in value);

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (no taking despite 78% loss in value); *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1349 (Fed. Cir. 2001) (no taking where value of coal reduced by 91%); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3rd Cir. 1987) *cert. denied* 482 U.S. 906 (1987) (no taking despite 90% loss in value); *Haas v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) *cert denied* 445 U.S. 928 (1980) (no taking despite 95% reduction in value); *Warren Trust & Marietta Trust v. United States*, 2012 U.S. Claims LEXIS 1493 (Fed. Cl. 2012) (82% diminution of value not enough to establish taking).

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. Pl. Exh. 195. Mr. Knight's appraisal shows an economic loss of 17%. *Id.* His valuation is consistent with Columbia Venture's own estimates of property value. Tr. Vol. 10, p. 1960, line 8 – p. 1963, line 21. Loss in value of less than 50% has been widely rejected as failing to show severe or significant loss. See *CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011) (... "we are aware of no case in which a court has found a taking where diminution in value was less than 50 percent."). Mere diminution in property value cannot establish a taking. *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, ___ S.C. ___ 2013 S.C. LEXIS 2, *63 (Jan. 9, 2013). I find that Mr. Knight's valuation of 17% economic loss falls far short of significant economic loss required under *Penn Central*.

Also relevant in the analysis of economic loss is the existence of economic use available to Columbia Venture after the date of the alleged regulatory taking. A Plaintiff's ability to regain some or all of its investment mitigates against a finding that a taking occurred. *Norman*

v. United States, 63 Fed. Cl. 231, 278 (Fed. Cl. 2004). Since February 20, 2002, Columbia Venture sold almost 3,000 acres of its Property for a total of approximately \$10.5 million dollars. It also entertained offers to purchase some or all of the Property. Florida Rock Industries offered to buy 360 acres for \$3,360,000.00. Def. Exh. 103. An investor offered to purchase Columbia Venture's Property for \$26 million dollars. Def. Exh. 111. Columbia Venture examined several viable options for development of its Property. It was provided a financial analysis of developing a recreational club on its Property for a return of \$14 million dollars. Def. Exh. 110. Columbia Venture estimated that it could, under the 2002 Flood Map, develop big residential lots, create a wetlands mitigation bank, and develop artificial wetlands to filter wastewater discharges, with a probable net return of approximately \$49 million dollars. Def. Exh. 14; Tr. Vol. 6, 1090, line 25 – p. 1091, line 8. Columbia Venture estimated that traditional development of its Property located outside of the floodway consistent with its land use land use plan could yield approximately \$47 million dollars after payment of infrastructure costs. Def. Exh. 12. These actual sales, along with its own analysis of economic use of the Property, clearly demonstrate that Columbia Venture had substantial economic use of its Property even after the alleged taking.

Columbia Venture has failed to sufficiently show the valuation of its Property before or after the alleged regulatory taking, much less significant economic loss. Failure to present sufficient evidence of significant economic impact is dispositive. *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999); *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 439 (Fed. Cl. 2011).

2. Reasonable Investment-Backed Expectations

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 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, 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. See Tr. Vol. 12, p. 2127, lines 7-14. Columbia Venture intended to first convince FEMA to issue a new preliminary revised Flood Map showing no floodway on its Property. Assuming that Columbia Venture was successful in this endeavor and FEMA's revised Flood Data was not appealed, then Columbia Venture would proceed to levee improvements to meet FEMA's levee certification requirements. Pl. 264, p. 2450; Def. Exh. 10, p. 1; Tr. Vol. 12, p. 2138, line 23 – p. 2139, line 25; Tr. Vol. 12, p. 2142, line 25 – p. 2143, line 5; Wendel Dep. Exh. 136, p. 5. Once FEMA finalized this Map, then it planned to proceed with a request to FEMA for a CLOMR to remove the AE flood hazard zone from the Map through levee certification. Pl. Exh. 264; Pl. Exh. 120; Def. Exh. 10.

Yet prior to purchase, Columbia Venture had made very little investment in actual engineering analysis of its levee. Pl. Exh. 208; Tr. p. 939, lines 21-24; Tillotson Dep. p. 67, lines 9-25. 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. Tr. p. 965, line 6 – p. 966, line 22. It did not know whether Richland County would ultimately accept responsibility for maintenance. Tr. p. 599, line 14 – p. 601, line 12. 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. Pl. Exh. 254; Def. Exh. 10. 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." Def. Exh. 13. 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).

Even narrowing the focus to Richland County's regulations, Columbia Venture lacks reasonable investment backed expectations. Under the County's Floodplain Overlay District, construction within a floodway was clearly prohibited. Pl. Exh. 250a, § 26-73.4(2), Floodplain Overlay District (1999); Tr. Vol. 13, p. 2528, line 23 – p. 2529, line 9; p. 2617, lines 17-25; Tr. Vol. 13, p. 2593, line 2 – p. 2594, line 3; Pl. Exh. 497, p. 4; Def. Exh. 17, p. 4. The Zoning Ordinance contained a variance provision. Pl. Exh. 250a, §26-602.3, County Zoning Ordinance (1999). Columbia Venture has failed to produce any evidence regarding any reasonably foreseeable outcome of a variance request before the Board of Adjustment. *Cienega Gardens v. United States*, 503 F.3d 1266, 1288 (Fed. Cir. 2007) (holding that plaintiff bears the burden of establishing that it had reasonable investment-backed expectations at the time it purchased the property). Therefore, I cannot conclude that Columbia Venture's investment backed expectations were reasonable in light of regulatory impediments within the County's Floodplain Overlay Zoning District.

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. While I have reservations concerning the credibility of the testimony of Mr. Gregory⁴¹ and Mr. Manning,⁴² I need not resolve the question of whether their recollections were sound.

Even if Columbia Venture proved that it knew 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

⁴¹ Mr. Gregory testified that he and representatives of Lockwood Greene had conversations with County representatives and was told that "their ordinance was interpreted to mean 'no-rise.'" Tr. Vol. 3, p. 704, line 14 – p. 707, line 3. When pressed to identify who he spoke with, Mr. Gregory stated they "would have met with the county administrator," who "would have directed us to Mr. Pearson, the head engineer," and "several people like that." *Id.* at p. 706, line 9 – p. 706, line 3. Mr. Hester, a Lockwood Greene engineer working on the project, testified that he recalled attending a meeting with the County Engineer, among others, but was unaware that the County Engineer interpreted the word "impede" to mean no-rise. Tr. Vol. 12, p. 2156, line 10 – p. 2157, line 6. He further stated that he did not know of any other Lockwood Greene engineer who knew of the County Engineer's interpretation. Tr. Vol. 12, p. 2157, lines 7-9. Mr. Gregory conceded that he could not recall the substance of any conversation he may have had with Mr. Pearson. Tr. Vol. 5, p. 881, line 1 – p. 882, line 13. Mr. Manning testified that he had no knowledge of any representative of Columbia Venture having conversations with the County Engineer about the Storm Drainage Ordinance. Tr. Vol. 3, p. 621, line 21 – p. 622, line 13. No corroborating testimony from the County Engineer was obtained. Mr. Pearson did say, however, that he did not ever give any assurances to Burroughs & Chapin or Columbia Venture that the project would be approved and could be developed. Tr. Vol. 8, p. 1461, lines 14-19. Columbia Venture did not ask the County Engineer and therefore he did not testify regarding any communication he had with Mr. Gregory specifically concerning his interpretation of the Floodway Provision.

⁴² Mr. Manning testified regarding his recollection of how the County interpreted the Storm Drainage Ordinance based on events that occurred over twenty years ago. Tr. Vol. 1, p. 115, line 9 – p. 116, line 18. In the late 1980s, Mr. Manning was developing a new residential housing project called Woodlake subdivision. *Id.* As part of this subdivision, Mr. Manning testified that he sought permits from Richland County to construct a dam on Bridge Creek, which he recalled as being located within a floodway. *Id.* Mr. Manning testified that this floodway along Bridge Creek drew him to ask County officials about the Floodway Provision, and he was told by County officials that the word "impede" in the County's drainage ordinance in effect at the time to mean the same as FEMA's "no-rise" standard. Tr. Vol. 1, p. 116, line 12 – 123, line 16. However, FEMA had not yet delineated a floodway on Bridge Creek at this time. Def. Exh. 129, 130, 131, 139. Thus, during the time period Mr. Manning refers to as the basis for his understanding of the County's interpretation of the word "impede" within the floodway provision of its Storm Drainage Ordinance, he would not have had a reason to ask about it.

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. Tr. Vol. 5, p. 936, line 16 – p. 937, line 2.

Further, the Storm Drainage Ordinance provided an appeal process where an interpretation of the County Engineer's interpretation could be challenged. Pl. Exh. 230, § 8-59, County Storm Drainage Ordinance (1994). Appeals were heard and decided by the Richland County Planning Commission. *Id.* 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.

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. Def. Exh. 67.

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.

Moreover, I question whether Columbia Venture truly relied upon the County Engineer's interpretation at the time of purchase. Mr. Hester testified that he was unaware of the County Engineer's interpretation of the Storm Drainage Ordinance. Tr. Vol. 12, p. 2156,

line 10 – p. 2157, line 9. Instead, during the 1998-1999 time period and beyond, he understood the County to prohibit construction in a floodway. Tr. Vol. 12, p. 2125, line 21 – p. 2126, line 16; Tr. Vol. 12, p. 2134, lines 9-23; Tr. Vol. 12, p. 2141, line 3 – p. 2142, line 24. The evidence shows that that Columbia Venture expected to submit data to FEMA that would result in a Flood Map without a floodway on its Property. According to Columbia Venture's engineer, Mr. Mark Hester, this step was required because the floodway "made the property unbuildable ... by regulation, you couldn't build in a floodway." Tr. Vol. 12, p. 2132, lines 3-8. I see no reason why Columbia Venture would have decided on this plan of action prior to purchase, and acted upon it after purchase, if it relied on Mr. Gregory's and Mr. Manning's understanding of the Storm Drainage Ordinance.

Lastly, under the Storm Drainage Ordinance, "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." § 8-62(g), Richland County Storm Drainage Ordinance (1994). As already established, Columbia Venture expected to improve its levee to withstand a 100-year flood, which falls short of the County's Levee Standard. Recovery under a takings analysis is limited to "property owners who can demonstrate that they 'bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'" *Norman v. United States*, 429 F.3d 1081, 1093 (Fed. Cir. 2005). Under these provisions of the County's floodplain management ordinances, Columbia Venture's expectation to upgrade its levee to a standard other than the County's standard is not reasonable.

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). I find that Columbia Venture lacked reasonable investment backed expectations.

3. Character of the Government 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). As such, courts will look to see whether a regulation effects a "reciprocity of advantage While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." 480 U.S. at 491; *see also Dunes West Golf Club, LLC v. Town of Mount Pleasant*, ___ S.C. ___, 2013 S.C. LEXIS 2 **58-59 (Jan. 9, 2013).

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" Pl. Exh. 250a, § 26-73.2, Floodplain Overlay Zoning District (1999). A floodway poses the greatest danger to life and property. Tr. Vol. 12, p. 2218, line 22 – p. 2219, line 2. 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." *See* Tr. Vol. 15, p. 2697, lines 12-17; Tr. Vol. 15, p. 2702, lines 7-25. 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. Pl. Exh. 51, p. 1. "A taking does not take place if the prohibition applies over a broad section of land and thereby secures an average reciprocity of advantage." *Penn Central*, 438 U.S. 104, 147 (1978). 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. Tr. Vol. 14, p. 2619, lines 8-24. Reduction in potential flood damage represents a cost savings to these property owners, not only saving costs they would have to incur to repair flood damage but also savings realized through reduced cost to the County in response, rescue, evacuation, and other functions undertaken during a flood. *Id.* Richland County's Floodway Provisions serves to keep people out of harm's way.

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. Columbia Venture exaggerates and distorts the County's Floodway Provision. 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." Pl. Exh. 374, § 8-38(b), County Stormwater Ordinance (2001). 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. *See id.* ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless.").

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. Tr. Vol. 14, p. 2692, lines 3-13; Tr. Vol. 14, p. 2691, line 21 – p. 2692, line 2; Pl. Exh. 31; Def. Exh. 99. 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).

Columbia Venture may argue that evidence of bad faith is a relevant consideration in analyzing the character of the government action. However, due process considerations are "not a valid method of discerning whether private property has been 'taken' for purposes of the *Fifth Amendment*." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005); *see also* John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. Envtl. L. & Pol'y 171, 202 (2005)

("Because *Lingle* holds that the illegitimacy of the government action cannot provide the basis for a taking claim, *Lingle* appears to preclude the notion that allegations of bad faith can support a taking claim.). Bad faith has been recognized as a relevant factor in cases where a plaintiff alleges a taking based on extraordinary regulatory delay, which this order has addressed *supra*. Outside this limited context, no legal basis exists for the proposition that bad faith has any bearing on the character of the government action.

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. *Id.* at *60. The court looked at the purpose of the ordinance. *Id.* Here, as in the ordinance at issue in *Dunes West*, the County's floodplain management ordinances have a legitimate and important purpose. *Id.* The court looked at whether the government's action had eliminated all development potential. *Id.* Here, the County has not eliminated all development potential of Columbia Venture's Property. *Dunes West* examined whether the ordinance abridged the property-owner's existing use of his property or the right to sell his property. *Id.* Here, as also found in *Dunes West*, the County did not abridge Columbia Venture's present use or any rights to sell its Property. Lastly, *Dunes West* looked at whether the ordinance at issue constituted a "permanent and immutable prohibition" against the land use that the plaintiff sought. *Id.* at 61. Here as in *Dunes West*, the County provides several means by the impact of its restrictions may be lessened. *Id.* The County's floodplain management ordinances contain variances. FEMA regulations provide for

map revisions that may be used to reduce the extent of a floodway and/or flood hazard areas upon property. Thus, as in *Dunes West*, the character of the government action weighs in the County's favor.

CONCLUSION

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). A determination of whether a regulation has gone too far can only be made when 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). Although certain exceptions apply to this general rule, Columbia Venture has failed to meet its burden of showing that obtaining a final decision from Richland County would have been futile. In like manner, Columbia Venture has failed to demonstrate any sort of extraordinary regulatory delay that would excuse its obligation to obtain a final decision from Richland County. The facts in this case show that Columbia Venture made a conscious business decision to forego its original plan to develop its Property on a massive scale, choosing instead to pursue other options. It cannot then seek just compensation from Richland County for the loss of a development project that was abandoned in lieu of other profitable uses of its Property. I am not insensitive to the fact that the complex and evolving regulatory scheme Columbia Venture faced put it in a difficult legal, technical, and financial situation. However, the Takings Clause does not provide a solution. *Deltona Corp. v. United States*, 228 Ct. Cl. 476, 492-493 (Ct. Cl. 1981).

Even assuming *arguendo* that Columbia Venture's claim is ripe, I conclude that Columbia Venture has failed to meet its burden of demonstrating that each Penn Central factor weighs in its favor. Columbia Venture's evidence of economic loss is significantly flawed.

Notwithstanding these serious problems, the extent of economic loss is not severe enough to constitute a regulatory taking. Columbia Venture's investment backed expectations were unreasonable, especially in light of its underwhelming due diligence concerning its levees prior to purchase and its purchase of the Property in the midst of a FEMA restudy. It lacked a reasonable expectation under the County's floodplain management ordinances that it could improve its levee. 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). Lastly, the character of the government action weighs in favor of Richland County. Protecting life, limb and property from the dangerous velocities and flood depths within a floodway is clearly an important purpose of the County's floodplain regulations. While Columbia Venture, like all other similarly situated properties, is burdened by the County's regulations, Columbia Venture also receives a reciprocity of advantage. For these reasons, I enter judgment in favor of Richland County.

AND IT IS SO ORDERED.

John Hamilton Smith
Special Referee

_____, South Carolina

_____, 2013

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.

**PLAINTIFF'S MEMORANDUM
IN RESPONSE TO
DEFENDANT'S PROPOSED ORDER**

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**PLAINTIFF'S MEMORANDUM IN
RESPONSE TO DEFENDANT'S
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INTRODUCTION

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles [*this property owner*] to just compensation here.

Armstrong v. United States, 364 U.S. 40, 49 (1960).

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

The anti-Columbia Venture faction on County Council effected this taking on February 20, 2002, by adopting the FEMA FIRM that included the levees on Columbia Venture's Property ("Levees") in a floodway, thereby making its earlier amendment of the County's Stormwater

Ordinance an insurmountable barrier to Columbia Venture's plans – plans that but for County Council's actions could have gone forward under the no-rise standard utilized by FEMA and recommended by the County staff, without in any way impairing Richland County's continued participation in the National Flood Insurance Program ("NFIP"). In other words, none of the issues dealing with County ordinances that the County discusses in its Proposed Order (referred to herein as the "RCPO") would have presented a problem to Columbia Venture's full enjoyment of its rights of ownership and its development of its Property. But for the amended Stormwater Ordinance's prohibition on levee improvements in floodways, which also included the no-build floodway restriction, Columbia Venture could have executed with its plans, exercising its common law rights of property ownership to develop the Property. But with the amended ordinance and the newly effective FEMA maps of February 20, 2002, Columbia Venture's development plans and the value of its investment in its Property were essentially obliterated.

The premeditated murder of Columbia Venture's development presents yet again the lesson that political power, unrestrained by our constitutional guarantees, encourages a local government to favor one political interest over another without regard to the property rights of the disfavored group. Columbia Venture lost a political fight that it did not and could not foresee at the time Columbia Venture purchased the Property on February 19, 1999.

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

regard to the property interests of the owner. The political coalition that arose in this case to oppose Columbia Venture chose and successfully pursued that fourth option. And in the political fight that developed over the project, the opposition and their supporters on Council ignored the property interests of Columbia Venture. Of course, that fourth option is always the most financially attractive to opponents of development, as the cost is concentrated on a minority of one. Fortunately, however, the Takings Clause of both the United States and the South Carolina Constitutions are on guard against discrimination against minorities of one.

Without the encouragement and agreement of Richland County to support its proposed development, Columbia Venture would never have bought the Property and spent millions of dollars to proceed with its plans to develop it. Justice and fairness now demand that the County compensate Columbia Venture for County Council's having adopted regulations after Columbia Venture's purchase of the Property that were calculated and intended to eliminate, and did in fact eliminate, Columbia Venture's investment backed expectations that the County engendered in the first instance. The *Penn Central* and *Byrd* decisions of the United States and South Carolina Supreme Courts direct this court to measure Columbia Venture's economic loss by the extent to which the government has interfered with those investment backed expectations, which in this case have been diminished by many millions of dollars. If Richland County desires to conserve Columbia Venture's Property from development or prohibit development protected by certified or improved levees, it is only fair that all citizens of the County share in the burden necessary to achieve that goal and not place the burden disproportionately – indeed, solely – on Columbia Venture.

Under the facts of this case and the South Carolina and United States Constitutions, Richland County should not be allowed to take Columbia Venture's Property without payment of just compensation. To recap the essential facts:

- In 1998 and early 1999, Richland County enthusiastically supported (with good reason) Columbia Venture's investment-backed expectations in purchasing the Manning Property.
- Columbia Venture's proposed protection of the Property by certified levees and its subsequent development foretold a billion-plus dollar investment, triggering an employment boom and a substantial increase in the County's tax base.
- At Columbia Venture's request and pursuant to NFIP regulations, the County agreed to accept maintenance and operating responsibility for the Levees as improved via a unanimous resolution on February 2, 1999, and communicated the County's agreement to FEMA.
- Columbia Venture was fully prepared to meet all conditions to the County's agreement regarding the Levees, including improving the Levees to FEMA certification standards.
- Columbia Venture obtained FEMA's assurance that it would remove its floodplain and floodway designations from the protected property once the Levees were improved to certification standards and accepted by the County.
- County ordinances that existed at the time Columbia Venture purchased the Property would have permitted the necessary improvements to the Levees regardless of whether the Levees were located in a regulatory floodway due to the County Engineer's interpretation of those existing County ordinances as consistent with FEMA's "no-rise" engineering standard for construction in a regulatory floodway.
- Columbia Venture obtained an opinion from one of the largest professional engineering firms in the country that the required improvements could be made to the Levees under a no-rise standard.
- The County Administrator agreed, on behalf of the County, to work with Columbia Venture on issues critical to the success of the development, such as zoning, and on financial incentives, such as a multi-county business park.
- After purchasing the Property, Columbia Venture spent millions of dollars on engineering, land planning, and other professional services in furtherance of its plans to improve the Levees and develop its Property.
- Several months after Columbia Venture purchased the Property, the County made the decision not to consider any permits to upgrade the Levees until FEMA's flood mapping

process was completed. Such permits were necessary to begin the work to upgrade the Levees pursuant to the February 2, 1999 resolution.

- After Columbia Venture purchased the Property, a political coalition arose in opposition to Columbia Venture's proposed development, spawning an anti-Columbia Venture faction on County Council.
- Less than a year after Columbia Venture purchased the Property, Richland County appealed, in its own name, a flood map with a very small floodway and with which Columbia Venture essentially agreed.
- The outside political coalition included the Southern Environmental Law Center and the Congaree Task Force, the latter an *ad hoc* organization formed for the specific purpose of opposing Columbia Venture.
- At the center of the anti-Columbia Venture faction on County Council were Ms. Kit Smith (elected Council chair in 2000, and later a board member of the Southern Environmental Law Center) and Mr. Greg Pearce (elected Council vice-chair in 2000). Ms. Smith testified that she chose not to publicly oppose the project in February 1999 (prior to purchase) but that she would sometimes vote in favor of an issue so that she could seek to defeat it later. She also made her extreme antipathy toward Columbia Venture's plans and people evident in both her private musings and her public statements.
- Together, Ms. Smith and Mr. Pearce made decisions on behalf of the entire Council that served to prevent Columbia Venture from moving forward with its plans. For example, on October 6, 2000, they directed County staff and County's outside legal counsel to "relay [to Columbia Venture] the County's position that due to the unexpected change in the flood map, it suspends substantive negotiations with [Columbia Venture] until the map is finished ..." (PTE 004, at DEF-00004864-65); and on October 24, 2000, "[t]he Council chair and vice-chair decide[d] that no changes to floodway regulations will occur until a decision is made about [the] Green Diamond project." (*id.* at DEF-00004865), which accommodated the wishes expressed by opponents of Columbia Venture's project. *Id.*
- The County staff recommended that the County amend its Stormwater Ordinance to be consistent with the FEMA no-rise standard, as the County Engineer had interpreted it in the past. Ms. Smith initially agreed to go along with the "no-rise" standard but expressed concern that the Congaree Task Force would not be agreeable. PTE 004 at DEF-00004869. Later, on March 19, 2001 (one day before first reading was held on the Stormwater Ordinance amendments), she informed County staff that she was supporting the amendment proposed by the Congaree Task Force, which informed the staff that it had the votes to pass the amendment. *Id.* at DEF-00004870.
- By March 20 2001, the anti-Columbia Venture faction on Council had become the majority and, by April 3, 2001, only Council members Scott and Meetze remained firmly committed to the project. See PTE 004 at DEF-00004871-72.

- Through a series of steps specifically targeting Columbia Venture and its development plans, the anti-Columbia Venture assault ended with an absolute prohibition against improving levees located within a regulatory floodway, a draconian no-impepe standard for building for a very limited list of permissible uses within a floodway, and the adoption of a regulatory floodway on February 20, 20002, that placed Columbia Venture's Levees (and **only** Columbia Venture's Levees) within a regulatory floodway. The only two other property owners who would have been affected – Heathwood Hall and the City of Columbia – were specifically exempted.

Richland County's Proposed Order presents three consistent characteristics that are elaborated in the discussion below. First, it cites principles of law that, on the facts of the present case, establish the validity of Columbia Venture's Takings Claim. Second, it extrapolates implications from documents that were part of a "document dump" at the end of trial, as to the purpose, meaning, accuracy, and implications of which no witness ever testified.¹ Third, the County's contrary proposed findings of fact are based on unwarranted inferences from the testimony and exhibits it cites to support its proposed findings.²

DISCUSSION AND CITATIONS TO THE RECORD AND AUTHORITIES

I. The County seriously misapprehends the nature of Columbia Venture's Regulatory Takings Claim as a denial of an application for a government benefit.

The County repeatedly mischaracterizes Columbia Venture's regulatory Takings Claim, arguing at length that Columbia Venture is trying to obtain compensation for not receiving a government benefit. That is not the nature of the claim. Columbia Venture's Takings Claim, as it exists following this Court's ruling on summary judgment motions, is a claim that its Property, consisting of its ownership interest in real estate, has been taken by regulations that were targeted

¹ Throughout the RCPO, the County cites no fewer than 73 times to over 40 documents that were simply dropped into the record on the final day of trial. Many of these documents are not self-explanatory and are entitled to little if any weight.

² Columbia Venture's lack of comment on a particular finding or assertion in the RCPO should not be construed as Columbia Venture's agreement with the County's statement or construction. Instead, Columbia Venture has chosen to confine its comments to provisions materially at issue in this case. Columbia Venture also relies on its own proposed order ("CVPO") in full.

against Columbia Venture and that deny to it the most important rights associated with property ownership, *i.e.*, the right to develop the Property to a more valuable use, or its highest and best use, thus causing it a very substantial economic loss measured against the value of the Property absent the regulation. The “government benefit” portion of the County’s “Conclusions of Law” is, thus, irrelevant. That said, however, and to avoid the appearance of conceding any of the County’s more egregious errors, Columbia Venture offers a few observations on this argument.

