

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

**RECEIVED**

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

OCT 31 2014

John Hamilton Smith, Special Referee

**S.C. Supreme Court**

---

Case No. 2010-CP-40-8943R

---

Columbia Venture, LLC..... Appellant,

v.

Richland County..... Respondent.

---

REPLY BRIEF OF APPELLANT TO AMICUS CURIAE BRIEF OF  
THE SOUTH CAROLINA ASSOCIATION OF COUNTIES

---

Manton M. Grier, Bar No. 2265  
James Y. Becker, Bar No. 64991  
Elizabeth H. Black, Bar No. 76067  
Haynsworth Sinkler Boyd, P.A.  
Post Office Box 11889  
Columbia, SC 29211-1889  
803-779-3080  
803-765-1243 (fax)

Attorneys for Appellant Columbia Venture, LLC

**TABLE OF CONTENTS**

|   | <b>Page</b> |
|---|-------------|
| INTRODUCTION .....  | 1           |
| ARGUMENT .....  | 4           |
| I.    The Special Referee improperly granted summary judgment to Richland<br>County on Columbia Venture’s <i>per se</i> takings claim. ....   | 4           |
| A.    The Association fails to address Columbia Venture’s core<br>argument that the County appropriated a flood control<br>easement on its Property—thus taking Columbia Venture’s<br>Property without payment of just compensation. .... | 4           |
| B.    By virtue of its actions, the County took away Columbia<br>Venture’s right to improve its Levees and protect its<br>Property from flooding. ....  | 7           |
| II.   Columbia Venture is entitled to relief on its regulatory takings claim under<br><i>Penn Central</i> . ....  | 11          |
| A.    The character of the government action favors Columbia<br>Venture, in part, because the County’s actions targeted<br>Columbia Venture’s Property. ....  | 11          |
| B.    Richland County itself induced Columbia Venture’s<br>eminently reasonable investment backed expectations.....   | 15          |
| 1. <i>Dunes West Golf Club, LLC v. Town of Mount<br/>                  Pleasant</i> provides important guidance in evaluating<br>Columbia Venture’s investment backed<br>expectations.....  | 15          |
| 2.    It is entirely reasonable for a citizen to rely on<br>binding resolutions of county government, as well<br>as other manifestations of governmental intent, in<br>planning and ordering their affairs.....                           | 18          |
| C.    The Special Referee’s determination that the economic<br>impact of the County’s actions on Columbia Venture was<br>severe is sufficient in a <i>Penn Central</i> analysis. ....   | 24          |
| CONCLUSION.....   | 25          |

## TABLE OF AUTHORITIES

**Page**

### **Cases**

|   |          |
|---|----------|
| <i>A.A. Profiles, Inc. v. City of Ft. Lauderdale</i> , 850 F.2d 1483 (11th Cir. 1988) .....               | 23       |
| <i>Armstrong v. United States</i> , 364 U.S. 40 (1960) .....  | 2        |
| <i>Brace v. United States</i> , 72 Fed. Cl. 337 (2006) .....  | 14       |
| <i>Byrd v. City of Hartsville</i> , 365 S.C. 650, 620 S.E.2d 76 (2005) .....                              | 14       |
| <i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994) .....  | 5, 6     |
| <i>Dunes W. Golf Club, LLC v. Town of Mount Pleasant</i> , 401 S.C. 280, 737 S.E.2d 601 (2013) ..         | 15,      |
| 16  |          |
| <i>E. Enters. v. Apfel</i> , 524 U.S. 498 (1998).....   | 14       |
| <i>Glasscock Co., Inc. v. Sumter County</i> , 361 S.C. 483, 604 S.E.2d 718 (Ct. App. 2004).....           | 21, 22   |
| <i>Hill v. City of Hanahan</i> , 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984).....                        | 6        |
| <i>Horry County v. Tilghman</i> , 283 S.C. 475, 322 S.E.2d 831 (Ct. App. 1984) .....                      | 7        |
| <i>Hospitality Ass’n of S.C., Inc. v. City of Charleston</i> , 320 S.C. 219, 464 S.E.2d 113 (1995) .....  | 19       |
| <i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979).....   | 5        |
| <i>Koontz v. St. Johns River Water Mgmt. Dist.</i> , 133 S. Ct. 2586 (2013).....                          | 5        |
| <i>Lingle v. Chevron U.S.A., Inc.</i> , 544 U.S. 528 (2005).....  | 2, 5, 12 |
| <i>Lucas v. S.C. Coastal Council</i> , 309 S.C. 424, 424 S.E.2d 484 (1992) .....                          | 1, 10    |
| <i>Lucas v. S.C. Coastal Council</i> , 505 U.S. 1003 (1992).....  | 1        |
| <i>Nollan v. Calif. Coastal Comm’n</i> , 483 U.S. 825 (1987).....   | 5, 6     |
| <i>Palazzolo v. Rhode Island</i> , 533 U.S. 606 (2001).....   | 24       |
| <i>Rodriguez v. Pataki</i> , 280 F. Supp. 2d 89 (S.D.N.Y. 2003).....                                      | 13       |
| <i>Rose Acre Farms, Inc. v. United States</i> , 559 F.3d 1260 (Fed. Cir. 2009) .....                      | 11, 12   |
| <i>S. C. State Ports-Auth. v. Jasper County</i> , 368 S.C. 388, 629 S.E.2d 624 (2006) .....               | 19, 20   |
| <i>Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env’tl. Protection</i> , 130 S. Ct. 2592 (2010)... | 5        |
| <i>Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency</i> , 535 U.S. 302 (2002)       |          |
| .....   | 24       |

### **Statutes**

|   |    |
|---|----|
| S.C. Code Ann. § 4-9-25 (Supp. 2012)..... | 19 |
|---|----|

### **Regulations**

|                            |       |
|----------------------------|-------|
| 44 CFR § 60.3 (1998) ..... | 1, 10 |
|----------------------------|-------|

## INTRODUCTION

In the sections of its amicus curiae brief headed “Interest of the Amicus Curiae” and “Background,” the South Carolina Association of Counties (“Association”) includes a number of factual misstatements and arguments that do not relate to the issues before the Court. The Association asserts that “[l]ocal governments are expected to protect the community through land-use restrictions including the prohibition of risky development in flood prone areas.” Ass’n Brief at 1. It is well-established, however, and not an issue in this appeal, that local governments may prohibit land uses that would constitute a nuisance under state property law without incurring takings liability. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-30 (1992); *Lucas v. S.C. Coastal Council*, 309 S.C. 424, 426-27, 424 S.E.2d 484, 485-86 (1992).

