From: [redacted]
Sent: Tuesday, December 12, 2000 4:15 PM
To: mike buckley
Cc: wilson tillotson; todd davison; matt miller; mark vieira; [redacted] doug bellomo; [redacted] craig perl; [redacted] mary hudak
Subject: Fw: SCDNR request to FEMA to be a "community"

Mike,

Per my previous e-mails to FEMA regarding the SCDNR request to be designated a "community" by FEMA, I am enclosing for your consideration, a memorandum from Columbia Venture's legal counsel. As you will note, the legal counsel's view is that SCDNR does not meet FEMA's standards to a "community". After your review of the attached legal opinion, we would like to discuss this matter with you.

thanks,

[redacted]

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D53.061 DOC

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MEMORANDUM

TO: [redacted]
President and Chief Executive Officer
Burroughs & Chapin Company, Inc.

FROM: [redacted]

DATE: December 11, 2000

RE: SCDNR Status as a "Community"

You have indicated it is your understanding that the South Carolina Department of Natural Resources (SCDNR) seeks to be recognized by the Federal Emergency Management Agency (FEMA) as a "community" as it relates to property the SCDNR owns in Lexington County. Although there may be several reasons why the SCDNR seeks this recognition, for purposes of this memorandum, it is assumed that the primary reason is found in the following FEMA regulation:

> When a community proposes to permit encroachments . . . upon an adopted regulatory floodway which will cause base flood elevation increases in excess of those permitted under paragraphs (c)(10) [more than one foot over the base flood elevation] or (d)(3) [not result in any increase in flood levels within the community during the occurrence of the base flood discharge] of § 60.3 of this subchapter, the community shall apply to the Administrator for conditional approval of such action prior to permitting the encroachments to occur . . .

44 C.F.R. § 65.12(a). Submitted with the encroachment application is the "[c]oncurrence of the Chief Executive Officer of any other communities impacted by the proposed actions." Id. at § 65.12(a)(4). Thus, recognition as a

community confers upon the entity a form of veto authority over certain proposed encroachments in a floodway.

For purposes of the federal flood insurance program, Congress defines "community" as "a State or a political subdivision thereof which has zoning and building code jurisdiction over a particular area having special flood hazards." 42 USC § 4003 (a)(1). In South Carolina, the powers to zone and to adopt and enforce building codes are vested with counties and municipalities. See S.C. Code Ann. §§ 6-9-5 to –130 (Supp. 1999)(building codes); §§ 6-29-310 to –1200 (Supp. 1999)(zoning). State agencies, such as the SCDNR, are required to comply with local zoning ordinances. S.C. Code Ann. § 6-29-770(A)(Supp. 1999)("Agencies, departments, and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances"). No provision of law, either statutory or case law, was found which conferred upon the SCDNR zoning and building code jurisdiction.[1] For these reasons, the SCDNR does not possess zoning and building code jurisdiction as it relates to the historical site it owns on the Lexington County side of the Congaree River and, in the absence of this jurisdiction, is not a "community" for purposes of the definition found in the United States Code.

A different definition of "community" is found in FEMA's regulations: "*Community* means any State or area or political subdivision thereof, or any Indian tribe or authorized tribal organization, or Alaska Native village or authorized native organization, which has authority to adopt and enforce flood plain management regulations for the areas within its jurisdiction." 44 C.F.R. § 59.1. The South Carolina General Assembly has conferred upon the SCDNR the power "[t]o coordinate the development of a statewide flood plain lands area inventory and to formulate guidelines for the conservation, protection and use of flood plain lands, excluding tidelands and marshlands." S.C. Code Ann. § 48-9-290(10) (Supp. 1999). On its website, the SCDNR describes its role in floodplain

[1] In exercising it powers and duties pursuant to the South Carolina Water Resources Planning and Coordination Act, the SCDNR is required to "take into consideration the need for [f]lood damage control or prevention measures including zoning to protect people, property, and productive lands from flood losses." S.C. Code Ann. § 49-3-50 (Supp. 1999). A directive to take into consideration a particular matter, such as the need for zoning, falls far short of a grant of power. In addition, the powers and duties of the SCDNR relating to the state's Heritage Trust Program contains no provision conferring upon SCDNR zoning and building code powers. S.C. Code Ann. §§ 51-17-10 to –150 (1976 and Supp. 1999).

management as serving as the State NFIP Coordinating Office and cooperating with FEMA to provide assistance to communities participating in the NFIP. See /www.dnr.state.sc.us/water/envaff/flood/floodregs.html. Based on the power conferred upon the SCDNR and the manner in which the SCDNR describes its role in flood plain management, the SCDNR does not meet the requirements of the definition of community as contained in the FEMA regulations.

In addition to not meeting the requirements for recognition as a community based on the definitions, there is an important public policy at stake. If the SCDNR is a "community" because of its ownership of property (in this case, the historical site), then the SCDNR is a "community" in a significant number of locations in South Carolina. The SCDNR owns property throughout the state and that property is used for a variety of purposes including, but not limited to, boat landings, office facilities, and wildlife and marine research facilities. Recognition as a community for the SCDNR would give it unparalleled power to control growth and the use of land. Such authority in South Carolina should not occur as a result of a tortured interpretation of the FEMA statutory and regulatory definitions, but rather, should be a product of legislation enacted by the South Carolina General Assembly.

In conclusion, the SCDNR is not a "community" for purposes of the FEMA statutes and regulations. The General Assembly of South Carolina has not conferred upon the SCDNR the powers necessary to meet the requirements of Congress or FEMA as it relates to "community." Moreover, important public policy considerations support such a conclusion.

JME:wdb

cc: [redacted]