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IN THE DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA
THIRD DISTRICT

Case No. 3D21-1987

RODNEY E. SHANDS, et al.,
Appellants,

v.

CITY OF MARATHON, et al.,
Appellees.

On Appeal from the Circuit Court, Sixteenth Judicial Circuit,
in and for Monroe County, Florida
(Case No. 07-CA-99-M)

APPELLANTS' INITIAL BRIEF

JEREMY TALCOTT*
Cal. Bar No. 311490
ROBERT H. THOMAS*
Cal. Bar No. 160367
Haw. Bar No. 004610
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
jtalcott@pacificlegal.org
rthomas@pacificlegal.org
*admitted *pro hac vice*

KATHRYN D. VALOIS
Fla. Bar No. 1010150
PACIFIC LEGAL FOUNDATION
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
Email: kvalois@pacificlegal.org

Attorneys for Appellants

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GLOSSARY AND ABBREVIATIONS

1986 Comprehensive Plan: The County's 1986 adoption of the State Comprehensive Plan and development regulations, which changed Shands Key's zoning to "Conservation Offshore Island (OS)," and placed it in the Future Land Use category.

2010 Comprehensive Plan: The City's 2010 Comprehensive Plan.

BPAS: The City's Building Permit Allocation System.

City: The City of Marathon, Florida.

County: The County of Monroe, Florida.

Dr. Shands: The Shands' father, Dr. R.E. Shands, the original purchaser of Little Fat Deer Key in 1956.

GU: The County's general use zoning, which permitted one home per acre.

Judgment: The circuit court's Final Judgment (Aug. 31, 2021).

Little Fat Deer Key: Until 1999, the name of Shands Key.

Lucas: *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

Marathon: The City.

Mrs. Shands: Margaret Shands, widow of Dr. Shands and the Shands' mother.

Offshore island: Conservation Offshore Island zoning, which permits one home per 10 acres.

Penn Central: *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104 (1978).

R: Record on Appeal.

ROGO: Monroe County's Rate of Growth Ordinance.

Shands: The present owners of Shands Key, Plaintiffs-Appellants Rodney E. Shands, Robert E. Shands, Jr., Anna Kathryn Shands Edwards, and Thomas A. Shands.

Shands I: *Shands v. City of Marathon*, 999 So. 2d 718 (Fla. 3d DCA 2008).

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

State Comprehensive Plan: § 187, Fla. Stat. (2000).

T: Docketed trial transcript, May 24, 2021.

T2: Docketed trial transcript, May 25, 2021.

TDRs: Transferable Development Rights.

STATEMENT OF THE CASE AND FACTS

I. Nature of the Case

A. Summary

The Shands family bought Little Fat Deer Key from the federal government in 1956 to build a family retreat. For thirty years, they retained the right to build seven homes on their property.[1] But after downzoning the island to Conservation Offshore Island—to "preserv[e] natural resources," and to "provide[] disincentives for development"—the City wouldn't even permit a dock on the island.

After the City Council rejected the Special Master's conclusion the downzoning unfairly barred the Shands from building anything, they sought compensation under the U.S. and Florida Constitutions, asserting "categorical" takings claims (*Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)), and "*ad hoc*" takings claims (*Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978)). Twice the circuit court dismissed, and twice this Court reversed. This case now returns for a third time, presenting an opportunity for this Court to bring needed clarity to takings law by reversing the circuit court's fundamental legal errors.

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[1] In this brief, unless the context otherwise indicates, Plaintiffs-Appellants Rodney E. Shands, Robert E. Shands, Jr., Anna Kathryn Shands Edwards, and Thomas A. Shands will be referred to collectively as "the Shands." "Dr. Shands" refers to their father Dr. R.E. Shands (who bought the property in 1956), and "City" and "Marathon" refers to Defendant-Appellee City of Marathon.

B. Issues Presented for Review

1. As-applied categorical taking (*Lucas*): "[W]hen 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 [categorical] taking." *Lucas*, 505 U.S. at 1019 (footnote omitted) (emphasis in original). The circuit court held that even though Shands Key could not be developed and was therefore useless, the Shands could have sold it for a fraction of its pre-downzoning value to another property owner for the other owner's use as a chit to move up other property in the City's building permit queue. The first question is: Where the City has prohibited all development of Shands Key, does it avoid categorical takings liability simply because the property might be sold for some value, even if the Shands may not make any other uses?

2. As-applied *ad hoc* taking (*Penn Central*): Even when a regulation does not prohibit all economically-beneficial uses, it may nonetheless be an *ad hoc* regulatory taking if—considering all three factors in *Penn Central*, 438 U.S. at 124—its overall effect on the owner is tantamount to a direct appropriation or ouster. The second question comprises three subsidiary issues:

a. Economic impact: In *Shands v. City of Marathon*, 999 So. 2d 718 (Fla. 3d DCA 2008) ("*Shands I*"), this Court held that *Penn Central* "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 723 (quoting *Taylor v. Vill. of North Palm Beach*, 659 So. 2d 1167, 1171 n.1 (Fla. 4th DCA 1995)). The question is: Did the circuit court wrongly hold that the pre-downzoning value of Shands Key is "not relevant?"

b. Investment-backed expectations. The question is: Did the circuit court wrongly hold the Shands lacked "any" investment-backed expectations to use their land despite their expenditures and the longstanding residential zoning, because (1) the money they would have received if they sold Shands Key in 2007 for development chits exceeded their 1950s purchase costs, and (2) the Shands had not made substantial expenditures in pursuit of a specific development?

c. Character of the government action. The circuit court did not make any finding about the purposes and effects of the City's development ban. The question is: Must all three *Penn Central* factors be considered, including the "character" of the regulation?

C. Relief Sought on Appeal

The Judgment should be reversed or vacated, and the case remanded to the circuit court for further proceedings.

II. Factual Background

A. After Serving in the Pacific in WWII, Dr. Shands Dreamed of an Island Family Retreat

What is now known as Shands Key is a 7.91-acre island just offshore the

northwest side of Marathon, near mile-marker 50. Record on Appeal ("R.") 1223–24. Its original name was "Little Fat Deer Key." R. 190, 192.

EXHIBIT 2; R. 1172, 1187; T[2]. 37:2-38:11

Dr. R.E. Shands was a battlefield surgeon in World War II. Trial Transcript (May 24, 2021) ("T.") 43:13-45:13. Upon returning home, he began searching for an island on which to build a retreat for his young family. T. 68:10–11; R. 184–86. He explained to his family that he wanted an island because—having experienced the horrors of war on otherwise beautiful islands such as Saipan and Okinawa—he wanted a similar property, but one which they could enjoy in peace. T. 55:7–19.

B. Dr. Shands Was Able To Build Seven Homes

The federal government was offering islands in the Florida Keys for sale at public auction, including Little Fat Deer Key. R. 178. The island was subject to the

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[2] The transcript citations denote the page numbers found at the bottom of each page, not the PDF pages.

jurisdiction of Monroe County ("County"), which zoned it "general use" ("GU"). R. 1226. The GU zoning allowed residential uses as of right, with a density of one home per acre. R. 1226. Thus, Dr. Shands could build up to seven homes on the 7.91-acre island.

He bid $20,500, and won. R. 178. On December 31, 1956, Dr. Shands completed the purchase. R. 178–79, 1172–76, 1224. He received and recorded a United States Land Patent, which granted to him "and to the heirs of said claimant," the fee simple title to Little Fat Deer Key and all property rights "forever." R. 1172 (Ex. 7).

C. Dr. Shands Bought the Surrounding Bay Bottom and Began Planning a Bridge

Part of Dr. Shands' plans included building a bridge to connect Little Fat Deer Key to the mainland. R. 184–186. For that, he'd also need to own the submerged land surrounding the island. T. 60:25–61:9. Thus, in 1959, he purchased seven acres of the surrounding bay bottom from the State of Florida for $1,400. R. 183, 1172 (Ex. 8).[3]

At least twice, he took time off from running Shands Hospital in his hometown (New Albany, in northern Mississippi), and drove to Marathon to examine the

[3] Dr. Shands' purchase prices of $20,500 in 1956 and $1,400 in 1959 would be in excess of $165,000 in inflation-adjusted 2007 dollars. *See* U.S. Inflation Calculator, https://www.usinflationcalculator.com/.

property for development. R. 1224; T. 57:20–58:4. He also prepared drawings of the island, mapping out potential construction sites for a connecting bridge. R. 184–186, 1174 (Exs. 30–32).