Richland County relies on *Henry v. Jefferson County Comm’n*, 637 F.3d 269 (4th Cir. 2011), citing it for the proposition that denial of a discretionary government benefit is not a taking. RCPO p. 74. That case, however, in distinguishing *Far Away Farm, LLC v. Jefferson County BZA*, 222 W.Va. 252, 664 S.E.2d 137 (W.Va. 2008), makes clear that simply because a government action is “discretionary” does not mean that the discretion is unfettered. In *Far Away Farm*, the plaintiff had established that it had rebutted concerns about its project and so was entitled to the discretionary permit. *Id.* at 144-45; *Henry*, 637 F.3d at 275. Here, Columbia Venture has shown that Richland County had opportunities to air its concerns with the Levee responsibilities, upgrade, and the subsequent proposed development in at least two public meetings and in multiple private conversations, and indeed did discuss items of apparent concern to it, including liability and effects on the taxpayer. PTEs 020, 147, 252; Tr. 229-32, 698-99, 732-33, 878-79. On that basis, Richland County agreed to support the project. Richland County had thereby induced a multi-million dollar investment by Columbia Venture, and only later reneged on its commitments and passed or amended regulatory ordinances that then prevented Columbia Venture from exercising its ownership rights. Richland County thereby disabled Columbia Venture from proceeding with Levee improvement and development, thus causing

Columbia Venture to suffer the loss of its investment and of its reasonable investment backed expectations.

The County argues that the “discretionary benefit” was Richland County’s agreement to have the operation of the Levees be under its jurisdiction. Having the Levees “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]” is a condition for certification of levees by FEMA. 44 C.F.R. § 65.10(c). The County is correct that nothing required Richland County to take responsibility for operating and maintaining a private property owner’s levee. Two additional points are also true. First, the County nevertheless *did* agree to accept jurisdiction and communicated that agreement to both Columbia Venture and to FEMA before Columbia Venture bought the Property (PTEs 022, 147), thereby inducing that acquisition of the Property; and then, a number of months later, after substantial additional post-acquisition investment by Columbia Venture, the County reneged on that undertaking by preventing its condition (improvement of the Levees) from being met. Second, as long as Columbia Venture was able to improve the Levees – a right of ownership ultimately taken from it by the County – there was nothing in the FEMA regulations that made Richland County the only entity that could undertake jurisdiction that would be acceptable to FEMA. Had Richland County refused to accept jurisdiction over the Levees from the outset, Columbia Venture could have approached some other entity that fit within the FEMA regulation.³

³ The County argues that it agreed to accept jurisdiction over the Levee system only if the FEMA regulations required it to do so and that the FEMA regulations do not require it. RCPO p. 75. This is doublespeak. The FEMA regulations do require some entity like the County to accept jurisdiction in order to obtain certification, which was the whole point of the exercise. The County also argues that contingencies related to resolution of issues regarding performance and funding of the operation and maintenance responsibility gave the County discretion to

It is worth noting that the Fourth Circuit has said that “the analysis in a takings case necessarily begins with determining whether the government’s action actually interfered with the landowner’s antecedent bundle of rights.” *Henry*, 637 F.3d at 275 (quoting *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 330 (4th Cir. 2005)). Here, it certainly did. As demonstrated by the CVPO, Richland County’s actions interfered with Columbia Venture’s right to use and develop its Property and to protect it from floodwaters (addressed in more detail below).

II. Columbia Venture’s regulatory takings claim is ripe for adjudication by this Court.

The County argues at length that Columbia Venture’s Takings Claim is not ripe. The Court has already addressed this issue on Richland County’s motions for summary judgment on various grounds. Not only did the Court deny the motion for summary judgment on the basis of ripeness, it affirmatively concluded as follows:

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 claims are ripe.

Court’s Order Granting in Part and Denying in Part Defendant’s Motions for Summary Judgment, September 8, 2012, p. 45. No evidence was adduced at trial to call that conclusion into question now.

decline acceptance of the jurisdiction. *Id.* That, however, is not what the County did. Instead, the County prevented the improvement of the Levees in the first place.

A. The permitted uses of Columbia Venture's Property were definitively established by the County Council itself at the time of the taking.

The basic propositions of law cited by the County in this section of its "Conclusions of Law" are fully supportive of Columbia Venture's position. "A plaintiff may avoid the requirement of submitting even a meaningful application if the regulations at issue do not confer any discretion to permit development or the permissible uses of the property is [sic] known to a reasonable degree." RCPO p. 78. "Generally speaking, if an ordinance restricting land use does not include the opportunity to seek an administrative variance or exemption, then the government lacks discretion to provide relief." *Id.*

The County attempts to wiggle out of this legal strait-jacket by arguing that a property owner must submit a formal, detailed application for development and must pursue it up the chain of command in order to allow first-line administrative government officials to exercise their "flexibility" and, if that is unavailing, to "seek[] relief from a body with broader powers," citing *S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 503 n. 5 (9th Cir. 1990), *cert. denied* 502 U.S. 943 (1991). *See* RCPO p. 78.⁴ But here, the actions that eliminated any possibility of

⁴ In support of its "one meaningful application" argument, Richland County first cites *Fourth Quarter Props. IV v. City of Concord*, 127 Fed. Appx. 648 (4th Cir. 2005). However, the *Fourth Quarter* case demonstrates that there is no bright-line "one-meaningful application" rule in the post-*Palazzolo* era. In *Fourth Quarter*, the takings claim was deemed ripe although the plaintiff never submitted any application for the subject property. *Id.* at 651. The Court of Appeals for the Fourth Circuit noted that the plaintiff had been in extended negotiations with the local government and that an application for development of another, similar property had been denied. *Id.* at 651-52. Rather than requiring a futile application related to the subject property, the court specifically cautioned against "one-size-fits-all rules concerning ripeness," and the plaintiff's takings claim was deemed ripe notwithstanding that no application for development of the subject property was submitted. *Id.* at 652 n.4. In *DLX, Inc. v. Kentucky*, 381 F.3d 511, 525 (6th Cir. 2004), also cited by the County, the Court noted that a "'futility exception' ... only applies where a landowner has 'submitted at least one meaningful application for a variance.'" (emphasis added). Clearly the Sixth Circuit rule contemplates the ability of a plaintiff to at least seek a variance, an assumption that does not exist in the case at hand. The remainder of Richland County's authorities cited for the "one meaningful application" argument pre-date *Palazzolo* by ten years or more. *Palazzolo* constitutes the prevailing rule regarding ripeness. Once it becomes

getting a permit or variance were the direct actions of the entity with the broadest powers, the County Council itself. Thus, the proposition conceded by the County that futile applications are not required is in full force here.⁵

B. No meaningful variance procedure was available to Columbia Venture at the time of the taking.

The County argues that Columbia Venture should have utilized the variance procedures that exist in the Zoning Ordinance in order to ripen its claim. RCPO p. 81. This is incorrect for two very basic reasons. First, even if a variance was available to Columbia Venture under the Zoning Ordinance, it would not provide any assistance to Columbia Venture receiving a variance under the Stormwater Ordinance. Columbia Venture had to receive a land disturbance permit under the Stormwater Ordinance to improve its Levees. PTE 374 § 8-6 at DEF-00012748.001. Nothing in the Zoning Ordinance makes its variance provision applicable beyond the confines of the Zoning Ordinance. The board of adjustment is allowed to grant variances only “from the terms of *this ordinance*” PTE 250A § 26-602.3 at DEF-00012867.002. This begs the question what good would it do to obtain a variance under the Zoning Ordinance for a use that was effectively impossible to implement under the Stormwater Ordinance?

clear that 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 619. “Ripeness doctrine does not require a landowner to submit applications for their own sake. [A] Petitioner is required to explore development opportunities ... only if there is uncertainty as to the land's permitted use.” *Id.* at 622; *see also Anaheim Gardens v. United States*, 444 F.3d 1309, 1316 (Fed. Cir. 2006) (“[T]he ripeness doctrine does not require a landowner to submit applications for their own sake. Though a party is required to explore development opportunities on the land in question, this is true only if there is uncertainty as to the land's permitted use.”) (citing *Palazzolo*, 533 U.S. at 622).

⁵ The County argues that County Council might have changed its mind at some point: “This court cannot assume that the County would have continued this position in the future.” RCPO p. 88. But under this theory, there would be no such thing as a permanent regulatory taking, because the governing body could always change its mind. That is not the law of regulatory takings.

Second, in 2005, the County itself foreclosed Columbia Venture's proposed Levee improvements based on any sort of interpretation, variance, or exception to its ordinances. Columbia Venture advanced a reasoned argument that it was allowed under the Zoning Ordinance⁶ to upgrade the Levees to a 500-year standard because the Levees were "used" by Heathwood Hall for flood protection. PTE 430, Tr. 1035-48. Columbia Venture asked the County to "confirm CV's interpretation of these legal requirements and authority and advise us of any other requirements before CV incurs these expenses [for engineering work of approximately \$150,000]." PTE 430 at DEF-00005219. In response, the County "disagreed" with Columbia Venture's argument and reaffirmed that "maintenance and repair of Columbia Venture's levees are expressly authorized in the Development Code, provided that the maintenance or repair does not "result in a structure that would be higher or wider than it was before the need arose for such repair or maintenance." PTE 157. The County made *no* suggestion or implication that some other procedure existed to accomplish what Columbia Venture *plainly* wanted to do: upgrade the Levees. To now suggest that Columbia Venture could have somehow availed itself of a variance procedure when the County had so affirmatively and emphatically foreclosed that option borders on the absurd.

The County also claims that Section 8-27(i) of the 2001 Stormwater Ordinance incorporated a variance provision from the NFIP. Sub-section (i) provides that "[a]ll applicable regulations of the National Flood Insurance Program are incorporated by reference herein." PTE 374 at DEF-00012759.001. The County contends that it therefore "possessed the discretion ... to

⁶ Columbia Venture's request to the County technically came under the amended Land Development Code effective July 1, 2005. PTE 430. However, the operative language regarding permitted uses in floodways and levee construction remained essentially the same as under the Zoning Ordinance and Stormwater Ordinance as they existed on February 20, 2002. *See* PTEs 250A, 347, 430, DTE 087.

allow Columbia Venture to improve its levees under a 'no-rise' standard." RCPO p. 80. But what the County fails to understand is that the NFIP regulations do not provide a variance procedure.

The NFIP provision that the County relies on is 44 C.F.R. § 60.6(a). That provision, however, simply supplies guidance for when and under what conditions a community can grant a variance consistent with the NFIP. It does not *ex proprio vigore* create a variance procedure, nor does it require that the community itself create and make available a variance procedure. In fact, 44 C.F.R. § 60.6(a)(3)(iii) explicitly prohibits the granting of a variance unless it will not "conflict with existing local laws or ordinances." (emphasis added.) And County Council had made absolutely certain that improvements to levees located in a floodway would be in conflict with existing local laws and ordinances!

Notwithstanding any other provision of this Chapter, no levees, dikes, fill materials, structures or obstructions that will impede the free flow of water during times of flood will be permitted in the regulatory floodway [T]his section shall not be construed as authorizing or requiring the repair or maintenance of any such structure to the extent that such repair or maintenance would result in a structure that would be higher or wider than it was before the need arose for such repair or maintenance.

PTE 374 § 8-27(h) (emphasis added).⁷ And, of course, the provision that would have permitted a variance from these provisions, Section 8-25 of the earlier draft, was specifically and intentionally removed by County Council, to make sure that a variance would not be available to a developer seeking to develop property classified as a regulatory floodway. PTE 114. If the NFIP regulation was truly understood by the County as a free-standing variance option, why was

⁷ The County also argues that its amended and reinterpreted Stormwater Ordinance became "in effect the same as Lexington County's floodplain management regulations." RCPO p. 62. This is false. Although the County has not presented, quoted, or even cited to the allegedly applicable Lexington County ordinance, the cited evidence does not support the County's statement. Lexington County's ordinance contains a variance provision. Tr. 2702, PTE 051. Richland County's ordinance did not. They are *not* the same.

all the thought and discussion put into the removal of the variance provision; why was that not an option discussed with Heathwood Hall and the City in conjunction with the exemptions to the amended ordinance; why the need to carve out exemptions? *See* PTEs 114, 346.

It is, thus, entirely clear that the County had taken a veritable scorched-earth policy against the possibility of any variance. For it now to argue that Columbia Venture overlooked one utterly lacks credibility, especially in light of the legal advice under which the County acted at the time. In January 2001, the County received a legal opinion from George Wolfe addressing the variance issue as well as the interplay between the Stormwater Ordinance and the NFIP. Mr. Wolfe advised the County that “there is no requirement under the NFIP that the County have a variance provision in its floodplain management or other ordinances...” DTE 067 at SELC000237. He examined 44 C.F.R. § 60.6 and stated, “The NFIP does address variances in a way that contemplates that a community may include a variance provision in its floodplain management regulations.” *Id.* (emphasis added).

Mr. Wolfe further advised that subsection 8-27(i) would incorporate “[a]ll applicable regulations of the” NFIP “except to the extent that the Ordinance imposes stricter or additional standards than the NFIP” and that “any specific provision of the [Stormwater] Ordinance imposing more restrictive standards than a comparable provision of the NFIP should be viewed as controlling over such comparable provision.” *Id.* at SELC000233 (emphasis added). A variance is, by definition, a “modification of the minimum stormwater management requirements for specific circumstances where strict adherence of the requirements would result in practical difficulties or undue hardship and not fulfill the intent of this Ordinance.” PTE 112 at DEF-00002184. Consequently, granting a variance would by definition be a lessening or loosening of a standard, and, conversely, eliminating the possibility of a variance would be a

“stricter,” “additional,” or “more restrictive standard” that would, under Mr. Wolfe’s analysis, control over a more lenient NFIP standard.

In addition to refuting (again) the County’s argument that Columbia Venture’s Takings Claim is not ripe, the foregoing proof that no variance was available only serves to show just how thorough-going the taking actually was.⁸

On various tangential points allegedly related to ripeness, apparently attempting to remove the discussion from the “character of the government action” issue where it is relevant (and will be discussed below), the County argues that Richland County had not “dug in its heels” (RCPO pp. 83, 88) and that County Council acted in good faith (RCPO pp. 91-94). Both are fact questions, although the County attempts to convert the latter into a legal presumption. That legal presumption is, according to the cases cited by the County, overcome by “irrefragable proof,” and that ““irrefragable proof” has been equated with evidence of some specific intent to injure the plaintiff.” Cases cited at RCPO pp. 91-92. Is there such evidence in the record? The trial record shows the following:

- County Council as a body, not just a single member, forbade any improvement of levees located in a regulatory flood way, which only impacted Columbia Venture and no other landowner in Richland County.

⁸ Although not discussed in its Conclusions of Law, the County references other South Carolina DHEC regulations “incorporate[d] by reference” in the amended 2001 Stormwater Ordinance at Section 8-33 and claims that these contained “variance provisions applicable to stormwater management criteria within the ordinance.” RCPO pp. 14-15 (apparently referencing PTE 374). The plain language of these regulations, however, applies only to DHEC regulations and not Richland County ordinances (S.C. Code Ann. Regs. § 72-302(C)) or deal solely with “applicable effluent limitation requirements or time deadlines” of the Clean Water Act or “any discharge inconsistent with a plan” under the Clean Water Act. S.C. Code Ann. Regs. § 61-9.122.2(b) & 122.4(g)(1). These provisions have nothing to do with the County’s levee construction standards or with the availability of any variance to the applicable construction standards. Columbia Venture clearly could not have applied for a levee construction variance under these provisions.

- County Council as a body, not just a single member, affirmatively and intentionally removed any possibility of a variance that might have allowed the needed Levee improvements.
- County Council as a body, not just a single member, singled out Columbia Venture for adverse action by incorporating into its stormwater management ordinance specific carve-outs for the only other potentially affected landowners.

III. Columbia Venture's loss in property value is sufficient to establish a regulatory taking and is supported by the vast preponderance of credible evidence.

Richland County asserts that a property owner's loss in value must approach asymptotically close to 100% in order to amount to a compensable taking. RCPO pp. 106-07. That is not the law of takings. As described in the CVPO, there is no set rule or formula under the *Penn Central* test. CVPO p. 107, fn. 15; *see also United States v. Cress*, 243 U.S. 316, 328 (1917) ("[I]n the present case [government-caused flooding of riverfront properties], the value is impaired to the extent of only one half. But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."). The two Supreme Court cases cited by Richland County [*Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no taking despite 91.4% reduction in value); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (no taking despite 78% loss in value)], RCPO pp. 106-07] have been cited for the proposition that "*mere diminution in the value of property*, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (emphasis added). Columbia Venture does not contend that mere diminution in value constitutes a taking, without consideration of the other factors of *Penn Central's* regulatory takings analysis. However, it is indisputable that the diminution in value suffered by Columbia Venture is substantial.

The two cited Supreme Court cases, moreover, are entirely different from the case at hand for one key reason; and furthermore do not stand for the proposition for which they are

cited. Importantly, unlike our present case, neither of those cases was targeted against a single landowner. Rather, the ordinance in *Hadacheck* prohibited all landowners in a 3-square mile area from making bricks (239 U.S. at 408).⁹ *Euclid* involved a municipality-wide “comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.” (272 U.S. at 379).

More importantly, they do not stand for the proposition that a taking must rise to a certain level for the simple reason that neither one was a takings case! In both *Hadacheck* and *Euclid*, the plaintiffs sought not to obtain compensation for a taking but sought instead an injunction to deny to the government entity the underlying power to regulate and to zone property use. In fact, *Euclid* does not even mention “taking” or “just compensation.” *Hadacheck* refers to those terms only in a recitation of the pleadings of the complaint where they appear as an alleged grounds for invalidating the challenged ordinance.¹⁰ 239 U.S. at 407.

However, the inquiry into whether the government action is valid in itself is fundamentally different from whether that government action amounts to a taking that requires compensation. The United States Supreme Court has noted that difference and the doctrinal confusion created by courts when trying to apply Due Process jurisprudence to Takings Clause cases. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-45 (2005).

[S]uch an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause

⁹ In *Hadacheck*, there was in the original complaint an allegation of targeting, but the Court was not able to accept and address that on the record and dealt with the case as if there were no targeting. 239 U.S. at 412.

¹⁰ The “complaint” that initiated proceedings in *Hadacheck* was, due to the facts of the case, actually a petition to the California state supreme court for a writ of habeas corpus.

expressly requires compensation where government takes private property “for public use.” It does not bar government from interfering with property rights, but rather requires compensation “in the event of *otherwise* proper interference amounting to a taking.” *First English Evangelical Lutheran Church*, 482 U.S. at 315 (emphasis added). Conversely, if a government action is found to be impermissible—for instance because it fails to meet the “public use” requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

Id. at 543.¹¹ The Takings Clause, “[i]n other words, . . . ‘is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.’” *Id.* at 536-37 (quoting *First Evangelical*, 482 U.S. at 315. (emphasis in original).

It is the Takings Clause that Columbia Venture invokes in this case. Unlike the plaintiffs in *Hadacheck* and *Euclid*, Columbia Venture does not dispute the County’s power to do what it did, but only insists that it pay just compensation for the taking thereby effected.

Additionally, with respect to *Hadacheck* at least, the County’s calculation of the value taken is not supported by the Supreme Court’s decision. The plaintiff had eight acres on which he mined clay and made bricks. 239 U.S. at 408. The clay on that particular piece of property was especially good for making brick; consequently, brick made from it was particularly valuable. In that use, the plaintiff estimated his property’s value at \$800,000. *Id.* at 405. The city annexed his property and outlawed brickmaking in a district that included the plaintiff’s property. *Id.* The plaintiff argued that the only remaining use of his property would be as residential property, in which use its value would be \$60,000, a diminution of 92.5% (pretty

¹¹ The County quoted from this portion of the *Lingle* decision when it argued (wrongly – see discussion further below in text) against the relevance of evidence of the County’s bad faith to the merits of Columbia Venture’s claim, but apparently believes that the distinction applies only when it might be favorable to the County. RCPO p. 120.

close to Richland County's statement of a 91.4% diminution).¹² But only brickmaking was outlawed; not the extraction of the valuable clay and transporting of it to a brick kiln outside the district. *Id.* at 412. While the plaintiff contended that it was not financially feasible to move the clay, the lower court (the Supreme Court of California in that instance) "considered the case, as we understand its opinion, from the standpoint of the offensive effects of the operation of a brickyard, and not from the deprivation of the deposits of clay." *Id.* at 411. Other questions that might arise if the extraction were to be prohibited were expressly reserved. *Id.* In other words, the Court did not accept that the only remaining use was as a \$60,000 residential parcel. Consequently, while it is almost certain that the extent of the diminution in value in *Hadacheck* was considerably less than the figure claimed in the RCPO, it is entirely certain that the Court there did not consider the extent of the diminution to be a factor in its decision.

After suggesting that the loss figure must be awfully close to 100%, the County claims, perhaps inadvertently, that the loss has to be 100%. "A Plaintiff's ability to regain some or all of its investment mitigates [*sic*; presumably, "mitigates"] against a finding that a taking occurred." RCPO p. 107. But if the requirement is that none of the investment can be re-couped, then the loss would always have to be 100%. What Richland County has tried to do here is to convert the numerator/denominator test that it had described earlier into a 100% test. That is clearly not the law. Not only is a 100% loss not required, but the loss is not measured against the investment; it is measured against the pre-taking value of the property – hence, the importance of the

¹² Interestingly, the South Carolina Supreme Court recently calculated the *Hadacheck* "loss" as 87.5%. *Dunes West Golf Club LLC v. Town of Mount Pleasant*, No. 27208, Op. 2013 S.C. LEXIS 2 at *63 (Sup. Ct., Jan. 9, 2013). That same case calculates the *Euclid* "loss" as 75%, compared to the RCPO's statement that it was 78%. RCPO p. 98. It is not clear where the various calculations originate. What is clear from the diversity of calculations is that these figures do not constitute any definitive thresholds that provide a key to the *Hadacheck* and *Euclid* courts' determinations; otherwise the court opinions themselves would have calculated the percentages.

“investment backed expectations.” As noted in the CVPO, the “value” of a property “may be more or less than the owner’s investment. . . . It is the property, and not the cost of it, that is safeguarded by state and federal constitutions” *Olson v. United States*, 292 U.S. 246, 255 (1934) (emphasis added).

With regard to the measurement of loss, the County attempts at some length to discredit the analyses presented by Mr. Wingard and Mr. Hartnett. Both of their credentials and methodologies were fully explained at trial and in the CVPO (pp. 71-79). Interestingly, the County does not attempt to defend, nor does it even describe, either the credentials or the methodology of its own valuation witness, but simply proposes in one paragraph of its Proposed Order that the Court adopt his testimony. RCPO p. 107. That lack of support speaks volumes.

With regard to the attacks on Columbia Venture’s experts, a couple of points may suffice to demonstrate the lack of seriousness involved. First, at one point, Mr. Wingard’s analysis is attacked for reflecting a date that is nine and a half months after the date of the taking. RCPO p. 98. Four pages later, Mr. Wingard’s opinion is attacked for not taking into account the financial crisis that occurred more than five years after the taking and after the analysis. RCPO p. 102. Second, the County suggests that Mr. Wingard did not take into account the cost of improving the Levees to the County-required level of a 500-year flood. RCPO pp. 101-02. But because Mr. Wingard was using an assumed multi-county tax incentive package to pay for infrastructure including Levee improvement (see RCPO p. 99), an assumption that Mr. Hartnett removed, and that Columbia Venture removed in calculating its damages in the CVPO, the actual figure was irrelevant to the net value calculation. Moreover, additional cost would not be a significant variable. The difference between the 100-year flood improvement cost and the 500-year flood

improvement cost would be the cost of making the Levees higher by a few feet and wider by a few more feet; it would not be a difference of five times or anywhere close to that. See Tr. 707.

The alternate uses of the Property and their valuations recited by the County (which follow below) are far more speculative than either the meticulously documented appraisal by Mr. Wingard that the County finds so inadequate or the viability of the Green Diamond project that the County describes as a pie-in-the-sky wish rather than the investment-backed expectation that it was. RCPO p. 108.

- Florida Rock's offer to purchase 360 acres was conditioned on zoning and mining permits and successful drilling. DTE 103 (part of the last trial day's dump of unexplained documents into the trial record).
- The proposal for a recreational club assumed a per acre land cost of \$1000, far less than Columbia Venture actually paid. It also assumed no real estate taxes and no interest charges; and was for those reasons, among others, not at all realistic. DTE 110 (likewise, part of the document dump).
- The offer to purchase the property for \$26 million was not only less than the amount already invested but was also subject to several unacceptable contingencies. DTE 111 (again, part of the dump of unexplained documents).
- And the possible development scenario of large residential lots, wetlands mitigation and hunting leases set down on a pro forma spreadsheet for comparison with other realistic and speculative options, had no developer to back it and no support for its assumptions. DTE 014.