It is also not an issue before the Court that local governments have the power to adopt reasonable floodplain management regulations, and Columbia Venture does not challenge floodplain management regulations adopted to comply with the minimum standards of the National Flood Insurance Program (“NFIP”). In its prior briefing, Columbia Venture points out that the NFIP regulations were carefully crafted to avoid exposing local governments to takings liability. Columbia Venture Final Brief (“Final Brief”) pp. 52-51; Columbia Venture Reply Brief (“May 22 Reply Brief”) pp. 13-15; Columbia Venture Reply Brief to Amicus Curiae Association of State Floodplain Managers (“October 9 Reply Brief”) pp. 1-2. Thus, NFIP regulations in general permit flood proofed construction (with the first floor elevated above the base flood elevation) within the floodplain and similar construction in the regulatory floodway that does not result in any increase in flood levels within the community during the occurrence of the base flood discharge. 44 CFR § 60.3 (1998). Columbia Venture also cites authority

warning FEMA not to encourage local governments to prohibit all building within a regulatory floodway because such an absolute prohibition would likely go “too far” and expose a local government to takings liability. May 22 Reply Brief pp. 13-15. The Association does not address this point or this authority.

The Association points out that the Takings Clause “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.” Ass’n Brief at 11 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Within the context of the *Penn Central* analysis, courts must consider “the actual burden imposed [by the regulation] on property rights, or how that burden is allocated....” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005). But an absolute blanket prohibition on all construction within a regulatory floodway assumes that all regulatory floodway property is the same. It is not. The floodplain in the vicinity of Columbia Venture’s property (“Property”) is approximately five miles wide, and the regulatory floodway covers approximately 70% of Columbia Venture’s land. (R. pp. 1819-25). The burden on Columbia Venture is not the same as a land owner with a modest floodway or no floodway at all. Moreover, the County’s stormwater ordinance exempts Columbia Venture’s immediate neighbors from the prohibition against any construction within the regulatory floodway and contains no provision for a variance in hardship cases. (R. pp. 4249-76). By contrast, the NFIP regulations seek to equitably allocate the burden among all owners of property within a regulatory floodway by permitting development there so long as it does not increase flood levels thereby harming other landowners.

Columbia Venture’s Property is also unique in that it is already protected from flooding by a system of levees (“Levees”) that need to be modified and improved to

prevent their failure during major flooding. (*See* R. pp. 3481, 3489, 5742, 5874).<sup>1</sup> The County's prohibition on improving these Levees, along with the County's no build restrictions within the regulatory floodway, constitute a physical, *per se* taking under South Carolina and federal law dealing with physical takings as opposed to regulatory takings. The Association also erroneously asserts that Columbia Venture's development largely hinged upon FEMA's adopting a regulatory floodway that did not include Columbia Venture's Property. Ass'n Brief p. 4. This is not true. *See* May 22 Reply Brief pp. 27-31. Columbia Venture presented expert testimony to the Special Referee that it could have improved its Levees in compliance with FEMA and County standards under any of the FEMA flood maps that appear in the record in this case, including the one the County adopted on February 20, 2002, but for the restrictions on making Columbia Venture's Levees wider or taller and the prohibition against placing any obstructions (including fill dirt) within the regulatory floodway. (R. pp. 1819-25, 1863-64, 5930-46).

As discussed herein, as well as for the reasons discussed in Columbia Venture's prior briefing in this matter, the Special Referee's orders in this case should be reversed.

---

<sup>1</sup> In its brief, the Association cites sources outside the Record asserting that in the last 15 years prior to February 1999 the Congaree River was at or above flood stage 31 times. Ass'n Brief p. 4. If this information is accurate, it underscores Columbia Venture's need to improve its Levees. The Association also erroneously asserts that FEMA began the process of redrawing the flood maps for the portion of the Congaree River located in Richland and Lexington Counties in 1998. *Id.* FEMA in fact began its study of Lexington County in 1997 separately from Richland County and formally published its flood maps for Lexington County in 1998 starting the official appeal and comment period, which ended with no appeals on September 15, 1998. (R. p. 5862). FEMA first formally published its revised preliminary maps for Richland County in September 1999, starting the appeal and comment period which ended on December 13, 1999. (R. p. 5863).

## ARGUMENT

- I. **The Special Referee improperly granted summary judgment to Richland County on Columbia Venture’s *per se* takings claim.**
  - A. **The Association fails to address Columbia Venture’s core argument that the County appropriated a flood control easement on its Property—thus taking Columbia Venture’s Property without payment of just compensation.**

The Association fails to analyze Columbia Venture’s physical takings claim within the context of the standard for granting summary judgment.<sup>2</sup> The Association asserts that counties are expected to prohibit risky development in flood prone areas<sup>3</sup> and that Columbia Venture had no right to improve its Levees when doing so would harm other landowners. In its summary judgment materials, however, Columbia Venture submitted the opinion of an expert in the hydrologic and hydraulic engineering sciences that Columbia Venture could have improved its Levees to certifiable standards under the NFIP regulations without harming other landowners. (R. pp. 5930-5946). Columbia Venture also submitted evidence that Heathwood Hall Episcopal School (“Heathwood Hall”) has been permitted to build a chapel, bell tower, middle school, and gymnasium using no rise engineering and construction within the regulatory floodway the County adopted in 2002. (R. pp. 5947-5962). The only reasonable inference is that flood proofed construction consistent with NFIP standards that does not displace floodwater in the

---

<sup>2</sup> The Special Referee granted summary judgment to Richland County on Columbia Venture’s *per se* physical takings claim, thus eliminating that claim prior to trial.

<sup>3</sup> The Association persistently ignores the well-established (and repeatedly briefed) fact that Columbia Venture was *not* proposing a development in a flood prone area. May 22 Reply Brief pp. 27-28; October 9 Reply Brief p. 15 n. 17. By definition, land protected by certified levees is not considered part of the floodway or floodplain, and the NFIP does not subject such land to any building restrictions. From the very beginning of Columbia Venture’s consideration of the Property, it stressed the need to get the Property out of the floodplain requirements for building. (R. p. 3812).

regulatory floodway on Columbia Venture's Property does not constitute a public nuisance under South Carolina law.

