SUPREME COURT OF THE STATE OF FLORIDA

Case No. SC2025-0833
3d DCA Case No. 3D21-1987
L.T. No. 07-CA-99-M

CITY OF MARATHON,

Petitioner,

v.

RODNEY SHANDS, ROBERT SHANDS, KATHRYN EDWARDS and THOMAS SHANDS,

Respondents.

REPLY BRIEF OF RESPONDENTS ON JURISDICTION

KATHRYN D. VALOIS
Fla. Bar No. 1010150
MARK MILLER
Fla. Bar No. 0094961
PACIFIC LEGAL FOUNDATION
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
kvalois@pacificlegal.org
mark@pacificlegal.org

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*

Attorneys for Respondents

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

STATEMENT OF THE CASE AND FACTS

After the City of Marathon prevented the Shands Family from making any economically-beneficial use of 7.9-acre Shands Key by downzoning it to "Conservation Offshore Island," the Third District held the City liable for a regulatory taking. *Shands v. City of Marathon*, No. 3D21-1987 (Fla. 3d DCA Feb. 5, 2025) (Petitioner's Appendix at A.6).

This case had its genesis in 1956, when Dr. R.E. Shands obtained a federal patent for what was then known as Little Deer Key, granting fee simple title to him and his heirs "forever." A.6; A.8. The island, later renamed Shands Key in his honor, was zoned "General Use" by Monroe County. This permitted as-of-right construction of one home per acre on the property. A.6. Dr. Shands died before realizing his development plans for the island. A.8. Title to Shands Key passed to his wife, who later conveyed the property to their children. A.8.

In 1986, Monroe County adopted a Comprehensive Plan, downzoning Shands Key from General Use to Conservation Offshore Island, placing it in the future land use category of "conservation" for the stated purpose of preserving natural resources and

disincentivizing development. A.9. In 1999, the City of Marathon incorporated and fully adopted Monroe County's previous enactments. A.9.

In 2004, the Shands applied for a permit to construct a dock on Shands Key. A.10. The City denied the application, stating that the property consisted of "high quality hammock with a mangrove fringe," which was a "suitable habitat for the state listed threatened White Crowned Pigeon." A.10. However, the City expressed interest in acquiring six acres of upland and proposed that the Shands dedicate their land to the public in exchange for an award of points under the Rate of Growth Ordinance (ROGO) or Building Permit Allocation System allocation systems. A.10.

The Shands instead filed a Beneficial Use Determination application. A.10. The City's special master concluded that the City's regulations "prohibit[ed] any development of [Shands'] property" and left no reasonable economic use. A.10. He recommended the City either issue a building permit for a single-family residence or purchase the property. A.10. The Marathon City Council rejected the recommendations, and the Shands filed suit in state court. A.10.

Twice the circuit court dismissed and twice the district court reversed. A.10.

Following the second remand, Shands sought partial summary judgment holding the City liable for a categorical, as-applied challenge. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). A.12. The circuit court denied, and after a two-day non-jury trial found the city not liable for a taking. A.13. The Third District reversed en banc, concluding that the downzoning deprived the Shands of all economically beneficial use of Shands Key—a *Lucas* categorical taking.

The Third District's carefully reasoned en banc opinion applied long-established federal takings principles to hold that when regulations prohibit all economically beneficial uses of property, full and just compensation is required regardless of any theoretical salvage value that might be obtained by selling the property to a third party for donation to the City in exchange for transferable development rights.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over the City's petition for two independent reasons. First, the City has failed to demonstrate

express and direct conflict with First District precedent. Second, the Third District's opinion does not present novel questions of state constitutional interpretation requiring this Court's review.

ARGUMENT

I. NO EXPRESS AND DIRECT CONFLICT WITH FIRST DISTRICT PRECEDENT

This Court may take jurisdiction in the absence of certification by a district court only when the opinion presents an "express and direct" conflict with the decision of another district court of appeal or of this Court. *State v. Vickery*, 961 So. 2d 309, 311–12 (Fla. 2007). District courts create cognizable conflict only when they present "an identical point of the law" under similar factual circumstances. *In re Rule 9.331, Determination of Causes by a Dist. Ct. of Appeal En Banc, Fla. Rules of App. Proc.*, 416 So. 2d 1127, 1128 (1982). The cases the City presents fail to meet that standard.

For example, any conflict with *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st DCA 1990), is illusory. *Glisson* involved a *facial* challenge to a regulation that was alleged to negatively impact all future property use. *Glisson*, 558 So. 2d at 1036. A facial taking occurs when the "mere enactment" of a regulation constitutes a

taking of property. *Id.* (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 470 (1987)). In other words, *Glisson* examined the impact of the ordinance itself *only*, without respect to the distinct factual circumstances of any plaintiff's individual property. *Id.* But *none* of the plaintiffs in *Glisson* had sought variances or waivers. *Id.* The Court thus concluded the regulations did not constitute a facial taking. *Id.* But critically, it withheld judgment on the "taking issue … as a *factual* matter," because none of the restrictions had "been applied to a specific land use proposal …." *Id.* at 1038 (emphasis added).