This final document (DTE 014) was explained by Mr. Bob Hughes, under whose supervision it was prepared. Tr. 1085. But the County, although providing page references, chose not to provide his actual explanation in the RCPO. It is first important to remember that Mr. Hughes did not become involved in the project until the end of 2003, well after the taking. PTE 402. But there are, in fact, other, far more serious reasons why this document is not a reasonable expression of value. The document presents several scenarios for use of the property – “exit strategies” – essentially the results of some brain-storming about exits with an arbitrary probability of success assigned to each idea. Tr. 1091. But Mr. Hughes testified that several key

elements of these strategies were, in fact, precluded by the same County prohibition on levee improvement that had prevented Columbia Venture's original idea for development. Tr. 1090-91. Mr. Hughes further testified that if Columbia Venture had attempted this strategy, they would have failed. Tr. 1089. Further, Mr. Hughes's testimony was not that the Property was worth the misleading \$49 million figure touted by the County, but that it was instead, at the time he became involved, worth only \$10 or \$11 million. Tr. 1092.

The County also argues that reasonable expectations must be based on the regulatory regime in place at the time of the investment. RCPO p. 110. Columbia Venture agrees. Accordingly, Columbia Venture has measured its expectations as of a time when the Levees could be improved pursuant to Richland County's ordinances no matter the location of the floodway, when variances (to the extent they were needed) with regard to the improvement of the Levees had not been forbidden, when the County had communicated to Columbia Venture and to a federal agency its willingness to accept jurisdiction over the improved Levees, when the County interpreted its floodway regulations as imposing a no-rise rather than a no-build standard, and when all property owners protected by the Levees were treated the same way by the County. That was the regulatory regime in place at the time of Columbia Venture's investment. It was not, however, the regulatory regime in place after the taking. The change is the doing of Richland County Council, and is the reason for this lawsuit.

In a further effort to rebut the reasonableness of Columbia Venture's investment-backed expectations, the County argues that Columbia Venture cannot prove that a variance would have been granted and that, therefore, any expectation based on an assumption of a variance is not a "reasonable assumption" to support a taking. RCPO pp. 111-12. Again, there are two points to be made. First, the un-contradicted support that the County gave to Columbia Venture's project

at the time Columbia Venture was making its investment (as fully outlined the CVPO at pp. 28-37), demonstrates that the expectation was entirely reasonable. Second, under the County Engineer's interpretation of the County's floodplain management ordinances at the time Columbia Venture bought the property, a variance was not required. Columbia Venture could have obtained a permit to improve the Levees on showing a no-rise.

Additionally, insofar as the right to improve levees is at issue, the County denies it interfered with any right of property ownership. Its position is that the right to exclude the common enemy of surface water from one's land does not apply to flood water. RCPO p. 120. The point is both wrong and inconsequential.

The law in South Carolina is clear. The relevant distinction is between "surface waters" and "waters of a natural course." *Johnson v. Williams*, 238 S.C. 623, 121 S.E.2d 223 (1961). A somewhat lengthy excerpt from *Johnson* may be helpful.

The obstruction of surface waters and the waters of a natural course are distinct and different, and are attended by entirely different consequences. The obstruction of the flow of surface water is generally not actionable, while the obstruction of the flow of a natural watercourse, if it results in damage to an adjoining landowner, is actionable.

The law is well settled in this State that surface water is a common enemy, and every landowner has the right to use such means as he deems necessary for the protection of his property from damages it would cause, except that (1) a landowner must not handle surface water in such a way as to create a nuisance, and (2) he must not by means of a ditch or other artificial means collect surface water and cast it in concentrated form upon the lands of another. Subject to the foregoing exceptions, a landowner has the right to take any measures necessary for the protection of his property from surface water, even if in doing so he throws it back upon an adjoining landowner to his damage.

On the other hand, it is well settled that a landowner has no right to obstruct the flow of water in a natural watercourse, so as to back it up on the lands of an adjoining landowner to his damage.

Johnson, 238 S.C. at 633, 121 S.E.2d at 228 (internal citations omitted).

So the initial question becomes whether water that in a flood departs from a river's natural watercourse and spreads inland a distance of over a mile (PTE 391) is properly considered "surface water" or "waters of a natural course." "If the flood water becomes severed from the main current or leaves the same never to return, and spreads out over the lower ground, it becomes surface water." *Jones v. Seaboard Air Line Ry.*, 67 S.C. 181, 198. 45 S.E. 188 (1903), quoted in William T. Toal, *Surface Water in South Carolina*, 23 S.C. L. Rev. 82, 83 (1971).

In the present case, the flood waters would be flowing over or through discrete breaches in the Levees and spread out onto approximately 3,000 acres of property characterized by varying topography. PTE 204 at 27. The water would be separated from the river course and unable to flow back to it. *Id.* It would be surface water; and the common enemy doctrine would apply.

Even if not, the inhibition regarding "waters of a natural course" is not that a property owner cannot defend against them but only that if he does, he must do so in a way that does not "obstruct the flow of water in a natural watercourse, so as to back it up on the lands of an adjoining landowner to his damage." First, we are, by definition, talking about waters that have left the natural watercourse. Consequently, the Levees could not be considered "obstruct[ing] the flow of water in a natural watercourse." Second, the testimony in this case was uncontroverted that the Levees could be improved to the 100-year FEMA certification standard and to the County's 500-year standard without increasing the base flood elevation. Tr. 1240,

1244-45. Consequently, the Levee improvements would not back up water onto an adjoining landowner's property to his damage.¹³

IV. The County's targeted actions toward Columbia Venture are infused with malice and bad faith.

Most likely because the evidence of the County's bad faith is so compelling, the County argues that evidence of it is not relevant to an examination of the character of the government's action. RCPO pp. 120-21. That is simply not the law. See CVPO pp. 133-36. Richland County's argument on that point cannot even survive a common-sense test. Indeed, Richland County argues that evidence of bad faith is relevant if the government entity has delayed a property owner in the exercise of its rights, but that it is irrelevant where the governing body had taken the much more drastic step of denying a property owner its rights. There is simply no logic to that asserted distinction.

Richland County also argues that the recent *Dunes West* decision, *supra*, is controlling. RCPO pp. 121-22. In fact, that case and the present case are so very distinct that the contrast provides very strong support to Columbia Venture's claim. See CVPO pp. 98-103.

Richland County argues that good faith should be presumed, and in a stunning attempt at outright denial, the County argues that "Columbia Venture's efforts to cast Richland County

¹³ In all its floodmapping efforts, FEMA assumed that the levees would not breach in setting the BFEs for Lexington County. Tr. 1242-43. FEMA assumed that the levees would breach in setting the BFEs in Richland County. *Id.* It is also interesting to note that the governing bodies of Lexington County and the City of Cayce lobbied FEMA to adopt higher flood levels for their communities. PTEs 542, 543. FEMA resisted these efforts for reasons that the mayor of Cayce found unsatisfactory. PTE 567. Also, the City of Cayce's wastewater treatment plant, which sits directly across from the Manning levees in the Lexington County floodplain is protected by a ring levee. Tr. 2279. The City of Cayce has thus availed itself of South Carolina's common enemy rule to safeguard the assets of its wastewater treatment plant from surface water that will leave the channel of the river during the occurrence of a major flood.

Council member Kit Smith as manipulative, deceitful and hateful fail to overcome this presumption of good faith.” RCPO p. 92.

The following actual testimony and cited documents, not any “spin” by Columbia Venture, reveal that Ms. Smith, in a devious, if not malicious frame of mind, specifically targeted and deceived Columbia Venture, perhaps from her very first meeting with Mr. Gregory and her vote in favor of the February 2, 1999 resolution, and then actively, if not always openly, supported Columbia Venture’s opponents:

- “Q: Isn’t it reasonable to assume, Ms. Smith, that if you voted in favor of something that you’re in favor of it? A. Yes, most of the time. Sometimes you do it as a procedural matter so that you can make a motion later on to reconsider, so you’re really not in favor of it, you’re lining yourself up to be on the rebuttal side. But most of the time, that’s true.” Tr. 2393.
- “Q. Heathwood Hall and Columbia Venture wanted the same thing, didn’t they? A. They did. Q. They wanted the FEMA standard? A. They did. Q. They wanted to be treated equally? A. They wanted to be treated the same. Q. But that’s not what the County did, is it? ... A. No, that’s – we did not do that. You’re correct.” Tr. 2426.
- “Q. Those kinds of misunderstandings can occur when you vote to accept responsibility for something, but in your heart, you want to maintain maneuvering room and leave things open-ended, can’t they, Ms. Smith? A. I would say in response to that, that if that were true, there still wouldn’t be anything wrong with it.” Tr. 2456.
- She also wrote that Burroughs and Chapin are “bullies,” “fraudulent,” “fakes,” “elitist,” “indifferent,” and “unethical.” PTE 350. She concluded that “Burroughs & Chapin should be sent packing from Richland County,” and that “[t]hey are corporate welfare pimps, they are a threat to public education and they are just not good neighbors. They are not even a green diamond in the rough. They are a zircon of greed.” PTE 350; Tr. 2487-88.
- Ms. Smith later became a member of the Board of Trustees of the Southern Environmental Law Center, one of the main opponents to Columbia Venture’s proposed development,¹⁴ and corresponded with Mr. Holman of the SELC in 2004, comparing Green Diamond to “Chuckie,” a horror movie creature. PTEs 417, 560;

¹⁴ The SELC, and particularly Mr. Blan Holman, served as legal counsel to the intervenors in Columbia Venture’s judicial appeal of FEMA’s final determinations, which was litigated in federal court from 2001 until 2009.

PTE 474; Tr. 2494. She also referred to Columbia Venture as “Chuckie” in *The State* newspaper. PTE 474.

In an effort to overcome this evidence of outright malice toward Columbia Venture, the County argues that “Mrs. Smith was only one Council Member out of an eleven-member Council” and “although she served as chairperson of the Council in 2000 and 2001, that position gave her no control over how the Council as a whole voted.” RCPO p. 93. On the contrary, evidence indicates that Ms. Smith, while she was chairwoman of the County Council in 2000 and 2001 did, in fact, make decisions on her own or only in conjunction with Greg Pearce, the then-vice chairman, that expressed the policy of the County to Columbia Venture. Pearce Dep. Ex. 180 (October 25, 2000) states: “Kit and Greg say the [stormwater ordinance “impede” language] does not change unless and until the County decides on whether it wants to agree on levee construction.” Further, PTE 004 states in an entry for October 6, 2000: “Chair and Vice-Chair [Kit Smith and Greg Pearce] direct Mullen Taylor and George Wolfe to call Tim Rogers and relay the County’s position that due to the unexpected change in the flood map, it suspends substantive negotiation with B&C until map is finalized” PTE 004 at DEF-00004864. It is clear that Ms. Smith, as Chairperson, directed and instructed the position of the County (without, apparently, involving all of the other members of Council) in many of its most important dealings with Columbia Venture.

Any suggestion that Ms. Smith and Mr. Pearce were acting *ultra vires*, is rebutted by the simple fact, as discussed previously, that a majority of members of County Council did their bidding: County Council as a body, not just a single member, forbade any improvement of levees located in a regulatory floodway, affirmatively and intentionally removed any possibility of a variance that might have allowed the needed Levee improvements, and singled out Columbia Venture for adverse action by incorporating into its Stormwater Ordinance specific

carve-outs for the only other potentially affected landowners, Heathwood Hall and the City of Columbia.

The tragic irony of this result, at least for Columbia Venture, is that the County's preferential treatment given to Heathwood Hall, came over Heathwood Hall's own objection. In a plain attempt to spin this undeniable fact, the County claims that "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 to move forward expeditiously with its existing expansion plans. Pl. Exh. 184." RCPO p. 58. As an added dose of irony, Columbia Venture's improved Levees would have protected Heathwood Hall's property and allowed it to proceed expeditiously with its expansion plans, without building elevated and more expensive structures. *See* PTEs 108, 109, 110.

Moreover, the above is not an accurate characterization of Heathwood's request to the County. Although Heathwood expressed its desire "to move forward immediately with" its expansion plans, it said nothing about growing weary of the process. PTE 184. The letter targeted Richland County's "current interpretation" of its ordinances "despite the fact that [the] planned construction would meet FEMA standards for construction in a floodway." *Id.* Consequently, it was the *County's* position on the ordinance interpretation that was delaying Heathwood's plans. In no uncertain terms, Heathwood further asked the County to "adopt the FEMA minimum standards for construction in a regulatory floodway." PTE 184. That Heathwood identified "the current interpretation" of Richland County's ordinances as the impediment to its expansion plans highlights Mr. McSwain's May 1999 decision not to issue permits *for levee construction* as targeted to Columbia Venture. *See* Wendel Dep. Ex. 042 (quoting Mr. McSwain as saying on May 28, 1999: "We won't issue permits to build in that

area, and I think that was FEMA's primary concern."); PTE 031 at DEF-000002920 ("FEMA respectfully asks that you delay a decision on levee construction until after the next public meeting..."). Heathwood Hall's property was not included in this prohibition on construction permits.

The County, in yet another attempt to whitewash the patently targeted nature of its actions claims that, in the first reading of the amendment to the Stormwater Ordinance on March 20, 2001, "Richland County 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 River floodplain].' Pl. Exh. 186." RCPO p. 59.

Councilwoman Bernice Scott's comments in the County's March 20, 2001 meeting minutes suggest otherwise. "[T]his motion is definitely against any development in that area. We have had landowners on top of landowners that came before us today to tell us to take out just those two entities. What we are doing to landowners is saying we don't need you there, but we are going to take care of the school, the City and the Wastewater Treatment Plant." PTE 186 at DEF-00012099. "Ms. Scott wanted the record to reflect 'that this is the first step for a lawsuit because this is definitely wrong.'" *Id.* at DEF-00012100. And during the April 3, 2001 meeting: "Ms. Scott wanted the record to reflect that the ordinance is against Burroughs and Chapin." PTE 191 at DEF-00012108. Ms. Taylor also wrote to the City of Columbia on June 20, 2001, after the amendments to the Stormwater Ordinance and the Zoning Ordinance became effective, and categorized the County's attitude towards the wastewater treatment plant, as follows: "Since the FEMA appeal resolution FIRM for the Congaree River placed the City Wastewater Treatment Plant within a floodway, the County has committed to doing whatever it can to help the City protect the Plant. *Council's recent actions reflect this commitment*" DTE 087

(emphasis added).¹⁵ Because the public actions of the County Council are reflective of commitments the County makes, it is eminently inferable from the events of the spring 2001 that the County was *not* committed to allowing Columbia Venture to improve its Levees. By the same token, it is inferable from the Council's unanimous resolution on February 2, 1999, that it was committed at that time to the plan outlined therein.

In a final ploy to detract from the bad faith character of its targeted actions toward Columbia Venture, the County suggests that the benefits and burdens of the amended Stormwater Ordinance were applied equally to all affected property owners: "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." RCPO pp. 117-18. This is clearly false. "[A]ll property in Richland County located within a regulatory floodway" is not subject to the same rules for construction and development. Heathwood Hall and the wastewater treatment plant can build upon showing a no-rise, while Columbia Venture cannot build anything. PTE 374. Further, while all levees located in the regulatory floodway are subject to the prohibition against making a levee wider or taller, no witness could identify any other levees in Richland County located in a regulatory floodway other than the Manning Levees. Tr. 448, 2434-35.

The County also had the audacity to suggest the following: "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. Tr. Vol. 14, p. 2619, lines 8-24." RCPO p. 118. This plainly does not apply to the

¹⁵ Allowing Columbia Venture to upgrade the Levees to the 500-year flood protection level plus three feet of freeboard would have been the best protection the City's wastewater treatment plant could receive.

facts of this case because Columbia Venture's immediate neighbors were allowed to build *substantial* buildings in the floodway, such as a chapel (PTE 110), gymnasium (PTE 108), and middle school (PTE 109). How could it possibly benefit Columbia Venture that its neighbors can and did build substantial buildings on their property while Columbia Venture cannot build any buildings at all? The answer to this question is: it does not.

V. The County does not accurately describe the Flood Map Revision process of the NFIP and FEMA's implementing regulations.

The County offers its interpretation of various provisions of the NFIP regulations dealing with map revisions and changes. Several of the County's points are misleading and based on an incorrect or incomplete review and analysis of the applicable regulations.

First, the County states: "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 flood hazard designations 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.*" RCPO p. 5. While the County makes reference in subsequent paragraphs to a "request for a map revision," (pp. 5-6) and a "conditional letter of map revision," (p. 6), the synopsis offered by the County omits several key components, thus warranting a more complete description of the map revision process.

FEMA requires a map revision via its regulations before it will remove the flood hazard designations from a flood map. Two "procedures" for changing the flood maps are relevant to this matter: (1) a Conditional Letter of Map Revision ("CLOMR"), which FEMA defines as "FEMA's comments on a proposed project that would, upon construction, affect the hydrologic or hydraulic characteristics of a flooding source and thus result in a modification of the existing

regulatory floodway, the effective base flood elevations, or the Special Flood Hazard Area (SFHA)” and (2) a Letter of Map Revision (“LOMR”), which FEMA defines as “FEMA’s modification to an effective [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 SFHA.” 44 C.F.R. §§ 72.1, 72.2. “The LOMR officially revises the FIRM ... and sometimes the [FIS].” 44 C.F.R. § 72.2.¹⁶ Requests for CLOMRs or LOMRs “are based on proposed or actual manmade alterations within the floodplain, such as . . . *construction or modification of a bridge, culvert, or levee, or similar measure; . . .*” 44 C.F.R. § 72.1 (emphasis added). Consequently, removing the flood hazard areas from land protected by certified levees is accomplished by revising the applicable FIRM through a LOMR. *Id.* A CLOMR prior to undertaking the construction may also be requested, but is not necessary. 44 C.F.R. § 65.8 (“A community, or an individual through a community, *may request* FEMA’s comments on whether a proposed project, if built as proposed, would justify a map revision. FEMA’s comments will be issued in the form of a letter, termed a Conditional Letter of Map Revision.”) (emphasis added).

Second, the County asserts that “[i]f FEMA issues the CLOMR, the applicant returns to the local government to obtain construction approvals consistent with the CLOMR.” RCPO p. 6. This is incorrect and of critical importance to Columbia Venture. 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 (“The data required to support [a CLOMR request] are

¹⁶ Other “procedures” applicable to situations not relevant here are Conditional Letters of Map Amendment, Conditional Letters of Map Revision Based on Fill, Letters of Map Revision Based on Fill, and Physical Map Revisions. 44 C.F.R. § 72.1.

the same as those required for final revisions under §§ 65.5, 65.6, and 65.7 except as-built certification is not required.”). The requirements of 44 C.F.R. § 65.5 (“Revision to special hazard area boundaries with no change to base flood elevation determinations”), which are incorporated into 44 C.F.R. § 65.8, include the requirement that “[t]he participating community *has issued permits* for all existing or proposed construction or other development” 44 C.F.R. § 65.5(a)(4)(iii) (emphasis added).¹⁷ Upon completion of the project (regardless of whether a CLOMR is ever requested or issued), an application can be made for a LOMR, which, if granted, has the effect of changing the flood map. 44 C.F.R. § 65.9. As will be more fully discussed below, FEMA’s regulatory scheme regarding CLOMRs and LOMRs, and especially the requirement of actual permits, is of vital importance to Columbia Venture given the County’s May 1999 decision to postpone entertaining levee improvement permits until after FEMA finished its remapping process.

In addition, for changes affecting hydraulic conditions due to levees (44 C.F.R. § 65.6(c)(2)(i)), the applicable regulations requires construction plans for as-built conditions, new hydraulic analysis, and flood elevation profiles accounting for the effect of the changes and using the original flood discharge values upon which the original map is based and revised delineations of the flood plain boundaries and floodway. *Id.* § 65.6(c)(2). Consequently, in order to apply for a LOMR or CLOMR, it is necessary to undertake engineering hydraulic and hydrologic studies and modeling to provide the necessary engineering data to show entitlement to the map change effected by the LOMR process.

¹⁷ 44 C.F.R. § 65.6 (Revision of base flood elevation determinations) and 44 C.F.R. § 65.7 (“Floodway revisions”) also require that “[t]he participating community *has issued permits* for all existing and proposed construction or other development.” 44 C.F.R. §§ 65.6(a)(14)(iii), 65.7(b) (emphasis added).

The local government (here, Richland County) plays another vital role in the CLOMR or LOMR process. “All requests for changes to effective maps, other than those initiated by FEMA, must be made in writing by the Chief Executive Officer of the community (CEO) or an official designated by the CEO. Should the CEO refuse to submit such a request on behalf of another party, FEMA will agree to review it only if written evidence is provided indicating the CEO or designee has been requested to do so.” 44 C.F.R. § 65.4. Consequently, Richland County’s participation in the levee certification (discussed in more detail below) or CLOMR or LOMR process is far from “irrelevant,” as the County claims. RCPO p. 35-36.

Third, the County states: “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.” RCPO p. 5-6. This does not accurately summarize the timeframes or reasons for requesting that FEMA certify a levee. FEMA’s regulations state:

This information [for recognizing a certified levee] must be supplied to FEMA by the community or other party seeking recognition of such a levee system [1] at the time a flood risk study or restudy is conducted, [2] when a map revision under the provisions of part 65 of this subchapter is sought based on a levee system, and [3] upon request by the Administrator during the review of previously recognized structures.

44 C.F.R. § 65.10(a). Nothing in the cited regulations requires an owner of a non-certified levee to wait until FEMA’s remapping process has concluded before seeking “a map revision under the provisions of part 65 of this subchapter ... based on a levee system,” as suggested by the County. See RCPO p. 5. The County’s synopsis suggests that if a FEMA restudy is ongoing, submitting

the data required by 44 C.F.R. § 65.10 during the course of the restudy is the *only* method of achieving certification of a levee system. The text of the regulation does not support this interpretation, however, as the three times to supply information to FEMA under 44 C.F.R. § 65.10(a) are independent of one another.

Fourth, the County states that “[t]o revise the regulatory floodway, FEMA’s letter [PTE 018], 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) [sic] (requiring approval of a floodway revision by all affected NFIP communities).” RCPO p. 26. 44 C.F.R. § 65.7(a)(3) does not exist. To the extent the County meant to cite 44 C.F.R. § 65.7(b)(3), the citation does not support the County’s claim. 44 C.F.R. § 65.7(b)(3) states: “When a floodway revision is requested ... the following documentation shall be submitted: ... (3) Documentation of the approval of the revised floodway by the appropriate State agency (for communities where the State has jurisdiction over the floodway or its adoption by communities participating in the NFIP).” This section only refers approval by “the appropriate State agency,” and does not mention or concern “all affected NFIP communities,” as claimed by the County. RCPO p. 26. FEMA regulations dictate that impacted communities must approve a floodway reconfiguration, however, if the encroachment [*i.e.* levee construction] “will cause base flood increases *in excess* of those permitted under paragraphs (c)(10) or (d)(3) of § 60.3 of this subchapter.” 44 C.F.R. § 65.12(a)(4) (emphasis added). Further, logic dictates that if the floodway does not change in a community, that community is not “affected” by the floodway revisions. This is important here because Lockwood Greene opined prior to purchase that the Levee upgrades could be achieved without affecting the floodway or BFEs in Lexington. PTE 208 at CV002276. Mr. Barker has confirmed Lockwood Greene’s opinion (Tr. 1244-46), and the

County has presented no evidence in rebuttal. Therefore, if the floodway in other communities does not change as a result of a floodway revision in one community, no approval by those other communities would be warranted under FEMA's regulations.

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

Columbia Venture agrees with the County that two separate provisions of the County's ordinances controlled development in a regulatory floodway on February 19, 1999. First, the Storm Drainage Ordinance, enacted July 19, 1994, prohibited fill materials, structures, or obstructions within a regulatory floodway "that will impede the free flow of water during times of flood" PTE 230 § 8-62(h). This ordinance further states that "[a]ll applicable regulations of the National Flood Insurance Program are incorporated by reference herein." PTE 230 § 8-62(i). Similarly, the County's Zoning Ordinance prohibited filling or 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." PTE 250A § 26-73.4. The Zoning Ordinance also requires the County Engineer to review proposals for "a. Filling in -FW areas in connection with permissible uses or *as a use in itself*. b. All special exceptions within -FW areas." PTE 250A § 26-73.6(1) (emphasis added). Flood Control Works are specifically mentioned as a category requiring review by the County Engineer under this section. PTE 250A § 26-73.6(4).

The great weight of the evidence reveals that as of February 19, 1999, the County officials charged with interpreting and enforcing these two ordinances interpreted the operative language to allow construction in a regulatory floodway upon the showing of an engineering no-rise consistent with FEMA's standards contained in 44 C.F.R. § 60.3(d)(3).