The Association also argues that *per se* takings claims, as opposed to regulatory takings claims, are limited to actual physical occupations. Ass'n Brief p. 5. This is legally incorrect. In its opinions, the Supreme Court distinguishes between *per se* physical takings claims and regulatory takings claims, and since *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), it has been established that a government can physically take property by asserting an easement or servitude over private property. 444 U.S. at 179; *see also* Final Brief pp. 64-69; May 22 Reply Brief pp. 3-9; October 9 Reply Brief pp. 9-10.<sup>4</sup> In *Nollan* and *Dolan*, the Court also started its analyses "with the premise that, had the local government simply appropriated the easement" it sought to extract as part of the permitting process, it would have physically taken property. *Lingle*, 544 U.S. at 546; *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994); *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825, 831 (1987). In *Koontz*, the Court extended the holding in these cases to include monetary exactions associated with permitting real property uses. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013). The Court's opinion in *Koontz* also instructs that Columbia Venture's takings claim is more appropriately analyzed as a

---

<sup>4</sup> Indeed, this is the core point of the *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010) discussion in the May 22 Reply Brief. Contrary to the Association's argument at pages 7-8 of its brief, *Stop the Beach Renourishment* does not provide a different "avenue" for Columbia Venture's *per se* takings claim. Instead, *Stop the Beach Renourishment* is fully consistent with the long line of cases Columbia Venture has already cited in that it confirms that governments "effect a taking if they recharacterize as public property what was previously private property." *Stop the Beach Renourishment*, 130 S. Ct. at 2601. It makes no difference analytically if the governmental actor is the federal, state, or local government—what matters is the *effect* of the government action on the property at issue. And asserting an easement interest in private property that permanently reserves the property for flooding and prohibits any economically meaningful development is a taking that must be compensated justly.

physical takings claim rather than a regulatory takings claim. *Id.* Indeed, as the line of cases beginning with *Kaiser Aetna* emphasizes, it is the *right* to permanently use the easement at issue that gives rise to the taking. *Nollan* states:

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

*Nollan*, 483 U.S. at 832 (emphasis added). Here, Richland County has permanently physically occupied the floodway portion of Columbia Venture’s Property because it is requiring Columbia Venture to reserve this land on a continuous and permanent basis to serve as a hydraulic flow corridor to convey floodwaters across the Property even though there are times when floodwaters will not be on the Property. The Association, like Richland County and the Association of Floodplain Managers before it, fails to engage this core argument at all.

*Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984), which is appropriately analyzed as a physical takings case, is consistent with the Supreme Court’s doctrinal approach. Mrs. Hill wanted to add fill dirt to a ditch in front of her property. The city of Hanahan stopped her because the city wanted to use the ditch for “drainage and flood control purposes.” *Id.* at 531, 316 S.E.2d at 684. This was a taking. *Id.* In *Dolan v. City of Tigard*, Ms. Dolan wanted to construct a parking lot next to her store. The city wanted to use a portion of this land for “flood control.” 512 U.S. at 377. The city sought to acquire this right (an easement) as a condition for granting Ms. Dolan a building permit. *Id.* Had the city of Tigard simply appropriated the right, as the city of Hanahan did in Mrs. Hill’s case, the Supreme Court said it would have constituted a *per se* physical taking. *Id.* at 384 (“Without question, had the city simply required [Ms.

Dolan] to dedicate a strip of land along Fanno Creek for public use [as a flood control mechanism], rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred.”). In Columbia Venture’s case, Columbia Venture wanted to add fill dirt to its Levees to make them wider and taller. The County passed ordinances with criminal and civil sanctions, however, to stop Columbia Venture from doing precisely that because the County wanted to use the Property protected by the Levees to convey floodwater in times of major flooding. Under *Hill* and *Dolan*, it is clear that Columbia Venture has suffered a *per se* taking of its Property. Columbia Venture’s claim is fully consistent with these two cases and logically follows the analytical *per se* takings doctrine developing from *Kaiser Aetna* through and including *Koontz*.

**B. By virtue of its actions, the County took away Columbia Venture’s right to improve its Levees and protect its Property from flooding.**

The Association argues that Columbia Venture had no right to add fill dirt to its Levees such that this improvement would cause harm to others under the common law of South Carolina. Ass’n Brief p. 8 n. 6. Accordingly, the Association seemingly argues that the County did not take this right away from Columbia Venture when it passed the ordinances prohibiting Columbia Venture from improving its Levees to make them taller and wider. The summary judgment materials do not support the Association’s argument here.<sup>5</sup>

---

<sup>5</sup> The Association also argues that Columbia Venture did not have the required riparian rights to improve its Levees. Ass’n Brief p. 8, n. 6. This argument is misplaced. The doctrine of riparian rights does not control whether a landowner can construct levees to protect his property because riparian rights are concerned about the use of and access to water. *Horry County v. Tilghman*, 283 S.C. 475, 480, 322 S.E.2d 831, 834 (Ct. App. 1984). In constructing its Levees, Columbia Venture did not want to “use” or “access” the water from the Congaree River. Instead, it wanted to keep the water away from its

Columbia Venture applied for a land disturbance permit to begin the process of improving its Levees in May 1999. (R. pp. 3267-77, 5741). At that time the County was enforcing FEMA's February 25, 1999 revised preliminary flood map that placed the Levees within the regulatory floodway. (See R. pp. 2774-75). Accordingly, Columbia Venture needed to supply the county engineer with hydrologic and hydraulic engineering studies to demonstrate that the proposed levee improvements would not cause a rise in flood levels during a base flood (see R. pp. 5999-6000), and the county engineer instructed Columbia Venture by letter dated May 13, 1999, that it needed to supply 100-year flood elevations along with other materials. (R. pp. 3267-77, 5741). At that time, Columbia Venture could have secured the necessary no rise engineering certificate according to the expert opinion Columbia Venture submitted with its summary judgment materials. (R. pp. 5930-5946).<sup>6</sup> Later on in May 1999, however, the county administrator decided to enforce FEMA's effective 1994 flood map, which did not place the Levees in the regulatory floodway. (R. pp. 3060, 5739). After that point, Columbia Venture should have been able to obtain the permit without a no rise showing. The county administrator

---

Property. The doctrine of riparian rights has no place in this analysis. Indeed, Heathwood Hall was not a riparian owner, as the westward boundary of Heathwood Hall's property extended only to the landward toe of the Levees (R. p. 5947), but the County has never argued that Heathwood Hall cannot seek to have its property protected from flooding. (See R. pp. 3069, 3361-64, 4241-43). Indeed, the County has argued throughout this litigation that Columbia Venture has retained the ability to maintain "its levees so that it can hold back floodwaters," thereby "protecting" Columbia Venture's Property via the Levees. See County Brief p. 58. While a demonstrably false statement (see May 22 Reply Brief pp. 10-11), it nevertheless illustrates that the County believes that Columbia Venture has the right to protect its Property with the Levees.

<sup>6</sup> The necessary effect of a no rise certificate would be that improving the Levees would be done without causing harm to others. Indeed, summary judgment materials submitted by the parties provide *no* evidence that Columbia Venture's Levee improvement plan on a no rise standard would cause any harm. If there remained any question about such harm, however, summary judgment should not have been granted to the County and Columbia Venture's *per se* takings claim should have gone to trial. Granting summary judgment to the County was plain error.

decided, however, not to issue any permits to improve the Levees until FEMA had completed its flood mapping. (R. pp. 3060, 5739). During this period of delay, the County adopted the ordinances that took away Columbia Venture's right to improve its Levees by making them wider or taller. (R. pp. 4265, 4295-96, 4303-04, 5742).

