THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

John Hamilton Smith, Special Referee

Case No. 2010-CP-40-8943R

Columbia Venture, LLC ..... Appellant,

v.

Richland County ..... Respondent.

REPLY BRIEF OF APPELLANT TO AMICUS CURIAE BRIEF OF ASSOCIATION OF STATE FLOODPLAIN MANAGERS

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INTRODUCTION

Columbia Venture, LLC ("Columbia Venture") herein responds to the amicus brief filed by the Association of State Flood Plain Managers ("the Association"). As discussed below, the policy positions advanced by the Association are irrelevant to the issues before this Court and ignore actual federal law, the realities of Columbia Venture's proposed development plans, and Richland County's own policies. The Association further commits various mistakes of law and fact in opposing Columbia Venture's arguments that the Special Referee erred in finding in favor of Richland County on Columbia Venture's *per se* and regulatory takings claims.

ARGUMENT

I. The Association's policy position is contrary to established federal law and ignores Richland County's actual public policy choices.

A. The Association's position on levees is contrary to the National Flood Insurance Act ("NFIA") and National Flood Insurance Program ("NFIP").

The Association is fundamentally opposed and openly hostile to the carefully crafted and reasonably balanced standards central to the NFIP, and its policy position is quite obviously undertaken without any regard for the fundamental private property rights of property owners like Columbia Venture. For example, the Association boldly proclaims that it "strongly believes the minimum NFIP floodplain regulations do not provide adequate long-term flood risk reduction for communities and that the benefits of flood risk reduction achieved by higher regulatory standards far outweighs [sic] the burden of administering them."[1] Congress, in

[1] ASFPM, *A Guide for Higher Standards in Floodplain Management*, p. 3, *available at*: http://www.floods.org/acefiles/documentlibrary/committees/Insurance/ASFPM_Higher_Standards_Reference_Guide_1010.pdf (October 2010). The Association's disagreement with federal law and policy does not inform the issues before this Court. For example, the Association actually claims that *prohibitions* on floodway construction are a best practice in place for over 10 years. Ass'n Brief p. 41. This is false, especially as the Association cites only to its own wishful thinking, anti-development position paper with no reference to any actual enactment and ignores warnings that floodway prohibitions on construction likely "go too far" and amount to takings of

contrast, struck a reasoned balance between minimizing flood risks and permitting land development. For example, "[t]he 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 would contradict the NFIP's statutory mandate and be inconsistent with decades of nationwide practice." (R. p. 3497). Congress enacted the NFIP, in part, to "encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses." 42 U.S.C. § 4001(e)(1) (2000);[2] *see also* 42 U.S.C. § 4002(b)(3) (2000) (identifying an additional purpose of the NFIA as "requir[ing] States or local communities ... to adopt adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses").[3]

As has been fully briefed by Columbia Venture, an important part of the federal standards crafted by Congress and FEMA is the ability to protect land from flooding by appropriately designed, constructed, and maintained levees. 44 C.F.R. § 65.10 (1998); Columbia Venture

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private property without the payment of just compensation. *See* Columbia Venture Brief pp. 52-53; Columbia Venture Reply Brief pp. 13-14 & n.11.

[2] As in Columbia Venture's Brief and Reply Brief, all citations to the NFIA or to the NFIP regulations are to the versions existing during 1998-2002.

[3] In apparent ignorance of other portions of Columbia Venture's briefs, the Association charges that Columbia Venture misunderstands the NFIP in its argument that the NFIP empowers local communities to use their flood prone property resources by developing them in ways consistent with the hydraulic and hydrologic engineering undergirding the NFIP. Columbia Venture has never argued that Congress seeks to encourage floodplain or floodway construction that would in any way increase flood hazards or pose a danger to life and property. Instead, Columbia Venture emphasizes the careful public policy balance Congress has chosen to strike. As part of that balance, Congress and FEMA have established parameters for effective building restrictions for flood prone areas that still respect the rights of property owners and allow those property owners to use their property in ways consistent with its essential uses. Columbia Venture is not the first to observe that "[if] a community chooses not to participate in the [NFIP], economic development in the flood hazard area may be severely restricted." *Tex. Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025, 1031 (D.D.C. 1978) (quoting HUD environmental impact statement on NFIP).

Brief pp. 10-11. By designing, constructing, and maintaining levees under the standards set forth in the NFIP (and otherwise complying with certification standards), landowners can remove the protected land from status as a flood prone area as recognized by FEMA. (*See* R. p. 3125). Clearly, the ability to build and properly maintain levees is a key component of "constrict[ing] the development of land which is exposed to flood damage" as expressed by Congress in statutory text and by FEMA in its implementing regulations. By definition, land protected by FEMA-certified levees is not land expected to be exposed to flood damage.

B. The Association's position suffers from probability neglect.

In its quest to advance a public policy position rejected by federal law, the Association asserts that all levees, just by being levees, are doomed to failure and such failure results in catastrophe. In making this pronouncement, the Association cites numerous evidentiary materials outside the Record on Appeal (most post-dating the operative dates at issue in this case) to demonstrate the alleged dangers associated with flooding and levee failures and emphasizes some of the worst cases, such as the 1993 Midwest floods, Hurricane Katrina, Hurricane Rita, the 2008 Midwest floods, the 2011 floods along the lower Mississippi River, and Hurricane Sandy.

