THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

THE HONORABLE JOHN HAMILTON SMITH, SPECIAL REFEREE

Case No. 2010-CP-40-8943R

Columbia Venture, LLC, ... Appellant,

v.

Richland County, ... Respondent.

AMICUS CURIAE BRIEF OF THE SOUTH CAROLINA ASSOCIATION OF COUNTIES

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INTERESTS OF *AMICUS CURIAE*

The South Carolina Association of Counties (Association) represents the interests of each of South Carolina's forty-six counties. The South Carolina General Assembly granted the counties the general police power to enact laws to preserve the health, peace and order. S.C. Code Ann. §4-9-25. More specifically the counties are authorized to regulate land uses through comprehensive planning and zoning. S.C. Code Ann. §6-29-10 *et seq*. (The S.C. Local Government Comprehensive Planning Enabling Act).

Counties are the first line of defense in protecting the health safety and welfare of their residents. Local governments are expected to protect the community through land use restrictions including the prohibition of risky development in flood prone areas. Counties and other local government entities have an opportunity to lead the way in flood hazard mitigation through proactive land use regulation. They must address directly the tension between urban growth and increased flood risks. It is the County that must accept and communicate to its residents the need for land use regulation that reflects the reality of flood risk, including provisions that respect nature by leaving floodways undisturbed.

The Association supports Richland County's position that the land use measures restricting some of Columbia Venture's property did not constitute a taking of property without just compensation.

BACKGROUND

a. Floodplain Regulation is a Legitimate and Vital Police Power Granted to Counties

Floods are natural occurrences in the life of a river. When a river floods, it responds according to the laws of physics, expanding to take all space necessary to carry the flood flows. A floodplain acts as the river's self-regulator to hold waters until downstream levels subside sufficiently to receive them. The greatest harms and costs to the community occur when humans challenge nature by encroaching onto the river's territory. When that occurs, humans risk destruction to themselves and others. The final result is that floods, when they inevitably strike, take rising tolls in lives and property.

The starting point of regulatory control of development in flood prone areas is the federal government. The Federal Emergency Management Agency (FEMA) is responsible for implementing the National Flood Insurance Program (NFIP), 42 U.S.C. § 4001(c). The NFIP provides flood insurance to property owners within a community in return for the community's adoption of land use regulations designed to protect people from flood damage. Section 4102(c) of the National Flood Insurance Act addresses the goals of local land use measures. Federal law encourages local governments to adopt land use measures that will constrict development of land exposed to flood damage; guide proposed construction away from locations threatened by flood hazards; and improve long-range land management and use of flood-prone areas. 42 U.S.C. § 4102(c). FEMA makes various scientific and technical determinations to help identify flood hazards for a given area. One such determination, the "base flood elevation," measures the potential water level height during a 100-year flood, called the base flood. FEMA uses these base

flood elevation determinations to prepare flood insurance rate maps (flood maps) for local communities participating in NFIP. These maps also delineate the regulatory floodway that a community must adopt to comply with NFIP. A local government may adopt regulations more restrictive than FEMA's minimum standards. These regulations are a legitimate and vital police power of the counties.

b. Restrictions on Land Development Adjacent to the Congaree River serve to Protect the Health, Safety, and Welfare of the Community

The Congaree River is formed near downtown Columbia where the Saluda and Broad Rivers converge. Portions of the river form the geographic boundary between Richland and Lexington Counties. The River is historically prone to flooding. In an effort to assist the Court in its understanding of the nature of floods and the potential for damages in the Congaree River area, the Association points to the flood warnings provided by the National Weather Service (NWS).[1] The National Weather Service has recorded numerous instances of flooding at varying river levels.[2] At 10 feet, flooding begins in flood prone areas near and downstream of Columbia. Between 13 and 15 feet, flooding begins in the Congaree National Park, on roads in low lying areas downstream of Columbia, and over most of the Cayce-West Columbia River Walk. By the time the river reaches 20 feet, flooding has reached some residential areas in Cayce/West Columbia and areas downstream of Columbia. Once the river reaches 30 feet, additional residential areas near and downstream of Columbia experience flooding, the hydroelectric plant near downtown is flooded, and low lying roads downstream of

[1] The National Weather Service flood data is used to issue warnings to the public. It is used here solely as an illustration to the Court of the historic flood potential of the general area. National Weather Service data is not used by FEMA to determine floodplain and-or floodway designation.