Columbia Venture also submitted with its summary judgment materials technical reports issued by FEMA concluding that the Levees in their present condition will fail during a base flood and that a significant amount of water will be conveyed landward of the Levees during a base flood. (R. pp. 5872-5874). Accordingly, FEMA deemed it necessary to create a hydraulic flow path landward of the Levees to convey floodwater during base floods through the 1,320 feet wide relief bridge in the embankment of the I-77 highway on Columbia Venture's Property. (R. p. 5874).<sup>7</sup>

---

<sup>7</sup> In the revised preliminary FIS and FIRM FEMA released on August 12, 1999, which was formally published in September 1999, FEMA concluded: "We do expect isolated areas of failure [in the Levees], but not long failures such that we would create a hydraulic flow path." (R. p. 5860; *see generally* R. pp. 5842-61 ("Flood Hazards Along the Congaree River" (Jan. 24, 2000)); *see also* R. pp. 5864-68 ("General Summary of Hydraulic Analysis of the Congaree River in Lexington and Richland Counties, South Carolina, as Presented in the August 12, 1999 Revised Preliminary Flood Insurance Studies (FISs)," specifically R. p. 5867 discussing floodway determination ("[T]he floodplain behind the agricultural dike in Richland County is modeled as an ineffective flow area because the high grounds of the I-77 embankment and the agricultural dikes on either side of Gills Creek intercept the floodplain almost at right angles to the general flow direction and offer resistance to effective flow. The available topographic data indicated that this area does not contribute to the conveyance of flow in the general flow direction.")). In the September 26, 2000 Appeal Resolution, however, FEMA reversed itself and found it necessary to create a hydraulic flow path through the land protected by the Levees all the way to and including the 1,320 feet wide relief bridge in the embankment of I-77 on Columbia Venture's Property. (R. pp. 3464-98, specifically R. p. 3491 ("Specifically, it was determined that the large (1,320 feet wide) relief bridge is critical to conveying the Congaree River flow during a 100 year flood."); *see also* R. pp. 5872-74 ("Technical Report for the Final Flood Elevation Determination for the Congaree River in Richland and Lexington Counties, South Carolina" (Aug. 20, 2001)). All of these reports were included within the summary judgment materials submitted to the Special Referee. FEMA's final determination that it was critical and necessary to create a hydraulic flow path across Columbia Venture's Property is an adjudicatory fact

It follows that Columbia Venture had the right to improve its Levees before May 1999 (on a no rise showing) or after May 1999 (without the necessity of a no rise showing), that improving the Levees to certified standards under the NFIP regulations would not have harmed other landowners or constituted a nuisance under South Carolina law,<sup>8</sup> and that County eliminated this right by the new ordinances it adopted after May 1999, the last of which became effective on February 20, 2002, with the adoption of FEMA's effective flood maps and flood insurance study.<sup>9</sup> The County also went far further than it had to under the NFIP regulations and prohibited Columbia Venture from building economically meaningful structures within the regulatory floodway using no rise engineering and construction, which is permitted under FEMA's regulations. 44 C.F.R. § 60.3(d)(3). The County has thus appropriated the equivalent of a flowage or flood control easement over Columbia Venture's Property to serve as an unobstructed

---

specific to Columbia Venture's Property that the County adopted on February 20, 2002, when it enacted into law FEMA's final determinations.

<sup>8</sup> The fact that building meaningful structures on land is not considered a nuisance under state law was confirmed by this Court in *Lucas v. South Carolina Coastal Council*. 309 S.C. at 426-27, 424 S.E.2d at 485-86. Indeed, this is the primary relevance of the *Lucas* analysis to Columbia Venture's case. It is not that Columbia Venture has no value remaining in its land (it does). Instead, it is the fact that the *uses* to which both Columbia Venture and Mr. Lucas intended to put their properties at the time of purchase (building habitable structures) are in no way barred by underlying state common law.

<sup>9</sup> The Association misunderstands Columbia Venture's argument that a flood map operates like a plat in that it delineates legally operative boundaries by reference to lines on a map or depiction of real property. Columbia Venture does not argue that a flood map—by itself—gives rise to either a right to use property or an easement. It is necessary to refer to operative ordinances and other laws to understand the legal ramifications of flood maps. However, like with a plat or a zoning map, lines on a flood map are legally meaningful in Richland County, especially as they are incorporated by reference into the stormwater ordinance. (R. p. 4253 (defining "regulatory floodway" by its identification on "an official Flood Insurance Rate Map...")). Also, the floodway on Columbia Venture's Property is based on factual determinations made by FEMA that are specific to Columbia Venture's Property that were adopted by Richland County on February 20, 2002, when it legislatively adopted FEMA's final determinations that are graphically manifested in the 2002 effective FIRM. *See supra* n. 7.

hydraulic flow corridor to convey floodwaters in times of major flooding. The County has not paid Columbia Venture for this easement. Consequently, Columbia Venture's Property has been taken without payment of just compensation in violation of South Carolina and United States law.

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

The *Penn Central* analysis has been extensively briefed in this appeal by the parties and the prior amicus, and the Association, for the most part, emphasizes arguments that have already been thoroughly ventilated. To the extent it raises nuances on arguments not already briefed, Columbia Venture addresses them here.

**A. The character of the government action favors Columbia Venture, in part, because the County's actions targeted Columbia Venture's Property.**

The Association argues that the Court should consider that the County's ordinances were aimed at preventing harm when evaluating the character of the governmental action under *Penn Central*.<sup>10</sup> In support the Association cites the Federal Circuit's opinion in *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260 (Fed. Cir. 2009), a case involving temporary regulations of the USDA, which in general, among other things, required that eggs from chicken flocks testing positive for salmonella be diverted to pasteurized uses and not shipped in interstate commerce as raw table eggs.

---

<sup>10</sup> Columbia Venture has always maintained that regulating flood prone areas is a proper and appropriate function of a local government, and that properly conceived and implemented, floodplain and floodway management regulations do, in fact, protect the health, safety, and welfare of the community. Final Brief pp. 52-53; May 22 Reply Brief pp. 47-48. Indeed, an entire voluntary federal program exists to implement and oversee such protection in a carefully balanced way that protects *both* the health and safety of the public and the property rights of landowners. The Association, however, perceives *any* harm prevention as immunizing the County's no build floodway ordinance interpretation (which it began in 2001) and absolute prohibition on making levees located in floodways higher or wider from a takings argument. This is not the law, as discussed above.