A. The County interpreted "impede" in the Storm Drainage Ordinance to mean a no-rise as of February 19, 1999.

The testimony is clear from Mr. Ralph Pearson, P.E. the County Engineer from 1976 until 2005 that he interpreted the Storm Drainage Ordinance's use of the word "impede," until some time after Columbia Venture purchased the Property on February 19, 1999, as equivalent to the FEMA no-rise standard contained in 44 C.F.R. § 60.3(d)(3). Tr. 1315; PTE 051 at DEF-00002253. Mr. Pearson confirmed that it was his office's position that "if you could demonstrate a no-rise, then you weren't impeding the free flow of water." Tr. 1315. Mr. Pearson was charged with approving plans and permit applications made under the Storm Drainage Ordinance for construction or development in an area of special flood hazard (*i.e.* a floodplain or floodway). PTE 230 § 8-55; *see also* PTE 051 (Council Report Encroachments in a Floodway). The testimony is also clear that both Mr. Cary McSwain (the then-County Administrator) and Mr. Milton Pope (the then-Assistant County Administrator) understood Mr. Pearson's interpretation of "impede" as equivalent to a "no-rise." Tr. 2592; Pope Tr. 40.¹⁸ Consequently, any finding in the RCPO that the County interpreted the word "impede" in the Storm Drainage Ordinance as anything other than the FEMA "no-rise" as of February 19, 1999, is against the substantial weight of the evidence. *E.g.* RCPO pp. 7, 18, 35, 113.¹⁹ Further, Mr. Pearson testified further

¹⁸ Given the wide knowledge within the County of Mr. Pearson's interpretation of "impede" in February 1999 and the fact that Mr. Pearson has corroborated Mr. Gregory and Mr. Manning's testimony that Mr. Pearson interpreted "impede" as "no rise," the County's attack on Mr. Gregory and Mr. Manning's credibility on this point falls flat. RCPO p. 113. To question a witness's credibility when any potential "adverse" witness has confirmed the very fact testified to rings hollow and unpersuasive. Further, questioning Mr. Manning's credibility due to his testimony about building a dam in a floodway when the County's own ordinance defines a regulatory floodway as "the channel of a river or other watercourse" rings hollow, as well. PTE 230 § 8-54(s). By definition, building a dam necessarily impacts "the channel of a river." *See* Tr. 2267.

¹⁹ The County cites repeatedly to George Wolfe, Esq.'s January 2001 legal opinion regarding his interpretation of the word "impede." RCPO pp. 56-57, 114. Mr. Wolfe's 2001 opinion is irrelevant to how County personnel with the appropriate authority to interpret the "impede" language actually did so in 1998 and early 1999. It further appears that Mr. Wolfe was apparently unaware of FEMA's equation of "impede" with no-rise in October 2010. FEMA

that he changed his interpretation of “impede” as “no-rise” to “impede” as “no build” sometime after August 12, 1999, pursuant to instructions from the County Attorney. Tr. 1324-25, 1400.

B. The County’s Zoning Ordinance did not prohibit construction in a floodway on February 19, 1999.

The County affirmatively states that the Zoning Ordinance language of “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” “essentially prohibited construction in a floodway” (RCPO p. 9) and that construction in a regulatory floodway was “clearly prohibited.” RCPO p. 122. These statements beg the question of why the County agreed to allow Columbia Venture to upgrade the Levees on February 2, 1999. These statements also (as will be discussed below) ignore both the plain language of the Zoning Ordinance as well as the County Engineer’s unequivocal testimony about the meaning of “impede” as he applied it at all times relevant to Columbia Venture’s acquisition of the Property.

Under the Zoning Ordinance, the County Engineer is required to review applications to “fill[] in -FW areas in connection with permissible uses or as a use in itself” and to certify his findings. PTE 250A § 26-73.6(1). Those findings are “binding upon the zoning administrator unless overruled by the board of adjustment.” PTE 250A § 26-73.6(9)(a).²⁰ Consequently, Mr.

wrote to Richland County and others on October 10, 2010, in pertinent part, as follows: “*If the September 26, 2000 revised preliminary FIRM becomes finalized, how should Richland County deal with variances, such as for expansion to Heathwood Hall School or the City of Columbia wastewater treatment plant?*” (Kit Smith) There are several possibilities. First upgrades or direct replacements can be made on a 1:1 ratio of building footprint areas. Second, building standards could mandate that buildings **do not impede flood flow, such as construction elevated on piles to allow flow under the buildings**. Third, the floodway configuration could be altered, as discussed in the answer to question number 13. ...” PTE 523 at DEF-00001692 (emphasis added in bold). Similarly, Mr. Michael Criss’s testimony about the interpretation of the word “impede” from 2001 forward is irrelevant (cited at RCPO p. 9). Tr. 2617.

²⁰ Notably, the Zoning Ordinance gives review authority to the county flood coordinator for “[a]ll applications for zoning permits for uses permitted within -FP areas.” PTE 250A § 26-

McSwain's and Mr. Criss's interpretations about what was allowed in a floodway cannot override Mr. Pearson's testimony, as the County implies. RCPO p. 112. By the plain language of the Zoning Ordinance, filling in the floodway was an allowed "use in itself." If the Zoning Ordinance "clearly prohibited" or even "essentially prohibited" construction in a floodway, this section would not exist.

It also defies logic that Mr. Pearson would interpret "impede" as "no-rise" in the Storm Drainage Ordinance but as "no-build" in the Zoning Ordinance. Mr. Pearson testified as to the engineering reasoning behind his interpretation:

Q. Was it your position that if you could demonstrate a no-rise, then you weren't impeding the free flow of water?

A. That was our position, yes.

Q. Now, in your view, is the no-rise standard – is that an engineering standard?

A. Yeah, I would have considered it so.

Q. Okay. But a no-impede standard is not an engineering standard; is it?

A. I wouldn't think so. It's more like a language standard.

Tr. 1315, 1325. Further, because the County Engineer had permitted projects in the regulatory floodway from 1990 forward (PTE 051 – "Council Report Encroachments in a Floodway") and the Zoning Ordinance requires County Engineer review of applications for filling in the floodway (PTE 250A § 26-73.4), it logically follows that the County Engineer would allow and recommend zoning permits on a no-rise showing, as well. Indeed, if the Zoning Ordinance "clearly prohibited" or "essentially prohibited" construction in a floodway, how did those projects receive permits?

73.5(3). No mention is made of the county flood coordinator for review of projects in –FW areas. That review is reserved for the County Engineer alone. See PTE 250A §§ 26-73.4(4), 26-73.6(1).

To support its *post hoc* interpretation of the County's standards, the County relies on anecdotal or non-controlling interpretations of Richland County's ordinances (e.g. those made by FEMA (PTE 011 – "Richland County ... doesn't allow any development in the floodway (unless a variance is obtained") or Rust Environmental (PTE 497) or non-contextual statements made by County personnel *not* charged with interpreting the floodway provisions of the ordinances (e.g. DTE 017 - statement attributed to Harry Reed) or by engineers *not* charged with determining the County's official interpretation of the ordinance (Mark Hester), none of which lessen the weight of Mr. Pearson's testimony (as corroborated by Mr. McSwain and Mr. Pope). The County did not call Mr. Reed to testify, and, accordingly, the full import of Mr. Reed's understanding (or the scope of the questions he was posed) is not known. Indeed, no detailed testimony regarding DTE 017 was elicited from any witness. *See* Tr. 1458-59. It is understandable, however, that the average person might regard the no-rise standard of 44 C.F.R. § 60.3(d)(3) as a prohibition against building in a floodway because of the expense required to produce and supply the engineering needed to demonstrate a no-rise for, for example, the average homeowner proposing to build a backyard deck in a floodway. *See, e.g.,* Tr. 2651-52. Additionally, Mr. Hester testified that he was not part of the due diligence team assigned to discuss matters with County officials, including the County Engineer, prior to purchase. Tr. 2200-01. He further did not testify about the time frame for his understanding of the County ordinance. He applied it to specific maps that were dated (e.g. Tr. 2134), but provided no context for the timeframe that he himself understood the prohibition to be in effect.

In contrast, Mr. Gregory testified in depth and at length about his conversations with Mr. Pearson and others within the County regarding the "impede" language in the ordinances. Indeed, the existence of the Rust Report (PTE 297) and the notation about Mr. Reed (DTE 017)

highlight the importance to Columbia Venture of running to ground the County's official position on the interpretation of its ordinances. Both documents pre-date Burroughs and Chapin's involvement beginning in July 1998 (Tr. 888-89) and certainly predate Mr. Gregory's conversations with Mr. Pearson and other County personnel. Tr. 706-07. As Mr. Gregory testified:

Q. And did you get the same interpretation when you met with the planning department staff?

A. We got a consistent interpretation from Richland County officials.

Q. The engineering department and the planning department gave you the same answer with respect to the interpretation of the ordinance?

A. As did the administrator. Mr. Lydon, if I may continue, it stands to reason that had we not received the same one, that issue would have been ferreted out to the very end. Prior to closing, we would not have closed if there was an issue with that as it relates to the County. They understood -- again, I cannot be more clear on that -- Richland County -- and when I say that, I'm inclusive, with department heads, council, administrator, everybody we talked to -- everybody clearly understood what the resolution meant, what our questions were relating to, how do they interpret their ordinances and otherwise. But for those things, we would have never closed.

Tr. 886-87. Mr. McSwain testified that he knew that Columbia Venture would be seeking a permit to upgrade the Levees. Tr. 2564-65. If the County truly interpreted its ordinances at the time to prohibit construction in a regulatory floodway in the manner the County now claims such that Columbia Venture would not be able to secure the applicable permits, its failure to disclose such interpretation to Columbia Venture over the *months* of admitted due diligence and back and forth discussion between County officials and representatives of the development group is the height of bad faith by the County. As Mr. Manning testified: "Why would they take all of these steps, go through all of this political process, to come back and delay the project? I mean, that was clearly not the intent to start with. They could have said, No, we're not going to do what

you need us to do. Why don't you just wait until the maps are finished and we'll – at that point, Burroughs & Chapin would have gone home.” Tr. 573-74.

C. The County misstates FEMA's guidance to the County on which flood map to use.

Further, given the interpretation of the County's applicable ordinances as of February 19, 1999, expressed to Columbia Venture during its due diligence process (“impede” = “no rise” analysis), it would not matter which flood map (1994/95 effective FIRM or June 5, 1998 revised preliminary FIRM) the County was using to enforce its floodplain management regulations. Lockwood Greene opined prior to purchase that Levee improvements could be accomplished on a no-rise. PTE 208. However, the County seriously misstates and misinterprets the FEMA guidance that informs which flood map to use.

The County states that the use of a flood map is tied to *either* increased BFEs *or* a larger floodway. RCPO pp. 4, 19. This is wrong. FEMA's guidance to NFIP communities about the appropriate circumstances under which to use a revised preliminary map for Zone AE (applicable to this matter) are tied solely to the BFEs. PTE 031 at DEF-00000296. For Zone AE, the County *always* had the option of using the effective data in lieu of the preliminary data. *Id.* Where BFEs have been designated,²¹ FEMA advises communities to use the map (effective or preliminary) that contains the higher BFEs. *Id.* Only in “communities where floodways have not been designated for all or some of the flooding sources, but the BFEs have been provided, communities are required to apply the criteria at 44 CFR 60.3(c)(10).” *Id.* By the plain language of PTE 031, this guidance only applies if the preliminary FIS designates a floodway *for the first time* for that particular flooding source. Here, the Congaree River had a designated floodway on

²¹ BFEs were designated for the applicable cross sections for Columbia Venture's Property on both the 1994/95 effective FIRM and all revised preliminary FIRMs produced by FEMA from 1998 forward. *See, e.g.* PTE 533.

the 1994/1995 effective FIS and FIRM. Just because the floodway was bigger on the June 5, 1998 revised preliminary FIRM does not mandate the use of the larger floodway for floodplain management purposes. If that was FEMA's guidance, it simply would read: "Use the bigger floodway regardless of whether it is on the effective or revised map." FEMA did not say this or even remotely imply this. *See also* DTE 146 (6/23/98 letter to Richland County from FEMA): "Nonetheless, the community should utilize the elevations in the [revised preliminary] study for regulatory purposes if they exceed those identified on the current FIRMs." FEMA did not say anything in DTE 146 about using the revised preliminary study simply because the floodway got bigger. Mr. Barker further testified that the FEMA guidance is tied to the BFEs. Tr. 1298-99.

Further, the County's construction of FEMA's guidance is simply refuted by FEMA's advice to Richland County after the August 12, 1999 revised preliminary FIRM to use the 1994/95 effective FIRM. PTE 123 at DEF-00012042. The floodway was larger on the August 12, 1999 revised preliminary FIRM than on the 1994/95 effective FIRM, but the BFEs were generally lower. PTE 533. The same analysis is true for the September 26, 2000, which included a bigger floodway but generally lower BFEs. *Id.* FEMA advised the County after September 26, 2000, to use the 1994/95 effective FIRM for floodplain management purposes. PTE 523 at DEF-00001691.

VII. The County fundamentally mischaracterizes Columbia Venture's original plan for improving the Levees and removing the floodway and floodplain designations from its Property.

At paragraph 89 on pages 37 and 38 of the RCPO, the County states the following proposed finding of fact: "As of the date of purchase, Columbia Venture intended to first 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." Similarly, the

County again states in its conclusions of law: “The evidence presented shows that Columbia Venture did not intend to proceed with development of its Property until after FEMA finished its study and issued final Flood Data.” RCPO p. 89. Further, “Columbia Venture intended to first convince FEMA to issue a new preliminary revised Flood Map showing no floodway on its Property. Assuming that Columbia Venture was successful in this endeavor and FEMA’s revised Flood Data was not appealed, then Columbia Venture would proceed to levee improvements to meet FEMA’s levee certification requirements.” RCPO p. 111. This is fundamentally untrue and not supported by the evidence the County cites. It further ignores both documentary and testamentary evidence regarding Columbia Venture’s actual plan at the date of purchase.²²

As an initial note, Columbia Venture’s strategy for its Levee upgrade process and its relationship with the ongoing FEMA mapping process changed repeatedly as post-purchase events unfolded. As Mr. Wendel testified, “I mean, there probably were a large number of approaches that were outlined based on what’s happened and who did what and who said what and what was issued and what – the information.” Wendel 10/25/11 Tr. 48. The County doggedly applies a single interpretation to Columbia Venture’s plans without regard to applicable testimony or documentary evidence and does not distinguish among any of the various strategies undertaken by Columbia Venture as conditions changed over time. The County further selectively cites evidence in support of its arguments without considering the overall weight of the evidence.

²² The “theme” of Columbia Venture’s pre-purchase Levee improvement plans (both the actual, correct plan and the misstated plan contained in paragraph 89 and on pages 89 and 111) carries through the following enumerated proposed findings of fact in the RCPO: 26, 38, 39, 40, 41, 42, 49, 63, 78, 79, 82, 83, 85, 86, 89, 90, 91, 92, 93, 97, 98, 99, 100, 101, 102, 103, 105, 117, 118, 119, 128, and 129. It also carries through discussions in the proposed conclusions of law at pages 89, 94, 111, and 115.

- A. Columbia Venture's actual, well-documented pre-purchase plan was to (1) upgrade the Levees without waiting for FEMA to finish its floodplain mapping and (2) upon the completion of the upgrade and certification of the Levees, apply through the County for a LOMR to remove the floodway and floodplain designation from the Property.**

Ensuring that the Property behind the Levees was outside the floodway and floodplain was absolutely critical to the viability of Columbia Venture's project. As explained by multiple witnesses and in multiple exhibits, land that is classified on a FEMA FIRM as a floodway or floodplain faces greater and more onerous construction standards than land that is classified on a FEMA FIRM as land *not* in a floodway or floodplain. The County does not contest this basic fact, nor could it. The land protected by the Levees was, under each and every map put forward by FEMA (effective or revised preliminary) from 1994 to 2002 in at least a floodplain and, therefore, subject to some building restrictions. Wilson Tillotson, Deas Manning, and George Gregory all testified that the development envisioned by Columbia Venture would not have been possible with the building restrictions in place on floodplain property. Tr. 203, 519, 712-13, 679-80, Tillotson Tr. 27. Consequently, it was of critical importance that the development group figure out the best way to remove the floodplain and floodway designation from the Property. Even the 1994/95 effective FIS and FIRM, which placed the bulk of the Property in a floodplain, would not have allowed building the way the development group envisioned it. *See* PTE 264 at CVMcNair002450 (describing the need "to get the subject property out of the floodplain requirements for building").

As the County recognizes (RCPO p. 5), levee certification is a primary way to remove the floodplain or floodway status from property. *See* PTE 018. Under FEMA's regulations, land protected by a certified levee will be classified as Zone X and removed from all of the floodway and floodplain building restrictions upon certification and remapping via a LOMR. *Id.*; 44 C.F.R. §§ 65.5, 65.9. All of Columbia Venture's applicable pre-purchase documents—including

correspondence to both FEMA and Richland County—describe Columbia Venture's plan as upgrading the Levees without waiting on the FEMA remapping to conclude and then, upon upgrade and certification, applying for a LOMR through Richland County to remove the floodway and floodplain designation from the Property.

- Wilson Tillotson of Lockwood Greene formally presented the development group's plan to both FEMA and Richland County via his letter dated January 20, 1999, as follows: "The property owners intend to take the following steps. 1. The property owners *intend to upgrade the levee system* to meet structural requirements set out in 44 C.F.R. 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 responsibility for operation and maintenance of the levee system in accordance with 44 CFR 65.10. ...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." PTE 246 (emphasis added).
- Mr. Tillotson's January 20, 1999 letter to Ms. Holland tracks his December 11, 1998 letter to Mr. McSwain. The Tillotson to McSwain letter attached the following: "*Property owners intend to upgrade the levee system* to meet the structural requirements as specified in 44 CFR 65.10. At the completion of the upgrade, Richland County agrees to accept responsibility for operation and maintenance of the levee system in accordance with 44 CFR 65.10. Based on the above, and the existing levee system being in place, *we request relocation of the proposed floodway on the Richland County side of the Congaree River to the current map located which is the line of the dike. Upon certification of the levee system as a protective structure, Richland County will request a letter of map revision of the current FIRM.* ..." PTE 207 (emphasis added).
- Mr. Tillotson's bullet points became the focal point of Mr. Knudsen's recommendation to the Development and Services Committee on January 26, 1999: "This has been detailed in a letter to Mr. McSwain from Lockwood Greene dated December 11, 1998. Our comments are as follows: 1. *Property owners intend to upgrade the levee system* ... the approximate cost of this is in excess of six million dollars. 2. *County agrees to accept responsibility for operation and maintenance* ... this is shown as a preliminary cost estimate of approximately \$174,500 annually. 3. *Request the relocation of the proposed Floodway...* this will bring the entire area back to the "G" series map (the original FEMA map). 4. *Upon certification* ... the County must be the one requesting the map revision. 5. *Certification of levee system* ... self explanatory. ..." PTE 166 (emphasis in bold added).

- The McNair Law Firm faxed the following talking points/FAQs to Richland County on February 2, 1999 (PTE 252):
 - **Why must the Council act tonight?** Transactions involving a substantial portion of the property are set to close within the next seven to ten days. Development of the property is dependent upon how it is treated for FEMA purposes. Without county action to begin the first steps in changing the FEMA status of the property, the investors will have to evaluate whether they desire to proceed without a resolution of the FEMA issue. The proposed development of the property is on hold until the FEMA issue can be resolved. If the county will commit to the acceptance of operation and maintenance of the levee, then the transaction can be closed and the investors can start the process of up-grading the levees as required by FEMA and the next steps for the development of the property can begin.
 - **Can't this problem be solved with FEMA remapping?** No. FEMA is currently remapping the area and the remap is expected to be released within the next four to six weeks. ... Even if the investors could wait for this process to occur and be completed, the investors would be faced with the same issue then – the county must accept operation and maintenance responsibility if the area is to be removed from a designation as either a floodway or floodplain.

Nowhere in any of these critical communications to Richland County or FEMA did Columbia Venture express a desire to secure a favorable map to upgrade the Levees prior to actually upgrading the Levees. Indeed, Ms. Lisa Holland described Mr. Tillotson's letter (PTE 246) as seeking "assurances that if the levee is upgraded to meet the standards outlined in 44 CFR 65.10 ..., that the levee would be recognized by FEMA and FEMA would approve a map revision *submitted through the normal process*." PTE 017 (emphasis added). Further, all of these documents have been extensively discussed and affirmed as Columbia Venture's plan at the time of purchase by witnesses for both Columbia Venture and Richland County:

- Deas Manning:
 - "My opinion was that the only way to keep this property from being parceled out, broken up, ever to be developed, was going to be to get the levee certified. There was no way that anything beyond [Levee] certification was going to work to develop the property." Tr. 159.

- “Q. ... [W]as the plan to proceed with improvement of the levees? A. Yes. Q. In what time frame? ... A. I think there was earlier some schedules produced, phasing schedules, and I believe, off the top of my head, that one year to 18 months, maybe 24 months, was the improvement time frame for Levee Section 1 and 2. ... Q. Beginning when? A. March or April, May of 1999.” Tr. 367-69.
- “Q. Beginning in May of 1999, did Lockwood Greene and Columbia Venture adopt a new strategy to try and deal with FEMA and the flood maps? A. No, sir, not to my knowledge. I think the engagement that is reflected in the record was that they were trying to achieve improvement of the levees that had to do with the FEMA regulations that the County adopted in the resolution.” Tr. 522-23.
- Mr. Manning also confirmed the language and plans discussed in PTEs 018 (Tr. 589), 166 (Tr. 218-25), 207 (Tr. 213-16), 208 (Tr. 290-94), and 246 (Tr. 216-18).
- George Gregory:
 - Mr. Gregory further confirmed the language and plans discussed in PTEs 017 (Tr. 755-56), 018 (Tr. 756-58), 166 (Tr. 717-18), 169 (Tr. 738-41), 246 (Tr. 753-55)
 - “We wanted FEMA to sign off on the plan that we were working in conjunction with the County on to upgrade those levees, and we wanted assurances from FEMA that, once upgraded to the 500-year level, the Corps of Engineers, certified level, that we could – that all flood hazard designations of any type and descriptions would be eliminated from behind the levee, and that we could build flat on the ground.” Tr. 713
 - “[T]he plan that we had with the County to upgrade the levees; and two, that if done and done to the standards required, that the flood hazard designations would go away.” Tr. 715.
 - “Q ... Is it your testimony that all of the uncertainties that Burroughs & Chapin were aware of had been resolved prior to closing? A. I would not say that all of them – the primary one that we had to deal with – there were three of them. It was the ability to work with Richland County and them have us upgrade that levee to a certifiable standard, it was for them to accept responsibility for maintenance of the levee, and it was for FEMA to understand what it was Richland County and Burroughs & Chapin were agreeing to do; and that if we did those things, then, in fact, our interpretation of the regulations was that all flood hazard designations of any type would then, in fact, be removed from that property and we could build flat on the ground. Q. And that was your

interpretation, you said? A. It wasn't just my interpretation. Everybody understood that." Tr. 875-76.

- PTE 018 (January 26, 1999 letter from FEMA): "[I]t is a confirmation that if we take certain actions, then the special flood hazard designation in the floodway would be removed." Tr. 965.
- Wilson Tillotson:
 - Mr. Tillotson confirmed that his letter to Ms. Holland (PTE 246) was a desire for "confirmation from the approving authorities that should those steps be followed that – that the development could proceed on the property." Tillotson Tr. 31.
 - Mr. Tillotson confirmed that the plan laid out in the letter to Ms. Holland (PTE 246) was "what the property owners intended to do." Tillotson Tr. 24.
- Doug Wendel:
 - "The County – we agreed to upgrade and strengthen and improve the levee, which we were going to do to 500 year floodplain level, three percent [sic] freeboard, and the county was going to then operate and maintain them and they were going to remove the floodplain. I mean, that's what we all agreed on." Wendel 7/12/11 Tr. 183.
- Kit Smith:
 - Ms. Smith confirmed the language laid out in PTE 166 (Tr. 2340-47).
- Cary McSwain:
 - Mr. McSwain confirmed the language laid out in PTEs 166 (Tr. 2554-57), 207 (Tr. 2554-47), and 246 (Tr. 2557-79).

Indeed, given the regulatory scheme in place at the time of purchase (discussed above at Section VI of this Memorandum), it would be illogical for Columbia Venture to seek a different map because the County's regulations, as interpreted by applicable and authorized County personnel, would allow Columbia Venture to improve its Levees regardless of whether the applicable FIRM showed the Levees in a regulatory floodway or not. Tr. 1315, 1323-25. If the County chose to use the 1994/95 effective FIS and FIRM (which was the County's option), the Levees were in a floodplain but not a floodway. Consequently, an upgrade could be permitted by the County

Engineer's office. If, however, the County chose to use the 1998 revised preliminary FIS and FIRM for floodplain management decisions (which was also the County's option and what the County actually chose to do (PTE 012)), the Levees were in a floodway. The due diligence revealed that Mr. Gregory and others understood that Mr. Pearson interpreted the "impede" language of the applicable ordinances to be the equivalent of a no-rise under FEMA's standards. Tr. 705-06, 883. Consequently, the due diligence revealed that the Levee improvements could be permitted on a no-rise standard if the engineering showing could be achieved. Lockwood Greene extensively studied the no-rise issues and opined prior to purchase that a no-rise could be shown. PTE 208; Tillotson Tr. 29-30. Consequently, as of the time of purchase, there was no need for Columbia Venture to secure a map that was any different than the ones already in play. Further, Mr. Gregory testified that Columbia Venture was satisfied with the August 12, 1999 revised preliminary map that placed the Levees themselves in a floodway. Tr. 789-90. It makes no logical sense for Columbia Venture to be satisfied with a map that placed the Levees in a floodway unless Columbia Venture understood that it would be allowed to improve the Levees in a floodway.