[2] http://www.water.weather.gov/ahps2/river.php?wfo=cae&wfoid=18757&riverid=203657&pt%5B%5D=144492&pt%5B%5D=150315&allpoints=144492%2C143069%2C150315&data%5B%5D=impacts

Columbia in Richland and Lexington Counties become flooded.[3] Historic crest data for the Congaree River clearly indicates that water levels at flood stage or greater are a common occurrence. In the 15 years prior to Columbia Venture's February 1999 purchase, the Congaree River was at or above flood stage (19 feet) 31 times. The highest recorded crest during this time period was 29.9 feet.[4]

In 1998, FEMA began the process of redrawing the flood maps for the portion of the Congaree River located in Richland and Lexington County. Columbia Venture planned to build a high-density mixed-use development on property along the Congaree River. County ordinances sharply restricted construction within FEMA's regulatory floodway. Columbia Venture's development success largely hinged upon FEMA adopting a floodway that did not include their land. However, after two years of administrative appeals to FEMA's flood maps, FEMA issued a final determination that put a floodway over 3,130 acres of Columbia Venture's property. Columbia Venture's remaining 1,135 acres were located outside of the regulated floodway. R. p.143.

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[3] Id.

[4] http://www.water.weather.gov/ahps2/crests.php?wfo=cae&gage=cols1

ARGUMENT

I. RICHLAND COUNTY'S FLOODPLAIN REGULATIONS DO NOT CONSTITUTE A PER SE OR REGULATORY TAKING

Two types of regulatory actions are deemed to be *per se* takings under the Fifth Amendment: permanent physical occupation and complete deprivation of "all economically beneficial us[e]". *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). Regulatory *per se* takings are "relatively narrow." *Lingle* at 538; *see also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 325 (2002) ("physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights"); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002) ("the holding of *Loretto* is quite narrow"). Those cases which do not fall into either of these two narrow categories are subject to analysis under the *Penn Central* balancing test. *Lingle* at 538. Appellant's claims fail both the *per se* and *Penn Central* taking tests.

A. Richland County's Adoption Floodway Development Restrictions and Use of FEMA Flood Data Do Not Constitute a *Per Se* Taking Under *Loretto*

Richland County's adoption of floodway development restrictions, and the required utilization of FEMA flood data, do not constitute a permanent physical occupation of Columbia Venture's property, and therefore, is not a *per se* taking under *Loretto*.

A permanent physical occupation of private property by the government is a *per se* taking. *Loretto* at 426. "The government effects a physical taking only where it

requires the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (emphasis in original). "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* at 539 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Loretto* at 433; *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). A land use restriction in a floodway does not require Columbia Venture to submit to physical occupation of its floodway property.

Appellant argues that FEMA Flood Insurance Rate Maps are functionally equivalent to a plat that reserves a flood easement held by the government. As part of the NFIP, FEMA publishes Flood Insurance Rate Maps, more commonly known as Flood Maps, which are official maps of communities "delineat[ing] both the special hazard areas and the risk premium zones applicable to the community." 44 C.F.R. § 59.1. The Flood Maps are then used by the insurance industry to assess premiums for flood insurance policies and used by participating communities to identify flood hazard areas subject to floodplain management regulations. Unlike plats, which are recorded instruments delineating property boundaries, Flood Maps identify flood risk, and are open to revision and correction under the NFIP. *See e.g.* 44 C.F.R. § 65.6 (map revision of base flood elevations); 44 C.F.R. § 65.7 (map revision of floodway); 44 C.F.R. § 65.10 (map revision based upon levee accreditation). Characterizing Flood Maps as a plat that

reserves flood easements has no basis in law. A Flood Map does not create a legal right to use private property.[5]

Columbia Venture turns to *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Prot.*, 560 U.S. 702 (2010), as another avenue to further its mistaken takings theory. In *Stop the Beach*, beachfront property owners challenged a state statute enacted to restore eroded beaches. *Id.* at 711. The statute established an erosion control line that replaced the common law rule drawing the boundary between private ocean-front lots and state-owned submerged land at the naturally fluctuating mean high water mark. *Id.* at 710. Beach-front property owners challenged the law as taking their common law property right to own accretion to their property. *Id.* The Florida Supreme Court ruled on a certified question that the statute did not unconstitutionally deprive the property owners of littoral rights without just compensation. *Id.* at 712. The plaintiffs then argued that the Florida Supreme Court's ruling constituted a taking. *Id.* A plurality of the United States Supreme Court ruled that a state judicial decision eliminating a common law property right may effect a taking of private property in violation of the United States Constitution. *Id.* at 713–14. "If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Id.* at 715.

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[5] Furthermore, Columbia Venture's attempt to distinguish the County's floodplain management ordinances as different from other land use ordinances due to the existence and use of Flood Maps is unavailing. Flood Maps are akin to zoning maps in that they delineate the Special Flood Hazard Area as a type of zoning district subject to additional review and permitting requirements to assure that any new development and redevelopment will be "reasonably safe from flooding," as required by the NFIP regulations at 44 C.F.R. § 60.3.