D. Dr. Shands Died in 1963, and the Property Passed to His Widow

But Dr. Shands was never able to realize his dream for an island family retreat. In December 1962, he self-diagnosed late-stage, terminal pancreatic cancer. T. 70:24–71:12; R. 1224. He died shortly thereafter, on October 6, 1963. R. 187, 1172 (Ex. 9). His property—including Little Fat Deer Key and the surrounding bay bottom land—passed to his widow, Margaret. T. 73:6–16.

E. Mrs. Shands Conveyed the Property to Her Four Children

Twenty-one years after her husband died, Mrs. Shands completed conveyance of Little Fat Deer Key and the bay bottom land to her four children—who were by then adults. Today, the four siblings own both properties in fee simple. R. 188–89, 1172 (Ex. 10), 1224–25; T. 36:22–24.

The Shands siblings retained their father's vision for the property. T. 73:19–74:2; Trial Transcript (May 25, 2021) ("T2.") 10:19–11:12. They visited the area regularly from their homes in Mississippi. R. 1225–26. They hired boats to visit the island to maintain it; removed brush from the beach; took down temporary structures erected by trespassers; and discussed plans to build a family compound on the island. R. 1225–26, 1174; T. 73:19–75:1, 75:23–76:10, 83:14–86:1; T2. 10:22–11:12.

F. The County's 1986 Comprehensive Plan Downzoned Shands Key to "Conservation Offshore Island," Which Prohibited Homes

On September 15, 1986, the County adopted a new comprehensive plan and land regulations which downzoned the island from "GU" (one home per acre) to "Conservation Offshore Island." R. 793, 1226. Under the offshore island zoning, homes may be built at a density of only one per *ten* acres, meaning that at 7.91 acres, no home may be built. R. 1229. The 1986 comprehensive plans also placed the island in the residential "conservation future land use" category, in line with the stated policy of seeking to "provide for the preservation of natural and historic resources" and "provide[] disincentives for development of … offshore islands." R. 508, 1172 (Ex. 12).

G. Once Incorporated, the City Maintained the Restrictive Zoning to Keep Shands Key as a "Protected" Area

After it incorporated in 1999, the City took over regulatory control. R. 1229. It adopted the County's land development regulations and as a result, Shands Key remained zoned Conservation Offshore Island, and designated for "future land use." R. 472–97, 1172 (Ex. 19), 1229. The City's expressed purpose for keeping the island subject to Conservation Offshore Island zoning was "to establish areas that are not connected to US 1 as protected areas[.] R. 504, 1172 (Ex. 12).

That same year, the United States Board on Geographic Names renamed the island "Shands Key." It was already known informally in the Marathon area as

Shands Key, and the formal name change would recognize Dr. Shands' wartime heroism and compassion, his post-war humanitarian efforts including his sole-proprietorship of his rural community medical center, and his recognition in the Marathon community. R. 190, 1172 (Ex. 11); T. 106:6–24.

H. The City Said No to a Dock, But Told the Shands They Could Donate Their Property to the City for ROGO/BPAS Chits

Unaware of the new comprehensive plan (the Shands assert they never received notice of these major changes in the regulatory scheme), the Shands continued to pay property taxes, believing they could build something on their property. In 2004, they asked the City for permission to construct a dock on Shands Key. R. 1226; T. 138:15–141:24.

The City said no. It responded with a "Letter of Current Site Conditions," informing the Shands that their property consisted of "high quality hammock with a mangrove fringe," and was "suitable habitat for the state listed threatened White Crowned Pigeon." R. 504–05, 508–09, 1172 (Ex. 12). The Shands should not have even applied; the City would not even *accept* an application to develop an area that "contain[ed] threatened and endangered species or … high quality hammock." R. 504–05, 1172 (Ex. 12).

Instead, the City expressed its interest in acquiring Shands Key: it noted that the island contained six acres of upland which the Shands could donate to the City under the County's Building Permit Allocation System ("BPAS"), or Rate of Growth

Ordinance ("ROGO"). Had the Shands owned other developable property in Marathon, a gift of Shands Key to the City could have netted them "a total of +12 points in ROGO" that they could use to get a slightly better chance to develop such property by moving up on the City's tightly-restricted permit approval list.[4] R. 504–05, 1172 (Ex. 12).[5] But the Shands have never owned other property in Marathon.

I. Special Master to City: The City Should Buy Shands Key or Allow the Shands to Build One Home

A property owner who believes that the City's land use regulations preclude economically beneficial development of a specific parcel may apply for a Beneficial Use Determination ("BUD"). R. 1229–30. BUD is an internal administrative review process in which an independent Special Master considers evidence that regulations do not allow beneficial use of the land; if so, the Special Master may recommend the

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[4] The City limits residential development permits to 30 per year. Marathon Code § 107.02. Permit applications are allocated "points" that applicants may earn through things like cash donations and land dedications to the City. *Id.* at § 107.07(B)(1), (F). Other factors—for example, high-quality hammock on a property—preclude points. *Id.* These points are "scored" and may move an application up or down the list. Once the hard cap of 30 permits is met, the remaining applicants must wait, perhaps indefinitely. *See id.* at §§ 107.07(G), 107.08.

[5] Or the Shands might give their property to the City in return for .06 Transferable Development Rights ("TDRs"), which "could be sold and transferred to a different property." R. 375–76, 504–10; R. 504–05, 1230–32. The City's TDR program's purpose is to "protect[] environmentally sensitive land by sale or conveyance of the rights to develop from one (1) area (a sending site) to another area (a receiving site)." *Transfer of Development Rights*, Marathon, Florida.

City either waive the restrictive regulation and allow development or buy the land. R. 1229–30.

The City's Special Master—a lawyer with an office in Marathon—considered the evidence and concluded that downzoning Shands Key from seven-home GU, to no-home offshore island, "prohibit[ed] any development of the [Shands'] property under any circumstances[,]" and left the Shands with no reasonable, economic uses of their property. R. 196–99, 1172 (Ex. 15), 1229–30. The Special Master recommended the City either issue a building permit for a single-family home on Shands Key, or purchase the property:

> [T]hat the City of Marathon grant a building permit for a single family home on the property, said application to be 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 [Shands] for any reasonable investment expectations at the time of the purchase of the property.

R. 196–99, 1172 (Ex. 15), 1229–30.

J. The City Rejected the Special Master's Determination

Despite these findings, the Marathon City Council voted 3-2 to reject the Special Master's recommendations, denying the BUD application. R. 200–01, 1172 (Ex. 16), 1230. The City would neither allow development, nor acquire the property.

III. Course of Proceedings

A. The Shands Asserted As-Applied Categorical (*Lucas*), and As-Applied *Ad Hoc* (*Penn Central*) Takings Claims

The City's rejection of the Special Master's recommendation was its final word, and left the Shands with no way to develop anything. Their state and federal as-applied takings claims thus having been "ripened," the Shands filed a two-count complaint in circuit court. R. 165–76. They alleged the City's denial of the Special Master's recommendations resulted in regulatory takings under both the U.S. and Florida Constitutions.[6] *Id*.

First, the City's refusal to waive offshore island zoning was an as-applied, categorical (*Lucas*) regulatory taking because the Shands could not make any economically beneficial uses of their property. *Lucas*, 505 U.S. at 1019 ("[T]he 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*[.]") (emphasis added). Second, the complaint alleged that, even if downzoning left the Shands with some economic uses, the City still owed compensation because the overall effect was "tantamount to a direct appropriation or ouster" under *Penn*

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[6] Florida's takings clause is applied "coextensively" with its federal counterpart, and Florida's courts have adopted the same takings tests as the federal courts. *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).

Central's *ad hoc* test, which requires an evaluation of all three factors: (1) the "economic impact" of the City's development prohibition on the Shands; (2) how barring development thwarted the Shands' "investment-backed expectations," and (3) the "character" of the City's regulation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 528–29, 537 (2005) (citing *Penn Central,* 438 U.S. at 124).