B. The County does not cite any evidence to overcome the overwhelming consistent evidence discussed above.

The County cites the following documents in support of its theory that, *at the time of purchase*, Columbia Venture intended to have FEMA issue a final flood map and only then upgrade the Levees: PTE 264 (2/18/99), DTE 015 (approx. early to mid-March 1999; Tr. 1158). Wendel Dep. Ex. 136 (3/29/99),²³ PTE 294 (4/5/99), PTE 127 (5/2/99), DTE 002 (5/27/99), PTE

²³ This document contains Mr. Wendel's handwritten notes made during a meeting of Columbia Venture. Wendel 7/12/11 Tr. 180, 191-92. Mr. Wendel testified that these notes represented "talking, jotting down comments, ideas, free actions." Wendel 7/12/11 Tr. 192. Consequently, the probative value of these notes is limited to what was being discussed by

120 (7/2/99), PTE 307 (9/7/99), PTE 211 (11/16/99), DTE 046 (3/27/00), DTE 048 (5/5/00), DTE 049 (5/9/00), DTE 066 (12/4/00), DTE 010 (12/7/00), PTE 507 (1/26/01), PTE 508 (3/9/01), DTE 081 (4/2/01). The only one of these documents actually prepared prior to purchase was PTE 264, and although the fax cover sheet is dated February 18, 1999, Mr. Gregory testified that it was actually prepared much earlier as it was sent to prospective investors and as a source of talking points for discussing the project with local officials. Tr. 853-55. The text of this exhibit offers no support to the County's position and simply establishes that Lockwood Greene was tasked with figuring out the necessary plan of action regarding removing the floodway and floodplain from the Property.

FEMA Currently the land is in a proposed floodway. Lockwood Greene will take the lead. Their duties include: 1. Determine a detailed plan of action to have the proposed floodway designation removed from the affected areas. 2. Have the detailed plan initially approved by FEMA at the local level (political reasons). 3. Take the detailed plan to Atlanta for FEMA determination that the proposed floodway designation will be removed if certain studies are made and the plan of action is carried out. Need a sign off by the decision-makers. 4. Determine which politicians need to be involved should we get to that stage. Have the technical arguments prepared for their use.

DIKE SYSTEM. Lockwood Greene needs to prepare an analysis of the requirements for the levy system to be fully functional and acceptable to get the subject property out of the floodplain requirements for building. It is an existing feature that will hold water back. ... Lockwood Greene to determine if building can occur on flat ground if the levy system is adequate and meets appropriate standards.

PTE 264. Documents actually prepared by Lockwood Greene laid out Columbia Venture's actual plans at the time of purchase. PTEs 207, 208, 246. These documents further constituted the work product of Lockwood Greene envisioned in PTE 264.

Columbia Venture as opposed to firm and finalized plans, especially in the absence of any testimony from Mr. Wendel to that end.

The County chooses to cite selectively from Mr. Hester's testimony to attempt to establish that Columbia Venture's plan at the time of purchase was contrary to the plan explained in PTEs 166, 207, 246, and 252. When asked about PTE 264, quoted above, Mr. Hester testified as follows: "Q. At the time [PTE 264] was drafted, what was Columbia Venture's plan with respect to dealing with the flood map? A. Again, I wasn't a high-level person that was making decisions on direction. I could just tell you that there was information-gathering." Tr. 2130. Further, Mr. Hester's testimony is fully consistent with a plan at the time of purchase to improve the Levees prior to changing the map. As he testified, "once [the Levees are] constructed, then the mapping would be changed." Tr. 2140. Also, the Levee "would have to be certified for it to change the mapping" and "[t]he mapping will not change until they're actually constructed." Tr. 2145. Mr. Hester further equated removing the floodway with obtaining a LOMR or CLOMR: "If we got the map changed and the floodway rolled back? The floodway rolled back? Are you saying have a letter of map revision obtained or a CLOMR obtained?" Tr. 2133. Notably, the County did not ask Mr. Hester any questions about the pre-purchase communications to Richland County and FEMA that actually laid out the plan of action. Mr. Hester also carefully couched his testimony as "depend[ent] on the dates." Tr. 2136. Taken as a whole and with the important caveat that Mr. Hester's role with Columbia Venture was "specific sort of engineering tasks, to review technical data, that type of thing," and not broader policy or strategy (Tr. 2130, 2198), Mr. Hester's testimony is consistent with Columbia Venture's plan at the time of purchase to first upgrade the Levees and then proceed with a LOMR.

Of the sixteen post-purchase documents the County cites as supposedly supporting its interpretation of Columbia Venture's pre-purchase plans, only one ostensibly purports to do so

(DTE 010). The other fifteen documents, while potentially probative of Columbia Venture's plans *at the time the document was written*, have no relevance to determining Columbia Venture's actual plans at the time of purchase. DTE 010 is a document dated December 7, 2000, and comprises five pages. It is titled "CONFIDENTIAL MEMORANDUM Outline of Operating & Development Activities Financing Plan for Columbia Venture, LLC," and appears to be authored by someone at Burroughs and Chapin, though Mr. Wendel could not identify the author. DTE 010; Wendel 10/25/11 Tr. 128-29. On the first page, it purports to lay out a synopsis of an "initial plan," described as "a sound financial plan for Columbia Venture to implement." DTE 010. The remaining four pages are dedicated to analyzing the financial impacts on the LLC and its members based on the occurrence or non-occurrence of various events. *Id.* By its plain terms, it does not set out a comprehensive strategy vis-à-vis Levee upgrades or FEMA. *Id.* The County declined to ask Mr. Gregory any questions about this document (Tr. 990), and asked Mr. Wendel a limited amount of questions about this document. Wendel 10/25/11 Tr. 128-29. The document identifies the "basic concept" of Columbia Venture's initial "sound financial plan" as seven items, including "... 2. Secure appropriate flood lines from FEMA that would allow Columbia Venture, LLC to retrofit the levees where appropriate, to satisfy the requirements for a certifiable levee at the 500 year level."²⁴ DTE 010. Mr. Wendel testified that he believed DTE 010 to be "an accurate description" of Columbia Venture's initial plan, but was not asked specific questions about this provision. Wendel 10/25/11 Tr. 128-29.

²⁴ It is ironic that the County would point to this document as its primary evidence that Columbia Venture planned to have the flood maps changed before upgrading the Levees yet includes in the RCPO finding that Mr. Gregory's testimony that Columbia Venture always planned to improve its Levees to the 500 year level "not credible." RCPO page 35, footnote 18.

Mr. Wendel, however, testified as follows about DTE 002, a May 27, 1999 letter from Lockwood Greene regarding details about its proposed strategy about providing information to FEMA: "Q. Do you recall this particular approach [in DTE 002] being a departure from what Columbia Venture was planning at the time of purchase of the property? A. I can't comment on that. You know, again, they all run together for me." Wendel 10/25/11 Tr. 48. More generally, Mr. Wendel testified: "Q. At this point in time, had you conducted any sort of analysis of this February 25, 1999 preliminary – A. Once again, it all runs together for me. I can tell you what the final outcomes were and our final decision and the final models that we developed and the final consultants that we hired to offset and counter and address any issues that evolved, but I can't tell you in those segments. I'm sorry." Wendel 10/25/11 Tr. 44.

Columbia Venture freely acknowledges that its levee upgrade plans and strategies evolved over time in response to the actions of both FEMA and Richland County, as well as simply exploring possible options for achieving its goals. For example, because FEMA's regulations regarding a LOMR or CLOMR require the requesting landowner to actually have permits in hand to accomplish a map change (44 C.F.R. §§ 65.5(a)(4)(iii), 65.8), the County's decision of May 1999 not to issue any permits until after the FEMA floodmapping was finished (Tr. 2578-79) removed the possibility of a LOMR based on an upgraded and certified levee (*i.e.* Columbia Venture's plan at the time of purchase) or a CLOMR based on plans for an upgraded and certified levee (another option discussed by Columbia Venture and its consultants in May 1999 – DTE 002). By default and as a result of the County's decision to delay permits, Columbia Venture had to wait on the results of the FEMA mapping process. Tr. 400-01, 987-89. As testified by Columbia Venture's witnesses, this was categorically not its plan at the time of purchase, and had the County endorsed the option of waiting on the results of FEMA's

floodmapping process before taking any action regarding the Levees back in January and February 1999 when this issue came before both the Development and Services Committee and the full County Council, Columbia Venture would not have bought the Property. Tr. 224, 717. Ms. Smith conceded that the County Administrator's decision to postpone permit approvals until after the flood maps are finalized "was the same thing" as the County adopting the option of waiting on FEMA. Tr. 2439.

The County also maintains that S&ME was hired by Columbia Venture for the sole purpose of helping "Lockwood Greene convince FEMA that the Congaree River floodway should be reduced." RCPO page 41. The County's statements ignore the testimony of Mr. Lessley and Mr. Tillotson and other provisions of the documents the County cites in supposed support. Mr. Lessley testified on cross examination as follows:

Q. It's my understanding that S&ME was hired by Lockwood Greene as part of the strategies that they came up with, with Columbia Venture, to get FEMA to recognize the levees and redraw the flood maps in a way that was more favorable to Columbia Venture. Is that your understanding?

A. I don't think - I don't know. Tr. 1154.

Mr. Lessley further testified: "We were engineering a design that would bring the levees into compliance with government requirements." Tr. 1174. Mr. Tillotson testified even more emphatically that S&ME was "hired to design the levees," and, in fact, performed that work. Tillotson Tr. 16, 20, 33.

Additionally, S&ME's earliest reports provide recommendations for establishing "the maximum floodwater elevations for the 100-year return frequency flood event for Levee Section I," followed by establishing "the design crest elevations ... based on the desired protection and water elevations," followed by developing the "design of the remedial repairs and modifications and improvements to Levee Section I." Tr. 1116; PTE 294. While S&ME's work on the Levees

provided valuable information that was later submitted to FEMA for use in its remapping efforts (*see* DTE 002), the County fails to acknowledge that its initial purpose was, as testified by Mr. Tillotson, to improve and certify the Levees. The County also overlooks that CV was working to provide the no-rise analysis critical to approval of a permit to encroach in a regulatory floodway (Tr. 1314), and that both a no-rise analysis and FEMA certification is tailored to the 100-year flood. Tr. 1016-17. It would also be material to providing the required hydraulic and hydrologic analyses to demonstrate the impact (or lack thereof) on the applicable BFEs that a proposed or completed project would have to have under a LOMR or CLOMR application. 44 C.F.R. § 65.6(c)(2)(i).

The foregoing discussion demonstrates that the County's position is contrary to the weight of the evidence. The weight of the evidence convincingly shows that Columbia Venture's plans at the date of purchase were, as Mr. Tillotson wrote:

The property owners intend to take the following steps. 1. The property owners *intend to upgrade the levee system* to meet structural requirements set out in 44 C.F.R. 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 responsibility for operation and maintenance of the levee system in accordance with 44 CFR 65.10. ...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.

PTE 246 (emphasis added). This was Columbia Venture's plan and investment backed expectation. Any delay in Levee improvement only became necessary after Columbia Venture purchased the Property and after the County decided to refuse any permits while the FEMA flood mapping process was ongoing. As Mr. McSwain conceded, that did not occur until August 20, 2001. Tr. 2578-79. Of course, by the time the flood mapping process concluded, the County had amended its ordinances to affirmatively and specifically prohibit the very action that was

essential to Columbia Venture's development – making its Levees higher and wider in order to certify them as providing protection from the base flood and removing the floodway and floodplain designation (and associated restrictions) from its Property.

VIII. The County mischaracterizes Columbia Venture's pre-purchase disclosures of its development plans.

The County states or implies that Burroughs and Chapin/Columbia Venture were not specific in the disclosure of their pre-purchase plans and did not provide the County an adequate opportunity to consider the ramifications of Columbia Venture's proposed development prior to purchase. RCPO pp. 22, 23, 39, 63, 94. As an initial note, the County repeatedly refers to Columbia Venture's plan to build a large development "on the Congaree River floodplain" (RCPO p. 39) or "an entirely new mixed use development in a floodway" RCPO p. 63. These are gross misstatements of fact. At no time did Columbia Venture *ever* propose to build a mixed use development in a floodway or a floodplain. As just discussed, Columbia Venture always intended to build and certify the Levees so that the land protected by the Levees would be removed from both the floodway and the floodplain prior to beginning construction of the development.

The testimony is consistent from both Columbia Venture and County witnesses that Columbia Venture was upfront about its plans to build a substantial mixed use development involving commercial, residential, and recreational uses behind certified levees. Tr. 697-99, 2566-67; Pearce Tr. 14, 57-58. The only County witness to deny that Columbia Venture was upfront about its plans to build behind certified levees is Ms. Smith. In light of the testimony of other County witnesses, Columbia Venture's witnesses, and the information available to Ms. Smith beginning in the spring of 1998 regarding the levee issue, including newspaper articles (PTE 239), correspondence sent or received from the County (PTEs 011, 012, 013, 207), and

specific correspondence addressed to her that she testified that she probably did not read (PTE 236; Tr. 2308-09), Ms. Smith's testimony on this point is not credible or entitled to very little weight.

Further, and in contrast to page 22 of the RCPO, the testimony is consistent that Columbia Venture had extensive materials available in its meetings with County officials and personnel to show its vision for the Property. The County cites Deas Manning's testimony as supposed evidence that Columbia Venture did not have very developed plans prior to purchase. RCPO p. 22 (citing Tr. 550-51). Mr. Manning, however, was testifying about *final* plans: "Q. ... Prior to the purchase of the property, there was no formal detailed plans and specifications submitted to Richland County were there? A. You mean a land plan? Q. No. I'm talking about showing *exactly* what would be built, where when, the details, *the final plans*, specifications for the project. A. There were no details." Tr. 550-51 (emphasis added). Mr. Gregory testified that he took "a land plan" with him in meeting with public officials prior to purchase. Tr. 699. The land plan that Mr. Gregory had was prepared by LandDesign, Tr. 687-89, and included many details of proposed land uses. PTE 264. This is corroborated by Ms. Smith's testimony:

Q. ... And at that meeting [with Mr. Gregory and Mr. Ey], you looked at a concept plan of land use for development of that property, correct? A. I did. Q. It was a bubble map? A. Right. Q. Remember that? A. I do. Q. You know, it showed where they were thinking about putting commercial here, residential here, that kind of thing? A. Exactly. Q. Okay. It showed the roads, too, didn't it? A. It did. Q. And you were very impressed with it, weren't you? A. For the most part.

Tr. 2327-28. This was clearly not the "preliminary sketch plan" and "general terms" the County makes it out to be. RCPO p. 22.

The County also asserts that Mr. Gregory was "vague and nonspecific" in his testimony about his meetings with County officials because he could not recall precise details about the meetings that took place 14 years previously and could not remember conversations verbatim.

RCPO p. 23. Mr. Gregory's testimony indicates otherwise as in many places of this testimony, he gave detailed descriptions of his meetings with county officials. Mr. Gregory recalled meeting "with the county administrator, high-level county staff, including Ms. Taylor. We met with department heads, Knudsen with planning, Pearce [Pearson] in engineering, all of those types of things." Tr. 697. He also testified that he met with Ralph Pearson and Cary McSwain. Tr. 698. "We met with the appropriate county officials, asked them directly what their interpretation of the ordinance was. And the information we received back was that the interpretation and the way they viewed it was a no-rise, similar to the way that FEMA interpreted it." Tr. 705-06. He testified extensively about meeting with Kit Smith and what was discussed during those meetings. Tr. 733-42. He testified that he explained the vision for the property in his meetings with council members in a fashion similar to his courtroom testimony. Tr. 746. "Councilmembers that I can specifically remember discussing this with were Chairman Livingston, Bernice Scott, Buddy Meetze." Tr. 746-47. Mr. Livingston "was enthusiastic about it. He thought it was a wonderful idea. He understood the impact it could have on Richland County and the positives that it would bring." Tr. 886.

IX. The County mischaracterizes the nature and scope of Columbia Venture's pre-purchase due diligence.

The County states or implies that Columbia Venture was ignorant of or affirmatively chose to ignore Richland County's regulations in pursuit of its development plans. RCPO pp. 18, 21, 31, 34, 35, 36, 37, 44, 113, 114. The County implies and concludes repeatedly that Columbia Venture knew or should have known that various county ordinances prohibited building in a floodway. This issue is treated in depth above at Section VI of this Memorandum, and Columbia Venture will not recite all of the evidence that contradicts the County's assertions here. Mr. Gregory's testimony sums up the due diligence on this point nicely: "We got a

consistent interpretation [on the ordinance interpretation] from Richland County officials” in the engineering, planning, and administrator’s office. Tr. 884. “[I]t stands to reason that had we not received the same one, that issue would have been ferreted out to the very end. Prior to closing, we would not have closed if there was an issue with that as it relates to the County.” *Id.*²⁵

The County also makes various statements that Columbia Venture did not intend to comply with Richland County’s levee construction requirements and that its engineers did not know about the levee construction standards. RCPO pp. 31, 34, 35, 36, 37, 44. First, the testimony cited for the proposition that Columbia Venture’s engineers did not know about the County’s levee construction standard does not support that proposed finding, as it is Mr. Gregory’s testimony where he is speculating on what Columbia Venture’s engineers may or may not have known and at what point in time. Tr. 958-59. This does not support the finding that the engineers “were unaware” of the levee standard. Columbia Venture’s actual engineers (Mr. Tillotson and Mr. Hester) both testified that they could not remember when or how they became aware of Richland County’s levee design standard. Tr. 2162-63; Tillotson Tr. 70-72. The testimony in the record simply does not support the County’s construction.

²⁵ The County also states that Mr. Gregory thought that the County could either simply change its ordinances or ignore its ordinances in allowing Columbia Venture to develop. RCPO p. 21. This grossly misstates Mr. Gregory’s cited testimony, which is as follows: “One, we needed to do something that would allow us to get permits, other than going through that type of process. You know, again, Richland County had the ability to -- they had variances that were within their ordinance. We could do that. We could simply have them change the ordinance that they had. That would have been something they could have done. Or it would have been just simply straightforward, they can agree to give us a permit, at which time, these types of things would be immaterial anyway, because we would have a levee upgraded to a certified standard.” Tr. 708-09. Nowhere does Mr. Gregory state or even imply that the County should “ignore its ordinances and just give them a permit to develop.” Further, the plain language of Mr. Gregory’s testimony indicates that he was speaking of permitting behind certified levees, which requires different, and much less onerous, standards than permitting in a floodplain or floodway.

The County ignores the fact that to certify levees under a no-rise analysis, it is essential to have the 100-year flood information and claims that Columbia Venture's plans were "contrary" to Richland County's standards. RCPO pp. 31, 35. As an initial point, it is illogical to say that a 100 year design is "contrary" to the 500 year design. Indeed, Mr. Lessley of S&ME testified that the work associated with the 100 year design would simply need to be expanded and revised to accommodate the 500 year design. Tr. 1141. More substantively, it is undisputed that certification of a levee system pursuant to 44 C.F.R. § 65.10 is premised on the 100-year flood, and the County does not appear to argue (nor could it) that FEMA's certification requirements are not tied to the 100-year flood. The 500-year flood has nothing to do with levee certification. As FEMA itself has recognized, "[t]he NFIP is based upon the 100-year flood as the standard level of risk." PTE 204 at 29. Requiring analyses for purposes of compliance with FEMA's standards "based on a flood less probable than the 100-year event would contradict the NFIP's statutory mandate and be inconsistent with decades of nationwide practice." *Id.* Richland County does not and cannot certify levees, as conceded by counsel for the County. Tr. 2162. Consequently, the work necessary to certify the Levee *must* use the 100-year flood.

The 100-year flood information is also pertinent to the no-rise analysis Columbia Venture was pursuing due to the County's use of the June 5, 1998 revised preliminary FIRM, which placed the Levees in a floodway. Lockwood Greene had opined that "no impact on the direction of the floodway *or on the base flood elevations* would result from the proposed levee modifications." PTE 208 (emphasis added). Lockwood Greene was analyzing the Levee modifications pursuant to a no-rise analysis, which is what Mr. Pearson testified he would need to approve a proposal in the regulatory floodway, and that he would have to have 100-year calculations and information to make such an approval. Tr. 1314. Further, Richland County

itself defines the base flood elevations in relationship to the 100-year flood only. PTE 230 § 8-54(b) & (f) (equating base flood with the 100-year flood). Mr. Barker, the only expert to testify regarding FEMA's hydrology, hydraulics, and no rise studies, opined that the Levees could be upgraded on a no rise analysis and that this would remain true if the Levees were designed to a 500-year standard. Tr. 1244-45.

When placed in the proper context, Mr. Gregory's testimony of the ultimate construction plans for the Levees is consistent with the necessary initial step: engineering sufficient to support certification, which, at that point, included a no-rise. This is not inconsistent with a final design of the 500 year system. Consequently, any suggestion that Mr. Gregory is not credible on this point is belied by the context of the certification requirements vis-à-vis the ultimate plans for the levees as two distinct stages of analysis.

The County states or implies that Columbia Venture did not do thorough due diligence. RCPO pp. 34, 35, 37, 114. The County states that its actions prior to Columbia Venture's purchase could not be construed as making any sort of commitment to Columbia Venture regarding the future of its project. RCPO pp. 22-23. In contrast, the following items demonstrate the County's commitment, as represented to Columbia Venture:

- Ms. Smith demanded \$30 million from the developers. Tr. 738, 2371; PTE 169. Mr. Pearce testified that that was "what made this a very special project." Pearce Tr.46-47. It defies logic that a council member would demand and a developer would agree to such a condition if there was no implied commitment.
- Mr. McSwain chose to use the word "agree" in his letter to Mr. Gregory when describing the County's actions "to work with the development group on issues that are critical to the proposed development such as zoning, tax incentive vehicles and a multi-county business park." PTE 024.
- Both Mr. McSwain and Mr. Livingston similarly chose to use the word "agree" in their February 1999 correspondence to FEMA regarding the County's agreement to take the Levees. PTEs 022, 026.

In addition, the County faults Columbia Venture for not having full blown economic feasibility studies completed at the time of purchase. RCPO p. 34. This ignores Mr. Gregory's testimony as well as documents in Columbia Venture's due diligence file on this issue. Mr. Gregory testified:

The answer to your question is, did we have specific studies done showing [economic feasibility]? The answer is no. But, if I may explain, the experience of the company and the people that we talked to, those are issues that developed well ahead of buying the property. But for our understanding that those things were required and necessary and we had the ability to do it, we would never have come up with a land plan if we were able to do it, because you've got to give a land planner certain information and priority. So those types of things were known ahead of time.

Tr. 860-61. Mr. Gregory also testified that he had a "preliminary financial analysis" prepared by Ron Hendrix, CPA prior to purchase projecting a "very conservative" profit after five years of \$90 million. Tr. 681-82; PTE 264; *see also* PTE 254 ("Columbia Project - Prospective Economic Impact" dated January 30, 1999, and revised February 8, 1999). The appraisal prepared by Jerry R. Adkins dated March 1998 and updated in February 1999 also contains a detailed analysis of potential economic issues. PTE 255.

Finally, the County also characterizes the status of Columbia Venture's way forward with the County as of the date of purchase as "uncertain ... with very little technical data and a complex regulatory scheme." RCPO p. 35. Mr. Gregory's testimony flatly refutes this. In addition to testifying about the due diligence the development group undertook with decision makers at the County level and FEMA to understand and confirm the local and federal regulatory scheme at issue (*see* Sections VI and VII of this Memorandum), he also addressed the "uncertain" issues with the Levees, as well:

Q. But there were uncertainties?

A. Those uncertainties, Mr. Lydon, clearly, only as to time, not as to the – as to any uncertainty as it related to being able to remove – to upgrade that levee and remove it from the floodway.

Q. But my point is, at the time of closing, according to your engineer, there were uncertainties.

A. And those uncertainties were not of significance. They only dealt with timing issues, not any uncertainties relative to our ability to upgrade those levees and do so in a manner that would cause the property behind it that we were purchasing to have all flood hazard designations of any type or style removed, and we would be able to build and develop on that ground, flat.

Tr. 940. Further, as to “uncertainties” regarding the zoning and multi-county business park understandings, Mr. Gregory testified regarding the February 19, 1999 Memorandum of Understanding from Mr. McSwain (PTE 024):

A. This was the best-faith effort. This was just simply good faith and fair dealing between the County and Burroughs & Chapin at the time on what it is that we understood the issues that were on top of the table and how we were going to go about working on them. There were a lot of things that you have to go into a project like that, unknown. Developers do it all the time.

Q. I understand. A lot of uncertainty?

A. That part was uncertain.

Q. That part was uncertain?

A. It was certain we were going to get them. What the final outcome of them would be was the uncertainty. There was no uncertainty as to whether or not both parties intended to do those things.