Stop the Beach is not helpful to Columbia Venture because it applies to state law-making bodies having the power to abrogate common law property rights. Richland County does not make state law, nor is it empowered to legislatively eliminate a common law property right. *City of N. Charleston v. Harper*, 306 S.C. 153, 156, 410 S.E.2d 569, 571 (1991) ("The grant of [legislative] power is given to local governments with the proviso that the local law not conflict with state law."). Aside from this obvious distinction, no common law property right has been extinguished in this case. Columbia Venture has no common law right to make unfettered use of its Property. *MacDonald, Sommer & Frates v. Cnty. of Yolo*, 477 U.S. 340, 347 (1986). And Columbia Venture has no common law property right to construct levees.[6]

Columbia Venture makes much of the fact that Richland County's zoning and stormwater management provisions governing construction within floodways included civil and criminal enforcement mechanisms, as if these provisions amount to an appropriation of its property. CV Reply, p. 9. The mere existence of provisions within an ordinance authorizing the County Engineer or a code enforcement officer to inspect construction to determine compliance with an approved plan or permit does not give rise to a taking. *C.f. United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985)

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[6] Columbia Venture's property is located adjacent to the Congaree River, which, under normal circumstances, would give Columbia Venture a common law riparian right to build levees to hold back a flooded river so long as the levee causes no injury to other riparian owners. *Hopkins v. Clemson Agric. College*, 221 U.S. 636, 641–42 (1911); *Johnson v. Williams*, 238 S.C. 623, 633, 121 S.E.2d 223, 228 (1961); *Mason v. Apalache Mills*, 81 S.C. 554, 563, 62 S.E. 399, 402 (1908); *Ballentine v. Hammond*, 68 S.C. 153, 159, 46 S.E. 1000, 1003 (1904). The deeds conveying the Manning property to Columbia Venture excepted riparian rights from the property interests conveyed. *See* R. 3822–25; R. 3826–27; R. 3828–29. Consequently, Columbia Venture has no common law riparian right to construct or improve levees along the Congaree River. Even if it did, evidence indicates that Columbia Venture's proposed levee construction would have injured other riparian owners. Under the separate common law rule applicable to diffused surface waters, a property owner's right to fend off diffused surface water does not give him a right to construct a levee to prevent surface water from entering his land, thus backing up diffused surface water on another's land. *Brandenburg v. Zeigler*, 62 S.C. 18, 24, 1901 S.C. LEXIS 7, 11 (1901).

(stating that the existence of a permitting scheme does not constitute a taking of property). Columbia Venture's insistence to the contrary suffers from the same fatal flaw as its flood easement theory – there has not been any actual flooding of Columbia Venture's land caused by Richland County, and there has been no entry upon Columbia Venture's land by any County official to inspect or enforce the provisions of the Stormwater or Zoning Ordinance. If Columbia Venture's logic was to be accepted, any land use ordinance containing enforcement provisions would expose local governments to physical takings liability regardless of whether these provisions were even exercised against a property owner. This is an absurd result that would upend local government land use regulation. Furthermore, had there actually been entry upon Columbia Venture's property for compliance purposes, the intermittent and transitory nature of this entry would fail to meet the permanency requirement of Loretto. *See Tennessee Scrap Recyclers Assoc. v. Henry*, 556 F.3d 442 (6th Cir. 2009); *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002); and *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995).

B. The Floodplain Regulations Did Not Destroy "All Economically Beneficial Use" Required For A Taking Under *Lucas*

Richland County's adoption of floodway development restrictions and the required utilization of FEMA flood data did not result in a complete loss of value of Columbia Venture's property, and therefore is not a *per se*, or categorical taking, under *Lucas*. In order to determine whether a taking has occurred under *Lucas*, the question must be whether the landowner was deprived of "all economically beneficial uses" of his land. *Lucas* at 1019. A categorical taking under *Lucas* is an "extraordinary circumstance [in which] no productive or economically beneficial use of land is permitted." *Lucas* at

1017. The United States Supreme Court was clear in that the standard for a *Lucas*-style categorical taking is the loss of "all economically beneficial uses." *Lucas* at 1019.

Under the County's zoning regulations, permitted uses within a floodway included agricultural and horticultural uses, parking and loading areas, and airport runways. Permissible uses within a floodway by special exception included transient amusement enterprises, car sales lots, mining, marinas and boat rentals, docks and floating restaurants. R. pp. 3647–48. Columbia Venture's non-floodway property could be used in any manner allowable within the underlying zoning classification, provided that structures are elevated or located on fill material that raise the floor of the structure above the base flood elevation. These regulations clearly do not deprive Appellant of all economically beneficial use of its entire parcel.