The regulations in *Glisson* still permitted "most existing uses of the property." *Glisson*, 558 So. 2d at 1037.[1] Further, the regulations left open the opportunity for landowners to seek a variance.[2] *Id.* The

---

[1] It is also notable that the TDRs at issue in *Glisson* were primarily designed to allow the transfer of density *between contiguous properties under the same ownership*. *Glisson*, 558 So. 2d at 1033. They could only be transferred to adjoining properties not under the same ownership if presented as part of a Planned Unit Development. *Id.* The Shands own no other property in Marathon, and the TDRs and ROGO points at issue were analyzed for their value in a third-party sale only.

[2] While the regulations at issue here also provide a process to obtain a variance, the Shands have already sought—and been denied—such relief. A.6. As noted above, the court in *Glisson* was reviewing the

availability of TDRs to transfer density to contiguous parcels was viewed as *one* remaining use of property among others, not a single dispositive factor that was sufficient to save against a taking of property. *Id.*

By contrast, the Third District here reviewed the Shands' claims as an *as-applied* taking *after* the Shands had been denied all beneficial uses of their property. The court had the benefit of significant factual development—the Shands had sought, and the City had denied, a permit to install a dock, and then pursued a Beneficial Use Determination, in which they requested either a variance to build, or compensation. It was only after these steps had concluded that the Shands filed an inverse condemnation suit, alleging their property was forced to remain economically idle. It was in this posture that the Third District reviewed the impacts of the City's regulations and determined that the city has taken Shands Key.

The City's assertion of conflict with *Bradfordville Phipps Ltd. P'ship v. Leon County*, 804 So. 2d 464 (Fla. 1st DCA 2001), and *Leon*

---

regulations facially, and no landowner had submitted development plans or requested a variance.

County v. Gluesenkamp, 873 So. 2d 460 (Fla. 1st DCA 2004) similarly fails because those cases involved temporary restrictions on use, not permanent prohibitions. Its argument mischaracterizes both cases, which involved temporary development moratoria rather than *permanent* regulations that eliminated all economically beneficial uses of property.

In *Bradfordville Phipps*, the First District addressed a temporary injunction that prohibited the county from issuing building permits in the Bradfordville Study Area until the county complied with comprehensive plan requirements for stormwater management. *Bradfordville Phipps*, 804 So. 2d at 466. The court noted that the injunction was designed to suspend development only until the county completed required studies, and that "even though a moratorium may restrict or delay temporarily the use of property for development purposes, it can hardly be said that a moratorium that was temporary from the outset destroys the economic value of the property." *Id.* at 471.

Similarly, in *Gluesenkamp*, the First District addressed *temporary* restrictions on development permits in the same area, emphasizing that such temporary moratoria "look[] more like a

permitting delay than a compensable regulatory taking." *Gluesenkamp*, 873 So. 2d at 466. Moreover, *Gluesenkamp* applied a different legal standard (*Penn Central*) and not the *Lucas* analysis the en banc court applied here. *Id.* at 465–67.[3] These opinions on temporary moratoria do not create any conflict with the Third District's analysis of permanent prohibitions under *Lucas*. The Third District correctly recognized that the analytical framework differs when addressing permanent regulations that eliminate all economically beneficial uses versus temporary restrictions that delay development. While temporary moratoria leave open the possibility of future use and are analyzed under *Penn Central*'s balancing test, permanent regulations that require property to remain in its natural state fall under *Lucas*' categorical rule.

Lucas contemplated this distinction, noting that regulations "requiring land to be left substantially in its natural state" create "a heightened risk that private property is being pressed into some form

[3] The First District's references to "value" addressed whether temporary delays destroy the economic value of property, not, as here, whether permanent regulations that eliminate all uses constitute takings under *Lucas*.

of public service." *Lucas*, 505 U.S. at 1018. The Third District's application of this established principle to the permanent conservation zoning of Shands Key represents a correct application of takings law, rather than a departure from First District precedent.

In short, the First District opinions applied a different analysis to different facts, and do not conflict with the en banc Third District here.

II. NO NOVEL QUESTIONS OF LAW WARRANTING THIS COURT'S REVIEW

The Third District applied well-established federal takings principles that courts have recognized for decades, and is neither a decision of first impression nor does it involve unclear caselaw warranting this Court's involvement. The petition, however, claims Third District broke new legal ground because it rejected the argument that because Shands Key may have salvage value after a sale for ROGO points, the City is insulated from takings liability. The city claims the Third District has jeopardized the validity of TDR programs. But the court did no such thing. It did not invalidate TDR programs or interfere with municipal authority to regulate land use. The court simply held that our constitutions forbid placing on the

Shands the entire cost of the City's decision to preserve Shands Key in its natural state, the same way that the City would be required to provide full and just compensation were it to take the island for a public park by eminent domain. The court protected constitutional rights, while also preserving governmental regulatory authority.

