

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

John Hamilton Smith, Special Referee

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

Columbia Venture, LLC,

Appellant,

v.

Richland County,

Respondent.

**REVISED RECORD ON APPEAL
VOLUME 3 OF 13
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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.
Post Office Box 11889
Columbia, SC 29211-1889
(803) 779-3080
ATTORNEYS FOR APPELLANT

Weston Adams, III (SC Bar No. 64291)
Thomas E. Lydon (SC Bar No. 10242)
M. McMullen Taylor (SC Bar No. 72848)
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, SC 29211-2519
(803) 779-2300
ATTORNEYS FOR RESPONDENT

Pope D. Johnson, III (SC Bar No. 3048)
1230 Richland Street
Columbia, SC 29201
(803) 799-9791
ATTORNEY FOR RESPONDENT

John D. Echeverria, *Pro Hac Vice*
Vermont School of Law
164 Chelsea Street
Post Office Box 96
South Royalton, VT 05068
(802) 831-1386
ATTORNEY FOR RESPONDENT

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That Columbia Venture lost its gamble does not render it's risk-taking a violation of the *Takings Clause*. *Paradissiotis v. United States*, 304 F.3d 1271, 1276 (Fed. Cir. 2002).

b. State Common Law

Columbia Venture claims in its Proposed Order that the “extent to which the owner’s reasonable expectations have been shaped by the State’s law of property” is a recognized factor in determining reasonable investment-backed expectations. CV Proposed Order, p. 112. It cites to a footnote in *Lucas v. S.C. Coastal Council* as support for this factor. *Id.* In footnote 7, Justice Scalia speculated that in defining the relevant parcel for the purpose of takings analysis, it might make sense to define the parcel by examining “how the owner’s reasonable expectations have been shaped by the State’s law of property— *i.e.*, whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.” *Lucas*, 505 U.S. 1003, 1016 (1992). This dictum, which relates only the parcel issue and not to the proper application of the concept of reasonable investment-backed expectations, has never been adopted by the United States Supreme Court or elaborated upon in any subsequent decision. Justice Scalia’s speculation suggested a possible way of modifying the traditional parcel as a whole rule, an idea the Court thoroughly rejected in subsequent decisions. *See e.g. Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 331 (2002).

More generally, Columbia Venture is off base in asserting that any interference with common law property interests interferes with investment-backed expectations for the purpose of a takings analysis. Of course, in order to present a takings claim at all, one must be able point to

This \$18 million dollar purchase price was significantly lower than the appraised value of \$30 million dollars. In comparison, Tee-To-Green’s purchase price of \$15 million dollars for approximately half of the Property was agreed upon before FEMA issued its preliminary Flood Maps, and the purchase price is in line with the \$30 million dollar appraisal of 4,600 acres. Tr. Vol. 1, p. 136, line 21 – p. 143, line 18.

a protected property interest. As the County has explained above, Columbia Venture has no common law property interest in improving its levees to hold back floodwater or surface water. Even if Columbia Venture did possess a common law property interest in improving its levees, simply proving such a property interest is different from being able to claim an interference with investment backed expectations. As Justice Scalia said, "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

In order to claim that, nonetheless, a regulation interferes with investment-backed expectations, Columbia Venture must point to some objective circumstances, other than the mere possession of a property interest, such as an existing regulatory regime plainly authorizing property development, in order to establish the existence of reasonable investment-backed expectations. Columbia Venture's theory is inconsistent with settled law regarding the balance between private property interests and public regulatory authority.

Hill v. Hanahan illustrates this point nicely. 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984). In *Hill*, the plaintiff was in the process of filling an artificially created pond on her property when the city ordered her to cease her filling activities. *Id.* at 528, 683. The court found that the plaintiff had a common law right to fill the pond, stating that "property in a thing consists not merely in its ownership and possession but in the unrestricted right of use, enjoyment and disposal." *Id.* at 530, 683. This broad unrestricted right of use articulated by the Court of Appeals had its roots in a due process case decided in 1934, *Henderson v. City of Greenwood*, 172 S.C. 16, 172 S.E. 689 (1934). In *Gasque v. City of Conway*, the South Carolina

Supreme Court articulated this same notion in the context of a takings claim. 194 S.C. 15, 21, 8 S.E. 2d 871, 873 (1940).

Yet as time went on, defining property rights as including an unrestricted right of use faded in the modern era of land use regulation. The last time the South Carolina Supreme Court cited approvingly to the *Gasque* view of property rights was in 1963. See *Sease v Spartanburg*, 242 S.C. 520, 131 S.E.2d 683 (1963) (“Property in a thing consists not merely in its ownership and possession but in the unrestricted right of use, enjoyment and disposal.”). The *Gasque* view of property rights took its last breath in a Court of Appeals case, *Tallent v. S.C. Dep’t of Transportation*, 363 S.C. 160, 609 S.E.2d 544 (Ct. App. 2005); see also *Hardin v. S.C. Dep’t of Transportation*, 359 S.C. 244, 253, 597 S.E.2d 814, 818 (Ct. App. 2004) (stating that right to ingress and egress is “rooted in the principle that the deprivation of the ordinary beneficial use and enjoyment of one’s property is equivalent to the taking of it”). The South Carolina Supreme Court reversed, rejecting the Court of Appeals’ reasoning concerning the plaintiffs’ property interests. *Hardin v. S.C. Dep’t of Transportation*, 371 S.C. 598, 641 S.E. 2d 437 (2007). In so doing, the Supreme Court implicitly rejected *Gasque*’s concept of property rights. After *Hardin*, neither the Court of Appeals nor the South Carolina Supreme Court has cited to *Gasque* or *Henderson* for the proposition that property owners possess an unrestrained right of use. Thus, *Hill* has been relegated to the dustbin of outdated case law no longer reflecting the evolving balance between private property interests and public regulatory authority.

c. Alleged Inducement by the County

Columbia Venture asserts in its Proposed Order that Richland County “induced” it to purchase the Property with the expectation that it would be able to obtain a permit to improve the Levees in order to meet FEMA’s levee certification standards. The County allegedly induced

Columbia Venture through what Columbia Venture calls “advocacy” on its behalf by the County Administrator, Mr. Cary McSwain, relative to FEMA, which Columbia Venture infers was motivated by letters written by Mr. Burwell Manning and Mr. Deas Manning. “Overwhelming support” expressed by Richland County officials and others prior to Columbia Venture’s purchase of the Property also allegedly induced Columbia Venture, followed by the County Council’s resolution adopted February 2, 1999. Lastly, Columbia Venture claims that the County’s Administrator’s non-binding letter to Mr. Gregory actually induced Columbia Venture to purchase the Property. Columbia Venture’s characterizations of these actions are flawed, and reliance on them is not reasonable.

Soon after FEMA’s public meeting to discuss its June 5, 1998 preliminary Flood Data, Mr. McSwain made a written request to FEMA asking that FEMA delay finalization of its June 5, 1998 preliminary Flood Data until more information was known about the status of the Manning levees. County Finding of Fact ¶ 28. Mr. McSwain’s request for delay was motivated by an interest in obtaining more time for any affected property owner to obtain and review relevant information. County Finding of Fact ¶ 29. While his request would have benefitted any affected property owner, including Mr. Manning, Mr. McSwain testified that his request had nothing to do with any support or non-support of Burroughs & Chapin’s development plans. *Id.*

“For government regulation to constitute a taking, the property owner must objectively demonstrate the existence of investment-backed expectations.” *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, ___ S.C. ___, 2013 S.C. LEXIS 2 (Jan. 9, 2013) (emphasis added). “The party’s subjective expectations for the property should not be considered.” *Mehaffy v. United States*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012) (emphasis added). To call Mr. McSwain’s letter “advocacy” in support of Columbia Venture is merely a subjective belief based on nothing more

than the fact that Mr. Manning, along with other affected property owners, were copied on the letter. Pl. Exh. 12; Tr. Vol. 1, p. 176, line 18 – p. 177, line 15. Columbia Venture's alleged reliance on the County Administrator's requests to FEMA that it delay proceeding with finalization of the June 5, 1998 preliminary Flood Data is subjective, not objective; therefore, such reliance is unreasonable.

As additional evidence of inducement, Columbia Venture turns to testimony from Mr. Gregory that he met with four Council Members, and that members of Burroughs & Chapin's due diligence team met with other unidentified members of County Council prior to purchase of the Property. CV Proposed Order, p. 118. Mr. Gregory also described these Council Members as being "extremely supportive." Tr. Vol. 4, p. 747, lines 9-21. However, Mr. Gregory acknowledged that he could not recall specific conversations he had, just an impression of enthusiastic support. County Findings of Fact ¶ 32 and ¶ 33; *see also* Tr. Vol. 5, p. 878, line 15 – p. 879, line 7. His testimony was vague in terms of how he described the project to County Council Members. County Finding of Fact ¶ 30; *see also* Tr. Vol. 3, p. 698, line 25 – p. 699, line 15. He only specifically remembered that he showed Council Members a preliminary land use plan. *Id.* Mrs. Smith recalled Mr. Gregory showing her a preliminary land use plan for the Property, nothing more. *Id.*; *see also* Tr. Vol. 13, p. 2326, line 22 – p. 2330, line 18.

It is not reasonable to rely on initial responses by individual elected officials to a general, preliminary vision of the Property as the basis for buying the Property, not because elected officials are untrustworthy, but rather, because their response may change and evolve once land use decisions are put before them as a legislative body in the exercise of their police power. *C.f. Greenville County v. Kenwood Enters.*, 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003) ("As a general rule, estoppel does not lie against the government to prevent the due exercise of its police

power or to thwart the application of public policy.”); *S.C. Dep’t of Social Services v. Parker*, 275 S.C. 176, 178, 268 S.E.2d 282, 283 (1980) (“While the State may be subject to the doctrine of estoppel in its contractual relations, that doctrine will not be applied to deprive it of the due exercise of its police power or to thwart its application of public policy.”) (internal citation omitted). It strains credulity to believe this sort of informal contact with individual members of County Council induced Columbia Venture, an entity managed by a sophisticated developer, to spend millions of dollars in a land purchase.

Columbia Venture then turns to the County’s Levee Resolution of February 2, 1999 as evidence of County inducement to buy the Property. It spends an inordinate amount of time focusing on the County staff report to the Council Committee concerning Lockwood Greene’s request that the County assume responsibility for levee maintenance. *See* CV Proposed Order, pp. 28-32; pp. 118-119. Although the County takes issue with the significance that Columbia Venture places on who was present at the Committee meeting, the signatures of the County attorney and financial officer on the report, and the options laid out by the planning department, the real problem with Columbia Venture’s heavy emphasis on this staff report is that this report represented staff thinking about Lockwood Greene’s request, not the thinking of County Council. Comments or explanations by County staff to County Council do not manifest the intent of County Council. *See Eagle Container Co., LLC v. County of Newberry*, 366 S.C. 611, 630-631, 622 S.E.2d 733, 743 (Ct. App. 2005) (explaining that statements made by members of County Council may be used to determine intent of the County Council, but statements made by staff person not indicative of County Council’s intent).

The Committee recommended to the full County Council that it “authorize the Council Chairman or his Designee to begin first steps of acceptance of responsibility and maintenance

contingent upon engineering certification, certification by the Corps of Engineers and approval and acceptance by FEMA.” Pl. Exh. 147 at DEF-00012032. County Council is not bound to follow the recommendation of its committees. *F.B.R. Investors v. County of Charleston*, 303 S.C. 524, 527-528, 402 S.E.2d 189, 191 (Ct. App. 1991). Mrs. Smith introduced a substitute motion, in the form of a resolution, which had the effect of superseding the Committee’s motion. *Id.*; Tr. Vol. 12, p. 2283, lines 18-21; Tr. Vol. 13, p. 2390, lines 2-5. The substance of this resolution was different than the Committee recommendation. Therefore, even if the staff report had some bearing on the thought process of County Council, it is even less consequential in terms of ascertaining the intent of County Council. Based on the differences between the Committee motion and the Levee Resolution, one could argue that the County Council’s Levee Resolution indicates an intent to reject the staff report altogether.

Mr. Gregory conceded that resolutions do not bind the enacting body to any particular course of action. County Finding of Fact ¶ 50. He also conceded that the Levee Resolution was not a contract. *Id.* The Board of Directors of Burroughs & Chapin understood this as well. After the County adopted its Levee Resolution, the Board of Directors of Burroughs & Chapin reiterated criteria that must be met in order to purchase the Property, one of which was “that an agreement can be negotiated with Richland County to assume the maintenance of the dike system” County Proposed Findings of Fact ¶ 37. The Board of Directors’ repetition of its levee maintenance criteria on February 8th and 15th indicated that the County’s Levee Resolution did not meet the criteria of a binding agreement.

Additionally, the language of the Board’s levee maintenance criteria used the permissive word “can,” as opposed to “shall,” and employed the future tense as opposed to present tense. County Proposed Findings of Fact ¶ 37. This language indicated that the Board expected its

executive staff, at the time of purchase of the Property, to merely report that they thought they had the ability to obtain an agreement with Richland County at some point after the purchase of the Property, not that Burroughs & Chapin had actually secured an agreement with the County prior to purchase. Hence, Columbia Venture cannot legitimately argue that the Levee Resolution induced the purchase of the Property. Again, "the party's subjective expectations for the property should not be considered." *Mehaffy v. United States*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012).

The Levee Resolution was negotiated with Mrs. Kit Smith and drafted by Burroughs & Chapin's legal counsel who agreed to its substance. It conferred discretion to County Council in deciding whether to ultimately accept responsibility for levee operation and maintenance. The County agreed to accept this responsibility if 44 C.F.R. § 65.10 required Richland County to accept responsibility for levee maintenance. 44 C.F.R. § 65.10(d) required levee systems to be maintained by a federal, state or local community; however, the regulation does not impose upon these entities any requirement that they must accept such responsibility.

Additionally, there was no certainty that all the contingencies contained in the Levee Resolution would or could be met. In particular, the fourth contingency – that the County, City and Columbia Venture resolve issues of performance and funding of the operation and maintenance responsibility – required agreement among three entities on who was going to own, operate and maintain the levee and how operation and maintenance in perpetuity would be funded.⁶ Liability issues associated with these activities would necessarily have to be

⁶ Columbia Venture tries to divert attention from this contingency by unilaterally asserting that the levee upgrade itself was the first contingency to accomplish. Columbia Venture's insistence that the first listed contingency was the first to be accomplished is a subjective expectation and thus cannot be considered to be a reasonable investment backed expectation. *Mehaffy v. United States*, 102 Fed. Cl. 755, 765 (Fed. Cl. 2012). A reasonable developer in the shoes of Columbia Venture would have wanted resolution of who would be performing the operation and maintenance and how that would be paid for, before levee improvements are made. It is pointless to spend millions of dollars to improve the levee if uncertainty exists regarding responsibilities associated with operating and

considered. The complexity of this contingency makes its outcome uncertain. The discretionary nature of the Levee Resolution along with the uncertainty surrounding at least one contingency makes Columbia Venture's claim of inducement unavailing.

Finally, Columbia Venture's Proposed Order would have this court conclude that Columbia Venture relied upon a clearly non-binding letter from the County Administrator to Mr. Gregory whereby the County agreed "to work with the development group on issues that are critical to the proposed development such as zoning, tax incentive vehicles, and a multi-county business park." CV Proposed Order, p. 120. Reliance on a letter that expressly stated that it was non-binding both at the head and foot of the letter is not reasonable. Columbia Venture's suggestion that this letter could very well constitute a binding contract in spite of the express words to the contrary is untenable. Columbia Venture's reliance on *Stevens & Wilkinson of S.C. v. City of Columbia* for this proposition is of no help because the memorandum of understanding in that case did not contain express statements that it was non-binding, and the County's letter included no classic contract language. 396 S.C. 338, 721 S.E.2d 455 (Ct. App. 2011).

Although *Dunes West* noted that the government's representations that lead a property owner to expect government approvals may be relevant in assessing investment backed expectations, those government-induced expectations must nonetheless be reasonable. *Dunes West*, 2013 S.C. LEXIS 2, at *67. For a sophisticated developer such as Columbia Venture to claim that the County Administrator's letters to FEMA, the County Council's initial impressions of a preliminary land use plan, and the County Administrator's clearly non-binding letter, served to induce purchase of the Property, simply underscores the weakness of its claim of reasonable investment backed expectations.

maintaining it once constructed. Additionally, a reasonable developer would want the second contingency of preparing all required documentation concerning levee certification accomplished prior to the first contingency.

The facts of this case show that Burroughs & Chapin, a sophisticated developer, took a chance on a risky development plan during the midst of a FEMA restudy with little more from the County than preliminary, informal conversations and non-binding documents. The test for reasonable investment backed expectations is whether, from an objective standpoint, a reasonable developer in the shoes of Burroughs & Chapin would have moved forward with a massive development on a floodplain under the facts of this case. See *Mehaffy v. United States*, 102 Fed. Cl. 755, 765-766 (Fed. Cl. 2012) (“The critical question is what a reasonable owner in the plaintiff’s position should have anticipated.”). Here, a reasonable developer would not have taken a leap of faith in the midst of a FEMA restudy that all the approvals needed to develop on a floodplain would be obtained and obtained expeditiously. A reasonable developer would have either entered into an option agreement or entered into a purchase agreement with contingencies that a favorable Flood Map would be finalized and certain approvals would be obtained. Columbia Venture’s Proposed Order not only rests upon expectations that were not investment backed but those expectations were patently unreasonable. The predicament Columbia Venture found itself in was self-inflicted. Having decided to take this risk when it could very well have avoided it, Columbia Venture cannot fairly expect the public to bail them out for their reckless business decision.

7. THE CHARACTER OF THE GOVERNMENT ACTION FAVORS THE COUNTY

In its Proposed Order, Columbia Venture knows that it has a problem meeting the economic loss element of *Penn Central*, and tries to magnify the character of the government action as an issue of fairness⁷ that can overcome an insufficient showing of economic loss. CV

⁷ In *Lingle v. Chevron USA, Inc.*, the United States Supreme Court rejected Chevron’s attempt to fashion a general principle of fairness into an overriding litmus test. 544 U.S. 528, 542-543 (2005) (“Chevron appeals to the general principle that the *Takings Clause* is meant ‘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.’ But that appeal is clearly

Proposed Order, p. 123. In a *Penn Central* analysis, the character of the government action takes no such precedence. “The character of the government action could, in conjunction with other factors, support a taking, but this single factor does not support a taking in the absence of reasonable investment-backed expectations and where the economic diminution does not reach a level that has been associated with a finding of a taking.” *Cane Term., Inc. v. United States*, 57 Fed. Cl. 115, 129 (Fed. Cl. 2003).

Under the character of the government action element, the relevant inquiry is an examination of “the magnitude or character of the burden a particular regulation imposes upon private property rights” and how that “regulatory burden is distributed among property owners.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005). This inquiry “help[s] to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property” *Id.* In examining the character of the government action, Columbia Venture’s Proposed Order ignores contrary facts and law, dangles a red herring, misreads case law, and draws unsupported conclusions.

a. The County’s regulations serve to prevent harm to life and property

“There is little doubt that it is appropriate to consider the harm-preventing purpose of a regulation in the context of the character prong of a *Penn Central* analysis.” *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009). “The law of regulatory takings does not generally compensate property owners when a regulation’s economic impact is slight and temporary but the potential for physical harm to the public is significant.” *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1283 (Fed. Cir. 2009). Government action that serves to prevent harm to public safety may impose burdens on a property owner, but burdens caused by

misplaced A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.”).

harm prevention are typically not compensable. *Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447, 518 (Fed. Cl. 2009). This is appropriate because such regulation serves to prevent harm to the public, whereas eminent domain serves to take private property that is useful to the public. *S. Kemble Fischer Realty Trust v. Board of Appeals*, 9 Mass. App. Ct. 477, 482, 402 N.E.2d 100, 104 (App. Ct. 1980) *cert denied sub nom* 449 U.S. 1011 (1980). Additionally, regulations serving to protect public safety are not functionally equivalent to direct appropriation of property or ouster of the property owner. *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1282 (Fed. Cir. 2009). The harm-prevention nature of the County's floodplain regulations weighs in favor of the County.

Columbia Venture attempts to avoid this conclusion by claiming that enactment of the County's Stormwater Ordinance was not intended to protect public safety, but instead, it was intended to harm Columbia Venture. It points to statements made by a single Council Member expressing her opinion that the ordinance "is against Burroughs & Chapin." CV Proposed Order, p. 132. It claims that the ordinance amendments were driven solely by vocal opposition to Columbia Venture. CV Proposed Order, pp. 132-133. It asserts that this court should find that the Stormwater Ordinance was not motivated by intent to prevent flood damage. CV Proposed Order, p. 134. Questioning the County's motivations for enacting its Stormwater Ordinance has no place in a takings analysis. *See Lingle*, 544 U.S. 528, 543 (2005) ("... the *Takings Clause* presupposes that the government has acted in pursuit of a valid public purpose."); *Rith Energy v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) (rejecting argument that permit was denied due to political pressures as improper under a takings analysis). This court should resist Columbia Venture's efforts to attack the motivation of the County in enacting its Stormwater Ordinance.

b. Columbia Venture's attempts to characterize the County's regulations as a physical taking are unavailing

Columbia Venture claims that "the County's regulations will unquestionably result (and are in fact designed to result) in maintaining Columbia Venture's land in an undeveloped state to permit invasion of it by the conveyance of floodwaters" CV Proposed Order, p. 124. In advancing this argument, Columbia Venture attempts reargue its physical taking claim by incorrectly asserting that this court's Physical Takings Order only addressed physical occupation, not physical invasion, and proceeds to argue that the County's ordinances equate to physical invasion of its Property. CV Proposed Order, pp. 123-124. This court's Physical Takings Order made no distinction between physical occupation and physical invasion. Columbia Venture's attempts to argue otherwise wholly lack merit.

Its effort to create a new avenue for its physical invasion argument through a recently decided United States Supreme Court case, *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 519 (2012), is of no help. Columbia Venture relies on *Arkansas Game* for its contention that the County's actions were intended "to allow periodic, temporary flooding" of its Property. CV Proposed Order, p. 125. *Arkansas Game*, like all the other cases cited in this court's Physical Takings Order to distinguish Columbia Venture's claim, involves facts where the government took affirmative action that caused flooding to occur on the plaintiff's property. *See Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 519 (2012) ("Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable.").

Despite Columbia Venture's persistent arguments to the contrary, Richland County has not caused flooding of any sort to occur on Columbia Venture's Property. The County has not

dammed the Congaree River. The County has not built a structure that diverted water onto Columbia Venture's Property. The County has not conjured up a major storm to flood Columbia Venture's Property. Columbia Venture has not even alleged that its Property has in fact been flooded. And Columbia Venture's assertion that the County's ordinances somehow grant authority to flood Columbia Venture's Property is patently ridiculous. Columbia Venture's tired argument is unavailing.

Contrary to what Columbia Venture may believe, *Nollan* and *Dolan* are not instructive here. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). These cases pertain to the government's affirmative requirement that an easement be placed upon private property in order for the property owner to obtain a permit. The facts of *Nollan* and *Dolan* are not at all similar to the facts here. As part of the Court's analysis of whether the government's conditions imposed upon issuance of a permit, *Nollan* and explained that that the government's actual appropriation of an easement, if imposed unilaterally, would have resulted in a physical taking. Columbia Venture seizes on this premise as support for its proposition that the County's ordinances are "highly analogous to" and "indeed functionally equivalent to, an ordinance-imposed, involuntary no-build easement to convey floodwaters or as an ordinance-imposed, involuntary conservation easement over Columbia Venture's property." CV Proposed Order, p. 126.

The County's Floodplain Overlay Zoning District is, obviously, a zoning designation, the quintessential land use regulation. The County's Stormwater Ordinance regulates land use by setting forth limitations, standards and/or criteria for construction within floodways and floodplains. Mere restrictions on the use of property do not constitute a physical invasion of ownership interests. *Norman v. United States*, 63 Fed. Cl. 231, 248 (Fed. Cl. 2004). The

County's ordinances regulate the types of land use allowed within floodplains and floodways and establish construction standards and restrictions. Limiting the uses of such property does not operate to oust the property owner from his domain, or deny him the ability to exclude people or surface water. *See Henry v. Jefferson County Comm'n*, 637 F.3d 269, 277 (4th Cir. 2011) (rejecting characterization of land use regulations as comparable to physical invasion). The County's floodplain management ordinances regulate what Columbia Venture can do with its Property. They do not force Columbia Venture to devote its Property to public service.⁸

Moreover, Columbia Venture's assertions concerning the effect of the County's regulations on its Property does not hold up under a plain reading of the County's regulations. Columbia Venture's 1,200 acres within the floodplain could have been developed subject to flood-proofing or elevation requirements within the County's Floodplain Overlay Zoning District. Within the floodway, Columbia Venture had the opportunity to actually perform the analysis needed to determine if levee construction would not cause a rise in base flood elevations, and seek a variance from the County's Stormwater and Zoning Ordinances to allow application of a no-rise standard. And nothing in the County's ordinances prevent Columbia Venture from maintaining its levees, including restoring slope design. It is Columbia Venture's inaction, not the County's ordinances, that have caused Columbia Venture's land to remain idle.⁹

c. Columbia Venture's suggestion that adoption of more restrictive standards than FEMA's minimum standards should count against Richland County is a non sequitur

Columbia Venture points to the fact that the County's Floodway Provisions within its floodplain management ordinances are more restrictive than FEMA's minimum standards as

⁸ Columbia Venture's contention that land use regulations are equivalent to a conservation easement has been rejected by the Federal Circuit. *Brace v. United States*, 72 Fed. Cl. 337, 366 (Fed. Cl. 2006) *affirmed* 2007 U.S. App. LEXIS 23752 (Fed. Cir. 2007) (rejecting theory that a land use regulation equates to a conservation easement and collecting relevant cases in support of such conclusion).

⁹ Columbia Venture annexed its Property into the City of Cayce in 2007. Consequently, as of the date of annexation, Columbia Venture's Property is no longer within the jurisdiction of Richland County.

reason to for this court to conclude that the character of the government action weighs in its favor. CV Proposed Order, pp. 127-129. In attempting to characterize FEMA's minimum standards as standards that the County is "entitled to" and implying that the County's more restrictive floodway standard is somehow deviant,¹⁰ Columbia Venture ignores the NFIP's clear intention to encourage local communities to adopt floodplain management regulations that do more than what the NFIP requires. 44 C.F.R. § 60.1(d). Under the NFIP, local floodplain management ordinances more restrictive than FEMA's minimum standards "shall take precedence." *Id.* In suggesting that doing more to protect public safety should be held against the County in the context of the character of the government action, Columbia Venture asks this court to intrude upon the County's discretion to determine how best to protect its citizens from harm.

Moreover, the fact that a local community imposes more restrictive floodplain management regulations than what FEMA provides does not necessarily lead to the conclusion that a taking has occurred. Courts have consistently rejected takings claims involving restrictive regulations pertaining to high risk areas, including floodways.¹¹

¹⁰ In discussing the County research in 2001 regarding other counties' floodplain management ordinances, Columbia Venture conveniently ignores that Lexington County was identified as prohibiting construction in a floodway. Pl. Exh. 051. The Lexington County Planning Director testified to this effect as well. *See* Tr. Vol. 15, p. 2697, lines 12-17.

¹¹ *See e.g., Usdin v. State Dept. of Environmental Protection*, 414 A.2d 280 (N.J. 1980); (rejecting takings challenge concerning state floodway regulations prohibiting structures for human occupancy, storage of materials, and depositing solid wastes because of threats to occupants of floodway lands and to occupants of other lands); *Maple Leaf Investors, Inc. v. State Dept. of Ecology*, 565 P.2d 1162 (Wash. 1977) (upholding denial of a permit for proposed houses in floodway of the Cedar River because there was danger to persons living in a floodway and to property downstream.); *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (Mass. 1972) *cert. denied*, 409 U.S. 1108 (1973) (upholding zoning regulations essentially limiting the floodplain to open space uses despite testimony that the land was worth \$431,000 before regulations and \$53,000 after regulation.); *Krahl v. Nine Mile Creek Watershed District*, 283 N.W.2d 538 (Minn. 1979) (holding that watershed district's floodplain encroachment regulations limiting fill to 20% of a floodplain property and affecting 2/3 of an 11 acre tract were not an unconstitutional taking.).

d. The burden associated with the Floodway Provision is widely distributed

Columbia Venture's Proposed Order erroneously concludes that the County's floodplain regulations placed a disproportionate burden on it. As explained in the County's Proposed Order, the County's floodplain regulations contained a general prohibition against construction in a floodway (unless a variance was obtained) and several narrow exceptions to this general exception. Columbia Venture's unimproved Property fell into the general rule along with the vast majority of other properties located within a floodway. Therefore, Columbia Venture's burden was widely shared with thousands of acres of floodway property located within Richland County.¹² See *Cummins v. Robinson Twp.*, 283 Mich. App. 677, 720, 770 N.W.2d 421, 448 (Cl. App. 2009) (... "provisions regarding flood-plain construction ... apply equally to all landowners with property similarly situated in flood-prone areas. Thus, plaintiffs are both benefited and burdened like other similarly situated property owners").

Columbia Venture complains about the narrow exceptions carved out for certain uses, including Heathwood Hall Episcopal School and the City of Columbia's wastewater treatment plant located within the Congaree River floodway behind levees. Through the lens of just these uses, Columbia Venture argues it was disproportionately burdened because it was not allowed to build in a floodway under the County's ordinances but its neighbors, also behind a levee, were allowed to build within a floodway. This argument is unavailing because the limited number of excepted properties compared to all other properties subject to the Floodway Provision does not point to a disproportionate burden. Columbia Venture's property and approximately 16,000

¹² As of early 2001, approximately 16,500 acres of property within Richland County were located within a regulatory floodway. Pl. Exh. 51, p. 1. This figure does not include the floodways newly designated within FEMA's 2002 Flood Maps. Therefore, the actual floodway acreage as of February 20, 2002 is greater than 16,000 acres.

acres of other floodway property are subject to the County's Floodway Provision. Columbia Venture has not been singled out to bear the burden alone.¹³

Columbia Venture relies upon *Wensmann Realty, Inc. v. City of Eagan*, as support for its contention that the County has disproportionately burdened Columbia Venture. 734 N.W. 2d 623, 2007 Minn. LEXIS 389 (2007). This case actually helps Richland County, not Columbia Venture. In *Wensmann*, the city rezoned all three golf courses in the city to a park zoning district which only allowed parks and other recreational uses. *Id.* at 628. The court found that this zoning designation was "extremely restrictive" and "aimed at things that have been considered governmental functions." *Id.* at 640. "The benefits of the open space provided by the golf course property are widely shared through the community, but the costs are focused solely on the property owner." *Id.* The court concluded that "if the property owner is forced to leave the property undeveloped for the benefit of neighboring landowners without an opportunity to pursue a reasonable use of the property, the city is, in essence, asking the property owner to carry a burden that in all fairness should be borne by the entire community." *Id.* at 641-642. The case was remanded for a factual determination of whether any reasonable use of the property remained. *Id.* at 642.

Here, the County's Floodway Provision does not apply just to a handful of property owners, but to all floodway properties not excepted. In other words, the Floodway Provision

¹³ The County's floodplain management regulations defined its floodway exceptions by the type of existing land use. Columbia Venture's Property was not similarly situated to those existing uses that fell under the limited exceptions. The fact that the City's wastewater treatment plant happened to be located by a levee that the City owned, and Heathwood Hall happened to be located behind Columbia Venture's levee did not have any relevance to the exceptions within the ordinances. In any event, fourteen other neighboring property owners other than Columbia Venture's predecessors in interest were located behind the levees. Pl. Exh. 166, DEF-00000057 (map prepared by Richland County identifying owners of property behind levee as: William Maxwell Gregg, Marchants Associates, Terrel Norris Seed Co., City of Columbia, David M. Jordan, John W. Foster, Shemian P. Jordan, B.A. Jordan, Carmine Seeds, Inc., Charlie G. Foster, Franklin L. Claytor, Richland County, Susan Campbell, and Arthur A. Madden). Thus, Columbia Venture's theory, even if considered, does not show that it was burdened when its neighbors were not. Most of the property behind the levee was burdened just like Columbia Venture.

applies to thousands of acres of property. Further, the County's Floodplain Overlay Zoning District permits multiples uses in a floodway.¹⁴ Unlike the ordinance in *Wensmann*, the County's ordinance allows economic use of its Property, and the allowable uses are not all equivalent to government functions. As the evidence shows in this case, reasonable use of Columbia Venture's Property remains. County Findings of Fact, ¶ 245, ¶ 251, ¶ 252, ¶ 254, ¶ 255, ¶ 261. Columbia Venture has not been disproportionately burdened.

e. Columbia Venture's focus on the County's exceptions within its Stormwater Ordinance is a red herring

Columbia Venture's constant complaint about the exceptions within the County's Stormwater Ordinance is merely a red herring. At bottom, its arguments that it was treated differently than the City and Heathwood Hall are equal protection arguments, which is not the same concept as the issue of disproportionate burden relevant in a regulatory takings claim. See *Dunes West*, 2013 S.C. LEXIS 2 (analyzing the plaintiff's equal protection claim of disparate treatment under rational basis test and analyzing the character of the government action element of Penn Central by looking at the nature and impact of rezoning upon plaintiff). The County may lawfully create and apply differing standards to categories of similarly situated property. See *Dunes West* at *17 ("The Equal Protection Clause does not prohibit different treatment of people in different circumstances under the law.").

The record in this case includes evidence of the County's reasons for its exceptions. Columbia Venture's arguments concerning whether the County's rationale for the exceptions were overly broad or otherwise suspect touch upon equal protection considerations, not

¹⁴ The following uses are permitted outright: agricultural and horticultural uses, parking and loading areas, open-air uses accessory to residential uses, recreational uses, airport runways, and streets, bridges, sewer lines and water intake structures. Pl. Exh. 250a, 26-73.4(3), Floodplain Overlay Zoning District (1999). The following uses are allowed if a special exception is obtained: transient amusement enterprises such as carnivals and circuses, parking for drive-in theaters, car sales lots, mining, marinas, railroads, docks, piers, and floating restaurants. *Id.* at (4).

regulatory takings considerations; therefore, its attempt to undermine the County's rationale should be disregarded as irrelevant.¹⁵ *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 639 (Minn. 2007) ("We believe that the appropriate focus of the character inquiry should be on the nature rather than the merit of the governmental action."). See CV Proposed Order, pp. 135-136.

Moreover, the City of Columbia and Heathwood Hall are not similarly situated to Columbia Venture. The City is a local government operating an existing wastewater treatment plant along the Congaree River. The City owned the levee in front of its plant, and was exempt entirely from the County's Stormwater Ordinance. Heathwood Hall is a private school with an existing campus located along the Congaree River. Both uses – a sewer plant and a school – are important government and institutional uses that were established long before FEMA even initiated its restudy of flood hazards in 1998. At the request of the City and Heathwood Hall, the County essentially grandfathered their long-standing uses while still maintaining a high level of protection. In comparison, Columbia Venture owned unimproved Property within the Congaree River floodplain that it bought during FEMA's restudy, thereby assuming the risk that its Property would be designated as a floodway. Columbia Venture came to the nuisance. In contrast, the City purchased its property in 1967, and Mr. Burwell Manning donated the property

¹⁵ Even if this court finds these arguments relevant, Columbia Venture's arguments miss the mark. In arguing that the County's rationale for allowing Heathwood Hall to expand is questionable, Columbia Venture asserts that the Stormwater Ordinance would allow Heathwood Hall to build "dormitory housing should the school begin accepting boarding students." CV Proposed Order, p. 135. This argument is purely speculative and ignores the basic fact that the use of land for multi-family housing is governed by the Zoning Ordinance and Heathwood Hall would only be allowed to build multi-family housing if its basic zoning designation allowed it. See Def. Exh. 87. Because no evidence exists that provides Heathwood Hall's zoning designation, we do not know if it would be allowed to even build dormitories. In a similar vein, Columbia Venture's argument regarding the Stormwater Ordinance's levee standard misses the point. CV Proposed Order, p. 135. The levee standard is simply a design standard. It does not seek to encourage residential development behind levees; in fact it requires a quite high design standard that is more expensive than a 100-year design standard, thus providing a disincentive to build residences behind a levee. Also, Columbia Venture's argument fails to take into account the impact of the Floodway Provision. If property is within a floodway, then no residential development could occur at all unless a variance is obtained. If property is within a floodplain outside of the floodway, then the levee standard would be applicable if the property was properly zoned for residential use.

on which Heathwood Hall sits in the early 1970s, well before Richland County joined the NFIP in 1981. Pl. Exh. 520; Def. Exh. 147; Tr. Vol. 2, p. 449, lines 11-13. Columbia Venture's existing use, proposed use, and circumstances were not the same as the City and Heathwood Hall.

f. Bad faith has no place in determining the character of the government action

Columbia Venture's Proposed Order also contends that evidence of bad faith is relevant to the character of the government action. CV Proposed Order, p. 133. In support of this assertion, Columbia Venture cites to dictum in *Tahoe-Sierra* where the Court is merely listing possible theories for support of finding a taking in the case. 535 U.S. 302, 333. Furthermore, the *Tahoe-Sierra* Court relies on *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999), to support this theory. In *Lingle*, the Court jettisoned the due process considerations found in *Del Monte Dunes* as an improper test under the *Takings Clause*, thereby undermining the bad faith theory derived from that decision. See John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. Envtl. L. & Pol'y 171, 202 (2005) ("Because *Lingle* has repudiated the substantially advances test relied upon in *Del Monte Dunes*, the bad faith theory derived from that decision is certainly undermined."). *Tahoe-Sierra* provides no help to Columbia Venture.

Similarly, reliance on *Acorn Land* is entirely misplaced. There, the issue before the Fourth Circuit was whether the plaintiff's claim was ripe. *Acorn Land*, 402 Fed. Appx. 809, 812 (4th Cir. 2010). The court concluded that the plaintiff established that pursuit of a final decision by the county was futile due to the county's imposition of repetitive or unfair land use procedures in order to avoid a final decision. *Id.* at 814. The question of ripeness is an altogether different inquiry than examination of the character of the government action under *Penn Central*. *Acorn Land* is easily distinguished.

Columbia Venture's citation to *Cooley v. United States*, 324 F.3d 1297 (Fed. Cir. 2003) and *Byrd v. City of Hartsville*, 365 S.C. at 661 fn. 15, 620 S.E.2d at 82, fn. 15, are equally unavailing. As discussed in the County's Proposed Order, bad faith is recognized as relevant in a narrow line of cases where extraordinary delay operates to ripen a takings claim. In order to succeed on this variant of a ripeness argument, the plaintiff must show that the government's excessive foot-dragging is the product of bad faith. In *Cooley* and *Byrd*, bad faith was addressed in this context of extraordinary delay. Although *Cooley* briefly mentioned bad faith and delay under the heading of "character of the government action," federal claims cases rightly understood that "a finding of extraordinary delay is a condition precedent to undertaking the *Penn Central* analysis of whether a taking had occurred." *Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115, 132 (Fed. Cl. 2003); see also *Riviera Drilling & Exploration Co. v. United States*, 61 Fed. Cl. 395, 404 fn. 10 (Fed. Cl. 2004) (recognizing extraordinary delay as one of two exceptions to the ripeness requirement for a permit denial).

Cooley's reference to bad faith and extraordinary delay as part of *Penn Central's* character of the government appears to be an anomaly. A subsequent Federal Circuit case returns bad faith to its narrowly confined place. In *Seiber v. United States*, the court explained that "a temporary taking may occur by reason of extraordinary delay in the governmental decisionmaking process." 364 F.3d 1356, 1364-1365 (Fed. Cir. 2004). "In such a case, a property owner may be entitled to compensation for property loss incurred while the government was in the process of deciding whether to allow the contested activity." *Id.* "This type of temporary takings claim may be asserted notwithstanding the failure of the government to deny a permit or affirmatively prohibit a certain use of the property." *Id.* Therefore, Columbia Venture

lacks any real authority for its assertion that evidence of bad faith is relevant under the element of character of the government's action.

8. COLUMBIA VENTURE'S ALLEGED JUST COMPENSATION RESTS UPON UNREASONABLE ASSUMPTIONS

Because Columbia Venture has failed to establish that a regulatory taking occurred, its calculations regarding the measure of just compensation are meaningless. Columbia Venture is not entitled to just compensation when it fails to establish economic loss, fails to demonstrate reasonable investment backed expectations, and fails to show that the character of the government action is tantamount to physical invasion or disproportionately burdens it.

In any event, the County in its Proposed Order addressed flaws in Mr. Hartnett's opinion. In addition to those already identified flaws, Mr. Hartnett's calculation is based on an assumption that FEMA would approve levee certification such that the entire Property would be removed from any floodway or floodplain designation. CV Proposed Order, p. 79. "The potential of property may be considered as an element affecting value, but it is not sufficient to show that the potential is a mere possibility." *Carolina Power & Light Co. v. Copeland*, 258 S.C. 206, 215, 188 S.E.2d 188, 191 (1972). "It must be shown that the potential is reasonably probable." There is no evidence showing it was reasonably probable that Columbia Venture would obtain the necessary approvals from FEMA to remove the flood hazard areas and floodway from behind the levee. Such an assumption is speculative and should be disregarded. *See Tex. Gas Transmission, LLC v. 18.08 Acres in Southeast Quarter of Section 24*, 2012 U.S. Dist. LEXIS 173146 (N.D. Miss. 2012) ("The court notes the interesting and imaginative approach employed by the Levee Board to arrive at its proposal for just compensation but concludes that the appraisal methodology utilized lacks supporting precedent, is unsubstantiated, and is based upon the occurrence of highly unlikely speculative events, and the potential of these events occurring

is so remote that it cannot be considered in arriving at a proper measure of just compensation or damages.”). Thus, in addition to the other grounds raised in the County’s Proposed Order, Mr. Hartnett’s unreasonable assumption propping up his property value before the alleged taking should not be considered.

In the event that this court concludes that a regulatory taking occurred, the County respectfully requests additional briefing to decide the amount of just compensation, with a subsequent ruling on this issue. The County calls to this court’s attention that, if just compensation is awarded, Columbia Venture must convey its Property to Richland County. See S.C. Code Ann. § 28-2-90.

9. SHOULD COLUMBIA VENTURE PREVAIL IN THIS MATTER, THE COUNTY WILL DISPUTE ANY AWARD OF ATTORNEY’S FEES

Regarding Columbia Venture’s claim of entitlement to attorney’s fees assuming it prevails in this matter, the County of course will dispute any award of attorney’s fees. Under S.C. Code Ann. § 28-2-510(B), “the court, in its discretion, may reduce the amount to be awarded pursuant to this section, or deny an award, to the extent that the landowner, during the course of the action, engaged in conduct which unduly and unreasonably protracted the final resolution of the action or to the extent the court finds that the position of the condemnor was substantially justified or that special circumstances make an award unjust.” Similarly, under S.C. Code Ann. § 15-77-300, the County asserts that, in the event that Columbia Venture is the prevailing party, the County’s actions were substantially justified and special circumstances make an award unjust.

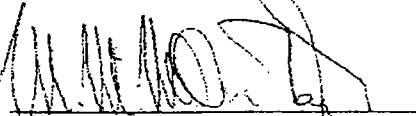
The County notes that a prevailing defendant may seek and obtain attorney’s fees and expert’s fees under 42 U.S.C. § 1988. The County has requested recovery of attorney’s fees and other costs in its Answer.

CONCLUSION

Columbia Venture's Proposed Order is riddled with errors, both factual and legal. Throughout its Proposed Order, Columbia Venture blames Richland County for the failure of its development plans. However, Columbia Venture's troubles were self-inflicted. It entered into a purely speculative real estate venture in the face of significant uncertainty, and now turns to this court to bail it out at the public's expense. Its purchase price reflected the uncertainty of development within a floodplain. Yet Columbia Venture wants to turn Richland County into an involuntary guarantor of its gamble that it could pull off its plan to: 1) convince FEMA to issue a Flood Map to its liking; 2) gain agreement among two local governments to accept responsibility to own, operate, and maintain its levee if certified; 3) persuade these same governments to foot the bill for upgrading, operating and maintaining the levee; 4) obtain from FEMA a Flood Map revision reflecting a certified levee that does not throw water onto Lexington County; 5) hope that it could attract people who would be unfazed by living or working on floodplain property behind a levee to actually buy such property; and 6) then walk away with \$90 million dollars in its pocket. In all fairness, the *Takings Clause* does not obligate Richland County to underwrite Columbia Venture's risk-taking.

At bottom, there is no regulatory taking here. Columbia Venture has failed to demonstrate that its claim is ripe for adjudication. Even if this court holds otherwise, Columbia Venture has failed to prove any economic loss, much less severe economic loss. Columbia Venture's expectations were either not investment-backed or not reasonable. Its efforts to attack the character of the County's actions are unconvincing. Therefore, we respectfully ask that this court enter judgment in favor of the Defendant Richland County.

Respectfully Submitted,



Thomas E. Lydon
M. McMullen Taylor
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211
(803) 779-2300
803-748-0526 (fax)
mullen.taylor@mgclaw.com

Pope D. Johnson, III
Johnson & Barnette, LLP
Post Office Drawer 11209
Columbia, South Carolina 29211-1209
803-799-9791
803-253-6084 (fax)
pdjohnson@johnsonbarnette.com

Attorneys for Defendant Richland County

Columbia, South Carolina
March 8, 2013

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
C.A. No. 2010-CP-40-8943R

Columbia Venture, LLC,

Plaintiff,

v.

Richland County,

Defendant.

PLAINTIFF'S MOTION TO RECONSIDER,
ALTER, OR AMEND
ORDER ENTERED MARCH 19, 2013

RICHLAND COUNTY
FILED
2013 MAR 19 PM 1:22
JEANETTE M. BRIDGEMAN
C.C. & J.S.

Pursuant to Rules 52 and 59(e), SCRPC, Plaintiff Columbia Venture, LLC moves the Court to reconsider, alter, or amend its Order entered March 19, 2013 ("Order"), finding in favor of Defendant Richland County on Columbia Venture's regulatory takings claim. Columbia Venture received notice of the entry of this Order on March 19, 2013. Columbia Venture seeks an amended order finding in its favor because the evidence is insufficient to support the Court's findings of fact and conclusions of law, as discussed in Columbia Venture's own proposed order and in Columbia Venture's memorandum in response to Richland County's proposed order. In addition, Columbia Venture respectfully submits authority on the following points that have not heretofore been briefed, which, in addition to the discussion in Columbia Venture's previous submissions, compels the conclusion that Columbia Venture has suffered a taking without payment of just compensation under the *Penn Central* case and its progeny.

- I. **It is respectfully submitted that this Court should reconsider the portion its Order regarding the reasonableness of Columbia Venture's investment backed expectations.**

The Order finds that Columbia Venture acted unreasonably as a matter of law in its reliance on the County's unanimous resolution of February 2, 1999, in ordering its affairs and

purchasing the Property on February 19, 1999, with the distinct expectation of building an extensive multi-use development behind improved and certified levees. The Order further finds that, as a resolution and not an ordinance, the agreement manifested by the County "had no legal binding effect on the County." Order at 67. Plaintiff respectfully submits that based on authority not previously briefed, this finding is incorrect. 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).¹ The Supreme Court of South Carolina 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.

Richland County's own ordinances are in accord. Section 2-39 of the Richland County Code of Ordinances² 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." Richland County Code § 2-39. "No

¹ All cited authority is contained in the attached Appendix. The portions of the Richland County Code of Ordinances cited herein were downloaded pursuant to instructions on the County's website.

² All of the cited Richland County ordinances were enacted in 1976 and, thus, were in effect at the time the February 2, 1999 unanimous resolution was passed and became effective.

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." *Id.* "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. 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 subsequently entered into the minutes of the council. *See* PTE 147.

The February 2, 1999 unanimous resolution was in effect on the day Columbia Venture purchased the Property, and it was in effect on February 20, 2002—the day Richland County took Columbia Venture's Property without payment of just compensation. "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." Richland County Code § 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.³ State law and Richland County's own ordinances fully authorized the County to act in the manner it did in considering, debating, and passing unanimously the February 2, 1999 resolution. It was, indeed, binding on Richland County.

The South Carolina Supreme 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 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 the Supreme Court 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

³ Richland County certainly believed itself to be bound to 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. PTE 022 (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 and review and enforcement after the rebuilding of the levees has been approved and accepted." PTE 026 (emphasis added).

terminal, and SAIT would serve as Port Developer/Manager for [the] County.” *Id.* at 393, 629 S.E.2d at 626.⁴ 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.* The Supreme 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 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 the Supreme 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 Manning 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

⁴ 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).

(Ct. App. 2004),⁵ 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 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 721.⁶

⁵ 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.*

⁶ 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. Richland County Code § 2-40. All other resolutions are “actions,” and show the “consent or decision of the council.” *Id.* § 2-42. Further, as described above, repeal or amendment of a resolution must be done via a subsequent resolution. *Id.* § 2-47. Resolutions are thus binding on the County.

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. Richland County's own 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. The South Carolina Supreme 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.⁷ Columbia Venture respectfully requests that the Court reconsider this portion of its Order.

II. It is respectfully submitted that this Court should reconsider the portion of its Order regarding the character of the governmental action.

The Court should reconsider its ruling that the character of the government action weighs in Richland County's favor because the government action in this case is both legally and factually indistinguishable from the government action which was found to be a *per se* regulatory taking in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

In *Lucas*, the challenged governmental action was the 1988 Beachfront Management Act, S.C. Code Ann. §§ 48-39-10 to -360 (effective July 1, 1988) ("Beachfront Management Act" or "the Act"). *Lucas v. S.C. Coastal Council*, 309 S.C. 424, 425, 424 S.E.2d 484, 485 (1992). Under the Act, the South Carolina Coastal Council ("Coastal Council") was charged with

⁷ 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).

establishing new baselines and setback lines for construction on the South Carolina Coast. *Id.* Mr. Lucas's two lots, on which he desired to build "habitable structures," were located entirely seaward of the baseline and setback line established by the Coastal Council pursuant to the Beachfront Management Act. *Id.* Thus, as a consequence, Mr. Lucas's desired uses of the lots was prohibited by section 48-39-300 of the Act, as follows:

"No new construction is allowed seaward of the baseline. No new recreational amenities may be constructed, placed, or otherwise made to appear seaward of the setback line. . . . Nothing herein prohibits the construction of fishing piers or structures, which enhance beach access, seaward of the baseline if permitted by the [Coastal] council."

S.C. Code Ann. § 48-39-300 (as effective July 1, 1988).⁸

The Act "had the direct effect of barring [Mr. Lucas] from erecting any permanent habitable structures on his two parcels," *Lucas*, 505 U.S. at 1006, and "provided no exceptions." *Id.* at 1009. The United States Supreme Court reviewed the *Lucas* case based on the trial court's finding that the Act's "permanent ban on construction . . . 'deprived Lucas of any *reasonable economic* use of the lots, . . . *eliminated the unrestricted right of use*, and rendered them valueless.'" *Id.* (emphasis added) (quoting trial court's order). The United States Supreme Court found this governmental action to be a *per se* regulatory taking, *id.* at 1027, "unless Coastal Council [could] demonstrate that Lucas's intended use of his land was not part of the bundle of rights inhering in his title." *Lucas*, 309 S.C. at 427, 424 S.E.2d at 486. On remand of the *Lucas* case to the South Carolina Supreme Court, the Court characterized the issue for further consideration as "whether Coastal Council possesses the ability under the common law to prohibit Lucas from constructing a habitable structure on his land." *Id.* The Court found that

⁸ An excerpt of the pertinent portions of the archived bill establishing the Act is included at Tab 8 of the enclosed Appendix. The full archived bill is available in the South Carolina Legislative Council's online archives at http://www.scstatehouse.gov/sess107_1987-1988/bills/3713.htm.

there was no basis under South Carolina common law by which the Coastal Council “could restrain Lucas’s desired use of his land,” *i.e.*, to build habitable structures. *Id.*

As this Court has noted in its Order, “Columbia Venture wanted to build an extensive development of residences, shopping centers, restaurants, hotels, and a retirement village on its property.” Order at 71. This Court further observed that “[t]hese uses involve significantly more people occupying structures for longer time periods than” for the neighboring property owners, a school and a wastewater treatment plant. *Id.* (emphasis added). Columbia Venture, thus, like Mr. Lucas, wanted to build habitable structures on its land.

There is no question that Richland County’s actions prevented Columbia Venture from constructing habitable structures on its Property, as the County’s April 2001 amended and reinterpreted Stormwater Management Ordinance, PTE 374, prohibited building *anything* that would be an impediment to water flow (so, virtually anything solid (Tr. 1325)) even if consistent with those few permitted uses in the County’s floodway overlay district in the Zoning Ordinance.⁹ Thus, while Columbia Venture might use its property for agriculture, it could not build a barn, a grain bin, or a fence; while it might build a golf course or a swimming pool, it could not build a club house or a restroom; while it might construct an airport runway, it could

-
- ⁹
- a. Agricultural and horticultural uses, and plant nurseries.
 - b. Parking and loading areas.
 - c. Open-air uses generally accessory to residential uses, such as lawns, gardens, play areas, and parking areas.
 - d. Recreational uses, which are primarily open-air uses and which do not offer a substantial impediment to water flow, such as swimming areas, fishing areas, beaches, boat launching ramps, lifeguard stations, parks, playgrounds, playfields, picnic grounds, wildlife or nature preserves, hiking trails, horseback riding trails, golf courses, driving ranges, archery ranges, and tennis courts.
 - e. Airport runways and landing strips.
 - f. Streets, bridges, overhead utility lines, storm drainage facilities, sewerage lines, waste treatment plant outlets, and water supply intake structures.

DTE 087.

not construct an airplane hanger or terminal building. Unlike Mr. Lucas, Columbia Venture could not even build a fishing pier or a walkway to the river. Indeed, the restriction on building anything that impedes the free flow of water renders the list of permitted uses nothing more than an illusion.

Just as the Beachfront Management Act imposed a "no-build zone" or "conservation easement" on property located seaward of a government established baseline, the County's ordinances in place on February 20, 2002, regulating construction and uses in the regulatory floodway impose virtually identical prohibitions on building habitable structures and other economically valuable uses of real property located riverward of a government established floodway line. For these reasons, the character of Richland County's actions constitute a *per se* regulatory taking of Columbia Venture's Property.

CONCLUSION

For all of the foregoing reasons, and for the reasons and grounds set forth in Columbia Venture's Proposed Order submitted on February 4, 2013, and Columbia Venture's Memorandum in Response to Defendant's Proposed Order submitted on March 8, 2013, both of which are incorporated herein, it is respectfully requested that this Court issue an amended order finding in favor of Columbia Venture on its regulatory takings claim.

[signature on following page]

Respectfully Submitted,

HAYNSWORTH SINKLER BOYD, P.A..

By: Elizabeth H. Black

Manton M. Grier

James Y. Becker

Elizabeth H. Black

Haynsworth Sinkler Boyd, P.A.

PO Box 11889

Columbia, SC 29211-1889

803 540-7850

803 765-1243 fax

ATTORNEYS FOR PLAINTIFF

March 29, 2013

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Columbia Venture, LLC,

Plaintiff,

vs.

Richland County,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT

) Civil Action No. 2010-CP-40-8943R

) DEFENDANT'S MEMORANDUM
) OPPOSITION TO PLAINTIFF'S
) MOTION TO RECONSIDER
) REGULATORY TAKINGS ORDER

RICHLAND COUNTY
FILED
2013 APR -8 AM 11:13
JANET W. MCBRIDE
S.C. & G.S.

This Court's Order granting judgment in favor of Defendant on Plaintiff's regulatory takings claim ("Order") was entered by the Clerk of Court on March 19, 2013. On March 29, 2013, Plaintiff Columbia Venture moved to reconsider, alter or amend this Order ("Motion"). "Courts have considerable discretion in determining whether to grant or deny a motion to alter or amend" 12-59 Moore's Federal Practice - Civil § 59.30.¹ "However, this discretion is not limitless; the reconsideration of a previous order is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Id.*

Columbia Venture asserts that this Court should amend its Order because "the evidence is insufficient to support the Court's findings of fact and conclusions of law, as discussed in Columbia Venture's own proposed order and in Columbia Venture's memorandum in response to Richland County's proposed order." Motion, p. 1. This Court, as pointed out in its Order, carefully reviewed the extensive evidence in this case, comprised of almost three weeks of "live testimony," additional deposition testimony,

¹ "Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical." *Elam v. S.C. DOT*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004).

and 494 trial exhibits. Order, p. 1. In reaching its decision, this Court also studied approximately ninety regulatory takings cases. *Id.* Each party submitted detailed proposed orders and memoranda. The Order is amply supported by the evidence and its legal reasoning is sound. In response to Columbia Venture's contentions to the contrary, the County attaches and incorporates herein its proposed order as Exhibit A, and its memorandum in opposition to Columbia Venture's proposed order as Exhibit B.

As for Columbia Venture's new arguments in its Motion that it admits were not made previously, these new arguments are not preserved. See *Dixon v. Dixon*, 362 S.C. 388, 299, 608 S.E.2d 849, 854 (2005) (issue raised for the first time in a post-hearing motion is not preserved); *Eaddy v. Oliver*, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial"). Without conceding whatsoever that Columbia Venture's new arguments cannot be considered by this Court, the County briefly makes the following points.

1. Columbia Venture's argument regarding the effect of Resolutions is misplaced.

Columbia Venture argues at length that the Order erred in concluding that the County's Resolution dated February 2, 1999 ("Levee Resolution") "was a resolution only and had no legal binding effect on the County." There is no question that counties are empowered to take action by resolution, and the Order does not suggest otherwise. The fact that Richland County Council enacted the Levee Resolution in a manner consistent with state law is not at issue. The Order does not conclude that the enactment of the County's Levee Resolution had no legal effect; instead, the Order stated that the Resolution, unlike a contract or ordinance, did not bind the County to any particular

course of action. See Order, p. 25. As explained in *Glasscock Co. Inc. v. Sumter County*, a resolution is not a law, rather, it is "an act of a special or temporary character, not prescribing a permanent rule of government, but is merely declaratory of the will or opinion of a municipal corporation in a given matter." 361 S.C. 483, 489, 604 S.E.2d 718, 721 (Ct. App. 2004). In *Glasscock*, as well as *S.C. State Ports Authority v. Jasper County*, 368 S.C. 388, 629 S.E.2d 624 (2006), the resolutions at issue expressed the will of the governing body to proceed with executing a binding contract or enacting a permanent rule of law. Neither *Glasscock* nor *Jasper County* hold or suggest that the governing body was bound by the resolution in the sense that it could not later change its mind and choose not to execute the contract or enact an ordinance.

More importantly, the Order's findings and conclusions regarding the Levee Resolution rest largely on the discretionary language of the Resolution itself. The provisions of the Levee Resolution provided the County with wide discretion, as the Order recognizes. See Order, p. 25-26. By its plain language, the Levee Resolution gave the County the ability to choose to proceed with acceptance of levee operation or maintenance or not.

Furthermore, it is well settled that a County Council cannot, by contract, resolution or law, bind or restrict its future ability to exercise legislative or governmental functions, and any such attempt by a governing body is of no force or effect. See *Newman v. McCullough*, 212 S.C. 17, 25-26, 46 S.E.2d 252, 256 (1948) ("The power conferred upon municipal councils to exercise legislative or governmental functions is done so to be exercised as often as may be found needful or politic; and the council holding such powers is vested with no authority to circumscribe, limit or diminish their

efficiency, but must transmit them unimpaired to their successors.”); *Cunningham v. Anderson County*, 2013 S.C. App. LEXIS 7 *16 (Ct. App. 2013) (same). Once a new term of Richland County Council commenced in January 2001 by virtue of another election cycle, the Levee Resolution no longer had any force or effect. See S.C. Code Ann. § 4-9-90; compare Pl. Exh. 147 (minutes of Richland County Council dated February 2, 1999 listing members of Richland County Council: Paul Livingston, Joseph McEachern, J.D. “Buddy” Meetze, Susan Brill, Anthony Mizzell, Stephen Morris, L. Gregory Pearce, Bernice G. Scott, Kit Smith, Thelma Tillis, James Tuten) with Pl. Exh. 190 (minutes of Richland County Council dated April 17, 2001 showing that Joan Brady replaced Stephen Morris on Richland County Council: Kit Smith, L. Gregory Pearce, Joan Brady, Susan Brill, Paul Livingston, Joseph McEachern, J.D. “Buddy” Meetze, Anthony Mizzell, Bernice G. Scott, Thelma Tillis, James Tuten). Thus, the Levee Resolution cannot and did not bind Richland County Council to take any future action.