Appellant also argues that "the restrictions imposed on Columbia Venture's land—no filling and no building in a floodway—are essentially identical to the restrictions imposed on the landowner in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In *Palazzolo*, the landowner was prevented by municipal regulation from filling wetlands for construction of structures. *Palazzolo* at 621. In dismissing the *Lucas* claim, the Court noted that Palazzolo's property retained "$200,000 in development value" and Palazollo could build a "substantial residence on an 18-acre parcel." *Id.* at 631. This amount of diminution of value, the Court said, did not leave the property "economically idle" so that it qualified as a categorical taking under *Lucas*. *Palazzolo* at 631. Mr. Palazollo's *Lucas* claim was denied. *Id.*

Appellant equates the regulatory framework on their property to that found in *Palazzolo*. Like *Palazzolo*, significant economically beneficial use or value remains in Appellant's property, and therefore, no categorical taking has occurred under *Lucas*.

C. <u>The Floodplain Regulations Do Not Constitute a Regulatory Taking Under *Penn Central*</u>

One of the bedrock principles of property law is the idea that the Takings Clause contained in the Fifth Amendment to the United States Constitution "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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In 1922, the United States Supreme Court announced that a Fifth Amendment taking could occur by virtue of government regulation of property that in the words of the court, "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Over time the Courts have struggled to determine how and when a regulatory restriction on property use goes too far. In 1978, the Supreme Court, in *Penn Central Transp. Co. v. New York City*, 348 U.S. 104 (1978) crafted a multi-part test to determine whether a government regulation, when it falls short of completely eliminating the use or value of property is nevertheless a taking. In order to determine whether a regulatory action has improperly burdened property, the courts look to three factors: 1) the economic impact that the regulation has on the property; 2) the degree of interference with the owner's reasonable investment-backed expectations; and 3) the character of the government's action. *Penn Central*, 438 U.S. 104, 124. These three factors must be applied to the owner's whole parcel and not just the portion alleged to be burdened by the regulation. *Penn Central*, 438 U.S. at 130–31; *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002).

i. State and Federal Courts Have Historically Held That Existing and Anticipated Regulations Diminish Reasonable Investment-Backed Expectations

In order to prove that a floodplain regulation "took" their property, developers such as Columbia Venture must prove that they have reasonable investment-backed expectations. *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (2013). A reasonable investment-backed expectation must be more than a property owner's unilateral expectation. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). Over time, the courts have adopted various means for determining whether a party's investment-backed expectations are reasonable. Federal courts often cite three factors: 1) is the matter one within a highly regulated industry?; 2) were the parties aware of the problem/issue that spawned the regulation when the property was acquired?; and 3) could the regulation have been reasonably anticipated?. *See e.g. Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004); *LaSalle Nat'l Bank v. City of Highland Park*, 799 N.E.2d 781, 797 (Ill. App. 2003).

A highly relevant factor in defining a party's reasonable expectations is "whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the alleged taken property." *Appolo Fuels*, 381 F.3d at 1349. Columbia Venture proposed the risky plan to construct one of the largest real estate developments in Richland County history. The site chosen by Columbia Venture was wholly contained within a known floodplain, requiring a complex regulatory review and permitting scheme designed to guide development in areas prone to flooding. The new preliminary FIS and FIRM for the Congaree River floodplain were released by FEMA on June 5, 1998, resulting in the inclusion of practically all of the property in dispute within an expanded

floodway. R. p.116. In order to develop property within a floodway or floodplain, a property owner must contend with complex federal and local regulations intended to discourage such development and protect people from harm. R. p. 164.

The Special Referee concluded that flooding and floodplain management are real issues with serious consequences and that Columbia Venture was aware of these realities. R. p. 164. Specifically, the Special Referee concluded that the evidence presented showed that Deas Manning and Burroughs and Chapin Company were aware of FEMA's preliminary inclusion of the property in an expanded floodway as early as May 1998. Additionally, evidence was presented that the preliminary data induced a potential purchaser of the property to cancel a proposed purchase. During this time period, Deas Manning contacted Richland County requesting assistance from the County to appeal FEMA's decision. R. p. 164. Mr. Manning's letter to the County stated that an expanded floodway "would disallow any expansion of the Heathwood Hall School, City of Columbia Treatment Plant, or any planned development." Therefore, it is apparent that prior to purchase, Columbia Venture knew of the regulatory problems it faced.

The Special Referee's conclusions cannot be disturbed on appeal unless they are an error of law. Given the serious issues surrounding the complex regulatory framework of federal and local laws designed to protect life and property from floods, the Special Referee correctly concluded that Columbia Venture's expectations for speculative development of residences and businesses in a flood prone area were necessarily diminished by the known risks and harms associated with floods and floodplain development.

ii. Reasonable Investment-Backed Expectations Must be More than A Desire to Exploit a Potential Development Opportunity

A property owner does not establish a taking simply by showing that a regulation denied them the opportunity to exploit an interest they thought they had. *Dunes West* at 320, 737 S.E.2d at 622. The Special Referee concluded that the ambitious development scheme proposed by Columbia Venture was speculative and failed to provide sufficient evidence to show that they had reasonable investment-backed expectations.