B. The Circuit Court Dismissed: the Federal Takings Claims Were Not Ripe, and the State Claims Missed the Statute of Limitations

The circuit court dismissed the Shands claims against the City. Order Granting Defendant City of Marathon's Motion to Dismiss, 07-CA-99-M, Nov. 30, 2007. It concluded the lawsuit was both too early, and too late: the federal taking claims were not ripe, while the state takings claims accrued either in 1986 or 2010 when the comprehensive plans were adopted. Consequently, the state takings claims missed the four-year statute of limitations. *Id.*

C. *Shands I*: The As-Applied Federal Takings Claims Were Ripe, and the As-Applied State Takings Claims Were Timely

This Court reversed. *Shands I*, 999 So. 2d at 721–22. The only issue before the Court was whether the Shands' takings claims were "facial" or "as applied." *Id*. at 723.[7] If the claims were "facial" and challenged the *adoption* of the

[7] "Facial" and "as-applied" (terms used universally in constitutional litigation) describe the claim's procedural posture. In a "facial" claim, the plaintiff maintains that the mere enactment of a law or regulation violates everyone's constitutional rights. This Court rightly concluded the term "facial" is a term of art "more properly applied when evaluating the constitutional validity of a statute, regulation or

comprehensive plans, the circuit court was correct when it dismissed. However, if the takings claims were "as-applied" and challenged *application* of the regulations to the property, the claims accrued only when the City rejected the Special Master's recommendation to either allow development or purchase. *Id*. This Court rejected the circuit court's conclusion that the Shands raised "facial" challenges, holding instead that they never asserted the mere adoption of the comprehensive plans was a taking. Rather, the Court held, the Shands raised as-applied takings claims. *Id*. at 722 n.8.

The Court remanded for a determination whether the City's refusal to issue a building permit or buy Shands Key "rises to the level of a compensable as-applied taking under state and federal law." *Id.* at 727. To make that determination, the circuit court must "analyz[e] permissible uses [of Shands Key] *before and after* enactment of the regulation.'" *Id*. at 723 (emphasis added) (citation omitted).

D. The Circuit Court Next Entered Summary Judgment for the City Because It Deemed This Case To Be Just Like *Beyer*

After remand, the City sought summary judgment, R. 1180–81, and the circuit

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ordinance, as in whether the ordinance is constitutional 'on its face.'" *Shands I*, 999 So. 2d at 722 n.8. Facial claims challenge the "mere enactment of the regulation[.]" By contrast, "as-applied" constitutional claims do not accrue upon the mere enactment of the regulation, but only when the regulation has directly interfered with the plaintiff's rights, and the plaintiff seeks individually-tailored relief. *Taylor v. Vill. of North Palm Beach*, 659 So. 2d 1167, 1170–71 (Fla. 4th DCA 1995).

court granted it. Order Granting Summary Judgment in Favor of Defendant City of Marathon, 07-CA-99-M, July 26, 2017; R. 29.[8]

E. *Shands II*: This Court Ordered the Circuit Court to Determine the Impact of Downzoning Shands Key

Again, this Court reversed. An "'as-applied takings' challenge [could] only be resolved based upon the impact of the regulation on a particular parcel of property." *Shands v. City of Marathon,* 261 So. 3d 750, 753 (Fla. 3d DCA 2019) (*Shands II*); R. 529–34, 1180–81. The Court ordered the circuit court to conduct an analysis of the "impact of the regulation on [this] particular parcel of property," including what uses of Shands Key—if any—remained. *Id*.

IV. Disposition in the Circuit Court

A. The Circuit Court Concluded the Categorical (*Lucas*) Claims Had Already Been Resolved in the City's Favor

Back before the circuit court, the Shands requested summary judgment on

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[8] The court held that the Shands' claims were "indistinguishable" from those asserted in *Beyer v. City of Marathon*. 197 So. 3d 563 (Fla. 3d DCA 2013). In *Beyer*, the owners sued the City for a taking under what the opinion describes as a "per se, facial taking" theory. *Id*. at 565. The parties apparently tried the case under a hybrid of a categorical (*Lucas*) theory and an *ad hoc* (*Penn Central*) theory: this Court affirmed the circuit court's entry of summary judgment in the City's favor, holding that there was no taking because, "[t]he award of ROGO points, coupled with the current recreational uses allowed on the property, reasonably meets the Beyers' economic expectations under these facts. Thus, under an 'as applied' takings analysis, the Beyers were not deprived of all economically beneficial use of the property." *Id*. at 567.

their categorical (*Lucas*) as-applied claims. R. 134–160. They submitted evidence the offshore island zoning did not allow any uses that could remotely be characterized as "economically beneficial," that the regulations required them to leave Shands Key "economically idle," and that the property must remain substantially in its natural state. R. 134–60. *See Lucas*, 505 U.S. at 1015–19. The City did not submit countervailing evidence.

The circuit court denied the motion and concluded *Shands I* and *Shands II* had already resolved the categorical (*Lucas*) claims in the City's favor:

> [T]he 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 categorical, 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."

R. 780. The court also concluded the property's value, not its uses, determines a *Lucas* claim, and disputed factual issues regarding the market *value* of Shands Key were disputed. R. 781.

B. Trial

In accordance with this Court's remand instructions, the Shands introduced evidence showing the uses and value of Shands Key before and after the City's 2007 rejection of the Special Master's recommendation. Robert Gallaher MAI, an appraiser experienced at valuing land in the Keys, detailed the downzoning's impacts on the use and value of Shands Key. First, he testified that the highest and

best use of Shands Key before the "offshore island" zoning restrictions were imposed was as one single-family buildable lot, with a fair market value of no less than $3 million. T. 156:17–157:4. This was the only evidence presented at trial about Shands Key's "before"-regulation value and uses. Next, Gallaher testified that in 2007—because the City rejected the application to construct a dock and the Special Master's BUD recommendation—the only remaining use of the property was the occasional daytime recreational visit (via kayak or, a low tide walk). The Shands were not allowed to build even a wood platform on which to pitch a tent, or to stay overnight. Thus, he concluded, in 2007, Shands Key had only a token value of $40,000–50,000. T. 173:14–174:7.[9]

Rodney Shands (a retired judge) and his brother Dr. Thomas Shands, testified about their father's reasons for buying the island. T. 51–168; T2. 24–41. They also testified that after his death, the family was unable to immediately continue or actively pursue development of the island. The Shands were minors, and Mrs. Shands—a now-single mother who has just lost her family's emotional and financial bedrock—had neither the time nor the wherewithal to press forward immediately.

[9] He also testified that the City's alternative "uses" for Shands Key—sale to a third party for dedication for ROGO/BPAS points or a sale for TDRs—were not economic uses to the Shands since the land itself could not be used in a beneficially productive way. T. 171:21–173:11–92. Dwight Merriam, a national expert in land use law, also explained that in 2007, there was no market for ROGO/BPAS points or TDRs, and any sales for points were speculative. T. 212:23–215:9.

And even after the siblings became adults and acquired title from their mother, they similarly lacked the immediate financial ability to pick up their father's plans where they had been cut off by his sudden passing. T2. 9:9–23. But after they grew and were educated, began careers, and raised their own families, they were able to return to their father's plan. T2. 9:9–11:12. By then, they had the experience, knowledge, and the means to do so. T. 92:1–92:12, 100:9–101:6; T2. 11:15–13:3.[10]

The City limited its evidence. Even though this Court had remanded the case with instructions to "analyz[e] permissible uses [of Shands Key] before and after enactment of the regulation" in 2007, *Shands I*, 999 So. 2d at 723, the City instructed its appraiser to *not* form an opinion of the "before regulation" value of Shands Key, and instead instructed him to focus solely on whether the property retained any value under the offshore island zoning. T2. 146:19–147:14. Accordingly, he opined only that in 2007 there was a market to buy undevelopable properties that could be given to the City in return for ROGO/BPAS points. T2. 134:10–14. The City also argued the Shands could not have investment-backed expectations to develop Shands Key

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[10] For example, Rodney Shands testified about his multiple visits to maintain the property by clearing brush, remove illegal structures erected by trespassers, and inspect the upland areas for development. T. 73:19–75:1, 75:23–76:10, 83:14–86:1. But when he contacted the City to inquire about the process for adding a dock to transport building materials to the island, the City told him that no development whatsoever was possible. T. 116:3–117:15. A City biologist's site report confirmed the City needed to preserve the high-quality environmental resources on the island, and would not even accept an application for development. T. 123:23–124:16.

because they had taken too long before taking tangible steps, it and had not obtained final entitlements to build before the County and the City prohibited all development. T2. 61:21–62:9, 67:13–22. The City offered no evidence of the character of its actions.