Q. It was certain that Richland County was going to fund some of the infrastructure through incremental tax growth grants?

A. It was certain that the County was going to work with the developer to work on tax-incentive vehicles, such as a multicounty business park.

Tr. 971-72. Mr. Gregory and his due diligence team had run to ground all of their identified issues prior to closing because, as Mr. Gregory testified, if the team had not been satisfied with the County’s position on their ordinances, the February 2, 1999 resolution, and other due diligence items, Columbia Venture “would not have closed” on the property. Tr. 884.

X. The County’s decision to delay consideration and approval of levee improvement permits until after completion of the FEMA floodplain mapping process prevented Columbia Venture from implementing its original plan.

Any delay in Levee improvement only became necessary after Columbia Venture purchased the Property and after the County decided in May 1999 to refuse any permits while the FEMA flood mapping process was ongoing. As Mr. McSwain conceded, that process did not end until August 20, 2001. Tr. 2578-79. Of course, by the time the flood mapping process concluded, the County had amended its ordinances to affirmatively and specifically prohibit the very action that was essential to Columbia Venture's development – making its Levees higher and wider in order to certify them as providing protection from the base flood and removing the floodway and floodplain designation (and associated restrictions) from its Property.

Columbia Venture's original plan was to upgrade the levee system in phases. Lockwood Greene estimated that "[l]evee section[s] 1 and 2 could be completed and the remapping done in approximately eighteen months." PTE 208 at CV002277. As detailed above at Section VI of this Memorandum, shortly after it purchased the Property, Columbia Venture took actions to execute its plan by hiring S&ME on an expedited basis to provide the necessary geotechnical engineering to evaluate the existing levees and design the upgraded levee system to be constructed by Lockwood Greene. Tr. 1108, 1174, Tillotson Tr. 16, 20, 33. Lockwood Greene also retained the services of the John R. McAdams Company to perform hydrologic and hydraulic engineering necessary to demonstrate that the Levee improvements would not cause a rise in the levels of the base flood. DTE 034. This type of engineering would be required to show a no-rise under 44 C.F.R. § 60.3(d)(3) if the levees were determined to be within a regulatory floodway and also to obtain a revised map under the NFIP regulations via a LOMR. Columbia Venture's plan was to come away with a revised map as part of a LOMR package that showed no BFEs or floodway for the land protected by the upgraded levees and no change in the BFEs or floodway in Lexington County. PTEs 208, 246. Columbia Venture also entertained

amendments to this plan to first seek a CLOMR from FEMA. DTE 002. Lockwood Greene further supplied technical information to FEMA to address perceived errors in its preliminary mapping (e.g. DTE 037) and, prior to June 30, 1999, “[b]egan preparation of documents to be submitted to FEMA in support of a CLOMR (Conditional Letter of Map Revision) which [would] allow the Venture’s development to take place.” PTE 120 at CV012918.

Columbia Venture’s plan was frustrated, however, when the County Administrator and County Engineer decided not to issue any permits to improve the levees while the FEMA flood mapping was ongoing. In order to obtain a CLOMR or LOMR, Columbia Venture needed to obtain permits from Richland County to construct the necessary levee improvements. 44 C.F.R. §§ 65.5(a)(4)(iii), 65.8. The decision by the County not to issue any permits to improve the levees until FEMA issued its Letter of Final Determination, meant that Columbia Venture could not proceed with its original plan, or even a revised, CLOMR-based plan, until after FEMA had completed its flood mapping, which did not occur until August 20, 2001.

The County states: “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. Pl. Exh. 4.” RCPO p. 42. The County ignores, however, the decision by the County Administrator, also made in May, not to issue permit approvals until after the flood maps were finalized. Tr. 2579, 2598-99. The exhibit cited by the County, PTE 004, is the chronology prepared by Mullen Taylor, which records the following events taking place in May 1999:

County initially denies permit for levee improvements because of FEMA’s request that most recent preliminary flood be used for decision making purposes.^[26] The recent map places the levees in the floodway,

²⁶ The County also asserts: “The County followed FEMA’s advice in using the February 25, 1999 Flood Data for permitting purposes. Tr. Vol. 13, p. 2583, line 16 – p. 2585, line 19.”

which requires greater restrictions on construction. But County Administrator makes decision to base County floodplain decisions on 1994 flood map, which is the last map to be finalized by FEMA. This map does not include levees in floodway. Later, the Administrator postpones permit approvals until after the flood maps are finalized.

PTE 004 at DEF-00004861. Mr. McSwain confirmed that the events described in this chronology entry took place during May 1999. Tr. 2579, 2598-99. Under the cited exhibit, therefore, it is clear that a permit application, even if made, would not be approved until after the flood mapping process was finished, which Mr. McSwain confirmed did not occur until August 2001. Tr. 2578-79. The exhibit further reflects that being in a floodway "requires greater restrictions on construction" [e.g., no-rise engineering] but not that being in a floodway prohibited construction, as the County now alleges. PTE 004 at DEF-00004861.

The County also points to a statement in a letter dated April 2, 2001, from Jim Wiseman to council member Bernice Scott that "a CLOMR application could not be provided until after FEMA had finished its remapping process." RCPO page 60. This letter was written after the County Administrator had made the decision not to issue a permit to improve the levees until after FEMA had finished its flood mapping. An application for a CLOMR requires the landowner to have all applicable permits in hand. At this point in time (spring 2001), Richland County would not issue a permit until after FEMA finished its floodmapping. Consequently, it

RCPO p. 45. The cited testimony does not support this statement. The cited testimony only reveals that Mr. McSwain confirmed that FEMA's guidance to the County was what the County should do and that FEMA's guidance focuses on the BFEs. Other evidence shows that the County did not necessarily follow the February 25, 1999 data for permitting purposes for the duration that it was under consideration by FEMA (February 25, 1999 - August 12, 1999). Mr. McSwain testified that he made the decision to use the 1994/95 effective FIRM in May 1999. Tr. 2598-99; *see also* PTE 004 (May 1999) ("County Administrator makes decision to base County floodplain decisions on 1999 flood map, which is the last map to be finalized by FEMA.").

would be impossible to get a CLOMR prior to FEMA's LFD. Further, Columbia Venture does not concede that the statements made on April 2, 2001 regarding the timing of the CLOMR accurately reflect the plan for the Levee upgrade and subsequent remapping in place in early 1999 and at the time of purchase. Once again, the County demonstrates its refusal to acknowledge that Columbia Venture's plans necessarily had to evolve from their well-documented pre-purchase expectations as the County made decision after decision to frustrate Columbia Venture's development plans.

The County also asserts the following in an attempt to argue that neither Mr. McSwain nor Mr. Pearson continued their "no permits for levee improvement" stance after approximately May of 1999:

The minutes [of September 7, 1999] simply state that "it was noted that under the 1995 maps, the County could issue a maintenance permit to maintain the existing levees." Pl. Exh. 123. This statement does not define what "maintenance" means, nor does it say that the County would deny a permit to construct the levees to meet county standards. *See e.g.* Tr. p. 1407, lines 12-17. Mr. McSwain's statement, even if interpreted to mean that the County would not issue a permit for levee improvements, cannot be read to go so far as to create an unyielding policy of the County. ...

Mr. McSwain's statement is not sufficient to find that the County "dug in its heels" and refused to consider a permit application to improve the levees.

RCPO p. 84. Further:

Mr. Pearson's position concerning permitting only refers to his thinking in May through July 1999. No testimony was elicited, nor documents introduced, suggesting that Mr. Pearson maintained his position taken in May 1999 until FEMA's final determination in August 2001, over two years later. Similarly, the County Administrator's decision to postpone permitting decisions until after FEMA finalizes its Flood Maps was a decision made in May 1999. Again, no testimony was elicited, nor documents introduced, suggesting that Mr. McSwain maintained his position taken in May 1999 until FEMA's final determination in August 2001.

RCPO p. 88. These findings are incorrect and contrary to the testimonies of Mr. McSwain and Mr. Pearson. Mr. McSwain testified as follows:

Q. And that last sentence: Later the administrator proposed – postpones permit approvals until after the floodplains are finalized. That’s what Mr. Buckley asked you to do in that letter he wrote you, that we were looking at. ... That’s what he asked you to do. He asked you to – in our opinion, he asked you to not permit levee construction before resolution of all technical issues, correct, sir?

A. That’s correct.

Q. And I think you just said that you – after due consideration – agreed to that request. Now, the technical issues weren’t all resolved until the letter of final determination was issued by FEMA. Is that correct, sir?

A. Resolved to FEMA’s satisfaction that they were the final decision-maker.

Q. And that was August 20th of 2001, correct, sir?

A. I believe that’s correct, yes.

Tr. 2578-79. Mr. McSwain further testified that “[t]he proposal was not to issue any permits for any construction. Q. Any construction? A. Right.” Tr. 2587-88. In addition, Mr. Pearson testified that in May 1999 or shortly thereafter, his office would not issue any permits to improve the Levees until FEMA had issued an LFD or the County Administrator told him otherwise. Tr. 1354-56, 1399. “[O]ur position was that, we either had to have a final determination by FEMA or somebody above me would have to say that we’re going to use some other determination.” Tr. 1393. Mr. Pearson testified that neither Mr. McSwain nor the County Attorney ever told him he could issue a permit for Levee improvements. Tr. 1440.

XI. The County fundamentally misconstrues the nature of the County Council’s February 2, 1999 unanimously passed resolution to accept jurisdiction over and responsibility for operation and maintenance of the Levees.

The RCPO contains factual findings which distort the context and plain language of the County’s February 2, 1999 resolution, by which Richland County Council unanimously agreed to accept operation and maintenance responsibility for the Levees upon certain contingencies. Richland County’s proposed facts ask the court to find that (1) the County’s February 2, 1999

unanimous resolution had no relationship to the County Council's Development and Services Committee's earlier unanimous recommendation that County Council "authorize the Council Chairman or his designee to begin first steps of responsibility and maintenance of the Manning Levee;" and (2) the February 2, 1999 unanimous resolution was essentially a nullity. Richland County's characterization of the background and import of the February 2, 1999 resolution is contradicted by the weight of the evidence, most significantly the language of the resolution itself.

A. The County mischaracterizes the context surrounding the February 2, 1999 resolution.

The RCPO mischaracterizes the context surrounding the February 2, 1999 resolution. RCPO pp. 28, 29, 30, 31. First, it is absurd for the County to contend that the February 2, 1999 resolution was passed in a vacuum, rather than in response to Mr. Knudsen's report and recommendation which the Development and Services Committee unanimously voted to send to the entire County Council for approval. The RCPO boldly asserts:

The recommendations and other analysis of Lockwood Greene's request contained in the County staff report to County Council has no relevance. The resolution adopted by County Council bears no resemblance to the [Development and Services] Committee recommendation, nor does it fall into any of the staff's identified alternatives. Thus, the report does not provide any helpful indication of the County Council's intent at the time.

RCPO p. 28 (citations omitted).

However, it defies logic and common sense to state that Mr. Knudsen's report to the Development and Services Committee, which was unanimously approved by that committee days earlier (PTE 166), had no impact on the County's decision making process.²⁷ If Mr.

²⁷ All but one of the eleven members of the County Council were present at the Development and Services Committee meeting: five who were members of the Development and Services Committee and five who were not members of the committee. CVPO p. 32 (citing PTE 020; Tr. 227-28; Pearce Tr. 26).

Knudsen's report was irrelevant, how would the County Council even understand the import of what it was being asked to do? The suggestion that Mr. Knudsen's report is irrelevant to understanding the resolution proposed by Ms. Smith and unanimously passed by the Council on February 2, 1999, would result in the absurd inference that the Council would not even understand what "levee system" or "area" was to be impacted by the unanimous vote the County took. The County's proposed findings of fact therefore fail to accurately describe the context surrounding the unanimous adoption of the February 2, 1999 resolution, and should be rejected as unsupported by the weight of the evidence.

B. The County's characterization of the February 2, 1999 resolution as essentially meaningless should be rejected as a factual and legal matter.

1. The County erroneously attempts to render the resolution meaningless by misconstruing both the resolution and applicable FEMA regulation.

The RCPO attempts to siphon all import from the resolution by mischaracterizing the FEMA regulation which requires a local jurisdiction to accept maintenance and operation activities in order to have certified levees. The RCPO suggests that the "County agreed to accept this responsibility *if* 44 C.F.R. § 65.10 required Richland County to accept responsibility for levee maintenance," and the FEMA regulation doesn't specifically require *Richland County* (as opposed to another local jurisdiction) to accept responsibility. RCPO p. 29. Presumably, the County reasons that the resolution is therefore a nullity. Such an interpretation, however, would require a tortured reading of both the February 2, 1999 resolution and the FEMA regulation which the resolution was intended to address. The entire point of 44 C.F.R. § 65.10 is to provide for the *certification* of the levees, which is precisely what the development group wanted to do. To be a certified levee, the operation and maintenance activities of the levee "*must* be under the jurisdiction of a Federal or State Agency ... or an agency of a community participating

in the NFIP.” 44 C.F.R. § 65.10(c) & (d) (emphasis added). There is no ambiguity in the FEMA regulations that to have a certified levee, the local jurisdiction is, in fact, required to accept the maintenance and operation activities. The County understood that the developers’ goal was to build a development behind certified levees. Tr. 2566-67; Pearce Tr. 14, 57-58. Richland County fully exercised its “discretion” to accept responsibility for levee maintenance when it voted unanimously on February 2, 1999, to do so. See PTE 147.

Indeed, both Mr. Livingston and Mr. McSwain wrote to FEMA in February 1999, as follows: “Richland County **has agreed** to accept responsibility for local inspection and enforcement of the operations and maintenance plan for the levee system as submitted by the owner and approved by FEMA contingent upon: [4 contingencies]” (Livingston; PTE 0220) and “Richland County **has agreed** to be the inspector, provide monitoring and review and enforcement after the rebuilding of the levees has been approved and accepted” (McSwain; PTE 026) (emphasis added in bold). The County attempts to downplay Mr. Livingston’s letter by noting that “[n]othing in County Council’s minutes authorized Mr. Livingston to write the letter.” RCPO p. 31. However, Mr. McSwain, the then-County Administrator, testified that Mr. Livingston, as chairman of the County Council, was authorized to write the letter. Tr. 2562.

2. The County’s characterization of the February 2, 1999 resolution as something “less than” an agreement should be rejected.

Richland County next attempts to downplay the February 2, 1999 resolution by characterizing it as something less than an agreement. The County notes that “Mr. McSwain 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.’” RCPO p. 30. The County also points out that “Mrs. Smith testified that the

resolution gave the County time to fully explore issues such as liability and financing.” RCPO p. 30.

Columbia Venture does not dispute that Mr. McSwain and Ms. Smith so testified. However, their testimony is simply not supported by the plain and unambiguous language of the February 2, 1999 unanimous resolution. PTE 147 at DEF-00012032.

The only portion of the resolution to which Mr. McSwain’s testimony about bringing parties together could arguably apply is contingency number 4, which states: “[t]he parties, including Richland County, the City of Columbia and the developers, resolve the issues of the performance and funding of the operation and maintenance plans.” PTE 147. Mr. Gregory, however, testified that the development group would have been willing to absorb the cost of the maintenance responsibility, if necessary, which was estimated to be approximately \$174,500 per year. Tr. 741. Importantly, no other “parties” other than the “property owners” were involved in the necessary first step of “upgrad[ing] the levee system to meet FEMA standards.” PTE 147. The full burden of that initial step was placed on the property owners. Mr. McSwain’s testimony here also conflicts with his characterization to FEMA on February 26, 1999, of what Richland County had *agreed* to do. PTE 026. As for Ms. Smith’s testimony, the word “liability” is not even mentioned in the resolution. The County’s *post hoc* characterizations of the resolution should be rejected as contrary to the resolution’s plain language.

The County also attempts to make hay of testimony from Mr. Gregory that the resolution was not an ordinance and not a contract. RCPO p. 29. However, a complete picture of Mr. Gregory’s testimony is that the County’s actions manifested an intent to enter into a unilateral contract: “Q. If I offer a reward for the return of my lost dog for \$100, and somebody brings him back, I owe them \$100; don’t I? A. You do. Q. Now, isn’t this analagous to that? If you

improve the levees, I'll take the maintenance of them, I will accept the maintenance of them. Isn't that analogous to that? A. Yes, sir." Tr. 1019. The County, however, by its actions, prevented Columbia Venture from being able to perform its part of the bargain.²⁸ Mr. Gregory also testified:

[A] We came in good faith to Richland County, and I think, at a bare minimum, you know, we had a right to believe that they would be truthful and fair in their dealings with us, as we were with them. I do not think that's an unreasonable thing to assume from one of the seats of government in the state capital in the center of the state.

Q. Are you saying [Richland County] was not truthful with Burroughs & Chapin?

A. I'm saying that they did not follow through on the things they agreed to do with Burroughs & Chapin.

Tr. 877. The Court should not adopt the County's characterizations of the February 2, 1999 unanimous resolution agreeing to accept responsibility for operation and maintenance of the Levees.

3. The County ignores that Columbia Venture was prepared to meet all the contingencies for County acceptance of Levee responsibility, but for the County's actions.

Richland County also attempts to downplay the significance of the February 2, 1999 resolution by mischaracterizing the nature of the contingencies under which the County agreed to accept responsibility for the Manning Levee. Richland County asserts that "[t]he contingencies listed in the resolution were not intended to be completed in the order they were listed" and that

²⁸ Cf. *Continental Mortgage Investors v. Quail Run Associates*, 280 S.C. 409, 417, 312 S.E.2d 272, 277 (Ct. App. 1984) ("It is settled that a party who precludes the other from performing under the contract cannot avail himself of such non-performance.").

“[t]here was no certainty that any of the contingencies listed in the resolution could or would be met.” RCPO p. 30. These characterizations are contrary to the evidence.

The testimony cited by the County for the proposition that “the contingencies were not intended to be accomplished in the order listed” is the opinion testimony of Ms. Smith who, as referenced above, provides a tortured reading of the resolution that is contradicted by its plain language. The only way that the resolution makes sense is if the first listed contingency of “[t]he property owners upgrade the levee system to meet FEMA standards” happens first. PTE 147. The second contingency (“the property owners prepare all required documentation, including operation and maintenance plans”) and third contingency (“certification that the levee system, as upgraded, meets FEMA standards”) are subsets of the “FEMA standards” referenced in the first contingency and would be accomplished in complying with FEMA standards. It defies logic to have the fourth contingency (“[t]he parties, including Richland County, the City of Columbia and the developers, resolve the issues of the performance and funding of the operation and maintenance responsibility”) not occur until after the upgrade is well underway, because some of the details required for the performance and funding of operation and maintenance would logically only become known in the detailed plans for upgrading and the construction process. As Mr. Manning testified, “you can’t get to [the fourth] step without the other step being done.” Tr. 600. The fifth contingency (“The County’s acceptance of responsibility terminates if the developers of the area do not invest at least \$30,000,000.00 within ten years of the date of the adoption of this motion.”) necessarily comes last.

With regard to the County’s language regarding uncertainty, this proposed finding of fact ignores Mr. Gregory’s testimony that Burroughs and Chapin was prepared to meet all of the contingencies listed, including funding the maintenance suggested under the fourth contingency

if necessary. Tr. 738-41. It also ignores that only Richland County could issue the necessary permits to allow Columbia Venture to fulfill the first contingency of upgrading the Levees, and that it refused to do so.

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

Richland County contends that any improvements to the Levees would affect the floodway in Lexington County, thus rendering the Green Diamond Project impermissible according to FEMA regulations. RCPO pp. 40, 45, 120. The County also suggests this was of concern to Lexington County officials. RCPO p. 45. Finally, the County implies that Columbia Venture knew and assumed this risk when it purchased the Property, and actively attempted to influence the FEMA floodplain mapping process to avoid this.

To begin this argument, the County claims to paraphrase the testimony of Doug Wendel: "Mr. Wendel understood that, if the levees remained in a floodway, any improvements to the levee would push a larger floodway onto Lexington County. Wendel Dep. p. 193, lines 12-15; p. 194, lines 12-16." RCPO p. 40. However, the cited testimony says nothing about improving the levee and pushing a larger floodway onto Lexington County. The cited testimony instead reads as follows:

I guess the ambush question, Tommy, going back to that, we thought we had the county, FEMA, us, everybody in agreement. And then comes out with a different set of situations on the map.

Q. So as of March 29, 1999, who did you feel like was ambushing Columbia Venture?

A. Well, we though[t] we had agreement by all parties at that time. Then when a new map came out, we questioned what happened.

Wendel Depo. 7/12/11 Tr. 193-94. To the extent the citation is a typographical error, Columbia Venture cannot find any other testimony of Mr. Wendel to corroborate the County's proposed finding of fact.

As to the technical substance of whether or not Levee improvements would increase flooding in Lexington, in all of FEMA's pertinent flood mapping of Lexington County, FEMA assumed that the Levees would hold in determining the BFEs and floodway for Lexington County. Tr. 1242-45, 2704-09, 2724-25. Therefore, certification of the Levees would not cause a rise in the BFEs in Lexington County. Lockwood Greene recognized this fact prior to purchase (PTE 208), and Lexington County Council also advocated for using the Lexington model (with the Levees acting as certified levees) in determining the BFEs and floodway for Lexington County. PTE 542. Consequently, to the extent anyone was concerned with the potential flooding in Lexington as a result of the Levee upgrades, those concerns were apparently alleviated to the satisfaction of the Lexington County Council when, on November 14, 2000, that body "considered the long range economic implications of the floodway elevations and the model prepared by FEMA configuring the proposed floodway as it affects Lexington County and the economic development opportunities" and "the critical impact, both commercially and residentially, of these elevations and floodways on the wastewater treatment facilities serving Lexington County and this region." PTE 542. The "Lexington County Council request[ed] that FEMA's Notice of Final Determination reflect a floodway for property in and on the Lexington County side of the Congaree River that is determined using the Lexington BFE HEC 2 model." PTE 542. The evidence is undisputed that the "Lexington BFE HEC 2 model" to which this resolution refers modeled a scenario setting the BFEs and floodway for Lexington based on the assumption that the Manning Levees would hold and that water would not flow behind the Levees. Tr. 1242-45, 2704-09, 2724-25. The effect of this model is the same as assuming that the Manning Levees were certified, and that water will not flow behind the Levees. See Tr. 1201-02. As Mr. Hester testified, the effect of Levee certification would be to remove the

Richland County BFEs from behind the Levee with no impact on Lexington County. “Since the Lexington side of the river was already set with the levee being in, it was pretty much already done. ... On the Richland side once you removed the flood elevation on that side, it would not appear on the Richland side. The BFEs – you know once you removed it and certified the levees, the BFEs would not appear behind the levee.” Tr. at 2183. Consequently, Lexington County’s concerns with the improvement of the Manning Levees were subsequently resolved long before FEMA’s LFD in August 2001.

This above discussion of Lexington County’s official actions demonstrates that Richland County’s assertion that “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,” RCPO p. 45, is entirely unavailing, if not disingenuous.

XIII. Columbia Venture’s Green Diamond Project was not contingent upon the receipt of multi-county business park bond financing.

The County misconstrues two fundamental points about Columbia Venture’s intentions for the multi-county business park financing. First, the County fails to understand that the receipt of multi-county business park financing was not an impediment to the development going forward. Mr. Wendel testified that although a multi-county business park represented an attractive alternative for both the County and Columbia Venture, the feasibility of the project going forward did not hinge on the multi-county business park issue. Wendel 7/12/11 Tr. 125-26. He testified that “I don’t think [the tax incentive bond package] was critical [to Columbia Venture’s purchase of the property], but obviously from a developer’s viewpoint and from the county’s viewpoint, that would allow us to probably accelerate the project and it enhanced the benefits of both groups.” *Id.* The probable receipt of multi-county business park financing was, however, engendered by Mr. McSwain’s Memorandum of Understanding (PTE 024), which, as

Mr. Wendel testified “[a]s an old county administrator” and current developer, gave Burroughs and Chapin a “good comfort level” that “there was going to be give and take on those things, but the process was going to take place and be a positive outcome.” Wendel 7/12/11 Tr. 162-65. Mr. Gregory testified similarly that he understood that Columbia Venture and the County were to work together in good faith pursuant to the Memorandum of Understanding. Tr. 766-67. The County already had a multi-county business park set up with Fairfield County and was, therefore, well-versed in the requirements and contours of the multi-county business park financing vehicle. Tr. 2417-20, 2568.