The conclusion of the Special Referee that Columbia Venture lacked reasonable investment-backed expectations was correct and should not be disturbed on appeal. The mixed-use plans and vision of Columbia Venture, while extensive, were speculative at best. The numerous federal and local regulatory hurdles that Columbia Venture should reasonably have expected to encounter were too simply great to surmount.

iii. The Special Referee Was Correct In Concluding That The County's Floodplain Management Ordinances Weighed In Favor Of The County

Penn Central analysis also relies on an examination of the character of the government action. The Special referee correctly recognized that Richland County's floodplain management ordinances served a legitimate harm-preventing purpose, and that the burden of regulation fell evenly among property holders within the floodplain/floodway. R. p. 169–70. Columbia Venture asserts that consideration of the harm-preventing purpose of the regulations constitutes an error of law. Brief of Appellant, p. 102. In support of their allegation Appellant cites *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005), which held that the due process inquiry of whether a government action substantially advances legitimate government interests is not the

relevant consideration in takings cases. The relevant consideration in reviewing the character of a government action is whether the action "amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good." *Lingle* at 539. The Appellant's characterization of *Lingle* is mistaken.

In weighing the benefits, burdens, and distribution of a regulation, "there is little doubt that it is appropriate to consider the harm-preventing purpose of a regulation in the context of the character prong of a *Penn Central* analysis." *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260 (Fed. Cir. 2009), *cert. denied* 559 U.S. 935 (2010). Government action that serves to prevent public harm may impose burdens on a property owner, but burdens caused by harm prevention are typically not compensable. *Resource Invs, Inc. v. United States*, 85 Fed. Cl. 447, 518 (Fed. Cir. 2009). Regulation of property within floodplains is a legitimate exercise of a county's police power to ensure the health, safety, and welfare of its citizens.

A landowner does not possess "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). The General Assembly has granted counties the authority to enact land use regulations to protect its citizens from flood by restricting the types of development allowed in flood prone areas. The counties authority stems mainly from two main sources. The first is the "general police power" granted in section 4-9-25 of the Home Rule Act. Section 4-9-25 provides:

> All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of

> this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

Section 4-9-25 authorizes the counties of South Carolina to enact any regulation it deems necessary and proper to promote the safety and health of the community. The General Assembly in 1994 enacted the Local Government Planning Enabling Act, codified as Chapter 29 of Title 6 of the S.C. Code of Laws. The Act authorizes counties to undertake reasonable land use planning and zoning tools to guide land uses and development in the community. The Act specifically references land use planning related to floods at least four times. The Act provides that zoning ordinances:

> must be made with reasonable consideration of the following purposes...
>
> (5) to regulate the density and distribution of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, protection against floods, public activities, and other purposes;
>
> ...
>
> (7) to secure safety from fire, flood, and other dangers.

S.C. Code Ann. 6-29-710(A). Another section of the Planning Act provides authority for counties to enact subdivision regulations for land within the county. Section 6-29-1130 directs that subsequent subdivision regulations shall prohibit the county from approving development plans unless the county is assured of the safety of the land uses. This section

specifically references flood or other inundation as a menace to health, safety, and welfare.

The General Assembly and the Courts have recognized that protection of county citizens from the dangers of floods is an important police power inherent to counties. The floodplain regulations restricting the types of development on Appellant's property does not amount to a physical invasion, but instead merely affects property interests through an important public program adjusting the benefits and burdens of economic life to promote the common good. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005).

iv. The Special Referee Erred In Concluding That The Economic Impact Was "Significant" Where No Actual Loss Value Could Be Determined.

In analyzing whether a *Penn Central* style regulatory taking has occurred the court must examine the economic impact suffered by the property owner. *Fla. Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21 (1999), and *Cienega Gardens v. United States*, 503 F.3d 1266, 1283 (Fed. Cir. 2007), are two seminal decisions in Federal Claims and Federal Circuit Courts that advanced standard applications of good economics to measure and evaluate the *Penn Central* test. These cases clarified that the financial analysis of a potential taking is a function of the investment in the property, the measured frustrations of investment-backed expectations, and the change in economic viability of the investment. Recoupment of and return on investment were established as the basis to evaluate the economic elements of the *Penn Central* test. In order to establish a taking, the property owner must quantify a severe economic loss caused by the disputed regulation. *Cienega Gardens,* 503 F.3d at 1282. "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 *Lingle* decision affirmed that "the *Penn Central* inquiry turns in large part ... upon the magnitude of the regulation's economic impact." 544 U.S. at 539. The Association contends that the Special Referee erred, not in saying the Appellant's loss was significant, but in his failure to establish what exactly the underlying loss was. Both parties presented differing and conflicting appraisals of the land both before and after FEMA's flood data was publicly released and the County's flood regulations were enacted. R. p. 152–60. In his regulatory takings order, the Special Referee discussed at length the relative merits and major problems with each of the appraisals presented by the parties. The dilemma faced by the Special Referee was clearly displayed in the Takings Order. The Referee ultimately failed to determine a loss value. In his order he simply found:

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

R. p. 160.

A regulatory takings plaintiff has the burden of proof on each of the *Penn Central* factors. In relation to economic impact, the property owner has the burden of proving economic damages resulting from the regulatory restrictions upon the owner's property. *Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011) (citing *Kiriakides v. Sch. Dist. Of Greenville Cnty.*, 382 S.C. 8, 675 S.E2d 439 (2009)).