In advancing this argument, the Association engages in what Professor Cass Sunstein and professional sociologists refer to as the "availability heuristic," which leads to the phenomenon of probability neglect. Cass R. Sunstein, *Laws of Fear, Beyond the Precautionary Principle* 36-41, 124 (2005); *see also* Daniel Kahneman, *Thinking, Fast and Slow* 141-45 (2011).[4] By

[4] "It is well established that in thinking about risk, people rely on certain heuristics, or rules of thumb, which serve to simplify their inquiry.... When people use the availability heuristic, they assess the magnitude of risk by asking whether examples can readily come to mind." Sunstein, *supra*, at 36. But "[t]he availability heuristic can produce inaccurate assessment of probability." *Id.* at 39. "The problem is that both individuals and society may be fearful of nonexistent or trivial risk – and simultaneously neglect real dangers" *Id.* at 105. "[I]t makes no

focusing on the worst-case scenario (catastrophic levee failure), the Association's argument fails to consider the probability that the worst-case would actually occur.[5] Neither the Association nor Richland County point to a single instance in which a 500-year levee, certified and properly maintained under the NFIP, has ever failed. The reason why is that no 500-year certified levee has ever failed. (*See* R. p. 5037).[6] Also, if Columbia Venture were allowed to build 500-year certified levees, the probability that lives would be lost as a result of a levee failure would be even less: the probability that a 500-year certified levee would fail multiplied by the probability that a successful evacuation of the area protected by the levees (if ordered) could not be accomplished during the three to four days that a 100-year flood on the Congaree River would rise, crest, and then recede according to FEMA. (R. p. 3495).[7]

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sense to take steps to avert catastrophe if those very steps would create catastrophic risks of their own." *Id.* at 114. "In view of probability neglect and the operation of the availability heuristic, it is not difficult to produce large changes in public judgments, by dramatically increasing fear. A statement of worst-case scenarios can greatly alter both behavior and thought." *Id.* at 124. Now a professor at Harvard Law School, Professor Sunstein has also taught at the University of Chicago Law School and recently served as Administrator of the Office of Information and Regulatory Affairs under President Obama. He is a member of the American Academy of Arts and Sciences and has written extensively on the subject of risks and government regulation. *E.g.* Cass R. Sunstein, *Risk and Reason* (2002) & Cass R. Sunstein, *Worst Case Scenarios* (2007).

[5] Interest groups, such as those that opposed Columbia Venture, frequently use a tactic, which Professor Sunstein calls the availability cascade, in which they enlist the media to publicize recent examples of worst-case scenarios to influence public opinion and public officials. This tactic seeks to exploit the phenomenon of probability neglect. Sunstein, *Laws of Fear* at 95-98, 103; Kahneman, *supra*, at 141-45.

[6] Levee failures in situations where, for example, the levees were not designed properly, were not certified, or were not designed to withstand the flood at issue (*e.g.* a 50-year levee's performance in a 100-year flood) are simply not probative of how a properly designed and maintained 500-year levee would perform.

[7] The probability of a 500-year flood occurring in one year, P(A), is 0.002. The probability that a 500-year certified levee will fail during a 500-year flood, P(B), is less and is determined by the equation expressing the probability that two dependent events will occur: P(A and B) = P(A) x P(B/A). M. Triola, *Elementary Statistics* 144 (4th ed. 1984). The probability that an evacuation, if ordered, would be unsuccessful, P(A), in the event of a levee breach, P(B), is determined by the equation expressing the probability of two independent events: P(A and B) = P(A) x P(B). *Id.*

Probability neglect also has another downside: the failure to recognize risks associated with *not* improving the Manning Levees ("Levees"), which is the foreseeable and, in fact, intended result of the County's 2001 Stormwater Ordinance combined with its adoption of the February 20, 2002 regulatory floodway. Based on its probability analysis, FEMA has concluded that in the event of a 100-year flood the Levees in their present profile, even if maintained, will fail. (R. p. 3495). At risk is the City of Columbia's wastewater treatment plant, as well as Heathwood Hall Episcopal School ("Heathwood Hall") and the I-77 highway embankment. The flood that breached the Levees in 1976 was a 10 year flood. (R. p. 3041). The substantial risk that a 100-year flood or a 500-year flood poses, for example, to I-77 and the City's wastewater treatment plant and the surrounding environmental area by not improving the Levees is completely ignored by the Association. Having to temporarily close I-77 due to flood damage could be catastrophic.

C. The Association's policy generalizations ignore the property at issue and Richland County's actual public policy.

By focusing on the worst case scenarios, the Association ignores the actual property ("Property") and Levees at issue. There is abundant record evidence as to how a flooding event on the Congaree River would impact Columbia Venture's Property and Levees, but the Association cites none of it. For example, while the Association sounds dire warnings that "floodwaters breaching a levee can flood areas behind a levee up to twenty feet in a matter of minutes," Ass'n Brief p. 22, it is clear that the Association has not reviewed pertinent studies of the Property to determine how a flood would affect *this* Property. FEMA has determined that the Levees, in their unimproved and uncertified condition, are susceptible to piping[8] as "the most

[8] Piping refers to seepage of waters under the levee, which can "surface on the landside of the levee, forming damp areas and possibly so-called sand boils. A sand boil is the culmination of a tiny tunnel connecting the river and the landside of the levee." (R. p. 4994).

likely mode of failure" and that "[s]hear 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." (R. p. 3480). Further, the potential for piping failure was confined to "two or possibly three weak locations [on the levee] during a single occurrence of the 100-year flood." (R. p. 3481).[9] This form of failure, as found and described by FEMA, is a far cry from the extreme example cited by the Association.

The Association identifies the Monarch-Chesterfield levee failure in the 1993 Midwest floods as the "most costly" failure of that flooding event. Ass'n Brief p. 20.. Unmentioned by the Association is that the Record in this case contains a detailed analysis of the Monarch-Chesterfield levee failure and specific comparisons to Columbia Venture's plans. Columbia Venture engaged Gary Dyhouse, P.E.[10] to study levee issues and discuss the similarities and differences between various levee projects and Columbia Venture's proposals. In a section comparing the Monarch-Chesterfield levee to Columbia Venture's design (described as Green Diamond), Mr. Dyhouse wrote:

> Both projects started initially from farm levees having a reasonably adequate height but a substandard cross section and little proper maintenance. However, here the similarities end. *The original Chesterfield-Monarch levee did not receive an adequate engineering and design analysis until after the 1993 flood.* The Green Diamond Levee project has already included a proper engineering and design analysis prior

[9] Clearly, the improvement of the Levees to 500-year protection levels combined with certification from FEMA and proper maintenance would eliminate or tremendously reduce the chances of Levee failure. "The usual means of designing for levee underseepage include stability berms on the landside to lengthen the underseepage flow path and to give added weight to combat the uplift pressures, and/or seepage weels to allow the water to surface in a controlled location without bringing soil with it." (R. p. 4994).

