APPENDIX

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APPENDIX A

SUPREME COURT OF FLORIDA

SC2025-0833

Lower Tribunal No(s).:
3D2021-1987; 442007CA000099A001MR

CITY OF MARATHON,

Petitioner(s)

v.

RODNEY SHANDS, *et al.*,

Respondent(s)

Friday, December 5, 2025

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

The motion for attorney's fees is granted and it is ordered that Respondents shall recover from Petitioner the amount of $2,500.00 for the services of Respondents' attorneys in this Court.

MUÑIZ, C.J., and CANADY, LABARGA, COURIEL, and GROSSHANS, JJ., concur.

A True Copy

Test:

/s/ John A. Tomasino
John A. Tomasino
Clerk, Supreme Court
SC2025-0833 12/5/2025

LC

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RICHARD BRADLEE ROSENGARTEN
E. TYSON SMITH, JR.
JEREMY TALCOTT
ROBERT H. THOMAS
KATHRYN DALY VALOIS

APPENDIX B

THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 3D21-1987

Lower Tribunal No. 07-99-M

RODNEY SHANDS, *et al.*,

Appellants,

vs.

CITY OF MARATHON,

Appellee.

Opinion filed May 14, 2025.

Not final until disposition of timely filed motion for rehearing.

An Appeal from the Circuit Court for Monroe County, Mark H. Jones, Judge.

Pacific Legal Foundation, Jeremy Talcott (Sacramento, CA), Robert H. Thomas (Sacramento, CA), Mark Miller, and Kathryn D. Valois (Palm Beach Gardens), for appellants.

Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, PA, and Hudson C. Gill (Fort Lauderdale), for appellee.

Derek V. Howard and Peter H. Morris, Assistant County Attorneys, for Monroe County, Florida, as

amicus curiae, and Weiss Serota Helfman Cole & Bierman, P.L. and John J. Quick, for Village of Islamorada, as amicus curiae.

Before LOGUE, C.J., and EMAS, FERNANDEZ, SCALES, LINDSEY, MILLER, GORDO, LOBREE, BOKOR, and GOODEN, JJ.

PER CURIAM.

UPON CITY OF MARATHON'S MOTION FOR CERTIFICATION

Denied.

FERNANDEZ, LINDSEY, MILLER, GORDO, LOBREE, BOKOR, and GOODEN, JJ., concur.

LOGUE, C.J., dissenting from denial of certification.

I would find this case has great public importance even if it applied only in the Florida Keys and only to recreational property. But this case has significance far beyond that. The en banc majority opinion shifts takings analysis away from its traditional focus, which has always been the impact of a regulation on a property's value. To accomplish this shift away from value, the en banc majority substantially re-interprets two seminal U.S. Supreme Court decisions along lines never before adopted by a court.

I would certify the following question as one of great public importance:

> When deciding if a regulation that limits a property to recreational uses constitutes a "categorical" taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), what consideration, if any, should be afforded to (1) the value of the property's transferable development rights, and (2) the

> value of the property marketed for recreational uses, where the record establishes an active, private market for both, either of which meets the owner's investment-backed expectations?

The en banc majority opinion essentially answers this question: "no consideration whatsoever."

To get to "no consideration whatsoever," the en banc majority interprets *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), as holding that a property's transferable development rights *cannot* be included as part of the property's value in analyzing whether a taking occurred. Every other court across the United States that has considered this issue has reached the opposite result. *See*, *e.g.*, *Shands v. City of Marathon*, 50 Fla. L. Weekly D293, at *19 n.19 (Fla. 3d DCA Feb. 5, 2025) (Logue, C.J., dissenting). Further, many counties and cities across Florida incorporated transferable development rights into their land-use laws for this very reason. *See id.* at *19 nn.20-21. This 180-degree change in the understanding of *Penn Central*, even if correct, is of great public importance.

Next, the en banc majority re-interprets *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), as holding that the market value generated by recreational uses can never be considered in a takings analysis because the *Lucas* analysis does not focus on value. No other court has adopted this view where the record reflected an active private market for recreational uses. This second shift away from value, even if correct, is of great public importance.

The upshot of the en banc majority opinion is to allow judges at every level to more speedily and easily declare a regulation to be a "categorical taking" under

Lucas. It provides a way for judges to bypass the deliberative, more fact-intensive value analysis of *Penn Central*. In this way, it opens the door for judges to become policymakers or at least override the policy of the executive and legislative branches. Courts should refrain from doing so and instead employ the most restrained, careful, and painstaking approach before declaring a law unconstitutional or an unconstitutional taking. For this additional reason, I believe this case has great public importance.

SCALES, J., dissenting from denial of certification.

I respectfully dissent from the majority's declining to certify to our Florida Supreme Court a question that I believe is one of great public importance passed upon by this Court's groundbreaking, February 5, 2025 *en banc* opinion.

I would certify the following question to the Florida Supreme Court:

> Is the value attributable to a property's transferable development rights relevant to the determination of whether a government's regulatory scheme has deprived a property owner of all economic use of the property for the purposes of a categorical, as-applied regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)?[1]

While I think the *en banc* majority opinion is correctly decided, in my view the question is most assuredly one of great public importance to our State. As recognized in our *en banc* opinion, the land development regulations of Florida local governments generally, and the Florida Keys in particular, rely heavily on transferable development rights (TDRs) as a means to effect land conservation. Hence, it is my belief that whether the value attributable to TDRs can preclude what might otherwise constitute a regulatory taking is a question of great public importance. EMAS, J., concurs.

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[1] My phrasing of the question differs somewhat from that suggested by the City of Marathon: "Whether the value of a property attributable to the sale of transferable development rights on the private market is relevant to determining whether a taking has occurred?"

APPENDIX C

THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 3D21-1987

Lower Tribunal No. 07-99-M

RODNEY SHANDS, *et al.*,

Appellants,

vs.

CITY OF MARATHON,

Appellee.

Opinion filed February 5, 2025.

Not final until disposition of timely filed motion for rehearing.

An Appeal from the Circuit Court for Monroe County, Mark H. Jones, Judge.

Pacific Legal Foundation, Jeremy Talcott (Sacramento, CA), Robert H. Thomas (Sacramento, CA), Mark Miller, and Kathryn D. Valois (Palm Beach Gardens), for appellants.

Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, PA, and Hudson C. Gill (Fort Lauderdale), for appellee.

Derek V. Howard and Peter H. Morris, Assistant County Attorneys, for Monroe County, Florida, as amicus curiae, and Weiss Serota Helfman Cole &

Bierman, P.L. and John J. Quick, for Village of Islamorada, as amicus curiae.

Before LOGUE, C.J., and EMAS, FERNANDEZ, SCALES, LINDSEY, MILLER, GORDO, LOBREE, BOKOR, and GOODEN, JJ.

MILLER, J.

UPON CITY OF MARATHON'S
MOTION FOR REHEARING,
REHEARING EN BANC, AND CERTIFICATION

We grant rehearing en banc, withdraw the panel opinion in *Shands v. City of Marathon*, 48 Fla. L. Weekly D907 (Fla. 3d DCA 2023), and substitute the following opinion in its stead.

This inverse condemnation appeal presents a novel issue regarding the role that transferred development rights ("TDRs") occupy in adjudicating a categorical, as-applied regulatory takings claim advanced under the landmark case of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Appellants, the children of the late Dr. R.E. Shands, are the owners of Shands Key, a 7.9-acre offshore island in the Florida Keys. Dr. Shands acquired the property in 1956, and at that time, the property was zoned for residential use with an authorized density of one dwelling per acre. Upon the death of Dr. Shands, title to the island passed to his wife. She, in turn, conveyed the property to appellants. In 1986, Monroe County changed Shands Key's zoning status from "General Use" to "Conservation Offshore Island." Thirteen years later, appellee, the City of Marathon, incorporated and adopted Monroe County's regulations. An application to construct a dock for increased island access was denied, and the zoning authority effectively foreclosed any use of the island, other than for beekeeping or personal camping.

After unsuccessfully pursuing administrative relief, appellants filed suit, alleging a regulatory taking under *Lucas*. Protracted litigation and multiple appeals ensued. Appellants then sought partial summary judgment on the basis that the regulation, as applied, deprived them of all economically beneficial use of their property. The City countered the motion with affidavits alleging that TDRs awarded under its Rate of Growth Ordinance ("ROGO") and Building Permit Allocation System ("BPAS")[1] infused the property with some value. These, it argued, considered in tandem with the residual land value derived from a potential future sale, precluded a *Lucas* claim. After considering the language in two prior decisions rendered by this court, the trial judge concluded that he was constrained to adjudicate the case under the ad hoc, multi-factor test developed in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), and further found that disputed issues of fact precluded summary judgment. The primary issue in this appeal is the propriety of that ruling.

I

In 1956, Dr. R.E. Shands purchased an offshore island in the Florida Keys from the federal government at public auction. The island, now known as Shands Key, spanned 7.9 acres and was subject to the

[1] The City's "Numerical Allocation Limits" set a total annual allocation of thirty residential building permits. Marathon, Fla., Code § 107.02. Permit applications are allocated "points," which applicants may earn through cash donations and land dedications. *Id.* § 107.01(B)(1), (F). Some factors, such as high-quality hammock, preclude points. The points function to advance or hinder a pending application. Once the City fulfills the annual allocation, applicants must wait, perhaps indefinitely, for a permit. *See id.* §§ 107.07(G), 107.08.

jurisdiction of Monroe County, which zoned it "General Use" ("GU"). This designation allowed for the construction of one home per acre on the property.

Dr. Shands received and recorded a federal land patent, which granted fee simple title to the island to him and his heirs "forever." He then purchased seven acres of the surrounding bay bottom from the State of Florida to construct a bridge connecting the island to the mainland.

Dr. Shands never realized his plans, as he died in October 1963. Title to Shands Key and the surrounding bay bottom passed to his wife, who conveyed the property in fee simple to her four adult children twenty-one years later.

In 1979, the Florida Legislature designated the Florida Keys archipelago as an "area of critical state concern" in response to a rise in development. *See* § 380.0552(1), Fla. Stat. (1979). This designation subjected any enactments, amendments, or rescissions of land development regulations or elements of a local comprehensive plan in the Florida Keys to approval by the state land planning agency. *See generally* § 380.05, Fla. Stat. (1979); *see also* § 380.0552(9), Fla. Stat. (1989).

In 1986, Monroe County adopted the Monroe County Comprehensive Plan (the "Plan"), a regulatory land use management system that restricted development in unincorporated areas of the county. *See* Ch. 163, Fla. Stat. (1986). Consistent with the Plan, the County downzoned Shands Key from GU to "Conservation Offshore Island" and placed it in the future land use category of "conservation" for the stated purpose of preserving natural resources and disincentivizing development.

In 1992, Monroe County adopted its ROGO, a competitive permit allocation system for residential development designed to guide development away from environmentally sensitive areas. It was purposed to ensure resident safety during hurricane evacuation and preserve natural resources.

Seven years later, the City of Marathon incorporated and adopted Monroe County's previous enactments. As a result, Shands Key remained zoned as Conservation Offshore Island and designated in the conservation future land use category in order "to establish areas that are not connected to U.S. 1 as protected areas."

In 2004, appellants applied for a permit to construct a dock on Shands Key. The City denied the application, informing appellants that their property consisted of "high quality hammock with a mangrove fringe," which was a "suitable habitat for the state listed threatened White Crowned Pigeon." However, the City expressed an interest in acquiring six acres of upland and proposed appellants publicly dedicate their land in exchange for an award of TDRs under the ROGO or BPAS allocation systems.

Appellants declined and, instead, filed a Beneficial Use Determination ("BUD") application. The City's special master concluded that downzoning Shands Key from GU to Conservation Offshore Island "prohibit[ed] any development of [appellants'] property under any circumstances" and left appellants with no reasonable economic use for the island. He recommended the City either issue a building permit for a single-family residence or purchase the property from appellants. The Marathon City Council voted 3-2 to reject the special master's recommendations, and appellants filed suit in the Sixteenth Judicial Circuit in and for Monroe County.

So began nearly two decades of litigation, including two appeals. In the parties' first appeal, this court reversed the trial court's order dismissing the case on statute of limitations grounds. *See Shands v. City of Marathon* (*Shands I*), 999 So. 2d 718, 720 (Fla. 3d DCA 2008). There, the court determined appellants' challenge was "as applied," rather than "categorical" or "facial,"[2] and therefore not barred by the statute of limitations. *Id.* at 725–26. In support of this characterization, the court reviewed the relevant ordinance and noted that it provided for "low intensity residential uses . . . that [could] be served by cisterns, generators and other self-contained facilities," and "[d]etached residential dwellings." *Id.* at 724 (citations omitted). It further observed that TDRs, including ROGO allocation points, were available. *See id.*[3]

On remand, the City successfully moved for summary judgment on the complaint, contending that the availability of TDRs rendered the facts indistinguishable from *Beyer v. City of Marathon (Beyer II)*, 197 So. 3d 563 (Fla. 3d DCA 2013). This court again reversed on appeal, finding the City failed to establish the value of the TDRs associated with the property. *See*

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[2] *See id.* at 722 n.8 ("The word 'facial' is a term of art more properly applied when evaluating the constitutional validity of a statute, regulation or ordinance, as in whether the ordinance is constitutional 'on its face.' This is a separate analysis from whether the regulation has, by its enactment, effected a 'taking.' [The *Shands I* court] use[d] the term 'facial,' however, following the usage made by the parties, but point[ed] out that in this context the term refers to a categorical, per se, taking, as used in *Lucas* . . . .").

[3] The affidavit-based submissions outline the availability of allocated points.

Shands v. City of Marathon (*Shands II*), 261 So. 3d 750, 753 (Fla. 3d DCA 2019).

Following the second remand, appellants moved for partial summary judgment on the basis that they had established a viable categorical, as-applied challenge under *Lucas*. In support of their motion, appellants submitted sworn testimony establishing that the downzoning from GU to Conservation Offshore Island limited the use of the property to beekeeping and personal camping. This limitation, they argued, rendered the property "economically idle" under *Lucas*. *See* 505 U.S. at 1019.

Invoking *Shands I* and *II* and other precedent, the City opposed summary judgment on the ground that the potential award of TDRs infused the property with value, thereby precluding a categorical, as-applied taking under *Lucas*. The City also offered an expert affidavit for the proposition that the property could be sold to a willing buyer for recreational value.

The trial court denied the motion. The case subsequently proceeded to a two-day non-jury trial, at the conclusion of which the court found the case indistinguishable from the *Beyer* cases—a duology of inverse condemnation appeals from this court involving Bamboo Key, a nine-acre offshore island in unincorporated Monroe County. *See generally Beyer v. City of Marathon (Beyer I)*, 37 So. 3d 932 (Fla. 3d DCA 2010); *Beyer II*, 197 So. 3d 563. In *Beyer I*, this court rejected a categorical *Lucas* takings claim premised on downzoning, stating that "[t]he [p]roperty . . . has additional beneficial economic value because it has transferable development rights." 37 So. 3d at 934 (emphasis removed). By way of a lengthy and well-reasoned order, the trial court then determined appellants failed to establish a taking under the

ad hoc, multi-factored analysis set forth in *Penn Central*. This appeal followed.[4]

II

Our review is de novo, as it entails the denial of partial summary judgment and resultant claim preclusion. *See Shands II*, 261 So. 3d at 752. This casewas decided under Florida's "old" summary judgment standard. As we explained in *Feldman v. Schocket*, 366 So. 3d 1104 (Fla. 3d DCA 2022),

> Pursuant to the old standard, summary judgment was proper "if there [was] no genuine issue of material fact and if the moving party [was] entitled to a judgment as a matter of law." In accordance with this test, "the existence of *any* competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stop[ped] the inquiry and preclude[d] summary judgment, so long as the 'slightest doubt' [was] raised."

Id. at 1107 (alterations and emphasis in original) (first quoting *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000), and then quoting Bruce J. Berman & Peter D. Webster, *Berman's Florida Civil Procedure* § 1.510:5 (2020 ed.)).

III

The Takings Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, commands, "[N]or shall private property be taken for public use, without just compensation."

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[4] As this is an appeal from a final judgment, "the antecedent denial of summary judgment is reviewable." *Tiger Point Golf & Country Club v. Hipple*, 977 So. 2d 608, 610 (Fla. 1st DCA 2007).

Amend. V, U.S. Const.[5] Similarly, the Florida Constitution provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid . . . ." Art. X, § 6(a), Fla. Const.[6] As the Supreme Court has explained, "[t]he aim of the Clause is to prevent the 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.'" *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *see also Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."). Importantly, the Clause "does not proscribe the taking of property; it

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[5] The Takings Clauses of the Fifth Amendment and the Florida Constitution are interpreted coextensively. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1222 (Fla. 2011), *rev'd on other grounds*, 570 U.S. 595 (2013).

[6] Florida statutory law further expands protection for private property rights under the "Bert J. Harris, Jr. Private Property Rights Protection Act." *See* § 70.001(1), Fla. Stat. (2024) ("[A]s a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property."); *see also City of Jacksonville v. Smith*, 159 So. 3d 888, 892 (Fla. 1st DCA 2015) ("The Act 'filled a void in then-existing Florida law because, prior to its enactment, there was no means by which an owner could receive compensation for the adverse financial effects of governmental regulation of his land without satisfying the constitutional standards for a taking, namely, physical invasion or the loss of all economically viable use.'") (quoting David L. Powell et al., *A Measured Step to Protect Priv. Prop. Rts.*, 23 Fla. St. U. L. Rev. 255, 265 n.52 (1995)).

proscribes taking without just compensation." *Fla. Dep't of Transp. v. Mallards Cove, LLP*, 159 So. 3d 927, 932 (Fla. 2d DCA 2015) (quoting *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985)); *see also Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021) ("[P]roperty must be secured, or liberty cannot exist.") (quoting *Discourses on Davila*, in 6 Works of John Adams 280 (C. Adams ed. 1851)).

As observed by Judge Shepherd in his dissent in *Ganson v. City of Marathon*, 222 So. 3d 17, 20 (Fla. 3d DCA 2016), "[t]he Takings Clause is clear and concise," but "[r]egrettably, regulatory takings jurisprudence is cryptic and convoluted." The Fifth Amendment was historically understood to apply only to "direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Over a century ago, however, the Supreme Court inaugurated the concept of regulatory takings in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Mahon*, the Court recognized that the Takings Clause extended to overly burdensome regulations of property. Writing for an 8-1 Court, Justice Oliver Wendell Holmes observed that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

A

Identifying those regulations that go "too far" remains a thorny issue, but guiding principles emerge from two seminal Supreme Court decisions. *See Lingle*, 548 U.S. at 538 ("The rub, of course, has been—and remains—how to discern how far is 'too far.'"). In the first decision, *Penn Central*, the Court developed a framework for assessing partial, rather than categori-

cal, regulatory takings claims. *See generally* 438 U.S. at 123–24. The Court articulated a fact-specific, ad hoc inquiry, consisting of the following three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *See id.* at 124; *see also Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 871 n.12 (Fla. 2001) ("Those regulations which fall short of effecting a categorical taking are appropriately analyzed under the ad-hoc factual inquiry outlined in *[Penn Central].")*.