Finally, this Court cannot take judicial notice of the ordinances that Columbia Venture relied upon and attached to its Motion. *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 92-93, 344 S.E.2d 869, 872 (Ct. App. 1986) (“... “local ordinances are not subject to judicial notice.”). In order for the ordinances to be properly before this Court, Columbia Venture is required to obtain a certified copy of the ordinances from the Richland County Clerk of Council proving that the ordinances are true and accurate. See *id.* at 93, 869 (“... absent proof of adoption by a local authority, the trial court technically erred in charging the jury violation of the alleged [ordinance] was negligence per se.”).

2. ***Lucas v. S.C. Coastal Council* is legally and factually distinguishable from the County's actions.**

Columbia Venture asserts that this Court "should reconsider its ruling that the character of the government action weighs in Richland County's favor because the government action in this case is both legally and factually indistinguishable from the government action which was found to be a *per se* regulatory taking in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)." Motion, p. 7. *Lucas* is readily distinguished from the facts and the law of this case.

In *Lucas*, the Beachfront Management Act's prohibition against construction of structures applied to Lucas' entire property, whereas here, the County's prohibition against construction applied to the seventy percent of Columbia Venture's Property within a floodway. On its remaining thirty percent, or approximately 1,200 acres, Columbia Venture could have built all manner of structures under the County's floodplain management ordinances. Columbia Venture estimated that development of its non-floodway property would yield \$47 million dollars after payment of construction costs. Def. Exh. 12. "Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002). Instead, the court focuses on the entire parcel, with all property rights arising from it, in determining a regulation's impact upon property. *Id.* In arguing that the County's floodplain management ordinances "prevented Columbia Venture from constructing habitable structures on its Property," Columbia Venture conveniently overlooks the value of its 1,200 acres outside of the floodway.

In addition, unlike *Lucas*, Columbia Venture's Property within a floodway nonetheless retained value. Since February 20, 2002, Columbia Venture sold almost 3,000 acres of its Property, much of it in a floodway, for almost \$10 million dollars. Florida Rock Industries offered to buy 360 acres for \$3,360,000.00. Def. Exh. 103. An investor offered to purchase all of Columbia Venture's Property for \$26 million dollars. Def. Exh. 111. Columbia Venture could have built golf courses, swimming pools and/or a hunt club on its floodway property configured in such a way that any ancillary club house or restroom would be located on its non-floodway property. Likewise, it could have used its floodway property for an airport runway, with the terminal building and hangars located outside the floodway. Further, the floodway property retained value for agricultural and silvicultural uses. Columbia Venture takes an overly narrow view of its ability to realize value from its Property. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (U.S. 2001) (rejecting property owner's contention that all property value taken because "a regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property economically idle.").

Additionally, *Lucas* involved a *per se* taking of all value in the property at issue. *Lucas*, at 1018. Where government action causes property to lose all value, then a total taking has occurred and compensation is due. *Id.* Under this categorical rule, the *Penn Central* element concerning the character of the government action is irrelevant. See *id.* at 1026. The *Lucas* Court rejected the argument that the purposes of the Beachfront Management Act could excuse a total taking of value. *Id.* Here, Columbia Venture did not claim it lost all value of its Property and it in fact has not lost all value of its Property. Therefore, the legal issue presented in *Lucas* is not comparable to this case.

CONCLUSION

Richland County opposes reconsideration of this Court's Order on any ground, including those addressed above. Columbia Venture's Motion to Reconsider this Court's Order should be denied.

Respectfully Submitted,



Thomas E. Lydon
M. McMullen Taylor
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211
(803) 779-2300
mullen.taylor@mgclaw.com

Pope D. Johnson, III
Johnson & Barnette, LLP
Post Office Drawer 11209
Columbia, South Carolina 29211-1209
(803) 799-9791
pdjohnson@johnsonbarnette.com

Attorneys for Defendant Richland County

April 8, 2013
Columbia, South Carolina

1 STATE OF SOUTH CAROLINA
2 COUNTY OF RICHLAND
3
4 COLUMBIA VENTURE, LLC,
5 Plaintiff,
6 vs. CASE NO. 2010-CP-40-8943R
7 RICHLAND COUNTY,
8 Defendant.
9

10 DISPOSITIVE MOTIONS HEARING HELD BEFORE
11 SPECIAL REFERRE JOHN H. SMITH
12

13 DATE: July 18, 2011

14 TIME: 10:02 A.M.

15 LOCATION: Richland County Judicial Center
16 1701 Main Street, Room 2-E
17 Columbia, SC

18 REPORTED BY: LORI S. MORTGE,
19 Certified Court
Reporter, CCR
20

21 A. WILLIAM ROBERTS, JR., & ASSOCIATES

22 Fast, Accurate & Friendly

23 Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (843) 839-3376

24 Columbia, SC Greenville, SC Charlotte, NC
25 (803) 731-5224 (864) 234-7030 (704) 573-3919

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFF
3 COLUMBIA VENTURE, LLC:

4 HAYNSWORTH SINKLER BOYD, PA
5 BY: JAMES Y. BECKER
6 MANTON M. GRIER
7 CLARKE W. DUBOSE
8 1201 Main Street
9 22nd Floor
10 Columbia, SC 29201
11 (803) 779-3080
12 jbecker@hsblawfirm.com
13 mgrier@hsblawfirm.com
14 cdubose@hsblawfirm.com

15 ATTORNEYS FOR THE DEFENDANT
16 RICHLAND COUNTY:

17 MCANGUS GOUDELOCK & COURIE, LLC
18 BY: M. MCMULLEN TAYLOR
19 THOMAS E. LYDON
20 1320 Main Street
21 10th Floor
22 Columbia, SC 29201
23 (803) 227-4945
24 mullen.taylor@mgclaw.com
25 tlydon@mgclaw.com

ATTORNEYS FOR KATHRYN S. SMITH:

JOHNSON & BARNETTE, LLP
BY: POPE D. JOHNSON, III
1230 Richland Street
Columbia, SC 29201
(803) 799-9791
pdjohnson@johnsonbarnette.com

(INDEX AT REAR OF TRANSCRIPT)

1 THE COURT: All right. You lawyers have
2 kept me quite busy in the past few weeks but I've
3 enjoyed it. Quite an interesting -- very
4 interesting case.

5 Our purpose here today is to hear
6 certain motions. I had received an e-mail from
7 Ms. Taylor in which she suggested that they be heard
8 in a certain order, the physical taking and then
9 after that lack of protected property interest/final
10 decisions, and then lastly the due process motion.
11 Is there any problem about that order of the
12 motions?

13 MR. BECKER: Your Honor, we are in
14 agreement with that. In fact, before you arrived we
15 agreed that what we would -- the way we would like
16 to proceed, if it's okay with you, is that Columbia
17 Venture will go first on the first issue of what is
18 sometimes called the physical takings claim, and
19 then the County will go first on the next two
20 issues. Both -- I'm thinking of the protected
21 property interest and lack of final decision or
22 rightness issue as one, that will --

23 THE COURT: Right.

24 MR. BECKER: -- be Number 2, they'll go
25 first on that, and then they'll also go first on the

1 substantive due process and we would respond on each
2 of those. I failed to make sure with my partner in
3 advance if that was okay with him, but -- so if
4 that's okay with you, that's the way I think the
5 parties will --

6 THE COURT: Yes, that's fine. That's
7 fine. Any order is all right.

8 All right, then. If there's anything
9 further before we get underway with the hearing of
10 these motions? Anything?

11 (No response.)

12 THE COURT: All right. Then we will
13 begin.

14 MR. BECKER: Thank you, Your Honor. May
15 it please the Court. I'll be arguing the physical
16 taking issue and the lack of protected property
17 interest and rightness issue, and Mr. Grier will be
18 arguing the substantive due process claim.

19 Your Honor, just to orient us today --
20 or right now, we're here on Columbia Venture's
21 motion for partial summary judgment, that a per se
22 regulatory taking has occurred. The County has
23 filed a cross motion for summary judgment on this
24 same issue. It is sometimes referred to as a
25 physical taking, but I'm going to hopefully convince

1 you in the course of my presentation to you that
2 that is an unnecessary distinction on the facts of
3 this case given the state of the law both in the
4 Federal Courts interpreting the U.S. Constitution
5 and especially our State Courts interpreting the
6 South Carolina Constitution.

7 I'm going to start with going through
8 the Federal precedents and I'm going to end with the
9 discussion of Hill v. City of Hanahan. And I would
10 submit to you that I believe you will find that you
11 can rely on Hill v. City of Hanahan when placed in
12 the context of the Federal precedents as the sole
13 exclusive authority you need to rely on to grant
14 summary judgment to Columbia Venture on this issue,
15 that under the facts of this case a per se
16 regulatory taking has occurred and just compensation
17 has not been paid.

18 In going through the Federal precedents
19 let's, of course, start at the source which is the
20 Fifth Amendment to the Constitution. The takings
21 clause is to bar Government from forcing -- from
22 taking private property for public use without just
23 compensation.

24 The Court in earlier cases -- early
25 cases has explained the role of takings clause as to

1 bar Government from forcing some people alone to
2 bear public burdens which, in all fairness and
3 justice, should be borne by the public as a whole.

4 We also know from the Seminole case of
5 Pennsylvania Coal versus Mahon that the Government
6 cannot do indirectly what it is prohibited from
7 doing directly, and that is taking private property
8 for public use without paying the owner for the
9 privilege.

10 As you know from your long career on the
11 bench, Your Honor, the Government can take property
12 in one of two ways. And our Court of Appeals
13 explains this quite succinctly in Hill v. City of
14 Hanahan which we'll get to at the end of my
15 presentation, but those two ways are -- the first is
16 very straightforward. There's a statutory process
17 through which a Government, or a quasi governmental
18 agency, can condemn property, take legal title or
19 impose a legally recorded -- recorded legal
20 servitude or easement on property and pay just
21 compensation to the owner. The issue there is not
22 whether or not the Government is going to be taking
23 property, the Government stands up and says we are
24 taking private property for public use.

25 The only issue in those cases, the

1 straightforward condemnation cases, is what is the
2 value of the property interest that is taken by the
3 Government for public use? But as the Court told us
4 in Pennsylvania Coal versus Mahon, sometimes
5 Government can so -- in enacting laws so restrict
6 the right of a private owner of property to fully
7 enjoy that full bundle of rights that are inherent
8 in the ownership of private property and protected
9 under the common law of this country in all 50
10 states. The Government can so restrict the owner's
11 free exercise of those property rights that it goes
12 too far and accomplishes a taking, indirectly, and
13 without paying for that taking.

14 Now, in the Lingle case, which is I
15 believe the most recent case -- recent U.S. Supreme
16 Court case that has been cited to Your Honor by
17 either party, the Supreme Court of the U.S.
18 reaffirmed that a plaintiff seeking to challenge a
19 Government regulation as an uncompensated taking of
20 private property may proceed under one of four
21 theories and they said -- this is what they said
22 they are. That was Justice O'Connor, I believe,
23 writing that opinion. She said by alleging a
24 physical taking, analogous somewhat to the
25 straightforward condemnation case, but as we know

1 from Loretto it can occur, a physical intrusion of
2 property can occur by the Government or be
3 authorized by the Government. And in those cases
4 there's a per se regulatory taking.

5 She said the second category is a Lucas
6 type total regulatory taking, where Government so
7 completely annihilates the owner's rights of use and
8 enjoyment of the property as to render it
9 economically idle or to annihilate all economically
10 viable uses of the property. Mr. Lucas' beach front
11 property down there, not far from you, where
12 effectively he could do nothing but go out and have
13 a picnic on his property.

14 The third category, of course, is that
15 Penn Central regulatory taking, a Penn Central type
16 taking, where the facts are such that the Court is
17 compelled to engage in an ad hoc factual inquiry
18 balancing the intrusion affected by the regulation
19 with the effect on the property owner's investment
20 backed expectations and the extent of value in the
21 property that has been deprived by virtue of the
22 regulation.

23 And then the fourth category is that
24 what Justice Connor -- O'Connor called a land use
25 exaction violating the standards set forth in Nollan

1 and Dolan.

2 So we've got these four categories that
3 the Court gave us in Lingle, but I want to go back
4 to 1947 and read to you a short passage from U.S.
5 versus Dickinson, which I also would suggest to Your
6 Honor is a critical case in this analysis. And let
7 me just read to you there what the Court said back
8 in 1947:

9 The Constitution is intended to preserve
10 practical and substantial rights, not to maintain
11 theories. One of the most theory-ridden of legal
12 concepts is a cause of action. This Court has
13 recognized its shifting meanings and the danger of
14 determining rights based upon definitions of a cause
15 of action unrelated to the function which the
16 concept serves in a particular situation. Property
17 is taken in the Constitutional sense when inroads
18 are made upon an owner's use of it to an extent that
19 as between private parties a servitude has been
20 acquired either by agreement or in the course of
21 time. The Fifth Amendment expresses a principle of
22 fairness and not a technical rule of procedure
23 enshrining old or new niceties regarding causes of
24 action when they are born, whether they proliferate
25 and when they die.

1 So I want to go forward discussing the
2 categories that Justice O'Connor laid out for us in
3 Lingle in 2005, but without forgetting what the
4 Court also told us back in 1947 in U.S. v.
5 Dickinson. I think the point there is that you
6 don't need to get too hung up into whether or not
7 the claim of a per se regulatory taking fits exactly
8 into one of the four boxes that Justice O'Connor
9 gave for us.

10 The basis of Columbia Venture's motion
11 is that the County's actions, taken in their
12 totality, deprived Columbia Venture of essential
13 uses of its property that fit in the category of a
14 per se regulatory taking defined by Loretto, Nollan,
15 Dolan and Dickinson.

16 Columbia Venture's motion for a partial
17 summary judgment does not use the phrase physical
18 taking and its memorandum I would say -- our
19 memorandum is in support, I believe, indirectly
20 titled itself the Plaintiff's memorandum in support
21 of motion for partial summary judgment on its
22 physical takings claim.

23 The County's motion also used this
24 nomenclature and, of course, it came from Lingle.
25 It's understandable exactly why, but the critical

1 distinction, as the case is made clear, is not
2 whether the Government itself has physically
3 occupied the property but, rather, whether the
4 Government's interference with an owner's
5 established property rights under common law is so
6 pervasive that a Court may find that a per se taking
7 has occurred for purposes of the Fifth Amendment to
8 the U.S. Constitution.

9 In Lucas, that per se taking occurred
10 through the deprivation of all economically viable
11 uses of the property. In Loretto, Nollan and Dolan,
12 the Court unequivocally holds that when Government
13 permanently authorizes a physical occupation of
14 land, it is a per se regulatory taking. In Loretto
15 that physical occupation was the permanently
16 authorized right of cable TV companies, operating in
17 a municipality, to occupy a private -- an owner's
18 private property to place wire on the buildings
19 whether or not they actually ran the cable or not,
20 although in Loretto that cable had already been run.

21 Interestingly enough, by the Plaintiff's
22 predecessor in title the cable had been run before
23 Mrs. Loretto even purchased the property. Note also
24 there it's not the Government doing the physical
25 occupation, it's the cable company.

1 In Nollan, the physical occupation was
2 the permanently authorized right of the public to
3 pass along the property at the shore line. In
4 Dolan, the physical occupation was the permanently
5 authorized right of the public to bicycle or walk
6 along the creek side. In Dickinson, the physical
7 occupation was accomplished by a thing, not a
8 person. It was the intermittent passing or
9 intrusion of flood water, albeit flood water that
10 was caused at least in part by a permanent
11 governmental structure, a dam.

12 In this case, like in Dickinson, the
13 physical occupation occurs only intermittently, if
14 at all, and it's by flood water passing over lands
15 when rains fall and floods occur. The authorization
16 for that flood water to do as it will is permanently
17 authorized by Richland County.

18 In each of the cases I've discussed
19 above, the physical intrusion was either authorized
20 by or caused by the Government and was either
21 intermittent or permanent. So in taking juris
22 prudence, neither distinction makes any difference.
23 Each of these cases, the property right that was
24 taken by the Government was the right to exclude
25 others or things from physically invading private

1 property. The wires of the cable TV company, the
2 people strolling on the beach, the people walking
3 and biking along the riverside, intermittent
4 inundation from flood waters.

5 In each of these cases the net practical
6 effect was that the owner no longer had the
7 exclusive right to determine how some portion of
8 their property was used because that right was taken
9 by the Government.

10 In Lucas, Loretto, Nollan, Dolan and
11 Dickinson, a property right has been taken by
12 governmental regulation or other action rather than
13 outright condemnation, and in each case the Court
14 found the taking and determined that just
15 compensation was due.

16 Now, we know that the indisputable
17 practical effect of Richland County's combined
18 actions with the February 20th, 2002 adoption of the
19 revised FEMA flood map in concert with the earlier
20 enacted revised storm water management ordinance is
21 to require Columbia Venture to reserve large areas
22 of its property landward of the Manning levees,
23 approximately 70 percent of its total acreage of
24 4400 acres, to serve as an unobstructed undeveloped
25 no-build zone for the purpose of conveying flood

1 waters during flood events for the benefit of the
2 public as set forth in the National Flood Insurance
3 program. The only economically viable use that
4 remains to Columbia Venture of its property is
5 agriculture and minor recreational uses.

6 The combined effect of these County's
7 actions severely diminish the title and the right of
8 ownership of the property by prohibiting Columbia
9 Venture from building structures or adding fill
10 material to the property, that is, developing the
11 property in any meaning -- economically meaningful
12 way, from being able to take reasonable measures to
13 exclude flood water from the property so that even
14 if Columbia Venture does harm the property it can't
15 prevent the crops from being destroyed by flood.
16 And we're prevented from being able to deny all
17 persons a right of entry, all persons or things a
18 right of entry to the property, flood water, the
19 County engineer even without a search warrant.

20 Those are the rights that -- and the
21 title, a way in which our title has been diminished
22 and our rights have been taken.

23 Now, Richland County argues four main
24 points. First is the County itself has not caused
25 the flooding on Columbia Venture's property. Well,

1 we know from the precedents that that does not make
2 a difference. In Loretto, the Government itself was
3 not the occupier, but the Supreme Court of the U.S.
4 found the taking nonetheless. They said a permanent
5 physical occupation authorized by state law is a
6 taking without regard to whether the State, or
7 instead a party authorized by the State, is the
8 occupant.

9 Nollan and Dolan are controlling to the
10 contrary. They say it's the right of physical
11 occupation that must be permanent, not necessarily
12 the occupation itself. Here again, getting into the
13 intermittent character of the occupation.

14 Here Columbia Venture suffers a de facto
15 permanent physical occupation of its property
16 because the County requires Columbia Venture to
17 reserve the property in an essentially undeveloped
18 and unprotected, that is, an unlevied state so that
19 it might convey flood water for the benefit of the
20 public. With regard to the effect upon the owner's
21 property rights, there's simply no functional
22 distinction between property that is permanently
23 flooded and property that is permanently reserved in
24 an undeveloped and unprotected state for flooding.
25 The impact on that owner's rights to develop his

1 property, as the common law would allow him to do,
2 is eviscerated in both cases.

3 In Nollan -- excuse me. Just back up
4 one second. Functionally the fact pattern of our
5 case is no different than requiring an undeveloped,
6 unfenced portion of the land for the public to walk
7 or bike across, as the Supreme Court of the U.S.
8 determined would constitute a taking by an easement
9 in Nollan and Dolan if it were condemned by the
10 Government acting directly rather than indirectly.
11 In Nollan the Court said we think a permanent
12 physical occupation has occurred for purposes of the
13 rule where individuals are given a permanent and
14 continuous right to pass to and fro so that the real
15 property may continuously remain traverse even
16 though no particular individual is permitted to
17 station himself permanently upon the property.

18 Well, let's paraphrase that quote with
19 the facts of this case. We think a permanent
20 physical occupation has occurred for purposes of the
21 rule where flood waters are allowed a permanent and
22 continuous right to pass to and fro so that the real
23 property may continuously be traversed even though
24 no water is permanently on the premises. It's the
25 same thing.

1 The County argues also, its second major
2 point, well, the common enemy rule has no bearing in
3 this case. Well, we know that the common enemy rule
4 is a part of the common law of South Carolina, I
5 think we can agree on that much. The issue is, does
6 it have a bearing in this case?

7 The County says the common enemy rule
8 applies to surface water as opposed to waters within
9 a national water course. And the definition the
10 County uses of surface water in my view does not
11 support the point they want to make. The definition
12 they use says as follows: Surface water is defined
13 as waters of a casual and vagrant character which
14 squander themselves over the surface, have no banks
15 or channels in the soil, and include waters which
16 are diffused from rains and melting snows.

17 Well, this sounds to me like waters in
18 the Congaree flood basin, not the usual waters
19 flowing down the channel of the Congaree River.
20 That definition defines surface waters as the flood
21 waters that would flow almost a mile inward from the
22 river's bank during times of rains. And since we
23 rarely have melting snows here in South Carolina we
24 can just assume, I guess, that maybe one day we
25 would and that may contribute to a flood.

1 The County also argues that the storm
2 water maintenance ordinance actually requires proper
3 maintenance of the levees, but we know the levees
4 are uncertified and FEMA expects they will breach in
5 a 100-year flood. So what is the purpose of
6 maintaining an uncertified levee in an uncertified
7 state when everyone expects it to fail when it's
8 needed most? That requirement does not begin to
9 make up for the burden imposed by the regulation
10 which is the evisceration of rights to develop the
11 property as the owner sees fit.

12 The third major point the County argues
13 is the County itself does not make any actual use of
14 Columbia Venture's property. Well, we've largely
15 already dealt with that. This, again, is a
16 distinction without a meaningful difference and I
17 think it demonstrates the small, even nonexistent
18 divide, Your Honor, in the intellectual framework
19 between the physical takings box of a taking and the
20 other forms of a regulatory takings analysis.

21 It's easy to think of this case as a
22 physical taking in which Richland County took the
23 development rights to the property from Columbia
24 Venture. It took one or more of the sticks out of
25 that bundle of sticks which form the whole right of

1 ownership of property which are indistinguishable as
2 our courts have told us from the property itself.
3 And that physical taking in which Richland County
4 took the development rights of the property from
5 Columbia Venture occurred by denying Columbia
6 Venture all use of them even though the County made
7 no use of them itself except to keep the land
8 undeveloped.

9 The Government engages in a physical
10 taking of property if it decides to leave vacant the
11 land or the property rights that it takes from a
12 private owner, which is what happened here.
13 Development rights in the property or the right to
14 protect one's property from flooding are no
15 different.

16 Now, someone could argue that so long as
17 the Government doesn't physically occupy Columbia
18 Venture's land or use the development rights to
19 build on Columbia Venture's property it's a mere
20 restriction on use, similar to other -- other forms
21 of regulation such as zoning and, in fact, this is
22 what the County argues. Well, the same could be
23 said of land for which the Government actually takes
24 legal title to but, nonetheless, does not physically
25 enter and forbids its former owner all rights of

1 access or use. Those situations are functionally
2 indistinguishable as the Supreme Court of the U.S.
3 asked back in 1947 in U.S. v. Dickinson why should
4 the question of whether or not compensation is being
5 owed depend on any of these fine distinctions?
6 Because in all of these situations the net practical
7 effect on the owner is the same. I can't use my
8 property according to the common law of property as
9 it is known in the State of South Carolina.

10 Let's give a few examples just from
11 every day life just to illustrate this point.
12 Imagine a computer game belongs to my son. My son
13 has misbehaved and, as a punishment, I tell him I am
14 not going to take that computer game away from you
15 but, nonetheless, you cannot make any use of it for
16 a month. Perhaps never again if your behavior does
17 not improve.

18 Now, does my claim that I have not taken
19 the computer away from him -- computer game away
20 from him carry any weight? No. The computer game
21 is sitting there in front of him. He can see it,
22 but he can't touch it or use it. It's been taken --
23 taking it from him just as if I had picked it up,
24 taken it out of his room and sold it on eBay. Does
25 my claim that I have done this for his own good

1 diminish the fact that his right to use the computer
2 has been completely taken away? No, it does not.

3 I think what Richland County has done,
4 when viewed in relation to this simple analogy from
5 everyday life, everyone should regard this
6 regulation as tantamount to a taking.

7 Now, the fourth main argument from the
8 from the County, as I read it, is that this theory
9 of functional equivalency does not hold water. I'm
10 sure no pun was intended there. Let me read from
11 Page 3 of the County's memorandum where they set
12 forth the basis of that argument. The County storm
13 water ordinance is a legislative --

14 THE COURT: Excuse me. I thought the
15 use of the term does not hold water was quite
16 interesting.

17 MR. BECKER: It is interesting.

18 THE COURT: That's to decide.

19 MR. BECKER: I was -- I was saying with
20 tongue in cheek no pun was intended there. I
21 thought it was clever, too.

22 But reading from Page 3 of their
23 memorandum, the County storm water ordinance is a
24 legislative enactment of general applicability that
25 restricts use of property located within a floodway.

1 This restriction is a proper exercise of the
2 County's police power to protect public safety and
3 prevent damage to adjacent property owners. While
4 the storm water ordinance limits the use of property
5 within a floodway at the same time, protection of
6 public safety inures to the benefit of all property
7 owners including Columbia Venture.

8 No -- two important points here. They
9 say this is a legislative enactment of general
10 applicability and that the benefits of it inured all
11 property owners, including Columbia Venture. I
12 think I can demonstrate to you that neither of those
13 points are an accurate -- general applicability,
14 one, is easily dispensed with because we know that
15 the neighbors next door, Heathwood Hall Episcopal
16 School and the City of Columbia's wastewater
17 treatment plant, are even closer to the river than
18 most of Columbia Venture's property, do not labor,
19 are not burdened with the same regulatory regime.

20 And as you hopefully saw in our appendix
21 with the affidavit of Elizabeth Summers, since
22 February 20th, 2002 Heathwood Hall has built five
23 major structures on its property that under the
24 ordinances of Richland County are not possible for
25 Columbia Venture to build. So the idea that there

1 is some general applicability is dispensed with, I
2 would suggest, by reference to that one indisputable
3 fact.

4 The second point that we benefit from
5 the regulation I fail to see. All economically
6 viable development rights in our property have been
7 taken on 70 percent of it. Columbia Venture does
8 not understand how it benefits from that restriction
9 or how others are not equally burdened by it, which
10 we know they're not. So I'll get more into that
11 as -- toward the end of this presentation, but
12 let's -- let's go on with dealing with this theory
13 of functional equivalency not holding water. And
14 here we're talking about whether or not the County's
15 actions are functionally equivalent to imposing an
16 easement on Columbia Venture's property.

17 Consider first how exceedingly broad the
18 restrictions are. Here Richland County's prohibited
19 Columbia Venture from erecting any -- any fill
20 materials, structures or obstructions that will
21 impede the free flow of water during times of flood.
22 That excludes, as far as we can tell from the
23 literal plain unambiguous language of the ordinance,
24 things such as a fence post, a telephone pole, a
25 sign post, a flag pole, a port-a-john, a golf course

1 marker, a barn feed bin, a water trough for animals.
2 There's not much you can do with property when you
3 can't erect any structure, place any fill material
4 or permit any obstruction that imposes -- impedes
5 the free flow of water during times of flood.

6 Richland County has effectively taken
7 title to Columbia Venture's rights to develop the
8 property for any use of the property except
9 agriculture and minor recreation. This is a denial
10 of all economically viable use of those development
11 rights. There's no residential use available.
12 There's no office use available. There's no retail
13 use available. No industrial use available. No
14 recreational use such as a golf course with a
15 clubhouse. And as we see from the photos of what
16 Heathwood Hall has done, those restrictions are not
17 generally applicable.

18 Functionally, the County's combined
19 actions are equivalent in all significant respects
20 to a taking accomplished through the imposition of
21 an easement on the property or the imposition of
22 restrictive covenants for which just compensation is
23 unquestionably due. The County says, well, Columbia
24 Venture must first show that an easement exists. It
25 says, and I quote: An easement has to spring from

1 somewhere, whether that be a written instrument or
2 prescriptive use or in the context of a physical
3 taking by actual and continuous flooding caused by
4 the Government.

5 Well, that's what we've shown. A
6 permanently authorized physical occupation of land
7 is a per se regulatory taking under Loretto, Nollan,
8 Dolan and Dickinson. That's what we have here. But
9 let's take the analysis the County urges to the next
10 logical step. There's a map, a floodway, available
11 in the U.S. and Richland County Government offices
12 which delineates a line on Columbia Venture's
13 property. The line between the floodway and the
14 floodplain, it's on Columbia Venture's property.
15 It's capable of exact determination and location on
16 the ground by survey. We know what can happen on
17 one side of the line and we know what cannot happen
18 on the other. It's not much difference than if you
19 hired a surveyor, asked them to go out and survey a
20 roadway easement and you took it and filed it in the
21 RMC's office in Richland County. It's functionally
22 indistinguishable. On one side of the floodway line
23 on Columbia Venture's property, by legislative fiat,
24 rather than by formal condemnation or voluntary
25 agreement, all the uses and only here on private

1 property, except agriculture, are reserved to
2 Richland County for it to use or not use as it sees
3 fit rather than Columbia Venture in perpetuity. As
4 I said, this sounds a lot, to me, like an easement
5 recorded in the land records of this very
6 courthouse.

7 But let's look at a few real life
8 examples. The net practical effect of the County's
9 actions are indistinguishable from well established
10 types of takings accomplished through actual
11 easements or restrictive covenants.

12 A floodway easement, let's start with
13 that one. We know that governments routinely bring
14 formal condemnation actions to obtain floodway
15 easements on private property. If you will look on
16 Page 17 of our memorandum, we cite to a number of
17 them. I'm not going to discuss those other than to
18 just point out, Your Honor, that they are there, and
19 if you want copies we will get them for you.
20 Governments routinely do by condemnation directly
21 paying just compensation what this County has done
22 indirectly by legislative fiat without paying a
23 dime.

24 Let's look at the example of utility
25 line easements. As we know governments -- or

1 utility companies routinely condemn land for utility
2 easements. It might be an overhead power line, it
3 might be an underground power line or sewer pipe or
4 water pipe, gas pipe. The net practical effect, the
5 property is undeveloped so that the overhead or
6 underground power lines can pass through the
7 property. Just like where the floodway easement is
8 concerned, the net practical effect is the property
9 is undeveloped so that it can be intermittently
10 flooded in times of flood. Think of an access
11 easement, or a roadway easement. Governments
12 routinely condemn those things. The net practical
13 effect, the property remains undeveloped so that the
14 public, on foot or on vehicles, can pass over the
15 property.

16 Again, the functional distinction, the
17 functional impact net practical effect on the owner
18 is the same in all those easement situations with
19 what was done to Columbia Venture in this case.

20 But, Your Honor, let me offer one final
21 example that I think truly captures what happened
22 here. And that is the example of a restrictive
23 covenant or a conservation easement which you are
24 undoubtedly familiar with.

25 Let's look at the political opposition

1 to Columbia Venture's property. It was the Congaree
2 Task Force, the Southern Environmental Law Center
3 and others in the community who clearly did not want
4 Columbia Venture to proceed with any development of
5 the property as it had agreed it would do with
6 Richland County on February 2nd, 1999 when it
7 unanimously passed that ordinance approving of the
8 plan to improve the levees and requiring, as a
9 condition of that promise, that Columbia Venture
10 spend \$30 million over -- at least \$30 million over
11 ten years developing that property.

12 We know that after that became public
13 the Congaree Task Force, the Southern Environmental
14 Law Center and other groups within the community
15 became vehemently opposed to the development plan,
16 the development proposal. As opponents of the plan,
17 they had three choices to prevent development of the
18 property as Columbia Venture. They could come
19 forward and buy it from Columbia Venture in an arm's
20 length transaction and leave it undeveloped. That
21 was Option 1. They could pay for a restrictive
22 covenant to prevent future development, in effect, a
23 conservation easement. Indeed, Columbia Venture at
24 one point considered this very strategy as an exit
25 strategy, and I'm sure Your Honor is familiar with

1 reading of situations where certain organizations
2 such as the Sierra Club or Ducks Unlimited or
3 wildlife conservancy groups regularly receive a
4 dedication in the form of a restrictive coverment --
5 covenant or conservation easement of the development
6 rights to property that is important for wildlife
7 and nature to use instead of human beings. They
8 call that a conservation easement, and the Internal
9 Revenue Code even permits the owner to take a
10 significant tax deduction for giving away those
11 development rights to an organization, charitable
12 organization, 501c3 organization, that will keep the
13 property undeveloped in perpetuity. That's called
14 the conservation easements.

15 So that was the third -- the second
16 option that the opponents of Columbia Venture's
17 project could -- could employ. They could come
18 forward and say, you dedicate the development rights
19 of your property to the Congaree Task Force, to the
20 Southern Environmental Law Center, to Ducks
21 Unlimited, to the Sierra Club who will -- and we
22 will pay you for those development rights. And the
23 Sierra Club or whomever will make sure that the
24 property is left undeveloped for wildlife or flood
25 waters or trees to grow, nature to do whatever it

1 will do with the land.

2 Option Number 3 for opponents of
3 Columbia Venture's property was this: They could
4 convince a majority of Richland County Council to
5 pass ordinances that make it impossible for Columbia
6 Venture to proceed with any development plans for
7 the property.

8 Now, we know what option they chose.
9 They didn't -- they didn't want to buy it because
10 that would cost too much. They didn't want to buy
11 the development rights through a conservation
12 easement because that would also cost a lot of
13 money. So they convinced a majority of Richland
14 County Council to pass ordinances that made it
15 impossible for Columbia Venture to develop the
16 property and receive nothing in return.

17 In each of the three situations I just
18 described, Options 1, 2 and 3, the net practical
19 effect on the landowner is exactly the same except
20 for one critical difference. In Option 3, Columbia
21 Venture receives no benefit and bears all the
22 burden. Columbia Venture loses its valuable
23 property rights to develop the property, to exclude
24 flood waters, to deny the County engineer and other
25 County officials the right of unfettered entry

1 without a search warrant, and receives no just
2 compensation for the taking. For whatever public
3 purpose leaving the land undeveloped might serve,
4 the proponents of that outcome have paid nothing.
5 And no one but Columbia Venture has borne a burden.

6 Your Honor, this leads me to Hill v.
7 City of Hanahan. I would suggest to you that the
8 issue of whether a per se regulatory taking has
9 concerned -- has occurred. One where you need
10 engage in no further analysis of what has been lost
11 and what has been gained is decided by this case
12 under the State Constitution. The issue of whether
13 a taking has occurred under the facts of this case
14 has already been decided by the South Carolina Court
15 of Appeals back in 1984 in Hill v. City of Hanahan.

16 Let's look at those facts. The
17 essential facts are indistinguishable from the facts
18 of this case. In Hill, an owner had 3.1 acres of
19 previously excavated low lying land that collected
20 water. The owner began filling the 3.1 acres when
21 he was -- when he was stopped by the City. The City
22 allegedly wanted to use the basin for flood control,
23 the drainage. The owner insisted that she be
24 permitted to fill the land under -- under her common
25 enemy right to divert water other than natural

1 springs.

2 This is no different from the facts of
3 this case. Here, an owner has 4400 acres of low
4 lying land that might flood when it rains a whole
5 lot. This owner wants to add fill to its levees so
6 that the property won't flood. The County wants to
7 use the property by leaving it undeveloped for flood
8 control and drainage purposes. Again, the owners
9 are here to insist that they have a right, among
10 others, to divert the common area flood water.

11 Now, Justice -- Judge Sanders in Hill
12 found a table by inverse condemnation --

13 THE COURT: Sanders in Hill?

14 MR. BECKER: Yes, sir.

15 THE COURT: And Judge Bell?

16 MR. BECKER: It was Judge Gardner.

17 THE COURT: Sorry. I misspoke.

18 MR. BECKER: I misspoke, too.

19 THE COURT: But both Sanders and Judge
20 Bell were on that panel.

21 MR. BECKER: They were. The Court in
22 Hill found the taking by inverse condemnation and it
23 said this. The City simply wanted to use Hill's
24 land for drainage and flood control purposes, but
25 this desire simply is not founded in any legal right

1 of the City. There was little analysis in the case
2 because little analysis was needed. Your Honor,
3 they said this, here's the case.

4 THE COURT: I have it here.

5 MR. BECKER: On Page 2 and I think
6 this -- I think this language bears reciting,
7 especially in light of the explanation I hope I have
8 made clear about the Federal precedents on Page 2 in
9 about the -- midway down the page the Court tells us
10 property in a thing consists not merely in its
11 ownership and possession but in the unrestricted
12 right of use, enjoyment and disposal. Anything
13 which destroys one or more of these elements to --
14 of property to that extent destroys the property
15 itself. It must be conceived the substantial value
16 or property lies in its use. If the right of use be
17 denied, the value of property is annihilated and
18 ownership is rendered a barren right. Where the act
19 involves the actual interference with or the
20 disturbance of property reside -- rights resulting
21 in injuries which are not merely consequential or
22 incidental, a taking of property has occurred.

23 That is what has happened here, and I
24 would submit to you that this case compels a ruling
25 that a per se regulatory taking has occurred in this

1 case.

2 Now, the County attempts to distinguish
3 it in two ways. They say in Hill there was no
4 existing ordinance prohibiting the activity the
5 landowner wanted to engage in. Well, this misses
6 the entire point of taking juris prudence. The
7 Government cannot accomplish indirectly, through
8 legislation or regulation, that which is prohibited
9 from doing directly, taking private property without
10 paying just compensation. It makes no practical
11 difference whether the State shows up and prevents
12 you from doing something in an ultra vires fashion
13 outside their authority or by virtue of authority
14 enshrined in an ordinance.

15 Again, the net practical effect on the
16 landowner is just the same whether the County is
17 authorized by law to do it or not. A taking of
18 property rights has occurred in both situations.
19 They say here, too, in Hill they attempt to
20 distinguish it by saying there was an actual
21 physical invasion by an armed police officer. Well,
22 as I just pointed out, does it really make a
23 difference if the physical invasion is authorized by
24 the County or the County actually physically invades
25 itself?

1 Again, the net practical effect on the
2 landowner is the same. And you can be sure that if
3 Columbia Venture had proceeded to begin improving
4 its levees to the FEMA standards that some officer
5 of the Government, the County engineer if not the
6 sheriff, would have been dispatched by Richland
7 County Council to enforce the law as they had passed
8 it.

9 Your Honor, Hill stands for the simple
10 proposition that a taking by the Government of a
11 part of that bundle of inchoate rights inherent in
12 ownership of real property is no different than
13 taking legal title to a part of the real property
14 acreage itself. The two are indistinguishable under
15 the law. My rights inherent in ownership are
16 co-terminus with the land itself. The land itself
17 is co-terminus with my rights under the common law.
18 You can take away part of the land, you can take
19 away part of the rights that belong to the whole
20 expanse of land. Either one, either way, it counts
21 as a taking, a per se regulatory taking under our
22 law.

23 What Government did to the property
24 owner in Hill v. City of Hanahan on its 3.1 acres is
25 factually indistinguishable from what Richland

1 County did to Columbia Venture on its 4400 acres.
2 That is an unconstitutional taking without just
3 compensation.

4 Your Honor, in light of the indisputable
5 facts here that neither party has contested, the
6 plain unambiguous language of the storm water
7 management ordinance, the plain unambiguous
8 placement of the floodway boundary on Richland
9 County's property, the deprivation of all common law
10 property rights of use except agriculture and minor
11 recreation, the absence of any variance procedure,
12 the refusal of two permit requests, the de facto
13 imposition of an easement or a servitude, a
14 restrictive covenant for public purposes, this Court
15 should grant summary judgment for a per se taking of
16 Columbia Venture's property rights in violation of
17 the U.S. and the South Carolina Constitutions and
18 move to a hearing to receive evidence on the amount
19 of just compensation that is due under the
20 Constitution.

21 THE COURT: Before you leave the podium,
22 there, Mr. Becker, let me ask you. There's
23 something that you touched on in the very beginning
24 which is a concern that I have. Between the two
25 parties, you probably sent me 100 cases. I've read

1 80 percent of them. The reason I say 80 percent is
2 because if you test me I'll say, well, that's on the
3 20 percent I haven't read yet. But I've read a lot
4 of cases and what I wonder in reading those is
5 whether or not that Lingle case that you dealt with
6 up front in the beginning where Justice O'Connor
7 said, all right, it's either a -- four categories
8 of, of course, none what I would call direct
9 condemnation --

10 MR. BECKER: Yes.

11 THE COURT: -- like you pointed out
12 before, with rights or rights of waiver of
13 utilities, roads, whatever. But in the inverse
14 condemnation area you named those four areas as a
15 physical taking, the complete regulatory taking like
16 we had in the Lucas, Penn Central or the exaction as
17 I think the words to that effect, the -- let's see,
18 the land use exaction such as in Nollan and Dolan.

19 And what I wonder about -- of course,
20 under the physical takings the case of Dickinson and
21 Loretto were cases where you had actual presence
22 of -- actual presence of something on someone's
23 property, such as the water or the...

24 MR. BECKER: Cable.

25 THE COURT: Cable on top of the building

1 and so on with landlords in Loretto. I wonder
2 whether the United States Supreme Court is saying
3 that with inverse condemnation cases, in essence, if
4 it doesn't fit into the first category, the second
5 category or the fourth category, that we're going to
6 funnel them into the Penn Central category because
7 we recognize that governments have the right to pass
8 ordinances and limit use and so on. And we're, in
9 essence, offering up the Penn Central case for those
10 that sort of fall in between, between the actual
11 taking, the water on the person's land or the
12 Nollan/Dolan where you've got, as you say, the beach
13 front easement where people can walk back and forth
14 as a prerequisite for being able to build a house
15 there, they have to dedicate it. And on Dolan where
16 they enlarged -- their electrical company had to
17 dedicate land, in essence sign a deed. Both of them
18 they pointed out that that had to be done.

19 The Courts seem to be setting up these
20 categories. What you're saying is like under Hill,
21 look. A taking is a taking is a taking. Why are we
22 fooling around with these categories, only square
23 pegs in square holes and round pegs in round holes
24 and setting up this almost hyper technical dealing?
25 We are really just talking about taking somebody's

1 land from them, restricted it, you can't use it, and
2 so, therefore, there ought to be compensation.

3 But I wonder whether the -- under Lingle
4 now they're in essence saying that's the way it's
5 going to be because Hill was before Lingle, where as
6 we know Lingle wasn't effective until 2005,
7 something like that. What are your thoughts on
8 that?

9 MR. BECKER: Well, I think I understand
10 exactly what you're driving at. And I, for a long
11 time, I think I understood the cases and read them
12 in the way you just described, that there are these
13 boxes -- or you might think of it as a funnel where
14 it either fits in one of these three boxes up here
15 and if it doesn't, then it funnels down and so you
16 do the Penn Central analysis.

17 I would remind you again, I think that
18 language in -- in Dickinson is right on point and it
19 goes to what you were saying, let's don't get too
20 caught up in whether it's a cause of action as a
21 physical takings, a Lucas type taking, a land use
22 exaction Nollan/Dolan taking or a Penn Central
23 taking. Let's focus on whether a taking is a taking
24 is a taking, as you say. I think that's clear here.

25 And I think a different way to look at

1 those cases, or the four categories we've just
2 described, is points along a continuum with Penn
3 Central at one end and maybe Loretto at another. A
4 regulatory taking occurs under any of those
5 theories.

6 What distinguishes them is that starting
7 with Loretto, the taking of some part of the bundle
8 of property rights is so apparent from the facts
9 that no -- not much analysis of the situation is
10 needed. There's a physical invasion or, as you get
11 into Nollan and Dolan, a physical authorize -- a
12 governmentally authorized physical invasion.

13 In -- in Lucas it was easy to see.
14 There was nothing left to do with the property
15 except go have a picnic. In Loretto it was easy to
16 see. I mean, you're suffering a physical invasion
17 of your property. In Nollan and Dolan it's easy to
18 analogize because, you know, I mean, effectively
19 what you're doing here is imposing indirectly an
20 easement for the public to walk or bicycle across
21 your property. It's easy to see. The evidence is
22 not subject of much debate

23 But when you get down here toward this
24 Penn Central end of the regulatory takings
25 continuum, there's more of a need to hear evidence

1 and understand better what was the purpose of the --
2 of the governmental action, exactly how and to what
3 extent that it really truly deprived an owner of
4 property rights. What benefits did the owner get in
5 return, if any? What was the impact of the
6 regulation on their investment backed expectations?
7 What was the real effect of the legislation on their
8 ability to use their property in a way that is
9 allowed under the common law property rights of the
10 State?

11 I would argue to you that under these
12 indisputable facts of this case the diminution and
13 use is so apparent, the diminution and rights are so
14 apparent and uncontested, the effect on our ability
15 to move forward with our plans is so apparent and
16 undisputed that we don't need to go through all of
17 the fact finding inherent in a Penn Central
18 analysis. We can rely by analogy to Loretto,
19 Nollan, Dolan and Dickinson to find a per se inverse
20 condemnation of our development rights of the
21 property, of our rights to exclude the common enemy
22 of flood water.

23 You know, maybe -- maybe one -- maybe
24 actually Lucas belongs at the other -- at the
25 opposite end of Penn Central, but I can -- I can

1 argue to you, Your Honor, that this case, the facts
2 of this case put it somewhere in between Lucas and
3 in between Nollan and Dolan. In Lucas, you had the
4 deprivation of all economic developable use of
5 property. In Nollan and Dolan, you had a de facto
6 physically imposed easement on just a strip, just a
7 little part. In this case, you have a clear
8 unequivocal evisceration of development rights on 70
9 percent of the property. It's not far removed from
10 Lucas. The only use that remains is agriculture and
11 minor recreation. Minor.

12 The ordinance goes so far as to say the
13 only structures you can create are those incidental
14 to minor recreational uses. Can we put a picnic
15 table down there? Probably so. Can we put a soccer
16 goal? Probably so. Can we build a golf course
17 clubhouse? No way. Can we farm it? Yeah. Can we
18 build a barn? Not so sure. You know, can we build
19 a chicken place to grow chickens?

20 THE COURT: Coop.

21 MR. BECKER: Chicken coop, yeah.

22 THE COURT: I know you were trying to
23 think. I knew you knew what it was.

24 MR. BECKER: I'm not so sure, you know.
25 No, I think -- I think this case, if you want to

1 think of these cases, Judge, Justice O'Connor has
2 set before us not as boxes or in the shape of a
3 funnel, but as points along a continuum that is
4 called regulatory takings where we have per se
5 regulatory takings toward one end and Penn Central
6 type fact-based factual inquiry type analysis
7 regulatory takings on the other end. We fit much
8 closer to the Lucas end of that continuum, much
9 closer.

10 THE COURT: Thank you very much,
11 Mr. Becker. We will take a recess before we hear
12 the arguments of the County. Take about ten
13 minutes, I guess.

14 (A recess transpired.)

15 THE COURT: Who will be presenting the
16 argument?

17 MR. LYDON: Your Honor, Tommy Lydon on
18 behalf of Richland County.

19 THE COURT: All right. You may proceed,
20 sir.

21 MR. LYDON: Thank you, Judge. Your
22 Honor, I'm going to be fairly brief as compared to
23 Mr. Becker for a couple of reasons. First, you took
24 away a good bit of my argument in the questions you
25 asked Mr. Becker and did it much better than I

1 could, including my square peg/round hole analogy.
2 Also, I'm simply asking the Court -- Richland County
3 is simply asking the Court to apply the simply well
4 established juris prudence with respect to physical
5 takings. We're not asking you to ignore United
6 Supreme Court cases -- United States Supreme Court
7 cases, we're not asking you to adopt this new
8 continuum analysis of takings law which is
9 interesting and creative but is nowhere in any of
10 the cases that I read.

11 Your Honor, we both agree, both being
12 Richland County and Columbia Venture, that there is
13 no -- there are no issues of material fact with
14 respect to whether or not there was a physical
15 taking. So basically this -- in our opinion, given
16 the motions that have been filed by the parties and
17 the facts have been recited, boils down to a matter
18 of law.

19 With respect to a physical taking, the
20 law is really pretty simple. The physical taking
21 requires permanent physical occupation. It occurs
22 when there is a permanent occupation of private
23 property by the Government under Government
24 authorization. If you read the cases cited by both
25 parties in the memos, it's clear what physical

1 takings are.

2 The Government has built something like
3 a dam, it causes the landowner's property to flood,
4 that's a physical taking. If the Government places
5 an expressed easement on a property that gives
6 others the right to intrude on the owner's property,
7 that is a physical taking.

8 But neither of those situations are
9 present here, Your Honor. Columbia Venture's
10 property is in exactly the same situation as it was
11 when Columbia Venture purchased the property in
12 1999. The only thing that has changed is that FEMA,
13 not Richland County, revised its flood maps for the
14 Congaree River. Your Honor, the map revision was
15 not directed at Columbia Venture, it was not unique
16 to the Congaree River. Federal law requires that
17 FEMA must assess the need to revise flood data every
18 five years and must undertake revisions as it sees
19 fit.

20 Again, Richland County didn't change
21 anything. Before Columbia Venture bought this
22 property in 1999, construction in a floodway was
23 prohibited. Construction in a floodway is still
24 prohibited. The only thing that changed was the
25 map, The map was -- that was prepared by FEMA.

1 Now, if Richland County had done
2 something that caused a map to change, then maybe we
3 would have a situation that would involve physical
4 taking. For example, if Richland County had
5 conducted -- I mean, constructed a dam upstream, if
6 they had put in levees upstream, something that
7 changed the floodway that caused the change in the
8 floodway map, then maybe you would have a situation
9 where you could argue there's a physical taking.
10 But there's no suggestion to anything like that
11 occurring in this case.

12 The change in the map was due to
13 improved mapping techniques and the fact that water
14 courses naturally change over time, which is why
15 Congress requires FEMA to do these map restages on
16 floodways every five years.

17 Columbia Venture cited a number of cases
18 that they believe were not -- Nollan and Dolan and
19 cases like that that Mr. Becker discussed which you
20 asked some questions about. We think all those are
21 distinguishable from this case. There's -- none of
22 the cases that they've cited are anywhere near the
23 facts of this case. Generally speaking, all of
24 those cases involve the Government placing an
25 easement on a specific piece of property or a

1 Government taking some action or -- excuse me, or a
2 Government preventing a landowner from taking some
3 action that had been previously permitted. And that
4 was the case in Hill v. Hanahan, which I'll talk
5 about in a minute, where the landowner wanted to
6 fill in this area so they can build rental units on
7 it. Something that under the law at the time or the
8 ordinances at the time they acquired the property
9 were permitted to do.

10 Here in this case, again, construction
11 in a floodway was prohibited in Richland County at
12 the time that Columbia Venture acquired this
13 property in 1999. The only thing that changed was
14 the map and Richland County didn't change the map,
15 FEMA changed the map.

16 What's interesting, Your Honor, in
17 researching this and what's missing from the cases
18 that Columbia Venture has cited is any case where
19 the adoption of a FEMA flood map by a local
20 government is deemed to be a physical taking. We
21 know that FEMA regularly issues these flood maps, we
22 know that they regularly revise these flood maps,
23 they do it all over the United States. But no Court
24 anywhere has ever found that the adoption of a flood
25 map by a local government constitutes a taking. In

1 fact, it doesn't appear that anybody has thought to
2 raise that argument because clearly, under the
3 physical juris prudence law where physical
4 occupation is required, it doesn't fit.

5 In fact, if you take Columbia Venture's
6 theory to its legal conclusion, every time FEMA puts
7 out a new map that changes the floodway, assuming
8 that the local government, like all most of them, do
9 prohibit construction in a floodway, you're going to
10 have a taking and it's going to go on and on and on.
11 Every time there's a new map, there's going to be
12 takings. And I don't think that's what was intended
13 by the law or what's governed by the Supreme Court
14 cases.

15 They talked about Lingle and the four
16 types of takings that the Supreme Court has
17 recognized, and then I think generally acknowledged
18 that this case doesn't really fit within those. You
19 have -- except to put it in the Penn Central bucket.
20 It seems to me that what they're arguing is that
21 there ought to be either a fifth type taking or this
22 continuum analysis that, again, I haven't seen in
23 any cases that I've read or studied on any of this
24 because the physical taking analysis is a very
25 simple analysis. The round peg in the square hole.

1 They don't have the facts to support physical taking
2 that would fit into that very easy round hole
3 analysis and they're trying to avoid the more
4 complicated Penn Central regulatory taking analysis
5 by sort of calling it physical taking, I'm not
6 really sure. Their memo says it's a memorandum in
7 support of their motion for summary judgment that
8 there was a physical taking, and Mr. Becker says,
9 well, it really is misnamed because we're really not
10 arguing that those are physical takings. Well, if
11 they're not arguing there's a physical taking, then
12 I think clearly Richland County's motion for summary
13 judgment on that issue should be granted.

14 Your Honor, Hill v. Hanahan, you made
15 the point that it's a 1984 South Carolina Court of
16 Appeals decision that -- well before the Lingle
17 decision that Columbia Venture's asking you to sort
18 of set aside or ignore or expand. But even if you
19 look at the facts of Hill versus Hanahan, they're
20 distinguishable from the situation we've got here.

21 In Hill, there was no existing ordinance
22 that pro -- that prohibited the activity that the
23 landowner wanted to engage in, filling in an
24 excavated portion of the property. Here, the
25 Richland County ordinance that prohibits

1 construction in a floodway was on the books before
2 Columbia Venture purchased this property. In Hill
3 versus Hanahan, there was an actual physical
4 invasion, the Court had to stretch a little bit to
5 find that, when they found that an armed police
6 officer was on the property.

7 In this case Mr. Becker suggested, well,
8 there could be a physical invasion, you know, if
9 they did something that probably somebody would show
10 up. But, again, there has been no physical
11 invasion.

12 So we believe that this case is subject
13 to the Supreme Court's ruling and analysis in the
14 Lingle case, got involved in those four boxes, and
15 that that's -- that Hill really doesn't address that
16 because it was 20 years before. And so you don't
17 really have to deal with Hill but you can deal with
18 it and you can distinguish the facts from Hill from
19 the facts in this case.

20 I guess, just in concluding, physical
21 taking requires physical possession and it occurs
22 when a government occupies property or requires the
23 landowner to submit to physical occupation. There
24 is no evidence or even argument that we have
25 occupied -- Richland County is occupying the

1 property, nor have we required Columbia Venture to
2 submit to physical occupation. Richland County
3 didn't build the levee that's causing the property
4 to flood, Richland County didn't -- hasn't imposed
5 an easement that's causing the property -- that
6 would create the property -- excuse me, create a
7 problem for the property. We didn't do anything to
8 create the larger floodway that's been generated by
9 the FEMA map.

10 In short, Richland County hasn't done
11 any of the things that the United States Supreme
12 Court and the South Carolina Supreme Court view as
13 affecting a physical taking. There's no genuine
14 issue of fact on this and we believe that Richland
15 County's motion for summary judgment that there was
16 no physical taking should be granted. Thank you.

17 THE COURT: Thank you, Mr. Lydon. All
18 right. Are we ready to move to the next motion
19 then?

20 MR. BECKER: Could I reply just briefly,
21 Your Honor?

22 THE COURT: Yes, you can.

23 MR. BECKER: This will be brief. Your
24 Honor, I think the County's argued that as a matter
25 of law it's not a physical taking because the

1 physical taking requires continuous physical
2 occupation by the government itself. I think we've
3 convincingly dealt with those -- those concepts and
4 let me, again, just quote from Loretto: A permanent
5 physical occupation authorized by state law is a
6 taking without regard to whether the State or,
7 instead, a party authorized by the State is the
8 occupant.

9 It takes no leap of logic to conclude
10 that if the Government permanently authorizes flood
11 water to pass to and fro over our land there's a
12 permanent physical occupation authorized by State
13 law. It makes no difference whether the occupation
14 is permanent or intermittent. Again, quoting from
15 Nollan, we think a permanent physical occupation has
16 occurred for purposes of the rule where individuals
17 are given a permanent continuous right to pass to
18 and fro so that the real property may continuously
19 remain traverse, even though no particular
20' individual is permitted to station himself upon the
21 premises.

22 Again, no significant leap of logic and
23 reasoning by analogy to conclude that if Government
24 authorizes on a permanent basis in perpetuity flood
25 water to traverse up and down your land that it's no

1 different from what the Supreme Court of the U.S.
2 said would be a taking in Nollan and Dolan and
3 Loretto.

4 Moving on, Mr. Lydon said construction
5 in a floodway was prohibited when we bought this
6 property. Well, that is a significantly disputed
7 fact.

8 Another fact that is significantly
9 disputed is whether or not we bargained specifically
10 with the County in the form of the unanimous
11 resolution for the right to improve the levees so we
12 could develop the property. I mean, there was, at a
13 minimum, an implicit promise that the County would
14 work with us to allow that to occur no matter how
15 the existing ordinance might have read or how it
16 might have been enforced. And as we have argued in
17 our submittals to the Court, that no-impede standard
18 was interpreted by the County engineer at the time
19 we bought the property to be the FEMA no-rise
20 standard.

21 So that is an issue that is hotly
22 disputed because as to construction in a floodway
23 was prohibited when we bought the property.

24 Mr. Lydon points out that no court has
25 ever found adoption of a flood map constitutes a

1 taking and suggests that if you find the taking here
2 it would stand for the proposition that every time
3 FEMA puts out a new map there will be a taking.
4 That's not what we're suggesting. It was not the
5 flood map alone that affected the taking. It was
6 the flood map in concert with the storm water
7 management ordinance which placed severe
8 restrictions on our right to use our property and
9 build upon it, but left that no-rise standard open
10 to Heathwood Hall.

11 And as you see, it is -- since February
12 20th, 2002 built major buildings on its property.
13 If -- if we were not burdened with restrictions that
14 didn't apply to our neighbor, we might have 30, 40,
15 50 buildings --

16 THE COURT: Wouldn't this case --

17 MR. BECKER: -- like that on our
18 property now.

19 THE COURT: I'm sorry, I didn't mean to
20 interrupt. Wouldn't that be more in the due process
21 area whether there was a physical taking or not?

22 MR. BECKER: Well, I think it would.
23 And I'm only bringing it up now because Mr. Lydon
24 mentioned it but -- so I'll move on.

25 The -- Mr. Lydon suggests that you can

1 safely ignore Hill v. Hanahan because it's an old
2 case and it conflicts with Lingle and -- but I would
3 suggest to you, Your Honor, that as I think I
4 explained, that Hill v. Hanahan may be old but it
5 does not conflict at all. The result in that case,
6 and the law upon which it relied, does not conflict
7 at all with the principles underlying the more
8 modern cases. It does not conflict with them at
9 all.

10 Finally, he said Richland County hasn't
11 imposed an easement and it didn't create the
12 floodway map. But here again, there they're arguing
13 that the Government has a right to do indirectly
14 what it is prohibited from doing directly, and that
15 is taking property without paying just compensation.
16 They simply can't do that. What they have done is
17 the functional equivalent of imposing a floodway
18 easement or a restrictive covenant in the form of a
19 conservation easement on our property.

20 Let me just go back to Lingle. Let me
21 quote one sentence from Lingle that I think disposes
22 of the crux of their argument, and that is where
23 Justice O'Connor said, in talking about Nollan and
24 Dolan: In each case, the Court began with the
25 premise that had the Government simply appropriated

1 the easement in question this would have been a per
2 se physical taking.

3 What we are arguing is that you attempt
4 to do indirectly, through legislative fiat, if the
5 result of what you have done is functionally
6 indistinguishable from the result that would attain
7 if you sent surveyors out to our property and you
8 survey the line and you recorded an easement in the
9 courthouse, it would be no different than what we
10 are faced with today.

11 So we are saying, Your Honor, that they
12 have done, through indirect means, what is factually
13 indistinguishable from what our Courts have said is
14 a per se physical taking. Under the body of
15 regulatory takings law, and especially Hill v. City
16 of Hanahan, we believe that a result -- the
17 conclusion -- the Court should reach the conclusion
18 that a per se regulatory taking has occurred in this
19 case. Thank you.

20 THE COURT: Thank you, sir.

21 MR. JOHNSON: Your Honor, Pope Johnson.
22 I'll argue our next motion which is for summary
23 judgment, Columbia Venture had no protective
24 property interest in connection with the alleged
25 taking of February 2002.

1 THE COURT: All right. Mr. Johnson, you
2 may proceed.

3 MR. JOHNSON: Your Honor, you may recall
4 from our last hearing Counsel may have extended an
5 argument and argued that this case was a very
6 complex case, and when I argued to you I took the
7 opposite position. In essence, I argued that it was
8 a simple case when you look at what we're dealing
9 with. And here's why I argued it was a simple case
10 and that is for the Plaintiff to have a claim for a
11 taking -- a regulatory taking claim or a due process
12 claim, the Plaintiff must have a protected property
13 interest. That is a threshold requirement of either
14 of those claims, they have to have it; but if they
15 don't have it, they don't have a takings claim and
16 they don't have a due process claim.