The court rejected the government’s argument “for a per se exception to a regulatory taking based on the regulation’s public health purposes,” but did agree “that the character of the government’s act, protecting the public health by identifying diseased eggs and forcing their owner to remove them from the table market, weighs strongly against finding a taking here.” *Id.* at 1281. The court also surveyed the law dealing with the right to sell certain foods for human consumption and recognized “that – whether through criminal law, nuisance law, or tort law – the law has long imposed significant restrictions on the food-property owner.” *Id.* The court also said that the Supreme Court in *Lingle* “instructed that, instead of looking at the rationality of the regulation, we must consider ‘the actual burden on the property rights or how that burden is allocated.’” *Id.* at 1278 (quoting *Lingle*, 544 U.S. at 543). The court went on to evaluate the regulatory burden on Rose Acre and whether it had been singled out. The court concluded that the regulations “targeted no single egg producer unless ... that farm tested positive [for salmonella].” *Id.* at 1279.

In the present case, Columbia Venture was the only landowner in Richland County that was affected by the County’s ban on making existing levees in a regulatory floodway wider or taller. (R. pp. 1382, 2636-37). Also as previously mentioned, not all property within a regulatory floodway is the same. The County’s ban on building economically meaningful structures in a regulatory floodway has little or no impact on many property owners with little or no regulatory floodway on their property. By contrast, the burden on Columbia Venture’s Property is severe and self-evident – it covers 70% of its land area. (R. pp. 4216, 4294-4314, 5449-52). The County’s ban on all construction within a regulatory floodway thus does not allocate the regulatory burden

fairly,<sup>11</sup> and the unfairness of the allocation is made worse and even more apparent by the exemptions the County granted to Columbia Venture's immediate neighbors, Heathwood Hall and the city of Columbia's wastewater treatment plant, and by the County's action in deliberately eliminating an express provision allowing variances for hardship cases when it enacted the new stormwater ordinance. May 22 Reply Brief pp. 38-41, 46-47; October 9 Reply Brief pp. 23-24.

The Association further claims that Columbia Venture improperly questioned the motivations of Council in enacting the 2001 stormwater ordinance, specifically mentioning the animus towards Columbia Venture displayed by then-Council chairwoman Kit Smith. Ass'n Brief p. 20. The Association, however, fails to recognize that Richland County—not Columbia Venture—called Ms. Smith as a witness in defense and questioned her about her motives and opinions in passing legislation concerning Columbia Venture. (R. pp. 2506-07). While Columbia Venture addressed these issues on cross-examination, as well, Richland County opened the door to such an inquiry.<sup>12</sup>

---

<sup>11</sup> As Columbia Venture has already briefed, going beyond the NFIP's no-rise standard and banning development in floodways does not provide additional protection from increasing flood levels. October 9 Reply Brief pp. 21-22. Under no rise construction, you cannot cause a rise in the base flood elevations. And Columbia Venture's plan was to improve the Levees—under no rise construction, if necessary—thus completely removing the development from floodplain (and floodway) building requirements. Richland County allowed for levees to provide this sort of protection at all times material to this matter. (R. pp. 3583 (§ 8-26(g)), 3585-86 (§ 8-64(d)), 3588-89 (§ 8-72)), 4264-65 (§ 8-26(g)), 4268 (§ 8-29(d)), 4272-74 (§ 8-36 - § 8-39)). Consequently, banning construction in floodways does not add any additional protection from floods not already accomplished by no rise construction and actually does nothing to advance health and safety from a hydraulic and hydrologic engineering perspective.

<sup>12</sup> Thus, the Association's concerns about legislative privilege are misplaced. A qualified privilege, the legislative privilege can certainly be waived. *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100 (S.D.N.Y. 2003). By calling Ms. Smith to testify and questioning her about her motivations and opinions regarding legislation about Columbia Venture, the County has waived any legislative privilege that arguably attached. (See R. pp. 38-39 (emphasizing that "legislators cannot *be compelled* to answer questions

Trial logistics aside, Columbia Venture is not attempting to set aside the County's 2001 stormwater ordinance as a wrong or improper government action. Ass'n Brief p. 21. The County can legislate from animus if it so chooses without necessarily giving rise to a charge that its action was wrong or unauthorized. However, *Penn Central* demands an "ad hoc factual inquiry," which can encompass an examination of whether the citizen was improperly targeted in considering the character of the governmental action as well as the "reasons" for the actions at issue. *E. Enters. v. Apfel*, 524 U.S. 498, 537 (1998); *Brace v. United States*, 72 Fed. Cl. 337, 356 (2006); *Byrd v. City of Hartsville*, 365 S.C. 650, 661, 620 S.E.2d 76, 81 (2005). The legislative history of the new stormwater ordinance reveals that Columbia Venture was, in fact, targeted, and the targeting was primarily accomplished at the County level by the then chairwoman and vice-chairman of the County Council.<sup>13</sup> Final Brief pp. 40-45.

---

regarding intent, motivation, mental processes, communications or deliberations underlying legislative activity" (emphasis added)). In addition, specific instances of legislative privilege were argued and decided by the Special Referee below. (See R. pp. 2626-27, 2635-36). None of those rulings on legislative privilege have been appealed, nor has either party briefed any concerns about legislative privilege. This issue is simply not before the Court, and it is improper for the Association to attempt to raise it here.

<sup>13</sup> As Columbia Venture has already briefed, such animus towards Columbia Venture did not end on February 20, 2002. Final Brief pp. 47-50. Councilwoman Smith became a member of the board of trustees of the Southern Environmental Law Center in 2003, and served on its litigation approval committee. (R. pp. 5875, 5878). The Southern Environmental Law Center served as one of the main opposing organizations to Columbia Venture and represented intervenors in a federal lawsuit adverse to Columbia Venture during Ms. Smith's tenure on the board and service on the litigation approval committee. Ms. Smith repeatedly communicated with counsel for the Southern Environmental Law Center about both policy for Richland County as well as specifically about Columbia Venture's project and the Southern Environmental Law Center's legal strategy. (R. pp. 4704, 4975, 5887-88, 5916-18, 6047-48). During this span of years, Columbia Venture repeatedly sought approval from the County to move forward with its Levee improvement plans. (R. pp. 3343-44, 4818-20). The County repeatedly blocked any advances by Columbia Venture without disclosure that Ms. Smith was serving on the board of an organization diametrically opposed to Columbia Venture.

This record compels the conclusion that the County's ordinances were targeted at Columbia Venture and calculated to stop its development, which the County Council unanimously and enthusiastically supported at the time Columbia Venture bought the Property. For the reasons discussed in this reply brief and in Columbia Venture's prior briefing, the Special Referee erred in concluding that the character of the governmental action under *Penn Central* favored the County.

**B. Richland County itself induced Columbia Venture's eminently reasonable investment backed expectations.**

**1. *Dunes West Golf Club, LLC v. Town of Mount Pleasant* provides important guidance in evaluating Columbia Venture's investment backed expectations.**

Columbia Venture has extensively briefed how the County induced Columbia Venture's investment-backed expectations and but for the official manifestations of support for improving the Levees and thereafter developing the Property given to Columbia Venture before purchase, Columbia Venture *never* would have purchased the Property. This prong of *Penn Central* has been extensively briefed. It is instructive, however, to draw pertinent questions to ask from this Court's opinion in *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (2013) to show that Columbia Venture's expectations for the Property were both investment backed and entirely reasonable.