In the second decision, *Lucas*, the Court developed a rule applicable to "total" or "categorical" regulatory takings, defined as the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses." 505 U.S. at 1018; *see also Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n*, 141 S. Ct. 731, 731 (2021) (Thomas, J., dissenting from denial of certiorari) ("[I]n more than 1,700 cases over a 25-year period, there were only 27 successful takings claims under *Lucas—a* success rate of just 1.6%.") (citing Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1849–50 (2017)). In *Lucas*, the property owner, David Lucas, acquired two residential lots on the Isle of Palms in Charleston County, South Carolina, to build single-family homes. 505 U.S. at 1007–08. Both lots were zoned for residential construction, and neither was subject to any use restriction. *See id.* at 1008. The South Carolina Legislature subsequently enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on the two lots. *Id.* at 1007. However, he was permitted to maintain a wooden walkway and dock. *Id.* at 1009 n.2.

Lucas filed suit, alleging a categorical, as-applied taking. *See id.* at 1009. The trial court found that the Act, as applied, permanently banned construction on the property, and that this prohibition constituted a deprivation of any reasonable economic use of the lots, rendering them valueless. *Id.* Thus, the court ordered payment of just compensation. *Id.*

The Supreme Court of South Carolina reversed the judgment, finding that since Lucas did not challenge the facial validity of the Act pursuant to the government's use of police power, no compensation was due because the finding that new construction in the coastal zone threatened the public resource was unreviewable. *Id.* at 1010. In other words, the court ruled that "when a regulation respecting the use of property is designed to prevent serious public harm," no compensation is due, regardless of the effect on property value. *Id.* (quotations and citations omitted).

The United States Supreme Court granted certiorari. Writing for the majority, Justice Scalia recounted the history of regulatory takings law and noted that the Court has traditionally recognized "two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Id.* at 1014–15. The first involves physical invasions of property and the second is where "regulation denies all economically beneficial or productive use of land." *Id.* As to the latter, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019 (emphasis in original).

The *Lucas* Court repeatedly emphasized that the key to establishing a categorical, as-applied regulatory

taking is a "total deprivation of beneficial use." *Id.* at 1017. Stated differently, "the Fifth Amendment is violated when land-use regulation . . . '*denies an owner economically viable use of his land*'" without just compensation. *Id.* at 1016 (quoting *Agins*, 447 U.S. at 260) (emphasis in original).

Justice Blackmun dissented. He contended that the property retained residual value because Lucas had the right to exclude others, . . . picnic, swim, camp in a tent, . . . live on the property in a movable trailer," and "alienate the land." *Id.* at 1044 (Blackmun, J., dissenting). He therefore opined that characterizing the property as "valueless" was a misnomer. *See id.* Justice Stevens agreed, stating, "Lucas may put his land to 'other uses'— fishing or camping, for example— or may sell his land to his neighbors as a buffer. In either event, his land is far from 'valueless.'" *Id.* at 1065 n.3 (Stevens, J., dissenting).

B

In the aftermath of *Penn Central*, *Lucas*, and their progeny, TDRs have emerged as a popular and effective tool for local governments to promote conservation efforts and urban growth management. Such rights typically benefit the landowner by authorizing expanded "development beyond the restricted level on [another] piece of land." Ralph A. DeMeo, *Transfer Development Rights*, in II Florida Environmental and Land Use Law, ch. 23 (1996).

The significance of TDRs in the regulatory takings matrix has been sharply debated. Some legal commentators have opined that TDRs are irrelevant to the takings side of the equation because they do not impact the nature and extent of the property interest

taken by the government.[7] Others have posited that TDRs necessarily mitigate the economic impact of

[7] *See* Richard D. Himberger, *Transferable Development Rights*, 43 Advocate 8, 12 (2000) ("If government enacts a zoning ordinance requiring a landowner to leave his real estate as open space, that regulation will emasculate all viable economic use in his land. Under the *Lucas* Total Deprivation Rule, such a regulation would constitute a taking of private property requiring payment of just compensation. This conclusion is not altered when a TDR program is added to the mix. The fact that the owner receives part of his just compensation in the form of TDR sales proceeds does not change the fact the taking has occurred.") (footnote omitted); *see also* William Hadley Littlewood, *Transferable Dev. Rts., TRPA, and Takings, the Role of TDRs in the Const. Takings Analysis*, 30 McGeorge L. Rev. 201, 232 (1998) ("Applying TDRs to the takings side of the Fifth Amendment's protections will prove both unworkable and inequitable."); Samantha Peikoff Adler, *Penn Cent. 2.0: The Takings Implications of Printing Air Rts.*, 2015 Colum. Bus. L. Rev. 1120, 1181 (2015) ("While TDRs have become an important investment option and land use currency, it is questionable whether they will ever be perceived the same as property rights in land."); James E. Holloway & Donald C. Guy, *The Utility and Validity of TDRs Under the Takings Clause and the Role of TDRs in the Takings Equation Under Legal Theory*, 11 Penn St. Env't. L. Rev. 45, 48–49 (2002) ("Regulatory scheme providing TDRs and other benefits to reduce the constitutional liability or offset the financial impact of land use, natural resources, and environmental regulations raise a constitutional question regarding the utility and validity of TDRs under regulatory takings law and a jurisprudential question regarding the position and role of TDRs in the takings equation.") (footnotes omitted); R.S. Radford, *Takings and Transferable Dev. Rts. in the Sup. Ct.: The Const. Status of TDRs in the Aftermath of Suitum*, 28 Stetson L. Rev. 685, 687 (1999) ("[T]he TDR concept is diffuse and flexible and—as was unfortunately demonstrated by the facts of *Suitum—capable* of serious abuse.") (footnote omitted); David A. Dana, *Nat. Pres. and the Race to Dev.*, 143 U. Pa. L. Rev. 655, 669 (1995) ("The most troubling aspect of a regime of uncompensated natural preservation regulation may be that it encourages investors to accelerate development."); Michael M. Berger, *Vindicating the Rts. of Priv. Land Dev. in the Cts.*, 32 Urb.

regulation by infusing the property with value and therefore should be relevant in determining whether the government has effectuated a taking.[8]

The Supreme Court has yet to clarify this conundrum.[9] The issue was tangentially implicated in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). There, writing for the majority, Justice Souter observed,

> While the pleadings raise issues about the significance of the [TDRs] both to the claim

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Law 941, 965 (2000) ("Contrary to some extreme lower court assertions, the right to build on one's property is *not* a governmentally conferred benefit.") (emphasis in original).

[8] *See* Arden H. Rathkopf et al., *Relation to Constitutional Taking Claims—As Factor on Merits of Claim*, in 3 Rathkopf's The Law of Zoning and Planning § 59:17 (4th ed. 2023) ("[E]conomic value of available TDRs are to be considered in determining whether an owner is provided with a reasonable return on his investment and might possibly result in rejection of such a claim even where economically viable developmental uses of the particular restricted site are prohibited."); Jennifer Scro, *Navigating the Takings Maze: The Use of Transfers of Dev. Rts. in Defending Reguls. Against Takings Challenges*, 19 Ocean & Coastal L.J. 219, 238 (2014) ("[T]o maintain TDRs' continuing viability, courts should consider TDRs as a mitigating property right both in the takings analysis itself and for potential post-verdict compensation."); Paul Merwin, *Caught Between Scalia and the Deep Blue Lake: The Takings Clause and Transferable Dev. Rts. Programs*, 83 Minn. L. Rev. 815, 847–48 (1999) ("TDR programs avoid the categorical takings rule of *Lucas* by providing landowners with an economic use of property. TDR programs meet the goals of the Takings Clause[] and avoid many of the evils that takings law seeks to prevent.") (footnote omitted).

[9] Holloway & Guy, *supra* note 7, at 84–85 ("This question is a constitutional concern that demands further consideration under jurisprudential concepts defining economic, political, and legal relationships of property and liability rules.")

> that a taking has occurred and to the constitutional requirement of just compensation, we have no occasion to decide, and we do not decide, whether or not these [TDRs] may be considered in deciding the issue whether there has been a taking in this case, as opposed to the issue whether just compensation has been afforded for such a taking. The sole question here is whether the claim is ripe for adjudication . . . .

Id. at 728.

In a noteworthy concurrence, Justice Scalia, joined by Justices O'Connor and Thomas, squarely addressed the issue. Concluding "the relevance of TDRs is limited to the compensation side of the takings analysis, and that taking them into account in determining whether a taking has occurred [would] render much of [the Court's] regulatory takings jurisprudence a nullity," *id.* at 750 (Scalia, J., concurring in part and concurring in judgment), Justice Scalia reasoned that

> TDRs, of course, have nothing to do with the use or development of the land to which they are (by regulatory decree) "attached." The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop *his* land. The latter is valuable, to be sure, but it is a *new* right conferred upon the landowner in exchange for the taking, rather than a *reduction* of the taking. In essence, the TDR permits the landowner whose right to use and develop his property has been restricted or extinguished to extract money from others. Just as a cash payment from the government would not relate to whether the

> regulation "goes too far" (i.e., restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking; and just as a chit or coupon from the government, redeemable by and hence marketable to third parties, would relate not to the question of taking but to the question of compensation; so also the marketable TDR, a peculiar type of chit which enables a third party not to get cash from the government but to use his land in ways the government would otherwise not permit, relates not to taking but to compensation.

Id. at 747 (emphasis in original).

More recently, in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), Chief Justice Roberts, writing for the majority, invoked Justice Scalia's *Suitum* concurrence for the proposition that "once there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation." *Id.* at 364. This is consistent with Justice Thomas's recent reiteration of the *Lucas* principle that "[a] regulation effects a taking . . . categorically whenever [it] . . . leaves *land* 'without economically beneficial or productive options for its *use*.'" *Bridge Aina Le'a, LLC*, 141 S. Ct. at 731 (Thomas, J., dissenting from denial of certiorari) (quoting *Lucas*, 505 U.S. at 1018) (emphasis added); *see also Lingle*, 544 U.S. at 539 (reaffirming that under *Lucas*, "the complete elimination of a property's value is the determinative factor"); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 330 (2002) ("Under that rule, a statute that 'wholly eliminated the value' of Lucas' fee simple

title clearly qualified as a taking. But our holding was limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'") (quoting *Lucas*, 505 U.S. at 1017) (emphasis in original).

C

Against this jurisprudential landscape, we examine the summary judgment record in the instant case. Appellants established that regulation deprived them of any use of the property beyond beekeeping or personal camping. Casting aside the inherent logistical challenges in accessing an island without a dock fringed with high quality hammock and mangroves, these activities are not economically productive. It is axiomatic that "a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." *See Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

The City advances the somewhat circular argument that a future sale of the island for beekeeping and personal camping is an economic use that precludes a *Lucas* taking. The United States Court of Appeals for the Federal Circuit recently considered and rejected a similar argument. In *Lost Tree Village Corporation v. United States*, 787 F.3d 1111 (Fed. Cir. 2015), *cert. denied*, 582 U.S. 952 (2017), the Court of Federal Claims held that the government's denial of a landowner's application for a permit to fill wetlands on an approximately five-acre tract constituted a categorical regulatory taking. *Id.* at 1114. On appeal, the government argued "that a landowner's ability to sell an affected parcel is an economic use that precludes *Lucas's* per se treatment." *Id.* at 1117. The appellate court first noted the infirmities inherent in tying economic use to a future sale, stating that "[s]peculative

land uses are not considered as part of a takings inquiry." *Id.* (citing *Olson v. United States*, 292 U.S. 246, 257 (1934)). It then flatly rejected the proposition that "all sales qualify as economic uses." *Id.* The court explained that, instead, the relevant inquiry is whether the landowner retains an underlying economic use, and "[w]hen there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land." *Id.* (emphasis in original). This is because "[t]ypical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel." *Id.* (citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984) (logging); *United States v. 50 Acres of Land*, 469 U.S. 24 (1984) (landfilling); and *United States v. Fuller*, 409 U.S. 488 (1973) (livestock grazing)).

This rationale is consistent with other cases. *See Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 628 (9th Cir. 2020) ("[T]he relevant inquiry for us is whether the land's residual value reflected a token interest or was attributable to noneconomic use."); *see also Nekrilov v. City of Jersey City*, 45 F.4th 662, 671 n.3 (3d Cir. 2022) ("The plaintiffs are correct that the ability to sell a property does not always constitute an economically beneficial use."); 83 Am. Jur. 2d Zoning and Planning § 743 ("The fact that a piece of property has a potential for sale . . . does not, in and of itself, detract from a . . . clear showing that a parcel is not susceptible to a beneficial use.") (citing *Marchi v. Town of Scarborough*, 511 A.2d 1071, 1073 (Me. 1986)); *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 486–88 (2009) ("Both in its holding and its reasoning, *Lucas* . . . focuses on whether a regulation permits *economically viable* use of the property, not whether the property retains some value on paper. . . . To be sure, the complete elimination of a property's value may be

sufficient to establish a categorical taking under many circumstances, given the obvious correlation between uses and their market values; a parcel of real property without value would usually have no lawful economically viable use. Yet the lack of value is not *necessary* to effect a taking, as a parcel will typical[ly] retain some quantum of value even without economically viable use. Such a scintilla of value is insufficient to defeat an otherwise-viable takings claim.") (emphasis added) (citations and footnotes omitted); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996) ("[T]he mere fact that there is one willing buyer of the subject property, especially where that buyer is the government, does not, as a matter of law, defeat a taking claim."); *State ex rel. AWMS Water Sols., L.L.C. v. Mertz*, 165 N.E.3d 1167, 1181 (Ohio 2020) (finding that potential subletting of property to third-party "does not rise to the level of an economically beneficial use under *Lucas"); Banker's Choice, LLC v. Zoning Bd. of Appeals of Cincinnati*, 170 N.E.3d 923, 929–30 (Ohio Ct. App. 1st Dist. 2021) ("A regulation denies an owner all economically viable use of the owner's land if it restricts the use of the land so as to render it valueless, the permitted uses are not economically feasible, or the regulation permits only uses which are highly improbable or practically impossible under the circumstances. . . . However, an owner's ability to sell an affected property does not constitute an economically beneficial use . . . .") (quotations and citations omitted).

We must therefore consider the alternative contention that there was no *Lucas* taking because, by granting TDRs through ROGO and BPAS points, the City "creat[ed] and convey[ed] a separate [property] interest that has value on the market." Adam Riff, *The Eminent Domain Path Out of a Pub. Pension Crisis*, 37 Cardozo

L. Rev. 307, 339 n.172 (2015). As Justice Scalia observed in his *Suitum* concurrence, any income associated with TDRs does not flow from cultivating or developing the property in the traditional framework of ownership. *See* 520 U.S. at 747 (Scalia, J., concurring in part and concurring in judgment). Instead, the potential revenue is generated from the preservation and non-use of the property. *See id.*

Consistent with this logic, while "[p]utting TDRs on the taking rather than the just compensation side of the equation" when a landowner has been deprived of all economic use of the property "is a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our Takings Clause jurisprudence," doing so effectively creates a Fifth Amendment loophole. *Id.* at 747–48. This approach allows the government to effectively appropriate private property for a public purpose and provide some compensation, without the constitutional stricture of just compensation, rendering the holding in *Lucas* nugatory. As William Handle Littlewood explained in *Transferable Development Rights, TRPA, and Takings, the Role of TDRs in the Constitutional Takings Analysis*,

> Although many . . . would not be concerned with this outcome, they fail to recognize the underlying rationale of the *Lucas* decision. The underpinning of *Lucas* is that regulatory schemes seeking to keep land in its natural state place such a burden on the landowner that even the most compelling state interest will not suffice absent just compensation. Inverse condemnation claims based on the reasoning in *Lucas* will become obsolete if we allow TDRs into the "takings" side of the analysis. This will result because every

> regulatory scheme concerned with approaching the level of a taking will contain a provision allocating TDRs to the burdened landowners, thus circumventing *Lucas*.

Littlewood, *supra* note 7, at 225 (footnotes omitted).[10]

D

Of course, that is not to say that TDRs never have relevance in determining whether a taking has occurred. *Penn Central* presents one such example. There, unlike here, the property owners retained a beneficial use of the affected parcel but were prohibited from fully developing airspace above Grand Central Terminal. *See Suitum*, 520 U.S. at 748 (Scalia, J., concurring in part and concurring in judgment). New York City awarded the property owners TDRs, and the Supreme Court accounted for the TDRs when evaluating the impact of the government's regulation. But as Justice Scalia explained in his *Suitum* concurrence, "[the *Penn Central]* analysis can be distinguished . . . on the ground that it was applied to landowners who owned at least eight nearby parcels,

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[10] *See also* Luke A. Wake, *The Enduring (Muted) Legacy of Lucas v. S.C. Coastal Council: A Quarter Century Retrospective*, 28 Geo. Mason U. Civ. Rts. L.J. 1, 29 n.147 (2017) (explaining TDRs are not only "transparently designed to immunize government from takings liability," but are further suspect because "[i]n the wake of *Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586 (2013), it is clear that the government bears a heightened burden under the Takings Clause to justify conditions requiring payment of money as a term of obtaining a discretionary land use approval. In other words, a developer might also challenge a requirement to purchase a TDR under *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 838 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994), which adds even further reason to doubt the viability of a functioning market for TDR sales, which is of course a premise of the entire TDR regime").

some immediately adjacent to the terminal, that could be benefited by the TDRs." *Id.* at 749; *see also Penn Cent. Transp. Co.*, 438 U.S. at 137 ("Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings.").

We find Justice Scalia's reasoning cogent and persuasive. Allowing the government to avoid a categorical, as-applied takings claim by awarding TDRs is constitutionally infirm, and here, the downzoning barred appellants from improving or developing Shands Keys in any manner. This left appellants with only a token interest in the property. Because the City simultaneously deemed "conservation" the only future use, appellants were required to perpetually preserve Shands Key in its natural state. The "newly legislated or decreed (without compensation)" regulation that left appellants with this token interest did not "inhere in the title itself [or] in the restrictions that background principles of [Florida] law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029.