C. Final Judgment: No Taking

Having earlier rejected the Shands' categorical (*Lucas*) claims, the circuit court considered only the *ad hoc* (*Penn Central*) takings claims. The court entered Final Judgment in the City's favor. Final Judgment (Aug. 31, 2021) ("Judgment"):

1. Economic impact. The circuit court held the Shands suffered *no* economic impact from the downzoning. To reach this conclusion, the court did not consider the decline in the fair market value of Shands Key caused by the downzoning; it did not compare the fair market value of the property "before and after enactment of the regulation" as this Court instructed in *Shands I*.

Rather, the court first rejected as "not relevant" evidence of the property's value before the City imposed the offshore island zoning, and instead focused solely on the post-regulation value of Shands Key: "Gallaher opined on the value of the Property under the hypothetical scenario where a single-family residence could be built on the Property. This opinion is not relevant for determining whether the actual remaining value of the Property was reasonable." R. 1234 (Judgment ¶ 64). Next, the court acknowledged that the Shands could not build anything, but held that

Shands Key retained value because it could have been sold in 2007 for $147,000 to a third party to give to the City in exchange for ROGO/BPAS points to move the buyer's other property up the City's permit list. R. 1233 (Judgment ¶ 63). The court then compared $147,000 to the Shands' cost basis, which it concluded was "zero" because they received it from their widowed mother. R. 1236 (Judgment ¶ 73). The court acknowledged Dr. Shands' initial investment of $21,900 in the 1950s. R. 1237 (Judgment ¶ 74). However, the court still concluded that a sale of Shands Key in 2007 for $147,000 would have realized a "sixfold increase" over the initial purchase cost. *Id*. In essence, the court held that the Shands would have made money in 2007 by selling their property, despite acknowledging that the initial basis would have been in 1956 and 1959 dollars, and the $147,000 was in 2007 dollars. R. 1236–37 (Judgment ¶¶ 72–74).

2. Investment-backed expectations. The court concluded the Shands lacked "any investment-backed expectations" because they took no "meaningful, investment backed steps to develop the Property in the decades they or their immediate predecessor in interest owned the Property." R. 1238 (Judgment ¶ 77).

3. Character of the Government Action. The court made no ruling about the third *Penn Central* factor, the "character of the government action."

On September 29, 2021, the Shands Family appealed. R. 1265–67.

SUMMARY OF ARGUMENT

The circuit court's Judgment is the result of several fundamental legal errors:

1. Categorical (*Lucas*) taking: Selling Shands Key to another property owner as a ROGO/BPAS chit is not an "economically beneficial use" to the Shands. The City cannot avoid a categorical (*Lucas*) taking simply because the land retains some value.

2. *Ad hoc* (*Penn Central*) taking: The circuit court made three additional legal errors. First, by disregarding this Court's instruction to analyze Shands Key's "permissible uses *before and after* enactment of the regulation[,]'" the circuit court incorrectly analyzed the "economic impact" of offshore island zoning. *Shands I*, 999 So. 2d at 723 (emphasis added). Instead, the circuit court held the "before" uses and value were "not relevant," and focused solely on the property's uses and value as regulated. Next, the court concluded the Shands lacked "*any*" investment-backed expectations of residential use, even though it accepted the uncontroverted evidence that Dr. Shands purchased the island and the surrounding submerged land for the purpose of developing it, and that these investments were backed by law and the property's three decades of residential zoning. Instead, the court viewed expectations as limited to whether the Shands expected to profit. The court also equated the Shands' investment-backed expectations of using their property with the separate question of whether their rights to develop their land had "vested" under Florida

property law. Finally, the circuit court did not consider the character of the City's regulations at all.

ARGUMENT

I. SALE OF SHANDS KEY AS A ROGO/BPAS CHIT IS NOT AN "ECONOMICALLY BENEFICIAL" USE

A. Shands Key Is Economically Idle, Preserved in Its Natural State

To "protect" Shands Key, the City has preserved it in its natural state, economically idle.[11] The City rejected the Special Master's conclusion that because the downzoning prohibited all beneficial uses, the restrictions should be waived and the Shands allowed to build a single home on their property. A wipeout of economic use is exactly what concerned the Supreme Court in *Lucas*:

> [A]ffirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by 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*.

505 U.S. at 1018 (emphasis added).

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[11] This Court reviews the circuit court's denial of the motion for summary judgment *de novo*. *Tiger Point Golf & Country Club v. Hipple*, 977 So. 2d 608, 609–610 (Fla. 1st DCA 2007) ("Now that appeal has been taken from the amended final judgment, the antecedent denial of summary judgment is reviewable. The standard of review for orders denying summary judgment is de novo.") (citing *The Florida Bar v. Rapoport*, 845 So. 2d 874, 877 (Fla. 2003)).

The City has preserved Shands Key in its natural state, just as it said it would (the purpose of Conservation Offshore Island zoning is "to establish areas that are not connected to US 1 as *protected* areas …".). R. 504, 1172 (Ex. 12) (emphasis added). And it has done just that—Shands Key is forever protected from development. The family can do nothing with Shands Key but keep it in its current, raw condition, undeveloped. The Shands have no doubt their island is beautiful; that is one of the reasons their father purchased it. The restrictive zoning has, in effect, impressed Shands Key with a public conservation easement. And the City didn't spend a single penny to acquire it.

As Justice Holmes reminded 100 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The U.S. and Florida Constitutions require the City to "pay for the change" because it is not fair for the Shands to shoulder the entire economic burden of turning their property into a nature preserve. *Lingle*, 544 U.S. at 537 ("we have emphasized [the Takings Clause's] role in 'bar[ring] 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.'") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Even though the Shands asserted both federal and Florida categorical *Lucas*

claims, the circuit court refused to consider them. The court concluded that *Shands I* had already resolved the categorical claims in the City's favor. R. 780. The court's conclusion misreads both *Shands I* and *Lucas*. The clearest expression is this Court's instruction to consider the Shands' as-applied federal and state takings claims:

> 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 I, 999 So. 2d at 727 (emphasis added).

The Shands' "as-applied" takings claims referred to include both the as-applied categorical (*Lucas*) claims, and the as-applied *ad hoc* (*Penn Central*) claims.[12] The circuit court, however, conflated "categorical" takings claims (*Lucas* claims) with "facial" takings claims—even though a "categorical" *Lucas* claim can be *either* facial *or* as-applied. *Lucas*, 505 U.S. at 1042 n.4 (Blackmun, J., dissenting) ("Here, of course, Lucas has brought an as-applied challenge.").

This error caused the circuit court to wrongly conclude that the Shands' complaint "'d[id] not state a *categorical, facial* takings claim, because the mere

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[12] Indeed, because the Shands never alleged that the City's mere adoption of the comprehensive plan deprived every property owner in Marathon of every economic use of every regulated property, this Court recognized the Shands did not raise a facial claim. *See id.* at 723 ("A *facial*, or categorical, taking occurs when the mere enactment of the regulation precludes all development.") (emphasis added) (citing *Lost Tree Vill. Corp. v. City of Vero Beach*, 838 So. 2d 561, 572 (Fla. 4th DCA 2002)).

enactment of the 1986 State Comprehensive Plan, or the City's adoption of the 2010 Comprehensive Plan, did not preclude all economic use and value.'" R. 780 (emphasis added) (quoting *Shands I*, 999 So. 2d at 725). But the Shands have never asserted a "facial" claim: they neither sought to invalidate the comprehensive plans, nor did they allege that the mere adoption of these plans deprived every property owner in Marathon of every economic use of every regulated property. Rather, the Shands alleged that the City's *application* of the regulations when it rejected the Special Master's recommendations rendered Shands Key categorically, economically useless.

Contrary to the circuit court conclusion, this Court has never addressed—much less conclusively resolved—the Shands' as-applied categorical (*Lucas*) claims.[13] The circuit court should not have denied the Shands summary judgment.