Second, the County implies throughout the RCPO that Columbia Venture always “expected” to fund the costs of levee improvements through the multi-county business park because it could not afford to fund the levee improvements itself. RCPO pp. 35, 111. This is not true. Mr. Wendel (Wendel 7/12/11 Tr. 125-26), Mr. Tillotson (Tillotson Tr. 43), and Mr. Gregory all testified that Columbia Venture was prepared to pay the cost of improving the Levees, whether that stayed at the estimated \$12 million or even much higher. As Mr. Gregory testified: “If it [the cost of levee improvements] had gone to 30 million, they [Columbia Venture] would still have updated the levees based on the opportunity behind them to be able to build flat.” Tr. 958. Further, Lockwood Greene prepared a “cost range and a completion date range for the upgrade and remapping activities,” dated February 17, 1999, which does not mention any multi-county business park financing or, indeed, any payments for the improvements beyond Columbia Venture itself. PTE 208.²⁹

Columbia Venture’s actions shortly after purchase confirm that it did not initially plan on securing multi-county business park financing prior to constructing the upgraded Levees. It

²⁹ Even Ms. Smith testified that it was “months down the path” that Columbia Venture requested any potential County funding for the Levee improvements. Tr. 2345.

engaged S&ME in early March 1999 and began paying S&ME for levee design work shortly thereafter, paying that company \$144,969.62 in 1999 alone. PTE 521 at CV004409. A potential timeline for the project prepared in the summer of 2000 did not even anticipate the multi-county business park ordinances going before County Council until November 2000. DTE 137 at DEF-00001435. In addition, it was not until April 2001 that Columbia Venture submitted its various draft zoning, infrastructure financing, and levee ownership structure documents. PTE 581 at CV005581-82 (listing drafts of the development agreement, zoning ordinance, Green Diamond Design Guidelines, Infrastructure Agreement, and Proposed Structure for Levee Ownership, Maintenance and Liability Assurances; CV005657-76 (draft development agreement); CV005678-95 (draft zoning ordinance); CV005716-53 (preliminary design guidelines); CV005829-42 (draft infrastructure agreement); CV005917-19 (levee structure).³⁰

Columbia Venture freely admits that as time passed after the County delayed consideration of permits to upgrade the Levees that Levee improvement funding was eventually rolled into the multi-county business park request. However, as is a theme throughout the RCPO, the County fails to consider the changing circumstances from February 19, 1999, to February 20, 2002, due to the County's shifting positions and the evolution of Columbia Venture's plans in response.

The County also seems to imply that Columbia Venture's approach to multi-county business parks was novel or unsupported by the law. RCPO p. 67. However, nothing about the fundamentals of Columbia Venture's plans had changed from the time Mr. McSwain wrote the Memorandum of Understanding to Mr. Gregory on February 19, 1999, "agreeing" to "work with

³⁰ On page 64 of the RCPO, the County claims that Columbia Venture did not submit any of these documents. There is little reason to believe this because the version of *The Simple Truth About Green Diamond* introduced by Columbia Venture (PTE 581) is a 363 page document with drafts of all of these documents.

the development group on issues that are critical to the proposed development such as zoning, tax incentive vehicles and a multi-county business park.” PTE 024. Columbia Venture had told the County beginning months before it purchased the Property that it sought to upgrade and certify the Levees and thereafter build a substantial, multi-use development behind the certified Levees. Mr. McSwain testified that he knew this basic plan prior to Columbia Venture’s purchase of the Property. Tr. 2566-67. Consequently, at the time he wrote the Memorandum of Understanding, Mr. McSwain knew that any multi-county business park financing would be going to a real estate development – the precise sort of development the County now says it was not sure could legally receive this financing. RCPO p. 67. While the contours of Columbia Venture’s request for multi-county business park financing changed over time (e.g., from financing the Levee upgrade itself to including that in the multi-county business park package), the fundamentals of the development plan never changed. Consequently, it was the *County* who changed its position on the availability of multi-county business park financing to a group like Columbia Venture after Columbia Venture purchased the Property and in contrast to its written pre-purchase communications.

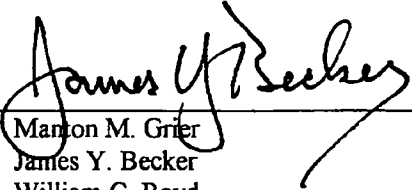
CONCLUSION

For the foregoing reasons, the findings of fact and conclusions of law advanced in the RCPO are contrary to the great weight of the evidence and to the law applicable to Columbia Venture’s regulatory takings claim. Columbia Venture’s Proposed Order should be adopted in full.

Respectfully submitted,

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March 8, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Columbia Venture, LLC,	)	Civil Action No. 2010-CP-40-8943R
	)	
Plaintiff,	)	
	)	DEFENDANT'S MEMORANDUM
vs.	)	IN OPPOSITION TO PLAINTIFF'S
	)	PROPOSED ORDER
	)	
Richland County,	)	
	)	
Defendant.	)	

In reviewing Columbia Venture's Proposed Order (also referred to as "CV Proposed Order"), it is apparent that the parties have widely divergent views of the facts¹ and the law. The County's Proposed Order is well-supported by the facts and rests upon sound reasoning consistent with established law. In contrast, as this memorandum will demonstrate, Columbia Venture's Proposed Order ignores important facts, distorts facts, or relies on irrelevant facts, and asserts theories of regulatory takings law that do not comport with well-established jurisprudence.

1. COLUMBIA VENTURE HAS FAILED TO ESTABLISH A RIPE CLAIM

Columbia Venture's Proposed Order states that its regulatory takings claim is ripe due to the unambiguous floodway prohibition in the County's Stormwater Ordinance, which Columbia Venture claims relieved it of any obligation to seek a variance from the floodway prohibition. CV Proposed Order, p. 139. Columbia Venture's legal conclusion is in error. A plaintiff may

¹ Where the County's Proposed Order contains a finding of fact relevant to arguments herein, this memorandum cites to the finding of fact. Otherwise, the record of evidence is cited in support of facts not included in the County's findings of fact.

avoid the requirement of submitting even a meaningful application if the regulations at issue do not confer any discretion to permit development, or the permissible uses of the property are known to a reasonable degree. In *Palazzolo*, the regulatory scheme at issue prohibited filling of wetlands. *Id.* However, the regulations contained a special exception whereby an applicant could escape the prohibition. *Id.* The defendant argued that the plaintiff's regulatory takings claim was unripe because it had failed to seek a special exception from the regulation's general prohibition against filling wetlands. *Id.* However, because the defendant's regulations concerning criteria for obtaining a special exception were interpreted in a manner that made approval of a special exception impossible under the defendant's particular circumstances, the court concluded that the plaintiff's claim was ripe. *Id.* at 620. Columbia Venture ignores this important distinction.

Here, the County's Storm Drainage and Floodplain Overlay Zoning District, as a general rule, prohibited construction in a floodway. Nevertheless, both ordinances provided a means to obtain a variance from this prohibition. Unlike the facts in *Palazzolo*, the County had not interpreted its variance provisions in a manner that would deny Columbia Venture the ability to meet the criteria for a variance. Further, the plain language of the variance provisions does not support any contention that it would have been impossible for Columbia Venture to obtain a variance. Under the variance provisions, Columbia Venture could have requested a variance from the floodway prohibitions in both the Floodplain Overlay Zoning District and the Stormwater Ordinance. It could have requested that the County apply FEMA's "no-rise" standard to its proposed levee construction. The County possessed the discretion to grant this variance request. Columbia Venture made no effort to seek a variance. *Palazzolo* does not excuse Columbia Venture from seeking variances.

Moreover, Columbia Venture mistakenly calls the County's ripeness defense an affirmative defense, which it is not. Under Rule 8(c) of the South Carolina Rules of Civil Procedure, ripeness is not identified as an affirmative defense. In *FMI, Inc. v. RMAX, Inc.*, an affirmative defense was defined as follows:

An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action. In other words, it assumes all elements of the plaintiff's case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable. On the other hand, where the defendant pleads special matter that denies an element of the plaintiff's cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case. *FMI, Inc. v. RMAX, Inc.*, 286 S.C. 343, 347, 333 S.E.2d 360, 363 (Ct. App. 1985).

Columbia Venture bears the burden of proving that a regulatory taking occurred. Without a final decision from the government, "the extent of the restriction on property is not known and a regulatory taking has not yet been established." *Palazzolo*, 533 U.S. 606, 621, (2001). Thus, a ripeness argument does not assume that a taking has occurred but the County is not liable. Ripeness constitutes an element of Columbia Venture's claim. In a regulatory takings claim, the plaintiff bears the burden of establishing a ripe claim. *McGuire v. United States*, 2013 U.S. App. LEXIS 3608 (Fed. Cir. 2013). Columbia Venture has failed to demonstrate that it obtained a final decision from Richland County or that obtaining such a decision was futile. It has also failed to prove that any extraordinary delay in County decision-making ripened its claim. As a result, Columbia Venture's regulatory takings claim is unripe and must be dismissed.

2. COLUMBIA VENTURE'S ALLEGED PROPERTY INTERESTS ARE MISCHARACTERIZED OR IN ERROR

Government action can effect no taking unless it has deprived an owner of a property interest. *Hardin v. S.C. Dep't of Transportation*, 371 S.C. 598, 609, 641 S.E.2d 437, 443 (2007). A threshold inquiry in a regulatory taking is whether the property interest affected is inherent in

the plaintiff's ownership rights or completely dependent upon regulatory licensing. *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012); *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 148-149, 580 S.E.2d 116, 119 (2003); *Rick's Amusement, Inc. v. State*, 351 S.C. 352, 359, 570 S.E.2d 155, 158-159 (2001). "Background principles of State property and nuisance law inform this inquiry." *McQueen*, at 149, 119. A court must determine whether the asserted property right is "one of the sticks in the bundle of rights that inhered in ownership of the underlying res." *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012); see also *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 (4th Cir. 1998) (defining classic property rights as rights of possession, use, and disposition).

a. Columbia Venture has no protected property interest under common law to improve its levees

Columbia Venture asserts that it has a common law property right to remove surface water from its Property, and the County has interfered with this alleged property right. Columbia Venture has no property right to fend off floodwater by improving its levees.

A person who owns property contiguous to a natural watercourse is called a riparian owner and possesses certain property rights relating to the natural watercourse. *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 107, 552 S.E.2d 778, 784 (Ct. App. 2001). Columbia Venture's Property is located adjacent to the Congaree River, which, under normal circumstances, would confer upon Columbia Venture a riparian right to build levees along alongside a river to hold back floodwaters rising from a river. *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 641-642 (1911); *Ballentine v. Hammond*, 68 S.C. 153, 159, 46 S.E. 1000, 1003 (1904); *Mason v. Apalache Mills*, 81 S.C. 554, 563, 62 S.E. 399, 402 (1908). This right may be exercised so long as the levee causes no injury to other riparian owners. *Johnson v.*

Williams, 238 S.C. 623, 633, 121 S.E.2d 223, 228 (1961); *see also* S.C. Code Ann. § 49-11-10 ("No person shall be permitted or allowed to make or keep up any dam or bank to stop the course of any waters so as to overflow the lands of another person without the consent of such person first had and obtained nor shall any person be permitted or allowed to let off any reserved water to injure the crops upon the grounds of other persons."). Indeed, a riparian owner has a right to compel the removal of a levee constructed by another riparian owner that causes flooding. A. Dan Tarlock, *LAW OF WATER RIGHTS AND RESOURCES*, § 3:12, p. 36 (West 2012).

However, riparian rights may be severed from one's property rights by the grantor's exception or reservation in the deed of conveyance. *McAdams v. Dagit Bros. Holding Co.*, 2010 N.J. Super. Unpub. LEXIS 309 (App. Div. Feb. 17, 2010); *Thurston v. Portsmouth*, 205 Va. 909, 912, 140 S.E.2d 678, 680 (1965); *see also* S.C. Code Ann. § 27-7-20 (stating that nothing in the State's form of deed restrains parties from "inserting any other clause in conveyances, as may be deemed proper and advisable by the purchaser and seller."). The grantors of the general warranty and limited warranty deeds of conveyance to Columbia Venture all expressly excepted riparian rights from the property interests conveyed. County Findings of Fact ¶ 70 and ¶ 71. Consequently, Columbia Venture has no common law riparian right to construct or improve levees along the Congaree River.

Columbia Venture refers to a right to fight off surface water as providing a basis for its claims. *See* CV Order, p. 112-113. Water in a river that overtops its banks and floods an adjoining property is considered to be waters of a natural watercourse, not diffused surface waters. *Johnson v. Williams*, 238 S.C. 623, 634, 121 S.E.2d 223, 228 (1961). In *Jones v. Seaboard Air Line R.R. Company*, this rule was explained at length:

The flood water of a river is not usually surface water, although spread out over the adjacent lands. The test is thus stated in 13 Am. & Eng. Ency., 687: "Whether

the water from the overflow of streams is to be considered as still a part of the water course or to be treated as surface water, is the subject of diverse opinions; but the most satisfactory rule which has been evolved makes its character depend upon the configuration of the country and the relative position of the water after it has gone beyond the usual channel. If the flood water becomes severed from the main current or leaves the same never to return, and spreads out over the lower ground, it becomes surface water. But if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel presently to return, as by recession of the waters, it is to be regarded as still a part of the stream. *Jones v. Seaboard Air Line R.R. Co.*, 67 S.C. 181, 198, 45 S.E. 188, 194 (1903).

Columbia Venture contends that, under the common enemy rule, it has a right to improve its levee in order to prevent diffused surface waters from even entering its Property. Even considering the law of diffused surface waters, our court holds that a landowner's right to exclude surface water does not give him a right to construct an embankment such as a levee to prevent surface water from entering his land, thus backing up diffused surface water on another's land. *Brandenberg v. Zeigler*, 62 S.C. 18, 24, 1901 S.C. LEXIS 7, 11 (1901); *see also Holman v. Richardson*, 115 Miss. 169, 180, 76 So. 136, 137 (1917) (... "the appellant is without right to prevent this surface water from crossing her land in a diffused state by means of a brick wall, thereby causing it to pond on appellee's land."). Columbia Venture's so-called property right to exclude diffuse surface waters by improving its levees does not hold up. Columbia Venture has no such common law right.

For floodwater that does not eventually recede back into the banks of a river, and thus spreads out over the ground, such diffused surface water becomes the property of the landowner. *Brandenberg v. Zeigler*, 62 S.C. 18, 24, 39 S.E. 790, 792 (1901). Under the facts of this case, Columbia Venture's existing levee would likely sever floodwater from the Congaree, thus making water lying upon Columbia Venture's Property diffused surface water. As owner of the diffused surface water, a property owner may dispose of diffused surface water as he sees fit without liability, so long as the disposal of surface water does not cause a nuisance or cast the

water in concentrated form to the injury of others. *Lucas v. Rawl Family, Ltd. P'shp*, 359 S.C. 505, 509, 598 S.E.2d 712, 714 (2004). However, the common enemy rule is not a property right in and of itself; it is more accurately described as a rule "addressing tort liability for obstructing and diverting the flow of diffused surface water." *M & M Corp. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 260, 701 S.E.2d 33, 35 (2010).

Thus, Columbia Venture's real complaint is that the County has prevented Columbia Venture from excluding diffused surface waters, whether during a flood or ordinary rain event. Ironically, Columbia Venture's existing levees, which run parallel to the Congaree River and Gills Creek, serve to hold diffused surface water onto its property by preventing water from naturally draining into the Congaree or Gills Creek. In spite of its existing impediment, Columbia Venture could combat the surface water upon its land by constructing a drainage system providing controlled detention and release of surface waters from its Property, through or under its levees, into the Congaree or other drainage channel. It could pump water off its Property and into the Congaree or other drainage channel. Nothing about the County's ordinances interferes with Columbia Venture's common law right to exclude diffused surface water.

b. Columbia Venture does not possess an unfettered right to use its Property to its highest utility

South Carolina courts have recognized that, "[t]he right of a citizen to engage in lawful business, to make contracts, and to dispose of his property, is not absolute; is it subject to regulation and control by the state in the exercise of its police power." *Gwynette v. Myers*, 237 S.C. 17, 24, 115 S.E.2d 673, 676 (1960); *see also* ("It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long

recognized, some values are enjoyed under an implied limitation and must yield to the police power.”).

Columbia Venture claims that fee simple ownership in its Property confers an unfettered right to use its Property to its highest utility. See CV Proposed Order, p. 94. In support of its proposition, Columbia Venture quotes the following phrase from *City of Myrtle Beach v. Juel P. Corp & Gay Dolphin, Inc.* recognizing “the common law right to use private property so as to realize its highest utility.” 344 S.C. 43, 47, 543 S.E.2d 538, 540 (2001). *Gay Dolphin* is not a regulatory takings case. At issue in *Gay Dolphin* was interpretation of an ordinance. *Id.* The full sentence from *Gay Dolphin* from which Columbia Venture only cites a phrase states that “ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose.” *Id.* In *Denene v. City of Charleston*, the court put *Gay Dolphin* in its proper perspective, stating that “while the Court in *Gay Dolphin* did hold that ordinances in derogation of the natural rights of a person over their property are to be strictly construed, the case did not involve equal protection and did not involve the health, safety, or welfare of the general population.” 359 S.C. 85, 92, 596 S.E.2d 917, 921 (2004).

In constitutional challenges to ordinances, it is well settled that the government’s exercise of police power may indeed impair the market value of property and such impairment does not necessarily rise to the level of a compensable taking. See *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 347 (1986) (“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.”); *Kiriakides v. Sch. Dist. of Greenville County*, 382

S.C. 8, 16, 675 S.E.2d 439, 443 (2009) ("The impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking."); *Woods v. State*, 314 S.C. 501, 504, 431 S.E.2d 260, 261 (Cl. App. 1993) (stating that loss in value "must be different in kind and not merely in degree from that sustained by the public generally."). Thus, Columbia Venture's attempt to claim a broad unrestrained right to use its Property to its highest utility is not consistent with the law of regulatory takings.

3. COLUMBIA VENTURE'S CLAIMS THAT THE COUNTY THWARTED ITS EFFORTS TO OBTAIN A PERMIT IS NOT SUPPORTED BY THE FACTS

Columbia Venture repeatedly claims that the County took steps to thwart Columbia Venture from obtaining a land disturbance permit to improve the levees, thereby preventing it from meeting FEMA's levee certification requirements. See CV Proposed Order, pp. 111, 119, 133, 136, 137. For whatever reason Columbia Venture turns to this allegation - whether to attempt to excuse its failure to obtain a final decision or to demonstrate bad faith - its assertion is simply not supported by the facts.

As explained in the County's Proposed Order, the statements made by Mr. McSwain and Mr. Pearson in May 1999 concerning delay of permitting decisions concerning the levees cannot trump the mandatory review and approval provision within the Storm Drainage Ordinance. See County Proposed Order, pp. 88-89. Likewise, Mr. McSwain's statement that a maintenance permit could be issued to Columbia Venture under the August 12, 1999 preliminary revised Flood Map, even if interpreted as a decision not to issue a permit for levee improvements, would also be trumped by the mandatory review and approval provision within the Storm Drainage Ordinance. From August 12, 1999 to August 20, 2001, there was no regulatory floodway landward of the levees, meaning that Columbia Venture's Property was not subject to the Floodway Provisions within the County's Floodplain Overlay Zoning District or the Storm

Drainage Ordinance. Thus, during this time period, Columbia Venture could have submitted a land disturbance application to the County but chose not to.

On April 17, 2001, the County enacted its Stormwater Ordinance. The Stormwater Ordinance prohibited construction in a floodway unless a variance was obtained. On May 15, 2001, Columbia Venture petitioned the City of Columbia for annexation. On August 20, 2001, FEMA issued its final determination of Flood Data. Approximately 70% of Columbia Venture's Property was within a regulatory floodway. At this point, the County's Floodway Provisions within the Stormwater Ordinance and Floodplain Overlay District would have applied to 70% of Columbia Venture's Property. Both of these ordinances contained variance provisions whereby Columbia Venture could seek to obtain permits to improve its levees under a no-rise standard. Columbia Venture made no effort to obtain a variance. There is no evidence in the record remotely suggesting that the County attempted to block Columbia Venture from seeking a variance.

In fact, the County made an overture to Columbia Venture to revise its Stormwater Ordinance to accommodate Columbia Venture without even going through a variance process. During County Council's adoption of the Stormwater Ordinance in March and April 2001, Columbia Venture was assured that, once it submitted a formal development proposal, the County would revisit the floodway prohibition in the Stormwater Ordinance if needed. County Finding of Fact ¶ 188. Columbia Venture acknowledged and accepted this assurance. *Id.* Columbia Venture did not present to the County a proposed development agreement or any application. County Findings of Fact ¶ 256 and ¶ 257.

Instead, after August 20, 2001, Columbia Venture decided to pursue an arrangement with the City of Columbia to upgrade Levee Section 1. County Findings of Fact, ¶ 243, ¶ 244. This

plan involved the City of Columbia contributing \$8,750,000.00 to construct the levee upgrade, bearing the engineering costs of preparing a CLOMR, and submitting the CLOMR to FEMA. *Id.* at 244. A non-profit corporation would be formed to construct the levee. *Id.* The City would accept the responsibility for operation and maintenance of the upgraded levee. *Id.* Columbia Venture would offer dirt and land to the City of Columbia in exchange for annexation and a development agreement. *Id.* A special tax district would be formed to assess property owners for the cost of levee maintenance. *Id.* Apparently, the City declined Columbia Venture's offer. County Finding of Fact ¶ 247.

Nothing in the record suggests that Columbia Venture's failure to follow through with its grandiose and risky plan had anything to do with actions of Richland County. Instead, Columbia Venture's gamble on the Property simply failed to pay off. Its gamble failed because FEMA's restudy took far longer than it expected due to two rounds of administrative appeals, including Columbia Venture's own appeal. County Finding of Fact, ¶ 126, ¶ 128, ¶ 129, ¶ 145, ¶ 151. Its financial plan anticipated selling Mr. Manning's repurchased shares in Columbia Venture at a profit, thereby giving Columbia Venture a cash infusion to proceed with development. County Finding of Fact, ¶ 142. Columbia Venture, however, failed to attract an investor in light of the uncertainty engendered by FEMA's restudy. County Finding of Fact, ¶ 142, ¶ 62. As a result, Columbia Venture was forced to saddle itself with approximately \$10 million dollars in debt in order to repurchase Mr. Manning's shares and pay for expensive consultants, lawyers and engineers working to fight FEMA while at the same time spinning a rosy picture of how building a massive development on a floodplain was a great idea. County Finding of Fact ¶ 142, ¶ 144, ¶ 152. Columbia Venture ran out of money because it could not get all the moving parts of its

risky plan to coalesce in the short time frame it set for itself. County Finding of Fact, ¶ 233, ¶ 240. Columbia Venture's effort to blame Richland County for its failures is unavailing.

4. THE PROPERTY'S PURCHASE PRICE IS WHAT IS STATED ON THE CLOSING DOCUMENTS, NOT AN AFTER-THE-FACT CALCULATION FROM AN ACCOUNTANT

Columbia Venture advances a baseless theory that its purchase price for the Property was not \$18 million dollars as was unambiguously stated on its closing documents, but rather, a sum comprised of the purchase price, Columbia Venture's investments in the Property after purchase, and the valuation placed upon each member of Columbia Venture's ownership interest in the limited liability corporation, for a total of \$23,582,991.00. CV Proposed Order, pp. 68-69. The purchase price "denotes a consideration, usually monetary, received in exchange for a property interest conveyed." *Sidhu v. Shigo*, 61 Md. App. 61, 66 (Md. Ct. Spec. App. 1984). "It signifies the expenditure required of a buyer to bring about an agreed return from a seller." *Khalaf v. Politis*, 165 A.2d 782, 783 (Mun. Ct. App. D.C. 1960). Columbia Venture's investments made after purchase of the Property were not incurred as a requirement by Mr. Manning to convey the Property, and the valuation of Columbia Venture the entity has nothing to do with "expenditure[s] required of a buyer to bring about an agreed return from a seller." Columbia Venture cites no authority for its attempt to inflate its purchase price, nor can it. The County found no case law to support Columbia Venture's numbers game.

5. COLUMBIA VENTURE HAS FAILED TO DEMONSTRATE SEVERE ECONOMIC LOSS

The *Penn Central* test "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005). "Accordingly, [*Penn Central*] focuses directly upon the severity of the burden that government imposes upon private property rights." *Id.* As a result, regulatory takings doctrine is reserved for truly onerous

regulations. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). While there is no precise minimum level of economic impact necessary to support a taking under *Penn Central*, courts have repeatedly rejected claims involving diminutions in value approaching 90% and above. See, e.g., *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004) (92% diminution); *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (95% diminution); see also *Warren Trust & Marietta Trust v. United States*, 107 Fed. Cl. 533, *105 (Fed. Cl. 2012) (“Supreme Court decisions suggest that diminutions in value approaching 75% or higher do not necessarily dictate the existence of a taking. The Court of Federal Claims has generally relied on diminutions well in excess of 85% before finding a regulatory taking.”). Thus, Columbia Venture’s attempt to downplay this point is contrary to *Penn Central*’s direction that the regulation at issue must impose an onerous burden, as demonstrated through severe economic loss.

Columbia Venture attempts to dilute the impact of the *Penn Central* element of economic loss by describing it as inconclusive, devoid of “mathematical precision,” and merely a “guidepost” to determine whether a taking has occurred. CV Proposed Order, p. 103. Regulatory takings claims are governed by standards or factors set forth in *Penn Central*. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (“regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*”) (emphasis added); *Dines West Golf Club, LLC v. Town of Mt. Pleasant*, ___ S.C. ___ 2013 S.C. LEXIS, *56 (Jan. 9, 2013). It is error for this court to disregard the requirement of severe economic loss. See *Noghrey v. Town of Brookhaven*, 48 A.D.3d 529, 532 (N.Y. App. Div. 2d Dep’t 2008) (reversing lower court for the failure to apply correct jury charge for establishing economic loss, and stating that “the proper inquiry is whether the regulation left only a “bare

residue” of value, or use similar language which would properly convey to the jury the high threshold of loss necessary to support a partial regulatory taking.”).