IV

As the *Lucas* court observed, regulations "requiring land to be left substantially in its natural state . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018. And in this case, the regulation was more onerous than that which went "too far" in

Lucas.[11] Lucas was authorized to maintain a dock and wooden walkway on his beachfront lots, while appellants in this case were prohibited from even constructing a dock on Shands Key. Accordingly, as Justice Scalia explained in *Lucas*, the City "may resist compensation only if the logically antecedent inquiry into the nature of [appellants'] estate shows that the proscribed use interests were not part of [their] title to begin with." *Id.* at 1027. As this exception is not implicated, we conclude that appellants were entitled to partial summary judgment on their categorical, as-applied claim. To the extent that *Beyer I*, 37 So. 3d 932, *Beyer II*, 197 So. 3d 563, *Shands I*, 999 So. 2d 718, *Shands* II, 261 So. 3d 750, and *Ganson*, 222 So. 3d 17, may be viewed as previously holding that an award of TDRs will always be sufficient to defeat a categorical takings claim under *Lucas*, we hereby recede from those decisions. The final judgment is reversed and remanded with instructions for the trial court to enter partial summary judgment in favor of appellants.

Reversed and remanded.

EMAS, FERNANDEZ, SCALES, LINDSEY, GORDO, LOBREE, BOKOR, and GOODEN, JJ., concur.

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[11] Appellants compellingly argue that the regulation in this case is akin to involuntarily imposing a perpetual conservation easement for the benefit of the public.

SCALES, J., concurring.

I concur in the majority opinion and write only to explain why I do not see the majority opinion as upending constitutional law or resulting in the City's economic calamity.

A. The Island's Rezoning Coupled with the City's High-Quality Hammock Designation Effected a Regulatory Taking under Lucas

Dr. Shands owned a 7.9-acre offshore island in the Florida Keys zoned General Use ("GU"). Pursuant to that GU zoning, Dr. Shands was able to build seven single-family homes (one per acre).

For legitimate public policy reasons, though, the island's zoning was changed from GU to Conservation Offshore Island. As a result of the island's rezoning, coupled with the City's prohibition on development in areas (such as the island) classified as high-quality hammocks, no construction is now permitted on the island, not even a dock.

Presumably, people can swim to the island to camp and bee-keep (i.e., the only uses permitted under the Conservation Offshore Island zoning), but, from a practical perspective, the island's zoning change and high-quality hammock designation prevent appellants from any meaningful economic use of their island. In this regard, appellants are in a similar position to David Lucas, whose two waterfront lots were rendered economically unviable by South Carolina's legitimate and well-meaning Beachfront Management Act. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006-07 (1992).

Like the Beachfront Management Act examined under *Lucas*, the City's zoning ordinance has constitu-

tional implications. As correctly concluded by both the City's hearing officer and the majority, the re-zoning of the island coupled with its high-quality hammock designation implicate the constitution per *Lucas* because the City's regulatory scheme has deprived the island of all economically beneficial use. As discussed in more detail below, the City owes appellants "just compensation" because the City's offer of $147,000 worth of transferable development rights did not infuse the island with value to prevent a regulatory taking under *Lucas*.

B. TDRs are No Longer Relevant to Determine Whether a Regulatory Taking Has Occurred, but are Relevant to the "Just Compensation" Side of the Takings Equation

In what can only be described as a trailblazing decision, the majority holds that, as a matter of constitutional law, the availability of TDRs[12] does not infuse value into property otherwise rendered valueless by the regulation. The majority, adopting the rationale expressed by Justice Scalia's concurring opinion in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 745 (1997), holds that the availability of TDRs is not to be considered in the analysis of whether a regulatory taking under *Lucas* has occurred, but is relevant to the just compensation side of the takings equation (Op. at 16-20).

[12] In a TDR system, the government provides a property owner the right – which the property owner may sell to a third party – to undertake development on property other than the property affected by the regulation.

C. How to Apply TDRs to the Just Compensation Side of the Takings Equation

While I concur in the majority opinion's holding, it bears noting that neither the majority opinion, nor Justice Scalia's concurrence in *Suitum*, discusses the practical mechanics of exactly *how* TDRs are to be considered "as part of the just compensation side of the takings equation." Because I am concerned that the instant decision leaves trial courts, local governments, property owners and practitioners without a framework to apply this new TDR/just compensation rubric (at least until an authority higher than this concurring opinion provides guidance), I offer the following.

As a practical matter, because the value of TDRs is set in the marketplace and is easily determined, I presume the vast majority of regulatory takings cases will be settled (without the uncertainty, delay and expense occasioned by a jury trial) with the property owner accepting the government's TDR offer as just compensation, so long as the offer is reasonable and generous. TDR offers from government should be generous because TDRs, like the regulations from which TDRs provide valuable relief, are creations of government. Not only do TDRs require no appropriation of taxpayer funds, but the development occasioned by TDRs generally results in more ad valorem tax revenue for the government.[13]

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[13] For illustration purposes only, the City may, on remand, hypothetically choose to offer appellants, in lieu of cash, sufficient TDRs for a developer to build a profitable, affordability-restricted apartment complex. Given the relative scarcity of, and expense associated with otherwise obtaining, such TDRs, a hypothetical developer might be inclined to purchase those offered TDRs from appellants for a price less than what the developer would otherwise pay, but which compensates appellants for the damages

Of course, under Florida's existing takings jurisprudence, I suspect a local government cannot force an owner to accept TDRs in lieu of cash as just compensation for a regulatory taking. But, presumably, if a written offer of TDRs in lieu of cash is made by the local government to the owner, the value of offered TDRs can certainly be taken into consideration in determining whether an award of attorney's fees is appropriate, and, if so, the amount of such award.[14] And certainly, after a jury determines the damages that a regulatory taking has caused a property owner, the parties may negotiate a settlement where the owner accepts TDRs as an alternative to either party's appeal.

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sustained as a result of the City's regulatory taking of appellants' island.

[14] Section 73.092 of the Florida Statutes provides that, in eminent domain proceedings, when a written offer is made by the government to an owner, attorney's fees are awardable to the owner based solely on the "benefits achieved for the client." § 73.092(1), Fla. Stat. (2024). Section 73.092 is applicable also in inverse condemnation proceedings. *City of N. Miami Beach v. Reed*, 863 So. 2d 351, 352-53 (Fla. 3d DCA 2003).

While Section 73.092(1)(a) generally defines "benefits" as the difference between the final judgment and the government's written offer, section 73.092(1)(b) expressly authorizes the trial court, in determining whether an attorney has provided a "benefit" to the client, to consider nonmonetary benefits obtained, so long as such nonmonetary benefits can be easily quantified. Presumably, to give effect to the majority's constitutional dictate that TDRs are to be considered on the just compensation side of the takings equation, a trial court judge, in determining whether an attorney has provided a benefit to the client for section 73.092's purposes, must also now consider the value of TDRs (i.e., a nonmonetary benefit) contained in a written settlement offer made pursuant to section 73.092.

Thus, to the extent necessary to facilitate the use of TDRs as just compensation, local governments may consider amending their land development regulations to formalize the employment of TDRs as compensation for a regulatory taking. Accordingly, local governments and practitioners may wish to keep close tabs on marketplace transactions relating to TDRs so that the accurate valuation of such TDRs can be readily accessed. It seems to me that the proper and considered use of TDRs on the compensation side of the takings equation as required by the majority opinion should not have a calamitous effect on local governments' pocketbooks.

GORDO, J., concurring.

I concur in the majority opinion. I write separately to address my belief that the dissent's separation of powers argument is decidedly misplaced. This is not a case in which this Court is invading the province of the legislative branch or expanding its own power improperly. In my view, this is a case in which the Court is exercising its most important role envisioned by our founding fathers—safeguarding individual constitutional rights against government overreach.

I.

"The cornerstone of American democracy known as separation of powers recognizes three separate branches of government—the executive, the legislative, and the judicial—each with its own powers and responsibilities." *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004). "Our Constitution's separation of powers . . . is the absolutely central guarantee of a just Government and the liberty that it secures for us all." *Trump v. United States*, 603 U.S. 593, 650 (2024) (Thomas, J., concurring) (internal quotation marks and citation omitted). "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours." *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

In Florida, the constitutional doctrine has been expressly codified in article II, section 3 of the Florida Constitution, which divides the state's government into three branches and expressly prohibits one branch from exercising the powers of the other two branches:

> The powers of the state government shall be divided into legislative, executive and judicial

> branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Art. II, § 3, Fla. Const.

The Florida Supreme Court has explained that the separation of powers doctrine "encompasses two fundamental prohibitions." *Chiles v. Child. A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991). "The first is that no branch may encroach upon the powers of another." *Id.* "The second is that no branch may delegate to another branch its constitutionally assigned power." *Id.* It rests soundly on principles that each branch of the government, both federal and state, will stay in its own lane and affirmatively act only when the ball is in its court. The majority, in my view, properly strikes the proverbial "government overreach ball" squarely before it for violating appellants' constitutional right not to have their property taken without full compensation.

II.

While the dissent pointedly accuses the majority of invading the province of the other branches, it is the fundamental role of the judiciary to say what the law is. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). "As the United States Supreme Court has explained, the power of the judiciary is 'not merely to rule on cases, but to *decide* them, subject to review only by superior courts[.]'" *Bush*, 885 So. 2d at 330 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995)).

"Under the express separation of powers provision in our state constitution, the judiciary is a coequal

branch of the Florida government vested with the sole authority to exercise the judicial power[.]" *Id.* (internal quotation marks and citation omitted). "The judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 414 (2024) (Thomas, J., concurring) (citation omitted). "Under the basic concept of separation of powers that flows from the scheme of a tripartite government adopted in the Constitution, the judicial Power . . . cannot be shared with the other branches." *SEC v. Jarkesy*, 603 U.S. 109, 127 (2024) (internal quotation marks and citation omitted). "Or, as Alexander Hamilton wrote in The Federalist Papers, 'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" *Id.* (quoting The Federalist No. 78 (Alexander Hamilton)).

III.

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." Amend. V, U.S. Const. It is noteworthy that the Florida Constitution has its own takings provision, which provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid . . . ." Art. X, § 6(a), Fla. Const.

While the Florida Supreme Court has interpreted the takings clauses of the United States and Florida Constitutions "coextensively,"[15] the Florida Constitution expands the Fifth Amendment's constitutional guarantee by affording property owners more expansive compen-

[15] *See St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1226 (Fla. 2011), *rev'd on other grounds*, 570 U.S. 595 (2013).

sation protections by not simply offering a subjective version of "just compensation" but by requiring "full compensation." *See Joseph B. Doerr Tr. v. Cent. Fla. Expressway Auth.*, 177 So. 3d 1209, 1215 n.5 (Fla. 2015) (recognizing that the Florida Constitution provides for more extensive compensation than the Fifth Amendment's Takings Clause because "full compensation" provided by the Florida Constitution includes reasonable attorney's fees for the property owner).

As originally understood—and as its name indicates—the Takings Clause of the Fifth Amendment applied only to direct, physical takings. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 798 (1995) ("The predecessor clauses to the Fifth Amendment's Takings Clause, the original understanding of the Takings Clause itself, and the weight of early judicial interpretations of the federal and state takings clauses all indicate that compensation was mandated only when the government physically took property."); Jay T. Jarosz, *Enough Is Enough, Unless of Course, It's Not: A Missed Opportunity to Reexamine the Ambiguity of Penn Central*, 54 Suffolk U. L. Rev. 109, 109 (2021) ("The Founders envisioned the Takings Clause as a way to compensate property owners whose tangible property was physically seized by the government."); Aziz Z. Huq, *Property Against Legality: Takings After Cedar Point*, 109 Va. L. Rev. 233, 235 (2023) ("In a leading constitutional treatise of the early Republic, St. George Tucker . . . identified the Takings Clause of the Fifth Amendment as a means to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses.") (internal quotation marks and citation omitted); *Horne v. USDA*, 576 U.S. 350, 360 (2015) ("Prior to this Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S.

393 (1922), the Takings Clause was understood to provide protection only against a direct appropriation of property—personal or real. *Pennsylvania Coal* expanded the protection of the Takings Clause, holding that compensation was also required for a 'regulatory taking'—a restriction on the use of property that went 'too far.'" (quoting *Id.* at 415)).

This narrowly drafted provision is representative of the basic political values of the founding fathers. The founders, believing in a representative democracy, never intended the Takings Clause to reach government regulation because "they believed it was the appropriate responsibility of democratic decision-makers to balance individual property interests against other community interests." William Michael Treanor, *The Original Understanding of the Takings Clause*, Georgetown Environmental Law & Policy Institute Papers & Reports, at 5 (1998).

Over the course of the nation's history, however, we have seen significant growth of government regulation. As we evolved into new and unchartered regulatory schemes, courts were faced with applying the Takings Clause to modern conditions of comprehensive regulation not originally envisioned by the founders. A consequence of this is that modern takings jurisprudence has essentially ignored the original understanding of the Takings Clause. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) (J. Scalia writing: "Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all, but even he does not suggest (explicitly, at least) that we renounce the Court's contrary conclusion in *[Pennsylvania Coal Co. v.] Mahon.* Since the text of the Clause can be read to encompass regulatory as well as

physical deprivations (in contrast to the text originally proposed by Madison), we decline to do so as well.") (cleaned up); Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 Dick. L. Rev. 571, 581 (2003) ("As the *Lucas* Court emphasized, compensation for regulatory takings can be justified by the functional similarity between the effect of a regulation and a direct, physical taking of property.").

IV.

The majority here is not "expand[ing] the Court's authority relative to that of the other branches of government" so as to violate the separation of powers doctrine as the dissent suggests. Rather, we are simply enforcing the takings provisions of the United States and Florida Constitutions guaranteeing the natural right of property ownership and proscribing the taking of property without full and just compensation. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 714 (2015) (Thomas, J., dissenting) ("[T]he judiciary is that department of the government to whom the protection of the rights of the individual is by the constitution especially confided.") (internal quotation marks and citation omitted); *Dade Cnty. Classroom Tchrs. Ass'n, Inc. v. Legislature*, 269 So. 2d 684, 687 (Fla. 1972) ("The doctrine of judicial authority and responsibility was early established in the historic case of *Marbury v. Madison*, 5 U.S. 137 (1803); and in the many years since then—particularly in the last quarter of a century—the courts have not hesitated to accomplish by judicial fiat what other divisions of government have failed or refused to do in protecting, implementing, or enforcing constitutional rights.").

The regulatory scheme as applied, which deprives Shands Key of all economically beneficial use, can only

stand if we abrogate our duty to independently preserve and safeguard appellants' fundamental constitutional right. As I see it, failing to vindicate a right expressly stated in the Constitution is not judicial restraint but judicial abnegation. That we must not do.

FERNANDEZ, SCALES, BOKOR, and GOODEN, JJ., concur.

LOGUE, C.J., dissenting.

In this inverse condemnation case brought under the Fifth and Fourteenth Amendments, the hurricane regulation at issue requires offshore islands in the Florida Keys to have ten acres to build a residence. The owners of an offshore island of seven acres claimed this regulation constituted a taking. They argued the regulation essentially limited the owners to the island's value marketed for its transferable development rights and for recreational purposes in its natural state.

It is undisputed that the unique economy of the Florida Keys provides an active, competitive market among private buyers for (1) transferable development rights, and (2) islands in their natural state available for recreational uses. The first use provides the island a value of six times its purchase price; the second use provides the island a value of three times its purchase price. These facts were properly established in the summary judgment and trial record. The case went to a bench trial and the trial court concluded no taking occurred, finding these values provided the owners a reasonable return on their investment based on investment-backed expectations.

In an extraordinary feat of legal acrobatics, however, the majority opinion somersaults over these facts, as well as decades of well-established U.S. Supreme Court and Florida precedents, to reverse the trial court and find a taking. In doing so, it inserts the courts into land use policy issues that the U.S. Constitution assigns to the political branches of government. I respectfully dissent.

OVERVIEW OF THIS DISSENT

Contrary to the majority opinion, the only reliable touchstone to determine if a regulatory taking occurred warranting compensation is not a judge's subjective opinion regarding a property's "productive use" but the objective value the property commands in a free and competitive market. If the property subject to the regulation provides a reasonable return on investment, as the trial court found here, there can be no taking under the Fifth Amendment.

Regulatory takings analysis must examine "the impact of the restriction on the value of the parcel as a whole." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130 n.27 (1978). The majority opinion ducks consideration of "the value of the property as a whole" in two ways. First, it excludes the value of the property's transferable development rights marketed to third parties. But *Penn Central* expressly included transferable development rights. And *Penn Central* has been consistently interpreted to mean the value of those rights marketed to third parties. The majority opinion breaks from this uniform body of precedent.

Second, unable to reverse solely on that ground, the majority opinion excludes the value of the island marketed for recreational use in its natural state. It does so even though the undisputed record shows that islands held in their natural state for recreational uses command significant value in an active, competitive market among private buyers in the Florida Keys. The majority opinion is again the only court in the nation so holding. The cases it cites are inapposite because they involve instances where there was no competitive market among private buyers for the subject properties held in their natural state.

The majority's reliance on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), to exclude categories of value is grossly misplaced. *Lucas* allows a judge to bypass the fact-intensive review required by *Penn Central* and to declare a "categorical" taking in the "rare" circumstance where "the regulation wholly eliminated the value of the claimant's land" and "rendered [the owner's] parcels 'valueless.'" *Id.* at 1007, 1018, 1026. But no one in this case suggests the island at issue was rendered valueless.

The majority instead claims that *Lucas* switched the focus from objective "market value" to subjective "productive use." This claim has been rejected by the Supreme Court twice. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 332 (2002) ("[T]he categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of *all value*[.]") (emphasis added); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) ("In the *Lucas* context, of course, the complete elimination of a *property's value* is the determinative factor.") (emphasis added).

Finally, the upshot of the majority opinion is to streamline and expedite the process to declare legislative acts an unconstitutional taking. This is contrary to my understanding of separation of powers. We should recognize that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Mo., Kan., & Tex. Ry. Co. of Tex. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.). I believe the courts should always incline to the most restrained, careful, and painstaking approach before declaring a law unconstitutional. The trial court should be affirmed and applauded, not reversed, for doing that here.

BACKGROUND

I. The Regulations.

The regulations at issue are part of a network of laws that the political branches determined are necessary to protect lives and property values in the Keys from hurricanes. The Keys are a half-mile wide scattering of reefs and small islands that lie barely above sea level. They project over a hundred miles into one of the busiest hurricane corridors on Earth. They are connected to the mainland by a single narrow road. The property values of the residents depend on water quality; their lives depend on timely hurricane evacuation.

