

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS

**S.C. Supreme Court**

The Honorable John Hamilton Smith, Special Referee

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Case No. 2010-CP-40-8943R

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COLUMBIA VENTURE, LLC, ..... APPELLANT,

v.

RICHLAND COUNTY, ..... RESPONDENT.

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**RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING**

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Under Rule 221, SCACR, a petition for rehearing of this Court's opinion in this case "must state with particularity the points supposed to have been overlooked or misapprehended by the court." Contrary to Appellant Columbia Venture's assertions in its Petition for Rehearing, this Court neither overlooked nor misapprehended any fact or law in its opinion issued August 12, 2015. Columbia Venture's incorporation of its briefs by reference into its Petition fails to meet the particularity requirement within Rule 221, SCAR, and thus should be disregarded. As for its arguments actually raised within its Petition, Columbia Venture mostly rehashes its prior arguments, which this Court clearly apprehended and rejected. "The purpose of a petition for rehearing is not just to have the case tried in this Court a second time." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 172-173, 167 S.E. 234, 238 (1933); *Checker Yellow Cab Co. v. Checker Cab & Parcel Service, Inc.*, 287 S.C. 608, 612, 340 S.E.2d 549, 552 (Ct. App. 1986). Columbia Venture also impermissibly makes arguments not raised in its briefs to this Court. Columbia

Venture's Petition should be denied for these reasons as more specifically argued within this Return.

## ARGUMENTS

### **1. This Court did not misapprehend Columbia Venture's radical and misguided efforts to characterize the County's land use regulations as a *per se* physical taking.**

Columbia Venture asserts that this Court "failed to recognize" its radical and totally unsupported *per se* physical takings theory. A *per se* physical taking is rare and easily identified – a continuous and permanent physical occupation of private property by the government (or authorized by the government) constitutes a *per se* taking requiring just compensation. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 325 (2002); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). A physical taking requires physical possession, and occurs when the government itself actually occupies the property or requires the landowner to submit to actual physical occupation. *Stearns Company, LTD v. United States*, 396 F.3d 1354, 1357 (Fed. Cir. 2005). There is nothing particularly complicated about this type of takings claim. Yet Columbia Venture goes on for pages in its Petition, offering complex hypotheses and rationales in order to explain to this Court how it misunderstood its *per se* physical taking claim. This Court did not overlook or misapprehend Columbia Venture's theory, this Court simply rejected it, for good reason.

Government action causing private property to be permanently flooded unquestionably constitutes a physical taking. *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012); *United States v. Dickinson*, 331 U.S. 745 (1947); *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871); *Early v. South Carolina Pub. Serv. Auth.*, 228 S.C. 392, 90 S.E.2d 472 (1955). In cases finding that government-induced flooding in effect imposed a flood easement, some

affirmative action by the government caused the flood water to encroach upon the plaintiff's land. *See United States v. Dickinson*, 331 U.S. 745, 747 (1947) (stating that the federal government impounded the Kanawha River to improve navigability, causing permanent flooding of adjoining private property); *United States v. Cress*, 243 U.S. 316, 328 (1917) (finding that the government's construction of a lock and dam system on the Kentucky River caused backwaters to frequently flood private property). These cases and others cited by this Court represent a classic early example of a physical taking in which the courts, prior to the modern articulation of physical takings in *Loretto*, characterized government-induced flooding as taking a flood or flowage easement. While this Court did not cite to *Loretto's per se* physical taking test, this Court readily recognized the fundamental flaw in Columbia Venture's theory, stating correctly that "Richland County's floodway development restrictions are simply limitations on land use and do not constitute a flowage easement upon Columbia Venture's property." Shearouse Advance Sheet No. 31, Aug. 12, 2015, at 53. Richland County did not take action that caused Columbia Venture's property to flood, or as this Court put it, Columbia Venture failed to show "that the occurrence of flooding is the natural consequence of government action." *Id.* at 54.

Columbia Venture argues once again that the County's Stormwater Ordinance had in effect conferred a right to the County to flood its Property, or reserved for public use 70% of its Property for conveyance of the base flood. The Stormwater Ordinance restricts how a property owner may use his property located within a floodway. It does not compel any property owner to convey a property interest to the government. Under the Stormwater Ordinance, the County does not acquire any right to use Columbia Venture's Property. Columbia Venture retains its ability to use and profit from its Property. Thus, the County's Stormwater Ordinance does not impress a public

servitude on the floodway portion of Columbia Venture's Property.<sup>1</sup> Columbia Venture's assertion that the Ordinance and flood maps force it to helplessly stand by and watch its Property flood is equally absurd. Columbia Venture continues to possess the ability to maintain and repair its existing levees. As this Court correctly recognized, the County's Ordinances "maintain the status quo in terms of flood risk." Shearhouse Advance Sheet, Number 31 at 56.