Citing to *Dunes West*, Columbia Venture claims that the South Carolina Supreme Court rejected the notion that a comparison of property values before and after a regulatory action determines the extent of economic loss. CV Proposed Order, p. 103. A closer look at *Dunes West* renders Columbia Venture’s implication absurd. In support of its dicta that comparison of values before and after the alleged taking “is by no means conclusive,” *Dunes West* cites to *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 490 (1987). There, *Keystone Bituminous* was addressing the balancing of a harm-preventing regulation with severe economic loss:

We reject petitioners’ implicit assertion that *Pennsylvania Coal* overruled these cases which focused so heavily on the nature of the State’s interest in the regulation. Just five years after the *Pennsylvania Coal* decision, Justice Holmes joined the Court’s unanimous decision in *Miller v. Schoene*, 276 U.S. 272 (1928), holding that the Takings Clause did not require the State of Virginia to compensate the owners of cedar trees for the value of the trees that the State had ordered destroyed. The trees needed to be destroyed to prevent a disease from spreading to nearby apple orchards, which represented a far more valuable resource. In upholding the state action, the Court did not consider it necessary to ‘weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute.’ *Id.*, at 280. Rather, it was clear that the State’s exercise of its police power to prevent the impending danger was justified, and did not require compensation. ... Other subsequent cases reaffirm the important role that the nature of the state action plays in our takings analysis. ... As the Court explained in *Goldblatt*: ‘Although a comparison of values before and after a regulatory action is relevant, . . . it is by no means conclusive . . .’ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 490 (1987) (internal quotations and citations omitted).

Keystone Bituminous stands for the proposition that a state regulation serving to prevent harm, even when weighed against severe economic loss, can overcome a plaintiff’s claim of a regulatory taking. Neither *Keystone Bituminous* nor *Dunes West* held that economic loss need

not be proved at all, or that the comparison of property value before and after the alleged taking can be brushed aside.

a. Evidence Concerning Property Value Before the Alleged Taking

The County has clearly shown significant flaws in Columbia Venture's Conservation Easement Appraisal, which we will not repeat here. In its Proposed Order, Columbia Venture takes the position that its Conservation Easement Appraisal showing a property value of \$142 million dollars is appropriate and supportable as the value of its Property before the date of the alleged taking. Columbia Venture seems to believe that its Conservation Easement Appraisal constitutes fair market value according to the Property's highest and best use and therefore, represents the best valuation.

"Highest and best use has been defined as the reasonably probable and legal use of property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value, including those uses to which the property may be readily converted." *Brace v. United States*, 72 Fed. Cl. 337, 350 (Fed. Cl. 2006). In other words, highest and best use is not some pic-in-the-sky number. It must be reasonably probable that the use is physically possible, financially feasible and legally permissible. *Normandy Corp. v. S.C. DOT*, 386 S.C. 393, 404, 688 S.E.2d 136, 142 (Ct. App. 2009). "The highest and best use of property as determined by an appraisal "must bear some grounding in reality, even in the case of a projected future use." *Brace*, at 350. "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value -- a thing to be

condemned in business transactions as well as in judicial ascertainment of truth.” *Olson v. United States*, 292 U.S. 246, 257 (1934).

Columbia Venture’s Conservation Easement Appraisal offers a valuation based on unrealistic and unsupported conclusions concerning legal permissibility, physical possibility, and financial feasibility. In the Appraisal’s discussion of legal permissibility, no discussion was made of whether Columbia Venture’s levee could be improved in a manner that complied with FEMA’s regulations. In the Appraisal’s discussion of physical possibility, it acknowledged that physical possibility is “contingent on the improvement and recertification of the current levee to allow for removal of the subject property from the flood plain and floodway to allow for subsequent development usage.” Pl. Exh. 394, p. 56. However, it failed to explain how levee certification was reasonably probable. Instead, the Appraisal based its determination of physical possibility upon “the feasibility and design criteria by [its land use planners] relative to development prospects,” whatever that means. Regarding financial feasibility, the Appraisal simply stated that public infrastructure will be funded through a multi-county business park, without consideration of reasonable probability. *Id.* at. p. 56. Columbia Venture’s Conservation Easement Appraisal is, therefore, fundamentally unsound, and should be disregarded. Columbia Venture has failed to put forward sound evidence of property value before the alleged taking took place.

Columbia Venture’s Proposed Order is particularly strange in that it touts the Conservation Easement Appraisal as the most appropriate to use in determining the *Penn Central* element of loss in value, yet later, when Columbia Venture offers its measure of just compensation, it concedes that the Conservation Easement Appraisal failed to account for various uncertainties. CV Proposed Order, pp. 141-142. Columbia Venture cannot expect this

court to find the Conservation Easement Appraisal to be credible when Columbia Venture holds it up in one argument, then rejects it in another argument.

The only remaining evidence showing the value of Columbia Venture's Property before the alleged taking is the County Appraisal, in which the Property was valued at \$33 million dollars. County Finding of Fact ¶ 260. Columbia Venture attacks the County's valuation of the Property before the alleged taking as based on a methodology that is not recognized by courts. CV Proposed Order, p. 106. In examining fair market value, courts have recognized the comparative sales approach, the cost approach, and the development approach.² *Cane Tenn., Inc. v. United States*, 71 Fed. Cl. 432, 439 (Fed. Cl. 2005); *Snowbank Enterprises, Inc. v. United States*, 6 Cl. Ct. 476, 485 (Cl. Ct. 1984). In determining the fair market value of Columbia Venture's Property before the alleged taking, the County's expert, Mr. Knight, determined that a cost approach was the most appropriate method. Tr. Vol. 10, p. 1949, lines 15-23; Pl. Exh. 195, p. 5. Trial courts are not restricted to a particular valuation approach. *Cane Tenn., Inc. v. United States*, 71 Fed. Cl. 432, 439 (Fed. Cl. 2005); *Snowbank Enterprises, Inc. v. United States*, 6 Cl. Ct. 476, 486 (Cl. Ct. 1984). Instead, trial courts are given "considerable discretion to select the method of valuation that is most appropriate in the light of the facts of the particular case." *Id.* Thus, Columbia Venture's assertion that Mr. Knight's methodology is not recognized or "approved" by courts is simply erroneous.

² The development approach is also known as the subdivision valuation approach. Tr. Vol. 8, p. 1569, lines 8-18. The development approach, used by Columbia Venture in its Conservation Easement Appraisal, has been criticized as too speculative. See *Algonquin Gas Transmission Co. v. 60 Acres of Land, etc.*, 855 F. Supp. 449, 454 (D. Mass. 1994) (stating that development approach "is too inherently speculative to be used except in those cases where development of the subdivision is relatively far along."); *Woodland Partners Ltd. P'ship v. DOT*, 286 Ga. App. 546, 551, 650 S.E.2d 277, 282 (Cl. App. 2007) (ruling that trial court erred "in admitting the expert's valuation testimony because the testimony valued the land taken as if it were already subdivided ... and as if it were fully developed and sold on the retail market.").

Columbia Venture also criticizes Mr. Knight's appraisal as failing to value its Property according to its highest and best use. CV Proposed Order, pp. 106-107. The County appraisal found that the highest and best use was some sort of mixed use development. Mr. Knight did not ignore Columbia Venture's land use plan. Instead, he found it was not reasonably probable that the land use plan represented highest and best use due to a combination of many uncertainties, including whether FEMA would remap the Property to eliminate the floodway and flood hazard areas. As stated in *Olson*, "elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value -- a thing to be condemned in business transactions as well as in judicial ascertainment of truth." *Olson v. United States*, 292 U.S. 246, 257 (1934). The County appraisal constitutes the best estimate of Columbia Venture's Property before the alleged taking, considering what was reasonably probable at the time.

b. Evidence concerning Property Valuation after the Alleged Taking

To establish the Property's value after the alleged date of taking, Columbia Venture uses the value of \$11 million dollars that the Conservation Easement concluded was the value of the Property as-is. CV Proposed Order, p. 107. Like Columbia Venture's Bank Appraisal, this \$11 million dollar valuation is significantly flawed in that it values the Property as of a date that is not the same as the date of alleged taking, and it also fails to differentiate between acreage located within the floodway and outside the floodway. Valuing the property outside the floodway as the same as the floodway property artificially depresses the value of the Property. The non-floodway portions of the Property retain development potential, yet Columbia Venture's Conservation Easement Appraisal does not take this into account. Columbia Venture cannot

ignore the Property's highest and best use after the alleged taking in order to reach a higher economic loss.

In valuing the Property after the alleged date of taking, the County Appraisal does take into account the higher value of property located outside the floodway. It concludes that the maximum profitability of the Property after the alleged taking would be "to parcel up the 1,225 acres outside the floodway for development tracts to include residential, commercial, or industrial uses" and the remaining 3,175 acres within the floodway "should be parceled up and sold for agricultural and recreational uses." Pl. Exh. 195, p. 52. Mr. Knight undertook a comparable sales analysis of five similarly situated properties to determine valuation of Columbia Venture's 1,225 acres outside the floodway. *Id.*, at pp. 53-69. After making an adjustment to account for differing sale dates, Mr. Knight concluded that the property outside the floodway had a value of \$15,000 per acre. *Id.* at p. 69. He then valued the 3,175 acres within the floodway at \$3,100 per acre based upon a comparable sales analysis. *Id.* at p. 89. Mr. Knight's valuation of the Property after the alleged taking totaled \$28 million dollars. *Id.* Mr. Knight's valuation is the most credible valuation of the Property after the alleged taking.

c. This court should conclude that Columbia Venture failed to meet its burden of demonstrating severe economic loss

Columbia Venture has failed to meet its burden of establishing a property value before the alleged taking as well as after the alleged taking. The evidence of economic loss put forward by Columbia Venture is so riddled with errors that it tells us nothing reliable about economic loss. Columbia Venture could have prepared an appraisal specifically for this litigation that properly included infrastructure costs, adequately stated and supported its assumptions, and determined highest and best use according to reasonable probability. But it chose to cobble together fatally flawed appraisals to show economic loss. Columbia Venture has failed to meet

its burden. “Failure to provide evidence to support the existence of economic injury is fatal to a takings claim.” *Seiber v. United States*, 364 F.3d 1356, 1371 (Fed. Cir. 2004).

In contrast, the County Appraisal is well supported and reasoned. It shows only a 17% loss, which falls far short of the severity needed to establish a taking. *See CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011) (“we are aware of no case in which a court has found a taking where diminution in value was less than 50 percent.”). Mere diminution in property value cannot establish a taking. *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, ____ S.C. ____ 2013 S.C. LEXIS 2, *63 (Jan. 9, 2013). Without demonstrated economic loss of sufficient severity, Columbia Venture’s regulatory takings claim fails. *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999); *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 439 (Fed. Cl. 2011).

6. COLUMBIA VENTURE’S ASSERTED INVESTMENT BACKED EXPECTATIONS ARE UNREASONABLE

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

In analyzing whether a property owner had reasonable investment-backed expectations, the threshold inquiry is to determine the actual investment that the members of Columbia

Venture made in the property. *Cienega Gardens v. United States*, 503 F.3d 1266, 1289 (Fed. Cir. 2007). "A property owner's reasonable investment-backed expectations are defined at the time the property is purchased." *Norman v. United States*, 63 Fed. Cl. 231, 267 (Fed. Cl. 2004). Columbia Venture claims that its expectations concerning its Property were backed by "significant investments, including pre-purchase diligence that included preliminary engineering review of the Levees (see PTE-208), preliminary concept and financial plans and estimates (see PTE-264 at CVMcNair002447-55), the acquisition itself, and extensive post-acquisition development costs." CV Proposed Order, p. 108. For the purposes of the reasonable investment backed expectation prong of *Penn Central*, Columbia Venture's post-acquisition development costs are not relevant.³ At the time of purchase, the evidence shows that Columbia Venture paid eleven million dollars in cash as part of the purchase price. County Finding of Fact ¶ 74.

Columbia Venture put forward no evidence of other investment costs incurred at the time of purchase. Recitation of its pre-purchase economic analysis and due diligence does not tell this court anything about the dollar amount expended to obtain this information. Columbia Venture's work product prepared prior to purchase indicates that its investment was minimal. It is undisputed that Lockwood Greene had done very little engineering analysis concerning its levees. It had only preliminary soils analysis and topographic survey information, and a cost estimate to improve the levees to a standard that did not meet the County's levee design standard. County Finding of Fact ¶ 85. Of this work, the evidence indicates that Mr. Manning paid for the survey work. See Def. Exh. 156, p. 2; Def. Exh. 157, p. 1 (purchase agreement and notice of intent to purchase stating that Burroughs & Chapin has the right to have surveys

³ Even if post-purchase development costs were considered, Columbia Venture's costs associated with FEMA, such as engineering, legal, and lobbying costs as part of its submittal of technical data to FEMA in 1999, its costs relating to its participation in FEMA's first administrative appeal process, and its costs to bring and defend its own administrative appeal and subsequent judicial appeal, are not costs that can be considered in this regulatory taking case against the County.

prepared at Mr. Manning's expense). Columbia Venture's preliminary land use plan prepared prior to purchase was described by Columbia Venture as in need of improvement and intended only to be used as a guide for potential investors. Pl. Exh. 264, CVMcNair002450. The evidence establishes that Columbia Venture was still working on its land use plan over a year after purchase of the Property. Def. Exh. 48, p. 1. The costs of the pre-purchase appraisals appear to have been incurred by Mr. Manning, not Burroughs & Chapin. See Pl. Exh. 255 (stating that updated appraisal prepared at the request of Mr. Manning). Columbia Venture has failed to demonstrate its actual investment at the time of purchase was anything more than \$11 million dollars.

This \$11 million dollar investment went to purchase of the Property which included unimproved agricultural levees. Columbia Venture expected to improve the levees to meet FEMA's levee certification requirements. However, its expectation regarding levee improvement was not investment-backed. At the time of purchase, Columbia Venture's plan was to "secure state and federal grant funds and/or tax incentive funds to upgrade levees and install basic infrastructure ... required to jump start the research technology village" Def. Exh. 10. Columbia Venture obviously had no entitlement to discretionary federal and state grants or tax incentives to facilitate its development scheme. Thus, Columbia Venture's expectations regarding levee improvement should not be considered.

Columbia Venture asserts that its expectations at the time of purchase were reasonable based upon three factors: 1) the regulatory scheme in place at the time of purchase; 2) state common law; and 3) government inducement of expectations. The County takes these factors in turn to explain why Columbia Venture is wrong.

a. Regulatory Scheme in Place at Time of Purchase

Relevant factors to the determination of a party's reasonable expectations include "whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property," and "whether the plaintiff could have reasonably anticipated the possibility of such regulation in light of the regulatory environment at the time of purchase." *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004).

Here, a reasonable developer in the position of Columbia Venture would know that floodplain development is inherently risky. Def. Exh. 64. Floods happen and the number of floods is increasing. *Id.* at DEF-00001932. Flood protection is costly, never-ending and has unintended consequences. *Id.* Within a floodway, the greatest flood velocities and depths occur, causing the greatest damage during a flood. County Finding of Fact, ¶ 198. Anyone with common sense would know that diverting water from one location causes it to go somewhere else. Def. Exh. 64, DEF-00001903. 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. *Compare* Def. Exh. 131 with Def. Exh. 129 and 130. 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.

In addressing the regulatory scheme in place at the time Columbia Venture purchased the Property, Columbia Venture's Proposed Order completely ignores the County's Floodway and

Floodplain Overlay Zoning District. This zoning district overlays whatever 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. Tr. Vol. 13, p. 2528, line 23 – p. 2529, line 9; 2617, lines 17-25; Tr. Vol. 13, p. 2593, line 2 – p. 2594, line 3.⁴ "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. County Findings of Fact ¶ 20, ¶ 21, ¶ 24.

Columbia Venture attempts to escape this undeniable problem by suggesting that the County Engineer possessed the authority to interpret the provisions of the Floodplain Overlay Zoning District. However, the Zoning Ordinance plainly states that the Zoning Administrator is charged with interpreting the terms and provisions of the Zoning Ordinance, not the County Engineer. Pl. Exh. 250a, § 26-502, Zoning Ordinance (1999). The County Engineer had a role in the administration of the Floodplain Overlay Zoning District, but he did not have primary responsibility for administration. *Id.* at § 26-73.2a. (stating that the planning department has

⁴ The County's Proposed Order cited this evidence within its section addressing the County's floodplain management regulations instead of explicitly making a finding of fact. See County Proposed Order, p. 9. It should have been made a finding of fact.

"primary responsibility for administering and enforcing this ordinance and ... utilization of the county engineer as required by this ordinance."). The County Engineer was required to certify certain findings consistent with criteria set forth within the Floodplain Overlay Zoning District. *Id.* at § 26-73.6. His findings were binding upon the Zoning Administrator unless overruled by the Board of Adjustment. *Id.* at § 26-73.6(9). The criteria for review of applications for filling, grading, excavating or dredging in a floodplain involved factual or technical findings such as the type of fill material and the adequacy of design criteria. *Id.* at § 26-73.6(3). Nothing in the criteria authorized the County Engineer to interpret the provisions of the ordinance.

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 called the County Engineer to testify that, prior to Columbia Venture's purchase, he interpreted the word "impede" to mean the same as FEMA's "no-rise" standard. In an effort to establish that Columbia Venture knew of Mr. Pearson's interpretation, it called Mr. Gregory and Mr. Manning to testify concerning their recollections of talking with Mr. Pearson about his interpretation. Additionally, Columbia Venture called Mr. Carroll Barker to testify as an expert witness that Columbia Venture would have been able to upgrade its levees under a "no-rise" standard. Columbia Venture has failed to meet its burden of proof.

Columbia Venture's plan of action at the time of purchase made Mr. Pearson's interpretation of the Floodway Provision irrelevant. Columbia Venture's argument turns on its cherry-picked version of the facts that ignores entirely its own extensive documents and the

testimony of its own engineer explaining how its first step was to submit technical data to FEMA as part of FEMA's restudy that would support a new preliminary Flood Map showing no floodway on the Property. FEMA would then issue a preliminary Flood Map reflecting no floodway on the Property and ultimately finalize it. Once this step was accomplished, Columbia Venture planned to seek a map revision based upon a certified levee in order to remove the A and AE flood hazard zones from the Property. Under this plan, the County's Floodway Provisions were not an issue because Columbia Venture expected a Flood Map with no floodway.

Columbia Venture's Proposed Order focuses exclusively on the second step of its plan, as if its first step did not exist. Under its version of the facts, Columbia Venture intended to immediately obtain permits in order to proceed with levee certification. Yet the facts do not support Columbia Venture's story, as explained above. All evidence establishing Columbia Venture's two-step plan is ignored by Columbia Venture in its Proposed Order. Instead, Columbia Venture states that it "began its efforts to develop the Property soon after purchase with particular focus on the Levee upgrade." CV Proposed Order, p. 42. In support of this statement, Columbia Venture cites to the testimony of Mr. Tillotson, formerly the lead Lockwood Greene engineer for Columbia Venture, who spoke in very general terms, without any specific time period, about S&ME being hired to design levee upgrades. Tillotson Dep. p. 16. S&ME did provide some design work for the levees, but this occurred in November 1999, which was after FEMA issued its August 12, 1999 preliminary revised Flood Maps and initiated its process to finalize this data. At this point, Columbia Venture expected to move forward expeditiously with its second step of its strategy, levee certification.

Columbia Venture also cites to its agenda for its "kick-off members meeting" held on March 10, 1999 as evidence supporting its claim that the levee upgrade was the particular focus of its efforts after purchase of the Property. Pl. Exh. 502. This document refers in general terms to evaluation of the levee system without giving any indication of whether such evaluation was related to submittal of data to FEMA to support a reduced floodway on a new preliminary revised Flood Map, or to proceed with actual levee certification. Similarly, at trial, Columbia Venture elicited testimony from its witnesses about Columbia Venture's plans to obtain levee certification without asking specifically when this process would take place. At no point during the trial did Columbia Venture question any witnesses about its key first step in its strategy. Mr. Hester, Columbia Venture's own engineer, testified at length about Columbia Venture's two-step strategy, yet Columbia Venture did not question him at all about it on cross-examination. See Tr. Vol. 12, pp. 2128-2140; p. 2198-2204.

Even if this court finds that Mr. Pearson's testimony concerning his interpretation is relevant to Columbia Venture's expectations at the time it purchase the Property, the fact that the County Engineer, prior to Columbia Venture's purchase of the Property, interpreted the Storm Drainage Ordinance's Floodway Provision to mean "no-rise" is meaningless unless Columbia Venture shows that it knew and relied on that interpretation. The testimony of Mr. Gregory and Mr. Manning is too hazy and ill-defined to be given weight, especially in light of the lack of any corroborating testimony from Mr. Pearson. It is telling that Columbia Venture did not ask Mr. Pearson if he informed Mr. Gregory or Mr. Manning of his interpretation.

The testimony of Columbia Venture's own engineer, Mr. Mark Hester of Lockwood Greene, is more credible. Mr. Hester testified that he was unaware of the County Engineer's interpretation of the Storm Drainage Ordinance. Tr. Vol. 12, p. 2156, line 10 – p. 2157, line 9.

The testimony of Mr. Hester, who has no stake in this litigation, should be given more weight than the testimony of Mr. Gregory and Mr. Manning.

Further, the evidence shows that Mr. Pearson publicly stated his interpretation shortly after Columbia Venture purchased the Property, and Messrs. Gregory and Manning could have mistakenly recollected knowing of Mr. Pearson's interpretation before purchase of the Property. Mr. Gregory demonstrated faulty recollection at trial with his emphatic statements that Columbia Venture, at the time it purchased its Property, planned to improve the levees to meet the County's levee design standard, when the documentary evidence conclusively showed otherwise. Mr. Manning's memory of knowing Mr. Pearson's interpretation is also called into question in light of his correspondence to Mr. McSwain in May 1998, in which he explained that FEMA's proposed "change in the floodway would disallow ... any planned development." County Finding of Fact ¶ 10. Mr. Manning's statement, made during the relevant time period, that a floodway on the Property would "disallow" development, is inconsistent with Columbia Venture's argument that he knew of Mr. Pearson's interpretation prior to purchase. If Mr. Manning knew that Mr. Pearson interpreted the Floodway Provision to mean the same as FEMA's "no-rise" standard, then development could occur in a floodway as opposed to being "disallowed" as Mr. Manning stated.

Even if this court believes that Mr. Manning and Mr. Gregory did in fact know of Mr. Pearson's interpretation prior to purchase, Columbia Venture must have also known that Mr. Hester understood the County to prohibit construction in a floodway. County Finding of Fact ¶ 89; *see also* Tr. Vol. 12, p. 2125, line 21 – p. 2126, line 16; Tr. Vol. 12, p. 2134, lines 9-23; Tr. Vol. 12, p. 2141, line 3 – p. 2142, line 24. Faced with conflicting understandings of the

County's Storm Drainage Ordinance, Columbia Venture's reasonable course of action would have been to ask the County to state its interpretation in writing. It made no such request.

Mr. Carroll Barker's testimony that Columbia Venture could have improved its levees under a "no-rise" standard is unhelpful. Mr. Barker is not an engineer. Tr. Vol. 7, p. 1207, lines 4-7. Columbia Venture did not ask Mr. Barker to actually perform any hydrological or hydraulic analysis to support his conclusion. Tr. Vol. 7, p. 1211, line 23 – p. 1213, line 15. He based his opinion on his prior knowledge of the Congaree River watershed and performance of no-rise certifications for a pedestrian bridge over a tributary of the Congaree River and over the Saluda River, neither of which compare to heightening and widening miles of levees. Tr. Vol. 7, p. 1214, line 22 – p. 1215, line 4; p. 1218, line 22 – p. 1219, line 2. Without preparation of an actual no-rise analysis, no one really knows one way or the other if the levees could be improved without causing a rise in base flood elevations. Mr. Barker's opinion, devoid of actual analysis, does nothing to help Columbia Venture show that it had reasonable investment-backed expectations.

One who buys property with knowledge of regulations posing an obstacle to his development expectations assumes the risk of economic loss. *Mehaffy v. United States*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012). "In such a case, the owner presumably paid a discounted price for the property" and "[c]ompensating him for a taking would confer a windfall." *Id.* "To hold otherwise would turn the Government into an involuntary guarantor of the property owner's gamble that he could develop the land as he wished despite the existing regulatory structure." *Id.* Here, Columbia Venture did indeed buy the Property at a discounted price, as evidenced by the purchase price of \$18 million dollars compared with an appraised value of \$30 million dollars.⁵

⁵ Columbia Venture's purchase price of \$18 million dollars was agreed upon after the June 5, 1998 preliminary Flood Maps were issued and after the Rust Report stated that the County prohibited construction in a floodway.