The Florida Legislature designated the Florida Keys as an area of "critical state concern" in the Florida Keys Area Protection Act. § 380.0552(3), Fla. Stat. It did so not only to protect the Keys' economy and ecosystem, but most importantly to "[e]nsure that the population of the Florida Keys can be safely evacuated" during "hurricanes." § 380.0552(2)(j), Fla. Stat. As explained in an annual report mandated by the Legislature:

> The Florida Keys are a chain of lushly vegetated tropical islands surrounded by clear shallow ocean waters teeming with sea life. The islands are connected by a narrow ribbon of U.S. Highway 1 stretching 112 miles and spanned by 19 miles of bridges. The highest point of elevation along these rocky islands is only 18 feet above sea level and there is no point that is more than four miles from water. The Florida Keys are isolated from the rest of the state and receive

> electricity and potable water from Florida City, located on the Florida mainland.
>
> Access to and from the Keys is primarily by U.S. Highway 1. Evacuation of the Keys' population in advance of a hurricane strike is essential for public safety. No hurricane shelters are available in the Florida Keys for Category 3-5 hurricane storm events. A system of managed growth was developed to ensure the ability to evacuate within the 24-hour evacuation clearance time as required by section 380.0552(9)(a)2., Florida Statutes.

Div. of Cmty. Dev., Fla. Dep't of Econ. Opportunity, *Fla. Keys Area of Critical State Concern*, ANN. REP. 3–4 (2020). To ensure safe hurricane evacuation, the State placed a cap on permits for new residential structures built in the Keys. *Id.* at 4.

In response to the cap on residential structures, the City of Marathon adopted several related ordinances. One ordinance required ten acres of upland to build a residence on an offshore island zoned for conservation. *See* MARATHON, FLA., ORDINANCES app. A, § 103.15. Other ordinances gave undeveloped parcels transferable development rights, including Building Permit Allocation System points, which can be used by the owner or marketed to third parties. *See*, *e.g.*, MARATHON, FLA., ORDINANCES app. A, ch. 107, art. 1–3.

II. The Case Before Us.

The central question the property owners raised in their lawsuit is whether the requirement of ten acres to construct a residence rises to the level of a regulatory taking of their property by denying them all economic use of their property.

In the property owners' pretrial summary judgment motion relied upon by the majority opinion, the property owners maintained that the City's regulation constituted a categorical taking under *Lucas*. In opposition, the City filed the deposition of one of the property owners which indicated that the property owners' father purchased the island in 1957 for $20,500. The deposition also reflected that no improvements were made to the property; the island has no bridge and no access to water, electricity, trash removal, or sewerage disposal. The City filed the affidavit of its appraiser. As he would later do at trial, the appraiser testified to the following points. An active, private market existed in the Keys for transferable development rights. Based on comparable sales, if sold for those rights, the island had a fair market value of $147,000. Also, an active, private market existed in the Keys for islands with their uses limited to recreation. Based on the comparable sales of islands in the Keys sold for recreational uses, the island had a fair market value of $60,000.

The property owners' argument in their summary judgment motion required the trial court to decide if the appraiser's testimony of value created an issue of fact as to whether "the regulation wholly eliminated the value of the claimant's land." *Lucas*, 505 U.S. at 1026. The property owners did not contest the adequacy of the appraiser's affidavit or otherwise contest the facts that the City submitted into the summary judgment record. Instead, they argued that the value of property should not include its value marketed for transferable development rights or recreational uses.

Applying Florida's old, subjective summary judgment standard, which disfavored summary judgments

in a lopsided manner,[16] and relying on this Court's binding precedents that recognized the value of transferable development rights and recreational uses, two of which were law of this case,[17] the trial court denied the property owners' motion and found that "there exist genuine issues of material fact which preclude the entry of partial summary judgment." Significantly, nothing in the summary judgment record addressed the issue of whether a return of six

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[16] Florida's old summary judgment standard required that summary judgment be denied "[i]f the record reflects the existence of any genuine issue of material fact or the *possibility of any issue*, or if the record raises *even the slightest doubt* that an issue might exist . . . ." *Raven v. Roosevelt REO US LLC*, 278 So. 3d 245, 247 (Fla. 3d DCA 2019) (quoting *Johnson v. Deutsche Bank Nat'l Tr. Co. Ams.*, 248 So. 3d 1205, 1208 (Fla. 2d DCA 2018)) (emphases added). In a development welcomed by the general legal community, the Florida Supreme Court has since adopted a more modern, rational, and objective summary judgment standard. *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72 (Fla. 2021).

[17] *Shands v. City of Marathon*, 261 So. 3d 750, 753 (Fla. 3d DCA 2019) (reversing grant of summary judgment for City under *Beyer v. City of Marathon*, 197 So. 3d 563 (Fla. 3d DCA 2013), expressly because the record did not contain a valuation for the transferable development rights relied upon by the trial court); *Beyer*, 197 So. 3d at 567 ("The award of ROGO [or Rate of Growth Ordinance] points, coupled with the current recreational uses allowed on the property, reasonably meets the Beyers' economic expectations . . . ."), *reh'g en banc denied sub nom*, *Ganson v. City of Marathon*, 222 So. 3d 17, 18 (Fla. 3d DCA 2016), *rev. denied*, No. SC16 1888, 2017 WL 1365218, at *1 (Fla. Apr. 13, 2017), *cert. denied*, 583 U.S. 1102 (2018); *Beyer v. City of Marathon*, 37 So. 3d 932, 934 (Fla. 3d DCA 2010) (basing its ruling on the fact that the subject property had "additional beneficial economic value because it has transferable development rights"); *Shands v. City of Marathon*, 999 So. 2d 718 (Fla. 3d DCA 2008) (expressly considering transferable development rights when denying a takings challenge under *Lucas).*

or three times an investment over that extended period was adequate given the time value of money. That issue obviously presents a serious question. But in the absence of any undisputed testimony, that question would appear to be a question of fact concerning investment-backed expectations in a particular market, which supports the trial court's decision to send this matter to trial. *See generally Penn Cent.*, 438 U.S. 104.

Thus, under the antiquated summary judgment standard of the time, the appraiser's testimony raised the "possibility" or "the slightest doubt" as to whether "the regulation wholly eliminated the value of the claimant's land." *Lucas*, 505 U.S. at 1026. Given the record, the lopsided standard, and the controlling law, it seems inescapable the trial court properly denied summary judgment and sent the case to trial.

After a non-jury trial, the trial court entered judgment, finding that the regulation did not constitute a taking. In finding no taking had occurred, the trial court accepted the trial testimony of the City's appraiser. The appraiser testified that the island had a fair market value of six times its purchase price when sold for its transferable development rights, and three times its purchase price when sold for recreational use in the Keys' unique recreational market. For each value, the appraiser relied on six comparable sales in the Keys, for a total of twelve comparable sales. Again, the owners presented no evidence addressing the issue of whether a return of six or three times an investment over that extended period was adequate given the time value of money.

A panel of our Court issued an opinion reversing the trial court. Our Court then unanimously agreed to consider this case en banc. Like the panel opinion, the

en banc majority opinion reverses the trial court. In reversing the trial court, however, the majority opinion does not challenge or even address the evidence at trial or the trial court's fact-findings. Instead, the majority maintains the trial court erred in denying the property owners' motion for summary judgment. The trial court erred, the majority opinion contends, because when deciding whether "the regulation wholly eliminated the value of the claimant's land," *Lucas*, 505 U.S. at 1026, the trial court was prohibited by the Fifth Amendment from considering the value of the property's transferable development rights and the value of the property marketed for recreational use in the state of nature. To reach this result, the majority opinion reverses prior decisions of this Court decided over decades holding the opposite, including two prior decisions involving this case.[18]

DISCUSSION

I. The "value of the parcel as a whole" includes the value of transferable development rights marketed to third parties.

As held in innumerable takings cases, "our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property[.]" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). This formulation has been refined over time. But the focus on value never changed. Contrary to the majority opinion, the only reliable touchstone to determine if a regulatory takings occurred warranting compensation is not a judge's subjective opinion regarding a property's "productive use" but the objective value the property commands in a free and competitive market.

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[18] *See* footnote 17, *supra.*

If the property subject to the regulation provides a reasonable return on investment, as the trial court found here, there can be no taking under the Fifth Amendment.

The takings analysis focuses on "the value of the parcel as a whole." *Penn Cent.*, 438 U.S. at 130 n.27; *see also id.* at 130–31 (providing that the focus is on the value of "the parcel as a whole"). "'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." *Id.* at 130; *see also Lucas*, 505 U.S. at 1026 (requiring court to determine whether "the regulation wholly eliminated the value of the claimant's land").

The majority opinion evades consideration of "the value of the parcel as a whole." It contends no consideration can be given to the value of the property's transferable development rights. This assertion conflicts with *Penn Central.* In deciding that no taking occurred in *Penn Central*, the Supreme Court expressly held that *"the transferable development rights* afforded appellants by virtue of [their property's] designation as a landmark *are valuable[.]" Penn Cent.*, 438 U.S. at 129 (emphases added). It therefore concluded that the value of the "parcel as a whole" included the value of the property's "transferable development rights" which must be considered when deciding whether a regulation caused a taking. *Id.* at 137.

The majority opinion, however, attempts to limit the holding of *Penn Central* by interpreting it to prohibit consideration of the value of transferable development rights transferred to third parties. The majority opinion's exclusion of the value provided by sale to third parties is contrary to the near universal judicial

understanding of *Penn Central* that the required consideration of the value of the property as a whole includes the value of transferable development rights marketed to third parties. This understanding is reflected in every judicial decision on this issue.[19]

This understanding is also reflected in the many state and local laws adopting transferable development rights saleable to third parties. Florida counties that have adopted ordinances reflecting this universal understanding include, but are not limited to, Alachua, Hillsborough, Miami-Dade, Monroe, Orange, and Polk.[20] Florida municipalities that have done so

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[19] *See*, *e.g.*, *Pulte Home Corp. v. Montgomery Cnty., Md.*, 909 F.3d 685, 696 (4th Cir. 2018) (finding the first *Penn Central* factor is not sufficiently met to constitute a regulatory taking as, among other things, the purchaser "remains free to sell its unused TDRs [Transferable Development Rights] to another developer for use in another location, allowing it to recoup at least some portion of its twelve million dollar TDR investment"); *Sierra Nev. SW Enters., Ltd. v. Douglas Cnty.*, 506 F. App'x 663, 666–67 (9th Cir. 2013) (addressing the *Penn Central* factors and noting that "[e]ven if Defendants' conduct diminished the value of Plaintiffs' TDRs to some extent, the latter two factors preclude a *Penn Central* claim"); *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 359 (2d Cir. 1990) (addressing appellant's offered arguments to distinguish the facts of *Penn Central* as unavailing and finding "evidence . . . indicat[ing] that the transferrable development rights for the airspace above the Church property are, contrary to [appellant's] claim, not worthless"). *See also Glisson v. Alachua Cnty.*, 558 So. 2d 1030, 1037 (Fla. 1st DCA 1990) (finding regulations at issue did not constitute a taking of property in part because they "provide a mechanism whereby individual landowners may obtain . . . a transfer of development rights").

[20] ALACHUA COUNTY, FLA., ORDINANCES part III, title 40, ch. 402, art. XXIX (2024) (recognizing the sale and transfer of development rights from properties "regulated [for] conservation" or that are "viable agriculture areas" where the county restricted

include Coral Gables, Fort Lauderdale, Fort Myers, Key West, Marco Island, Melbourne, Miami, Saint Petersburg, Sarasota, Tampa, and West Palm Beach.[21]

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development of these properties); HILLSBOROUGH COUNTY, FLA., LAND DEV. CODE art. V, part 5.07.00 (2024) (recognizing the sale and transfer of development rights from properties that are "environmentally sensitive," "agricultural," or "historic" where the county restricted development of these properties); MIAMI-DADE COUNTY, FLA., ORDINANCES ch. 33B, art. II, div. 3 (2024) (recognizing the sale and transfer of development rights from unimproved land in the East Everglades Area of Critical Environmental Concern where the county restricted development of these properties to preserve their natural state); ORANGE COUNTY, FLA., ORDINANCES ch. 30, art. XIV, div. 3 (2024) (recognizing the sale and transfer of development rights to create greenbelts in neighborhood districts); POLK COUNTY, FLA., LAND DEV. CODE ch. 9, § 914 ("establish[ing] procedures for the transfer of allocated development rights" in the county, and in particular recognizing that "[a]ny development right which is appurtenant to a parcel of land in the [c]ounty . . . which has not been developed may be transferred to any person at any time, to the same extent and in the same manner as any other interest in real property").

[21] CORAL GABLES, FLA., ZONING CODE art. 14, § 14-204 (creating a transfer development rights program recognizing the transfer of a property's development right where the city restricted the development of the transferring property after designating it historic); FORT LAUDERDALE, FLA., UNIFIED LAND DEV. CODE art. XII (2023) (creating a transfer development rights program that recognizes the sale of a property's development right where the city restricted the development of the selling property after designating it as historic or of archeological significance); FORT MYERS BEACH, FLA., ORDINANCES ch. 34, art. III, div. 3, § 34-632(6) (2023) (recognizing the transfer of development rights from one property to a separate property where the first property's development rights were density restricted); KEY WEST, FLA., ORDINANCES subpart B, ch. 108, art. XI (2023) (creating a transfer development rights program that recognizes the sale of a property's development right where the city restricted the development of the selling property after designating it as a conservation land); MARCO ISLAND, FLA., ORDINANCES ch. 30, art. XV, §§ 30-969,

Reflected in these laws are the considered reliance of our citizens on the traditional and, until now, universal understanding of *Penn Central*. The majority opinion's holding would upend this considered reliance in a manner that is breathtaking.

Because our test for regulatory taking focuses on "the value of the parcel as a whole," *Penn Cent.*, 438

30-972 (2023) (recognizing the transfer of development rights from one property to another where the city designated the transferring property as a "special treatment" property, thereby restricting the use of these properties due to their "environmental sensitivity and historical and archaeological significance where the essential ecological or cultural value of the land is not adequately protected under the basic zoning district regulations"); MELBOURNE, FLA., ORDINANCES part III, app. B, art. IV, § 4(c) (2023) (recognizing the transfer of development rights from properties where the city restricted development to preserve the Indian River Lagoon to unrestricted properties); MIAMI, FLA., ORDINANCES ch. 23, art. I, § 23-6 (2023) (creating a transfer development rights program that recognizes the sale of a property's development right where the city restricted the development of the selling property after designating it as historic); SAINT PETERSBURG, FLA., ORDINANCES ch. 16, §§ 16.20.160.3, 16.70.040.1.16 (2023) (prohibiting "uses other than preservation" for properties within a "preservation district" and in return, "allow[ing] property owners of designated preservation districts to benefit from the development potential by allowing the sale of the development right"); SARASOTA, FLA., ZONING CODE art. VI, div. 9, § VI-912(c)(5) (2023) (recognizing the sale and transfer of development rights from properties designated historic, where the city limited the development of these properties); TAMPA, FLA., ORDINANCES ch. 27, art. II, div. 6, § 27-141 (2023) (recognizing the sale and transfer of development rights for properties designated historic, where the city restricted the use of these properties); WEST PALM BEACH, FLA., ORDINANCES ch. 94, art. IV, § 94-132 (2023) (creating a transfer development rights program that recognizes the sale of a property's development right where the city restricted the development of the selling property).

U.S. at 130 n.27, 130-31, no persuasive reason exists for excluding entire categories of value in the manner done by the majority opinion.

The contention that categories of market value should be excluded from the takings analysis is just a variation of the old claim that the property should be severed into discrete strands to decide if a discrete strand of the property has lost value rather than the property as a whole. This severance argument has been routinely rejected as distorting the takings analysis. *See*, *e.g.*, *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) ("[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). *See also Keystone Bituminous Coal*, 480 U.S. at 498 ("Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place.").

The only authority the majority offers for its creative revision of *Penn Central* is a twenty-seven-year-old suggestion by Justice Scalia in his concurrence in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). In his concurrence, Justice Scalia suggested that the value of transferable development rights sold to third parties should not be considered part of the value of a property for purposes of the takings analysis. *Id.* at 749. He reasoned real estate development rights that are transferable are more like "chits" or "cash payments" than strands of the bundle of sticks that make up real property.

In the first place, this reasoning does not apply in Florida. Under Florida property law, transferable development rights are an interest in real estate and often a very valuable interest. For example, the Florida courts have recognized that the movement of transfer development rights from a sending to a receiving property can wrongfully impair the value of real estate collateral secured by a mortgage on the sending property. *Gordon v. Flamingo Holding P'ship*, 624 So. 2d 294, 297 (Fla. 3d DCA 1993) (holding that "[a]s a result of the transfer of development rights the collateral for the Mortgage has been wasted, impaired, and diminished"). Florida law in this regard is in accord with the general understanding that transferable development rights are an interest in real estate while attached to real estate. *See*, *e.g.*, I.R.S. Priv. Ltr. Rul. 202335002, 2023 WL 5653502 (Sept. 1, 2023) (recognizing transferable development rights sold to third parties as real estate for purposes of like-kind exchanges under federal tax law); Appraisal Institute, *Appraisal of Real Estate* 76 (14th ed. 2013).

This status under Florida law is determinative because, of course, state, not federal, law defines property.[22] A court respectful of the few and diminishing vestiges of the federalism established by our original Constitution will be careful not to further degrade the authority of the states by creating what amounts to a federal common law of property that undermines "the

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[22] "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); *see also Morgan v. Comm'r of Internal Revenue*, 309 U.S. 78, 80 (1940) ("State law creates legal interests and rights.").

legitimate and traditional interest which the State has in creating and defining the property interest of its citizens." *Aquilino v. United States*, 363 U.S. 509, 514 (1960).

Moreover, the majority in *Suitum* firmly declined Justice Scalia's suggestion. It did not limit consideration of transferable development rights to those transferred to other property of the owner of the rights as suggested by Justice Scalia. Instead, the majority in *Suitum* based its decision (that the takings case was ripe for adjudication) on the very fact that the *"salability"* of the transferable development rights was established and "there are many potential, *lawful buyers for Suitum's [transferable development rights]*, whose receipt of those rights would unquestionably be approved." 520 U.S. at 741 (emphases added). The majority expressly framed the issue as involving rights *marketed* to third parties: "[W]hether the claim is ripe for adjudication, even though Suitum has not attempted to *sell* the development rights she has or is eligible to receive." *Id.* at 728–29 (emphasis added).[23]

In the twenty-seven years since *Suitum* was issued, no court has adopted Justice Scalia's suggestion. Instead, courts considering the issue have uniformly held that the concurring opinion in *Suitum* "underscores the [Supreme] Court's reaffirmance of the *Penn Central* holding that the value of [transferable development rights] is to be considered to answer the threshold question of whether a taking has occurred." *Good v. United States*, 39 Fed. Cl. 81, 108 (1997), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999) (using the value at sale

[23] This ripeness holding became moot when the Supreme Court subsequently lowered the ripeness standard in *Knick v. Township of Scott, Pennsylvania*, 588 U.S. 180, 184–85 (2019).

of transferable development rights to determine no taking had occurred).