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[13] A perfunctory reading of *Shands I* might lead a reader to conclude that a "facial" taking refers to a "categorical" (*Lucas*) taking, and an "as-applied" taking refers to an *ad hoc* (*Penn Central*) taking. *See*, *e.g.*, *Shands I*, 999 So. 2d at 723 ("The standard of proof for a *facial taking* is whether the regulation has resulted in a deprivation of all economic use.") (emphasis added) (the Court was describing a categorical (*Lucas*) taking). But this and other similar statements in *Shands I* were all made in the context of this Court addressing the sole questions on appeal: were the Shands asserting "facial" takings claims (of either variety)? This Court held no. The description of a categorical takings claim as "facial" or "as-applied" says nothing about whether it alleges a categorical (*Lucas*) claim or an *ad hoc* (*Penn Central*) claim. Consequently, any statements conflating a "facial" challenge with a "categorical" takings claim were, at most, imprecise language, or dicta. Even the U.S. Supreme Court has acknowledged that in takings law, the Justices have employed terms imprecisely, and have fallen short of articulating the various takings terminology clearly in the past. *See Lingle*, 544 U.S. at 542 ("Although *Agins*'

Rather, because all the evidence the parties placed in the record (during summary judgment and at trial) shows that the offshore island zoning left Shands Key without a single use that makes economic sense, the court should have enforced the constitutional requirements and ordered the City to provide compensation.

B. The Shands Have Even Less Use of Their Property Than Lucas

The key uncontested fact that should have resolved the *Lucas* categorical takings claim in the Shands' favor is that offshore island zoning absolutely prohibits any economically-sensible use. The City does not escape liability for a categorical taking merely by pointing out that *some* use is allowed by the regulation, if there's no evidence that these uses are economically productive.[14] To be considered an "economic" use, a use must be both (a) physically possible (given the size, shape, geography, or topography of the land, for example), and (b) most importantly, "commercially practicable" (financially feasible) to the owner. *See Pennsylvania*

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reliance on due process precedents is understandable, the language the Court selected was regrettably imprecise."). A court's first duty is to get the law right, even if it has in the past not done so. This appeal presents an opportunity for this Court—like the Supreme Court in *Lingle*—to correct course and clean up any such imprecise language in earlier decisions. While it may be understandable that the circuit court conflated "facial" and "categorical" claims in an area of law as complex as regulatory takings, its refusal to apply the essential holding of *Shands I* resulted in its declining to even consider the as-applied categorical (*Lucas*) taking claim.

[14] The record is devoid of evidence that beekeeping and recreational camping are economically beneficial uses. R. 1232 (Shands Key is "not suitable for residential development" under the Comprehensive Plan density restrictions, and that the only uses remaining are "beekeeping as well as camping and recreational use").

Coal, 260 U.S. at 414 ("To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it"); *id*. ("What makes the right to mine coal valuable is that it can be exercised *with profit*."); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496 (1987) (noting that the petitioner must prove that the property cannot generate a profit as regulated); *Lucas*, 505 U.S. at 1017 ("[F]or what is the land but the profits thereof[?]" (quoting 1 Edward Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812))).

The Shands introduced evidence (uncontroverted by the City, both at summary judgment and trial) showing that because the minimum developable parcel size under the offshore island zoning is 10 acres, the seven-acre Shands Key has been left with no "economically beneficial or productive options for its use." *Lucas*, 505 U.S. at 1018. Thus, as the City acknowledged, "development permits cannot be issued." *Id*.; *see also* R. 793 (admitting that the 1986 Comprehensive Plan prohibited all development on Shands Key).

Stripped of all development potential, the Shands have even less use of their property than David Lucas did of his. Lucas owned two vacant beachfront lots. *Lucas*, 505 U.S. at 1006. Like Shands Key, prior to adoption of the challenged regulations, the zoning allowed single-family homes on his property. *Id.* at 1008. And, like the Shands, Lucas had not developed his property before adoption of a

regulation prohibiting residential development (there, the South Carolina Beachfront Management Act, which designated Lucas' properties an environmentally sensitive area and imposed a large setback in which no development was allowed). *Id.* But unlike Marathon's zoning regulations, the South Carolina Act allowed certain non-habitable developments such as wooden walkways and small decks. *Id.* at 1009 n.2. Nonetheless, the Supreme Court focused on the fact that the Act "requir[ed] [Lucas'] land to be left substantially in its natural state…." *Id.* at 1018. The Court held that Lucas was entitled to compensation because he had "been called upon to sacrifice *all* economically beneficial uses in the name of the common good…." *Id.* at 1019. Put another way, Lucas was left with no choice but to "*leave his property economically idle* …." *Id.* (emphasis added).

Where Lucas was permitted to build permanent non-habitable "wooden walkways" or a "small wooden deck," the City prohibited even a small dock on Shands Key. T. 116:3–117:20. As the result of the City's development restrictions, Shands Key remains—today and forever—"substantially in its natural state[,]" and therefore has been *categorically* taken. *Lucas*, 505 U.S. at 1019.

C. Sale for ROGO/BPAS Chits Isn't a *Lucas* Use: "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."

Nor may the City escape liability for a categorical taking simply because someone might have been willing to buy Shands Key to trade the City for

ROGO/BPAS points.

1. To qualify as an economically-beneficial use, a sale must reflect the actual market

In *Lucas*, the Supreme Court was concerned with how much the challenged regulation diminishes the owner's beneficial use. *Lucas*, 505 U.S. at 1018. The circuit court, however, wrongly conflated the distinct concept of economic uses the Shands may make of their property, with the value that Shands Key may represent to another property owner. *Cf. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 350 (2002) (Rehnquist, C.J., dissenting) (It is a mistake to read *Lucas* as being "fundamentally concerned with value," rather than with "economically beneficial or productive use."). But anything that might be realized from a sale of Shands Key as undevelopable land is not relevant in *Lucas* takings when it remains certain that the land itself retains no actual beneficial uses to the Shands. That the property might be used by someone else as an administrative chit so that person has a chance to move up a different parcel in the City's queue does nothing to alter the fact that the zoning prevent *the Shands* from making productive use of *their* land.[15] As Justice Scalia explained about such schemes:

> 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

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[15] Because the Shands own no other property in Marathon, they are ineligible to participate in the City's donate-money-or-land-for-BPAS-points system. T. 129:17–30:11.

> 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.

Suitum v. Tahoe Reg'l Plan. Agency, 520 U.S. 725, 747 (1997) (Scalia, J., concurring) (emphasis in original). The circuit court rejected this reasoning.

2. *Lost Tree*: sale for "mitigation activities in development of other lands" is not an economic use to the owner

The circuit court's blanket rule that a sale of Shands Key to trade for BPAS points is always an economically beneficial use is a variation of the sale-for-speculation theory that courts, *Lucas* included, have soundly rejected.[16] The best

[16] The *Lucas* majority rejected Justice Blackmun's dissenting argument that "the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house" should preclude a finding of categorical taking. *See Lucas*, 505 U.S. at 1016 n.6, 1043. *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) ("[A] State may not evade the duty to compensate on the premise that the landowner is left with a token interest."); *Tahoe-Sierra*, 535 U.S. at 350 (value alone not relevant to *Lucas*, even though the property retained market value based on "the contingency, which soon came to fruition, that the development ban would be amended") (Rehnquist, C.J., dissenting); *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 902 (Fed. Cir. 1986) (noting that regulated land will retain value because buyers might "bet that the prohibition … would someday be lifted."); *Fla. Rock Indus., Inc. v. United States*, 8 Cl. Ct. 160, 166 n.6 (1985) ("If passively holding land against the possibility that restrictions on its use will be lifted were deemed a productive economic use, property would never be rendered useless by regulation and there could be no such thing as a regulatory taking.").

example is the Federal Circuit's reasoning in *Lost Tree*, which keenly illustrates why the mere possibility that someone might have been willing to buy Shands Key for ROGO/BPAS points is not relevant to the categorical (*Lucas*) inquiry.

In that case, the property was part of a barrier island and consisted of uplands, wetlands, submerged lands, and ditches for mosquito control. *Lost Tree*, 787 F.3d at 1113. The Corps of Engineers denied a request for a fill permit. After considering the testimony of the appraisers, the trial court concluded that denial of the permit left the Lost Tree property undevelopable. But as in the present case, the government's appraiser testified that even though it could not be developed, the land remained *marketable*: someone still might purchase it for "'passive recreation,' which [the appraiser] described as 'a place that human beings can go for relaxation, they can go to enjoy nature.'" *Lost Tree Vill. Corp. v. United States*, 115 Fed. Cl. 219, 228 (2014), *aff'd*, 787 F.3d 1111 (Fed. Cir. 2015). The owner's appraiser testified that property's only uses to the owner were non-economic: it could be used as "a wetland parcel with little or no economic use except at nominal levels that may be related to nuisance value or environmental use which typically does not support significant economic value except in support of mitigation activities in development of other lands." *Lost Tree*, 115 Fed. Cl. at 228. Thus, as here, to the owner, the *Lost Tree* property had "a residual land value derived solely from noneconomic uses." *Lost Tree*, 787 F.3d at 1115–16.