[10] Mr. Dyhouse spent 32 years with the U.S. Army Corps of Engineers, primarily in St. Louis, where he was Chief of Hydrologic Engineering and was "in charge of a variety of water resource projects, which included numerous levees." (R. p. 4986). He was heavily involved in the 1993 Midwest flood response and has served on the faculty of Washington University of St. Louis and the University of Missouri-Rolla. (*Id.*).

> to any development. The Green Diamond Levee project will provide a 500-year level protection initially, while Chesterfield-Monarch was only a 100-year design. The Green Diamond Levee project is proceeding in the proper fashion to build a major urban levee for residential-commercial property development in the protected area.

(R. p. 5028 (emphasis added)). Mr. Dyhouse also reported that in the wake of the 1993 flood, the local community decided to "support the repair and upgrade of the [Monarch-Chesterfield] levee," and that it was proceeding toward 500-year levee protection. (R. p. 5026). The reasons that the Monarch-Chesterfield levee failed in 1993 are easily distinguished from the facts of Columbia Venture's Levee proposals. The Association fails to even discuss any of these distinguishing features.

In addition, the Association argues that "[b]y walling off large sections of the floodplain, levees give rivers much less room to spread out horizontally. A levee's confining effect pressures the floodwater to rise higher than it otherwise would, resulting in higher flows and greater velocities to the opposite bank and throughout the floodplain than it would experience prior to levee construction or enlargement." Ass'n Brief p. 23. This generalization again ignores the record evidence on how a flood would affect *this* Property and *this* floodplain. In uncontradicted expert testimony, Carroll Barker testified that the combined Richland and Lexington Congaree River floodplains are over five miles wide and that physically improving the Levees to certified status and 500-year protection levels would cause no rise and no change in the floodway in Lexington County. Columbia Venture Reply Brief pp. 43-45. Also, the "opposite bank" of Lexington was already modeled and mapped by FEMA as if the Levees were upgraded and would actually hold.[11] (*See* R. pp. 1789-99, 2438).

[11] The Association misleadingly states that Columbia Venture's 2001 analysis found that improving the Levees would increase base flood elevations in Lexington County and upstream from the Levees. Ass'n Brief p. 23. As explained by Columbia Venture, the unorthodox

The Association also completely ignores Richland County's *actual* public policy regarding levees at all times material to this action. In 1994, Richland County, in apparent ignorance of the "shock waves" and "national discussion" on the "benefits and costs of levees" following the 1993 Midwest floods (*see* Ass'n Brief pp. 7, 20), enacted an ordinance both allowing and affirming the importance and use of levees. (R. pp. 3583 (§ 8-62(g)), 3585-86 (§ 8-64(d)), 3588-89 (§ 8-72)). This ordinance was in effect when Columbia Venture purchased its Property in February 1999. Richland County's new stormwater ordinance passed in April 2001 retained all of the substantive affirmations of levees. (R. pp. 4264-65 (§ 8-26(g)), 4268 (§ 8-29(d)), 4272-74 (§ 8-36 - § 8-39)). Instead of advocating a rejection of levees as a matter of public policy in 2001, Columbia Venture's opponents successfully persuaded a majority of the County Council to legislatively enact restrictions and prohibitions on *Columbia Venture's* Levees and Property. (R. pp. 2952, 3068-69, 3255-57, 3358-60, 3363-64, 3368-69). Levees not belonging to Columbia Venture were still acceptable to Richland County. (*See* R. pp. 4264-65 (§ 8-26(g)), 4268 (§ 8-29(d)), 4272-74 (§ 8-36 - § 8-39)).

II. Columbia Venture has properly asserted a *per se* takings claim.

The Association asserts that "[a] physical taking occurs only when the government physically occupies or invades private property, or a government regulation authorizes a third party to physically occupy or invade private property." Ass'n Brief at 8-9. This is patently incorrect. *Koontz*, *Dolan*, *Nollan*, *Kaiser Aetna*, and *Hill*, all discussed extensively in Columbia

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methods FEMA used in the September 26, 2000 Appeal Resolution (which was essentially affirmed on August 20, 2001), did create some complications that would make a CLOMR more difficult to obtain, but it still would be achievable. Columbia Venture Reply Brief pp. 44-46 & n.48. The question raised by the Association and the County (*i.e.* whether FEMA *might* impose some other requirements that would make obtaining a CLOMR difficult) is a moot point in view of the County's ordinance prohibiting Columbia Venture from making the Levees taller or wider. Without this ability to make the Levees taller or wider, Columbia Venture could go no further with its plans to improve and certify the Levees.

Venture's briefs, establish that a unit of government physically takes property by asserting or appropriating an interest in land. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (stating that government action requiring a landowner to make improvements to nearby public land "would transfer an interest in property from the landowner to the government" and "would amount to a *per se* taking similar to the taking of an easement or a lien"); *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (describing the city's request that plaintiff keep the floodplain area of her property free of development as a "floodplain easement"); *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking."); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (holding that "the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina" and stating that "even if the Government physically invades only an easement in property, it must none the less pay just compensation ...."); *Hill v. City of Hanahan*, 281 S.C. 527, 531, 316 S.E.2d 681, 684 (Ct. App. 1984) ("[T]he City simply wanted Hill's land for drainage and flood control but this desire simply is not founded in any legal right of the City."); *see also Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546 (2005) (finding that in both *Nollan* and *Dolan*, "the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking"). Under these precedents, it is not necessary for the government itself to cause the invasion or to allow a third party to invade[12]—it is the simple reservation of a sufficient interest in property that gives

[12] Those situations where the government does cause an invasion or affirmatively permits

rise to the right to just compensation.

The Association further misreads *Koontz*, and states affirmatively that the test under *Koontz* regarding monetary exactions "is not the *per se* physical taking test." Ass'n Brief p. 11 n. 28. This is incorrect. In *Koontz*, the permitting authority suggested to Mr. Koontz that his application to fill wetlands on his property might be granted if he agreed to improve nearby public lands. *Koontz*, 133 S. Ct. at 2593. The dissenting minority of the court argued that this so-called monetary exaction was in effect a permitting fee and should be analyzed under *Penn Central*. *Id.* at 2609 n.3 (Kagan, J. dissenting). The majority disagreed, holding that the case should be analyzed and decided as a *per se* taking despite the fact that the governmental unit had not physically invaded or occupied Mr. Koontz's property. *Id.* at 2600 ("In this case, moreover, petitioner does not ask us to hold that the government can commit a *regulatory* taking by directing someone to spend money. As a result, we need not apply *Penn Central*'s 'essentially ad hoc, factual inquir[y],' at all .... Instead, petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable interest such as a bank account or parcel of real property, a '*per se* [takings] approach' is the proper mode of analysis under the Court's precedent.").