Evaluation of investment-back expectation is the essential prong of the *Penn Central* test. Comparing the value of property before and after the date that a regulation allegedly took property is an essential process in order to ascertain the extent of economic loss so as to distinguish between mere diminution in value or a compensable taking.

The Appellant failed to meet their burden of proof. The inability of the Special Referee to determine a loss in value due to "conflicting evidence" should have ended the inquiry into the *Penn Central* economic impact factor. Without a determination of a loss value, the Referee's ultimate conclusion that the loss was simply "significant" was an error. A thing is not significant if you do not know what to compare it to. Allowing an ultimate conclusion of law to be based on pure speculation leads South Carolina courts down a slippery slope in which plaintiffs need not prove they suffered actual, definitive and calculable loss supported by substantive evidence, in order to survive a *Penn Central* review.

The Special Referee's conclusion of law finding the Appellant suffered a significant loss in property value should be overturned. The Appellant failed to meet their burden of proof on that issue.

II. APPELLANT'S ATTEMPTS TO INQUIRE INTO AND ATTACK RICHLAND COUNTY COUNCIL'S MOTIVES IN ADOPTING THE STORMWATER ORDINANCE IN 2001 WERE IMPERMISSIBLE

SCAC is disturbed by Columbia Venture's consistent efforts throughout this litigation to attack the motivations of Richland County Council in enacting its Stormwater Ordinance in 2001. *See* Brief of App., pp. 41–54, 47–48; 106–08. Columbia Venture argues that Richland County Council members' adoption of the amended Stormwater Ordinance in 2001 was motivated by citizen groups intending to stop

Columbia Venture from developing its property and out of simple hatred for Columbia Venture. For example, Appellant argued below that county council member Kit Smith had strongly held negative feelings toward Columbia Venture, which Columbia Venture claims motivated her to take legislative action designed to send Columbia Venture packing from Richland County. R. pp. 611, 680–83. Columbia Venture asserted that the Stormwater Ordinance amendments were driven by a faction of county council taking action, described as "premeditated murder of Columbia Venture's development," based upon impermissible political favoring of a special interest group. R. pp. 820–25. Columbia Venture accused Richland County Council Member Kit Smith of acting "in a devious, if not malicious frame of mind, specifically target[ing] and deceiv[ing] 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...." R. p. 845. Columbia Venture's attempt to assign malicious motivation to County Council's legislative decision-making is impermissible.

It is entirely inappropriate to question the motivations of legislators in enacting ordinances. *Horry Tele. Co-op., Inc. v. City of Georgetown*, 408 S.C. 348, 354, 759 S.E.2d 132, 135 (2014); *see also Pressley v. Lancaster Cnty.*, 343 S.C. 696, 542 S.E.2d 366 (Ct. App. 2001) ("Judicial inquiry into legislative motivation is to be avoided."); *Columbia Ry., Gas & Elec. Co. v. Carter*, 127 S.C. 473, 121 S.E. 377, 379 (1924) ("The court cannot speculate as to the intention, much less as to the motives, of the Legislature."); *Douglas v. City Council of Greenville*, 92 S.C. 374, 75 S.E. 687, 689 (1912) (discussing improper motives for passing an ordinance, "[w]e cannot inquire into

the motives which induce legislative action"); *State v. Cardozo*, 5 S.C. 297 (1874) ("So far as it implies any wrong or improper motive on the part of the Legislature in the particular enactment, it is beyond the control of the judicial department.").

A takings claim is separate from a challenge to alleged improper government conduct. *Acadia Tech. v. United States*, 458 F.3d 1327, 1331 (2006); *Del-Rio Drilling Programs v. United States*, 146 F.3d 1358, 1364 (Fed. Cir. 1998) (an uncompensated takings and an improper government action are "two separate wrongs [that] give rise to two separate causes of action"). "[I]n a takings case we assume that the underlying action was lawful and we decide only whether the governmental action in question constituted a taking for which compensation must be paid." *Rith Energy v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) (refusing to consider appellant's "assertions that the government's decisions in this case were driven by political pressure"). As such, Columbia Venture's "complaints about the wrongfulness of the [government action] are therefore not properly presented in the context of its takings claim." *Id.*