Consequently, the government argued that proof the property retained value defeated Lost Tree's *Lucas* claim, even if the reasons someone might buy the land were not economically beneficial to the seller. But the Federal Circuit reasoned that the use and development of property means doing something with *your* land. Inherent in that concept of the use of *your* land is that the land will remain *your* land: "[t]ypical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel." *Id*. (citations omitted).[17] The Federal Circuit held that evidence someone might be willing to buy the property for a use that would not be economically beneficial to the owner/seller was irrelevant to a categorical takings claim. Fire-sale prices indicate speculation, not the usual reflection of a property's economic uses:

> the government argues that this court's precedent characterizes *Lucas* as applying only in the narrow circumstance in which all value, regardless of its source, has been lost. We disagree…. Speculative land uses are not considered as part of a takings inquiry

Id. at 1117. In other words, value may serve as an *indicator* of the loss of economic

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[17] This approach also confirms that when the Supreme Court in *Lucas* referred to the "use" of property, it meant it in its everyday sense. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021) (noting "intuitive" and "common sense" approach to property). You don't have a use of your land if all you can do is sell it to *someone else* who may give it to the City in return for permission to use *their* other land. *See* Donald J. Kochan, *The ~~[Takings]~~ Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 Fla. St. U. L. Rev. 1021, 1046 (2018) ("If you own something, you expect that part of what it means 'to own' is that you get 'to keep' what you own.").

use, but cannot simply be a wholesale *substitution.* Here, that indicator reflects a massive loss of market value, economically devastating by any equitable measure: a minimum loss of 95.1% (viewing all evidence in the City's favor, as the circuit court did), or a depression in value of 98.9% considering the Shands' valuation evidence.

Someone wanting to buy Shands Key to benefit the buyer by giving it to the City does not alter the reality that to the Shands, Shands Key remains zombie property, undevelopable and forever vacant. As in *Lost Tree*, just because someone might be willing to buy land for "passive recreation," or "a place that human beings can go for relaxation" and to "enjoy nature" does not mean that that land has an economic use to the owner: "[w]hen there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land." *Id*. at 1117.[18]

In short, selling property might qualify as an economic use, but only if the property independently retains other economically-beneficial uses. Otherwise, the mere fact that a someone is willing to buy it reflects speculation.[19] The circuit court's

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[18] There always may be a speculator or preservationist willing to buy undevelopable land. People do not necessarily buy land to make a profit, or for reasonable—or even rational--reasons. Allowing nothing but growing weeds on David Lucas' vacant land might entice a preservationist to buy it, but that did not prevent the Court from concluding that a statute prohibiting development was a categorical taking because it barred all economic uses. *Lucas*, 505 U.S. at 1018.

[19] The circuit court, however, did not inquire whether a sale for ROGO/BPAS donation in 2007 would be compelled by the fact that the City-created "market" was the only place that owners of undevelopable property could go. The court simply assumed that a sale of Shands Key for *any* value qualified as an "economically

blanket rule that as a matter of law, *any* value that might be realized defeats a categorical taking reduces the *Lucas* standard to an empty promise. The Supreme Court's analysis cannot be sidelined by a surface inquiry about whether property retains any value to someone else, but must remain focused on whether the regulation has deprived *the owner* of all economic use.[20]

II. *PENN CENTRAL*: NO FACTOR IS DISPOSITIVE, NO FACTOR IS IGNORED

The Shands also asserted *ad hoc* (*Penn Central*) takings claims. The Supreme Court requires the evaluation of all three factors: (1) the economic impact of the City's development prohibition on the Shands; (2) how barring development thwarted their "investment-backed expectations, and (3) the "character" of the City's regulation. *Penn Central*, 438 U.S. at 124; *Palazzolo*, 533 U.S. at 617. A total absence of evidence of one factor is not conclusive, and a taking may still be found

beneficial use." But to qualify as an economically-beneficial use, a sale must reflect an actual market, not a government-created and restricted market like ROGO where the City, having exercised regulatory power to bar all development, also created the sole method by which an owner might eke something out of their now-useless land: sale for a fraction of market value, where the buyer's sole option is to give it to the City. Thus, for only the "cost" of exercising its police power to prohibit development, the City has a system to obtain nature preserves for literally nothing.

[20] And paradoxically, the very process of litigating a *Lucas* claim would itself ensure the land has some value: a claim that property is valueless would itself invite speculators to bet on its being worth purchasing on the cheap—either because the *Lucas* claim might prevail, or because the restrictions on use thwarting use might be lifted down the road. "Land value resulting from such speculation would defeat the very *Lucas* claim on which the speculation was based." *Id*. at 1118.

if the other factors show the regulation "may be so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle*, 544 U.S. at 528. No factor is dispositive, no factor is ignored. In one example, the Supreme Court found a *Penn Central* taking, even though the regulation imposed a total economic impact of only $4,500 and the owner's investment-backed expectations were "dubious," because the "character of the government regulation" was "extraordinary." *Hodel v. Irving*, 481 U.S. 704, 715–16 (1987). Here, however, circuit court misapprehended—and consequently misapplied—each *Penn Central* factor:

1. It held that the essential evidence of economic impact—the value of Shands Key as developable *before* imposition of offshore island zoning restrictions—was "not relevant."

2. It afforded the investment-backed expectations factor dispositive importance by (a) focusing on the Shands' cost basis (which it held was "zero" because they received the property as a gift) as the sole evidence of their expectations, (b) concluded that if the Shands had any expectations, those were met because they would have made money by selling their land in 2007 to another property owner for $147,000, and (c) wrongly equated *Penn Central*'s investment-backed expectations with "vested rights" under Florida law.

3. It failed to even consider the character of the government action.

These fundamental legal errors are not merely failure-to-weigh-evidence,

credibility, or otherwise harmless errors. Each is sufficient, on its own, to invalidate the Judgment.[21]

A. The Circuit Court Rejected as "Not Relevant" the Most Essential Evidence of Economic Impact—the Value of Shands Key in Its Unregulated Condition

The circuit court's approach was contrary to "essential" law, and this Court's clear remand instructions: the Shands' as-applied takings claims require "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.'" *Shands I*, 999 So. 2d at 723 (emphasis added) (citation omitted). Understanding the "before regulation" value of the property is an "essential requirement[] of the law." *City of Venice v. Gwynn*, 76 So. 3d 401, 405 (Fla. 2d DCA 2011) (reversing where the circuit court considered only the "before" value of property). This approach is not only legally required, but makes evidentiary sense: the heart of the "economic impact" question focuses on "the *change* in fair market value of the subject property caused by the regulatory imposition." *Leon Cty. v. Gluesenkamp*, 873 So. 2d 460, 467 (Fla. 1st DCA 2004) (emphasis added). And to correctly calculate the *change* in value of a parcel of land, the trier of fact must

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[21] This Court reviews the legal errors in the Judgment *de novo*. *GFA Intl, Inc. v. Trillas*, 327 So. 3d 872, 875 (Fla. 3d DCA 2021) ("To the extent the trial court's order is based on factual findings, we will not reverse unless the trial court abused its discretion; however, any legal conclusions are subject to de novo review.") (citation omitted).

consider evidence of its "before" value.

Accordingly, the Shands introduced evidence that immediately prior to the City's downzoning the Shands Key, the GU zoning recognized the ability to build at least one home (even though up to seven homes could be built as-of-right under GU zoning), and the fair market value of Shands Key was $3,000,000-$3,500,000. T. 157:1–5. The City, by contrast, offered no evidence of the "before" value, and its expert testified only to the *post-regulation* value of Shands Key. The circuit court refused to consider the Shands' evidence of the before-regulation value (concluding it was "not relevant"), and ignored the City's failure to introduce any countervailing evidence of "before" value. This fundamental legal error is in paragraph 64 of the Judgment:

> 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 to determining whether the actual remaining value of the Property was reasonable*.

R. 1234 (emphasis added).

The circuit court rejected evidence of the "before" value for two reasons.