17 And what I want to argue here today is
18 that under the pleadings done of the facts they have
19 no such protected property interest.

20 Your Honor, the Plaintiffs in this case
21 served a 33-page complaint, which I read and reread
22 again this morning to be sure I was right on this.
23 Nowhere in the complaint do they allege that they
24 had a protected property interest. Those words are
25 not found in the complaint, they never say that a

1 protected property interest by virtue of this. They
2 talk about everything in the world -- venue,
3 jurisdiction, factual background, conduct of the
4 County before and after, they allege four causes of
5 action, but nowhere in their pleading do they
6 identify a protected property interest as a basis
7 for the claims they asserted which is an element of
8 these claims.

9 Now, if you look at their omnibus
10 memorandum as I read it they claim this: They claim
11 that the acquisition and mere ownership of the
12 property as of February 19, 1999 gave them a
13 protected property interest to develop the property.
14 They argue that the 1999 resolution where the County
15 agreed to accept certain responsibilities regarding
16 the levees, provided five conditions were met, gave
17 them a protected property interest. And what I want
18 to do -- it's interesting they argue in their
19 memorandum that that made the County their
20 governmental partner, the County had become their
21 supporter and their -- they're partners with the
22 Plaintiff regarding this development.

23 Now, those are the mere allegations.
24 But what I want to ask you to do is look at two --
25 two things which are the undisputed facts in the

1 case. First of all, Your Honor, I want you to look
2 at Tab -- behind Tab 15 that we provided, which is a
3 summary of the meeting minutes of July 8th, 1998.
4 If you look in there, you will see that that is a
5 meeting where Columbia Venture was present. And
6 during the course of the meeting FEMA explained that
7 the Manning levee did not meet the FEMA requirements
8 for certification and that because of that they were
9 substantially explaining -- expanding the floodway
10 in a manner which affected the Manning property.

11 They also said that for that to be changed the
12 levees would have to be upgraded to certification.

13 The minutes also reflect at this time,
14 Your Honor, they had preliminary maps that showed
15 that expansion onto the Manning property. And at
16 this time the minutes reflect that Richland County
17 was making permitting and regulatory decisions based
18 upon the preliminary maps. In other words, even if
19 they hadn't been adopted, Richland County was using
20 them for permitting and regulatory purposes.

21 The other item I want to refer you to is
22 behind Tab 24, which is the County's resolution of
23 February the 2nd, 1999. That's where they agreed to
24 accept responsibility for local inspection
25 enforcement, provided five contingencies were met.

1 And those are the -- those are the facts that
2 existed -- undisputed facts that existed at the time
3 Columbia Ventures (sic) made the decision to move
4 forward and purchase the property.

5 So the question is, did Columbia
6 Ventures, with those facts in place when they bought
7 the property, have a protected property interest to
8 move forward with the development of the property?
9 And we would say that these documents show and
10 establish, as a matter of law, that they had no
11 protected right.

12 Now, Your Honor, the way I would ask you
13 to analyze the thing is this: If the chairman of
14 the board of Burroughs & Chapin came to you prior to
15 the closing and said, Judge, we want to hire you and
16 I want your opinion as to whether -- you know, we've
17 got these minutes of the meeting and we've got this
18 resolution, I want to know if you would give me an
19 opinion that you would stand behind that would say
20 that we -- if we go forward and buy this property we
21 would have a guaranteed or an assured right to do
22 the development the way we wanted to do the
23 development. And we want you to tell us -- give us
24 thumbs up or thumbs down on that because we want the
25 property, we want to do the development; but if we

1 don't know if for sure we're going to get to do the
2 development, we don't want to spend our money and
3 take the risk.

4 Your Honor, if they presented that to
5 you with these facts, or to anyone in the room, in
6 this building or in this town, no lawyer would have
7 said or given an opinion that you had -- that
8 Columbia Ventures, based on these facts, could buy
9 the property with the assurance that they had a
10 right to develop the property as they wanted.

11 Now, why is that? Because the minutes
12 of the meeting told Columbia Ventures that Richland
13 County was developing the property -- Richland
14 County was making regulatory and permitting
15 decisions about development of the property based
16 upon the revised maps. So Columbia Ventures knew
17 that these preliminary maps were the ones that were
18 being -- being in place and the preliminary map
19 would not allow them to develop the property because
20 they expanded over onto the Manning property.

21 Furthermore, Your Honor, you would have
22 had before you the resolution and you would have had
23 to tell the client that they don't have an agreement
24 with County Council to allow them to upgrade and
25 that the County would take over the management of

1 the responsibilities for the levee because a
2 resolution is not an agreement. I looked it up in
3 Black's Law Dictionary, and I'll hand it up, but a
4 resolution is a mere expression of intention. And
5 what Black's says on that point is this: A chief
6 distinction between a resolution and the law is that
7 the former is used whenever the legislative body
8 passes wishes merely to express an opinion as to
9 some given matter of thing and is only to have
10 temporary effect on such particular thing while the
11 law it is intended to permanently, directly control
12 matters applying to persons and things in general.

13 So you would have to tell -- tell the
14 client that all they had was a resolution, not an
15 agreement, that the County was not bound to do
16 anything other than they would take it if certain
17 contingencies were met and then you'd have to go
18 into what the contingencies were.

19 And, Your Honor, one of the
20 contingencies was that the parties, which include
21 Richland County, City of Columbia and the
22 developers, resolve issues of the performance and
23 funding of the operation and maintenance
24 responsibility.

25 Your Honor, the County was -- the City

1 of Columbia was not a party to the resolution.
2 There's no resolution from the City of Columbia. I
3 can tell you from living in Richland County 30-plus
4 years there's many, many times that the County and
5 City can't find it in their hearts to agree about
6 anything. So keep in mind if this was an agreement,
7 I believe this language would make the agreement
8 unenforceable because an agreement -- all of the
9 terms have to be agreed to. And an agreement to
10 make an agreement, which is what this says if it was
11 an agreement, is no agreement at all.

12 So, Your Honor, I believe you'd have to
13 tell them that there was -- there was no guaranteed
14 or assured right by virtue of this information and
15 that they would take a risk if they bought the
16 property. Now, these people are business people and
17 they can take a risk. But there was a risk that
18 unless all the stars lined up right they wouldn't be
19 able to do this development. And if it wasn't
20 assured or guaranteed that they could do the
21 development, they couldn't have a protected property
22 right or interest.

23 So our position is under the undisputed
24 facts they didn't have a protected property interest
25 to develop the property at the time they bought the

1 property and, as a result, the claims should fail.

2 Now, they argue in their papers -- oh,
3 Your Honor, they argue -- I mentioned they argued in
4 papers that this resolution somehow made the County
5 a partner with them. I also would say if the
6 chairman of the board of Burroughs & Chapin take --
7 turned to you and said, does this agreement mean
8 that we're partners? I don't think you'd have any
9 trouble answering the question that there's nothing
10 about a partnership agreement or being partners in
11 the resolution.

12 Now, the other thing they've argued is
13 that the County should be estopped from arguing that
14 there's no protected property interest and our
15 response to that is twofold. First of all,
16 equitable estoppel is an affirmative defense and it
17 has to be pled and if it's not pled, it's waived.
18 There's been no plea of equitable estoppel in this
19 case. And, Your Honor, for that point I would cite
20 the case of Wright versus Craft, which is 640
21 Southeastern 2nd 486 2007 Court of Appeals decision
22 that was written by Ralph King Anderson, a law
23 judge. And, Your Honor, I had a copy of the cases
24 for counsel and for the Court but somehow I didn't
25 get the full case copied and over the lunch break

1 I'll get a copy and give it back to you.

2 But what it says is that if it's a
3 requirement to plead, if you don't plead it you --
4 you waive it. And even if equitable estoppel
5 applied, one of the elements is reasonable reliance
6 on what is done by the other party and there could
7 be no reasonable reliance resolution guaranteed or
8 gave them any kind of guaranteed right to develop
9 their property.

10 So we would ask that you on this point
11 find as a matter of law that they -- there was no
12 genuine issue of material factors as to whether they
13 had a protected property interest and they did not
14 have a protected property interest.

15 THE COURT: Thank you very much. All
16 right. Mr. Becker, you may proceed.

17 MR. BECKER: Thank you, Your Honor. I
18 think whether this case is a simple one or not, I
19 think this issue is a very simple one because the
20 cases are legion that rights in property include the
21 right to develop it and use it. An unfettered right
22 of use is inherent in property rights. Those rights
23 are inherent in ownership of the land.

24 Our complaint may not say in specific
25 words that we had a protected property interest, but

1 our complaint leaves no doubt that we owned the
2 property and that pursuant to that ownership under
3 the common law of this State we had the right to
4 develop the property. And much of my previous
5 presentation dealt with that very issue.

6 Now, Mr. Johnson seems to be saying here
7 that based on these minutes of a meeting with
8 Richland County -- with -- I don't know exactly who
9 was there but whoever, Columbia Venture was there
10 and was put on notice that the County was now making
11 permitting decisions based on the new map. And that
12 based on that we should have known and no reasonable
13 lawyer in the State would have advised us that we
14 could expect to move forward and develop the
15 property.

16 Well, the McNair Law Firm handled this
17 transaction on behalf of Columbia Venture. They're
18 extremely experienced attorneys, capable real estate
19 transactional attorneys, they work in representing
20 public entities all the time in municipal and bond
21 finance transactions. It certainly seemed to be
22 good enough for them for us to go forward based on
23 the unanimously passed resolution of the County
24 Council, as well as all the other assurances that
25 were obtained in writing from FEMA and officers of

1 the County -- officials of the County.

2 I guess what they're here telling us is
3 that you, citizens of Richland County, you may not
4 rely on a unanimously passed resolution of your
5 elected representatives acting as a body of the
6 legislative branch of this county government. You
7 may not rely on what they say and you must proceed
8 at your peril. In fact, you had better be sure that
9 you reduce it to a binding contract before you deal
10 with the County. Otherwise, they may well change
11 their mind and stab you in the back, which is what
12 they did here. He said the County can't be bound to
13 do anything. There was no guaranteed or assured
14 right and we took a risk in buying the property.

15 The risk we took was that the County
16 would live up to its word and deal with us in good
17 faith and not pass an ordinance that so restricts us
18 that we cannot build a single building on our
19 property while our neighbor proceeds to build five
20 buildings -- our similarly situated neighbor
21 proceeds to build five buildings, housing hundreds
22 of students. If we were permitted that same grace
23 of the County, we could have moved forward with our
24 development whether we improved the levees or not.
25 All we would need is for the same standards that

1 apply to our neighbor to apply to us.

2 So I think the -- the law is clear. Our
3 protected property interest is the right to develop
4 and use the property according to the common law of
5 property in this state. Those -- those quotes that
6 I gave you from the Hill v. City of Hanahan case
7 have not changed since 1984, no matter what the
8 Court -- other courts may have decided about
9 regulatory taking. That was our protected
10 properties interest.

11 We -- we had a protected property
12 interest in improving the levees based upon the
13 unanimous resolution of the City Council wherein
14 they bargained with us to allow us to improve the
15 levees and require, in exchange, to invest \$30
16 million developing the property. If that kind of
17 County action does not engender a protected property
18 interest or expectation, we might as well all move
19 to Kazakhstan where the rule of law does not
20 prevail. We really -- we really might as well.

21 I think what Mr. Johnson is suggesting
22 you -- you hold in this case that you simply can't
23 rely on the word of Government. That is what I call
24 an absence of what we know in this country as the
25 rule of law. We had a protected property interest

1 in doing what the County said it would let us to do.
2 We had a protected property interest in that bundle
3 of inchoate property rights protected under the
4 common law to use and develop the property as we saw
5 fit. But even if we didn't, we ought to have an
6 expectation and we ought to have a protected
7 property right to develop our property at least to
8 the same extent that our neighbors, Heathwood Hall
9 and the City of Columbia wastewater treatment plant,
10 get to do.

11 So I -- I don't think, Your Honor, the
12 issue whether or not equitable estoppel was pled or
13 not. I haven't studied the complaint as recently as
14 Mr. Johnson, I don't know if it is listed among our
15 affirmative defenses. If necessary we'll move to
16 amend our complaint to add that affirmative defense
17 because I think the facts establishing that the
18 property is equitably estopped from asserting that
19 we had no protected property interest have been
20 amply laid out in our -- in our submittals and so I
21 won't go further on that now.

22 Thank you, Your Honor. Unless you have
23 any questions I don't have anything else.

24 THE COURT: As I sat through the cases
25 cited by the County seem to primarily deal with .

1 permit cases where at the time an individual has
2 filed for a permit that the law allowed it, I think
3 Scott versus Greenville, I believe. And that
4 they -- they allowed that use, the individual
5 applied for it and then the Government acted to cut
6 that off.

7 MR. BECK: Exactly. They denied the
8 permit.

9 THE COURT: What you're contending is
10 while this is not a permit case, it doesn't have to
11 be a permit case. You're saying that by virtue of
12 owning the property and dealing with the County
13 entering into this agreement, even though there was
14 some contingencies, it still gives you a property
15 right sufficient to support your claim for lack of
16 due process.

17 MR. BECKER: Exactly. And even -- even
18 if there had been no due diligence, no unanimous
19 resolution, no understanding reached between
20 Columbia Venture and the members of Richland County
21 Council, we bought the property. We had, when we
22 bought it, rights to develop the property that had
23 have been completely denied.

24 Just compare us to our neighbor. We --
25 we had a protected property interest that has been

1 saved for the benefit of our neighbors but denied to
2 us. It's -- it's apparent when you step on the
3 campus of Heathwood Hall and see the buildings, the
4 massive buildings they have built since February 20
5 of 2002, that's what we were denied. The right to
6 do with our property what our immediate neighbor in
7 the same floodway is doing with theirs. That's the
8 protected property right that we have lost.

9 THE COURT: Okay. Thank you,
10 Mr. Becker. All right. Any response?

11 MR. JOHNSON: Your Honor, just briefly.
12 And I don't have a clue as to what the McNair firm
13 was asked or what they said.

14 I would say to you when they bought this
15 property they knew that Columbia -- that the County,
16 for regulatory purposes, was operating on the
17 preliminary maps. They knew that. They can't say
18 we bought it and didn't know that was going on and
19 we relied upon our right to -- as an owner to have
20 it. They bought it with their eyes open, they
21 bought it with the contingency -- with a whole set
22 of contingencies, none of which or at least only one
23 has ever been met or sought to be met. They can't
24 do that and say, well, despite that we have an
25 absolute right to develop our property even though

1 they knew that all we had was this contingent
2 arrangement with the County.

3 So that's where we are on protected
4 property right. They bought it knowing all this,
5 they can't claim that these things didn't exist and
6 they didn't know. If they didn't exist and they
7 didn't know, we may have a different case. When
8 they buy with their eyes open, take the risk, the
9 risk fails, they can't turn around and sue the
10 County claiming the protective property interest.
11 It's really that simple.

12 MR. BECKER: Your Honor, could I respond
13 just briefly to that? Mr. Johnson is right,
14 Columbia Venture knew that a new floodway mapping
15 process was underway and that the floodway boundary
16 might change, the floodplain boundary might change.
17 It knew that.

18 And that is precisely why it bargained
19 with the County for the right to improve its levees,
20 so that the land protected by those levees could be
21 developed and not subject to any floodway or
22 floodplain restrictions. It would be taken
23 completely out of the floodway and out of the
24 floodplain. We knew that was going on, that's why
25 we bargained for the right to improve those levees

1 which were denied on three separate occasions by the
2 County, the first just three months after we bought
3 the property in May of 1999, the second time in 2005
4 as demonstrated by exchange of letters between Bill
5 Boyd of our law firm and Mitch Willoughby, a local
6 attorney representing the County, in which the
7 Richland County said no, you may not improve the
8 levees. You may not improve them at all, you may do
9 nothing to make them higher or wider.

10 And then in 2005, later that year when
11 Judge Margaret Seymour vacated the base flood
12 elevations of the FEMA map, vacated the floodway,
13 vacated the floodplain, did everything and sent us
14 back to where we were in 1994 as far as the FEMA
15 flood maps were concerned. At that very moment
16 Columbia Venture had the right, under the law of the
17 County, to improve its levees.

18 Faced with the prospect that Columbia
19 Venture would apply to do so the County inserted
20 itself -- the County Council, the legislative body,
21 inserted itself in the administration of granting or
22 denying permits and declared not one but several
23 successive moratoria on the granting of building
24 permits in a floodplain. If that is not hostility
25 to a protected property interest, hostility to a

1 valid expectation of the way Government will conduct
2 itself, then I don't know what would qualify as
3 such.

4 The protected property interest in
5 improving the property, in developing the property
6 and improving the levees, was completely eviscerated
7 by Richland County.

8 MS. TAYLOR: Your Honor, may I make --

9 THE COURT: I'm hearing about protected
10 interest. It's not -- as we all know, not a
11 separate cause of action. It's just the first step
12 you have to establish in order to make a substantive
13 due process claim. The County feels strongly about
14 it, that's why they split it off into a separate
15 motion to protect the --

16 MR. JOHNSON: Your Honor, Counsel has
17 spent a little bit of time talking about what
18 happened after 2000 -- February of 2002. But as you
19 also remember from the last hearing the question
20 that we sought an answer to was when was the taking?
21 And the taking, according to them, was in February
22 of 2002. They have no claim for hostility to
23 Columbia Venture's current cause of the moratorium,
24 the taking occurred then. The question is what
25 protected property interest did they have at that

1 time and was it taken?

2 And we say because they bought this with
3 their eyes open and knew that they didn't have a
4 guaranteed right or an ordinance that said they
5 could do this development. They can't come in and
6 claim they had a protected property right. It's
7 really that simple.

8 MS. TAYLOR: Your Honor, if you'd just
9 indulge me for a minute I'd like to make a couple of
10 comments, too, about what Mr. Becker said.

11 Mr. Becker said there were three
12 occasions in which the County had taken this
13 property. One, in May of 1999 permit application,
14 which I think if you look on the actual record we
15 have provided the letter from Richland County in
16 response clearly states that the application is
17 incomplete. There is no property interest that
18 vests based on an incomplete application.

19 Second, Columbia Venture is for the
20 first time that Richland County has heard
21 referring to a letter in 2005 from Mr. Willoughby to
22 Mr. Boyd -- and I actually wrote that letter, Your
23 Honor, and I was -- can tell you that the facts
24 surrounding that was certainly not -- or I can tell
25 you the County certainly did not believe that that

1 letter requesting --

2 MR. BECKER: Is she testifying?

3 THE COURT: I suggest you not because
4 you may wind up a witness in the case so --

5 MS. TAYLOR: Okay.

6 THE COURT: You can skip over that.
7 Mr. Johnson was just reaching for you.

8 MS. TAYLOR: All right. Well, let me
9 walk that back and merely say this. The letter, if
10 you read it, can be construed simply as asking for a
11 legal opinion regarding the meaning of maintenance.
12 There's nothing in there in which Columbia Venture
13 is submitting some particular plans for development
14 in which the County denies. So the County could
15 contend that certainly this application that they
16 tried to make this letter out to be is not right.

17 And, lastly, the point I'd like to make
18 is the order of vacatur by the United States
19 District Court was stayed and then reversed so, you
20 know, Columbia Venture tends to neglect to bring
21 that fact up and I just wanted to remind Your Honor
22 of this.

23 THE COURT: You know, this protected
24 property interest issue is somewhat difficult
25 because in some of the cases, like the harbor case

1 in Charleston and others in Scott, it's really the
2 focus of the court. Not the total focus, but they
3 spend a lot of time on it saying that they were
4 either not entitled to it as the case with the
5 harbor or they were as the case with Scott. Most of
6 the -- it seems to me that most of the substantive
7 due process cases that I recall reading that even
8 though they always list it as Element Number 1 that
9 they often don't spend that much time on. They
10 don't spend any time on it, they seem to go right
11 into a discussion of whether a legitimate use of
12 governmental powers beyond all process can cure all
13 of the other quotes, alternatives and so on.

14 So the issue of having a protected
15 property interest is not as clear-cut as I had hoped
16 it would be. That's just a comment. I'm not
17 soliciting --

18 MS. TAYLOR: May I respond, Your Honor?

19 THE COURT: Any discussion, but I --
20 it's not quite as clear. While in the zoning cases
21 it seems to be, but it seems to be almost only if
22 the Court particularly wants to dwell on that.

23 MS. TAYLOR: May I respond to that, Your
24 Honor?

25 THE COURT: Sure.

1 MS. TAYLOR: I did -- I must say you are
2 right. There are some court cases in which -- there
3 are some court cases in which the Court seems to be
4 more ready to address the issue of whether the
5 actions were met -- met the due process test as far
6 as capricious and arbitrary action as to what is
7 meant under the due process clause. And sometimes I
8 do think it's easier for the judge not to dwell on
9 that. But I think the difficulties that some other
10 Courts may have found in terms of whether or not
11 there was a property interest is not evident here.
12 I think due process cases in South Carolina, as well
13 as the Fourth Circuit, make it clear that you must
14 have more than the mere ownership in property in
15 order to make out a sufficient property interest for
16 a due process claim.

17 And I think the reason for that is
18 because a due process claim is seeking to protect
19 property owners from the outer reaches of truly
20 outrageous and egregious government action and,
21 therefore, the property interest must be
22 correspondingly narrowed, I think, in order for due
23 process to lie. And I think that if you look at any
24 of the Fourth Circuit cases or South Carolina
25 Supreme Court cases, you won't find a due process

1 case in which there was not some permanent or
2 rezoning request before that. Only land use has
3 some sort of restriction based on local regulation.
4 The Payner (phonetic) case that Mr. Becker brings up
5 is from I think the 1930s or '40s, it was an early
6 case. And I would submit to you, Your Honor, that
7 since this unfettered use is no longer consistent
8 with the modern sense of what a property right is
9 associated with use of its property because land use
10 regulation in modern times is an extremely different
11 animal than it was in the early part of -- or the
12 mid...

13 THE COURT: It seems to me property is
14 almost like a standing issue, because a lot of
15 people can have -- everybody, if you own a piece of
16 property, you have an interest or an expectation or
17 a hope in regard to what you may use your property
18 for. That's not going to give you standing to
19 challenge the change of a zoning law, for example.

20 MS. TAYLOR: True.

21 THE COURT: I think it just becomes more
22 relevant.

23 MS. TAYLOR: But mere expectation of a
24 particular use is not a protected property right --

25 THE COURT: Right.

1 MS. TAYLOR: -- under due process.

2 THE COURT: Okay. All right, then. The
3 second aspect of this motion, which is the final
4 decision -- what I call the lack of final decision.

5 MR. JOHNSON: Your Honor, we'll leave
6 that to the brief.

7 THE COURT: I'm sorry?

8 MR. JOHNSON: We'll leave that to the
9 brief. We've already -- case law is what it is.

10 THE COURT: All right, then. With that
11 we will move forward with the due process and --
12 it's 12:30. I suggest, if it's all right with the
13 attorneys and the Court Reporter, that we go ahead
14 and push forward with this and complete it before
15 anybody collapses. Lack of substance sure.

16 All right, then. We will proceed with
17 the due process and that's -- the County will lead
18 as well.

19 MS. TAYLOR: I will be arguing that one.

20 THE COURT: All right. You may proceed.

21 MS. TAYLOR: And before I start, Your
22 Honor, I should apologize in advance. I should have
23 said something about this earlier but one of the
24 ordinances that we had included within our earlier
25 memorandums file, one of which was an inadvertent

1 oversight. I did not get it certified by the Clerk
2 of County Council, so I do have the certified
3 version of the zoning ordinance, the original for
4 you. It's the same ordinance that's been produced
5 to Richland -- to Columbia Venture.

6 THE COURT: That's the 77 -- amended --

7 MS. TAYLOR: Well, this is the one that
8 was -- the zoning ordinance that was in effect up
9 until the County made major revisions in 2004.

10 THE COURT: Okay. If I might, without
11 going to interrupt your timing here -- I mean, your
12 flow, so let me ask it now because I'm afraid I
13 might forget to ask this. And it was included in
14 some of the material, I believe in one of the
15 County's submissions.

16 But in regard to this expanded floodway
17 from what it was before, other than the school and
18 the City's building out there and CV, as I call it,
19 property, how many other owners are actually
20 involved with this land with the levee floodway
21 change?

22 MS. TAYLOR: Do you mean floodway change
23 as far as the order of vacatur, or do you mean
24 associated with the moratoria, or --

25 THE COURT: No, I mean --

1 MS. TAYLOR: -- do you mean the flood
2 map?

3 THE COURT: When FEMA adopted this in
4 2002, I believe is when they finally -- or it
5 finally went into effect, the floodway obviously
6 affects CV and they affect the school and they
7 affect the wastewater facility. Are there any other
8 land owners in that affected area? I understood
9 that there were.

10 MS. TAYLOR: Yes, sir. Yes, Your Honor.

11 THE COURT: But how many other
12 landowners? Do you know?

13 MS. TAYLOR: The County went and adopted
14 the moratoria, specified certain flood -- flood
15 insurance rate map handles that were affected by
16 Judge Seymour's order and it was in the order. I
17 think it was over 200 properties, if I recall
18 correct.

19 THE COURT: Properties, but property
20 owners? Would that also be property owners?

21 MS. TAYLOR: Certainly -- I can't say
22 because there's 200 -- over 200 properties, there's
23 200 owners.

24 THE COURT: But more than -- more than
25 these three entities that I talked about?

1 MS. TAYLOR: And also, as a point that I
2 think is relevant, is when FEMA initiated its
3 restudy it was a study of the entire unincorporated
4 Richland County. So the February 2002 Flood
5 Insurance Study and Flood Insurance Rate Maps were
6 countywide.

7 THE COURT: Sure. Sure. I was just
8 thinking about the Manning levees and the extension
9 of floodway in that regard. So with those there are
10 still...

11 MS. TAYLOR: Others affected, yes, sir.

12 THE COURT: All right. Thank you very
13 much.

14 MS. TAYLOR: I'm here to argue the
15 County's motion for summary judgment on the issue of
16 substantive due process. I'm going to focus really
17 on Scott v. Greenville County since Columbia Venture
18 is alleging that Scott is the appropriate case law
19 in which to apply. But first I'd like to remind
20 this Court what the tests are for substantive due
21 process under the United States Constitution and the
22 South Carolina Constitution.

23 Under the United States Constitution the
24 Plaintiff must prove the property interest, as
25 they've already addressed to some degree and I'm

1 really not here at this point to continue that
2 argument. I'm going to be focusing on the remaining
3 parts of the test and that is, obviously, the
4 property interest was deprived by a government
5 entity in a manner that falls so far beyond the
6 outer limits of the gentleman's prone to action
7 (phonetic) that due process took care of this
8 deficiency. This test sometimes is referred to by
9 other circuit courts as shocks the conscience and
10 our Fourth Circuit has used that, but the more
11 typical language is what I just recited to you.

12 Under the South Carolina Constitution
13 the Plaintiff must prove arbitrary, capricious,
14 degradation of a state created property interest.
15 And if the government action bears a reasonable
16 relationship to any legitimate interest of the
17 Government, the claim fails. The validity of the
18 County's legislative enactments must be upheld if
19 the propriety of that action is even barely
20 available. It is a tough test to meet, and there's
21 a reason for that because substantive due process,
22 or its due process clause, is intended to address
23 Government action that exceeds the bounds of proper
24 exercise of police power -- police power, rather, and
25 abuses its power or uses that power as an instrument

1 of oppression.

2 So a truly egregious action that has no
3 rational basis whatsoever to the proper exercise of
4 police power is what the Plaintiffs must, by clear
5 and convincing evidence, show to this Court to make
6 out a due process claim. And I want to emphasize
7 that if the Government action has any conceivable
8 relationship to the exercise of police power, there
9 is no due process violation.

10 So when Columbia Venture, for example,
11 argues about this hostility or this opposition, you
12 know, hostility or opposition in land use setting,
13 the Courts make a distinction here between land use
14 decisions in which there's almost always some sort
15 of opposition. It only rises to the attention as
16 far as due process is when there is absolutely no
17 other indication that the local governing body is
18 making a decision except for something that is
19 impermissible, such as racial discrimination.
20 Clearly, racial discrimination is not an interest
21 for a legitimate exercise of government police
22 power.

23 There are some other Scott -- that was
24 an example of evidence that they intended to show
25 that there was some racial abuse. Likewise in the

1 MLC case, which is another subsequent case dealing
2 with the same Scott factors, there were some
3 opposition to a car dealership. If -- and just
4 simple opposition to a car dealership with nothing
5 else that was before that County Council or City
6 Council would be something that's not a legitimate
7 governing interest.

8 But if you throw in a factor that wasn't
9 present there, I think it does make context a little
10 easier. Let's say before MLC Auto that there was
11 discussion or interest expressed dealing with
12 traffic issues. Maybe a car dealership had some,
13 you know, concerns about increased traffic in the
14 neighborhood, maybe there was some intrusion of
15 commercial interest in a primarily residential
16 community that certainly would have a legitimate
17 basis for rezoning that property.

18 But because of that case and the other
19 cases that Columbia Venture cites, the reason why
20 their opposition was relevant was not just because
21 opposition was present, because I can tell you in
22 almost any land use decision there's opposition to a
23 proposed different land use, it's because there was
24 nothing -- no other basis for which to ascertain the
25 legitimate governing interest in exercise of police

1 power.

2 In Scott v. Greenville County the
3 characteristics is targeting the action towards a
4 single party, whether that be racial
5 discrimination -- I don't like a particular use for
6 no good reason -- action that is tainted with
7 fundamental procedural irregularity. This is not
8 something that is run of the mill, ill advised or
9 mistaken procedural issue. This has got to be
10 something that's fundamental. And how I read Scott
11 in these other cases, fundamental basically means it
12 was deliberate. Otherwise, the clear understanding
13 of due process in the cases that we have provided to
14 you in which the Court says mistaken or ill-advised
15 decisions do not rise to the level of substitute due
16 process violation.

17 So I think you must look at this factor
18 of action taken with fundamental procedure of
19 irregularity as some situation with which there was
20 an intentional, deliberate act that was some knowing
21 violation of law.

22 Then, lastly, the factor of deviation
23 from regular practice in some sort of unprecedented
24 manner. Those factors the Court has decided
25 indicates that there is no legitimate government

1 rational basis whatsoever. I'm going to skip over
2 going through the particular facts of -- or the
3 details of Scott and MLC Auto unless you'd like me
4 to go through that in greater detail, but I think a
5 couple of things stand out that illustrate these
6 three factors that I'm just going to hit on.

7 One, as I said, with Scott there was
8 some either racial ends or people just didn't like
9 this guy, Mr. Scott.

10 THE COURT: The Supreme Court found that
11 they did not act in accordance with the law before
12 it even went to the Fourth Circuit. They relied
13 on --

14 MS. TAYLOR: That's correct.

15 THE COURT: Judge Ervin ruled that they
16 had to issue under the law -- they don't have any
17 right to meddle in zoning -- County Council didn't
18 have a right to meddle in zoning matters, the zoning
19 board does that. And the South Carolina Supreme
20 Court said that's right, they acted without any
21 authority from the Fourth Circuit.

22 MS. TAYLOR: And that's interesting you
23 bring that up because in the actions of Scott there
24 was reference within the facts the County Attorney
25 had advised the County Council of their role in

1 dealing with the permitting process, the ministerial
2 versus what their role was as an elected body. So
3 that's -- I think that's an important factor in
4 terms of why the Fourth Circuit decided that there
5 was some tainted fundamental irregularity. It's
6 something that the County Attorney advised them that
7 that was not an appropriate thing for them to do and
8 they did it anyway, which is a distinction from the
9 year mistaking the revised decisions.

10 And Helping Hands. There was a County
11 Council member representing the district that
12 apparently voiced her opposition to a methadone
13 clinic, and then that particular Council member
14 introduced an ordinance creating a new zoning
15 category compliance, which was only allowed by
16 special exception, and this was after the owners of
17 the clinic, or the proposed clinic, had a clear
18 property entitlement. And so the County
19 Councilman -- of course this was obviously voted on
20 by the entire County -- the elected body -- chose to
21 attempt to make these affirmative acts to be able to
22 prevent the clinic from actually coming into
23 fruition, from actually taking place.

24 They also had these unprecedented
25 aspects in terms of speeding up your usual three

1 meeting process for passage of ordinances, they
2 shortened what there would normally be effective
3 date of ordinances, and there was a revision of the
4 ordinance on third reading to deny a particular
5 grace period.

6 In MLC, same similar situation dealing
7 with a property owner who had a right and then the
8 County -- or the City -- I guess this is Town,
9 rather, of Southern Pines took these extraordinary
10 efforts without any basis of -- rational basis and
11 exercise of police power to snatch that property
12 right away from them.

13 And I think those are important to keep
14 in mind when you look at the facts of this case
15 because I think what's important here is that none
16 of these other cases indicated that there was any
17 other rational basis for the Government's actions,
18 and I think you'll find in this case there was ample
19 rational basis for Richland County's actions.

20 As I said before, for example, had the
21 County in Scott initiated a rezoning and they did
22 present legitimate land use of rezoning issues, such
23 as traffic problems or commercial businesses
24 intruding in residential, I think the outcome in
25 that case would have been different because what our

1 Fourth Circuit cases and other Circuit cases say is
2 that even if you do have something that can
3 conceivably be not a legitimate interest in
4 government, yet there is at the same time an
5 interest that is legitimate, then there is no due
6 process violation. And I think that's consistent
7 with the South Carolina Constitution of if the
8 action is even fairly debatable, if there's any
9 legitimate interest in the Government, then the
10 claim fails.

11 Now, Columbia Venture attempts to make a
12 whole host of facts fit into due process case law.
13 But the County contends that it fails to present
14 these sort of facts that supports its contentions.
15 And even if those contentions are accurate, then it
16 fails as a matter of law.

17 These actions, and I'll go through each
18 one, hopefully we won't be here for the rest of the
19 afternoon, but I think in order to -- think of the
20 context as you think of these actions. The facts of
21 this case involve a series of events that were
22 thrust upon Richland County and the County is
23 reacting and responding to a complex issue of
24 floodplain development, its responsibilities under
25 the National Flood Insurance Program, and a judicial

1 appeal of FEMA's Congaree River Flood Map
2 determinations, which Richland County was not a
3 party but, yet, had to respond to the consequences.

4 All of the County's actions, both
5 legislative and administrative, was informed and
6 animated by a legitimate government interest of
7 protecting public health and safety and complying
8 with the National Flood Insurance Program. And none
9 of the procedural actions that Columbia Venture
10 raises constitutes something that's fundamental
11 procedural irregularity driven by something other
12 than an irrational basis in the exercise of police
13 power. And there is nothing that in the County's
14 actions are extraordinary given the context in which
15 they were taken, and I think that's important to
16 remember when we go through these particular
17 actions.

18 First, the County appeal of FEMA's
19 preliminary advised flood data on December 14th,
20 1999. Columbia Venture contends this action
21 violated its due process rights because the appeal
22 allegedly violated FEMA's regulations concerning
23 administrative appeals by basing its appeal on what
24 Columbia Venture contends are citizens' submittals
25 that lacked a scientific basis indicating some sort

1 of result different from FEMA.

2 A community's right to appeal is
3 discretionary, it's authorized under Federal
4 regulation. There's no requirement under FEMA
5 regulations that the County must make its own
6 independent engineering analysis. The County
7 received many, many -- I believe there's over 700
8 pages worth of comments, protests. What property
9 owners contended were appeals that did properly
10 submit analysis. It is not the County's
11 responsibility, under Federal regulation, to
12 determine with any sort of certainty that they have
13 merit. That's FEMA's responsibility and they, in
14 fact, did that when they provided a letter to the
15 County and everybody else, who were in the affected
16 community, indicating who they thought had submitted
17 evidence sufficient to be recognized as a formal
18 appellant. And I think you have that in the record,
19 Your Honor.

20 The County Administrator in making his
21 decision, I believe you have a resolution of
22 Richland County that was made on -- taken on
23 December 7, I'd like to submit -- I know you have
24 lots of paper.

25 THE COURT: That's all right.

1 MS. TAYLOR: This is the actual letter
2 that the County Administrator sent to FEMA
3 submitting an appeal on behalf of Richland County.
4 And I think what you'll find in this should be
5 undisputed, it's also consistent with the
6 resolution, that he did, in fact, find some
7 particular property owners, or appellants,
8 individuals did, in fact, submit data and analysis
9 that he thought met the requirements of the FEMA
10 regulation.

11 I submit that that's all the County is
12 required to do, that FEMA is in a position to make
13 those decisions, and there is no due process
14 violation simply because Columbia Venture disagrees
15 with FEMA's decision as to whether or not these
16 appellants were legitimate appellants.

17 They support this -- they seek to
18 support this contention with deposition testimony
19 from Mr. Pearson, Ralph Pearson, who was the County
20 Engineer at the time, who merely answered the
21 question asking if he had knowledge of any technical
22 data on which to base an appeal and Mr. Pearson
23 answered that he did not have any such knowledge.
24 Merely because Mr. Pearson has no knowledge does not
25 support their argument that no justification existed

1 for the County to appeal.

2 Similarly, Columbia Venture cites the
3 deposition testimony of Mr. Chris (phonetic) who
4 merely stated in general terms that a person who
5 submits an appeal has to have technical and
6 scientific data. That's all he said. There's
7 nothing in this testimony that is contrary to this
8 letter or the resolution that you already have.
9 Simply because Columbia Venture disagrees that there
10 was apparently, in their minds, no proper basis to
11 appeal does not rise to the level of due process
12 violation.

13 Also I'll point out, which was already
14 in our memorandum, that Mr. McSwain, who was the
15 County Administrator at the time, testified that his
16 interest in the appeal was an open fair process
17 where all concerns about the accuracy of the data
18 would be examined through FEMA's appeal process.
19 That is certainly another reason, a valid rational
20 basis, that exists for the County's actions.

21 Columbia Venture's claim that the
22 County's appeal somehow violates due process because
23 it was done after Richland County Council passed a
24 resolution agreeing to accept responsibility after
25 several conditions were met is really not -- I think

1 that's a red herring, Your Honor. First, there's
2 nothing in this resolution to even suggest that the
3 County would refrain from exercising this discussion
4 in deciding whether to bring an appeal. And I think
5 it would be improper to even infer that in an
6 agreement not to exercise this discretion prior to
7 Richland County even receiving appeals or prior to
8 an appeal period even being available. So I think
9 Columbia Venture stretches this resolution in
10 February of 1999 way too far.

11 Additionally, I think it's important to
12 add that FEMA did not recognize Richland County as
13 an appellant. We submitted -- reviewed the
14 documentation, we had a right under Federal
15 regulation to determine whether or not we wanted to
16 submit an appeal on our own behalf. We did that and
17 FEMA didn't recognize us as such an appellant. They
18 recognized three appellants -- South Carolina
19 Department of Natural Resources, Blanchard Machinery
20 and two USC professors. We were not recognized as
21 an appellant.

22 So although Columbia Venture has been
23 trying in vain to argue that DNR did, in fact,
24 appeal on behalf of the County, and there certainly
25 was a resolution on December 7th, Richland County

1 expressing a willingness or interest in having DNR
2 appeal on its behalf, the County has produced -- I
3 think it's in Tab 29 of your notebook an affidavit
4 by the director of DNR that DNR did not appeal on
5 Richland County's behalf. They appealed
6 independently, which they had every right to do.

7 So I think that should determine, once
8 and for all, this question of whether or not DNR
9 appealed on behalf of Richland County. Why that
10 matters is Richland County's decision to exercise
11 its discretion to appeal a flood map really, at the
12 end of the day, has no import if we were never
13 recognized as an appellant. So I find it hard to
14 believe that Columbia Venture would argue that
15 there's some due process violation in something that
16 we never were, at the end of the day, recognized as
17 an appellant.

18 Second, they talk about the County's
19 adoption to FEMA's 2002 flood data. There is no
20 question that adoption of FEMA's flood data within
21 its storm water ordinance and within its zoning
22 ordinance constitutes a legitimate public purpose.
23 It is in order to comply with the National Flood
24 Insurance Program which enables its citizens to
25 obtain flood insurance, disaster relief and

1 federally backed mortgages. It also serves the
2 purpose of protecting public health and safety, and
3 I think there's no question that maintaining
4 compliance with the flood insurance program, as well
5 as protecting public health and safety and property
6 damage, is a rational basis in which to adopt FEMA's
7 flood data.

8 Columbia Venture's contention that the
9 flood data was wrong does not change this result.
10 Columbia Venture has spent eight years in Federal
11 Court appealing the merits of the FEMA flood data
12 and they chose to settle that at the end of the day.
13 And, actually, it's real relevant for the purpose of
14 this due process challenge. As I said, even if it
15 is an error, if it's simply an ill-advised or
16 mistake that the County adopted, that still does not
17 rise to a substantive due process violation.

18 Any argument that Columbia Venture may
19 have set the adoption of these flood maps with some
20 sort of Affirmative Action, specifically targeted at
21 Columbia Venture, is nonsense. As you had asked
22 earlier, these are maps that apply to the entire
23 incorporated Richland County as well as the Flood
24 Insurance Study. And just because Columbia Venture
25 affirmatively disagrees with FEMA 's analysis, which

1 was FEMA's analysis I'd like to emphasize and not
2 Richland County's, does not make the County's action
3 a target of Richland County.

4 Next I'd like to talk about the storm
5 water ordinance amendment for 2001 which Columbia
6 Venture obviously seems to be distressed and
7 disturbed about.

8 First I think it's important to start
9 with that the ordinance is a legislative action and,
10 as such, Columbia Venture must demonstrate, by clear
11 and convincing evidence, that the County lacked any
12 basis at all in the exercise of its police power in
13 enacting that ordinance. I don't think Columbia
14 Venture has shown how the enactment of this
15 legislation lacks any relationship to the exercise
16 of police power because, once again, the floodplain
17 regulations contained within it serve the purpose of
18 preventing or mitigating, reducing flood damage in
19 order to protect the health and safety of Richland
20 County residents. Not only do they meet FEMA's
21 minimum standards, but in some respects exceed
22 FEMA's minimum standards for floodplain regulation.

23 And I think a question would be if FEMA
24 proposes minimum standards which the County has
25 adapted some and even more which, by the way, FEMA

1 encourages more restrictive regulations, I don't see
2 how anyone can argue they do not meet some
3 particular important, I might add, health and safety
4 interests in protecting from the dangers of
5 flooding.

6 Now, Columbia Venture focuses on these
7 limited exceptions conferred in 2001 to wastewater
8 treatment plants and schools. Now, these are
9 consistent with the intent and purpose of the storm
10 water ordinance to protect public health and safety.
11 It doesn't authorize the wastewater treatment --
12 let's say City of Columbia and Heathwood Hall, any
13 sort of unlimited construction of floodway. It
14 provides FEMA standard, which is commonly a no-rise
15 for construction for those two uses. Certainly
16 using FEMA's standard, as I said before, given that
17 they are the expert in terms of flood damage
18 mitigation, certainly cannot be called for some
19 action taken that fails to prevent health and
20 safety.

21 Now, Columbia Venture argues this
22 ordinance was targeted at Columbia Venture because
23 these other two uses were allowed. Now, Columbia
24 Venture is subject to the general rule in this
25 ordinance which is essentially no destruction.

1 Columbia Venture is not targeted. They and hundreds
2 of other people in Richland County that have
3 property in the floodway are subject to this. The
4 County granted these exceptions for a good reason,
5 for a legitimate reason, that is fully within its
6 power under police power. Wastewater treatment
7 plants are generally within floodplains and a lot of
8 times within floodways. That's just the nature of
9 what they do. Certainly a wastewater treatment
10 plant that serves both the City and the County, as
11 well as actually Lexington County for that matter,
12 protecting that and allowing the City of Columbia to
13 proceed with its already existing expansion plans --
14 I believe in your records you have a letter that we
15 had provided you from the City of Columbia -- and
16 Heathwood Hall wants a little bit of different use,
17 it's not residential use. It's a school in which
18 kids are there during a limited time period.

19 In contrast, Columbia Venture wanted to
20 build a massive development including thousands of
21 homes, residential homes, which has a greater
22 potential for flood damage, loss of life, loss of
23 property. The County decided for these limited
24 exceptions, for these existing uses, by folks who
25 already had existing expansion plans.

1 Now, Columbia Venture argues that the
2 ordinance was targeted on Columbia Venture because
3 opponents of Columbia Venture prepared the first
4 draft. However, the exceptions proposed by Southern
5 Environmental Law Center mirrored language that I
6 believe was submitted prior to Southern
7 Environmental Law Center being around and that was
8 provided by Heathwood Hall. So I don't think, one,
9 the fact that Southern Environmental Law Center,
10 which they were opponents of the project, simply
11 because they drafted a proposed ordinance amendment,
12 one, makes any difference. If you're going to land
13 use arena -- kind of like lobbyists. Lobbyists are
14 there in order to provide resources. It's not an
15 unusual occurrence for opponents, proponents,
16 interested parties to provide draft ordinances or
17 suggestions for revision.

18 So I don't think that Columbia Venture's
19 argument that simply because Southern Environmental
20 Law Center drafted makes any difference at all.
21 Actually, I think it's also significant, especially
22 when you look at Scott and MLC and Helping Hand,
23 that County Council had been deliberating this
24 ordinance for months prior to first reading of it in
25 March of 2001. It received and -- requested and

1 received a legal opinion from outside legal counsel
2 about the meaning of the word impede and also
3 questions that arose about the memory provision, it
4 received that opinion. It also asked Columbia
5 Venture for its opinion which they provided. And
6 Southern Environmental Law Center provided an
7 opinion unsolicited by the County, but many other
8 people provided their opinions which the County took
9 and considered.

10 But this fact I think undercuts any
11 argument that Columbia Venture may have that the
12 County acted swiftly, without any legitimate purpose
13 solely to target us. The fact that County staff
14 recommendations were made for several months, that
15 they deliberated over staff recommendations, does
16 not make any sort of procedural irregularity that's
17 fundamental. County Council is not required to
18 accept staff recommendations as far as anything for
19 that matter. And so that is, I think, the relevant
20 point.

21 And unlike the facts in Scott, no County
22 staff advised that its actions were clearly contrary
23 to law and nor can that be later advised because
24 there's nothing contrary to law about the ordinance.

25 Now, the Council's motion giving first

1 reading to this ordinance included the Council's
2 intent to make clear the exceptions in no way
3 reflects Council's position on any thought in this
4 area. If you look at the Council minutes for that
5 action, which you have, that statement was made part
6 of the motion which was carried by Richland County
7 Council. Columbia Venture makes much about a single
8 council member, Ms. Bernie Scott, who reflected a
9 different view of the matter. Her view, she's
10 entirely entitled to it. There were folks on County
11 Council who supported the amendment, there were some
12 that did not support the amendment. There was a
13 simple majority that did or we wouldn't be here
14 today I guess.

15 But Ms. Scott's was not part of the
16 motion and, therefore, does not reflect the intent
17 of County Council. It is the motion itself of the
18 ordinance, the plain language of the ordinance that
19 expresses the intent of the body.

20 I think Helping Hand, that Fourth
21 Circuit case, is no help to Columbia Venture because
22 there the County admitted the ordinance at the last
23 minute to grant a grace period only to one clinic
24 and not the other and had some despair of treatment
25 of a single category of land uses.

1 As I mentioned before, these are
2 completely -- this is like apples and oranges.
3 Heathwood Hall and City of Columbia were preexisting
4 uses that had existing expansion plans and was ready
5 to go, and they made a request to the County for
6 some sort of relief.

7 Also, Columbia Venture has not and I
8 believe cannot prove any facts sufficient to show,
9 by clear and convincing evidence, that there was
10 absolutely no rational basis whatsoever in the
11 provisions for the storm water ordinance. Even if
12 the Council's actions were driven by opposition to
13 Columbia Venture, the opposition has no bearing or
14 rational basis that exists. It cannot show by any
15 sort of measure that the Council's legislative
16 action was tainted by procedural -- fundamental
17 procedural irregularity. There were three readings,
18 there was a public hearing, there was no last minute
19 run, nothing suspicious along those lines. And they
20 did not accelerate the legislative process -- matter
21 of fact, it took more time than it normally does and
22 I heard lots of comments dealing with this storm
23 water ordinance.

24 And, also, I think it's important to
25 know that this storm water ordinance with the

1 no-impepe language had been on the County's --
2 within the County's storm water ordinance since at
3 least 1984. There's nothing -- the County's actions
4 here did not pass a new restriction. It simply
5 created two narrow exceptions in which they had to
6 comply with FEMA's minimum standard, which is
7 actually quite restrictive, and it's also important
8 to note that all those photos that Columbia Venture
9 brought forward showing buildings, structures
10 within -- that was built by Heathwood Hall, they had
11 all to comply with the no-rise standard which they
12 did. And they also -- when you look at those photos
13 they're elevated, Your Honor. That means that
14 Richland County required them to comply with
15 additional requirements in the flood -- in the storm
16 water ordinance to elevate their buildings in order
17 to assure greater flood protection like they had in
18 the past. Heathwood Hall has, at least since
19 Richland County has adopted the floodplain
20 regulations in the late '70s/early '80s, required
21 Heathwood to elevate its buildings.

22 Moving on to the moratoria Richland
23 County, following the United States District Court's
24 order of vacatur, the County enacted a series of
25 three moratoria each lasting 30 to 60 days, I

1 believe --

2 THE COURT: I don't mean to interrupt
3 you at this point but I --

4 MS. TAYLOR: Sure.

5 THE COURT: I concur with you on the
6 moratoria. I had heard a lot from the other side,
7 but I think the reasons for that is everything was
8 just in a flux.

9 MS. TAYLOR: Exactly.

10 THE COURT: They just didn't know what
11 was going to happen, they were conferring back and
12 forth with FEMA and what to use and so on. I mean,
13 I don't want to totally cut that issue off from
14 being argued, but I understand the County's argument
15 that it was a period of flux and until they got
16 further guidance from FEMA they didn't know what
17 they were going to do. I think that was --

18 MS. TAYLOR: Okay. I can skip --

19 THE COURT: -- the basis for the
20 moratoria --

21 MS. TAYLOR: -- over the moratoria.

22 MR. GRIER: Your Honor, I would like to
23 respond to that.

24 THE COURT: That's fine and you can, but
25 my point I guess is I understand their position.

1 But I can certainly be persuaded differently, but I
2 do understand your position on it.

3 MS. TAYLOR: Okay. Well, just a brief
4 statement on the moratoria. Once again, there's
5 entirely ample legitimate government reason, clearly
6 within the County's police power/authority, to
7 initiate moratoria, to not exceed nine months. I
8 think it was a careful, narrow, cautious yet wise
9 decision to give some time in order to let some -- a
10 complex situation influx shake out. And you must
11 excuse me, I'm recovering from a cold. My cough
12 sometimes gets me when I least expect it.

13 The County's letter of map revision that
14 took place at the end of 2006. Once again, the
15 County has broad discretion in determining whether
16 to proceed on the letter of map revision has
17 authority under Federal regulation to submit map
18 revisions. There's no requirement that County
19 Council must vote on a submittal of LOMR, as
20 Columbia Venture seems to try in vain to make some
21 sort of procedural irregularity argument. LOMRs are
22 an administrative decision, it was made by the
23 Administration as the deposition testimony of
24 Mr. Pope, who was the County Administrator at the
25 time testified. There is no procedural irregularity

1 in the County submittal of the LOMR. The fact that
2 County Council was apprised of the staff's decision
3 to proceed with the LOMR during executive session
4 does not prove any sort of fundamental procedural
5 irregularity. As a matter of fact, County Council
6 is entitled to receive legal advice in executive
7 sessions, which they did dealing with the events
8 surrounding the U.S. District Court rule of vacatur.

9 Columbia Venture makes this one
10 statement in their memo that is trying to make out
11 an issue of procedural irregularity in which it
12 states that the LOMR was pursued notwithstanding
13 guidance from FEMA to suspend the recalls, but it
14 also argues that FEMA turned around and said that it
15 was some ultra vires act on behalf of Richland
16 County.

17 Now, the statement that the LOMR was
18 pursued notwithstanding guidance from FEMA to
19 suspend the request refers to some deposition
20 testimony regarding an e-mail which was not provided
21 to this Court, and I've got it right here. I turn
22 your attention to the bottom page in which it stated
23 that Mr. Bellamo (phonetic), who's a FEMA engineer,
24 suggested that the County hold off for a week or two
25 on what to do about proceeding with a LOMR.

1 Ms. Carter testified, which was cited in
2 Columbia Venture's memorandum, that she went ahead
3 and proceeded with submitting a requisition to
4 Richland County to start the curing process a week
5 later. I fail to see how waiting a week as opposed
6 to waiting two weeks and even waiting four weeks
7 after FEMA's mere suggestion that they wait one to
8 two weeks, and the County waited one week, how that
9 can be any sort of contention from Columbia Venture
10 that the LOMR was pursued notwithstanding guidance
11 from FEMA to suspend the request.

12 Columbia Venture asserts that the LOMR
13 was submitted without public notice. Notice to
14 property owners is required of a LOMR only if the
15 base flood elevations requested were higher than the
16 existing BFEs. I think I pointed this out in my
17 memorandum. In this case, the BFEs were not higher;
18 thus, no public notice was required.

19 Now, this assertion by Columbia Venture
20 that the LOMR was determined to be ultra vires,
21 there's a citation to Mr. Pope's testimony that just
22 simply does not support their contention. Mr. Pope
23 simply confirms that FEMA, after receiving the
24 County's LOMR, decided to be processed as a letter
25 of physical map revision. FEMA can decide how to

1 process its own map revision request received and
2 there's nothing that suggests that the County cannot
3 submit a LOMR pursuant to a regulation which you
4 have, which is 44CFR65.4.

5 At the end of the day, Your Honor, even
6 if all these things you accept as true as some sort
7 of procedural irregularity, I think it falls far
8 short of what is required for substantive due
9 process violation.

10 The next to last issue I'd like to
11 raise, unless you have any questions about LOMR, is
12 the County's ordinance adopting the '95 BFEs while
13 leaving the 2002 floodway in place. This was a
14 result of FEMA's guidance in which they told
15 Richland County that the order of vacatur did not
16 vacate the 2002 plan. And even if Richland County
17 wanted to adopt the '95 floodway, doing so would
18 violate FEMA's floodplain management regulations.
19 Clearly, assuring compliance with the Flood
20 Insurance Program provides a rational basis for the
21 County's actions to adopt its ordinance.

22 Now, Columbia Venture asserts that using
23 these two different data sets violates the County's
24 definition of a repertory floodway within a County's
25 ordinance. Even if it's true, once again, this sort

1 of violation fails to amount to a due process
2 violation. There's ample evidence -- or actually
3 rules, cases from the Fourth Circuit and elsewhere
4 that describes simple capricious and arbitrary in
5 the sense of administrative law or state law. It's
6 not the same as capricious and arbitrary under the
7 due process clause. As I mentioned before, due
8 process protects against oppressive and abusive
9 government action. Merely adopting two sets of data
10 that has a result of having a repertory floodway
11 definition that they contend is not met does not
12 rise to the level of abusive or oppressive
13 government action.

14 And also, lastly, the County has in the
15 memo that we provided and included deposition from
16 the Richland County Planning Director who has
17 explained quite well and rationally, I think, how
18 they would apply those two data sets.

19 Lastly I want to talk about opposition
20 to Columbia Venture. I touched on this earlier. If
21 there is opposition to Columbia Venture or, let's
22 say, opposition to people with land use, first I
23 think it's important to point out that opposition in
24 and of itself is not a due process violation. If
25 that was the case, I don't see how local governing

1 bodies can function. They would be exposed to due
2 process violations all the time simply because
3 there's a controversy of land issue before them.
4 Opposition to Columbia Venture only is relevant when
5 there's no other legitimate government basis for the
6 Government making the decision that it did because
7 if there's nothing before the County Council, for
8 example, other than we don't like Columbia Venture
9 or we don't like car dealerships, then certainly
10 that gives reason for the Court to make the decision
11 that a due process violation may have occurred
12 because simply not liking car dealerships has no
13 basis in the police power exercise of -- that
14 Richland County carries out.

15 Now, Columbia Venture seems to focus its
16 attention on one County Council member, Kit Smith,
17 who was County Council Chair at the time, and
18 somehow argues that her opposition to Columbia
19 Venture's project amounts to a due process
20 violation. Now, as I said, opposition by one
21 elected official is relevant only when that's the
22 only evidence and County Council or City Council,
23 what governing body seems to be basing a decision
24 purely on some irrational opposition to particular
25 use.

1 Now, in Helping Hand there's an example
2 of one Council member who was actively opposed to a
3 particular -- I guess that was the methadone clinic,
4 I believe. That introduced a bill -- specifically
5 opposed to that particular use. There's nothing
6 similar in the facts of this case dealing with Kit
7 Smith. There's no evidence that she was actively
8 engaged in opposing the project like that seen in
9 the Helping Hand. And even if that was true,
10 Ms. Smith was only one of 11 Council members and I
11 believe that County Council's job is to decide
12 whether to oppose a particular land use proposal or
13 support a land use proposal.

14 I think if you are to carry Columbia
15 Venture's logic that a single Council member who is
16 opposed is somehow a due process violation, I think
17 you would feed an important part of the public and
18 its democracy being able to petition and address the
19 government and to exercise First Amendment rights.
20 And I think it really upends what the democratic
21 process is for a legislative body because they are
22 supposed to make decisions.

23 Now, Ms. Smith's service on the board of
24 Southern Environmental Law Center, Columbia Venture
25 makes much of that in terms of sense of conflict of

1 interest in her service on the Southern
2 Environmental Law Center board and her service as a
3 Council member. Now, Southern Environmental Law
4 Center represented intervenors in Columbia Venture's
5 FEMA appeal where the issue is whether FEMA's data,
6 the final determination that took effect in February
7 2002, was technically and scientifically incorrect.
8 The County had no role in this dispute. The
9 County's interest was land use and floodplain
10 management.

11 So, first off, I think it's important to
12 point out that the difference in interests in how
13 Southern Environmental Law Center's representation
14 of appellants dealing with the scientific and
15 technical merits of flood map, which Richland
16 County's adopted, and required by Federal law to
17 adopt whatever FEMA's final flood map is has any
18 sort of conflict of interest in terms of what the
19 County's decisions are relating to land use.

20 Now, Columbia Venture also asserts that
21 the same time the County was taking these so-called
22 procedurally irregular actions in response to the
23 order of vacatur, the Southern Environment Law
24 Center was actually seeking a stay of the order as
25 if that somehow was making -- created some sort of

1 conflict of interest.

2 Now, I think if you look at the evidence
3 that's submitted, the County's moratoria was
4 enacted, the series of votes in 2006, started
5 beginning January -- I think the effective date of
6 the first one was in February and expired sometime
7 in September of 2006. The letter of map revision,
8 the LOMR, was submitted the end of 2006. Southern
9 Environmental Center's motions for a stay was filed
10 in 2008, so I'm not sure if I understand where that
11 conflict of interest or what Columbia Venture
12 believes Kit Smith should have disclosed her service
13 on Southern Environmental Center would have
14 accomplished.

15 Finally, there's a couple of assertions
16 that Columbia Venture makes in which Kit Smith is
17 describing Columbia Venture in a newspaper article
18 from 2007, I believe as Chuckie dealing with the
19 movie character. I've never seen the movie, I'm not
20 a fan of horror movies.

21 THE COURT: I haven't seen a movie since
22 The Big Chill.

23 MS. TAYLOR: That's been a while. Now,
24 Columbia Venture, in its memorandum, characterizes
25 Ms. Smith as saying that she tried to kill Chuckie

1 and it kept coming back to life. Now, first, I want
2 to point out to you that when you actually look at
3 the article it states they thought he was dead and
4 he keeps coming back. So I think it's a little bit
5 of a stretch on Columbia Venture's part because
6 they're trying to imply that Kit Smith is trying to
7 kill Columbia Venture.

8 THE COURT: She said that the Green
9 Emerald was a zircon --

10 MS. TAYLOR: A zircon of greed, we'll
11 get to that, yes. Besides Kit Smith's comment about
12 Chuckie, was made in November 2007, years after any
13 County actions that Columbia Venture complains of
14 and I -- and Columbia Venture can't reasonably
15 convince this Court that this attempt at humor, and
16 I think if you look at Ms. Smith's deposition
17 testimony which I have excerpts from she was asked
18 about the Chuckie remark, she didn't have any sort
19 of retroactive effect.