This is firmly grounded in established precedent, as the facts and posture of this case mirror *Lucas*. That case, as here, was an as-applied categorical takings claim. *Lucas*, 505 U.S. at 1042 n.4 (Blackmun, J., dissenting) ("Here, of course, Lucas has brought an as-applied challenge."). And, as here, the court concluded that all economically beneficial uses of the property had been proscribed. *Id.* at 1019 ("[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 taking.").

Federal courts have consistently recognized that takings focuses on whether regulations permit *economically viable use* of property, not whether property retains hypothetical salvage value. *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) ("Moreover, focusing

solely on property values confuses the economically viable use inquiry with the diminution of value inquiry normally applied only where no categorical taking exists."). The Federal Circuit similarly held, "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." *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015).

Horne v. Dep't of Agric., 576 U.S. 350, 364 (2015), reinforced this understanding by emphasizing that any payments from government "go[], at most, to the question of just compensation" rather than to whether a taking has occurred. This principle directly supports the Third District's holding that sale for ROGO points are perhaps relevant to the amount of compensation owed (much like the special benefit offset in eminent domain), not to the determination of whether the City's downzoning resulted in a taking.

Florida courts consistently interpret the state's takings clause in harmony with federal constitutional requirements. *See Bojorquez v. State*, No. SC2023-0095, 2025 WL 1584721, at *4 (Fla. June 5,

2025).[4] The Third District adhered to this established approach by applying *Lucas* to hold that regulations eliminating all economically beneficial uses constitute takings regardless of residual value attributable to transferable development rights.

III. THE THIRD DISTRICT'S DECISION WILL NOT CAUSE THE SKY TO FALL

Finaly, the Third Circuit's decision is not one that calls out for this Court's discretionary review. *See Univ. of Miami v. Wilson*, 948 So. 2d 774, 790 n.5 (Fla. 3d DCA 2006) (Shepherd, J., concurring). The issue here—*did the Third District adhere to established federal precedent when it concluded the City's downzoning deprived Shands Key of all beneficial and economic uses?*—is not, as this case is now presented, an issue of statewide significance. As noted previously, this is an as-applied claim, meaning that the Shands challenge the City's downzoning of their specific parcel, and do not challenge the City's power to downzone, the validity of the ROGO system, or anything else. Notwithstanding the City's and its amici's claim that the sky is going to fall, the Third District's decision if left undisturbed

[4] In his concurrence, Justice Couriel suggested that the Florida Constitution may be entitled to a distinct interpretation. *Bojorquez*, 2025 WL 1584721, at *6 (Couriel, J., concurring).

will not limit the rights or liabilities of anyone but the parties. The decision below does not create sweeping rules prohibiting governments across Florida from regulating land use or adopting TDR schemes. If anything, a ruling contrary to the Third District may be of wide impact, because that would upset long-established U.S. Supreme Court rules. Here, the en banc Third District carefully and correctly applied established federal and Florida constitutional principles to a particular factual circumstance, and this Court's further review is not warranted.

CONCLUSION

No doubt the City disagrees with the en banc Third District's application of takings law, and wishes it was not obligated to provide compensation for eliminating all of Shands Key's economically-beneficial uses. But it fails to identify a proper conflict, cannot point to where the Third District adopted or applied a new rule of law, and has not shown any statewide impact for what is a very specific, as-applied claim for compensation.

Because the City has not identified any legitimate grounds for this Court to grant review, this Court should decline to accept jurisdiction.

DATED this 21st day of July, 2025.

Respectfully submitted,

KATHRYN D. VALOIS
Fla. Bar No. 1010150
MARK MILLER
Fla. Bar No. 0094961
PACIFIC LEGAL FOUNDATION
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
kvalois@pacificlegal.org
mark@pacificlegal.org

/s/ Jeremy Talcott
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*

Attorneys for Respondents

CERTIFICATE OF FONT COMPLIANCE

The undersigned hereby certifies that this computer-generated brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, as submitted in Bookman Old Style 14-point, and that the brief contains 2,487 words.

DATED: July 21, 2025.

/s/ Jeremy Talcott
JEREMY TALCOTT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion was served upon the following via the Florida eFiling Portal the 21st day of July, 2025:

Hudson C. Gill
Johnson, Anselmo, Murdoch,
Burke, Piper & Hochman, PA
2455 E. Sunrise Blvd.
Suite 1000
Fort Lauderdale, FL 33304
HGill@jambg.com

Edward G. Guedes
John Joseph Quick
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
2800 Ponce de Leon Boulevard
Suite 1200
Coral Gables, Florida 33134
eguedes@wsh-law.com
jquick@wsh-law.com

Attorneys for Petitioner
City of Marathon

/s/ Jeremy Talcott
JEREMY TALCOTT