1. It limited consideration to whether the property retained any value *as regulated*: the court held that no taking had occurred because "the Plaintiff's

property had been left with reasonable value and uses." R. 1242 (Judgment ¶ 87).[22] However, under *Penn Central*, the question in an *ad hoc* takings case is about "the *magnitude* of a regulation's economic impact and the *degree* to which it interferes with legitimate property interests[,]" and not whether it retains value and use. *Lingle*, 544 U.S. at 540 (emphasis added). The circuit court mistakenly applied the *Lucas* test (what economic uses does the regulation leave the owner?) to the *Penn Central ad hoc* "economic impact" question (how much did the regulation depress the property's value?).

2. Next, the circuit court compared Shands Key's post-regulation value of $147,000 with the Shands' purported "basis or investment," which the court concluded was either "zero," or at most $21,900 in 1950s dollars. R. 1236–37 (Judgment ¶¶ 73–74). This error led the court to conclude that the Shands would have *made* money by selling their land in 2007. R. 1237 (Judgment ¶ 74). But the Shands' cost basis (in 1956) has nothing to do with the property's fair market value

[22] The circuit court rejected this Court's remand instructions by leaning heavily on *Walcek v. United States*, 49 Fed. Cl. 248, 249 (2001), *aff'd,* 303 F.3d 1349 (Fed. Cir. 2002). *See* R. 1236 (Judgment ¶ 73). But *Walcek* highlights the circuit court's legal errors and lends no support to a conclusion that the value of the property prior to the regulation taking effect is irrelevant. To the contrary, the Court of Federal Claims reviewed all *Penn Central* factors, including a comparison of the pre- and post-regulation values of the property. *Walcek*, 49 Fed. Cl. at 258–72. Only after the court calculated the diminution in value did it evaluate whether that diminution was "severe" in light of the owner's expectations. *Id.* at 266. Nothing in the case endorses the limited, incomplete review undertaken here.

immediately before the imposition of the challenged regulation (in 2007). *Shands I,* 999 So. 2d at 723.[23] Like Shands Key, a property's market value may be millions before a regulation limits use, and the regulation may, as a consequence, impose a massive "economic impact" (change in value), even though the owner paid little or nothing to acquire the property.

By treating the value of Shands Key before the City's regulation restricted its use as irrelevant and "hypothetical,"[24] the circuit court failed the first essential duty under *Penn Central*, because it was impossible to calculate the economic impact—the *change* in value—brought about by the regulation once the court closed its eyes to the only evidence of the pre-regulation value of the property. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943–44 (2017) ("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").

These legal errors resulted in the court's erroneous holding that the Shands

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[23] The circuit court rejected the Federal Circuit's reasoning that the owner's purchase price is irrelevant to the loss-in-value calculus. *See Lost Tree*, 787 F.3d at 1118 (the "after regulation" value must be compared to the property's "highest and best use" before application of the regulation).

[24] It is not a valid criticism that an appraiser testifies about "hypothetical" value, because that's the nature of appraiser testimony (and expert testimony in general). Of course, all evidence of the market value of Shands Key offered by the parties was hypothetical because after Dr. Shands purchased in in 1956, the island has never been sold.

suffered no economic impact, "since," the court explained, "the Plaintiffs can recoup the entirety of their basis or investment in the Property." R. 1236 (Judgment ¶ 73). Thus, the circuit court never actually calculated the change in Shands Key's value "before and after" the regulation, as this Court instructed. *See Shands I*, 999 So. 2d at 723. To do so, the circuit court should have taken the sole evidence of Shands Key's value immediately before the City downzoned it ($3,000,000-$3,500,000), compared that to the "after enactment" value (at most $147,000, but—in terms of actual *use* of the property for recreation, only $40,000-$60,000), and concluded that the economic impact of the regulation resulted in a diminution of at least $2,853,000, (a 95.1% loss), and as much as $3,460,000 (a 98.9% diminution).

B. The Circuit Court Concluded the Shands Lacked "*Any*" Investment-Backed Expectations of Residential Use, Even Though Their Purchases Were Backed by Three Decades of Residential Zoning

The "expectations" inquiry required the circuit court to consider the Shands' expectations of making use of their property, and then determine whether those expectations were "distinct" or "reasonable." *Penn Central*, 438 U.S. at 124. The court, however, having already concluded (when it evaluated the "economic impact") that the Shands made "zero" investment, the court thus also concluded that the Shands "[could not] establish *any* investment-backed expectations." R. 1225 (Judgment ¶ 77) (emphasis added). Even assuming the circuit court merely mislabeled its analysis does not save its conclusion, for three reasons. First, the court

should have considered evidence of the Shands' expectations of *use*, and the law backing up their expectations as reasonable. Second, the court should not have focused on whether the Shands expected to "recoup" their investment (or, put another way, whether they expected to turn a profit), or whether they actually did so. Finally, the circuit court should not have equated investment-backed expectations with the entirely separate question whether the Shands "vested" their right to develop under Florida property law.

1. The Shands' expectations were backed by investment and the law

For thirty years, Dr. Shands and his family expected that they could do something more with their property than leave it in its natural state. They believed they could build at least one—and up to seven—homes. Dr. Shands purchased fee simple title to Shands Key in 1956 and received a patent from the federal government. R. 182, 1172 (Exh. 7). The only reservation on the deed was the retention of the mineral rights in "all the oil and gas" underlying the island. *Id.* He invested even more in his development plans by buying the bay-bottom land from Florida. All of the evidence at trial confirmed that in accordance with the GU zoning, the Shands believed they had the right to develop at least one single-family residence. T. 68:23–69:11, 80:21–84:7, 91:2–9; T2. 11:7–12. They possessed these beliefs when Dr. Shands purchased the property, when his widow Margaret received the property, and when she transferred it to their children.

This evidence is the same as the Supreme Court identified in *Penn Central* reflected an owner's investment backed expectations. In that case, the Court pointed to the facts in *Pennsylvania Coal* as an example of the nature of this inquiry, emphasizing that the owners' expectations are measured by what they believed they could do with their property before imposition of the prohibitive regulation (and what they actually did, as evidence that their belief was genuine). *Penn Central*, 438 U.S. at 127 ("the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder"). That evidence was enough, according to the Court, to show that Pennsylvania's subsequent restrictions on the ability to mine subsurface coal in *Pennsylvania Coal* was a taking. *Id*. at 127 (*Pennsylvania Coal* "is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'").

The Shands' expectations they could develop their property were not merely genuinely held beliefs; those expectations were solidly "backed" by investment and confirmed by three decades of law—the longstanding GU zoning which allowed up to seven homes on Shands Key as-of-right. To determine whether expectations are reasonable, the circuit court should have looked at "common, shared understandings of permissible limitations derived from a State's legal tradition." *Palazzolo*, 533 U.S. at 630. Thus, it should have started with the presumption that "private property"

protected by the Fifth Amendment and the Florida Constitution includes the right to develop it: "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) (quoting *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1007 (1984)).

The Shands' expectations backed by fee ownership were also objectively reasonable because they were confirmed by County and City law: for decades, from the time of purchase until the adoption of the 1986 Comprehensive Plan, nothing limited or restricted development, and the GU zoning permitted up to seven homes on Shands Key as-of-right. As the Supreme Court noted:

> "not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."

Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) (quoting *United States v. Willow River Co*., 324 U.S. 499, 502 (1945)). That the Shands didn't need any discretionary land use approvals further "backed up" their expectations that they could build at least one home on Shands Key.

There is no indication in the Judgment that the circuit court considered any of this. Although the court was not bound to give dispositive weight to the Shands' evidence of their expectations of use in the *Penn Central* analysis, neither could it utterly omit this evidence from the calculus.