In these circumstances, the majority opinion erred in following the reasoning of a concurring opinion, rather than that of the *Suitum* majority opinion. *See*, *e.g.*, *Wirt v. Cent. Life Assurance, Co.*, 613 So. 2d 478, 479 (Fla. 2d DCA 1992) (noting that while a concurring opinion may be persuasive, "it does not provide authority").

II. The "value of the parcel as a whole" includes the value of the property marketed for recreational use in its natural state where an active, competitive market among private buyers exists for such use.

The majority opinion also evades consideration of "the value of the parcel as a whole" by excluding the value of the property marketed for recreational purposes in its natural state. In doing so, the majority opinion errs. Whether the sale of a property for recreational use produces meaningful value is not a question of constitutional law, it is a question of fact dependent on supply and demand in the particular market at issue.

Anyone who hunts or fishes knows that the market for land held in its natural state is growing as such land becomes scarcer. To deny this fact is to deny the basic tenet of supply and demand that underlies our free market economy. Indeed, studies have shown that land in its natural state can have substantial monetary value for hunting, fishing, camping, and other nature-oriented uses.[24]

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[24] *See*, *e.g.*, L. Macaulay, *The Role of Wild-Life Associated Recreation in Private Land Use and Conservation: Providing the*

In the Keys' real estate market, with its unique demand for recreational uses, a sale of an offshore island in its natural state for recreational use yields substantial value, according to the undisputed record before us. This should surprise no one familiar with the Florida Keys. The Keys draw visitors from across the globe for fishing, snorkeling, scuba diving, spearfishing, lobstering, kayaking, sailing, motorboating, windsurfing, and wildlife-observing. *See*, *e.g.*, Fodor's Travel Guides, *Fodor's InFocus Florida Keys* (8th ed. 2023).

In any event, as an appellate court, we are not free to depart from the facts in the record. *See generally Cruz v. State*, 320 So. 3d 695, 712 (Fla. 2021) ("[A]s long as the trial court's findings are supported by competent substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court." (citations and internal quotation marks omitted)).

Nevertheless, the majority opinion elevates this question of fact into an a priori principle of constitutional law. The majority opinion is based on the legal fiction that any value generated from a property in its natural state must be deemed a token amount

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Missing Baseline, 58 LAND USE POLICY 218–33 (2016) ("Approximately 32.7% of the private land in the U.S. (440.1 million acres) is either leased or owned for wildlife-associated recreation. Hunting land is the primary contributor to the land area, accounting for 80.9% (355.9 million acres) of the total, followed by wildlife-watching at 11.3% (49.9 million acres) and fishing at 7.8% (34.3 million acres).").

regardless of its actual market value. This legal fiction finds no support in the text of the Fifth Amendment.

To elevate what would normally be a question of fact to a principle of constitutional law, the majority opinion relies upon a misreading of *Lucas*. *Lucas* concerned a South Carolina law barring the owner of two ocean front lots in a residential development surrounded by other homes from building homes on his lots. 505 U.S. at 1008. Under the regulation, the only use for the ocean front lots was recreation overlooked by the adjacent houses. *Id.* The South Carolina trial court expressly made a fact-finding that in the relevant real estate market, the parcels were rendered "valueless." Based on the state court's factfinding, *Lucas* held that a regulation that rendered the lots "valueless" in the sense that it *"wholly* eliminated the *value* of the claimant's land" was a "categorical" taking. *Id.* at 1015–18, 1026 (emphases added).

Lucas is easily distinguishable from this case. In *Lucas*, the state trial court made a factual finding that the lots marketed solely for recreational uses adjacent to lots with residences were rendered "valueless." Here, the state trial court made a factual finding that the offshore island in the Florida Keys when marketed for recreational use had significant value. In *Lucas*, moreover, the lots had no transferable development rights. Here, the offshore island has transferable development rights that the trial court found have substantial value. In sum, in *Lucas* the South Carolina trial court found the lots were "valueless" in the South Carolina market; here the Florida trial court found the offshore island had significant value in the Florida Keys market.

But the majority opinion reads *Lucas* as shifting the focus of takings analysis away from the regulation's impact "on the value of the parcel as a whole." Instead of "value," the majority opinion interprets *Lucas* as focusing on "productive use." The majority opinion would, in essence, remove the term "value" and insert the term "productive use" in the Supreme Court's classic formulation of the regulatory taking test: "[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property[.]" *Keystone Bituminous Coal*, 480 U.S. at 497. The majority opinion then envisions "productive use" as limited only to physical development and therefore a priori excludes the value of the property used for recreation in its natural state, no matter how profitable. Thus, the majority opinion reasons that because the sale of property for recreational uses does not involve physical development, it does not constitute an "economic use" of property, even though the sale, as here, generates substantial economic value.

It is simply illogical, however, to maintain that a use that generates economic value is not an economic use. A theory of economic use divorced from market value is valueless—worse, it is ultimately subjective. Yet that is the essence of the majority's position. Nothing in the Constitution requires such a counter-intuitive result. The majority opinion's interpretation of *Lucas* as shifting the takings focus from market value to physical development does not withstand analysis.

It is not a fair reading of *Lucas.* At every step of its analysis, the Supreme Court in *Lucas* focused on "value." The Supreme Court framed the issue in *Lucas* as one of value: "This case requires us to decide whether the Act's dramatic effect on the economic

value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of 'just compensation.'" 505 U.S. at 1007 (emphasis added). The Supreme Court framed the holding of *Lucas* as one of value based on the trial court's finding that the law at issue rendered the parcels "valueless." *Id.* (emphasis added).

Admittedly, *Lucas* uses the terms "economic use" and "value" interchangeably. But, as *Lucas* itself makes clear, "economic use" means a use that generates "value." In this regard, the only way to determine if a use is "economic" is to estimate its "value." The only way to estimate value is to turn to the market and determine sales price. It is extraordinary to suggest, as the majority opinion does, that a sale of property is not an "economic use of property." In any system of free market capitalism, provided there is an active and competitive market as exists here, the sale of property is "the most profitable use of [a property owner's] property." *Andrus*, 444 U.S. at 66 (emphasis added). Therefore, if a recreational use generates economic value when a property is sold in the real estate marketplace, it is an "economic use." The Fifth Amendment does not state otherwise.

Moreover, the Supreme Court has expressly rejected attempts to interpret *Lucas* as shifting the focus from value to "productive use" in the manner proposed by the majority opinion. First, in *Tahoe-Sierra Preservation Council, Inc.*, the Supreme Court held that "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value[.]" 535 U.S. at 332 (emphasis added). Indeed, in *Tahoe-Sierra*, even the dissent conceded (what the majority opinion here denies) that "[t]he Court also reads *Lucas* as being

fundamentally concerned with value, rather than with the denial of 'all economically beneficial or productive use of land.'" *Id.* at 350 (Rehnquist, J., dissenting) (internal citation omitted and emphasis added).

Again, in *Lingle*, the Court held that value is the key criteria in a *Lucas* analysis: "In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor." 544 U.S. at 539 (emphases added). Significantly, in this case, no one contends there was a complete elimination of the island's value.

Citing these cases, other courts have held that the value of a property based upon a sale must be considered because "later Supreme Court cases make clear that, to prevail on a *[Lucas]* categorical taking claim, the property must lose *all value." Robinson v. City of Baton Rouge*, No. CV 13-375-JWDRLB, 2016 WL 6211276, at *40 (M.D. La. Oct. 22, 2016). *See also Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007); *Nammari v. Town of Winfield*, No. 2:07-CV-306, 2008 WL 4757334, at *11 (N.D. Ind. Oct. 29, 2008) (noting it was implausible that owner could state categorical taking claim under *Lucas* because they were able to sell their interest in the subject property).

The cases the majority cites for its misreading of *Lucas* all involved factual circumstances where a regulation left a property in its natural state but there was also no competitive, private market for the property in its natural state. Properly understood, they hold only that where "government action relegates permissible uses of property to those consistent with leaving the property in its natural state (e.g., nature preserve or public space), and no competitive market exists for the property without the possibility of development, a taking may have occurred."

Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1433 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999) (emphasis added). These cases are easily distinguishable from the instant case where a competitive, private market exists.

The main case relied upon by the majority opinion, for example, found a *Lucas* taking in a denial of a permit to fill wetlands. *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1113 (Fed. Cir. 2015). In doing so, the court readily acknowledged, what the majority here denies, namely that the *Lucas* "Court used the term 'use' synonymously with the term 'value.'" *Id.* at 1115 (quoting *Lucas*, 505 U.S. at 1019 n.8). Examining the issue of value, it noted that the subject property's "residual environmental value has been reduced by mosquito abatement measures, which left isolated hummocks and stagnant eutrophic pools." *Id.* at 1117. Critically and perhaps for this reason, "[t]he government did not produce evidence indicating that Lost Tree could sell [the subject property] in such a condition." *Id.* For this reason, *Lost Tree* is easily distinguishable from the instant case in which the record reflects a competitive, private market for the island at issue. More importantly, it does not support the majority's "productive use" theory.

In another case cited by the majority for its theory that the takings analysis involves comparison of productive use rather than value, the court held that the trial court committed reversible error in "reason[ing] that value was relevant to but not dispositive of the *Lucas* inquiry." *Bridge Aina Le`a, LLC v. Hawaii Land Use Comm'n*, 950 F.3d 610, 628 (9th Cir. 2020). "This was error," the court held, "because, as we have explained, the Supreme Court's precedents underscore that value is determinative." *Id.* ("Absent more, there

is no *Lucas* liability for this less than total deprivation of value."). *Bridge Aina Le`a* held that no *Lucas* taking had occurred. These cases do not support the majority's "productive use" theory.

In sum, the Fifth Amendment does not require the government to compensate for every reduction in value caused by a regulation. This is because every regulation arguably impacts value. If the government had to pay for every regulation, the government could not regulate. At what point then does the Fifth Amendment require compensation? The Fifth Amendment requires compensation when the regulation reduces the value below a reasonable return on investment. Thus, no regulatory taking occurs where the property subject to the regulation retains value sufficient to provide a reasonable return, which is what the trial court found here.

III. By streamlining the process to declare a taking, the majority opinion will encourage judges at all levels to depart from the appropriate restraint that courts must exercise when asked to review the constitutionality of the acts of the executive and legislature.

I would be less than candid if I did not admit that I have serious concerns about the majority opinion's impact on "the doctrine of separation of powers, one of the structural pillars upon which American freedoms rest." *Detournay v. City of Coral Gables*, 127 So. 3d 869, 873 (Fla. 3d DCA 2013).

The majority opinion clears the way for courts to quickly and easily declare laws a "categorical" taking, thereby avoiding the deliberate and fact-intensive approach of *Penn Central*. Indeed, the majority opinion seems motivated to expedite and streamline the

process to declare laws a taking. But does it promote the Constitutional separation of powers to hand every judge the power to override the acts of executive and legislative bodies in a faster, easier, less deliberative way?

I believe courts should always incline to the most restrained, careful, and painstaking approach before declaring a law unconstitutional. I am particularly concerned that the majority opinion uses its quick and easy "categorical" approach to strike down laws that the other branches of government determined were necessary to protect the lives of the residents of the Florida Keys from hurricanes.

The majority opinion will place judges, rather than legislators, at the forefront of certain land use policy. To give one relatively small example, underlying this case are important land-use policy questions such as: how much upland should be required to build a residence on an offshore island in the Florida Keys given their dependence on water quality and hurricane evacuation? The Keys consist of thousands of small islands, most of them undeveloped. Should residences be allowed on islands of ten acres, one acre, a half-acre, a quarter acre, or less? Should residences be allowed on the many privately owned parcels of bay-bottom? The majority opinion essentially declares the requirement of ten acres a taking. In doing so, it will inevitably drag the courts into the role of drawing these lines in disputes regarding any undersized lots. I firmly believe this type of line drawing requires broad input and a constant rebalancing of interests that is outside the competence of judges, no matter how well-intentioned or self-assured.

A wise judge once wrote: "The aggressive judge expands the Court's authority relative to that of other

branches of government. The modest judge tells the Court to think very hard indeed before undertaking to check actions by other branches of government." William H. Pryor, Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 Fla. L. Rev. 1007, 1012 (Dec. 2008) (citations and quotations omitted). This Court should have taken the path of the modest judge here, recognizing that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Mo., Kan., & Tex. Ry. Co. of Tex.*, 194 U.S. at 270 (Holmes, J.).

CONCLUSION

Because the trial court properly adjudicated this case under well-established law, the trial court should be applauded and affirmed, not reversed. The majority opinion overturns well-established law relied upon by many legislative bodies. It replaces objective criteria like "market value" with subjective criteria like "productive use." Its approach will ultimately prove unworkable. In the meantime, it will tie the hands of legislative bodies and interfere with their ability to enact hurricane and environmental regulations that save lives and shore up property values. I respectfully dissent.

APPENDIX D

THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 3D21-1987

Lower Tribunal No. 07-99-M

RODNEY SHANDS, *et al.*,

Appellants,

vs.

CITY OF MARATHON, etc., *et al.*,

Appellees.

Opinion filed May 3, 2023.

Not final until disposition of timely filed motion for rehearing.

An appeal from the Circuit Court for Monroe County, Mark H. Jones, Judge.

Pacific Legal Foundation, Jeremy Talcott, and Robert H. Thomas (Sacramento, CA), and Kathryn D. Valois (Palm Beach Gardens), for appellants.

Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A. and Michael T. Burke, and Hudson C. Gill (Fort Lauderdale), for appellees.

Before EMAS, HENDON, and MILLER, JJ.

MILLER, J.

This inverse condemnation appeal presents a novel issue regarding the role that transferred development rights ("TDRs") occupy in adjudicating a per se as-applied regulatory taking claim advanced under the landmark case of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Appellants, the children of the late Dr. R.E. Shands, are the owners of Shands Key, an offshore island in the Florida Keys. Dr. Shands acquired the property in 1956, and, upon his death, title to the island passed to his wife. She, in turn, conveyed the property to appellants. In 1986, Monroe County changed Shands Key's zoning status from "General Use" to "Conservation Offshore Island." In 1999, appellee, the City of Marathon, incorporated and adopted Monroe County's regulations. An application to construct a dock to allow for increased island access was denied, and the zoning authority effectively foreclosed any use of the property, other than for beekeeping or personal camping. After unsuccessfully pursuing administrative avenues for relief, appellants filed suit, alleging a regulatory taking. They then sought partial summary judgment on the basis that the regulation, as applied, deprived them of all economically beneficial use of their property. Finding that an award of TDRs and Building Permit Allocation System ("BPAS") points, considered in tandem with the residual land value derived from personal recreation and beekeeping, precluded a per se as-applied claim, the trial court denied the motion. The primary issue on appeal is the propriety of that ruling.[1]

[1] Because the error associated with the partial summary judgment denial is dispositive, we decline to reach the other issues on appeal.

PROCEDURAL HISTORY

This dispute underscores the "cryptic and convoluted" nature of contemporary regulatory takings jurisprudence. *See Ganson v. City of Marathon*, 222 So. 3d 17, 20 (Fla. 3d DCA 2016) (Shepherd, J., dissenting). This is the third time this case has come before this court. The salient facts precipitating the filing of suit are as follows:

> Dr. R.E. Shands purchased the 7.9-acre Little Fat Deer Key in 1956, and seven acres of adjacent bay bottom in 1959, before any state land use policies existed. He died in 1963, and his wife inherited the property, now known as Shands Key. She conveyed title to their children, the appellants, in 1985. From the time it was purchased until 1986, Shands Key was within Monroe County jurisdiction and was zoned General Use.
>
> In 1986, Monroe County adopted the State Comprehensive Plan and development regulations that altered Shands Key's zoning status to Conservation Offshore Island (OS), and placed it in the Future Land Use category. When the City of Marathon incorporated in 1999, it adopted the 1986 Monroe County comprehensive land use plan, and Shands Key was within the City bounds. In 2005, the City adopted the City of Marathon Comprehensive Plan; the land use and zoning designations of Shands Key remained unchanged.
>
> In 2004, the Shands filed an application for a dock permit. The application was denied, referring to the City's prohibition on develop-

> ment in areas classified as high[-]quality hammocks, or areas with known threatened or endangered species. The Shands then filed a Beneficial Use Determination (BUD) application as required by the City of Marathon Code of Ordinances, Article 18. The Special Master at the conclusion of the BUD hearing found that the Shands had reasonable economic investment-backed expectations that they could build a family residence on the Key, as planned in the late 1950s. The Special Master recommended that the City grant a building permit for a single family home exempt from the Rate Of Growth Ordinance (ROGO) requirements of 0.1 units per acre, or purchase the property for a mutually agreeable sum. After a public hearing, the Marathon City Council rejected the Special Master's recommendations and denied the Shands' BUD application.
>
> The Shands then brought suit against the City, claiming that the City's acts resulted in an as-applied regulatory taking of their property without just compensation, in violation of state and federal law.

Shands v. City of Marathon (*Shands II*), 261 So. 3d 750, 751–52 (Fla. 3d DCA 2019) (quoting *Shands v. City of Marathon* (*Shands I*), 999 So. 2d 718, 720–22 (Fla. 3d DCA 2008)).

Some additional procedural history is necessary. In the parties' first appeal, this court reversed a trial court order dismissing the case on statute of limitations grounds. *Shands I*, 999 So. 2d at 720. There, the court determined appellants' challenge was "as applied," rather than "categorical [or] facial," and therefore not

barred by the statute of limitations. *Id.* at 725–26. In support of this characterization, the court reviewed the relevant ordinance and noted that it provided for "low intensity residential uses . . . that can be served by cisterns, generators and other self-contained facilities," and "[d]etached residential dwellings." *Id.* at 724. It further observed that TDRs, including ROGO allocation points, were available.[2] *Id.*

On remand, the City successfully moved for summary judgment on the complaint, contending that the availability of TDRs and BPAS points rendered the facts indistinguishable from *Beyer v. City of Marathon*, 197 So. 3d 563 (Fla. 3d DCA 2013). This court once again reversed on appeal, finding the City failed to establish the value of the TDRs associated with the property. *See Shands II*, 261 So. 3d at 753.

Following the second remand, appellants moved for partial summary judgment, alleging they had raised a viable per se, as-applied challenge under *Lucas*. In support of their motion, appellants attached sworn testimony establishing that the zoning change effectively limited the use of the property to beekeeping or personal camping. This limitation, they argued, rendered the property "economically idle" under *Lucas*. 505 U.S. at 1019.