1. Was continuation of the existing use of the Property Columbia Venture's primary expectation? *Id.* at 319, 737 S.E.2d at 622.

2. Were Columbia Venture's investment backed expectations more than a unilateral expectation or abstract need? *Id.*

3. Did Columbia Venture investigate the feasibility of the desired development prior to purchase? *Id.*

4. Did Richland County take any action or make any representation that served to increase Columbia Venture's expectation or lead Columbia Venture to believe that its proposed development would be forthcoming? *Id.* at 319-20, 737 S.E.2d at 622.

5. Prior to purchase, was there any expressed public sentiment in opposition to Columbia Venture's proposed development? *Id.* at 320, 737 S.E.2d at 622.

6. Did Columbia Venture expend resources in furtherance of its development plans after purchase? *Id.*

7. Did Columbia Venture take concrete steps in furtherance of its proposed development? *Id.*

The answers to all of these questions weigh heavily in Columbia Venture's favor.

1. Columbia Venture sought to acquire the Property, not to maintain its present use (agriculture), but to improve the Levees and develop the Property protected by those Levees. Final Brief pp. 14-16.

2. Columbia Venture certainly had more than a unilateral expectation or abstract need, as described further in the answers to questions 3-6 below. May 22 Reply Brief pp 49-50.

3. Columbia Venture met with various public officials, all members of the County Council, the county administrator, and county staff to ascertain whether there was support for the project. Final Brief pp. 17-18. Columbia Venture also met with the county engineer to determine whether the Levees could be improved to certifiable standards under existing County ordinances given that the Levees were within a regulatory floodway on the revised preliminary flood map FEMA had issued in July 1998.

Final Brief pp. 19-23. Columbia Venture enlisted the services of Lockwood Greene, an international engineering firm, and the McNair Law Firm to assist it with its due diligence. Final Brief pp. 23-24, 26.

4. Columbia Venture sought and obtained the approval of the County's Development and Services committee (a standing committee of Council) for its plans after a public hearing. Final Brief pp. 24-26. At a public meeting of County Council, Columbia Venture sought and obtained a unanimous resolution from the County Council agreeing to accept the responsibility for the inspection and maintenance of the Levees on certain conditions, the first of which was that Columbia Venture physically upgrade the Levees to certifiable standards. Final Brief pp. 27-28. The chairman of the County Council wrote FEMA informing FEMA of the County's agreement. Final Brief p. 28. Certainly it cannot be said that the County took no action or made no representation that served to increase Columbia Venture's expectations or lead Columbia Venture to believe that its proposed plans would be supported.

5. The evidence presented at trial also established that there was no public sentiment opposed to the development prior to purchase even though the issue was covered in the press and that members of the County Council as well as the county staff were overwhelmingly and enthusiastically in favor of the project. Final Brief pp. 18, 26. Prior to purchase, Columbia Venture obtained written assurances from FEMA that the floodplain and floodway designations of the land protected by the Levees would be removed once the Levees were upgraded and accepted by the County. Final Brief pp. 28-29. Prior to purchase, Columbia Venture also obtained the opinion from Lockwood Greene that the Levees could be upgraded to certifiable standards even if they were in a regulatory floodway on a FEMA flood map. Final Brief pp. 23, 29.

6. The record establishes that Columbia Venture expended considerable resources both before and after purchase investigating and then pursuing its plans. Among other things, Columbia Venture retained the geotechnical engineering firm, S&ME, to begin designing the upgraded Levees shortly after purchase and that the final plans were essentially completed in November 1999. Final Brief pp. 31, 34-35. Columbia Venture's managing member, Burroughs and Chapin, organized Columbia Venture, LLC to proceed with the development and recruited members who had the expertise and financial resources to see the project through to completion. Final Brief pp. 30-31. Columbia Venture applied for a permit to begin the Levee upgrade in May of 1999 but, as previously mentioned, the county administrator decided not to issue any permits to upgrade the Levees until after FEMA had finished its flood mapping. Final Brief pp. 32-33.

7. Certainly Columbia Venture took concrete steps in furtherance of its proposed development, and its expectations were reasonable, induced by the County, and investment backed. *See e.g.* Final Brief pp. 85-87.

Under the analytical framework laid out in *Dunes West*, the investment backed expectations prong of the *Penn Central* analysis clearly favors Columbia Venture.

**2. It is entirely reasonable for a citizen to rely on binding resolutions of county government, as well as other manifestations of governmental intent, in planning and ordering their affairs.**

The Association also states that Columbia Venture should not have relied on the February 2, 1999 unanimous resolution in making its decision to purchase the Property. Ass'n Brief pp. 24-25. There is nothing "not binding" or "unofficial" about a resolution. Under South Carolina state law:

All counties of the State ... 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.

S.C. Code Ann. § 4-9-25 (Supp. 2012) (emphasis added). This Court has construed this statutory authority as a “broad grant of power ... limited only by the requirement that the regulation, *resolution*, or ordinance be consistent with the Constitution and general law of this State.” *Hospitality Ass’n of S.C., Inc. v. City of Charleston*, 320 S.C. 219, 226, 464 S.E.2d 113, 118 (1995) (emphasis added). Clearly, state law authorizes counties to act by resolution in their official capacities and in the official transactions of county business.<sup>14</sup>

This Court examined the role of resolutions and ordinances in expressing the will and binding agreement of counties in *South Carolina State Ports Authority v. Jasper*

---

<sup>14</sup> Richland County’s own ordinances are in accord. Section 2-39 of the Richland County Code of Ordinances establishes “a formal system to be hereafter employed by the council of enacting, recording and preserving the official actions of the council pursuant to the authority vested in it by the Constitution and laws of the state.” (R. p. 6051). “No action hereafter taken by the council shall have force and effect unless the same is accomplished in accordance with this division.” (*Id.*) Consequently, actions taken by the council that are “accomplished in accordance with this division” would presumably have “force and effect.” Subsequent sections of the Code of Ordinances allow the County Council to pass ordinances (§ 2-40), regulations (§ 2-41), and actions (§ 2-42). An “action” is defined as “[a]ny other official decision, proclamation, motion, *resolution*, administrative action or routine business involving or requiring consent or decision of the council” other than an ordinance or regulation. (*Id.* § 2-42 (emphasis added)). “Actions,” including resolutions, “may be passed by a majority vote of those members of the council present and voting.” (*Id.*) “Such action shall be effective upon its official entry in the minutes of the council, which shall be a permanent public record.” (R. p. 6052 § 2-42). “All ordinances, regulations, *resolutions* and actions of the council shall be deemed published and public notice thereof shall be effective as of the date the formalities of enactment hereinabove provided are complied with, and are entered into the minutes of the council.” (*Id.* § 2-43 (emphasis added); *see also* R. pp. 6057-60). Richland County complied with its own ordinances in passing the February 2, 1999 unanimous resolution because it was “passed by a majority vote of those members of the council present and voting,” and was entered into the minutes of the council. (*See* R. pp. 3326-27).