Appellant's attempt to have this Court examine the county council's motive also impinges upon legislative privilege. It is indispensably necessary in promoting a robust democracy that an elected member of a legislative body be afforded the freedom in developing legislative policy to deliberate, brainstorm, and strategize with colleagues and constituents without the influence of an inquisitorial executive or judiciary. Steven F. Huefner, *The Neglected Value of The Legislative Privilege in State Legislatures*, 45 WM MARY L.REV. 221, 225, 228 (2003). The legislative privilege arises from this important principle to protect and preserve separation of powers among the co-equal branches of government. *Id.* at 228. Just as judges should not have to justify their decisions under

oath, nor should legislators be compelled to explain themselves about their legislative activities. Though the South Carolina Constitution does not include a Speech and Debate Clause—the provision that the legislative privilege is traditionally premised on—South Carolina unmistakably recognizes legislative privilege based on the separation of powers doctrine. *Pressley v. Lancaster Cnty.*, 343 S.C 696, 707, 542 S.E.2d 366, 371 (Ct. App. 2001) ("Judicial inquiry into legislative motivation is to be avoided . . . such inquiries endanger the separation of powers doctrine, representing a substantial judicial intrusion into the workings of other branches of government."); *Douglas v. City Council of Greenville*, 92 S.C. 374, 75 S.E. 687, 689 (1912) (discussing motives for passing an ordinance, "[w]e cannot inquire into the motives which induce legislative action").

The legislative privilege also prevents a potential chilling effect upon both legislators and the people of South Carolina. In light of society's propensity to litigate, specials interests and political opportunists will seek creative ways to obtain a political win. Without the legislative privilege, these groups "would use the judiciary itself to influence, if not, manipulate, the legislative process through intimidation" in order to secure an outcome favorable to their position. Brief for James Harold Thompson, et al. as Amici Curiae Supporting Respondents, *Fla. League of Women Voters v. Fla. House of Representatives*, 132 So.3d 135 (2013). "If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the poll, not the courts." *Bear Enterprises v. Cnty. of Greenville*, 319 S.C. 137, 139, 459 S.E.2d 883, 885 n.1 (Ct. App. 1995). To allow otherwise would fundamentally change the legislative decision-making process by forcing elected representatives to unceasingly consider the prospect of having to explain their mental process when taking

legislative action. As a result, legislators would have misgivings with engaging in open and free debate; time and effort would be diverted from studying and evaluating constituent issues to trying to anticipate how to justify themselves during a judicial inquiry or deposition.

Our courts have also stated without reservation that it is inappropriate to depose an individual legislator for the purpose of challenging a legislative action of the full legislative body. *Bear Enterprises* at 139, 459 S.E.2d at 885 n.1, *Greenville Cnty. v. Kenwood Enterprises*, 353 S.C 157 (2003), *Horry Telephone Co-op.*, at 354, 759 S.E.2d 132, 135 (2014) ("Testimony of individual council members as to their motivations . . . is not competent evidence."). *Bear Enterprises* noted that it was "aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision." *Id.* "The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise." *Id.*

Legislative privilege applies when the legislator is acting "within the sphere of legitimate legislative activity." *Alexander v. Holden*, 66 F.3d 62, 65 (4th Cir. 1995). Preparing, viewing, and voting on ordinances is "quintessentially legislative." *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998); *see also Conway v. City of Greenville*, 254 S.C. 96, 104, 173 S.E.2d 648, 652 (1970) (stating that enacting a zoning ordinance is clearly a legislative function). Richland County Council's adoption of its Stormwater Ordinance is unquestionably a legislative act. Appellant's efforts to have this Court peer into the minds of individual county council members to determine their motivations in adopting this legislation is patently contrary to South Carolina law.

Appellant's unfounded and disparaging remarks about county council members are simply a distraction that misleads this Court; Appellant's arguments undermine the functioning of county government. "Meeting with interest groups, professional or amateur, regardless of their motivation, is a part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider." *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980). Appellant fails to appreciate that county councils are in the business of making policy decisions and enacting laws that promote the interests of the community. Council members must consider both popular and unpopular public opinion to arrive at an informed decision that they believe best serves their constituents. Columbia Venture's attempt to have this Court consider the county council's motives is not proper in the context of a takings claim and violates legislative privilege.

III. RICHLAND COUNTY COUNCIL DID NOT INDUCE COLUMBIA VENTURE TO ACQUIRE SPECULATIVE PROPERTY WHEN THEY AGREED TO NEGOTIATE CONDITIONAL LAND USE ISSUES

Columbia Venture argued before the Special Referee, unsuccessfully, that a February 1999 county council resolution and a later non-binding Memorandum of Understanding induced them to close on the disputed property on February 19, 1999. Appellant's Initial Brief p. 91–92. No reasonable sophisticated land developer should have ever relied upon a simple municipal resolution as a justification to consummate an expensive and risky development purchase such as the flood-prone property at issue in this matter. There is no legal precedence to suggest South Carolina courts should raise a municipal resolution to the level of binding law sufficient to allow a developer to rely upon them as a matter of due diligence.