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a third party to physically invade property are unquestionably *per se* takings. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012). The Association also claims that "Columbia Venture does not claim that the County has taken permanent action, such as constructing a dam or physically altering the landscape, causing intrusion of floodwater on its property." Ass'n Brief p. 9. The Association misrepresents Columbia Venture's position. The County's actions in enacting its ordinances are permanent. Columbia Venture Reply Brief pp. 16-18. In addition, while the County has not constructed a dam to flood Columbia Venture's property, its explicit prohibition on making Columbia Venture's Levees higher or wider to protect Columbia Venture's Property (and neighboring property belonging to Heathwood Hall and the City's wastewater treatment plant) in the face of FEMA's official studies indicating that Columbia Venture's Levees will breach in a flood in abrogation of Columbia Venture's common law rights to protect its Property is the functional equivalent of affirmative action undertaken to flood the property. Columbia Venture Brief pp. 56-59; Columbia Venture Reply Brief pp. 5-9.

The Association claims that Columbia Venture is only complaining about a land use regulation that restricts Columbia Venture's ability to "use" its property. Ass'n Brief pp. 11-12. While the stormwater ordinance's "no build" interpretation and the prohibition on making levees located in a floodway higher or wider do, in fact, restrict the uses to which Columbia Venture can put its Property, they do not stop there. They go far further and, in this case, amount to an easement for flood control purposes on Columbia Venture's Property for which just compensation has not been paid. Similar to the Association, the dissent in *Nollan* argued that requiring public access onto plaintiff's private property for beach access was simply "a mere restriction on its use." *Nollan*, 483 U.S. at 848 n.3 (Brennen, J. dissenting). The majority thoroughly rejected this argument: "To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather (as Justice Brennen contends) 'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U.S. at 831.

As Columbia Venture has pointed out, a "use" restriction amounts to a taking "when inroads are made upon an owner's *use* of [its property] to an extent that, as between private parties, a servitude has been acquired ...." *United States v. Dickinson*, 331 U.S. 745, 748 (1947) (emphasis added); *see also Koontz*, 133 S.Ct. at 2591 (describing how the unconstitutional takings in *Nollan* and *Dolan* arose from "the misuse of the power of land-*use* restrictions") (emphasis added). Columbia Venture Brief p. 56; Columbia Venture Reply Brief p. 3. Properly framed under *Dickinson*, *Nollan*, and *Koontz*, the question in this case is: has the restriction at issue risen to the level that the restriction appropriates a servitude on Columbia Venture's Property? As Columbia Venture has thoroughly briefed, the answer is yes.

Easements are interests in land for which the government must pay just compensation.

Neither the County nor the Association have argued otherwise. The Association (like the County in its brief) completely ignores the language in Richland County's own ordinances, which plainly define an easement as including a "*reservation* by the owner of land, for the use of such land by others for a specific purpose or purposes" and further define a regulatory floodway as "[t]he channel of a river or other watercourse and the adjacent land areas that must be *reserved* in order to discharge the base flood without cumulatively increasing the water surface elevation by more than one (1) foot ...." (R. pp. 4251 § 8-5, 4253 § 8-5) (emphasis added). The County's ordinances thus force Columbia Venture to "reserve" a defined portion of its Property to serve the public purpose of a regulatory floodway to discharge the base flood. This amounts to the appropriation of the equivalent of an easement. The Association can hardly claim that Columbia Venture has posited no "logical reasoning" for its argument when the Association wholly fails to engage in or cite to the specific language giving rise to Columbia Venture's arguments.[13]

The Association advances the argument that because Columbia Venture does not challenge the NFIP, it must concede that a regulatory takings analysis, as opposed to a physical takings analysis, is appropriate to decide this case because a physical taking is not a question of

[13] The two cases the Association cites in support of its proposition that floodplain management ordinances do not constitute *per se* physical takings are quite distinguishable from the facts of this case. In *Krahl v. Nine Mile Creek Watershed District*, 283 N.W.2d 538, 543 (Minn. 1979), the court there noted simply in passing that a temporary flood zone building limitation (certainly not a prohibition and actually a limitation on filling in the floodplain in excess of 20 percent) was not a physical interference with the plaintiff's property but did not at all address issues such as easements and other *per se* interests in land, such as those claimed by Columbia Venture. In *Maple Leaf Investors v. State*, 565 P.2d 1162, 1165 (Wash. 1977), the court found no flowage easement when the only structures prohibited in a floodway were those for human habitation and where the state did not propose to take any action that would increase the flow of water over appellant's property. This is a far cry from the total, blanket, no build, no making levees in a floodway higher or wider prohibitions that prohibited Columbia Venture from placing a scoop of dirt on top of its Levees or putting a fence post in the ground—thus keeping the regulatory floodway (as applied to Columbia Venture's Property only) completely free of any obstructions whatsoever regardless of whether such items would cause a rise in base flood levels.

degree. *See* Ass'n Brief p. 12. But this is not a case where the County simply adopted a no build as opposed to a no rise floodway.[14] Critically, by the same ordinance, the County has prohibited Columbia Venture from making its Levees taller or wider so that they will fail (as FEMA is convinced they will do) during a major flood and allow floodwater to be conveyed across Columbia Venture's Property through the large I–77 relief bridge. (R. p. 5874). Thus, the County has prohibited Columbia Venture from placing structures within the regulatory floodway so that it may be used as an unobstructed flow corridor to convey floodwater during times of flood. The County seeks to physically use Columbia Venture's Property for this purpose and prohibits Columbia Venture from using its Property in a way that might interfere with the County's anticipated need/use.