*County*, 368 S.C. 388, 629 S.E.2d 624 (2006). The Ports Authority and Jasper County were involved in a dispute over which public entity could validly establish a port on the Savannah River pursuant to the powers of eminent domain. While *Jasper County* held that the Ports Authority (as a state agency) possessed superior condemnation rights to those of the county, it also affirmed Jasper County’s “power and authority to develop and operate a terminal on the Savannah River.” *Id.* at 401, 404, 629 S.E.2d at 631, 632.

Jasper County passed a resolution “authoriz[ing Jasper] County to enter into development and management agreements with South Atlantic International Terminal, LLC (SAIT), a private company. Under Resolution # 05-01, [Jasper] County would own the land and the public marine terminal. SAIT would assist [Jasper] County in developing and managing [the] County’s terminal, and SAIT would serve as Port Developer/Manager for [the] County.” *Id.* at 393, 629 S.E.2d at 626.<sup>15</sup> The same day, the Jasper County Council gave first reading to an ordinance authorizing a loan agreement with SAIT for financing the marine terminal. *Id.* This Court held that Jasper County had the authority to enter into this resolution, which “established” a marine terminal and “appointed” a developer to undertake extensive work. As the Supreme Court stated: “Section 4-9-25 [of the South Carolina Code], especially read in conjunction with Article VIII’s [of the South Carolina Constitution] mandatory liberal construction, ***authorizes County to pass a resolution*** and enact an ordinance promoting the general welfare of County’s residents by building and maintaining a public marine

---

<sup>15</sup> The actual text of the resolution read: “There is *hereby established* a public marine terminal for and of Jasper County on the Terminal Property to be named the South Atlantic International Terminal. ... There is *hereby appointed* ... South Atlantic International Terminal, LLC as Port Developer/Manager to provide assistance to the County in the form of turnkey development and management services. ...” *Jasper County*, 368 at 401-02, 629 S.E.2d at 631 (emphasis added).

terminal on the Savannah River.” *Id.* at 402-03, 629 S.E.2d at 631 (emphasis added). Clearly, the resolution was part of Jasper County’s expression of its will and intention regarding the public marine terminal, and at no point did this Court treat the resolution authorizing significant contractual commitments as somehow inappropriate or not binding on Jasper County. If Jasper County can establish a marine terminal and contract with a developer via a resolution under state law, Richland County can agree via resolution to assume maintenance and operational responsibility for the Levees upon upgrade by the landowner and certification by FEMA.

Although ordinances and resolutions serve different purposes in relationship to each other, *see, e.g. Glasscock Co., Inc. v. Sumter County*, 361 S.C. 483, 488-89, 604 S.E.2d 718, 721 (Ct. App. 2004),<sup>16</sup> no South Carolina law suggests that it is unreasonable as a matter of law for a citizen to order its affairs and rely on a resolution passed by county government. *Glasscock* established that a resolution does not trump an ordinance passed subsequently on the same subject matter, especially when the underlying law

---

<sup>16</sup> In *Glasscock*, the question before the Court was whether Sumter County complied with its procurement code in extending a waste disposal contract with Waste Management, Inc. *Id.* at 488, 604 S.E.2d at 720. The Sumter County Procurement Code required competitive sealed bidding for such a contract extension except when the contract was “specifically approved by a county ordinance.” *Id.* (quoting Sumter County Code § 2-186(A)(1)). Sumter County passed resolutions on April 10, 2001, “to amend the collection and transportation contracts” with Waste Management, Inc. *Id.* at 486-87, 604 S.E.2d at 719-20. “At its next scheduled meeting on April 24, 2001, Council gave first reading to two proposed ordinances ... authorizing the contract extensions that had been approved by resolution on April 10, 2001.” *Id.* at 487, 604 S.E.2d at 720. Second and third reading followed, and “the contract amendments were formally adopted on May 22, 2001.” *Id.* *Glasscock* argued on appeal that passing a resolution to enter into contract amendments with Waste Management, Inc. meant that the County had bound itself by resolution and, thus, did not comply with the procurement code which required an ordinance if the contract was not put out for competitive bidding. *Id.* at 488, 604 S.E.2d at 720. The Court of Appeals held that the County had complied with its procurement code requirements because it did pass an ordinance approving the contract amendments. *Id.*

requires an ordinance (and not a resolution) to be effective. *Id.* However, the *Glasscock* court specifically found that the resolution at issue there played an important role in defining the “understanding” between the County and a company “regarding the details of any contract amendments that would ultimately be agreed upon” and would be passed by ordinance due to the requirements of the procurement code. *Id.* at 489, 604 S.E.2d at 721.<sup>17</sup>

Resolutions are but one way that counties in South Carolina can choose to govern their affairs, make policy, and interact with citizens. Richland County allows official action to be taken by resolution, and once a resolution has been passed, it can only be amended or repealed by a subsequent resolution doing so.<sup>18</sup> Richland County’s own

---

<sup>17</sup> The *Glasscock* Court’s “general” or “normal” findings about the function of resolutions vis-à-vis ordinances differ significantly from Richland County’s own ordinances defining resolutions. While *Glasscock* stated that “[r]esolutions do not normally have mandatory or binding effect,” and that “the passage of resolutions is generally considered to be merely directory,” 361 S.C. 483 at 488-89, 604 S.E.2d at 721 (emphasis added), Richland County’s ordinances set out that a “resolution” can be considered an “ordinance” if it is in the proper form and so titled. (R. p. 6051 § 2-40). All other resolutions are “actions,” and show the “consent or decision of the council.” (*Id.* § 2-42). Further, as described below, repeal or amendment of a resolution must be done via a subsequent resolution. (R. p. 6053 § 2-47). Resolutions are thus binding on the County.