Columbia Venture's assertion that summary judgment should be reversed because a material issue of fact was raised by FEMA's determination that the levees would fail in two or three places does nothing to change this Court's ruling. As a preliminary matter, it is interesting to note Columbia Venture's own ambivalence about FEMA's conclusion. In its Final Brief, Columbia Venture declared that it "does not concede (nor has ever conceded) that FEMA's conclusion is scientifically or technically correct." CV Final Brief, p. 57, fn. 24. More to the point though, FEMA's determination about levee failure is not a genuine issue of material fact that would have altered the Special Referee's sound legal conclusions. FEMA's decision, alone or in conjunction with the County's Stormwater Ordinance, did not have the effect of burdening Columbia Venture's property with a servitude reserving a hydraulic flow corridor. Columbia Venture continues to grasp at a totally unsupported legal conclusion that the County's floodway restrictions give rise to a right appropriated by Richland County to use Columbia Venture's floodway property to convey floodwaters.

Columbia Venture's efforts to transform regulatory limitations on the use of floodway property into a *per se* physical taking has no support in takings jurisprudence. Columbia Venture

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<sup>1</sup> For this reason, Columbia Venture's conservation easement theory also fails. Unlike a conservation easement, where a government holds an interest in private property, a land use regulation does not confer upon the government any right to hold an interest in real property. Compare S.C. Code Ann. 27-8-10(1) and 2(a) (defining a conservation easement as "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations ..." and a "holder" as "a government body empowered to hold an interest in real property ..." with the relevant provision of the County's stormwater ordinance, "no levees, dikes, fill materials, structures or other obstructions that will impede the free flow of water during times of flood will not be permitted in the regulatory floodway.")

turns to *Koontz v. St. Johns River Management District*, 133 S. Ct. 2586 (2013), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) in an effort to prop up its theory; however, these cases are of no help to Columbia Venture. These cases concern a different type of takings claim than that brought by Columbia Venture, and involves situations where, as a condition to receiving a permit, the government demands or acquires actual transfer of real or personal property to the government.<sup>2</sup> In *Dolan*, the Court explained that the permit condition imposed by the city was not simply a limitation on the use that Dolan might make of her own parcel, but a requirement that she deed portions of the property to the city. 512 U.S. 374, 384 (1994). Columbia Venture's effort to transform a land use ordinance into a transfer of an easement to the County does not square with United States Supreme Court cases that draw a clear line between a physical taking and a *Penn Central* regulatory taking. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 153 (1978) (describing "appellants' related contention that a taking must be found to have occurred whenever the land-use restriction may be characterized as imposing a "servitude" on the claimant's parcel as a "fallacy."). Columbia Venture asks this Court to extinguish the distinction between a government's actual acquisition of (or demand for) private property found in *Nollan*, *Dolan*, and *Koontz* and regulatory limitations on how a property owner may use his property. This Court did not misapprehend Columbia Venture's argument. Instead, this Court simply rejected Columbia Venture's argument as contrary to well established precedent.

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<sup>2</sup> This Court recognized this distinction. Shearhouse Advance Sheet No. 31, Aug. 12, 2015 at 56-57, fn. 19.

**2. Columbia Venture impermissibly raises a new and meritless argument relating to its *per se* physical takings claim.**

Columbia Venture raises a new argument that a floodway is not a legislative determination creating a broad classification of property within the County, but rather, a floodway is an individual adjudicative decision. Pet. Rehearing, p. 12-13. “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended ....” *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). This Court should decline to entertain Columbia Venture’s argument.

Even if this Court considers this new argument, it wholly lacks merit. FEMA determines the extent of a regulatory floodway shown on its flood maps. For the County’s purposes, flood maps serve to identify areas subject to the County’s Floodplain/Floodway overlay zoning district, and also triggers restrictions within the County’s Stormwater Ordinance. The County makes no individualized determination of whether or not a particular property should or should not be located within a floodway. If property is identified on FEMA’s flood maps as within a regulatory floodway, the County’s floodway regulations apply. Columbia Venture’s citation to *Dolan v. City of Tigard*, 512 U.S. 374 (1994) as support for its proposition is unavailing. In *Dolan*, the Court was reviewing an adjudicative permitting decision in which the city required the property owner to deed a portion of her property along a creek to the city as a condition of permit approval. *Id.* at 385. The County’s adoption and use of flood maps for regulatory land use purposes bears no resemblance to an adjudicative permitting decision.

**3. Columbia Venture impermissibly raises a new argument relating to Burwell Manning that in any event has no bearing on this Court's analysis.**

In its Petition for Rehearing, Columbia Venture asserts that this Court misapprehended or overlooked an argument it made concerning *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), assuming that Mr. Burwell Manning had retained title to the Property. Pet. Rehearing, p. 7. The argument that Columbia Venture refers to, on pages 78-80 of its Final Brief, is one of several arguments Columbia Venture raised as part of its *per se* physical takings claim. On those pages, Columbia Venture made no mention of *Palazzolo*, quite possibly because *Palazzolo* concerns reasonable investment-backed expectations, an element under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), which has no relevance whatsoever to a *per se* physical takings claim. Columbia Venture cannot now raise this argument, however flawed, for the first time. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532 (2001).

