

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

RECEIVED

SEP 28 2015

S.C. Supreme Court

Columbia Venture, LLC,

Appellant,

v.

Richland County,

Respondent.

REPLY TO RETURN TO PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellant Columbia Venture, LLC (“Columbia Venture”) herein replies to Respondent Richland County’s (“County”) Return to Columbia Venture’s Petition for Rehearing.

Before the County changed its ordinances during the course of Columbia Venture’s administrative appeal before FEMA, Columbia Venture had the right to widen or heighten its levees to protect its property from flooding and the right to build habitable structures on its property. The County’s new ordinance took away both rights. Both rights are incidents of property ownership that may not be taken without payment of just compensation. *Lucas v. Rawl Family Ltd. P’ship*, 359 S.C. 505, 509, 598 S.E.2d 712, 714 (2004) (“South Carolina follows the common enemy rule with respect to the diversion of surface waters naturally flowing across land, [and t]he rule allows a landowner to treat surface water as a common enemy and dispose of

it as the landowner sees fit.”) (internal citations omitted); *Lucas v. S.C. Coastal Council*, 309 S.C. 424, 427, 424 S.E.2d 484, 486 (1992) (“Coastal Council [does not possess] the ability under the common law to prohibit Lucas from constructing a habitable structure on his land.”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (U.S. 1992) (citing *Curtin v. Benson*, 222 U.S. 78, 86 (1911) (“It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land; they rarely support prohibition of the ‘essential use’ of land.”)).

Although Columbia Venture may maintain its levees, the County’s ordinances forbid it to alter the slope of the levees to make them wider in places to prevent their failure during major floods, like the 10-year flood that breached the levees in 1976. Based on the extensive scientific and technical evidence included in the summary judgment record, FEMA has concluded repeatedly that the levees, in their present profile, will fail during major floods.¹ This

¹ The following are quotations from FEMA’s administrative record and summarize the Agency’s findings regarding the likelihood and magnitude of a breach in the Manning levees.

During a flood in October 1976, which was approximately a 10-year flood, the levee directly west of the sewage treatment facility was breached in two places and the area within the levees was flooded. The breaches have since been repaired; however, a major flood on the Congaree River can be expected to cause similar failures of the levee at other locations....

(R. 3041, 5739 (July 17, 1995)).

We do expect isolated areas of failure, but not long failures such that we would create a hydraulic flow path[.]

(R. 5741, 5860 (Jan. 24, 2000)).

Since receiving appeals, FEMA decided to take a more detailed approach.

...
Based on the relative H/L ratio [the ratio of hydraulic head across the levee to the base width the levee] and extensive engineering experience, it was determined that a breach would likely be about 120 feet wide... [And] it would be reasonable

unchallenged technical evidence distinguishes Columbia Venture's case from those cases in which the threat of flooding was mere conjecture. Here, the County's ordinance unequivocally took away Columbia Venture's common law right to exclude surface water and dooms the property to invasion by "common enemy" surface water during periodic and foreseeable flooding.²

A unit of local government may prohibit building on property on which such building would constitute a nuisance under state law without incurring an obligation under the Fifth

to assume that the levee could fail by piping at two or possibly three weak locations during a single occurrence of the 100-year flood.

...

The geotechnical evaluation previously discussed above identified two locations as having the highest likelihood of breach by piping.

...

Based on these investigations with the RMA-2 model, it was concluded that the Richland County floodplain would convey a significant amount of flow in 100-year flood. 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. Therefore, based on the two-dimensional model investigation, it was determined that the floodway should extend landward of Manning's dike in Richland County, and should allow for flow through the large relief bridge.

(R. 3480, 3481, 3487, 3491, 5742 (Sept. 26, 2000)).

After reviewing the data submitted during the comment period, we remain convinced that the existing dike will breach, and as a result, significant flow under Interstate 77 in the Richland County overbank will result.

(R. 5742, 5874 (Aug. 20, 2001))

² The County observes that Columbia Venture never accepted FEMA's conclusions as scientifically and technically correct. Return p. 4. In its administrative appeal, Columbia Venture submitted two-dimensional modeling that challenged FEMA's conclusions that the area landward of the levees was an area of effective flow (1 cf/sec) or conveyance that could be included in a regulatory floodway determined by equal reduction of conveyance. Columbia Venture's two-dimensional modeling accepted FEMA's conclusions that the levees would in fact breach during a base flood. See R. pp. 1571-75, 4956-61 ("This analysis *considers the potential for a series of levee breaches* that would enable water to flow through the floodplain on the Richland County side of the river during a peak 100-year flood and evaluates the appropriateness of this floodplain to serve as a floodway under existing conditions.") (4956-57 emphasis added).

Amendment to compensate the owner. Under such circumstances, the right to build is not inherent in the owner's title. But if the property owner's proposed buildings would not be a nuisance under state law, then the right to build is an incident of ownership that may not be taken away without payment of just compensation. The large and varied school buildings constructed by Heathwood Hall Episcopal School ("Heathwood Hall") on its property located in the exact same regulatory floodway unequivocally demonstrate that building productive structures on Columbia Venture's property (which in many places is located farther from the river's edge than Heathwood Hall's property) would not be a nuisance. Thus, when a unit of local government prohibits building in a regulatory floodway altogether without providing a variance where the affected property is otherwise suitable for building under the state law of nuisance, it commits a taking of property. A regulatory floodway, after all, is not a floodway in fact; it is rather a regulatory concept and is not limited to property that is otherwise not suitable for building under the state law of nuisance. Columbia Venture does not contend that the County was without power to adopt its ordinances, only that the County must pay just compensation where the exercise of its power constitutes a taking.