2. The circuit court should have examined the Shands' expectations of use, not profit

Instead, the circuit court concluded the only relevant evidence of the Shands' expectations was whether they would make a profit, and it treated that evidence as conclusive. Here, too, the court wrongly applied *Penn Central*'s expectations factor. First, the court held that the Shands' cost basis in the property was "zero" because they acquired it by gift from their mother, who had, in turn, become the owner when she was widowed upon Dr. Shands unexpected death in 1963. R. 1236 (Judgment ¶ 73). The circuit court wrongly treated this fact as dispositive. Routine intrafamily transfers such as this have no bearing on an owner's expectations of using property: "We also have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property, such as a donee, heir, or devisee." *Palazzolo*, 533 U.S. at 634–35 (O'Connor, J., concurring) (citing *Hodel*, 481 U.S. at 714–18).[25]

Second, the circuit court's conclusion doesn't even pencil out because it compared Dr. Shands' 1950s purchase price with the amount the court concluded the Shands could have received in 2007 had they sold Shands Key to another owner

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[25] Justice O'Connor concluded, "Courts instead must attend to those circumstances which are probative of what fairness requires in a given case." *Id.* at 635. The circuit court's "no cost, equals no expectations" rationale would allow the government to take property by eminent domain and refuse to provide compensation any time an owner had acquired it by gift or at a cost below its current fair market value.

for ROGO/BPAS chits, without any adjustment for inflation. R. 1236 (Judgment ¶ 72). But this is not a valid comparison because the value of $1 in the 1950s cannot be fairly compared to the value of $1 in 2007 without some recognition that the value of money changed in the intervening half-century. In other words, the circuit court's conclusion that the Shands would have realized a "sixfold increase" return on Dr. Shands' 1950s investment wasn't the result of an apples-to-apples comparison. Dr. Shands' initial purchase price in the 1950s would be nearer to $165,000 if measured in 2007 dollars. Meaning that if profit is the issue, the Shands would not have realized a six-fold increase, but would have suffered a nearly $20,000 *decrease*.[26]

3. "Investment-backed expectations" does not mean the owner must spend money to chase vested rights

Instead of weighing the correct expectations evidence, the circuit court imposed a different analysis. It held that in order to possess private property worthy of the constitution's protections, the Shands needed to do *more* than own property and invest in it to show expectations of use: they were required to have actively engaged in a race to vest their rights to develop a specific project by spending money on architects, planners, engineers, contractors (and lawyers), and on plans and

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[26] In 2007, Dr. Shands' 1950s purchase cost would be $166,244 adjusted. *See* U.S. Inflation Calculator, *supra* n.3. Under the City's highest asserted value of Shands Key, that represents a $19,244 loss of value from the initial investment.

permits and applications.[27] Thus, the circuit court concluded, "just like the plaintiffs in *Collins* and *Byers*," the Shands did not "develop the properties in the face of ever-increasing regulations[.]" R. 1241 (Judgment ¶ 86). The court's key error is revealed by its use of the term "steps," speaking not in terms of *expectations*, but of "meaningful, investment backed *steps* to develop the property…." R. 1241 (Judgment ¶ 86) (emphasis added and removed). Thus, the court concluded the Shands "cannot establish *any* reasonable investment backed expectations." *Id.* (Put bluntly, *if you snooze by not vesting, you lose*: anything short of a vested right means an owner cannot have "*any* reasonable investment backed expectations."). The Supreme Court has never endorsed such a rule, and for good reason. Whether owners expect to make economic uses of property is an entirely different question from whether they can enforce by injunction a right to complete a project.[28]

The circuit court's focus on "investment backed *steps*" rather than "investment backed *expectations*" exacerbated one of the fundamental errors earlier

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[27] *See*, *e.g.*, *Town of Longboat Key v. Mezrah*, 467 So. 2d 488, 491 (Fla. Dist. Ct. App. 1985) (developer obtained vested right after spending thousands on "plans, engineering, and specifications").

[28] Should an owner obtain a vested right to develop a particular project, that right is, of course, a *separate* "property" right also protected from uncompensated takings, and that owner has unassailable proof of expectations. John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 Wash. U. J. Urb. & Contemp. L. 27 (1996).

identified by members of this Court—the conflation of expectations in takings analysis, which concerns only whether the constitutions require compensation, with the wholly separate question in vested rights, which asks whether the government has induced an owner to proceed so far down the development path that it is unfair to preclude the owner from completing the project:

> Since the "prolonged inaction" argument finds no basis in federal takings jurisprudence, it should come as no surprise that the case cited in support of this approach by both the circuit court and *Beyer II* is not a regulatory takings case but a vested rights case.

Ganson v. City of Marathon, 222 So. 3d 17, 26 (Fla. 3d DCA 2016) (Shepherd, J., dissenting from denial of rehearing en banc).

An owner's "expectations" as used by the Supreme Court in *Penn Central* are not limited to vested development permits. Starkly illustrating the circuit court's legal error is its reliance on *Monroe Cty. v. Ambrose*, 866 So. 2d 707 (Fla. 3d DCA 2003) (per curiam). That case solely asked whether the owner had sufficiently relied on the government's acts or omissions and thereby obtained a vested right under Florida law.[29] It said nothing whatsoever about *Penn Central* investment-backed expectations analysis. To be clear: whether an owner's rights were vested under state

[29] "Florida common law provides that vested rights may be established if a property owner or developer has (1) in good faith reliance, (2) upon some act or omission of government, (3) made such a substantial change in position or has incurred such extensive obligations and expenses (4) that it would make it highly inequitable to interfere with the acquired right." *Ambrose*, 866 So. 2d at 710 (citations omitted).

property law may be one of the considerations relevant to the issue of its "investment-backed expectations."[30] But standing alone, the mere *lack* of vesting under Florida law does not mean that the owner conclusively lacks "any" expectations, as the circuit court held. The court essentially required the Shands to have bought their constitutional protection.

C. *Penn Central* Requires Evaluation of All Three Factors, Including the "Character of the Governmental Action"

Penn Central does not establish a "one-strike-you're-out" checklist; it requires a balancing in which all three factors are considered. No one factor is "talismanic," as Justice O'Connor noted when criticizing the state court for "elevating what it believed to be '[petitioner's] lack of reasonable investment-backed expectations' to 'dispositive status.'" *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring). Each of the *Penn Central* factors "is *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'" *Id*. (quoting *Pennsylvania Coal*, 260 U.S. at 415). The character of the regulation must be considered to evaluate what the regulation does, whom it impacts, and whether the burden of the regulation is equitably

[30] "For example, the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner." *Palazzolo*, 533 U.S. at 634–35 (O'Connor, J., concurring).

distributed between the individual owner and the public.[31]

By not considering at all the character factor, the circuit court's *ad hoc* takings analysis was incomplete and the Judgment legally insufficient. In *Hodel*, for example, after analyzing both the economic impact of the regulation and the investment-backed expectations of the owners, the Court noted that—were it to stop there—the statute would not be a taking: the economic impact was almost trivial, and the owners' expectations slight. *Hodel*, 481 U.S. at 714–15. But the Court didn't stop. It also evaluated the character of the government action, which it deemed "extraordinary" because it virtually abrogated "the right to pass on a certain type of property" to one's heirs. *Id.* at 716.

By contrast, the circuit court did not consider the character of the City's actions at all, even though the character of the City's regulation has a similarly extraordinary impact. The City won't allow a dock, much less a single home. Nothing is allowed on Shands Key and it remains vacant, idle, and devoid of economic uses to the Shands forever. The circuit court should have also recognized that the expressed purpose of Conservation Offshore Island zoning is to "protect"

[31] *Lingle*, 544 U.S. at 529 ("the magnitude or character of the burden a particular regulation imposes upon private property rights [and] how any regulatory burden is distributed among property owners").

and "preserve" Shands Key in its natural condition. And that the Shands alone are required to bear the cost of the Shands Key nature preserve.

CONCLUSION

This appeal presents the opportunity to clarify takings law, a question of great public importance. *See* Fla. Const. art. V, § 3(b)(4). The circuit court's Judgment should be reversed or vacated, and the case remanded for further proceedings.

DATED this 4th day of March, 2022.

JEREMY TALCOTT*
Cal. Bar No. 311490
ROBERT H. THOMAS*
Cal. Bar No. 160367
Haw. Bar No. 004610
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
jtalcott@pacificlegal.org
rthomas@pacificlegal.org
*admitted *pro hac vice*

/s/ Kathryn D. Valois
KATHRYN D. VALOIS
Fla. Bar No. 1010150
PACIFIC LEGAL FOUNDATION
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
Email: kvalois@pacificlegal.org

Attorneys for Appellants

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Fort Lauderdale, FL 33304
Tel: 954-463-0100
Burke@jambg.com
HGill@jambg.com

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	ppuccio@pacificlegal.org
Kathryn Daly Valois	kvalois@pacificlegal.org

Name	Email Address
	incominglit@pacificlegal.org
	ppuccio@pacificlegal.org
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