Invoking *Shands I* and *II* and other precedent, the City countered summary judgment on the ground that the award of TDRs, including the allocation of BPAS points, infused the property with value, precluded a per se finding under *Lucas*.[3] The trial court denied the

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[2] The affidavit-based submissions outline the availability of TDRs and BPAS points, rather than ROGOs.

[3] Because the government may not evade the duty to compensate on the basis that the landowner retains a token

motion. The case subsequently proceeded to a two-day non-jury trial, at the conclusion of which the court found appellants failed to establish a taking under the ad hoc multi-factored analysis set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). This appeal followed.[4]

STANDARD OF REVIEW

Our review is de novo, as it entails the denial of partial summary judgment and resultant claim

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interest in the property, we reject the circular and conclusory assertion that a hypothetical acquisition of the property for beekeeping or personal camping precluded a per se as-applied claim. *See Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 628 (9th Cir. 2020) ("[T]he relevant inquiry for us is whether the land's residual value reflected a token interest or was attributable to noneconomic use."), *cert. denied*, 141 S. Ct. 731 (2021); *see also Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 486 (2009) *("Lucas* . . . focuses on whether a regulation permits *economically viable use* of the property, not whether the property retains some value on paper."); *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015) ("When there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land. Typical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel."); *State ex. rel. AWMS Water Sols., LLC v. Mertz*, 165 N.E.3d 1167, 1181 (Ohio 2020) (finding that potential subletting of the property to a third party "does not rise to the level of an economically beneficial use under *Lucas"); Nekrilov v. City of Jersey City*, 45 F.4th 662, 671 n.3 (3d Cir. 2022) ("The plaintiffs are correct that the ability to sell a property does not always constitute an economically beneficial use."); *Banker's Choice, LLC v. Zoning Bd. of Appeals of Cincinnati*, 170 N.E.3d 923, 930 (Ohio Ct. App. 2021) ("However, an owner's ability to sell an affected property does not constitute an economically beneficial use.").

[4] As this appeal is from a final judgment, "the antecedent denial of summary judgment is reviewable." *Tiger Point Golf & Country Club v. Hipple*, 977 So. 2d 608, 610 (Fla. 1st DCA 2007).

preclusion. *Shands II*, 261 So. 3d at 752. This case was decided under Florida's "old" summary judgment standard. As we explained in *Feldman v. Schocket:*

> Pursuant to the old standard, summary judgment was proper "if there [was] no genuine issue of material fact and if the moving party [was] entitled to a judgment as a matter of law." In accordance with this test, "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stop[ped] the inquiry and preclude[d] summary judgment, so long as the 'slightest doubt' [was] raised."

47 Fla. L. Weekly D1930–31 (Fla. 3d DCA Sept. 21, 2022) (alterations in original) (first quoting *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000); and then quoting Bruce J. Berman & Peter D. Webster, *Berman's Florida Civil Procedure* § 1.510:5 (2020 ed.)).

ANALYSIS

The Takings Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, commands: "[N]or shall private property be taken for public use, without just compensation." Amend. V, U.S. Const. Similarly, the Florida Constitution provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid." Art. X, § 6(a), Fla. Const. As the Supreme Court has explained, "[t]he aim of the Clause is to prevent the 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.'" *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Importantly, the

Clause "does not proscribe the taking of property; it proscribes taking without just compensation." *Florida Dept. of Transp. v. Mallards Cove, LLP*, 159 So. 3d 927, 932 (Fla. 2d DCA 2015) (quoting *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985)); *see also Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (quoting *Discourses on Davila*, in 6 Works of John Adams 280 (C. Adams ed. 1851)) ("[P]roperty must be secured, or liberty cannot exist.").

The Fifth Amendment was historically understood to apply only to "direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Over a century ago, however, the Supreme Court inaugurated the concept of regulatory takings in the case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Mahon*, the Court recognized that the Takings Clause extended to overly burdensome regulations of property. Writing for an 8-1 Court, Justice Oliver Wendell Holmes observed that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

Identifying those regulations that go "too far" remains a thorny issue, but guiding principles emerge from two seminal Supreme Court decisions. In the first decision, *Penn Central*, the Court developed a framework for assessing partial regulatory takings claims. There, the Court articulated a fact-specific, ad hoc inquiry, consisting of the following three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Cent.*, 438 U.S. at 124; *see also Keshbro, Inc. v. City of Miami*, 801

So. 2d 864, 871 n.12 (Fla. 2001) ("Those regulations which fall short of effecting a categorical taking are appropriately analyzed under the ad-hoc factual inquiry outlined in *[Penn Central].")*.

In the second decision, *Lucas*, the Court developed a rule applicable to "total" takings, defined as the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses." *Lucas*, 505 U.S. at 1018; *see also Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731, 731 (2021) (Thomas, J., dissenting from denial of certiorari) (citing Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1849–50 (2017)) ("[I]n more than 1,700 cases over a 25-year period, there were only 27 successful takings claims under *Lucas*—*a* success rate of just 1.6%."). There the Court held that, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019.

Under *Lucas*, the "determinative factor" is whether the regulation effectively eliminates any economic use associated with the property. *Lingle*, 544 U.S. at 539. However, even where regulation deprives a property owner of all economically beneficial use, the government is still permitted to demonstrate that background principles of property and nuisance law support regulation. *Lucas*, 505 U.S. at 1029.

In the aftermath of *Penn Central*, *Lucas*, and their progeny, TDRs have emerged as a popular and effective tool for local governments to promote conservation efforts and urban growth management. Such rights

typically benefit the landowner by allowing for expanded "development beyond the restricted level on [another] piece of land." Ralph A. DeMeo, *Transfer Development Rights*, in II Florida Environmental and Land Use Law ch. 23 (1996).

The significance of TDRs in the regulatory takings matrix has been sharply debated. Some legal experts have opined that TDRs are irrelevant to the takings side of the equation because they do nothing to impact the nature and extent of the property interest taken by the government.[5] Others have espoused the belief that TDRs necessarily mitigate the economic impact of regulation by infusing the property with value; therefore, they should be considered before determining whether the government has effectuated a taking.[6]

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[5] *See* Richard D. Himberger, *Transferable Development Rights*, 43 Advocate 8, 12 (2000) (footnote omitted) ("If government enacts a zoning ordinance requiring a landowner to leave his real estate as open space, that regulation will emasculate all viable economic use in his land. Under the *Lucas* Total Deprivation Rule, such a regulation would constitute a taking of private property requiring payment of just compensation. This conclusion is not altered when a TDR program is added to the mix. The fact that the owner receives part of his just compensation in the form of TDR sales proceeds does not change the fact the taking has occurred."); *see also* William Hadley Littlewood, *Transferable Development Rights, TRPA, and Takings, the Role of TDRs in the Constitutional Takings Analysis*, 30 McGeorge L. Rev. 201, 232 (1998) ("Applying TDRs to the takings side of the Fifth Amendment's protections will prove both unworkable and inequitable."); Samantha Peikoff Adler, *Penn Central 2.0: The Takings Implications of Printing Air Rights*, 2015 Colum. Bus. L. Rev. 1120, 1181 (2015) ("While TDRs have become an important investment option and land use currency, it is questionable whether they will ever be perceived the same as property rights in land.").

[6] *See* Arden H. Rathkopf et al., *Relation to Constitutional Taking Claims—As Factor on Merits of Claim*, in 3 Rathkopf's

The Supreme Court has yet to clarify this conundrum. In a noteworthy concurrence in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), Justice Scalia, joined by Justices O'Connor and Thomas, squarely addressed the issue. Concluding "the relevance of TDRs is limited to the compensation side of the takings analysis, and that taking them into account in determining whether a taking has occurred [would] render much of [the Court's] regulatory takings jurisprudence a nullity," *id.* at 750, the concurrence explained:

> TDRs, of course, have nothing to do with the use or development of the land to which they are (by regulatory decree) "attached." The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop *his* land. The latter is valuable, to be sure, but it is a new right conferred upon the

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The Law of Zoning and Planning § 59:17 (4th ed.) ("[E]conomic value of available TDRs are to be considered in determining whether an owner is provided with a reasonable return on his investment and might possibly result in rejection of such a claim even where economically viable developmental uses of the particular restricted site are prohibited."); Jennifer Scro, *Navigating the Takings Maze: The Use of Transfers of Development Rights in Defending Regulations Against Takings Challenges*, 19 Ocean & Coastal L.J. 219, 238 (2014) ("[T]o maintain TDRs' continuing viability, courts should consider TDRs as a mitigating property right both in the takings analysis itself and for potential post-verdict compensation."); Paul Merwin, *Caught Between Scalia and the Deep Blue Lake: The Takings Clause and Transferable Development Rights Programs*, 83 Minn. L. Rev. 815, 847–48 (1999) (footnote omitted) ("TDR programs avoid the categorical takings rule of *Lucas* by providing landowners with an economic use of property. TDR programs meet the goals of the Takings Clause, and avoid many of the evils that takings law seeks to prevent.").

> landowner in exchange for the taking, rather than a reduction of the taking. In essence, the TDR permits the landowner whose right to use and develop his property has been restricted or extinguished to extract money from others. Just as a cash payment from the government would not relate to whether the regulation "goes too far" (i.e., restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking; and just as a chit or coupon from the government, redeemable by and hence marketable to third parties, would relate not to the question of taking but to the question of compensation; so also the marketable TDR, a peculiar type of chit which enables a third party not to get cash from the government but to use his land in ways the government would otherwise not permit, relates not to taking but to compensation.

Id. at 747 (Scalia, J., concurring in part and concurring in judgment).

More recently, in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), Chief Justice Roberts, writing for the majority, invoked Scalia's concurrence in *Suitum* for the proposition that "once there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation." *Id.* at 364. This is consistent with Justice Thomas's recent reiteration of the *Lucas* principle that "[a] regulation effects a taking . . . categorically whenever [it] . . . leaves *land* 'without economically beneficial or productive options for its *use*.'" *Bridge Aina Le'a*, 141 S. Ct. at

731 (Thomas, J., dissenting from denial of certiorari) (emphasis added) (citations omitted) (quoting *Lucas*, 505 U.S. at 1018).

Against this jurisprudential landscape, we examine the summary judgment record in the instant case. Appellants established that regulation deprived them of any use of the property, other than for beekeeping or personal camping. These do not constitute economically beneficial uses, as "a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). As Justice Scalia observed in his *Suitum* concurrence, any income associated with TDRs does not flow from the cultivation or development of the property in the traditional framework of ownership. Instead, the potential revenue is generated from the non-use of the property.

Consistent with this logic, while "[p]utting TDRs on the taking rather than the just compensation side of the equation . . . is a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our Takings Clause jurisprudence," doing so allows the government to provide some compensation without the constitutional stricture of just compensation. *Suitum*, 520 U.S. at 748–49 (Scalia, J., concurring in part and concurring in judgment).

To reason otherwise would render *Lucas* nugatory. As William Handle Littlewood explained in *Transferable Development Rights, TRPA, and Takings, the Role of TDRs in the Constitutional Takings Analysis:*

> Although many commentators would not be concerned with this outcome, they fail to recognize the underlying rationale of the *Lucas* decision. The underpinning of *Lucas* is

> that regulatory schemes seeking to keep land in its natural state place such a burden on the landowner that even the most compelling state interest will not suffice absent just compensation. Inverse condemnation claims based on the reasoning in *Lucas* will become obsolete if we allow TDRs into the "takings" side of the analysis. This will result because every regulatory scheme concerned with approaching the level of a taking will contain a provision allocating TDRs to the burdened landowners, thus circumventing *Lucas*.

Littlewood, *supra* note 5, at 225 (footnotes omitted).

Further, to the extent that the City invokes the law of the case or res judicata for the proposition that the *Lucas* claim has been previously adjudicated, neither the *Shands I* nor *Shands II* court directly considered the viability of the total as-applied regulatory taking claim under *Lucas*. The first panel effectively folded the entirety of the as-applied challenge into the *Penn Central* rubric. In so doing, the panel viewed *Lucas* as applicable only to "facial" challenges. This conclusion was incomplete and not quite precise.[7] "[A] *per se* taking challenge can be brought as either an as-

[7] This court painted the *Beyer* case with the same broad stroke and recast the landowner's challenge as a *Penn Central* claim. *See Ganson*, 222 So. 3d at 22–23 (Shepherd, J., dissenting) ("Although the Beyers brought a *Lucas*-type challenge alleging the deprivation of all economic use of their land, *Beyer I* went to great lengths to transform the Beyers' categorical challenge into one controlled by the ad hoc, factual inquiry set forth *Penn Central*. . . . Unfortunately, despite the unmistakable parallels between the economic impact in *Lucas* and the economic impact on the Beyers' property, the Beyers' challenge was never considered under *Lucas's* total regulatory takings framework.").

applied or facial claim." *Goodwin v. Walton County Fla.*, No. 3:16-CV-364/MCR/CJK, 2018 WL 11413298, at *6 n.15 (N.D. Fla. Mar. 6, 2018). A per se facial claim, also characterized as a total facial claim, arises where "the mere enactment of a statute constitutes a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). Conversely, a per se as-applied claim rests on the allegation that "the particular impact of government action on a specific piece of property requires the payment of just compensation." *Id.* Indeed, the claim in *Lucas* was an as-applied, rather than a facial, challenge.

Compounding the confusion was the synonymous use by the panel of the words "categorical" and "facial." In this arena, a categorical claim invokes a per se or total regulatory taking. However, as we previously explained, such a taking may take the form of either a facial or an as-applied challenge. The first panel broadly glossed over this distinction and noted that no "facial, categorical" claim remained viable under *Lucas*—a conclusion unnecessary to its holding.

Like the first before it, the second panel viewed the claim through the lens of *Penn Central* and merely determined the valuation summary judgment record was insufficient to support a finding in favor of the City. *See Shands I*, 999 So. 2d at 727 ("On remand, it remains for the trial court to determine whether, given the Shands' economic expectations, the City's denial of the BUD application rises to the level of a compensable as-applied taking under state and federal law."); *Shands II*, 261 So. 3d at 753 ("The trial court therefore properly treated this case as an 'as applied' challenge.").

Thus, neither decision disposed of the *Lucas* as-applied claim.[8]

In accord with the foregoing analysis, we conclude that appellants established overly burdensome government regulation deprived them of "all economically beneficial uses" of their property. *Lucas*, 505 U.S. at 1019. Consequently, they were entitled to an award of partial summary judgment on their per se as-applied *Lucas* claim. We therefore reverse and remand for the trial court to vacate the final judgment, enter partial summary judgment in favor of appellants, and conduct further proceedings consistent with this opinion.

Reversed and remanded.

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[8] *See Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975) ("[A] purely gratuitious [sic] observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple. While such dictum may furnish insight into the philosophical views of the judge or the court, it has no precedential value."); *First Protective Ins. Co. v. Hess*, 81 So. 3d 482, 485 (Fla. 1st DCA 2011) ("We find the relevant language . . . dicta and, therefore, not binding under the facts in this case."); *State ex rel. Biscayne Kennel Club v. Bd. of Bus. Regul. of Dep't of Bus. Regul. of State*, 276 So. 2d 823, 826 (Fla. 1973) ("The statement of the District Court of Appeal in its opinion requiring the allocation of dates to be on the fiscal year basis in the future was not essential to the decision of that court and is without force as precedent.").

APPENDIX E

CIRCUIT COURT OF FLORIDA,
16TH JUDICIAL CIRCUIT, GENERAL
JURISDICTION DIVISION.
MONROE COUNTY

Filed For Record
2021 Sep. 2

No. 2007-CA-99

RODNEY SHANDS, ROBERT SHANDS, KATHRYN EDWARDS, AND THOMAS SHANDS,

Plaintiffs,

v.

CITY OF MARATHON, A MUNICIPALITY CREATED UNDER THE LAWS OF THE STATE OF FLORIDA AND MARATHON CITY COUNCIL,

Defendants.

August 31, 2021

FINAL JUDGMENT

Mark H. Jones, Judge.

THIS CAUSE, having come before the Court on May 24 and 25, 2021 for a bench trial on Plaintiffs' two Count Complaint for federal takings claims in Count I and Florida takings claims in Count II and the Court, having considered the evidence presented, pertinent legal authority, argument of counsel, the Court file, and being otherwise fully advised in the premises hereby finds as follows:

1. This case involves events which unfolded over a period of time in excess of 60 years. The case also encompasses various events in the history of the Shands family, of which all 4 Plaintiffs are members. During the course of the trial, the Court was quite flexible with respect to admitting evidence over Defendants' objections about the Shands family and its members. Ultimately, much of said evidence turned out not to be relevant. However, as stated by the Court during the trial and at the close of the case, the Court believed that it was important to allow the Plaintiffs to tell their story which featured the hopes and dreams and struggles and triumphs of a strong family of great character. Ultimately, of course, the case had to be decided by an objective application of the relevant facts as the Court found them to be to the pertinent law.

2. The Plaintiffs are four siblings who own an offshore island located in the Defendant, CITY OF MARATHON ("City"). 5-24-21, Trial Trans. at 36-38, 108.

3. The Plaintiffs are all residents of Mississippi. 5-24-21, Trial Trans. at 36.

4. The island is approximately 7.91 acres and is located on the northside of US , north of the east end of the airport, and north of a subdivision known as Sierra Estates. 5-25-21, Trial Trans. at 26-27. It is within approximately 300 yards to a quarter mile from Vaca Key. *Id.*

5. The island contains high quality hammock near the center with a 15- to 20-foot-wide mangrove fringe and some rocky shoreline. 5-25-21, Trial Trans. at 28-29; Pltfs.' Ex. 12.

6. The only access to the island is by boat, it is vacant and undeveloped, and it does not have any utilities available such as electricity, potable water, wastewater, or solid waste removal. 5-24-21, Trial Trans. at 160, 174-175, 179; Pltfs.' Ex. 12.

7. The City is a municipality created under the laws of the State of Florida and is located in Monroe County, Florida. 5-25-21, Trial Trans. at 27. It was incorporated in 1999. *Id.*

8. On December 31, 1956, R.E. Shands, the Plaintiffs' father, ("Father"), purchased a 7.91 acre off-shore island then known as "Date Palm Key" or "Little Fat Deer Key," for $20,500. Pltfs.' Exs. 5, 6; 5-24-21, Trial Trans at 56. It was his intention to build a residential vacation complex for his family.

9. Following the purchase, the Father retained a surveyor to prepare a sketch of the bay bottom surrounding the island for the purpose of purchasing the bay bottom. 5-24-21, Trial Trans at 60-61; Pltfs.' Ex. 30.

10. In 1959, the Father purchased 7.0 acres of the bay bottom surrounding the island for $1,400. 5-24-21, Trial Trans at 65-67; Pltfs.' Ex. 8. The two parcels are hereinafter collectively referred to as the "Property."