And in prohibiting Columbia Venture from making its Levees wider or taller, the County took away a right that Columbia Venture had under the County's ordinances in place at the time Columbia Venture purchased the Property and the NFIP. Even accepting the Association's argument that Columbia Venture was prohibited by the County's overlay zoning ordinance from placing any fill in the regulatory floodway in 1999 (a view obviously not shared by the county engineer in May 1999 (R. pp. 1875, 3267-68)),[15] Columbia Venture could certainly have made its river Levees taller because their crest (45 feet wide) exceeds BFEs on all of FEMA's maps and would remain dry during a base flood. (R. pp. 1176-77, 1195). Also, using the phenomenon

[14] No rise regulatory floodways permit landowners to fully develop their property in accordance with its essential use. The Court only needs to look at three pages in the Record (R. pp. 3206, 3207, 3208 (Heathwood Hall's new gymnasium, middle school, and chapel, respectively)), to understand the extent to which the NFIP allows development in a regulatory floodway based on no rise engineering and construction. (*See also* R. pp. 4880-88). In this sense, the no rise standard is in the same category as a building code: it requires elevated construction but allows even multistory construction so long as it does not displace floodwater.

[15] Columbia Venture has refuted this argument and variations on it in its prior briefing. Columbia Venture Brief pp. 21-24, 82-85; Columbia Venture Reply Brief pp. 19-26.

of conveyance shadow referred to by the Association, and accepting, for purposes of argument, the Association's interpretation of the County's floodplain overlay zoning ordinance, Columbia Venture should have been permitted to increase the width of its Gills Creek Levees without impeding the free flow of water.[16] Under these facts, and the recent Supreme Court decision in *Koontz*, Columbia Venture's takings claim should have been analyzed and decided as a *per se* physical takings.

Finally, although the Association tries to paint Columbia Venture as taking an unreasonable and radical position on "convert[ing]" use restrictions into *per se* takings (Ass'n Brief p. 13), Columbia Venture has never maintained that *all* use restrictions amount to *per se* takings or that they must be analyzed as such. Instead, consistent with *Dickinson*, *Nollan*, and *Koontz*, Columbia Venture invites this Court to look at the underlying facts for *this* unique Property, *these* ordinances, and the *actual* effects the restrictions at issue caused for Columbia Venture. As briefed by Columbia Venture, a review of this Property, these ordinances, and the effects thereof lead to the conclusion that the County has appropriated, in effect, an easement on Columbia Venture's Property for which it has not paid just compensation. The Special Referee's order granting summary judgment on this issue should be reversed.

III. Columbia Venture has properly established a regulatory takings claim.

A. Columbia Venture's well-documented pre-purchase plan was entirely reasonable.

The Association claims that Columbia Venture's plan to move forward with its Levee upgrade process immediately upon purchase without waiting for FEMA to issue a new FIRM was unreasonable for several reasons, most of which Columbia Venture has previously briefed

[16] FEMA concluded that the Gills Creek Levees in their present state "do not have the structural strength to hold the 100-year flood waters that enter the Richland side [of] the floodplain." (R. p. 3495). Accordingly, FEMA removed them from the geometry of its two-dimensional model. (R. pp. 3488-90).

and refuted.[17] Nuances to which Columbia Venture has not fully responded are addressed below.

1. The existing regulatory scheme at the time of purchase in 1999 allowed both levees and no rise construction in the regulatory floodway.

At page 16 of its brief, the Association commits the same error as the Special Referee and the County in concluding that Richland County in 1999 (as opposed to 2001) interpreted its ordinances to prohibit "most any construction within a floodway." It is plain error to use the public controversy and debate over the words "to impede the free flow of water in times of flood," which took place in 2000/2001, to interpret the meaning of those same words in earlier ordinances passed by a different legislative body. The Special Referee was misled because the ordinances that predate 1999 use the same words. (*See* R. pp. 3583 § 8-62(h), 3647 § 26.73.4(2)). But it does not follow that the Council that passed those earlier ordinances intended the same meeting to attach to those words. Those ordinances were enacted as part of the County's floodplain management regulations required to participate in the NFIP, which is based on the hydrologic and hydraulic engineering sciences. Thus, interpreting these words in this context raises a question of hydraulics and fluid dynamics, not common English usage.[18] The flow of

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[17] Like the County, the Association persists in misrepresenting Columbia Venture's plan to build an extensive development in a *floodplain*. Ass'n Brief p. 34. This is false. Columbia Venture *never* proposed to build an extensive development on land classified as a floodplain. Upon upgrade and certification of the Levee system to FEMA and County standards, the floodplain and floodway on the Property protected by the Levees would be removed. *See* Columbia Venture Reply Brief p. 27.

[18] Accordingly, to determine what does or does not impede the free flow of a liquid like water, one would need to consult, not Webster's Dictionary, but rather a qualified engineer knowledgeable in hydraulics and fluid dynamics. *See* Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Legal Texts* 73 (2012) ("Sometimes context indicates that a technical meaning applies. Every field of serious endeavor develops its own nomenclature—sometimes referred to as *terms of art*. Where the text is addressing a scientific or technical subject, a specialized meaning is to be expected ...."). *See also* the hydraulic flow equations that are included in the Record as part of the 1981 USGS study of the Congaree floodplain, which are quite complex. (R. pp. 5758-59). Also, with an open channel, there is an intuitive relationship between the velocity of the water in the channel and the height of its surface elevation. A dam

water in times of flood or "Q" is expressed in cubic feet per second by FEMA and other hydrologists. (R. pp. 1191, 3477). In the case of the Congaree River, FEMA determined the Q to be 292,000 cfs. (R. pp. 3465, 3476). That free flow of water would not be impeded or retarded by a flagpole or fencepost. If the obstruction were large enough, however, it would cause a rise in the surface elevation of the water. Thus, the county engineer in 1999 and before correctly interpreted "impede the free flow of water" as consistent with the FEMA no rise standard. According to the engineer, if you are not causing a rise, you are not impeding the free flow of water. (R. pp. 1874-75).