20 Further reference to Chuckie is made on
21 Page 54 of Columbia Venture's memo where Columbia
22 Venture suggests that her reference to Columbia
23 Venture's project as Chuckie indicates some sort of
24 inference of hostility which, again, in deposition
25 testimony, which I guess I probably should give it

1 to you since I am talking about it, she was
2 specifically asked if the reference to Chuckie,
3 which seemed to be more of an attempt at humor,
4 asked if that indicated hostility. And Ms. Smith
5 testified: I would call it massive frustration. I
6 wouldn't call it hostility. I would call it
7 creative writer -- I'm sorry, I'm reading the wrong.
8 I just skipped to the zircon of greed, let me get to
9 the Chuckie, excuse me. Sorry for my error.

10 (Reading.)

11 So the point of this deposition
12 testimony, which you can review, is that she was
13 specifically questioned as to whether or not this
14 Chuckie comment was indicating some hostility, and
15 she said not, it was indicating her level of
16 frustration and fatigue.

17 And staying with zircon of greed, if you
18 look at the deposition testimony she testified that
19 this was a private document that she used for her
20 own personal way of venting. It was never provided
21 to anybody in the public, was never circulated.
22 Merely represents her private thoughts and I think
23 it is, quite frankly, unfair of Columbia Venture to
24 bring this forward of evidence as hostility on the
25 part of a County member when she has testified that

1 it is a private document. I don't think it has any
2 sort of relevance or as far as her actions as far as
3 a County Council member.

4 In conclusion here, Your Honor, I think
5 to wrap up, I think Columbia Venture has failed to
6 present any evidence sufficient to prevail on the
7 due process claim, and the pivotal factor here is
8 that Government action that clearly serves
9 legitimate government interests despite opposition
10 for purposes of this memo to believe that, you know,
11 it automatically fails as far as the due process
12 violation. Mere mistaken or ill-advised action
13 cannot meet due process requirements because they
14 lack that characteristic of some deliberate action
15 to forward a property interest that is intended to
16 be oppressive or abusive. Opposition is common
17 place in land use disputes and cannot serve to
18 support due process solely because there's
19 opposition present in a land use controversy. No
20 fundamental procedural regularity exists in this
21 case, so there's no deliberate action to break the
22 law. There is no rushing of ordinances. I believe
23 if you look at every legislative action that's
24 properly enacted, there is no unprecedented practice
25 here.

1 I will admit that the circumstances in
2 which Richland County was acting was not a party to
3 that action, it was intending in good faith to be
4 able to respond to the uncertainties with that
5 order.

6 For these reasons I think that the
7 County's motion for summary judgment should be
8 granted. There is no evidence that Columbia Venture
9 has submitted that I believe rises to the level of
10 due process violation. If you have any questions
11 I'll be happy to answer them, or I'll sit down and
12 let Mr. Grier continue.

13 THE COURT: It's almost 1:30. In
14 fairness --

15 MS. TAYLOR: We should eat something.

16 THE COURT: That we should take a break
17 so we cannot be distracted in regards to the
18 argument. There's also one thing I would like --
19 before we begin his argument I would like for you to
20 address and that is the action of Richland County in
21 regard to the storm ordinance. And I understand
22 that before this change in the floodway that
23 Richland said that you could not impede, couldn't
24 fill and other matters there in the floodway, that
25 you could -- then but you can maintain levees. I

1 believe that was in the prior -- that was there
2 before, before all this change in the floodway.

3 But what I'm interested in is the --
4 after the floodway was changed, while they
5 maintained the language about the allowance of the
6 maintenance of the -- that they specifically
7 provided that this should not be construed to allow
8 the increase and type and width of the levee. And
9 that aspect, of course, was what CV said in the
10 beginning they wanted to do. Since these were
11 uncertified levees they wanted to have these levees
12 to actually meet the 500-year requirement.

13 And I'd like, when we come back, for you
14 to address, of course, in the due process aspect
15 relative to inquire why that was done, why that was
16 singling out and what general purpose did that
17 serve.

18 MS. TAYLOR: Are you talking about the
19 language within the floodway provision that had the
20 no-impede language?

21 THE COURT: The storm water ordinance
22 was amended after the floodway was changed; right?

23 MS. TAYLOR: Amended in 2001.

24 THE COURT: That's right.

25 MS. TAYLOR: April 2001.

1 THE COURT: And that they went further
2 than what they had done before with regard to the
3 levee situation. They still said they could
4 maintain the levees but they added the provision
5 that said you cannot increase the height nor
6 increase the width which, of course, CV would have
7 to do in order to improve the levees to meet FEMA
8 requirements.

9 MS. TAYLOR: I'll be happy to address
10 that after lunch.

11 THE COURT: All right. Let's take about
12 however for lunch -- almost an hour. Be back here
13 at 2:30.

14 (A luncheon recess transpired.)

15 THE COURT: I believe when we left off I
16 had a question.

17 MS. TAYLOR: Your Honor, I want to make
18 sure we're talking about the right thing before I
19 answer. May I just show this to you to make sure
20 we're talking about the same thing?

21 THE COURT: Yes. (Reading.) That is.

22 MS. TAYLOR: Okay.

23 MR. BECKER: We're talking at Section
24 826H, last sentence, last paragraph?

25 MS. TAYLOR: Yes. Okay. Your Honor, I

1 believe the question you had was, again, dealing
2 with this provision relating to the substantive due
3 process factor under Scott related to targeted
4 action.

5 THE COURT: Would you repeat that?

6 MS. TAYLOR: Sure. Your question
7 relating to the provision was asking about this
8 relating to targeted action?

9 THE COURT: Yes, that's correct.

10 MS. TAYLOR: Okay. Well, let me first
11 start by saying, you know, the intent of County
12 Council was reflected in the ordinance -- the
13 language of the ordinance itself and the minutes in
14 which County Council adopts the ordinance. So as
15 far as you know, whether or not there was intent to
16 target, I think that's what you have to look at. If
17 the minutes themselves -- and I mentioned earlier
18 this is for the -- you have this, it's under
19 Columbia Venture's records Page 340 under first
20 reading of storm water ordinance. On March 20,
21 2001, there was an amendment to the motion
22 requesting the Chair to write a letter to FEMA that
23 was voted by Council in no way reflects Council's
24 position in any development in this area and that
25 was incorporated in a motion. So that intends the

1 intent of the legislative body in terms of the
2 enactment of this ordinance.

3 Secondly, I think the section dealing
4 with the -- I think referring to the last part of
5 the paragraph that says maintenance and repair of
6 levees, dikes, dams and similar structures provide,
7 however, that the sentence shall not be construed
8 as authorizing or requiring the repair or
9 maintenance of any structures to the extent such
10 repair or maintenance can result higher or wider
11 than it was before such repair or maintenance.

12 And how I read this ordinance, there is
13 a section that is entirely devoted to levees,
14 although this section does not limit itself to
15 levees. I read this to be levees, dikes, dams and
16 similar structures. But if you look at the
17 provisions dealing with maintenance, especially it
18 would be on Page -- gosh, it's Section 8-38,
19 maintenance standards for levees in particular, it
20 talks about earth embankment and how those shall be
21 maintained and not less than design grade and
22 section by replacing material that's sloughed off or
23 eroded or sagged and that kind of thing, and that's
24 certainly allowed. It's actually an express
25 statement of what maintenance is. So how I read

1 this in total, you know, is that it's asserting for
2 clarification purposes that that sort of maintenance
3 activity is not prohibited by this section.

4 And, lastly, I think as far as
5 substantive due process goes, if you look at Tab 33
6 of the record of evidence dealing with property
7 interest, and I'll be happy to -- y'all all have it
8 but it's a letter that Columbia Venture submitted to
9 Richland County Council on April 2nd, 2001 by which
10 I believe the second reading of this ordinance, and
11 they stated in here that: While we continue to have
12 concerns over the proposed amendment to the storm
13 water ordinance, Columbia Venture decided our focus
14 could be working towards the development agreement
15 with Richland County, Richland School District 1 and
16 possibly City of Columbia. We also appreciate your
17 assurance at the last Council meeting. If we can
18 reach agreement on Green Diamond and in order for
19 the project to proceed, you would support
20 appropriate modifications at that time. For these
21 reasons and because of your statements that votes on
22 the storm water ordinance should not be viewed as up
23 and down on Green Diamond, we are withdrawing any
24 opposition to the amendment currently before you.

25 And, actually, Pope is making a good

1 point as far as targeted action. The actual
2 language of this ordinance applies to levees, dikes,
3 dams and similar structures. Any further questions
4 or clarification, Your Honor?

5 THE COURT: No. I didn't know whether
6 Mr. Johnson was just attempting a stage --

7 MR. JOHNSON: It was, but I'll be glad
8 to say it out loud. This is targeted, doesn't just
9 deal with levees. Anybody who got's a dike or dam
10 is subject to this language you were concerned
11 about.

12 THE COURT: All right. Thank you very
13 much. Mr. Grier, you may proceed, sir.

14 MR. GRIER: Thank you, Your Honor. Do
15 you have our appendix in front of you?

16 THE COURT: Let me tell you folks
17 something. I rented literally at least a trailer if
18 not a U-HAUL. What I did was to take your memoranda
19 and I put selected cases on the book. But as far as
20 evidentiary aspects, you sent me those and I read
21 them in conjunction with your memo but I didn't
22 bring it with me.

23 MR. GRIER: I'm going to provide you
24 with a copy because I'm going to refer --

25 THE COURT: Appreciate that.

1 MR. GRIER: -- to some of the materials
2 in there. And Your Honor, I want to start with --
3 in 1994 with the flood map that was the effective
4 flood map at that time.

5 THE COURT: Okay.

6 MR. GRIER: Do you have a copy of that?

7 THE COURT: You know, I do but my copy
8 is so dark. Can you bring that up here just a
9 second and let me look at it? Because the copy I've
10 got is so dark, it's sort of hard to make out.

11 MR. GRIER: We can try to get you a
12 bigger one.

13 MS. TAYLOR: I have extra originals of
14 those if you'd like.

15 THE COURT: That would be great.

16 MR. GRIER: Okay.

17 THE COURT: Okay. Thank you.

18 MR. GRIER: What this shows, Your Honor,
19 is the floodway is -- it is hard to see, but it runs
20 right along the riverside toe of the levee.

21 THE COURT: Mm-hmm.

22 MR. GRIER: So the levee is -- it is not
23 in the floodway. This is part of the floodplain and
24 let me explain that a minute. This was the
25 effective map in January of 1994. There's some

1 confusion, I think, in the memorandum that was filed
2 by the County and the same confusion I saw in the
3 opponents to the Green Diamond projects. They
4 assume that FEMA thought these levees were certified
5 levees and then in 1998 said, oh, my goodness,
6 they're not certified, we have to put a floodplain.

7 That's not true at all. FEMA recognized
8 these levees in the Flood Insurance Study that we've
9 included in the appendix as non-certified levees
10 that would affect the high clog of the area, but
11 they put a floodway behind the levees -- I mean,
12 excuse me, a floodplain. So that meant if you look
13 at the map, if you get one you can see better, there
14 are lines in here. These are base flood elevations
15 that go through here, so this is a floodplain behind
16 this levee.

17 Had FEMA recognized that levee as a
18 certified levee, this would have been Zone X behind
19 that -- behind the levee. Now, that was in 1994 and
20 the Flood Insurance Study that went along with that
21 was revised in July of 1995. So you will see some
22 references sometimes to the 1994/1995 base flood
23 elevations. Really, the 1994 and the Flood
24 Insurance Study that was revised in 1995. And we
25 have included in the appendix a couple of pages from

1 that 1995 revised Flood Insurance Study and that
2 starts at Page 84. And if Your Honor would -- on
3 Page 86 they make a reference to the -- to the
4 levees and they say that the levees -- they conclude
5 they will breach in the event of a base flood. And
6 that's the reason that they didn't recognize them as
7 certified levees and put a floodway behind it.

8 Now, on Page 88 is the base flood
9 elevation determinations that go along with the
10 cross-sections of this property on the Congaree
11 River. That's on Page 88. And if you look at that,
12 Your Honor, you'll see the first cross-section there
13 is cross-section A and that's at the bottom --
14 that's the cross-section at the bottom of this map
15 and it goes on up through I believe E, which would
16 be at the top of this property.

17 Now, you will see what FEMA does in
18 publishing flood elevation determinations is the
19 National Flood Insurance Act authorizes FEMA to
20 promulgate and publish flood elevation
21 determinations for land use purposes. And that's a
22 defined term in their regulation, that means the
23 determination of the water surface elevations of a
24 flood, and there's more than one. If you look at
25 this table on Page 88, what you see there is you'll

1 see three of them. Regulatory without floodway and
2 with floodway, base flood water elevations. And
3 you'll notice the last column is increase, and if
4 you count down there and look and you'll see none of
5 those increases exceed one foot. You have a couple
6 that are one foot, but none exceed one foot.

7 If you look at cross-section A, the
8 regulatory is 1346. The regulatory is defined in
9 the regs as a base flood elevation that will include
10 water from a back water source. Example of that
11 might be Gills Creek, you have water -- flood water
12 from the Congaree River backing up that raises the
13 level. But here they're the same so you don't have
14 any back water influence there. You've got 1346,
15 1346, then your floodway elevation is 1356, one foot
16 increase.

17 Now, this is, I think, very significant
18 to this -- to the case, Your Honor, and that is the
19 FEMA floodway. In promulgating the National Flood
20 Insurance Act in the National Flood Insurance
21 Program, both the United States and FEMA struck a
22 balance between the ability of the community to
23 permit development in flood prone areas and the
24 protection from flood hazards. And the first thing
25 they did is they focused on a particular flood, and

1 that's the flood called the one percent annual
2 chance flood. That's the flood that has a chance
3 being equally exceeded in one year, one percent
4 chance, and sometimes called 100-year flood. So
5 they focused on the 100-year flood, they could have
6 been more conservative and gone to the 500-year
7 flood and/or less conservative, or 25 or 50, but
8 they focused on this 100-year flood and they call it
9 the base flood. That's what they planned for, was
10 the 100-year or base flood.

11 Now, this is -- this diagram is the
12 better copy on Page 89. This comes out of FEMA's
13 Flood Insurance Study and this explains, I think,
14 very well the FEMA floodway. And you'll see there
15 there's a line going from A to B and there's a
16 little arrow pointed to the flood elevation before
17 encroachment on the floodplain. That would be the
18 water surface elevation of a base flood.

19 Now, what the engineers do that
20 determine these numbers that you see in this table,
21 these elevations, in this case they use the
22 hydraulic engineering program called an HEC-2.
23 That's stands for something like Hydrologic
24 Engineering Center-2, and it's one-dimensional. It
25 can only analyze water -- water flowing, you know,

1 one direction down the river. And it can tell you
2 on these cross-sections what the average depth is
3 across the sections.

4 What they do, there's several methods
5 for getting this floodway that the engineers use.
6 And if the floodway or if the channel of the river
7 they're looking at is a political boundary between
8 two communities, they have to use FEMA's
9 regulations -- something called an equal reduction
10 of conveyance floodway.

11 THE COURT: What does that mean? I saw
12 that. I never understood it.

13 MR. GRIER: Okay. If you look at this
14 diagram it's easier to see I think on Page 89,
15 you'll see the level of base flood. And you see
16 that little -- right in the middle it says channel,
17 and you see that surcharge there? That's where you
18 figure a floodway under this program. The engineer
19 will use something called Method 4, and he will put
20 in there what the surcharge is. And in FEMA's case
21 it's one foot, so that's what he does. And then
22 the -- the program will generate a floodway
23 elevation for these cross-sections, it will show the
24 width and it will show the water surface elevation.

25 MR. JOHNSON: Your Honor, I have an

1 objection. Mrs. Taylor was sent down because there
2 was some concern that she was testifying. I haven't
3 heard anything that relates to the motion that we
4 had on the floor which has to do with what we're
5 arguing about. This is just Mr. Grier telling us
6 his view of what the law is and what these things
7 are. Unless it's relevant to the motion, I object.

8 THE COURT: Well, I overrule that. He
9 went over this, he discussed in his memo.

10 MR. GRIER: Mm-hmm. Now, I think this
11 is critical -- this is a critical point here, Your
12 Honor, is that under -- the engineer will put that
13 one foot in there surcharge and the program will
14 generate these lines here. It will generate -- tell
15 you where the floodway is on the ground and it will
16 give you the surface elevation. And in FEMA's case
17 it can't exceed this surcharge, can't exceed one
18 foot.

19 Now, a local community, if it wanted to,
20 can adopt a more stringent floodway. It can use,
21 like, six inches. If you use the six-inch floodway,
22 this line C and D are going to move this way. If
23 you used a zero, these lines are going to move to be
24 co-extensive with your floodplain.

25 Now, the equal reduction of conveyance

1 is that when you compute this floodway, when this
2 river is a political boundary, you have to reduce
3 the conveyance on each side by an equal amount and
4 that's the volume here. This volume has to equal
5 that volume, that's how they figure it. And that's
6 done by a particular method in this HEC-2 hydraulic
7 model.

8 Now, the significance of this is that
9 the balance that Congress and FEMA struck in
10 allowing local communities to develop on floodplain
11 properties, they allow you to build in the
12 floodplain, you can -- you may have to raise the
13 property line, the level of your elevation of your
14 property or raise your house somewhat. Your living
15 area has to be above this line here by a certain
16 number of feet -- maybe two feet, I think. And the
17 idea being that if a flood comes, you know, you get
18 out of your house and when you come back you've just
19 got a ring of mud around it and it wards that off,
20 you come in your door and your house is dry. That's
21 the idea about building in a floodplain.

22 Now, in the floodway you can also build.
23 There is a restriction, though, and this is critical
24 I think to this whole program. This is the internal
25 logic of the whole National Flood Insurance Program

1 and that is C, he can build here but whatever he
2 builds he can't displace water. So he's got to have
3 engineering to demonstrate that whatever he wants to
4 build in that floodway is not going to displace
5 water on D. And D can build so long as he can show
6 that he's not displacing water either in the event
7 of one of these floods.

8 And that's why if you look at the
9 beginning at Page 505 in this appendix you will see
10 what Heathwood Hall has been able to build in the
11 floodway by showing a no-rise. And what they do is
12 they elevate the buildings, they put parking
13 underneath and they're able to demonstrate that
14 those towers in the parking deck don't cause a rise
15 in the flood levels and they're permitted to build
16 these very substantial buildings in a floodway under
17 a no-rise standards.

18 Now, so -- it's a misconception, I
19 should say, that you can't build in a floodway. In
20 fact, probably most of your beach houses down at the
21 beach that are built up on telephone poles or else
22 pilaster are probably in a floodway. So that was
23 the balance that Congress and FEMA struck in
24 allowing communities to develop flood prone areas
25 but, at the same time, protecting the public from

1 flood hazards. You've got to build above the BFE
2 level in the floodplain for your living area. Here
3 you've got whatever you build -- can't displace
4 water, but you're permitted to build in either
5 location.

6 Now, when Columbia Venture first started
7 looking in its property the evidence will show that
8 in June of 2008 FEMA had what it called in the
9 Federal litigation a working draft FIRM.

10 THE COURT: You said 8 -- you said 2000.
11 You mean --

12 MR. GRIER: Excuse me. I meant 1998.
13 I'm sorry, Judge.

14 THE COURT: Sure.

15 MR. GRIER: I'm getting old and getting
16 my dates all jumbled up. But FEMA initially started
17 flood mapping in Lexington and they pretty much
18 completed their flood mapping over in Lexington and
19 in 2 -- in 1998 they shared with the County what
20 they called in the Federal Court a working draft
21 FIRM. Now, in order to start an appeal comment
22 period, FEMA will publish a revised preliminary
23 flood insurance rate map and study. That's how they
24 start an appeal process and a comment period.

25 Now, the wall that deals with these

1 Federal agencies is such that when they have a
2 comment period you can submit comments, and this
3 happens frequently with these big companies where
4 drug companies all -- it's called notice and comment
5 rule-making where the agency proposes a rule. And
6 it gets all these comments from, you know, different
7 drug companies or whatever companies. It has to --
8 under Federal agency law it has to respond to the
9 significant comments it receives. If it doesn't,
10 the Federal Court will set the final rule. So it's
11 a comment period as well as an appeal period.

12 And in the County's brief, they
13 mentioned that FEMA says you can't appeal a
14 floodway. Well, FEMA in the Federal litigation here
15 did not take that position because my position was
16 that if you can't appeal the floodway, then you can
17 appeal it under the Administrative Procedure Act.
18 And FEMA said, we're not taking the position that
19 you can't challenge a floodway under the National
20 Flood Insurance Act. And what you're challenging
21 here is your elevations when you -- when a landowner
22 makes a scientific and technical appeal to a FEMA
23 revised preliminary Flood Insurance Study and Flood
24 Insurance Rate Map, and in that elevation determines
25 the width of your flood plain and your floodway,

1 that's what you're challenging, and the law says --
2 the statutes say you're supposed to submit
3 scientific and technical information to challenge
4 these numbers which translate to those widths.
5 That's what the law is.

6 Well, no. When FEMA shared that map
7 with the County, the County asked FEMA not to
8 publish it. FEMA was still studying it. I submit
9 that as a reasonable inference from the
10 correspondence here that FEMA was still fudging the
11 map. In fact, they told the County that. But the
12 County nevertheless said, don't publish it. We've
13 got a landowner that's concerned with the -- with
14 the map, and FEMA agreed that it wasn't going to
15 publish that map.

16 Now, there's been some -- Mr. Johnson
17 made the comment that, well, Columbia Venture knew
18 about this proposed map at the time it bought its
19 property. Well, it did. It was a proposed
20 non-published map. If the County wanted to use it
21 it could use it. But the engineer at that time, the
22 County floodplain -- storm water ordinance said
23 although you can't put anything in a floodway that
24 will impede the free flow of water, in the
25 Engineer's deposition -- and it's replete in the

1 minutes in the appendix that we gave you -- took the
2 position that that was a no-rise standard. That was
3 consistent with the internal logic of the National
4 Flood Insurance Program. So that he had, in fact,
5 allowed projects to be built in a floodway on
6 showing these no-rise certificates and we quote
7 that, submitted that deposition testimony as part of
8 the appendix and referred to it in our memorandum.

9 So that was at the time going into --
10 into the Summer of '98 when FEMA shared this map
11 with the County and the County said don't publish it
12 and FEMA said okay, the levees themselves were not
13 within a floodway. They were an effective map, was
14 that '94 map, they weren't in a floodway, and in
15 it -- the engineer had taken his position was that
16 the ordinance -- County ordinance was a no-rise
17 standard, not a no-build standard. That was
18 consistent with the National Flood Insurance
19 Program.

20 Now, going on to November, Columbia
21 Venture -- Mr. Manning had this property for sale
22 and Columbia Venture signed an agreement to buy it
23 subject to a number of conditions. And Columbia --
24 I say Columbia Venture, apologize. That was
25 Burroughs & Chapin, at that time the developer from

1 Myrtle Beach was looking to buy the property and
2 looking to put together a group of investors that
3 later became Columbia Venture to develop this
4 property, and their plan was to develop the property
5 behind certified levees so that you can build on
6 grade behind certified levees. And the -- there is
7 a report that the County did at some point, it's in
8 the record, I don't know that we included it in the
9 appendix, where they studied certified levees and
10 certified levees have really -- none of them have
11 really failed. There's one, I think, where somebody
12 left the gate open. These levees that you see that
13 failed like in New Orleans, those were not certified
14 levees. These certified levees are designed to
15 withstand a flood, they're designed to protect
16 against. These levees here on grade, they're about
17 10, 15 feet high, 60 feet wide at the bottom. You
18 can drive your car on the top of them to get them
19 certified, they need to be sloped differently. They
20 need to have a clay core put inside of them and in
21 some areas they need to be raised in some areas --
22 sloped different but they can be easily certified
23 right up to certified standards.

24 But one issue that you have -- and by
25 the way, FEMA figured that the flood -- base flood,

1 100-year flood, out there would only last I think
2 three, four days so that the water would rise over a
3 period of three to four days and then recede. So
4 you're not going -- these levees are not going to
5 have water against them 24 hours a day. All they've
6 got to do is with damming the flood when it comes,
7 and it's only going to be -- the peak is only going
8 to be several hours, not, you know, weeks or days or
9 anything. So, in any event, these levees could be
10 safely constructed to withstand that flood and
11 protect the assets behind them, and FEMA regulations
12 provide for these certified levees to protect
13 against assets behind the levees.

14 Now, that was the plan that Burroughs &
15 Chapin had. They were going to put together a
16 group, it was going to get the levees, see if they
17 can get them certified and -- but there's one -- one
18 issue that they had to address and that is the Code
19 of Federal Regulations under this National Flood
20 Insurance Act says the levees themselves need to be
21 maintained and operated by an agency created by
22 Federal or State law.

23 Now, you can -- you can do a levee
24 directed -- you can do maybe a 501c3, some type of
25 corporation to do that. But their plan was to ask

1 the County if the County would assume that
2 responsibility and the County is -- at that point
3 was a community operating in this flood insurance
4 program so they were eligible to do that. So
5 towards that end Mr. Wilson Tillotson, who's an
6 engineer with Lockwood Greene, one of the largest
7 engineering firms in the State at that time, and
8 also one of the members of Columbia Venture when it
9 was formed met with Mr. Cary McSwain who was the
10 County Administrator at that time to see about -- to
11 vet this issue. Would the County be willing to do
12 this if we were to buy the property, and that
13 resulted in a study done by Mr. Ken Knutson, and
14 that's in the materials.

15 Mr. Knutson did the study in January and
16 what he recommended was that the County accept the
17 responsibility for the maintenance and operation of
18 the program -- and even there was a budget in there,
19 about \$175,000 annually. And Mr. Knutson's comment
20 was, well, we'll more than make that up in tax
21 revenue, increased tax revenue.

22 THE COURT: Let me ask you. I know
23 Tillotson with Lockwood Greene. Who was Knutson
24 with?

25 MR. GRIER: The County, land director

1 was his title at that time. So he prepared this
2 report in January and the report was reviewed by the
3 County Attorney, Larry Smith, who signed it,
4 approved it in January -- on January 22nd, I think,
5 and then it was approved by the County
6 Administrator -- the then Assistant County
7 Administrator Milton Pope. And the next thing it
8 was referred to the Development and Services
9 Committee of Richland County, and that is a standing
10 committee of the County Council.

11 And a meeting was held and it was
12 debated. And during that debate it was discussed
13 what happens if the thing breaks and what kind of
14 liability is the County going to have? Maybe we
15 should look into getting liability insurance.

16 Anyway, at the conclusion of the debate
17 the Development and Services Committee recommended
18 unanimously to approve the -- to send this thing to
19 the County Council, to the full Council with a
20 recommendation that the Council approve the
21 acceptance of the levees.

22 Now, Mr. Tillotson at the same time was
23 checking with FEMA, so he writes a letter to
24 Ms. Lisa Holland at that time who's with South
25 Carolina Department of Natural Resources, another

1 agency of FEMA in South Carolina, and he lays out
2 what their plans are. You want to improve the
3 levees, get County to accept the maintenance and the
4 operation of the levees, and if we do that we will
5 see if FEMA recognizes the levees as certified
6 levees and she sends it to two people. She sends it
7 first to Buckley and then she sends it to Mr. Miller
8 within FEMA. And she tells them sorry about the
9 rush, but these potential purchasers want to know
10 before they purchase the property.

11 And Mr. Miller writes back and says yes,
12 if you do that then we will recognize them, the
13 levees are certified levees and the land protected
14 by the levees will be removed from the floodplain
15 and the floodway. So Mr. Tillotson has got the
16 assurance from FEMA.

17 And then the County Council, on February
18 the 2nd, considers this and the motion that's --
19 you've seen that's been quoted, was passed
20 unanimously to accept the responsibility to the
21 levees or certain conditions all of which Columbia
22 Venture was able and willing to perform. I say
23 Columbia Venture because it was the property that
24 was purchased. On February the 19th Columbia
25 Venture was formed and then -- Burroughs & Chapin

1 assigned its interest to Columbia Venture and it
2 bought the property for about a little over 17
3 million, I think, in cash and equity interest in the
4 joint venture.

5 Now, the day before that closed
6 Mr. Tillotson had verified with Mr. McSwain and
7 Mr. Harry Reed who, I believe, was the floodplain
8 manager that if the -- once the levees were
9 certified, the land behind the levees would be Zone
10 X and that the land would be unrestricted; that you
11 could build on grade behind the levees and they
12 confirmed that understanding the next day when the
13 property was closed.

14 Now, going forward on February 25th, I
15 mentioned that FEMA was still fudging with its
16 revised preliminary FIRM and they, again, shared
17 with the County a revised preliminary Flood
18 Insurance Rate Map and they had reduced the floodway
19 based on their own study of the data. But, again,
20 Mr. McSwain writes and says, don't publish the map,
21 we need more time to study all lined out, and FEMA
22 ultimately agrees to that. So we're, again, on
23 hold.

24 Then Mr. McSwain, he intervenes for
25 Columbia Venture with FEMA to get information from

1 FEMA and then intervenes to get FEMA to consider
2 some of the engineering information that Columbia
3 Venture was generating during this period of time.

4 Now, Columbia Venture also met with I
5 believe all the members of the County Council to
6 explain its -- before it purchased property to
7 explain its vision here. And according to the
8 deposition testimony of Mr. -- of Doug Wendell, who
9 was the CEO at that time and Mr. George Gregory,
10 house general counsel at that time -- by the way,
11 that's the late Justice Gregory's son.

12 THE COURT: I wondered about that.

13 MR. GRIER: Anyway, he said we have a
14 lot of enthusiasm for this project. We go on to May
15 and Columbia Venture does submit, according to the
16 newspaper articles, a request for permit to make
17 some improvements to the levees. There is not --
18 this was not a permit to do the whole levee system,
19 it was to make some -- add some width to some of
20 them, add some height to some of them where they had
21 aged or eroded, and that permit was turned down by a
22 letter that said you need a full set of plans, you
23 need to have cross-sections, soil analysis. You
24 need all of this information which would be the kind
25 of information you would get if you were going to do

1 the whole project and it was turned down.

2 Now, about that same time FEMA wrote
3 Mr. McSwain and said, we'd like you to use the
4 February 25th map and, also, we would like you not
5 to issue any permits to build in that area until we
6 have the public -- more public input, a letter to
7 that effect. I think it's in the materials.

8 Mr. McSwain then tells the newspaper reporters that
9 he's decided that he's -- that he's going to use the
10 old map, the '94 map, because that's the map that
11 has been finalized and went all through the appeal
12 process. The new map has not been -- has not
13 been -- gone through publication and all of that
14 process, so he's going to use the old map. However,
15 he's not going to grant any permits to improve the
16 levees until the flood mapping is completed. And
17 that's backed up by the chronology that we got from
18 the County that we included in the appendix.

19 Mr. McSwain decided to use the 1994 map
20 for flood map -- for floodplain purposes, but he's
21 going to use -- he's not going to grant any permits
22 while this process is going on and he tells Columbia
23 Venture that you can maintain the levees but you
24 can't make them bigger, you can't make them wider,
25 can't make them taller.

1 MS. TAYLOR: Your Honor, I'd like to
2 object for a moment. Columbia Venture is referring
3 to quotes from the County Administrator in a
4 newspaper article which I believe is inadmissible
5 hearsay.

6 THE COURT: That is certainly correct.

7 MR. GRIER: Okay. So that's consistent
8 with what he tells Columbia Venture. Now, FEMA
9 comes out with on August the 12th, '99, they come
10 out with a map that they're ready to publish. And
11 they, in fact, do publish it and it is published in
12 the newspaper twice, last date is September 14th of
13 '99. That starts the appeal comment period running.
14 Mr. McSwain -- and we have the minutes -- around
15 September sometime in the appendix where he meets
16 with the County Council to brief them. And
17 consistent with what he tells Columbia Venture they
18 will get a permit to maintain the levees. And by
19 that he maintains you can't make them bigger, you
20 can't make them wider, you can't make them taller.
21 And FEMA advises us to use the 1994 map. And under
22 that map, the levees are not within the regulatory
23 floodway.

24 So going forward a number of groups
25 surface that are opposed to development in this

1 area. Mr. McSwain again is quoted in the newspaper
2 saying that the proponents are opposed to
3 development --

4 MS. TAYLOR: Renew that objection.

5 MR. GRIER: And they are. You've got
6 the -- I think the Congaree Task Force is organized
7 specifically, they don't want this pristine area
8 developed. You've got Southern Environmental Law
9 Center from Chapel Hill at that time, Blane Holman
10 representing them opposed to this development. They
11 want the property left undeveloped, and a number of
12 members of County Council begin to waiver within the
13 face of this opposition.

14 Now, the County does appeal on the last
15 day, December the 13th, and I mentioned earlier the
16 National Flood Insurance Act says you've got to have
17 scientific and technical information to appeal. The
18 County doesn't really have any -- and I want to hand
19 up some pages from the deposition of Kit Smith. And
20 she, I think, candidly says that the reason they
21 appealed is it would add gravitas or greater weight
22 to the other appeals, you know, that if we didn't
23 appeal, if the County didn't appeal, FEMA wouldn't
24 take those other appeals seriously. So we include
25 in the appendix and in our brief the statement by

1 Mr. Knutson saying we have resisted all along the
2 movement of this floodway and now that they moved it
3 where we want it why are we going to appeal? So the
4 irony was not lost on Mr. Knutson, the land planning
5 director at that point.

6 Now, going forward Columbia Venture, of
7 course, did not appeal because you've got to have
8 scientific and technical evidence to appeal.

9 There's no way you could challenge. The floodway is
10 on the other side of this levee, on the riverside of
11 the levee on that little strip of land between the
12 river channel and the riverside to a levee.

13 So going forward, the opponents of the
14 project are still going and we get to 2000, the year
15 2 -- the end of, say, first or second quarter of
16 2000. And the executive director of FEMA, Mr. James
17 Lee Witt, comes out and opposes any development in a
18 floodplain. Now, bear in mind that the Congress and
19 the duly enacted regulations permit building in a
20 floodplain and building in a floodway, had buildings
21 behind certified levees, but here you have the
22 executive director saying I don't think this is a
23 good idea. Just because our regulations say you can
24 do it doesn't mean you ought to do it, and he meets
25 with members of County Council and he stirs things

1 up.

2 And then what FEMA does is if you look
3 at all the appeal information they've got, none of
4 the appellants submitted a two-dimensional model.
5 This is a critical point, Your Honor. In the first
6 pages of our appendix, we have included a study done
7 by the USGS, starts on Page 1 and goes to Page 66.
8 And this study was done to size the bridge openings
9 of the I-77 embankment which transverses the
10 floodplain in Richland and Lexington County, the
11 Congaree floodplain. I'm sure Your Honor has driven
12 over it before. And FEMA had to have studied it
13 when it came out with its flood map on August 12,
14 '99.

15 And what FEMA concluded was that, again,
16 that these levees would not -- would probably breach
17 the uncertified levees but they would block
18 conveyance of flow. What that means is that the
19 levees would essentially block -- there would be a
20 pond, if you will, form behind the levees that
21 wouldn't flow in the general direction of the flow
22 down the channel of the river. That's what they
23 concluded.

24 And so you recall I was talking about
25 that equal reduction of conveyance floodway where

1 you've got to have an area of conveyance to reduce
2 in order to contribute to that kind of floodway, and
3 if your area is not an area of effective flow, not
4 an area of conveyance, it's not part of the floodway
5 and that's what FEMA concluded. And I would just --
6 if Your Honor would just look at Page 66, I know
7 this is hard to see, we've got a bigger map of this
8 at some point but what the USGS did to size these
9 bridge openings on I-77, this particular run --
10 there is a two-dimensional model, not the
11 one-dimensional model I described earlier. It is a
12 very sophisticated model that can tell you the depth
13 and velocity of the water on the floodplain.

14 And what the USGS did, we've got sized
15 the bridge opening in Richland County, you know, and
16 this thing has got to be sized to last for a long
17 time -- number of years or that Manning levee might
18 -- you know, they may bulldoze it. It might not be
19 maintained, so we're going to take that out of the
20 geometry of the model. And there's some talk about
21 Lexington County building the levee, the Otarian
22 (phonetic) levee, so we're going to put a levee on
23 the Lexington side here to block any flow going on
24 the Lexington side. And then we're going to use the
25 largest flood of record, not the base flood but the

1 largest flood of record, and I believe it's 364,000
2 cubic feet per second. That's how they figure the
3 volume of these floods, feet per second.

4 FEMA, when it finally concluded this
5 mapping process in 2001 or -- 2001 it settled on the
6 base flood being 292,292. This is 364,000 cubic
7 feet per second with a levee opening, blocking all
8 flow to the Lexington floodplain, all of the flow is
9 going on the Richland side. The Manning levee has
10 been removed and you see those blank areas. Those
11 are areas of high ground that naturally exists
12 behind the Manning levees that under all of these
13 circumstances, with that levee in Lexington, largest
14 flood of record, would be dry. If you were standing
15 there your feet would be dry during all of this
16 occurrence. And you see those little arrows? The
17 water is going behind those areas of high ground,
18 sort of ponding around in there.

19 THE COURT: Come show me that up here if
20 you would. It's hard to see on this little...

21 MR. GRIER: (Indicating.) See, going in
22 that direction and not going like these arrows here.
23 See those arrows, the long of the arrow, the
24 velocity under this particular model? That's the
25 fast moving water right there. This water is

1 going -- I can get you the big map.

2 THE COURT: I see what you're talking
3 about.

4 MR. GRIER: Now, in September of --
5 September, I believe, 26 of 2000 FEMA came out with
6 really what was a new flood insurance rate, a
7 revised preliminary flood insurance rate map. And
8 that was a dramatic difference than the one they had
9 proposed on August 12th, '99, and it moved the
10 floodway about a mile -- places over a mile inward.
11 And this is a Federal agency so it can't -- it can't
12 just say, well, we changed our minds. It's got to
13 have a reason to document why it changed its mind.

14 And what it did, what FEMA did, they
15 came out with a 26-page appeal resolution. It
16 commissioned additional two-dimensional studies to
17 examine the flow behind these levees is what they
18 say. Based on those two-dimensional studies
19 concluded that the land behind the levees was,
20 indeed, an area of conveyance, and to reach that
21 conclusion the two big models they used weren't new.
22 They took this same model and they made changes to
23 it. These areas of high ground, they had taken them
24 out.

25 I'm not here to reargue the FEMA case,

1 but just simply tell you that they changed that
2 model to get that result. And that appeal
3 resolution, you know, in the Federal litigation
4 determined that the model they actually used was not
5 disclosed in that appeal resolution but, again, I'm
6 not here to reargue that case. But, anyway, it was,
7 in effect, a new map and Columbia Venture went to
8 FEMA and said, you have really aggrieved us because,
9 you know, the earlier map we couldn't appeal that
10 because we would have challenged it, and now you've
11 done us this floodway on our property and we -- you
12 need to -- in all fairness, let us appeal. So FEMA
13 said, yeah, you're right.

14 So on November -- a letter in November
15 they said, we'll make you an appellant. What
16 Columbia Venture did, they went out and hired an
17 expert on this two-dimensional model, which was
18 prepared at great expense, two-dimensional models
19 that demonstrated that this was wrong, that their
20 initial conclusion was correct. There's no
21 effective flow behind this levee. And this was
22 submitted to FEMA in -- around February, and there
23 was some additional submissions in March and April.

24 While that process was going on, the
25 opponents of the Columbia Venture property or --

1 they've got potential here if they can hang on to
2 this floodway, if they can keep this thing they can
3 eliminate this project if -- if they can somehow
4 convince the County to adopt this no-impede, to
5 adhere to this no-impede standard.

6 Now, this is -- the County at that time,
7 in 2000, is looking at revising this storm water
8 ordinance that has this no-impede language that the
9 engineer has been interpreting as a no-rise. And
10 the Congaree land -- the Congaree Task Force and
11 Southern Environmental Law Center, and I submit this
12 is a reasonable inference based on these e-mails
13 that were exchanged at that time, see this as the
14 best strategy they've got to stop this thing, to
15 keep this property pristine, non-developed. And
16 that is to convince the County Council to adhere to
17 a non-objective, non-engineering no-impede standard
18 and don't use a no-rise standard because they're
19 concerned with no-rise standards, is that Columbia
20 Venture could probably show that by adding dirt to
21 various sections of this levee they could do it
22 without causing a rise in the flood water.

23 So the no-rise standard for them is
24 problematic. They want this no-impede standard, so
25 they lobby for that. And in the chronology that we

1 submitted here, it references a meeting that's going
2 to take place between Robert Adams of the Congaree
3 Task Force and representatives of the County. And
4 the County Engineer and staff want this no-rise
5 standard because that keeps you in with the internal
6 logic of the whole program. And Mr. Adams,
7 according to those minutes, says I've got the votes.
8 He wasn't interested in hearing anything about
9 no-impepe. I've got the votes, and he did. And so
10 the County at that time, and we've got e-mails going
11 back, the first thing that Congaree -- first thing
12 the Southern Environmental Law Center did is they
13 wanted -- the old storm water ordinance had a
14 variance provision in it. Well, wait a minute now.
15 The engineer might give Columbia Venture a variance.
16 Got to get rid of that, they got rid of that. They
17 convinced the County to take that out and then
18 they've got to convince the County to go along with
19 this no-impepe standard and ditch the no-rise
20 standard, and there's a problem with it. You've got
21 Heathwood Hall School and you've got City of
22 Columbia's wastewater treatment plant.

23 Well, they take care of that. We can
24 exchange several drafts, and they come up with the
25 language that exempts those particular landowners.

1 Now, bear in mind this is not a grandfathered
2 provision. This doesn't grandfather them in, is
3 what you would normally do if you were concerned
4 with them building something in the floodplain.
5 This allows them to expand future buildings. Not
6 only that, the City of Columbia wastewater treatment
7 plant has expanded on land that it didn't even own
8 at the time. It bought the land later and it's
9 building improvements and expanding on. So there
10 was not a grandfathered provision.

11 So they draft this language and we have
12 submitted in the appendix a document we got out of
13 the Southern Environmental Law Center that has the
14 language that Your Honor focused on, and that is
15 nothing in this statute would prohibit you from
16 maintaining a levee so long as the maintenance
17 doesn't result in a wider or taller structure after
18 you've done the maintenance that was stuck in there.

19 Now, after the County voted and went
20 along with this no-impepe standard the Congaree Task
21 Force, according to this chronology, we've got it in
22 records, announces victory. They said, we've won.
23 They've only won if all of this modeling that --
24 Columbia Venture to FEMA doesn't convince FEMA to
25 move the floodway back. And Columbia Venture is

1 fairly optimistic that it's not the better science
2 and it's going to prevail and move the floodway
3 back.

4 Now, I mentioned that a Federal agency
5 is supposed to address all significant comments it's
6 got and they came out with an appeal -- I mean, a
7 final resolution on August 20th, 2001, a little over
8 a page long. Says, we remain convinced that the
9 land behind the levee is going to convey water.
10 Well, that was the letter of final determination and
11 that -- that meant that six months from that date
12 the floodway was going to be -- the floodway was
13 going to effectively move from on the riverside tow
14 of our levees, go over our levees and placed over a
15 mile. And that was going to be the initial floodway
16 and it was for us, Columbia Venture, it was going to
17 be a no-build zone. And not only that, it was going
18 to be a place where we wouldn't improve our levees.
19 We couldn't add to them, we couldn't make them
20 taller or wider. So that's -- the opponents
21 essentially won at that point. Columbia Venture
22 nevertheless noted judicial appeal in October of
23 2001.

24 Now, let me back up just one minute so
25 to -- going back to that September 26 map that came

1 out. There was a meeting with FEMA and officials
2 from Richland County, including Councilwoman Smith,
3 and she asked FEMA what map should we use now that
4 you've come out with this September 26, 2000 revised
5 FIRM. And FEMA says you can use the 1994 map until
6 the letter of final determination comes out, so they
7 could have used -- they could have given us a permit
8 if they wanted to but they didn't.

9 Now, going forward to 2004 and these
10 e-mails, I think, give you a window on the Southern
11 Environmental Law Center/Congaree Task
12 Force/Councilwoman Smith thinking about this
13 no-impede standard. Michael -- I think the Mungo
14 Company, big developer here, went to Council and
15 complained about this no-impede language in a
16 floodway. He was going to have to build a
17 suspension bridge to span a floodway, a regulatory
18 floodway because he couldn't put the pilings of a
19 bridge in the regulatory floodway and that was going
20 to cost him a lot of money. So he says, you need to
21 change this thing; otherwise, it's ridiculous. I'm
22 going to have to spend all this money to build a
23 suspension bridge.

24 At that point the County Engineer and
25 the County Administrator -- we've got minutes in

1 here in 2004 from the Planning Commission where they
2 discussed this. He recounts the whole history of
3 this no-impe, no-rise. He said he is trying to
4 come up with an engineering approach, if I've got to
5 live with this impe way, let's see if I can't come
6 up with some engineering concept to define it. Like
7 can't reduce the flood bearing capacity, something
8 of that nature.

9 Mr. Adams and Mr. Holman wouldn't have
10 any of that. They got e-mail exchanges with
11 Mr. Smith saying, no, you can't -- we can't let him
12 go with a no-rise. That's what the Engineer and the
13 County Administrator wanted to do, be consistent
14 with the internal logic of this whole program. If
15 we do that, that will give Columbia Venture some
16 wiggle room and they may be able to come in and get
17 a permit to improve these levees and so they
18 prevailed once again. They retained that no-impe
19 standard, but they modified it so that you could put
20 bridge pilings in the floodway to accommodate the
21 Mungo Company.

22 Going on to 2005 the County adopts a
23 comprehensive land use code and that is the occasion
24 when they did that -- this correspondence that
25 Mr. Becker mentioned, that was generated and let me

1 see if I can find the page number for that. Look at
2 445.

3 THE COURT: Got it.

4 MR. GRIER: Now, this was a letter by
5 Bill Boyd and when he goes through the land
6 development, the new land development code, and
7 says, you know, we believe that this code authorizes
8 us -- mandates us to improve the levees. Not only
9 that, it mandates us to make -- bring them up to a
10 100-year standard. It goes through his legal
11 analysis here, he says that -- and he quotes it
12 here, that the Section 26404(d)(2)(i)(2) sets forth
13 the following permitted uses in a floodway area:
14 Any existing or future facility that is or will be
15 part or used by here in the lines used by public or
16 private school. Then he goes on and he quotes
17 26203(b)(2)(g): Notwithstanding any other
18 provisions of the chapter, no levees, dikes, that
19 will impede the free flow of water during times of
20 flood will be permitted in the regulatory floodway
21 unless such proposed impediment is permitted use
22 under Section 26104(d)(2)(i) of this chapter, and
23 that's the one that says: Any existing or future
24 facility that is or will be part of or used by a
25 public or private school.

1 So he's saying, okay. The levee is used
2 by Heathwood Hall. They don't use just the section
3 that's in front of them, they just the whole thing.
4 You can't just do ten feet of the levee so, you
5 know, under this ordinance we ought to be entitled
6 to improve the levee. Not only that, as we read it
7 we're mandated to do it. He tells in order to get a
8 permit it's going to cost us \$150,000. If we're
9 going to spend \$150,000 just to have you say no,
10 that's the reason we're writing this letter.

11 And Mr. Willoughby responds on 448, he
12 said, you know, County disagrees with your analysis.
13 You're not entitled to -- you're not required to
14 improve the levees to that standard. In fact,
15 you're entitled to maintain them. He says: Please
16 note that maintenance and repairs of these levees
17 are expressly authorized by the development code
18 providing that the maintenance repairs do not result
19 in a structure that would be higher or wider than it
20 was before the need arose for such repair or
21 maintenance. So he's saying don't bother to spend
22 \$150,000 because the answer is no.

23 Now, going forward again in 2005, in
24 November or right before November, October, we had
25 to in the Federal litigation and we, of course,

1 asked the Court to take judicial notice of record
2 and the documents following that, we had to file
3 motions to compel just to get the administrative
4 record to produce. And when it was finally produced
5 it was clear that FEMA had not published the notice
6 in the Federal Register, that there's nothing in
7 their statute that they're required to do. And they
8 had -- not only that they had filed an affidavit
9 saying they had done that, when they didn't so we
10 moved to vacate the whole shooting match and we got
11 our motion to vacate, on Page 450. Of course, it
12 would have had a memorandum that went with it but
13 that's the motion to vacate and it says to vacate
14 FEMA's final floodway determination of the Cooper
15 River null and void and 2001 fire and FIRMS for the
16 Congaree floodplain and we ask -- we're saying the
17 open paragraphs that the BFEs and floodways are null
18 and void. When FEMA publishes these flood
19 elevations, everything is derived from that. The
20 floodway is -- has a water surface elevation and
21 it's derived from the base flood elevations. So all
22 of that comes from the base flood water surface so
23 you can't set aside a BFE and not set aside a
24 floodway because it's derived from that BFE.

25 Anyway, we specifically say we want to

1 set it aside and the Judge has got a fairly recent
2 order here and she relies on some cases out of the
3 D.C. circuit. And, Your Honor, the D.C. circuit is
4 probably -- hears more administrative law appeals
5 than any other circuit. And their rule is that if
6 the Congress can limit the power of an agency to act
7 in political mode by procedure, and if they tell you
8 to publish it you've got to publish in the Federal
9 Register. You have to do that or you can't claim
10 harmless error or you eviscerate the statute, so she
11 relied on those cases and vacated not only the BFEs
12 but the floodway. She granted the motion.

13 On Page 464 is her -- is the judgment.
14 and, like State court and Federal court, you've got
15 to have a separate judgment. Got to be entered,
16 your order. And she says having granted -- heard
17 and granted Plaintiff's motion to vacate the 2001
18 final determinations for the Congaree River
19 floodplain -- so she knocked out everything in
20 its -- I'm going to submit to you the only inference
21 that can be drawn is that she took out the BFEs and
22 the floodway. The floodway is derived from the
23 BFEs. She specifically expressly said, I'm vacating
24 the floodway.

25 You cannot draw a reasonable inference

1 from this judgment, from this order for this motion,
2 that she did anything else but invalidate the
3 floodway and BFES. Now, when that happened, she
4 reinstated the 2000 -- 1994 BFES and the floodway.
5 So we're back under the 1994 map and the levees were
6 no longer in the floodway. Now, at that point there
7 was no County ordinance that would have prevented
8 Columbia Venture from getting the permit to a land
9 disturbance permit to make those levees taller, make
10 them wider. And the County reacts by adopting the
11 moratoria.

12 Now, the County submitted to you, Your
13 Honor, a lot of correspondence that does look
14 confusing. Like the County, we don't know what to
15 do. We don't know what to do. You cannot draw an
16 inference that Judge Seymour didn't invalidate the
17 floodway. That's not a reasonable inference at this
18 stage. What the County did is they did ask FEMA,
19 what are you going to do? FEMA responds -- FEMA,
20 I'll have to say this. FEMA was not -- was pretty
21 guarded. They didn't want to come out, they didn't
22 want to give some advice to the County that I was
23 going to get my hands on and go back to Judge Seymour
24 so they said, we're not in a hurry here. This was
25 in the letter. We're involved in Fourth Circuit

1 mediation that might resolve the whole thing and,
2 you know, we don't have any plans to issue any --
3 any new flood elevations at this point.

4 Now, what the County does is a pretext,
5 and I submit this is a reasonable inference, I think
6 is they didn't want to hide behind FEMA. They said,
7 we'll worry about we might get kicked out of the
8 National Flood Insurance Program. There is no
9 correspondence from FEMA to the County that you've
10 got to do anything. The reverse is true. We don't
11 plan to do anything because we're involved in this
12 Fourth Circuit mediation. So there's nothing -- no
13 threat at all from FEMA to kick the County out of
14 the National Flood Insurance Program.

15 Now, the County submitted, and
16 apparently they submitted behind tabs, and they
17 included this letter to Brad Durig -- Brad -- let me
18 see -- yeah. Let me give you a copy. Now, what
19 they do is they send this e-mail to Dr. Durinn
20 (phonetic), who has no involvement at all in the
21 Congaree controversy of Columbia Venture and FEMA.
22 He's in Atlanta and they give him this hypothetical:
23 We're getting ready to adopt this ordinance and we
24 just want to run this by you. The Congaree -- the
25 2001 Congaree BFES were vacated but the 2002 was

1 founded -- 2002 remains in effect. That's wrong
2 right off the bat. You can't draw that inference
3 from Judge Seymour's order and judgment.

4 So, anyway, they've run this by him and
5 say, we want to do this, is that okay? And he says,
6 that sounds right. That sounds right. Okay. Then
7 the next month -- now, bear in mind this guy doesn't
8 know anything about this conflict. He's in Atlanta,
9 not Washington. And the next month they send him
10 this letter, e-mail, same guy, and say, well, you
11 know, we've got this letter from Columbia Venture
12 that says Judge Seymour actually vacated the FIRM
13 and what do you think? And the guy, he calls back
14 and he said, I forwarded your e-mail to FEMA
15 headquarters for support. I've asked at this point
16 about connecting you directly with FEMA legal staff
17 since I'm not familiar with the Congaree issues. So
18 this is a guy that doesn't know that they're trying
19 to rely on him to justify what they're doing.

20 Now, there's evidence what they're doing
21 is targeting Columbia Venture that that's the only
22 landowner that they're concerned about with this
23 moratoria. The moratoria first comes up before this
24 standing committee of Development and Services
25 Committee, and it has an exception that's further

1 put in there I believe by Councilman Jeter. And the
2 exception would allow Columbia Venture, not by name,
3 but by levee owner to make improvements to a levee,
4 to bring them up to FEMA certification standards.
5 So it says there's a moratoria on permits except you
6 can get a permit to improve a levee and bring it up
7 to certification standards. Mr. Greg Pearce,
8 councilman, is on that committee and he's got a
9 dilemma now because he's in line with the opponents
10 of any development out here at Columbia Venture.

11 MS. TAYLOR: Your Honor, there is some
12 reference to the e-mails between Mr. Pearce and
13 constituents that was the subject of my motion for
14 protection on legislative privilege that Columbia
15 Venture is trying to use. I do apologize for
16 interrupting Mr. Grier, but I do object to those
17 e-mails that my understanding, based on your order,
18 was protected by legislative privilege.

19 MR. GRIER: An e-mail that is just to a
20 constituent --

21 MS. TAYLOR: That is exactly --

22 THE COURT: That legislative privilege
23 is quite broad.

24 MR. GRIER: Mr. Pearce votes for the
25 moratoria with that exception in it, but then he

1 gets up before the Council and Kit Smith moves to
2 delete so it passes. The Council traps out the
3 amendment that would have allowed Columbia Venture
4 to get a permit to approve its levees. To me, that
5 tells you that they were targeting Columbia Venture
6 with this moratoria. The evidence is the reasonable
7 inference it was targeted and Mr. Pope, in his
8 deposition, said he wasn't aware of any other
9 landowner who was looking for a permit in the
10 Congaree floodplain.

11 So you've got this series of moratoria,
12 there's no concern that FEMA's going to kick them
13 out of the program. That's one of the
14 justifications that they suggest to Your Honor.
15 There's no confusion about -- no reasonable
16 confusion that you can draw about what Judge Seymour
17 did, but they extend this moratoria and then they
18 adopt -- on December 5th of 2007 they adopt this
19 ordinance which adopts the 2000 -- excuse me, the
20 1994 -- 1994 base flood elevations and the 2001
21 floodway.

22 Now, at that point what you have is you
23 have a floodway that has no relationship to the base
24 flood elevation. It's completely a legislative fiat
25 for the Congaree floodplain. Everywhere else in the

1 County floodway is determined by the County's code
2 one-foot rise, except in the Congaree where it's
3 done by legislative fiat. No relation to the base
4 flood elevation.

5 Now, the next day they file this
6 application for a LOMR. Here's the point on this.
7 You go through three readings of an ordinance, a
8 public hearing, to reinstate the 199 -- 1994/'95 BFE
9 and then with no public hearing, no notice, you
10 submit an application to undo exactly what you've
11 just done in a public forum, public session. Now
12 they say, well, we were going to lower the BFEs so
13 we didn't have to give notice that wasn't FEMA's
14 position. FEMA finally said you cannot do what you
15 want to do with the LOMR. You've got to do a
16 physical map revision and you have to give notice.
17 You have to publish in the newspaper.

18 So the County, I submit the evidence is
19 that they tried to do -- to undo what they had done
20 in a public session under the cover of darkness,
21 nobody would see in order to reinstate the 2001
22 BFEs. Now, eventually FEMA got crosswise with the
23 Federal Court and withdrew the whole thing. They
24 had started publishing a notice to notify the public
25 and start an appeal, but you have to have an appeal

1 comment period with this physical map provision and
2 they withdrew it all. They filed a notice in the
3 Federal Register withdrawing the whole thing and
4 telling the public that any effective landowner in
5 the area needs to be governed by the FIRM, that's
6 the subject of Judge Seymour's order of vacatur, and
7 that's covered in Linda Carter's -- Ms. Carter's
8 deposition that we included in the record.

9 Now, I submit, Your Honor, that we are
10 relying principally on the three cases that we cited
11 in our memorandum -- the Scott case, the Helping
12 Hand case and the MCL auto case. They are discussed
13 in our brief and I won't go into this in a lot of
14 detail. But I find that the most helpful thing I
15 found is the Helping Hand case and that's a 199 --
16 2007 case, I think, this is the one with the
17 methadone clinic. And like here, you had a
18 methadone clinic that had a lease and they were
19 getting ready to open up and then the -- I guess
20 County Council passes a new medical services agency
21 statute that they grandfather in any existing
22 clinics and stops this methadone clinic. This is a
23 jury trial and there is a Federal District judge who
24 has a jury and he has to instruct the jury on what
25 the law is with respect to substantive due process.

1 And this substantive due process relates
2 to the abuse of governmental power, and that's
3 exactly what it reaps. It's not procedural due
4 process, it's substantive due process and it looks
5 to oppress abusive conduct by the Government. And
6 he charges the jury in the Fourth Circuit, says this
7 was a correct statement of the law. Now,
8 deprivation of a property interest violates the
9 Plaintiff's due process rights if it was clearly
10 arbitrary and unreasonable with no substantial
11 relationship to a legitimate government purpose.
12 Indications that a government body's actions are
13 arbitrary, unreasonable and not substantially
14 related to a legitimate government at interest
15 include, but are not limited to, one, the action is
16 tainted with fundamental procedural irregularity;
17 two, the action was targeting a single entity;
18 three, the action deviates from or is inconsistent
19 with the Defendant's regular practice.

20 Now, I submit to you, Your Honor, that
21 the reasonable inferences here are that starting
22 with the storm water ordinance in 2001 it was
23 targeted that the Columbia Venture property exempted
24 the neighboring landowners from the no-impe
25 standard. It also provided that Columbia Venture

1 could maintain but not improve the levees. It was
2 first triggered when the floodway moved in February
3 of 2002.

4 Further, when the County -- when Judge
5 Seymour set aside the floodway and put in place the
6 '94/'95 BFES floodway and Columbia Venture would
7 have been entitled to a permit under existing County
8 ordinance, it is County Council inserted -- County
9 Council did not issue permits. And it targeted
10 Columbia Venture based on reasonable inferences in
11 what I just told you in the deposition of Milton
12 Pope, that was the one landowner that they were
13 concerned with. The things that they told you were
14 protected, that they were concerned about FEMA
15 kicking them out of the program. That was
16 protection. FEMA couldn't care less.

17 They also violated their own process,
18 they adopted a floodway that violated their own --
19 not only the internal logic of the National Flood
20 Insurance Program but their own ordinance. By
21 grandfather -- not grandfather but by getting these
22 other landowners like -- like the Helping Hand case
23 that indicates substantive due process violation and
24 the MCL auto case I think is instructive because
25 there the Court says that you didn't have any

1 studies to back up what you're saying now. I think
2 this is an important point that a lot of what the
3 argument the County makes are post hoc
4 rationalizations by Council about whether or not
5 it's more hazardous to have and -- evacuate
6 residential houses or school. There is no study
7 that backs that up that the Council considered at
8 the time. That is just post hoc rationalization by
9 the attorneys for the County. It was not something
10 that the County set forth as a justification for
11 what it did. If you're concerned with the public
12 safety, it would make not only good public policy,
13 sound public policy, but just common sense to
14 improve those assets of Heathwood Hall and the
15 wastewater treatment plant that's the largest in the
16 State. That would make common sense, good sense.

17 So the only reason you would not do it
18 is because if you did it, if you allowed that to
19 happen, the area behind it would be developed and no
20 longer farmland. Thank you, Judge.

21 THE COURT: Thank you. All right, then.

22 MS. TAYLOR: I just want to make one
23 brief comment. Columbia Venture seems to want this
24 Court to believe that development behind a levee
25 is -- was some sort of recipient of targeted action

1 in some infamous way, if you can equate that to a
2 methadone clinic or low income housing, without
3 really recognizing the fact that during the process,
4 during the year 2000/2001 when Columbia Venture was
5 actually working for support on this project that
6 there was a serious public policy issue here dealing
7 with levee construction and developing a massive
8 development behind the levees.