11. The Father then had a surveyor prepare a sketch of a proposed roadway from the island over the bay bottom to Vaca Key. 5-24-21, Trial Trans at 67; Pltfs.' Ex. 32.

12. No evidence exists as to the amount paid by the Father (if any) to the surveyor. *See* 5-24-21, Trial Trans at 60-68.

13. During the 6 years after acquiring the property, R.E. Shands engaged in research and planning and

made infrequent trips to the Property in pursuit of his dream to connect the Property to the main island with a road or causeway and construct his family's residential vacation complex. Unfortunately, in 1963 he passed away at the age of 56 and could no longer plan nor act upon his dream. 5-24-21, Trial Trans at 71; Pltfs.' Ex. 9.

14. Following the death of the Father in 1963, the Property passed to the Plaintiffs' mother, Margaret W. Shands ("Mother"), via inheritance. 5-24-21, Trial Trans at 39.

15. During her ownership of the Property, the Mother did not do anything to develop the Property. 5-24-21, Trial Trans at 137-138.

16. In 1985, the Mother conveyed the Property to the Plaintiffs for "love and affection [of her] children and other good and valuable consideration." 5-24-21, Trial Trans at 38; Pitfs.' Ex. 10. The Plaintiffs did not pay any money to the Mother for the Property. 5-24-21, Trial Trans at 110, 135.

17. The Court finds that from 1963 through 2004, the Plaintiffs and their predecessor, in interest did not take any investment backed steps to develop the property although they did not dispose of the property nor forget about their father's dream. No evidence was presented that the Mother or the Plaintiffs took any action towards the development of the Property. 5-24-21, Trial Trans at 137-138.

18. Beginning in 1963, Plaintiff Rodney Shands visited the Property by boat every few years to check on the island, confirm that it was unoccupied for purposes of adverse possession, and consider the development possibilities for the Property. 5-24-21, Trial Trans at 73, 76, 78-79, 80-81, 83-84. On some of

the visits he was accompanied by one or more of his siblings. *Id.* None of the Plaintiffs ever spent the night on the island. 5-24-21, Trial Trans at 146-147.

19. Although these trips involved visits to the Property, the trips were often multi-purpose and included vacation-type activities such as golfing. 5-24-21, Trial Trans at 83-84.

20. While Rodney Shands visited the island every few years during this period, he never spoke to anyone at Monroe County or the City regarding the applicable land development regulations, never obtained or reviewed any of the land development regulations, never filed any application to develop the Property, and did not retain the services of any contractor or architect to pursue development of the Property. He did however, personally prepare design sketches based on research of other properties within the Florida Keys. 5-24-21, Trial Trans. at 139-141, 142, 148.

21. According to Rodney Shands, he contacted a local contractor in 2004 to have a dock constructed on the Property to improve access and as a first step to development 5-24-21, Trial Trans. at 116-117. The contractor informed him that he would need a permit from the City to build a dock and that local regulations likely prohibited both the building of the dock and any development on the Property. *Id.*

22. Rodney Shands then contacted the City in 2004 regarding the construction of a dock and was informed that such a permit could not be issued by the City. 5-24-21, Trial Trans. at 117-118.

23. Prior to 1986, the Property was within the jurisdiction of Monroe County and was zoned as "general use," which would have allowed, among other

things, I residential unit per acre. 5-25-21, Trial Trans. at 38-39.

24. In 1979, the State of Florida designated most of Monroe County as an area of critical state concern. 5-25-21, Trial Trans. at 36-37.[1] The purpose of the designation was to, among other things, establish a land use management system that protects the natural environment of the Florida Keys including "shoreline and marine resources, including mangroves, coral reef formations, seagrass beds, wetlands, fish and wildlife, and their habitat" and "upland resources, tropical biological communities, freshwater wetlands, native tropical vegetation (for example, hardwood hammocks and pinelands), dune ridges and beaches, wildlife, and their habitat." §§ 380.0552(2), (7), Fla. Stat.

25. The designation resulted in additional regulatory oversight by the State of Florida such that any "enactment, amendment, or rescission" of a "land development regulation or element of a local comprehensive plan in the Florida Keys Area" "becomes effective only upon approval by the state land planning agency." § 380.0552(9), Fla. Stat.

26. This designation also resulted in the creation and adoption of the 1986 Monroe County Comprehensive Plan, which applied to all properties within unincorpo-

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[1] "The following area is hereby designated as the Florida Keys Area of Critical State Concern: All lands in Monroe County, except: (1) That portion of Monroe County included within the designated exterior boundaries of the Everglades National Park and areas north of said Park; (2) All lands more than 250 feet seaward of the mean high water line owned by local, state, or federal governments; (3) Federal properties; and (4) Area within the incorporated boundaries of the City of Key West." *See* Rule 28-29.002, Fla. Admin. Code. The City is included within the area designated as the Florida Keys Area of Critical State Concern.

rated Monroe County. 5-25-21, Trial Trans. at 36-37, 40-41, 42-43.

27. The process leading up to the adoption of the 1986 Comprehensive Plan involved almost a hundred public hearings, meetings, and workshops. 5-25-21, Trial Trans. at 41-42, 45. Each one of these public hearings, meetings, and workshops were open to the public and was publicly noticed in a newspaper of daily circulation within Monroe County.

28. George Garrett, the current City Manager, was employed with Monroe County beginning 1985 and was previously employed in Monroe County by the Florida Department of Natural Resources. 5-25-21, Trial Trans. at 45-47. He testified that the public hearings, meetings, and workshops were often filled to capacity. 5-25-21, Trial Trans. at 45-47.

29. The Shands Family was not given individualized notice nor was notice provided to other individual landowners because it was not required by statute and would have involved sending notices to the owners of more than 95,000 individual panels. 5-25-21, Trial Trans. at 45.

30. The 1986 Comprehensive Plan was first adopted by the Planning Commission, then adopted by the County Commission, and then presented to the Department of Community Affairs for approval 5-25-21, Trial Trans. at 47-48.

31. Both during and after the adoption of the 1986 Comprehensive Plan affected property owners could appear and speak at the hearings, meetings, and workshops to challenge the designation of their specific properties and also appeal the designation. 5-25-21, Trial Trans. at 46-47, 48-49.

32. Following the adoption of the 1986 Comprehensive Plan, the Property, like all of offshore islands in Monroe County, was designated as "off-shore island." 5-25-21, Trial Trans. at 60-61, 62, 63.

33. Under the "off-shore island" designation, development was limited to single family residential use with one dwelling unit per 10 acres, bee keeping, and camping and recreation for personal use. 5-25-21, Trial Trans. at 60-61,62, 63; Pltfs.' Ex. 12.

34. Neither the Plaintiffs nor their representatives participated in any of the hearings or workshops and did not seek relief from or appeal the designation.

35. The adoption of the 1986 Comprehensive Plan and resulting change in the applicable development regulation resulted in a reduction of the Property's assessed value on Monroe County's tax roll. In 1987, the Property's assessed value was $24,595. Defs, Ex. 2. The next year (1988), the Property's assessed value dropped to $1,491. *Id.* The annual property taxes for the Property went from $218.26 in 1987 to $13.97. *Id.* The annual proper taxes for the Property remained near $13.97 in the succeeding years. Def's. Exs. 3, 4, 5.

36. Although Monroe County adopted new comprehensive plans in 1987 and 1997, the regulations applicable to the Property did not change in any meaningful manner and residential development remained limited to 1 residential dwelling unit per 10 acres. 5-35-21, Trial Trans. at 60-61, 62, 63.

37. After the City was incorporated in 1999, the Property became part of the City, and the City adopted the County's Comprehensive Plan and land development regulations as its own. 5-25-21, Trial Trans. at 59-60.

38. As a result, the Property remained zoned "offshore island" with a residential density of 1 unit per 10 acres. 5-25-21, Trial Trans. at 60-61, 62, 63.

39. In January 2006, the Shands filed an Application for Determination of Beneficial Use with the City. Pltfs.' Ex. 15; 5-24-21, Trial Trans. at 124-125.

40. The beneficial use determination ("BUD") is a process by which the City evaluates the allegation that no beneficial use remains and can provide relief from the regulations by granting additional development potential, providing just compensation or if it so determines, extending a purchase offer for the property. Marathon, Fla., Code § 202.99(b).

41. After an application is filed, the property is afforded a quasi-judicial, evidentiary hearing before a hearing officer, who issues a non-binding recommendation on the application, Marathon, Fla., Code §§ 102.101, .103.

42. The recommendation is then presented to the City Commission, which has the final authority to grant, deny, or modify the recommendation of the hearing officer. Marathon, Fla., Code § 102-104.

43. The hearing officer issued his recommendation on the Plaintiffs' BUD application on December 11, 2006, recommending as follows:

> I recommend that the City of Marathon grant a building permit for a single family home on the property, said application to exempt from the ROGO point requirement. If State or City regulations cannot be varied to allow the issuance of the permit, and the property is deemed environmentally desirable to the City, I recommend that the property be

> purchased for the appraised value of $3,000,000.00 (or some other mutually agreed upon price), which is specifically found to adequately compensate the Applicant for any reasonable investment expectations at the time of the purchase of the property.

Pltfs.' Ex. 15 at 4.

44. On February 27, 2007, the City Commission rejected the hearing officer's December 11, 2006, recommendation and did not offer nor provide any compensation to the Shands. Pltfs.' Ex. 16.

45. In 1993, Monroe County adopted its Rate of Growth Ordinance ("ROGO"), which created a competitive permit allocation system where those applications with the highest scores were awarded building permits to construct residential dwelling units. 5-25-21, Trial Trans. at 49-52, 54-55. The competitive point system guided development towards areas with infrastructure and away from environmentally sensitive areas such as habitat for threatened or endangered species. *Id.*

46. The ROGO system was a response to an agreement between Monroe County and the State regarding hurricane evacuation times. 5-25-21, Trial Trans. at 50-52. The maximum number of dwelling units in Monroe County was capped at the maximum number of units the state estimated could be evacuated within a 24 hour period upon the approach of a major hurricane. *Id.*

47. Under the agreement, Monroe County was permitted approximately 35,000 additional dwelling units. 5-25-21, Trial Trans. at 50-22.

48. The County elected to use a competitive application process base on a point system to award the allocations. 5-25-21, Trial Trans. at 54-55.

49. Upon incorporation, the City created a point system almost identical to ROGO to award its allocation of buildable dwelling units. 5-25-21, Trial Trans. at 58-59, 71-72. The City's system is called the Building Permit Allocation System ("BPAS") and in 2006 and 2007 was generally similar to the ROGO system. *Id.*

50. When a property owner applies for an allocation and corresponding building permit, the property would be scored based on a number of factors. 5-25-21, Trial Trans. at 56-59. For example, scarified land is awarded more points than environmentally sensitive land. 5-25-21, Trial Trans. at 55-56.

51. Additional points can be obtained through other means including the use of cisterns and solar panels and the dedication of environmentally sensitive land to the City. 5-25-21, Trial Trans. at 55.

52. Points can also be purchased from other property owners. 5-25-21, Trial Trans. at 55-56, 58-59. This could be accomplished by purchasing the land and dedicating it to the City or by purchasing the development rights associated with the property from the other property owner. 5-25-21, Trial Trans. at 80-81, 84085, 86-87, 94. Under the latter scenario, the selling property owner remains the fee simple owner of the property. *Id.*

53. The more points an applicant has, the higher the applicant is placed on the list for being awarded an allocation and building permit for construction of a new residential dwelling unit. 5-25-21, Trial Trans. at 91-93.

54. The evidence indicates more than 50 lot dedications to the City for BPAS points in 2006 and 2007. 5-25-21, Trial Trans. at 78-81.92-93; Def.'s Ex. 6.

55. Following the passage of the 1986 Comprehensive Plan and through today, the Property was not suitable for residential development because it lacked sufficient acreage. 5-25-21, Trial Trans. at 60-61, 62, 63; Pltfs.' Ex. 12. The "off-shore" island designation limited residential development to 1 dwelling unit per 10 acres, but the Property is only 7.91 acres, *Id.*

56. However, in 2007, beekeeping as well as camping and recreational use were permitted uses as a matter of right. 5-25-21, Trial Trans. at 60-61, 62, 63; Pltfs.' Ex. 12.

57. In addition, the Property would also be worth 12 points in the City's BPAS system and .6 transferable development rights ("TDRs"). Pltfs.' Ex. 12; 5-25-21, Trial Trans. at 89-92.

58. The Property's 12 BPAS Point and .6 TDRs could be sold and transferred to another property for use in developing the other property. 5-25-21, Trial Trans. at 89-92.

59. The City's real estate appraiser, Trent Marr, testified that the Property had market value in 2007 when sold for personal use or for use as ROGO or BPAS points. 5-25-21, Trial Trans. at 120-137.

60. In forming his opinion, Marr utilized the comparable sales approach where he identified sales of similar properties during the relevant time period to ascertain the fair "market value" of the Property. 5-25-21, Trial Trans. at 123-124.

61. Mart identified six sales of properties between September 2005 and February 2008 (with only one

sale coming after 2007) of properties sold for the purposes of dedicating them to the City to obtain BPAS points. 5-25-21, Trial Trans. at 127-130. Based on these sales, Mart concluded that the market value of property in the City in 2007 on a per BPAS point basis was $12,500 per point. 5-25-21, Trial Trans. at 129-130. Based on this analysis, Marr concluded that the fair market value of the Property in 2007 was $147,000 when sold for use as BPAS points. 5-25-21, Trial Trans. at 130.

62. Marr confirmed the comparison properties were sold for BPAS points based on the information left in the MLS system and because five of the properties had been dedicated to the City. 5-25-21, Trial Trans. at 127, 130.

63. Marr prepared a similar analysis of offshore island sold for personal use such as camping or recreation. 5-25-21, Trial Trans. at 130-134. Marr identified six offshore islands sold in Monroe County between November 2001 and May 2005. 5-25-21, Trial Trans. at 131-133. Based on these comparable sales of offshore islands, Marr opined that the market value of the Property in 2007 when sold was between $46,000 to $60,000. 5-25-21, Trial Trans. at 131-130.

64. The Court also considered the testimony of Robert Gallaher, the expert appraiser retained by the Plaintiffs, but rejects it for several reasons. First, Gallaher opined on the value of the Property under the hypothetical scenario where a single-family residence could be built on the Property. 5-24-21, Trial Trans. at 156-157. This opinion is not relevant for determining whether the actual remaining value of the Property was reasonable.

65. In this case, Marr's opinion provides the relevant figure. Moreover, in analyzing the value of the Property when sold for personal use under the current conditions, Gallaher's opinion aligned with Marr's estimate. *Id.* at 174.

66. Second, the Court also finds the methodology and assumptions utilized by Gallaher to be less persuasive than the methodology utilized by Marr. Marr used the comparable sales approach wherein he simply identified sales of similar, undeveloped offshore islands that occurred around the time of the alleged taking to determine value of the Property. 5-25-21, Trial Trans at 123.

67. Gallaher used the extraction method whereby he identified the sales of developed offshore islands and then attempted to extract the value of the improvements to determine the value of the Property with the hypothetical right to build a home. 5-24-21, Trial Trans. at 156-158. The Court finds that several of the assumptions used by Gallaher make his opinion unreliable including (1) his use of developed mainland lots to come up with the price per square foot for purposes of extraction, id. at 189-190, (2) his reliance upon contracts for sales that never closed, *id.* at 181, and (3) his use of sales of developed islands that included either a bridge or a dock lot. *Id.* at 182-184. Since the Property has neither a bridge to it nor a dock lot, islands that have such access points are not suitable comparators. For all these reasons, the Court rejects Gallaher's testimony as speculative and unreliable.

68. "Inverse condemnation is a cause of action by a property owner to recover the value of property that has been de facto taken by an agency having the power of eminent domain where no formal exercise of the

power has been undertaken." *Osceola County v. Best Diversified, Inc.*, 936 So. 2d 55, 59-60 (Fla. 5th DCA 2006). Whether a plaintiff has established a taking "is a question for the court in an inverse condemnation case." *Fla. Dep't of Agric. & Consumer Servs. v. Mendez*, 126 So. 3d 367, 375 (Fla. 4th DCA 2013).

69. In a series of opinions, the Third District has articulated the proper standard applicable to taking claims like the one asserted by the Plaintiffs. "In an as-applied claim, the landowner challenges the regulation in the context of a concrete controversy specifically regarding the impact of the regulation on a particular parcel of property." *Collins v. Monroe Cnty.*, 999 So.2d 709, 713 (Fla. 3d DCA 2008). The standard for evaluating as-applied claims originates from the Supreme Court's decision in *Penn Central*.

70. "In *Penn Central*, the Court identified three factors to apply when engaging in an analysis of whether a regulation constitutes a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Leon Cnty. v. Gluesenkamp*, 873 So.2d 460, 467 (Fla. 1st DCA 2004); *see Ocean Palm Golf Club P'ship v. City of Flagler Beach*, 139 So. 3d 463, 473 (Fla. 4th DCA 2014). Applying these factors, the Court finds no taking has occurred.

71. Although "[t]he focus of [the first] factor is on the change in the fair market value of the subject property caused by the regulatory imposition," it "is not the sole indicia of the economic impact of the regulation. Rather, [courts have] indicated that, in assessing the severity of the economic impact of the regulations, 'the owner's opportunity to recoup its

investment or better, subject to the regulation, cannot be ignored,' thereby requiring the court to compare 'the relationship of the owner's basis or investment' in the property before the alleged taking to the fair market value of the property after the alleged taking." *Walcek v. United States*, 49 Fed. Cl. 248, 258, 266 (2001), aff'd, 303 F.3d 1349 (Fed. Cir. 2002) (quoting *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed.Cir.1986), cert. denied, 479 U.S. 1053, 107 S.Ct, 926, 93 L.Ed.2d 978 (1987)).

72. "[I]n determining an owner's basis or investment in property, it appears reasonable and logical to include not only the initial purchase price, but also other capital expenditures that the owners may have incurred with respect to their property." *Walcek*, 49 Fed Cl. at 266. However, "an adjustment for inflation is not ordinarily included in calculating an individual's 'investment' in property, nor most certainly is it reflected in the 'basis' employed by a taxpayer in calculating gain for income tax purposes." *Id.*

73. The Court finds that the first factor weighs in favor of finding that no taking occurred since the Plaintiffs can recoup the entirety of their basis or investment in the Property. As a threshold matter, the evidence demonstrated that the Plaintiffs' basis or investment in the Property was zero given that the Property was gifted to them in 1984 and they engaged in no capital projects during their ownership.