Municipal resolutions are less formal than governing ordinances. Courts have frequently noted that resolutions are not law. *Sutherland Statutory Construction* 29:1. A municipal resolution, such as the one passed by Richland County Council on February 2, 1999, is generally not binding enacted law in the same way a legislative statute or ordinance is. South Carolina's courts have explicitly rejected the notion that municipal resolutions are binding law. *See Central Realty Corp. v. Allision*, 218 S.C. 435, 63 S.E.2d 153 (1951); *Glasscock Co., Inc. v. Sumter Cnty.*, 361 S.C. 483, 604 S.E.2d 718 (Ct. App. 2004). Such resolutions usually relate to temporary or administrative matters. *Sutherland Statutory Construction* 30:3. Resolutions "may simply be an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance." 56 Am. Jur. 2d *Municipal Corporations* §296 (2000).

Richland County Council's February resolution was, at best, an acknowledgment that county staff could begin research and due diligence to prepare for preliminary negotiations with the Appellant concerning an undetermined development scheme. The resolution plainly gave the county a way to walk away from even considering the contingencies. Furthermore, under South Carolina law, Richland County Council would not have been authorized to undertake many of the activities outlined as contingencies in the resolution without the enactment of certain ordinances. S.C. Code of Laws Section 4-9-120 requires county councils to take any legislative action by ordinance. In some cases these contingencies would have also required public hearings.[7] If any of the contingencies were not met, the County could not move forward with negotiations.

[7] On May 1, 2001, Columbia Venture in a document entitled "The Simple Truth About Green Diamond", proposed the county issue $80 million in Special Source Revenue Bonds to fund the construction and maintenance of the levees. R. p. 142. S.C. Code Ann §4-9-130 requires public hears before the county may

Columbia Venture next argued that a letter from the County Administrator to Burroughs and Chapin expressly described as a "Non-Binding Memorandum of Understanding" (MOU) that merely agreed "to work with the development group on issues that are critical to the proposed development such as zoning, tax incentive vehicles and a multi-county business park" served as a further inducement to purchase the property. The language used in the MOU was not sufficient to raise the document to the level of a contract. The South Carolina Supreme Court has recently settled the issue of when an MOU could be enforceable as a contract. In *Steven & Wilkinson v. City of Columbia*, , the Court held that for a valid enforceable contract to exist there must be a meeting of the minds between the parties with regard to all essential and material terms. Op. No. 27434, August 20, 2014 (citing *Patricia Grand Hotel, LLC v. MacGuire Enters*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007)). There is no contract if material terms remain for future agreement. Examining the facts as presented by Columbia Ventures in their brief, there were clearly material terms that remained to be negotiated. The non-binding MOU was simply an agreement to work towards resolving issues of rezoning of the property; the creation by the County of a multi-county business park designation; and the adoption of then undefined tax incentive vehicles. Initial Brief of Appellant p. 31. There was no meeting of the minds on any material terms outlined in the MOU. Based upon these facts, and the recent opinion of the court, Columbia Venture's argument that they relied upon the MOU as an inducement to purchase flood-prone property lacks any merit. The Special Referee's conclusion should therefore be upheld.

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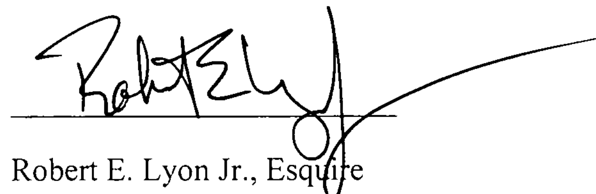
adopt capital budgets, appropriate money, or levy taxes. Each of these would have been required to issue these bonds.

CONCLUSION

The Association asks this Court to affirm the conclusions of the Special Referee that the land use regulations enacted by Richland County were non-discriminatory harm-reducing measures that did not result in either a *per se* or regulatory taking of Columbia Venture's property. The issues involved in this matter are admittedly complex. In reality however, this dispute can be reduced to one simple fact. A sophisticated consortium of commercial land developers, engineers and financial professionals now seek to exact a huge sum of money from Richland County taxpayers for what was a poor investment choice.

Respectfully Submitted,



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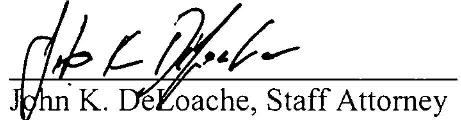
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the South Carolina Association of Counties' *Amicus Curiae* Brief was mailed this 20th day of October, 2014 via United States Postal Service, First Class Postage Prepaid, to the following counsel of record:



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