9 In 1993 the Mississippi River had
10 flooded, there was a lot of national debate and
11 local debate dealing with that. We certainly had --
12 Katrina has renewed that debate in 2005. There's
13 plenty of evidence that Richland County Council,
14 we'll be happy to give you more paperwork, dealing
15 with considerations of, you know, the health and
16 safety impacts and whether or not development should
17 occur on a floodplain. I think that's a very
18 important consideration in which the largest
19 development to be considered in Richland County's
20 history, just the size of it, not to mention whether
21 or not a levee was to be constructed. In Richland
22 County there's a lot of high ground here. There's
23 not a whole lot of occasion for Richland County to
24 be able to consider floodplain policies such as
25 whether or not a levee ought to be constructed.

1 THE COURT: All right. Do we have any
2 other matters to take up this afternoon? Does that
3 take care of it?

4 (No response.)

5 THE COURT: All right. I'm going to
6 take this under advisement and give it some due
7 considerations. The arguments by both sides were as
8 good as your briefs and I commend you. It was a
9 real pleasure to work with really good lawyers, but
10 it makes you work hard. A lot harder. But I do
11 appreciate your presentations.

12 I know you all -- as I say, I've read
13 everything you've sent me, you opened some other
14 areas today for me to explore further, but I think
15 you can expect me to decide this within a week. As
16 I say, I have -- I'm familiar with the cases now,
17 and with the case law I'm familiar with the
18 arguments. So I'll -- I should be able to decide it
19 within a week.

20 And what I have decided to do, rather
21 than have each side submit orders, which I know is
22 often done and then decide, I believe that because
23 of your materials you've already submitted to me
24 that that's not going to really help my
25 decision-making process and there's no reason to put

1 y'all to that. What I will do is to decide the
2 issues, and however I decide them I'll let you both
3 know, of course, at the same time by e-mail. And I
4 will then ask for an order -- or orders, I may rule
5 for one side on certain issues and one side on other
6 issues. And at that time then I will -- will be
7 getting your input. But I don't think at this time
8 I would be well served by having to go through by
9 giving me proposed orders.

10 All right, then. Anything further,
11 then, before we adjourn?

12 MR. JOHNSON: No, Your Honor.

13 THE COURT: Fine. Thank you very much.

14 (The preceding was concluded at 4:05
15 p.m.)

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1 STATE OF SOUTH CAROLINA
2 COUNTY OF RICHLAND
3
4 Columbia Venture, LLC,
5 Plaintiff,
6 vs. CASE NO. 2010-CV-40-8943R
7 Richland County,
8 Defendants.
9
10

11 PROCEEDINGS: TRIAL - VOLUME I
12 BEFORE: THE HONORABLE JOHN HAMILTON SMITH
13 DATE: September 10, 2012
14 TIME: 10:02 a.m.
15 LOCATION: Richland County Judicial Center
16 1701 Main Street
Columbia, SC
17 REPORTED BY: Susan M. Valsecchi, CRR
18 Registered Professional Reporter
19
20

21 A. WILLIAM ROBERTS, JR., & ASSOCIATES

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1 We also had farming operations outside of that.

2 But we produced seed crops, processed them, bagged
3 them, and re-sold them to farmers in the Southeast.

4 Q. Who owned this business?

5 A. My father.

6 Q. All right. Was it part of a farming
7 operation on the property we're here to talk about
8 today?

9 A. It was, yes.

10 Q. And you worked for Eastern Corn and
11 Grain for how long?

12 A. I think it was '83, '84.

13 Q. Until that time?

14 A. Right, correct.

15 Q. Okay. Tell us -- I understand that
16 after that, you went and worked for the Manning
17 Company from about 1984 to 1994. Is that correct?

18 A. That's correct. I went to work with
19 the Manning Company, which was a fairly diversified
20 real estate company. We also operated sewer
21 treatment plants, built sewer treatment plants,
22 owned and operated golf courses, did residential
23 development, multifamily development in the
24 Northeast area.

25 The primary project we were involved

1 in, when I began work there, was the Wildwood
2 development, which was about 1,600 acres.

3 Q. All right. Is that the Wildwood
4 subdivision? Is that what it's known as?

5 A. That's correct.

6 Q. Does it have a country club and golf
7 course?

8 A. It does. It's got an 18-hole golf
9 course. We built the sewer treatment plant to
10 serve the neighborhood. Service was not out there
11 at the time. That plant was later taken over by
12 East Richland.

13 Q. Would you pull that microphone just a
14 little bit closer to you there, Mr. Manning.

15 A. Is that better?

16 Q. Pull it just a little closer. Yeah, I
17 think that might help us here.

18 MR. BECKER: Can you hear him okay?

19 THE COURT: Hopefully, that will be
20 better. Thank you.

21 THE WITNESS: Is that better?

22 THE COURT: Yes, that's fine.

23 BY MR. BECKER:

24 Q. So you have experience in land
25 development and building, constructing sewer

1 plants, utility plants. Is that right?

2 A. My responsibilities at the Manning
3 Company, I was a CEO from about 1986 until the time
4 I left. So I was involved in the development
5 process, permitting processes. We built houses as
6 well. We probably had 20 or 30 houses ongoing,
7 most years. So I was involved in just about all
8 facets of that.

9 Q. Has all of that development been in
10 Richland County?

11 A. It has.

12 Q. Through that experience, did you have
13 occasion to interact frequently with the Richland
14 County government?

15 A. I was involved in the permitting
16 process with numerous projects; that entailed me to
17 interact with, you know, staff, Richland County
18 engineer's office, Richland County Council. I went
19 before them on numerous occasions for a rezoning
20 request or working on joint projects.

21 One particular project was WoodLake,
22 where we had a joint service agreement where we had
23 to put a road in to facilitate the construction on
24 a new project we were doing in the Northeast.

25 Q. Have you had a working relationship

1 with members of the county staff over all of these
2 years?

3 A. I have. I've had a good working
4 relationship with most of the county staff.

5 Q. Now, I believe, after you left the
6 employment of the Manning Company in about 1994,
7 you moved on to form a company called Manning, Kirk
8 & Associates. Is that correct?

9 A. That's correct.

10 Q. And you are currently employed with
11 that company. Is that correct?

12 A. I own that company. I'm a partner in
13 it with John Kirk. We started the company in 1994
14 and continue to do development in the Northeast
15 area.

16 Q. All right. And when you say the
17 Northeast area, do you mean Richland County?

18 A. Richland County, that's correct.

19 Q. Over the years, what kinds of -- just
20 give Judge Smith a summary of the different kinds
21 of real estate projects you have personally
22 developed in Richland County.

23 A. Well, after I left the Manning Company
24 and started my own company, I did independent
25 development in the Wildwood area initially,

1 developed the WoodLake subdivision, which was about
2 a 300-acre community in the Northeast area of
3 Richland County. In that process, we built a
4 70-acre lake, which was approved through the County
5 and DHEC, and there was a lot of regulations that
6 dealt with that issue.

7 We built apartments. Atrium Place
8 Apartments, we built. And then the latest project
9 was a planned unit development called GreenHill
10 Parish, which was about 320 acres, located right
11 off of Clemson Road and Spears Creek Church Road.
12 And that was a multiuse project. It required a PUD
13 zoning. An estimate of the build-out was about 200
14 million.

15 Q. And, again, these are all projects in
16 Richland County?

17 A. Correct.

18 Q. Have you had an opportunity to develop
19 projects in other counties in South Carolina?

20 A. I have, but I -- I -- my primary focus
21 is here.

22 Q. All right. Do you have any
23 professional licenses?

24 A. I do. I have a South Carolina real
25 estate broker's license, and I'm a licensed

1 contractor in South Carolina.

2 Q. Are both of those licenses in good
3 standing?

4 A. Yes, they are.

5 Q. Do you have continuing education
6 requirements to maintain those licenses?

7 A. We do.

8 Q. Have you been involved in any civic or
9 professional activities here in the local
10 community?

11 A. Um, I've served on the BB&T advisory
12 board when BB&T moved to Columbia, started out
13 there. Been involved in Palmetto little league
14 baseball. I served on the planning commission for
15 Richland County. That's about it.

16 Q. Are you currently a member of the
17 planning commission for Richland County?

18 A. I am, and my term expires in a few
19 months. I have also been a member of the HBA and
20 have served on the land development council and
21 served on their board as well.

22 Q. What is the HBA?

23 A. The Home Builders Association of
24 Columbia.

25 Q. All right. Now, Mr. Manning, I would

1 like to turn to the topic about this subject of
2 this lawsuit, which is a 4,400-acre tract of land
3 in Southeast Richland County. I've got, on the
4 screen there, a photograph of property there at the
5 corner of Bluff Road and I-77.

6 MR. BECKER: Let's go ahead and
7 distribute those pictures, please.

8 This is Plaintiff's Exhibit 225, Your
9 Honor.

10 (PLF. EXH. 225, Property photo with
11 boundary outline, was presented.)

12 MR. JOHNSON: Your Honor, we object.
13 We were trying to find out -- what I was asking
14 was, I know the parties stipulated to the
15 admissibility -- authentication of a number of
16 documents, but apparently, they want to
17 show -- they can't tell me whether this was one of
18 the documents that's been authenticated. So could
19 we have a moment to discuss this?

20 THE COURT: Sure, yes.

21 MR. BECKER: Your Honor, I was going to
22 have Mr. Manning authenticate it right now.

23 THE COURT: You can go ahead and
24 proceed.

25 MR. BECKER: I don't know what there is

1 to discuss.

2 THE COURT: Go ahead.

3 BY MR. BECKER:

4 Q. Mr. Manning, are you familiar with that
5 photograph?

6 A. I am.

7 Q. Have you seen it before?

8 A. I have.

9 Q. What does it depict?

10 A. It basically outlines the property that
11 is owned by Columbia Venture, the
12 4,500-plus-or-minus acres that the levees were
13 placed on. And it also shows, in red, some
14 outparcels that were not owned by Columbia Venture.

15 Q. Mr. Manning, I would like to give you
16 this little laser pointer so that you can describe
17 certain aspects of the property for Judge Smith.

18 Can you work it okay?

19 A. Yeah. This is basically the property
20 boundary. This is the Congaree River, going north
21 to Columbia. That is I-326 and Bluff Road.

22 Q. Did you mean to say I-77?

23 A. Well, excuse me, it was originally
24 called I-326. It is I-77 now. I apologize.

25 Bluff Road, I think, is this right in

1 there. Heathwood Hall school would be located
2 right there. The City of Columbia wastewater
3 treatment plant right there. Our farming
4 headquarters were right here.

5 As I said, those were the outparcels,
6 and that's the southern boundary right there of the
7 property.

8 Q. All right.

9 A. This is Columbia, which is
10 approximately 2 miles from here to here.

11 Q. All right. And you say that red parcel
12 in the middle is an outparcel?

13 A. Those are properties that were not
14 included in the CV purchase.

15 Q. Okay. Could you briefly show us where
16 the levees are located.

17 A. It's hard to do on this particular map,
18 but the levees were broken down into three
19 sections. The first section would be from the
20 northern property boundary down, just below 77, and
21 come around back to Bluff Road.

22 The second levee section would start
23 where that left off, come down approximately right
24 here, and would come back around to Bluff Road.

25 The third levee section would start

1 right in here, come all the way around and then
2 back up through there. There was a parcel of
3 property approximately 300 acres right in here that
4 was out on the river that the levees did not
5 protect.

6 Q. Okay. How much property are we talking
7 about here? How many acres?

8 A. Approximately 4,500. To be exact, I
9 think it's 4,461 or something like that.

10 Q. All right. Now, you mentioned the City
11 of Columbia wastewater treatment plant. Did your
12 father sell that land to the City of Columbia for
13 that plant?

14 A. He did. There was about 100 -- I think
15 it's 130 acres in the city treatment plant. He
16 sold that to them, I think, back in the late
17 sixties. Actually, he was involved in the
18 construction of that plant, did the earth-moving
19 work for it.

20 There's a levee on the City property in
21 here, and when he sold that property to the City,
22 one of the things he required was a deed covenant
23 that required the City to maintain that levee in
24 perpetuity.

25 Q. So does the City actually own a portion

1 of what we've referred to in this case as Levee
2 Section 1?

3 A. They do. I'm not exactly sure of the
4 linear footage, but it's substantial.

5 Q. And you mentioned that they're
6 required, pursuant to a deed covenant, to maintain
7 it, is that correct, to protect against flood?

8 A. Correct. Obviously, when my father
9 built these levees, you know, he had a larger
10 vision in mind and --

11 MR. JOHNSON: Your Honor, I object.
12 This would be hearsay.

13 THE COURT: Yes, I sustain that
14 objection.

15 MR. BECKER: I'm sorry, Your Honor, I
16 was talking to Mr. Grier. I didn't even hear what
17 he said. I'm sorry.

18 THE COURT: Mr. Manning was referring
19 to his father's projections for the property, and I
20 sustained the objection as to hearsay.

21 MR. BECKER: I'm sorry. His father's
22 what?

23 THE COURT: His father's thoughts or
24 projections about what he was going to do with the
25 property.

1 BY MR. BECKER:

2 Q. Okay. We were on the issue of the land
3 that was sold to the wastewater treatment plant,
4 Mr. Manning.

5 Did he also donate land for Heathwood
6 Hall school?

7 A. He did.

8 MR. JOHNSON: Your Honor, I mean, if
9 this is background, maybe it's okay, just in
10 general, but it's not relevant to the issues. I
11 mean, Heathwood's been out there.

12 THE COURT: I will overrule that
13 objection. This is part of the overall background.

14 BY MR. BECKER:

15 Q. Describe for us what happened when your
16 father donated the land to Heathwood Hall school.

17 MR. JOHNSON: Objection, unless there's
18 some evidence, background, to show personal
19 firsthand knowledge.

20 THE COURT: Well, he has testified that
21 he was in business with his -- with his father, so
22 he would -- I think you should explore whether he
23 had personal knowledge of what his father did,
24 aside from what his father told him.

25 BY MR. BECKER:

1 Q. Let me ask you this, Mr. Manning:

2 Describe for us, if you will, what your
3 father did for a living and your involvement with
4 him in his businesses from the time you were a
5 young teenager until the time that he died.

6 A. My father was -- had numerous
7 businesses, but primarily farming. He also owned a
8 company called General Construction Utilities that
9 was instrumental in helping build the levees. They
10 did highway work. They also, you know, built
11 airports and did work on the sewer treatment plant.

12 He was in the development business. He
13 developed Bluff Industrial Park, which was part of
14 this property initially; he put in the
15 infrastructure necessary to develop a quite nice
16 industrial park.

17 Q. Did you work for your father in his
18 businesses during the summertimes when you weren't
19 in school, when you were of school age?

20 A. I did.

21 Q. Did you do that up through high school?

22 A. I did.

23 Q. Did you work on the farm, along with
24 your father, after school?

25 A. You know, I have worked there full time

1 just about all of my life, and, you know, I worked
2 during the summers and when I was in school.

3 Q. All right. And then did you work
4 closely with your father with respect to this
5 property?

6 A. Well, I was very familiar and involved
7 in what he was doing, from the farming and the
8 construction and the development aspects of it.
9 And Heathwood Hall was an integral part of that,
10 and the sewer treatment plant was an integral part
11 of that. You had to have those wastewater
12 facilities there to have development in the future.

13 The school was donated because -- the
14 property was donated to Heathwood Hall Episcopal
15 School because they had outgrown their current
16 campus in town, grades 1 through 6. They realized
17 they needed to expand, and he felt like that would
18 be a great mix.

19 MR. JOHNSON: Object to hearsay. Lack
20 of personal knowledge. If he was involved with it
21 and can testify about his involvement, that's fine.
22 But he's now telling us what his father did and why
23 he did it, and that would have to be hearsay.

24 THE COURT: I will overrule the
25 objection.

1 MR. BECKER: Thank you, Your Honor.

2 BY MR. BECKER:

3 Q. You may proceed, Mr. Manning, just
4 exactly as you had planned.

5 A. He felt that the school would be a very
6 compatible use to future development. It would
7 help create synergy for the property, and he was at
8 that time also working with Central Midlands, he
9 was working with the COATS planning, he was working
10 with the highway department in trying to create an
11 overall development process for that property.

12 Q. All right. You described the COATS
13 project. What does that stand for?

14 A. Columbia Area Transportation Study.

15 Q. I'm sorry, say that again.

16 A. The Columbia Area Transportation Study.

17 Q. And describe what that involved.

18 A. It was an organization, I think,
19 Central Midlands, the highway department, other
20 municipalities, worked in conjunction to see what
21 the needs of the general community were and how to
22 plan for road improvements.

23 Q. Did you and your father interact with
24 that planning process?

25 A. We did.

1 Q. Did it impact the property?

2 A. There was a lot --

3 MR. JOHNSON: Objection, relevance.

4 THE COURT: Overruled.

5 THE WITNESS: There was a lot of effort
6 made to create the proper alignment of this
7 highway, that that alignment was critical to the
8 development of the property. And Central Midlands,
9 you know, was studying those issues, the Highway
10 Department. Actually, there was a huge case about
11 the -- relative to the location of that road.

12 BY MR. BECKER:

13 Q. All right. Was there a road that was
14 planned to go through the property in a north/south
15 direction?

16 A. Actually, there was a --

17 MR. JOHNSON: Objection, Your Honor,
18 relevance.

19 THE COURT: Overruled.

20 THE WITNESS: In the COATS plan, it
21 called for another road to have an interchange
22 right here and go to the north, which would have
23 eventually gone back into Columbia. And that was
24 called the north/south freeway.

25 BY MR. BECKER:

1 Q. Now, when your father donated the
2 property to Heathwood Hall, was a road built
3 through the property to access Heathwood Hall?

4 A. No, there was not. We had to build
5 what is now South Beltline Boulevard and dedicate
6 it to the State Highway Department, and it's
7 approximately a mile and a half.

8 There was also no water line to service
9 the school, and we had to put that in. And we
10 brought a water line through Bluff Industrial
11 Boulevard in this little area right here and
12 brought it down to the school, an 8-inch water
13 line.

14 Q. Were you involved in the construction
15 of that road and that water line?

16 A. I was.

17 Q. What was the purpose of doing that?

18 A. The purpose was to create the
19 infrastructure, or put the infrastructure in,
20 necessary to continue the development process.

21 Q. Now, based on your own personal
22 knowledge and based on your own personal
23 involvement, being employed by the companies that
24 manage this property and did construction work on
25 it and sold and donated parts of it, what was the

1 original plan for the property? What was your and
2 your father's plan for this property?

3 MR. JOHNSON: Objection, Your Honor,
4 relevance. And he can't testify about what his
5 father's plan was, Your Honor, unless there's
6 something to show when and if he was even working
7 with his father during that time. I think he
8 testified he left him in '84.

9 Rule 602 says the Court's got to
10 require a personal knowledge before they allow
11 testimony.

12 I would ask that we have some
13 background to know that he has personal knowledge
14 of what he's about to testify to.

15 THE COURT: All right. Well, he's
16 certainly correct that there has to be personal
17 knowledge, so if you would explore that with him,
18 please.

19 BY MR. BECKER:

20 Q. Well, describe, again, did you
21 have -- did you meet with your father and discuss
22 development plans for the property?

23 A. I did.

24 Q. On how many occasions would you say,
25 over the years that you worked directly with him,

1 did you do that?

2 A. Well, I don't know how many mornings we
3 met to discuss the development process, but I met
4 with him every morning.

5 Q. And over -- what -- again, does that
6 extend from the time that you were old enough to be
7 a young teenager to the time that -- up until the
8 time he died?

9 A. There was a period when I was working
10 for him about ten years that I was involved in just
11 about every aspect of the property.

12 Q. Did that include the time period when
13 the property was donated to Heathwood Hall?

14 A. It did.

15 Q. And were you personally involved in
16 that land donation and transfer?

17 A. I didn't sign the deed, but I certainly
18 advised him as to things he should and shouldn't do
19 and how we should dedicate the property. We had to
20 dedicate it to a foundation, and actually there
21 were some other companies involved that I was a
22 shareholder in, Overlook, Whirlabout, and Bluff
23 Industrial.

24 Q. Let's take just a minute, then,
25 Mr. Manning and explain the ownership structure of

1 the 4,400 acres and how you were involved in that.

2 A. Eastern Corn and Grain was owned,
3 approximately 85 percent, by my father, and then he
4 had some minor shareholders, some family and
5 another employee.

6 Overlook, Inc., which is the property
7 in the most northern area, was 80 percent owned by
8 my father, 20 percent by my sisters and I.

9 And -- well, we went through
10 Eastern -- Bluff Industrial was pretty much, I
11 think, all -- he was sole ownership of that.

12 General Construction Company, 100
13 percent of that. There may have been 2 or 3
14 percent to a minority shareholder.

15 Whirlabout was 80/20.

16 Q. So were you involved in helping your
17 father decide which parcel of land to donate to
18 Heathwood Hall?

19 A. We had discussions about where it
20 should be. Obviously, the road alignment of I-77
21 was going to impact that -- could impact
22 that -- and it was felt that it had more potential
23 to be in the northern levee section than pushing it
24 further back south, road access, easier to get the
25 utilities in, cheaper to get the utilities into it.

1 Q. So let me come back to the question.

2 Would you please just describe, based
3 on your personal interaction with your father over
4 the years, your involvement with the companies that
5 owned the property, your partial ownership of the
6 property, and all of the planning and -- planning,
7 meetings, and discussions you had with your father.

8 Describe what was the owner's -- the
9 ownership structure's ultimate vision and plan for
10 the property that is inside those yellow lines.

11 MR. JOHNSON: Objection, Your Honor.

12 THE COURT: Overruled. He can testify.

13 MR. BECKER: Thank you.

14 THE WITNESS: His vision was to create
15 a city within a city, basically. This 4,500 acres
16 was located very, very close to already-existing
17 infrastructure, to the state capital, state
18 government. There were places in this country that
19 we visited to understand the levee process.

20 St. Louis, I went out there in 1974
21 with Frank Macaulay, who was an officer in General
22 Construction to look at a major flood on the
23 Mississippi. Toured a place called Earth City,
24 tried to understand how highways impact levee
25 systems.

1 In that situation, we learned the
2 hydraulics and being able to put obstacles in
3 overpass ramps and block them off. So we were
4 trying to explore what could be done with the
5 property. But it ultimately was to create a
6 large-scale development in that area.

7 MR. JOHNSON: Your Honor, move to
8 strike that testimony as hearsay. He testified as
9 to his father's vision of the property. The only
10 way he would know that would be if his father told
11 him. His father is not here so that we can
12 cross-examine him.

13 THE COURT: I overrule the objection,
14 because he's testified that, although his father
15 may have been the primary stockholder, he was
16 actively involved with his father, advising him.
17 They had interconnected business interests
18 pertaining to this property. He took a trip, as he
19 said, to Missouri in regard to this particular
20 property in trying to further that -- the project
21 that they had discussed. So I overrule the
22 objection.

23 MR. BECKER: Thank you, Your Honor.

24 BY MR. BECKER:

25 Q. Mr. Manning, I'm just going to hand you

1 a little water in case you need it, as we go along.

2 A. Thank you, I appreciate it.

3 Q. All right. Mr. Manning, I would like
4 to next move to the topic of the levees that were
5 constructed on this property, and we've got a
6 series of photographs of those levees that we'll
7 show as soon as we get toward the end of this
8 segment of your testimony.

9 If you would, describe the basis of
10 your knowledge about how the Manning levees were
11 built. What was your involvement in that process,
12 if any?

13 A. Well, the levee construction started in
14 the early sixties, a little before I was able to
15 work in that process, but --

16 Q. What year were you born, Mr. Manning?

17 A. 1954.

18 Q. All right.

19 A. They were under construction for a
20 number of years. Like I said earlier, there's
21 three levee sections, approximately 20 miles of
22 levees in those three sections.

23 You know, obviously, the height of them
24 varies in relation to the topographical features
25 going down the river. But, you know, the Levee

1 Sections 1 and 2, for the most part, were
2 constructed well above the 100-year elevation.

3 Q. Let me back up just a minute. Who
4 built the levees on the property, which, if -- I
5 will just refer to as the Manning levees, or the
6 levees as we go forward. Who built them?

7 A. Well, obviously, they were under the
8 direction of my father and Frank Macaulay, who was
9 vice president and development coordinator for my
10 father, General Construction.

11 They were primarily responsible for
12 construction of the levees, but there was overlap.
13 We had people working on the farm from time to time
14 that we would move over to General Construction,
15 and they would work on the levees, if we weren't
16 busy on the farm. And, you know, vice versa,
17 General Construction, when they weren't bidding
18 work, and had some time, they were working on the
19 farm.

20 Q. What is Mr. Macaulay's background?

21 A. I think he's a registered surveyor. He
22 worked for B.P. Barber & Associates for a number of
23 years before coming to work with my father to
24 oversee levee construction and running the
25 construction company.

1 Q. So it was your father, Mr. Manning, and
2 Mr. Macaulay who were primarily responsible for
3 constructing the levees. Is that right?

4 A. That's correct.

5 Q. Did they ever seek assistance from the
6 engineering firm you mentioned, B.P.
7 Barber & Associates?

8 A. Well, I know they have --

9 MR. JOHNSON: Your Honor, I object,
10 unless he's got some personal firsthand knowledge
11 that is shown.

12 THE COURT: All right, sir, I overrule
13 the objection. Part of that is based on the fact
14 that this goes to the background of -- and I think
15 that plays a role in regard to whether testimony is
16 to be admitted or not, whether it goes straight to
17 the heart of it or whether it's background and
18 general knowledge about the levees. His certainly
19 extends to more than general knowledge.

20 MR. BECKER: Thank you, Your Honor.

21 BY MR. BECKER:

22 Q. Mr. Manning, did you personally observe
23 sections of the levee being constructed?

24 A. I did.

25 Q. Were you present at various times

1 during that construction process in the field

2 office where your father and Mr. Macaulay might be
3 present?

4 A. I shared an office with him.

5 Q. All right. Were you physically present
6 as they were discussing construction of the Manning
7 levees?

8 A. I was.

9 Q. Did you observe the things that they
10 were working with and the construction plans and
11 drawings that they were working with?

12 A. I did.

13 Q. Did you observe there, with them, any
14 sort of manuals that described the appropriate
15 standards for levee construction?

16 A. Obviously at the time, there was no
17 permitting process for the levees when they
18 initially were being built. The really only manual
19 that was out there was the Corps of Engineers
20 manual.

21 Q. Is that the U.S. Army Corps of
22 Engineers?

23 A. U.S. Army Corps of Engineers manual.

24 I know they referenced that. The USGS
25 had some standards. They worked off of hydraulic,

1 topographical. They were, obviously, not just
2 throwing a levee up; they were being advised as to
3 elevations that they needed to get to, to create
4 the type of levee system they wanted.

5 Q. Did you observe your father and
6 Mr. Macaulay referring to the U.S. Army Corps of
7 Engineers manual for levee construction during the
8 construction process?

9 A. I don't have one, but I know that they
10 discussed it.

11 Q. All right. Why did -- based on your
12 interactions with your father and Mr. Macaulay,
13 what was the purpose of building the levees?

14 A. The purpose was to protect --

15 MR. JOHNSON: Your Honor, object.
16 Hearsay. I don't have a clue as to what he's going
17 to say, but it can only come from his father as to
18 why the father -- what the father's purpose was,
19 and it would be something his father told him.

20 And it's irrelevant anyway, because
21 we're talking about something that occurred years
22 before that is being offered for the truth of the
23 matter asserted. It's hearsay.

24 THE COURT: Well, I'm assuming that the
25 purpose will come into play. If the answer is much

1 more than that, then there may well need to be more
2 inquiry in regard to the basis of the knowledge.

3 BY MR. BECKER:

4 Q. All right. At the time that the levees
5 were being constructed, Mr. Manning, were you
6 personally involved in agricultural operations on
7 the property?

8 A. I was.

9 Q. And so you were farming, I take
10 it -- approximately how many sections of the
11 property were you farming?

12 A. We farmed all of that, basically. We
13 also farmed outside of the county. We were farming
14 approximately 10,000 acres at one time.

15 Q. Of the 4,400 acres that we're talking
16 about, approximately how many acres were under
17 cultivation?

18 A. I would say 3,500, 4,000.

19 Q. 3,500 acres?

20 A. 3,500 probably.

21 Q. And were you personally involved in
22 managing that farming operation?

23 A. That was one of my responsibilities.

24 Q. Well, then, let me come back to it,
25 then. Based on your business operations involving

1 the property and farming, your knowledge of your
2 father's ultimate plans for the property, your
3 partial ownership interest in some portions of the
4 property, your family's ownership interest in
5 portions of the property, your observations of
6 Mr. Macaulay and your father planning and
7 constructing the levees, what was the purpose for
8 which they were built?

9 MR. JOHNSON: Same objection.

10 THE COURT: All right. Overruled.

11 THE WITNESS: The purpose was to
12 protect the property from flooding on the Congaree
13 River, and it was twofold. One, it would protect
14 the farming operation from flooding, but it was
15 also to develop the property in the
16 future -- protect it for development purposes in
17 the future.

18 BY MR. BECKER:

19 Q. All right. Now, you mentioned earlier
20 that -- was a -- did Richland County -- at the time
21 the Manning levees were constructed, did it have
22 any ordinances or standards for constructing
23 levees?

24 A. Not to my knowledge.

25 Q. Did -- do you know if the Federal

1 Emergency Management Agency even existed or, if it
2 did, did it have any standards for constructing
3 levees?

4 A. I don't know whether FEMA existed at
5 that point in time. It may have been the Corps of
6 Engineers, but --

7 Q. Other than the U.S. Army Corps of
8 Engineers' manual for levee construction, are you
9 aware of any other set of standards for levee
10 construction that existed at the time the Manning
11 levees were built?

12 A. Not to my knowledge.

13 Q. All right. Now, I would like to go
14 through a series of photographs that show the
15 actual levees, and we have --

16 MR. BECKER: What is this exhibit,
17 Beth?

18 This is Exhibit 217, Your Honor,
19 through -- there are various numbers, 217 through
20 224.

21 THE COURT: Let me go back, if I might,
22 and ask you about this. I've got the -- let's see,
23 three copies of this Exhibit 225, and they're all
24 the same thing. Is this for admission purposes as
25 well or --

1 MR. BECKER: Well, I will move at the
2 end of this examination, Your Honor, to -- yeah, I
3 think you only need one copy of this.

4 THE COURT: All right.

5 MR. BECKER: You do have three. I will
6 take the other two, if you would like.

7 THE COURT: That would be fine.

8 MR. JOHNSON: May I ask which one
9 you're putting in?

10 MR. BECKER: Well, I intend to put all
11 of them in evidence, and rather than just do it
12 piecemeal, I was planning to do it all at the end,
13 Your Honor.

14 (Off-the-record discussion.)

15 MR. BECKER: Your Honor, my plan is,
16 rather than interrupt the testimony and the flow of
17 it, as we go along today, to move to admit specific
18 exhibits into evidence.

19 My plan was to just move -- at the end
20 of Mr. Manning's testimony -- to admit all of the
21 exhibits into evidence.

22 If you would prefer that I proceed in a
23 different way, I'll be happy to do so.

24 THE COURT: I think that's the most
25 expeditious way to do it.

1 MR. BECKER: Thank you.

2 (PLF. EXH. 217, Levee photograph, was
3 presented.)

4 (PLF. EXH. 218, Levee photograph, was
5 presented.)

6 (PLF. EXH. 219, Levee photograph, was
7 presented.)

8 (PLF. EXH. 220, Levee photograph, was
9 presented.)

10 (PLF. EXH. 221, Levee photograph, was
11 presented.)

12 (PLF. EXH. 222, Levee photograph, was
13 presented.)

14 (PLF. EXH. 223, Levee photograph, was
15 presented.)

16 (PLF. EXH. 224, Levee photograph, was
17 presented.)

18 BY MR. BECKER:

19 Q. Mr. Manning, have you been personally
20 involved in maintaining the Manning levees?

21 A. Yes, I've been involved in that.

22 Q. How long have you been involved in
23 maintaining the Manning levees?

24 A. When I was working for my father, I was
25 involved in that process, and I'm involved in that

1 process today.

2 Q. Since what age do you recall working on
3 the Manning levees?

4 A. As early as a part-time worker to, you
5 know, my role as an officer in the development of
6 the company.

7 Q. What age were you when you first began
8 working on the Manning levees to maintain them?

9 A. 15, 16 years old.

10 Q. What kinds of activities were you
11 engaged in at that stage?

12 A. Just running equipment, you know,
13 basically driving a bulldozer or sheepsfoot roller,
14 compactor, some type of equipment to work on the
15 levees.

16 Q. Okay. And you have been involved in
17 that process of maintaining the levees up until the
18 present day, you said?

19 A. Correct. I'm involved with -- from
20 CV -- my managerial role with Columbia
21 Venture -- that's one of the responsibilities I
22 have.

23 Q. Let's take a minute and just go ahead
24 and have you explain to Judge Smith what your
25 continuing role in the management of the property

1 has been since the time it was sold by the
2 ownership to Columbia Venture up until the present
3 day.

4 So let me just jump forward for a
5 little bit. To the time it was sold -- at the time
6 it was sold by your father and these other
7 ownership entities that we've described that owned
8 the property -- to Columbia Venture, was your
9 father an initial member of Columbia Venture, LLC?

10 A. When the property closed, my father
11 took an ownership interest in Columbia Venture.

12 Q. At what age was he at that time?

13 A. Well, he died in 2005, so you do the
14 math.

15 Q. He was in his 80s?

16 A. No. He was -- he was 75 when he died,
17 so, in '99, he would have been 70.

18 Q. Okay. About 70 years old?

19 A. Right.

20 Q. Okay. Did you act for him in any
21 capacity with regard to his ownership interest in
22 Columbia Venture, LLC?

23 A. Well, I was involved with his interests
24 as an advisor -- um, as a shareholder. Um, prior
25 to that, I was, you know, involved in the marketing

1 please, what that role is and what -- and how you
2 serve in it.

3 A. In 2004, 2005, I was appointed, along
4 with Bob Hughes and Charles Macaulay, to manage
5 Columbia Venture.

6 Burroughs & Chapin, who had been the
7 managing member for the venture, felt like it would
8 be better --

9 MR. JOHNSON: I object to him
10 describing what Burroughs & Chapin felt like.
11 Hearsay.

12 THE COURT: I'll sustain that.

13 BY MR. BECKER:

14 Q. We really don't need to get into what
15 Burroughs & Chapin felt. If you could just
16 describe for Judge Smith, Mr. Manning --

17 A. I'm involved, personally, in my
18 managerial role, in creating marketing plans, exit
19 strategies, financial statements, financial
20 management, levee maintenance, you know, just
21 general managerial tasks that go along with all of
22 that.

23 Q. Thank you.

24 So is it accurate to say, just to sum
25 up, that you have been involved personally in the

1 maintenance of the Manning levees since you were a
2 young teenager, to the present day?

3 MR. JOHNSON: Object to the leading.

4 THE WITNESS: Correct.

5 THE COURT: Overruled.

6 BY MR. BECKER:

7 Q. And that's a period of approximately 34
8 years. Is that correct?

9 A. Correct.

10 Q. Now, based on your past experience,
11 prior to the sale of the property to Columbia
12 Venture, was it ever necessary to obtain a permit
13 to maintain the levees?

14 MR. JOHNSON: Objection, irrelevance.

15 THE COURT: Overruled.

16 THE WITNESS: It was never -- there was
17 never a permit required to maintain those levees.
18 I've been on those levees for 30, 35 years,
19 whatever the time is, and not once did I ever
20 obtain a permit.

21 I think there's an exemption -- well, I
22 know there's an exemption under the stormwater
23 ordinance to allow maintenance.

24 MR. JOHNSON: I object, if he's going
25 to tell the Court the law.

1 THE COURT: Well, as I understand it,
2 he's giving his opinion in regard to what his
3 understanding of the law is.

4 BY MR. BECKER:

5 Q. You may proceed, Mr. Manning.

6 A. But I have had Richland County concur
7 with my opinion that there is an exemption under
8 the ordinance.

9 MR. JOHNSON: Objection, Your Honor.

10 THE COURT: That is objectionable. I
11 will sustain it.

12 BY MR. BECKER:

13 Q. You're explaining what someone else
14 told you.

15 A. Right, right.

16 Q. So if you could confine your testimony
17 to what you know, based on your own experience, but
18 without referring to what other people have told
19 you.

20 A. Well, I will try to do that.

21 Q. All right. As best you can.

22 A. I've not ever had to obtain a permit to
23 maintain those levees.

24 Q. Have you ever applied for a permit to
25 maintain the levees?

1 A. No.

2 Q. While you've been maintaining the
3 levees, has anyone from Richland County objected
4 that you were doing something that was -- for which
5 a permit was required?

6 MR. JOHNSON: Your Honor, I object,
7 unless there's some foundation that Richland County
8 even knows he's doing anything.

9 THE COURT: I will overrule the
10 objection.

11 THE WITNESS: Approximately 2000, 2005
12 or '6, I went to see Ralph Pearson to get
13 concurrence about a position on levee maintenance.
14 He indicated to me --

15 MR. JOHNSON: Objection, Your Honor,
16 hearsay, and relevance to the time period we're
17 talking about.

18 THE COURT: Well, he's saying that he
19 spoke with an employee of Richland County in regard
20 to permitting, so I will overrule the objection.

21 BY MR. BECKER:

22 Q. Go ahead, Mr. Manning.

23 A. I met with Mr. Ralph Pearson, who was
24 the county engineer at the time. We had discussion
25 about the levee maintenance issue and the permit

1 necessary to do that. I followed that up with a
2 letter to Mr. Milton Pope, who was the county
3 administrator at the time.

4 Mr. Pearson's position was that I did
5 not need a permit, therefore, I got --

6 MR. JOHNSON: Your Honor, I object. He
7 can say what Mr. Pearson said, but he can't give an
8 opinion as to what his position was. If he wrote a
9 letter, the letter would be the best evidence of
10 what we're talking about. I object --

11 THE COURT: I overrule that.

12 MR. JOHNSON: -- on that ground as
13 well.

14 BY MR. BECKER:

15 Q. Go ahead, Mr. Manning.

16 A. So there was no permit required in mid
17 2000 to do levee maintenance.

18 However, I was called by Milton Pope
19 later to say that if I were to get back on the
20 levees again, please give him a call.

21 Q. And this happened in about 2004, 2005?

22 A. Approximately.

23 Q. Prior to that time, has anyone with
24 Richland County ever told you -- either Mr. Pearson
25 or any other officer or employee of Richland County

1 ever told you in the discussions you had with
2 them -- that a permit was required to maintain
3 levees?

4 MR. JOHNSON: Objection. Unless --

5 THE WITNESS: No.

6 MR. JOHNSON: -- there's some evidence
7 that the witness talked to him about a permit.

8 THE COURT: I will overrule the
9 objection.

10 BY MR. BECKER:

11 Q. And what was your answer to that
12 question?

13 A. No, sir.

14 Q. Okay. Based on your experience,
15 Mr. Manning, approximately how much does it cost on
16 an annual basis to maintain the Manning levees?

17 MR. JOHNSON: Objection, relevance.

18 THE COURT: I will overrule the
19 objection.

20 THE WITNESS: That number can vary from
21 year to year, depending on the type of maintenance
22 you're doing. But, historically, we spend anywhere
23 from \$20,000 to \$50,000, some years more or less,
24 maintaining the levees. That would include cutting
25 grass, tree removal, slope stabilization, pipe

1 inspection.

2 I just let a contract with Cherokee
3 Construction to do levee maintenance, to do just
4 what we just described, for \$35,000 this
5 week -- last week.

6 BY MR. BECKER:

7 Q. All right. Has it ever exceeded
8 \$174,000 on an annual basis?

9 A. No, sir.

10 Q. Mr. Manning, let's go through these
11 pictures of the levees. And I would like for you
12 to just describe for Judge Smith what we're seeing
13 in these photographs so that he can understand the
14 size and scope of the levees and the activities
15 that are required to maintain them.

16 Could you do that for us, please.

17 MR. JOHNSON: Your Honor, could we have
18 some foundation as to when the pictures were taken,
19 who took them.

20 THE COURT: Yes. When were the
21 pictures taken?

22 BY MR. BECKER:

23 Q. Did you take these pictures,
24 Mr. Manning?

25 A. I took these pictures.

1 Q. All right. Do you recall when that
2 was?

3 A. Probably 2006, 2005 or 2006.

4 Q. All right. Are you familiar with
5 the -- were you on the Manning levees when you took
6 these photographs?

7 A. In some situations, I was.

8 Q. And can you confirm for Judge Smith,
9 based on your own personal knowledge, that these
10 are photographs of the Manning levees?

11 A. These are levees on the property.

12 Q. Thank you.

13 You may proceed.

14 A. Um, this first exhibit, I think is 217,
15 is located on the northern end of the property.
16 That would be the crest of the levee. That would
17 be the toe of the levee. That's the land side of
18 the levee, the river is on the opposite side. The
19 height of that is approximately 20 feet. There's a
20 road on top, 45 feet wide, approximately.

21 Q. All right. Shall we go to the next
22 photograph?

23 A. Um, the next photograph shows the top
24 of the levee. That is also on the northern section
25 above Heathwood Hall school. That is the Congaree

1 River. That is an area that is undeveloped or
2 wouldn't be developed along the riverfront right
3 there.

4 Q. Can you point out where would be or
5 approximately where you would find what is
6 sometimes referred to as the riverside toe of the
7 levee?

8 A. You can't quite see it just because of
9 the -- where the picture was taken, but it would be
10 in this area right there. That would be the
11 riverside toe of the levee.

12 Q. Is the riverside toe of the levee where
13 the base is on the side, where the river is?

14 A. That's correct.

15 Q. Okay. The base of the levee on the
16 riverside of the levee?

17 A. Correct.

18 Q. All right. Now, that little strip
19 of -- let me go back to that picture, please. That
20 strip of land in between the levee and the river,
21 did -- were there ever any plans to develop that
22 part of the property?

23 A. No, sir. The only thing that would be
24 used in that part of the property would be access
25 to the river, marina or boat landing, or some

1 recreational purpose.

2 Q. All right, all right. Let's move to
3 the next one. That's Exhibit 219.

4 A. Um, 219 also shows a road on top. It
5 shows some underbrushing going on along the river.
6 That's the -- in the background, probably the
7 Carolina Stadium, I believe, or the City of
8 Columbia right there. Heathwood Hall School would
9 be located right in here.

10 Q. And proceeding on to Exhibit 220.

11 A. Basically that's the same thing. I
12 don't know exactly where that shot is in relation
13 to the school or the city, but it's on the
14 northern -- on the northern property and Levee
15 Section 1. Trees behind it are that buffer area
16 that we saw in another picture and the river behind
17 that.

18 Q. All right. And the next photograph.
19 That's Exhibit 221.

20 A. 221 is a shot of -- that is what is
21 known as the loop levee, and that levee was built
22 by the South Carolina Highway Department -- or the
23 Federal Highway Transportation. It's part of the
24 interstate system, actually.

25 There is an underpass -- an underpass

1 just right over here. It's off the picture, but
2 this is the levee. That's I-77. You can see the
3 trucks going down it. City wastewater --

4 Q. So the cars in the photograph are
5 actually on I-77?

6 A. That's correct.

7 Q. All right.

8 A. And this loop levee comes around and
9 there's a road that goes under the interstate. So
10 it was built by the Department under their
11 standards, and all of the soil and fill was taken
12 off site from a borrow pit nearby.

13 Q. You mentioned the construction of
14 Interstate 77. Did you and your father deal with
15 the South Carolina Department of Transportation
16 when I-77 was constructed?

17 A. Yes, we did. I mean, there was a large
18 controversy about the location, as I mentioned
19 earlier. But another problem was the height of the
20 actual interstate, where it crossed the river, what
21 was going to be the final height.

22 We had to enter into an agreement with
23 the South Carolina Department of Transportation to
24 assure that that levee was going to be able to go
25 to the 500-year, which was a county standard at the

1 time.

2 They initially were going to put it at
3 the 100-year, and my father was anticipating
4 building a higher levee than that. And so there
5 was an agreement entered into to do that.

6 Q. All right. Describe for us, if you
7 will, Plaintiff's Exhibit 222.

8 A. That actually is a section of levee
9 behind Heathwood Hall school. This is a ramp that
10 is used to access the top of the levee. This is
11 some work being done by Cherokee Construction in
12 2005 or '6 on the levees. These ramps were put in
13 at different points around the property to
14 access -- so you can get on them quick if you need
15 to.

16 Q. All right. Thank you.

17 And Exhibit 223?

18 A. That's just another shot of some of
19 that same work going on.

20 Q. Okay. Finally, Exhibit 224.

21 A. Same thing. You'll note that there's a
22 road on top, level, good slope.

23 Q. All right. Thank you.

24 Mr. Manning, can you tell us
25 what -- what -- who are the different landowners

1 that own the land in each of the levee sections?

2 And let me ask you, just prior to
3 February 20th, 2002, speaking about Levee Section
4 1, what different landowners had land that was
5 protected by Levee Section 1, Manning Levee Section
6 1.

7 A. In Levee Section 1, there were really
8 only three landowners, CV -- Columbia
9 Venture -- Heathwood Hall school, and the City of
10 Columbia. And the City of Columbia and CV were
11 exempt from the ordinance of 2002.

12 Q. How about Levee Section 2?

13 A. I believe there were -- there were
14 three or four -- four additional landowners inside
15 Levee Section 2.

16 Q. In addition to Columbia Venture?

17 A. Correct. I think you had East Richland
18 sewer service district, the Jordan property, Foster
19 property, and Finlay property.

20 Q. All right. You mentioned the East
21 Richland property. Describe for us who that was.

22 A. East Richland is another utility
23 company that has a plant location on Whitehouse
24 Road, which would have been inside Levee Section 2.

25 Q. Is that a wastewater treatment plant?

1 A. Yeah, right.

2 Q. And you mentioned three other
3 individuals. Who are they?

4 A. The Jordans are a family that own land
5 that used dirt off of that property to build I-77.
6 They had a borrow pit over there. John Foster is
7 just a landowner that's been inside those red
8 outparcels that you saw. His property is located
9 in there. His family has owned property there for
10 years. Kirkman Finlay had actually acquired
11 property, I guess, maybe starting in '98, '97,
12 maybe, about -- I don't remember the exact date,
13 but he was a landowner who was inside that Levee
14 Section 2.

15 Q. Let's go back to that picture, the
16 first photograph of the property that we put up.
17 Are you talking about landowners that
18 own land in that red outparcel in the middle?

19 A. This area right here is where all
20 outparcels were, and they've been contained in
21 that.

22 Q. How about Levee Section 3, who owned
23 property in Levee Section 3 as of February 20th,
24 2002?

25 A. Only -- only CV.

1 MR. JOHNSON: That will be fine, Your
2 Honor.

3 THE COURT: But, certainly, your
4 objection is preserved throughout.

5 MR. BECKER: Thank you, Your Honor.

6 BY MR. BECKER:

7 Q. Mr. Manning, I want to return back to
8 just one item before we move on. When I asked you
9 about the landowners who are -- as of February
10 20th, 2002 who owned land in Levee Section 1, you
11 mentioned Columbia Venture, Heathwood Hall
12 Episcopal School, and the city wastewater treatment
13 plant?

14 A. Correct.

15 Q. Are there any others that had land in
16 Levee Section 1 as of February 20th, 2002?

17 A. Actually there is one, a Bill Greg.

18 Q. And who is he?

19 A. Just an individual who lives in
20 Columbia, South Carolina, owns some land north of
21 us.

22 Q. Approximately how many acres does he
23 own in Levee Section 1?

24 A. 300. That's not included in the
25 44 -- 4,500 acres.

1 Q. Okay. It's not included in the 4,400
2 acres that was owned by Columbia Venture as of that
3 day?

4 A. That's right.

5 MR. BECKER: All right. Your Honor, I
6 would like to next submit into evidence three
7 exhibits from the Flood Insurance Rate Map and the
8 Flood Insurance Study. These come from the
9 official FEMA record in an administrative
10 proceeding.

11 I would like to ask Mr. Grier to
12 explain to you the background of that proceeding
13 and why these documents are admissible in evidence.

14 MR. JOHNSON: Your Honor, we don't have
15 any objection to the documents coming in. I'm not
16 aware of interrupting the testimony of a witness
17 for a lawyer to explain what the documents mean.

18 THE COURT: I think -- I anticipate
19 what your concern is, that you don't have any
20 problems with these documents, but what is this
21 witness going to say about these documents? Is he
22 going to give opinions or whatever --

23 MR. JOHNSON: Particularly after he
24 hears the explanation of the lawyer.

25 THE COURT: I just don't know until we

1 to introduce Plaintiff's Exhibits -- Trial
2 Exhibits -- 162, 229, and 003.

3 (PLF. EXH. 162, 1994 Effective FIRM
4 (map panel 160, Richland County), was presented.)

5 (PLF. EXH. 229, Floodway shaded FIRM,
6 was presented.)

7 (PLF. EXH. 003, Richland County FIS,
8 was presented.)

9 BY MR. BECKER:

10 Q. Let's look, first, Mr. Manning,
11 at -- this is in evidence without objection -- I
12 will simply explain to you that this is a FEMA
13 Flood Insurance Rate Map.

14 MR. JOHNSON: Your Honor, I object to
15 counsel explaining to the witness what he's talking
16 about. That isn't the way to do it.

17 THE COURT: I will overrule the
18 objection.

19 MR. BECKER: I was just publishing what
20 he has. This is the Flood Insurance Rate Map
21 dated -- effective date of January 19th, 1994.

22 Along with that, we have another
23 version of that same document that it's -- as the
24 Court well knows -- and all of us who have looked
25 at these photocopies of these maps, it's very

1 difficult to see where the floodway boundary is.

2 I have another version of that,
3 Mr. Manning, shown in Plaintiff's Exhibit 229, that
4 has the actual floodway boundaries shaded in.

5 Do you see that on Exhibit 229?

6 A. I think I do. I can see it here.

7 Q. Based on your knowledge of the property
8 and the Flood Insurance Rate Map effective at that
9 time, is this where the floodway boundary was on
10 the property as of January 19th, 1994?

11 A. It is.

12 Q. All right. And where does it lie,
13 specifically with respect to the levee, the Manning
14 levees?

15 A. On the riverside toe of the levee.

16 Q. In this Flood Insurance Rate Map,
17 effective January 19th, 1994, was any portion of
18 the Manning levees in Sections 1, 2, and 3 in the
19 regulatory floodway as shown on this Flood
20 Insurance Rate Map?

21 A. No, sir.

22 Q. Now, Mr. Manning, I would like to take
23 a look at Plaintiff's Exhibit 003.

24 This is a Flood Insurance Study for
25 Richland County, South Carolina. As you can see,

1 on the cover page, a Flood Insurance Study for
2 Richland County, South Carolina and certain
3 incorporated areas within that county. It was
4 revised July 17th, 1994, and it was published by
5 the Federal Emergency Management Agency.

6 If you look on the second page of this
7 exhibit, you will see a notice to Flood Insurance
8 Study users, and you will see down at the bottom
9 after the second full paragraph, that it refers to
10 an initial countywide Flood Insurance Study
11 effective date of January 19th, 1994, and mentions
12 this revised flood insurance date of July 17th,
13 1995.

14 MR. BECKER: I would like to next call
15 the Court's attention to the table of contents on
16 the following page and the area studied and two
17 discussions there, principal flood problems, and
18 flood protection measures.

19 MR. JOHNSON: Your Honor, can I catch
20 up?

21 MR. BECKER: Your Honor, do you have
22 that exhibit in front of you?

23 THE COURT: I do.

24 MR. BECKER: This is, again -- for
25 Mr. Johnson -- Plaintiff's Trial Exhibit 3. We've

1 just been over the cover, and then pointing to the
2 table of contents, those two sections to which I
3 will turn to next, Section 2.3 and 2.4.

4 Your Honor, if you would turn to Page
5 7, you will see the principal flood problems that
6 are discussed in the study area, which is Richland
7 County. And turning to the full paragraph at the
8 top of Page 8, it states:

9 Floods on the Congaree River between
10 the confluences of Gills Creek and the City of
11 Columbia are affected by a levee built along the
12 east bank of the river. Elevations along the top
13 of the levee vary but are above the elevations of
14 the 100-year flood. The levee was built in the mid
15 1960s to protect farmland in the floodplain along
16 the eastside of the river.

17 At the time this report was prepared,
18 development within the area protected by the levee
19 included sewage treatment facilities owned by the
20 City of Columbia, a private school operated by the
21 Episcopal church, and offices, barns, storage
22 sheds, and other facilities owned by the developer
23 of the levee. The remainder of the property within
24 the levee system is primarily used for agriculture.

25 During a flood in October 1976, which

1 was approximately a 10-year flood, the levee
2 directly west of the sewage treatment facility was
3 breached in two places and the area within the
4 levee was flooded. The breaches have since been
5 repaired. However, a major flood on the Congaree
6 River could be expected to cause similar failures
7 of the levee at other locations.

8 BY MR. BECKER:

9 Q. Mr. Manning --

10 A. Yes, sir.

11 Q. -- do you recognize the description in
12 this document of the Manning levees and the land
13 protected by them?

14 A. I do.

15 Q. Do you have any knowledge of a flood
16 that occurred in 1976 which caused two breaches in
17 the levee in front of the City of Columbia
18 wastewater treatment plant?

19 A. I did.

20 Q. Would you explain to Judge Smith
21 what -- what your knowledge of that event
22 was -- is?

23 A. The levee breached in two locations on
24 the City of Columbia property. Um, there was a
25 lawsuit that resulted from that. The deed

1 MR. BECKER: All right, Your Honor, I
2 will move on.

3 BY MR. BECKER:

4 Q. Moving to Page 9 of the 1995 Flood
5 Insurance Study, Your Honor, just reading that
6 first paragraph under Section 2.4:

7 Aside from the levee along the Congaree
8 River discussed in Section 2.3, there are presently
9 no planned or completed projects designed to reduce
10 flooding on any of the streams studied in detail.

11 That's all I have with that document,
12 Mr. Manning.

13 Now, do you -- do you have knowledge,
14 Mr. Manning, of any other levees in Richland
15 County?

16 A. The only other levee I'm aware of is
17 located in the northwest portion of the county in
18 the vicinity of I-20 and 215. There is an
19 industrial park located off of Frontage Road -- I
20 believe it's called Windhill Road -- That has a
21 levee protecting it.

22 Q. How do you know about this levee? What
23 is the basis of your knowledge of it?

24 A. My earliest way of getting -- being
25 aware of it is, we owned a piece of property when

1 we were developing 700 acres on I-20 that was one
2 interchange up on 321; so I had the opportunity to
3 visit that property, see the levee, and have
4 recently been there to look at the levee.

5 Q. All right. Are you aware of who the
6 owner is?

7 A. I do not know the name. The levee
8 project was -- the levee was built a good while
9 ago, and the property had been sold off in parcels.

10 Q. Are you aware of some of the owners or
11 operators of businesses in the land behind --

12 A. Yes.

13 Q. -- that's protected by the levee?

14 A. Yes, I am.

15 Q. Have you visibly inspected that levee?

16 A. I can't say that I have walked every
17 bit of it. I've been to it, I have walked out on
18 it, but I did not walk the whole levee, no.

19 Q. Are you aware of whether or not that
20 levee is in a floodway?

21 A. The levee is not in a floodway.

22 Q. And how do you know that?

23 A. After inspecting the levee, or going to
24 see the levee, which was recently, I pulled up
25 Richland Online and went to their GIS mapping, and

1 clicked overlays, and the FEMA overlays are a part
2 of that mapping, and it showed that the floodway
3 boundary was on the creek side, Crane Creek side,
4 toe of the levee.

5 Q. So where would the floodway boundary be
6 in relation to the riverside toe of that levee?

7 A. On the riverside, it would be on the
8 outside.

9 Q. So is any part of that levee in a
10 floodway?

11 A. No, sir.

12 Q. Now, you mentioned Richland Online.
13 What is that?

14 MR. JOHNSON: Your Honor, could we ask
15 for a timeframe on this, what boundary he's looking
16 at and what timeframe we're talking about? If it's
17 after --

18 MR. BECKER: I think he's -- well, he's
19 just talking about any other levees that he's aware
20 of in the county. And, certainly, if there's
21 another levee in a floodway that the County's aware
22 of and wants to put up evidence of, Your Honor,
23 they can do that.

24 I'm just asking him about any other
25 flood protection structure in the form of a levee

1 A. Well, I'm sure that in my development
2 experience, I had to apply for permits that were
3 either a part of the development process, the
4 wetland process. Richland County is full of
5 wetlands.

6 When you build a lake in a streambed --

7 MR. JOHNSON: Your Honor --

8 THE COURT: The question was actually
9 if you've made any -- as I understand it -- any
10 requests for permits in a floodway, as opposed to
11 wetlands, and that type of thing.

12 Correct?

13 MR. BECKER: Yes, Your Honor.

14 If I may, I think he's just
15 establishing the background from his prior
16 development experience of the projects that he
17 might have been personally involved in that did
18 involve a floodway.

19 THE COURT: Yes. Anything that
20 involves a floodway --

21 MR. BECKER: Yes.

22 THE COURT: -- I will allow that.

23 MR. BECKER: Right.

24 BY MR. BECKER:

25 Q. So if you would, Mr. Manning, testify,

1 if you will, to your knowledge of -- and experience
2 with permit requests, either that you made, or of
3 which you have personal knowledge, for permit
4 requests made by others for construction in an area
5 that would be within the regulatory floodway prior
6 to February 19th, 1999.

7 A. To the best of my knowledge, the one
8 particular project that comes to mind would have
9 been the WoodLake development.

10 There was a large stream in the
11 property called Bridge Creek, which we seek
12 permit -- a permit -- to build a dam that was in a
13 floodplain; and if it was in a floodplain, we've
14 got to have a floodway, so...

15 MR. JOHNSON: Your Honor, if the
16 question is floodway, it needs to be limited to
17 floodway. If he knows it's a floodway, he can
18 testify about it, and if he's had experience, fine.
19 If he doesn't --

20 THE COURT: There's a real importance
21 here between uses on a floodplain and uses -- or
22 permits in a floodway itself.

23 So if you know it was actually in a
24 floodway, then testify. If you don't, then you
25 should not testify.

1 THE WITNESS: Okay. You know, I can't
2 say for sure that that map was a floodway, but I
3 would have to believe it was.

4 BY MR. BECKER:

5 Q. Was there an actual creek that you were
6 seeking to place a dam on?

7 A. It was, and so most all regulatory
8 streams have floodways and floodplains.

9 Q. What creek was it?

10 A. Bridge Creek.

11 Q. Take a look at Exhibit Number 3,
12 Page -- 3 little I.

13 A. 3(i)?

14 Q. Uh-huh. Do you see Bridge Creek listed
15 in that list of streams that are part of the Flood
16 Insurance Study for Richland County?

17 A. I do.

18 Q. All right. Based on seeing that, do
19 you believe that there was a -- what is your
20 knowledge of whether or not there was a floodway
21 along Bridge Creek?

22 MR. JOHNSON: Your Honor, I object.
23 He's asking an opinion about what this document
24 means. If he's got firsthand knowledge that there
25 was a floodway where he was, fine, but otherwise...

1 THE COURT: Yes, sir. He would have to
2 have firsthand knowledge of it. He can't just
3 assume that it was.

4 MR. BECKER: Okay. All right.

5 BY MR. BECKER:

6 Q. Then are you able to testify,
7 Mr. Manning, about permit requests for construction
8 in a regulatory floodway, as something that you
9 know was in an actual floodway?

10 A. I would have to assume that Bridge
11 Creek was in the floodway.

12 MR. BECKER: And it's listed on the
13 Flood Insurance Study of FEMA, Your Honor. I think
14 that's pretty compelling evidence that
15 it's -- there's at least a floodway.

16 If there's a floodplain involving
17 Bridge Creek, there's got to be a floodway running
18 along the boundary of Bridge Creek.

19 THE COURT: Well, that may well be an
20 assumption, and he's drawn that assumption, but
21 that's as far as we can go with it.

22 MR. BECKER: All right. May I go ahead
23 and ask him about what he built to stop up Bridge
24 Creek, or shall I --

25 THE COURT: No. I think, unless it's

1 established that was a floodway, then this would
2 all still be just hypothetical.

3 MR. BECKER: Okay. Your Honor, I would
4 next like to offer into evidence Plaintiff's trial
5 Exhibit 230.

6 This is a certified copy of a Drainage,
7 Erosion, and Sediment Control Ordinance of Richland
8 County. I believe the County has agreed as to its
9 authenticity.