Thus, when Columbia Venture sought a permit to make improvements to the levees in May 1999, the county engineer requested, among other things, 100-year flood information. (R. p. 3267). The County at that time was enforcing FEMA's February 25, 1999 revised preliminary FIRM, which placed the Levees in the regulatory floodway (*See* R. pp. 2774-75), and accordingly, Columbia Venture would be required to demonstrate that the improvements it proposed to make to the Levees at that time would not cause a rise in the 100-year flood levels. The engineer, did not, however, reject the application out of hand because Columbia Venture proposed to add fill in a regulatory floodway. (R. p. 3267). Rather, the application was turned down as incomplete and needing additional information to be supplied. (*Id.*). Later in the same month, the county administrator decided to enforce countywide the 1994/1995 effective FIS and FIRM that did not place the Levees in a regulatory floodway, but at the same time, the county administrator decided that the County would not issue any permits for Levee improvements until FEMA had completed its mapping. (R. pp. 2768, 2787-88, 3060 (May 1999 entry)). During this

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placed in a river would cause the surface elevation of the water to rise, as well as retard the velocity of the water. Moreover, if the Council that adopted the County's floodplain management ordinance prior to 1999 had intended to prohibit structures in a regulatory floodway, it could have easily said so.

period of delay (which lasted until August 20, 2001), the County changed its ordinances to provide for "no build" as opposed to "no rise" regulatory floodways and prohibited levees in regulatory floodways to be made higher or wider. (*See* R. pp. 2767-68).

2. **Columbia Venture needed both 100-year and 500-year data and plans to upgrade the Levees to be certified under FEMA standards and to comply with the County's building requirements.**

The Association claims that Columbia Venture's plan to move forward with its Levee upgrade process immediately upon purchase without waiting for FEMA to issue a new FIRM was unreasonable because Columbia Venture's plans were allegedly tailored to the 100-year flood when the County required levees to withstand the 500-year flood plus three feet of freeboard. This is false. First, the Association ignores the abundant testimony in the record from those charged with investigating the County's standards and formulating development plans that Columbia Venture intended, at all times, to build a 500-year levee in full compliance with the County's ordinances. (R. pp. 1489, 1491-92, 1530, 1664). Second, the Association wholly fails to acknowledge two critical points regarding the 100-year flood standard: (1) to achieve levee certification under 44 C.F.R. § 65.10, all such engineering must be tailored to the 100-year flood and (2) the no rise showing necessary to floodway construction is entirely premised on extensive hydrologic and hydraulic engineering based on the 100-year flood. Simply put, there is no way for Columbia Venture to even get to a 500-year construction plan without going through the 100-year flood analysis required for certification and no rise engineering showing. Under this backdrop, it is entirely reasonable and appropriate for Columbia Venture to engage in *both* 100-year and 500-year engineering, which it began in March 1999 and had largely completed in November 1999. Columbia Venture Brief pp. 31-35.[19]

[19] The Association further claims that Columbia Venture's lack of detailed and comprehensive engineering regarding the no rise issue prior to purchase shows that Columbia

3. The Association misreads FEMA's January 26, 1999 letter.

The Association also argues that the January 26, 1999 letter from FEMA[20] confirming Columbia Venture's plan as articulated in Mr. Tillotson's letter of January 20, 1999, does not mean what it plainly says. In pertinent part, FEMA's letter states:

> If the aforementioned levee is upgraded to meet in total the applicable portions of 44CFR, Part 65.10, and the construction necessary for it to meet said requirement is in compliance with State and local floodplain management requirements, then FEMA would revise the applicable FIRM to remove the Special Flood Hazard Area designation and floodway. As you are aware, ***should*** the structural modifications necessary to bring the levee into compliance with 44CFR, 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 44CFR, 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.

Venture's investment-backed expectations were unreasonable. Columbia Venture does not deny that a full blown no rise engineering study (especially for 20 miles of Levees) is an expensive and time-consuming undertaking. It certainly took Lockwood Greene and S&ME over half a year and hundreds of thousands of dollars to do the geotechnical work in preparation for finalizing upgrade plans. (R. pp. 1745, 1759-60, 1969, 3520-50, 4896, 4906-08). Prior to purchase, Lockwood Greene engineers analyzed the available information (including unchallenged Lexington County floodway/floodplain data that assumed that the Levees were certified and would hold in the event of a 100-year flood) and made the educated opinion that upgrading the Levees would not cause a rise in flood levels and would have no impact on Lexington County. (R. p. 3504). Lockwood Greene was correct, and the County cannot refute it (and has not). (*E.g.* R. pp. 1819, 1823-24). Indeed, engineers familiar with no rise engineering do not necessarily have to go through the extensive modeling process to state intuitively whether or not a given project will likely cause a rise in base flood elevations, especially with a five mile wide floodplain and the relatively small amount of fill required to upgrade the Levees compared to the vast width of that floodplain. (*See* R. pp. 1823-24). However, had Lockwood Greene been *incorrect* or if latent issues in the Property revealed that no rise upgrade of the Levees was not possible (and further assuming that such determinations were made when the County was enforcing a floodway on the Levees), Columbia Venture simply would not have a regulatory takings claim against the County. Columbia Venture has a regulatory takings claim because *after* the County unanimously agreed to accept operations and maintenance of the Levees after upgrade and Columbia Venture consequently purchased the Property, the County changed its ordinances to prohibit both the very actions Columbia Venture had to take to upgrade the Levees to certified status and any building or construction whatsoever on Columbia Venture's Property.

[20] The Association inaccurately states that FEMA's letter was dated 15 days before closing. Ass'n Brief p. 29. It was not. It was dated 24 days before closing.