<sup>18</sup> “No ordinance, regulation, **resolution** or action of the council enacted pursuant to this division may be amended or repealed except by the same formal procedure and requirements as provided for the enactment thereof.” (R. pp. 6053 § 2-47 (emphasis added)). Richland County never passed a resolution repealing or amending the February 2, 1999 resolution. The February 2, 1999 unanimous resolution was a binding action of County Council that could only be repealed or amended by a resolution passed pursuant to “the same formal procedure and requirements as provided for the enactment” of the February 2, 1999 resolution. Further, Richland County certainly believed itself to be bound by the resolution after it was passed. Council Chairman Paul Livingston wrote to FEMA on February 17, 1999, that “Richland County, **by action of its governing body**, the County Council, **has agreed** to accept responsibility for local inspection and enforcement of the operations and maintenance plan for the levee system as submitted by the owner and approved by FEMA contingent upon” four contingencies. (R. pp. 3130-31 (italicized and bold emphasis added)). County Administrator Cary McSwain wrote to FEMA on February 26, 1999: “Richland County **has agreed** to be the inspector, provide monitoring

ordinances, therefore, establish the binding effect of resolutions on Richland County. Just as with ordinances, County Council is free to vote to change resolutions at any time, but until such formal vote occurs, the resolution continues in full force and effect. This Court has found resolutions authorizing extensive and important contractual matters to be within the scope and authority granted to counties. The February 2, 1999 unanimous resolution was binding on Richland County and engendered reasonable investment-backed expectations in Columbia Venture.<sup>19</sup>

The Association also argues that the February 2, 1999 resolution gave the County a way to walk away from its commitment. No language in the ordinance supports this, and the Association cites none. By its plain terms, the resolution bound the County to assume operations and maintenance responsibility for the Levees contingent upon five things—four of which only Columbia Venture could accomplish, and the last (the parties deciding on maintenance funding), Columbia Venture was willing to accomplish on its own if necessary. (R. pp. 1514, 3326-27). Columbia Venture was the main actor in complying with the resolution, but compliance required the cooperation of the County—chiefly by issuing the required permits necessary to improve the Levees in accordance with federal and County regulations. Beginning in May 1999, however, the County

---

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

<sup>19</sup> As the Eleventh Circuit has held, “although the taking did not occur simply because appellant expended a great amount of money to begin the project, this expenditure *in reliance on the resolution* [allowing the planned wood-chipping development] underscores the importance of the original resolution.” *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1488 (11th Cir. 1988) (emphasis added). Further, had Columbia Venture failed to spend \$30 million on its development in the ten years spanning February 2, 1999 and February 2, 2009, the County would likely have cited the resolution as an enforceable reason as to why it could cease operating and maintaining the Levees as it agreed to do.

refused to issue any permits to Columbia Venture for its Levee improvement work, thus becoming the sole impediment to Columbia Venture's plans. May 22 Reply Brief pp. 31-33.

Finally, the non-binding Memorandum of Understanding of February 19, 1999, does not have to be a formal contract to rise to the level of engendering investment backed expectations. Indeed, Columbia Venture has no breach of contract case against the County. However, the County's written word that it was looking favorably on Columbia Venture's proposals—combined with the myriad other manifestations of support from the County both anecdotal and official—certainly added to Columbia Venture's confidence in moving forward with its plans. Final Brief pp. 17-18, 85-87.

**C. The Special Referee's determination that the economic impact of the County's actions on Columbia Venture was severe is sufficient in a *Penn Central* analysis.**

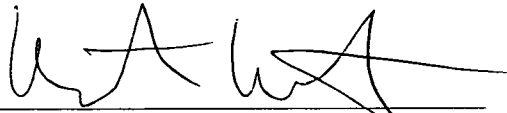
The Association charges that the Special Referee's lack of mathematical precision on assigning a dollar amount of change in value for Columbia Venture's Property is fatal and should be reversed. Aside from the preservation problems with this argument (*see* May 22 Reply Brief p. 53), the law imposes no requirement of mathematical precision when considering the general economic impact on a landowner in the context of the *Penn Central* factors. "*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether compensation is required." *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (O'Connor, J. concurring); *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 n.1 (2002) (same). The Association seems to be confusing a just compensation calculation (which would be required if a taking were to be found) with the *ad hoc* factual inquiry into whether a taking has actually occurred.

The Special Referee did not err in finding that the financial impact on Columbia Venture due to the County's actions was severe. May 22 Reply Brief pp. 53-56.

**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 Richland County on Columbia Venture's *per se* takings claim and finding no regulatory taking of Columbia Venture's Property should be reversed.

Respectfully submitted,



---

Manton M. Grier, SC Bar No. 2265  
James Y. Becker, SC Bar No. 64661  
Elizabeth H. Black, SC Bar No. 76067  
HAYNSWORTH SINKLER BOYD, P.A.  
1201 Main Street, 22<sup>nd</sup> floor (29201)  
Post Office Box 11889  
Columbia, South Carolina 29211-1889  
803.779.3080

*Attorneys for Appellant Columbia Venture, LLC*

October 31, 2014

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

John Hamilton Smith, Special Referee

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

Richland County,

Respondent,

v.

Columbia Venture, LLC,

Appellant.

**RECEIVED**

OCT 31 2014

**S.C. Supreme Court**

**CERTIFICATE OF SERVICE**

This is to certify that I caused a copy of the foregoing **Appellant's Reply Brief to Amicus Curiae Brief of The South Carolina Association of Counties** to be Included in the Record on Appeal to be served on the following individuals in the manner expressed below and addressed as follows:

**Via U.S. Mail & Email:**

M. McMullen Taylor, Esq.  
Mullen Taylor LLC  
1230 Richland Street  
Columbia, SC 29201  
[mmt@MullenTaylorLLC.com](mailto:mmt@MullenTaylorLLC.com)

**Via U.S. Mail & Email:**

Prof. John D. Echeverria  
Vermont School of Law  
164 Chelsea Street  
PO Box 96  
South Royalton, VT 05068  
[jecheverria@vermontlaw.edu](mailto:jecheverria@vermontlaw.edu)

**Via U.S. Mail and Email:**

Pope D. Johnson, III, Esq.  
Attorney at Law  
1230 Richland Street  
Columbia, SC 29201  
[pope@popejohnsonlaw.com](mailto:pope@popejohnsonlaw.com)

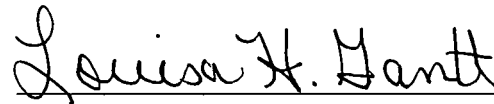
**Via U.S. Mail & Email:**

John S. Nichols, Esq.  
Bluestein Nichols Thompson  
Delgado, LLC  
PO Box 7965  
Columbia, SC 29202  
[jnichols@bntdlaw.com](mailto:jnichols@bntdlaw.com)

**Via U.S. Mail and Email:**

Robert E. Lyon, Jr., Esq.  
John K. DeLoache, Esq.  
Alexander W. Smith, Esq.  
James F. Knox, Esq.  
SC Association of Counties  
PO Box 8207  
Columbia, SC 29202  
[blyon@scac.sc](mailto:blyon@scac.sc)  
[jdeloache@scac.sc](mailto:jdeloache@scac.sc)  
[asmith@scac.sc](mailto:asmith@scac.sc)  
[jknow@scac.sc](mailto:jknow@scac.sc)

October 31, 2014

A handwritten signature in cursive script that reads "Louisa H. Gantt". The signature is written in black ink and is positioned above a horizontal line.

Louisa H. Gantt

DM: 2230504 V.5