10 MR. JOHNSON: That's correct, Your
11 Honor.

12 MR. BECKER: Your Honor, I will
13 just -- if the Court will allow -- publish a few
14 discreet little parts of this ordinance.

15 THE COURT: All right, sir.

16 (PLF. EXH. 230, Richland County
17 Stormwater Ordinance (1994), was presented.)

18 MR. BECKER: I would draw the Court's
19 attention to it. Your Honor, if you would just
20 notice on the first page, it's an ordinance for the
21 Richland County Code of Ordinances, Chapter 6,
22 dealing with drainage, erosion, and sediment
23 control.

24 It is hereby amended by deletion of the
25 language contained therein, and substitution of the

1 following language; so it's an amendment to all of
2 Chapter 6.

3 If you look on the last page, Your
4 Honor, you will see that it became effective on
5 July 19th, 1994, which is a date shortly after the
6 most recent Flood Insurance Rate Map we've been
7 discussing previously.

8 Turning back to Page 1, you will see
9 toward the bottom of the page under Division 3,
10 Procedure, Section 8-21. And if you will proceed,
11 Your Honor, to what is Page 589 up at the top, Book
12 005, Page 589, it also has 3819 right above it.

13 THE COURT: Yes, I have it.

14 MR. BECKER: Section 8-21, Variances
15 and Exceptions: The Richland County planning
16 commission may, upon application to it and showing
17 of undue hardship, grant variances and exceptions
18 to any of the provisions of this ordinance,
19 provided such variance or exception is, in the
20 judgment of the planning commission, in harmony
21 with the general purpose and intent of this
22 ordinance.

23 The planning commission shall consider
24 the opinions of the soil and water conservation
25 district and the Richland County engineer before

1 deciding upon any variance or exception.

2 Moving ahead, Your Honor, to
3 page -- what is marked Page 3830, up at the top, it
4 appears that it's also Book 005. 600 is the page
5 number. Subsection 8-62(g) on that page:

6 All levees protecting residential
7 structures or non-residential structures which are
8 not floodproofed shall be designed, constructed,
9 and maintained to provide protection against the
10 500-year flood, plus 3 feet of freeboard. Flood
11 elevations shall be as shown on the latest Flood
12 Insurance Rate Maps or as determined by appropriate
13 hydrologic methods.

14 And then Subsection (h), Your Honor:
15 No levees, dikes, fill materials, structures or
16 obstructions that will impede the free flow of
17 water during times of flood will be permitted in
18 the regulatory floodway...

19 That's all I have with that, Your
20 Honor.

21 BY MR. BECKER:

22 Q. Mr. Manning, were you aware of that
23 ordinance in effect and provisions I just read at
24 the time in 1994?

25 A. Oh, yeah.

1 Q. And were you aware of them between 1994
2 and February 19th, 1999?

3 A. Yes, sir, I was.

4 Q. Now, based on your experience and your
5 personal knowledge, Mr. Manning, prior to February
6 19th, 1999, how did the County interpret the
7 no-impede language in the stormwater management
8 ordinance?

9 MR. JOHNSON: Objection, Your Honor.

10 THE COURT: I will sustain the
11 objection.

12 BY MR. BECKER:

13 Q. Did you have any experience --

14 A. It was my understanding -- I did. I
15 mean, when we were in the -- you know, developing
16 properties, you run across these things all the
17 time, and some of them can be minor, some of them
18 can be major, but the difference between impede --

19 MR. JOHNSON: Your Honor, I thought you
20 sustained it.

21 THE COURT: I sustained the objection.

22 MR. BECKER: Could I establish a
23 foundation, Your Honor?

24 THE COURT: Yes, sir, you need to.

25 BY MR. BECKER:

1 Q. Prior to February 19th, 1999, did you
2 have occasions to discuss this no-impede provision
3 in the Stormwater Management Ordinance with
4 officials of Richland County?

5 A. My experience was that --

6 MR. JOHNSON: Your Honor, he asked
7 prior to that date, did he have discussions. We
8 hadn't gotten that, and he was launching into what
9 his experience was.

10 THE COURT: Rather than say what my
11 impression was -- the question was, did you have
12 discussions with them about the no-impede
13 provision.

14 THE WITNESS: Yes, sir, I did.

15 MR. JOHNSON: Prior to that date?

16 THE WITNESS: I'm sorry, I couldn't
17 hear you.

18 MR. JOHNSON: Prior to that date?

19 THE WITNESS: Prior to 1999?

20 MR. JOHNSON: Yes.

21 THE WITNESS: Yes.

22 BY MR. BECKER:

23 Q. Prior to February 19th, 1999, did you
24 have discussions at various times with members of
25 the staff of Richland County about the no-impede

1 language in the county Stormwater Management
2 Ordinance?

3 A. Yes, and it didn't necessarily
4 affect it.

5 Q. All right. Approximately how many such
6 conversations did you have over the years?

7 A. Numerous.

8 Q. And who were the people that you spoke
9 with about this?

10 A. It could have been the county staff,
11 the people who would issue drainage permits. It
12 could have been the people who would issue the
13 permits for roads, bridges, you know. There were
14 encroachments into these kind of things on numerous
15 occasions. And so there was an ongoing dialogue
16 with the County. Staff interpreted the ordinance
17 to say this --

18 MR. JOHNSON: Your Honor, I object. He
19 can't identify who he talked with. He talks about
20 staff members. We don't know who they are or
21 whether they have any authority to speak for the
22 County, and I object to it.

23 THE COURT: Well, he can testify to
24 actual conversations that he had with employees of
25 the County employed in regard to these particular

1 regulations. And so he can do that.

2 To say he's got to talk to someone who
3 had the authority to bind the County, then you get
4 that person there, and the administrator says,
5 Well, I don't know, that's not my department; I
6 don't handle that.

7 So he can testify as to conversations
8 he actually had, as long as they were with persons
9 who were -- had the authority to interpret or give
10 advice to the public in regard to these provisions.

11 MR. JOHNSON: Your Honor, would he not
12 have to identify who those people were?

13 THE COURT: If he knows their names.
14 If not, he can describe where he talked to them and
15 where they were, or what gave him the impression
16 that they had some authority in that area.

17 BY MR. BECKER:

18 Q. Who are some of the individuals that
19 you can recall, Mr. Manning, having such
20 discussions with?

21 A. Ralph Pearson, county engineer; Gordon
22 Green, the assistant county engineer. I'm sure
23 I've had conversations with Harry Reed, who was the
24 floodplain development coordinator. Ken Knudsen.

25 You know, this is not just an issue

1 related to Columbia Venture. You know, I worked
2 with the Home Builders Association on issues that
3 were problematic for the industry, and, you know,
4 this kind of thing came up, and so we worked with
5 staff to make sure that the ordinances were what we
6 thought they were.

7 The last thing you want is an ordinance
8 that's undefinable and unclear. In my business,
9 you've got to know what you can and can't do.

10 Q. Right.

11 So are these conversations that you had
12 with the members of the County staff that you just
13 mentioned -- were they in connection with some of
14 your own personal development projects?

15 A. Sure.

16 Q. And were they in connection with some
17 of the issues raised formally within the Home
18 Builders Association of which you have served as an
19 officer?

20 A. Sure. It was broad and specific.

21 Q. All right. Then based on that
22 experience, prior to February 19th, 1999, how did
23 the County interpret the no-impede language in the
24 Stormwater Management Ordinance?

25 MR. JOHNSON: Your Honor, I object,

1 unless there's some testimony that the
2 interpretation of no-impepe relates to what goes on
3 in a floodway.. That's what we're dealing with
4 here.

5 MR. BECKER: Your Honor, the provision
6 doesn't apply to any land except land in the
7 floodway.

8 THE COURT: It does only reflect the
9 matters in regard to the regulatory floodway.

10 MR. JOHNSON: Your Honor, the witness
11 has already testified he's had no experience
12 dealing with floodways.

13 THE COURT: And that's -- that's -- I
14 think that's a valid objection, is that you're
15 asking him, how did they interpret the no-impepe
16 provision, which states that you cannot impepe free
17 flow of water during times of flood that would be
18 permitted in the regulatory floodway.

19 And he's said that his only other
20 experience with the floodway was in a different
21 context, and that's a dam.

22 MR. BECKER: Well, could we ask the
23 witness to explain that, Your Honor? I mean, he's
24 clearly had conversations with members of County
25 staff.

1 THE COURT: I know, but I think what
2 you're seeking here is the testimony as to the
3 County's -- the manner in which they, perhaps,
4 handled -- and their attitude toward handling other
5 matters in the floodplain, as opposed to how they
6 handle matters in the floodway.

7 Now -- and I think that that's a very
8 precise issue. I do think, however, that the
9 anticipated purpose for this testimony is the -- is
10 what this witness -- what this witness's impression
11 was and information that he may have given to
12 Columbia Venture, relative to his prior dealings
13 with the County on the issue of the interpretation
14 of development within -- under the floodplain and
15 not under this storm and erosion and sediment
16 control ordinance, which may well have affected
17 their view and their reasonable expectations in
18 regard to how the County would act relative to the
19 proposed flood map by FEMA.

20 I don't know whether you are or not,
21 but if that's what you're doing it for and if
22 that's what it's coming in for, then I would allow
23 it.

24 But as far as it being specifically the
25 County's attitude as to building in the floodway,

1 it would not be permissible for that, unless you're
2 just referring to the one other instance that he
3 had.

4 MR. BECKER: Your Honor,
5 ultimately -- you are correct -- we intend to have
6 him testify about what you just mentioned.

7 Perhaps, if the Court would grant me
8 just a little more leeway with a few questions to
9 the witness in order to lay a foundation.

10 THE COURT: Go ahead.

11 BY MR. BECKER:

12 Q. Mr. Manning, did you have development
13 projects -- regardless of whether you remember
14 whether or not the regulatory floodway was
15 specifically impacted on a map -- but did you have
16 development projects, in your past experience,
17 prior to February 19th, 1999, that, for whatever
18 reason, required you to interact and have
19 discussions with Mr. Pearson, Mr. Reed, Mr. Green,
20 others within the County staff, about how this
21 ordinance, the Stormwater Management Ordinance, and
22 the no-impede language, would be applied, if it
23 would be, to the development project for which you
24 were seeking a permit application?

25 A. Yes. I mean --

1 Q. All right. Now, in your experience as
2 a member and officer of the Home Builders
3 Association, did you have experience with
4 interacting with Mr. Green and Mr. Pearson, the
5 county engineer, and Mr. Reed about how the County,
6 in handling permit applications generally, would
7 interpret the no-impede language in the Stormwater
8 Management Ordinance with respect to specific
9 examples of permit applications?

10 A. In the past, they had looked at it as a
11 no --

12 Q. Would you just answer that question yes
13 or no.

14 A. Yes.

15 Q. All right. Then based upon that
16 experience, Mr. Manning, how, in those
17 conversations you had with Mr. Pearson and
18 Mr. Green and Mr. Reed, how did the county
19 engineers office and those staff members interpret
20 the no-impede language in the Stormwater Management
21 Ordinance?

22 MR. JOHNSON: Objection, Your Honor.

23 THE COURT: Before you answer that
24 question, go ahead, sir.

25 MR. JOHNSON: Your Honor, having heard

1 your comments, it does seem to me that the first
2 question the witness ought to have to answer is:
3 Did you ever have any conversation with the people
4 at Columbia Venture prior to the purchase as to how
5 the County interpreted it?

6 If he didn't, it doesn't make any
7 difference anyway. If he says he did, then we need
8 to argue the objection.

9 THE COURT: All right, sir. I think
10 he's got a point there. It's really not relevant
11 unless this is information that he shared with
12 Columbia Venture in regard to his opinion -- or his
13 experience with the County in dealing with these
14 matters.

15 MR. JOHNSON: Prior to the purchase.

16 THE COURT: Yes, prior to the purchase.

17 BY MR. BECKER:

18 Q. Prior to the purchase on February 19th,
19 1999, did you at one time or another explain your
20 experience in dealing with officials of Richland
21 County -- Mr. Pearson, Mr. Green, Mr. Reed -- on
22 how they interpreted the no-impepe language in the
23 Stormwater Management Ordinance?

24 A. I'm sure I had conversations about
25 that.

1 Q. With members and representatives of
2 Burroughs & Chapin?

3 A. Absolutely, and Tee-to-Green, another
4 prospect.

5 MR. JOHNSON: Your Honor, "I'm sure I
6 must have had conversations," doesn't meet the
7 test.

8 It's not, "I speculate I had
9 conversations."

10 We need to hear from the witness, Does
11 he have a recollection of a conversation with
12 Burroughs & Chapin, prior to the purchase, where he
13 explained to them whatever he thought the County's
14 engineers thought it meant.

15 THE COURT: I think you need to take
16 that a step further.

17 BY MR. BECKER:

18 Q. Did you have conversations like
19 Mr. Johnson just described, prior to the purchase?

20 A. I did have conversations. I don't know
21 what time and date and exactly who was in those
22 meetings and what was exactly said, but it was all
23 in the text of what was going on with the -- you
24 know, how to deal with a sediment/erosion control
25 permit, you know, where the floodway line was on

1 the toe of the levee, did we even need to discuss
2 that? You know, was that an issue?

3 So we would have had those
4 conversations, I just can't tell you verbatim what
5 was said in them.

6 MR. JOHNSON: And I object.

7 THE COURT: I find that to be
8 sufficient that he did pass it on to them.

9 And I think, as authority for allowing
10 this type testimony, I again cite this Walcek case,
11 W-a-l-c-e-k there, the court of claims went into a
12 lot of detail in regard to Mr. Walcek's previous
13 dealings with the persons responsible for the
14 enforcement of the Wetlands Act, how it was
15 interpreted by them, what they allowed him to do in
16 regards to certain -- I'm sorry, not -- it's not
17 Walcek. It's -- I'll get on the right one here.

18 In any event, I would like to find the
19 cite of the -- I mean, the name of the case -- I
20 will find it. It has to do -- Walcek was one
21 dealing with a -- with some canal-front property.
22 What I'm -- the case I'm thinking about, that I
23 will put on the record later, that was a case
24 involving a farmer who had a lot of acreage, and
25 some of it was subject to the Wetlands Act. And

1 the government and agents responsible for the
2 enforcement of that Act had been quite permissive
3 in regards to allowing him to do certain things
4 with his property.

5 And the Court found that that was
6 relevant to his reasonable expectations in regard
7 to what he could or could not do when he entered
8 into it. And so the Court allowed that. And I
9 think this is sort of a similar situation.

10 That's part of the reasoning for me
11 allowing this individual to utilize his prior
12 dealings, how they had previously dealt with him,
13 and what type of attitude they had toward these,
14 because I think that's relevant in regard to CV's
15 view of getting into this, whether or not FEMA was
16 going to stand by that provision, whether the
17 County was going to help them, all of those issues.

18 So he's testified he did have -- did
19 have conversations with them relative to his prior
20 dealings, and I think that is admissible.

21 MR. JOHNSON: Your Honor, so that I can
22 just put it on the record, I heard the testimony
23 differently.

24 I heard the witness say, I had
25 conversations, I can't tell you who was there, when

1 it was, what was said, but I did have conversations
2 about it.

3 If he can't tell us what was said, then
4 it doesn't -- my position would be, respectfully,
5 it doesn't meet the test.

6 THE COURT: Right. I think I had cut
7 him off from giving the general nature of those
8 conversations. I think we stopped that, so we
9 really haven't gotten to that point. He says he
10 can't remember precise dates, precise people,
11 exactly what was said verbatim.

12 But the general nature of it, we
13 haven't gotten into that yet, so I think we're
14 getting ready to go into that.

15 MR. BECKER: That's right.

16 THE COURT: Go ahead.

17 BY MR. BECKER:

18 Q. Let me ask you, who is Ralph Pearson?

19 A. County engineer.

20 Q. And who is Harry Reed?

21 A. Floodplain coordinator for Richland
22 County.

23 Q. And who is Gordon Green?

24 A. He would have been the assistant, I
25 think, County engineer.

1 MR. JOHNSON: Your Honor, I just want
2 to say, now that my co-counsel has pointed it out
3 to me, Mr. Manning had also said that at the time
4 the floodway was on the toe of the levee, so why
5 was there even a need to talk about it? Because
6 you don't get there if you're not in a floodway.

7 And so I think what the witness said
8 was, I don't know what was said and why we were
9 even talking about it, because, at the time we were
10 having the discussion, the floodway was at the toe
11 of the levee on the river side.

12 So I would ask that the Court at least
13 require more detail about the matter before he
14 gives this ultimate view.

15 THE COURT: Well, is there any question
16 but that, at the time of the contract to purchase
17 was entered into, that -- in '98 -- that they had a
18 revised preliminary map that did extend the
19 floodway over the properties, correct?

20 They, then, were trying to, according
21 to the Defendant, they -- it was their belief that
22 the County was going to join with a -- having FEMA
23 revise that map, or -- or perhaps allow the
24 improvement of the levees so that the property
25 would not be within a floodway.

1 And whether or not they were reasonable
2 in thinking that might take place can depend on a
3 whole bunch of facts, one of which is talking to
4 the seller who has had extensive dealings with the
5 County relative to how the County views these
6 matters and how amenable they more than likely
7 would be to assisting in regard to getting the FEMA
8 map revised.

9 Is that where you're headed?

10 MR. BECKER: Exactly, Your Honor.

11 Thank you.

12 MR. JOHNSON: Your Honor, what I don't
13 understand, you're right about the 19 -- about the
14 revision of the maps, and the maps were revised to
15 put the property in -- virtually all of it -- in
16 the floodway.

17 I'm just reporting what the witness
18 testified to, which doesn't seem to correlate with
19 him having discussions -- or specific
20 discussions -- during the time frame in question.

21 All I ask is, before he gives whatever
22 ultimate testimony he wants to, that we have more
23 detail so we can determine if he has a recollection
24 of the specific conversation where it was
25 discussed.

1 THE COURT: All right. Well, I will
2 overrule that.

3 Go ahead.

4 MR. BECKER: Your Honor, my co-counsel,
5 just by way of clarifying the record and
6 Mr. Manning's experience, has pointed me to the
7 floodway and floodplain table for Bridge Creek that
8 is part of the Flood Insurance Study dated July
9 17th, 1995. It's Plaintiff's Trial Exhibit 3.

10 I would like to point both the Court
11 and the witness to that page of the flood insurance
12 study. It is not numbered, but it is called Table
13 3 and it provides floodway data for Bridge Creek
14 and Rice Creek, and it's about midway through the
15 document, Your Honor. And you will see --

16 THE COURT: I'm not there. Why don't
17 you approach the bench and find it for me.

18 MR. BECKER: Okay, Your Honor, thank
19 you. Right here, Your Honor. And if I could find
20 it for the witness, Your Honor.

21 THE COURT: Okay, certainly.

22 MR. BECKER: Your Honor, I would like
23 to publish from this page, Plaintiff's Exhibit 3,
24 that Bridge Creek is listed on this document, the
25 Flood Insurance Study, and it shows both a

1 floodway -- a floodway of varying widths along the
2 panels of the cross sections of Bridge Creek and
3 the area -- section area -- in square feet -- of
4 the floodway at those cross sections, those study
5 cross sections.

6 I think this demonstrates, Your Honor,
7 that Mr. Manning did, in fact -- though he may not
8 specifically remember this, whether what was
9 floodplain, what was floodway -- he testified that
10 he sought a permit to construct a dam across Bridge
11 Creek. And that would necessarily involve
12 construction in a regulatory floodway, according to
13 the flood insurance study.

14 So I would like to ask him about his
15 interaction with the County officials in seeking
16 that permit application for that dam.

17 THE COURT: Okay.

18 MR. JOHNSON: Your Honor, if the
19 witness can testify which cross section his
20 development was in and when his development was
21 done, it may become more relevant, or become
22 admissible. But until he can do that, um, we don't
23 know that his development is anywhere near any of
24 these cross sections.

25 THE COURT: All right. So this was

1 prior to 1998?

2 THE WITNESS: Yes, sir.

3 THE COURT: All right. If it's a dam
4 being built on a river, I take judicial notice that
5 that must be a floodplain. I don't know how it
6 could not be.

7 All right, sir.

8 BY MR. BECKER:

9 Q. All right. Now, Mr. Manning, I would
10 like for you to describe your experience in dealing
11 with officials of Richland County, the men you've
12 described -- the county engineer, the County
13 floodplain coordinator, members of their
14 staff -- what was your experience in seeking the
15 permit to build a dam across Bridge Creek for the
16 WoodLake subdivision; and based on that experience,
17 what was their interpretation of the no-impede
18 language in the Stormwater Management Ordinance?

19 MR. JOHNSON: Your Honor, I object,
20 until we hear testimony as to when the development
21 took place, because this study is done in
22 1995 -- or revised in 1995.

23 If it was before 1995, it wouldn't be
24 the study -- we don't know what the study would
25 have shown then.

1 THE COURT: All right, then.

2 Mr. Becker?

3 MR. BECKER: Well, I will go back to
4 what the Court took judicial notice of, Your Honor:
5 If you're damming a stream that's part of FEMA's
6 Flood Insurance Study, you're definitely going to
7 be crossing the floodway no matter what.

8 THE COURT: But did they have this
9 language in the ordinance -- the no-impede
10 language -- at that time?

11 BY MR. BECKER:

12 Q. All right. Well, based on your
13 experience in dealing with the officials, were they
14 dealing with no-impede language at that time?

15 A. Well, there was no way to build a dam
16 without impeding the flow, and so the
17 interpretation that we were getting was a
18 quantifiable number on a rise.

19 Q. All right. So is it your testimony --

20 MR. JOHNSON: Your Honor, could we
21 get --

22 THE COURT: Mr. Johnson's point is
23 that, if the ordinance about no-impede wasn't in
24 existence at the time that he built the dam, then
25 it's not relevant.

1 BY MR. BECKER:

2 Q. When did you build the dam?

3 A. Late eighties.

4 Q. Though we do not have a copy of the
5 Stormwater Management Ordinance in effect at the
6 time, do you know whether or not that no-impede
7 language was part of the Stormwater Management
8 Ordinance in effect at that time?

9 And if so, what is the basis of that
10 knowledge?

11 MR. JOHNSON: Your Honor, I object.
12 The ordinance would be the best evidence.

13 THE COURT: Well, it would be the best
14 evidence; but if he says he read it and he can give
15 us the date of it, then he can testify.

16 THE WITNESS: Well, I personally don't
17 recall what the language was in the Stormwater
18 Ordinance in 1988 or '9. I don't think there was
19 much difference in the impede.

20 THE COURT: All right. I will have to
21 sustain the objection at this point.

22 BY MR. BECKER:

23 Q. When did you say that the
24 stormwater -- when did you say you built that dam?

25 A. In the late eighties, I believe.

1 Q. In the late eighties? All right.

2 MR. BECKER: Your Honor, I would like
3 to move to Plaintiff's Exhibit, I believe it is,
4 51.

5 Any objections to admitting this
6 document into evidence?

7 MR. JOHNSON: Just one second. No
8 objection, Your Honor.

9 (PLF. EXH. 51, Richland County Council
10 Minutes and Council Report, Re: Encroachments in a
11 Floodway, February 9, 2001, was presented.)

12 MR. BECKER: All right. Your Honor,
13 what I have handed you are minutes of a Richland
14 County Council regular session meeting. I'm not
15 concerned at this time with the substance of the
16 minutes, but attached to those minutes, as produced
17 by Richland County, is an official document
18 prepared by Mullen Taylor dated February 9th, 2001,
19 a report to the county council.

20 And at that time, her position was
21 assistant county administrator, and it's a document
22 that she prepared in the conduct of her official
23 duties, and I would like to publish a few short
24 excerpts from this council report at this time.

25 First of all, as you can see, it's

1 entitled Council Report on Encroachments in a
2 Floodway. It was prepared by Mullen Taylor on
3 February 9th, 2001. You see that down at the very
4 bottom --

5 THE COURT: Yes.

6 MR. BECKER: -- Your Honor, by the page
7 number.

8 On the first page in the one, two,
9 three, four, fifth paragraph down, it says --

10 MR. JOHNSON: Your Honor, may I
11 interrupt one second? I'm sorry.

12 MR. BECKER: Your Honor, Mr. Johnson
13 wanted me to stipulate that the minutes are, in
14 fact, a separate document from the council report,
15 and I don't have any problems stipulating to that.
16 I mean, the minutes are separate and distinct. The
17 council report is what it is. It was produced
18 along with the documents with the minutes, but
19 whether they were attached to each other at the
20 time, we don't know for sure.

21 MR. JOHNSON: Thank you.

22 MR. BECKER: Again, Your Honor, reading
23 the fifth paragraph down on the first page:

24 In 1974 Richland County adopted its
25 first drainage ordinance. In this first ordinance,

1 regulations stated that levees, dikes, and other
2 fill materials shall not be allowed in the
3 floodplain unless specified by approval of the
4 City/County engineer. In 1981, the County
5 undertook its first -- let me start back.

6 In 1981, the County undertook its first
7 major revision to this drainage ordinance. In the
8 revision, the 1974 language stated above was
9 changed to the following: No levees, dikes, fill
10 materials, structures, or obstructions that will
11 impede the free flow of water during times of flood
12 will be permitted in the regulatory floodway.

13 So, Your Honor, I would offer this as
14 evidence that at the time that Mr. Manning
15 testified that he built the dam across Bridge Creek
16 in Richland County in the late 1980s, the very
17 language of the ordinance we're discussing today
18 was in effect.

19 THE COURT: All right. I concur.

20 MR. BECKER: And I would like to
21 proceed to ask Mr. Manning about his interactions
22 with members of the Richland County Engineer's
23 Office and the floodplain coordinator's office and
24 their staff about their interpretation of the
25 ordinance in effect at that time, when he sought a

1 building permit to build a dam across Bridge Creek.

2 May I proceed?

3 THE COURT: All right, sir. You may
4 cross the bridge.

5 BY MR. BECKER:

6 Q. Mr. Manning --

7 A. Yes, sir.

8 Q. -- would you describe, at the time that
9 you applied for a building permit with the county
10 engineer's office to build a dam across Bridge
11 Creek, how did the county engineer and his staff
12 interpret the no-impece language in the ordinance
13 that was in effect at that time?

14 MR. JOHNSON: Your Honor, I object to
15 this question.

16 THE COURT: I overruled the objection.

17 MR. JOHNSON: My request is that if we
18 publish -- we be permitted to publish more from the
19 document that was published under the rule that
20 allows -- if they put something in and we think
21 it's incomplete, we're entitled to publish further
22 information --

23 THE COURT: All right, sir.

24 MR. JOHNSON: -- that bears on the
25 question.

1 If you turn to Page 2 of the document,
2 council report of Ms. Taylor, the second paragraph:

3 Since 1981, Richland County's provision
4 has remained unchanged, although there has been
5 some ambiguity as to how to interpret this
6 provision. However, the issue of clarifying the
7 provision was not a priority for the public works
8 department because the department received very few
9 applications for construction or improvement of any
10 sort in a floodway.

11 When the department did receive an
12 application, the county engineer used the test of
13 whether the project created no rise in the base
14 flood elevation in order to determine approval or
15 denial.

16 Thank you, sir.

17 THE COURT: You may proceed.

18 BY MR. BECKER:

19 Q. And my question to you, Mr. Manning,
20 is, At the time that you applied for a building
21 permit with the Richland County Engineer's Office
22 in the late 1980s to build a dam across Bridge
23 Creek, did they interpret the no-impede language in
24 the County ordinance in effect at the time in
25 accordance with the no-rise standard that Mr. Pope

1 just described from Ms. Taylor's memorandum?

2 A. I think it's obvious that we got the
3 dam built, and we were going to create an
4 impediment in the creek. And it was a measure that
5 the county engineer used to allow or disallow
6 projects in a floodway.

7 Q. And so did they utilize a no-rise
8 standard in approving that permit?

9 MR. JOHNSON: Object to the form,
10 leading. Let him ask what standard they used.

11 THE COURT: Well, I think you are
12 leading him.

13 BY MR. BECKER:

14 Q. What standard did they use in reviewing
15 your permit application?

16 A. A no-rise.

17 Q. Thank you.

18 Did you have -- now, you've also
19 discussed other conversations that you've had with
20 those same members of Richland County government in
21 dealing with the Home Builders Association and in
22 dealing with other projects for which you have
23 sought permit applications.

24 Based on those experiences, what
25 standard did the county engineer's office use to

1 interpret the no-impede language in the Stormwater
2 Management Ordinance?

3 MR. JOHNSON: Object, Your Honor,
4 relevance.

5 THE COURT: I will overrule the
6 objection.

7 Go ahead, sir.

8 THE WITNESS: I mean, from the document
9 you just handed me, the -- I don't know if this is
10 a resolution or what you would call this -- to the
11 council -- but Ms. Taylor is saying there's
12 ambiguity in the ordinance.

13 And so there had to be an
14 interpretation that said, Do we use a no-rise, or
15 do we use, you know, no impediment at all?

16 Projects would come forward that I know
17 in the County were out there, that had an
18 impediment in the flow, but they couldn't go
19 forward if they didn't change the language; and so
20 the no-rise that we've been operating off of became
21 nothing --

22 MR. JOHNSON: Your Honor, move to
23 strike the answer. It really wasn't responsive at
24 all to the question.

25 THE COURT: I will overrule the

1 objection. I think he's giving his -- and he's
2 limiting his testimony with regard to his
3 experience with the engineers and with the County
4 in regard to their utilizing the no-rise standard
5 in regard -- rather than the no-impede standard.

6 It is one o'clock. I saw at least two
7 of you looking at your watch. We'll go ahead and
8 break now, come back at two o'clock, if that gives
9 everybody enough time to get something to eat.

10 All right. We'll be in recess, then,
11 until two o'clock.

12 (The lunch recess was held.)

13 THE COURT: All right, then, if we have
14 everyone, we can proceed.

15 Mr. Becker, you may proceed.

16 MR. BECKER: Thank you, Your Honor.

17 I'm informed by the Court staff that
18 they're going to refill our water pitchers in a
19 minute. I'll go ahead and start, but I wanted you
20 to be aware.

21 THE COURT: All right, fine. Thank
22 you.

23 BY MR. BECKER:

24 Q. Mr. Manning, I would like to next show
25 you Plaintiff's Trial Exhibit 233.

1 (PLF. EXH. 233, Option Agreement and
2 Addendum between Manning and Congaree Farms, LLC,
3 was presented.)

4 BY MR. BECKER:

5 Q. Mr. Manning, I'm concerned, first, with
6 the -- what is Page 4 of that document.

7 A. Page 4?

8 Q. Yes. If you will look on Page 4,
9 there's an agreement that begins on that page. Do
10 you see that, dated June 25th, 1997?

11 A. June 25th?

12 Q. Yes. It's titled Agreement and it's
13 June 25th.

14 A. Okay, I've got it.

15 Q. Are you familiar with this document?

16 A. Yes, I am.

17 Q. Okay. Let me -- before I ask you to
18 explain it, did your father have mortgages on the
19 property prior to the sale of the Columbia Venture
20 in February of 1999 --

21 A. Yes, sir.

22 Q. -- or at some point prior to that,
23 prior to this date, June 25th, 1997, did he have
24 mortgages on the property?

25 A. He did. He had a number of mortgages

1 with Farmers Home Administration, some agricultural
2 production credit lines, that kind of thing.

3 Q. Were you familiar with those mortgages?

4 A. I was.

5 Q. And what was the basis of your
6 knowledge of those mortgages?

7 MR. JOHNSON: Your Honor, I would
8 object on relevance. I don't see how this is part
9 of the general history.

10 THE COURT: All right, sir. What is
11 the relevance?

12 MR. BECKER: Well, Your Honor, it's
13 explaining the status of the property and who had
14 rights in it and -- option rights in it -- at the
15 time it was sold to Columbia Venture, and the
16 status of those option rights, the deadlines that
17 were imposed as a result of these agreements. It
18 just goes to the general --

19 THE COURT: It just goes into why the
20 property was sold and motivation.

21 MR. BECKER: Exactly. And the time
22 frame that was imposed as a result of these
23 agreements.

24 THE COURT: All right, sir. I will
25 overrule the objection. You can go ahead.

1 BY MR. BECKER:

2 Q. And by June 25th -- well, I think what
3 I had asked was, what was the basis of your
4 knowledge of those mortgages and their status in
5 June of 1997?

6 A. I was involved in placing -- getting
7 those mortgages put on the property a few years
8 earlier prior to me leaving my father's operation.

9 Q. Did you help negotiate the terms of
10 those mortgages with the Farmers Home?

11 A. Yes.

12 Q. On your father's behalf?

13 A. Yes.

14 Q. Were you familiar with the status of
15 those mortgages in June 1997?

16 A. Unfortunately they were in default.

17 Q. What was the cause of that default?

18 A. Well, it was a series of things, but by
19 and large, two major disasters.

20 MR. JOHNSON: Your Honor, I object.
21 The cause -- if they were in default, they were in
22 default.

23 THE COURT: Well, sir, I think that
24 there's a broader issue here, and this gives me an
25 opportunity now to -- I found the correct cite,

1 finally. I was saying it was Walcek. It touches
2 on this area of background information,
3 expectations, and so on. And it's the Brace
4 decision, B-r-a-c-e, in 72 Federal Claims 337.

5 And that talks about -- it's certainly
6 not exactly what we're getting into right now, but
7 it bears on it, the expectations factor that goes
8 into the extent of reliance on the regulatory
9 scheme in place at the time, the investment
10 decisions, the extent to which the further
11 regulation of its property was foreseeable.

12 All of those issues, I think, in
13 reading these cases over the weekend, particularly
14 the ones I have read over the weekend, they spend a
15 lot of time going into all of the factual -- into a
16 lot about the factual circumstances prompting the
17 seller and buyer and expectations and so on.

18 It's -- that's pretty broad. You don't
19 need to get too detailed about this situation, but
20 certainly, you can go into some of the background
21 in regard to why the seller sold.

22 MR. BECKER: Thank you, Your Honor.

23 BY MR. BECKER:

24 Q. You don't need to dwell on it,
25 Mr. Manning, but just explain to us what caused the

1 mortgages to be in default.

2 A. There was a series of catastrophic
3 events that, you know, he could not repay the
4 Farmers Home debt. The Congaree Farms basically
5 went to him and discussed a plan to buy the
6 mortgages out and, um --

7 Q. Let's back up just a minute.

8 A. Okay.

9 Q. Let's talk now about this agreement
10 dated June 25th, 1997. The parties to that
11 agreement are who?

12 A. Manning's obviously a party, and then
13 Congaree Farms, LLC.

14 Q. Okay. What was the purpose of this
15 agreement?

16 A. The purpose was to allow him time to
17 proceed; you know, basically pay for another day.
18 They would buy the mortgages out and give him
19 options to repurchase certain parcels within a
20 certain time frame.

21 Q. Who were the members of Congaree Farms,
22 LLC?

23 A. I don't have all of them in front of
24 me, but Don Houck was one, Mile Loadholt was
25 another. Johnny Godley.

1 Q. Could you move the microphone up just a
2 little bit.

3 A. Don Houck, Miles Loadholt, Johnny
4 Godley were some of them.

5 Q. All right. Were you involved in
6 negotiating this agreement?

7 A. Not really, no.

8 Q. All right. But you are familiar with
9 it?

10 A. Absolutely.

11 Q. After it was entered into?

12 A. Correct.

13 Q. All right. And this is a copy of the
14 agreement that your father entered into with
15 Congaree Farms. If you will look on what is Page
16 16 of 29, according to the faxes, the fax heading
17 up at the top, top right-hand corner --

18 A. What page are you on?

19 Q. Page 16 of 29. If you will look up in
20 the upper right-hand corner.

21 A. Okay.

22 Q. Is that your father's signature on the
23 document?

24 A. That is.

25 Q. All right. It says -- if you would, go

1 back to the page we were working from, which is 11
2 of 29 in the upper right-hand corner.

3 Read what the purpose of the agreement
4 was.

5 A. The agreement is intended to enable
6 Manning to obtain a release of the FSA mortgages
7 and liens on real estate Manning now owns.
8 Congaree will make the required payment to FSA for
9 the release of the FSA mortgages and liens, and
10 hold title to the property, except for the Manning
11 home, unless and until Manning has made payments or
12 sales of the property in accordance with the
13 provisions stated hereinbelow.

14 Q. And in Paragraph 2, it refers to the
15 4,400-some-odd acres that your father and your
16 family owned?

17 A. That's correct.

18 Q. Describe generally, if you would, what
19 the payments were and what the timetable for making
20 those payments was.

21 MR. JOHNSON: Your Honor, I object.
22 The agreement speaks for itself. The Court can
23 read it. In his opinion, what it says is not
24 relevant.

25 THE COURT: I will overrule the

1 objection.

2 THE WITNESS: Basically, Congaree would
3 pay \$4,359,000 to FSA in 1997, and -- for the
4 release of mortgages and liens on the property.
5 This payment is in addition to two \$100,000
6 non-refundable deposits paid to FSA.

7 Basically, he was required to make
8 certain payments back to Congaree Farms within a
9 particular time frame. Those time frames, I think,
10 were a year. Properties could be parceled out,
11 according to a schedule that's in this document.
12 It was done by levee section and different release
13 prices per section.

14 BY MR. BECKER:

15 Q. All right. You're referring to the
16 schedule that appears -- well, actually, that is
17 not part of the document.

18 Excuse me. It's on Page 14 of 29.

19 A. That is the release provisions for the
20 properties.

21 Q. All right. So property could be
22 released or repurchased at that per-acre net price
23 in Levee Sections 1, 2, and 3, as stated there?

24 A. That's correct.

25 Q. So was the balance owing on the Farmers

1 Home mortgage was at that time 4.359 million?

2 A. That's correct.

3 Q. And the total release price for all of
4 the acreage was set forth in Paragraph 5(b) on 12
5 of 29, is that right, \$6,660,800?

6 A. That's correct.

7 Q. And he had an option as set forth there
8 in Paragraph 5(b) on that page in the first
9 sentence -- a requirement, rather -- to pay 3.3
10 million in releases during the first year?

11 A. Correct.

12 Q. All right. Take a look on Page 15 of
13 29, Paragraph 8. It says, Time Required For
14 Closings.

15 Time is of the essence in Manning's
16 making payments to Congaree. Is that right?

17 A. That's correct.

18 Q. As it turned out, were the borrowers
19 insisting on strict adherence to those time frames?

20 A. Yes, they were.

21 Q. I'm sorry, Congaree Farms, was it
22 insisting on strict adherence to the time frames
23 set forth herein?

24 A. They did.

25 Q. Thank you. That's all I have on there.

1 Now, did the agreement with Congaree
2 Farms -- what did it cause your father and you to
3 do with respect to the property?

4 A. After he entered into this agreement, I
5 approached him about possible ways of, you know,
6 creating a strategy where he could continue to
7 maintain or obtain control of the property. I did
8 not want the property broken up into parcels, and
9 according to this agreement, there were some large
10 option payments that were required on an annual
11 basis in order to do that.

12 Um, so I put a number of investment
13 groups together where we went in and bought the
14 properties out from Congaree Farms. We did that
15 initially. I can't remember the exact dollar
16 amount, but --

17 Q. You're jumping ahead just a little bit
18 of where I wanted to be. We'll get to that in a
19 minute, Mr. Manning, but did your father list the
20 property for sale?

21 A. He did, and I was the listing broker.

22 Q. So you were acting as the listing
23 broker for the property?

24 A. If it wasn't at that exact time,
25 shortly thereafter, I was.

1 Q. Did you deal with any sales prospects
2 after that point? After the summer of 1997, did
3 you begin to deal with any sales prospects who were
4 interested in purchasing the property?

5 And I would like you, if you would,
6 just to name the number of prospects you worked
7 with.

8 A. After we secured the position with
9 options -- exercising the options -- we did begin
10 to have conversations with potential purchasers of
11 the property, first being Tee-To-Green, which was a
12 company out of Ohio and Kentucky.

13 And then later we had discussions with
14 Burroughs & Chapin, which resulted ultimately in
15 Columbia Venture. But those were the two that we
16 were having discussions with.

17 Q. Tell us what you recall about
18 Tee-To-Green. What kind of company was it, what
19 kind of business was it in, that kind of thing.
20 Tell us about who was Tee-To-Green, LLC.

21 A. Tee-To-Green was a development company,
22 likely from Kentucky and Ohio, and they had been
23 involved in a number of golf projects. And they
24 realized the potential to do golf here, but the
25 acreage was such that it needed to be a mixed-use

1 community.

2 And we began looking at ways to develop
3 the property, creating some site planning, and one
4 thing led to another. They were primarily
5 interested in Levee Sections 1 and 2, not 3.

6 And they basically entered into an
7 agreement -- I don't recall the exact date -- but
8 somewhere in the summer -- to do a venture where I
9 think it was my father put up half the interest,
10 and they would put up 15 million dollars for that,
11 for the remainder.

12 Q. Okay. So their arrangement -- did they
13 actually enter into an Option Agreement --

14 A. They did.

15 Q. -- on those terms?

16 A. They did.

17 Q. And the terms of that agreement were to
18 acquire Levee Sections 1 and 2?

19 A. Correct.

20 MR. JOHNSON: Object to the form.
21 Counsel is leading.

22 MR. BECKER: I'm just trying to
23 summarize his prior testimony, Your Honor.

24 THE COURT: Leading is not really a big
25 thing since we don't have a jury.

1 MR. BECKER: Well, that's what I
2 thought, and I'm just trying to do this
3 expeditiously.

4 THE COURT: Let's put it this way: I'm
5 easily led.

6 BY MR. BECKER:

7 Q. Repeat, if you will, what the terms of
8 their agreement was with your father.

9 A. Basically, they would put up 15 million
10 dollars for half the property, my father would
11 retain the other half, and it would be on 2,500
12 acres.

13 Q. Okay. So they were signing an option
14 to buy 2,500 acres in a joint venture with your
15 father; is that correct?

16 A. Correct.

17 Q. And they would put up 15 million, and
18 he would put up 2,300 acres?

19 A. Approximately 2,500.

20 Q. 2,500, okay.

21 Did Tee-To-Green conduct any due
22 diligence? And, specifically, did they commission
23 an appraisal of the property?

24 A. They did an appraisal on the property.
25 They ordered site plan and environmental

1 assessment. And they did a lot of investigation
2 into wetlands. And part of their due diligence
3 was, obviously, to look at the levee system to
4 determine whether they could improve the levees.

5 Q. Mr. Manning, I would like to show you a
6 copy of a site plan.

7 Is this a site plan that Tee-To-Green
8 prepared, a preliminary site plan for the property?

9 A. It is.

10 Q. Okay. And it shows the development
11 that they had proposed to -- to build on the
12 property?

13 A. This was part of their analysis to see
14 what they could do on the property.

15 Q. All right.

16 A. You know, it's rough. It's not a
17 refined site plan, just enough to get going on.

18 MR. BECKER: Okay. Let me now show you
19 Plaintiff's Exhibit 255.

20 (PLF. EXH. 255, Appraisal of 4,461
21 acres by Jerry R. Adkins, was presented.)

22 BY MR. BECKER:

23 Q. At this point, I want to call your
24 attention to -- it would be the 13th page on the
25 document. You can count forward six actual paper

1 pages, and it's got, at the bottom, the Bates
2 number CV006005.

3 Do you see that?

4 A. Not quite.

5 THE COURT: I'm sorry, would you say
6 that again.

7 MR. BECKER: It's down in the lower
8 right-hand corner, CV006005.

9 THE COURT: Thank you.

10 THE WITNESS: I apologize, I'm not
11 finding it.

12 MR. BECKER: Could I show the witness,
13 Your Honor, the page?

14 (Off-the-record discussion.)

15 BY MR. BECKER:

16 Q. All right. This is the portion of this
17 exhibit that I want to call your attention to at
18 this time.

19 Do you recognize this document?

20 A. Yes, sir.

21 Q. All right. What is it?

22 A. It's a -- kind of a rough aerial photo
23 of the property we're talking about.

24 Q. What is the title of the document?

25 A. Real Property Appraisal.

1 Q. And who was it prepared for?

2 A. Burwell Manning.

3 Q. What does it say -- read the full title
4 there on the cover page, please.

5 A. Full title?

6 Q. Right here, right here. Just read
7 that.

8 A. Complete Appraisal/Summary Report, Fee
9 Simple Interest At Congaree Farms, LLC, Proposed
10 4,461 Acre River Pointe South Development, Richland
11 County, South Carolina, reflecting market
12 conditions as of March 26th, 1998 for First
13 Republic Mortgage.

14 Q. All right. What involvement did First
15 Republic Mortgage have, if any, in the property, or
16 with Tee-To-Green?

17 A. Tee-To-Green had approached them about
18 possibly using them in financing the property.

19 Q. So they were a proposed lender on the
20 project for Tee-To-Green?

21 A. That's correct.

22 Q. Was this appraisal commissioned by
23 Tee-To-Green for that purpose, for providing to
24 their lender?

25 A. Yes, it was.

1 MR. JOHNSON: Your Honor, object. I'm
2 looking at an appraisal where it's a letter to
3 Burroughs & Chapin dated February the 8th, 1999.

4 MR. BECKER: Well, that's an update.
5 And I'm not talking about that right now. I'm
6 talking about this page, CV006005.

7 BY MR. BECKER:

8 Q. Did you receive a copy of this
9 appraisal at or about the time it was prepared?

10 A. Yes, sir, I did.

11 Q. And did you review it then?

12 A. I did.

13 Q. Did you have discussions with
14 Tee-To-Green about the appraisal at that time?

15 A. We did.

16 Q. All right. Mr. Adkins, do you know
17 him? Do you know that appraiser?

18 A. I know of him; I don't know him
19 personally.

20 Q. Did you have discussions with him as he
21 was preparing the appraisal?

22 A. I provided information to him, or Bill
23 Sermon, who was also a broker in this situation, to
24 give him the necessary information, from the title
25 and deeds and that kind of thing.

1 Q. When you say Mr. Sermon, who are you
2 talking about?

3 A. Mr. Sermon was a real-estate broker
4 that I knew from Myrtle Beach who became involved
5 in this project with me as a co-broker.

6 Q. So he was also involved in providing
7 information for this appraisal?

8 A. Yes, he was.

9 Q. What was the -- if you will look on
10 Page 4 of this document, which at the bottom it's
11 CV006010. Just flip forward a few pages until you
12 come to that. It's got Mr. Adkins' signature at
13 the bottom in the lower left corner.

14 Do you see that?

15 A. I see it.

16 Q. Okay. What was his opinion of the
17 value of the property as of March 26th, 1998?

18 A. 30 million dollars.

19 Q. All right.

20 MR. JOHNSON: Your Honor, can I have
21 the witness publish the two paragraphs -- three
22 paragraphs -- before the 30 million dollars?

23 THE COURT: Yes.

24 MR. JOHNSON: Or at least call your
25 attention to it. He doesn't need to read it.

1 A. After we received the report, sometime
2 in early June, we began having --

3 Q. Of 1998?

4 A. 1998.

5 Q. Okay.

6 A. We had conversations with principals of
7 Tee-To-Green.

8 Q. And who were they?

9 A. Greg Tabar, and he also had a
10 consultant that was doing some of the due diligence
11 work. I can't recall his name off the top of my
12 head. But Greg Tabar was the principal. He was
13 here in Columbia. He spent a good bit of time
14 here. And we did have discussions about what this
15 meant. We were shocked to find out that this
16 preliminary map was out there, and we didn't know
17 about it, given all that we had done regarding
18 levees in the past.

19 At that time, we were under some pretty
20 tight deadlines. You know, we discussed how to
21 move forward with that obstacle in the way. And
22 the issue was, Is there any way we can get those
23 levees built? You know, my past experience had
24 been no-rise, you know, and that the levee had
25 been -- the toe of the levee had been the floodway

1 boundary, you know. But given the fact that if it
2 moved it in, what did that mean?

3 I mean, we didn't know what it meant.

4 So we had -- you know, we were dealing a lot with
5 the County to determine what could be done and what
6 couldn't be determined -- I mean, what couldn't be
7 done. And because of the time frames involved,
8 they couldn't get assurance with us and the County
9 what could be done, and they withdrew their option
10 to purchase.

11 Q. Thank you.

12 If you will look on -- if you will also
13 go to the top of Page 6 and read that paragraph.

14 A. Visual inspection of the Congaree River
15 levee was conducted during the site reconnaissance.
16 The levee appeared to be well maintained within the
17 property boundaries. North of the property,
18 particularly at the northernmost extent, the levee
19 did not appear to be well maintained. A number of
20 large trees are growing on the levee, and the top
21 of the levee is narrow with signs of erosion
22 evident. Therefore, based upon elevation and
23 condition, it is likely that construction work on
24 the levee will be required.

25 This situation could be corrected by

1 THE COURT: Overruled.

2 Go ahead.

3 THE WITNESS: Well, it was my opinion
4 that -- and my father's opinion, who was associated
5 with the property --

6 MR. JOHNSON: Object to his father's
7 opinion, hearsay.

8 THE COURT: Just what your opinion was.

9 THE WITNESS: My opinion was that the
10 only way to keep this property from being parceled
11 out, broken up, ever to be developed, was going to
12 be to get the levee certified. There was no way
13 that anything beyond certification was going to
14 work to develop the property.

15 BY MR. BECKER:

16 Q. All right. And when you say certified,
17 what do you mean?

18 A. Meet the standards of the Corps of
19 Engineers and FEMA to improve the levees.

20 Q. I think you have already covered this,
21 but let me make sure.

22 Did Tee-To-Green exercise their option
23 to purchase?

24 A. No, they withdrew it.

25 MR. BECKER: All right. Your Honor, I

1 would next like to publish -- offer into evidence
2 and publish portions of the next successive Flood
3 Insurance Rate Map and Flood Insurance Study.

4 This is Plaintiff's Trial Exhibits 238,
5 237, and Exhibit 10.

6 (PLF. EXH. 238, June 1998 preliminary
7 FIRM (map panel 160, Richland County), was
8 presented.)

9 (PLF. EXH. 237, Floodway shaded FIRM,
10 was presented.)

11 (PLF. EXH. 10, Richland County
12 Preliminary FIS, June 5, 1998, was presented.)

13 MR. BECKER: All right. Your Honor, I
14 have offered into evidence and have up on the
15 screen the revised preliminary Flood Insurance Rate
16 Map of June 5th, 1998. We have two versions that
17 show this one on the screen up there.

18 The one that's sort of shaded in yellow
19 shows the extent of the floodway on that map.

20 BY MR. BECKER:

21 Q. Mr. Manning, looking at that map,
22 approximately how much of Levee Section 1 does the
23 new floodway cover?

24 A. From what I can see, it doesn't cover
25 all of Levee Section 1, 2, or 3, but I think the

1 conclusion is that it's all of it.

2 Q. Did that include the levees? Were the
3 levees inside the floodway, according to this map?

4 A. Everything from the river to the bluff
5 was in the floodway.

6 MR. BECKER: Your Honor, looking at
7 Plaintiff's Exhibit 10, again, I will note this is
8 a Flood Insurance Study of FEMA, marked preliminary
9 and dated June 5th, 1998. It is for Richland
10 County, South Carolina and incorporated areas like
11 the previous one, including the towns of Arcadia
12 Lakes, the City of Columbia, Town of Eastover, City
13 of Forest Acres, the Town of Irmo, and
14 unincorporated areas of Richland County.

15 If you look on the very next page of
16 the document, under Notice to Flood Insurance Study
17 Users, it indicates that the initial countywide
18 flood insurance effective date was January 19th,
19 1994, and the revised Flood Insurance Study is July
20 17, 1995.

21 Again, the table of contents, it
22 discusses -- as did the previous Flood Insurance
23 Study -- the principal flood problems and the flood
24 protection measures in Sections 2.3 and 2.4,
25 respectively.

1 Turning to Page 7, as you can see, in
2 the Principal Flood Problems section, there is no
3 mention of the Manning levees in this section, and
4 that discussion continues over on Page 8 and part
5 of Page 9.

6 I just draw the Court's attention to
7 the fact that the Manning levees were discussed in
8 that section in the previous Flood Insurance Study,
9 and I call the Court's attention to Section 2.4
10 Flood Protection Measures.

11 And it states, again: There are
12 presently no planned or completed projects designed
13 to reduce flooding on any of the streams studied in
14 detail.

15 That's all I have for that, Your Honor.
16 BY MR. BECKER:

17 Q. All right. Mr. Manning, I would like
18 you to next take a look at Plaintiff's Exhibit 236.

19 (PLF. EXH. 236, letter from Burwell
20 Manning to Members of Richland County Council, Re:
21 4,500 acre new town development and proposed
22 floodway, dated May 26, 1998, was presented.)

23 BY MR. BECKER:

24 Q. Mr. Manning, do you see that this
25 letter is on the stationery of Eastern Corn and

1 the floodway, unless a variance is obtained.

2 Q. All right. That's all I have for that
3 document.

4 MR. JOHNSON: Your Honor, we ask that
5 the witness publish Paragraph N.

6 THE COURT: I'm sorry, which one?

7 MR. JOHNSON: Paragraph N.

8 MR. BECKER: N?

9 MR. JOHNSON: November.

10 THE WITNESS: N?

11 MR. JOHNSON: N, please.

12 THE WITNESS: Richland County
13 representatives indicated they are currently using
14 the preliminary maps (with the widened floodway)
15 for regulatory and permitting purposes.

16 MR. BECKER: All right. Plaintiff's
17 Exhibit 12.

18 (PLF. EXH. 12, McSwain letter to FEMA
19 (Buckley) Re: mapping process, dated July 18, 2001,
20 was presented.)

21 BY MR. BECKER:

22 Q. Mr. Manning, look on page -- the second
23 page of this document at the carbon copy
24 recipients.

25 Do you see the second one from the

1 bottom?

2 A. Burwell Manning?

3 Q. Yes. Did you -- do you know if your
4 father received a copy of this letter at or about
5 the time it was written?

6 A. He did.

7 Q. Did he discuss it with you?

8 A. He did.

9 Q. Did he give you a copy?

10 A. I'm sure I have one.

11 Q. Did you read it?

12 A. Absolutely.

13 Q. This is a letter from Cary McSwain to
14 Mr. Michael Buckley at FEMA. Is that right?

15 A. Yes, sir.

16 MR. BECKER: All right. Your Honor, I
17 would like to publish this. We can read it. Would
18 you like to just take a moment to read it, or would
19 you like Mr. Manning to read it in the record?

20 THE COURT: I will just read it. Since
21 it's going in the record, I will just read it.

22 I have read it, thank you.

23 MR. BECKER: Thank you, Your Honor.

24 BY MR. BECKER:

25 Q. All right. Mr. Manning, I would like

1 to move next to July 17th, 1998, just moving
2 forward in the chronology here and show you
3 Plaintiff's Exhibit 262.

4 (PLF. EXH. 262, Agreement among
5 Manning, Chapel Hill, and DAK, with Amendment, was
6 presented.)

7 BY MR. BECKER:

8 Q. You'll recall that the date of the
9 Option Agreement, Mr. Manning, on Congaree Farms
10 was June of 1997.

11 A. Thereabouts, yeah.

12 Q. All right. And so you had about one
13 year to exercise the options under that Option
14 Agreement with Congaree Farms?

15 A. That's correct.

16 Q. All right. Look on page -- what is
17 actually the -- it's got CV -- it's Page 3 of 29 in
18 the upper right-hand corner beginning with the
19 faxed documents. If you will look in the upper
20 right-hand corner about the fourth page in.

21 A. I've got 3/29. Where to now?

22 Q. All right. Do you see that agreement
23 there?

24 A. I do.

25 Q. And who are the parties to that

1 agreement? Look at the signatures at the end and
2 tell us who the parties to that agreement were and
3 just generally describe for Judge Smith what this
4 agreement was for.

5 MR. JOHNSON: Objection, relevance.

6 MR. BECKER: He's going to testify
7 about what the relevance is, Your Honor.

8 MR. JOHNSON: Your Honor, this is yet
9 another matter that doesn't involve the Plaintiff
10 in this case and --

11 MR. BECKER: Your Honor, it does
12 involve the entities who sold the property to the
13 Plaintiff.

14 THE COURT: Yes, I think it's
15 consistent with what I have previously ruled on,
16 the related matter. I'm going to overrule the
17 objection.

18 THE WITNESS: The parties to the
19 amendment were Chapel Hill, DAK III, LLC, and my
20 father.

21 BY MR. BECKER:

22 Q. And describe for Judge Smith just who
23 those parties were and what the purpose of entering
24 into this agreement on the date that it was signed,
25 which appears to have been in July of 1998.

1 A. Kirkman Finlay was the sole owner of
2 Chapel Hill. Alec Chaplin and myself and Bud
3 Kibler and Kirkman were members of DAK III. My
4 father, obviously, was the person who had the right
5 to repurchase the property.

6 Q. When you say DAK III, are you referring
7 to the entity that's called D-A-K, the Third, LLC?

8 A. That's correct.

9 Q. And so what was the substance of the
10 agreement?

11 A. We were extending our time frame so
12 that it would allow for a potential investor to
13 step in and modify -- or meet the deadline that we
14 had to meet in the next go-around.

15 Q. Did those entities acquire certain
16 rights to the property at this time?

17 A. There were no rights at this time, but
18 they had rights going forward, that, you know, they
19 would be paid more than their investment into the
20 property if they were exercised.

21 Q. Did those entities put up a required
22 consideration under the previous Option Agreement
23 with Congaree Farms, LLC, of 3.3 million dollars?

24 A. We did.

25 Q. All right. And were the option -- was

1 the option that belonged to your father under the
2 agreement with Congaree Farms, LLC, extended for
3 the second term?

4 A. It was extended.

5 Q. Nothing further with that.

6 Now, this brings us up to about July
7 1998. When did you first receive an inquiry from
8 Burroughs & Chapin about any possible interest in
9 purchasing the property?

10 A. After Tee-To-Green elected to withdraw,
11 Bill Sermon and I had conversations about other
12 potential investors in the project. Bill was from
13 Myrtle Beach and knew of Burroughs & Chapin, so he
14 immediately, at that point in time -- I can't tell
15 you the date -- but in and about July of that
16 year -- he began to have conversations with
17 principals or staff members or principals of
18 Burroughs & Chapin about the project.

19 Q. All right. Let me show you Plaintiff's
20 Exhibit 498.

21 (PLF. EXH. 498, Draft option to
22 purchase, was presented.)

23 BY MR. BECKER:

24 Q. Now, this document is not executed, but
25 I can tell you it was produced in discovery in this

1 case.

2 Did Burroughs & Chapin begin to offer
3 an option on the property when you first began
4 having discussions with them?

5 MR. JOHNSON: Your Honor, is this
6 document being offered into evidence?

7 THE COURT: I assume that it is. It's
8 marked as an exhibit, yes.

9 MR. JOHNSON: What relevance could a
10 non-executed document have?

11 THE COURT: Well, I think if they were
12 making offers in the beginning negotiations, that
13 would all go to this -- go to the issue relative to
14 the expectations. So I think it is relevant.

15 MR. JOHNSON: Is there an
16 identification of whose document it is and was it
17 presented and anything to tie it to the
18 transaction? I mean, in the absence of that, it
19 seems to me it wouldn't be relevant at all.

20 THE COURT: Well, if it expressed
21 intentions and expectations relative to the
22 purchase of the property, it would be relevant.

23 I think, again, consistent with the
24 other rulings that I've made, the cases are clear
25 that whether or not the expectations of the

1 Plaintiff were reasonable in regard to the
2 regulations, whether the regulations might be
3 changed, is very important in regard to the Penn
4 Central factors.

5 So I'm not sure yet what relevance this
6 will have, but I will overrule the objection.

7 BY MR. BECKER:

8 Q. Did you and Burroughs & Chapin begin to
9 exchange drafts of Option Agreements beginning
10 sometime in around the summer of 1998?

11 A. Yes, we did.

12 Q. Does this appear to be similar to the
13 draft Option Agreements that you began exchanging
14 with Burroughs & Chapin in the summer of 1998?

15 A. It does.

16 Q. All right. Let me call your attention
17 specifically -- and the real purpose for offering
18 this is to call your attention to Exhibit A. In
19 it -- well, describe for Judge Smith what Exhibit A
20 sets forth.

21 A. It's basically a description of the
22 property, the owner of the options, basically, and
23 the repurchase rights during that time frame from
24 all the various parcels that Columbia Venture owned
25 or bought.

1 Q. And it shows, of course, options to
2 repurchase parts of Levee Section 1 were owned by
3 DAK III, LLC. Is that right?

4 A. That's correct.

5 Q. And options to repurchase parts of
6 Levee Section 2 were owned by -- and Section
7 3 -- were owned by Chapel Hill, LLC?