(R. 3125 (emphasis added)). In January 1999 (and indeed until February 20, 2002), the *existing* regulatory floodway on the Congaree River was located on the strip of land between the river channel and the riverside toe of the Levees. (R. p. 3567). FEMA's letter thus cautioned Columbia Venture that if any work on the riverside portion of the Levee system in the existing regulatory floodway resulted in an increase in base flood elevations within that existing regulatory floodway, Columbia Venture would also have to comply with the provisions of 44 C.F.R. § 65.12.[21]

Given the plain language of FEMA's letter about the existing regulatory floodway, it is strange, to say the least, that the Association argues that the "only logical conclusion" to be drawn from the letter is that FEMA concluded that Levee improvements would only proceed after FEMA issued a final FIRM showing a large floodway on the Property. Ass'n Brief pp. 29-30. The record does not support the Association's argument.[22] At Richland County's request, FEMA withheld publication of the June 5, 1998 revised preliminary FIRM. (R. p. 3115-16).[23] FEMA also, on its own, abandoned the June 5, 1998 revised preliminary FIRM on February 25,

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[21] The Association is only halfway correct in its statement that 44 C.F.R. § 65.12 "applies only when construction would occur in a floodway." Ass'n Brief p. 29. 44 C.F.R. § 65.12 applies to encroachments upon an adopted regulatory floodway "which will cause base flood elevation increases in excess of those permitted under paragraphs (c)(10) or (d)(3) of § 60.3 of this sub-chapter." 44 C.F.R. § 65.12(a). Obviously, not all regulatory floodway construction must comply with § 65.12—just that which will cause a rise in the base flood elevation.

[22] Applicable NFIP regulations regarding LOMRs and CLOMRs also fail to support the Association's argument, as they are only available for "modification of the existing regulatory floodway." 44 C.F.R. § 72.2. The state NFIP coordinator did not construe Mr. Tillotson's request as anything other than confirming the "normal process" with FEMA. (R. p. 3121).

[23] The document the Association cites in footnote 54 does not help its argument. The July 28, 1998 letter (R. pp. 3117-18) was written to confirm FEMA's acquiescence to Richland County's request to put the mapping effort on hold. (*See* R. pp. 3115-16). Nothing in the July 28, 1998 letter indicates that the "completion of flood control works" as described therein was tied to any particular FIRM. Instead, the letter simply affirms that effective maps "may be revised at any time should the community provide data showing that changes have occurred that affect the flood hazards depicted on the maps, such as the completion of flood control works." (R. p. 3118).

1999, when it issued another revised preliminary FIRM (that it also did not publish for review and comment and which was the subject of correspondence from the county administrator in light of the County's agreement to operate and maintain the Levees upon upgrade and certification). (R. p. 3313, 3881). Indeed, the revised preliminary FIRM that FEMA *did* actually publish on August 12, 1999, included a floodway running only to the landward toe of the levees—a significantly smaller floodway than that in the June 5, 1998 unpublished revised preliminary FIRM. (R. p. 4105).

B. The County's 2001 ordinances were targeted in bad faith at Columbia Venture's Levees and proposed development and were not aimed to prevent harm.

One page 4 of its brief, the Association argues that this "case raises the question whether the public can rely on traditional police power authority to prevent hazardous development in dangerous flood prone areas without triggering takings liability." The Association is arguing against a strawman. *Lucas* establishes that the state may prohibit hazardous development in dangerously flood prone areas under the nuisance exception elucidated in that case without triggering takings liability. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031-32 (1992); *see also* Columbia Venture Reply Brief pp. 50-51, which the Association fails to address. The County could have prohibited the building of structures in any portion of the floodplain shown to be unsafe and a nuisance under state law. The County's no build floodway, however, does not distinguish between areas of the floodway that are dangerous for construction and those that are safe for no rise engineering and construction, such as the campus of Heathwood Hall. In contrast, Columbia Venture did not propose to develop property in a floodplain or floodway. Columbia Venture sought to develop property protected by 500 year certified Levees. Obviously unsafe levees (such as levees that are predicted to fail if not improved even if maintained) are a bad idea from the standpoint of public policy. Public policy should require such levees to be

improved and made safe consistent with accepted engineering and construction design and practices applicable to certified levees. That is exactly what Columbia Venture sought to accomplish in this case—and what the County actively sought to thwart and prevent from 2001 forward.

The Association argues that the County's no build floodway serves to prevent increases in flood levels by restricting floodplain development. Ass'n Brief p. 18. But a no build floodway, as opposed to a no rise floodway, adds nothing to the goal of preventing increased flood levels during times of flood. If that is the goal, then the County should prohibit building in the flood*plain*.[24] The NFIP allows flood proofed construction in the floodplain with living quarters elevated above the BFE. 44 C.F.R. §§ 60.3(c)(2), 60.3(d)(1). Both Richland County's 1994 and 2001 ordinances are in accord. (*See* R. pp. 3583 (§ 8-62(d), 3648 (§ 26-73.5(2), 4264 (§ 8-26(d). Such floodplain construction is permitted even if it causes a rise in the BFE. Indeed, the NFIP regulations permit landowners on both sides of a river to truck in fill dirt and to raise the level of their property within the floodplain to a height equal to or exceeding the BFE. (R. p

[24] Where a community has not adopted a regulatory floodway, the NFIP regulations do not allow construction in the floodplain that would displace water by more than one foot. 44 C.F.R. § 60.3(c)(10) ("[The community shall] require until a regulatory floodway is designated, that no new construction, substantial improvements, or other development (including fill) shall be permitted within Zones AI-30 and AE on the community's FIRM, unless it is demonstrated that the cumulative effect of the proposed development, when combined with all other existing and anticipated development, will not increase the water surface elevation of the base flood more than one foot at any point within the community."). The minimum "regulatory floodway [is] based on the principle that the area chosen for the regulatory floodway must be designed to carry the waters of the base flood, without increasing the water surface elevation of that flood more than one foot at any point." 44 C.F.R. § 60.3(d)(2). Thus, once the community adopts a regulatory floodway, it may permit construction in the *floodplain* without regard to the displacement of flood water but must "[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 analysis performed in accord with standard engineering practices 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).

1813). In that event, the BFE should rise by one foot in accordance with FEMA's hydraulic model. (*See id.*). But the NFIP regulations do not permit construction in the regulatory floodway that would cause a rise in the BFE. 44 C.F.R. § 60.3(d)(3).[25] Consequently, prohibiting all construction within a regulatory floodway does not serve to add additional protection from increased flood levels that is not already accomplished by allowing only no rise construction within the regulatory floodway.[26]

This pretextual claim of harm prevention is amply illustrated by the obvious disparities with which the County's 2001 ordinance treated the Property of Columbia Venture on one hand and its immediate neighbors (Heathwood Hall and the City) on the other.[27] The Association claims that Heathwood Hall's and the City's structures were "legacy structures" and, as such,

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[25] A very limited exception exists for encroachments within the regulatory floodway that do result in an increase in base flood elevations "provided that the community first applies for a conditional FIRM and floodway revision, fulfills the requirements for such revisions as established under the provisions of § 65.12, and receives the approval of the Administrator." 44 C.F.R. § 60.3(d)(4). Section 60.3(d)(4) does not apply to Columbia Venture, because Columbia Venture intended to show and could have shown a no-rise in its Levee improvement plans in conformance with § 60.3(d)(3).