To the extent that Columbia Venture is arguing that this Court misapprehended whatever expectations Mr. Burwell Manning had as it relates to its *Penn Central* claim, this Court did not err. Using an assumption that Mr. Manning had not sold the Property to Columbia Venture does not “better focus this Court’s attention.” The fact is that Mr. Manning did sell his interest in the Property to Columbia Venture, and before he conveyed the Property, Mr. Manning was well aware of the preliminary flood map putting a floodway on almost all of his property.<sup>3</sup> Whatever Columbia Venture is attempting to argue, it is difficult to see how this Court could have

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<sup>3</sup> Columbia Venture mistakenly seems to believe that Mr. Manning’s status as a member of Columbia Venture after he conveyed the Property has some relevance to its argument. Its assertion that Burwell Manning “continued to own an interest in the property as a member of Columbia Venture” is contrary to well established United States Supreme Court precedent. See *Rhode Island Hospital Trust Co. v. Doughton*, 270 U.S. 69, 81 (1926) (“The owner of the shares of stock in a company is not the owner of the corporation’s property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property.”).

misapprehended or overlooked any significance of Mr. Burwell Manning's pre-purchase interests in the Property when analysis of his pre-purchase interests is not outcome determinative. In analyzing reasonable expectations, the expectations of prior property owners are irrelevant. *Norman v. United States*, 429 F.3d 1081, 1093 (Fed. Cir. 2005); *Mehaffy v. United States*, 102 Fed. Cl. 755, 766 (Fed. Cl. 2012).

Moreover, the excerpts from *Palazzolo* that Columbia Venture refers to addresses an issue that has no bearing on this case. The paragraphs that Columbia Venture relies upon within *Palazzolo* opinion responds to the lower court's ruling that a person who purchased property after a land use restriction was enacted is barred from ever bringing a takings claim. 533 U.S. at 626-629. The Court rejected this notion as unfair to property owners. 533 U.S. 606, 628 (2001). Here, this Court did not hold that Columbia Venture's takings claim was barred due to taking title with notice of the County's floodway restrictions. Instead, this Court emphatically rejected such a notion. Shearhouse Advance Sheet, at 61, fn. 20.

**4. This Court did not err in analyzing the character of the government action.**

Columbia Venture argues that this Court overlooked or misapprehended the magnitude of the burden placed upon property owners owning property within a floodway because the acreage of floodway property within unincorporated Richland County is less than 16,500 acres.<sup>4</sup> Even if floodway property located within the corporate boundaries of municipalities was removed from the over 16,500 acres of floodway identified within Richland County, Columbia Venture's point does not change the conclusion that this Court correctly made – that the County's floodway

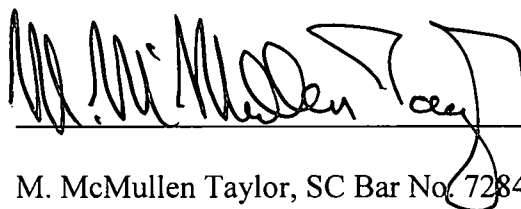
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<sup>4</sup> This Court's statement that the 16,500 acres was floodplain property is a typographical error. The record shows that this acreage comprised floodway property. R. p. 3175. Floodplain acreage within Richland County would be far greater because floodways typically represent only a portion of a larger floodplain. Also, the 16,500 acres of floodway property likely referred to floodway acreage before FEMA issued its final determination of new flood maps in August 2001, effective on February 20, 2002. As of February 20, 2002, the floodway acreage expanded to include 3,130 acres of Columbia Venture's property, as well as other properties affected by the enlarged Congaree River floodway.

restrictions applied to a broad swath of property, and thus, did not force Columbia Venture to bear the burden of the restrictions alone.

Further, Columbia Venture appears to be trying to argue that it was burdened more because the combined acreage of its floodway property along with the acreage of floodway property owned by the City of Columbia and Heathwood Hall, amounted to 20% of the total floodway acreage in Richland County. It is unclear why Columbia Venture is adding together its floodway acreage together with the floodway acreage of the City of Columbia and Heathwood Hall, much less why this percentage matters in terms of a takings analysis. The fact remains that Columbia Venture shared the burden of the County's floodway restrictions with thousands of acres of other property in Richland County.

For these reasons, Columbia Venture's Petition for Rehearing should be denied.



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Columbia, South Carolina  
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THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS

The Honorable John Hamilton Smith, Special Referee

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

COLUMBIA VENTURE, LLC,.....APPELLANT,

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RICHLAND COUNTY,.....RESPONDENT.

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**CERTIFICATE OF SERVICE**

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I certify that I have served a copy of Respondent's **Return to Appellant's Petition for Rehearing** by depositing a copy of it in the United States Mail, postage prepaid, and by electronic mail, on the 21<sup>st</sup> day of September, 2015, addressed to counsel of record, as follows:

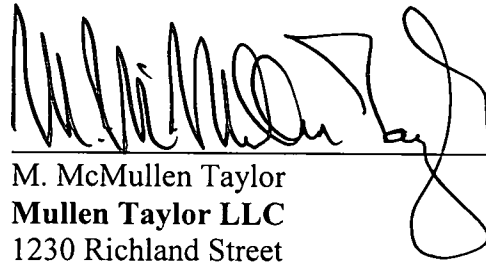
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