74. Even taking into account the Father's initial investment, the evidence confirms that the Plaintiffs remain able to recoup the investment and more. The only evidence presented at trial regarding the Father's basis was the initial purchase price of the Property of $21,900. The evidence at trial also demonstrates that the Property could be sold for use as BPAS points for

$147,000, a sixfold increase on the initial investment. Given that the Plaintiffs were able to recoup the investment in the Property, the first factor weighs in favor of finding that no taking occurred. *See Collins*, 118 So. 3d at 876 n7 (finding that no taking occurred and noting that "the evidence presented at trial showed relatively passive landowners who took minimal action towards the improvement or development of their respective properties and invested little into the development *other than their initial purchase costs*." (emphasis added)).

75. The second *Penn Central* factor also weights in favor of the City. "The existence or extent of the [plaintiffs'] investment-backed expectations to develop [a property] is a fact-intensive question." *Beyer*, 197 So. 3d at 565. Courts looks to a variety of factors in analyzing this element including the property owner's effort to develop, the length of ownership, and history of development regulations. *Id.; see Shands v. City of Marathon*, 999 So. 2d 718, 725, 723 (Fla. 3d DCA 2008).

76. In the first appeal in this case, the Third District noted the Plaintiffs' lack of reasonable investment-backed expectations. As to this factor, the Third District stated:

> Although RE. Shands bought the property in 1956 with the idea to eventually build a family home on it, the Shands family's "investment-backed expectations" were minimal at best. The Shands had no specific development plan and only recently sought a dock permit. To be sure, they had not pursued any development of the property since it was purchased in 1956. "A subjective expectation that land can be developed is no more than an expectancy and does not translate into a

> vested right to develop the property.... If the landowners did not start development prior to the enactment of these land regulations, they acted at their own peril in relying on the absence of zoning ordinances." Indeed, the Shands inherited the property, and have not shown any substantial personal financial investment in Shands Key. Although this is not a test for the legitimacy of a takings claim, it does emphasize the Shands' difficulty in demonstrating that they had any reasonable expectation of selling Shands Key for residential development, or that they have suffered any substantial loss as a result of the regulations.

Shands, 999 So. 2d at 724-25 (internal citation omitted).

77. At trial, the evidence confirmed the Plaintiffs' lack of investment-backed expectations. The Plaintiffs were unable to present evidence that they took any meaningful, investment backed steps to develop the Property in the decades they or their immediate predecessor in interest owned the Property. Indeed, since the Property was purchased by their late father in the 1950s, neither the Plaintiffs nor their Mother (their predecessor in ownership) pursued any development of the Property until they allegedly applied for a dock permit in the early 2000s. The Court finds the Plaintiffs cannot establish any investment-backed expectations.

78. Based on the foregoing, the Court finds that the Plaintiffs' lack of investment-backed expectations combined with their ability to recoup significantly more than any initial investment establishes that no

taking has occurred, and that judgment should be entered in favor of the City.

79. A finding that no taking occurred is in accordance with cases from the Third District that addressed taking claims under similar circumstances where the property owners – like the Plaintiffs here – have been longtime owners of property in the Florida Keys yet failed to pursue any development opportunities over decades of ownership. First, in *Collins*, the Third District addressed claims for inverse condemnation brought by several property owners in the Florida Keys. 118 So. 3d at 874. After the trial court found in favor of the County as to all but one of the plaintiffs, the plaintiffs appealed. *Id.* In affirming entry of judgment in favor of the County, the Third District explained:

> While the [l]andowners own properties on distinct areas of the Florida Keys, there appears to be one underlying commonality among them: with the exception of [the prevailing property owner], the [l]andowners did not take meaningful steps toward the development of their respective properties, or seek building permits, during their sometimes decades-long possession of their properties.

Id. at 876.

80. The Third District continued:

> the evidence presented at trial showed relatively passive landowners who took minimal action towards the improvement or development of their respective properties and invested little into the development other than their initial purchase costs. Under these facts, the trial co correctly found in favor of the

> appellees under the reasonable investment-backed expectation prong of *Penn Central*.

Id. at 876 n7.

81. Then, in *Beyer*, the Third District addressed an as-applied taking claim involving – just like the property here – an undeveloped offshore island. 197 So. 3d 563. There, the plaintiffs purchased an undeveloped nine (9) acre offshore island, Bamboo Key, in 1970. *Id.* at 564-565. At the time of purchase, the property was undeveloped, was under the jurisdiction of Monroe County, and was zoned for General Use, which permitted one single-family home per acre. *Id.* In 1986, Monroe County adopted new zoning regulations that altered Bamboo Key's zoning status from General Use to Conservation Offshore Island and placed it in the Future Land Use category, which limited density to one dwelling unit per ten acres. *Id.* In 1996, Monroe County adopted a new comprehensive plan identifying Bamboo Key as a bird rookery and prohibiting any development. *Id*

82. In 1997, the *Beyer* plaintiffs submitted their first BUD application. *Id.* at 565. After the City incorporated in 1999 and Bamboo Key came under its jurisdiction, the City asked the plaintiffs to submit a new BUD application. *Id.* A BUD hearing was ultimately heard before a special master on July 13, 2005, and the special master issued an order recommending denial finding, among other things, that the assignment of sixteen ROGO points constituted a reasonable economic use of the property. *Id.* Based on his recommendation, the City passed a resolution denying the petition later that month. *Id.*

83. The Third District affirmed the trial court's finding that no as-applied taking occurred because the

plaintiffs failed to produce any evidence that the change in the land use regulations deprived them of the reasonable economic use of their property or frustrated a reasonable investment-backed expectation held at the time of purchase. *Id.* at 565 ("The record before us is devoid of fact evidence that the Beyers had any specific plan for developing the property, dating from the time of purchase in 1970, up to the present."), 566. It further explained:

> the record [wa]s devoid of evidence that - not only at the time of purchase but in all the intervening years - the [plaintiffs] pursued any plans to improve or develop the property. They provided no evidence of investment-backed expectations at or since the time the property was purchased, nor demonstrated any reasonable expectation of selling the property for development.

Id. at 567.

84. Additionally, the Third District found that "[t]he award of ROGO points, coupled with the current recreational uses allowed on the property, reasonably meets the [plaintiffs'] economic expectations under these facts." *Id.* at 566-567.

85. In both *Collins* and *Beyer.* the Third District cited to its prior decision in *Monroe Cnty. v. Ambrose* for the following proposition:

> If the [l]andowners did not start development prior to the enactment of these land regulations, they acted at their own peril in relying on the absence of zoning ordinances.... A subjective expectation that land can be developed is no more than an expectancy and

> does not translate into a vested right to develop the property.

Beyer, 197 So. 3d at 565-566 (quoting *Monroe Cnty. v. Ambrose*, 866 So. 2d 707, 711 (Fla. 3d DCA 2003) (internal citations omitted); *Collins I*, 999 So. 2d at 718 n. 16 (quoting *Ambrose* and explaining that "Monroe County was designated an area of critical state concern in 1979, but the first land use regulations were not enacted until 1986. If the Landowners did not start development prior to the enactment of these land regulations, they acted at their own peril in relying on the absence of zoning ordinances.").

86. The Court finds that the evidence at trial in this case is indistinguishable from *Collins* and *Beyers.* Just like the plaintiffs in those cases, the Plaintiffs were unable to present evidence that they took any meaningful, *investment backed* steps to develop the Property *in the decades* they or their immediate predecessors in interest owned the Property. Since the Property was purchased by their late father in the 1950s, neither the Plaintiffs nor their Mother (their predecessor in ownership) pursued any development opportunities for the Property until they allegedly applied for a dock permit in the early 2000s. Thus, just like the plaintiffs in *Collins* and *Beyers* who similarly failed to seek to develop the properties in the face of ever increasing regulations, the Plaintiffs cannot establish any reasonable investment backed expectations. *See Shands I*, 999 So. 2d at 724 ("Although R.E. Shands bought the property in 1956 with the idea to eventually build a family home on it, the Shands family's 'investment-backed expectations' were minimal at best. The Shands had no specific development plan and only recently sought a dock permit. To be sure,

they had not pursued any development of the property since it was purchased in 1956.").

87. In addition just like the plaintiff in *Beyer*, the evidence at trial established that the Plaintiffs' property had been left with reasonable value and uses. According to the City's expert appraiser, Marr, the Property retained significant value after the alleged taking either for sale for personal recreational use (between $46,000 to $60,000) or through the sale of the BPAS points ($147,000). *See Beyer*, 197 So. 3d at 566-567 (finding that "[t]he award of ROGO points [worth $150,000], coupled with the current recreational uses allowed on the property, reasonably meets the [plaintiffs'] economic expectations under these facts.").

88. The Court finds the comparison to *Beyer* particularly apt given the similarities of the facts. *Beyer* involved a 9-acre undeveloped offshore island located in the City that had been owned by the Plaintiffs since 1970. 197 So. 3d at 564. During their decades of ownership, the Beyers took no meaningful steps to develop the island. *Id.* Because of its size, the island was assigned 16 ROGO points, which were valued at $150,000, $16,66.67 per acre or $9,375 per point. *Id.* at 565. Under these facts, the Third District found no taking. This case involves a 7.91 acre undeveloped offshore island also located in this City and that has been owned by the same family since the 1950s. Just as with the Beyers, the Plaintiffs and their immediate predecessor in interest took no meaningful steps to develop the Property in their decades of ownership. The City assigned the Property 12 BPAS points, which were valued at $147,000, $18,584 per acre, or $12,500 per point. The Court finds *Beyer* and this case indistinguishable and, just as in *Beyers*, finds no taking occurred.

89. The lack of reasonable investment-backed expectations here as well as is in *Collins* and *Beyers* is made all the more evident when compared to the conduct in *Galleon Bay Corp. v. Board of County Commissioners of Monroe County.*, 105 So. 3d 555 (Fla. 3d DCA 2012), another Third District case addressing a similar taking claim involving undeveloped property in the Florida Keys, *Galleon Bay* involved a landowner who expended hundreds of thousands of dollars, over many years, pursuing multiple efforts to improve and develop the property. *Id.* at 567. Under these facts, the Third District found the trial court erred in its determination that Galleon had not established a taking. *Id.* at 569. The evidence in the instant case at trial demonstrated that the Plaintiffs were not able to establish reasonable investment-backed expectations similar to those at issue in *Galleon* Bay. The Plaintiffs failed to present any evidence of actual dollar amounts expended toward development of the Property. *See* 5-24-21, Trial Trans. at 60-68.

90. Rodney Shands' periodic trips to the Property do not alter the analysis. Although Rodney Shands visited the Property multiple times between 1972 and 2004 and thought about future plans for developing the Property which included making notes and sketching drawings, the Court finds these visits and very preliminary ideas do not create reasonable investment backed expectations and do not constitute legally cognizable steps to develop the Property. Although the Plaintiff Rodney Shands would walk the Property to theorize about the best place for development, neither he nor any of the other Plaintiffs took any of the actual steps necessary to commence with development such as filing an application for development or retaining the services of contractor or architect. Without some monetary investment in the

steps required to develop the Property, the Plaintiffs cannot establish reasonable investment backed expectations.

91. The Plaintiffs' argument regarding lack of knowledge of Monroe County's adoption of the 1986 Comprehensive Plan and change of the applicable regulation is also without merit. City Manager George Garrett testified regarding steps Monroe County took to advertise the 1986 Comprehensive Plan prior to adoption including – as required by state law – public notice provided in a newspaper of daily circulation within Monroe County. 5-25-21, Trial Trans. at 41-42, 45. Moreover, Plaintiff Rodney Shands' lack of knowledge is not legally significant. *Gusow v. State* 6 So.3d 699, 705 (Fla. 4th DCA 2009) ("Ignorance of the law is no excuse. Although no one can know all the law, all persons are charged with constructive knowledge of the law."); *Bee's Auto Inc. v City of Clermont*, 927 F. Supp. 2d 1318, 1328 (M.D. Fla. 2013) (same). In this case, Rodney Shands, an attorney licensed in the state of Mississippi, admitted he never read Monroe County or the City's land developments in the almost two decades he and his sibling owned the Property before first contacting the City in 2004. 5-24-21, Trial Trans. at 142-143; *see* 5-24-21, Trial Trans. at 97.

92. The Plaintiffs have referred to *Palazzolo v. Rode Island*, 533 U.S. 606, 620 (2001), as supporting their claim and supporting the proposition that the multiple transfers of ownership (from the Father to the Mother to the Plaintiffs) should not impact their claim. *Palazzolo* does not stand for this proposition or support their claim. There, the plaintiff and his business associates, operating under the name Shore Gardens, Inc. (SGI), purchased three undeveloped parcels on the Rhode Island coast in 1959 which consisted largely of

wetlands. The plaintiff eventually became sole shareholder of SGI, and began efforts to develop the land by submitting several unsuccessful applications to the town in the 1960s. No further attempts to develop the property were made for over a decade. *Id.* at 614.

93. In 1971, Rhode Island enacted legislation creating the Coastal Resources Management Council, charged with protecting the state's coastal properties. *Id.* at 614. Regulations promulgated by the council protected coastal salt marshes as "coastal wetlands," on which construction was severely limited. *Id.* Then, in 1978, SGI's corporate charter was revoked for failure to pay corporate income taxes; and title to the property passed, by operation of state law, to the plaintiff as the corporation's sole shareholder. *Id.* In 1983, the plaintiff again attempted to develop the land, submitting several permits, all of which were rejected. *Id.* at 614-615. The plaintiff filed suit in state court for inverse condemnation. *Id.* at 615.

94. On appeal, the Supreme Court addressed the following issues: (1) whether the claim was ripe, *id.* at 618-626, (2) whether a "purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking," *id.* at 626, 626-630, and (3) whether the facts supported either a *Lucas* or *Penn Central* taking. at 630-632.

95. As to the second issue, the Supreme Court held that an owner who acquires title to property after the allegedly confiscatory regulation is passed is not subject to a "blanket rule" that always strips that owner of a potential taking claim. *Id.* at 628 ("A challenge to a land use regulation, by contrast, does not mature until ripeness requirements have been

satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.").

96. As to whether a taking had occurred, the Supreme Court affirmed dismissal of the *Lucas* style taking because it was undisputed that his parcel retained significant development value. *Id.* at 630-632. The Supreme Court remanded for consideration of the *Penn Central* factors. *Id.*

97. The rulings from *Palazzolo* simply have no application to the current case. The City is not contending the Plaintiffs' claim is unripe or that some post-1986 Comprehensive Plan transfer of the Property negates the claim. Instead, the City is asserting that, for purposes of the reasonable investment-backed expectations analysis, the relevant consideration is the investment-backed expectations of *these* Plaintiffs. The City submits that the conduct of a predecessor interest – even one that is relative – has little relevance to this analysis given that almost 70 years have passed, and two transfers of ownership have occurred.

98. Ultimately, the Court finds the facts of this case to be materially similar to those at issue in *Collins* and *Beyers* and accordingly, the legal precedent established in those cases controls the outcome in this case. Therefore, the Court finds in favor of the City as to all claims asserted in the Complaint, concludes that no taking has occurred, and that judgment should be entered in favor of the City.

IT IS ADJUDGED that the Plaintiffs, RODNEY SHANDS, ROBERT SHANDS, JR., KATHRYN EDWARDS, and THOMAS SHANDS, take nothing by this action and that Defendant, CITY OF MARATHON, shall go hence without day. The Court reserves jurisdiction to determine any timely filed motions for costs and fees.

DONE AND ORDERED in Key West, Monroe County, Florida on this 31st day of August 2021.

/s/ Mark H. Jones
MARK H. JONES
CIRCUIT COURT JUDGE

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APPENDIX F

CIRCUIT COURT OF FLORIDA,
16TH JUDICIAL CIRCUIT.
MONROE COUNTY

Filed For Record
2020 Sep. 28

No. 2007-CA-99

RODNEY SHANDS, *et al*,

v.

CITY OF MARATHON, *et al.*

September 16, 2020

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

MARK H. JONES, Judge.

THIS CAUSE, having come before the Court on July 29, 2020 upon the Plaintiffs' Motion for Partial Summary Judgment and the Court, having considered said motion and supporting memorandum, the Defendant's response in opposition, the summary judgment evidence, pertinent legal authority, argument of counsel, the Court file, and being otherwise fully advised in the premises, hereby finds as follows:

1. The Plaintiffs claim that it has been established as an undisputed material fact that they have been denied all or substantially all economically beneficial or productive use of their property. Accordingly, the Plaintiffs argue that the Court should rule as a matter of law that there has been a per se categorial taking of

their property as set forth in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) for which the Defendant, City of Marathon, is liable in an amount of compensation to be determined by a jury.

2. The Court disagrees with the Plaintiffs' position both in terms of the applicable law and the conclusion to be drawn from the summary judgment evidence.

3. In terms of the applicable law, this case has already twice been before the Third District Court of Appeal and the appellate court has made it clear what legal standards the trial court is to employ in evaluating the Plaintiffs' taking claim.

4. In "*Shands I, Shands v. City of Marathon*, 999 So. 2d 718 (Fla.3d DCA 2008), the Third District Court applied the analysis set forth in *Lucas* and concluded that, "the Appellants' cause of action for inverse condemnation does not state a categorial, facial takings claim because the mere enactment of the 1986 State Comprehensive Plan, or the City's subsequent adoption of the 2010 Comprehensive Plan, did not preclude all economic use and value." *Id.* at 725. Accordingly, the appellate court concluded "that the facts in this case present an as-applied taking cause of action." *Id.* The Court further explained that:

> In an as-applied taking claim the landowner challenges the specific impact of the regulation on a particular property. The standard of proof for an as-applied taking is whether there has been a substantial deprivation of economic use or reasonable investment-backed expectations. *Taylor*, 659 So.2d at 1167. This requires a "fact-intensive inquiry of impact of the regulation on the economic viability of the landowner's property by analyzing permissible

uses before and after enactment of the regulation *Id.* at 1174 n. 1; see, *Penn Central Transp. Co v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978);

5. In *Shands II*, *Shands v. City of Marathon*, 261 So. 3d 750 (Fla.3d DCA), the appellate court found that "The trial court therefore properly treated this case as an "as-applied" challenge." *Id.* at 753. However, the cause was reversed and remanded in order for the trial court to determine the impact of the regulations on the particular piece of property in this case.

6. In terms of the conclusions to be drawn from the summary judgment evidence, the Court finds that there exist genuine raises of material fact which preclude the entry of partial summary judgment.

Wherefore, it is hereby:

Ordered and Adjudged:

1. That the Plaintiffs' Motion for Partial Summary Judgment is DENIED and the case shall proceed to a trial by court on the issue of liability in accordance with the legal standards set forth herein.

DONE and ORDERED at Key West, Monroe County, Florida, this 16th day of September, 2020.

/s/ Mark H. Jones
MARK H. JONES
CIRCUIT JUDGE