[26] The Association argues that numerous courts have rejected challenges to the NFIP regulations. Ass'n Brief p. 10. *E.g. Adolph v. FEMA*, 854 F.2d 732, 737 (5th Cir. 1988) (The NFIP is a carefully crafted regulatory scheme that allows beneficial use of flood prone areas and "when operating precisely as intended by Congress, results in no unconstitutional taking of plaintiffs' property ...."). The NFIP is also a voluntary federal program and FEMA, as a matter of law, neither affected nor required any unconstitutional taking of plaintiffs' property because the parish was not compelled to participate in the NFIP. *Id.* at 733; *accord Tex. Landowners*, 453 F. Supp. at 1025. Columbia Venture does not challenge the NFIA or the NFIP, so these cases are neither dispositive nor pertinent to the issues before the Court. The NFIP regulations allow property owners ample opportunity to develop the regulatory floodway on their property. The no build floodway adopted by the County, however, does not.

[27] Columbia Venture does not deny that many portions of the County's April 17, 2001 stormwater ordinance are in fact tailored to harm prevention and other proper purposes. The legislative history of the specific exemptions for Columbia Venture's neighbors and the prohibition on making levees higher or wider, however, combined with the dearth of hydraulic and hydrologic engineering logic contained in these prohibitions show the animus directed at Columbia Venture and its development plans, which the Council legislatively enacted. (R. pp. 3231-32, 3255-57, 4222).

they were allowed to remain. This argument ignores two important points. First, Heathwood Hall and the City were allowed to build significant *new* structures using no rise engineering. (R. p. 4265). Heathwood's new middle school, new gymnasium, and new chapel could not be considered "legacy" structures, as they did not exist in 2001. Second, if Heathwood Hall and the City's various existing infrastructure were considered legacy structures, why were Columbia Venture's existing Levee infrastructure not considered legacy structures? An argument that legacy structures were permitted but omits some of the existing structures fails. Also, like Heathwood Hall, Columbia Venture had plans to develop its Property. Heathwood Hall's plans were allowed to move forward; Columbia Venture's were not. (*See* R. pp. 3206-08).

C. No variance was available to Columbia Venture.

The Association, like the County, reaches to find a variance that would be available to Columbia Venture under the County's ordinances, but neither the Association nor the County in their briefs take the next step and argue that Columbia Venture has failed to exhaust that remedy and that its case is not ripe for judicial review for that reason.[28] So the question arises: why work so hard to uncover a hidden variance buried in other statutes or regulations? The answer is the implicit recognition by the Association and the County that a no build regulatory floodway without a variance would simply go too far and take property in many cases, including here.

The Association argues that the County in enacting the 2001 stormwater ordinance intended to incorporate by reference a variance found in the NFIP regulations, specifically 44 C.F.R. § 60.6. But nowhere in the text of the ordinance is there a provision which incorporates

[28] In 2005, Columbia Venture did seek permission to improve the Levees under the exception granted to Heathwood Hall, which obviously uses entire Levee system, but was turned down flat and told that it could not do anything to make the Levees taller or wider. (R. pp. 3343-44, 4818-20).

by reference an applicable variance found in the NFIP regulations or elsewhere. Moreover, the manifest intent of the County Council was to eliminate and not allow *any* variances from the prohibition against building in a regulatory floodway. (*E.g.* R. pp. 3064-65, 3069-70, 3231-32, 3255-57, 4222). An early draft of the stormwater ordinance contained a provision that allowed for variances but it was deleted at the request of the Southern Environmental Law Center and the Congaree Task Force, who asserted that there should be no building at all in the regulatory floodway with no exceptions. (R. pp. 3231-32, 3255-57, 4222). Later exceptions were added to the ordinance for Heathwood Hall and the City's wastewater treatment plant, but these specific exceptions were drafted by the Southern Environmental Law Center and the Congaree Task Force to avoid the Council's adoption of a general variance provision that might benefit Columbia Venture and permit it to improve its Levees. (R. pp. 3069-70, 3358-60, 3363-64). Thus, the clear intent of the Council in passing the stormwater ordinance was to have no variances. Certainly the Council had the power to enact a stormwater ordinance that did not allow for variances, as nothing in the NFIP regulations forbids a local government from doing this if it so chooses.[29] But, as the Association implicitly recognizes, local floodplain management regulations lacking a variance provision likely go "too far" and take private property in cases which obviously call for a variance process.[30]

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[29] Indeed, the legal advice upon which the County was operating in passing the 2001 stormwater ordinance did not construe the NFIP regulations as either supplying or requiring a variance. (R. p. 5365).

[30] As Columbia Venture has already briefed, the NFIP does not provide a standalone variance provision. Columbia Venture Reply Brief p. 46. Additionally, important logistical aspects of a variance (when to apply, to whom to apply, administrative review, etc.) are wholly absent from the enacted stormwater ordinance (but were included in the variance provision deleted at the request of Columbia Venture's opponents (R. pp. 3231-32)) and are not supplied by the NFIP.

CONCLUSION

For the reasons discussed above and in Columbia Venture's prior briefing in this matter, the Special Referee's orders granting summary judgment to the County on Columbia Venture's *per se* takings claim and finding no regulatory taking of Columbia Venture's Property should be reversed.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

John Hamilton Smith, Special Referee

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

Richland County, Respondent,

v.

Columbia Venture, LLC, Appellant.

CERTIFICATE OF SERVICE

This is to certify that I caused a copy of the foregoing **Reply Brief of Appellant to Amicus Brief of Association of State Floodplain Managers** to be Included in the Record on Appeal to be served on the following individuals in the manner expressed below and addressed as follows:

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