8 A. Correct.

9 Q. And the deadline for the expiration of
10 those repurchase rights that is shown over there in
11 the far column, what is the date there?

12 A. February 17th, 1999.

13 Q. Is that the expiration date of the
14 repurchase options under the agreement with
15 Congaree Farms?

16 A. That's correct.

17 Q. All right. I would like to offer
18 Plaintiff's Exhibit 60.

19 (PLF. EXH. 60, Status of Manning
20 Property, October 16, 1998, was presented.)

21 BY MR. BECKER:

22 Q. This is a memorandum dated October
23 16th, 1998, Mr. Manning, from Cary McSwain to Terry
24 Brown. And this was produced by the County.

25 As you can see, the received stamp

1 recall that.

2 Q. Did you discuss those same issues with
3 any other members of the Richland County staff?

4 A. I can't recall that, no.

5 MR. BECKER: Your Honor, we've been at
6 it an hour and a half. I would like to get a glass
7 of water.

8 THE COURT: Yes. Court will be in
9 recess now for 15 minutes.

10 (A brief recess was held.)

11 THE COURT: All right. You may
12 proceed.

13 MR. BECKER: Thank you, Your Honor.

14 BY MR. BECKER:

15 Q. Mr. Manning, before the break, we had
16 left off at about October of 1998, and you were
17 testifying about discussions that you were having
18 at the time with members of the county
19 administration.

20 During this time frame and since the
21 summer of July of 1998, had you also been having
22 conversations with Burroughs & Chapin about the
23 property?

24 A. We have had conversations with
25 Burroughs & Chapin.

1 Q. Were you continuing to exchange --

2 A. It's an ongoing process.

3 Q. Were you continuing to exchange drafts
4 of potential Option Agreements, things of that
5 nature?

6 A. We did.

7 Q. Did you explain to Burroughs & Chapin
8 the existence of the Congaree Farms -- the
9 agreement with Congaree Farms?

10 A. They were aware of that.

11 Q. All right. Did you make them aware of
12 that?

13 A. I can't remember or recall whether it
14 was I or my father, but they had copies of that.

15 Q. Did you explain to Burroughs & Chapin
16 your knowledge of the ongoing FEMA floodplain
17 mapping process?

18 A. Burroughs & Chapin was aware of the
19 issues regarding all of the floodplains, and they
20 were also doing other analytical investigation on
21 the property.

22 Q. On their own?

23 A. On their own.

24 Q. Okay. Did you have discussions with
25 Burroughs & Chapin about the work that might be

1 required to improve the Manning levees?

2 A. Actually, at that point,
3 Lockwood-Greene had come in to do some
4 consultation. Lockwood-Greene had actually been
5 involved previously with Tee-To-Green, but they
6 became involved with Burroughs & Chapin to help
7 understand the levee issue at hand.

8 Q. All right. Did you interact with
9 Lockwood-Greene as a part of Burroughs & Chapin's
10 due diligence on the property?

11 A. My role would be primarily to assist.
12 They wanted a third-party person to do that. They
13 would request information from me, I would provide
14 them what I could, or point them in the right
15 direction, and then they would go from there.

16 Q. All right. As the listing broker on
17 the property and the representative of your father,
18 were you generally aware of what due diligence
19 Burroughs & Chapin was undertaking at this time?

20 A. I knew for the most part what they were
21 doing, yes, sir.

22 Q. Would that be normal, for the listing
23 broker involved in the property to be involved in
24 that process?

25 A. It is. I mean, they want someone to

1 help facilitate the process, and that would be me.
2 I would gather the information for them, provide
3 them what they wanted, or help them get to where
4 they needed to go in order to get the answers they
5 needed.

6 Q. All right. Did you provide Burroughs &
7 Chapin with the appraisal prepared by Mr. Adkins?

8 A. Sometime in the fall or December, you
9 know, they got a copy of it, they did.

10 Q. Did you provide them a copy of the
11 environmental siting study that had been prepared
12 by Rust Environment and Infrastructure?

13 A. All of the due diligence that was done
14 by Tee-To-Green was basically utilized by Burroughs
15 & Chapin..

16 Q. All right. Did you assist in handing
17 it over to them?

18 A. We did.

19 Q. Let me ask you to next look at
20 Plaintiff's Exhibit 275.

21 (PLF. EXH. 275, Reinstatement of and
22 Amendment to Purchase and Sale Agreement and
23 Purchase and Sale Agreement, was presented.)

24 MR. BECKER: And, Your Honor, if I may
25 just explain for the Court, the reason these

1 Q. And he was signing on behalf of all
2 three of those?

3 A. Correct.

4 Q. And looking back on the first page of
5 the document, what is the date of the document?

6 A. November 13th, 1998.

7 Q. All right. Does this appear to you to
8 be the fully executed purchase and sale agreement
9 between Burroughs & Chapin and your father for the
10 property?

11 A. Appears to me it is.

12 Q. All right. It refers to -- on Exhibit
13 A under the first numbered paragraph called
14 Sale/Purchase, Exhibit A, and it refers to
15 approximately 4,460 acres. Is that right?

16 A. That's correct.

17 Q. All right. Is that the entire property
18 that we've been referring to throughout the day?

19 A. That's the property.

20 Q. All right. Now, under Paragraph 2,
21 Number 2, on that same page that ends with CVMcNair
22 000282, what is the purchase price?

23 A. 18 million.

24 Q. All right. Now, what was the purchase
25 price that you've previously been discussing with

1 Tee-To-Green, just earlier that year?

2 A. It was a different arrangement,
3 basically, but the purchase price was, in effect,
4 30 million dollars. We ended up putting up 15 and
5 them putting up the property.

6 Q. And that was for how much acreage?

7 A. 2,500 acres.

8 Q. And the property had previously been
9 appraised as a whole by Mr. Adkins for 30 million.
10 Is that right?

11 A. Correct.

12 Q. What caused your father to agree to
13 sell it for 18 million? Do you know?

14 MR. JOHNSON: Object, Your Honor,
15 hearsay.

16 MR. BECKER: Let me lay a foundation,
17 Your Honor.

18 BY MR. BECKER:

19 Q. You were the listing broker on the
20 property?

21 A. I was.

22 Q. Were you involved in the back-and-forth
23 negotiations between Burroughs & Chapin and Burwell
24 Manning --

25 A. I was.

1 going to say what Burroughs -- his understanding of
2 what Burroughs & Chapin was going to do, not what
3 they planned. It would be based upon them telling
4 him what their plan was.

5 THE COURT: That's right. I think he
6 can testify in regards to what they told him, what
7 someone with the company told him. I don't believe
8 that's hearsay. I don't think he can simply give a
9 general description of his opinion as to what they
10 would do.

11 BY MR. BECKER:

12 Q. Mr. Manning, who were you negotiating
13 with for the purchase of the property? Who was
14 representing Burroughs & Chapin in those
15 negotiations?

16 A. George Gregory.

17 Q. Did you discuss with Mr. Gregory why
18 Burroughs & Chapin was interested in purchasing the
19 property?

20 A. I did.

21 Q. What did he tell you?

22 A. Burroughs & Chapin was interested in
23 looking at opportunities outside of Myrtle Beach.
24 They were concerned about the risk of having all of
25 their eggs in one basket down there, and they were

1 diversifying how they developed property.

2 So we had discussions about that. We
3 had discussions about the opportunity that this
4 tract had, given its proximity to the City of
5 Columbia, the infrastructure that it had down
6 there, um, the University being at the back door.
7 Um, you know, there were many, many opportunities
8 here that they felt like they ought to pursue.

9 Q. All right. Did Mr. Gregory discuss
10 what Burroughs & Chapin intended to do with the
11 property if they bought it?

12 MR. JOHNSON: Same objection.

13 THE WITNESS: The discussion --

14 MR. JOHNSON: You have ruled, I
15 understand that, I'm just protecting the record.

16 THE COURT: All right, sir.

17 Go ahead, sir.

18 THE WITNESS: The discussions I had
19 with Mr. Gregory regarding Burroughs & Chapin's
20 intentions weren't to a specific site plan. None
21 of that had been done at this point. But they
22 realized Mr. Gregory understood the dynamics of
23 this property and the opportunity that it presented
24 Burroughs & Chapin if they were able to develop it.
25 He also understood the risks associated

1 with the levee issue and all other due diligence
2 issues. That hadn't been completed yet, but that
3 was one that was a game changer for them that they
4 had to overcome, or they weren't going to close on
5 the property.

6 BY MR. BECKER:

7 Q. All right. In your experience and as
8 the listing broker for the property, what did you
9 consider to be at the time the highest and best use
10 of the property?

11 MR. JOHNSON: Objection, Your Honor.
12 What difference does it make as to his opinion on
13 this issue? How is it possibly relevant to the
14 three issues that have got to be proved? Plus,
15 it's an opinion by a lay witness. He's not an
16 expert appraiser who gives --

17 THE COURT: He's not an expert
18 appraiser, but he has testified in regards to his
19 extensive background in regard to real estate
20 development. And, of course, the economic impact
21 is, of course, the first issue in Penn Central.

22 So he can -- he's been asked, not of
23 the value of the property, but he's been asked for
24 the highest and best use. And I think, with his
25 background, he would be competent to testify to

1 that.

2 MR. BECKER: Thank you, Your Honor.

3 BY MR. BECKER:

4 Q. Again, Mr. Manning, in your experience,
5 given your real estate development experience, your
6 experience with working on the property and being
7 involved with it for all of those years and as a
8 real estate broker active in the marketplace, what
9 did you believe was the highest and best use for
10 the property?

11 MR. JOHNSON: Your Honor, could I ask
12 for a foundation for the question? Are we talking
13 about the property with the levees improved or the
14 property without the levees improved? The property
15 in the floodway?

16 THE COURT: Well, I will overrule the
17 objection. I think that's for cross-examination.
18 Go ahead, sir.

19 THE WITNESS: First of all, as a
20 developer, we have to rely on other experts to lead
21 us to conclusions: Appraisers, engineers,
22 environmentalists. In the case of the appraiser,
23 he was testifying to a value. I have to
24 assume -- or not agree -- that his appraisal is
25 correct. We've got more than one appraisal out

1 there. Those appraisers are not for agricultural
2 values.

3 Given what I know could happen to the
4 property, I would have to say that the future
5 development plans, assuming those obstacles would
6 be overcome, was for a large mixed-use project.

7 BY MR. BECKER:

8 Q. At this time and based on your
9 experience in the development business and as the
10 listing broker for the property, would it have been
11 possible to achieve that highest and best use of
12 the property without improving the levees to
13 certified standards?

14 MR. JOHNSON: Your Honor, there's been
15 no qualification of his expertise in FEMA issues or
16 what the county ordinances mean. We're talking
17 about the ultimate issue in the case, I guess, from
18 a lay witness, and I object to him being permitted
19 to offer an opinion on this.

20 THE COURT: I will overrule your
21 objection. He had intimate knowledge and
22 involvement with this property, what had to be done
23 in order to overcome the -- before they could
24 develop it.

25 As a matter of fact, he has testified

1 to that already. So I will overrule your
2 objection.

3 Go ahead.

4 BY MR. BECKER:

5 Q. So, again, Mr. Manning -- and I will
6 try to repeat my question as close as possible:

7 Based on your experience as a real
8 estate developer, based on your experience as the
9 listing broker for the property, and based on
10 everything that you knew about the current
11 regulatory regime that attached to the property,
12 would it have been possible to proceed with a
13 mixed-use development of the property without
14 improving the FEMA levees to certified standards?

15 A. No.

16 Q. Did you explain that position to
17 Mr. Gregory at Burroughs & Chapin?

18 A. Mr. Gregory was fully aware of that
19 without me even saying it.

20 Q. And do you know that based on
21 conversations you had with Mr. Gregory?

22 A. Absolutely, yeah.

23 Q. Now, I believe we've touched on this,
24 but I want to make sure. Describe your role in
25 Burroughs & Chapin's due diligence process prior to

1 purchasing the property. Just generally.

2 A. Generally, as I stated before, my role
3 was to provide information to assist him in getting
4 answers to questions that they may have regarding
5 environmental issues, wetland issues, levee issues,
6 soil conditions. You know, there's a wide range of
7 conditions there in that agreement.

8 And although I didn't go meet with
9 every person in that loop, I assisted them in
10 evaluating that stuff and helping them go through
11 the regulatory process, explained what I knew about
12 what was going on in Richland County -- they were
13 from Myrtle Beach -- how things worked, who to go
14 see, who to talk to.

15 So they did their own due diligence,
16 primarily through third party, but I was aware of
17 what was going on. They would ask me.

18 Q. How did Burroughs & Chapin's due
19 diligence for this property compare to other
20 purchasers you had worked with in the past on
21 properties you may have listed for sale?

22 MR. JOHNSON: Your Honor, he's now
23 asking for an opinion about the quality of the due
24 diligence of Burroughs & Chapin.

25 THE COURT: I think what he asked him

1 pre-purchase discussions that you had with Richland
2 County Council members and staff.

3 Again, pivoting back to, you were
4 having these conversations with Burroughs & Chapin
5 as the potential purchaser of the property, but you
6 were also representing the seller, and there were
7 issues that needed to be addressed with Richland
8 County during that time. Is that accurate?

9 A. That is correct.

10 Q. Describe for me what were -- and did
11 you have -- during this time frame at or about the
12 time the purchase agreement was entered into with
13 Burroughs & Chapin, in November of 1998, did you
14 have continuing discussions with officials of
15 Richland County regarding the purchase negotiation?

16 A. I did.

17 Q. Who were some of the people that you
18 talked with about that issue?

19 A. Mr. McSwain was the primary person in
20 the County I communicated with.

21 Q. All right. In those discussions with
22 Mr. McSwain, what were your objectives in the
23 discussions? What did you want Mr. McSwain to do?

24 A. He knew that we were under a very tight
25 time frame.

1 improvement, as I know them, have three or four
2 items in it that have to be met, tests that have to
3 be met.

4 One of those is to have a municipality
5 acknowledge as a fact that there's development that
6 can take place behind the levee.

7 There's also another step, that the
8 County or the municipality accept, for operation
9 and maintenance, those levees once they are
10 improved and certified.

11 BY MR. BECKER:

12 Q. Would the configuration of the levees
13 need to be changed in order to meet FEMA standards?

14 A. According to the engineers we were
15 discussing, no.

16 Q. What sorts of changes would need to be
17 made for the configuration of the levees?

18 A. The configuration would basically
19 remain intact. They would improve the levees in
20 height and width, and there's a process that you
21 need to go through. And I'm not trying to
22 oversimplify this, but there's steps in the Corps
23 manual that you've got to go through.

24 But the engineers, Lockwood-Greene, who
25 was doing the work for Burroughs & Chapin, felt

1 like that was --

2 MR. JOHNSON: Objection, Your Honor.

3 THE COURT: I will sustain that.

4 BY MR. BECKER:

5 Q. Did you explain that -- what you just
6 testified to, not the part he objected to -- did
7 you explain that to Mr. McSwain in your discussions
8 with him around November and December of 1998?

9 A. Not the part about what the engineers
10 felt. I mean, I discussed the issues of what the
11 County could do to help move the process forward.

12 Q. Okay. All right. Mr. Manning, I would
13 like to next show you Plaintiff's Exhibit 207 and
14 offer that into evidence.

15 (PLF. EXH. 207, Tillotson letter to
16 McSwain re: Manning levees and letter to FEMA,
17 dated December 11, 1998, was presented.)

18 BY MR. BECKER:

19 Q. This is a letter dated December 11th,
20 1998 from Wilson Tillotson at Lockwood-Greene to
21 Cary McSwain. Your father is listed as a carbon
22 copy recipient.

23 Do you see that?

24 A. I do.

25 Q. Did your father receive a copy of this

1 letter at or about the time it was written?

2 A. He did.

3 Q. Would you have seen it -- a copy of
4 it -- and read it at about the time it was written?

5 A. I would.

6 Q. Did -- read it for us. Read the
7 letter. It's just two sentences.

8 A. The letter or the bullet point?

9 Q. The letter and the bullet points.

10 A. Dear Cary, thanks for meeting with us
11 yesterday to discuss the levee system at the
12 Manning property. I think the meeting was very
13 informative and productive. Attached is a list of
14 bullets for the suggested letter to FEMA. I will
15 call you later today to discuss this. Thanks for
16 all your help. Wilson Tillotson, Lockwood-Greene.

17 Q. Lockwood-Greene, what was their role
18 again?

19 A. They were providing all of the
20 engineering services for the due diligence process.

21 Q. Who were they working for at this time?

22 A. Burroughs & Chapin.

23 Q. And what were the proposed contents of
24 the letter to FEMA from Richland County?

25 A. Well, there's six bullet points. Do

1 you want me to read them?

2 Q. Go ahead.

3 A. Proposed contents of the letter from
4 FEMA to Richland County: Property owners intend to
5 upgrade the levee system to meet the structural
6 requirements as specified in 44 CFR 65.10.

7 At the completion of the upgrade,
8 Richland County agrees to accept responsibility for
9 operation and maintenance of the levee system in
10 accordance with 44 CFR 65.10.

11 Based on the above and the existing
12 levee system being in place, we request relocation
13 of the proposed floodway on the Richland County
14 side of the Congaree River to the current map
15 located which is the line of the dike.

16 Upon certification of the levee system
17 as a protective structure, Richland County will
18 request letter of map revision of the current FIRM.

19 It is our understanding that
20 certification of the levee system will remove the
21 area protected by the levee [sic] from designation
22 as a flood prone area or as any floodway.

23 We request FEMA confirmation of the
24 above plan and understanding.

25 Q. Thank you.

1 All right. Now, Mr. McSwain -- or
2 Mr. Tillotson, in his letter, refers to a meeting
3 that occurred on December 10, 1998, the day before
4 the letter was written, and it copied your father.

5 Do you know if your father -- were you
6 present at that meeting? Do you recall?

7 A. I'm not sure which meeting you're
8 talking about.

9 Q. Well, read the first paragraph.

10 A. No, I would not have been in that
11 meeting.

12 Q. All right. Let me hand you Plaintiff's
13 Exhibit 246 and offer that into evidence.

14 (PLF. EXH. 246, Tillotson letter to
15 Holland re: Plan with FEMA, dated January 20, 1999,
16 was presented.)

17 BY MR. BECKER:

18 Q. You are listed as a carbon copy
19 recipient of this letter on the fourth page. Is
20 that correct?

21 A. That's correct.

22 Q. All right. And it's a letter from
23 Wilson Tillotson to Lisa Holland, who is the state
24 coordinator of the National Flood Insurance
25 program. Is that right?

1 A. That's correct.

2 Q. And it's dated January 20th, 1999?

3 A. Right.

4 Q. Read that first paragraph of the
5 letter.

6 A. Dear Ms. Holland, Lockwood-Greene is
7 representing the property owners of the managed
8 properties adjacent to the Congaree River in lower
9 Richland County. As you are aware, this property
10 is within an area being proposed as floodway by the
11 preliminary June 5, 1998 Flood Insurance Rate Maps.

12 We have had several meetings with
13 Richland County and the City of Columbia and have
14 been asked to represent them as well in any
15 clarifications of FEMA regulations, particularly
16 44 CFR 65.10.

17 Q. All right. And then the -- are those
18 numbers -- where it says, The property owners
19 intend to take the following steps, are those
20 basically the same bullet points that Mr. Tillotson
21 proposed to the letter to FEMA --

22 A. That's correct.

23 Q. -- in his letter to Mr. McSwain?

24 All right. Would you and your father
25 have received a copy of this letter at or about the

1 time it was sent by Mr. Green to Ms. Holland?

2 A. We did.

3 Q. All right. I would like to turn next
4 to the Plaintiff's Exhibit 166 and offer it into
5 evidence.

6 (PLF EXH. 166, Richland County Council
7 Proposed Action, Re: Levees, dated January 21,
8 1999, was presented.)

9 BY MR. BECKER:

10 Q. Mr. Manning, this is a -- are you
11 familiar with this document?

12 A. I have seen it.

13 Q. This is a Richland County Council
14 Proposed Action.

15 If you would, please read the first
16 paragraph of the document.

17 A. The purpose of this report is to
18 request county council's consideration in
19 authorizing the council chairman or his designee to
20 act on the County's behalf to communicate to FEMA
21 the agreement by Richland County to accept the
22 right-of-way to the levee systems and
23 responsibility to review, monitor, and maintain the
24 levee system, contingent upon proper certification.

25 Q. And this is signed by, it looks like,

1 K.C. Knudsen?

2 A. Ken Knudsen.

3 Q. And what was his role at that time?

4 A. I believe at that time he was planning
5 director.

6 Q. All right. It's also signed by
7 J. Milton Pope on behalf of the county
8 administrator.

9 Do you know Mr. Pope?

10 A. I do.

11 Q. Did you have any discussions with
12 Mr. Pope in the -- leading up to the closing of the
13 sale to Burroughs & Chapin -- to Columbia Venture?

14 A. No, I didn't.

15 Q. It is also signed by a Larry C. Smith,
16 the county attorney. Do you see that?

17 A. I do.

18 Q. And also signed by the financial
19 officer of the county, on 1/21/99. Do you see that
20 other signature below there?

21 A. I do see it. I can't read it.

22 Q. Okay. I would like to ask you to turn
23 to the first page of the report and publish
24 Paragraph A.

25 A. Purpose and Recommendation: The

1 purpose of this report is to request county
2 council's consideration of authorizing the county
3 councilman or his designee to act on the County's
4 behalf to communicate to FEMA the agreement by
5 Richland County to accept the right-of-way to the
6 levee system and responsibility to review, monitor,
7 and maintain the levee system contingent upon
8 proper certification.

9 Q. All right. And we don't need to go
10 over the background, but if you would, let's go
11 through the discussion section. Read that for me,
12 please.

13 A. One of the affected property owners,
14 Congaree Farms/Manning has retained a consulting
15 firm, Lockwood-Greene, to assist them in reviewing,
16 reconstruction and ultimate certification and
17 acceptance of the existing levee system. Due to
18 FEMA regulations any reconstruction or creation of
19 a levee system must be done under the auspices of
20 the governmental body having jurisdiction in the
21 area. This necessitates that the County agrees in
22 principle to accepting responsibility of the levee
23 system once completed and acceptable to FEMA.

24 This has been detailed in a letter to
25 Mr. McSwain from Lockwood-Greene, dated December

1 the 11th, 1998.

2 Q. Okay. Now, he lists under there six
3 points. And if you look back to Plaintiff's
4 Exhibit 207, look at those lists of bullet
5 points --

6 A. I see them.

7 Q. -- and compare them to the six comments
8 that are listed under Mr. Knudsen's memo there.

9 Do they -- just review them. Do they
10 match up?

11 A. They do.

12 Q. There are six bullet points on the
13 letter from Mr. Tillotson?

14 A. Right, right.

15 Q. And there are six comments listed here?

16 A. Right.

17 Q. And they match?

18 A. Correct.

19 Q. All right. Now, Mr. Knudsen
20 recommended -- well, let me first go to the
21 financial impact. Read that paragraph.

22 A. The financial impact on the county is
23 estimated at \$174,500 per year. This estimate,
24 according to Lockwood-Greene, is on the high side
25 and assumes everything must be done yearly. Some

1 items, such as repair and replacement of equipment,
2 will not occur on a yearly basis. These costs
3 should be offset by the rezoning and development of
4 these properties and the accompanying increase in
5 the County's tax base.

6 Q. All right. Now, I would like you to
7 look at the last page of this exhibit.

8 This is prepared by Lockwood-Greene.
9 There at the bottom right above their name it says:

10 This is a preliminary cost estimate for
11 the purpose of establishing an order of magnitude
12 estimate.

13 Do you see that?

14 A. I do.

15 Q. And up at the top it's dated January
16 12th, 1999, and it says:

17 Congaree Properties Levee System
18 Operation and Maintenance Cost Estimate.

19 Do you see that? Lockwood-Greene,
20 right under the word Congaree properties.

21 A. Oh, okay.

22 Q. Do you see that?

23 A. I do.

24 Q. All right. Would you take just a
25 moment and review this budget, this cost estimate.

1 A. Okay.

2 Q. Based on your experience in the past
3 and continuing up to the present date, for
4 maintaining the Manning levees, did you consider
5 this to be a reasonable cost estimate?

6 THE COURT: I will sustain the
7 objection.

8 BY MR. BECKER:

9 Q. Have you ever experienced -- in your
10 personal experience of maintaining the levees in
11 their current configuration, have the annual costs
12 ever exceeded \$174,000?

13 A. No, but you wouldn't be maintaining the
14 same levees, either. That generally -- you have a
15 certified levee, it's going to be something fairly
16 easy to maintain. Slopes are a little bit
17 different.

18 Our costs, as I testified earlier, I
19 think, they run anywhere from \$20 to \$50,000 a
20 year. So I see it as reasonable.

21 Q. All right. Let me go back to the
22 alternatives that are recommended. And let me ask
23 you to publish those three alternatives that
24 Mr. Knudsen mentioned in his report.

25 A. The first one is:

1 Do nothing. The area will stay as is
2 and any expansion or development within the
3 affected area will be prohibited.

4 Two, authorize the council chairman or
5 his designee to begin the first steps of acceptance
6 of responsibility and maintenance, contingent upon
7 engineering certification, certification by the
8 Corps of Engineers, and approval and acceptance by
9 FEMA.

10 Defer action. This would mean the
11 County awaits whatever action FEMA imposes upon
12 Richland County.

13 Q. If the County had chosen Alternative 1,
14 would the sale to Burroughs & Chapin have closed?

15 A. No.

16 Q. If the County had chosen Option 3,
17 would the sale to Burroughs & Chapin have closed?

18 MR. JOHNSON: Your Honor, I object.
19 There's no way to know whether the sale would have
20 closed. It's giving an opinion.

21 THE COURT: I will overrule that.

22 THE WITNESS: If there had been any
23 deferral on this, it never would have closed. The
24 timeline was too tight.

25 BY MR. BECKER:

1 Q. And, ultimately, this was signed by
2 Mr. Knudsen. And what did he recommend?

3 A. Alternative 2.

4 Q. Mr. Manning, please look next at
5 Plaintiff's Exhibit 17, which the Plaintiff offers
6 into evidence.

7 (PLF. EXH. 17, Holland letter to FEMA,
8 Re: Need assurances prior to purchase, dated
9 January 22, 1999, was presented.)

10 BY MR. BECKER:

11 Q. This is a letter from Lisa Holland to
12 Mr. Michael Buckley of the Federal Emergency
13 Management Agency. It is dated January 22nd, 1999.

14 Please read the letter.

15 A. Dear Mr. Buckley, We have received the
16 attached letter from Lockwood-Greene, an
17 engineering firm who is advising Mr. Manning
18 concerning the Richland County levee issue.

19 Mr. Manning is negotiating a
20 real-estate transaction for a portion of his
21 property.

22 Basically, the attached letter is
23 asking for assurances that if the levee is upgraded
24 to meet the standards outlined in 44 CFR 65.10
25 (mapping of areas protected by levee systems) that

1 the levee would be recognized by FEMA and FEMA
2 would approve a map revision submitted through the
3 normal process.

4 We apologize for the short notice,
5 however, we need an answer by Tuesday, January
6 26th, 1999, because the potential buyers want
7 assurances prior to purchase. A faxed response
8 would be appreciated.

9 Should you need additional assistance
10 or clarification, you may contact me by telephone
11 at 803-734-9120 or through an e-mail at the address
12 below.

13 Q. All right. And was the letter from
14 Mr. Tillotson to Ms. Holland dated January 20th,
15 1999, is it attached?

16 A. It is.

17 Q. And this is a file, and it purports to
18 be a file copy from the South Carolina Department
19 of Natural Resources?

20 A. Correct.

21 Q. All right. Mr. Manning, I ask you,
22 next, to please look at Plaintiff's Exhibit 20,
23 which Plaintiffs offers into evidence.

24 (PLF. EXH. 20, Minutes of Richland
25 County Council Development and Services Committee

1 dated January 26, 1999, was presented.)

2 BY MR. BECKER:

3 Q. These are the minutes of the Richland
4 County Council Development and Services Committee,
5 which occurred on January 26th, 1999, at 5 p.m.

6 It mentions there are certain members
7 present. Do you know who those people are, the
8 members that were present?

9 A. For the most part --

10 Q. Let me ask you this. Were they all at
11 that time members of Richland County Council?

12 A. I believe so, yes.

13 Q. There were others present at the
14 meeting. I would like for you to state the names
15 of the people you know and identify who they were.

16 A. Kit Smith, council person. Tony
17 Mizzell, council person. Paul Livingston, council
18 person. Joseph McEachern, councilman. James
19 Tuten, councilman. Sack Edge, I believe he was
20 zoning administrator or had some capacity with the
21 County. Tony McDonald, assistant county director,
22 administrator. I don't know Ash Miller. Milton
23 Pope, assistant county administrator. Larry Smith,
24 county attorney. Ralph Pearson, county engineer.
25 I do not know Judge Augustus. Sherry Wright, I'm

1 vaguely familiar with, I'm not sure what her
2 responsibilities are. Jocelyn Jennings worked for
3 the County, but I'm not sure in what role. Judy
4 Carter, I don't know her. And Ronaldo Myers, I
5 don't know him. Amanda Mayes worked with the state
6 paper. Michelle Cannon-Finch, um, works for the
7 County, and I'm not exactly sure what her capacity
8 is. Marsheika Washington, I don't know.

9 Q. To your knowledge, are all of those
10 people either members of county council or
11 employees of the County? All of those people
12 listed as others present?

13 A. That's my impression.

14 Q. All right. Now, let me go back and ask
15 you to look back at Plaintiff's Exhibit 166.

16 A. Repeat that, please.

17 Q. Look back at Exhibit 166, on the first
18 page.

19 A. Okay.

20 Q. Do you see that, the Richland County
21 Council proposed action?

22 A. I do.

23 Q. Read the sentence that is written in
24 right above Mr. Milton Pope's signature.

25 A. We are expecting to receive additional

1 information on Monday regarding this issue;
2 therefore, a recommendation will be provided at the
3 committee meeting.

4 Q. All right. This was dated January
5 20th, 1999, right?

6 A. Correct.

7 Q. And the date of that development and
8 services committee was January 26th, '99?

9 A. Correct.

10 Q. Did you attend that meeting?

11 A. It doesn't show that I did, but I
12 thought I was there.

13 Q. Do you have a recollection of making a
14 presentation to --

15 A. I do remember making a presentation,
16 and that would probably have been the proper forum
17 to do that.

18 Q. Were the -- do you remember -- from
19 what you remember of who was present when you gave
20 the presentation, were some of those people -- do
21 you remember some of those people being there?

22 A. Not really, you know, I would have
23 had -- the presentation would have been to the
24 members: Buddy Meetze, Susan Brill, Greg Pearce,
25 Bernice Scott.

1 Q. All right.

2 A. So I wouldn't have been aware of all of
3 them.

4 Q. But you do remember Mr. Meetze being
5 there?

6 A. Yes, I do.

7 Q. And Ms. Brill?

8 A. I do.

9 Q. And you made a presentation?

10 A. I made a presentation to them at some
11 point.

12 Q. Was it about this time frame?

13 A. Yes.

14 MR. JOHNSON: Your Honor, I object.

15 The witness says he doesn't know.

16 THE COURT: I will sustain it.

17 BY MR. BECKER:

18 Q. At the meeting you did attend -- you do
19 recall attending -- describe what you said to the
20 members of county council who were present and what
21 they said to you.

22 A. Basically -- and if you go back to
23 those bullet points, everything I said was an
24 offshoot of that, you know, we needed for the
25 County to cooperate in helping us deal with the

1 FEMA issue. They had to step up and acknowledge
2 that it was a planned development, that we needed
3 them to step up operation and maintenance. We
4 needed, you know, the certification process on 44
5 CFR, and, you know, with FEMA, we needed their
6 cooperation in that.

7 We discussed the size and the scope of
8 the project, and I clearly remember Mr. Meetze,
9 after I said a billion dollars, he said, We don't
10 need to have any further discussion; this is
11 something we need to move forward on.

12 Q. All right. Having read over the
13 substance of this county council proposed action
14 document, 166, Mr. Knudsen's recommendation to the
15 council -- now, look at the minutes.

16 A. The minutes to that meeting?

17 Q. Yes, look at the minutes to the
18 meeting.

19 A. Meeting on --

20 Q. On the 26th.

21 A. -- on January 20th.

22 Q. Yes, but before we do that, let me ask
23 you, was the substance of -- Mr. Manning, please
24 look at me.

25 On the meeting that you attended and

1 spoke to the council members, was the substance of
2 Mr. Knudsen's report -- was that the topic of
3 discussion that evening at the meeting?

4 A. Right, they needed to have a vote to
5 continue with the process to -- we had to get to
6 the next step.

7 Q. Thank you.

8 Now, look at the minutes of the -- of
9 Exhibit 20. I'm sorry, we don't have that up
10 yet -- or do we -- Plaintiff's Exhibit 20. All
11 right. Yes, we've been going over that.

12 Look on the Page 4. It's marked 4.
13 It's actually the third page. It's shown as Page 3
14 up at the top. Do you see that, Page 3 under
15 Richland County Council Development and Services
16 Committee, Page 3? Well, it says Page 4 in the
17 lower right-hand corner.

18 A. Right, I've got that. I see that.

19 Q. Just publish the -- what it says in
20 that area that's been highlighted. Can you read
21 that?

22 A. Consideration of accepting maintenance
23 of the levee system along the Congaree River.

24 Q. Right. All right. That's right.

25 Keep reading.

1 time it was written?

2 A. I think they would have, yeah.

3 Q. All right. All right. Next, I'm
4 showing you what's been marked as Plaintiff's
5 Exhibit 169.

6 Can you identify this document?

7 A. I can.

8 Q. What is it?

9 A. It's a resolution that was adopted by
10 the Richland County Council on or before February
11 19th, 1999.

12 Q. Were you present when this document was
13 drafted?

14 A. I was present when it was drafted and
15 crafted.

16 Q. All right. Who was present at that
17 meeting?

18 A. Um, it was Mike Ey's office.

19 Q. Who is Mike Ey?

20 A. An attorney from McNair Law Firm.

21 Q. Who was McNair Law Firm representing --

22 A. They represented --

23 Q. Just be sure and let me finish my
24 question.

25 A. Okay.

1 Q. Our court reporter -- I know this is
2 tedious, Mr. Manning, and I apologize, but our
3 court reporter needs to get a clean record, and if
4 you will just bear with us. Thank you.

5 Who was Mr. Ey representing in the
6 transaction?

7 A. Burroughs & Chapin.

8 Q. Okay. Who else was present at the
9 meeting?

10 A. George Gregory, myself, Kit Smith.

11 Q. All right. And who was Ms. Kit Smith?

12 A. She was a council person for Richland
13 County.

14 Q. A member of Richland County Council?

15 A. Right.

16 Q. Do you know her?

17 A. I do.

18 Q. Have you known her for many years?

19 A. A good many years.

20 Q. Okay. Describe for me what happened at
21 that meeting, who wanted what, who said what, and
22 what was the discussion among the participants of
23 that meeting.

24 A. Um, George Gregory felt it was
25 necessary to sit down and discuss the requirements

1 that we had to have with Ms. Smith, so that we
2 could get something substantial that we could
3 rely on -- or they could rely on, Burroughs &
4 Chapin -- in order to close this transaction. And
5 he wanted to make sure that --

6 MR. JOHNSON: Your Honor, I object.

7 THE COURT: Yes, I sustain. I sustain
8 the objection because it's going into the thought
9 process or motivation, or whatever, of Mr. Gregory.

10 BY MR. BECKER:

11 Q. So, Mr. Manning, if you would just
12 please explain what Ms. Smith said, what
13 Mr. Gregory said, what Mr. Ey said or did, what you
14 said or did, and if you can shy away from -- if you
15 could focus on what was actually said --

16 A. Okay.

17 Q. -- among the parties, rather than what
18 someone felt or what their thought process was.

19 A. There was an explanation of what we had
20 to have, which is by and large what's in this
21 motion.

22 Q. And who offered that explanation?

23 A. George Gregory.

24 Q. To whom?

25 A. Kit Smith.

1 Q. All right. Keep going.

2 A. At that point, I think -- well, at that
3 point, Ms. Smith felt like it was necessary for --

4 MR. JOHNSON: Your Honor.

5 BY MR. BECKER:

6 Q. What did she say? What did she say to
7 you?

8 THE COURT: I sustain the objection.

9 MR. JOHNSON: And I have a further
10 objection. Him testifying about what other people
11 said in a meeting would be hearsay, if it's being
12 offered for the truth of the matter asserted.

13 THE COURT: Well, we've got both
14 parties -- both parties were present.

15 MR. JOHNSON: Actually, it's not both
16 parties, because one person -- one councilman is
17 not the council.

18 THE COURT: I understand that, but
19 she's a council person at the time and this is all
20 about whether or not CV acted reasonably. And he
21 is -- he proposes to elicit from this witness
22 what Ms. Smith said.

23 Is Ms. Smith going to be a witness in
24 the case?

25 MR. BECKER: She could be, but, Your

1 Honor, we prefer to streamline the trial as much as
2 possible and minimize the number of witnesses that
3 need to be called, and Mr. Manning was present at
4 the meeting. We're discussing the very action
5 taken by county council. He's describing what a
6 member of Richland County Council said what she
7 wanted out of the process, what another party to
8 the transaction was saying and --

9 THE COURT: Well, she's -- she has
10 certainly been a council person, and she was a
11 representative of the -- of the Defendant.

12 MR. BECKER: In fact, Your Honor -- and
13 we'll get to this -- on the night that the meeting
14 was held and Richland County Council took action,
15 Mrs. Smith offered the amendment that was actually
16 passed by county council that night.

17 THE COURT: Is Mr. Gregory going to
18 testify?

19 MR. BECKER: Yes.

20 THE COURT: I'm going to go ahead and
21 allow this witness to testify. I'll overrule the
22 objection.

23 BY MR. BECKER:

24 Q. Again, just talking about what
25 Ms. Smith said, what Mr. Gregory said, what you

1 said, what Mike Ey said.

2 A. There was discussions about what the
3 requirements --

4 MR. JOHNSON: Your Honor, could we get
5 an identification of who said what?

6 THE COURT: Yes.

7 THE WITNESS: George Gregory and myself
8 brought up the requirements necessary for levee
9 improvements, FEMA requirements, Corps
10 requirements, the responsibility that was
11 necessary -- or the responsibilities the County
12 would have to assume as a part of that process.
13 This was all coming out of the development services
14 committee meeting previously.

15 And there was concern on my part, there
16 was a concern on George's part, that Ms. Smith did
17 not fully -- you know, did not understand the scope
18 and size of the project; therefore, we had
19 discussions with her about what was involved in the
20 project.

21 And she felt like there needed to be an
22 investment in the project in order for the County
23 to assume that --

24 BY MR. BECKER:

25 Q. Did she feel something or did she say

1 something?

2 A. She actually crafted this order. I
3 mean, she drew it up, and, you know, Mike Ey then
4 drafted what she had -- uh, had written out.

5 Q. When you say she crafted it, did she
6 write it down? What do you mean she crafted it?

7 A. She was right there, line by line, on
8 what needed to take place.

9 Q. Was she writing on a legal pad or
10 something?

11 A. Yes, she was writing.

12 Q. Okay.

13 A. And I don't know if it was 8-by-11
14 or -- but she was taking notes and writing.

15 Q. Was it based on the discussion you were
16 having with her at the time?

17 A. Yes.

18 MR. JOHNSON: Object to the leading.

19 BY MR. BECKER:

20 Q. I would like for you to tell me
21 everything you can possibly remember, Mr. Manning.
22 Just take a minute to think about it. I would like
23 for you to take a minute and think of every single
24 thing you said to Kit Smith in that meeting. Tell
25 me what you said to Ms. Smith and then tell me what

1 George Gregory said to Ms. Smith.

2 A. Well, going back to those bullet
3 points, going back to the resolution -- I mean, to
4 the minutes --

5 Q. The bullet points in --

6 A. Right.

7 Q. -- Mr. Tillotson's letter?

8 A. Correct. The bullet points that I sent
9 Mr. McSwain earlier, the size and scope.

10 Q. Well, look at that. It's Exhibit 207.
11 Review that.

12 MR. JOHNSON: Your Honor, can I ask if
13 the witness be asked, can he recall specifically
14 what he discussed with anyone in a meeting 13 years
15 ago? Because he's been asked to say what he said.
16 And instead of saying what he said, he says it goes
17 back to the bullet points, so --

18 THE COURT: Well, the way I took that
19 is that he went over the bullet points with
20 Ms. Smith.

21 MR. JOHNSON: He didn't say that, Your
22 Honor. He really didn't. He said it goes back to
23 the -- we're talking about 13 years ago. Is he
24 going to say he remembers what was said?

25 THE COURT: Well, that's for

1 cross-examination.

2 MR. JOHNSON: But, Your Honor, I think
3 there's got to be a foundation laid for his
4 testimony.

5 MR. BECKER: All right. I will lay
6 that foundation.

7 BY MR. BECKER:

8 Q. Was this an important transaction for
9 your father?

10 A. Critical.

11 Q. Say that again.

12 A. It was critical.

13 Q. Was it an important transaction for
14 you?

15 A. Absolutely, it was.

16 Q. Um, was this meeting with Ms. Smith an
17 important step in that process?

18 A. I felt, personally, from my standpoint,
19 knowing what I knew about Burroughs & Chapin, that
20 if we didn't come out of there with something like
21 this, like the motion, the deal was going to
22 collapse.

23 Q. So given those circumstances, do you
24 have a good recollection of what occurred in that
25 meeting or what --

1 A. I can't tell you verbatim, as we just
2 discussed a minute ago, but we had specific
3 discussions about the size and the scope of the
4 project, the impact to us, you know, Burroughs &
5 Chapin not being able to go forward under the
6 timeline, um, the dates were certain that we had to
7 meet, and if we didn't meet them, it was over. And
8 the County would have to do these things to make
9 that process continue.

10 Ms. Smith worked on the language for
11 doing that, with the assistance of Mike Ey. And he
12 drafted -- he had it typed up after the meeting was
13 over, and I assume they forwarded that on to the
14 council for the resolution to be adopted.

15 MR. JOHNSON: Objection to hearsay,
16 Your Honor.

17 THE COURT: Sustained.

18 BY MR. BECKER:

19 Q. Is this the document that was produced
20 at the end of that meeting between Mike Ey, George
21 Gregory, and yourself?

22 A. It is.

23 Q. All right. Mr. Manning, I would next
24 like you to look at Exhibits 252 and 251, which I
25 offer into evidence.

1 (PLF. EXH. 251, Q&A, Re: acceptance of
2 levees by County Council, was presented.)

3 (PLF. EXH. 252, Q&A, Re: acceptance of
4 levees by County Council, was presented.)

5 BY MR. BECKER:

6 Q. Do you recognize these documents,
7 Mr. Manning?

8 A. I do.

9 Q. Let me ask you, first, to look at
10 Plaintiff's Exhibit 251.

11 Whose handwriting is that on the
12 document?

13 A. Mine.

14 Q. On all three pages?

15 A. Yeah.

16 Q. All right. Now, let me ask you to look
17 at Plaintiff's Exhibit 252, and I can represent to
18 you that this document was produced by the County
19 in discovery in this action, this version of the
20 document.

21 Um, and do you see up at the top,
22 there's a fax strip from the -- on the top, do you
23 see that?

24 A. I do.

25 Q. What is the date of that?

1 A. February 2nd, '99.

2 Q. And where is the fax -- who is it
3 coming from?

4 A. McNair Law Firm.

5 Q. Now, looking at the questions and the
6 answers, um, do you -- what is this document?

7 A. It's a document asking the County to do
8 certain things and what the impacts would be if
9 they didn't do it. You know, it asks the questions
10 about extending time, you know, why they have to do
11 it now.

12 Q. All right.

13 A. It talks about the size and the scope
14 of the property, all of what we've been through.

15 Q. All right. Did you discuss these
16 topics with Ms. Smith in the meeting you had with
17 her?

18 A. Yes.

19 MR. BECKER: Your Honor, would you like
20 to take a moment to read the document?

21 THE COURT: Yes, that would be fine.

22 All right, sir, I have read it.

23 MR. JOHNSON: Your Honor, can I ask a
24 question? I understand this is a document prepared
25 by McNair Law Firm.

1 MR. BECKER: Yes, that's my
2 understanding.

3 BY MR. BECKER:

4 Q. All right. Next, Mr. Manning, I would
5 like to show you Plaintiff's Exhibit 146 and offer
6 that into evidence.

7 (PLF. EXH. 146, Chambers Memo to
8 McSwain and L. Smith, Re: Liability Insurance for
9 Levee Maintenance, February 2, 1999, was
10 presented.)

11 BY MR. BECKER:

12 Q. Mr. Manning, this is a letter dated
13 February 2nd, 1999 from Mr. David Chambers to
14 Mr. McSwain and Larry Smith, the county attorney.

15 Would you -- in it, Mr. Chambers
16 recounts his efforts in investigating the liability
17 insurance for levee maintenance.

18 And I would like you just to make -- to
19 move along here -- to ask you to read just the last
20 sentence, the last paragraph, of this letter, this
21 memorandum.

22 A. I expect the liability insurance, if
23 available, to be expensive. I strongly recommend
24 against accepting any liability related to levees.
25 Flood will occur and levees will fail. Just the

1 litigation expense will be considerable.

2 Q. All right. Mr. Manning, the next
3 exhibit is --

4 THE COURT: Let me ask you this. This
5 Mr. Chambers, he's a member of -- was a member of
6 council. Is that right?

7 MR. BECKER: It's my understanding he
8 was the risk manager.

9 THE COURT: Risk manager.

10 MR. BECKER: Yes, sir.

11 THE COURT: Okay, thank you.

12 BY MR. BECKER:

13 Q. Mr. Manning, if you would look next at
14 Plaintiff's Exhibit 147.

15 (PLF. EXH. 147, Richland County Council
16 Meeting Minutes, February 2, 1999, was presented.)

17 BY MR. BECKER:

18 Q. These are the minutes of Richland
19 County Council, regular session, that occurred at
20 6 p.m. on February 2nd, 1999.

21 Mr. Manning, would you please read the
22 members of Richland County Council who were present
23 at the meeting.

24 A. Members: Paul Livingston, chair. Joe
25 McEachern, co-vice chair. Buddy Meetze, co-vice

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF RICHLAND
4
5 Columbia Venture, LLC,
6 Plaintiff,
7 vs. CASE NO. 2010-CV-40-8943R
8 Richland County,
9 Defendants.

10 PROCEEDINGS: TRIAL - VOLUME II
11 (Pages 261 through 468)
12 BEFORE: THE HONORABLE JOHN HAMILTON SMITH
13 DATE: September 11, 2012
14 TIME: 10:01 a.m.
15 LOCATION: Richland County Judicial Center
16 1701 Main Street
17 Columbia, SC
18 REPORTED BY: Susan M. Valsecchi, CRR
19 Registered Professional Reporter
20

21 A. WILLIAM ROBERTS, JR., & ASSOCIATES

22 Fast, Accurate & Friendly

23 Charleston, SC Hilton Head, SC Myrtle Beach, SC
24 (843) 722-8414 (843) 785-3263 (843) 839-3376
25 Columbia, SC Greenville, SC Charlotte, NC
(803) 731-5224 (864) 234-7030 (704) 573-3919

1 he wishes to. But they're on the record and he
2 took them up, of course, as each one was discussed.

3 So those objections by the Defendants
4 will be maintained in the record.

5 MR. BECKER: Thank you, Your Honor.

6 MR. JOHNSON: Your Honor, as you will
7 recall, I think you announced your position on
8 whether there was a bright line eliminating any
9 evidence after February of 2002.

10 I think you said you were going to take
11 it up sort of fact by fact as it relates to the
12 reasonable investment-backed expectations.

13 THE COURT: Right.

14 MR. JOHNSON: And we want to put our
15 position on the record and ask you to reconsider,
16 again, the question of whether there's a bright
17 line, and I would like our legal expert,
18 Ms. Taylor, to tell you why.

19 THE COURT: I recognize her as such.

20 MS. TAYLOR: I won't take long, Your
21 Honor. And we certainly can discuss this further
22 on and we would certainly be open to any sort of
23 post-trial briefing, if need be.

24 But as we stated briefly in our
25 pretrial brief, the Plaintiff has claimed that the

1 regulatory taking occurred on February 20, 2002.

2 The Plaintiff must prove each of those
3 three Penn Central elements relating to that
4 particular alleged regulatory taking that took
5 effect on February 20th, 2002.

6 Now, the Plaintiff appears to be
7 arguing that actions that took place subsequent to
8 2002 -- such as, for example, the county's
9 decisions on other actions -- are relevant to
10 determining one or more factors of Penn Central as
11 it relates to what they've already stated to be the
12 date of taking, which is February 20th, 2002.

13 You have one case, Brace, which I would
14 like to revisit. You also have Byrd v. City of
15 Hartsville, which is a South Carolina case.

16 And I would also like to hand to you
17 and to opposing counsel another case that I don't
18 believe you have, although that may be shocking if
19 you do not have it. It's Mehaffy versus United
20 States.

21 THE COURT: And that's Mehaffy with an
22 E, M-E?

23 MS. TAYLOR: Yes, but I may be wrong.

24 THE COURT: Yes.

25 MS. TAYLOR: I think this case is also

1 very instructive. And what I would like to point
2 out in Mehaffy -- and I may be butchering this
3 guy's name -- is that he's alleging a regulatory
4 taking by the Corps of Engineers when it denied a
5 permit to fill waters of the United States. And
6 that denial took place on August 30th, 2007.

7 And the Court makes clear that the
8 reasonable investment-backed expectations, one, is
9 an objective standard, not a subjective standard.
10 It is not what the plaintiff believes it to be.

11 But, also, more relevant to what I'm
12 talking about here, it should be assessed at the
13 time of purchase. And, depending on the
14 circumstances of the case, facts that occurred
15 post-purchase may also be relevant. But at no time
16 in this case, or any other case that I have seen,
17 are there admissible relevant actions by the
18 government, you know, pertaining to reasonable
19 investment-backed expectations that occurred after
20 the date of taking.

21 In this case, you will not find that.
22 The Court considered government actions that took
23 place after the purchase, but certainly not after
24 the date of taking.

25 And this is because -- I think it's

1 useful, this is not the only case that says this,
2 but I just wanted to give you an example.

3 The reason for that is because the
4 question of reasonable investment-backed
5 expectations looks at the extent to which the
6 regulation interfered with reasonable
7 investment-backed expectations, and the regulation
8 that is referred to in this case, as well as other
9 cases, is the challenged government action that
10 allegedly caused the regulatory taking.

11 In this case, it would be February
12 20th, 2002. In Mehaffy, the date was August 30th,
13 2007.

14 Now, the Brace case doesn't say
15 anything differently. There, it is a long account
16 of the plaintiff's attempt to develop wetlands on
17 his property. And so based on the circumstance and
18 the context of that case, there was certainly a lot
19 of talk about what happened, not only prior to
20 purchase, but to some degree what occurred after
21 the purchase date.

22 But the regulatory taking that
23 occurred, the taking was a consent decree that the
24 federal government entered -- actually, it was
25 Third Circuit -- sometime in the mid 1990s. It's

1 not all that clear, it doesn't have an exact date.
2 That is what the plaintiff is alleging that caused
3 the taking.

4 And Brace stated that the plaintiff's
5 decisions at the time of purchase and after the
6 purchase is relevant, but, again, the Court did not
7 take into any consideration events that occurred
8 after the date of the alleged taking.

9 And I think that Byrd v. City of
10 Hartsville is instructive -- and I know that
11 everyone probably has about three of these cases.

12 THE COURT: I have Byrd.
13 (Off-the-record discussion.)

14 MS. TAYLOR: Now, Byrd is not exactly
15 on point, but I do think it yields some useful
16 guidance for the Court. There the Court had
17 argued -- I think I just gave you my version. Oh,
18 no, here it is.

19 The Court was -- in Byrd -- considering
20 a regulatory taking, and the plaintiff in Byrd
21 argued that there were two separate actions of the
22 city council, that he was trying to turn into -- to
23 have the Court treat as just one regulatory taking,
24 and the Court rejected that immediately because
25 there was a gap of time in between those two

1 actions. There was a three-month gap between the
2 complained actions. And, thus, the second action
3 was not included in the Court's analysis of the
4 first action that was alleged to be a regulatory
5 taking.

6 The Penn Central factors were applied
7 to the first action without any consideration of
8 the subsequent action.

9 The Court said that, if you want this
10 subsequent second action to be considered the
11 taking, Penn Central factors have to be all three
12 applied to that action separately and independent
13 from the first action.

14 So I think, taking all of this
15 together, what the law says as far as regulatory
16 takings is that, yes, there may be some facts and
17 evidence in analyzing Penn Central, dealing with
18 reasonable investment-backed expectations prior to
19 purchase, sometimes after purchase, but I have yet
20 to see a case -- and it doesn't make sense for the
21 Court to consider actions that took place after the
22 date of regulatory taking.

23 And I would go so far as to say for the
24 character of the government action, the Plaintiff
25 has identified the date as February 20th, 2002;

1 that the ordinance and the flood map in place,
2 which is the cause of the restrictions on
3 Plaintiff's property, is what ought to be looked
4 at, as far as analyzing the Penn Central factors.

5 The economic loss factor, I think, is
6 the only one in which there is facts that could be
7 considered after purchase because of the way in
8 which the Court now determines the extent of loss,
9 before purchase, after purchase. But that's the
10 only prong in which I believe there is any
11 relevance to any -- certainly government
12 actions -- that took place after the date of
13 taking.

14 THE COURT: Well, I certainly concur
15 with you that the date of the taking is the key
16 date. That's the key date, that's the focus for
17 the value. It's also the primary focus in regard
18 to the other issues, such as expectations.

19 However -- and a lot of this goes to
20 what weight to give evidence after the date of the
21 taking -- if the evidence presented after the date
22 of the taking has the purpose of establishing such
23 things as removing questions about, Well, if they
24 had persisted, would the County have changed its
25 mind, if they had taken further steps, perhaps the

1 County would have relented and amended an
2 ordinance, these are -- to me,
3 after-the-date-of-the-taking evidence in regard to
4 actions of the County, in essence, would relate
5 back to the time of taking, for whatever weight
6 should be given that evidence in regard to these
7 issues of expectations.

8 It's sort of additional evidence to
9 show that their decision, in essence, as of the
10 time of the taking, that it was feasible to try and
11 continue to convince the council, that council
12 might still change their mind.

13 I think that that evidence can be used
14 to support the frame of mind that they had at the
15 time of taking.

16 The primary weight of the evidence, of
17 course, and consideration of the evidence, would be
18 given as to matters before and at the time of
19 taking, but this corroborative evidence after the
20 time of taking, I think, can be admitted, so long
21 as it's understood that it's not intended and will
22 not be given the primary focus of the factfinder.

23 MR. JOHNSON: Thank you, Your Honor.

24 THE COURT: All right, then, are we
25 ready to proceed, then?

1 in the lower right-hand corner.

2 A. Yes, sir.

3 Q. All right. This is a letter dated
4 February 11th, 1999 from -- that appears to be
5 George Gregory's signature as the assistant to the
6 CEO and general counsel of Burroughs & Chapin. Is
7 that correct?

8 A. That's correct.

9 Q. Did your father receive this letter on
10 or about February 11th, 1999?

11 A. He did.

12 Q. And you know that from your own
13 personal knowledge?

14 A. Yes, sir.

15 Q. All right. Would you please read the
16 substance of the letter after Dear Burwell.

17 A. This letter constitutes notice that
18 condition precedent set forth in Section 8(c) and
19 Section 8(e) of the initial agreement and the
20 additional condition precedent set forth as Numbers
21 3 and 11 in the notice have not been resolved to
22 the reasonable satisfaction of the buyer, and that
23 the agreement is hereby terminated and is null and
24 void and the buyer shall have no further
25 obligations under the agreement.

1 Q. Your father received a copy of this
2 letter?

3 A. He did.

4 Q. Did you also read it at or on or about
5 February 11th, 1999?

6 A. I think I read it on the 12th, but I
7 heard about it on the 11th.

8 Q. You heard about it from your father?

9 A. Yeah.

10 Q. The deadline for exercise of the
11 repurchase options was which date?

12 A. The 17th.

13 Q. This was dated February 11th?

14 A. Correct.

15 Q. At this time, did you have any other
16 purchasers who might be interested in purchasing
17 the property?

18 A. There was no way to bring another
19 purchaser to the table at this point.

20 Q. What was your reaction to this letter?

21 A. Shock.

22 MR. JOHNSON: Objection, relevance.

23 THE WITNESS: We were -- we were --

24 MR. JOHNSON: Objection.

25 THE COURT: I will overrule the

1 Q. Okay. But they also, by that
2 time -- by the time you recommenced
3 negotiations -- he told you that they now had the
4 investors they needed. Is that right?

5 MR. JOHNSON: Your Honor, I object to
6 the leading.

7 THE COURT: Yes, you are leading him
8 there.

9 MR. BECKER: I was just trying to
10 summarize his prior testimony, Your Honor, forgive
11 me. We'll move ahead.

12 BY MR. BECKER:

13 Q. Mr. Manning, please look next at
14 Plaintiff's Trial Exhibit 22, which we offer into
15 evidence.

16 (PLF. EXH. 22, Livingston letter to
17 FEMA, Re: County taking responsibility for levees
18 once upgraded, dated February 17, 1999, was
19 presented.)

20 BY MR. BECKER:

21 Q. Mr. Manning, this is a letter from Paul
22 Livingston, the chair of the Richland County
23 Council, to Mr. Michael Buckley, dated February
24 17th. Is that correct?

25 A. Yes, sir.

1 Q. Would you please publish the letter.

2 A. Dear Mr. Buckley, An area between the
3 Congaree River and Bluff Road in lower Richland
4 County, commonly referred to as the Manning
5 property, is protected by a levee system. More
6 specifically, the area affected is the one depicted
7 on your Series H maps dated June 5th, 1998, and it
8 is protected by existing, uncertified levees.

9 The property owners intend to upgrade
10 the levee system to comply with the requirements of
11 FEMA Regulation 44 CFR 65 for protective
12 structures.

13 Richland County, by action of its
14 governing body, the county council, has agreed to
15 accept responsibility for local inspection and
16 enforcement of the operations and maintenance plan
17 for the levee system as submitted by the owner and
18 approved by FEMA, contingent upon:

19 One, property owners upgrading the
20 levee system to meet FEMA standards as contained in
21 44 CFR 65.10.

22 Two, property owners preparing all
23 required documentation, including operation and
24 maintenance plans as provided in 44 CFR 65.10.

25 Three, certification that the levee

1 system, as upgraded, meets FEMA standards.

2 And, four, the parties, which include
3 Richland County, the City of Columbia, and the
4 developers, resolving to the reasonable
5 satisfaction of the County, the issues of the
6 performance and funding of the operation and
7 maintenance responsibility.

8 We understand that if the above steps
9 are taken and upon certification of the levee
10 system as a protective structure, the area
11 protected by the system can be removed from
12 designation as Special Flood Hazard Areas, Zone AE
13 or A. On behalf of Richland County, I request your
14 confirmation of this understanding.

15 Finally, Richland County requests that
16 you consider the existing levee system in any
17 current or future calculation of floodway for this
18 area.

19 Your assistance in this matter is
20 greatly appreciated, and I look forward to your
21 response. Paul Livingston.

22 Q. Thank you, Mr. Manning.

23 I would like you to look next, please,
24 at Plaintiff's Trial Exhibit 2 -- well, excuse me.

25 Before I move on, let me ask you, was

1 this a necessary part of the due diligence that you
2 were cooperating with, with Burroughs & Chapin
3 leading up to the sale?

4 MR. JOHNSON: Objection, Your Honor.
5 He's going to give an opinion?

6 THE COURT: I think in regard to what
7 his role in the due diligence -- as I understand
8 it, he said that his role was to give information.

9 MR. BECKER: I think he said before,
10 Your Honor, that he was working with
11 Burroughs & Chapin.

12 THE COURT: To try and get the County
13 to do this, true.

14 MR. BECKER: And in the loop.

15 THE COURT: I will overrule the
16 objection.

17 MR. JOHNSON: Your Honor, I don't think
18 the witness has even testified he saw the letter.

19 THE COURT: He may not have seen the
20 letter, but I think the issue was, was he working
21 with them in regard to due diligence. He said that
22 he went to the meetings with council, he went
23 before council, he appeared before council.

24 MR. JOHNSON: I don't have an objection
25 to that. I heard the question differently, but

1 we'll hear it and see what it is.