Notably, the County does not address *Adolph v. FEMA*, 854 F.2d 732 (5th Cir. 1988) and similar cases holding that FEMA is immune from takings liability under the NFIP because it is a voluntary program. Because the County's ordinances unquestionably prohibit Columbia Venture, but not Heathwood Hall or the City of Columbia, from utilizing the no-rise construction techniques that FEMA's regulatory scheme allows, the County must be held responsible for the taking of Columbia Venture's common law property rights to exclude surface water and to build productive, habitable structures.

The County attempts to distinguish *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) on the ground that these cases involved exactions as part of a permitting process. However, critical to the Supreme Court’s holding in these cases was the premise that had the local unit of government simply appropriated the interest sought, a *per se* physical taking would have occurred. *See Koontz*, 133 S. Ct. at 2600. If the County had offered to grant Columbia Venture a permit to improve its levees in exchange for Columbia Venture’s agreement not to build habitable, productive structures within the regulatory floodway, the case would be on all fours with *Koontz*, *Nollan*, and *Dolan*. Instead, the County achieved the same result by simply passing an ordinance that prohibited both the levee improvement and the structures.

The County further argues that a “physical taking requires physical possession” Return p. 2. This is incorrect. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the owners of a private pond dredged an 8-foot deep channel connecting the pond to Maunaloa Bay and the Pacific Ocean. Once connected, the Army Corps of Engineers, which had acquiesced in the proposal to build the channel, made the “naked assertion” that the pond was subject to the navigational servitude of the United States. *Id.* at 178. The simple assertion of a servitude—with no actual physical possession occurring—was sufficient to find a taking. In *Lucas*, 505 U.S. at 1015, the United States Supreme Court cited *Kaiser Aetna* as an example of a regulatory action “that compel[s] the property owner to suffer a physical ‘invasion’ of his property” and which is “compensable without case-specific inquiry into the public interest advanced in support of the restraint.” No actual physical possession is required.

The County also fails to address the exemptions in its ordinances that allow Heathwood Hall and the City of Columbia to build structures within the same regulatory floodway in which Columbia Venture's property is located. While every "landowner is constrained by those 'restrictions that background principles of the State's law of property and nuisance already place upon land ownership,'" *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) (quoting *Lucas*, 505 U.S. at 1029), "[a] regulation or common-law rule cannot be a background principle for some owners but not for others." *Id.* at 630. With respect to Columbia Venture's physical takings claim, this discriminatory treatment conclusively disqualifies the County's ordinances as representative of background principles of state property law. With respect to Columbia Venture's regulatory takings claim, and in particular the *Penn Central* factor of the character of the governmental action, the County's prohibition against building in a regulatory floodway was not uniformly applied to all owners of property within a regulatory floodway. Rather, Columbia Venture's similarly situated and immediate neighbors within the same regulatory floodway of the Congaree River floodplain, who were politically favored by the County, are exempted from the prohibition against building within a regulatory floodway. The County further argues that Columbia Venture shares the burden of regulatory floodway restrictions with other regulatory floodway property owners. However, treating similarly situated property owners differently in terms of development capabilities necessarily makes the burden inequitable. *See Lucas*, 505 U.S. at 1035-36 (Kennedy, J., concurring) ("Here, the State did not act until after the property had been zoned for individual lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots. This too must be measured in the balance.").


The County also asserts that Columbia Venture failed to raise two arguments in its prior briefing or argument. Return pp. 6 (adjudicative decision of regulatory floodway for Columbia Venture's property), 7 (application of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) to potential takings claim of Burwell Manning). The County is incorrect. On page 79 of its Opening Brief, Columbia Venture cited some of the same pages in *Palazzolo* that it cites on page 8 of its Petition for Rehearing in discussing the rationale for any takings claim that Mr. Manning had while he owned the property. The point here is that Mr. Manning "must be understood to have transferred [his] full property rights in conveying [the property]," including any takings claim he may have had. *Palazzolo*, 533 U.S. at 629 (quoting *Nollan*, 483 U.S. at 842 n.2). In addition, Columbia Venture briefed the adjudicative nature of FEMA's regulatory floodway determinations for its property in its October 31, 2014 Reply Brief at pages 9-10. Such issues and arguments are, and have been, squarely before the Court.

At a minimum, Columbia Venture's physical takings claim should have been allowed to proceed to a trial on the merits. There is simply no basis for concluding, in light of the principles of law and FEMA's scientific evidence alluded to above, that there was no genuine issue of material fact. For the reasons above, as well as those contained in Columbia Venture's Petition for Rehearing, the Court should grant Columbia Venture's Petition.

[signature on following page]

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Court of Common Pleas

John Hamilton Smith, Special Referee

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

Richland County, Respondent,

v.

Columbia Venture, LLC, Appellant.

CERTIFICATE OF SERVICE

This is to certify that I caused a copy of the foregoing **Reply to Return of Richland County** to be served on the following individuals in the manner expressed below and addressed as follows:

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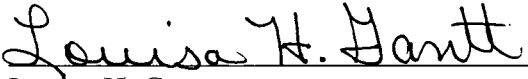
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