2 BY MR. BECKER:

3 Q. Were you aware of this letter at or
4 about the time it was written?

5 A. I was.

6 Q. You were aware that it had been sent
7 from FEMA to -- from Mr. Livingston to FEMA?

8 A. I was.

9 Q. All right. And how were you aware of
10 that?

11 A. Through my due diligence work with
12 Burroughs & Chapin. All of this was ongoing. It
13 was part of the whole situation that they had to
14 have the assurance to go forward. And so they were
15 communicating to me what they were doing, and I was
16 communicating to them, you know, what they needed
17 and, um...

18 Q. That's good. Thank you.

19 All right. Please look next at
20 Plaintiff's Exhibit 208, which we offer into
21 evidence.

22 (PLF. EXH. 208, Tillotson letter to
23 Gregory, Re: FEMA, floodway, and levee issues prior
24 to closing, dated February 18, 1999, was
25 presented.)

1 letter. You don't need to lay the groundwork in
2 regard to whether he's familiar with it or not.

3 MR. BECKER: And the only reason I did
4 was because of his objections, Judge. Thank you.

5 THE COURT: That's fine.

6 BY MR. BECKER:

7 Q. Would you please publish the letter,
8 Mr. Manning.

9 A. The February 17th letter?

10 Q. Yes.

11 A. Dear George, Attached is a summary of
12 the FEMA and floodway issues relating to the
13 property located in Columbia. Also attached are
14 some of the relevant documentation. We have
15 estimated a cost range and a completion range for
16 the upgrade and re-mapping activities.

17 The primary reasons for the variations
18 in the estimated costs and time are, length of time
19 required to obtain wetlands regulation permits,
20 review times by agency, including FEMA, preliminary
21 status of soils and topographic survey information
22 on which to base the preliminary design used for
23 estimates.

24 Other than the uncertainties noted
25 above, we have discovered no barriers that would

1 prevent us from removing the property within the
2 existing levee from the special flood hazard or
3 floodway.

4 Q. That's fine, on that page.

5 Take a look at the next page, which was
6 attached. It's Page 3 of 14 up in the upper
7 right-hand corner. He notes a summary. Please
8 publish that for us.

9 A. Property is currently classified as
10 Zone A, special flood hazard areas, inundated by
11 100-year flood. This is primarily due to the fact
12 that the levee system is not certified as, quote, a
13 protective structure.

14 Classification can be changed to Zone X
15 by upgrading and certification of the levee system,
16 confirmed in writing by FEMA, through South
17 Carolina Department of Natural Resources state
18 coordinator, National -- I think it should
19 say -- Flood Insurance Program.

20 Cost to upgrade the levee system is
21 approximately 12 million. Schedule for
22 reclassification is 12 to 24 months.

23 Current status, the property is
24 currently zoned special flood hazard. The
25 classification is AE or A.

1 Exhibit C-1.

2 Floodway is currently the toe of the
3 levee along the Congaree River. Maps proposed in
4 July 1998 show special flood hazard classification
5 AE for the majority of the property. It is also
6 classified as floodway on the proposed map.

7 The acceptance of these maps as final
8 is currently on hold by FEMA. See attached map
9 labeled Exhibit C-2.

10 Based on the FEMA regulations, if the
11 levee system is classified as a protective
12 structure, the special flood hazard classification
13 can be removed. The area would be reclassified as
14 Zone X on the basis of being protected by levees
15 from the 100-year flood.

16 The reclassification process has been
17 confirmed by FEMA in writing through the state
18 coordinator of the National Flood Insurance
19 Program. Zone X allows construction with no
20 restrictions.

21 Q. Thank you, Mr. Manning.

22 MR. JOHNSON: Your Honor, could I ask
23 the witness to publish the first paragraph under
24 Floodway Modifications on the following page.

25 THE COURT: Okay. If you can read

1 that, sir, on the top of the next page.

2 THE WITNESS: Okay. Yes, sir.

3 Floodway Modifications: FEMA requires
4 that if the structural modifications of the levee
5 system result in any increase in the base flood
6 elevations, the municipality must provide
7 re-mapping of the flood-prone area.

8 Also, any change from the floodway
9 reconfiguration as a result of the structural
10 modifications must have approval of impacted
11 communities.

12 During meetings held on July 1998, the
13 consulting company for FEMA indicated that the
14 levee system along the Congaree River ignored in
15 the calculations determining the Richland County
16 side of the Congaree River.

17 However, in order to provide
18 conservative engineering for Lexington County, the
19 levee system on the Richland County side of the
20 study was included in the engineering analysis for
21 Lexington County.

22 The study results for Lexington County
23 on the map that was proposed in July 1998 indicate
24 the following: Floodway area remained relatively
25 unchanged from the previous limits. The base flood

1 elevation was higher than on the Richland County
2 side, because the levee system was considered to be
3 intact as part of the study.

4 The study interpretation implies that
5 if the levee's height modifications were made on
6 the Richland County side of the Congaree River, the
7 base flood elevation/floodway in Lexington County
8 would not be changed. If alignment changes were
9 made, then the base flood elevation, floodway,
10 would be altered in Lexington County.

11 It is our intent to maintain the
12 alignment of the levee system along the current
13 limit of the floodway, the toe of the levee.
14 Further, it is our interpretation that no impact on
15 the direction of the floodway or the base flood
16 elevations would result in the proposed levee
17 modifications.

18 The floodway elevation is currently
19 being redone by FEMA. The results of this are not
20 known as of yet. Preliminary indications that a
21 large portion of the property in Richland County
22 will be removed from the floodway. No indication
23 as to what the impact will be on the Lexington
24 side.

25 BY MR. BECKER:

1 County's -- the County's position was and the
2 indications that the County was giving in regards
3 to cooperation serves as corroboration for that of
4 Burroughs & Chapin.

5 And so I think that, based upon that,
6 he should be -- it is admissible.

7 MR. BECKER: Thank you, Your Honor.

8 BY MR. BECKER:

9 Q. Let me just repeat the last part of the
10 question for you, Mr. Manning.

11 What was the County's position toward
12 the improvement of the levees and the development
13 plan for the property?

14 THE COURT: Just being a stickler here,
15 but my ruling was, it has to be clear that it was
16 his impression, not, what was it. What was your
17 impression as to what it was?

18 MR. BECKER: Thank you, Your Honor.

19 BY MR. BECKER:

20 Q. And let me just rephrase the entire
21 question.

22 Based on your participation in the due
23 diligence process with Burroughs & Chapin and your
24 interactions with members of Richland County
25 Council and the staff of Richland County Council in

1 the weeks and months leading up to the sale that
2 occurred on February 19th, 1999, what is your
3 impression of the County's position toward the
4 improvement of the levees and the development plan
5 for the property?

6 A. I would have to say, going back in time
7 to July, all the way forward, my impression was
8 that the County realized -- saw -- what we were
9 trying to do and was trying to help facilitate that
10 process.

11 There was obviously a lot of
12 communication back and forth between FEMA and the
13 County and the County and FEMA and engineers and so
14 on and so forth, ultimately resulting in a
15 resolution that said, You can improve those levees.
16 You do certain things, we'll do certain things.
17 And going through the due diligence process with
18 Burroughs & Chapin, they were extremely sensitive.

19 MR. JOHNSON: Your Honor, this goes
20 beyond the question. I object.

21 THE COURT: I will overrule the
22 objection.

23 THE WITNESS: They were very
24 conservative in their approach. They did a lot of
25 work to get to those issues to make sure that they

1 could do what they thought they could do with the
2 property.

3 And I think that the County, from my
4 impression, embraced the project. I mean, we had
5 unanimous votes and resolutions on that resolution
6 that said that, and, you know, the County was doing
7 everything that they could do at that point to
8 allow this project to go forward.

9 MR. BECKER: Thank you, Mr. Manning.

10 Your Honor, at this time, we've got a
11 number of documents to submit into evidence. I
12 would offer into evidence Plaintiff's Exhibits 276,
13 275, 277, 280, 279, and 278.

14 (PLF. EXH. 276, Termination of Purchase
15 Options and Agreements, dated February 19, 1999,
16 was presented.)

17 (PLF. EXH. 277, Assignment of Purchase
18 and Sale Agreement to Columbia Venture, LLC, was
19 presented.)

20 (PLF. EXH. 280, Purchaser's Closing
21 Statement, was presented.)

22 (PLF. EXH. 279, Seller's Closing
23 Statement, was presented.)

24 (PLF. EXH. 278, Summary of
25 Disbursements, was presented.)

1 being the documents from the closing of the
2 transaction?

3 A. 276 is. 277 is correct. 278 is
4 correct. 279 is correct -- excuse me, I'll look a
5 little bit more at 279. That's correct. 280 is
6 correct.

7 Q. You had previously examined Plaintiff's
8 Exhibit 275. Do you recognize it as being a
9 document from the closing of the transaction?

10 A. 275?

11 Q. Yes.

12 A. I don't see 275 -- sorry. 275 is
13 correct.

14 MR. BECKER: Your Honor, I believe
15 these certified copies of the deeds are
16 self-authenticating.

17 BY MR. BECKER:

18 Q. All right. So the sale did actually
19 close on February 19th, 1999. Is that correct?

20 A. That's correct.

21 Q. Mr. Manning, let me give you next what
22 is Plaintiff's Trial Exhibit 250.

23 This is a certified copy of a Richland
24 County Zoning Ordinance that was adopted September
25 7th, 1977 and amended through January of 1999.

1 A. It was.

2 Q. Was Item III, Contact with Richland
3 County, discussed at the meeting?

4 A. It was.

5 Q. Roman Numeral III, Future needs of the
6 development process, was that topic discussed?

7 A. It was.

8 Q. Item 3, Roman Numeral III-J, The
9 project name, was that topic discussed?

10 A. It was.

11 Q. What is the name -- what name did the
12 project ultimately receive?

13 MR. JOHNSON: Objection, Your Honor,
14 relevance.

15 THE COURT: Overruled.

16 THE WITNESS: Green Diamond, LLC -- I
17 mean, Green Diamond. Not LLC.

18 BY MR. BECKER:

19 Q. Do you know where that name came from?

20 A. Yeah, I do. I know where it came from.

21 Q. Where did that name come from?

22 A. Green Diamond was an employee of my
23 father's for about 45 years, a wonderful guy, and
24 I'm sorry his name got caught up in this mess.
25 But, anyway, that's where the name came from. He

1 was an employee of my father's.

2 Q. And his name was Green Diamond?

3 A. Green Diamond. He lived on Pineview
4 Road.

5 Q. The future objectives are set forth on
6 Page 2 of this exhibit under Item B. The first one
7 is -- I believe that should say -- Commenced
8 development and sale of land as appropriate.

9 Was that topic discussed?

10 MR. JOHNSON: Again, Your Honor, I
11 object, to counsel changing the document that
12 you're reading from.

13 THE COURT: I sustain the leading, but
14 it says, Commerce development, so I don't know.

15 MR. JOHNSON: I don't know what it
16 means.

17 BY MR. BECKER:

18 Q. Was the topic of beginning development
19 as expeditiously as possible discussed at the
20 meeting?

21 A. Yes, sir.

22 Q. Was the topic of making members whole
23 as soon as practicable discussed at the meeting?

24 A. That was always discussed.

25 Q. Under Item C on that page to the

1 Q. Okay. The area of the levee,
2 approximately what is the acreage of the levee
3 itself owned by -- sold to Columbia Venture for
4 Levee Section 1?

5 A. 39 acres.

6 Q. Okay. All right. Based on your past
7 experience in the construction and maintenance of
8 levees, what is a borrow area?

9 A. It's a location for dirt to put on the
10 levees -- or, you know, the Highway Department had
11 a borrow area. We created a 50-acre lake just
12 south of I-77 in close proximity to where the work
13 needed to be done.

14 So borrow areas were selected by S&ME
15 for us later to come back and place dirt on the
16 levees.

17 MR. BECKER: That's all I have of this
18 document, Your Honor.

19 (PLF. EXH. 294, Embankment Evaluation
20 Report on Levee Section 1 by S&ME, was presented.)

21 BY MR. BECKER:

22 Q. Mr. Manning, I would like you to next
23 take a look at Plaintiff's Exhibit 294.

24 Mr. Manning, based on your continuing
25 involvement with Columbia Venture and your

1 upon desired protection water elevations, plus a
2 standard freeboard height.

3 Three, Continue with the Phase II
4 investigation to develop geotechnical engineering
5 analyses parameters for design of remedial repairs,
6 modifications, and improvements to the existing
7 Levee Section 1 embankments and embankment
8 penetrations.

9 Q. Thank you.

10 And is this document signed and bear
11 the seal of Mr. Lessley and Mr. Calsing who are
12 licensed South Carolina -- registered professional
13 engineers in South Carolina?

14 A. Yes, sir.

15 Q. Now, Mr. Manning, let me ask you, based
16 upon your experience in constructing levees and
17 maintaining levees, would -- and your understanding
18 of -- based on your attendance at the member
19 meetings of Columbia Venture, was the plan to
20 proceed with improvement of the levees?

21 A. Yes.

22 Q. In what time frame?

23 MR. JOHNSON: Your Honor, I object.
24 This would be hearsay. This would be hearsay,
25 something that was discussed at a meeting. And

1 unless he said it himself, he can't testify about
2 what other people said or what the conclusion was.

3 THE COURT: I will overrule the
4 objection.

5 THE WITNESS: I think there was earlier
6 some schedules produced, phasing schedules, and I
7 believe, off the top of my head, that one year to
8 18 months, maybe 24 months, was the improvement
9 time frame for Levee Section 1 and 2.

10 BY MR. BECKER:

11 Q. I need you to be a little bit more
12 specific. You're talking about the estimated time
13 frame for improving all of the levees to FEMA
14 standards was 18 months. Is that what you're
15 saying?

16 MR. JOHNSON: Your Honor --

17 THE COURT: Yes, sustained.

18 BY MR. BECKER:

19 Q. Just elaborate, please, Mr. Manning.
20 What was the 18 months? When would it start? When
21 would it end?

22 A. In the spring of '99, Lockwood-Greene
23 produced a schedule, a phasing plan, for the
24 levees. And without having it in front of me and
25 seeing what it was -- I believe that schedule was

1 to --

2 MR. JOHNSON: Object, Your Honor,
3 hearsay.

4 THE COURT: Overruled.

5 THE WITNESS: I believe the schedule
6 provided the time frame to phase Levee Section 1
7 and 2, submit permit applications, and then begin
8 construction and complete construction of those
9 phases during that 18 to 24 months, 12 to 24
10 months.

11 BY MR. BECKER:

12 Q. Beginning when?

13 A. March or April, May of 1999.

14 Q. Thank you.

15 Would it be possible, in your
16 experience, to improve all of the 20 miles of
17 levees all at once?

18 MR. JOHNSON: Objection, Your Honor.

19 THE COURT: I will sustain it.

20 BY MR. BECKER:

21 Q. You mentioned phases, proceeding in
22 phases. Did I hear you say that?

23 A. That's correct.

24 Q. What do you mean by proceeding in
25 phases?

1 BY MR. BECKER:

2 Q. Mr. Manning, I would like to next
3 present you with Plaintiff's Exhibit 118 and offer
4 that into evidence.

5 (PLF. EXH. 118, Hester letter to
6 Gregory with draft levee maintenance permit, dated
7 May 4, 1999, was presented.)

8 BY MR. BECKER:

9 Q. You can disregard the first page, but
10 the second page is a letter dated May 4th, 1999
11 from Mark Hester to George Gregory. I would like
12 you to just publish the first two paragraphs under
13 Dear George.

14 THE COURT: Hold on one second.

15 THE WITNESS: Dear George, Enclosed --

16 MR. BECKER: Hold on, hold on.

17 THE COURT: Go ahead.

18 BY MR. BECKER:

19 Q. If you would, please publish the first
20 two paragraphs under Dear George.

21 A. Dear George, Enclosed is the erosion
22 and --

23 Q. First, what's the subject?

24 A. Erosion and sediment control permit
25 application.

1 Q. What's the next word?

2 A. Signature.

3 Q. Okay. Thank you.

4 A. Enclosed is the erosion and sediment
5 control permit application form for sites
6 disturbing more than 2 acres. Please sign the form
7 and forward two copies to Mr. Gordon Greene at
8 Richland County.

9 I have enclosed a draft letter that may
10 be used to submit the permit application to
11 Mr. Greene. Also, please return a copy of the
12 signed form to Lockwood-Greene so that we can
13 maintain complete records.

14 Q. Thank you.

15 Now, I would like to turn your
16 attention to the form document that was attached
17 and ask you to publish certain portions of that
18 document.

19 First of all, this is a DHEC form? Is
20 that correct?

21 A. Yes, sir.

22 Q. Mr. Manning, are you -- based on your
23 own previous construction and development
24 experience, are you able to identify what kind of
25 permit application this is? I mean, what would it

1 be called in normal everyday --

2 A. It's a land disturbance permit.

3 Q. Okay. And it's on -- is it typically
4 on a DHEC form?

5 A. It is.

6 Q. Okay. If you would read the first part
7 where it says, Standard Application Form.

8 A. Standard application form for
9 construction sites disturbing more than 2 acres,
10 South Carolina Department of Health and
11 Environmental Control, Stormwater Management.

12 Q. What is the date under Section 1?

13 A. April 15th, 1999.

14 Q. And what is the facility or project
15 name on Line 1?

16 A. Columbia Venture.

17 Q. What is the county on the line right
18 under that?

19 A. Richland.

20 Q. What is the tax map number, four lines
21 down?

22 A. 10900-01-02 and 11100-01-07.

23 Q. Are you familiar with those tax map
24 parcels?

25 A. I am.

1 Q. Where is that property located?

2 A. In Levee Section 1.

3 Q. What is the nearest receiving water
4 body on Line 2?

5 A. Congaree River, slash, Gills Creek.

6 Q. What is the distance to the nearest
7 receiving water body?

8 A. 200 feet.

9 Q. How far is Levee Section 1 from the
10 Congaree River?

11 A. Approximately 200 feet.

12 Q. What is the next known receiving water
13 body listed on the application form?

14 A. Gills Creek.

15 Q. Well, on the third line down, under
16 the -- under the line that says, Distance to
17 nearest receiving water body.

18 A. Oh, excuse me, 200 feet.

19 Q. And the line under that, next known
20 receiving water body?

21 A. Congaree River.

22 Q. On Line 3, who is the property owner of
23 record?

24 A. Columbia Venture, LLC.

25 Q. On Line 5, who is the agent or contact

1 person?

2 A. George T. Gregory, III.

3 Q. On Line 6, who is the engineer,
4 technical representative, or firm?

5 A. Lockwood-Greene Engineers.

6 Q. Under Section 3, what is the size or
7 total of acres on Line 8?

8 A. 67 acres.

9 Q. What is the surface area of land
10 disturbance?

11 A. 32.

12 Q. All right. Mr. Manning, I would like
13 to have you go back to Plaintiff's Exhibit 247, the
14 letter dated January 21, from Wilson Tillotson to
15 George Gregory.

16 Do you see that?

17 A. Yes, sir.

18 Q. Look on the second page of the
19 document. What is the -- in the first column under
20 Levee Section 1, what is the area of levee?

21 A. 39 acres.

22 Q. And what is the area of levee borrow
23 area?

24 A. 50.

25 Q. Based on your knowledge of the size of

1 Levee Section 1, approximately how many acres is
2 the riverside portion of Levee Section 1?

3 A. 1,500-and-some-odd acres.

4 Q. No, I don't mean the --

5 A. Are you talking about the levees
6 themselves?

7 Q. The levees themselves. I'm trying to
8 have -- I'm wondering, how does the size of the
9 levee -- of Levee Section 1 -- based on your
10 knowledge -- compare to Line 8 on this permit
11 application?

12 A. It's almost identical.

13 Q. If you will proceed to page -- it has
14 CV013151 at the bottom in the lower right-hand
15 corner.

16 What is the start date on Line 12 at
17 the top?

18 A. May 24th, 1999.

19 Q. And what is the completion date listed
20 right beside it?

21 A. It appears to be October 9th, 1999.

22 Q. All right. And is the application
23 signed?

24 A. It is.

25 Q. Do you recognize that signature?

1 A. I believe it's Mark Hester's signature.

2 Q. He was the employee with

3 Lockwood-Greene?

4 A. Yes, sir.

5 Q. And does it bear his seal?

6 A. That's it.

7 Q. Now, the next page is the proposed
8 cover letter that was referred to in the cover
9 letter to this document, whereby Mr. Gregory would
10 forward this to Mr. Greene.

11 Please read the letter under, Dear
12 Mr. Greene.

13 MR. JOHNSON: Your Honor, before we
14 read that letter, could we have the witness read
15 Paragraph 15 and 17 in the prior page?

16 THE COURT: All right.

17 THE WITNESS: Certification?

18 MR. JOHNSON: Yeah.

19 THE WITNESS: 15?

20 MR. JOHNSON: And then 17.

21 THE WITNESS: I hereby certify that all
22 land-disturbing construction and associated
23 activity pertaining to this site shall be
24 accomplished pursuant to and keeping in with the
25 terms and conditions of the approved plans. I also

1 certify that a responsible person will be assigned
2 to the project for day-to-day control.

3 I certify, under penalty of law, that
4 this document and all attachments were prepared
5 under my direction or supervision in accordance
6 with a system designed to assure that qualified
7 personnel properly gathered and evaluated the
8 information submitted.

9 Based on my inquiry of the person or
10 persons who manage the system or those persons
11 directly responsible for gathering the information,
12 the information submitted is, to the best of my
13 knowledge and belief, true and accurate and
14 complete.

15 I am aware that there are significant
16 penalties for submitting false information,
17 including the possibility of a fine and
18 imprisonment for known violations.

19 Number 17 --

20 MR. JOHNSON: I'm sorry, could you tell
21 me whether the signature line is signed?

22 THE WITNESS: Could you say that again?

23 MR. JOHNSON: Could you tell me whether
24 the signature line is signed.

25 THE WITNESS: It says George T.

1 Gregory. I don't see a signature next to it.

2 MR. JOHNSON: Thank you. Continue.

3 THE WITNESS: With 16 or 17?

4 MR. JOHNSON: 17.

5 THE WITNESS: Design Certification:

6 Five copies of the plans, all specifications and
7 supporting calculations, forms, and reports are
8 herewith submitted and made a part of this
9 application. I have placed my signature and seal
10 on the design documents submitted, signifying that
11 I accept responsibility for the design of the
12 system.

13 Further, I certify, to the best of my
14 knowledge and belief, that the design is consistent
15 with the requirements of Title 48, Chapter 14 of
16 the Code of Laws of South Carolina, 1976, as
17 amended, and pursuant to Regulation 72-300.

18 BY MR. BECKER:

19 Q. Thank, you, Mr. Manning.

20 Would you please proceed to the next
21 page, which has Bates Numbers CV013152 in the lower
22 right-hand corner.

23 Again, this is the proposed cover
24 letter for transmittal to Mr. Gordon Greene of the
25 Richland County Department of Public Works. If you

1 would please read the letter beginning with Dear
2 Mr. Greene.

3 A. Dear Mr. Greene, Subject, Columbia
4 Venture project, levee maintenance. Enclosed are
5 two copies of the signed permit application for the
6 Columbia Venture project.

7 Please include this permit application
8 form into the materials submitted on 04 May 1999
9 from Lockwood-Greene.

10 Please review the information and
11 provide a permit to begin construction. If you
12 have any questions, please call me at (803)
13 913-7779. Sincerely.

14 Q. Mr. Manning, do you know if Columbia
15 Venture submitted a permit application on or about
16 May 4th to Mr. Gordon Greene at Richland County?

17 MR. JOHNSON: Your Honor, can we, uh --

18 THE WITNESS: They did.

19 BY MR. BECKER:

20 Q. All right. What was your -- what type
21 of permit application was it?

22 A. Levee improvements.

23 Q. And the purpose of those levee
24 improvements?

25 A. To begin the process of bringing them

1 into compliance with 44 CFR.

2 Q. All right. I would like you to next
3 look at Plaintiff's 119.

4 MR. JOHNSON: Your Honor --

5 (PLF. EXH. 119, Greene letter to
6 Hester, Re: Columbia Venture Project - Proposed
7 Levee Improvements, dated May 13, 1999, was
8 presented.)

9 BY MR. BECKER:

10 Q. Mr. Manning, before I ask you about
11 this document, I would like to -- and I believe
12 you've covered this previously, but for the benefit
13 of opposing counsel, I want to make sure we go over
14 this now.

15 As part of your construction and
16 development activities, in Richland County -- which
17 have been ongoing for how long now?

18 A. Since 1994. Excuse me, since '83.

19 Q. All right. Do you regularly submit
20 land-disturbance permit applications to Richland
21 County?

22 A. I have.

23 Q. And have you interacted with the staff
24 of the county engineer's office and the other
25 county offices with respect to those permit

1 testified -- based on your -- based on your
2 attendance at meetings and your other interactions
3 with members of Columbia Venture and Richland
4 County, I would like you to tell us whether -- what
5 did happen with respect to Columbia Venture's
6 permit applications, in terms of the three
7 alternatives that are listed on this document.

8 MR. JOHNSON: I'm sorry, I can't find
9 the document, and we've got limited space over
10 here.

11 BY MR. BECKER:

12 Q. Mr. Manning, after the May 13, 1999
13 letter from Mr. Greene to Mr. Hester, and based on
14 your involvement with Columbia Venture and your
15 knowledge of Columbia Venture's continuing attempts
16 to develop the property, and after the letter from
17 Mr. Davison of FEMA to Mr. McSwain, what is your
18 impression of the position that Richland County
19 took from that point forward regarding a permit
20 application to improve the Manning levees?

21 MR. JOHNSON: Objection, Your Honor.
22 He was not in any capacity at that time. His
23 impression would be irrelevant, consistent with
24 what you've previously ruled.

25 THE COURT: The difficulty is, I don't

1 know what -- maybe it just goes to the weight more
2 than the admissibility, because you're just simply
3 asking an opinion of an observer. I don't know
4 that that's inadmissible, because you're not asking
5 for hearsay; you're just asking what's his
6 impression. I think it would go to the weight of
7 the testimony.

8 MR. JOHNSON: Your Honor, I believe
9 it's excludable under Rule 702 -- 701 -- opinion
10 testimony by a lay witness, and that opinion
11 testimony doesn't get them just --

12 THE COURT: I will give you your book
13 back. I think in this case -- so he's not
14 testifying as an expert, he's not testifying just
15 as someone off the street, but he's testifying as
16 someone who has followed this process. But as far
17 as the weight of it is concerned, it's just his
18 opinion, and so that's the way it would have to be
19 accepted. But I'm going to allow the answer.

20 BY MR. BECKER:

21 Q. All right. Do you remember the
22 question, Mr. Manning?

23 A. Yes, sir.

24 Q. What is your answer?

25 A. The county deferred action, and this

1 would mean the County awaits whatever action FEMA
2 imposes upon Richland County.

3 Q. All right. So the County -- after the
4 letter from Mr. Davison to Mr. McSwain on May 19th,
5 1999, is it your impression, that, of the three
6 alternatives listed on Page 3 of Plaintiff's
7 Exhibit 166, the County took Alternative 3?

8 A. That's correct.

9 MR. JOHNSON: Your Honor, I object.
10 That is the most leading question I have ever
11 heard.

12 THE COURT: Well, he's already stated
13 his opinion, that it was a delay.

14 MR. BECKER: I'm just summarizing.
15 It's just clarifying, that's all.

16 Your Honor, I would like to publish,
17 for the record, the next Flood Insurance Study and
18 Flood Insurance Rate Map in this series.

19 THE COURT: All right.

20 MR. BECKER: This is Plaintiff's
21 Exhibits 306 and 304 and 305.

22 (PLF. EXH. 306, 8/12/99 Revised
23 Preliminary FIRM - Richland County Map Panel 160,
24 was presented.)

25 (PLF. EXH. 304, Floodway shaded FIRM,

1 was presented.)

2 (PLF. EXH. 305, 8/12/99 Revised

3 Preliminary FIS for Richland County, was

4 presented.)

5 MR. BECKER: Your Honor, I would,

6 again, just call the Court's attention on Exhibit

7 305, the Flood Insurance Study -- we've been over

8 numerous of them before -- this one is dated,

9 Revised Preliminary, August 12th, 1999 -- ask the

10 Court to note on the second page that the

11 still-effective Flood Insurance Study is dated

12 January 19th, 1994, as revised on July 17, 1995,

13 that the Principal Flood Problems and Flood

14 Protection Measures set forth, beginning at Pages 7

15 and 9, still do not -- they discuss the --

16 MR. JOHNSON: Your Honor, I don't mind

17 him publishing it, but I don't think he gets to

18 comment on what's in there and what's not in there.

19 THE COURT: I think as far as time is

20 concerned, I believe that it's been previously

21 brought out that it does not mention the levees in

22 that particular section.

23 Is that what you're referring to?

24 MR. BECKER: Right. And yet this one,

25 also, does not refer -- under 2.4 -- does not refer

1 to any other flood-protection structure in Richland
2 County, other than the Manning levees.

3 THE COURT: All right. It does mention
4 the levee under 2.4.

5 MR. BECKER: Yes.

6 THE COURT: Okay.

7 MR. BECKER: That is the only
8 flood-protection structure it mentions.

9 THE COURT: Okay. May I ask you this?

10 MR. BECKER: Yes.

11 THE COURT: This is just an eyesight
12 issue.

13 On 304, what is the date on that map?

14 MR. BECKER: Those maps correspond with
15 the date of the Flood Insurance Study.

16 THE COURT: This one?

17 MR. BECKER: Yes, sir.

18 THE COURT: 304, so that would be the
19 1999, August 12th?

20 MR. BECKER: Yes. August 12th, 1999;
21 yes, sir.

22 For each of the -- we do have bigger
23 versions of these on blown-up boards, if you would
24 like to --

25 THE COURT: No, actually, I have

1 already got some copies of these.

2 MR. BECKER: Okay. The larger-size
3 copies?

4 THE COURT: Yes.

5 BY MR. BECKER:

6 Q. Mr. Manning, looking at the copy of
7 Plaintiff's Exhibit 304 that's displayed on the
8 projector, approximately where is the floodway
9 boundary with respect to the Manning levee, based
10 on your knowledge of the property?

11 A. On the levee.

12 Q. On the levee?

13 A. That's what it appears to me.

14 Q. So is the levee in the floodway on that
15 map?

16 A. It is.

17 MR. BECKER: Your Honor, could we
18 possibly take a short afternoon break?

19 THE COURT: Yes, it's time. It's been
20 an hour and a half.

21 (A brief recess was held.)

22 MR. BECKER: Your Honor, the next group
23 of exhibits I would like to offer into evidence are
24 a series of monthly project status reports from
25 Lockwood-Greene regarding Columbia Venture, LLC,

1 that were produced in accordance with that study.

2 And I would simply call the Court's attention to
3 the same items in that study that I pointed out on
4 previous studies, Sections 2.3 and 2.4.

5 BY MR. BECKER:

6 Q. Mr. Manning --

7 A. Yes, sir.

8 Q. -- I would like to continue with you
9 and get back to the time frame of May 1999, after
10 Mr. McSwain received the letter from Todd Davison
11 of FEMA and the action that he took thereafter with
12 respect to permit applications to improve the
13 Manning levees.

14 Based on your continuing participation
15 with the membership meetings of Columbia Venture,
16 your general observations as a citizen of Richland
17 County, with the efforts to develop the project,
18 did the floodplain mapping process with FEMA
19 continue?

20 A. It did.

21 Q. And did any groups arise in Richland
22 County -- any organized groups arise to oppose the
23 Green Diamond project?

24 MR. JOHNSON: Objection, Your Honor.
25 Arise?

1 THE COURT: I overrule the objection.

2 BY MR. BECKER:

3 Q. Did any organized groups arise to
4 oppose the project?

5 A. There were a number of environmental
6 organized groups that opposed the project.

7 Q. Can you name some of them?

8 A. Friends of Congaree were one, Riverland
9 Park, whether they were just as a homeowners
10 association at that point or represented by
11 somebody else, I can't recall. But there was a
12 concerted effort from the environmental coalition.

13 Q. Was there a group called Congaree Task
14 Force for Economic and Environmental
15 Responsibility?

16 A. I thought that was the Friends of
17 Congaree, but maybe it wasn't. There was a group
18 called that, though.

19 Q. Are you familiar with some of the
20 leaders of that organization?

21 A. I know some of them.

22 Q. Do you know who they were? Can you
23 name them?

24 MR. JOHNSON: Your Honor, relevance,
25 objection.

1 THE COURT: Well, of course, from other
2 exhibits that were submitted on other issues, I'm
3 familiar with the public meetings, and so on, that
4 they had.

5 Part of the Penn Central and
6 interpretations after that, as I refer to it in the
7 article and that have been written in that case, is
8 anticipation of public opposition, whether or not
9 it would be reasonably expected, what effect would
10 that have on a reasonable person, the expectations,
11 before going into a project, relative to the
12 potential effect on the regulations. They
13 particularly mention public opposition. So I will
14 overrule it.

15 BY MR. BECKER:

16 Q. Do you know who was the head of the
17 Congaree Task Force?

18 A. Robert Adams was a participant. I
19 don't know if he headed it, but he was very vocal
20 in the process.

21 Q. Was Weston Adams also a participant?

22 A. I think so, yeah.

23 Q. He's a lawyer in town?

24 A. Yes, sir.

25 Q. Do you know which firm he's with?

1 A. No, sir.

2 Q. Do you -- was there a public interest
3 law firm that was also involved in opposing the
4 Green Diamond project?

5 A. Southern Environmental Law Center was
6 involved. John Gregory is another person that
7 comes to mind on that. He was in opposition.

8 Q. Based on your observations, what was
9 the objective of these organizations?

10 A. To stop the development of Green
11 Diamond.

12 Q. Did they ultimately succeed?

13 MR. JOHNSON: Objection, Your Honor.

14 THE COURT: I sustain the objection.

15 BY MR. BECKER:

16 Q. Let me show you, then, Plaintiff's
17 Exhibit 114, Mr. Manning.

18 (PLF. EXH. 114, Memorandum from Weston
19 Adams to Richland County Council, Re: Proposed
20 stormwater management, erosion, and sediment
21 control ordinance, dated November 28, 2000, was
22 presented.)

23 BY MR. BECKER:

24 Q. This is a letter dated November 28th,
25 2000 to Richland County Council. It was produced

1 BY MR. BECKER:

2 Q. Just to recap, where was the floodway
3 boundary with respect to the levees according to
4 the January 19, 1994 Flood Insurance Rate Map?

5 A. The January 1994?

6 Q. Yes, going way back to January '94, on
7 that map, where was the floodway boundary with
8 respect to the Manning levees?

9 A. Outside the levee on the toe of the
10 levee on the riverside.

11 Q. According to the Flood Insurance Rate
12 Map that became effective on February 20th, 2002,
13 where was the floodway boundary?

14 A. Entirely over the property. You know,
15 80 percent of the property was encumbered by the
16 floodway.

17 Q. Are you aware -- other than the Manning
18 levees, are you aware of any other levee in
19 Richland County, in a floodway, other than the
20 Manning levees?

21 A. No.

22 MR. BECKER: Your Honor, I would like
23 next to show and offer into evidence a series of
24 buildings and photographs of a series of buildings
25 at Heathwood Hall Episcopal School.

1 I will just have Mr. Manning identify
2 the buildings in the photographs and where they
3 are.

4 BY MR. BECKER:

5 Q. Mr. Manning, are you familiar with the
6 campus of Heathwood Hall Episcopal School?

7 A. Yes, sir, I am.

8 Q. What's the basis of your knowledge?
9 Have you been there, visited there? What's the
10 basis of your knowledge of the campus?

11 A. My father gave the property to
12 Heathwood Hall back in the seventies to begin the
13 expansion of the school campus. I watched the
14 campus develop from the early seventies to now, and
15 I've been out there numerous times. My children,
16 some of them, attended there. But I'm familiar
17 with it.

18 Q. All right. I would like to show you a
19 series of photographs and just have you identify
20 for Judge Smith what these buildings are.

21 MR. JOHNSON: Your Honor, could we ask
22 that the date the building was constructed be
23 included in whatever explanation is, because that
24 affects what was done or could be done with the
25 property.

1 THE COURT: If he's aware of that.

2 THE WITNESS: Yes. Well, I will try to
3 give an estimate.

4 BY MR. BECKER:

5 Q. I can just ask you, With respect to the
6 date of February 20th, 2002, was the building built
7 before or after that date, to your knowledge?

8 A. Okay.

9 (PLF. EXH. 108, HHES gym photograph,
10 was presented.)

11 (PLF. EXH. 109, HHES Middle School
12 picture, was presented.)

13 (PLF. EXH. 110, HHES chapel picture,
14 was presented.)

15 (PLF. EXH. 516, Photograph of Heathwood
16 Hall, was presented.)

17 (PLF. EXH. 517, Photograph of Heathwood
18 Hall, was presented.)

19 (PLF. EXH. 518, Photograph of Heathwood
20 Hall, was presented.)

21 BY MR. BECKER:

22 Q. All right. Go ahead. This first one,
23 Plaintiff's Exhibit 108, Mr. Manning, what is that
24 a picture of?

25 A. That is the Highlander gym, Heathwood

1 Hall gym.

2 Q. All right. Do you know if it was built
3 before or after February 20th, 2002?

4 A. After.

5 Q. All right. The next building, the next
6 exhibit, 109, can you identify that building?

7 A. That's the new middle school building.

8 Q. All right. Do you know if it was built
9 before or after February 20th, 2002?

10 A. After.

11 Q. The next exhibit, 110, can you identify
12 that building?

13 A. That's the chapel.

14 Q. Do you know if it was built before or
15 after February 20th, 2002?

16 A. After.

17 Q. The next exhibit is sort of a composite
18 exhibit of photographs of the middle school, which
19 you've already identified. The third -- I'm sorry,
20 these aren't on the screen, but we do have copies
21 in front of us.

22 The fourth photograph in Exhibit
23 516 -- did I mention that we are on Exhibit 516?

24 A. I will go back to 516.

25 Q. All right. That is a -- do you have --

1 A. I have 516 and 517.

2 Q. 516. Those are photographs of the
3 middle school which you have already identified.
4 Can you identify the last two photographs in that
5 exhibit, Exhibit 516?

6 A. The interior shots?

7 Q. Yes, the interior shots and the one
8 after that.

9 A. Yeah, I've been in the building. I
10 don't know exactly where that is in relation to the
11 building. I can tell you that the last shot is the
12 lower floor of that building.

13 Q. All right. Underneath the building?

14 A. Correct.

15 Q. And the picture before it is inside the
16 middle school. Is that correct?

17 A. That's correct.

18 Q. Plaintiff's 517, can you identify those
19 photographs, those three photographs?

20 A. Basically the same thing. It's the new
21 gym, the interior shot of the basketball and
22 volleyball courts, and then beneath that gym is
23 that area shown on the last picture.

24 Q. All right. And, finally, Plaintiff's
25 Exhibit 518, what is that? The sign above it says:

1 Heathwood Hall Athletic Field.

2 Can you identify that as being what
3 that is?

4 A. That's correct.

5 Q. And were those improvements to the
6 athletic fields constructed before or after
7 February 20th, 2002?

8 A. The field --

9 Q. Well, how about the sign?

10 A. Well, I know the sign was put up --

11 Q. After --

12 A. -- after that, yes. We've got a statue
13 back there behind it you didn't show, which is
14 Burwell Manning.

15 Q. Okay.

16 A. So all of that was done after 2002.

17 Q. After February 20th, 2002?

18 A. Right. But the fields have progressed
19 over time. The lower field, just to the right of
20 the main football field, was built after 2002 as
21 well.

22 Q. Okay. So the statue behind the two
23 columns and the sign above them is a statue of your
24 father Burwell Manning?

25 A. Right, right.

1 Q. Could you describe the statue. What
2 does it look like?

3 A. Well, some friends of my family were
4 kind enough to honor him for what he did for the
5 school, and they had a statue erected, along with
6 creating the signage and the columns and all of
7 that, probably in 2008 or '9.

8 Q. Does the statue show him standing,
9 sitting?

10 A. Right. It's a full -- it's probably 8
11 or 9 feet high.

12 Q. Let me ask you this: Based on your
13 knowledge of the floodway boundary, on the map that
14 became effective on February 20th, 2002, are all of
15 these buildings in the regulatory floodway?

16 A. They are.

17 MR. BECKER: Your Honor, I don't have
18 any other questions for Mr. Manning at this time.
19 We have not been able to cover the zoning issues
20 that we deferred earlier this morning, and we have
21 yet to hear from the Plaintiffs with respect to
22 Exhibit 4.

23 I propose that we break for the day and
24 continue with Mr. Manning for just -- it will be
25 very short continuation of the direct examination

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF RICHLAND
4
5 Columbia Venture, LLC,
6 Plaintiff,
7 vs. CASE NO. 2010-CV-40-8943R
8 Richland County,
9 Defendants.

10 PROCEEDINGS: TRIAL - VOLUME III
11 (Pages 469 through 724)
12 BEFORE: THE HONORABLE JOHN HAMILTON SMITH
13 DATE: September 12, 2012
14 TIME: 10:01 a.m.
15 LOCATION: Richland County Judicial Center
16 1701 Main Street
17 Columbia, SC
18 REPORTED BY: Susan M. Valsecchi, CRR
19 Registered Professional Reporter
20

21 A. WILLIAM ROBERTS, JR., & ASSOCIATES

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1 Ms. Black to supplement this. And then, of course,
2 you can hear from the County.

3 We have removed from our designation
4 all of the excerpts of the deposition that
5 Ms. Taylor attached to the County's motion in
6 limine regarding the legislative privilege.

7 With respect to an e-mail communication
8 that Mr. Pearce had to one of his -- with one of
9 his constituents, Ms. Taylor had attached to her
10 motion in limine everything about that e-mail, from
11 the time we first placed it in front of Mr. Pearce
12 to ask him to identify it and to describe who the
13 people were that he was communicating with, until
14 the end of our questions to him about that
15 document.

16 We would prefer to include in the
17 designated portions of the deposition his
18 identification of the e-mail and who the parties
19 were that he was communicating with in the e-mail
20 message and eliminate all remaining questions about
21 that e-mail that get to the subject about, What did
22 you intend by the amendment, what were your
23 thoughts, what was your motive, to the extent those
24 were the questions, but we would propose to keep in
25 the first page or two of that passage in which he

1 identifies the e-mail communication and identifies
2 the recipients of the e-mail message and who they
3 are and then take out everything else after that.
4 So that would be our proposal.

5 THE COURT: What's your position on
6 that?

7 MR. JOHNSON: Your Honor, aren't they
8 supposed to give us their designations? He can
9 designate anything he wants. We give them back, a
10 day later, our written objections.

11 So we would like to see -- you know,
12 whatever they give us, we'll respond to it. If
13 it's an issue, we'll need to take it up. I think
14 if that will put it in focus.

15 THE COURT: All right.

16 MR. BECKER: All right. We'll be glad
17 to do that, Your Honor. I thought we really
18 already had, except for this one little thing.

19 THE COURT: Why don't you just, during
20 the break or whatever, just confer about that,
21 rather than having to get it in writing and all of
22 that. But if it's going to be published today,
23 that's fine. If it's not published, then I would
24 like to read it this evening.

25 MR. BECKER: And, of course, the plan

1 BURWELL DEAS MANNING, III

2 being previously duly sworn, testified as follows:

3 EXAMINATION

4 BY MR. BECKER:

5 Q. Mr. Manning, I will hand you what's
6 been marked as Plaintiff's Trial Exhibit 499, and
7 you've been with us while we've discussed that.

8 I would like to put up, if we could,
9 please, the large photograph of the property that
10 we began Mr. Manning's examination with, and,
11 Mr. Manning, you have that laser pointer.

12 I would like to ask you, dealing first
13 with that zoning designation of D-1, development
14 district, would you just read there, the
15 description of the D-1 development district.

16 A. D-1 development district, 26-62.1.
17 This district is intended to provide for large
18 tracts of land located primarily on the fringe of
19 urban growth where the predominant character of
20 urban development has not yet been fully
21 established, but where the current characteristics
22 of use are predominantly residential, agricultural,
23 or semi-development with scattered related uses.

24 It is further recognized that future
25 demand for development land will generate requests

1 for amendments and zone designations to remove land
2 from the D-1 classification and place it into other
3 more intensely developed classifications as a
4 natural consequence of urban expansion.

5 Q. Thank you.

6 Now, Mr. Manning, according to the
7 summary exhibit, which is Plaintiff's 499, there
8 were approximately 3,120.762 acres that had that
9 zoning classification at the time of purchase; is
10 that correct?

11 A. That's correct.

12 Q. Does that comport with your general
13 recollection of the zoning of the property at the
14 time of sale?

15 A. Yes, sir, that's accurate.

16 Q. Could you -- where was the acreage?
17 And by this, I'm asking you, in which levee section
18 or sections -- plural -- was the land that had a
19 D-1 zoning classification?

20 A. It appears to me that the property in
21 Levee Section 1 and Levee Section 2 represent the
22 D-1 zoning classification.

23 Q. All right. Point that out, again,
24 please, for the Court, using the laser pointer.

25 A. 1 being this property, and then 2 being

1 this property.

2 Q. All right. Okay, thank you.

3 Now, the next zoning district was RU
4 rural district.

5 Would you please read the excerpt
6 describing the characteristics of that zoning
7 classification.

8 A. This district is intended to, one,
9 protect and encourage agricultural endeavors and
10 promote the wide use of prime agricultural and
11 forest lands, protect and encourage the integrity
12 of existing rural communities, protect valuable,
13 natural, and cultural resources, maintain open
14 space and scenic areas contiguous to development
15 areas. Excuse me.

16 Q. And what was the total acreage,
17 according to this chart, in that zoning
18 classification?

19 A. 1,277.48 acres.

20 Q. All right. Could you show Judge
21 Smith -- well, let me ask this: Does that comport
22 with your understanding of the total acreage in
23 that zoning classification at the time of sale?

24 A. Yes, sir.

25 Q. Would you please point out for Judge

1 Smith the land that -- that zoning classification.

2 A. It would be Levee Section 3, which we
3 stated earlier would be this property right there.

4 Q. Okay. And just -- is that the southern
5 end of the property?

6 A. Yes, sir, that's the southern end of
7 the property.

8 Q. I take it, then, that the City Center
9 of Columbia is north of the property. Just orient
10 us on the compass.

11 A. North, south, east, west.

12 Q. All right. The next zoning
13 classification is M-1, light industrial.

14 Would you please read the
15 characteristics of that zoning classification.

16 A. This district is intended to
17 accommodate wholesale and distribution, storage,
18 processing, light manufacturing, and general
19 commercial/agricultural uses.

20 Q. And how many acres were in that zoning
21 classification at the time of sale?

22 A. 40.

23 Q. Could you point out that acreage to
24 Judge Smith, please.

25 A. Actually, it's 40 acres right along

1 Bluff Road, right in there.

2 Q. And that would be south of I-77?

3 A. South of I-77 and adjoining Bluff Road.

4 Q. All right. Finally, the RS-3
5 single-family residential classification, what are
6 the characteristics of that?

7 A. These districts are intended as
8 single-family residential areas with low to medium
9 population densities.

10 Q. And how many acres were in that zoning
11 classification at the time of sale?

12 A. 10.

13 Q. Could you point out to the Court,
14 please, that acreage.

15 A. Actually, I don't know if it's shown,
16 but there's a 10-acre block right across from the
17 40 acres on Bluff Road.

18 Q. All right, sir. All right.
19 Mr. Manning, have you previously -- in your past
20 development experience, have you converted the
21 zoning for a development tract from some other
22 classification to a planned unit development --

23 A. Yes, sir.

24 Q. -- zoning district?

25 A. Yes, sir. The last project I had

1 rezoned was a planning unit development, multiuse,
2 commercial apartments, residential. It was located
3 on Clemson Road and Spears Creek. It was
4 approximately 320 acres. It's called GreenHill
5 Parish. And I was able to go through the zoning
6 process in probably 60, 90 days.

7 Q. Is that in Richland County?

8 A. Northeast Richland County.

9 Q. And how many acres was it?

10 A. 322.

11 Q. What was the prior zoning
12 classification?

13 A. I believe it was rural.

14 Q. Did you interact with the County to
15 obtain that change in the zoning classification?

16 A. Yes, sir. As I mentioned earlier,
17 there was a plan called Vision 2020, Town & Country
18 2020. It was to stimulate different ways to
19 develop properties around those that already had
20 existing infrastructure.

21 There was a no -- well, it was located
22 close by, not on the property, but close by, and it
23 was perceived well by the community and the
24 council -- planning commission and the council.

25 Q. And the whole process took

1 Q. Long last.

2 First thing, you and I have known each
3 other for a number of years, correct?

4 A. Yes, sir, we have.

5 Q. Children are good friends?

6 A. Good friends. I saw Duncan two
7 weekends in a row.

8 Q. I'm going to try to refer to you as
9 Mr. Manning and address you that way. If I say
10 Deas, would you please answer anyway?

11 A. Yes, sir.

12 Q. Good.

13 Now, Mr. Manning, I want to first ask
14 you about Plaintiff's Exhibit 499 that you have
15 there in front of you.

16 A. Okay.

17 Q. When did you see this and go over it to
18 check its accuracy?

19 A. When did I see this document?

20 Q. Yeah, and to check its accuracy.

21 A. Well, you know, some of these documents
22 came from the McNair closing, so I saw a lot of
23 information that went to this off of the McNair
24 closing documents, so I had to verify zoning at
25 that point in time. Robert Smith, you know,

1 prepared zoning letters, which I did review.

2 This chronology was put together, I

3 guess, for me to see in the last month or so.

4 Q. You said in the last month or so?

5 A. Yes, sir.

6 Q. All right. Now, the zoning
7 designations that are indicated, were those the
8 zoning designations in 1998?

9 A. To the best of my knowledge.

10 Q. They've remained the same ever since?

11 A. Other than the change in zoning in the
12 annexation process with Cayce.

13 Q. Okay. And so until that zoning -- that
14 annexation occurred well after 2002?

15 A. Yes, sir.

16 Q. So before the contract with
17 Burroughs & Chapin and the sale to Columbia
18 Venture, the zoning was shown as it's shown here,
19 and then it remained that way until years later
20 when it was annexed by the City of Cayce?

21 A. That's correct.

22 Q. Now, you testified about the zoning
23 change you got for a 320-acre tract. Is that
24 correct?

25 A. Yes, sir.

1 Q. And although Columbia Ventures had
2 opposed it initially, according to Mr. Wiseman's
3 letter, they are withdrawing any active opposition
4 to the amendment, correct?

5 A. That's what it says.

6 Q. And when His Honor was asked yesterday
7 to compare the prior amendment and the subsequent
8 amendment and to compare it to what came from the
9 environmental groups that was subpoenaed from them,
10 that is the same amendment that Columbia Venture
11 withdrew its active opposition to, didn't it?

12 A. Well, the political process has really
13 gotten out of hand at this point, and I think that
14 the -- what I take from this letter is that they
15 wanted to see if they could make something work,
16 which, obviously, wasn't going to work before,
17 because they had been blocked.

18 Q. Mr. Manning, I'm not really asking you
19 what your opinion is of what the letter means. I'm
20 asking you, isn't that what the letter said, they
21 were withdrawing?

22 A. They withdrew it.

23 Q. No question about it.

24 Now, the Stormwater Ordinance that was
25 adopted, I guess, in April of 2001, after the

1 withdrawal of opposition by Columbia Venture,
2 applied countywide, didn't it? It was a countywide
3 ordinance?

4 A. Well, it looked like a bull's-eye on
5 Green Diamond to me, but it was a countywide
6 ordinance, but it specifically targeted that
7 property.

8 Q. Mr. Manning, it applied to every
9 citizen in Richland County; did it not?

10 A. Well, there wasn't anybody that had 20
11 miles of levees and was dealing with this floodway
12 issue, either.

13 Q. Mr. Manning, we saw from the chart
14 yesterday that counsel put up, there's 16,000 acres
15 that are within a floodway in Richland County,
16 aren't there? You saw that?

17 A. None protected by a levee.

18 Q. Well, none protected. Well, wait a
19 minute. Have you done --

20 A. Other than the one I testified.

21 Q. Have you done a survey of the county
22 properties that are in a floodway to make any
23 determination as to whether there are other levees?

24 A. There's only one other levee in
25 Richland County that I know of.

1 Q. I understand that. There may be only
2 one you know of.

3 My question is, have you done a survey
4 of the floodways in Richland County to determine
5 who has levees and who does not?

6 A. No, I have not.

7 Q. And anybody who is in a floodway who
8 doesn't have a levee currently but may want to
9 build one in the future is affected by this
10 ordinance, aren't they?

11 A. Obviously, they can't do that.

12 Q. Now, you were asked some questions
13 about Heathwood Hall and the water department.

14 A. Could you refresh my memory.

15 Q. Yeah, where we talked about the
16 pictures.

17 A. Oh, okay.

18 Q. Heathwood Hall was exempted from the
19 requirements of the Stormwater Ordinance, weren't
20 they?

21 A. Yes, sir.

22 Q. Now, but that exception didn't give
23 Heathwood the right to build anything they wanted,
24 any kind of way, did it?

25 A. I think the exemption stated that they

1 had to comply with other provisions of 44 CFR,
2 which were no-rise implications, for additional
3 property owners.

4 Q. Actually, what Heathwood had to
5 do -- we can look at the photographs -- Heathwood
6 had -- they could build on their property, but they
7 had to elevate, didn't they?

8 A. Sure.

9 Q. They had to stick them on stilts?

10 A. They did.

11 Q. Every building that we looked at
12 yesterday -- Plaintiff's Exhibit 109 is the
13 intermediate middle school?

14 A. That's correct.

15 Q. Built since the ordinance?

16 A. That's correct.

17 Q. Built on stilts?

18 A. That's correct.

19 Q. The gymnasium, home of the Heathwood
20 Highlanders, built on stilts, correct?

21 A. Stilts.

22 Q. Stilts.

23 The chapel, built since the ordinance,
24 built on stilts?

25 A. Those look like brick piers. That's

1 about 4 or 5 foot high. I wouldn't call that a
2 stilt.

3 Q. Well, you don't know how high they go
4 up to --

5 A. Well, look at the steps.

6 Q. So you think those are not stilts?

7 A. I think that the floor level is over
8 the 100-year flood, but it's not on stilts.

9 Q. So they built it high enough to get
10 above the flood?

11 A. Sure.

12 Q. Okay. What about the football field,
13 is your father's statue built up or is it down on
14 the ground level?

15 A. It's on the ground level, just like
16 those columns are.

17 Q. So if they get a flood there, he may
18 get wet?

19 A. He would get wet.

20 Q. Now, prior to the purchase by Columbia
21 Venture or as a result of the -- what did you call
22 it, a Char --

23 A. Charette.

24 Q. Charette, I'm sorry.

25 -- nobody was envisioning doing the

1 Columbia Venture's property where every structure
2 would be built on stilts, were they?

3 A. No, that would not have been feasible.

4 Q. Now --

5 THE COURT: I'm sorry, would you repeat
6 that last question. I was making a note.

7 BY MR. JOHNSON:

8 Q. The question was, the plan
9 envisioned -- before purchase and as a result of
10 the charette -- did not involve building every
11 structure on stilts?

12 A. Well, it -- obviously, if you don't
13 need to, you wouldn't. And at the time, when they
14 bought the property, it was envisioned they would
15 build on grade. I mean, you can build elevated at
16 the beach all the time, but the market does not
17 accept that from a large, large development like
18 this.

19 Q. Sure. I think we agree.

20 A. Okay.

21 Q. Now, Mr. Manning --

22 MR. JOHNSON: Can we get the Stormwater
23 Ordinance. It's Plaintiff's Exhibit 374.

24 BY MR. JOHNSON:

25 Q. Would you please publish the purpose of

1 the Stormwater Ordinance.

2 A. An ordinance amending the Richland
3 County Code of Ordinances, Chapter 8, drainage,
4 erosion and sediment control, by the deletion of
5 the language contained therein and the substitution
6 of the following language.

7 Q. I'm sorry. Purpose.

8 A. Oh, excuse me, I'm sorry.

9 THE COURT: What's the exhibit number?

10 MR. JOHNSON: It's 374, Your Honor.

11 THE WITNESS: In order to protect the
12 general health, safety and welfare of the people of
13 Richland County, South Carolina, and to protect the
14 natural assets and resources of Richland County for
15 posterity, this stormwater management, erosion, and
16 sediment control chapter is enacted to protect the
17 land and waters from the effects of excessive soil
18 erosion and sedimentation, to prevent siltation of
19 streams and lakes, to prevent clogging of drainage
20 channels and to prevent damages to the property of
21 adjacent landowners.

22 In addition, it is the purpose of this
23 chapter to provide proper drainage channels by
24 urban stormwater runoff and to prevent encroachment
25 into natural drainage channels by buildings or

1 other land improvements. Proper management of the
2 quality and quantity of stormwater runoff will
3 minimize damage to public and private property,
4 ensure a functional drainage system, promote the
5 attainment and maintenance of water quality
6 standards, enhance the local environment associated
7 with the drainage system, maintain, as nearly as
8 possible, the pre-development runoff
9 characteristics of the area, and facilitate
10 economic development while mitigating associated
11 flooding and drainage impacts.

12 BY MR. JOHNSON:

13 Q. Would you agree that those were very
14 worthy goals?

15 A. And I would bet you, that's the same
16 language that was in the '94 and '95 sediment
17 erosion control.

18 Q. So they would have been worthy goals in
19 '94?

20 A. Exactly.

21 Q. Now, you were asked a series of
22 questions. I'm not sure you were asked too many
23 questions, but do you recall yesterday that a
24 series of documents from S&ME and Lockwood Greene
25 were put into evidence?

1 A. Yes, sir.

2 Q. And those are Plaintiff's Exhibits 294,
3 127, 119, 31, 120, 209, 307, 308, 211, 515, 323,
4 and maybe 366.

5 Do you remember those documents being
6 discussed yesterday?

7 A. Yes, sir.

8 Q. Now, actually, Mr. Manning, during this
9 time frame, weren't these documents
10 prepared -- being prepared as part of an effort by
11 Columbia Venture and Lockwood Greene to develop a
12 new strategy to use with FEMA?

13 A. What were the dates on that?

14 Q. They were -- the dates were beginning
15 April 5 of '99, May 2nd of '99, May 13th, May 19th,
16 and then going forward.

17 Do you want to keep looking?

18 A. Yeah, if you don't mind --

19 Q. Sure.

20 A. -- because the strategies -- you know,
21 I'm not sure when they changed.

22 Q. Refresh your recollection on anything
23 you want, and I will ask you the question.

24 A. Could you repeat the question for me.

25 Q. Beginning in May of 1999, did Lockwood

1 Greene and Columbia Venture adopt a new strategy to
2 try to deal with FEMA and the flood maps?

3 A. No, sir, not to my knowledge. I think
4 the engagement that is reflected in the record was
5 that they were trying to achieve improvement of the
6 levees that had to do with the FEMA regulations
7 that the County adopted in the resolution.

8 Q. Let me show you a letter dated May
9 27th, 1999 and ask you to look at it and see if it
10 refreshes your recollection on this point.

11 MR. JOHNSON: And while Mr. Manning is
12 reading that, we would offer this letter into
13 evidence.

14 (DFT. EXH. 2, a letter dated May 27,
15 1999 to George Gregory from H. Wilson Tillotson,
16 was presented.)

17 THE WITNESS: Okay.

18 BY MR. JOHNSON:

19 Q. Mr. Manning, what was happening at that
20 time was Lockwood Greene, on behalf of Columbia
21 Venture, was trying to get -- adopt in a strategy
22 that would enable them to get the Corps of
23 Engineers to recognize, that even though the levees
24 weren't certified that, they did provide some flood
25 preventative measure, protection, and that they

1 to a certification standard or not, and there's
2 been permit applications by Columbia Venture to do
3 just that, on more than one occasion.

4 So I don't know how you get there
5 without going through the permit process that was
6 denied by Richland County, but there's been an
7 effort to do that.

8 Q. We'll talk about that. The Richland
9 County ordinances that were in place prior to
10 closing, prior to the purchase by Columbia Venture,
11 were, in fact, more stringent than the FEMA
12 requirements; weren't they?

13 A. The --

14 Q. Richland County ordinances.

15 A. -- the Richland County --

16 Q. Stricter, yes, prior to the purchase.

17 A. I can't say they were. I mean, I'm
18 taking your word for it, but I do know where the
19 floodway was in that time period, which was on the
20 outside toe of the levee, which is totally
21 different from where it is now.

22 Q. Mr. Manning, didn't the FEMA
23 requirement require levees to be upgraded to
24 withstand the 100-year flood?

25 A. It did. And the County said they would